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Court of Appeals No. 71624-7
Whatcom County Cause No. 11-3-00824-0

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

LAURA NIWRANSKI,

Appellant
(Respondent Below)

v.

HARRY NIWRANSKI

Respondent
(Petitioner Below)

APPEAL REPLY BRIEF OF APPELLANT LAURA NIWRANSKI

Decisions to be Reviewed: Final Orders of Whatcom County Superior Court Judge Ira Uhrig of 12/13/13

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I. INTRODUCTION

COMES NOW, the Appellant, **LAURA L. NIWRANSKI,** by and through her attorney of record, Stuart E. Brown (WSBA #35928), and provides this brief in Reply to the Amended Responsive Brief of the Respondent, **HARRY NIWRANSKI,** dated 10/01/14.

II. REPLY ARGUMENT

The Respondent, through counsel, begins his introduction with a number of misleading or inaccurate claims addressed below. First, on page one, opposing counsel (OC) states, "after the wife agreed to 'pare down' her list (of witnesses), the trial court allowed all her expert witnesses to testify except two financial experts and her criminal defense attorney, who the wife agreed was at the 'bottom' of her priority list." This is inaccurate as the court essentially forced Appellant's counsel to reduce the already greatly reduced witness list (from 40 initially) further. In addition, as noted at length in Appellant's initial brief, several of even the expert witnesses that were allowed, were allowed only as rebuttal witnesses, greatly reducing their effectiveness and ability to offer critical factual evidence showing the Respondent's serious alcohol problem; his on-going problems with anger control; his poor parenting behaviors; his on-going

threatening and abusive behavior toward the Appellant and women in general; and showing that the mother lacked *all* such dynamics.

On page one, OC also attempts inaccurately to 'frame' the financial issues argument as one where the wife was somehow the beneficiary of the court's largesse and fairness toward her by claiming, "At the end of the trial, the trial court awarded each party their separate property, and awarded the wife 73% of the community property …." In fact, by excluding the Appellant's *only* (italicized here and below for emphasis) financial experts and their property valuations and testimony as to property tracing and Appellant's immense contribution to the businesses the court awarded the Respondent as his separate property, Appellant argues that the court greatly and artificially reduced what should have been determined as community property. Aside from this critical error and even accepting for argument's sake the premise that the court correctly characterized separate versus community property, the trial court, having "all of the parties' property, community and separate, before it for [equitable] distribution," (*In re Marriage of Olivares,* 69 Wash. App. 324, 328, 848 P.2d 1281 (1993)), utterly failed to provide anything close to a fair and equitable division of all property before it. A claim that the Appellant received 73% of 'community property' is highly misleading.

On page two, OC states, "In her appeal, the mother does not seriously argue that the trial court abused its discretion in making fact based decisions based on substantial evidence before it." As noted in her initial brief, the mother certainly *does* argue that the court clearly abused its discretion *exactly* as stated by OC who makes the Appellant's case here in that the court completely *ignored* the very substantial and *overwhelming evidence* before it supporting Appellant's claims as to her being granted primary custody of the children with sole decision making, and specifically thus, the trial court *did not* make fact based decisions. The court also failed to make *fact based* decisions as to the financial issues and asset distribution by excluding all of the Appellant's expert witnesses as to financial matters before the court, leaving her defenseless.

On page five, OC incorrectly states, "Even though she had no background or training in the field, HPI (Helicopter Parts International), eventually hired her as a bookkeeper/office manager. Over the parties' marriage, HPI compensated Laura for her services at an average of $70,000 annually." In fact, the Appellant completed a 12 month training program in avionics at the British Columbia Institute of Technology in Aircraft Mechanics well before the marriage and certainly was familiar with HPI's business. OC again makes the case for the Appellant's importance to the firm by noting on page six of her response that not only

was the Appellant paid an average of $70,000 during the course of the marriage, but her presence, work, and productivity for HPI resulted in an increase of her salary from a mere $26,722 during 2001 to $139,000 in 2011, and an increase in Respondent's salary from $59,000 in 2001 to $328,550 in 2011. There can be little question that HPI greatly prospered and grew at a highly impressive rate by any standard *after* the marriage and *after* the Appellant became business manager. In fact, OC states clearly on page six, "The business grew steadily during the marriage." Indeed. The Appellant in fact was denied the opportunity to clearly show how much the firm had grown from an essentially insignificant and struggling start up endeavor making little or no profit, to a multimillion dollar thriving company. Had the Appellant been allowed to have her two financial experts testify at trial and been allowed to have their extensive and detailed reports introduced at trial, the trial court would have heard evidence showing that the Respondent's *four* financial experts allowed to testify at trial, under-valued the properties at issue in this case by more than three million dollars and would have heard critical evidence as to tracing issues and contribution issues by the Appellant, that she believes would have changed the court's characterization of community versus separate property. The Appellant is clearly in the awkward position of arguing as to evidence not before the court in the form of an offer of proof

but maintains it is critical for this court to understand the immense and damaging impact inflicted on her by the court's refusal to admit *any* evidence from her experts. The Respondent failed to present *any* evidence as to the actual value of HPI/ACS at the trial, leaving the court totally ignorant as to rapidly escalating value of the firms' values from the time of marriage to the time of final separation in 2011 due in significant part to the Appellant's contributions. As noted in Appellant's initial brief, the court also granted the Respondent *all* business and personal banking accounts worth approximately $1,500,000 while accepting whole cloth the testimony and spreadsheets of Respondent's financial experts while again allowing *no* competing testimony or exhibits from Appellant's own expert financial witnesses, thus producing a biased, one sided trial as to financial issues and an inequitable distribution of all property before the court.

On page seven, OC states, "After closely looking at the books, *the accountant* realized that Laura (Appellant) had been embezzling the company," and goes on further to state on that same page, "After the parties finally separated, *a forensic accountant calculated* that Laura had misappropriated $368,486 in cash from HPI between May of 2010 and November 2011 alone." Nothing could make the court's egregious error in excluding *all* of the Appellant's financial witnesses and their reports, more clear than this self-serving statement by the Respondent. The *accountant*

and the *Forensic accountant* referred to by OC of course are the *Respondent's* expert financial witnesses paid in full by the Respondent and who *never* consulted with the Appellant at any time while completing their one sided 'investigation' and report, while the Appellant was allowed no such experts, again making the financial rulings by the court simply a farce. Had these experts been allowed to testify, the court would have heard competing testimony that the Appellant did not embezzle or misappropriate such funds and that the parties made these related expenditures jointly and in consultation including a mutual decision by the parties to pay off the remaining debt on the Semiahmoo Drive Property, to open and fund medical savings plans to their mutual benefit, and to fund purchase of additional vintage autos to start an additional family business.

On page eight, OC discusses a letter that the Appellant was reported to have sent to HPI customers and quotes the Respondent's trial testimony statement that he "noticed that 'business dropped off after the Appellant sent this letters to his customers." In fact, the Respondent offered no proof at trial of any such claim and *never* offered *any* tax returns or other evidence as to HPI or ACS profits or loses of the firms throughout the entire period of the marriage.

On page nine, OC discusses the family home at 8515 Semiahmoo Drive and incorrectly states, "When the parties met in 1998 or 1999 (they

met in 1998), Harry had already torn down the small house and broken ground for construction of a new home." OC then states on that same page, "Laura did not contribute any money to the house prior to the marriage." Again, had Appellant's financial experts been allowed to testify, the court would have heard that in fact the small cabin on the property was not in fact torn until 2001 and would have further heard evidence related to the Appellant's money and personal labor efforts that went into both clearing the property for building the eventual family home and in terms of assisting in the construction of the family home (not completed until 2005) and maintenance of the property, for a decade. OC then states, "The trial court valued the Semiahmoo Drive home at $1.25 million." Had Appellant's expert financial witnesses been allowed to testify, the court would have heard evidence that Respondent's financial experts substantially under-valued this and other properties.

On page nine, OC states, "Harry (Respondent) also owned a nearly 15 acre landlocked property near the airport, which he purchased in 1998 for recreation purposes.... The trial court valued this property at $206,000." Had they been allowed to testify, Appellant's financial experts would have testified to the significant undervaluing of this property as well, would have testified that the property was not 'landlocked' and had an access road, and would have testified that the property would be valued

at approximately $277,000 per acre if converted to airport use which could easily have been accomplished with the airport's growing need to expand immediately westward. The court heard none of this critical testimony.

On page 10, OC claims with no evidence other than the self-serving trial testimony of the Respondent, that "In 2005, Laura *presented* Harry with quit claim deeds for these properties and other real properties acquired by HPI/ACS prior to marriage. Harry testified that Laura claimed the deeds were necessary 'in case something happens to me, that there wouldn't be a problem with the will and insurance policies with the court. The deeds purported to convey the properties to both parties, but made no mention of any intent to create community property. Harry, who had not consulted an attorney, testified that he did not intend to change ownership of any of the properties, but only intended the deeds to be used for estate planning purposes." As noted in her initial brief, the Appellant testified that the Respondent had in fact quit claimed a 50% ownership share of these four properties to her with the actual quit claim deeds (as noted by OC appears in Ex. 107, 108, 109, 111) stating that the 50% share granted by the Respondent *or by HPI/ACS*, were given for "love and affection and other good consideration," to the Appellant, and with the quit claim deed signings notarized and witnessed by two witnesses, and recorded. While the Respondent may have later come to regret his gift out of love and

affection which once existed, the evidence nonetheless is clear that he indeed did gift 50% of these properties to the Appellant. A discussion of case law raised by OC as to the claim by OC that under *Estate of Borghi,* 167 Wn.2d 480, 484, 219 P.3d (2009) the quit claim deeds at issue do not change the property from separate to community, appears below.

On page 10, OC states. "With the *exception* of the Semiahmoo property, the trial court found all of these pre-marital properties to be Harry's properties. The trial court found that the Semiahmoo Drive property was *part community* and part separate property." The Appellant argues that this ruling by the trial court captures the nature of the court's frankly illogical and idiosyncratic decisions as to distribution of the properties at issue. Here, OC has correctly noted that the trial court decided that the Appellant had in fact contributed (by labor and/or money) to the growth of the value of the family home over the more than a decade since marriage, but at the same time refused to consider or even hear expert financial testimony that the same contribution by the Appellant as to the HPI/ACS firms warranted her receiving a substantial share of the increased value of these firms since marriage.

On page 12, OC continues, "The only real property acquired during the marriage were three parcels nearly 32 acres, described as 'H&L Land.... The trial court valued the land at $272,000 *and found it to be*

community property even though its mortgage was paid by HPI, Harry's separate property business." Here again, OC points out the lack of any logic or consistency to the court's rulings as to characterization of properties (separate or community) and as to how such assets are to be distributed between the parties. The court here and above decides without any real analysis and with little regard for whether the property at issue is the Respondent's separate property or not or whether it came from him or from HPI/ACS, that the Appellant *does* get an ownership share, while refusing an ownership share as to other properties. Clearly, the issue of HPI being the separate property of the Respondent as ruled by the court, did *not* stop the court from granting the mother a well-deserved share of both the H&L lands property and of the family home at Semiahmoo Drive. The Appellant asks for consistency which is sorely lacking here.

On page 13, OC turns to parenting plan (PP) related issues and while attempting to provide evidence to support the court's misguided rulings in contradiction to the trial evidence as to the final PP, states unequivocally, "Harry admitted that he threw some groceries (more than $1,000 worth as noted in the Appellant's initial brief) in the garbage," and that "Harry then broke a car window (actually the Appellant's car window) ...." On page 14 OC continues, "Apparently (actually in fact), most of the professionals involved in the parenting dispute during the

2009 dissolution action sided with Laura, believing that Harry was the aggressor." As noted at great length in the Appellant's initial brief, *all* of the expert mental health, probation, and lay witnesses *at trial,* testified without contradiction that the Respondent indeed was the aggressor, was a threatening (particular as to women) and angry individual, and evidenced seriously concerning parenting behavior. All of this overwhelming evidence was ignored by the court in its frankly inadequate three page ruling which lacked any credible form of justification and analysis for its findings. OC is correct on page 17 that the *only* professional who testified in support of the Respondent was the court appointed (second) GAL, David Nelson, who did conclude that "the children should reside primarily with Harry, who the GAL believed provided the most stability for the children. The GAL rejected Laura's claims that Harry was an alcoholic, mentally ill, and not in control of his emotions." The Appellant has made her case very clear in her initial brief that *no witness* other than the Respondent himself and the GAL, testified to the findings or beliefs claimed by the GAL, who failed to *ever* observe the mother and children and did no follow-up in the case with her for nine months before the trial. In fact, over a *dozen* witnesses testified *at trial* at great length to the contrary, that the Respondent was angry, threatening, an alcoholic, engaged in stalking behavior, engaged in highly inappropriate behavior in

front of and with his children, and was likely to be the perpetrator in terms of DV and not the mother. The court again almost totally ignored the actual evidence before it in terms of PP issues, and clearly abused its discretion in so doing. On page 18, OC states, "The GAL also reported that based on his observations, he believed that Harry proved that he can control his emotions and create stability for the children." Again, all of the mental health experts made it very clear at trial (the GAL is an attorney and *not* a mental health expert), that these claims as to the father's emotional control and ability to create stability for the children, were untrue and without merit Again, *only* the Respondent himself and the GAL testified in behalf of the Respondent. The overwhelming body of evidence presented to the court *did not* support the Respondents (or the GAL's) claims. On page 19, OC points this out by stating, "The GAL acknowledged that his view of the case was contrary to those held by *previous* professionals involved in the case." Actually, as was made clear in the Appellant's initial brief, *both* previous *and current* professionals acknowledged that the GAL's view of the case was contrary to the overwhelming body of evidence presented to the court at trial. OC then states on page 19, "The GAL concluded that this new stability was due to Harry learning from his prior experiences …." The testimony from *all* mental health and lay professionals carefully detailed in the Appellant's

initial brief makes it 100% clear that there was *no* evidence of any such newfound 'stability' or learning from prior experiences.

OC begins to recount the procedural history of the case leading to the Appellant's lack of a timely witness or any exhibit list at the time of trial on page 20. On page 24, OC correctly notes, "The trial court declined to continue the trial noting that it was not a practical solution since the case had already been continued *once,* for nearly a year, and the matter had now been pending for two years." In fact as previously argued in Appellant's initial brief, there was nothing impractical about a short continuance to allow father's trial attorney to depose any of the mother's witnesses in order to serve justice and allow a fair trial. OC states on page 24, "The trial court partially granted Harry's motion to exclude witnesses, finding that there was 'no reasonable excuse' for Laura's failure to timely disclose her expert witnesses, particularly as she purportedly knew as early as August which witnesses she wished to have testify. The trial court was also 'shocked' that Laura had expert reports in her possession for some time but 'without any good justification' never produced them to Harry. Harry was 'sandbagged' by Laura's failure to timely disclose." Although this 'artful' framing of the facts of the case aims to convince this court that the mother herself was somehow responsible for the failure to present a timely witness list and *no* exhibit list at all, the stark reality as

outlined at length in the initial brief, is that Appellant's *attorney,* charged with zealously, ethically and professionally defending his client based on the Rules of Professional Conduct (RPC) and court rules, utterly and admittedly (to the court) failed to provide a timely witness list and provided *no* Exhibit list. The trial court well knew this fact based on Mr. Showrai fully admitting that *he* and *not* his client (who had no knowledge of what was or was not admitted) was legally and professionally responsible for this egregious and damaging failure on his part to provide an adequate defense. A continuance should have been granted to allow for deposing of such witnesses and entering of an appropriate exhibit list, in order to have a fair trial. The trial court clearly erred in this decision.

On page 27, OC presents again her claim that the Appellant somehow was the 'winner' and beneficiary of the court's ruling as to distribution of property by indicating that she received "73% of the community property," or $1,205,000 of the parties' $1,643,000 total community estate. Again, despite this artful presentation, OC does then note the reality that the Respondent received $4,160,000 of theoretical separate property including HPI valued at $3.3 million. As addressed at great length in mother's initial brief and above, the reality is that had *her* financial witnesses been allowed to testify, they would have provided evidence that the separate property claims of the Respondent were not

justified, and that the combined properties (community and separate) were undervalued by more than $3,000,000 by the Respondent's financial experts who were left uncontested by any financial expert.

OC then returns to the court's decision as to PP issues and states on page 29, "The trial court stated that its decision was 'made upon considering each and every statutory factor viewed in light of all of the evidence and testimony and is deemed to be in the best interests of the children." In fact, the trial court failed to provide anything approaching a credible analysis of statutory factors related to the best interests of the children or of the actual evidence presented at trial as to PP issues, and simply provided a vague and incomplete three page order with no real analysis of any form. The court failed to carry out its legal responsibility to provide a clear and cogent basis for its findings.

On page 30, OC begins discussion of the trial court's post trial decision that both parties *shall* complete an A&D and DV evaluation within 30 days, but then decided in the face of a motion by the Appellant asking to delay signing final orders until both parties completed comprehensive DV and A&D evaluations with the same professionals to allow for an accurate comparison between the parties, that "the trial court did not intend to have a 'new trial' after the evaluations were completed and that the recommended evaluations were simply intended to be

'assurances' due to the parties conflicting allegations." As noted in mother's initial brief, the trial court's decision here simply makes no sense and further brings question to the soundness, logic, and credibility of the rulings and orders signed off by the court. It is reasonable to simply ask exactly who the court was trying to 'assure' by its '*shall*' order to compete additional *post trial* DV/A&D evaluations. Clearly, neither party believed the other and was not looking for any 'assurances' from the other, but looking for direction and wisdom of the court. Given the father's completing a combined $300 DV/A&D evaluation from a professional not certified to complete a DV evaluation (see initial brief of Appellant), the mother would hardly be 'assured' of anything.

OC then notes on page 32, "A trial court's decision denying a motion for reconsideration or new trial will not be reversed on appeal absent a manifest abuse of discretion." *Marriage of Tomsovic,* 118 Wn. App. 96, 108, P.3d 692 (2003); *Collins v. City First Mortgage Servs., LLC,* 177 Wn. App. 908, 918, 317 P.3d 1047 (2013) *rev. denied,* 179 Wn.2d 1028 (2014). First, the facts of these two cases have little or nothing to do with the facts of our case and are distinguishable. In *Tomosovic,* the husband filed a motion for reconsideration as to a minor modification of a PP which was denied and the Court of Appeals (COA) (Division 3) noted that "the trial court concluded that adequate cause had

not been demonstrated to authorize a full hearing on the motion to modify the residential schedule." *Tomosovic at* 696. The COA continued, "On appeal, Mr. Tomsovic again presents evidence submitted for the first time in his motion for reconsideration. We will not reverse the trial court's ruling on a motion for reconsideration or for vacation of judgment absent a showing of manifest abuse of discretion. Reconsideration *is warranted* if the moving party presents new material evidence that could not have been produced at trial." *Tomosovic at* 698. If anything then, the case stands for support of Appellant's motion for reconsideration and claims of trial court error as she was and *is* presenting or attempting to present new evidence that was not allowed at trial or was not considered by the trial judge post trial in the motion of reconsideration. As to *Collins,* this case dealt with a complex contract action brought by a former homeowner against a lender and a so called 'Mary Carter' agreement and had nothing to do with facts related to our case. The COA (Division I) noted, "The order denying the motion for a new trial is reviewed for abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Collins at* 917-918. In *Collins,* the court analyzed a complex multiparty contract dispute and appropriately found that the trial court's decision was not manifestly unreasonable or based on untenable grounds as opposed to our case where the Appellate has

provided extensive evidence in her argument that the trial court decision was in fact both manifestly unreasonable and untenable based on the evidence and exclusion of evidence.

OC then cites *Tucker v. Tucker,* 14 Wn. App. 454, 455, 542 P.2d 789 (1975) in support of Respondent's claim that the trial court's decision to deny a continuance was appropriate and left to the "sound discretion of the (trial) court and the exercise of that discretion will be set aside only for manifest abuse thereof." *Tucker at* 455. Again, the facts of *Tucker* are at variance with those of our case. In *Tucker,* the COA (Division I) in a case where the trial court had awarded custody of a minor son to the mother, held that the trial court's denial of a continuance in this divorce case was not an abuse of discretion, especially where the trial court granted leave to the father to renew his motion at the conclusion of the case but said motion was not renewed. In *Tucker,* the COA noted, "Error is first assigned to the trial court's denial of a motion for continuance made at the commencement of trial on the grounds that counsel for the father was not prepared to proceed." *Tucker at* 455. The COA then noted that the father new counsel had been confused as to the actual trial date causing him to seek a continuance." *Tucker at* 455. The COA further noted, "Counsel for the father argues in reliance upon *Chamberlin v. Chamberlin,* 44 Wash.2d 689, 703, 270 P.2d 464 (1954), that a continuance, especially the first one,

should be granted *liberally* in divorce cases when not to do so would deny a litigant his day in court, *Chamberlin* can be distinguished on its facts. Further, the trial court here granted leave to renew the continuance motion at the conclusion of the mother' case. The motion was not renewed. We find no abuse of discretion in the denial of the motion for continuance." *Tucker at* 455. These facts are clearly distinguishable from our case and the COA ruling here strongly suggests a "continuance should be granted *liberally* in a divorce case...." especially if a party is denied a fair and full opportunity to have her day (or days) in court.

As to exclusion of witnesses, OC notes on page 32, "Further, a trial court's decision to exclude witnesses is reviewed by the court for an abuse of discretion. This determination should not be disturbed on appeal except on a showing of abuse of discretion, that is, discretion that is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Lancaster v. Perry,* 127 Wn. App. 826, 830, P.3d 1 (2005). This case involved a personal injury arising from an automobile accident where the trial court excluded the defendant's *undisclosed* expert witness related to a CR 35 examination. Here, the COA (Division I) noted that "under King County Local Rules (KCLR 26(f)), witnesses not timely disclosed may not testify *absent a showing of good cause.* Here, the defendant failed to (ever) disclose his expert witness and did not show

good cause for this failure." *Lancaster at* 828. The court further noted, *Burnet* (131, Wash,2d at 491, 933 P.2d 1036) does not apply here. In *Burnett,* the name of the specific witness was known. Here, Perry failed to even name his expert witness." *Lancaster at* 833. "More importantly, Perry did not have the right to call this witness absent court order. CR 35 is not self-executing; in order to conduct a CR 35 examination, a party must obtain the agreement of OC or must obtain a court order." *Lancaster at* 832. Thus again, the facts of our case are clearly distinguishable and the Appellant clearly showed and shows good cause for her witnesses not being disclosed as opposed to the facts in *Lancaster.*

On page 33, addressing the issue of Appellant's claim of inadequate counsel leading to irreparable damage to her case based on his failure to follow the RPC and court rules and properly defend his client by failing to timely file witness lists and exhibit lists, OC notes, "The wife was not entitled to counsel, effective or otherwise in this action to dissolve her marriage," citing *King v. King, 162 Wn.2d 378, 395, 174 P.3d 659* (2007) (there is no right to counsel in dissolution proceeding). Again, this case is distinguishable from our case. *King* involved a case as to whether an indigent parent representing herself pro se, had a constitutional right under the Washington State Constitution, to appointment of counsel at public expense in a dissolution proceeding. Here, *following the trial,* Ms.

King obtained counsel who argued for a new trial based on the claim that mother was constitutionally entitled to an attorney. *King at* 382. The court simply concluded that no such Constitutional right existed. *King at* 395. Instead, our case clearly involves a situation where the mother retained a licensed Washington attorney whom she paid over $180,000 for services and whom she believed was experienced, qualified, knowledgeable and able to defend her, but who utterly failed to perform his basic duties.

As to exclusion of the Appellant's two critical financial experts, on page 35 OC states, "The trial court properly excluded the two financial expert witnesses. The trial court carefully considered the factors set forth in *Barci v. Intalco Aluminum Corp.* 11 Wn. App. 342, 350, 522 P.2d 1159, *rev. denied,* 84 Wn.2d 1012 (1974). The trial court found that to allow testimony would result in prejudice to the husband that 'would be difficult to overcome." *Barci* involved an action brought by landowners against an Aluminum company for personal injuries and property damage allegedly caused by release of pollutants from its plant. The COA (Division I) noted that Counsel had agreed to notify each other of the names of witnesses to be produced at trial; noted that 11 days prior to the scheduled trial start, Plaintiff's counsel advised they may call a Dr. Hubbard as an expert witness; noted that the trial court ruled the defense could depose the doctor prior to the trial; noted that the defense then did indicate it intended to call

the doctor as an expert witness at trial; and noted that when counsel for defense attempted to depose the doctor he was not available and could thus could not be deposed prior to trial, causing defense counsel to move to exclude his trial testimony, *or in the alternative,* be granted a continuance. *Barci at* 344-345. The trial court withheld ruling on defense's motion at the start of the trial but declared the doctor could come to be deposed which then did take place. At trial, plaintiff's counsel called the doctor and the defense renewed their motion to exclude his testimony which was granted. *Barci at* 345-346. The COA then defined 11 factors material to a court's decision to exclude or allow witnesses. *Barci at* 349-350. These factors include: materiality of the proposed testimony to the proponent; extent of surprise to the opponent; availability of opportunity to depose; opportunity of OC to secure contradicting witnesses and to prepare for cross examination; prejudice presented to a proponent *or* opponent's case if a continuance is granted; and ability of an imposition of costs upon a proponent to remedy any hardship imposed on an opponent by the late calling of a witness. *Barci at 349-350.* Review of these factors makes it abundantly clear that the Appellant's excluded witnesses, especially her financial experts, could have and should have been allowed to testify under the *Barci* factors without damaging the Respondent's case while providing reasonable remedies for him while also

providing support for an allowance for a continuance for the mother. OC also cites *Southwick v. Seattle Police Officer John Doe # s 1-5,* 145 Wn. App. 292, 297, 186 P.3d 1089 (2008) in stating, "Our courts regularly uphold decisions by the trial court excluding witnesses for failure to comply with local rules requiring timely disclosure without any adequate showing of good cause." In *Southwick,* King County filed a motion for summary judgment arguing that Southwick had not identified any witnesses to support his allegations of abuse by a City police officer. Southwick then filed a responsive brief along with a declaration from a Dr. Fleet who had not been previously identified as a witness in response to discovery requests. The county moved to strike his declaration and the trial court agreed. *Southwick at* 295. The COA (Division 1) noted, "The trial court has discretion whether or not to accept an untimely declaration.... KCLR 16(a)(4) provides that any witness not timely may not be used at trial , unless the court orders otherwise for good cause *and subject to such conditions as justice requires.*" The Appellant argues that *justice does require* the allowance for her expert witnesses (especially financial) and further argues that she was not and is not versed on local or even state court rules and left such knowledge and practice to her trained attorney and should not be punished for his incompetence and failure to carry out his professional duties to her and the court which irreparably

damaged her case. OC attempts to refute this claim by pointing to *Haller v. Wallis,* 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) and suggesting that "an attorney's negligence is attributable to the client and is not a basis for reversal." *Haller* involved a mother moving to vacate a judgment that approved of her child's personal injury settlement for $1,000 while claiming she had not signed or approved the settlement negotiated by her counsel. Our Supreme Court noted in its ruling, "The attorney's knowledge is deemed to be the client's knowledge when the attorney acts on his behalf. As between attorney and client, *there is a duty to keep the client informed* of material developments in the matters being handled for the client to avoid misunderstanding." *Haller at* 547. Clearly, Appellants trial attorney *did not keep her informed* as to his failure to timely submit a witness and exhibit list and she cannot and should not thus be faulted for his egregious and damaging failures.

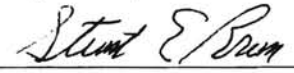
As to determination of separate versus community property, OC points to the well-known case of *Estate of Borghi,* 167 Wn.2d 480, 484, 219 P.3d 932 (2009) which established "that even when a spouse's name is included on a deed or title at the direction of the separate property owner spouse, this does not evidence an intent to transmute separate property into community property but merely an intent to put both spouses names on the deed or title." *Borghi at* 489. However, the *Borghi* court also

made clear that, "Disregarding title as relevant to the characterization of property does not hinder a party who intends to transmute her separate property into community property from doing so. With respect to real property, a spouse *may execute a quit claim deed* transferring the property to the community, join in a valid community property agreement, or otherwise in writing evidence his or her intent." *Borghi at* 488-489. This is *exactly what occurred in our case* where the Respondent without question and without duress and for love and affection before two witnesses and a notary, quit claimed 50% of his four properties to his wife whom he loved and cared for at the time. The Appellant is fully entitled to 50% of an accurate and fair valuation of the properties.

III. CONCLUSION

Based on all of the above, we respectfully request that the COA vacate the findings of the trial court and order a new trial where the mother can be properly represented and can present *all* of the necessary witnesses and exhibits to defend herself based on all of the errors of the court annunciated in her initial appeal brief.

Respectfully submitted this 24th day of October, 2014 by:



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