IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of: WALTER JAMES GOLDSMITH, Appellant, v. CRYSTAL HAUNG SOON KWAK-GOLDSMITH, Respondent.	No. 37921-0-II UNPUBLISHED OPINION

Penoyar, J. — William Goldsmith and Crystal Kwak-Goldsmith entered into a CR 2A agreement that appointed an appraiser to determine their gas station's value. The agreement provided that neither party nor counsel shall make or have any unilateral contact with the appraiser. The appraiser visited the gas station when Kwak-Goldsmith was present, and Kwak-Goldsmith told the appraiser that the Department of Ecology (DOE) was scheduled to inspect the property for soil contamination. She also told the appraiser that she thought his site visit should be rescheduled to a date after the DOE inspection. The trial court found that Kwak-Goldsmith breached the agreement but that the breach was not material. Goldsmith argues that finding immateriality was error. We affirm.

FACTS

As part of their dissolution action, Goldsmith and Kwak-Goldsmith entered into a CR 2A agreement that appointed an appraiser to determine the value of their Lakewood convenience

store and gas station. The agreement specifically provided that "neither party nor counsel shall make/have any unilateral contact with the appraiser who shall be the Appraisal Group of the Northwest." Clerk's Papers (CP) at 8.

On September 27, 2007, Carl Westman, an appraiser with the Appraisal Group of the Northwest, visited the gas station for an on-site inspection. Westman testified that he did not know before his visit that he could not have unilateral contact with the parties or with counsel.

Kwak-Goldsmith was at the gas station at the time of Westman's visit. Kwak-Goldsmith and Westman testified that Kwak-Goldsmith told Westman that the DOE was scheduled to inspect the property for soil contamination and that Kwak-Goldsmith further told Westman that she thought his site visit may need to be rescheduled to a date after the DOE inspection. Both Kwak-Goldsmith and Westman testified that Kwak-Goldsmith communicated no other information during their conversation. Westman testified that the conversation had no impact on his ultimate property valuation.[1] He also testified that during the course of his engagement he had contact with Kwak-Goldsmith's attorney and email contact with both parties' attorneys but that none of these contacts affected his appraisal. He further testified that the data in his report well-supported his valuation. He acknowledged that the appraisal value was less than an appraisal conducted in 2004, but that sales volumes had since fallen at the gas station. He noted that a possible reason for the decline in sales was that a new Safeway gas station had opened near the

[1] Westman's report did not indicate whether the DOE found soil contamination on the property. Westman testified that it was not unusual to exclude possible soil contamination, which might be identified in a scheduled DOE evaluation, from a report appraising a gas station when the appraiser did not have the results at the time of the appraisal. No one provided Westman with any information subsequent to the issuance of his report indicating the results of the DOE inspection.

property. Ultimately, Westman gave the gas station a $780,000 appraisal value.

Goldsmith engaged Edward Greer, a real estate appraiser, to review Westman's report. Greer researched and compared the sale prices of properties in the immediate area and looked through Westman's report. His appraisal excluded any business value, inventory, and any valuation of the business as a going concern. Greer ultimately valued the gas station in the range of $1,000,000. Further, in the 12 months before trial, the parties received, but did not accept, two written offers to purchase the gas station. The first offer was for $1,000,000; the second offer was for $1,100,000. Whether these offers were conditioned on inspections, review of business records, or other contingencies is unclear.

Goldsmith testified that the no contact provision was included in the CR 2A agreement to ensure a fair and neutral appraisal. Goldsmith testified that Kwak-Goldsmith liked to be "in control" and that the provision was "very important" to him. 2 Report of Proceedings (RP) at 64.

The trial court found that Kwak-Goldsmith breached the agreement's provision regarding the unilateral contact but that the breach was not material to the bargain between the parties and did not arise from any fraud, mutual mistake, or lack of understanding by either party. Goldsmith filed a motion for reconsideration, which the trial court denied. Goldsmith now appeals.

ANALYSIS

The parties agree that the no contact provision was breached. Goldsmith assigns error to finding of fact 2.21.11.[2] It states:

> Any unilateral contact between the appraiser and the respondent and her attorney was not a material breach of the CR 2A agreement nor was it a violation of the Court's order of September 5, 2007 which would require any type of remedial sanction, including vacating that portion of the CR 2A agreement which provided for the appraisal to be done by the Appraisal Group of the Northwest.

CP at 276. We hold that substantial evidence supports this finding.

We will not substitute our conclusion regarding the facts for those of the trial court when substantial evidence supports the findings. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). The party challenging a finding of fact bears the burden of demonstrating that substantial evidence does not support the finding. *Nordstrom Credit, Inc.* v. *Dep't of Revenue,* 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise. *Cowiche Canyon*

[2] Goldsmith also assigns error to findings of fact 2.7, 2.8.14, 2.21.3, 2.21.5, and 2.21.8. Finding of fact 2.7 states, "The separation contract or prenuptial agreement [CR 2A] should be approved." CP at 272. Finding of fact 2.8.14 states that the value of the filling station is ($233,681). Finding of fact 2.21.3 states that a letter providing that the appraiser was not to have any unilateral contact with either party, including their relatives and attorneys, "was not provided to the individual appraiser performing the appraisal work." CP at 275. Goldsmith assigns error to the trial court's failure to enter a finding that "unilateral contact had occurred between appraiser Westman and [Kwak-Goldsmith's] attorney at the time of the on site inspection performed by appraiser Westman." Appellant's Br. at ii-iii (citing Finding of Fact 2.21.5). Finding of fact 2.21.8 states, "The Appraisal Group of the Northwest had previously appraised the value of the real estate only (land and appurtenances) as of August 25, 2004 at the value of $1 million." CP at 276. Goldsmith fails to challenge any of these findings of facts in the argument portion of his brief. It is incumbent on counsel for the appellant to present argument to the appellate court why the evidence does not support specific findings of fact and to cite to the record to support that argument. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998); *see* RAP 10.3. Goldsmith has not done this.

Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992) (quoting *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 157, 776 P.2d 676 (1989)). Unchallenged findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Whether a breach is material is a question of fact. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 82, 765 P.2d 339 (1988). In determining whether a breach is material, the court considers whether: (1) the breach deprives the injured party of a benefit that he reasonably expected, (2) the injured party can be adequately compensated for his lost benefit, (3) the breaching party will suffer a forfeiture by the injured party's withholding of performance, (4) the breaching party is likely to cure his breach, and (5) the breach comports with good faith and fair dealing. *Bailie Commc'ns, Ltd.*, 53 Wn. App. at 83

We conclude that substantial evidence supports the trial court's conclusion that the breach of the no contact provision was not a material breach. Goldsmith contends that the no contact provision was "material" to him. Appellant's Reply Br. at 3. This is evident from his insistence on the provision. Including a provision does not itself make its breach material. Goldsmith wanted a fair and neutral appraisal, and the breach did not deprive Goldsmith of the benefit of such an appraisal. There is no evidence that Goldsmith's fear that Kwak-Goldsmith would influence the result of the appraisal was realized. Westman gave a rational explanation for why his conclusions differed from the 2004 appraisal and the appraisal by Goldsmith's expert, Greer. Westman noted that sales volumes had fallen at the gas station since 2004, and a possible reason for the decline in sales was the opening of a new Safeway gas station near the property. In determining the gas station's value, Greer researched the sale prices of properties in the immediate area. Also, he only

looked at the value of the real estate, not the business value of the property. Further, while there were two offers to purchase the gas station, one for $1,000,000 and one for $1,100,000, we do not know that these were genuine or unconditioned offers. While the provision was material to the CR 2A agreement, we uphold the trial court's finding and conclusion that the breach here was not material.

Kwak-Goldsmith argues that we should award attorney fees to her based on her need, Goldsmith's ability to pay, and the frivolity of this appeal. Goldsmith also requests attorney fees under RAP 18.1 and RCW 26.09.140.

Both Kwak-Goldsmith and Goldsmith request attorney fees under RCW 26.09.140.[3] Resp't's Br. at 29; Appellant's Br. at 23. We may award attorney fees under RCW 26.09.140 after balancing the need of the recipient against the other party's ability to pay. In re Marriage of *Young*, 44 Wn. App. 533, 538, 723 P.2d 12 (1986). We deny attorney fees where the record is devoid of evidence as to the needs and abilities of the parties to pay attorney fees during the time the appeal was pending. *In re Marriage of Ochsner*, 47 Wn. App. 520, 529, 736 P.2d 292 (1987). Kwak-Goldsmith does not cite RAP 18.1, nor does she attempt to make a showing of her need or Goldsmith's ability to pay during the course of this appeal. Likewise, Goldsmith does not show his need or Kwak-Goldsmith's ability to pay. Accordingly, the requests for attorney fees are denied.

Kwak-Goldsmith also requests attorney fees under RAP 18.9(a). RAP 18.9(a) allows us

[3] RCW 26.09.140 provides that "[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs" in a dissolution or legal separation proceeding.

to order attorney fees on appeal when the appeal is frivolous. An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). We hold that Goldsmith's appeal was not frivolous and deny Kwak-Goldsmith attorney fees on this basis.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Van Deren, J.