

64342-8

64342-8

No. 64342-8-I

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COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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RAY MACLEOD,

Appellant,

v.

CORNERSTONE EQUIPMENT LEASING, INC.,

Respondent.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN -4 PM 4:52

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BRIEF OF APPELLANT

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O. Yale Lewis, Jr.  
WSBA No. 1367  
Kara C. Rowton  
WSBA No. 40569  
Attorneys for Appellant

Hendricks & Lewis PLLC  
901 Fifth Avenue, Suite 4100  
Seattle, Washington 98164  
(206) 624-1933

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**ASSIGNMENTS OF ERROR UNDER RAP 10.3(a).**

*No. 1.* The Superior Court erred by granting Plaintiff Cornerstone Equipment Leasing, Inc.'s Motion for Summary Judgment and entering the Order on Plaintiff's Motion for Summary Judgment.

*No. 2.* The Superior Court erred by entering the Order Re Attorneys' Fees and Expenses and entering the Corrected and Final Judgment in the amount of \$331,288.96 for the principal judgment amount and Cornerstone's attorneys' fees, costs and expenses.

**Issues Pertaining to the Assignment of Error.**

*No. 1.* Whether Mr. Chevigny on behalf of Cornerstone fraudulently induced Mr. MacLeod to sign the 2005 Note when Mr. Chevigny stated to Mr. MacLeod, who had expressly stated that he did not assent to the terms of the note, that the 2005 Note was for internal purposes only and reiterated that the parties would use the disputed funds to invest in a future investment for their mutual benefit, and Mr. MacLeod signed the note in reliance upon Mr. Chevigny's statements?

*No. 2.* Whether Mr. Chevigny on behalf of Cornerstone waived any remaining indebtedness of Mr. MacLeod in December 2006 when he stated that Mr. MacLeod need not pay any more to Cornerstone. Additionally, whether Cornerstone failed to effectively reinstate the debt when Mr. Chevigny sent a letter to Mr. MacLeod on June 22, 2007, after six months without communication, and asked Mr. MacLeod to propose a payment plan, and when Cornerstone's counsel sent a letter on November 6, 2007, to Mr. MacLeod demanding payment of \$187,144.61

within 30 days?

*No. 3.* Whether Cornerstone should be barred under the doctrine of equitable estoppel from asserting its claim for recovery on the 2005 Note when Mr. Chevigny on behalf of Cornerstone stated that the parties were even and that Mr. MacLeod need not pay any more to Cornerstone, and Mr. MacLeod relied upon Mr. Chevigny's statements and invested the disputed money?

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

##### **A. Ray MacLeod.**

Mr. MacLeod is a Canadian resident, a farmer, business developer and investor. CP 205 (¶ 2), 216-217 (¶¶ 61-62). Throughout his business career, he has repeatedly evidenced a willingness to defer a present advantage in order to maintain a good, long-term relationship. CP 208-209 (¶ 22), 209 (¶ 24), 210 (¶¶ 29-30), 212 (¶ 38), 213 (¶¶ 44-46), 215 (¶¶ 56-57), 216 (¶ 59).

Around 1989 or 1990, Mr. MacLeod began distributing fuel to gas stations owned and operated by the Oneida Indian Nation of New York ("the Oneidas"). CP 205-206 (¶¶ 3-6). On at least one occasion, Mr. MacLeod helped the Oneidas finance the construction of a new gas station by providing an interest-free loan. CP 208 (¶ 18), 209 (¶ 24). They developed a trusting business relationship, and Mr. MacLeod and the Oneidas regularly went without written contracts in their dealings. CP 206 (¶ 5), 209 (¶ 25). Mr. MacLeod and the Oneidas have continued to work together over the last 20 years; Mr. MacLeod's company, BHREAC, is

now the exclusive distributor to the Oneida's several dozen gas stations. CP 209 (¶ 24).

In 1997, Mr. MacLeod invested in a newly-developed technology called "Request Information Services" ("Request"). CP 206 (¶ 8). In that context, he met James Chevigny, the president of fellow investor Cornerstone Equipment Leasing, Inc. ("Cornerstone"). CP 206 (¶ 9).

**B. Cornerstone.**

A Washington corporation, Cornerstone's primary business was to lend money to other businesses that wanted to acquire assets. CP 149:22-150:5. The company also operated under various unregistered trade names, including Cornerstone Equipment Finance, Cornerstone Financial and Cornerstone Capital, depending on the nature of the opportunity it pursued and the image it wanted to project (e.g., it responded to entrepreneurs as "Cornerstone Capital" in order to make itself seem capable of raising capital). CP 156:18-24, 157:1-158:2. Although the company has three shareholders and officers—President James Chevigny, Vice President Timothy Lee and Secretary Rhoady Lee, Jr.—only Mr. Chevigny actively participated in the business of Cornerstone. CP 145-146, 164:11-16, 360:14-17, 369:6-14. Mr. Chevigny set his own salary, managed the company, and had full authority to make, modify and forgive loans. CP 159:2-19, 165:14-24, 369:6-14.

"[A]s much as anything," the three shareholders used the company as "a tax investment." CP 159:24-160:3. As Mr. Chevigny explained, the shareholders of the company used the company "to throw off losses

and . . . take advantage of those, if . . . they need a write-off.” CP 160:20-23. In this way, the shareholders have taken advantage of more than \$2 million in losses. CP 162:14-163:7.

**C. The Parties’ Business Dealings.**

Both Mr. MacLeod and Cornerstone lost their investments in Request when the venture failed. CP 206 (¶ 11). However, Mr. MacLeod and Mr. Chevigny became business friends and pursued a variety of other investments and opportunities in the years that followed. CP 206 (¶ 12), 207 (¶¶ 13-16), 208 (¶ 19), 211 (¶¶ 33-34), 212 (¶ 40), 214 (¶ 48).

For example, in 1997, the parties, at Mr. Chevigny’s instance, attempted to facilitate merger talks between Tully’s Coffee (“Tully’s”) and Treats International Enterprises, Inc. (“Treats”). CP 207 (¶ 13). Mr. MacLeod owned a significant number of shares of Treats, and Mr. Chevigny was an advisor to the board of directors of Tully’s and wanted Cornerstone to provide the financing for the merger. CP 207 (¶ 14), 163:8-25. However, in the end, the merger talks never came to fruition because one of Treats’ significant shareholders was skeptical of Mr. Chevigny and his demands. CP 207 (¶¶ 15-16). Mr. MacLeod lost between \$10,000 and \$20,000 when the deal fell through. CP 207 (¶¶ 15-16). Although Mr. Chevigny had proposed the merger, neither he nor Cornerstone lost anything. CP 207 (¶ 13), 216 (¶ 59).

Additionally, beginning in 1998, the parties coordinated to purchase a tire recycling business in Montreal called Thermex. CP 211 (¶ 34). Mr. MacLeod personally invested more than \$580,000. CP 211

(¶ 34). At that point, Mr. Chevigny told Mr. MacLeod that he would set aside Mr. MacLeod's balance on the Oneida loan, discussed herein *infra*, to be invested for their mutual benefit. CP 211 (¶ 34). However, after two years of their efforts, the deal collapsed, in large part because Mr. Chevigny demanded an unreasonably high return on his and Cornerstone's investment. CP 211 (¶ 34). Mr. MacLeod lost more than \$580,000, while Cornerstone lost nothing. CP 211 (¶ 34).

In 2004 and 2005, Mr. MacLeod and Mr. Chevigny discussed working together to drill for oil and natural gas. CP 214 (¶ 48). Mr. MacLeod owned the land and obtained all of the necessary permits, but he needed financial assistance with the high start-up costs and approached Mr. Chevigny. CP 214 (¶ 48). In the end, Mr. Chevigny demanded more return on his investment than Mr. MacLeod felt was reasonable, so Mr. MacLeod proceeded without Cornerstone. CP 214 (¶ 48).

**D. The Oneida Loan.**

The deal that actually materialized involved financing a new gas station to be built by the Oneidas in Canastota, New York in 1998, the note for which forms the basis of this action. CP 208 (¶¶ 17-19). When Mr. MacLeod learned that the Oneidas needed \$1.45 million to build the station, he was only able to make a loan for half of the total amount. CP 208 (¶ 18). Consequently, Mr. MacLeod approached Mr. Chevigny and asked if Cornerstone would provide the other \$725,000. CP 208 (¶ 19). Mr. Chevigny agreed to make the loan on the condition that Cornerstone

loan directly to Mr. MacLeod rather than the Oneidas. CP 208 (¶ 19). Mr. Chevigny further required that Mr. MacLeod pay back the money by the following year, including 20 percent interest, a portion of which Mr. Chevigny explained was to be applied to recoup Cornerstone for its lost investment in Request. CP 208 (¶¶ 20-21). Although Mr. MacLeod had not been responsible for the failure of Request, nor for any portion of Cornerstone's lost investment, he agreed to the terms because he could afford to pay the 20 percent interest at that time and did not care how Cornerstone allocated the interest internally. CP 208 (¶ 21), 183:14-25. Mr. MacLeod signed the promissory note ("1998 Note") on July 15, 1998, and the addendum regarding the apportionment of interest on July 17, 1998. CP 208-209 (¶ 22), 220, 222.

At the outset, repayment of the loan went well, and Mr. MacLeod was on track to timely pay off the 1998 Note. CP 210 (¶¶ 27-28). Then, Mr. Chevigny asked Mr. MacLeod to cut the principal payments in half in order to extend the loan and the accompanying 20 percent return for a longer period. CP 210 (¶ 29). Since the reduced payments also benefitted the Oneidas, Mr. MacLeod agreed to do so, although no written amendment was executed. CP 210 (¶¶ 29-31), 169:16-170:13.

In December 1999, after Mr. MacLeod had made reduced payments for nearly a year pursuant to Mr. Chevigny's request, Mr. Chevigny presented an amendment to Mr. MacLeod, formalizing their agreement to reduce the payments and extend the note for 24 months ("1999 Amendment"), which Mr. MacLeod signed. CP 210-211 (¶ 32),

236.

In 2001, Cornerstone reported a balance of \$139,608.20, and Mr. Chevigny again asked Mr. MacLeod to sign an extension (“2001 Amendment”). CP 211 (¶ 35). However, by June 2001, Mr. MacLeod had paid Cornerstone around \$813,600, which was enough to cover the original principal and an additional \$90,000 in interest. CP 211 (¶ 35). Consequently, Mr. MacLeod protested making any further payments, reasoning that he had already paid a substantial sum to Cornerstone and because he had lost nearly \$600,000 the previous year when the Thermex deal fell through, discussed herein *supra*. CP 211 (¶¶ 34-36).

Mr. Chevigny agreed that Mr. MacLeod had already paid and lost a great deal, so he told Mr. MacLeod that he would set aside the balance of the principal with the understanding that it would be used for the financing of a future business venture. CP 212 (¶ 37). However, citing concerns about keeping his Cornerstone partners happy, Mr. Chevigny asked that Mr. MacLeod pay interest on the amount they set aside until such a deal could be worked out successfully. CP 212 (¶ 37). In order to preserve his good business relationship with Mr. Chevigny while they pursued other opportunities, Mr. MacLeod agreed to set aside the dispute about the amount for reinvestment and to pay interest until they could work out the next deal. CP 212 (¶ 38), 172:4-173:18.

From June 2001 until June 2004, Mr. MacLeod presented several investments that were seriously discussed, although none worked out. CP 212 (¶ 40). Mr. Chevigny proposed no new deals, and Cornerstone

continued to collect 20 percent interest from Mr. MacLeod, an average of nearly \$2,400 per month. CP 212 (¶¶ 39-40), 114-116.

**E. The Disputed Debt.**

Near the end of 2003, Mr. Chevigny asked Mr. MacLeod to sign a new amended note providing for 20 percent compounded interest and \$15,000 monthly payments on principal and interest. CP 212 (¶¶ 41-42). Mr. MacLeod refused. CP 213 (¶ 43).

At that point, Mr. MacLeod had already paid Cornerstone enough to cover the principal of the original loan plus \$160,000, twice the interest that Mr. MacLeod originally contemplated paying. CP 212 (¶ 41).

Although Mr. MacLeod reminded Mr. Chevigny of their agreement that the remaining balance was to be used for a future investment for their mutual benefit, Mr. Chevigny insisted that he needed to get something signed by Mr. MacLeod in order to keep his partners happy. CP 213 (¶ 43). Subsequently, Mr. Chevigny added a term to the amended note that provided that the “principal” would be due on June 30, 2005, or the date Mr. MacLeod received payment on another specified investment (“2004 Amended Note”). CP 213 (¶ 44). Mr. MacLeod ultimately signed the 2004 Amended Note as a gesture of friendship to Mr. Chevigny. CP 213 (¶ 46), 238-239.

In June 2005, Mr. Chevigny asked Mr. MacLeod to sign yet another amended note. CP 214 (¶ 49). Mr. MacLeod initially refused because he had by then paid Cornerstone well over \$930,000 and because they had been unsuccessful in their pursuit of other investments for which

the disputed funds were to be used. CP 214 (¶ 49).

Mr. Chevigny responded by assuring Mr. MacLeod that they could still work out the disputed money in a future deal, but that he needed some kind of paperwork because his partners were giving him a hard time. CP 214 (¶ 50), 178:3-9. Mr. Chevigny said he needed Mr. MacLeod to sign the note for “internal purposes only.” CP 214 (¶ 50), 180:1-4. He presented Mr. MacLeod with a note stating a principal of \$121,608.20 and providing that the note would be due upon October 31, 2005 (which was changed in handwriting to April 1, 2006) or upon the date Mr. MacLeod received payment on other specified investments. CP 214 (¶ 51), 241-242. Relying on Mr. Chevigny’s statements, Mr. MacLeod signed the note (“2005 Note”). CP 214 (¶ 51), 241-242.

Although Mr. Chevigny cited his partners’ concerns as to why he needed Mr. MacLeod to sign the 2005 Note and previous extensions and to pay interest on the principal they set aside, in reality, and unbeknownst to Mr. MacLeod, Mr. Chevigny’s partners were completely uninvolved in Cornerstone’s business. CP 164:11-16, 164:24-165:8, 403:13-15, 360:14-17. Timothy Lee was only generally aware of the loan to Mr. MacLeod for the Oneida gas station. CP 394:15-23. He never inquired about payments on the loan, nor did he ever instruct Mr. Chevigny to try to get the loan paid off. CP 399:23-25, 402:5-11. Mr. Chevigny never informed him that he agreed to set aside the principal for a future investment, nor did he ever inform him that Mr. Chevigny agreed in December 2006 that Mr. MacLeod owed nothing more to Cornerstone. CP 409:14-17, 409:24-

410:9, 402:12-13.

**F. Resolution of the Dispute.**

During one of their regular phone conversations in 2005, Mr. Chevigny indicated that Cornerstone viewed its dealings with Mr. MacLeod as a success; it had made substantial revenue on its loan to Mr. MacLeod for the Oneida gas station, and had even recovered more than enough interest to recoup its entire loss from the Request investment. CP 214-215 (¶ 52), 181:23-182:5.

Mr. MacLeod was surprised to learn that Cornerstone had recouped its loss from Request, because for years Mr. Chevigny had used the Request loss as a rationale for needing additional payments. CP 215 (¶ 53). Accordingly, at that point, Mr. MacLeod told Mr. Chevigny that he had paid enough over the years and that Mr. Chevigny needed to straighten the matter out with his partners. CP 215 (¶ 54). Nevertheless, purely as a gesture of good will and in an effort to preserve their business friendship, Mr. MacLeod offered \$50,000 to put the whole matter behind them. CP 215 (¶56), 185:2-11.

Mr. MacLeod made one final payment of \$3,000 in July 2006. CP 215 (¶ 57). Over the course of their dealings, Mr. MacLeod paid more than \$950,000 to Cornerstone, enough to cover the entire loan plus approximately three times the interest that he and Mr. Chevigny originally contemplated when the 1998 Note was signed. CP 216 (¶ 58).

In December of 2006, just before Christmas, Mr. Chevigny called Mr. MacLeod to discuss the money. CP 216 (¶ 59). Mr. MacLeod

refused to pay any more, explaining that as a result of all of their failed deals, he had lost a substantial amount over the years, far more than the amount of money Cornerstone was seeking from him. CP 216 (¶ 59). By contrast, Cornerstone had lost nothing in all of those years, and had made more than enough money on the Oneida gas station deal to cover the loan to Mr. MacLeod and recoup its Request loss. CP 216 (¶ 59).

Mr. MacLeod further argued that he had paid Cornerstone a lot of money because he considered Mr. Chevigny a friend, but he was not going to pay any more and wanted to put the dispute behind them. CP 216 (¶ 59).

Mr. Chevigny finally agreed that they were “even” and that Mr. MacLeod had paid enough. CP 216 (¶ 60), 181:23-182:5, 186:20-22. Their conversation ended amicably, each agreeing that they knew how to reach the other if a prospective deal presented itself. CP 216 (¶ 60).

**G. Mr. MacLeod’s New Investment.**

Following the parties’ December 2006 agreement that Mr. MacLeod had no further indebtedness to Cornerstone and that the dispute was resolved, Mr. MacLeod turned his attention and resources to the development of his property in Ontario into a wind farm, installing equipment capable of converting wind energy into useful energy. CP 216-217 (¶¶ 61-62). Mr. MacLeod made no further payments to Cornerstone and received no statements. CP 217 (¶ 63).

**H. Mr. Chevigny’s Loan From Cornerstone.**

Meanwhile, Cornerstone’s business had been “winding down.” CP 149:13-16, 151:20-152:3. Starting in 2000, the market for the type of

lending Cornerstone specialized in began to change, and Cornerstone was unable to generate as many profitable transactions. CP 153:6-16.

Although it had employed as many as eight or ten employees in the 1990s, it dwindled down to just four employees in 2004. CP 149:9-12, 154:19-25. By 2007, Cornerstone employed only a single employee, Mr. Chevigny. CP 155:3-5, 149:3-4. Mr. Chevigny began looking for other businesses to become involved in. CP 153:17-23.

Through an independent company, NTF, LLC, owned exclusively by him, Mr. Chevigny began developing a series of Taco Del Mar restaurants in Alaska. CP 153:20-23, 363:9-20. To finance his project, he withdrew \$1 million from Cornerstone's line of credit with Bank of America in order to provide a loan to NTF to develop the restaurants. CP 153:24-154:3, 362:19-364:10. His balance on the loan as of 2009 was \$1.6 million. CP 406:16-407:10.

At some point thereafter, Bank of America was "not feeling comfortable" with Cornerstone's line of credit, on which Cornerstone owed approximately \$2.5 million. CP 371:6-7, 434:16-18. Unfortunately, that call was highly problematic for Mr. Chevigny's partners because the Cornerstone line of credit was guaranteed by Lakeside Industries ("Lakeside"), which was owned in part by Mr. Chevigny's partners and other members of their family. 370:22-371:7, 353:3-6. Consequently, Lakeside Industries paid off Cornerstone's line of credit and Mr. Chevigny's partners turned up the heat on Mr. Chevigny to make things right with them. CP 371:3-12, 407 (¶¶ 15-20), 434:10-18.

Eventually, Mr. Lee, one of the owners of Lakeside and one of Mr. Chevigny's partners in Cornerstone, discovered that Mr. Chevigny had made a loan to himself. Mr. Lee's reaction was "surprise." CP 366:3-6. Mr. Chevigny had never sought his or their other partner's permission to take the money. CP 364:19-25, CP 434:7-8, CP 434:22-23.

Thereafter, Lakeside's Controller, Dax Woolston, assumed direct responsibility for Cornerstone's accounting, which had previously been done by Mr. Chevigny. CP 440:3-12. Mr. Chevigny has listed for sale his Taco Del Mar restaurants in order to repay his debt to Cornerstone, which must in turn pay off its debt to Lakeside. CP 407:15-20, 404:1-10.

**I. Cornerstone Changed Its Position.**

Although Mr. MacLeod had not communicated with Mr. Chevigny since December 2006, in June 2007, Mr. Chevigny called out of the blue and inquired of Mr. MacLeod about the 2005 Note. CP 217 (¶ 63). Mr. Chevigny followed-up with a letter dated June 22, 2007, in which he asked Mr. MacLeod to "contact [him] with [his] plan to pay the balance off in full." CP 217 (¶ 63), 244. During their telephone conversation, Mr. MacLeod reminded Mr. Chevigny of their express agreement in December 2006 that Mr. Chevigny did not owe Cornerstone anything more. CP 217 (¶ 64-65). Mr. Chevigny said that he remembered the conversation and still agreed with Mr. MacLeod, but said that his partners did not have the same relationship with Mr. MacLeod that he did, and that he had to answer to them. CP 217 (¶ 65). Because Mr. Chevigny had agreed that Mr. MacLeod did not owe Cornerstone anything more,

Mr. MacLeod refused to pay any more. CP 217 (¶ 66).

Mr. MacLeod heard nothing more from Cornerstone or Mr. Chevigny until November 2007, when Cornerstone's counsel sent a letter to Mr. MacLeod demanding payment of \$187,144.61 within 30 days. CP 217 (¶ 67), 246-248.

**J. Procedural Facts.**

Cornerstone filed this action on March 17, 2008. CP 1, 217 (¶ 68). On July 31, 2009, Cornerstone filed Plaintiff Cornerstone Equipment Leasing, Inc.'s Motion for Summary Judgment ("Summary Judgment Motion"). CP 27-40. Mr. MacLeod filed Defendant's Opposition to Plaintiff's Motion for Summary Judgment on August 17, 2009, CP 121-141, and Cornerstone filed its Reply in Support of Plaintiff's Motion for Summary Judgment on August 24, 2009, CP 251-256. The Superior Court entered its Order on Plaintiff's Motion for Summary Judgment, granting summary judgment in favor of Cornerstone on August 31, 2009. CP 496-499.

On September 22, 2009, Cornerstone filed Plaintiff's Motion for Award of Attorneys' Fees and Expenses and Entry of Judgment. CP 502-507. Mr. MacLeod filed Defendant's Opposition to Plaintiff's Motion for Award of Attorneys' Fees and Expenses and Entry of Judgment on September 28, 2009. CP 592-602. Cornerstone filed its reply on September 29, 2009. CP 710-716. On October 8, 2009, the Superior Court entered its Order Re Award of Attorneys' Fees and Expenses, granting Cornerstone's motion for attorneys' fees and expenses of

\$84,388.35. CP 751-754. On October 8, 2009, the Superior Court entered the Corrected and Final Judgment, in the amount of \$331,288.96 for the principal award and attorneys' fees, costs and expenses. CP 755-758.

Mr. MacLeod filed his Notice of Appeal on October 19, 2009, seeking review of the Order on Plaintiff's Motion for Summary Judgment, Order Re Attorneys' Fees and Expenses, and the Corrected and Final Judgment.

#### **SUMMARY OF ARGUMENT.**

The claim asserted by Cornerstone in this action is not actually for debt based upon a 2005 note, as Cornerstone contends. Rather, it is a half-court "buzzer shot" attempt by Cornerstone to connect with whatever funds can be possibly touched at this late stage in order to facilitate replacement of the \$1.6 million Mr. Chevigny borrowed from the now largely-defunct Cornerstone without having ever asked for the permission of his Cornerstone partners.

Because Mr. MacLeod long ago settled the underlying dispute with Cornerstone, and because the 2005 Note was the result of Mr. Chevigny's fraudulent inducement, the record supports several grounds upon which Cornerstone should be denied recovery of the debt it claims is owed by Mr. MacLeod.

Mr. MacLeod never assented to the terms of the 2005 Note and explicitly stated to Mr. Chevigny that he did not agree that he owed anything to Cornerstone. Nevertheless, by exploiting Mr. MacLeod's trust in him as a long-time business friend, Mr. Chevigny convinced

Mr. MacLeod to sign the note, explaining that it was merely for “internal purposes,” and that Mr. Chevigny still intended to honor their previous agreement to set aside the disputed principal for use as seed money for a future investment.

Even assuming *arguendo* that Mr. MacLeod assented to the terms of the 2005 Note, Cornerstone waived Mr. MacLeod’s indebtedness in a telephone conversation in December 2006 when Mr. Chevigny told Mr. MacLeod that—in light of the substantial monies Mr. MacLeod had already paid Cornerstone and Mr. MacLeod’s loss of over \$600,000 in other investments the parties had jointly pursued—the parties were “even,” with neither party having any ongoing indebtedness to the other.

Because Cornerstone expressly waived whatever obligation Mr. MacLeod might have had to make additional payments to Cornerstone, Cornerstone was required to (1) provide specific and definite notice of its intent to reinstate and attempt to enforce the 2005 Note, and (2) allow Mr. MacLeod a reasonable opportunity to comply with the terms of the note. Although Mr. Chevigny re-contacted Mr. MacLeod six months later, asking him to propose a payment plan (which Mr. MacLeod refused to do), Mr. Chevigny failed to give definite and specific notice that the note had been reinstated. He never even acknowledged the waiver, let alone clearly indicate that it was being revoked. Similarly, a subsequent attempt by Cornerstone’s counsel did not reinstate the note because it did not allow Mr. MacLeod a reasonable opportunity to comply with its terms.

In any event, Cornerstone should be permanently estopped from

asserting its present claim, which is clearly contrary to its position three years ago—that the parties’ dispute was over and that Mr. MacLeod owed nothing more to Cornerstone.

For the reasons discussed herein, the Superior Court erred in ordering summary judgment in favor of Cornerstone and in subsequently awarding it \$331,288.96 for the principal and Cornerstone’s attorneys’ fees, costs and expenses. The order and judgment should be reversed, and the case should be remanded for a trial on the merits.

If, at trial, the trier of fact accepts Mr. MacLeod’s testimony about the parties’ oral communications and course of dealing, he will prevail. If not, he won’t. But either way, this is a classic example of a case that ought to be resolved—not by summary judgment—but rather by live testimony and the credibility of the witnesses.

#### **STANDARD OF REVIEW.**

Appellate courts review decisions on motions for summary judgment *de novo*. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000).

Summary judgment is appropriate only if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

CR 56(c). *See, e.g., Hash by Hash v. Children’s Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988) (defining “material

fact”) (quoting *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980)); *Hope v. Larry’s Markets*, 108 Wn. App. 185, 192, 29 P.3d 1268 (2001) (*overruled on other grounds*)). See also *Meadows v. Grant’s Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967) (a party is entitled to judgment as a matter of law only where the facts are not in dispute).

Consequently, the evidence and all reasonable inferences from the evidence must be viewed in the light most favorable to Mr. MacLeod **and most unfavorable to Cornerstone**. *Hash by Hash*, 110 Wn.2d at 915-16. Mr. MacLeod is also to be given the benefit of all favorable inferences that can be drawn from the evidence. *Meadows*, 71 Wn.2d at 879-82.

#### **ARGUMENT.**

When the evidence is viewed most favorably to Mr. MacLeod and all reasonable inferences from the evidence are drawn in his favor, there are at least three reasons why Cornerstone is not entitled to recover the debt it claims is owed by Mr. MacLeod.

##### **A. The 2005 Note Is Voidable Because Mr. MacLeod’s Signature Was Fraudulently Induced.**

The 2005 Note is voidable by Mr. MacLeod because Mr. Chevigny fraudulently induced Mr. MacLeod to sign it. “A fraudulent misrepresentation or, under the right circumstances, even a material innocent misrepresentation can render a contract voidable.” *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 390, 858 P.2d 245 (1993) (en banc). “If a party’s manifestation of

assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.” *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981)).

“Fraudulent misrepresentation requires proof of: (1) a false statement; (2) upon which the party seeking to avoid the contract was entitled to rely and (3) did rely; (4) resulting in injury.” *Rainier Nat. Bank, Bellevue Midlakes Branch v. Clausing*, 34 Wn. App. 441, 446, 661 P.2d 1015 (1983) (citing *Kruger v. Redi-Brew Corp.*, 9 Wn. App. 322, 511 P.2d 1405 (1973); J. Calamari & J. Perillo, *Contracts* §§ 9-13 to 9-16 (2d ed. 1977)).

“A misrepresentation is ‘an assertion that is not in accord with the facts.’” *Yakima*, 122 Wn.2d at 390 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981)). “It is not necessary that [a party’s] reliance [upon a misrepresentation has] been the sole or even the predominant factor in influencing his conduct.” RESTATEMENT (SECOND) OF CONTRACTS § 167, comment (a) (1981). “It is enough that the manifestation substantially contributed to his decision to make the contract. It is, therefore, immaterial that he may also have been influenced by other considerations.” *Id.*

**1. Mr. Chevigny Falsely Stated That the Purpose of the 2005 Note Was to Keep His Partners Happy and It Was for “Internal Purposes Only.”**

Mr. Chevigny made false statements in order to induce

Mr. MacLeod to sign the 2005 Note. Mr. Chevigny knew that Mr. MacLeod did not agree that he owed Cornerstone the amount stated and that Mr. MacLeod did not agree to the terms stated in the 2005 Note. CP 179:2-10. Consequently, in order to persuade Mr. MacLeod to sign the note despite the parties' disagreement about the debt, Mr. Chevigny reiterated that the dispute over the money would be worked out in a future deal, as the parties had previously agreed, and Mr. Chevigny assured Mr. MacLeod that the note was intended for "internal purposes only," and that the purpose of the amended note was to show to his own partners in order to keep them "happy." CP 180:1-4, 214 (¶ 50). The obvious import of these statements was that the concern being addressed was a matter of bookkeeping rather than substance.

Mr. Chevigny's statements were not in accord with the facts. The 2005 Note was neither required nor requested by Mr. Chevigny's partners, nor were Mr. Chevigny's partners even made aware that Mr. MacLeod had signed the 2005 Note. Mr. Chevigny's partners had never questioned or expressed dissatisfaction with the status of Mr. MacLeod's alleged debt, and they never requested that Mr. Chevigny obtain a reiteration of the note from Mr. MacLeod. CP 401:24-402:16, 414:20-416:10. In fact, Mr. Chevigny subsequently admitted under oath that his partners did "literally nothing" with regard to the business of Cornerstone, and that neither of his partners had any involvement in the management of Cornerstone's business. CP 164:11-16, 164:24-165:8, 165:19-24. Timothy Lee testified that he never discussed with Mr. Chevigny any of

Mr. Chevigny's conversations with Mr. MacLeod about the alleged debt. CP 402:14-16.

Additionally, even at the time the 2005 Note was executed, Mr. Chevigny did not intend to stand by the promises he made to Mr. MacLeod. Washington law recognizes promissory fraud when a promise of future action is made with a “present intent not to attempt the future fulfillment of the promise[.]” *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1218 (9th Cir. 1983) (quoting *Fruit Indus. Research Found. v. National Cash Register Co.*, 406 F.2d 546, 550 (9th Cir. 1969)). When a “promise is made with the intention of not performing it, this implied assertion is false and is a misrepresentation.” RESTATEMENT (SECOND) OF CONTRACTS § 171, comment (b) (1981). “The promise itself need not be made in words but may be inferred from conduct or even supplied by law.” *Id.*

Here, although the parties did not use the specific word “unenforceable,” CP 178:3-13, Mr. Chevigny implied that Cornerstone would not enforce the note against him when he stated that the note was for “internal purposes only” and that the disputed funds would be invested in new business opportunities to the parties’ mutual benefit. However, events that followed (of which Mr. MacLeod was unaware) make clear that Mr. Chevigny’s statements to that effect were disingenuous at best. Mr. Chevigny never informed his business partners of his agreement with Mr. MacLeod to use the disputed funds as future investment seed money. CP 400:1-11, 409:14-17, 409:24-410:9. Moreover, although

Mr. Chevigny and Mr. MacLeod had contemplated and actively pursued more than a dozen business deals over the course of their relationship, Mr. Chevigny did not propose nor did the parties discuss any potential deals after negotiations regarding oil drilling on Mr. MacLeod's property fell through in 2005. CP 214 (¶¶ 48-49). In light of this and Mr. Chevigny's subsequent *de facto* denial of having ever intended to set aside the disputed funds for a future deal, CP 409:14-410:6, it is now clear that Mr. Chevigny was no longer interested in pursuing potential investments with Mr. MacLeod, let alone intend for the principal to be used in any future investment. Accordingly, his statements to that effect and his implication that the note would not be enforced were misrepresentations.

**2. Mr. MacLeod's Reliance Upon Mr. Chevigny's False Statements Was Justifiable in Light of Mr. Chevigny's Position Within Cornerstone, His Authority Over Cornerstone's Loan Transactions, and the Parties' History of Informal Dealings.**

Given Mr. Chevigny's authority and position at Cornerstone and the parties' established history of informal dealings, Mr. MacLeod's reliance upon Mr. Chevigny's misrepresentations was justifiable. Mr. Chevigny is the President of Cornerstone and one of only three partners. CP 145-146, 164:11-16, 360:14-17, 369:6-14. From the beginning of his relationship with Cornerstone, Mr. MacLeod dealt exclusively with Mr. Chevigny. CP 206-216 (¶¶ 9-60). Moreover, Mr. Chevigny conceded that he had the authority to forgive a loan on

behalf of Cornerstone. CP 165:14-18. Additionally, Mr. Lee, one of Mr. Chevigny's partners, stated that Mr. Chevigny was the only person involved in negotiating and deciding lease and loan terms. CP 369:6-14. Under these circumstances, Mr. MacLeod was entitled to rely upon Mr. Chevigny's statements. *See Rainier Nat'l Bank*, 34 Wn. App. at 446 (reliance was not justified where defendant relied upon information from "relatively minor officers in an outlying bank").

Mr. MacLeod's reliance is also reasonable considering the parties' history of casual dealings involving substantial amounts of money. On multiple occasions, the parties entered into agreements calling for a specified performance and then orally agreed to and accepted inconsistent performance. As one example, the parties orally agreed as early as June 2001 that Cornerstone would accept interest-only payments on the amount that Cornerstone claimed was due. CP 212 (¶¶ 37-39), 78 (¶ 6). However, the parties' agreement to do so was never memorialized in writing. CP 212 (¶¶ 37-39), 78 (¶ 6). Even when "Loan Modification Agreement # 2" was executed by Mr. MacLeod and accepted by Cornerstone on December 31, 2001—by which time Mr. MacLeod had been paying only interest for a full six months—the parties explicitly "ratified and confirmed" the terms of the original note, which provided for payments on both principal and interest. CP 92, 212 (¶¶ 37-39). Thereafter, Cornerstone accepted interest-only payments pursuant to the parties' oral agreement for an additional two and a half years. CP 114-116. In total, the parties observed the term of their oral agreement for three years

despite the clearly contradictory terms of the parties' written agreements. CP 212 (¶¶ 37-39), 106 (¶ 6), 114-116, 177:3-12, 78 (¶ 6), 92.

Similarly, the parties agreed in December 1998 or January 1999 that Mr. MacLeod would make payments of \$.05/gallon of gas sold, rather than the \$.10/gallon called for in the 1998 Note. CP 210 (¶¶ 29-32). Pursuant to this agreement, Cornerstone accepted Mr. MacLeod's reduced payments for nearly one year before the term was memorialized in the "Loan Modification Agreement," executed on December 31, 1999. CP 50:13-22, 210-211 (¶¶ 31-32), 77-78 (¶¶ 4-5), 171:9-17.

With this history, Mr. MacLeod's reliance upon Mr. Chevigny's statements was justifiable and reasonable under the circumstances.<sup>1</sup>

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<sup>1</sup> In its Reply in Support of Plaintiff's Motion for Summary Judgment, Cornerstone cited to the Third Circuit case *Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Inv.*, 951 F.2d 1399, 1412 (3d Cir. 1991), in support of the proposition that, as a matter of law, a party may not rely on oral promises that directly contradict written agreements between parties. That case is distinguishable. The Third Circuit examined the circumstances surrounding the formation of the agreements at issue, and it ultimately concluded that the plaintiff was not entitled to rely upon oral statements that contradicted the written agreements, reasoning that the plaintiff bank corporation was represented by a "sophisticated business[man]" that had consulted "with counsel at all stages of the transaction and closing" of an agreement with the defendant, which was a major banking institution, and that the representatives of defendant who had made the statements relied upon by the plaintiff never informed the defendant's board of directors of their promises. *Mellon*, 951 F.2d at 1412. By contrast, here, Mr. MacLeod is an individual, was not assisted by counsel in his dealings with Cornerstone, and dealt directly with the President of a very small niche lender who was also one of only three partners in the company. Thus, the only principle that should be drawn from *Mellon* as it relates to this case is that the reasonableness of one's reliance upon oral statements that contradict the terms of a written contract should be assessed in light of the surrounding circumstances. Given the circumstances of the relevant series of transactions and the parties' relative positions, Mr. MacLeod's reliance upon Mr. Chevigny's statements was justifiable.

**3. Mr. MacLeod Relied Upon Mr. Chevigny's Statements When He Agreed to Sign the 2005 Note, Which Has Resulted in Injury to Him.**

Mr. MacLeod relied to his detriment upon Mr. Chevigny's misrepresentations about the 2005 Note. Mr. MacLeod did not agree to the terms of the 2005 Note and voiced his dissent to Mr. Chevigny. CP 179:2-10, 214 (¶ 49). Nevertheless, he ultimately signed the 2005 Note in reliance upon Mr. Chevigny's assurances that the note was for "internal purposes only" and that the disputed funds would still be invested for their mutual benefit. CP 214 (¶ 50). Now Cornerstone seeks to use Mr. MacLeod's execution of that amendment—obtained by way of Mr. Chevigny's deceit and exploitation of Mr. MacLeod's trust and his commitment to remaining business friends—as a lever against him in order to facilitate recovery of a debt that was disputed in 2005 and then was later expressly waived by Cornerstone in 2006, as discussed herein, *infra*. Amplifying the usury, Cornerstone claims entitlement to 20 percent compounding interest on the forgiven debt. Unless the 2005 Note is voided as a result of Cornerstone's fraudulent inducement of Mr. MacLeod's assent, Mr. MacLeod will suffer significant injury.

In light of the forgoing evidence in support of Mr. MacLeod's affirmative defense of misrepresentation, the superior court erred when it granted summary judgment in favor of Cornerstone.

**B. In December 2006, Cornerstone, Through Mr. Chevigny, Waived Any Claim It Might Have Had for Further Payments From Mr. MacLeod and Never Effectively Reinstated the Claim It Waived.**

**1. Cornerstone Waived Its Right to Collect Further Payments in December 2006 When Mr. Chevigny Told Mr. MacLeod That He Owed Nothing More to Cornerstone.**

“A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Waiver “may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage.” *Id.*

During a phone call in December 2006, Cornerstone, through Mr. Chevigny, waived any further payment 2005 Note. CP 181:23-182:5, 186:20-22, 216 (¶¶ 59-60). In that discussion, the parties talked about the fact that Mr. MacLeod had lost a substantial amount of money in their multiple failed deals, far more than the sum Mr. Chevigny claimed that Mr. MacLeod owed to Cornerstone. CP 216 (¶ 59). Additionally, Mr. MacLeod reminded Mr. Chevigny that, while he suffered the losses, Cornerstone had never lost any money. CP 216 (¶ 59). Mr. MacLeod also stated that he and Mr. Chevigny had been friends for many years, and, for that reason, he had continued to pay them, totaling enough that they had made a substantial amount of money on the Oneida deal. CP 216 (¶ 59). He told Mr. Chevigny that he wanted to put their dispute about the

debt behind them. CP 216 (¶ 59). In response, Mr. Chevigny explicitly agreed that Mr. MacLeod had paid enough and that the parties were “even.” CP 216 (¶ 60).

Thereafter, pursuant to their conversation, Mr. MacLeod made no further payments, the parties did not communicate, and Cornerstone took no action until June 2007. CP 217 (¶ 63). Thus, Mr. Chevigny expressly relinquished Cornerstone’s right to collect any further payments. The intent to waive Cornerstone’s right is also supported by its extended inaction following that relinquishment. Indeed, Cornerstone concedes for purposes of summary judgment that it waived its right to collect further payments.<sup>2</sup> CP 35.

## **2. Cornerstone Failed to Revoke Its Waiver.**

Waived rights are “capable of being reinstated only by giving a definite and specific notice of an intention to act under them.” *Douglas v. Hanbury*, 56 Wash. 63, 65, 104 P. 1110 (1909) (quoting *Watson v. White*, 152 Ill. 364, 38 N. E. 902 (1894)). Following “a waiver, in order to reinstate the original terms of the contract, the [waiving party] must give notice of his intention thereafter to demand strict compliance with the terms of the contract and must allow the purchaser a reasonable opportunity to comply.” *Crutcher v. Scott Pub. Co.*, 42 Wn.2d 89, 97, 253 P.2d 925 (1953). *See also Forest Preserve Real Estate Imp. Corp. v.*

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<sup>2</sup> However, Cornerstone incorrectly argued that the waiver occurred in December 2005. To the contrary, Mr. MacLeod repeatedly stated that Mr. Chevigny agreed in December 2006 that Mr. MacLeod need not make any further payments to Cornerstone and that their dispute had been resolved. CP 186:20-22, 181:23-182:5, 216 (¶¶ 59-60).

*Miller*, 379 Ill. 375, 382, 41 N.E.2d 526, 529 (1942) (“The notice must be a reasonable one and a definite and specific notice of a changed intention.”).

Following Mr. Chevigny’s December 2006 waiver of the debt, Mr. MacLeod received two written communications from Cornerstone that related to the debt: a letter from Mr. Chevigny dated June 22, 2007, and a letter from Cornerstone’s counsel dated November 6, 2007, neither of which should be construed as a revocation of Cornerstone’s waiver. Consequently, regardless of any intention it might have had, Cornerstone failed to effectively reinstate any duty Mr. MacLeod had to make further payments on the 2005 Note.

**(a) The June 22, 2007 Letter Is Not a Revocation of Waiver Because It Does Not Provide Definite and Specific Notice of Intent to Demand Strict Compliance.**

Despite Cornerstone’s claim to the contrary, its June 22, 2007 letter does not reinstate the terms of the 2005 Note. The letter does not provide definite and specific notice of any intent of Cornerstone to demand strict compliance with the 2005 Note. The letter states in relevant part: (1) that Mr. Chevigny enclosed a loan amortization schedule reflecting all of the payments Mr. MacLeod had made and a copy of the 2005 Note; (2) that the “payoff” of the Note as of June 30, 2007 was \$171,585.44; (3) that “[g]iven the length of time this has been outstanding, [Mr. Chevigny is] sure [Mr. MacLeod will] agree that as a lender [Cornerstone has] been extremely lenient”; and (4) that “[w]e would like

to wrap this up soon, so please contact me with your plan to pay the balance off in full.” CP 244. Mr. Chevigny did not demand that Mr. MacLeod begin making monthly payments of \$5,000, due on the first day of each month, as the 2005 Note provided. Mr. Chevigny also did not demand a balloon payment of the balance, which the contract specified was due by April 1, 2006.<sup>3</sup> The only definite and specific demand in the letter is that Mr. MacLeod contact Mr. Chevigny to propose his own payment plan. CP 244. Allowing Mr. MacLeod to set his own payment schedule cannot be construed as a demand for strict compliance with the terms of the 2005 Note.

Additionally, the letter should not be construed as a reinstatement of the terms of the 2005 Note because it fails to explicitly revoke Cornerstone’s waiver. Washington courts have not addressed the issue of whether a party must explicitly revoke its waiver when, as here, there had been an express waiver. This is likely because contract waiver issues are typically raised in the creditor-debtor context, wherein a debtor has a duty to make monthly installment payments, and by accepting late payments, the creditor is found to have *implicitly* waived his right to take action upon delinquent or missed payments as provided for in the note. *See, e.g., Douglas*, 56 Wash. at 65-66 (creditor waived provision making “time of the essence” by accepting 17 late payments); *Crutcher*, 42 Wn.2d at 97

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<sup>3</sup> The 2005 Note also provided that the note would be due in full on the earlier of (1) October 31, 2005, which was modified in handwriting to reflect April 1, 2006; or (2) the date upon which Mr. MacLeod received the proceeds of a promissory note due him from the Estate of Leslie John Goodwin; or (3) the date upon which Mr. MacLeod closed the sale of his tire recycling company to Lafarge.

(creditor waived right to terminate contract on the basis of late payment by regularly accepting delinquent payments); *Fehl-Haber v. Nordhagen*, 59 Wn.2d 7, 7-8, 365 P.2d 607 (1961) (creditor waived right of forfeiture by accepting delinquent payments and failing to assert its right to forfeiture). *See also Daniels v. Philadelphia Fair Hous. Comm'n*, 513 A.2d 501, 502-503, 99 Pa. Comwth. 155, 159-160 (1986) (landlord waived contract term requiring tenant to pay utility bills by voluntarily assuming responsibility for utility bills). Why would one expect a party revoking an implied waiver—who would likely take the position that there had been no waiver in the first place—to expressly acknowledge the waiver? By contrast, in the context of express waivers, it would seem that nothing but an acknowledgement and explicit revocation of the expressly waived term would be sufficient to provide “definite and specific notice” that the term had been reinstated. In this case, Mr. Chevigny’s June 22, 2007 letter neither acknowledges the waiver, nor does it expressly revoke the waiver. Accordingly, it simply fails to give the definite and specific notice required to reinstate the debt.

Moreover, during the phone call that immediately preceded the June 22, 2007 letter, Mr. Chevigny told Mr. MacLeod that, although he had to answer to his partners, he still agreed with Mr. MacLeod that Mr. MacLeod does not owe anything to Cornerstone. CP 217 (¶ 65). Taking this statement together with the fact that Mr. Chevigny did not make clear in his letter that he was revoking his previous statements, and drawing all reasonable inferences in Mr. MacLeod’s favor, a reasonable

person in Mr. MacLeod's position would not have concluded that Cornerstone's June 22, 2007 letter imposed upon on him a duty to strictly comply with the terms of a note.

**(b) The November 6, 2007 Letter Did Not Allow Mr. MacLeod a Reasonable Opportunity to Comply.**

A party demanding strict compliance with a previously waived contract term must provide definite and specific notice of its intent to do so, and must also allow the party subject to the reinstated term a reasonable opportunity to comply. *Crutcher*, 42 Wn.2d at 97. There is “[n]o comprehensive rule as to what constitutes a reasonable length of time to be given in a notice of such changed intention[.] . . . What is reasonable notice in one case may not be such in another.” *Forest*, 379 Ill. at 382.

The November 6, 2007 letter from Cornerstone's counsel did not allow Mr. MacLeod a reasonable opportunity to comply with its demand to pay the balance of the disputed note, 20 percent compounded interest and attorneys' fees, together totaling \$187,144.61, within 30 days. CP 246-247. A period of 30 days did not provide Mr. MacLeod a reasonable opportunity to comply in light of the fact that just several months before, Mr. MacLeod's obligation to Cornerstone had been zero. Additionally, even when the note was executed, the monthly payment was only \$5,000. Moreover, Cornerstone's demand was unreasonable given the substantial sum demanded by Cornerstone. *Cf. Knoblauch v. Sanstrom*, 37 Wn.2d

266, 270, 223 P.2d 462 (1950) (holding that notice of withdrawal of waiver demanding payment of \$402.43 within five days failed to provide reasonable time to comply).

**3. Withdrawal of Cornerstone's Waiver Would Be Unjust and Should Therefore Be Barred Because Mr. MacLeod's Position Materially Changed Following Cornerstone's Waiver of the Debt and During Its Delay in Demanding Payment.**

In any event, a waiver cannot be withdrawn “if reinstatement would be unjust in view of a change of position by the other party.” RESTATEMENT (SECOND) OF CONTRACTS § 84, comment (f) (1981). Mr. MacLeod relied upon Mr. Chevigny's statement that no further payments were required and directed his energy and resources to the development of his wind farm, purchasing and installing all of the equipment, and obtaining the necessary permits to develop and operate the wind farm. CP 216-217 (¶¶ 61-62). Mr. MacLeod stated that “had [his] dispute with Cornerstone not been resolved, [he] would not have been able to” make the necessary investments in the wind farm. CP 216-217 (¶ 62). By implication, those funds are no longer readily available.

More importantly, withdrawal of Cornerstone's waiver is unjust because of the substantial growth of the sum over the course of Cornerstone's approximately 11-month delay. At the time of the parties' December 2006 agreement, the balance according to Cornerstone's calculations submitted with its Summary Judgment Brief would have been approximately \$138,000. Notably, there is no contemporaneous accounting of the sum claimed due by Cornerstone at that time because it

had not provided any statements for several months. CP 217 (¶ 64). By the time Cornerstone made a definite and specific demand for payment in the November 6, 2007 letter from its counsel, the sum demanded was in excess of \$187,000, nearly \$50,000 more than the balance would have been in December 2006 had it not been expressly waived.<sup>4</sup>

In light of the substantial balance increase resulting from Cornerstone's delay and the fact that Mr. MacLeod changed his position following Mr. Chevigny's waiver, it would be patently unjust to now require Mr. MacLeod to pay the sum Cornerstone claims is reinstated and immediately due, plus the 20 percent compounded interest that has accrued in the meantime.

**C. Cornerstone Should Be Estopped From Enforcing the 2005 Note Because Mr. Chevigny Agreed in December 2006 that Mr. MacLeod Owed Nothing More to Cornerstone.**

Even if the contract is not voidable as a result of Mr. Chevigny's material misrepresentations, and even if this Court were to find that Cornerstone reinstated the debt after it had been waived, Cornerstone should be barred from recovery in this action under the principle of

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<sup>4</sup> If one compares the alleged balances due during December 2006 and November 2007 as reflected in the accounting that Cornerstone prepared for its Summary Judgment Motion, a different result would be found. Cornerstone's previous accounting had been prepared by Mr. Chevigny, who made several accounting errors and failed to give credit for multiple payments by Mr. MacLeod. The accounting submitted in support of its Summary Judgment Motion corrects those errors, and reflects a November 1, 2007 balance of \$162,274.80, approximately \$25,000 less than the amount demanded by Cornerstone in November 2007. However, whether one compares the balance claimed due by Cornerstone in its November 6, 2007 letter or the substantially lower balance it recently calculated due for November 1, 2007, the result is still that the balance increased substantially during Cornerstone's delay, by at least \$24,000. Thus, the same logic would apply.

equitable estoppel, which applies “where an admission, statement or act has been justifiably relied upon to the detriment of another party.” *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). “The principle of equitable estoppel is based upon the reasoning that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975). A litigant seeking the protection of the doctrine must establish three elements: (1) that the other party made an admission, statement, or acted in a way that is inconsistent with the claim now being asserted; (2) that the litigant took action in reliance on that other party’s admission, statement or act; (3) that the litigant would suffer an injury due to this detrimental reliance if the court allowed the other party to recover. *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992) (en banc).

As set forth below, Cornerstone’s present claim is wholly inconsistent with Mr. Chevigny’s agreement with Mr. MacLeod in December 2006, upon which Mr. MacLeod relied in good faith when he invested the funds that had been in dispute. Allowing Cornerstone to now change its position would cause Mr. MacLeod to suffer substantial financial injury.

- 1. Mr. Chevigny’s December 2006 Statement That the Parties’ Were “Even” and that Mr. MacLeod Had Paid Enough Is Inconsistent With Cornerstone’s Claim for Recovery on the 2005 Note.**

The record shows that Cornerstone’s position in December 2006 and for months thereafter is clearly inconsistent with its present claim to recover the alleged balance due on the 2005 Note. Mr. MacLeod asked Mr. Chevigny to end the dispute, because he had paid Cornerstone a substantial amount of money over the years, CP 216 (¶ 59), enough to cover the entire principal of the original loan and more than \$227,000 in interest, CP 216 (¶ 58). Mr. MacLeod also argued that he had suffered significant financial losses resulting from the failure of other deals that they had pursued together—totaling nearly \$600,000, CP 211 (¶ 34), CP 15 (¶¶ 15-16), far more than the sum Cornerstone claimed was due—while neither Cornerstone nor Mr. Chevigny had lost *any*. CP 216 (¶ 59). Mr. MacLeod further explained that he had paid Cornerstone so much by that point that Cornerstone had been able to recoup its loss from the Request Information Services investment. CP 216 (¶ 59). He told Mr. Chevigny that he had continued to pay because they had been friends for several years, but he was not going to pay any more and wanted to end the dispute. CP 216 (¶ 59).

In response, Mr. Chevigny finally agreed to end the dispute. CP 216 (¶ 60). He agreed that Mr. MacLeod had paid enough and did not owe Cornerstone any more and that, consequently, they were “even.” CP 216 (¶ 60), 217 (¶¶ 64, 65). They ended the phone call amicably, agreeing that they knew each other’s contact information in case a new investment opportunity arose. CP 216 (¶ 60).

Cornerstone’s inactivity during the months that followed further

support the conclusion that it had abandoned its claim to the alleged debt. Although Mr. MacLeod and Mr. Chevigny had talked regularly for almost a decade, they did not communicate for six months after they agreed to end the dispute. CP 217 (¶ 63). Concurrently therewith, Cornerstone did not send even a single statement. CP 217 (¶ 63).

Then, after six months of silence, Mr. Chevigny called Mr. MacLeod unexpectedly, asking Mr. MacLeod to pay Cornerstone more money, which was followed by Mr. Chevigny's letter of June 22, 2007. CP 217 (¶ 63), 244. However, it was not entirely clear at that point that Cornerstone intended to renege on its agreement to end the dispute. Confusingly, Mr. Chevigny said that he still agreed with Mr. MacLeod's position that he no longer owed money to Cornerstone, but that his partners did not have the same relationship with Mr. MacLeod that he did, and that Mr. Chevigny had to answer to them. CP 217 (¶ 65).

It was not until November 2007 that Cornerstone asserted for the first time the position it now maintains, that Mr. MacLeod still owes Cornerstone, plus 20 percent compounded interest and attorneys' fees, which is entirely inconsistent with its previous agreement that Mr. MacLeod did not owe anything further.

Notably, Cornerstone's about face paralleled a series of events and radical internal changes the company underwent at approximately that same time. Over the course of several years, Cornerstone's business slowed dramatically to a point where, in 2007, Mr. Chevigny was its sole employee. CP 155:3-5. Through an independent company, NTF, LLC,

owned exclusively by him, Mr. Chevigny began developing a series of Taco Del Mar restaurants in Alaska. CP 153:20-23, 363:9-20. Without ever seeking permission or even informing his two partners in Cornerstone, Mr. Chevigny drew \$1 million from Cornerstone's line of credit with Bank of America in order to provide a loan to NTF to develop the restaurants. CP 153:24-154:3, 362:19-364:10. The balance of the loan increased to \$1.6 million. CP 406:16-407:10. When Bank of America started "not feeling comfortable" with the \$2.5 million balance of Cornerstone's line of credit, Lakeside stepped in and paid off the balance, which Cornerstone now owes to Lakeside. CP 353:3-6, 370:22-371:7, 434:10-18. Lakeside's Controller, Dax Woolston, was placed in charge of Cornerstone's accounting, CP 440:3-12, and Mr. Chevigny listed for sale his Taco Del Mar restaurants in order to repay his debt, CP 407:15-20, 404:1-10.

Despite the personal sense of loyalty, if any, Mr. Chevigny may have felt toward Mr. MacLeod, he obviously yielded to the exigencies of his own personal circumstances and contacted Mr. MacLeod to try to scrape together additional money to cover his own follies. However, regardless of Cornerstone's internal changes, Mr. Chevigny's statement that Mr. MacLeod owed nothing more to Cornerstone bound Cornerstone. When he made the statement, Mr. Chevigny was the president of Cornerstone, exclusively managed the company's business and all negotiations of loan agreements, and was authorized to forgive any loan due Cornerstone. In practical effect, as well as legally, Cornerstone acted

through Mr. Chevigny, agreeing to settle the dispute over the debt, a position that is clearly contrary to the claim asserted by Cornerstone in this action.

**2. Mr. MacLeod Made No Further Payments and Committed His Resources Instead to Developing His Wind Farm in Reliance Upon Mr. Chevigny's Statements That He Owed Nothing More to Cornerstone.**

Mr. MacLeod relied upon his agreement with Mr. Chevigny that he did not owe Cornerstone any more money. Having finally resolved his dispute about the alleged debt, Mr. MacLeod started a new business and invested in developing the wind farm along with his son. CP 216-217 (¶¶ 61-62). Mr. MacLeod explicitly stated that, “[r]ather than making further payments to Cornerstone, [he] put the money towards the wind farm, buying all of the necessary equipment and obtaining the necessary permits; had my dispute with Cornerstone not been resolved, I would not have been able to do so.” CP 216-217 (¶ 62). Thus, in reliance upon Mr. Chevigny’s agreement that he owed no more money to Cornerstone, Mr. MacLeod invested the money into the wind farm and it is no longer readily available.

**3. Mr. MacLeod Would Suffer Substantial Injury if Cornerstone Were Permitted to Repudiate Mr. Chevigny's December 2006 Statement.**

Mr. MacLeod would suffer substantial injury if Cornerstone were permitted to repudiate Mr. Chevigny’s December 2006 agreement that Mr. MacLeod did not owe Cornerstone anything more. Three years ago, Mr. Chevigny agreed that Mr. MacLeod’s debt was zero. As of

September 24, 2009, Cornerstone claims that Mr. MacLeod owes \$331,288.96 for the long-ago settled debt and 20 percent compounded interest and for the attorneys' fees, costs and expenses it has incurred in pursuing this action, in addition to the substantial attorneys' fees, costs and expenses he has incurred in defending the claim. Moreover, whatever resources Mr. MacLeod once had available to pay Cornerstone are now tied-up in the wind farm, which has yet to become fully operational. CP 216-217 (¶ 62).

Mr. MacLeod relied justifiably and in good faith on Mr. Chevigny's agreement to end the dispute and Cornerstone's subsequent inaction, and Cornerstone should be estopped from now claiming entitlement to the sum. Any other outcome would be profoundly inequitable and result in substantial injury to Mr. MacLeod.

#### **CONCLUSION.**

The 2005 Note upon which this litigation is based is voidable by Mr. MacLeod because he was fraudulently induced to sign it. Whatever duty he had to pay Cornerstone was waived in December 2006, when Cornerstone, acting through its president, Mr. Chevigny, told Mr. MacLeod that they were "even," and he need not pay anything more. Cornerstone's delayed attempts to reinstate the note failed for two reasons: (1) it never even acknowledged the waiver, let alone made a definite and specific demand for compliance with its terms, and (2) it did not allow Mr. MacLeod a reasonable opportunity to comply with the demand. In any event, Cornerstone should be estopped from recovering

any alleged sum due on the 2005 Note because Mr. MacLeod reasonably relied to his detriment on the statement that he and Cornerstone were “even” and that he owed nothing more to Cornerstone.

Accordingly, Mr. MacLeod respectfully requests the Court to reverse and vacate the Superior Court’s summary judgment and remand for trial. Mr. MacLeod additionally requests that the Court reverse the Superior Court’s order awarding attorneys’ fees and costs and the judgment in favor of Cornerstone of \$331,288.96 for the principal amount and attorneys’ fees, costs and expenses.

DATED this 4<sup>th</sup> day of January, 2010.

Respectfully Submitted,

HENDRICKS & LEWIS PLLC

By: *Gale Lewis*  
O. Yle Lewis, Jr., WSBA No. 1367  
Kara C. Rowton, WSBA No. 40569  
Attorneys for Appellant  
Ray MacLeod