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NO. 64342-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RAY MACLEOD,

Appellant,

v.

CORNERSTONE EQUIPMENT LEASING, INC.,

Respondent.

**BRIEF OF RESPONDENT CORNERSTONE EQUIPMENT
LEASING, INC.**

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I. INTRODUCTION

This case is about one, simple claim. Defendant-Appellant Ray MacLeod ("MacLeod") did not pay the sums due on a promissory note held by Plaintiff-Appellee Cornerstone Equipment Leasing, Inc. ("Cornerstone"), and Cornerstone filed suit to enforce the note. MacLeod recounts a long history of dealings between the parties, but resolution of this case turns on events in a short time frame over which there is no material dispute.

MacLeod agrees that he signed a 2005 restated promissory note and that he breached it. He now claims that even though he signed the restated note and made payments under it, he was told it was for "internal purposes only" and would not be enforced. And, he claims that in a subsequent oral communication with Cornerstone's President Jim Chevigny ("Chevigny"), regarding which there is no documentary confirmation, Cornerstone told him he was "even." Regardless of what was said in that call, there is undisputed evidence that Cornerstone subsequently demanded performance of the note, withdrawing any waiver that might be claimed. MacLeod's fraudulent inducement, waiver, and estoppel arguments did not persuade the trial judge, and summary judgment was appropriately granted. This Court should affirm.

II. STATEMENT OF ISSUES

- A. Whether Cornerstone met its burden on summary judgment to prove that MacLeod's failure to pay sums due on a June 2005 Amended and Restated Promissory Note entitled Cornerstone to judgment on the note when MacLeod ceased making payments required under the note and conceded that he had breached it?
- B. Whether MacLeod failed to prove the affirmative defense of misrepresentation when Chevigny's alleged statements at the time that MacLeod signed the June 2005 Amended and Restated Promissory Note were, if made, mere statements of future intent and not of existing fact and when those statements were inconsistent with the express terms of the note?
- C. Whether MacLeod failed to prove the affirmative defense of waiver when the waiver alleged to have occurred in December 2006 was, if made, without any consideration given by MacLeod and was revoked by Cornerstone's written notice providing a reasonable time for compliance?
- D. Whether MacLeod failed to prove the affirmative defense of equitable estoppel when MacLeod offered no evidence of detrimental reliance on any alleged admission, statement, or action of Cornerstone?

III. RESPONDENT'S STATEMENT OF THE CASE

A. **Cornerstone Equipment Leasing, Inc. and Ray MacLeod.**

Cornerstone Equipment Leasing, Inc. loaned money to businesses for the acquisition of assets, and on rarer occasions, made loans to individuals. CP 149:22-150:2; CP 15:19-24. Ray MacLeod was one of the individuals with whom Cornerstone entered into a lending relationship.

In 1997, MacLeod met Cornerstone President Jim Chevigny when MacLeod and Cornerstone were both investors in a venture called Request

Information Services ("Request"). CP 206 (¶¶ 8, 9). Although the Request venture was ultimately unsuccessful, resulting in losses to both MacLeod and Cornerstone, MacLeod and Chevigny continued exploring mutual business opportunities. CP 206 (¶ 11); 207.

B. The Loan from Cornerstone to MacLeod.

In 1998, MacLeod and Cornerstone (through Chevigny) agreed that each would provide one-half of a \$1,450,000 loan to the Oneida Nation to construct an automobile filling station. CP 208 (¶¶ 18, 19). MacLeod had an existing business relationship with the Oneida Nation, under which he delivered gasoline to several filling stations owned by the Oneidas. CP 206 (¶¶ 5-7). The construction of the new filling station expanded MacLeod's business opportunities, by providing another station to which he would sell gasoline. CP 76-77 (¶ 2); CP 46:11-22.

Under the parties' agreement, Cornerstone loaned \$725,000 to MacLeod (the "Cornerstone Loan"), and he in turn loaned \$1,450,000 to the Oneida Nation. The Oneida Nation signed a promissory note to MacLeod (the "Oneida Note") (CP 47:16-19; CP 84-88) which provided for an interest-free loan and repayment of principal at the rate of ten cents (\$0.10) per each gallon of gasoline delivered by MacLeod. And, MacLeod signed a promissory note in favor of Cornerstone, dated July 15, 1998 (the "1998 Note") (CP 82-83; *and see* CP 48:7-19), for the \$725,000

loaned by Cornerstone. The 1998 Note required MacLeod to repay the principal amount of the Cornerstone Loan by passing through the ten-cents-per-gallon payments he received on the Oneida Note. CP 82.

The 1998 Note and its addendum also provided for interest accrual on the Cornerstone Loan at the rate of 20% per annum, and required monthly payments of the accruing interest. CP 82-83. The maturity date of both the Oneida Note and the 1998 Note was November 7, 1999. CP 82; 84.

C. The Parties Modify and Extend the Repayment Terms.

In 1999, MacLeod's monthly payments of principal were reduced to five cents (\$0.05) per gallon and the maturity date of the 1998 Note was extended by 24 months to November 7, 2001. This modification was memorialized in a Loan Modification Agreement dated December 31, 1999, signed by MacLeod and accepted by Cornerstone. CP 77-78 (¶ 5); CP 90. *See* CP 49:23-CP 50:8.

Beginning in June 2001, MacLeod ceased making payments on the principal balance of the Cornerstone Loan. CP 78 (¶ 6). The remaining principal balance was then \$139,608.20, according to Cornerstone's calculations. *Id.*; CP 114. From June 2001 until July 2004, MacLeod made interest-only payments based on that balance. CP 114-116. Cornerstone then agreed to extend the maturity date by an additional 24

months, until November 7, 2003. The extension of the maturity date was memorialized by a document entitled "Loan Modification Agreement #2," dated December 31, 2001. As with the first Loan Modification Agreement, this document was signed by MacLeod and accepted by Cornerstone. CP 78 (¶6); CP 92. *See* CP 51:21-CP 53:22.

D. MacLeod Signs a 2004 Amended and Restated Promissory Note.

From December 2003 until July 2004, MacLeod and Cornerstone negotiated over terms for payment of the remaining balance of the Cornerstone Loan. CP 78 (¶7); CP 279 (¶ 3) and CP 314-328. Eventually, MacLeod signed an Amended and Restated Promissory Note, dated July 20, 2004 (the "2004 Note"). CP 78 (¶7); CP 94-95; *and see* CP 56:10-CP 57:18. The 2004 Note required a minimum monthly payment of \$2,000. The interest rate (20% per annum) was unchanged from the 1998 Note, but the 2004 Note provided that unpaid interest would be compounded monthly. CP 94. The maturity date was the earlier of June 30, 2005 or receipt by MacLeod of payment on an unrelated obligation owed to him by a third party. CP 94. The 2004 Note expressly stated: "This Amended

and Restated Promissory Note amends and restates the Previous Loan Documents,¹ which are superseded and replaced hereby." CP 95.

MacLeod made eight payments following the execution of the 2004 Note through June 9, 2005. CP 116. Although the payments were not sufficient to pay accruing interest in full, Cornerstone applied \$2,000 of each payment to principal and the rest to interest. CP 78-79 (¶8); CP 116. This reduced the principal balance of the Cornerstone Loan to \$123,608.20, but left an unpaid interest balance of approximately \$6,700.00 according to Cornerstone's calculations. CP 116. Although Cornerstone had a right to compound interest under the 2004 Note, it did not do so. CP 460:9-21; CP 470:11-14.

E. MacLeod Signs a 2005 Amended and Restated Promissory Note and Concedes that He Subsequently Breached the Terms of the Note.

With the maturity date of the 2004 Note approaching, MacLeod and Cornerstone again discussed final resolution of the Cornerstone Loan. Eventually, MacLeod signed, and Cornerstone accepted, a second Amended and Restated Promissory Note, dated June 23, 2005 (the "2005 Note"). CP 79 (¶9), CP 97-98; CP 58:12-CP 61:7. The 2005 Note increased the required minimum monthly payment of principal and

¹ The 2004 Note defined the Previous Loan Documents as the 1998 Note with its addendum regarding interest, the Loan Modification Agreement, and the Loan Modification Agreement #2. CP 94.

interest to \$5,000. CP 97. The interest rate (20% per annum) was unchanged, and unpaid interest was to be compounded monthly. *Id.* The maturity date was the earlier of April 1, 2006 or receipt by MacLeod of funds on either of two unrelated matters. *Id.* The 2005 Note provides for 5% late fee on any payment not received within five days following the due date. *Id.* As the 2004 Note also had, the 2005 Note expressly stated: "This Amended and Restated Promissory Note amends and restates the Previous Loan Documents,² which are superseded and replaced hereby." CP 98.

MacLeod made a payment received on June 29, 2005 (\$4,236.72), and paid \$5,000.00 on September 13, 2005. He had made no further payments when Chevigny sent him a letter, dated December 1, 2005, advising of delinquency and demanding immediate action to cure the defaults or pay off the note. CP 79(¶19); CP 100. MacLeod concedes that he breached the terms of the 2005 Note. CP 61:16-20.

MacLeod paid an additional \$2,000.00 on December 29, 2005. Cornerstone accepted the payment, but MacLeod was still in arrears, and Chevigny sent another demand to MacLeod dated January 12, 2006. CP 79 (¶11); CP 102-103. Among other things, the January 12, 2006 demand

² The 2005 Note defined the Previous Loan Documents as the 1998 Note with its addendum regarding interest, the Loan Modification Agreement, the Loan Modification Agreement #2, and the 2004 Note. CP 97.

advised that the compound interest provision of the 2005 Note would be enforced from January 1, 2006 forward. CP 102.

The 2005 Note matured by its terms on April 1, 2006. CP 97-98. Cornerstone received a \$2,000.00 payment on April 3, 2006, another \$2,000.00 payment on April 20, 2006, and a \$3,000.00 payment on July 24, 2006. CP 116-117. No further payments were received.

MacLeod asserts that during a December 2006 telephone conversation, Chevigny told him that Cornerstone and MacLeod were "even."³ CP 216. Between December 2006 and June 2007, MacLeod did not communicate once with Cornerstone, CP 217 (¶ 63); thus, neither Chevigny nor Cornerstone had any knowledge of MacLeod's current plans or business ventures.⁴ After no word or payment from MacLeod, in June 2007, Cornerstone (through Chevigny) sent MacLeod a notice attaching a schedule of all of the payments that MacLeod had made on the

³ Cornerstone disputes that Chevigny made any such statement, CP 79, but as described in this brief, the disputed fact is not material. Cornerstone was entitled to summary judgment whether or not the conversation occurred as MacLeod claims.

⁴ MacLeod states that he was investing in a wind farm venture in or around 2006 and 2007. Brief of Appellant, p. 11; CP 216-17 (¶¶ 61, 62). For the purposes of summary judgment and this appeal, Cornerstone accepts as true MacLeod's statements regarding the wind farm venture but notes that the record is entirely devoid of evidence that such investment caused any harm to MacLeod.

Cornerstone Loan and documenting the outstanding debt to Cornerstone.⁵

CP 244. The notice stated, among other things:

- "Per our discussion today, please find enclosed the loan amortization since the date of the last note signed in June 2005."
- "The total payoff as of June 30, 2007 amounts to \$171,585.44"
- "We would like to wrap this up soon, so please contact me with your plan to pay the balance off in full."

Id. In November 2007, when MacLeod had made no additional payments, Cornerstone's attorney sent MacLeod a letter demanding payment or threatening to file suit to enforce the 2005 Note. CP 246-47. MacLeod made no further payments.

F. Procedural Facts.

Cornerstone agrees with MacLeod's statement of procedural facts.

Brief of Appellant, pp. 14-15.

IV. STANDARD OF REVIEW

In reviewing the granting of a motion for summary judgment, the appellate court engages in the same inquiry as the trial court. *Wilson v.*

⁵ MacLeod points to evidence of investments made by Chevigny in several Taco Del Mar restaurants, Brief of Appellant, pp. 12-13. For the purposes of summary judgment and this appeal, Cornerstone accepts as true the evidence of such investments but observes that such evidence does not bear on the issues that must be decided by this Court. There is no evidence that the other Cornerstone partners learned, before June 2007, of the Taco Del Mar investments. Moreover, even if they had, as is explained in this brief such knowledge has no bearing on the enforceability of the 2005 Note.

Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982). Considering the facts in the light most favorable to the nonmoving party, the appellate court will affirm the trial court's grant of summary judgment if it determines "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993).

A material fact which, if in dispute, prevents summary judgment is a fact "of such a nature that it affects the outcome of the litigation." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citations omitted). A fact that is either admitted by the opposing party or immaterial will not preclude summary judgment. *Jacobsen v. Seattle*, 98 Wn.2d 668, 671, 658 P.2d 653 (1983).

Where a party lacks competent evidence to support an essential element of a claim, summary judgment is appropriate because a failure of proof concerning an element necessarily renders all other facts immaterial. *See Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993).

V. ARGUMENT

A. **MacLeod Does Not Dispute that He Signed the 2005 Note or that He Breached Its Terms.**

MacLeod's appeal rests entirely on his affirmative defenses.

MacLeod concedes that he signed the 2005 Note, and he concedes that he

breached it. CP 61:16-20. He does not now attempt to retract those concessions. Therefore, for the purposes of this appeal, the 2005 Note—and its predecessor notes and addenda—must be treated as valid except as may be affected by MacLeod's affirmative defenses. *See Kadorianian v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (issues not briefed are deemed waived on appeal) (citation omitted).⁶ The existence of the valid agreement and MacLeod's breach entitled Cornerstone to relief.

This brief now turns to the issues of MacLeod's affirmative defenses, all of which fail as a matter of law.

B. The Trial Court Did Not Err by Dismissing MacLeod's Fraudulent Inducement Defense.

MacLeod argues that the 2005 Note is voidable because Chevigny fraudulently induced MacLeod to sign it.⁷ Brief of Appellant, p. 18. To

⁶ Cornerstone also notes that MacLeod does not dispute the amount of the trial court's judgment: MacLeod takes no issue with the calculations of principal (including prejudgment interest and late fees); attorneys' fees, costs, and expenses; and post-judgment interest. CP 742. Therefore, if this Court affirms the trial court's ruling that Cornerstone was entitled to summary judgment on the promissory note, then the Court must also affirm the order awarding attorneys' fees to Cornerstone (CP 774-76) and the judgment (CP 742-44).

⁷ Notably, MacLeod does not dispute the amounts stated as due on the face of the 2005 Note and is now held to them under the legal principle of account stated. *Sunnyside Valley Irrigation Dist. V. Roza Irrigation Dist.*, 124 Wn2d 312, 315, 877 P.2d 1283 (1994) (the parties to a debt are bound by any “manifestation by both the creditor and the debtor that the stated sum is an accurate computation of the amount due”) (citation omitted). It is, furthermore, undisputed that MacLeod breached the terms of the 2005 Note. CP 61: 16-20. Thus, this Court's

prevail on a fraudulent misrepresentation defense, the party asserting fraudulent misrepresentation must prove the following nine elements of fraud:

- (1) Representation of an existing fact;
- (2) Materiality;
- (3) Falsity;
- (4) Speaker's knowledge of its falsity;
- (5) Speaker's intention that it shall be acted upon by the plaintiff;
- (6) Plaintiff's ignorance of falsity;
- (7) Reliance;
- (8) Right to rely; and
- (9) Damages.

Chen v. State, 86 Wn. App. 183, 188, 937 P.2d 612 (1997); *see also In re Patterson v. Taylor*, 93 Wn. App. 579, 586, 969 P.2d 1106 (1999). “Each element of fraud must be established by clear, cogent and convincing evidence.” *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).⁸

determination that MacLeod's affirmative defenses fail necessarily requires this Court to affirm the trial court's grant of summary judgment.

⁸ MacLeod makes a reference, in passing, to an “innocent misrepresentation.” *See* Brief of Appellant, pp. 18-19. To the extent MacLeod now argues that Chevigny's alleged misrepresentation was “innocent,” this claim was not advanced on summary judgment and therefore should be disregarded on review. *See* RAP 9.12. Even if the Court considers the merits of the innocent misrepresentation claim, the claim fails. Like fraudulent misrepresentation, negligent misrepresentation requires, among other elements, proof, by clear, cogent, and convincing evidence, of a false statement and a right to rely on the false statement. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). As shown below, MacLeod cannot prove either of these elements as a matter of law.

In this case, the entirety of the evidence on which MacLeod's fraudulent misrepresentation claim is based is contained in a single paragraph of his declaration filed in opposition of Cornerstone's Motion for Summary Judgment, which states:

Mr. Chevigny told me that he needed some kind of paperwork because his partners were giving him a hard time, and so he again asked me to sign the note and make just a few payments, which he explained were "for internal purposes only." Mr. Chevigny said that the 2005 Amended Note was simply to make his partners happy and that we would work the dispute out in a future deal.

CP 214 (¶ 50).⁹

Accepting this statement as true and viewing it in light most favorable to MacLeod, MacLeod has failed, as a matter of law, to establish two essential elements of fraud by clear, cogent and convincing evidence:

- (1) a right to rely on the alleged misrepresentation and
- (2) misrepresentation of an existing fact. With respect to the right to rely, MacLeod cannot, as a matter of law, prove that he had a right to rely on an alleged statement that was directly contrary to a contemporaneous written

⁹ MacLeod did not testify at his deposition that he thought the 2005 Note would be unenforceable because it was signed "for internal purposes only" and "simply to make his partners happy." At his deposition, MacLeod testified that Chevigny took the view that at the time the 2005 Note was signed MacLeod "owed the money." CP 179:11-13. He also testified that he "never told him that [he] didn't think that [the 2005 Note] was unenforceable." CP 179:21-22. When asked whether he had any reason to think that the 2005 Note was unenforceable, MacLeod responded that he "signed it, again, as a business friend with Jim, who had been having problems with his partners because of the amount of money owed and the time in between." CP 180:1-4.

agreement – the 2005 Note. MacLeod also cannot establish a misrepresentation of an existing fact. Chevigny's alleged statement shows, at most, that Chevigny promised to take a future action, which, by definition, could not be true or false at the time it was made. Further, MacLeod has not put forth any evidence establishing that Chevigny did not intend to stand by his alleged promise at the time the promise was made.

1. MacLeod cannot establish that he had a right to rely on the alleged misrepresentation.

MacLeod cannot prove that he had a right to rely on Chevigny's alleged representation, made contemporaneously with execution of the 2005 Note, that the 2005 Note would not be enforced.

While no Washington cases were found addressing fraud claims premised on contemporaneous statements inconsistent with a written agreement, other jurisdictions have held, as a matter of law, that the promisee cannot establish the right to rely on such statements. For example, California courts have consistently rejected fraud claims “premised on prior or contemporaneous statements at variance with the terms of a written integrated agreement.” *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 346, 9 Cal. Rptr. 3d 97, 83 P.3d 497 (2004); *see also Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272,

281 (9th Cir. 1992) (quoting *Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 484, 261 Cal. Rptr. 735 (1989)). Likewise, in *Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Inv.*, 951 F.2d 1399, 1412 (3d Cir. 1991), the court held that it was not reasonable for plaintiff to rely on oral promises that directly contradicted the written agreements between the parties.¹⁰

In this case, undisputed evidence establishes that Chevigny's alleged prior and/or contemporaneous statements that the 2005 Note was "for internal purposes only" are directly inconsistent with the terms of the note. As such, as a matter of law, it was unreasonable for MacLeod to rely on such a statement.

2. MacLeod cannot establish misrepresentation.

a. MacLeod cannot establish misrepresentation of an *existing fact*.

One of the essential elements of fraud is misrepresentation of an existing fact. *Shook v. Scott*, 56 Wn.2d 351, 355, 353 P.2d 431 (1960). A statement as to future performance, by definition, does not amount to a representation of an existing fact. *Id.* Such a statement is a "mere estimate" of something to take place in the future and "from its nature

¹⁰ The fact that the plaintiff in *Mellon Bank* was a banking institution represented by counsel does not help MacLeod. MacLeod, although an individual, is a sophisticated business man who was admittedly involved in numerous business deals in the past.

cannot be true or false at the time when it is made.” *Id.* As explained in

Shook:

Were the rule otherwise, any breach of contract would amount to fraud; and that to permit a rescission for fraud by one who has no ground for complaint except an unfulfilled promise—a broken contract—would obscure elementary distinctions between remedies, and tend to nullify the Statute of Frauds.

Id.

In *Shook*, the plaintiff alleged that he was induced to enter into a contract for purchase of land by the seller’s representations that a well on the property was capable of supplying a certain number of gallons of water per minute. *Id.* at 352. The Court held that the proper test to apply, in determining whether this representation pertained to an existing fact or was a mere expression of a promise, was as follows:

Where the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon particular future use, or future requirements of the representee, then the representation is not of an existing fact.

Id. at 356 (citing *Holland Furnace Co. v. Korth*, 43 Wn.2d 618, 262 P. 2d 772 (1953)). See also *Stiley, supra*, 130 Wn.2d at 505-06 (a letter containing a promise of future performance was not a representation of existing fact).

On the other hand,

[A] statement is one of existing fact if a quality is asserted which inheres in the article or thing about which the representation is made so that, at the time the representation is made, the quality may be said to exist independently of future acts or performance of the one making the representation, independently of other particular occurrences in the future, and independently of particular future uses or future requirements of the buyer.

Id.

Applying these tests, the *Shook* Court found that whether the water would be made available to the plaintiff depended, among other things, on the future acts of the promisor (the defendant). Therefore, at best, the defendant's statement could only be construed as a warranty or guaranty that the contract would be performed. As such, it was not a representation on which an action for fraud could be grounded. *Id.* at 357. The *Shook* Court, therefore, reversed the jury verdict granting contract rescission. *Id.* at 359-60.

In this case, accepting MacLeod's declaration as true and viewing it in the light most favorable to MacLeod, the evidence establishes, at most, that Chevigny promised to take a future action, *i.e.*, to appease his business partners or work out a new deal with MacLeod.¹¹ That was a "mere estimate" or a promise of future performance. As such, by

¹¹ Furthermore, the evidence advanced by MacLeod pertains to only one of the two partners of Chevigny, Timothy Lee, and is therefore inconclusive.

definition, this statement could not be true or false at the time it was made. Therefore, as a matter of law, this was not a representation on which an action for fraud could be grounded. *Shook*, 56 Wn.2d at 355, 357. Even if Chevigny had explicitly promised MacLeod not to enforce the 2005 Note (which he did not), such a statement would still not amount to a misrepresentation of an existing fact. Under *Shook*, a representation that depends on future acts of the promisor can be construed only as a warranty or guaranty and is not a representation on which an action for fraud could be based. *Id.* at 357. *See also Stiley, supra*, 130 Wn.2d at 505-06.

MacLeod's account of his discussions with Chevigny amounted to a fraud by MacLeod on Cornerstone. That is, he is claiming a deal with Chevigny in which the 2005 Note would be signed and provided to Cornerstone's investors as evidence of the loan, but Chevigny would never enforce it. Such an illegal scheme cannot be a basis for MacLeod to avoid his liability to Cornerstone.

- b. There is no evidence that Chevigny lacked intention to act on his alleged promise.

MacLeod also argues that Chevigny fraudulently misrepresented his intentions at the time he made the alleged oral promise to MacLeod. This theory was not advanced by MacLeod on summary judgment and should be disregarded by the Court. Only evidence and issues called to

the attention of the trial court may be considered on review. RAP 9.12; *see also Goodwin v. Wright*, 100 Wn. App. 631, 648, 6 P.3d 1 (2000) (the appellate courts have read this rule “quite literally”).

Even if the Court considers the argument that Chevigny committed fraud because he did not intend to stand by his alleged promises, this argument fails. The party asserting that a statement regarding the promisor’s intent is fraudulent bears the burden of proving that the promisor had no intention to fulfill the promise *at the time the agreement was made*. Comment "d" to Section 530 of Restatement (Second) of Torts explains:

The intention that is necessary to make the rule stated in this Section applicable is the intention of the promisor *when the agreement was entered into*. The intention of the promisor not to perform an enforceable or unenforceable agreement cannot be established solely by proof of its nonperformance, nor does his failure to perform the agreement throw upon him the burden of showing that his nonperformance was due to reasons which operated after the agreement was entered into.

Restatement (Second) of Torts § 530, cmt. d (emphasis added). *Accord* Restatement (Second) of Contracts § 171, cmt. a (“the truth of a statement as to a person’s intention depends on his intention at the time that the statement is made and is not affected if he subsequently, for any reason, changes his mind”).

In this case, MacLeod attempts to establish misrepresentation of an existing intention solely by evidence that Chevigny *subsequently* acted inconsistently with alleged promises made at the time the 2005 Note was signed. Brief of Appellant, pp. 21-22. However, Chevigny's alleged failure to inform one of his two business partners, Timothy Lee, about the supposed agreement with MacLeod (CP 400:1-11; 409:14-410:9), and the lack of any subsequent discussion of additional business deals with MacLeod or Lee (CP 214; 409-10), establishes, at most, that Chevigny may have changed his mind after the 2005 Note was executed.¹² This is not clear and convincing evidence of Chevigny's intent at the time the 2005 Note was signed.

Washington courts have found that evidence of subsequent events not in accord with a statement at issue do not create a genuine issue of material fact with regards to existence of a misrepresentation. In *Patterson v. Taylor*, 93 Wn. App. 579, 586, 969 P.2d 1106 (1999), a property owner (Patterson) argued that a CR 2A agreement was unenforceable because the property's joint owner (Taylor) knew that the value of the disputed property was more than he represented during

¹² MacLeod incorrectly asserts that Chevigny subsequently denied "having ever intended to set aside the disputed funds for a future deal." Brief of Appellant, p. 22. The evidence cited by MacLeod shows only that Chevigny told his partner Lee that he never set the money aside to invest into a different deal with MacLeod. CP 409:14-410:6. As such, this evidence does not establish MacLeod's intent at the time the alleged promise was made.

mediation. At mediation, the parties had agreed that the value was \$135,000; however, the property was sold for \$169,500 just two months later. *Id.* Despite the fact that the value turned out to be higher than represented by Taylor, the court held that the record contained “no evidence that Taylor knew at mediation that the property had a higher value than Taylor asserted.” *Id.* Further, no claim or evidence suggested that Patterson could not have had the appraisal done at his own expense and/or that the settlement could not have been conditioned on an appraisal. “These facts support[ed] a conclusion that Patterson made a choice, which he may now regret, but which does not constitute a basis for overturning the contract.” *Id.* at 587.

And, in *Stiley, supra*, plaintiff client claimed that a defendant attorney’s letter to him constituted a misrepresentation of an existing fact. 130 Wn.2d at 505-06. In that letter, the defendant stated his understanding that the plaintiff’s investment in a real estate development, Westwood Hills, would be secured by “a first mortgage against real property [in Westwood Hills] and a second mortgage against the remaining seven lots.” The letter also stated “upon clearing title, we will record [plaintiff’s] Deed of Trust . . . which will give him a first lien position against this property.” *Id.* at 496. The Westwood Hills development consisted of 100 lots. The Deed of Trust recorded by the defendant

attorney shortly thereafter gave the plaintiff security interest in only seven lots of the 100, contrary to the defendant's letter. *Id.* at 496. The Court of Appeals and the Supreme Court concluded that the letter at issue “contained a promise of future performance, and not a representation of existing fact.” *Id.* at 505-06 (emphasis added). The Supreme Court held that the trial court erroneously denied the defendant’s motion for directed verdict on the fraud issue. Even viewing all the evidence in light most favorable to the plaintiff, there was no “clear, cogent and convincing evidence” of fraud by the defendant. *Id.* at 505. Evidence of subsequent conduct (which occurred shortly after the letter was written) that was inconsistent with the statement made in the letter did not establish misrepresentation.

Here, as in *Patterson* and *Stiley*, the evidence that subsequent events turned out to be not in accord with a prior statement is insufficient to establish that the statement was a misrepresentation of an existing fact. This evidence does not establish Chevigny’s intention at the time the alleged statements were made; therefore, MacLeod has not met his burden of establishing misrepresentation. *See* Restatement (Second) of Torts § 530, cmt. d; Restatement (Second) of Contracts § 171, cmt. a.

C. Even if Cornerstone Waived the Debt in December 2006, the Waiver Was Effectively Revoked.

MacLeod asserts that in December 2006 Chevigny told MacLeod that the parties were "even" (CP 216 (¶ 60)) and that Chevigny's statement waived Cornerstone's right to collect on the 2005 Note. Cornerstone disputes that Chevigny made any such statement and notes that there is no document confirming this claim. Further, Cornerstone denies that any such ambiguous statement, if made, would be sufficient to operate as a waiver of MacLeod's obligations. However, for the purposes of this appeal, Cornerstone accepts MacLeod's assertions as true because any alleged waiver was revoked as a matter of law.

1. MacLeod gave no consideration for Cornerstone's alleged waiver. Under such circumstances, Cornerstone could revoke the alleged waiver.

In his description of the December 2006 telephone conversation with Chevigny, MacLeod asserts that he and Chevigny discussed their prior history on other dealings, their friendship, and MacLeod's desire to put the Cornerstone Loan behind him. Brief of Appellant, pp. 26-27; CP 216 (¶ 59). MacLeod does not assert, and there is no evidence to support, that he gave any consideration for Chevigny's alleged waiver of the remaining liability to Cornerstone. *See Panorama Residential Protective Ass'n v. Panorama Corp.*, 97 Wn.2d 23, 28-29, 640 P.2d 1057

(1982) (waiver is unilateral and without consideration when the right waived was known and existed at the time of the waiver).

Because there was no consideration given, the alleged waiver could be retracted by Cornerstone. *See Seattle-First Nat'l Bank v. Westwood Lumber, Inc.*, 65 Wn.App. 811, 826 n. 7 (1992) (noting that parties may reinstate rights that have been waived upon reasonable notice). *See also Daniels v. Philadelphia Fair Housing Com'n*, 513 A.2d 501 (Pa. Cmwlth. 1986) (holding that landlord's retraction of prior waiver of lease term requiring tenant to pay utility bills was effective).

Retraction of a waiver is accomplished by notice from the waiving party that full performance will be required. *Fehl-Haber v. Nordhagen*, 59 Wn.2d 7, 8, 365 P.2d 607 (1961) ("[O]nce a vendor waives his right of forfeiture he can only reinstate it by giving notice of forfeiture to the vendee, coupled with a reasonable opportunity for the vendee to fully comply with the contract"); *Crutcher v. Scott Pub. Co.*, 42 Wn.2d 89, 97, 253 P.2d 925 (1953) (noting that after seller had orally waived right to receive payment on first of month per contract, seller could have reinstated that right with notice and reasonable opportunity to comply); *Lundberg v. Switzer*, 146 Wash. 416, 419, 263 P. 178 (1928) ("Where the vendor has

waived strict performance by accepting delayed payments, he may, by due notice to the purchaser, reinstate strict performance").¹³

In line with these cases, Cornerstone effectively retracted its waiver, if made, when Chevigny sent MacLeod the June 22, 2007 notice logging MacLeod's past due amounts and demanding payment. CP 244.

2. Chevigny's June 22, 2007 notice reinstated MacLeod's obligations under the 2005 Note, if ever waived.

MacLeod claims that Chevigny's June 22, 2007 notice did not revoke Chevigny's alleged prior statement that the parties were "even," but this claim overlooks the only reasonable inferences that can be drawn from Chevigny's notice.

The parties rely on the same line of cases holding that when a unilateral waiver is made, it may be withdrawn if the waiving party gives notice of intention to demand strict compliance, accompanied by a reasonable opportunity to comply. *See, e.g., Crutcher*, 42 Wn.2d at 97. But, MacLeod does not acknowledge that the cited line of cases principally concern circumstances in which the *timing* of payment is alleged to have been waived. *See, e.g., id.* (addressing whether acceptance

¹³ MacLeod argues that the retraction of an *express* waiver (as opposed to an implied waiver) is only effective if the retraction explicitly revokes the prior waiver. Brief of Appellant, pp. 29-30. MacLeod acknowledges that there is no such holding in Washington and, in fact, offers no basis for expanding the uniform body of case law setting forth the criteria for waiver retractions. The Court should decline MacLeod's invitation to take that leap.

of late payments waived seller's right to require timely payments). In a circumstance where the *specific* payment timing obligation has been waived, it is appropriate, and indeed necessary, for a revocation of that waiver to expressly demand strict compliance with the contract's original terms. Otherwise, the performing party is without notice that she may not continue under the agreement as modified by the term's waiver.

In contrast, here, MacLeod claims that the nature of the alleged waiver was not of a specific contract term but rather of a full forgiveness of all of MacLeod's obligations under the 2005 Note. CP 216 (§ 60). Applying the case law, revocation is accomplished by (i) a notice revoking the waiver that was allegedly made (in this case, the full forgiveness of the 2005 Note) and (ii) a reasonable period of time in which to comply. The trial court rightly determined that a reasonable person could arrive at no other conclusion than the language of the June 22, 2007 notice accomplished both criteria. The notice stated:

Per our discussion today, please find enclosed the loan amortization since the date of the last note signed in June 2005. It includes each monthly statement that you have made, by date and amount, and has been produced on a commercial loan program, ensuring its accuracy. For reference [the 2005 Note] is also included. . . . The total payoff as of June 30, 2007, amounts to \$171,585.44

CP 244. The demand that payment be made in full on the 2005 Note constituted a retraction of the claimed waiver. *See Douglas v. Hanbury*,

56 Wash. 63, 65, 104 P. 1110 (1909) (a "demand for payment and the lapse of a reasonable time" constituted a valid retraction).

Furthermore, the June 22, 2007, notice of retraction gave MacLeod a reasonable opportunity to comply with the 2005 Note. In the notice, Chevigny asked MacLeod to contact him with a "plan to pay the balance in full." CP 244. MacLeod now attempts to use Cornerstone's flexibility against it, claiming that because the June 2007 notice did not reference the 2005 Note's balloon payment, the notice cannot constitute a retraction. There is no authority supporting MacLeod's position, and the language of the notice—expressly demanding payment "in full"—demands an interpretation that Cornerstone was calling for payment on the 2005 Note. After sending that notice, Cornerstone gave MacLeod nearly five months to pay before Cornerstone was forced to refer the matter to its attorney for debt collection. CP 246-47. During those five months, MacLeod had opportunity to comply with the 2005 Note, but he concedes that he took no such action.

3. The November 6, 2007 notice of collection further confirmed the debt obligation of MacLeod.

When MacLeod did not respond to Chevigny's June 2007 notice of overdue payment, Cornerstone referred MacLeod's outstanding debt to its attorney, James P. Davis ("Davis"). CP 217 (¶67). On November 6, 2007,

Davis sent a registered letter to MacLeod again informing him of the debt due under the 2005 Note and requesting payment within 30 days of the letter's date. CP 246-47.¹⁴ The calculation of MacLeod's debt in the November 2007 letter mirrored the calculation in Chevigny's June 2007 notice. *Compare* CP 246-47 with CP 244. MacLeod did not make any payments in response to the demand, and Cornerstone filed this lawsuit a few months later. CP 217 (¶68).

4. No injustice results from requiring MacLeod to pay his debt under the 2005 Note.

MacLeod claims that recovery of his debt to Cornerstone would be unjust, relying on an interpretive comment in the Restatement (Second) of Contracts. Brief of Appellant, p. 32 (citing Restatement (Second) of Contracts § 84, cmt. f (1981) which provides, in relevant part, that "[A condition cannot be reinstated] if reinstatement would be unjust in view of a change of position by the other party").¹⁵ MacLeod's evidence, even if accepted as true for the purposes of the summary judgment standard, does not sever MacLeod from his obligations under the 2005 Note.

¹⁴ MacLeod concedes that the November 6, 2007 letter made a "definite and specific demand for payment." Brief of Appellant, p. 33.

¹⁵ MacLeod offers no authority that Washington has adopted this section of the Restatement. *See Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 401, 879 P.2d 276 (1994) (declining to adopt a section of the Restatement). Nor did a search of case law from all 50 states reveal a single instance in which a court applied § 84's comment f to find that a waiver could not be revoked.

First, MacLeod argues that reinstatement would be unjust because of the debt's increase during the period from December 2006 through November 2007. Brief of Appellant, p. 32. This argument ignores the earlier demand for payment made in June 2007. It also misses the obvious—that reinstatement of the 2005 Note necessarily meant that the debt due would be calculated under the 2005 Note and, thus, its total hardly a surprise. MacLeod's argument falls short of the Restatement's standard, which measures whether reinstatement would be unjust based on *MacLeod's* change in position, not because of the inevitable and foreseeable increase over time in the interest accruing on the unpaid debt.

Second, MacLeod refers to a wind farm venture, describing its timing without any specificity as generally contemporaneous to his claimed discussion with Chevigny in December 2006. CP 216 (¶¶ 60, 61). Even if accepted as true, no reasonable person could find from the evidence that the wind farm efforts effected a change in MacLeod's position that would render the reinstatement of the 2005 Note unjust. MacLeod never testified, and there is no evidence to support, that his payments into the wind farm venture rendered him unable to resume payments to Cornerstone when the demands came in June and November

2007. CP 216-17.¹⁶ As MacLeod has been an active investor in various business opportunities since at least the 1980s (*See, e.g.*, CP 205 (¶¶ 2,3); CP 206 (¶¶ 6, 7, 8)) the fact that he made an unrelated investment proves nothing about the 2005 Note. Instead, the evidence shows that MacLeod *chose* not to pay anything further to Cornerstone. CP 217 (¶ 66) ("I told Mr. Chevigny that I did not owe any money to Cornerstone, that we had already settled the dispute, and that I would not pay any more").¹⁷

D. Cornerstone Was Not Estopped from Enforcing the 2005 Note Because MacLeod Offered No Evidence of Reliance and Has Not Proven that Injury Would Flow from Enforcement of the 2005 Note.

The protection of equitable estoppel is only available when the party invoking it proves three conditions:

- (1) That the other party made an admission, statement, or acted in a way that is inconsistent with the claim now being asserted;
- (2) That the litigant took action in reliance on that other party's admission, statement, or act;

¹⁶ MacLeod's appellate brief argues that MacLeod's money is "no longer readily available," but the argument of counsel is unsupported by any evidence in the record and should be disregarded accordingly. *See* Brief of Appellant, p. 38.

¹⁷ Nor does MacLeod's hypothesizing about the timing of Chevigny's investment in a series of Taco Del Mar restaurants matter. Brief of Appellant, pp. 11-13. There is no evidence (and MacLeod does not suggest) that Chevigny's investment, and Cornerstone's reaction to that investment, had any impact—direct or indirect—on MacLeod's debt on the 2005 Note or MacLeod's ability to pay that debt.

- (3) That the litigant would suffer an injury due to this detrimental reliance if the court allowed the other party to recover.

Robinson v. Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992).

MacLeod describes in detail the facts he claims support the first element of equitable estoppel: that Cornerstone's 2007 request for payment under the 2005 Note was inconsistent with Chevigny's alleged December 2006 waiver. Brief of Appellant, pp. 35-37. However, for the purposes of this appeal, Cornerstone concedes that a December 2006 waiver of the 2005 Note is inconsistent with efforts in 2007 to collect on the note. This concession is far from fatal to Cornerstone, however, because MacLeod does not meet the required showing of detrimental reliance. Accordingly, MacLeod's estoppel argument fails as a matter of law.

MacLeod states that, after the alleged December 2006 conversation with Chevigny, he focused his energy and resources on developing a wind farm. CP 216-17 (¶ 62). MacLeod's declaration language (the only evidence presented to the trial court) is important and, thus, set forth below:

Around that time [December 2006], beginning in 2006, I had begun to work on a new kind of investment with my son. I had formed Kent Breeze Corporation, and we undertook to install on our farm in Ontario, Canada,

equipment designed to convert wind into energy, which could then be contributed to the regional power grid.

Having finally put my dispute with Mr. Chevigny and Cornerstone behind me, I focused my energy and resources on developing the wind farm, which we anticipate will be fully operational next year. Rather than making any further payments to Cornerstone, I put the money towards the wind farm, buying all of the necessary equipment and obtaining the necessary permits; had my dispute with Cornerstone not been resolved, I would not have been able to do so.

. . .

[In June 2007] I told Mr. Chevigny that I did not owe any money to Cornerstone, that we had already settled this dispute, and that I would not pay any more.

CP 216-17 (¶¶ 61, 62, 65). Even taken in the light most favorable to MacLeod, there is *no* evidence or inference that MacLeod's claimed focus on a wind farm venture worked to his detriment. *See Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 61 P.3d 1184 (2002) ("All *reasonable* inferences must be drawn in favor of the nonmoving party upon summary judgment. Unreasonable inferences that would contradict those raised by evidence of undisputed accuracy need not be so drawn") (emphasis in original).

Here, there is no evidence that at the time of Chevigny's June 2007 notice (or anytime thereafter), MacLeod could not have made payments to

Cornerstone because his resources were tied up in the wind farm.¹⁸ There is no evidence that MacLeod does not stand to profit from the wind farm venture. Rather, MacLeod himself describes the wind farm as an "investment" that will produce energy to contribute to the "regional power grid." CP 216 (¶ 61). Equitable estoppel offers no protection unless the claimed reliance has worked a detriment on the relying party, and MacLeod has not made a showing of *detrimental* reliance. See *Wilson v. Westinghouse*, 85 Wn.2d 78, 83, 530 P.2d 298 (1975) (no equitable estoppel because the party asserting the claim did not offer evidence that the choice he made, in claimed reliance on the other party's actions, was worth less than the decision he would otherwise have made).

MacLeod also claims that he would be injured because of the additional interest and penalties that accumulated on the 2005 Note from December 2006 to June 2007. Brief of Appellant, p. 39. However, MacLeod cannot show that this asserted injury is caused by any reasonable reliance on Cornerstone's actions. MacLeod's payments on the 2005 Note were routinely late, and interest continued to accrue. CP 79 (¶10); CP 107 (¶4) and CP 119. In fact, MacLeod had stopped making payments *five months before* the alleged December 2006 telephone

¹⁸ See footnote 16, *supra*, regarding MacLeod's counsel's statement, unsupported by any evidence, that MacLeod's funds are "no longer readily available."

conversation with Chevigny, and his payments prior to that date were sporadic and insufficient to cover accruing interest. CP 106 (¶ 3); CP 509 (¶¶ 2, 3); CP 512-13. Additionally, MacLeod never asserts that he would have made payments between December 2006 and June 2007 had the alleged conversation with Chevigny not occurred. MacLeod has failed to establish detrimental reliance, as a matter of law, and the trial court appropriately entered judgment for Cornerstone. *Priestly v. Petersen*, 19 Wn.2d 820, 844, 145 P.2d 253 (1944) ("There is no element of estoppel in the case, as respondent did not rely, *to her detriment*, upon any statement or act of appellant") (emphasis added).

E. Cornerstone Seeks Its Attorney Fees and Costs Incurred on Appeal.

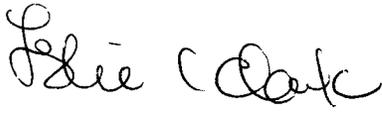
Attorney fees and costs may be awarded on appeal where "applicable law grants to a party the right to recover reasonable fees or expenses on review." RAP 18.1. Here, the 2005 Note includes an attorney fees and costs provision. CP 98. Cornerstone asks this Court to award its attorney fees and costs incurred in this appeal.

VI. CONCLUSION

For all of the foregoing reasons, summary judgment was appropriately granted, and Cornerstone asks this Court to affirm the trial court.

RESPECTFULLY SUBMITTED this 17th day of February, 2010.

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DECLARATION OF SERVICE

I, Linda J. Cooper, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein.

On February 17th, 2010, I served true and correct copies of the document to which this Declaration is attached on:

<p>O. Yale Lewis, Jr., WSBA #1367 Kara C. Rowton, WSBA #40569 Hendricks & Lewis PLLC 901 Fifth Avenue, Suite 4100 Seattle, WA 98164 <i>Attorneys for Appellant</i></p> <p><input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Hand Deliver <input type="checkbox"/> E-mail <input type="checkbox"/> Facsimile</p>

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 COURT OF APPEALS
 STATE OF WASHINGTON
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on February 17, 2010, at Seattle, Washington.


 Linda J. Cooper