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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

DONNA O. GRIFFITHS,

Appellant/Cross-Respondent,

vs.

STAN R. GRIFFITHS,

Respondent/Cross-Appellant.

Supreme Court Case No. 47099-2019  
District Court Case No. CV13-5712

CROSS-APPELLANT'S  
REPLY BRIEF

I.A.R. 35(c)

CROSS-APPELLANT'S REPLY BRIEF

An appeal from the Magistrate and District Courts in the Seventh Judicial District, Bonneville County. The Honorable Michelle R. Mallard, Magistrate Judge, presiding at trial, and the Honorable Bruce L. Pickett, District Judge, presiding on appeal.

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## CROSS-APPEAL REPLY ARGUMENT

### **1. The Magistrate Court Did Not Rely on Substantial and Competent Evidence.**

Donna continues to ignore Stan's primary argument, i.e., that "Ms. Barker did not provide any substantial or competent evidence at trial." (*Cross-Appellant's Brief*, p. 46). As per Stan's opening brief, Ms. Barker provided only insubstantial and incompetent evidence at trial. (*Id.*, pp. 37-46). Donna makes little effort to discuss the content of Ms. Barker's evidence. (*Response Brief*, pp. 20-24). For instance, Donna provides only a few citations to Ms. Barker's trial testimony (*Id.*, p. 20-21, 23), and she does not analyze the testimony in terms of its substantive content. Rather, Donna spends most of her time summarizing or reiterating the District Court's holdings. (*Id.*). See also R. pp. 331-33 for the District Court's analysis. Donna also relies on conclusory arguments, e.g., "Ms. Barker had technical or other specialized knowledge, which could assist the trial judge to understand the evidence or to determine a fact at issue, and was qualified by knowledge, skill, experience, training and education." (*Id.*, p. 22). Donna then fails to discuss Stan's challenges to Ms. Barker's lack of methodology. (*Id.*, pp. 20-24). In sum, Stan has met his burden to show that the Magistrate and District Courts erred, and Donna fails to show otherwise.

Donna says that "even if [Ms. Barker's] testimony was incorrect or inadmissible, the same would be harmless, as the District Court found." (*Response Brief*, pp. 20-21). That is simply not true. The Magistrate used Ms. Barker's testimony to assess Donna's alleged future investment earning options (R. p. 41), which in turn influenced Donna's property and support awards. See *Cross-Appellant's Brief*, pp. 37-46, for details. The Supreme Court should find that Ms. Barker's testimony permeates the Magistrate Court's awards and should reverse the decision to allow the testimony into evidence.

Donna says with great exaggeration that "Stan argues that Ms. Barker needed to be a software engineer, an economist, an attorney and judge to testify. (*Response Brief*, p. 21). Aside from misconstruing Stan's actual position, Donna's argument on the matter highlights a common tactic in her briefing, viz., she attacks Stan over imaginary issues and avoids responding to the real substance of his assignments of error on appeal. The Supreme Court should find that Donna has not adequately responded to Stan's cross-appeal.

The Supreme Court should reject Donna's "calculator" analogy, wherein she asks: "Does the use of a calculator that any lay-person can use deny the expertise of the physicist doing the calculations?" (*Response Brief*, p. 21). Donna continues to ignore the fact that Ms. Barker did not substantiate her calculations or her methodology. As explained in Stan's opening brief, "An expert opinion must 'set forth facts' and, in doing so, outline a line of reasoning arising from a logical foundation. Thus, 'an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.'" *Brainard v. Am. Skandia Life Assurance Corp.*, 432 F.3d 655, 664 (6th Cir. 2005) (internal citations omitted). At trial, Ms. Barker did not supply the Magistrate Court with anything but software figures. Moreover, "in an adjudicatory system that requires expert testimony when the topic at issue is 'based on scientific, technical, or other specialized knowledge,' the blind acceptance by a court of the efficacy of a particular piece of software is inconsistent with the traditional manner in which a court resolves factual disputes." *West Coast Prods. v. Doe*, 2012 U.S. Dist. LEXIS 110847, \*15. The Supreme Court should find that the Magistrate and District Courts erred in the matter and should order them to disregard the testimony on remand.

See Stan's opening brief for additional authorities and record citations.

## 2. The Magistrate Court Erred in Making an Unequal Property Division.

Donna says in her brief: “Stan’s brief, rather than addressing the issue of whether there is substantial evidence to support the Trial Court’s decision [on the unequal property division], simply wants to reargue the case and have this Court second guess what was decided in the trial Court.” (*Response Brief*, p. 25). That is not true. Stan specifically highlighted the Magistrate’s lack of discussion on the issue and other related errors:

In making its unequal property awards, the Magistrate Court was supposed to enter specific findings on the factors listed in Idaho Code § 32-712, e.g., the health of the parties, their employability, their financial needs, etc. The Magistrate Court engaged in only a cursory review of these factors in its memorandum decision. (R. pp. 50-51). The Court then ignored any evidence which mitigated against an unequal property division. For instance, the Court ignored the fact that Donna said she could probably obtain at least a minimum wage job, or higher (Tr. Vol. II, p. 273; ln. 14-17), and that her living expenses were only about \$4,000.00 per month. (Tr. Vol. II, p. 260, ln. 19-21). The Magistrate Court then failed to recognize that Donna was capable of earning almost half her annual living expenses through employment, (*Id.*),<sup>1</sup> and that she was scheduled to receive over 2 million dollars in cash assets. (R. pp. 46-48). In sum, the Magistrate Court failed to find any “compelling” reasons to deviate from Idaho’s standard of making a substantially equal division of marital assets. (R. pp. 330-31). The District Court should have found that the Magistrate abused its discretion and did not rely on any substantial and competent evidence. This Court should remand the issue with instructions to enter a substantially equal property division.

(*Cross-Appellant’s Brief*, pp. 46-47).

Stan recognizes this is a narrow issue on appeal and that the Magistrate had substantial discretion in the matter. Nevertheless, Stan believes that the District Court should have remanded this issue for the same reasons it remanded the spousal support issue. See

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<sup>1</sup> Stan argued in his brief: “With a minimum wage job, Donna could earn at least \$15,080.00 per year, or \$1,256.67 per month. That is more than 30% of her admitted monthly expenses...In terms of spousal maintenance, the District Court found that ‘there was no reason not to consider Donna’s own admission that she, at the very least, could work a minimum wage job.’ (R. p. 334). The District Court should have applied that same reasoning to the parties’ property division under I.C. § 32-712 and remanded the issue for additional consideration.” (*Cross-Appellant’s Brief*, p. 47, fn. 12).

above. The Supreme Court should find that the Magistrate Court did not base its decision on substantial and competent evidence and that both the Magistrate and District Courts failed to show a “compelling reason” to deviate from Idaho Code § 32-712.

See Stan’s opening brief for additional authorities and record citations.

### **3. Donna is Not Entitled to Costs or Attorney Fees on Appeal.**

Donna says that she “should be awarded her attorney fees and costs incurred in defending against this appeal,” with apparent reference to the defense of Stan’s cross-appeal. (*Response Brief*, p. 26). Donna then gives a conglomerate argument:

On appeal to this court, Stan claims that the court abused its discretion regarding the value of the MVH units, entitlement to spousal support, propriety of an unequal division of property and a couple of evidentiary issues. However, it is respectfully suggested that he makes no cogent legal argument justifying a reversal of the Trial Court’s findings. Stan has failed to demonstrate that the Trial Court’s decisions were an abuse of discretion or were unsupported by substantial and competent evidence. His argument that the valuation of MVH units was a conclusion of law rather than a finding of fact is an example of the lack of foundation in his arguments.

(*Response Brief*, p. 27). Donna is the one who appealed the MVH unit values to this Court, along with the tax issues, the equalization payment issue, and the spousal support issue. She should not get attorney fees and costs for having to “defend” against those issues. In any event, Donna should not be the prevailing party on those issues or Stan’s two cross-appeal issues, and so she should not get any prevailing party costs or fees on appeal. See prior briefing for arguments as to why Stan should prevail on both appeals.

Even if Donna prevails on Stan’s cross-appeal, the Supreme Court should find that Stan did not merely second-guess the Magistrate and District Courts. See prior briefing for details. Moreover, the Court should find that Stan had a narrow, good-faith basis for his cross-appeal, and that he did not raise any frivolous or unfounded arguments on cross-

appeal. Idaho case law says: "A court must determine whether the evidence adduced is sufficient, albeit disputed, to establish a fairly debatable issue under the legal theories advanced by the plaintiff...attorney fees should be awarded under I.C. § 12-121 only if the position advocated by the non-prevailing party is plainly fallacious and, therefore, not fairly debatable." *Assocs. Nw. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987). See also *Gulf Chem. Emps. Fed. Credit Union v. Williams*, 107 Idaho 890, 895, 693 P.2d 1092, 1097 (Ct. App. 1984) ("...when a fairly debatable claim is deemed frivolous for no stated reason other than its ultimate failure upon a point of law, we believe discretion has been abused."); *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 911, 684 P.2d 307, 313 (Ct. App. 1984) ("A misperception of law or of one's interest under the law is not, by itself, unreasonable conduct. If it were, virtually every case controlled by a question of law would entail an attorney fee award against the losing party under I.C. § 12-121. Rather, the question must be whether the position adopted by the owner was not only incorrect but so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation."). The Court should deny Donna's request for fees on appeal.

### CONCLUSION

The Supreme Court should remand the issues of the admission of Ms. Barker's testimony and the unequal division of community property, as set out in Stan's cross-appeal. The Court should award Stan his reasonable attorney fees and costs on cross-appeal.

Dated: March 16, 2020

NALDER & BLAKE, PLLC



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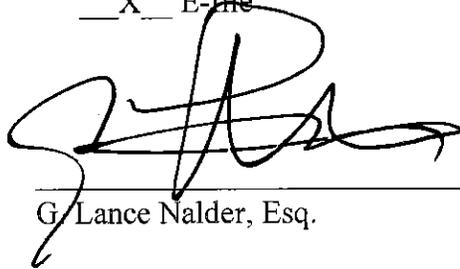
G. Lance Nalder Attorney at Law

**CERTIFICATE OF SERVICE**

I certify that on March 17, 2020, I caused a true and correct copy of this entire document to be served, as follows:

David A. Johnson  
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E-file



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G. Lance Nalder, Esq.