DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BRIGITTE CHARBONNEAU,
Appellant,

v.

LAWRENCE CHARBONNEAU,
Appellee.

Case No. 4D17-0191

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

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TABLE OF CITATIONS

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PRELIMINARY STATEMENT

In this brief, Appellant Brigitte Charbonneau will be referred to as "Former Wife" and Appellee Lawrence Charbonneau will be referred to as "Former Husband." The Record consists of the all relevant documents in the lower tribunal's docket as well as **all** exhibits and transcripts of proceedings filed in the lower tribunal in accordance with Rule 9.200(a)(1). References to matters of Record will be made by the following: citations to the trial transcript will be designated by (T _) with the appropriate page number from the trial transcript inserted; citations to the record and supplemental record will be designed by (R _ _) with the appropriate page number inserted. References to Former Husband's Answer Brief will be designed by (AB _ _) with the appropriate page number inserted.

I. INTRODUCTION TO FORMER WIFE'S REBUTTAL

Prior to addressing each item from Former Husband's Answer Brief, Former Wife respectfully submits the following points. Firstly, the Answer Brief does not address the fact that Former Husband and his current wife repeatedly, emphatically, and ***falsely*** testified that Former Husband performed no work in the year 2016. This statement is not meant to be provocative but rather to draw this Court's attention to the proper weight a "reasonable person" (within the meaning of Canakaris and its progeny) would attribute to Former Husband's and his current wife's testimony regarding other matters in this case. Ostensibly, Former Husband takes the position that a "reasonable person" would accept Former Husband's and his current wife's testimony uncritically even after that same court found their repeated testimony to be "not credible" (i.e. false) with regard to a critical element of the case. Former Wife respectfully submits that this Court should reject this position outright; and further submits that testimonial evidence of witnesses that provided "not credible," (i.e. false testimony) can never, on their own, constitute "competent and substantial evidence." This is particularly true when said testimonial evidence is self-serving and likewise contracted by all objective evidence.

Additionally, Former Husband's Answer Brief repeatedly and incorrectly asserts that Former Wife has waived each of the items on appeal. Former Wife

respectfully submits that these assertions are nothing more than red herrings designed to distract this Court from the weight of the arguments in Former Wife's Initial Brief. All of the items on appeal were presented to, and ruled upon by, the trial court. Finally, Former Husband's repeated reference to Simmons and Farghali and the line of cases regarding the "specific factual findings" requirement for assets and liabilities set forth in F.S. § 61.075(3) has no bearing whatsoever on this appeal.

II. FORMER WIFE'S REBUTTAL TO "THE TRIAL COURT APPROPRIATELY GRANTED RELIEF THAT WAS SPECIFICALLY PLED"

Former Husband first asserts that Former Wife failed to raise the scope of pleadings issue at trial. This is clearly incorrect. In fact, this precise issue, along with relevant case law, was presented to the trial court during Former Wife's closing argument and Former Husband's rebuttal closing. Former Wife informed the trial court that the pleadings specifically alleged that Former Husband's purported retirement on August 1, 2015 was involuntary and thus Former Husband's attempt, for the first time during closing argument, to allege voluntary retirement was outside the scope of the pleadings. (T 338, 347-348) Additionally, Former Wife repeatedly informed the trial court that the Pimm framework, which relates to voluntary retirement, was inapplicable to this case since Former Husband's petition alleged that his retirement was involuntary. (T 347) In fact, Former Wife specifically cited Wiedman, in support of her position that the Pimm

"voluntary retirement" analysis did not apply to this case because Former Husband alleged involuntary retirement. (T 338) Wiedman v. Wiedman, 610 So.2d 681 (Fla. 5th DCA 1992). Thus, Former Wife clearly satisfied the rule that "a party must take some position below" in order for the appellate court to review how the trial court ruled on that position. Eagleman v. Korzeniowski, 924 So. 2d 855, 859 (Fla. 4th Dist. App. 2006). Then, during his rebuttal closing, Former Husband attempted to draw a distinction between Wiedman and the present case. (T 353) Thus, Former Husband's assertion that this issue was not presented to, and ruled upon by, the trial court is fallacious.

Additionally, Former Husband's assertion that Former Wife was required to file a motion for rehearing in order to preserve this issue for appeal is incorrect. As demonstrated throughout this Reply Brief, Farghali (cited by Former Husband) relates solely to matters in which the appellant alleges the trial court failed to make specific findings of fact as to the disposition of assets and liabilities. Former Wife respectfully submits that Farghali, both specifically and generally, is clearly inapplicable to the scope of pleadings issue and to this appeal in general.

Former Husband next argues that since he pled that he was involuntarily retiring on August 1, 2015, Former Wife was given sufficient notice that "he wanted the trial court to consider his post-judgment retirement." (AB 12) However, Former Husband's logic in this regard is flawed as it fails to recognize

the clear distinction between voluntary and involuntary retirement and likewise ignores the fact that Florida is a fact-pleading jurisdiction. Deloitte & Touche v. Gencor Industries, Inc., 929 So. 2d 678, 681 (Fla. 5th Dist. App. 2006)

In this case, Former Husband specifically pled that he would be retired as of August 1, 2015 and would be ***incapable*** of working after that date because it would ***seriously jeopardize his health***. (R 393-395) Since Former Husband alleged that he was incapable of working in any capacity due to health reasons, he clearly alleged an involuntary retirement. During trial, Former Wife went through the painstaking task of proving that this was false and Former Husband had continued to work extensively in the coin industry after August 1, 2015. The trial court agreed with Former Wife on this point. However, the trial court then, without jurisdiction, went outside the scope of the pleadings and ruled that Former Husband voluntarily retired in July/August 2016.

Former Husband acknowledges that some district courts of appeal have held that there is a different standard for voluntary and involuntary retirement. (AB 15) Former Husband's attempt to trivialize the case law that supports the distinction between a voluntary retirement and an involuntary retirement is misguided. The distinction in the analysis between involuntary and voluntary retirement rests on the premise that in an involuntary retirement, the payor spouse may be required to find alternative employment; or may, in fact, be incapable of working (e.g. if

illness or injury cause the involuntary retirement). This analysis is very different from the analysis for a voluntary retirement as set forth in Pimm. The rationale for the distinction between voluntary and involuntary as separate causes for modification is sound, and Former Wife respectfully submits that this Court, to the extent it has not already, should formally adopt it.

Furthermore, as stated above, Former Husband's petition cites August 1, 2015 as the specific date for his alleged involuntary retirement. (R 392) Former Wife proved that Former Husband did not retire as of that date and continued working in the coin business for at least a year after the date of his alleged retirement. The trial court is without jurisdiction to simply pick a random date for Former Husband's retirement more than a year after the retirement date alleged in the pleadings. If Former Husband's position is accepted, litigants in modification/retirement cases would be incentivized to falsely plead retirement as of the petition date, then continue to work throughout the pendency of the case, and only stop working on the very eve of trial. Former Wife respectfully submits that this Court should not accept this position.

Finally, the issue of a voluntary retirement was not tried by consent. The only mention of Pimm in the Former Husband's opening statement was in regard to 65 being the presumptive age of retirement in the state of Florida. (T 6) In his opening statement, Former Husband ***never*** alleged voluntary retirement. In fact,

throughout the trial, Former Husband never argued anything other than he involuntarily retired on August 1, 2015 due to health reasons. During trial, Former Husband ***never presented*** any evidence that he voluntarily retired in July 2016. It was not until Former Husband's closing argument that his counsel first mentioned voluntary retirement in relation to this case. As demonstrated above, during her rebuttal closing argument, Former Wife repeatedly objected to Former Husband's request that the Court's use the Pimm "voluntary retirement" analysis because it went beyond the scope of the pleadings. Thus, Former Husband's assertion that this matter was tried by consent (explicit or implied) is fallacious.

III. FORMER WIFE'S REBUTTAL TO "THE TRIAL COURT PERFORMED THE CORRECT ANALYSIS OF THE FORMER HUSBAND'S RETIREMENT"

Former Husband, citing Simmons, once again, incorrectly argues that Former Wife has waived this item by not filing a motion for rehearing. However, Simmons and that particular line of cases, including Farghali, relates to the statutory finding of fact requirement set forth in 61.075(3) regarding the value of assets and liability in a dissolution proceeding. Simmons v. Simmons, 979 So. 2d 1063, 1064–65 (Fla. 1st Dist. App. 2008). The rationale for the Simmons' rule, is that a party that is responsible for presenting the trial court with evidence to support a finding of fact pursuant to 61.705(3), should not, absent a motion for rehearing, be permitted to benefit on appeal by arguing that there is insufficient

findings of fact to support appellate review. Simmons v. Simmons, 979 So. 2d 1063, 1064 (Fla. 1st Dist. App. 2008).

In this item on appeal, Former Wife is clearly not arguing that the Final Judgment lacks sufficient findings of fact to allow meaningful appellate review. Former Wife is simply arguing that Pimm requires a certain standard to determine the "reasonableness" of an alleged voluntary retirement. Once again, this specific issue and the specific requirements of Pimm were presented to the trial court for consideration in Former Wife's closing argument.

Former Husband does not contest the fact that the trial court failed to consider the "age at which others" in Former Husband's "line of work normally retire." Additionally, Former Husband's Answer Brief simply ignores the fact that the trial court did not specifically consider whether Former Husband's retirement would place Former Wife in "peril of poverty." Therefore, Former Wife respectfully submits that it is self-evident that the trial court did not apply the Pimm standard in the Final Judgment.

IV. FORMER WIFE'S REBUTTAL TO "THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE FORMER HUSBAND'S ALIMONY OBLIGATION DOWNWARD

Former Wife's third point on appeal addresses the issue of whether there was sufficient evidence to support the trial court's reduction of Former Wife's alimony or if the trial court abused its discretion in this regard. Former Husband,

once again citing Simmons, mistakenly asserts that Former Wife has waived this issue by not filing a "Motion for Reconsideration." However, Former Husband has once again confused and conflated this line of cases. Former Wife is not arguing that the Final Judgment contains insufficient findings of fact for appellate review. Rather, Former Wife is arguing that there is insufficient evidence in the record to support the Final Judgment.

Moreover, this is precisely the type of matter that is covered by Florida Family Law Rules of Procedure 15.530(e), which mirrors Fla. R. Civ. P. 1.530(e):

> **When Motion Is Unnecessary; Non-Jury Case**. When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection to it in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment.

Therefore, Former Husband's assertion that Former Wife has waived her argument challenging the sufficiency of the evidence is clearly misplaced. See also, Welch v. Welch, 22 So. 3d 153, 155 (Fla. 1st Dist. App. 2009)

Former Husband's Motivation for Retirement:

With regard to Former Husband's motivation for retirement, Former Husband's Answer Brief utterly ignores the fact that Former Husband ***never testified*** that he retired in late July 2016. Both Former Husband and his current wife repeatedly and consistently testified that he had retired due to health reasons on August 1, 2015. The trial court unequivocally found this testimony to be false

in its Final Judgment and Order on Former Wife's Motion for Contempt (R 810). Therefore, since Former Husband never argued that he retired as of July 2016, he clearly never testified or offered any evidence whatsoever regarding his motivation for a voluntary retirement in late July 2016.

Former Husband likewise ignores the fact that Leisure Time Coins' financial status in July/August 2016 had no relevance whatsoever on Former Husband's retirement or ability to work since Former Husband divested himself of his ownership interest in Leisure Time Coins on August 1, 2015. In the Final Judgment and the Order of Contempt, the trial court essentially ruled that this divestment was designed in order to divert Former Husband's income to his current wife ***in order to avoid paying alimony to Former Wife.*** This is precisely why the trial court found Former Husband in contempt on December 19, 2016. The fact that Leisure Time Coins was dissolved as a legal entity in order to avoid paying a final judgment has absolutely no impact on Former Husband's purported motivation for retirement or ability to work.

Former Wife respectfully submits that it is unreasonable for the trial court to carry fundamentally contradictory holdings regarding Former Husband's motivation for his pled date of retirement (August 1, 2015) and the date of retirement the trial court ultimately ascribed to him in the Final Judgment (July/August 2016). It was likewise unreasonable for the trial court to ascribe a motive to Former Husband's

purported retirement in July/August 2016 when Former Husband never testified or offered any evidence that he retired as of that date. This conclusion is made more unreasonable by the fact that the trial court, in the same Final Judgment, held that Former Husband had effectively faked his retirement between August 1, 2015 and July/August 2016 in order to avoid paying alimony. Then, the trial court held that since there was no evidence that Former Husband worked in the few months on the eve of trial, Former Husband had fully and voluntarily retired ***and*** that his alimony obligation played no role in that decision.

Former Wife respectfully submits that it is wholly unreasonable and an abuse of discretion for the trial court to find that Former Husband's purported retirement was not motivated by a desire to avoid his alimony obligation, when that same court ruled that Former Husband had faked his retirement over a twelve month period, in contempt of court, in order to avoid paying his alimony.

Age at which Other Coin Dealers Normally Retire

Former Husband does not attempt to contest the fact that he failed to adduce any evidence at trial regarding the age at which coin dealers normally retire. The record likewise clearly establishes the fact that Former Husband's age played no role in his alleged retirement.

Former Husband's Health:

While Former Husband alleged a number of health issues in his Petition and throughout trial, his self-serving testimony and that of his current wife does not form the basis for "competent substantial evidence" when said testimony is clearly contradicted by all objective evidence. This is particularly true when the trial court has ruled that Former Husband's and his current wife's testimony regarding Former Husband's alleged retirement on August 1, 2015 was ***not credible*** (i.e. false). While it is true that Former Husband and his current wife testified that Former Husband had some health issues, they also repeatedly and falsely testified that he had performed no work in 2016. No "reasonable person" would uncritically accept their testimony as gospel in the face of all objective evidence to the contrary.

If Former Husband had genuinely been suffering from diminished mental capacity after August 1, 2015, clearly his current wife would not have used him as an expert witness in her case against Republic Metals in December 2015 and certainly would not have permitted him to transport large sums of bullion and rare coins unaccompanied. There is simply no competent and substantial evidence that Former Husband's health had any impact whatsoever on his alleged retirement.

Former Husband's Answer Brief does not contest that the Final Judgment reduces Former Wife to Poverty

While the first four Pimm factors relate to the status of the payor spouse, Pimm's fifth factor (which can effectively trump the other four) is a built in

protection mechanism that is designed to prevent the payor's voluntary retirement from placing the payee spouse in "peril of poverty." Simply put, a payor spouse, even at the age of sixty-five or later, cannot "unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty." Thus, according to Pimm, if a payor spouse's voluntary retirement renders the payee spouse in "peril of poverty," then said voluntary retirement is *per se* unreasonable.

This fifth factor highlights one of the critical distinctions between a voluntary and an involuntary retirement in a modification proceeding. In an involuntary retirement case, the payor spouse must present evidence that he/she is incapable of working, and, once this is established, the effect of the involuntary retirement on the receiving spouse is largely irrelevant. However, in the voluntary retirement framework, a payor spouse ***cannot retire*** if said retirement would place the receiving spouse in "peril of poverty."

Former Wife respectfully asserts that this component was placed into the Pimm framework for situations like the present case where Former Husband's retirement has in fact, placed Former Wife in a horrific circumstance of poverty. If ever there was a situation in which a voluntary retirement would be deemed unreasonable under Pimm, it would be the present matter where the Final Judgment forces Former Wife to choose between paying for medicine and paying for food and prevents her from receiving essential medical treatment.

Importantly, Former Husband does not contest the fact that the Final Judgment leaves Former Wife in poverty and unable to meet her "basic needs." The only distinction that Former Husband attempts to draw between this matter and Kelley v. Kelley, 967 So. 2d 924 (Fla. 2d DCA 2006) is the fact that that Former Wife was not "shortchanged" because the difference between Former Husband's and Former Wife's income is "de minimis." However, this clearly ignores the fact that the Final Judgment acknowledges that Former Husband's current wife reduces his monthly expenses, and, more importantly, ignores the fact that Former Husband owned real estate worth approximately $470,000 at the time of trial. (T 331) When one party owns hundreds of thousands of dollars in assets and the other party must choose between medicine and food, clearly one party is being "shortchanged."

Therefore, since Former Husband's purported retirement has clearly rendered Former Wife in poverty, there is no evidence to support the trial court's conclusion in the Final Judgment that Former Husband's purported voluntary retirement is reasonable.

Permanence of Retirement:

As an initial matter, Former Husband's Answer Brief once again ignores the fact that the Final Judgment found that he had worked extensively in the coin business for at least twelve of the sixteen months following the date of his alleged

retirement on August 1, 2015. Likewise, Former Husband's Answer ignores the case law that rejects the position that a brief change of a few months on the verge of trial does not establish the "permanency" requirement to modify alimony. Perez v. Perez, 973 So. 2d 1227 (Fla. 4th DCA 2008). Former Husband has failed to cite any case law to support his position that he can establish the permanency of his retirement simply by not working in the few months before trial after he had essentially faked his retirement for at least a year.

Additionally, Former Husband does not address the fact that there is no evidence to support the trial court's conclusion that: "the evidence supports that the Former Husband does not have any way to continue doing business with his former company, or any other company, at this time." As stated in her Initial Brief, this statement is clearly contradicted by the evidence and, is also contradicted by the Final Judgment itself which identifies that Former Husband owns multiple pieces of real estate, one of which is worth at least $100,000. In fact, in his closing argument Former Husband acknowledged that he had unsold real estate worth $470,000. (T 331) Therefore, Former Husband clearly has the means to continue working in the coin business. The fact that Former Husband has the assets to continue working in the coin business in no way runs afoul of the prohibitions set forth in Galligar. Thus Former Wife respectfully submits that the trial court's determination that Former Husband "does not have any way" to continue to

function as a coin dealer was not supported by competent and substantial evidence, and thus was an abuse of discretion.

Failure to Impute

Former Husband's Answer Brief does not provide any response to Former Wife's position that the trial court erred in not imputing income to Former Husband. The evidence conclusively established that Former Husband dissipated vast sums of money to his current wife over the last twenty-years and engaged in bad faith in this proceeding. In its Order of Contempt, the trial court essentially agreed with these positions and imputed income to Former Husband for the period from August 1, 2015 –August 1, 2016. The Final Judgment clearly should have continued this imputation of income to Former Husband for the period after August 1, 2016.

IV. CONCLUSION

Former Husband's Answer Brief does nothing to challenge the critical aspects of this appeal: (1) Former Husband never pled or offered evidence that he voluntarily retired in July 2016, and therefore the Final Judgment went beyond the scope of the pleadings; (2) the trial court did not apply the Pimm standard; and (3) the trial court abused its discretion in reducing Former Wife's alimony to $500 per month for the reasons set forth above, which includes the fact Former Wife is now unable to take care of her basic needs and lives in a horrific state of poverty.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email on the following recipients this 18th day of December 2017; Ralph White, Esq. 4400 PGA Blvd. Suite 600 Palm Beach Gardens, FL 33410. white@rtwhitelaw.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of the Florida Rules of Appellate Procedure 9.210(a)(2).

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