

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.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

As indicated in BPO's opening brief, and only confirmed by Brenner Motel's response brief, the meaning of the Rent-Floor Clause in paragraph 3(d) of the Lease is precisely the type of contract interpretation issue that must be resolved by a trier of fact. Its language, which requires that the rental amount under the Lease in the 31st year cannot "be less than the figures and formula used for the first three hundred sixty (360) months of this lease," is inherently ambiguous. While Brenner Motel argues that the context of the Lease supports its reading of the provision, the evidence it relies upon is inadmissible, heavily disputed, and runs counter to evidence set forth by BPO. Indeed, BPO's evidence of context shows that the original lessee, William Brenner ("Mr. Brenner"), proposed a fair market rate adjustment after 30 years (the "Fair Market Rental Value Provisions") that was designed to address the exact scenario that occurred here: annual increases of rent of 5 percent per year bringing the rental amount in the 30th year of the lease (\$23,461.96 per month) well above the fair market value as determined at arbitration (\$9,887.50 per month).

Brenner Motel's construction of the Lease eviscerates this provision, and Brenner Motel relies only on disputed evidence to argue that Mr. Brenner, or any reasonable lessee, would have agreed to a rent floor that matches Brenner Motel's interpretation. The evidence of

context—which is critical to interpretation because of the vague manner in which the original lessor, Charles Woodke (“Mr. Woodke”) drafted the Rent-Floor Clause—is in dispute. If resolved by the trier of fact in BPO’s favor, the evidence supports BPO’s interpretation of the Rent-Floor Clause. This Court should reverse the trial court’s summary judgment and remand for trial, where the trier of fact can weigh the parties’ evidence, make credibility determinations of witnesses, and determine the reasonable meaning of the Rent-Floor Clause.

COUNTERSTATEMENT OF FACTS

While BPO set forth its statement of facts in its opening brief, *see* Br. of Appellant at 5-12, it briefly responds here to some factual inaccuracies in Brenner Motel’s brief. The facts below are significant because they negate Brenner Motel’s argument that the original leasing parties understood the Rent-Floor Clause to mean what Brenner Motel now argues it means.

A. Brenner Motel relies upon evidence that the trial court excluded.

Much of the opening portion of Brenner Motel’s statement of facts, related to the purported negotiation of the Lease, comes from a portion of the record that the trial court held to be inadmissible. *See* CP 463-64 (granting BPO’s motion to strike, and quoting and crossing out portions of

paragraph 3 to the Declaration of Charles Woodke (“Woodke Declaration”). This includes:

- Mr. Woodke’s unexpressed desire to tie the annual rental increase to the consumer price index,
- Mr. Brenner’s statement that he wanted a fixed amount of rent for his financing,
- Mr. Woodke’s verbal agreement to a 5 percent increase,
- Mr. Woodke’s subjective belief that he “felt a 5 percent increase was a major concession,”
- Mr. Woodke’s statement that he “proposed a market value adjustment of the rent after thirty years,” purportedly when Mr. Brenner’s proposed financing ended, and
- Mr. Woodke’s subjective statement that he “would never have agreed to a rent floor at the end of the first thirty years of the Lease that was equal to the starting rent under that Lease.”

See Br. of Resp’t at 3-4 (citing CP 86), *but see* CP 463-64 (striking these portions of paragraph 3 of the Woodke Declaration). As set forth at pages 22 to 24 of this reply, these portions of the Woodke Declaration are inadmissible and should not be considered by this Court.

Furthermore, Mr. Woodke stated in paragraph 4 of his declaration (which was not stricken) that the Rent-Floor Clause represents a “stipulation that the rent would not go down at that time,” a “fact” that is stated in Brenner Motel’s brief. *See, e.g.*, Br. of Resp’t at 4. This assertion is merely Mr. Woodke’s interpretation of the text of the Rent-Floor Clause, and nothing more. No evidence shows that the parties discussed their understandings of the Rent-Floor Clause. *See infra* at 6-7.

B. The negotiation history of the Lease remains disputed.

In its opening brief, BPO argued that the lease drafts produced in discovery show that BPO’s predecessor-in-interest, Mr. Brenner, proposed the Fair Market Rental Value Provisions, Brenner Motel’s principal, Mr. Woodke, countered with the Rent-Floor Clause, and the parties agreed to that version of the Lease. Br. of Appellant at 8-9, 31-32. This chronology, if true, renders unbelievable that Mr. Brenner would insist on a reset to fair market value after 30 years and, in the very next breath, agree to a rent floor that would prevent him from obtaining the very fair market reset on which he had insisted.

Brenner Motel argues that Mr. Woodke, not Mr. Brenner, proposed the Fair Market Rental Value Provisions, and that Mr. Woodke also proposed the Rent-Floor Clause. Br. of Resp’t at 3-4. This testimony is heavily disputed. First, it relies on the same stricken evidence discussed in

the previous section. *See* Br. of Resp't at 3-4 (citing CP 86, ¶ 3). Second, Brenner Motel's brief incorrectly states that BPO relies on Woodke's testimony to show the lease negotiation chronology. Br. of Resp't at 20. To the contrary, in its statement of facts, BPO relies upon the draft leases themselves. Br. of Appellant at 8-9. In light of the trial court's order striking the inadmissible portions of the Woodke Declaration, the draft leases are the *only* admissible source of information regarding the parties' lease negotiations.

Third, the draft leases provide strong evidence that Mr. Brenner, not Mr. Woodke, proposed the fair market value adjustment. Brenner Motel's assertion that Mr. Woodke proposed both the Fair Market Rental Value Provisions and the Rent-Floor Clause is highly implausible because the fair market value adjustment and the Rent-Floor Clause first appeared in different versions of the draft lease. *Compare* CP 258, ¶ 3(d) (Lease 3, first appearance of fair market value adjustment, without Rent-Floor Clause) *with* CP 279, ¶ 3(d) (Lease 4, first appearance of Rent-Floor Clause). Viewed in the light most favorable to BPO, the draft leases show that different parties proposed the Fair Market Rental Value Provisions and the Rent-Floor Clause, and thus Mr. Brenner proposed the Fair Market Rental Value Provisions.

C. Contrary to Brenner Motel's assertion, Mr. Woodke and Mr. Brenner did not discuss the meaning of the Rent-Floor Clause.

Brenner Motel disputes that Mr. Woodke testified in his deposition that he does not recall discussing the Rent-Floor Clause with Mr. Brenner. Br. of Resp't at 25. The portion of the testimony copied by Brenner Motel, however, omits the remainder of the questions on this topic, where Mr. Woodke admitted he doesn't "recall specific conversations with Mr. Brenner" on any topic. CP 300, ll. 16-17. Prior to the testimony cited by Brenner Motel, Mr. Woodke stated, with respect to the Rent-Floor Clause:

Q. Did you have any discussions with Mr. Brenner about this language?

A. I don't specifically remember. This was something that I requested be inserted into the lease.

CP 299, ll. 16-19. Mr. Woodke then stated that he had discussed "terms and conditions," with Mr. Brenner, and "this is just a part of the terms and conditions of the lease." CP 299, l. 25 - CP 300, l. 2. The testimony on this point concluded with Mr. Woodke's admission as follows:

Q. So other than just it's a request that you made, that's the only discussion that you had with him?

A. I don't remember. As I state, this is 30 or 40 years ago now. I don't remember specifically.

Q. Do you recall explaining to him what your understanding of that language was?

A. It's my opinion that that sentence speaks for itself, and it was a part of the lease.

Q. So do I take that to mean that you did not have a conversation with Mr. Brenner where you explained to him your understanding of this specific language?

A. As I say, I don't remember specific conversations with Mr. Brenner.

CP 300, *ll.* 3-17 (emphasis added). Brenner Motel misleads the Court, therefore, by pointing to testimony that Mr. Woodke essentially recanted in response to the same line of questioning.¹

BPO points out these discrepancies between Brenner Motel's briefing and the record on appeal because they go to critical issues—what extrinsic evidence the trial court could consider and what this extrinsic evidence might show in support of BPO's lease interpretation. The extrinsic evidence that is before this Court supports BPO's reading of the Rent-Floor Clause.

REPLY ARGUMENT

The trial court erred in holding that the Rent-Floor Clause was unambiguous. Summary judgment on a claim related to a contract is inappropriate in two scenarios: where “two or more meanings are reasonable,” *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 362 P.3d 974, 2015 WL 5286176, at *10 (2015), and where interpretation

¹ Brenner Motel's brief additionally discusses BPO and its parent company's property portfolio, their locations, and BPO's parent company's assets and net income. Br. of Resp't at 5-6. This serves no legitimate purpose: Mr. Brenner, an individual, negotiated the Lease, and BPO's predecessor acquired it in 2000. CP 86, ¶ 7.

of a contract “depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.” *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990) (adopting Section 212(2) of the Restatement (Second) of Contracts). Here, the Rent-Floor Clause is inherently ambiguous and susceptible to multiple reasonable meanings. Moreover, the available extrinsic evidence of context, which must be considered by the Court, is susceptible to multiple interpretations, as the factual disputes outlined above confirms.

A. The Rent Floor Clause has no plain meaning on its face.

Brenner Motel properly does not attempt to argue that, standing alone, the Rent-Floor Clause is unambiguous. *See* Br. of Resp’t at 16-17; *see also Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712-13, 334 P.3d 116 (2014) (noting that the court’s first preference is to look to the text to show a “reasonable meaning . . . to determine the parties’ intent”). Indeed, as set forth in BPO’s opening brief, the provision that the rental amount shall not “be less than the figures and formula used for the first three hundred sixty (360) months of this lease” is inherently ambiguous. Although Brenner Motel urges that the “figures and formula” refers to the initial base rental amount of \$5,700, plus five percent year-over year for thirty years, the Lease contains no provision showing a time period at which the figures and formula “for the first three hundred sixty

(360) months of [the Lease]” is to be measured. BPO’s reading of the “figures and formula” term—namely, that “figures” refers to the initial base rent of \$5,700, and that the reference to “formula” means that during each successive year of a rental reset period, the rent will increase by not less than the five percent annual rental escalator used for the first 30 years of the Lease—is at least as plausible, if not more so, than Brenner Motel’s reading.

Brenner Motel’s interpretation of the Rent-Floor Clause sets the rent floor at the rent owed during Year 30 of the Lease—the base rental of \$5,700 plus a yearly increase of 5 percent over 30 years—which would yield a minimum rental amount of \$23,461.98 per month. But as stated in BPO’s opening brief, the Rent-Floor Clause does not say that the rent cannot fall below the amount owed “at the end of” the first 30 years. *See* Br. of Appellant at 26-27. Brenner Motel repeatedly superimposed these words into its interpretation of the Rent-Floor Clause, and it continues to do so on appeal. *See, e.g.*, Br. of Resp’t at 9 (citing CP 67) (“in no event will the rent after the first 360 months be less than the rent at the end of the first 360 months.”).² Brenner Motel’s need to rephrase the Rent-Floor

² Brenner Motel also substitutes a plain language explanation of its proposed reading of the Rent-Floor Clause (“with the stipulation that the rent would not go down” in the 31st year of the Lease), for the language of

Clause to derive Brenner Motel’s proffered meaning shows that the phrase is ambiguous on its face.

Brenner Motel argues that the words “at the end of” are “implicit in the [Rent-Floor Clause] itself.” Br. of Resp’t at 19. The need to imply words in a provision that is supposedly obvious only indicates that the provision is ambiguous. Moreover, Brenner Motel’s explanation highlights the difference between the terms in the Lease that actually used that phrase and the Rent-Floor Clause. As Brenner Motel admits, the Fair Market Rental Value Provisions state that rent will be adjusted after negotiations that must occur prior to “the end of the first 360 months” of the Lease term. Br. of Resp’t at 19; *see also* CP 90-91, ¶ 3(d). The subsequent Rent-Floor Clause does not specify such a time, and Brenner Motel’s argument simply recites its proposed interpretation without sufficiently explaining why such meaning is plain.

The Rent-Floor Clause is facially ambiguous, and it is similar to the types of terms that courts have concluded are ambiguous. *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 remanding for trial, in part, to determine whether considering a tree as

the Rent-Floor Clause. *See* Br. of Resp’t at 4 (citing CP 86, ¶ 4). The actual language used in the Rent-Floor Clause lacks this clarity.

a “fence” or “shrub” was reasonable in light of the overall covenant purposes); *Kries*, 2015 WL 5286176, at *10 (concluding that the term “open or draining wound” in hospital’s policy was ambiguous, and triable question existed as to whether wound was “open wound”); *Marshall v. Thurston County*, 165 Wn. App. 346, 352, 267 P.3d 491 (2011) (concluding that the term “incident” was ambiguous, where term could have reasonably been interpreted to refer to repair work or subsequent injuries).

Because the Rent-Floor Clause does not have a plain meaning, and therefore does not show the parties’ intent standing alone, extrinsic evidence of context is determinative of the parties’ intent, and such evidence favors BPO’s interpretation. Summary judgment was therefore inappropriate. *Viking Bank*, 183 Wn. App. at 711 (noting that “[w]hen a court relies on inferences drawn from extrinsic evidence, interpretation of a contract is a question of fact”) (citing *Berg*, 115 Wn.2d at 667-68).

B. Evidence of the context of the parties’ agreement supports BPO’s interpretation of the Rent-Floor Clause, not Brenner Motel’s.

Extrinsic evidence of context supports BPO’s reading, when considering “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). First, Brenner Motel’s interpretation is unreasonable, and BPO’s is not. Brenner Motel never satisfactorily accounts for the effect of its preferred interpretation of the Rent-Floor Clause in a way that gives any meaning to the Fair Market Rental Value Provisions, which were critically important to Mr. Brenner. Second, the Lease negotiations show that neither Mr. Brenner, nor any reasonable lessee, would have agreed to the Rent-Floor Clause and Fair Market Value Rental Provisions as now interpreted by Brenner Motel. Third, Brenner Motel’s reliance on the consumer pricing index is unavailing, and only supports BPO’s interpretation of the Lease. Fourth, the circumstances showing the formation of the Lease show that Mr. Woodke had only a subjective understanding of the Rent-Floor Clause, and no evidence shows that it was shared by Mr. Brenner.

1. Brenner Motel’s interpretation of the Rent-Floor Clause eviscerates the benefit of the Fair Market Rental Value Provisions, and is therefore unreasonable.

Brenner Motel’s interpretation of the Rent-Floor Clause renders ineffectual the protection of the Fair Market Rental Value Provisions, and thus is unreasonable. *See Berg*, 115 Wn.2d at 666 (reasonableness of parties’ interpretations is one form of context evidence court may

consider). The Lease itself shows the importance of the Fair Market Rental Value Provisions, as their plain import is to establish fair market rental value after the first 30 years. This makes perfect sense: the Fair Market Rental Value Provisions are mandatory, *see* CP 90-91, ¶ 3(d), and require the parties to bring the rental amount back to fair market, a figure that could not be predicted with certainty over 52 years. The trier of fact can also conclude, as set forth previously, that the Fair Market Rental Value Provisions were important to Mr. Brenner, especially, because he proposed them.

Brenner Motel's construction of the Rent-Floor Clause, along with the Fair Market Rental Value Provisions, means that BPO cannot benefit from the Fair Market Rental Value Provisions during their most important application—after 30 years of steady rental increases that substantially outpaced the Property's fair market value. The Fair Market Rental Value Provisions have no purpose but to correct such discrepancies. Under Brenner Motel's construction, the Fair Market Rental Value Provisions do not accomplish their plain purpose of returning the rent to market value, and render those provisions ineffectual—a disfavored result of contractual interpretation. *See GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, 317 P.3d 1074 (2014) (citation omitted). Under BPO's interpretation, however, Brenner Motel continues to benefit from a rent floor and

receives the fair market value of the Property if the rent floor is exceeded. BPO's interpretation, not Brenner Motel's, renders both provisions meaningful.

Brenner Motel argues that it advances the only reasonable interpretation of the Lease and the Rent-Floor Clause, but its arguments depend on the Court viewing the parties' objectives and the surrounding Lease negotiations in a manner favorable to Brenner Motel. A court cannot do so on summary judgment. *See Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). First, Brenner Motel argues that the Rent-Floor Clause as interpreted by BPO would likely not apply because it depends on rent falling below the initial base rent after 30 years. Br. of Resp't at 23. But a minimum rental amount always has some potential benefit to the landlord, even if it does not ultimately apply, because it sets a floor that could serve to increase the rent over fair market value. The Rent-Floor Clause as interpreted by BPO is a safety net that provided that even in the face of a severe economic depression, the rent would never decrease below its initial rent. Brenner Motel's argument simply substitutes a result favorable to Brenner Motel for one favorable to BPO.

Brenner Motel also argues that the Rent-Floor Clause, as interpreted by BPO, renders certain terms meaningless. Br. of Resp't at 18 (arguing that the Rent-Floor Clause interpretation advocated by BPO

addresses only the term “figures,” and does not apply meaning to “formula”). Not so. BPO’s interpretation accounts for the figure of \$5,700 in the base rent (which, along with advanced rent payment, are the only monetary “figures” in the Lease) and applies the “formula” of 5 percent to each year thereafter. It is BPO’s reading—which actually gives effect to the Fair Market Rental Value Provisions and the Rent-Floor Clause—that successfully construes the Rent-Floor Clause in effect with the entire Lease.³ Brenner Motel cannot show that its interpretation is the only reasonable one, and summary judgment should have been denied.

2. The parties’ negotiation, viewed in the light most favorable to BPO, shows that Mr. Brenner did not share Brenner Motel’s interpretation of the Rent-Floor Clause.

Brenner Motel argues that it proposed both the Fair Market Rental Value Provision and the Rent-Floor Clause, and it therefore is reasonable to infer that it received the benefit of both (and BPO received the benefit

³ Even if BPO’s construction of the Rent-Floor Clause causes repetition of the 5 percent rental increase, it would not warrant summary judgment for Brenner Motel. First, the 5 percent rental increase is contained in three separate portions of the Lease, including the Rent-Floor Clause, and so it is already used repetitively. *See* Br. of Appellant at 25-26 (citing CP 90-91, ¶¶ 3(a) and (d)). Second, any presumption is “to be taken as suggestive working rules only” and interpretive rules “will be harmful if . . . 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.” *Berg*, 115 Wn.2d at 664-65 (citing 3 Arthur Linton Corbin, Contracts § 535, at 21 (1960)).

of neither).⁴ But as the Lease negotiation drafts show, this scenario is unlikely and is contested. At least equally plausible, and supported by the Lease drafts, is a scenario where Mr. Brenner proposed the Fair Market Rental Value Provisions and Mr. Woodke countered with the Rent-Floor Clause. *See Berg*, 115 Wn.2d at 667 (court may consider circumstances surrounding the making of the contract if relevant to mutual intent). Viewing the extrinsic evidence in the light most favorable to BPO, the context of the negotiation shows that Mr. Brenner would not have agreed to a Rent-Floor Clause that means what Brenner Motel says it does. To have done so would have negated any benefit to the Fair Market Rental Value Provisions that Mr. Brenner had just proposed. *See infra* 4-5.

Brenner Motel’s arguments to the contrary are unavailing and fail to show—as it must—that its interpretation is the only reasonable reading of the Lease. *See Kries*, 2015 WL 5286176, at *10. Brenner Motel misses the point in arguing that it was entitled to negotiate favorable lease terms. *See Br. of Resp’t* at 22.⁵ BPO does not dispute that a minimum rent

⁴ As stated at pages 2-4 of this reply brief, Brenner Motel relies only on inadmissible evidence for this argument.

⁵ Brenner Motel asserts that BPO “argues that it makes no sense that the lessee would have agreed to a rent floor that can only benefit the landlord,” *Br. of Resp’t* at 20, but this mischaracterizes BPO’s argument. BPO argues that the Fair Market Rental Value Provisions and the Rent-Floor Clause, as interpreted by Brenner Motel, make no sense in the context of the parties’ negotiation. Mr. Brenner would not have proposed

provision by definition benefits a landlord (just as a maximum rent provision by definition benefits a tenant), but the combined effect of the Fair Market Rental Value Provision and the Rent-Floor Clause in this Lease is what is truly at issue. It makes no sense to believe that Mr. Brenner would have insisted on a fair market reset after 30 years, while then allowing it to operate in a manner that could only favor Mr. Woodke (and later Brenner Motel) by allowing the rent to only go up, and not down, after 30 years. Brenner Motel has no admissible evidence that this lease negotiation led to such an anomalous result.

3. Extrinsic evidence related to the consumer price index in 1982 supports BPO, not Brenner Motel.

Brenner Motel relies on the consumer price index in 1981 (the year prior to the Lease execution) to argue that Mr. Woodke believed he had settled for below-market rental increases of 5 percent per year during the first 30 years of the Lease. Br. of Resp't at 24. According to Brenner Motel, “[a]t the time the Lease was signed, the consumer price index was averaging around 10% annually,” had increased over 5 percent every year for the ten years preceding the Lease, and caused the landlord to “fac[e] the prospect of rent significantly below market value after 30 years.” Br.

the Fair Market Rental Value Provision and then accepted the Rent-Floor Clause had he believed that their combined effect could only be to make rent increase after 30 years. Br. of Appellant at 32.

of Resp't at 17. Viewed in proper context, however, the consumer price index supports BPO's interpretation of the Rent-Floor Clause, not Brenner Motel's.

As a threshold matter, there is no admissible evidence beyond speculation that the consumer price index was relevant to the parties' negotiations. *See* CP 462-65 (striking this supposition in the Woodke Declaration). But even if this were pertinent, Brenner Motel relies upon a brief period of unprecedented growth that existed in the three years prior to the Lease execution. From 1979 to 1981, the yearly consumer price index exceeded 10 percent. CP 408. But prior to that time, only one other period in the history of consumer price index calculation experienced similarly large increases, and that was during World War I. CP 406, 408. Moreover, in previous thirty years (the same period in the Lease prior to the first fair market adjustment), the consumer price index averaged 4.7 percent—close to and below the 5 percent yearly rent increase that the parties had agreed to. CP 412. The notion that in 1982, Mr. Woodke—who had previously worked in the U.S. Treasury Department in a role overseeing the national banking industry, CP 289—would view a three-year stretch of annual consumer price index increases exceeding 10 percent as predictive of the next 30 years of inflation is absurd. The more likely inference is that the parties were aware that double-digit inflation

was a historical aberration, and that even 5 percent inflation exceeded the average historical consumer price index to date. *See* CP 412. Brenner Motel’s reliance on the consumer price index is unavailing, and it fails to show that BPO’s interpretation of the Rent-Floor Clause is unreasonable.

4. Mr. Woodke admitted to drafting the Rent-Floor Clause, admitted to being aware of a specific figure to which he interpreted the Rent-Floor Clause, and admitted to not sharing his interpretation with Mr. Brenner.

Brenner Motel does not contest that Mr. Woodke knew the exact rental amount that corresponded to his purported interpretation of the Rent-Floor Clause, CP 311-12, 354-57, drafted the Rent-Floor Clause, *see* CP 299, *ll.* 6-7, and could not recall discussing his belief about what the provision meant with Mr. Brenner. CP 299-300. Taken together, this evidence shows that Mr. Woodke could have ensured a shared understanding of the Rent-Floor Clause into the Lease—by stating a specific number—but he did not. Mr. Woodke’s failure to do so shows the absence of any mutual understanding—at least with respect to Brenner Motel’s current interpretation—of what the Rent-Floor Clause’s actual effect would be in the 31st year of the Lease.

Brenner Motel argues that Mr. Brenner was equally capable of calculating the rent floor at the end of the 30 years as understood by Mr. Woodke. *Br. of Resp’t* at 21 (“If Mr. Woodke could easily calculate the

rent that would be paid in thirty years, so could Mr. Brenner.”) But this argument starts by presuming the correctness of Brenner Motel’s position in the entire litigation: that the terms “figures and formula used for the first three hundred sixty (360) months of [the Lease]” has a meaning that is plain on its face. The only reason Mr. Brenner would have had to calculate what the rent would be during the 30th year of the Lease is if he had shared Mr. Woodke’s subjective view of the Lease. There is no evidence that this was so, and such guesswork would have been avoided if Mr. Woodke—who drafted the provision—had drafted it to state, “In no event shall the rent be less than \$23,461.96,”⁶ as he admittedly was capable of doing.

Because the Rent-Floor Clause is susceptible to multiple reasonable meanings, based upon the text and admissible context, the trial court erred in granting Brenner Motel’s motion for summary judgment. Genuine issues of material fact remain, and the trier of fact will be required to determine the parties’ intent or resolve ambiguities based on canons of construction.

C. The Lease should be construed against Brenner Motel.

⁶ Mr. Woodke could have also drafted the provision to state that “in no event shall the rent be less than the rental amount owed at the end of the 30th year of the Lease.” *See supra* at 9-10.

Under well established law, an ambiguous lease should be construed against the drafter and the lessor. *See Berg*, 115 Wn.2d at 677; *see also Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 420, 869 P.2d 1097 (1994) (construing insurance coverage provisions in a lease against the lessor). Brenner Motel argues that the parties drafted the Lease together, but ignores that Mr. Woodke drafted the Rent-Floor Clause. CP 299, *ll.* 6-7. Because Mr. Woodke drafted the provision at issue, and leases are construed against the drafter to prevent the drafter from “tak[ing] advantage of ambiguities it could have prevented with greater diligence,” *McKasson v. Johnson*, 178 Wn. App. 422, 429-30, 315 P.3d 1138 (2013) (citation omitted), the canon applies fully here.⁷

Even if the parties can be considered to have drafted the Rent-Floor Clause together, the Court will resolve any ambiguity by adopting the reading of the provision that is most reasonable and just, as opposed to the reading that is unreasonable and imprudent. *See Berg*, 115 Wn.2d at 672; *see also* Br. of Resp't at 25-26 (recognizing this principle). Because the Rent-Floor Clause is ambiguous, the trial court may be required to apply the reasonable and just principle. Brenner Motel cannot seriously

⁷ See also Restatement (Second) of Contracts § 206(a) (1981), *cited in McKasson*, 178 Wn. App. at 430 n.6, which notes that the party who drafts a contract (1) is more likely to protect his or her own interests over the other party's interests; and (2) may intentionally leave a term ambiguous, hoping to decide at a later date what meaning the term should hold.

dispute that the rental value of the fair market value is reasonable and just, and a rental value of nearly triple the fair market value is unreasonable and imprudent. *See, e.g., Berg*, 115 Wn.2d at 671-72 (suggesting that a lease construction providing highly favorable result to lessor was unreasonable).

D. Brenner Motel has waived any challenges to the admissibility of Paragraph 3 of the Woodke Declaration.

The trial court properly declined to consider excerpts of Paragraph 3 to the Woodke Declaration submitted with Brenner Motel's motion for summary judgment. *See* CP 463-64 (order striking inadmissible material from the Woodke Declaration). The Woodke Declaration attempted to offer testimony related to hearsay statements by both Mr. Woodke and Mr. Brenner, Mr. Woodke's subjective impressions of his offers under the Lease, and statements made by Mr. Brenner that cannot be considered under the "Dead Man's Statute," RCW 5.60.030. Because Brenner Motel has neither assigned error to these evidentiary rulings nor offered any argument as to why the trial court was incorrect in making them, it has waived the issue on appeal. *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 23-24, 277 P.3d 685 (2012) (respondent must assign error in its response brief to trial court rulings it wishes to challenge, even if it does not seek affirmative relief on appeal); *State v. Kindsvogel*, 149 Wn.2d 477, 480-81, 69 P.3d 870 (2003) (same) (citing RAP 10.3(b)); *see also Jackson*

v. Quality Loan Serv. Corp., 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015) (appellate court will not consider claim of error that is not supported with legal argument in party's brief; failure to argue against trial court's decision on an issue waives any argument on that issue).

It is Brenner Motel that has waived arguments as to the admissibility of the evidence, not BPO, and Brenner Motel's arguments to the contrary are meritless. *See* Br. of Resp't at 28 (citing Br. of Appellant at 30-31, and arguing that BPO has cited to language in paragraph 3 of the Woodke Declaration "in support of its arguments"). First, the citation in BPO's brief relied upon in Brenner Motel's waiver argument is to paragraph 4 of the Woodke Declaration, not paragraph 3, and paragraph 4 was not stricken. Brenner Motel apparently argues that BPO meant to cite to paragraph 3 of the Woodke Declaration, but BPO's citation in the brief matches the record. *See* Br. of Appellant at 30-31 ("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." (emphasis added)); CP 86, ¶ 4 ("The term of the Lease was for 52 years with fixed annual rent, a 5% annual increase in rent, and a market value adjustment of the rent after thirty years with the stipulation that the rent would not go down at that time.") (emphasis added).

Second, even if BPO had cited to the portion it objected to, which

it did not, Brenner Motel's suggestion that a party "relies upon" evidence by merely citing it to show the other party's position is baseless. BPO is entitled to discuss Brenner Motel's arguments before this Court, and Brenner Motel has no authority for the proposition that merely *citing* to one portion of a party's declaration *to show that party's position on an issue* waives objections to that evidence. Third, if BPO relied on any portion of the Woodke Declaration, it relied only upon one clause in paragraph 3, and the vast remainder would remain inadmissible even under Brenner Motel's strained argument. The stricken portions are not before the Court and, even if admissible, would not eliminate any genuine issue of material fact because the stricken portions are disputed.

E. Numerous issues of fact require resolution by the trier of fact.

Interpretation of the ambiguous Rent-Floor Clause will require the trier of fact to weigh evidence, determine witness credibility, and attempt to ascribe a reasonable meaning to the Rent-Floor Clause. *See, e.g., Berg*, 115 Wn.2d at 668 (noting that an issue of fact is presented when contract interpretation "depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence"). Several genuine issues of material fact exist, as only confirmed by Brenner Motel's brief. A trier of fact will need to resolve

key factual disputes including (1) who proposed which Lease drafts, (2) the market conditions that the parties anticipated, including the effect of the consumer price index, if any, and (3) Mr. Woodke's own credibility, as he is the only living party who participated in the Lease negotiations. *See Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). In the absence of a showing of mutual understanding of the Rent-Floor Clause, the trier of fact will apply relevant canons of construction (either construing the provision against Brenner Motel or applying the reasonable and just canon) to determine the effect of the Rent-Floor Clause.

CONCLUSION

For the reasons stated in this reply brief and BPO's opening brief, the Court should reverse the trial court's summary judgment for 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 20th day of January, 2016.

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I hereby certify under penalty of perjury of the laws of the State of Washington that on this 20th day of January, 2016, I caused a true and correct copy of the foregoing document to be served in the manner indicated:

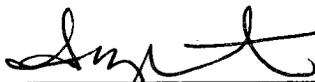
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Suzanne M. Petersen

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