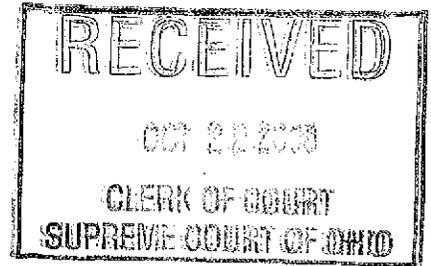


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10/20/08



In The Supreme Court of Ohio

Dennis P. Bills

Appellant

vs.

Beth A. Bills

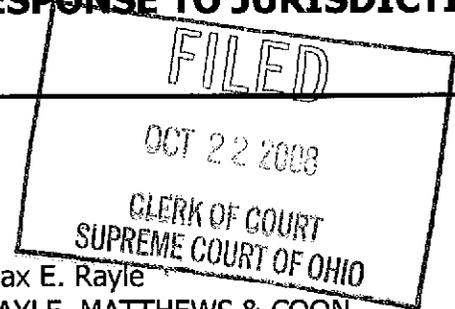
Appellee

S.C. No. 2008-1920

On Appeal from the Wood County
Court of Appeals,
Sixth Appellate District

C.A. No. WD-07-043

MEMORANDUM OF APPELLEE IN RESPONSE TO JURISDICTION



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STATEMENT OF APPELLEE'S POSITION ON JURISDICTION

The case below presented a routine question of statutory application [(R.C. 3105.171(A)(3)(a) and R.C. 3105.18(C)(1)(a)] and there is neither a conflict among the districts nor the presentation of any unique issue requiring this Court's guidance.

The decision below did not involve a so-called theory of "double dipping" but rather a simple classification of an asset as marital and approving a trial court's distribution of such as a part of the property division order in a divorce case. There was no valuation or distribution of any on-going business as Appellant's Proposition of Law No. 1 states or any kind of calculation of the present value of future income as was involved in the cases Appellant relies upon. Instead the trial and appellate court simply recognized that \$222,000.00 of crops in storage had accumulated over time much like a savings account would and that such was rightly a marital asset that required division consistent with Ohio statutes and a plethora of case authority. The establishment of spousal support - issues with which the appellate court deferred ruling on due to a limited remand which remains active - was then addressed as a separate issue. There is no matter of public or great general interest involved in this case as a careful dissection of Appellant's argument will show.

At first blush, the jurisdictional statement of Appellant appears to present an attractive argument for accepting discretionary review of this case. Farming is certainly an important industry in Ohio and as divorce rates sadly escalate throughout the country more farm families will be before the domestic relations courts of Ohio for the application of the marital property division [R.C. 3105.171] and spousal support [R.C. 3105.18] statutes. Couching the argument in terms of a self-proclaimed "double dipping" problem/issue and accompanying such by claims of perceived conflicts within the appellate districts would expectedly pique the attention and

curiosity of this tribunal. However, when stripped of its artificial gilding, the argument for jurisdiction loses its appeal since it is revealed as little more than a garden-variety request to review the classification and division of a common marital asset - a type of savings account which in this case simply happens to be in a tangible form.

Arguing the concept of an unfair claim of "double dip" has become fashionable in domestic relations cases in Ohio and elsewhere but whether such exists as a recognized legal theory in this state is of some question. Appellant suggests that the Tenth District decision in *Heller v. Heller*, 2008-Ohio-3296 should be read as validating an application of the "double dipping" theory in Ohio domestic relations proceedings. A closer examination of the entire *Heller* case seems otherwise as the later Memorandum Decision denying a Motion for Reconsideration in that case directly states. [See Argument *Infra* at p. 5].

While it may not be clear whether any Ohio appellate court has yet fully embraced the concept of prohibiting so-called "double dipping" as the courts of some other states have [See, for example *Hutta v. Hutta*, 2008-Ohio-3756 which specifically rejected the argument], what IS clear is that no improper "double dipping" or "double counting" occurred here.

At the trial court level, Appellant's "farming operating" was never valued, on an "income approach" or otherwise. Therefore, unlike the situation in *Heller* [value of Sub-S corp valued by capitalizing future earnings, dividing that asset as a property division, and then ordering the company-owning spouse to pay a percentage of all future earned income also as it was received] and *Burkhart v. Burkhardt*, 173 Ohio App. 3d 252, 2007-Ohio-3992 [businesses valued and divided during divorce and then later treating the repayment of principle on a loan to the company from funds derived from the sale of business assets as income for modifying spousal support], this Appellant's **FUTURE** income was never divided as an asset. Rather, crops in storage were determined to be an asset subject to equitable division consistent with

every appellate case addressing the issue. See: *Cooper v. Cooper* (1983), 10 Ohio App. 3d 143; *Walston v. Walston* (Sept. 29, 1995), 6th Dist. No. WD-94-057, 1995 Ohio App. LEXIS 4206; *Burks v. Burks* (Sept. 12, 1996), 3rd Dist. No. 16-96-2, 1996 Ohio App. LEXIS 4063; *Bitters v. Bitters*, 2004-Ohio-5233. After the marital assets were divided, the trial court then determined Appellant's income for spousal support purposes as is required by R.C. 3105.18(C) and used a three-year average of **PAST** income, as defined in R.C.3105.18(C)(1)(a) which, by statutory necessity, included consideration of net farm income for prior years that would encompass harvested crops. The trial court did not simply take the amount of crops in storage as reported on farm financial statements as the amount of income to be used as Appellant implies, but rather utilized tax returns and did the statutory computation as required. Therefore, there simply was no "double dip" in this case.

As to the second claim for discretionary review, there is also nothing unique in the trial court's allocation of debt between marital farm assets and non-marital farm assets that requires this Court's attention or consideration. Appellant never briefed in the appellate court below and the Court of Appeals never considered or decided whether the allocation of farm debt by the trial court between marital real estate and non-marital real estate was proper. The claim now asserted was therefore never perfected or preserved. Had it been, the result would be the same since the trial court had voluminous documentary evidence on every loan and/or mortgage that was ever taken out in the entire history of this 24 year marriage. It used that evidence to do an allocation of marital and non-marital debt as the law requires. In fulfilling that duty, the trial court exercised proper discretion in its debt allocation, a conclusion which is supported by the fact that Appellant never made the issue an assignment of error in the appellate court below.

Simply put, this case presents no unique issues or unsettled areas of the law that require this Court's time or attention. Claims made now simply seek correction of what Appellant perceives as errors. As Justice Cook observed in her concurrence in *Baughman v. State Farm Mut. Ohio. Ins. Co.* (2000), 88 Ohio St. 3d 480, 2000-Ohio-397, "... this court sits to settle the law, not to settle cases." Since the law is settled, acceptance of this case for review would do little more than provide Appellant with another alleged error review.

**ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION
OF LAW NO. I**

**Any concept/theory relating to "double counting" or
"double dipping" is not present in the case *sub judice*
since no business entity was either valuated or divided.**

If this case presented an issue of an unfair or unjust "double counting" or "double dipping" then it might be one for this Court's consideration. A "double count" or a "double dip" occurs when the value of an ongoing business set by capitalizing FUTURE BUSINESS INCOME is divided as a marital asset and then that same FUTURE INCOME is awarded to the other spouse again but denominated as "spousal support". That is the precise fact pattern that was presented in *Heller v. Heller*, 2008-Ohio-3296, the case which Appellant rests his entire request for discretionary review on. In *Heller*, the husband owned an interest in a "Sub-S corp" that periodically issued dividends and he received a salary separate and apart from those corporate distributions. The value of husband's interest in the corporation was established by an "income approach" which capitalized FUTURE EARNINGS. Wife was awarded one-half of that value (in other assets) as a part of the property division. The trial court then made an award of \$8,000.00 per month of indefinite spousal support AND AN ADDITIONAL AWARD OF 20% OF ALL FUTURE "BONUS" [i.e., non-salary] INCOME HUSBAND RECEIVED FROM THE CORPORATION AS IT WAS RECEIVED. *Heller, supra* at ¶11. Such action by the trial court clearly awarded wife a part of the same asset twice [her one-half interest in the capitalized future earnings of the business as an asset division and 20% of the actual future earnings as they are received as well] and the Tenth District Court of Appeals made it clear that such was improper:

In this case, the evidence clearly indicates that the value assigned to defendant's interest in H & S did not include defendant's compensation for his daily labor, but did include his share of all of H & S's future excess earnings; that is, it included the present value of all of

defendant's future stock dividends. In making its property division, the trial court divided this asset equally between the parties. But the trial court then awarded to plaintiff, in addition to her one-half of that asset, another 20 percent of *defendant's half*.

2008-Ohio-3296 at ¶22.

Contrary to the implied suggestion of Appellant, the *Heller* court never held that a spouse's income from a business pursuit cannot be considered for spousal support purposes any time that the business itself is divided as an asset. The Tenth District's Memorandum Decision of August 12, 2008 denying a Motion for Reconsideration made that point abundantly clear:

[R]ather, we held that it is error for a court to treat a party's ownership interest in a closely-held company as an asset, reduce that asset to present value using the "income" method, which accounts for the company's future excess earnings, but not for the spouse-owner's future income from that company [i.e., remuneration for labor], then divide that value between the parties; and later award part of the spouse-owner's share of that asset to the other spouse, payable in the future when the spouse-owner finally realizes his share of the already-calculated and already-divided value.

Memorandum Decision at p. 3.

The Tenth District's analysis of the law is correct and the Sixth District's approval of the trial court's application of statutory law in this case has not resulted in a conflict between the property award [R.C. 3105.171] and the support order [R.C. 3105.18] no matter how many times Appellant claims such to be the case. R.C. 3105.171(C)(3) requires that a property division award be made before and without regard to any spousal support consideration. That is precisely what the courts below did in this case. R.C. 3105.18(C)(1) then requires the court to consider in determining any spousal support award a number of factors, including:

(a) The income of the parties, from all sources, **including, but not limited to, income derived from property divided, disbursed, or distributed under Section 3105.171 of**

the Revised Code. [Emphasis Added]

That was also done here by both courts below. Thus, claims of a violation of public policy mandating the separation of property division awards from spousal support awards as enunciated by the General Assembly are fanciful at best.

In his quest to obtain jurisdiction in this Court, Appellant also seeks to divert attention from the actual facts of this case by conjuring up perceived conflicts among the appellate districts on the issue of "double counting" and issuing a call to join a sister state (New York) in embracing that concept in a judicial ruling while the other state acted through statute. [See N.Y. Domestic Relations Law Section 236 [B][5][d][5] referenced in *Grunfeld v. Grunfeld* (2000), 94 N.Y. 2d 696; 731 N.E. 2d 142, cited by Appellant with approval in Memorandum, p. 4]. The cases Appellant attempts to juxtapose to meet that goal do not have any application here since this case involved the division of an asset and not a business.

Throughout the nearly 25 years of this marriage, the parties acquired/maintained little or no savings. Rather, they accumulated crops held in storage, which the Farm Financial Statements from 1991 through 2004 show grew increasingly over the years. The value of this tangible savings account grew from zero in 1981 to \$39,458.00 by 1984, to \$61,525.00 by 1989, to \$166,000.00 by 1992, to \$249,000.00 by 1996 and to \$262,664.00 in 2004. The accumulation of such a savings-type asset is directly attributable to the significant increases that occurred in the parties' gross farming income which soared from \$96,215.00 the year of the marriage (1981) to over \$320,000.00 in 2004.

At the time of trial in 2005, crops in storage were worth just over \$222,000.00. The grain constituted a liquid asset that the court had to deal with and it was never argued that it was a part of any "business enterprise" that needed to be valuated. Neither party made such an assertion at the trial court level and no expert testimony was presented by either side as to

any business entity. Future net farm income was not capitalized, reduced to present value and divided as an asset, as the business interest was in *Heller*. Rather, tangible assets were jointly appraised or values were mutually agreed to and those tangible assets had to include the crops in storage under R.C. 3105.171(A)(3)(i) since they were accumulated during the marriage. The court then simply divided those assets equitably and moved on to the spousal support determination.

The acceptance of Appellant's position would require a holding that accumulated crops (either in the field or stored) could never be considered as anything other than a "stream of income". That has never been the law of this state, as an examination of existing appellate authority shows. In *Cooper v. Cooper*, (1983), 10 Ohio App. 3d 143 the Third Appellate District indicated that crops in storage can be income even if not sold but never said they were not assets. The case dealt with a post-divorce motion to modify child support, not an original asset division question. In *Burks v. Burks* (Sept. 12, 1996), Wyandot App. No. 16-96-2, 1996 Ohio App. LEXIS 4063 the same appellate district specifically found both stored and growing crops to be divisible assets in a divorce action under R.C. 3105.171(A)(3)(a)(i). In *Duke v. Duke* (Jan. 23, 1995), Preble App. No. CA94-04-009, 1995 Ohio App. LEXIS 167 the Twelfth District affirmed an award of stored and growing crops as assets, albeit as separate property rather than marital. The Sixth District has ruled in a similar manner as to both growing crops and crops in storage in the instant case as well as in *Walston v. Walston* (Sept. 29, 1994), Wood App. No. WD-94-057, 1995 Ohio App. LEXIS 4206 and in *Bitters v. Bitters*, 2004-Ohio-5233. All of these decisions are wholly consistent with the legislative policy set forth in R.C. 3105.171.

In fairness, Appellant does present an alternative approach in his brief, arguing that if existing crops are treated as assets then the value of those crops could never be used to estimate future net income for support purposes. That position would lead to an even more

absurd result. If accepted, it would mean that a farm housewife could never receive a spousal support award where the husband kept net income in the form of grain. R.C. 3105.171 and 3105.18 never envisioned such a circumstance and this Court should not put its stamp of approval on it either.

The nominal spousal support award entered in this case - which still is subject to further appellate review after this Court acts - does not change the asset division award into some unbalanced or inequitable order. After nearly a quarter century of marriage Appellant sought a divorce. Appellee had given up a lucrative career in public employment as a court reporter within two years of the marriage to stay at home and raise the children and she has remained out of the work force ever since. The trial court examined all of the statutory factors set forth in R.C. 3105.18, including the net income of Appellant as averaged over three years due to fluctuation. The support order issued was not based upon the value of \$222,000.00 of crops in storage but rather an average PAST INCOME of \$117,433.00. Based upon that factor and others, a sliding award of \$4,000.00 per month for two years and \$2,500.00 for five years was entered. Such an award is not a property division in disguise and it did not include any double counting of divided assets. This Proposition should be rejected.

**ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION
OF LAW NO. II**

A trial court determination of marital and non-marital debt allocation will not be addressed in a discretionary appeal where the issue was never raised at any level of the proceedings below.

Before this Court gives any consideration to the merits of Appellant's Proposition of Law No. II, it is important to point out what the proposed proposition specifically relates to and what it does not. The fact that the trial court made a determination that two farms acquired by Appellant prior to the marriage had both a marital and a separate property component by application of R.C. 3105.171(A)(3)(a)(ii) is certainly mentioned in the proposition heading and in the argument. But that is not what the proposed proposition fundamentally asserts. By its very terms it does not challenge the application of a trial court formula to determine and allocate the marital/separate property value of the real estate itself but rather asserts error in applying that percentage to the allocation of marital debt. This distinction is important to the jurisdictional question before the Court because Appellant never raised or presented that issue in either the trial court or the court of appeals.

At the trial court level, the trial court magistrate found that some of the debt existing on the date of trial should be allocated to the separate property (primarily farms and farm machinery) that Appellant was claiming. [Magistrate's Decision of August 29, 2006 at p. 4, 7]. On objection to the trial court judge, Appellant never raised that issue for review. Appellant instead confined his objection concerning the allocation of debt to the rejected claim that some of the debt should be considered the separate obligation of Appellee due to "financial misconduct." [Plaintiff's Memorandum In Opposition To Defendant's Objections And In Support Of Plaintiff's Objections of November 27, 2006, at p. 9]. The argument made therein actually

embraced the percentage allocation the magistrate had recommended but with requested adjustments to comport with the "financial misconduct" theory.

In ruling on objections filed by both parties, the trial court ordered a slightly different allocation of the existing debt between marital and non-marital components that the magistrate had determined but it reversed and modified the magistrate's order that found no marital component to the farms purchased prior to the marriage. [Order of February 13, 2007 at p. 19-20]. After subsequent proceedings on other unrelated matters, Appellant filed a request for reconsideration. In that pleading, no mention was made of any challenge to the debt allocation issue. [Request for Reconsideration of May 7, 2007].

After a final entry of divorce was journalized, Appellant filed a notice of appeal to the Sixth District Court of Appeals and Appellee filed a cross-appeal. No where in either the original merit brief of November 5, 2007 or the reply/answer brief of February 4, 2008 did Appellant raise any issues concerning the allocation of debt between a marital and non-marital component other than to re-assert the rejected theory of financial misconduct. The Court of Appeals decision makes no mention of such issue other than as it relates to finding a marital interest in the premarital real estate.

The policy followed by the Court concerning claimed errors not raised or preserved in the court of appeals is clearly stated in a multitude of cases, including *State, ex rel. Babcock v. Perkins* (1956), 165 Ohio St. 185 which states in Syllabus Para. 3:

3. Where an appeal on questions of law is taken to the Supreme Court from the Court of Appeals, which latter court had jurisdiction of the subject matter of and the parties to the action, the Supreme Court will not consider or determine claimed errors which were not raised and preserved in the Court of Appeals.

Appellant certainly raised an issue of the finding of a marital component to his premarital real estate (which was determined by comparing the fair market value of the

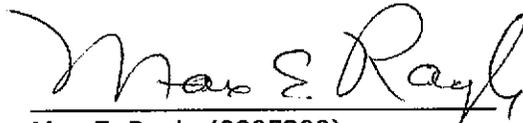
property at the time of the marriage to the balance of premarital debt due and owing at the same time but which was fully discharged during the marriage from marital assets). He did not, however, raise, argue or preserve any issue with respect to the allocation of debt other than the argument relating to a claim of financial misconduct, which is not asserted here.

The second proposed proposition of law should be ignored.

CONCLUSION

This case does not present any unique issue and does not provide an opportunity to clarify any uncertainty in the law. For the reasons stated above, discretionary review should be denied.

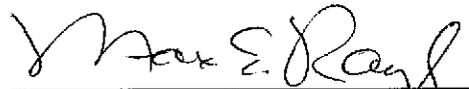
Respectfully submitted,



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The undersigned hereby certifies a copy of the foregoing was forwarded by ordinary U.S. mail this 20th day of October, 2008 to: John L. Straub, SHUMAKER, LOOP & KENDRICK, LLP 1000 Jackson Street, Toledo, OH 43624.



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