

63121-7

63121-7

NO. 63121-7

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

WESLEY F. RIEDEL and LANA L. RIEDEL, husband and wife,
Appellants,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT STATE OF WASHINGTON'S BRIEF

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I. INTRODUCTION

This matter arises out of a condemnation action filed by the State of Washington (“State” or “WSDOT”) to acquire a portion of real property owned by Wesley and Lana Riedel needed to widen SR 20 in Skagit County. Approximately nine months after the condemnation petition was filed, the parties attended mediation. The Riedels were accompanied by their attorney, who began representing them before the condemnation petition was filed, and their appraiser. At mediation, the parties negotiated the terms of an agreement, which was immediately reduced to writing and signed by Mr. and Mrs. Riedel, their attorney, and WSDOT’s attorney. The next day, the Riedels fired their attorney and expressed their desire to back out of the settlement agreement. They claim the agreement is not enforceable and that the State breached the agreement. While it is unfortunate that the Riedels regret signing the settlement agreement, that is not a basis to find the agreement unenforceable. The State, which complied with all the terms of the agreement, is not in breach.

II. STATEMENT OF THE CASE

A. Statutory Framework

The Washington Uniform Relocation Assistance and Real Property Acquisition Act (“Act”) was enacted in 1971. RCW 8.26. The Act, and

the regulations that implement it,¹ provide relocation assistance for people displaced by public works programs. Certain types of relocation assistance were made available under other statutes as early as 1965. Examples of relocation assistance currently provided by statute or regulation include moving costs,² business reestablishment costs,³ and replacement housing payments.⁴

There are many differences between the manner in which a person is compensated for public acquisition of his or her real property and the manner in which relocation assistance payments are made. Where WSDOT determines that a particular parcel is needed for a public project, it first seeks to negotiate a purchase price with the property owner. If no agreement can be reached, WSDOT initiates a condemnation action under RCW 8.04, in which the value of the property and the amount of just compensation are determined in a trial in superior court. After a judgment for damages is rendered, the court enters a decree of appropriation vesting legal title to the condemned property in the state of Washington. RCW 8.04.120. The State then pays the damages and costs by depositing them with the clerk of the court. RCW 8.04.130, RCW 8.04.160.

¹ WAC 468-100.

² RCW 8.26.035.

³ WAC 468-100-306.

⁴ RCW 8.26.045, RCW 8.26.055.

In contrast, the circumstances in which relocation assistance is to be paid are defined in RCW 8.26.035 through RCW 8.26.055. WSDOT must provide notice to persons who may be displaced by a project that the persons may be eligible for the program, and then determines eligibility based on whether the person in fact will be displaced. WAC 468-100-203. A claim for a relocation payment then must be made as provided in WAC 468-100-207. If a person's claim for relocation assistance is denied, he or she must file an administrative appeal with WSDOT. WAC 468-100-010(1). Judicial review of the agency determination is accomplished under the Administrative Procedure Act, RCW 34.05. RCW 8.26.010(3). Unlike just compensation for the acquisition of real property, payments made for relocation assistance are not considered income. WAC 468-100-209.

B. Factual and Procedural Background

To widen SR 20 in Skagit County, WSDOT needed to acquire a portion of real property from a parcel owned by the Riedels. CP at 418-421. In July 2005, shortly after the right of way plans were approved, WSDOT right of way agent Cindy Worrell contacted the Riedels. CP at 421, 477, 483. Over the next few months, Ms. Worrell, the Riedels and their first attorney, Craig Magnusson, communicated about a variety of matters. CP at 485, 487-488. She provided them with information about

the project and the nature of the acquisition, including the ability of trucks to make u-turns on SR 20, the elevation of the highway after construction, and access to their property during construction. CP at 487-488. In a letter dated December 7, 2005, Ms. Worrell addressed the Riedels' belief that the WSDOT right of way plan depicted the right of way line between SR 20 and the northern boundary of their property incorrectly. CP at 487. She provided the Riedels with documentation supporting WSDOT's right of way plan. CP at 487.

In March 2006, after the State's appraisal was complete, Ms. Worrell made a formal offer to acquire the portion of the Riedels' real property needed for the highway project. CP at 490-491. Thereafter, Ms. Worrell spoke and met with the Riedels on many occasions. CP at 477-481. She reviewed the right of way plan sheets and the appraisal with them. CP at 479. She asked them to make a counteroffer. CP at 479-480. At one meeting, Mr. Riedel again told Ms. Worrell that he believed that the right of way plan sheets incorrectly showed WSDOT's existing right of way line. CP at 479. Ms. Worrell obtained additional documentation showing that the right of way plans correctly depicted WSDOT existing right of way line and provided that information to Mr. Riedel. CP at 479. A search of the county records by Ms. Worrell failed to reveal surveys of neighboring properties that would contradict the State's right of way

plans. CP at 479. In an attempt to further clarify the issue, Ms. Worrell also explained that WSDOT surveys its property from the centerline of the highway. CP at 480. She also informed Mr. Riedel that the WSDOT would not perform an additional survey of his property. CP at 480. Mr. Riedel did not agree with the documentation provided by Ms. Worrell. CP at 480. Negotiations failed to result in an agreement for the acquisition of the Riedels' property. CP at 480.

On January 31, 2007, the State filed a condemnation petition. CP at 418. A legal description of the property was attached to the petition. CP at 420-421. The description provided that WSDOT would acquire all rights of ingress and egress between SR 20 and the remainder of the Riedel property, except for two access connections, which WSDOT would construct. CP at 421. One of the access connections constructed would be a commercial access not to exceed 50 feet and the other would be a farm access not to exceed 20 feet. CP at 421.

Prior to and during the course of the proceedings, the Riedels were represented by attorney Richard Pierson. CP at 423, 480. In the months after the condemnation petition was filed, the case progressed as condemnation cases typically do. The Riedels agreed that the State could take immediate possession of their property. CP at 404-408. The parties hired appraisers, met for site views, discussed issues such as the dispute

regarding the location of the right of way line, and engaged in discovery. Appraisal reports were completed, exchanged, and the appraisers were deposited. CP at 426, 428, 430-431, 434-435, 437.

On October 24, 2007, the parties and their attorneys attended mediation. Terrence Carroll, an experienced mediator and retired King County Superior Court Judge, acted as mediator. CP at 410, 464. During mediation, the State was asked to enter into a global settlement resolving the amount of just compensation due for the acquisition of the real property and all relocation issues. As such global settlements are prohibited by the Federal Highway Administration (FHWA), the State replied that it could not enter into such an agreement. CP at 285, 16. This was communicated to the Riedels. CP at 16. The parties went on to reach an agreement, the terms of which were as follows:

- WSDOT agrees to pay the Riedels \$600,000 as just compensation for the acquisition of a portion of their real property described in the condemnation petition filed by WSDOT. This payment constitutes full and final settlement of all the Riedels' claims against WSDOT regarding the just compensation for the acquisition of the real property. CP at 441.
- WSDOT agrees to pay the Riedels \$45,000 for the attorney and expert witness fees and costs. CP at 442.
- WSDOT agrees that if the Riedels purchase and occupy a replacement house for \$350,000 or more within 12 months after the date they vacate the house on the property that is the subject of this case AND if the Riedels make a claim for a replacement housing payment within 6 months after occupying the replacement

house, WSDOT will pay a replacement housing payment in the amount of \$98,000. The parties agree to cooperate in good faith for a prompt resolution of any and all issues related to relocation benefits, including but not limited to the Riedels' inventory and equipment and moving expenses. CP at 442.

The terms of the agreement were immediately memorialized in a written settlement agreement, which was signed by the Riedels, their attorney, and WSDOT's attorney at mediation. CP at 441-442.

On October 25, 2007, the day after the mediation, the Riedels fired Mr. Pierson. CP at 457. The State asked the Riedels to sign a stipulated judgment and decree of appropriation memorializing the terms of the agreement. CP at 455, 449-453. After the Riedels communicated that they did not wish to be bound by the agreement, they were advised that if they did not sign, the State would file a motion to enforce the settlement agreement. CP at 287. The State also provided the Riedels with information about hiring a new attorney. CP at 287. In a letter dated October 29, 2007, the Riedels again indicated that they wanted to back out of the agreement. CP at 458.

On November 26, 2007, the State filed a motion to enforce the settlement agreement. CP at 409-413. The Riedels and WSDOT's attorney appeared before Judge Dave Needy on December 7, 2007. The hearing was continued to January 11, 2008 to give the Riedels time to find a new attorney. CP at 14. On January 8, 2008, the Riedels filed a

response to the State's motion to enforce the settlement agreement. CP at 14-69. Among other things, they argued that they had not been paid a fair market value, and that they were not compensated in a fair and just manner. CP at 16. The Riedels and WSDOT's attorney appeared before Judge John Meyer on January 11, 2008. On January 16, 2008, Judge Meyer entered an order granting the State's motion to enforce the settlement agreement.

The Riedels remained unwilling to sign a stipulated judgment and decree of appropriation. Therefore, on April 1, 2008, the State filed a motion to enter judgment. It was around this time that the Riedels hired their current attorney. The parties appeared before Judge Susan Cook on the State's motion to enter judgment on May 15, 2008. At this hearing, the Riedels argued that the State was not complying with the terms of the settlement agreement because it was not acting in good faith to resolve the Riedels' claims for relocation assistance. Specifically, the Riedels claimed that the State improperly denied a claim for relocation assistance in the amount of \$2,900. Judge Cook stated that she did not fully understand the information set forth in a letter from WSDOT to the Riedels. CP at 505. She commented that she was not inclined to sign the State's proposed order and suggested that the State obtain more information as to the status of the Riedels' claims for relocation assistance.

CP at 505. She did not find that the State acted in bad faith. She did not find that the State breached the agreement. She made no findings of fact at all. She did not enter an order either granting or denying the State's motion. *See* CP at 509-517. After that hearing WSDOT's attorney did obtain more information about the status of the Riedels' claims for relocation assistance and sent a letter to the Riedels' attorney providing a detailed explanation regarding the status of certain claims and why some claims had been denied. CP at 511-513.

The parties appeared before Judge Meyer on December 19, 2008 on the State's Motion to Enter Judgment and the Riedels' Motion to Set Aside the Agreement. Mr. and Mrs. Riedel testified. RP at 3-11, 20-97. Mr. Riedel testified that vehicles could make u-turns at the intersection of Avon-Allen Road and SR 20. RP at 37. However, he was displeased that the State does not plan to install u-turn signs at the intersections. RP at 37. Mr. Riedel testified that prior to the acquisition there were three access connections from his property to SR 20 and that after the acquisition, there are two, one of which is 50 to 60 feet wide and one of which is 20 to 30 feet wide. RP at 60. It should be noted that the access connections that the Riedels testified they received were the ones promised by WSDOT in the condemnation petition.

On January 29, 2009, Judge Meyer entered an order and decree of appropriation. CP at 312-313. The order stated that making the payment of the balance of the just compensation and fees and costs into court did not excuse the State from continuing to act in good faith in working with the Riedels to resolve relocation entitlement issues.⁵ CP at 312-313. In the body of that order, Judge Meyer noted that the Riedels' Motion to Set Aside the Mediation Agreement was denied and that relocation entitlement issues are subject to the administrative process. Judge Meyer also added a provision to the order stating that entry of the decree did not resolve issues raised by the Riedels regarding drainage rights and u-turns, which the parties were directed to address by mediation. CP at 313. Entry of that order does not preclude the Riedels from making additional claims for relocation assistance or from appealing any decisions on those claims with which they do not agree.

Since the mediation, WSDOT made the following payments for relocation assistance to or on behalf of the Riedels:

- the sum of \$42,685 for the Riedels' inventory of perishable foods and store merchandise;

⁵ Contrary to the assertion by the Riedels in their brief, the State does not take the position that the provision requiring the parties to work together to promptly resolve the Riedels' claims for relocation assistance is meaningless. The State incorporated the provision into the final order and decree of appropriation. It is now part of a binding court order of record.

- the cost to move certain items of the Riedels' personal property from the house acquired by WSDOT to a rental home;
- the cost to move those items from the rental home to their new home;
- the cost to move the remainder of their personal property from the house acquired by WSDOT into a storage facility pending their purchase of a replacement home and the cost of that storage;
- the cost to move those items from storage to their new home;
- the sum of \$6,132.50 to the Riedels' private relocation agent;
- the cost to appraise the Riedels' business equipment;
- the cost to move certain items of equipment and fixtures into storage and the cost of the storage. As of the date of the last hearing with Judge Meyer, WSDOT was still paying for that storage. RP at 74-75.

CP at 10-12, 203-204. The State has sent numerous letters to the Riedels, responding to questions, approving requests to continue to pay for the storage of business equipment, explaining why certain claims had been denied, and advising them of the appeal rights. CP at 86-87, 112, 114-115, 117, 136, 143, 145, 147, 152-153, 158-159, 161, 173-174, 192-194, 238, 242-247, 250, 262, 266, 271, 281. WSDOT approved some claims for relocation assistance upon further review after the Riedels filed an administrative appeal. CP 309-310. In May 2008, the State paid the replacement housing payment as required by the settlement agreement. CP at 204. After Judge Meyer entered the order and decree of

appropriation, the State deposited the balance of the just compensation and the attorney and expert fees into the court registry.

III. ISSUES PRESENTED

1. Whether the written settlement agreement, signed by the Riedels and their attorney at mediation, is enforceable?
2. Whether the State breached the settlement agreement when it paid the replacement housing payment in the amount of \$98,000, deposited the balance of just compensation, fees and costs into the court registry, and paid claims for relocation assistance in excess of \$70,000?
3. Whether the Riedels are entitled to additional fees and costs?

IV. STANDARD OF REVIEW

Motions to enforce judgment are reviewed de novo where the evidence consists of only declarations and affidavits. But where the trial court decides a motion to enforce after taking evidence and testimony at a hearing, the trial court's factual findings are reviewed for substantial evidence. *Veith v. Xterra Wetsuits, L.L.C.*, 144 Wn. App. 362, 183 P.3d 334 (2008). The standard of review is not completely clear. At the hearing on the state's motion to enforce the settlement agreement, the court did not take testimony. Only declarations were submitted. However, at the hearing on the state's motion to enter judgment and the Riedels' motion to set aside the mediation agreement, the court took testimony.

V. ARGUMENT

Although the Riedels list five assignments of error, their argument can be summarized as follows – that the settlement agreement itself is not enforceable and that the settlement agreement must be rescinded due to an alleged breach.

A. The settlement agreement is enforceable.

The Riedels argue that the written settlement agreement is not enforceable because (1) there is a dispute as to the material terms of the agreement; (2) there are disputes about issues unrelated to the agreement; and (3) the agreement was contingent on resolving other issues. The written settlement agreement, reached at mediation and signed by the Riedels and their attorney, is enforceable. Enforcement of a settlement agreement is governed by CR 2A. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

CR 2A applies only when (1) the agreement was made by the parties or attorneys in respect to the proceedings in a cause; and (2) the purport of the agreement is disputed. *In re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993). When these elements are met, CR 2A supplements but does not supplant the common law of contracts. *Id.* It precludes enforcement of a disputed settlement agreement not made in writing or put on the record, whether or not common law requirements are

met. *Id.* at 582-583. However, it does not affect an agreement made in writing, or put on the record. *Id.* at 583.

It is not clear that CR 2A can be used to preclude enforcement of a written settlement agreement. As mentioned above, the *Ferree* court held that while CR 2A will preclude enforcement of a disputed settlement agreement not made in writing, it does not affect a written agreement. This was echoed by the court in *In re Patterson*, 93 Wn. App. 579, 583, 969 P.2d 1106 (1999), which further stated that:

When a genuine dispute over the existence of the agreement or of a material term is established by the party resisting enforcement, the moving party may prevail either by showing the disputed agreement was made on the record or by showing it was reduced to writing and signed by the party or attorney denying the agreement.

This also seems to indicate that CR 2A will not preclude enforcement of a written settlement agreement. Despite this language, the *Patterson* court went on to determine whether the terms of the written settlement agreement in that case were disputed. Since it is not clear whether or not CR 2A can actually preclude enforcement of a written settlement agreement, the State will address the issue.

1. There Is No Dispute As To The Existence or Material Terms of the Settlement Agreement

The material terms of the written settlement agreement are not genuinely disputed. The “purport” of an agreement is disputed only when

its material terms are disputed. *In re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993). The dispute must be a genuine one. *Id.* Courts have found that the material terms of a settlement agreement are genuinely disputed when the parties orally agreed that the settlement agreement would contain a release, hold harmless and indemnity provision but did not agree on the terms of the provision.⁶ Conversely, the courts have found that settlement agreements reduced to writing at mediation and signed by the parties at mediation are enforceable.⁷

There is no dispute over the terms of the agreement signed by the Riedels. This is not a case in which an oral agreement was made as to some terms but not others, or in which a subsequent written agreement included additional or different terms. This settlement agreement was reduced to writing at mediation, contemporaneous with the making of the terms. The parties signed it on the spot. The Riedels have never claimed that they agreed to something other than what is written in the agreement.

The Riedels dispute the terms of the agreement because they want it to mean something to which the parties never agreed. Like other arguments made in their brief, this one underscores the Riedels' subjective belief or hope that all of their relocation claims would be approved and that the Riedels would be paid a certain amount of money in relocation

⁶ *Lavigne v. Green*, 106 Wn. App. 12, 23 P.3d 515 (2001).

⁷ *In re Patterson*, 93 Wn. App. 579, 969 P.2d 1106 (1999).

assistance, as part of a “global settlement,” to make up the difference between the amount of just compensation to which they agreed in the settlement agreement and the amount to which they think they were entitled.⁸ The notion that they could use the relocation assistance program to “make up for” a perceived lack of just compensation is the subjective belief of the Riedels. This is evidenced in one letter, in which they state that they “signed . . . hoping relocation money would come in to help our situation.” CP at 97. However, there is nothing in the agreement or the record to suggest that it was the mutual assent of the parties that WSDOT would pay the Riedels a certain amount of money in relocation assistance to artificially increase the just compensation for the acquisition of their real property. If the parties so intended, the agreement either would have omitted the language that payment of just compensation was in full and final settlement of their claims regarding the real property acquisition; or it would have specified a specific amount of money that WSDOT would pay for relocation.

The assertion made in their brief that the State is forcing them to accept inadequate compensation because they relied on the State’s

⁸ The Riedels assert that they understood that the negotiation was “global” and included relocation benefits. The record does not support this contention. The Riedels understood that there was no global settlement. RP at 46. They acknowledged that Judge Carroll informed them at mediation that the State, by law, could not enter into a global settlement. CP at 16, 98.

contractual obligation to resolve remaining property issues promptly and in good faith mischaracterizes the agreement and the nature of just compensation. The State cannot force a party to accept inadequate just compensation by not resolving relocation issues in their favor. Just compensation and relocation assistance are two entirely different things handled in completely different ways.

The State is required to pay just compensation for the acquisition of real property. Const. art. I, § 16. Just compensation is the fair market value of the real property. *City of Medina v. Cook*, 69 Wn.2d 574, 418 P.2d 1020 (1966). The amount of just compensation due to a property owner for the acquisition of real property is determined by a jury or the court at trial after the filing of a condemnation petition. Relocation assistance is not an element of fair market value. The review, approval or disapproval, payment and appeal of claims for relocation assistance is all handled administratively. Relocation assistance is not intended to provide an alternative basis for full just compensation claims. *Schons v. State*, 43 Wn. App. 160, 162, 715 P.2d 1142 (1985).

The settlement agreement, reached after mediation and signed by the Riedels and their attorney, is enforceable. The terms of the agreement are not genuinely disputed. Unfortunately, the Riedels had a change of heart about the amount of just compensation to which they agreed. This is

evident in communications made soon after the mediation, in which they claim that they were not compensated in a fair and just manner. CP at 16-17. However, a party's change of mind regarding the sufficiency of the settlement amount does not make the settlement agreement disputed within the meaning of CR 2A. *Lavigne v. Green*, 106 Wn. App. at 14.

2. A Dispute Unrelated To The Terms Of The Agreement Does Not Result in the Agreement Being Disputed Under CR 2A

The Riedels argue that a settlement agreement is disputed under CR 2A if the parties disagree about issues not addressed in the agreement. In this case, the Riedels argue that the settlement agreement is not enforceable because there are disputes as to the size of the access connections from the remainder of the Riedels' property to SR 20, drainage from the Riedel property to SR 20, the location of WSDOT's right of way line as it related to the northern boundary line of their property line, the ability to make u-turns at certain intersections on SR 20,⁹ and the ability of the Riedels to redevelop their property.¹⁰

⁹ As indicated in the Statement of Facts, the Riedels acknowledged that vehicles can make u-turns at the intersection in question. Rather, they were upset about a lack of signage. There is no evidence the State promised the Riedels u-turn signs would be installed.

¹⁰ The Riedels imply in their brief that the State knew that Skagit County would not allow the Riedels to redevelop. Brief of Appellants, at 23, *Riedel v. State*, No. 63121-7 (Court of Appeals, Division 1, September 16, 2009). It should be noted that they do not cite to anything in the record to support this contention.

The parties agreed in writing that payment of just compensation in the amount of \$600,000 constituted a full and final settlement of all of the Riedels' claims against WSDOT for the acquisition of the real property described in the condemnation petition. The access, drainage and boundary line issues all relate to the acquisition of the portion of the Riedels' property by WSDOT. As such, the settlement agreement included any just compensation due to the Riedels as a result of those issues.¹¹ The Riedels released all claims against WSDOT for those issues when they signed the settlement agreement.

Furthermore, parties are free to resolve one issue in a settlement agreement in order to narrow the issues that need to be tried. It is not necessary to resolve every issue in a dispute in a settlement agreement. The court in *In re Marriage of Ferree* alludes to the fact that an agreement reached at mediation can resolve less than all of the issues in a dispute. ("The purpose of CR 2A is not to impede without reason the enforcement of agreements, intended to settle **or narrow** a cause of action."), 71 Wn. App. at 40-41.

3. The Settlement Agreement Was Not Contingent On Resolving Other Issues

¹¹ In an effort to end the litigation regarding the entry of an order and decree of appropriation, the State offered to construct a drain line from the Riedels' property to SR 20 if they agreed to sign a utility permit in accordance with the law. RP at 59-60. As they were unwilling to do so, the drain line was never constructed.

The Riedels take the position that the written settlement agreement is not enforceable because it is contingent on resolving outstanding claims for relocation assistance. The import of this argument is that the resolution of relocation issues is a condition precedent to the performance of the other provisions in the agreement. The parties did not intend such a result.

Whether a contract provision is a condition precedent or a contractual obligation depends on the intent of the parties. *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 96 P.3d 454 (2004). Where it is doubtful whether words create a promise (contractual obligation) or an express condition, the courts interpret them as creating a promise. *Id.* Words such as “provided that,” “on condition,” “when,” “so that,” “while,” “as soon that,” and “after,” suggest a conditional intent, not a promise. *Id.* There is no language in the agreement signed by the Riedels indicating that the parties intended resolution of all relocation assistance claims to be a condition precedent to performance of the other provisions of the agreement. If that were the case, WSDOT would not have paid the replacement housing payment into escrow or the just compensation and fees and costs into the court registry. Further, the law allows a displaced person to make a claim for relocation assistance up to 18 months after final payment is made on the acquisition of real property.

It is therefore contemplated that claims for relocation assistance will be made after the resolution on the issue of just compensation for real property.

State v. Trask, 91 Wn. App. 253, 957 P.2d 781 (1998), a condemnation case just like this one, is on point. In *Trask*, a stipulated order for immediate possession and use contained a provision in which the State agreed to provide and expedite payment of Trask's claims for relocation assistance. The order also set forth Trask's agreement to deliver possession of his property by a certain date. Trask did not deliver possession of his property by the promised date. Trask argued that he was excused from performing because the State failed to provide and expedite payment of his claims for relocation assistance. The court held that the provision regarding relocation assistance was not a condition precedent to Trask delivering possession of his property. In so holding, the court noted that the agreement did not say that the State's payment of such benefits was a condition precedent to Trask's delivery of possession, or even that the State promised to pay such benefits before Trask delivered possession. *Id.* at 275. The *Trask* court also pointed out that if counsel had intended to make the State's payment of relocation benefits a condition precedent to Trask's duty to move, they could have easily done so. *Id.*

The same is true in this case. If the parties had intended to delay payment of just compensation and the transfer of legal title of the property until after the resolution of the Riedels' relocation claims, they would have done so.

B. WSDOT did not breach the settlement agreement.

WSDOT did not breach the settlement agreement. As required by the agreement, it paid the replacement housing supplement in the amount of \$98,000. The balance of the just compensation and fees and costs were deposited into the court registry as provided by law after Judge Meyer entered the order and decree of appropriation. The only remaining provision in the agreement is the one requiring the parties to cooperate in good faith to promptly resolve the Riedels' claims for relocation assistance.

The State did not breach the provision of the agreement that required the parties to cooperate in good faith to promptly resolve the Riedels' relocation claims. That WSDOT did not respond as quickly as the Riedels hoped or that they did not approve every claim made by the Riedels is not bad faith. The State has paid over \$70,000 in relocation assistance to and on behalf of the Riedels. CP at 203-204. At the time of the hearing before Judge Meyer, all or most of the Riedels' outstanding claims had been paid. In fact, the focus of the Riedels' testimony at that

hearing was on other issues, such as whether u-turns would be allowed at certain intersections, drainage issues, and their belief that WSDOT's legal description did not accurately reflect the northern boundary of their property. These issues had nothing to do with any alleged breach. Rather, they had to do with the Riedels' position that the agreement they entered into was not fair.

C. The Riedels are not entitled to additional attorney fees and costs.

The Riedels argue that they are entitled to attorney fees and costs either pursuant to RCW 8.25.070 or because the State acted in bad faith.

1. The Riedels Are Not Entitled To Attorney Fees And Costs Pursuant To RCW 8.25.070

RCW 8.25.070 provides that attorney fees, expert fees, and costs must be awarded:

- (a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or
- (b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial (assuming the condemnees signed an order of immediate possession and use if requested to do so).

The statute also provides that the attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

RCW 8.25.070(2). As this case did not go to trial, this is the only provision that applies to the Riedels. In accordance with this provision, the State agreed to pay \$45,000 for costs and attorney and expert fees. They are entitled to no more than what the parties agreed, in writing, that the State would pay to settle the condemnation action.

2. The Riedels Are Not Entitled To Attorney Fees And Costs Because The State Did Not Act In Bad Faith

The Riedels also ask for an award of attorney fees and costs based on the contention that the State did not act in good faith, or asserted a frivolous or untenable position. The State has acted in good faith throughout these proceedings. It paid the balance of just compensation and fees and costs into the court registry as soon as it was able to by law. It paid the replacement housing payment. It processed and paid relocation claims in excess of \$70,000. By the time the parties appeared before Judge Meyer, most, if not all, of the Riedels' relocation claims were paid or approved for payment. The State did not act in bad faith by asking the court to enforce a written settlement agreement that the Riedels signed.

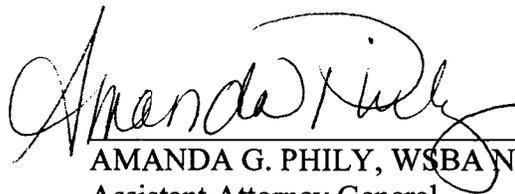
VI. CONCLUSION

No one can deny that the condemnation action was a difficult and emotional experience for Mr. and Mrs. Riedel. However, the Riedels had the benefit of counsel prior to the filing of the condemnation action,

throughout the proceedings, and at mediation. It is truly unfortunate that they had second thoughts about the agreement. However, a litigant's remorse or second thoughts about an agreement is not sufficient to render an agreement unenforceable. *Lavigne v. Greene*, 106 Wn. App. 12, 19, 23 P.3d 515, 519 (2001). Further, mediation, negotiations, and settlement agreements are meaningless if the parties cannot rely on them to be binding. No one would agree to mediate or enter into settlement agreements if a party could change his or her mind the next day. The agreement signed by the parties was enforceable, and the State did not breach the agreement by failing to meet the Riedels' subjective belief that they could make up a perceived shortfall in just compensation by way of relocation assistance.

RESPECTFULLY SUBMITTED this 6th day of November, 2009.

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APPENDIX

1 THE COURT: All right. We are back on the record
2 in the matter of GMAC versus Everett Chevrolet. And
3 this morning's hearing was scheduled to talk about the
4 motion to amend the complaint. I've sort of changed
5 this agenda. I'm going to give you my ruling. So
6 here we go.

7 This matter has come before the Court for hearing
8 from March 17th, 2009 to April 10th, 2009. The Court
9 has heard and reviewed trial testimony, all exhibits,
10 the memorandum of counsel, the records and the files
11 herein. It is therefore ordered, adjudged and
12 decreed as follows:

13 And these are my Findings of Fact.

14 Owner, John Reggans, has been operating Everett
15 Chevrolet Inc. (Henceforth ECI) successfully in the
16 City of Everett since 1996. He started in this
17 business with an 80 percent investment from Motor's
18 Holding, a division of General Motors Company and a
19 twenty percent match of his own.

20 The program he engaged in with Motor's Holding
21 enabled the junior investor to buy out the larger
22 company interest in a certain amount of time.

23 The pro forma plan for Mr. Reggans was to
24 accomplish this task in 3.5 years. His actual
25 performance was better. He acquired one hundred

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1 percent ownership in 1999, after only two years and
2 nine months. This acquisition was achieved solely
3 through dealer profits.

4 ECI, under Mr. Reggans, has been profitable every
5 year from 1996 to 2006. The Dunn and Bradstreet
6 report filed as exhibit number 92 indicates that his
7 high year sales were approximately 40 million dollars.

8 During the late 90's Mr. Reggans testified that he
9 averaged new car sales of 70 a month from 1996 to
10 1999. In 1999, a new Chevy dealership, Speedway
11 Chevrolet, opened up as a direct competitor. After
12 this, his new car sales dropped, but he still managed
13 to average about 40 to 60 new cars sold a month.

14 In 1999, he received a working capital loan from
15 GMAC in the amount of \$500,000, and repaid it in full
16 in five years. He has had revolving line of credit
17 with GMAC since 1999, with payment terms of interest
18 only. This continued until July 2008, when GMAC
19 unilaterally demanded principal reduction payments of
20 \$10,000 a month in addition to interest.

21 Mr. Reggans testified that in 2006 ECI earned
22 \$700,000 in net profit. However, after 2006, the car
23 industry began to decline. His 2007 net profit was
24 only about \$28,000.

25 In September of 2007, Mr. Jerry Vick became GMAC

1 branch manager for the Pacific Northwest. When Mr.
2 Vick was asked on direct examination if there were any
3 credit issues in 2007, he indicated, yes, that ECI
4 needed to expand its revolving line of credit from
5 \$500,000 to \$800,000.

6 The request was made directly between Mr. Reggans
7 and Mr. Vick. There was no problem granting this
8 request at that time. At the end of 2007, Mr.
9 Reggans also requested of Mr. Vick that GMAC help
10 finance the purchase of real estate the firm was
11 leasing. Mr. Reggans saw this as critical to the
12 profitability of his business because he was facing a
13 dramatic increase in lease payments and this was a
14 proactive action on his part.

15 The purchase of the property would avoid an
16 escalation in lease payments of nearly fifty percent.
17 Mr. Reggans made clear that this deal had to close by
18 December 31st, 2007. GMAC did not respond until May
19 of 2008. The response was a decline and was verbally
20 delivered by Mr. Vick. GMAC did not respond to this
21 request in writing.

22 On direct examination, Mr. Vick indicated that the
23 reason for the decline was no positive cash flow.
24 However, the April financial statement loss was the
25 first quarter loss of the year. Plus GMAC had just

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1 increased the revolving line of credit.

2 Lastly, the collateral is extremely valuable real
3 estate on Highway 99, Evergreen Way in Everett. The
4 property was appraised. The unrebutted testimony is
5 that the sales price was one million dollars under the
6 appraisal, as such, the Court does not find Mr. Vick's
7 answer at trial to be credible.

8 From a business standpoint, GMAC's position is not
9 reasonable. From the facts presented, GMAC appears
10 to have been dragging its feet. This delay, rather
11 than swift rejection, denies the dealer the
12 opportunity to pursue other options in a timely
13 manner. As an isolated occurrence, this fact is not
14 important. But it is important if it is a pattern of
15 behavior.

16 The April ECI financial statement showed a year to
17 date loss of \$163,042. This led to a meeting between
18 Mr. Vick and Mr. Reggans on June 10th. Mr. Vick
19 testified that the meeting basically covered all the
20 items later memorialized in his letter of July 31st,
21 2008, which is exhibit number 1. Mr. Reggans disputed
22 this vehemently in his testimony, indicating that the
23 meeting was dominated by a request for his personal
24 guarantee and that virtually none of the other topics
25 in Mr. Vick's subsequent letter were communicated in

1 this meeting. This raises a very serious issue of
2 credibility.

3 In his court testimony, Mr. Vick indicated that he
4 could not recall Mr. Reggans' response to raising
5 these very serious issues, particularly to the request
6 for the \$800,000 cash injection. The Court finds that
7 Mr. Vick's testimony is simply not credible.

8 In the letter, Mr. Vick indicates that because of
9 the losses, ECI will need a cash injection of
10 \$800,000, Mr. Reggans's personal guarantee and
11 continue to pay promptly and faithfully. A deadline
12 was set at October 31st, 2008 to achieve these goals
13 and if that they were not achieved, GMAC promised to
14 "suspend or terminate" the dealer's wholesale credit
15 lines. After these conditions were set, a few more
16 were added.

17 One was a charge of \$500 per audit.

18 And number two was the change in the revolving line
19 of credit setting a principal reduction payment of
20 \$10,000 a month.

21 This letter is copied to Michelle Smith and her
22 only. The Court also finds it incredible that a
23 letter of this magnitude would be sent almost fifty
24 days after the meeting.

25 In the world of finance, sixty days is a lifetime.

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1 A concerned dealer would certainly want these fifty
2 days in order to meet the conditions set. Here, GMAC
3 deprived the Dealer of his time to adjust, another
4 indication of delay.

5 By his own testimony, Mr. Vick did not mention the
6 deadline in his meeting, only in the letter. The
7 entire scenario, as reported by Mr. Vick, lacks
8 credibility.

9 This letter has been construed in many different
10 ways, but in business this is known as a drop dead
11 letter. The author is communicating to the reader
12 that the relationship is over and it is just a matter
13 of time before the end. However, this letter
14 attempts to mask this intent by justifying GMAC's
15 actions based on credit trends and performance. But
16 at this point in the year, there were no trends as
17 yet. All high overhead businesses show losses at the
18 beginning of the year until they reached their break
19 even point in sales later in the year. This is
20 common knowledge. If this had been the subject of
21 oral conversation over lunch, there is no question, in
22 this Court's view, given Mr. Reggans' wide ranging
23 contacts, that he would have had a different posture.

24 But GMAC deprived him of the opportunity to make
25 the maximum use of his time by misleading him, by

2 on a reservation of its rights. This fifty days
3 becomes a critical point later in the year.

4 What Mr. Reggans did not know is that GMAC was
5 undertaking a very sophisticated financial analysis on
6 his firm. He did not know that a metric was being
7 applied to him. Ms. Smith testified that he needed
8 to show a debt to equity ratio of three to one, yet
9 this was never told to him, even though GMAC knew they
10 had analyzed his April debt to equity ratio at over
11 9.73 to 1. There was no proof by GMAC that the cash
12 injection of \$800,000 was based on achieving this
13 three to one debt to equity ratio.

14 And in fact, Ms. Smith testified that she knew he
15 could not make this target in July because he had
16 continued to lose money. When Mr. Reggans did inject
17 \$500,000 into his business in October hoping this
18 would convince GMAC to lift the personal guarantee
19 condition, he still could only achieve a debt to
20 equity ratio of 18 to 1.

21 On questioning by the Court, Ms. Smith admitted
22 that the target cash injection of \$800,000 was no
23 longer valid in July when it was requested in writing.
24 And they did not tell him it was no longer valid. She
25 calculated that a total cash injection of \$800,000 by

1 the October deadline, given the increased losses,
2 would only get him to a debt to equity ratio of 10.73

3 to 1, when the metric is 3 to 1. She knew that ECI
4 could not meet GMAC goals.

5 According to GMAC, both Mr. Vick and Ms. Smith
6 engaged in detailed financial discussions with Mr.
7 Reggans about the performance of his business, yet not
8 once did they share the financial analysis with him.
9 Targets were set without any justification.
10 Deadlines were set without any notice or
11 justification. When he inquired why he was asked for
12 his personal guarantee after 12 years of doing
13 business with GMAC, he was told vaguely that it was
14 not uncommon. That was a quote, not uncommon, and
15 that "not every dealer" had to do it.

16 Ms. Smith was also not a credible witness. By her
17 own testimony she has 25 years in the business and a
18 Masters in business administration. Yet she could
19 not derive the formulas from simply reviewing the
20 financial information on instruments she has
21 purportedly used for years. She could not glean the
22 formulas without a formula handbook or a cheat sheet
23 and she could not give the Court ECI's breakeven point
24 in total sales, only in units per month. For a high
25 level unit manager, this is simply not credible.

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1 However, it is credible if her primary job is
2 collections and shutting down companies. This does
3 not require a high level financial analysis. And she
Page 9

4 testified that she was just "promoted" to high risk
5 manager. This is a credit collection term. In other
6 businesses it's called special credits. This is a
7 division of a firm that a client goes to when all
8 credit is about to be cancelled and all debts called
9 due.

10 Proof of this collection attitude is her response
11 to Mr. Reggans when he asked her why he needed to have
12 a personal guarantee. She said he has to have some
13 "skin in the game." This Court found this comment to
14 be highly insulting. It is not only insulting to a
15 person who has earned his ownership via hard work and
16 profit over a 12 year period, it is insulting based on
17 her explanation that a "personal guarantee shows level
18 of commitment." That's a quote. In the credit world
19 this is a false statement. Every single business
20 person in the world knows what a personal guarantee
21 means. It means the lowest credit rating for a
22 business. It means the business has no value. This
23 is why the personal guarantee is required, so that the
24 lender can take your house if the business fails to
25 pay its debts. In this case, it is not true that the

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1 business had no value. Motor's Holding, after its
2 own due diligence, was prepared to invest 2.5 million
3 dollars in this business. This casts doubt on the
4 requirement for a personal guarantee.

5 Most small business people start with a personal
6 guarantee and struggle to escape this risk by building
7 the net worth of their business. For her to say this
8 in court under oath shows her lack of respect for the
9 court, and her total lack of credibility. But it does
10 reveal her motivation. Clearly, this explanation to
11 the Court and to Mr. Reggans is the first real proof
12 of a GMAC hidden agenda.

13 Surprisingly, Mr. Pedram Davoudpour did testify
14 credibly. When the Court asked him why these actions
15 were taking place, he candidly indicated that there
16 were "red flags in the file."

17 When I asked him to identify what he read in the
18 file that was a red flag, he indicated that the letter
19 of July 31st, 2008 was the red flag. Mr. Davoudpour
20 was not using the occurrences of November or December
21 or August to impose the restrictions on ECI that he
22 was responsible for implementing, he was relying on
23 the July letter. Mr. Davoudpour's testimony affirms
24 for the Court that the requirements in the July letter
25 were false targets and were designed to create the

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1 basis for ECI's default.

2 The hidden agenda that is taking place here is a
3 working capital assault on ECI designed to manufacture
4 a default.

5 First, a target for cash injection is set that can

6 either not be reached, or if it is reached, will not
7 bring ECI into compliance with the policy metric of a
8 3 to 1 debt equity ratio.

9 Next is a communication to ECI that the break even
10 is units and that he needs to sell more units to meet
11 GMAC's goals. ECI is also told that they need to
12 reduce inventory. When the Court asked Ms. Smith what
13 this meant, she said, "sell more cars."

14 Next is the \$500 audit charge.

15 Then there is the \$10,000 monthly principal
16 reduction charge.

17 Then the revolving line of credit is suspended,
18 exhibit 69, while at the same time the interest rate
19 is increased from Libor plus 300 basis points to Libor
20 plus 600, an increase of one hundred percent.

21 Ms. Smith testified that all past credit decisions
22 were purportedly based on ECI's performance, but this
23 one in her letter is thinly based "market condition",
24 without indicating what metric in the market is being
25 used, without any stated relation to a specific market

1 condition or contract term. This seems to be just an
2 arbitrary action, which is not commercially
3 reasonable.

4 Next is the inventory reduction charged billed at
5 over \$170,000. This pre payment has no basis in the
6 contract. See exhibit number 3 where it says "As
Page 12

7 each vehicle is sold or leased, we will faithfully and
8 promptly remit." It comes directly out of working
9 capital without being earned. The calculation of the
10 sum has no metric and appears totally arbitrary. It
11 appears to assume depreciation of a vehicle that is
12 not being used when all depreciation rules are based
13 on use. It is even generally known that you value a
14 car based on mileage used, so this charge appears
15 arbitrary and as such is not commercially reasonable.

16 Then there is the November refusal to floor
17 unencumbered new and used vehicles at the Dealer's
18 request when it would have had maximum positive effect
19 on the Dealer in response to the Dealer's efforts to
20 be proactive and anticipate his problems.

21 Followed by that decision is the one in December to
22 allow flooring after audits found ECI to be out of
23 Trust. This action violated GMAC's own rule as
24 testified by Ms. Smith that no flooring would be done
25 once the floorplan was suspended.

14

1 But in the December case, the flooring helps GMAC
2 by obtaining more of ECI's assets, and harms the
3 Dealer because only his earlier proactive approach
4 would have enabled him to avoid the Out of Trust
5 position.

6 The three day business day remit rule in this
7 context is used to assault working capital. When the

8 business most needs flexibility, the rule is strictly,
9 if not arbitrarily, enforced. This rule is not a
10 contract term, and it is not uniform among dealers.
11 Some have a five business day remit rule. And there
12 was no testimony in the record concerning how it was
13 applied or who got three and who got five.

14 If it's not based on contract or a clearly
15 articulated policy, it is arbitrary and not
16 commercially reasonable.

17 The sales date determined by GMAC is arbitrary.
18 Pedram Davoudpour testified that when there was a
19 dispute about sales dates then they would negotiate it
20 with the Dealer. However, it was clear from the
21 testimony that there would be no negotiating with Mr.
22 Vick or Mr. Ted Modrzejwski. The date is applied in
23 an arbitrary manner because cars are considered sold
24 before the deal closes and is funded. Even known
25 unwinds are included in the audits as due and payable.

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1 This is a working capital assault, because it then
2 requires the Dealer to fund the GMAC floorplan payment
3 out of his working capital rather than out of the
4 sale. A Dealer with a five day remit will have a
5 distinct advantage here over one who has a three day
6 remit. And this is not commercially reasonable
7 because it's not based in any contract term and not on
8 any clearly articulated policy.

9 Audits taking place on a daily basis also assault
10 working capital. All the employees who testified
11 indicated that the daily audits interfered with their
12 performance. They testified that it reduced sales.
13 Inefficient performance diminishes working capital
14 because employees must be paid who are not achieving
15 peak performance. Mr. Jaffee testified that GMAC was
16 on site interfering with the business operation from
17 November 14th, 2008 until he left on January 28th,
18 2009. He testified that during this time, "there was
19 not one day when they were not physically on the
20 premises." This is not commercially reasonable
21 behavior. He testified that customers overheard their
22 conversations when they would come into his office and
23 demand information. This testimony is contrary to
24 GMAC witnesses who said they were polite and asked
25 employees to step out. This creates a credibility

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1 question that this Court resolves against GMAC.

2 On December 4th, exhibit 56, demand on the open
3 account was made severely impacting not only working
4 capital, but the Dealer's cash position by diverting
5 and freezing these critical funds.

6 On December 15th GMAC demanded payment on all
7 credit lines with a deadline of March 13th.

8 And then surprisingly, on December 19th, just four
9 days later, GMAC demanded immediate payment of all

10 credit lines referenced in the letter December 15th,
11 2008. These two actions coming within days of each
12 other do not make sense unless they are intended to
13 stop his investment from Motor's Holding.

14 On December 30th GMAC acquired a Temporary
15 Restraining Order that shut the business down for two
16 weeks.

17 Demand notices went to financing institutions and
18 this assault stopped all financing of sales until
19 relief was granted by the Court January 15, 2009.

20 It is unrebutted that Mr. Reggans had a
21 pre-investment contract, exhibit number 109, in place
22 that would have provided an equity cash injection into
23 his business by Motor's Holding in the amount of 2.5
24 million dollars and which was due to close on January
25 9th, 2009. It is unrebutted that Mr. Vick and Ms.

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1 Smith of GMAC, and others, knew this contract was
2 pending. With this deal, Mr. Reggans would again be a
3 junior investor in his business. However, it is also
4 undisputed that an equity investment of 2.5 million
5 dollars, just days away, would have solved all of
6 ECI's credit problems with GMAC. Motor's Holding, in
7 its refusal to close, cited this lawsuit as a basis
8 for denial.

9 Okay. So here is my analysis, and this is a
10 quote.

11 "The law has not yet acknowledged a general
12 requirement of full disclosure of all relevant facts
13 in all business relationships but the duty to disclose
14 relevant information to contractual party can arise as
15 a result of transaction itself within the partie's
16 general obligation to deal in good faith."

17 This is from Liebergesell vs. Evans 93 Wash.2d 881.
18 And the quote is from 893. It's a 1980 case.

19 By failing to disclose the debt to equity ratio and
20 other aspects of GMAC's sophisticated financial
21 analysis, GMAC was able to create a false target for
22 the Dealer and mislead ECI about its future actions.

23 GMAC withheld information on its true targets and
24 metrics, while at the same time pushing the Dealer to
25 achieve the stated targets by trying to increase

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1 sales, while at the same time deliberately depriving
2 the Dealer of the working capital needed to reach the
3 stated targets and/or goals set for him by GMAC. By
4 so doing, GMAC leads the Dealer to behave in a way
5 that is beneficial to GMAC but detrimental to the
6 Dealer. These facts were never disclosed. These
7 facts were at all times relevant to their relationship
8 and this Court finds that GMAC had a duty to disclose
9 them. As such, failure to disclose these facts
10 constitutes a breach of the implied covenant of good
11 faith and fair dealing.

12 In a slow market there are two ways to break-even
13 and reach a favorable debt to equity ratio. One is to
14 increase sales but the other is to reduce overhead,
15 which will reduce the firm's ability to sell.
16 Revealing the debt to equity ratio and other parts of
17 the financial analysis could make this determination
18 to reduce possible. To discuss break even analysis
19 only in units and only in increasing unit sales hides
20 this fact. Lower sales in the current climate was not
21 good for GMAC. GMAC pushed the Dealer to perform when
22 he could have reduced his efforts to obtain
23 profitability, but this would have increased his
24 inventory. Ms. Smith testified that he needed to
25 "sell more cars" to succeed. Clearly, in the current

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1 market, with all of his competitors, hers is a
2 specious conclusion.

3 The U.C.C. defines good faith in RCW 62A.9A-102(43)
4 as follows:

5 "Good faith means honesty in fact and the
6 observance of a reasonable commercial standards of
7 fair dealing."

8 In the instant case, GMAC did not conduct itself
9 honestly. There was a hidden agenda throughout the
10 time from when Mr. Vick took control until the
11 catastrophic demands in December. The goal of the
12 team from GMAC in this case was to shut down the

13 Dealer. The mechanism was to set a false target that
14 could not be achieved and by so doing manufacture a
15 default.

16 Given the totality of GMAC's actions, this is the
17 only conclusion this Court can come to. This was a
18 hidden agenda. GMAC does not have a contractual right
19 to shut down the Dealer and put him out of business.
20 GMAC may withdraw their financing, but they must do so
21 in a commercially reasonable manner. This was not
22 done in this case. The actions taken by GMAC to
23 assault the Dealer's working capital were designed to
24 put him out of business, not merely to protect
25 collateral. If GMAC had disclosed that it did not

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1 want to do business with ECI in the future openly and
2 honestly, then he would have had recourse to
3 alternatives. But instead the Dealer was led to
4 believe his past good relationship with GMAC still
5 existed all the while secret actions were taking
6 place, which damaged his ability to perform, and these
7 actions escalated during 2008. In fact, the actions
8 of December 15th and 19th seemed designed to block his
9 financing from Motor's Holding, which closing date was
10 less than thirty days away.

11 If he had the fifty days from June 10th to July
12 31st, he may have been able to close that deal despite
13 the efforts of GMAC. Here, GMAC aligned all forces in

14 order to make the Dealer fail. Such actions are not
15 commercially necessary or reasonable. This case is
16 the perennial problem of a false target, otherwise
17 known as "hiding the ball". If ECI had known that it
18 could never achieve the goals GMAC had set, then it
19 would have been free to pursue other options.

20 Now, GMAC quoted the case of Badgett. I am not
21 going to give the cite. But Badgett is not on point
22 because it deals with an affirmative expansion of a
23 duty of good faith by requiring cooperation. Here no
24 such expansion is contemplated or required. ECI and
25 this Court does not require GMAC to cooperate in any

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1 venture. The law only requires GMAC to be honest with
2 regard to its intentions and not attempt to
3 manufacture defaults, put pressure on a business to
4 fail, or block other contract opportunities. All
5 these things were done in this case, and all are acts
6 of bad faith.

7 The Dealer in this case has a right to know how he
8 is being evaluated. Failure to disclose this amounts
9 to having to take a test without knowing what the
10 problems are to be solved. He was constantly given
11 partial financial information and encouraged to turn
12 his inventory when doing just the opposite would have
13 made him profitable.

14 ECI sold 19 million dollars by October of 2008.

15 With these sales, that if he had cut back his sales
16 efforts and lowered his break-even point, he could
17 have made a profit, but GMAC was pushing him to do
18 just the opposite in order to engineer default. This
19 constitutes bad faith.

20 So the conclusions of law are that this Court has
21 jurisdiction in this matter.

22 GMAC breached the contract by violating the
23 covenant of Good Faith and Fair Dealing.

24 The request for replevin is denied.

25 And I think consistent with that, the motion to

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1 amend the complaint is also denied.

2 I don't think we need to talk about it.

3 Anybody have anything else they want to say?

4 MR. GLOWNEY: What is the Court going to do with
5 the TRO?

6 THE COURT: Well, I think that means it's over.
7 Mr. Hausmann?

8 MR. HAUSMANN: I agree, I think it was just in
9 place between the time of the inception of the case
10 and this ruling on replevin, so I think it's
11 distinguished by definition.

12 MR. WHEELER: Your Honor --

13 MR. GLOWNEY: Is the Court treating this as the
14 final ruling in this case?

15 THE COURT: The Court is treating this as the
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16 final ruling in this case.

17 MR. WHEELER: Your Honor, taking that into
18 consideration, we would request that there be a hold
19 on the bond so that we could pursue monetary damages
20 against GMAC on that bond.

21 THE COURT: I will grant that.

22 MR. GLOWNEY: Is that going to be in this case or
23 some different case?

24 THE COURT: I am not sure.

25 MR. GLOWNEY: I'm just trying to understand, if you

23

1 are saying that this case is finished, then where is
2 he pursuing this claim?

3 THE COURT: well, I thought about this to a
4 certain extent, because I know that this matter is
5 going to continue in some form. I am not quite sure
6 how. What I'm going to do is I'm going to retain
7 jurisdiction in this case for any post hearing motions
8 that relate to this replevin action.

9 And if you think that the bond relates to that, go
10 ahead and make your motion.

11 MR. HAUSMANN: Your Honor, I think just to -- for
12 interest of full explanation we do have a counterclaim
13 pending, and it has a claim for damages.

14 And I just don't -- I am not -- I'm still
15 processing your decision, I am not sure how we should
16 approach that issue through here.

17 THE COURT: The rest of the trial?

18 MR. HAUSMANN: Yes, well you just mentioned this
19 was a final decision.

20 THE COURT: On the replevin motion.

21 MR. WHEELER: So should we file a motion for -- as
22 for readiness to proceed against the bond for the
23 monetary damages on the counterclaim?

24 THE COURT: I am not quite sure I understand that
25 either.

24

1 MR. WHEELER: We have a counterclaim against GMAC
2 for monetary damages. The bond was submitted by GMAC
3 so that in the event the replevin action was decided
4 against GMAC --

5 THE COURT: Oh, is it a replevin bond?

6 MR. HAUSMANN: It is a replevin bond.

7 MR. GLOWNEY: It is.

8 MR. WHEELER: It is. So in the event that that
9 decision was rendered against GMAC and the Dealer
10 could prove damages, the Dealer could pursue a claim
11 against that bond.

12 THE COURT: I'm just doing this off the top of my
13 head, I hadn't thought about this part. I would
14 expect that would be the second step of this action,
15 the proceeding against the bond.

16 MR. GLOWNEY: Wouldn't it be a trial on monetary
17 damages? I don't quite understand what proceeding

18 against the bond is --

19 THE COURT: Well, the bond is replevin bond and
20 the decision on the replevin has been made.

21 MR. HAUSMANN: Just to confuse things a little bit
22 more. The first action was an injunction. What GMAC
23 filed was a replevin bond before Judge Allendoerfer.
24 We argued that was not the right type of bond. Judge
25 Allendoerfer said it's a bond, it's sufficient. I

25

1 don't want to paraphrase what he said, but arguably he
2 said that was a bond to insure from damages that
3 flowed from the injunction, which I think might be a
4 different species of damages or species of claim, than
5 a replevin bond and the damages related to the
6 replevin.

7 THE COURT: Okay. What I contemplated was that
8 there was this replevin show cause action and then
9 once the decision was made here, then the other issue
10 would proceed to trial.

11 MR. HAUSMANN: Okay.

12 THE COURT: That's what I contemplated.

13 MR. HAUSMANN: Right.

14 THE COURT: But there might be some -- what I was
15 thinking about last night, is there may be need in
16 going from that step to the trial, there may be some
17 need for other types of motions, depending on the
18 ruling of this hearing, to facilitate a smooth

19 transition. And off on the top of my head, I couldn't
20 think of anything, but that might have been because it
21 was 3:30 in the morning and I couldn't process all
22 that well then.

23 But I think that there are probably some things
24 that probably need to be done, so I will retain
25 jurisdiction for the post hearing motions. I will not

26

1 retain jurisdiction for the trial, that has to go back
2 to presiding to be assigned out for trial. And that
3 trial will be on damages.

4 MR. GLOWNEY: So the injunction is lifted?

5 THE COURT: The injunction is lifted.

6 MR. GLOWNEY: So when they sell cars what do they
7 do?

8 MR. HAUSMANN: They are still contractually bound.

9 MR. WHEELER: We will pay the floorplan amount.

10 MR. GLOWNEY: Then we have \$700,000 in
11 delinquencies.

12 MR. WHEELER: The delinquencies were caused as a
13 result of your action.

14 MR. GLOWNEY: And the 130 under the TRO, we don't
15 need to debate that here, but that's a question.

16 THE COURT: I understand that is not a neat and
17 tidy situation, okay. But I can't resolve all the
18 problems at this point.

19 MR. GLOWNEY: I just want to be clear, the

20 injunction is lifted or not.
21 THE COURT: It is lifted.
22 MR. HAUSMANN: Thank you, your Honor.
23 MR. WHEELER: Thank you, your Honor.
24 THE COURT: So I'm not quite sure what you all
25 want to do in terms of an order, but in an hour I'm

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1 going to be heading over to juvenile court.
2 MR. Hausmann, you know where juvenile court is.
3 MR. HAUSMANN: Yes.
4 THE COURT: If you need me to sign something today,
5 I will be available over there.
6 MR. WHEELER: Yes, we do.
7 THE COURT: You just need to go over there and
8 speak with the court coordinator.
9 MR. HAUSMANN: That's down at Denny.
10 THE COURT: Have you been there lately? Just go
11 in the main front entrance, once you go through the
12 metal detector and all that, there is a little booth.
13 MR. HAUSMANN: Kiosk.
14 THE COURT: Yes, kiosk, and just ask them. I will
15 either be in courtroom one after three o'clock, or I
16 will be upstairs in staffing.
17 MR. GLOWNEY: Are you going to prepare an order or
18 do you want me to --
19 MR. HAUSMANN: We will work together.
20 MR. GLOWNEY: We need to get it entered today.

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21

THE COURT: Anything else?

22

MR. GLOWNEY: I don't think so.

23

THE COURT: Thank you. Court will be in recess.

24

25

No. 63331-7-I

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

GMAC, a Delaware corporation,

Petitioner,

v.

EVERETT CHEVROLET, INC., a Delaware Corporation,
JOHN REGGANS, AND JANE DOE REGGANS,

Respondents.

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON
DIVISION I

I certify that at all times mentioned herein, I was and now am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, WA 98101. Counsel are being provided with copies of *APPELLANT'S OPENING BRIEF and Certificate of Service* by the methods set forth herein (email/pdf; U.S. Mail and Legal Messenger):

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Teresa Bitseff, Secretary
Signed at Seattle, WA
Dated: November 5, 2009

Court of Appeals: Original & Copy