SUPREME COURT OF FLORIDA

CASE NO.: 82,503

DCA-5 CASE NO.: 91-1869

MARY ANN KENNEDY,

Petitioner,

v.

EDWARD M. KENNEDY,

Respondent.
_____/

AN APPEAL FROM THE DISTRICT COURT OF APPEAL

OF THE STATE OF FLORIDA

IN AND FOR THE FIFTH DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

CHIUMENTO, KATZ & GUNTHARP, P.A.

By: _____
B. PAUL KATZ, ESQUIRE
4 Old Kings Road North
Suite B
Palm Coast, Florida 32137
(904) 445-8900
Attorney for Petitioner
Florida Bar No. 203521

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA RULES

STATEMENT OF THE CASE

This appeal is filed with the Supreme Court under Rule 9.120, Fla. R. App. P., seeking discretionary review of a decision of the Fifth District Court of Appeals. Jurisdiction is sought under Rule 9.030 (a)(2)(A)(iv), Fla. R. App. P., based upon direct and express conflict between the decision below and decisions of this court and other district courts of appeal.

This Dissolution of Marriage was tried in the Ninth Judicial Circuit Court. Trial was held on June 13, 1991, at the conclusion of which the Court announced its findings and rulings. A Final Judgment was rendered on August 8, 1991, and an appeal to the Fifth District Court of Appeals filed by the Husband (Appellant below) on August 16, 1991.

The Husband appealed the award of Permanent Alimony, arguing only that the trial judge **abused his discretion.** The Wife (Appellee below) cross-appealed (1) a condition imposed by the trial court that the permanent alimony terminate upon "cohabitation" with a man; and (2) the failure to award the Wife attorneys fees. No other errors were urged by either party.

At some point in the appellate process following oral argument, the three judge panel invited an en banc review of the legal issue of termination of permanent alimony upon "cohabitation" by the wife. This case was then decided en banc. There was no majority opinion issued. The plurality opinion reversed and remanded the case because the Final Judgment did not included findings of fact, an issue not raised by either party. It further

adopted a new species of appellate review of alimony awards, which it termed the "Doctrine of Comparable Fairness." This doctrine rejects and expressly conflicts with the rules of appellate review of discretionary trial court decisions defined by this Court in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) and its progeny.

Seven separate opinion were issued. Appellee sought clarification to determine the status and law of the case. Her motion was denied.

The final judgment was reversed because of a supposed violation of the "Doctrine of Comparable Fairness", and because the trial court's findings of fact were deemed inadequate, **an "error" not urged by either party on appeal.** The case was then remanded for further proceedings consistent with the "Doctrine of Comparable Fairness.

JURISDICTIONAL ISSUES PRESENTED

1. The "Doctrine of Comparable Fairness" adopted by the Fifth District Court of Appeal directly and expressly conflicts with the "reasonableness" standard of appellate review of discretionary decisions set forth in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) and its progeny.

2. In reversing the final judgment and remanding the case for further proceedings, the district court decision directly and expressly conflicts with Strickler v. Strickler, 548 So. 2d 740 (Fla. 1st DCA 1989), which held that such cases should be merely remanded to the trial court for entry of an amended Final Judgment containing requisite findings of fact, and not reversed and remanded for further proceedings.

3. In reversing the final judgment because of an alleged error not raised by either party, which alleged error is not fundamental error, the district court decision directly and expressly conflicts with City of Miami v. Steckloff, 111 So. 2d 446 (Fla. 1959).

SUMMARY OF ARGUMENT

1. The standard of review of a lower court's exercise of its discretion in the award of alimony is the "reasonableness" test set forth in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). If the record contains competent substantial evidence to support the trial judge's award then there is logic and justification for the award and thre is no abuse of discretion. The doctrine of "comparable fairness" directly and expressly conflicts with that standard by requiring an additional test of comparing the results to other results in other cases .

2. If the appellate court decides that a judgment on appeal lacks written findings of fact, established case law holds that the case is to be remanded to the judge who entered the judgment, with instructions that he amend the judgment to include the required written findings of fact. For the Fifth District Court of Appeals to direct further proceedings is in direct and express conflict with decided case law.

3. Existing case law in Florida holds that if an error is not a fundamental error, then the appellate courts cannot utilize such error to reverse a lower court, unless that error is presented for appeal by one of the parties. The failure to include findings of fact in a final judgment is not a fundamental error. For the Fifth District Court of Appeal to utilize the lack of findings of fact in the lower court's opinion to reverse the lower court, when neither party cited this as error, is in direct and express conflict with decided case law.

DISCUSSION

1. The only error the Appellant below urged was that the trial judge **abused his discretion** in awarding the Wife $1,000.00 per month permanent alimony. (See Appellant's initial brief in Appendix)

In Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), this Honorable Court established the standard for review of a judge's discretion in an award of alimony to be:

> "In reviewing the true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial court should be disturbed only when his decision fails to satisfy this test of reasonableness." (at 1202-1203)

In Kuvin v. Kuvin, 442 So. 2d 203 (Fla. 1983), this Honorable Court cited its own prior opinion in Shaw v. Shaw, 334 So. 2d 12 (Fla. 1976), in saying,

> "It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evalution of the testimony and evidence, but rather **the test is whether the judgment of the trial court is supported by competent evidence.**" (emphasis supplied) (at 206)

In Marcoux v. Marcoux, 464 So. 2d 542 (Fla. 1985), this Honorable Court refined the standard, saying,

> "If a reviewing court finds that there is competent substantial evidence in the record to support a particular award, then there is logic and justification for the award... Under these circumstances there is no abuse of discretion." (at 544)

The doctrine of "comparable fairness" converts this standard into an analysis of other facts before other courts. It is as if

one jury's verdict can control another jury reviewing similar injuries in another case: whether the award made by the trial court was "outside the range established by precedent for cases based on similar facts," goes far beyond whether there was competent substantial evidence in the record to support the award, and is in direct conflict with these cited authorities. Under these authorities, the lower court's exercise of discretion is to be affirmed if there is substantial competent evidence in the record to support the award. No matters outside the record are to be reviewed.

The decision below cites as its basis the propensity of reviewing courts to reweigh the evidence when it believes a wife has been "short-changed." (See page 7 of decision below) In Walter v. Walter, 464 So. 538 (Fla. 1985), this Honorable Court reversed an earlier attempt by the Fifth District to modify the standard of review of an award of permanent periodic alimony established by Canakaris. In Walter, this Court said,

> "In Connor v. Connor 439 So. 2d 887 (Fla. 1983), when this Court stated that "(t)he determination that a person has been 'short-changed' is an issue of fact and not one of law",... That statement was not intended to either broaden or restrict the authority of the district courts of appeal to review the reasonableness of discretionary acts upon admitted facts or the facts taken most favorably to the prevailing party." (emphasis supplied by court) (at 540)

Further, Walter confirmed that the basis for the trial court having the discretion to fashion awards is the unique character of each and every marriage, and thus the unique character of each and every divorce, by stating,

"We reiterate that "(i)n considering the appropriate criteria for the award of the different types of alimony, it is important that appellate courts avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible." Canakaris, 382 So. 2d at 1200 (emphasis added **by court**) That statement reflects our recognition that the **discretionary authority granted trial judges is necessary because such cases are not susceptible to fixed patterns.** (at 540) (emphasis added by writer)

2. If a reviewing court believes that a judgment under review is lacking sufficient findings of fact it is improper to reverse and remand for additional proceedings, and by doing so grant a new trial. The proper course is to remand with instructions to the judge entering the deficient order to amend the order under review.

In Strickler v. Strickler, 548 So. 2d 740 (Fla. 1st DCA 1989), the court reversed and remanded with instructions a Final Judgment of Dissolution which did not include findings of fact or conclusions of law which would permit meaningful review. The Final Judgment was reversed and **remanded to the lower court with instructions to the trial court to enter an amended final judgment containing the missing findings of fact.** See also Moorman v. Moorman, 577 So. 2d 726 (Fla. 1st DCA 1991); Clance v. Clance, 576 So. 2d 746 (Fla. 1st DCA 1991); B&H Construction and Supply Co. Inc. v. The District Board of Trustees of Tallahassee Community College, Florida, 542 So. 2d 382 (Fla. 1st DCA 1989).

In Rodewald v. Rodewald, 394 So. 2d 1143 (Fla. 4th DCA 1981), the lower court had granted a new trial without specifying the grounds therefor as required by Rule 1.530 (f), Fla. R. Civ. Proc.

Instead of reversing the order, the appellate court merely relinquished jurisdiction to the trial court for the entry of an order stating the reasons for granting the new trial. It did not reverse the trial court. This same procedure was followed in the third district in Daon Corporation v. Blankenship 444 So. 2d 85 (Fla. 3d DCA 1984).

3. Under Florida law, when an issue is not addressed in a brief, either by raising it as a point on appeal, or by briefing it, it is deemed abandoned, or waived, and the lower court's ruling, which is clothed with the presumption of correctness, is deemed final as to the parties. City of Opa-Locka v. Metropolitan Dade County, 247 So. 2d 755 (Fla. 3d DCA 1971); City of Miami v. Steckloff, 111 So. 2d 446 (Fla. 1959).

In Hillsborough County Aviation Authority v. Walden, 196 So. 2d 912 (Fla. 1967), a proceeding for declaratory relief, the trial court passed upon the constitutionality of a statute. Appellant filed a notice of appeal in the district court of appeal, but it did not assign as error the ruling on the constitutionality of the statute. Nor did it argue this point in its brief. Nevertheless, the appellate court, sua sponte, transferred the case to the supreme court on the theory that the trial court passed on the constitutionality of the statute. The supreme court returned the case to the district court of appeal. Quoting the supreme court:

> "The trial court did (pass on the validity of the statute), but this holding has never been assigned as error nor has it ever been argued in any appellate brief. There is simply no jurisdictional vehicle to bring the matter here"

There is a recognized exception to this rule, however, in cases of fundamental error. A review of Florida authorities on the issue of fundamental error reveals the following:

In Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970), this Honorable Court said:

"Fundamental error," ... is error which **goes to the foundation of the case or to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly."** (emphasis provided) (at 137)

In City of West Palm Beach v. Cowart, 241 So.2d 748 (Fla. 4th DCA 1970) the court instructed us that,

"The decisional definition of fundamental error in civil cases relates to the existence of the cause of action, the right to recover, or the jurisdiction of the trial court, and this is not waivable." (at 750)

The Third District Court of Appeal in Wagner v. Nottingham Associates, 464 So.. 2d 166 (Fla. 4th DCA 1985), said,

"We have held that such a (fundamental) error arises only when it affirmatively appears that it could not have been cured below if met with a timely objection... Stated another way, fundamental error occurs when, no matter what was or could have been said by the other side at the trial, the resulting judgment is fatally and incorrectly flawed." (at 170)

The case below does not fall into any of these categories of errors. The error was the failure of the judge to follow a procedure enacted by the legislature for the **convenience** of the courts and the litigants. Since the appellate court must review discretionary acts in light of the facts in the record taken most favorably to the prevailing party, the failure of the judgment to contain specific findings of fact is harmless error at best-- not fundamental error.

CONCLUSION

In this case, the District Court has adopted a standard of review of alimony awards which conflicts directly, expressly, and fundamentally with existing case law of the Supreme Court. The new standard urged by the Fifth District is as follows:

> "(i)f the Appellate panel finds that any specific alimony award is unfair when compared to the range of other awards based on similar facts, it could find that the trial court abused its discretion." (see page 7 of District Court's opinion)

This standard of review of discretionary awards expressly and directly conflicts with the law as cited in Canakaris, Marcoux, Kuvin and Walter. The current standard requires the appellate courts to review the record of the case being decided to determine if a discretionary award satisfies minimum standards of reasonableness and is supported by competent substantial evidence. If it is, the award must to affirmed.

The doctrine of "comparable fairness" shifts the award of alimony from an **equitable** decision based on the discretion of the trial court applied to the facts of that case, to a **legal** decision based upon a comparison with prior appellate decisions, and requires an analysis of supposedly "similar facts" of what are in reality unique and different cases. This process destroys the discretion and sound judgment of the trial judge to do equity based upon the record in front of him.

"Comparable Fairness"is legal quicksand which renders trial judges impotent to do justice based upon the facts before them. It violates the most basic principles of Canakaris. This Honorable Court is urged to take jurisdiction to resolve the conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing was served by U.S. Mail on Charles Willits, Esquire, 1407 East Robinson Street, Orlando, Florida 32801; this 14 day of October, 1993.

CHIUMENTO, KATZ & GUNTHARP, P.A.

By: _____

B. PAUL KATZ, ESQUIRE
4 Old Kings Road North
Suite B
Palm Coast, Florida 32137
(904) 445-8900
Attorney for Petitioner
Florida Bar No. 203521