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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO 348288**

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

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CORNERSTONE EQUITIES, LLC, a Washington Limited Liability  
Company, KEITH SCRIBNER and JANE DOE SCRIBNER, husband  
and wife, Plaintiffs-Respondents/Cross-Appellants

v.

MAHLEN INVESTMENTS, INC., a Washington Corporation,  
and CRAIG L. MAHLEN and KAREN I. MAHLEN, husband and wife,  
Defendants-Appellants

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

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**SECOND AMENDED**

**BRIEF OF RESPONDENTS & CROSS-APPELLANT**

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## I

### INTRODUCTION

The dispute between Appellant, Mahlen Investments, Inc<sup>1</sup> and Respondent/Cross-Appellant, Cornerstone Equities, LLC<sup>2</sup> is a run-of-the-mill landlord tenant dispute involving a commercial lease of a building which Mahlen leased to operate his laundry and dry-cleaning business. The central theme of Mahlen's appeal is which party breached, Mahlen or Cornerstone? Cornerstone alleged, and the trial court found, that Mahlen anticipatorily breached. Mahlen, in a cross-complaint, alleged that Cornerstone breached by failing to reasonably perform. Mahlen also alleged that Cornerstone and Scribner committed fraud, claims soundly rejected by the trial court.

On substantial evidence the trial court found that Cornerstone's performance was reasonable under the circumstances and that neither Cornerstone nor Scribner misrepresented any facts. (CL 30 at CP 877) (CL 39 at CP 878) (CL 40 at CP 879). The trial court found that Mahlen breached the contract when Craig Mahlen unequivocally and

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<sup>1</sup> The corporation's performance was guaranteed by Craig and Karen Mahlen, its shareholders

<sup>2</sup> Cornerstone's Managing Member, Keith Scribner ("Scribner") and his wife, Leilani, were also named as defendants.

without providing the notice and opportunity to cure as required by the lease, advised Cornerstone *I'm moving out*. (RP 32;15-22)(RP 75;16-76;6)<sup>3</sup>. Thereafter, Mahlen paid no rent and two months later vacated the premises. While Mahlen focuses on the unsupportable argument that Cornerstone failed to reasonably perform, it ignores the fact that even if this Court were to agree, Mahlen would still be the breaching party because of the failure to provide notice and opportunity to cure, a point seized upon by the trial court. (CL<sup>4</sup> 23 at CP 876).

The trial court correctly found that in consideration of a 50 percent rent concession and the promise by Cornerstone to erect a new pylon sign on Division Street, Mahlen granted Cornerstone an open-ended extension in which to complete a small paving obligation and that under all of the circumstances, Cornerstone acted reasonably in attempting to complete its side of the bargain. (CL 17 at CP 875).

At page 40, Cornerstone incorporates its cross-appeal challenging the award of half rent after Mahlen's breach rather than full rent as stated in the lease.

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<sup>3</sup> Later Mahlen attempted to change his testimony to "if things don't change I'm going to move". However, after forced to consult his deposition, Mahlen admitted that he had said, "I don't see anything happening and I'm moving out". (RP 213;7-12).

<sup>4</sup> CL refers to Conclusion of Law

## II

### STATEMENT OF THE CASE

During lease negotiations Mahlen and Scribner discussed the *possibility* of a drive-thru. (RP 93;5-8). According to Mahlen, Scribner told him that he *didn't see a problem*. (RP 93;5-8). Believing that the site had the *possibility* of a drive-thru, Mahlen drafted and signed a letter of intent. (RP 222; 17-24); (RP 100; 5-9).

The Parties executed a written lease on September 9, 2013. (Plts. Ex 1). The lease obligated Cornerstone to perform nine items listed on Schedule "C". (RP 42;23- 43;1) (Plts. Ex 1, p. 44). Mahlen was obligated to perform the work on Schedule "D" (RP 43;2-4) (RP 44;12-45;2) (Plts. Ex 1, p. 45). One of the nine items on Schedule "C" required Cornerstone to pave a small strip of land, 12 feet by 45 feet, (hereinafter "the strip"). The strip was to be used as part of a drive-thru to allow patrons to drop-off and pick-up laundry. (RP 252; 17-25); (RP 108;9-11).

Mahlen took possession on October 18, 2013. (RP 40;12-41;6) (FF 87 at CP 869)<sup>5</sup>. Schedule "C" obligated Cornerstone to pave the strip within 90 days of Mahlen having taken possession. Accordingly,

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<sup>5</sup> FF stands for Finding of Fact

Cornerstone originally had until January 16, 2014 to complete the paving. (FF 47 at CP 865). Of the nine items listed on Schedule "C", eight were completed by the third week of October, 2013. (RP 43;5-18) (RP 39;18-25) (FF 48 at CP 865). Mahlen received a Certificate of Occupancy during the last week of October and opened for business on November 4, 2013. (RP 39;25- 40;5).

In order to pave the strip it was necessary to excavate the area. During the excavation the city temporarily stopped Cornerstone's paving effort because the excavator had not obtained the permit necessary to grade near the property line and to encroach onto city property. (RP 266; 23-268; 9) (FF 55 at CP 866). In addition, the city also required a grading plan before it would issue a grading permit. (FF 56 at CP 866).

Cornerstone immediately hired Metro Engineering to prepare the grading plan. (269; 6-9) (FF 57 at CP 866). Metro began working on the plan on Nov 12, 2013. (RP 174; 20-23). (Plts. Ex 8). The plan was submitted to the city on December 31, 2013 with a \$45 application fee. (RP 175;7- 176; 12). When the city requested changes Metro resubmitted the modified plan on January 10, 2014. (RP 176;6-16). The city approved the grading permit on Feb 10, 2014. (RP 177;6-17). (Plts. Ex 76). The permit expired August 9, 2014 when Cornerstone allowed

it to lapse after Mahlen advised that he was vacating the premises. (RP 271;14-20).

**During the permitting process to allow the grading, Scribner learned that Cornerstone would need to vacate the alley at its west property line in order to have the necessary 12 feet for the drive-thru**

Scribner thought there was twelve feet between the building and the west property line which abutted an alley. (RP 278;4-7). After the November 4 work stoppage Scribner learned that there was only 10 feet. (RP 278;23) (FF 59 at CP 866). Accordingly, Scribner realized that in order to pave 12 feet Cornerstone would have to apply to the city for vacation of the alley to provide the additional two feet for the drive-thru. (FF 60 at CP 867 & FF 89 at CP 870). Scribner had been informed by his architect and engineer that in order to obtain vacation of the alley he would need to fill out an application. (RP 281; 10). Scribner spoke first with a receptionist at the city. (RP 281; 1). Next he spoke to a man in engineering about the vacation process. (RP 282;20). He learned that he needed a list of all owners of property adjoining the ally. (RP 282; 25- 283; 2). He was told that if he wanted to insure a smooth process he needed to reach out and see if everyone was willing to sign an application to vacate. (RP 283;14-17).

Scribner was told by the City that he needed 100% participation if wanted the city council to look favorably and did not want to have a problem. (RP 414;8-14). Scribner and Mahlen discussed the alley vacation in January, 2014. (RP 67;22- 68;3) (RP 291; 16). Scribner told Mahlen that he would need to get in touch with all of the property owners and get them to sign off. (RP 114;2-4); (RP 390;18-22).

Scribner contacted Stewart Title Company in January and ordered a list of all property owners and a map of the parcels. (RP 289;1-8) (FF at CP 867). He received the information on January 23, 2014. (RP 290; 1-3) (Plts. Ex 24).

**Mahlen had been in possession for only one month when it was granted its first lease modification**

Being forced to wait for the city to issue a grading permit, it became evident that the paving would not take place in November as Scribner had planned. Not knowing how long it would take to obtain the permit, Mahlen requested a 10 percent rent reduction as compensation for the delay. (RP 65;17-23) (RP 276; 19- 277; 17). Cornerstone agreed to Mahlen's request on November 20, 2013 when Rose Krug, Scribner's agent, emailed Mahlen advising that the rent would be reduced by 10 percent "until the drive-thru is completed...". (FF 63 at CP 867). The email did not contain a completion date for the paving. (FF 64; CP

867).<sup>6</sup> Cornerstone's November 20, 2013 email reducing the rent constituted a valid modification of the Lease. (CL 8 at CP 872)<sup>7</sup>.

**To compensate for delay in paving the drive-thru, Cornerstone granted Mahlen a 50 percent rent reduction until paving was completed and Mahlen granted Cornerstone an open-ended extension of time to complete the paving**

At the end of January or beginning of February, Mahlen began to negotiate for a larger rent reduction to compensate for the fact that the strip had not been paved by January 16, 2014. (RP 68;6-8) (FF 65 at CP 867). Scribner offered another small rent reduction. (RP 70;16-20). Mahlen, however, wanted the rent cut in half and a new pylon sign erected on Division Street. (RP 68;14-21). Scribner eventually agreed to Mahlen's demands. (RP 69;24- 70;1). He also agreed to install a temporary pylon sign and to pay for Mahlen's placard that would go onto the new pylon sign when erected. (RP 69;16-23) (FF 66 at CP 867) (also see Plts. Ex 43).

Scribner drafted an addendum and sent it to Mahlen. (RP 298; 12) (Plts. Ex 43). The addendum did not contain a date by when Cornerstone would be required to have completed the paving and have installed the sign. Mahlen, himself, being an experienced owner and

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<sup>6</sup> This November agreement will be referred to as the "Modification".

<sup>7</sup> CL stands for Conclusion of Law

lessor of commercial property, wanted those dates stated. (RP 199;10-22) (RP 204;4-8) (RP 71; 6- 72; 6); (RP 301; 1) (FF 67 at CP 867) (CL 2 at CP 871). Scribner refused, stating that he couldn't provide a date because he didn't know when the paving would be completed. (RP 72;10-11) (RP 301;1-5).

Scribner redrafted the addendum to provide that the 50 percent rent reduction would continue *until* both the strip of paving was completed and until the new pylon sign was installed. (RP 72;12-19). When Mahlen was presented with the modified addendum he again asked that a completion date be included. (RP 72;21-27); (RT 302;24-303;6). Scribner again refused. (RP 72;4-10). The parties signed the addendum on February 27, 2014 allowing Cornerstone an *open-ended extension*. (RP 73;4-5). (also see Plts. Ex 5). The trial court concluded that both parties had an equal opportunity to negotiate the terms and conditions of the Addendum. (CL 10 at CP 872).

**The first step in vacating an alley is to fill out an application provided by City of Spokane. They were unavailable for six to ten months beginning at the time that Scribner began his search for one**

According to the testimony of Eric Johnson, a city engineer in the department which deals with street vacations, in late 2013 and early 2014 there was a *six to ten month period when vacation applications*

*were unavailable* in the third floor engineering department. The city had run out and it was getting ready to reprint them but needed to list new departments on the applications. *The city had not printed applications for a while.* (RP 184;2-185;2).

Scribner's effort to locate an application had begun with a phone call to the city in January 2014. (RP 281; 5 - 282; 2). A female receptionist had promised to mail one but it never came. (RP 281;7-24). A couple of weeks later, Scribner again called the city, this time speaking to a gentleman. (RP 282;13).

With Mahlens execution of the Addendum at the very end of February, Scribner's efforts to obtain an application began anew in March. Again he went down to the city offices. A receptionist pointed Scribner to the rack where various applications were usually kept. (RP 352;8-14). But there were no applications. She then looked at rack behind counter—nothing there either. (RP 352;6- 353;8). She then said that she would pull one up online. She tried but failed. (RP 353;1-8). She told Scribner to come back when someone else would be available to help him. (RP 353;5-8). Scribner returned home and tried to find an application online but couldn't. (RP 353;24- 354;6).

Scribner called the city again later in March or April. He couldn't get anyone to provide an application. Finally his architect, Martin Hill,

provided him with an old application he had been able to find. (RP 350;15-24).

During the time period that Scribner was searching for an applicaiton Johnson had heard that applications were available on line. However, when he went on line to try and print one *even he couldn't find one*. (RP 185; 5-10).

Johnson also provided the court with the procedure involved in obtaining vacations. Once the application is filled out and the fee is paid, it is routed to 19 city employees and five utilities. Eldon Brown, chief engineer then reviews all the responses and recommended conditions. A report is prepared for the city council after which the site is posted and notice is mailed to everyone within 300 feet of the street being vacated. A hearing is then held about 30 days later. (RP 186;9-190;22). The process can take up to 6 months but varies. (RP 186;19-187;1).

**Cornerstone's efforts to gain consent of adjacent property owners**

Scribner tried to reach his neighbor, Harlan Knobel, by phone once or twice in Dec, 2013 but failed. (RP 285; 16-20). Scribner left messages. (RP 285; 25-286; 1). Scribner finally reached Knobel's receptionist. Next, he spoke to a male he believed to be Knobel's son.

(RP 286; 1-4). By December 19, 2013, Scribner had talked to Knobel's attorney by phone. (RP 331;9-14). Scribner was able to talk to Knobel or his attorney in January or February of 2014 at which time he learned that Knobel was not opposed to vacating the alley. (RP 287; 1-8). In fact, Scribner talked to Knobel two or three times regarding alley vacation. (RP 287; 19-23). He spoke to Knobel or his attorney again in February. (RP 288;4). Knobel's concern was his fire exit. He didn't mind if Cornerstone bought the alley as long as he received an easement for his fire escape. (RP 287;9-13).

In March, Scribner contacted the fire department to find out what was required. (RP 357;17- 358;8) (FF 96 at CP 870). He was told that 40 inches would be needed. Scribner then went to the site and measured the distance for Knobel. (RP 358;18-25)

Scribner also left messages for other neighbors in March, leaving messages. (RP 354;11- 355;5). A lot of the properties were owned by LLCs and trusts and no phone numbers were provided. RP 356;13-21). Finally, in March or April of 2014, Scribner learned that he could likely obtain a partial vacation. (RP 294; 17-25) (RP 304;13- 305;3). He informed Mahlen of the development. (RP 306;1-3).

**In June, without complying with the notice requirements of the lease, Mahlen called Scribner and unequivocally informed him that he was moving out**

Article 37.1 of the Lease required that in the event of a default on the part of Cornerstone, Mahlen was obligated to provide notice specifying the nature of such default and to allow Cornerstone 30 days to cure. The Article also required that if the nature of the default was such that it could not be cured within 30 days that Cornerstone have such additional time as may be *reasonably necessary* to complete performance. Article 22 of the lease required that all notices, requests and demands be in writing. (Plts. Ex 1).

In June of 2014, without issuing any notice, written or verbal, Mahlen called Scribner and advised,

***I have found out that the drive-thru will never get paved and I'm moving out***<sup>8</sup>

(RP 32;15-22) (RP 75;16- 76;6). Mahlen then simply hung up. (RP 325;11-22). Scribner believed Mahlen was serious. (RP 326;8-16). Based on that phone call, Scribner placed his efforts to vacate the alley on hold. (RP 325;23- 326;7). In his trial brief, Mahlen stipulates that in

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<sup>8</sup> Later he attempted to change his testimony to “if things don’t change I’m going to move”. However, after consulting his deposition he admitted that he had said, “I don’t see anything happening and I’m moving out. (RP 213;7-12).

June of 2014, he gave “verbal notice” that he was terminating the lease. (CP Doc #96; Def’s Trial Brief 8;15-18; Appendix “A”)<sup>9</sup>.

When July came, Mahlen failed to pay rent. (RP 326;17-18). On July 16, 2014 Cornerstone sent Mahlen a default notice. (RP 134;18-24). (Plts. Ex 25). Mahlen vacated the premises on August 31, 2014. (RP 326;19-21).

Prior to the June phone call, Mahlen had never voiced any complaint about the speed with which things were progressing. (RP 306; 17- 307; 7). An August 1 letter from Mahlen’s attorney was the very first *written* notice Scribner received indicating that Mahlen was unhappy. (RP 307;8-11). Between execution of the Addendum and the June phone call, Scribner had twice seen Mahlen in person. (RP 307;22-24). Mahlen expressed no sense of urgency or anger. (RP 307;25-308;8). Scribner actually believed that the sign was more important to Mahlen than the paving. (RP 309;4-9).

Scribner sought engineering for the sign in March, 2014 and received plans and specifications on April 7. (Plts. Ex 13). Cornerstone received bids from Baldwin signs in March. (RP 318;13- 322;1). (Plts.

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<sup>9</sup> Cornerstone obtained leave to supplement the record by adding Mahlen’s trial brief to the Clerk’s Papers. It will be document 96 but the designation to the page number of CP has not been designated.

Exs 17, 50, 52). It also received a bid from Pro Sign, (Plts. Ex 19), from Sign Corp., (Plts. Ex 21) and Signs Now, (Plts. Ex 51).

### III

#### ARGUMENT

##### Legal Issue Number 1

##### Can Cornerstone Be Excused From Performing Its Obligations Based Upon Unforeseen Obstacles?

##### Introduction

Legal Issue Number 1 asks if unforeseen obstacles legally excused Cornerstone's performance? The answer is no. In fact, at no time did Cornerstone ask the trial court to excuse performance due to unforeseen obstacles. Nor did the trial court do so. The trial court actually found that it was Mahlen's material breach that excused Cornerstone's further performance. (CL 31 at CP 877).

Mahlen's opening brief is organized in a manner meant to address *excuse of performance* as Legal Issue Number 1 and whether Cornerstone's performance was *reasonable under the circumstances* as Legal Issue Number 2. A good deal of Mahlen's argument contained within Issue Number 1 might more effectively have been argued under Number 2. Cornerstone will attempt to limit its argument in this section to Mahlen's *excuse of performance* argument and provide complete

analysis pertaining of why Cornerstone's actions were *reasonable under the circumstances* in response to, Legal Issue Number 2.

### **Argument**

The trial court did not apply a tort analysis to this contract case as Mahlen argues. Cornerstone didn't argue that it should be relieved of its contractual duties because performance became more difficult or expensive than originally anticipated. Mahlen argues that Article 20 of the lease should not have been employed---it wasn't<sup>10</sup>. Mahlen also argues that contract principals of *substantial performance* should not have been employed---they weren't. Such arguments are intended to divert attention from the trial court's findings that Cornerstone's efforts were reasonable up through the time of Mahlen's material breach.

### **Mahlen's attempt to use the cancellation provision contained at Article 5.3 of the lease is just another red-herring**

Article 5.3 of the lease provides;

**Cancellation.** If for any reason whatsoever Landlord has not delivered the Premises to Tenant with Landlord's Work substantially complete on or before December 1<sup>st</sup> 2013, and as Tenant's sole and exclusive remedy, this Lease shall be deemed automatically cancelled, and shall have no force or effect, and Landlord shall return to Tenant any prepaid rent and other sums paid to Landlord upon execution and delivery of this Lease; subject, however, to Landlord's right to apply

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<sup>10</sup> Article 20 of the lease allows performance to be excused for a period equaling the length of a delay caused by acts of the other party, the elements, war, riot, labor disputes, etc.

the Security Deposit as provided in **Paragraph 5.4** below if Tenant shall have received occupancy of the Premises for any reason.

The Lease obligated Cornerstone to complete nine discrete items of work at the leased premises. (RP 42;23- 43;1) (Plts Ex 1, p. 44). Eight of the nine were completed within the time specified in the lease. (RP 43;5-18) (FF 48 at CP 865). The final item of work, paving the strip, is what is at issue.

Section 5.3 of The Lease allowed Mahlen to cancel the lease if Cornerstone failed to substantially complete its work by December 1, 2013. Ignored by Mahlen is the fact that Section 5.3 did not even apply to paving of the strip. It applied only to the eight items that were timely completed. (RP 44;8- 46;7). The reason it didn't apply to paving of the strip is spelled out at item #8 of Exhibit "C" which provides;

**Pave or asphalt around west side of building approximately 12 feet wide from the front of building to rear of building (This item cannot be completed [by] possession date but will be completed within 90 days after the possession date)**

Under the lease, Cornerstone was given until January 16, 2014 to pave the strip. Obviously, the December 1, 2013 date specified in Article 5.3 would come and go before then. Puzzling also is Mahlen's contention that the cancellation clause stated in Section 5.3 was somehow "resurrected" when the parties executed the Addendum.

Mahlen didn't even attempt to explain how the open-ended extension of time to complete the paving granted in February of 2014 could possibly be subject to a December 1, 2013 deadline. The argument is just silly.

## **Legal Issue Number 2**

### **Did Cornerstone Make Reasonable Progress Toward Performance?**

#### **Standard of Review**

This Court examines the trial court's decision by asking whether substantial evidence supports the findings of fact and whether those findings support the trial court's conclusions of law. *Casterline v. Roberts*, 168 Wn.App. 376, 381, 284 P.3d 743 (2012). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). This Court reviews the trial court's conclusions of law pertaining to contract interpretation de novo. *See Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn.App. 803, 814, 225 P.3d 280 (2009).

Mahlen's attack on the trial court's decision is primarily that its finding of reasonable performance is not supported by substantial evidence. Missing from Mahlen's brief is a recitation of all of the evidence considered by the trial court in making its findings. How is

this Court expected to make a finding that substantial evidence did not support the trial court's findings if Mahlen only points to evidence favoring Mahlen?

Mahlen also seems unclear on the applicable law. Mahlen cited *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn.App. 551, 558, 519 P.2d 278 (1974) for the proposition that determination of *reasonable time* is usually a mixed question of law and fact. However, in *Jarstad* there actually was a stated time for performance. Moreover, *Jarstad* involved reasonable time for notice of *default* rather than reasonable performance under the circumstances.

In deciding *Jarstad*, the Court cited to *Kasey v. Suburban Gas Heat of Kennewick, Inc.*, 60 Wn.2d 468, 374 P.2d 549 (1962), a case decided in the context of timely notice of breach under the Uniform Sales Act, RCW 63.04.500, not a common law contract. Regardless, the *Jarstad* Court found that whether the notice was timely was a question of fact, noting;

*What constitutes notice within a reasonable time,' as provided in Rem.Rev.Stat. § 5836-49, supra [RCW 63.04.500], is usually a mixed question of law and fact, dependent upon a variety of facts and circumstances of the particular case, generally resolving itself into a question of fact to be determined by the jury, upon proper instructions by the court.*

(*Id* at 474).

Clearly, in this case now under review, whether or not Cornerstone acted reasonably under the circumstances is a question of fact which was resolved by the trial court based upon substantial evidence.

**Where the contract contains no date by when performance must be rendered performance must be completed within a reasonable time**

When no time for performance is stated, the performance must be rendered within a reasonable time. *Birkenwald Distributing Co. v Heublein, Inc.*, 55 Wn. App. 1, 6, 776 P.2d 721 (1989). Without an established completion date, the Court must consider whether the actions of Plaintiff were reasonable given the circumstances. *Lano v. Osberg*, 67 Wn.2d 659, 663, 409 P.2d 466 (1965).

At page 21 of its Opening Brief, Mahlen contends that the Court misread or failed to understand *Lano*. Mahlen claims that *Lano* does not, as the trial court indicated, provide that “a contract without a completion date forces the Court to consider whether the actions of Plaintiff were reasonable given the circumstances. However, the trial court was absolutely correct in its citation of *Lano* which specifically states;

***The contract did not specify a completion date; the law, therefore, supplies the requirement that plaintiffs' progress must be reasonable under the circumstances.* (at 663).**

Having misstated the law, Mahlen then takes an even larger leap in the wrong direction by arguing that the law required the Court to base its decision on what Cornerstone *accomplished*. However, the word *accomplished* is nowhere to be found in *Lano*. The reasonable progress test does not depend upon having accomplished any part of the contract, only that in progressing, the performing party is acting reasonably under all of the circumstances. This is obviously a question of fact.

In determining whether a party has performed reasonably under the circumstances the court looks to the nature of the contract, the position of the parties, their intent, and the circumstances surrounding performance. *Pepper & Tanner, Inc. v. Kedo, Inc.*, 13 Wn. App. 433, 435, 535 P.2d 857 (1975). If performance is not rendered within a time that is reasonable under the circumstances the other party may terminate following a reasonable time<sup>11</sup>. *Birkenwald Distributing Co. v Heublein, Inc.*, 55 Wn. App. 1, 6, 776 P.2d 721 (1989).

**What were the circumstances surrounding Cornerstone's actions?**

Five key circumstances which informed the trial court's determination that Cornerstone acted reasonably are;

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<sup>11</sup> Of course, in this case, Mahlen was still obligated to provide the written notice and opportunity to cure as mandated by Article 37.1 of the lease.

1. Mahlen negotiated a bargain where his rent was reduced a full 50 percent in consideration for granting Cornerstone an open-ended extension in which to complete the alley vacation and paving.

2. Mahlen was very experienced with commercial property leasing, having previously rented property as a commercial landlord in other states and, at the time of the Amendment, owning a 46,000 square foot business park in Indiana. (RP 199;10- 22) (RP 204;4-8).

3. Mahlen provided no notice or other indication that he was unhappy with the progress Cornerstone was making prior to informing Scribner that he was moving out and hanging up the phone. (RP 307;22-308;8).

4. Cornerstone was acting reasonably and in good faith and had only been working on the vacation for around 90 days when Mahlen decided to vacate. (CL 17 at CP 875). Cornerstone was making progress. (CL 49 at CP 882).

5. The vacation applications were not even available during the time Scribner was attempting to locate one. (RP 184;2-185;2).

**Omission of a date of completion was the result of negotiation**

Scribner drafted an Addendum and sent it to Mahlen. (RP 298; 12). The Addendum did not contain a date by when Cornerstone had to have the paving and sign completed. Mahlen wanted completion dates

incorporated into the addendum. (RP 71; 6- 72; 6); (RP 301; 1). Scribner refused, stating that he couldn't provide dates because he didn't know when he would be finished. (RP 72;10-11); (RP 301;1-5). Scribner redrafted the Addendum to include that the one half rent reduction would continue until both the strip paved and until the new pylon sign was installed. (RP 72;12-19). When presented with the modified Addendum Mahlen again asked that completion dates be included. (RP 72;21-27); (RP 302;24- 303;6). Again Scribner refused. (RP 72;4-10).

The parties signed the addendum on February 27, 2014 allowing Cornerstone an *open-ended extension*. (RP 73;4-5) (Plts. Ex 5). Mahlen was himself, a very experienced commercial property landlord. (RP 199;10- 22) (RP 204;4-8). The trial court concluded that both parties had an equal opportunity to negotiate the terms and conditions of the Addendum. (CL 10 at CP 872).

#### **Cornerstone's efforts after execution of the Addendum**

With the execution of the Addendum, Scribner's efforts to obtain an application began anew. He went to the city offices in March. A receptionist pointed Scribner to the rack where various applications were kept. (RP 352;8-14). But there were no applications. She then looked at rack behind counter—nothing there either. (RP 352;6- 353;8). She

then said that she would pull one up online. She tried but failed. (RP 353;1-8). She told Scribner to come back when someone else would be available to help him. (RP 353;5-8). Scribner returned home and tried to find an application online but couldn't. (RP 353;24- 354;6). Scribner spoke once more to Knoble or his attorney. (RP 288;4).

In conjunction with efforts to vacate the alley, after the Addendum was executed, Cornerstone engaged in a telephone conversation with the an official of the Spokane City Fire Department to inquire as to the requirements for exiting the building directly. (FF 96 at CP 870). It was in March that Scribner learned from the fire department that 40 inches would be required for Knoble's fire exit. (RP 357;17-358;8). Scribner then went to the site and measured the distance for Knobel. (RP 358;18-25)

Still seeking the application, Scribner again called the city in March or April of 2014. He still couldn't get anyone to provide an application. Finally his architect, Martin Hill, provided Scribner with an old application he was able to locate. (RP 350;15-24).

In addition to Knobel, Scribner called other neighbors in March, leaving messages. (RP 354;11- 355;5). A lot of the properties were owned by LLCs and trusts and no phone numbers were provided. (RP 356;13-21). The Court determined that in conjunction with efforts to

vacate the alley after the Addendum was executed Cornerstone contacted various neighbors seeking to obtain their thoughts on the vacation. (FF 97 at CP 870).

In March or April of 2014 Scribner informed Mahlen of his progress, principally that he may be able to proceed with only a partial vacation. (RP 304;13- 306;1-3). At the same time as he was pursuing the alley vacation with neighbors and the city, Scribner was working towards obtaining the pylon sign which he believed was more important to Mahlen than the paving. (RP 309;4-9). He sought engineering for the sign in March, 2014 and received plans and specifications on April 7. (Plts. Ex 13). Cornerstone received bids from Baldwin signs in March. (RP 318;13- 322;1). Bids were obtained from Pro Sign, (Plts. Ex 19), from Sign Corp., (Plts. Ex 21) and from Signs Now, (Plts Ex 51). Between February 2014 and April 2014, Mr. Scribner obtained structural calculations from Inland Northwest Engineering, Inc. (FF 58 at CP 866).

There are two additional circumstances that bear heavily on the issue of whether what Scribner was doing after the Addendum was reasonable. First, it came to light during the trial that the vacation applications were not readily available during the time Scribner was

attempting to locate one. This came from the testimony of Eric Johnson, a city engineer.

Johnson worked in the part of the city engineering department that deals with street vacations. (RP 182;22- 183;6). Johnson admitted that in late 2013 and early 2014 there was a *six to ten month period when vacation applications were unavailable* in the third floor engineering department. The city had run out and it was getting ready to reprint them but needed to list new departments on the applications. *The city had not printed applications for a while.* (RP 184;2-185;2). During that time frame, Johnson had heard that applications were available on line but when he had gone on line to try and print one *even he couldn't find them.* (RP 184;5-10). This coincides exactly with the period of time in which Scribner's disparate efforts to locate an application were for naught.

The second circumstance of particular importance is that Mahlen was not pushing to get the paving completed or the sign installed. Between execution of the addendum and the June phone call, Scribner had twice seen Mahlen in person. (RP 307;22-24). Mahlen expressed no sense of urgency or anger. (RP 307;25- 308;8). As noted, Scribner actually believed that the sign was more important to Mahlen than the paving. (RP 309;4-9). Cornerstone purchased a placard and temporary

pylon sign for Mahlen. (RP 323;17-21) (RP 70;2-6). With Mahlen not providing any notice, verbal or written, to give Scribner any indication that he was not satisfied with Scribner's progress it was reasonable for Scribner to believe that Mahlen approved the progress being made.

In June of 2014, Mahlen gave Scribner verbal notice via telephone that Mahlen would be terminating the Lease due to lack of progress on the drive-thru and the pylon signage. (FF 68 at CP 867). The trial court, however, found that Cornerstone made reasonable progress. (CL 49 at CP 882). An August 1 letter from Mahlen's attorney was the very first *written* notice Scribner received indicating that Mahlen was unhappy. (RP 307;8-11).

### **Legal Issue Number 3**

#### **Did Cornerstone Materially Breach The Lease?**

Legal Issue Number 3 is sufficiently answered by Cornerstone's response to Legal Issue Number 2. The answer is no. The trial court specifically found that Cornerstone's actions between execution of the Addendum and Mahlen's June, 2014 material breach were reasonable under the circumstances. (CL 30 at CP 877) (CL 39 at CP 878) (CL 40 at CP 879). In response to Legal Issue Number 2, Cornerstone explained what those circumstances were, of what its performance consisted and the state of the law regarding performance where there is

no set time for completion. Whether or not Cornerstone's performance was legally sufficient is a question of fact.

The trial court found that Cornerstone had adequately performed under all of the circumstances. (CL 14 at CP 874). Argument and recitation of alternative facts upon which the trial court could possibly have based its conclusion does not meet the burden of showing that the trial court's finding was not based upon substantial evidence. The trial court concluded that Cornerstone established that it was operating in good faith and reasonably. (CL 17 at CP 875).

As between Cornerstone and Mahlen, there can only be one breaching party. The trial court had no trouble coming to the conclusion that Cornerstone did not breach the lease. (CL at CP 875). In response to Legal Issue Number 5, Cornerstone explains how Mahlen breached which further explains why the answer to this Legal Issue Number 3 is No.

#### **Legal Issue Number 4**

##### **Did Cornerstone Commit Misrepresentation?**

After hearing all of the evidence, the trial court concluded that *Mr. Scribner never provided false information to the Defendants.* (CL 39 at CP 878). Further, Cornerstone's *representations were in accord with the facts.* (CL 30 at CP 877). Those conclusions were amply supported

by the facts. Defendant failed to establish that Cornerstone is liable for negligent misrepresentation or intentional misrepresentation either at inducement of the lease or at the time of either the Modification or the Addendum (CL 40 at CP 879).

**Negligent Misrepresentation**

First, neither the counterclaim nor the third party complaint even allege a cause of action for *negligent* misrepresentation. Moreover, Mahlen failed to establish any of the required elements of negligent misrepresentation. In effect, all Mahlen really does in this section is quibble with the trial court's findings, all supported by the evidence.

As Mahlen noted in its opening brief, to prove negligent misrepresentation it was required to establish the following facts;

1. That Scribner provided *false* information to *guide Mahlen in its business transaction*
2. That Scribner *knew or should have known* that the information was supplied to guide Mahlen in a business transaction
3. That *Scribner was negligent* in obtaining or communicating the false information
4. That Mahlen *relied* upon the false information
5. That such reliance was *justified*, and
6. That the false information was the *proximate cause* of Mahlen's damages.

*Lawyers Title Ins. Corp v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002).

The trial court found that Scribner simply *underestimated* the substantial amount of work involved. Without citing any authority, Mahlen contends this equates to negligence. (AOB<sup>12</sup> at 38). Obviously, the trial court did not intend to conflate the two terms as evidenced by the conclusion that there was no negligent misrepresentation. (CL 40 at CP 879).

Missing also is any evidence or even argument that Scribner knew or should have known that he was supplying information in order *to guide Mahlen in the business transaction*. Scribner and Mahlen were both experienced commercial landlords operating at arm's length, on opposite sides of a commercial real estate transaction. (RP 199;10- 22) (RP 204;4-8). Mahlen admitted at trial that he was not basing his decision on Scribner's thoughts. (RP 204; 17-25).

Nor was it established that any information communicated by Scribner was the proximate cause of damage sustained by Mahlen. Any loss sustained by Mahlen was clearly the result of Mahlen's breach, not its reliance on advice from Scribner.

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<sup>12</sup> AOB stands for Appellant's Opening Brief

Mahlen's own testimony about his discussions with Scribner lays this issue to rest. He testified that he and Scribner only discussed the *possibility* of a drive-thru, (RP 93; 5-8), and that Scribner *didn't see a problem with a drive-thru*. (RP 93; 5-8). Mahlen further testified that he *thought* 1101 N Division had a *possibility* of having a drive-thru. (RP 222; 17-24). Mahlen's testimony in this regard applies equally to intentional misrepresentation.

### **Intentional Misrepresentation**

The burden on Mahlen is clear and cogent evidence. *In re Marriage of Angelo*, 142 Wn.App. 622, 648, 175 P.3d 1096 (2008). Mahlen cites *West Coast, Inc. v Snohomish County*, 112 Wn.App. 200, 206, 48 P.2d 997 (2002) for the elements necessary to establish intentional misrepresentation.

1. Scribner made a representation of an existing fact.
2. the fact was material.
3. the representation was false.
4. Scribner knew the representation was false.
5. Scribner intended that Mahlen act on the representation.
6. Mahlen was ignorant of the falsity of the representation.
7. Mahlen relied on the false representation.
8. Mahlen had a right to rely.

9. Mahlen sustained damage as a result of its reliance.

Absent clear and cogent evidence of each of those nine elements a trial court's award of damages based on common law fraud claims is unsupported and will be vacated and reversed. (*Id* at 648).

First, there is no representation of an *existing* fact. The parties discussed Cornerstone paving the strip at a point in the future. Mahlen tries to satisfy the *existing fact* requirement by arguing that Scribner *must have known* that he only had 10 feet available instead of 12 because his architect had drawn a plot plan that showed 10 feet between the building and the alley. However, Scribner did not represent to Mahlen that there was 12 feet available and there is no evidence that Scribner noticed the 10 foot measurement, that it was ever pointed out to him by his architect or that he should have noticed it.

In the end, Mahlen is left to rely upon the testimony of Patty Kels to support its argument regarding intentional misrepresentation. As shown below, that testimony in no way establishes intentional misrepresentation. The simple truth here is that Mahlen does not properly represent Kel's testimony and even if he had, Martin Hill's testimony directly contradicts Kels and the trial court is the arbiter of credibility.

### **Testimony of Patty Kels**

Mahlen argues that Cornerstone had ruled out pursuit of the drive-thru prior to entering into the Addendum. (AOB at p. 41). Mahlen contends that Cornerstone's architect, Martin Hill, *made it clear* to Patty Kels, a traffic engineer assistant with City of Spokane, that Cornerstone would not pursue the drive-thru. (AOB at p. 40 citing RP 411; 20-412; 9). Mahlen's representation to this Court that "Martin Hill *made it clear* to Kels that Cornerstone would not pursue the drive-thru" is not true.

The truth is that Kels testified that she and Mr. Martin talked and *she came away from the conversation assuming* that Cornerstone was not going to pursue a drive-thru because after she explained the problems and cost to Hill he didn't pursue it further. There just was no further conversation between Kels and Hill on the subject. There certainly was no statement by Hill that the drive-thru would not happen. (RP 410; 4-21) (RP 411; 24- 412; 4).

### **Martin Hill's testimony directly contradicts that of Kels**

Martin Hill was adamant that the conversation Kels related never happened. (RP 458;4-8). He testified that he and Kels had never discussed engineering of the drive-thru. (RP 458;18-459;3). He testified that had that happened he would have told Scribner. (RP 459;4-

6). Hill produced Plts. Ex 86 which is a plan he prepared. He testified that it contained Kel's handwritten notes which only relate to the parallel parking south of the building and the exit onto Division. (RP 456;21-458;3). Hill testified that Kels wanted the curb cut made smaller. (RP 458;4-10). Hill was adamant that if he had learned from Kels that there would be a need for engineering and that the entire drive-thru would need to be brought up to city standards he would have notes on it. (RP 456;4-12).

Obviously, the trial court has the final say on credibility and determines the weight to be given to the testimony of each witness. Here, after listening to both Kels and Hill, the trial court did not find misrepresentation or fraud on the part of Scribner or Cornerstone.

Finally, Mahlen points to a letter Scribner wrote in anger in August of 2014, two months *after* Mahlen was found to have breached, (AOB p. 40) (Ex 28). Certainly that letter, written after the breach, can not establish misrepresentation inducing Mahlen's to enter into the lease or to continue abiding by its terms. In the final conclusion, the trial court concluded that Cornerstone's *representations were in accord with the facts*. (CL 30 at CP 877).

At CL 39 at CP 878 the trial court concluded that Mahlen failed to meet the requisite elements under either its counterclaim against

Cornerstone or its third party claim against Scribner. The court found that Scribner never provided false information to Mahlen. The court even commended Cornerstone in completing 8 of the 9 items on Exhibit “C”. In the end, Mahlen fell far short of meeting its burden of clear and cogent evidence of misrepresentation. (CL 40 at CP 879).

### **Legal Issue Number 5**

#### **Did Mahlen Anticipatorily Repudiate The Contract And Terminate Without Required Notice?**

Anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994); (see also, *State v. Brown*, 92 Wn.App. 586, 602, 965 P.2d 1102 (1998)). One is relieved of the duty to render its own performance when the other party by word or act indicates that he will not perform. *Sherman v. Lunsford*, 44 Wn.App. 858, 863, 723 P.2d 1176 (1986) (citing *Kreger v. Hall*, 70 Wn.2d 1002, 425 P.2d 638 (1967)). When Mahlen told Scribner he was moving out he was indicating that he would no longer perform. And he no longer did.

Mahlen’s breach excused further performance by Cornerstone. *Puget Sound Service Corp. v. Bush*, 45 Wn.App. 312, 316, 724 P.2d 1127 (1986). Mahlen’s June phone call to Scribner constituted an

anticipatory breach. Scribner believed Mahlen was serious. Mahlen left no doubt that he was. When Mahlen breached, Cornerstone was relieved of its obligation to continue its attempt to vacate the alley and pave the strip.

**Facts establishing anticipatory breach**

In June of 2014, Mahlen called Scribner and bluntly stated, “I have found out that the drive-thru will never get paved and I’m moving out” (RP 32;15-22); (RP 75;16- 76;6). The conversation ended at that point with Mahlen hanging up. (RP 325;11-22). Scribner believed Mahlen was serious. (RP 326;8-16). Based on that phone call, Scribner placed his efforts to vacate the alley on hold. (RP 325;23- 326;7). Prior to the June phone call, Mahlen had never voiced any complaint about the speed with which things were progressing. (RP 306; 17- 307; 7). Mahlen anticipatorily breached the lease during the June phone call when he informed Scribner that he was moving out. (CL 21 at CP 875).

**Mahlen’s statement that he was moving was unequivocal and was later confirmed by his own attorney**

Mahlen’s statement that “I’m moving out” was unequivocal. When July came, Mahlen failed to pay the rent. (RP 326;17-18). On July 16, Cornerstone sent a default letter. (RP 134;18-24). (Plts. Ex 25). Upon receipt of the letter Mahlen contacted his attorney. (RP 75;10-

12)(RT 134;18-24). On August 1, 2013, Mahlen's attorney wrote Cornerstone a letter confirming Mahlen's June statement, stating, "inability to provide the drive-thru made it impossible for the business to stay open". (RP 75;16-20). Cornerstone had no obligation to provide the drive-thru within the short 92 days between February 27 and June 1. Mahlen vacated the premises on August 31. (RP 326;19-21). In fact, in his trial brief, Mahlen stipulates that in June of 2014, he gave "verbal notice" that he would be terminating the lease. (CP Doc #96; Defendant's Trial Brief; 8;16) (Appendix "A").

Interestingly, the trial court concluded that even if Mahlen didn't breach during the June, 2014 phone call he certainly did when he moved out without adhering to Article 37.1 which required notice and opportunity to cure, (CL 23 at CP 876), and his failure to pay rent going forward. (CL 26 at CP 876).

**Mahlen's June phone call clearly constituted anticipatory breach**

Anticipatory repudiation requires a positive statement to the promisee indicating that the promisor will not or cannot substantially perform his contractual duties. *Regional Enterprises, Inc. v. Teachers Insurance and Annuity* 352 F.2d 768, 775, (9th Cir. 1965) citing Restatement, Contracts § 318 (1932). See *Trompeter v. United Ins. Co.*,

51 Wash.2d 133, 316 P.2d 455, 461 (1957). Mahlen's statement to Scribner, whether the one found at RP 32; 15-22 and RP 75;16- 76;6 that "*I have found out that the drive-thru will never get paved and I'm moving out.*" or his alternate version found at RP 213;7-12, "*I don't see anything happening and I'm moving out*", is a definite statement that he will no longer be bound by the lease. His attorney's letter of August 1 confirms that Mahlen viewed his continued participation under the lease "impossible". There is no dispute that Mahlen failed to provide notice and opportunity to cure as required by Article 37.1 of the lease. (CL 22 at CP 876).

**Legal Issue Number 6:**

**Is Mahlen Liable For Rent and Common Area Maintenance Fees?**

The relief sought by Mahlen under Legal Issue Number 6 is unclear. First, Mahlen provides no reason why it should not be responsible for the common area maintenance charges called for in the lease. In fact, Mahlen seems to use this separate section of its brief to reiterate its contention that Cornerstone was the breaching party and to re-state the completely illogical argument that Section 5.3 should have been given new life upon execution of the Addendum, evidently to the end that the December 1, 2013 deadline somehow voided the Addendum immediately upon execution.

Towards the end of the section, Mahlen claims that the trial court erred in *failing to consider* that Mahlen had made a \$5,744.00 deposit. Not so. In fact the \$5,744 deposit is irrelevant to this case on review. The deposit was to be credited half towards common area expenses with the other half to remain as a deposit until the end of the lease term. (FF 32 at CP 863) (Plts. Ex 1 at p. 2). Mahlen failed to show that the part applicable to CAM charges was not credited when the trial court awarded damages.

Cornerstone did not accelerate the unpaid rent beyond the date of the trial. The lease that Mahlen breached extend through October, 2018 and unless the premises is re-rented before then, Cornerstone will file another lawsuit to collect the rent that accrues between May 2016 and October 2018. Under the terms of the lease the deposit must remain in tack as security over the entire term. (Article 5.4; Plts. Ex 1 at pp. 2 and 5).

#### **Legal Issue Number 7**

#### **If Cornerstone is Entitled to Damages, Should an Award For CAM Charges be Included?**

The lease obligates Mahlen to pay common area expenses (CAM charges). Yet, Mahlen contends that the trial court erred in awarding \$10,533.55 in CAM charges and a \$644.21 administration fee. The

management administration fee is challenged under *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 334 P.3d 116 (2014). The difference, of course, is that here, Cornerstone is not the management company. The Cornerstone property is managed by NRE. Cornerstone is a Washington LLC owned by Scribner and Harlan Douglass. (RP 242; 21-243; 3) While Mahlen argues that NRE “is really just another arm of Scribner”, it is unclear what “just another arm” means or how Mahlen would know that. In attempting to establish that NRE is “an arm” of Scribner, Mahlen can only cite to the testimony of Joel Lee, a civil engineer.

Mr. Lee’s testimony begins at RP 170 and continues through RP 181. At RP 176, Mahlen’s counsel asks Mr. Lee if he knows what NRE is. Mr. Lee offers the opinion that NRE “would be Scribner”. Certainly, without foundation, this off-hand statement cannot provide the basis for this Court’s conclusion that Scribner and NRE are one in the same. There was no such finding. Even Mr. Lee didn’t state that NRE and Cornerstone are one in the same. Obviously, in awarding Cornerstone the management fees, the trial court did not find that they were. With Mahlen providing no authority to establish that Cornerstone and NRE are one in the same, this Court must do as the trial court and consider NRE to be a separate management entity.

### **Attorney Fees**

The prevailing party will be entitled to attorney's fees pursuant to the lease and to RAP 18.1(a)-(b). Cornerstone and Scribner request that they be awarded attorney's fees on appeal.

## **CORNERSTONE'S CROSS-APPEAL**

### **I**

#### **ASSIGNMENTS OF ERROR & LEGAL ISSUES**

##### ***Assignment of Error***

1. The trial court erred in reducing damages sustained by Cornerstone to 50% of each months unpaid rent through May, 2016.

##### ***Legal Issue Pertaining to the Assignments of Error***

1. Did the trial court err in awarding Cornerstone only half of the monthly rent called for in the lease following Mahlen's material breach?

### **II**

#### **STATEMENT OF THE CASE**

By now this Court likely understands the case, the parties and the conflict. Accordingly, Cornerstone limits this section to the trial court's conclusion that rent damages arising from Mahlen's breach should be

limited to the temporary rate agreed to in the Addendum *prior to the breach*.

The Lease obligated Mahlen to pay monthly rent as follows;

Months 02-12; \$2,185.00

Months 13-24; \$2,228.00

Months 25-36; \$2,273.00

Months 37-48; \$2,318.00

Months 49-60; \$2,365.00

(Plts. Ex P 1 p. 8).

Cornerstone elected not to accelerate the rent and only sued for rent coming due between the time of breach and trial; July, 2014 through May, 2016<sup>13</sup>. The rent for those months based upon the lease is \$2,185.00 per month for July, August, September, and October, 2014, \$2,228 per month from November 2014 through October 2015, and \$2,273.00 per month from November 2015 through May 2016, the last month at issue in this lawsuit.

In the trial court's original conclusions of law issued July 15, 2016, the court correctly concluded that once Mahlen breached the contract Cornerstone was excused from any further performance. (CL 31

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<sup>13</sup> This Court's decision on this issue will therefore dictate the amount of damages to be claimed in a future lawsuit for the balance of unpaid rent.

at CP 746). The court then concluded that rent damages should be the full monthly rent called for in the original lease. (CL 41 at CP 749). This was the correct measure of damages because once Mahlen breached, Cornerstone was relieved from further efforts to pave the strip. Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused. *Puget Sound Service Corp. v. Bush*, 45 Wn.App. 312, 316, 724 P.2d 1127 (1986).

However, in deciding Mahlen's motion for reconsideration, the trial court reduced damage to that called for in the Addendum, 50% of the original monthly lease payments. The trial court reasoned that since Cornerstone had agreed to receive only one-half of the rent until the drive-thru was completed and since the drive-thru was not completed, the damages from the breach should consist of only one-half of the rent<sup>14</sup>. The trial court cut Cornerstone's rent damages in half, awarding unpaid rent of \$1,092.50 per month for July, August, September, and October, 2014, \$1,114 per month from November 2014 through October 2015, and \$1,136.50 per month from November 2015 through May 2016. (CL 41 at CP 880). Cornerstone contends that the trial court

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<sup>14</sup> Decision on Motion for Reconsideration; CP 797

erred in reducing rent damages because the reason that the strip did not get paved is because when Mahlen breached there was no need for Cornerstone to continue those efforts.

### III

#### ARGUMENT

##### **Legal Issue Number 1**

Did the trial court err in awarding Cornerstone only half of the monthly rent called for in the lease following Mahlen's material breach?

##### **1. Standard of Review**

Generally, the appropriate measure of damages for a given cause of action is a question of law, reviewed de novo. *Shomake v. Ferrer* 168 Wn.2d 193, 198, 225 P.3d 990 (Wash. 2010). Contract interpretation is also a question of law reviewed de novo. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990); *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wn.App. 927, 932, 147 P.3d 610 (2006) (absent disputed facts, the legal effect of a contract is a question of law we review de novo). Where the contract presents no ambiguity and no extrinsic evidence is required to make sense of the contract terms, contract interpretation is a question of law. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 134, 323 P.3d 1036 (2014).

**2. There is no legal principal which justifies keeping rent at the Addendum rate after Mahlen's material breach**

When the Addendum was entered into which allowed Mahlen to temporarily pay half rent, it carried the same implied promise as is inferred in all contracts, i.e., that neither party would materially breach. When Mahlen breached, Cornerstone's obligation to continue its efforts to pave the strip as well as its promise to collect rent at 50% of the lease amount obviously ended.

If it is unfair for Mahlen, the breaching party, to be so advantaged by its own material breach. With Cornerstone not obligated to pave the strip after Mahlen's breach it is contrary to law to accord Mahlen this a windfall on the basis that Cornerstone has not completed the paving which is no longer an obligation. The trial court's decision on Mahlen's motion for reconsideration unfairly penalized Cornerstone, the non-breaching party, and rewarded Mahlen, the breaching party.

The general measure of damages for breach of contract is that the injured party is entitled to (1) recover all damages that accrue naturally from the breach and (2) be put into as good a pecuniary position as he would have had if the contract had been performed. *Eastlake Constr. Co. v. Hess*, 102 Wash.2d 30, 39, 686 P.2d 465 (1984). Had the contract

been performed Cornerstone would be entitled to full rent. Admittedly, Cornerstone did not complete the paving. However, that was because it was relieved of that obligation by Mahlen's material breach. Having been relieved to the obligation to pave, that element must be removed from the equation.

A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty. *Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951). (see also *Dwinell's Central Neon v. Cosmopolitan Chinook Hotel*, 21 Wn.App. 929, 936-37, 587 P.2d 191 (1978) (quoting *Jacks*). Once Mahlen breached the contract Cornerstone was excused from further performance. (CL 31 at CP 877).

#### IV

#### ATTORNEY FEES

The prevailing party will be entitled to attorney's fees pursuant to Article 30 of The Lease, (Plts. Ex P-1 at p. 28) and to RAP 18.1(a)-(b). Cornerstone and Scribner were awarded attorney fees following trial (see CL 46 at CP 880) and request that they be awarded attorney's fees on this appeal

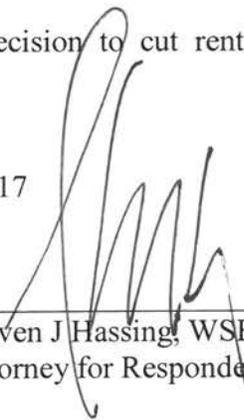
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**CONCLUSION**

It is clear that when this Court applies the relevant law to the facts established at trial it will affirm the trial court's decision finding Mahlen had breached the lease and unable to establish misrepresentation against Cornerstone or Scribner.

It is also fair, just and in accordance with Washington law that, with Mahlen's breach having relieved Cornerstone of further obligation to perform, the trial court's decision to cut rent damage in half be reversed.

DATED this 4<sup>th</sup> day of April, 2017



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