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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

APPELLATE CASE NO. 315843

SANDRA KAY HUNT, Respondent
v.
SAMUEL EARL HUNT, Appellant

APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR WHITMAN COUNTY

HONORABLE DAVID FRAZIER, JUDGE
Case No. 12-3-00030-3

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN DENYING APPELLANTS MOTION TO REOPEN, RECONSIDERATION AND TO CLARIFY ON MARCH 15, 2013
2. THE TRIAL COURT ERRED IN ENTERING ITS FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT WITHOUT ALLOCATING SUBSTANTIAL COMMUNITY LIABILITIES THAT EXISTED AS OF THE DATE OF SEPARATION.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1

DOES THE TRIAL COURT'S REFUSAL TO ACCEPT CLARIFYING DOCUMENTATION TO REHABILITATE THE ALLEGED LACK OF CREDIBILITY OF MR. HUNT, AS SUGGESTED BY THE COURT FOR THE FIRST TIME IN ITS ORAL AND WRITTEN RULINGS, CONSTITUTE AN ABUSE OF DISCRETION? (Assignment of Error No. 1)

ISSUE NO. 2

DOES THE COURT'S REFUSAL TO CONSIDER THE

FOLLOWING COMMUNITY INDEBTEDNESS OWED AT THE TIME OF SEPARATION CONSTITUTE AN ABUSE OF DISCRETION: 1) COMMUNITY INDEBTEDNESS IN THE AMOUNT OF \$46,410.00 OWED TO WALT MILLER; 2) COMMUNITY INDEBTEDNESS IN THE AMOUNT OF AN ADDITIONAL \$91,245.00 OWED TO WALT MILLER (REPRESENTING ONE-HALF OF THE TOTAL BILL OF \$182,490.00); AND 3) COMMUNITY OBLIGATIONS OWED BY C & L LOCKERS IN THE AMOUNT OF \$21,317.37. (Assignment of Error No. 2)

ISSUE NO. 3

WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ABOVE COMMUNITY INDEBTEDNESS IN THE TOTAL AMOUNT OF \$158,972.37 AS OF THE DATE OF SEPARATION? (Assignment of Error No. 2)

ISSUE NO. 4

DOES THE COURT'S FAILURE TO ALLOCATE THE ABOVE COMMUNITY DEBTS IN THE TOTAL AMOUNT OF \$158,972.37 RESULT IN A DIVISION OF PROPERTY AND LIABILITIES THAT IS NOT JUST AND EQUITABLE? (Assignment of Error No. 2)

STATEMENT OF THE CASE

The parties were married on April 15, 2006 and separated on September 11, 2011. (CP page 27) Following the trial in this matter, the court presented a spread sheet awarding the property and liabilities of the parties. The spreadsheet did not address in any form the substantial community liabilities owed by the marital community to Walt Miller and C & L Lockers suppliers. Mr. Hunt filed a Motion to Reopen, Reconsider and To Clarify the property and debt division orally ruled on by the trial court. (CP pages 08 through 25). The motion addressed several issues that had not been properly addressed by the court in arriving at a fair and equitable division of the property and liabilities of the parties. Those issues were as follows:

1. Community debts owed at the time of separation to Walt Miller for the purchase of sheep at the time of separation were not addressed by the court (CP page 9, line 10 through line 20), (CP page 19 through page 21) despite Mr. Hunt's testimony to this effect. (RP 12/3/2012, page 131 line 22 through page 136. Line 9; Exhibit No. 26; and CP page 4). This testimony was further corroborated in the cross examination of Mr. Hunt when he testified to the sale of sheep in July 2012, following the date of separation. (RP 12/3/2012 page 139, line 22 to page 140, line 12) This testimony demonstrated that the Walt Miller community indebtedness above-referenced in fact existed.

The testimony and documents further reflect the specific amount of community loans from Walt Miller to the parties, the first loan being in the principal amount of \$46,410.00, without an interest calculation (CP page 4) and a second loan being in the principal amount of \$91,245.00 as of the time of separation in September, 2011. (CP page 4) The latter sum representing one-half of a total debt of \$182,490.00 owed to Walt Miller with the remaining one-half of said debt being the responsibility of a third party, Mr. Dillon Summers. The court disregarded in its written rulings the entirety of these seemingly uncontroverted community debts. (RP 3/15/2013, page 27, line 3 through line 9, and page 29, line 10 through page 31, line 11)

2. The community debts owed by C & L Lockers, (CP page 9, lines 20-27, Respondents Exhibit 16 and RP 12/3/2012 page 149, line 21 through page 152, line 6) were completely disregarded by court, both at trial and in the motion to clarify. At trial, Mr. Hunt's responses to formal discovery were submitted, revealing that the total C & L Lockers indebtedness at the time of separation amounted to the sum of \$28,500.00. In the Motion to Reopen, Reconsider and to Clarify, Mr. Hunt further corroborated his trial testimony by providing additional declarations of two of the five suppliers of Mr. Hunt. These declarations supported \$21,317.37 of the listed debts for C & L Lockers. The information attached to the Motion for Clarification was merely attached to corroborate the testimony of Mr.

Hunt at trial, after the Court's oral ruling suggesting a lack of "credibility" by Mr. Hunt by failing to provide receipts or invoices to support the debts to which he testified under oath, and for which he believed were undisputed. The material submitted as a part of the Motion For Clarification was introduced in specific response to the court's oral comments that Mr. Hunt's credibility was an issue. It was not tendered as "new evidence" regarding a community liability that was not already disclosed at trial. (RP 12/3/2012 page 250, line 12 through 251, line 8)

The Findings of Fact (CP page 27, paragraphs 2.8 and 2.10 and page 31) and Conclusions of Law (CP page 29, paragraph 3.4) make no reference to outstanding community debts owed to Walt Miller as of the time of separation on September 11, 2011 in the respective amounts of \$46,410.00 and \$91,245.00. The court's spreadsheet was not provided to the parties until after the trial had concluded and the court had taken the matter under advisement. As such, Mr. Hunt's first objection to the courts's failure to address the above community indebtedness was made in conjunction with his Motion to Reopen, Reconsider and to Clarify on March 15, 2013. (RP 3/15/2013 page 29, line 10 to page 31, line 11)

ARGUMENT

The standard of review of a trial court decision have recently

been set out in the case of Buck Mt. Owners' Ass'n v. Prestwich,
174 Wn. App. 702, ____ P. 3rd ____, (2013) as follows:

1. When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings support the trial court's conclusion of law and judgment.
2. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.
3. The court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses.
4. In determining the sufficiency of the evidence, the court need only consider evidence favorable to the prevailing party.
5. There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.
6. Unchallenged findings of fact are verities on appeal.
7. The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument or they become verities on appeal.
8. Such unsupported arguments need not be considered.
9. The court reviews questions of law de novo.

Buck Mt. Owners' Ass'n, supra, at 713-714

Mr. Hunt contends that a property division that does not address community debts totaling \$158,973.37 cannot be considered a “just and equitable” division of the parties’ property and liabilities. Further, the courts’s failure to address, or properly allocate, the said community debt in its written findings of fact and conclusion of law, should be considered an error of law, to be considered de novo by this court.

ISSUE NO. 1

DOES THE TRIAL COURT’S REFUSAL TO ACCEPT CLARIFYING DOCUMENTATION TO REHABILITATE THE ALLEGED LACK OF CREDIBILITY OF MR. HUNT, AS SUGGESTED BY THE COURT IN ITS ORAL RULINGS, CONSTITUTE AN ABUSE OF DISCRETION?

The court refused to consider corroborating and what should be considered cumulative evidence to rehabilitate its concern over the credibility of Mr. Hunt in this matter based upon a Motion to Reopen, Reconsider and To Clarify. The court in its oral decision raised the issue of credibility of Mr. Hunt as it related to the purchase of a pickup and the expenses that related to the pickup, when he or the community carried such a large amount of debt (RP 12/3/2012, page 250, line 12 through line 19). Further, the court refused to accept corroboration of testimony related to the Walt Miller

outstanding debts (RP 3/15/2013, page 27, line 1 through line 9). However, there was documentation and testimony related to the Walt Miller debts at trial, (CP page 4; RP 12/3/2012, page 204, line 8, through line 18).

In Meridian Minerals v. King County, 61 Wn. App 195, 810 P. 2d 31 (1991), it was held:

“Although not encouraged, a party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered.” [citations omitted] Meridian, supra. at 202-203.

The foregoing authority stands for the proposition that the trial court is entitled to accept additional evidence following its oral or memorandum opinion before it has entered its written findings, conclusions and judgment. The above logic should be even more compelling when the evidence sought to be admitted is for the sole purpose of attempting to rehabilitate a witness whose credibility has been questioned for the first time by the court in its oral ruling upon the conclusion of the trial. In this case, the testimony to which the corroborating evidence pertained, had been admitted at trial, and it was its weight, regardless if the motion follows a bench trial or a summary judgment motion. The finality of the decision is the same in both cases. The legal justification for allowing corroborating post trial evidence would seem to be to its admissibility, that was questioned in the courts’s oral rulings, due to these general

credibility concerns.

Also, in In Re Marriage of Harshman, 18 Wn. App. 116, 567 P.2d 667 (1977) where a motion for reconsideration was made following an oral decision, but before findings, conclusions and judgment were entered, the court held:

“... a trial judge’s oral decision is not more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into findings conclusions, and judgment.”[citations omitted], Harshman, supra at 120.

It is recognized there is authority contrary to the above, but in those cases, the motions made pursuant to CR 59(a)(7)-(9), were not pursued for the purpose of getting the trial court to consider evidence and dispose of issues that had already been admitted into evidence at trial, or otherwise address post-trial concerns raised by the court. See, Jet Boats v. Puget Sound Bank, 44 Wn. App 32, 721 P.2d 18 (1986).

In the case at bar, it was not learned until after the court had taken the matter under advisement, following the conclusion of the trial, that certain evidence regarding the parties’ community indebtedness had been apparently overlooked or otherwise dismissed by the court. This became clear when the trial court submitted its property and liability division spreadsheets. The substantial

community indebtedness addressed herein was entirely missing from the spreadsheets. As such, it became necessary to bring these matters to the attention of the court. As noted above, there had been evidence presented at trial as to these debts, and it appeared to be substantially uncontroverted. The documentation presented in the Motion to Reopen, Reconsider and Clarification was merely cumulative to the trial materials, but was offered to rehabilitate the credibility of Mr. Hunt.

A Motion to Reopen, Reconsider or Clarification is to be considered in the sound discretion of the trial court and the reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. This has been found to have occurred when the trial court's decision is based on untenable grounds or reasons. Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 122 P.3d 729, review denied 157 Wash. 2d 1022, 142 P.3d 609 (2005). Based upon the substantial disparity of the property division in this matter, considering the community debts that were not disposed of, it must be concluded that there was a manifest abuse of discretion on the part of the trial court by refusing to consider the rehabilitative documentation provided in the motion.

ISSUE NO. 2

DOES THE COURT'S REFUSAL TO CONSIDER THE

FOLLOWING COMMUNITY INDEBTEDNESS OWED AT THE TIME OF SEPARATION CONSTITUTE AN ABUSE OF DISCRETION: 1) COMMUNITY INDEBTEDNESS IN THE AMOUNT OF \$46,410.00 OWED TO WALT MILLER; 2) COMMUNITY INDEBTEDNESS IN THE AMOUNT OF AN ADDITIONAL \$91,245.00 OWED TO WALT MILLER (REPRESENTING ONE-HALF OF THE TOTAL BILL OF \$182,490.00); AND 3) COMMUNITY OBLIGATIONS OWED BY C & L LOCKERS IN THE AMOUNT OF \$21,317.37.

The trial court entered the following Findings of Fact:

“2.10 Community Liabilities

The parties have incurred community liabilities as set forth in Exhibit 1. This exhibit is attached or filed and incorporated by reference as part of these findings.” (CP page 27)

Exhibit 1 lists the debts of the parties. (CP page 31)

Mr. Hunt objected to the failure to include the community debts in the property division. The court noted the objection. (RP 3/15/2013, page 29 line 10 to page 31 line 11) The findings of fact did not address the exclusion of these community debts. This issue then comes a conclusion of law that is not supported by the findings of fact, and should be reviewed de novo by this court.

The trial court in this matter suggested that there was a credibility issue relating to some of the testimony of Mr. Hunt, after

the trial, in rendering its oral decision. A motion was filed to clarify the courts ruling. As a part of this motion, Mr. Hunt attached additional contracts and C & L Locker bills that had not been placed in evidence, (but had formed part of the basis of Mr. Hunt's testimony) to corroborate the testimony and documents presented in the matter. Such evidence would likely have been considered cumulative had it been offered at trial.

The courts refusal to address or even consider the above community debts, has the effect of leaving the parties jointly responsible for the debts incurred during their marriage, since they were not disposed of by the court. Ross v. Pearson (1982), 31 Wn. App. 609, 643 P.2d 928

RCW 26.09.080 relative to the disposition of assets and liabilities requires:

“... the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors”

The trial court, having been made aware of the outstanding community debts owed Walt Miller and the community debts owed by C & L Lockers, as of the date of separation, abused its discretion in failing to either dispose of these debts or factor them into the just and equitable allocation of property and liabilities.

The standard in reviewing an issues relating to an abuse of discretion is set forth in Marriage of Manry, 60 Wn. App. 146, 803 P.2d 8 (1991) as follows:

“The trial court’s considerable discretion is making a property division will not be disturbed on appeal absent a manifest abuse of discretion. A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons.”

(Citations omitted.) In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 683 (1989), review denied, 114 Wn.2d 1002 (1990).

Exhibit 1 (CP page 31-32) reflects assets of \$662,158.70 and debts totaling \$438,028.64, without any reference to the community Walt Miller debts of \$137,655.00 and C & L Locker bills of \$21,317.37. Following the court’s attempt to make an equal just and equitable disposition of the property and liabilities of the community, it is maintained that the following should be the appropriate result:

Assets	\$662,158.70
Debts	<u>-\$438,028.64</u>
Net before adjustment	\$224,130.06
Walt Miller Debts	-\$137,655.00
C & L Locker Bills	<u>-\$ 21,317.37</u>
Net to divide	\$ 65,157.69

Assuming an equal division of community property and liabilities, each party would have receives a net award of \$32,578.85

Utilizing the trial court’s intended approach and dividing the

net community estate into equal shares, had the trial court properly considered the remaining community indebtedness, would have resulted in an equalization payment by Mr. Hunt to Mrs. Hunt of \$15,823.24 as follows:

	Husband	Wife
Assets	\$619,387.70	\$42,771.00
Debts	-\$412,012.25	-\$26,015.39
Adjusted Debts	<u>-\$158,972.37</u>	<u>-\$ 0.00</u>
Net	\$ 48,402.08	\$ 16,755.61
Equalize	<u>-\$ 15,823.24</u>	<u>\$ 15,823.24</u>
Net to each	\$ 32,578.84	\$ 32,578.85

An alternative manner of reviewing this issue is to divide the community debts that the court failed to recognize of \$158,972.37 by the net worth of the parties as found by the court of \$224,130.06. The result is that the net worth of the parties has been inflated by over 70% by not taking into account the community debts, with an inflated value therefore being awarded to the wife to equalize the property division.

ISSUE NO. 3

WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ABOVE COMMUNITY INDEBTEDNESS IN THE TOTAL AMOUNT OF \$158,972.37 AS OF THE DATE OF SEPARATION?

The original debts owed Walt Miller were established by the Balance Sheet Schedules from Zions Bank dated February 22, 2012. (CP page 4). The debts of C & L Lockers were both shown by the answers to interrogatories (CP page 23) and the testimony of Mr. Hunt (RP 12/3/2012 page 149, line 21 through page 152, line 8). Since the court had questioned the credibility of Mr. Hunt as it pertained to the purchase of a pickup truck, in its closing comments following the trial, (RP 12/3/2012 page 250, lines 12-19), and then the spreadsheet from the court that did not include the community debts owed to Walt Miller and the C & L Locker suppliers, the Motion to Reopen, Reconsider and to Clarify (CP pages 8-25) included corroborating documents, not as new evidence, but merely as a cumulative showing to support the position being taken in the motion. (CP pages 19-21 and 23-25).

Based upon the evidence in the record, there was ample evidence in support of both the community debts owing Walt Miller and the community debts of C & L Lockers as of the time of separation. The trial court took a critical view of the community obligations owed by C & L Lockers and owed to Walt Miller.(RP 3/15/13 page 25 line 19 through page 27,line 9). However, there was no contrary testimony offered by Mrs. Hunt as to the business community debts claimed by Mr. Hunt of either C & Lockers or the Walt Miller debts on the sheep. Mrs. Hunt accepted the benefit of

the value of the sheep at the time of separation, as found by the court, in the amount of \$209,939.00 as a the community asset (CP page 37) and did not dispute at trial, or otherwise, that there were debts owed for the sheep to Walt Miller of \$137,655.00. It is further of interest to note that Mrs. Hunt accepted Mr. Hunt's answers to interrogatories as evidence of various values of assets of the community, and only through her attorney were the debts of C & L Lockers questions, because actual receipt were not presented in court.

Mr. Hunt merely provided corroborating information in his Motion to Reopen, for Reconsideration and to Clarify, to support his testimony at trial that there were community debts in existence at the time of the separation for C & L Lockers. The amount claimed at trial for this indebtedness, from the interrogatory answers, included 5 debts, and testified to by Mr. Hunt, was \$28,500.00. The corroborating documents offered to rehabilitate the testimony of Mr. Hunt, in the motion totaled only \$21,317.37, including only 2 debts from suppliers who responded to Mr. Hunt. The latter amount being the amount claimed and relied upon in this appeal.

Based upon the record, there in fact was substantial evidence to support the community liabilities as claimed by Mr. Hunt. The court failed to address these liabilities in arriving at its property division.

ISSUE NO. 4

DOES THE COURTS FAILURE TO ALLOCATE THE ABOVE COMMUNITY DEBTS IN THE TOTAL AMOUNT OF \$158,972.37 RESULT IN A DIVISION OF PROPERTY AND LIABILITIES THAT IS NOT JUST AND EQUITABLE?

RCW 26.06.080 requires that the court divide the property and liabilities of the parties in a just and equitable manner. By ignoring over 70% of the parties net worth by not taking into consideration \$158,972.37 of the parties debts owing at the time of separation, particularly when the court attempted to make an equal division of the parties net assets, is not a “just and equitable” division of the parties assets and liabilities.

CR 59(b) provides that a motion for reconsideration shall be filed not later than 10 days after the entry of the judgment, order , or other decision. In the case, there had not been the entry of a judgment prior to March 15, 2013. Furthermore, a judgment is not final until it has been entered and the judge is free to change his or her mind until such time as a formal judgment is entered. Carns v. Shirley, 44 Wn2d 662, 269 P.2d 804 (1954)

The failure of the court to address and allocate over 70% of the communities net worth, by not considering the community liabilities, resulted in a division of the property and liabilities of the parties that was not just and equitable.

CONCLUSION

The trial court in this matter was presented with evidence establishing substantial community debts that were ignored by the court when entering its findings, conclusions and judgment. This constitutes a manifest abuse of discretion and it resulted in a net property division that was neither just nor equitable. The trial court's failure to address these substantial community liabilities constitute an error of law. Notwithstanding, the trial court should have considered the corroborating supporting documentation submitted, not as new evidence, but merely as cumulative evidence, supporting the testimony and other court documents, dealing with the credibility of Mr. Hunt.

It should be recalled that the credibility issue as to Mr. Hunt was not raised until after all of the testimony in the trial had been received. The credibility issues only dealt with the purchase of a pickup truck. Then, when the trial court issued its spreadsheet providing for the division of the property and debts, that did not address a substantial amount of community debt, did it become necessary to seek a clarification of the court's accounting.

It is respectfully requested that the trial courts decision be reversed and remanded to address the issues of a just and equitable division of the property and debts as required by RCW 26.09.080, taking into account the \$158,937.37 of community debt not disposed

of in the proceedings.

Respectfully submitted this
29th day of August 2013

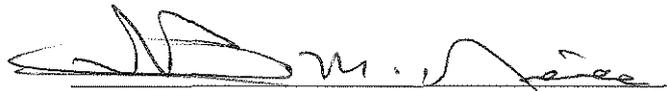
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By 

Howard M. Neill WSBA No. 05296
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on this 29th day of August 2013, I caused a full, true and correct copy of this APPELLANT'S BRIEF to be mailed to attorney for Respondent, Jenna Brozik, of Prinz & Brozik PLLC, 445 S. Grand Ave., Pullman, WA 99163, by first class United States Mail, with postage fully prepaid thereon.



Howard M. Neill