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IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

STACY FRANK,

Petitioner,

v.

MARK K. STRALEY,

Respondent.

CASE NO. 78,556

DCA CASE NOS. 89-3505
90-1546

PETITIONER'S REPLY BRIEF ON MERITS

GEORGE A. VAKA, ESQUIRE
Florida Bar No. 374016
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

STEPHEN W. SESSUMS, ESQUIRE
Florida Bar No. 072463
SESSUMS AND MASON
Post Office Box 2409
Tampa, Florida 33601
(813) 251-9200
Attorneys for Petitioner

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[1] Table of Authorities prepared by Lexis.

STATUTES

REPLY ARGUMENTS

At the outset, it is important to recognize the tactical course the Husband has chosen in his Answer Brief. Although he provided this Court with a 16-page Restatement of the Case and Facts, the slightest recognition of the standard of review is conspicuously absent. In response to two issues raised on appeal by the Wife, the Husband, without any explanation, restates the issues as four separate arguments, which by the undersigned's count, include an additional ten subarguments. The Husband also requests that the issues presented in the briefs below and improperly attached as an Appendix to his Answer Brief be considered. Those briefs raise ten arguments and an additional 23 subarguments. Remarkably, all of these issues are raised without any cross-appeal concerning issues raised below.[2]

Given the standard of review, the Husband's presentation of conflicting evidence to challenge the trial court's findings of fact is at a minimum, irrelevant. Likewise, since it was the Husband who challenged the sufficiency of the evidence below, the presentation of the conflicting evidence as "fact" is likewise improper. See, Thompson v. State, 588 So.2d 687 (Fla. 1st DCA 1991). In many instances, the Husband has portrayed factual situations to this Court as unqualifiably established by the

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[2] The Husband claims he could not attempt to cross appeal. However, if he believed the rulings against him in the Second District were in error, he could have pursued an appeal of those issues as an aggrieved party of the decision. See, Fountain v. City of Jacksonville, 447 So.2d 353 (Fla. 1st DCA 1984).

record, when in fact, the record contains conflicting evidence on that point. Given the limitations of a Reply Brief, the Wife will do her best to identify these types of situations which some courts have recognized as obvious improprieties in the preparation of a brief. See, e.g., Seaboard Airline Railroad v. Hawes, 269 So.2d 392, 394 (Fla. 4th DCA 1972). She will also attempt to respond to the new issues raised by the Husband to the extent they may pertain to the issues which have been raised in this appeal. In the unlikely event this Court finds in any of the new issues sufficient questions which need to be answered by this Court, the Wife respectfully requests the opportunity to submit supplemental briefing concerning those issues.

I.

THE SECOND DISTRICT ERRED WHEN IT DISMANTLED THE EQUITABLE DISTRIBUTION SCHEME FASHIONED BY THE TRIAL COURT, WHERE THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL JUDGE'S FACTUAL FINDINGS, AND THE ORDER OF DISSOLUTION DEMONSTRATES THE TRIAL COURT'S COMPLIANCE WITH FLORIDA STATUTE § 61.075.

This Court has repeatedly stated that appellate courts are to examine dissolution judgments as a whole to determine whether the trial court abused its discretion. Recently, this Court reversed the Fifth District and stated that court lacked authority to hold that a trial judge abused his discretion in fashioning one element of an award without considering that judgment as a whole. See, Hamlet v. Hamlet, 583 So.2d 654 (Fla. 1991). The Husband ignores this fundamental precept. Instead, he

dissects the trial court's distribution which provided each party approximately 50% of the marital assets. (R. 634-644, 957-958) As in Hamlet, the district court here found the Husband's invitation to focus on single elements of the distribution irresistible. The district court should also be reversed here.

The Husband tacitly concedes that application of this Court's unanimous decision in Robertson v. Robertson, ___ So.2d ___, 16 FLW S758 (Fla. December 5, 1991) requires reversal of the district court's opinion below. To avoid that result, the Husband argues that Robertson is factually distinguishable, that the statutory rule announced there should not be applied retroactively to him, and that as a co-tenant in the beach property "with a special equity", he should not have been arbitrarily divested of title. Those contentions can be easily disposed of by this Court.

The Husband states that Robertson is distinguishable because there is "uncontroverted testimony" that he did not intend to make a gift of non-marital contributions used to purchase the beach property, the motor boat and the "Evtide". Of course, this statement ignores the Wife's testimony that both before and after the marriage, the parties commingled their funds and considered all property to be joint. (R. 130) Indeed, the Husband even ignores his own testimony about how the parties commingled their funds, placed them into a family pot and used them for family expenses. (R. 406-408) As such, the funds referred to by the Husband are not funds which were clearly unconnected with the marriage. See, Vandegrift v. Vandegrift, 477 So.2d 638 (Fla. 5th

DCA 1985). The trial court, therefore, had the authority to conclude that the Husband never met his initial burden of showing a special equity. See, Weinstein v. Weinstein, 528 So.2d 49 (Fla. 5th DCA 1988); Geddes v. Geddes, 530 So.2d 1011 (Fla. 4th DCA 1988). To conclude otherwise would, at a minimum, require the district court to reweigh the evidence. The district court was not free to reweigh the evidence whether it applied the law of the Second District or the Fifth District. See, e.g., Brandenburg Investment Corp. v. Farrell Realty, Inc., 463 So.2d 558 (Fla. 2d DCA 1985); Prevatt v. Prevatt, 462 So.2d 604 (Fla. 2d DCA 1985); Deakyne v. Deakyne, 460 So.2d 582 (Fla. 5th DCA 1984). Therefore, under either the rule announced in Robertson or the rule before, the denial of the Husband's special equity claims is supported by competent substantial evidence and should have been affirmed.

The Husband next argues that to retroactively apply the statute to him violates his due process rights. Typically, Florida courts do not address issues which are raised for the first time on appeal. See, e.g., Glendale Federal Savings & Loan Ass'n. v. State Dept. of Insurance, 485 So.2d 1321 (Fla. 1st DCA), rev. den., 494 So.2d 1150 (Fla. 1986). The constitutional argument was not raised below. Presumably, that argument was not raised below because the Husband's attorney represented to the Court in opening statements that the case would be governed under the new statute. (R. 23) Simply stated, the contention that the

statute may not be retroactively applied, even assuming that it were accurate, has been waived.[3]

The Husband next contends that as a co-tenant with a "special equity" he should not have been arbitrarily divested of title in the beach house. Since there was competent substantial evidence upon which to deny his "special equity" claim in the beach house, this argument should be rejected. Likewise, the Husband's suggestion that partition should have been granted is without merit. In closing argument, the Husband's attorney never even requested partition of the beach property. His proposal was that the Wife should get one property and the Husband the other. (R. 502-504) The Husband's attorney argued to the court that it would be better for both parties if they did not have to participate in partition suits. (R. 503) The Husband's attorney also suggested that the initial claim for partition with respect to the beach property should be abated. (R. 6)[4]

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[3] The Husband's refusal to recognize this waiver is even more confusing when one considers the fact that it was specifically referenced at Page 2 of the Wife's Initial Brief. The Fifth District has recognized that omission of material facts or continued representation of a fact which clearly is untrue is the type of conduct which is sufficient to impose sanctions upon the author of the brief. See, Addison v. Brown, 413 So.2d 1240 (Fla. 5th DCA 1982); Hutchins v. Hutchins, 501 So.2d 722 (Fla. 5th DCA 1987).

[4] Contrary to the Husband's contention, the district court did not state that Straley's request for partition should have been granted. Instead, it merely suggested that the trial court may have been on safer ground had the court decided to partition the property. Obviously, the district court could not have considered the conduct of the Husband and his attorney below when making such a suggestion.

Even if the issue of partition had not been waived below, the Husband is seeking affirmative relief which was not granted to him by the district court's decision. In the absence of the notice of a cross-appeal, which the Husband freely admits he did not file, such requested relief is improper. See, A-1 Racing Specialties, Inc. v. K & S Imports of Broward County, Inc., 576 So.2d 421 (Fla. 4th DCA 1991).

Finally, the Husband does not remotely suggest how the trial court would have abused its discretion under the guidelines of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) and Tronconi v. Tronconi, 466 So.2d 203 (Fla. 1985), by giving the very relief advocated by the Husband's attorney (giving one home to one spouse and the other to the other spouse). Simply stated, the Husband's contentions are without merit and should be rejected by this Court.[5]

Recognizing that he fails his burden under Robertson or the prestatute case law, the Husband next argues that this Court should not review any issue other than those associated with Robertson. These same arguments were rejected by this Court when it denied the Husband's Motion to Dismiss. The Wife sees very little need to provide another detailed response to arguments previously rejected. Suffice it to say, the decision of the district court presented conflict in several areas, the resolution

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[5] The Husband's partition argument is even more curious when his efforts to oppose the partition suggested by the Wife are considered. (R. 591-596)

of which are necessary to uniform application of the relevant sections of Chapter 61 throughout Florida.

Finally, the Husband argues that the enhanced values of the real estate partnerships were solely passive gain. He also claims that the court abused its discretion in awarding all of their enhanced value to him. To support these contentions, the Husband first represents that the characterization of the marital or non-marital asset is a question of law. Citing, Harper v. Harper, 546 So.2d 438 (Fla. 2d DCA), rev. den., 553 So.2d 1165 (Fla. 1989). Even a casual review of Harper should have demonstrated that it cannot be cited in support of such a statement. First, Harper is silent on the issue. Secondly, the Husband has failed to disclose that this Court disapproved of the Second District's Harper decision in Thompson v. Thompson, 576 So.2d 267, 270 n.3 (Fla. 1991) to the extent it held that goodwill could never be considered in the valuation of professional practices. The only case out of the Second District to address the issue, Macaluso v. Macaluso, 523 So.2d 615, 617 (Fla. 2d DCA 1988), states that the determination of whether an asset is marital or non-marital for purposes of equitable distribution is a question of fact. See also, Moon v. Moon, ___ So.2d ___, 17 FLW D547, 548 (Fla. 1st DCA, February 19, 1992).

The Husband next claims that the increased value in the land partnerships did not result from the infusion of marital funds. To support his claim, the Husband makes two arguments. First, the Husband argues that the funds paid by the law firm for

the land partnership debt service were not income because they were neither treated, used nor relied upon by the parties as marital assets. Given the definitions of income and marital asset contained in Fla. Stat. §§ 61.046(4) and 61.075(5)(a), it is difficult to imagine how such an argument could be made in good faith. It is undisputed and demonstrated by the parties' joint tax returns, that the parties paid federal income taxes on those sums used to service the debt of the partnerships. (R. 139, 173, 287) The Wife testified that the parties used the land partnerships as a forced savings plan. (R. 139) The real estate partnerships were viewed as an investment in a mutual "nest egg". (R. 139)

The second argument is that the land partnerships' increased value did not "result from" the infusion of marital funds. This contention once again ignores the standard of review and the conflicting evidence. The funds which were used to maintain the interest in the partnerships arose from the Husband's daily work efforts and would have been paid to him as cash distributions if not invested in the partnerships. The trial court was free to find that the Husband's continued interest in the partnerships simply would not have existed in the absence of the expenditure of that income. As the Husband so astutely points out, the statute requires a causal relationship between the funds expended and the assets' increased value. Here, there was competent substantial evidence to support the trial court's conclusion, and the district court should not have substituted its

opinion for that of the trial court on this fact-intensive issue. See, Hellman v. Seaboard Coastline Railroad, 349 So.2d 1187 (Fla. 1977); Marsh v. Marsh, 419 So.2d 629 (Fla. 1982).[6]

Finally, the Husband argues that the trial judge abused his discretion in awarding all of the enhanced value of the real estate partnerships to him. The alleged abuse of discretion is based on the Husband's claims that the real estate partnerships are "illiquid". Obviously, this Court need only look to the $57,000.00 cash disbursement which the Husband received from the refinancing of one of the properties to recognize that there has been no abuse of discretion here. (R. 47, 1891) The trial court obviously recognized that the Husband's claim that the assets were illiquid was illusory at best given the fact that the partnership freely refinanced one of the properties resulting in a substantial cash disbursement to the Husband and that the other properties could likewise be refinanced.[7]

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[6] The Husband raises numerous questions about what the Wife would do had the values of the Husband's partnership interests declined. The answers to those questions are simple. Had the values in the partnerships declined during the course of the marriage, the Wife would have helped to absorb the loss just as she did with many of the Husband's other questionable investments such as the sailing yacht known as the "Evtide". Likewise, the Wife will be precluded from claiming any greater value for the property when the land in question, across the street from Tampa's new Convention Center, is sold to make room for a hotel or some other development.

[7] The Husband suggests that it would have been better to grant the Wife an interest in those partnerships. With all due respect, the trial court may have abused its discretion in forcing the Wife to become an unwilling business partner in an intolerable financial arrangement. See, Robbins v. Robbins, 549 So.2d 1033 (Fla. 3d DCA

There was competent substantial evidence to support the trial court's findings of fact. The distribution plan made an approximate 50-50 split of the marital assets between the parties. The district court should have rejected the Husband's invitation to reweigh the evidence and lacked authority to find that the trial judge abused his discretion in fashioning this equitable remedy. This Court should reverse the district court's en banc decision with instructions on remand to reinstate the trial court's distribution plan.

II.

THE SECOND DISTRICT ERRED WHEN IT REVERSED THE TRIAL COURT'S ATTORNEY'S FEE AWARD CREATING A NEW STANDARD TO REVIEW FEE AWARDS BASED SOLELY UPON CONSIDERATIONS OF THE WIFE'S FINANCIAL CIRCUMSTANCES AND NOT THE RELATIVE FINANCIAL CIRCUMSTANCES OF THE PARTIES.

As he has done throughout his brief, the Husband ignores the appropriate standards of review in his arguments concerning the fee award. Perhaps this consistency represents the Husband's recognition that the only way to justify the decision below is to disregard those fundamental precepts of appellate review.

The Husband has gone to extraordinary lengths to present conflicting evidence and his creative interpretation of that evidence as fact.[8] He likewise attempts to go far beyond the

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1989), rev. den., 560 So.2d 234 (Fla. 1990).

[8] This Alice in Wonderland creativity is demonstrated at Page 10 of the Husband's brief where he represents that Judge Knowles said it was impossible for him to determine the fees reasonably incurred by the Wife. (Citing, R.

confines of this record to demonstrate an alleged diminished capacity to pay. Although this implicit invitation to go outside the record is tempting, the Wife relies upon those facts stated in the Initial Brief with citations to the record to demonstrate the substantial competent evidence which was present and amply supported the trial court's award of fees.

The Husband first argues that the Wife's fees were grossly excessive and that too many hours were expended. He claims that the majority of the discovery was done by the Wife and then erroneously concludes that it was unnecessary. Of course, the Husband's argument ignores that the vast majority of the discovery occurred subsequent to when the Husband raised numerous special equity claims. All of those claims were rejected by the trial court. The Husband's tactics in the Answer Brief are demonstrative of the course he has followed throughout these proceedings and help explain why the work below was necessary. The Husband cannot now shield himself from the consequences of his conduct by claiming that work was unnecessary or he has some new-found diminished financial capacity. See, Mettler v. Mettler, 569 So.2d 496 (Fla. 4th DCA 1990).

The Husband next argues that the hourly rate charged by the Wife's attorney was excessive. Once again, the Husband ignores the expert testimony which supported the trial court's findings of fact that the hourly rate was reasonable. Instead,

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1658-1661) The court simply did not make such a statement. Instead, the court proceeded to hear the evidence. (R. 1661-1662)

the Husband focuses upon the contention that "competent" counsel was available for a lesser hourly rate.

What the Husband fails to disclose, however, is that the issue of what "competent" counsel charge per hour is irrelevant to the criteria identified by this Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). There, this Court stated that the amount of an attorney's fee award must be determined on the facts of each case. Id. at 1150. One of the factors identified by this Court which trial judges are to rely upon in determining an appropriate fee is the experience, reputation and ability of the lawyer or lawyers performing the services. This Court noted that the party who sought fees carried the burden of establishing the prevailing market rate, that is, the rate charged in that community by lawyers of reasonable comparable skill, experience and reputation for similar services.

The Husband argues that the fact there was "competent" counsel who would have charged a lesser rate, necessarily means that such rate should be imposed upon the Wife's attorney. That factor is irrelevant to the Rowe criteria. Certainly, for purposes of professional responsibility or liability, every lawyer is "competent". The fact that there is disparity of hourly rates charged by "competent" counsel does not answer the question of what is the market rate charged in the community by lawyers of reasonable comparable skill, experience and reputation for similar services. In this case, the only evidence that the trial judge had before him concerning that criteria was provided by the Wife's

trial attorney. He stated that he was aware of other prominent attorneys in the Tampa area who charged the same amount as he did in marital matters. (R. 1653) He admitted that his rate was one of the highest rates in the community. As recognized by the dissent, however, the Wife's trial attorney is at the pinnacle of his profession. There are simply very few lawyers who have reasonably comparable skill, experience and reputation for these types of services.

The mere fact that there are only a small group of lawyers with reasonably comparable skill, experience and reputation as the Wife's trial lawyer should not mean that the trial court does not have discretion when presented with competent substantial evidence to award such an attorney his or her normal hourly rate. The Husband certainly has not provided any logical reason to divest the trial court of that discretion.[9]

The Husband also claims that the trial judge erred in refusing to allow the Husband to introduce evidence concerning settlement offers. As the trial court was advised, each of the settlement offers concerned in part the issue of attorneys' fees and costs and were inadmissible. (R. 1823) Of course, since that was the very issue pending before the Court at the time, it is

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[9] The Husband also contends that there was nothing in the record to explain how the Wife incurred $19,050.00 in paralegal fees. Obviously, the Husband must have overlooked the affidavit for attorneys' fees and the testimony of the Wife's fee expert to see that there was an abundance of evidence to support the trial judge's findings in this regard. (R. 1300-1346, 1627-1628, 1667-1674)

difficult to understand how the Husband can maintain that the trial court abused his discretion in failing to admit those settlement offers into evidence. Likewise, the Wife would have provided a detailed evidentiary response if the offers were admissible. (R. 1921-1924)[10]

Finally, the Husband desperately attempts to avoid the payment of the fee award by strenuously arguing that he now has a diminished financial capacity. This claim relies upon testimony which he claims to have occurred immediately prior to the time the trial court struck his financial affidavit as a sham. (Fn. 8, Page 15 and Pages 40 through 41 of Husband's Answer Brief) According to the Husband, since the trial judge allowed "similar testimony" to the facts as stated in the affidavit, then this Court should likewise rely upon that "similar testimony". In Wood v. Price, 546 So.2d 88 (Fla. 2d DCA 1989), the Second District explained that a sham pleading was one which appeared to be good on its face, but was absolutely false in fact. In order to strike a pleading as a sham, the trial court had to find that it was palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue. Id. at 90. Despite the numerous arguments made by the Husband concerning the fee award, he never challenged the order

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[10] If the Husband's offers were, in fact, far more "generous" than the court's award, one must seriously question the Husband's underlying motivations for the extraordinary efforts to have the distribution reversed on appeal (DCA Case No. 89-3505). Remarkably, the Husband offers no explanation for this glaring inconsistency.

striking the sham affidavit. The fact that the Husband attempts to rely upon that same "false" information here is a telling commentary on the type of candor the Husband has exhibited throughout these proceedings. This Court should reverse the decision of the en banc majority of the district court with instructions to reinstate the trial court's fee award.

CONCLUSION

There was competent substantial evidence to support all of the trial judge's findings of fact below. The district court improperly reweighed the evidence and then misapplied or created new standards to conclude that the trial court abused its discretion concerning the distribution and fee award. This Court should reverse the decision of the district court and order that the trial court's judgments be reinstated on remand.

Respectfully submitted,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
Attorneys for Petitioner

STEPHEN W. SESSUMS, ESQUIRE
SESSUMS AND MASON
Post Office Box 2409
Tampa, Florida 33601
(813) 251-9200
Attorneys for Petitioner

By: _____
George A. Vaka, Esquire
Florida Bar No. 374016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U. S. MAIL to **Raymond A. Alley, Jr., Esquire,** 805 W. Azeele, Tampa, Florida 33606; and **George K. Rahdert, Esquire,** 535 Central Avenue, St. Petersburg, Florida 33701, on March 9, 1992.

_____
George A. Vaka, Esquire