IN THE SUPREME COURT OF IOWA

No. 21-0014

DOLLY INVESTMENTS, LLC,
Plaintiff-Appellant,

vs.
MMG SIOUX CITY, LLC, DALE MAXFIELD and MAXFIELD MANAGEMENT GROUP, LLC,
Defendant-Appellees.

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT

THE HONORABLE JEFFREY A. NEARY
PRESIDING JUDGE

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF

JACOB B. NATWICK, IOWA #AT0010523
ZACK A. MARTIN, IOWA #AT0014476
Heidman Law Firm, P.L.L.C.
1128 Historic Fourth Street
P.O. Box 3086
Sioux City, Iowa 51102-3086
(712) 255-8838 - telephone
(712) 258-6714 - telefax
E-mail: Jacob.Natwick @heidmanlaw.com
Zack.Martin@heidmanlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT
DOLLY INVESTMENTS, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Plaintiff-Appellant preserved the issue of whether Defendant-Appellant repudiated the lease agreement either by raising it to the District Court or as incident to issues which were determined and properly presented to the District Court.

Beverage v. Alcoa, Inc., 958 N.W.2d 611 (Iowa Ct. App. 2021)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Messina v. Iowa Dep't of Job Serv., 341 N.W.2d 52 (Iowa 1983)
O'Reilly Auto Parts v. Alexander, 824 N.W.2d 561 (Iowa Ct. App. 2012)
Presbytery of Se. Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975)
State v. Gibbs, 941 N.W.2d 888 (Iowa 2020)

II. Whether the District Court erred by granting Defendant-Appellee's Motion to Reconsider and amending its ruling to find that Plaintiff-Appellant was the first party to breach the lease agreement.

Adam's Tower Ltd. P'ship v. Richter, 186 Misc. 2d 620 (N.Y. App. Div. 2000)
Alliant Energy Corp. v. Alltel Corp., 344 F.Supp.2d 1176 (S.D. Iowa 2004)
Beck v. Trovato, 150 N.W.2d 657, 659 (Iowa 1967)
Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)
Brown v. State Cent. Bank, 459 F. Supp. 2d 837 (S.D. Iowa 2006)
Conrad Brothers v. John Deere Ins. Co., 640 N.W.2d 231 (Iowa 2001)
Homeland Energy Sols., LLC v. Retterath, 938 N.W.2d 664 (Iowa 2020), *reh'g denied* (Feb. 26, 2020)
Feld v. Borkowski, 790 N.W.2d 72 (Iowa 2010)
Pavone v. Kirke, 807 N.W.2d 828 (Iowa 2011)
Restatement (Second) of Contracts § 241 (1981)
Restatement (Second) of Contracts § 243 (1981)
Restatement (Second) of Contracts § 250 (1981)
Shelby County Cookers, L.L.C. v. Utility Consultants Intern., Inc., 857 N.W.2d 186 (Iowa 2014)
Smith v. Hegg, 214 N.W.2d 789 (S.D. 1974)
Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc., 599 N.W.2d 684 (Iowa 1999)

ARGUMENT

I. Appellant Preserved its Claim of Repudiation Because the Issue of Whether MMG Repudiated the Lease was Either Determined by the District Court or was Incident to the District Court's Determination as to Which Party First Breached the Lease.

MMG claims that Dolly failed to preserve its argument that MMG repudiated the lease by abandoning the Golden Corral property and communicating to the public that the restaurant had permanently closed because Dolly "did not mention the concept of repudiation or that term at trial" and instead "contended exclusively that MMG was the first to materially breach the contract." Appellee's Proof Br. at 17 (internal quotations omitted). However, mere mention of the word "repudiation" in the trial court record is not the standard for error preservation. *See Presbytery of Se. Iowa v. Harris*, 226 N.W.2d 232, 234 (Iowa 1975) (error preservation occurs when an issue is presented to or is "incident to a determination of other issues properly presented" to the trial court). As a determination on repudiation was incident to the District Court's determinations regarding breach and materiality thereof, the issue of repudiation is properly before this Court on appeal.

An error is properly preserved when the determination of the issue claimed to be preserved is "incidental to and intertwined with" issues undoubtedly considered and ruled upon by the finder of fact. *O'Reilly Auto Parts v. Alexander*, 824 N.W.2d 561 (Iowa Ct. App. 2012). It is improper for a party claiming error preservation to first raise their argument in a reply brief and the party must develop its argument as

to why and how the issue flagged is incident to another issue. *Beverage v. Alcoa, Inc.*, 958 N.W.2d 611 (Iowa Ct. App. 2021) (citing *State v. Gibbs*, 941 N.W.2d 888, 902 (Iowa 2020) (McDonald, J., specially concurring) ("the failure to make more than a perfunctory argument constitutes waiver"). However, when such an argument is sufficiently developed, a party's mere failure to employ the relevant terms before the trial court does not preclude a finding that the issue was actually litigated and is proper for consideration on appellate review. *See Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52, 61 (Iowa 1983) ("[a]lthough we do not find, on the basis of the skimpy record before us, that either employed the word "waiver," we are convinced the issue was litigated").

Whether labeled "repudiation" or not, the fight, particularly on reconsideration of the trial court's initial ruling, was over whether MMG's actions, prior to June 25, 2019, justified Dolly's reentry of the property. *See id.* (holding that the waiver issue was preserved because "[w]hether labeled waiver or not" the issue below was whether an employee's acts were permitted under his employment contract); App. 103 (finding Dolly's entry of the premises was the first material breach, which excused MMG's further obligations under the lease). Where issues are so intertwined that "there is no insurmountable obstacle to [an appellate court's] consideration of the larger issue [raised on appeal]," the relevant issue should be

considered. *Feld v. Borkowski*, 790 N.W.2d 72, 84 (Iowa 2010) (Appel, J., concurring in part and dissenting in part).

In its Proof Brief, Dolly did more than enough to sufficiently develop its argument that the issue of repudiation was at least implicitly considered by the trial court and was intertwined with the issue of breach. After providing relevant legal authorities for what qualifies as repudiation, Dolly stated:

> *The District Court erred* in its ruling on reconsideration *when it determined that*, by reentering the property and changing the locks on June 25, 2019, Plaintiff-Appellant *Dolly was the first to materially breach the lease.* Ruling on Defs.' Mot. to Reconsider at 4–5. *Rather*, through its communications with Dolly regarding its inability to pay the rent, and the newspaper article in the Sioux City Journal on June 17, 2019 indicating that the Golden Corral had permanently closed, *MMG repudiated the lease agreement contract in advance of June 25, 2019.* Such actions, when taken together, were sufficiently positive to show that MMG could not or would not perform under the lease agreement. *Thus, the first breach occurred when MMG repudiated the contract* and not when Dolly reentered the property.

Appellant's Proof Brief at 18–19 (emphasis added). The above-cited passage sufficiently demonstrates the connection between whether MMG repudiated the lease and the impact such repudiation would have on an issue undoubtedly considered by the trial court: which party was the first to materially breach the lease. App. 72 ("which party breached the lease first is hotly contested"); App. 104 ("Dolly Investments' breach was the first material breach).

The mention of the term "repudiation" is not outcome determinative as to the issue of error preservation, as MMG seems to contend. Appellee's Proof Br. at 17. Furthermore, MMG's position that Dolly's claim of repudiation is nothing more than a repackaging of its emergency claim at trial conflates two concepts which have differing standards. *Id.* at 19. While it may be true that many of the same actions which gave rise to MMG's repudiation of the lease were also cited by Dolly in support of its contention that an emergency existed which justified its reentry of the property, what qualifies as an "emergency" was defined by the lease, whereas what qualifies as repudiation is determined by the Restatement (Second) of Contracts and Iowa courts' interpretation of its relevant provisions. *See* App. 304 at ¶ 25.15 (discussing "emergency" reentry of the property without 24-hours' notice); *Pavone v. Kirke*, 807 N.W.2d 828, 833 (Iowa 2011) (citing Restatement (Second) of Contracts § 250 (1981)) (defining repudiation).

Accordingly, Dolly has properly preserved the issue of whether MMG repudiated the lease for appellate review. Whether MMG repudiated the lease is inextricably intertwined with the finding of which party breached the lease first and the impact that finding has on Dolly's damages. This is not a situation where Dolly has raised this issue for the first time in its reply brief, or otherwise failed to put forth a sufficient argument that the issue of repudiation is interrelated with the District Court's finding on breach. If that were the case, MMG may be able to claim unfair

surprise were it to be blindsided by this issue in advance of appellate argument. *Beverage*, 958 N.W.2d 611 (citing *Gibbs*, 941 N.W.2d at 902 (McDonald, J., specially concurring)). Instead, the issue of repudiation has been properly preserved and should therefore be considered by this Court on appeal.

II. The District Court Erred in Finding That Dolly was the First to Breach the Lease.

A. MMG repudiated the lease.

Because Dolly has demonstrated that its claim that MMG repudiated the lease was preserved before the District Court, the issue may be properly considered on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) (preservation occurs when the record reveals that the court was aware of a claim, at least inferentially, the claim need not be the basis for the court's decision). In an effort to refute the authorities cited in Dolly's Proof Brief on the issue of repudiation, MMG argues that the actions of MMG did not sufficiently express that it could not or would not perform under the lease, making a finding of repudiation improper. Appellee's Proof Br. at 20 (citing Restatement (Second) of Contracts § 250 (1981); *Pavone v. Kirke*, 807 N.W.2d 828, 833 (Iowa 2011)). This argument misses the mark and should be rejected by this Court.

MMG's position appears to be that one particular act or communication must be identified as the act amounting to repudiation. *See id.* However, this position is

inconsistent with Iowa law. *See Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 698 (Iowa 2020), *reh'g denied* (Feb. 26, 2020) (statements that a party cannot or will not perform, *coupled with non-performance*, is sufficiently positive to amount to repudiation). In fact, Iowa courts have consistently recognized that it is when the communication of an intent to refuse future performance is followed by an act consistent with that indication that a claim for repudiation arises. *See, e.g., id.*; *Pavone*, 807 N.W.2d 828; *Shelby County Cookers, L.L.C. v. Utility Consultants Intern., Inc.*, 857 N.W.2d 186 (Iowa 2014); *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001); *Berryhill v. Hatt*, 428 N.W.2d 647 (Iowa 1988).

The position asserted by MMG is also inconsistent with the Restatement's definition and illustrations of repudiation. Restatement (Second) of Contracts § 250 (1981). When "language that under a fair reading amounts to a statement of intention not to perform . . . *is accompanied* by a breach by non-performance," the language "may amount to a repudiation even though, standing alone, it would not be sufficiently positive." *Id.* at cmt. B. The Restatement, just like the Iowa caselaw interpreting it, specifically provides that actions or language, which may not alone be sufficient to repudiate a contract, must be considered in their surrounding context and, when so considered, may result in a finding that a party has in fact repudiated the agreement. *See id.*

When looking at the facts, in their totality, there can be little doubt that MMG's actions and statements amounted to repudiation. MMG had been delinquent on its property tax obligations for nearly nine (9) months, failing to make payment on the property tax balance which became due September 1, 2018, and March 1, 2019. App. 328. MMG had also failed to make timely payment of the rent throughout the time Dolly owned the property, beginning in 2017. App. 127:8–13 (Dolly testifying that delayed rent payments began as early as 2017).

Concerns only grew when, on April 16, 2019, MMG threatened Dolly that, unless Dolly decreased MMG's rent obligation "the Sioux City Golden Corral will not survive." App. 327. Maxfield, on behalf of MMG, further indicated in early June 2019 that MMG may soon cease operating the Sioux City Golden Corral. "[W]e are considering the sale of the Golden Corral in Sioux City. I have some medical conditions that are making the five hour drive very difficult to make and need to look at other options." App. 332. This was particularly concerning given the context that MMG had only paid half of the rent which was due for June and informed Dolly that it did not have the remaining half of June 2019's rent. App. 322.

If MMG is searching for a single act which pushed it over the line from delinquent tenant to repudiating the lease—the straw that broke the camel's back, so to speak—MMG need look no further than when it ceased operating the restaurant on June 17, 2019. App. 318–321. While a sign on the door read "closed for remodel,"

Dale Maxfield, President of MMG, confirmed in a June 17, 2019 article in the Sioux City Journal that the Golden Corral would not be reopening. App. 319–320. "According to a former employee, it was previously believed that the restaurant would reopen following the remodel. But on Monday night, Dale Maxfield, Maxfield Management Group LLC president, confirmed that the restaurant would not open again. Maxfield Management Group LLC was the owner of the Sioux City restaurant." App. 320. After June 17, 2019, MMG left the restaurant abandoned and unoccupied. Dolly is hard-pressed to think of a clearer repudiation of a commercial lease agreement than the tenant-operator of a business abandoning ship and publicly announcing their intentions to permanently cease operations. *See* App. 318–321.

Taken alone, any one of these actions, particularly MMG ceasing operations of the Golden Corral restaurant, could have constituted a repudiation. Considered collectively, MMG's indicated a clear inability to perform. Restatement (Second) of Contracts § 250 (1981). MMG made statements directly to Dolly that it was unable to meet its rent obligations under the lease. MMG then made public statements to the Sioux City Journal indicating that the Golden Corral had permanently closed. These statements were accompanied by a breach—MMG did not perform its obligations under the lease, failing to pay the full amount of rent due under the lease. MMG was similarly delinquent in paying property taxes, which were MMG's responsibility pursuant to the lease. App. 305 at ¶ 25.23. Collectively, the words and

actions of MMG indicated an unwillingness or inability to perform. *See* Restatement (Second) of Contracts § 250 cmt. b ("[l]anguage that is accompanied by a breach by non-performance may amount to a repudiation even though, standing alone, it would not be sufficiently positive").

Thus, the District Court erred in finding that Dolly was the first party to materially breach the lease agreement when it inspected the property and changed the locks on June 25, 2019. MMG's prior actions in the month of June, typified by the Sioux City Journal article and its June 19 renewed refusal to pay the rent and property taxes that were due, constituted repudiation of the agreement such that MMG repudiated no later than June 19, 2019. Accordingly, MMG and not Dolly was the first party to materially breach the lease agreement.

MMG's repudiation, effective no later than June 19, 2019, discharged any duty Dolly had to render performance under the lease contract. *See Homeland Energy Sols., LLC*, 938 N.W.2d at 697 (repudiation of the contract by one party excuses the other party from its performance obligations under the contract). Thus, after June 19, 2019, Dolly had no obligation to permit MMG to use and occupy the Golden Corral restaurant. Therefore, Dolly's reentry of the property cannot be said to be a breach. The District Court's finding to the contrary was reached in error.

B. MMG materially breached the lease by failing to pay full rent and vacating the premises in June 2019.

Alternatively, if MMG's actions did not amount to repudiation, MMG materially breached the lease by failing to pay the full rent and property taxes which were due and vacating the premises in June 2019. MMG argues that the lease expressly provided the exclusive remedy for MMG's failure to pay rent, requiring Dolly to send written notice to MMG and permit MMG fifteen (15) days to cure its breach. Appellee's Proof Br. at 24 (citing App. 298 at ¶ 13.1). MMG further contends that the District Court properly found that Dolly reentered the property, changed the locks, and excluded MMG from the premises prior to providing the required notice to cure. *Id.* These assertions and MMG's claims regarding the legal effect of these assertions are incorrect.

It is true, as noted by the District Court, that paragraph 13.1 of the lease provided a mechanism by which Dolly could have addressed MMG's failure to pay the rent and that no other provision of the lease expressly provides an alternative method for addressing MMG's breach. *See* App. 76 (noting the requirements Dolly was to follow pursuant to Article 13.1(A) of the lease). It does not follow therefrom that this was Dolly's exclusive remedy. Paragraph 13.1 constitutes "default." It is silent, as is the entirety of the lease, on the issue of what constitutes a "material breach." Material breach of a contract, just like repudiation, excuses the duties of the

other party to the contract. *Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc.*, 599 N.W.2d 684, 688 (Iowa 1999).

Iowa courts consider five factors when determining whether a breach is material: (i) to what extent the non-breaching party will be deprived of the benefit it reasonably expected; (ii) the difficulty the non-breaching party may have proving damages; (iii) the possibility that the breaching party will suffer forfeiture; (iv) the likelihood that the breaching party will cure its failure; and (v) the degree that the breaching party's behavior comported with standards of good faith and fair dealing. *Id.* at 692 (citing Restatement (Second) of Contracts § 241 (1981)). The issue of materiality is very fact-dependent and "is necessarily imprecise and flexible." Restatement (Second) of Contracts § 241 cmt. a (1981). The first two factors to consider (the extent of the deprived benefit and difficulty in proving damages) are interrelated, as the difficulty in proving with sufficient certainty the amount of loss necessarily affects the adequacy of compensation. *Id.* at cmt. c. The probability that the failure will later be cured, often informed by the financial weakness of the other party suggesting an inability to cure, is also relevant to the determination of materiality. *Id.* at cmt. e.

MMG misstates the factual record when it alleges, in its brief, that it "operated its restaurant at the property without incident and paid all of its rent and tax obligations." Appellee's Proof Br. at 13. As was well-documented at trial and

referenced in Appellant's Proof Brief, MMG was delinquent in its rent and tax payments on numerous occasions before June 2019.[1] This misstatement of fact is relevant as MMG's prior issues with meeting its rent and tax obligations suggested financial weakness and an inability to cure its breach, supporting a finding that MMG's breach was material. Restatement (Second) of Contracts § 241 cmt. e (1981).

The difficulty Dolly encountered in proving its damages also points towards MMG's breach being material. As correctly pointed out by the District Court in its initial Ruling, determining future damages in a commercial lease case is difficult, particularly in light of the impact the COVID-19 pandemic has had on Dolly's ability to re-lease the property. Ruling on Petition and Counterclaims at 6. Thus, this is yet another factor which points towards a material breach.

Similarly relevant to the issue of materiality are the demands by Dolly, asking MMG to comply with its financial obligations pursuant to the lease going forward, after MMG failed to do so on numerous occasions. *See, e.g.*, App. 326 (noting failure to pay taxed owed in March 2019); App. 322 ("[i]f you fail to immediately comply with all lease provisions, then I will exercise my legal rights"). Where the tenant has

---

[1] *See, e.g.*, App. 328 (showing tax delinquencies on September 1, 2018, and March 1, 2018); App. 127:8–13 (Dolly testifying that delayed rent payments began as early as 2017).

previously been delinquent in rent payments and the landlord demands strict compliance going forward, the tenant cannot rely on the landlord's prior forbearances to argue that the breach is not material if he again fails to tender the rent due. *Beck v. Trovato*, 150 N.W.2d 657, 659 (Iowa 1967).

On the issue of the likelihood of MMG curing its breach, MMG's actions in abandoning the property and informing the public of the permanent closure of the Golden Corral restaurant point definitively against such likelihood. *See* Proceedings at 160:24–161:16 (Reingold testifying that his bank, Northwest Bank, located near the Golden Corral, informed him that the property was "abandoned"); App. 318–321. A tenant vacating the premises gives the indication that the tenant is unlikely to cure its breach, which, in turn points towards the breach being material. *See Van Oort Constr. Co.*, 599 N.W.2d at 692; Restatement (Second) of Contracts § 241 (1981).

In fact, an argument can be made that MMG's abandonment of the Golden Corral, standing alone and without even considering MMG's rent delinquency, was a material breach. This argument may be considered on appeal as it was presented to the District Court by Dolly contending that abandonment of the property was part of the materiality of MMG's breach. *See* App. 76 (discussing implications of MMG's "wrongful abandon[ment] [of the] leased premises"). An implicit and reciprocal term agreed to by a commercial tenant, in exchange for the right to possess

and operate its business out of a leased property, is the continued occupation and operation of the business by the tenant. *See* App. 299 at ¶ 14.2 (Right to Possession). Thus, MMG's abandonment of the property and ceasing operation of the Golden Corral was in breach of its lease agreement with Dolly.

Considering the totality of the circumstances, it is clear that MMG was materially in breach of the lease, prior to June 25, 2019. Whether MMG's actions constituted material breach or outright repudiation of the lease is not determinative as to the issue of damages, as both repudiation and material breach provide that damages for total breach is the appropriate measure of damages. Restatement (Second) of Contracts § 243 (1981).

Furthermore, MMG is incorrect in its assertion that Dolly was only permitted to send out a Notice to Cure in response to MMG's abandonment and failure to pay rent. Appellee's Proof Br. at 24. It is true that Iowa law "encourages compliance with contract terms, supports the parties' intentions as expressed in the contract, and . . . expect[s] that all terms of a contract are meaningful." App. 103. However, the notice to cure requirement should not be rigidly applied in a case of breach of the lease which goes well beyond the simple failure to pay rent. *See Adam's Tower Ltd. P'ship v. Richter*, 186 Misc. 2d 620, 622 (N.Y. App. Div. 2000) (notice to cure not required when cumulative pattern of tenant's failure to pay rent was not capable of "cure" within the provided period). When appropriately considering MMG's

actions, in their entirety, Dolly was well within its rights when it reentered and secured the property on June 25, 2019. Dolly's actions were in response to MMG's material breach. The District Court's erred in reaching the converse conclusion.

C. Dolly did not breach the lease by reentering the property on June 25, 2019.

Dolly did not materially breach the lease when it reentered the property on June 25, 2019. If Dolly's reentry of the property on June 25, 2019 was in breach of the lease agreement, which Dolly does not concede that it was, the breach was nevertheless non-material. This would mean that Dolly did not materially breach the lease agreement prior to MMG's failure to cure its default within fifteen (15) days after receiving a notice to cure from Dolly, or July 18, 2019. The District Court's finding to the contrary was reached in error.

MMG mischaracterizes Dolly's position at trial by asserting that Dolly "conceded" that it breached the parties' lease. Appellee's Proof Br. at 28 (citing App. 75). Leon Reingold stated that he reentered the property prior to providing the fifteen (15)-day curative period, consistent with paragraph 13.1 of the lease. App. 159:23–161:16. However, Dolly reentered the property under the good faith belief that it was doing so consistent with paragraph 25.15 of the lease, which provided that the landlord must give twenty-four (24) hours prior notice to enter the property "except in the event of an emergency." App. 304 at ¶ 25.15; App. 264:24 – 265:22 (Dolly's

counsel cross-examining Maxfield about existence of an "emergency" on June 25, 2019, which would have permitted Reingold's entry).

MMG similarly mischaracterizes Leon Reingold's testimony regarding whether the restaurant equipment was still in the building when he arrived to visit his property on June 25, 2019. Appellee claims that Reingold testified that "*all* of MMG's restaurant equipment remained inside the building" when he secured the restaurant premises. Appellee's Proof Br. at 15. This statement is not supported by the record. All the utensils necessary to operate a Golden Corral restaurant, such as plates, forks, spoons, and knives were missing. App. 136:15–137:11. All the computers and files were similarly taken from the restaurant. App. 136:15–137:11; 176:4–177:3. That all the equipment was not still in the restaurant when Reingold visited the property on June 25, 2019 is undisputed. Maxfield himself conceded at trial that he took the aforementioned items because they "were useable to a different Golden Corral." App. 226:8–229:3.

MMG is also incorrect when it asserts that Dolly placing new locks on the Golden Corral excluded it from the property. Dale Maxfield, on behalf of MMG, never requested access to the property nor did he inquire about operating the Golden Corral out of the relevant property. *See* Proceedings at 259:13–18 (Maxfield admitting he never asked for access to the property in the time between when the

locks were changed and when Dolly sent a Notice of Termination in late August 2019).

As a threshold matter, a party cannot be excluded from property if they are never told of such exclusion and never request access. *See Smith v. Hegg*, 214 N.W.2d 789, 791 (S.D. 1974) (holding that a commercial tenant could not be found to have abandoned the property because the landlord had changed the locks and when the tenant requested access, the landlord refused). Furthermore, where a tenant demonstrates that they will be permanently and not merely temporarily absent, "changing of the locks [i]s a permissible peaceful means for the [owner] to take possession of the property" particularly when such property appears abandoned. *Brown v. State Cent. Bank*, 459 F. Supp. 2d 837, 843 (S.D. Iowa 2006).

A party is similarly not deprived of a contractual benefit if such benefit is not one which the party could have reasonably expected to enjoy. *See Alliant Energy Corp. v. Alltel Corp.*, 344 F.Supp.2d 1176, 1189–91 (S.D. Iowa 2004); Restatement (Second) of Contracts § 241 (1981) (discussing requirement for material failure including the injured party being "deprived of the benefit *which he reasonably expected*") (emphasis added). MMG could not have reasonably expected the continued unrestricted access to the property after abandoning it and leaving it in a state of disarray.

Therefore, Dolly acted within its rights, pursuant to the agreement, when it reentered the Golden Corral property on June 25, 2019. Dolly did not breach the agreement in so doing. In continuing its compliance with the terms of the lease, Dolly sent a Notice to Cure Default via certified mail to MMG on July 3, 2019. Pl's. Pet. at Ex. C. When MMG failed to cure, Dolly sent a Notice of Termination on August 22, 2019, in advance of filing this action.

Because Dolly did not breach the lease when it reentered the property, at least not materially, the first material breach was that of MMG, in failing to pay the rent and property taxes that were due and failing to cure after a notice of default. The District Court's finding that Dolly did materially breach the lease by accessing the property on June 25, 2019 was in error. Accordingly, the District Court's Ruling on reconsideration should be reversed to the extent the Court found that Dolly and not MMG was the first party to materially breach the lease agreement.

CONCLUSION

The issue of whether MMG repudiated the lease by its actions prior to June 25, 2019 is properly before this Court for appellate review. Because MMG's actions did amount to repudiation, this Court should reverse the District Court's finding that Dolly was the first party to materially breach the lease by reentering the property on June 25, 2019. Alternatively, MMG materially breached the lease by failing to pay full rent and property taxes, and by vacating the premises in advance of June 25,

2019. Finally, Dolly did not materially breach the lease when it reentered the property on June 25, 2019. In that case, the first material breach would have occurred after MMG failed to cure its default within fifteen (15) days after receiving a notice to cure from Dolly, or July 18, 2019.

CERTIFICATE OF COMPLIANCE

Plaintiff-Appellant, Dolly Investments, LLC, pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 4,517 words of a 14-point proportionally spaced Times New Roman font and it complies with the 14,000-word maximum permitted length of the brief.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jacob B. Natwick

JACOB B. NATWICK, AT0010523
ZACK A. MARTIN, AT0014476
1128 Historic Fourth Street
Post Office Box 3086
Sioux City, Iowa 51102
Telephone: (712) 255-8838
Facsimile: (712) 258-6714
Jacob.Natwick@heidmanlaw.com
Zack.Martin@heidmanlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT DOLLY INVESTMENTS, LLC

CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Appellant's Proof Brief with the Clerk of the Supreme Court by using the EDMS filing system.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jacob B. Natwick

JACOB B. NATWICK, AT0010523
ZACK A. MARTIN, AT0014476
1128 Historic Fourth Street
Post Office Box 3086
Sioux City, Iowa 51102
Telephone: (712) 255-8838
Facsimile: (712) 258-6714
Jacob.Natwick@heidmanlaw.com
Zack.Martin@heidmanlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT DOLLY INVESTMENTS, LLC

PROOF OF SERVICE

I, the undersigned, hereby certify that I did serve the attached Plaintiff-Appellant's Proof Brief on all other parties electronically utilizing the EDMS filing system, which will provide notice to:

Philip S. Bubb
Brandon R. Underwood
FREDRICKSON & BYRON, P.A.
505 East Grand Avenue, Suite 200
Des Moines, IA 50309
pbubb@fredlaw.com
bunderwood@fredlaw.com

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jacob B. Natwick
JACOB B. NATWICK, AT0010523
ZACK A. MARTIN, AT0014476
1128 Historic Fourth Street
Post Office Box 3086
Sioux City, Iowa 51102
Telephone: (712) 255-8838
Facsimile: (712) 258-6714
Jacob.Natwick@heidmanlaw.com
Zack.Martin@heidmanlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT DOLLY INVESTMENTS, LLC

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Plaintiff-Appellant's Proof Brief was the sum of $0.00 exclusive of service tax, postage, and delivery charges.

HEIDMAN LAW FIRM, P.L.L.C.

BY: /s/ Jacob B. Natwick

JACOB B. NATWICK, AT0010523
ZACK A. MARTIN, AT0014476
1128 Historic Fourth Street
Post Office Box 3086
Sioux City, Iowa 51102
Telephone: (712) 255-8838
Facsimile: (712) 258-6714
Jacob.Natwick@heidmanlaw.com
Zack.Martin@heidmanlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT DOLLY INVESTMENTS, LLC