

{¶ 1} Defendant-appellant Jeffrey Jones appeals from a final judgment and decree of divorce entered by the Montgomery County Common Pleas Court, Domestic Relations Division. Jeffrey contends that the trial court abused its discretion in the division of property. He further contends that the court erred by failing to release documents for which he executed a subpoena. Finally, he claims that the court abused its discretion by ordering him to pay spousal support.

{¶ 2} We conclude that the trial court erred by not releasing the documents that were the subject of Jeffrey's subpoena, and we also conclude that the trial court's property division constituted an abuse of discretion. Because our decision regarding the property division may have an effect on the spousal support determination, we further conclude that the award of spousal support must be reconsidered. Accordingly, the judgment of the trial court is reversed, and the matter is remanded for further proceedings in accordance with this opinion.

I. Course of the Proceedings

{¶ 3} Jeffrey and Diana Jones were married in February 2008. They have no children as a result of their union.

{¶ 4} Relevant to this appeal, Jeffrey became employed with the Montgomery County Engineer's Office in 1991. Diana became employed with the same office in August 2002. Jeffrey's employment was terminated in 2007. Diana's employment was terminated in August 2009. In July 2013, Diana and Jeffrey filed a civil suit against the Engineer's Office and the former County Engineer, Joseph Litvin. The suit sought

damages for gender discrimination, retaliation, intentional infliction of emotional distress, loss of consortium and breach of contract. The complaint alleged that, prior to their marriage, Jeffrey had been employed as Diana's supervisor and that his employment was terminated in retaliation for his attempt to "intercede on her behalf with Defendant Litvin." Def. Exh. JJ. The complaint also alleged that Diana had been bypassed for promotions and raises and that she had been subject to gender discrimination. The matter was settled in June 2015. The settlement agreement stated that the settlement was the "result of bona fide adversarial negotiations to resolve a tort based case involving Plaintiff, Diana Jones' physical sickness." Def. Exh. A. The settlement further provided that, in exchange for the dismissal of all claims made by both Jeffrey and Diana, the Engineer's Office would pay the sum of \$750,000 in four separate checks payable to Diana.

{¶ 5} In February 2016, Diana filed a complaint for divorce. Jeffrey filed an answer and counterclaim. During discovery, Jeffrey issued a subpoena to the Montgomery County Prosecutor's Office and the Engineer's Office seeking documents related to the 2013 civil suit.¹ Jeffrey argued that the information was relevant to his claim that the settlement proceeds from the lawsuit constituted marital property. The Prosecutor's Office filed a motion to quash on the basis that the request was unduly burdensome. The motion also argued that the documents sought were confidential. The confidentiality claim was asserted because the parties' settlement agreement included a confidentiality clause. The motion also sought to have the court conduct an in camera review of the requested documents. The trial court granted the request for an

¹ The Prosecutor's Office represented both Litvin and the Montgomery County Engineer's Office during the course of the civil litigation.

in camera review of the documents.

{¶ 6} The final divorce hearing was conducted over two days in late 2017 and early 2018. During that time, both parties testified and both presented the testimony of appraisers regarding the value of real estate and businesses owned by the parties. At the end of the hearing, Jeffrey asked the court whether it would release the documents that it had reviewed in camera as the court had not rendered a decision on the issue. The court stated that none of the requested documents delineated how the proceeds of the employment lawsuit were to be divided. The court, thus, implicitly overruled the request for the release of the documents to Jeffrey.

{¶ 7} The trial court issued a decision on May 18, 2018 related to property division and spousal support; this decision was incorporated into the June 26, 2018 final judgment and decree of divorce. The court concluded that because the settlement agreement provided that the payments would be made to Diana for her “physical sickness,” the proceeds were her non-marital property. The court ordered Jeffrey to pay spousal support in the sum of \$900 per month for a period of 36 months. The court retained jurisdiction over the amount but not the duration of the spousal support.

{¶ 8} The trial court’s decision also divided Jeffrey’s interest in two businesses he acquired prior to the marriage, specifically his farming business and a snow removal/trucking business known as South West Ohio Services. There was no testimony or other evidence presented regarding the value of the businesses at the time of the marriage. But the trial court relied on the testimony of Diana’s expert, who assigned a combined value of \$202,477 for both businesses as of the date of the hearing. There was evidence that the farming business purchased equipment valued at \$110,000

during the course of the marriage. Based on this evidence, the court concluded that the value of the farming business was \$110,000, \$55,000 of which belonged to Diana. The court then deducted this value from the expert's total valuation and concluded that the snow removal/trucking business had a value of \$92,477. The court awarded Diana one-half of that value, or \$46,238.50.

{¶ 9} Jeffrey filed an appeal, Diana filed a cross-appeal. Diana has failed to prosecute her cross-appeal, thus we have dismissed that appeal by separate order (Decision & Entry, June 5, 2019).

II. Subpoenaed Documents

{¶ 10} Jeffrey's first assignment of error is as follows:

THE TRIAL COURT ERRED IN NOT RELEASING SUBPOENAED RECORDS REGARDING THE PARTIES' SETTLEMENT.

{¶ 11} Jeffrey contends that the trial court erred when it did not release the documents submitted to the court by the Montgomery County Engineer's and Prosecutor's Offices following the issuance of his subpoena for such documents. We agree.

{¶ 12} While the Prosecutor's Office correctly points out that that the terms of the settlement were subject to a confidentiality clause, we cannot conclude that such clause prohibited Jeffrey, a party to the settlement, from accessing the requested materials. Further, we have inspected the documents that were submitted to the trial court. Most of the documentation consisted of correspondence between the attorney for the Joneses

and the Prosecutor's Office concerning settlement of the action.² None of the documents appear to be work-product or subject to attorney/client privilege.

{¶ 13} The trial court did not state, and we can discern no reason for, the denial of Jeffrey's request to release the requested documentation. Therefore, we conclude that the trial court erred by failing to permit Jeffrey to inspect the documents submitted to the court. Accordingly, the first assignment of error is sustained.

III. Property Division

{¶ 14} Jeffrey's second assignment of error states as follows:

THE TRIAL COURT ERRED IN DETERMING [SIC] AND DIVIDING
PROPERTY AND DEBT.

{¶ 15} Jeffrey contends that the trial court abused its discretion regarding the division of property. Specifically, he contends that the proceeds of the settlement of the 2013 civil action were marital property and that the trial court erred in determining otherwise. He further contends that the trial court erred when awarding Diana an interest in his premarital snow removal/trucking business.

{¶ 16} A trial court has broad discretion regarding the division of marital property, and its judgment will not be disturbed absent an abuse of that discretion. *Mathews v. Mathews*, 2d Dist. Clark No. 2012-CA-79, 2013-Ohio-2471, ¶ 8, citing *Bisker v. Bisker*, 69 Ohio St.3d 608, 609, 635 N.E.2d 308 (1994). A trial court abuses its discretion when the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v.*

² There is also a copy of the settlement agreement and a damages report compiled by an expert on behalf of the Joneses.

Blakemore, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). “It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.” *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). “A decision is unreasonable if there is no sound reasoning process that would support that decision.” *Id.*

{¶ 17} We first address the issue of whether the civil litigation settlement proceeds constituted separate or marital property. Jeffrey contends that the monies constituted marital property, as they were gained during the marriage and constituted remuneration for Diana’s lost wages resulting from employment discrimination. Conversely, Diana contends that the monies constituted separate property because they were paid as a result of a personal injury.

{¶ 18} The classification of property as marital or separate must be supported by competent, credible evidence. *Mays v. Mays*, 2d Dist. Miami No. 2000-CA-54, 2001 WL 1219345, *3. The factors set forth in R.C. 3105.171(A) determine the marital or separate classification of property. Marital property is defined in R.C. 3105.171(A)(3)(a) as all of the following:

- (i) All real and personal property that currently is owned by either or both spouses * * * and that was acquired by either or both of the spouses during the marriage;
- (ii) All interest that either or both of the spouses currently has in any real or personal property * * * and that was acquired by either or both of the spouses during the marriage;

(iii) * * * all income and appreciation on separate property, due to labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage;

* * *

{¶ 19} Separate property is that which meets the standards of R.C. 3105.171(A)(6)(a), including, in pertinent part, the following:

* * *

(ii) Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage;

(iii) Passive income and appreciation acquired from separate property by one spouse during the marriage;

* * *

(vi) Compensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets[.]

{¶ 20} “The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable.” *Janis v. Janis*, 2d Dist. Montgomery No. 23898, 2011-Ohio-3731, ¶ 40, citing R.C. 3105.171(A)(6)(b). Similarly, “the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital or separate property. Instead, the couple's total circumstances are reviewed.” (Citations omitted.) *Id.*

{¶ 21} As noted, R.C. 3105.171(A)(6)(a)(vi) characterizes compensation for

personal injury as the injured spouse's separate property, except for those amounts attributable to a "loss of marital earnings and compensation for expenses paid from marital assets." Thus, the trial court must look to the totality of the circumstances in order to determine whether such proceeds are the product of anything other than the spouse's injury.

{¶ 22} Here, the trial court's finding that the proceeds were non-marital was based solely upon the language of the settlement agreement regarding Diana's "physical sickness" and the fact that the settlement checks were made payable to Diana. We find that this was an abuse of discretion, in part, because the trial court does not appear to have considered any other evidence regarding the nature of the proceeds. Further, we find an abuse of discretion because the trial court denied Jeffrey a reasonable opportunity to establish the marital nature of the settlement proceeds when it denied him the right to review the subpoenaed documents.

{¶ 23} The documents reviewed, in camera, by the trial court contained correspondence exchanged between the Joneses' attorney and the Prosecutor's Office during 2014 and 2015. The 2014 correspondence made clear that, as of mid-2014, following a positive resolution of her administrative appeal of her dismissal, Diana intended to return to her employment and was not making any claim that she was disabled. It further indicated that the return to work was predicated merely upon a satisfactory resolution of the issue of the back pay owed to her. However, the 2015 correspondence indicated that, as the terms of the settlement were being negotiated between the parties, the Engineer's Office wanted to, and ultimately did, negotiate a provision that neither Jeffrey nor Diana would be considered eligible for employment in

the Engineer's Office. Further, there was correspondence from the Joneses' attorney indicating that they were concerned about the tax consequences of the settlement, that they did not want any tax withholding or deductions taken from the settlement proceeds, and that they wanted to consult with the Prosecutor's Office regarding how they could "legitimately classify the \$750,000 to avoid taxes if possible." Thereafter, there was correspondence discussing the use of the language "Diana's physical sickness." In a May 6, 2015 letter from Frank Payson, the Joneses' attorney, to the Prosecutor's Office, Payson confirmed that the Joneses agreed that the settlement agreement would contain language that "[t]his settlement is the result of bona fide adversarial negotiations to resolve a tort based case involving Plaintiff's physical sickness." The letter further stated that the Engineer's Office and Prosecutor's Office agreed that the "settlement agreement and the check(s) issued will not contain any mention of or reference to the word 'wage(s)'" The letter went on to state that "an IRS form 1099 will not be issued at any time related to this settlement to either of the Plaintiffs."

{¶ 24} Additionally, Diana's own testimony tended to corroborate Jeffrey's claims regarding the marital status of at least some portion of the settlement proceeds. Diana did testify that the settlement monies were paid to her because she became unable to work due to her physical sickness which consisted of "severe manic depressive and anxiety disorder [and] severe panic attacks," all of which caused her to "struggle with keeping things straight." Tr. p. 91 and 108. She further testified that her "health conditions debilitated [her] to where [she] physically was not able to do a lot of things that [she] used to be able to do." Tr. p. 155. She testified that her head, neck, and back were hurt. Tr. p 156. However, she did not submit any documentation regarding her

medical conditions, nor did she present the testimony of a medical provider to corroborate her claims. Further, when asked during cross-examination about the reason for her inability to work, Diana testified that “the stress of all of this six years of straight lawsuit, fighting officials, state officials, and letters and documents, and six years. * * * And my health deteriorated during that period of time.”³ Tr. p 171. She also admitted that she could not attribute the entire amount of the settlement to her claimed physical illness. She further testified that she had never applied for disability compensation.

{¶ 25} Thus, regardless of the language used or the issuance of payment to Diana alone, the evidence in this record could support a finding that Diana and Jeffrey negotiated the language and terms of the settlement agreement to avoid paying income tax on the settlement proceeds and, thus, that the entirety, or some portion, of the settlement was a marital asset subject to equitable division. See 26 U.S.C. 104(a)(2) (income does not include the amount of any damages received as compensation for “physical sickness.”).

{¶ 26} Based upon the evidence cited above, and the trial court’s apparent failure to consider such evidence, we conclude that the trial court’s decision regarding the settlement proceeds constituted an abuse of discretion. On remand, the trial court must allow Jeffrey access to the subpoenaed materials and then allow the parties to present evidence regarding their respective claims as to the settlement proceeds.

³ Since the hearing was conducted in 2017 and 2018, Diana’s testimony indicated that her medical conditions did not manifest until well after her employment ended in 2009. It further indicated that the conditions were the result of stress induced by the litigation process rather than her actual employment. This finding was corroborated by the above-mentioned 2014 correspondence indicating that Diana wanted to return to her employment as of 2014.

{¶ 27} We next turn to the division of Jeffrey’s businesses. There was no dispute that Jeffrey acquired the businesses prior to the marriage. However, Diana claimed that she was entitled to a division of the increased value of those businesses.

{¶ 28} “Marital property” is defined as, among other things, “all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage.” R.C. 3105.171(A)(3)(a)(iii). Thus, “under R.C. 3105.171, an increase in the value of separate property due to either spouse's efforts is marital property.” *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 696 N.E.2d 575 (1998), syllabus. In contrast, “passive income and appreciation acquired from separate property by one spouse during the marriage” is separate property. R.C. 3105.171(A)(6)(a)(iii). “Passive income” is defined as “income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse.” R.C. 3105.171(A)(4).

{¶ 29} R.C. 3105.171, which governs property distribution, does not mandate a particular property valuation methodology. *Crim v. Crim*, 5th Dist. Tuscarawas No. 2007 AP 06 0032, 2008-Ohio-5367, ¶ 36, citing *Focke v. Focke*, 83 Ohio App.3d 552, 555, 615 N.E.2d 327 (2d Dist.1992). Thus, an appellate court's duty is not to require the adoption of any particular method of valuation, but to determine whether, based upon all the relevant facts and circumstances, the court abused its discretion in arriving at a value. *Focke* at 555. However, a trial court must have a rational, evidentiary basis for assigning value to marital property. *McCoy v. McCoy*, 91 Ohio App.3d 570, 576-578, 632 N.E.2d 1358 (8th Dist.1993).

{¶ 30} The trial court was correct that there was expert testimony that the fair

market value of the businesses at the time of the divorce was \$204,477. However, there was no evidence presented as to the value of the snow removal/trucking business at the inception of the parties' marriage. Therefore, the trial court could not have determined that there was any increase in the value of that business, let alone whether the increase was passive or, instead, was due to the marital contribution of either or both of the spouses. Thus, we conclude that the trial court erred in awarding Diana \$46,238.50 as her marital share of the snow removal/trucking business.⁴

{¶ 31} Finally, we note that the trial court's decision regarding the division of all the marital property required Jeffrey to pay Diana approximately \$262,237 as her share of those properties within six months of the divorce decree.⁵ Jeffrey argues that the time-frame set out in the decree was inequitable because none of his assets were liquid and because the real estate was encumbered by debt and co-owned with a third party.

{¶ 32} Since we are reversing the trial court's decision regarding the division of the pre-marital businesses and the civil litigation proceeds, we will not consider this argument at this time. We note, however, that as a result of this opinion, the amount Jeffrey owes Diana is reduced by \$46,238.50, and that a revised division of the settlement proceeds may eliminate, or at least mitigate, the claimed inequity.

{¶ 33} The second assignment of error is sustained.

IV. Spousal Support

⁴ This conclusion does not apply to the \$55,000 awarded to Diana as her share of the farming equipment acquired during the marriage.

⁵ The trial court's decision on the division of properties also addressed property not discussed in this opinion.

{¶ 34} The third assignment of error asserted by Jeffrey provides as follows:

THE TRIAL COURT ERRED IN AWARDING SPOUSAL SUPPORT.

{¶ 35} Jeffrey contends that Diana was not entitled to an award of spousal support.

{¶ 36} Trial courts have broad discretion regarding spousal support orders, and absent an abuse of that discretion, an appellate court will not disturb the trial court's decision. *Reveal v. Reveal*, 154 Ohio App.3d 758, 2003-Ohio-5335, 798 N.E.2d 1132, ¶ 14 (2d Dist.). However, the court's exercise of discretion is governed by R.C. 3105.18, which mandates that the court consider all of the relevant factors in that statute when making an award of spousal support. Those factors, set forth in R.C. 3105.18(C)(1), are as follows:

- (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
- (b) The relative earning abilities of the parties;
- (c) The ages and the physical, mental, and emotional conditions of the parties;
- (d) The retirement benefits of the parties;
- (e) The duration of the marriage;
- (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
- (g) The standard of living of the parties established during the marriage;
- (h) The relative extent of education of the parties;

- (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
- (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
- (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
- (l) The tax consequences, for each party, of an award of spousal support;
- (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
- (n) Any other factor that the court expressly finds to be relevant and equitable.

{¶ 37} While the trial court did discuss the relevant factors as they related to the parties, it is not clear which of those factors the trial court actually relied upon in awarding support to Diana. But, given our disposition of the second assignment of error, we have effectively altered the facts regarding at least one of the factors to be considered when awarding spousal support. Thus, the trial court, on remand, should make a determination concerning whether to modify, terminate or retain its current support order after adjusting the property division.

{¶ 38} The third assignment of error is sustained.

V. Conclusion

{¶ 39} Jeffrey's assignments of error being sustained, the judgment of the trial court is reversed, and this matter is remanded to the trial court for further proceedings regarding the settlement proceeds, the property division, and the issue of spousal support.

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DONOVAN, J. and FROELICH, J., concur.

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