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IN THE SUPREME COURT  
STATE OF IDAHO

RODGER C. SWANSON,  
  
Petitioner/Respondent,  
  
vs.  
  
JACKIE SWANSON,  
  
Respondent/Appellant.

Docket No. 48021-2020  
Civil Case No. CV-2017-011

**APPELLANT'S REPLY BRIEF**

I.A.R. 35(a)

**APPELLANT'S REPLY BRIEF**

An appeal taken from the Magistrate Court in the Seventh Judicial District,  
Lemhi County, Idaho. The Honorable Stephen J. Clark, Magistrate Judge, presiding.

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## REPLY ARGUMENTS

**1. In his response brief, Rodger confirms he is speculating about the alleged community nature of the "unknown disbursements."**

In his response brief, Rodger unwittingly confirms why Jackie should prevail on appeal, i.e., he confirms that Mr. Smith (and now himself) are speculating about the nature of the “unknown disbursements.” Rodger says in his brief:

<b>Table 1: Rodger Speculates as to the Source of the Disbursements</b>
own investment income. <sup>48</sup> <b>It is quite likely that she utilized community funds to purchase the annuities for her children, and retained her separate property in other accounts,</b> which she admitted she had. The trial court, while not explicitly coming to that conclusion, considered

*(Respondent’s Brief, at p. 13)* (Emphasis added).

This speculation by Rodger constitutes an important admission of Jackie’s central arguments in this appeal: 1) that Mr. Smith was not hired to do any community asset analysis; 2) that Mr. Smith (in fact) did not do any community asset analysis; 3) that Mr. Smith admits his opinion labeling as “unknown disbursements” certain transactions was sheer guesswork (that is, he was hired only to identify the Swanson Ranch sale proceeds, and merely assumed everything else was community); and 4) that Mr. Smith (as he admitted) failed to account for Jackie’s separate property.

The Magistrate and District Courts erred in accepting Mr. Smith’s opinions as to the “unknown disbursements” when the opinions were not supported by any evidence, and certainly not by substantial and competent evidence. (See *Appellant’s Opening Brief*, pp. 12-33).

The Magistrate Court specifically questioned Mr. Smith about the completeness of his presumptions, saying: “I also understood that based upon your presumptions is that [sic] if it wasn’t separate property, it was presumed to be community property; and so if any of that was Jackie Swanson’s separate property, would that change the dynamics a little bit?” (R. Vol. 11, p. 2153, ln. 14-17). After some equivocation, Mr. Smith admitted, “that’s correct.” (*Id.*, at ln. 18-25; R. Vol. 11, p. 2154, ln. 1-5).

Rodger knows, or should know, that the ‘unknown disbursements’ are not community property. He admits twice in his response brief that Jackie provided clear evidence that she used her separate CDs to purchase the annuities, as follows:

<b>Table 2: Rodger’s Admissions About the Source of the Annuities</b>
Rodger. <sup>30</sup> She testified that the money in the six CDs she had at the time of trial came mostly from investment money she had with Bill Allen. <sup>31</sup> Jackie further testified that some of her
Jackie testified that the CDs were later used to purchase annuities, and that she purchased four \$250,000 annuities. <sup>33</sup> She admitted that the money for the annuities came from the CDs and

*(Respondent's Brief, pp. 10-11).*

The problem with Rodger's argument, (that Jackie purchased the annuities with community property) is that he cannot cite any actual evidence or testimony (from Mr. Smith or otherwise) to rebut Jackie's testimony that she used her separate property CDs to purchase the annuities. Rodger's argument that the annuities "likely came from the parties' community property," is mere speculation.<sup>1</sup>

The Magistrate and District Court erred in relying on Mr. Smith's opinions on the "unknown disbursements" because those opinions were contrary to the trial evidence, that is, contrary to Jackie's unrebutted testimony that the "unknown disbursements" were a part of the CD/annuity rollover of her separate funds. (*Appellant's Opening Brief, pp. 12-33*).

The Supreme Court's time-tested standard of review, that a lower court's decisions must be based on substantial and competent evidence, is applicable here. *See Griffiths v. Griffiths*, 167 Idaho 287, 469 P.3d 615, 625 (2020). The rule prevents upholding Mr. Smith's opinions solely based on his professional credentialing alone: his statements that the "unknown disbursements" are community property are completely speculative on this record, and have no evidentiary support, so by definition they are not supported by evidence in the record. The Supreme Court would have to set a new, and concerning standard on appeal, if an expert witness expresses

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<sup>1</sup> Roger does not identify evidence in the trial record to rebut Jackie's testimony because there isn't any.

wholly unfounded opinions, and the trial court is permitted to rely on the unfounded opinions, simply as a matter of their broad discretion.

Jackie respectfully submits it's never acceptable for a trial court to rely on (and base its findings & conclusions on) unfounded expert opinions. See *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992) (the admissibility of expert opinion depends on the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion; the key to admission of the opinion is the validity of the expert's reasoning and methodology; in resolving these issues, the trial court should not substitute its judgment for that of the relevant scientific community; the court's function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs). See also *Kelly v. Kelly*, 451 P.3d 429 (2019) (the court abuses its discretion when its findings are clearly erroneous such that the findings are not based on substantial and competent evidence at trial).

To be clear, Jackie is not saying that the Magistrate Court erred in admitting Mr. Smith's testimony, as he clearly had a basis to testify about the tracing of the Swanson Ranch sale proceeds. But Jackie is saying that the Magistrate Court erred by adopting the "unknown" portions of the analysis. Mr. Smith made it clear in this testimony that he arrived at his opinions on the community nature of the "unknown disbursements" merely by a vague process of elimination. (R. Vol. 11, p. 2151, ln. 1-

8) (“I’m only looking for those proceeds from the sale of the separate property. Everything else is assumed to be nonsale.”); (R. Vol. 5, p. 753) (“The Accounting included for this case...includes deposits during the marriage as community property, unless a source of separate property (if any) is identified.”). This confirms that Smith’s methodology nothing about the nature of the “unknown disbursements” in terms of being community property.<sup>2</sup>

The Magistrate Court should have rejected Mr. Smith’s opinions on the “unknown disbursements” because they did not stem from a credible tracing methodology. The District Court should have vacated the Magistrate Court’s findings on the “unknown disbursements” for that same reason. See *Nield v. Pocatello Health Servs.*, 156 Idaho 802, 849, 332 P.3d 714, 761 (2014) (admissibility of an expert’s opinion depends on the validity of the expert’s reasoning and methodology, rather than his or her ultimate conclusion); See also *State v. Konechny*, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000) (the court must examine (1) the presence of safeguards in the technique; (2) analogy to other scientific techniques whose results are admissible; (3) the nature and breadth of inferences drawn; (4) the extent to which the basic data are verifiable by the Court and jury; (5) availability of other experts to test and

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<sup>2</sup> A valid and sufficient community property tracing analysis by Mr. Smith would have been similar to his separate property tracing analysis, i.e., it would have identified community deposits into the EICU #3407-50 account and then applied a methodology—LIFO or otherwise—to connect those deposits to the “unknown disbursements.” Mr. Smith did not do any actual tracing or analysis in terms of identifying the account’s community property. Rather, Mr. Smith simply assumed all other funds were community because they were not part of the sale proceeds which he was hired to trace.

evaluate the technique; (6) the probative significance of the evidence in the circumstances of the case); See also *State v. Perry*, 139 Idaho 520, 81 P.3d 1230 (2003) (a court must examine whether the methodology underlying the testimony is scientifically valid and whether the methodology properly can be applied to the facts in issue).<sup>3</sup>

According to Mr. Smith’s own report data, the deposits which preceded (and correspond to) the “unknown disbursements” had already been identified as Jackie’s CD rollover funds. In other words, the separate nature of the funds (i.e., the rollover funds) was in front of Mr. Smith the entire time, as shown in his report:

<b>Table 3: Exhibit 10 from Mr. Smith’s Report</b>			
612	Wells Fargo 4485	11/28/2016	-5,000.00
1144	EICU Mny Mrk 3407-50	11/28/2016	146,982.07
1145	EICU Mny Mrk 3407-50	11/28/2016	146,982.07
1146	EICU Mny Mrk 3407-50	11/28/2016	146,982.07
1147	EICU Mny Mrk 3407-50	11/28/2016	146,982.07
1148	EICU Mny Mrk 3407-50	11/28/2016	146,982.07
1149	EICU Mny Mrk 3407-50	11/28/2016	146,982.07
1177	EICU CD1	11/28/2016	-146,982.07
1183	EICU CD2	11/28/2016	(146,982.07)
1189	EICU CD3	11/28/2016	-146,982.07
1195	EICU CD4	11/28/2016	-146,982.07
1201	EICU CD5	11/28/2016	-146,982.07
1207	EICU CD6	11/28/2016	-146,982.07
505	Wells Fargo 9759	11/29/2016	-450.36
1056	EICU Shares 3407-9	11/29/2016	-30.00
90	Wells Fargo 4475	11/30/2016	

<sup>3</sup> See also *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 153 P.3d 1180 (2007) (when an expert's opinion is based upon scientific knowledge, there must likewise be a scientific basis for that opinion because if the reasoning or methodology underlying the opinion is not scientifically sound, then the opinions would not assist a trier of fact).

(R. Vol. 5, p. 838) (highlights added).

The Magistrate Court erred in refusing to accept Jackie's un rebutted testimony that the disbursements were a known part of the rollover funds. She testified they were part of the transfers from the CDs into the annuities.<sup>4</sup> The Magistrate Court replaced fact (i.e., Jackie's testimony) with fiction (i.e., Mr. Smith's testimony) and lumped the "unknown disbursements" into the community property division in violation of Jackie's separate property rights.

Importantly, the disbursement at issue (\$905,566.94) was not a single withdrawal event but was instead part of a fiction created by Mr. Smith to describe four separate disbursements on 11/30 for \$250,000.00 each. This fact is critical because the actual disbursements (unlike Mr. Smith's fiction) corresponded precisely with the amount of the annuity purchases which Jackie described in her testimony:

(table continued to next page)

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<sup>4</sup> Jackie testified that she came into the parties' marriage with \$730,000.00 received from her deceased husband's estate. (R. Vol. 11, p. 2223, ln. 16-23). Jackie also testified that she put these funds (and accrued interest) into six separate certificates of deposit ("CDs"). (R. Vol. 11, p. 2307, ln. 1-19; p. 2218, ln. 9-15; p. 2217, ln. 20-24; pp. 2299-2300). Jackie said that her CDs matured in 2016 and that she had "rolled them over into a money market." (R. Vol. 11, p. 2217, ln. 11-24); (R. Vol. 11, p. 2219, ln. 2-15; p. 2299, ln. 15-25; p. 2300, ln. 1-25; p. 2301, ln. 1-13). Jackie testified that the CDs did not come from Rodger's or the Ranches' money. (R. Vol. 11, p. 2217, ln. 20-24).

**Table 4: Disbursements Summary from Smith's Report**

<b>S50 MONEY MARKET</b>			
<b>Transaction Date</b>	<b>Description</b>	<b>Amount</b>	<b>Balance</b>
10/31	Previous Balance		258,085.85
11/28	Share Deposit Transfer Transferred from C-1 Effective 11/29	146,982.07	405,067.92
11/28	Share Deposit Transfer Transferred from C-2 Effective 11/29	146,982.07	552,049.99
11/28	Share Deposit Transfer Transferred from C-3 Effective 11/29	146,982.07	699,032.06
11/28	Share Deposit Transfer Transferred from C-4 Effective 11/29	146,982.07	846,014.13
11/28	Share Deposit Transfer Transferred from C-5 Effective 11/29	146,982.07	992,996.20
11/28	Share Deposit Transfer Transferred from C-6 Effective 11/29	146,982.07	1,139,978.27
11/30	Share Withdrawal	-250,000.00	889,978.27
11/30	Share Withdrawal	-250,000.00	639,978.27
11/30	Share Withdrawal	-250,000.00	389,978.27
11/30	Share Withdrawal	-250,000.00	139,978.27
11/30	Dividend Annual Percentage Yield Earned: 0.20% on Average Balance of \$283545.34 for 30 Days	46.61	140,024.88
11/30	New Balance		140,024.88

*C = 905,564.94*  
*S = 94,433.06*

(R. Vol. 5, p. 855) (emphasis added).

Mr. Smith's "unknown disbursements" theory was contrary to all the available evidence—including Mr. Smith's own report data and Jackie's testimony. The District Court's acceptance of the conclusion, that the "unknown disbursements" were divisible community property, was error because that conclusion was not based on substantial and competent evidence. *See In re Permit No. 65-12842*, 122 Idaho 59, 831 P.2d 527 (1992) (a finding of fact without any basis in the record would be clearly erroneous; a finding of fact lacking substantial and competent evidence to support it is clearly erroneous; in order to uphold an agency's finding, the court must find more than a mere scintilla of evidence). *See also Idaho ex rel. Indus. Comm'n v. Skydown Skydiving, Ltd. Liab. Co.*, 462 P.3d 92 (2020) (ultimately, although the Supreme Court gives deference to the factfinder, those findings must be

based on substantial evidence correctly applied to the law); *Paull v. Preston Theatres Corp.*, 63 Idaho 594, 124 P.2d 562 (1942) (the Supreme Court reversed the Industrial Accident Board’s order denying compensation for the appellant because there was a lack of substantial and competent evidence to support the Board’s findings; the evidence was exclusively in appellant’s favor).

*See, generally*, detailed discussion on the unfounded nature of Mr. Smith’s “unknown disbursements” opinions, and the Magistrate and District Courts’ errors in relying upon such, in *Appellant’s Opening Brief*, pp. 12-33.

## **2. Rodger is trying to perpetuate an illusion about “missing” funds.**

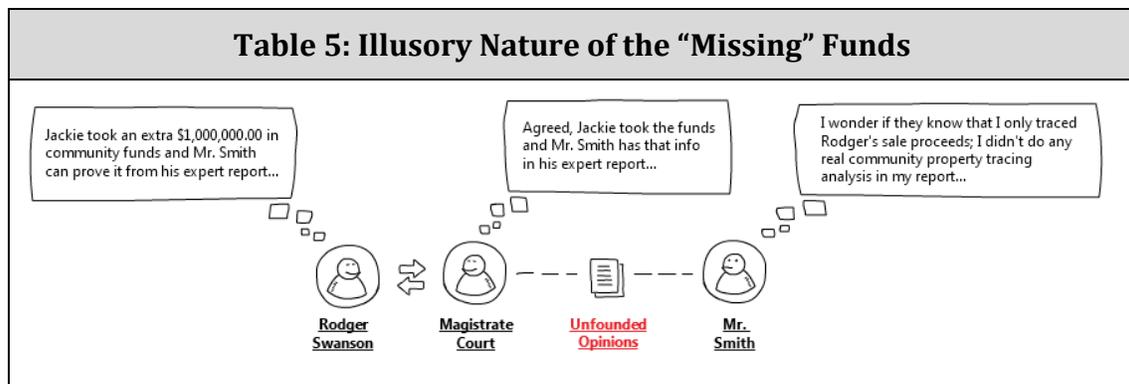
Rodger states in his brief that he “testified that \$1.8 million was missing from his accounts, including his separate property funds from the Swanson Ranch sale.” (*Respondent’s Brief*, p. 14) (See also R. Vol. 11, p. 1966, ln. 9). Jackie acknowledges that Rodger still believes that she withdrew that much money, but she strongly disagreed with (and contradicted) that assertion at trial. (R. Vo. 11, p. 2241). The Magistrate Court adopted Rodger’s position—identifying \$945,562.00 as proceeds from the Swanson Ranch (which Jackie is not disputing), but also identifying the \$1,130,000.00 as “missing” community funds. (R. Vol. 1, pp. 48-49).<sup>5</sup> The record plainly shows this second amount (i.e., \$1,130,000.00) was nothing more than the

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<sup>5</sup> As stated in her opening brief, Jackie is not disputing this part of the Magistrate Court’s award, i.e., she is not disputing the \$945,562.00 award to Rodger.

alleged “unknown disbursements.” As set out above, Mr. Smith did not ‘trace’ any of these funds—he merely assumed that everything which was “nonsale,” that is, everything outside of the Swanson Ranch sale proceeds, were community funds.<sup>6</sup>

As seen in the record, Mr. Smith was only able to trace the \$945,562.00 in Swanson Ranch sale proceeds and did not make any tracing efforts—not in his report, not in his testimony—in terms of the community funds. When asked about the matter at trial, Rodger could only say: “Nancy [my sister] went through it all. And then, I think, David Smith. I haven’t seen David’s Smith’s deal there...” (R. Vol. 11, p. 1966, ln. 9-12). Thus, the concept of a “missing” million dollars was an illusion:



<sup>6</sup> Mr. Smith explained at trial that he labeled any unknown deposits as “nonsale.” (R. Vol. 11, p. 2151, ln. 1-8) (“I’m only looking for those proceeds from the sale of the separate property. Everything else is assumed to be nonsale.”); (R. Vol. 5, p. 753) (“The Accounting included for this case...includes deposits during the marriage as community property, unless a source of separate property (if any) is identified.”). Mr. Smith also said that he was “not aware of any separate property owned by the Defendant, Jackie Swanson, before or after the marriage.” (R. Vol. 5, p. 754). He simply used this “nonsale” designation to characterize-by-assumption: calling everything “nonsale” as community property, without reference to the actual evidence of its source. (R. Vol. 11, p. 2132, ln. 6-25; p. 2133, ln. 1-19).

Neither Rodger nor Mr. Smith could support the “missing” funds theory with any actual tracing evidence; they could only speculate that the funds existed and were part of the “unknown disbursements.” The Magistrate and District Courts accepted this conclusion in error, because it was not consistent with legal standards under Idaho Code § 32-712, to divide imaginary “missing” funds as if they were a community asset. See *Lunneborg v. My Fun Life*, 163 Idaho 856, 421 P.3d 187 (2018) (the court must act consistent with applicable legal standards).

As detailed in Jackie’s opening brief, the District Court simply accepted the Magistrate Court’s decision to adopt Mr. Smith’s report as being supported by substantial and competent evidence. (*Appellant’s Opening Brief*, pp. 27-33). But neither the trial court nor the District Court scrutinized Mr. Smith’s theories or methods. When compared to the testimony by Jackie, Mr. Smith’s theory on the “missing” funds was purely speculative. The District Court should have reversed the Magistrate Court’s findings and remanded the issue—or directed entry of an amended judgment of \$351,558.00 to Rodger (i.e., the adjusted judgment of \$804,341.00, less the \$452,783.00 shown to be Jackie’s separate property under the evidence, rather than “unknown disbursements”).

**3. Jackie was competent to testify about her separate property.**

Rodger says that “Jackie strategized not to call an accounting expert to present her version of the finances and rebut Rodger’s financial expert’s testimony and

conclusions, or to offer any evidence to support her separate property claims.” (*Respondent’s Brief*, pp. 6-7). However, Jackie did not need to call an expert witness under I.R.E. 701; she testified based on her personal knowledge of the parties’ finances which she had handled. Her testimony about the source of the “unknown disbursements” was “rationally based on [her] perception.” See *State v. Ehrlick*, 158 Idaho 900, 354 P.3d 462 (2015) (the perception of the witness requirement in Rule 701(a) requires opinions and inferences to be based upon the witness's personal knowledge of events or facts; it requires the same personal knowledge of events as required by I.R.E. 602). Jackie had personal knowledge of her own accounts and easily identified the alleged “missing funds” as not ‘missing’ at all, but constituting the CD/annuities rollover funds.

Rodger urges the courts to disregard Jackie’s own personal knowledge, suggesting her unrebutted testimony is unpersuasive, when his own expert could offer nothing more than a “shoulder-shrug” theory about “unknown disbursements.” A party who has personal knowledge of their financial transactions should not be required to hire an expert to make their knowledge credible. This would be a troubling rule in family law cases, where parties routinely identify their own transactions e.g., support payments, money transfers, asset purchases for the Court. Indeed, Rodger called his own sister as a witness in his case regarding the Swanson Ranch sale proceeds. (R. Vol. 11, pp. 176-223). Rodger also testified as to the nature of his

banking transactions and the sale proceeds i.e., the nature of his own separate property. (R. Vol. 11, pp. 76-79). Jackie was certainly competent to speak about her account transactions. And her testimony was the only evidence needed, as it was unrebutted, and constitutes substantial evidence under Idaho law. *See, Griffiths, supra*, 469 P.3d at 625 (“...substantial evidence my, in fact, consist of a single piece of evidence.”)

Importantly, Jackie explained the only money which ever existed in the EICU #3407-50 account was her “personal money from investments.” (R. Vol. 11, p. 2214, ln. 4-22). Jackie did not comingle the CD funds with any of the ranch sale money or other community money. Jackie, for several pages in the trial transcript, explained how she used the EICU account to purchase six CDs and then to purchase the four annuities for her children, as seen in the following trial testimony:

(table continued to next page)

**Table 6: Jackie's Testimony re: The "Unknown Disbursements"**

11 A. This bank statement is from 4-19-2017, and it is the money  
12 market. And this statement is showing that I had some CDs that  
13 -- in that previous year that came to fruition and that I took  
14 those CDs and with my -- I had met with my financial advisor in  
15 August of 2016. Oh, this is -- that's the date it was printed  
16 because this is -- the date is 2016. So I had taken the CDs that  
17 had come to fruition and I rolled them over into a money market.

18 So that's showing that I took those CDs and put them into  
19 a money market.

20 Q. Okay.

21 A. And so that was my own personal money, not the bank -- or  
22 not the business's money, the ranch's money.

23 Q. Okay. How many CDs did you start with when you married --

24 A. Six.

25 Q. -- Rodger?

8 Q. And where did these six come from?

9 A. They came from investment money that I invested with Bill  
10 Allen, mostly. When I -- I worked for Bill Allen in '98, and I

2 Q. Okay. So these six CDs are still in Eastern Idaho Credit  
3 Union 133407?  
4 A. The CDs have been turned into annuities.  
5 Q. Oh.  
6 A. So, yes.  
7 Q. Okay. So you've turned them into annuities.  
8 A. But they are with the Eastern Idaho Credit Union.  
9 Q. And what amount is represented by the annuities?  
10 A. Four \$250 annuities. Did I say that right? So \$1 million  
11 is represented by the annuities that are in -- that are in the  
12 East Idaho Credit Union, and they are separate from the ranch  
13 account and have been for the time that we were married.  
14 Q. Okay. And that is Account 133407?  
15 A. Yes.

(R. Vol. 11, pp. 2217-10) (highlights added).

Jackie sufficiently traced her separate interests in the “unknown disbursements” by showing that the disbursements were part of the CD/annuities rollover process. Jackie’s documentary support for her analysis, if in doubt, is already contained in the exhibits to Mr. Smith's report. (See *Appellant's Opening Brief*, pp. 4-33). For his part, Rodger failed to rebut Jackie’s testimony—through Mr. Smith or otherwise. (See above). The Magistrate Court only had one reasonable choice in terms of its findings, i.e., to accept Jackie's un rebutted testimony in the matter and award her

the “unknown disbursements,” i.e., the CD/annuity rollover funds, as Jackie clearly demonstrated that the funds were part of her separate investments.

<b>Table 7: Summary of Jackie’s Tracing Evidence</b>		
		
<b><u>Smith’s Report</u></b>	<b><u>Jackie’s Testimony</u></b>	<b><u>Proper Outcome</u></b>
<p>Mr. Smith opined that Jackie had taken approximately \$1,130,000.00 in “unknown disbursements” and that close to \$1,000,000.00 of these funds was community property. Mr. Smith based this opinion on his assumptions that everything he could not identify was community property.</p>	<p>Jackie clarified the matter at trial, showing that the “unknown disbursements” were part of the CD/annuities rollover process and that the four distinct disbursements of \$250,000.00 (as per Mr. Smith’s report data), i.e., the bulk of the “unknown disbursements,” were simply the evidence of her separate property annuities purchases.</p>	<p>The proper outcome on intermediate appeal would have been for the District Court to overturn the Magistrate Court’s existing findings on the “unknown disbursements” due to lack of substantial and competent evidence and to order the Magistrate Court to award the disbursements to Jackie as her separate property.</p>

If nothing else, the label used in Mr. Smith’s opinion, i.e., “unknown,” should have indicated to the Magistrate Court that the opinion did not contain any substantial and competent evidence. The label should have indicated the stopping point of Mr. Smith’s analysis. Under the circumstances, the Magistrate Court should have looked exclusively to Jackie’s testimony, which identifies the source of the disbursements (i.e., the four \$250,000.00 disbursements) as her annuity purchases.

In the case of *Kraly v. Kraly*, 147 Idaho 299, 208 P.3d 281 (2009), the parties disputed the character of certain real estate. The Magistrate Court found that the real estate was divisible community property, subject to the husband’s reimbursement claim. The husband appealed and the District Court reversed, finding that the

available evidence showed that the real estate was the husband's separate property, and that the wife was not entitled to any value in the property. On appeal, the Supreme Court upheld the District Court's separate property award to the husband, saying that the "whether a specific piece of property is characterized as community or separate property depends on when it was acquired, and the source of the funds used to purchase it." *Id.*, at 303. The Supreme Court further explained:

One way to prove that property acquired during marriage is separate property is to show that the asset was purchased with one spouse's separate property. *Worzala v. Worzala*, 128 Idaho 408, 412, 913 P.2d 1178, 1182 (1996). This Court has long recognized that the property acquired shares the same character as the property or funds used to acquire it. *Winn*, 105 Idaho at 813, 673 P.2d at 413; *Stanger v. Stanger*, 98 Idaho 725, 728, 571 P.2d 1126, 1129 (1977) ("The status of property acquired during marriage is determined by the funds with which it is purchased."); *Cargill v. Hancock*, 92 Idaho 460, 464, 444 P.2d 421, 425 (1968) (holding that the central question in determining the character of property acquired during the marriage is the source of the funds with which it was purchased). Therefore, the presumption that all property acquired during the marriage is community property can be overcome by showing that such property was purchased with one spouse's separate funds.

*Id.*, at 303-04 (emphasis added).

In our case, Jackie was able to show, with reasonable certainty and particularity, that she purchased the property at issue (i.e., the "unknown disbursements," or rather, the four annuities) with her separate property CD funds. The Magistrate Court should have accepted this testimony and found that Jackie's purchases corresponded to Mr. Smith's alleged "unknown disbursements" and that the matter had a clear explanation in the record. The Supreme Court should apply the principles in

*Kraly v. Kraly* on appeal and reverse the Magistrate’s division of the “unknown disbursements.” In the alternative, the Supreme Court should direct the District Court to reverse the erroneous division and order the entry of a reduced amended judgment. Either way, the Supreme Court should not allow the division to stand.

**4. Miscellaneous reply arguments to Rodger’s response brief.**

Rodger continues his personal attacks on Jackie’s character in defending this appeal, characterizing money transfers as “surreptitious” even though Jackie had long handled the parties finances. (*Respondent’s Brief*, p. 6). Jackie’s unrebutted trial testimony showed that she had sequestered Swanson Ranch sale proceeds, i.e., the \$1,015,000.00, because Rodger had threatened to withhold all money from her, essentially telling her she’d be left with nothing. (R. Vol. 11, pp. 2287-88). Of course, personal attacks on Jackie are irrelevant and a distraction; all funds were accounted for at trial, and the Swanson Ranch sale proceeds are not at issue on this appeal. Jackie has agreed that Rodger is entitled to the sale proceeds, subject to adjustments as set out in her opening brief.

Rodger then goes on to claim—without any citation to the record—that “[Jackie’s] testimony at trial established that the annuities were purchased, in whole or in part, with community funds.” (*Respondent’s Brief*, p. 10). But as shown above, that is simply not true. Jackie was the only witness to provide evidence as to the source of the annuities. (See *infra*). Mr. Smith did not cite or say anything about the

annuities and merely speculated as to the character of the "unknown disbursements." (*Id.*).

If anything, Rodger's argument as to the community nature of the annuity purchases is a tacit admission on his part that the "unknown disbursements" were really part of the CD/annuities rollover transaction. That being the case, Jackie is entitled to her relief in this appeal because the Magistrate Court has already found that Jackie owned the CDs as her separate property and that she had enough separate funds to purchase the annuities. (R. Vol. 1, p. 46-47, 66).

Rodger says that "Jackie did not provide the records of her transactions with Bill Allen to either opposing counsel or the Court." (*Respondent's Brief*, p. 11). But that is misleading, as Jackie testified at trial that she didn't have access to the Bill Allen investment records—because Rodger still had all the records at the parties' marital home. (R. Vol. 11, p. 2260, ln. 13-19). Rodger failed to rebut that testimony. When questioned at trial, Mr. Smith admitted that he might have had additional Bill Allen records, but that he hadn't bothered to look: "They could be in my file, and I wouldn't have even looked at them." Thus, Rodger's continued insistence that Jackie was withholding her investment account information is unfounded.

Rodger says, "clearly, the cash Jackie said she had when she married Rodger was insufficient to purchase four \$250,000 annuities for her children." (*Respondent's Brief*, p. 11). That is also misleading, as Jackie testified that her Bill Allen

investments did enable her to purchase the annuities. (R. Vol. 11, p. 2259, ln. 18-25; p. 2260, ln. 1-12). Even the Magistrate Court resolved this disputed point in Jackie's favor, explaining that "Ms. Swanson had enough separate property to finance this \$1,000,000 purchase." (R. Vol. 1, p. 66).

Rodger says that Jackie took "more than \$1,000,000.00 from ranch accounts from May to July, 2016, and placed that money in her own accounts to which Rodger had no access." (*Respondent's Brief*, p. 5). This is misleading, too, since it's a reference to the Swanson Ranch sale proceeds. (R. Vol. 1, p. 69). Further, the observation has nothing to do with the merits of this appeal, as the sale proceeds are not at issue.

Rodger says that Jackie "focuses on disbursements from the account, rather than Judge Clark's findings characterizing the source of the funds in that account." (*Respondent's Brief*, p. 9). But in fact, Jackie has shown in her opening brief how the manner of the division by the trial court, as affirmed by the District Court, did not have a substantial and competent basis in the record for the manner of the division made, and Jackie has met her burden to show the funds were her separate property.

Rodger says that Jackie's position "presumes facts not in evidence." (*Respondent's Brief*, p. 9). However, Rodger fails to explain or support this statement with any examples. Jackie took great pains to document all of her facts from the record, and she made approximately 55 citations to either the transcripts or the record.

Rodger then submits “the trial was very generous to Jackie...[as] Judge Clark chose to leave her with the annuities as her separate property.” (*Respondent’s Brief*, p. 13). But this argument simply ignores Jackie’s actual position, as shown in her opening argument, that the “unknown disbursements” were a part of the annuity purchases and that she is now being deprived of the value of those annuities by a judgment entered in error requiring payment of her separate property to Rodger as “unknown disbursements.”

Rodger cites to other transfers from the parties’ joint bank accounts simply to try and further discredit Jackie’s character. (*Respondent’s Brief*, p. 15). As Rodger is soon forced to admit, however, those transfers “related primarily to [Jackie’s] loans to the community and the repayment for those loans.” (*Id.*). Rodger spent much of the trial seeking to smear Jackie’s character, and now before this Court continues to argue “a pattern of behavior on Jackie’s part.” (*Id.*). The Trial Court did not rely on such mischaracterizations and this Court should disregard such assertions.

In his closing paragraphs, Rodger says that Jackie “did not present testimony and evidence to rebut [Mr. Smith’s] conclusions, conceding for the purposes of appellate review that no such evidence existed.” (*Respondent’s Brief*, p. 16). But if Jackie conveys nothing else to Rodger on this appeal, she hopes to convey this fact—that she did rebut Mr. Smith’s speculations as to the “unknown disbursements” and that she successfully traced the disbursements to her four \$250,000.00 annuity purchases.

The Supreme Court should not follow Rodger's example by closing its eyes to Jackie's evidence. Rather, the Supreme Court should find that Jackie met her tracing burdens and that she is entitled to a reduced amended judgment which does not divide the alleged "unknown disbursements" as a community asset.

**5. The Supreme Court should reverse the District Court's decisions.**

The Supreme Court should reverse the District Court's intermediate appellate decision on the issue of the "unknown disbursements." As explained in Jackie's opening brief, the Supreme Court must view the issue as "whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." *Griffiths v. Griffiths, supra*. The Supreme Court cannot reasonably support the District Court's decision because the findings on the "unknown disbursements" were based on Mr. Smith's speculations. The Supreme Court should reverse the District Court on this issue, as well as on the issue of the award fees to Rodger on appeal. (*See* Augmented Record).

The Supreme Court should order the entry of a reduced judgment in the amount of \$351,558.00. In the alternative, the Court should remand the issue of property judgment amount for further determination by the lower courts. Either way, the Supreme Court should find that it was an abuse of discretion and reversible error to divide the "unknown disbursements," and that the full value of the disbursements was Jackie's separate property.

**6. Jackie is entitled to her costs and attorney fees on appeal.**

Rodger has not responded in good faith to Jackie’s appeal and has advanced several frivolous arguments regarding community property, e.g., that Jackie likely purchased her annuities with community property, that Jackie failed to rebut Mr. Smith’s community property analysis, etc. Based on the legal authorities set out in Jackie’s opening brief, the Supreme Court should award Jackie her costs and fees on appeal, in amounts to be determined by subsequent memorandum.

**CONCLUSION**

The Magistrate Court did not have a substantial and competent basis for accepting Mr. Smith's “unknown disbursements” analysis, and Jackie has provided uncontradicted testimony to disprove the analysis. The District Court should have reversed the Magistrate Court’s decision and further reduced Rodger's judgment by \$452,783.00. The Supreme Court should do so now, reversing the Magistrate Court’s judgment and limiting Rodger's community property judgment award to \$351,558.00. The Supreme Court should award Jackie her costs and attorney fees on appeal, in amounts to be proven by subsequently filed memorandum.

Dated January 20, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 20, 2021, I served a true copy of this entire document on the following individuals:

- hand delivered to:
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