

to comply with the mandate from this court, by failing to consider the express terms of the parties' separation agreement regarding the equalization of income and by denying the motion to modify.

{¶ 3} The order of the trial court from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 4} The Chepps were married in 1971. Following the filing of a petition for dissolution and a separation agreement, a decree was entered in 2000 dissolving their marriage. Included in the separation agreement, which was incorporated in the decree, was the requirement that Mr. Chepp pay \$2,711 per month (\$32, 532 per annum) to Ms. Chepp as spousal support. At that time, Mr. Chepp had an annual income of \$95,400, while Ms. Chepp's annual income was \$30,306. Pursuant to the language of the separation agreement, the spousal support was intended to "equalize" the parties' income. Essentially, the spousal support left both parties with an annual income of approximately \$63,000. The separation agreement further stated:

{¶ 5} " * * * Husband's obligation shall terminate upon the death of either party, Wife's remarriage or Wife's cohabitation with an adult male unrelated to her, whichever occurs first. The Court shall retain jurisdiction over the issue of spousal support for the purpose of modification in the event of a substantial change in circumstances which now is not contemplated."

{¶ 6} In 2006, Mr. Chepp filed a motion to modify his spousal support

obligation due to his impending retirement at the age of 58, and due to an increase in Ms. Chepp's income. A hearing was held before a magistrate in June 2007, following which the motion to modify was overruled. Mr. Chepp filed objections to the magistrate's decision, which he later withdrew after filing a second motion to modify spousal support. Another magistrate's hearing was conducted in January 2008, following which the trial court held its own supplemental evidentiary hearing in September 2008. The request for modification was denied upon the trial court's finding that Mr. Chepp's retirement was, in part, based upon his desire to reduce his spousal support obligation.

{¶ 7} Mr. Chepp appealed. In our opinion, we stated that “[w]hile we may have come to a different conclusion [regarding the reason for retirement], our role is only to review for an abuse of discretion, and we cannot substitute our judgment for the trial court’s factual finding in this regard. Therefore, we conclude that the trial court did not abuse its discretion in finding that Mr. Chepp’s voluntary early retirement did not constitute a substantial change in circumstances.” *Chepp v. Chepp*, Clark App. No. 2008 CA 98, 2009-Ohio-6388, ¶ 16.

{¶ 8} But we also noted that the trial court was required to consider whether the increase in Ms. Chepp's income constituted a substantial change in circumstances meriting a modification of the support order. We reversed the order of the trial court and remanded the matter “for a determination of the narrow issue of whether the increase in Ms. Chepp's income is a substantial change of circumstances, within the meaning of R.C. 3105.18(F), taking into account the facts as they were at the time of the hearings [on the modification held] below.” *Id.* at

¶18.

{¶ 9} Upon remand, the trial court held an “informal conference” with counsel for both parties. Thereafter, the trial court issued an entry in which it stated that the increase in Ms. Chepp’s income did “appear to be a substantial change in circumstances.” However, the trial court further stated that there was no evidence upon which it could determine whether the increase in income, which was due in part to the onset of pension payments to Ms. Chepp, was contemplated by the parties at the time they executed the separation agreement. Therefore, the trial court again denied the motion for modification upon the authority of *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d, 2009-Ohio-1222, wherein the Ohio Supreme Court stated that any substantial change must be one that “was not contemplated at the time of the original decree.” *Id.* at paragraph two of the syllabus.²

{¶ 10} From this order, Mr. Chepp appeals.

II

{¶ 11} Mr. Chepp’s sole assignment of error states as follows:

{¶ 12} “THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FOLLOW THE REMAND ORDER OF THE APPELLATE COURT.”

{¶ 13} Mr. Chepp contends that the trial court failed to follow our mandate. The trial court did follow our mandate to the extent that it concluded that the increase in Ms. Chepp’s annual income, from \$30,326 at the time of the dissolution, to \$53,456 in 2007, which does not include her pension income, constituted a substantial change in circumstances. But the trial court went beyond this “narrow

issue,” set forth in our mandate, and determined that this 76% increase in Ms. Chepp’s annual income, not including her pension income, over a seven-year period, was a change not contemplated by the parties at the time of the decree.

{¶ 14} “R.C. 3105.18(E) governs the payment of alimony and spousal support and specifies the circumstances under which the trial court may modify such awards.” *Chepp*, supra at ¶ 7, citation omitted. In order to modify an award of spousal support, there must be a substantial change in circumstances. *Id.* at ¶ 9, citing *Mandelbaum*, supra. Furthermore, the change in circumstances must “not be contemplated at the time of the original decree.” *Mandelbaum*, at paragraph two of the syllabus.

{¶ 15} In its decision in the case before us, the trial court stated:

{¶ 16} “This Court has not been provided with sufficient evidence to establish when Mrs. Chepp began receiving her monthly pension benefits and therefore, it would only be speculation by this Court as to when she began receiving them. She may have been receiving her monthly pension entitlements since shortly after the parties’ dissolution or she may have started receiving them much more recently, however, as of the time of the hearing before the Magistrate on June 11, 2008 and before this Court on September 2, 2008 the Court did not have sufficient evidence to establish this fact, which in this Court’s opinion, goes a long way in determining whether Ms. Chepp’s monthly pension entitlements were ‘contemplated’ when the original spousal support order was agreed to by the parties and approved by the Court.

{¶ 17} “ * * * * ”

{¶ 18} “It is logical to assume that at the time that the parties negotiated Mr. Chepp’s spousal support obligation, they were also both well aware of Mrs. Chepp’s pension entitlements and the time frame in which she would be entitled to begin receiving them. Irrespective of the foregoing, however, this Court has not been provided with sufficient evidence to establish whether or not Mrs. Chepp’s subsequent substantial increase in income was contemplated by the parties at the time that they negotiated and this Court approved Mr. Chepp’s original spousal support obligation. In this Court’s opinion, that burden falls upon Mr. Chepp, as the moving party seeking to modify his spousal support obligation. Without such evidence, this Court lacks jurisdiction to modify its prior order pursuant to *Mandelbaum*.”

{¶ 19} The parties clearly entered into the separation agreement with the intent to “equalize” the income of the parties as it existed at the time of the dissolution. At that point, Ms. Chepp had an income that was approximately \$60,000 less than Mr. Chepp. Thus, Mr. Chepp’s support obligation was designed to ameliorate that disparity.

{¶ 20} At the time of the trial court’s hearings on the motion to modify, Ms. Chepp had a salary of \$53,456. She was also receiving the sum of \$25,200 per year in pension payments. Thus, her total yearly income was \$78,656. When combined with the \$32,532 in spousal support payments due under the separation agreement, Ms. Chepp’s total annual income is \$111,188, about \$48,000 more than Mr. Chepp’s pre-retirement income minus the spousal support payments.

{¶ 21} It is illogical to assume that the parties contemplated that the onset of

pension payments, combined with Ms. Chepp's increased salary and the amount of agreed upon spousal support, would provide Ms. Chepp an income about \$48,000 more than Mr. Chepp's pre-retirement income minus spousal support, when the spousal support was expressly intended to "equalize" income. The meaning of "equalize" as used in the separation agreement is obvious – the parties intended to have equal income available to both, which is confirmed by the fact that the spousal support agreement rendered the income of both parties virtually identical.

{¶ 22} The parties did not foresee that circumstances would result in the spousal support called for in the decree leading to, not the equalization specified as the intended result, but Ms. Chepp's receiving \$48,000 more than Mr. Chepp (even after imputing income to him as a result of his voluntary underemployment). This is evidenced by the statement in their separation agreement "* * * in the event of a substantial change in circumstances *which now is not contemplated.*" (Emphasis added.)

{¶ 23} An "[a]buse of discretion" has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). 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. A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *Bogart v. Blakely*, Miami App. No. 2010 CA 13, 2010-Ohio-4526, ¶ 25-26.

{¶ 24} We conclude that when the trial court went beyond the scope of our mandate, reaching an issue that was not presented by the “narrow issue of whether the increase in Mrs. Chepp’s income is a substantial change of circumstances, within the meaning of R.C. 3105.18(F),”¹ the trial court went beyond its discretion.

{¶ 25} Although the trial court may impute income to Mr. Chepp upon the ground that he is voluntarily underemployed, upon remand the trial court is directed to modify spousal support to implement the clear intent of the parties’ agreement, which is the equalization of their incomes.

{¶ 26} Mr. Chepp’s sole assignment of error is sustained.

III

{¶ 27} Mr. Chepp’s sole assignment of error having been sustained, the order of the trial court from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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¹*Chepp v. Chepp*, supra, ¶ 18.