

CASE NO.: 4D17-0191
LT CASE NO.: 50-1992-DR-006366SB

**IN THE FOURTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA**

BRIGITTE CHARBONNEAU

Appellant

v.

LAWRENCE CHARBONNEAU

Appellee

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

ANSWER BRIEF OF APPELLEE

SEPTEMBER 28, 2017

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PRELIMINARY STATEMENT

Brigitte Charbonneau, Former Wife, appeals a final judgment modifying downward the permanent alimony obligation of the Former Husband, Lawrence Charbonneau. Brigitte Charbonneau is referred to as “Former Wife” or “Appellant” herein, and Lawrence Charbonneau is referred to as “Former Husband” or “Appellee.” All emphasis is supplied unless indicated otherwise. The following symbols are used:

(R. [page]) - Represents the Record on appeal.

(TT. [page]) - Represents the Trial Transcript.

(IB. [page]) – Represents Appellant’s Initial Brief.

APPELLEE'S STATEMENT OF THE CASE AND FACTS

Former Husband is providing a brief recitation of the facts as Former Wife fails to state the facts in the light most favorable to Former Husband, the prevailing party. *See, e.g., Sinclair v. Sinclair*, 804 So. 2d 589, 594 (Fla. 2d DCA 2002). On appeal, the Appellate Court must not only view the evidence in the light most persuasive to the position of the appellee or the party who prevailed in the lower court but he, as the prevailing party, is entitled to the benefit of all reasonable inferences that can be drawn from the evidence viewed in the light most propitious to him. *Mirras v. Mirras*, 202 So. 2d 887, 893 (Fla. 2d DCA 1967).

The parties' marriage was dissolved on February 19, 1993 by *Final Judgment of Dissolution of Marriage*, which incorporated the parties' February 18, 1993 *Property Settlement Agreement*. (R. 30, 281). Pursuant to the *Final Judgment of Dissolution of Marriage*, the Former Husband was obligated to pay permanent periodic alimony to the Former Wife. *Id.* In a subsequent Order dated September 9, 2009, the Former Husband's alimony obligation to Former Wife was modified upward from \$300.00 per week to \$500.00 per week, for a total of \$2,167.00 per month. (R. 194).

The Former Husband was the longtime owner of Leisure Time Coins, Inc., a coin and precious metals operation, which he founded in 1969 and operated with his current wife, Beth, from the early 1990s. (TT. 20, 22, 121). The business was

successful until approximately 2012, when the price of gold began to decline from its spike in 2011. (TT. 25-26). At that point, the entire precious metals market was “drying up.” (TT. 316). In an attempt to save the business, the Former Husband and his wife cut expenses by renegotiating their rent, foregoing all advertising, removing their online eBay store, reducing pay and number of employees, and closing their satellite store. (TT. 24, 26-27). In August of 2015, the Former Husband transferred his then remaining 51% interest in Leisure Time Coins, Inc., to his current wife. (TT. 21). Though the Former Husband testified it was his intent to retire in August of 2015, after the transfer to ease the transition the Former Husband occasionally helped his wife in the business by communicating with certain long-time clients and conducting limited transactions. (TT. 119-120). Unfortunately, shortly thereafter Leisure Time Coins, Inc., lost a substantial fraud lawsuit against a refinery, which resulted in a judgment entered against Leisure Time Coins, Inc., in the amount of \$221,000. (TT. 37). Leisure Time Coins, Inc., did not have sufficient assets to cover the judgment, and thus was forced to close its doors on July 29, 2016. (TT. 38).

During this time period, the Former Husband also began to suffer from significant health issues. In 2010, the Former Husband had a second heart attack which required that he have double-bypass surgery. (TT. 118). The Former Husband now takes blood pressure medication. (TT. 118). The Former Husband, as

well as his current wife, testified that following the double-bypass surgery, he began having memory issues that caused him to make calculation and invoice errors, and occasionally he would drive somewhere and not remember why he was there. (TT. 21-2, 121). As a result, his current wife is now his mode of transportation. (TT. 122). The Former Husband testified that his memory has not improved. (TT. 122). The Former Husband also requires surgery for a hernia, which he testified was due to lifting boxes in the business. (TT. 119).

On March 27, 2014, the Former Husband filed a *Supplemental Petition to Modify or Terminate Alimony*. (R. 207). The Former Husband amended his *Supplemental Petition to Modify or Terminate Alimony* on August 20, 2014 (R. 273). The Former Husband later filed a *Motion for Leave to Amend* to which he attached his proposed *Second Amended Supplemental Petition to Modify or Terminate Alimony*. (R. 392). The Former Husband's *Second Amended Supplemental Petition to Modify or Terminate Alimony* ultimately become the operative pleading in this matter pursuant to the trial court granting Former Husband's *Motion for Leave to Amend* on August 11, 2015. (R. 392, 410). Trial on the Former Husband's *Second Amended Supplemental Petition*, along with the

Former Wife's *Motion for Civil Contempt/Enforcement*, proceeded on December 5 and 6, 2016. (R. 788).¹

In support of the Former Husband's request for modification or termination of his alimony obligation, the Former Husband's *Second Amended Supplemental Petition for Modification or Termination of Alimony* included allegations that: (1) Former Husband was 66 years of age² and in poor health; (2) that the Former Husband would be retired as of August 1, 2015; (3) that the Former Husband would no longer have ownership interest in the business Leisure Time Coins, Inc., which was suffering from a substantial loss of business and profit; (4) that the Former Husband's retirement was permanent in nature; (5) that the Former Husband's monthly Social Security income of \$2,087.00 was less than his monthly alimony payment obligation of \$2,167.00; and (6) that the Former Wife was in a supportive relationship which reduced her financial needs.³ (R. 392).

¹ While the parties were litigating the Former Husband's request to modify or terminate his alimony, in August of 2015 the Former Husband became delinquent in his alimony payments to Former Wife. (R. 762). The Former Wife filed her *Motion for Civil Contempt/Enforcement* on November 25, 2015. (R. 417).

² The Former Husband turned sixty-eight (68) years old on the second day of trial. (TT. 286).

³ Following the parties' dissolution of marriage, the Former Wife moved in with Thomas Ziebarth, with whom she has continued to live for approximately 20 years. (TT. 300). The Former Wife now lives in Minnesota with Mr. Ziebarth, where she does not pay for utilities, car payments, or car insurance, and does not have a written lease but has agreed to pay \$600.00 per month in rent (though she had not paid that amount in some time). (TT. 301).

The trial court heard all the evidence presented at trial, which Former Wife rehashes in her brief, and entered a *Final Judgment on Former Husband's Amended Supplemental Petition for Modification or Termination of Alimony* on December 19, 2016, modifying the Former Husband's alimony obligation to the Former Wife downward from \$2,167.00 per month to \$500.00 per month. (R. 802). The trial court found that the Former Husband's retirement created a substantial change in circumstances requiring a modification of alimony. (R. 802).

Although the trial court did not find credible the testimony that the Former Husband had retired as of August 1, 2015 when he turned over his remaining 51% ownership interest in Leisure Time Coins, Inc. to his current wife, the trial court did find that the Former Husband truly retired in July 2016 when Leisure Time Coins, Inc., closed, and subsequently dissolved, following the entry of a money judgment against the company in the amount of \$221,000. (R. 803-4). The trial court further found that there was no evidence that the Former Husband had done any work in the rare coin/metals business, or anywhere else, since the business closed in July 2016,⁴ that the Former Husband does not have any way to continue

⁴ Though the Former Wife entered into evidence voluminous telephone records of the Former Husband, most of the records were from prior to July 2016, and the few phone calls subsequent to July 2016 were not established to be business phone calls. (TT. 170-240). Further, the Former Husband's current wife and former business partner in Leisure Time Coins, Inc., no longer works in the gold industry; she completed her master's degree in counseling and psychology and is now employed as a therapist. (TT. 20, 27).

doing business with his former company, or any other company, at this time, and that the Former Husband did not retire so as to avoid paying alimony. (R. 804-5). Finally, the trial court referenced the Former Husband's "significant health problems" and advanced age. (R. 805).

As to the Former Husband's ability to pay, reflected in the *Final Judgment* is the trial court's consideration of the Former Husband's financial affidavit and monthly deficit of \$933.00, the Former Husband's real property, and the Former Husband's current wife's contributions to the Former Husband's monthly expenses. (R. 805). The Former Wife references in her Initial Brief that the Former Husband drives a Cadillac and that he is moving into a home owned by his wife's family trust that is currently under renovation. (IB. 21). The evidence showed the Cadillac is 10 years old and worth only approximately \$4,000.00 (TT. 127), and that the home the Former Husband and his current wife plan on moving into is under renovation because it is currently uninhabitable due to the age of the home. (TT. 43, 235).

As to the Former Wife's needs, reflected in the *Final Judgment* is the trial court's consideration of the Former Wife's Social Security income, the Former Wife's significant health issues and stated inability to pay \$500.00 per month for medication, the Former Wife's monthly deficit of \$1,326.00, and the Former Wife's debts. (R. 806).

Ultimately, the trial court reduced the Former Husband's alimony obligation to the Former Wife to \$500.00 per month, recognizing that the alimony amount would leave the Former Husband with less net income than the Former Wife. (R. 807). The trial court found this case to have "exceptional circumstances" requiring the Former Husband to make such a payment as the Former Wife was in dire need of the \$500.00 monthly alimony to pay for her medications as listed on her Financial Affidavit. (R. 807). It is from this Final Judgment that Appellant has appealed.

SUMMARY OF THE ARGUMENT

This Court should affirm the Final Judgment modifying the Former Husband's alimony obligation to the Former Wife downward because the Former Husband has met his burden to show a substantial, material, unanticipated change in circumstances. The trial court applied the correct standard to the evidence in this case and found it sufficient to justify a downward alimony modification. Competent, substantial evidence supports the trial court's findings that the Former Husband retired in July of 2016 following the close of his company. As the Former Wife has failed to show an abuse of discretion, this Court should affirm.

ARGUMENT

I. THE TRIAL COURT APPROPRIATELY GRANTED RELIEF THAT WAS SPECIFICALLY PLED AND SHOULD BE AFFIRMED.

A. Standard of Review.

Whether a court has subject matter jurisdiction is a question of law reviewed *de novo*. *See Sanchez v. Fernandez*, 915 So. 2d 192 (Fla. 4th DCA 2005).

B. Argument.

The Former Wife asserts as her first point on appeal that the trial court erred in finding that Former Husband voluntarily retired as of late July 2016, arguing that the Former Husband never pled voluntary retirement and instead specifically pled that he involuntarily retired on August 1, 2015.

First, the Former Wife has waived this argument, as the Former Wife did not object to testimony or argument during trial as to this issue, and Former Wife failed to file a Motion for Rehearing addressing this issue. *See generally Farghali v. Farghali*, 187 So. 3d 338 (Fla. 4th DCA 2016); *Eagleman v. Korzeniowski*, 924 So. 2d 855, 860 (Fla. 4th DCA 2006) (reminding litigants that the argument raised on appeal must have been asserted before the trial court).

Even if the Former Wife had not waived this argument, the Former Husband clearly appropriately pled that his retirement was the primary basis on which he was seeking a downward modification of his alimony, sufficiently putting the

Former Wife on notice as to his intent to argue same. Within paragraph 5 of the Former Husband's *Second Supplemental Petition for Modification or Termination of Alimony*, the Former Husband alleges that there has been a "substantial change in circumstances, which is sufficient, material, involuntary and permanent in nature requiring a modification or termination of alimony." (R. 392). The Former Husband then alleges a number of grounds, including his age, the downturn of the business, the Former Wife's lack of need for alimony, and specifically alleges with regard to retirement the following:

- a. Former Husband is sixty-six (66) years of age and in poor health. As of August 1, 2015, the Former Husband will be retired.
- b. Former Husband will no longer have any ownership interest, stockholder interest, or shareholder interest in the business Leisure Time Coins, Inc.
...
- e. Former Husband's retirement is permanent in nature. The Former Husband suffered two heart attacks which lead to open heart surgery and is being evaluated for memory deficits. There is no likelihood that the Former Husband will be able to work as the stress could jeopardize his health."

(R. 392).

The first and second ground in the Former Husband's *Second Supplemental Petition for Modification or Termination of Alimony* clearly state that the Former Husband is retiring and that his retirement is intended to be permanent in nature. The *Second Supplemental Petition for Modification or Termination of Alimony* on

a whole suggests that the retirement is due to the downturn of the business, the Former Husband's transfer away of his remaining shares of the business, and his health. *Id.* Former Wife was clearly on notice as to basis for the Former Husband's requested relief. The fact that the Former Husband has alleged the "magic words" that there has been a "substantial change in circumstances, which is sufficient, material, involuntary and permanent in nature" does not preclude him from consideration under *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992).

In *Pimm*, the Florida Supreme Court held that the post-judgment retirement of a spouse who is obligated to make support or alimony payments pursuant to a judgment of dissolution of marriage is a change of circumstances that may be considered together with other relevant factors and applicable law upon a petition to modify such alimony or support payments. *Id.* Notably, the question itself that was answered in the affirmative by the Florida Supreme Court in *Pimm* was not limited to "voluntary" or "involuntary" retirement. Instead, *Pimm* holds that the "retirement" of a payor spouse is a legitimate factor to consider in a modification proceeding. *Id.* Though some Florida courts have suggested that *Pimm* only applies to the reasonableness of "voluntary" retirement and in the case of an "involuntary retirement" the payor spouse should present evidence that he is incapable of working, the Florida Supreme Court has not mandated this analysis. *See Wiedman v. Wiedman*, 610 So.2d 681 (Fla. 5th DCA 1992). In the case of *Lopez v. Lopez*,

970 So.2d 388, (Fla. 3rd DCA 2007) for example, the court applied the elements of *Pimm* to an involuntary retirement. Thus, it should not matter whether the Former Husband specifically plead that his retirement was “voluntary” or “involuntary,” so long as he pled sufficient facts to put the Former Wife on notice that he wanted the trial court to consider his post-judgment retirement together with other relevant factors upon his *Second Supplemental Petition for Modification or Termination of Alimony*. The Former Husband clearly did so and, as such, the trial court’s ruling should be affirmed.

Finally, even if the Former Husband did not plead “voluntary” retirement as a basis for relief within his *Second Supplemental Petition for Modification or Termination of Alimony*, when issues not raised by the pleadings are tried by implied consent, they are to be treated as if they had been raised in the pleadings. *Fla. Fam. L.R.P. 12.190(b)*; *Hemraj v. Hemraj*, 620 So.2d 1300, 1301 (Fla. 4th DCA 1993). In accordance with *Fla. Fam. L.R.P. 12.190(b)*:

“Amendments to Conform with the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend will not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and must do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the

admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.”

Here, from the outset of the trial, Former Husband’s position was clear that he was asserting his retirement was voluntary within the confines of *Pimm*, based primarily upon his health, his age, and secondarily upon the downturn of the business. (TT. 6, 9). Although the Former Wife did assert that the Former Husband’s retirement should be considered involuntary, not once during the trial or after the trial did the Former Wife object to the Former Husband’s argument that his retirement *could* be considered under *Pimm* or assert that the trial court did not have jurisdiction to make such a finding. (TT. 329). Therefore, this issue was tried by consent and the trial court’s ruling should be affirmed.

II. THE TRIAL COURT PERFORMED THE CORRECT ANALYSIS OF THE FORMER HUSBAND’S RETIREMENT AND SHOULD BE AFFIRMED.

A. Standard of Review

The standard to be applied in reviewing a modification of alimony is the abuse of discretion standard. *Woolf v. Woolf*, 901 So. 2d 905 (Fla. 4th DCA 2005). An abuse of discretion exists only where, based on the evidence that was presented to the trial court, no reasonable person would take the view adopted by the trial court. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). If reasonable persons could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there is no abuse of discretion. *Id.*

B. Argument

The Former Wife asserts as her second point on appeal that the trial court erred since it failed to perform the requisite legal analysis for voluntary retirement under *Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992).

First, the Former Wife has waived this argument, as the Former Wife failed to file a Motion for Rehearing addressing this issue. *See generally Farghali v. Farghali*, 187 So. 3d 338 (Fla. 4th DCA 2016); *Eagleman v. Korzeniowski*, 924 So. 2d 855, 860 (Fla. 4th DCA 2006) (reminding litigants that the argument raised on appeal must have been asserted before the trial court). In *Farghali v. Farghali*, 187 So. 3d 338 (Fla. 4th DCA 2016), this Court explicitly recognized that a party is not entitled to complain that an order fails to contain sufficient factual findings unless that party raises the omission before the trial court in a motion for rehearing.

If this Court finds that the Former Wife did not waive this argument, it is clear within the Final Judgment on appeal that the trial court performed the appropriate analysis in modifying the Former Husband's alimony obligation. (R. 802). The Final Judgment states Former Husband voluntarily retired at the end of July 2016 and that the Former Husband's retirement created a substantial change in circumstances requiring a modification of alimony. (R. 802).

Pursuant to *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992), in order to modify alimony, the trial court must find three fundamental prerequisites: (1) that there is a

substantial change in circumstances, (2) that the change was not contemplated at the time of final judgment of dissolution, and (3) that the change is sufficient, material, involuntary, and permanent in nature. *Id.* However, retirement is an exception to the general rule in alimony modification proceedings that the change in circumstances must be “involuntary.” *Id.* When a party retires, the “court must consider the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire.” *Id.* at 537. “The age of sixty-five years has become the traditional and presumptive age of retirement for American workers.” *Id.* Some Florida courts have suggested that if a payor’s retirement is involuntary, the payor spouse should present evidence that he is incapable of working. *See Wiedman v. Wiedman*, 610 So.2d 681 (Fla. 5th DCA 1992); *contra Lopez v. Lopez*, 970 So.2d 388, (Fla. 3rd DCA 2007).

In the instant case, in finding that the Former Husband voluntarily retired, the trial court clearly considered all of the factors under *Pimm*. The trial court found that there was a substantial change in circumstances since the entry of the 2009 order, and that the change was sufficient, material, involuntary, and permanent in nature necessitating a modification of alimony. (R. 802). The trial court continued the *Pimm* analysis by specifically referencing the Former Husband’s significant health problems including his heart attack, memory loss and

confusion. (R. 803-4). As to the Former Husband's age, the trial court specifically referenced his age of 68, which is beyond the traditional and presumptive age of retirement. *Id.* The trial court further found that there was no evidence that the Former Husband has done any work in the rare coin/metals business, or anywhere else, since the business closed in July 2016,⁵ that the Former Husband does not have any way to continue doing business with his former company, or any other company, at this time. (R. 804-5). Finally, the trial court specifically considered the Former Husband's motivation for retirement, finding that it was not to avoid paying alimony. (R. 804).

The trial court then appropriately went on to consider the Former Husband's ability to pay alimony and the Former Wife's need for alimony as required in *Pimm*. As to the Former Husband's ability to pay, reflected in the *Final Judgment* is the trial court's consideration of the Former Husband's financial affidavit and monthly deficit of \$933.00, the Former Husband's real property, and the Former Husband's current wife's contributions to the Former Husband's monthly expenses. (R. 805). The Former Wife references in her Initial Brief that the Former

⁵ Though the Former Wife entered into evidence voluminous telephone records of the Former Husband, most of the records were from prior to July 2016, and the few phone calls subsequent to July 2016 were not established to be business phone calls. (TT. 170-240). Further, the Former Husband's current wife and former business partner in Leisure Time Coins, Inc., no longer works in the gold industry; she completed her master's degree in counseling and psychology and is now employed as a therapist (TT. 20, 27).

Husband drives a Cadillac and that he is moving into a home owned by his wife's family trust that is currently under renovation. (IB. 21). The evidence showed the Cadillac is 10 years old and worth only approximately \$4,000.00 (TT. 127), and that the home the Former Husband and his current wife plan on moving into is under renovation because it is currently uninhabitable due to the age of the home. (TT. 43, 235).

As to the Former Wife's needs, reflected in the *Final Judgment* is the trial court's consideration of the Former Wife's social security income, the Former Wife's significant health issues and stated inability to pay \$500.00 per month for medication, the Former Wife's monthly deficit of \$1,326.00, and the Former Wife's debts. (R. 806).

Ultimately, the trial court reduced the Former Husband's alimony obligation to the Former Wife to \$500.00 per month, recognizing that even the reduced alimony amount would leave the Former Husband with less net income than the Former Wife. (R. 807). The trial court found this case to have "exceptional circumstances" requiring the Former Husband to make such a payment as the Former Wife was in dire need of the \$500.00 monthly alimony to pay for her medications as listed on her Financial Affidavit. (R. 807).

There is nothing in this case that would suggest the trial court failed to perform the requisite legal analysis for voluntary retirement under *Pimm*. On the

contrary, the evidence is overwhelming that the trial court completed the appropriate analysis. Therefore, the judgment should be affirmed.

III. TRIAL COURT COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE FORMER HUSBAND'S ALIMONY OBLIGATION DOWNWARD AND SHOULD BE AFFIRMED.

A. Standard of Review

The standard to be applied in reviewing a modification of alimony is the abuse of discretion standard. *Wolf v. Wolf*, 901 So. 2d 905 (Fla. 4th DCA 2005).

B. Argument

As and for her third point on appeal the Former Wife asserts that the trial court abused its discretion in reducing Former Wife's Alimony because (a) the Former Husband's retirement is "unreasonable" and the Former Wife will be placed in peril of poverty if Former Husband is permitted to voluntarily retire, (b) there is no competent and substantial credible evidence to support the trial court's findings that Former Husband has retired and that his alleged retirement is permanent, and (c) the trial court erred in not imputing income and assets to Former Husband.

Again, Former Husband asserts that Former Wife has waived this argument in not filing a Motion for Reconsideration. Where an error by the court appears for the first time on the face of a final order, a party must alert the court of the error

via a motion for rehearing or some other appropriate motion in order to preserve it for appeal. *See Simmons v. Simmons*, 979 So.2d 1063, 1064 (Fla. 1st DCA 2008).

Even if Former Wife has not waived this argument, an abuse of discretion exists only where, based on the evidence that was presented to the trial court, no reasonable person would take the view adopted by the trial court. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). If reasonable persons could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there is no abuse of discretion. *Id.* The trial court did not abuse its discretion here.

An abundance of evidence was presented supporting the trial court's finding that the Former Husband reasonably retired in July of 2016. First, on the business side, Leisure Time Coins, Inc., began to spiral downward when the price of gold declined. (TT. 25-26). A witness in the industry, Greg Bowlin, testified that the entire precious metals market was and is "drying up." (TT. 316). The Former Husband and his current wife attempted to save the business by cutting expenses, renegotiating their rent, foregoing all advertising, removing their online eBay store, reducing pay and number of employees, and closing their satellite store. (TT. 24, 26-27). The company then had a significant judgment entered against it, for which it did not have sufficient assets to pay, and was ultimately forced to close its doors on July 29, 2016. (TT. 37-38). Finally, the Former Husband's current wife and

former business partner in Leisure Time Coins, Inc., left the gold industry when she completed her master's degree in counseling and psychology and is now employed as a therapist. (TT. 20, 27). As the trial court appropriately found, there was no evidence presented that the Former Husband continued to work in the gold industry, or at all, subsequent to the closing of the business in July/August 2016. (R. 804). Though the Former Wife entered into evidence telephone records of the Former Husband, most of the records were from prior to July 2016, and the few phone calls subsequent to July 2016 were not established to be business phone calls. (TT. 170-240).

Not only was there trouble with the company leading to the Former Husband's retirement, but the evidence clearly established that the Former Husband also began to suffer from significant health issues that affected his ability to work. The Former Husband, who turned 68 years old during the trial, requires surgery for a hernia, which he testified was due to lifting boxes in the business. (TT. 119). There was a time during trial when the Former Husband had to stand up to relieve the pain in his back. (TT. 148). The Former Husband has suffered from two heart attacks, the second of which required him to have double-bypass surgery and begin taking blood pressure medication. (TT. 118). Following his double-bypass surgery, the Former Husband began having memory issues that caused him to make calculation and invoice errors, and to not remember why or where he was

driving. (TT. 21-2, 121). While no one testified that the Former Husband's issues have grown worse, both the Former Husband and his current wife testified that his memory issues have not improved. (TT. 122, 133).

There was evidence that the Former Husband testified as an expert witness about the profession on one occasion in December of 2015, but there was no evidence to suggest that speaking about coins is substantially the same as, or requires the same mental acuity as, running a business. (TT. 242). In fact, the issue of the Former Husband's increasing mistakes at work was highlighted during trial when the Former Wife produced a sales receipt that should have been for a "rare coin" but instead contained the description of a "gold bullion," which is a significant difference in the industry. (TT. 322).

As to the permanency of his retirement, the evidence supported the trial court's finding that the Former Husband had not done any work in the rare coin/metals business, or anywhere else, since the business closed in July 2016, and that the Former Husband does not have any way to continue doing business with his former company, or any other company, and that at the age of 68 the Former Husband has significant health problems. (R. 804-5).

A reasonable person could certainly accept the view adopted by the trial court finding the Former Husband's retirement to be permanent when taking into consideration the voluminous evidence supporting same as outlined above, which

included the decline of the industry, closing of the business, and the Former Husband's declining physical and mental health. Therefore, the trial court did not abuse its discretion and the judgment should be affirmed.

As to the Former Wife's assertion that Former Husband's retirement will place Former Wife in poverty or in peril of poverty, the trial court clearly took this into consideration when drafting the *Final Judgment*. Although the judgment does not specifically reference the word "poverty" as it appears in *Pimm*, the trial court synonymously found this case to have "exceptional circumstances" requiring the Former Husband to make payment as the Former Wife was "in dire need" of the \$500.00 monthly alimony to pay for her medications as listed on her Financial Affidavit. (R. 807). In doing so, the trial court left the Former Husband with less net income than the Former Wife. (R. 807). While the Former Wife may be in dire need, it would have been improper for the trial court to award more alimony than the Former Husband had income; a trial court may not require a payor spouse to make alimony payments to a former spouse in an amount that does not allow for the payor to support himself. *See Galligar v. Galligar*, 77 So. 3d 808, 811 (Fla. 1st DCA 2011).

Contrary to the Former Wife's contention that the trial court did not fully consider the Former Husband's financial status, the trial court clearly explained its consideration of the Former Husband's financial affidavit and monthly deficit of

\$933.00, the Former Husband's real property "including a house that is about to be listed and sold, which is expected to be worth at least \$100,000.00, and there is no mortgage on the property," and the Former Husband's current wife's contributions to the Former Husband's monthly expenses. (R. 805). Again, while the Former Wife references in her Initial Brief that the Former Husband drives a Cadillac and that he is moving into a home owned by his wife's family trust that is currently under renovation (IB. 21), the evidence showed the Cadillac is 10 years old and worth only approximately \$4,000.00 (TT. 127), and that the home the Former Husband and his current wife plan on moving into is under renovation because it is currently uninhabitable due to the age of the home. (TT. 43, 235). Though it seems apparent that the Former Wife would have the Former Husband sell or mortgage his few remaining assets to contribute further to her support, the trial court cannot require the former husband to incur indebtedness to pay alimony. *Galligar v. Galligar*, 77 So. 3d 808, 811 (Fla. 1st DCA 2011).

As to the Former Wife's needs, reflected in the *Final Judgment* is the trial court's consideration of the Former Wife's social security income, the Former Wife's significant health issues and stated inability to pay \$500.00 per month for medication, the Former Wife's monthly deficit of \$1,326.00, and the Former Wife's debts. (R. 806). The Former Wife lives in Minnesota with Mr. Ziebarth, where she does not pay for utilities, car payments, or car insurance, and does not

have a written lease but has agreed to pay \$600.00 per month in rent (though she had not paid that amount in some time). (TT. 301)(R. 806).

Ultimately, the trial court reduced the Former Husband's alimony obligation to the Former Wife to \$500.00 per month, recognizing that even the reduced alimony amount would leave the Former Husband with less net income than the Former Wife. (R. 807). Unlike the case of *Kelley v. Kelley*, 967 So. 2d 924 (Fla. 2d DCA 2006) cited by Former Wife which states that trial courts abuse their discretion when a receiving spouse is awarded an amount of alimony that leaves them "substantially unable to meet their basic needs,"⁶ one spouse was not shortchanged here – the difference between the incomes now of the Former Husband and the Former Wife is *de minimis*. (R. 807).

The trial court did not abuse its discretion in modifying the Former Husband's alimony obligation downward, and therefore, this Court should affirm.

⁶ *Kelley* was an initial dissolution of marriage case, not a post-judgment modification.

CONCLUSION

For the reasons stated above, specifically that the Former Wife failed to preserve these issues for review on appeal, that the trial court made the appropriate analysis under *Pimm*, and that the trial court did not abuse its discretion in finding that the Former Husband reasonably retired in July of 2016 and modifying the Former Husband's permanent alimony obligation downward to \$500.00 per month, this Court should affirm the judgment in the instant case.

Respectfully submitted,

/s/ Ralph T. White

Ralph T. White, Esq.

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished via electronic mail in compliance with Rule 2.516, Florida Rules of Judicial Administration on September 28, 2017 to: John Caserta, Esq., john@casertalaw.com (Counsel for Appellant), and electronically filed with this Court.

/s/ Ralph T. White

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the lettering in this Reply Brief is Times New Roman 14 point in compliance with Florida Rules of Appellate Procedure, Rule 9.210 (a) (2).

/s/ Ralph T. White

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