

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
COLUMBIANA COUNTY

KIM M. MANLEY NKA ROSE,

Plaintiff- Appellee,

v.

JAMES M. MANLEY,

Defendant- Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 17 CO 0036**

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Civil Appeal from the  
Court of Common Pleas of Columbiana County, Ohio  
Case No. 2013-DR-660

**BEFORE:**

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

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**JUDGMENT:**

Affirmed.

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*Atty. Carl J. King*, 115 W. Lincoln Way, Lisbon, Ohio 44432 for Appellee and

*Atty. Dominic A. Frank*, 1717 Lisbon Street, East Liverpool, Ohio 43920 for Appellant.

Dated: June 25, 2018

**Robb, P.J.**

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{¶1} Defendant-Appellant James Manley appeals the decision of the Columbiana County Common Pleas Court denying his motion to terminate spousal support based upon his retirement and the trial court's granting of Plaintiff-Appellee Kim Manley nka Rose's motion in limine. The trial court held the motion to terminate was barred by res judicata because months prior to the filing of the motion to terminate spousal support, Appellant filed a motion to modify spousal support based on his retirement. The trial court denied the motion to modify, and Appellant failed to appeal that decision to this court. Consequently, the trial court determined the issue of whether spousal support should be terminated based on Appellant's retirement was barred by res judicata and no new arguments or facts were presented concerning this issue. On appeal, Appellant contends the trial court's decision is incorrect and is an abuse of discretion. This court finds no merit with Appellant's argument. The divorce decree is clear. The court reserved jurisdiction to modify spousal support and listed retirement as one of the reasons for modification. The court also clearly set forth the reasons for termination of spousal support: retirement was not one of them. Thus, the trial court did not have the authority to terminate spousal support based on retirement; it only had the authority to modify the amount and duration of spousal support upon a showing of a substantial change of circumstances. Furthermore, the arguments Appellant presented for termination and modification were the same. Therefore, even if the motion to terminate was construed as a motion to modify, the arguments are barred by res judicata; those same arguments were considered when the trial court denied the motion to modify spousal support. The trial court's decision is affirmed.

#### Statement of Case

{¶2} Appellee filed for divorce in December 2013. Appellant filed an answer and counterclaimed also seeking a divorce. 3/6/14 Answer and Counterclaim.

{¶3} The parties were granted a divorce on the basis of incompatibility. 3/16/15 J.E. The parties were married 35 years prior to the granting of the divorce. 3/16/15 J.E. Based on the disparity in income and the length of the marriage, Appellant was ordered to pay Appellee \$2,000.00 a month in spousal support for an indefinite period. 3/16/15

J.E. Two paragraphs in the divorce decree are pertinent to this appeal. These two paragraphs address spousal support and provide:

17. All spousal support, shall be payable by wage withholding through the Ohio Child Support Payment Central (OCSPC), P.O. Box 182372, Columbus, Ohio 43218. Spousal support shall terminate upon the death of either party, remarriage of the [Appellee], or the cohabitation of the [Appellee] with an unrelated adult male.

18. The Court shall retain continuing jurisdiction to modify both the monthly amount and duration of spousal support. This is particularly important because the [Appellant] may choose to retire, or his job situation could change, or [Appellee] may become eligible for social security disability benefits. Both parties have a duty to immediately notify the other party if their income changes by more than 10%.

3/16/15 J.E.

{¶4} Less than a month following this decree, Appellant filed a motion to modify spousal support alleging he was laid off and receiving unemployment benefits. 4/7/15 Motion to Modify Spousal Support. The motion was heard by the magistrate. The magistrate found Appellant chose to take a voluntary early retirement, but there was no evidence he was at risk of involuntarily losing his job. Thus, the magistrate overruled the motion to modify spousal support. 10/9/15 Magistrate Decision.

{¶5} Appellant filed objections to the magistrate's decision. 10/23/15 Objections. Appellee filed a memorandum in support of the magistrate's decision and also a supplemental memorandum in support of the magistrate's decision. 4/11/16 Memorandum; 5/27/16 Memorandum. Appellee contended that on February 10, 2015, prior to the divorce decree, Appellant requested a temporary unpaid leave of absence from work, which he was allowed. Then on June 25, 2015 he accepted voluntary early retirement. With approval from the magistrate, Appellant filed supplement objections to the magistrate's decision. 5/27/16 Supplemental Objections. Appellant asserted whether the retirement was voluntary or involuntary it was a substantial change of circumstance warranting modification of spousal support. 5/27/16 Supplemental Objections.

{¶6} The trial court overruled the objections and the magistrate's decision to deny the motion to modify spousal support was affirmed in all respects. 6/6/16 J.E. In reaching its decision, the trial court indicated Appellant took a voluntary six month layoff; he worked the first three months of the layoff and was paid according to his salary, but did not work the remaining three months and received unemployment benefits. 6/6/16 J.E. While he was laid off, Appellant received the information about early retirement. 6/6/16 J.E. The court noted there was no evidence Appellant was in poor health or unable to continue working. 6/6/16 J.E. Rather, Appellant voluntarily retired early, "on the heels of the underlying divorce action being finalized and his spousal support obligation being fixed." 6/6/16 J.E. Appellant did not appeal that decision.

{¶7} Four months later, Appellant filed a motion to terminate his spousal support obligation on the basis of his retirement. 10/17/16 Motion to Terminate. He asserted he was eligible and did retire from his place of employment on August 1, 2015. 10/17/16 Motion to Terminate. On that basis he asserted there was a substantial change in circumstance warranting termination of his spousal support obligation. 10/17/16 Motion to Terminate.

{¶8} In response, Appellee filed a motion in limine asserting res judicata bars litigation of the motion to terminate spousal support on the basis of retirement. 3/3/17 Motion.

{¶9} Appellant countered arguing a motion to terminate is not a motion to modify. 3/27/17 Response to Motion in Limine. In changing the course of the argument set forth in the October 17, 2016 Motion to Terminate, Appellant asserted he was not required to show a change in circumstance because the occurrence on which the termination was based was retirement as outlined in paragraph 18 of the divorce decree. 3/27/17 Response to Motion in Limine. Appellant was essentially asserting he met the condition subsequent for termination of spousal support as set forth in paragraph 18 of the divorce decree.

{¶10} The magistrate sustained the motion in limine. 5/1/17 Magistrate's Decision. It held paragraph 17 of the divorce decree, not paragraph 18, set forth facts upon which spousal support would terminate. 5/1/17 Magistrate's Decision. It explained paragraph 18 reserved jurisdiction to modify spousal support. 5/1/17

Magistrate's Decision. The court held the allegations raised by Appellant were the same allegations raised in the motion to modify and thus, they were barred by res judicata. 5/1/17 Magistrate's Decision.

{¶11} Appellant objected to the decision; he asserted the magistrate failed to consider the distinction between termination and modification. 5/15/17 Objections. He also filed an amended motion to terminate spousal support asserting he met the condition subsequent, retirement, set forth in paragraph 18 of the divorce decree. 5/1/17 Amended Motion to Terminate Spousal Support.

{¶12} Appellee filed a memorandum in support of the magistrate's decision. 7/7/17 Memorandum.

{¶13} The trial court overruled the objections and adopted the magistrate's decision. 9/20/17 J.E. It reasoned:

In his current Objection, Mr. Manley maintains there is a distinction between his first Motion, to modify his spousal support obligation, and his second Motion, to terminate that obligation. The fact remains, however, that both Motions spring from Mr. Manley's retirement. Under the terms of the parties' divorce decree, Mr. Manley's retirement is not a trigger that terminates his spousal support obligation. Instead, termination of the spousal support obligation is contingent upon the occurrence of one of the following events: the death of either party, remarriage of the Plaintiff, or the cohabitation of the Plaintiff with an unrelated adult male. The Magistrate correctly determined that in the Second Motion, Mr. Manley did not recite the occurrence of any of these conditions.

Moreover, it has already been decided that Mr. Manley's retirement from Vallourec was voluntary. Therefore, his retirement is not and cannot be a "substantial change of circumstances" for purposes of modifying his spousal support obligation. No appeal was taken from this Court's decision. Therefore, res judicata prevents Mr. Manley from re-litigating the issue of his retirement for the purposes of attempting to terminate his spousal support obligation.

9/20/17 J.E.

{¶14} Appellant timely appealed that decision.

### First and Second Assignments of Error

{¶15} Appellant sets forth two assignments of error and addresses them simultaneously. They are:

“The trial court erred to the prejudice of the Appellant when it found the motion to terminate spousal support was not properly before the court due to Appellant’s failure to list one of the three conditions set forth in the final decree of divorce issued on March 16, 2015 that are necessary to terminate his spousal support obligation.”

“The trial court abused its discretion to the prejudice of the Appellant when it sustained Appellee’s Motion in Limine barring Appellant the right to present evidence of his retirement under the doctrine of res judicata.”

{¶16} In reviewing a trial court’s decision in domestic relations matters, an appellate court must uphold the decision absent an abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989); *Hutchinson v. Hutchinson*, 12th Dist. No. CA2009-03-018, 2010-Ohio-597, ¶ 16 (A trial court has broad discretion in determining a spousal support award, including whether to modify an existing award.). In order to find an abuse of discretion, we must determine that the trial court’s decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶17} Appellant begins his argument by contesting the trial court’s determination that the motion to terminate was not properly before it because none of the three conditions set forth in the final divorce decree were listed in the motion to terminate. Appellant contends a motion to terminate and a motion to modify are distinctions without a difference because they are simply different points on the same continuum. It appears Appellant is arguing when the divorce decree reserved jurisdiction to modify for specific instances, such as for retirement, and when the divorce decree indicated instances where termination of spousal support would occur those instances are interchangeable because of the relationship between modification and termination of spousal support.

{¶18} In expressing this argument, Appellant cites to the Ohio Supreme Court decision in *Kimble*, which stated:

We stated that the difference between a modification and a termination of alimony was “a distinction without a difference. ‘Modification’ and ‘termination’ of an alimony award are simply different points or degrees on the same continuum.” *Id.* at 221, 543 N.E.2d 797. Thus, we conclude that a motion to terminate spousal support falls within the definition of a “modification,” since it seeks to alter, change, or reduce the support award.

*Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667, 780 N.E.2d 273, ¶ 7.

{¶19} The issue in *Kimble* was whether a trial court has jurisdiction to terminate a spousal support order where the obligee remarries and the divorce decree did not retain jurisdiction. *Id.* at ¶ 3. The obligor in *Kimble* argued R.C. 3105.18(E) requiring retention of jurisdiction to modify a spousal support award did not apply because he sought to terminate, not modify spousal support. *Id.* at ¶ 5-6. The Supreme Court rejected this argument based on the above quoted analysis; it held the trial court could not terminate because there was no retention of jurisdiction. *Id.* at ¶ 3, 7. Thus, the Supreme Court concluded termination of spousal support could not occur if there was no retention of jurisdiction.

{¶20} In the case at hand, the divorce decree has two distinct paragraphs – one addresses termination of spousal support and one addresses modification of spousal support. The termination paragraph is paragraph 17 and it stated spousal support would terminate upon the death of either party, remarriage of Appellee, or Appellee cohabitating with an unrelated adult male. Paragraph 18 dealt specifically with modification; the trial court expressly stated it had continuing jurisdiction to modify the spousal support. It then stated retention of jurisdiction was important because Appellant may choose to retire, his job situation could change (which appeared to be a contemplation of being laid off), or Appellee could collect social security disability benefits. This paragraph placed a duty on the parties to immediately notify the other party if their income changes by more than 10%.

{¶21} The divorce decree in the case at hand is different from the one in *Kimble* where there was no retention of jurisdiction. This decree not only retained jurisdiction to modify, but it also listed conditions subsequent for termination of spousal support.

{¶22} Appellate courts have indicated *Kimble* does not affect conditions subsequent for termination and there does not need to be a showing of a substantial change in circumstance for termination. Therefore, although termination and modification may be on a continuum, they are not necessarily the same. For instance, the Ninth Appellate District has explained when a condition subsequent is listed in the divorce decree for termination, a party does not have to show a change in circumstance (the test for modification) to have the spousal support terminated, rather it only has to show the condition subsequent. *Guggenbiller v. Guggenbiller*, 9th Dist. No. 10CA009871, 2011-Ohio-3622, ¶ 2-6. In that case, the obligee argued the trial court incorrectly terminated spousal support based on her cohabitation with her boyfriend. *Id.* at ¶ 2. She contended the obligor failed to show a substantial change in circumstance. *Id.* The Ninth Appellate District explained the divorce decree indicated spousal support would terminate if she cohabitated with an adult male. *Id.* This was a condition subsequent for termination. *Id.* at ¶ 6. The appellate court noted there is a distinction between modification and termination based on a condition subsequent; “Modification is an increase or decrease in the amount of alimony payable, or a change in the terms and conditions of payment. A condition subsequent is a future occurrence such as remarriage, death, or cohabitation which upon happening, accelerates the termination of the alimony award.” *Id.* at ¶ 4, citing *Hibbard v. Hibbard*, 12th Dist. No. 88–06–078, 1988 WL 139129 at \*2 (Dec. 27, 1988) (Hendrickson, J., concurring). The court then discussed and determined that no Ohio Supreme Court decision, including *Kimble*, eliminated that distinction. *Id.* at ¶ 5 (“The Supreme Court’s holding [in *Mandelbaum*] did not eliminate the distinction that has been drawn by courts between terminations of support based on a change in circumstances of the parties and those based on the occurrence of a specific condition subsequent.”). Accordingly, the Ninth Appellate District held since the motion to terminate was based on cohabitation and cohabitation was listed as a condition subsequent for termination in the divorce decree, the trial court had jurisdiction to terminate spousal support based on that condition. *Id.* at ¶ 6.

{¶23} Therefore, although modification and termination may be on the same continuum, it does not necessarily mean that when a divorce decree lists circumstances which will result in the termination of spousal support and also separately retains



jurisdiction for modification of spousal support listing circumstances which could result in modification, those circumstances can be used interchangeably for termination and modification. The Twelfth Appellate District has held conditions subsequent upon which spousal support would terminate are inapplicable to modification of spousal support. *Tedrick v. Tedrick*, 12th Dist. No. CA2015-07-065, 2016-Ohio-1488, ¶ 14, citing *Hutchinson v. Hutchinson*, 12th Dist. No. CA2009-03-018, 2010-Ohio-597, ¶ 11 (Divorce decree specifically listed three conditions subsequent for termination of spousal support and then separately reserved jurisdiction to modify spousal support based on a change of circumstances.). In *Hutchinson*, the language of the divorce decree stated, “this spousal support order .... shall terminate when [Pamela] cohabitates with an unrelated adult male, dies or remarries, whichever occurs first.” *Hutchinson*, 2010-Ohio-597 at ¶ 11. The decree separately reserved jurisdiction to modify spousal support. *Id.* The appellate court, considering the language held, “it is clear that the trial court intended to reserve the authority to modify the spousal support award if the moving party proved a substantial change in circumstances other than Pamela's death, remarriage or cohabitation with an unrelated adult male.” *Id.*

{¶24} Accordingly, whether a circumstance is a condition subsequent or a basis for modification depends upon the language used in the divorce decree. In another case, the Twelfth Appellate District determined retirement was a condition subsequent for termination of spousal support based on the language of the decree. *Akers v. Akers*, 12th Dist. No. CA2003-07-176, 2004-Ohio-2908, ¶ 9-10. In *Akers*, the divorce decree reserved jurisdiction to modify spousal support upon change of circumstances. *Id.* The decree also stated the term of support “shall continue until Appellant’s retirement.” *Id.* The trial court found Appellant’s retirement did not constitute a change of circumstances. *Id.* The appellate court reversed and held the plain language of the decree indicated retirement was a condition subsequent and therefore, if appellant retired spousal support terminated. *Id.*

{¶25} Thus, the language of the decree is crucial. Courts have even held that the retention of jurisdiction to modify may be restricted to defined changes of circumstances enumerated in the divorce decree. *Tedrick*, 2016-Ohio-1488 at ¶ 13 (The trial court's jurisdiction to modify spousal support was limited to defined changed

circumstances, and since wife's remarriage was not one of the defined change of circumstances, the trial court was without jurisdiction to modify spousal support upon that basis.); *Kopczak v. Kopczak*, 11th Dist. No. 2011-A-0056, 2012-Ohio-3014, ¶ 23-24 (Reservation of jurisdiction limited to amount of spousal support. Thus, jurisdiction to modify did not extend to duration of spousal support.); *Jordan v. Jordan*, 3d Dist. No. 5-05-24, 2005-Ohio-6028, ¶ 9-10 (“In this case, the ‘specific’ reservation of jurisdiction was limited to three instances and none of those instances were alleged by [the obligor].” The appellate court determined, the trial court was only authorized to modify spousal support for those three instances.).

{¶26} As set forth above, the divorce decree at issue has two separate and distinct paragraphs. The termination paragraph is paragraph 17 and it lists conditions subsequent for termination of spousal support - death of either party, remarriage of Appellee, or Appellee cohabitating with an unrelated adult male. Paragraph 18 deals specifically with modification; the trial court expressly stated it had continuing jurisdiction to modify the spousal support. It then listed reasons for modification. Whether this list is an all-inclusive list of reasons for modification is not an issue before us. Regardless, it does not matter because retirement is listed as a reason for modification. The language of this decree is plain. The conditions subsequent for termination are death, remarriage, and cohabitation. Retirement is not a condition subsequent for termination. Therefore, the trial court had no authority to grant the motion to terminate on the basis of retirement.

{¶27} We do not dispute that there is a continuum between modification and termination. In many instances, movants request both modification and termination in the same motion. The trial court, in some respects, treated this motion for termination as also a motion for modification. It did so by acknowledging the similarity between the motions (both springing from Appellant's retirement), granting the motion in limine, and indicating the motion was barred by *res judicata*.

{¶28} As stated above, the decree specifically lists retirement as a basis for modification. Therefore, in order for the amount of spousal support to be modified on the basis of retirement Appellant must show a substantial change in circumstance. *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009–Ohio–1222, 905 N.E.2d 172,

paragraph two of the syllabus (A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree expressly retained jurisdiction to make the modification and the court finds that a substantial change in circumstances has occurred and the change was not contemplated at the time of the original decree.).

{¶29} However, the trial court correctly determined Appellant’s argument was barred by res judicata.

{¶30} The doctrine of res judicata “involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel).” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). “[A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claims arising out of the transaction or occurrence that was the subject matter of the previous action.” *Id.* at 382.

{¶31} Principles of res judicata provide that “material facts or questions that were in issue in a former suit, and were there judicially determined by a court of competent jurisdiction, are conclusively settled by a judgment therein so far as concerns the parties to that action and persons in privity with them.” *Mlakar v. Mlakar*, 8th Dist. No. 98194, 2013–Ohio–100, ¶ 11, quoting *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 195, 443 N.E.2d 978 (1983). Res judicata has been applied to bar claims in motions to modify support obligations that were previously made between the same parties and finally decided by the court. *Mlakar* at ¶ 12.

{¶32} Here, the basis for the October 2016 Motion to Terminate was his 2015 retirement. Although the basis for the April 2015 motion to modify was at first based on Appellant’s claim that he was receiving unemployment, the motion was later amended to request modification based on Appellant’s voluntary retirement; the magistrate’s decision indicated the retirement was voluntary and denied the motion to modify the spousal support award. 10/9/15 Magistrate’s Decision. Consequently, the motion to modify and motion to terminate were both based on Appellant’s 2015 voluntary retirement.

{¶33} Although Appellant objected to the Magistrate’s October 9, 2015 denial of his April 2015 motion to modify, he did not appeal the trial court’s June 6, 2016 decision overruling the objections and adopting the magistrate’s decision. Consequently, since

the same facts were at issue in both motions, the issue was decided by the court, and it was a final appealable order that could have been appealed to this court, the matter is barred by res judicata. See *Carlisle v. Carlisle*, 180 Ohio App.3d 569, 2009-Ohio-215, 906 N.E.2d 483, ¶ 11-13 (4th Dist.) (Second motion to modify spousal support was barred by res judicata. When counsel was asked what the difference between the first and second motions were, counsel cited no difference, except for the fact that previous counsel had failed to present evidence in support of that motion.).

{¶34} That conclusion, however, does not necessarily mean Appellant's retirement is foreclosed forever as forming any basis for modification. For instance, when Appellant reaches full retirement age, he could move for modification indicating he is now at full retirement age and seeks modification based on his full retirement age and the fact that he is retired. The magistrate and trial court's decisions were based on the fact that Appellant took a voluntary early retirement. However, once he reaches the age of full retirement that fact may create a new basis for a change in circumstance so that res judicata would not act as a bar. See *Comella v. Parravano*, 8th Dist. No. 100062, 2014-Ohio-834, ¶ 30 (Argument that the second motion to modify spousal support was barred by res judicata was found to be meritless because material facts that were not at issue at the time of the court's prior order were raised in the second motion.).

{¶35} In conclusion, the trial court did not abuse its discretion in denying the motion to terminate spousal support and in granting the motion in limine. The divorce decree clearly indicated retirement was not a basis for termination of spousal support. Furthermore, the trial court already adjudicated the issue of whether Appellant's 2015 early retirement warranted modification of spousal support and Appellant did not appeal that issue to this court. Thus, the doctrine of res judicata barred relitigation of that issue. Both assignments of error lack merit. The trial court's decision is affirmed.

Donofrio, J., concurs.

Waite, J. concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**