100016-2

No. 81252-1-I

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

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1201 W NICKERSON LLC, a Washington limited liability company,

Respondent,

v.

SUPERIOR MOTOR CAR CO, LLC, a Washington limited liability company,

Appellant.

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# PETITION FOR REVIEW

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## A. INTRODUCTION, IDENTITY OF PETITIONER, AND COURT OF APPEALS DECISION WARRANTING REVIEW

This case is about tenants' rights. Division I wrongfully held that the following temporary, cosmetic alteration of a leased property warranted eviction and judgment for up to $690,085.24, even without proof of damages, because the landlord technically gave permission to remove part of a decorative stripe to install a sign, but not the entire thing:


Division I's opinion conflicts with the law and policy of this state. The law protects tenants from eviction over such minor disagreements.

A tenant cannot be evicted absent a breach of a *material term* in the lease, which Washington law has long described as only "primary terms" striking at the "root or essence of the contract." Neither the law nor equity in Washington support eviction where a landlord has ample means to remedy a minor breach, such as withholding a damage deposit or seeking an order compelling the tenant to cure the breach. Petitioner, Superior Motor Car Company, LLC ("Superior"), asks this Court to grant

review and reverse Division I's outlier opinion, cause no. 81252-1-I, because it conflicts with these well-established principles of contract and landlord/tenant law and important public policy in this state. RAP 13.4(b)(1), (2), (4).

## B. ISSUES PRESENTED FOR REVIEW

1. Can a landlord terminate a lease and evict a tenant for breaching "an intended purpose" or "one of the multiple functions of the contractual relationship" as Division I held, or must the landlord show that the breach affected a "primary term" going to the "root or essence" of the lease, as courts in Washington have held for decades?

2. Does a minor alteration to a leased building's aesthetics to install a tenant's approved sign warrant eviction and forfeiture of a valuable lease without proof that the alteration was permanent, damaging, or even costly to replace?

3. Must a court consider equitable alternatives to forfeiture?

## C. STATEMENT OF THE CASE

As discussed below, the Court of Appeals got many facts wrong in this case involving an unlawful detainer. The court fell for the landlord's tactics of relying on facts and evidence that was excluded at trial or not included in the landlord's formal notice of unlawful detainer. Beyond these mistakes, the operative facts are largely undisputed.

Superior sells and consigns preowned cars. Superior's founders, Ahmed (Ed) Elbejou (Bejou), and Zhili (Andy), negotiated a lease in 2019 for a new location at 1201 W. Nickerson Street in Seattle with

Respondent, 1201 W. Nickerson LLC ("Nickerson"). CP 48-77. The lease lasted for five years and contained two, three-year renewal options. CP 48. The lease mandated that Nickerson complete improvements to address several problems with the building. CP 73-74. Superior tendered a total deposit of $58,950 and began moving in. CP 953.

Unfortunately, the problems with the building persisted and interfered with Superior's operations. CP 23-31. After Nickerson missed several deadlines to make improvements required by the lease, Superior issued a notice of default, asking that Nickerson complete the work. *Id.* The parties agree that around this time their relationship soured. *E.g.*, RP 89-90, 174-75. The parties argued over the repairs and other issues like building access; they had trouble recovering a working relationship, despite Superior's efforts to mend things. RP 89-90.[1]

Ultimately, this dispute boils down to a single aesthetic change Superior made to the building, thinking it had permission to do so. A decorative, blue metal stripe ran along the sides of the building, and Superior wished to remove the stripe on one side to install a sign advertising its presence. Exs. 32, 132.[2] The stripe overlaid the building's siding, attached by simple screws. CP 91. The stripe served a purely

[1] Bejou testified that Superior had "zero" issues with its prior landlord. RP 103.

[2] Exhibits cited in this petition are included in the attached Appendix.

aesthetic function; it had nothing to do with the building's structural integrity. CP 91-92.

Superior sent renderings of its proposed sign to Nickerson. Ex. 32. Those drawings showed the decorative stripe entirely removed on the side of the building where the sign would go. *Id.* Nickerson responded by email, "Signage is approved…Stripe can be removed where the sign is to be installed." Ex. 132. Nickerson's representative, LeAnn Polin, later testified that she meant Superior could *partially remove* the stripe from that side of the building, only exactly where the sign would go. RP 259. There is nothing in the record to show that Nickerson clarified this caveat to Superior, other Polin's single email.

Superior removed the decorative stripe on the north side of the building to install the sign according to the picture Nickerson approved. RP 59. Thinking it had permission, Superior removed the entire stripe, resealed any holes with silicone-sealed screws, and had its sign professionally installed by a permitted installer. *Id.*; CP 35-37, 90-92, 366-75; Exs. 177, 178.

The parties' relationship remained strained, and Nickerson eventually served Superior with its own notice of default, alleging five breaches of the lease. CP 6. This included an allegation that Superior made "exterior modifications without prior Landlord

approval…compromising structural integrity and integrity of [the] building envelope." *Id.* The trial court would later find that the four other alleged breaches[3] were either not proven, not a breach of the lease, or not a material breach justifying eviction. CP 970-71. Nickerson did not cross appeal those findings, and, thus, those issues are not relevant on appeal. Superior refuted the allegations, asserting that Nickerson gave permission to remove the stripe, that the stripe was purely aesthetic, not structural, and later that even if it technically breached the lease by exceeding Nickerson's permission, its breach was not material. CP 35-36, 348-401.

(1) Trial Court Proceedings

Nickerson filed an unlawful detainer action in King County Superior Court, seeking to terminate the lease and repossess the property due to Superior's alleged material breaches of the lease. CP 1-4.

Superior engaged a well-qualified construction expert, who refuted Nickerson's allegations that removing the decorative stripe caused structural damage to the building. CP 89-104. With no evidence to refute this, Nickerson dropped any allegations of structural or other damages in a

[3] The other alleged minor breaches were for allegedly preventing the landlord's agent from entering the property on occasion, failure to pay a water bill on time, failure to provide proof of insurance, and failure to comply with certain environmental regulations. *See* CP 6, 970-71. Nickerson dropped many of these allegations, presenting no evidence at trial, and the trial court properly found either that no breach occurred, or that the breach was minor and not material to the parties' contract. *Id.*

formal stipulation at trial. RP 9-10, 59, 96.[4] Thus, the only remaining issue at trial was whether removing too much of the decorative stripe, without proof of damages, was a material breach of the lease.

After a two-day bench trial, the trial court, the Honorable Steve Rosen, ruled for Nickerson. It found that even though Nickerson gave permission to remove part of the decorative stripe, Superior materially breached the lease by removing it entirely to install the approved signage. CP 549-47. The trial court evicted Superior, finding that Superior forfeited the lease due to that single material breach. CP 555-57. The court awarded Nickerson attorney fees, under the fee-shifting provision in the lease, double damages, and rent for the rest of the lease until Nickerson mitigated its damages by reletting the premises. CP 65, 555-57. Superior ultimately faces up to $690,085.24 in potential damages under the order. CP 545.[5] Superior appealed. CP 628-741.

(2) The Court of Appeals

Superior argued on appeal that even if it technically breached the lease, the breach was not material and did not justify eviction as a matter

[4] The Court of Appeals correctly vacated findings the trial court made about damage to the building due to Nickerson's stipulations that damage to the building was no longer an issue at trial. Op. at 9-10.

[5] Superior moved for reconsideration under CR 59(a)(6), (7), and (9), arguing that the trial court's order that removing a purely decorative stripe was contrary to law, based on insufficient evidence, and inequitable as a matter of justice. CP 348-401. The trial court denied that motion. CP 962-65.

of law, especially absent *any proof of damage* or irreversible change to the building. Appellant's br., *generally*. It argued that the trial court applied the wrong legal because it never found that the breach substantially defeated a primary or root term of the contract – which, being a commercial lease, was to transfer possession of the property to operate a car dealership in exchange for rent – and because it did not consider remedies short of eviction, as required by principles of law and equity. *Id.*

After considering the case without argument, Division I affirmed, holding for the first time in Washington (or elsewhere based on the authorities presented by both parties) that a non-damaging, decorative alteration supports eviction and forfeiture of a lease. The Court held that because the breach "defeated *an intended purpose* [of the lease]: that Nickerson retain control over the building's aesthetics" the breach was material. Op. at 12 (emphasis added). Elsewhere, the Court wrote that a finding that a party breached "one of the multiple functions of the contractual relationship" can sustain forfeiture for material breach. *Id.*

These legal errors, creating conflicts with published authority, are detailed below, but it is worth noting here that Division I misstated several basic facts. First, it based its decision, in part, on the misconception that Superior "failed to pay rent throughout the entire trial." Op. at 13. Not true; Nickerson admitted at trial that Superior tendered rent checks

through trial, but *Nickerson* decided not to cash them. RP 331; CP 753.

Division I also relied on facts and issues that were not before the trial court. The Court wrote that "Superior *continuously* made *changes* [to the premises] without approval." Op. at 11 (emphasis added). But even if that were true (which is it is not),[6] the only "change" at issue in the unlawful detainer was the removal of the decorative stripe. CP 6. That was the only change alleged in the notice of unlawful detainer served on Superior, CP 5-7, and the trial court *excluded* any testimony about other contemplated "changes" to the building because they were not plead. *E.g.*, RP 185 ("sustaining the objection as to the testimony…about exterior modifications other than removal of sheet metal paneling").

Without explanation, the Court of Appeals denied Superior's motion for reconsideration to correct these legal and factual errors. App. 1. This timely petition for review follows that denial. RAP 13.4(a).

## D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### (1) Division I's Opinion Conflicts with Existing Law by Lowering the Standard for Material Breach. RAP 13.4(b)(1), (2).

Review is warranted because Division I's opinion departs from

[6] There is no evidence in the record that Superior made any unauthorized "changes" to the premises, other than technically removing too much of the decorative stripe. For example, Division I mentioned painting, but Superior submitted all proposed painting to Nickerson for approval. *E.g.*, Ex. 132. This is true of all the other proposed changes. *See, e.g.*, RP 69-81 (testimony from Superior's architect who noted Nickerson's "micromanaging" when Superior sought approval for all proposed changes).

established law on material breach. It held that because the breach "defeated *an intended purpose* [of the lease]: that Nickerson retain control over the building's aesthetics" the breach was material. Op. at 12 (emphasis added). It also held that breaching "one of the multiple functions of the contractual relationship" can justify eviction of a lease for material breach. *Id.* Division I is wrong, and its opinion creates conflicts with published authorities, warranting review. RAP 13.4(b)(1), (2).

Material breach is a term of art in contract analysis. A breach is not material if it merely defeats "an intended purpose" of a contract, as Division I incorrectly concluded. Rather, a material breach is one that "substantially defeats a primary function of an agreement." *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 724, 281 P.3d 693 (2012) (quotation omitted).[7] It must be "so significant it excuses the other party's performance and justifies rescission of the contract." *Park Ave. Condo. Owners Ass'n v. Buchan Devs., L.L.C.*, 117 Wn. App. 369, 383, 71 P.3d 692, *reconsidered in part*, 75 P.3d 974 (2003). An "inconsequential or trivial breach" is insufficient grounds to vitiate a contract. *Campbell v. Hauser Lumber Co.*, 147 Wash. 140, 143, 265 P. 468 (1928). Thus, courts have clarified that the term must go to the "root or essence of the contract"

[7] Merriam-Webster defines "primary" as "of first rank, importance, or value." *Primary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/primary (last accessed July 21, 2021).

to be material. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 220, 317 P.3d 543 (2014); *Lake Hills Investments LLC v. Rushforth Constr. Co., Inc.*, 14 Wn. App. 2d 617, 639, 472 P.3d 337 (2020), *review granted*, 196 Wn.2d 1042 (2021).

Division I's opinion creates clear conflicts with these authorities. RAP 13.4(b)(1), (2). Merely breaching "an intended purpose" or "one of the multiple functions" of a lease is not enough to evict a tenant. Without a finding that some decorative change substantially defeated the *primary function* or the *root or essence* of the contract, eviction cannot stand.[8] The Court should grant review to ensure consistency in the law.

(2) Division I's Opinion Conflicts with Law and Public Policy Because Eviction Is a Last Resort. RAP 13.4(b)(1), (2), (4).

Review is also imperative to protect tenants' rights. Division I's opinion lowers the bar for materiality by disregarding whether the breach was at the *root or essence* of the lease, creating an impermissibly liberal standard for evictions, contrary to law and public policy in Washington. A

[8] Upon granting review, the Court should reverse because no reasonable person could find that the prohibition on unauthorized alterations is a primary or root term of the lease. It is not among the "BASIC AGREEMENT TERMS" as defined by the lease. CP 48-49. In the 21-page, single-spaced lease, it occupies just *eight lines*. CP 52. It is a subsection of a subsection. *Id.* And of all the authorities presented below evaluating this issue, *none* have held that temporary, decorative alterations constitute a material breach of a lease, even where the lease or landlord forbids them, because the primary function of such contracts is to transfer possession for the collection of rent. *See, e.g., Kaydon Acquisition Corp. v. Am. Cent. Indus.*, Inc., 179 F. Supp. 2d 1022, 1040 (N.D. Iowa 2001), *infra*, ("A review of [the reported decisions across the country] reveals that courts have been extremely reluctant to grant a forfeiture of a lease due to a tenant's making of alterations or modifications to leased premises without the landlord's prior permission.").

tenant must not face the threat of eviction for breaching a minor or immaterial term in a lease, like a general prohibition on unapproved, decorative alterations. This is especially true here where the parties merely miscommunicated about the extent of Nickerson's permission to remove the decorative stripe. By holding otherwise, tenants in Washington could face the harshest remedy at law – eviction – for merely painting a wall the wrong color. Review is warranted to ensure tenants in this state receive greater protection than Division I's outlier opinion affords. RAP 13.4(b)(1), (2), (4).

Division I gave short shrift to the principle that when assessing whether a breach is material, thus warranting forfeiture of a lease, a court must start with the premise that "[t]he law does not favor forfeitures, and equity abhors them." *Deming v. Jones*, 173 Wash. 644, 648, 24 P.2d 85 (1933) (denying landlord's action to terminate a lease through unlawful detainer). Forfeiture is a last resort, and close calls cannot justify forfeiture. *Pardee v. Jolly*, 163 Wn.2d 558, 574, 182 P.3d 967 (2008) ("[F]orfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial."). Additionally, the statutes governing unlawful detainer actions are strictly construed in favor of the tenant, evidencing a policy in Washington that eviction actions for material breach are subject to strict standards. *Hous. Auth. of*

*City of Everett v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745 (1990).

For these reasons, courts have long held that eviction is improper where a landlord has adequate remedies to cure minor breaches, including injunctive relief, specific performance, or damages if the landlord can prove them (which Nickerson did not even attempt to do), which often involves withholding money from a tenant's damage deposit. *See Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 222, 242 P.3d 1 (2010), *review denied*, 171 Wn.2d 1014 (2011) (discussing that in a landlord tenant dispute, the aggrieved party can always seek damages or "compel a party to specifically perform its promise" when money damages "cannot adequately compensate a party's loss").

There is simply no case in Washington, or elsewhere, to support Division I's holding that removing a purely decorative stripe constitutes a material breach of a lease, especially without any proof of lasting damage. Nickerson cited no such authority to any court. *See, e.g.*, CP 271-89 (Nickerson's trial brief); Resp't br., *generally*. Division I extended the law in favor of landlords further than ever before, as evidenced by its omission of caselaw from Washington or elsewhere analyzing materiality in the landlord/tenant context.[9]

[9] *See* op. at 7-12 (citing *224 Westlake*, 169 Wn. App. 700 (real estate purchase option agreement); *Park Ave.*, 117 Wn. App. 369 (breach of implied warranty of quality construction for a condominium); *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App.

When Washington courts have commented on disputes over the aesthetics of properties, they have held that such concerns are not fundamental to the property's use. For example, in *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 522, 799 P.2d 250 (1990), this Court noted that mere "aesthetic concerns" are insufficient grounds to find that a breach of the warranty of habitability in the construction of a residential building because they do not undermine the building's fundamental use. *See also, Westlake View Condo. v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 770, 193 P.3d 161 (2008) (commenting that "trivial" and "merely aesthetic" defects are not material breaches of a contractor's duty when constructing a residence).

While *Atherton* and *Westlake* involved residential properties, they support the notion that temporarily altering a building's aesthetics is a fleeting, trivial concern that does not constitute a material breach of a commercial lease because it does not affect the lease's fundamental purpose – which is to transfer the right to possession in exchange for rent. Division I's opinion conflicts with these analogous authorities warranting

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77, 765 P.2d 339 (1988), *review denied*, 113 Wn.2d 1025 (1989) (purchase agreement for a condominium in Hawaii); *DC Farms*, 179 Wn. App. 205 (action by farmer against food processor for breach of contract); *Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 167 P.3d 1125 (2007) (action against surety to recover on subcontractor's performance bond)).

review by this Court. RAP 13.4(b)(1), (2).

Division I's opinion not only conflicts with Washington law, but it stands as an outlier nationwide, where courts are "extremely reluctant to grant a forfeiture of a lease due to a tenant's making of alterations or modifications to leased premises without the landlord's prior permission." *Kaydon*, 179 F. Supp. 2d at 1040 (reviewing reported decisions across the country). Instead, if party makes changes that are fleeting or merely "cost some money to fix," courts have widely held that any technical breach is not material as a matter of law. *Gateway Co. v. Charlotte Theatres, Inc.*, 297 F.2d 483, 486 n.2 (1st Cir. 1961). This is especially true absent a showing of any damages. *E.g.*, *Fowler v. Resash Corp.*, 469 So. 2d 153, 154 (Fla. Dist. Ct. App. 1985), *review denied*, 479 So. 2d 117 (Fla. 1985) (setting aside a jury verdict ordering forfeiture of a lease where the landlord suffered no actual damages in a dispute over a "decorative colonnade"). It is also especially true when it comes to signage and other minor alterations made in connection with advertising a tenant's presence in the building. *See 18 Associates, LLC v. Court St. Pizza, Inc.*, 57 Misc. 3d 1204(A), 66 N.Y.S.3d 653 (N.Y. Civ. Ct. 2017) (unauthorized "signage is a minor infraction of the lease" and "without evidence…produced to prove any kind of damages from this infraction…this ground is insufficient as a matter of fact and law to terminate the tenancy of the

Respondent"), *aff'd sub nom., Eighteen Associates, LLC v. Court St. Pizza, Inc.*, 66 Misc. 3d 148(A) (N.Y. App. Term. 2020).[10]

Even where tenants have made *significant alterations* to a leased property without the landlord's approval – far greater than merely removing too much of a decorative stripe to install an approved sign – courts have routinely refused to find that such alterations are *material* warranting eviction, the harshest remedy at law.[11]

In contrast, *Feist & Feist v. Long Island Studios, Inc.*, 29 A.D.2d

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[10] *See also, Louis & Anne Abrons Found., Inc. v. 29 E. 64th St. Corp.*, 78 A.D.2d 814, 815 (N.Y. App. Div. 1980) ("[I]nstallations of the signs, gates, canopies and other attachments by defendant subtenants without the approval of [the landlord]…were inconsequential breaches that do not warrant the forfeiture of the respective leases and subleases.").

[11] *See, e.g., Goldblum v. C & C Investments*, 444 So. 2d 642, 643 (La. Ct. App. 1983), *cert. denied*, 447 So. 2d 1078 (La. 1984) (refusing to evict where the tenant removed a wall to open a 12-foot wide passageway between the leased site and an adjacent area to enlarge the business area); *Fly Hi Music Corp. v. 645 Restaurant Corp.*, 64 Misc. 2d 302, 304 (N.Y. City Civ. Ct. 1970) (refusing to evict where a tenant installed a new stairway, kitchen and raised platform without the landlord's permission), *aff'd*, 71 Misc. 2d 302 (N.Y. App. Term 1972); *Harar Realty Corp. v. Michlin & Hill, Inc.*, 86 A.D.2d 182 (N.Y. App. Div. 1982), *appeal dismissed*, 57 N.Y.2d 607 (N.Y. 1982) (refusing to evict over the installation of a staircase); *Lake Anne Realty Corp. v. Sibley*, 154 A.D.2d 349 (N.Y. App. Div. 1989) (refusing to evict after a tenant spent $7,000 on improvements for a porch and another room to a vacation cottage because it would be unduly harsh); *Pollock v. Adams*, 548 S.W.2d 239, 242 (Mo. Ct. App. 1977) (refusing to evict where a tenant installed a temporary partition and a hasp for a padlock on an office door of a leased restaurant); *Sabema Corp. v. Sunaid Food Products, Inc.*, 309 So. 2d 620, 622 (Fla. Ct. App. 1975) (holding that tenant's failure to obtain written consent to repair and replace oil drain fields and soakage pits did not constitute a material breach of lease); *Kaydon*, 179 F. Supp. 2d 1022 (refusing to find a material breach even where a tenant made over $1,000,000 in unauthorized "structural alterations or improvements and fixtures" because the alterations did not defeat the purpose of the lease, which was to manufacture hydraulic cylinders in the building). Superior relied on these authorities, thinking the law protected its rights as a tenant to be free from eviction over reversible alterations.

186 (N.Y. App. Div. 1968) – a case both parties cited in the Court of Appeals – shows the type of *significant* alterations that represent a material breach. There, a tenant leased a hanger and agreed that the property would be used "solely for a general services motion picture studio." *Id.* at 187. The tenant made over $10,000 in alterations to the space to open "a discotheque type of facility to the general public." *Id.* at 188. The court held that these unauthorized alterations changed the fundamental purpose and nature of the agreement, constituting a material breach. *Id.* at 188-89; *see also*, *Sherwood 38 Assocs. v. Tenth Ave. Corp., No. 02-151/155,* 2002 WL 31015606 (N.Y. App. Term. 2002) (tenant made unauthorized "structural" and "architectural" changes to convert an "office/restaurant space to a nightclub") (cited in Nickerson's brief).

This case is nothing like *Feist.*[12] Superior's alterations were purely aesthetic and did not transform the nature of the parties' lease, which was to operate a car dealership in exchange for rent. Superior did not renovate the building so that it could operate a discotheque or some other business. Thinking it had permission, Superior merely removed a decorative stripe to install a sign on the exterior of the building to advertise its presence.

[12] Even *Feist*'s facts – which are *far more extreme* than the trivial breach alleged here – garnered a split decision among the court. The dissenting justice wrote that forfeiture was too "harsh" a remedy for the technical breaches of the lease, and the landlord should have sought an injunction, rather than termination, to enforce the terms of the lease. *Id.* at 189-92 (Hopkins, J., dissenting). The same is true here, on much less egregious facts.

Without more, such a fleeting, trivial change cannot constitute a material breach justifying the harsh remedy of forfeiture.

Again, Nickerson presented *no evidence* that removing the decorative stripe caused any damage, either to the building itself or to Nickerson's business reputation or brand. Nor did it offer any evidence that the change was permanent even costly to remedy.

Preserving the stripe was never a material term in the lease, and Division I misstated testimony central to its analysis. The court wrote that "LeAnn [Polin] testified at trial…that retain[ing] the right to decide how the building looked from the outside…was an important part of the agreement." Op. at 10. But that was not her testimony. When asked how important it was to have control over the building's exterior, Polin did not mention aesthetics or preserving the decorative stripe. She merely testified that it was important to her that "any improvements that were done were done correctly" to not "put[] the building at risk." RP 189.[13]

Superior substantially satisfied this expectation, removing the stripe without damaging the building and having its sign professionally installed, thereby negating any finding of material breach. CP 89-104; RP 9-10, 59, 96; Ex. 178. Division I's opinion creates additional conflicts

[13] In fact, Polin testified that she merely wanted the chance to oversee the stripe's proper removal, not prevent it from ever occurring. She even testified that she would have been willing to remove the stripe herself: RP 186.

where such substantial performance cannot constitute material breach. *DC Farms*, 179 Wn. App. at 220 ("Substantial performance is…the antithesis of material breach.").

All along, this was merely pretext to evict Superior after the parties butted heads over other minor issues during the first few months of their business relationship. Nickerson used their miscommunication over removing the stripe as grounds for eviction when it could not prove any other material breach. This Court should grant review and reverse to clarify that tenants in Washington are protected from such pretextual evictions over fleeting, non-damaging alterations to a property. Review is necessary to resolve conflicts and to effect the clear policy in this state (and elsewhere) protecting tenants from eviction over trivial breaches, an issue of substantial public importance. RAP 13.4(b)(1), (2), (4).

(3) A Court Must Consider Alternatives to Eviction as a Matter of Law and Equity, and Division I's Deferential Review Conflicts with Published Authority on the Application of Equitable Relief. RAP 13.4(b)(1), (2), (4).

Division I's opinion also conflicts with published authority by applying an "abuse of discretion standard" to the trial court's determination that Superior had no right to relief from forfeiture as a matter of equity. Op. at 12. Again, the trial court had a *legal obligation* to consider less drastic remedies than forfeiture and did not do so. *Deming*,

*Pardee*, *supra*. But Division I's discussion of equity also conflicts with clear precedent. RAP 13.4(b)(1), (2).

This Court recently held that the threshold question of whether equitable relief is appropriate is a question of law reviewed *de novo*:

> [T]he question of whether equitable relief is appropriate is a question of law that we review de novo. In this case, we are asked to review whether the trial court properly determined that Burbank was entitled to [equitable relief] as a matter of law and not whether the trial court properly fashioned the equitable remedy. Because the threshold inquiry is whether an [equitable remedy] was an appropriate remedy in the first place, our review is de novo.

*Borton & Sons, Inc. v. Burbank Properties, LLC*, 196 Wn.2d 199, 207, 471 P.3d 871 (2020).

Here, as in *Borton*, the trial court did not fashion an equitable remedy therefore turning Division I's review into one for an abuse of discretion. Rather, it ordered forfeiture, the harshest legal remedy available under the unlawful detainer statutes, without considering other less-punitive, options. The question the trial court was obligated, but neglected, to consider, was whether an equitable remedy like specific performance was appropriate to avoid forfeiture. *Pardee*, *supra*. Under *Borton*, Division I had to consider whether Nickerson is entitled to equitable relief for itself, *de novo*, which it refused to do, further

warranting review by this Court.[14] RAP 13.4(b)(1), (2).

F. CONCLUSION

Superior respectfully asks that this Court grant review and reverse. Division I's opinion conflicts with published authority and undermines tenants' rights in Washington, a significant question of public interest. RAP 13.4(b)(1), (2), (4). Upon granting review, the Court should reverse and award Superior its costs and attorney fees.

DATED this 22nd day of July, 2021.

Respectfully submitted,

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[14] Deferring to the trial court rather than engaging in *de novo* review, Division I implied that a court could find that equitable relief was inappropriate because Superior allegedly refused to cure its breach by replacing the decorative stripe. Op. at 11. Even if refusal to cure without a court order were grounds to evict, Division I again got its basic facts wrong. In truth, Nickerson *never informed* Superior that it needed to replace the stripe until it changed its theory of the case at trial. Polin testified in a declaration that she told Superior to fill "open holes" and "return[]" the "metal structural siding stripe" to Nickerson, *not put it back up*. CP 117. Likewise, Nickerson's formal notice informed Superior that it needed to "repair" the "siding" because its changes had compromised the "structural integrity and integrity of [the] building envelope." CP 6. But the stripe was not part of the siding and had nothing to do with the structural integrity of the building, as Superior's expert concluded. CP 89-104. Superior cured the breach alleged in the notice of unlawful detainer by not damaging the building, as Nickerson admitted at trial when it dropped all allegations of damages.

# APPENDIX

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

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| 1201 W NICKERSON LLC, a Washington limited liability company,<br><br>Respondent,<br><br>v.<br><br>SUPERIOR MOTOR CAR CO., LLC, a Washington limited liability company,<br><br>Appellant. | No. 81252-1-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant Superior Motor Car Co. LLC has filed a motion for reconsideration of the opinion filed on May 3, 2021. Respondent 1201 W. Nickerson LLC has filed an answer to appellant's motion. The panel has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Judge

# EXHIBIT 32

**From:** LeAnn Polin (1201 W Nickerson LLC) <nickersonllc1201@aol.com>
**To:** andyliu987 <andyliu987@hotmail.com>; andyliu <andyliu@seattlesuperiormotors.com>
**Subject:** Re: Signage and exterior paint - Superior Motors

**Date:** Wed, Sep 4, 2019 6:03 pm

Andy,

I did not give Superior Motors permission to remove the stripe. I stated the stripe can be removed to accommodate your signage - I did not give approval or permission to remove the stripe, nor did I say the whole stripe could be removed.

Landlord only gave permission to install signage per the original planning as noted in email below. Bullet Points 1-4 were notes only.

Placement of signage on building is not what Superior Motors asked Landlord for permission to install or what was submitted to the City of Seattle on the signage permit.

Landlord request to be informed of installation date prior to signage installation was denied.

Per the lease contract, Superior Motors is not permitted to make any external modifications to the building. The stripe, if needed to be removed, was to be performed by the Landlord. Landlord never received a request for removal.

Since Superior Motors removed the stripe, without obtaining Landlord permission first, Superior Motors is in default of the lease.
Removal of the stripe has compromised the structural integrity of the building. There are now over 200 holes in the siding that fully penetrate the walls to the interior of the building that have not been filled with new water-tight sheet metal fasteners. As a result, the building is no longer water tight when it rains.

This means water damage to the building structural walls, insulation, vapor barrier, and sheetrock will occur.

Structural Integrity of the lower roof may also be compromised due to 4-5 people walking on the roof at one time. Center of lower roof on both sides is floating. Inspection of lower roof is now required to access damages.

I have stated in numerous in-person meetings, meeting notes, and via email, all modifications require Landlord approval.

Since Superior Motors has removed the stripe, my main concern is now restoring the structural integrity of the building.

1. Where are the metal panels for the stripe that was removed? Panels are to be returned undamaged to Landlord
2. Building structural Integrity needs to be restored. This will be at the cost of Superior Motors.
   -- Work to restore structural integrity of building must be coordinated\approved with Landlord.

I hope the above information provides clarification.

Also, can you please let me know if Mr. Glosser is still representing Superior Motors.

Thank you,

***LeAnn Polin***
*1201 W Nickerson LLC*
*Property Manager*
*(206) 601-2608*
*nickersonllc1201@aol.com*

-----Original Message-----
From: zhili liu <andyliu987@hotmail.com>
To: nickersonllc1201@aol.com <nickersonllc1201@aol.com>
Sent: Wed, Sep 4, 2019 3:25 pm
Subject: Fwd: Signage and exterior paint

Hi LeAnn,
The blue stripe was removed form the building where our sign was installed as approved by you in the email below. I don't understand what you mean with the letter we got. We followed your instructions. We did not remove the stripe on the side of the building since we did not put a sign there.

Please call me when you have a chance

Andy

发自我的 iPhone

以下是转发的邮件：

发件人: Ed Bejou <ed@seattlesuperiormotors.com>
日期: 2019年9月4日 GMT-7 15:18:38
收件人: "andyliu987@hotmail.com" <andyliu987@hotmail.com>
主题: 转发: **Signage and exterior paint**

**From:** "LeAnn Polin (1201 W Nickerson LLC)" <nickersonllc1201@aol.com>
**Date:** April 15, 2019 at 11:40:41 AM PDT
**To:** ed@seattlesuperiormotors.com
**Subject: Re: Signage and exterior paint**

Signage is approved.

VHB tape is supposed to be good for bonding signs, so there should not be any issue with the signs falling off the building. However, FASTSigns is installing the signs and therefore, they hold the liability is there is an issue.

I personally would be using a solar seal 900 silicone product over Loctite Siliconeas it is designed for thermal properties of metal siding (flexing, UV, etc).

However, just a note, please make sure the locations of the signs are where you want them.

See attached.

1) Upper northwest corner of the north facing wall of building is not being removed. I have communicated this several times to Gene. This means the location of your sign you want installed will not be on the right hand edge as you are anticipating.

2) Double-check measurements from edge of building for sign off of 12th Ave W to make sure sign clears electrical poles on edge of building where electrical comes in

3) You have not submitted plans to the building department for new windows yet. Therefore, showing location of new windows should not be included on the FASTSigns permit application.

4) As for building colors. We will need to discuss. The warehouse portion of the building was not apart of the agreement for paint. Stripe can be removed where sign is to be installed. Only the lower 1-story office building and trim on warehouse building were part of lease agreement.

Please let us know when you anticipate the signs to be ready for installation so we can make sure the building siding is re-cleaned in that area.

Thank you,

***LeAnn Polin***
*1201 W Nickerson LLC*
*Property Manager*
*(206) 601-2608*
*nickersonllc1201@aol.com*

-----Original Message-----
From: Ed Bejou <ed@seattlesuperiormotors.com>
To: LeAnn Polin <nickersonllc1201@aol.com>
Sent: Thu, Apr 11, 2019 5:54 pm
Subject: Signage and exterior paint

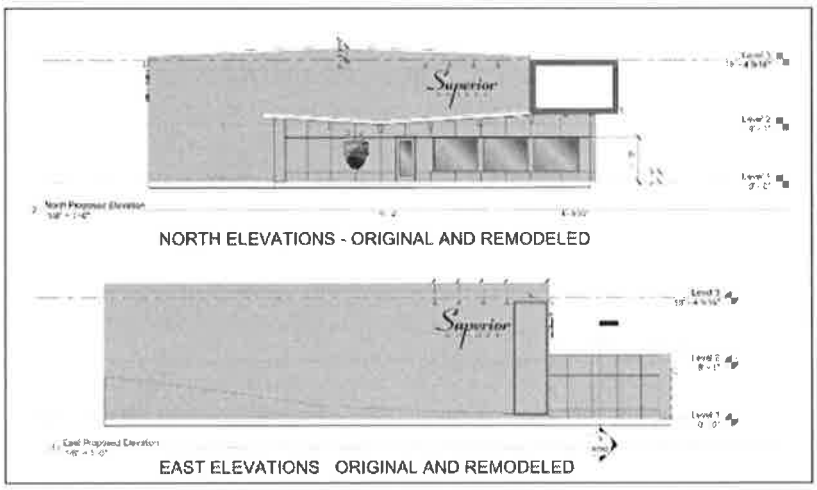
Hi LeAnn,

I've attached the permit drawings for signage which we are submitting to the city for permits and want your approval before submitting.

Also, below are the colors I've chosen for the building. The office portion will be painted in China White and the warehouse in winter gates. Please confirm that you are ok with this and when I can expect to get it completed as this will dictate how soon we can get the signs up (at least for the warehouse portion first).

Thanks again,

Ed Bejou
(206) 323-7517
Seattlesuperiormotors.com







# EXHIBIT 132

Subject **Re: Signage and exterior paint**
From LeAnn Polin (1201 W Nickerson LLC) <nickersonllc1201@aol.com>
To <ed@seattlesuperiormotors.com>
Date 2019-04-15 11:40

- Signage - Suprior Motors.jpg (~392 KB)

Signage is approved.

VHB tape is supposed to be good for bonding signs, so there should not be any issue with the signs falling off the building. However, FASTSigns is installing the signs and therefore, they hold the liability is there is an issue.

I personally would be using a solar seal 900 silicone product over Loctite Siliconeas it is designed for thermal properties of metal siding (flexing, UV, etc).

However, just a note, please make sure the locations of the signs are where you want them.
See attached.

1) Upper northwest corner of the north facing wall of building is not being removed. I have communicated this several times to Gene. This means the location of your sign you want installed will not be on the right hand edge as you are anticipating.

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***LeAnn Polin***
*1201 W Nickerson LLC*
*Property Manager*
*(206) 601-2608*
*nickersonllc1201@aol.com*

-----Original Message-----
From: Ed Bejou <ed@seattlesuperiormotors.com>
To: LeAnn Polin <nickersonllc1201@aol.com>
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Thanks again,

Ed Bejou
(206) 323-7517
Seattlesuperiormotors.com


Signage - Suprior Motors.jpg
~392 KB



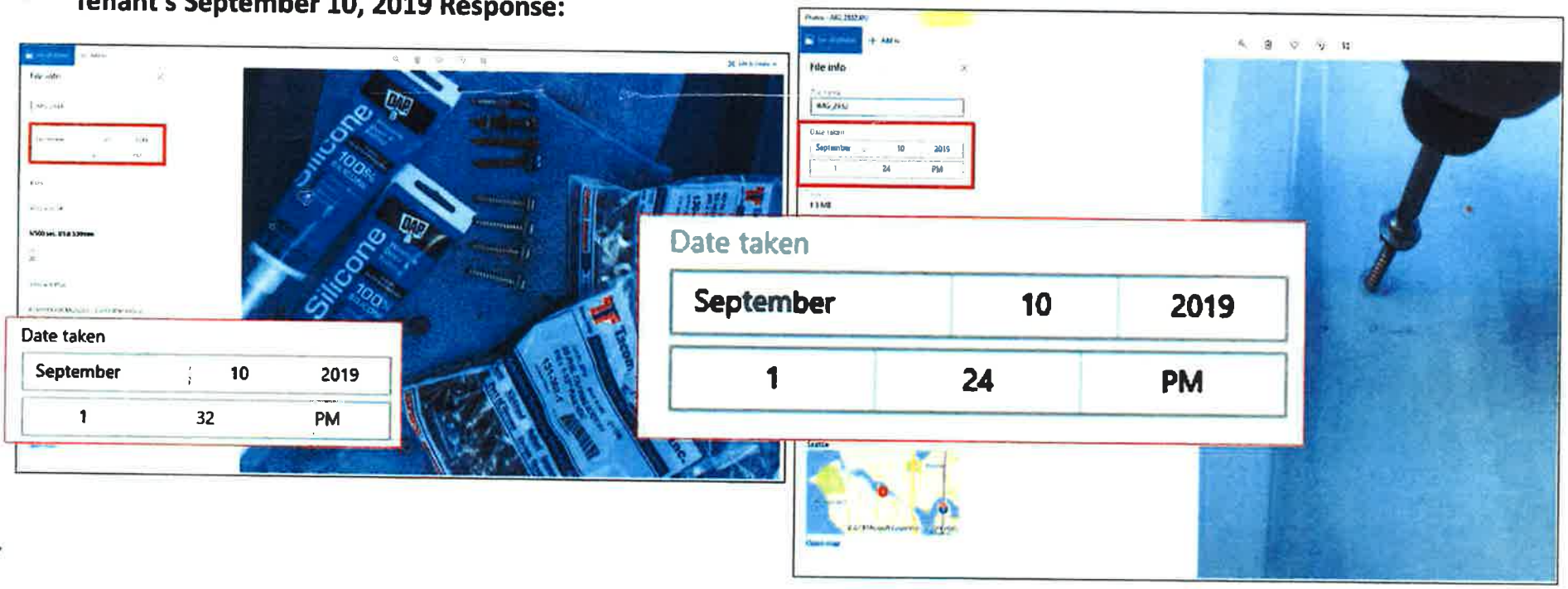
App. 7

# EXHIBIT 177

## September 5, 2019 Notice of Default:

| ¶ Number | Breach |
|---|---|
| ¶4.3.2 | **Tenant performed exterior modifications without prior Landlord approval, including removal of the sheet metal paneling on exterior of building, compromising structural integrity and integrity of building envelope. Holes in the building need to be repaired and siding restored, as approved, in advance, by Landlord.** |

## Tenant's September 10, 2019 Response:




CLEAR
DAP
Silicone
Window, Door & Siding
100% WATERPROOF
100% SILICONE
Interior/Exterior
Flexible
Minimal Shrinkage


DAP
Silicone
Window, Door & Siding
100% SILICONE
100% WATERPROOF
CLEAR
Tacon
Fasteners
SEP 04, 2018
SS NEOPRENE BONDED WASHER 18-8
#10 X 1/2" O.D.
130-404-1
QTY: 100
MADE IN TAIWAN
11 Locations Serving the Great Pacific Northwest...
Everett
Kent
Kirkland
Port of Tacoma
Ballard
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Georgetown
Olympia
Portland
Bremerton
Boise
EXPRESS REORDER
Call
1 800 562-8192
Tacoma Screw Products, In
tacomascrew.com
Fasteners • Tools • Maintenance & Shop Supplies
APR 03, 2018
Bin #: 50-1066
SS PHIL TAPPING SCREW 18-8
#10 x 1-1/2" PAN HEAD
131-307-1
QTY: 100
MADE IN TAIWAN
11 Locations Serving the Great Pacific Northwest...
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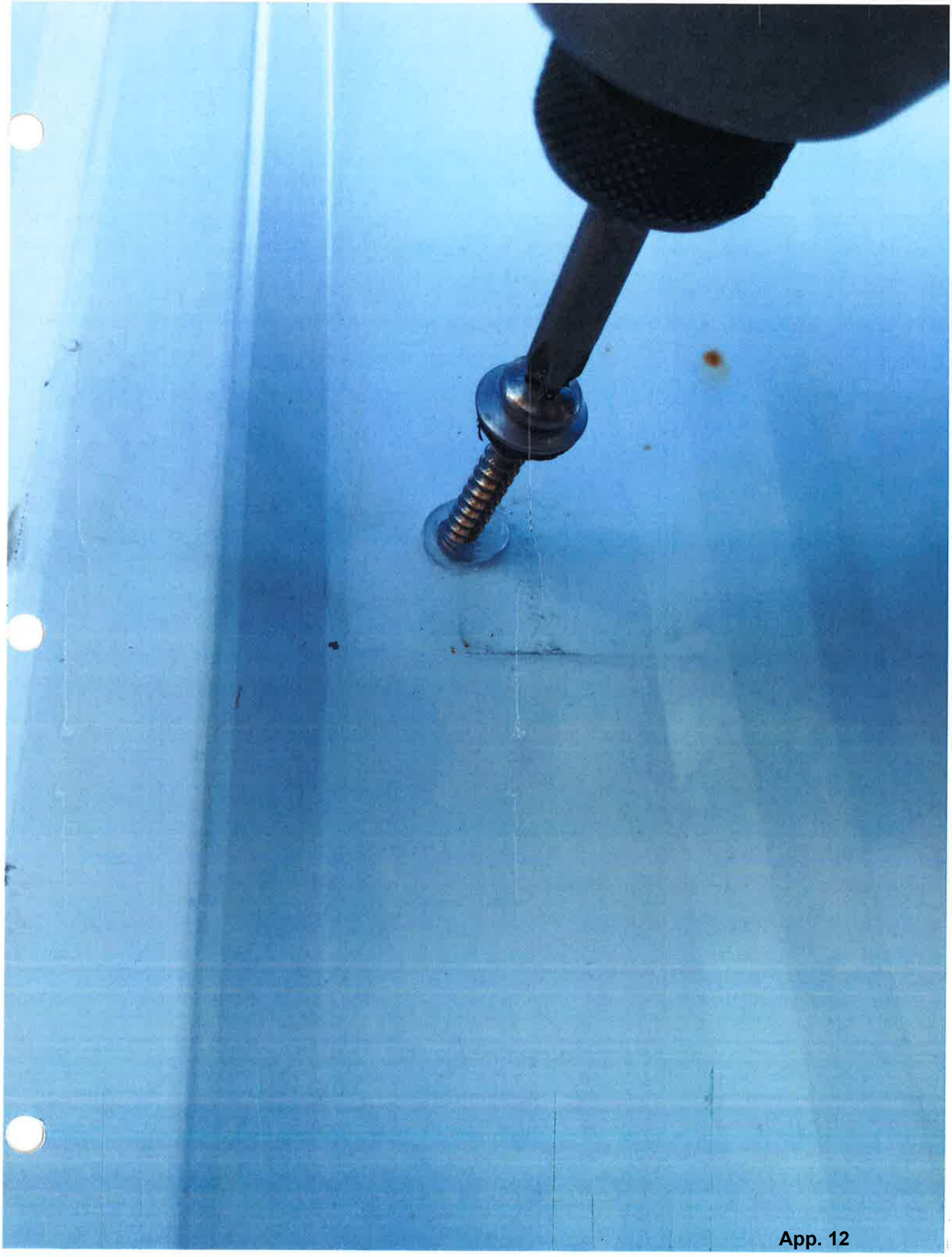
Kent
Kirkland
Port of Tacoma
Ballard
Tacoma
Georgetown
Olympia
Portland
Bremerton
Boise
EXPRESS REORDER
Call

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#10 X 1/2" O.D
130-404-1
QTY: 100
SS PHIL TAPPING SCREW 18-8
#10 x 1-1/2" PAN HEAD
131-307-1
QTY: 100
Locations Serving the Great Pacific Northwest
Kirkland
Port of Tacoma
Ballard
Tacoma Olympia
EXPRESS

# EXHIBIT 178

Seattle Department of
Construction and Inspections
700 Fifth Ave, Suite 2000
P.O. Box 34019
Seattle, WA 98124-4019
(206) 684-8600

# CITY OF SEATTLE
# Sign, Awning and Canopy Permit

**6721632-SB**
**Permit Number**

**Site Address: 1201 W NICKERSON ST SEATTLE, WA 98119**
**Location:**

| SIGN OWNER | CONTRACTOR | |
|---|---|---|
| SUPERIOR MOTORS<br>1201 W NICKERSON ST<br>SEATTLE, WA 98119<br>Ph: (206) 323-7517 | FastSigns Southwest Seattle<br>Chris Doyle<br>922 SW 151ST ST<br>BURIEN, WA 98166<br>Ph: (206) 577-4077<br>**Primary Applicant/Installer** | **Application Date:** 04/17/2019<br>**Issue Date:** 04/17/2019<br>**Expiration Date:** 10/17/2020<br>**Fees Paid:** $437.90<br>**As of Print Date:** 04/17/2019 |

**Description of Work:** 1/2" Black PVC Routed Letters & Logo mounted to two sides of the building using VHB tape and Silicone for "Superior Motors". 4/17/19 SS; Applicant did not enter sign detail information on application so no fees were assess or paid. Sign are based fees added for (2) non-illuminated wall signs, 85 and 21 square feet each.

**Map Page Number**

**PERMIT SUBMITTED ONLINE**

**LU Conditions** No

**Zone** C2-40

**Awning/Canopy Structure Value** $0.00

**Sign Detail Information**

| Sign Type | Type of Work | Sign Area | Illuminated | Lighting Method | Watts | Electrical Label # | Number Branch Circuits | Owner Install |
|---|---|---|---|---|---|---|---|---|
| Wall | New Signage Only | 85 | No | | | | | No |
| Wall | New Signage Only | 21 | No | | | | | No |

Install on-premises signage. This permit is for the sole use of . If ceases business, the permitted sign must be removed pursuant to SBC 3107.7.2

Permission is hereby granted to install and/or maintain an "on-premises sign" within the meaning of City law and consistent with the approved application and plans. The permittee may alter sign copy without further permission provided the sign remains an "on-premises sign" consistent with the approved application and plans. This permit is not transferrable.

**Work must not be covered until inspected. When ready for inspection, make request with the Seattle Department of Construction and Inspections at (206) 684-8900 or on the web at www.seattle.gov/dpd/permits/inspections/. Provide site address and permit number.**

Permission is hereby given to do the above work at the site address shown, according to the conditions hereon and according to the specification pertaining thereto, subject to compliance with Ordinances of the City of Seattle. Correct information is the responsibility of the applicant. Permits with incorrect information may be subject to additional fees.

**You Must Have a Paper Copy of Your Approved and Stamped Plan Set Available at Your Job Site for the City Inspector to Review. If You Do Not Have Your Plans Printed and Ready for Review, You May Fail Your Inspection.**

**CERTIFICATION**

**I CERTIFY** that I am Custodian of the Records for the Seattle Department of Construction & Inspection and that I am the designated custodian of the records of that office; that this is a record kept by the Seattle Department of Construction & Inspection in the regular course of business of the Seattle Department of Construction & Inspection and that it is in the regular course of business of that Department that such records are maintained.

**THAT** this is a true and correct copy of a record maintained by the Seattle Department of Construction & Inspection pertaining to the property named.

Warren Clay

Custodian of the Records
City of Seattle
Department of Construction & Inspection

Date 1/22/2020

Seattle Department of
Construction and Inspections
700 Fifth Ave, Suite 2000
P.O. Box 34019
Seattle, WA 98124-4019
(206) 684-8600

# CITY OF SEATTLE

**6738161-EL**
**Permit Number**

# Electrical Permit

**Standard Electrical Permit**

**DIST # 09**

## Site Address: 1201 W NICKERSON ST SEATTLE, WA 98119

**Location:**

| OWNER | CONTRACTOR | |
|---|---|---|
| Nickerson LLC<br>1201 W Nickerson St<br>Seattle, WA 98119<br>Ph: (206) 601-2608 | Custom Electrical Services, LLC<br>Jan Earl Rosander<br>3802 AUBURN WAY N<br>STE 307<br>AUBURN, WA 98002<br>Ph: (425) 282-4971<br>Electrical Contractor Lic: CUSTOES893J2 | **Application Date:**<br>**Issue Date:** 07/16/2019<br>**Expiration Date:** 07/16/2020<br>**Fees Paid:** $180.25<br>**As of Print Date:** 07/16/2019 |

**Description of Work:** INstall 4 dedicated circuits for printer, fridge, and kitchen countertop and run 6 circuit extensions for new outlets and lights, add 8 surface mount lights and a single pole switch

**Electrical Details**

Work Type: Remodel or Repair

**Devices and Branch Circuits**

Dedicated Appliance Circuits (15-25 Amps): 4

| Connections | |
|---|---|
| **Connection Type** | **Connection Quantity** |
| Light Fixtures (Luminaires) | 8 |
| Receptacles | 9 |
| Switches | 1 |

**Permitted work must not be covered until inspected. When ready for inspection, make request with the Seattle Department of Construction and Inspections at (206) 684-8900 or on the web at** http://www.seattle.gov/sdci/inspections. **Provide site address and permit number.**

Permission is hereby given to do the above work at the site address shown, according to the conditions hereon and according to the specification pertaining thereto, subject to compliance with Ordinances of the City of Seattle. Correct information is the responsibility of the applicant. Permits with incorrect information may be subject to additional fees.

**The Approved and Stamped Plan Set Must be On-Site at All Times.**

**CERTIFICATION**

**I CERTIFY that I am Custodian of the Records for the Seattle Department of Construction & Inspection and that I am the designated custodian of the records of that office; that this is a record kept by the Seattle Department of Construction & Inspection in the regular course of business of the Seattle Department of Construction & Inspection and that it is in the regular course of business of that Department that such records are maintained.**

**THAT this is a true and correct copy of a record maintained by the Seattle Department of Construction & Inspection pertaining to the property named.**

Warren Aragon
Custodian of the Records
City of Seattle
Department of Construction & Inspection

Date 1/22/2020

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 81252-1-I to the following:

Irving A. Sonkin
Sonkin & Schrempp
12715 N.E. Bel-Red Road
Suite 150
Bellevue, WA 98005-2627
irvs@lawyerseattle.com

Lawrence S. Glosser
Ahlers Cressman & Sleight PLLC
999 Third Avenue, Suite 3800
Seattle, WA 98104-4023
larry.glosser@acslawyers.com

Daniel A. S. Foe
Mullavey, Prout, Grenley & Foe, LLP
2401 N.W. 65th
P.O. Box 70567
Seattle, WA 98107
dfoe@ballardlawyers.com

Catherine W. Smith
Ian C. Cairns
Smith Goodfriend, P.S.
1619 Eighth Avenue North
Seattle, WA 98109-3007
catherine@washingtonappeals.com
ian@washingtonappeals.com

Copy electronically served via appellate portal to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 22, 2021, at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

# TALMADGE/FITZPATRICK

## July 22, 2021 - 1:49 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 81252-1 |
| **Appellate Court Case Title:** | 1201 W Nickerson LLC, Respondent v. Superior Motor Car Co., LLC, Appellant |

**The following documents have been uploaded:**

- 812521_Petition_for_Review_20210722134736D1774069_6364.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was PFR.pdf*

**A copy of the uploaded files will be sent to:**

- Larry.Glosser@acslawyers.com
- andrienne@washingtonappeals.com
- cate@washingtonappeals.com
- dfoe@ballardlawyers.com
- ian@washingtonappeals.com
- inartker@ballardlawyers.com
- irvs@lawyerseattle.com
- isonkin@hotmail.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com

**Comments:**

Petition for Review, filing fee will be sent directly to Supreme Court.

---

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
**Filing on Behalf of:** Aaron Paul Orheim - Email: Aaron@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

**Note: The Filing Id is 20210722134736D1774069**