

NO. 47813-7-II

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

---

BRENNER MOTEL, LLC, a Washington limited liability company,

Respondent,

v.

BPO PROPERTIES LTD., a Canadian corporation, and FIFE SERVICES  
LLC, a Delaware limited liability company,

Appellants.

---

BRIEF OF APPELLANTS

---

Jesse O. Franklin IV, WSBA # 13755  
Peter A. Talevich, WSBA #42644  
Raina V. Wagner, WSBA # 45701  
*Attorneys for Appellants BPO  
Properties Ltd. and Fife Services  
LLC*

K&L GATES LLP  
925 Fourth Avenue, Suite 2900  
Seattle, Washington 98104-1158  
Telephone: 206-623-7580  
Email: jesse.franklin@klgates.com  
Email: peter.talevich@klgates.com  
Email: raina.wagner@klgates.com

**KL GATES LLP**

**November 06, 2015 - 3:16 PM**

**Transmittal Letter**

Document Uploaded: 4-478137-Appellants' Brief.pdf

Case Name: Brenner Motel LLC v BPO Properties Ltd.

Court of Appeals Case Number: 47813-7

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Suzanne M Petersen - Email: [suzanne.petersen@klgates.com](mailto:suzanne.petersen@klgates.com)

A copy of this document has been emailed to the following addresses:

[suzanne.petersen@klgates.com](mailto:suzanne.petersen@klgates.com)

[JVHandmacher@bvmm.com](mailto:JVHandmacher@bvmm.com)

[peter.talevich@klgates.com](mailto:peter.talevich@klgates.com)

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ASSIGNMENTS OF ERROR ..... 4

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 4

STATEMENT OF THE CASE..... 5

A. Statement of Facts..... 5

    1. The parties execute the Lease in 1982 related to a hotel and restaurant project in Fife, Washington..... 5

    2. The “Rental” section of the Lease includes a five percent escalator for 30 years, a fair market rental reset after 30 years, and a rent floor of no “less than the figures and formula used for the first three hundred sixty (360) months” of the Lease. .... 6

    3. Drafts of the Lease produced in discovery appear to have contributions from both parties..... 8

    4. Mr. Woodke admits that he authored the Rent-Floor Clause, and Mr. Woodke admits that he could have used a specific number in the Rent-Floor Clause if he believed it to refer to rent due at the end of 360 months..... 10

    5. Arbitrator Thomas Brewer determines that the fair market value of the Property is \$9,877.50 per month. .... 11

B. Procedural History. .... 12

    1. Brenner Motel files a complaint for a declaratory judgment that the Rent-Floor Clause requires rent of \$24,635.08 per month. .... 12

    2. The trial court grants summary judgment to Brenner Motel, reasoning that the Lease unambiguously provides for a Rent-Floor Clause amount of \$23,461.96. .... 13

    3. On summary judgment, the trial court strikes portions of Brenner Motel’s supporting evidence..... 15

    4. BPO timely appeals the trial court’s summary judgment and entry of judgment. .... 16

ARGUMENT ..... 16

A. Standards of Review. .... 16

B. The trial court erred by adopting Brenner Motel’s interpretation of the Rent-Floor Clause. .... 18

|  |    |
|--|----|
| 1. The text of the Rent-Floor Clause has multiple reasonable meanings and is therefore ambiguous. ....                                     | 21 |
| a. The Rent-Floor Clause is susceptible to an interpretation of \$5,700, or \$23,461.96. ....  | 21 |
| b. Brenner Motel’s own statements show that the Rent-Floor Clause is ambiguous. ....   | 26 |
| 2. Extrinsic evidence supports BPO’s reading of the Rent-Floor Clause. ....  | 28 |
| a. The subject matter and objective of the Lease supports BPO’s reading of the Rent-Floor Clause. ....                                     | 29 |
| b. The circumstances surrounding the formation of the Lease and the Rent-Floor Clause support BPO’s reading of the Rent-Floor Clause. .... | 31 |
| c. Brenner Motel’s acts subsequent to the Lease’s formation support BPO’s reading of the Rent-Floor Clause. ....                           | 34 |
| d. BPO’s reading of the Rent Floor Clause, and not Brenner Motel’s reading, is the most reasonable. ....                                   | 35 |
| 3. The trial court erred by not construing the ambiguous language against its drafter and the landlord, Mr. Woodke. ....                   | 36 |
| 4. The trial court failed to adopt a reasonable and just interpretation of the Lease. ....   | 37 |
| 5. The trial court’s summary judgment should be reversed, and the matter remanded for trial. ....  | 39 |
| C. The trial court erred by awarding attorneys’ fees and costs to Brenner Motel. ....  | 40 |
| CONCLUSION. ....   | 41 |

## TABLE OF AUTHORITIES

### Cases

|   |                |
|---|----------------|
| <i>Berg v. Hudesman</i> ,<br>115 Wn.2d 657, 801 P.2d 222 (1990).....  | passim         |
| <i>Dep’t of Labor &amp; Indus. of the State of Wash. v. Delozier</i> ,<br>100 Wn. App. 73, 995 P.2d 1265 (2000).....                            | 30             |
| <i>GMAC v. Everett Chevrolet, Inc.</i> ,<br>179 Wn. App. 126, 317 P.3d 1074, <i>review denied</i> , 181<br>Wn.2d 1008, 335 P.3d 941 (2014)..... | 18             |
| <i>Hall v. Custom Craft Fixtures, Inc.</i> ,<br>87 Wn. App. 1, 937 P.2d 1143 (1997).....  | 17             |
| <i>Hearst Commc’ns, Inc. v. Seattle Times Co.</i> ,<br>154 Wn.2d 493, 115 P.3d 262 (2005).....  | 19, 20, 28, 29 |
| <i>Hubbard v. Spokane County</i> ,<br>146 Wn.2d 699, 50 P.3d 602 (2002).....  | 17             |
| <i>Indus. Coatings Co. v. Fid. &amp; Deposit Co. of Maryland</i> ,<br>117 Wn.2d 511, 817 P.2d 393 (1991).....                                   | 40             |
| <i>Int’l Marine Underwriters v. ABCD Marine, LLC</i> ,<br>179 Wn.2d 274, 313 P.3d 395 (2013).....   | 17             |
| <i>Jensen v. Lake Jane Estates</i> ,<br>165 Wn. App. 100, 267 P.3d 435 (2011).....  | 19             |
| <i>Johnny’s Seafood Co. v. Tacoma</i> ,<br>73 Wn. App. 415, 869 P.2d 1097 (1994).....   | 20, 37         |
| <i>Kries v. WA-SPOK Primary Care, LLC</i> ,<br>__ Wn. App. __, __ P.3d __, No. 32879-1-III, 2015 WL<br>5286176 (2015).....                      | passim         |
| <i>Lakes at Mercer Island Homeowners Ass’n v. Witrak</i> ,<br>61 Wn. App. 177, 810 P.2d 27 (1991).....  | 20, 23         |

|   |                |
|---|----------------|
| <i>Lybbert v. Grant County</i> ,<br>141 Wn.2d 29, 1 P.3d 1124 (2000).....   | 16, 17         |
| <i>Marshall v. Thurston County</i> ,<br>165 Wn. App. 346, 267 P.3d 491 (2011).....  | 21, 22, 28     |
| <i>Pierce County v. State</i> ,<br>144 Wn. App. 783, 185 P.3d 594 (2008).....   | 36             |
| <i>Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha</i> ,<br>126 Wn.2d 50, 882 P.2d 703 (1994), amended by 891 P.2d<br>718 (1995)..... | 21             |
| <i>Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.</i> ,<br>120 Wn.2d 573, 844 P.2d 428 (1993).....                                       | 17             |
| <i>Viking Bank v. Firgrove Commons 3, LLC</i> ,<br>183 Wn. App. 706, 334 P.3d 116 (2014).....   | 19, 20, 21, 30 |
| <i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> ,<br>142 Wn.2d 654, 15 P.3d 115 (2000).....  | 19, 30         |

## INTRODUCTION

This case involves the interpretation of the rent calculations in a 52-year ground lease for commercial property housing a motel and former restaurant in Fife, Washington (the “Lease”). Thirty years into the Lease, the landlord and tenant were required to negotiate the fair market value of the property, or failing an agreement, to arbitrate the provision. An arbitrator determined that the fair market value of the property was \$9,887.50 per month. During the first 30 years of the Lease, monthly rent had risen from its base amount of \$5,700 by five percent year-over-year, and monthly rent after 30 years was \$23,461.96. The arbitrator’s award meant that the lessees would again be paying fair market value, rather than more than double the fair market value.

After it lost at arbitration, the lessor, Brenner Motel, LLC (the appellee, and “Brenner Motel”), sued its lessees BPO Properties Ltd. and Fife Services LLC (the appellants, and collectively referred to as “BPO”). Brenner Motel sought a declaratory judgment that, despite the newly determined fair market value, a separate provision of the Lease established that the rent amount could not decrease below the amount payable at the end of the first 30 years of the Lease. Brenner Motel argued that the following language unambiguously referred to the rental amount at the end of 30 years (which was \$23,461.96): “[I]n no event shall the rents be less

than the figures and formula used for the first three hundred sixty (360) months of this lease.” For convenience, the parties have called the phrase the rent-floor clause (the “Rent-Floor Clause”) although the Lease contains no such defined term.

The trial court below granted summary judgment for Brenner Motel and against BPO, reasoning that the above language was subject to only one reasonable interpretation and was not ambiguous. This holding was in error, and this Court should reverse the trial court and remand the case for trial. First, the text of the provision is inherently ambiguous and unclear, is susceptible to multiple meanings, and does not refer to a specific rental amount or the time at which the rental amount is to be determined. Its meaning should have been resolved at trial. Second, the provision is also ambiguous when you consider the context of the Lease (as a trial court must). The context further confirms the trial court should have concluded the provision was subject to multiple meanings. Extrinsic evidence shows that (i) the fair market value provision was significant to the parties and is eviscerated by Brenner Motel’s interpretation of the Rent-Floor Clause; (ii) BPO’s predecessor insisted on the fair market provisions, and would not have reasonably agreed to a rent floor that could only cause rent to increase after 30 years; (iii) Brenner Motel itself misinterpreted the supposedly clear Rent-Floor Clause; and (iv) Brenner

Motel's interpretation of the Rent-Floor Clause provides it with a massive windfall above fair market value. This evidence further undermines the trial court's conclusion that the Rent-Floor Clause could only be interpreted to mean \$23,461.96 per month.

Having erroneously found no ambiguity, the trial court erred in failing to apply doctrines of interpretation to an ambiguous phrase. The trial court's third major error was failing to construe the ambiguous Rent-Floor Clause against the drafter and the lessor, Brenner Motel. The trial court's fourth error was failing to construe the Rent-Floor Clause in a manner that was just and reasonable, but instead in a manner that destroyed the fair market protection that the parties bargained for and gave Brenner Motel a windfall. And the trial court's fifth error was awarding attorneys' fees and costs under the Lease to Brenner Motel.

A jury, not a judge, should have determined what the parties intended when, in 1982, they referred to "the figures and formula used for the first three hundred sixty (360) months of this lease." Summary judgment was improper, and the trial court's judgment should be reversed and remanded for trial.

### **ASSIGNMENTS OF ERROR**

1. The trial court erred in granting Brenner Motel's Motion for Partial Summary Judgment.
2. The trial court erred in entering final judgment for Brenner Motel.
3. The trial court erred in awarding attorneys' fees and costs to Brenner Motel.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

The trial court granted summary judgment to Brenner Motel, holding as a matter of law that the Rent-Floor Clause providing that rent cannot fall below "the figures and formula used for the first three hundred sixty (360) months of this lease" was unambiguous. Did the trial court err because:

1. The text of the Rent-Floor Clause is susceptible to multiple reasonable interpretations, making summary judgment inappropriate;
2. The trial court should have considered extrinsic evidence of context that gives rise to multiple, reasonable interpretations of the Rent-Floor Clause;

3. The trial court failed to construe the Lease against the lessor and drafter;
4. The trial court failed to adopt an interpretation of the Lease that was just and reasonable; and
5. No award of attorneys' fees and costs should have been entered because Brenner Motel did not prevail under the Lease?

## **STATEMENT OF THE CASE**

### **A. Statement of Facts.**

#### **1. The parties execute the Lease in 1982 related to a hotel and restaurant project in Fife, Washington.**

On or around December 1, 1982, Charles L. Woodke III and Lona Woodke, as lessor, and William Brenner and Lorene Brenner, as lessee, entered into the Lease. CP 89-109. The Lease has a term of 52 years starting May 1, 1983. CP 89-90, ¶ 2. Only Mr. Woodke and Mr. Brenner participated in the lease negotiations, and Mr. Brenner has died. CP 221, 294-95.

The leased property (the "Property") is located in Fife, Washington, at 3021/3025 Pacific Highway East, and was intended to be a motel and restaurant complex. CP 379-80. The Property now consists of the land underlying the Best Night Inn and the former Fife City Bar & Grill. CP 380. The restaurant located on the Property ceased operations

in September 2013, and is presently vacant. CP 380; *see also* CP 417-19 (photos of Property).

The original parties to the Lease were Charles L. Woodke III and Lona L. Woodke, as lessor, and William F. Brenner and Lorene Brenner, as lessee. CP 107. BPO Properties Ltd. succeeded as lessee, and assigned its interest to Fife Services LLC (a BPO subsidiary). CP 150, 187. BPO Properties Ltd. nevertheless is responsible for rent as an assignee under the Lease. CP 113. Woodke transferred his interest in the Property to Brenner Motel in 2000. CP 87. Thus, the current parties to the lease are Brenner Motel, as lessor, and Fife Services LLC, as lessee, although BPO Properties Ltd. shares Fife Services LLC's obligations under the Lease. CP 87.

**2. The “Rental” section of the Lease includes a five percent escalator for 30 years, a fair market rental reset after 30 years, and a rent floor of no “less than the figures and formula used for the first three hundred sixty (360) months” of the Lease.**

Paragraph 3 of the Lease (entitled “Rental”) sets forth the payment structure over the 52-year Lease term. CP 90-91. Paragraph 3(a) first specifies a “base rent” of \$5,700, which is the rent for the first year of the Lease. CP 90, ¶ 3(a). The rent increases over the base rent by five percent, year-after-year, except when rent undergoes a fair market adjustment. CP 90, ¶ 3(a). The Lease required advance payment of the

first two months, in the amount of \$11,400. CP 90, ¶ 3(a). Apart from dates and other periods of time, the \$5,700 base rent and the \$11,400 advance payment are the only two “figures” in Paragraph 3 of the Lease. *See* CP 90-91.

Paragraph 3(d) provides for the fair market adjustment that is in dispute in this appeal. In its entirety, this paragraph states:

Six (6) months prior to the end of the first three hundred sixty (360) months of the lease term and six (6) months prior to the end of each five (5) years of the lease term thereafter, Lessor and Lessee shall negotiate a fair market rental value for the lease premises as of that date. If the parties cannot agree on the fair rental value of the leased premises, then the matter shall be submitted to arbitration in the manner provided in Paragraph 15 of this lease. The rental so determined shall be the base rental to be paid for the next twelve (12) calendar months of the lease term, and said base rental shall be increased at the expiration of the first full twelve (12) calendar months each year thereafter by five percent (5%) of the previous year’s rental; provided, however, that the five percent (5%) increase shall not be applied to the base rental for the first twelve (12) calendar months after an adjustment in the base rental pursuant to this subparagraph (d); but in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease.

CP 90-91, ¶ 3(d).

The first sentence of this paragraph requires a negotiation over “a fair market rental value” six months before the end of the first 30 years of the lease. CP 91, ¶ 3(d). If the parties could not agree on a fair market rental value—which is what occurred in this case—then the second

sentence states that the parties were required to submit the matter to arbitration. CP 91, ¶ 3(d) (together with the first sentence of 3(d), the “Fair Market Rental Value Provisions”). As described in further detail below, the parties indeed submitted the matter of fair market rental value to arbitration. The third sentence requires that the rental amount determined, either through negotiation or arbitration, would become the base rental amount in the 31st year, and would continue to escalate by five percent in years other than reset years, as provided in the Lease. CP 91, ¶ 3(d).

Following these three mandatory provisions is the Rent-Floor Clause, which states: “in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease.” CP 91.

**3. Drafts of the Lease produced in discovery appear to have contributions from both parties.**

Mr. Brenner provided the initial version of the proposed lease (“Lease 1”). CP 231, 236. Lease 1 called for a term of 60 years with a variable rental rate based on the revenue from the motel. CP 236. The next lease, partially dated at “November 1982” (“Lease 2”), included a set monthly rent of \$5,500 that annually escalated at five percent for 60 years. CP 249. These Lease 2 terms were undoubtedly more favorable to the

landlord, and so it follows that Mr. Woodke and his attorney, Elvin Vandeberg, drafted the version of Lease with these terms.<sup>1</sup> A third version of the Lease (“Lease 3”) appears to chronologically follow Lease 2 because it contains new terms that were not included in Lease 2. CP 256-75.<sup>2</sup> Lease 3 adds the Fair Market Rental Value Provisions but does not include the Rent-Floor Clause. CP 258. Lease 3 was more beneficial to Mr. Brenner, as the Fair Market Rental Value Provisions would serve as a market correction—up or down—after 30 years at the agreed five percent escalation. A fourth version of the Lease (“Lease 4”) appears to chronologically follow Lease 3 because it simply adds to Lease 3 and is closest in form to the final Lease.<sup>3</sup> CP 277-82. Lease 4 is the first time the Rent-Floor Clause makes its appearance. CP 279.<sup>4</sup> Mr. Woodke authored the Rent-Floor Clause. CP 299, 37:6-7. However, he testified in his deposition that he does not recall discussing it with Mr. Brenner. CP 299-300.

---

<sup>1</sup> No indicia of authorship are included on Lease 2.

<sup>2</sup> No indicia of authorship are included on Lease 3.

<sup>3</sup> Brenner Motel produced only six pages of Lease 4, claiming privilege on the remaining pages. No indicia of authorship are included on Lease 4.

<sup>4</sup> *Compare* CP 258 *with* CP 279.

**4. Mr. Woodke admits that he authored the Rent-Floor Clause, and Mr. Woodke admits that he could have used a specific number in the Rent-Floor Clause if he believed it to refer to rent due at the end of 360 months.**

BPO deposed Mr. Woodke, who was the only living witness to the Lease negotiations. CP 294-95. Mr. Woodke testified—consistent with the Lease drafts’ chronology—that he added the Rent-Floor Clause during negotiations. CP 299, 464. Mr. Woodke admitted that, when he drafted the Rent-Floor Clause, he knew what the rent in the 360th month would be based on a five percent annual increase over 30 years: \$23,461.96. CP 311-12. In “late 1982”—during the Lease negotiations—Mr. Woodke prepared a rent schedule showing what the monthly and annual rent would be each year if increased by five percent annually for the entire life of the Lease. CP 311-12; *see also* 354-57 (the “Rent Schedule”). Mr. Woodke’s Rent Schedule states that the rent for the 360th month would be \$23,461.96. CP 355 (line “year 30”).

While Mr. Woodke admitted that he would have been able to place a specific rent-floor number into the Lease, because he had that number written down in clear form, he instead used the “figures and formula” language. CP 311-12. Mr. Woodke’s testimony on this matter was as follows:

Q. You were able to sit down with a piece of paper and start at \$5,700 per month, increase it five

percent every year and come up with a number, correct?

A. Yes.

Q. You could do that.

A. Yes.

Q. There is no number written in here. You didn't write in that number.

A. I didn't.

Q. Why not?

A. Because the matter spoke for itself.

CP 311-12, 59:25-60:10.

**5. Arbitrator Thomas Brewer determines that the fair market value of the Property is \$9,877.50 per month.**

After Brenner Motel and BPO were unable to negotiate a price for the Property's fair market value, BPO filed a demand for arbitration. CP 63, 69, 72-73. The arbitration was specifically limited to a determination of the fair market value of the Property and did not address the Rent-Floor Clause. CP 72. Mr. Thomas Brewer conducted the arbitration. CP 376.

BPO argued at arbitration that the fair market rental value was \$9,844 per month and Brenner Motel argued that the fair market rental value was \$18,158.33 per month. CP 380. While the parties' experts' calculations differed, "[b]oth experts agree[d] that a downward adjustment (from current rent) is appropriate." CP 381. The experts "both agreed that the [Lease's] provision . . . mandating automatic five percent escalations of the original base rent amount resulted over time in above-market rents in the time period preceding the date of valuation." CP 381. Mr. Brewer

also noted that the five percent escalator clause in the Lease would likely raise the rental value above its fair market value and a lessee “would not have a realistic prospect of recapturing these payments later.” CP 386. A reasonable lessee would therefore “attempt to negotiate a reduced initial rental amount in the first place, at the beginning of the reset period.” CP 386. Mr. Brewer concluded that the fair market value of the Property was \$118,650 per year, or \$9,887.50 per month. CP 386.

On October 2, 2014, Mr. Brewer issued a Final Award confirming the terms of the Interim Award and awarding attorney fees and costs to BPO. CP 184-98. Judge Philip K. Sorensen of the Pierce County Superior Court entered an order confirming this award. CP 209-11.

## **B. Procedural History.**

### **1. Brenner Motel files a complaint for a declaratory judgment that the Rent-Floor Clause requires rent of \$24,635.08 per month.**

Before Mr. Brewer had issued his final award, Brenner Motel filed a Complaint for Declaratory Judgment in Pierce County Superior Court, which was later amended. CP 1-12. The operative complaint (the Second Amended Complaint) sought a declaratory judgment that “the rent owed under the Lease throughout the remaining term of the Lease is not less

than \$24,635.08 per month,<sup>5</sup> the amount determined using the figures and formula used for the first 360 months of the Lease . . .” CP 32, “Wherefore” section, ¶ 1. BPO counterclaimed for a declaratory judgment that the Rent-Floor Clause provided for an amount of \$5,700, and for overpaid rent in excess of the fair market rental value as determined through arbitration. CP 40-48.

**2. The trial court grants summary judgment to Brenner Motel, reasoning that the Lease unambiguously provides for a Rent Floor Clause amount of \$23,461.96.**

Following discovery, Brenner Motel moved for summary judgment. CP 49-58. Brenner Motel argued that the Lease provided for a rent floor of \$24,653.08 per month, which it asserted was the beginning rent of \$5,700, increased by five percent in each year of the first 30 years of the Lease, thus yielding its proposed amount. CP 57. BPO asserted that the Lease’s rent floor was \$5,700, which constituted the sole figure set forth in the Lease (the base rental of \$5,700), and was subject to the annual five percent rent escalator *after* the rent floor was applied. CP 130. BPO argued that the Rent Floor Clause was “subject to multiple readings, making the contract ambiguous.” CP 123. It requested that the trial court

---

<sup>5</sup> Brenner Motel conceded that this number was incorrectly calculated. Even under Brenner Motel’s erroneous interpretation of the Rent-Floor Clause, the rent due in the 31st month would be \$23,461.96, not \$24,653.08. CP 446-47.

deny Brenner Motel's motion and hold "that the amount of rent for the final 22 years of the [L]ease is a material issue for the trier of fact . . ." CP 123.

The trial court granted Brenner Motel's motion for summary judgment. CP 460-61. The court held that "the rent owed under [Brenner Motel's] lease to [BPO] is not less than \$23,461.96 per month for the remainder of the lease term, which is the rent floor set by the lease after the first 360 months of the lease term." CP 460-61 (emphasis added). During argument, the trial court stated that it did "not believe that [the Rent-Floor Clause] is ambiguous," and that Brenner Motel's interpretation "is a reasonable interpretation." RP 22. The trial court reasoned that it was required to "give meaning to both the terms 'figures' and 'formula,' and 'figures,' being, you know, starting with the 5700, and then 'formula' being the five percent accelerator." RP 22-23. The court concluded that the Rent-Floor Clause being \$23,461.96 was "the only interpretation that . . . gives meaning to both of these terms." RP 23. The trial court entered judgment for Brenner Motel, including a monetary judgment of \$18,762.50 for attorneys' fees and costs under the Lease. CP 466-68.

**3. On summary judgment, the trial court strikes portions of Brenner Motel's supporting evidence.**

In its motion for summary judgment, Brenner Motel submitted a declaration by Charles Woodke, who signed the Lease and is Brenner Motel's predecessor. CP 85 (the "Woodke Declaration"). The Woodke Declaration included assertions that the initial lease proposal from Mr. Brenner was "unacceptable to [him]," that Mr. Woodke had desired "annual increases in the rent equal to increases in the consumer price index," and that Mr. Brenner had "asked for annual increases" in rent instead of increases based on the consumer price index. CP 85-86, ¶ 3. BPO objected to these portions of paragraph 3 of the Woodke Declaration, because they were irrelevant, inadmissible hearsay, and offered in violation of the Dead Man's Statute, and moved to strike. CP 424-33.

The trial court granted the motion to strike. CP 462-64. The court's written order specifically referenced the objectionable portions of the Woodke Declaration, including Woodke's impression of certain aspects of the Lease negotiations, statements purportedly made by Mr. Brenner during the Lease negotiations, and Woodke's subjective impressions of the Lease negotiations. *See* CP 463-64. The order included a revised paragraph 3 of the Woodke Declaration, with the objectionable portions stricken. CP 464. On its accompanying summary

judgment order, the Court noted that it had not considered the portions of the Woodke Declaration “objected to by Defendants in the Motion to Strike.” CP 460.

Brenner Motel has not cross-appealed the trial court’s order striking portions of the Woodke Declaration. Therefore, Brenner Motel may not rely upon those portions of the Woodke Declaration on appeal, as they are not part of the appellate record. *See* RAP 9.12 (on review of order on summary judgment, only evidence and issues designated in order on summary judgment form appellate record).

**4. BPO timely appeals the trial court’s summary judgment and entry of judgment.**

The trial court entered final judgment on June 24, 2015. CP 466-68. BPO then appealed the ruling on summary judgment and the entry of judgment to this Court on July 17, 2015. CP 469-76. BPO’s appeal is timely under RAP 5.2(a).

**ARGUMENT**

**A. Standards of Review.**

A trial court’s order granting or denying a motion for summary judgment is reviewed de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The court must consider the facts and all reasonable

inferences in the light most favorable to the nonmoving party. *Id.* “Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281, 313 P.3d 395 (2013) (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002); CR 56(c)).

In a case involving interpretation of a contract, summary judgment is only appropriate when “the parties’ written contract, viewed in light of the parties’ other objective manifestations, has only one reasonable meaning.” *Kries v. WA-SPOK Primary Care, LLC*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, No. 32879-1-III, 2015 WL 5286176, at \*10 (2015) (citing *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997)). “On the other hand, the trial court should deny a summary judgment motion regarding interpretation of a contract provision when (1) the interpretation depends on the use of extrinsic evidence or (2) more than one reasonable inference can be drawn from the extrinsic evidence.” *Id.* (citing *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993); *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990)). Moreover, “if two or more meanings are reasonable, a question of fact is presented.” *Id.* (citing *GMAC v. Everett*

*Chevrolet, Inc.*, 179 Wn. App. 126, 135, 317 P.3d 1074, *review denied*, 181 Wn.2d 1008, 335 P.3d 941 (2014)).

Under these standards, the trial court erred in granting summary judgment. The Rent-Floor Clause is not clear on its face, as the term “figures and formula used for the first three hundred sixty (360) days of this lease” is ambiguous. Both before and after considering extrinsic evidence, the Rent-Floor Clause can reasonably mean either \$5,700 or \$23,461.96, and its interpretation should have been left to a jury. This Court should reverse the summary judgment, vacate the monetary judgment for attorneys’ fees and costs, and remand to the trial court with instructions to conduct a trial.

**B. The trial court erred by adopting Brenner Motel’s interpretation of the Rent-Floor Clause.**

The trial court erroneously concluded its inquiry as to the meaning of the Rent-Floor Clause by reasoning that the language of the Rent Floor Clause was unambiguous. Had the trial court proceeded through all the steps of a proper contractual analysis (as explained in this section), it would have concluded that a genuine issue of material fact existed. Summary judgment should have been denied, and this Court should reverse.

The trial court's (and this Court's) role in interpreting a contract are as follows. First, the court must attempt to determine the parties' intent from the contract. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116 (2014). The court does so applying the "objective manifestation theory" of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties' intent." *Id.* at 712-13 (citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). The court will "give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent," and will "view the contract as a whole." *Id.* (quoting *Hearst Commc'ns*, 154 Wn.2d at 504; citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000)).

Second, as part of this initial inquiry, and regardless of whether it believes the contract provision at issue to be ambiguous, the court will apply the "context rule" of *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990)). See *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011) ("[A]mbiguity is not a prerequisite for a court to examine the context surrounding the execution of a contract."). Under the context rule, the court considers "the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the

subsequent acts and conduct of the parties to the contract, and the reasonableness of the interpretations advocated by the parties.” *Kries*, 2015 WL 5286176, at \*10 (citing *Berg*, 115 Wn.2d at 666-67). The context rule may be used to interpret specific terms of a contract, although it cannot be used to “show an intention independent of the instrument” or to “vary, contradict or modify the written word.” *Hearst Commc’ns*, 154 Wn.2d at 503.

Third, if viewing the text and context of the provision yields multiple reasonable meanings, then the contract provision is ambiguous. *Viking Bank*, 183 Wn. App. at 713. Summary judgment is generally therefore inappropriate. *See Kries*, 2015 WL 5286176, at \*10. Fourth, when a provision is ambiguous, the court may construe the provision against the drafter, or if the agreement was drafted jointly, may “adopt the interpretation that is the most reasonable and just.” *Viking Bank*, 183 Wn. App. at 713 (citing *Berg*, 115 Wn.2d at 672). The trial court should also construe a lease agreement against the lessor. *See Johnny’s Seafood Co. v. Tacoma*, 73 Wn. App. 415, 420, 869 P.2d 1097 (1994). The interpretation of an ambiguous contract, however, remains a question of fact. *See, e.g., Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App. 177, 184, 810 P.2d 27 (1991) (reversing summary judgment interpreting covenant and returning for trial, in part to determine whether considering

trees as “fence” or “shrub” was reasonable in light of overall covenant purposes).

**1. The text of the Rent-Floor Clause has multiple reasonable meanings and is therefore ambiguous.**

First, the text of the Rent Floor Clause indicates no plain meaning on its face, and does not have a singular “reasonable meaning . . . to determine the parties’ intent.” *Viking Bank*, 183 Wn. App. at 712-13. The trial court erred in holding that the Lease term was unambiguous.

**a. The Rent-Floor Clause is susceptible to an interpretation of \$5,700, or \$23,461.96.**

The Rent-Floor Clause—“but in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease”—is inherently ambiguous. Neither “figures” nor “formula” is defined elsewhere in the Lease. *See generally* CP 90-91. Undefined terms in a contract are given their plain, ordinary, and popular meaning. *Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 66, 882 P.2d 703 (1994), *amended by* 891 P.2d 718 (1995).

Ambiguity in a contract exists where a provision is “susceptible to two reasonable interpretations.” *Marshall v. Thurston County*, 165 Wn. App. 346, 351, 267 P.3d 491 (2011). In *Marshall*, for example, this Court concluded that the trial court erred when it held that the word “incident” in a release was unambiguous. *See id.* at 351-52. There, property owners

sued Thurston County, alleging that an improperly installed water diversion device caused flooding on the landowners' property. *Id.* at 349. The property owners settled the claim against the County and signed a release of liability. *Id.* Following a later flood, the Marshalls sued again, but the County argued the new claims were barred by the release, which released the County from claims related to the "incident." *Id.* at 350. The Marshalls argued that the "incident" referred to the earlier floods that damaged their property, while the County argued the "incident" was the installation of the faulty water diversion system. *See id.* at 352. This Court reasoned that the provision in the contract was ambiguous because it could have referred to either specific floods or the apparent cause of the floods, and held that "summary judgment was not appropriate based on the meaning of the release." *Id.*

Similarly, in *Kries*, the Court of Appeals concluded that a provision prohibiting a medical assistant from working with an "open or draining wound" was ambiguous. 2015 WL 5286176, at \*9 - \*10. The court reasoned that the medical assistant's wound, which was sutured and covered with drains exiting outside the wound, was susceptible to interpretations as a wound that could not be controlled, or any wound that was not fully healed. *See id.* at \*4. The Court of Appeals held that the trial court had erroneously held as a matter of law that the policy made the

medical assistant's wound both draining and open, and reversed its summary judgment. *Id.* at \*12; *see also Lakes at Mercer Island Homeowners' Ass'n*, 61 Wn. App. at 179, 184 (holding that question of fact existed as to whether row of trees constituted "fence" or "shrubs" in violation of covenants).

The provision at issue here, "figures and formula used for the first three hundred sixty (360) months of this lease," is no clearer than the provisions in *Marshall, Kries*, and *Lakes at Mercer Island Homeowners Association*. The only "figures" in the Lease are the \$5,700 base rent and the \$11,400 advance payment. The "formula" applied during the entirety of the Lease, except for years in which the base rental amount is adjusted, is a five percent increase above the prior year's rental amount. This formula is described in two places in the Lease:

- \* In paragraph 3(a), which specifies the base rent of \$5,700, the Lease provides that "[a]t the expiration of the first twelve (12) calendar months of the lease term and every year thereafter, the base rental shall increase by five percent (5%) of the previous year's rental except for those years in which the rental is adjusted pursuant to subsection (d) of this paragraph."
- \* In paragraph 3(d), after describing the mandatory procedure for determining fair market rental value 30 years into the Lease,

the rental amount determined “shall be the base rental to be paid for the next twelve (12) calendar months of the lease term, and said base rental shall be increased at the expiration of the first full twelve (12) calendar months and each year thereafter by five percent (5%) of the previous year’s rental; provided, however, that the five percent (5%) increase shall not be applied to the base rental for the first twelve (12) calendar months after an adjustment in the base rental pursuant to this subparagraph (d) . . .”

CP 90-91. The five percent “formula” therefore applies in each of years 2 through 30, 32 through 35, 37 through 40, 42 through 45, 47 through 50, and the 52nd and final year of the Lease. CP 90-91.

Brenner Motel contends that the “figures and formula” refers to the initial base rental of \$5,700, plus each of the five percent escalations until the end of the 30th year of the Lease term, yielding a figure of \$23,461.96. CP 57. The Lease, however, does not specify a time period, e.g., beginning, end, etc., at which the base rental and the formula are measured: it refers to the figures and formula “for the first three hundred sixty (360) months of this lease.” CP 91. Because the five percent formula applies at all times during the Lease term, it does not necessarily refer to the number yielded from applying the five percent escalator for all

years until the end of the 30th year. BPO's reading of the "figures and formula" term—namely, that "figures" references the initial base rent of \$5,700 (and the calculated initial up front payment of \$11,400) and that "formula" references the five percent annual rental escalator—is equally plausible given the language of the Rent-Floor Clause.

Brenner Motel argued, and the trial court apparently found persuasive, that "formula" necessarily only included the rental amount at the end of the 30th year, because "paragraph 3(d) already specifies that the base rental established at the end of 360 months will increase by 5% for the following four years." CP 57. But the clause in paragraph 3(d), which states that base rental determined based upon fair market value will continue to increase, is itself repetitive of paragraph 3(a), which states that for each year after the first, except where base rent is adjusted under the Fair Market Rental Value Provision, "the base rent shall increase by five percent (5%) of the previous year's rent." CP 90, ¶ 3(a). It is plausible that the parties would intend to incorporate the "formula" expressed twice in paragraph 3 of the Lease to confirm that the new base rent, as determined by the fair market rental value, would continue to increase by five percent. Any canon of construction disfavoring the repetitive use of terms is less persuasive when the same term has already been used repetitively in the Lease; and in any event, such principles of interpretation

“should not be applied as absolutes.” *Berg*, 115 Wn.2d at 664. Such principles are “to be taken as suggestive working rules only” and “will be harmful if they are taken as dogmatic directions that must be followed, or if they mislead us into thinking that language has only one meaning, the one absolutely correct.” *Id.* at 664-65 (citing 3 Arthur Linton Corbin, *Contracts* § 535, at 21 (1960)).

A reasonable jury could find the text of the Lease’s Rent-Floor Clause susceptible to two or more meanings, based on the text alone. Brenner Motel’s own words repeatedly recognize this and the context surrounding the provision further shows its ambiguity.

**b. Brenner Motel’s own statements show that the Rent-Floor Clause is ambiguous.**

The phrase “figures and formula” is not susceptible to a single interpretation and Brenner Motel’s own communications with BPO and the courts show that the phrase is ambiguous. Brenner Motel began its concerted effort to insert the phantom phrase “at the end of” into the Rent-Floor Clause as early as March 12, 2013, well before this litigation began, and consistently continued this practice throughout the lower court litigation. Consider the following phrasing used in Brenner Motel’s various communications with BPO, and filings in this case:

- “But in no event will the lease after the first 360 months be less than the rent *at the end of* the first 360 months.” CP 368.

- “But in no event will the rent after the first 360 months be less than the rent *at the end of* the first 360 months.” CP 4, *l.* 10.
- “Under (d), it can be no less than the rent that was collected *at the end of* the first 360 months.” CP 311, 59:17.
- “But in no event will the rent after the first 360 months be less than the rent *at the end of* that first 360 months.” CP 56, *l.* 16.
- “. . . the rent *at the end of* thirty years . . .” CP 56, *l.* 21.
- “. . . the base rental established *at the end of* 360 months . . .” CP 57, *l.* 11.
- “The rent floor clause created a minimum rent calculated as of *the end of* the first 30 years.” CP 57, *ll.* 15-16.

In every instance, Brenner Motel inserted the words “the end of” in describing its interpretation of the Rent-Floor Clause. This undercuts Mr. Woodke’s assertion that the Rent-Floor Clause “speaks for itself.” CP 299, 37:9.

The Rent-Floor Clause as it actually appears in the Lease does not state that the rent floor is equal to the “rent at the end of the first three hundred sixty (360) months of this lease.” Rather, it states that the rent cannot be “less than the figures and formula used for the first three hundred sixty (360) months of this lease.” CP 91. The words “at the end of” are neither stated nor implied. The parties certainly could have used the phrase when drafting the Lease—had they intended for the Rent-Floor Clause to mean what Brenner Motel now wants it to mean—but they did not. Brenner Motel’s repeated attempts to superimpose this language into

the Rent Floor Clause are further evidence that the clause is ambiguous on its face.

From plain meaning of words, either Brenner Motel's or BPO's interpretation can be reached, indicating that the Rent-Floor Clause is "susceptible to two reasonable interpretations." *Marshall*, 165 Wn. App. at 352. The trial court erred in reasoning that Brenner Motel's interpretation of the Lease was the only reasonable interpretation and the Rent-Floor Clause was unambiguous. RP 22. Moreover, as stated in the next subsection, the trial court erred in declining to address evidence of the context of the Lease that further supports BPO's reading of the Rent-Floor Clause.

## **2. Extrinsic evidence supports BPO's reading of the Rent-Floor Clause.**

Extrinsic evidence may be used to determine the intent of contracting parties. *Hearst Comm'ns*, 154 Wn.2d at 502. "If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties." *Id.* (citing *Berg*, 115 Wn.2d at 667). Extrinsic evidence

presented by BPO under each of these prongs supports BPO's reading of the Rent Floor Clause and was improperly disregarded by the trial court.

**a. The subject matter and objective of the Lease supports BPO's reading of the Rent-Floor Clause.**

Evidence of the Lease as a whole, and the purposes of the fair market rental Value Provisions and the Rent-Floor Clause, supports BPO's reading that, even if the fair market value, as agreed by the parties or as determined by arbitration, is below the initial base rent, the Rent-Floor Clause precludes a reset base rent lower than the base rental figure at the outset of the Lease. From the face of the agreement, the purpose of Paragraph 3(d) of the Lease was to establish fair market rental value after the first 30 years. This is logical, because the parties had no way to tell with certainty whether the rent in a 52-year ground lease would remain consistent with market forces throughout its entire term. The goal to establish fair market rental value after the first 30 years is articulated in the many mandatory provisions in that paragraph.

Before the end of the first 30 years of the lease, the Fair Market Rental Value Provisions require a negotiation over "a fair market rental value" six months before the end of the first 30 years of the lease. CP 91, ¶ 3(d). Then, the Fair Market Rental Value Provisions require the parties to submit the matter to arbitration if they could not agree on a fair market

rental value. CP 91, ¶ 3(d). The third sentence of paragraph 3(d) requires that the rental amount determined, either through negotiation or arbitration, would become the base rental amount in the 31st year and would continue to escalate by five percent in years other than reset years, as provided in the Lease. CP 91, ¶ 3(d). All three of these provisions are mandatory. *See Dep't of Labor & Indus. of the State of Wash. v. Delozier*, 100 Wn. App. 73, 77, 995 P.2d 1265 (2000) (“[T]he word ‘shall’ is mandatory.”). The Lease therefore required the parties to determine a fair market rental value (either through negotiation or arbitration), and required that rental amount to become the base rental amount in the 31st year of the Lease term. The Rent-Floor Clause comes after these mandatory provisions.

While the Fair Market Rental Value Provisions were obviously important to the parties, hence their presence in the Lease and their mandatory nature, Brenner Motel’s interpretation of the Rent-Floor Clause eviscerates each of them. *See Viking Bank*, 183 Wn. App. at 713 (“[W]e view the contract as a whole, interpreting particular language in the context of other contract provisions.”) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000)). As Brenner Motel candidly admits, its interpretation of the Rent-Floor Clause can only benefit it, and not the tenant, after 30 years. CP 86, ¶ 4

(declaration from Mr. Woodke interpreting the Lease as containing “a market value adjustment of the rent after thirty years with the stipulation that the rent would not go down at that time”). BPO’s reading instead gives meaning to both the significant and mandatory Fair Market Rental Value Provisions, which would function as a means of actually resetting the rental value to its fair market value, and the Rent-Floor Clause, which ensures that the rent would not go below its agreed initial base amount. As Brenner Motel reads the Lease, the Rent-Floor Clause leads to the dysfunctional result that rent exceeds fair market value by over two times—and makes the three sentences relating to a fair market value reset meaningless. The purpose of the Lease’s provisions on rent supports BPO’s reading of the Lease, not Brenner Motel’s.

**b. The circumstances surrounding the formation of the Lease and the Rent-Floor Clause support BPO’s reading of the Rent-Floor Clause.**

Extrinsic evidence related to the “circumstances surrounding the making of the contract,” *Berg*, 115 Wn.2d at 667, shows that (1) the lessee did not agree to a market correction provision that would not benefit him, and (2) the drafter of the Lease used intentionally imprecise language. This prong of the *Berg* test similarly supports BPO’s reading of the Lease.

First, the history of the Lease’s negotiation shows that the lessee, Mr. Brenner, proposed a fair market value adjustment. After the parties’

negotiation progressed from a variable rate based on revenue, to a five percent escalator over the entire term of the Lease with no market adjustment, Mr. Brenner proposed a market adjustment at the end of 30 years. Mr. Woodke countered with the Rent-Floor Clause. Because the market adjustment was significant to Mr. Brenner—as he placed the fair market adjustment in the Lease to hedge against a potentially harsh five percent rent increase for the full 52 years of the Lease—it makes no sense that Mr. Brenner would have then settled for a Rent-Floor Clause that would (1) accomplish the same unwanted goal (consistent rent escalation despite the established fair market rent) and (2) only benefit the landlord. In the context of the parties' negotiations, it makes more sense that the parties compromised on a market reset provision with a rent floor clause that could potentially benefit either party—not one that could only continue to increase the base rent after 30 years.

Second, the context surrounding the formation of the Lease shows that Mr. Woodke admittedly was aware of a specific figure that he envisioned for the rent floor, but instead used the imprecise language now contained in the Rent-Floor Clause. Mr. Woodke, who added the Rent-Floor Clause, knew what the rent in the 360th month would be based on a five percent annual increase over 30 years: \$23,461.96. He had a specific written schedule that he had prepared that stated precisely what the rent

would be after thirty years of five percent increases. CP 355. Although Mr. Woodke knew the actual amount he says he calculated as the rent floor, he did not insert the actual number into the Lease. Instead, he inserted the convoluted and confusing provision: “in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease.” Mr. Woodke testified only that the provision that he inserted “spoke for itself.” CP 311-12. But if Mr. Woodke had wished for the parties to clearly agree to a sum that reflected the rent as it stood after 30 years, he could have written it into the contract. A stated number would have alerted Mr. Brenner that, despite the perceived safety of the Fair Market Rental Value Provisions, the lease rate would never reset to a number that would benefit anyone but the landlord.

At the very least, Mr. Woodke’s failure to state a simple, known dollar amount as the rent floor signals that the Rent-Floor Clause was not the subject of a mutual understanding by Woodke and Brenner, and Mr. Woodke likely intended it to mean something different than what Brenner Motel now claims. This constitutes an issue of material fact that precludes summary judgment.

**c. Brenner Motel's acts subsequent to the Lease's formation support BPO's reading of the Rent-Floor Clause.**

The "subsequent acts and conduct of the parties" since the Lease reached its 30-year mark further support an inference that BPO's reading is correct, or at least that the provision is ambiguous. *See Berg*, 115 Wn.2d at 667. The interpretation of the 30-year market reset provision and the Rent-Floor Clause did not arise until nearly 30 years into the Lease term, because the rental amount was clear from the face of the contract in the first 30 years. But Brenner Motel has itself shown that the calculations are ambiguous, because it miscalculated the rental amounts due. Brenner Motel itself commenced the litigation arguing the rent due in the 360th month was actually \$1,173.12 more than the amount truly due during the 31st year of the Lease term. Brenner Motel consistently (and inaccurately) argued that the rent payable in the 360th month was \$24,635.08. CP 49, 368-69. Until Brenner Motel conceded that its math was wrong in its summary judgment reply brief, CP 446-47, it misinterpreted the allegedly clear Rent-Floor Clause. Viewing the facts in the light most favorable to BPO, the meaning of the Rent-Floor Clause is ambiguous and is a genuine issue of material fact requires reversal of summary judgment.

**d. BPO's reading of the Rent Floor Clause, and not Brenner Motel's reading, is the most reasonable.**

Finally, BPO's interpretation of the Rent-Floor Clause, not Brenner Motel's reading, is the most reasonable. *See Berg*, 115 Wn.2d at 667 (court may consider "reasonableness of respective interpretations urged by the parties" in examining context of contract). Brenner Motel's reading of the Lease is unreasonable for many reasons, several of which are discussed elsewhere in this petition. Brenner Motel's reading assumes that the tenant insisted on a market reset provision, then agreed to a counterproposal that the parties understood would not benefit the tenant after 30 years, but could only benefit the landlord.

Brenner Motel argues that it was "absurd to argue that the parties intended a rent floor thirty years into the lease term that would be equal to the rent at the beginning of the Lease." CP 56. But Brenner Motel ignores that it is protected by the fair market value reset and is still protected by the Rent-Floor Clause. BPO's reading of the Rent-Floor Clause means that the rental value would be reset to the higher of the fair market value as determined at arbitration and the \$5,700 rent floor—in a manner that could make the rent after 30 years either increase or decrease. Brenner Motel's reading means that rent can only increase after 30 years, regardless of whether (as here) the fair market value greatly fell behind the

rental amount in the first 30 years of the Lease term. Unlike Brenner Motel's reading, BPO's reading does not create a major windfall for any party, but instead tethers the rental amount after 30 years to the then-established fair market rental amount, subject to the \$5,700 rent floor.

The trial court failed to consider all extrinsic evidence to determine the parties' intent with respect to the Rent-Floor Clause. The evidence shows, however, that Paragraph 3(d) of the Lease was intended to include an effective fair market reset; that no reasonable tenant would have ascribed to Mr. Woodke's view of the provision; that Mr. Woodke deliberately placed imprecise language in the Lease when he was able to draft clear language; and that Brenner Motel's application of the Rent-Floor Clause has provided it with a massive windfall. Because both the plain language of the Rent-Floor Clause and its application in context show ambiguity, the trial court erred in holding that the Rent-Floor Clause was unambiguous, and its order should be reversed.

**3. The trial court erred by not construing the ambiguous language against its drafter and the landlord, Mr. Woodke.**

When a provision is ambiguous, the courts will generally construe ambiguities against the contract's drafter. *Pierce County v. State*, 144 Wn. App. 783, 813, 185 P.3d 594 (2008); *see also Berg*, 115 Wn.2d at 677 ("Depending on [extrinsic] evidence adduced on remand, it may be proper

for the court to construe ambiguous language against the drafter[ . . .”). Even more germane to this case, ambiguities in a lease drafted by the lessor are resolved in favor of the lessee. *Johnny’s Seafood Co.*, 73 Wn. App. at 420 (construing insurance coverage provisions in a lease against the lessor, the City of Tacoma, and in favor of the lessee, Johnny’s Seafood Co.).

Mr. Woodke, the original lessor, drafted the Rent-Floor Clause. CP 287-90. Brenner Motel is Mr. Woodke’s LLC and is the lessor under the Lease. CP 87, ¶ 8. Thus, ambiguities in that clause must be construed in favor of BPO. At a minimum, an issue of fact exists that would permit a jury to construe the Rent-Floor Clause in favor of BPO’s interpretation and contrary to the interpretation urged by its drafter, Mr. Woodke, and his successor LLC, lessor Brenner Motel.

**4. The trial court failed to adopt a reasonable and just interpretation of the Lease.**

Even if the Court determines that the parties drafted the contract together or that the drafter cannot be determined, BPO should prevail because the Court must adopt the interpretation that would make the Lease “reasonable and just.” *See Berg*, 115 Wn.2d at 672. In *Berg*, for example, the Supreme Court addressed the meaning of the term “gross rentals” in a 99-year ground lease, and reversed the trial court’s summary judgment

holding that the term was unambiguous and remanded for trial. *Id.* at 671. As an example of its application of the context rule, the *Berg* Court discussed the differing outcomes of the gross rental term on the landlord and the tenant. *See id.* at 671-72. The landlord argued that gross rentals included all amounts that the ground tenant received from subtenants. *See id.* at 672.

The Supreme Court noted that the landlord's proposed reading would include reimbursements that the ground tenant received from subtenants. *Id.* Under the ground tenant's reading, the ground tenant would be made whole by the reimbursements, but under the landlord's reading, the ground tenant would have been required to pay half of the reimbursements that it incurred to the landlord (in one year, \$14,476.39). *See id.* The Supreme Court reasoned that, given the result:

[I]f the trial court determines the language is subject to two possible constructions, it should apply the following principle:

When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.

*Id.* (citations omitted).

BPO's reading of the Lease is reasonable and just and Brenner Motel's is not. The Lease requires the parties to determine fair market

rental value and Arbitrator Brewer determined that the fair market rental value is \$9,877.50 per month or \$118,650 per year. CP 195. Under Brenner Motel’s interpretation of the Rent-Floor Clause, the rent due for the 31st year of the Lease term is \$23,461.96 per month or \$281,543.52 per year—which means that BPO is paying more than double the fair market rental value. *Compare* CP 360 (rent schedule showing rent under BPO’s interpretation of the Lease), *with Berg*, 115 Wn.2d at 672 (suggesting that \$14,476.39 windfall to landlord would result in unreasonable and unjust interpretation of gross rental provision). At minimum, a question of fact exists that would permit a jury to determine that BPO’s reading is more reasonable, and find in BPO’s favor.

**5. The trial court’s summary judgment should be reversed, and the matter remanded for trial.**

Because the trial court erred in holding that the Lease’s Rent-Floor Clause was subject to only one reasonable interpretation, it erred in granting summary judgment and its order should be reversed. The Rent-Floor Clause, as written, may be reasonably interpreted to mean either \$5,700 or \$23,461.96, based on both its text and extrinsic evidence related to the Lease, particularly the fair market rent determination. “[I]f two or more meanings are reasonable, a question of fact is presented.” *Kries*, 2015 WL 5286176, at \*10 (citation omitted). Moreover, although the trial

court did not reach this issue because it did not expressly consider extrinsic evidence in interpreting the Lease, an interpretation of the extrinsic evidence discussed above, at a minimum, “depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.” *Berg*, 115 Wn.2d at 668 (adopting Section 212(2) of the Restatement (Second) of Contracts). This Court should reverse the trial court’s summary judgment and remand for trial.

**C. The trial court erred by awarding attorneys’ fees and costs to Brenner Motel.**

After entering summary judgment, the trial court entered final judgment and an award of \$18,762.50 for reasonable attorney fees and costs to Brenner as the prevailing party in the declaratory judgment action. CP 466-68. However, those fees and costs were granted in error, as the existence of a fact issue should have precluded summary judgment. When the lower court’s granting of summary judgment is reversed, the trial court’s award of attorney fees and costs should also be reversed. *Indus. Coatings Co. v. Fid. & Deposit Co. of Maryland*, 117 Wn.2d 511, 519, 817 P.2d 393 (1991). This Court should reverse the trial court’s entry of summary judgment and it should also reverse the entry of judgment including the costs and attorneys’ fees and costs awarded.

## CONCLUSION

For the reasons stated in this brief, the Court should reverse the trial court's summary judgment to Brenner Motel, vacate the trial court's entry of judgment, and remand to the trial court with instructions to conduct a trial on the matter.

Respectfully submitted this 6th day of November, 2015.

K&L Gates LLP

By: /s/ Peter A. Talevich

Jesse O. Franklin, WSBA # 13755

Peter A. Talevich, WSBA # 42644

Raina V. Wagner, WSBA # 45701

*Attorneys for Appellants BPO Properties  
Ltd. and Fife Services LLC*

## APPENDIX

**PROOF OF SERVICE**

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 6th day of November, 2015, I caused a true and correct copy of the foregoing document to be served in the manner indicated:

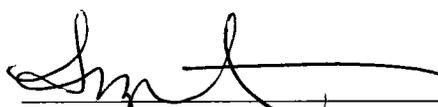
James V. Handmacher  
820 "A" Street, Suite 600  
P.O. Box 1533  
Tacoma, WA 98402  
Email: JVHandmacher@bvmm.com

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email
- via electronic court filing
- via hand delivery

Attorney for Plaintiff

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

DATED November 6, 2015, at Seattle, Washington.

  
\_\_\_\_\_  
Suzanne M. Petersen