

FILED
COURT OF APPEALS
DIVISION II

No. 37921-0-II

09 JUN -4 PM 3:23

STATE OF WASHINGTON
BY JW
DEPUTY

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

WALTER JAMES GOLDSMITH
Appellant

v.

CRYSTAL HAUNG SOON KWAK-GOLDSMITH.,
Respondent

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred by finding that the separation contract (CR2(A) agreement) executed by the parties on May 21, 2007 should be approved. (Finding of Fact 2.7).
2. The trial court erred by finding that the value of the community filling station was a negative \$233,680. (Finding of Fact 2.8.14).
3. The trial court erred by finding that the appraisal letter directed by the trial court judge on September 5, 2007 was not provided to the individual appraiser performing the appraisal work. (Finding of Fact 2.21.3).
4. That the trial court erred by not finding that unilateral contact had occurred between appraiser Westman and Crystal’s attorney at the time of the on site inspection

performed by appraiser Westman. (Finding of Fact 2.21.5).

5. The trial court erred by finding that the Appraisal Group of the Northwest had previously appraised the value of the real estate as of August 25, 2004 at the value of \$1,000,000. (Finding of Fact 2.21.8).
6. The trial court erred by finding that any unilateral contact between the appraiser and the respondent and her attorney was not a material breach of the CR2(A) 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 CR2(A) agreement which provided for the appraisal to be done by the Appraisal Group of the Northwest. (Findings of Fact 2.21.11).

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by finding the respondent's breach of the CR2(A) agreement not to be a material breach?
Assignments of error 1-6.

STATEMENT OF THE CASE

This appeal is the result of a trial court's decision in a dissolution of marriage proceeding. During the dissolution proceedings, the parties entered into a CR2(A) agreement that provided for the appraisal by a single appraiser of the parties' gasoline filling station located in Pierce County. The CR2(A) agreement provided that there would be no unilateral contact with the appraiser by either side. At time of trial there was testimony that there was unilateral contact between the respondent and the appraiser. Petitioner believed the breach to be material and asked the court to vacate the provisions of the CR2(A) agreement that required a single appraiser agreed upon by the parties to appraise the property for dissolution purposes. The trial court did not find a material breach, and thus this appeal.

Factual background

Without disrespect to the parties the petitioner is referred to as Walter and the respondent is referred to as Crystal.

Walter and Crystal were married on August 19, 1995. CP 2. At the time of trial Walter was 42 years of age and Crystal was 57

years of age. CP 1. There were no dependent children of the parties at the time of trial. CP 1.

One of the assets owned by the parties during marriage was a gasoline station and convenience store known as Bridgeport Deli Mart & 76 Gas (hereinafter referred to as filling station) located in Lakewood.

The parties had purchased the filling station in September 2004 for \$1,260,000. At the time of said purchase the filling station was appraised by The Appraisal Group of the Northwest. It had appraised in the "current market condition" for \$1,160,000. (CP 177)

During the course of the dissolution proceedings the parties agreed to have the filling station appraised for property distribution purposes by The Appraisal Group of the Northwest. The parties entered into a CR2(A) agreement that was signed by both of the parties and their counsel on May 21, 2008. Said CR2(A) agreement provides in part as follows:

II. (B)

The convenience store and gas station (hereafter referred to as "the gas station") located at 10712 Bridgeport Way SW, Lakewood, WA 98499, shall be appraised by Appraisal Group of the Northwest, LLP (hereafter referred to as "the

appraiser"). The equity in the gas station shall be determined by deducting from the appraised value both the mortgage and real estate taxes owing on the gas station as of date of this CR2(A) agreement together with 50% of any prepayment penalties (1%) if imposed by mortgage lender if the property is sold. Neither party nor counsel shall make/have any unilateral contact with the appraiser who shall be the Appraisal Group of the Northwest. The appraisal shall be coordinated to take place as soon as possible. The parties may mutually agree to another method to determine the value of the gas station. All costs of the appraisal shall be shared on a 50/50 basis between the parties. Inventory shall be valued as of date of separation, any post separation income which can be shown to have clearly increased the value of the station solely due to efforts of wife shall be wife's. Exhibit 1.

As a result of the CR2(A) agreement the court directed the parties to send a letter to the appraiser. Exhibit 5. Said letter provides in part as follows:

Both the wife and husband desire to have you remain impartial and without unilateral contact with either party, including their relatives and attorney. 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.

Exhibit 5.

On October 29, 2007 the appraiser issued his report. His report found that the property had a "going concern" market value of \$780,000. Exhibit 2.

On December 3, 2007 Walter filed a declaration that provided in part:

However, I had very real concerns that my wife would attempt to manipulate the appraisal. My attorney and opposing counsel attempted to work out the terms of the engagement letter for the appraiser. We were not able to reach a conclusion. However, I was insistent that the engagement letter require that all communication to the appraiser be jointly, through the attorneys, and that no one, attorney or petitioner or respondent have unilateral contact with the appraiser. The court can probably recall my attorney's insistence that these provisions be included in the engagement letter.

On September 5, 2007 the court entered an order with the attached letter. The letter very clearly sets forth the communication between the parties and attorneys and the appraiser would not be unilateral.

I have not had any communication with the appraiser. I have not had any telephonic communication with the appraiser. I have not received any written communication from the appraiser nor have I directed any communication to the appraiser.

CP37-235 at 38

Walter's concerns stemmed, in part, from the appraiser's report, page 39 that provided in part as follows:

Our investigation included discussions with the owner/operator of the subject, inspection of the property, and consideration of other factors that were deemed necessary under the circumstances. We also reviewed information concerning the economy

and market in which the property competes. The historical operating statements that include sales volumes, cost of good sold and operating expenses and other pertinent information provided by the client were accepted, reviewed, and were considered in our analysis and conclusion.

Exhibit 2.

Walter did not want either party, or their counsel to have any unilateral contact with the appraiser. (CP 39). Walter did not want to create an appearance of impropriety. (CP 39).

Walter was concerned even before the issuance of the appraisers report that there may be unilateral contact between Crystal and her attorney with the appraiser. (CP 45-61).

During the course of the dissolution proceedings, and prior to trial, Walter and Crystal received two separate offers to purchase the filling station. One offer was for \$1,100,000 and the other offer was for \$1,000,000. (CP 198-235).

On December 3, 2007 the trial court declined to enter Findings of Fact and Conclusions of Law and a Decree of Dissolution of Marriage based upon the appearance of unilateral contact in the appraisers report and set this matter for trial. (CP 236-237). The court set forth that one of the issues for trial would be the issue of the appraisal raised by Walter. (CP 236). Walter

was directed to file pretrial motions pertaining to same. (CP 236-237).

On May 1, 2008 Walter filed his trial motions which requested that the court vacate that portion of the CR2(A) agreement that provides that the filling station be valued by the Appraisal Group Northwest and to allow testimony from Walter's expert, Ed Greer of GPA Valuation as to the valuation of the filling station. (CP 247).

Trial Proceedings

The parties stipulated to Tacoma attorney John Purbaugh to hear this matter as a judge Pro Tempore. (CP 245-246).

Pro Tem Purbaugh heard this case on May 14 and 15, 2008.

Both counsel for Walter and Crystal conceded that the CR2(A) agreement was a hard fought agreement. (RP 8; RP 12).

Both parties provided opening statements that framed the issues for the court. Crystal indicated that the "focal point is this appraisal and whether the appraisal is the one that was asked for in the CR2(A) settlement agreement or not." (RP V.1-8). "This appraisal came about as a result of the CR2(A) agreement, which was really very, very hard fought. Mr. Helland and I spent numerous hours putting this agreement together to get to a one day

trial, and I think the evidence will establish that.” (RP V. 1-8)

Walter likewise advised the court that this had been a very ugly, contentious separation with a lot of animosity with a fair amount of manipulation going on. (RP V. 1-13). Even the letter sent to the appraiser was a result of judicial involvement. (RP V. 1-13). The parties intended there be no unilateral contact between the parties, their counsel, and the appraiser. (RP V.1 12-13). Walter believed if the CR2(A) agreement and letter had been violated the recourse was to strike that provision of the CR2(A) agreement that required a unilateral appraisal and for an award of attorney's fees. (RP V.1 17-18).

The parties' stipulated commercial real estate appraiser, Carl Westman of The Appraisal Group of the Northwest, acknowledged that his firm had received the authorization letter from Walter and Crystal to evaluate the property. (RP V.1-48). Mr. Westman acknowledged that he met with Crystal at the filling station. (RP V. 1-49). He acknowledged that there was discussion with Crystal pertaining to potential contamination and the fact that there was soon going to be a Department of Ecology inspection of the filling station. (RP V. 1-50). Mr. Westman further acknowledged that the issue of the Department of Ecology inspection did not have any

bearing on his appraisal insofar as his appraisal contained limiting conditions and certification that excluded soil contamination issues. (RP V. 1-51). Mr. Westman acknowledged that during his visit with Crystal at the filling station she offered information to him that he did not solicit. (RP V. 1-55). Mr. Westman acknowledged contacting Crystal's attorney by telephone and by email regarding making the appointment to do the inspection. (RP V. 1-56). Mr. Westman further conceded that he had agreed to put the filling station appraisal on hold at the request of Crystal and her attorney pending the Department of Ecology inspection. (RP V. 1-61). Mr. Westman further conceded that his appraisal assumes that there is no contamination on the site and reserves the right to amend the evaluation if contamination is found to be present. Mr. Westman indicated that this standard limitation will be in the appraisal whether or not the appraisal is finished before or after the Department of Ecology inspection. (RP V. 1-61). Mr. Westman further acknowledged not communicating with Walter's attorney. (RP V. 1-61). Mr. Westman further acknowledged that while he was at the filling station with Crystal that Crystal called her attorney and asked the attorney whether or not the appraisal should be put on hold pending the Department of Ecology inspection. (RP V. 1-62).

At the same time Mr. Westman spoke with Crystal's attorney and informed Crystal's attorney that Mr. Westman could go forward or not with regard to the appraisal. (RP V. 1-62-63). Mr. Westman further acknowledged that had DOE done an inspection and found some sort of contamination that such a finding would have an absolute impact on the evaluation. (RP V. 1-63). The final appraisal was issued after the DOE had completed its investigation and the DOE investigation results are reflected in the appraisal report. Exhibit 2.

Crystal acknowledges that she informed Mr. Westman when he came to the filling station that she could not talk to him and then proceeded to speak with him about what they were going to be able to do and that they should put a hold on the inspection due to the Department of Ecology testing. (RP V. 1 161-162).

Mr. Westman, when he was advised by Crystal that they should not have any contact, acknowledged that he was aware of that prohibition and then continued to discuss events surrounding the filling station. (RP V. 1-162). After discussing the fact that the agreement between the parties prohibited unilateral discussion with the appraiser Crystal proceeded to call her attorney "to tell you what we are going to do. That's it." (RP V. 1-162). Crystal

acknowledges speaking with her attorney and that "He is going to tell how we are going...So we was to put it behind a couple of weeks so that Ecology is done, and then we're going to do the appraiser- the Ecology test to pass." (RP V. 1-163). There is no question that Crystal requested that the appraiser hold off on his appraisal until the DOE test results came back. (RP V. 1-165).

Crystal acknowledged that during the pendency of the dissolution proceedings that the parties had received three or four separate signed offers to purchase the filling station. (RP V. 1-175). During the beginning of 2006 they received an offer for \$1,340,000. (RP V. 1-175). They also received two additional offers, one for \$1,000,000 and the other for \$1,100,000. (RP V.1-175-176).

The court did allow Walter's property appraiser, Ed Greer, to testify. Mr. Greer testified that he disagreed with appraiser Westman's appraisal value of \$780,000 for the property and believed that from reviewing comparable sales of similar properties that the value would be roughly \$1,000,000 to \$1,000,000+ range. Mr. Greer testified that he was concerned with a strict mathematical evaluation of the property without looking at the current local

market conditions to see what was happening in the market. (RP V. 1-109).

Mr. Greer testified that he had evaluated the real estate which included the real estate, the building, and fixtures including tanks and canopy and indicated the fair market value of the property was in the \$1,000,000 range. (RP V. 1-110-111).

Walter testified that he wanted the no contact provision of the CR2(A) agreement to make sure that there would be a neutral appraisal. (RP V. 2-63-64). Walter testified that in the past his wife has been very controlling. (RP V. 2-64). Walter testified that the no contact provision was "very important to me." (RP V. 2-64). Walter further indicated that the creation of the CR2(A) agreement was "very time consuming." (RP V. 2-64). When Walter was cross examined about whether or not Walter believed that Crystal had manipulated the appraisal his response was: "I don't know what kind of contact they had in there, but it wouldn't surprise me if she had tried." (RP V. 2-97). Walter further acknowledged that Mr. Westman had never contacted him. (RP V. 2-111).

The Court's Oral Ruling

The court indicated that before it could consider appraiser Greer's testimony it must determine whether or not a breach had

occurred of the CR2(A) agreement. (RP V. 2-134). The court held that “The court has discretion to relieve a party from a stipulation or in part thereof when the court is convinced that that’s necessary to prevent an injustice and granting the relief won’t place the other party to the agreement at a disadvantage by having that as a reliance on the agreement. That sort of circumstances, which typically are looked to, justify that sort of relief from a stipulation include fraud, mistake, lack of understanding or some lack of jurisdiction by the court.” (RP V. 2-157-158; RP V. 2-176).

The court concluded that the CR2(A) agreement was breached by Crystal “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 by either of the parties.” (RP V. 2-176).

Therefore, the court concluded that the CR2(A) agreement was enforceable as written and the court adopted the appraisal of Mr. Westman in the amount of \$780,000.

ARGUMENT

1. Standard of Review

Whether or not a breach of contract is material is reviewable as a question of fact and therefore the substantial evidence standard applies. Bailie Communications v. Trend, 53 Wn. App. 77, 82 (1988){ TA \ "Bailie Communications v. Trend, 53 Wn. App. 77, 82 (1988)" \s "Bailie Communications v. Trend, 53 Wn. App. 77, 82 (1988)" \c 1 }.

2. Breach of Contract

In determining the intent of the parties entering into a contract, the intent must be determined from reading the contract. In Felton v. Menan Starch Company, 66 Wn.2d 792 at 797 (1965){ TA \ "Felton v. Menan Starch Company, 66 Wn.2d 792 at 797 (1965)" \s "Felton v. Menan Starch Company, 66 Wn.2d 792 at 797 (1965)" \c 1 } the court stated:

The basic rules for construing a written contract are well known. The intention of the parties must control; the intent must be ascertained from reading the contract as a whole; and, where language used is unambiguous, an ambiguity will not be read into the contract. Wise v. Farden, 53 Wn.2d 162 (1958){ TA \ "Wise v. Farden, 53 Wn.2d 162 (1958)" \s "Wise v. Farden, 53 Wn.2d 162 (1958)" \c 1 }. The court must ascertain the intention of the parties and strive to give effect to that intention and the construction must be reasonable so as to carry out,

rather than to defeat, the purpose for which it was given. National Bank of Tacoma v. Aetna Casualty and Surety Company, 161 Wash. 239 (1931){ TA \l "National Bank of Tacoma v. Aetna Casualty and Surety Company, 161 Wash. 239 (1931)" \s "National Bank of Tacoma v. Aetna Casualty and Surety Company, 161 Wash. 239 (1931)" \c 1 }.

The issue as to whether or not a breach was material was addressed in Bailie Communications v. Trend Business Systems, 53 Wn. App. 77 (1988){ TA \l "Bailie Communications v. Trend Business Systems, 53 Wn. App. 77 (1988)" \s "Bailie Communications v. Trend Business Systems, 53 Wn. App. 77 (1988)" \c 1 } where the court stated at page 82 as follows:

The ultimate question, then, with respect to whether the Bailies lost anything as a result of Suburban Wosepka's fraud, is whether Suburban's breach was material. This issue is reviewable as a question of fact.

The Bailie court likewise considered the Restatement (Second) of Contracts{ TA \l "Restatement (Second) of Contracts" \s "Restatement (Second) of Contracts" \c 5 } in determining whether or not a breach was material. The court held:

The Restatement lists five factors that should be considered in determining whether a breach is material. They are: (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 breach 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 of Contracts 2d{ TA \ "Restatement of Contracts 2d" \s "Restatement of Contracts 2d" \c 5 } paragraph 241(a)-(e).

In Bailie the trial court failed to find a material breach and the Court of Appeals reversed finding that the five factors had been met.

In this case, Walter was deprived of a benefit that he reasonably expected, that benefit being that there would be no unilateral contact with the appraiser. The second issue involves whether or not Walter can be adequately compensated for the breach involving the prohibition against unilateral contact. In this case, the only way that he can be compensated is for the appraisal not to be considered. There is no way to compensate Walter for the breach and to allow for the results of that appraisal to be binding upon both parties.

The third issue under Bailie and the Restatement is whether or not Crystal will suffer a forfeiture by Walter's withholding of performance. Walter has already fully complied with all provisions of the agreement by paying his fees and not having contact with the appraiser.

The fourth prong of the Restatement test is whether or not Crystal is likely to cure her breach. Once the breach has occurred and contact has occurred, especially as to the material aspect of the contract, which is the appraisal, there is no cure for the breach other than to exclude the provision of the requirement which requires a single appraisal.

The last component of the breach deals with whether or not the breach comports with good faith and fair dealing. Clearly, knowledge of the prohibition that all contact is prohibited, discussing that prohibition with the appraiser, and then discussing how the appraisal is to be conducted with the appraiser and your attorney does not comport with good faith to Walter and fair dealing with Walter.

A party's failure to perform fully a contractual duty when it is due constitutes a breach of contract. Restatement (Second) of Contracts{ TA \s "Restatement (Second) of Contracts" } paragraph 235(2).

Likewise, Washington Pattern Civil Jury Instruction{ TA \l "Washington Pattern Civil Jury Instruction" \s "Washington Pattern Civil Jury Instruction" \c 3 } 302.03 provides as follows:

A “material breach” is a breach that is serious enough to justify the other party in abandoning the contract. A “material breach” is one that substantially defeats the purpose of contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.

In Campbell v. Hauser Lumber Company, 147 Wash. 140 at 147 (1928){ TA \l "Campbell v. Hauser Lumbar Company, 147 Wash. 140 at 147 (1928)" \s "Campbell v. Hauser Lumbar Company, 147 Wash. 140 at 147 (1928)" \c 1 } the court addressed a trial court’s jury instruction dealing with a material breach of a portion of the contract. The instruction directed the jury to find a material breach if, among other things, “if plaintiff would have been less willing to enter into the contract if that part were not included and if the profits which the plaintiff might otherwise have made from the full performance of the contract would have been substantially decreased.”

Another definition of a material breach of contract is found in Mitchell v. Straith, 40 Wash. App. 405, 410 (1985){ TA \l "Mitchell v. Straith, 40 Wash. App. 405, 410 (1985)" \s "Mitchell v. Straith, 40 Wash. App. 405, 410 (1985)" \c 1 } where the court stated “rescission requires a material breach of contract often defined as one that

substantially defeats the purpose of the contract." 17 Am.Jur.2d Contracts{ TA \ "17 Am.Jur.2d Contracts" \s "17 Am.Jur.2d Contracts" \c 5 }, paragraph 504 at 981 (1964).

The materiality of a breach is an issue of fact that depends upon the circumstances of each particular case. Vacova Company v. Farrell, 62 Wn. App. 386 (1991){ TA \ "Vacova Company v. Farrell, 62 Wn. App. 386 (1991)" \s "Vacova Company v. Farrell, 62 Wn. App. 386 (1991)" \c 1 }; Bailie Communications, Limited v. Trend Business Systems, 53 Wn. App. 77, 82 (1988){ TA \ "Bailie Communications, Limited v. Trend Business Systems, 53 Wn. App. 77, 82 (1988)" \s "Bailie Communications, Limited v. Trend Business Systems, 53 Wn. App. 77, 82 (1988)" \c 1 }.

The court's review as to whether or not non compliance with a contractual agreement constitutes a material breach of the contract is limited to determining whether that finding is supported by substantial evidence in the record. Panorama Village Homeowner's Association v. Golden Rule Roofing Company, 102 Wn. App. 422, 425 (2000){ TA \ "Panorama Village Homeowner's Association v. Golden Rule Roofing Company, 102 Wn. App. 422, 425 (2000)" \s "Panorama Village Homeowner's Association v. Golden Rule Roofing Company, 102 Wn. App. 422, 425 (2000)" \c 1 }.

There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. See Badgett v. Security State Bank, 116 Wn.2d 562, 569 (1991){ TA \ "Badgett v. Security State Bank, 116 Wn.2d 562, 569 (1991)" \s "Badgett v. Security State Bank, 116 Wn.2d 562, 569 (1991)" \c 1 }.

With regard to reviewing the trial court's determination as to whether or not a material breach has occurred the review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings support the court's conclusion of law and judgment. Brim v. Stutzman, 89 Wn. App. 809, 824 (1988){ TA \ "Brim v. Stutzman, 89 Wn. App. 809, 824 (1988)" \s "Brim v. Stutzman, 89 Wn. App. 809, 824 (1988)" \c 1 }. Substantial evidence is evidence that is sufficient to persuade a fair minded person of the truth of the declared premise. Brim, 89 Wn. App. at 824{ TA \ "Brim, 89 Wn. App. at 824" \s "Brim, 89 Wn. App. at 824" \c 1 }.

In Corbin on Contracts{ TA \ "Corbin on Contracts" \s "Corbin on Contracts" \c 5 } it is stated in conditions, paragraph 11-18 as follows:

There is no simple test to ascertain whether or not a breach is material. Among the factors to be considered are:

1. To what extent, if any, the contract has been performed at the time of breach. The earlier the breach the more likely it will be regarded as material.
2. A willful breach is more likely to be regarded as material than a breach caused by negligence or by fortuitous circumstances.
3. A quantitatively serious breach is more likely to be considered material. In addition, the consequences of the determination must be taken into account. The degree of hardship on the breaching party is an important consideration particularly when considered in conjunction with the extent to which the aggrieved party has or will receive a substantial benefit from the promised performance and the adequacy with which he may be compensated for partial breach by damages. Materiality of breach is ordinarily a question of fact.

In this case we know that the CR2(A) agreement had been entered into in order to allow for the appraisal of the real property. The appraisal was in the process of being performed when the breach occurred. The evidence also reflects that the breach was willful. The unrefuted testimony cited above shows that Crystal knew of the prohibition of contact with the appraiser. It is also clear

that the appraiser, at that time, was aware of the prohibition of contact with the party, as referenced by Crystal's unrefuted testimony set forth above. The breach may have been immaterial had Crystal simply identified herself and offered to make the premises available to Mr. Westman for inspection. However, the contact went beyond that. The contact involved discussing as to the appropriateness of the timing of the issuance of the appraisal report based upon a Department of Ecology inspection that was upcoming. Even though the appraiser indicated that there is disclaimer language/conditions set forth in his appraisal that indicates that the appraisal does not take into consideration any potential soil contamination the appraiser, after speaking with Crystal and her attorney he agreed to withhold finalization of the appraisal until such time as the issue of the Department of Ecology investigation had been concluded. The appraiser admitted that any adverse finding from DOE would have resulted in an absolute adjustment in value. Whatever else may have occurred during the prohibited contact we simply do not know.

The prohibition in this CR2(A) agreement and engagement letter was clear. The prohibition was that there should not be any unilateral contact. Walter testified that he was fearful that his wife

may manipulate the appraisal and that she was controlling. This testimony was not refuted. Walter testified that the CR2(A) agreement and engagement letter were hard fought. Besides the issue of who pays for the appraisal the only material aspect of this CR2(A) agreement as it relates to the appraisal of the filling station was that there would be no contact. The purpose of no contact is simply to guard against the unknown in terms of what could occur through such contact.

The evidence produced at time of trial raises concern with Mr. Westman's appraised value of the property. Not only did Walter's expert testify that the property was worth approximately \$1,000,000 but also Crystal acknowledged that during the pendency of their separation, and close in time to the Westman appraisal the parties had received several different written offers to purchase the property as a result of the property being listed for sale, which ranged in value from \$1,000,000 to \$1,034,000.

4. Attorney's Fees

RAP 18.1{ TA \l "RAP 18.1" \s "RAP 18.1" \c 4 } provides in part that if applicable law grants a party the right to recover reasonable attorney's fees that the requesting party must request the fees.

RCW 26.09.140{ TA \l "RCW 26.09.140" \s "RCW 26.09.140"

\c 2 } provides in part:

Upon 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.

Attorney fees on appeal are allowable in dissolution cases as well as in dissolution cases involving contractual issues. See In re Marriage of Bernard, 165 Wn.2d 895, 908 (2009){ TA \l "In re Marriage of Bernard, 165 Wn.2d 895, 908 (2009)" \s "In re Marriage of Bernard, 165 Wn.2d 895, 908 (2009)" \c 1 }.

Walter requests and award of attorney's fees and costs with regard to this appeal.

CONCLUSION

The parties wanted to utilize one appraiser to save money. However, Walter wanted to make sure that the appraiser remained fair and impartial by prohibiting any contact with the appraiser unless it was done mutually. The CR2(A) agreement is clear that unilateral contact was prohibited. Crystal knowingly violated that condition, as did Mr. Westman. Even though Mr. Westman testified that the presence or absence of contamination would not directly impact his report insofar as it has a soil contamination exclusion

clause, Mr. Westman did acknowledge that the presence of contamination would absolutely impact the appraised value. Whatever else may or may not have been discussed between Crystal and her attorney with Mr. Westman remains unknown. However, we do know that there was contact and that the contact was more than simply introductions and making the premises available for inspection. It went to the heart of the issue, that being the appraisal. In fact, the appraisal was even delayed by the agreement of Crystal, her attorney and Mr. Westman simply to await the outcome of the DOE investigation. This is the unilateral contact that was prohibited simply because Walter was fearful that there may be manipulation or other improper conduct or suggestion from his wife to the appraiser. Therefore, the breach is material and the provision requiring a single appraiser should have been struck and the court should have considered the testimony of Ed Greer, Walter's commercial property appraiser and the court should have considered an award of attorney's fees in Walter's behalf.

DATED the 4th day of June, 2009.

RESPECTFULLY SUBMITTED,



Robert Helland, WSBA # 9559
Attorney for Appellant.

Certificate of Service

UNDER PENALTY OF perjury under the laws of the State of Washington, I affirm the following to be true:

That on June 4, 2009 I transmitted a true and correct copy of the Brief of Appellant attached hereto, by United States Mail, ABC Legal Services or by personal delivery to the following:

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Rao & Pierce, LLC
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Seattle, WA 98144-5014

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Tacoma, WA 98402

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SIGNED at Tacoma, Washington on: 6.4.09

Heather Deryak
Heather Deryak