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COURT OF APPEALS
DIVISION ONE

JAN 29 2016

No. 73557-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ZACHARY B. HARJO,
Petitioner,

v.

GELSEY HANSON,
Respondent.

RESPONSIVE BRIEF OF RESPONDENT

2016 JAN 29 PM 1:48
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
M

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INTRODUCTION

In this case involving distribution of property acquired during a non-marital relationship, the court awarded roughly equal assets to each party following trial in 2010. The court was fully aware of and considered the unequal compensation each party received from their jointly owned business, Ocho, along with the disproportionate amount of work invested in the business, particularly post-separation. The court knew that each party received different levels of distribution and managerial compensation, but chose not to reallocate any managerial compensation despite the lack of equality, except for splitting 2010 profits. This was a deliberate choice on the part of the court based on the overall, post-separation financial positions of the parties.

Following instructions from the Court of Appeals to explain why managerial compensation was not reallocated, the trial judge did exactly that, explaining that Harjo received a successful business; Hanson received additional debts and obligations; and that the court was deliberately not awarding Harjo any additional managerial compensation. Furthermore, the court entered written findings explaining that Harjo had already been more than fairly compensated for the years in question (2009 and 2010).

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. On remand, the trial court did not refuse to clarify the compensation due to Harjo for his labor in running Ocho on his own from June 2009 to December 2010; instead, Judge Spector did clarify her findings by explaining that she did not intend to award additional managerial compensation. In any event, Harjo was fully compensated for both years at a level higher than his replacement value.
2. It was not an abuse of discretion for the trial court to refuse to enter a judgment for managerial compensation for Harjo.
3. It was not an abuse of discretion for the trial court to refuse to vacate a 2013 judgment which did not compensate Harjo for disproportionate withdrawals in 2009.
4. The trial court did not ignore its previously entered findings, but properly explained its reasons for not ordering that managerial compensation be reallocated.
5. The trial court's findings of fact are correct and supported by substantial evidence.
6. The trial court properly drew a negative inference against Harjo based on his lack of production and lack of credibility.
7. The Court of Appeals should not modify the trial court's decision, but should affirm the trial court in all respects.
8. Since the trial judge followed the express instructions from the Court of Appeals, wisely instructed the parties on moving forward with their lives, and entered findings

explaining her decision, there is no basis for assigning this matter to a different judicial officer.

B. Issues Pertaining to Assignments of Error

1. It was not an abuse of discretion for the trial court to refuse to enter a judgment for managerial compensation for Harjo.
 - a. Allocation of property following a committed, intimate relationship is within the discretion of the trial court, including an allocation other than 50/50.
 - b. Here, the court divided the known assets equally, and considered – but did not separately allocate – the value of managerial compensation in 2009.
 - c. Even if the 2009 compensation was to be reallocated, Harjo has already been fully reimbursed.
 - d. Here, the court also did not intend to reallocate managerial compensation in 2010.
 - e. Even if the 2010 compensation was to be reallocated, Harjo has already been fully reimbursed.
2. The trial court’s June 2015 findings are supported by substantial evidence.
 - a. Where any reasonable view of the evidence substantiates the trial court’s finding, the finding should be sustained.
 - b. The appellant’s failure to provide a complete record forecloses review based on arguments that substantial evidence does not support a particular finding.

- c. Nevertheless, the trial court's findings were supported by substantial evidence.
 - i. 2009 and 2010 Managerial Compensation Is Reasonably Based on Tax Returns.
 - ii. Harjo's Lack of Full Disclosure at Trial, and on Remand, Is Supported by the Record.
 - iii. Harjo's Overcompensation Is Supported by Substantial Evidence.
 - iv. Hanson's Lack of Means of Self-Support Is Supported by Substantial Evidence.
 - v. Hanson's Higher Tax Burden Is Supported by Substantial Evidence; Harjo's Arguments Regarding Fairness Are Within the Trial Court's Discretion.
 - vi. Harjo's Lack of Entitlement to Compensation for Disproportionate Draws Is Supported by Substantial Evidence.
 - vii. The Trial Court's Mathematical Error Regarding 2010 Profits Is Harmless.

STATEMENT OF THE CASE

This case concerns distribution of assets following a marital-like relationship. Trial occurred over five years ago, in 2010.

The Successful Business, Ocho, Is Awarded to Harjo.

One of the many issues at trial concerned the business that the parties jointly created, a restaurant known as Ocho.

The value of the business was not resolved by the court, but by stipulation of the parties. CP 20. The evaluator considered a number of factors in arriving at the valuation, including economic outlook, book value, earning capacity of the company, dividend-paying capacity of the company, goodwill, and comparison to other companies. CP 52. Income was one factor, but not the only factor, used to establish value. CP 53. The evaluation was completed May 27, 2010. CP 51. Thus, for purposes of establishing the value, Mr. Weber assumed a replacement for Mr. Harjo would need to be paid \$75,000/year. CP 63. Also, for purposes of the business valuation, no records after April 2010 were utilized, so the post-valuation trajectory of the business was not known to Mr. Weber. CP 53. Following trial in November of 2010, the court awarded the business to Harjo, “including all working capital, inventory and all rights to and control over all Ocho websites, recipes and trademarks...” CP 30. At that time (following trial), the court had a better understanding of the continued success of the business based on the testimony and evidence submitted at trial. In 2015, the court recalled “the fact that this was a very successful business,” a “very viable, successful business, Ocho.” RP 19, 22.

Following the 2010 trial, the court was aware of the amounts Harjo received in compensation from the business, and aware of the differing

levels of work the parties were able to put into the business. CP 21. Hanson was excluded from business operations after May, 2009, and Harjo ran the business alone from that time forward. CP 19-20. The court accepted \$75,000/year as the value of Harjo's labor in the business. CP 20. The court was aware of the fact that Harjo received less than \$75,000 in cash draws in 2009, and less than \$75,000 in cash draws in 2010, so far as figures were known in November of that year.

The Trial Court Did Not Find Any Right To Reimbursement for Wages in 2009.

The court was clearly aware of the different amounts of compensation the parties received from Ocho in 2009, as set forth in its Findings. CP 20. The court did find, "It is appropriate to compensate [Harjo] for his labor in running the business on his own from June 2009 to present." CP 20. The court also found, "It is appropriate to compensate [Harjo] for his labors and to *consider* the funds received by [Hanson] in that year [2009]." CP 22 [emphasis supplied].

While considering the funds each party received from Ocho in 2009, the court did not create any right to *additional* compensation for Harjo beyond what he was able to earn and receive from Ocho in 2009. Harjo was compensated – not at exactly \$75,000, but at some level, depending on how various figures were accounted for – for the work he

did. Hanson also received funds in 2009, which the court listed and considered. In its Decree, the court created no right to additional compensation, equalization, or re-allocation of income for 2009.

The Court Creates No Right to Additional Compensation in 2010.

The language employed by the court regarding 2010 compensation was somewhat different. Instead of noting that the compensation was “considered,” the court indicated: “...it is appropriate to compensate [Harjo] for the difference between the value of his salary and the compensation/draws he has received. (\$75,500 - \$30,405 or \$44,695)” CP 20 [sic]. Since trial occurred in November 2010, however, the court was unaware of what Harjo’s total compensation for the year would be. Again, as with the 2009 compensation, the Decree did not provide Harjo any additional rights with respect to his alleged undercompensation, nor did the court provide for any means to reimburse Hanson in the event Harjo was overcompensated. Harjo’s actual compensation for 2010 was unknown; he would receive additional compensation from the time the last figures were presented, through the end of the year.

Notably, Harjo was solely in control of Ocho through all of 2010. He had sole control of the books. He had the ability to time purchases of new equipment or supplies, manipulate payroll expenses, measure when to

receive draws, and determine timing of bills for tax purposes. He could also decide how much effort to put into the business, and whether to work more (which would potentially reduce the amount he would receive in this lawsuit) or work less (which might increase the amount he would receive in this lawsuit). CP 138.

The figures presented at trial were far from clear. The books for 2009 were “a mess.” CP 22. The books for 2010 were necessarily incomplete, since trial occurred in November. The business valuation was mostly based on records prior to January 2010, although it included some records through April 2010. CP 49-63. The court specifically found that Harjo’s testimony was not credible as to expenses incurred on the community home. CP 32. This creates additional uncertainty regarding the total compensation Harjo would receive in 2010.

The Managerial Compensation “Oversight” is Resolved by Judge Spector Over Four Years Later.

Three appeals have largely resulted in affirmation of the trial court’s decisions. On January 20, 2015, this court remanded one final question to the trial judge:

Third, 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.

CP 80.

Hearing on this issue occurred June 5, 2015. Judge Spector frankly answered the question of why there was no additional equalization of managerial compensation:

I know one thing for sure was that money was not an overpayment. It just, you know, not everything had to be 50/50. He was getting a very profitable business, Ocho, which everybody testified to was just taking off and doing great, and she had no business. She had her house. I know that she got the house because of the inheritance from her father's untimely passing.

So I think Mr. Louden's point is well taken insofar as this was not an overpayment. This is what the court's equitable powers has a right to do. I don't look at it as a mathematical error. It just might have been a mathematical silence, meaning the court didn't address the issues that are now before it, but I think overall, I don't think she was overpaid for that period of time.

RP 18-19. The court went on to describe the reasons that it did not strictly apply a 50/50 split to the case:

...everybody comes in saying I want 50/50, and you know this, I sit as a court of equity, and the court had no intention of making everything 50/50, because he was getting an ongoing profitable business that looked like it was going to take off.

He was going to be a very, very comfortable business owner, and she had nothing. So that was the purpose of a little bit of inequity, if you will. So to characterize it as overpayment, I think, is not accurate. There is [sic] I was just trying to even out what we had as real numbers at the time.

RP 20-21. Judge Spector further clarified that to the extent the result was not exactly equal, Mr. Harjo had the stronger financial position:

He had – I know he had condo rent that he didn't reimburse her for and all I was trying to do is even things up as much as I could, but if there was going to be more than 50 percent to go to someone, it was going to go to her because he got the very viable, successful business, Ocho.

RP 22. Judge Spector made it clear that her intent was not to reallocate managerial compensation, but to create a final resolution that would allow both parties to move on:

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 22.

The court then entered written findings which resolved the mathematical questions regarding Mr. Harjo's managerial compensation in 2009 and 2010. In 2009, he received total compensation of \$97,763 – significantly more than was anticipated by the court's 2010 findings. CP 137. In 2010, he received total compensation of \$78,210, not including profits. CP 139. These figures were based on the tax returns produced by Harjo. CP 139.

For 2010, the court also explained that “Ocho was entirely within the control of Harjo. Harjo should therefore be tasked with the burden of

producing a profit from the business.” CP 139. Since the business income and expenses were subject to manipulation by Harjo, he should have produced sufficient documentation to show that the accounting was not improperly manipulated. CP 139.

(The court also noted that it did not intend for Ms. Hanson to receive additional funds for 2009 and 2010, as she had requested.) CP 138-40.

ARGUMENT AND ANALYSIS

- 1. The trial court did not refuse to clarify the compensation due to Harjo for his labor in running Ocho on his own from June 2009 to December 2010; instead, Judge Spector did clarify her findings by explaining that she did not intend to award additional managerial compensation. In any event, Harjo was fully compensated for both years at a level higher than his replacement value.**

Tasked with clarifying the question of the compensation due to Harjo for his labor in running Ocho on his own for a year and a half, Judge Spector did not “refuse to clarify the question,” as alleged by Harjo. She noted that “not everything had to be 50/50.” RP 18. She clarified that “this was not an overpayment. This is what the court’s equitable powers has a right to do. I don’t look at it as a mathematical error.” RP 19. In her written findings, she noted that “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.

Furthermore, in her written findings, Judge Spector noted that Hanson was assigned a higher tax burden for 2009. CP 138-9. She furthermore calculated the amounts that Harjo received, finding that he had not only been compensated for more than \$75,000, he had been overcompensated for both 2009 and 2010. CP 137-40.

The trial court therefore directly answered the question posed by the court of appeals: it did not intend for Harjo to receive additional compensation or offsets; and even if it had, he received more than had been anticipated. Therefore, no additional funds were due to him.

2. It was not an abuse of discretion for the trial court to refuse to enter a judgment for managerial compensation for Harjo.

a. Allocation of property following a committed, intimate relationship is within the discretion of the trial court, including an allocation other than 50/50.

Following a committed, intimate relationship, the court has the discretion to divide property acquired during that relationship in a “just and equitable” manner. *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995); *In re Marriage of Lindemann*, 92 Wn. App. 64, 69, 960 P.2d 966 (1998). Property acquired during a committed, intimate relationship is subject to equitable division and, since *Lindsey*, the court

may apply the principles of community property “by analogy.” Kenneth W. Weber, 20 Washington Practice, Family and Community Property Law, §57 (1997); *Pennington v. Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000), citing *In re Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984).

The distribution does not need to be equal. *Lindsey*, 101 Wn.2d at 304; *In re Relationship of Long and Fregeau*, 158 Wn. App. 919, 928-29, 244 P.3d 25 (2010). “A trial court is not required to place the parties in precisely equal financial positions at the moment of dissolution.” *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45 (2013).

The Court of Appeals reviews the trial court’s distribution for abuse of discretion. *In re Relationship of Long and Fregeau*, 158 Wn. App. at 928.

Here, the court did equally allocate the *known* assets 50/50, pursuant to the intent expressed in the Findings of Fact and Conclusions of Law. CP 17 (lines 17-19): “I was just trying to even out what we had as real numbers at the time.” RP 21. However, there were figures that the court did not balance, such as 2009 compensation, and figures that the court lacked, such as the 2010 bank statements for Ocho.¹ So while the

¹ The 2010 bank statements for Ocho were not produced in 2015, either.

“real numbers” were balanced, other figures were not specifically determined or resolved.

b. Here, the court divided the known assets equally, and considered – but did not separately allocate – the value of managerial compensation in 2009.

The court set forth language which indicated it well knew what Harjo had received in 2009. CP 19-22. However, while providing that Harjo should be compensated for his efforts, the court specifically did *not* create a separate right to any specific compensation. The language only provides that the parties’ compensation should be considered. CP 22 (FFCL, line 13). This is entirely appropriate. The future earning potential of a party “is a substantial factor to be considered by the trial court in making a just and equitable property distribution.” *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007), quoting *In re Marriage of Hall*, 103 Wn.2d 236, 248, 692 P. 2d 175 (1984).² The trial court is required to consider all relevant factors. *In re Marriage of Williams*, 84 Wn. App. 263, 927 P.2d 679 (1996).

The unequal draws of the parties are relevant to how their other property should be divided. Judge Spector did consider the unequal draws, but deliberately created no additional right to offset or

² However, future earning potential may not be treated as an asset. *In re Marriage of Hall*, 103 Wn.2d 236, 692 P.2d 175 (1984).

compensation to balance out the inequality. This was a decision within her broad discretion. *In re Marriage of Olivares*, 69 Wn. App. 324, 328, 848 P.2d 1281 (1993).

c. Even if the 2009 compensation was to be reallocated, Harjo has already been fully reimbursed.

Even if Harjo was entitled to some balancing of the 2009 compensation as a matter of law, he has already received more than the compensation the court would have intended.

According to the 2009 tax return for Ocho, the business enjoyed Ordinary Business Income of \$63,822. CP 166. In addition to this, the business made Guaranteed Payments to Partners of \$81,345. *Id.* Of this, \$33,941 was paid to Harjo (CP 184), and \$47,404 was paid to Hanson (CP 186). In addition to the \$33,941, Harjo also received Ordinary Business Income of \$63,822. The total compensation to Harjo was therefore \$33,941 + \$63,822, for a total of \$97,763. The court specifically found that Harjo received this in total compensation for 2009. CP 137. He has therefore already been compensated for the \$75,000 he feels he is owed.

Harjo argues that the 2009 Ordinary Business Income was already included in the value of the business. However, the business was valued on the basis of many factors, not just income. Other factors included the “history and nature of the business, the economic outlook of the United

States and that of the specific industry in particular, The book value..., the earning capacity of the company, ... Whether or not the firm has goodwill or other intangible value...” CP 52. For Ocho, other records reviewed include the business’s assets and depreciation schedule, accounts payable, the Profit and Loss statements for January through April of 2010, the lease agreement, and “other documents as requested.” CP 53. The business valuation was as of December 31, 2009, but the court heard testimony about the trajectory of the business in November of 2010, so the court’s decision was informed by the passage of an additional nine months, plus days of testimony. The court could reasonably find that the compensation which Harjo received in the form of payments to partners plus ordinary business income should be considered in addition to the value of the business itself.

d. Here, the court also did not intend to reallocate managerial compensation in 2010.

The language used by the court in its findings regarding 2010 is somewhat different than that used for 2009. Instead of providing that Hanson’s compensation be “considered,” the court found, “it is 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).” CP 20 [sic]. Of course, trial occurred in November

of 2010, and it was not known how much Harjo would be compensated for the entire year. Following the 2010 trial, the court also did not set up a mechanism for reallocation of 2010 managerial compensation, depending on whether he made more or less than the replacement value of his salary.

On remand, the court clarified that it did not intend to reallocate anything other than business profits in 2010. Since Harjo was solely in control of the business, it was incumbent on him to ensure that the business generated sufficient revenue to pay him. CP 139. Hanson should not have to compensate him if he chose to work less, or made poor business decisions. *Id.* “Harjo could simply refuse to work the business, making Hanson responsible for paying his salary for the year; this is not the result the court intended.” *Id.*

e. Even if the 2010 compensation was to be reallocated, Harjo has already been fully reimbursed.

As in 2009, Harjo was overcompensated for 2010. Combining the guaranteed payments to partners (\$66,371) with ordinary business income (\$11,839) created total compensation to Harjo of \$78,210. CP 192. This is more than the court anticipated his labor would be worth. CP 20. And again, the court made specific findings to this effect. CP 139.³

³ As set forth in Section 5(c)(vii), below, this figure is based on a mathematical error, since Hanson had been awarded half the profits from 2010, and the “profits” awarded to Hanson are included in the amounts granted to Harjo. However, since there was intent to reallocate 2010 managerial compensation, the error is harmless.

However, because the court did not intend to create a right to reallocate 2010 compensation, it denied Hanson's request for additional funds. CP 139. Had the total compensation to Harjo *not* been over \$75,000 in 2010, the court would also have denied his request that he be reimbursed by Hanson because a 50/50 division was not intended.

3. It was not an abuse of discretion for the trial court to refuse to vacate a 2013 judgment which did not compensate Harjo for disproportionate withdrawals in 2009.

In 2015, Harjo sought an additional credit of \$13,000 for the first five months of 2009, during which Hanson received \$47,000 from Ocho, and Harjo received only about \$34,000. Harjo argued that the court should correct this under CR 60(a) as a "clerical mistake." Judge Spector clarified, "I know one thing for sure was that money was not an overpayment. It's just, you know, not everything had to be 50/50." RP 18.

CR 60(a) is intended to correct a record to reflect the intention of the court or the parties. *In re Kramer's Estate*, 49 Wn.2d 829, 307 P.2d 274 (1957). CR 60(a) does not permit correction of judicial errors. *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). An error is "judicial" if the judgment, as amended, does not embody the trial court's intention, as expressed in the record at trial. *Id.*, *Marchel v. Bunger*, 13 Wn. App. 81, 84, 533 P.d 406 (1975).

Here, the trial court's expression of intent is consistent, both in its 2013 decision and in its 2015 decision which affirmed the 2010 and 2013 decisions. The same judge made all the rulings in this case. No ruling granted a dollar-for-dollar credit or offset for the \$13,000 difference in draws by the parties during the first half of 2009. Judge Spector clarified that "the money was not an overpayment." RP 18.⁴ There was no clerical error or scrivener's error, and the request to reform the judgment was therefore properly denied.

4. The trial court did not ignore its previously entered findings, but properly explained its reasons for not ordering that managerial compensation be reallocated.

Judge Spector did not ignore her findings. She did clarify that she did not intend to reallocate managerial compensation for either 2009 or 2010. The Findings and Decree were consistent, and consistent with her intent *not* to reallocate managerial compensation.

The 2010 findings provided that Harjo should be compensated for his work at Ocho in 2009. The findings also note that Harjo *was*

⁴ If the court *had*, in 2015, "corrected" the 2010 Decree to insert a credit, this would have constituted judicial error. In *Presidential Estates*, the trial court entered a new and different judgment on a CR 60(a) motion. While "the trial court may have sincerely believed that the additional relief it provided in the amended judgment could be implied from the spirit of the equitable remedy that it had crafted in the original judgment," there was no expression that the court intended *at the time of the original judgment* to grant that additional relief. Therefore, the judicial error could not be corrected under CR 60(a). *Presidential Estates*, 129 Wn.2d at 328.

compensated for his work at Ocho in 2009. However, Judge Spector made no finding that he had to receive exactly \$75,000. As her findings indicate, she considered the unequal amounts of compensation each party received in coming to her final decision.

In any event, based on Judge Spector's 2015 findings, Harjo was fully and fairly compensated for 2009. CP 146.

For 2010, Judge Spector similarly found that (a) she did not intend to reallocate managerial compensation, (b) she could not rely on the limited amount of records Harjo produced to determine his 2010 compensation, and (c) even based on the records he produced, he still was fully compensated. CP 144-46.

5. The trial court's June 2015 findings are supported by substantial evidence.

a. Where any reasonable view of the evidence substantiates the trial court's finding, the finding should be sustained.

"We cannot substitute our findings for those of the trial court where those findings are supported by substantial evidence. This is not only a matter of judicial policy, but is also a constitutional mandate. *Teratron General v. Institutional Investors Trust*, 18 Wn. App. 481, 596 P.2d 1198 (1977). ... We will not upset the trial court's interpretation of

the testimony when any reasonable view of the evidence substantiates a questioned finding, as it does here. *Kaas v. Privette*, 12 Wn. App. 142, 145, 529 P.2d 23 (1974).” *Parsons Travel, Inc. v. Hoag*, 570 P.2d 445, 18 Wn.App. 588 (1977).

Evidence is substantial when there is a sufficient quantum of evidence "to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). So long as a finding is supported by substantial evidence, it does not matter that other evidence may contradict the finding. *Burrill*, 113 Wn. App. at 868. An appellate court does not review the trial court's determinations as to the credibility and persuasiveness of the evidence. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

b. The appellant's failure to provide a complete record forecloses review based on arguments that substantial evidence does not support a particular finding.

It is the appellant's burden to provide the court with all portions of the record necessary to review the issues raised on appeal. RAP 9.2(b). A party who argues that facts found by the fact finder were not supported by evidence must provide a complete record of the evidence on which the fact finder was entitled to rely. *Id.* Where the appellant fails to provide a verbatim report of proceedings, the findings of fact are deemed verities

and binding on appeal. *Morris v. Woodside*, 101 Wn.2d 812, 815, 682 P.2d 905 (1984).

Harjo makes various arguments regarding lack of substantial evidence, but provides only a partial record from the trial. The testimony of the parties themselves was not provided. Only a few of the many submitted exhibits were provided. It is therefore impossible for the Court of Appeals to analyze the total record with regard to managerial compensation, particular findings of fact, or the overall fairness of the verdict.

c. Nevertheless, the court's findings were supported by substantial evidence.

i. The 2009 and 2010 Managerial Compensation Findings Are Reasonably Based on the Business Tax Returns.

The trial court's decision regarding managerial compensation was supported by substantial evidence. The calculation of the amounts due to Harjo in 2009 and 2010 were supported by the Ocho tax returns. CP 164-213. Evidence at trial consisted of more than just the business valuation. Judge Spector recalled testimony from trial regarding "the fact that this was a very successful business," a "very viable, successful business, Ocho." RP 19, 22. Judge Spector may have heard testimony regarding the trajectory of the business, its growing prospects through 2010, and other

evidence regarding what constituted the value, independent from the basic earnings. As previously noted, the business valuation was not based solely on the earnings or book value of the business, but a variety of factors. CP 51-53. Judge Spector could reasonably find, based on the testimony at trial, that the value of the business should be considered separately from the earnings, profits, guaranteed payments to partners, draws, and other compensation Harjo received in 2009.

Judge Spector considered the fact that Harjo hired attorneys and covered his own living expenses during a time that he argued he took no draws from the company, creating doubt as to his claim. CP 138.

Without a complete record, it is impossible for the Court of Appeals to set aside a finding of the trial court based on a lack of substantial evidence. Here, there was sufficient evidence for the court to conclude that Harjo was compensated over and above the value of the business, based on the business tax returns.

ii. **Harjo's Lack of Full Disclosure at Trial, and on Remand, Is Supported by the Record.**

Again, without a complete record, it is impossible to determine what information was produced and not produced at trial, and what evidence was available to the trial judge to support her findings. Still, Judge Spector did recall what had been produced, particularly for 2010.

RP 8. The court's recollection of the suspicious circumstances during the time that Harjo was solely in control of the business is also persuasive. "I had very little evidence presented by Mr. Harjo as to how he got to that tax return. I didn't see any of the supporting documentation, and that was a concern to this court and it was suspect, and to this day he's had every opportunity to try to supplement and he's chosen not to do that and I can only assume that there's a reason for that, but I don't know what that reason is." RP 19. The court similarly found it suspicious that Harjo was able to pay attorneys and keep up with his bills during a time that he was supposedly taking no draws from the business. CP 138. Hanson had no control over business operations, documentation, or accounting from the time that she was excluded from the business in May of 2009. The court had previously found Harjo's testimony to lack credibility regarding the community home. CP 32. The lack of bank records and full production on Harjo's part was therefore supported by substantial evidence. While the court may have allowed Ocho's 2010 tax return to be sufficient to allocate profits in 2013 (at Hanson's invitation), this does not require that the court accept Ocho's 2010 tax return as sufficient to re-allocate managerial compensation, particularly when Harjo is the party seeking affirmative relief.

iii. **Harjo's Overcompensation Is Supported by Substantial Evidence.**

Harjo complains that the finding that Harjo was overcompensated is not supported by substantial evidence. He ignores the very tax returns he, himself, produced. CP 164-213. These returns were prepared with the numbers that Harjo provided to the accountant. The accountant did not verify the numbers. CP 164. The tax returns show Harjo's compensation, and constitute sufficient evidence for the court to determine the amount that should be due to him, if any.

As stated above, Mr. Weber's valuation included a number of factors, not just book value or earnings. The court was entitled to independently make a finding regarding the level of compensation that Harjo received, and also determine that it was considering that compensation independently of what the value of the business was. "[E]xpert opinions are not binding on a trial court." *State v. Toomey*, 38 Wn. App. 831, 837, 690 P.2d 1175 (1984); see also *In re Marriage of Magnuson*, 141 Wn. App. 347, 350, 170 P.3d 65 (2007). Judge Spector was not required to adopt Mr. Weber's opinion – expressed for the first time in Reply on Harjo's 2015 motion – that the business valuation included the compensation paid to partners in 2009. She could reasonably rely on the 2009 tax returns and other financial information before the

court to determine the amount of compensation Harjo received and was entitled to, which is exactly what she did.

iv. **Hanson’s Lack of Means of Self-Support Is Supported by Substantial Evidence.**

Again, without the complete record, it is impossible to challenge the sufficiency of the evidence. Nevertheless, following the 2010 trial, Harjo received a successful business. Hanson had no means of compensation, except working as a minimum-wage waitress. Just because she earned some minimal income doesn’t mean she was given a means of support. There is no contradiction in the record.

v. **Hanson’s Higher Tax Burden Is Supported by Substantial Evidence; Harjo’s Arguments Regarding Fairness Are Within the Trial Court’s Discretion.**

It is uncontroverted that Hanson received tax burdens greater than Harjo. While those higher taxes may be a result of her own choices, the question of fairness is one that lies with the trial court.

Harjo’s complaint is *not* that Hanson didn’t have an increased tax burden – she did, and this finding of fact is not controverted. His complaint is that the court should *not* have considered the fact, when in fact it did. However, “[T]he economic circumstances of each spouse upon dissolution [are] of paramount concern.” *In re Marriage of Olivares*, 69 Wn. App. 324, 330, 848 P.2d 1281 (1993). The court was *required* to

consider this fact, and the resolution of the fairness question is within the court's broad discretion. *In re Marriage of White*, 105 Wn. App. 545, 20 P.3d 481 (2001). It is clear that Harjo feels the result of trial is unfair; however, the fairness of the result is within the purview of the trial court (and is not challenged on appeal).

vi. **Harjo's Lack of Entitlement to Compensation for Disproportionate Draws Is Supported by Substantial Evidence.**

The question of whether Harjo is entitled to dollar-for-dollar compensation for the disproportionate draws in the first half of 2009 was not a question put before the trial court by the Court of Appeals on remand. The trial court did not rule that Harjo was entitled to offset for the disproportionate draws. Had the court made such a direct finding, then it would have been appropriate to address this in 2010, through a motion for reconsideration or appeal. Had the court erred in 2013 in its refusal to award an offset at that time, it would have been appropriate to remedy the omission through reconsideration or appeal. The only issue remanded to the court was that of managerial compensation.

Nevertheless, the court's decision is supported by substantial evidence. The court found that Harjo was entitled to compensation for 2009. CP 22. He received compensation in 2009. The court did not find that he was entitled to compensation equal to Hanson, or compensation

equal to his replacement value as a manager. Again, Harjo's complaint on appeal is not so much that the finding of fact is in error, but that "it's not fair." And again, fairness is a question for the trier of fact. *In re Marriage of White, id.*

Ironically, Harjo highlights the language in *Marriage of Lindeman*, 92 Wn. App. 64, 69, indicating that the court should distribute property acquired "through efforts extended **during the relationship.**" Brief of Appellant, at 37. If the court's jurisdiction extends only to the parties' efforts during the relationship, then Hanson should not be required to reimburse Harjo based on Harjo's work, business decisions, or accounting decisions after the relationship ended.

vii. **The Trial Court's Mathematical Error Regarding 2010 Profits Is Harmless.**

Hanson concedes that the court's calculation of the total compensation to Harjo in 2010 is mathematically in error, since it does not account for the fact that she was awarded \$5,919 in profits in 2010. Deducting this amount from the total compensation to Harjo of \$78,210 means that Harjo's actual, total compensation for 2010 was only \$72,291. If the court were going to grant additional compensation to him based on his value as a manager, then he would be entitled to $\$75,000 - \$72,291 = \$2,709$.

However, the court also noted that the business was entirely within Harjo's control in 2010. CP 139. He should therefore be tasked with producing a reasonable profit. *Id.* He had the ability to work less, if he chose to. *Id.* He could strategically time expenditures. And the court did not intend that Hanson be compensated if the business became much more successful than anticipated. *Id.*

While there does appear to be a factual error on this point, it is therefore harmless.

6. The trial court properly drew a negative inference against Harjo based on his lack of production and lack of credibility.

Harjo cites no authority for why the court's negative inference was improper. Contentions without support of authority need not be considered on appeal. RAP 10.3(a)(6); *State v. Giffing*, 45 Wn. App. 369, 376, 725 P.2d 445 (1986). Nevertheless, the court's negative inference was proper in this case.

Business income and expenses are subject to a high level of manipulation by the business owner. In a restaurant, an owner may choose to make a large liquor purchase right at the end of the fiscal year, which would dramatically reduce the business income by dramatically increasing the costs of goods sold. The owner may similarly time payment of employee bonuses, remodeling, and equipment purchases in

order to artificially adjust business income. Owner draws may be postponed until the following year, particularly when the owner is aware of the legal effect of a certain income. Through most of 2009 and all of 2010, the parties in this case were engaged in litigation, and Harjo was aware of the legal effect of his business decisions.

Cash may or may not appear on the books. Marsha Cote testified that “they must have lived off tips is all I could figure out because they drew very little out of the business. The business paid for things like their medical insurance, their car insurance, their phones.” Testimony of Marsha Cote, at 38. So the business provided benefit to the owner over and above the figures shown on the tax returns, Profit and Loss Statements, and Business Valuation. The Quickbooks records were different from the tax records. Testimony of Janet Gibb, at 25.⁵ Ms. Gibb relied on Harjo for accounting information. *Id.*, at 24, line 5. She also relied on Ms. Cote’s bookkeeping. *Id.*, at 26, line 5, and at page 28. She did no independent audit of the books. *Id.*, at 53, line 11. Contrary to his assertion on appeal, it is not 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.” Brief of Appellant, at 26.

⁵ “I might have made adjustments that are not reflected in Quickbooks.”

Ms. Cote could only account for the books until she was excluded from the business. The books were “a mess.” CP 22. Hanson did not have “complete access to Ms. Gibb,” (Brief of Appellant, at 28), and had no control over records produced by Harjo after June of 2009.

It is true that the court adopted the stipulation regarding the value of Ocho. But that does not end the inquiry regarding the books of the business and Harjo’s benefits in owning and running the company. Harjo’s ability to cover his living expenses and attorney’s fees was suspicious, given the lack of draws he made from Ocho. CP 138. For 2010, Harjo did not produce the business bank statements, which led Judge Spector to question the accounting. CP 138, RP 19. Judge Spector was also aware of the records that had and had not been produced at trial. “I don’t think I ever got complete tax returns on the business.” RP 9. Janet Gibb’s testimony was rife with questions about accounting irregularities and questions. Even Ms. Gibb conceded, “we can’t go through every single transaction that happened.” Testimony of Janet Gibb, at 55. On some disputed items, she would just “split it” or “I just kind of used a reasonableness test.” *Id.*, at 55-56. From May of 2009 forward, Harjo was exclusively in control of all records related to business income and expenses. “He was given every opportunity to provide that and he chose not to do it.” RP 29.

Under these circumstances, it is entirely fair for the judge to make a negative inference against Harjo, especially when, over four years later, he still had not produced more than a tax return to reflect the 2010 business income and expenses.

7. The Court of Appeals should not modify the trial court's decision, but should affirm the trial court in all respects.

Here, Judge Spector's decision is supported by the evidence, and fair and equitable under the law. She clearly answered the question posed by the Court of Appeals. Her findings of fact (with one harmless exception) are supported by substantial evidence. Her decision should be affirmed.

8. Since the trial judge followed the express instructions from the Court of Appeals, wisely instructed the parties on moving forward with their lives, and entered findings explaining her decision, there is no basis for assigning this matter to a different judicial officer.

"The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.' " *Sherman v. State*, 128 Wash.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988), cert. denied sub nom. *Milken v. S.E.C.*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d

1012 (1989)). The effect on the judicial system can be debilitating when "a trial judge's decisions are tainted by even a mere suspicion of partiality." *Sherman*, 128 Wash.2d at 205, 905 P.2d 355." *In re Marriage of Davison*, 112 Wn. App. 251, 48 P.3d 358, (2002).

As in *Davidson*, there is no evidence of bias or partiality on the part of Judge Spector, other than Harjo's dissatisfaction with her rulings in this case. Harjo has appealed nearly every decision made by Judge Spector, and has been mostly unsuccessful on appeal. His lack of success is not a basis for throwing out the verdict or assigning the case to a new judge on remand.

At some point, litigation must come to an end. "[T]rial courts are accorded great discretion in family law matters due to the need for finality and certainty." *In re Marriage of Neumiller*, 183 Wn.App. 914, 920, 335 P.3d 1019 (2014). The cost of litigation can swallow up the amount at issue, which does not benefit the parties or society as a whole. In the majority of cases that go to trial, one side feels the result was unfair. But there comes a time when the parties must move on. Judge Spector wisely suggested that this time has arrived. This does not show judicial bias; nor is it a basis for re-assigning this case. Judge Spector's comments were entirely appropriate. While Hanson also was not granted the relief she had

requested, she took Judge Spector's words to heart, and hoped for an end to litigation and the ability to move on.

Assigning this matter to a different judge would throw the parties back into the position they were in when litigation began in 2009. A new judge could not resolve a few discrete issues, when the fundamental test is whether the overall property distribution is fair and equitable. If the distribution varies from Judge Spector's intention by tens of thousands of dollars, then her overall vision of what is fair and equitable is not reflected in the final result. Therefore, the only possible resolution would be a new trial, de novo. This would not serve the interests of justice.

CONCLUSION

Harjo's appeal should be denied. Judge Spector's decision should be affirmed.

Respectfully submitted this 29th day of January, 2016.



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Attorney for Respondent Gelsey Hanson

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I, SEATTLE

ZACHARY HARJO,

Petitioner,

No. 73557-8-I

v.

PROOF OF SERVICE OF
BRIEF OF RESPONDENT

GELSEY HANSON,

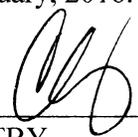
Respondent.

On this date, I personally caused a copy of the Brief of Respondent,
along with this Proof of Service to be hand-delivered to:

Mr. Joseph A. Grube
Breneman Grube, PLLC
1200 Fifth Avenue, Suite 625
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of
Washington that this is true and correct.

DATED this 29th day of January, 2016.



COTI WESTBY