In the Supreme Court of the State of Nevada

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JAMES K. WICHERT, Appellant, vs. SUSAN M. WICHERT, Respondent,	)	S.C. DOCKET NO. 33809 & 34357 D.C. CASE D198590

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

Appellant James K. Wichert ("James") relies upon the Statement of the Case as set out in Appellant's *Opening Brief* ("AOB"). This Court is aware of the motions and orders that led to the nearly two years that passed between the filing of the *Opening Brief* and the time when Susan had to file her *Respondent's Answering Brief* ("RAB"), and it is presumed that those matters do not have to be recounted here. Controlling law that has changed during that pendency will be noted below.

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STATEMENT OF FACTS

James relies upon the Statement of Facts in the *Opening Brief*.[1] The version proffered by Susan is not helpful to examination of the case on its merits. Because this appeal is very fact-oriented, mischaracterizations of the record could have a distorting effect, and Susan has been unable to resist mixing argument with alleged factual references, although some of it was done quite subtly.

Susan's *Answering Brief* liberally comments that there was "conflicting evidence," even where none existed. The set up for those arguments is found throughout the "Statement of the Facts," where one party's opinion or submission is offered as factual matter, even where that testimony was later shown to be incomplete or inaccurate; it often uses as citations to statements of "fact" only counsel's equally unsupported opinions and arguments in the court below.

For example, Susan asserts that she "never earned more than $18,000.00 per year." RAB at 3. Her testimony, however, showed that she was referencing only her primary employment, that she also had various seasonal and part-time jobs, and that she was not sure of her figures and admitted that she "could be totally wrong." TT at 27-30.

Similarly, Susan flatly states that she "did not return to the work force until 1995," when her own testimony showed that she left the work force only briefly, starting in 1991, and that she not only owned, but helped operate the family store business in 1993 and 1994, gradually returning to full-time work by 1995. TT at 270-71, 259-260. She asserts that the family store "began to deteriorate just before the parties separated [in August, 1995]," RAB at 5, when her own testimony

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[1] Susan makes an unwarranted attack on undersigned counsel in her footnote 4, on page 3 of the *Answering Brief*. She argues that the *Opening Brief* violated NRAP 28(g) by exceeding the permissible number of pages allowed by this Court's *Order* permitting its filing, because I "hid" the statement of the case and statement of facts by means of using roman numerals for those sections. Opposing counsel received our *Motion to File Brief in Excess of Thirty Pages* (he cites it), and so had before him its statement that

> We have exceeded the standard limit. Specifically, there are three pages of authorities, the very convoluted proceedings summarized in the statement of the case took another five pages, and the statement of facts took another fifteen pages. The argument portion of the brief is 36 pages, including spacing and conclusion.

Nothing was "hidden." Susan's attack is disingenuous, displaying an unfortunate willingness to abuse the facts, by omission and commission, which surfaces repeatedly throughout the *Answering Brief*.

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showed that she knew "it was in financial disarray, bankruptcy options" by the end of 1994 or very beginning of 1995. TT at 28.

There are many similar examples. The point is that most of the "facts" set out in the *Answering Brief* were over-selectively assembled to suit counsel's argument rather than reveal what evidence was actually before the lower court at trial, and others are not supported by the record cited at all. It is submitted that the Statement of Facts in the Opening Brief should be relied upon by this Court.

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ARGUMENT

As a preliminary matter, it is worth acknowledging the absence of any dispute as to the standard of review. *See* RAB at 10-11. We concur that the questions are either as to abuse of discretion, error of law, or the existence or non-existence of substantial evidence to support findings.

Where we part company with our opponent is in his presumption that any mention in the record below of any comment relating to a subject matter somehow constitutes "substantial evidence," as where he attempts to create an interest in real property by reference to an un-memorialized hearsay conversation allegedly occurring fifteen years earlier between non-owners of the property (this is addressed in detail below). For the same reason, there is neither a question of "credibility" nor a matter of "conflicting evidence" when there is no competent evidence at all to support a proposition.

Facts supporting findings may not be implied when the record is unclear as to what those facts were. *Trident Construction v. West Electric*, 105 Nev. 423, 428, 776 P.2d 1239 (1989); *Pease v. Taylor*, 86 Nev. 195, 467 P.2d 109 (1970). A respondent who fails to show ***how*** evidence in the record could legally justify a ruling below has failed to sustain his burden, and findings and orders unsupported by substantial evidence in the record will be reversed. *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994) (reversing alimony award where the record did not reveal evidence sufficient to support lower court's findings). Findings of fact will be set aside when they are clearly erroneous, and they are clearly erroneous when they are not supported by substantial evidence. *Pandelis Constr. Co. v. Jones-Viking Assoc.*, 103 Nev. 129, 734 P.2d 1236 (1978).

This Court has stated that it will not comb the record to ascertain matters that might have been set forth in a respondent's brief. *Summa Corp. v. Brooks Rent-A-Car*, 95 Nev. 779, 602 P.2d 192 (1979). It is the responsibility of a respondent to show how, as a matter of law, evidence in the record could support the rulings below, and a failure to do so both constitutes a confession of error and justifies reversal. *See*, *e.g.*, *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 125, 676 P.2d 1318 (1984).

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I. JAMES SHOULD NOT SUFFER UNDULY FOR HIS ATTORNEY'S FAILINGS

In a five-page response to our first point, Susan makes the remarkable claim that this Court "***may not consider***" the competence of Mr. Ayers in reviewing the facts of this case, because the matter of Mr. Ayers' competence and disbarment was not "presented as part of any proceeding below." RAB at 11, 12-16. She misunderstands the point, cites inapplicable authority,[2] and is both factually[3] and legally incorrect.

This is not a criminal matter, and James' substantive rights do not hinge on the competence of his counsel (although, as noted below, certain principles espoused in criminal cases are equally applicable here). This Court has already come to a conclusion as to the competence of Mr. Ayers, by way of formal order of disbarment.[4] Information relating to Mr. Ayers' breakdown and disbarment was not an "argument" – it was a fact.

The point here is this Court's directive that cases, particularly domestic relations cases, should be decided on their merits.[5] This Court can only perform its function of reviewing the arguments and record to determine whether there has been an "abuse of discretion" if the Court is informed of the factual context of the proceedings below. In *Evans v. State*, 117 Nev. ___, 28 P.3d 498 (Adv. Opn. No. 50, July 24, 2001), this Court observed:

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[2] Susan cites *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997) and *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996) for the proposition that this Court is not permitted to consider Mr. Ayers' competence at the time of trial. RAB at 14. That proposition does not exist in either case, and Susan's (apparently deliberate) citation of inapplicable authority itself violates *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 125, 676 P.2d 1318 (1984).

[3] Susan is wrong; this information was discussed on the record below. Transcript of 2/2/99 at 15-16. Further, opposing counsel is fully aware that his assertion of fact (that it "was never raised") is false, because he quotes from the exchange in question. RAB at 14.

[4] Mr. Ayers was disbarred for violations of SCR 151 (competence), SCR 153 (diligence), SCR 154 (communication), SCR 165 (safekeeping property), and SCR 200(2) (failure to respond to disciplinary authority); it appears that he suffered these failings at the same time that this case was progressing to trial.

[5] *See, e.g.*, *Lesley v. Lesley*, 113 Nev. 727, 941 P.2d 451 (1997); *Price v. Dunn*, 106 Nev. 100, 105, 787 P.2d 785, 787 (1990); *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

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> The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though [the] errors are harmless individually.

This is a practical consideration and is fundamental to the fairness of a proceeding, whether civil or criminal, and whether or not the errors are of constitutional magnitude. *See Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052 (1984) (a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered . . . as a result of the alleged deficiencies). This Court has indicated that where public policy concerns are implicated, or it appears that one party has taken advantage of another, this Court will carefully review the record in the interests of resolving those cases on their merits. *See Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) (where wife did not have independent representation, she did not have a fair opportunity to present issues to the original divorce court, meriting "careful review of the record"); *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998); *Matter of Parental Rights of Montgomery*, 112 Nev. 719, 917 P.2d 949 (1996).

Opposing counsel, apparently unhappy with identification of the tactics he employed below,[6] makes another unwarranted attack on the undersigned in this section, going so far as to assert that inclusion of the disbarment order in the Appendix "is an unlawful interference with the proceedings of this court." RAB at 13. Again, this is incorrect. Counsel is aware of no rule by which the citation of a published order of this Court, or its inclusion in an Appendix for the convenience of the Court, could constitute a wrongful act. *Cf.* SCR 123. The assorted representations about the facts below,

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[6] The *Opening Brief* is not overly critical of Mr. Minagil's obvious and repeated taking advantage of Mr. Ayers' weaknesses, to Susan's benefit – we merely point out where the result was error. We neither said nor inferred that the "sharp practices" employed by Mr. Minagil crossed over the line to outright unethical conduct. At one point, Mr. Minagil objects to identification of the hearing at which he took advantage of my absence because of illness, ignored my request for a continuance because of that illness, and obtained further orders not justified by the record. RAB at 14, n.5. He claims that it is a "fact out side of the record." He is wrong. *See* I App. 222 (showing Mr. Stone's appearance); II App. 87, 90-91 (my motion regarding it). Having taken maximum advantage of every opportunity to push the limits of acceptable conduct for his client's profit, our opponent is in no position to complain about that conduct being made the subject of appellate scrutiny.

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made by Susan to bolster her point, are either false or so misleading that it appears the misrepresentations are deliberate.[7]

It is submitted that in the unusual context of a trial conducted by counsel at a time when this Court has determined he was performing too dysfunctionally to remain in practice, it would be a disservice to the ends of justice, and a violation of this Court's policy of reviewing domestic relations cases on their merits, to ***not*** bring those facts to the Court's attention. Mr. Ayers' diminished capacity to function as counsel should be noted by the Court, and greater scrutiny of the record is warranted accordingly.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING SUSAN LIFETIME ALIMONY

In the two years that have passed since the *Opening Brief* was filed, this Court has given additional guidance regarding the appropriateness of alimony awards. Peculiarly, Susan does not address *Rodriguez v. Rodriguez*, 116 Nev. ___, 13 P.3d 415 (Adv. Opn. No. 107, Nov. 30, 2000), instead, circularly quoting the "findings" Mr. Minagil made up after the trial as the "evidence" that justified the existence of those findings.[8] RAB at 17; *see* AOB at xix-xx, 2-13. Susan calls this recitation "overwhelming." RAB at 17. This brief will therefore discuss Susan's argument before turning to the current case law.

Susan does not identify any deficiency in the extensive scouring of the record set out in the *Opening Brief*. She identifies no facts that were not discussed there, and has chosen to ignore rather

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[7] For example, Susan claims that there is "absolutely no evidence in the record to suggest that Ayers was not prepared or not competent." RAB at 15. This is not true; Mr. Minagil himself chastised Mr. Ayers' repeatedly for his lack of preparation and discovery, and was joined in those criticisms by the district court judge. *See*, *e.g.*, TT at 243-44, 376; *see* discussion at AOB 9. Similarly, Susan asserts that: "Three different district court judges . . .found James to be lacking in credibility . . . ." RAB at 15. This also is untrue. Only one judge heard any testimony, and that judge did not state ***anything*** on the record regarding James' credibility. It was the passing of this case between departments that allowed the errors now on appeal to occur in the first place.

[8] As discussed in the *Opening Brief* at 3-10, the trial court's written minute order made no such findings nor is there any record of these findings in the record of the trial.

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than address the fact that there were no findings referencing *Sprenger*[9] factors 1, 4, and 5. *See* AOB at 3, 8, 9. Susan ***has*** attempted to justify the findings below as to the remaining factors, but to do so, she was required to misrepresent the record to greater and lesser degrees, and did so.

Addressing the second factor, Susan states that the parties were "married for twenty years." RAB at 17, 20. While technically correct, she ignores the fact that they were separated during the last three of those years, as they were bogged down in divorce court, and the argument made as to the relevance of that separation.[10] *See* AOB at 4-6. She ignores all of the public policy discussion, and the comparison of the facts of this case with this Court's prior alimony cases, under which the award made here was wildly disproportionate to the length of the marriage. *Id*.

Addressing the third factor, Susan recites that James "continued to attend school after the marriage." RAB at 18, 21. She ignores the facts that James was already ***in*** college when they met, and that he happened to complete the last of his nine years of never-identified night-school education at the very beginning of the marriage while continuing to work full time. TT at 5, 27-30, 250-51, 257, 333-34. There is nothing in the record to indicate that James' completion of his night-school classes in Michigan in the 1970s had anything at all to do with the only financial success the parties ever had while living together – the two and a half years of profitability running the dollar store business in Las Vegas between 1993 and 1995.

That store was financed by Susan's family, some of whom already worked in that business; the parties got into the business and learned about it at the ***same time***, and had exactly the same opportunity to pick up "acumen" in the field in the three years (1992-1995) between their move to

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[9] *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994). The factors in that case are:
(1) the wife's career prior to marriage;
(2) the length of the marriage;
(3) the husband's education during the marriage;
(4) the wife's marketability;
(5) the wife's ability to support herself;
(6) whether the wife stayed home with the children; and
(7) the wife's award, besides child support and alimony.

[10] This Court noted, but did not discuss, the parties' two-year separation before divorce in *Rodriguez*, *supra*.

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Las Vegas and the financial collapse of the family store business. TT at 87-88, 162-63, 204, 258-59, 341. In fact, Susan, her mother, and her sister-in-law were the stockholders, and she described James' role as the "president more or less." TT at 59.

Most outrageous, however, is Susan's recitation – four times – of the falsehood that "Susan quit college 'to take care of the [child]'" and "While Susan stayed at home caring for the parties' child and stopped attending college, James continued his schooling."[11] RAB at 18, 21, 22. ***Both*** parties worked full time in Michigan, making a marginal living, and the child was not born until a decade ***later*** than James was in school, ***thirteen years*** after the marriage, and shortly before the parties broke up. TT at 5, 28, 87, 250-51; I App. 174. Susan's repeated implications that she left the work force to care for the parties' child at the start of this marriage are, at best, disingenuous.

There was no "career advancement" by James during the three years between the parties' move to Las Vegas and their separation. The child was born in 1991; for most of the child's life, the parties have been separated and coparenting from two households. There was no evidence to contradict the fact the facts that Susan was only out of the work force for a very brief time, just before the end of the marriage, and that when salaries were increased to the level to which Susan claims she quickly "became accustomed," the business began its spiral into bankruptcy and collapsed, less than a year before the parties separated. TT at 14-15, 28, 87-88, 204-206, 257-261, 269-270, 275; I App. 34-35; III App. 108, 113, 117.

Susan's complaint about never having "an opportunity to establish a career" (RAB at 22) are simply false – the parties had equal opportunities throughout the thirteen years or so that they lived in Michigan, worked what jobs they could, and decided what they wanted to do. Susan's time off taking care of the child was for about a year and a half ***in the 1990s***, followed, at her choice, by

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[11] This is the sort of "abuse of the facts" in the *Answering Brief* complained of above. Susan asserts that "Even James acknowledged Susan stayed home to care for the parties' child 'the majority of the time,'" RAB at 21, implying that such was the case "during the marriage," while deliberately omitting the critical fact that the time period referenced was only ***one year*** (1993). It is also worth noting that the referenced transcript pages (161-62) have nothing to do with the subject of Susan staying home; those pages detail how the parties took too much money out of the family store until it collapsed. The testimony by James that Susan intended to reference is at TT 152.

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temporarily part-time work for another year and a half, until she went back to work full time. *See* AOB at 10-11.

These facts do not constitute "denial of an opportunity" for a career. While the facts of *Sprenger* are correctly recounted at page 22 of the *Answering Brief*, the assertion in the paragraph beginning on line 24 that the parties in this case had similar facts is simply false.

When this Court has referenced "staying home to raise a family" as a fact of significance to an alimony analysis, it has referenced 15-20 years off work. *See Sprenger*, *supra*; *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992). There is no precedent to a wife's leveraging less than three years off full-time work (at the very end of a marriage), during three years in which the parties briefly made money (and then went bankrupt),[12] into a lifetime award of alimony.

In other words, of the "findings" numbered 26 to 36, listed on page 17 of the *Answering Brief* as supposedly supporting a lifetime award of alimony, number 26 is misleading by omission, number 27 is incomplete *and* misleading, 28 is simply false, there is no evidence of any kind supporting the first half of number 30, number 31 is almost entirely false (and what might be true is not established by the record), number 34 is irrelevant if true, and 35 addresses an alleged comment that does not apparently exist anywhere in the testimony. The remainder are worth individual brief comments.

Finding 29 was that Susan's family assisted James monetarily to start a new business in Las Vegas.[13] RAB 17. There is no explanation as to how this could possibly justify an award of permanent alimony.

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[12] The parties' trial testimony was in agreement that the best living they ever made while together was in running the one dollar stores in Las Vegas, when both worked at the stores owned by Susan and her family, just before they broke up. TT at 87, 258-260, 274. Both verified that they took too much money out to live well, and the business collapsed in massive debt about nine months before they separated. TT at 14-15, 204-206, 260-61, 269-270, 275; I App. 34-35. ***Both*** parties testified that by 1996 – ***after*** they broke up – they had to "start over" from "square one," trying to find new jobs. TT at 87-90, 259, 275-76.

[13] This is the family store, from which (at Susan's insistence) her mother and sister-in-law each made a $40,000.00 profit, which monetary loss precipitated the financial collapse of the business. TT at 87-88, 269; *see* AOB at xiii-xiv.

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Finding 33 was conceded to have been based on information known to be faulty, and therefore is not supportable, as discussed below in the next section of this *Reply Brief*.

Finding 32 deserves special attention, since it is the only "finding" with any support in the record that has any obvious nexus to the validity of an alimony award. It was that James "has shown he has the ability to operate a profitable business while [Susan] on the other hand has not shown success in the business field." RAB a 17. The "profitable business" referenced was the entirely new service business that James started up a year after the parties separated, and was trying to grow during the additional two years of divorce litigation. This created a business that was technically community property,[14] and Susan received her share of it (indeed, as established in the *Opening Brief*, and entirely ignored by Susan in the *Answering Brief*, she triple-dipped her community property interest in the business; this is discussed below).

For ***alimony*** purposes, however, this Court's focus as to businesses and earnings has always been on the standard of living, lifestyle, and earnings while the parties were together ***during the marriage***, because the Court has been concerned with post-divorce continuity of that standard of living. *See*, *e.g.*, *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998). Obviously, the spouse cannot "grow accustomed" to a lifestyle achieved through an income-stream coming from a business that is started after the parties separate. Even if it ***was*** possible to make such a claim, the numbers James earned during the time in question would not support the award here, as discussed below.

Further, James paid temporary support during the entire extended separation until divorce, at first voluntarily, and later by court order. TT at 385; I App. 30.

There are two aspects to the award to be considered on appeal – its amount, and its duration. Here, both were excessive, to a degree unsupported by the record, and unjustifiable under this Court's holdings to date.

This Court's focus on historical earnings in alimony cases illustrates why the award here was excessive in amount. Susan testified that, throughout the marriage, the parties worked many different jobs, and that James' final (and apparently highest) salary in Michigan was $51,619.00.

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[14] *See Forrest v. Forrest*, 99 Nev. 602, 606-607, 668 P.2d 275 (1983).

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TT at 257-58. After the move to Las Vegas in 1992 and establishment of the family business, the parties' ***combined*** incomes were about $45,000.00, $76,000.00, and $92,000.00, for 1993, 1994, and 1995, respectively.[15] After the collapse of that business, and during the post-separation period leading to the divorce trial, James made $38,000.00 in 1996, and $41,000.00 in 1997. TT at 377-380; III App. 84.

Yet on this record, Susan claims an entitlement to a lifestyle in the manner to which she "has become accustomed" (RAB at 23), and the lower court set alimony starting at $12,000.00 per year, and increasing to $18,000.00 per year for life.[16] That figure – nearly half of James' last pre-divorce year's gross income, is grossly disproportionate to the parties' historical earnings and standard of living, and constitutes an abuse of discretion on the face of the record. The attempt to justify it – based on a projection of James' ***future*** ability to make a living, looking to his efforts to start a business after separation – is an excessive award in search of a rationalization, not based on statute or any cogent theory espoused by this Court.

Accordingly, one of the issues to be decided in this appeal is whether a spouse such as Susan has a right to set a "lifestyle" to be maintained by alimony, post-divorce, at the "high water mark" of the maximum income the parties ever had together, even if that period was fleeting (here, one year out of the 17 the parties lived together, three years before the divorce). It is submitted that there is no precedent – in Nevada or elsewhere – that would support such a proposition, and that the alimony award made in this case constituted a reversible abuse of discretion.

It is similarly illogical to base an award of lifetime alimony on the business James started after the parties separated. Where a business, and income stream, are developed ***after*** separation and just prior to divorce, and the person establishing it is paying support to the spouse, it is inherently unfair and inequitable to base the spouse's claim to lifetime alimony on those post-separation efforts and earnings.

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[15] TT at 150-51, 153-54,160, 203-204; III App. 112, 117, 121.

[16] Where the record leaves off, James was also paying child support at the rate of $400.00 per month. TT at 86-87.

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As to duration, the *Answering Brief* is silent. Susan does not even try to rationalize why, in light of the existing cases, she can start receiving support at age 38[17] and continue receiving it for three times the length of the marriage, for her life expectancy. *See* AOB at 12-13. Susan neither disputes nor acknowledges that under the mathematical formulas derived from this Court's prior holdings, she should have received a temporary spousal support award of about six years' duration. *See* AOB at 12-13, n.53.

Under all case authority discussed in the *Opening* and *Answering Briefs*, the alimony award here was excessive to the point of an abuse of discretion. The only other matter that should be reviewed here is this Court's most recent holding, *Rodriguez*, which was ignored by Susan in the *Answering Brief*, to see if that case dictates any different result.

In *Rodriguez*, the Court reasserted and expanded the 1974 *Buchanan* factors as a list of what was to be considered by courts setting alimony awards: (1) the financial condition of the parties; (2) the nature and value of the parties' respective property; (3) the contribution of each to any property held by them as tenants by the entirety; (4) the duration of the marriage; (5) the husband's income, earning capacity, age, health, and ability to labor; and (6) the wife's age, health, station and ability to earn a living.

Here, other than the post-separation, future-projected earning ability of James, the parties had a relatively modest financial condition, as reflected by their historical earnings set out above. Their property was also relatively modest, but of what they had, Susan either got half (James' post-separation business value), or all (the house equity, all the parties' material possessions, etc.) *See* AOB at x - xxiv. The third factor is not relevant. The parties separated after a moderate term of 17 years, and were formally divorced after 20 years.

The fifth factor is basically analyzed above. James' historical income was moderate, but lifetime alimony was apparently based primarily on what Mr. Minagil argued that James ***would*** earn in the future, from the new business he started after the parties separated. As to the sixth factor, Susan has not disputed the description in the *Opening Brief* – that at the time of divorce she was "a

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[17] Susan has been receiving monthly support from James since 1995, when the parties separated. TT at 385.

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young, healthy, former spouse fully capable of continuing to work for a living," who had been given the opportunity to learn exactly the same field that the husband was in, at exactly the same time and place, and who had far better connections in that trade. AOB at 12.

Application of these "common sense" factors leads to exactly what the *Opening Brief* stated before the opinion in *Rodriguez* was issued:

> The record indicates that the parties had some (never quantified) historical wage disparity, and that Susan was required to take off work for a year and a half because of their child's illness as a baby. These factors certainly made some award of alimony to Susan reasonable in the Court's discretion. . . . It is patently unreasonable, however, for the lower court to have ordered lifetime alimony, to be paid over a term several times longer than the marriage . . . .

A closer reading of *Rodriguez* provides an indication of why Susan chose not to cite or draw the Court's attention to it:

> Alimony is not a sword to level the wrongdoer. Alimony is not a prize to reward virtue. Alimony is financial support paid from one spouse to the other whenever justice and equity require it. Alimony may not be ***awarded or denied*** in an arbitrary or uncontrolled abuse of discretion.

116 Nev. at ___, 13 P.3d at ___ (emphasis added). The record does not reveal, and Susan does not specify, any legally cognizable "wrongs" that James might have committed; from an economic point of view, at least, no wrongful conduct is indicated, although he took a beating on every economic issue before the lower court.

Since there is no reasonable support for either the amount or the duration of the alimony award made below, it is submitted that it was awarded in an "arbitrary or uncontrolled abuse of discretion," and should be reversed accordingly. Under *Rodriguez*, as under *Sprenger* and *Gardner*, the lifetime alimony award by the district court was not supported by substantial evidence and thus constituted an abuse of discretion; it was wildly excessive, and should be reversed because it is just not ***fair***. This Court should either reduce the alimony award to an amount and a duration supportable by the facts existing at the time of divorce, or remand with directions that the lower court do so.

III. THE DISTRICT COURT ERRED IN CALCULATING THE VALUE OF JAMES' BUSINESS

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Susan entirely ducks the actual issue presented, ignoring the admitted error of her expert witness, and instead raises the red herring of the lower court's ability to "weigh credibility" when there is "conflicting evidence." RAB at 24-26. The citations provided appear to be correct, but they are irrelevant.

The point to this issue is that ***all*** of the evidence as to nature of the money in the business Schwab and Wells Fargo accounts was that the sums were advance deposits from James' customers, from which he would buy inventory from them, and pay various people (including his own travel costs), and finance build-outs, etc., keeping what was left at the ***end*** of that process as profit. TT at 117-121, 149, 172-77, 186, 208-209, 211-213, 370, 378. Susan did exactly the same thing with her accounts, when she was running the same kind of business. TT at 318-320. ***No*** witness ever claimed that the money in James' accounts was anything other than what James said it was.

Mr. Minagil nevertheless attacked James throughout the trial and in argument, stating that James "used" the money as if it was his, paid his travel costs out of it, and earned interest on it. All of these things are true, but they are irrelevant. There was ***no evidence of any kind, from anyone***, that the money in the Schwab and Wells Fargo accounts was anything other than advance deposits by customers that ***might*** eventually produce a profit.

Certainly, Susan suggests the existence of no such evidence in the *Answering Brief*. Instead, she tries the same sleight-of-hand in her brief that worked for her below, deliberately confusing references to the failed family store with references to James' post-separation business (RAB at 24-25),[18] claiming that as to the earlier family business, James had "exclusive control" as "president" (ignoring the ***ownership*** of the business by Lori and her family), RAB at 25, and citing her attorney's own oral arguments at trial as "evidence" that James "ran down the business." *Id*. None of these matters have ***anything*** to do with the valuation of the new business James began post-separation.

Susan does make one correct point – Mr. Ayers did not present any evidence as to the value of James' new business. RAB at 25. As noted above, *Forrest* makes such businesses technically community property, and Mr. Ayers should have presented evidence of a value; as she also points

[18] The "phenomenal" quote, for example, was Susan's description of how the family stores "started out," before they collapsed in bankruptcy. TT at 260.

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out, however, Mr. Ayers ***did*** use ***Susan's expert's*** methodology, after subtracting out his incorrect assumption, and the resulting value was $25,717.77. RAB at 25; I App. 151.

That brings us to the actual issue here. Susan's expert, Dr. Clauretie, admitted that he ***assumed*** the money in the business accounts was "some sort of revenue." TT at 216, 230, 245. He further admitted that if the money in those accounts was ***not*** revenue, all three of his alternate valuations were too high. TT at 247. Susan studiously ignores any mention of this testimony in the *Answering Brief*, choosing instead to repeat Dr. Clauretie's credentials and methodologies. RAB at 25-26.

Since ***all*** of the evidence in the record is that the sums in the accounts were advance deposits by prospective customers, there is no issue of "credibility" or of "conflicting evidence," and no issue as to the credentials of the expert. Since Dr. Clauretie based his calculations on a premise that was wrong, he conceded the error of those calculations. Susan's single cite in this section, to *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995), is the correct one, but not for the reason she claims.

That case stands for the proposition that a valuation will not be reversed as an abuse of discretion "so long as the value placed on the property falls within a range of possible values demonstrated by ***competent*** evidence" (emphasis added). 111 Nev. at 427. Since ***all*** of the evidence in the record demonstrates that the starting figure used by Dr. Clauretie for all three of his projections was too high, his resulting valuations were ***not*** competent, and the judgment based on them was an abuse of discretion, as well as simple error, and should be reversed accordingly. *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995) (where the face of the record reveals that an expert's opinion was based on a faulty premise, that opinion is to be disregarded).

Mr. Ayers performed Dr. Clauretie's calculations, eliminating the error of his "assumption," and derived a value of $25,717.77, instead of the $60,900.00 figure found by the lower court; on remand, the lower figure should be used, or the matter should be returned to the lower court to have the expert perform his calculations without the error.

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IV. THE DISTRICT COURT'S AWARD TO SUSAN OF HALF THE PRIOR BALANCE IN THE SCHWAB ACCOUNT WAS ERROR

A. Since the Schwab account was an asset of $1 Store, which was divided between the parties, dividing the business' operating account was a "double dip"

Susan completely ignores this issue,[19] disregarding the presence of the Schwab account in her own expert's valuation of James' business, in favor of repeating the mantra of "substantial evidence," resolving "conflicts in the evidence," and discussing irrelevant facts.[20] RAB at 26-28. There ***are*** no such conflicts in the evidence, and no question of substantial evidence.

So it is clear, we concede that the account was a community property asset, since it belonged to a business that James started during the marriage. *See Forrest*, *supra*. But Susan only gets to have it counted, and divided, ***once***. Since her expert took the entire cash flow of the business into account in valuing James' business,[21] she ***got*** half the value of the business' accounts when she got half the value of the ***business***.

Why it was error to allow Susan to go back and ***also*** claim half the assets of the business is one of those "dragon in the garden" situations of something so obvious that it is difficult to state; the closest analogy counsel can come up with is having a library valued at $100.00, having one party keep the library, and the other getting $50.00, and then having that other party come back and demand half the books.

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[19] This Court ***could*** take Susan's failure to address the issue, by itself, as a confession of error meriting reversal. *See Hewitt v. State*, 113 Nev. 387, 936 P.2d 330 (1997). What follows here is a discussion of the merits of the issue, in light of what Susan did submit in the *Answering Brief*, on the presumption that the Court will choose not to resolve the matter as a confession of error.

[20] For example, Susan spends much of a page discussing how deposits were entered one way in James' books when the new business used cash-based accounting, but were entered another way when the business switched to accrual-based accounting. RAB at 27. Her expert claimed to have no difficulty understanding those entries, and the only reason apparent for discussing such technical irrelevancies in the *Answering Brief* is as part of an effort to either distract or confuse this Court so as to avoid the actual legal issue. Her similar irrelevant comments about James earning interest on the deposits, taking his travel expenses from them, etc., RAB at 28, are addressed above; the single loan from those funds after the divorce trial when James bought a house is addressed separately below.

[21] TT at 217-18, 230-31, 245; III App. 19-82, 68-82.

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Susan's argument that the trial court's findings were supported by unspecified "substantial evidence" is a ruse. There is neither evidence, nor logic, nor law, which can support the re-dividing of an asset which has already been divided and paid. *See* NRS 125.150(1)(b).

As a matter of both logic and law, the award to Susan of half of the Schwab account after she got half the value of the business that owned the account was an impermissible "double dip," which should be reversed as both legal error and an abuse of whatever discretion the lower court had in its division of community property.

B. It was error for the trial court to "divide" money that did not exist at the time of trial

Susan has attempted to ignore this issue out of existence as well; again, the Court has the option of treating her failure to address it as a confession of error. The matter only needs attention of any kind, however, if the award of half the money in the Schwab account is not resolved as set out immediately above.

If, somehow, the Court's analysis reaches this sub-issue, then we ask that the award be restricted to the ***only*** evidence in the record – solicited and put there by Susan's attorney – that the balance was $2,000.00 at the time of trial, TT at 189.[22] *Alba*, *supra*; *see* AOB at 17-18.

V. SUSAN COULD NOT BE AWARDED AN INTEREST IN THE TREES PLANTED ON JAMES' FATHER'S WISCONSIN PROPERTY

As with the preceding issues, Susan completely ducks the legal issue in question, in favor of a string cite regarding the trial court's ability to weigh credibility. RAB at 28-30.

"Credibility" has nothing to do with the question before this Court. The question is what possible legal interest, if any, a spouse can get as a result of her husband's payment of $300.00,

[22] Mr. Minagil's cross-examination of James challenged this answer on the basis that an account statement showed the balance as being $3,300.00; but James had explained that there were always outstanding checks against the account that had not yet cleared, so the statement balance was never the actual balance. *See*, *e.g.*, TT at 119.

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fifteen years earlier, for the purpose of planting trees on his father's property?[23] Susan has refused to address any of the citations in the *Opening Brief* indicating James has ***no*** legal interest of any kind in the property. *See* AOB at 18-22. Susan, as James' wife, therefore cannot have any derivative "community property" right.

Again, so it is clear, there is no dispute that Susan ***wants*** an interest in James' father's land, and she may sincerely believe that she ***has*** an interest in the land. But neither wishes, nor beliefs, can create an interest in real property.[24] Susan's refusal to address any of the statutes or cases so holding (she merely repeats her testimony below and recites the lower court's "granting" of an "interest" accordingly),[25] constitutes a failure of her duty to provide this Court with meaningful legal authority in support of her position. *See* NRAP 28(a)(4); *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority); *Smith v. Timm*, 96 Nev. 197, 606 P.2d 530 (1980) (inadequate "discharge of the appellant's obligation to cite legal authority"); *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971) (contentions not supported by relevant authority need not be considered).

Neither the lower court, nor opposing counsel, can conjure an interest in real property out of recollections of decades-old conversations.[26] The lower court's order creating an interest in trees growing on a third party's property must be reversed as beyond that court's jurisdiction. NRS 125.150(1)(b); NRS 111.065(2); *McKissick*, *supra*; *see Gladys Baker Olsen Family Trust v. District Court*, 110 Nev. 548, 874 P.2d 778 (1994) (all persons materially interested in the subject matter of the suit must be made parties so that there is a complete decree to bind them all. If the interest of

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[23] Without reference to any documentation of any kind, Susan repeatedly refers to this long-past payment in the form "the parties invested." *See*, *e.g.*, RAB at 6.

[24] *McKissick v. McKissick*, 93 Nev. 139, 560 P.2d 1366 (1977); *Edmonds v. Perry*, 62 Nev. 41, 140 P.2d 566 (1943); NRS 111.065(2).

[25] As noted, Susan's counsel took unfair advantage, and slipped into the written order a provision that the lower court judge had specifically refused, but apparently did not notice had reappeared in Mr. Minagil's written order. *See* AOB at x-xi & n.10; AOB at 22.

[26] None of the conversations in question were even with the person who owned the land.

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absent parties may be affected or bound by the decree, they must be brought before the court or it will not proceed to decree").

The remaining question is what to do with the $300.00 that James admitted spending, fifteen years before the divorce, to put the trees on his father's land. The *Opening Brief* suggested that such a far past, *de minimus* expenditure, which the person making it claimed was a gift, should be conclusively presumed a gift. AOB at 18-22. Susan, as with all other issues she does not want this Court to address, has completely ignored the discussion.

It is submitted that Susan's complaint in the divorce about James' long-past small expense to improve his father's land is exactly the sort of "retrospective accounting of expenditures" that this Court has cautioned "are not and should not be relevant to community property allocation and do not present 'compelling reasons' for an unequal disposition." *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997). Susan has suggested no authority at all authorizing any other result, she just wants this Court to not consider the question and rubber-stamp the creation of an encumbrance on property belonging to a third party upon the non-sequitur that the lower court "weighed the evidence." RAB 29.

Susan has provided no authority that could support the order below relating to the tree farm on James' father's land. It should be reversed.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO EQUALLY DIVIDE THE DISCOVER CARD DEBT

The parties are in agreement that: when the parties separated, there was a significant outstanding balance on what had been their joint Discover card; James serviced the debt throughout the separation leading up to the divorce; and in the three years that passed until entry of the *Decree*, both parties incurred further debts and were ordered to pay those ***post***-separation debts (although the district court ultimately handed Susan all remaining equity from the parties' former marital home to pay off her debts, giving James nothing in return). AOB at xx-xxi, 22-24; RAB at 30-32.

The dispute lies in defining the duty of the lower court to deal with the ***pre***-separation balance on the card, that James alone serviced during the years of separation. The *Opening Brief* argued that

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because the lower court made no findings of any specific compelling reasons to unequally divide the debt, the court was required to divide it equally. *See Wolff*, *supra*; AOB at 23-24.

Susan, again, fails to address the authority cited in the *Opening Brief*. Instead, she again claims that the lower court can make decisions where the evidence is conflicting. RAB at 31. She does not identify any "conflicting evidence," because there ***wasn't*** any. The parties are in agreement as to the facts; the issue is one of law.

No specific findings were made by the lower court that would support giving Susan all of the parties' pre-separation property, while handing James all of their pre-separation debt, in violation of the statutory mandate that a court intending to do so "[set] forth in writing the reasons for making the unequal disposition." NRS 125.150(1)(b). The obvious purpose of the statutory provision is to permit appellate review, and where a lower court fails to make written findings, it fails to provide a basis on which such an unequal disposition of property and debts can be made.[27]

That error, alone, warrants reversal of the order denying an equal distribution of the debt existing on the date of the parties' separation, but a couple of issues relating to appellate procedure and public policy arguably raised by the *Answering Brief* deserve some comment.

Susan makes claims regarding James' alleged "superior financial position," as if there was such a finding in the order at issue. RAB at 31. There is no such finding, as noted above, and the portion of the appendix to which Susan cites is only her own attorney's unsupported allegation in a lower court filing. II App. 109.

That raises two matters. First, as noted in the Statement of Facts above, it is improper for a litigant to imply the existence of "evidence" in the record below by pointing to only that own person's unsupported allegations in the lower court, because such allegations are not "evidence" of anything. ***Saying*** that there are "compelling reasons" for something does not ***create*** the compelling

[27] James has not raised in this appeal the issue of the unequal disposition of property (Susan got virtually everything the parties had ever had while together), although the fact of it can and should be noted by this Court in its disposition. As to property matters, he has only raised as issues the triple-dip as to the business valuation and distribution, and this one unequal debt division.

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reasons; this Court has made it clear that mere recital of a mantra is neither evidence nor adequate to sustain a party's burden.[28]

Second, we return to the matters gone over in the Introduction to the Argument on pages one through two of this *Reply Brief* – this Court should not have to comb the record to try to come up with some evidence that might support a respondent's version of the facts, and facts supporting findings may not be implied. *Trident Construction v. West Electric*, 105 Nev. 423, 428, 776 P.2d 1239 (1989); *Pease v. Taylor*, 86 Nev. 195, 467 P.2d 109 (1970); *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994); *Pandelis Constr. Co. v. Jones-Viking Assoc.*, 103 Nev. 129, 734 P.2d 1236 (1978); *Summa Corp. v. Brooks Rent-A-Car*, 95 Nev. 779, 602 P.2d 192 (1979); *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 125, 676 P.2d 1318 (1984).

Deleting Susan's citations of her own attorney's arguments, unsubstantiated conclusions, and irrelevant references to the standards for reviewing non-existent "conflicting evidence" leaves nothing at all in defense of the order below. Adequate findings to support departing from the statutory mandate of equal division of debt are neither provided by Susan nor to be implied. The lower court's order refusing to divide the debt accrued by these parties as of their date of separation should be reversed and remanded for entry of an order dividing that debt equally.

VII. THE DISTRICT COURT ERRED IN AWARDING SUSAN AN EXTRA $50,000.00 AFTER THE DIVORCE TRIAL

In her analysis of the final issue, Susan continues the pattern followed regarding all of the other issues – she completely ignores the substantive law concerning the subject, in favor of trying to persuade this Court to not address the merits under the rubric of "substantial evidence." As with the other matters, however, the lower court's order is legally indefensible, and must be reversed.

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[28] In the child custody cases, this Court has made it clear that a court cannot merely state that there are "changed circumstances," without stating what the change ***was***, and that an order stating only the conclusion is insufficient as a matter of law and constituted reversible error. *See*, *e.g.*, *Moser v. Moser*, 108 Nev. 572, 836 P.2d 63 (1992). There seems no greater logical reason to rubberstamp an unspecified "compelling reason" than there is to rubberstamp an unspecified "changed circumstance."

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The issue concerns sums received and deposited by James after the divorce trial, which he borrowed against to buy a home. ***All*** of the evidence in the record proves that the sums ***did not exist*** on the date of the divorce trial,[29] but Susan restates for this Court her allegation below that the money was a "fraudulently omitted asset" that James "did not disclose" at that trial. RAB 32-33. With all due respect to Mr. Minagil's forensic skills, the basic laws of temporal mechanics show that sums not yet received as of the date of a trial could neither be disclosed, nor hidden, at that trial.

There are three actual legal issues presented by the order regarding the $50,000.00, and while Susan studiously ignores them, they are recounted below because the proper disposition of the appeal requires that they be addressed.

A. The $1 Store had already been valued and divided at trial, and Susan was not entitled to "double dip"

Actually, since Susan had already been awarded half the value of the business that owned the Schwab account at trial, and then got half the balance ***in*** that account on ***top*** of that award, the award made by the visiting judge was a "triple dip" rather than a "double dip."

In any event, it was error, for the same reason that the additional award of half the Schwab account (discussed above as issue IV) was error. Susan had already ***received*** her half value of the business that owned the account, Dr. Clauretie had already accounted for the cash flowing through the Schwab account when he valued the business,[30] and it was simply no one else's business ***what*** James did with the business or its accounts from that day forward.

Susan's refusal to address this issue merits reversal as a confession of error, but it would be preferable for reversal to be based on the facts and logic, to provide better guidance in any future proceedings.

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[29] II App. 16-74, 1-15.

[30] Dr. Clauretie reviewed records showing hundreds of thousands of dollars flowing through the business Schwab and Wells Fargo accounts. TT at 227, 229, 230, 245-246. These are the same accounts that Susan argues were "omitted." All parties acknowledged and discussed that the business was in operation, that the accounts were open, and that deposits would continue to be made – it was the expectation that James would continue working the business that provided the basis for the excessive alimony award discussed above.

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B. The money in the $1 Store business accounts was advance deposits that were not James' property when received and deposited

We return to another matter addressed above – the unrefuted evidence (and Susan's personal knowledge) that the money received by James was for deposits against future expenses and business, not compensation for work previously performed. *See* discussion at pages 12-13, *supra*. Susan attempts a half-hearted opposition on this issue (without identifying the issue), however, and her points deserve further scrutiny. *See* RAB at 33-34.

First is what is ***not*** present in the *Answering Brief* – there is no citation of any page of the record showing either testimony or any documentary evidence that the deposits in question were anything other than what James said they were.

Next, as to what ***is*** in the *Answering Brief* – the same innuendo presented below, intended to cause this Court to transfer James' property to Susan without any legal basis. She asserts that when James borrowed money from the business accounts to purchase a house after the divorce trial, he somehow transmuted the money from advance deposits to his personal property; she further asserts that – somehow – that entitled her to a claim on the money.[31] RAB at 33.

Borrowing against those deposits was a somewhat ***risky*** thing for James to do – if he had not managed to replace that money by the time he had to buy merchandise for his customers or pay to build stores for them, etc., he would have been forced to go out and borrow other money commercially for that purpose. But there was nothing illegal or illicit about it.

James is not a lawyer, and he has none of the restrictions placed on attorneys governing the handling of lawyer "trust" accounts. He can borrow against the money in his possession, commingle it with other funds, earn interest on deposits, etc., at will – the only limit he has is that he had better

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[31] Susan has attempted to repeat here some of the sleight-of-hand used to create confusion and uncertainty below – such as referencing James' accounting methods from years earlier (when he was cash-based) – without revealing the year in question – to imply some impropriety years later (when he was accrual-based). *See* RAB at 33, lines 25-28. This particular matter is addressed above, and an exhaustive list of attempted misrepresentations by omission and commission would detract from the logical flow of the discussion of the actual legal issue. Accordingly, other than to note that there are multiple such attempts in the pages of the *Answering Brief* in question, they are disregarded in this section of the *Reply Brief*.

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be able to produce the necessary money on the date he contractually obligates himself to use it. If he fails to do so, the people that gave him the money for future specific uses could sue him.

There is ***nothing*** about any part of those transactions that either did, or could, give Susan any kind of property interest in the accounts belonging to James' business after the date that the business was valued and Susan was paid her half interest ***in*** the business.

As with the other issues discussed above, there is no matter of "conflicting evidence" or "credibility" or any related doctrine. ***All*** the evidence established that the sums in question were advance deposits against future work, received by James ***after*** the divorce trial, and the order giving Susan $50,000.00 because James "used" his business accounts after the divorce trial was clearly erroneous on its face and should be reversed.

C. For valuation purposes, the divorce ended at the close of evidence at the divorce trial

It is actually something of a shame, but the one interesting and novel legal issue presented by this case is completely disregarded by Susan, depriving this Court of any insights that her counsel might have had on the subject. Pages 29 through 34 of the *Opening Brief* contend that the divorce case ended, for valuation and other property issues, as of the date of the divorce trial which resulted in distribution of those assets. Susan's failure to address the issue, contentions, and citations, in any way at all, constitutes a confession of error and merits entry of judgment on that ground alone. *See Hewitt v. State*, *supra*, 113 Nev. 387, 936 P.2d 330 (1997).

Again, however, while we urge reversal, we would prefer it to be on the basis of the substantive arguments submitted. Susan should not be allowed an opportunity to take advantage of her own attorney's delay in filing orders to "find" as additional property the money earned by her ex-husband as he continued to work after the trial. A good deal of mischief at the trial court level could be averted by this Court's issuance of an opinion eliminating the incentive for such delay on the part of counsel for spouses who are ***not*** working, by holding that they cannot, after such a delay, file further motions hoping to grab more of the post-trial earnings of the spouse who ***is*** working.

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If for no other reason than that "equity considers as done that which ought to be done,"[32] this Court should take this opportunity to enunciate a clear rule stating that when a divorce court closes the evidence and takes a case under advisement, the continuing income of parties who continue employment between the trial and formal entry of judgment is not "community property" to be adjudicated by means of any post-divorce motion claiming that the income is "omitted." *See* AOB at 32 & nn.99-100. That ruling, made previously by this Court only by way of unpublished order,[33] should be explicitly stated in a published opinion for the guidance of the bench and Bar, and the prevention of additional cases like this one.

[32] *Milender v. Marcum*, 110 Nev. 972, 879 P.2d 748 (1994).

[33] There are some published holdings to the same effect, but they provide insufficient guidance to prevent the sort of error at issue here. For example, in *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996), this Court noted the "effective date" of the parties' divorce as being the date they executed a property settlement agreement, although it omitted and the parties litigated the primary marital asset (the PERS pension) for about another year, after which the trial court entered findings, conclusions, and a judgment. The valuation date remained the "effective date" during the later proceedings.

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CONCLUSION

No significant questions of "substantial evidence," "credibility," or "conflicting evidence" are presented by this appeal; the question is whether factual findings, and the judgments resting on those findings, can be allowed to stand in the absence of any competent evidence at all.

In determining the degree to which the record should be scrutinized, this Court not only "may," but ***should*** consider the fact that prior counsel for James was too dysfunctional to be permitted to practice law when this case was being prepared and tried, so that this domestic relations case is decided on its merits.

The "findings" made up by Susan's counsel to support the award of lifetime alimony are either false, misleading, or unsupported by the record in the case. The historical income of the parties would not permit the size of the monthly award made, and a lifetime award of alimony payments to a healthy, young spouse who was only briefly out of full-time work was an arbitrary or uncontrolled abuse of the lower court's discretion to set a sum of alimony that was just and equitable. The alimony order should be reversed, and remanded if necessary, for entry of an alimony sum and duration merited by the facts of the case.

The valuation of the business that James started after the parties separated was made on the basis of an assumption by the expert witness that was contrary to ***all*** of the evidence in the trial record. Accordingly, the valuation was not within the range of possible values demonstrated by competent evidence. The order based on that valuation should be reversed and remanded for entry of an order in accordance with the value actually derived by application of the expert witness' methodology to numbers not including the sums added in error.

If any award to Susan out of the Schwab account had been proper, the lower court would have been limited to an award within the range of values for what existed in that account at the time of divorce. This issue need not be reached, however. The award to Susan of half of the Schwab account, in addition to her award of half the value of the company that owned that account, was an impermissible "double dip," which should be reversed.

There is no evidence in the record that ***either*** party ever had an interest in the land owned by James' father, or the trees ***on*** the land owned by James' father. In the absence of an interest in the

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property, there was nothing within the jurisdiction of the trial court to award. A *de minimus* expenditure of funds many years prior to a divorce is not susceptible to a retrospective accounting upon divorce in an effort to derive property interests where there is no documentation of any such interest. The order awarding Susan any portion of any interest in the property belonging to James' father should be reversed as a legal nullity.

The debts existing on the date of separation should have been split between the parties equally, and the trial court's failure to do so without setting forth written findings of "compelling circumstances" for that failure mandate reversal of that order.

There can be no "fraud" or finding that property not yet existing on the date of a trial was "omitted" from that trial. Since Susan was fully compensated for her interest in James' business, she was not entitled to any share of any sums received by that business after the business was valued and distributed at trial, and ***all*** of the evidence was that the deposits made after trial were for future work not yet performed; James' borrowing of funds from those deposits did not alter their character, or create any kind of property right of Susan. The post-trial award to Susan of yet another $50,000 out of money deposited into the business Schwab account was unsupported by any law, constituted a "triple dip" into the value of the business for which Susan had already been fully compensated, and should be reversed.

Each of the referenced orders should be reversed. There are two orders for which some further order is appropriate. As to the business valuation, this Court should either direct entry of the number as calculated by Mr. Ayers, or remand for purpose of having the district court reset the business value without the erroneous inclusion of the advance deposits as "revenue." As for the alimony order, this Court should either remand with directions to enter an order in accordance with this Court's determination of an appropriate sum and length of time, or remand for the district court to do so after further proceedings.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this _____ day of _____, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of THE LAW OFFICE OF MARSHAL S. WILLICK, P.C., and on the _____ day of _____, 2002, I deposited in the United States Mails, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the **APPELLANT'S REPLY BRIEF**, addressed to:

Stephen R. Minagil, Esquire.
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That there is regular communication between the place of mailing and the places so addressed.

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An Employee of the Law Office of
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