**SC 95918**

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**IN THE SUPREME COURT OF MISSOURI**

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**KATHRYN J. LANDEWEE,**

**Appellant**

**v.**

**JOHN E. LANDEWEE,**

**Respondent.**

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# APPELLANT'S SUBSTITUTE REPLY BRIEF

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## APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF FACTS

Respondent John Landewee spent approximately 5.5 pages of his 6-page "Statement of Facts" arguing that Appellant Kathy Landewee did not comply with Rule 84.04 of the Missouri Rules of Civil Procedure or arguing the case in general. This does not comply with Rule 84.04 and should be disregarded by this Court. Appellant's Statement of Facts fully complies with Rule 84.04 and the Court should disregard Respondent's arguments to the contrary.

## ARGUMENT

**1. The circuit court erred in its division of marital property because the division fails to satisfy the circuit court's obligation under Section 452.330 to equitably divide all of the couple's marital property and debts in a manner that is definite and capable of enforcement in that it deferred allocation of a portion of Respondent John Landewee's LAGERS pension benefit to Appellant Kathy Landewee.**

The circuit court's overall property division in this case is unjust and unfair and it lacks finality as required by law and is unenforceable.

Respondent John Landewee (hereinafter "John") concedes that a portion of his LAGERS plan is marital property and that Appellant Kathy Landewee's

(hereinafter "Kathy") "recitation of the tenants of RSMo. Section 452.330 (2011), the inapplicable nature of QDROs to LAGERS plans, and the Dissolution of Marriage act are all facially correct."[1] John then goes on to caution that a "dangerous precedent" will be set if this Court finds in Kathy's favor, although he does not enlighten us as to what danger lies in requiring our circuit courts to follow the law and order a final and enforceable property settlement in a dissolution action. In this case, the circuit court did neither.

***Joyner v. Joyner* is binding in this case, not *Kuchta v. Kuchta*.**

John cites to a thirty-four-year-old Missouri Supreme Court case, *Kuchta v. Kutcha*[2], as authority for allowing the circuit court in the present case to defer division of one of the marriage's largest assets for an indeterminate period with no viable enforcement mechanism for Kathy to collect. The *Kuchta* case is not applicable in this case and does not support John's position.

In *Kuchta*, the circuit court made a deferred division of the husband's TWA pension, the district appellate court affirmed, and the Supreme Court affirmed the division.[3] The opinion in *Kuchta* provides little factual information that would allow a parallel to be drawn between Mr. Kuchta's TWA pension and John Landewee's LAGERS plan. There is an analysis of how plans vest and mature

[1] Respondent's Substitute Brief at page 12.

[2] *Kuchta v. Kuchta*, 636 S.W.2d 663 (Mo. 1982).

[3] *Id.* at 666.

and the Court styles three categories of vested and matured benefits, but acknowledges that there are an "untold number of 'pension plans' which appear to have their own singular and unique requirements for meeting 'vesting' and 'maturing' provisions."[4] John relies on these thirty-four-year-old classifications, which do not reference the statutorily created LAGERS plan, as support for his contention that the circuit court was correct in deferring division of the LAGERS plan.[5] This is an incorrect and disingenuous reading of *Kuchta.*

The *Kuchta* Court acknowledges that a pension or retirement plan may often be the most valuable asset of a marriage but does not discuss finality or enforcement mechanisms.[6] We cannot know whether the TWA pension of Mr. Kuchta was amenable to a QDRO or to garnishment and whether the Court thought that was sufficiently enforceable for Mrs. Kuchta because the Court did not address those issues. By contrast, in John and Kathy's case there is no uncertainty about the lack of an enforcement tool; Kathy has no real way to enforce this deferred division of property under the current judgment. The Court should not rely on *Kuchta* as support for an unenforceable, deferred division of property. The proper legal authority is *Joyner v. Joyner*.[7]

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[4] *Id.* at 665.

[5] Respondent's Substitute Brief at 12-13.

[6] *Id.* at 664.

[7] *Joyner v. Joyner*, 460 S.W.3d 367 (Mo.App.W.D. 2015).

***Joyner v. Joyner* is controlling.**

In the case of *Joyner v. Joyner*, the Western District Court of Appeals faced an issue almost identical to the one currently before this Court.[8] In *Joyner*, the parties accumulated marital property, including husband's LAGERS retirement benefits.[9] On appeal, the Court agreed with the wife that a deferred division of the husband's LAGERS benefits was irregular and void because those benefits are not subject to execution or garnishment under section 70.695, RSMo., reversing and remanding the matter with instructions to reallocate the overall division of property.[10] This case is controlling and the Court should reverse the property division of the circuit court and remand the matter for a new hearing on the valuation of and division of property.

John dismisses the *Joyner* ruling as incapable of withstanding judicial scrutiny for its proposition that a deferred division of a LAGERS plan is not a final division of property, but the *Joyner* case is precisely on point and controlling. Looking to other cases like *Kuchta*, that do not specifically address LAGERS plans, is a smokescreen to distract this Court from the holding in *Joyner*.

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[8] *Id*.

[9] *Id.* at 470.

[10] *Id.* at 472-473, 476.

**Missouri's public policy of finality and enforceability of dissolution judgments is codified in Chapter 452, RSMo.**

John argues that relying on *Joyner* would be a "Potential Public Policy Nightmare." This argument lacks merit. We know what the public policy of our state is with regard to division of marital property because the legislature has codified it in the Dissolution of Marriage Act. That Act requires a final division of property that severs the unity of possession and title and eliminates the need for future litigation between the parties.[11] This Court does not need to read through John's confusing "nightmare" scenario, but need only look to Chapter 452, RSMo.

A division of marital property that does not fully sever the common ownership of property should be used only for unusual situations.[12] There is nothing unusual about John and Kathy's case that would justify a deferred allocation of marital property. In fact, both parties advocated for an immediate division of the LAGERS plan at trial.[13] The circuit court's action violates the plain language, goal, and legislative intent of the Dissolution of Marriage Act.

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[11] *Joyner* at 473.

[12] *Joyner* at 473 (citing *Wax*, 63 S.W. 3d at 671); see also *Whaley v. Whaley*, 805 S.W. 2d 681, 682 (Mo.App.E.D. 1990).

[13] A-32, A-34 to A-47: L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

John argues that Kathy has an enforceable judgment because she can file an action for contempt against him if he fails to pay her the deferred portion of his LAGERS plan, but this is not a solution and it flies in the face of the Dissolution of Marriage Act. If Kathy were to, nine years from now, file a contempt action against John Landewee for failure to pay, what would she get? The Court's finding that John is in contempt? And what, exactly, could she do with that contempt judgment? Section 70.695, RSMo., prevents Kathy from levying against the LAGERS plan or filing a garnishment against it to recover her marital portion of the benefits. That judgment of contempt would be worthless. What if John does not start collecting benefits for fifteen years? Does Kathy need to come back to the circuit court in 10 years to revive her worthless judgment? There is no remedy at law or otherwise that will enable Kathy to compel payment of her portion of the LAGERS benefits and the circuit court's division of property should be reversed and remanded for a new hearing on the current present value of the LAGERS plan and a just and equitable overall property division.

**John has waived any arguments as to the financial health of the LAGERS plan or his own financial situation because he did not present evidence of either at trial.**

At trial John presented evidence that his LAGERS plan had a present value and should be immediately divided.[14] Now he has abandoned that argument and taken a contradictory and completely unsupported position that valuing the LAGERS plan and dividing it at the time of dissolution will cause some sort of cascade effect of impoverishing LAGERS participants.[15] John goes so far as to speculate that LAGERS participants may "have accumulated little in the way of assets" and that if courts start calculating present values and dividing LAGERS plans during divorces, these participants will have to take out loans to make equalization payments.[16] John did not bring in a witness from LAGERS to discuss the financial condition of either the plan or its participants and it is obvious why he did not: because he thought the circuit court should adopt his present value calculation and immediately divide the LAGERS plan. John also did not present evidence at trial that an immediate division would injure him financially because he was advocating for an immediate division of the plan.[17]

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[14] A-32, A-34 to A-47; L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

[15] Respondent's Substitute Brief at 18-20.

[16] Respondent's Substitute Brief at 19-20.

[17] A-32, A-34 to A-47: L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

John's new argument misapplies the law, there is no evidence on the record to support it, and the Court should disregard it because it was not properly presented to the circuit court and is not part of the Record on Appeal.[18]

The circuit court's order does not satisfy its obligation under section 452.330.1, RSMo. to equitably divide all of the parties' marital property in such a way that is definite and capable of enforcement. The circuit court misapplied section 452.330, RSMo., which resulted in an inequitable and unconscionable division of property. This Court should reverse the circuit court's division of property and remand this matter for a reallocation of the overall division of property after a hearing to consider evidence as to the value of the LAGERS plan.

**2. The circuit court erred in assigning a present value of zero dollars to Respondent John Landewee's LAGERS plan because that present value was not supported by substantial evidence and was against the weight of the evidence in that the circuit court heard expert testimony that the LAGERS plan had a present value of between $53,000.00 and $216,121.62.**

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[18] *See* Rule 81.12(a) of the Missouri Rules of Civil Procedure; *see also 8182 Maryland Associates, Ltd. Partnership v. Sheehan*, 14 S.W.3d 576 (Mo. 2000) ("Generally, appellate courts will not consider evidence outside of the record on appeal.").

The parties presented evidence to the circuit court that the LAGERS plan had a present value of between $53,000.00 and $216,000.00.[19] But the circuit court erroneously ignored this evidence, finding that the LAGERS plan had a present value of zero dollars.[20] In doing so, the circuit court failed to include the true value of the LAGERS benefits in the overall division of property, basing its finding on no evidence in the record and leaving Appellant Kathy Landewee (hereinafter "Kathy") with the burden of paying Respondent John Landewee (hereinafter "John") more than $196,000.00 in equalization.[21] This result is unfair and constitutes reversible error.

**The circuit court's finding that the LAGERS plan had present value of zero dollars is not supported by substantial evidence in the record.**

Although the trial court is not expressly required to assign values to marital property, "evidence from which the value of the marital property can be

[19] A-32, A-34 to A-47: L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

[20] L.F. at 105.

[21] L.F. at 102-105.

determined must appear."[22] Thus, a trial court is "prohibited from entering a valuation of marital property not supported by the evidence at trial . . . ."[23]

There was no evidence presented by either party or either party's expert that the LAGERS plan had a present value of zero dollars.[24] In fact, both parties advocated for the value assigned by their respective experts.[25] It was not until this matter was appealed that John decided that the expert he paid to do the calculation and then testify on his behalf must be wrong and changed his position to now assert that the circuit court's finding of zero dollars was just fine with him.[26]

**The circuit court's finding that the LAGERS plan had present value of zero dollars is against the weight of the evidence in the record.**

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[22] *Spauldin v. Spauldin,* 945 S.W.2d 665, 669 (Mo. App.W.D. 1997).

[23] *Farley v. Farley,* 51 S.W.3d 159, 164 (Mo.App.S.D. 2001), See also *Lewis v. Lewis,* 978 S.W.2d 64, 66 (Mo.App.W.D. 1998) (holding that the trial court, in dividing marital property, is prohibited from relying on valuations not supported by the evidence at trial)).

[24] A-32, A-34 to A-47: L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

[25] *Id*.

[26] Respondent's Substitute Brief at 14, 23-24.

John cites to the case of *Houston v. Crider*[27] as support for his contention that Kathy's "Against the Weight of the Evidence Challenge" is flawed. *Houston* involved a dispute over two beneficiary deeds for the same property.[28] In denying one of the points on appeal, the Court set forth a four-part analysis of "against-the-weight-of-the-evidence" claims.[29] In the present case, Kathy has satisfied all four parts of the analysis and, therefore, the Court should find that the circuit court's valuation of the LAGERS plan was against the weight of the evidence, in addition to finding that it was unsupported by substantial evidence.

Using the *Houston* court's framework, Kathy has demonstrated the following: (1) She has challenged the factual proposition that the value of the LAGERS plan was zero dollars, a factual proposition that would be necessary to affirm the circuit court's finding; (2) She has identified all of the favorable evidence that would support a finding of zero dollars for the value of the LAGERS plan, that is, there is *no evidence* on the record that would support such a finding and she has directed the Court's attention to that absence of evidence; (3) Kathy identified the evidence presented by both parties' experts that the LAGERS plan had a value of between $53,000.00 and $216,000.00 and noted that there was no contrary evidence presented; (4) Finally, she demonstrated why the lack of any

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[27] *Houston v. Crider*, 317 S.W.3d 178 (Mo.App.S.D. 2010).

[28] *Id.* at 181-183.

[29] *Id.* at 186-187.

evidence that the LAGERS plan had a present value of zero dollars fails to induce belief in the proposition that the plan had a present value of zero dollars. Therefore, under *Houston*, Kathy has conclusively demonstrated that the circuit court's finding of zero dollars as the present value of the LAGERS plan is against the weight of the evidence.

The circuit court had all of the information before it to adopt the most credible present value calculation of the LAGERS plan, $216,121.62, and make a just and equitable division of property after considering all of the factors in section 452.330. The circuit court's division of property should be reversed and remanded for a new hearing to reallocate the division of marital property.

**3. The circuit court erred in its division of marital property because the division fails to satisfy the circuit court's obligation to consider the factors set forth in section 452.330, RSMo. in that the court did not properly consider the factors and instead used an oversimplified formula that resulted in an unfair, unjust, and unconscionable division that orders Appellant Kathy Landewee to pay more than $196,000.00 to Respondent John Landewee.**

Section 452.330, RSMo., requires the circuit court to consider all statutory factors when dividing the marital property in a dissolution.[30] The factors include the economic circumstances of each spouse, the contribution of each spouse to the

[30] *Joyner* at 470.

acquisition of the marital property, the value of nonmarital property set apart to each spouse, the conduct of the parties during the marriage, and custodial arrangements for minor children.[31]

In Respondent John Landewee's (hereinafter "John") and Appellant Kathy Landewee's (hereinafter "Kathy") case, the circuit court simply took out a sheet of paper and listed all of the assets and debts awarded to Kathy into one column and came up with a total of $549,488.00.[32] The circuit court put all of the assets awarded to John into the other column and came up with a total of $176,995.00.[33] Then the circuit court subtracted John's number from Kathy's and ordered Kathy to pay John one-half of the difference.[34] While this may be a quick and easy way to divide the marital property, it is an unfair simplification of the division of property and demonstrates that the circuit court failed to consider the factors set forth in section 452.330.1, RSMo.

John cites *In Re Marriage of Hash* for the proposition that "the division [of marital property] should be substantially equal unless one or more of the statutory

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[31] Section 452.330.1, RSMo. 2011.

[32] This final number in Kathy's column was later changed when the judgment was amended to reflect a different value for Kathy's personal vehicle. L.F. 95-123.

[33] L.F. at 73.

[34] L.F. at 73, 100-106.

and non-statutory factors causes such a division to be unjust.[35] In John and Kathy's case, the evidence was clear that Kathy's economic situation was not good, that John made minimal contributions to Knaup Floral, that the parties agreed to contribute more to the health and balance of John's IRA than to Kathy's retirement account, and that John was a controlling and abusive husband.[36] Consideration of this evidence and application of the statutory factors causes an "equal" division of the marital property to be unfair, unjust, and unconscionable in this case.

The circuit failed to consider the factors set forth in section 452.330.1, RSMo. in dividing the marital property and this Court should reverse the circuit court's judgment and remand with instructions for the court to reallocate the marital property.

## Conclusion

Appellant, Kathryn J. Landewee, respectfully requests that this Court reverse the circuit court's division of marital property. The circuit court erred by deferring the allocation of Kathy's portion of the LAGERS retirement plan, by valuing the LAGERS plan at zero dollars, and by failing to consider the statutory factors contained in 452.330, RSMo and ordering Kathy to pay John more than $196,000.00 in equalization. The division of property is unjust, unfair, and

[35] *In re Marriage of Hash*, 838 S.W.2d 455, 459-460 (Mo.App.S.D. 1992).

[36] L.F. at 31-32, 103-104, 120-122; Tr. at 53-54, 59-61, 63-75, 91.

unconscionable and Appellant requests that this Court remand the matter to the circuit court for further action consistent with this Court's ruling.

Respectfully submitted,

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**/s/*Laura Clubb*/s/**

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,080 words, excluding the cover, the Table of Contents, the Table of Authorities, and this certification, as determined by Microsoft Word software. This brief was scanned and is free of viruses.

I hereby certify that a copy of this brief was sent to all attorneys of record and all unrepresented parties via the Missouri eFiling System this 21st day of December, 2016 and via U.S. Mail, postage prepaid, this 21st day of December, 2016 to:

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