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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, and **KEITH SCRIBNER and JANE DOE SCRIBNER**,  
husband and wife  
Plaintiff-Respondents,

v.

**MAHLEN INVESTMENTS, INC.**, a Washington Corporation, and  
**CRAIG L. MAHLEN and KAREN L. 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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**REPLY BRIEF OF APPELLANTS/BRIEF OF CROSS-  
RESPONDENTS**

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- A. Plaintiff's Exhibit 31: August 7, 2014 letter from Brian Hipperson
- B. Plaintiff's Exhibit 28: August 5, 2014 letter from Keith Scribner
- C. RAP 2.5

## I. INTRODUCTION

The parties now agree that the landlord in this case, Cornerstone Equities, LLC (hereinafter “CORNERSTONE”), was required under the lease with its tenant, Mahlen Investments, Inc. (hereinafter “MAHLEN”), to build a drive-thru for MAHLEN’s dry cleaning business. The parties further agree that CORNERSTONE never built that drive-thru. The questions we are left to answer are: 1) Why? And 2) How did that fact impact the parties’ tenancy?

In responding to the first question, CORNERSTONE principally argues that although it failed to build the drive-thru, it “reasonably performed,” and that its ultimate performance was excused by MAHLEN’s alleged anticipatory breach. However, in arguing as such, CORNERSTONE fails to explain how the tort concept of “reasonable performance” has any place in this contract case. Moreover, even if “reasonable performance” was a measure by which the conduct at bar should be measured, CORNERSTONE cannot escape the undisputed fact that it took no action to keep the drive-thru construction in the required state of forwardness.

Similarly, on the issue of anticipatory repudiation, CORNERSTONE did not even address MAHLEN's argued position. In short, that position is that the doctrine of anticipatory repudiation can only apply where the repudiation comes *before* the other party's performance was due, and that here there is no question that CORNERSTONE was required to have built the drive-thru or at least to have made progress toward that performance by the time of the alleged June 2014 repudiation cited by CORNERSTONE.

The resulting impact of CORNERSTONE's lack of performance is made clear by the parties' lease: the tenancy automatically terminated. Even if it were otherwise, CORNERSTONE has no damages. Thus, judgment against MAHLEN should be reversed, and judgment instead should be entered in MAHLEN's favor with an award of fees and costs.

Concerning CORNERSTONE's cross-appeal, it is barred by RAP 2.5(b). Indeed, CORNERSTONE accepted payment of the judgment by MAHLEN without posting any security for restitution as required by RAP 2.5(b)(1). Even if it had posted security, CORNERSTONE's position that it is entitled to twice the rent then due at termination of the lease without basis in law or fact as it has no damages at all.

## **II. STATEMENT OF THE CASE**

### **A. Summary of Facts**

MAHLEN's opening brief accurately spells out the pertinent facts.

To frame what follows, MAHLEN provides a brief summary here:

MAHLEN and CORNERSTONE agreed to a commercial lease for real property on Division St. in Spokane, Washington where MAHLEN intended to operate a branch of its dry cleaning business. MAHLEN chose the location in question based on CORNERSTONE's promise to construct a drive-thru for the business.

The parties executed a written lease (hereinafter "Lease"), Section 5.3 of which stated:

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, 2013, and as Tenant's sole and exclusive remedy, this Lease shall be deemed automatically cancelled, and shall have no force or effect....

(P. Ex. 1).

The "Landlord's Work" was defined in Exhibit C to the Lease which altered the December 1, 2013 deadline only as to the drive-thru work. (P. Ex. 1, p. 1-44). Specifically, Exhibit C required that the drive-thru be completed within 90 days of MAHLEN taking possession. (*Id.*). Nowhere in Exhibit C did it say, as is urged by CORNERSTONE, that the cancellation clause was inapplicable to completion of the drive-thru work.

CORNERSTONE failed to complete the drive-thru work when due. However, as an inducement for MAHLEN to continue the Lease, CORNERSTONE agreed to cut the rent in half. In amending the Lease in this way, the parties made clear:

That except as herein modified, all terms and conditions of said Lease dated September 1<sup>st</sup>, 2013, shall be the same and remain in full force and effect.

(P. Ex. 5).

Thus, the February 24, 2014 amendment (hereinafter “Amendment”) did not, as CORNERSTONE implies, write MAHLEN’s cancellation rights out of the contract.

Thereafter, in June 2014, it became abundantly clear to MAHLEN that CORNERSTONE had no intention to complete the promised drive-thru, and that even if CORNERSTONE wanted to, its ability to perform was hamstrung by tax obligations dating back to 2011 of more than \$44,000.00 (P. Ex. 81). As a consequence, MAHLEN exercised its cancellation rights and vacated on August 31, 2014.

Despite its failures, CORNERSTONE sued for rents and fees. The trial court granted CORNERSTONE that relief by applying a tort analysis to conclude that, although it failed to build the drive-thru, CORNERSTONE’s performance was reasonable under the circumstances.

**B. Factual errors in CORNERSTONE’s brief**

CORNERSTONE's Statement of the Case contains errors, red herrings, and otherwise omits critically important facts all designed at persuading this Court to also adopt and apply a tort analysis whereby CORNERSTONE's failure to perform can be excused. The most flagrant examples will be discussed here in turn.

### **1. Expiration of the grading permit**

In order to install the drive-thru, CORNERSTONE needed to perform grading work to flatten the area where the drive-thru would be installed. CORNERSTONE began to perform that work in October 2014, but inexplicably did so without a permit. A permit required an engineered grading plan, which CORNERSTONE did not get around to filing until February 2014. (P. Ex. 41). Even then, CORNERSTONE failed to pay the required fee for the permit ultimately resulting in its expiration. (P. Ex. 76; *see also* P. Ex. 77).

CORNERSTONE's Statement of Facts tries to explain this away. At page 4 of its brief, CORNERSTONE urges that the permit was only allowed to expire after MAHLEN advised that it was vacating. Of course, this does not explain why the permit was not paid for in the intervening four months between the February 2014 approval of the grading plan, and June 2014--the first date cited by CORNERSTONE as receiving notice of MAHLEN's intention to vacate.

**2. When Mr. Scribner learned that CORNERSTONE lacked the 12 feet of land necessary for the drive-thru**

CORNERSTONE contends at page 5 of its brief that Keith Scribner, an owner of CORNERSTONE, and the principal in charge of its day to day operations, first learned that it did not have enough space to install the promised drive-thru in November 2014 when the City stopped the grading work for lack of permitting. In other words, CONERSTONE says that it was not until then that it realized that it had promised a drive-thru on property it did not own.

The truth is that Mr. Scribner knew or should have known about this problem no later than October 17, 2012. This is because Mr. Scribner commissioned and reviewed architectural drawings prepared on that date by Martin Hill. (P. Ex. 82; RP 253:24-254:2). Those drawings show the location of the property line extending only 10 feet from the edge of CORNERSTONE's building. (P. Ex. 82, *see* site plan note 19 and the 5' note next to it).

This is a critical fact because it means that Mr. Scribner induced MAHLEN to enter into the lease upon a false representation that CORNERSTONE would build a 12 foot wide drive-thru when, in fact, he knew or should have known that CORNERSTONE only owned 10 feet of the necessary land.

**3. The percentage of adjoining property owners necessary for the application to vacate**

The two additional feet of land necessary for the drive-thru were in an alley owned by the City of Spokane. To purchase that land from the City, CORNERSTONE was required to file an application to vacate said alley. At the bottom of page five of its brief, CORNERSTONE contends that the City told Mr. Scribner that he needed 100% of the adjoining property owners to agree to the vacation. This is not true. Only a majority of the ownership interest adjacent to the alley was needed. Mr. Scribner was keenly aware of that fact and noted it explicitly when he created a timeline of events. (D. Ex. 102, p. 6).

This distinction is important because, as Mr. Scribner found out in January 2014, that majority was made up of CORNERSTONE and a neighbor called Boone Court, LLC. (P. Ex. 24; RP 393:4-8). By then, Boone Court, LLC had already agreed to the alley vacation. (P. Ex. 31; RP 333:1-6). Thus, by January 2014, CORNERSTONE had the information and agreements necessary to file the application to vacate. This filing was the first step in the vacation process, and one CORNERSTONE never took.

**4. Mr. Scribner's alleged difficulty in obtaining an application to vacate the alley**

In an attempt to explain why it never filed the application to vacate, CORNERSTONE blames the City of Spokane. In fact, CORNERSTONE spends two full pages of its response brief pointing a finger at the City. However, in doing so, CORNERSTONE offers only the uncorroborated testimony of Mr. Scribner, a convicted felon of a crime involving dishonesty. (RP 241:20-24; *see also* CP 868, Finding 74). Incredibly, Mr. Scribner claims that over the course of several months and multiple trips to City Hall, the staff there could not locate or provide him with the application form. (*See* Brief of Respondent p. 8-10). He claims also that when he called and requested that the application be mailed to him, the City failed to so. (*Id.*).

CORNERSTONE attempts to buttress Mr. Scribner's testimony in this regard with that of City employee, Eric Johnson. However, CORNERSTONE again omits the most critical testimony on the subject. Indeed, when Mr. Johnson was asked about Mr. Scribner's testimony and the City's alleged failures to provide him with the application form, Mr. Johnson flatly rejected the testimony as inaccurate. (RP 194:3-6). Rather, Mr. Johnson explained the myriad ways that a member of the public can obtain the application form. He explained that the one page form is available on both the second and third floors of City Hall. (RP 184:2-11). He explained that if an applicant called by phone, the City could mail or e-

mail the form. (RP 194:7-16). He further explained that if, for some reason, the City ran out of forms, one could be easily printed for the applicant. (RP 184:5-8; 184:24-25). In fact, in corroborating Mr. Mahlen's testimony, Mr. Johnson explained how easy and fast it had been to provide a copy of the form to Mr. Mahlen upon his inquiry:

**Q** I made mention of Mr. Mahlen back here. Have you had an opportunity to speak with him on the phone before?

**A** I believe I have, yes.

**Q** And did he ask you for something when you talked?

**A** He asked for the application, too, for a right of way of vacation.

**Q** And that's the application to vacate an alley that we've been discussing?

**A** Same application, yeah.

**Q** And did you go about getting him one of those applications?

**A** I believe I e-mailed him.

**Q** How long did that take you to do it?

**A** Couple minutes.

**Q** So how long went by between when he called and when you got him the application?

**A** Maybe 20 minutes tops.

(RP 195:3-19). As one can see, when a full picture of Mr. Johnson's testimony is provided, it completely guts Mr. Scribner's story.

Here is why this issue so important and why CORNERSTONE spent two pages of its brief making excuses and blaming the city on this issue:

- Filing the application to vacate was the first step to vacate the subject alley (RP 186:9-13), and hence the first step toward building the drive-thru.
- Mr. Scribner knew as of November or December 2013 that he needed to file the application to vacate. (RP 387:13-388:10).
- Mr. Scribner failed to even obtain the application form until April 2014. (CP 867, Finding 62).
- Mr. Scribner never filed the application. (RP 418:22-25).

In other words, in order to perform the obligations of the contract at issue, the first thing CORNERSTONE was required to do was file the application to vacate. Having undisputedly failed in that regard, CORNERSTONE breached the contract.

#### **5. CORNERSTONE's contacts with neighbors**

Here again, CORNERSTONE's response brief mischaracterizes the entire course of events relative to its interactions with its neighbors. This was an important subject, because, as stated previously, cooperation from one neighbor, Boone Court, LLC, was necessary to file the

application to vacate. Boone Court, through its attorney, communicated its agreement to cooperate on December 19, 2013. (P. Ex. 31; RP 333:1-6). Yet, over the course of the following nine months, Boone Court heard nothing further from CORNERSTONE, prompting a follow up letter from Boone Court's counsel on August 7, 2014. In pertinent part, the letter reads:

I have been requested by the owner of [Boone Court] to follow up on my letter of November 20, 2013 as well as my telephone discussion with you on December 19, 2013.

....

Furthermore, you stated a desire to petition the City for an alley vacation and would provide our client with an easement to ensure continuing use of the fire exit route—and would be willing to pay all expenses incurred therewith.

To date, we have not heard back from either you or your attorney.

....

(P. Ex 31).

In the face of this unassailable evidence of its dilatory conduct, CORNERSTONE again offers only the testimony of its principal, Keith Scribner, with his self-professed troubles with memory (RP 371:17-20; CP 868, Finding 75) and truth. Contrary to the above cited letter, Mr. Scribner testified to various contacts and attempted contacts with Boone Court and other neighbors. *See* Brief of Respondents, p. 11. This

evidence is apparently offered to show that Mr. Scribner was making some effort to move the project forward. However, in addition to leaving out any reference to the letter quoted above, CORNERSTONE fails to explain why Mr. Scribner's alleged diligence failed to culminate in a completed application to vacate or any other objective signs of progress.

#### **6. June 2014 phone call between Scribner and Mahlen**

The next subject of CORNERSTONE's Statement of the Case is a phone call in June 2014 wherein Mr. Scribner alleges that Mr. Mahlen said he was moving out. CORNERSTONE posits that Mr. Scribner believed Mahlen was serious and, as a result, put a hold on efforts to vacate the alley. *See* Respondent's Brief, p. 12.

These facts are important to CORNERSTONE because they form the basis for its claim of anticipatory repudiation. However, CORNERSTONE again fails to address critical facts. Specifically, those facts penned in a letter dated August 5, 2014 from Mr. Scribner to MAHLEN's previous counsel. Therein, Mr. Scribner wrote:

Regarding your letter, let us be very clear that it is incorrect. **We are and have been actively working on installing the drive thru on the west side of the building....** We are very confident this will be completed.

(P. Ex. 28) (emphasis added).

This time, the undoing of CORNERSTONE's narrative is Mr. Scribner's own words. He used the present tense: "We are..... working on installing the drive thru...." He also used the past tense to show that there were not any gaps in those efforts: "We are and have been actively working..." Mr. Scribner's words in this respect are unequivocal and completely contrary to the now advanced story that CORNERSTONE stopped the drive-thru work two months prior to the letter based on the June 2014 Scribner-Mahlen phone call.

Of course, the truth of the matter is that there was no drive-thru work to stop in June 2014. Rather, that work never got started in the first instance.

#### **7. Rent payments for July and August 2014**

On the subject of MAHLEN's rent payments, CORNERSTONE's statement of facts is also inaccurate. CORNERSTONE claims that MAHLEN failed to pay rent for July and August 2014 before vacating on August 31, 2014. However, the only evidence in the record is that as of July 1, 2014, MAHLEN had sufficient funds left from its \$5,744.00 deposit to cover all obligations for the following two months. (RP 139:9-13). In fact, MAHLEN should have received \$200.00 back. (*Id.*).

#### **8. MAHLEN's failure to complain**

CORNERSTONE spends a substantial portion of text in its statement of facts alleging that MAHLEN failed to complain about the lack of progress with the drive-thru work. This is a red-herring.

First, the lease obviously does not pre-condition performance on any obligation to complain, inquire, or otherwise speak up. Rather, CORNERSTONE was obligated to build the drive-thru whether MAHLEN was beating down its door or saying nothing at all. Second, it is equally obvious that CORNERSTONE was aware of MAHLEN's frustrations because it agreed to cut the rent in half in February 2014. (P. Ex. 5). Third, to the extent it is relevant to consider whether or not MAHLEN was sufficiently moaning and groaning, Mr. Mahlen's efforts to discuss his concerns with CORNERSTONE after February 2014 were hamstrung by Mr. Scribner. Specifically, in May 2014, Mr. Mahlen and Mr. Scribner scheduled a day for Mr. Scribner to stop by the property. Mr. Mahlen let Mr. Scribner know that he would be there between 7:00 a.m. and 1:00 or 2:00 p.m. (RP 129:3-11). However, Mr. Scribner did not show up then or on multiple other days when the two had agreed to meet. (*Id.*).

### **III. ARGUMENT**

#### **A. Legal issue one: Construction and Interpretation of the contract**

The construction or legal effect of a contract is determined as a matter of law. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617 (1987). As explained in MAHLEN's opening brief, this case can be resolved simply by giving effect to the terms of the parties' contract and applying the agreed upon facts.

These are the key terms of the lease:

1. CORNERSTONE was required to build a drive-thru within 90 days of MAHLEN's date of possession. (P. Ex. 1, Exhibit C ("Landlord's Work"))
2. If CORNERSTONE failed to build the drive-thru within 90 days, MAHLEN was entitled to automatic cancelation of the lease. (P. Ex. 1, Section 5.3)
3. Delays would be excused only for causes beyond CORNERSTONE's reasonable control. (P. Ex. 1, Article 20).

These are the key terms of the February 2014 amendment to the lease:

1. The rent was cut in half until the drive-thru and pylon sign were completed. (P. Ex. 5).
2. All other terms of the Lease were to remain the same and in full force and effect. (*Id.*).

Notably, the amendment did not change the 3 key Lease terms listed above. Thus, if the drive-thru remained short of substantial completion after the 90<sup>th</sup> day of possession, MAHLEN was entitled, as his sole remedy, to automatically cancel the Lease.

Thus, the only factual questions are: 1) was the drive-thru completed in 90 days? And 2) was any delay beyond CORNERSTONE's reasonable control?

The answer to both questions is no. As such, MAHLEN was entitled to automatic cancelation of the lease without notice.

In countering this straightforward construction of the contract, CORNERSTONE argues that key term 2 above, the cancellation clause at Section 5.3, did not apply to the drive-thru. (Respondent's Brief, p. 16). However, the contract does not say that. By its terms, the cancelation clause applies to the "Landlord's Work." The "Landlord's Work" is defined in Exhibit C to the Lease. Exhibit C includes the drive-thru. Thus, the cancelation clause applied to the drive-thru. It is that simple.

CORNERSTONE points out that the cancelation clause made the Landlord's Work due by December 1, 2013, but that Exhibit C changed that date as it relates to the drive-thru, making the drive-thru work due at the 90<sup>th</sup> day after possession. That is true. However, CORNERSTONE then makes an unexplained leap and urges the Court to construct those contract terms to mean that the entirety of the cancelation clause is otherwise inapplicable to the drive-thru. Again, the words of the contract do not say as much. Moreover, nothing from the words of the contract indicates any such intent. Had the parties wished to exclude the drive-thru

work from the cancelation clause, they could have done so explicitly. To now carve out the drive-thru work from the cancelation clause would violate the contract construction rule which requires that courts not “disregard contract language which the parties have employed nor revise the contract under a theory of construing it.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).

**B. Legal Issue 2: Reasonable Progress**

CORNERSTONE urges that the February 2014 Lease amendment bought it an open ended period of time to finish the drive through, subject only to the necessity that its actions were reasonable given the circumstances. Of course, as explained above, a plain language reading of the contract does not support such a conclusion. Regardless, even if the February Amendment made the deadline for completion of the drive-thru indefinite, and a tort analysis about reasonable conduct given the circumstances is the correct approach, the facts provide no support for a conclusion that CORNERSTONE acted reasonably.

If CORNERSTONE’s tort analysis and view of the February 2014 amendment is proper (which it is not), *Lano v. Osberg*, 67 Wn.2d 659, 409 P.2d 466 (1965), becomes critical. The rule from *Lano* is that where the contract states no time for performance, there must be reasonable progress under the circumstances. *Id.* At 663.

Thus, if the February Amendment really did eliminate a time for performance of the drive-thru work, the question is whether CORNERSTONE's subsequent progress was reasonable under the circumstances. *Lano, supra*. Importantly, this is a far different issue compared to whether CORNERSTONE's conduct was reasonable given the circumstances—the lens through which the trial court analyzed the case. Specifically, measuring CORNERSTONE's progress goes beyond a simple analysis of how it conducted itself. Whatever is to be made of CORNERSTONE's conduct, it is inarguable that it made no progress.

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

In responding to MAHLEN's brief, CORNERSTONE first argues that MAHLEN's standard of review citation to *Jarstad v. Tacoma Outdoor Recreation, Inc.* was improper. As CORNERSTONE pointed out, MAHLEN cited that case for the proposition that a determination of what constitutes a reasonable amount of time is a mixed question of law and fact. (Brief of Appellant, p. 26). The exact language MAHLEN relied upon is as follows:

Reasonable time where no time limit is fixed by an agreement, depends on the nature, purpose, and circumstances of such action. RCW 62A.1—204. What may be considered a reasonable time is usually a mixed question of law and fact.

*Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn.App. 551, 558, 519 P.2d 278 (1974) (emphasis added).

CORNERSTONE argues that the issue here should not be determined as a mixed question of law and fact, but rather as a question of fact. CORNERSTONE does not explain why the rule from *Jarstad* is inapplicable, except to argue that *Jarstad* was different in that the contract there actually stated a time for performance. (Brief of Respondent, p. 18). This is a distinction without a difference. Moreover, as can be seen from the above quoted language, the *Jarstad* court's citation to the mixed question of law and fact standard immediately followed a sentence discussing agreements where no time is fixed for performance. Surely this was not accidental. Rather, in context, the *Jarstad* court was very clearly stating that the mixed question of law and fact standard applied where the agreement at issue was without a deadline.

CORNERSTONE further attempts to distinguish *Jarstad* because it was a case under the Uniform Sales Act, rather than a common-law contract. Again, this is a distinction without a difference. Indeed, the *Jarstad* court made no effort to limit its discussion of the proper standard of review to agreements that implicate the Uniform Sales Act. In fact, the *Jarstad* court ultimately resolved the timing question presented as a matter of law. 10 Wn.App. at 560. The court stated:

The circumstances of this case are such that a reasonable time for discovery of an inventory shortage should necessarily be a short time. Likewise, a reasonable time for giving notice of the shortage should necessarily be a short time. We conclude as a matter of law defendants should be barred from any remedy involving the inventory rendered in November 1970, for failure to timely assert the claim. RCW 62A.2—607(3)(a).

*Id.* (emphasis added).

The circumstances of this case vis a vis the timing question are similar. The time to make progress on the drive-thru after the February 2014 amendment should necessarily be a short time. That is because all CORNERSTONE needed to do to make progress was to act on the agreement already in place with its neighbor and file the one page application to vacate. Having failed to do that in the six months between the February 2014 amendment and MAHLEN vacating in August 2014, this Court may, as the *Jarstad* court did, conclude as a matter of law that CORNERSTONE's remedy is barred.

## **2. Reasonable progress test**

Neither party has located a case that specifically defines what constitutes reasonable progress. However, MAHLEN pointed out that construction cases require contractors to keep their work in a "state of forwardness." *Byrne v. Bellingham Consol. School Dist. No. 301, Whatcom Cnty.*, 7 Wn.2d 20, 32, 108 P.2d 791 (1941). MAHLEN also

cited to the Dictionary which defines “progress” to mean “to move forward: proceed,” or “to develop a higher, better, or more advanced stage.” *Progress, Webster’s New Collegiate Dictionary* (7<sup>th</sup> ed. 1970).

CORNERSTONE does not address either of the foregoing citations. Incredibly, it argues that to have made reasonable progress, it did not actually have to accomplish anything. (Respondent’s Brief, p. 20). Of course, CORNERSTONE is forced to make such an argument because it is keenly aware of the fact that it, in fact, accomplished nothing toward the drive-thru or pylon sign after the February 2014 amendment.

CORNERSTONE then comes full circle and completely strips the meaning of the word progress from the reasonable progress test. It urges that the test only requires analysis of whether CORNERSTONE was “acting reasonably under all of the circumstances.” Again, whether CORNERSTONE was “acting reasonably” is necessarily a different question from whether it was making any progress. The Court should thus adopt a test consistent with the “state of forwardness” requirement from construction cases and the dictionary definition requiring that the work must “move forward,” or “proceed,” or be developed to “a higher, better, or more advanced stage.”

**3. Did CORNERSTONE keep the drive-thru and pylon sign work in a state of forwardness and develop a higher, better, or more advanced stage?**

The trial court answered the immediately foregoing question in the affirmative. In searching for factual support for that conclusion, the trial court initially pointed to an April 2014 permit. (CP 796-798) There was no such permit. (RP 491:21-492:2). In recognizing this fact on reconsideration, the trial court instead pointed to the mere fact that CORNERSTONE obtained the permit application form. (RP 492:11-15). Thus, to endorse the trial court's decision, one would need to accept that a contractor develops a more advanced stage in promised construction work simply by grabbing a permit application without the need to fill that application out and pay the required fee. Surely that cannot be the rule.

Otherwise, beginning at page 30 of its opening brief, MAHLEN goes through each of the findings offered by the trial court that might conceivably support a conclusion that the answer to the foregoing question is 'yes.' As indicated there, none of trial court's findings relative to what CORNERSTONE did after February 2014 are at all consistent with moving the project forward toward a more advanced stage. Indeed, CORNERSTONE spent no money, did not move any dirt, did not sign any contracts for the work, did not obtain any of the required permits, did not draw up any plans for the necessary retaining wall, did not hire a lawyer to execute an easement needed for Boone Court, did not follow up with Boone Court on its agreement to participate in the application to vacate,

and did not file the application to vacate despite having all of the information necessary to do so.

Rather than address these failings, CORNERSTONE starts by blaming the City again for failing to provide Mr. Scribner with the application form—a narrative that must be rejected for the reasons already identified. But even if we were to excuse CORNERSTONE's failures to timely obtain the application form, we still must ask why it failed to file the application once one was obtained in April 2014? By then, CORNERSTONE had agreement from Boone Court to sign off on the application. Thus, all CORNERSTONE needed to do was to fill out the one page form, provide a copy to Boone Court for its signature, and pay the required fee. No explanation is offered for why CORNERSTONE failed in this regard. Rather, CORNERSTONE points down the road two months to the aforementioned June 2014 phone call between Mr. Mahlen and Mr. Scribner and argues that based on that conversation it was justified in stopping the work. However, CORNERSTONE does not explain why no work was done in the intervening two months between obtaining the application form in April and the June conversation.

Next, CORNERSTONE again blames MAHLEN for not complaining enough. This red herring deserves no further discussion beyond that which MAHLEN set forth above, except to say that the

parties' contract included no requirement that MAHLEN express its dissatisfaction. Instead, the contract was drafted by CORNERSTONE to give MAHLEN cancellation rights that were "automatic" when the Landlord's Work was not timely performed.

CORNERSTONE further argues that it did, in fact, complete eight out of the nine items required of it in Exhibit C to the Lease, "Landlord's Work." The attractiveness of this argument quickly fades when one analyzes the nature and scope of the completed work versus the uncompleted work. Specifically, the one item that went incomplete, the drive-thru work, was by far and away the most costly item on the list with estimates between \$30,000.00 and \$100,000.00. (P. Ex. 64; RP 326:2-7). This incomplete work also deprived MAHLEN of the "main thing" it looked for in choosing CORNERSTONE's property. (RP 89:24-90:5) On the other hand, the eight items that were completed covered tasks like installing an electrical box and bathrooms—items that would have been required regardless of who rented the space. (RP 120:22-121:11).

CORNERSTONE's brief also fails to explain its lack of progress on the pylon sign promised in the February 2014 Amendment. The only thing CORNERSTONE did between February 2014 and MAHLEN vacating in August 2014 was obtain estimates. (P. Ex. 14, 16, 17, 19, 22, 23). The record is without evidence to show CORNERSTONE hired any

of the contractors that provided an estimate, obtained any permitting for the sign, or otherwise kept the sign work in a state of forwardness. Not seeing any progress in the six months after the Lease Amendment on either the pylon sign or the drive-thru, MAHLEN validly exercised its cancelation rights.

At the end of the analysis, neither the trial court nor CORNERSTONE offer any facts which support a conclusion that reasonable progress was made after the February 2014 amendment. Thus, this case should be reversed.

**C. Legal Issue 3: Did CORNERSTONE materially breach the lease?**

In responding to MAHLEN's position on this issue, CORNERSTONE fails to dispute several important points. Those are as follows:

- A material breach excuses the other party's further performance.
- The party injured by the material breach may treat the contract as terminated.
- The drive-thru was a material issue that went to the root of these parties' contract.
- A party can maintain an action on a contract only where such a party has substantially performed its obligations.
- The trial court found that CORNERSTONE did not substantially perform (CP 870, Finding 95).

The analysis that flows from there is simple: Since CORNERSTONE did not substantially perform on the material issue of the drive-thru, it breached. Because CORNERSTONE breached, it excused MAHLEN's further performance and entitled MAHLEN to treat the contract as terminated. Accordingly, judgment for CORNERSTONE should be reversed.

#### **D. Legal issue 4: Misrepresentation**

##### **1. Negligent Misrepresentation**

The parties agree on the elements that must be proven for a case of negligent misrepresentation. However, CORNERSTONE argues that the evidence was lacking on a few of the elements. Those elements disputed by CORNERSTONE's brief will be addressed in turn.

##### **a) Mr. Scribner provided false information for MAHLEN's guidance in a business transaction.**

The trial court concluded that "Mr. Scribner underestimated the substantial amount of work that was required in order to complete the drive-thru." (CP 879, Conclusion 39). In this way, CORNERSTONE supplied false information for MAHLEN's guidance. Specifically, CORNERSTONE was keenly aware of the importance of the drive-thru to MAHLEN's operation. That much is clear by CORNERSTONE's agreement to cut the rent in half when, by February 2014, it had failed to

build the drive-thru. Realizing the importance of the drive-thru, CORNERSTONE induced MAHLEN toward the lease by first communicating to MAHLEN that it could have the drive-thru complete by August 31, 2013. (RP 103:3-9). Then CORNERSTONE drafted a lease promising as an inducement to MAHLEN that it would pave a drive-thru that would be approximately 12 feet wide. (P. Ex. 1, Exhibit C (Landlord's Work)). CORNERSTONE further represented that it would finish the drive-thru work within 90 days after MAHLEN took possession.

These representations were false. CORNERSTONE could not build a 12 foot drive-thru because it only owned 10 feet of property west of its building where the drive-thru was to be located. It was also false that CORNERSTONE could complete the work by August 31, 2013 or within 90 days after possession. That is because to complete the work, a vacation process was necessary that, in itself, would take three to six months. (RP 186:22-26). Thus, it would take at least 90 days just to purchase the additional two feet necessary for the 12 foot drive-thru, to say nothing for performing the actual work itself which was to involve grading, installation of a retaining wall, and paving.

CORNERSTONE also falsely represented to MAHLEN that delays in the drive-thru work were because CORNERSTONE was waiting on the City of Spokane to issue permits. (RP 131:20-132:11).

CORNERSTONE went so far as to put that representation in writing in the February 2014 Amendment. (P. Ex. 5). However, as Mr. Mahlen discovered when he visited the City in June 2014, the only permit CORNERSTONE had actually applied for had expired for non-payment. (RP 125:18-23; P. Ex. 76, 77).

Each of these false representations were unquestionably made to guide and induce MAHLEN in first signing a Lease, then continuing with the Lease when the drive-thru was not finished 90 days post possession, and then finally in agreeing to an Amendment to the Lease.

**b) CORNERSTONE knew or should have known that its representations were false.**

Before promising to build an approximately 12 foot wide drive-thru, a reasonable person would have checked to see that it owned enough property for that to be possible. CORNERSTONE could have checked on that quite easily. That is because in 2013, CORNERSTONE commissioned architectural drawings that showed its property lines. (P. Ex. 82). Those drawings show that CORNERSTONE's property line extends only 10 feet from the western most edge of its building. (*Id.*). Mr. Scribner admitted to having reviewed those drawings. (RP 253:24-254:2). Thus, CORNERSTONE either knew or should have known that it lacked the necessary footage.

Also, CORNERSTONE unquestionably knew that the holdup on the drive-thru was not the City or permits therefrom. Rather, by December 2014 at the latest, CORNERSTONE knew it needed to pursue the alley vacation process previously described. (RP 387:13-388:10). CORNERSTONE also necessarily knew that it had not filed the necessary application form when it made its representations, including that put to writing in the February 2014 Amendment. In other words, CORNERSTONE knew it was falsely representing that it was waiting on permits that it had not even applied for.

**c) Proximate cause**

CORNERSTONE argues that it was not the proximate cause of MAHLEN's damages. It tries to support this position by regarding the drive-thru as a mere "possibility." However, that is not what any of the contract documents say. The letter of intent, Lease, and February 2014 amendment were all unequivocal in promising a drive-thru. Nowhere in those documents that CORNERSTONE drafted does it say that the drive-thru was merely "possible."

Moreover, Mr. Mahlen testified concerning his process for selecting CORNERSTONE's property. He explained that he eliminated all other properties under consideration because they did not offer a drive-thru. As to CORNERSTONE's property though, Mr. Scribner said that

the drive-thru was already in the works (RP 91:5-8), and then signed a letter of intent and Lease promising that it would be built. Without such representations, MAHLEN would not have rented CORNERSTONE's property. Indeed, Mr. Mahlen testified that a drive-thru was the "main thing" he was looking for in a downtown location (CP 869, Finding 79) because he knew that Clark's, his downtown competitor, had multiple downtown locations with drive-thrus (RP 93:20-23), and the importance of a drive-thru were driven home by his employee with over 10 years of experience, Lorrie Ferris. (RP 437:2-20). Thus, as Mr. Mahlen testified, but for the drive-thru representations, he would have avoided \$65,404.53 in net costs related to the downtown location. (RP 141:22-25; D. Ex. 115, MAHLEN\_00158).

## **2. Intentional misrepresentation**

As with the prima facie case for negligent misrepresentation, the parties agree upon the nine required elements for fraud. CORNERSTONE argues that MAHLEN fails on the first element—a representation of an existing fact. CORNERSTONE then goes on to attack another City employee, Patty Kels, who testified that CORNERSTONE's agent made it clear that the drive-thru would never be built.

### **a) Representation of an existing fact**

On this element, CORNERSTONE says there was no representation of an *existing* fact. (Brief of Respondent, p. 31). CORNERSTONE argues that the representation was only that a drive-thru would be built at some future time. This is simply another attempt by CORNERSTONE to argue that the drive-thru as a mere “possibility.” But that is not what CORNERSTONE promised. Instead, it unequivocally promised that a 12 foot drive-thru would be built. Necessarily accompanying this representation was a promise that it had the land to build a drive-thru of the promised width.

Not addressed by CORNERSTONE were the additional representations that the hold up with the drive-thru were permits it was waiting on from the City. The existing fact represented on this point was that the City was the hold up in this permitting process when, in fact, applications for the permits had either not been filed, or not been paid for.

**b) Patty Kels’ testimony**

The important takeaway from Ms. Kels’ testimony is that CORNERSTONE had investigated installing a drive-thru in the location promised to MAHLEN before ever making those promises, decided it would not pursue the drive-thru because of the scope of the necessary improvements, but nonetheless later falsely represented to MAHLEN that it could and would build the drive-thru.

Ms. Kels' testimony in this regard arose from a conversation she had with CORNERSTONE's architect, Martin Hill. CORNERSTONE attempts to characterize Ms. Kels' understanding of Martin Hill's representation as a mere "assumption" that CORNERSTONE would not do the drive-thru work. Here, the record speaks for itself. The words "assumption" or "assume" were never stated:

**Q** (By MR. ARMITAGE) Based upon your conversation with Mr. Hill, did you form an understanding about whether or not the improvements within this alley that you mentioned to him were necessary would ever happen?

**A** Based on our conversation, I did not believe that the -- the alley would be improved only except what was required for the building permit we already approved.

**Q** And why did you believe that?

**A** Because that's what -- would entail a lot of engineering, a lot of additional work that was not discussed as part of the predevelopment or the building permit application at the time they were submitted.

**Q** Was your thought in that regard also based upon the discussion that you had with Mr. Hill?

**A** Yes.

(RP 411: 20-412:9).

CORNERSTONE claims that this conversation which Ms. Kels recalled in specific detail, simply never happened. (Respondent's brief, p. 32). CORNERSTONE bases its position in this regard on the testimony of

Martin Hill. However, Mr. Hill admitted he was a regular at City Hall for his work (RP 463:16-19), and occasionally had discussions with Ms. Kels while there. (RP 463:24-464:4). In fact, he billed CORNERSTONE for 1.1 hours of “coordination, i.e. meetings, telephone calls, etc.” concerning a “drive-thru lane site plan” for the Subject Property for work done between April 4, 2013 and January 20, 2014 (P. Ex. 9)—the very same timeframe in which Ms. Kels recalled the conversation taking place (RP 409:8-24).

Thus, Ms. Kels’ testimony was not rebutted with any substantial evidence in the record, and the trial court made no findings that it had been or that Ms. Kels’ credibility was somehow lacking. Thus, we are left with a record that shows that CORNERSTONE decided against building the drive-thru because of the scope of the improvements that were necessary, but nonetheless promised the drive-thru to MAHLEN to induce it into a tenancy. In other words, CORNERSTONE committed intentional misrepresentation.

#### **E. Legal Issue Five: Anticipatory Repudiation**

As MAHLEN pointed out in its opening brief, anticipatory repudiation is only available to a party where the alleged repudiation came before the other party’s performance was due. *Grant Cnty. Port Dist. No. 9 v. Wash. Tire Corp.*, 187 Wn.App. 22, 231, P.3d 889 (2015).

Here, that rule required CORNERSTONE to prove that MAHLEN repudiated before CORNERSTONE was required to build the drive-thru. We know that CORNERSTONE was required to build the drive-thru within 90 days of MAHLEN's possession, or about mid-January 2014. Thus, CORNERSTONE was required to prove that MAHLEN repudiated before that date. However, the alleged repudiation CORNERSTONE points to did not come until June 2014. Because that alleged repudiation came after CORNERSTONE's performance was due, the doctrine of anticipatory repudiation does not apply.

Alternatively, if the Court accepts that the February Amendment made the date for completion uncertain, CORNERSTONE was nevertheless required to perform by subsequently making reasonable progress toward performance. *Lano, supra*. The need to make such progress certainly was due in the four months between the February Amendment and the alleged June repudiation. Thus, either way you approach the problem, the doctrine of anticipatory repudiation is inapplicable.

CORNERSTONE's brief completely ignores the requirement that MAHLEN's alleged repudiation occur before CORNERSTONE's performance was due. CORNERSTONE simply argues that Mr. Mahlen's June 2014 statement was unequivocal and that Mr. Scribner took him

seriously. Even if those facts were true, they still fail to satisfy the anticipatory requirement of the anticipatory repudiation doctrine.

**F. Legal Issue 6: MAHLEN is not liable for rent and common area maintenance fees.**

MAHLEN pointed out in its opening brief that it could not be liable for rent and fees because CORNERSTONE's was required to spend substantial sums to build a drive-thru and pylon sign, and its failures to do so excused MAHLEN's further performance pursuant to the cancelation clause at section 5.3 of the Lease. As indicated, the cancelation clause in combination with Exhibit C, made cancelation of the Lease automatic and MAHLEN's sole and exclusive remedy where CORNERSTONE failed to perform the "Landlord's Work."

On this issue CORNERSTONE principally states that the relief sought by MAHLEN on this point is unclear. To resolve any lack of clarity, the first point here is that the trial court's conclusion 26 that MAHLEN breached by failing to pay rent from May 2014 forward cannot stand. Indeed, by May 2014, MAHLEN was entitled to deem the Lease automatically terminated by the explicit terms of the parties' agreement. Thus, any failure to pay rent after May 2014 does not serve as a basis to find MAHLEN in breach. Because MAHLEN neither breached through

anticipatory repudiation or by failing to pay rent that was due and owing, there is no basis to hold MAHLEN liable for damages.

Even if there was a breach by MAHLEN, CORNERSTONE's damages are that amount of money required to have put it into the position it would have been had the contract been performed. *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984). The problem for CORNERSTONE is that had there been no breach, it would have had to spend money to build the drive-thru and the pylon sign. Those costs must be reduced from the rents CORNERSTONE was promised. *Gould v. McCormick*, 75. Wash. 61, 68, 134 P. 676 (1913).<sup>1</sup>

The cost of that drive-thru was between \$30,000.00 and \$100,000.00. (P. Ex. 64; RP 326:2-7). The estimates for the pylon sign averaged \$29,383.80. (P. Ex. 14). Thus, had there been no breach, CORNERSTONE would have had to spend between \$59,383.80 and \$129,383.80. On the other hand, the rent awarded only totals \$39,454.36. In other words, because CORNERSTONE's costs are a complete offset to its rents had the contract been performed, MAHLEN should not be liable for damages.

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<sup>1</sup> "If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery." 25 Wash. Prac., Contract Law and Practice s 14:4 (3d ed.).

One additional point must be discussed here because CORNERSTONE notes that although it did not accelerate unpaid rent and sue for rent subsequent to May 2016, that it somehow intends to file a second lawsuit at some point in the future to collect rent from May 2016 to October 2018. (Brief of Respondent, p. 38). Of course, such a second lawsuit would be precluded by this one. That is because parties are not permitted to split their claims in the fashion CORNERSTONE apparently contemplates. On that point, the law is clear: “[f]iling two separate lawsuits based on the same event—claim splitting—is precluded in Washington.” *Ensley v. Pitcher*, 152 Wn.App. 891, 898, 222 P.3d 99 (2009). The Ensley court explained that rule in stating:

The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.

*Id.* At 899.

Whatever the reason for CORNERSTONE not accelerating rent and claiming damages beyond May 2016, it will not be entitled to a second bite at the apple in a future suit.

**G. Legal Issue 7: CAM charges and administration fee.**

In its opening brief, MAHLEN cited to *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 334 P.3d 115 (2014). The rule from *Viking Bank* applicable here is that a landlord may not collect a management fee it unilaterally incurred for its own benefit in a triple net situation. *Id.* 711. Thus, even if the trial court was correct in awarding damages to CORNERSTONE (it was not), the trial court nevertheless erred in including the “CAM Administration Fee” noted in part A subsection d of the Judgment. (CP 885).

CORNERSTONE attempts to differentiate this case from *Viking Bank* on the basis that CORNERSTONE and its management company are two different entities. However, that was also the situation in *Viking Bank* where the landlord hired an outside management company for its own benefit and convenience.

Even if the rule were different and there was some requirement of identity between the landlord and the management company, it is disingenuous for CORNERSTONE to feign ignorance to the fact that Keith Scribner is a principal of both CORNERSTONE and its management company, NRE. That identity was made clear by CORNERSTONE’s witness and engineer, Joel Lee. (RP 176: 17-20).

CORNERSTONE argues that this was just an “off hand” comment made without foundation. However, no such objection is included in the record to that effect and none should be entertained here.

On the subject of the CAM charges and the corresponding damage award of \$10,533.55, there is not substantial evidence in the record to show that CORNERSTONE did the work by which a CAM charge would be earned. To be clear, a “CAM charge” is for common area maintenance. Of course, to collect this element of damage, CORNERSTONE had the burden of proof. However, the evidence in the record shows that CORNERSTONE’s tenants performed all of the common area maintenance. (RP 442:5-443:3). This fact is driven home by the additional fact that CORNERSTONE failed in its obligation to reconcile the CAM charges as the Lease required at section 7.7. Specifically, section 7.7 states:

If Landlord elects to bill Tenant based upon estimates, Landlord shall, within one hundred twenty (120) days after the end of the calendar year, or as soon thereafter as possible, forward to Tenant a written statement (the “annual reconciliation statement”) which adjusts the estimated expenses to reflect the actual expenses incurred for the year.

(P. Ex. 1, Section 7.7).

Of course, the reason CORNERSTONE failed to provide such a reconciliation statement is that it had no actual expenses for common area

maintenance to reconcile because its tenants were doing the work. Thus, even if MAHLEN somehow breached (it didn't), CORNERSTONE failed in its burden to prove that it was entitled to over \$10,000 in CAM charges.

#### **IV. CORNERSTONE's CROSS APPEAL**

##### **A. Statement of the Case**

In light of the fact that the Amendment to the Lease cut MAHLEN's rent in half, and the condition by which the rent would increase (drive-thru and pylon sign installation) never occurred, the trial court awarded unpaid rent only in the one half amount the Amendment required. Of course, as MAHLEN has pointed out, the trial court should have awarded no rent at all. Nonetheless, MAHLEN paid the judgment entered by the trial court (CP 929-931) choosing to seek restitution after reversal by this court pursuant to RAP 12.8.

CORNERSTONE accepted the benefits of the judgment, but has failed to post any security. Nonetheless, CORNERSTONE now urges the Court on cross appeal to award full rent irrespective of the February 2014 Amendment.

##### **B. ARGUMENT**

###### **1. RAP 2.5(b) bars CORNERSTONE's cross appeal**

RAP 2.5(b)(1) states:

A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(RAP 2.5(b)(1) (emphasis added)).

In *LaRue v. Harris*, the appellate court explained that RAP 2.5(b)(1) denies the right of appeal to a party who accepts benefits except in the situations stated in the rule. 128 Wn. App. 460, 464, 115 P. 3d 1077 (2005).

Here, none of the exceptions to the rule apply. The judgment entered by the trial court is now a final decision and not subject to modification except upon reversal here. The possibility of reversal, however, is the exact reason that RAP 2.5(b)(1) exists. That is, the rule helps ensure that there is an avenue for the party that paid the judgment to obtain restitution. Thus, the possibility of reversal is certainly not the type of modification which would satisfy the exception stated in subpart (i). Rather, subpart (ii) is the only grounds on which CORNERSTONE could have avoided losing its right to cross appeal. However, because

CORNERSTONE failed to give security after accepting the benefits of the judgment, its cross appeal was forfeited.

**2. Even if not forfeited, CORNERSTONE's cross appeal is without merit.**

Irrespective of RAP 2.5(b)(1) which bars CORNERSTONE's cross appeal, CORNERSTONE has failed to cite authority to double the rent that was due and owing at the time of MAHLEN's alleged breach. Indeed, not one case cited by CORNERSTONE entitled the plaintiff to resurrect a previously agreed upon rent figure that was later changed by valid amendment. Rather, CORNERSTONE argues that even though it failed to build the drive thru or install the pylon sign—the conditions necessary to resurrect the prior rent—MAHLEN's breach relieved CORNERSTONE from performing that work and thereby entitles it to the full rent as if the work had been performed.

CORNERSTONE's analysis is faulty. CORNERSTONE admits that the measure of its damages is the amount necessary to put it into as good a pecuniary position as it would have been had the contract been performed. (Respondent's brief, p. 44, *citing Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984) (emphasis added)). What CORNERSTONE leaves out though, is the corresponding rule that the profit realized through performance must be reduced by the “the cost of

performing the act to be done by the plaintiff.” *Gould v. McCormick*, 75. Wash. 61, 68, 134 P. 676 (1913).

In *Gould* the plaintiff was promised \$8,000.00 for its work. *Id.* The defendant breached and the plaintiff sued. *Id.* The court noted the rule cited by CORNERSTONE that the measure of damages required the plaintiff to be placed into the same condition that it would have been had the contract been performed. *Id.* However, the plaintiff was not awarded damages of \$8,000.00 as promised in the contract. *Id.* Rather, the Court correctly noted that had the contract been performed, the plaintiff would have been required to spend \$1,500.00 to make its \$8,000.00, for a net recovery of \$6,500.00. *Id.*

Similarly, the contract at issue here required CORNERSTONE to build a drive-thru. The cost of that drive-thru was between \$30,000.00 and \$100,000.00. (P. Ex. 64; RP 326:2-7). As amended, the contract also required CORNERSTONE to erect a pylon sign. Several estimates were obtained for the pylon sign averaging \$29,383.80. (P. Ex. 14). Thus, had the contract been performed, CORNERSTONE would have incurred costs ranging between \$59,383.80 and \$129,383.80.

The full rent sought was as follows:

- July-August 2014: \$2,185.00
- Sept. 2014-Oct. 2014: \$4,370.00

- Nov. 2014-Oct. 2015: \$26,736.00
  - Nov. 2015-May 2016: \$15,911.00
- Total: **\$49,202.00**

In other words, to make \$49,202.00, CORNERSTONE was going to need to spend a minimum of \$59,383.80—a full offset. Thus, had the contract been performed, CORNERSTONE would have actually come out \$10,000 behind. No wonder CORNERSTONE failed to perform. Since CORNERSTONE would have realized no profit had the contract been performed, it has no damages.

CORNERSTONE attempts to get around this problem by arguing that its duty to perform was excused by MAHLEN's breach. However, CORNERSTONE fails to appreciate that the measure of damages rule it cites contemplates performance by both parties. That much can be seen from *Gould*. Although the defendant breached and the plaintiff was relieved from the obligation to do further construction work, its damages were measured based on the contract price less the corresponding cost the plaintiff would have necessarily incurred in performing. 75. Wn. at 68. A contrary rule would permit windfalls to plaintiffs and place them in a better position than they would have been in had the contract been performed. Thus, there is no basis to award damages here, let alone twice the rent agreed upon at the time of the breach.

## V. ATTORNEY FEES

The parties' lease calls for an award of fees to the prevailing party. (P. Ex. 1, Article 30). RAP 18.1 entitles the party prevailing on appeal to attorney fees. MAHLEN requests that it be awarded attorney fees as the prevailing party on its appeal and CORNERSTONE's cross appeal.

## VI. CONCLUSION

Based on the foregoing, MAHLEN seeks the following relief:

1. That judgment for CORNERSTONE be reversed;
2. That this case be remanded to the trial court with instructions to enter judgment for MAHLEN with return of property, restitution, and an award of damages totaling \$65,404.53.
3. That MAHLEN be awarded attorney fees on appeal, and that this case be remanded for an award of attorney fees to MAHLEN as the ultimate prevailing party.
4. That this case be remanded with instructions to enter MAHLEN's proposed findings of fact: 12, 14, 19, 24, 25, 28, 30, 31, 32, 37, 38, 39, 41, 47, 50, 51, 52, 53, 54, 55, 56.
5. That this case be remanded with instructions to the trial court to enter MAHLEN's proposed conclusions of law: 5, 10, 11, 12, 15, 16, 17, 19, 21, 22, 23, 24.

6. To the extent CORNERSTONE is entitled to damages (which it is not), that this court remand with instructions to reduce those damages by \$3,102.70 by virtue of MAHLEN's deposit covering rent/fees for July-August 2014.

7. To the extent CORNERSTONE is entitled to damages, that this Court remand with instructions to reduce those damages by \$10,533.55 for the CAM charges to which CORNERSTONE is not entitled, and to also reduce by \$644.21 for the CAM administration fee to which CORNERSTONE is not entitled.

8. To dismiss and reject CORNERSTONE's cross-appeal.

DATED this 6th day of April 2017.



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Attorneys for Appellant MAHLEN

**CERTIFICATE OF SERVICE**

I hereby certify that this 6 day of April 2017, I served a true and correct copy of the foregoing Reply Brief of Appellant by delivering the same to the following attorney of record, by the method indicated below, addressed as follows:

<input type="checkbox"/> Hand delivery	Steve Hassing 425 Calabria St. Roseville, CA 95747 Fax: 916-677-1770 Email: sjh@hassinglaw.com
<input type="checkbox"/> Overnight mail	
<input checked="" type="checkbox"/> US mail	
<input type="checkbox"/> Fax	
<input checked="" type="checkbox"/> Email	

  
NIK ARMITAGE

# APPENDIX A

HENNESSEY, EDWARDS, HIPPERSON & REDMOND, P.S.

ATTORNEYS AT LAW

1403 SOUTH GRAND BOULEVARD – SUITE 201 SOUTH  
SPOKANE, WASHINGTON 99203

(509) 455-3713  
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August 7, 2014

DOUGLAS J. EDWARDS\*  
BRIAN G. HIPPERSON  
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\*Admitted in Washington & Idaho

WM. E. HENNESSEY  
Retired

Cornerstone Equities, LLC  
ATTN: Keith R. Scribner  
PO Box 8262  
Spokane, WA 99203-0262

RE: National Color Graphics Building  
W. 25 Boone

Dear Mr. Scribner:

I have been requested by the owner of the National Color Graphics Building to follow up on my letter of November 20, 2013 as well as my telephone discussion with you on December 19, 2013. In the context of that discussion, you assured me that your civil engineer (Joel Lee) would shortly be sending a letter to the City Engineer's Department outlining your steps to stabilize the embankment. You further conceded to me that you were prepared – at your own expense – to install a retaining wall to not only eliminate further erosion of the embankment, but also to stabilize what is left of it in order that occupants of my client's building may safely exit it through the emergency fire door adjacent to the embankment.

Furthermore, you stated a desire to petition the City for an alley vacation and would provide our client with an easement to ensure continuing use of the fire exit route – and would be willing to pay all expenses incurred therewith.

To date, we have not heard back from either you or your attorney. Moreover, contrary to what you stated that your engineer told you, the embankment has significantly eroded even further. Photographs given to me show that the embankment has sloughed off and eroded nearly to the edge of the building foundation and that the cement pad directly in front of the emergency exit door is significantly undermined.

Based upon your unexplained silence and failure to take prompt action as promised, along with the steady progression of erosion and deterioration of the embankment, it is quite clear that you or personnel working under your control and authority have committed what is known under the law as a trespass, a nuisance, and quite likely loss of lateral support. National Color Graphics requires the emergency exit door and access outside of the building. Lack of ability to utilize such will likely cause my client a building occupancy violation. In addition, damages in the form of diminution in value to the property are most probable.

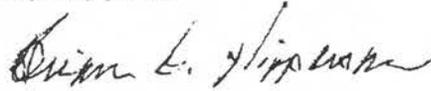
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Cornerstone Equities, LLC  
ATTN: Keith R. Scribner  
August 7, 2014  
Page 2

Our client has authorized us to proceed with a lawsuit against you for the above actions and damages. However, as a courtesy to you, we are sending you this final demand letter requiring that you immediately contact us with a plan to stabilize and restore the embankment, including a specific time frame involved.

Please give this matter your immediate attention.

Very truly yours,



Brian G. Hipperson

BGH:srk

cc: National Color Graphics, Inc.

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## APPENDIX B

August 5, 2014

To: Stephen Ford, Ford Law Office

From: Cornerstone Equities LLC

Regarding: Mahlen Investments LLC

Dear Mr. Ford,

Please be advised that we are in receipt of your letter dated August 1<sup>st</sup>, 2014, that your client is vacating the premises at 1101 N Division Suite D, no later than August 31<sup>st</sup> 2014.

Your client has not paid rent for either July or August 2014 even after we sent him a letter bringing this to his attention. This is a breach of the lease agreement and your client is in default of the lease agreement.

Regarding your letter, let us be very clear that it is incorrect. We are and have been actively working on installing the drive thru on the west side of the building. We have spent a significant amount of money having engineers, consultants, and architects work on this process. In addition, we have spent a lot of money completing tenant improvements for your client. We are very confident this will be completed. In addition, we find it quite telling how your client has come to the conclusion that the drive thru will not be installed and because of that vacating the premises when he has not communicated with us about this issue for several months.

On February 24<sup>th</sup>, 2014, we executed a first lease addendum with your client that significantly reduced his base rent until the drive thru was completed. Your client agreed to these terms with no hesitation and has taken advantage of this reduced rent and other lease concessions. In this agreement, no date was set for completion because we didn't have one. Your client didn't object to this and was happy to get reduced rent until the drive thru was completed. The fact that your client has shared with us his business was not nearly as profitable as he hoped, and the fact that your client doesn't have drive thru's at the other locations makes it obvious he is just trying to get out of the lease.

Please be advised your client will be held responsible for all terms, conditions and expenses per the lease agreement, and we will be forwarding this file to our attorney for further contact.

Sincerely,

Keith Scribner

Cornerstone Equities LLC

PO Box 8262

Spokane, Wa 99203

U.S. Postal Service	
CERTIFIED MAIL RECEIPT	
(Domestic Mail Only. No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ 0.49
Certified Fee	\$3.30
Return Receipt Fee (Endorsement Required)	\$2.70
Restricted Delivery Fee (Endorsement Required)	\$0.00
Total Postage & Fees	\$ 6.49

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Sent To: *Ford Law Office*

Street, Apt. No.:

08/12/2014

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## APPENDIX C

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## Rules of Appellate Procedure

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### RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b) (2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) Security. If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) Conflict With Statutes. In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

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