

NO. 37652-1-II

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

DAVID A. BLACK,

Appellant,

v.

PAULA EINSTEIN,

Respondent

STATE OF WASHINGTON
BY [Signature]
NOV 30 11 06 AM '11
COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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INTRODUCTION

Appellant David Black appeals on the ground that it was unfair for the trial judge, Hon. Mark McCauley, to hear this case after forming the opinion that Black was not a credible witness based on evidence that Black blatantly and intentionally violated Judge McCauley's oral and written restraining orders. A trial judge must form opinions of the credibility of the parties in a bench trial and those opinions must be based on the evidence presented in trial. Judge McCauley's opinion was soundly based on ample evidence.

Other than a brief and misdirected argument about the duration of the meretricious relationship, Black has simply piled up every ruling that went against him (and some that were favorable to him) without any meaningful argument or citation of authority. Compounding meritless arguments results in a meritless appeal. Any number, no matter how large, multiplied by zero equals zero.

The Black brief is a shameless insult to a seasoned and capable trial judge who presided over this trial with remarkable patience and care. This Court should affirm.

RESTATEMENT OF ISSUES ON APPEAL

1. Are the Findings Of Fact supported by substantial evidence?
2. Did any meretricious relationship last no longer than the period found by the trial court – from the time the parties moved to the farm until Einstein learned of Black’s infidelity with Wrede?
3. Are the trial court’s Conclusions Of Law correct?
4. Is a trial judge disqualified from fairly and impartially trying a case where the judge has formed an opinion of the parties’ credibility based on evidence during trial proceedings?
5. Did the trial court “reopen the evidence”? If the court had reopened the evidence, would the court have abused his discretion?
6. Did the trial court delegate its contempt powers to Einstein?
7. Did the trial court abuse its discretion in denying discovery and discovery sanctions against Einstein?
8. Did the trial court abuse its discretion with respect to exhibits summarizing financial information?
9. Did the trial judge abuse his discretion with respect to exhibits summarizing financial information?

10. Did the trial judge employ a “double standard” regarding the rules of evidence?

11. Would any objective, reasonable person conclude that Judge McCauley was biased?

RESTATEMENT OF THE CASE

A. Standard of Review

Although appellant Black pays lip service to the standard of review, BA 45, his statement of the case ignores the findings of fact and the evidence on which they are based. This brief relies on the findings of fact and the evidence that supports those findings.

Substantial evidence is “defined as a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true.” *South Kitsap Family Worship Ctr v. Weir*, 135 Wn. App. 900, 907, 146 P.3d 935 (2006) (quoting *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 79 P.3d 369 (2003)). “If the standard is satisfied, a reviewing court will not substitute its judgment for the trial court’s even though it might have resolved a factual dispute differently.” *Id.* (Quoting *Sunnyside Valley*, 149 Wn.2d at 879-80).

B. Finding of Fact (F/F) 2.4: “David Black and Paula Einstein started dating but did not live together in a stable marital-like relationship while living in California. They maintained separate residences, separate bank accounts and did not pool or combine resources while in California.” (CP 817)

Einstein met Black in 1990 or 1991, when both were living in California. RP 37 (6/12/07). They quickly developed a romantic relationship, and spent many nights together. *Id.* at 38-39. However, they maintained separate apartments. *Id.* They did not commingle funds. *Id.* at 48. Einstein deposited her earnings into her personal account at Home Savings Bank and maintained a Federal Credit Union account for savings. *Id.* at 120. Black’s name was never on any of Einstein’s California bank accounts. RP 118 (6/13/07); RP 95-96 (6/29/07).

This substantial evidence amply supports F/F 2.4 (CP 817).

Black repeatedly states that the meretricious relationship commenced in 1990 and lasted for 14 years. *E.g.*, BA 22, 23. The trial court rejected Black’s claim, finding that there was no meretricious relationship while the parties were in California. RP 55-56 (7/26/07). In fact, having heard the evidence of Black’s various affairs during his relationship with Einstein, the trial court observed, “If just having a sexual relationship on a regular basis is

a meretricious relationship, then Mr. Black has four or five or six of those going over the last 12 or 14 years.” *Id.* at 56.

C. F/F 2.7: “Paula Einstein purchased the farm property located at 1863 Wynooche Valley Road, Montessano, Washington, in March 1994 for \$225,000 in her own name as her separate property.” (CP 817)

The trial court found in F.F. 2.7 (CP 817):

Ms. Einstein purchased the property with \$45,000 of her own separate funds from an account in California and she borrowed the balance of the funds from Northwest Mortgage. David Black contributed no portion of the purchase price and did not obligate himself on the loan that was required to finance the purchase of the farm. Paula Einstein did not intend for David Black to have any interest in the farm property.

Black does not dispute F/F 2.5 that he and Einstein came to Washington State in December 1993 and saw the farm on the Wynooche River. F/F 2.5, CP 817. The property was a 40-acre farm with two houses, a double wide mobile and a single wide mobile home and other farm buildings. F/F 2.6, CP 817. Einstein testified that the \$45,000 down payment for the farm came from her California accounts at Home Savings and the Federal Credit Union. RP 121 (6/12/07). The funds in these accounts came from her earnings as well as her inheritance. *Id.* This was the only source of funds for the down payment on the farm. *Id.* It is undisputed that Black was not on the title, and, as stated in F/F 2.7, “did not

obligate himself on the loan that was required to finance the purchase of the farm.” RP 114 (6/12/07).

Einstein never intended for Black to own any portion of any of the real estate. RP 127 (6/12/07). She never agreed to give Black any ownership interest and never discussed doing so. *Id.* Einstein had learned in a prior relationship that it was important who paid the bills and who owned the property (*Id.* at 126-27):

David didn't have any money. He didn't have a credit line. He didn't have a good credit record. He didn't have a steady job. He didn't have any way for paying for this. I did. He didn't step up and say, here's, you know, even \$25,000, so it was half the down payment. It was - - the burden fell to me, and I took it on, and I think when you take something like that on, you should get it in your name.

Black claimed that he had contributed to the down payment on the farm by committing what the trial court characterized as “insurance fraud.” RP 23 (6/12/07) (Black's opening statement), RP 48 (7/26/07) (oral decision). While Einstein and Black were neighbors in California, a large fire swept through their neighborhood and they both lost personal possessions. RP 43-44 (6/12/07). Einstein had a renter's insurance policy under which she claimed a loss, and Black asked Einstein to claim some of his things as well. *Id.* at 44-45. Einstein wrote down a few of Black's possessions and recovered some money on his behalf. *Id.* at 45-

46. Black claimed that Einstein's down payment on the farm included insurance proceeds for Black's possessions. RP 120-21 (6/13/07).

Far from crediting Black with a portion of the down payment, the trial court found it "almost shocking" that Black would make such a claim. RP 47 (7/26/07). Judge McCauley explained in his oral decision, "as I got into it, I asked him questions, because I almost couldn't believe what I was hearing, because he came up with some sort of a scheme." *Id.* at 47. Judge McCauley was "not really happy" with Einstein, but concluded she never would have done this were it not for Black. *Id.* at 48. Judge McCauley concluded that Black's claim about the insurance proceeds was one of several indications of Black's character and his lack of honesty and integrity. *Id.* at 46.

Nor did it reflect well on Black when he explained that his name was not on the title because he was trying to evade an IRS lien. RP 153, 166 (6/12/07). A Vermont child support judgment had been filed against Black in California, but Black claimed that a child support judgment was not the reason he did not put his name on the farm. RP 116 (6/13/07). Judge McCauley did not believe that because of the property was placed in Einstein's name

because of the tax lien, but concluded it was placed in her name because “she was the one financing it with her father’s money and with her money and credit” RP 51 (7/26/07). But Judge McCauley did conclude that Black’s action was, “[a]nother indicator to me that his trustworthiness, his honesty, I guess his integrity, is not there.” *Id.* at 52.

Einstein’s testimony amply supports F/F 2.7 that the farm property was purchased from Einstein’s separate funds and became her separate property. The same testimony supports findings 2.9, 2.10, 2.11, 2.12 regarding the purchase of other properties.

D. F/F 2/8: “After Paula Einstein purchased the farm the couple moved to that property and later began a business known as Onestone Farms. Onestone Farms was an unincorporated business engaged in the breeding and sale of horses.” (CP 817)

It is undisputed that after Einstein purchased the farm, she and Black moved to the property and began a business known as Onestone Farms. F/F 2.8, CP 817. They called it Onestone Farms because that is a literal translation of the name “Einstein.” RP 75 (11/3/06). The trial court found that the meretricious relationship began after the farm was purchased, “about in the middle of 1994.” F/F 2.22, CP 819.

The parties opened a checking account at Sterling Savings and the account was used to pay expenses on the farm, including the mortgage. RP 67-69 (6/12/07). The Sterling account was in Einstein's name, but eventually Black was given signature authority. *Id.* at 64. If there were insufficient funds in the Sterling account, Einstein would transfer money into the account from her California account. *Id.* at 65. Both parties worked at other jobs during this period. F/F 2.14, CP 818. Einstein worked as a film editor in California for several months each year, while Black worked at various jobs, including travel to Europe and other foreign countries. *Id.* When the parties earned income from non-farm sources, they deposited most, but not all, of their earnings into the Sterling account. RP 70 (6/12/07).

The trial court found that Black "persuaded Ms. Einstein to declare that the income he deposited into the Onestone account was business income from the farm and horse breeding activities." F/F 2.15, CP 818. Einstein filed income tax returns and included all of her income, Black's income, and the farm income on those returns. *Id.* Black did not file personal federal income tax returns and did not report his earnings to the IRS. *Id.* This finding is supported by Black's own testimony. RP 130-31 (6/13/07). Black

selected the accountant who agreed to report all of the income on Einstein's return, and Black dealt with the accountant more than Einstein. RP 109-10 (6/29/07). Einstein questioned whether this was appropriate, and the accountant told her that it was a gray area, but later admitted to Einstein that this was essentially money laundering. *Id.* at 110.

Judge McCauley found that Black's failure to file tax returns was yet another indication of his lack of honesty and integrity. RP 52-53 (7/26/07).

E. F/F 2.22: "The farm and horse raising business, as opposed to the real property, was operated and maintained by funds and efforts put in by each of the parties. The funds generated by the business were consumed by the operations when they were running this horse business. They never showed a profit in that business." (CP 819-20)

One of Judge McCauley's frustrations with the case was that Black and Einstein never kept accurate records and combined all of their incomes into one tax return under Einstein's name. RP 59-60 (7/26/07). As a result, it was difficult to determine whether the business made any contribution whatsoever to the value of the real property.

Substantial evidence supports F/F 2.22 that the farm operation never showed a profit and that all funds generated by the

business were consumed by the operations. Einstein testified that the farm could not have supported itself without her earnings as well as Black's earnings independently of the farm, and that the farm did not pay for itself. RP 57, 70, 73, 88 (6/12/07). Black's appellate brief claims, "[b]y 2000, the farm operation, and the property acquisition and management operation, were self-sufficient and making money." BA 27. But the record citations that follow this assertion simply show that other earned income by the parties was subsidizing the operation of the farm and that Einstein "thought" that the farm was paying for itself. See citations at BA 27, first full paragraph. Black admitted on cross-examination that Einstein's tax returns only showed a profit for two years, not throughout the years of operation. RP 131 (6/13/07).

As Judge McCauley found, any "contributions by Mr. Black to the real property were offset considerably by the value he received from living on the premises and being able to use the premises for business operations." F/F 2.22, CP 820. Black does not dispute F/F 2.23, that the reasonable rental value of the farm was \$1,200 per month. CP 820.

F. F/F 2.24: The trial court awarded the meretricious “community” a lien of 20% of the value of the net proceeds of the sale of the real property, which “is probably overly generous to Mr. Black considering the consumption of income by the parties including trips and other expenditures.” (CP 820)

Judge McCauley found that the meretricious “community” should have a lien of 20% of the value of the net proceeds of the sale of the real property, which should be divided equally between Einstein and Black, 10% each. F/F 2.24, CP 820. Judge McCauley considered this “probably overly generous to Mr. Black” because the meretricious “community” had enjoyed the use of the property and the rental income from the rental houses purchases by Einstein. *Id.* Judge McCauley also noted, “[t]he failure of the parties to keep accurate and proper records of the farming business and Mr. Black’s combining of his income into one tax return prevents an accurate determination of the contributions of the ‘community’”. *Id.*

The evidence clearly supports Judge McCauley’s finding that it was impossible to accurately determine the contributions of the “community” to the real property. The real property was all purchased by Einstein in her name, using her credit and her funds, as discussed above. F/F 2.9 – 2.12 (CP 817-18). But the parties

used two bank accounts, the Sterling account and the Wells Fargo account, to pay the mortgages and all payments to operate the farm and the horse business. RP 67-68, 88 (6/12/07). Both parties deposited their outside earnings into these accounts. *Id.* at 70, 73, 177. Both Black and Einstein worked on the property and contributed their labor to the farm and horse raising business. *Id.* at 57, 67, 77; RP 36-38 (6/13/07).

Black relied heavily at trial and now on appeal on the summaries prepared by Black's CPA witness, Lonnie Rich. BA 31-34. There are several problems with Rich's summaries. First, because all sorts of unrelated income and expenses were rolled together in the bank records, Rich's summaries carried that same meaningless combination of information into summary documents. In other words, Rich's summaries simply rolled together monies contributed by Einstein to purchase properties, rent on those properties, earnings by Einstein and Black, farm income, and rental income, all combined into one massive summary. *E.g.*, Ex 76, 103. All that Rich did was to summarize the "relative contributions of both parties." RP 8-9 (6/29/07). He simply took the records given him by Black and assembled them into a summary of all income and outflows. *Id.* at 9. The resulting summaries are not financial

statements, and they are not even compilations. *Id.* at 9-12. Rather, Rich testified, “[t]his is litigation support services.” *Id.* at 12. A bookkeeper could have assembled this information, and it was not necessary for a CPA to do the task. *Id.* at 13. Rich did not ask Einstein for any financial information, *id.* at 13-14, and he had no tax returns to work from. RP 209 (6/13/07). Rich’s summary in Ex 76 treated the down payments for the farm property and the income for for the farm property as if they were equally contributed by Einstein and Black. RP 15, 19-20 (6/29/07). Rich based this treatment on his conversation with Black and his own analysis. *Id.* at 15-17.

In addition to summarizing cash flow, Rich estimated the value of Black’s personal services working on the farm. Rich discussed with Black how much time Black worked on the farm and accepted Black’s claims based on Black’s calendar. RP 204-05 (6/13/06). Black told Rich that Black worked 12-14 hours every day he was at the farm, seven days a week. RP 311 (7/19/07). Rich testified that “to be conservative” he reduced Black’s estimated hours from 12-14 per day to 10 hours per day, seven days a week. *Id.* at 311. Rich then credited Black with that number of hours at the average farm wage rate for farm labor in Washington and

Oregon, which he considered to be conservative. RP 203-04 (6/13/07). Rich made a similar calculation with respect to Einstein (without talking to Einstein), concluding that Black contributed services valued at \$327,191 and Einstein contributed services valued at \$227,288. *Id.* at 206. Rich then lumped together the cash inflow and expense summary with a labor summary and concluded that Black made a net contribution to the “community” of \$945,952, and Einstein of \$874,419. *Id.* at 206. Rich then prepared a second analysis based on the assumption that the property was purchased entirely by Einstein. RP 43 (6/29/07).

Rich did look at Einstein's tax returns, but he did not consider them reliable because they combine the income from the farm with Einstein's and Black's earnings from other sources. RP 60, 67-68 (6/29/07). Rich did not include depreciation in his calculations, and he calculated all income received by Black as earned income, despite the fact that that income included expenses being reimbursed to Black where the original expenses had been paid from the Sterling account. *Id.* at 62, 64-66.

Based on all of this evidence, F/F 2.24 states, “[t]he court does not find the testimony of Mr. Rich persuasive because it merely accepts the claims of . . . Mr. Black regarding his

contributions of money and labor without independent verification or corroboration.” CP 820.

G. F/F 2.22: “The meretricious relationship lasted until the time that Ms. Einstein became aware of the last affair, and resulting pregnancy of Anja Werde.” CP 819.

Einstein discovered just before Thanksgiving 2003 that Black had been unfaithful to her with a woman named Anja Werde (also spelled in the transcript as “Wrede”). RP 109 (6/12/07). About the same time, Black told Einstein that Wrede was pregnant. RP 32 (6/13/07). This was a fundamental breach of their relationship. *Id.* at 33. In Black’s opinion, his affair with Wrede did not end the meretricious relationship. *Id.* at 32-33.

Black was cross-examined on the inconsistencies about his relationship with Wrede. He initially testified that he first met her and began an intimate relationship in 2002. RP 48-49 (7/25/07). On cross-examination, Black admitted that he knew Wrede in 2001. *Id.* at 76, Black was impeached through an email from Wrede to Black on October 8, 2001 that says, “It was very nice for me to see you last week. Not only the kisses, it was good to talk with you.” *Id.* at 80. Black was impeached with another email from Wrede on November 1, 2001, stating that she was wanted to meet Einstein. *Id.* at 80-81.

Black had denied that he and Wrede tried to get Einstein out of the picture and take over the farm. *Id.* at 76. He was impeached by further emails from Wrede, stating, "Maybe we can share a part of this fucking damn nice life," *Id.* at 83, and, "[t]he farm could be near and I could find somebody that loves me honestly and open[ly], not hidden with shame and lies and sex always in a rush." *Id.* at 90.

Black admitted that there were other infidelities in addition to his affair with Wrede. RP 162 (6/13/07). His affair with a woman named Becky Sexton, was probably around 1996 or 1997. *Id.* He also acknowledged infidelity with women named Bryn Morgan, Kristine Kellabow, and Liza (or Lisa). *Id.* at 163.

Many excuses have doubtless been offered over the centuries for infidelity, but Black's excuse in a pleading filed in this Court is surely unique:

[A]s to Appellants [*sic*] several affairs, this Court can take judicial notice that it rains 144 inches per year at the Wynochee Oxbow, and it is the wettest location in the lower 48. Mr. Black was left alone to tend the farm for six months out of the year each winter while Paula Einstein played at being a movie trailer video editor in Hollywood. Human beings need companionship.

Appellant's Response To Motion to Dismiss at 2.

This evidence supports Judge McCauley's finding that the meretricious relationship ended when Einstein became aware of the Wrede affair. F/F 2.22, CP 819. The finding is also supported by the allegation in Black's initial complaint that he and Einstein "lived together up until approximately 2003" CP 2.

H. Procedural History: "Black engaged in some of the most egregious contempt that [the trial] court has ever seen." F/F 2.18, CP 819.

Black commenced this action in May 2006 asking the Court to find a meretricious relationship and make an equitable distribution of their property. CP 1-3. The trial court granted Black's motion for an ex-parte order restraining Einstein from selling any of the real property. CP 10-12. Einstein responded with her own motion for a temporary order requiring Black to leave the farm and giving her immediate access to an possession of the horses. CP 19. Einstein also asked that Black be restrained from transferring, removing, concealing or disposing of any documentary evidence relevant to the proceedings. *Id.* The trial court, Judge David Foscue, noted that credibility was at issue and that testimony would be required to resolve the cross-motions for restraining orders. RP 14 (8/7/06). He ordered that no records should be

destroyed and that the status quo should remain in effect pending the hearing. *Id.* at 16-17.

The matter came on for hearing on November 2 and 3, 2006.¹ Both Einstein and Black testified at the hearing, which was held before Judge McCauley. Judge McCauley expressed his hope that the parties would get some “good accountants to go to work on sorting through the last number of years trying to figure out who contributed what.” RP 109 (11/3/06). He noted that the parties’ horse business “is a financial mess with no real good documentation.” *Id.* He also observed that this case would be much easier if there were appropriate accounting and tax returns. *Id.* He noted that, “Black has no real incentive to move quickly, to sell the property, because he wants to run his operation out of there, his horse business.” *Id.* at 111. Noting that the vast majority of the money used to purchase the property was Einstein’s, *id.* at 110, Judge McCauley ordered that Black be out of the property on or before December 1, including anyone living with him. *Id.* at 112.

Judge McCauley ordered, “I want nothing removed from the property unless there is a full inventory by himself [Black], which is

¹ Appellant Black failed to obtain the transcript for the November 2, 2006 hearing. Einstein moved twice to dismiss the appeal or alternatively to limit the issues on appeal based on Black’s failure, but those motions were denied.

submitted through his attorney to Mr. Parker and it's okayed for him to remove anything from the property." *Id.* Nor was Einstein to remove any property, but should use the same inventory process imposed on Black. *Id.* at 113.

No written order was entered after the November 3 hearing until November 27. CP 200. On the 27th, Black asked for more time, claiming he needed until the end of December to vacate the farm. RP 2, 4 (11/27/06). Judge McCauley denied the request because Einstein was on her way up from California to take over the property. *Id.* at 5. Einstein's proposed order recited in part (CP 201):

Both parties are restrained from removing any item of personal property (other than his or her horses) from the property including but not limited to vehicles, equipment, household goods, tools, hay, tack, documents, records, files, or other items unless the items are inventoried and removal of the items is approved in writing by counsel for both parties or this court.

Black's attorney asked for clarification about personal items, and Judge McCauley responded that if there were items such as clothing that were totally Black's and to which Einstein made no claim, he could remove those items. RP 6 (11/27/06). But any items as to which there were any doubt should be inventoried and not removed absent agreement. *Id.*

When Einstein regained possession, she discovered that Black had literally cleaned out the house and the outbuildings, and Einstein was forced to move for return of the personal property and for contempt. CP 250. Einstein's declaration in support of the motion listed many items that were missing, including, among other things: John Deere tractor; one ton Dodge truck; horse trailer; gate panels for stalls, custom made for the farm, which Black had dismantled; welding torches and tanks; all papers for Einstein's horses; round bale spear and back blade for the tractor; almost all kitchen utensils and appliances; five beds, dressers, chairs, tables, rugs; everything useful in the tackroom; blankets, halters, bridles, medicine; most of the tools of any kind, including hammers, screwdrivers, crowbars, ladders, fencing tools and wire. CP 230-33. Ironically, Black left personal items such as his clothes, a moosehead, his pool table, and other personal items. *Id.* Einstein supported her motion with photographs she had taken on October 30 (before Black left) and December 1 and 2 (after). CP 234-49. Black did not contest Einstein's declarations.

Einstein's motion was heard by Judge McCauley on February 9, 2007. Einstein presented the testimony of Katherine Hull, who had previously purchased hay from Black and Einstein.

RP 9-10 (2/9/07). Hull testified that on November 6 (3 days after the evidentiary hearing in which Judge McCauley ordered the parties to maintain the status quo), Black called Hull and told her that he wanted to sell her some hay as quickly as possible because “he needed to get all his stuff off the property.” *Id.* at 6. Hull bought 272 square bales of hay, and wrote a check for partial payment on November 7. *Id.* at 6-7. Hull paid an additional \$300 on December 22, and still has not paid for the remaining balance. *Id.* at 11, 12-13.

Einstein testified that she had gone to the farm on October 30 to inspect the premises and take photographs. *Id.* at 14-15. After she took possession, she again took photographs and attached them to her declaration. *Id.* at 15. Einstein also testified that Black had taken a horse named Serengiti, the ownership which was disputed and which Einstein had wanted to keep. *Id.* at 20-22. Einstein had subsequently heard that Serengiti died while in Black’s custody. *Id.*

Judge McCauley found that it is “very clear” that Black was in contempt of both the oral order and the written order. RP 38 (2/9/07). He observed that Black did not even offer a defense. *Id.* Judge McCauley gave Black one week to prepare a full inventory of

everything that was taken. Einstein and her attorney would then review the inventory and anything they demanded be returned, Black must return. *Id.* at 38-39. With respect to returning the property, Einstein and her attorney are “going to call the shots.” *Id.* at 38. If Black failed to comply, Judge McCauley would begin imposing sanctions, including a daily monetary fine and possible jail time. *Id.* at 39. Judge McCauley set a follow up hearing for one week later. *Id.*

Black’s attorney, Scott Campbell, withdrew after the contempt hearing and before the trial, and Black’s new attorney Jon Cushman, called Campbell as a witness to the circumstances of Black’s contempt. RP 129-30 (7/25/07). Campbell testified that he and Black had “a lot of discussions” about what he could remove from the property. *Id.* at 131. Campbell told Black “what I would tell any client. [A c]ourt order is a court order and you risk contempt.” *Id.* at 134. Campbell never contemplated that Black would take things from the property without approval. *Id.* Rather, he told Black that if there was something that Black needed, he would have to wait and file a motion afterwards to retrieve the property. *Id.* at 134-35. Campbell told Black that he should not

violate the court order and explained the potential penalties. *Id.* at 144.

At the conclusion of the trial, Judge McCauley explained to Mr. Cushman, Black's new counsel, that the court had ordered Black in no uncertain terms on November 3 that he had to be out of the property by November 30. RP 40 (7/26/07). Judge McCauley considered it "somewhat offensive" that Cushman and Black portrayed Black's contempt "as if the Court on November 27 ordered him out of the property." *Id.* Judge McCauley told Black at that time that if he wanted to remove anything, he had to fully inventory it and resolve any disputes. *Id.* at 40. Black had almost an entire month to do that. Black's lawyer, Campbell, clearly explained to Black what would happen if he took property without permission. *Id.* at 41. But Black just "wiped the place out," even taking portions of the horse stalls as well as records that he had been ordered not to take by both Judge McCauley and Judge Foscue. *Id.* at 41-42. Campbell and Black had no defense at the contempt hearing because Black "had blatantly and intentionally disobeyed my orders, my oral order and my written one." *Id.* at 42. Judge McCauley concluded (*Id.* at 42):

It was obvious he had no respect for the orders of the Court, disregarded Judge Foscue's order entirely, and intentionally and blatantly disregarded my order that I had made in court on the record, in his presence, and it was signed and in writing.

The follow-up hearing set for one week later never occurred because Judge McCauley became violently ill. *Id.* at 43-44.

Based on everything he had heard, Judge McCauley concluded that, "I do not trust Mr. Black." *Id.* at 46. The judge gave a few examples of Black's lack of honesty and integrity: the fire insurance situation in California; selling hay to Ms. Hull in blatant violation of the court's order; evading the IRS lien and child support; cheating his employer on reimbursements; Black's claim to have worked an incredible number of hours seven days a week; his failure to file tax returns; his affairs and infidelity. *Id.* at 46-55.

Judge McCauley concluded that the meretricious relationship began when Black and Einstein moved to Washington and concluded when Einstein learned of Black's affair. *Id.* at 58-59. All of the real estate was purchased in Einstein's name and with her funds and credit, and remains her separate property. *Id.* at 57-58. The interest of the meretricious "community" in the real property was a 20% interest, to be split 10% to each. *Id.* at 59. However, the 20% value of the property must be deposited in the registry of

the court to give the IRS an opportunity to make a claim against the funds. *Id.* at 61-62.

Apparently reasoning that the best defense to his contempt is to try to tar Einstein, Black complains that Einstein sold hay that she should not have sold, and sold horses too cheaply. BA 35. Einstein explained that all of the proceeds from the sales, together with any rental income, had gone into a bank account awaiting the judges decision. RP 114-15 (6/12/07). All of these funds were applied to pay debt arising out of the farm operation. RP 171 (7/17/08). With respect to the horses, it took Einstein over a year to sell them, and she incurred about \$6,000 in expenses during that period. RP 268 (7/19/07). She negotiated the price of the horses and got the best price she could. RP 124-25 (6/12/07).

I. Post-trial Proceedings.

The Argument section below discusses post-trial proceedings, to the extent they are relevant.

ARGUMENT

A. The Findings of Fact are amply supported by substantial evidence.

The Court need not consider issues that are not adequately argued by the Appellant. *Marriage of Angelo*, 142 Wn. App. 622,

628 n.3, 175 P.3d 1096, *rev. denied*, 164 Wn.2d 1017 (2008). Black assigns error to 24 separate findings of fact, BA 2, which he “argues” in one paragraph. BA 46. The primary argument is an attempt to incorporate objections he made to the trial court’s proposed findings. Arguments must be included in the appellate brief; they cannot be incorporated by reference from trial court pleadings. *Kwiatkowski v. Drews*, 142 Wn. App. 463, 499-500, 176 P.3d 510, *rev. denied*, 164 Wn.2d 1005 (2008) (court rejected an effort to incorporate over two dozen pages of trial court briefing into an already 100-page brief: “We do not consider the additional briefing and, because Kwiatkowski submits no additional argument, authority, or citation to the record related to this issue, we refuse to address this issue.”)

Black does argue it was error to enter judgment for the amounts interlineated by the Court into the Decree and Judgment on July 17, 2008, arguing that there are no findings and no factual basis. BA 46. The three amounts are:

Paula Einstein should have judgment against David Black for \$5,000.00 for the loss of the horse, Serengetti.

Paula Einstein should have judgment against David Black for \$7,240.00 for the loss of personal property taken from the fund in violation of the court’s orders.

...

Paula Einstein is awarded judgment against David Black in the sum of \$3,149.95 for hay sales and other farm income.

Decree and Judgment, CP 856-57 (Judge McCauley's handwritten interlineations in italics.) Although these items appeared in the Conclusions of Law, these are clearly Findings of Fact, and as Black acknowledges, a finding of fact designated as a conclusion of law is treated as a finding of fact. BA 46.

Ample evidence supports each of these numbers. Black removed Serengetti from the farm without Einstein's agreement, which was a violation of Judge McCauley's rulings, as discussed above. RP 20 (2/9/07). Einstein repeatedly testified that Serengetti should have been worth \$10,000 - \$15,000. *Id.* at 21; RP 108-09 (6/29/07); RP 267 (7/19/07). Black admitted that Serengetti died while in Black's custody. RP 41 (7/25/07). Since Serengetti was jointly owned by the parties, this evidence amply supports the finding regarding Serengetti.

With respect to the judgment against Black for \$7,240.00, Einstein testified at trial and at this final hearing that Black removed personal property worth \$14,480.00 from the farm in violation of Judge McCauley's order, and never returned the property. RP 9

(7/25/07); RP 804 (7/17/08). Judge McCauley awarded judgment for half that value.

The judgment against Black for \$3,149.95 “for the hay sales and other farm income” is based on Black’s own Ex 49, with adjustments made by Judge McCauley that are unclear from the record. RP 180-82 (7/17/08). In any event, even without the adjustments, Black’s admission that he earned over \$7,000.00 from the hay sales, 50% of which should have belonged to Einstein, amply supports an award in Einstein’s favor of \$3,149.95.

B. Any meretricious relationship lasted no longer than the period found by the trial court, from the time the parties moved to the farm until Einstein learned of Black’s infidelity with Wrede.

The Trial Court found that the meretricious relationship began in the middle of 1994, and continued until Einstein became aware of Black’s most recent affair with Anja Wrede. FF 2.22 CP 819. Einstein respectfully submits that the Court could well have found that no meretricious relationship ever existed in light of Black’s numerous affairs and infidelities. A meretricious relationship is more appropriately referred to as a “committed intimate relationship.” *Oliver v. Fowler*, 161 Wn.2d 655, 657 n.1,

168 P.3d 348 (2007). Black was hardly “committed” to the relationship – he systematically cheated.

In any event, the evidence amply supports Judge McCauley’s finding and conclusion that the meretricious relationship existed from mid-1994 until the end of 2003. Black argues that a meretricious relationship began in California four years before Einstein purchased the Washington farm and she and Black moved to the farm. BA 47-48. But, under Washington law, “[r]elevant factors establishing a meretricious relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.” **Connell v. Francisco**, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). As Judge McCauley found, Black and Einstein were living separate and apart in California, and maintained separate accounts. RP 55-56 (7/26/07). Merely engaging in a romantic relationship and sleeping over at one another’s apartments is insufficient to establish a meretricious relationship.

Under California law, which presumably governed Einstein and Black while they lived in California, parties who cohabit can enter into oral or written agreements to govern their acquisition of

property. **Chiba v. Greenwald**, 156 Cal. App. 4th 71, 67 Cal. Rptr. 3d 86, 91-92 n.1, 168 P.3d 348 (2007). But, without an agreement, there is no enforceable interest in another's property. *Id.* There is no evidence in this case that Black and Einstein had any agreement when they lived in California, other than an agreement to sleep together.

Black also argues that any meretricious relationship lasted more than a year after Einstein learned of Black's infidelity and his relationship with Wrede. BA 47-48. But as discussed above, if their relationship was ever a "committed intimate relationship," it was no longer "committed" after Einstein learned of the affair and pregnancy.

The beginning date of the meretricious relationship is significant because Einstein purchased the farm before the parties commenced a meretricious relationship. The farm was accordingly Einstein's separate property: "[P]roperty owned by one of the parties prior to the meretricious relationship and property acquired during the meretricious relationship by gift, bequest, devise, or dissent with the rents, issues and profits thereof, is not before the court for division." **Connell**, 127 Wn.2d at 351. Accordingly, the rents and crops derived from the farm were Einstein's separate

property, and together with Einstein's other separate assets, were used to acquire the additional rental properties.

To the extent that Black provided funds or services to increase the value of the farm, a right of reimbursement could arise subject to offset for any benefit received by the meretricious community for its "use and enjoyment of the individually owned property." *Id.* Judge McCauley followed **Connell** precisely. He found that the real property was Paula's separate property because it was acquired in Paula's name and through her assets and credit, without any intent to benefit Black,. Judge McCauley recognized that the meretricious community might have some right to reimbursement, but that any such reimbursement should be reduced by the value of the "community's" use of the property. Given the confused nature of the financial records and the lack of any coherent proposal by Black, Judge McCauley made what he considered to be an equitable decision, awarding a 20% interest in the real property to the meretricious community. This was a just and equitable division, which is exactly what is required under **Connell** and subsequent cases. *Id.* at 351. There was no error.

C. The trial court's conclusions of law are correct.

Black offers a jumble of arguments about the court's conclusions of law. BA 46-55. To the extent not already answered, Einstein responds as follows.

Conclusions of Law ("C/L") 3.1, 3.2 and 3.3 are appropriate for the reasons previously discussed. Black also claims incorrectly that the \$80,000 debt incurred by Einstein post-separation was solely her debt. BA 35, 47. To the contrary, Einstein used these funds to pay the mortgage and other expenses on the farm, since Black was not making any payments. RP 109-10, 113-14 (6/12/07), RP 87-89 (6/29/07), RP 66 (11/3/06).

C/L 3.4 is discussed *infra*.

Black argues that the court erroneously granted judgment for Einstein against Black for a \$9,500 loan, arguing that the loan was "incorporated into the accounting done by Lonnie Rich, Black's accountant, and properly dealt with in the accounting." BA 49. Judge McCauley rejected Rich's testimony because Rich accepted Black's claims regarding his contributions of money and labor without independent verification or corroboration. F/F 2.24, CP 820. Thus, the loan was still owed and was appropriately made part of the judgment.

Black complains that the attorney fee award to Einstein failed to adhere to the argument of ***Bowers v. Transamerica Title Ins. Co.***, 100 Wn.2d 581, 593-599, 675 P.2d 193 (1983). BA 49. This is Black's only argument about attorney fees, and it is meritless because the award conforms to ***Bowers***.

Bowers adopted the lodestar formula, under which the trial court must determine the number of hours reasonably expended multiplied by the reasonable hourly rate of compensation, and then adjust for any factors not considered in the lodestar calculation. ***Bowers*** at 597-98. Einstein's attorney, Jon Parker, filed a declaration supporting attorney fees of \$4,862.50, 22.75 hours charged at \$225 per hour. CP 425-26. Parker attached detailed billing statements showing exactly what he did. Parker filed a supplemental declaration asking for an additional \$1,575 for seven hours of time. CP 464-65. Judge McCauley awarded \$4,862.50, holding (RP 63 (7/26/07)):

Your attorney fees are more than reasonable. You never should have had to put up with the intentional contempt of Mr. Black and his refusal to follow court orders.

No more is required under ***Bowers***.

Black descends from the trivial to the meaningless when he objects to the listing of trial days at the beginning of the findings of

fact. BA 49. Black objects that the hearing on cross-motions for restraining orders on November 2 and 3, 2006, was not a part of the trial. BA 49-50. CR 65(a)(2) provides in relevant part, “[a]ny evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.” Einstein’s counsel offered Einstein’s prior testimony at the November 2 hearing as testimony in Einstein’s case in chief. RP 73 (6/29/07). Black’s counsel Jon Cushman (who was not counsel at the November 2006 hearing) objected on the ground that evidence from the preliminary injunction hearing could not be considered evidence at the subsequent trial. *Id.* at 73-74.

Judge McCauley explained that his typical practice is to consider evidence from preliminary hearings as evidence at the subsequent trial, giving dissolution cases as an example. *Id.* at 74-75. Judge McCauley ruled, “It would create an incredible duplication of testimony that was under oath, with vigorous cross-examination, and I’m going to consider it. So if you want to question about anything that came up in November you’re welcome to do so.” *Id.* at 76. Judge McCauley observed that he always

takes “detailed notes” of preliminary hearings in situations like this. *Id.* at 74-75. The November hearing was clearly part of the trial.

Black quibbles that June 7, 2007 was not a trial date, but a hearing on a motion to continue the trial, and that October 18, 2007 was “not a day with any case activity.” BA 50. In fact, October 18 involved a post trial motion to deal with personal property issues. RP 340-76 (10/18/07). Listing these dates as a part of the trial was entirely appropriate.

Black objects that paragraph 3.2 of the judgment is erroneous in that it awards him only a “de minimus equitable interest” in the farm property. BA 51. If Black believes his 10% interest to be “de minimus,” Einstein suggests that he expressly abandon it.

Black argues that it was error to award Einstein \$5,000 for the loss of the horse Serengetti, arguing that he held Serengetti as a bailor without liability. BA 53. Einstein had a property interest in Serengetti and Black converted Einstein's interest when he contemptuously removed the horse from the farm in violation of Judge McCauley's order. ***Marriage of Langham and Kolde***, 153 Wn.2d 553, 106 P.3d 212 (2005). The measure of damages for conversion is the value of the article converted at the time of the

taking. *Id.* at 567. The evidence was that Serengetti was worth \$10,000 to \$15,000 at the time of the conversion. The award of \$5,000 was well within the evidence.

Black complains that the award of \$7,240 for personal property was incorrect because all issues of personal property were settled on the record on May 16, 2008. BA 53. Black mixes apples and oranges. The May 16 hearing addressed the auction of personal property items at the farm. The judgment had nothing to do with the auctioned property; it was for personal property removed by Black and never returned.

Black makes a two sentence argument that that there is “no basis in the trial court record” to award the name Onestone Farms or variations of the name to Einstein. BA 54. To the contrary, Einstein testified that she began using “OneStone Farms” as a DBA in 1993 or 1996, and that Black only claimed the name in 2000 or after 2003. RP 54-55 (6/12/07). Einstein presented evidence that she applied for a trade name for “Onestone Farms” on July 26, 1996. *Id.* at 131-32. There was no error in awarding her the right to use variations of the name.

D. A judge's opinion of the parties' credibility based on the evidence during trial proceedings does not disqualify the judge from fairly and impartially trying the case.

Black argues that Judge McCauley "prejudged the case" by deciding that Black was not credible. BA 55-57. It is undisputed that Judge McCauley formed his opinion of Black's credibility based on the preliminary injunction hearing on November 2 and 3, 2006. A judge is never disqualified based on opinions based on hearing the evidence in the case. Any other rule would make it impossible to try cases because judges would always be disqualified as soon as they formed an opinion based on the evidence.

Judges are presumed to perform their functions "regularly and properly and without bias or prejudice." *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945, *rev. denied*, 122 Wn.2d 1019 (1993). It is not a basis for disqualification that a judge has been exposed to adjudicative facts. *Ritter v. Board of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 513-14, 637 P.2d 940 (1981). The United States Supreme Court has held that judges are not disqualified from subsequent proceedings in a case merely because they have sat in an earlier phase of the case. *Withrow v. Larkin*, 421 U.S. 35, 55, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975). Thus, judges are not disqualified under the following

circumstances: judges who issue arrest warrants may later determine whether there is probable cause to believe a crime has been committed and can preside over the subsequent criminal trial; judges who preside at preliminary hearings on the sufficiency of evidence to hold a defendant for trial can also preside over the subsequent criminal trial; judges who issue temporary restraining orders may preside over injunction proceedings; and decision-makers in administrative agencies may approve the filing of formal complaints and then participate in the ensuing hearings. *Id.* at 56. The Ninth Circuit summarized the relevant principle: “[t]he bias must stem from an extra judicial source and not be based solely on information gained in the course of the proceedings.” ***Hasbrouck v. Texaco, Inc.***, 842 F.2d 1034, 1045-46 (9th Cir. 1987) *affirmed* 496 U.S. 543 (1990).

Applying these principles to this case, Judge McCauley’s participation in the November 2006 hearings did not disqualify him from presiding over the trial. Judge McCauley’s opinions were based on evidence presented under oath and subject to cross-examination. None of his opinions were based on extra-judicial sources and none predated these proceedings.

Fair trial would become impossible if judges were disqualified the moment they heard evidence that caused them to form an opinion about the defendant. This entire case was tried to Judge McCauley without a jury. Of course Judge McCauley formed opinions about the credibility of both parties; that was part of his job. Black's attack on Judge McCauley gratuitously insults an experienced, capable and impartial jurist who has long served the people of Grays Harbor County.

E. The trial court did not re-open the evidence and would not have abused his discretion if he had re-opened.

Black argues at some length that the trial court erred in delaying the entry of findings of fact and in re-opening the evidence. BA 57-59. Black's entire argument is based on a misunderstanding of the procedural background of this case.

Judge McCauley did not "re-open the evidence" because he never closed the evidence. At the conclusion of the trial, Judge McCauley stated in his oral decision that he would "deal with the personal property after I see the lists." RP 62 (7/26/07). There followed a series of disputes over how to handle personal property. Einstein's counsel found the lists conflicting and indecipherable and proposed auctioning the personal property. RP 343 (10/18/07).

The court approved the proposal for an auction and directed the parties to proceed. *Id.* at 367-69. The parties then pursued issues over selling the real property. RP 2 (3/3/08); RP 2 (4/7/08). When Einstein finally managed to schedule an auction for the personal property, Black opposed and sought to stop the auction. RP 2 (5/14/08). The court allowed Black additional time to examine the personal property and identify his personal items. *Id.* at 27, 31, 33-39, 45-48. The parties were back in court three days later again disputing the terms of the auction. RP 4 (5/16/08).

The court heard argument on May 20, 2008 over conflicting findings proposed by Black and Einstein. RP 21 (5/20/08). Judge McCauley observed:

I immediately notice[d] when I reviewed Mr. Cushman's [proposed findings] a while back that it wasn't even close to a lot of the - - the findings that I made orally and, in fact, indicated findings that I specifically did not make and that would basically reverse my oral decision.

RP 21 (5/20/08). Recognizing that it would be wasteful to attempt to draft findings and conclusions "by committee", Judge McCauley announced that he would work from Einstein's draft and try to develop a final set. *Id.* at 21-22. At the conclusion of the hearing, Judge McCauley set a follow up for June 5, observing that "if we're lucky" they could resolve the personal property issues: "But if we

can't, . . . I am going to retain jurisdiction on the personal property and debts but here are the final orders on the real property." *Id.* at 52.

The court reconvened on June 13, 2008 to consider Black's objections to the Court's revised set of findings of fact. RP 54 (6/13/08). Judge McCauley felt that he had cut Black off on some of the personal property issues and wanted to give Black a chance to present any evidence on those issues. *Id.* at 71-72. Judge McCauley was inclined to leave blanks in the final judgment stating that the personal property issues would be handled in a subsequent hearing. *Id.* at 78-79. Accordingly, Judge McCauley decided to set a date to give the parties one last opportunity to present evidence on rental receipts and other personal property issues. *Id.* at 86-87. Judge McCauley felt "obligated" to give both parties a chance to come in and testify about the outstanding personal property issues. *Id.* at 88.

The final hearing occurred on July 17, 2008. Black objected to hearing any testimony or considering any additional evidence, which he considered an attempt to "reopen" the record. RP 92 (7/17/08). Judge McCauley explained that he never intended to limit additional testimony, anticipating that he would hear any

evidence either party wished to present. *Id.* at 97-98. Both parties testified about the final personal property items. *Id.* at 101-133 (Einstein); *Id.* at 134-36 (Black). The court filled in the blanks in the decree and interlineated the additional amounts. CP 856-57.

The foregoing chronology demonstrates that the evidence on the personal property was never “closed” so it never had to be “reopened.”

Black quotes out of context Judge McCauley’s statement as to Einstein, “However she wants to do it.” BA 59. Judge McCauley was simply saying that Einstein could use the funds she received from the sale of personal property or from rental income to pay off credit cards or to pay off the line of credit, “however she wants to do it.” RP 178 (7/17/08). There is nothing biased or improper about giving Einstein the option of which debts she wished to pay from the fund.

F. The court did not delegate its contempt powers to Einstein.

Black argues that the trial court delegated its contempt power to Einstein. BA 60-61. Black makes this argument only by quoting Judge McCauley out of context. Black quotes Judge McCauley’s statements that Einstein was in control and would get

whatever she wanted. *Id.* But Judge McCauley explained exactly what he meant by this statement (RP 139 (5/14/07)):

To being with, [Black] was to remove nothing. And I found him in contempt, because from the pictures he cleaned out the place. And then I said, take everything back, make an inventory of everything you have taken and take it back, unless Mr. Parker's client says I don't want that or you can keep. That's what I meant it was totally in her control.

There was nothing unfair about Judge McCauley's ruling, and he certainly did not delegate the contempt power to Einstein or her counsel.

G. The trial court did not abuse its discretion in denying discovery and discovery sanctions against Einstein.

Black argues that the trial court should have compelled mid-trial discovery from Einstein, sanctioned Einstein's counsel for *Firestorm* violations, and sanctioned Einstein for alleged violations of the court's 11/27/06 order. BA 62-64. All of these arguments lack merit.

This court reviews discovery rulings and discovery sanctions for abuse of discretion. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 98 P.3d 1264 (2004). Trial in this case commenced on June 12, 2007. On June 15, three days after the commencement of trial, Black's attorney mailed discovery requests to Einstein's attorney. CP 385. Einstein's attorney declined to answer the

interrogatories under the circumstances. CP 386. Black moved to compel responses to discovery, and the motion was argued on July 17, 2007, mid-trial. Judge McCauley refused to order discovery, pointing out that this is the sort of discovery that takes place before trial, not during trial. RP 177 (7/19/07). The judge concluded that there had been no good faith effort to sort out discovery issues, and that the interrogatories were burdensome and overly-broad. RP 175-77. For example, Black's interrogatories had asked Einstein to list all assets that she or Onestone Farms had used or acquired since 1990, the price paid for each asset, or whether or not it had been sold or it was still in her possession. CP 392. Judge McCauley did not abuse his discretion in denying this mid-trial discovery.

Black also accuses Einstein's counsel of improperly contacting Black's CPA expert Lonnie Rich in violation of *In Re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996). BA 63. Einstein's counsel believed in good faith that Black had no objection to the contact (CP 385):

My contact was limited to asking Mr. Rich the nature of his task and whether he had or needed information from my client. I did not ask him for any specific information nor did I ask him about his conclusions or proposed testimony. My second contact with Mr. Rich was merely to clear the date

for his deposition with him. I had to do the call because I had no secretary available for the task and there were severe time constraints.

Judge McCauley observed that based on his observations of Einstein's counsel, Jon Parker, in his courtroom over 13 years, he had always been very professional and straightforward. RP 174 (7/19/07). Judge McCauley accepted Mr. Parker's assertion of good faith, found that if there was a violation, "it was probably a technical violation at best," and admonished him not to call Mr. Rich any more. *Id.* There was no abuse of discretion.

Finally, Judge McCauley did not consider it productive to set a contempt hearing as to Einstein's compliance or lack of compliance with the Court's November 2006 orders. RP 177-78 (7/19/07). To the extent that Einstein might have violated any order, it was "of a much lesser degree, if it is a violation . . ." *Id.* at 178. As Judge McCauley observed, the case "needs to be finished" and he was not going to "drag it out and set some sort of contempt hearing for some later dates." *Id.* There was no abuse of discretion.

H. The trial court did not abuse its discretion with respect to exhibits summarizing financial information.

Black looses a buckshot fusillade of picayune evidentiary arguments relating to Einstein's use of exhibits summarizing financial information. Black's aim is wide of the mark and would not have been persuasive even if the birdshot had struck home. These evidentiary rulings are reviewed for abuse of discretion and the trial court was well within his discretion.

Black argues that Einstein was improperly permitted to use Ex 104 to refresh her recollection during testimony. BA 64. Einstein prepared Ex 104 from her records, summarizing the dates of purchase and the mortgage amounts for all expenses incurred in purchasing the real properties. RP 81 (6/29/07). Judge McCauley refused to admit Ex 104, but expressly allowed Einstein to use it to refresh her recollection. *Id.* at 82. Einstein then testified to each step in the purchase of the properties. *Id.* at 82-90.

Black argues that Einstein had no memory of the amount she paid to acquire the real properties, but merely read from Ex 104. BA 65. When Black objected on this ground at trial, Judge McCauley directed Einstein's counsel to ask the question without using the exhibit, and if she did not recall, she could use the

document to refresh her recollection. RP 83 (6/29/07). As Einstein followed this process, Black's only objection was that a witness could not refresh her recollection based on a summary she prepared shortly before trial. *Id.* at 84. The court overruled the objection and Black did not again object to Einstein's refreshing her recollection from Ex 104.

Black argues that the court improperly allowed Einstein to "read from prepared notes, Ex 108, 109, 110, instead of using them to refresh her memory." BA 65. These exhibits were extensive lists of checks and expenses paid by Einstein from her California bank accounts, in which Black had no ownership. RP 93-102 (6/29/07). Einstein testified without objection to the totals on each exhibit: Ex 108 totaled over \$150,000; Ex 109 totaled \$250,000; Ex 110 totaled \$122,000. *Id.* at 97, 101, 102. There was no objection that she was reading from the exhibits. Judge McCauley refused to admit the exhibits as substantive evidence. *Id.* at 102-03.

Black argues that it was error to admit Exs 106 and 107, Einstein's tax returns for 2004 and 2005. BA 65-66. Black neglects to mention that at the conclusion of the evidentiary hearing for the temporary restraining orders, Judge McCauley had observed that it would be much easier to account for the financial records if the

parties filed tax returns and had expressed his hope that everyone would get their tax returns up to date. RP 109, 114 (11/3/06). Exhibits 106 and 107 were admitted to prove that Einstein had filed her tax returns, not for the truth of the matters asserted. RP 92-93 (6/29/07).

Black argues that Judge McCauley improperly admitted Einstein's Exs 130-140, breezily asserting without citation that they do not qualify as business records, and that the adding machine tapes associated with the exhibits do not qualify as illustrative exhibits. BR 66. Exhibits 130-140 are envelopes containing checks and carbon copies of checks written by Einstein on her California bank accounts and spent for mortgage payments and other farm expenses. RP 253-56 (7/19/07) (Ex 130 is incorrectly transcribed as Ex 30 on some of these pages.) The envelopes include some checks that are not related to farm or real estate expenses, but Einstein tallied up the farm and real estate expenses on adding machine tapes to show the totals for farm expenses. *Id.* at 326-28.

Judge McCauley admitted the exhibits under the business records exception, and allowed the adding machine tapes as summaries and business records. *Id.* at 332-34. Black has waived

an objections to the documents as business records by his failure to argue the issue.

Black argues that Exs 144, 145 and 146 were erroneously admitted “to ‘illustrate’ testimony that was never given, but then made recourse to a year later as if they were substantive exhibits.” BA 66. These exhibits were summaries of personal property with Einstein’s valuations. Contrary to Black’s assertion, Einstein testified to the total value listed in each exhibit: Ex 144, \$7,640; Ex 145 \$14,480; Ex 146, \$17,450. RP 7-10 (7/25/07). On the day the findings were entered, before the attorneys gave closing argument, Judge McCauley explained that he would look at the illustrative exhibits just as a jury would, and identify in his notes which exhibits incorporated testimony from the trial. RP 136-37 (7/17/08). There was no error.

I. There was no “double standard” regarding the rules of evidence.

Black incorrectly argues that the trial court imposed a “double standard on evidentiary rulings.” BA 69-71. There was no double standard.

Black begins his argument with the most trivial possible example, from which Black could not possibly have suffered any

prejudice. Black argues that the trial court refused to admit some checks offered by Black because they were already part of another exhibit and therefore duplicative, but admitted a deed to one of the properties offered by Einstein over objection that it was already in the record. BA 69. It is an unnecessary waste of time to burden this already over length brief with a trivial example that could not possibly be prejudicial to Black, but the two incidents are different. Black himself testified that Black's Ex 102 was already included in Ex 51, RP 185-86 (6/13/07),² but by contrast, neither the court nor counsel could recall whether Einstein's proposed exhibit duplicated an earlier exhibit. RP 121 (6/29/07). As Judge McCauley stated, "Make sure it's in. If it's a duplicate, it's not going to do any harm." *Id.*

Black argues that Judge McCauley would not permit Black's expert to testify to a legal conclusion about the relationship between Black and Einstein, but allowed "Einstein's expert to offer the same testimony over Black's objection" BR 70. In fact, Judge McCauley did not allow Einstein's expert to testify to a legal conclusion. When Black's attorney objected that Einstein's

² BA 69 incorrectly identifies this transcript as 6/17/07, a date for which there is no transcript.

accountant was getting into a legal conclusion, Judge McCauley observed, "I guess it's getting close to it." RP 155 (6/29/07). Einstein's attorney then changed his question, and when Black's attorney again objected, Judge McCauley sustained the objection and Einstein's attorney moved on to a different subject. *Id.* at 156.

Black complains that Judge McCauley refused to allow Black's expert witness Lonnie Rich to listen on a cell phone to the testimony of Einstein's accountant expert. BA 71. Judge McCauley ruled, "I think that's a little abnormal. If you really need to get the record you can get the record, if you can't convey what took place." RP 141 (6/29/07). This was not "disparate" treatment because Einstein's counsel never made such a request.

J. No objective, reasonable person would conclude that Judge McCauley was biased.

Judges should recuse only if "their impartiality might reasonably be questioned" CJC 3(D)(1). That is, a party seeking to disqualify a judge must show "actual or potential bias," without which "an appearance of fairness claim cannot succeed and is without merit." *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). The test is what an objective, reasonable person who knows the facts would conclude. See

Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995), and ***Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n***, 87 Wn.2d 802, 810, 557 P.2d 307 (1976).

As a threshold matter, a party cannot argue bias for the first time on appeal, but must ask the trial court to recuse. Black never asked Judge McCauley to disqualify himself. In a post-trial memo, Black argued that Judge McCauley “should have recused,” but that, “we are beyond that point now and it is time for the Court to rule.” CP 440. Black has waived any claim of bias.

No reasonable objective person would conclude that Judge McCauley was biased or partial. Over a period of 1 ½ years, Judge McCauley patiently presided over numerous hearings and carefully considered the arguments and evidence offered by both sides. In his oral decision, Judge McCauley stated unequivocally that he did not know Black or Einstein when this case started. RP 38 (7/26/07). Black’s counsel mentioned something about a prior estate case, but Judge McCauley had absolutely no recollection of such a case. *Id.* He explained:

I believe that I come into every case that I am going to consider for trial with an open mind, and if I had any belief otherwise, I would recuse myself, as I have in many cases

when I've known a party too well or a witness too well or have had some personal relationship with a party in the past; even if it was the distant past, I always disclose it, and I make sure that everybody believes I can be fair and impartial, and I hope that I've developed a reputation of being fair and impartial over the almost 14 years I've been on the bench, and I'm not perfect, but I think I try to make a good effort in every case to be fair and impartial.

Id. at 37-38.

Judge McCauley candidly explained that his opinion of Black was based in part on Black's having committed "the most egregious contempt that I've ever seen", and his intentional and blatant disregard of the court's orders. *Id.* at 41-42. Judge McCauley explained that he evaluates the credibility of witnesses under the same principles that he uses in instructing the jury in the language of WPI 1.02, including all factors that affect witness credibility. *Id.* at 45-46. Judge McCauley explained that his evaluation of Black's credibility affected his findings regarding the title to the property and the extent to which Black contributed funds and labor to the operation of the horse raising business. *Id.* at 51-52. Black's past actions also made it clear to Judge McCauley that Einstein was the only person liable on the purchase of the properties, and if the properties had proven to be a liability, "there's no way he would have stepped up to the plate and helped her out. She would have

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been on the hook for it” *Id.* at 57. Although it was difficult to place any value on a lien in favor of the meretricious “community,” Judge McCauley did impose what he considered to be a generous lien of 20%. *Id.* at 59.

None of these facts demonstrate bias. They are an exemplary portrait of a trial court judge performing his duties and deciding cases based on the evidence and the law.

Black claims without argument or citation of the authority that Judge McCauley ruled incorrectly over 50 times on evidentiary matters. BA 71. It is impossible to respond to unargued points, and this Court does not consider assignments of error unsupported by argument or authority. ***Marriage of Angelo***, *supra*. Black fails to offer any evidence at all that Judge McCauley was biased against him and this Court should affirm.

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CONCLUSION

Respondent Paula Einstein respectfully asks the court to affirm.

RESPECTFULLY SUBMITTED this 25 day of November, 2009.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 25 day of November 2009, to the following counsel of record at the following addresses:

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