SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 95618-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NICKY BRINEY, A Washington Individual

Appellant,

and

MARGARET MORGAN, A Washington Individual

Respondent.

REPLY TO RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

THE HUNSINGER LAW FIRM
Attorney for Appellant NICKY BRINEY

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I. INTRODUCTION

Apparently pursuant to RAP 13.4(d), in her Answer to Mr. Briney's Petition for Review of the Court of Appeals' ruling upholding the trial court's $461,675 judgment awarded in her favor against Mr. Briney, Margaret Morgan slips in a request that her $711,157 judgment that the Court of Appeals reversed be "restored", but only if "this Court finds that sufficient basis exists to grant review, . . . ". *Answer,* page 15 This lukewarm request for review does not mention any of the four mandatory bases for this Court's acceptance of review itemized in RAP 13.4(b), because none of them applies. It therefore must be denied.

II. COUNTER-STATEMENT OF THE CASE

The Statement of the Case at pages 2 – 11 of Mr. Briney's Petition for Review accurately describes the fundamental facts of this case, including some that pertain to the very narrow issue presented by Ms. Morgan in her request for review: a detailed description of Mr. Briney's separate property and how he constantly and contemporaneously accounted for – and always kept separate – every asset and every debt, and every deposit and every expense during the parties' lengthy CIR. *Petition*, pp. 5 – 7 That accounting included Exhibit 78, which is the subject of Ms. Morgan's request

for review, although her Statement of the Case says virtually nothing about those or any other facts that are pertinent to her request for review.

The Court of Appeals reversed Ms. Morgan's judgment because there were no findings of fact supporting a conclusion that Mr. Briney's investment and retirement accounts were quasi-community property or that any increase in their value during the CIR was attributable to community efforts. *Morgan v. Briney*, 200 Wn. App. 380, 403 P.3d 86 (2018) ("*Morgan*")

In her request for review, Ms. Morgan contends that the Court of Appeals erroneously held that the trial court did not rely on Exhibit 78 in its ruling. *Answer*, pages 15 – 16 But Ms. Morgan makes no attempt to explain what Exhibit 78 is, the minimal role it played in the trial, and the real reason why it was not admitted into evidence at or after trial: her counsel intentionally and repeatedly declined the opportunity to have it – or virtually any other information regarding Mr. Briney's income or assets – admitted into evidence.

Despite being provided with approximately 18 years of Mr. Briney's income tax returns and 14 years of investment account and bank statements, Ms. Morgan offered into evidence at trial only two

of each, none of which contained any meaningful information regarding Mr. Briney's income.

Moreover, during the trial Ms. Morgan's attorney had the opportunity to introduce into evidence two exhibits presented by the Defendant: a "check register" itemizing each expenditure from and deposit into Mr. Briney's main bank account during 2006 (trial exhibit 78) and a spreadsheet showing how much he spent each year during the CIR for each category of expenditure (trial exhibit 77). Instead, he objected to their admission in the Joint Statement of Evidence and in his cross-examination of Mr. Briney he asked no questions about any of the entries in either document.[1]

It is also undisputed that:

- Ms. Morgan's attorney objected to the exhibits' admission in the Joint Statement of Evidence at the start of the trial, so the trial court reserved ruling on their admissibility.
- Mr. Briney testified regarding only one expenditure and one deposit in Exhibit 78, and only one category of expenditures in Exhibit 77.
- Mr. Briney's counsel did not offer either exhibit into evidence because they were discussed only to explain how he maintained his Quicken software bookkeeping procedures to

[1]The Counter-Statement of Case and Argument in this Reply is a somewhat condensed version of Defendant's Memorandum in Opposition to Plaintiff's Motion to Include Exhibits (CP 786 – 795) filed by Ms. Morgan over a year after the trial had concluded. The Memorandum was supported by the Declaration of Michael D. Hunsinger in Opposition to Plaintiff's Motion to Include Exhibits (CP 796 – 915)

(successfully) persuade the trial court to admit into evidence the value of his separate property on the two most likely dates the CIR began (trial exhibits 71 and 72).

- The Court never was asked to, and did not rule on, the admissibility of exhibits 76 – 78 and consequently returned them to Mr. Briney's counsel at the end of the trial.

- The June 19, 2015 emails discussing those exhibits between Mr. Briney's attorney, the Court's clerk, and Ms. Morgan's attorney demonstrate that the latter knew no later than June 19, 2015 that the exhibits had not been entered into evidence and had instead been returned to Mr. Briney's attorney.

- The Defendant's June 15, 2015 proposed Findings of Fact and Conclusions of Law, and the Findings of Fact and Conclusions of Law entered by the Court on June 30, 2015, listed each exhibit entered into evidence at trial; exhibits 76 – 78 were excluded.

- The fact that exhibit 78 was not admitted into evidence was expressly discussed in Mr. Briney's Motion for Reconsideration pleadings and Ms. Morgan's response to them filed in July 2015.

- Ms. Morgan's attorney nevertheless did not at any time file a motion or otherwise request that exhibits 76, 77, or 78 be included in the trial record.

- Even after Mr. Briney's counsel filed his Notice of Appeal of the trial court's trial rulings in February 2016 and filed his appellate brief on April 13, 2016 with a cover email to Ms. Morgan's attorney reminding him that exhibits 77 and 78 had not been admitted into evidence, Ms. Morgan's attorney did not file a motion or otherwise ask that the exhibits be included in the trial record.

- Even after Mr. Briney's counsel sent a copy of the trial transcript to Ms. Morgan's attorney on April 15, 2016 at his request, and even when Ms. Morgan's attorney filed two successful motions to extend the deadlines for filing his brief

in response to Mr. Briney's appellate brief, Ms. Morgan's attorney did not file a motion or otherwise ask that the exhibits be included in the trial record.

- Even after Mr. Briney's counsel sent him an email on May 25, 2016 again requesting that he not include exhibits 77 and 78 in his response brief, Ms. Morgan's attorney did not file a motion or otherwise ask that the exhibits be included in the trial record. Instead, while implicitly conceding that exhibits 77 and 78 were not admitted into evidence, Ms. Morgan's attorney replied that Judge Spector had referenced exhibit 78 in her Findings of Fact and Conclusions of Law, so it was "before the Court" and he believed it was "proper for the judge to rely on it (assuming she did)." He "suspect[ed] that that might [sic] a question the appellate court resolves, as well as whether that exhibit's inclusion or exclusion would have changed the income [sic]."

- It was only after Ms. Morgan's attorney submitted a Supplemental Request for Designation of Clerk's Papers and was informed by the King County Superior Court clerk that exhibits 76 – 78 were not forwarded because "they were designated but returned at trial" that on June 24, 2016 Ms. Morgan's attorney filed her Motion to Include Exhibits [76, 77, and 78].

The trial court partially granted Ms. Morgan's Motion, holding only that the three exhibits "shall be included in the court record." (CP 916-917) The Court of Appeals noted that the trial court's ruling "does not order that the exhibits be admitted into evidence or indicate that the court considered them at trial. Accordingly, we do not consider these exhibits as evidence on appeal." *Morgan*, at page 395

III. ARGUMENT WHY REVIEW SHOULD BE REJECTED

A. There is Substantial Evidence to Support the Court of Appeals Decision, Which Was Consistent With Washington State Law.

1. Exhibit 78 was not admitted into evidence because Ms. Morgan's attorney intentionally chose not to do so, and it was therefore properly not considered by the trial court.

It was undisputed that at all times during their relationship the parties' income and assets were never commingled.

Any meaningful evidence of Mr. Briney's income or any information regarding the increase or decrease in the value of his investment accounts during the CIR may have helped Ms. Morgan attempt to satisfy that burden of proof, potentially requiring Mr. Briney to rebut it with evidence of his own. Mr. Briney was ready to do so.

The most obvious source of that information was Mr. Briney's annual federal income tax returns and monthly investment account statements. However, Ms. Morgan's counsel chose not to offer their admission into evidence except a handful that contained no meaningful information that called for a response by Mr. Briney. None of the Findings of Fact or Conclusions of Law referred to, or were apparently based upon, any of those exhibits or the information contained in them.

Exhibit 78, the 2006 "check register", included all of Mr. Briney's deposits into that bank account for that year. Had Ms.

Morgan's attorney solicited Mr. Briney's testimony regarding that information on cross-examination or asked that the exhibit be introduced into evidence, it would have provided only a very small sample of Mr. Briney's income, but enough to call for Mr. Briney to present evidence on re-direct examination to rebut it, which he would have done.

During closing argument the trial court commented that "I can't reopen, and I don't think that would be fair", meaning that it would not be fair *to Mr. Briney* to allow the case to be reopened to allow Ms. Morgan to introduce evidence after the trial ended. That was, of course, the appropriate course to take, to which Ms. Morgan's attorney appropriately did not object, until 13 months later, too late for Mr. Briney to introduce any evidence to rebut it. The trial court then refused to allow exhibit 78 to be admitted into evidence, because that would have terribly prejudiced Mr. Briney, especially when Ms. Morgan's attorney had numerous opportunities during and after the trial to introduce the evidence and chose not to.

This is not a situation where Ms. Morgan's counsel was understandably unaware of or confused about whether the exhibits had been introduced into evidence. He not only should have been aware they had not been introduced into evidence, he was aware of that fact, and he ***intentionally*** chose not to ask that they be introduced into evidence, just as he ***intentionally*** chose not to

ask Mr. Briney any questions about any of the entries in either of the exhibits during his cross-examination.

Not surprisingly, Ms. Morgan provides no applicable authority in support of her request for review.

Hector v. Martin, 51 Wash. 2d 707, 321 P.2d 555 (1958) involved a boundary dispute between two neighbors who had conflicting surveys of their property line and sued each other for damages and injunctive relief. The trial court granted the defendant's motion to dismiss the plaintiffs' damages claim at the conclusion of their case, but reserved ruling on the injunctive relief issue. The defendants then presented evidence to rebut the plaintiff's claim for injunctive relief but the trial court found in favor of the plaintiffs.

The appellate court ruled that by presenting evidence to rebut the plaintiffs' injunctive relief claim after the court reserved ruling on their motion to dismiss, they waived their challenge to the sufficiency of the evidence. In so doing, the Court merely stated at page 709-710 that ". . . the failure of the trial court to rule on ***[a motion to dismiss for insufficient evidence]*** before introduction of proof by a defendant, is tantamount to a denial of the ***motion."*** (emphasis added) It has nothing to do with a trial court reserving a ruling on the admission of ***evidence.***

State v. Koloske, 100 Wash. 2d 889, 676 P.2d 456 (1984) consolidated two appeals of criminal cases. In her Answer at page

17 Ms. Morgan cites the Supreme Court's discussion of a situation involving a tentative or advisory ruling, but fails to disclose the type of issue involved, which is far different from the facts of this case. *Koloske* involved a criminal defendant who wanted to bar evidence of prior convictions in the trial for his most recent alleged criminal offense. He was convicted after a trial judge denied his motion in limine to bar that evidence. The Supreme Court upheld his conviction because he failed to make an offer of proof with his motion. There was, in other words, no "tentative or advisory" ruling.

In dictum in *Koloske* the Supreme Court discussed several issues regarding the procedure for hearing and deciding such a motion, including when the motion should be made, when it should be decided or reserved, the necessity for an objecting defendant to submit an offer of proof, the importance of recording sidebar conferences involving discussions of these issues, etc. *Koloske,* at 896-897. But at no time does the Court discuss, or even allude to, whether a trial court's failure to rule mandates the admission of the prior conviction into evidence.

Demps v. San Francisco Housing Authority, 149 Cal. App. 4th 564, 57 Cal. Rptr. 3d 204 (2007) is even less applicable because (a) it is a California case and (b) it involves a summary judgment motion, not a trial. In *Demps* the defendant filed a motion for summary judgment dismissal and moved to strike many of the

allegations in the plaintiff's response pleadings. At the hearing the defendant/moving party asked the judge to rule on the objections; the judge declined, merely stating it was "only considering the relevant and pertinent evidence." *Demps,* at page 574. The trial court granted the defendant's motion and dismissed the case, which was upheld on appeal.

The appellate court ruled that the trial court erred by not specifically ruling on the defendant's objections, and treated them as waived, to the benefit of the plaintiff, who nevertheless lost his appeal. How California requires its judges to deal with evidentiary objections in motions for summary judgment (especially for the benefit of the party who lost the motion and the appeal) has nothing to do with a Washington case dealing with evidentiary objections during a trial where the party who objected to the admission of evidence later wants it admitted because that party chose not to object to it.

If Ms. Morgan's "reasoning" were correct, any party could object to the admission of documents in the Joint Statement of Evidence, neither object to it or ask that it be admitted during the trial, then after all evidence has been presented, claim that each document had been automatically and retroactively admitted into evidence because the trial court never ruled that it was or was not admissible. This "evidentiary sandbagging" would be absurdly prejudicial and inefficient.

But there is an even greater distinction between those three cases and this one. Here the party asking for the admission of evidence had numerous opportunities to have that evidence admitted, but chose not to do so. Moreover, none of those cases, nor any published authority to the undersigned's knowledge, asked that trial exhibits be admitted into the record a full year after the entry of Findings of Fact and Conclusions of Law, and ten weeks after the opposing party filed his appellate brief, with no ability for the opposing party to supplement the trial record with rebuttal evidence, that could have drastically affected the initial outcome of the trial.

2. Ms. Morgan failed to produce direct and positive evidence, in fact failed to produce any evidence at all, that her community contributions caused the increase in the value of Mr. Briney's separate property.

As the Court of Appeals stated in *Morgan* at page 393, Ms. Morgan does not dispute that Mr. Briney's investment assets were presumptively separate, nor that she therefore has the burden of proving by direct and positive evidence that their value increased during the CIR by community efforts. *Answer,* pages 18 – 19 However, in her Answer – as she did throughout the trial – she merely alleges that the "unquantifiable contributions she made toward the community; for example, keeping Mr. Briney alive

during his crippling depression . . . constituted a community contribution". *Answer*, page 19 But as the *Morgan* court correctly stated at page 395 : "But the trial court did not link Morgan's efforts to the increase in value of Briney's separate property and Briney's separate property is not before the court for distribution. Thus, her efforts do not entitle her to a share of Briney's separate property."

B. Ms. Morgan Does Not Even Claim, Let Alone Prove, that the Court of Appeals Decision Satisfies RAP 13.4 (b).

Nowhere in her request for review does Ms. Morgan contend that the Court of Appeals' reversal of her judgment conflicts with a decision of the Washington Supreme Court or Court of Appeals, involves a significant question of law under the Washington or United States Constitutions, or involves a substantial public interest that this Court should determine. None of the four subsections of RAP 13.4(b) apply: the request must be denied.

DATED this 19th day of April, 2018

THE HUNSINGER LAW FIRM
Attorneys for Appellant Nicky Briney

By: _____
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CERTIFICATE OF SERVICE

I certify that on the 19th day of April, 2018, I caused a true and correct copy of this Petition to be served on the following on April 19, 2018, in the manner indicated below:

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THE HUNSINGER LAW FIRM

April 19, 2018 - 11:37 AM

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