SUPREME COURT OF FLORIDA

CASE NO. SC02-1925

L.T. CASE NO. 3D00-3096
CHARLES FREDERICK ACKER,

Petitioner,

vs.

BARBARA DRUMM ACKER,

Respondent.
_____/

REPLY BRIEF OF APPELLANT, CHARLES FREDERICK ACKER

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES: **Page No.**

STATUTORY AUTHORITY:

OTHER AUTHORITY:

ANALYSIS OF ARGUMENTS

The Respondent has failed to address the issues raised in Point I and Point II of the Petitioner's Initial Brief directed to this Court upholding the *Diffenderfer* prohibition against double-dipping either as a matter of law or as a matter of public policy. Instead, she attempts to divert attention from these two points by simply complaining about matters irrelevant to this appeal. When setting alimony initially or later seeking to modify it, the trial court has but two overriding concerns, to wit: the ability of one person to pay alimony as measured against the needs of the other requiring its receipt. *Canakaris v. Canakaris*, 382 So.2d 1187 (Fla. 1980); *Eyster v. Eyster*, 503 So. 2d 340 (Fla. 1st DCA 1987). This Court warned in *Diffenderfer* that when a retirement asset is divided as equitable distribution, it cannot be later used in determining an ability to pay alimony. *Diffenderfer v. Diffenderfer*, 491 So.2d 265at 267 (Fla.1986). This is precisely what occurred when the trial court denied the Petitioner's modification request.

The Respondent's response to Point I of the Petitioner's brief was to complain about the results of equitable distribution. By doing this, the Respondent seks a second bite at equitable distribution by directing this court to recede from its holding in *Diffenderfer* that the divided pension asset may not be used to satisfy alimony. If this court were to so rule, she would then continue to receive alimony

which would be supported by the income derived from the divided pension asset.[1] The alimony determined by receding from *Diffenderfer* could then substitute for what the Respondent believes was an unfair distribution of assets when the parties divorced.[2] (T. 5/25/000, p.130-132). The trial court made the same erroneous conclusion when it determined in paragraphs 19 and 39 of its findings that the Petitioner received a greater equitable distribution than the Respondent from which it fashioned its alimony ruling.[3] (R.p. 253-262).

When the Petitioner shows in his Point IV that the Respondent's needs can be adequately provided by the assets that she was awarded in equitable

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[1] The Respondent ignores the testimony introduced at trial and which the Respondent did not refute that 86.12% of all benefits paid to the Petitioner were attributed to marital property and only 13.84% of all his benefits were attributed to post marital accumulations. (T. 5/25/00, p. 110-112). The cases which the Third District certified as being in direct conflict with its opinion, *Rogers v. Rogers*, 746 So. 2d 1176, 1179 (Fla. 2d DCA 1999), *Paris v. Paris*, 707 So. 2d 889, 890 (Fla. 5th DCA 1997), *Ellis v. Ellis*, 699 So. 2d 280, 283 (Fla. 5th DCA 1997), *Bain v. Bain*, 687 So. 2d 79, 81 (Fla. 5th DCA 1997), *Gentile v. Gentile*, 565 So. 2d 820, 822-823 (Fla. 4th DCA 1990), all prohibit using that 86.12% as a source of alimony payments. *See also, Rahn v. Rahn*, 768 So.2d 1102 (Fla. 2nd DCA 2000); *Schlafke v. Schlafke*, 755 So.2d 706 (Fla. 4th DCA 1998); and *Hollinger v. Baur*, 719 So.2d 984 (Fla. 3d DCA 1998).

[2] It is well settled that one cannot label alimony as lump sum alimony and conclude that it is therefore nonmodifiable when it acts and works like permanent periodic alimony. *See, Flipov v. Flipov*, 717 So.2d 1082 (Fla. 4th DCA 1998). It follows that one cannot use an alimony proceeding as an alternate mechanism for redoing equitable distribution.

[3] The trial court ruling based upon this finding clearly violates *Boyett v. Boyett*, 703 So.2d 455 (Fla. 1997) in the same manner that this court later determined that savings alimony also violates *Boyett*. *See, Mallard v. Mallard*, 771 So.2d 1138 (Fla. 2000).

distribution, the Respondent first argues that she should continue to receive alimony in order to protect the value of those assets. Secondly, she argues that a modification should not be granted unless the Petitioner can show a change in circumstances that could not be anticipated at the time that alimony was first set.

The Respondent's first argument confirms that she believes that her entitlement to alimony should be regarded as a property right, and this court should do away with the standards it established in *Canakaris v. Canakaris*, supra. This position clearly contravenes this Court's prohibition against the award of savings alimony. *See*, *Mallard v. Mallard*, supra. Her second argument shows that she believes the holding of *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992) works to reverse the double-dipping holding in *Diffenderder* by arguing that his income as supported by the pension is at least equal to the earned income he enjoyed before retirement.[4] While the Petitioner's retirement does not by itself create the change in circumstances necessary for a modification of alimony, his substantially reduced income after application of the *Diffenderfer* holding does.

The balance of the Respondent's Answer Brief shows greed, <u>not</u> need. She shows greed as her motivation in many ways. First, by the extensive use of labels

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[4] The *Pimm* holding has generally been applied to situations where the employee elects voluntary retirement. In this case, the Petitioner sought to modify alimony only after he reached his mandatory retirement age under federal law.

which mis-characterize the facts. Second, when referring to the Petitioner, she twice refers to him as a "Millionaire" and on eleven more occasions, "$1,000,000 plus windfall" accompanies his name. These references are entirely irrelevant to the issues before this court and are inserted to gain sympathy from this court and to obfuscate the issues of law. The intent behind these references is to mis-direct this court's attention from the Petitioner's arguments in his Point IV that the Respondent has no need to receive alimony at the present level. *Lauro v. Lauro*, 757 So. 2d 523 (Fla. 4th DCA 2000). The Respondent's liquid assets had grown to over $660,000 giving her an income source on which to live, in addition to a debt-free house worth $250,000. By labeling the Petitioner as a "millionaire", and making liberal use of the terms "$1,000,000", and "$1,000,000 windfall" in describing him, while at the same time characterizing her own financial position as meager, as being supported by "limited financial means" or as producing an "extremely conservative lifestyle", she hopes this court will ignore her assets as a source to meeting her own needs and fail to conclude that she too is a "millionaire" in her own right. When the Respondent concludes that she should not be forced to liquidate her own assets, what she really argues is that she has the right to maintain her own status as a "millionaire" and have that status improve over time by allowing the earning increment attached to the liquid assets to remain untouched

while the Petitioner should be forced pay alimony by dissipating his assets which were previously divided as equitable distribution.

The issue raised by the Petitioner in his Point I is that if double-dipping is to be prevented, the Petitioner cannot be required to use his retirement asset awarded as equitable distribution as a source of income. If his retirement asset is considered as a source of alimony as under *Lauro v. Lauro*, 757 So. 2d 523, supra, then the Respondent's assets must also be considered as to her needs. However, unlike the facts of *Lauro* where both parties took under the retirement assets in pay status at the same time, just as nothing in life remains constant, the equitably distributed assets in the instant case through time have changed. This problem can be corrected by permitting the Petitioner to substitute the Respondent's value of the remaining divided asset for his remaining portion of his divided share. By doing this, both parties are permitted to exclude the asset divided under equitable distribution and the appreciation thereon.[5]

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[5] The practical application of this value substitution as applied to the parties would be to look to the percentage of the Petitioner's retirement benefit earned after the cut off date (13.84%) and determine with this increment the ability of the Petitioner to pay alimony as measures against the needs of the Respondent. At the same time, the admonishment contained in the holding of *Waldman v. Waldman*, 520 So.2d 87 (Fla. 3d DCA 1988) continues to serve as a directive to an ex-spouse not to deplete or squander equitable distribution assets because a second bite at the apple is unavailable from the other spouse's equitably distributed retirement assets and the appreciation thereon through a continued alimony payment.

It is particularly important that this procedure be allowed because appreciation of a pension asset is an integral portion of the asset itself. Unlike a parcel of real estate, which can keep pace with the rate of inflation while simultaneously generating income, when the income of the pension asset is used for purposes of demonstrating the Petitioner's ability to pay alimony, his divided share of equitable distribution withers away without him every touching a penny of it. This was shown with three examples in Point I of the Petitioner's Initial Brief.

The Respondent points out that the Petitioner freely elected early retirement. Even though early retirement was his choice, he continued to pay the current level of alimony and only sought to reduce the obligation at the time when he would have faced mandatory retirement as a pilot at age 60.[6] On the one hand, while the Respondent argues that the Petitioner's income was greater after retirement than it was before, she concludes that he could have continued to work as a flight engineer following age 60.[7] Besides being false, as evidenced by the testimony that he contracted glaucoma and cataracts, (T. 5/25/00, p. 36-38), it shows the *extent* of the

[6] The maximum benefit limitation applicable at age 65 for all other ERISA plans is set at age 60 for commercial airline pilots due to mandatory retirement requirements of such individuals. Accordingly, the *Pimm* normal retirement age is satisfied at age 60.

[7] The record is devoid of any such position being available to the Petitioner which also causes this argument to fail. *Brown v. Brown*, 784 So. 2d 464 (Fla. 5th DCA 2001)

Respondent's greed as the *sole* motivation in contesting the modification. The Respondent complains that the Petitioner earned $160,000 per year as a pilot during the marriage, yet retires on $170,000. She concludes that he is better off now than when alimony was initially set which is entirely irrelevant to the issue of law raised by this appeal. Then she argues that he could have continued to work as flight engineer for substantially less than the $160,000 amount. With this argument, the Respondent believes that it was appropriate for the Petitioner to work for the airline effectively for free in order to provide her continuation of alimony. After all, if he was paid hypothetically $90,000 as a flight engineer, he could receive that amount of income and then some by simply retiring. If he stayed on as a flight engineer, he would also be giving up immediate access to another $80,000.00 of benefits, to wit: $170,000 - $90,000. Yet by receiving the income as W-2 earned income instead of as retirement pay divided as equitable distribution, the Respondent can now use this income in demonstrating the Petitioner's ability to pay alimony. She suggests with this argument that the *Pimm* holding should be modified to require the Petitioner to work until the Respondent attains age 65. Such an interpretation of *Pimm* would work to prevent employees who marry spouses much younger from ever retiring.

As the Respondent fails to understand that any right to alimony is derived from public policy[8] and not as a contractual right of value, she completely fails to address the Petitioner's Point II that this court must balance the public policy interest that he be permitted to keep his share interest in his retirement benefit for the impairments of his old age with the public policy interest that he be required to support his former spouse and not the public.[9]

Central to the Respondent's argument is that she received a buyout from the Petitioner's defined benefit plan and that she would not have agreed to it had she understood that four years later it could be worth so much more. She surmises this to have occurred due to deception, not only in terms of what the Petitioner disclosed in his financial affidavit, but also in the testimony of the Petitioner's expert witness Tony Thalen. Not only does this position fail to rise above pure accusation, but there is no reasonable basis upon which to conclude that she would have done otherwise had she properly understood the relationship that the defined

[8] *Bassert v. Bassert*, 464 So.2d 1203 (Fla. 3d DCA 1985); *Miami v. Spurrier*, 320 So.2d 397 at p. 398 (Fla. 3d DCA 1975); *Cleveland v. Board of Trustees*, 229 N.J. Super 156, 550 A.2d 1287, at 1289 (1988); *Schlaefer v. Schlaefer*, 112 F.2d 177 (D.C.App. 1940); *See also*, *Wissner v, Wissner*, 338 U.S. 665, 693, 93 L. Ed. 424, 70 S.Ct 398 (1950).

[9] Congress dealt with balancing the needs of both Petitioner and Respondent when it created a double-dipping preemption for social security benefits. A spouse in need can strip away social security payments of a worker under 42 USCA §§659 and §§662(c); but was precluded from receiving any lumpsum alimony or property division thereof because such spouse could share in a family benefit under 42 USCA §402(a) to (f).

benefit plan had to the A/B plan by guaranteeing a floor benefit. The Petitioner was never entitled to receive both. The uncontroverted testimony of Mr. Thalen confirmed that the value of the A/B plan benefit never exceeded the floor benefit guarantee of the defined benefit plan at any time before the divorce dating as far back as 1972 when the defined benefit plan was first implemented. Therefore, no reasonable basis existed at the time of the divorce to conclude that it would likely occur in the future. In other words, the value placed on his benefit appeared very fair at the time of the buyout, because if the value of the A/B benefit was less than the value of the defined benefit accrual at the time of the divorce, then a buyout based upon the lower value would have yielded less cash. Plainly, it is that simple.

Furthermore, the Respondent had an opportunity to obtain summary plan descriptions of all plans, both in terms of her ability to subpoena them, and in terms of the beneficiary status provided her under ERISA (without the need to subpoena them).[10] She simply relied upon what was provided in the benefit statement printout and then complains that she fails to ask questions before she entered into the agreement. The Respondent remains estopped as a matter of law from making this argument. *Macar v. Macar*, 803 So. 2d 707 (Fla. 2001); *Schreiber v. Schreiber*, 795 So. 2d 1054 (Fla. 4th DCA 2001); *Pretracca v.*

[10] *See*, 29 USC § 1022(a) (1997); 29 USC § 1056(d)(3)(J) (1997); Labor Law.Reg §2520.104(b) -2 Rights to obtain information are enforceable under 29 USC §1132(c) (1997) and 29 USC §1132(a)(3)(B)(i) and (ii) (1997).

Petracca, 706 So. 2d 904 (Fla. 4th DCA 1998); *Seiffert v. Seiffert*, 702 So. 2d 273 (Fla. 1st DCA 1997).

At issue here is the Respondent's examination of the future value based upon the performance of the stock market years after the divorce and then followed by a complaint of "foul- play". She looks to the good fortunes of the Petitioner, which cannot be considered an element of her entitlement, *Szuri v. Szuri*, 759 So.2d 709 (Fla.3rd.DCA 2000). Her need for alimony is to be measured against any shortfall of her ability to meet those needs with her own assets. *Lauro v. Lauro*, supra. *See also*, *O'Connor v. O'Connor*, 782 So.2d 502 (Fla. 2d DCA 2001). This again demonstrates her greed, <u>not</u> her need.

The Respondent then admonishes this court that reversing the trial court's order would send a message to every spouse involved in a dissolution proceeding, that no such spouse should give up her right to her interest in the other's spouse's pension.[11] This is little more than reprehensible. First, the Respondent did not

[11] The opposite might be true. If this court should recede from the prohibition against double-dipping as to retirement assets, the incentive for the employed spouse to buy out retirement assets would disappear if the alimony paying spouse knows that when he retires after taking all the risks with such plans, he has merely preserved a fund for his ex-spouse to look to for continued alimony. Instead, there would be an insistence that such plans be split and upon retirement, the beneficiary spouse's share would be available to meet her needs under *Lauro v. Lauro*, supra. Also, as pointed out by Judge Gersten in footnote 12 of his lower court dissenting opinion, large numbers of voluntarily negotiated agreements which relied on 16 years of caselaw prohibiting double-dipping will be negated.

give up her rights to the pension. She instead received her full interest in a cash and asset buyout. *See, Kazymirczuk v. Kazymirczuk*, 709 So. 2d 142 (Fla. 2d DCA 1998). Had the plan contained a "true" early retirement subsidy, as referenced under 29 USC § 1054(g)(2)(A) (1997), and she failed to value it, her acceptance of the buyout would be deemed to cover the value earned on the date of divorce.[12] The failure to value any portion or consider a portion in arriving at the value would not cause that property to be considered earned after the marriage. This constitutes the heart of her argument as to why the *Diffenderfer* double-dipping exclusion does not apply to the IRA account which she inappropriately labels the "$1,000,000 windfall" despite the lion's share of that increase being derived from passive earnings produced by the stock market. (T. 5/25/00, p.133-134, 146-147). The fact that she accepted the buyout places more responsibility on her shoulders, not less.

Second, she received the full value of the Petitioner's 401(k) plan. The Petitioner sacrificed all of his liquidity and gave it to the Respondent. He retained an asset in its place which could have been worth very little to him if the airline went bankrupt the following year, (as had occurred with Eastern Airlines and TWA, and which recently occurred with US Airlines and United Airlines),

[12] An early retirement benefit is subsidized when "the benefit has greater value at the early retirement date". *See* Reiss & Thompson, *Dividing Pension Property After Boyett*, 75 Fla.Bar.J. 2 at p. 48 (Feb. 2001).

followed by the loss of his job or a great cutback in his pension benefit under 29 USC §1344 (1997). The pension plan could have also been worth very little to him if he had been stricken with a terminal illness following the divorce. He would have similarly found himself on the losing end of that trade had illness forced him to retire the following year. He would have questioned the wisdom of that decision had any of these events occurred. That liquidity which he bargained away in an arms length transaction would have meant so much more to him under those circumstances, but would have been precluded from changing the bargain.

Neither party is poor here. Both parties have assets of a million dollars or more. The assets of each are substantially derived from the Petitioner retirement plans, either directly or indirectly, as consideration for a buyout. Monday night "quarterbacking" should not be tolerated as a means for determining whether alimony should continue, be adjusted, or terminated.

The arguments as advanced by the Respondent in her Answer Brief should be disregarded.[13]

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[13] In her conclusion, the Respondent argues that the points raised by the Petitioner in his Initial Brief were not argued in the court below and therefore could not be considered by this court. At the time of the trial of this action, 14 years of case law existed which clearly prohibited double-dipping. Also, at trial, the petitioner had preserved the issue as to the consideration of the respondents assets to meet her needs. With this comment, the Respondent is saying that the Petitioner at trial should have anticipated that the Third District would recede from previous case law and no longer follow *Diffenderfer*.

ATTORNEY'S FEES

The Respondent misconstrues the argument of the Petitioner as to the award of fees by the trial court. The issue as framed by the Petitioner as to the trial court's award to the Respondent of attorneys fee is simply whether this court in *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997) interpreted § 61.16, Fla. Stat. to allow an award of attorneys fees to a prevailing party when both parties have similar ability to pay attorney fees and there has been no finding of spurious or improper litigation. The Petitioner answers no to this question.

The Respondent, however, argues that the Petitioner is in a better financial position to pay the Respondent's trial attorney fees, citing *Hough v. Hough*, 739 So.2d 654 (Fla. 4th DCA 1999); *Leonard v. Leonard*, 613 So.2d 1339 (Fla. 3d DCA 1993); *Creel v. Creel*, 568 So.2d 942 (Fla. 3d DCA 1990); and , *Nisbeth v. Nisbeth*, 568 So.2d 461 (Fla. 3d DCA 1990). In these cases, the court made findings as to a party's superior financial ability to pay fees and so ordered the payment of fees. In the instant case, the trial judge found that each party had funds to pay his and her own attorney fees and costs, so that there is no finding of either party having the superior ability to pay attorney fees and costs.

Instead, the Petitioner argues the trial judge's determination of the Respondent's entitlement to fees to be contrary to law because he employed a

prevailing party standard when he found that the Respondent "was put into the posture of defending the modification and has successfully defended" the Petitioner's modification proceedings. See, *Abraham v. Abraham*, 753 So.2d 625 (Fla. 3rd DCA 2000) (Court reversed an attorney fees award in a modification proceeding noting that the record did not demonstrate litigation made in bad faith, frivolously, spuriously, or for harassment).

The Respondent relies in support of her position that the lower court's attorney fees award must be upheld cases such as *Baker v. Green*, 732 So.2d 6 (Fla. 4th DCA 1999) (inexcusable frustration of visitation); *Goldman v. Smargon*, 524 So.2d 479 (Fla 3d DCA 1988) (baseless repetitious attempts to modify a final judgment); *Patterson v. Patterson*, 399 So.2d 73 (Fla. 5th DCA 1981) (willful refusal to comply with terms of final judgment with finding of contempt); and, *Spencer v. Spencer*, 305 So.2d 256 (Fla. 3d DCA 1974) (flagrant disregard of decree with finding of contempt). Not only has there been no finding of the egregious conduct as found to have existed in those cases, the record is devoid of such conduct. Although the Respondent obviously had to defend against the Petitioner's, that alone does not warrant the awarding of attorney fees. *Abraham v. Abraham*, supra. Therefore, the award of attorneys fees must be reversed.

CONCLUSION

The Third District Court's opinion should be quashed, and this court should render an opinion reaffirming the prohibition against double-dipping as set forth in *Diffenderfer*. This court should reverse the trial court's refusal to modify the Petitioner's alimony obligation for any or all the reasons set forth in the Petitioner's Initial Brief. The award of attorneys fees should also be reversed, especially if this court should not grant relief to the Petitioner as to alimony.

CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY, that a true copy of the above has been sent via U. S. First Class Mail to Nancy A. Hass, Esq., Nancy A. Hass P.A., The Prince George, 1865 S. Ocean Drive/Suite 5K, Hallandale, Fl. 33009, this ____ day of February, 2003. **I HEREBY FURTHER CERTIFY**, that the foregoing has been submitted in Times New Roman 14 point font.

By:_____

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