

IN THE SUPREME COURT OF FLORIDA

SHERRY PALICTE ZOLD,
Petitioner,

v.

JOHN R. ZOLD,
Respondent.

Supreme Court Case No. SC04-1858
Fifth DCA Case No. 5D03-148, 5D03-2117
Trial Court (Orange County) Case No. DR01-1145

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITATIONS.....ii

TABLE OF REFERENCES.....iv

ARGUMENTS ON APPEAL:

Argument I:

THE TRIAL COURT DID NOT ERR WHEN IT ATTRIBUTED K-1 INCOME TO RESPONDENT FOR PURPOSES OF COMPUTING SUPPORT OBLIGATIONS AND DID NOT ERR WHEN IT CONSIDERED RESPONDENT’S INTEREST IN TRI TECH FOR BOTH DISTRIBUTION AND SUPPORT.....

1

Argument II:

THE APPELLATE COURT ERRED IN ITS OPINION BY ADDING ADDITIONAL CRITERIA TO THE DEFINITION OF INCOME UNDER SECTIONS 61.30, FLA. STAT. AND 61.046, FLA. STAT. AND PLACING THE BURDEN OF PROOF ON PETITIONER

7

Argument III:

THE APPELLATE COURT ERRED IN ITS OPINION BY SUPERCEDING ITS VIEW OF THE FACTS FOR THE TRIAL COURT’S WHEN THERE WAS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT’S FINDINGS AS TO THE HUSBAND’S INCOME.....

8

Argument IV:

THE TRIAL COURT’S COMBINED ORDERS REQUIRING HUSBAND TO CONTRIBUTE TO WIFE’S ATTORNEY’S FEES AND COSTS IS NOT AN ABUSE OF DISCRETION AND IS BASED ON FINDINGS WHICH ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.....

11

Argument V:

THE DISTRICT COURT DID NOT ERR BY RULING THAT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT’S FINDING THAT THE HUSBAND OWNED 57.15428% OF THE

STOCK IN TRI TECH CORPORATION.....	11
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	15
CERTIFICATE OF COMPLIANCE.....	15
APPENDIX.....	

Ai

TABLE OF CITATIONS

CASE LAW

A.D. v. Dept. of Children and Families
837 So.2d 1078 (Fla. 5th DCA
2003).....10,13,14

Acker v. Acker
821 So. 2d 1088, 1092 (Fla. 3d DCA
2002).....6

Canakaris v. Canakaris
382 So.2d 1197 (Fla.
1980).....9,12

Cerra v. Cerra
820 So.2d 398 (Fla. 5th DCA
2002).....14

Cole v. Cole
723 So.2d 925 (Fla. 3d DCA
1999).....10,13

DeSanto v. Desanto
621 So.2d 560 (Fla. 2nd DCA
1993).....10,11

Diffenderfer v. Diffenderfer
491 So.2d 265 (Fla.
1986).....6

Drakyne v. Drakyne
460 So. 2d 582, 583 (Fla. 5th DCA
1984).....9,12

Huber v. Huber
687 So.2d 42,43 (Fla. 5th DCA
1997).....14

Kuvin v. Kuvin
442 So.2d 203 (Fla.
1983).....9,12

Layeni v. Layeni

843 So. 2d 295 (Fla. 5th DCA 2003).....	6
Martinez v. Martinez 761 So.2d 433 (Fla. 3d DCA 2000).....	7
McHugh v. McHugh 702 So.2d 639 (Fla. 4 th DCA 1997).....	4
Morse v. Morse 796 So.2d 1200 (Fla. 3d DCA 2001).....	1,14
Oxley v. Oxley 695 So.2d 695 (Fla. 4 th DCA 1997).....	4
Perdoza v. Perdoza 779 So.2d 616 (Fla. 5 th DCA 2001).....	13
Roberts v. Wright 871 P. 2d 390 (N.M. App. 1994).....	7,8
Ryan v. Ryan 277 So.2d 266, 272 (Fla. 1973).....	13
Sohacki v. Sohacki 657 So.2d 41 (Fla. 1 st DCA 1995).....	7
Zipperer v. Zipperer 567 So. 2d 916 (Fla. 1 st DCA 1990).....	7

Statutes

Section 61.075, Fla. Stat.....	6
Section 61.08, Fla. Stat.	

(1991).....7

Section 61.08(2)(g), Fla. Stat.
(2002).....7

Section 61.30(2)(a), Fla. Stat
(2002).....8

Laws of Florida section 91-246
.....7

TABLE OF REFERENCES

The Petitioner, Sherry Palicte Zold, the Former Wife below, shall be referred to as "Petitioner" or "Wife."

The Respondent, Jack F. Zold, the Former Husband below, shall be referred to as "Respondent" or "Husband."

All references to the Record on Appeal shall be denoted by the letter R and the page on the record.

All references to the transcript of the Trial on the Petition for Dissolution of Marriage shall be denoted by the letter T and the page of the transcript.

All references to the transcript of the Hearing on Attorney's Fees and Costs in the Dissolution of Marriage and Interim Appeal shall be denoted by the letters TAF and the page of the transcript.

All references to Appendix shall be indicated by the abbreviation "App."

ARGUMENT I

THE TRIAL COURT DID NOT ERR WHEN IT ATTRIBUTED K-1 INCOME TO RESPONDENT FOR PURPOSES OF COMPUTING SUPPORT OBLIGATIONS AND DID NOT ERR WHEN IT CONSIDERED RESPONDENT'S INTEREST IN TRI TECH FOR BOTH DISTRIBUTION AND SUPPORT

The parties agree that an important issue at trial was the amount of Husband's income. Respondent attempts to reargue facts and convince this Court that the trial court's factual determination of income was wrong. Respondent refuses to acknowledge the basic precept that the trial court is the determiner of fact, not the Appellate Courts. The trial court's findings are presumed correct in this Court unless specifically shown to have no support of competent substantial evidence. Morse v. Morse, 796 So.2d 1200 (Fla. 3d DCA 2001).

Respondent rehashes factual arguments. Petitioner did not agree with Respondent, at trial, about the amount of Husband's income. Wife presented a chain of evidence of Husband owning a majority portion of Tri Tech. The trial court did not believe Respondent or his witnesses about Husband's income and ownership interests of Tri Tech.(R1567, 1568, 1570-1). The trial court did believe Mr. Stahl, the evaluations he made, and Tri Tech's audited financial statements. The trial court found that Respondent's proposed view of the evidence would be illegal under Federal law and would further evidence conduct which impaired Husband's believability.

Respondent attempts to shift the burden to Petitioner. Petitioner believes that the trial court did not err in finding that the income of \$245,388 represented Respondent's income for support purposes.

The issue is not and cannot be whether Husband received some specific income because this narrow view creates deception. The case law cited in Petitioner's Initial Brief demonstrates that receiving funds is not and should not be the test for determining a party's income. Respondent acknowledges that receiving income is not the test, saying in his Answer Brief, "that anything of value received or capable of being received constitutes income."

In this case, during trial, Wife produced significant evidence of Husband's income, including but not limited to, Tri Tech tax returns and income and asset analyses shown in the Tri Tech Appraisal Report (R962) Appendix 1, Page 1 through 3 (a copy of which is set forth in Appendix 1 to this Brief).

Once Petitioner produced this evidence of Respondent's income, she established a prima facie case of "gross receipts minus ordinary and necessary expenses necessary to produce such income". The trial court accepted this evidence as a properly reflected amount. The burden falls on Husband to prove any other expenses, if, as here, he asserts there are

expenses beyond those shown in the business documentation. There was clear evidence of significantly higher income to Husband and the trial court's determination is supported by substantial competent evidence. Respondent states, in his Answer Brief, that the trial court determined that Husband had \$245,388 available for support and attorneys fees. The trial court did not make this finding. The trial court found Husband's gross income (not available income) and then used that gross number for further calculations. The trial court found that the tax return was reflective of Husband's true income. Husband, who controlled all financial information for the year of the trial, chose to present no evidence of income after the 2001 information.

The trial court's determination requires the understanding of the nature of an income analysis for support purposes. The issue before the trial court for any support determination is not what was Husband's income last year but determines what is Husband's current income. The trial court reviews historical information as evidence of what the current situation appears to be. The trial court made such determination in this case and should be affirmed.

Respondent argues that the trial court's finding for Husband's income included a one time non-recurring amount

which is not reflective of Husband's historical income. The trial court rejected this argument. The income analysis for the years 1997 through 2001 shown in the Tri Tech Appraisal Report (R962) Appendix 1, Page 3 shows the five year income picture of the company, with gross sales increasing consistently.

The trial court accepted the evidence in that report, showing a company with sales increasing from 1997 to 2001 at 11.39% per year, liquidity ratios exceeding those of the industry when adjusted to replacement cost; leverage ratios of the company outperforming the industry when adjusted to replacement cost. (See Appendix 2 attached hereto).

Respondent argues that the income was not available to Husband. The trial court found that the income was available to Husband and set forth its findings which are in Petitioner's Statement of Facts, (Initial Brief P4).

Oxley v. Oxley 695 So.2d 695 (Fla. 4th DCA 1997) and McHugh v. McHugh 702 So. 2d 641 (Fla. 4th DCA 1997) both support the trial court and its ruling in this case. Respondent attempts to strain Petitioner's Initial Brief by saying she asserts "the Husband, ...has exclusive control" over distributions. Respondent added the word "exclusive." There is competent substantial evidence to support the trial

court's findings on corporate control.

Respondent asserts that Petitioner misrepresented the evidence about available cash. The Appraisal Report demonstrated gross cash flow as \$414,305 in 2001 and cash and equivalents rising, accounts payable reducing, current long term debt being reduced from, and retained earnings rising. (Appendix 1 page 1.) All of these facts support a conclusion that Husband was hoarding funds.

Respondent attempts to rely on the Fifth District's conclusions that the trial court had to look at other factors. The evidence in this case, as summarized above, showed all of those factors. Fifty-seven percent of the retained earnings represents \$318,732 which could be withdrawn from the business by Husband without any tax impact. The Appraisal Report showed the business to be viable, with greatly reduced responsibility to creditors and significantly growing cash available to liquidate Petitioner.

The decision of the Fifth District attempts to place the burden on the wrong party. The Fifth District re-analyzed these complex facts without seeing any witnesses and not mentioning the Appraisal or its findings which were relied on and accepted as accurate by all parties, made its own determination that was not available and that the

undistributed corporate income should not be included in Husband's income.

Respondent wants to reargue his accountant's testimony which appears to have been rejected by the trial court. "The sum total of my understanding of the ownership of the company being the initial information that I got was that Jack owned four-sevenths, and Jay owned three-sevenths."

Respondent argues that the trial court cannot consider Husband's close corporation income because the income was considered in the business value. This argument exhibits that Respondent does not understand the two separate analyses of evidence involved in a case like this.

In analysis one (valuing the asset) the expert takes a picture of the business on a specific date and time to see what exists, Layeni v. Layeni 843 So. 2d 295 (Fla. 5th DCA 2003).

This demonstrates the value of the business on the selected valuation date. Further assets acquired by either party will typically be non marital because the date of filing cuts off the accumulation of further marital assets. F.S. 61.075.

In the second analysis, the trial court examines existing evidence of the parties' income from earnings, assets they receive, Diffenderfer v. Diffenderfer 491 So.2d 265 (Fla.

1986); Acker v. Acker 821 So. 2d 1088, 1092 (Fla. 3d DCA 2002), other assets they have, business income and all other sources are as of this time. As argued above, this analysis, looks at historical data to determine what the income is expected to be. The fact that the same data is used to reach two different factual conclusions does not make double counting. Evidence is often used for multiple purposes when making factual determinations.

The evidence before the trial court supported the finding that Husband's reasonable earning ability for current and future support purposes was \$245,288 and that Husband had control of or access to retained earnings and cash and its equivalents.

ARGUMENT II

THE APPELLATE COURT ERRED IN ITS OPINION BY ADDING ADDITIONAL CRITERIA TO THE DEFINITION OF INCOME UNDER SECTIONS 61.30, FLA. STAT. AND 61.046, FLA. STAT. AND PLACING THE BURDEN OF PROOF ON PETITIONER

Respondent states, "It is difficult to imagine why authority should be needed for a common sense requirement" to justify adding requirements to statutory definitions. Respondent also states that in section 61.08(2)(g) one of the factors in the award of alimony is "All sources of income available to either party," somehow restricts the definition of income.

This language was added to section 61.08, F.S. in 1991, Laws of Florida section 91-246. Yet the prior Appellate Courts looking at this issue did not make this interpretation. See Martinez v. Martinez, 761 So.2d 433 (Fla. 3d DCA 2000), Sohacki v. Sohacki, 657 So.2d 41 (Fla. 1st DCA 1995), and Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA 1990).

Respondent has acknowledged "that anything of value received or capable of being received constitutes income." Petitioner asserts that the language in 61.08(2)(g) does not limit the definition of income but should be expansively viewed to make sure that all economic benefits received by an individual are considered by the court.

The Fifth District's analysis requiring an additional element of income is unnecessary. Roberts v. Wright, 871 P. 2d 390 (N.M. App. 1994), raised this question by interpreting Section 40-4-11.1(C)(2)(b) which defined gross income of a closely held business almost identical to our definition.

The parent claiming a business expense must show not only that it is ordinary and necessary to the business, but also that it is irrelevant to calculating support obligations Id.

The Roberts Court went on to explain that, "As we have stated, if there is a disagreement about the appropriateness of the deduction, then the deduction must be justified by the party claiming the expense." Id.

In the case at issue, Respondent attempted to convince the trial court that it needed to retain earnings for business purposes. The trial court did not believe the Respondent's evidence.

Alternatively, the trial court should recognize that the income definitions for support purposes are based on the economic benefit received by an individual and not some artificial manipulation. This principle is substantiated in the definition section 61.30(2)(a). In this case, the item at issue is whether business income from a close corporation should be included in income. The definition is clear that business income should be included. The trial court's conclusion on Husband's income is supported by substantial competent evidence and should have been affirmed.

ARGUMENT III

THE APPELLATE COURT ERRED IN ITS OPINION BY SUPERCEDING ITS VIEW OF THE FACTS FOR THE TRIAL COURT'S WHEN THERE WAS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDINGS AS TO THE HUSBAND'S INCOME

Respondent attempts to shift the burden of proof on this issue. The standard of review is abuse of discretion. See Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983), and Drakyne v. Drakyne, 460 So. 2d 582, 583 (Fla. 5th DCA 1984). In his Answer Brief, Respondent reargues evidence presented at trial, which the

trial court considered and did not find persuasive, to support the Fifth District's opinion which superceded the trial court.

Respondent states "There is nothing in this record, other than one entry on line 22 of the 2001 tax return, to support a finding that the Husband ever earned anywhere near in the neighborhood of \$245,000.00" Respondent ignores the testimony of Mr. Stahl, who documented Husband's income. In 2001, Husband's income was reflected at \$245,000.00. However, if questionable bookkeeping entries were not used then Respondent's income would have been \$312,000.00 as reflected on Respondent's return and if his proper ownership interest of 57.15428% was used then his income would have been \$395,000.00. (R1570). Respondent ignores sections of Mr. Lykkebak's testimony where Lykkebak confirmed the above calculations, the Business Analysis in evidence (R962 - Appendix 1 and 2), the conflicting testimony of Husband, and the compilation of the evidence of Husband's efforts to deceive the trial court about his ownership issue.

The trial court rejected Husband's position on ownership and found that he owned 57.15428% of Tri Tech, and the court rejected Husband's position that there was not adequate liquidity in the corporation, noting the increase in its cash assets. The income analysis shown in the Tri Tech Appraisal

Report (R962) Appendix 1, Page 3 (see detail in Argument I) showed gross sales increasing, gross profits significantly up, net income going up and gross cash flow increasing. The evidence showed that the company is mature and experiencing positive growth numbers. Tri Tech Appraisal Report (R962) page 2 (See Appendix 2 attached hereto).

The Appellate Court did not mention any of the above facts. The Fifth District merely substitutes its own analysis and rejects the findings and observations of the trial court. The Appellate Court erred because the trial court, as finder of fact, is to resolve conflicts in the evidence and weigh the credibility of witnesses, and great deference is to be afforded to the finder of fact because it has first hand opportunity to see and hear the witnesses testify. See A.D. v. Dept. of Children and Families, 837 So.2d 1078 (Fla. 5th DCA 2003) and Cole v. Cole, 723 So.2d 925 (Fla. 3d DCA 1999). The Appellate Court's opinion should not stand.

Respondent argues that DeSanto v. DeSanto, 621 So.2d 560 (Fla. 2nd DCA 1993) mandates reversal. DeSanto involved a situation where the trial court relied on evidence that Husband had income in prior years that the evidence showed without contradiction would never be there again. In evaluating the income issue, the Appellate Court determined

that the trial court erred because the historic income was not reflective of the current income. This case has no bearing on the issue of the Appellate Court usurping the fact finding function.

This Court should reverse the District Court and reinstate the lower court's findings.

ARGUMENT IV

THE TRIAL COURT'S COMBINED ORDERS REQUIRING HUSBAND TO CONTRIBUTE TO WIFE'S ATTORNEY'S FEES AND COSTS IS NOT AN ABUSE OF DISCRETION AND IS BASED ON FINDINGS WHICH ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

Petitioner agrees that if this Court affirms the remand from the Appellate Court, the issue of attorneys fees and costs will be revisited. However, neither issue should be readdressed because the reversal of both awards should not stand. The remand directions should be to reconsider the awards. This Court should reverse the Fifth District remands as set forth in the above Arguments, and should order the District Court opinion vacated and the trial court affirmed.

ARGUMENT V

THE DISTRICT COURT DID NOT ERR BY RULING THAT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT THE HUSBAND OWNED 57.15428% OF THE STOCK IN TRI TECH CORPORATION

Respondent argues that the Appellate Court erred in affirming the trial court's finding that, at trial, Respondent owned 57.15428% of Tri Tech and not 40% as asserted by

Respondent. The standard of review for this issue is abuse of discretion. See Canakar v. Canakar, 382 So.2d 1197 (Fla. 1980), Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983), and Drak kyne v. Drak kyne, 460 So.2d 582, 583 (Fla. 5th DCA 1984). The Fifth District's determination that the trial court's order is supported by substantial competent evidence should be affirmed.

The Record contains substantial evidence that the Respondent owned more than 50% of Tri Tech. The trial court considered evidence from the Respondent, his business partner, his CPA, and the evaluating CPA, Briggs Stahl, as well as documentary evidence regarding Respondent's interest in Tri Tech.

Respondent reargues the factual issues determined by the trial court and affirmed by the Fifth District. It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the evidence. See Kuvin, supra and Drak kyne, supra.

The trial court did not find Respondent or his witnesses to be credible of the Tri Tech ownership issue. The trial court, as finder of fact, is to resolve conflicts in the evidence and weigh the credibility of witnesses, and great deference is to be afforded to the finder of fact because it

has first hand opportunity to see and hear the witnesses testify. See A.D., supra and Cole, supra. The trial court made substantial findings in the Final Judgment. (R1565-1568).

The trial court relied on Mr. Stahl's testimony, a certified business appraiser and accredited business evaluator. (T147-182).

Respondent's share of Tri Tech reflected on his 1999 K-1 was 57.15428 percent. (T497). Respondent testified that for the tax year 2000, his ownership interest in Tri Tech was 57.15428 percent. (T497-8).

John Lykkebak testified in the 2001 audit, the corporation issued 700 shares. (T764-67). The trial court considered Mr. Lykkebak's testimony and did not find this evidence credible. See Perdoza v. Perdoza 779 So.2d 616 (Fla. 5th DCA 2001).

The balance of Respondent's arguments labeled "Argument II" are reargument of factual determinations by the trial court which were affirmed by the Appellate Court.

Respondent cites Ryan v. Ryan, 277 So.2d 266, 272 (Fla. 1973) for support that the trial court misused the clean hands doctrine. In Ryan, this Court stated,

. . . there may be a direct fraud perpetrated upon the other spouse by misrepresentations, concealments or untruths, manifesting itself either in the course of the proceedings or at a later time. The courts

will not indulge or reward falsehood and when such a purposeful inducement or fraud upon the other spouse or the court is made to appear by the evidence
. Id.

The trial court's reference to unclean hands was justified in this case because the trial court referenced the doctrine as additional explanation of why the court rejected Husband's testimony and that of his witnesses.

The trial court heard evidence about Mr. Atassi and his involvement with Tri Tech and made findings which were affirmed by the Appellate Court. See A.D., supra, Cerra v. Cerra, 820 So.2d 398 (Fla. 5th DCA 2002) and see Morse, supra.

Respondent argues that the trial court made meaningful appellate review impossible by "creating a climate of confusion." The trial court had competent evidence to support its ruling and, therefore, this Court has no basis or jurisdiction to make a contrary finding. See Cerra, supra and Morse, supra.

Respondent cites Huber v. Huber, 687 So.2d 42,43 (Fla. 5th DCA 1997)but Huber is distinguishable because the trial court used different methods for valuing different assets (gross versus net equity) without providing an evidentiary basis. Id. In this case, the trial court used Mr. Stahl's valuation method that was uncontradicted in the evidence and then

applied that same value to the uncontradicted evidence about the number of shares of stock owned by the two Tri Tech shareholders. The trial court had the opportunity to consider the income or market approach but decided to use the asset approach, the lowest expert value offered.

The trial court and Appellate Court did not err by holding that there is substantial competent evidence to support the trial court's finding that Respondent owns 57.15428% of Tri Tech.

CONCLUSION

Petitioner requests that this Court affirm the Final Judgment of Dissolution of Marriage, the Final Judgment on Attorney's Fees on Dissolution of Marriage, and Final Judgment on Attorney's Fees on Interlocutory Appeal after Remand from Appellate Court entered by the trial court. In the event that this Court affirms the Fifth District's opinion on remand, then the Petitioner requests that this Court specify the procedure for remand and the party which has the burden of proof on this issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by facsimile and U.S. Mail to Charles Willits, Esq., 1407 E. Robinson St., Orlando, FL, 32801, this ____ day of February, 2005.

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CERTIFICATE OF COMPLIANCE

I, AMY HAMLIN, CERTIFY THAT the font used in this Reply
Brief is Courier New (12 point) type.

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