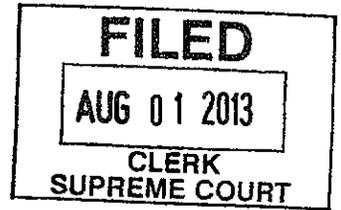


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
NO. 2012-SC-000563-D



KAVEN L. RUMPEL

APPELLANT

vs.

**APPELLANT'S REPLY BRIEF**

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

APPELLEES

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

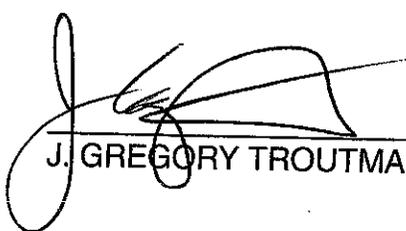
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Appellant's Reply Brief was mailed this 1st day of August, 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 OF PURPOSE**

This Reply Brief by the Appellant, Kaven L. Rumpel (“Kaven”) responds to the Appellee Brief filed by the Appellee, Kathie W. Rumpel (“Kathie”). In this instance, Kathie's Brief fails to refute the reasons shown by Kaven why this Court should reverse the Court of Appeals' August 17, 2012 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.

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## ARGUMENT

### I. KATHIE'S COUNTERSTATEMENT OF THE CASE ASSERTS MATTERS WHICH ARE IRRELEVANT TO THIS APPEAL.

At the outset, it is appropriate to address certain facts which Kathie included in the Counterstatement of the Case portion of her Brief. There is an old maxim that "when you don't have the facts, argue the law; when you don't have the law, argue the facts; when you don't have either, pound the table". In this instance, Kathie has chosen to pound the table.

In her Counterstatement of the Case, Kathie commented about the fact that Kaven allowed Advantage to employ several individuals who were convicted felons, including an individual whose former charges included robbery. So what??? Without a doubt, Kathie's recitation of these facts was a clear attempt to unnecessarily smear Kaven in the Court's eyes. This is evidenced by the fact that Kathie did not allege in either her Counterstatement of the Case or Argument that these employees engaged in any untoward actions while working for Advantage. In fact, Kathie failed to articulate any correlation between the employment of these individuals and the limited scope of issues presented by this appeal. The Court should accordingly see Kathie's efforts for what they are - - table pounding by a party who cannot stand on either the facts or the law.

### II. KATHIE'S BRIEF FAILS TO REFUTE THE COURT OF APPEALS' ERROR IN AFFIRMING THE AWARD OF ATTORNEY FEES.

In his principal Brief, Kaven asserted that the Court of Appeals erred in affirming the Trial Court's attorneys' fee award because: (1) he did not violate CR 37.03; (2) the

Trial Court failed to analyze the CR 37.03 safe-harbors; and (3) the Trial Court impermissibly relied upon KRS 403.220 when imposing a CR 37.03 attorneys' fee award. In response, Kathie erroneously argues in her Brief that the Trial Court: (1) did not base its attorneys' fee award even though it correctly determined a violation of CR 37.03; (2) was not required to state the inapplicability of the CR 37.03 safe-harbors before imposing an attorneys' fee award; and (3) based its attorneys' fee award solely upon the factors stated in KRS 403.220.

**A. The Trial Court Did In Fact Base Its Attorneys' Fee Award Upon CR 37.03, And Erroneously Did So.**

Kathie's argument concerning the genesis of the Trial Court's attorneys' fee award flies in the face of the plain language stated at page 17 of the Judgment.<sup>1</sup> In such recitation, the Trial Court stated the following in support of its attorneys' fees award:

"The Petitioner makes a request for attorney fees. The Respondent was requested to admit; pursuant to CR 36 that his interest in Advantage and Highview was valued at \$265,000 as of December 9, 2008 and the Court herein has found a higher value. Thus, under CR 37.03, Respondent is liable for Petitioner's reasonable expenses in making that proof, including attorney fees. The Court further finds that the bulk of Petitioner's expenses have related to that issue and further finds, after considering the provisions of KRS 403.220, that Respondent shall pay \$50,000.00 to Petitioner and her attorneys, within 30 days from date hereof."

Contrary to Kathie's argument, the Judgement clearly stated that a violation of CR 37.03 was the basis for the attorneys' fee award. In fact, Kathie's argument is curious

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<sup>1</sup> RA 695.

considering that the Trial Court's determination was written nearly verbatim from page 12 of her Proposed Findings of Fact and Conclusions of Law.<sup>2</sup>

Kathie further does not refute the Trial Court's erroneous determination of a CR 37.03 violation. Plain and simple, Kathie asked Kaven to admit the accuracy of a concrete valuation amount for Advantage and Highview as of a date certain. Now, Kathie argues at page 14 of her Brief that Kaven understood the proposed concrete valuation amount stated in the disputed Request for Admissions really meant such amount or a greater amount. Such a meaning, however, cannot be discerned from the manner in which Kathie framed the disputed Request for Admission. This is precisely an example of the type of gamemanship which Kaven addressed at pages 22 and 23 of his principal Brief.

Further, Kathie erroneously argues that she was not required to file a Motion in order to invoke relief under CR 37.03. Simply including a proposed attorneys' fee when tendering Proposed Findings of Fact and Conclusions of Law is not sufficient. CR 37.03 says that a party who disproves the denial of a request for admission:

“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.”

CR 7.02 is clear in its mandate that an “[a]n application to the court for an order shall be by motion.” The import of CR 7.02 is clear - - no CR 37.03 relief without a motion.

**B. The Trial Court Was Required to Articulate the Applicability of the CR 37.03 Safe-Harbor Provisions.**

CR 37.03 is clear in its mandate that a trial court must determine the inapplicability of the Rule's four safe-harbor provisions before imposing an attorneys'

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<sup>2</sup> RA 642.

fee sanction. Kathie argues in response that CR 37.03 does not require that a trial court articulate its findings concerning the applicability or inapplicability of the safe-harbor provisions. Frankly, Kathie's argument is patently ridiculous.

Courts in Kentucky speak "only through written orders entered upon the official record." *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky.App.2010) and *Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky.App. 2012). Thus, a trial court is compelled to make a written articulation of its findings with respect to the CR 37.03 safe-harbors.<sup>3</sup> Otherwise, how are Kentucky's appellate courts able to discern whether such finding was erroneous?

**C. Kathie Errs in Her Analysis of KRS 403.220 as Applied by the Trial Court in This Case.**

The crux of Kathie's argument concerning the attorneys' fee issue was that the Trial Court really based such award on KRS 403.220 and not CR 37.03. A clear reading of page 17 of the Judgment reveals the error of Kathie's argument.

The Trial Court devoted the bulk of its analysis of the attorneys' fee issue to Kaven's alleged violation of CR 37.03, and how "the bulk of [Kathie's] expenses have related to that issue".<sup>4</sup> Any discussion and findings concerning KRS 403.220 were collateral to the matter. The Court of Appeals confirmed a disparity of the parties' financial resources and essentially confirmed that Kaven employed obstructive litigation

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<sup>3</sup> What is perhaps most telling about Kathie's analysis of the CR 37.03 safe-harbor issue is that she does not refute the proposition that a party acts in good faith for purposes of such safe-harbors when basing the denial of a request for admission upon expert opinions.

<sup>4</sup> RA 695.

tactics.<sup>5</sup> It is unclear, however, from the Trial Court's recitation at page 17 of the Judgment whether its consideration of the provisions of KRS 403.220 was based purely upon the disparity of the parties' financial resources, or rather upon Kaven's allegedly obstructive litigation tactics.

In this instance, any finding that Kaven's denial of the disputed Request for Admission represented obstructive litigation tactics is clearly erroneous, and thus not a sufficient basis for an attorneys' fee award under KRS 403.220. Because the Trial Court did not articulate that it based the attorneys' fee award on the parties' financial disparity versus obstructive tactics, it is unclear from the Judgment whether the Trial Court would have made such award had the CR 37.03 issue not have been in play.

Here, the lack of clarity results from the Trial Court's substantial regurgitation of Kathie's Proposed Findings of Fact and Conclusions of Law. This Court in *Bingham v. Bingham*, 628 S.W.2d 628, 629-30 (Ky. 1982) cautioned that the practice of delegating the preparation of Findings of Fact and Conclusions of Law must evidence that the trial court controlled the decision-making process and that the findings and conclusions were the product of the deliberations of the trial judge's mind. That is precisely the problem here.

III. **KATHIE'S BRIEF FAILS TO REFUTE THE COURT OF APPEALS' ERROR IN AFFIRMING THE TRIAL COURT'S POST-TRIAL INCREASE OF KAVEN'S EQUITY IN HIGHVIEW.**

In his principal Brief, Kaven demonstrated that the Trial Court and Court of Appeals both erred with respect to the post-judgment increase on his equity in

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<sup>5</sup> Opinion, p. 13.

Highview. Kaven premised such argument upon the proposition that Kathie's post-judgment motion was based upon facts known to her at trial, and such increase was clearly erroneous. Kathie's retort was that: (1) the information necessary to know and properly address the amount which had been paid down on the principal of Highview's mortgage was unavailable due to Kaven's failure to file his 2009 tax returns, and (2) the Trial Court had the discretion to weigh the credibility and validity of any given accounting method. Kathie's arguments are fallacious.

**A. Kathie Incorrectly Argues the Information Necessary to Determine That Any Post-Valuation Increase in Equity Was Not Available at Trial.**

Kathie's Brief seeks to justify her failure to address at trial the issues relating to Highview's post-valuation reduction of its mortgage indebtedness by pointing the finger at Kaven's failure to timely file his 2009 income tax returns. Kathie claims this failure made it impossible for her to discern the alleged post-valuation. It is inconceivable that Kathie can make this argument given the face of her CR 59.05 post-trial Motion.<sup>6</sup>

Yes, contrary to Kathie's representations, she fully knew (or should have known) at the time of trial that Highview had reduced its mortgage indebtedness by \$175,403 since the December 30, 2008 valuation. Kathie's CR 59.05 Motion proves this fact. Kathie acknowledged in Paragraph 1 of her Motion that she knew the balance of Highview's mortgaged indebtedness as of the December 30, 2008 valuation date.<sup>7</sup> Kathie then acknowledged in Paragraph 3 of her Motion that she was aware of

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<sup>6</sup> See RA 716 - 719.

<sup>7</sup> RA 716.

Highview's mortgage indebtedness reduction at the time of trial. Such knowledge is reflected by the fact that Kathie supported her equity-adjustment argument upon none other than her own Trial Exhibit #43 and Kaven's Trial Exhibit 6. Under such circumstances, it begs the question that Kathie knew, or should of known, of the equity reduction at the time of trial.

The fact is clear that Kathie knew, or should have known, at the time of trial about Highview's mortgage reduction. The law thus required that Kathie address the proposed increase to Kaven's equity at trial instead of holding such argument in reserve for a post-judgment motion. The Trial Court accordingly erred in considering Kathie's equity increase argument on a post-trial basis, and the Court of Appeals likewise erred in affirming such consideration.

The undeniable fact, however, is that the Trial Court could have re-opened the evidentiary record to take additional proof regarding Advantage's and Highview's post-valuation financial transactions. Doing so would have given both Kaven and Kathie an opportunity to address the full panoply of financial transactions which occurred subsequent to their December 30, 2008 valuations. Instead, the Trial Court said that a single financial transaction captured the true value of Kaven's equity in Highview. Kathie argues the Trial Court was simply obligated to render an equitable division of Kaven's interests in Highview. Such position, however, runs afoul of this Court's statement in *Gaskill v. Robbins*, 282 S.W.3d 308, 312 (Ky. 2009) that "everything of value must be counted" when valuing a business. Obviously, this Court recognized that considering all variables which affect the financial position of a business is a necessary predicate to obtaining an accurate valuation. It thus begs the question whether a

division of a marital interest in a business can be truly equitable if the underlying valuation is inaccurate. In this instance, the Trial Court's determination only consider the single variable of Highview's reduction of mortgage indebtedness in casting a re-valuation was arbitrary and erroneous, and thus must be reversed.

**B. Kathie's Brief Fails to Refute the Arbitrariness of the Trial Court's and Court of Appeals' Disregard of Basic Accounting Principles.**

If the aforementioned error was not bad enough, the Trial Court compounded such error by incorrectly analyzing the economic effect of Highview's reduction of its mortgage indebtedness.

In his principal Brief, Kaven took issue with the Trial Court's post-trial increase of his equity in Highview, and the Court of Appeals' affirmance, on the basis that such determination was contrary to basic accounting principles. In her Brief, Kathie in essence responded that the Trial Court was not obligated to adhere to generally accepted accounting principles. Kathie supported such argument by relying upon this Court's decision in *Gaskill*, supra., in arguing that the Trial Court had the discretion to adopt whatever accounting system it deemed appropriate. Kathie's argument, however, misinterprets what this Court said in *Gaskill*.

At issue in *Gaskill* was the valuation and division of the goodwill of a sole-owned medical practice. In addressing such valuation, the Court held that a trial court must have a rational basis for applying given accounting principles which must be supported by adequate evidence. 282 S.W.3d at 315. This Court certainly did not say that a trial court may disregard generally accepted accounting principles in favor of whatever

accounting standard it may wish to devise. To the point, such a holding would run contrary to this Court's decision in *National Distillers and Chemical Corp. v. Stephens*, 912 S.W.2d 30, 32 (Ky. 1995).

In *Stephens*, this Court held that an entity's reliance upon anything other than generally accepted accounting principles "would at the very least cause confusion among both participants in and observers of the financial world." In support of such holding, the Court cited the regulations of the Securities and Exchange Commission which dictate that:

"[f]inancial statements filed with the Commission which are not prepared in accordance with generally accepted accounting principles will be presumed to be misleading or inaccurate,...."

17 C.F.R. § 210.4-01(a)(1). This principle does not vary simply because an entity is privately-owned versus publically-traded.

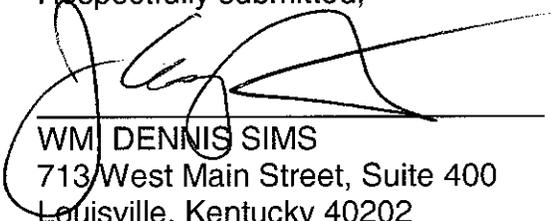
The determinations of the Trial Court and the Court of Appeals concerning the increase of Kaven's equity in Highview were clearly erroneous and arbitrary. On this point, the following observation by the Court in *Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708, 712 (Ky. 1990) is appropriate: that merely establishing a voluminous record does not support a declaration that an apple is an orange. While *Abramson* addressed an arbitrary and result-oriented determination of neighborhood blight which was contrary to the facts, the underlying principle is nevertheless applicable here. No matter which accounting system a trial court may determine applicable, any such determination does not change the concrete fact that "Assets - Liabilities = Equity". Such formula universally applies to the determination of owner

equity in all businesses regardless of whether the Court is valuing a child's lemonade stand or Microsoft. No matter the size of a business, the payment of indebtedness always results in a reduction of both its assets and its liabilities, and does not result in an increase in equity. A trial court cannot be heard to say otherwise, just as it cannot be heard to find that an apple is an orange. Here, the Trial Court's finding that Highview's post-valuation reduction of its indebtedness resulted in an increase to Kaven's equity was patently arbitrary and thus erroneous. A reversal of such determination is required in this instance.

### **CONCLUSION**

For the reasons set forth above and in Kaven's principal Brief, this Court should reverse the Court of Appeals' August 17, 2012 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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