ORIGINAL

IN THE SUPREME COURT OF OHIO

Jeffrey Morrow,	:	Case nos. 2012-1674
	:	2012-1898
Appellant,	:	
	:	On Appeal from the
v.	:	Medina County Court of Appeals,
	:	Ninth Appellate District
Sherri P. Becker,	:	
	:	Court of Appeals
Appellee.	:	Case No. 11CA0066-M

REPLY BRIEF OF APPELLANT JEFFREY MORROW

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REPLY BRIEF OF DEFENDANT-APPELLANT

Defendant-Appellant Jeffrey Morrow submits the following reply in connection with the proposition of law he has raised in the instant appeal.

I. Appellee's efforts to discredit Mr. Morrow deflects attention from the main issues.

Here, Appellee-Becker's response to the Proposition of Law does not address the main issues argued by Appellant Jeffrey Morrow. Mr. Morrow contends that his company benefits stem from his employment at the Ohio College of Massotherapy, and therefore, they should not be included for purposes of calculating child support because the R.C. 3119.01(C)(13) specifically identifies such benefits in the calculation of support *only* under circumstances where the benefits stem from self-employment, work as a proprietor of a business or as a joint owner of a partnership or closely held corporation. Ms. Becker does not argue that Mr. Morrow's work-related benefits, such as his company car, stemmed from self-employment, but rather argued that Mr. Morrow possessed the ability to manipulate his employer and his employer's certified accountant and "simply reduce his income" and "increase his benefits" to any desired amount (Appellee Brief, p. 9). This is inaccurate and not in accordance with the record. In fact, Ms. Becker made several arguments along these same lines that are simply not supported by the transcript.

First, Ms. Becker inaccurately asserts that Mr. Morrow's company has "repeatedly" purchased a Lexus automobile for his benefit (Appellee Brief, p. 1). At the time of the trial, Mr. Morrow had been employed at the Ohio College of Massotherapy for eighteen years (July 27, 2010 hearing, hereafter "Tr2" at p. 10). In all that time, the company has provided him only two Lexus automobiles (Tr2 at p. 34-35). In support of Ms. Becker's position that the company has repeatedly purchased Lexus cars for Mr. Morrow, she references page 35, line 13-14 of the trial transcript, which simply relates to Mr. Morrow's statement that the company purchased him his current Lexus automobile to be used primarily for business purposes (Tr2 at p. 35, line 13-14). Nowhere does it state that the company has "repeatedly" purchased for him Lexus automobiles.

Second, although it is true that Morrow first recognized that unless his salary, along with other staff members, were reduced[1] the company could face economic ruin, this decision needed to be supported by the company's certified public account and also ratified by the Board (Tr2 at 16;89). Ms. Becker emphasis that one of the board members was Mr. Morrow's "elderly, out-of-state uncle" (Appellee Brief at p. 9) is misplaced, as Mr. Cangelosi continues to work full-time in his own business, and goes to work every day. Moreover, it would have been a foolish waste of resources to demand that Mr. Cangelosi fly to Ohio every time

[1] This coincided with the elimination of several departments and programs, like the technical and registrar department and the 403b program (TR2 at pp. 13-14; 42)

there is a board meeting, when, in this day and age, the same results can be achieved through tele-conferencing.

Although OCM's board members currently consist of four members, it is true that at the time that OCM reduced employee salaries in 2009 the board consisted of only two members. However, having the current board structure in place back then, or adding other additional members, would not have altered the decision to cut programs and reduce salaries. Mr. Morrow, as company president, came to the decision to cut staff salaries, including his own, after consulting with OCM's certified accountant. Mr. Morrow went to the board on April 28, 2009, with the intention of rescuing his employer with a host of cost-shaving measures, including discontinuing the 403(b) program, reducing membership in the group health plan, as well as reducing his salary, as well as other staff members. (See trial exhibits, Pl. exhibit 1). Mr. Ruther, OCM's accountant, testified that salaries are "based on the financial wherewithal of the company." (Tr2 at p. 88). Although in 2007 OCM was showing a small profit, its operating reserves had been decreasing. (Tr2 at p. 92). OCM was beginning to have liquidity issues, which potentially create multiple problems with banks and lines of credit. (Tr2 at p. 93-94; 97) In 2006, OCM had approximately $207,000 of operating liquid reserves, while in 2008, that dropped to about $76,000. (Tr2 at p. 93). It was necessary that OCM make the changes in 2009 to turn the financial situation around. OCM made a number of cuts and reductions in salaries that helped generate a profit and

decreased operating expenses. (Tr2 at 94). Cutting or reducing salaries not only made the most sense, but it was necessary, according to Mr. Ruther. (Tr2 at p. 96-97).

Mr. Ruther also explained that when a company is having liquidity problems and is looking to improve its balance sheet, employee salaries are the most desirable target because unlike many expenses that are fixed or semi-fixed, salaries are variable expenses and have more room to move. (Tr2 at 95).

When Morrow made his recommendation to the board to cut salaries, he was simply following the advice of OCM's accountant who had emphasized the importance of stabilizing the balance sheet to avoid financial danger. Had these drastic measures not been taken, as the evidence demonstrated, OCM's liquidity problems would have worsened and the college could have faced financial ruin.[2] It certainly would not have been in the best interest of Morrow's children or Ms. Becker if OCM went bankrupt and he lost his livelihood.

CPA audited financial statements for accredited colleges are highly scrutinized, much more intensely than conventional CPA audits. Unless Ms. Becker is alleging that Mr. Morrow "doctored" the books and/or Mr. Ruther committed perjury, her allegation that Mr. Morrow's has "limitless" control over his income and compensation (Appellee's Brief at 9) is ludicrous and is not supported by anything in the record.

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[2] See Mr. Morrow's testimony, Tr2 at 14; Mr. Ruther's testimony, Tr2 at 86-98.

II. Mr. Morrow's company benefits were basic in nature, specifically identified in statute, making the "catch-all" provision inapplicable.

Ms. Becker also argues that "[i]t is simply impossible for a General Assembly to list every possible source of income which they would like to include for purposes of calculating child support." (Appellee Brief at 6). She makes this argument to bolster her position that the General Assembly's failure to state the example of automobile benefits in the definition of gross income does not mean that they didn't intend on its inclusion under the "catch all" provision. She cites to *Burns v. United States* (1991), 501 U.S. 129, 136 for her authority, but neglects to mention that *Burns* dealt with criminal sentencing guidelines, has been over-ruled and superseded by Criminal Rule 32, and has no application here.

Mr. Morrow's company benefits, which included an automobile, were basic employee benefits which didn't need to be part of any catch-all. Ms. Becker cannot use the "catch-all" provision based on "any other income" as a substitute for the more specific provisions of the statute. A catch-all provision only applies when a more specific provision does not apply. *Tabor v. Tabor*, 7th Dist. No. 02-CA-73, 2003-Ohio-1432, ¶ 30, citing *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914, 1994-Ohio-107.

In the instant case, company benefits -- such as a company car -- are specifically provided for under R.C. 3119.01(C)(13). This is not a situation where

the General Assembly didn't "envision" that a company car or other work-related benefits might be given to a working parent, but specifically acknowledged that such situations would occur, and thus, clearly defined the circumstances in which a company car and other related benefits could be included in the definition of gross income for purposes of calculating child support. As both *Spier v. Spier, et. al.*, 7th Dist. No. 05 MA 26, 2006-Ohio-1289 and *Botticher v. Stollings*, 3rd Dist. No. 11-99-08, 1999-Ohio-976 concluded, company benefits should be included when calculating gross income when such benefits stem from self-employment or from work as either a proprietor of a business or a joint owner of a partnership or closely held corporation. However, since Mr. Morrow's company benefits came from his employment as President of a non-profit organization, and did not come from any self-employment work, which Ms. Becker concedes, R.C. 3119.01(C)(13) does not apply to him and the value of his company benefits should not have been included in the calculation of child support.

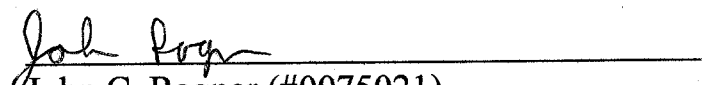
Ms. Becker also argues that R.C. 3119.01 also addressed what should be specifically excluded from the broad definition of gross income. She asserts that because "company benefits" are not in this exclusion, the General Assembly did not intend for it not to be within the definition of gross income (Appellee Brief at p. 7). Again, this would be accurate if the General Assembly had not specifically addressed how company benefits should be calculated in the determination of gross income. The General Assembly did not want to exclude company benefits in the

calculation, as they did with the specific exclusions in which Ms. Becker refers, but simply wanted to define and limit its application to be utilized only under circumstances where the benefits stem from self-generated income. *Spier v. Spier, et. al.*, 7th Dist. No. 05 MA 26, 2006-Ohio-1289 at ¶ 21; *Botticher v. Stollings*, 3rd Dist. No. 11-99-08, 1999-Ohio-976 at p. 2). Because Mr. Morrow's benefits did not come from self-generated income as defined by statute, the value of such in-kind benefits cannot be included as gross income. *Id.*

CONCLUSION

For all the reasons stated herein and in his original Merit Brief, Mr. Morrow respectfully requests that the lower court's decision be reversed and remanded back to the trial court for a new trial.

Respectfully submitted,



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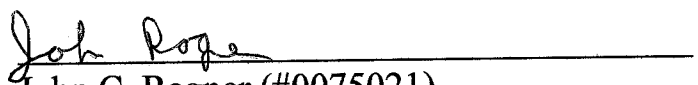

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