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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS NO. 38113-3-II

STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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JARA, INC., an Oregon Corporation,

Appellant

v.

STIERS, INC., a Washington Corporation,

Respondent

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APPEAL FROM SUPERIOR COURT OF CLARK COUNTY  
HONORABLE JUDGE JOHN WULLE  
CLARK COUNTY CAUSE NO. 07-2-03798-9

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERRORS**

### **A. ASSIGNMENT OF ERRORS**

1. The trial court erred in entering the Findings of Fact set forth in Paragraphs 7, 13, 16, 19, 21 and 22 and in Conclusions of Law set forth in Paragraphs 1, 2, 3, 4, 5, and 6.

2. The trial court erred in assuming the role of plaintiff's counsel throughout the entire trial while presiding as the trier of fact.

3. The trial court erred by failing to grant Defendant's cross-motion for summary judgment when there were no material issues of fact as to how the then market rental rate value was to be established for the period beginning July 1, 2007 based on Judge Skimas' May 15, 2002 binding arbitration decision.

### **B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS**

#### **1. Assignment of Error No. 1**

1.1 Did the trial court err in finding that the car wash facility located at the mill plain center was intended to be an anchor tenant when this finding is not supported by substantial evidence? (Finding of Fact 7).

1.2 Did the trial court abuse its discretion by admitting a hearsay statement regarding an interpretation of the language contained

in the leases of other former tenants as “personal knowledge” and thus lack substantial evidence in concluding they contained language similar to thunder car wash’s lease? (Finding of Fact 13).

1.3 Did the trial court err in finding that the language contained in section 1.07 of the lease is broad, unclear and capable of more than one meaning when this finding is not supported by substantial evidence? (Finding of Fact 16, Conclusion of Law 1)

1.4 Did the trial court err in finding that “The then market rental rate” for the lease extension was the average amount being paid by Clark County, Washington car washes and the other commercial tenants located in the mill plain center when this finding is not supported by substantial evidence? (Findings of Fact 19, 21, and 22; Conclusions of Law 2, 3, 4, and 5)

1.5 Did the trial court abuse its discretion in awarding plaintiff attorneys’ fees and costs when there was no prevailing party? (Conclusion of Law 6)

## **2. Assignment of Error No. 2**

2.1 Did the trial court deny defendant its due process right to a fair trial by assuming the role of trial counsel by routinely assuming plaintiff’s counsel’s role and asking a majority of the questions of the witnesses? An Appellate Court reviews whether a trial judge’s

intervention into the conduct of a trial denies a party its due process right to a fair trial by examining all the facts and circumstances as they would appear to a reasonably prudent person. Brister v. Tacoma City Council, 27 Wn. App. 474, 487, 619 P.2d 982 (1980).

### **3. Assignment of Error No. 3**

3.1 Did the trial court err in failing to grant defendant's Cross Motion for Summary Judgment when there were no material issues of fact as to how the "the market rental rate" was to be determined? An Appellate Court reviews rulings of summary judgment de novo. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

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

### **A. Procedural History of Case**

In this case Jara, Inc., an Oregon corporation, was the defendant at the trial level and is now the petitioner before the Court of Appeals. Stiers, Inc., a Washington corporation, was the plaintiff at the trial level and is now the respondent before the Court of Appeals. On July 27, 2007, Plaintiff filed its First Amended Complaint in the Superior Court of Clark County. (CP 5) Defendant, Jara, Inc. filed its answer on August 30, 2007. (CP 6) On March 18, 2008, Plaintiff filed a motion for summary judgment. (CP 13) On April 4, 2008, Defendant filed a response to Plaintiff's motion for summary judgment and a cross-motion for summary

judgment. (CP 17) On April 7, 2008, Defendant filed a motion to strike Plaintiff's declaration in support of his motion for summary judgment. (CP 18) On April 15, 2008, Plaintiff filed a reply memorandum in support of Plaintiff's motion for summary judgment. (CP 20) On April 21, 2008, Clark County Superior Court Judge John Wulle entered an order denying Plaintiff's motion for summary judgment and denying Defendant's cross-motion for summary judgment. (CP 22)

On June 2, 2008, the parties proceeded to a bench trial in front of Clark County Superior Court Judge John Wulle. On June 25, 2008, Defendant filed his objections to Plaintiff's proposed findings of facts, conclusions of law and judgment. (CP 37) On July 7, 2008, Judge Wulle entered the findings of facts and conclusions of law and the judgment setting the monthly rental rate at \$20.02 per square foot as of July 1, 2007. (CP 39, 40) On July 29, 2008, Jara, Inc. filed its Notice of Appeal. (CP 41)

### **III. STATEMENT OF FACTS**

This lawsuit concerns a commercial lease for a business operating in Clark County, State of Washington, known as "Thunder Car Wash." (RP 1) This lawsuit involves an action brought to obtain a determination of the base rental rate Plaintiff is to be charged by Defendant for a five year lease extension commencing July 1, 2007. (RP 1) In June of 1992, a

commercial lease was entered into by Mill Plain Vancouver Joint Venture, as landlord, and J&C, Inc. as tenant. (RP 19, EX 1) Plaintiff is the successor in interest to J&C, Inc. (RP 13) Defendant is the successor in interest to Mill Plain Vancouver Joint Venture. (RP 1, EX 1) The commercial lease was originally for an 84 month term, “with an option to extend at the then market rental rate for an additional two option periods of five (5) years each.” (EX 1) The lease was amended in 1995 to provide that the base lease term would expire on July 1, 2002, and that the original terms of the lease would still apply. (EX 2, 3) Section 1.08 and 5.01 require Plaintiff to use the property only as a car wash. (RP 59-60) Plaintiff is to obtain permission from landlord if he wishes to use the leased property for any other purpose. (RP 60) Whether or not the changing of Plaintiff’s use of the property would have a change in the rent is unknown to Plaintiff. (RP 60)

Plaintiff testified that the original idea behind the Mill Plain Center (Center) was that it was to be a mixed automotive/retail center, with a combination of tenants who performed automotive related services or sold automotive related products and tenants who had retail style businesses, such as a video store. (RP 15) According to Plaintiff, this automotive/retail complex concept was based on the idea of installing one large service/retail tenant at one end of the complex and to install one

automotive anchor tenant at the other end. (RP 31) The anchor retail store for the complex was World Gym. (RP 32) It is unclear who the other anchor tenant was as Plaintiff testified that both Thunder Car Wash and Video Warehouse was the other anchor tenant for the Center. (RP 32, 110) The area that Thunder Car Wash rents encompasses one thousand, eight hundred and seven (1807) square feet, which is the dimension of the inside space of the building. (RP 41, 57) Plaintiff also has the use of an exterior portion of the property where customers can vacuum out their own vehicle and perform other services on their vehicles for which and Plaintiff does not pay any additional rent. (RP 104, 204)

The original owner of the Center brought Plaintiff on board in 1989 to help establish the Center and he eventually became involved in the car wash aspect of the Center in 1996. (RP 17, 18) From 1990 until July of 1996, Plaintiff was the property manager and the leasing agent for the Center. (RP 18) According to Plaintiff, part of his duties as leasing agent for the Center was to help draft the language contained in the leases for the Center's tenants. (RP 20) Further, Plaintiff stated that language similar to the lease at issue in this case appeared in the leases of six different tenants from January 1990 until July of 1996. (RP 23) According to Plaintiff, all six of these leases had the same renewal language as Thunder Car Wash's lease. (RP 24) Plaintiff testified that the phrase "the then market rental

rate,” located in Section 1.07 of the lease in this case, refers to the current rental rate for commercial space in the Center. (RP 41) Further, Plaintiff stated that this language was designed to insure for the tenants of the Center that when their lease renewal date came up their rent would be adjusted to match the success or failure of the Center. (RP 42)

In 1996, the Center was purchased by another owner and Plaintiff ceased acting as the leasing agent for the Center. (RP 43) At this time, Elliot Management Company took over the management of the Center for approximately two and a half years. (RP 67) When Defendant purchased the Center in the middle of 2006, Ted Durant and Associates took over the property management and still manage the property at this point in time. (RP 66-67)

In 1992 Plaintiff was paying \$14.00 a square foot in basic monthly rent. (RP 108) Plaintiff testified that from the inception of the lease to mid-1996, his base rent had only increased through Consumer Price Index (CPI) adjustments. (RP 43-44) In 2002, the average rent for the rest of the Center was about \$14.00 per square foot. (RP 71, EX 12) At the end of June of 2002 Plaintiff stated he was paying a base rent of \$17.95 per square foot (up from the inception rate of \$14.00 per square foot). (RP 44, 108) After Plaintiff exercised the first lease option Plaintiff and Defendant were unable to agree upon a new rental rate they proceeded to

binding arbitration. (RP 108) On May 15, 2002, Retired Superior Court Judge John Skimas issued a binding arbitration decision setting the base rental rate at \$21.75 per square foot to begin on July 1, 2002. (RP 71, 108, EX 13) Plaintiff exercised his second option to renew the lease pursuant to section 1.07 of the lease, extending the term of the lease through June 30, 2012. (RP 113-114) Plaintiff and Defendant were unable to agree upon a base rental rate for this final lease option. This action was initiated to determine the appropriate base rental rate for the final five year extension. In trial Plaintiff asked the court to set the monthly base rent at \$15.32 per square foot. (RP 108)

As of December 31, 2007, the average rental rate of automotive tenants in the Center was \$15.31 and the average rental rate for service/retail tenants at the Center was \$15.33. (RP 72) On June 30, 2007, Plaintiff was paying base monthly rent of \$24.38 per square foot. (RP 72-73) Defendant, after a rental market analysis, requested that Plaintiff pay monthly base rent in the amount of \$30.00 per square foot beginning July 1, 2007. (RP 72, EX 5) Plaintiff has been paying \$30.00 per square foot base monthly rent since July 1, 2007, up to the date of entry of the trial court's order. (RP 77)

Plaintiff introduced and testified to a series of photos depicting Thunder Car Wash and the Center. (RP 92, EX 15) These photos

included pictures of planters inside of the center and the planters in front of Thunder Car Wash and the condition of the asphalt around Thunder Car Wash and throughout the Center. (RP 94-97) The photos also include pictures of various other car washes throughout the east Clark County. (RP 102-103, EX 15)

Plaintiff testified that the photos of the area that depicts where arrows are not painted and the pavement is not completed are areas that he does not use and that he has the use of an exterior portion of the parking lot as well as the drive through and drive out of Thunder Car Was. (RP 104) Plaintiff stated that section 6.03.1 of the lease states that the tenant shall replace any portion of the property or system or equipment in the property which cannot be fully repaired regardless of whether the benefit of such replacement exceeds the terms of the lease. (RP 105, EX 1) Plaintiff also testified that section 6.4 of the lease absolves the landlord of any responsibility to repair, maintain or replace any portion of the property at any time. (RP 105-106)

Charles Kaady, an owner and operator for over 30 years of 15 different car washes in the Vancouver, Washington and the Portland, Oregon metropolitan area, named Kaady Car Wash, testified regarding how he evaluates car wash property rental rates. (RP 119-120) Mr. Kaady leases one car wash in Vancouver, WA, formerly known as Gentle

Wash (the car wash referred to in Retired Judge Skimas' arbitration decision). (RP 122) Mr. Kaady rented this car wash for a rate of \$21.75 per square foot and this rent increased to \$25.00 per square foot in July of 2008. (RP 122) When Mr. Kaady leased this Vancouver, WA car wash he extensively remodeled it, spending over \$500,000. (RP 124) This extensive remodeling job led to the initial rent being set at the low rate of \$21.25 per square foot. (RP 124) Further, Mr. Kaady feels that the rental rate of \$25.00 per square foot is still low due to the extensive remodeling his company did. (RP 125)

In determining the rental rates for car washes, Mr. Kaady looks at the layout of the property, the amount of exposure the location receives, whether or not the property has good ingress and egress and the amount of traffic the location receives. (RP 126) Mr. Kaady does not look at what other individuals in the same location or complex, car wash or other type of business, are paying in order to help determine what he feels is the market rental rate. (RP 131) Mr. Kaady testified that Thunder Car Wash's location is superior to his car wash located in Vancouver because of the amount of exposure it receives and that it is positioned parallel to the street upon which it is located (Mill Plain Blvd). (RP 132-134) Due to its superior location Mr. Kaady would be willing to pay \$30 a square foot in rent if he were leasing the Thunder Car Wash. (RP 136-137)

Dean Meyer, an uncontroverted expert for commercial real estate appraisals for PGP Evaluation, located in Vancouver, WA, prepared a Summary Market Rent Analysis Report concerning Thunder Car Wash in preparation for this trial. (RP 150-152, EX 5) Mr. Meyer has been a commercial real estate appraiser for about 19 years and received his designation as a Member of the Appraisal Institute in 1999. (RP 150-152) Mr. Meyer defines market rent as the rental income a property would comparably command in the open market indicated by the current rents that are either being paid or asked for comparable spaces as of the date of the appraisal. (RP 175)

In preparation for his report, Mr. Meyer inspected the subject property; researched the physical characteristics of the property; considered its "locational" (sic) characteristics, such as access to the property, its exposure, its age and condition of any improvements done on the property; researched other comparable leased car wash facilities in order to be able to compare them to the subject property. (RP 155-156, 182, 189, EX 5) Due to a lack of leased car washes in the defined market area, Mr. Meyer expanded his research area to include the Portland, OR metropolitan area of which Vancouver, WA is considered a suburb. (RP 156, EX 5) Mr. Meyer does not consider the value or condition of any equipment located inside a subject property in conducting a market rent

analysis. (RP 199) Mr. Meyer's Summary Market Rent Analysis Report recommended in his report that the market rental rate for Thunder Car Wash be set somewhere between \$29.00 - \$31.00 per square foot per year, plus common area maintenance fees (CAM). (RP 159, 197)

Mr. Meyer stated that he felt the rent being paid by Mr. Kaady for his leased Vancouver, WA location was on the lower end of the market rental rate due to the amount of improvements to the property paid for by Mr. Kaady when he initially leased the property and that it is perpendicular to the street it is located on and not parallel. (RP 159, EX 5) In preparing his Summary Market Rent Analysis, Mr. Meyer further testified that it was not necessary, based on his experience as a commercial real estate appraiser, to look as the rent being paid by other tenants in the Center because they do not operate car washes and a car wash building is specific to running a car wash. (RP 160, 175, EX 5) Nor did Mr. Meyer feel it necessary or appropriate to look at rent being paid by other non-car wash businesses in the area. (RP 160, 175)

#### **IV. ARGUMENT**

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

An appellate court reviews a trial court's decision following a bench trial by determining whether the findings of facts are supported by substantial evidence and whether those findings support the conclusions of

law. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational-fair minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Questions of law are reviewed de novo. Sunnyside Valley Integration Dist. v. Dickie, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003). A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion only when its decision is manifestly unreasonable or on untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

**B. SUBSTANTIAL EVIDENCE DOES NOT EXIST TO SUPPORT THE COURT'S FINDING OF FACT THAT THUNDER CAR WASH SERVED AS AN ANCHOR TENANT FOR THE MILL PLAIN CENTER.**

The court's finding of fact that Thunder Car Wash served as an anchor tenant or that the ret paid by an anchor tenant is different than other tenants is not supported by substantial evidence and is therefore improper, and, in fact irrelevant in this case. As noted above, substantial evidence is a quantum of evidence sufficient to persuade a rational-fair minded person that the premise is true. Wenatchee Sportsmen Ass'n., 141 Wn.2d at 176. In order for substantial evidence to exist there must be enough evidence to

persuade a fair-minded person of the truth of the finding of fact. Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). The testimony in this case given by Plaintiff in regard to whether or not Thunder Car Wash served as an anchor tenant for the Mill Plain Center is inconsistent, contradictory and has no relevance to the issues in this case. Plaintiff first testified, after frequent questioning by the trial judge and over the objection of Defendant, that the concept of the Center was to install one large anchor service/retail tenant and to install one automotive tenant. (RP 31) The trial judge then interrupted Plaintiff in his testimony and began asking numerous question regarding anchor tenants at other properties. (RP 31-32) Plaintiff then testified in response to suggestive questioning from the trial judge regarding anchor tenants that a business known as “World’s Gym” was the retail/service anchor for the Center and that the car wash was the automotive anchor tenant for the Center. (RP 33) Following this line of questioning, the trial judge then proceeded to ask Plaintiff questions regarding whether anchor tenants were entitled to discounts in rent due to their status as anchor tenants. (RP 33 – 35).

Later in the proceedings, the topic of anchor tenants was again discussed in a line of questioning, objected to as part of Defendant’s ongoing relevancy and inadmissible hearsay and parol evidence objection

regarding what Plaintiff felt the rent should be for Thunder Car Wash. (RP 40, 109 – 110) In response to a question from Plaintiff’s counsel, objected to by Defendant, Plaintiff stated that “[w] have lost the World Gym, the Video Warehouse – our anchor tenants.” (RP 110) This answer is in direct contradiction to Plaintiff’s prior answer to the trial judge’s suggestive questioning regarding whether or not Thunder Car Wash was an anchor tenant or not and thus entitled to lower rent. The trial judge placed a substantial amount of weight in his oral ruling in determining the “then market rental rate” that Thunder Car Wash was an anchor tenant. (RP 231, 249)

As noted above, in order for a reviewing court to uphold a trial courts finding of fact, the finding must be supported by substantial evidence and is event relevant to the issues in the case. Dorsey, 51 Wn. App. at 668-69. Substantial evidence exists when there is a quantum of evidence sufficient to persuade a rational-fair minded person that the premise is true. Wenatchee Sportsmen Ass’n, 141 Wn.2d at 176. A quantum of evidence does not exist to support the trial court’s finding of fact that Thunder Car Wash was/is an anchor tenant of the Center or that a discount in rental rate would be justified. Due to the suggestive line of questioning from the trial judge regarding this issue and Plaintiff’s contradictory testimony, a rational-fair minded person could not conclude

that that Thunder Car Wash was an anchor tenant nor that it would be entitled to a discounted rental rate. (Findings of Fact 7) Therefore, Defendant requests that the appellate reverse the trial court's finding that Thunder Car Wash was an anchor tenant and entitled to a discounted rental rate at the Center.

**C. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY STATEMENTS REGARDING THE LANGUAGE CONTAINED IN THE LEASES OF OTHER FORMER TENANTS AS PERSONAL KNOWLEDGE AND THUS LACKED SUBSTANTIAL EVIDENCE IN CONCLUDING THAT THE LEASES CONTAINED LANGUAGE SIMILAR TO THUNDER CAR WASH'S LEASE.**

An appellate court reviews a trial court's evidentiary ruling for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion by basing its decision on manifestly unreasonable or untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An appellate court reviews a trial court's decision following a bench trial by determining whether the findings of facts are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational-fair minded person that the premise is true. Wenatchee Sportsmen Ass'n v.

Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). A trial court does err when it enters a finding of fact not based on substantial evidence. Dorsey, 51 Wn. App. at 668-69.

The testimony by Plaintiff regarding the content of the leases of other tenants is inadmissible hearsay and the trial court's ruling to the contrary was based on manifestly unreasonable and untenable grounds. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. ER 801(a). A declarant is a person who makes a statement. ER 801(b). "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802. Evidence of out-of-court statements offered for proof of the matters asserted therein are inadmissible; however, these statements may be admissible if they fall within in one of the set forth exceptions to ER 802 and they are relevant. State v. Sharp, 15 Wn. App. 585, 589, 550 P.2d 705 (1976). If the out-of-court statement is self-serving, in that it tends to aid the party's case, then the statements are not admissible under the exceptions. Id., citing State v. Haga, 8 Wn. App. 481, 507 P.2d 159 (1973).

In our case, Plaintiff' counsel asked Plaintiff "[w]hat concerns were you trying to deal with (in drafting the lease)?" (RP 20). Plaintiff responded, in part, that the language used in the leases he drafted first appeared in Video Warehouse's lease in 1991. . ." (RP 20) At this point Defendant's counsel objected to Plaintiff's answer as being hearsay and thus inadmissible. (RP 21) Defendant's counsel clarified his objection to specifically concerning the testimony regarding the language of the leases of other tenants in the Center. (RP 21) The trial judge overruled the objection stating "because I don't believe that it is hearsay. I think he's testifying with personal knowledge. So I'll let it stand." (RP 22 – 23) Plaintiff then went on to testify that he believed that six other tenants had the same lease verbiage and the same lease as the one at issue in our case. (RP 23) Plaintiff further testified that all six of these other leases had the same renewal language as that contained in the Thunder Car Wash lease. (RP 24)

In applying the definitions set forth in ER 801, it is quite apparent that Plaintiff's testimony regarding what type of language the leases of other tenants contain is an oral assertion and thus is a statement under ER 801(a). Further, Plaintiff is a declarant under ER 801(b). Plaintiff testified as to this issue to prove that leases other than its own contained language similar to Plaintiff's lease in regards to the lease extension and

therefore is hearsay under ER 801(c). Defendant's timely objection to this testimony was overruled on the grounds that Plaintiff was testifying with "personal knowledge" and therefore it is not hearsay. (RP 24) Under ER 802, hearsay is not admissible except as provided by the rules of evidence, by court rules, or by statute. Nothing in the Washington Rules of Evidence states that "personal knowledge" is an exception to the hearsay rule. Even if the trial court's overruling of Defendant's objection was because of a valid hearsay exception the statements are clearly self-serving. As noted above, self-serving hearsay is not admissible under the hearsay exceptions. The statements made by Plaintiff were given to aid its case in establishing its theory as to how the "then market rental rate" was to be determined.

As noted above, an appellate court reviews a trial court's evidentiary ruling for an abuse of discretion. Finch, 137 Wn.2d at 810. Abuse of discretion occurs when the trial court bases its evidentiary ruling decision on manifestly unreasonable or untenable grounds. It is apparent that the trial court's ruling that Plaintiff's testimony regarding the lease language contained in the leases of other tenants was admissible because Plaintiff testified as to "personal knowledge" is based on manifestly unreasonable and untenable grounds. Further, even if this testimony was admissible under an exception to the hearsay rule it is purely self-serving

and therefore not admissible. Because the trial court based Finding of Fact 13 on the inadmissible, self-serving hearsay testimony of Plaintiff, there is not a quantum of evidence that would persuade a rational-fair minded person that this is true and therefore could not be supported by substantial evidence. Therefore, Defendant requests that the appellate court reverse the trial court's finding that leases of the other tenants in the Center contained language similar to Thunder Car Wash's.

**D. THE TRIAL COURT ERRED IN DETERMINING THAT THE LANGUAGE CONTAINED IN SECTION 1.07 OF THE LEASE IS BROAD, UNCLEAR AND CAPABLE OF MORE THAN ONE MEANING.**

Whether a written instrument is ambiguous is a question of law for the court. Carlstrom v. Hanline, 98 Wn. App. 780, 784, 990 P.2d 986 (2000), citing McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). An appellate court reviews questions of law de novo. State v. McCormack, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992).

The phrase "the then market rental rate" in Section 1.07 of the lease is not ambiguous and therefore the trial court abused its discretion when it found that it was capable of more than one meaning. (Finding of Fact 16 and Conclusion of Law 1) Ambiguity will not be read into a contract where "it can reasonably be avoided by reading the contract as a

whole.” Carlstrom, 98 Wn. App. at 784, citing McGary, 99 Wn.2d at 285. “Under the “context rule” of contract interpretation, the parties’ intent is determined by viewing the contract as a whole, the objective of the contract, the contracting parties’ conduct, and the reasonableness of the parties’ respective interpretations.” King v Rice, \_\_\_ Wn. App. \_\_\_ (2008), citing Berg v. Hudesman, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). A court may consider extrinsic evidence whether or not the terms of the contract are ambiguous. Berg, 115 Wn.2d at 669. Extrinsic evidence is to be used by the court to illuminate what was written in the contract, not what was intended to be written. Berg, 115 Wn.2d at 669. Extrinsic evidence may not modify or contradict a written contract in the absence of fraud, accident, or mistake; however, a court may use it to clarify the meaning of words used in a contract. King, \_\_\_ Wn. App. at \_\_\_, citing In re Marriage of Schweitzer, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997); U.S. Life Credit Life Ins. Co. v. Williams, 129 Wn.2d 565, 569-70, 919 P.2d 594 (1996), citing Berg, 115 Wn.2d at 669. A court may use extrinsic evidence only to help explain undefined terms, not to modify, vary, or contradict terms of a written contract. King, \_\_\_ Wn. App. \_\_\_, citing Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). Unilateral or subjective purposes and intentions about the meanings of what is written in a contract do not constitute evidence of the parties’

intentions. Lynott v. Nat'l Union Fire Ins. Co., 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

If extrinsic evidence is not able to resolve the ambiguity, then the court shall construe the contract against the drafter. King, \_\_\_ Wn. App. \_\_\_, citing Queen Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 513, 760 P.2d 350 (1988). Further, if the contract uses technical or terms of art to a particular trade, the general rule is that such language is to be given its technical meaning when used in transaction within its technical field. Berg, 115 Wn.2d at 669.

In Watkins v. Restorative Care Center, Mr. and Mrs. Watkins, the mortgagors of a nursing home appealed an order granting summary judgment in favor of Restorative Care Center (RCC) claiming, amongst other things, that the trial court erred in granting summary judgment based on there not being a question of material fact presented by the extrinsic evidence they had produced to the court. 66 Wn. App. 178, 831 P.2d 1085 (1992). The Watkins opened a nursing home in 1950. Id. In December of 1974, the Watkins leased the nursing home to Restful Manor (a corporation wholly owned by the Watkins). Id. at 181. The lease included a phrase that required the Center at the end of the lease to return the “premises in as good condition as they were when leased.” Id. In 1975, the Watkins expanded their facility to a 250-bed nursing home. Id. at 181-

82. In February of 1975, Restful Manor entered into an agreement with the United States Dept. of Housing and Urban Development (HUD) in which they agreed to at all times maintain a license from the state, not remodel, reconstruct, add to, or demolish any part of the mortgaged property, and they shall not use the project for any other purpose other than a nursing home. Id. at 181-82. In 1977, an addendum to the lease was executed requiring Restful Manor to maintain the Watkins property in good repair and return their personal property upon termination of the lease. Id. at 182.

Restful Manor remained the licensed operator of the center until 1978, when the Watkins sold their entire interest in Restful Manor but maintained their security interest in the center as mortgagors. Id. at 182. In 1978, C&L acquired Restful Manor and assumed Restful Manor's obligations under the lease. Id. In 1986 (RCC) acquired Restful Manor and agreed to guarantee C&L's performance of the lease. Id. In 1987, RCC lowered the number of beds in the Center to 189 beds. Id. In February of 1988, the Watkins commenced a declaratory action alleging that RCC was in breach for reducing the number of beds below 250. Id. at 183.

In opposition to RCC's motion for summary judgment, the Watkins submitted the declaration of Mr. Watkins stating that, as the

Center's owner and as Restful Manor's principal officer, his intent when entering the lease was to "preserve, maintain and operate the [Center] as a 250-bed facility." Id. at 184. Watkins also stated that he understood that the agreements required the nursing home to be operated at a bed level of 250. Id. Upon review of this claim, the Court of Appeals stated that there was no mention of the 250-bed requirement in the original lease and that Mr. Watkins stated, for the first time in 1990 when the dispute arose, that the preservation of the Center's 250-bed authority was contemplated at the time the lease was executed. Id. at 192. Further, the lease was not an arm's length transaction involving a third party, but rather a single party, the Watkins, acting both as the lessor and lessee. Id. at 192. The Court of Appeals found it to be significant that the Watkins did not express their intent to C&L in 1978, when C&L acquired Restful Manor and assumed the lease. Id. Therefore, the Court held that there was no evidence that C&L was ever aware of, let alone shared, the Watkins' intention that the Center be operated as a 250-bed facility. Id. The Court also stated that the Watkins' failure to express this intent in subsequent leases undermined "his assertion that (they) intended the promise to return the "premises" in as good condition as when leased to include the Center's. . . 250-bed license." Id. at 193. Therefore, the Court Appeals held that RCC did not

breach the lease agreement by reducing the number of beds and summary judgment was appropriate. Id. at 194.

In this case, the trial court judge allowed Plaintiff to testify, over Defendant's repeated objections, regarding his subjective, unilateral belief as to how "the then market rental rate" was to be determined at the time of renewal. (RP 35, 38, 41, 76, 110) The trial court judge overruled Defendant's objection by stating "I'm not gonna (sic) deny either side the opportunity to develop the theory of their case." (RP 40) This is not a defined legal standard for allowing in extrinsic evidence under the "context rule." As noted above, the process a trial court must go through to permit extrinsic evidence into the record is a much higher standard than the standard used by the trial court in this case. Plaintiff testified that the phrase "the then market rental rate" "[a]t the time of renewal it (sic) means the current rental rate for commercial space in the Mill Plain center." (RP 41) Plaintiff was also permitted to testify that the "then market rental rate" was to be set to match the Center's current market rental rate for commercial space. (RP 76) Further, Plaintiff testified that the "original meaning and intent of the current market rental rate was to address the success or the failure of the Mill Plain Center." (RP 110) All of the testimony, including these statements, from plaintiff regarding the

“meaning and intent” behind the phrase “the then market rental rate” are extrinsic evidence.

In order to determine whether this extrinsic evidence was admissible, the trial court should have walked through a process similar to the law set forth above as opposed to allowing the testimony to come in so that each side was not prevented from developing “the theory of their case.” (RP 40) In applying the law set forth above, it is apparent that the trial court erred in permitting Plaintiff to testify as to his subjective, unilateral opinion regarding the intent and meaning of the phrase “the then market rental rate.” In our case, the language “the then market rental rate” is not ambiguous. As noted above, if a contract uses terms of art to a particular trade, that language is to be given its technical meaning when used within its technical field. Berg, 115 Wn.2d at 669. Defendant’s expert witness Dean Meyer, an MAI designated real estate appraiser with over 19 years of experience (RP 151 – 154) testified that the phrase “market rental rate” and “market rent” are the same and the only difference is a matter of semantics and that in the real estate appraisal business the phrase is called “market rent.” (RP 173-174) As part of the report Mr. Meyer prepared for this case he defined the phrase “market rent” as “[t]he rental income a property would probably command in the open market indicated by the current rents that are either being paid or

asked for comparable space as of the date of the appraisal.” (RP 175)

Under Berg, this is the definition the trial court should have adopted thus making the lease unambiguous and the trial court should not have allowed Plaintiff to testify regarding his subjective, unilateral beliefs. Lynott, 123 Wn.2d at 684.

Even if the trial court was correct in that the phrase “the then market rental rate” was ambiguous Plaintiff still should not have been allowed to testify because, as in Watkins, Plaintiff’s version was unknown to Defendant when it assumed the lease. There is no mention of this phrase in the original lease between J & C, Inc. and the Center’s original management group. (EX 1) In addition, there is no mention of this phrase in either the lease addendum dated 6/25/1992 or the lease extension agreement dated July 1, 2002. (EX 2, 4) Also, the trial is the first time Plaintiff stated his belief as to what the phrase meant. Lastly, the original lease and addendum to lease are similar to the leases in Watkins in that they are not an arm’s length transaction involving a third party, but rather a single party, because Plaintiff was essentially the lessor and lessee given that he was the property manager and drafter of the lease language and addendum at the time they were entered into. Therefore, just as in Watkins, the trial court should not have permitted Plaintiff to testify regarding his belief as to the intention and meaning behind the lease.

Lastly, if the trial court was correct in that the language was ambiguous, Plaintiff's testimony still should not have been allowed because it modifies and adds to the language of the lease. Plaintiff's testimony that the "then market rental rate" was to be determined "[a]t the time of renewal it (sic) means the current rental rate for commercial space in the Mill Plain Center" (RP 41) adds to the lease a formula for how the rate at the time of renewal was to be calculated. This is not allowed under Washington law. See Berg, 115 Wn.2d at 669. Further, if neither definition of "the then market rental rate" cured the ambiguity, the lease should have been construed against Plaintiff, the drafter of the lease.

Based on the above set forth arguments, the trial court erred and abused its discretion by finding that the phrase "the then market rental rate" is broad and the trade definition for the phrase given by Defendant's expert should have been adopted by the court and thus no ambiguity exists. Even if the phrase is ambiguous, the trial court still erred in allowing Plaintiff to testify as to the intent and meaning behind the phrase because the testimony is subjective and unilateral and only goes to advance the Plaintiff's side of the case not to determine the intent of the parties at the time the original lease was made. Lastly, Plaintiff should not have been allowed to testify as to the intent of the phrase because it modifies and adds to the lease, which is not a permitted use of extrinsic

evidence. There is not substantial evidence to support the court conclusion of law that the language is unclear and capable of more than one meaning. Therefore, Defendant requests that the appellate court reverse the trial court's finding that the language in Section 1.07 of the lease is broad, unclear and capable of more than one meaning and direct the trial court to enter a finding that the language is not ambiguous and should be defined according to the definition set forth by Mr. Meyer.

**E. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT "THE THEN MARKET RENTAL RATE" FOR THE LEASE EXTENSION WAS THE AVERAGE AMOUNT BEING PAID BY CLARK COUNTY, WASHINGTON CAR WASHES AND THE OTHER COMMERCIAL TENANTS LOCATED IN THE MILL PLAIN CENTER WHEN THIS FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE? (FINDINGS OF FACT 19, 21, AND 22; CONCLUSIONS OF LAW 2, 3, 4, AND 5)**

An appellate court reviews a trial court's decision following a bench trial by determining whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey, 51 Wn. App. at 668-69. Substantial evidence is a quantum of evidence sufficient to persuade a rational-fair minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). A trial court does err when it enters a

finding of fact not based on substantial evidence. Dorsey, 51 Wn. App. at 668-69.

The trial court's findings of fact that "the then market rental rate" requires the court to consider rents being paid by other comparable businesses in Clark County and then finding that those comparable business are other car washes in Clark County and the other commercial tenants in the Center are not supported by substantial evidence and therefore the trial court abused its discretion in making these findings. (Findings of Fact 19 and 21) Further, the trial court abused its discretion by finding that the average rent between comparable Clark County car washes and other commercial tenants in the Center was \$20.02 and thus concluded that this is "the then market rental rate" under section 1.07 of the lease. (Finding of Fact 22, Conclusions of Law 2, 3, 4, and 5)

The trial court found and concluded that the definition of the phrase "the then market rental rate" in section 1.07 means considering other comparable businesses in Clark County in comparable circumstances. (CP 39; Finding of Fact 19, Conclusion of Law 2) The trial court went on to find that "comparable businesses" for purposes of section 1.07 are comparable Clark County car washes (with an average rental rate of \$24.72 per square foot) and the other tenants in the Center (with an average rental rate of \$15.32). (CP 39; Finding of Fact 21 and

testify that the “then market rental rate” was to be set to match the Center’s current market rental rate for commercial space. (RP 76) From this theory Plaintiff testified that the average rental rate for automotive tenants of the Center as of December 31, 2007 was \$15.31 per square foot and that the average for service/retail tenants as of that same date was \$15.33 per square foot. (RP 72) These averages were based on objected to inadmissible parol evidence. (EX 9, 12) Further, Plaintiff’s theory is inconsistent with his statement regarding what the effect to his rental rate would be if he conducted some type of business in addition to his car wash business at his location. When asked what the effect would be Plaintiff testified that “[i]n our lease we have to get the approval from the landlord so I don’t know how it would affect the rent.” (RP 60) This statement is completely contradictory with Plaintiff’s testimony regarding the rental rate of all the tenants being determined based on the success/failure of the Center and not on the type of business conducted.

It is a well-established rule in Washington that parol evidence will not be admissible to vary the promissory terms of a written contract. Shelton v. Fowler, 69 Wn.2d 85, 93, 417 P.2d 350 (1966). Evidence which is extrinsic to a written document is considered parol evidence and is generally in the form of oral or verbal statements. Black’s Law Dictionary 1117 (6<sup>th</sup> ed. 1990). Interpretation of contracts may sometimes

require the use of parol evidence. Bort v. Parker, 110 Wn. App. 561, 573, 42 P.3d 980 (2002), citing DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 32, 959 P.2d 1104 (1988). However, a trial court may only use parol evidence for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties. Id. “Parol evidence admitted to interpret the meaning of what is actually contained in a contract does alter the terms contained in the contract. Thus, use of parol, or extrinsic, evidence as an aid to interpretation does not convert a written contract into a partly oral, partly written contract.” Id. at 574. In addition, the parol evidence rule bars the use of parol evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract, “i.e., one which is intended as a final expression of the terms of the agreement.” Id. “Admissible extrinsic evidence does not include (1) evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.” Bort, 110 Wn. App at 574, citing Hollis v. Garwell Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

In determining whether parol evidence is admissible, the courts should follow a two step process in determining if the parol evidence rule

applies: (1) decide if the document is fully integrated and (2) if the document is integrated, determine if the evidence contradicts the written terms of the contract. Bort, 110 Wn. App. at 574. If it does, then parol evidence in reference to the agreement is inadmissible. Bort, 110 Wn. App at 574, citing Hollis v. Garwell Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

First, an integrated writing is a writing intended as a final expression of the terms of the agreement. Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). To determine this, the courts have adopted the “context” rule. Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). As an aid in ascertaining the intent of contracting parties, a court may look at the subsequent conduct of the contracting parties and the reasonableness of the parties’ respective interpretations. Id. In addition, the court may look at any evidence of negotiations surrounding the formation of the contract. Id. Also, an “integration clause” that states that the written documents constitute the parties’ entire agreement is a strong indication that the agreement is fully integrated. Olsen Media v. Energy Sciences, 32 Wn. App. 579, 584, 648 P.2d 493 (1982).

Second, if the contract is found to be fully integrated the court then determines if the evidence contradicts, adds to, subtract from, or modifies the terms of the contract. Bort, 110 Wn. App. at 574. If it does, then the

evidence is inadmissible. Bort, 110 Wn. App at 574, citing Hollis v. Garwell Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

In our case, the lease is fully integrated as evidenced by the inclusion of an integration clause in section 13.06. This section states that “[t]his lease is the only agreement between the parties pertaining to the Lease of the Property and no other agreements are effective. All amendments to this Lease shall be in writing and signed by all parties. Any other attempted amendment shall be void.” (EX 1)

Second, because the lease is fully integrated, the next step is to see if the evidence adds to or modifies the terms of the lease. The sole purpose of Plaintiff’s introduction into evidence of Exhibit 9 and 12 and testimony regarding these exhibits was in an attempt to modify the lease agreement by adding a formula for calculating “the then market rental rate.” Thus this evidence should have been ruled inadmissible and should not have been relied upon by the trial court. However, even if this evidence was admissible it is not substantial evidence in support of the findings the court made in Findings of Fact 19, 21 and 22.

Defendant’s witness Mr. Meyer testified that “the then market rental rate” should be established by looking at other comparable car washes in the Clark County, WA/Portland, OR metropolitan area. (EX 5) Defendant’s witness Mr. Kaady testified he determines the rental rates for

car washes by looking at the layout of the property, the amount of exposure the location receives, whether or not the property has good ingress and egress and the amount of traffic the location receives. (RP 124) Mr. Kaady also testified that he does not take into account what other individuals in the same location or complex, car wash or other type of business, are paying in order to help determine what he feels is the market rental rate. (RP 131) At no point did any of Defendant's witnesses testify that the comparable businesses that should be compared to determine "the then market rental rate" were other car washes in Clark County and other commercial tenants in the Center. Therefore, Defendant did not supply the trial court with the substantial evidence needed to support Findings of Fact 19, 21 and 22.

Based on the improper admission of parol evidence by the trial court and the complete lack of evidence supporting the trial court's findings it cannot be said that there is a quantum of evidence sufficient to persuade a rational-fair minded person that the premise is true. Therefore, the trial court did err when it entered Findings of Fact 19, 21 and 22 and thus there is not sufficient evidence to support the trial court's conclusions of law that "the then market rental rate" refers to the average amounts being paid by comparable businesses in comparable circumstances with those businesses including Clark County car washes and the other

commercial tenants in the Center. These findings and conclusions were fashioned by the court without any evidence being presented to support them. Based on these errors, the trial court should be reversed.

**F. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING PLAINTIFF ATTORNEYS' FEES AND COSTS UNDER SECTION 12.01 OF THE LEASE WHEN THERE WAS NO PREVAILING PARTY AS REQUIRED BY THE LEASE.**

An appellate court reviews a trial court's awarding of costs and fees for an abuse of discretion. Bank of Am. Nt. & Sa. v. Hubert, 153 Wn.2d 102, 123, 101 P.3d 409 (2004) (citing Schmidt v. Cornerstove Inves., Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990)).

The trial court's awarding of attorneys' fees and costs was an abuse of its discretion and therefore Plaintiff is not entitled to receive them. When a contract contains a provision awarding attorneys' fees to the prevailing party there is no prevailing party if each side prevails on an issue. McGary v. Westlake Investors, 99 Wn.2d 280, 288, 661 P.2d 971 (1983).

Section 12.01 of the lease states that 'if any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the party in whose favor a judgment is entered a reasonable sum as attorney's fees and costs.' (EX 1) Our case did not involve a dispute regarding an alleged breach of the lease or a dispute to

make either party comply with a certain provision of the lease. This case involved an action between Plaintiff and Defendant to determine the monthly lease payments. Therefore, attorneys' fees are not awardable under section 12.01 of the lease. Further, Defendant was also a prevailing party in this matter. At trial Plaintiff asked that the rental rent be set at \$15.32 per square foot. (RP 3, 76, 108, 109, 110, 224) After the trial court had heard all the testimony it set the market rental rate at \$20.02 per square foot. (CP 39) Therefore, although Plaintiff succeeded in getting the rent set lower than what it was paying before the dispute, Defendant succeeded in getting the rent set higher than Plaintiff requested. Therefore, both if either party was to be considered the prevailing party and entitled to an award of attorneys' fees that should have been Defendant. Defendant requests that the trial court's award of attorneys' fees and costs to Plaintiff be reversed and that Defendant's be awarded its attorney's fees and costs as the prevailing party.

**G. THE TRIAL COURT DENIED DEFENDANT ITS DUE PROCESS RIGHT TO A FAIR TRIAL BY ASSUMING THE ROLE OF TRIAL COUNSEL BY ROUTINELY AND FREQUENTLY ASKING QUESTION OF THE WITNESSES.**

An appellate court reviews whether a trial judge's intervention into the conduct of a trial denies a party its due process right to a fair trial by examining all the facts and circumstances as they would appear to a

reasonably prudent person. Brister v. Tacoma City Council, 27 Wn. App. 474, 487, 619 P.2d 982 (1980).

A trial judge should not enter into the “fray of combat” nor assume the role of counsel. Egede-Nissen v. Crystal Mountain, 93 Wn.2d 127, 141, 606 P.2d 1214 (1980) (referencing Judicial Intervention in Trials, Wash. U.L.Q. 843 (1973)). Under ER 614, a court is entitled to question witnesses that are called either by a party or by the judge. An isolated instance of judicial intervention may be deemed harmless if it does not violate constitutional bounds of judicial comment. Egede-Nissen, 93 Wn.2d at 141, citing Const. art. 4, § 16. “On the other hand, the cumulative effect of repeated interjections by the court may constitute reversible error.” Id.

In State v. Eisner the State Supreme Court reversed a first degree rape of a child conviction due to the trial court’s extensive intervention into the questioning of a child witness. 95 Wn.2d 458, 463-64, 626 P.2d 10 (1981). In Eisner, the prosecutor in the case declined the trial judge’s invitation to ask leading questions of the State’s witness. Id. After the prosecutor declined the invitation, the judge entered the fray, asking a lengthy series of leading questions. Id. In reversing Eisner’s conviction, the Supreme Court noted that the evidence procured by the trial court’s examination of the State’s witness essentially proved the State’s case. Id.

In our case it is quite apparent that the trial court judge not only entered into the “fray of combat,” but did so with full force. An examination of the report of the proceedings shows that the trial court asked questions for pages upon pages of the transcript. The first of such questioning began by the trial court judge stating that he will be asking questions of the witnesses under Evidence Rule 614 “because we don’t have this jury – it’s easier for me just to ask the question(s).” (RP 14-15) During the testimony of Mr. Stiers (Plaintiff’s only witness) the trial court judge began asking questions regarding the difference between service/retail tenants and automotive tenants. (RP 25-26) This questioning continued until page 29. The trial court then assumed the role of Plaintiff’s counsel on the very next page and began asking questions regarding the concept of “mating these auto things with retail things.” (RP 30) This line of questioning continued until page 35 (it is during this line of questioning that the trial court judge first suggested to Mr. Stiers that Thunder Car Wash was an anchor, contrary to Mr. Stiers’ testimony later in the trial). (RP 35)

The trial court next assumed the role of counsel for Plaintiff on page 36 of the report of the proceedings by asking questions as to the business definition of “facial” which continued for another 2 pages. (RP 36-38) On page 49 of the proceedings, the trial court judge began asking

question of Mr. Stiers regarding the combination auto/retail mall concept, this line of questioning lasted for approximately six more pages. (RP 49-54) Two pages later, the trial court judge began questioning Mr. Stiers regarding plaintiff's ability to conduct other types of business on the leased property. (RP 56-57) From pages 62 – 64, the trial judge once again asked questions regarding anchor tenants and how they usually pay less rent. (RP 62-64) The trial court judge next assumed the role of Plaintiff's counsel by asking questions of Mr. Stiers regarding the different types of car washes and their pricing schemes. (RP 80-83) From pages 86-89, the trial court judge asked Mr. Stiers questions regarding the number of cars that Thunder Car Wash services in a day and what its customer base is. (RP 86-89) The trial court judge then asked questions of Mr. Stiers regarding the location of the Center. (RP 96-99)

After the direct examination of Mr. Stiers, the trial court judge continued to assume the role of counsel by essentially conducting the cross-examination. It begins on page 103 of the report of proceedings with questions by the judge regarding the landlord's duty to repair under the lease. (RP 103 – 106) On redirect, the judge asked questions regarding the Catholic Church and their rental property in the Center. (RP 112) The judge then asked questions regarding whom the landlord is and where he is located. (RP 116-117)

After Plaintiff rested their case and Defendant called its first witness to the stand, the trial judge continued his repeated questioning and assumption of Plaintiff's counsel. From pages 125 – 132 the judge essentially cross-examined defense witness Charles Kaady about how he evaluates car wash locations, his profitability and Mr. Kaady familiarity with Thunder Car Wash and why he would pay \$30 per square foot in rent, thus essentially conducting Plaintiff's cross-examination for it. (RP 125-136) During Plaintiff's cross-examination of Mr. Kaady, the trial court judge continued to dominate the proceedings with his questions by asking Mr. Kaady a line of questions regarding exposure of a car wash and the impulsive nature of car wash customers and question as to how Mr. Kaady's car washes operate. (RP 139-147)

Defendant's next witness in the trial, Dean Meyer, was also subjected to the trial court's continuous and dominating line of questioning. On page 160 of the report of the proceedings, the trial court judge completely assumed the role of Plaintiff's counsel and began questioning Mr. Meyer on behalf of Plaintiff. (RP 160-168) This portion of questioning is perhaps the worst due to the trial court essentially attempting to make Plaintiff's case for him. During Plaintiff's cross-examination of Mr. Meyer, the trial court once again assumed the role of Plaintiff's counsel by asking questions regarding the rental rate of

buildings within a two mile radius of Thunder Car Wash. (RP 180-182) The trial court judge then asked questions regarding the equipment of another car wash in Clark County. (RP 185-186) The trial court judge then continued to attempt to make Plaintiff's case for it by asking questions regarding the comparison of different car washes in Clark County and where they derive their customer base from. (RP 189-195)

During the testimony of Defendant's last witness, Steven Mikulic, the trial court judge continued assuming the role of Plaintiff's counsel by continuing Plaintiff's cross-examination after Plaintiff's counsel had rested. (RP 213) The trial court judge continued Plaintiff's cross-examination of Mr. Mikulic asking him questions as to how Mr. Mikulic, the property manager for Defendant, placed a value on a business and whether or not the condition of a business factors into that equation. (RP 213-217).

The questioning of witnesses in our case covers approximately 206 pages of the transcript. (RP 12-218) Of those 206 pages, the trial court judge enters the "fray of combat" by questioning and cross-examining the witnesses for approximately 87 pages. This is just over 42%. Surely this cannot be what was intended under ER 614. It cannot be said that the trial court judge conducted harmless error by frequently and routinely asking questions of the witnesses and essentially establishing Plaintiff's case. It

should be noted that the trial judge noted Defendant's continuing objection to the questions. Similar to Eisner, the trial court judge's "cumulative effect of repeated interjections by the court" constitutes reversible error. Therefore, Defendant requests the trial court be reversed and if a new trial is ordered that the case be assigned to a different judge.

**H. THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO ISSUE OF MATERIAL FACT AS TO HOW THE "THEN MARKET RENTAL RATE" WAS TO BE DETERMINED.**

An appellate court reviews a decision on a motion for summary judgment de novo. Seybold v. Neu, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). Summary judgment is proper if the record before the court shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Ruff vs. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). The evidence and any inferences that may be drawn from that evidence is viewed by the appellate court in a light most favorable to the nonmoving party. Miller v. Jacoby, 145 Wn. App. 65, 71, 33 P.3d 68 (2001) (citing Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). An appellate court does not defer to a trial court's rulings on evidence when reviewing the propriety of a motion for summary judgment. Hill v. Sacred Heart, 143 Wn. App. 438, 446, 177 P.3d 1152 (2008). The appellate court

decides whether evidence is sufficient or should have been considered and to what extent. Folsom v Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

It is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for collateral estoppel or issue preclusion in a subsequent judicial trial. Robinson v. Hamed, 62 Wn. App. 92, 96-97, 813 P.2d 171 (1991). A party to an arbitration proceeding may be precluded from relitigating the same issue in a subsequent lawsuit. Id. at 98. For collateral estoppel to apply, the moving party must show that: (1) the issue decided in the arbitration is identical with the one presented in the court action, (2) the prior arbitration ended in a final decision on the merits, (3) the party bringing the new action was a party or in privity with a party in the arbitration, and (4) application of the doctrine does not work an injustice. Id. at 98-99 (citing McDaniels v. Carlson, 108 Wn.2d 299, 738 P.2d 254 (1987)). The general rule is that an injustice does not occur if the prior proceeding offered a full and fair hearing on the issue. Robinson, 62 Wn. App. at 100.

Plaintiff filed a motion for summary judgment on March 18, 2008 along with the declaration of Jim Stiers in which it also argued that the binding arbitration decision from 2002 should control the issue in this case. (CP 12, 13) In response, Defendant filed its reply and cross-motion

for summary judgment along with the declaration of Steve Mikulic asking the court to grant it summary judgment on the issue of collateral estoppel. (CP 16, 17) Defendant also filed a motion to strike Mr. Stiers' declaration. (CP 18). Plaintiff then filed its reply brief. (CP 20) On April 21, 2008, the trial court denied Plaintiff's motion for summary judgment and Defendant's cross-motion for summary judgment. (CP 22)

In our case all four elements for collateral estoppel apply and thus Plaintiff should not have been allowed to go forward with its complaint and the prior arbitration decision issued by Retired Judge Skimas' should have controlled. First, the issue in Plaintiff's complaint is the exact issue the arbitrator determined in 2002, what is market rental rate for the lease extension. (CP 5, 13) Second, the arbitration ended in a final decision on the merits as demonstrated in the written decision issued by Retired Judge Skimas on May 15, 2002, which set the market rental rate at the beginning of the first option period at \$21.75 per square foot and established the method for future rental rate determinations. (CP 13) Third, Plaintiff was a party the prior arbitration and is a party to this current dispute. (CP 5, 13) Fourth, Plaintiff was afforded a full and fair hearing at the 2002 arbitration and therefore the application of collateral estoppel would not work an injustice.

In viewing the evidence and any inferences that may be drawn from that evidence in a light most favorable to Plaintiff there is still no issue of material fact as whether or not the prior arbitration decision controls how the rental rate is to be determined for this option period. Based on that arbitration decision the trial court should have ordered that the fair market value at the time Plaintiff exercised its option be used to determine the rental rate. (CP 13) Based on this, Defendant requests that the appellate court reverse the trial court's dismissal of its cross-motion for summary judgment and order that the rental rate be determined according to the prior arbitration decision and set at \$30.00 per square foot which is suggested by the only admissible evidence offered at trial by Defendant's expert witness, Dean Meyer.

#### **V. REQUEST FOR ATTORNEY'S FEES**

Lastly, Defendant asks the appellate court to award Defendant attorneys' fees and costs incurred while defending against this lawsuit at the trial court level and at the appellate level. Section 12.01 of the lease states that "if any action for breach of or to enforce the provisions of this lease is commenced, the court in such action shall award to the party in whose favor a judgment is entered a reasonable sum as attorneys' fees and costs." (EX 1)

## VI. CONCLUSION

In conclusion, Defendant requests the appellate court: (a) reverse the trial court's finding that Thunder Car Wash was an anchor tenant at the Center based on the lack of substantial evidence and that it was not relevant to this action; (b) find that the trial court abused its discretion in allowing Plaintiff to testify to inadmissible hearsay statements regarding the language of the leases of other tenants at the Mill Plain Center; (c) find that there was not substantial evidence to support the trial court's finding that Section 1.07 of the lease was broad, unclear and capable of more than one meaning; (d) find that there was a lack of substantial evidence that the phrase "the then market rental rate" contained in the lease means the average amount being paid by Clark County car washes and other commercial tenants in the Mill Plain Center that it be granted a new trial; (e) adopt Mr. Meyer's definition of market rental rate and direct the trial court to enter an order setting the rental rate at \$30.00 per square foot; (f) reversing the trial court's award of attorneys' fees and costs to Plaintiff; and (g) award Defendant its attorney fees and costs of trial and on appeal.

Defendant requests that due to the trial court's denial of Defendant's due process right to a fair trial that if a new trial is ordered, Defendant be granted a new trial in front of a different Clark County

Superior Court judge. This request is based upon the trial court's repeated and frequent interjections into the questioning of witnesses and the trial court attempting to establish Plaintiff's case and the trial court's obvious bias against Defendant. Defendant is entitled to a trial court judge who is and appears impartial. Santos v Dean, 96 Wn. App. 849, 982 P.2d 632 (1999). Lastly, Defendant asks the appellate court to grant its motion for cross-summary judgment against Plaintiff and order that the rental rate for this last lease option be set in accordance to the prior arbitration that occurred between these two parties.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of October, 2008

  
\_\_\_\_\_  
**RONALD W. GREENEN**, WSB #6334  
of Attorneys for Appellant

**APPENDIX**  
**BRIEF OF APPELLANT**

**A. Findings of Fact**

1. **Findings of Fact No. 7:**

*Mr. Stiers testified that the developer's intent and concept for the Mill Plain Center was to have two anchor tenants that would attract the public to the various businesses to be contained within the Center. One of the anchor tenants was World Gym. The other anchor tenant was Thunder Car Wash, a business owned at the time by J&C Inc., of which Mr. Stiers was the President.*

2. **Findings of Fact No. 13:**

*Numerous tenants at the Mill Plain Center had this same language in their commercial leases.*

3. **Findings of Fact No. 16:**

*The language utilized in section 1.07 is broad, and does not clearly support the interpretation advanced by either party.*

4. **Findings of Fact No. 19:**

*To interpret the meaning of "the then market rental rate", the Court finds that it is appropriate to consider rents being paid by comparable businesses in Clark County in comparable circumstances.*

5. **Findings of Fact No. 21**

*Based upon the evidence presented, the average rent paid by comparable car washes in Clark County is \$24.72 per square foot. The average rent paid by the other tenants in the Mill Plain Center for commercial space is \$15.32 per square foot.*

6. **Findings of Fact No. 22**

*The midpoint of those two averages is \$20.02 per square foot.*

**B. Conclusions of Law**

1. **Conclusions of Law No. 1:**

*The Court must give plain meaning to contract terms. The plain meaning of the lease's operative language, "the then market rental rate," is unclear, and is capable of more than one meaning. Accordingly, the language is ambiguous.*

2. **Conclusions of Law No. 2:**

*The Court interprets "the then market rental rate" to refer to the average amounts being paid by comparable businesses in comparable circumstances at the time an option to extend the lease is exercised. Those comparable businesses include Clark County car washes and the other commercial tenants in the Mill Plain Center.*

3. **Conclusions of Law No. 3:**

*This case presents a justiciable controversy as to what was the then market rental rate for commercial space being leased by plaintiff as of July 1, 2007. The midpoint of the average rent paid by comparable Clark County car washes and the average rent paid by the other tenants in the Mill*

*Plain Center for commercial space represents a fair and reasonable amount to be charged for the space leased by plaintiff in the circumstances of this case. That midpoint is \$20.02 per square foot. The Court concludes that the then market rental rate, for the base rent to be charged to plaintiff, was \$20.02 per square foot as of July 1, 2007.*

4. **Conclusions of Law No. 4:**

*At the rate of \$20.02 per square foot for plaintiff's lease, the base rent that the defendant should have charged each month since July 1, 2007, is \$3,119.78.*

5. **Conclusions of Law No. 5:**

*Because defendant has charged plaintiff at the rate of \$30 per square foot, or \$4,675 per month, from July 1, 2007, defendant has overcharged plaintiff, and has thereby breached the parties' lease agreement. Plaintiff is entitled to damages of \$1,555.22 per month, from July 1, 2007 through May 2008, representing the sum it has been overcharged and that it has paid each of those months.*

6. **Conclusions of Law No. 6:**

*Section 12.01 of the lease contains an attorney fee provision. As the prevailing party, plaintiff is entitled to an award of reasonable attorneys fees and costs under that section. Plaintiff's attorneys billed plaintiff at the rate of \$225 per hour, which the Court finds to be reasonable in this area for a case of this type. Plaintiff's attorneys billed plaintiff for 34.1 hours of work on this case, which the Court finds to be reasonable under the circumstances of this case. The Court finds that the total attorneys fees requested by plaintiff, \$7,672.50, is a reasonable amount. Plaintiff shall be awarded reasonable attorneys fees of \$7,672.50 and taxable costs of \$230.00.*

**C. Washington Court Rules**

1. **CR 56(c) – Summary Judgment**

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**D. Rules of Evidence**

1. **ER 614 – Calling and Interrogation of Witness By Court**

(a) Calling by Court. The court may, on its own motion where necessary in the interests of justice or on motion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate

witnesses, whether called by itself or by a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute a comment on the evidence.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

2. **ER 801 (a) (b) and (c) - Definitions**

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

3. **ER 802 – Hearsay Rule**

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

**E. Exhibits**

1. **Exhibit 1**

Copy of Commercial Lease

2. **Exhibit 2**

Addendum to Lease dated 6/25/92

3. **Exhibit 3**  
Copy of Lease Addendum dated 12/15/95
4. **Exhibit 4**  
Lease Extension dated 7/1/02
5. **Exhibit 5**  
Summary Market Rent Analysis Report
6. **Exhibit 9**  
Copy of Analysis of Tenants (Sorted by Space Size)
7. **Exhibit 12**  
Copy of Rent Roll for Mill Plain Center/Confidential per  
Protect Order
8. **Exhibit 13**  
Copy of Thunder Car Wash Invoice for Rent dated 1/1/08
9. **Exhibit 15**  
Copy of Pictures of Various Car Washes throughout  
Vancouver

FILED  
COURT OF APPEALS  
DIVISION II

08 OCT -7 AM 9:39

STATE OF WASHINGTON  
BY cm  
DEPUTY

IN THE COURT OF APPEALS - DIVISION II

FOR THE STATE OF WASHINGTON

STIERS, INC., a Washington corporation, )  
)  
)  
Respondent, )  
v. )  
)  
JARA, INC., an Oregon corporation, )  
)  
)  
Appellant, )  
\_\_\_\_\_ )

**NO. 38113-3-II**

**AFFIDAVIT OF SERVICE  
RE: BRIEF OF APPELLANT**

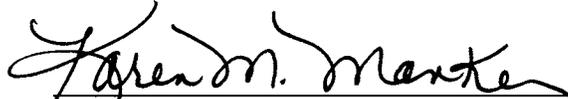
STATE OF WASHINGTON )  
: ss.  
County of Clark )

I, KAREN MANKER, being first duly sworn on oath depose and state that I am a resident of the State of Washington, and over the age of eighteen years, not a party to this action, and competent to be a witness herein. On this 3<sup>rd</sup> day of October, 2008, I personally delivered to:

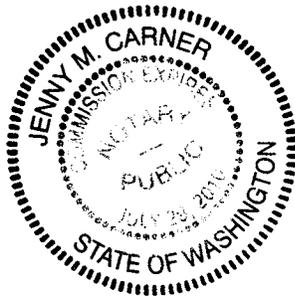
Stephen G. Leatham  
Attorney at Law  
211 E. McLoughlin Blvd., Ste. 100  
Vancouver, WA 98663

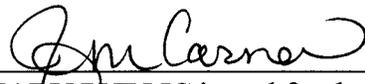
**AFFIDAVIT OF SERVICE RE:  
BRIEF OF APPELLANT - 1**

The document(s) described as: BRIEF OF APPELLANT

  
KAREN M. MANKER

SUBSCRIBED AND SWORN to before me this 3 day of October, 2008.



  
NOTARY PUBLIC in and for the State of  
Washington. Residing at Vancouver.  
My commission expires: 7-29-2010

**AFFIDAVIT OF SERVICE RE:  
BRIEF OF APPELLANT - 2**