

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

FILED

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COA NO. No. 319512-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

FLORENTINA FLORES,

Respondent.

v.

JULIO FLORES,

Appellant,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is a dissolution of marriage case. Husband, Julio Flores, age 44, is a self-employed heating and air conditioning contractor. Wife, Florentina Flores, age 43, is employed as an aid with the Prosser School District. The parties have four daughters, three of whom are dependent.

Assignments of error arise from the trial court's findings, unsupported by substantial evidence, regarding: (1) Husband's annual income; (2) the goodwill value of the heating and air conditioning business; (3) Husband's ownership of a 2011 Harley Davidson Street Glide motorcycle; and (4) Husband's appropriation of \$34,000.00 cash. As result of the error regarding Husband's income, the Court erroneously calculated Husband's child support. As a further result of the error regarding Husband's income, and the Court's failure to consider the value of the assets awarded to Wife, the Court erroneously awarded maintenance to Wife and erroneously awarded Wife attorney's fees and costs totaling \$49,637.

The assignments of error regarding: (1) Husband's ownership of the 2011 Harley Davidson Street Glide motorcycle and (2) Husband's appropriation of \$34,000.00 from the parties'

credit union account, also unsupported by substantial evidence, resulted in drastically disproportionate, unfair and inequitable division of the parties property and debts, including the award of a “transfer payment” judgment of \$38,638.00.

Husband requests that the award of attorney’s fees and costs be reversed, and that the award of maintenance and division of property be remanded to the trial court for re-trial.

II. ASSIGNMENTS OF ERROR

1. The Court erred in making its Findings of Fact No. 2.12 and 2.15 to the effect that Respondent earns an annual gross income of \$78,000.00, for the reason that there is not substantial evidence to support the finding.

2. The Court erred in making its Child Support Order, Finding of Fact No. 3.2, to the effect that the Respondent’s actual monthly pre-tax Income is \$6,500.00, based upon the finding that the Respondent earned an annual income of \$78,000, for the reason that there is not substantial evidence to support the finding.

3. The Court erred in making its Findings of Fact, No. 2.8, Exhibit 1, page 2, paragraph 8, and Exhibit 2, Line 82, to the effect that the value of the parties heating and air conditioning business,

including the value of good will, was \$82,500.00, for the reason that there is no substantial competent evidence to support the finding.

4. The Court erred in making its Finding of Fact No. 2.8, Exhibit 1, page 2, paragraph 6, and Exhibit 2, Line 10, and Finding of Fact No. 2.9, to the effect that the parties owned, as community property, a 2011 Harley Davidson Street Glide motorcycle, with a value of \$20,748.00, for the reason that there is no substantial evidence to support the finding that the parties, or either of them owned such motorcycle.

5. The Court erred in making its Findings of Fact No. 2.8, Exhibit 1, page 4, paragraph 20, to the effect that Respondent took \$34,000.00 from the Lower Valley Credit Union Savings Account, and awarding that sum to Respondent, for the reason that there is no substantial evidence to support the finding.

6. The Court erred in making its Finding of Fact No. 2.8, Exhibit 1 and 2, to the effect that the distribution of property, including a "transfer payment" from Respondent to Petitioner in the amount of \$38,638.00, is fair and equitable, for the reason that there is no substantial evidence to support the finding.

7. The Court erred in its Finding of Fact No. 2.12 to the effect that Ms Flores has a need for maintenance without

considering the factors to be considered under RCW 26.09.090, including the financial resources of the party seeking maintenance and the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

8. The Court erred in its Findings of Fact No. 2.15 to the effect that Ms Flores has the financial need for payment of attorney's fees and costs without considering the financial resources of both parties pursuant to RCW 26.09.140.

9. The Court erred in its Conclusion of Law, No. 3.4 that the distribution of property and liabilities was fair and equitable for the reasons that the court's distribution of property and liabilities was neither fair nor equitable as required by RCW 26.09..080, and was based upon erroneous findings of fact.

10. The Court erred in its Conclusion of Law NO. 3.7 that attorney's fees and other professional fees and costs should be paid by Respondent for the reason that the court failed to consider the resources available to both parties, as required by RCW 26.09.140.

11. The Court erred in denying the Respondent's Motion for Reconsideration as to Respondent's annual income for the reason

that the court refused to consider evidence not available at the time of trial, specifically, Respondent's amended 2011 federal income tax return and Respondent's 2012 federal income tax return, prepared by Respondent's accountant subsequent to trial.

12. The Court erred in denying Respondent's Motion for Reconsideration as to the value of the heating and air conditioning business.

13. The court erred in denying Respondent's Motion for Reconsideration as to the ownership of the 2011 Harley Davidson Street Glide motorcycle.

14. the court erred in denying the Respondent's Motion for Reconsideration as to the award of attorney's fees and costs to Petitioner.

15. The trial court erred in denying Respondent's Motion for Reconsideration as to the court's finding that the Respondent misappropriated \$34,000.00 of community property cash.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether or not there is substantial evidence in the record to support the trial court's finding of fact that Respondent owned a 2011 Harley Davidson street Glide motorcycle, with a value of \$20,748.00? (Assignments of Error No. 4, 6, 9 and 13)

2. Whether or not there is substantial competent evidence in the record to support the trial court's finding of fact that the Respondent's business has a value of \$82,500.00 when that finding is based solely on the testimonial evidence of Petitioner's expert who based his opinion and assumption, guess and speculation? (Assignments of Error 3 and 9)

3. Whether or not there is substantial evidence in the record to support the trial court's finding that the sum of \$34,000.00 paid by Respondent to Yolanda Flores, the Respondent's mother, was appropriated by Respondent and not spent in payment of a community property debt, owing by the parties? (Assignments of Error 6 and 9)

4. Whether or not there is substantial evidence in the record to support the trial court's finding that the Petitioner had the financial need, and the Respondent the financial ability to pay attorney's fees of \$39,786.00, and appraisal fees of \$9,851.00 where the trial court failed to consider the financial resources available to each party in accordance with RCW 26.09.140, and Petitioner was awarded a greater share of the community property including \$125,381.00 in cash together with , and a "transfer

payment" judgment of \$38,638.00? (Assignments of Error 8, 10 and 14)

5. Whether or not the expert opinion of a certified public accountant based upon guess, speculation and estimation is substantial and competent evidence of Respondent's earnings and the goodwill value of the Respondent's hearing and air conditioning business? (Assignments of Error 1,2,3 and 6)

6. Whether or not the distribution of property and liabilities is fair and equitable where Petitioner is awarded assets valued at \$212,051.00, including \$125,381.00.00 in cash, plus a judgment (transfer payment) of \$38,638.00, and fees and costs of \$88,275.00, totaling \$338,964.00, while Respondent was awarded assets valued at \$205,110.00, including the sum of \$20,748.00 for Harley Davidson Street Glide motorcycle not owned by either party, the sum of \$34,000.00 previously paid to Respondent's mother for the purchase of the parties residential real property, and \$51,000.00 in business goodwill not proved by substantial evidence? (Assignments of Error 4, 5, 6, 9 and 11)

7. Whether or not the trial court's finding that the Respondent earned pre-tax income of \$78,000.00, was supported by substantial evidence, where the only evidence of such income

was the testimony of Petitioner's expert, based on guess, speculation and assumption? (Assignments of Error 1, 2, 8, 9, 11, and 12)

IV. STATEMENT OF THE CASE

1. Parties. This is an action for dissolution of marriage. Petitioner, Florentina Flores (hereinafter "Ms Flores") and Respondent, Julio Flores, Jr., (hereinafter "Mr. Flores") were married April 3, 1993, and resided together until the time of their separation on September 26, 2010. The parties have four daughters, ages 18, 16, 13 and 12 years old. At the time of trial, the 18 year-old daughter was no longer dependent.

Ms Flores was age 43 at the time of trial. She was employed in a clerical position with the Prosser School District, earning a net monthly income of \$1,348.97, including her income from fruit harvesting during the summer months. Mr. Flores was age 44. He was self-employed as a heating and air conditioning contractor. The amount of Mr. Flores' annual income was disputed for purposes of computation of child support, maintenance, and as a component of the valuation of the heating and air conditioning business.

2. Business Value and Net Income. Respondent operated, as a sole proprietorship, a heating and air conditioning business, known as JR's Heating and Air Services, which he had operated for 16 years. RP 292, II 15-23; RP 293, II 5-7. From the beginning, Julio Flores had assistance in preparing his quarterly and federal income tax returns. He relied upon his invoices and receipts for the preparation of his quarterly returns, and his federal income tax returns. RP 294-295; RP 296, II 2-7. He did not keep a check register. RP 297, II 13-17. Aside from some limited assistance from Petitioner and the children, Respondent was the only one involved in the business. No employees were hired. RP 294, II 13-24 Income from the heating and air conditioning business varied from year. Based upon testimony and exhibits presented at trial, the annual pre-tax income from the heating and air conditioning business, was as follows:

2006	\$30,000.00
2007	\$12,622.00
2008	-\$ 5,510.00
2009	\$ 3,505.00
2010	-\$2,433.00
2011	\$20,000.00
2012	\$49,000.00

RP 192-194; RP 306-307; Ex. 1, tabs 1-6, 13, 15-16.

Joseph Reid, a certified public accountant, testified for Petitioner, as an expert witness, for the purpose of establishing a value for the heating and air conditioning business. RP p. 159, IIs 16-25. Mr. Reid is a certified public account. RP 159, I 22. Two years prior to trial, Mr. Reid obtained an accreditation in business valuation after taking a one week class and passing an examination. RP 162, II 19-25. Prior to the testimony given in this case, Mr. Reid had never before testified as an expert witness in business valuation. RP 202, II 13-15. After reviewing the pertinent records and meeting with the Respondent, Mr. Reid prepared a written report, including his opinion that the business was worth \$65,000.00. RP 170, I-194;

To arrive at this opinion of value, Mr. Reid used multiple approaches, including what he described as the market approach, the capitalization approach, and the discounting cash flow approach. RP 170, II 7-10. Included in Mr. Reid's initial opinion of value was \$40,900.00 of business assets aside from any intangible assets or goodwill, and \$24,100.00 in goodwill. RP 187, II 9-13; 188, II 17-25; 189, II 1-15. Mr. Reid also opined that Mr. Flores annual pre-tax income was \$41,475.00. Ex. 1, tab 7.

Thereafter, Mr. Reid, focusing on apparent discrepancies in the records solely for the year 2011, completed another analysis. RP 171, II 8-11; Ex. 3, tab 27; RP 198, II 16-19. Specifically, Mr. Reid was provided with a QuickBooks file that did not agree with the 2011 quarterly and federal income tax returns. RP 173, II 17-25. Mr. Reid then attempted to reconstruct the Respondent's 2011 business income through the use of his invoices, and imputing a markup of 65 per cent as well as computing an hourly rate for his labor at \$85.00 per hour, based on a Risk Management Association data base index. RP 177-178. Mr. Reid then rendered a second report wherein he estimated that Mr. Flores' pre-tax income from the business was \$78,000.00, and the value of the heating and air conditioning business was \$100,000.00. RP 178, II 7-11; Ex. 3, tab 27; RP 183, II 15-16. In Mr. Reid's second report, he allocated \$48,000.00 or \$49,000.00 to business goodwill and \$51,000.00 to tangible assets.¹ RP 198, II 7-13; Ex. 3, tab 27. Mr. Reid acknowledged that in preparing his second report, he had to make certain assumptions about Mr. Flores' gross profit margin, (RP 198, II 16-25), and his net income. RP 183, II 15-16. Based on these

¹ All of the business assets of the heating and air conditioning business, including the motor vehicles, tools, equipment and inventory, were separately appraised and valued by Booker Appraisal Services, and those values were not disputed.

assumptions, Mr. Reid estimated Mr. Flores' gross business revenue, for 2011, at \$272,000.00 and possibly as high as \$385,000.00, assuming that the gross income for the last two quarters of 2011 were the same as the first two quarters. RP 199-200. Yet, Mr. Reid acknowledged that the total of all deposits to Mr. Flores bank account, for 2011, appeared to be \$191,000.00. RP 199, II 14-18. Moreover, Mr. Reid acknowledged that there were non-income monies included in the deposit total of \$191,000.00. RP 202, II 8-10.

Mr. Reid also testified that unless Mr. Flores had at least \$60,000.00 of business profit per year, there would be no goodwill associated with the business. RP 197, II 17-22.

Finally, Mr. Reid acknowledged that because of the discrepancies in the business records, for the year 2011, he could not render an opinion of value based on a more probable than not basis. RP203-204. Mr. Reid also acknowledged that the revenue he attributed to Mr. Flores may or may not be accurate. RP 206, II 14-18. Mr. Reid offered no criticism of the business records and tax returns reviewed for each of the other six years, showing net business income as set forth above.

Julio Flores testified that in 2008, he purchased a Quick Books program for his computer, to keep track of his income and expenses. RP 298, II 2-4. However, he was unable to use the program, himself. RP 298, II 5-10. Ultimately, he obtained assistance from his brother's fiancée, Priscilla Mendez, a bookkeeper, to assist him in setting up the Quick Books program. RP 298, II 11-23. Ms Mendez began setting up the Quick Books Program in December 2010, or early 2011. RP 299, II 1-2. Ms Mendez assisted Julio with the Quick Books bookkeeping for the first two or three quarters of 2011. RP 299-300. During 2011, Julio engaged the services of Keith Sattler, a certified public accountant, predecessor to Brian Newhouse, to prepare his quarterly tax returns. RP 300, II 3-6. It became apparent that errors had occurred in the entry of data into the Quick Books program while Ms Mendez was providing those services. Invoices were found to have been entered multiple times, and taxes were not deducted. RP 300, II 14-20.

Since that time, Julio Flores has relied upon Brian Newhouse, a certified public accountant, and his staff to assist him in keeping his business records on the Quick Books program. RP 301, II 3-11. As a result of the errors while Ms Mendez was

providing bookkeeping services, Julio Flores' 2011 federal income tax return, originally showing a business loss of \$10,324.00, was incorrect. RP 91, ll 5-8. When the errors regarding the 2011 record keeping became known to Brian Newhouse, his office began working to correct those errors and prepare amended state and federal tax returns. RP 91, ll16-17. Based upon Brian Newhouse's work on this matter at the time of trial, he testified that the net income from Julio Flores' business, for 2011, should actually have been approximately \$20,000.00 rather than net loss of \$10,324.00 reported on the original return.² RP 91, ll 21-24. Mr. Newhouse, in reviewing the Quick Books program, discovered that it had not been properly set up. RP 94-95. In reviewing all of Julio Flores' records, Mr. Newhouse, and his staff were able to reconcile all of the business and banking records, for 2011, within a margin of \$2,000.00. RP 97, ll9-15. At the time of trial, Mr. Newhouse and his staff were working on the 2012 tax return, and had determined, subject to final adjustments, that the business income for 2012, was approximately \$47,585.77. RP 99, ll 20-24.³

² Subsequent to trial, Brian Newhouse completed the amendment of Mr. Flores' 2011 federal income tax return, which resulted in a pre-tax income of \$22,969.00. Appendix 2.

³ Also subsequent to trial, Brian Newhouse, CPA, completed Mr. Flores' 2012 federal income tax return, which showed a pre-tax income for Mr. Flores of \$30,015.00.

3. 2011 Harley Davidson Street Glide Motorcycle. Yolanda Flores testified that Julio Flores owned a 2011 FLHX Street Glide Motorcycle. RP 64, II 1-6. She based her testimony on seeing Julio ride the motorcycle to court for a settlement conference in this case. RP 64, II 8-15. She then testified that the motorcycle was worth \$20,000.00. RP 64, II 16-21. Julio Flores testified that he did not own that motorcycle. RP 388, II 1-6. He further testified that the motorcycle belonged to his brother, Luis, who purchased it in 2011, that he had borrowed it, and did ride it to court the day of the settlement conference. RP 388, II 11-17. Julio further acknowledged that since he borrowed the motorcycle from his brother, he did insure the motorcycle on his State Farm motor vehicle insurance, while he was using it. RP 388-389. The Court found, based on the testimony and the State Farm Insurance coverage, that this 2011 FLHX Street Glide motorcycle, belonged to Julio Flores, and awarded it to him, as a community property asset, with a value of \$20,748.00. CP 190. Subsequently, Julio moved for reconsideration of the Court's ruling regarding the ownership and value of this motorcycle, and submitted, in support of his motion, a declaration from Luis Flores. CP 181. The Declaration of Luis Flores affirmed that the 2011 FLHX Street Glide motorcycle

was purchased by him, on May 27, 2011, and that he had loaned the vehicle to his brother, Julio Flores, periodically. CP 181.

Notwithstanding the evidence presented, the Court denied the motion for reconsideration. CP 197.

4. Obligation Owing to Yolanda Flores. The parties acquired a two and one-half acre parcel of real property from Julio Flores' mother, Yolanda Flores. This property was initially improved with a used mobile home. RP 277-283. The purchase price of this real property is not in dispute. Both parties, as well as Mr. Flores' mother testified that the purchase price of the real property was \$30,000.00. RP 25, II 11-17; RP 281, II 7-21; 252, II 11-14. However, the testimony regarding the acquisition of the mobile home was disputed. Ms. Flores testified that Julio Flores purchased the mobile home. RP 25, II 2-6. She did not know the price or the source from which the purchase money came. RP 139, II 24-25; RP 139, 18-22. She further testified that the real property was paid by she and Mr. Flores assuming and paying off a debt Yolanda Flores owed to one Paul Rupp. RP 25, II 8-11. Both Mr. Flores and Yolanda Flores testified that Yolanda Flores purchased the mobile home, which was titled in her name, for an initial price of \$16,000.00. RP 230, II 24-25; RP 280, II 3-6. After purchasing the

mobile home, it was moved onto her real property and substantial improvements and remodeling were done. RP 231, II 1-23. Both Yolanda Flores and Julio Flores testified that the agreement for the purchase of the land and mobile was that Mr. Flores was to pay off Yolanda Flores' debt to Paul Rupp, in the amount of \$34,000.00, and then pay Yolanda Flores another \$33,500.00. RP 233, II 11-16; RP 283, II 17-22.

Mr. Flores paid off the obligation to Paul Rupp in 2003. RP 234, II 13-155. After Mr. Flores and Florentina separated, Yolanda asked Mr. Flores about payment of the remaining \$33,500.00, and Mr. Flores paid her from money on deposit with the Lower Valley Credit Union. RP 234, II 1-11; RP 330, II 3-16. Nevertheless, the Court awarded the sum of \$34,000.00, from the Lower Valley Credit Union Account, to Julio Flores, without recognizing that those funds were used to pay off the obligation owing to Yolanda Flores for the purchase of the and mobile home. CP 190. In denying Mr. Flores' motion for reconsideration on this issue, the trial court stated that it did not find the testimony of Mr. Flores or his mother credible on this issue. CP 197. Yet Ms Flores, demonstrating only a vague understanding of the transaction, testified that she did not know the

source of the money used to purchase this mobile home, or the price of the mobile home. RP 139-140.

5. Equitable Division of Property and Debts. The Court found that the parties owned community property valued at \$455,709.00, including the Harley Davidson Street Glide motorcycle and business goodwill valued at \$54,425.00.⁴ The Court also included in the community property the sum of \$34,000.00 cash, which was paid by Mr. Flores to his mother, for the parties' acquisition of the real property and mobile home. CP 190, 191. The Court then awarded property valued at \$212,051.00 to Ms. Flores, including the family home and \$125,381.00 in cash. CP 191. In addition, the Court awarded judgment ("transfer payment") to Ms. Flores in the amount of \$38,638.00, together with attorney's fees and costs totaling \$88,275.00. As a result of this distribution, Ms. Flores was awarded property and judgments totaling \$338,964.00. CP 191. Mr. Flores was awarded property valued at \$243,748.00, including the Harley Davidson Street Glide at \$20,748.00, net goodwill of \$54,425.00, and \$34,000.00 paid to

⁴ The trial court found the value of the heating and air conditioning business to be \$82,500.00, a median figure between the two opinions of value rendered by Joseph Reid, and then deducted therefrom the sum of \$28,075.00 for the tangible business assets which were valued separately by Booker Appraisals. In finding the value of the business to be \$82,500.00 the trial court noted, "I questioned the second or subsequent valuation of \$100,000, as I didn't fully understand how he came up to this number."

his mother for the purchase of the real property and mobile home. CP 191. After deducting the judgment (Transfer payment) and award of attorney's fees and costs from the value of the property awarded to Julio, he realized a net distribution of \$116,835.00, including the Harley Davidson Street Glide motorcycle, at \$20,748.00, the goodwill at \$54,425.00, and the \$34,000.00 cash paid to Yolanda Flores for the real property, constituting \$109,173.00 of the net sum of \$116,835.00 awarded to Julio. CP 191.

6. Maintenance. The trial court found that Mr. Flores' income was \$78,000.00 annually. As stated by the Court, "I am accepting Joe Reid's estimated income for Mr. Flores at \$78,000.00." CP 190, Ex. 1, ¶ 9. (emphasis added). The Court further found that Ms. Flores had the need for maintenance, stating, "Certainly Mrs. Flores has the need for maintenance and the real question is what if anything can Mr. Flores afford to pay in maintenance? This is a difficult question to answer given the issues with the record-keeping of his business." CP 190, EX. 1, p.

5. The Court then stated its decision as follows:

With an annual income of \$78,000., I calculate his gross monthly income at \$6,500. His child support will be approximately \$1,800-\$2,000.

per month for three kids. I understand that one of the daughters is 18 or has recently or will turn 18. Additionally, I understand that one of the daughters is not residing with Mrs. Flores. This is why I am asking that child support be calculated for three children. Given the above, I believe maintenance should be set at \$1,500.00 per month for total of 84 months. With child support and maintenance, I calculate both to take up to 50% of Mr. Flores gross monthly income. Given the length of the marriage, I believe this is fair and equitable. Eighty-four months (84) months of maintenance provides for the youngest daughter to get to high school graduation and provides two years beyond that time for Mrs. Flores to return to school if she so chooses.

CP 190, Ex. 1, p 5.

7. Attorneys Fees and Costs. Finally, the Court awarded Mrs. Flores Expert Witness Fees for the business appraisal done by Joseph Reid, in the amount of \$7,576.00 and personal property appraisal fees for the appraisal done by Booker Appraisals Services, in the amount of \$2,275.00, plus attorney's fees of \$39,786.00. CP 191, Ex. 1.

V. ARGUMENT

1. **The trial court erred and abused its discretion in finding that Mr. Flores has a business profit or pre-tax income of \$78,000.00, based only upon the testimony of Petitioner's Expert witness who based his opinion upon guess, assumptions and speculation.**

The only evidence presented supporting a finding that Mr. Flores had an income of \$78,000.00 annually, was the testimony of Joseph Reid, a certified public accountant and business valuator. RP 159, II 22; RP 162, II 11-25. Initially, Mr. Reid found that Mr. Flores pre-tax income was \$41,475.00. Ex 3, tab 7. Mr. Reid testified that he then conducted a subsequent evaluation and estimated Mr. Flores income at \$78,000.00. RP 183, II 15-16. On cross-examination, Mr. Reid testified that he ascribed a salary to Julio of \$60,000.00 and excess earnings of \$18,000.00. RP 191, II 21-23. However, on further questioning, Mr. Reid acknowledging that he found nothing to show that Mr. Flores ever earned income of \$60,000.00 other than that the accumulation of assets, "that to me indicated someone that's a good income earner." RP 192, II 1-7. Mr. Flores' tax returns never indicated an income of \$60,000.00. RP 194, II 17-20. Finally, Mr. Reid acknowledged that in conducting his analysis of both Mr. Flores' income and business value, he made several assumptions, particularly as to "gross profit margin." RP 198, II 20-23. Mr. Reid based his assumptions almost entirely on the 2011 records. RP 198, II 24-25; RP 202-203. The 2011 records were admittedly inaccurate, as explained by both Mr. Flores and Brian Newhouse, his accountant. RP 300, II 14-20; RP

91, II 16-17. Mr. Reid acknowledged that the total of all deposits to Mr. Flores bank account for 2011, totaled \$191,000.00. RP 199, I 18. Yet, Mr. Reid rendered his opinion that Mr. Flores gross revenue for 2011 was \$272,000.00 RP 199, II 19-22.

(a) When an expert's opinion is based on assumption and speculation for which there is no factual basis, the opinion is not substantial evidence.

Where an expert's opinion is based on assumptions or theoretical speculation, the opinion is not substantial evidence.

Riccobono v. Pierce County, 92 Wn. App. 254, 966 P.2d 327 (1998); State v. Willis, 151 Wn. 2d 255, 87 P. 3d 1164 (2004); Farms, Inc., v. The Central National Insurance Company of Omaha, 126 Wn. 2d 50, 882 P. 2d 703 (1995).

In *Riccobono v. Pierce County, supra*, a former Pierce County employee sued the County alleging wrongful retaliation and discrimination in the workplace. Riccobono presented expert testimony as to her future income loss. The expert calculated the plaintiff's future income based on the salary she was earning at her employment at Pierce County, and then subtracted what he assumed she would earn by working for other employers. In the Court of Appeals, Division 2, Judge Morgan, a distinguished evidentiary expert, writing for a unanimous court, stated that an

expert opinion cannot be based on assumptions for which there is no factual basis. *Id at 334*. See Also, *State v. Willis, supra* [a criminal case in which the defendant offered expert witness testimony on child witness interview techniques which was excluded. In *Farms, Inc., v. The Central National Insurance Company of Omaha, 126 Wn. 2d 50, 882 P. 2d 703 (1995)* [a coverage suit, where the insurer had denied coverage for clean-up costs for contamination of groundwater] defendant offered expert testimony concerning underwriter practices. The Washington Supreme Court held that where there is no basis for the expert's opinion except theoretical speculation, the expert testimony should be excluded.

Similarly, in the case now before the Court, Mr. Reid testified as to his estimation of Mr. Flores' income. That opinion was based on speculation and assumptions as to what Mr. Flores' income should have been, if his gross revenue for the last two quarters of 2011 was equal to what it was reported to be for the first two quarters. RP 200, ll 5-8. Mr. Reid then attempted to use Mr. Flores' product costs, multiplied by a mark up, and an hourly rate to attempt to attempt to project revenues for the year. RP 204-206. Mr. Reid acknowledged that those assumptions "may or may not

be accurate.” RP 206, I 8. Assumptions and speculation cannot sustain an expert opinion, and his opinion as to both Mr. Flores’ income and the goodwill of his business must be disregarded. Absent substantial and credible evidence as to Mr. Flores income, Mr. Reid’s opinion cannot be substantial evidence in support of a finding that Mr. Flores has a pre-tax income of \$78,000.00. There being no other evidence of any kind to support such a finding, the finding is not supported by substantial evidence. The error affects issues of child support, maintenance and the court’s award of attorney’s fees and costs. Citations of authority regarding the substantial evidence requirement are set forth in Argument, Section 2, below.

2. The trial court erred and abused its discretion in finding that the value of the Heating and Air Conditioning Business was \$82,500.00 where such finding was supported only by the testimony of Petitioner’s Expert Witness, who based his opinion on guess, speculation and assumption regarding Respondent’s Annual Revenues.

As set out in Section V(1)(a) above, Ms. Flores’ expert witness, based his opinion as to the goodwill value of Mr. Flores’ business on speculation and assumption. More troubling is that he based his entire analysis on one year of business: 2011, even though Mr. Flores had been in business as a sole proprietor for 16

years. RP 198, II 16-19. Ms Flores' expert, Joseph Reid, focused his analysis on 2011 apparently because there were discrepancies in Mr. Flores' records for that year. Based on those discrepancies, Mr. Reid allowed himself to indulge in assumptions that Mr. Flores earned an annual income of \$78,000.00, based on gross revenues he guessed were either \$224,000.00 or \$272,000. RP 199, II 19-22; RP 206, II 14-15. In fact Mr. Flores' bank deposits for the year 2011 totaled only \$191,000, and \$28,000.00 of non-income money, including the proceeds of the sale of motor vehicles and loans from his mother. RP 304-305. Even though the trial court based its findings on Mr. Reid's testimony, the court observed in her memorandum decision, "I question the second or subsequent valuation of \$100,000.00, as I didn't fully understand how he came up to this number." CP 175, ¶8. Yet the trial court made a finding clearly based on Mr. Reid's testimony, that the value of the heating and air conditioning business was \$82,500.00, a figure halfway between Mr. Reid's first opinion as to value (\$65,000.00) and his second (\$100,000.00). CP 175, ¶.

Based on the authorities cited in Section V(1)(a) of this brief, which are incorporated here by this reference, it is submitted that Mr. Reid's testimony and opinions as to the good will value of the

business are not based on fact, but rather upon speculation and assumption. Since those opinions are not based on fact, they do not rise to the level of substantial evidence and cannot sustain the finding that the business had a value of \$82,500.00.

3. The trial court erred by finding that Julio was the owner of a 2011 Harley Davidson FLHX Street Glide motorcycle, worth \$20,748.00, and awarding that motorcycle to him when there was no substantial evidence in the record to support such finding.

Florentina testified that Julio owned a 2011 Harley Davidson FLHX Street Glide motorcycle because she observed him to ride that motorcycle to a settlement conference in this case. RP 64, ll 1-15. She presented, as evidence a State Farm Insurance invoice, showing that Julio insured the motorcycle at the time. Ex. 6. Julio testified that he did not own the motorcycle, but in fact borrowed it from his brother. RP 388, ll 1-17. Julio acknowledged insuring the motorcycle during the period of time that he borrowed it from his brother. RP 388-389. Subsequently, on motion for reconsideration, Julio submitted the declaration of his brother, Luis Flores, attesting to the fact that Luis Flores purchased the motorcycle in May of 2011, attaching a copy of his current motor vehicle registration, and further attesting that he loaned the motorcycle to Julio periodically. CP 181. Nevertheless, the trial

court found that this motorcycle was owned by Julio, as a community property asset, and awarded the asset to him at a value of \$20,748.00. CP 190, Exhibit 1, ¶ 6.

A trial court's findings of fact will be accepted as verities if there is substantial evidence in the record to support them.

Thorndike v. Hesperian Orchards, Inc., 54 Wash.2d 570, 343 P.2d 183 (1959); *In re Marriage of Nicholson*, 17 Wash. App. 110, 561 P.2d 1116 (1977); *Pankow, Inc., v. Holman Properties, Inc.*, 13 Wash. App. 537, 542, 536 P.2d 28 (1975). Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. **Substantial evidence** is evidence sufficient to persuade a rational fair-minded person that the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879, 73 P.3d 369 (2003); *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978); *In re Marriage of Burrill*, 113 Wash. App. 863, 56 P.3d 993 (2002). To constitute an abuse of discretion, the discretion must have been exercised upon a ground, or to an extent, clearly untenable or manifestly unreasonable. *Friedlander v. Friedlander*, 80 Wash.2d 293, 304, 494 P.2d 208 (1972); *In re Marriage of Nicholson, supra at 114*; *Clever v. Clever*, 10 Wash. App. 14,

16, 516 P.2d 508 (1973). In order to conclude that a trial court manifestly abused its discretion, an appellate court is required to find that no reasonable person would have ruled as a the trial judge did. *Richards v. Richards*, 5 Wash. App. 609, 613, 489 P.2d 928 (1971).

Here it is significant that the parties separated September 21, 2010. CP 190 (Findings of Fact No. 2.5). The only evidence presented regarding the 2011 Harley Davidson Street Glide motorcycle, was Ms. Flores' testimony that she observed Julio drive the motorcycle to a settlement conference during these dissolution of marriage proceedings. RP 64. She also introduced evidence, Exhibit 6, showing that State Farm Insurance coverage for the motorcycle was billed to Julio for the period July 1, 2012 through July 1, 2013. Ex. 6. In response, Mr. Flores testified that he had not purchased this motorcycle, but rather the motorcycle was purchased by his brother, Luis Flores, and that he borrowed the motorcycle from his brother at the time observed by Ms. Flores. RP 388-389. Upon moving for reconsideration of the Court's decision, Julio presented the declaration of Luis Flores attesting that Luis Flores purchased the motorcycle and occasionally loaned it to Julio. CP 180. Attached to the Declaration of Luis Flores was a copy of

his motor vehicle registration for the motorcycle, showing that Luis Flores was the registered owner. Certainly the most persuasive evidence presented regarding the ownership of the motorcycle was the vehicle registration, showing the registered owner of the vehicle was Luis Flores. Yet the trial court failed to consider this evidence, and further observed that his testimony would likely not have been persuasive to the court. CP 197.

The question then becomes whether the evidence presented: the observation of Julio riding the motorcycle to a settlement conference and the State Farm invoice for insurance coverage, substantial evidence that Julio Flores was the owner of the motorcycle. Is that evidence sufficient to persuade a fair minded person that Julio Flores was the owner of the motorcycle? Moreover, when considering Julio's testimony that the motorcycle did not belong to him, and that he had borrowed it from his brother, is the evidence that Julio owned the motorcycle substantial?

Mr. Flores submits that the evidence of his ownership of the motorcycle was not substantial evidence of the ownership of a \$20,748.00 asset; that no rational person could conclude, on such meager evidence, that he owned the motorcycle. The inclusion of this illusory asset in Julio's total of community property, increased

the value of property awarded to him by \$20,748.00, which was not his and did not benefit him because it did not exist as a marital asset. The trial court does not have authority to distribute property not owned by the parties. RCW 26.09.080.

4. The Trial Court Erred and Abused its Discretion in Awarding Julio Flores \$34,000.00, as a Asset, and Charging Him With that Value in Disposing of the Parties Community Property, where the Money so Awarded to Julio Flores had been paid by him to his Mother, in payment of a debt owed by the Community for the Purchase of the Parties Real Property and a Mobile Home.

Immediately after the parties separated in September, 2010, Mr. Flores withdrew the sum of \$34,000.00 from the parties' savings account at Lower Valley Credit Union (LVCU), and paid that sum to his mother, Yolanda Flores. Mr. and Ms Flores had purchased 2.5 acres of real property and a mobile home from Yolanda Flores, and in payment for that property, the parties were to pay and discharge a debt owing by Yolanda Flores to one Paul Rupp, and to pay Yolanda Flores an additional \$34,000.00. The obligation to Paul Rupp had been paid in full; the sum of \$34,000.00 remained owing to Yolanda Flores at the time the parties separated. Following separation, Mr. Flores paid that debt to his mother. Ms Flores, although denying that they owed money to Yolanda Flores, acknowledged that these transactions were

handled by Mr. Flores, and she did not know where the money came from to pay for the mobile home or how much it cost. RP 139, II 24-25; RP 139, II 18-22.

Both Mr. Flores and his mother, Yolanda Flores, testified in detail as to the parties' acquisition of the two and a half acres of land and the mobile home. Both Yolanda Flores and Julio Flores testified that the agreement for the purchase of the land and mobile home was that Mr. Flores was to pay off Yolanda Flores' debt to Paul Rupp, in the amount of \$34,000.00, and then pay Yolanda Flores another \$33,500.00. RP 233, II 11-16; RP 283, II 17-22. Mr. Flores paid off the obligation to Paul Rupp in 2003. RP 234, II 13-155. After Mr. Flores and Ms Flores separated, Yolanda Flores asked Mr. Flores about payment of the remaining \$33,500.00, and Mr. Flores paid her from money on deposit with the Lower Valley Credit Union. RP 234, II 1-11; RP 330, II 3-16.

The only substantial evidence of this transaction is the testimony of both Julio Flores and Yolanda Flores. Nevertheless, the trial court found that Mr. Flores "took" \$34,000.00 from the Lower Valley Credit Union Account, and awarded that non-existent asset to Julio Flores. CP 190.

5. The Trial Court Erred and Abused its Discretion by entering Findings of Fact 2.12 Maintenance and Exhibit 1 incorporated therein (CP 190) that maintenance should be paid to Wife.

Maintenance awards are 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 Marietta*, 129 Wash. App. 607, 624, 120 P.3d 75 (Div. 3, 2005) [reversing maintenance award; *In re Marriage of Mathews*, 70 Wash. App. 116, 123, 853 P.2d 462 (Div. 3, 1993) [vacating maintenance award]. Accord, *In re Marriage of Sheffer*, 60 Wash. 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].

As in the *Mathews* case, the trial court in this matter abused its discretion by finding that Mr. Flores is able to pay maintenance to Ms Flores in the amount of \$1,500.00 per month. Ms Flores was awarded substantial community assets, including the family home having an equity of \$69,450.00, and cash in the amount of \$125,381.00. (CP 191, Exhibit 1, spread sheet I 2). During the

parties' separation, Mr. Flores was required to pay the costs of the home, including the monthly mortgage payment, real property taxes and insurance, without credit from the court for a principal reduction of \$9895.51. RP 291, I 10-20; CP 191, Exhibit 1, spread sheet, I 2.⁵

The Court's error was compounded by finding, absent substantial evidence, that Mr. Flores has a gross monthly income of \$6,500.00. Mr. Flores earnings records were highest for the year 2012, which showed his annual pre-tax income at \$49,000.00. RP 194, II 8-16; RP 100, II 9-10.

RCW 26.09.090 sets forth the factors to be considered by the court when considering a request for maintenance. The maintenance order shall be in such amounts and for such periods of times as the court deems just, without regard to misconduct.⁶

The factors to be considered by the court are:

⁵ At the time of trial the actual principal balance owing on the Bank of America Home Loan was \$148,104.49. Ex. 3, tab 29.

⁶ The relevant statutory factors a court must consider include:

- (1) the financial resources of the party seeking maintenance, including separate or community property apportioned to him or her;
- (2) 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;
- (3) the standard of living established during the marriage;
- (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and

a. Duration of Marriage.

Division 1 of the Court of Appeals has recognized a long term marriage to be one of 25 years or more. *In re Marriage of Rockwell*, 141 Wash. App. 235, 243, 170 P.3d 572 (2007). Here, Mr. and Mrs. Flores were married for 17 years and five months at the time of separation, having married April 3, 1993 and separating September 26, 2010. CP 190.

b. Age, physical and emotional condition and financial obligations of the spouse seeking maintenance.

At the time of trial, Ms Flores was 43 years old. RP 24, I 18. She reported no physical or emotional conditions that would affect her ability to work. Ms Flores is employed full-time with the Prosser School District and picks fruit during the summer months. She earns \$1348.97 net per month, from her employment, and with her earnings from fruit harvest, annualized and computed monthly. CP 189., Child Support Order, Findings of Fact No. 3.3. Other than the home mortgage loan, Ms Flores had no significant debts. CP 190 and 191.

c. The financial resources of the party seeking maintenance including separate or community property apportioned to her.

(6) the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking maintenance. RCW 26.009.090.

The trial court's paramount concern must be the economic condition in which the dissolution decree leaves the parties. *In re Marriage of Williams*, 184 Wash. App. 263, 268, 927 P.2d 679 (1996), *review denied*, 131 Wash.2d 1025, 937 P.2d 1102 (1997). Here the trial court failed to consider this disproportionate division of property, and the assets available to Ms Flores, including \$96,000.00 in cash, and another \$29,336.00 in her retirement accounts, while at the same time considering the economic situation Mr. Flores is left in, having assets of little or no real value. See *RCW 26.09.090(1)*. Here the trial court simply failed to recognize and consider, when it awarded maintenance to Ms. Flores, that pursuant to the division of property, Ms. Flores was awarded substantially all of the community property of any value, including liquidity of over \$125,000.00. Mr. Flores, on the other hand, was awarded no liquidity, and assets of dubious value, at best. CP 191. See also, *In re Marriage of Crosetto*, 82 Wash. App. 545, 548, 918 P.2d 954 (1996); *In re Marriage of Rink*, 18 Wash. App. 549, 552-53, 571 P.2d 210 (1977).

d. The Standard of Living Established During the Marriage.

While the trial court must consider the standard of living established during the marriage, it is not required to maintain that

standard post-dissolution of marriage. The maintenance of a lifestyle to which one has become accustomed is not a test of need. *Friedlander v. Friedlander*, 80 Wash.2d 293, 297, 494 P.2d 208 (1972). The standard of living enjoyed by the parties was created not only by their joint earnings, but also by bartering done by Mr. Flores and the assistance of his family, including his mother, who loaned them money, and sold them real property with deferred payment of the purchase price, as well as with the assistance of Mr. Flores' friends and brothers, who assisted in the improvements made to that property. RP 284, II 8-11; RP 284, II 19-20. With Ms Flores net monthly earnings of \$1,348.97, child support as ordered, of \$1,919.51 per month, and maintenance, as ordered, of \$1,500.00 per month, Ms Flores has a monthly income of \$4,768.48. CP 189 ; CP 191. When approximately \$49,000.00⁷, Ms Flores appears to have been awarded child support and maintenance, when taken together with her own income, is greater than Mr. Flores' highest annual income by some \$8,000.00. RP 86-99; RP 192-194; RP 306-307. It therefore appears that the trial

⁷ Subsequent to trial, Brian Newhouse, Mr. Flores' accountant, completed the amended federal income tax return for 2011, and the tax return for 2012. Those documents show that Mr. Flores 2011 pre-tax income was \$20,969.00, and his 2012 pre-tax income was \$30,015.00. Appendix 2, ¶¶ 3 and 4.

court has enhanced Ms Flores standard of living beyond what it was during marriage.

e. The Ability of the Spouse From Whom Maintenance is Sought to Meet His Needs and Financial Obligations While Meeting Those of the Spouse Seeking Maintenance.

The trial court abused its discretion in finding that Mr. Flores had a monthly gross income of \$6,500.00, and finding that Mr. Flores had the ability to pay maintenance based upon that erroneous finding. CP 190, Exhibit 1, ¶ 9; CP 189, Order of Child Support, Findings of Fact No. 3. 2. Mr. Flores is self-employed as a heating and air conditioning contractor. RP 293, II 19-22. His annual business profit, after business expenses, based upon his federal income tax returns, and the testimony of his accountant, Brian Newhouse, are as set forth above, Section IV(2). The greatest business profit he has received in any one year, since at least 2006, is the sum of approximately \$49,000.00 for the year 2012.⁸ RP 86-99; RP 192-194; RP 194, II 17-20; RP 306-307. The trial court, instead, based its findings upon the testimony of Joseph Reid, who testified that he estimated Mr. Flores business profit to be \$78,000.00. RP 198, II 20-23 [assumptions as to gross profit margin]; RP 199, II 2-7; RP 200, II 15-24 [assumptions as to income

⁸ See Foot note 7

did not correspond to bank deposits]; RP 203-204; [assumption as to gross revenue based on the first two quarterly tax returns and projecting the second two quarters as equal. RP 200, II 5-8; [could not render an opinion on a more probable than not basis] RP 203-204.

Consequently, the trial court's finding, as to Mr. Flores' income, based as it were on the opinions of Joseph Reid, were not supported by substantial evidence, and were erroneous. As a result, Mr. Flores' income, or ability to pay, for purposes of the maintenance determination, was incorrect, and prejudicial to Mr. Flores in that the court's order has tasked him with an obligation to pay maintenance that he does not have the financial ability to pay.

6. The Trial Court Erred in Awarding Wife \$39,786.00 in Attorney's Fees and \$9,851.00 in Professional Fees, Where Wife Was Awarded Most of the Community Assets, Including the family home and cash of \$125,381.

The trial court awarded Ms Flores \$96,000.00 in cash from the parties Lower Valley Credit Union Account and \$29,381.00 in 401K monies. CP 191, Exhibit 1, II 81, 83 and 84. In addition, Ms. Flores was awarded the equity in the parties' home, valued at \$69,450.00. CP 190, exhibit 1, Spread Sheet, I 2.

RCW 26.09.140 requires the court, in deciding a request for reasonable attorney's fees and other professional fees, to consider the financial resources of both parties. Here Mr. Flores was awarded no liquid assets. Ms. Flores was awarded \$125,381.00 of liquid assets in the form of cash and 401K monies, while Mr. Flores was awarded no liquid assets. CP 191. There is no indication that the trial court considered these liquid assets awarded to Ms. Flores in awarding attorneys fees and costs. Failing to do so was error pursuant to RCW 26.09.140.

7. The Trial Court erred in failing to grant Respondent's Motion for Reconsideration on the Issues of: (1) the Harley Davidson Street Glide motorcycle, (2) the goodwill value of the heating and air conditioning business, (3) Respondent's income for purposes of child support and maintenance, (4) expert witnesses fees, (5) attorney's fees, and (6) LVCU Account (\$96,000.00) and indebtedness to Respondent's mother (\$34,000.00).

CR 59 (a) provides that a motion for reconsideration may be brought for any of the following reasons: (3) accident or surprise which ordinary prudence could not have guarded against, (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial, (7) that there is no evidence or reasonable inference from the evidence to justify the verdict or decision of the

court, or that it is contrary to law, and (9) that substantial justice has not been done.

At the time of trial, Mr. Flores accountant, Brian Newhouse, testified that, at that time, he was in the process of preparing an amended federal income tax return for Respondent, for the year 2011, due to errors in the Respondent's record keeping discussed at the time of trial. RP 89-97. Additionally, Mr. Newhouse and his staff were in the process of preparing Mr. Flores 2012 federal income tax return. RP 98, ll 17-18. Neither the amended return for 2011 nor the 2012 federal income tax return were available at the time of trial. The trial court acknowledged that these tax returns were not completed at the time of trial. CP 175, Memorandum of Decision, p. 3, ¶ 8.

Filed in support of Mr. Flores' Motion for Reconsideration was the Declaration of Brian Newhouse, attesting that he had completed the amended federal income tax return for 2011 and the 2012 federal income tax return for Mr. Flores, showing that the pre-tax income for Mr. Flores for 2011 was \$22,969.00, and the pre-tax income for Mr. Flores for year 2012 was \$30,015.00. CP 187. Notwithstanding the presentation of this additional evidence regarding Mr. Flores income for the years 2011 and 2012,

unavailable at the time of trial, the trial court denied reconsideration on the issue of Mr. Flores income. Surprising the Court refused to consider Mr. Newhouse declaration, stating that she did not find him to be credible on the issue, just as the court had done regarding critical testimony of both Mr. Flores and Yolanda Flores, his mother. Denial of Mr. Flores motion for reconsideration as to his income was error.

Also filed with Mr. Flores' motion for reconsideration, was the Declaration of Luis Flores, attesting to his ownership of the 2011 Harley Davidson Street Glide motorcycle, the time of his purchase of that vehicle, the vendor from whom he purchased the vehicle, the cost of the vehicle, the financing arrangements he made to purchase the vehicle, and a copy of his registration, showing the vehicle to be registered in the name of Luis A. Flores. Luis Flores also declared that he did, in fact, loan this vehicle to his brother, Julio Flores, who agreed to insure the vehicle while he borrowed it. CP 181. Notwithstanding this additional evidence, affording the trial court the opportunity to see that substantial justice was done on this issue, the trial court denied the Respondent's motion for reconsideration on the issue of the ownership of this asset. In so doing, the trial court noted:

1) 2011 Harley Davidson Street Glide Motorcycle. I heard the testimony of Florentina Flores and Julio Flores on this issue. Testimony by Luis Flores was not offered at trial. Based on the testimony of the parties, I found Ms. Flores more credible on the issue. Mr. Flores, at the time of trial, denied ownership of the motorcycle and claimed it was the property of his brother, Luis Flores. Given the fact that Mr. Flores rode this motorcycle, had the motorcycle in his possession, and insured the motorcycle, I made the factual determination that the motorcycle belonged to Julio Flores.

I don't find it appropriate to re-open the case to consider the testimony of Luis Flores. There is no indication that Luis Flores was not available for trial. Additionally, I would have expected Luis Flores to testify favorably for his brother, Julio. The bottom line is I did not believe Mr. Flores on this issue and Instead, accepted the testimony of Mrs. Flores and considered the documentation that Mr. Julio Flores insured the motorcycle to conclude that the motorcycle was Julio Flores property.

If any error was made, it would be in the characterization of the motorcycle as community property. Even changing the character of the property as separate does not change the remainder of my ruling. (Emphasis added)

CP 197, Order on Motion for Reconsideration, dated September 10, 2013,

A motion for reconsideration is addressed to the sound discretion of the trial court and will not be reviewed absent a showing of manifest abuse of discretion. *Pacific Industries, Inc., v. Singh*, 120 Wash. App. 1, 86 P.3d 778 (2003). Reconsideration is

warranted if the moving party presents new material evidence that could not have been produced at trial. *Cf. In re Marriage of Tomsovic*, 118 Wash. App. 96, 109, 74 P.3d 692 (Div. 3, 2003).

In the case at hand, the evidence regarding Mr. Flores' corrected 2011 federal income tax return, as well as the 2012 federal income tax return, were not available at trial. RP 91, II 16-17; RP 98, II 13-18. Moreover, as stated above, the trial court acknowledged that these income tax returns for Mr. Flores had not been completed at the time of trial. Nevertheless, the trial court denied Mr. Flores' motion for reconsideration as to the issue of his income, material for both child support and maintenance considerations, on the grounds that:

7) Respondent's income for purposes of child support/maintenance. I based my decision on the testimony of Joe Reid. I found his testimony more credible than the testimony of Brian Newhouse. Mr. Newhouse, at the time of trial, admitted that new information came to light that would require him to amend Julio's tax return(s). Based on that testimony, I chose to accept the testimony of Joe Reid.

CP 197, Order on Motion for Reconsideration, dated September 10, 2013, p. 3, ¶ 7.

Since the trial court found Mr. Flores income to be an annual pre-tax income of \$78,000.00, it was error for the court to deny Mr.

Flores' motion for reconsideration, supported by material evidence, not available at trial, which showed Mr. Flores' pre-tax annual income to have been \$22,969.00 for the year 2011, and \$30,015.00 for the year 2012. CP 187. Certainly such evidence was significant as to both the trial court's decisions on spousal maintenance and child support.

It was not learned until the trial court issued its memorandum of decision dated 16, 2013, that the trial court found Mr. Flores' testimony regarding the 2011 Harley Davidson Street Glide motorcycle to lack credibility. CP 190, Exhibit 1, p. 2, ¶ 6. Mr. Flores testified, specifically that he did not own the 2011 Harley Davidson Street Glide motorcycle, and that in fact that vehicle belonged to his brother, Luis Flores. His testimony was not impeached. His testimony, in view of the evidence offered by Ms. Flores, that she saw Mr. Flores ride the motorcycle to a settlement conference in these proceedings, and that he insured the motorcycle, was overwhelming. When the opportunity arose for the trial court to correct this error on reconsideration, the trial court erred by refusing reconsideration.

Finally, the trial court erred by denying Mr. Flores' motion for reconsideration as to the value of the heating and air conditioning

business, the disposition of \$34,000.00 from the Lower Valley Credit Union account, and the award of expert witness fees and attorney's fees, even though, as set forth above, those decisions were not supported by substantial evidence.

VI. CONCLUSION

The Respondent respectfully submits that an examination of the record will show that the trial court's findings regarding (1) Mr. Flores' income; (2) the value of the heating and air conditioning business; (3) the Respondent's ownership of a 2011 Harley Davidson Street Glide motorcycle; and (4) the disposition of the \$34,000.00 in cash from the Lower Valley Credit Union account, were not based on substantial evidence. As a result of these erroneous findings, the trial court fashioned a distribution of property and debts that is grossly inequitable. The decree of dissolution of marriage provided the award of \$212,051.00 of assets of real value to Ms. Flores, while awarding to Mr. Flores assets largely of ephemeral value. The trial court then added a judgment in favor of Ms. Flores in the amount of \$38,638.00 to bring the total value of property plus judgment awarded to Ms. Flores to \$250,689.00.

The trial court also erred in awarding Ms Flores \$1,500.00 in maintenance without consideration of the statutory factors set forth in RCW 26.09.90, including the financial resources of the party seeking maintenance (\$125,381.00 in cash), and the ability of the spouse from whom maintenance is sought to pay the maintenance and meet his own needs and financial obligations.

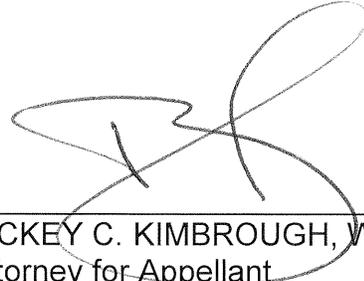
Finally, the trial court erred in awarding Ms. Flores attorney's fees of \$39,786.00 and professional fees of \$9,851.00, without consideration of the factors required to be considered under RCW 26.09.140, including specifically the resources of each party.

The net result of the trial court's decision is that Mr. Flores is left with virtually nothing from a community estate valued at \$455,799.00. While the Respondent recognizes that an equitable distribution of property does not have to be equal, the disproportionate distribution of property in this case, can hardly be viewed as equitable.

Respondent, Julio Flores, respectfully requests that the award of attorney's fees and professional fees be reversed, and the issues of distribution of property and maintenance be remanded for re-trial.

Respectfully submitted this 5th day of March, 2014.

RICK KIMBROUGH LAW OFFICE

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a 'K' and a 'B' that are intertwined and looped together.

RICKEY C. KIMBROUGH, WSBA 5230
Attorney for Appellant

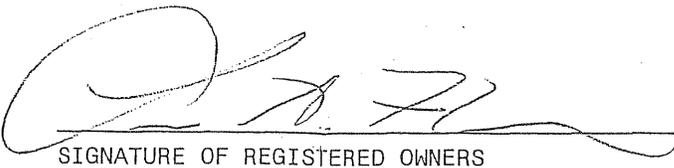
APPENDIX 1

8B1912

03/08/2013 VEHICLE REGISTRATION CERTIFICATE

Lic/Plt 8B1912	Iss-Dt 03/2012	Tab-No A062370	Reg-Exp 02/10/2014	Val-Cd/Year 17245/2004	Dep 1	Mo-Reg 12	Mo-Gwt	Pwr G	Use CYC	Mdyr 2004	
Make HD	Body FLHRS	VIN or Serial No 1HD1BXB114Y049775		Res-Co 03	Sclwt 669	Seats	Model/BT ISF/RS	Gwt	Gwt-St / /	Gwt-Exp / /	Flt
Equip	Prev-Plt 834232	Filing \$3.00	TBD 0300	RTA Tax	Subagent	Gwt/Veh Wt \$10.00	Other \$30.75	Total Fees \$43.75	Check \$43.75	Gwt Cr	

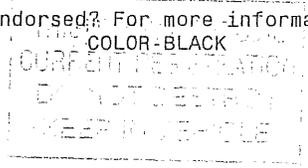
FLORES, LUIS A
150001 W RICHARDS RD
PROSSER WA 99350



SIGNATURE OF REGISTERED OWNERS

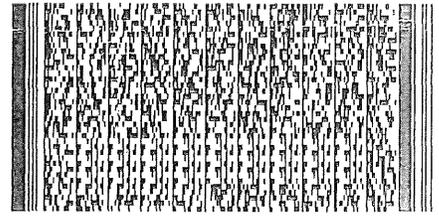
SIGNATURE OF REGISTERED OWNERS

COMMENTS:
Washington State requires an endorsement for all motorcycle operators. Are you endorsed? For more information
<http://www.dol.wa.gov/driverslicense/motorcycles.html>



REMARKS:

NDS:



ID: AREGPR-1 VALIDATION CODE 40030202130670308130190020332

THIS CERTIFICATE IS NOT PROOF OF OWNERSHIP

REGPR:2009/30/6.00001(1)

FILED

MAR 17 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON**

In re the Marriage of:)	Court of Appeals 319512
)	
FLORENTINA FLORES,)	
Petitioner,)	CERTIFICATE OF MAILING
)	
and)	
)	
JULIO FLORES,)	
Respondent.)	

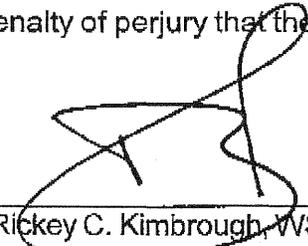
The undersigned, being first duly sworn on oath deposes and states:

On the 5th day of March, 2014, 2011, I caused to be forwarded a copy of the attached *Appellant's Opening Brief, and Verbatim Report of Proceedings, Volume I, II and III* addressed to the following:

JOANNE COMINS RICK	<input type="checkbox"/>	U.S. Mail
Halstead & Comins Rick, P.S.	<input checked="" type="checkbox"/>	Hand Delivery
PO Box 511	<input type="checkbox"/>	Federal Express
Prosser, WA 99350	<input type="checkbox"/>	Facsimile

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

DATED: March 5, 2014.



Rickey C. Kimbrough, WSBA #5230
Attorney for Respondent
607 E. Wine Country Road
P. O. Box 518
Grandview, WA 98930

CERTIFICATE OF MAILING
PAGE 1