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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

In re the Marriage of:

MEIKA MAGEE (n/k/a NOWAK), Respondent/Appellee,

and

JAMES MAGEE, Appellant.

AMENDED RESPONSE BRIEF

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I. INTRODUCTION

The sole basis for this appeal is that Mr. MaGee claims an amount of \$447,312 was included in the parties' division of assets and debts that was "created out of thin air and does not exist." *Brief of Appellant, page 4.* What Mr. MaGee fails to acknowledge to this Court is that not only was he the first party to assert this figure as the value of his pension, but also that he admitted as evidence several exhibits that support this value. This is a frivolous appeal and simply an attempt to create further conflict and cost in this matter, which has included non-stop litigation since August of 2015 as a result of Mr. MaGee's behavior (for which he was found by the trial court to have committed child abuse and engaged in abusive use of conflict). For these and the following reasons, Mr. MaGee's appeal should be denied, the trial court's decision should be affirmed, and Ms. MaGee should receive an award of fees and costs for having to respond.

II. RESTATEMENT OF ISSUES ON APPEAL

- A. **Should this appeal be dismissed as frivolous when the exact figure adopted by the trial court as the value of Mr. MaGee's pension was presented, documented, and advocated by Mr. MaGee at trial?**
- B. **Was the trial court's decision to value Mr. MaGee's pension based on its accrued, vested value as**

presented at trial an abuse of discretion when applicable case law deems it appropriate to value deferred compensation earned during the marriage even if such value is not presently available for distribution?

- C. Was it an abuse of discretion for the trial court to grant Ms. MaGee a disproportionate division of assets and debts when Ms. MaGee received no maintenance at trial despite the fact Mr. MaGee earns five times Ms. MaGee's monthly income, Mr. MaGee was awarded extensive separate property, and Ms. MaGee received minimal property despite the length of the parties' marriage?**
- D. Was it an abuse of discretion for the trial court to deny Mr. MaGee's Motion for Reconsideration when Mr. MaGee presented no argument or legal basis that a Motion for Reconsideration was proper per CR 59, when it relied on the same evidence already presented at trial by Mr. MaGee?**
- E. Should this Court award reasonable attorney fees and costs to Ms. MaGee on appeal for responding to this frivolous matter and based on her need for assistance and Mr. MaGee's ability to pay?**

III. RESTATEMENT OF THE CASE

Meika MaGee (n/k/a Nowak) and James MaGee were married on August 9, 2003, and separated 12 years later on August 7, 2015. CP 14-19. They have three children: Willem (age 10 at the time of the Petition), Tess (age 8 at the time of the Petition), and Jane (age 6 at the time of the Petition). CP 14-19. In her Petition for Dissolution, Ms. MaGee requested a fair and equitable

division of the assets and debts as well as maintenance. CP 14-19.

Specifically, she stated that:

The petitioner [Ms. MaGee] has the need for maintenance and the respondent [Mr. MaGee] has the ability to provide maintenance. Additionally, maintenance may be necessary to give the court a flexible tool, as set forth in *In re Marriage of Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984), to fashion a fair, just, and equitable distribution of property and liabilities.

In support of her request for support, Ms. MaGee explained that Mr. MaGee is a successful attorney who typically earned over \$400,000 per year, while she was a stay-at-home mom who worked part time as an occupational therapist and took care of the parties' children (including ferrying them to their many appointments and extracurricular activities). CP 145. On October 13, 2015, the court ordered Mr. MaGee to pay interim maintenance of \$1,200 as part of continuing that hearing to a later date, CP 161, and on December 21, 2015, after that full temporary orders hearing, Mr. MaGee was ordered to pay support of \$3,500 to Ms. MaGee each month, CP 180. At this hearing, the court determined that Mr. MaGee's monthly gross income was \$22,007.00, while Ms. MaGee's monthly gross income was \$4,220. CP 173.

One year passed before the parties attended trial in this matter, during which time 27 hearings were held due to Mr. MaGee's conflict-causing behavior, as part of which restraints were issued against him, CP 306-09, and his visitation with the children was limited, CP 310-14.

In light of difficulties with Mr. MaGee and in gaining his compliance with court orders, Ms. MaGee requested at trial that she received a disproportionate share of the assets in lieu of extended maintenance as a way of minimizing contact and conflict with Mr. MaGee. CP 182. Specifically, she requested that each party:

keep the assets/debts in their names, and that Ms. MaGee have an equalizing share from Mr. MaGee's retirement. She also asks that she receive a disproportionate share of assets in lieu of extended maintenance. Per RCW 26.09.090, she does have a need for maintenance in order to get on her feet as well as to provide the children with the standard of living to which they have become accustomed.

CP 191-92. Trial lasted six weeks - from August 15, 2016, through September 28, 2016, before the Honorable Judge Susan K. Serko. CP 259-305.

Judge Serko issued extensive findings based on the parties' trial, which are encompassed within the 24-page Findings and

Conclusions about a Marriage, dated December 16, 2016. CP 59-97 (Findings of Fact and Conclusions of Law, dated 12/16/16). As part of her findings, Judge Serko determined that Mr. MaGee is not “credible.” CP 59-97 (Findings of Fact and Conclusions of Law, dated 12/16/16). Specifically, she found that “[m]any of the diametrically opposed descriptions of various incidents appeared to be made up by Mr. MaGee when he was faced with potentially damaging testimony by neutral witnesses.” CP 59-97 (Findings of Fact and Conclusions of Law, dated 12/16/16). (The trial court was not only the only court to find Mr. MaGee not credible; court-issued sanctions against him were upheld by both the U.S. Bankruptcy Court and the Ninth Circuit for his behavior. Exhibits 115-118.

Regarding the children, on October 3, 2016, Judge Serko issued the Final Parenting Plan, which placed the children primarily with Ms. MaGee and included restrictions against Mr. MaGee under RCW 26.09.191 for:

Child Abuse - . . . JAMES MAGEE . . . abused or threatened to abuse a child. The abuse was . . . repeated emotional abuse.

Abusive use of conflict - . . . James H. MaGee uses conflict in a way that endangers or damages the psychological development of a child

CP 311. As a result of these findings, Judge Serko issued the following restrictions against Mr. MaGee:

Maintaining distance from Mother, Meika MaGee, sole decision-making for Mother, Meika MaGee; limited visitation for Father [James MaGee].

CP 312.

Regarding support, Judge Serko found that Mr. MaGee's monthly gross income was \$20,815 and Ms. MaGee's monthly gross income was \$5,497.30, which gave the parties a pro rata child support split of 78.4% to Mr. MaGee and 21.8% to Ms. MaGee. Mr. MaGee was ordered to pay monthly support of \$3,151.37 (which included his portion of work-related daycare and the children's monthly health insurance premium). CP 328, 335.

Judge Serko also determined that Mr. MaGee owed Ms. MaGee \$2,730.65 for child expenses he had not paid despite the existence of a court order. CP 41-43; 326, 332.

Regarding the assets and debts, generally, Judge Serko issued her initial Findings on October 3, 2016. CP 23-26. In those findings, she awarded the majority of community assets to Mr. MaGee as well as all of his separate assets (including two pieces of real property, all of his bank, retirement, and investment accounts, and his separate debts). CP 23-26, CP 44-47. In contrast, Ms.

MaGee was awarded her personal bank accounts, her retirement, her separate 2002 Volvo, and all of the debt she incurred while trying to get on her own two feet. CP 23-26; CP 44-47.

As to maintenance, Judge Serko did not award a monthly maintenance amount. CP 41-43; 59-97. Instead, Ms. MaGee received a disproportionate share of the community in the form of an equalizing payment from one of Mr. MaGee's retirement accounts such that the community assets were divided 47.4% to Mr. MaGee and 52.6% to Ms. MaGee. CP 44-47.

Mr. MaGee asserts that, as part of this division of assets, Judge Serko created an account valued at \$447,312 out of "thin air." *See Brief of Appellant, pages 4, 6, 8, 10, 11, 13, and 15.* The following demonstrates that this account is very real.

On the first day of trial, August 15, 2016, Mr. MaGee filed and presented to the court his "Pretrial Information Form," which included his proposed asset and debt division spreadsheet. On this spreadsheet, as set out below, he included the "Law Offices of James MaGee Pension Plan (Defined Benefit Plan)" at a value of \$447,312 and proposed that Ms. MaGee receive \$223,656 from it. CP 252. He based this figure on exhibits 462-467 and 562. CP 252.

462-467, 552	Law Offices of James MaGee Pension Plan (Defined Benefit Plan)	Community	\$447,312		\$447,312	\$223,656	\$223,656
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CP 252. As part of this spreadsheet, Mr. MaGee identified the following retirement accounts only with the following values:

Account Description	Pretrial form value
Van Kampen x1488	\$19,693
Edward Jones SEP IRA x837-1-1	\$45,922
Law Offices of J. MaGee 401k	\$235,151
Law Offices of James Magee 401k inheritance	\$53,945
Legg Mason SEP IRA – Separate portion	\$10,201
Legg Mason SEP IRA – Community portion	\$2,358
Clipper Fund SEP IRA	\$42,454
Dodge & Cox SEP IRA	\$17,370
Law Offices of James MaGee Pension Plan (Defined Benefit Plan)	\$447,312

On August 24, 2016, Mr. MaGee filed and presented at trial an Amended Asset and Debt Spreadsheet that included the same values, albeit laid out somewhat differently. CP 256.

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Account Description	Pretrial Information Form, CP 252-54	Amended Asset/Debt Spreadsheet, CP 255-58
Van Kampen x1488	\$19,693	\$19,693
Edward Jones SEP IRA x837-1-1	\$45,922	\$45,922
Law Offices of J. MaGee 401k	\$235,151	\$235,151
Law Offices of James Magee 401k inheritance	\$53,945	\$53,945
Legg Mason SEP IRA – Separate portion	\$10,201	\$10,201
Legg Mason SEP IRA – Community portion	\$2,358	\$2,358
Clipper Fund SEP IRA	\$42,454	\$42,454
Dodge & Cox SEP IRA	\$17,370	\$17,370
Law Offices of James MaGee Pension Plan (Defined Benefit Plan)	\$447,312	\$447,312

At trial, both parties introduced evidence of retirement accounts in Mr. MaGee's name, a few of which were not included on either of Mr. MaGee's previous spreadsheets or otherwise did not quite match what he had presented for values:

- 1) **Exhibit 452** was statements for Mr. MaGee's Mass Mutual x587 account, which showed a value of

\$281,072.84 (rounded to \$281,073) and matched the entry for his 401(k) on his spreadsheets.

- 2) **Exhibit 458** was statements for an additional Mass Mutual account ending in x076 with a value of \$285,727. Neither this account nor this amount were listed on either of Mr. MaGee's spreadsheets.
- 3) **Exhibit 52** was statements for Mr. MaGee's Putnam Fund Roth IRA x1519, which was also not included in Mr. MaGee's spreadsheets. Evidence was presented as to the separate and community nature of these funds, and Judge Serko determined that part of each Mass Mutual account contained separate funds, while the remainder was community. Exhibit 52.

With these adjustments, the resulting division of assets was slightly different from what Mr. MaGee proposed, although the total value of Mr. MaGee's retirement accounts in his Pretrial Information Form spreadsheet and amended asset/debt spreadsheet differ very little from Judge Serko's final values based on the exhibits presented: Mr. MaGee's account of his own retirement accounts totals \$920,328, and Judge Serko's final values based on the exhibits presented total \$1,082,400. The difference between these

figures is nowhere near the \$447,312 error Mr. MaGee claims was made, but despite this difference, the figures used are accurate per the evidence admitted at trial.

\$447,312

As noted above, Mr. MaGee claims that there is no account or exhibits that support Judge Serko's finding of the pension's value at \$447,312. However, Mr. MaGee's entry in his own spreadsheets for \$447,312 and Judge Serko's inclusion of that amount in part of the final divorce decree was not an accident and was supported by evidence. At trial, Mr. MaGee presented Exhibit 462, which contains statements from his pension plan administrator, Farmer & Betts, for the Law Offices of James H. MaGee Defined Benefit Plan. Exhibit 462. The last page of Exhibit 462 states that as of 12/31/14, the "present value of [Mr. MaGee's] vested accrued benefit is \$447,312." Exhibit 462. This gave him an estimated monthly benefit of \$17,500" upon retirement. Exhibit 462. Exhibit 463, which was also presented by Mr. MaGee, shows that the vested benefit of that same fund as of 12/31/15 was \$620,867 for just Mr. MaGee. Since Exhibit 463 also indicated that Mr. MaGee was required to provide additional funding to the account after 2014, Judge Serko indicated on the division of assets and debts

spreadsheet, CP 44-47, that the known value of \$447,312 was included, but that "Extra Value when funding complete" was not included because no evidence was presented about the increase in value after funding. CP 44-47. Even the Plan Administrator, Nichole LaFerriere, did not testify as to the present cash value of the plan or to the value of any other accounts. VRP 19-20. Specifically, she was asked "And you have no idea how much the present cash value of the plan is?" VRP 19-20. She responded with "I do not." VRP 20.

Therefore, the evidence showed that there were two Mass Mutual accounts, one with a value of \$285,726 (demonstrated by the last page of Exhibit 458) and another one with a value of \$281,073 (demonstrated by the first page of Exhibit 48). Both of these accounts were appropriately included in the division of assets and debts. Further, Exhibits 462 and 463 showed that Mr. MaGee had a vested pension value of \$447,312 as of 12/31/2014, which would be higher after that date but for Mr. MaGee's failure to provide any evidence on the pension's value if that funding was completed. CP 41-43, 44-47.

The end result, based on the information presented, is that Mr. MaGee received \$589,620 in community property and

\$704,712 in separate property (totaling \$1,294,332), and Ms. MaGee received \$644,280 in community property and \$90,736 in separate property (totaling \$735,016). CP 41-43, 44-47.

As part of upholding this disproportionate award, Judge Serko noted the following:

Although the distribution shows a slight disparity (52.6% to Wife), this difference is justified by several factors:

- No award of spousal maintenance;
- Extraordinary separate property awarded to Husband including the family residence with no mortgage; and
- Husband's earning ability compared to Wife's more modest income.

CP 41-43. Mr. MaGee's second Motion for Reconsideration followed this decision, and after it was denied, he filed this appeal.

IV. STANDARD OF REVIEW

Trial courts have broad discretion when fashioning divisions of assets and debts, and "[a] property division made during the dissolution of a marriage will be reversed only if there is a manifest abuse of discretion." *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

V. ARGUMENT

A. THE OVERALL DIVISION OF ASSETS AND DEBTS WAS FAIR, JUST, AND EQUITABLE

RCW 26.09.080 requires the court to consider all assets and liabilities of the parties and make a “just and equitable” disposition after considering the community property, separate property, duration of the marriage, and economic circumstances of the parties. The trial court’s discretion is broad to determine just what exactly is just and equitable based on the circumstances of each case. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). A just and equitable division of the assets and debts “does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties.” *In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996). “Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.” *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). “Just and equitable distribution does not mean that the court must make an equal distribution.” *In re Marriage of Dewberry*, 115 Wn. App. 351, 366, 62 P.3d 525 (2003). Ultimately, the trial

court is in the best position to decide issues of fairness. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

In this case, there were significant financial disparities between the parties that, when combined with Mr. MaGee's substantial separate property, justified a disproportionate division of the assets and debts. Mr. MaGee did not challenge the Temporary Orders or the Final Order of Child Support that found his monthly income to be about **five times** what Ms. MaGee earned each month. Therefore, it was entirely appropriate for Ms. MaGee to receive a slightly disproportionate award of the assets and debts via equalizing transfer payment from one of Mr. MaGee's retirement accounts. Ms. MaGee received maintenance throughout the parties' dissolution matter and, due to ongoing difficulties with payments and conflict from Mr. MaGee, requested a disproportionate split of the assets and debts in lieu of maintenance.

Additionally, it is this overall view of the division of assets and debts that Mr. MaGee does not discuss in his brief. Not only does evidence prove the value of the asset, as discussed further below, but it is not as though Judge Serko included one extra asset

and gave half to Ms. MaGee. Rather, based on the overall values of assets and debts, Ms. MaGee's need for support, and the extensive community property going to Mr. MaGee as well as his substantial separate property, a disproportionate award overall was appropriate.

Further, a trial court has an obligation to determine the value of property based on evidence actually presented at trial. *In re Marriage of Martin*, 22 Wn. App. 295, 296-97, 588 P.2d 1235 (1979). Valuation of property is a question of fact. *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). Our Courts of Appeals have held that a trial court's findings of fact will not be reversed if supported by substantial evidence in the record, as in evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Id.*

In this case, substantial evidence was presented that there were retirement assets of the values set forth in the final Decree. As set forth above, actual financial statements were not only presented at trial to show the basis of these values, but they were presented and used by Mr. MaGee in his own trial materials that were filed with the court. Mr. MaGee points to his own argument that the asset does not exist, but offers no explanation as to why he

included the \$447,312 figure in his own proposed division of assets and debts. Further, Mr. MaGee points to Nichole LaFerriere's testimony as showing that the value does not exist, but even she could not testify as to the present value of the pension plan, and she certainly did not testify to the value of any of Mr. MaGee's other assets. The evidence presented at trial was that she knew nothing about the cash value of the plan, but the vested value was correct. She did not discuss Mr. MaGee's Mass Mutual accounts or any other assets. If anything, Mr. MaGee omitted assets that were discovered in his own trial materials, and Judge Serko used the exhibits at trial to determine the values of the assets. Including that account was not error, and the division of assets and debts should be affirmed.

B. APPELLANT CITES NO CASE IN SUPPORT OF HIS POSITION

Mr. MaGee cites only a few cases in his brief, none of which support his position. He cites *Marriage of Brady*, but that case contradicts Mr. MaGee's position in this appeal and actually supports affirming the trial court's decision.

In *Brady*, the husband challenged the trial court's characterization of a piece of land, which the trial court determined

was part separate and part community property. 50 Wn. App. 728, 729, 750 P.2d 654 (1988). Even though the husband purchased the property during the marriage, the trial court determined that its post-marriage increase in value was caused solely by community efforts during the marriage and shared that post-marriage value between the parties. *Id.* at 729-30. After considering this along with the remaining property division, the trial court determined that it was fair to give the wife an extra \$39,439.67 beyond what was awarded to the husband. *Id.* at 730.

On appeal, Division 1 determined that it was error for the trial court to attribute the post-marriage increase in property value to community efforts, as it was more likely than not that the value increase was due to market fluctuations, not the community. *Id.* at 731. However, this error was not a reason to disturb the overall division of assets and debts. *Id.* “The ultimate obligation of the trial court in circumstances such as these is to arrive at a fair, just and equitable distribution of assets and liabilities regardless of their characterization as separate or community.” *Id.* at 731 (citing RCW 26.09.080; *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985)). Therefore, even though an error in reasoning was

made, the Court examined whether the overall Decree was “fair, just and equitable.” *Id.*

Ultimately, the Court held that the overall Decree was fair, just and equitable despite any error. *Id.*

Despite the trial court’s error in characterization of the parties’ property, we will not disturb the distribution of those properties if in our judgment that distribution is otherwise fair, just and equitable. . . . Only in circumstances where the distribution is unfair, unjust or inequitable will we modify or reverse the judgment. Taking into account the economic circumstances of the parties in the instant case, we cannot say that the distribution is unfair, unjust or inequitable. The parties were married for 12 years . . . [the husband’s] income is double that of [the wife’s income]. . . . Accordingly, the award of a lien to [the wife] . . . was not otherwise an abuse of discretion.

Id. at 732. Therefore, the Decree was affirmed.

In the instant case, the trial court relied directly on evidence presented by Mr. MaGee, so the overall division was not in error. If anything, *Brady* emphasizes that it is the overall division that needs to be fair, and in light of Mr. MaGee’s extensive separate property and the fact that extensive community property was awarded to him, that his income at trial was determined to be almost *five times* Ms. MaGee’s monthly income, and the fact that Ms. MaGee, who had otherwise been receiving maintenance during the case, did not receive any maintenance as part of the Decree, the overall division

of assets and debts was fair, just, and equitable. Just like *Brady*, this Court should determine that the overall division of assets and debts is fair, regardless of any technicalities.

In support of his proposition that the trial court should disturb and undo the division of assets in this case, Mr. MaGee cites *Marriage of Valente* and *Marriage of Kraft*. Neither support his position. Both *Marriage of Valente* and *Marriage of Kraft* involved significant errors made by a trial court that directly contradicted the requirements of a statute. In *Valente*, it was a violation of RCW 26.09.090's requirement of findings in support of maintenance that invalidated the trial court's self-acknowledged "arbitrary" award of nominal maintenance to preserve maintenance jurisdiction indefinitely. In *Kraft*, it was the trial court's valuation and division of military disability in violation of federal law prohibiting the division and award of military disability. Neither of these cases support Mr. MaGee's arguments.

In *Valente*, both parties challenged many aspects of the trial court's Decree, including the division of property and the maintenance award, but despite these alleged errors, Division 1's only concern was the trial court's award of nominal maintenance in order to retain jurisdiction over maintenance until the wife's death.

179 Wn. App. 817, 820, 320 P.3d 115 (2014). Since there were no findings that maintenance would be needed at that point, and since the trial court judge admitted on the record that the nominal maintenance was “arbitrary,” Division 1 reversed that award but affirmed the remainder of the Decree. *Id.* at 831. What is interesting is that this case actually emphasizes the extent of the trial court’s discretion when it comes to fashioning a fair, just, and equitable division of the assets and debts. *Id.* For example, regarding maintenance, the Court acknowledged that “The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just.” *Id.* at 821 (quoting *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990)).

Further, Mr. MaGee appears to rely on this case as reason why attorney fees should not be awarded against him, as the Court declined to award fees in that appeal because the wife had no need per RCW 26.09.140. *Id.* at 832. This is not novel, as need is a prerequisite for fees under RCW 26.09.140 and the wife in that case had just received \$3,288,409.53. *Id.* But Ms. MaGee neither has nor was awarded that amount of property as part of this case

and it has nothing to do with whether she has need for assistance with fees.

Regarding *Marriage of Kraft*, the Washington State Supreme Court reversed a trial court that valued the husband's military disability and awarded it to him, awarding other assets to the wife as an "offset." 59 Wn. App. 630, 447-48, 800 P.2d 394 (1990). The fact that this violated federal law, which precluded a court from valuing or dividing a federal disability award, meant that reversal and remand was necessary. *Id.* In the instant case, there are no disability assets at issue, and other than general claims of unfairness, Mr. MaGee cites no law, state or federal, that was violated by valuing a pension at the value he proposed. In fact, per *Marriage of Pea*, 17 Wn. App. 728, 556 P.2d 212 (1977), this Court held that it would be error not to value and award a pension in a dissolution, as that would violate the requirement of RCW 26.09.080 that the court value and divide all assets and debts. *Id.*

Mr. MaGee also cites *In re Marriage of Chandola*, which addresses restrictions in Parenting Plans and does not apply to any of the arguments made here, as the Parenting Plan was not appealed. Mr. MaGee cites it regarding fee awards, but like *Marriage of Valente*, it only recites the requirement of RCW

26.09.140 that an award of fees per this statute requires need, and since there was no “disparity in the parties’ income that would justify an award of fees to either party,” fees were not appropriate in that case. *In re Marriage of Chandola*, 180 Wn.2d 632, 656, 327 P.3d 644 (2014). That the parties did not meet the statute in that case does not mean the statute does not apply in this case, as there is a significant disparity in the parties’ incomes in this case.

Lastly, although a criminal case and not applicable factually, Mr. MaGee cites *State v. Dye* regarding its discussion of the abuse of discretion standard. Per *State v. Dye*, a trial court has abused its discretion if any of the following are true: 1) its decision was “manifestly unreasonable” i.e. it fell “outside the range of acceptable choices, given the facts and the applicable legal standard”; 2) its decision was based on “untenable grounds” i.e. “the factual findings are unsupported by the record”; or 3) its decision was “based on untenable reasons” i.e. “based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Following this same order, Mr. MaGee asserts the decision was 1) manifestly unreasonable because “there is but one defined

benefit pension plan . . . the Court's finding of two . . . is an abuse of discretion" Despite this claim, however, Mr. MaGee points to no place in the record where the trial court determined that his law firm had two pension plans. Rather, his own evidence presented at trial, including his own asset/debt spreadsheets and his own statements, show that the present value of the pension was \$447,312. Separately, the evidence presented by Mr. MaGee showed he also had a 401(k) account at Mass Mutual with a cash value of \$281,072.84 in his name and a second account in his name with a cash value of \$285,727 in it. An examination of the spreadsheets provided by Mr. MaGee demonstrate that several assets and accounts were not listed, and it was after reviewing the evidence presented by both parties that all assets were finally included in the ultimate division of assets and debts.

Further, Mr. MaGee claims that the pension was overvalued because he needs to make further contributions to it, but he fails to acknowledge several critical facts: A) Exhibit 462 listed the present value of \$447,312 as of 12/31/14, which was 8 months ***before*** the parties separated, but its value on 12/31/15 was \$620,867 for *just Mr. MaGee's portion* of the retirement account. Per Judge Serko's decision in the Finding re Assets, CP 22-26, and Amended

Property Division, CP 44-47, this asset was valued as of 12/31/14 in part because of further funding requirements and in part because Mr. MaGee failed to provide evidence of post-funding increases in value. As with all pensions, they have a present-day value that is actuarially based on the amount to be received at retirement.

In this case, Mr. MaGee provided evidence that as of 12/31/14, the present-day value of the pension was \$447,312, but if the trial court had valued the pension as of the date of separation or later like the remaining assets, Mr. MaGee would appropriately have had a value of \$620,867 for the pension in his total assets, not the lower, earlier figure of \$447,312. Again, \$447,312 was a figure Mr. MaGee used and advocated that the court use at trial; it was only after Ms. MaGee received a disproportionate award of assets as requested and needed that Mr. MaGee suddenly began to insist that the \$447,312 did not exist. Therefore, the trial court's decision to rely on the evidence presented by Mr. MaGee was not manifestly unreasonable.

Regarding the second prong of the abuse of discretion standard, Mr. MaGee claims the trial court's findings of the \$447,312 figure were not supported by the record, "given the testimony of Ms. LaFerriere and the exhibits and testimony

presented.” As stated above, it was Mr. MaGee’s own evidence that provided this number, as his Exhibit 462 stated the present value of the pension was \$447,312, and his own asset and debt spreadsheets incorporated that figure. Based on this evidence, it was not an abuse of discretion for the trial court to rely on that information when determining the value of the assets and debts.

Regarding the third prong of the abuse of discretion standard, Mr. MaGee claims once again that the allocation of \$447,312 to Mr. MaGee “when such asset does not exist” is not fair. As described above, it was Mr. MaGee who asserted the pension was worth that value and provided evidence of its worth from the plan administrator. Exhibit 462 supports this along with his own spreadsheets.

It appears that, despite providing and advocating for this value, Mr. MaGee takes issue with the fact that a present-day pension valuation encompasses funds not yet available or in existence. However, that is the nature of pensions, as “[p]ension benefits constitute property rights in the nature of deferred compensation, even if benefits are not presently available.” *In re Marriage of Bulicek*, 59 Wn. App. 630, 636, 800 P.2d 394 (1990). This has been the long-standing law on dividing pensions in a

dissolution, for even this Court held in *Marriage of Pea* that “It is clear that retirement pay, even though benefits are not presently available, is held to be deferred compensation and subject to equal distribution under RCW 26.09.080.” *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977). In fact, this Court even held that a trial court erred when not valuing and awarding the pension, whether based on a present-day value or on an as-received basis. *Id.* at 731.

In sum, not only does this asset exist, but the fact that it does not have a present-day cash value that can simply be transferred to another party does not mean it is not an asset to be divided as part of the dissolution. It represents deferred compensation that is subject to distribution, and since neither party asserted it was anything but a community asset up to the date of its valuation, using a present-day value was entirely appropriate. (It is *Bulicek* that suggests using the as-received percentage formula is more appropriate when a pension is part community and part separate property as of the date of valuation. 59 Wn. App. 630, 638-39, 800 P.2d 394 (1990)).

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C. APPELLANT'S MOTION FOR RECONSIDERATION WAS IMPROPER AND APPROPRIATELY DENIED

Mr. MaGee claims it was error for the trial court not to reconsider his motion, citing *Worden v. Smith* generically and no other cases, statutes, or court rules. Civil Rule 59(a) states that a Motion for Reconsideration **may** be granted “for any one of the following causes materially affecting the substantial rights of such parties:

- (1) Irregularity in the proceedings . . . by which such party was prevented from having a fair trial;
- (2) Misconduct of prevailing party or jury . . .
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;
- (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
- (6) Error in the assessment of the amount of recovery . . . when the action is upon a contract;
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time . . . ;
- (9) That substantial justice has not been done.

None of these bases provide the moving party with a “second bite at the apple” or an opportunity to re-argue with the

court arguments that could have or were made at trial. In fact, CR 59(c) requires that the Motion for Reconsideration “identify the specific reasons in fact and law as to each ground on which the motion is based.”

In this case, Mr. MaGee’s motion makes no reference to CR 59, its requirements, or the potential bases for reconsideration. Mr. MaGee has not alleged there were (1) irregularities in the proceedings that prevented him from having a fair trial; in fact, the record on appeal shows that Mr. MaGee was able to present his exhibits and witness without issue.

There was no jury, so CR 59(a)(2), (5) do not apply.

Mr. MaGee has not alleged (3) there was any accident or surprise, but even a claim of surprise at the court’s decision is not credible as it was Mr. MaGee’s proposal to value the pension at the \$447,312 amount based on his own evidence, so if anything, it would have been a surprise to use a different value.

Regarding (4) newly discovered evidence, Mr. MaGee points to the same evidence and witnesses provided at trial but for a post-trial declaration from his witness that was not admitted at trial or subject to cross-examination, but he makes no required showing that the evidence “could not with reasonable diligence have [been]

discovered and produced at trial.” He provides new statements from the witness, but no explanation of why those statements could not have been provided at trial, and further, he provides no new evidence, but instead points to the same evidence used during trial and relied upon by the trial court. This is not newly discovered evidence; it is just new argument.

Further, Mr. MaGee does not allege (5) damages so excessive that passion or prejudice must have been at play, and while he argues that Judge Serko created the \$447,312 figure “out of thin air,” he did not allege anything improper about her behavior and did not challenge any of her other decisions (not even the trial court’s Parenting Plan, which included restrictions against Mr. MaGee for child abuse and abusive use of conflict).

Regarding (6), the action was not upon a contract, and (7), as described above, there was evidence provided to support the figure used by the trial court.

As to (8) error in law, Mr. MaGee points to no place where an error was actually made and where he actually objected at the time (if anything, using the \$447,312 figure at trial and then using it as a basis for an appeal thereafter is similar to arguments rejected under the invited error doctrine, *State v. Boyer*, 91 Wn.2d 342, 588

P.2d 1151 (1979)), and lastly, Mr. MaGee did not even argue the catchall of (9), but it would be substantial injustice for the parties to undergo a 6-week trial as part of which the trial court relied on evidence presented by Mr. MaGee as to the value of the pension only to have that amount disrupted on appeal.

In sum, Mr. MaGee did not and has not argued any of the required bases per CR 59 for a Motion for Reconsideration, so his Motion was appropriately denied, and that decision should be upheld.

Ultimately, it was not an abuse of discretion to rely on uncontroverted evidence presented by Mr. MaGee, and in light of that evidence, it should not be held that “no reasonable person would have ruled as the trial court did on the facts before it” such that would amount to abuse of discretion. See *In re Marriage of Pilant*, 42 Wn. App. 173, 176, 709 P.2d 1241 (1985).

In *Pilant*, this Court declined to change a trial court’s pension valuation due to contradictory evidence because “a court is not required to accept the opinion testimony of experts solely because of their special knowledge, rather, the court decides an issue upon its own fair judgment, assisted by the testimony of experts.” *Id.* at 178 (citing *Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*,

16 Wn.2d 631, 649-50, 134 P.2d 444 (1943)). “A court may reject opinion testimony in whole or in part in accordance with its judgment of the persuasive character of the evidence presented.” *Id.* at 179 (citing *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975)).

Here, the trial court relied on uncontroverted evidence presented by Mr. MaGee to value assets in his name and then divided those assets in a manner that was fair in light of the nature of community and separate property as well as the parties’ respective economic circumstances. The division should be upheld.

VI. CONCLUSION AND REQUEST FOR FEES

For the reasons set forth above, Ms. MaGee respectfully requests that the trial court’s orders be affirmed and the appeal be denied. Further, Ms. MaGee requests an award of fees and costs pursuant to RAP 18.1, which allows a party to recover attorney fees in responding to an appeal. Further, this appeal is a frivolous appeal in light of the fact that Mr. MaGee openly asserts the \$417,312 figure was created by the trial court out of “thin air” when it was Mr. MaGee’s own evidence that provided that figure several times. RCW 4.84.185 allows for recovery of fees and costs on a

frivolous matter that is advanced without reasonable cause.

Finally, RCW 26.09.140 allows attorney fees to be awarded “to pay for the cost to the other party of maintaining the appeal” as well as in consideration of the parties’ financial resources. In this case, Mr. MaGee’s income was about five times Ms. MaGee’s income.

Further, Mr. MaGee is an attorney who is able to represent himself at significant cost savings, while Ms. MaGee is not an attorney and has no legal training. It would be extraordinarily difficult for Ms. MaGee or any non-lawyer *pro se* party to handle an appeal against an attorney without attorney assistance. Therefore, not only did Mr. MaGee file a frivolous appeal, but it was done so in a way that saves him on cost while drastically increasing Ms. MaGee’s legal fees. Therefore, it is appropriate that Ms. MaGee be reimbursed her fees and costs incurred as part of this appeal.

Respectfully submitted this 29th day of January, 2018.

CARLSEN LAW OFFICES, PLLC



Laura A. Carlsen, WSBA No. 41000

PROOF OF SERVICE

Laura A. Carlsen certifies as follows:

On January 29, 2018, I served upon the following a true and correct copy of this Response Brief via U.S. Mail:

James MaGee
1108 North 6th Street
Tacoma, WA 98403

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED AND DATED this 29th day of January, 2018, at Auburn WA.



Laura A. Carlsen

CARLSEN LAW OFFICES

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