

NO. 37931-II

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

In Re the Marriage of

WALTER JAMES GOLDSMITH
Appellant

vs.

CRYSTAL HUANG SOON KWAK GOLDSMITH
Respondent.

STATE OF WASHINGTON
BY _____
COUNTY OF PIERCE
COMPL-7 PR 306
COURT OF APPEALS
DIVISION TWO

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF RESPONDENT

2411 Fourteenth Ave. S.
Seattle, WA 98144
(206) 721-8880

RAO & PIERCE PLLC
By: Elizabeth A. Hoffman
WSBA #40722
Christopher R. Rao
WSBA #27592
Attorneys for Respondent

OFFICIAL

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I. INTRODUCTION

Walter Goldsmith and Crystal Kwak married in 1995. During the marriage, the parties acquired several parcels of real property, including a home and two rental properties. They also acquired the gas station at issue in this appeal.

Walter and Crystal purchased the Bridgeport Deli Mart, a convenience store and gas station in Lakewood, Washington (“gas station” or “the station”) in the summer of 2004.

On August 25, 2004, the station was appraised by Appraisal Group of the Northwest. CP 149 – 175, 276. That appraisal affixed a market value of \$1,000,000.00 to the gas station. CP 150, 276.

In September of 2004, the parties purchased the station for \$1,260,000.00, which was supplied primarily by a mortgage. CP 276, RP V.II 73. At the time of trial in 2007 they owed a mortgage debt of \$980,177.00 on the property. CP 276.

From the time of purchase until the parties’ separation in January of 2006, Walter¹ managed the station. Over that two year period, he failed to pay half year taxes in both 2004 and 2005. RP V.I 176, RP V.ii 16 – 19.

¹ For clarity’s sake, the first names of the parties are used throughout this brief. No disrespect is intended.

By the time the parties went to trial, they owed approximately \$50,459.99 in back taxes on the station. RP V.II 19.

After separation, Crystal took over management of the station. RP V.II 73. In order to reduce overheads, Crystal fired the clerks hired by Walter, and instead worked at the station herself with the assistance of one of her daughters. RP V.I 158. Crystal worked long hours, virtually every day. RP V.I 158.

On February 9, 2006, Walter filed a Petition for Dissolution. CP 1 – 3. On May 21, 2007, the parties entered into a CR2A stipulation regarding the distribution of their property. CP 7 – 11. The parties stipulated to a 50/50 split of the total value of the community to be determined by the following formula:

...adding up the equity of the properties, to wit, the home, [the rental properties], and the gas station, and also adding in the equity and debts as further set below, and dividing same evenly between the parties, with the Respondent applying her share of the equity to the gas station and the home. To the extent either party has remaining equity in another property they be cashed out.

CP 8.

Thus the amount of money to be paid by Crystal to Walter or visa versa would depend on the values assigned to the assets Crystal was to receive: the gas station and the home. CP 8. If the combined value of the gas station and home was more than half of the total value of the

community, Crystal would have to make a balancing payment to Walter. CP 8. If the combined value was less than half of the total value of the community, Walter would have to make a balancing payment to Crystal. CP 8.

The CR2A agreement did not state a value for the gas station, as the parties had been unable to reach agreement on this issue. Walter, at the time of the signing of the CR2A agreement and at trial, asserted that the property continued to enjoy a market value of at least one million dollars based upon the 2004 appraised market value, the purchase price, and offers made on the property by prospective buyers. RP V.II 77 – 78. Crystal believed that the value of the business as a going concern had declined during Walter’s management, but had begun to increase as a result of her own efforts post-separation. RP V.I 76.

The parties agreed to appoint Appraisal Group of the Northwest to appraise the gas station. CP 8. The CR2A set out the process by which that value would be determined. CP 8.

The parties stipulated that the equity in the gas station would be determined by “deducting from the appraised value [as determined by Appraisal Group of the Northwest] both the mortgage and real estate taxes owing on the gas station as of the date of [the] CR2A Agreement.” CP 8.

The parties further agreed there would be no unilateral contact by either party with the appraiser. CP 8.

Rick Westman of the Appraisal Group of the Northwest was engaged and completed the appraisal report. His appraisal included an on-site inspection of the property. Crystal was working at the gas station at the time of Westman's site visit. It was during this inspection that Westman spoke with Crystal. RP V.I 160 – 164. It is that conversation and its consequences which are at the heart of Walter's present appeal.

Westman concluded that the value of the station as a going concern was \$780,000.00, subject to a reduction of \$540,000.00 due to an "external obsolescence", namely, a Safeway Supermarket and Gas Station operating nearby. CP 68 - 69. The Safeway gas station appeared to have disrupted the sales of the gas station. CP 68 – 69. Per the stipulated calculation set out in the CR2A, the Court ultimately determined the value of the station to be negative equity of \$233,681.00.² CP 273.

After receipt of the Westman report, Walter moved for (1) an order vacating the provision of the CR2A Agreement regarding the appointment of a single, binding appraiser; (2) an order allowing testimony from a second appraiser, Edward Greer; and (3) attorney's fees and costs. CP 247-48.

² The negative equity figure is calculated as follows: \$780,000 business value less the mortgage and taxes owing on the real estate at the time of trial.

Walter believed that Westman's value was incorrect because the station had previously been appraised at \$1,000,000.00 at the time of purchase in 2004, and because the parties had received two offers to purchase the station for \$1,000,000.00 and \$1,100,000.00 respectively in the 12 months prior to trial. CP 40 – 42.

Because the CR2A agreement provided that the value of the gas station would be determined by the Appraisal Group of the Northwest, it was necessary for Walter to find fault with the CR2A itself in order to avoid Westman's opinion of the station's value. In seeking to impugn the CR2A, Walter relied on the only irregularity that he could identify, namely the conversation between Westman and Crystal at the time of his site visit. Walter contended that the conversation between Crystal and Westman was a breach of the CR2A. CP 37-42. Given that Westman and Crystal both testified that the conversation had occurred, the fact that this provision of the CR2A was in fact breached has never been in dispute. RP V.I 47, 49, 160-162, 164 -165.

In order to obtain relief from the CR2A, however, Walter had to go further than identifying a technical breach. He was obliged to contend and did contend that this breach was material in that it had influenced the ultimate value assigned to the station by Westman. CP 37-42.

A trial on this and other issues was held before Pro Tem Judge John Purbaugh on May 14 and 15, 2008.

At trial, Westman and Crystal gave testimony regarding the conversation between them during the inspection. RP V.I 47, 49, 160-162, 164 -165. Both testified that Crystal told Westman that the Department of Ecology (“DOE”) was scheduled to inspect the property for contamination, and that Crystal further told Westman that she thought his site visit may need to be re-scheduled to a date after the DOE inspection. RP V.I 47, 49, 160-162, 164-165. Both Crystal and Westman testified that no other information was provided or communicated by Crystal during their conversation. RP V.I 50, 55, 165.

Westman testified that the conversation had no impact on his ultimate valuation of the property, as such inspections by DOE are in and of themselves routine. RP V.I 49, 51, 63, 71 – 72. He further testified that his valuation including the impact of the nearby Safeway gas station was well supported by data included in the report. RP V.I 27 – 28, 32 – 33.

Walter was permitted by the Court to present evidence from Edward Greer, a real estate appraiser engaged by Walter to review the Westman appraisal. RP V.I 92-93. Greer testified that he was not a business appraiser, but rather a real estate appraiser who evaluated only the value of the land where the station was located and the improvements

and fixtures thereon, and not the going concern valuation method specified in a joint engagement letter ordered by the Court. RP V.I 99; CP 275. Greer also researched the sale prices of “comparable properties” near the parties’ station. RP V.I 93-99.

Greer testified that he believed there were “some problems” with Westman’s appraisal based on the fact that other stations in the Lakewood area had sold for prices of a “million to million-plus.” RP V.I 99.

The difficulty which Walter faced at trial and faces now on appeal is that Westman was not testifying merely as an expert witness whose findings might be called into doubt or moderated by the views of a competing expert such as Greer.

Rather, Westman was testifying per the CR2A as the appraiser whose opinion the parties had agreed to treat as binding. At trial, and now, it is Walter’s case not only that Westman’s valuation was flawed, but that it was flawed because of the conversation he had with Crystal.

Walter argues that this conversation was a material breach of the CR2A because it must have somehow influenced Westman to appraise the business at a number significantly below its true value. RP V.II 97-98, 135 - 138; Brief of Appellant 15 – 22.

At the conclusion of the trial, the Court found no credible evidence of a material breach of the CR2A stipulation. RP V.II 171 – 177; CP 271 –

278. The Court declined to vacate that portion of the CR2A which provided that the value of the gas station was to be determined based on a valuation by Appraisal Group Northwest. RP V.II 177, CP 271 – 278. The Court determined the value of the gas station to be negative \$233,681.³ CP 271-278.

Walter now appeals that ruling. He contends that the Court erred when it found no credible evidence of a material breach of the CR2A and declined to vacate the relevant portion of same. Brief of Appellant iii.

II. STATEMENT OF THE ISSUES

1. Whether the trial court properly denied the Appellant's request for relief from the CR2A, concluding that although the Respondent breached the CR2A by communicating with the parties' agreed appraiser, there was no credible evidence that the unilateral contact had a material effect on the neutrality and accuracy of the appraiser's report?

(Appellant's Assignments of Error 1-6)

2. Whether the trial court properly exercised its discretion in enforcing the CR2A Agreement when (1) there is an abuse of discretion standard regarding enforcement of CR2A Agreements, (2) the only information Crystal provided to Westman was regarding the upcoming

³ Per the stipulated formula for division of the community estate, Walter ultimately received an equalizing payment of \$36,921. (CP 279-283)

DOE inspection, and (3) Westman testified the information Crystal provided him did not have any impact on his valuation of the property? (Appellant's Assignments of Error 1, 6)

3. Whether this Court should award attorney's fees to Respondent based on her need, the Appellant's ability to pay, and the frivolity of this appeal?

(Appellant's Assignments of Error 1-6)

III. PROCEDURAL HISTORY & RESTATEMENT OF THE CASE

A. CR2A Agreement

In May 2007, the parties entered into a CR2A stipulation in which they agreed, *inter alia*, that they would dissolve their marriage on the basis of an equal split of their community assets; that the wife would receive the Lakewood Washington gas station and the parties' home; that if the value of those assets amounted to more than half of the value of the community she would make a payment to the husband to equalize their interests; and that if the value of the assets awarded to the wife amounted to less than half of the value of the community the husband would make an equalizing payment to her. CP 7-11.

The parties also stipulated to a process by which the value of the gas station would be determined. CP 8.

They agreed to obtain an appraised value and deduct from it the mortgage and real estate taxes owed on the property. CP 8. They further stipulated that this appraised value would be determined by Appraisal Group Northwest. CP 8.

The CR2A contained a provision which stated that “neither party nor counsel shall make/have any unilateral contract with the appraiser.” CP 8. It was undisputed by Walter at trial that the purpose of the “no unilateral contact” provision was to ensure a “fair and neutral appraisal.” RP V.II 63 – 64.

B. Engagement Letter

Due to significant delay in commencing the appraisal, the Court ordered the parties to jointly draft an engagement letter to Rick Westman of the Appraisal Group of the Northwest. CP 19, 60 – 61. In said letter, the parties instructed Westman to appraise the gas station under three valuation approaches: (1) the Cost Approach, (2) the Sales Comparison Approach, and (3) the Income Capitalization Approach. CP 60.

The parties further informed the appraiser that:

Both the wife and husband desire to have you remain impartial and without unilateral contact with either party, including their relatives and attorneys. Therefore, we simply propose sending you this joint communication. Should you be contacted by any party, their relative, or any third parties or their attorneys, please let us know.

CP 60.

Westman testified at trial that he never saw this jointly-drafted engagement letter, and was unaware of the parties' desire that there be no unilateral contact. RP V.I 57. However, Westman did complete a report which contained analyses using each of the three specified valuation methods. CP 68 – 131.

C. Testimony of Rick Westman

Appraiser Rick Westman is a commercial real estate appraiser who testified that he had appraised “probably 300” gas stations over a 30 year career. RP V.I 18-20.

He explained to the Court that his appraisal of the gas station was “less than what the 2004 appraisal was, but this value is well supported by the documentation” contained in his appraisal report. RP V.I 27.

This documentation included information that “over the last two to three years, sales volumes have fallen within the subject property. And a possible reason that they have fallen is that Safeway opened a new station, new store and gas station near the subject property.” RP V.I 27.

Westman further testified that the appraisal “include[d] a very substantial allowance for external obsolescence” created by the proximity of the Safeway gas station. RP V.I 27 – 28, 32 – 33. He explained to the court that the value of the station business had substantially declined

because “[t]here simply isn’t enough income. This is specialty real estate. When there isn’t enough income from its designed and intended use, the value of the improvements are decreased by this external obsolescence factor.” RP V.I 31 – 32.

Westman testified that he never saw the engagement letter which prohibited unilateral contact. RP V.I 57. He testified he did not discuss the letter with his supervisor and that he had “no idea [he] couldn’t talk to everyone.” RP V.I 59 – 60.

Westman admitted that he communicated with counsel for Crystal during the course of his engagement. RP V.I 47. He testified that that contact did not affect his appraisal. RP V.I 47.

Q: Did you have any contact with [Crystal’s counsel] that affected your decision in this report?

A: Absolutely not.

RP V.I 49.

Westman also testified that he had email contact with the attorneys for both parties. RP V.I 50. He stated that the emails with counsel “absolutely [did] not” have a material effect on his evaluation of the property. RP V.I 51.

Westman also admitted that he spoke to Crystal at the gas station when he visited the station for inspection. RP V.I 49. He described for the court his communication with Crystal:

Q: Can you tell the Court what the communication was between yourself and Ms. Kwak at that time?

A: It was very brief. There were a few questions and answers. My total visit at the gas station wasn't over 40 minutes. It was based primarily on the physical aspect of the station.

There was some discussion about potential contamination and the fact that there was going to be a Department of Ecology inspection soon. There was then some discussion between [Crystal's attorney] and [Walter's attorney] about whether we wanted to proceed with the appraisal at that point or wait for the DOE report to be finalized.

RP V.I 50.

Westman testified that Crystal did not communicate or provide him with any other information about the property. RP V.I 55. He testified that he did not have any other conversations with Crystal. RP V.I 50.

He testified that he had no motive to appraise this property in a "low manner or a high manner." RP V.I 51. He testified that the impending Department of Ecology inspection mentioned to him by Crystal had "no" bearing on his appraisal. RP V.I 51.

Westman testified that “if there is any kind of contamination or physical problem with the property that isn’t visible [such as soil contamination], we reserve the right to amend the valuation.” RP V.I 63.

The Court questioned Westman regarding the difference between the 2004 appraisal and purchase price, and the value as determined by Westman. RP V.I 68. The Court was specifically concerned with the importance, if any, of the purchase price paid by the parties in determining a current value.

Q: So is it accurate for me to understand that while what was paid for the property [by the parties in 2004] is necessarily considered and observed, it is not a material element in determining the current value of the going concern?

A: That’s absolutely correct, within the time frame that we’re talking about, of course. RP V.I 68 – 69.

The Court also questioned Westman about the effect of Crystal’s statement regarding the DOE evaluation on his report. RP V.I 71 – 72.

Q: So for lack of a better term, exclusion of possible soil contamination which might be identified in a scheduled DOE evaluation, is a fairly standard thing to exclude from a report appraising a gas station where you don’t have the results at that?

A: Absolutely. We appraise gas stations every day without DOE reports. The DOE survey was just coincidentally going to happen near the same time as the appraisal.

RP V.I 71 – 72.

D. Testimony of Edward Greer

Walter engaged real estate appraiser Edward Greer to “look at sales... of properties in the immediate area to see what those were selling for” and to review Westman’s report. RP V.I 93, 111. At trial, Greer stated that “there was a potential for a problem with the first report or report” and that, based on the sales information he reviewed, Greer believed the property could be sold in the “million to million-plus area.” RP V.I 94, 99.

Greer testified that he did not appraise businesses. RP V.I 99. Greer testified that his valuation of the station at \$1,000,000.00 was based only his projected market value of the real estate and fixtures, based upon the sale prices of similar properties in the Lakewood area. RP V.I 109 – 111.

E. Testimony of Crystal Kwak-Goldsmith

Crystal admitted that she spoke to Westman when he visited the property for inspection. RP V.I 160 – 161. She testified that she informed Westman that she could not talk to him. RP V.I 161.

She testified that she informed Westman of the pending Department of Ecology inspection. RP V.I 161 – 162.

She informed the Court that she and Westman discussed whether the appraisal might need to be delayed due to the DOE inspection. RP V.I 164 – 165. She testified that she did not provide Westman with any other information during the conversation. RP V.I 165.

F. Testimony of Walter Goldsmith

Walter testified that the purpose of the “no unilateral contact” provision of the CR2A was to ensure a “fair and neutral appraisal.” RP V.II 63 – 64. He testified that this provision was “very important” to him because he feared that Crystal would “manipulate” and attempt to control the appraisal. RP V.II 64.

At trial, when questioned as to why he believed the conversation between Westman and Crystal had influenced the ultimate value assigned to the station, Walter stated that the “appraisal seemed very low.” RP V.II 97.

He could not identify or explain why he believed the contact had ultimately influenced the appraisal to his detriment, other than to say that the appraisal numbers were lower than he expected. RP V.II 97 – 98. In fact, when prompted, Walter could not even say whether he thought the appraisal was biased against him:

Q: Mr. Goldsmith, you’ve indicated that you believe Mr. Westman was biased against you and biased in favor of your wife?

A: I questioned just the number of the appraisal seemed very low. That is correct. I don't [know] why he thought or how he conducted it. The numbers seemed very, very low.

RP V.II 97 – 98.

Walter did not explain with any specificity his concern that Crystal had “manipulated” the appraisal through her conversation with the appraiser, other than to say he would “not be surprised” if she had tried to manipulate the appraisal. RP V.II 97-98.

Nor could Walter articulate any link between the contact with Crystal, and Westman's conclusions, except to say that the value was lower than he expected based upon the 2004 appraisal:

Q: Your reason for saying that it wasn't neutral is because the number was \$780,000?

A: I just questioned the number being so low in such a short period of time. It didn't jive with the original appraisal that they did.

RP V.II 99.

G. Findings by Pro Tem Judge Purbaugh At Conclusion of Trial

At the conclusion of trial, pro tem Judge Purbaugh made the following oral ruling with respect to the breach of the “no unilateral contact” clause in the CR2A:

Paragraph 2B of the [CR2A] Agreement directed that an appraisal of the gas station property be done by a

designated appraiser... and... neither of the parties nor their counsel have any unilateral contact with the appraiser. After substantial delay in starting the appraisal, the Court ordered that the appraisal occur setting the joint engagement letter signed by both counsel as attached to the Court's order, dated September 5, 2007.

This joint engagement letter was sent to the designated appraisal firm but apparently was never provided by the firm to the individual appraiser who did the work and prepared the appraisal report.

Being initially unaware of the prohibition on unilateral contact, the appraiser visited the gas station and spoke to the wife, who was then managing the business. She called her attorney to report this contact and also informed the appraiser of impending Department of Ecology inspection that had some potential to affect the appraisal.

The wife's attorney informed the husband's attorney of these communications, and the appraiser was then informed on the prohibition of unilateral contact of parties and their counsel. **There is no credible evidence of further unilateral contacts following this incident discussed above.** The Department of Ecology did not find contamination and **had no affect on the appraisal results.**

...

A review appraisal of the gas station was obtained at the husband's request when he had concerns about the appraisal by the designated appraiser. That valued the station at approximately \$1 million. That valued only the land and improvement and did not attempt to value the business's going concern...

The Court is called upon to determine whether to give either party a relief from the CR2A Agreement. The Agreement meets the requirements of both the rule and RCW 2.44.010, and it's, therefore, enforceable under either or both of those authorities. Such agreements are interpreted using contract principles.

A Court has discretion to relieve a party from the stipulation of this sort when it's shown relief is necessary to prevent injustice in granting relief and not place the adverse party to a disadvantage by having reacted in reliance of the stipulation. Circumstances traditionally viewed as justifying relief from the stipulation include fraud, mistake, lack of understanding or some lack of jurisdiction by the Court.

[T]he agreement's provision regarding the unilateral contact was breached by the wife. But there is insufficient evidence to conclude that this breach was material to the bargain between the parties or that it arose from any fraud, mutual mistake or lack of understanding of either of the parties.

...

So the Court will enforce the Agreement as written between the parties without granting either party relief from the terms of the Agreement which they seek.

Emphasis added. RP V.II 171 – 177.

H. Hearing on Reconsideration

A motion for reconsideration was timely filed by Walter, and heard by Judge Purbaugh on June 13, 2008. CP 284 – 294; 300 – 301. Said motion was denied. CP 300 – 301.

During the hearing on reconsideration, the Court provided further explanation of the reasons for his findings at trial:

...I believe that if [Walter] had mustered evidence which showed either that the husband's fears came true in the form of overt manipulation or regardless of motive that they came true in the form of discrepancies which affected

the outcome of the appraisal that the Court might have been led either to a different result or certainly to a more difficult weighing of the elements.

...

I've basically combed my notes and my recollection of the trial testimony and the documentary exhibits again to ascertain if there might be sufficient evidentiary basis, primarily in the form of inferences arising from the evidence from which to conclude that the unilateral contact, which did occur, was material, meaning affected either the methodology or the outcome of the work of the designated appraiser.

Despite having performed that diligent review, I'm left with the same view that I had before; namely, that **there isn't sufficient evidence that the unilateral contact which did occur between the parties and their counsel and their appraisers, affected the designated appraiser's methods or the results which gave rise to any bias.**

Emphasis added. RP.III 13, 24.

IV. ARGUMENT

A. The Trial Court Properly Found That the Breach of the CR2A Was Not Material In That the Conversation Between Crystal Goldsmith and Rick Westman Did Not Influence Westman's Valuation of the Property.

Appellant alleges that the trial court made numerous erroneous findings of fact. However, the only allegedly erroneous finding of fact related to Appellant's case on appeal is the Court's finding that "any unilateral contact between the appraiser and the respondent and her attorney was not a material breach of the CRA agreement." Brief of Appellant, pg. iii.

This Court will not substitute its conclusion regarding the facts for those of the trial court when the findings are supported by substantial evidence. *Mayo v. Mayo*, 75 Wn.2d 36, 40, 448 P.2d 926 (1968).

The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993). “Substantial evidence” is evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” *In re Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991).

On appeal Walter contends that the trial court should have found that the conversation between Crystal and Westman was a material breach of the “no unilateral contact provision” of the CR2A stipulation. “The ‘standard of materiality... is necessarily imprecise and flexible.’ However, it ‘is to be applied... in such a way as to further the purpose of securing for each party his expectation of an exchange of performances.’” *Bailie Commc'ns v. Trend Bus. Sys.*, 53 Wn. App. 77, 84, 765 P.2d 339 (1988) (quoting Restatement of Contracts 2d § 241, comment *a*).

In determining materiality of an alleged breach of contract, Washington courts consider the five factors listed in the Restatement of Contracts 2d:

- (1) whether the breach deprives the injured party of a benefit which he reasonably expected;
- (2) whether the injured party can be adequately compensated for the part of that benefit which he will be deprived;
- (3) whether the breaching party will suffer a forfeiture by the injured party's withholding of performance;
- (4) whether the breaching party is likely to cure his breach; and
- (5) whether the breach comports with good faith and fair dealing.

See Restatement 2d § 241(a)-(e) (1981).

The plain language of the CR2A, the jointly-drafted, court-ordered engagement letter, and the testimony of the parties make it clear the benefit both parties expected to receive from the “no unilateral contact” was a neutral and accurate appraisal.

The jointly-drafted, court-ordered engagement letter informed the appraiser that both parties “desire to have you remain impartial and without unilateral contact with either party[.]” CP 60.

At trial, Walter testified that he wanted the CR2A to include the provision to ensure a “fair and neutral” appraisal because he feared that Crystal would attempt to manipulate the appraisal. RP V.II 64.

Walter’s entire case for relief below was that Westman’s conversation with Crystal had somehow affected the neutrality and

accuracy his appraisal, thereby depriving Walter of the benefit for which he had bargained in the CR2A. RP V.II 135 – 137.

However, on appeal, it is apparently now Walter's contention that the benefit he expected to receive from the "no unilateral contact" clause was that there would be "no unilateral contact with the appraiser." Brief of Appellant, pg. 15. In other words, Walter now claims on appeal that the benefit of the bargain was the bargain itself. This new and self-serving contention is contrary to his case at trial and should not be considered by this Court.

The evidence presented at trial clearly supported the Court's conclusion that neither the on-site conversation between Westman and Crystal nor the information provided by her to him had any affect whatsoever on Westman's ultimate conclusion about the station's value.

Although Appellant now insinuates that there is some mystery surrounding the contents of the conversation, the Court was satisfied by the testimony and evidence presented that the subject matter of the communication between Crystal and Westman was the impending DOE inspection. RP V.I 47, 49, 50, 55, 160 – 162, 164 – 165. The Court was further satisfied by Westman's testimony that this information had "no impact" on his ultimate valuation, and by Westman's testimony that the

reduction in value was primarily attributable to the presence of the newly-constructed Safeway station. RP V.I 27 – 28, 32, - 33, 49 – 51, 71 – 72.

Conversely, there was no credible objective evidence presented at trial sufficient to warrant relief from the CR2A for material breach.

Despite having ample opportunity on both direct and cross-examination to explain in detail how or why he believed the appraisal to have been materially compromised by unilateral contact, Walter could only state (1) that the appraisal number was lower than he desired and expected; and (2) that he would not have been surprised if Crystal had done some unknown and unspecified act to manipulate the appraisal. RP V.II 97 – 98.

Nor could the testimony of appraiser Edward Greer have provided the Court with any objective evidence or even indicia of possible influence by Crystal on Westman. Greer’s own approach to valuing the station was to value the real estate and fixtures thereon, and to review the sales prices of “comparable properties” in the Lakewood area. RP V.I 93, 109 – 111.

By his own admission, Greer was not a business appraiser, had not appraised the business or the going concern value of the station, and did not use any of the three court-ordered valuation approaches. RP V.I 99.

The difference between Westman’s value and Greer’s value was not attributable to manipulation, influence, bias or even to honest error.

Rather, the difference in the two appraiser's values arose from the disparate methodologies followed by them (only Westman's methodology being that outlined in the joint letter of instruction). Thus, Greer's testimony was entirely irrelevant to the issue of whether the Westman appraisal had been influenced by unilateral contact with Crystal.

There was clearly substantial evidence before the Court to support its finding that the conversation between Crystal and Westman did not affect the accuracy or impartiality of the appraisal (or affect the appraisal at all), and that the conversation was therefore not a material breach of the CR2A. Conversely, Walter did not present any evidence that the neutrality of appraiser, or his resulting report, was manipulated or in any way compromised by the unilateral contact.

All of the evidence before the Court below demonstrated that Walter and Crystal each received the benefit of the bargain – a neutral and fair appraisal of the parties' gas station. The Court's finding that the unilateral contact was not a material breach of the CR2A should be affirmed.

B. The Court Properly Exercised Its Discretion in Enforcing the CR2A Because There Was No Credible Evidence that the Unilateral Contact Between Crystal and Westman Entitled Walter to Relief from the Stipulation.

Appellant contends that the trial court erred by approving the CR2A. Brief of Appellant, pg. ii. Appellant further contends that the trial court erred when it did not vacate the portion of the CR2A which provided for the binding appraisal to be performed by the Appraisal Group of the Northwest. Brief of Appellant, pg. iii.

A trial court's decision to enforce a settlement agreement under CR 2A is reviewed for an abuse of discretion. *In re Patterson v. Taylor*, 93 Wn. App. 579, 586, 969 P.2d 1106 (1999). An abuse of discretion occurs when a decision of the trial court is manifestly unreasonable or based on untenable grounds or reasons. *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). The appellant bears the burden of proving an abuse of discretion. *In re Parenting and Support of S.M.L.*, 142 Wn. App. 110, 118, 173 P.3d 967 (2007).

A trial court has discretion to relieve a party from a stipulation when it is shown that that relief is necessary to prevent an injustice and the granting of relief will not place the adverse party at a disadvantage by having acted in reliance on the stipulation. *Baird v. Baird*, 6 Wn. App. 587, 494 P.2d 1387 (1972).

The discretion of the trial court to relieve parties from stipulations when improvident or induced by fraud, misunderstanding or mistake, or rendered inequitable by the development of a new situation, is a legal discretion to be exercised in the promotion of justice and equity, and there must be a plain case of fraud, misunderstanding or mistake to justify relief.

Id. at 590-591, quoting *Schmidt v. Schmidt*, 40 Wis. 2d 649, 162 N.W.2d 618 (1968).

As set forth above, there was substantial evidence before the Court that the only information provided by Crystal to Westman related to the impending DOE inspection and that that information had no impact on Westman's ultimate valuation of the property.

Westman testified that the information regarding the impending DOE inspection did not have, and would not have had, any impact on his ultimate valuation of the property. RP V.I 27 – 28, 32, - 33, 49 – 51, 71 – 72. He and Crystal both testified that there was no other information conveyed during their brief conversation. RPV.I 50, 165.

Instead, the evidence before the Court indicated that Westman affixed a value to the property that was significantly lower than the 2004 appraisal and the purchase price due to an external obsolescence created by the construction and operation of a Safeway gas station near the parties' gas station. RP V.I 27 – 28, 32 – 33.

There was no evidence before the Court that Crystal unilaterally communicated any information to Westman that persuaded him to appraise the property at a deflated value. The single issue of the greatest concern to Westman – the presence of the Safeway station and its impact on sales – was not even mentioned in his conversation with Crystal. No witness claimed or even suggested that Crystal was concerned about the Safeway, mentioned it to Westman, or even shared his opinion as to its impact on the station's value.

Despite the fact that Walter was given ample opportunity to explain the basis of his suspicions of manipulation by Crystal of the appraisal, he could only say that (1) he was concerned by the fact that Westman's numbers were lower than the 2004 appraised value and purchase price; and (2) that he would not be surprised if Crystal had done something to manipulate the appraisal. RP V.II 97 – 99.

These statements were no more than expressions of speculation by Walter. They were not evidence of anything which would have allowed the court to draw an inference of influence or wrong doing. In short, there was no evidence before the Court that enforcing the CR2A, notwithstanding the unilateral conversation, would deprive Walter of the unbiased appraisal he had bargained for.

The Court's finding that there was no material breach of the CR2A was reasonable and well grounded in the evidence before it. As such, the Court's decision to enforce the CR2A was well within its broad discretion and should be affirmed.

C. This Court Should Award Crystal Kwak-Goldsmith Her Attorneys' Fees on Appeal.

This Court should award attorneys' fees to Crystal on appeal based on her need, Walter's ability to pay, and the frivolity of this appeal. RAP 18.9(a); RCW 26.09.140; *In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114 (1983). An appeal is frivolous if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997).

Although Appellant has framed the issue on appeal to be the trial court's finding that there was no material breach of the CR2A, the Appellant's true complaint is with the Court's wholly discretionary decision to enforce the CR2A agreement.

He cannot point to any evidence in the record to support his claim that the conversation between Crystal and Westman was a material breach of the "no unilateral contact" provision of the CR2A. Instead, he simply

asks this Court to reverse the court below on the assertion that what truly transpired between Crystal and Rick Westman at the gas station “remains unknown.” Brief of Appellant 21, 24.

Walter makes this assertion in the face of overwhelming and credible evidence in the record of the content of the conversation; that the conversation had no effect on Westman’s ultimate valuation of the station; and that the reason Westman appraised the station to be worth less than the purchase price and the 2004 appraised value was the presence of the nearby Safeway gas station. Walter’s appeal has no merit and this Court should award Crystal the fees she has incurred for having to respond to it.

V. CONCLUSION

The trial court’s finding that the conversation between Crystal and Walter was not a material breach should be affirmed. The Court’s finding that Crystal’s breach of the CR2A was not material is supported by substantial evidence in the record that the unilateral contact by Crystal did not affect the neutrality and accuracy of the appraisal, and that the reason for the low appraised value was the external obsolescence created by the Safeway gas station.

The denial of Walter’s request for relief from the CR2A was proper and should also be affirmed. The Court’s decision to enforce the CR2A reasonable and well within its discretion because there was

substantial evidence that the appraisal had not been influenced or affected by unilateral contact, and thus both parties received the bargained-for benefit of a fair and impartial appraisal.

Dated this 7th day of August, 2009.

RESPECTFULLY SUBMITTED,
Rao & Pierce, PLLC



Elizabeth A. Hoffman
WSBA #40722



Christopher R. Rao
WSBA #27592
Attorneys for Respondent

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On August 7th 2009, I transmitted a true and correct copy of the Brief of Respondent via ABC Legal Services to:

WASHINGTON STATE COURT OF APPEALS, DIV. II
950 Broadway, Suite 300
Tacoma, WA 98402

ROBERT HELLAND
960 Market Street
Tacoma, WA, 98402

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

SIGNED at Seattle, Washington on August 7th, 2009.


Michelle M. Morrell