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Court of Appeals No. 75166-2

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

CAROL LOUISE SILVI

Appellant

v.

PAUL GILBERT SILVI

Respondent

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Assignments of Error.....	2
1. The Superior Court erred by ruling that Ms. Silvi was only entitled to \$200,000 from Mr. Silvi's retirement account.....	2
2. The Superior Court erred by ruling that the value of Silvi Sports, Inc. was \$0.....	2
III. Issue Pertaining to Assignments of Error.....	2
1. Do the trial court's findings of fact support its conclusion that Ms. Silvi should only receive \$200,000 from Mr. Silvi's retirement account when the court reasoned that it would have to award more assets to Ms. Silvi due to: (a) adjust for the inappropriate level of spousal maintenance, (b) pay her the \$12,000 he already owed her under prior orders, and (c) to reimburse the community for funds her spent on secret residence?.....	2
2. Did the trial court distribute property in accordance with its finding that Ms. Silvi should be given a higher property award to compensate for Mr. Silvi's inability to pay adequate maintenance?.....	2
3. Did the trial court disregard evidence of the value of Silvi Sports, Inc.'s assets?.....	2
IV. Statement of the Case.....	2
V. Argument.....	9

A. Standard of Review	9
B. The trial court's sudden decrease in the amount awarded to Appellant is not support by its findings.....	10
C. The trial court erred by valuing Mr. Silvi's closely-held business at \$0.....	13
VI. Conclusion.....	17

TABLE OF AUTHORITIES

	<u>Page No</u>
<u>Washington Cases:</u>	
<i>Erection Co. v. Dep't of Labor & Indus.</i> , 160 Wn. App. 194, 248 P.3d 1085 (2011).....	10
<i>In re Marriage of Berg</i> , 47 Wn. App. 754, 737 P.2d 680 (1987)...	14, 15
<i>In re Marriage of Clark</i> , 13 Wn. App. 805, 538 P.2d 145 (1997)...	12
<i>In re Marriage of Hall</i> , 103 Wn.2d 236, 692 P.2d 175 (1984).....	14, 15 16
<i>In re Marriage of Horner</i> , 151 Wn.2d 884, 93 P.3d 124 (2004)....	10
<i>In re Marriage of Fahey</i> , 164 Wn. App. 42, 262 P.3d 128 (2011)...	10
<i>In re Marriage of Knight</i> , 75 Wn. App. 721, 880 P.2d 71 (1994)...	15
<i>In re Marriage of Larson & Calhoun</i> , 178 Wn. App. 133, 313 P.3d 1228 (2013).....	10
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	10
<i>In re Marriage of Lukens</i> , 16 Wn. App. 481, 558 P.2d 279 (1976)...	15, 16
<i>In re Marriage of Monaghan</i> , 78 Wn. App. 918, 899 P.2d 841 (1995).....	15
<i>In re Marriage of Muhammad</i> , 153 Wn.2d 795, 108 P.3d 779 (2005).	10
<i>In re Marriage of Thomas</i> , 63 Wn. App. 658, 821 P.2d 1227 (1991).....	14
<i>Johnny's Seafood Co. v. City of Tacoma</i> , 73 Wn. App. 415, 869 P.2d 1097 (1994).....	10

<i>Koher v. Morgan</i> , 93 Wn. App. 398, 968 P.2d 920 (1998).....	14
<i>Suther v. Suther</i> , 28 Wn. App. 838, 627 P.2d 110 (1981).....	15
<u>Revised Code of Washington</u>	
RCW 26.09.080.....	10
<u>Other</u>	
CR 59.....	11
KCLR 59.....	11
J. Crane and A. Bromberg, Law of Partnership § 84 (1968).....	15

I. INTRODUCTION

Findings of Fact are important. They are so important, in fact, that they must manifest themselves in the final conclusions of law. In other words, it is axiomatic in our court system that the findings of fact must lead to and support the conclusions of law.

Here, the trial court made numerous findings that justified a disproportionate division of property in favor of the wife: the husband earned hundreds of thousands of dollars in income every year, the wife did not work for the majority of the marriage by agreement, the husband squandered community assets on at least one secret five-year affair, and, in the end, the husband was not able to pay appropriate maintenance, so a disproportionate property award would be necessary to support the wife. The trial court even concluded that the property division should be unequal, with more going to the wife. Yet, when the trial court issued its final orders, the property division was split nearly evenly between both spouses, contrary to all of its findings.

Additionally, when a court values a closely held business, it should assess all of the business' assets, both tangible and intangible. Here, the trial court considered only cash flow, disregarding evidence that there was valuable goodwill and a history of able buyers willing to pay a large sum for a small stake in the business.

The trial court abused its discretion in its final division of property between Paul and Carol Silvi. This Court should reverse the trial court and remand for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by ruling that Ms. Silvi was only entitled to \$200,000 from Mr. Silvi's retirement account. Findings of Fact & Conclusions of Law, Exhibit A, No. 32; Findings of Fact & Conclusions of Law, Exhibit B.
2. The Superior Court erred by ruling that the value of Silvi Sports, Inc. was \$0. Findings of Fact & Conclusions of Law, Exhibit A, Nos. 24-25.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do the trial court's findings of fact support its conclusion that Ms. Silvi should only receive \$200,000 from Mr. Silvi's retirement account when the court reasoned that it would have to award more assets to Ms. Silvi due to: (a) adjust for the inappropriate level of spousal maintenance, (b) pay her the \$12,000 he already owed her under prior orders, and (c) to reimburse the community for funds her spent on secret residence
2. Did the trial court distribute property in accordance with its finding that Ms. Silvi should be given a higher property award to compensate for Mr. Silvi's inability to pay adequate maintenance?
3. Did the trial court disregard evidence of the value of Silvi Sports, Inc.'s intrinsic assets?

IV. STATEMENT OF THE CASE

Appellant Carol Silvi married Respondent Paul Silvi on September 4, 1987, in Bloomfield Hills, Michigan. CP 838. In 1993, Mr. Silvi accepted a job from KING TV, and relocated from Michigan to Seattle. CP 841. Ms.

Silvi, then a judicial assistant, quit her job and moved to Seattle to join Mr. Silvi. CP 841. Per the parties' agreement, Ms. Silvi did not seek employment after the Silvis moved to Seattle. CP 841; RP 497. From 1994 until June 2015, Ms. Silvi acted as a full-time stay-at-home mother to the couple's three children. RP 4-538.

Paul Silvi is the sports anchor for KING TV in Seattle, and earns a significant income. CP 841. He is paid an annual six-figure salary, plus "talent fees", equal to 110% of his per diem income, for any days worked beyond the normal five-day workweek. CP 843; RP 44. From 2008 to 2014, his earnings were as follows:

2008:	\$307,195
2009:	\$292,523
2010:	\$315,229
2011:	\$321,702
2012:	\$315,415
2013:	\$336,185
2014:	\$324,727

Ex. 179; CP 842.

Not until the older children were well into their teens did Ms. Silvi seek some outside employment. Ms. Silvi was interested in fitness instruction and received a considerable amount of training to become a certified instructor. CP 842. She currently works part-time at Tahoma Athletic Club, where she has worked for the last several years, earning between about \$4,000 to \$12,000 per year. CP 842; Ex. 179. Due to her long absence from

the workplace, Ms. Silvi's "financial resources are not enough for her to be able to meet her needs independently," and she is unlikely to earn more than \$40,000 per year. CP 849.

In 2006, Mr. Silvi and David Chamberlain created Silvi Sports, Inc., a corporation for the sale of a portable soccer goal invented by Mr. Silvi. RP 106. Mr. Silvi used his fame as a local sports personality to market his product, including bringing it to the attention of professional athletes, such as Jay Buhner of the Seattle Mariners. RP 476. While initially a partnership, shares of the company have been sold to various investors. On October 10, 2014, while the dissolution was proceeding, Mr. Chamberlin wrote Mr. Silvi a check for \$20,000 to purchase 2% of his interest in the company. On April 14, 2013, Mr. Chamberlin again wrote a check for \$20,000 to purchase another 2% of Mr. Silvi's holdings. Ex. 186. The company currently maintains an inventory of anywhere between 50 and 400 goals. RP 106-07. Mr. Silvi has sold some of the inventory on various occasions, attending soccer tournaments and setting up displays at Costco. RP 108, 600. Currently, Mr. Silvi owns 41% of Silvi Sports, Inc. RP 107; CP 846.

In 2008, Mr. Silvi started having an affair¹ with a woman named Sally Miller. CP 842. In January 2010, Mr. Silvi began renting an apartment and secretly used it as a second residence, with Ms. Miller joining him in 2011. CP 842. Over the next five years, Mr. Silvi continued to rent various apartments, unbeknownst to Ms. Silvi. To fund his covert affair, Mr. Silvi diverted a portion of his income into a secret, separate bank account. CP 844; RP 2-254. Mr. Silvi incurred and paid for significant expenses for his secret residences, using community funds, without the knowledge or consent of his wife. CP 845; RP 255-57. As a result, “the Silvis neither lived a lavish life style nor were able to save any money.” CP 844. In total, Mr. Silvi spent at least \$46,514.50 in community funds on rent alone to further his affair with Ms. Miller. Exs. 44-46, 48, 230.

As a benefit of his employment with KING TV, Mr. Silvi maintained a 401(k) and a pension. At the time of trial, the pension was worth approximately \$60,000, \$50,000 of which was community property. CP 846. As of June 30, 2015, the net worth of the 401(k) was \$647,011.71. CP 845. Of this amount, the majority, \$618,651.61, was community property. CP 846.

¹ His second.

Although he had a secret second residence, Mr. Silvi continued to live primarily at the family home, spending nights there, until fall 2013. CP 843. Mr. and Ms. Silvi formally separated in September 2013. CP 838. Mr. Silvi filed for dissolution on June 2014. CP 1-6.

The dissolution trial in October 2015, spanned five days, with testimony from numerous witnesses. Following the trial, the court sent both of the parties an email dated March 3, 2016, with a draft of its orders and findings attached. CP 854-77. In this draft, the trial court awarded Ms. Silvi \$300,000.00 out of Mr. Silvi's 401(k). CP 877. The trial court issued its final written order one week later. CP 840. Inexplicably, the trial court had decreased its award to Ms. Silvi by \$100,000.00, without any explanation or without amending any of the findings of fact. CP 837-53.

Pertinent to this appeal, the trial court's draft and final orders included the following findings of fact:

10. In March 2012 Mr. Silvi signed a new three-year employment agreement which provided for a base annual salary from October 2011 through September 2014 of:

2011: \$279,877

2012: \$285,474

2013: \$291,183

CP 843.

11. Mr. Silvi's income from KING TV was not limited to his base salary: he earned additional pay equal to 110% of his average per diem income whenever he worked more than five days a week, virtually all spent covering the

Seahawks during the NFL season. In 2013 he was paid over \$51,000 for that additional work, Exh. 1, and in 2014 after Gannett purchased the station and began imposing budgetary restrictions he was still paid over \$35,000 in addition to his \$291,183 salary. *Exhs. 2 and 3.*

CP 843.

15. Although Mr. Silvi was earning a substantial amount of money, the Silvis neither lived a lavish lifestyle nor were able to save any money. Feeding, clothing, and providing automobiles to three children was expensive, and the family residence was relatively expensive to maintain. In addition, Mr. Silvi spent significant community funds to maintain his second, secret residence.

CP 844.

22. Mr. Silvis's 401(k) was worth \$647,011.71 as of June 30, 2015. *Exh. 16.* It was worth \$550,126.00 at the end of 2013, just after separation. In 2014 and the first half of 2015, a net total of \$25,485.35 was contributed to the 401(k) by KING TV and by Mr. Silvi. The pertinent increase percentage for 2014 was 11.28%. The net contributions after separation, and the increase in their value total \$28,360.10, all of which is Mr. Silvi's separate property. The remaining \$618,651.61 is community property.

CP 845-46.

24. Mr. Silvi's Interest in Silvi Sports, Inc. Many years ago Mr. Silvi developed a portable soccer net that he hoped would make him a substantial fortune. However, it has not been a success. The rights to distribute the product are now owned by a Washington corporation he formed called Silvi Sports, Inc., in which Mr. Silvi contributed \$500 and his concept (his patent for the product expired a long time ago) in return for what is now a 41% interest in the company. In 2013, the most recent year Silvi Sports filed a tax return, it reported gross sales of \$22,270, cost of goods

sold of \$18,146 and other expenses of \$21,541, for an operating loss of \$17,417. *Exh. 132.*

CP 846.

25. The company's only asset is its inventory, consisting of approximately 50 poorly constructed nets, and an undetermined number (substantially fewer than 350) that were better produced. The only credible evidence indicates that the cost of operating Silvi Sports, Inc. each year is and will continue to be the same or more than the sales it generates. The Court therefore finds the company has no net value, and awards to Mr. Silvi his 41% interest in it.

CP 846.

30. Mr. Silvi also owes Ms. Silvi approximately \$12,000 for various matters arising out of court orders in this case: \$5,000 for Ms. Silvi's attorneys' fees, \$2,100 for Wells Fargo late fees, \$1,000 for September maintenance, and his one-half share of family expenses incurred by Ms. Silvi. This debt is to be considered resolved by the court's distribution of assets.

CP 847.

32. **Allocation of Assets.** Mr. Silvi's separate property will be awarded to him. The community property will be distributed unequally, in favor of Ms. Silvi. The allocation is reflected on Exhibit B. In this long term marriage, the court strives to treat the parties equally, and to leave them in [sic] similar circumstances. In order to do that, the court will award maintenance to Ms. Silvi as set forth below. However, the current cash-flow situation means that it would be difficult for Mr. Silvi to pay monthly maintenance at an appropriate level. The court will award more assets to Ms. Silvi in recognition thereof. This is fair and equitable going forward, and also recognizes the community funds Mr. Silvi secretly spent on non-community purposes; those expenditures played a

significant role in leaving the parties in their current less-than-ideal financial circumstances.

CP 847-48.

The trial court awarded the house to Ms. Silvi and assessed the value of its equity at \$325,000. CP 853. Mr. Silvi was awarded all of his \$60,000 pension. CP 853. Mr. Silvi's 401(k) was ultimately divided \$200,000 to Ms. Silvi and \$447,012 to Mr. Silvi. CP 853. Ms. Silvi was also awarded maintenance on a decreasing scale, starting at \$5,000 per month. CP 850. However, the trial court expressed its doubts as to whether the full amount of maintenance would actually be paid. CP 848.

Ms. Silvi moved for reconsideration, challenging the court's sudden alteration of the 401(k) division, as well as the court's valuation of Silvi Sports, Inc. at \$0. SUPP CP ___ (sub #190)² The court denied Appellant's motion.³ CP 910-12. Ms. Silvi timely filed a notice of appeal. SUPP CP ___ (sub #199).

V. ARGUMENT

A. Standard of Review

This Court "review[s] findings of fact to determine if they are supported by substantial evidence and whether the findings, in turn, support

² Appellant has filed a supplemental designation of clerk's papers, which includes her motion for reconsideration and notice of appeal.

³ The trial court granted Appellant's motion to the extent that it asked for clarification regarding the effective date of spousal maintenance. CP 910-12.

the conclusions of law and the judgment.” *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 418, 869 P.2d 1097 (1994). “‘Substantial evidence’ exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). All evidence and reasonable inferences must be construed in favor of the prevailing party. *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011).

B. The trial court’s sudden decrease in the amount awarded to Appellant is not supported by its findings.

All community and separate property brought before the Court is to be divided in a just and equitable manner. RCW 26.09.080. The trial court has broad discretion to determine what is just and equitable. *In re Marriage of Larson & Calhoun*, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013). “A property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion.” *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). A court abuses its discretion if the facts do not support its conclusions. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)) (“A court's decision

... is based on untenable reasons if ... the facts do not meet the requirements of the correct standard.”).

The trial court found that “[t]he community property will be distributed unequally, in favor of Ms. Silvi.” The trial court further found that it would be difficult for Mr. Silvi to make appropriate monthly maintenance, so “[t]he court will award more assets to Ms. Silvi in recognition thereof.” Appellant does not challenge either of these findings. However, Ms. Silvi challenges the court’s conclusion that “[t]he allocation is reflected on Exhibit B.” CP 847-48. That may have been the case in the trial court’s “draft” version, but not in its final written decision.

After the trial court first came to its decision, the court notified the parties via email, with its draft decision attached. In this draft, the trial court allocated Mr. Silvi’s 401(k), \$300,00 to Carol Silvi and \$347,012 to Paul Silvi. CP 877. The trial court appears to have reconsidered its original decision by substantially reducing the assets awarded to Ms. Silvi (making a \$100,000 change in the award of the 401k from \$300,000 to \$200,000).

There was no newly discovered or newly submitted evidence that would permit the court to reconsider its ruling as contemplated by CR 59. Also, procedurally, there was no call for a response to the reconsideration request as would be mandatory before reconsidering a decision. KCLR 59.

Aside from any procedural irregularities, the court's factual findings do not fit with these new numbers. Exhibit B shows the distribution of assets awarded to both parties. CP 853. Ms. Silvi was awarded the equity in the family home, valued at \$325,000.00, plus \$200,000.00 from Mr. Silvi's 401(k), for a total sum of \$525,000.00. CP 853. Mr. Silvi was awarded the remainder of the 401(k) – \$447,012.00 – plus his \$60,000.00 pension, for a total sum of \$507,012.00. CP 853. Thus, under the trial court's property division, Ms. Silvi will receive only \$18,000.00 more than Mr. Silvi; a small sum compared to the sum total of all marital assets. Furthermore, since the trial court "considered" Mr. Silvi's \$12,000.00 pre-trial debt as "resolved" by its property award, CP 847, Ms. Silvi's net gain is actually only \$6,000.00. This is an equal property division,⁴ not an unequal one favoring Carol Silvi.⁵

When one considers the nature of the assets awarded to each party, it becomes apparent that Ms. Silvi is actually disadvantaged by this property distribution. The bulk of the court's award to Ms. Silvi is the equity in the family home – an asset not easily converted to cash. The only way for Ms.

⁴ Specifically, this is not even a 51%/49% split.

⁵ If the Court also accounts for the money that Mr. Silvi spent funding his affair, the net award actually tips in Mr. Silvi's favor, by more than \$40,000.00. See *In re Marriage of Clark*, 13 Wn. App. 805, 808, 538 P.2d 145, review denied, 85 Wn.2d 1025 (1997) ("The dissipation of marital property is as relevant to its disposition in a dissolution proceeding as would be the services of a spouse tending to increase as opposed to decrease those same assets.").

Silvi to convert the home's equity in to cash is to sell the home, after which Ms. Silvi would still need to find a new residence. Any cash realized from the sale of the home is likely to go straight into another home, rather than remaining a liquid asset that Ms. Silvi can put towards her other living expenses. Thus, under the trial court's award, Ms. Silvi really only has about \$200,000 in usable assets.⁶ This does not fit the trial court's finding that Mr. Silvi's inability to pay adequate maintenance should be made up for in the award of assets.

A court cannot find, repeatedly, that one party is entitled to a greater portion of the assets and then allocate the property in equal shares. In other words, the court cannot say one thing and do another. Yet, that is precisely what happened here. The trial court's property division was an abuse of discretion that should be reversed by this Court.

C. The trial court erred by valuing Mr. Silvi's closely-held business at \$0.

The trial court further erred by valuing Mr. Silvi's business, Silvi Sports Inc., as completely worthless. The trial court explained how it reached this number as follows:

In 2013, the most recent year Silvi Sports filed a tax return, it reported gross sales of \$22,270, cost of goods sold of \$18,146 and other expenses of \$21,541, for an operating loss of \$17,417. *Exh. 132.*

⁶ If that, given the penalties that may be associated with withdrawal.

25. The company's only asset is its inventory, consisting of approximately 50 poorly constructed nets, an undetermined number (substantially fewer than 350) that were better produce. The only credible evidence indicates that the cost of operating Silvi Sports, Inc. each year is and will continue to be the same or more than the sales it generates. The Court therefore finds the company has no net value, and awards to Mr. Silvi his 41% interest in it.

CP 846. The trial court's method of valuation in determining the net worth of Silvi Sports, Inc. is improper for various reasons.

Courts have broad discretion in valuing property and in picking a valuation date. *Koher v. Morgan*, 93 Wn. App. 398, 404, 968 P.2d 920 (1998), *review denied*, 137 Wn.2d 1035 (1999). However, trial courts "must set forth on the record which factors and methods were used in reaching its finding" as to the value of a business. *In re Marriage of Hall*, 103 Wn.2d 236, 247, 692 P.2d 175 (1984). Any uncertainty as to values of assets or proceeds received from assets should be resolved against a spouse who fails to provide records in his or her control. *In re Marriage of Thomas*, 63 Wn. App. 658, 664, 821 P.2d 1227 (1991).

Here, Mr. Silvi presented virtually no evidence regarding the value of his business. The only evidence he did produce were records of the business' tax records. A business' cash flow is not determinative of its overall net worth. *In re Marriage of Berg*, 47 Wn. App. 754, 758, 737 P.2d 680 (1987) (book value does not reflect overall value of assets).

The trial court's valuation of Silvi Sports, Inc. also fails to account for its inventory, its investments, and intangible business assets, such as goodwill. Goodwill, in addition to the physical assets of the business, is a business asset subject to division upon dissolution. *Id.* 103 Wn.2d at 238–39. In *In re Marriage of Monaghan*, 78 Wn. App. 918, 926, 899 P.2d 841 (1995), the Court of Appeals held, “Goodwill is an intangible asset of a business representing the expectation of a continued public patronage. It cannot be disposed of apart from the business as a whole.” (citing *In re Marriage of Knight*, 75 Wn. App. 721, 726, 880 P.2d 71 (1994)).

Valuation of goodwill is a question of fact. *Suther v. Suther*, 28 Wn. App. 838, 627 P.2d 110 (1981). Goodwill has been defined by Washington courts as:

a benefit or advantage “which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.”

In re Marriage of Lukens, 16 Wn. App. 481, 483-84, 558 P.2d 279 (1976) (quoting J. Crane and A. Bromberg, *Law of Partnership* § 84 (1968)). It is not the same as earning capacity. *Hall*, 103 Wn.2d at 241.

By valuing the business at \$0, the trial court necessarily found that Silvi Sports, Inc. has no attached goodwill. This is not supported by the facts. Mr. Silvi is a television sports personality, and is widely recognized throughout the area. He has attended multiple soccer tournaments to promote his product, selling an average of five to ten goals per tournament. RP 1-108. He even managed to obtain input on his product from professional athletes. RP 4-476. With his “common celebrity,” *Lukens*, 16 Wn. App. at 484, the goodwill of Mr. Silvi’s business is clearly not zero.

The Court in *Hall* recognized five ways that a trial court could value a business’ goodwill. Of those five, two are especially relevant here: the market value approach, and the buy/sell agreement approach. The market value approach values a business’ goodwill based on “what fair price would be obtained in the current open market if the practice were to be sold.” *Hall*, 103 Wn.2d at 245. The buy/sell agreement approach is essentially the same, except that in this instance, there has been an actual completed sale. *Id.* at 246.

Ms. Silvi presented records of not one, but two recent sales of shares in Silvi Sports, Inc. Ex. 186. In both transactions, the parties valued 1% of the company at \$10,000.00. Ex. 186. At the very least, this evidence demonstrates that the goodwill of the business has *some* value. After all, who would spend \$40,000 for a tiny share of a worthless business?

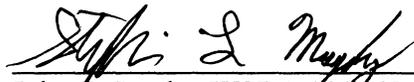
This Court should remand this matter with instructions to the trial court to consider all of Silvi Sports, Inc.'s assets, including its goodwill.

VI. CONCLUSION

Due to Mr. Silvi's significant income, his dissipation of community assets, and Ms. Silvi's limited earning potential, the trial court found that it should distribute the couple's property unequally, in favor of Ms. Silvi. However, this was not what happened when the trial court actually divided the assets. This is a rare case where the findings of fact do not support the court's ultimate conclusion, and error which this Court should remedy.

Further, the trial court erred by valuing Silvi Sports, Inc. at \$0, where the evidence showed that the business had some value in its intangible assets. Accordingly, this Court should REVERSE the decision of the trial court, and remand for further proceedings.

DATED this the 12th day of August, 2016.



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CERTIFICATE OF SERVICE

I certify that I caused one copy of the foregoing Opening Brief of Appellant to be served on the following parties of record and/or interested parties by E-mail and ABC Legal Messenger, delivery to the same to the below named attorneys as follows:

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Dated this 12th day of August, 2014, at Auburn, Washington.


Jennifer Toderashko

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