Supreme Court No. _____

Court of Appeals No. 58572-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GERALD BURKE

Appellant,

vs.

ETHELDA BURKE

Appellee.

PETITION FOR REVIEW

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I. Identity of Petitioners

The petitioner is Gerald Burke, defendant in the trial court and appellant in the Court of Appeals.

II. Court of Appeals Decision

The Court of Appeals January 7, 2025 unpublished opinion is attached to this petition at App. 1-14. On February 19, 2025, the Appellant's Motion for Reconsideration was denied.

III. Issues Presented for Review

In *Rookstool v Eaton*, 12 WnApp2d 301, 311; 457 P3d 1144, 1149 (2020), this Honorable Court determined that "cumulative error applies to civil cases" and that, "[l]ike criminal litigants, civil litigants are entitled to fair trials." *Rookstool* at 311. The questions here directly track *Rookstool* in that Appellant was denied a fair trial, as is his right, by the fact that the trial court – and the Court of Appeals – permitted trial by ambush to occur due to the failure of the plaintiff to file exhibit and witness lists and a trial brief, and further failed to

permit Appellant to call witnesses to testify on his behalf and to cross-examine the Respondent as to her credibility. The issue presented is whether the Court of Appeals' decision conflicts with *Rookstool* and other decisions of this Court and raises issues of substantial importance to an area of public concern – the right to a fair trial – such that review should be granted under RAP 13.4(b)(1).

IV. Statement of the Case

This is a dissolution proceeding of a 57 years marriage, with no minor dependents, modest Community Properties, and a singular Reverse Mortgage Community Debt (CP 173-174; 221). The Parties married on May 1, 1966 in Portland, Oregon, moved to Pierce County, Washington the next day, and remained together therein until December 31, 2021—which is when Appellant partially moved out of the Burkes Family Home and onto their boat (CP 215-217).

By mutual agreement, Respondent filed for Dissolution of their Marriage on April 11, 2022 (CP 173-183), and Appellant

filed his Response (CP 184-193; 220;654) and a Summary Judgement Motion (SJM) (CP 1-43; 195-199; 209; 220-230; 234-237). The Parties had agreed on the SJM approach to minimize the time and expenses to effectuate the Dissolution process as soon as possible—but that Motion was Denied (CP 209) (but, see, *Manning v. Manning*, No. 32440 (Ga., Oct. 5, 1970); *Whitmire v. Whitmire*, 236 Ga.153,233 S.E.2d 136 (1976), and other jurisdictions—including Washington—that allow SJM in dissolution cases.

The Parties finally were divorced on July 27, 2023 (CP 730-735)—after fifteen months and incurred approximately $65,000 in attorney fees. However, there were numerous delays and events that caused the delay, including a trial, rather than summary judgment. That trial was originally scheduled to occur over a period of two to three days to determine the distribution of community property. However, on the eve of trial, the schedule for the trial was reduced to 5 hours and the appointed trial judge was changed. Additionally, the day prior to trial, the

Respondent filed her brief and proposed exhibits. At trial, Respondent was permitted to admit her proposed exhibits and was not sanctioned for her late-filed brief.

When Appellant attempted to counter Respondent's proposed exhibits, particularly the valuation of the marital home, with which the Respondent had only an outdated tax assessment as evidence, the trial court refused to admit prepared statements of valuation under the rules of evidence against hearsay and did not give the Appellant time to continue the trial so that he could bring witnesses to testify regarding the truth and accuracy of the valuation statements, which would have permitted their admission. Instead, the trial court used the Respondent's testimony as to the valuation of the homestead alone in establishing value for the distribution of the property.

Additionally, at trial, the trial court did not award any spousal support even though it had been specifically requested by Appellant. Further, there was a great disparity between the incomes of the parties due to Respondent's continuing

employment income and retirement income and benefits as compared to Appellant's sole income of social security benefits as a fully retired individual. Moreover, the trial court failed to consider that spousal support had been given by the Respondent to the Appellant for a period of time during the pendency of the dissolution as extrinsic evidence as to the desire of the parties for continuing spousal support.

These errors combined, in addition to other procedural and evidentiary errors, – including evidence as to the untruthfulness of Respondent, which goes to the underlying issue of the valuation of community property and the full disclosure of all financial assets – violated Appellant's right to a fair trial and so prejudiced the outcome that the only remedy is a new trial before a different trial court. Further, in defending himself against this unfair and biased distribution of property and in seeking to enforce what property judgments were rendered, the Appellant filed several motions. The trial court denied all of these motions, though, and awarded attorney fees

to Respondent in addition, in an amount in excess of $25,000.00, some of which was due to the Appellant failing to comply with discovery orders. However, the Appellant was unable to comply with these orders due to the necessary documents in part being located in the marital home, a place from which he was barred due to a TRO. As a result, the Respondent was awarded unjustified attorney's fees – for a situation she created – for the Appellant failing to turn over documents that she already had in her possession, which is manifest injustice.

The Court of Appeals rejected *all* of Appellant's arguments but one – that the attorney fees charged against Appellant should be segregated between those awarded as property distribution and those awarded due to Appellant's supposed intransigence. Appellant contends that this was a manifest abuse of discretion in both the trial court's decision and in the Court of Appeals' decision, in that, due to the cumulative errors, the decision is "outside the range of

acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Given the profound errors and manifest injustice that occurred at the trial court, considering that the Appellant was, essentially, barred from presenting his case, the ruling of the Court of Appeals is contrary to public policy and opinions of this Honorable Court. Therefore, Appellant respectfully seeks discretionary review pursuant to RAP 13.4(b)(1).

V. Argument Why Review Should Be Accepted

A. The Court of Appeals' Opinion conflicts with decisions of this Court regarding cumulative error and a defendant's right to a fair trial, thus warranting review under RAP 13.4(b)(1)

1. Cumulative Error

Appellant argued before the Court of Appeals that the trial court erred by creating cumulative error in allowing

respondent to introduce witnesses and exhibits from lists and briefs that were given to Appellant the day prior to trial, contrary to PCLR 15(2). (VRP at 6). Further, respondent was not sanctioned for her late discovery, whereas Appellant was sanctioned significantly, and the respondent granted significant attorney fees for, delayed discovery.

Additionally, Appellant contends that the trial court erred in its refusal to grant a continuance to allow Appellant to call witnesses on his behalf to testify regarding the value of the marital home and its denial of Appellant's right to cross-examine respondent at trial regarding her credibility. Moreover, these errors were further permitted to prejudice Appellant when he was required to move forward with the case without notice, was denied the admission of exhibits showing the current valuation of the home, was denied a continuance to call witnesses to testify as to the truth and accuracy of the exhibits, and was denied the ability to cross-examine the Respondent as to her credibility – when credibility and full

disclosure of assets were material issues in the case at bar. As a result, he had to formulate his strategy on-the-fly and did not have the needed witnesses on hand to testify as to the valuation of the marital home and was not able to elicit testimony from the Respondent as to her credibility. (VRP at 78). If he had had Respondent's trial brief and exhibits in a timely manner, as required by the court rules, he would have been prepared and had his witnesses ready to testify as to the value of the home, rather than just their reports. Instead, the trial court determined the value based only on the testimony of Respondent and an old tax record, which did not reflect the current market conditions or market value of the home, and an inflated cost of repairs estimate from Respondent, who had never maintained the home herself. (VRP at 28-30, 32, supra). Moreover, the trial court, of its own volition, determined that the Respondent was credible and the Appellant was not.

As a result, the value of the home – and thus the total division of property – was greatly reduced from what it should

have been, to the extent of hundreds of thousands of dollars, and there was no testimony regarding the credibility of the Respondent heard by the court, which instead decided that the Appellant instead was not credible, based solely on the Respondent's testimony, which greatly prejudiced the Appellant. (VRP 78, supra). Thus, while any one of the errors, taken alone, may not themselves be sufficient for reversal, taken cumulatively, these errors, and the prejudice suffered by the Appellant indicate a gross miscarriage of justice and an abuse of discretion such that the trial court's decision was manifestly unreasonable or is based on untenable grounds or reasons. *In re Marriage of Muhammad*, 153 Wn2d 795, 803; 108 P3d 779 (2005).

The decision of the Court of Appeals, in upholding the verdict of the trial court, was a manifest abuse of discretion, in that it contradicts a previously published opinion of the Court of Appeals determining that "cumulative error applies to civil cases" and that, "[l]ike criminal litigants, civil litigants are

entitled to fair trials." *Rookstool* at 311. However, the Court of Appeals failed to consider cumulative error, which is "manifestly unreasonable, [as] it is outside the range of acceptable choices, given the facts and the applicable legal standard; [and] it is based on untenable grounds [because] the factual findings are unsupported by the record" due to the cumulative error. *Littlefield* at 47. Further, the decision of the Court of Appeals is "based on untenable reasons [as] it is based on an incorrect standard [and] the facts do not meet the requirements of the correct standard" because of the failure to consider cumulative error. *Id*.

The Court of Appeals further erred in the award of attorneys' fees and the fees awarded against the Appellant for "intransigence." Respondent contends that Appellant was intransigent during the dissolution process. A careful review of the record shows that Appellant was not intransigent and did not fail to comply with the rules of discovery. Rather, the documents demanded by respondent were already

constructively in her possession, as they were located in the marital home, and Appellant was barred from said location by a TRO secured by respondent. (VRP at 87). Respondent cannot demand discovery of documents already in her possession, bar Appellant from accessing said documents, then receive an award when Appellant cannot reach said documents to turn them over to her – doing so is manifest injustice.

Further, Appellant acted in good faith, both in the filing of motions, and in his appearance at proceedings – the hearing for which Appellant is accused of failing to appear is one where technology failed while Appellant was attempting to log on via Zoom, not a willful failure to appear – Appellant should not be punished for the failure of technology – particularly when hundreds of other similarly-situated parties also had failures to appear for hearings under the same circumstances since the rise of Zoom hearings during COVID and were not similarly penalized.

2. Spousal Support

Finally, the Court of Appeals further erred by upholding the finding of the trial court in not awarding spousal support despite the original request for such, the history of the respondent paying support to Appellant during the pendency of the dissolution case, and several motions filed by the Appellant requesting modification of spousal support during the pendency of the dissolution case. In its January 7, 2025 unpublished opinion, the Court of Appeals held that the trial court did not error in making this determination and that Appellant was first raising the issue of spousal support on appeal. In doing so, the Court of Appeals failed to consider that the trial court did not "enter a specific finding on income before considering the statutory factors for maintenance," rather the trial court merely denied spousal support entirely without considering the statutory factors of RCW § 26.09.090, which controls the award of maintenance. *In re Marriage of Anthony*, 9 WnApp2d 555, 563; 446 P3d 635 (2019).

Here, both parties are retired, but the Respondent has substantially more monthly income than the Appellant due to her pension. (VRP 19-20). Further, even with a division of property, the liquid assets of Respondent are substantially greater than Appellant due to said monthly income; whereas the assets allocated to Appellant were offset by a pre-dissolution disbursement and further reduced by litigation costs, leaving Appellant's liquid assets greatly reduced. (VRP 33, supra). Moreover, the trial court, and thus the Court of Appeals, failed to consider that "[a]n award of maintenance is 'a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time,' [and that] "[u]ltimately, the court's main concern must be the parties' economic situations post-dissolution." *Anthony* at 563-564 (citing *In re Marriage of Washburn*, 101 Wash2d 168, 179, 181; 677 P3d 152 (1984)). As such, the trial court failed to consider that Appellant would be living in a significantly reduced standard of living and Respondent would be living in a significantly improved

standard of living post-dissolution without an award of spousal support and that their respective economic situations would be grossly unequal. Beyond such, the course of conduct between the parties during the dissolution proceedings should also have indicated to the trial court that spousal support was specifically requested. Indeed, the trial court granted temporary spousal support during the proceedings, though the order was not fully followed by Respondent. Additionally, during the proceedings Appellant filed a motion and a hearing was heard to increase spousal support. These facts combined – in addition to the request on the initial pleadings – should have indicated to the trial court that spousal support was requested.

Thus, the decision of the Court of Appeals upholding the erroneous decision of the trial court in denying spousal support further shows that the decision of the Court of Appeals is manifestly unreasonable such that this Honorable Court should grant review.

VI. Conclusion

For the reasons set forth above, the Court should grant review under RAP 13.4(b)(1).

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Respectfully submitted:

Dated: March 20, 2025

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CERTIFICATE OF SERVICE

I, the undersigned declare: I am over the age of eighteen years and not a party to the cause; I certify under penalty of perjury under the laws of the United States and of the State of Washington that on March 20, 2025, I caused the following document(s):

PETITION FOR REVIEW

To be served on the following via e-mail and/or through the Courts E-service:

Andrew K. Helland Helland Law Group andrew@hellandlawgroup.com Attorney for Appellee	E-Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

January 7, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: ETHELDA BURKE, Respondent, And GERALD BURKE, Appellant.	No. 58572-3-II UNPUBLISHED OPINION

CRUSER, C.J. — Gerald and Ethelda Burke were married for 56 years. In 2022, Ethelda petitioned for divorce. The sole issue before the trial court was property distribution. The parties each asked the court to divide their property evenly between them. The trial court, following this request, awarded Ethelda the majority of the parties' community property, including the family home, and ordered Ethelda to pay Gerald an equalization payment.

Gerald appeals the final divorce order. He argues (1) the trial court abused its discretion because the distribution of property was not fair and equitable, (2) the trial court erred by not awarding Gerald spousal support, (3) the trial court made a number of procedural and evidentiary errors that violated his right to a fair trial, and (4) the trial court erred in awarding attorney fees based on Gerald's intransigence because Gerald was not intransigent and the court did not limit the award to the amount needed to compensate Ethelda for proven intransigence. We affirm in

part, but remand for the trial court to segregate the fees incurred because of Gerald's intransigence and determine an appropriate fee award.

FACTS

I. BACKGROUND

Gerald and Ethelda Burke[1] were married in May 1966. Gerald and Ethelda separated after 56 years of marriage. Gerald retired from his position as an attorney approximately 20 years ago. Ethelda retired from her position as a school district superintendent around 2017.

At the time of separation, Gerald and Ethelda possessed the following community property: boat sale proceeds, proceeds from a Skyline investment, interest from the Skyline investment, a TIAA retirement account, a UBS investment account, Ethelda's deferred compensation account, Ethelda's public employee pension, Ethelda's vehicle, Gerald's vehicle, GESA Credit Union savings certificates, silver coins, and the family home. Gerald and Ethelda also had debts in the form of a reverse mortgage on the family home and their 2021 IRS tax debt.

II. TRIAL

Gerald and Ethelda each asked the trial court to divide their community property evenly between them. Ethelda asked to stay in the family home, Gerald asked that the home be sold. Ethelda also requested an attorney fee award based on Gerald's intransigence prior to trial.

During trial, Gerald challenged Ethelda's evidence and her credibility. First, Gerald moved to strike Ethelda's trial brief and proposed exhibits because they were not submitted until the day

[1] For clarity, we refer to the parties by their first names because they share a surname.

prior to trial. Gerald argued that this action amounted to "trial by ambush." The trial court denied this motion, and invited Gerald to review the proposed exhibits during trial.

Next, Gerald cross-examined Ethelda concerning an instance when Ethelda allegedly falsely accused Gerald of having an affair. Ethelda objected, arguing that the question was not relevant. Gerald countered that the question was relevant to Ethelda's credibility. The trial court sustained the objection because the question was not within the scope of direct examination. Finally, Gerald sought to admit an appraisal of the family home into evidence. Ethelda objected, arguing that the appraisal was hearsay and irrelevant because it was illegible and incomplete. The trial court sustained Ethelda's objection, ruling that the proposed exhibit was not a true and accurate copy of the document Gerald received because it was missing pages and illegible in sections. The trial court valued the family home at $1.2 million based on Ethelda's testimony and the tax statement on the family home.

III. PROPERTY DISTRIBUTION

The trial court, following the parties' requests, divided the community property evenly between Gerald and Ethelda. The trial court awarded Ethelda the family home and the reverse mortgage on the family home, the Skyline loan proceeds, the TIAA retirement account, the UBS Investment account (except a portion already withdrawn by Gerald), Ethelda's deferred compensation account, Ethelda's vehicle, half of her pension, and the GESA Credit Union savings certificates. The trial court awarded Gerald the remaining boat sale proceeds, Gerald's vehicle, half of Ethelda's pension, the silver coins, the amount Gerald had withdrawn from the UBS investment account, and an equalization payment from Ethelda in the amount of $408,169.20. The

equalization payment equaled half of the difference between the value of the property awarded to Ethelda and that awarded to Gerald.

IV. SPOUSAL SUPPORT

Neither party requested spousal support, and spousal support was not ordered.

V. ATTORNEY FEE AWARD

Ethelda requested attorney fees based on Gerald's intransigence. The trial court admitted into evidence several pretrial orders. First, the trial court admitted the court's order denying Gerald's motion for summary judgment and interlocutory relief and motion to shorten time, which awarded Ethelda $600 in attorney fees. Ethelda testified that as of the date of trial, she had not received the attorney fee award. The trial court also admitted its order granting Ethelda's motion to strike Gerald's motion for interlocutory relief, order denying Gerald's motions, and temporary family law order. Each of these orders reserved the issue of attorney fees for trial. The trial court also admitted its order on motion to compel discovery and for attorney fees, order on motion to compel, and order on review hearing, which required Gerald to pay a $50 per day sanction starting on May 5, 2023, until the discovery deficiencies were fully cured. Ethelda testified at trial that the missing discovery was never provided.

Gerald testified that he filed the summary judgment motion because when he practiced law 20 years ago, it was permissible to file a summary judgment motion in a dissolution case. Gerald further argued that he did not comply with the order to compel discovery because the documents requested were in the family home, which he was not permitted to enter. The trial court awarded

Ethelda $25,000 in attorney fees based on Gerald's intransigence and $2,950 in sanctions for failing to provide discovery. The attorney fee award was subtracted from the equalization payment.

ANALYSIS

I. STANDARD OF REVIEW

At issue before us are several aspects of a trial court's decision in a marriage dissolution action. With regard to review of dissolution proceedings, the supreme court has observed that "[t]he emotional and financial interests affected by such decisions are best served by finality." *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Accordingly, "[t]he spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court." *Id*.

The trial court has abused its discretion where its decision is manifestly unreasonable or is based on untenable grounds or reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

"A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Where, as here, the trial court has weighed the evidence, our role on review is to determine whether substantial evidence supports the findings of fact, and in turn, whether the findings support the trial court's conclusions of law. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d

572 (2007). " 'Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.' " *Id.* (*quoting In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002)). We do " 'not substitute [our] judgment for the trial court's, weigh the evidence, or adjudge witness credibility.' " *Id.* (alteration in original) (*quoting In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999)). If a trial court's decision is based on unsupported findings, or if the findings do not satisfy the applicable legal standard, the trial court's decision amounts to an abuse of discretion, warranting reversal. *Muhammad*, 153 Wn.2d at 803; *Littlefield*, 133 Wn.2d at 47.

II. PROPERTY DISTRIBUTION

Gerald argues that the trial court's distribution of the parties' community property was not just and equitable because it did not equalize the parties' finances throughout the rest of their lives. We disagree.

A. Legal Principles

In a marriage dissolution proceeding, a trial court is tasked with disposing the parties' property and liabilities, " 'either community or separate, as shall appear just and equitable after considering all relevant factors.' " *Muhammad*, 153 Wn.2d at 803 (quoting RCW 26.09.080). The trial court must consider a list of nonexclusive factors set forth in RCW 26.09.080, including "(1) [t]he nature and extent of the community property; (2) [t]he nature and extent of the separate property; (3) [t]he duration of the marriage . . . ; and (4) [t]he economic circumstances of each spouse . . . at the time the division of property is to become effective." RCW 26.09.080; *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999).

Trial courts are vested with "broad discretion" to determine a just and equitable allocation of property based on the particular circumstances in a case. *Rockwell*, 141 Wn. App. at 242. Mathematical precision is not required in a just and equitable distribution; instead, a trial court must ensure " 'fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties.' " *Zahm*, 138 Wn.2d at 219 (*quoting In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996)).

B. Application

Here, both parties agreed that it would be equitable to divide the property evenly between them. The court, following the parties' requests, divided the property between the parties then ordered Ethelda to pay an equalization payment representing half the difference between the value of the property awarded to Ethelda and the value of the property awarded to Gerald. With this adjustment, the parties received equal assets.

It appears that Gerald's argument that the property division is disproportionate is based, at least in part, on Gerald's contention that the trial court undervalued the family home. Valuation of a home in a divorce proceeding is a factual finding we review for substantial evidence. *See Worthington v. Worthington*, 73 Wn.2d 759, 440 P.2d 478 (1968). We hold that the trial court's valuation of the family home is supported by substantial evidence. The trial court admitted the 2023 tax statement on the home, which assessed the taxes based on the value of the house being $1.2 million. This evidence is sufficient to persuade a fair-minded person that the value of the property was $1.2 million. Therefore, Gerald has not demonstrated manifest abuse of discretion by the trial court.

III. EVIDENTIARY RULINGS

Gerald argues that the trial court made a number of procedural and evidentiary errors[2] that collectively violated his right to a fair trial.[3] We conclude that none of the rulings Gerald identifies were error.

A. Trial Brief and Proposed Exhibits

Gerald argues that the trial court erred by denying his motion to strike Ethelda's trial brief and that his right to a fair trial was violated when he received Ethelda's trial brief and her proposed exhibits the day prior to trial. Gerald cites no authority for the proposition that filing a trial brief and proposed exhibits shortly before the start of trial, alone, violates any court rule or the opposing party's right to a fair trial. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Therefore, we reject Gerald's argument.

[2] Gerald raises numerous additional arguments in his briefing. RAP 10.3(a)(6) directs each party to supply in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Furthermore, "[p]assing treatment of an issue or lack of reasoned argument" does not merit our consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). These additional arguments were given only passing treatment in Gerald's briefing. Therefore, we decline to address them.

[3] To the extent that Gerald's argument invokes the cumulative error doctrine, Gerald cites no authority in support of the proposition that the cumulative error doctrine applies to a civil case. Accordingly, we decline to address this argument. *DeHeer*, 60 Wn.2d at 126 ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

B. Failure to Admit Appraisals

Gerald argues that the trial court erred when it declined to admit appraisals of the family home. We disagree.

We review a trial court's decision to admit evidence for abuse of discretion, which occurs when the decision is based upon untenable grounds or was made for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). We hold that the trial court did not abuse its discretion when it declined to admit appraisals that were illegible in part and missing pages because their authenticity could not be established. Moreover, Gerald did not intend to call the appraisers as witnesses. Unless the parties stipulate to the admission of an appraisal in lieu of testimony, the appraisal is hearsay. *In re Marriage of Martin*, 22 Wn. App. 295, 297, 588 P.2d 1235 (1979). Because there was no such stipulation, the appraisals were inadmissible hearsay.[4]

C. Limitation on Cross-Examination

Gerald argues that the trial court abused its discretion by sustaining a relevance objection to Gerald's questions about what he describes as "false statements" contained in several declarations submitted by Ethelda "relating to community properties and other matters." Br. of Appellant at 68. Gerald does not alert us to the exact statements about which he wished to question Ethelda. His reference to Washington being a "no fault" state suggests that he is referring to Ethelda's alleged prior statements about whether Gerald had been unfaithful during the marriage, which is a matter he raised in the trial court. *Id*. However, Gerald's failure to specifically identify

[4] Although the trial court did not address hearsay directly in its oral ruling, we may affirm the trial court on any grounds supported by the record. *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).

the information he sought to admit renders us unable to find an abuse of the trial court's discretion. Gerald is correct that specific instances of a witness's prior conduct may, in the discretion of the trial court, be inquired into on cross-examination if probative of truthfulness. *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005). But even if Ethelda had, in the past, made statements about Gerald being unfaithful, Gerald does not explain why that evidence is probative of Ethelda's truthfulness.

Moreover, in exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the issues presented at trial. *Id.* The only issue at trial was division of property, and fault is not relevant to that question. *Muhammad*, 153 Wn.2d at 804 (Although bad conduct that results in *the dissipation of marital assets* can be considered in the division of property in a dissolution, "marital fault alone is not an appropriate consideration.") We find no abuse of discretion.

IV. SPOUSAL SUPPORT

Gerald argues that the trial court erred because it did not award him spousal support. Gerald did not request spousal support at trial. As a general rule, we do not consider an issue raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Therefore, we decline to address this claim.

V. ATTORNEY FEES AT TRIAL

Gerald argues that the trial court erred in awarding attorney fees and imposing sanctions against Gerald. Gerald contends that his motions were not intransigent, but, instead, were reasonable efforts to present valid offenses and defenses and to comply with court orders. Gerald

further argues that the award should be limited only to the amount needed to compensate the opposing party for proven intransigence.[5] We conclude that the trial court did not err in finding that Gerald was intransigent, and remand to limit the attorney fee award to only those fees resulting from Gerald's intransigence.

A. Legal Principles

A court may award attorney fees based on a party's intransigence, which "is an equitable as opposed to statutory basis for awarding attorney fees." *In re Marriage of Chandola*, 180 Wn.2d 632, 656, 327 P.3d 644 (2014). " 'Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in "foot-dragging" and "obstruction" . . . or simply when one party made the trial unduly difficult and increased legal costs by his or her actions.' " *Id.* at 657 (alteration in original) (internal quotation marks omitted) (*quoting In re Marriage of Katare*, 175 Wn.2d 23, 42, 283 P.3d 546 (2012)). The party alleging intransigence of another must demonstrate that the opposed party acted in a way that increased the costs of litigation. *In re Marriage of Pennamen*, 135 Wn. App. 790, 807, 146 P.3d 466 (2006).

A court need not consider the parties' resources where intransigence is established. *In re Marriage of Larson*, 178 Wn. App. 133, 146, 313 P.3d 1228 (2013). We review a trial court's "discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee

[5] Gerald also argues that the trial court could not reserve on the issue of attorney fees, and had a duty to impose sanctions at the time of the hearings on the meritless motions. Gerald cites to no authority in support of this argument. Accordingly, we decline to address this argument. *DeHeer*, 60 Wn.2d at 126.

award for an abuse of discretion." *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

B. Application

Here, the trial court found that Gerald was intransigent because Gerald filed numerous motions without legal merit, including a motion for summary judgment, prior to the statutory waiting period required by RCW 26.09.030; because Gerald failed to appear at a hearing on his own motion; and because Ethelda was forced to file several motions to compel discovery from Gerald. These actions support the trial court's finding that Gerald was intransigent and the trial court, therefore, did not abuse its discretion.

Ethelda requested an award of $40,000, the entirety of the attorney fees she incurred throughout the case. The trial court declined to award the full amount, and instead awarded Ethelda $25,000 in attorney fees "because irrespective of [Gerald's] intransigence, the petitioner would be responsible to pay attorney fees given that they are in an active dissolution." Rep. of Proc. (July 27, 2023) at 8. A trial court's fee award based on intransigence must segregate the fees incurred because of intransigence, unless the spouse's bad acts permeated the entire proceeding. *In re Marriage of Bresnahan*, 21 Wn. App. 2d 385, 411, 505 P.3d 1218 (2022). Here, the trial court did not make a finding that Gerald's bad acts permeated the entire proceeding nor did it segregate the fees incurred because of intransigence. In fact, the trial court only had the billing records of Ethelda's trial counsel, not her two previous attorneys, in front of it. Accordingly, we remand for the trial court to segregate the fees incurred because of Gerald's intransigence and determine an appropriate fee award.

VI. Attorney Fees on Appeal

Ethelda argues that she is entitled to attorney fees and costs on appeal because Gerald's appeal is frivolous. An appellate court may award fees for a frivolous appeal. RAP 18.9(a). "[A]n appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists." *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914 (2013). We consider the civil appellant's right to appeal an adverse judgment, thus we resolve any doubts about whether an appeal is frivolous in favor of the appellant. *Id.*

Here, Gerald's appeal is not frivolous. Gerald's argument that the trial court erred by not limiting the attorney fee award to those fees incurred because of Gerald's intransigence has merit, and Gerald provided legal support for his claim. Therefore, we deny Ethelda's request for fees under RAP 18.9(a).

CONCLUSION

We conclude that (1) the trial court did not abuse its discretion because the distribution of property was fair and equitable, (2) the trial court's evidentiary rulings were not an abuse of discretion, (3) the trial court did not err by failing to award Gerald spousal support, and (4) the trial court did not err in finding Gerald intransigent, but did err in awarding attorney fees without segregating the fees incurred because of Gerald's intransigence.

We affirm the trial court's order and rulings, but remand for the trial court to segregate the fees incurred because of Gerald's intransigence and determine an appropriate fee award.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, C.J.

We concur:

VELJACIC, J.

PRICE, J.

THE APPELLATE LAW FIRM

March 20, 2025 - 2:16 PM

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