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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of PETER JAMES GREGORA and HYDEE ROSE FELDSTEIN.	B269587
PETER JAMES GREGORA, Respondent, v. HYDEE ROSE FELDSTEIN, Appellant.	(Los Angeles County Super. Ct. No. BD576096)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Juhus, Judge. Affirmed.

The Rudd Law Firm, Christopher L. Rudd for Appellant.

Wasser Cooperman & Mandles, Dennis M. Wasser and John A. Foley; Grienes, Martin, Stein & Richland, Robert A. Olson and Marc J. Poster for Respondent.

This matter involves a contentious divorce between Peter James Gregora and Hydee Rose Feldstein, two successful attorneys who amassed considerable assets during their approximately 26-year marriage. Hydee[1] appeals from the judgment, contending the trial court unfairly distributed the marital assets and improperly imposed a $250,000 sanction against her. We affirm the judgment.

FACTS

Hydee and Peter were married on February 22, 1986, and have an adult child together. Peter and Hydee are both attorneys. Peter was a tax partner at Irell & Manella from July 1, 1977, until November 30, 2008, when he retired. At the time of trial, Peter was a partner emeritus at Irell & Manella, where he worked part-time and was compensated on an hourly basis. Hydee worked at Irell & Manella as a bankruptcy and litigation associate from 1982 to 1984. She then worked at a number of firms, including at Paul Hastings Janofsky & Walker from 1996 to 2006, where she was the head of the Los Angeles office's corporate department for three years. She then became a partner at Sullivan & Cromwell from January 1, 2007 until April 16, 2012, when she retired. During her time at Sullivan & Cromwell, Hydee earned more than $21 million. Peter's and Hydee's tax returns showed gross marital income of more than $54 million during their marriage.

Hydee and Peter separated on December 31, 2012, and dissolution proceedings were initiated by Peter. Hydee alleged Peter breached his fiduciary duty to her by diverting and

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[1] We refer to the parties by their first names, as is typical in marital dissolution matters. No disrespect is intended by this practice.

concealing millions of dollars of marital assets. Trial consumed nine court days, most of it focused on Hydee's claim against Peter. The trial court announced its ruling from the bench, finding Hydee had failed to prove Peter breached his fiduciary duties. It exhaustively discussed the trial exhibits which Hydee claimed would prove Peter's concealment and diversion of marital assets, and found no evidence of misappropriation.

The trial court found "the vast significant dollars ran through [Hydee's] checking account" since her Sullivan & Cromwell salary, which accounted for 39 percent of their total marital income, was directly deposited into her checking account. The trial court also found "they both have equal control of the community property."

The trial court criticized both parties' attempts to reconstruct the finances of the marriage. In particular, it faulted Peter for merely subtracting the remaining assets from their total marital income to arrive at their living expenses over the course of their marriage. It also took issue with Hydee's conclusion that Peter must have stolen from the community because the assets remaining after she subtracted conservatively estimated living expenses from their income were not as substantial as she assumed. The trial court concluded, "coming into court and saying there should be more isn't going to carry the day."

Peter prepared a proposed statement of decision based on the trial court's remarks, which was signed by the trial court with only one minor change. Hydee moved for a new trial, which was denied. Judgment was entered and Hydee appealed.

A subsequent judgment was entered which awarded Peter $250,000 in Family Code section 271 sanctions.[2] Hydee also appealed from that judgment.

DISCUSSION

Hydee challenges the trial court's distribution of their community property, contending it improperly relied on a post-trial exhibit which had not been admitted into evidence and "handed its gavel" to Peter when it signed Peter's proposed judgment with only one minor change. Hydee also challenges the $250,000 sanctions issued against her under section 271 and the trial court's findings regarding her breach of fiduciary duty claim against Peter.

What Hydee attempts on appeal is merely to reargue the "facts" as she sees them, an argumentative presentation that disregards the admonition that she is not to "merely reassert [her] position at . . . trial." (*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 687; accord, *Albaugh v. Mt. Shasta Power Corp*. (1937) 9 Cal.2d 751, 773.) This "factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to [her] at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399 (*Hasson*).)

I. Exhibit 78 And Its Progeny

A. Underlying Proceedings

Exhibit 78 was a balance sheet prepared by Peter's forensic accountant, Joseph Sweeney, with a proposed division of assets. Exhibit 78 set forth each marital asset, noting whether it was

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[2] All further section references are to the Family Code unless otherwise specified.

community or separate property, and gave an assigned value as of a listed date. Certain assets, such as wine and jewelry, were listed, but not assigned a value. These assets were to be divided according to a stipulation between the parties. The exhibit also identified reimbursement claims made by the parties and, at the end, set forth an equalizing payment for each party to account for those assets which were not divided equally. The majority of the assets were divided equally between the parties. Exhibit 78 was admitted into evidence at trial and Sweeney testified extensively about it.

Hydee conducted Sweeney's cross-examination herself. She noted this was the third time they spoke about the exhibits prepared by Sweeney, including Exhibit 78. She then exhaustively questioned him about the documents he relied upon to prepare the exhibit as well as his method of valuation for the assets listed. For example, she questioned him about a note receivable from Hydee's parents which Sweeney valued at $104,000. She questioned whether that valuation was correct since it was not expected to be paid back until the death of the surviving parent occurred. As a result, the "present" market value of the note would be less than $104,000 to account for the time to maturity. She also challenged whether he conducted a fair market analysis on the partnership interests listed in Exhibit 78.

During Sweeney's direct testimony, the trial court made several suggestions about Exhibit 78, including that the valuations for items to which the parties had stipulated and which were not in dispute be deleted. It suggested allocating each life insurance policy to the insured and then providing an equalizing sum for the balance rather than allocating half of each

policy to each party. Sweeney's office made those changes to Exhibit 78 during the lunch break and presented it as Exhibit 78-A during redirect examination. Sweeney explained the changes made: his office deleted the value to assets which were subject to stipulation, allocated the cash surrender value of the life insurance policies to the insured, allocated the retirement plans to the person whose name the retirement plan is in, and deleted the line item for the wine and cash on hand since they were subject to stipulation.

Hydee's counsel subsequently noted as to Exhibit 78-A, "[t]o the extent that Mr. Sweeney has created a new table, which we've already seen some issues with, we're going to need him back." The trial court responded, "Then you know what, I'll tell you what. I will take out of evidence 78-A. I'm sorry I asked him to do it. He did it at my request. I'm not going to do that. I asked him to do something. I will ignore it, and we'll—78-A is no longer in evidence. We're done. That's fine. Not a problem."

After trial, Peter filed a proposed statement of decision with citations to the record, including testimony and trial exhibits. Thereafter, Exhibit 78 was updated and identified as "Gregora Community Balance Sheet Per Court Final 09-2015" (Post-Trial 78). According to Peter, Post-Trial 78 reflected all of the trial court's rulings, including assigning the life insurance policies to the insured rather than dividing it in kind. It also reflected the parties' stipulation regarding the division of certain property. In addition, the values of the assets listed in Post-Trial 78 were updated as required under section 2552, subdivision (a).[3] For example, many stock and bond account values were updated

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[3] Section 2552, subdivision (a) requires the parties "value the assets and liabilities as near as practicable to the time of trial."

to reflect their value as of the month of the trial. For most assets, their values remained relatively unchanged. However, the joint Vanguard account showed a decline in value of almost $1 million, from $3.2 million in March 2015 to $2.3 million, reflecting a court-ordered distribution. These and other changes altered the total value of the assets from approximately $17 million to $12 million. In addition, certain accounts were allocated to the party in whose name the account was held, causing the equalizing payment calculated by Sweeney to change in Peter's favor.

Hydee filed a "Corrections to Community Property Balance Sheet." This filing addressed Post-Trial 78. In it, Hydee submitted a declaration of an accounting expert, James Burke, which identified how Post-Trial 78 was "demonstrably wrong in a number of material respects." Among other things, Burke stated that some stock accounts which were allocated to Hydee because they were held in her name alone in Post-Trial 78 were actually closed accounts, the balances of which were deposited into joint accounts. Thus, he contended these assets were double counted to Hydee's detriment.

This declaration formed a basis for Hydee's new trial motion. In denying the motion, the trial court noted it "read and considered the papers filed by all parties as well as the oral argument in open court. While the Court read the submitted declaration by Mr. James A Burke, the Court did not put much emphasis on it. It appears from the pleadings that Mr. Burke's declaration is in many ways not based in solid, supportable evidence . . . ." The trial court determined, "Much of the respondent's argument [in the new trial motion] was no more than a disagreement with the court's ruling. Further, the Court believes that the evidence supported the findings and rulings,

that the Court could make the findings and rulings that it did based on the law and the evidence, and there were no procedural or legal errors in the trial."

B. Analysis

1. Alleged Inappropriate Use of Exhibit 78-A and Post Trial 78

Hydee asserts the trial court used Exhibit 78-A and Post-Trial 78 in issuing its findings despite never having admitted either exhibit into evidence. Thus, neither Exhibit 78-A nor Post-Trial 78 constitute substantial evidence upon which the trial court could have based any decision. We disagree.

In a bench trial, the court is presumed to have considered only admissible evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606.) The record supports that presumption here and Hydee has failed to rebut it.

It is undisputed Exhibit 78 was admitted into trial and Hydee does not challenge its admission on appeal. The record shows that Exhibit 78-A and Post-Trial 78 merely reflect the trial court's rulings, the parties' stipulations, and the changed values of the assets contained in Exhibit 78. Exhibit 78-A was created during the lunch break as a result of comments made by the trial court during Sweeney's testimony. Moreover, Post-Trial 78, dated September 14, 2015, came after the trial court signed the statement of decision on September 9, 2015. Hydee does not dispute that Post-Trial 78 reflects the trial court's rulings. Thus, it is not the case that the trial court improperly construed Exhibit 78-A and Post-Trial 78 to be evidence when they were not admitted into evidence. In fact, the opposite appears to be true: Exhibit 78-A and Post-Trial 78 reflect the trial court's rulings and

Hydee's challenge to them is merely a challenge to the trial court's findings.

Moreover, Hydee was provided ample opportunity to, and did, dissect and dispute what she considered to be errors contained in Post-Trial 78. Hydee admits the trial court accepted Peter's proposed statement of decision and the resulting judgment, which includes Post-Trial 78, "[o]ver [Hydee's] objections and corrections . . . all of which Hydee raised or attempted to raise during the course of the trial and in post-trial litigation." In ruling on Hydee's objections to the judgment and new trial motion, the trial court merely disbelieved the expert declaration submitted by Hydee about Post-Trial 78 because it was "not based in solid, supportable evidence . . ." For this reason, we dispense with Hydee's argument that the trial court erred in relying on exhibits not in evidence.

2. Sufficiency of the Evidence

Hydee argues there was insufficient evidence to support the trial court's findings, as they are reflected in Post-Trial 78.[4] Again, we disagree.

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[4] We need not address Hydee's challenges to Exhibit 78-A because they are mostly repetitive of her criticisms to Post-Trial 78.

Further, Hydee's statement of facts is riddled with argument about the evidence, most of it duplicative and one-sided. Thus, Hydee fails to present a "thorough and accurate statement of facts." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290 (*Western Aggregates*).)

To compound the problem, Hydee fails to include these evidentiary challenges in the relevant subsection. Instead, Hydee merely cites to portions of the statement of facts in support of her argument, i.e., "See Chart supra" and "As

Our review is for substantial evidence. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 (*Bickel*); *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Under those well-known principles, "'"the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . .' [Citation.]" (*Bickel, supra*, at p. 1053.)

We first address Hydee's "chart" shown on page 9 of her opening brief. Hydee takes issue with the division of Chase bank account number 7060 (Chase 7060). She contends there was "[n]o evidence to support allocation of [separate property] to [Peter]" as to that account. However, the chart shows this account was consistently allocated to Peter as his separate property in Exhibit 78, Exhibit 78-A, and Post-Trial 78. It does not appear Hydee objected to the allocation of this account at trial, thus forfeiting the issue. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184-185 (*Doers*); *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591.)

Further, Exhibit 78 explains that Chase 7060 was used by Peter and "contains community property funds withdrawn from other community property accounts. The funds withdrawn by

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discussed above in Statement of Facts (D)(2), the court thereby swept in values from Post-Trial 78, which was never in evidence." It is not this court's obligation to scour Hydee's 24-page statement of facts or 20-age reply brief to unearth substantial evidence issues related to the trial court's findings. As a result, we only address those issues contained in the referenced chart and addressed in section (D)(2) of her opening brief.

[Peter] which were deposited into Chase account #7060 have been charged to him as part of the post-separation accounting (Reimbursement Claims). Therefore, the funds in this account are his separate property, except for $95,294 which represents the balance of community property funds in the account as of July 22, 2013, when [Peter] took control of this account." Substantial evidence supports the trial court's allocation of Chase 7060 to Peter. We note that Hydee's contention has nothing to do with whether the trial court took Exhibit 78-A or Post-Trial 78 into account in reaching its decision, but everything to do with Hydee's disagreement with the trial court's ruling, to which she failed to object at trial.

Second, Hydee challenges the award of a Citibank account to Peter on the ground that "Sweeney awarded as [separate property] 'based on who had control of account' rather than on tracing." There is no indication Hydee objected to this allocation on this ground at trial, forfeiting the issue. (*Doers*, *supra,* 23 Cal.3d at pp. 184-185.) Further, this is actually a dispute with the trial court's ruling rather than a true dispute over the use of Exhibit 78-A or Post-Trial 78, neither of which differed from Exhibit 78's treatment of this account.

Third, Hydee takes issue with a $34,078 Merrill Lynch retirement account (ML 2265) in her name which was valued as of February 28, 2013, and divided 50/50 in Exhibit 78. In Post-Trial 78, the account was allocated to Hydee as separate property with a value of $35,487 as of March 28, 2013. Hydee complains ML 2265 was closed "as of trial" so there was no basis to allocate the account to her. Beyond this bald statement, however, Hydee fails to cite to any trial evidence showing the account was closed at that time. Instead, Burke stated in his post-trial declaration

that he "was informed" by Hydee that the account was closed. That is hearsay and inadmissible even if it had been timely presented at trial. (Evid. Code, § 1200.) We agree with the trial court, which correctly wondered, "Post-trial, how do I take into account a declaration which is clearly hearsay from an expert that – with a bunch of documents that are without foundation?"

Further, Hydee attempts to reverse the burden of proof on appeal and contends Peter fails to cite to any evidence "to support the amount in the judgment for Merrill Lynch #2265 because he cannot do so." It is not Peter's burden to prove the account value on appeal. Hydee's own chart shows that ML 2265 was a line item in Exhibit 78; Exhibit 78 was admitted into evidence, properly considered by the trial court, testified to by an expert, and both alone and with its supporting documents constitute substantial evidence of the account value.

We likewise reject Hydee's contention that three other closed accounts were improperly allocated to her, resulting in a double counting of the assets to her detriment. These accounts – City National Bank #5851, Union Bank #7834, and Farmers & Merchants #2544 - were all in her name and were listed in Exhibit 78. Hydee made no objection to the allocation of these accounts and offered no conflicting evidence at trial to demonstrate the alleged "double counting." "At the risk of sounding like a broken record, we again cite the general [forfeiture] rule . . ." (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)

Even were we to consider these challenges, they are not supported by the record. Exhibit 78 noted that Farmers & Merchants #2544 (a joint account) had been closed and the proceeds deposited in Chase #1928 (Hydee's separate account).

As a result, the balance sheet properly charged Hydee with withdrawal of these community assets.

As to the other two accounts, Hydee relies on Burke's post-trial declaration in support of the "Corrections to Community Property Balance Sheet." In that declaration, Burke stated the accounts were closed and the balances deposited in other accounts. While Burke provided a deposit slip showing a transfer of $250,000 from City National Bank to J.P. Morgan #1928, the deposit slip is dated January 2015. Trial was held in June 2015. There is no indication, and Hydee has failed to make any showing, that this deposit slip was admitted into evidence at trial. Burke also noted that Hydee was "still searching" for copies of the other deposits.

As discussed above, Burke's declaration is not evidence. On the other hand, Exhibit 78 and its supporting documents are evidence and sufficiently support the trial court's ruling. There is no basis to disrupt the trial court's ruling on these "closed" accounts.

We also reject Hydee's implication that the parties somehow "agreed" the accounts had zero balances. The reporter's transcript on which Hydee relies shows the parties advised the trial court they agreed to exchange updated bank statements by July 10, 2015. Hydee then informed the court that the City National, Union Bank, and Farmers and Merchants were all closed during the course of the proceedings. When the trial court replied "so the accounts are now resolved," it is unclear whether he referred to those three accounts specifically or to the agreement to provide updated statements on all accounts. In any case, there was no stipulation on record that the accounts were closed. While Hydee acknowledges they were closed "during the

course of the proceedings," there was no evidence presented at trial as to the status of the accounts. It is also unclear whether Hydee provided updated statements showing the closed accounts on July 10, 2015. In short, the record does not support Hydee's contention the parties stipulated to the accounts' closure.

Fourth, Hydee takes issue with a category of funds entitled "Remaining Division of Liquid Assets" on the ground there was "no evidence to support the change from 78 to 78A to Post-trial 78." We find the challenge meritless. The facts here show that in Exhibit 78, line item 108 identified "Remaining Division of Liquid Assets – pursuant to Court order dated February 27, 2015" as a $710,043 disbursement to each party per court order. In Post-trial 78, that line item was removed, along with other assets which were subject to distribution by stipulation. Even assuming there was some error in removing that item from the list, Hydee makes no showing of prejudice—that is, how identical amounts charged to both parties affect the ultimate division of assets to her detriment. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 (*McLaughlin*) [appellant must demonstrate prejudice resulting from error].)

Fifth, Hydee asserts "there is no explanation for the reduction of [Peter's] equalizing payment in Post-trial 78." We disagree. The answer is contained in the statement of decision, which sets forth the trial court's findings and allocation of assets, as well as the parties' stipulation. Again, it is Hydee's burden to show prejudice resulting from an error. (*McLaughlin, supra,* 82 Cal.App.4th at p. 337.) Hydee has failed to prove a computational error or any other error, as discussed above.

Hydee argues Post-Trial 78 worsened her allocation by "selectively 'updating' certain accounts to June 30, 2015 such as

Chase Account No. 2003—increasing [Peter's] 'allocation' from that account—but not doing so for others allocated exclusively to [Hydee's] where the balance had declined such as Chase Account No. 1695—with the balance stated as of July 31, 2014, or more than a year before Post-trial 78 was submitted. Then, to add insult to injury, [Peter]/Sweeney not only failed to remove the closed zero balance accounts from Post-trial 78 as agreed in court on the record on June 30, 2015 but actually increased the value of one of the closed accounts allocated to [Hydee]."

We have addressed the issue of the "closed" accounts above, and have nothing more to add here.

As to Chase Account No. 1695, it was listed as a savings account in Hydee's sole name in Exhibit 78 with a value as of July 31, 2014. Trial began almost a year later in June 2015. There is no indication Hydee objected to the valuation of the account at that time. We are compelled again to state that any error is therefore forfeited. (*In re Aaron B.*, *supra*, 46 Cal.4th at p. 846.) We add only that Burke's post-trial declaration fails to mention Chase Account No. 1695.

To the extent Hydee argues it was improper for the value of the assets to be adjusted at all, we disagree. Section 2552 requires the court to assess the asset values as close to the trial date as possible. Hydee's reliance on *In re Marriage of Hahn* (1990) 224 Cal.App.3d 1236 and *In re Marriage of Johnson* (1983) 143 Cal.App.3d 57, 61 for the proposition that Peter was required to bring a motion for reconsideration of value is unpersuasive. Neither of these cases contradict section 2552's requirement, but merely set forth specific circumstances, not applicable here, in which the value of an asset may be adjusted after trial.

II. Unequal Distribution of Community Property

Hydee next claims the trial court substituted Peter's judgment for its own when it signed the proposed statement of decision, resulting in an unequal distribution of community property. As a result, Hydee accuses the trial court of abdicating its role as the trier of fact, arguing, "[t]he trial court very obviously treated Sweeney as though he were a neutral expert while rebuffing any efforts by [Hydee]." As discussed above, Hydee has failed to prove any error in the allocation of the community property by the trial court.

Hydee further contends "[t]he trial court adopted wholesale [Peter's] proposed 24-page statement of decision (with only one change) and [Peter's] proposed judgment (simply interlineating out the ascribed value on certain investments and dividing them 50/50)." We are not persuaded.

The record belies these assertions. The reporter's transcript shows clearly the trial court made detailed rulings regarding the division of assets, rejecting certain of Peter's arguments and accepting others. For example, Peter claimed a $150,000 inheritance from his mother as separate property. The trial court found the money was deposited in a community account and its separate property status could not be traced. The trial court further disallowed Peter's claim for reimbursement of Irell & Manella retirement payments received by him post-separation and for certain cash gifts made by Hydee to her relatives. We see no error.

Having made its ruling, "[t]he trial court had no duty to prepare its own statement of decision." (*Western Aggregates, supra,* 101 Cal.App.4th at p. 310.) It is common practice for a

party to be tasked with preparing a statement of decision. (*Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 129, fn. 5.)

With one exception, Hydee does not contend the final judgment failed to conform to the trial court's rulings. Hydee only argues the judgment is incorrect because the trial court "made no affirmative finding that 'no community assets have been misappropriated or concealed, all community assets were disclosed, and [Peter] has not breached his fiduciary duties toward Respondent [Hydee].'" The reporter's transcript shows, however, the trial court stated, "I don't find that Mr. Gregora breached his fiduciary duty in any way . . . I think that he provided a full disclosure of all information upon request as required under the law."

III. Family Code Sanctions

Hydee also challenges the trial court's imposition of a $250,000 sanction against her, made pursuant to section 271. Hydee contends the trial court levied sanctions against her to punish her for losing and not due to any obstreperous conduct on her part. Again, the record belies this assertion.

A. Applicable Law

Section 271, subdivision (a) provides:

"Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the

parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

Section 271 "'authorizes sanctions to advance the policy of promoting settlement of litigation and encouraging cooperation of the litigants' and 'does not require any actual injury.' [Citation.] Litigants who flout that policy by engaging in conduct that increases litigation costs are subject to imposition of attorney fees and costs as a section 271 sanction." (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225.) Some courts have authorized attorney's fees and costs as a penalty for obstreperous conduct. (*See Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1520; *In re Marriage of Freeman* (2005) 132 Cal.App.4th 1, 6.)

"The imposition of sanctions under section 271 is committed to the sound discretion of the trial court. The trial court's order will be upheld on appeal unless the reviewing court, 'considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order.'" (*In re E.M.* (2014) 228 Cal.App.4th 828, 850; *In re Marriage of Corona, supra*, 172 Cal.App.4th at pp. 1225-1226.) It is not the function of the reviewing court to decide questions of fact or credibility. (*In re E.M., supra,* at p. 851.) Instead, we review any findings of fact that formed the basis for the award of sanctions under a

substantial evidence standard of review. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1479.)

B. Proceedings Below

After trial, Peter moved for $2 million in attorney's fees and costs under section 271. In support of his motion, Peter's trial counsel, Dennis M. Wasser, submitted a declaration stating that Hydee "served more than 480 subpoenas on third parties, many of which exceeded 40 pages in length. These subpoenas not only requested documents regarding Peter, but also documents respecting Peter's father (who died in 1990), his mother (who died in 2005), his ex-wife (whom he divorced nearly 30 years ago), certain of Peter's clients, one of Hydee's clients, Peter's attorneys, and literally hundreds of foreign entities that Peter had never heard of. These third-party subpoenas yielded substantially in excess of 100,000 pages of documents." In addition, Hydee deposed Peter's ex-wife, six Irell & Manella partners, two of Hydee and Peter's former accountants, Peter's current accountant, an accountant who formerly worked for Irell & Manella, a representative of Charles Schwab, and a banker from Citibank. Hydee was also compelled by the trial court to answer Peter's discovery requests and sanctioned as a result of her failure to do so. As a result, Hydee spent approximately $3.6 million in litigation and Peter spent approximately $2.1 million.

Hydee presented argument and evidence at the section 271 hearing. She argued she was entitled to pursue her claims and the amount of attorney's fees was reasonable given the length of the marriage, the amount of the assets, and the complexity of the parties' financial investments. Further, Hydee testified she engaged in settlement negotiations:

"Q: In your opinion, aside from that issue of the 1542 release,[5] would you have been able to settle this case?

A: We did. We signed separate property agreements dividing things 50/50. I did a written offer of settlement that I attempted to deal with a 1542 issue whereby the provision in the written offer of compromise was that Mr. Gregora would have a last chance to make full disclosure. And the only issue that would remain following settlement would be assets that were not disclosed. [¶] And I did a graduated settlement so that he had a basket of I think it was up to a million or $2 million that he could fail to disclose that I would get nothing. And then I would get x percent of the next 5 million that he failed to disclose. And I think it went up to a hundred percent if he failed to disclose in excess of $50 million."

The trial court awarded Peter $250,000 in attorney's fees and costs under section 271, finding a $2 million sanction "not appropriate." Instead, it found a $250,000 award was justified given the unnecessary expenditure of fees caused by Hydee's conduct during litigation. In particular, the trial court found Hydee unreasonably increased the attorney's fee for Peter by

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5 Civil Code section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." However, the protections under Civil Code section 1542 may be expressly waived by the parties. (*Carmichael v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 311, 315; *Casey v. Proctor* (1963) 59 Cal.2d 97, 109.)

conducting unnecessary discovery. All of this was done in pursuit of a claim for breach of fiduciary duty which, the trial court found, "required her to demonstrate that numerous third party individuals were in conspiracy with [Peter] to harm [Hydee], which she did not do." The court also ruled Hydee had failed to enter into meaningful settlement discussions because she refused to release Peter from her multi-million dollar breach of fiduciary claim. In short, "[d]ividing up the known assets and leaving the bulk of her claims open for further litigation does not make for a comprehensive settlement offer."

C. Analysis

Hydee contends she pursued her fiduciary duty claim because she had good cause to do so, not because she had any malicious intent to delay proceedings. This is based on her expert's conclusion that it was "reasonable" to assume Peter misappropriated funds from the community. Hydee contends she also had reason to believe in Peter's breach due to the inconsistent testimony provided by Peter and other witnesses. She additionally points to her structured settlement offer as evidence she engaged in good faith settlement negotiations. All of this, she argues, demonstrates the sanction against her was unwarranted. We disagree.

The trial court's findings and the record, tell a different story. The trial court found Hydee failed to make a good faith effort to settle the matter before trial. Despite having engaged in exhaustive discovery over two years, Hydee continued to a nine-day trial, where she was unable to prove Peter misappropriated any community assets. Nor could she even advise the trial court approximately how much he had stolen. In fact, the trial court found "some of her theoretical claims were directly controverted

by the facts at trial: the margin account and the French foreign bank accounts to name two."[6] Thus, the trial court stated, Hydee "built her case on a very thin reed of possible but ultimately unproven breaches."

This ultimately led Peter to incur over $2 million in attorney's fees. His attorney opined this matter should have been completed for a maximum of $750,000 in attorney's fees and costs, even taking into account extensive discovery. Given the circumstances, the trial court did not abuse its discretion in awarding Peter a $250,000 sanction for the increase in "unnecessary attorney fees." (*Sagonowsky v. Kekoa* (2016) 6 Cal.App.5th 1142 [section 271 sanctions must be tethered to attorney fees and costs].)

That Hydee made a settlement offer to Peter which allowed him a "last chance" to disclose the alleged misappropriated assets does not demonstrate a good faith effort to settle. Hydee's "offer" merely set the stage for further litigation, as did her other

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[6] Hydee claimed a 520 Euro check from the French "Tresor Public" made out to "M. ou Mme. [Monsieur or Madame] Gregora Peter" showed that Peter held undisclosed foreign accounts. However, the evidence showed Hydee executed a Sullivan & Cromwell document in 2012 appointing a French law firm to file French taxes on her behalf. She identified Peter as her spouse in that document. She also received the check from Sullivan & Cromwell. In fact, her tax expert and accounting expert both testified they believed the check was associated with Hydee's job at Sullivan & Cromwell.

She also accused Peter of trading securities on margin in a joint Charles Schwab account. According to Hydee, this tended to prove Peter maintained other brokerage accounts which he hid from her. Notwithstanding the leap of logic required to reach that conclusion, Peter testified he never traded on margin.

settlement attempts. She testified, "the only issue that would remain following settlement would be assets that were not disclosed." Under her offers, she would have been able to pursue her belief that Peter misappropriated assets indefinitely, which is no settlement at all.

Hydee also contends her conduct is not sanctionable because it fails to rise to the level exhibited by the parties in other cases. (*See In re Marriage of Feldman, supra,* 153 Cal.App.4th 1470 [failure to disclose multiple assets]; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507 [party frustrated settlement by violating mediation privilege, failing to meet and confer, mistreating expert appraisal; counsel exhibited rude and unprofessional conduct during litigation]; *In re Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, 1100 [attempted to write off an account receivable that was community property]; *In re E.M., supra,* 228 Cal.App.4th 828 [filed abandonment petition to delay and obstruct visitation by other parent].) These cases do not stand for the proposition that sanctions under section 271 are only appropriate under those circumstances, however. Section 271 quite clearly applies to all instances in which one party to a marital dissolution unreasonably increases fees and impedes settlement. The trial court did not abuse its discretion in imposing sanctions because that is what happened here.

IV. Watts Charges

Hydee again attempts to reargue the facts when she contends the trial court erred in failing to award *Watts*[7] charges to her for Peter's exclusive use of both the Drexel and Westridge

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[7] *In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 372-374 (*Watts*).

properties from January 1, 2013 through May 26, 2013. We find no error.

Hydee contends Peter lived at the Westridge property while he renovated the Drexel property and that is sufficient to show *Watts* charges should have been awarded. However, Peter testified that while Hydee did not live at the Westridge property during that time period, she "was there almost every day." Also, Peter did not live in the Drexel property during this time; it was being renovated.

A *Watts* charge is applicable only when one spouse has "exclusive use" of an asset between separation and trial and must reimburse the community for the reasonable value of that use. (*In re Marriage of Garcia* (1990) 224 Cal.App.3d 885, 890.) There is no indication Peter had exclusive use of the Westridge property if Hydee was there constantly. Neither did he have "exclusive use" of the Drexel property during renovations. The trial court did not abuse its discretion in declining to impose a *Watts* charge on either property for that time period. (*Watts, supra,* 171 Cal.App.3d at 374.)

V. Fiduciary Duty Findings

A. Breach of Fiduciary Duty Finding

Hydee contends the trial court erred when it found Peter did not breach his fiduciary duty. We are not persuaded.

We dispense with Hydee's first argument with dispatch: she contends the trial court should have found that Hydee failed to establish his breach at trial rather than finding Peter did not breach his fiduciary duty. That is a difference without a distinction. The failure of a party to meet her burden of proof supports a "not true" finding as to her allegations. (*Day v.*

Rosenthal (1985) 170 Cal.App.3d 1125, 1152-1153; *Brooks v. Brooks (*1944) 63 Cal.App.2d 671, 674.)

B. Managing Spouse Finding

Hydee contends the trial court erred in failing to make a finding as to whether Peter exercised exclusive management or control over the assets that were the actual subject of Hydee's fiduciary duty claim. We see this argument as a red herring. That is, we see this argument as an attempt to divert our attention with the intention of trying to abandon the original argument. Indeed, Hydee admits her "entire breach of fiduciary duty claim rested upon undisclosed assets . . ." Since the trial court found there were no undisclosed assets, there need not be a finding regarding who managed those nonexistent assets.

In any case, substantial evidence supports the trial court's finding that all of the community assets were under the joint control of both spouses at all times. It is undisputed that Peter and Hydee were both successful attorneys. It is also undisputed that the bulk of the income earned during the marriage was earned by Hydee at Sullivan & Cromwell. That income was deposited into her separate checking account. Both Hydee and Peter had access to their financial information; most financial statements were sent to their home and kept there.
The statements for Hydee's primary checking account were not sent to their home, but to Hydee's office.

Their former tax accountant testified he spoke with both Hydee and Peter about their taxes, "more with her."
He "considered them equal" with respect to their control over the tax and accounting issues. Hydee and Peter also periodically discussed the state of their finances throughout their marriage, such as when they decided to buy a home and when Hydee

questioned why they made a large overpayment to the IRS. Hydee's attempt to reargue the evidence is unavailing. (*Hasson, supra,* 32 Cal.3d at pp. 398-399.)

In seeking reversal on this issue, Hydee attempts to flip the burden of proof, contending the trial court failed to apply the test set forth in *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252 (*Margulis)* to require Peter to show he did not breach his fiduciary duties to Hydee. We will not do so. Under *Margulis*, "once a nonmanaging spouse makes a prima facie showing concerning the existence and value of community assets in the control of the other spouse postseparation, the burden of proof shifts to the managing spouse to rebut the showing or prove the proper disposition or lesser value of these assets. If the managing spouse fails to meet this burden, the court should charge the managing spouse with the assets according to the prima facie showing." (*Id.* at p. 1267.) Given that Hydee failed to meet her burden of proof, it did not shift to Peter.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.