

64514-5

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COURT OF APPEALS  
DIVISION ONE

AUG 19 2010

No. 64514-5-1

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION I

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PETER GARRISON,

*Appellant,*

v.

SEKIKO SAKAI GARRISON,

*Respondent.*

2010 AUG 19 PM 3:11

COURT FILED  
STATE OF WASHINGTON

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REPLY BRIEF OF APPELLANT

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## **I. INTRODUCTION**

Appellant Peter Garrison submits this reply to the Brief of Respondent Sekiko Garrison (“Resp. Br.”).

## **II. REPLY TO STATEMENT OF THE CASE**

Factual matters in reply are in the argument sections below.

## **III. SUMMARY OF ARGUMENT**

This is not a “normal” dissolution appeal and is not a “normal” battle over valuation of a home. Rather, this is a case where the trial court committed blatantly erroneous errors of law, and abuses of discretion, and entered findings without any support. It adopted a valuation that was based on a flawed methodology. Mr. Chamberlin’s decision to exclude comparables over \$850,000 guaranteed his “appraisal” in August 2009 (arriving at \$700,000) was fatally flawed as his process simply excluded comparables showing higher values. This outcome-distorting approach is not a valid basis for setting a range, and Chamberlin’s \$700,000 opinion is not “evidence” at all.

The attorney fee award of \$24,537 for alleged “intransigence” fails. Not one act alleged to show “intransigence” is close to the level of culpable misconduct required for “intransigence.” Instead, the trial court seemed to view picayune or minor lapses as “intransigence” – even things like a “failure” to perform like a trained trial lawyer. There was no proof

of the total fees claimed (\$49,075), of which the trial court award half. No pervasiveness was shown. No segregation was even attempted. The fee award must be vacated.

Second, this long marriage ends with Ms. Garrison making \$11,416.66 a month and Mr. Garrison earning less than \$1,000 a month.<sup>1</sup> The reason is her salaried position remains despite finance market turmoil that prevented Mr. Garrison and others at his firm from closing deals and earning commissions. The trial court ignored this explanation of why he is not earning more. Without any evidence in support, it concluded if only he would have spent more time working, he could overcome a global financial meltdown through dint of greater effort. This underlies the finding he could earn \$5,000 and denial of maintenance. Yet there was no evidence his greater personal efforts could undo the world's financial meltdown. The denial of maintenance had no tenable basis and was an abuse of discretion.

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<sup>1</sup> In 2008 Ms. Garrison earned \$137,000 (CP 855) which equates to \$11,416.66 per month. Mr. Garrison previously earned some \$175,000 a year, but his income dropped dramatically years before this litigation due to the dot com bubble burst. CP 855. The undisputed evidence showed in 2007-2009, Mr. Garrison earned a total of \$21,000 while working with Stonebridge Securities (Trial Exhibits 5 and 70; RP 9/17/09 at 57) -- less than \$1,000 a month. Notably, this level was in place well before this case started.

As to the marital home, Ms. Garrison challenges a \$987,900 valuation provided by Mr. Watkins. But she strangely then points out the trial court belatedly said it admitted and considered this price opinion in its October 23, 2009 hearing on written findings. Ms. Garrison does not appeal that ruling – so, the \$987,900 price opinion is in evidence. Any argument to the contrary is now waived, for failure to appeal.

In contrast, admission of, and any reliance on, the \$700,000 opinion of Mr. Chamberlin is improper. Chamberlin’s \$700,000 price opinion could not have been properly admitted nor does it constitute “substantial evidence.” It admittedly rests on his arbitrarily excluding any “comparables” over \$850,000. He admittedly excluded comparables that would undermine the interest of Ms. Garrison. This cut-off device was not shown to be a proper method. It cannot be proper. It inalterably skews the outcome , severely downward. As a result, his opinion should not have been admitted, and if deemed admissible, cannot constitute substantial evidence. The prior appraisal he made nine months before trial, saying the value was \$850,000, was stale at the time of trial. Thus, the only price opinion in the case is \$987,900, and the findings must be modified accordingly.

The pattern of gross errors, unsupported findings, and abuses shows the outcome of this case was an improper finding of marital fault.

The findings and final orders should be vacated and modified on that basis, too.

#### IV. ARGUMENT

##### A. **The \$24,537 Fee Sanction Fails; There is No Evidence of “Intransigence.”**<sup>2</sup>

Underlying the fee award issue is a gross error of law. The trial court used in effect an improper definition of “intransigence.” The caselaw shows “intransigence” is bad faith and egregious misconduct, causing significant unnecessary fees or burdens. The trial court viewed any delay or mistaken position as intransigence.

The cases in the Opening Brief, and those now cited by Ms. Garrison, show that severe culpable misconduct is required:

In *Marriage of Greenlee*, 65 Wn.App. 703 (1992), the Court of Appeals affirmed fees based on intransigence. There, it was shown the husband refused sign papers to let the wife refinance a home to remove an IRS lien. Id. 708- 710. In *Marriage of Foley*, 84 Wn.App. 839 (1997), the Court upheld “intransigence” where the husband filed numerous

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<sup>2</sup> Ms. Garrison cites *Marriage of Thomas*, 63 Wn.App. 658, 671 (1991) to say fees awards are discretionary. This is not entirely accurate. Fees are discretionary under RCW 26.09.140. See e.g., *Kruger v. Kruger*, 37 Wn.App. 329, 333 (1984). That was not the basis here, though. And when there is an evidentiary basis for finding intransigence, the factual basis for finding intransigence is not discretionary. The standard on review is substantial evidence as to the fact of intransigence, as it is on any fact issue.

frivolous motions, did not appear at deposition, and refused to read mail causing numerous trial delays and additional fees. *Id.* at 846. (*Foley* also states a trial court must indicate its method of calculation of fees, consider various factors; the court there noted there the wife submitted a “detailed record of her fees.” *Id.* at 930).

In *Marriage of Crosetto*, 82 Wn.App. 545 (1996), the “intransigent” spouse refused visitation and GAL cooperation, was in contempt, avoided service, threatened a psychologist, was thrice warned sanctions would ensue, and made un-sustained allegations of violence and abuse, requiring lengthy delays and investigations. *Id.* at 564-565. In *Crosetto*, the Court affirmed “intransigence.” But even there, the Court remanded, because the claim of over \$50,000 in fees was without evidence. The Court also remanded for a hearing on segregation (requiring separation of “fees incurred because of intransigence from those incurred by other reasons”), because even on these severe facts of multiple acts of intransigence, the intransigence was not “pervasive,” and, absent pervasiveness, segregation is required. *Id.* at 565.

Ms. Garrison also cites *Marriage of Thomas*, 63 Wn.App. 658, 671 (1991). This case also shows the definition of intransigence is confined to severe misconduct. There, there were multiple acts of contempt, prior fee

awards, and a refusal to pay court-ordered maintenance. But, even this level of misconduct did not justify a finding of intransigence.

Nothing remotely approaching the requisite degree of severe misconduct exists, or is alleged, or shown, in the present case.

Mr. Garrison never was in contempt of court, never refused to appear, and was never found to have taken a frivolous position justifying a fee award. He did nothing like the acts of endangering the marital home in *Greenlee*. He made no spurious allegations of abuse or violence leading to lengthy investigations. There is nothing here like the massive record of intransigence in *Crosetto*.

The trial court and Ms. Garrison ignore the culpability component of intransigence, saying, in effect, that intransigence is anything that causes delay, difficulty, additional motions, or additional legal costs. *See* Resp. Br. at 42-43; CP 855 (“intransigence” is merely “failing” to follow a schedule or rules or making “unnecessary motions”). But this leaves out the key ingredient of culpability. It allows negligent acts, minor lapses, and even proper acts, to be called “intransigence” -- because even negligent acts, minor lapses and proper acts can cause delay or additional burdens. This definition explodes the proper scope of “intransigence” beyond recognition. It would mean nearly any dissolution case shall now be followed by fee claims based on intransigence claims.

Ms. Garrison in Resp. Br. at 44-48 provides a laundry list of the alleged intransigent acts. This includes laudable things Mr. Garrison did. Ms. Garrison argues, for example, that Mr. Garrison was “intransigent” because during this case *he gave up on some positions taken*.<sup>3</sup> But agreement and accommodation cannot be culpable intransigence. Ms. Garrison complains Mr. Garrison sometimes had objections overruled, or offered things in evidence that were excluded. Resp. Br. at 45 (concerning offering a settlement agreement Ms. Garrison made relating to her lawsuit against her employer earlier in the marriage, in New York City; this related to Mr. Garrison’s supporting her, when she was not working). But being zealous, or offering things that are excluded, happens in every trial.

Ms. Garrison claims there was “intransigence” because Mr. Garrison made a motion to reconsider that was untimely, and obtained the trial court’s consent to delays in the trial date (based on delays in his assault IV trial in Shoreline District Court). But a lapse of being one day late in a motion is just one minor act of negligence: common enough, and far from culpable misconduct. And obtaining a continuance with approval

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<sup>3</sup> Mr. Garrison agreed to shared custody after first seeking primary custody; he eventually agreed to a residential schedule and shifted during the case from seeking a 60-40 property division to a 50-50 split. See Resp. Br. at 44. Ms. Garrison also gave in on some issues. However, neither her changes in position to move more towards accommodation, nor his, are “intransigence.” They are its opposite. Clearly a definition that labels accommodation “intransigence,” is erroneous as a matter of law.

of a trial court cannot be culpable. Like the wife in *Marriage of Muhammad*, 152 Wn.2d 795 (2005), Mr. Garrison asserted a legal right, then was punished for it.

There is a continual argument that Mr. Garrison did not act skillfully at trial, in representing himself pro se. But “not being a highly skilled trial lawyer” is neither culpable nor intransigence.<sup>4</sup> Ms. Garrison admits (Resp. Br. 46-48) the trial was four days, and this was what was

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<sup>4</sup> Mr. Garrison offered financial trends in his industry in 2001 (Resp. Br. at 46), as this was relevant to earnings history and maintenance. While a few times he resumed lines of questioning that were ruled irrelevant, this is proper zealotry, and neither uncommon nor bad faith. Ms. Garrison complains he should have learned -- in three weeks -- how to be a skilled trial lawyer. This is absurd. In any event, a mere “failure” is not culpable misconduct. Obviously, he did the best he could. Ms. Garrison labels as intransigence his attempt to ask for help from his attorney-brother who was present at trial. This is not culpable or bad faith or any kind of important misconduct at all, much less “intransigence.” She argues Mr. Garrison was late several times. *Id.* at 46. This is quibbling over minutes of delay at most. There is occasional lateness in many trials; nothing bad faith is alleged here. On one occasion cited, Mr. Garrison was even taking an emergency call about his young son who had been concussed and was on his way to the emergency room. (See Resp. Br. at 47; compare RP 9/21/09 at 94 (Mr. Garrison expressing his concern to “find my son because he’s going to the emergency room to be checked out for a concussion where he lost vision and blacked out”)). To argue with a straight face that a father’s taking a call about a child who blacked out and lost vision is “intransigence” -- comparable to bad faith conduct endangering a spouse’s possession of a house by refusing to sign papers to clear an IRS lien -- is frivolous. For the trial court to find “intransigence” based on things like this, so far outside the clear definition of intransigence in the case law, indicates an improper finding of marital fault motivated the outcome in this case. This is discussed below.

projected. Saying the trial should have been three days, not four, is picayune. It is very far from intransigence.

Ms. Garrison's arguments about intransigence in the post-trial phase also fall far outside the level of culpable misconduct needed to constitute intransigence. She says Mr. Garrison objected to proposed orders and went into arguably irrelevant matters on September 21, 2009, Resp. Br. at 47. Again, this is asserting one's rights, acting zealously; this does not come within the ballpark of true "intransigence" as defined in the case law. Is every litigant who worries over the wording of final orders going to be deemed intransigent?

The fee award must be reversed because the trial court used an unbounded and over-inclusive definition of intransigence; and there is no substantial evidence of any real intransigence here. For the same reason, there was no pervasive intransigence. See Resp. Br. at 48. Even in *Crosetto*, 82 Wn.App. 545, with many acts of highly culpable misconduct, pervasiveness was still not shown. There is none here.

The fee award also fails for other reasons. There was no proof at all of the \$49,075 in fees claimed, as required. See *Crosetto*, 82 Wn.App. at 565 (requiring proof of over \$50,000 in claimed fees even in case of intransigence). There was no segregation, as is required. *Id.* The burden

was on Ms. Garrison to prove additional fees and (failing pervasiveness) to segregate; she did not even attempt to do so.<sup>5</sup>

A wildly overbroad definition was used, contrary to the case law that clearly requires egregious and culpable misconduct. No act remotely close to this was shown, or alleged. Nothing approaching pervasiveness was shown. No proof of the claimed \$49,075 was given. No segregation was attempted. The fee award must be vacated.

**B. It Was Abuse of Discretion to Not Award Maintenance, Given the 10:1 Disparity In Incomes Leaving this Long Marriage.<sup>6</sup>**

It is not disputed the marriage was long; the pair had a high standard of living; and upon leaving the marriage one spouse is making

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<sup>5</sup> Accepting almost \$50,000 in claimed fees, with no proof whatsoever, is shocking. Any fee petition requires proof of the amount of fees, and that they were actual, reasonable and necessary. The trial court's utter disregard of elementary requirements like these, indicates a finding of marital fault improperly drove the outcome in this case.

<sup>6</sup> Ms. Garrison claims Mr. Garrison waived the claim to maintenance because a pretrial order stated maintenance is not an issue. Resp. Br. at 37 n. 3. However, CR 15(b) states amendment of pleadings "shall" be freely made, when this serves resolution on the merits and there is no prejudice. Clearly the same liberality allowed this trial court to try and decide maintenance issues. In fact, the parties put in evidence relevant to maintenance, and no prejudice is even alleged by Ms. Garrison. It is not even clear if Ms. Garrison articulated this objection to the trial court in the page she cites (RP 9/21/10 at 88). Also, that page indicates Mr. Garrison said the pretrial order was never signed, indicating some clerical or other error. In any event the trial court properly tried the issue of maintenance and in effect amended its own pretrial order, which it has the power to do.

over \$11,000 a month while the other one in fact makes less than a tenth of that amount at about \$1,000 month. As shown in the Opening Brief, this is the classic case for maintenance: to prevent widely disparate living standards for a reasonable period.

The trial court found Mr. Garrison was voluntarily underemployed, and could choose, at any time, to make \$5,000 a month. In other words, the findings here are that he has been deliberately impoverishing himself, living on only about \$1,000 a month by choice, deliberately giving up an additional \$4,000 a month. This is absurd; there is also no substantial evidence in support of this finding.

Ms. Garrison cites Mr. Garrison's education and earning history, Resp. Br. at 39. However, no evidence was provided that in today's conditions, high earnings many years ago, and degrees from top schools, enable one to make high earnings, on demand. Rather, the undisputed evidence provided by Mr. Garrison showed catastrophic turmoil in his sector originating in the dot com bust in 2001 and going through the recent bankruptcy of Lehman Brothers and our national banking meltdown.

Ms. Garrison contends Mr. Garrison at any point could have made more money had he not chosen to be "distracted" in spending time on the divorce case. Resp. Br. at 35. But there was no evidence linking "spending time on the divorce" with his lowered income. First, the

reduction in income started years before the dissolution case. Second, although the trial court ignored this, he proved that a market meltdown in the finance sector made it impossible to close deals – not only for him, but for Mr. Hendrickson, everyone else at Stonebridge and others. See Opening Br. at 5-8 and record citations therein.<sup>7</sup>

Ms. Garrison’s counsel tried to get Mr. Hendrickson to link “spending time on the divorce” to a lack of earnings. She asked him to put a number on Mr. Garrison’s spending time on the divorce case: “is he low [in earnings] compared to the other . . . consultants in his firm?” The answer was **“No, as a matter of fact, he probably has more pay than the others.”** RP 9/17/10 at 79-80 (emphasis added).

Thus, there was no evidence that time on the divorce caused any loss of income at all. All evidence showed no one could close deals. The notion Mr. Garrison could overcome global financial meltdown by “trying

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<sup>7</sup> Of course, Mr. Hendrickson believed at some point an “up” period and prosperity for the finance industry, and his firm, will return. Resp. Br. at 40. This justifies Mr. Garrison’s staying in this sector rather than (for example) trying to get retraining and downsizing to a average-salary job. There was no evidence provided that this would be possible, though. And in any event, even if the notion is that Mr. Garrison change fields and get retraining to find a salaried job at \$60,000 a year this transition is often the kind of thing that maintenance is provided for. He should not be punished just because the job he choose was a commissioned one, that produced lots of income for the community for years, but for a time will not, while Ms. Garrison is in a salaried position that fortuitously has not been cut.

more” was unsupported; the finding he can earn \$5,000 thus has no substantial evidence; and the denial of maintenance thus was abuse of discretion.

Ms. Garrison also points to Mr. Garrisons’ pretrial declaration in March 2008. But this is not evidence he could earn \$5,000 a month, either. This declaration showed his actual income for the year to date was then only \$3500. In other words, his low income antedated the dissolution case. In an *asterisked* comment, he made full disclosure that at that time he anticipated his income could go up to \$5,000 a month. CP 78-84, CP 79, 80.<sup>8</sup> But there was no evidence at trial it did; or that his not earning \$5,000 a month was within his control. At trial, as noted, he showed market factors made commissions impossible to win for everyone. Mr. Garrison’s projection that was not realized, due to the unprecedented financial turmoil in our nation, is not proof he was shirking and can suddenly earn more, at will.

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<sup>8</sup> Ms. Garrison strangely also cites to CP 380-86 and 590-91. CP 380-386 is not evidence of his earning power; it is her own financial declaration about hers. The citation to CP 590-91 is also misleading or in error as this is a cover sheet and article on real estate. In any event, in this declaration seeking HELOC funds pre-trial, Mr. Garrison made it clear that his “finances are uncertain...dependent upon market conditions to allow our clients to pay...I just need a few of the firm’s transactions to close...I do not have a set time frame for when that will happen.” CP 574. Again, he is saying his earnings are dependent on outside forces, and this negates the notion that he can at will choose to earn \$5,000 a month.

There is no substantial evidence supporting findings of imputed income, voluntary underemployment, or an ability to earn \$5,000 a month. Therefore, the denial of maintenance was an abuse of discretion. In effect, the trial court in denying maintenance punished Mr. Garrison for the global financial meltdown.<sup>9</sup>

This Court should set the proper level of maintenance. See RCW 26.09.090(1)(a). There is a 10:1 disparity in actual earnings leaving the marriage, after many years in which both contributed. The prior standard of living was high. There were marital assets including equity in the home worth hundreds of thousands of dollars. No substantial argument is offered in the Response Brief to show Ms. Garrison cannot afford maintenance. She could refinance or sell the Sound view home if needed. The basis asserted for denying maintenance is not tenable. Mr. Garrison should receive a third of Ms. Garrison's gross income (about \$3,600 a month) for three or four years (or such other reasonable amount as the Court finds), to avoid the very gross disparity in living standards that otherwise will ensue, merely because Mr. Garrison's job was commission based and cannot produce income for a time, while Ms. Garrison

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<sup>9</sup> That the trial court ignored evidence of the catastrophic state of our financial markets, in saying Mr. Garrison gave no explanation of the lack of income, is shocking. This shows a finding of marital fault drove the outcome in this case.

happened to choose a job that made less but is salaried and now happens to be one surviving the recent financial crisis.

Without significant maintenance, Mr. Garrison is left in penury. A thousand dollars a month does not pay for rent, utilities, food and other costs. Mr. Garrison should not be forced to borrow more and more, to keep afloat in modest quarters, while the other spouse lives in an upscale Sound view home.<sup>10</sup> If a wife left a long marriage that had had a high standard of living, and the wife was making only \$1,000 a month, while the husband makes over \$11,000 a month, the abuse of discretion in denying maintenance would be clear. The same abuse of discretion exists here. This Court should not hesitate to modify the final orders to provide reasonable maintenance.<sup>11</sup>

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<sup>10</sup> Ms. Garrison complains that Mr. Garrison proposed the parties should provide financial data every three months. However, this allows each party to monitor the other for any substantial change in circumstances, and would allow Ms. Garrison to end maintenance obligations as soon as Mr. Garrison's market recovers and he begins to earn at a higher level.

<sup>11</sup> Ms. Garrison discusses child support at length. See Resp. Br. at 32-37. However, the Opening Brief made it clear that Mr. Garrison challenges the findings of fact as to voluntary unemployment, or imputed income, and only seeks a modification in child support that will follow due to provision of maintenance. The child support cases make it clear that the concept of voluntary unemployment relates only to changes in income after, during or just before an order of child support. In contrast, here, the drop in income was well before this case was filed, showing it was not "voluntary" at all.

**C. The Finding Valuing the Home at \$700,000  
Must Be Modified to \$987,900.**

Ms. Garrison (a) argues against the Watkins price opinion being admitted into evidence, but (b) argues in favor of it being admitted when pointing out the trial court suddenly stated it had considered Watkins' testimony when discussing final written orders on October 23, 2009. Resp. Br. at 27 citing RP 10/23/09 at 18 (after making oral rulings excluding Watkins' testimony, the trial court in final written findings states it was considered ("I absolutely considered their evaluations")). Ms. Garrison has not appealed from that ruling on October 23, 2009, a ruling that in effect, admitted the \$987,900 Watkins price opinion. There is no cross appeal at all in this case. As a result, the Watkins' valuation at \$987,900 is in evidence. The argument it should be excluded has been waived through failure to appeal. As shown below, Mr. Chamberlin's opinion at \$700,000 was based on a fatally flawed method, could not have been properly admitted or could not constitute substantial evidence. The only valuation left is \$987,900 and the findings and decree should be modified accordingly.<sup>12</sup>

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<sup>12</sup> This would result in an order for Ms. Garrison to pay \$143,950 to Mr. Garrison. That amount is half the difference between \$700,000 and \$987,900. An additional payment of half the difference is required because neither party here challenges the basic decision there should be a 50-50 split in the community assets.

**1. Mr. Chamberlin's \$700,000 Is Neither Admissible, Nor Substantial Evidence, Where He Arbitrarily Excluded "Comparables" Over \$850,000.**

The finding of fact the marital home was worth \$700,000 was based on the trial court's adopting Mr. Chamberlin's August 2009 "appraisal."<sup>13</sup> However, this so called appraisal rested on a fatally flawed method. As explained in the Opening Brief, Mr. Chamberlin "fixed" the result of his work, by deliberately setting an upper boundary of \$850,000 in his search for comparable homes. This cut-off excluded any comparable sales above that amount. This arbitrarily excluded any comparables that would tend to show a higher value in the subject property. The Watkins study – now admitted to be in evidence, because its admission is not appealed from – includes several comparables above \$850,000 and even above a million dollars, within a quarter mile from the subject, which Mr. Chamberlin's cut-off decision excluded from his

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<sup>13</sup> Ms. Garrison incorrectly states that findings of fact and conclusions of law are reviewed for abuse of discretion. See Resp. Br. at 21. This is not so. As noted in the Opening Brief, findings of fact are reviewed for substantial evidence, issues of admitting or excluding evidence are reviewed for abuse of discretion and legal issues are reviewed de novo.

consideration.<sup>14</sup> Thus, his method logically and in fact was a pre-decision to “fix” the result of his work, by barring comparables that would show a higher value than \$850,000.

If one arbitrarily excludes comparables showing higher value, one ends up, most assuredly, with a lower value. Literally, the result was “fixed” the same way a card dealer can “fix” a blackjack game, by eliminating certain cards from the next deal, to favor the house.

There was no evidence provided that setting a limit on comparables or setting it at \$850,000 is part of a normal appraisal method. See Resp. Br. at 23-24. Mr. Chamberlin described his “very consistent policy” in doing an appraisal. See RP 9/16/09 at 5 et seq. He said he followed that method with respect to the subject property. Id. at 9. But nothing in the methodology he had laid out as being proper methodology suggested that it is proper to set an arbitrary screen when searching for comparables, much less one arbitrarily set at the price level appraised for the subject in a prior appraisal. See RP 9/16/09 at 5 through 9.

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<sup>14</sup> Mr. Watkins used several comparables that were within a quarter mile and that had similar traits and protected views. E.g., RP 0/17/09 at 208; see Opening Br. at 25, 29-33. Mr. Chamberlin’s arbitrary low-ball screen allowed him to ignore these, and even forced him to search far and wide for so called comparables; he left the Innis Arden part of Shoreline, going into areas without protected views and even used homes miles away in another city. Opening Br. at 25, 27-36. This violated the location principle, and stretched the “comparative” approach to valuation beyond recognition.

Thus, there was no foundation shown that his \$850,000 cut-off device was part of proper methodology. Indeed, Mr. Chamberlin's own description of the process contradicts this kind of arbitrary screen, because he said the process is to search for comparables -- and the \$850,000 limit on the search would exclude comparables, on an *a priori* basis.

Ms. Garrison does not explain why this pre-judgment device could be proper. She mere says it was "reasonable" because the appraisal nine months earlier at \$850,000 was stale. *Id.* at 23. But not having a current appraisal only means one does a new appraisal. It does not justify an arbitrary device to exclude comparables. (Nor does it justify the arbitrary setting of that device at the level of the prior appraisal.)

Ms. Garrison says this \$850,000 cut-off device was justified because there was eight months of a "falling real estate market." *Id.* at 24 citing RP 9/16/09 at 18-19. But this is circular reasoning. The appraiser does not know if this house at this location has fallen in value, until a proper appraisal is done; if he uses an arbitrary limit on comparables, this device guarantees one will find a fall in price. Thus, the hypothesis (a falling market) cannot be falsified, and will automatically be confirmed. This circular path to a desired outcome, is not substantial evidence of anything.

In any event, there was no substantial evidence the market for houses like the subject, in its location with its protected views, was falling. The testimony cited by Ms. Garrison (id.) contains an exchange in which Mr. Chamberlin agrees that a change from \$850,000 to \$700,000 indicates a drop of \$150,000. Of course. But he cannot base the use of the arbitrary cut-off device on the outcome of using the arbitrary cut-off device. This is circular sophistry, not any “method,” and not “evidence” at all. Mr. Chamberlin also states he believed there was a falling market because he had done updates (not put in the record) of other properties with undisclosed locations, sizes, and features, at undisclosed times. Id. at 19 lines 1-9. This is too vague to show anything. There is no foundation this vague talk relates to the subject, and going from general trends to one particular kind of house in a particular location directly violates the “location, location, location rule” that Mr. Chamberlin himself espoused. RP 9/16/09 at 15. In any event, again, even proving a falling market would not justify a decision to exclude all comparables above a certain level.<sup>15</sup>

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<sup>15</sup> RP 9/16/10 also contains hearsay from Ms. Garrison about the assessed value. But Mr. Chamberlin was very clear in saying “county records are incorrect with a certain degree of occurrence [so] that [the appraiser] do[esn’t] rely on their records.” RP 9/16/09 at 41. Thus, there was no evidence that assessed value was part of proper methods. In any event, again, showing a general falling trend does not justify the cut-off device.

The junk nature of Mr. Chamberlin's arbitrary cut-off device can be illustrated, if one considers a repetition of his process. If he does a new appraisal, then, under his approach, he would set a new limit on comparables at \$700,000; this assuredly leads to a new valuation at lower than that amount, perhaps now \$600,000. Repeating this process, the new limit on comparables would be \$600,000, leading to an outcome saying the value is below that amount, perhaps \$500,000. The new limit on comparables would be \$500,000, and so on. Successive repetitions guarantee a perpetually falling result. The impropriety of this method is clear. His \$700,000 cannot be viewed as an appraisal, as evidence or as a basis for findings of fact here.

Ms. Garrison argues the argument about the \$850,000 screen was not raised at trial. Resp. Br. at 23-24. This is not so. Mr. Garrison argued Mr. Chamberlin's \$700,000 appraisal was "defective." RP 9/21/09 at 92 line 18. Mr. Garrison's entire presentation on value and the thrust of Mr. Watkins' testimony was to challenge Mr. Chamberlin's outcome and methodology, pointing out Chamberlin's method arbitrarily excluded Watkins' comparables that were above \$850,000. Nothing was waived, and objections to Chamberlin's method and outcome were preserved.<sup>16</sup>

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<sup>16</sup> Mr. Garrison challenged Chamberlin's method and conclusions at every turn. The entire thrust of Mr. Watkins' testimony was to challenge

In sum, Mr. Chamberlin's description of his basic methodology at RP 9/16/09 pages 6-7 contains not a hint that his arbitrary limit device can be proper. He violated his location rule, by going miles away. Therefore there was no foundation for his August 2009 work setting value at \$700,000. That price opinion was not admissible, and, even if it is deemed admitted, the arbitrary cut-off device means it is cannot be substantial evidence. The only evidence in the trial record of value at the time of trial is Watkins' \$987,900. This Court on review should modify the findings and final decree accordingly.

**2. Mr. Watkins' \$987,900 Price Opinion Is Now Admitted to Be Admissible, and is the Only One Left in the Record.**

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everything Chamberlin said. Watkins showed there were higher-value comparables within a quarter mile of the subject (and with protected views), arbitrarily excluded by Mr. Chamberlin, whose method drove Chamberlin to delve into Magnolia and Olympic View miles away and other "incomparable" homes. Mr. Garrison also noted that "Valuable properties have not been diminished in value in *this* marketplace" (id. at lines 24-25) (emphasis added). Mr. Garrison objected that Mr. Chamberlin did not provide his Magnolia search, id. at 21-22. Mr. Garrison pointed out that the screen used included a "large area" and included foreclosures. Id. at 48-49. Mr. Garrison pointed out the screen was "a lower value screen" at 60-61, directly raising the issue of the screening device. Ms. Garrison argues Mr. Garrison did not challenge Mr. Chamberlin's screening decision; in fact he did, through Mr. Watkins' testimony asserting that Mr. Chamberlin's \$700,000 valuation is wrong because his "comparables" were not comparable. Id. at 15. Challenging Chamberlin's "comparables" was in effect challenging his screen; by excluding real comparables Chamberlin, was forced to use sales that were not comparable.

Ms. Garrison continues to argue for excluding Mr. Watkins' opinion. However, she points to the trial court's decision to admit it (Resp. Br. at 27 citing RP 10/23/09 at 18 ("I absolutely considered their evaluations," referring to Watkins' testimony *inter alia*). Ms. Garrison does not challenge this on appeal. Therefore, she has waived the issue and the Watkins' testimony is in evidence. In any event, Ms. Garrison's argument about RCW 18.140.020 (Resp. Br. at 25-27) fails. *Watkins admittedly spoke the statutorily required disclosure in open court.* Resp. Br. at 26. That is all the statute required. Nothing required him to not use the word, "appraisal," or to "believe in" the statute, etc. <sup>17</sup>

In the October 23, 2009 hearing (Resp. Br. at 27 citing RP 9/23/09 at 18) the trial made a bizarre statement. It stated it "heard the testimony of your evaluators, and considered them." *Id.* This referred to Jolene Anderson and Phil Friend -- testimony offered by Mr. Garrison that the trial court barred and never heard. The trial court on October 23d ruled in effect that testimony of Anderson and Friend should have been admitted.

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<sup>17</sup> Watkins testified he provided a competitive market report/analysis as Associate Broker; he did not claim to be a certified appraiser. See RP 9/17/09 at 154, 172, 173, 192. Mr. Garrison later told the trial court Mr. Watkins was an associate broker, not an appraiser. RP 9/21/09 at 5. Moreover, the statutory disclosure requirement does not apply, because there was an intended user (a judge) who was not a seller or buyer.

Yet that testimony never was given. This alone requires vacating the finding on value.

**D. Marital Fault Improperly Motivated the Outcome.**

*Muhammad*, 152 Wn.2d 795, is not limited to division of property issues, as Ms. Garrison contends. See Resp. Br. at 41. Here, the \$24,537 in fees imposed against a spouse making \$1,000 a month came without any proof of the amount of fees, and with no act of real intransigence cited. The trial court instead found intransigence in things like a pro se litigant's "failure" to be a skilled trial lawyer. The finding as to voluntary unemployment stated Mr. Garrison gave no explanation for not making money. He did: there was undisputed testimony of financial meltdown, a Lehman Brothers bankruptcy and other factors preventing deals from closing. The trial court in effect demanded Mr. Garrison overcome the global meltdown by stopping shirking, and *working more hours*.

On the value of the marital home, the trial court allowed and relied on a value produced by a method that guaranteed a severely skewed result. The trial court excluded Watkins' testimony in September based on a statute, where Watkins read the disclosure statement required in open court. Then in October, the trial court suddenly announced it had considered Watkins' testimony (only because Mr. Garrison objected to proposed findings mischaracterizing the September record). The trial

court then said it heard Friend's and Anderson's testimony – testimony that had never been given. This pattern of erratic and manifestly unreasonable rulings has no explanation other than an improper finding of marital fault. The findings/rulings should be overturned on this basis, too.

**E. Mr. Garrison's Appeal Is Not Frivolous.**

An appeal that is meritorious or presenting debatable issues upon which reasonable might differ is not frivolous. *Olsen Media v. Energy Sciences*, 32 Wn.App. 579, 588, *rev. denied*, 98 Wn.2d 1004 (1982). Ms. Garrison claims this appeal is frivolous, Resp. Br. at 49. But the issues raised here are meritorious and at a minimum, reasonably debatable.

**V. CONCLUSION**

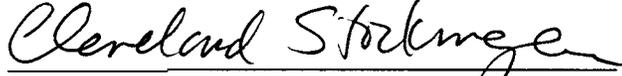
For the foregoing reasons, the findings and decree should be modified to (a) vacate the award of fees, and require repayment to Mr. Garrison of \$24,537; (b) vacate findings as to imputed income/voluntary unemployment, and order maintenance of \$3,600 a month for a reasonable period (with child support adjusted accordingly); (c) modify the finding as to value of the marital home, so that it finds its value was \$987,900 at the relevant time, and require payment to Mr. Garrison of \$143,950; and (d) order payment of his fees on appeal.

If there is any remand, as to some particular issue, it should be to a different trial judge.

DATED: this 19th day of August, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of August 2010, I caused a true and correct copy of the foregoing Reply Brief of Appellant to be hand delivered to the office of counsel for respondent at:

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