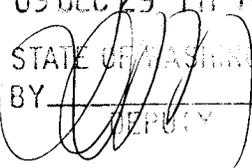


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DIVISION II

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STATE OF WASHINGTON  
BY 

DEPUTY

No. 37652-1-II  
COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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DAVID A. BLACK,

Appellant/Plaintiff,

vs.

PAULA L. EINSTEIN,

Respondent/Defendants

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**APPELLANT'S REPLY BRIEF**

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## **I. Introduction**

Using Respondents own writings, Appellant will show that they are entitled to reversal. The judgment entered ignore the very evidence the trial court demanded, in November, 2006, that the parties bring to trial: an accounting. Appellant submitted Ex. 76, the only accounting, which showed what Respondent admits: the parties bought all their real estate from funds they co-mingled in two accounts, on which they both had signature authority. The first purchase was made with co-mingled funds from an insurance settlement, and all subsequent purchases (three more pieces of real estate were acquired), were made with the parties' co-mingled funds. Their respective contributions to the co-mingled accounts were relatively equal. Ex. 76, 103.

Respondent invites this Court to do what it successfully urged the trial court to do: hate David Black because he had sex outside his relationship with Paula Einstein. Respondent hopes to fuel the fire of prejudice in this Court which drove the process and outcome in the trial court. The parties' relative shares of the assets acquired during the relationship should be based upon their relative contributions during the relationship: 50/50. David Black should not be punished as requested.

This Court should reverse, and order the real property split 50/50; or remand for a new trial before a visiting Judge.

## II. ARGUMENT

Appellant will not repeat the arguments or citations to the record made in the previous brief. However, the only accounting evidence submitted at trial shows the parties contributed funds equally to the co-mingled accounts they maintained for over at least 10 years (Respondent admits ten years of meretricious relationship, Appellant contends there were 14 years). Ex. 76, 103. From these co-mingled accounts all the parties' real property was acquired, paid for and improved.

Respondent relies on the trial court's statement that it was impossible to "accurately" determine the contributions of the "community" to the real property. Page 12, Response. But Respondent goes on to acknowledge that "the parties used two bank accounts, the Sterling account and the Wells Fargo account, to pay the mortgages and all payments to operate the farm and the horse business. Both parties deposited their outside earnings into these accounts. Both Black and Einstein worked on the property and contributed their labor to the farm and horse raising business." Page 12, 13, Response. See also Ex. 76, 103.

This is a critical admission. Co-mingled funds bought all four properties. The accounting shows the cash contribution from each party was virtually equal. Ex.76. Sweat equity favored David Black, who was there all year long, 1994 to 2006, while Respondent was half time.

Although Respondent must discredit the Lonnie Rich accountings, Respondent can only do so by the same faulty analysis used by the trial court: "Since I don't believe David Black, I don't believe his expert." Lonnie Rich was able to reconcile every entry for cash in or out of the co-mingled banking accounts to a banking record. Ex. 76, 103. He did several analysis in order to re-but Respondent's criticism: he did cash and sweat equity; cash alone; and did it each way with both being responsible for debt, or for Paula only being responsible for debt (the position claimed by Paula). No matter how the cake was cut, the parties were within a few percent of 50/50; sometimes Black ahead, sometimes Einstein ahead.

On this record there was no dispute, because there was no contrary evidence. Only the Lonnie Rich accountings fulfilled the trial court's demand for an accounting, and these accountings showed the parties were equal in contribution to acquisition. Ex 76. In order to ignore this un-rebutted evidence the trial court had to discredit Lonnie Rich, a reputable CPA in Aberdeen: the accounting evidence was rejected because it was offered by David Black. The Lonnie Rich accountings did not depend upon the veracity of David Black's testimony, except sweat equity which was nearly equal anyway. The Lonnie Rich accountings were based upon bank records, available to both sides. Un-rebutted bank records show actual cash contributions to the co-mingled accounts were almost equal.

The real property was acquired by use of funds from co-mingled accounts to which the parties contributed equally. Ex. 76, 103. The real property should have been split equally. Any other result is driven by prejudice and not by evidence or law.

The attempt to reconcile the outcome by saying the meretricious community had to pay rent begs the question. If it was the real owner it would not have to pay rent. But more importantly, if it had to pay rent, such rent would be chargeable to each party equally, and hence would not change the 50/50 outcome driven by the un-rebutted relative contribution analysis at all. If the parties contributed equally to the acquisitions, and the properties so acquired are entitled to a credit to come from each party equally, the relative share of each party in each property does not change.

Respondent wants to claim that the meretricious relationship terminated upon Anja Wrede becoming pregnant. It did not. The record is clear: Black and Einstein lived together another year thereafter, and even considered adopting the child, which Ms. Wrede would not accept.

Respondent offered e-mails of Anja Wrede, admitted over objection (see footnote 8, Opening Brief), which show that Black and Wrede had a relationship before she became pregnant. One would assume so. These e-mails served no other purpose than to further inflame the already angry trial court, and they are offered here for the same purpose.

Respondents says that the incidents in which the trial court treated the parties differently were minimal. They were anything but minimal.

The false insurance claim that resulted in the commingled down payment was filed by Einstein, but the trial court excused her by saying that she was influenced to act so by Black. Then the trial court cited that very behavior in the litany of behaviors upon which it based its adverse finding of credibility against Black.

Likewise, the parties' practice of reporting Black's outside income on Einstein's tax return, as if they were a married couple filing jointly, was a decision made by both parties, yet the trial court excused Einstein's part in it, saying she was somehow not responsible, but Black was. Again the trial court cited that very behavior in the litany of behaviors upon which it based its adverse finding of credibility against Black.

The trial court also looked to Black's extra "marital" affairs to find fault, upon which to find lack of credibility, upon which to disregard evidence offered by Black and his experts, upon which to base this one sided outcome. RCW 26.09.080 applies in both marriage dissolution, and in distributing assets of a meretricious relationship. The trial court should not have penalized Mr. Black: "the court shall, *without regard to marital misconduct*, make such disposition of the property and the liabilities of the parties...as shall appear just and equitable...." RCW 26.09.080

The trial court emphasized how angry it was at Black for taking his own property with him when he was evicted, as well as jointly owned property. This was the basis of its contempt order, which the trial court held over Black's head, threatening jail time, and fines of hundreds of dollars a day, all the way through this "fair" trial. Yet when Paula Einstein admitted a much larger violation, she sold jointly owned property (three expensive horses, hundred of bales of hay), and removed additional property to her other ranch in California, all in violation of the same order upon which Black was held in contempt, the trial court turned a blind eye.

Respondent wants to claim that Black always acted unilaterally. From the November 2, 3 hearing date onward, the trial court put Einstein and her attorney in charge. Anything Black wanted, even if it was his, had to be cleared through Einstein. Scott Campbell's testimony was clear. No matter how many times he submitted requests in writing to Respondent and her trial counsel, he could not get a response. Black provided a list of items he sought permission to remove to his counsel on or before 11/30/06, who in turn provided it immediately to opposing counsel. Einstein did not respond until after the 11/30 deadline. RP 7/25/07, pg. 130, lns. 1-24; pg. 138, lns. 1-19. Ex. 73; Ex. 153. Black's then attorney told Black if he had to take items by necessity, they would seek post facto approval. RP 7/25/07, pg. 134, lns. 18-25; pg. 135, lns. 1-3.

In February, Einstein sought and received a contempt order. At the contempt hearing in February, the trial court ceded its authority to Einstein. “They’re going to call the shots. Anything that they want back, if they want everything back, it all has to be returned.” RP 2/09/07, pg. 38, lns. 21-23. With authority comes responsibility, and Einstein did not wield that ax gently or fairly. She consistently refused to respond to Black or his attorney, Scott Campbell, frustrating attempts to comply.

The contempt order required Black to identify what he had removed in a list to be provided to the other side the following week. RP 7/25/07, pg. 136, lns. 12-25; pg. 137, lns. 1-3. Black immediately provided that list to his counsel who in turn provided a copy to opposing counsel the same day. RP 7/25/07, pg. 61, lns. 14-22, pg 138, lns. 2-13, 19-24; pg. 145, lns. 15-18. Ex 147. The trial court was ill the Friday following the contempt hearing. Respondent did not respond to the list that had been provided on February 13 pursuant to the Court order of February 9 until May 3, 2007. RP 7/25/07, pg. 145, lns 20-25; pg. 146, lns. 1-18, pg. 155, lns. 21-23.

Within a week of getting the 5/3/07 letter identifying things the Einstein was demanding back, Black began returning the requested items, which took several trips, the first installment of which was set forth in a letter of 5/10/07 to Einstein’s counsel. RP 7/25/07, pg. 147, lns. 22-25;

pg. 148, lns. 1-25; pg. 149, lns. 1-25; pg. 150; lns. 1-25; pg 151. Lns 1-25, pg. 152, lns. 1-21. None the less, at the hearing May 14, 2007, the trial court blamed Black for the delay, and re-iterated that he had put Einstein in complete control: "That's what I meant it was totally in her control." RP 5/14/07, pg. 139, lns. 8-9.

Black's former counsel, caught in a situation where the trial court was mad at him and his client for not returning stuff sooner, when they had only received a response on 5/3/07 to their list which they had provided as ordered 2/13/07, meekly asked if he could get a list of what was to be returned next. RP 5/14/07, pg. 141, lns. 1-5. The Court, which had threatened jail time and hundreds of dollars a day in fines, responded "I will let Mr. Parker and his client decide, you know, what they are willing to do with Mr. Black. Because I have already made it very clear what I wanted to do. ....I am leaving it in their control. Whatever they want, they get." RP 5/14/07, pg. 141, lns. 6-12.

This astounding posture taken by the trial court continued to the end of the trial, a year later, when the evidence was improperly re-opened to allow Einstein to get new items into the record. Even then her counsel and the court could not figure out how to fill in the blanks in the judgment form, and took instruction from Ms. Einstein from counsel's table:

**"However she wants to do it."** RP July 17, 2008; pg. 178, lns 16-17.

Respondent makes no argument that the trial court did not exceed its authority when it required the parties to deposit the 20% community equity in the registry of the trial court for the IRS, not a party. And having no claim. At page 25 and 26 the Respondent acknowledges without comment this was indeed the order, but fails to address Appellant's argument that this was an issue over which the trial court had no authority.

Likewise Respondent makes no argument as to why Black should pay damages when a horse in which he had an ownership interest died, in the absence of any showing of negligence on his part. Even in a bailment, where the bailee has no ownership interest in the bailed goods, negligence must be shown before an action lies for the recovery of the value of the lost bailed goods. Here Black was 50% owner of the horse in question, was in possession without objection from Einstein, and the horse died while in the care of a veterinarian. There is no basis to charge Black for this loss.

7/25/09, Respondent rested: "That's all we have." RP 7/25/07; pg 187, ln. 3. Appellant protested the trial court's decision to allow Respondent to open the evidence after resting. RP 7/17/08; pg. 99, lns. 8-25; pg.- pg. 102, ln. 14. All personal property issues were finally resolved by auction, and that resolution was on the record May 16, 2008. The trial court let Einstein cure defects in the record for which there was no excuse.

CR 60(b)(3) authorizes a court to admit and consider “new evidence” only if it (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. Go2Net, Inc. v. C I Host, Inc., 115 Wn.App. 73, 88, 60 P.3d 1245 (2003). No such showing was made.

The re-opened record did not just address issues of personal property either. The entire financial record was re-opened. From this came various errors in the judgment. For instance, David Black had used all hay income received from hay sales prior to eviction to pay farm mortgage, taxes, and insurance. This was already in the record, and ignored by the trial court, when in the July, 2008 hearing, it allowed testimony of the sale of the hay, and treated it as if David Black had pocketed the money, resulting in a \$3,149.95 judgment in favor of Einstein.

But most incredibly, although the trial court had found that Respondent owned the real estate separately, and although an order had been entered in August, 2006, stating that all post separation debts would follow the party incurring the debts, the trial court allowed Paula Einstein to seek reimbursement from the community share of the estate for the \$80,000 debt she had incurred post separation. The trial court made Black liable for Einstein’s separate debts!

Respondent acknowledges the trial court ruled she was the sole owner of the real estate. Page 31, Response. Respondent can't deny the August 2006 order regarding separate responsibility for post separation debts. It is in the record at CP 149. Yet Respondent says the trial court has a basis for making Black liable for \$80,000 is post separation debt Respondent incurred for which she never accounted, except to say that she spent it paying for her separate property.

Respondent states at page 33 of Response: "Black also claims incorrectly that the \$80,000 debt incurred by Einstein post separation was solely her debt." That is Appellant's contention, and it was solely her debt. There is no principled basis for which Black is responsible for it.

Respondent states: "To the contrary, Einstein used these funds to pay the mortgage and other expenses on the farm, since Black was not making any payments." Page 33 of Response. Respondent admits it was debt incurred post separation, used solely on what the court ruled was Respondent's separate property, from which Black had been evicted 11/30/06. On the trial court's order Black was nothing but an evicted tenant when this debt, which was used to pay mortgage, taxes, insurance, and improvements, was incurred. Since when is an ex-tenant liable for the landlord's future mortgage payments? As stated in the Rubyat: "Sue for a debt we never did contract, and cannot answer, oh the sorry trade!"

The \$80,000 was clearly separate debt, under the August, 2006 order, and under the trial court's order that Einstein owned the real estate separately. The money the trial court was allowing Einstein to use to pay off the separate debts (credit cards and lines of credit) was coming from the auction of jointly owned property! This holding of the trial court is so contrary to law, the law of the case, and the record, that it can only be explained by the abject prejudice then infecting every aspect of the trial court's decision making. **"However she wants to do it."** RP July 17, 2008; pg. 178, lns 16-17.

The award of fees to Einstein did not follow the Browers method. No evidence of necessity or reasonable was made. Some of the fees clearly don't relate to the contempt hearing. The award is contrary to law.

Not only did Appellant object to the trial court re-opening the record after a year for the sole benefit of Respondent, without any legal excuse offered or established, but Appellant objected to the trial court incorporating the record of November 2, and 3, 2006, as part of the trial court record. That hearing was not held under CR 65. Any reference to the notices of that motion shows that. It was called a "motion for temporary orders". The problem is compounded by the absence of any record for November 2, 2006, and event curiously predicted by Respondent before the appeal was even filed.

Throughout the trial the court allowed Paula Einstein to read from prepared statements. Appellant objected. It was not a proper use of a writing to refresh memory. Einstein never had a memory of the notes from which she was reading. It was nothing but scripted testimony. Ex.104. RP June 29, 2007, pg. 80, lns 13-25; pgs. 81-83, lns 1-25; pg.84, lns 1-21; pg. 97, lns. 13-15. This was a chronic problem throughout trial. The Court simply allowed Einstein to read from prepared notes, Ex 108, 109, 110, instead of using them to refresh her memory. RP 6/29/07, pg. 93, lns. 18-25; pgs. 94-102, lns. 1-25; pg. 103, lns. 1- 16; RP 7/17/08; lns. 3-18.

The trial court tried to avoid the objection by treating the notes as “illustrative exhibits”, but they were not offered as such, and were not illustrative exhibits. They were scripts prepared by the script writer with no evidentiary value. They were not business records, or summaries. They were not past writings. They were scripts, nothing else. Further, the contents of the scripts were not fully recited as testimony into the record, yet the scripts were relied upon later by the court.

The trial court admitted tax records which were hearsay. RP June 29, 2007, pg. 91, lns. 18-25; pg. 92, lns. 1-22. Then the Court admitted Einstein’s Exs. 130-140, which did not qualify as business records, and included prepared notes setting forth conclusions reached by, which would not have qualified under ER 1006.

The Court permitted the summations as illustrative exhibits, but there was no accompanying testimony to be illustrated. Instead the Court treated these as substantive exhibits. RP July 19, 2007, pg. 327, lns. 1-25; pgs. 328-335, lns. 1-25; pg 336, lns. 1-6.

Clearly the trial court relied upon them, over objection, in deliberating, saying: “a jury can look at them, a judge can look at them.” RP July 17, 2008, pg. 136, lns. 14-25; pg. 137, lns. 1-8. A jury can’t look at illustrative exhibits during deliberation. Neither can a judge.

The improper use of scripts, and the improper use of hearsay, and reliance on “illustrative exhibits” as substantive evidence was addressed in the opening brief. This is not just a fine line, where a trial court’s familiarity with the rules of evidence cures error when it hears “hearsay” because it can recognize it and ignore it. Improper evidence was admitted over objection. Without that improper material, Respondent did not make a record, and that failure can’t be cured by the trial court ignoring the rules of evidence.

Respondent complains that Appellant’s brief criticizes the trial judge, and it does. Appellant’s counsel does not relish this contest, since he is not infrequently before the Grays Harbor County Superior Court, but neither can he simply allow the abuses observed throughout this process which worked such prejudice against his client to go unchallenged.

The record is replete with examples of prejudice and bias. RP February 9, 2007, pg. 38, lns. 21-23; RP May 14, 2007, pg. 139, lns. 5-9; RP July 26, 2007, pg. 43, lns. 7-15; “They’re going to call the shots. Anything they want back, if they want everything back, it all has to be returned.” RP February 9, 2007, pg. 38, lns. 21-23. Black had made every effort to comply with the trial court’s order, only to be frustrated at every turn by Einstein, who was wrongfully armed with the court’s contempt powers. The trial court refused to declare the contempt purged and forced the trial forward with jail time and huge fines looming over Black’s head. CP 341-342; CP 347-352; CP 304-336; CP 337-340; RP June 7, 2007, pg. 52, lns. 21-25; pg. 53, lns. 1-11; RP June 12, 2007, pg. 18, lns. 4-22. The month before trial began the trial court announced that Black’s fate was in the Einstein’s hands. “I will let Mr. Parker and his client decide, you know, what they are willing to do with Mr. Black. Because I have already made it very clear what I wanted to do. ....I am leaving it in their control. **Whatever they want, they get.**” RP 5/14/07, pg. 141, lns. 6-12.

That was the case through the end of trial over a year later when the Court repeated, while filling out the Judgment form using unsworn input from Einstein:“**However she wants to do it.**” RP July 17, 2008; pg. 178, lns 16-17. There was not even a minimal appearance of fairness or impartiality.

Due Process, the appearance of fairness doctrine, and Canon 3 of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. Smith v. Behr Process Corp., 113 Wash. App. 325, 914 P.2d 141 (1996).

### III. CONCLUSION

This Court should reverse, and enter an order that all real property is owned 50/50. Alternatively this Court should order a new trial before a visiting Judge from an adjacent county.

Respectfully Submitted this 27 day of December, 2009

CUSHMAN LAW OFFICES, P.S.

By

  
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

On **December 28<sup>th</sup>, 2009**, I caused to be served on the undersigned and/or arranged for service of Appellant David Black's Reply Brief, to the Court and parties in the manner indicated:

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