[Cite as *Jones v. Jones*, 2022-Ohio-4236.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

Jane Ann Jones,	:	
Plaintiff-Appellee,	:	Case No. 22CA2
v.	:	
Daniel John Jones,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	**RELEASED 11/22/2022**

APPEARANCES:

Jane Jones, Naples, Florida, pro se plaintiff-appellee.

Nancy E. Brum, Marietta, Ohio, for defendant-appellant.

Hess, J.

{¶1} Defendant-Appellant Daniel John Jones appeals the trial court's partial grant and partial denial of his motion to terminate spousal support to his ex-wife Plaintiff-Appellee Jane Ann Jones. Daniel raises two assignments of error. First, he contends that the trial court abused its discretion in not terminating his entire spousal support obligation because he presented clear and convincing evidence that Jane was cohabitating with another. Second, he contends that the trial court abused its discretion in not terminating his entire spousal support obligation because he presented clear and convincing evidence that there had been a substantial change in the circumstances of both parties and the existing award is no longer reasonable and appropriate.

{¶2} We find that the trial court did not act arbitrary, unreasonable, or unconscionable when it partially granted and partially denied Daniel's motion. In the divorce decree, Daniel's spousal support was divided into two parts: (1) a portion that

created an equal division of the parties' monthly respective social security income and (2) a portion that equalized their earned income. The trial court did not abuse its discretion when it found that there had not been a significant change in the circumstances in the parties' social security benefits, but there had been a significant change in the circumstance in earned income that the parties receive from employment because Daniel had retired. Therefore, the trial court did not abuse its discretion when it terminated the portion of spousal support that equalized earned income, but continued Daniel's requirement to pay the portion that equalized their respective social security income. We overrule both assignments of error and affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL BACKGROUND

{¶3} Daniel and Jane were married in 1981. In 2011, after 30 years of marriage, Jane filed a complaint seeking a divorce, and Daniel counterclaimed for divorce. The trial court entered its decree of divorce that provided for the following two spousal support obligations:

> Defendant [Daniel] shall pay Plaintiff [Jane] spousal support in the amount of five-hundred and twenty dollars ($520) per month by the fifth of every month beginning April, 2012, this amount is computed by creating an equal division of the parties' monthly respective social security income.
>
> In addition, Defendant shall pay Plaintiff spousal support in the amount of five-hundred thirty four ($534) per month by the fifth of every month beginning April, 2012. This amount is computed by using one-half of parties' equalized earned monies.

The decree contained no language that terminated either of Daniel's spousal support obligations based upon Jane's cohabitation. The trial court retained jurisdiction to adjust spousal support:

> Spousal support may be adjusted annually by motion of either party. * * * This Court shall retain jurisdiction as to all aspects of spousal support, including but not limited to amount and duration.

{¶4} In 2021, Daniel moved to terminate spousal support asserting that there had been a substantial change in circumstances because he was no longer employed outside the home and Jane was cohabiting with another. The trial court held a hearing on the motion. At the hearing Jane testified that she was in a dating relationship with Tom, a man that she had reunited with at a 50th college reunion. At the time of the hearing, she and Tom had been living together in Florida for two months. Before their move to Florida, she had lived with Tom in California for 13 months. Jane testified that she gave Tom $20,000 for the purchase of the Florida residence and told him, "I'd like to use that for rent for the time that I lived with him in California, and also for Florida." However, later in the hearing she testified that she loaned Tom the $20,000 and had a promissory note with accrued interest.[1] She testified that she pays all her own expenses but that none of the utilities, real estate taxes, or real estate are in her name. Jane had not paid rent or utilities since June 2020, when she moved to California to be with Tom. They both contributed towards the food expenses. Jane testified that before she moved to California her rent and utilities were approximately $1,000 per month. In addition, she had other personal expenses of approximately an additional $1,100 per month for health insurance, auto

[1]Jane attached a copy of the promissory note to her appellate brief and explained that she was forfeiting collection of the interest as a form of rental payments to Tom. However, the promissory note was not admitted into evidence at the hearing and there was no testimony about the use of interest as rental payments. Neither the note nor Jane's explanation are part of the record on appeal. We may not consider exhibits attached to appellate briefs that are not part of the record. *Willis v. Ohio Dept. of Transp*., 2016-Ohio-1593, 50 N.E.3d 581 (4th Dist.); *Isbell v. Kaiser Found. Health Plan*, 85 Ohio App.3d 313, 619 N.E.2d 1055 (8th Dist.1993) (appellate courts cannot consider affidavits or other matters included for the first time in appellate briefs that were not properly certified as part of the trial court's original record). App.R. 9(A) limits our consideration to the "original papers and exhibits thereto filed in the trial court."

insurance, dental and eye care, furniture storage, food, beverages, telephone, monthly credit card bill, and haircuts. As a result, her monthly expenses decreased by approximately $1,000 per month when she moved in with Tom because she was not paying utilities and rent. Jane testified that while she did not pay Tom rent and utilities, she did the cooking, cleaning, walked the dogs, and did the gardening while she resided in California. She also testified there were no heating or air conditioning bills because the year-round temperature in Los Angeles County was 65 to 75 degrees.

{¶5} Jane testified that Tom has not made financial arrangements to provide for her if he dies, and everything, including the Florida residence, would go to Tom's daughter. Jane has no commitment to Tom and testified, "I have no commitment to him. No commitment to marriage. If he asked me tomorrow, I'd say no." Jane testified that she does not want to be forced into marriage and if she loses spousal support and Tom dies, she would not be able to survive financially, "I'm not going to be forced into marriage. I've had bad experiences. So what if he dies in a month from now, and I lose spousal support? How am I going to live? I can't."

{¶6} Daniel testified that he currently resides in New Mexico. At the time of his divorce from Jane, he worked outside the home as a real estate broker and boat building instructor. However, he retired about three years ago when he was 75 years old and his income has changed significantly as a result. Daniel introduced his tax returns over the most recent three-year period and testified that his income had been reduced substantially since his retirement. Daniel testified that he is remarried, and his current wife is a retired teacher and receives teacher retirement funds. He and his current wife

file separate tax returns and keep all their money separate, except for a shared car insurance expense.

{¶7} The trial court issued a judgment entry in which it granted Daniel's motion in part and denied it in part. The court terminated Daniel's monthly $534 spousal support obligation that was intended to equalize monthly earnings because it determined that there had been a significant change in circumstance in monies earned now that both parties were retired and living off social security and investments. It also found that both parties were sharing living expenses with another person. However, the court found that the estimate of the parties' social security income had not changed significantly since the divorce. As a result, the trial court found that there was not a substantial change in the parties' social security benefits that would warrant a modification or termination of the spousal support obligation intended to equalize social security income. The trial court did not terminate or modify the $520 monthly spousal support obligation related to the equalization of social security income.

{¶8} Daniel appealed.

II. ASSIGNMENTS OF ERROR

{¶9} Daniel designates two assignments of error for review:

> I. The trial court abused its discretion in not terminating the Spousal Support Order as the evidence presented proved by clear and convincing evidence that Jane Jones was cohabiting with Thomas Kreig.
>
> II. The trial court abused its discretion in not terminating the Spousal Support Order as the evidence presented proves by clear and convincing evidence there has been a substantial change in the circumstances of both parties and the existing award is no longer reasonable and appropriate.

III. LEGAL ANALYSIS

{¶10} Because the assignments of error are interrelated, we will consider them together.

A. Spousal Support Modification and Termination

1. Standard of Review

> The trial court is afforded wide latitude in determining spousal-support issues, including issues regarding the modification of spousal support. An appellate court will not reverse a determination on spousal support unless the trial court has abused its discretion. Under the abuse-of-discretion standard of review, we will affirm the trial court's judgment unless the decision is unreasonable, arbitrary, or unconscionable. In making this highly deferential review, an appellate court may not freely substitute its judgment for that of the trial court.

(Citations omitted.) *Carlisle v. Carlisle*, 180 Ohio App.3d 569, 2009-Ohio-215, 906 N.E.2d 483, ¶ 10 (4th Dist.).

2. Substantial Change in Circumstances

{¶11} "[A] trial court lacks jurisdiction to modify a prior order of spousal support unless the decree of the court expressly reserved jurisdiction to make the modification and unless the court finds (1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree." *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, ¶ 33. The party seeking a modification of spousal support has the burden of proving by clear and convincing evidence a changed circumstance justifying a change in the level of spousal support. *Carlisle* at ¶ 10. "The 'changed circumstances' analysis is a threshold inquiry that the court must make before the court considers the appropriateness of the current spousal-support order." *Id.*

{¶12} Under R.C. 3105.18(E) and (F)(1):

> a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses, or other changed circumstances so long as both of the following apply:
>
> (a) The change in circumstances is substantial and makes the existing award no longer reasonable and appropriate.
>
> (b) The change in circumstances was not taken into account by the parties or the court as a basis for the existing award when it was established or last modified, whether or not the change in circumstances was forseeable [sic].

{¶13} The trial court found that at the time of the divorce, Daniel was employed, and Jane was not. However, Daniel is now retired and both parties are living off investments and social security. The trial court also found that there was evidence that both parties are now sharing living expenses with another person. As a result, the trial court found that, "based upon the parties both having zero income from employment, there has been a significant change in circumstance in earned monies that the parties receive from employment." It granted, in part, Daniel's motion to terminate spousal support and terminated the spousal support of $534 per month that was based upon equalization of income.

{¶14} However, the trial court found that "the estimation of the parties' social security income has not changed much since the divorce." As a result, the trial court found that there was not a substantial change in the circumstances of the parties' social security benefits and "it is not warranted to modify or terminate the spousal support of $520 per month that was based upon the equalization of the parties' social security benefits."

{¶15} We find the trial court's summation of the evidence to be consistent with the testimony and evidence provided at the hearing. Daniel was seeking to terminate both

forms of spousal support: (1) social security equalization payments and (2) earned income from employment. While he provided evidence that he had retired and thus his earned income from employment had significantly changed, he provided no evidence that the parties social security benefits had materially changed. There was no evidence that Jane had unexpectedly experienced a significant increase in her social security benefits or that he had unexpectedly experienced a significant decrease in his. Thus, there was no basis to warrant a recalculation of the monthly equalization payment.[2] Moreover, Daniel makes no rational connection between equalization of social security benefits and cohabitation/remarriage. When the stated purpose is to equalize the social security benefits, we see no reason for Jane's social security benefits to have been reduced upon cohabitation, any more than Daniel's should have been reduced upon his remarriage.

{¶16} We find the trial court did not abuse its discretion in denying Daniel's request to terminate that part of his spousal support obligation that equalized social security benefits, i.e., $520 per month. We overrule Daniel's first and second assignments of error.

IV. CONCLUSION

{¶17} We overrule the assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

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[2] In her appellate brief, Jane argues that Daniel has received annual cost of living adjustments ("COLA") over the years to his social security benefits and she has not received any COLA increases on her portion – it has stayed fixed at $520 for the past 20 years. She asks us to require Daniel to "increment the same percentage of COLA increase he receives each year" to her portion. However, she did not seek this remedy at the trial court and cannot seek it now for the first time on appeal. *Great Lakes Crushing, Ltd. v. DeMarco*, 2014-Ohio-4316, 20 N.E.3d 430, ¶ 27 (11th Dist.) (it is well-established that a party cannot raise new issues or legal theories for the first time on appeal).

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.