No. 89646-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69039-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MUKILTEO RETIREMENT APARTMENTS, L.L.C., a Washington limited liability company,

Respondent,

v.

MUKILTEO INVESTORS L.P., a Washington limited partnership; CAMPBELL HOMES CONSTRUCTION, INC., a Washington corporation,

Appellants.

ANSWER OF RESPONDENT TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Respondent Mukilteo Retirement Apartments, LLC ("MRA") answers Appellants Mukilteo Investors, L.P.'s and Campbell Homes Construction, Inc.'s (collectively referred to hereafter as "MILP") Petition for Review.

II. RELIEF REQUESTED

MRA requests that this Court deny MILP's Petition for Review. Essentially, MILP's petition seeks to retry the case with different facts and legal theories than were actually presented to the trial court. The record below makes clear: (1) the parties' positions before the trial court; (2) the trial court's thorough consideration of the evidence; and (3) the correct application of well-established law and unambiguous court rules. That MILP disagrees with the result is no reason for this Court to grant discretionary review.

MILP's petition fails to raise grounds that would permit review.

1. Waiver of Judicial Admission. MILP first claims that the Court of Appeals ruled that judicial admissions cannot be waived. It requests review under RAP 13.4(b)(4) claiming that this ruling decided a question of first impression. MILP is not entitled to review because the Court of Appeals made no such ruling. The Court of Appeals properly refused to allow MILP to raise the enforceability of the Option for the

first time on appeal after MILP admitted enforceability in its Answer and failed to amend its position under CR 15 during the trial below.

2. Agreement to Agree. MILP next requests review under RAP 13.4(b)(1) claiming that the Court of Appeal's decision ruling that the Option was enforceable conflicts with a prior decision of this Court. The Court of Appeals properly ruled that the Option stated all the required elements for the cash sale of real property. This ruling was consistent with the prior decisions of this Court and existing Washington law. MILP's request for review should be denied.

3. Consequential Damages. MILP asks this Court to review the award of consequential damages. MILP claims it is entitled to review under RAP 13.4(b)(2) because the Court of Appeal's decision conflicts with a prior decision of the Court of Appeals. MILP's claim is incorrect as the award of consequential damages was entirely consistent with prior decisions.

III. STATEMENT OF THE CASE

The facts of this case are stated in the trial court's controlling Findings of Fact. These findings are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). MRA will not restate these findings here in the interests of brevity.

MILP's "Statement of the Case" wildly deviates from the

Findings of Fact. MILP asks this Court to impermissibly weigh the evidence, make new and different findings, and substitute its opinions for those of the trial court. MRA therefore disputes the "facts" contained in MILP's statement that deviate from the controlling Findings.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Properly Held that MILP was Not Entitled to Raise the Enforceability of the Option for the First Time on Appeal.

MILP admitted the enforceability of the Option in its Answer and pursued a breach of contract counterclaim for more than three years before trial. CP 1270-74;1165-1225. MILP never raised the enforceability of the Option in its trial brief, opening or closing statements, or its "supplemental" trial brief submitted the last day of trial.[1] Despite several post-trial motions and having already engaged its

[1] MILP's *sixty-one* page trial brief made no claim that the Option was unenforceable. Instead, MILP stated that the Option had been "extensively negotiated by and between the parties and by their lawyers." CP 1171. It admitted that it had "proposed and MRA accepted, alternative Option language" which "entrusted the later determination of a substitute Facility's replacement cost and its quantification to the appraiser that MILP chose." CP 1175. MILP even stated it had "never disputed that MRA exercised the purchase option, nor has it ever refused to carry out its contract obligations." CP 1188.

In its *thirty-nine* page "Supplement Trial Brief," MILP continued to argue that the Option was enforceable:

- "Notwithstanding MRA's claims, there are no facts which support that MILP or defendant Campbell Homes was unwilling to sell the option property[.]" CP 68.
- "For its part, having followed Option Agreement price setting procedures and having received from an experienced professional and licensed appraiser the pricing conclusions reached, MILP was entitled under the contract and by law, to rely upon those calculations and it has

appellate counsel, MILP never raised the issue of enforceability before the trial court. CP 5485-88; 5491-5504.

Only in its opening brief on appeal did MILP first claim that the Option was unenforceable. MILP hoped to take advantage of the trial court's finding that there was "never a meeting of the minds with respect to what was to be included in determining replacement cost for the facility" in order to try to invalidate the Option for lack of mutual assent. CP 5478 (FOF 70). While conceding it had admitted enforceability below, MILP claimed it was permitted to raise this argument on appeal based on an exception contained in RAP 2.5(a)(2).

MRA responded by pointing to the long-established case law prohibiting parties from raising issues for the first time on appeal. MRA specifically pointed to *Neiffer v. Flaming*, 17 Wn. App. 443, 563 P.2d 1300 (1977), wherein a seller was prohibited from arguing that an option was unenforceable for the first time on appeal. With respect to MILP's attempt to rely on RAP 2.5(a)(2), MRA pointed to past precedent prohibiting an appellant from relying upon this exception when the appellant took a contrary position before the trial court. *See Hemenway*

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the right in good faith and under the contract, to ask this court to enforce them." CP 71.

• "As a matter of law, MILP is entitled to have the pricing terms of the parties' written Option Agreement enforced." CP 101.

v. Miller, 55 Wn. App. 86, 97, 776 P.2d 710 (1989) (party could not rely upon RAP 2.5(a)(2) to argue a new issue on appeal when that party presented precisely the contrary argument before the trial court), *rev'd on other grounds*, 116 Wn.2d 725 (1991). In its reply, MILP claimed that MRA had waived its right to rely upon MILP's admission that the Option was enforceable.

The Court of Appeals properly rejected MILP's attempt to raise enforceability for the first time on appeal. It found MILP's reliance upon RAP 2.5(a)(2) misplaced, holding that this subsection was limited to circumstances where the proof of particular facts at trial is required to sustain a claim. *Slip op.* at 16. Because MILP admitted the enforceability of the Option in its Answer and the issue had not been amended into the case under CR 15(b), the Court held that MRA was not required to prove the enforceability of the Option in order to obtain the relief it was requesting, i.e. the sale of the Facility. Id.

Only in a footnote did the Court of Appeals comment upon MILP's claim that MRA had waived any ability to rely upon MILP's previous admission. *Slip Op.* at 12, n.8. Contrary to MILP's claim, the court did not hold that a party cannot waive the ability to rely upon a judicial admission. Id. The court simply noted that no court in Washington had agreed with MILP's claim that a judicial admission can

be waived merely by introducing evidence that allegedly tends to disprove the admission. Id. MILP simply ignores the rest of the footnote in which the court placed its primary emphasis in this case on the fact that MILP never raised the issue of enforceability in its pleadings or during the trial itself, even after MRA had allegedly introduced evidence tending to disprove the enforceability of the Option. Id.

MILP's petition makes no attempt to show how this dictum raises an issue of substantial public interest. MILP merely claims that the court decided an issue of first impression in Washington. As the Court of Appeals actually made no ruling regarding judicial admissions, MILP's claimed basis for review is meritless. In any event, the question of whether a party waived a judicial admission is so highly fact dependent and will vary so widely from case to case that it can hardly be said that the facts of any one case (especially a case involving these facts) would involve an issue of a substantial public interest. This Court should decline review.

Further, MILP makes no attempt to show how the Court of Appeals abused its discretion in refusing to allow MILP to argue enforceability for the first time on appeal. Under the plain text of RAP 2.5(a), it is within the discretion of the Court of Appeals to allow a claim of error to be made for the first time on appeal.

MILP's claim that MRA presented evidence contrary to MILP's admission that the Option was enforceable is not supported by any finding of fact. MILP asks this Court to impermissibly find its own facts, make inferences, and conclude that MRA presented evidence contrary to MILP's admission.[2] This Court should decline this request. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009) ("Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.").

Finally, MILP's claim that MRA introduced evidence contradicting MILP's admission of enforceability is untrue. MILP claims that "Mr. Struthers testified that the parties signed the option agreement despite having failed to agree on the meaning of the replacement cost component of the price formula." Petition for Review, p.3. It also claims: "at trial MRA sought to prove that the parties never had a meeting of the minds on a material component of the agreement's price term." Id., p.8. MILP provides no cite for these false statements.

Based on the parties' pleadings, the issues to be litigated at trial were limited to determining which party had breached the Option and

[2] For example, MILP claims that trial court's finding that there was no meeting of the minds regarding replacement cost resulted from Ron Struthers' testimony. There is no finding to support this claim. MILP just assumes (and asks this Court to assume) that this is true. Not only is there no evidence of this, but as demonstrated below, MILP's depiction of Struthers' testimony is wildly inaccurate and self-serving.

what damages, if any, resulted therefrom. Although the parties disputed the meaning of the term "replacement cost," neither party argued that this disagreement rendered the contract unenforceable.

MRA presented evidence and argument about the meaning of "replacement cost" at trial, nothing more. In its opening, MRA stated that "replacement cost" was undefined in the Option itself. RP I 34. MRA therefore argued that the definition of "replacement cost" contained in the incorporated Facility Lease Agreement or the term's plain and ordinary meaning should apply. Id.

MRA presented this same evidence at trial. Struthers testified that shortly after September 23, 1999, he had a conversation with Gene Hiner, a MILP owner, to discuss a draft of the Option. RP I 134. Hiner refused to provide a definition of "replacement cost" at that time. RP I 134-40. *Thereafter*, on or about October 12, 1999, MILP *itself* provided a method stating that "replacement cost" would be determined by the appointment of a "disinterested" appraiser. See Exs. 216, 219, 221, & 225. This subsequent addition provided the certainty regarding price that the law requires to form an enforceable option contract for the cash sale of real property. See *Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 318, 481 P.2d 17 (1971). Finally, Struthers testified that when MRA signed the Option, on October 21, 1999, it understood that "replacement cost"

would have the same definition as the term was defined in the Facility Lease Agreement. RP I 140, RP II 23-25. This evidence was provided to develop the parties' intent as to the meaning of this term. Nowhere in Struthers' testimony or anywhere else at trial did MRA or even MILP suggest that the Option was unenforceable.

MILP next claims that the Court of Appeals' decision is contrary to CR 15(b). MILP claims that an amendment of the pleadings occurs under CR 15(b) whenever evidence that purportedly raises issues not raised by the pleadings is admitted. Petition for Review, p. 13.

MILP fails to correctly apply the test for amendment under CR 15(b). To determine whether an amendment under CR 15(b) occurred by the implied consent of the parties, a court is to consider the record as a whole, including whether the issue was mentioned in discovery, pretrial motions, opening arguments, or in the trial briefs. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). A court can also consider whether evidence on the issue was admitted at trial and whether there is legal and factual support for the trial court's conclusions, if any, on the issue. *Federal Signal Corp. v. Safety Factors*, 125 Wn.2d 413, 435-36, 886 P.2d 172 (1994).

The hallmarks of a trial by implied consent never occurred here. As noted by the Court of Appeals, the issue of the Option's

enforceability was not raised by either party in their pleadings, multiple motions for summary judgment, extensive trial briefs, or during opening arguments. *Slip Op.* at 14. The trial court also did not enter any conclusion of law about the Option's enforceability and never discussed the issue at trial. The Court reviewed the entire record to see if the parties had even raised the issue of enforceability and reasonably concluded (based on the complete absence of any such evidence in the record) that the parties did not try this issue. MILP's request for review of this issue should be denied as the Court of Appeals' ruling was not contrary to CR 15(b) or existing case law.

Finally, none of the cases MILP cites support its argument that an amendment under CR 15(b) occurred. For example, in *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987), the issue of a negligence claim was *actually* raised by the parties in their discovery, pre-trial motions, during trial, and the trial court actually ruled on the claim. As such, even though the negligence claim had not been pled, the claim was deemed to be part of the pleadings. Id. at 767.

Similarly, in *DiPirro v. United States*, 189 F.R.D. 60 (W.D.N.Y. 1999), the plaintiff presented evidence of her failure to have surgery to repair her shoulder following an accident. Id. at 64. Unlike the case at bar, the trial court *actually* considered the evidence and affirmatively

ruled on this unpled defense at trial. Id.

In both *Reichelt* and *DiPirro*, the parties actually raised the subject issue *before* the trial court and the trial court actually considered and *ruled* on the issue. Here, the parties never raised the issue of the enforceability of the Option before the trial court and the trial court never ruled on the issue. No court could reasonably find amendment under CR 15(b) under these facts.

B. The Court of Appeals Properly Recognized that All the Elements for an Enforceable Agreement (Price, Parties, and Property) Were Present in the Option.

MILP next claims the Court of Appeals erred in failing to recognize the Option as an unenforceable "agreement to agree." Setting aside the question of whether MILP is entitled to raise this issue for the first time on appeal, MILP's claim is nonetheless meritless. The Option states all the material terms (parties, property, and price) to sell real estate for cash with reasonable certainty.

A contract "must embody all of the essential and material parts of the [agreement] with sufficient clarity and certainty to show that the minds of the parties have met on all the material terms with no material matter left for future agreement or negotiation." *Friedl v. Benson*, 25 Wn. App. 381, 383, 609 P.2d 449 (1980). "Mutual assent does not require both parties, however, to have an actual and identical

understanding of all the nuances of the bargain." 25 WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 2.8, at 43 (2d ed. 2007).

For the cash sale of real property under an option, the written agreement must merely state the parties, the property, and the price. *Neiffer,* 17 Wn. App. at 446; *Valley Garage, Inc.*, 4 Wn. App. at 318.

An enforceable contract requires manifestation of assent to material terms that are reasonably certain. *Howard v. Fitzgerald*, 58 Wn.2d 403, 405-06, 363 P.2d 386 (1961). Contract terms are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979). Regarding price, courts have repeatedly held that price is stated with reasonable certainty where the parties agree to have price determined by a practicable method, without any new expression by the parties. *Valley Garage, Inc.*, 4 Wn. App. at 318.[3]

The Option contained all the essential terms for an enforceable contract for the cash sale of real estate. It identified the parties (MILP

[3] *Valley Garage* involved a written lease with an option to sell the property at a "reasonable price" as determined by three appraisers. The court affirmed the award of specific performance because the option identified the parties, described the property for sale and included a "method for the determination of a price[.]" *Id.* at 318. Further, having "a reasonable price" as determined by three appraisers supported the *higher* threshold remedy of specific performance. A greater degree of certainty is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages. *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 692, 184 P.2d 90 (1947). It is hard to conceive how the agreed pricing method in this case is less certain than the provision in *Valley Garage*.

and MRA), described the real property (by an attached legal description), and provided a detailed method for determining price through the use of possibly three different pricing alternatives to be determined *by* appraisers. The parties objectively manifested their assent to these terms by signing the Option.

MILP's claim that the parties needed "further agreement" regarding price is meritless. The Option provided that the highest of possibly three different valuation methods (assuming all methods were actually and timely invoked) would be used as the purchase price. Further, each of the three designated pricing methods – (i) fair market value at time of exercise; (ii) replacement cost as time of exercise; and (iii) prospective fair market value of the leased property at stabilized occupancy plus 3% per year – were to be determined by unbiased appraisers, not the parties. The parties agreed that these determinations would bind the parties. There was nothing left for the parties to agree upon. The multi-faceted procedure was sufficiently definite to be specifically enforceable. *Valley Garage, Inc.*, 4 Wn. App. at 318. The Court of Appeals decision finding that all the material elements of an enforceable were present was completely consistent with existing Washington law. This Court should decline to review this issue.

MILP's reliance upon *Sea-Van Inv. Assocs. v. Hamilton*, 125

Wn.2d 120, 881 P.2d 1035 (1994) is misplaced as that case is factually distinguishable. In *Sea-Van* the issue of enforceability of a real estate contract was actually raised before the trial court and the trial court affirmatively found that required terms (including the terms of the promissory note, deed of trust, type of deed, time of closing, and payment of taxes) had not been agreed upon by the parties. Id. at 125. Here, the parties agreed to a cash sale (not a real estate contract) and the enforceability of the Option was not raised or disputed at trial. The only precedent from *Sea-Van* that would be relevant to this case is the proposition that agreements to buy real estate must be definite enough on the required material terms to be enforceable. Id. at 129. Here, the Court of Appeals correctly held that the Option stated all the material elements for the cash sale of real property with reasonable certainty. The Court of Appeals decision was entirely consistent, to the limited extent *Sea-Van* is applicable, with *Sea-Van*.

MILP's claim that "nothing in the language of the option agreement provides for disregarding any of the three component values under any circumstances" is just plain wrong. Petition for Review, p. 16. The Option expressly required the timely appointment of appraiser (within 15 days from Option exercise), appointment of "disinterested" appraisers, and required the appraisers to complete their work "within

thirty (30) days." CP 966. The failure to meet these requirements would result in the appraisal or method not being considered. Id. Further, under Washington law "an agreement to be bound by an independent appraisal will be set aside if the court finds the appraisal was conducted on a fundamentally wrong basis." *Chatterton v. Bus. Valuation Research, Inc.*, 90 Wn. App. 150, 157, 951 P.2d 353 (1998).[4]

MILP's argument confuses formation with execution. At formation, the parties were required to agree to all the elements of an enforceable agreement, including a method to determine price. As stated above, the parties did so and therefore the Option was enforceable. That the parties agreed to a multi-faceted appraisal approach to determine price in forming the contract does not mean that each of the different pricing alternatives had to be included in determining the final price.

Upon MRA's execution of its Option right, specific and timely actions were required in order for replacement cost to be considered in setting the final price. MILP failed to take timely action and failed to appoint a disinterested appraiser. Instead, MILP engaged in bad faith to manipulate its own appraiser to arrive an artificially high sales price. Just because MILP failed to take the proper steps to have "replacement cost"

[4] Here it is undisputed that the trial court disregarded MILP's appraiser's Fair Market Value and Replacement Cost valuations in their entirety because the appraiser "abandoned his own independence and integrity," the appraisal was untimely, and contained numerous errors. CP 5297-99 (FOF 69, 74).

considered and chose to engage in bad faith, does not mean that the pricing alternatives the parties originally agreed to were invalid.

MRA does not believe this Court should even reach MILP's argument about the applicability of the severability clause. To even reach this argument MILP would have to first show it is entitled to raise enforceability of the Option for the first time on appeal and have to show a lack of mutual assent. But even if MILP could jump these hurdles, the Court of Appeals did not err in applying the severability clause to sever the replacement cost alternative. The parties expressly contemplated that two of the three pricing alternatives possibly would not apply if timely, proactive steps were not taken after option exercise. It is therefore reasonable to conclude that the parties intended to have the severability clause sever any alternatives that were allegedly invalid at formation.[5]

C. The Award of Consequential Damages to MRA Was Completely Consistent With Washington law.

MILP claims the trial court's award of consequential damages conflicts with *Cornish College of the Arts v. 1000 Virginia*, 158 Wn.

[5] MILP cites to *Amb Prop v. Mis*, 250 Ga. App. 513, 551 S.E.2d 102 (2001) for the proposition that a severability clause cannot be used to sever a defective price contained in a lease option. In *Amb Prop* the court ruled that a severability clause could not be used to sever an integrated pricing scheme. There, the parties agreed that the greater of two components would set the lease price for a renewal term. Here, the parties agreed to an alternate pricing scheme, not an integrated once. The parties agreed to compare the greater of only those pricing alternatives that were timely activated and properly performed to determine price.

App. 203, 242 P.3d 1 (2010). This claim lacks merit as the consequential award was entirely consistent with *Cornish*.

The applicable law is well-established. Consequential damages awarded in addition to specific performance are not awarded for the breach of the contract itself. *Cornish*, 158 Wn. App. at 228. Rather, they are awarded at the *equitable discretion* of the trial court in an attempt to make the nonbreaching party whole. Id. In making the award, the goal is to try to restore the nonbreaching party to the position it would have been in had performance occurred. Id. at 229. A trial court has *broad* discretion in fashioning equitable consequential damages. Id. at 230. A reviewing court will not disturb an exercise of this discretion absent a clear abuse of its discretion. Id. at 228-29.

In *Cornish*, the trial court awarded a tenant consequential damages in the amount of the renovation and rent costs the tenant paid as a result of the landlord's breach. *Cornish*, 158 Wn. App. at 215, 230. Exactly as in *Cornish*, the trial court here awarded consequential damages in the amount of the rents MRA paid as a result of MILP's breach. Had MILP performed as agreed on June 15, 2008, MRA would not have been forced to continue to pay MILP the monthly rents (more than $115,000 per month) it paid from June 15, 2008 through July 15, 2012 (the end of trial).

The Court of Appeals did not err in upholding this award. By returning these rents to MRA, the trial court made MRA whole and returned both parties, as best it could, to their June 2008 positions. The trial court then ordered MRA to continue to make lease payments from July 15, 2012 *forward* "to such date of closing[.]" CP 5301. The trial court reasoned that since the consequential award returned MRA to its June 2008 position, MRA should pay monthly rent for as long as it took MRA complete its purchase of the Facility. April 18, 2013 Transcript (21:17-23:13).[6] The award was completely consistent with *Cornish* as it met the dual goals of returning MRA to the position it would have been in but for MILP's breach and made MRA whole. MRA received no windfall. There simply is no need for this Court to accept review of this issue as no conflict with existing precedent exists.

MILP argues that the consequential award should be reduced by the amount of interest MRA would have been paying on a hypothetical loan from June 2008 through July 2012. Petition for Review, p.18. However, MILP is reading a single line in *Cornish* ("to restore the

[6] The trial court initially gave MRA no more than nine-months from July 15, 2012 to close its purchase of the Facility. CP 5301. If MRA could close its purchase in *less* time, MRA would only be required to pay monthly rent until closing. Id. As it turned out, MRA was prevented from purchasing the Facility within nine months due to MILP's own unsuperseded appeal. Lenders were unwilling to lend during the appeal process if the transaction could be unwound pursuant to RAP 12.8. MILP therefore received monthly rents for the first nine months of its appeal. In total, MILP received monthly rental payments totaling $1,189,293.30 from July 15, 2012 to April 15, 2013.

nonbreaching party 'as nearly as possible to the position he would have been in had the seller performed'") in isolation and ignoring the goal of making the non-breaching party whole. This selective reading of the case law does not provide a basis for review.

MILP's argument would actually place MRA in a *worst* position than had MILP actually performed. MILP's argument would have MRA pay four years of principal and interest on the hypothetical loan it never received (from June 15, 2008 through July 15, 2012) while also being fully responsible to pay the same principal and interest on the loan MRA will actually use to purchase the Facility. In effect, MILP's argument would cause MRA to pay twice for the first four years of its purchase of the Facility. Had MILP actually performed, MRA would have only have had to pay these costs once. The trial court did not abuse its discretion refusing to place MRA in a worse position than had MILP actually performed.

In a passing, MILP claims that the consequential award should have been reduced to exclude monthly rent received while MRA pursued a premature option date. This Court should refuse to consider this request as it is unsupported by any authority or argument. In any event, this claim fails because it ignores the parties' concurrent dispute about price. MILP insisted throughout the litigation that MRA was in breach of the

Option because MRA refused to pay MILP's the $27 million "replacement cost" price it manufactured. Thus, even if MRA had not contested the option exercise date, the parties' would have still disputed the issue of price. The issue of price was resolved at trial. The trial court did not abuse its discretion in awarding consequential damages from June 15, 2008 when price was being disputed by the parties.

D. RAP 18.1(j) Request for Attorneys' Fees and Expenses.

MRA respectfully requests an award of its reasonable attorneys' fees and expenses incurred in answering this petition for review pursuant to RAP 18.1(j) and Paragraph 16 of the Option.

V. CONCLUSION

For the foregoing reasons, this Court should decline MILP's Petition for Review in its entirety.

RESPECTFULLY SUBMITTED this 16th day of December, 2013.

RYAN, SWANSON & CLEVELAND, PLLC

By: _____
Jerry Kindinger, WSBA #5231
Robert R. King, WSBA #29309
Attorneys for Respondent

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 16th day of December, 2013, I caused the foregoing document to be served on counsel for Appellants, as noted, at the following address:

VIA MESSENGER
Mr. Michael B. King
Mr. Jason W. Anderson
Mr. Justin P. Wade
Carney Badley Spellman P.S.
701 Fifth Avenue, Suite 3600
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Dawn L. Fisher

Dawn L. Fisher, Legal Assistant

Dated: December 16, 2013

Place: Seattle, WA

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

MUKILTEO RETIREMENT APARTMENTS, LLC, a Washington Limited Liability Company,	)	
Plaintiff,	)	NO. 08-2-07119-5
vs.	)	CT. OF APPEALS NO. 69039-6-I
MUKILTEO INVESTORS LIMITED PARTNERSHIP, a Washington Limited Partnership, et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR RELIEF ON JUDGMENT

BE IT REMEMBERED, that on April 18, 2013, the above-named and numbered cause came on regularly for hearing before the HONORABLE GEORGE N. BOWDEN sitting as judge in the above-entitled court, at the Snohomish County Courthouse, in the city of Everett, County of Snohomish, State of Washington;

The plaintiffs appeared in person and through their attorney, Robert King;

The defendants appeared through their attorney, Michael King.

WHEREUPON, the following proceedings were had to-wit:

fund combined with the fact that they delayed certain kinds of investments and improvements and maintenance until now they've got to do it because they're paying a price in the market. None of that is responsibility that can be put off on the landlord. Not even under this decree which is final. CR 60 places the limits there, and there's no authority for making that change.

Extend the closing date, fine, but the rent should stay as it is.

THE COURT: All right. Thank you both.

Obviously I will extend the closing date to the sooner of either MRA securing financing to close the transaction if my decision is upheld or nine months out. And I start with some assumption that because of the option that some arrangement will be made or decision that would permit MRA to purchase the facility. But that may be in error.

It is obviously a hardship on MRA to continue making rent payments of $132,000 a month. And it would be a hardship to MILP if they don't have that stream of income with underlying debt to pay off.

My intent at the time of trial in setting the purchase price was to offset payments made after June 15th of 2008 against the purchase price on the theory that if there had been agreement on value of the property, which I then had to determine in the absence of an agreement as to the

purchase price, backing that to the effective date of the option of June 15 of 2008, that seemed to create a method where the purchase price could be determined. Whatever the period of time necessary to close the transaction would really be at the hands of MRA. If they could get their financing together in 90 days, they could close in 90 days. If it took nine months, that seemed to be more than enough time to close the transaction. I've seen nothing to the contrary other than the fact that I think everyone agrees the simple pendency of this appeal makes it impossible to put that deal together under any realistic terms.

Rather than reducing the amount of rent, or increasing it for that matter, I'm going to maintain the rents as called for at the present dollar amount continuing forward, but, effective April 15, those rents will be paid to the registry of the clerk of court unless the parties should agree on some other remedy. That may continue to work a hardship for MRA and also a hardship for MILP, but, arguably, but for the appeal, the sale would have been completed, there wouldn't be any additional rent payments going to MILP, and at least there's an argument that ongoing payments may work as something of a windfall. Teasing all of this out prospectively is impossible at this time without knowing what the decision will be, what the financing terms will be, and how that will impact either

the purchase price for the facility or an adjustment of some of those payments going forward.

While I had previously deducted payments from June 15, 2008, to the time of my decision, arguably -- and I suppose it doesn't take a rocket scientist to predict that I would probably look at doing the same thing, but that remains for another day. This way the payments are still being made. They're still available. When the time comes to revisit all of that, if that happens, if MILP succeeds on its appeal, the rents are there and available for distribution to MILP. If MRA prevails on the appeal, those funds there are to help offset their cost of acquisition of the facility.

MR. MICHAEL KING: Your Honor, we'll need to draft up an order. And, in addition, I think out of an abundance of caution, since your decision is on review, I think we need to present the proposed form of order to the Court of Appeals for their signoff under RAP 7.2(e) and then we -- all timelines from that order, then it would be entered and all timelines for that order would proceed. So why don't Mr. King and I -- well, never mind, the two King fellows will get a form of order together.

THE COURT: Very well. Thank you.

MR. ROBERT KING: Thank you, Your Honor.

(Whereupon, the proceedings were concluded.)

C E R T I F I C A T E

I, **STACEY M. ENRIQUEZ LOMBARDO**, do hereby certify:

That the foregoing verbatim report of proceedings were taken by me and completed on April 18, 2013, and thereafter transcribed by me or under my direction by means of computer-aided transcription;

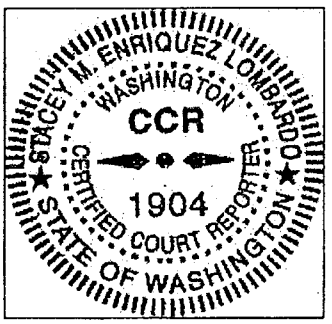
That the foregoing transcript is a full, true, and complete transcript **of the proceedings ordered**;

That I am not a relative, employee, attorney or counsel of any party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That I am herewith delivering the original and e-mailing one copy to Michael King.

IN WITNESS HEREOF, I have hereunto set my hand this 23rd day of April, 2013.

Stacey M. Enriquez Lombardo



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No. 89646-1

Answer of Respondent to Petition for Review filed by

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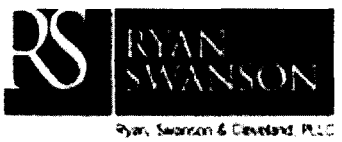

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