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104 MAL 2022

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF PENNSYLVANIA

104 MAL 2022

ANN M. ROGERS,
Respondent

v.

ROBERT P. BAUCHWITZ,
Petitioner

APPLICATION FOR REARGUMENT

From the Supreme Court's Order of September 13, 2022,
denying a Petition for Allowance of Appeal
of the Superior Court's Order
of February 4, 2022, at Docket No. 1499 MDA 2020

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PETITIONER

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Petitioner/Appellant (Husband)

Petition for Allowance of Appeal (PAA)

Reproduced Record (R.)

Superior Court or its memorandum decision (SuperCt)

APPELLANT'S APPLICATION FOR REARGUMENT

There are several compelling reasons for reargument of the issues appealed in this case. (210 Pa. Code § 65.38). The order denying the Petition for Allowance of Appeal (PAA), however, did not specify any basis for denial of consideration, nor was there an attached memorandum providing any explanation. Therefore, the rationale for the Court's September 13, 2022 order is impossible to discern.

I. Issue: Economic Justice in Divorce

The people of the Commonwealth of Pennsylvania could take the results of this case as notice that a post-divorce earning capacity difference between spouses of 4-fold (400%) *per year*, even after purported equitable adjustment of marital assets, comports with economic justice in divorce.

As Husband noted in his PAA: "the question can be asked: has Husband been afforded economic justice by losing [almost $27,000/month] from his gross marital income/standard of living, representing a 4-fold decline of income" - even after amortization of additional assets provided to the spouse with lower earning capacity in equitable distribution was included as income? Husband asserted that this cannot possibly be the case.

As Husband further quoted his lead attorney, a Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family

Lawyers, regarding the unfair outcome of equitable distribution of assets without alimony:

> "even with a $72k earning capacity there is still a need for alimony when your spouse will continue to earn in excess of $400k until she decides [to] retire." (PAA p.24)

Importantly, it is not the absolute numbers that matter as much as the very large drop in the standard of living from that Husband had for at least a quarter century. (ABr pp.17-18).

It is also notable that this case involved a 27-year marriage, with separation at advanced age (approaching retirement). Husband appealed the master's illogical claim that, since the parties had been married for the same amount of time ("This factor, in and of itself, does not favor a larger distribution to either party"), there was no such length of marriage factor to consider. (23 Pa. C.S.A. 3701(b)(5); ABr p.54;).

Putting a spouse at risk of a massive decline in the standard of living, so late in life when recovery is much less likely, and after such a long marriage, is not something that is likely to spread confidence in the public concerning the goals of Pennsylvania family law in promoting equity in divorce. (23Pa.C.S. §3102)

II. Issue: Evidentiary matters, including overlooking or misapprehending evidence

Standard of law cited: abuse of discretion (*Teodorski v. Teodorski,* 857 A.2d 194 (Pa. Super. Ct. 2004)

Some of the evidentiary concerns of note raised in Husband's PAA:

(1) There were issues of serious marital misconduct alleged against Wife by Husband at times relevant to separation (in 2016 and 2017; ABr.pp.50-52). Nevertheless, the evidence presented was overlooked by each of the courts, despite such being a factor specific to alimony (23 Pa. C.S.A. 3701(b)(14).

Instead of addressing the evidence and law surrounding fault for the divorce, the Superior Court simply quoted the master's report (SuperCt. p.7), which attempted to give credence to images from Wife, to which Husband clearly objected on several grounds, including temporal (decades old), Wife as assailant, and interpretability. (ARBr pp.28-29; PAA pp.28-29). The outcome of the master's reference to material challenged as untrustworthy and irrelevant, at best, was to offset a need to consider numerous serious and time-relevant concerns of Wife's misconduct.

Husband further specified in his appeal that the master, as if testifying on behalf of Wife, wrote in her report regarding Husband's evidence of Wife's assaults of 2016 and 2017, that Husband had submitted such evidence to the police

after Wife left the marriage "to bolster Husband's position in the divorce action" (PAA p.40-41; R.1348a-1351a).

Yet the real question is not the imputation of some improper motive in submitting evidence (made within the statute of limitations), but rather, whether the evidence Husband submitted did in fact bolster his case. The quality of the evidence of record can be judged by the public, and certainly by this point should have been so by the trial and Superior Courts. Therefore, the Supreme Court should finally address with specificity these evidentiary concerns regarding marital misconduct claims, in order to preserve the credibility of its oversight process.

(2) The Superior Court made a highly material evidentiary error in claiming with respect to evidence involved in consideration of earning capacity:

> "Husband *does not deny* that instead of presenting any *new* evidence pertaining to his job searches or earning capacity, *he merely referred to documents submitted two years earlier to the domestic relations office*. *Husband offers no explanation why he did not present any evidence to the divorce master*, for her independent recommendations to the trial court as to equitable distribution and alimony." (SuperCt p.18).

Yet in response, Husband at PAA (p.23) wrote:

> "The evidence of record refutes these claims by the Panel. The record before the master clearly indicated that Husband had presented considerable **new**

evidence at the master's hearing in 2019, i.e. since the limited discussion at the Support Conference in 2017. For example, see the references and quoted testimony provided above regarding employment in the "medical fields", fraud examination, and paralegal areas. **Husband's report of the rejections of his applications to the Food and Drug Administration alone constitute new evidence** that was not presented at the Support Conference."

Despite Husband's presentations of extensive quoted material from the record, the Supreme Court's merit panel remained silent on this point (as on all others).

The Supreme Court should review this matter of what job search evidence was presented, for evidentiary sufficiency and abuse of discretion, particularly since Husband's purportedly "incredible" Harvard degree (ABr p.30) and "obvious" diagnosis by the master of motivation as relevant to employment (ABr pp.34-35) were the primary bases provided by the lower court for Husband's employability.

(3) With respect to the issue of the handling of evidence relevant to the appeal for further financial discovery:

"Husband **does not refute** the master's summary that the parties **resolved** the issues of the alleged missing retirement asset. He is entitled to no relief." (SuperCt p.24)

But the point the Superior Court raised was not relevant to the discovery being sought. By quoting Husband, the Panel might have understood:

> "despite Husband's continued efforts to obtain from Wife several financial documents, including **1099 forms**, per discovery directive of March 21, 2019, ... **Wife persistently failed to provide the requested materials**." (ABr.p.63-65).

"Therefore, the text presented to the court makes clear that **Husband was not again seeking the same financial documents** he had already obtained earlier in discovery. It was only on the very day that the master rejected Husband's motion for additional discovery that Wife disclosed required 1099-INT forms. (ABr.p.64).

Thus, despite the preceding being clear evidence that **Wife did not comply with discovery directives**, the Master nevertheless accepted Wife's claims that the purportedly credibly testifying Wife had yet again made "mistakes". (ABr.p.64).

Such lapses in accurate assessment of evidence was quite pervasive at the trial and Superior Court levels. Both would most often first extensively quote the divorce master's report, then claim that Husband had ignored such material, while at the same time turning a blind eye to Husband's actual responses. By way of additional example involving the financial topic, the Superior Court's memorandum at p.23 states: "Wife filed a response, which: (1) "again"

acknowledged "that the failure to list all of the retirement accounts was" due to her counsel's mistaken belief "that 'the TIAA retirement account and the Empower account were the same asset[;]'" and (2) explained this mistake was "discussed and resolved between the parties' attorneys [and] was not meant to fraudulently hide marital assets." *Id.* at 33-34."

Yet Husband, which this same court purports to be employable as a certified fraud examiner, provided very specific written evidence in his Appellant's Reply brief (at pp.15-17), that opposing counsel's claims were a "**fundamental deception**". Husband urges the Supreme Court to closely examine this matter, as it goes very to the core integrity of their courts and their ability to oversee their own colleagues rather than reflexively defend them.

(4) Things that were not in evidence yet were treated as such:

The master asserted, and the courts above her did not refute when challenged:

> "The *fact* that Husband has to date, ***refused*** to obtain employment commiserate [sic?] with his education does make him incapable of self-support." (Mrep R.0464a; R.068a-0689a)

How is this a "fact"? What evidence is there that Husband had "*refused*" anything? Where is the quote in the record? Can either the trial or Superior Courts present search terms of the complete, reproduced record for the public to affirm what was stated on this point by either party?

(5) More "fact" fabrication by the master:

> "Whether or not the [qui tam] lawsuit was commenced by Husband and Husband alone or at the behest of the Federal government **is not relevant to any of the determinations to be made in the case at hand**. [Therefore, the master concedes Husband's challenge on this point.] However, the ***fact*** that Husband felt it ***necessary*** to **embellish** the importance of the lawsuit by ***implying*** that the Federal government was ***one-hundred percent*** behind it when, in actuality, the Federal government declined to intervene in the suit ***does impact somewhat negatively on Husband's credibility***." (MRep pp.18-19)."

As for the other examples cited above, there is nothing in the actual record that would remotely show any "fact" that Husband "implied" that the U.S. Department of Justice, or any other portion of the federal government, was "100%", or any other percent, behind entering the *qui tam* suit. Again, use of specific quotations, and presentation of search terms used to assess the complete case record, might go a long way towards reducing the discretionary disasters that can be repeatedly imposed by such court officials.

III. Issue: Credibility and Other Discretionary Determinations by a Master

The people of the Commonwealth of Pennsylvania could take the results of this case to indicate that a divorce master is considered, *de facto*, so reliable

an observer of litigant demeanor, "credibility", and other discretionary matters, that her determinations are essentially irreversible and could severely prejudice a case without evidentiary support.

(1) The Superior Court, citing *Carney*, 167 A.3d at 13, raised an issue of major importance to this application, namely, the elevated credence that Pennsylvania law implies is to be given to observations and other determinations of a master, simply because she is "present". The Panel wrote:

> "Throughout her report, the divorce master set forth credibility determinations with respect to both parties, regarding particular issues. **On appeal, Husband challenges the master's statements** that "Husband testified that he oversaw the parties' investments to a very detailed and exhaustive knowledge of the parties' finances[,]" and that "***by his own admission***[,] Husband was largely in charge of the parties' finances[.]" ... No relief is due. ***We reiterate*** that a master's report and recommendation "is to be given the ***fullest consideration***, particularly on the question of ***credibility of witnesses***, because the master has the opportunity to observe and assess the behavior and demeanor of the parties." ***Carney***, 167 A.3d at 131. The points raised by Husband relate to ***one isolated issue*** — the extent of Husband's knowledge of Wife's finances — the weight of which would

not require reversal of the master's and trial court's extensive findings into the other matters presented in this case." (SuperCt pp.22-23)

As Husband noted in his PAA (pp.37-38), "even if it had been "only" one such issue, what the master seems to have done is to have repeatedly fabricated a **false admission.** Husband believes this is a very serious charge and should not be lightly dismissed." (ABr pp.58-61). If the master had been handling a criminal case and she were found to have been involved in fabricating false confessions, it is highly likely that such behavior would be a major factor going towards reversing the "extensive findings" she had made, particularly since the credibility of those were challenged as evidentiarily flawed as well.[1]

It is also worth considering what the Superior Court's concession regarding the master's repeated false claims says about the master and *her* credibility. Despite their attempt to minimize the importance of this finding, were the master not their colleague, it might be easy to imagine that the courts would consider such behavior to be highly impeaching.

(2) Even were the master a generally credible reporter, the premise of *Carney* seems to be that any court official, even one not explicitly qualified as expert, can

[1] The preceding statement by the Superior Court appears to be the only concession to the evidentiary concerns raised by Husband. Perhaps Husband seemingly prevailed on this point because, not only did he present a complete case record, but he also provided several search terms which he had used to mine that record for information potentially relevant to what he claimed were the master's falsified claims against him.

assess truthfulness from demeanor. However, this view has been studied scientifically, as presented in law reviews, and found unwarranted:

> "A premise of several legal rules and institutions is that the opportunity of a trier of fact (a jury, judge, or hearing officer) to view the demeanor of a witness is of great value to the trier in deciding whether to believe the witness's testimony. ... With impressive consistency, the experimental results indicate that this legal premise is erroneous. ... On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments." (Olin Guy Wellborn III, Demeanor , 76 Cornell L. Rev. 1075 (1991)).

Should leave be given to prepare a brief for the Supreme Court, this litigant, who himself has experience as a cognitive neuroscientist and training as a fraud examiner, will present additional expert information, including by amicus brief, to assist the court in overruling the inappropriate practice of demeanor credibility assessments implicitly permitted by *Carney*.

(3) Repeated due process violations

As this court has noted:

> "Recently, we confirmed procedural due process requires not only adequate notice and an opportunity to be heard, but also 'the **chance to defend oneself before a fair and impartial tribunal** having jurisdiction over the

case.' *S.T. v. R.W.*, 192 A.3d 1155 (Pa. Super. Ct. 2018) citing J.M. v. K.W., 164 A.3d 1260, n.5 (Pa. Super. 2017)(en banc)(citing Everett,889 A.2d at 580)(emphasis added)."

But in numerous important instances, such rights have not been afforded Husband in this case. For example, property rights were unilaterally taken without hearing (by the trial court; R.0382a), fees for purported contempt were issued without hearing based on what Husband has appealed as errors of law (by the master; PAA pp.34-35; ARBr pp.20-23)[2], APL funds were cut off before hearing (by the trial court; R. pp.1960a-1961a), and conclusions about "credibility" of a party were drawn from impermissible *ex parte* judicial investigations mislabeled as "judicial notice" (by the master; ARBr pp.24-26).

The very idea that a master can make her own "observations" that contribute to testimony concerning credibility, either by assessments of demeanor or *ex parte* investigations, can lead to significant questions of whether an impartial tribunal has been afforded a litigant.

CONCLUSIONS

[2] Other matters of law appealed: "When Husband filed his answer to the first petition for contempt, the gist of Husband's answer was that he never agreed, ... However, it did **unequivocally require** Husband to not only execute, but also, deliver to Wife the Power of Attorney ...". N.B. yet again: the Supreme Court has been asked to resolve issues of legal error in this POA matter as well. (e.g. ARBr pp.20-23).

Therefore, it appears that a Supreme Court merits panel may have overlooked or misapprehended several material facts of record, including those not only insufficient, but altogether absent. 210 Pa.Code §65.38(D)(3). The numerous evidentiary concerns raised here do not reproduce all of those presented in Appellant's other filings (ABr, ARBr, and PAA). Nevertheless, Husband believes that flaws of comparable number and import such as presented here, if observed in other fields involving the assessment of evidence, would lead to investigation and revision, or outright retraction of the results.

Even more importantly, it appears the issues have potential for a significant impact upon developing law and public policy. 210 Pa.Code §65.38(D)(5). These matters of public policy include not only the risk that the public could lose faith that reasonable bounds exist to discretionary determinations of economic justice in divorce in the courts of the Commonwealth of Pennsylvania, but also that the assessment of case evidence itself does not meet professional standards of rigor and oversight that would justify faith in the courts. Therefore, request is made that the public policy and evidentiary issues raised in Appellant's filings be carefully reviewed and communicated, and, as appropriate, full briefing of the Court be permitted.

More generally, based on observations made in this case, and presented in this and earlier appellate filings, there are some initial, concrete steps that the

Supreme Court could take to reduce the risk of problematic handling of evidence in decisions by court officers:

1) overrule *Carney*, and prevent completely any introduction of observational conclusions by adjudicators that are not based on sound, expert foundations and due process;

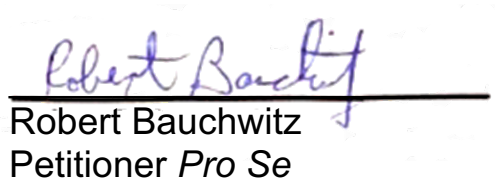
2) set a non-discretionary requirement for counsel and adjudicators to quote the complete record equally for all parties[3];

3) require masters and courts at all levels to provide the search terms used to assess the current, complete record for each point of evidence addressed.

By presenting lists of search terms used to assess a complete case record, litigants and the public might be much better able to confirm that the courts effectively read the material presented to them by the parties, and thereby also greatly reduce the "overlooking" and "misapprehensions" of evidence that could be taking up the time of the appellate courts, especially the Supreme Court, as in this case.

[3] In requiring quotes, it is recommended that brief page limits be removed, and allowance be made for unlimited tables of quotes to be appended.

Respectfully submitted,

By: 

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APPENDIX A

APPENDIX F

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ANN M. ROGERS,	:	No. 104 MAL 2022
	:	
Respondent	:	
	:	Petition for Allowance of Appeal
	:	from the Order of the Superior Court
v.	:	
	:	
	:	
ROBERT P. BAUCHWITZ,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 13th day of September, 2022, the Petition for Allowance of Appeal is **DENIED**.

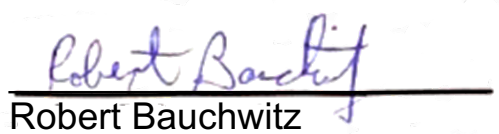
A True Copy Elizabeth E. Zisk
As Of 09/13/2022

Attest: Elizabeth Zisk
Chief Clerk
Supreme Court of Pennsylvania

SUPREME COURT OF PENNSYLVANIA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Application consists of ____2998___ words, excluding the title page, table of contents, and table of citations, and this complies with the requirements of Pennsylvania Rule of Appellate Procedure 210 Pa. Code § 2544(c) that applications for reargument shall not exceed 3,000 words.

By: 

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DATED: September _27__, 2022

SUPREME COURT OF PENNSYLVANIA

CERTIFICATE OF SERVICE

I, Robert Bauchwitz, Petitioner, hereby certify that on

__September____27___, 2022 I filed an electronic copy of the Application for Reargument via PACFile which electronically sends a copy of the same to the following counsel of record:

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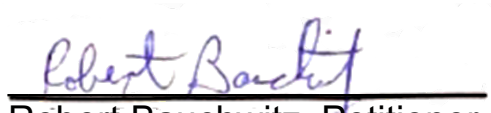

Robert Bauchwitz, Petitioner *pro se*