

[Cite as *Walpole v. Walpole*, 2015-Ohio-3238.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102409

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**KATHLEEN M. WALPOLE**

PLAINTIFF-APPELLANT AND  
CROSS-APPELLEE

vs.

**THOMAS L. WALPOLE, III**

DEFENDANT-APPELLEE AND

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Domestic Relations Division  
Case No. DR-07-318177

**BEFORE:** Boyle, J., E.A. Gallagher, P.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** August 13, 2015

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MARY J. BOYLE, J.:

{¶1} Plaintiff-appellant and cross-appellee, Kathleen M. Walpole, appeals from a judgment dismissing several of her post-decree motions for want of prosecution and granting defendant-appellee and cross-appellant's, Thomas Walpole's, motion to modify spousal support.

Kathleen's Assignments of Error

1. The court erred in dismissing plaintiff, Kathleen Walpole's, motion to show cause.
2. The court erred in not allowing the taking of Dr. Eric Thompson's deposition for use at trial and in not allowing the testimony of Jack W. Abel as part of plaintiff's claims and defenses.
3. The court erred in failing to find the defendant, Thomas Walpole, in contempt of court for his failure to pay spousal support as ordered.
4. The court erred in failing to award plaintiff, Kathleen Walpole, attorney fees and litigation expenses.
5. The court erred in hearing defendant, Thomas Walpole's, motion to modify support in the first instance. The court was without jurisdiction to have done so.
6. The court erred in granting defendant, Thomas Walpole's, motion to modify support. He failed to meet his burden of proof.
7. The court erred in failing to conduct an independent review of the magistrate's decision in regards to the termination of the defendant[s], Thomas Walpole's, spousal support obligation.

Thomas's Cross-Assignments of Error

1. The trial court erred and abused its discretion by denying cross-appellant's motion to disqualify counsel and granting Mr. Agin's motion to quash and for protective order.

2. The trial court erred and abused its discretion by failing to award attorney fees, expert fees, and expenses to cross-appellant.

{¶2} After review, we do not find merit to the parties' arguments on appeal or cross-appeal and affirm the judgment of the trial court.

#### Procedural History and Factual Background

{¶3} Kathleen and Thomas were divorced in June 2011 after 30-plus years of marriage.<sup>1</sup> The divorce decree required Thomas to pay Kathleen \$14,000 per month in spousal support for ten years. The trial court retained jurisdiction to modify the amount of spousal support "within the term based on defendant's retirement or any other changes in accordance with the Ohio Revised Code Section 3105.18(F)."

{¶4} On May 14, 2013, Thomas filed a motion to modify and/or terminate spousal support asserting that he would be retiring from Novelis Corporation, his place of employment for approximately 34 years, on July 15, 2013. At the time of his retirement, Thomas was 58 years old and had been president of Novelis North America, which is a Fortune 500 company. On July 17, 2013, Thomas filed a motion to stay spousal support payments since he had retired.

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<sup>1</sup>Kathleen filed for divorce on October 4, 2007. The divorce trial was held over several days in November and December 2008. The termination date of the marriage as determined by the trial court was November 5, 2008. Kathleen began receiving temporary spousal support of \$15,000 per month on April 1, 2008, and then began receiving \$14,000 per month of spousal support on November 5, 2008.

{¶5} On September 25, 2013, Kathleen filed a motion to show cause and for attorney fees. She also filed a motion to modify spousal support on October 16, 2013.

{¶6} The magistrate held hearings on the matters over four days in April and June 2014, and issued her decision in September 2014. The magistrate granted Thomas's motion to modify and/or terminate spousal support, terminating Thomas's obligation to pay spousal support as of July 15, 2013, the day Thomas retired from Novelis. But the magistrate denied Thomas's motions for attorney fees. The magistrate then dismissed all of Kathleen's motions for lack of prosecution because she failed to appear for all hearing dates despite being ordered to do so by the magistrate.

{¶7} Kathleen and Thomas objected to the magistrate's decision. The trial court overruled all objections and adopted the magistrate's decision in its entirety. It is from this judgment that Kathleen appeals and Thomas cross-appeals. We will address the parties' arguments out of order for ease of discussion and together where they are interrelated.

### Jurisdiction

{¶8} In her fifth assignment of error, Kathleen argues that the trial court lacked jurisdiction to hear Thomas's motion to modify and/or terminate spousal support. She maintains that there was no change of circumstance sufficient to confer jurisdiction because the parties had contemplated Thomas's retirement at the time of the divorce decree, and Thomas's retirement was voluntary.

{¶9} A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree of the court expressly retained jurisdiction to make the modification and the court finds that (1) a substantial change in circumstances has occurred, and (2) 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, paragraph two of the syllabus; R.C. 3105.18(F).

{¶10} R.C. 3105.18(F)(1) provides:

[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 foreseeable.

{¶11} To “contemplate” means more than “think about”; rather, a party had to “intend” that an event happened for it to preclude a modification of spousal support. *Kaput v. Kaput*, 8th Dist. Cuyahoga No. 94340, 2011-Ohio-10, ¶ 22. “Courts have misconstrued that standard by applying a test of foreseeability: was the particular circumstance one reasonably to be anticipated? The better test is one grounded in the record, and contemplates a finding that the circumstance is not one that ‘was thoroughly considered at the time of the divorce.’” *Allread v. Allread*, 2d Dist. Darke No.

2011-CA-14, 2012-Ohio-2093, ¶ 16, quoting *Palmieri v. Palmieri*, 10th Dist. Franklin No. 04AP-1305, 2005-Ohio-4064, ¶ 19.

{¶12} In a divorce decree, however, a court may specify triggering events that would constitute a change of circumstances pursuant to R.C. 3105.18. *See, e.g., Lira v. Lira*, 12 Ohio App.3d 69, 465 N.E.2d 1353 (8th Dist.1983) (noting that the original decree validly specified that the probable changes in the husband’s income would trigger review and possible modification of the spousal support award); *Jordan v. Jordan*, 3d Dist. Hancock No. 5-05-24, 2005-Ohio-6028, ¶ 9 (original decree specified various possible conditions that would trigger future modification).

{¶13} The movant bears the burden of proving that the parties did not contemplate the substantial change in circumstances at the time of the divorce. *Potter v. Potter*, 8th Dist. Cuyahoga No. 99247, 2013-Ohio-3531, ¶ 13, citing *Tremaine v. Tremaine*, 111 Ohio App.3d 703, 676 N.E.2d 1249 (2d Dist.1996).

{¶14} In this case, the trial court expressly reserved jurisdiction to modify spousal support based upon Thomas’s retirement. Moreover, the change in circumstance — Thomas’s retirement — was not taken into account by the parties or the court as a basis for the existing award when it was established, even though Thomas’s retirement was foreseeable. Indeed, that is why the trial court reserved jurisdiction to modify spousal support upon Thomas’s retirement. Rather, the spousal support award at the time of the divorce was based upon Thomas’s income as a top executive at Novelis. As this court noted in the parties’ direct appeal from their divorce decree, “[t]he court found that such

things as the uncertainties of the global economy, the temporary nature of Thomas's current assignment, and the possibility of retirement make Thomas's projected gross income unpredictable.” *Walpole v. Walpole*, 8th Dist. Cuyahoga No. 99231, 2013-Ohio-3529, ¶ 28. That is why the trial court expressly reserved jurisdiction to modify spousal support once the triggering event occurred.

{¶15} Kathleen further maintains that Thomas's retirement was voluntary, and thus, did not meet the requirements of an “involuntary decrease” in his wages under R.C. 3105.18(F)(1) to justify a “change in circumstances.” If a party is eligible to retire early and does not do so to defeat the spousal support obligation, then retirement can be considered as a legitimate decrease in income for purposes of modifying spousal support. *Roach v. Roach*, 61 Ohio App.3d 315, 319, 572 N.E.2d 772 (8th Dist.1989); *Tissue v. Tissue*, 8th Dist. Cuyahoga No. 83708, 2004-Ohio-5968, ¶ 21.

{¶16} While it is true that Thomas's retirement was voluntary, he established that he did not do so to circumvent paying spousal support. He testified that he and Kathleen had always intended to retire at age 55, and that is why they had saved so much over the years. After their divorce, he said that he had to work a few more years to ensure that he had sufficient savings to retire. Notably, Kathleen acknowledged this fact in the parties' direct appeal. *See Walpole*, 8th Dist. Cuyahoga No. 99231, 2013-Ohio-3529, at ¶ 57.

{¶17} Further, in *Mlakar v. Mlakar*, 8th Dist. Cuyahoga No. 98194, 2013-Ohio-100, this court found:

While a voluntary retirement does not necessarily preclude a finding that an obligor spouse is voluntarily unemployed, *Drummer v. Drummer*, 3d Dist.



No. 12-11-10, 2012-Ohio-3064, ¶ 31, a voluntary retirement “does not bar consideration of [a party’s] decrease in income when determining if there was a substantial change of circumstances.” *Robinson v. Robinson*, 12th Dist. Nos. CA93-02-027, CA93-03-047, 1994 Ohio App. LEXIS 1436, \*2-3 (Apr. 4, 1994). *See also Reveal v. Reveal*, 154 Ohio App.3d 758, 2003-Ohio-5335, 798 N.E.2d 1132, ¶ 18 (2d Dist.) (“a reduction in income due to voluntary retirement is literally a change of circumstances.”)

*Mrakar* at ¶ 23.

{¶18} Accordingly, Kathleen’s fifth assignment of error is overruled.

#### Termination of Spousal Support

{¶19} In her sixth assignment of error, Kathleen argues that the trial court should have denied Thomas’s motion to modify spousal support because he failed to meet his burden under R.C. 3105.18(C).

{¶20} A magistrate’s decision on the issue of modification of spousal support is subject to a de novo review by the trial court. *Potter*, 8th Dist. Cuyahoga No. 99247, 2013-Ohio-3531, at ¶ 11. The trial court must conduct an independent analysis of the evidence in order to reach its own conclusions about the issues in the case and determine whether the magistrate properly determined the factual issues and appropriately applied the law. *Id.*; Civ.R. 53(D)(4)(d). An appellate court’s review is more limited, however, and a trial court’s ruling on objections to a magistrate’s decision will not be reversed absent an abuse of discretion. *Gobel v. Rivers*, 8th Dist. Cuyahoga No. 94148, 2010-Ohio-4493, ¶ 16.

{¶21} With respect to spousal support, a trial court has broad discretion in determining what is proper based upon the facts and circumstances of each case. *Kunkle*

*v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990). As a reviewing court, we cannot substitute our judgment for that of the trial court absent an abuse of the trial court's discretion. *Id.* Further, this court will not reverse a decision of the domestic relations court if there is competent, credible evidence in the record supporting the trial court's decision. *Abernethy v. Abernethy*, 8th Dist. Cuyahoga No. 92708, 2010-Ohio-435, ¶ 39.

{¶22} When determining whether spousal support is appropriate and reasonable, the trial court must consider the factors set forth in R.C. 3105.18(C)(1). *Kaletta v. Kaletta*, 8th Dist. Cuyahoga No. 98821, 2013-Ohio-1667, ¶ 22. No single factor, by itself, is determinative. *Id.* at ¶ 22.

{¶23} The factors enumerated in R.C. 3105.18(C)(1) include consideration of: (1) the parties' income from all sources, including income derived from the property division made by the court; (2) the relative earning abilities of the parties; (3) their ages and physical, mental, and emotional conditions; (4) their retirement benefits; (5) the duration of the marriage; (6) their standard of living during the marriage; (7) the relative extent of education of the parties; (8) their relative assets and liabilities; (9) the contribution of each party to the education, training, or earning ability of the other party; (10) tax consequences of spousal support; and (11) the lost income production capacity of either party that resulted from that party's marital responsibilities. R.C. 3105.18(C)(1).

{¶24} "The court need not expressly comment on each factor but must indicate the basis for an award of spousal support in sufficient detail to enable a reviewing court to

determine that the award is fair, equitable, and in accordance with the law.” *Walpole*, 8th Dist. Cuyahoga No. 99231, 2013-Ohio-3529, ¶ 20, citing *Kaletta* at ¶ 22.

{¶25} At the hearing, Thomas testified that when he and Kathleen were married, they always intended to retire at age 55 which is why they saved so much money over the years. Thomas said he did not retire at 55 years old as planned because of the divorce; he worked a few more years to ensure that he would be financially comfortable. Thomas explained that when he retired, he received a lump sum payment of \$637,500.

{¶26} Thomas testified extensively about his and Kathleen’s retirement benefits that were divided equally in the divorce. Thomas testified to the amount of monthly income that he and Kathleen presently receive from these benefits and what they will receive from them in the future. Thomas further explained his remaining assets and investments he has as well as the income that he earns from these investments.

{¶27} John Stark testified that he was hired by Thomas to “analyze and review a report issued by [one of Kathleen’s attorneys] dated March 10, 2014, as well as analyze the income and cash flow of Thomas Walpole and Kathleen Walpole.”

{¶28} He opined that in calculating annual income for support purposes, John had an annual income of \$101,503 available to him after his retirement. He further opined that Kathleen had \$96,116 available to her. These amounts will be explained further when discussing the magistrate’s findings.

{¶29} At the conclusion of the hearing, the magistrate dismissed Kathleen's motions over the objection of her attorneys because she failed to appear and prosecute them.

{¶30} In her decision, the magistrate reviewed the history of the case, including the parties' extensive assets that were divided in the divorce.

{¶31} The magistrate found that the parties had extensive retirement benefits as a result of Thomas's years of employment at Novelis. Since Thomas had retired, the parties had begun receiving these benefits (or had the option of doing so). The magistrate reviewed each of these plans and the amounts the parties would receive each month. *See also Walpole*, 8th Dist. Cuyahoga No. 99231, 2013-Ohio-3529 (discusses the parties' retirement benefits at length); and *Walpole v. Walpole*, 8th Dist. Cuyahoga No. 101900, 2015-Ohio-2157 (involves a dispute the parties had over a QDRO dividing one of the retirement plans).

{¶32} The magistrate also reviewed Thomas's testimony regarding his current assets, expenses, and income. The magistrate further found that Thomas received his final payroll income from Novelis in July 2013, and that he received a lump sum severance payment of \$637,500 less taxes and withholding upon his separation from employment.

{¶33} The magistrate found that Kathleen still owed Thomas \$172,172 to equalize the property division from the divorce, and another \$12,554, \$52,296, and \$55,039 for

various other matters. The magistrate found that Kathleen had not yet paid Thomas these amounts.

{¶34} The magistrate noted that at the time of the divorce, Thomas was president of Novelis Asia. His compensation at that time was complicated and consisted of various components as a result of working overseas. The court (at the time of the divorce) found that his income at the end of the marriage was \$666,951, plus \$28,000 expatriot premium (for working in Korea), plus \$28,500 location allowance, plus \$155,397 for housing and other benefits, plus bonus income of \$169,554. The trial court imputed \$33,200 of income to Kathleen because she was licensed to teach children from kindergarten through eighth grade and had worked as a teacher during the marriage.

{¶35} The magistrate considered Thomas's expert opinion as well. The expert stated that Thomas's IRA provided him with approximately \$9,453 in annual earnings that could be considered income for support purposes. Thomas also had income and capital gains from his portfolio dividends, which amounted to \$92,050. The expert concluded that Thomas had a total of \$101,503 as income for support purposes, and that this amounted to a reduction of 87 percent in income since his retirement.

{¶36} The magistrate found that it was unknown if Kathleen had earned any income in 2013 because she failed to show up for the hearings. But the magistrate found that Kathleen was capable of earning \$33,200 based upon the trial court's finding in the divorce. Based upon Thomas's expert report, the magistrate found that Kathleen was capable of earning \$7,916 in annual earnings from her IRA accounts. The magistrate

further noted that based upon “certain tax information” provided in discovery, Kathleen also earned \$1,346 in income from capital gains and interest. And the magistrate considered Thomas’s expert’s opinion and found that based upon the \$1.1 million in liquid assets that Kathleen was awarded in the divorce, if she had invested that amount, she could be earning \$55,000 in annual interest income. The magistrate found that Kathleen’s income for support purposes was \$97,462.

{¶37} The magistrate noted that Kathleen had received \$750,000 in spousal support since 2009, but did not consider it as current income for determining support. But the magistrate stated that she could not make any other determinations regarding Kathleen’s financial circumstances since Kathleen did not appear or present any evidence.

{¶38} The magistrate further noted that both parties have the ability to derive income from their assets that were divided in the divorce.

{¶39} The magistrate concluded that based upon the factors set forth in R.C. 3105.18(C), and Thomas’s evidence, including his expert witness, Thomas had a substantial reduction in income since his retirement in July 2013. The magistrate further concluded that both parties would now receive pension and retirement income, and thus, the magistrate recommended that Thomas’s spousal support obligation be terminated.

{¶40} After review, we find no error in the trial court’s decision to adopt the magistrate’s decision granting Thomas’s motion to modify or terminate spousal support. The magistrate thoroughly considered the relevant factors and extensive circumstances regarding spousal support. The evidence established that Thomas and Kathleen had

intended to retire at age 55 from the time that they were 17 years old. Because of the divorce, however, Thomas worked a few more years to ensure that he was financially able to retire. Further, after Thomas's retirement, he and Kathleen earned roughly the same amount of income, and both parties had significant retirement benefits and assets. Accordingly, we find that Thomas met his burden of proof to support the trial court's judgment terminating his spousal support.

{¶41} Kathleen's sixth assignment of error is overruled.

#### Excluding Evidence

{¶42} In her second assignment of error, Kathleen argues that the trial court erred when it excluded the testimony of her expert and her attorney. We disagree.

{¶43} Kathleen cites to Civ.R. 32(A)(3)(e) in support of her argument claiming that the trial court's refusal to allow her physician's deposition to be taken for the purpose of providing trial testimony. She quotes the following portion of Civ.R. 32(A):

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds \* \* \* (e) that the witness is an attending physician or medical expert, although residing within the county in which the action is heard[.]

{¶44} Notably, Kathleen failed to include the first sentence of Civ.R. 32(A) in her quote. The first sentence provides that "[e]very deposition intended to be presented as

evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing.” The court did not find good cause here. Kathleen’s counsel filed a notice to take the deposition of her physician after trial had commenced. The trial court had notified all parties on February 4, 2014, that trial would commence on April 16, 2014.

{¶45} It is well established that a trial judge has the power to regulate court proceedings. *Lisboa v. Lisboa*, 8th Dist. Cuyahoga No. 92321, 2009-Ohio-5228, ¶ 19. Likewise, a magistrate is “authorized to regulate the proceedings and to do everything necessary for the efficient performance of its responsibilities.” *Regalbuto v. Regalbuto*, 8th Dist. Cuyahoga No. 99604, 2013-Ohio-5031, ¶ 13, citing Civ.R. 53(C)(2).

{¶46} Thus, it was well within the magistrate’s discretion to refuse Kathleen from using her physician’s deposition under the circumstances of this case.

{¶47} Further, Kathleen argues in one sentence at the end of her second assignment of error that the trial court erred when it refused to allow her attorney to testify as to the “complexities of the case, fees, expenses and the like.” For the reasons set forth in the next assignment of error regarding the dismissal of her motions, we find no abuse of discretion in the trial court’s refusal to allow Kathleen’s attorney to testify.

{¶48} Kathleen’s second assignment of error is overruled.

#### Dismissal of Kathleen’s Motions

{¶49} In her first assignment of error, Kathleen argues that the trial court erred in dismissing her motion to show cause (and within this assignment of error, she includes



her other motions as well in a very brief argument).<sup>2</sup> She contends that even though she did not appear at the hearings, she established — through her attorney and certified records from the Child Support Enforcement Agency (“CSEA”) — that Thomas failed to obey an existing court order when he stopped paying spousal support in July 2013.

{¶50} Civ.R. 41(B)(1) states that “[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff’s counsel, dismiss an action or claim.” Because a trial court’s decision to dismiss a case for failure to prosecute rests within its sound discretion, an appellate court’s review is limited to determining whether the trial court abused its discretion. *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 678 N.E.2d 530 (1997). But the ordinary abuse of discretion standard is heightened when reviewing a decision that forever denies a plaintiff a review of a claim’s merits. *Sazima v. Chalko*, 86 Ohio St.3d 151, 158, 712 N.E.2d 729 (1999).

{¶51} Here, we apply a heightened abuse of discretion standard. Civ.R. 41(B)(3) provides that “a dismissal under [Civ.R. 41(B)] and any dismissal not provided for in this rule \* \* \* operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.” The court did not specify here if it was dismissing

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<sup>2</sup>Thomas contends that Kathleen only references her June 10, 2013 motion to show cause and motion for attorney fees, which she voluntarily dismissed in November 2013. While Kathleen did voluntarily dismiss her June 10 motions, she filed another motion to show cause and for attorney fees on September 25, 2013; it is these motions that the magistrate’s decision specifically references. Although Kathleen references the wrong date, we will address her arguments as to her September 25 motion.

Kathleen's motions with or without prejudice, and thus, under Civ.R. 41(B)(3), the dismissal is an adjudication upon the merits of her claims; essentially they were all denied because she failed to prove that she was entitled to relief on any of them.

{¶52} Kathleen argues that the magistrate erroneously applied Civ.R. 41(B)(1). Kathleen asserts that the magistrate was not correct when it found that she was subpoenaed by Thomas because there is no notation on the docket regarding any subpoena. Thomas's attorneys informed the magistrate that they did subpoena Kathleen.

And the docket reflects that on April 24, 2014, Thomas's attorneys filed a subpoena commanding Kathleen to appear at court on June 4 and 5, 2014; the subpoena indicates that it was sent by certified mail. The dates should have been June 5 and 6, 2014, but she was at least on notice as to one of the dates.

{¶53} Regardless of whether Kathleen was subpoenaed, however, at the first hearing on April 16, the magistrate ordered Kathleen to appear at the hearing on the following day. And before the June hearing dates, the docket reflects that the magistrate issued the following entry: "It is ordered that trial will resume on June 5 and 6, 2014 before [the magistrate]. All parties and counsel are ordered to appear."

{¶54} The record further reflects that the magistrate notified all parties on February 6, 2014, that the trial would begin on April 15, and go through April 17 (although it did not begin until April 16). On the first day of trial, Kathleen moved for a continuance, or in the alternative, a motion to excuse her appearance. The magistrate denied her continuance and excused her appearance for that day only. The magistrate

then ordered Kathleen to appear the following day. Kathleen did not appear the following day, or at the following two hearing dates in June. After the request for a continuance and motion to excuse absence on the first hearing date, Kathleen's attorneys gave no other reason for her absence on the remaining three trial dates.

{¶55} At the close of his case, Thomas moved to dismiss Kathleen's motions. He moved to dismiss them again when Kathleen failed to present evidence (besides the CSEA records). The magistrate put Kathleen's counsel on notice several times. Kathleen still failed to appear and place any evidence on the record as to her financial status, an important factor when considering whether to modify spousal support (a motion that Kathleen also filed). Even if she submitted CSEA records showing that Thomas stopped paying spousal support in July 2013, that does not support her case because Thomas asserted as much in his motion to modify and his motion to stay, as well as at the hearing. Moreover, Kathleen failed to establish any of the other factors regarding the issue of spousal support.

{¶56} The fact that Thomas did not pay spousal support after he retired is also irrelevant to her argument now. In this case, the trial court adopted the magistrate's recommendation to terminate Thomas's spousal support as of the date he retired. He paid spousal support up until that time. Thus, Thomas was not in contempt. We find Kathleen's arguments regarding the dismissal of her motion to show cause to be without merit.

{¶57} Kathleen also argues — in one paragraph — that it was wrong for the court to dismiss other motions that she filed because she attempted to present evidence on her behalf regarding her health and earning ability through the testimony of her physician. But we already determined that the trial court did not abuse its discretion in refusing to allow her physician to testify through deposition when she gave notice to take his deposition after trial had commenced.

{¶58} Accordingly, we find no abuse of discretion in the trial court’s adoption of the magistrate’s dismissal of Kathleen’s motions — even at the “heightened” abuse of discretion standard of review. Further, because we find no abuse of discretion in the trial court’s dismissal of Kathleen’s motions, we also find no abuse of discretion in the magistrate’s refusal to allow Kathleen’s attorney to testify as to the issue of attorney fees.

{¶59} Moreover, having found that the trial court properly dismissed Kathleen’s motions, we summarily overrule Kathleen’s third and fourth assignments of error arguing the merits of these motions.

{¶60} Accordingly, Kathleen’s first, third, and fourth assignments of error are overruled.

#### Independent Review of Magistrate’s Decision

{¶61} In her seventh assignment of error, Kathleen argues that the trial court failed to conduct an independent review of the magistrate’s decision as it is required to do under Civ.R. 53.

{¶62} Civ.R. 53(D)(4)(d) states:

Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

{¶63} An appellate court “must presume that a trial court has performed an independent review of the magistrate’s recommendations unless the appellant affirmatively demonstrates the contrary.” *Barrientos v. Barrientos*, 196 Ohio App.3d 570, 2011-Ohio-5734, 964 N.E.2d 492, ¶ 5 (3d Dist.). “[S]imply because a trial court adopted the magistrate’s decision does not mean that the court failed to exercise independent judgment.” *Pietrantano v. Pietrantano*, 12th Dist. Warren No. CA2013-01-002, 2013-Ohio-4330, ¶ 14. A trial court may adopt a magistrate’s decision in whole or in part pursuant to Civ.R. 53(D)(4)(b) so long as the trial court fully agrees with the magistrate’s findings ““after weighing the evidence itself and fully substituting its judgment for that of the [magistrate].”” *Id.*, quoting *In re Dunn*, 101 Ohio App.3d 1, 8, 654 N.E.2d 1303 (12th Dist.1995).

{¶64} In this case, the trial court explicitly addressed Kathleen’s objections, extensively responding to them, analyzing them, and ultimately overruling them. Accordingly, we find no merit to Kathleen’s argument that the trial court failed to independently review the magistrate’s decision.

{¶65} Kathleen’s seventh assignment of error is overruled.

Thomas’s First Cross-Assignment of Error

{¶66} In his first cross-assignment of error, he argues that the trial court erred when it denied his motion to disqualify counsel and motion for protective order. Thomas's arguments relate to Kathleen's proposed trial tactics in the matter of spousal support. Because we have affirmed the trial court's granting of his motion to terminate spousal support, Thomas's arguments regarding this issue are moot.

{¶67} Thomas's first cross-assignment of error is overruled.

#### Thomas's Second Cross-Assignment of Error

{¶68} In his second cross-assignment of error, Thomas argues the trial court erred when it denied his motion for attorney fees.

{¶69} R.C. 3105.73(B) governs the award of attorney fees for post-decree motions and proceedings and provides as follows:

In any post-decree motion or proceeding that arises out of an action for divorce, dissolution \* \* \* the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶70} The statute specifically vests the trial court with discretion to determine whether to award attorney fees. Thus, a court's decision on a request for attorney fees will not be overruled unless there is "no sound reasoning process that would support that decision." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶71} In this case, the trial court agreed with the magistrate's decision to deny Thomas's motion for attorney fees. The magistrate found that although Thomas had to retain an expert witness because Kathleen had indicated that she would have an expert witness, the magistrate relied on Thomas's expert's testimony in deciding to grant his motion to modify or terminate spousal support. We find no abuse of discretion in the trial court's judgment denying Thomas's request for attorney fees. Both parties filed extensive motions in the case, causing the other party to respond. Both parties have the resources to pay their attorney fees.

{¶72} Accordingly, we overrule Thomas's second cross-assignment of error.

{¶73} Judgment affirmed.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

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MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and  
MARY EILEEN KILBANE, J., CONCUR