[Cite as *Foppe v. Foppe*, 2009-Ohio-6926.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

LISA A. FOPPE,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2008-10-128 CA2009-02-022
	:	
- vs -		<u>O P I N I O N</u> 12/30/2009
	:	
LAWRENCE FOPPE,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 06DR29938

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HENDRICKSON, J.

{¶1} Defendant-appellant, Lawrence Foppe, appeals both a decision of the Warren County Court of Common Pleas, Domestic Relations Division, regarding property valuation and the court's judgment regarding a Civ.R. 60(B) motion filed by plaintiff-appellee, Lisa A. Foppe.

{¶2} The pertinent facts as they relate to this appeal are as follows: After approximately 22 years of marriage, Lawrence and Lisa separated in the early months of 2005. In February of 2006, Lisa filed for divorce. During the marriage, the parties were involved in several enterprises, whose valuation is the subject of the first appeal, CA2008-10-128.

{¶3} In its August 13, 2008 decision, the trial court valued the companies owned or partially owned by the parties as follows: (1) Foppe Technical Group, Inc. (FTG), valued at $131, 207 as of December 31, 2004, with Lawrence owning a 100 percent interest in the company; (2) Midwest Environmental Drilling, Inc. (MED), valued at $200,000 as of December 31, 2004, with Lawrence owning an 80 percent interest in the company;[1] (3) Sonoran Hospitality Group, Inc. (Sonoran), valued at $383,494 as of December 31, 2004, with Lawrence owning a 60 percent interest in the company;[2] (4) PCJ Properties, Inc. (PCJ), which had a stipulated value of $1,160,000 ($523,600 after mortgage deduction) as of January 5, 2007,[3] with Lawrence owning a 51 percent interest and Lisa owning a 49 percent interest in the company; and (5) East-West Properties, LLC, (EWP) which had a stipulated value of $1,390,000 ($272,090 net equity) as of January 5, 2007, with Lawrence owning a 1/3 interest in the company.

{¶4} In dividing the marital properties between the two parties, the trial court ordered Lawrence to retain his interest in FTG, MED and Sonoran; and assign his interest in PCJ and EWP to Lisa. The trial court directed Lisa to remove Lawrence's name as guarantor of any loans to PCJ and EWP; and the court instructed Lawrence to

1. Originally the 80 percent ownership interest was in Lisa's name, however she transferred her interest in MED to Lawrence in 2007.

2. Lawrence transferred 10 percent of his shares in the company to the two other Sonoran shareholders on January 1, 2005, leaving him with a 50 percent ownership interest in Sonoran.

3. Although the parties agreed to a valuation date of December 4, 2004, the parties stipulated to a January 5, 2007 value for two of their companies.

remove Lisa's name as guarantor of any liability associated with FTG, MED and Sonoran.

{¶5} Both parties filed motions for reconsideration. On September 19, 2008, Lisa filed a supplemental memorandum in which she alleged – based on new information that had come into her possession – Lawrence had been taking money out of PCJ. In its October 2, 2008 entry, the trial court denied both motions for reconsideration. However, the trial court expressly retained jurisdiction over the issues raised by Lisa in her supplemental memorandum reasoning that neither party had presented evidence during the preceding hearings regarding the alleged misappropriation of PCJ funds. On October 6, 2008, the trial court filed its judgment entry and final decree of divorce. Lawrence filed his first appeal on October 20, 2008, arguing in three assignments of error that the trial court erred in assigning values to the five companies.

{¶6} Meanwhile, Lisa filed a motion for accounting with the trial court on October 29, 2008, in which she maintained that Lawrence committed financial misconduct by inappropriately taking money from PCJ. Lawrence moved to dismiss Lisa's motion by arguing the trial court had no jurisdiction over the matter while his appeal was pending. On November 19, 2008, the trial court filed an entry in which it suggested Lisa modify her motion for accounting into a Civ.R. 60(B) request for relief. Lisa amended her motion pursuant to the trial court's suggestion, and filed the request for relief on January 6, 2009. After a hearing on the matter, the trial court found Lawrence had improperly taken $10,942 out of PCJ; and as a result, ordered Lawrence to repay that amount as well as Lisa's post-trial attorney fees. Lawrence filed a second appeal from this judgment, resulting in CA2009-02-022, arguing a single assignment of error. Both appeals were consolidated by order of this court.

{¶7} Because the first three assignments of error are all related to the issue of property valuation, we have chosen to set forth our standard of review before addressing the merits of each assignment.

{¶8} Prior to making an equitable division of marital property, a trial court must determine the value of marital assets. *Donovan v. Donovan* (1996), 110 Ohio App.3d 615, 620-21. "Rigid rules to determine value cannot be established, as equity depends on the totality of the circumstances." *Baker v. Baker* (1992), 83 Ohio App.3d 700, 702, citing *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 221-22. Thus, a trial court has broad discretion in determining the value of marital property. *Donovan* at 621. A trial court's decision regarding property valuation will not be disturbed on appeal absent an abuse of its discretion. Id. An abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE TAX CONSEQUENCES ASSOCIATED WITH THE PROPERTY AWARD."

{¶11} In his first assignment of error, Lawrence argues the trial court failed to consider certain tax consequences on each party, in making the property award, by ignoring the requirements of R.C. 3105.171(F)(6). We agree.

{¶12} "According to R.C. 3105.171(F)(6), in making a division of marital property, and in determining whether to make and the amount of any distributive award, a trial court is required to consider the tax consequences of the property division upon the respective awards." *Gould v. Gould*, Butler App. No. CA2004-01-010, 2005-Ohio-416, ¶48. Based on the mandatory language of the statute, the General Assembly has clearly placed a requirement on the trial court to consider the tax consequences of each party's property awards. However, after considering the tax consequences of the award on both parties, a trial court may then exercise its discretion in deciding whether or not to amend the value of the award. See *Hingsbergen v. Kelley*, Butler App. Nos. CA2003-09-215, CA2003-09-218, 2003-Ohio-5714; ¶14.

{¶13} On the third day of trial, Lawrence attempted to introduce the testimony of his expert, Joseph Paulin, regarding the embedded taxes in the parties' five businesses:

{¶14} "[MR. ADAMS, Attorney for Lawrence Foppe]: Okay, now Mr. Paulin, let's turn to the issue of [e]mbedded taxes and would you explain just briefly to the Court what that means, what the concept is?

{¶15} "[MR. PAULIN]: Yeah, the concept of valuing the company, you take that and treat it as a sale and you would determine what the taxes would be if it was sold for that price.

{¶16} "* * *

{¶17} "[MR. ADAMS]: So, if the company value determined, however it was determined, is [$]200,000, then you look at what is really happening is you're selling the company and it's [sic] assets, or whatever, the underlying assets for [$]200,000. [T]hen you can determine what the tax would be, if it were sold to an outsider for that price and you'd compute the taxes.

{¶18} "THE COURT: Mr. Adams, are you going to offer evidence that if I determine that this company is worth $200,000, that if he sold it, if the tax consequences are such and such, and that I should apply those tax consequences in making the allocation of property, is that what you're trying to do here?

{¶19} "MR. ADAMS: Well, it's two pieces. That's one piece and the other is when you do an equitable division of assets that you should take into consideration the [embedded] taxes, so it's one or the other. Your call, but that's the essence here.

{¶20} "THE COURT: I will allow you to proffer the testimony and any exhibits, but I do not agree with that particular concept. He did not sell this particular corporation. Those tax consequences are too speculative at this point in time. I am not going to consider tax consequences for something that didn't happen.

{¶21} "MR. ADAMS: Your Honor, in my trial brief, I have submitted to you, there's two Twelfth District cases that actually stand for the proposition that tax consequences are required to be considered in these circumstances, because in [e]ffect when you're dividing companies, you're really requiring to sell and the other party to buy those interests and I've cited both of those cases in the trial brief that I've given to you, so that's the reason I am offering this.

{¶22} "* * *

{¶23} "THE COURT: Mr. Adams, you have an exhibit that summarizes what it is that you're presenting here?

{¶24} "* * *

{¶25} "THE COURT: I'll let you proffer this exhibit Mr. Adams, but I am not going to hear testimony on a speculative sale of this particular business."

{¶26} We find that the trial court abused its discretion by refusing to consider the tax consequences of its division of the parties' five companies upon the property awards made to each spouse. As this court stated in *Hermann v. Hermann* (Nov. 6, 2000), Butler App. Nos. CA99-01-006, CA99-01-011, "[i]n making a division of marital property, the court is required to consider the tax consequences of the property division upon the respective awards to be made to each spouse." Id. at 16, citing R.C. 3105.171(F)(6). However, "Ohio courts have [also] determined that a court need not consider tax consequences that are speculative." *Hermann* at 16, citing *Day v. Day* (1988), 40 Ohio App.3d 155, 159; *Frost v. Frost* (1992), 84 Ohio App.3d 699. Without even considering evidence of the tax consequences proffered by

Lawrence's trial counsel, along with the arguments contained in his trial brief, the trial court opined that they were too speculative to contemplate because it was "not going to consider tax consequences for something that didn't happen."

{¶27} It appears from the record the trial court felt the tax consequences were too speculative because none of the businesses had actually been sold. The legislature has mandated under R.C. 3105.171(F)(6) that the courts must consider the tax consequences of the property division upon the respective awards to be made to each spouse. By refusing to hear appellant's expert evidence on the tax consequences of a property division award as to the parties' businesses, the lower court failed to comply with the requirements of R.C. 3105.171(F)(6). Rather than considering the impact of the tax consequences on each party's property award, the trial court decided that because no sale had occurred the taxes were speculative and chose to ignore them. The trial court should have allowed appellant's expert to testify on this issue and consider this information in determining whether such tax consequences have an impact on the value of the assets when deciding an appropriate property division award.

{¶28} While the trial court may certainly find that the taxes are speculative *after* examining their consequences on the parties; a trial court may not reject the tax consequences before even considering their effect, as such a decision is clearly violative of the legislative mandate in R.C. 3105.171(F)(6).

{¶29} Therefore, we sustain Lawrence's first assignment of error and reverse and remand this case to the trial court to consider the embedded tax consequences in the property valuation and subsequent division. See *Kelley v. Kelley*, Butler App No. CA2001-04-087, 2002-Ohio-2317, ¶14.

{¶30} In remanding this matter to the trial court, we in no way render an opinion as to whether the taxes claimed by Lawrence will affect the value of the businesses; we are merely requiring the trial court to comply with the mandate of R.C. 3105.171(F)(6).

{¶31} Assignment of Error No. 2:

{¶32} "THE TRIAL COURT ERRED IN THE METHOD IT USED TO VALUE SONORAN."

{¶33} In his second assignment of error, Lawrence maintains the trial court's valuation of Sonoran was not supported by competent, credible evidence because the court incorrectly used a portion of his expert's calculation, rather than using his expert's entire calculation. We disagree.

{¶34} "Because of its discretion, '[a] trial court has some latitude in the means it uses to determine the value of a marital asset.'" *Brickner v. Brickner*, Butler App. No. CA2008-03-081, 2009-Ohio-1164 at ¶11, quoting *Kevdzija v. Kevdzija*, 166 Ohio App.3d 276, 2006-Ohio-1723, ¶23. Therefore,"[w]hen valuing a marital asset, a trial court is neither required to use a particular valuation method nor precluded from using any method." *Gregory v. Kottman-Gregory,* Madison App. Nos. CA2004-11-039, CA2004-11-041, 2005-Ohio-6558, ¶15, citing *James v. James* (1995), 101 Ohio App.3d 668, 681.

{¶35} However, in determining the value of marital property, the trial court must have sufficient evidence in order to justify and/or support the figure that it establishes. *McCoy v. McCoy* (1993), 91 Ohio App.3d 570, 575. Therefore, "[w]hatever valuation the trial court chooses must be supported by competent, credible evidence." *Moore v. Moore*, Clermont App. No. CA2006-09-066, 2007-Ohio-4355, ¶45, citing *McCoy* at 575.

{¶36} Before placing a value on Sonoran, the trial court heard testimony from three experts. Lisa's expert, Allan Bieber, testified that Sonoran's value on December 31, 2004 was $650,893. Lawrence, in turn, utilized two experts to place a value on Sonoran. Lawrence's first expert, Reuvl Couch, testified that the value of Sonoran on December 31, 2004 was $691,000 after "blending" a percentage of gross sales and a percentage of cash flow.[4] Lawrence's second expert, Candice DeClark-Pearce (DeClark), made adjustments to Couch's valuation to take into account cash, deposits, and accounts and notes payable as a going concern (adjusted value estimate); and ultimately valued Sonoran at $279,494 less a discount for lack of control.

{¶37} In its August 13, 2008 decision, the trial court wrote that Couch testified "that restaurants tend to sell for a percentage of sales or a percentage of cash flow." The trial court reasoned that because a buyer would like to buy a business at two times cash flow ($635,000), and a seller would prefer to sell at three times cash flow ($953,000), the business would sell for "at least 2.5 times cash flow, or approximately $795,000." In supporting its decision, the trial court made reference to parts of Couch's report which stated the restaurant was "well-position[ed] for continued success," revenue growth had averaged more that "12% annually," "the overall outlook for th[e] business appear[ed] to be strong," and that Sonoran was "capable of maintaining its market share and profitability for an extended period." Because, this figure was $104,000 more than Couch's original estimate, the trial court added that amount to DeClark's adjusted value estimate, and determined Sonoran's December 31, 2004 value was $383,494.

{¶38} Lawrence argues that the trial court mistakenly used one part (percentage of cash flow) of his expert's calculation in placing a value on Sonoran, rather than utilizing the

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4. Within the expert report provided to the trial court, Couch included a worksheet detailing the following blended valuation of Sonoran, for FY 2004:

Annual Gross Sales x 25%:	$419,074.65
Annual Gross sales x 45%:	$754,334.37
Annual Cash Flow x 200%[:]	$635,721.74
Annual Cash Flow x 300%[:]	$953,582.61
Average Gross Sales Valuation[:]	$586,704.51
Average Cash Flow Valuation[:]	$794,652.18
Blend Valuation[:]	$690,678.34

expert's entire calculation (percentage of gross sales and cash flow). Lawrence points out that the trial court believed Couch testified that a valuation could be based on a percentage of gross sales *or* a percentage of cash flow, whereas Couch actually stated his figure was based on a percentage of gross sales *and* a percentage of cash flow.

{¶39} Lisa, however, calls our attention to the fact that on cross-examination Couch testified that he used a "range" to determine valuation. Couch stated that he used a "range" between 25-45 percent of gross sales ($419,074.65 – $754,334.37) to 200-300 percent of cash flow ($635,721.74 – $953,582.61). Both of these ranges were averaged to create an "average gross sales valuation" ($586,704.51) and an "average cash flow valuation" ($794,652.18), which were then "blended" – in essence averaged again – to come up with Couch's final valuation of $690,678.34. See fn. 3.

{¶40} Lisa further contends that the trial court's decision was supported by competent, credible evidence because the number chosen by the court was within Couch's range, and the court thoroughly explained its decision to value Sonoran on the higher end of that range.

{¶41} We agree with Lawrence to the extent that Couch's testimony and his report took into account both gross sales and cash flow in his valuation of Sonoran.[5] However, the testimony also reveals that Couch's valuation was based on the fair market value of Sonoran. Upon being asked what a fair market appraisal meant in his business, Couch replied, "[i]t would be the value of the business given, the time to find – properly market a find a qualified, ready, willing and able buyer." Later, Couch stated that "an astute buyer is not going to pay

5. Couch twice testified that he used both gross sales and cash flow to value the business stating, (1) " * * * we've obviously tracked our activity for a long time and also other restaurant sales in that area and we find this to be a range, you know depending on you know competition or trends or upswings or down swings where these you know, a range of percentage of sales and a range of cash flow that restaurants sell for" and (2) "We didn't use capitalization. We used a percentage of sales and a percentage of cash flow."

more than three times a cash flow for a business * * * They're not going to pay more than that, probably again 2 to 2.5 – a buyer wants to buy two, a seller wants to sell at three."

{¶42} In addition, Couch agreed to Lisa's counsel's query as to whether the "cash flow method was your primary determinate of what the value of the restaurant is * * *?" Couch also testified that using different percentages created "the range of what restaurants would sell for." Upon being asked whether Sonoran's price fell within a range between approximately $586,000 to $794,000, Couch agreed the range was correct; although he also acknowledged that he had sold restaurants for both lower and higher amounts than those calculated within a given range.

{¶43} The trial court may have misstated Couch's calculation methods; however, the court's decision to value Sonoran based on an average of annual cash flow, was supported by competent, credible evidence. Couch stated that his valuation of Sonoran was based on its fair market value, or the amount the business would sell for, if marketed. An astute buyer, according to Couch, would pay approximately 2.5 times cash flow for a business. Moreover, Couch conceded that his valuation calculations constituted a range between $586,000 to $794,000. Thus, there is support for valuing Sonoran based on its cash flow alone. It is also clear from the trial court's decision that it chose to value Sonoran on the high end of Couch's range because Sonoran is a successful business. Indeed, both Couch's expert report and Beiber's expert report attest to Sonoran's steady revenue growth. We do not find the trial court's decision to value Sonoran in this manner was an abuse of discretion. Therefore, we overrule Lawrence's second assignment of error.

{¶44} Assignment of Error No.3:

{¶45} "THE TRIAL COURT ERRED WHEN VALUING SONORAN BY FAILING TO APPLY AN APPROPRIATE DISCOUNT FOR LACK OF CONTROL."

{¶46} In his third assignment of error Lawrence argues the trial court erred in failing to apply a discount for his lack of control of Sonoran, contending the court should have found he only owned half of Sonoran, rather than 60 percent of the company. We do not agree.

{¶47} In 2000, Lawrence, his sister, and her husband (hereinafter the Craigs) invested in two restaurant companies, one of which was Sonoran. Initially, Lawrence was a 50 percent shareholder, while the Craigs owned the other 50 percent and operated the restaurants. On September 1, 2001, FTG loaned Sonoran and the other restaurant the sum of $50,000 ($25,000 to each company) which was to be repaid to FTG on December 31, 2001. On October 1, 2001, Lawrence and the Craigs entered into an agreement whereby Lawrence would receive an additional 10 percent of the shares in each company, if the loans were not repaid in full on December 31, 2001.[6] Although Lawrence claims the agreement between the parties was that he would return the additional 10 percent of the shares when the loan was repaid; there is no language in the October 1, 2001 agreement to indicate this accord.

{¶48} The loan to Sonoran was repaid to FTG on December 22, 2003, while the other loan was repaid by Sonoran on July 9, 2004, as the other restaurant had gone out of business. In a document dated December 31, 2004, Lawrence and the Craigs entered into a second agreement, which referenced the October 1, 2001 agreement, and stated that the original agreement "required a transfer of shares of Sonoran;" and that the ten shares (10 percent interest) were "the same number of shares transferred by the Craigs to Foppe in consideration of the [l]oan." The December 31, 2004 agreement transferred the 10 percent interest back to the Craigs effective January 1, 2005.

{¶49} Although the trial court observed, in its August 13, 2008 decision, that Lawrence had a current interest of 50 percent in Sonoran, the court found that on December

6. Lawrence explained that although the loan was made by FTG, the shares were transferred to Lawrence because, as a subchapter S corporation, FTG could not own the stock.

31, 2004 Lawrence had a 60 percent interest in Sonoran. The trial court stated:

{¶50} "In 2001 a loan was made to Sonoran wherein [Lawrence] received an additional 10 percent of the company * * * Eventually the loan was repaid and this 10 percent ownership was returned to [the two other partners] as of January 1, 2005. The latter agreement indicated that the '2001 agreement required a transfer of shares . . . until the loan . . . is paid in full.' However, the 2001 agreement provided by this court made no such requirement."

{¶51} Furthermore, because the date of valuation was December 31, 2004, the trial court valued Lawrence's "share of Sonoran as if he owned 60 percent of the shares." Because of this determination, the trial court chose to find a 20 percent discount for lack of control was unwarranted, and as a consequence, found Lawrence's share of Sonoran to be 60 percent of $383,494, or $230,096.

{¶52} Lawrence maintains the trial court should have viewed his ownership interest prospectively, instead of only viewing his interest on the agreed valuation date. Lawrence contends that valuation of a business is essentially finding a present value of future benefits. Lawrence also argues that Lisa's own expert, Alan Bieber, acknowledged that determining a value is prospective in nature.

{¶53} In declining to apply the lack of control discount, the trial court appears to have focused more on the language in the October 1, 2001 agreement – which did not involve return of the shares after the loan was repaid – rather than the required transfer referenced in the December 31, 2004 document. Moreover, the trial court properly concentrated its inquiry on the ownership interest on December 31, 2004, the parties' stipulated date for valuation of their properties. Indeed, by agreeing to the valuation date, Lawrence cannot now claim error in evaluating his ownership interest in Sonoran when he agreed to value the property as of December 31, 2004. Since we do not substitute our judgment for that of the trial court, we find the trial court did not abuse its discretion in finding Lawrence had a 60 percent interest in Sonoran on December 31, 2004, making him ineligible for a discount for lack of control. Lawrence's third assignment of error is overruled.

{¶54} Assignment of Error No. 4:

{¶55} "THE TRIAL COURT ERRED BY CONSIDERING AND GRANTING WIFE'S RULE 60(B) MOTION."

{¶56} In his final assignment of error, Lawrence maintains the trial court lacked jurisdiction to consider Lisa's Civ.R. 60(B) motion. We agree.

{¶57} "When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 146, 1994-Ohio-219, citing *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44; *In re Kurtzhalz* (1943), 141 Ohio St. 432, paragraph two of the syllabus. However, notwithstanding this rule, the Ohio Supreme Court has "expressly held that an appeal divests trial courts of jurisdiction to consider Civ.R. 60(B) motions for relief from judgment." *Howard* at 147, citing *State ex rel. East Mfg. Corp. v. Ohio Civ. Rights Comm.* (1992), 63 Ohio St.3d 179, 181. In those cases, "[j]urisdiction may be conferred on the trial court only through an order by the reviewing court remanding the matter for consideration of the Civ.R. 60(B) motion." *Howard* at 147, citing *Klinginsmith v. Felix* (1989), 62 Ohio App.3d 147, 151 and *Majnaric v. Majnaric* (1975), 46 Ohio App.2d 157.

{¶58} Based on the fact that Lawrence's first appeal deals solely with matters of property valuation, while Lisa's Civ.R. 60(B) motion deals solely with financial misconduct committed by Lawrence with regard to PCJ, it appears as though the trial court's decision to rule on Lisa's Civ.R. 60(B) motion would not be inconsistent with this court's jurisdiction to reverse, modify, or affirm the trial court's judgment entry. However, because Lisa failed to move this court to remand the matter to the trial court to consider her Civ.R. 60(B) motion, the trial court had no jurisdiction to rule on her motion. See *Howard* at 147.

{¶59} Therefore, we sustain Lawrence's fourth assignment of error and vacate the trial court's January 22, 2009 judgment based on lack of jurisdiction.[7]

{¶60} Judgment affirmed in part and reversed and remanded in part in CA2008-10-128; judgment vacated in CA2009-02-022.

POWELL, P.J., and YOUNG, J., concur.

7. By resolving Lawrence's first appeal within this opinion, the trial court may now exercise its jurisdiction to consider post-trial motions, including those under Civ.R. 60(B), so long as they were properly filed in accordance with all other applicable Rules of Civil Procedure. See, e.g., *Pegan v. Crawmer* (1996), 76 Ohio St.3d 97, 103, 1996-Ohio-419; *State ex rel. Newton v. Court of Claims*, 73 Ohio St.3d 553, 558, 1995-Ohio-117.