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65338-5

No. 65338-5-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

COLLEGE GEAR.COM INC., *Plaintiff,*

v.

GEAR ATHLETICS LLC (f/k/a ALKI SPORTS LLC), *Appellant, Cross-Respondent*

v.

ENGSTROM PROPERTIES, LLC, *Respondent, Cross-Appellant*

v.

CHAD BAERWALDT, *Appellant, Cross-Respondent*

BRIEF OF ENGSTROM PROPERTIES,
RESPONDENT, CROSS-APPELLANT

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I. INTRODUCTION

Conclusion of Law 8 states, “Absent a substantial loss of use of the Premises caused by partial damage to the Premises, the Lease contains no right to rent abatement. Because no loss of use of the Premises occurred from any damage to the Premises, Gear Athletics is not entitled to any rent abatement for any portion of the lease term.” This Conclusion is amply supported by unchallenged Findings of Fact.

Conclusion 8 and its supportive findings are central to both Gear Athletics’ (Gear) appeal and Engstrom Properties’ (Engstrom) cross-appeal. There is an irreconcilable contradiction between the trial court’s pretrial entry of an order confirming an arbitration award for rent abatement in Gear’s favor and Conclusion 8, made after a full and fair trial, concluding that Gear has no right to rent abatement. Engstrom assigns error to the pretrial confirmation order because it was not based upon any loss of use of the premises which is the only basis under the Lease for rent abatement, because the confirmation goes beyond the limited issue the parties agreed to arbitrate, and because the arbitration award was procured by undue means. Gear argues that the pretrial order precluded any determinations concerning loss of use and the right to rent abatement.

The Findings and Conclusions also provide that Engstrom breached no provision of the Lease and that it did not induce Gear to enter the Lease

through fraud. The Findings establish that Engstrom faithfully performed all of the Landlord's obligations under the Lease.

Engstrom prevailed on its single claim for past due rent and maintenance fees, and Gear prevailed on none of its four claims against Engstrom. The trial court, however, awarded Gear some of its fees and costs based on its intermediate successes, and reduced Engstrom's fee award by amounts Engstrom was reasonably compelled to incur in defending.

Engstrom Properties seeks this Court's vacation of the premature order and judgement (later made a judgement), reversal of any fee award to Gear, and reversal of the reduction of fees awarded to Engstrom. In all other respects, Engstrom asks the Court to affirm the remainder of the trial court's decisions.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

ASSIGNMENTS OF ERROR

1. The trial court erred in confirming, pretrial, an arbitration decision and ordering judgement for the amount of rent abatement. (Order and Judgement, CP 362-63.)

2. The trial court erred in awarding a set off for Gear's attorneys fees, and reducing Engstrom's reasonable fees. (Judgement, CP 523-25.)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should an order confirming an arbitration award be reversed

when the parties did not agree to arbitrate the issue, when the arbitrators exceeded their authority, and when the arbitration was procured through undue means? (Assignment of Error 1)

2. Can a party who prevails only in intermediate procedures but does not prevail on any of its claims at the conclusion of trial be a prevailing party? (Assignment of Error 2)

3. Should a party who prevails in obtaining a final judgement be awarded all of its reasonable fees, including those it was compelled to incur in intermediate procedures in which it was not successful? (Assignment of Error 2)

ISSUES PERTAINING TO GEAR'S APPEAL

1. Whether the Lease imposes indemnity on the Landlord unconnected to any fault or acts of Landlord?

2. Does the doctrine of collateral estoppel preclude the trial court's consideration of any matter when there is no identity of issues between an earlier arbitration and the trial, when applicability of the doctrine of collateral estoppel was first raised on appeal, and when application of collateral estoppel would work an injustice?

3. Should the trial court have considered the affirmative defense of mitigation of damages when it was not pled, not tried, and not proven?

4. Should interest and late fees which are awarded in the final

judgment and based upon evidence adduced at trial be affirmed?

III. STATEMENT OF THE CASE.

A. BACKGROUND OF LEASE.

Engstrom, as Landlord, and Gear, as Tenant, executed a lease for the former Athletic Supply Company building at 224 Westlake in Seattle, commencing on May 1, 2006 and terminating on December 31, 2008. Findings 1, 3, CP 431, Ex 1. The Lease was part of the consideration for Gear's purchase of the Athletic Supply Company business from Steve Engstrom and his partner. Finding 3, CP 431. ("[T]he lease of the building was part and parcel of the company purchase." Conclusion 15; CP 442.) Engstrom hoped to sell the building, but when a potential sale did not materialize, Gear subleased the building to Feelgood Networks, Inc.¹ Findings 6, 9, CP 432.

B. WATER INTRUSION.

When the Subtenant claimed on November 13, 2006², during a heavy rainstorm, that the basement was "flooding," Steve Engstrom, the owner manager of Engstrom, immediately went to the building. Findings 16, 21; CP

1

The record alternately refers to the Subtenant as "Collegegear.com," "Collegegear," "Feelgood," and "Feelgood Networks." For simplicity, it will be referred to in this Brief as "Subtenant," unless quoting from the record.

2

Gear's brief, at page 9, mistakenly claims that water intrusion was reported in "late 2007" instead of late 2006. See Findings 15, 18, CP 433.

433. No one from Gear went to the building for a week after the reported “flood.” Finding 16, CP 433. Steve Engstrom found, not a flood, but a small puddle of water. Finding 16, CP 433.

Steve Engstrom wiped up the puddle and took immediate steps to locate and repair the leak, including hiring a property manager, Brad Olson, to manage the repairs. Finding 17, CP 433. Then, on December 14, 2006, before roof repairs were completed, another heavy rain occurred. Brad Olson emailed the Subtenant to check on the basement, and the Subtenant again claimed the basement was “flooding.” Finding 18, CP 433. Olson went to the building the next morning and found a small, 1 x 1, puddle of water in the corner of the stairwell, and one damp t-shirt among piles of dry t-shirts on the floor. Findings 16, 21, CP 433-34. Olson took photographs of what he observed. Ex.29-34.

Roof repairs were completed by early January 2007. Finding 21, CP 434. Contrary to this finding, Gear claims, at page 9 of its Brief, that “Engstrom failed to permanently remedy the problem.” Gear’s only citation to the record is to its allegations in its Third Party Complaint.

Neither Gear nor the Subtenant ever notified Engstrom of any other water intrusion after December 2006. Findings 11, 27, CP 432, 434³. Indeed,

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In November 2007, Engstrom discovered another small leak, from a different source and in a different area, and repaired it as promptly as the Subtenant permitted access. Finding

Gear never notified Engstrom of any failure to perform any Lease obligation. Finding 11, CP 432.

The Subtenant did not lose a single day's use of the premises because of the leak or any other cause attributable to Engstrom. Findings 22, 28, CP 434 ("Feelgood's use of the Premises between September 2006 and March 31, 2008, when it voluntarily vacated, was not impaired by any substantial damage to the Premises.").

The Subtenant wanted out of its sublease after falling considerably behind in its rent. RP 409-410. It moved out on March 31, 2008 and stopped paying all rent and maintenance charges.⁴ Finding 10, CP 432. Gear then stopped paying Common Area Maintenance (CAM) charges in April 2008, and stopped paying any rent or CAM in September 2008. Findings 12, 55, CP 432, 438. Gear's brief, at 12, claims that it stopped paying rent "to offset its damages," and cites "Conclusion 12, CP 432." Conclusion 12, CP 441, says nothing of the sort. Finding 12 does say Gear stopped paying rent, but says nothing more. The Lease, Ex 1, does not authorize Gear to stop paying its rent as an offset or any other similar reason. Ex 1.

27, CP 434.

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On page 10 of its Brief, Gear claims the Subtenant abandoned the building on "May 8, 2008." To the contrary, Finding 28, CP 434, states the Subtenant vacated on March 31, 2008.

After the Subtenant vacated, Olson took care of changing the locks, and gave Gear the keys to the building. RP 249:14-23. Although Gear's Brief claims that Engstrom reentered the premises in April 2008, the only evidence is that Engstrom entered the building in November/December 2008 to perform an environmental remediation, well after Gear stopped paying all rent and CAM. RP 178:3-9. Section 13.2 of the Lease, Ex 1, provides "No re-entry or taking possession of the Premises by Landlord shall be construed as an election on Landlord's part to terminate this Lease." Gear also claims in its Brief, p 9, that it "turned control of the building back to Engstrom" when the Subtenant vacated, citing Finding 12. That finding, at CP 432, states only that Gear stopped paying rent after August 2008. There is no finding or any evidence in the record that Gear "turned control" back to Engstrom in April, September, or any other time.

The Subtenant sued Gear, alleging Gear breached the Sublease in numerous respects, including billing excessive CAM charges and failing to provide parking. CP 1-7. Later, Gear sued Engstrom, asserting that it did not breach the Sublease, but if it did, it was Engstrom's fault. CP 30-34.

C. ARBITRATIONS.

1. First Arbitration, Without Engstrom

The Sublease requires Gear and the Subtenant to arbitrate their disputes. Ex 47. The Subtenant and Gear agreed to mediate their dispute in

a morning session with retired Judge Terrence Carroll, and if unsuccessful, to utilize Judge Carroll as an arbitrator in the afternoon. Finding 33, CP 435. Engstrom declined to participate in this unorthodox procedure where the mediator becomes the fact finder. Finding 35, CP 435. Engstrom did, however, volunteer Steve Engstrom and Engstrom's property manager, Brad Olson, as witnesses for Gear. CP 228, ¶ 7.

Gear did not call either Steve Engstrom or Olson as witnesses in the arbitration with the Subtenant. Finding 36, CP 435; CP 228. Judge Carroll awarded Gear all of its rent through the end of the sublease, December 31, 2008, but offset this amount by \$3,000 a month through December 31, 2008 for a total of \$63,000. Finding 37, CP 436; Ex 48.

Judge Carroll was apparently misled to believe that water intrusion continued unabated through at least March 2007. Ex 48. Contrary to Judge Carroll's decision, "The roof repair was completed by early January 2007. Following the roof repair neither Feelgood nor Gear notified Engstrom or Brad Olson of any further water intrusion." Finding 23, CP 434. Significantly, "Judge Carroll did not find that Feelgood or Gear suffered any loss of use." Finding 38, CP 436; Ex 48.

2. Second Arbitration, With Engstrom and Gear

The Lease between Engstrom and Gear requires arbitration only on the limited issue of the extent or amount of rent abatement arising from

impairment of the Tenant's use of the Premises caused by damage to the Premises.

Section 9.5 of the Lease specifies the only relevant circumstance here in which liability for rent abatement arises:

If the Premises are Partially Damaged, the rent payable while such damage, repair or restoration continues shall be abated *in proportion to the degree to which Tenant's reasonable use of the Premises is substantially impaired.*

(Emphasis added.)

Section 16.12(b) provides the method for determining the amount of rent abatement in the event that a loss of use was sustained:

If any dispute arises between Landlord and Tenant regarding the *extent* of rent abatement under Section 9 or Section 14 and such dispute is not resolved within (20) days after notice by either party to the other of such disagreement, either party may request arbitration and each party shall appoint as its arbitrator an appraiser who has been a member of the American Institute of Real Estate Appraisers for not less than 10 years. . . .

(Emphasis added.)

Engstrom resisted Gear's demand to arbitrate the extent of rent abatement because neither Gear nor its Subtenant suffered any loss of use of the Premises, so no rent abatement was owed. Engstrom moved to stay arbitration, which, it argued, improperly placed the issue of damages ahead of the issue of liability. CP 99-103. Judge Charles Mertel denied Engstrom's motion and ordered arbitration. CP 148-49.

Gear called no witnesses from the Subtenant to testify to loss of use at the arbitration. RP 90:5-8. Instead, Gear piggy-backed off of Judge Carroll's earlier arbitration decision, which awarded \$63,000 as a rent set-off to the Subtenant. CP 229; Ex. 48.

The arbitration procedure itself was highly irregular, as more fully described in the Declaration of Sylvia Luppert. CP 227-237. Gear's attorney testified throughout the proceeding, frequently falsely, and despite his lack of personal knowledge. For example, he told the appraisers what other persons allegedly said and saw without presenting these persons as witnesses. The only persons who could have competently testified about loss of use were the employees of the Subtenant. Gear did not call them to testify in person or present their affidavits. Gear's attorney falsely claimed he had photographs of a flooded basement even though none were produced by Gear in discovery or to the arbitrators. He claimed that his office would send over the photographs to the appraisers, but the photographs did not arrive, and have never appeared at any time. None of the witnesses who were present testified that they had seen any flooding. Gear proffered an unsworn letter as evidence of past flooding from a purported employee who had not been identified as a witness. Gear raised irrelevant and potentially prejudicial issues including that Engstrom had been sued by the would-be

purchaser of 224 Westlake. He told the appraisers about Engstrom's alleged offers in a confidential mediation. He even gave the appraisers Engstrom's mediation letter contrary to RCW 7.07.030 and his own agreement that the mediation materials were confidential.

Perhaps most prejudicial and improper, Gear gave the appraisers Judge Carroll's decision from the earlier arbitration in which Engstrom did not participate. He also gave them Judge Mertel's order to arbitrate. He then told the arbitrators that Judge Mertel agreed with Judge Carroll and that Judge Carroll's decision was binding on Engstrom.

The arbitration panel of three real estate appraisers awarded Gear \$50,000 of the \$63,000 awarded by Judge Carroll as rent abatement and awarded the amount in expenses of arbitration in a 50/63 proportion.⁵ The real estate appraisers, like Judge Carroll, did not, however, find that there had been any loss of use of the Premises. Findings 38, 40, CP 436; Ex.18.

Gear moved to confirm the arbitration award and Engstrom moved to vacate it. CP 213-216, 217-226. Engstrom argued that the award should be vacated because the arbitration was outside the provisions of the Lease, the

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Gear's claim at page 15 of its brief that Engstrom did not pay its share of the arbitration expenses is false. It made a similar allegation to the trial court (similarly unsupported), which was refuted in the Second Declaration of Sylvia Luppert in support of the motion to vacate the award. That declaration has been requested in a supplemental designation of clerk's papers.

appraisers exceeded their authority, and the award was procured by undue means. In addition, because the award was not supported by a finding of loss of use, the predicate to an award for rent abatement, it should not be confirmed. CP 222-223. On the morning trial was to begin, the trial court, the Honorable Timothy Bradshaw, confirmed the arbitration award, and entered an order and judgement for \$50,000⁶. CP 360-61.

Judge Bradshaw may have believed himself constrained by Judge Mertel's order to arbitrate. See RP 3-4. Certainly, Gear vehemently argued that Judge Mertel's order to arbitrate compelled confirmation and judgment on the award and implied that Judge Mertel had reviewed "evidence," although he had not.⁷ CP 148-49.

D. TRIAL.

Also on the morning of trial, Engstrom argued its motion for summary judgement. Pertinent here, Engstrom argued that it was entitled to summary

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The Order was not a judgment because it contained no Judgement Summary as required by RCW 4.64.030. A correctly formatted judgement was entered on July 1, 2010.

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For example, Gear invoked Judge Mertel's name at RP 22-23; RP 24; RP 31-32; RP 37 ("The extent argument that that means there's no arbitration provision, that argument was made in front of Judge Mertel. I think Ms. Luppert acknowledges that in her reply. That was made and lost. So that's just rearguing Judge Mertel's evidence with no new facts or circumstances."); RP 38 (" And so I just don't think that there's anywhere close to meeting a burden to either reargue the motion that was lost in front of Judge Mertel or any other basis other than just conjecture which gives rise to sustaining a motion to vacate an arbitration award.").

judgment because there was no evidence of loss of use, and without loss of use, Gear cannot maintain a claim for rent abatement. CP 242-243. Because the trial court concluded that issues of fact precluded summary judgment, he denied the motion. RP 19-20.

Gear's opening statement asserted the tenant's loss of use. RP 12. Once testimony began, however, Gear objected to evidence regarding loss of use. The trial court overruled the objection. RP 115-116. On the morning of the second day, Engstrom raised a concern about the issues for trial in light of Gear's objection the day before. The trial court informed the parties that the evidence on issues surrounding water intrusion and loss of use was relevant to several issues. RP 134:13-135:8. Ultimately, Gear put on no evidence of loss of use and the trial court found no evidence of loss of use. Findings 22, 28, CP 434.

Just as during the arbitration before the appraisers, Gear called no witnesses from the Subtenant regarding loss of use. Finding 20, CP 433; RP 90,;5-8. Both parties inquired into the facts surrounding water intrusion throughout the trial. See, e.g., RP 123-124, 181-184. Steve Engstrom had seen a small puddle and Brad Olson saw a 1x1 area of water. No one else testified they had seen any water on the floor of the basement. Findings 16, 21, 24, CP 433-34. Brad Olson also testified that he had observed no changes in the Subtenant's use of the Premises. RP 221:22 - 222:4. Olson took

photographs on December 15, 2006 immediately after the second water intrusion and in September 2007. He compared photograph exhibits 30 from December 2006, and 35 from September 2007, taken of the same area on the two different dates. RP 213; 217:14-218:19. The Subtenant's use of the premises from the earlier to the later date is unchanged.

The uncontroverted evidence showed that the Subtenant did not move its inventory from the basement or change its use of the premises at any time during its tenancy. RP 221-22; Ex 30, 35-36; Finding 28, CP 434.

During the trial, Engstrom produced evidence in support of its claims for unpaid rent and CAM, proving its counterclaim. Findings 51-58, CP 438. Gear was unable to prove fraud or misrepresentation against Engstrom. Findings 41- 50, CP 436-37.

During closing arguments, Gear raised the defense of mitigation of damages for the very first time in the trial. RP 593. The defense of mitigation had not been raised in the pleadings. Conclusion 22, RP 434. No form of the word "mitigate" had been used in connection with the affirmative defense of mitigation throughout the trial until Gear asserted it in its closing. The trial court concluded that not only had the issue not been timely raised, Gear did not prove that there was a failure to mitigate. Conclusion 22, RP 434.

IV. ARGUMENT AND AUTHORITIES.

A. CONFIRMATION OF APPRAISERS' AWARD WAS ERROR.

An arbitration award may be vacated if there was no agreement to arbitrate, the arbitrators exceeded their authority, or the award was procured by undue means. RCW 7.04A.230. These circumstances, present here, warranted the trial court's denying Gear's Motion to Confirm the appraisers' award, and instead to vacate it.

1. There Was No Agreement to Arbitrate The Issue of Loss of Use.

The Lease between Engstrom and Gear requires arbitration of the issue of damages, but not the issue of liability. Loss of use of the premises is the sole grounds for rent abatement. The arbitration provision in the Lease limits its scope to the extent or amount of rent abatement. Specifically, the Lease calls for arbitration only of a dispute about the *extent* of rent abatement before a panel of real estate appraisers. The Lease does not require arbitration of the issue of whether there had been a loss of use of the premises.

Section 9.5 of the Lease, Ex 1, contains the provision for rent abatement: "If the Premises are Partially Damaged, the rent payable while such damage, repair or restoration continues shall be abated in proportion to the degree to which Tenant's reasonable use of the Premises is substantially impaired." Engstrom knew of no evidence of any use of the Premises being substantially impaired, and disputed that there had been any change in the

loss of use of the Premises.

Section 16.12(b) provides for arbitration only of the *extent* of rent payable as a result of Tenant's loss of use:

If any dispute arises between Landlord and Tenant regarding the *extent* of rent abatement under Section 9 or Section 14 and such dispute is not resolved within (20) days after notice by either party to the other of such disagreement, either party may request arbitration and each party shall appoint as its arbitrator an *appraiser* who has been a member of the American Institute of Real Estate Appraisers for not less than 10 years. . . .

The extent of rent payable is not the same as whether there was any loss of use creating a right to rent abatement. Section 9.5 poses three distinct issues: (1) Whether there was partial damage, (2) The degree to which "Tenant's reasonable use of the Premises is substantially impaired" by partial damage, and (3) The amount or extent of rent payable for loss of use. By choosing real estate appraisers, whose field of expertise is the determination of rental values, the arbitration provision's specification of the "extent" of rent abatement limits the scope of arbitration to a determination of the amount of rent abatement. The issue of loss of use, however, is a separate issue that is outside the scope of the agreement to arbitrate.

As the trial court found, the tenant's reasonable use of the Premises was not impaired: "Feelgood's use of the Premises between September 2006 and March 31, 2008, when it voluntarily vacated, was not impaired"

Finding 28, CP 34. Judge Carroll and the real estate appraisers did not find any loss of use. Findings 38, 40, CP 436; Ex 18, 48. Gear does not challenge any of these findings. These and the other unchallenged findings are verities on appeal. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010). The Lease does not require and Engstrom did not agree to arbitrate the issue of loss of use before three real estate appraisers.

Conducting the arbitration on damages before any determination of loss of use by a competent judicial proceeding was prejudicial to Engstrom because it put the issue of damages ahead of the issue of liability. Engstrom had not yet had a hearing on loss of use at the time of confirmation, the Lease's precondition for rent abatement. The arbitration award was prematurely confirmed, and should have been vacated.

2. The Award Exceeded the Arbitrators' Authority.

The best that might be said of the appraisers' arbitration award of \$50,000 was that it established the extent of rent abatement *if* Gear had been entitled to any rent abatement by reason of loss of use. But that cannot even reasonably be said.

To determine the extent of rent abatement "in proportion to the degree to which Tenant's reasonable use of the Premises is substantially impaired" as provided in §9.5 of the Lease, requires a calculation that includes the number of square feet of usage lost, the duration of the loss, as well as the

reasonable rent per square foot. Since no one from the Subtenant testified at the arbitration, RP 90:7-8, there was no evidence of any loss, so the appraisers could not perform a calculation of the amount of rent to be abated.

Although the appraisers state that water intrusion “became apparent in November 2006,” they do not state when it ceased. The Findings establish that repairs were complete in early January 2007. Finding 23, CP 434. The monthly rent for the entire building was \$17,283, Ex 1, making the \$50,000 amount of rent abatement for the two months of repairs exceed the amount of rent for the entire five story building (RP 44) for the same period.

The appraisers did not determine the extent of rent abatement, as is evident from the face of the award. Instead, they accepted Judge Carroll’s offset amount and subtracted that portion that thought might apply to the Subtenant’s annoyance from requests for access to the building. The appraisers had only Judge Carroll’s decision as a guide. Judge Carroll did not find any loss of use, so the appraisers could not determine the extent of rent proportionate to any loss of use.

3. The Award Was Procured Through Undue Means.

Washington’s arbitration statute, Chapter 7.04A RCW, does not define “undue means.” Federal authority interpreting similar statutes can provide guidance, as *Seattle Packaging Corp. v. Barnard* 94 Wn.App. 481, 486, 972 P.2d 577 (1999), sought from federal cases involving the term

“undue means” under the federal arbitration statute, 9 USC §10.

Although the term [undue means] has not been defined in any federal case of which we are aware, it clearly connotes behavior that is immoral if not illegal. See Black's Law Dictionary 1697 (Rev. 4th ed. 1968) (“Undue” means “more than necessary; not proper; illegal,” and “denotes something wrong, according to the standard of morals which the law enforces.” . . .).

A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403-04 (C.A.9 1992). “Undue means” also arguably exists when there is an absence of due process of law. Due process of law means according to established forms of law. *White v. Powers*, 89 Wash. 502, 506-507, 154 P. 820 (1916). Although due process is a flexible concept, the fundamental requirement “is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Smith v. Behr Process Corp.* 113 Wn.App. 306, 336, 54 P.3d 665 (2002), quoting *Mathews v. Eldridge*, 424 U.S. 319, 333-34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

The arbitration hearing was marked by an absence of any apparent process and by serious misconduct by Gear’ s attorney as described above in the Statement of Facts.

Although the grounds on which an arbitration decision or evidence presented in an arbitration may be reviewed are narrow, *Barnett v. Hicks*, 119 Wn.2d 151, 153, 829 P.2d 1087 (1992), the arbitration statute anticipates

that an arbitration award may be procured by undue means. One case where undue means was established is *Seattle Packaging*. The Court held, at 486-87, “We agree, and hold that an arbitration award procured by perjured testimony as to a material fact of consequence in the arbitration proceedings constitutes fraud,” and a basis to vacate an arbitration award.

Gear’s attorney made many false statements and improper assertions to the real estate appraisers, including what he claimed to be the meaning of Judge Mertel’s order and the binding nature of Judge Carroll’s arbitration decision. His conduct constitutes “behavior that is immoral if not illegal” . . . “more than necessary; not proper; illegal,” and “something wrong, according to the standard of morals which the law enforces.” *A.G. Edwards & Sons, Inc., Id.* As an officer of the court, he may not “knowingly make a false statement of fact or law to a tribunal, . . . or offer evidence that the lawyer knows to be false.” RPC 3.3(a).

With Gear’s attorney telling the arbitrators that Judge Carroll found a loss of use and that Judge Mertel agreed with Judge Carroll, Engstrom’s attorney’s attempt to instruct the legally untrained appraisers about the res judicata effect of Judge Carroll’s decision could hardly save the situation. An arbitration award procured in violation of RPC 3.3 is procured by undue means, and should be vacated.

The trial court's Conclusion 8⁸ cannot be reconciled with the contrary arbitration award for rent abatement. The trial, a formal procedure on the record presided over by a judge trained and practiced in the law, is unquestionably the more reliable determination. Further, imposing a judgement on Engstrom when it was entirely without fault and caused no loss, would be unjust.

Engstrom asks that the arbitration award be vacated because the arbitration of the issue of loss of use was not agreed upon in the parties' Lease, the appraisers acted outside their authority, and the award was procured by undue means.

B. THE LEASE DOES NOT PROVIDE FOR INDEMNITY UNCONNECTED TO ACTS BY THE LANDLORD.

The indemnity provision of the Lease, §8.5, Ex. 1, provides, in part, "Landlord shall indemnify and hold harmless Tenant from and against any and all claims arising from any breach or default in the performance of any of Landlord's obligations under the terms of this Lease or arising from any act of Landlord"

Fundamental rules of contract construction apply when interpreting

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Conclusion 8: "Absent a substantial loss of use of the Premises caused by partial damage to the Premises, the Lease contains no right to rent abatement. Because no loss of use of the Premises occurred from any damage to the Premises, Gear is not entitled to any rent abatement for any portion of the lease term." CP 440.

an indemnity provision in order to give effect to the intent of the parties. *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974).

Here, the indemnity provision is worded to reflect the parties' intent that the Landlord be culpable in causing the claim in order to be obligated to indemnify the Tenant. The maxim of *ejusdem generis* applies to the construction of the indemnity provision here. That maxim is "when general words follow specific words, the general words are construed to embrace a similar subject matter." *Burns v. City of Seattle* 161 Wn.2d 129, 150, 164 P.3d 475 (2007). Here, the general words "any act of landlord" follow the specific words "breach" and "default." The intent of the parties requires some fault or wrongdoing on the part of the landlord which caused claims to arise.

Courts do not impose contractual indemnity when the contractual indemnitor is fault free and the indemnity provision does not clearly require indemnification in the absence of fault by the indemnitor:

Moreover, and specifically with respect to indemnity provisions, it is to be noted that: (a) clauses which purport to exculpate an indemnitee from liability for losses flowing solely from his own acts or omissions are not favored and are to be clearly drawn and strictly construed, with any doubts therein to be settled in favor of the indemnitor; (b) such clauses are to be viewed realistically, recognizing the intent of the parties to allocate as between them the cost or expense of the risk of losses or damages arising out of performance of the contract; and (c) causation of loss is the touchstone of liability under a construction contract indemnity clause, rather

than negligence, although negligence may be incidental to the cause.

Jones, at 520-21 (citations omitted).

The indemnity provision here is not clearly drawn to exculpate Gear from liability for its own fault or to impose absolute liability on Engstrom in the absence of fault. A case which emphasizes the importance of clearly drawing such conditions is *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985). There, the indemnity provision was clearly drawn, and the Court enforced it. “The clause involved in this case explicitly refers to injuries ‘whether or not caused by Lessor's [Northwest's] negligence.’” *Hughes*, at 156. The Lease, here, does not refer to claims whether or not caused by Engstrom’s negligence or fault. Absent any similar language and resolving any doubts in Engstrom’s favor, the indemnity provision in the lease does not impose an indemnity obligation on Engstrom when it is fault free.

Even assuming *arguendo*, as Gear argues, that the Lease does impose an obligation of indemnity for any claims arising from any act of Engstrom, regardless of fault, Gear fails to identify a single *act* of Engstrom from which the Subtenant’s claims arose. At pages 28-29 of its Brief, Gear enumerates several claims, but no acts. It cites Collegegear’s complaint, a letter from Collegegear’s attorney, the testimony of Mark and Chad Baerwaldt, and the

arbitration decision of Judge Carroll (which makes no reference to Engstrom whatsoever.)⁹ None of these claims resulted in any Findings that any *act* of Engstrom caused the Subtenant's claims.

Jones v. Strom Constr. Co., 84 Wn.2d 518, 527 P.2d 1115 (1974) controls here. In *Jones*, the subcontractor, Belden, in an indemnity provision similar to that here, promised to indemnify the contractor, Strom, from any claims, "arising out of, in connection with, or incident to the SUBCONTRACTOR'S performance of this SUBCONTRACT." The trial court concluded that Strom's actions were the sole cause of the underlying accident. *Jones* held that Belden was not obligated under the indemnity provision absent some affirmative act on its part. It reasoned, at 521-522:

It is, therefore, Belden's performance of the subcontract, and losses 'arising' from, connected with, or incidental to that performance, which forms the keystone on which indemnity turns. Thus, it is clear that unless an overt act or omission on the part of Belden in its performance of the subcontract in some way caused or concurred in causing the loss involved, indemnification would not arise. Belden's mere presence on the jobsite inculpably performing its specified contractual obligations, standing alone, would not constitute a cause or participating cause.

Similarly, *Scruggs v. Jefferson County*, 18 Wn.App. 240, 567 P.2d

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The parties and trial court engaged in protracted discussions concerning the admission of Judge Carroll's decision, exhibit 48. Engstrom repeatedly asserted that if Gear was offering it as a statement, it would be admissible, but if it were being offered for the truth of the matters asserted, it was inadmissible hearsay. Eventually, the trial court admitted it as a "verbal act," not as hearsay, for the truth of the matters asserted. See RP 443-47. Gear's references to the exhibit are contrary to the purposes for which it was admitted.

257 (1977) holds that a mere “passive, nonculpable cause-in-fact of the injuries,” which “was a condition and not a cause of the accident” will not invoke the indemnity provision absent an overt act by the indemnitor. There plaintiff Scruggs was severely injured when the car in which he was riding failed to negotiate a curve on a Jefferson County road, and hit a pole owned by Puget Power located about 15 feet from the road. Scruggs sued both Jefferson County and Puget Power. The County settled with Scruggs. The trial court then found the injuries were solely the fault of the car’s driver. Jefferson County sought indemnity from Puget Power pursuant to an agreement between them in which Jefferson County granted Puget Power the right to install poles, and Puget Power promised broad indemnification for costs and expenses “by reason of accidents experienced or caused by the construction or operation of said transmission lines . . . or caused by reason of the exercise by grantee of any of the rights herein granted.” *Scruggs*, at 242. The Court, at 243-44, rejected the County’s indemnity claim reasoning that the accident “was not caused by the mere presence of the pole in a place specified by the franchise agreement. At most, the pole was merely a passive, nonculpable cause-in-fact of the injuries. It was a condition and not a cause of the accident.”

Engstrom Properties, like the subcontractor’s mere presence on the job site in *Jones*, and Puget Power’s pole in *Scruggs*, was merely a passive,

nonculpable party to the Lease. The Subtenant's mere claims against Engstrom do not invoke the indemnification provision.

Finally, with respect to the amount of indemnification claimed by Gear, §8.5 provides only for expenses "incurred in the *defense* of any such claim or any action or proceeding brought thereon." Ex 1. Gear successfully prosecuted its own claim for unpaid rent and CAM in the arbitration before Judge Carroll. It failed, however, to segregate the expenses of prosecuting its own claim from the expenses of defending against the Subtenant's claim. CP 508-519, 520-22. Further, Gear cannot be realistically considered to have actually defended against the Subtenant's claim. An actual defense of the Subtenant's claim for rent abatement required Gear to call Steve Engstrom and Brad Olson as witnesses. After all, only Steve Engstrom and Olson had personal knowledge and photographic evidence to refute the Subtenant's "flooding" and damages claims. Judge Carroll's \$63,000 rent abatement set-off might well have been avoided had Gear put up any real defense to the Subtenant's claims.

No act of Engstrom, much less any wrongful act of Engstrom, caused the Subtenant's claims to arise. The trial court's findings and conclusions that Engstrom had no indemnity obligation to Gear for the Subtenant's claims should be affirmed.

C. COLLATERAL ESTOPPEL CANNOT APPLY TO FINDINGS

THAT WERE NOT MADE.

A party may be bound by a prior decision under the issue preclusion doctrines of collateral estoppel and res judicata. Collateral estoppel requires (1) identity of issues, (2) a final judgment on the merits, (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication, and (4) application of the doctrine would not work an injustice. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.d 312 (1998). To establish res judicata, making an earlier decision binding on a current matter, requires a final decision on the merits and the identity of four elements between the prior and the present litigation: (1) cause of action; (2) subject matter; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 858, 860, 726 P2d 1 (1986).

1. No Identity of Issues

The common element in both preclusion doctrines is identity of issues. The issue of whether the tenant's reasonable use of the premises was impaired is the central issue of Gear's claim for rent abatement. The right to rent abatement depends upon whether there was any loss of use: "If the Premises are Partially Damaged, the rent payable while such damage, repair or restoration continues shall be abated in proportion to the degree to which Tenant's reasonable use of the Premises is substantially impaired." Ex. 1,

Lease §9.5.

Neither retired Judge Carroll's decision, Ex 48, nor the real estate appraisers' decision, Ex 18, makes any finding on loss of use. Because there was no resolution of the issue of loss of use, there simply was no identity of issues. Both issue preclusion doctrines are inapplicable, leaving the real estate appraisers' determination of the amount of rent abatement of no consequence to the central issue of loss of use between Gear and Engstrom of loss of use.

2. No Injustice to Gear Athletics

Gear pretends that it put on no evidence of loss of use because it relied upon the confirmation of the arbitration decision as precluding evidence on loss of use.¹⁰ A review of the record establishes that Gear had notice of the issue, argued the issue, and tried the issue without objection. The real reason Gear put on no evidence of loss of use is because there is no evidence of loss of use.

Engstrom Properties moved for summary judgement because Gear could not prove loss of use, the predicate for rent abatement. CP 238-248.

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Gear quoted, on page 16 of its Brief, an email between its attorney and Judge Bradshaw's bailiff regarding the length of trial. Gear claims that it was misled in the presentation of its case and that it "raised this dilemma with the trial court." Gear's claim is misleading. The email was first brought to Judge Bradshaw's attention in a Declaration of Michael Fleming filed on December 7, 2009, nearly four months after trial. CP 456-57.

Gear offered no evidence of loss of use in its response to Engstrom's motion for summary judgment. CP 266-282. Even though the trial court denied the motion, the motion put Gear on notice that it would be required to produce evidence of loss of use.

Gear argued in its opening statement that the Subtenant lost use of the Premises: "We're saying that the tenant was saying, 'It only leaks when it rains, and I can't use this space which is where my primary inventory is kept when I don't know -- I mean, if it rains, do I have to run from my house down here and start lifting stuff up? It just doesn't work for me.'" RP 12:7-12. Gear, however, did not call the Subtenant to testify. Finding 20, CP 433.

During the four day trial in this matter, both in Gear's case and Engstrom's case, evidence relating solely to the issues of water intrusion, repairs, and loss of use was offered and admitted without objection by Gear. Perhaps the most obvious example that the issues were tried are the photographs of the basement taken by Brad Olson, Exhibits 29-37. These photographs are relevant only to water intrusion and loss of use. Olson also testified that the Subtenant's use of the premises was not impaired, again without objection from Gear. RP 221-222.

If Gear believed that the Court was improperly considering evidence of water intrusion and loss of use, it was required to object at the time or its objection is waived. *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153,

156 (1960), states, “ If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” Asserting collateral estoppel for the first time on appeal is too late.

The closest Gear came to objecting on a grounds that might have been similar to collateral estoppel occurred on the first day of trial. Gear made an objection to questions about water intrusion on the basis of relevance and “that this is something that's already been ruled on by the Court.” RP 115-116. The trial court overruled the objection. The next morning, Engstrom expressed concern about Gear’s objection, and inquired into what the trial court saw as the scope of the evidence. The trial court made clear that it considered evidence of water intrusion and loss of use relevant to several issues. RP 134-135. At the conclusion of the discussion, Gear responded, “Perfect.” RP 135:25. Gear was not misled in the presentation of its case.

The issues of water intrusion and loss of use were relevant to issues injected by Gear in its claims for indemnification, as discussed above, and its claims of fraud or misrepresentation. To prove its indemnity claims, evidence of Engstrom’s breach, default, or other acts causing a claim by the Subtenant made the issues of partial damage, repairs, and loss of use relevant. At the trial level, Gear claimed that Engstrom failed to disclose water

intrusion problems constituting fraud or negligent misrepresentation and that Gear was damaged. To prove it was damaged by the alleged fraud, evidence of that damage was required. CP 177-82. *See, West Coast, Inc. v. Snohomish County*, 112 Wn.App. 200, 206, 48 P.3d 997 (2002).

3. Collateral Estoppel Cannot Be Raised First On Appeal.

This Court generally will not review an issue, theory, or argument not presented to the trial court in order to afford the trial court an opportunity to correct errors, and thereby avoid unnecessary appeals and retrials. *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 527, 20 P.3d 447 (2001); *See also, Lipscomb v. Farmers Ins. Co. of Washington*, 142 Wn.App. 20, 33, 174 P.3d 1182 (2007); RAP 2.5.

Gear did not argue that collateral estoppel precluded the evidence or make any other objections on that basis during the remainder of the trial. The words “collateral estoppel” and “res judicata” were used twice during the trial proceedings, and both times in reference to Judge Carroll’s decision from an arbitration in which Engstrom was not a party. RP 37:19 - 38:4, 621:8-15. Engstrom argued that Judge Carroll’s decision should not have been given to the appraisers under the doctrines of res judicata and collateral estoppel.

The admissibility of evidence is within the sound discretion of the trial court and will only be reversed upon showing an abuse of discretion. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994).

An abuse of discretion occurs only when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. STO Indus, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The trial court's ruling was well within its discretion based on the its reasoning that issues of fact concerning water intrusion and loss of use remained relevant following denial of Engstrom's motion for summary judgment, and to issues in Gear's own indemnity and fraud claims.

Collateral estoppel does not bar litigation of an issue which was not previously decided. Collateral estoppel, a product of equity, would not serve the ends of justice by imposing damages when there is no loss or liability. Gear's argument that it was misled in the presentation of its evidence is a sham because it was on notice that if it had evidence of loss of use, it was required to produce it. The trial court entered no findings or conclusions on the issue of collateral estoppel because Gear did not squarely present the issue. Even if Gear had, the elements of collateral estoppel do not apply here.

D. GEAR DID NOT PLEAD OR PROVE THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE.

Failure to mitigate is an affirmative defense. *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 WnApp. 602, 615, 971 P.2d 953 (1999). Like all affirmative defenses, failure to mitigate is waived if not raised in a pleading, a motion to dismiss, or by express or implied consent. *Federal Signal Corp.*

v. Safety Factors, Inc., 125 Wn.2d 413, 434, 886 P.2d 172, 183 (1994), citing with approval, *Bernsen v. Big Bend Elec. Cooperative, Inc.*, 68 WnApp. 427, 433-34, 842 P.2d 1047 (1993); *Lord v. Miller*, 86 Wash. 436, 150 P. 631 (1915).

[A]mendment under CR 15(b) cannot be allowed if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties.

Harding v. Will, 81 Wn.2d 132, 137, 500 P.2d 91, 96 (1972). Whatever few questions Gear asked about reletting the building cannot reasonably be construed either as notice that it was asserting the affirmative defense of failure to mitigate or as implied consent to try the unpled affirmative defense.

The “touchstone” for amending pleadings “is the prejudice such amendment would cause the nonmoving party.” *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986). Not hearing the word “mitigation” used in the context of a defense to the claim for unpaid rent until closing argument, Engstrom was completely unable to present evidence regarding its ability to rent the building for the four months after Gear Athletic stopped paying rent.

Although Gear did not expressly move to amend the pleadings to conform to the evidence, the trial court treated its Supplemental Brief, CP 374-378, as such a motion, and denied it in its Conclusion 22, CP 443.

The granting of a motion to amend a pleading is a discretionary act. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165-69, 736 P.2d 249 (1987). The denial of such a motion will not be disturbed unless the reviewing court concludes that the denial was a manifest abuse of discretion. *Del Guzzi Constr. Co. v. Global N.W. LTD.*, 105 Wn.2d 878, 719 P.2d 120 (1986). An abuse of discretion occurs only when no reasonable person would take the view adopted. *State v. Castellanos*, 132 Wn. 94, 97, 935 P.2d 1353 (1997).

In re Disciplinary Proceedings Against Bonet, 144 Wn. 502, 510, 29 P.3d 1242, 1246 (2001). The trial court did not abuse its discretion.

Even assuming *arguendo*, that the issue of failure to mitigate had been before the Court, it would have been Gear's primary burden of proof that the landlord could have mitigated and the amount by which damages would have been decreased. The burden of proof is placed upon the party asserting the affirmative defense. *Locke v. City of Seattle*, 133 WnApp. 696, 713, 137 P.3d 52, 61 (2006), *citing Gleason v. Metro. Mortgage Co.*, 15 WnApp. 481, 551 P.2d 147 (1976). Gear failed to prove either that Engstrom could, through reasonable efforts, have found a tenant for the building for four months or the amount of rent Engstrom might have obtained. Conclusion 22, CP 443.

Steve Engstrom testified in response to Gear's question, at RP 177:22, "It's a 36,000-foot building. It's almost impossible to find a tenant to take that building over for a six-month period of time. It just takes too much effort from a tenant's standpoint to obligate themselves for such a short period of

time.” No other evidence was offered by Gear.

Gear’s argument that Engstrom had an absolute duty to mitigate for either the landlord’s or tenant’s account is mistaken under the facts here. *Hargis v. Mel-Mad Corp*, 46 Wn.App. 146, 151, 730 P.2d 76, 80 (1986), cited by Gear, does state that the landlord has a duty to mitigate under Washington law, but unmentioned by Gear, also states that there are exceptions to that duty which apply in this case. The exception occurs when a lease “expressly saves the lessor's right to also recover damages based on unaccrued rent,” *Hargis*, at 151, citing, *Metropolitan Nat. Bank v. Hutchinson Realty Co.*, 157 Wash. 522, 289 Pac. 56 (1930). The lease at issue in *Hargis* fell within the *Metropolitan* exception because it contained a provision which expressly entitled Hargis to future rent even if the lease was surrendered. The Court affirmed the trial court’s award of accrued unpaid rent to Hargis. *Hargis*, at 152.

The exception described in *Hargis* is explained by *Metropolitan* at 529,

However, the parties may stipulate in the lease, as was done in this case, for the lessee’s continued liability. ‘It seems that by an express provision the lessor may be given the right to re-enter and resume the possession of the demised premises upon the lessee’s breach of his covenants in the lease, as in case of non-payment of rent, and hold the lessee still liable for the subsequently accruing rents. As has been said, there is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall

remain notwithstanding there has been a re-entry for default; and if the parties choose to make such an agreement there is no reason why it should not be held to be valid as against both the tenant and his sureties.

Like the lease in *Hargis*, section 13.2 of the Lease provides the Landlord with the option, but does not require, reentering, and reletting the Premises, and specifically provides that the Tenant shall remain liable for rent and maintenance expenses through the end of the lease term. The provision provides for a credit to the Tenant only for rent actually paid by any new tenant. Ex 1. The *Metropolitan* exception applies here because the Lease holds Gear liable for rent and expenses through December 31, 2008 regardless of whether Engstrom finds a new tenant.¹¹

In addition to the exception described in *Metropolitan* and *Hargis*, there is one circumstance which heavily weighs against Engstrom being under a duty to find another tenant before the end of the lease on December 31, 2008. "Execution of the Lease was part of the consideration for Gear's purchase of Engstrom's interest in Athletic Supply Company. Exhibit 51." Finding 3, CP 431. In the Asset Purchase Agreement, Ex 51, Gear obligated itself to a lease term from May 2006 through December 2008, without regard

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Gear cites a quote from *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn.App. 495, 503, 962 P.2d 824, 828 (1997), which is dicta. *Crown Plaza* reversed a summary judgement because the terms under which the tenant left the premises were disputed. *Crown Plaza* does, however, quote with approval *Exeter Co. v. Samuel Martin, Ltd.*, 5 Wn.2d 244, 250, 105 P.2d 83, 85 (1940), which in turn quotes, with approval, the exception to the rule in *Metropolitan*.

to whether Gear or anyone else actually occupied the premises. Ex 51, p 17, ¶6.7. Chad Baerwaldt of Gear admits that execution of the lease for 224 Westlake is part of the consideration for Gear's purchase of Athletic Supply Company. RP 426:6-13. To require Engstrom to find a new tenant when Gear stopped paying rent, would strip an important part of the consideration from the Asset Purchase Agreement. Consequently, in addition to the provisions of section 13.2, which making Gear liable for rent even if it leaves the building before the end of the term, Engstrom would have no duty to mitigate because the Lease and corresponding rent from May 2006 through December 31, 2008 was part of the consideration paid by Gear for its purchase of Athletic Supply Company.

Two other factors further undercut Gear's mitigation argument. First, Gear, whose lease ran until December 31, 2008, did not itself offer any evidence that it attempted to find another subtenant for the remainder of its lease. Thus, Gear failed to mitigate its claimed damages. Second, Gear recovered the full balance of the remaining rent and CAM from the Subtenant, through December 31, 2008, including the period it alleges Engstrom failed to mitigate. Ex 48. For Gear to argue that it owes no rent during the period when it collected rent from the Subtenant, would result in an unjustified windfall to Gear.

Because Gear failed to argue or demonstrate that the trial court abused

its discretion in not allowing the affirmative defense of failure to mitigate, and because Gear did not prove a failure to mitigate, the trial court's conclusion should be affirmed.

E. The Amount of Judgement Was Proper

1. Interest and Late Fees

Gear's claim that there was no evidence to support the award of interest and late fees is mistaken. First and principally, the Lease, Ex 1, is such evidence. Section 16.2 provides for the calculation of interest on past due obligation at 8 percent per annum beginning 30 days after due. Section 13.4 provides for late fees of five percent per month on the overdue amount in addition to interest accrued under section 16.2. The amount of monthly rent, \$17,283, and the months it was unpaid, September through December 2008, were never disputed. Although CAM charges were disputed, the trial court found that by August 8, 2008, Engstrom had provided a complete accounting of CAM charges. Finding 56, CP 438. The trial court referred to exhibit 42, which showed CAM charges through August 8, 2008. In addition Exhibit 54 shows CAM charges of \$43,749.36 through December 31, 2008, the end of the lease term. This is the same amount stated in the Judgement. CP 524.

Armed with the amounts of unpaid rent and CAM, the dates when they fell past due, and the provisions in sections 16.2 and 13.4, it becomes a

matter of simple, but tedious, arithmetic. Appendix 1 shows those arithmetic calculations which validate the interest and late fee calculations to February 5, 2010¹² awarded in the Judgement.

2. Damages Award

Preliminarily, if Gear is arguing that the amount of damages in the Judgement should have been offset by the \$50,000 arbitration award, it has ignored that there was no need of such an offset because, as it stood when the Judgement was entered on April 23, 2010, it had another judgement for \$50,000 and interest. CP 561-62. Engstrom assumes instead, that Gear is not asserting a right to double recovery, and is only asserting that interest and late fees should have been calculated based upon an unpaid rent and CAM of \$62,881.36 instead of \$112,881. (The Judgement uses \$69,132 as the amount of unpaid rent and \$43,749 as the amount of unpaid CAM which equals \$112,881.36 as the total amount unpaid. CP 524.)

The amount of late fees is correct. The amount of Gear's judgment was not liquidated until August 2009, when Gear had paid no rent or CAM

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The Judgment was not actually entered until April 23, 2010, depriving Engstrom of prejudgment interest of nearly \$2,000 accruing over the 77 day period between February 5 and April 23, 2010.

Whether Judge Bradshaw used figures supplied by Engstrom is unknowable because King County Local Rule prohibits filing of unsigned orders. The King County Clerk's office applied this rule inconsistently with regard to Proposed Findings and Conclusions and Proposed Judgements, but did apply it to the documents Engstrom provided in support of its proposed judgement.

for nearly one year. The trial court's award of late fees extends only through the end of the lease on December 31, 2008, before Gear sought confirmation of the appraisers' award. See Appendix 1. Consequently, whatever this Court's resolution of the appeal and cross appeal, the amount of late fees should not be changed.

Depending upon this Court's resolution of the issues before it, the trial court may be required to recalculate interest. Rather than set up the possible scenarios for outcomes on appeal, the determination of whether a recalculation of interest is necessary, should await this Court's resolution of the appeal and cross-appeal.

F. ENGSTROM PROPERTIES, NOT GEAR, WAS THE ONLY PREVAILING PARTY.

Because Engstrom prevailed on its single claim against Gear and Gear did not prevail on any of its four claims against Engstrom, only Engstrom is a prevailing party. The Lease, Ex 1, provides attorneys fees to the prevailing party.¹³

The trial court correctly awarded Engstrom some of its fees, but erroneously offset Engstrom's fee award by \$25,443.00 as fees to Gear on

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Paragraph 16.13 provides: "If either party brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party in any such action, on trial and/or appeal, shall be entitled to its reasonable attorneys' fees to be paid by the nonprevailing party as fixed by the court or adjudicating authority."

intermediate procedures in which Gear “initially prevailed.” The trial court also subtracted Engstrom’s fees for procedures which were unsuccessful but which Engstrom had been compelled to incur. Judgement CP 523-25.

Gear asserted four claims: (1) breach of lease, (2) fraud in the inducement, (3) negligent misrepresentation, and (4) common law damages. CP 177-82. The trial court’s Findings of Fact and Conclusions of Law confirm that neither evidence nor law support any of these claims. CP 430-443. In contrast, Engstrom prevailed on all of Gear’s claims and on Engstrom’s single claim. CP 442. Gear is not a prevailing party.

“First, a prevailing party is generally one who receives a judgment in its favor.” *Scoccolo Constr. v. City of Renton*, 158 Wn.2d 506, 521 145 P.3d 371 (2006), citing *Schmidt v. Cornerstone Inv. Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). Judgements occur at the conclusion of the case, rather than at intermediate points. “[A] prevailing party is the one who has an ‘affirmative judgment rendered in his favor *at the conclusion of the entire case.*’” *Building Industry Ass’n of Washington v. State Dept. of Labor & Industries*, 123 Wn.App. 656, 669, 98 P.3d 537 (2004), quoting, *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 114 Wn.2d 677, 684, 790 P.2d 604 (1990) (emphasis in *Building Industry Ass’n*). Similarly, “It is generally said that the prevailing party is that party who has an affirmative judgment

rendered in his or her favor at the conclusion of the entire case.” 14A Washington Practice § 36:3. Although Gear did receive an order for judgement, it was made at the beginning of the case, before trial, and in the trial court’ s estimate, was of *de minimus* evidentiary value. CP 557-58.

RCW 4.84.330¹⁴ defines prevailing party as “the party in whose favor final judgment is rendered.” “A final judgment is one that resolves the action and ‘leaves nothing open to further dispute’” whereas, “ an ‘interlocutory’ decision is one that is ‘not final,’ but is instead ‘intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy.’ ” *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194, 1200 (2002) (citations omitted). Gear’s successes on motions and intermediate procedures mean nothing in the context of prevailing party.

Gear demanded immediate arbitration, and Judge Charles Mertel ordered arbitration under the terms of the lease. At that point, Engstrom had no choice but to prepare for and arbitrate even though there was no evidence of any loss of use. The arbitration before the real estate appraisers was a waste of resources, expended solely at the instigation of Gear. Because Engstrom was compelled by Judge

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RCW 4.84.330 is cited by analogy only. It is not strictly applicable here because it addresses unilateral attorney fee provisions, and converts them into bilateral fee agreements. The fee provision in the Lease is bilateral.

Mertel's order to participate, its legal expenses in complying with that order were necessarily and reasonably incurred, and should have been awarded.

Engstrom Properties asks the Court to affirm the attorneys fees awarded to Engstrom, to award Engstrom the balance of the fees it reasonably incurred in defending, and to reverse the set-off of fees awarded to Gear.

VI. REQUEST FOR ATTORNEYS FEES AND EXPENSES

The Lease provides for attorneys fees to the prevailing party on appeal, as well as trial. Lease §16.13. Engstrom requests an award of its fees and other legal expenses on appeal pursuant to RAP 18.1.

VII. CONCLUSION.

Engstrom Properties respectfully requests the Court to reverse the trial court's confirmation and judgment on the arbitration award, to adjust the attorneys fee award as provided in the judgement, and otherwise asks the Court to affirm the trial court in all other respects.

Respectfully submitted this 5th day of October, 2010

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APPENDIX 1
Unpaid Rent, CAM, Late Fees, and Interest

	Unpaid CAM	Unpaid Rent	Total Unpaid	Late Fees - 5%	Interest- 8%/yr	Balance
Apr 2007	11,237.67	0	11,237.67	561.88	74.91	
May 2007	8,692.26	0	8,692.26	434.61	57.95	
Jun 2007	5,884.01	0	5,884.01	294.20	39.23	
Jul 2007	3,845.69	0	3,845.69	192.28	25.64	
Aug 2007	1,037.44	0	1,037.44	51.87	6.92	
Sep 2007	1,422.40	0	1,422.40	71.12	9.48	
Oct 2007	7,010.55	0	7,010.55	350.53	46.74	
Nov 2007	7,141.11	0	7,141.11	357.06	47.61	
Dec 2007	2,138.26	0	2,138.26	106.91	14.26	
Apr 2008	10,604.02	0	10,604.02	530.20	70.69	
May 2008	10,698.08	0	10,698.08	534.90	71.32	
Jun 2008	11,274.89	0	11,274.89	563.74	75.17	
July 2008	8,528.58	0	8,528.58	426.43	56.86	
Aug 2008	19,943.02	0	19,943.02	997.15	132.95	
Sep 2008	23,537.09	17,283	40,820.09	2,041.00	272.13	
Oct 2008	42,713.60	34,566	\$77,279.60	3,863.98	515.20	
Nov 2008	42,862.59	51,849	94,711.59	4,735.58	631.41	
Dec 2008	43,749.36	69,132	112,881.36	5,644.07	752.54	
Total on 12/31/08	43,749.36	69,132	112,881.36	21,757.56	2,901.01	137,539.88
Total on 02/05/10*					9,920.74	147,460.62

*The Judgement calculates interest through 02/05/10. Interest at 8% per annum on unpaid rent and CAM of \$112,881.36 is 24.74/day or 9,030.5/year. The period of 01/01/09 to 02/05/10 is 401 days, resulting in interest on \$112,881.36 at 8% equal to \$9,920.74.

Judgement was not actually entered until 04/23/10, a period of 478 days from 01/01/09

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**COURT OF APPEALS, DIVISION I
OF WASHINGTON STATE**

224 WESTLAKE, LLC,

Plaintiff,

v.

ENGSTROM PROPERTIES, LLC,

Defendant.

No. 65338-5-I

DECLARATION OF SERVICE

I Sylvia Luppert, attorney for Engstrom Properties, LLC declare that on October 6, 2010, I caused to be served by email to Michael Fleming and Ryan McBride, at the addresses FlemingM@LanePowell.com and McBrideR@LanePowell Engstrom Properties' Brief of Respondent, Cross-Appellant.


Sylvia Luppert, WSBA 14802