

No. 73557-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ZACHARY HARJO

Appellant

v.

GELSEY HANSON

Respondent.

INITIAL BRIEF OF APPELLANT

Joseph A. Grube, WSBA #26476
Karen Orehoski, WSBA#35855
Breneman Grube, PLLC
Attorneys for Appellant
1200 Fifth Avenue, Suite 625
(206) 624-5975

RECEIVED
COURT OF APPEALS
DIVISION I
JAN 11 2009

E

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF THE CASE.....	7
	A.	
	In 2010, following a bench trial, the trial court enters findings and conclusions expressly awarding Appellant Zachary Harjo managerial compensation for running the parties' business.	7
	B.	
	The first appeal results in a remand directing the trial court to use the "compensation due to Harjo" in its calculation of the equalization payment to (or from) Respondent Gelsey Hanson.	12
	C.	
	The trial court's subsequent entry of judgments in 2013 correctly includes ½ of Ocho's 2010 profits for Hanson but fails to include Harjo's unpaid managerial compensation and Hanson's uneven withdrawals of cash in its calculations.	13
	D.	
	After a second appeal, this Court remands the matter to the trial court "for the limited purpose of clarifying an apparent oversight: the compensation to Harjo 'for his labor in running the parties' restaurant business on his own from June 2009 to trial in December 2010."	15
	E.	
	On remand the trial court (1) denies that the Court of Appeals instructed it to answer the question of Harjo's compensation; (2) states it is "done" with the case; (3) refuses to correct the oversight it previously made in failing to include the manager's compensation it awarded to Harjo; and (4) subsequently enters findings	

	of fact in direct contradiction of prior unchallenged findings and which are unsupported by substantial evidence in an attempt to justify the incorrect mathematical conclusion it previously entered.....	17
IV.	SUMMARY OF ARGUMENT	19
V.	DISCUSSION.....	20
	A. Standards of Review.....	20
	B. The trial court abused its discretion when it refused to correct its clerical error omitting Harjo’s previously awarded managerial compensation.	21
	C. The trial court’s June 2015 findings are not supported by substantial evidence and are an abuse of discretion.....	24
	D. The trial court abused its discretion by drawing a “negative inference” as to Harjo.	39
	E. This Court should modify the trial court’s orders and judgments pursuant to RAP 12.2.	40
	F. The trial judge’s comments and actions would lead a disinterested person to question whether appellant received a fair, neutral, and impartial hearing and therefore a different judicial officer should consider the case on remand.	Error! Bookmark not defined.
VI.	CONCLUSION	44

TABLE OF AUTHORITIES

Cases

<i>Alpine Indus., Inc. v. Gohl</i> , 30 Wn. App. 750, 758, (Div. 1 1981)---	40
<i>Gormley v. Robertson</i> , 120 Wn. App. 31, 38, (2004)-----	20
<i>Hanson v. Harjo</i> , 170 Wn. App. 1044, 2012 WL 4335455 (2012)--	13
<i>Harjo v. Hanson</i> , 185 Wn. App. 1026, 2015 WL 249782 (2015) -----	passim
<i>Harp v. American Sur. Co. of New York</i> , 50 Wn.2d 365, 368 (1957) -----	20
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 353 (2007)-----	39
<i>Humphrey Indus., Ltd. v. Clay St. Associates, LLC</i> , 176 Wn.2d 662, 675 (2013) -----	20
<i>In re Marriage of Davison</i> , 112 Wn. App. 251, 257 (2002)-----	41
<i>In re Marriage of Muhammad</i> , 153 Wn.2d 795, 803 (2005)-----	21
<i>In re Marriage of Pennington</i> , 142 Wn.2d 592, 602-03 (2000)-----	21
<i>In the marriage of Lindeman</i> , 92 Wn. App. 64, 69, (Div. 1 1998)---	37
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 42 (2002) -----	9, 40
<i>Ross v. Hamilton</i> , 175 Wn. App. 1045 (2013)-----	20
<i>State ex. rel. Smith v. Superior Court for Cowlitz County</i> , 71 Wn. 354, 357 (1912)-----	20
<i>State v. Bilal</i> , 77 Wn. App. 720, 722 (1995)-----	41
<i>State v. Martinez</i> , 76 Wn. App. 1, 8 (Div. I 1994)-----	41
<i>State v. Rundquist</i> , 79 Wn. App. 786, 793 (1995)-----	21

State v. Schwab, 134 Wn. App. 635, 645, (2006) ----- 20

Rules

RAP 12.2 ----- 40

RAP 12.8 ----- 17

I. INTRODUCTION

This third appeal by Appellant Zach Harjo (“Harjo”) follows a second appeal in which this Court remanded the matter to the trial court “for the limited purpose of the trial court clarifying an apparent oversight: the compensation to Harjo ‘for his labor in running the [parties’ restaurant] business on his own from June 2009 to [trial in December 2010].” *Harjo v. Hanson*, 185 Wn. App. 1026, 2015 WL 249782 * 4 (Div. 1 2015) (“*Harjo II*”). In that decision, this Court ruled:

Although the court found that Harjo was entitled to [\$44,695], nowhere in this record regarding calculation of what each party owed to the other does this figure appear. The court’s decree likewise did not account for this figure. The court ultimately ordered Harjo to pay Hanson an equalization payment, but this payment does not address the compensation due Harjo.

Id. This Court remanded the case to the trial court on that issue:

Harjo argues that the court abused its discretion by failing to offset the 2010 profits awarded to Hanson by the amount of compensation the court had previously found Harjo was entitled to. The record appears to support this argument because there is no explanation showing either that this was done or, if not why not. Accordingly, we remand for appropriate action by the trial court on this limited issue.

Id. at * 4.

On remand, the trial judge refused to follow this Court’s instructions. Stating that she was “done” with this case, and that she

thought “everybody should be done with it here today”, the trial judge denied Harjo’s claim for managerial compensation without providing a valid explanation. In contradiction of her previously entered (and unchallenged) findings, and in contradiction of the evidence at the 2010 trial, the trial judge entered additional findings that are not supported by the evidence. She failed to answer the simple mathematical query, an “apparent oversight”, put to the trial court by the Court of Appeals, based on the facts of the case.

Because the trial court has repeatedly refused to award Harjo the managerial compensation it found he was entitled to, Harjo asks this court to award that compensation and to remand to a different trial judge for any further actions it requires.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in refusing to follow the Court of Appeals’ instruction on remand to “clarify an apparent oversight: the compensation to Harjo ‘for his labor in running the [parties’ restaurant] business on his own from June 2009 to trial in December 2010”.

2. The trial court erred in entering the following June 12, 2015¹ Findings of Fact and Conclusions of Law (“FFCL”):

FF p. 1 ll. 17-18:² **“Harjo was fully and fairly compensated for the second half of 2009, and all of 2010.”** (CP 136)

FF p. 1 ll. 18-21: **“Furthermore, to the extent he might have sought to prove that he was undercompensated, he had the burden of producing more documentation than has been provided, and his failure to [produce more financial information at the 2010 trial] creates a negative inference against him.”** (CP 136)

FF p. 1 l. 22 – p. 2 l. 1: **“Ocho’s 2009 form 1065 showed ordinary business income of \$63,822. This figure is income *after* payments to partners of \$81,345. Only Harjo enjoyed the benefit of this additional ordinary business income.”** (CP 136-137)

FF p. 2 ll. 1-7: **“Therefore, Harjo’s compensation in 2009 was...\$97,763 TOTAL.”** (CP 137)

FF p. 2 ll. 8-9: **“Harjo was therefore overcompensated for 2009 by \$22,763.”** (CP 137)

FF p. 3 ll. 5-9: **“Harjo is in control of the books and accounting for Ocho for 2009. He had the ability**

1 The trial court entered findings and conclusions of law following trial in 2010. The trial court then entered additional findings following remand in 2015. Appellant is challenging the 2015 findings in this appeal as inconsistent with and contrary to the unchallenged 2010 findings.

2 The trial court did not number its 2015 findings. They are therefore referred to by page and line number in an attempt to comply with RAP 10.03(g).

to produce a full accounting of business income and expenses, beyond the business tax returns. He also had the burden of establishing exactly what his compensation was, with Hanson being given the opportunity to evaluate the business accounts for the year. The lack of production on his part creates a negative inference. (CP 138)

FF p. 2 ll. 15-17: “[payment of \$145,167 to Harjo and Hanson in 2009] shows the income-generating ability of the restaurant, and also shows that the business paid far in excess of the reasonable managerial compensation for the year.” (CP 137)

FF p. 2 l. 22 - p. 3 l. 2: “The court intended to address managerial compensation separately from the assigned value to the business, and not to incorporate paid compensation as part of the business value.” (CP 137-138)

FF p. 3 l. 4 – 6: “[2009] was a time when [Harjo] hired attorneys and covered his own living expenses, creating some doubt as to the claim [that he received no additional draws or compensation in the second half of 2009]. (CP 138)

FF p. 3 ll. 6-9: “[Harjo] had the ability to produce a full accounting of business income and expenses, beyond his business tax returns...[and] had the burden of establishing exactly what his compensation was, with Hanson being given the opportunity to evaluate the business accounts for the year.” (CP 138)

FF p. 3 ll. 9: “The lack of production on [Harjo’s] part creates a negative inference.” (CP 138)

FF p. 3 l. 13-14: “Hanson was left with no means

of self-support. While mathematically, the result is not precisely equal, the result is nevertheless fair and equitable.” (CP 138)

FF p. 3 l. 17-21: “Harjo is not due any amount from Hanson due to disproportionate draws during the first half of 2009. The court previously considered the disproportionate draws of the parties during the first half of 2009 and made no reallocation of those funds. The court did not make a scrivener’s error. The disproportionate split was intentional, and no offset was intended. This was not a mathematical error, but a discretionary decision by the court.” (CP 138)

FF p. 3 l. 22 – p. 4 l. 2: “Offsetting any apparent unfairness in this division, the court notes that Hanson was made responsible for taxes on funds that she never received. She received \$47,404 per her K-1, on which she properly paid taxes. But she was also made responsible for the taxes on Ordinary Business Income of \$31,911, which was received and retained by Harjo.” (CP 138-139)

FF p. 4 l. 4-10 “In 2010, Ocho was entirely within the control of Harjo. Harjo should therefore be tasked with the burden of producing a profit from the business. If the business was unable to create a profit, then Hanson should not have to compensate Harjo for failing to generate a profit. Harjo could simply refuse to work, making Hanson responsible for paying his salary for the year; this is not the result the court intended. (Similarly, Harjo would not have to compensate Hanson if she failed to earn as much as the court expected her to earn, working part time waiting tables.)” (CP 139)

FF p. 4 l. 11 – 18: “Nevertheless, in 2010, Ocho’s form 1065 shows guaranteed payments to

partners of \$66,371, plus ordinary business income of \$11,839, for a total of \$78,210. Harjo enjoyed all the benefit of these funds. In other words, Harjo was overcompensated for 2010, as well. The difference between \$78,210 and his reasonable compensation of \$75,000 is \$3,210. Again, however, the court did not intend to create a right in Hanson to be compensated by Harjo if it turned out the business was even more successful than anticipated. Therefore Hanson's motion for allocation for excess profits is denied; and Harjo's motion to be reimbursed for 2010 compensation is also denied." (CP 139)

3. The trial court's decisions have been stained with a lack of objectivity and have violated the appearance of fairness doctrine, such that the case should be considered by a different judge on remand.

B. Issues Pertaining to Assignments of Error.

1. Was it an abuse of discretion for the trial court to refuse to enter a judgment for managerial compensation for Harjo? (Assignment of Error 1)
2. Was it an abuse of discretion for the trial court to refuse to enter a judgment compensating Harjo for Hanson's unauthorized withdrawal of operating capital in the amount of \$29,500, resulting in a disproportionate draw for Hanson by \$13,000? (Assignment of Error 1)
3. Was it an abuse of discretion for the trial court to ignore its previously entered (and unappealed) findings and instead enter contradictory findings to justify its previous calculation error? (Assignment of Error 2)
4. Are the trial court's June 2015 findings supported by substantial evidence? (Assignment of Error 2)
5. Did the trial court err in drawing a "negative inference"

as to Appellant's compensation when the parties stipulated that they were satisfied with the evidence produced and when no inference was necessary to perform a mathematical calculation based on the trial court's prior unchallenged findings? (Assignment of Error 2)

6. Should the Court of Appeals modify the trial court's orders and judgments pursuant to RAP 12.2 to correctly compensate Appellant for his managerial compensation where the only issue is a mathematical calculation and remand to the trial court for a third time would constitute unnecessary prejudice and expense to Appellant? (Assignment of Error 3)
7. Where the trial judge fails to follow the express instructions from the Court of Appeal, makes statements as part of her ruling that are material and factually incorrect, states that she is "done" with the case, draws "negative inferences" against a party which are not based on the record, and enters findings of fact contradicted by the record and her previous findings (which are the law of the case), does the appearance of fairness doctrine require remand for future proceedings before a different trial judge after the third appeal? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. Following a 2010 bench trial, the trial court enters findings and conclusions expressly awarding Appellant Zachary Harjo managerial compensation for running the parties' business.

This case arises out of a property division following the end of a committed intimate relationship between Appellant Zachary Harjo ("Harjo") and Respondent Gelsey Hanson ("Hanson"). It was originally

tried November 1, 2010 through November 9, 2010. Following the trial, the trial court entered Findings of Fact and Conclusions of Law (“2010 FFCL”) on December 22, 2010.³ (CP 13-27)

1. The 2010 trial court finds that the value of the parties’ restaurant (“Ocho”) is \$222,000 and awards each party ½ of that value.

The parties started a restaurant together (“Ocho”). (2010 FFCL 2.4.3 at p. 7 ll.11-12, CP 20). The value of Ocho was determined pursuant to an Agreed Order for a neutral appraiser. (2010 FFCL 2.4.3 at p. 8 l. 4, CP 20) Pursuant to that Order, a CPA (James Weber) determined the value of Ocho to be \$222,000 as of December 31, 2009. (2010 FFCL 2.4.3 at p. 8 ll. 4 - 6, CP 20) The parties did not dispute that figure, and the trial court expressly adopted that value as one of its findings. (2010 FFCL 2.4.3 at p. 8 ll. 6-7, CP 20) The CPA’s valuation, (TR. Ex. 2) valued Harjo’s “labor at \$75,000 per year, and this formed one premise of his overall value of the business.” (2010 FFCL 2.4.3 at p. 8 ll. 7-8, CP 20) The trial court awarded Harjo the business, including all tangible and intangible assets, working capital, and inventory. (2010 FFCL 2.4.3 at p. 11 ll. 4-7, CP 23) The trial court

³The 2010 FFCL discussed in this brief were either unchallenged or affirmed by this Court in *Harjo I* and/or *Harjo II*, and remain verities. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42 (2002)

awarded Hanson ½ of the value of the business (\$111,000), which included all tangible and intangible assets, working capital, and inventory. (2010 FFCL 2.4.3 at p. 11 ll. 8, 17-18, CP 23)

These findings were never challenged and are verities on appeal and on remand. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42 (2002).

2. *The 2010 trial court finds that Harjo should be compensated for his labor in running the business on his own from June 2009 through December 2010 following Hanson's assault on him.*

On May 31, 2009 Respondent Hanson assaulted Harjo at the restaurant. (2010 FFCL 2.4.3 at p. 7 ll. 22-24, CP 19). A no contact order was entered against Hanson by the City of Seattle as a result of the assault. That order prohibited Hanson from returning to the restaurant. (2010 FFCL 2.4.3 at p. 7 ll. 22 p. 8 l. 3, CP 19-20) The trial court found that “[b]ecause of the actions of [Hanson], [Harjo] bore full responsibility for all aspects of the business” from that point forward. (2010 FFCL 2.4.3 at p. 8 ll. 2-3, CP 20) Hanson, on the other hand, was able to work at other establishments for the balance of 2009 and 2010, keeping her separate salary during this timeframe. (2010 FFCL 2.5.2 at p 12 l. 11-12, CP 24) The trial court found that it was “appropriate to compensate Zach for his labor in running the business

on his own from June 2009 to present.” (2010 FFCL 2.4.3 at p. 8 ll. 10-11, CP 20)

These findings were never challenged.

3. The 2010 trial court determines that Harjo is owed **\$43,750.00** in managerial compensation for the portion of 2009 in which he performed 100% of the managerial duties on behalf of the Partnership.

As part of the 2010 FFCL, the trial court found, in accordance with the 2009 year-end business appraisal presented to it (TR. Ex.2), that the value of Harjo’s managerial services at Ocho was \$75,000 per year. (2010 FFCL 2.4.3 at p. 8 ll. 7 – 11, CP 20) The court expressly found that Harjo should be compensated for managing Ocho at a rate of \$75,000 per year, which is \$6,250 per month. (2010 FFCL 2.4.3 at p. 8 ll. 7-8, CP 20) June 2009 through December 2009 is seven months. Seven months at \$6,250 per month is \$43,750.00, which is the managerial compensation Harjo is due for 2009. These findings were never challenged by Hanson.

4. The 2010 trial court finds that Harjo is owed **\$8,629** in managerial compensation for 2010.

The trial court further found that it was appropriate to compensate Harjo at the same rate (\$75,000 per year) for 2010. (2010 FFCL 2.4.3 at p. 8 ll. 14-15, CP 20) The trial found that Harjo

had received \$30,405 in 2010. (2010 FFCL 2.4.3 at p. 8 ll. 12-13, CP 20) The Court found it “appropriate to compensate [Harjo] for the difference between the value of his salary and the compensation/draws he has received (\$75,000 - \$30,405 or \$44,695).[sic]” (2010 FFCL 2.4.3 at p. 8 ll. 15-16.4, CP 20).⁵

5. *The 2010 trial court finds that in 2009 Hanson withdrew significant amounts of cash from the business in violation of the partnership agreement.*

Immediately following her post-separation assault on Harjo, Hanson unilaterally took \$29,500 from the business operating capital bank account – thereby depleting the operating capital of the business by 50% (2010 FFCL 2.4.3 at p 8 l. 17-22, CP 20). Hanson did this while she was keeping the company books from Harjo⁶. Harjo never received an equivalent amount. The court found that Hanson made these withdrawals in violation of the business partnership agreement (2010 FFCL 2.4.3 at p 8 l. 18 - p 9 l. 1 CP 20), which required that

5 The only evidence about Harjo’s 2010 draws which was before the Court at the time the 2010 Findings were entered was through August of 2010. In fact, Harjo received \$66,371 during fiscal 2010 and would therefore be owed \$8,629 in managerial compensation for 2010. Appellant’s concession inures to the benefit of Respondent.

6 Hanson withheld the company books until mid-September. (11/1/10 RP p. 32 l. 16-23)

each partner perform an equal amount of managerial tasks and that each party be given equal draws at agreed upon times. (FFCL 2.4.3 at p 7 l. 20-22. CP 19)

6. *The 2010 trial court determined that Harjo is owed \$13,000 for being paid less than Hanson as a result of her cash withdrawals following the assault.*

The trial court further found that because of the illegal withdrawals of \$29,500 in June 2009 (following her assault on Harjo), Hanson received more for her work performing one half of the managerial tasks from January 1 to May 31, 2009 (\$47,404), than Harjo received for all of 2009 (\$33,941), including the period from June through December 2009 when he was solely responsible for managing the business. (2010 FFCL 2.4.3 at p. 9 ll. 5-12, CP 21) The Court expressly stated that the “sums each received in 2009 were not equal. It is appropriate to compensate [Harjo] for the value of his labors and to consider the funds received by [Hanson] in that year.” (2010 FFCL 2.4.3 at p. 10 ll. 12-14, CP 22) These findings were never challenged by Hanson.

B. The first appeal results in a remand directing the trial court to use the “compensation due to Harjo” in its calculation of the equalization payment to (or from) Hanson.

Harjo appealed *pro se*, on various issues. In an unpublished

decision, this Court remanded. *Hanson v. Harjo*, 170 Wn. App. 1044, 2012 WL 4335455 (Div. 1 2012) (“*Harjo I*”). In that opinion, this Court noted that “Hanson received \$13,000 more than Harjo and Harjo received less salary than that to which we was entitled for both 2009 and 2010; however as the 2010 Ocho profits hadn’t been liquidated at the time the 2010 FFCL were entered, “[i]t appears therefore that the court’s findings about compensation due to Harjo are relevant to the calculation, yet to be determined, of the distribution amount owed to Hanson for 2010.” *Harjo I* at * 3. In other words, the 2010 profits needed to be known before that amount could be offset against Harjo’s entitlement to unpaid managerial compensation. This Court further instructed the trial court to either “clarify its finding with respect to the amount due to Hanson for rental income or to adjust the equalization payment accordingly.” *Id* at *4.

C. The trial court’s subsequent entry of judgments in 2013 correctly includes ½ of Ocho’s 2010 profits for Hanson but fails to include Harjo’s unpaid managerial compensation and Hanson’s uneven withdrawals of cash in its calculations.

Following the first remand, the 2010 Ocho profits were determined to be \$11,839. (Judgment and Order for Profits from Ocho for 2010, CP 43-44) Using this number, the trial court entered two

judgments in favor of Hanson. On May 14, 2013 it awarded Hanson one half of Ocho's 2010 profits (with interest from January 2011 through May 2013) in a principal amount of \$5,919 plus interest for a total of \$7,635.51. (CP 43) That judgment, however, failed to account for Harjo's unpaid managerial compensation in its calculation. (CP 43)

On June 10, 2013, the trial Court entered an "equalization judgment" in favor of Hanson in a principal amount of \$52,205 plus interest and fees for a total amount of \$69,172. (CP 45-47). With respect to the equalization judgment, the Court calculated the principal amounts *exactly* as set forth in the 2010 FFCL but for two mathematical omissions: (1) the 2009 and 2010 managerial compensation; and (2) the 2009 overpayment to Hanson as a result of her large and unauthorized withdrawals from the company bank account. The trial court's award was calculated using the following amounts:

Amounts Harjo Owes to Hanson (\$117,500)

- A. \$111,000 representing fifty percent of the buy-out value of Ocho (CP 23)
- B. \$6,500 for post-separation condominium rent (CP 23)

Offset by Amounts Hanson Owes to Harjo (\$65,295)

- C. \$53,054 for Harjo's interest in the house (CP 17)⁶
- D. \$2,241 reimbursement for condo dues (CP 19, 23)
- E. \$10,000 "home lien". (CP 15, 23)

(June 10, 2013 Judgment at p. 2.,CP 45-47)⁷ The trial court's calculation for the original equalization judgment contained mathematical errors (by also failing to include the managerial compensation the Court previously expressly awarded to Harjo and by failing to account for the overpayment Hanson received in 2009). Those omissions resulted in a net judgment to Hanson,⁸ when it should have resulted in a net judgment to Harjo.⁹

D. After a second appeal, this Court remands the matter to the trial court "for the limited purpose of clarifying an apparent oversight: the compensation to Harjo 'for his labor in running the parties' restaurant business on his own from June 2009 to trial in December 2010.'"

⁶ "The court finds that an equitable division, taking into account the contributions of each and allocating the remainder to result on a 50/50 division of all property is appropriate, fair, and equitable."

⁷ \$117,500 less \$65,295 equals \$52,205, the principal amount of the June 2013 judgment.

⁸ Had the trial court included the additional amounts previously found to be owing to Harjo, the equalization payment would have required Hanson to pay Harjo \$13,174.

⁹ Harjo moved for clarification of the 2013 judgments. That motion was denied by the trial court and he was sanctioned for filing a frivolous motion. This Court vacated those sanctions because it determined his motion for clarification was directed at the issue for which the matter was remanded (compensation). *Harjo II*, 2015 WL 249782 at * 5.

Harjo appealed again. *Harjo v. Hanson*, 185 Wn. App. 1026 (2015) (“*Harjo II*”) He argued, among other things,¹⁰ that the trial court had abused its discretion by “failing to offset the 2010 profits awarded to Hanson by the amount of compensation the court had previously found Harjo was entitled to.” *Id.* at *4 This Court found that “[t]he record appears to support this argument because there is no explanation showing either that this was done or, if not, why not.” *Id.* In a second unpublished decision, this Court again remanded this case, noting that the trial court “expressly found that Harjo should be compensated for the difference between the value of his services in managing the restaurant between June 2009 to the end of 2010 and the actual compensation he received.” *Id.*

That opinion directed the trial court to answer two questions:

(1) “whether Harjo was compensated in the amount the court stated”,

¹⁰ “Second, Harjo argues that the court abused its discretion by incorrectly measuring the 2010 profits of the parties’ restaurant. We disagree. **At trial, the court awarded Hanson 50 percent of the 2010 profits...following our remand, the court found that the profits were \$11,839 and accordingly awarded Hanson \$5,919.** The court calculated this amount based on the restaurant’s 2010 tax return. The return listed \$11,838 as “ordinary business income” – total income minus deductible expenses. Thus, the record supports the determination of the 2010 profits.” *Harjo II* at * 3 (emphasis added)

and (2) “if not, why not.” *Id.*

E. On remand the trial court (1) denies that the Court of Appeals had instructed it to answer the question of Harjo’s compensation; (2) refuses to correct the oversight it previously made in failing to include the manager’s compensation it awarded to Harjo; and (3) subsequently enters Findings of Fact in direct contradiction of prior Findings and unsupported by substantial evidence in an attempt to justify the incorrect mathematical conclusion it had previously entered.

On remand Harjo asked the court to award manager’s compensation in accordance with *Harjo II* as well as restitution of amounts partially overpaid in satisfaction of the prior judgments pursuant to RAP 12.8. (CP 87) Harjo presented comprehensive briefing in light of *Harjo II*. (CP 86-93, CP 98, 102) The trial court (the Hon. Julie Spector) granted oral argument for June 5, 2015. (RP 1)¹¹ Harjo suggested vacating the prior judgments and entering a new judgment to correct the mathematical errors and omissions. (CP 93)

In response (and at oral argument) Judge Spector asked counsel for Harjo why she should grant any relief at all: “Why would I do that? Everything was [upheld] except for the sanctions.” (RP p. 5 ll. 21-23). The express direction on remand contained within *Harjo II*

¹¹The Verbatim Report of Proceedings for June 5, 2015 is referenced as “RP”.

was read in open court to Judge Spector and she then permitted argument to proceed.

During the hearing, Judge Spector stated that her “memory of this case is pretty vague since I have had about – I don’t know – 400 a year since 2009 and ’10.” RP p. 18 l. 15-19. She also stated that she was still looking for her notes from the trial but that she “just [couldn’t] find them.” RP p. 26 ll. 12-20.

At the same hearing Judge Spector stated that she didn’t “want to open this up again. I’m done with this case and I think everybody should be done with it here today.” RP l. 21 l. 16-18. She went on to state “I’m not trying to redo this case. I don’t want to vacate anything. I just want to get orders in that will satisfy the Court of Appeals and get these people on with their lives, because, frankly, after four and a half, five years, I think we’re done.” RP p. 22 l. 1-6. Judge Spector noted that this was “one of the only cases in 16 years I have been on the bench where I have had this just go up and down, up and down, on what I consider.” RP 27:23 – 28:1.

Nonetheless, after admitting that she had only a vague memory of the trial and could not find her notes, Judge Spector ignored the Court of Appeals’ instructions on remand to correct the

failure to include Harjo's compensation in its calculations. Instead, the trial court entered Respondent's supplemental proposed findings verbatim.¹² (CP 136 – 140). Illogically, the new findings state that Harjo was *both* (a) ineligible for the 2009 managerial compensation and yet (b) *also* overcompensated for his managerial compensation in 2009. FF p.1 I. 19 and FF. p.2 II.9 (CP 136-137) As discussed below, the 2015 findings materially contradict the trial court's earlier unchallenged findings and orders, and are not supported by substantial evidence.

IV. SUMMARY OF ARGUMENT

The trial court abused its discretion when it refused to correct clear mathematical errors in its 2013 judgments based on unsupported (and new) justifications. The trial court's 2015 findings are not supported by substantial evidence and are actually contrary to its prior, unchallenged findings which are the law of the case. The trial court's responses to this Court's prior rulings would lead a neutral observer to be concerned that the proceedings below were neither fair, nor impartial, to Zachary Harjo.

¹² The trial court made two minor handwritten changes to the findings (CP 138), but they are not material to this appeal.

V. DISCUSSION

A. Standards of Review

This Court's mandates are "binding" on the superior court and "must be strictly followed." *Harp v. American Sur. Co. of New York*, 50 Wn.2d 365, 368 (1957); *State ex. rel. Smith v. Superior Court for Cowlitz County*, 71 Wn. 354, 357 (1912). "Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court." *State v. Schwab*, 134 Wn. App. 635, 645, (2006), *aff'd*, 163 Wn.2d 664, (2008). This Court reviews de novo the issue of whether the trial court complied with its mandate. *Ross v. Hamilton*, 175 Wn. App. 1045 (2013).

A trial court's *unchallenged* findings of fact are verities. *Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 176 Wn.2d 662, 675 (2013). *Challenged* findings are reviewed for substantial evidence. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Gormley v. Robertson*, 120 Wn. App. 31, 38, (2004).

This Court reviews a trial court's factual determination of property distribution at the end of a committed intimate relationship

(an “equity relationship”) to determine whether (1) its conclusions of law are supported by findings of fact, and (2) whether the challenged findings of fact are supported by substantial evidence. *In re Marriage of Pennington*, 142 Wn.2d 592, 602-03 (2000).

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803 (2005). A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on facts unsupported in the record. *State v. Rundquist*, 79 Wn. App. 786, 793 (1995). A decision is “manifestly unreasonable” if the court adopts a view “that no reasonable person would take,” *State v. Lewis*, 115 Wn.2d 294, 298-99 (1990), and arrives at a decision “outside the range of acceptable choices.” *Rundquist*, 79 Wn. App. at 793.

B. The trial court abused its discretion when it refused to correct its clerical error omitting Harjo’s previously awarded managerial compensation.

On remand the trial court should have simply recalculated the equalization payment to include the amounts it had previously awarded Harjo. Instead of conceding its prior omission, and without taking any additional evidence, the trial court instead chose to justify

its earlier error by making new “findings” that are irreconcilable with its unchallenged findings from 2010. The trial Court abused its discretion by reaffirming the exact same judgments (and therefore erroneous math and omissions) which this Court had already stated failed to account for previously awarded compensation to Harjo.

The trial court should have corrected its June 10, 2013 equalization judgment using the following amounts to determine the correct net award – which would have gone to Harjo:

Amounts Harjo Owed to Hanson

(\$123,419)

No.	Description	Amount	Location in the Record
1.	50% of the value of Ocho as of December 31, 2009	\$111,000	CP 23
2.	Post-separation condominium rent.	\$6,500	CP 23
3.	2010 Ocho Profits	\$5,919	CP 43, 44

Amounts Hanson Owed to Harjo

(\$130,674)

No.	Description	Amount	Location in the Record
1.	Harjo’s ½ interest in home equity.	\$53,054	CP 17

2.	Reimbursement for condo dues.	\$2,241	CP 19
3.	"Home Lien"	\$10,000	CP 15
4.	2009 (June to December) Managerial Compensation	\$43,750	CP 20
5.	2009 (January to June) unequal partner draws	\$13,000	CP 20-21
6.	2010 Managerial Compensation	\$8,629	CP 20

Taking into consideration the award of ½ 2010 Ocho profits to Hanson, the net amount owing from Hanson to Harjo at the end of 2010 was \$7,255. That amount should have been offset by the Court's prior award of \$2,350 in attorney fees to Hanson. The proper calculation is as follows:

Hanson owes Harjo	\$130,674
Harjo owes Hanson	(\$123,419)
Attorney Fee award to Hanson	(\$2,350)
Net principal award to Harjo	\$4,905

Because Harjo was actually owed money from Hanson at the time of the equalization judgment, no judgment should have been entered for Hanson. Likewise, no prejudgment interest on either judgment should have been awarded. Rather, a net judgment of \$4,905 should have

been entered in Harjo's favor, plus interest accruing on that amount from December 2010. The prior judgments should have been vacated, and a judgment reflecting this amount in Harjo's favor should have been entered.¹³

C. The trial court's June 2015 findings are not supported by substantial evidence and are an abuse of discretion.

- 1. The trial court abused its discretion by finding that Harjo was "fully and fairly compensated" for the second half of 2009 and all of 2010 while not including the previously awarded managerial compensation in its calculations.¹⁴*

As set forth above, the trial court's unchallenged findings establish that Harjo was solely responsible for running (and maintaining) Ocho from June 2009 forward. (CP 20) The trial court found that Harjo should be compensated at a rate of \$75,000 per year. (CP 20). It found that for 2009, Harjo received only \$33,941 from the business for the whole year. (2010 FFCL 2.4.3 at p. 9 ll. 8-9, CP 21). Failure to award the 2009 difference (\$43,750) in the equalization judgment was error.

13 Because Harjo has partially satisfied \$22,081.63 of the existing judgments, he will ultimately be entitled to restitution of those amounts should this Court direct entry of a judgment in his favor. Because the trial court denied Harjo any relief, it did not address his claim for restitution pursuant to RAP 12.8.

14 FF p. 1 ll. 17-18 (CP 136)

Similarly, the trial court found that Harjo was entitled to compensation for all of 2010 at a rate of \$75,000 (\$6,250 a month). (CP 20) The trial court calculated that amount to be (“\$75,000 - \$30,405 or \$44,695”). (CP 20). The trial court’s failure to award that amount (or any amount) in the equalization judgment was error.

Finally, the trial court found that Hanson’s post-relationship unauthorized cash withdrawals had resulted in her receiving \$13,000 more than Harjo in 2009 while only fulfilling her obligation to the business for 5 months of that year. FFCL p.9 ll. 5-12 (CP 21) The trial court found that Hanson received \$47,404 in 2009, \$29,500 of which was taken without authorization and could have been used to pay manager’s compensation. Because the Partnership Agreement required equal partner draws (FFCL p.7 ll. 20-22), and because Hanson’s withdrawal prevented Harjo’s compensation, the court expressly found that it was “appropriate to compensate Harjo for the value of his labors and consider the funds received by Hanson in that year.” (CP 22) The trial court’s failure to award that difference in the equalization judgment was error.

2. The trial court's finding that Harjo failed to produce adequate financial information at the 2010 trial is not supported by substantial evidence.¹⁵

The 2015 trial court similarly found that Harjo had failed to produce adequate 2009 financial information at the 2010 trial, and that failure created a negative inference against him. It is an unchallenged fact that all of 2009 accounting (and the CPA who performed the 2008 and 2009 books) was before the court at the time of trial in 2010. The court's failure to recognize that all of its 2009 rulings in the 2010 FFCL stem from a complete review of the 2009 books at trial is another example of its disinterest in its obligation to correct its mistake. The court quotes the partnership 2009 IRS form 1065 on FFCL p. 9 ll. 5-20, p.12 ll.10-20, p.13 ll.1-9. The foundation of the property division is the Octopi LLC dba Ocho Business Valuation, December 31, 2009 (TR Ex 2) which is an examination of 2009 in its entirety and the 2010 court adopted the Business Valuation as an Agreed Order.

Further, this finding (that Harjo failed to produce adequate financial information) is not supported by anything in the record or the 2010 findings, and is actually contradicted by the 2010 findings which

15 FF p. 1 ll. 18-21 (CP 136); FF p. 3 ll. 5-9 (CP 138),

would more correctly draw any negative inference against Hanson.¹⁶ The trial court's unchallenged 2010 findings actually establish that "the transition to [Harjo's control] of Ocho was intentionally hampered by the withholding of records by the bookkeeper, Ms. Cote, a relative of [Hanson's]. [The bookkeeper] admitted on the stand that she was angry with Zach and deliberately withheld the books from him." (2010 FFCL 2.4.3 at p. 10 ll. 1-5, CP 22)¹⁷ Ms. Cote testified that she withheld the books on behalf of Hanson:

Q: What conversation did you have with [Hanson] about relinquishing the books in response to Zach's request?

A: I let her know that I had received this piece of -- a letter delivered by Zach, and I told her that I didn't hand over the books, and, she said, you know, good. Because that's what her attorney advised her.

¹⁶ However, as the court's prior findings went unchallenged and are verities, there was no need for an application of *any* inference on remand.

¹⁷ The trial court may have been conflating post-trial issues relating to the determination of 2010 Ocho profits following the first appeal, with accounting evidence produced (after trial) for the 2010 Ocho profit determination. However, the 2010 Ocho profit issues arose long after the 2010 findings were entered (in 2013) and could not have rationally formed a basis for them in 2010. Further, the trial court found (in 2013) that Harjo "**produced tax returns which the court found sufficient to comply with the accounting requirement**, and separately entered judgment based on those tax returns on May 28, 2013." (CP 47) (emphasis added)

(11/1/10 RP p. 23 ll. 16-23)

At the 2010 trial, the testimony established that Harjo was not in control of the books in 2009. In September Hanson finally relinquished the books (3 months after a no contact order barred her from Ocho) and normal bookkeeping resumed. At that time CPA Janet Gibb (and the bookkeeper she directed) had control of the books. The trial court found that the books “were a mess” when Gibb took over the books from Ms. Cote. 2010 FFCL 2.4.3 at p. 10 ll. 6-8 (CP 22). Further, both sides had complete access to Ms. Gibb and the books and there was no evidence that any conduct of Harjo impeded Hanson’s access to the books. For example, Ms. Gibb testified that at the end of her analysis it was Hanson who was dilatory, but that the parties cooperated equally:

Q: Were they – were either Zach or Gelsey more or less cooperative than the other?

A. I think it was about the same really. At the very end I was waiting for Gelsey, but there had been times earlier I had been waiting for Zach. So, you know, I think it works both ways.

(11/4/10 RP p. 31 ll. 8-13). There is simply no evidence in the record of the 2010 trial to support the trial court’s finding that Harjo failed to produce adequate financial information to establish his compensation

– especially in light of the fact that the trial court already made multiple unchallenged findings that he was entitled to managerial compensation. Therefore, the court’s finding of a negative inference against Harjo is an untenable abuse of discretion.

3. The trial court’s findings that Harjo was “overcompensated” by \$22,763 is not supported by substantial evidence.¹⁸

The trial court’s 2015 findings state that Ocho had:

ordinary business income of \$63,822. This figure is income after payments to partners of \$81,345. Only Harjo enjoyed the benefit of this additional ordinary business income...Therefore, Harjo’s compensation in 2009 was...\$97,763 TOTAL. Harjo was therefore overcompensated for 2009 by \$22,763”

(CP 136-137). These new findings are directly contradicted by the trial court’s 2010 findings that Harjo was compensated in 2009 in the amount of \$33,941 while Hanson received \$47,404. (CP 21).

The 2010 court was aware that the 2009 “profit” of Ocho was incorporated into the valuation of the business (“all tangible [profit] and intangible assets, including all working capital” FFCL p.11 II.5-6) and does not stand alone outside the value of \$222,000. The 2015

¹⁸ FF p. 1 I. 22 – p. 2 I. 1 (CP 136 - 137), FF p. 2 II. 1-9 (CP 137)

court fails to acknowledge this basic premise of property division and also ignores James Weber's Declaration clarifying this point for the court, to the extent it even needed clarification. FF p.2 ll.18-22. The trial court's refusal to acknowledge the allocation of 2009 profit underlying the valuation is another example of its disinterest in correcting its earlier omission. The trial court's finding that Harjo received \$97,763 is factually incorrect as Mr. Weber states in clear simple language:

[The] assertion that Mr. Harjo received \$63,822 in profit is erroneous. Mr. Harjo did not actually receive those funds. The \$63,822 was accounted for in the valuation of the Company and was not actually additional money that Mr. Harjo received. The only amount Mr. Harjo received from the company in 2009 was \$33,941, his guaranteed payments.

This means that the 2009 profit was no longer available to compensate Mr. Harjo for his manager's salary after the Company value was used by the Court to divide the business and property. The profit was used to determine the value of the Company. **The profit is not in addition to the value of the Company, it is a part of the value of the Company. (emphasis added)**

(CP 104) Hanson was awarded ½ the value (\$111,000) of Ocho, which included ½ of its inherent 2009 profit of \$63,822.

Further, the 2015 trial court's finding that it "intended to address managerial compensation separately from the assigned value to the business, and not to incorporate paid compensation as part of the business value"¹⁹ directly contradicts its unchallenged 2010 finding that the management cost of \$75,000 per year was "one premise of [the] overall value of the business." (2010 FFCL 2.4.3 at p. 8 ll. 7-8, CP 20) In addition to being inconsistent with previous findings, the 2015 finding is contrary to the evidence at trial that *Ocho's* expense of a manager (whether it be Harjo or someone else) was factored into the valuation of the company. (Ex. 2). That valuation was divided evenly between the parties. Funds that should have paid for manager's compensation had been diverted by Hanson's \$29,500 withdrawal, leaving Harjo's compensation unliquidated. Therefore manager's compensation from June 2009 through December 2010 was awarded solely to Harjo (just as Hanson's compensation from June 2009 through December 2010 was awarded solely to Hanson) FFCL p.12 ll.11-12.

19 FF p. 2 l. 22 - p. 3 l. 2 (CP 137-138)

4. *The trial court's findings that Ocho paid far in excess of reasonable managerial compensation for 2009 is not supported by substantial evidence.*²⁰

As discussed *supra*, there is no evidence that the 2009 payments to Hanson and Harjo were “far in excess” of reasonable managerial compensation. The trial court’s 2015 findings state that: “...the total managerial compensation paid in 2009 was \$145,167.” However, the finding that total compensation in 2009 was \$81,345 is an unchallenged 2010 finding. The 2015 court is incorrectly combining 2009 ordinary income with partner draws to arrive at \$145,167. The 2010 court heard testimony on this specific issue from Janet Gibb about 2008:

Q: Can you point me to...on the 2008 return... What the income to each of the partners is as a result of the earnings in 2008?

A: Those would be paid on the K ones.

Q: under line 10, the \$54,000, ordinary business income. How is that number derived?

A: ...the income and loss and any tax attributes flow through to their individual return... the individual partners pay income tax on their portion.

Q: Where do you get the \$54,000?

A: ...it's the profit and loss for the partnership multiplied by

20 FF p. 1 l. 22 – p. 2 l. 1 (CP 136-137), FF p. 2 ll. 15-17 (137)

the partnership's percent.

Q: Just because it says \$54,000 is taxable to each of them [ordinary income] **is that a reflection of what they actually received?**

A: No.

Q: --from the business?

A: **No. It's two totally different things...**

A: **...you might not have any cash even though your profit and loss might say \$100,000... you couldn't look at a profit and loss by itself.** You'd have to look at a balance sheet and the checks to that balance sheet.

(11/4/10 RP p. 10 l. 7, p. 11 l. 5, p. 20 l. 18, p.21 l.9)(emphasis added)

In 2010 the trial court found that Harjo was entitled to managerial compensation from June 2009 at a rate of \$6,500 per month. (CP 20). It also found that he "received sums in 2009 totaling \$33,941". (2010 FFCL 2.4.3 at p. 9 ll. 5-9, CP 21). The contested finding is simply unsupported by substantial evidence and is contrary to earlier unchallenged findings.

For the same reason, the trial court's findings that Harjo received additional compensation or may have received additional compensation from Ocho in 2009 are not supported by substantial evidence.²¹

21 FF p. 3 ll. 4-6, (CP 138)

5. *The trial court's findings that Hanson was "left with no means of self-support" is not supported by substantial evidence.*²²

The 2015 trial court found that "Hanson was left with no means of self-support. While mathematically the result is not precisely equal, the result is nevertheless fair and equitable." (CP 138) However, the 2010 findings expressly found that Hanson "received compensation from employment outside of Ocho and has retained those earnings as her separate property." (2010 FF 2.5.2, p. 12 ll. 11-12, CP 24); This unchallenged finding directly contradicts the trial court's purported basis for its 2015 findings. Further, the Court's finding that its award is "mathematically...not precisely equal" is an understatement and essentially minimizes the issue that Harjo has been bringing to its (and this Court's) attention all along: namely that the trial court's failure to award Harjo his compensation means he has been awarded \$66,379 less than he should have been.

This is a manifest abuse of discretion, and is unsupported by the unchallenged findings.

²² FF p. 3 l. 13-14 (CP 138)

6. *The trial court's findings and conclusions that Hanson's taxes "offset any apparent unfairness" are not supported by substantial evidence and contradict the law of the case.*²³

The trial court purported to use the taxes paid by Hanson for 2009 as a reason to justify the "apparent unfairness" of its division. However, the 2010 trial court ruled that Hanson's "own failure to anticipate and make installment payments on taxes she might owe is not an appropriate basis to shift to [Harjo] a portion of her taxes owed." (2010 FF 2.4.3, p. 10 ll. 17-19, CP 22) It also found that Hanson's higher tax burden resulted from her higher draws and income from employment outside of Ocho, as well as IRA withdrawals and capital gains income. *Id.* at ll. 14-17. It further found that "any 2010 tax liability arising from operation of the [business] should be allocated between the parties pro-rata in accordance with the income/distributions that the respective parties receive from the enterprise in 2010." (CP 23) These 2010 findings/conclusions were never challenged by Hanson and are the law of the case. The additional taxes paid by Hanson are not now, a justification for such an inequitable and disproportionate award.

23 FF p. 3 l. 22 – p. 4. L. 2 (CP 138 - 139)

Further, the trial court's finding that Harjo retained ordinary business income that Hanson paid taxes on is also unsupported by substantial evidence. As discussed above, Hanson did receive her ½ of the 2009 ordinary business income when she was awarded ½ of Ocho as of December 31, 2009. She also received ½ of the 2010 profits in a 2013 judgment. Because the finding is unsupported, it is an insufficient basis upon which to make such a disproportionate and inequitable award.

7. The trial court's findings and conclusions that Harjo is not entitled to compensation for Hanson's disproportionate draws in 2009 is not supported by substantial evidence.²⁴

The 2015 trial court attempted to justify its earlier errors and omissions by stating that it did not make a scrivener's error and that the substantially disproportionate award to Hanson was "intentional" and a "discretionary decision." However, as discussed above, the trial court originally ruled that Harjo was entitled to compensation for 2009 and 2010. It also ruled that the "sums received in 2009 were not equal. It is appropriate to compensate Zach for his labors and to consider the funds received by Hanson in that year." (CP 22). The record and

24 FF p. 3 l. 17-21 (CP 138)

the evidence establish that Hanson received \$13,000 more, for the first five months of 2009, than Harjo received for the entire year. At the time that Hanson removed \$29,500 from the working capital account of the business the parties had ended the intimate relationship. Therefore, this unauthorized withdrawal falls outside of the scope of the intimate relationship and is bound to the rules of the Partnership Agreement: "Once the court finds a committed intimate relationship exists, it distributes all property parties acquired "through efforts extended **during the relationship.**" *Harjo II* at 5 (*quoting In the marriage of Lindeman*, 92 Wn. App. 64, 69, (Div. 1 1998)) (emphasis added).

As the trial court explained with respect to the Partnership Agreement and distributions:

They verbally amended their partnership agreement, that required that each partner perform an equal amount of managerial tasks and that each party be given equal draws at agreed upon times...Gelsey's actions did not comply with the terms of the partnership agreement regarding agreed upon draws from the business.

FFCL p.7 ll. 20-23, p.8 ll. 19-20 (CP 19).

After detailing Hanson's withdrawals in in the 2010 FFCL, and characterizing them as violations of the partnership agreement, it simply makes no sense that the trial court now states that it

intentionally decided that Harjo should receive \$13,000 less than Hanson while fulfilling both his own as well as her obligation to the partnership even though he contributed seven more months of labor than Hanson contributed in that year. Furthermore, the court states it “intentionally” decided to award Hanson \$13,000 more for that year *while simultaneously claiming* that Harjo received \$97,763 (more than double what Hanson received) that year.

This Court previously remanded the case to the trial court stating that it appeared “the court had abused its discretion by failing to offset the 2010 profits awarded to Hanson by the amount of compensation the court had previously found Harjo was entitled to.” *Harjo II* at 4. In response, the trial court simply stated that its calculations were “discretionary” and “intentional.” This response simply begs the question posed by the Court of Appeals and does not actually answer it.

8. *The trial court’s findings and conclusions that Harjo was responsible for and retained all of Ocho’s 2010 profits are not supported by substantial evidence and are contrary to the trial court’s 2013 judgment awarding ½ of Ocho’s 2010 profits to Hanson.*²⁵

25 FF p. 4 l. 4-18 (CP 139)

Despite having previously awarded Hanson ½ of the Ocho profits for 2010²⁶ on May 28 2013 (\$5,919), the trial court's 2015 findings state that Harjo enjoyed "all of the benefit" of those funds. This is simply contrary to the court's 2010 findings and 2013 findings contained within its "Judgment and Order for Profits for Ocho" awarding Hanson one half of \$11,839. This finding is not supported by substantial evidence and is contrary to the trial court's prior findings on this issue.

D. The trial court abused its discretion by drawing a "negative inference" as to Harjo.

As discussed supra, the trial court's findings that Harjo failed to produce 2009 financial information are not supported by substantial evidence; for 2010 financial information, the finding is contrary to its own findings that Harjo "produced tax returns which the court found sufficient to comply with [its] accounting requirement..." (CP 47). In the end, "a trial court's findings of fact must justify its conclusions of law." *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353 (2007). Making an unjustified negative inference is the same effect as a judicial bias against a party. Because the trial court based its

²⁶ The 2010 Ocho profits were \$11,839. (CP 44)

“negative inference” against Harjo on an unsupported finding, it was an error of law.

More importantly, the trial court didn’t need to make any inferences to correct its judgment. Presumably any inferences it did make were expressed in the form of its 2010 findings. On remand the trial court should have simply taken its findings and converted all of them to an appropriate judgment. As of 2015, there were no “inferences” that needed to be made.

E. This Court should modify the trial court’s orders and judgments pursuant to RAP 12.2.

RAP 12.2 provides that this court may modify any decision under review in the interest of justice. RAP 12.2; *see also Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 758, (Div. 1 1981). When the amount at issue is “only a mathematical calculation”, this Court has the authority to direct the entry of a property judgment. *Trompeter v. United Ins. Co.*, 51 WN.2d 133, 142 (1957). That is the case here. The trial court has repeatedly refused to include all of the amounts previously awarded in its calculations. An order from this Court to enter a judgment in Harjo’s favor is in the interests of justice.

F. The trial judge's comments and actions would lead a disinterested person to question whether Harjo received a fair, neutral and impartial hearing and therefore a different judicial officer should consider the case on remand.

To the extent this Court does not direct entry of a specific judgment, Harjo requests that this matter be remanded to a different judicial officer for entry of the appropriate judgment because the trial judge's repeated refusal to correct her arithmetic error creates significant appearance of fairness concerns. A judicial proceeding only is valid if it would appear to a reasonably prudent and disinterested observer that "all parties obtained a fair, impartial, and neutral hearing." *State v. Bilal*, 77 Wn. App. 720, 722 (1995). When assessing a case under the appearance of fairness doctrine, the reviewing court must evaluate how the hearing would appear to a reasonable person. *State v. Martinez*, 76 Wn. App. 1, 8 (Div. I 1994). The appearance of fairness doctrine considers the impressions of an impartial viewer who is knowledgeable about all of the relevant facts and legal factors at play in a case. *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002).

As set forth above, virtually every statement and finding contained in the trial court's 2015 decision is factually incorrect, unsupported by substantial evidence, and is contradicted by the law

of the case and prior, unchallenged findings.

In the present case, several statements and acts of the trial judge in the June 5, 2015 hearing would lead a reasonably prudent and impartial observer to question whether Mr. Harjo received a fair hearing. As has been discussed *supra*, Judge Spector failed to heed the express language of this court in *Harjo II*. She initially stated she believed she had been affirmed on all issues except the award of sanctions. When the express language of *Harjo II* was read to her in open court she then stated she (1) had only a pretty vague memory of the trial; (2) could not find her notes; (3) didn't want to "redo" her analysis; (4) stated she was "done with this case"; and (5) stated she "just want[ed] to get orders in that will satisfy the Court of Appeals." RP 22:1-6 She closed with stating that this was one of her "only" cases that had been remanded more than once. Judge Spector then entered findings which (1) go beyond the scope of the remand, (2) are not fully impartial; (3) contradict her previous findings and (4) are unsupported by the evidence and are factually incorrect.

A reasonably prudent observer would not consider a trial judge impartial when she states she was affirmed on everything except her award of sanctions – when she was specifically directed to explain

why she did not abuse her discretion in her earlier orders.

A reasonably prudent observer would not consider a trial judge impartial when she states her intention to make negative inferences toward one party (the party that prevailed on appeal), especially when the basis for the negative inferences is something that is contradicted by the record and earlier findings.

Given her statements, including her stated objective to (now) make negative inferences about Mr. Harjo (without any basis in the record), the lack of evidence supporting her new findings, and the contradiction between her new findings and her previous findings, a reasonable observer likely would be concerned either that Judge Spector ignored undisputed evidence favorable to Mr. Harjo; or that she was not pleased with his successes before the Court of Appeals and was therefore exhibiting a bias against him. This Court should not require Harjo to once again return to the same trial judge who has repeatedly refused to follow its mandate.

VI. CONCLUSION

Appellant Zachary Harjo respectfully requests that this Court correct the trial court's refusal to enter the appropriate judgment in his favor based on the unchallenged 2010 findings and remand this matter to a different judicial officer for the purposes of restitution of amounts previously overpaid pursuant to RAP 12.8.

Respectfully submitted this 16th day of November, 2015.

BRENEMAN GRUBE, PLLC



Joseph A. Grube, WSBA 26476
Karen K. Orehski, WSBA 35855
(Attorneys for Appellants)

CERTIFICATE OF SERVICE

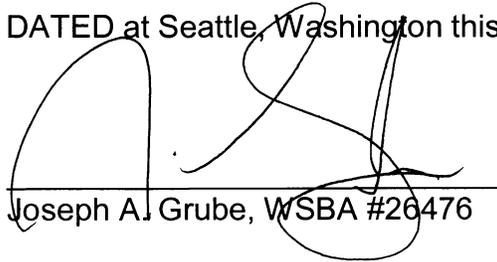
I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On November 16, 2015 I caused a copy of the foregoing APPELLANT'S BRIEF, to be served on the following parties:

Via LEGAL MESSENGER:

Michael W. Loudon
Wechsler Becker, LLP
Seattle, WA 98104
Attorney for Respondent

I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 16th day of November, 2015.


Joseph A. Grube, WSBA #26476

2015 NOV 16 PM 4:09
SUPERIOR COURT
STATE OF WASHINGTON