

**FILED**

**AUG 14 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 304205

WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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In Re the Marriage of

DONALD REINI

Appellant

v.

DEBRA KYLE-REINI

Respondent

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REPLY BRIEF OF RESPONDENT

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WSBA NO: 4648  
Counsel for Debra Kyle-Reini

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	i, ii, iii
I. INTRODUCTION.....	1
II. RESTATEMENT OF THE FACTS .....	2
A. Background .....	2
B. Mr. Reini chose to represent himself during most of the dissolution proceedings .....	4
C. Mr. Reini mishandled the parties' assets both before and after separation. ....	5
1. The Quincy espresso stand was under Mr. Reini's management when it failed .....	6
2. Mr. Reini withdrew his retirement and spent the entire amount without Ms. Kyle-Reini's knowledge or consent . . . . .	7
3. Mr. Reini spent the proceeds from the sale of community real property without Ms. Kyle-Reini's knowledge or consent .....	8
D. The Trial Court allocated assets equally between the parties .....	9
1. The Trial Court chose a value of the home that was within the range of options provided.	10
2. The Trial Court took all of the testimony regarding the Moxee espresso stand into consideration when it valued the asset . . . . .	10

III. ARGUMENT .....	11
A. Standard of Review .....	11
B. The Trial Court correctly awarded maintenance to Ms. Kyle-Reini .....	14
1. The Trial Court correctly and fairly considered the first statutory factor Including Ms. Kyle- Reini's need .....	17
i. The Trial Court correctly calculated Ms. Kyle-Reini's Income with the evidence it had before it at trial .....	19
ii. The Trial Court correctly determined Ms. Kyle Reini's need for spousal maintenance .....	21
2. The Trial Court correctly determined that Mr. Reini had the ability to pay spousal Maintenance .....	23
3. The Trial Court did not take marital misconduct into account when it awarded Ms. Kyle-Reini spousal maintenance. ....	24
C. The Trial Court correctly awarded a lien in favor of Ms. Kyle-Reini .....	28
D. The Trial Court properly denied Mr. Reini's motion for new trial .....	30
E. Mr. Reini impermissibly tries to add evidence in his brief that was not presented to the trial court. .	36
F. Ms. Kyle-Reini should be awarded attorney's fees for having to defend this appeal .....	36
IV. CONCLUSION .....	37

## TABLE OF AUTHORITIES

<b>Washington Cases</b>	<b><u>Page</u></b>
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 575, 343, P.2d 183, 186 (1959) . . . . .	11, 12
<i>Magnuson v. Magnuson</i> , 141 Wn. App. 347, 351 353, 170 P. 3d 65 (Div. III, 2007) <i>rev. den.</i> , 163 Wn. 2d 1050 (2008) . . . . .	12, 14
<i>In re Marriage of Schweitzer</i> , 81 Wn. App. 589, 595-96, 915 P.2d 575, <i>affirmed</i> , 132 Wn.2d 318 (1997) . . . . .	12
<i>In re Marriage of Marzetta</i> , 129 Wn. App. 607, 624, 120 P.3d 75 (Div. III, 2005) . . . . .	12
<i>In re Marriage of Mathews</i> , 70 Wn. App. 116, 123, 853 P. 2d 462, 467(Div. III, 1993) . . . . .	12, 16
<i>In re Marriage of Sheffer</i> , 60 Wn. App. 51, 53, 57-58 & n.2, 802 P.2d 817 (1990) . . . . .	12
<i>Marriage of Kovacs</i> , 121 Wn. 2d 795, 801, 854, P.2d 629 (1993) . . . . .	13
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 505-07, 784 P.2d. 554 (1990) . . . . .	13
<i>In re the Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) . . . . .	13
<i>In re Marriage of Wicklund</i> , 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996) . . . . .	14
<i>State v. Lord</i> , 161 Wn.2d 276, 284, 165 P. 3d 1251 (2007) . . . . .	14

<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn. 2d 677, 684, 132 P.3d 115 (2006) . . . . .	14
<i>Marriage of Foley</i> , 84 Wn. App. 389, 845-46, 930 P.2d 929, 932 (1997) . . . . .	16
<i>Spreen v. Spreen</i> , 107 Wn. App. 341, 28 P.3d 769 (2001) . . . . .	16
<i>In re Marriage of Crosetto</i> , 82 Wn. App. 545, 558, 918 P.2d 954 (1996) . . . . .	16, 37
<i>Dept' of Labor and Indus' v. Lanier Brugh</i> , 135 Wn. App. 808, 147 P.3d 588 (2006) . . . . .	20,
34, 35, 36	
<i>Vance v. Offices of Thurston County Com'rs</i> , 117 Wash. App. 660, 671, 71 P.3d 680, 685 (2003) . . . . .	20
<i>In re Marriage of Steadman</i> , 63 Wn. App. 523, 528, 821 P.2d 59, 62 (1991) . . . . .	26
<i>In re Clark's Marriage</i> , 13 Wn. App. 805,808, 538 P.2d 145 (1974) . . . . .	26
<i>Marriage of Brewer</i> , 137 Wn.2d 756,769, 976 P.2d 102 (1999) . . . . .	28
<i>Kuhn v. Schnall</i> , 155 Wn. App. 560, 570-71, 228 P.3d 828, 833 <i>review denied</i> , 169 Wn. 2d 1024, 238 P.3d 503 (2010) . . . . .	30
<i>State v. Carlson</i> , 61 Wn. App. 865, 869, 812 P.2d 536, 538 (1991) . . . . .	30, 31
<i>Beam v. Beam</i> , 18 Wn. App. 444, 569 P.2d 719 (1977).	31
<i>Rotta v. Early Industrial Corp.</i> , 47 Wn. App. 21, 733 P.2d 576 (1987) . . . . .	31, 32

<i>Newcomer v. Masini</i> , 45 Wn. App. 284, 724 P.2d 1122 (1986) .....	31, 32
<i>Batten v. Abrams</i> , 28 Wn. App. 737, 751 at fn.1, 626 P.2d 984 (1981). .....	33, 34
<i>Hecomovich v. Nielson</i> , 10 Wn. App. 563, 571-72, 518 P.2d 1081 (1974) .....	33
<i>Gamache v. Gamache</i> , 66 Wn.2d 822, 829–30, 409 P.2d 859 (1965) . .....	37
<i>Eide v. Eide</i> , 1 Wn. App. 440, 445–46, 462 P.2d 562 (1969). .....	37

<b>Constitutional Provisions, Statutes and Court Rules</b>	<b>Page</b>
RCW 26.09.080.....	12, 28
RCW 26.09.090 .....	12,15, 16,21, 23, 25
RCW 26.09.140 .....	37
Yakima County Local Rule 40(e)(1) .....	33, 34
Appeal Rules of Appellate Procedure (RAP) 9.11 .....	35, 36

## I. INTRODUCTION

The Appellant, hereafter referred to as "Mr. Reini" has filed this appeal complaining that he was not afforded a fair trial because Respondent's attorney did not provide him with Respondent's proposed exhibits prior to trial. Mr. Reini also complains that the Trial Court unfairly distributed the parties' assets in favor of Respondent, hereinafter referred to as "Ms. Kyle-Reini." He claims that the Trial Court based its decision in part on what Mr. Reini terms to be marital misconduct. Finally Mr. Reini complains that the Trial Court should not have awarded Ms. Kyle-Reini maintenance.

These discretionary rulings were made after Mr. Reini had a fair opportunity to present his case at trial. Mr. Reini chose to represent himself in his divorce and it was his responsibility to present the evidence he felt he needed in order to support his position at trial. After hearing the evidence and testimony from each side, the Trial Court awarded maintenance and a lien in favor of Ms. Kyle-Reini, decisions which are wholly in within its discretion and supported by both the law and the facts of this case. This Court should affirm the Trial Court's decision in its entirety.

### **III. RESTATEMENT OF THE FACTS**

#### **A. Background**

Respondent Debra Kyle-Reini and Mr. Reini were married on October 9, 1985. (CP at 172; RP at ). Ms. Kyle-Reini and Mr. Reini temporarily separated from August 2005 until May of 2006. (RP at 186). During their temporary separation, Ms. Kyle-Reini moved out of the family home. (RP at 186). After May of 2006, Mr. Reini began spending most of his time in Quincy until the couple officially separated on August 1, 2007. (RP at 205; CP at 172).

At the time the Dissolution Decree was entered Mr. Reini was fifty years old and worked in the construction business making 20 dollars per hour. (CP at 172; RP at 108). In the summer months, he works approximately 35 hours per week. (RP at 108; CP at 174). During the winter months he is laid off and receives approximately \$1,200 a month from unemployment benefits. (RP at 109; CP at 174).

In 2008, Mr. Reini moved in with his girlfriend who shares the household expenses with him. (RP at 166-67). Mr. Reini's

portion of the monthly household expenses is four hundred dollars, much of which goes toward a car driven by his girlfriend. (RP at 108). He testified that he does not pay rent and only pays some of the household expenses. (RP at 57).

Ms. Kyle-Reini is a fifty-seven year old woman whose education is limited to high school diploma and six months of college. (RP at 174, CP at 172). For the last nineteen years, Ms. Kyle-Reini has worked at an espresso stand that was jointly owned by her and her husband. (RP at 175). She has never had a set income from the espresso stand, instead she gets whatever is left after all of the bills are paid. (RP at 177, 185). She pays for all of her personal expense on her own. (RP at 188). Because of the small amount of income that she takes home, she has been and is currently unable to put any money in savings. (RP at 190).

Part of the reason for this is that her monthly expenses consume most of her income. Ms. Kyle-Reini has a gross monthly income of \$2000.00. (Exhibit 1.16). Her monthly obligations include mortgage payments, utilities and other necessary expenses. (CP at 18-20). She pays the monthly house payment in the amount of \$1,064.88. (CP at 18). She pays utilities in the

amount of \$318. (CP at 19). Along with her other health care and personal expenses, she owes more than she brings in. (CP at 18-20).

For a majority of the marriage, the couple did not pay into her social security because they planned on living on Mr. Reini's social security once they retired. (RP at 189-190). Because of this, even if Ms. Kyle-Reini retires at 70 years old she will only collect \$820 per month from social security. (RP at 189).

**B. Mr. Reini Chose To Represent Himself During Most Of The Dissolution Proceedings.**

On September 28, 2007, Mr. Reini through his attorney filed a dissolution petition. (CP at 1). Less than a year later he chose to represent himself in the divorce proceedings. (CP at 200). During that time Mr. Reini responded to numerous discovery requests including a June 12<sup>th</sup> letter from Ms. Kyle-Reini's counsel requesting "discoverable matters and/ or witness lists, additional information, interrogatories, and what not." (RP at 43). Prior to trial Mr. Reini did not request from or supply to Ms. Kyle-Reini's counsel any exhibits that he intended to supply at trial.

Mr. Reini did not make any objections to Ms. Kyle-Reini's exhibits at the time of trial. (See RP at 45). Ms. Kyle-Reini introduced 58 exhibits at trial and Mr. Reini did not object to any of them. (CP 147-149; RP at 82-230). It was not until he filed his Motion for New Trial that he made any comments about Ms. Kyle-Reini's exhibits. (CP at 180-187).

Even when Mr. Reini was represented by an attorney, he did not comply with court orders or discovery requests. (RP at 36). The court commented that "Mr. Reini has not done anything that the Court's ordered him to do." (RP at pg. 36, lines 12-13). After he chose to represent himself, he did not take depositions or ask for discovery of any kind from Ms. Kyle-Reini. (RP at pg. 53, lines 14-15, pg. 54, lines 16-19).

### **C. Mr. Reini Mishandled The Parties' Assets Both Before And After Separation**

Throughout the proceedings Mr. Reini mishandled the parties' assets. (RP at 35). His mishandling of the assets was so egregious that a court commissioner stated "[c]ertainly, Mr. Reini has done everything within his power to --- to get to a point where this is an assetless case." (RP at pg. 35, lines 12-13, 15-16). One

of the assets that Mr. Reini mishandled was the Quincy espresso stand. (RP at 37)

1. The Quincy Espresso Stand Was Under Mr. Reini's Management When It Failed.

Just before the parties separated in 2007, Mr. Reini took control of the espresso stand in the couple had purchased in Quincy, Washington. (RP at 179). Prior to trial, the espresso stand failed and was turned back to the sellers. (CP at 173; RP at 180). Ms. Kyle-Reini testified that part of the reason that the Quincy espresso stand went out of business was that Mr. Reini did not pay the bills and that he was using the money generated by the business for other purposes. (RP at 180). Mr. Reini admitted that during the time he was running the stand he did not pay expenses including B&O taxes and Social Security and L&I taxes for his employees. (RP at 162; see also RP at pg.3, line 22-23). He also did not pay the on the loan from a company called Summit Leasing. (RP at 37).

Mr. Reini used the business account to pay personal expenses without providing an accounting. (RP at pg. 11, lines 1-13). His "personal expenses" included paying for a trip to Hawaii

and trips to Idaho and Spokane. (RP at 22). As a result of Mr. Reini's mismanagement of the espresso stand, ownership of the stand had to be returned to the seller's. (RP at 180).

Despite his protests that the business failed due to a drop off of income, the Court determined that such was not the case. (RP at pg. 37, lines 14-15). In a memorandum opinion, the Court commission stated: "the Court is persuaded that husband's actions contributed to the failure of the Quincy business . . . ." (CP at 94).

2. Mr. Reini Withdrew His Retirement And Spent The Entire Amount Without Ms. Kyle-Reini's Knowledge Or Consent.

For a majority of the couple's marriage, Mr. Reini was employed by Yakima County as a corrections officer. (CP at 172; RP at 199). During that time he accrued a substantial amount in his PERS retirement. (CP at 172).

When the couple was first separated in 2005, Mr. Reini withdrew \$52,784.00 from his retirement account leaving a balance of \$4,583.00. (CP at 160; RP at 64, 186). The trial court was unable to tell how this money was spent, but based on Mr. Rein's testimony, determined that it went toward community debt. (CP at

160). However, the court did determine that it was done without Ms. Kyle-Reini's knowledge or consent. (CP at 160). Ms. Kyle-Reini confirmed this in her testimony. (RP at 186). She only found out about the withdrawal of the retirement because her banker inadvertently let it slip. (RP at 186-187). Even then Mr. Reini denied taking out his retirement money. (RP at pg. 187, lines 5-6).

3. Mr. Reini Spent The Proceeds From The Sale Of Community Real Property Without Ms. Kyle-Reini's Knowledge Or Consent.

The couple also sold two parcels of land for total of approximately \$96,000.00 toward the end of their marriage. (RP at 187; CP at 160). One parcel was sold during the parties' first separation. (RP at 187). Mr. Reini spent the proceeds without Ms. Reini's knowledge. (RP at 187). Although the trial court could not tell what most of the proceeds from the sales were used for, Mr. Reini admitted to using \$29,000.00 of the money to buy a Harley Davidson motorcycle. (RP at pg. 64, lines 11-12).

**D. The Trial Court Allocated Assets Equally Between the Parties.**

In its division of the parties' assets, the trial court determined that an equal division would be an equitable division. (CP at 162). The trial court therefore awarded Mr. Reini assets worth \$47,659.00. (CP 161-62). These assets included a Harley Davidson motorcycle valued at \$20,000.00, a fifth wheel trailer valued at \$12,500.00, and personal tools and possession with a total value of \$9000.00. (CP at 161). Mr. Reini did not dispute the value of these assets at trial.

The trial court awarded Ms. Kyle-Reini assets in the amount of \$25,876.00. (CP at 161-62). Although, the assets awarded to Ms. Kyle-Reini included the espresso stand and family home, each of these was encumbered with so much debt their value was reduced significantly. (CP at 161-62). The espresso stand was valued at negative \$16,070.00 and the house was valued at \$12,653.00. (CP at 161-62). In order to make the distribution award equal, the trial court awarded a \$20,165.00 lien in favor of Ms. Kyle-Reini. However, even with the lien, the assets awarded to

Mr. Reini exceeded those awarded to Ms. Kyle-Reini by over \$1,600.00. (CP at 161-62).

1. The Trial Court Chose A Value Of The Home That Was Within The Range Of Options Provided.

The trial court was presented with two valuations of the home. (CP at 161-62). Mr. Reini valued it at \$189,000.00 and Ms. Kyle-Reini valued it at \$114,000.00. (CP at 161-162). Neither side provided expert testimony regarding the value of the house. (CP at 153). After viewing pictures of the home, the trial court valued the house at \$130,000.00 with encumbrances totaling \$117,347.00 giving the house a total value of \$12,653.00. (CP at 162).

2. The Trial Court Took All Of The Testimony Regarding The Moxee Espresso Stand Into Consideration When It Valued The Asset.

After hearing testimony and reviewing documents provided by Ms. Kyle-Reini, the trial court found the value of the espresso stand was negative \$16,070.00. (CP at 161-62). This was in large part due to the loan in the amount of \$33,780.00 which was taken out in part to support the Quincy espresso stand which failed due to Mr. Reini's mishandling. (CP at 161; RP at 180). Initially Mr. Reini

was ordered by the court to pay the monthly payments but he refused. (RP at 37, 178). Ms. Kyle-Reini had to take over the payments in order keep the Moxee espresso stand from being foreclosed. (RP at 37, 178).

Along with the loan payment, Ms. Kyle-Reini testified that the cost of supplies and rent has increased recently and rent will increase another three percent in the next year. (RP at 226). Ms. Kyle-Reini also testified that she has lost customers due to the increase of competition in the area. (RP at 181-182). Due to all of these factors, the espresso stands profits had decreased. (RP at 226). The trial court took all of this into consideration, including the businesses gross income, when it valued the business at negative \$16,070.00. (CP at 161).

### **III. ARGUMENT**

#### **A. Standard of Review**

Review of a Trial Court's findings of fact is limited to determining whether the findings are supported by substantial evidence since "the constitution does not authorize the Court to substitute its findings for that of the trial court". *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183, 186

(1959). Substantial evidence means "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise". *In re Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991). *Accord, Magnuson v. Magnuson*, 141 Wn. App. 347, 351, 353, 170 P.3d 65 (Div. III, 2007), *rev. den.*, 163 Wn.2d 1050 (2008).

Property divisions under *RCW 26.09.080* are reviewed for an abuse of discretion. *In re Marriage of Schweitzer*, 81 Wn. App. 589, 595-96, 915 P.2d 575, *affirmed*, 132 Wn.2d 318 (1997) (reversing property award). Maintenance awards are also reviewed for an abuse of discretion, which occurs, among other circumstances, when the Trial Court "does not base its award on a fair consideration of the statutory factors under *RCW 26.09.090*". *In re Marriage of Marzetta*, 129 Wn. App. 607, 624, 120 P.3d 75 (Div. III, 2005)(reversing maintenance award); *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P. 2d 462 (Div. III, 1993)(vacating maintenance award). *Accord, In re Marriage of Sheffer*, 60 Wn. App. 51, 53, 57-58 & n.2, 802 P.2d 817 (1990)(reversing maintenance award for failure of Trial Court to adequately consider parties' standard of living during the marriage

and the post-dissolution economic conditions that would result from the property division and maintenance award).

A Trial Court abuses its discretion when its decision is manifestly unreasonable; or is exercised or based on untenable grounds or reasons concerning the purposes of the Trial Court's discretion; or for no reason, since then there is no exercise of discretion. *Marriage of Kovacs*, 121 Wn.2d 795, 801, 854, P.2d 629 (1993)(reversing for abuse of discretion). *Accord, Coggle v. Snow*, 56 Wn. App. 499, 505-07, 784 P.2d. 554 (1990) (vacating discretionary decision); *In re the Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).<sup>1</sup> Abuse of discretion thus can be boiled down to the following: a "court acts on untenable grounds if its factual findings are unsupported by the record; the court acts for untenable reasons if it has used an incorrect standard or the facts do not meet the requirements of the correct standard; and the court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard". *In re Marriage of*

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<sup>1</sup> "A Court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

*Wicklund*, 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996)(reversing trial court). Justice Kulik recently re-emphasized that “an abuse of discretion is found if the Trial Court applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P. 3d 1251 (2007) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 684, 132 P.3d 115 (2006)).” *Magnuson v. Magnuson*, *supra*, 141 Wn. App. at 353 (Kulik, J., dissenting).

Mr. Reini argues that the trial court abused its discretion in three ways: (1) by awarding maintenance to Ms. Kyle-Reini; (2) by awarding a lien against Mr. Reini’s property; and (3) by denying Mr. Reini’s motion for new trial based on Ms. Kyle-Reini’s attorney’s failure to follow LCR 40(e)(1). As discussed below the trial court was well within its discretion when it made its rulings.

**B. The Trial Court Correctly Awarded Maintenance To Ms. Kyle-Reini.**

The court may grant a maintenance order for either spouse in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant

factors. RCW 26.09.090. RCW 26.09.090 then sets out the following nonexclusive list of factors that the court must consider:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

Spousal maintenance is within the discretion of the trial court. *Marriage of Foley*, 84 Wn. App. 389, 845-46, 930 P.2d 929, 932 (1997). An award of maintenance that is not evidenced by a fair consideration of the statutory factors constitutes an abuse of discretion. *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993). An award does not evidence a fair consideration of the statutory factors when the award is substantively irreconcilable with fair consideration of the factors, *e.g.*, *Mathews*; when the record reveals unwarranted reliance on other, non-statutory factors, *e.g.*, *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001); and when the trial court substitutes a disproportionate property award for a duly-considered maintenance award, *see In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996).

In this case, the trial court found that Mr. Reini made \$3,000.00 a month based on his testimony that he earned \$20 per hour and worked 35 hours a week. (CP at 162; RP at 108). During the time that he is seasonally unemployed the court determined that he makes \$1,200.00 a month. (CP at 162). After considering the maintenance factors in RCW 26.09.090, the trial court ordered

Mr. Reini to pay \$500 a month during the time that he is employed and \$250 a month when he is receiving unemployment benefits. (CP at 162).

Mr. Reini argues that the maintenance award was unfair because Ms. Kyle-Reini has the means to support herself and Mr. Reini does not have the means to pay the support. (App. Brief at 25-33). Mr. Reini also claims that maintenance award was based in part on his marital misconduct. (App. Brief at 33). As discussed below these claims are without merit.

1. The Trial Court Correctly And Fairly Considered The First Statutory Factor Including Ms. Kyle-Reini's Need.

Mr. Reini essentially argues that because Ms. Kyle-Reini was awarded the espresso stand and the family home that she does not have need for spousal maintenance. (App. Brief at 25). However, this argument ignores the fact that Mr. Reini total asset award exceeded that of Ms. Kyle-Reini. (CP at 160-62).

The trial court awarded Mr. Reini assets worth \$47,659.00. (CP 161-62). These assets included a Harley Davidson motorcycle valued at \$20,000.00, a fifth wheel trailer valued at \$12,500.00, and personal tools and possession with a total value of \$9000.00. (CP

at 161). The assets awarded to Mr. Reini are encumbered by very little debt. (CP at 161). In fact the only assets awarded to Mr. Reini that had any encumbrances were the two Harley Davidson motorcycles. (CP at 161). Essentially Mr. Reini was awarded assets that could easily be liquidated to provide extra income.

On the other hand, the trial court awarded Ms. Kyle-Reini assets that although appear to be worth more are actually so encumbered by debt that they are virtually worthless. (CP at 161). The espresso stand that Mr. Reini claims to be such a huge income producing business was found to be worth negative \$16,070.00. (CP at 161). This is in large part to the loan in the amount of \$33,780.00 which was taken out in part to support the Quincy espresso stand which failed due to Mr. Reini's mishandling. (CP at 161; RP at 180). Initially Mr. Reini was ordered by the court pay the monthly payments but he refused and Ms. Kyle-Reini had to take over the payments in order keep Moxee espresso stand from being foreclosed. (RP at 37, 178).

Along with the loan payment, the cost of supplies and rent has increased and rent will increase another three percent. (RP at 226). Ms. Kyle-Reini has also lost customers due to the increase of

competition in the area. (RP at 181-182). She testified that the espresso stands profits have decreased. (RP at 226). The trial court took all of this into consideration, including the businesses gross income, when it valued the business at negative \$16,070.00. (CP at 161).

The same is true with the family home. The trial court was presented with two valuations of the home. (CP at 161-62). Mr. Reini valued it at \$189,000.00 and Ms. Kyle-Reini valued it at \$114,000.00. (CP at 161-162). After viewing pictures of the home, the trial court valued the house at \$130,000 with encumbrances totaling \$117,347.00 giving the house a total value of \$12,653.00. (CP at 162). Even if she were to sell the house, she would not be able to make enough to live for more than a few months, and she would be out of a home. Neither of these assets has enough value to take away Ms. Kyle-Reini's need for spousal support.

- i. The Trial Court Correctly Calculated Ms. Kyle-Reini's Income with the evidence it had before it at trial.

Mr. Reini claims that Ms. Kyle-Reini has a gross monthly income of \$3,000.00. (App. Brief at 25). He bases his claim on a

loan application, signed by Ms. Kyle-Reini one month before trial, which was never admitted into evidence. (RP at 58-59; CP at 230-31). The loan application was brought to the trial court's attention for the first time in Mr. Reini's Motion for New Trial. (CP at 180-81). Mr. Reini claimed that the application was newly discovered evidence warranting a new trial. (CP at 180-181). However, the trial court correctly determined that the application was not newly discovered evidence under CR 60.<sup>2</sup> (RP at 58-59). Because the application was not presented as evidence at trial, Mr. Reini cannot use it now to try and bolster his arguments. RAP 9.11(a); *see also Dept' of Labor and Indus' v. Lanier Brugh*, 135 Wn. App. 808, 147 P.3d 588 (2006). Regardless, on the third page of the application Ms. Kyle-Reini indicated that she had \$2,000.00 a month in gross income, and that was the same amount that she represented that she had at the time of trial. (CP at 232).

At the time of trial, the court had before it Ms. Kyle-Reini's financial declaration, and her bankruptcy documents. (Exhibits 1.2

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<sup>2</sup> In order to be newly discovered evidence Mr. Reini had to show that the application, even by due diligence, could not have been discovered in time to move for a new trial under rule CR 59(b). *Vance v. Offices of Thurston County Com'rs*, 117 Wash. App. 660, 671, 71 P.3d 680, 685 (2003). Mr. Reini made no such showing.

and 1.16). The financial declaration listed her income at \$2,000.00 and bankruptcy documents listed her income as \$1,970.00 per month. (Exhibits 1.2 and 1.6). Neither of these amounts were disputed at trial. Although it is difficult to tell which of these figures the trial court used, both are well below the \$3,000.00 a month that Mr. Reini makes when he is working. Even if the trial court were to use Mr. Reini's average income of \$2,550.00 as he proposes in his brief, Mr. Reini still grosses more than Ms. Kyle-Reini. (App. Brief at 14, 30).

ii. The Trial Court Correctly determined Ms. Kyle Reini's need for spousal maintenance.

The first factor that must be considered by the court is the need of the party asking for maintenance. RCW 26.09.090. This necessarily requires that the court take into account not only the income of the party but also his or her ability to meet its financial obligations with the income available to them. RCW 26.09.090(a).

Mrs. Kyle-Reini makes less than Mr. Reini. She has more financial obligations as well. Her monthly obligations include mortgage payments, utilities and other necessary expenses. (CP at 18-20). She pays the monthly house payment in the amount of

\$1,064.88. (CP at 18). She pays utilities in the amount of \$318.00. (CP at 19). Along with her other health care and personal expenses, she owes more than she brings in. (CP at 18-20). Despite Mr. Reini's arguments to the contrary, Ms. Kyle-Reini barely gets by on the money she is able to bring in from the espresso stand.

The trial court accounted for this when it awarded Ms. Kyle-Reini spousal maintenance. (CP at 162). The \$500 a month in maintenance puts both parties at the same amount of gross each month. After \$500 dollars in maintenance is taken away from Mr. Reini's gross of \$3,000 a month and added to Ms. Kyle-Reini's \$2,000 per month, both parties will have \$2,500 per month. Although the maintenance payments will increase her income, she will still have to cut back expenses in order to live within her income. (See CP 18-20).

Further, Ms. Kyle-Reini was 57 years old at the time of trial. For a majority of the marriage, the couple did not pay into her social security because they planned on living on Mr. Reini's social security once they retired. (RP at 189-190). Because of this, even if Ms. Kyle-Reini retires at 70 years old she will only collect \$820

per month from social security. (RP at 189). The trial court took this into consideration in determining the length of the maintenance award. (CP at 153).

The trial court correctly determined Ms. Kyle-Reini's need and Mr. Reini's ability to pay.

2. The Trial Court Correctly Determined That Mr. Reini Had The Ability To Pay Spousal Maintenance.

A court must determine the ability of the party from whom maintenance is sought to meet his or her financial obligations while meeting those of the spouse seeking maintenance. RCW 26.09.090(1)(f). Here the trial court determined that Mr. Reini had the ability to meet his own needs while paying spousal maintenance. (CP at 153).

Mr. Reini argues that he cannot afford to pay maintenance but gives no reason other than the fact that he filed for bankruptcy 4 years ago. (App. Brief at 30). However, this argument is flawed because many of his debts were discharged in bankruptcy leaving him more available income. (Exhibit 1.1).

Mr. Reini has very few monthly expenses. In 2008, he moved in with his fiancé and began sharing expenses with her.

(RP at 107-106, 166-167). He pays \$400.00 a month in expenses. (RP at 108). Although he grosses \$3,000.00 a month and only has \$400.00 in expenses he claims that he cannot pay maintenance to his ex-wife who only makes \$2,000.00 a month and has over \$1,000.00 dollars in monthly expenses.

Mr. Reini has not shown that he cannot afford to pay maintenance. In fact, the evidence shows that he can comfortably afford to pay \$500.00 a month when working, and \$250.00 a month when he is receiving unemployment benefits.

3 The Trial Court Did Not Take Marital Misconduct Into Account When It Awarded Ms. Kyle-Reini Spousal Maintenance.

Mr. Reini argues that the trial court improperly considered evidence that he withdrew his retirement account and spent the entire sum without the knowledge of Ms. Kyle-Reini; that he spent \$96,000 dollars from the sale of the couples land and beside buying a \$29,000 motorcycle, could not account for where the money went; and that he quit two steady jobs, one of which was after separation, in order to take a seasonal job. (App. Brief at 34-36). Mr. Reini contends that because this information was solicited from

Mr. Reini, the trial court impliedly used this information to punish him by awarding maintenance to Ms. Kyle-Reini. (App. Brief at 35). However, Mr. Reini's arguments confuse the issue.

First, there is no evidence that the trial court considered Mr. Reini's dissipation of assets when it awarded maintenance. (CP 153). In fact, the spousal maintenance section in the trial court's memorandum decision is wholly devoted to the income of the parties and does not mention assets. (CP at 152). The trial court's sole concern was an evaluation of the statutory factors for awarding maintenance. (CP at 152). This is evidenced by the court's statement that it had "considered the maintenance factors set forth in RCW 26.09.090." (CP at 152). After it had evaluated those factors, it determined that the maintenance award was appropriate. (CP 152).

Second, Mr. Reini's argument implies that "wasting of assets" by a spouse is "marital misconduct" and therefore cannot be considered by the court. This argument is incorrect.

RCW 29.09.090 states that court's decision to award maintenance must be made without regard to marital misconduct. "[T]he 'marital misconduct' which a court may not consider . . .

refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence or the squandering of marital assets.” *In re Marriage of Steadman*, 63 Wn. App. 523, 528, 821 P.2d 59, 62 (1991). However, the court may look to the acts of the spouses in dissipating community assets in order to achieve a just and equitable distribution of community assets. *In re Clark’s Marriage*, 13 Wn. App. 805,808, 538 P.2d 145 (1974).

In *Clark*, the issue before the court was whether the trial court could consider evidence of a husband’s wasting of marital assets. *Id.* at 808. In that case the husband had wasted much of his income on alcoholic beverages while his wife paid the household expenses with her income. *Id.* The husband was also unable to account for \$10,000 from the proceeds of the sale of the couple’s radio station even though he had complete control of the money. *Id.* The court found that although those acts happened during the marriage, the trial court could consider them in order to make a just and equitable distribution of community assets. *Id.* at 880-809.

Mr. Reini’s actions are similar to those of Mr. Clark. While Mr. Reini and Ms. Kyle-Reini were married, Mr. Reini took marital

assets spent them without the knowledge or consent of his wife. He was also unable to provide an adequate accounting of where most of the money went. He mishandled the Quincy espresso stand to the point where it had to be turned back to the sellers in lieu of foreclosure. He refused to pay on a loan even after he was ordered to by the court. His attempts to dissipate the marital assets was commented on by the Court Commissioner when she said “[c]ertainly, Mr. Reini has done everything within his power to --- to get to a point where this is an assetless case.” (RP at pg. 35, lines 12-13, 15-16).

Despite the fact, Mr. Reini wasted community assets, the trial court still determined that an equal split of the assets and an award of spousal maintenance was fair and equitable in light of the parties' economic circumstances. (CP at 153). As explained above, he awarded maintenance in an amount that would provide equal gross income to both parties (i.e. \$2,500 per month). (CP at 153). He also awarded the assets equally between the parties.

**C. The Trial Court Correctly Awarded A Lien In Favor  
Of Ms. Kyle-Reini.**

The division of the parties' property and liabilities is governed by RCW 26.09.080.

In a proceeding for dissolution of marriage . . . , the court shall, without regard to misconduct, make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) nature and extent of the community property;
- (2) nature and extent of the separate property;
- (3) duration of the marriage or domestic partnership; and
- (4) the economic circumstances of each spouse or domestic partner at the time of the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

"The trial court is in the best position to assess the assets and liabilities of the parties and determine what is 'fair', just and equitable. *Marriage of Brewer*, 137 Wn.2d 756,769, 976 P.2d 102 (1999). In light of the trial court's broad discretion, a property distribution will not be reversed on appeal absent a showing of manifest abuse of discretion. *Id.*

Mr. Reini's sole argument with regard to the lien is that he cannot afford to pay it. (App. Brief at 39-40). He contends that in order to pay the lien he would have to give up a year's salary. (App. Brief at 39-40). However, this argument ignores the fact that Mr. Reini was awarded over \$47,000.00 worth of assets. (CP at 161-62).

In its division of the parties' assets, the trial court determined that an equal division would be an equitable division. (CP at 162). The trial court therefore awarded Mr. Reini assets worth \$47,659.00. (CP 161-62). These assets included a Harley Davidson motorcycle valued at \$20,000.00, a fifth wheel trailer valued at \$12,500.00, and personal tools and possession with a total value of \$9000.00. (CP at 161). Mr. Reini did not dispute the value of these assets at trial.

On the other hand, the trial court awarded Ms. Kyle-Reini assets in the amount of \$25,876.00. (CP at 161-62). Although, the assets awarded to Ms. Kyle-Reini included the espresso stand and family, each of these was encumbered with so much debt their value was reduced significantly. (CP at 161-62). The espresso stand was valued at negative \$16,070.00 and the house was

valued at \$12,653.00. (CP at 161-62). In order to make the distribution award equal, the trial court awarded a \$20,165.00 lien in favor of Ms. Kyle-Reini. However, even with lien, the assets awarded to Mr. Reini exceeded those awarded to Ms. Kyle-Reini by over \$1,600.00. (CP at 161-62).

Despite the assets awarded to Mr. Reini he contends that he cannot pay the lien. It would be a simple thing for him to sell some of his assets to pay the lien. Selling even the one motorcycle would give him enough money to pay the lien.

**D The Trial Court Properly Denied Mr. Reini's Motion For New Trial**

The grant or denial of a new trial is a matter within the trial court's discretion. *Kuhn v. Schnall*, 155 Wn. App. 560, 570-71, 228 P.3d 828, 833 *review denied*, 169 Wn. 2d 1024, 238 P.3d 503 (2010). The court's decision will be disturbed only for a clear abuse of that discretion or when it is predicated on an erroneous interpretation of the law. *Id.* The erroneous admission of evidence is grounds for a new trial only when the evidence at issue was timely and specifically objected to at trial. *State v. Carlson*, 61 Wn.

App. 865, 869, 812 P.2d 536, 538 (1991); *Beam v. Beam*, 18 Wn. App. 444, 569 P.2d 719 (1977).

Here, Ms. Kyle-Reini introduced 58 exhibits at trial; Mr. Reini did not make any objections to Ms. Kyle-Reini's exhibits at the time of trial. (CP 147-149; RP at 82-215). In fact, he used some of Ms. Kyle-Reini's exhibits to bolster his case. (RP at 215-230). It was not until he filed his Motion for New Trial that he made any comments about Ms. Kyle-Reini's exhibits. (CP at 180-187). He therefore waived his right to ask for a new trial based on the admission of the exhibits. *Carlson*, 61 Wn. App. at 869, 812 P.2d 536.

Mr. Reini argues that it is irrelevant that he did not object to the exhibits until after trial because he raised them for the first time in his Motion for Reconsideration. (App. Brief at 41). In support of this argument Mr. Reini cites *Rotta v. Early Industrial Corp.*, 47 Wn. App. 21, 733 P.2d 576 (1987) and *Newcomer v. Masini*, 45 Wn. App. 284, 724 P.2d 1122 (1986). However, his reliance on these cases is misplaced. In both cases, the issues raised in the Motion for Reconsideration were also raised at trial.

In *Rotta*, the Court of Appeals found that the Defendant did not waive the issues of insufficient notice and commercial reasonableness because it had raised those issues in its closing argument at trial and again in its motion for reconsideration. 47 Wn. App. at 23-24, 733 P.2d 576. Similarly in *Newcomer*, the court found that because defendant's new theory on reconsideration was just an offshoot of theory he had argued at trial he did not waive the issue on appeal. 45 Wn. App at 287, 724 P.2d 1122. The *Newcomer* court state:

“Mr. Masini's theory of subrogation is not dependent upon new facts and is closely related to and part of the theory of unjust enrichment. Since subrogation is a corollary of the unjust enrichment theory, Mr. Masini need not have expressly presented every theory supporting his argument for reimbursement. It was sufficient here that he expanded and refined details of an argument already presented at trial.”

*Id.*

Here, unlike in *Newcomer, supra*, and *Rotta, supra*, Mr. Reini did not raise the issue of noncompliance with LCR 40(e)(1) at trial. The first time the issue was raised was in his motion for reconsideration. (CP at 200). The trial court correctly denied Mr.

Reini's motion because as it stated "[t]hat's something that should have been brought up prior to the time of trial. . ." (RP at 45)

Mr. Reini also contends that it was Ms. Kyle-Reini's counsel's duty to adhere to LCR 40(e)(1)<sup>3</sup> by providing proposed exhibits to Mr. Reini a week before trial. (App. Brief at 40). He argues that if Ms. Kyle-Reini's counsel had sent him exhibits a week before trial, he would have known that he needed to present exhibits of his own. (App. Brief at 40).

This argument is also without merit. First, it is a long standing rule that when a party decides to represent themselves in legal proceedings, they assume the same duties and responsibilities and are accountable to the same standard of ethics and legal knowledge as an attorney. *Batten v. Abrams*, 28 Wn. App. 737, 751 at fn.1, 626 P.2d 984 (1981)(citing *Hecomovich v. Nielson*, 10 Wn. App. 563, 571-72, 518 P.2d 1081(1974)). This necessarily includes that the pro se party become familiar with and adhere to the civil rules, including LCR 40(e)(1). It is apparent that Mr. Reini

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<sup>3</sup> Although LCR40(e)(1) became effective in 2010, it has never been implemented or enforced in Yakima County.

did not follow LCR 40(e)(1); he did not submit proposed exhibits to Ms. Kyle-Reini's counsel.

LCR 40(e)(1) requires that “[t]he week prior to trial, **counsel for all parties** shall provide a copy of their likely exhibits to all counsel. . .” (*emphasis added*). It does not make a distinction for parties who chose to represent themselves. LCR 40(e)(1). Mr. Reini had the same duty to produce exhibits a week before trial as did Ms. Kyle-Reini's attorney. He failed to do so. He cannot now say that Ms. Kyle-Reini's attorney should be faulted for not following the local rule when he is guilty of the same. The fact that he represented himself and was ignorant of the rule does not excuse him from the duty of following it. *See Batten*, 28 Wn. App. at 751, fn. 1 (*stating* that in these cases, “[t]he maxim of Roman law. ‘ignorantia legis neminem excusat’ applies.”).

**E. Mr. Reini Impermissibly Tries To Add Evidence In His Brief That Was Not Presented To The Trial Court.**

An appellate court is review of a superior court decision generally limited to record of the lower court. *See Dept' of Labor and Indus' v. Lanier Brugh*, 135 Wn. App. 808, 147 P.3d 588 (2006). RAP 9.1(a) defines the “record on review” as:

“(1) a ‘report of proceedings’, (2) ‘clerk’s papers’, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.”

RAP 9.11 does allow for the appellate court to direct that new evidence be taken in extremely limited circumstances. It states:

“The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse the party’s failure to provide the evidence to the trial court, (4) the remedy to the party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would inequitable to decide the case solely on the evidence already taken at the trial court.”

RAP 9.11.

In *Brugh*, the Appellant attempted to add documentation regarding whether the United States Department of Labor had to pay contractors overtime. 135 Wn. App. at 822, 147 P.3d 588. The Division I Court of Appeals held that attempting to supplement the record by introducing evidence for the first time in an appendix to a brief was impermissible under RAP 9.1. *Id.* It also stated that the

documents did not meet the requirements of RAP 9.11. *Id. at 823.* The Court of Appeals stated: "RAP 9.11 does not authorize the supplementation of the trial court records on the facts. . . . RAP 9.11(a) requires the [appellants] to satisfy the six elements to prove that the evidence is necessary to resolve the case." *Id.*

Here Mr. Reini impermissibly attempts include in his brief evidence of regarding the number of construction jobs in the United States economy. (App. Brief at Attachment 2). The document from the Bureau of Labor Statistics is for data compile in May of 2012, which was eight months after trial and six months after the trial court had heard all post trial motions. Mr. Reini also references this document in his brief as evidence that he cannot pay spousal maintenance. (App. Brief at pg. 31, lines 11-14, fn. 6).

Neither the Attachment nor the reference to the attachment meets the 6 requirements of RAP 9.11(a) and therefore it is an impermissible attempt to present new evidence. *See Brugh*, 135 Wn. App. at 822, 147 P.3d 588.

**F. Ms. Kyle-Reini Should Be Awarded Attorney's Fees  
For Having To Defend This Appeal.**

Under RCW 26.09.140, “the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.” As an independent ground the court may award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses. *Gamache v. Gamache*, 66 Wn.2d 822, 829–30, 409 P.2d 859 (1965); *Eide v. Eide*, 1 Wn. App. 440, 445–46, 462 P.2d 562 (1969). If intransigence is established, we need not consider the parties' resources. *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996).

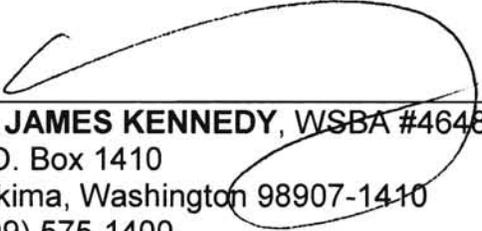
Here Mr. Reini has been intransigent in his handling of assets, his continued refusal to obey court orders, and his refusal to comply with discovery requests. (RP at 36).

#### **IV. CONCLUSION**

The trial court’s decisions on property distribution, spousal maintenance, and denial of Mr. Reini’s Motion for New Trial were well within its discretion. This Court should affirm.

Respectfully submitted this 13 of August, 2012.

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