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Sherry Palicte Zold v. John F. Zold

MARSHAL: PLEASE RISE . PLEASE BE SEATED.

CHIEF JUSTICE: NEXT CASE ON THE MORNING'S CALENDAR IS ZOLD VERSUS ZOLD. PARTIES READY ?

YES, MA'AM. PLEASE THE COURT, I WOULD LIKE TO RESERVE FIVE MINUTES OF MY TIME FOR REBUTTAL. IF IT PLEASE THE COURT, MY NAME IS NORMAN D LEVIN. I AM COUNSEL FOR AMY ZOLD IN THIS MATTER AND COUNSEL IN THE BRIEF RELATED TO THIS MATTER.

WOULD YOU ADDRESS THE EXPRESS AND DIRECT CONFLICT CASES?

I AM SURE IF , YES, THAT IS EXACTLY WHERE I WAS GOING TO GO. YOU WANT ME TO SKIP OVER THE FACTS AND GO RIGHT TO THE ISSUE.

WE ARE FAMILIAR WITH THE FACTS.

OKAY. YOUR HONOR , THE CONFLICT IN THIS CASE , HAS TO DO WITH A SERIES OF CASES THAT HAVE BEEN DECIDED OVER THE YEAR SINCE 1990. OVER THE YEARS SINCE 1990. IN 1990, THE ZIPPERER CASE WAS DECIDED IN THE FIRST DCA. IN THAT CASE, THE TRIAL COURT FAILED TO INCLUDE PASS-THROUGH INTEREST DIVIDEND AND BUSINESS INCOME , WHICH HE PAID ON THE TAX RETURN . HE PAID THERE WAS A LOSS PAID OUT AND THE TRIAL COURT REVERSED .

THAT WASN'T IN A SUBCHAPTER S CORPORATION. HE HAD A FINANCIAL PLANNING BUSINESS AND SOME MUTUAL FUNDS.

IT DID NOT INDICATE IN THE FACTS OF THE OPINION AS TO THAT, BUT I SUBMIT THAT THE ISSUE IS IDENTICAL AS TO THOSE MATTERS. THE HUSBAND'S CLAIM IN THAT CASE, WAS THAT IT WOULD CREATE A LOSS AND THAT THE TRIAL COURT HELD THAT THAT WOULD BE IRRELEVANT IN THAT PARTICULAR CASE . THE NEXT CASE WAS SEW HACK I OUT OF THE FIRST WAS ZOHACKI OUT OF THE FIRST DCA, ALSO , WHERE THE TRIAL COURT REFUSED TO INCLUDE NONBUSINESS INCOME. THE TRIAL COURT REVERSED AND THE TRIAL COURT WAS ORDERED TO REVISIT THE ISSUE , WAS THE TRIAL WAS NOT BOUND TO RELY UPON THAT AND IT FELT BOUND TO RELY UPON IT AND IT DIDN'T HAVE ANY OTHER CHOICE.

HOW DOES THAT CONFLICT WITH ZOLD , THEN , THE CASE BEFORE US?

IN THAT PARTICULAR CASE, THE HUSBAND'S CLAIM THAT HE ONLY RECEIVED THE LESSER AMOUNT WAS NOT BINDING ON THE TRIAL COURT AS A FINDER OF FACT. IN THE ZOLD CASE, THE TRIAL COURT INCLUDED THE RETAINED INCOME IN THAT MATTER WHERE HE WAS THE MAJORITY SHAREHOLDER, IN CONTROL OF THE OPERATION , OPERATING THE BUSINESS, AND WHERE FINDINGS INDICATE THAT THE TRIAL COURT DIDN'T BELIEVE THE HUSBAND AND HIS WITNESSES ABOUT THEIR TRANSACTIONS. THE FINDING REMANDED IN THAT CASE, AND THE WORDING OF THE REMAND WAS FOR FINDINGS AS TO THE AMOUNT OF INCOME AVAILABLE TO HUSBAND FOR SUPPORT PURPOSES , WITHOUT CONSIDERING ANY UNDISTRIBUTED SUBS INCOME TO SHAREHOLDERS, UNLESS IT CAN BE DEMONSTRATED THAT THE BUSINESS DELAYED DISTRIBUTIONS OF CASH, FOR PURPOSES OTHER THAN CORPORATE REQUIREMENTS. NOW , I SUBMIT TO THE COURT THAT, WHEN YOU LOOK AT ALL OF THE CASES TOGETHER THAT I AM GOING TO DISCUSS WITH YOU , THAT WHAT WE ARE TALKING ABOUT IS A BURDEN ISSUE THAT IS

INCONSISTENT IN THESE OPINIONS. THE QUESTION IS , WHO IS IT THAT HAS THE BURDEN OF GOING FORWARD TO SHOW OTHER THAN THE DOCUMENTARY EVIDENCE INDICATES, AND LET ME GIVE YOU AN EXPLANATION OF THAT. IN THIS CASE , IN THE ZOLD CASE , WE PUT INTO EVIDENCE , THE CORPORATE TAX RETURNS . THE CORPORATE TAX RETURNS ON THEIR FACE, SHOW INCOME LESS ORDINARY AND NECESSARY EXPENSES. THAT IS THE DEFINITION.

EXCUSE ME. IT DOESN'T SHOW, IN FACT , EXPENSES. IT SHOWS THOSE ALLOWABLE DEDUCTIONS, DOES IT NOT?

I AGREE WITH THE COURT THAT, IN FACT , THE DEFINITION, AND I THINK WHAT YOU ARE GETTING AT IS THAT THE TAX DEFINITION AND THE SUPPORT DEFINITION NEED NOT BE IDENTICAL .

THEY CAN NOT BE FOR TAX PURPOSES. I MEAN, FOR EXAMPLE , IF YOU HAD A BUSINESS THAT YOU HAVE THE FLOW-THROUGH , THE SUBS KIND OF SITUATION, AND ENTERTAINMENT , FOR EXAMPLE , IS AN ABSOLUTE NECESSITY OF THAT BUSINESS. THAT IS NOT 100 PERCENT DEDUCTIBLE BY A CORPORATE ENTITY, AND THOSE DOLLARS ARE GONE ,,YOU REALLY GET INTO TROUBLE WHEN YOU USE FACE OF TAX RETURNS FOR

YOUR STATEMENT THAT YOU GET INTO TROUBLE WHEN YOU USE FACE OF TAX RETURN , THE OTHER ISSUE IS THAT THE FACE OF TAX RETURN EVIDENCE IS THE EVIDENCE IN THIS CASE AND THE EVIDENCE OVER ALL.

LET ME ASK YOUR POSITION ABOUT ASCRIBING INCOME TO THE CORPORATION TO THE INDIVIDUAL, TO THE STATUTE AWARDED ALIMONY AND ATTORNEYS FEES , SECTION 61.046, WHICH SAYS THAT ANY FORM OF PAYMENT TO AN INDIVIDUAL, REGARDLESS OF SOURCE , IS DETERMINED TO BE INCOME. NOW, HOW IS THE INCOME TO THE CORPORATION NOT TO THE INDIVIDUAL, THAT IS NOT PASSED THROUGH TO THE INDIVIDUAL , A FORM OF PAYMENT TO THE INDIVIDUAL?

I HAVE TO HAVE YOU GO BACK AND LOOK AT THE HISTORICAL DEVELOPMENT OF THE CASE LAW UNDER THAT STATUTE .

BEFORE YOU GO INTO THE CASE LAW.

YES, SIR.

WHAT , UNDER THE PLAIN WORDS OF THE STATUTE, WOULD ASCRIBE A PAYMENT TO THE INDIVIDUAL?

WELL , WE HAVE TWO DIFFERENT STATUTES , AND , OFCOURSE, YOUR HONOR IS FOCUSING ON 61.046 , BUT WE , ALSO, HAVE 61.30 , THAT GIVES YOU A DEFINITION THAT SUPPLEMENTS THE UNDERSTANDING OF WHAT THE LANGUAGE MEANS IN THE OTHER SECTION. I SUBMIT TO THE COURT, THAT THIS COURT OR ANY OF THE APPELLATE DISTRICTS , HAS EVER MADE A DISTINCTION IN THE DEFINITION, BETWEEN THE DEFINITIONS IN 61.30 AND THE DEFINITION IN 61.046. IN FACT , IN ZIPPERER , IT SPECIFICALLY CITES 61.046 AS INCLUDING THIS KIND NEVER COME.

BUT ZIPPERER DIDN'T FOCUS ON THE WORD PAYMENT? IT FOCUSED ON THE PHRASE "REGARDLESS OF SOURCE".

ZIPPERER AND SO HACKI , BOTH , REFLECTED ON THE DEFINITIONAL SECTION THAT WE ARE REFERRING TO. BOTH OF THEM HELD THAT THAT DEFINITION INCLUDED THOSE TYPES OF SITUATIONS. IF YOU DETERMINE THIS CASE BASED UPON A SPLIT OF DEFINITION, WHICH , OBVIOUSLY , YOU MIGHT HAVE AN ABILITY TO DO THERE TO DO HERE , IF YOU CHOOSE THAT ROUTE, THEN WHAT YOU ARE GOING TO TELL US IS THAT IN EVERY ALIMONY AND CHILD

SUPPORT CASE , WE HAVE TWO SEPARATE AND COMPLETE DISTINCTIVE DEFINITION TO SAY CONSIDER. I DON'T BELIEVE THAT THAT WAS THE INTENT OF THE LEGISLATURE. I DON'T BELIEVE THE LATTER DEFINITION FOR INCOME USED IN THE STATUTE , IS 61.30. IT CAME AFTER THE INITIAL 61.046.

WHAT IS THE DEFINITION IN 61.30?

61.30 HAS A SPECIFIC DEFINITION, AND BY THE WAY , DON'T FORGET IN 61.046 , IT IS NOT LIMITED TO THAT LANGUAGE. IT INCLUDES , NOT INCLUDES ALL OVER ALL OTHER , BUT IN 61.30 , THE LANGUAGE SPECIFICALLY PROVIDES THAT , 61.30, I BELIEVE IT IS THREE , IT SAYS SPECIFICALLY , BUSINESS INCOME IS INCOME , AND IT SPECIFICALLY SAYS CLOSE CORPORATION INCOME , AND IT SAYS IT IS THE AMOUNT OF GROSS RECEIPTS LESS ORDINARY AND NECESSARY BUSINESS EXPENSES .

SO ARE YOU, THEN , ADVOCATING , SAYING AND YOU WOULD LIKE US TO SAY THAT WHEN WE HAVE INCOME FROM ANY SUB S CORPORATION , ARE YOU SAYING THAT SOME OR ALL OF IT SHOULD BE RETAINED FOR BUSINESS PURPOSES?

I HAVE NOT SAID THAT IN MY BRIEF. I BELIEVE THAT SOME OF THE HISTORICAL CASE LAW COULD BE READ THAT WAY . BUT EVEN IF YOU DON'T READ IT THAT WAY , I SUBMIT TO THE COURT THAT THE DEFINITION I JUST CITED TO , IS HONOR - - TO HIS HONOR , THAT DEFINITION DEALS WITH THE PROBLEM , AND I SPOKE OF THAT

THEN BREAK IT DOWN A LITTLE MORE CLEARLY THEN.

SURE.

WHAT IS YOUR POSITION? IF YOU ARE NOT TAKING THE ABSOLUTE POSITION THAT ALL OF THAT SHOULD BE CONSIDERED AS INCOME TO THE SHAREHOLDERS, THEN, WHAT PORTION OR HOW DO WE DETERMINE OR HOW DOES THE TRIAL JUDGE DETERMINE WHICH PORTION SHOULD BE AND WHICH PORTION SHOULD NOT BE ?

THE DEFINITION OF GROSS RECEIPTS MINUS ORDINARY AND NECESSARY BUSINESS EXPENSES , DEALS WITH THIS ISSUE. IT IS A DEFINITIONAL ISSUE, WHICH IS A MATTER OF FACT. THE EVIDENCE THAT WAS PUT IN IN THIS PARTICULAR CASE , FOR EXAMPLE , THE TAX RETURN , STARTS YOU OUT IN THAT DIRECTION. I SUBMITTED THAT POINT , IF THERE IS A NEED TO RETAIN ANY INCOME IN THE CORPORATION, THAT IT BECOMES THE BURDEN OF THE CORPORATE OWNER, THE PERSON IN CONTROL, TO COME IN AND SHOW THAT PART OF THE ORDINARY AND NECESSARY BUSINESS EXPENSES, IS TO RETAIN A CERTAIN AMOUNT OF INCOME IN THE CORPORATION FOR IDENTIFIABLE PURPOSES.

WASN'T THAT WHAT THE FIFTH DISTRICT, IN FACT, DID , BY REMANDING IT?

ABSOLUTELY NOT. BECAUSE WHAT THE FIFTH DISTRICT SAID IN ITS REMAND , WAS , AND I WAS IN THE MIDDLE OF SAYING THAT BEFORE , BUT WHAT THE FIFTH DISTRICT SAID, SAYS WE REMAND FOR FINDINGS AS TO THE AMOUNT OF INCOME AVAILABLE TO HUSBAND FOR SUPPORT PURPOSES, WITHOUT CONSIDERING ANY UNDISTRIBUTED SUB S INCOME TO SHAREHOLDERS , UNLESS IT CAN BE DEMONSTRATED THAT THE BUSINESS DELAYED DISTRIBUTIONS OF CASH FOR PURPOSES OTHER THAN CORPORATE REQUIREMENTS. BY THAT REMAND , IT WOULD SHIFT THE BURDEN IN THIS CASE TO THE WIFE , TO HAVE TO COME IN AND PROVIDE AN IMPOSSIBLE THING , MEANING THE PERSON HAS CONTROL. THEY HAVE

SO IF THE RULE OF LAW THAT CAME OUT OF THIS WAS THAT IT IS NOT A PER SE RULE OF LAW, THAT IS THAT RETAINED INCOME OF A SUBCHAPTER S CORPORATION , IS NOT 100 PERCENT TO BE CONSIDERED INCOME , IF THE SPOUSE WHOSE INCOME IT IS , CAN SHOW THAT IT WAS

RETAINED, THE AMOUNT RETAINED WAS RETAINED FOR A CORPORATE PURPOSE OR, AND THIS, I WANTED, WAS REQUIRED TO RETAIN IT, BASED ON SECTION 607.06401-3, WHICH PROHIBITS DISTRIBUTION UNDER CERTAIN CIRCUMSTANCES, FROM BEING MADE. WOULD THAT BE A SATISFACTORY RULE OF LAW?

AS LONG, IT WOULD BE A SATISFACTORY AND I BELIEVE, CONSISTENT WITH THE DEFINITION IN 61.30, SO LONG AS THE EVIDENCE, THE EVIDENTIARY QUESTION WAS THAT THE BURDEN IS ON THE POSSESSOR OF THE KNOWLEDGE OR OF THE KNOWLEDGE AND CONTROL, TO COME FORWARD AND SHOW THAT THE RETAINED EARNINGS ARE NECESSARY TO BE RETAINED, AS - - ORDINARY AND NECESSARY DEFINITION OF A BUSINESS EXPENSE, THAT BEING WHILE IN ADDITION TO OPERATING THIS BUSINESS, WE NEED TO KEEP AN EXTRA \$50,000 IN THIS BUSINESS FOR OPERATION PURPOSES. THE PROBLEM WITH THAT IN THIS CASE, IN THE ZOLD CASE, IS THAT THE JUDGE DIDN'T BELIEVE ANYTHING THAT THEY SAID, AND IF YOU LOOK AT THE FINDINGS THAT ARE EXPLICIT IN THE FINAL JUDGMENT, IF YOU LOOK AT THE FINDINGS IN THE SECONDARY JUDGMENT ON ATTORNEYS FEES, THE COURT SPECIFICALLY SAYS, I DON'T BELIEVE THE HUSBAND IN WHAT HE SAYS!

I THOUGHT IT WAS THE ISSUE OF THE DISBELIEF HAD TO DO WITH THIS IDEA THAT HE WAS ONLY A 40 PERCENT SHAREHOLDER. BUT IT LOOKS LIKE ALL THE JUDGE DID, IS TOOK ALL OF THE UNDISTRIBUTED INCOME AND CATEGORIZED THAT AS INCOME AVAILABLE TO HIM.

BECAUSE THEY DIDN'T SHOW ANY BELIEVABLE EVIDENCE TO INDICATE THAT THERE WAS ANY NEED TO RETAIN ANY EARNINGS IN THE CORPORATION.

IS THAT BASED ON ZIPPERER AND NOT WHAT THE FACTS WERE IN THE CASE BUT SIMPLY WHAT THE FACTS WERE IN THE FIRST DISTRICT.

ARE YOU TALKING ABOUT IN THE CLOSING ARGUMENT?

IN WHAT THE JUDGE DID. WHEN YOU SAY IT WAS BASED ON THE FACTS, BECAUSE HE DIDN'T BELIEVE WHAT THE HUSBAND SAID, WASN'T IT BASED ON THE FACT THAT THE JUDGE BELIEVED THAT YOU COULD TAKE THAT INTO ACCOUNT IN DETERMINING INCOME TO THE HUSBAND?

I CAN'T SPECIFICALLY AGREE OR DISAGREE WITH YOUR COMMENT. I WILL TELL YOU THIS, IN MY CLOSING ARGUMENT, I SPECIFICALLY BROUGHT TO THE COURT'S ATTENTION, THE CASES OF ZIPPERER AND SOHACKI. OPPOSING COUNSEL BROUGHT FORTH NO OPPOSING CASE LAW IN HIS CLOSING ARGUMENT. OPPOSING COUNSEL WAS QUESTIONED IN CLOSING ARGUMENT, AND THE QUESTION THAT WAS ASKED OF HIM, WAS, WHAT DO YOU HAVE TO SAY ABOUT THESE CASES, AND HOW THEY WOULDN'T APPLY HERE, AND HIS ANSWER WAS, WELL, HE DOESN'T HAVE THE MONEY, AND THERE WAS ONE OTHER PIECE OF THAT ANSWER THAT HE GAVE, AND SO HE GAVE AN ANSWER TO THAT, AND THE COURT, THEN, WENT ON BEYOND THAT.

WHAT, LET ME ASK YOU THIS.

SO THERE WAS NO REAL CONCESSION.

IN RESPECT TO YOUR BURDEN

COULD YOU, I AM SORRY. I DON'T KNOW HOW TO READ THIS TIME CLOCK.

CHIEF JUSTICE: YOU ARE STILL OKAY. A YELLOW LIGHT WILL COME ON WHEN YOU ARE IN, AND I WILL REMIND YOU.

THANK VERY MUCH.

IN RESPECT TO YOUR BURDEN ARGUMENT, WOULD THERE BE , IS THERE ANY PREDICATE PERCENTAGE OF OWNERSHIP OF ONE OF THESE CORPORATIONS THAT YOU HAVE TO HAVE BEFORE YOU HAVE THIS BURDEN?

CHIEF JUSTICE: NOW THE YELLOW LIGHT IS ON . GO AHEAD.

NOW THE YELLOW LIGHT IS ON. YOUR HONOR, MAY I RESERVE TO ANSWER THAT QUESTION UNTIL REBUTTAL? LET ME ANSWER IT TO YOU THIS WAY. I THINK THAT THESE ARE ALL FACTUAL QUESTIONS AT THE TRIAL COURT LEVEL.

I WANT TO KNOW WHAT THE RULE OF LAW IS GOING TO BE.

I THINK THE RULE OF LAW RELATED TO THIS MATTER , IS THE DEFINITION UNDER 61.30. THAT ANY INCOME INCLUDES THAT INCOME IS INCLUDES THE BURDEN

WHAT IS GOING TO COME OUT IN THIS CASE AS TO WHO HAS THE BURDEN AND WHEN THAT BURDEN ATTACHES?

I BELIEVE , YOUR HONOR , AND I AM NOW TALKING ABOUT THE McCUE DECISION. THE McCUE DECISION SAYS CLEARLY MINORITY WITH NO CONTROL, THEN NO CONTROL AND NO WAY TO CONTROL IT IN THAT SITUATION , THEN THAT WOULD GOVERN AND I THINK THAT IS A FACTUAL SITUATION. YOU MIGHT HAVE SOMEBODY WHO OWNS 40 PERCENT BUT HE HAS ACTUAL CONTROL OF AN OTHER SHAREHOLDER WHO WOULD VOTE WITH HIM TO CONTROL DISTRIBUTIONS AS WELL. THAT FACT SITUATION MIGHT AND MINORITY SITUATION WAS WHERE ACTUAL CONTROL WAS PRESENT.

IF YOU HAVE ACTUAL CONTROL, THEN , ALL INCOME OF THE CORPORATION HAS TO BE AScribed TO THE INDIVIDUAL , EVEN IF THE CORPORATION HAS LEGAL OBLIGATIONS THAT IT NEEDS TO USE THE MONEY FOR.

ABSOLUTELY NOT. IN THAT SITUATION, IF THEY COME IN AND THEY PROVE FACTS THAT INDICATE THAT IT IS AN ORDINARY AND NECESSARY REASON TO MAINTAIN THAT INCOME WITHIN THE CORPORATION, THEN THEY MEET THE DEFINITION UNDER 61.30, OF ADDITIONAL ORDINARY NECESSARY BUSINESS EXPENSES , AND THIS GETS BACK TO JUDGE LEWIS'S COMMENT ABOUT THE TAX INFORMATION IS A GUIDE TO START FROM , BUT THEN THEY HAVE TO COME IN AND HELP SHOW THE DISTINCTIONS.

JUST CLARIFY IF YOU WOULD.

IN MY REBUTTAL?

YOU MAY DO IT IN YOUR REBUTTAL. TO ADDRESS IT , WE ARE LOOSELY USING THIS WORD "RETAINED INCOME ". THAT FOLLOWS THAT PHRASE, AS IT IS KNOWN IN TAX PARLANCE, MAY REPRESENT DOLLARS THAT NO LONGER EXIST WITH REGARD TO IN SOMEBODY'S POCKET , AND SO IT SEEMS TO ME THAT IF WE START WERE TALKING ABOUT CONCEPTS LIKE THAT , IT SEEMS THAT ARE NOT DEDUCTIBLE FOR FEDERAL TAX PURPOSE, THEN WE START OFF WITH A FALSE PREMISE , SO HELP ME , I MEAN , IT IS MY UNDERSTANDING THAT DOLLARS ARE INCLUDED THERE THAT EXPENSES ARE ALREADY PAID BUT JUST NOT DEDUCTIBLE , SO.

WELL, IN THIS CASE , JUDGE, THE NUMBERS THAT WE ARE USING OFF THE TAX RETURN , ARE FAR LESS THAN THE NUMBERS WHICH WERE INDICATED OFF THE REVIEW WHICH WAS MAJADENIED YOU MEAN HERE , BECAUSE WHAT THEY DID WHICH WERE INDICATED OFF THE REVIEW , WHICH WAS , BECAUSE WHAT THEY DID THERE, THEY TOOK NUMBERS OFF THE CAP THAT SHOULDN'T HAVE BEEN TAKEN OFF, SO YOU HAVE ALL KINDS OF COMPLEX ANALYSIS THAT WOULD GO ON IN THIS TYPE OF CASE AND ALL OF THE BASIC IN THE DATA IS IN THE HANDS OF THE CONTROLLER.

THAT IS WHERE THE BURDEN NEEDS TO FALL , AS FAR AS GETTING OUT OF THAT. ONCE A PRIMA FACIE SHOWING HAS BEEN MADE OF THAT. THANK YOU VERY MUCH.

CHIEF JUSTICE: YOU SAVE A LITTLE TIME FOR REBUTTAL.

IF IT PLEASE THE COURT , MY NAME IS CHARLES WILLITS AND I REPRESENT THE APPELLEE IN THIS MATTER , JOHN ZOLD. I KNOW THE COURT'S INTEREST IS ABOUT SUBCHAPTER S CORPORATIONS AND DISTRIBUTION OF THAT INCOME AND HOW IT SHOULD BE DISTRIBUTED. IF YOU LOOK AT THE CASES , THERE ARE OBVIOUS CASES WHICH HAVE BEEN CITED , CASES SUCH AS McCUE , WHERE A PERSON HAS A 10 PERCENT OWNERSHIP AND NO ABILITY TO CONTROL THE DISTRIBUTIONS. OBVIOUSLY THAT IS AN OBVIOUS SITUATION. THERE IS MARTINEZ , WHERE HE HAS 100 PERCENT OF OWNERSHIP AND RETAINS AND MAY HAVE MORE FOR LEGITIMATE BUSINESS PURPOSE , BUT HE RETAINS MORE THAN AND THE COURT ORDERED THAT HE SHOULD , IN ORDER TO MAINTAIN SUPPORT.

IS THIS A CASE BY CASE ANALYSIS RULE?

NO , YOUR HONOR. I THINK IT OUGHT TO BE A BRIGHT-LINE RULE , AND I WOULD AGREE WITH JUDGE PETERSON IN THE ZOLD CASE AND THE ANDERSON CASE, WHICH HAPPENED TO OVERRULE A CASE THAT I LOST PREVIOUSLY AND THEY CHANGED THEIR MIND IN THAT CASE , BUT I THINK IT IS CORRECT WE NEED A BRIGHT-LINE RULE THAT WOULD BE WHAT THEY SET FOR TH. IF IT IS NOT FOR LEGITIMATE CORPORATE PURPOSES , AND IT CAN BE PROVED AS A QUESTION OF FACT BEFORE THE COURT , JUST AS ANY OTHER QUESTION OF FACT , IN ANAKANAKARIS.

THAT IS NOT MAINTAINED AS A BRIGHT-LINE RULE IF IT APPEARS ON AN INCOME TAX RETURN, WHICH MOST OF US IN MOST OTHER SITUATIONS, IF IT IS ON THE TAX RETURNS, IT WOULD HAVE MEANT YOU RECEIVED IT. IN SUBCHAPTER S , THAT IS NOT NECESSARILY THE CASE. HOWEVER , THE , SO THE QUESTION, THEN, IS , AS TO THE AMOUNT THAT STAYS IN THE CORPORATION, THAT IS NOT DISTRIBUTED , WHOSE BURDEN IS TO SHOW THAT IT WAS RETAINED FOR PROPER CORPORATE PURPOSES? SHOULDN'T IT BE ON THE PERSON WHO IS IN CONTROL OF THE CORPORATION, THE MAJORITY SHAREHOLDER , TO SHOW THAT THERE WAS LEGITIMATE CORPORATE REASONS FOR RETAINING THAT INCOME ?

YOUR HONOR , THAT MAY VERY WELL BE THE CASE.

IT LOOKS LIKE TO ME IN THE REMAND FROM THE FIFTH DISTRICT THAT, THEY PUT THE BURDEN ON THE WIFE , TO SHOW THAT IT WASN'T RETAINED FOR LEGITIMATE CORPORATE PURPOSES , WHEN , WHEREAS I AGREED TO THIS EXTENT , AT LEAST IT SEEMS LOGICAL THAT IT SHOULD BE , WHEN IT IS A MAJORITY SHAREHOLDER, IN THE RESPONSIBILITY OF THE MAJORITY SHAREHOLDER , TO EXPLAIN WHY THOSE AMOUNTS WERE RETAINED .

I UNDERSTAND YOUR HONOR'S POSITION, AND I PERSONALLY BELIEVE THAT THE CORPORATION IS A SEPARATE ENTITY . IN FACT , RETAINS EARNINGS FOR WORKING CAPITAL FOR EMPLOYEES , FOR PAYMENTS OF WORKMAN'S COMP, FOR ALL OF THE THING THAT IS A CORPORATION HAS TO PAY, HEALTH INSURANCE , ACCOUNTS RECEIVABLE, ALL OF THE THINGS THAT JUDGE PETERSON NOTICED IN AND SON AND IN THIS CASE IN ANSON AND IN THIS CASE , REALLY , MY PERSONAL BELIEF IS THAT THE BURDEN OUGHT TO BE ON THE OPPOSING SIDE TO SHOW THAT THOSE CORPORATE EARNINGS ARE IN FACT, BEING RETAINED FOR PURPOSES OTHER THAN LEGITIMATE CORPORATE REASONS.

BUT DOESN'T YOUR EXPLANATION, REALLY , BELIEVE THE ARGUMENT THAT YOU ARE MAKING, AND THAT IS YOU ARE DETAILING NOW , VERY LEGITIMATE REASONS FOR RETAINING THAT , AND IT SEEMS TO ME LIKE THAT WOULD BE HISTORY TO SHOW THAT IT HAS BEEN HELD FOR THE CORPORATION'S EXISTENCE AND THIS AMOUNT OF INCOME RETAINED REALLY HASN'T VARIED THAT MUCH OVER THE YEARS AND IN FACT , HAS BEEN CONSUMED, YOU KNOW, FOR THOSE

PURPOSES , AND THAT THAT , IS THIS REALLY SUCH A BIG DEAL , YOU KNOW , FOR BEING ON THE INSIDE AND KNOWING ABOUT THAT , AS OPPOSED TO HAVING TO SORT OF HAVE A GRAND JURY INQUIRY , YOU KNOW , FROM THE OUTSIDE , SO I AM SORT OF HAVING THE FEELING HERE , WHAT IS THE BIG DEAL ABOUT SAYING THAT THE SHAREHOLDER SHOULD HAVE THE RESPONSIBILITY OF DEMONSTRATING , ONCE IT IS DEMONSTRATED THAT THAT INCOME IS THERE AND IT IS SORT OF SETTING THERE , BECAUSE WE KNOW THAT THERE ARE GOING TO BE ALL KINDS OF VARIATIONS. IN SOME SITUATIONS , IT MAY BE SOMEBODY THAT SAYS , HAY , I WANT TO INFLATE THAT , AND HEY , I WANT TO INFLATE THAT , AND THEREFORE I WILL BE ABLE TO LIVE ON THAT VERY COMFORTABLY MYSELF , LATER IN OTHER CASES , IT IS GOING TO BE THE 20- YEAR TRACK HISTORY THAT SHOWS AS A MATTER OF FACT IN OUR JUDGMENT , DIDN'T RETAIN ENOUGH IN THE WAY THAT WE DID THAT , SO IS IT SUCH A BIG DEAL TO SAY THAT THE PERSON INVOLVED IN THE CORPORATION , SHOULD BE THE ONE THAT HAS THE BURDEN , ONCE IT IS DEMONSTRATED THAT IT IS THERE , TO SHOW THAT THAT IS A LEGITIMATELY RETAINED

BASICALLY IN MY EXPERIENCE , YOUR HONOR , IT MAY BE A DISTINCTION WITHOUT A DIFFERENCE . SORT OF LIKE THE

SORT OF LIKE THE WAY WE USED TO TRY CASES , AS OPPOSED TO INSTRUCTING THE JURY ABOUT BURDENS , YOU ENDED UP SAYING IF YOU FIND BY THE PREPONDERANCE OF EVIDENCE OR SOMETHING . HERE WE DO HAVE TO ASSIGN SOME RESPONSIBILITY , THOUGH , IS IT , IS THAT SUCH A BURDEN ?

NO , YOUR HONOR . I THINK A CORPORATION COULD EASILY RISE TO THAT BURDEN AND SHOW WHY THEIR FUNDS WERE NEEDED AND CORPORATE HISTORY TO SHOW THAT .

WOULD YOU LIKE TO TALK ABOUT THE STATUTES THAT ARE INVOLVED ? WE HAVE GOT 61.0467 , WHICH IS CONCERNING ALIMONY AND ATTORNEYS FEES , AND IT TALKS ABOUT ANY FORM OF PAYMENT TO AN INDIVIDUAL .

YES , YOUR HONOR .

THEN WE HAVE 61.30 , THAT TALKS ABOUT BUSINESS INCOME , AND TALKS ABOUT GROSS RECEIPTS MINUS ORDINARY AND NECESSARY EXPENSES . COULD YOU EXPLAIN TO ME , HOW YOU SEE BOTH OF THOSE STATUTES WORKING , BECAUSE , AGAIN HERE , WE ARE TALKING ABOUT WHAT INCOME MEANS FOR PURPOSES OF ALIMONY AND CHILD SUPPORT , AND DO YOU SEE ONE OR BOTH OF THOSE STATUTES APPLYING AND ARE THEY IN CONFLICT , AND WHAT WOULD YOUR DEFINITION OF INCOME BE ?

YOU MEAN THE DEFINITION OF INCOME UNDER THAT BEING A GROSS RECEIPTS MINUS ORDINARY AND NECESSARY EXPENSES ?

DOES THAT APPLY , I MEAN , HOW DOES THAT SQUARE WITH THE 61.0467 THAT JUSTICE CANTERO SPOKE ABOUT , WHICH TALKS ABOUT ANY FORM OF PAYMENT TO AN INDIVIDUAL ? IS THAT SUPPLEMENT , HOW DO THOSE TWO STATUTES WORK TOGETHER ?

WELL , YOUR HONOR , THERE IS NOT A PAYMENT UNDER SUBCHAPTER S CORPORATION , IF YOU RECEIVE A K - 1 AND YOU DO NOT EVER RECEIVE THE INCOME .

SO THEN UNDER THAT , IF THERE IS NO PAYMENT , DOES THAT END THE STORY AS TO WHETHER IT IS INCOME , IF THERE IS NO PAYMENT , OR DO YOU GO FARTHER AND LOOK AT 61.30 , WHICH DESCRIBES BUSINESS INCOME ?

WELL , I THINK AS JUDGE ANSTEAD , JUSTICE ANSTEAD , SO APTLY POINTED OUT , WE HAVE TO , THEN , GO TO WHAT THE BUSINESS REQUIRES IN ORDER TO OPERATE ON THE ORDINARY COURSE OF BUSINESS ON AN ANNUAL BASIS . WHAT CASH HAS TO BE RETAINED . ONE OF THE PROBLEMS IN

THIS CASE WAS THAT THE GOVERNMENT HAD HAD PREP AID \$230,000-SOMETHING TO THE CORPORATION FOR THE LA MP L IGHTE R PROJEC T ON THE F -16 , WHICH IT WAS NOT THEIR MONEY. THEY HAD TO HOLD IT IN RETAINED EARNINGS, TO BUY WIRE FOR FU TURE PRODUCTS AND LOCK IN THE PRICE.

I AM NOT SURE , YOU WOULD AGREE THERE ARE CIRCUMSTANCES WHERE , EVEN THOUGH THERE IS UNDISTRIBUTED INCOME , AND NOT DISTRIBUTION , SO THAT THERE WOULDN'T BE PAYMENT , THAT IF IT IS NOT BEING RETAINED FOR LEGITIMATE PURPOSES, IT COULD STILL BE CONSIDERED INCOME.

YES , YOUR HONOR.

SO YOU DO N'T, S O WE CAN'T APPLY A L I TERAL DEFINITION OF 61.0467 , WHERE OTHERWISE IT WOULD JUST BE LIMITED TO PAYMENTS .

WHICH, THEN, WOULD PUT PEOPLE IN AN UNTENABLE POSITION OF HAVING TO PAY SUPPORT , BASED UPON INCOME, WHICH IS PHANTOM INCOME . AND THAT IS WHAT I THINK HAS HAPPENED HERE , WHEN THE JUDGE ALL OCATED THE LO WER COURT \$147,000 OF INCOME TO MY CLIENT WHICH HE NEVER RECEIVED AND WILL NOT RECEIVE.

I AM NOT SURE YOU ARE STILL ANSWERING MY QUESTION ABOUT THE STATUTES AND THE DEFINITION SET FORTH BY THE LEGISLATURE AND HOW THEY RELATE TO THE IS SUES IN FRONT OF US.

WELL, I UNDERSTAND THAT, YOUR HONOR , BUT I THINK ONE OF THE STATUTES YOU REFER TO TALKS ABOUT BUSINESS INCOME TO MEAN GROSS RECEIPTS MINUS ORDINARY AND NECE SSARY EXPENSES REQU IRED TO PROD UCE INCOME. I BELIEVE THAT CAN BE CONSTRUED TO REQUIRE YOUR ACCOUNTS RECEIV ABLE , TO FINANCE THOSE, YOUR LOANS AT THE BA NK , YOUR OBLIGATION T O YOUR EMPLOYEES AND THE OTHER THINGS TO KEEP YOUR BUSINESS RUNNING.

SO YOU WOULD A GREE , THEN , WITH MR. LE VIN, TO THE EXTENT THAT 61.046 7 IS MODIFIED BY 61.30 , AS RESPECTS THE BUSINESS INCOME?

I DON'T KNOW IF I AG REE THE WAY H E APP LIES, IT BUT I DO AGR EE TO WHAT I HAVE JUST STATED, YES , YOUR HONOR.

NOW, IN TERMS OF THIS CASE, YOU HAD , AND YOU UNDERSTOOD THESE OBLIGATIONS , WHY ISN'T THIS SI MPLY A SITUATION THAT THE TR IAL JUDGE JUST DIDN'T BUY THE FACT THAT EVEN THOUGH IT WAS RETAINED, THAT THEY WE RENT' ACTUALLY AVAI LABLE TO YOU? WHY ISN'T IT THAT THE FI FT H DISTRICT SIMPLY SUBSTITUTED ITS JUDG MENT, AS OP POSED TO ANNOUNCED A RULE OF LA W THAT WAS DIFFERENT. IN THAT, I WA NT TO KNOW DO YOU THINK THAT THE TRIAL JUDGE FEEL BO UNDED BY ZIPPERER OR WHATEVER IT IS , OR DID THEY JUST DISBELIEVE EVERYTHING THAT YOUR WITNESSES HAD TO SAY?

YOUR HONOR, I HAVE , THE JUDGMENT OF THE CO URT HERE , THE LOWER COURT , AND I DO NOT BELIEVE THE COURT FULLY UNDERSTOOD THE EVIDENCE IN ALL DUE RES PECT , TO HIS H ONOR I N THAT COURTROOM , WHEN IT MA KES STAT EMENTS THAT THERE ARE UNCONTRADICTED EVIDENCE THAT MY CL IENT O WNE D 57 PERCENT OF THE CORPORATION, WHEN IT MAKES STATEMENTS IN THERE THAT MY CLIENT , IN FACT, IT WAS ILLEGAL THAT MR . ATASI'S INTEREST WAS NOT RECOGNIZED.

LET'S NOT GET INTO THE 57 V ERSUS 40 PERCENT. WE HAVE GOT TO AS SUME THAT THE FIFTH DISTRICT UP HELD THAT PART OF THE , I AM A SKING YOU ON THE ISSUE ABOUT ATTRIBUTING 100 PERCENT OF THE RETAINED INCOME AS INCOME AV AILABLE TO YOUR CLIENT , TO PAY ALIMONY AND THE OTHER DISTRIBUTIONS. DID THEY , IS IT YOUR , WHETHER THE JUDGE UNDERSTOOD OR

NOT , DID THE JUDGE FEEL B OUND BY PRECEDENT IN OTHER DISTRIBUTES?I MEAN, WHAT

YOUR HONOR , THE WAY I READ THE FIFTH DISTRICT COURT OF APPEALS 'S OP INION , T HEY SA ID THAT THE ALLOCATION BY THE LOWER COURT OF THE \$147,000 AS INCOME TO MY C LIENT FOR PURPOSES OF A SUBCHAPTER S CORPORATION , WAS WRONG , AND THEREFORE FOR THE REASONSSET FORT H IN THAT OPINION, THEY OVERRULED HI M. IT WAS NOT A QUESTION OF FACT.

WH Y WAS , WHY COULDN'T THE JUDGE , B ASED ON THE EVIDENCE PRESENTED , FIND THAT ALL 147,000 DOLLARS WASAVAILABLE TO YOUR CLIENT?

I GUESS THEY COULD HAVE DONE THAT , YOUR HONOR. IT WOULD HAVE , ACCORDING TO THE CPA IN T HIS CASE IN THE TESTIMONY , BANKRUPTED THE CORPORATION.

SO DID YOU MAKE AN ARGUMENT AND THIS NOW GOES BACK TO A QUESTION I ASKED EARLIER ABOUT SECTION 6 ON 7 .0 SECTION 607.061403. ARE YOU FAMI LIAR WITH THAT STATUTE?

Y ES, YOUR HONOR.

THAT STATUTE AC TUALLY PROHIBITS DISTRIBUTIONS I F IT WOULD ABRUPT A CORPORATION.DID YOU MAKE THAT ARGUMENT? WAS THAT STATUTE CITED TO THE TRIAL JUDGE AS A REASON THAT YOU , YOUR, THE CORPORATION COULD NOT HAVE MADE DISTRIBUTIONS BASED ON THE FINANCIAL SITUATION OF THE CORPORATION ?

YOUR HONOR , I CERTAINLY BELIEVE I DID . THIS IS A FOUR AND-A-HALF-YEAR-OLDCASE, AND IT WAS A VERY HARD-FOUGHT CASE, AND WE ARGUED EVERYTHING IN THIS CASE, AND I THINK THAT WAS AN ARGUMENT . OBVIOUSLY WE ARGUED THAT THE SUBCHAPTER S CORPORATIONINCOME IS NOT DISTRIBU TEABLE AND WE ARGUED THE PERCENTAGE OF OWNERSHIP.

NOW GO BA CK TO THESTATUTE A SECOND AND THIS CASE , WAS THERE AN ISSUE OF CHILD SUPPORT IN THIS CASE?

YE S, THERE WAS. THEY HAD E QUAL TIME WITH THE CHILD , AND THE JUDGE ORDEREDTHAT HE PAY \$502 A MONTH IN CHILD SUPP ORT.

WAS THERE AN ISSUE OF ALIMONY?

YES, YOUR HONOR. THE JUDGE ORDER ED \$5 ,000 PERMANENT PERIODIC ALIMONY , W HICH IS WHERE THE PROBLEMS DEVELOPED IF YOU ALLOCATE THE SUBC HAPTER S INCOME TO HIM AND IT IS PHANTOM INCOME.

FROM READING THE STATUTE , IT SE EMS LIKE 41.067 IS THE DEFINITION OF INCOME FOR PURPOSES OF THE CHAPTER. IT IS THE DEFINITIONAL SECTION.IS THAT NOT RIGHT?

YES, YOUR HONOR.

AND THEN SECTION 61.08 TALKS ABOUT ALIMONY, AND THEN IT SAY S ONE THING THE COURT SHOULD CONSIDER IS ALLSOURCES OF INCOME AVAILABLETO EITHER PARTY, SO YOU NEED TO U SE THE DEFINITION OF INCOME IN 61.046 FOR ALIMONY , I SN'T THAT CORREC T?

YES, YOUR HONOR .

AND IT SEEMS ALSO , SHOULDN'T WE READ TO THE EXTENT POSS IBLE , 61.046 AND 61.30 IN PARI M A TERIA AND RECONCILE THEM TO THE EX TENT POSSIBLE?

WELL , OBVIOUSLY THAT WOULD BE THE OBJECTIVE OF THE COURT , I AM SUR E, NOT TO

OVERRULE THOSE STATUTES, IF POSSIBLE . THERE HAS BEEN RECENT "BAR JOURNAL" ARTICLE THAT DISCUSSED THIS PARTICULAR ISSUE WHICH WE CITED IN OUR BRIEF, WHICH WAS SOMEWHAT INSTRUMENTAL.

IT JUST SEEMS TO ME, IF THE DEFINITIONAL SECTION OF INCOME IN 61.30, WHICH IS THE CHILD SUPPORT STATUTE , WHICH DIFFERS FROM 61.046 , IT WOULD DIFFER IN AWARDED CHILD SUPPORT AND NOT AWARDED ALIMONY, BECAUSE THAT DEFINITION DOESN'T APPLY TO ALIMONY. SO WE MAY HAVE TO DIFFERENTIATE BETWEEN CHILD SUPPORT AND ALIMONY .

YES, IT WOULD, YOUR HONOR, AND THERE IS NO LONG AREA MINOR CHILD IN THESE PARTICULAR PROCEEDINGS.

LET ME, I THINK, I DON'T KNOW IF YOU ANSWERED THE CHIEF JUSTICE'S QUESTION , FINALLY IS IT YOUR PARTICULAR POSITION THAT UNDISTRIBUTED INCOME CANNOT BE DISTRIBUTED?

- - UNDISTRICTED INCOME SHOULD BE AS CRIBED TO THE INDIVIDUAL?

IF IT IS RETAINED FOR UNDISTRIBUTED INCOME PURPOSES, IT SHOULD BE AS CRIBED TO THE INDIVIDUAL .

WHAT CASE LAW SAYS THAT ?

THE ZOLD CASE ANNE PETERSON AND JUDGE PETERSON SAYS THAT .

I AM STRUGGLING BETWEEN THAT AND THE DEFINITION FOR CHILD SUPPORT WHICH SAYS RETAINED PAYMENT.

I STRUGGLED WITH THAT, AND I STRUGGLED WITH IT IN THE BELIEF. IT IS A COMMON SENSE ANALOGY IN THE SENSE THAT MORE OR LESS YOU CANNOT RUN A BUSINESS WITHOUT WORKING CAPITAL. IT IS COMMON SINCE ZENS THAT YOU HAVE GOT TO RETAIN SOME IT IS MONDAY KMON SENSE THAT YOU HAVE GOT TO RETAIN SOME IT IS COMMON SENSE THAT YOU HAVE GOT TO RETAIN SOME EARNINGS OR YOU WOULD BE OUT OF BUSINESS .

YOU TALKED ABOUT THE POSSIBILITY THAT SOMEONE COULD HAVE MONEY COMING FROM THE TRUST AND THEY SIMPLY DON'T HAVE THAT MONEY DISTRIBUTED, EVEN THOUGH THERE IS NO PAYMENT , I DON'T KNOW THAT ANY COURT WOULD SAY THAT THAT WASN'T AVAILABLE. I MEAN, IN TERMS OF TRYING TO ANALOGIZE THAT WHAT WE ARE LOOKING AT IS A CORPORATION THAT, IN ORDER TO AVOID , AT LEAST FOR PURPOSES OF THIS ARGUMENT , A MAJORITY SHAREHOLDER DOESN'T RETAIN IT FOR LEGITIMATE BUSINESS PURPOSES, THAT IS WHAT WE ARE CONCERNED ABOUT.

YES, YOUR HONOR. AND THERE ARE TRUST CASES WHERE PEOPLE ALLOW THE TRUST CASES IN WHERE PEOPLE ALLOW THE MONEY TO INCREASE AND NOT TO BE HELD AS TRUST INCOME AND IT IS HELD FOR SUPPORT AND THAT MONEY WOULD BE AVAILABLE FOR SUPPORT AND I WOULD AGREE WITH THAT, BUT THAT TRUST IS NOT RUNNING THE BUSINESS WITH THE ORDINARY AND NECESSARY THINGS THAT YOU HAVE TO DO IN A BUSINESS AND I NEED TO KNOW AND I HAVE BEEN TROUBLED. I READ THIS DECISION 100 TIMES AS TO WHETHER THE FIFTH DISTRICT COURT OF APPEALS ACTUALLY SAID MR . ZOLD HAD A 57. WHATEVER PERCENT OWNERSHIP OF THIS CORPORATION OR WHETHER THEY SAID THAT IT WAS REVERSED AND FOR THE LOWER COURT TO CONSIDER THAT, AND I SAY THAT, BECAUSE ON PAGE 5 OF THE OPINION , THEY MAKE AN EQUATION REGARDING SOME MONIES THAT WERE DISTRIBUTED , AND IT IS IMPORTANT TO OUR ARGUMENT REGARDING THAT, WHERE THE WIFE ALLEGED THAT MR. ZOLD SAID THERE WAS \$250,000 FOR DISTRIBUTION , AND THE FIFTH DISTRICT COURT OF APPEALS SAID WE SEARCHED THE RECORD VOLUMINOUSLY AND SEARCHED THE VOLUMINOUS RECORD IN GREAT DETAIL AND FIND NOWHERE WHERE THAT STATEMENT IS. THEN THEY GO ON TO SAY, IF HE HAD 40 PERCENT ,

IT WOULD BE 100,000 AND IF HE HAD 57 PERCENT , IT WOULD BE 142,000 AND THEN THEY FOOTNOTE IT AND SAY THE FINDINGS BY THE JUDGE THAT JOHN OWENS 57 PERCENT OF TRITECH DOES NOT AFFECT TRITECH OR ITS STOCKHOLDERS, WHO ARE NOT PARTIES TO THESE PROCEEDINGS, AND THEN THEY VACATE AND SET ASIDE THE FINDINGS AS TO JOHN'S INCOME , THE PORTION OF THE FINAL JUDGMENT ORDERING SUPPORT AND EQUITABLE DISTRIBUTION , WHICH GOES

ISN'T THAT SOMETHING THAT , REALLY, YOU ALL ARE GOING TO HAVE TO SORT OUT DOWN THE ROAD , AS OPPOSED TO SORT OF A LIMITED LEGAL ISSUE ABOUT THE CONFLICT OF THESE DISTRICT COURT OF APPEAL DECISIONS ON THESE EARNED INCOME ISSUES , THAT IS THAT OUR PIECE OF THAT IS MUCH NARROWER, IS IT NOT?

YES, YOUR HONOR , I REALIZE WHY THIS COURT TOOK THIS CASE FOR APPELLATE PURPOSES. AND IT IS SUBCHAPTER S DISTRIBUTION OF INCOME.

WE ARE GOING TO HAVE ENOUGH DIFFICULTY SORTING THAT OUT , BUT WITH YOUR HELP WITH REFERENCE TO THIS BURDEN ISSUE, SO I THINK THAT THAT MAY AID THE RESOLUTION .

I WANT TO JUST ASK YOU SOMETHING ABOUT THE FINAL JUDGMENT. WAS THIS A FINAL JUDGMENT PREPARED BY ONE PARTY OR THE OTHER, OR WAS IT A COURT PREPARED THIS FINAL JUDGMENT?

YOUR HONOR , MR. LEVIN CAN ANSWER. THAT I BELIEVE THIS WAS EXACTLY WHAT HE GAVE THE JUDGE. HE SIGNED IT WITHOUT CHANGING A WORD.

BUT EITHER WAY , YOU DIDN'T CHALLENGE IT ON THAT BASIS , THAT IT WAS NOT AN INDEPENDENT WEIGHING BY THE JUDGE, DID YOU?

NO , YOUR HONOR, MY POSITION , I GUESS MY EXPERIENCE AS A TRIAL LAWYER IS TO FILE A MOTION FOR A NEW TRIAL , WAS A WASTE OF TIME.

BUT IN REFERENCE ON PAGE 7 OF THE FINAL JUDGMENT , IT SAYS THE COURT DID NOT FIND THE HUSBAND'S SWORN FINANCIAL AFFIDAVIT OR TESTIMONY REGARDING HIS INCOME TO BE CREDIBLE , AND THEN GOES ON ABOUT THAT , SO I , I SEE YOU ARE OUT OF TIME. MY CONCERN IS THAT , TO WHAT EXTENT DID THE TRIAL COURT ERR AS A MATTER OF LAW AND TO WHAT EXTENT REALLY WHAT HAPPENED IS THAT THE FIFTH DISTRICT SUBSTITUTED ITS JUDGMENT ABOUT THE CREDIBILITY OF THE HUSBAND 'S STATEMENT ABOUT HIS INCOME.

YOUR HONOR , IT IS HARD FOR ME TO SAY EXCEPT THAT I BELIEVE THE TOTALITY OF THE EVIDENCE WAS UNEQUIVOCAL THAT HE WAS A 40 PERCENT OWNER , AND I THINK THE FIFTH DISTRICT FELT THEY COULD NOT CHANGE, MAYBE , AND I DON'T KNOW WHETHER THEY DID OR NOT , BUT IF THEY FELT THAT SHE COULD NOT CHANGE THE 57 PERCENT , BUT IT WAS INCORRECT .

WE ARE OUT OF TIME. THANK YOU.

THANK YOU VERY MUCH.

CHIEF JUSTICE: MR. LEVIN . 90 SECONDS.

I BETTER TALK QUICKLY AND I REALLY WANT TO TALK TO THE JUDGE TO THE JUSTICE ABOUT HIS QUESTIONS. LET ME JUST QUICKLY , QUICKLY HIT ON A COUPLE OF THINGS .

YOU SAID THIS WAS A BURDEN ISSUE , REALLY.

I DID.

AND IN THAT EFFECT YOUR OPPONENT, IT SEEM S TO ME HERE, SAYS HE HAS NO PROBLEM WITH ACCEPTING THAT BURDEN OF THE PER SON INVOLVED WITH THE CORPORATIO N. WHY SHOULDN'T THAT END IT?

I THINK THAT THAT IS THE STARTING POINT OF THE RESOLUTION OF THE CONF LICT. THEN THE NEXT QUESTION IS HOW DO YOU APPLY THE RESOLUTION TO THIS PARTICULAR CASE , AND IN THIS PARTICULAR CASE , THERE WAS NO EVIDENCE PRODUCEED THAT THE COURT BELIEVED THAT WOULD JUSTIFY A FINDINGOTHERWISE, AND THEREFORE THE REMAND SHOULD GO BACK TO THE TRIAL COURT AND REINSTATE THE ENTIRE JUDGME NT THERE , BECAUSE THEY DIDN'T MAKE ANY SUCH EVIDENTI ARY FINDINGS. THIS IS NOT A CASE WHERE THEY SHOULD GO BA CK AND RETRY AND NOW TR Y TO REPROVEAN ISSUE THAT THEY DIDN'T PROVE AT THE TIME OF TRIAL.

WHAT THE DIFF ERENCE BETWEEN THE RESOLUTION HERE AND THE ISSUE THAT YOU HAVE , YOU ARE COMFORTABLE WITH THE BURDEN BEING ON THE PERSON INVOLVED WITH THE CORPORATION.

THAT IS ONE OF THE ARGUMENTS THAT I PUT THROUGH , Y ES.

THAT WOULD BE THE LEGAL RESOLUTION THAT WOULD COME OUT OF THIS CASE. HOW IT WOULD APPLY TO THE PARTICULAR FACT S OF THE CASE ARE SOMETHING WE WILL HAVE TO SORT OUT.

YES, SIR , AND I THINK IT IS IMPORTANT, THOUGH , THAT YOUR RE MAND DOES WHAT I SUGGESTED.

LET 'S GO BAC K TO THE ISSUE OF WHETHER 61.30 RELATES TO CHILD SUPPORT AND NOT ALIMONY.

JUDGE , I F I MAY T A KE YOU THROUGH A HISTORY THERE FORA SECO ND. 61.046 EX ISTS. THE DE CISION WAS MADE I N ZIPPERER, SHORTLY AFTER THE DEC ISION IN ZIPPERER, THE LEGISLATURE SPECIFIC ALLY ADDED LANGUAGE TO 61.08 THAT SAID ALL AV AILABLE INCOME IS, AND I SUBMIT TO THE COURT THAT THAT WOULD SU GGEST THAT THEY DID THAT T O CONF IRM THE R ULING IN ZIPPERER O R HAD NO I DEA BUT WANTE D TO MAKE SURE THAT ALL AVAILABLE INCOME . BUT IN REFE RENCE TO , THEN , THE NEXT THING THAT OCCURS IS THAT YOU HAVE 61.30 THAT GIVES A MUCH MORE SPECIFIC.THERE IS NO HIST ORY AND NONE OF THESE CASES SUGGEST ANY BASIS NOR DO I THINK THERE IS ANY LEGITIMATE BA SIS FOR DIFFERENTIATING IN THE TWO DEFINITIONS, AND I WOULD SUGGEST THAT THIS C OURTS HOULD NOT AND DOES NOT HAVE TO DO THAT. IN ADDITION TO THAT - -

I THINK THAT , UNLESS THERE IS ONE LAST POINT YOUWANT TO M AKE , YOU ARE OUT OF YOUR TIME .

THE ONLY OTHER THING IS I THINK IT IS VERY CL EAR THAT THERE IS SUBSTITUTED JUDGMENT HERE IN THE FIFTH'S OPINION , THAT NE EDS TO BE REVERSED, AND THAT THE TRIAL COURT'S SPECIFIC FINDIN GS , I DID NOT DRAFT THAT JUDGMENT. I WANT THE COURT TO KNOW THAT THE JUDGMENT WAS AT CLOSING ARGU MENT. I HAD IT PREPARED , A PROPOSED JUDGMENT. I USED IT IN MY CL OSING ARGUMENT. IT IS IN THE RECORD. I G AVE COUNSEL A COPY IN THE CLOSING ARGUMENT AND MADE THE ARGUMENT FROM THERE, ANDTHE JUDGMENT THAT ULTIMATELY E NDED UP HAD SIGNIFICANT CHANGES TO IT BY THE TRIAL JUDGE .

CHIEF JUSTICE: THANK YOU VERY MUCH AND THANKS TO B OTH S IDES FOR THE ORAL ARGUMENT RESPONSES TO DAY AND WE WILL TAKE THE CASE UNDER ADVISEMENT