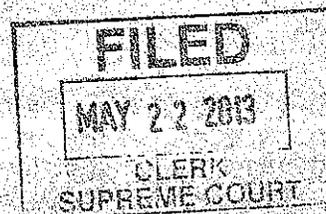


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012-SC-000563-D



KAVEN L. RUMPEL

APPELLANT

vs.

APPELLANT'S BRIEF

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

APPELLEES

APPEAL FROM THE 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 copy of this Appellant's Brief was mailed this 22nd day of May, 2013 to: Eric G. Farris, Lee Remington Williams, Buckman, Farris and Rakes, P.S.C., P.O. Box 460, Shepherdsville, KY 40165; Diana L. Skaggs, 623 West Main Street, Suite 100, Louisville, Kentucky 40202; Hon. Rodney D. Burress, Bullitt Circuit Court, 250 Frank E. Simon Avenue, Shepherdsville, KY 40165; and Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



J. GREGORY TROUTMAN

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant, Kaven L. Rumpel, respectfully requests that an oral argument be scheduled in this appeal. At issue in this appeal are several novel questions involving the scope of the Kentucky Rules of Civil Procedure which are likely to recur in future cases, and oral argument will benefit the Court in the consideration and analysis of such questions.

INDEX
AND
STATEMENT OF POINTS AND AUTHORITIES

	<u>PAGE</u>
STATEMENT CONCERNING ORAL ARGUMENT	i
INDEX AND STATEMENT OF POINTS AND AUTHORITIES	ii-vi
INTRODUCTION	1
STATEMENT OF THE CASE	2 - 10
ARGUMENT	11 - 33
I. <u>THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S CR 37.03 ATTORNEYS' FEE SANCTION BECAUSE THE RULE PROVIDES A SAFE-HARBOR WHEN A PARTY DENIES A REQUESTED ADMISSION BASED UPON A GOOD FAITH BELIEF OF A LIKELIHOOD OF PREVAILING</u>	12 - 23
<i>Kinnaird v. Libretto,</i> 2006-CA-001734-MR (Ky. App. 2009)	11
CR 37.03	<i>passim</i>
CR 37.03(c)	<i>passim</i>
A. <u>KATHIE WAS NOT ENTITLED TO AN ATTORNEYS' FEE SANCTION IN THE ABSENCE OF A MOTION SEEKING SUCH RELIEF</u>	12 - 13
<i>Cochran v. Cochran,</i> 746 S.W.2d 568 (Ky. App. 1988)	13
6 Kurt A. Phillips, Jr., <i>Kentucky Practice, Civil Procedure,</i> p. 882 (6th Ed. 2005)	13

B.	<u>THE COURT OF APPEALS AND TRIAL COURT ERRED BECAUSE IN DETERMINING THAT KATHIE DISPROVED THE INACCURACY OF KAVEN'S DENIAL OF HER PROPOSED VALUATION</u>	13 - 15
	Fed.R.Civ.P. 37(c)	15
	<i>Marchand v. Mercy Medical Center</i> , 22 F.3d 933 (9th Cir. 1994)	15
	<i>Fairland Recreational Club, Inc. v. Indianapolis Downs, LLC</i> , 818 N.E.2d 100 (Ind.App. 2004)	15
C.	<u>THE COURT OF APPEALS AND TRIAL COURT ERRED BY FAILING TO ADDRESS THE APPLICABILITY OF THE FOUR SAFE-HARBOR PROVISIONS AS A PREDICATE TO IMPOSING AN ATTORNEYS' FEE SANCTION</u>	16
D.	<u>A LITIGANT ACTS IN GOOD FAITH AND HAS A REASONABLE GROUND TO BELIEVE THAT HE MIGHT PREVAIL FOR PURPOSES OF CR 37.03 WHEN DENYING A REQUEST FOR ADMISSION BASED UPON THE OPINION OF A RETAINED EXPERT WITNESS</u>	17 - 23
	<i>Sullivan v. Sullivan</i> , 2009-CA-000282 (Ky. App. 2010)	18
	6 Kurt A. Phillips, Jr., <i>Kentucky Practice, Civil Procedure</i> , p. 916 (6th Ed. 2005)	18
	<i>Dobos v. Ingersoll</i> , 9 P.3d 1020 (Alaska 2000)	19
	<i>Wimberly v. Derby Cycle Corp.</i> , 65 Cal.Rptr.2d 532, 56 Cal.App.4th 618 (Cal. App. 4 Dist. 1997)	19
	<i>Greenbriar Condominium, Phase I, Council of Unit Owners, Inc. v. Brooks</i> , 159 Md.App. 275, 859 A.2d 239 (Md.App. 2004)	19
	<i>Checker Leasing, Inc. v. Sorbello</i> , 181 W.Va. 199, 382 S.E.2d 36 (W.Va. 1989)	20

Fed.R.Civ.P. 37(c)(2)(C)	20
<i>Watson v. Best Financial Services, Inc.</i> , 245 S.W.3d 722 (Ky. 2008)	20
<i>Phelps v. Wehr Constructors, Inc.</i> , 168 S.W.3d 395 (Ky. App. 2004)	20
<i>S.E.C. v. Happ</i> , 392 F.3d 12 (1st Cir. 2004)	20
<i>United States v. Pecore</i> , 664 F.3d 1125 (7th Cir. 2011)	20
<i>Comeaux v. Brown & Williamson Tobacco Co.</i> , 915 F.2d 1264 (9th Cir. 1990)	20
<i>Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.</i> , 82 F.3d 1533 (10th Cir. 1996)	20 - 21
<i>Russo v. Baxter Healthcare Corp.</i> , 51 F.Supp.2d 70 (D.R.I. 1999)	21
<i>Board of Dirs., Water's Edge v. Anden Group</i> , 136 F.R.D. 100 (E.D. Va. 1991)	21
<i>Scheufler vs. General Host Corp.</i> , 915 F.Supp. 236 (D.Kan. 1995)	21
<i>Dyer v. United States</i> , 633 F.Supp. 750 (D. Or.1985), <i>aff'd</i> 832 F.2d 1062 (9th Cir.1987)	21
<i>Washington State Dept. of Transp. v. Washington Natural Gas Co., Pacificorp.</i> , 59 F.3d 793 (9th Cir. 1995)	21
<i>Baird v. Consolidated City of Indianapolis</i> , 830 F.Supp. 1183 (S.D.Ind. 1993)	21
6 Kurt A. Phillips, Jr., <i>Kentucky Practice, <u>Civil Procedure</u></i> , p. 916 (6th Ed. 2005)	22
<u>Moore's Federal Practice</u> , Third Ed., §37.71 (2012)	22

II. **THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ATTORNEYS' FEE SANCTION BECAUSE IT IS IMPROPER IN A MARITAL DISSOLUTION CASE TO CONSIDER THE KRS 403.220 ECONOMIC FACTORS WHEN IMPOSING SUCH SANCTION** 23 - 27

KRS 403.220 23

New v. Commonwealth,
156 S.W.3d 769 (Ky. App. 2005) 23

Sexton v. Sexton,
125 S.W.3d 258 (Ky. 2004) 24

Gentry v. Gentry,
798 S.W.2d 928 (Ky. 1990) 24, 27

Lampton v. Lampton,
721 S.W.2d 736 (Ky.App. 1986) 25

Miller v. McGinity,
234 S.W.3d 371 (Ky. App. 2007) 26

Cochran v. Cochran,
746 S.W.2d 568 (Ky. App. 1988) 26, 27

Age v. Age,
340 S.W.3d 88 (Ky.App. 2011) 26

III. **THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S POST-JUDGMENT INCREASE OF KAVEN'S EQUITY IN HIGHVIEW** 28 - 33

A. **THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE TRIAL COURT'S CONSIDERATION OF EVIDENCE PRESENTED FOR THE FIRST TIME IN KATHIE'S POST-JUDGMENT MOTION** 28 - 30

Gullion v. Gullion,
163 S.W.3d 888 (Ky. 2005) 28

Hopkins v. Ratliff,
957 S.W.2d 300 (Ky. App. 1997) 28

B. INCREASING KAVEN'S EQUITY IN HIGHVIEW WAS CLEARLY ERRONEOUS UNDER GENERALLY ACCEPTED ACCOUNTING PRINCIPLES 30- 33

Black Motor Co. v. Greene,
385 S.W.2d 954 (Ky. 1964) 30

Hunter v. Hunter,
127 S.W.3d 656 (Ky. App. 2003) 30

Gullion v. Gullion,
163 S.W.3d 888 (Ky. 2005) 31

1. The Order Erroneously Considered the Effect of a Single Financial Transaction 31 - 32

2. The Order Was Clearly Erroneously As Its Conclusions Violated Basic Accounting Principles 32 - 33

Raymond De Roover,
The Medici Bank, p. 24 (1948) 32

CONCLUSION 33 - 34

APPENDIX

1. Court of Appeals Opinion dated August 17, 2012
2. Bullitt Circuit Court Findings of Fact, Conclusions of Law and Judgment dated December 7, 2010
3. Bullitt Circuit Court Order Amending Findings of Fact, Conclusions of Law and Judgment dated February 10, 2011
4. Petitioner/Appellee's Requests for Admissions, Interrogatories and Request for Documents
5. Respondent/Appellant's Answers to Petitioner's First Set of Requests for Admissions, Interrogatories and Request for Documents

INTRODUCTION

This is an appeal by the Appellant, Kaven L. Rumpel ("Kaven"), from the August 17, 2012 unpublished Opinion of the Kentucky Court of Appeals ("the Opinion"). A true photocopy of the Opinion is attached hereto as Appendix 1. The Opinion affirmed the Bullitt Circuit Court's December 7, 2010 Findings of Fact, Conclusions of Law and Judgment¹ ("Judgment") and February 10, 2011 Order Amending Findings of Fact, Conclusions of Law and Judgment² ("Order") in a marital dissolution case. True photocopies of the Judgment and the Order are attached hereto respectively as Appendix 2 and 3.

This appeal addresses the following issues for review by the Court:

1. The novel question of what constitutes a reasonable ground to believe that a party might prevail under CR 37.03(c) when denying a requested admission, and whether such provision provides a safe-harbor when a party's denial is based upon the opinions and conclusions of retained expert witnesses?
2. Is it permissible in a martial dissolution case for a trial court to consider the economic condition of the parties under KRS 403.220 when rendering an attorneys' fee award pursuant to CR 37.03?
3. Is it permissible for a trial court to consider arguments and proof made in a post-trial motion which were not advanced at trial, but were known to such party at the time of trial?

Addressing these issues necessitates that the Court reverse the Opinion and remand this matter to the Trial Court for further proceedings.

¹ RA 679 - 699.

² RA 741 - 743.

STATEMENT OF THE CASE

Kaven and the Appellee, Kathie W. Rumpel (now Wolford) (“Kathie”) were married on August 25, 1994.³ No children were born to the marriage, although Kaven and Kathie had permanent custody of Kaven’s grandson during their marriage.

Kathie filed a Petition for Dissolution in the Bullitt Circuit Court on April 20, 2009.⁴ In her Petition, Kathie sought a dissolution of the parties’ marriage, the restoration of her non-marital property, the equitable division of the parties’ marital property, the apportionment of marital debts, and an award of maintenance.⁵ On April 28, 2009, Kaven filed his Response and Counter-Petition for Dissolution.⁶ In his Response and Counter-Petition, Kaven agreed to the dissolution of the parties’ marriage, the restoration of the parties’ non-marital properties and the equitable distribution of the parties’ marital properties.⁷ Kaven, however, asserted that neither party should be awarded maintenance.⁸

The most significant of the parties’ marital assets was Kaven’s wholly-owned corporation, Advantage Associates, Inc. (“Advantage”) and its wholly-owned limited liability company subsidiary, Highview Manor Associates, LLC. (“Highview”). Highview’s sole business function was the ownership and operation of commercial real estate (a

³ Petition, ¶4; RA 2.

⁴ RA 1 - 4.

⁵ RA 3.

⁶ RA 17 - 21.

⁷ RA 19.

⁸ Id.

former strip shopping center) in Louisville. Advantage's sole business function was the ownership and operation of a licensed bingo parlor in Louisville upon the commercial property which it leased from Highview.⁹

Not so coincidentally, the valuation of both Advantage and Highview was the most significant (and contested) issue in the parties' divorce trial. Both Kaven and Kathie utilized expert witnesses in deriving their respective proposed valuations of Advantage and Highview, and there was a significant difference between such valuations. Kaven relied upon Richard M. Robinson of Rodefur Moss & Co., PLLC. ("Robinson") in valuing Advantage and Charles Allgeier ("Allgeier") in valuing the real estate owned by Highview as of December 30, 2008.¹⁰ Kathie, on the other hand, relied upon Helen Cohen, CPA of Blue & Co., LLC. ("Cohen") in valuing Advantage and Otto Spence ("Spence") in valuing the real estate owned by Highview as of December 30, 2008.¹¹ Both parties' experts considered the respective indebtedness of Advantage and Highview in reaching their valuation conclusions.¹²

On Kaven's behalf, Allgeier opined that \$810,000 represented the fair market value of Highview's commercial property based upon the income approach after considering the actual rents charged by Highview.¹³ Allgeier further opined that the cost

⁹ At the present time, Highview no longer owns the subject property, and Advantage no longer operates a bingo hall thereupon.

¹⁰ Judgment, p. 10; RA 688.

¹¹ Id.

¹² Id.

¹³ Respondent's Trial Exhibit 1.

and sales approaches were not applicable to Highview's valuation based upon the circumstances.¹⁴ In turn, Robinson opined that Advantage had a negative fair market value.¹⁵ Robinson reached this conclusion by utilizing a risk-free bond rate instead of the actual rate, and valuing Advantage as a unitary operation instead of as two independent business segments.¹⁶

On Kathie's behalf, Spence opined that \$1,400,000 represented the fair market value of Highview's real estate owned based upon the cost, income and sales approaches.¹⁷ Spence noted in his valuation that Advantage's rent was \$2.21 per square foot as opposed to his assessment that \$5.00 per square foot represented the property's fair rental value based upon allegedly comparable properties.¹⁸ In turn Cohen opined that \$383,000 represented the fair market value of Advantage.¹⁹ In valuing Advantage, Cohen relied upon Spence's \$1,400,000 appraisal of Highview's commercial real estate. Cohen also valued each business as separate components, which she then combined to render an aggregate value.²⁰ In essence, the predominant difference between the Cohen and Robinson aggregate fair market valuations of Advantage and Highview resulted from the disparity of respective fair market value

¹⁴ Respondent's Trial Exhibit 1.

¹⁵ Respondent's Trial Exhibit 2.

¹⁶ Judgment, p. 11; RA 689.

¹⁷ Petitioner's Trial Exhibit 3.

¹⁸ Id., at p. 46.

¹⁹ Petitioner's Trial Exhibit 1.

²⁰ Judgment, p. 10; RA 688.

determinations of Highview's real estate articulated in the Spence and Allgeier real estate appraisals.²¹

Between the December 30, 2008 valuation date and the time of trial, Highview reduced the balance of its mortgage indebtedness from \$1,401,269 to \$1,225,866.76 (a difference of \$175,403).²²

On March 1, 2010, Kathie tendered her Requests for Admissions upon Kaven. A true photocopy of Kathie's Requests for Admissions are attached hereto as Appendix 4. Specifically, Kathie's Requests for Admissions No. 2 demanded that Kaven admit the aggregate fair market value of his interest in Advantage and Highview was \$265,000 as of December 9, 2008. It is apparent from the tenor of Kathie's Requests for Admissions Numbers 1 and 2 that she sought to establish an aggregate fair market value figure with respect to Advantage and Highview by establishing that Kaven had purchased another shareholder's 50% interest for \$132,000.00 which could then, in turn, be extrapolated to yield a \$265,000.00 fair market value for 100% of such companies.

On March 23, 2010, Kaven served his Answers to Kathie's Requests for Admissions.²³ In his Answers, Kaven denied the accuracy of Kathie's proposed valuation. A true photocopy of Kaven's Answers to the Requests for Admissions is attached hereto as Appendix 5. At the time of Kaven's denial, none of the expert

²¹ Judgment, p. 11; RA 689.

²² Order, p. 2; RA 742.

²³ RA 396 - 446.

witnesses retained by the parties had opined that \$265,000 represented the aggregate fair market value of Advantage and Highview.

On October 28 and 29, 2010, Kaven and Kathie tried to the bench the issues of the restoration of their respective non-marital properties, as well as the valuation and division of marital properties and maintenance. At the conclusion of the trial, the parties' respectively tendered Proposed Findings of Fact and Conclusions of Law as directed by the Trial Court.²⁴

On November 19, 2010, the Trial Court entered an agreed Decree of Dissolution which dissolved Kaven's and Kathie's marriage.²⁵

On December 7, 2010, the Trial Court entered the Judgment which addressed the division of the parties' non-marital and marital assets, an award of maintenance to Kathie, and imposition of attorneys' fees against Kaven.²⁶ As the Court can discern, the Trial Court adopted nearly verbatim Kathie's Proposed Findings of Fact and Conclusions of Law.²⁷

In particular, the Trial Court accepted the \$383,000 valuation proposed by Cohen and the \$1,400,000 valuation proposed by Spence.²⁸ In reaching such

²⁴ RA 631 - 646 and 647 - 664.

²⁵ RA 677 - 678.

²⁶ RA 679 - 699.

²⁷ Compare RA 631 - 646 and RA 679 - 699. Kaven asserts the Trial Court's simple regurgitation of Kathie's proposed findings does not satisfy the requirement that findings be the product of the deliberations of the judge's mind. See CR 52.01, *Bingham v. Bingham*, 628 S.W.2d 628, 630 (Ky. 1982) and *Kentucky Milk Marketing & Anti-Monopoly Comm. v. Borden Co.*, 456 S.W.2d 831, 834 (Ky. 1969).

²⁸ Judgment, p. 13; RA 691.

conclusion, the Trial Court held that Cohen used three approaches (asset approach, income approach and market approach) in rendering her proposed valuation.²⁹ On the other hand, the Trial Court noted that Allgeier's real estate valuation only considered the income capitalization approach, whereas the asset and market approaches were also applicable.³⁰ The Trial Court further noted that Cohen also valued Advantage as a going concern (a separate valuation of Advantage's two business segments with the consolidation of the separate segments to reach a total value).³¹ Based upon such conclusions, the Trial Court determined that Kaven and Kathie had equally contributed to the acquisition of their marital properties.³²

In the Judgment, the Trial Court further noted that Kathie had made a claim for attorneys' fees related to Kaven's failure to admit the proposed valuation of Advantage and Highview stated in her Requests for Admissions.³³ The Trial Court's finding is curious because Kathie never filed a CR 37 motion for attorneys' fees. Nevertheless, the Trial Court reasoned that CR 37.03 mandated the imposition of attorneys' fees against Kaven because it determined a higher valuation of Advantage and Highview than Kathie had proposed in her Requests for Admissions.³⁴ The Trial Court then determined that the bulk of Kathie's expenses related to proving the value of Advantage

²⁹ Judgment, p. 13; RA 691.

³⁰ Id.

³¹ Id.

³² Id.

³³ Judgment, p. 17; RA 695.

³⁴ Id.

and Highview, and imposed a \$50,000 attorneys' fee award against Kaven after considering the factors set forth in KRS 403.220.³⁵

Kaven and Kathie each timely filed post-trial Motions pursuant to either CR 52 or CR 59. Kaven's post-trial Motion sought a ruling from the Trial Court on certain pre-trial motions, as well as proof presented at trial that he was entitled to recoup one-half of the \$78,291.22 of marital debts paid by him during the pendency of the parties' divorce.³⁶ Kathie's post-trial Motion sought to increase the value of Kaven's equity in Highview due to the \$175,403 reduction in mortgage indebtedness between the December 30, 2008 valuation date and the time of trial. Kathie based her post-trial motion upon Kaven's Trial Exhibit 6 which evidenced a reduction of Highview's mortgage indebtedness from that indicated in the December 2008 appraisal.³⁷

On February 10, 2011, the Trial Court entered the Order which adjudicated the parties' respective post-judgment motions.³⁸ The Order failed to address Kaven's motion to recoup the amount of the marital debts which he paid during the pendency of the parties' divorce action. In the Order, the Trial Court also granted Kathie's post-trial motion, and accordingly increased Kaven's equity interest in Highview in the exact amount of the \$175,403 paydown of its mortgage indebtedness. The Trial Court then equally divided such sum between Kaven and Kathie as marital property. In doing so,

³⁵ Judgment, p. 17; RA 695.

³⁶ RA 700 - 715.

³⁷ RA 716 and 719.

³⁸ RA 741 - 743.

the Trial Court essentially re-opened the evidence to accept proof which was known to Kathie during trial, or which should have been apparent to her. As a result, the Trial Court captured only a partial economic picture of Highview as it focused on a single transaction without considering the economic effect of all other transactions occurring between the stipulated valuation date and the time of trial.

On February 18, 2011, Kaven timely filed an appeal with the Kentucky Court of Appeals against Kathie and the Appellee, Diana L. Skaggs ("Skaggs"), with respect to the Judgment and the Order.³⁹ In his appeal, Kaven named Skaggs as an appellee before the Court of Appeals based upon the protocol which makes the attorney of a party obtaining a KRS 403.220 attorney fee award a necessary party to any appeal from such award.

On August 17, 2012, the Court of Appeals rendered the Opinion which affirmed the Judgment and Order in their entirety. See Appendix 1. In addressing the valuation of Advantage and Highview, the Court of Appeals began with the premise 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).⁴⁰ The Court of Appeals then held that the Trial Court's acceptance of the Cohen/Spence appraisals was well-reasoned and based upon sufficient evidence.⁴¹

³⁹ RA 744 - 745.

⁴⁰ Opinion, p. 8.

⁴¹ Id.

In affirming the attorneys' fee award, the Court of Appeals rejected Kaven's argument that the Trial Court confused the requirements of CR 37.03 with those of KRS 403.220.⁴² In analyzing the issue, the Court of Appeals held that an attorneys' fee award is justified under KRS 403.220 where there are "obstructive tactics and conduct, which multipl[y] the records and proceedings' are proper considerations 'justify[ing] 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).⁴³ The Court of Appeals held that the record confirmed both that Kathie "incurred significant legal fees as a direct result of the contentious business-valuation question" and that there was a "disparate financial resources of the parties."⁴⁴ The Court of Appeals thus concluded that the Trial Court's award of attorneys' fees was reasonable under the circumstances, and was supported by sound legal principles.⁴⁵

Kaven timely petitioned this Court for discretionary review on September 6, 2012. This Court accepted discretionary review of Kaven's appeal pursuant to its April 17, 2013 Order.

⁴² Opinion, p. 12.

⁴³ Opinion, at pp. 12 - 13.

⁴⁴ Id., at p. 13.

⁴⁵ Id.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S CR 37.03 ATTORNEYS' FEE SANCTION BECAUSE THE RULE PROVIDES A SAFE-HARBOR WHEN A PARTY DENIES A REQUESTED ADMISSION BASED UPON A GOOD FAITH BELIEF OF A LIKELIHOOD OF PREVAILING.

The underlying premise of Kaven's first argument is that CR 37.03 does not authorize the imposition of a sanction against litigants simply for being wrong when they assert a good faith denial to a contested Request for Admission and such denial is later proven incorrect. This is especially true when litigants base their denial to a contested Request for Admissions upon the opinions and conclusions of a retained expert witness. Matters related to the interpretation of the Kentucky Rules of Civil Procedure are governed by the *de novo* standard of review. See *Kinnaird v. Libretto*, 2006-CA-001734-MR (Ky. App. 2009).

In addressing the imposition of a punitive sanctions for a party's failure to admit a Request for Admissions, CR 37.03 provides that:

"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."

The implication of the above-cited language dictates that a trial court must undertake

a two part inquiry: (1) a determination of whether the party propounding a Request for Admission disproved the responding party's denial, and (2) whether the responding party's failure to admit such Request falls within the scope of the four safe-harbor provisions set forth in CR 37.03.

In this instance, Kathie premised her entitlement to an attorneys' fee sanction upon the proposition that she unnecessarily incurred such fees because Kaven denied her request to admit that the aggregate fair market value of his interest in Advantage and Highview was \$265,000. The Court should reverse the Opinion because the Court of Appeals erred in affirming the Trial Court's imposition of an attorneys' fee sanction pursuant to CR 37.03. Such error exists because: (1) Kathie never moved the Trial Court for CR 37.03 relief, (2) Kathie did not prove the truth of the valuation proposed in her Request for Admissions, and (3) neither the Court of Appeals nor the Trial Court addressed the applicability and scope of the four safe-harbors set forth in CR 37.03 before imposing a sanction. This latter issue will require the Court to address the novel questions of: (1) what constitutes a "reasonable ground to believe that [a party] might prevail" under CR 37.03(c), and (2) whether CR 37.03(c) provides a safe-harbor to litigants if they deny a requested admission in reliance upon the opinions and conclusions of a retained expert witness.

A. KATHIE WAS NOT ENTITLED TO AN ATTORNEYS' FEE SANCTION IN THE ABSENCE OF A MOTION SEEKING SUCH RELIEF.

As a threshold matter, the Court of Appeals erred in affirming the Trial Court's CR 37.03 attorneys' fee sanction against Kaven because Kathie never filed a motion which sought such relief. The absence of a CR 37.03 Motion is clearly evidenced by

the record. In fact, the only instance in which Kathie ever suggested the imposition of an attorneys' fee sanction was at page 12 of her Proposed Findings of Fact and Conclusions of Law.⁴⁶ The Trial Court essentially adopted verbatim such Proposed Findings of Fact and Conclusions of Law.

In *Cochran v. Cochran*, 746 S.W.2d 568 (Ky. App. 1988), the Court of Appeals held that it is impermissible for a trial court to impose a CR 37.03 attorneys' fee sanction in the absence of a party filing a motion seeking such relief. In accord is Professor Phillip's commentary in 6 Kurt A. Phillips, Jr., *Kentucky Practice, Civil Procedure*, p. 882 (6th Ed. 2005) which states that:

"The court is enjoined to enter the order [granting a CR 37 sanction] unless it finds there were good reasons for the denial, or the admissions sought were of no substantial importance, or the request was objectionable under CR 36.01, or the party had ground to believe he or she would prevail on the denied issue."

Here, the record clearly shows that Kathie never filed a CR 37.03 Motion before the Trial Court. According to *Cochran, supra*, the Court of Appeals and the Trial Court erred because such failure should have negated Kathie's entitlement to an attorneys' fee sanction as a threshold matter.

B. THE COURT OF APPEALS AND TRIAL COURT ERRED BECAUSE IN DETERMINING THAT KATHIE DISPROVED THE INACCURACY OF KAVEN'S DENIAL OF HER PROPOSED VALUATION.

Even if Kentucky law authorizes the imposition of a CR 37.03 sanction in the absence of a motion, the Opinion must nevertheless be reversed because the Court

⁴⁶ See RA 642.

of Appeals and Trial Court erred in determining that Kathie disproved the accuracy of Kaven's denial of her proposed valuation. Such issue require the Court to analyze and consider the manner in which litigants frame their Requests for Admissions.

With respect to the first prong of the CR 37.03 inquiry, Kaven does not dispute that he denied the proposed valuation stated in Kathie's Requests for Admissions. Kaven, however, does not concede the validity of the Trial Court's and Court of Appeals' findings that Kathie proved the inaccuracy of his denial. If anything, the Cohen/Spence valuations upon which Kathie relied at trial demonstrated that the subject Request for Admission was "self-disproving".

How could such a phenomena occur?

Such phenomena occurred because of the manner in which Kathie framed (or mis-framed) the subject Request for Admission. It is clear from the Opinion and the Judgment that both the Court of Appeals and the Trial Court read Kathie's Requests for Admissions as asking Kaven to admit that the aggregate fair market value of Advantage and Highview **exceeded** \$265,000.⁴⁷ The findings of both the Trial Court and the Court of Appeals ignore the plain fact that Kathie's Requests for Admissions simply asked Kaven to admit that \$265,000 was the aggregate fair market value of Advantage and Highview. While Kathie may have meant to ask that Kaven admit that the fair market value of Advantage and Highview exceeded the stated amount, the language she used did not impart such intention. The fair market value figure which Kathie proposed in her Requests for Admissions was obviously incorrect, and the

⁴⁷ See Opinion, p. 13 and Judgment, p. 17; RA 695.

expert opinions relied upon by **both parties** established such fact. Clearly, the manner in which Kathie framed the disputed Request for Admissions was at odds with the conclusions of her own expert.

In interpreting the parallel Fed.R.Civ.P. 37(c), the Ninth Circuit held in *Marchand v. Mercy Medical Center*, 22 F.3d 933, 937-9 (9th Cir. 1994) that the scope of a request for admissions is limited by the words of the request, and that courts will focus on the requests as literally framed by the propounding party. See also *Fairland Recreational Club, Inc. v. Indianapolis Downs, LLC*, 818 N.E.2d 100, 103 (Ind.App. 2004) which holds that the party requesting an admission bears the burden of artfully drafting a statement of facts contained in a request for admission in a manner that is precise, unambiguous, and not misleading to the answering party.

CR 37 sanctions are never appropriate when the party tendering a request for admission frames a question in such a manner that the opposing party is asked to admit a fact which bears absolutely no relation towards resolving the ultimate inquiry. In this instance, ascertaining the aggregate fair market value of Advantage and Highview was the ultimate inquiry. Kathie's proposed \$265,000 valuation, however, was absolutely inconsequential given that her own retained experts had opined a significantly higher value. The Court of Appeals and the Trial Court therefore erred in countenancing a CR 37.03 sanction against Kaven based upon their collective amplification of the scope of the plain language employed by Kathie. Such amplification was an abuse of discretion.

C. THE COURT OF APPEALS AND TRIAL COURT ERRED BY FAILING TO ADDRESS THE APPLICABILITY OF THE FOUR SAFE-HARBOR PROVISIONS AS A PREDICATE TO IMPOSING AN ATTORNEYS' FEE SANCTION.

Irrespective of the resolution of the issues addressed in Subsections (A) and (B) above, the Court must nevertheless reverse the Opinion because neither it, nor the Trial Court, addressed the applicability of the four safe-harbor provisions set forth in CR 37.03 before imposing an attorneys' fee sanction against Kaven.

It is clear from the plain language of CR 37.03 that the Trial Court must address the applicability of the Rule's four safe-harbor provisions after determining the existence of a violation as a required predicate before imposing an attorneys' fee sanction. In this instance, the safe-harbor provision articulated in CR 37.03(c) applies. Such provision provides in pertinent part as follows:

“ . . . The court shall make the order unless it finds that . . .
(c) the party failing to admit had reasonable ground to believe that he might prevail on the matter... . ”

The record clearly evidences that the Trial Court failed to address the applicability of the CR 37.03 safe-harbor provisions before imposing an attorneys' fee sanction upon Kaven. It is equally clear from the Opinion that the Court of Appeals also failed to address the applicability of such safe-harbors in affirming the Judgment. Accordingly the Court should reverse the Opinion, and remand this matter to the Trial Court with directions to vacate that portion of the Judgment which imposed a CR 37.03 attorneys' fee sanction.

D. **A LITIGANT ACTS IN GOOD FAITH AND HAS A REASONABLE GROUND TO BELIEVE THAT HE MIGHT PREVAIL FOR PURPOSES OF CR 37.03 WHEN DENYING A REQUEST FOR ADMISSION BASED UPON THE OPINION OF A RETAINED EXPERT WITNESS.**

Finally, the Court must reverse the Opinion, and direct that the Trial Court vacate that portion of the Judgment which imposed a CR 37.03 attorneys' fee sanction after conducting its own *de novo* analysis of the scope of the safe-harbor provided in CR 37.03(c).

The Court should interpret CR 37.03(c) to provide immunity from sanctions when a litigant bases the denial of a Request for Admissions upon the opinions and conclusions of a retained expert witness. This is especially true in cases where the fact sought to be admitted is the subject of disputed expert opinions. At a minimum, however, the Court should interpret CR 37.03(c) to create a rebuttable presumption of immunity when a party denies a request for admission based upon disputed expert opinions. Again, a party should not be penalized simply for being wrong when a good faith denial of a contested request for admission is later proven incorrect.⁴⁸ Such result is necessary because the circumstances evidence that Kaven acted in good faith and with a reasonable ground to believe that he might prevail on the subject valuation issue when denying the subject Requests for Admissions based upon his reliance upon the opinions and conclusions of retained expert witnesses.

⁴⁸ Again, Kaven's response to the Requests for Admissions was not factually erroneous based upon the manner in which Kathie framed the question for which she sought an admission. The combined fair market values of Advantage and Highview was not \$265,000, and Kathie knew such fact based upon the opinions of her experts when she tendered her Request for Admissions.

No Kentucky court appears to have heretofore addressed the scope of CR 37.03(c) in a published opinion. The Court of Appeals' unpublished opinion in *Sullivan v. Sullivan*, 2009-CA-000282 (Ky. App. 2010), however, is both instructive and supportive of Kaven's position. *Sullivan* involved a marital dissolution case in which a husband denied his wife's request to admit matters related to the validity of his marital property claim. In affirming the trial court's denial of a CR 37.03 attorneys' fee sanction, the Court of Appeals relied upon the safe-harbor articulated in subparagraph (c) of the Rule in determining that the husband's:

"answers show that he could reasonably have believed he could have prevailed in being awarded some marital interest in the aforementioned property."

Sullivan, at p. 10. In other words, *Sullivan* suggests that a party's good faith denial of a requested admission falls within the CR 37.03(c) safe-harbor. While *Sullivan* did not involve a litigant denying a request for admissions in reliance upon the opinions and conclusions of a retained expert, the moral of the case is that sanctions are not appropriate when a party refuses to admit a requested fact in the face of conflicting evidence.

The Court of Appeals' conclusion in *Sullivan* is further supported by the late Professor Phillips' commentary on CR 37.03 found in 6 Kurt A. Phillips, Jr., *Kentucky Practice, Civil Procedure*, CR 37.03, p. 916 (6th Ed. 2005). Such commentary postulates that:

"[t]he test is not whether a party prevailed at trial, but whether that party acted reasonably in believing that he or she might prevail."

Applying such test in this case demonstrates that both the Trial Court and the Court of Appeals erred because neither addressed the question of whether Kaven acted in a good faith belief that he might prevail when denying Kathie's proposed valuation of Advantage and Highview.

Further, Kaven's position regarding the scope of CR 37.03(c) finds support from the following cases decided by Kentucky's sister states:

- In *Dobos v. Ingersoll*, 9 P.3d 1020, 1026 (Alaska 2000), the Alaska Supreme Court held that the "reasonable grounds" exception is an objective test, and that courts look at the record to determining the existence of such "reasonable grounds".

- In *Wimberly v. Derby Cycle Corp.*, 65 Cal.Rptr.2d 532, 56 Cal.App.4th 618, 635 (Cal. App. 4 Dist. 1997), the California Court of Appeals held that discovery sanctions are mandated when a party in such stands on the denial of a request for admission and then fails to contest the issue at trial.⁴⁹

- In *Greenbriar Condominium, Phase I, Council of Unit Owners, Inc. v. Brooks*, 159 Md.App. 275, 859 A.2d 239, 266 (Md.App. 2004), the Maryland Court of Appeals held that sanctions were inappropriate regarding the denial of a request to admit the fair market value of property because "ultimate issues of fact" determinations such as fair market value of property are not appropriate subjects for a request for admission.

⁴⁹ It is patently obvious from the tenor of both the Judgment and the Opinion that Kaven denied Kathie's proposed valuation of Advantage and Highview, and then contested such valuation issue at trial.

- Finally, in *Checker Leasing, Inc. v. Sorbello*, 181 W.Va. 199, 382 S.E.2d 36, 39 (W.Va. 1989), the West Virginia Supreme Court held that “a court must give consideration to the subject matter embodied in the request for admissions” in order to “determine the reasonableness of the inquiry and whether the information is readily obtainable”. Thus, the Court in *Sorbello* essentially adopted a “sliding scale” analysis based upon its observation that when “the requested admission involves a fact that is relatively simple . . . the reasonableness of which is obviously readily obtainable, there can be little excuse for the failure to make such admission.”⁵⁰

Kaven’s position also finds support from federal court decisions interpreting the parallel Fed.R.Civ.P. 37(c)(2)(C).⁵¹ See *S.E.C. v. Happ*, 392 F.3d 12, 34 (1st Cir. 2004) which holds that “the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.”; *United States v. Pecore*, 664 F.3d 1125, 1136 (7th Cir. 2011) [Fed.R.Civ.P. 37(c)(2)(C) “provides an escape hatch for those parties that ‘had a reasonable ground to believe that it might prevail on the matter’”]; *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990); *Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533 (10th Cir.

⁵⁰ The “sliding scale” analysis discussed in *Sorbello* makes perfect sense from a practice perspective. For instance, it is one thing when a defendant in a foreclosure case is asked to admit something mundane like the genuineness of his or her signature on a promissory note or a mortgage. It is quite another thing when a litigant is asked to admit a proposed fair market value of a business when such value is based upon many complex variables and assumptions (like which valuation approach to utilize, what capitalization rate to utilize, etc.) not typically within the realm of a lay person’s scope of knowledge. The threshold for determining whether a party failed to act in good faith should be lower in the former situation, and significantly higher in the latter situation.

⁵¹ Kentucky courts look to cases interpreting parallel provisions of the Federal Rules of Civil Procedure. *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722 (Ky. 2008) and *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395, 398 (Ky. App. 2004).

1996); *Russo v. Baxter Healthcare Corp.*, 51 F.Supp.2d 70, 79 (D.R.I. 1999) [the Court accepted that "parties will have fundamental disagreements" . . . and that "it will not impose sanctions merely because a party failed to prove its case"]; *Board of Dirs., Water's Edge v. Anden Group*, 136 F.R.D. 100 (E.D. Va. 1991) [Fed.R.Civ.P. 37(c)(2)(C) immunizes a party against sanctions where a denial is lodged in the face of conflicting evidence].

The federal decisions in *Water's Edge*, supra, *Scheufler vs. General Host Corp.*, 915 F.Supp. 236 (D.Kan. 1995); *Dyer v. United States*, 633 F.Supp. 750 (D.Or. 1985), *aff'd* 832 F.2d 1062 (9th Cir.1987); *Washington State Dept. of Transp. v. Washington Natural Gas Co., Pacificorp.*, 59 F.3d 793 (9th Cir. 1995); and *Baird v. Consolidated City of Indianapolis*, 830 F.Supp. 1183 (S.D.Ind. 1993) are further instructive in that the Courts in such cases held that Rule 37 sanctions were not warranted where litigants had relied upon the opinions and opinions of retained expert witnesses in denying the disputed requests for admissions. That is precisely situation at issue in this case, and precisely the reason why the Court of Appeals and Trial Court erred in this case as a parties' reliance upon the opinions and conclusions of a retained expert should automatically trigger a determination of "reasonable grounds" under CR 37.03(c). Such reliance, at a minimum, should constitute a rebuttable presumption in favor of a "reasonable grounds" determination.

Discerning the fair market value of business (especially a business which operates in a multi-unit format) is a complicated and complex endeavor. Kaven was not qualified as a lay person to opine as to the value of Advantage and Highview.

Kaven accordingly relied upon qualified experts to render a valuation. Not so coincidentally, Kathie did the same. CR 36.01(2) required that Kaven make a reasonable inquiry before denying Kathie's proposed valuation. Under the circumstances, the Court should find that Kaven fulfilled his obligations to make a reasonable inquiry under CR 36.01(2), and that he acted with a reasonable belief that he might prevail for purposes of CR 37.03(c) in relying upon the valuation proposed by his experts when denying Kathie's Requests for Admissions.

In conclusion, one final point is worth noting when considering the scope of CR 37.03(c). Professor Phillips' commentary⁵² on Kentucky civil practice and Moore's commentary⁵³ on federal civil practice emphasize that the use of Requests for Admissions, and the responses thereto, are subject to abuse and gamesmanship by both the party framing the request and the party answering such request. This case evidences the manner in which the proverbial sword truly cuts both ways.

Kathie's Requests for Admissions demonstrate that the manner in which counsel frames a request for admission can be just as much a matter of gamesmanship as a responding party's answer. In this instance, Kathie's request concerning the valuation

⁵² In 6 Kurt A. Phillips, Jr., *Kentucky Practice*, *supra*, at p. 916, Professor Phillips warns that "[a]n attorney or party should not indulge in gamemanship when answering requests for admissions. ..."

⁵³ As observed by *Moore's Federal Practice*, Third Ed., §37.71 (2012):

"courts will focus on the requests as literally framed by the propounding party, and will not penalize a responding party who does not admit matters that are not set forth in the request."

The question of whether Kentucky courts adhere to this principle is also a novel question heretofore not addressed by our jurisprudence.

of Advantage and Highview was an attempt to play "gotcha". Such attempt is verified by the fact that the opinions and conclusions of Kathie's own retained experts refute her proposed valuation.⁵⁴ Unfortunately, the Trial Court and the Court of Appeals countenanced Kathie engaging in such hijinks.

It was erroneous for the Trial Court to conclude, and for the Court of Appeals to affirm, both that a violation of CR 37.03 occurred, and that an attorneys' fee sanction was warranted, simply because the Trial Court failed to accept the valuation amount proposed by Kaven's expert without addressing the applicability of the Rule's safe-harbor provisions. The Court should accordingly reverse the Court of Appeals' Opinion, and remand this matter to the Trial Court with directions to vacate that portion of the Judgment which imposed an attorneys' fee sanction.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ATTORNEYS' FEE SANCTION BECAUSE IT IS IMPROPER IN A MARITAL DISSOLUTION CASE TO CONSIDER THE KRS 403.220 ECONOMIC FACTORS WHEN IMPOSING SUCH SANCTION.

Second, the Opinion must be reversed because the Court of Appeals erred in affirming the Trial Court's consideration of the parties' economic circumstances pursuant to KRS 403.220 when imposing a CR 37.03 attorneys' fee sanction. Such determination involves a question of law, and a trial court's legal determinations are reviewed under the *de novo* standard. See *New v. Commonwealth*, 156 S.W.3d 769 (Ky. App. 2005).

⁵⁴ In hindsight, it would have inured to Kaven's benefit, and Kathie's significant detriment, had he admitted that \$265,000 represented the aggregate fair market value of Advantage and Highview. Instead of receiving a marital property division of \$191,500 (\$383,000 / 2) with respect to Advantage and Highview, Kathie would merely have received an award of \$132,500 (\$265,000 / 2) had Kaven admitted her proposed valuation.

In imposing its attorney fees' sanction against Kaven, the Trial Court held at [age 17 of the Judgment that:

"the bulk of Petitioner's [Kathie's] expenses have related to that issue and further finds, after considering the provisions of KRS 403.220, that Respondent [Kaven] shall pay \$50,000 to Petitioner [Kathie] and her attorneys, within 30 days from date hereof."

In affirming this determination, the Court of Appeals held at page 13 of its Opinion that:

"[a] review of the voluminous record of documentary evidence confirms that Kathie indeed incurred significant legal fees as a direct result of the contentious business-valuation question. It also confirms the disparate financial resources of the parties. Under the circumstances, we conclude that the court's award of attorneys' fees was reasonable and was supported by sound legal principles."

The Court of Appeals based such determination on the premise that *Sexton, supra.*, and *Gentry, supra.*, authorize the imposition of an attorneys' fee sanction under KRS 403.220 when a party engages in obstructive tactics and conduct which increases the cost of litigation. Ironically, however, neither the Trial Court nor the Court of Appeals determined that Kaven engaged in any obstructive tactics and conduct which increased Kathie's cost of litigation independent of his alleged violation of CR 37.03. Obviously, based upon the arguments stated in (I) above, Kaven's denial of the proposed valuation stated in the Requests for Admissions was justified, and could not thus constitute obstructive tactics.

It is erroneous for a trial court to mix the two divergent concepts articulated in KRS 403.220 and CR 37.03 unless a party invokes both the statute and the rule in seeking relief, and proves either an economic disparity or intentionally obstructive conduct when seeking an attorney fee award and a violation of CR 37.03. Such

position is supported by the spirit and intent of both KRS 403.220 and CR 37.03, as well as the Court of Appeals' opinion in *Lampton v. Lampton*, 721 S.W.2d 736 (Ky.App. 1986).

In marital dissolution cases, KRS 403.220 provides that a trial court may award attorneys' fees in its discretion based upon the existence of a sufficient financial disparity between the parties. CR 37.03, on the other hand, is a punitive procedural practice rule which mandates the imposition of an attorneys' fee sanction if a party's denial of a Request for Admissions is proven false and such denial does not fall within the Rule's four safe-harbor provisions. Since KRS 403.220 and CR 37.03 each approach the imposition of attorneys' fees from a different perspective, both the Trial Court and the Court of Appeals erred in countenancing an intermixing of the two approaches.

Such conclusion is precisely the conclusion reached by the Court of Appeals in *Lampton, supra*. In *Lampton*, the parties engaged in a contentious marital dissolution which resulted in the trial court imposing an attorneys' fee award against the husband based upon both a purported disparity of the parties' financial resources and the husband's allegedly obstructive litigation tactics.⁵⁵ In reversing such award, the Court of Appeals held that the parties' financial resources did not warrant an attorney fee award under KRS 403.220, and remanded such award for proof of the amount attributable to the husband's obstructive conduct. *Lampton* highlights the fact that

⁵⁵ As is evident from the Court of Appeals' Opinion in *Lampton*, the obstructive litigation tactics were the husband's "inability or unwillingness to submit candid disclosures concerning his financial condition" which resulted in a two year delay in equitably dividing the parties' marital assets. See 721 S.W.2d at 737.

attorney fee claims under KRS 403.220 and CR 37.03 are distinctive, and based upon different standards (equality of resources vs. improper litigation tactics).

The Court of Appeals' subsequent opinions in *Miller v. McGinity*, 234 S.W.3d 371 (Ky. App. 2007) and *Cochran*, supra., further highlight that a party wishing to recover attorney fees based upon both economic disparity and obstructive litigation tactics must make a motion which invokes both KRS 403.220 and CR 37.03. In *Miller*, the Court of Appeals vacated a trial court's award of attorneys' fees based upon KRS 403.220 and reversed outright an attorneys' fee award based upon CR 37.03. *Miller* noted that the trial court erroneously based its CR 37 sanction upon the parties' financial circumstances. The Court, however, rejected such award on the basis that a consideration of financial circumstances had "no plausible connection to discovery proceedings..." 234 S.W.3d at 375. *Cochran*, supra., drives home the point even further in holding that a CR 37.03 attorneys' fee award is impermissible in the absence of a Motion seeking such sanction.

Finally, the Trial Court's attorney fee award, and the Court of Appeals' affirmance of such award, must be reversed because the underlying facts do not support an attorneys' fee award pursuant to KRS 403.220 on the basis of the parties' economic circumstances. This particular issue is governed by the abuse of discretion standard. See *Age v. Age*, 340 S.W.3d 88 (Ky.App. 2011).

The record shows that Kathie's gross income in 2010 was approximately \$51,489, and her after-tax income in 2010 was \$33,323.29.⁵⁶ In addition, the value of

⁵⁶ Judgment, p. 14; RA 692.

the non-marital and marital property allocated to Kathie was approximately \$131,000, exclusive of the marital share of Kaven's pension. On the other hand, the record shows that Kaven had a gross income of \$33,060.84 per year.⁵⁷ In a martial dissolution case, *Gentry, supra.*, stands for the proposition that a KRS 403.220 attorneys' fee award is only appropriate against the party having the more superior financial resources. In this instance, the record shows that Kathie was the party with the greater financial resources *vis-a-vis* Kaven. The Trial Court therefore abused its discretion in granting such award based upon the parties' economic circumstances.

Based upon the arguments set forth above, the Court should reverse the Opinion and remand this case to the Trial Court with directions to vacate that portion of the Judgment which awarded attorneys' fees to Kathie. The record here clearly shows that Kathie never filed a CR 37.03 Motion before the Trial Court. According to *Cochran, supra.*, the Court of Appeals and the Trial Court erred because such failure should have been fatal to Kathie's attorneys' fee sanction as a threshold matter. Kaven has further established that the Court of Appeals and the Trial Court erred in considering the parties' economic circumstances when fixing a CR 37.03 attorney fee sanction in the absence of a motion seeking dual relief invokes both KRS 403.220 and CR 37.03.

⁵⁷ Judgment, p. 15; RA 693.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S POST-JUDGMENT INCREASE OF KAVEN'S EQUITY IN HIGHVIEW.

Finally, the Opinion should be reversed because the Court of Appeals erroneously affirmed the Trial Court's post-judgment increase of Kaven's equity in Highview because: (1) Kentucky law did not permit Kathie to utilize a post-trial motion as the basis for asserting new arguments concerning Kaven's equity increase in a post-judgment motion, and (2) such equity increase was clearly erroneous as it violated generally accepted accounting principles.

A. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE TRIAL COURT'S CONSIDERATION OF EVIDENCE PRESENTED FOR THE FIRST TIME IN KATHIE'S POST-JUDGMENT MOTION.

As a primary matter, the Court of Appeals' Opinion should be reversed because it erroneously affirmed the Trial Court's consideration of evidence presented by Kathie for the first time in her post-judgment Motion. The law in Kentucky is clear that a party cannot utilize a post-judgment motion to alter, amend, or vacate, for the purpose of raising arguments or introducing evidence which should have been presented before the entry of the judgment. See *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005) and *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997).

In this instance, it is obvious that Kathie was aware of Highview's debt paydown at the time of trial given that she relied upon Kaven Trial Exhibit 6 as support for her CR 59.05 Motion⁵⁸. This Trial Exhibit was dated October 7, 2010 (several weeks prior to trial) and reflected a reduction of Highview's mortgage indebtedness from the balance

⁵⁸ RA 716.

indicated in the parties' December 30, 2008 appraisals.⁵⁹ The Court of Appeals accordingly erred in affirming the Trial Court's post-judgment consideration of any evidence of the subject debt paydown since Kathie should have argued such matter during trial.

In this instance Kaven and Kathie mutually agreed to a December 30, 2008 valuation date for the purpose of ascertaining the aggregate fair market value of Advantage and Highview. The parties' respective expert witnesses accordingly based their valuation opinions of Advantage and Highview as of the stipulated valuation date. The proof presented at trial by Kaven's and Kathie's respective expert witnesses focused solely upon the December 30, 2008 stipulated valuation date. The Trial Court's fair market valuation determinations in the Judgment corresponded to the stipulated December 30, 2008 date. Kathie's post-judgment Motion highlights the fact that she was aware at the time of trial that Highview had paid \$175,403 towards the retirement of its mortgage indebtedness subsequent to the appraisals. Kathie, however, failed to argue at trial that such payment resulted in a dollar-for-dollar increase in Kaven's equity. Further, Kathie has never explained such failure, either in the Reply to Kaven's Response to her post-judgment Motion or in her brief before the Court of Appeals.

In the Order, the Trial Court accepted Kathie's position, and modified the Judgment to increase the amount of Kaven's equity interest in Highview by

⁵⁹ RA 719.

\$175,403.00.⁶⁰ In doing so, the Trial Court essentially re-opened the evidence to consider the fact that Highview had paid \$175,403.00 towards the retirement of its mortgage indebtedness between the December 30, 2008 valuation date and the time of trial. The Trial Court erred in considering any post-judgment arguments or evidence regarding the paydown of Highview's indebtedness after December 30, 2008, and the Court of Appeals compounded such error in affirming the Trial Court's determination.

B. INCREASING KAVEN'S EQUITY IN HIGHVIEW WAS CLEARLY ERRONEOUS UNDER GENERALLY ACCEPTED ACCOUNTING PRINCIPLES.

The Court of Appeals' affirmance of the Order also cannot withstand scrutiny because increasing Kaven's equity violated generally accepted accounting principles, and was thus clearly erroneous. Under Kentucky law, a trial court's factual determinations are governed by the "clearly erroneous" standard. See *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964). Under Kentucky law, factual finding is not clearly erroneous if it is supported by substantial evidence, that is evidence when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003).

⁶⁰ While Kathie alleged, and the Trial Court found, that Kaven paid the \$175,403.00 sum, she presented no evidence concerning the actual source of such payment (*i.e.* whether such payment came from Kaven's personal funds or from Highview's funds). Since Highview was organized as a legal entity, its funds were distinctive from Kaven's personal funds irrespective of the fact that Kaven was the entity's sole owner. Based upon the Highview Loan Activity Statement relied upon by Kathie, it would be fair to conclude that Highview's funds were the source of such payment. See RA 719.

This Court observed in *Gullion, supra.*, at p. 893, "that reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly". In this instance, both the Trial Court and the Court of Appeals failed to adhere to this principle. This is evidenced by the fact that the Trial Court's post-judgement re-crafting of a new valuation of Highview: (1) considered the effect of only a single transaction without requiring an updated valuation which accounted for all financial transactions occurring between December 30, 2008 and the date of trial, and (2) violated the most basic principles of accounting.

1. The Order Erroneously Considered the Effect of a Single Financial Transaction.

The Trial Court's post-judgment decision to increase Kaven's equity in Highview, and the Court of Appeals' affirmance of such determination, was clearly erroneous because it considered the effects of a single financial transaction in isolation to all other value-affecting transactions which occurred subsequent to December 30, 2008.

In making such determination, the Trial Court erroneously operated under the presumption that Highview operated in an economic vacuum between the December 30, 2008 valuation date and the time of trial. Of course there were many financial transactions (likely numbering in the hundreds) which occurred during this time period. Each transaction, naturally, had an impact upon Highview's fair market value, and thus Kaven's equity therein. Considering a single transaction (or series of related transactions) in isolation, as the Trial Court did, paints a myopic (and factually inaccurate) picture of Highview's financial position.

If the Trial Court believed that an updated valuation of Highview was warranted, it should have directed that the parties' procure such update from their respective experts. Doing so would have allowed the consideration of the economic effect of all other financial transactions which occurred after December 30, 2008, and would have allowed Kaven a fair opportunity to respond to Kathie's suggest re-valuation.

2. The Order Was Clearly Erroneously As Its Conclusions Violated Basic Accounting Principles.

The Trial Court's post-judgment decision to increase the amount of Kaven's equity in Highview, and the Court of Appeals' affirmance of such determination, was also clearly erroneous because such determinations fly in the face of the most basic of accounting principles.

One of the first things learned by accounting students is the mechanics and process of the dual-entry accounting system. The Florentine bankers created the concept of a dual-entry accounting system in the 15th Century based upon the elementary formula that $\text{Assets} - \text{Liabilities} = \text{Equity}$.⁶¹ This simple formula still applies today to even the most complex business transactions. Thus, every financial transaction which affects one or more accounts on a particular side of a ledger must be counter-balanced with an equal offset against one or more accounts on the opposite side of the ledger. In this instance, the Trial Court's post-judgment increase of Kaven's equity in Highview, and the Court of Appeals' affirmance of such determination, was clearly erroneous as violative of this principle.

⁶¹ According to Raymond De Roover, The Medici Bank, p. 24 (1948), Florence's Giovanni di Bicci de Medici perfected the system of dual-entry accounting during the 15th Century in the operation of his Medici bank.

The underlying fallacy of the Trial Court's determination, as affirmed by the Court of Appeals, was the attempt to equate Highview's paydown of its indebtedness with a corresponding increase in Kaven's equity. Such result, however, cannot occur under the aforementioned accounting formula. This is the case because Highview's pay down of its mortgage indebtedness involved a transaction (or series of transactions) which reduced the balance of its cash account on the left side of a dual-entry ledger, and correspondingly reduced the balance of its mortgage liability account on the right side of a dual entry ledger.

As a result, and contrary to the Trial Court's findings, Highview's reduction of its mortgage indebtedness did not result in an increase in Kaven's ownership equity. To the contrary, each corresponding ledger entry negated the other. Thus, Highview's payment of \$175,403 against its mortgage debt reduced the company's cash and correspondingly reduced its liabilities. Contrary to the Trial Court's and Court of Appeals' findings, this transaction did not increase Kaven's equity by \$175,403.00. The Court should accordingly reverse the Opinion, and remand this matter to the Trial Court with appropriate directions to overrule Kathie's post-judgment Motion.

CONCLUSION

This case involves an issue of first impression concerning the width and breadth of CR 37.03(c), as well as several corollary issues. Meaningful guidance from this Court to both the bench and bar is needed on these issues given their likelihood to recur. Based upon the arguments set forth above, the Court should reverse the Opinion, and remand this case to the Trial Court with directions to vacate: (1) that portion of the Judgement which imposed an attorneys' fee sanction against Kaven, and

(2) that portion of the Order which increased Kaven's equity in Highview and divided such increase as marital property.

Respectfully submitted,



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