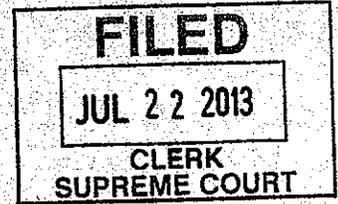


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012-SC-000563-D



KAVEN L. RUMPEL

APPELLANT

v.

APPELLEE'S BRIEF

KATHIE W. RUMPEL (now Wolford) and
DIANA L. SKAGGS

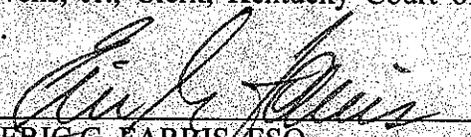
APPELLEES

APPEAL FROM KENTUCKY COURT OF APPEALS
2011-CA-000368
-AND-
BULLITT CIRCUIT COURT
HONORABLE RODNEY D. BURRESS
09-CI-00456

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the within was sent via first class mail this 19th day of July 2013, to: William Dennis Sims, 713 West Main Street, Suite 400, Louisville, KY 40202; J. Gregory Troutman, 1300 Clear Springs Trace, Suite 3, Louisville, KY 40223; Diana L. Skaggs, 623 W. Main St., Suite 100, Louisville, KY 40202; Hon. Rodney D. Burress, Bullitt Circuit Court, 250 Frank E. Simon Avenue, P.O. Box 746, Shepherdsville, KY 40165; and Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.


ERIC G. FARRIS/ESQ

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Kathie Rumpel, does not believe oral argument would assist this Honorable Court in resolving the issues raised on appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

Appellee, Kathie Rumpel, (hereinafter referred to as “Appellee”) accepts most of the facts set forth by Appellant, Kaven Rumpel, (hereinafter referred to as “Appellant”) in his *Statement of the Case* as correct. Minimal repetition of those facts, in combination with other evidence presented at trial, will serve to provide this Honorable Court with insight into the framework within which the Trial Court weighed and evaluated the evidence before it, including the credibility of the witnesses.

The most significant issue in this case was the valuation of two businesses owned by the Appellant, Advantage Associates, Inc., (hereinafter referred to as “Advantage”) and Highview Manor Associates, LLC., (hereinafter referred to as “Highview”).¹ Advantage operated a bingo hall used for charitable gaming, in space which it leased from its wholly owned subsidiary, Highview.² Highview charged its parent, Advantage, only \$2.21 per square foot as rent: significantly less than other shopping center tenants were paying.³ The shopping center and accompanying real estate owned by Highview had been appraised multiple times throughout its ten year history. During the Trial Court proceeding the real estate was again appraised with an agreed upon valuation date of December 31, 2008.⁴ Appellee’s appraiser valued the real estate at \$1.4 million, and

¹VR No. 1: 10-28-10; 9:48:10 to 9:48:36; 9:55:56

²VR No. 1: 10-28-10; 9:48:38

³VR No. 2: 10-29-10; 1:45:01; 1:46:40

⁴Petitioner’s Trial Exhibit 3, and Petitioner’s Trial Exhibit 5

Appellant's appraiser valued the real estate at \$810,000.⁵

The real estate was heavily indebted, as the debt on the Highview real estate was approximately \$1.47 million.⁶ Appellee's appraiser valued the two businesses separately, giving a net value of \$28,641 on the real estate owned by Highview, and a value of \$354,600 to Advantage. Appellee's appraiser valued both businesses together at \$383,000.⁷ Appellant's business valuation expert valued the businesses together as one entity, reaching a negative value for both businesses combined.⁸ In its Findings of Fact, Conclusions of Law and Judgment (hereinafter referred to as "Judgment"), the Trial Court accepted the valuations of Appellee's experts because they were more thorough.⁹

The day-to-day financial operation of the Advantage bingo business was handled by Appellant's sister, Karen Chapman¹⁰, who is a felon having been convicted of robbery.¹¹ Ms. Chapman also owned and operated a cleaning company which was separately paid on contract by Advantage to clean the bingo hall.¹² Bart Adkins, a felon convicted of manslaughter, was the maintenance manager for Advantage.¹³ Required

⁵VR No. 2: 10-29-10; 10:25:36; 11:16:57; 11:48:49; Petitioner's Trial Exhibit 3; and Petitioner's Trial Exhibit 5

⁶VR No. 2: 10-29-10; 2:33:44

⁷VR No. 1: 10:28:10; 10:11:38, and Petitioner's Trial Exhibit 1

⁸VR No. 2: 10:29:10; 2:38:01; Petitioner's Trial Exhibit 6 ...Mr. Robinson, relying on Mr. Allgeier's real estate appraisal, valued both businesses together as having a value of (\$289,000)

⁹Judgment, pp. 10-11; R.A. pp. 688-689

¹⁰VR No. 2: 10-29-10; 3:32:38

¹¹VR No. 2: 10-29-10; 3:41:13 - 3:41:27

¹²VR No. 2: 10-29-10; 3:47:48 - 3:48:05

¹³VR No. 2: 10-29-10; 3:51:47

quarterly gaming filings did not even show Mr. Adkins as being employed by Advantage,¹⁴ nor did the required quarterly gaming filings reflect Ms. Chapman's financial responsibilities with the company.¹⁵

Advantage also separately ran a cash snack bar business inside the bingo hall, as well as an ATM machine¹⁶ for which customers pay fees for the use of the machine. According to Ms. Chapman, Advantage could no longer afford to supply the cash to the ATM machine. Therefore, another employee took over the operation of that machine on a temporary basis.¹⁷ The cash from the snack bar, totaling between \$700 and \$1,500 per session was stored in an office safe.¹⁸ The bingo hall operated two sessions per day six days per week. Appellee testified that Appellant would remove money from that cash stash and would sometimes hand her money out of that cash.¹⁹

In December 2008, and prior to the parties' separation in April 2009, Appellant entered into an agreement to buy out his fifty percent (50%) partner, Neil Alioto, because Mr. Alioto, according to Appellant, took more than one million dollars from Advantage. Under the terms of the agreement, Appellant purchased Mr. Alioto's shares for a minimum price of \$122,000 and also received assignment of all restitution totaling

¹⁴VR No. 2: 10-29-10; 3:53:05

¹⁵VR No. 2: 10-29-10; 3:46:36; 3:47:24; 3:47:37

¹⁶VR No. 1: 10-28-10; 1:51:30; 3:15:00; VR No. 2: 10-29-10; 4:44:25

¹⁷VR No. 2: 10-29-10; 4:03:29; 4:03:52

¹⁸VR No. 1: 10-28-10; 1:52:21; 1:52:58; 1:53:09

¹⁹VR No. 1: 10-28-10; 1:53:52

\$337,206.22 from former employee Acquanetta Jewell, and an additional \$160.00 per month from Advantage.²⁰

Appellant receives a net monthly police pension of \$2,133.07.²¹ Until July 24, 2009, Appellant's salary from Advantage was approximately \$1,500 per week. After that he reduced his salary to \$620.00 per week.²² Notwithstanding the existence of a Status Quo Order, Appellant removed \$15,000 in cash value from a John Hancock Life Insurance policy, claiming he needed it to meet his living expenses.²³ However, Appellant acknowledged that he had no rent obligation because he was living with his fiancé.²⁴ Appellant also acknowledged that he was driving a borrowed car, and claimed that he was dependent upon his fiancé to make the payment on the parties' Cadillac.²⁵ Appellant also claimed that he was in such financial straits that he was bouncing checks, and owed approximately \$15,000 in various taxes related to the business.²⁶

Despite these claimed financial difficulties, Appellant was able to reduce the financial indebtedness of Advantage by \$175,403 between December 31, 2008 and the date of trial.²⁷ Appellant also found the resources to reduce marital obligations by

²⁰Petitioner's Trial Exhibit 2; VR No. 2: 10-29-10; 4:37:57; 4:38:35

²¹Judgment, p.15, R.A. p. 693

²²VR No. 2: 10-29-10; 4:13:34 - 4:14:04

²³VR No. 2: 10-29-10; 4:10:36

²⁴VR No. 2: 10-29-10; 4:35:19

²⁵VR No. 2: 10-29-10; 4:34:10; 4:34:29

²⁶VR No. 2: 10-29-10; 4:32:06; 4:09:48

²⁷Order Amending Findings of Fact, Conclusions of Law and Judgment, p.2, R.A. p. 742; VR No. 2: 10-29-10; 3:49:01

\$78,000 during the pendency of the litigation, thereby reducing the marital debt by \$35,678.²⁸

Appellant appealed the decision of the Trial Court to the Court of Appeals. The Court of Appeals rendered its Opinion Affirming (hereinafter referred to as "Opinion") the Judgment and Order Amending Findings of Fact, Conclusions of Law & Judgment (hereinafter "Order Amending") of the Trial Court in its entirety.²⁹ In considering the valuation of Advantage and Highview, the Court of Appeals applied the standard that Kentucky appellate courts will not disturb a trial court's valuations unless the decision is contrary to the weight of the evidence. *Clark v. Clark*, 782 S.W.2d 56 (Ky. App.1990).³⁰ The Court of Appeals held that the Trial Court's acceptance of the appraisals by Appellee's experts was well-reasoned and based upon sufficient evidence.³¹ Furthermore, not only was the Trial Court's acceptance of the Appellee's appraisal not an abuse of discretion, but the Trial Court was "...meticulous in its analysis of the valuations submitted."³² In affirming the Trial Court's award of attorney's fees, the Court of Appeals rejected Appellant's argument that the Trial Court had confused the requirements of CR 37.03 with those of KRS 403.220.³³ The Court of Appeals held that a trial court may award attorney's fees pursuant to KRS 403.220, but in order to justify

²⁸VR No. 2: 10-29-10; 4:24:38 -4:26:01

²⁹ Opinion pp. 1-15

³⁰ Opinion p. 8

³¹ Id.

³² Opinion p.11

³³ Opinion p. 12

such an award “...there must exist a disparity in the parties’ financial resources.” *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001)³⁴ The Court of Appeals also stated that “...obstructive tactics and conduct, which multiply the records and proceedings are proper considerations justifying both the fact and the amount of the award.” *Sexton v. Sexton*, 125 S.W.3d 258, 273 (Ky. 2004), quoting *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).³⁵ After review of the record the Court of Appeals confirmed that Appellee had “...incurred significant legal fees as a direct result of the contentious business-valuation question” and that there were “...disparate financial resources [between] the parties.”³⁶ The Court of Appeals affirmed the Trial Court’s award of attorney’s fees, as the award was “...reasonable and was supported by sound legal principles.”³⁷

Other facts relevant to the issues raised in Appellant’s brief will be discussed below as necessary to respond appropriately to those arguments.

³⁴ Opinion p. 12

³⁵ Opinion pp. 12-13

³⁶ Opinion p. 13

³⁷ Id.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES.

The Court of Appeals properly affirmed the Trial Court's award of attorney fees to the Appellee under KRS 403.220. Kentucky courts have followed the premise that a trial court's judgment and valuations will not be disturbed unless the decision is contrary to the weight of the evidence. *Clark v. Clark*, 782 S.W.2d 56 (Ky. App.1990). Additionally, this Honorable Court has held that "The amount of an award of attorney's fees is in the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct." *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). There is an abundance of evidence in the record which supports the Trial Court's award of attorney's fees in the case at bar, and such an award was made within the discretion of the Trial Court.

Appellant challenges the award of attorney's fees, asking that this Honorable Court find instead that the award was based upon CR 37.03, and that such an award was improper. Kentucky Civil Rule of Procedure 37.03 allows for sanctions to be issued in the form of attorney's fees based upon an improper denial of a requested admission. The Trial Court properly made the award of attorney's fees under KRS 403.220. Even if this Honorable Court finds that the award was made under CR 37.03 instead of KRS 403.220, such an award was still proper, and the decisions of the Court of Appeals and Trial Court should be affirmed.

A. THE TRIAL COURT GAVE PROPER CONSIDERATIONS IN ACCORD WITH KRS 403.220 IN AWARDING ATTORNEY'S FEES.

The award of attorney's fees was made under the provisions of KRS 403.220. The language of KRS 403.220 allows trial courts to make an award of attorney's fees in Dissolution of Marriage actions at the trial court's discretion. KRS 403.220 states as follows;

“The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.”

An award under KRS 403.220 is proper after a trial court has considered the disparate financial situations of the parties. Additionally, trial courts are allowed, at their discretion, to take into consideration the obstructive tactics and conduct of the parties which multiply the records and proceedings, in determining the fact and amount of the award. *Sexton v. Sexton*, 125 S.W.3d 258, 273 (Ky. 2004), quoting *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).

After extensive litigation and court proceedings, which have resulted in a voluminous record, the Trial Court, in its Judgment Ordered Appellant to pay attorney's fees to Appellee and her attorneys.³⁸ When reaching its decision, the Trial Court discussed how an award of attorney's fees under CR 37.03 would be proper because of the extended and unnecessary resources which were used in determining the value of a

³⁸Judgment, pp. 17 and 21; R.A. pp. 695 and 699

business, the Appellant having improperly denied the value of same in properly propounded Request for Admissions, Interrogatories, and Request for Documents (hereinafter referred to as "Request for Admissions"). However, the Trial Court ultimately based the award of attorney's fees on KRS 403.220 stating, "...after considering the provisions of KRS 403.220, that [Appellant] shall pay \$50,000.00 to [Appellees]..."³⁹

If this Honorable Court finds that the award of attorney's fees was made under the provisions of CR 37.03 it should still affirm the rulings of the Court of Appeals and the Trial Court, as such an award was proper under either KRS 403.220 or CR 37.03. Kentucky Rule of Civil Procedure 37.03, which allows courts to award attorney's fees as a sanction for improperly denying a requested admission, states as follows:

"If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to Rule 36.01, or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (d) there was other good reason for the failure to admit."

On March 1, 2010, Appellee served upon Appellant Request for Admissions pursuant to CR 36. Request number two of the Request for Admissions requested that Appellant admit, "The value of your resulting 100% interest in Advantage Associates,

³⁹Judgment, p.17, R.A. p. 695

Inc. and Highview Associates, LLC is \$265,000 as of December 9, 2008.”⁴⁰ Appellant denied this request in Respondent’s Answers to Petitioner’s First Set of Requests for Admissions, Interrogatories and Request for Documents (hereinafter referred to as “Answers to Request for Admissions”) which were answered on or about March 23, 2010.⁴¹ Included with his Answers to Request for Admissions was a document labeled “Exhibit. 1.” This document was a letter from Joseph Bryan with Bryant Appraisal Company dated December 12, 2008 which stated that “...the estimated market value of the leased fee interest of [High View Manor Center], as of December 9, 2008 is \$1,870,000.00.”⁴² This letter provided no explanation for the estimated market value, nor did it account for any encumbrances upon the property. Therefore this letter in no way accurately reflected what the value of Appellant’s 100% interest in Advantage and Highview was as of December 9, 2008.

Appellant argues that the award of attorney’s fees was made as a sanction for his denial of the requested admission, and that such an award is improper. However, based upon his denial of the requested admission, an award under CR 37.03 would have been proper.

B. A FORMAL WRITTEN MOTION IS NOT NECESSARY FOR A COURT TO ORDER A CR 37.03 SANCTION.

Despite the award of attorney’s fees being made under the provisions of KRS 403.220, Appellant argues that an award under CR 37.03 was improper because a formal motion for such an award was not made by Appellee. An award of attorney’s fees under

⁴⁰ Request for Admissions attached as Appendix 4 to Appellant’s Brief.

⁴¹ R.A. p. 396

⁴² Respondent’s Exhibit 1 to Answers to Request for Admissions, R.A. pp. 396-446

CR 37.03 would have been proper as Appellee had applied to the Trial Court for an award of attorney's fees in her Proposed Findings of Fact and Conclusions of Law and Judgment (hereinafter referred to as "Proposed Findings"), which were timely filed with the Trial Court.⁴³ The Appellant challenges the award of attorney's fees on the grounds that a formal motion for attorney's fees under CR 37.03 was not independently filed. The language of CR 37.03 states as follows,

"If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, **he may apply to the court** (emphasis added) for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to Rule 36.01, or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (d) there was other good reason for the failure to admit." (Emphasis added).

Under the language of CR 37.03 a formal motion is not required to authorize the court to order sanctions for an improper denial to a requested admission, but instead a mere application to the court is required to allow the court to consider CR 37.03 sanctions. Appellee, in her Proposed Findings, which was filed in accordance with local rule BCR 300(1),⁴⁴ properly applied to the Trial Court for an award of attorney's fees

⁴³Proposed Findings R.A. 631-646

⁴⁴BCR 300(1), At least five (5) days prior to trial each party shall file proposed jury instructions or proposed findings of fact and conclusions of law as appropriate.

which were unnecessarily incurred due to the improper denial to a request for admissions by Appellant.⁴⁵ The filing of said Proposed Findings both applied to the Trial Court for the award of attorney's fees, and also put Appellant on notice that such a request was being made.⁴⁶ When the issue of attorney's fees was raised at trial Appellant failed to raise an objection, and in fact, through his counsel requested an un-redacted copy of the itemization of attorney's fees accrued.⁴⁷

Appellant's brief to this Honorable Court misapplies the facts of *Cochran v. Cochran*, 746 S.W.2d 568 (Ky. App. 1988). In *Cochran* a trial court had awarded attorney's fees under KRS 403.220, which allows for the award of attorney's fees when the parties' financial resources are disparate, while stating that the award was for misconduct of one party.⁴⁸ The Court of Appeals stated in *Cochran* that the award was improper because the trial court had made the award under KRS 403.220 while citing to conduct which is remedied under CR 37, and that CR 37 sanctions could have been considered had a motion been filed.⁴⁹ In *Cochran* no request was made to the court for an award of attorney's fees. Instead the trial court had taken it upon itself to remedy what it viewed as disparate financial resources and misconduct during the proceedings. Unlike *Cochran*, in which the parties never applied to the court for attorney's fees and the fees were awarded under KRS 403.220 despite there not being disparate financial situations of

⁴⁵ Proposed Findings R.A. 631-646

⁴⁶ Id.

⁴⁷ VR No. 2. 10/29/10 1:26:06

⁴⁸ Id.

⁴⁹ Id. at 569

the parties, Appellee herein properly applied to the Trial Court for an award of attorney's fees in her Proposed Findings ⁵⁰, and the Trial Court conducted a thorough analysis of the parties' financial situations prior to awarding attorney's fees under KRS 403.220. The Trial Court's Judgment addressed the award of attorney's fees under CR 37.03, but ultimately made the award based on considerations of KRS 403.220.⁵¹

Even if CR 37.03 would require a formal motion, the award in this case was based on KRS 403.220 which does not require a formal motion. Instead KRS 403.220 allows the court to award a reasonable amount for the costs and attorney's fees of maintaining an action after considering the parties' financial resources. It is clear from the record that the Trial Court thoroughly analyzed the parties' financial resources when the award for attorney's fees was made. In the Trial Court's Judgment the Court specifically stated, "The Finder of Fact has considerable discretion in the award of attorney's fees after considering the factors set out in KRS 403.220. *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975) and further stated that "...after considering the provisions of KRS 403.220, that [Appellant] shall pay \$50,000.00 to Appellees..."⁵² The Judgment specifically Ordered Appellant herein to pay to the Appellees herein \$50,000.00 toward Appellee's attorney fees, expert witness fees, and costs.⁵³ The Court of Appeals was correct in its determination that the award of attorney's fees in this case was proper as it was based on

⁵⁰ Proposed Findings R.A. pp. 631-646

⁵¹ Judgment R.A. 679-699

⁵² Judgment pp. 17-18, R.A. 695 - 696

⁵³ Judgment, p. 21, R.A. p. 699

sound legal principles, and that review of the award is limited to consideration of whether the Trial Court abused its discretion.

C. APPELLEE DISPROVED APPELLANT'S DENIAL OF THE REQUESTED ADMISSION.

In support of Appellant's position that the award of attorney's fees was made under the provisions of CR 37.03 Appellant further argues that the Court of Appeals and Trial Court erred in determining that Appellee disproved the accuracy of Appellant's denial of her proposed valuation. The requested admission in dispute requested that Appellant admit that his interest in Advantage and Highview was valued at \$265,000. CR 36.01(2) states in pertinent part as follows:

“...A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder...”

Appellant denied the request that he admit that the value of his businesses was \$265,000.00, and provided as an exhibit a letter which did not address the statement which he was requested to admit or deny. Appellant challenges that he properly denied the requested admission because the businesses were ultimately determined to be of greater value. However, Appellant understood that the question was asking if the businesses were worth at least \$265,000, and this understanding allowed for a denial, but also warranted a good faith response which would have acknowledged that the denial was to the specific value, that being \$265,000.

The record reflects that extensive and expensive appraisals, evaluations, and accountings were conducted to ultimately establish the value of the businesses.

D. THE LANGUAGE OF CR 37.03 IS NOT MANDATORY AND THEREFORE DOES NOT REQUIRE THE COURT TO PROVIDE AN ON THE RECORD ANALYSIS OF EVERY POSSIBLE EXCEPTION.

The Appellant argues that if the award of attorney's fees was made under CR 37.03 the Trial Court was required to address each of the safe harbor provisions of CR 37.03. Although the award in this case was not made under CR 37.03, had it been there is nothing which requires the Trial Court to analyze each provision on the record.

The language of CR 37.03 provides four (4) safe harbor provisions which essentially excuse an improper denial of a requested admission, thereby preventing sanctions from being issued for the conduct. The pertinent part of CR 37.03 states as follows:

“...The court shall make the order unless it finds that (a) the request was held objectionable pursuant to Rule 36.01, or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (d) there was other good reason for the failure to admit..”

Nothing in the language of the rule instructs a court that it must analyze or explain why the facts of the given case do not fall under one of the safe harbor provisions, **nor does the rule require the court to make findings of fact; the court need only “find”**. Therefore, even if the Trial Court had made the award of attorney's fees under CR 37.03 it would not have been necessary for the Trial Court to have included an analysis of the safe harbor provisions within its Judgment.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S POST-JUDGMENT INCREASE OF APPELLANT'S EQUITY IN HIGHVIEW

The Court of Appeals correctly affirmed the Trial Court's Order Amending to increase Appellant's equity interest in Advantage.⁵⁴ Appellant argues that the Court of Appeals and Trial Court erred for two reasons. First, Appellant argues that the Trial Court improperly considered new arguments regarding the equity, and second that the Trial Court's ruling was clearly erroneous because of the accounting principles used in the calculation of said equity increase. Appellant's first argument is flawed because he chooses to selectively apply portions of *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005) to this case. Appellant's second argument fails because it has no legal basis, and disregards the Trial Court's discretion to make rulings based on evidence and legal principles.

A. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S RULING ON APPELLEE'S POST-JUDGMENT MOTION.

This Honorable Court has been very clear that a trial court's decision to grant or deny a motion to Alter, Amend, or Vacate its Judgment lies within the discretion of the trial court. *Emberton v. GMRI, INC.*, 299 S.W.3d 565 (Ky. 2007). In *Gullion* this Honorable Court has further declared that a "CR 59.05 motion may be used to dispute an order or judgment a party believes to be incorrect..." acknowledging that "...a trial court has unlimited power to amend and alter its own judgments."⁵⁵ The Appellant focuses on one line from *Gullion* which states that "A party cannot invoke CR 59.05 to raise

⁵⁴ Order Amending R.A. 741-743

⁵⁵ Id. at 891-892

arguments and to introduce evidence that should have been presented during the proceedings before the entry of judgment”,⁵⁶ arguing that the Court of Appeals erroneously affirmed the Trial Court’s consideration of evidence allegedly presented for the first time in Appellee’s post-judgment motion. However, the evidence regarding the reduction of the mortgage balance was not fully available at the time of trial because Appellant had failed to file the necessary tax returns. The Court of Appeals affirmed the decision of the Trial Court finding that there was no abuse of discretion by the Trial Court with regard to its ruling on Appellee’s post-judgment motion.⁵⁷

The Trial Court notes in its Order Amending, that the businesses were valued as of December 31, 2008 because Appellant had not timely completed his 2009 tax returns.⁵⁸ Appellee presented evidence at trial that Appellant had reduced the mortgage indebtedness for Highview by \$175,403. The fact that the parties agreed upon a set valuation date in no way should blind this Honorable Court to the reality of Appellant’s tactics of keeping the debt on the mortgage high for valuation purposes while spending down the business cash to make it appear that the business had less cash flow. That is a shell game from which Appellant should not benefit to Appellee’s detriment.

Whether the Trial Court could or should have considered other variables is not of importance. Under KRS 403.190 courts are directed merely to make an **equitable** division of marital property. The Trial Court had the opportunity to observe Appellant’s conduct and tactics, determine the existence of marital property, and to divide it in just

⁵⁶ Id. at 893

⁵⁷ Opinion pp. 1-15

⁵⁸ Order Amending R.A. 741-743

proportion. As to this particular debt reduction, the Trial Court divided the increased equity equally.

The information necessary to know and properly address the amount which had been paid down on the principal of the mortgage of the business was unavailable due to the Appellant's failure to file his 2009 tax returns in a timely fashion. Appellee's post-judgment motion was proper and in accordance with the Kentucky Rules of Civil Procedure.

B. NEITHER THE RULES OF THE COURT OR CASE LAW ESTABLISHES OR DEFINES GENERALLY ACCEPTED ACCOUNTING PRINCIPLES.

The Appellant argues that increasing Appellant's equity in Highview was clearly erroneous under generally accepted accounting principles, referencing a specific accounting method used by 15th Century Florentine bankers. A preferred method of accounting has not been adopted via statute or case law in the Commonwealth of Kentucky. Instead, this Honorable Court has found that a determination of the credibility and validity of any given accounting method is a matter of discretion for the trial court, so long as the method used is evidence based. *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009). Furthermore, the decision of a trial court shall be viewed under a clearly erroneous or abuse of discretion standard with regard to the determination as to the credibility of any given witness.⁵⁹

In the case at bar, the Trial Court made a decision regarding an increase in equity in a marital asset after having heard extensive testimony at trial by experts from both parties. The Court of Appeals correctly recognized that the Trial Court's decision to

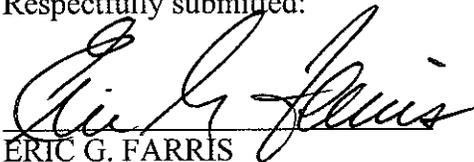
⁵⁹ *Id.* at 315

divide the \$175,403 paid to reduce the principal balance of the mortgage between the date of the valuation and the date of trial equally between the parties was not an abuse of discretion and was reasonable and adequately supported by the record.⁶⁰ The Trial Court's decision to rely on or apply an accounting method which did not provide the Appellant with the result he wanted does not equate to an abuse of discretion and therefore the decisions of the Court of Appeals and the Trial Court should be affirmed.

CONCLUSION

For the reasons set forth herein, the Appellee respectfully requests that this Honorable Court affirm the rulings of the Court of Appeals and the Trial Court.

Respectfully submitted:



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⁶⁰ Opinion p. 14