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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

# PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

DOCTRINE OF COMPARABLE FAIRNESS

In Respondent's Answer Brief, he clearly sets forth the crucial error of the "Doctrine of Comparable Fairness" being foisted on Florida jurisprudence by the District Court below. On page 8, Respondent says,

> "Therefore, when reviewing a discretionary act, the appellate court must not only consider if all of the mandated factors **were given appropriate weight** based on the record before them, **but they must also assure that the decision is within the discretionary authority of the trial court based upon judicial precedent set by cases decided previously.** (emphasis supplied)

Respondent correctly states that the doctrine of comparable fairness requires these two functions to be undertaken by the Appellate court. Unfortunately for Respondent, appellate courts are not permitted these functions under Florida law. The weight to be given evidence is the sole province of the trial court, or the jury.

In Prevatt v. Prevatt, 462 So.2d 604 (Fla. 2d DCA 1985), the Fourth District Court of Appeal recognized this mandated division of labor in the judiciary, when it said, "...this court cannot substitute its judgment for the trial court's and reweigh the evidence considered by the finders of fact." In so holding, it cited two cases from this Honorable Court, Helman v. Seaboard

Coastline Railroad Co., 349 So.2d 1187 (Fla. 1977); and Strawgate v. Turner, 339 So.2d 1112 (Fla. 1976). In both these cases, this Honorable Court reversed decisions of the appellate courts in which the appellate courts reweighed the evidence and substituted their judgments for the trial courts' judgments. In Helman, which was a jury trial, this Honorable Court said,

> "We initiate this analysis by articulating three incontrovertible premises of law which are relevant to our disposition of this case. **First, it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury.** (citations omitted)...**Second, if there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's opinion as to its appropriateness.** (citations omitted) Finally, the question of whether defendant's negligence was the proximate cause of the injury is generally one for the jury unless reasonable men could not differ in their determination of that question." (at 1189) (emphasis supplied)
>
> Application of these principles to the case sub judice mandates a reversal of the appellate court. On the face of its opinion, the District Court violated these rules. After conceding that respondents were negligent in exceeding their own speed regulations by five (5) miles per hour, the District Court concluded that such negligence was not the proximate cause of the injury. **By so concluding, the court substituted its judgment for the judgment of the jury whose function it was to determine proximate cause by drawing inferences from the evidence before it....For the District Court's decision to be sustained, there needed to be a complete absence of competent evidence to support the verdict, or, in the alternative, it was necessary that the evidence be of such a nature that reasonable men could only conclude that the behavior of the individual driving petitioner's truck was the sole proximate cause of the accident.** Neither is apparent from the record in the instant cause." (emphasis supplied) (at 1190)

In Strawgate, which was a bench trial, this Honorable Court said,

> "Findings of fact by a trial judge are presumed to be correct and are entitled to the same weight as a jury verdict. Read v. Frizzel, 60 So.2d 172 (Fla. 1952). Findings by a

trial court will not be disturbed unless there is a lack of substantial evidence to support the trial court's conclusion." (at 1113)

"Our examination of the record convinces us that the trial court had ample evidence before it as a basis for its judgment. In reaching a contrary decision, the District Court improperly substituted its judgment for the trial court's." (at 1113)

Ergo, the standard of review necessitated by the doctrine of comparable fairness, is aberrant to Florida law, and directly conflicts with what this Honorable Court has called, "**Three incontrovertible premises of law.**"

After the voice of this Honorable Court, perhaps the loudest and most eloquent voice for rejecting this "doctrine" is the voice of its own proponent, the District Court below. The District Court, to illustrate the principle, compared the case below with Bujarski v. Bujarski, 530 So.2d 953 (Fla. 5th DCA 1988), to determine if the award of $1,000.00 per month permanent alimony made by the trial court was "comparably fair" with the award made in Bujarski. In doing so, the district court illustrates the doctrine's flaw.

The district court recites several facts from both cases to make them **appear** similar. But Bujarski was not an appeal by a husband of an award of permanent alimony. The issue was whether the trial judge abused his discretion in not awarding the Wife a share of the military pension earned by the husband during the marriage, as equitable distribution of what was clearly a marital asset. In Bujarski, the Wife sought and was denied a share of the

military pension as an equitable distribution of a marital asset; instead, the trial court ordered the Husband to pay the wife $200.00 per month permanent alimony, even though the Wife had a greater income than the Husband. The Wife appealed this award. The issues involved had nothing to do with the issues in the case at bar. The facts upon which the issue was decided were not presented to adjudicate issues of the case at bar. In Bujarski, the Wife had greater income than the Husband, who was ordered to pay her permanent alimony, yet the Wife appealed the permanent alimony and the Husband did not complain, because he knew that if the court had awarded the Wife her equitable share of the pension, she would have received more than the alimony award. How ironic that the District Court would choose Bujarski to represent an "essentially alike" case.

Yet this is the case which the proponents of "Comparable Fairness" set out as comparable with the case at bar. This illustrates the flaw of this "doctrine", and the impossible burden it would place on trial courts. There is nothing comparable between Bujarski and the case at bar; yet the proponents of the doctrine of "Comparable Fairness" would dictate a similar result be obtained in these two totally unrelated cases.

Judge Harris, in his concurring opinion to Sylvester v. Ryan, 623 So.2d 767 (Fla. 5th DCA 1993) again attempts to illustrate the justification of "comparable fairness", this time by urging its use in child support decisions not covered by the guidelines of Section 61.30. He states that the amount of child support set forth in the

top of the guideline bracket,

> "is the maximum that could be awarded for the first $100,800 of incomes not covered by Section 61.30. Only in this way is equality of treatment assured."
>
> " The essence of justice is that all persons under similar conditions are treated substantially the same under the law... any two persons, regardless of gender, race or religion, under similar circumstances, should receive substantially the same result in litigation before our courts."
>
> "This concept- the concept of comparable fairness- is not unlike the doctrine of proportionality applied in capital proceedings and has the same constitutional aura because of the "equal protection" requirements of Article 1, section 2 of the Florida Constitution, and Article 14, section 1 of the Constitution of the United States."
>
> "An example of comparable fairness on the federal level is the progressive income tax in which all persons are required to pay the same rate of tax within the same tax bracket. I submit this should also be true of support requirements imposed by court order. All parents should pay substantially the same amount based on comparable income." (at 768)

No opponent of this doctrine could possibly cite a more compelling argument of how this doctrine conflicts with Florida law than this excerpt. The entire adjudication process established by Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) is discarded. No longer would the trial judge have the discretion to do equity between the parties as mandated by Canakaris. This doctrine would instead suggest an "alimony table", like a tax table, be created. Not only, however, would an amount be provided from the table, but also the actual entitlement itself would be a mathematical function of some form of matrix of the "relevant factors."

Respondent argues that "courts are not free to pick and choose at random which factors they will consider and which they will

disregard, but must consider all the relevant factors." (Page 8 of Answer Brief). However, not even the legislature has been so arrogant to suggest that it has listed all of the factors to be utilized in determining entitlement to alimony. Further, while the statute directs that the court "consider" these factors, the statute does not direct the **weight** to be given each factor, nor does it direct the manner in which the court shall make its consideration. The statute leaves that process to the trial judge's **discretion.** Section 61.08 (2), Florida Statutes, directs the trial court to consider all relevant economic factors, including but not limited to seven enumerated factors, but then recognizes that "**the court may consider any other factor necessary to do equity and justice between the parties**."

Respondent, in its brief, also illustrates the impossibility of implementation of "comparable fairness." On page 20 of the Answer brief, Respondent refers to two cases cited by Petitioner, Halberg v. Halberg, 519 So.2d 15 (Fla. 3d DCA 1987); and O'Neal v. O'Neal, 410 So.2d 1369 (Fla. 5th DCA 1982). Petitioner cited those cases for authority, based upon certain similar factual patterns which Petitioner believes are relevant, and thus helpful to the Court. Respondent, on the other hand, has scoured these same cases for **dis**similar factual patterns, so he can distinguish the case from the one at bar. That is good lawyering.

Both parties are correct; the cited cases have both similar, and dissimilar facts. How do those cases fit into the matrix for

"comparable fairness?" Who decides if the similarities in the cases are to be considered of greater weight than the dissimilarities? How can a trial court be required to know what was in the mind of the prior trial judge? The mere recitation of findings of fact on the enumerated statutory factors will not resolve this dilemma.

Even if findings of fact are recited in a trial court judgment, there is no requirement that the facts be properly and totally recited in the appellate opinion which is to serve as precedent. What about per curiam appellate decisions without opinions. Must trial judges scour the record in all unpublished opinions to determine the facts in the underlying trial court decisions which was upheld without opinion? How do we know how the prior trial court judges **weighed** each factor? Impossible!

To the extent that the District Court opinion requires equal weighing of all listed statutory factors, or any other factor, the decision also fundamentally and irreconcilably conflicts with the statute. It is only the doctrine of "comparable fairness" which would suggest that the trial court is reduced to some form of measuring device, be it a scale or calculator, required to reach a particular conclusion based upon the findings made by the court on the listed statutory factors, and then reviewed against some form of judicial calculus, utilizing other decisions made by other judges considering other facts and factors, utilizing other weighing of these other factors.

No. Contrary to the doctrine of comparable fairness, both the

cited statute and Florida case law establish that the trial court is to utilize its **discretion** to do equity and justice between the parties. That **discretion** is to be reviewed by appellate courts only to determine if its exercise was **reasonable.** That exercise is deemed to be reasonable **if reasonable men could differ.** Reasonable men could differ if it is **supported by competent substantial evidence in the record.** That is the standard of review of trial courts' awards of alimony.

Respondent's reliance upon the language in Canakaris which suggests that judges dealing with essentially alike cases should reach the same result, is misplaced. This language was not the holding of the case. It was obiter dicta. It was meant to comfort those who feared that there is no inherent limit on the discretionary decision making process. It was meant as a societal goal, rather than a "compellable right." see Spooner v. Askew, 345 So.2d 1055 (Fla. 1976).

It is clear that the doctrine of "comparable fairness" fundamentally and irreconcilably conflicts with the doctrine of judicial discretion and the appropriate standard of review of discretionary acts established by Canakaris and its progeny. The trial court must be free to exercise the discretion endowed by both the legislature and this Honorable Court, unfettered by such strict rules and formulae. As stated in Canakaris,

> "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 judge

should be disturbed only when his decision fails to satisfy this test of reasonableness."

REQUIREMENT OF FINDINGS

The adoption of the doctrine of "comparable fairness" and the requirement that findings of fact be included in the judgment were quite correctly and logically linked by the district court, when it said, "The second purpose of the findings of fact is even more important. It permits a comparable fairness analysis." (at 1035)

In a unanimous opinion, this Honorable Court, in Vandergriff v. Vandergriff, 456 So.2d 464 (Fla. 1984), reviewed a decision of the First District Court of Appeal, which reversed a trial court's divorce decree awarding the Wife rehabilitative alimony. The three judge district court panel issued three opinions, all of which reversed the award as being inadequate; one of which found the award of rehabilitative alimony (as opposed to permanent alimony) to have been an abuse of discretion; and one of which held that the trial judge committed error in not including findings of fact to support his award. This Honorable Court reversed the district court and reinstated the award of rehabilitative alimony as a permissible exercise of discretion.

This Honorable Court said two things in Vandergriff which are instructive in the case at bar. The first was stated as follows:

> "This cause presents the issue of whether the district court applied the correct standard of review in reversing the judgment of the trial court in a dissolution action. We hold it did not...
>
> "We will not regurgitate the guidance we have previously issued in Canakaris v. Canakaris, 382 So.3d 1197 (Fla. 1980),

and its progeny or conduct a de novo review of the evidence. We will, instead, confine ourselves to the controlling legal issue of whether the district court applied the correct standard of review. First, as Canakaris makes clear, the standard of review is whether the trial judge abused his discretion and the test is whether any reasonable person would take the view adopted by the trial judge." (at 466)

The other issue addressed by this Honorable Court in Vandergriff, was the contention by one of the judges on the district court panel, that the judgment of the trial court had to be reversed because it did not contain findings of fact. Again, quoting from Vandergriff:

> "We are not prepared to hold, as Judge Nimmons apparently would, that trial judges must support their decisions with factual findings. This would be contrary to the well established rule that trial court decisions are presumptively valid and should be affirmed, if correct, regardless of whether the reasons advanced are erroneous... Petitioner's effort...would necessitate our conducting a de novo review of the various factors on which the trial court might have grounded its decision." (at 466)

Error, to justify reversal, must be prejudicial. Otherwise it is merely harmless error. Prejudicial error means error which could have led to a different result. Katos v. Cushing, 601 So.2d 612 (Fla. 3d DCA 1992); Aristec Communities, Inc. v. Fuller, 453 So.2d 547 (Fla. 4th DCA 1984).

A conclusion includes an implied finding as to all factors necessary to that conclusion. Odham v. Peterson (supra). If there is substantial evidence in the record to support the court's conclusions, the conclusion must be affirmed. Odham v. Peterson (supra). Therefore, the absence of announced findings of fact in a record where there is substantial competent evidence to support

the conclusions reached by the trial court, is not reversible error, but harmless error, at best. Vandergriff v. Vandergriff (supra).

## CONSTITUTIONALITY OF MANDATED FINDINGS

Respondent does not cite any support for his argument that the statutory requirement that findings of fact be included in the judgment is constitutional. He argues that other statutes contain similar provisions, but then confuses the legislative prerogative to mandate factors to be considered in establishing substantive law, with the impermissible legislative mandate to include findings of fact in the judgment. This is a distinction made by Petitioner in her Initial Brief, and reiterated here. The legislature is free to establish substantive law; it cannot determine the required contents of a judgment, which is within the sole rulemaking province of this Court.

## DECISION BASED UPON ISSUES NOT RAISED

Respondent also cites cases in support of his position that the appellate courts have considered non-fundamental issues not raised by the parties on appeal. However, these citations do not approve the practice when challenged; they simply beg the question, and arrogate to the courts this authority. Petitioner concedes that courts have from time to time done that which Petitioner is

challenging in this case. Petitioner even cited several instances to this Court in the Initial Brief.

However, Respondent cited no authorities in which this practice was approved by this Court when challenged on the bases advanced by Petitioner. Petitioner's authorities cited in her Initial Brief stand unchallenged. This Court has the opportunity to decide this issue.

There are considerable jurisprudential interests which are best promoted by confirming this limitation on appellate courts. One fundamental interest is preserving the adversary system. Under the adversary system, the party litigants are deemed to be best able to determine which issues should be litigated to best promote or protect their respective interests. It is the duty of counsel to bring these issues to the court's attention, to brief these issues, and to argue these issues to the tribunal.

After the issues are identified, briefs are submitted, and arguments made. The adjudicatory process benefits from the arguments made by opposing interests. However, if the judges, once cloistered, turn the focus from the issues presented by the parties to issues neither party raised, those litigants are excluded from the appellate process, and lose their right to the redress of their grievances.

Florida law recognizes that some issues may be decided by the Courts, in the absence of a litigant's participation in the process. Those issues are called **fundamental** issues, and the court has the right to abjudicate those even if not presented by

the litigants. The logical justification for deciding these issues in the absence of participation by the litigants is that the issue is so fundamental or basic to the law, that nothing could be said by either litigant to change the result.

This is not the case with the "mandate" of findings of fact. There is no fundamental right to announced findings of fact. Odham v. Peterson (supra); Vandergriff v. Vandergriff (supra). This recent practice has been adopted totally for the convenience of the litigants and reviewing courts. For hundreds of years jurisprudence did not require findings. It does not require them now.

Litigants have always had the burden of presenting a record which establishes error. The failure to specifically state findings of fact is not such a departure from essential requirements of law as to require reversal. This being the case, appellate courts should not be able to utilize this "error" to reverse the lower court, unless this issue is raised as error, briefed and argued.

## CONCLUSION

This Honorable Court once again has to review a decision of a District Court of Appeal, which has either ignored, or sought to expand, its proper function in reviewing decisions of trial courts, beyond its proper bounds.

Trial courts cannot be required by the legislature to include findings of fact in their judgments; only this Honorable Court can promulgate such a rule. In Vandergriff, this Honorable Court rejected a district court judge's attempt to require findings of fact to be made in dissolution cases, and held that this would be contrary to the well established rule that trial court decisions are presumptively valid and should be affirmed, if correct, and that requiring findings would necessitate conducting a de novo review of the various factors on which the trial court might have grounded its decision-- an impermissible role for the reviewing court.

The "doctrine of comparable fairness" espoused by the District Court is an abomination which, if adopted by this Honorable Court, would alter forever the well reasoned balance of the roles of the various courts of this state. It is the integrity of the entire three tiered judicial process which is at stake in this case, and nothing less. To preserve that integrity, the Petition should be granted and the judgment of the Trial Court should be reinstated.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true copy hereof has been furnished by U. S. Mail to CHARLES W. WILLITS, ESQUIRE, 1407 East Robinson Street, Orlando, Florida 32801, this 10th day of May, 1994.

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