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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS NO. 38113-3-II

STATE OF WASHINGTON  
BY Cm  
DEPUTY

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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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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Defendant Jara Inc. reasserts its requests that the appellate court: (a) reverse the trial court's finding that Thunder Car Wash was an anchor tenant at the Mill Plain Center (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 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 Center and that it be granted a new trial; (e) adopt Dean 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 also reasserts its request 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, Defendants asks the appellate court to grant its cross-motion for summary judgment against Plaintiff and order that the rental rate for this lease option be set in accordance to the prior arbitration that occurred between these two parties.

## **II. APPELLANT'S POSITION**

### **A. Response to Plaintiff's Statement of Case**

#### **1. Procedural History**

Plaintiff's Statement of the Case does not comply with RAP 10.3(b) which states that "[t]he brief of the respondent should conform to section (a). . ." RAP 10.3(a)(5), Statement of the Case, requiring that "[a] fair statement of the facts and procedure relevant to issues presented for review without argument. Reference to the record must be included for each factual statement." Plaintiff's statement of the procedural history of the case does not contain one reference to the record or clerks papers.

In Kershaw Sunnyside v. Interurban Lines, the State Supreme Court held that references in a party's brief to facts not presented to the trial court or not in the record, irrelevant, etc., should be stricken from the appellate record. 156 Wn.2d 253, 278, 126 P.3d 16 (2006). By failing to comply with RAP 10.3(b), Plaintiff has referenced items that do not appear to be part of the record. Defendant requests that this portion of Plaintiff's brief be stricken and ask that the appellate court rely solely on the Procedural History set forth in Defendant's brief.

Further, in Plaintiff's Procedural History of the Case, Plaintiff states that "[D]efendant denied that the 2002 arbitration decision of Retired Superior Court Judge John Skimas was binding or had any collateral estoppel or issue preclusion effect." (Brief of Respondent 4). This is not correct. Paragraph 12 and 21 of Plaintiff's First Amended Complaint are the only paragraphs that contain allegations regarding the arbitration decision issued by Judge Skimas. (CP 5) In Paragraph 12 Plaintiff alleges that "[T]his identical issue was arbitrated before Retired Judge John Skimas. On May 15, 2002, Judge Skimas issued his arbitration decision, concluding that the appropriate rental rate value for the Thunder Car Wash premises was the same as that being paid for the Gentle Car Wash/Kaady facility in Orchards." In Paragraph 21, Plaintiff

alleges “[B]y virtue of Judge Skimas’ decision, it has already been judicially determined that the market rental rate for the Thunder Car Wash premises is the same as that being paid for the Gentle Car Wash/Kaady facility. Defendant is precluded from challenging this decision under principles of issue preclusion, claim preclusion, collateral estoppel, and/or res judicata.” (CP 5)

In Defendant’s Answer to Plaintiff’s First Amended Complaint, Defendant states in Paragraph 2 that “[A]s to paragraphs 6, 7, 8, and 12, Defendant admits that the documents state what they state.” (CP 6) In Paragraph 6 of Defendant’s Answer, Defendant states that “Defendant denies paragraphs 16, 17, 18, 20, 21, 22 and 23 of Plaintiff’s Complaint.” (CP 6) With these answers, Defendant does not deny that the 2002 arbitration decision of Judge Skimas was binding or had any collateral estoppel or issue preclusion effect. Defendant specifically stated that it admits the content of Judge Skimas’ written decision and Defendant denied that the rental rate be set as that being paid for the Gentle Car Wash/Kaady facility. Further, Defendant denied that he was precluded from challenging Plaintiff’s perception of Judge Skimas’ decision, not that Judge Skimas’ decision was not controlling. Plaintiff has made statements regarding Defendant’s position without any reference to where these

statements are contained within the Clerk's Papers or anywhere else. Therefore, Defendant requests that this portion of Plaintiff's brief be stricken and the court relies solely on the Procedural History set forth in Defendant's brief.

Next, Plaintiff once again incorrectly states Defendant's position on summary judgment. Plaintiff states that in response to its motion for summary judgment, "defendant contended that the arbitration ruling had no preclusive effect, asked the Court to deny the motion for summary judgment..." (Respondent's Brief 4) Plaintiff has made these statements without any reference as to where they exist in the record. In looking at Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, it is quite apparent that Defendant did not make the arguments in its motion that Plaintiff is alleging. (CP 17) Defendant argued that Plaintiff had misstated Judge Skimas' ruling by arguing that the rental rate was to be set at the rental rate for the Gentle Car Wash/Kaady facility. (CP 17) Defendant's reply and cross-motion for summary judgment, along with the declaration of Steve Mikulic, also asked for summary judgment on the issue of collateral estoppel. (CP 16, 17) Plaintiff has made statements regarding Defendant's position without any reference to where these statements are contained within the Clerk's

Papers or anywhere else. Therefore, Defendant requests that this portion of Plaintiff's brief be stricken and the court relies solely on the Procedural History set forth in Defendant's brief.

Lastly, Plaintiff mischaracterizes the affect of the trial court's dismissal of Plaintiff and Defendant's motion for summary judgment. Plaintiff states that a written order was not entered. This is incorrect. (Respondent's Brief 4) An order was entered by the trial court denying the motions. (CP 22) Nothing in the written order stated that if any amount was to be awarded to Plaintiff in the event the court determined Plaintiff had overpaid, the amount was to be awarded as "damages". (CP 22) Once again, Plaintiff has made statements regarding the procedural matter of the case without any reference to where these statements are contained within the Clerk's Papers or anywhere else. Therefore, Defendant requests that this portion of Plaintiff's brief be stricken and the court relies solely on the Procedural History set forth in Defendant's brief.

**B. Response to Defendant's Statement of the Case**

Defendant agrees with the additional facts set forth by Plaintiff, however would offer the following facts in response to the ones set forth by Plaintiff.

Mr. Meyer testified that the reason he did not consider the rents being paid by any businesses other than car washes was because a car wash operation is going to be the tenant that would rent the property at issue in this case “and the other spaces in the center aren’t pertinent.” (RP 160) As an example, Mr. Meyer testified that “State Farm Insurance or a Farmers Insurance agent isn’t (going to) lease space in that car wash building . . .” (RP 160) Due to the fact that there were no other leased car wash facilities in the market area, Mr. Meyer testified that he had to go outside the market area to locate leased car washes similar to Thunder Car Wash. (RP 189) Mr. Meyer testified that he was unable to give the court a rent per square foot for commercial properties in the “market area.” (RP 181) Mr. Meyer testified that commercial space in the area *can* be \$14 - \$15 per square foot, not that commercial space is rented at that rate in the market area. (RP 181)

**C. Standard of Review**

Plaintiff cites Jaffard v. Seifert for the proposition that an appellate court should not substitute its judgment for that of the trial court when a trial court has based its findings of fact on conflicting evidence and there is substantial evidence to support the findings. 22 Wn. App. 476, 478, 591 P.2d 809 (1979). While Defendant agrees with this standard, it would

reiterate that substantial evidence is a quantum of evidence sufficient to persuade a rationale-fair minded person that the premise is true.

Wenatchee Sportsman Ass'n. v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

**D. Assignment of Error 1.1 - the trial court's finding that Plaintiff's car wash facility was intended to be an anchor tenant was not supported by substantial evidence and was integral to the court's ultimate ruling.**

Plaintiff argues that the Court's finding that Thunder Car Wash was one of the Center's anchor tenants played virtually no role in the Court's ultimate decision. (Respondent's Brief 9) That this finding of fact "was merely one factor the Court considered in trying to interpret the language of the contract." (Respondent's Brief 9) In its oral ruling, the Court discussed the use of two anchor stores to bring in foot traffic and the importance of the concept used when the Center was developed. (RP 228-229) The Court stated "[s]o you have the development of these lands . . . and this concept . . . That's the climate under which this contract was entered into." (RP 229) This statement demonstrates that the Court considered the role of anchor stores in the Center and how the rent for such an anchor was too be determined, thus playing an integral part in the Court's decision. Plaintiff's argument that it "was merely a factor the Court considered in trying to interpret the language of the contract" is

flawed. If, as stated by Plaintiff, the key issue was the plain meaning of the “then market rental rate” language in the lease then all factors the Court used to determine that language would be “key,” including whether Thunder Car Wash was or was not an anchor tenant of the Center.

Plaintiff’s use of the Court’s statement “but my analysis was based solely on the relationship of the parties and trying to make sense out of this very nebulous language of a contract” is taken out of context. This statement was made in connection to Plaintiff’s losing argument that it was entitled to pre-judgment interest. (RP 248)

Substantial evidence did not exist to support the Court’s finding that Thunder Car Wash was an anchor tenant. Despite Plaintiff’s contention that ample evidence existed to support this finding of fact, it does not address the issue of the conflicting testimony. Plaintiff points out that Mr. Stiers testified that the car wash was designed to be one of the anchor tenants of the Center and therefore this is substantial evidence to support this finding of fact. However, Plaintiff completely ignores Mr. Stiers’ conflicting testimony that in fact World Gym and Video Warehouse were the anchor tenants. (RP 110)

Substantial evidence is a quantum of evidence sufficient to persuade a rational-fair minded person that the premise is true. Wenatchee

Sportsman Ass'n v. Chelan County, 141 Wn. 2d 169, 176, 4 P.3d 123 (2000). 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). Neither of these tests has been met in this case. Plaintiff cites Jarrard v. Seifert for the notion that when a trial court has based its findings of fact on conflicting evidence and there is substantial evidence to support the findings then the appellate court will not disturb those findings. 22 Wn. App. 476, 591 P.2d 809 (1979). However, in that case, the trial court judge examined the witness to clarify the conflicting testimony. That never happened in our case. In our case, we have two conflicting statements by Plaintiff but no clarification as to which is correct. Therefore, Defendant requests that the appellate court reverse the trial court's finding that Thunder Car Wash was an anchor tenant and entitled to a discounted rental rate. <sup>1</sup>

**E. Assignment of Error 1.2 – the trial court did abuse its discretion by allowing Mr. Stiers to testify to the language in the leases of other tenants.**

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<sup>1</sup> Plaintiff argues that there is no evidence to support that it ever sought a lower rent based on being an anchor store; however, Mr. Stiers did testify that anchor stores did receive a discount due their importance to the Center. (RP 34) Thus objected to evidence was presented suggesting that if Thunder Car Wash was an anchor store it was entitled to a discounted rental rate.

Plaintiff argues that Mr. Stiers testimony regarding what was contained in the lease is not inadmissible hearsay based on his knowledge of the leases as the former leasing agent and that his testimony is the same as testifying "I saw that the stop light was red." This is incorrect. Mr. Stiers testimony is not the same as someone testifying to an observation, rather Mr. Stiers is testifying as to written assertions, made out of court, being offered to prove the truth of the matter asserted, contained in a written document. Statements contained in a written document are assertions under ER 801(a). The language of the leases to which Mr. Stiers testified about is a written assertion and thus a statement under ER 801(a). Therefore, testimony regarding the lease language is hearsay and thus only admissible if it falls under one of the exceptions provided for in the Washington Rules of Evidence, which, in this case, it does not. Plaintiff has argued that this testimony should be allowed due to Mr. Stiers knowledge of what was contained in the lease and because he was a drafter; however, as noted in Defendant's Appellant Brief, personal knowledge is not an exception to the hearsay rule. Whether or not there is personal knowledge, hearsay is still hearsay, and thus inadmissible unless it falls under an exception.

Plaintiff cites Naylor v. Lovell, for the idea that Mr. Stiers was rightfully permitted to testify as to actions he personally took in the drafting of leases for the Center, however, Plaintiff fails to point out that this case involved a case of mistake and that the individuals were testifying as to the conditions in which the contract was made. 109 Wash. 409, 411-412, 186 P. 855 (1920) (an action to reform and foreclose a mortgage, alleged to have fixed the due date by mistake). In our case, Defendant objected to the testimony specifically relating to Mr. Stiers' statements as to what the written assertions in the leases of other tenants at the Center were. (RP 20 – 21) Further, Plaintiff argues that “the statement was made in court, with an opportunity for cross-examination,” but this is not the case. It is true that Mr. Stiers' testimony as to what the written assertions in the leases of the other tenants were occurred in court but the actual written assertions contained in the other leases are out-of-court statements. Further, Plaintiff did not provide a single copy of any of the other leases.

It is apparent that the trial court abused its discretion by allowing in such inadmissible hearsay regarding the written assertions contained in the leases of other tenants. The allowance of such testimony based on “personal knowledge” is manifestly unreasonable and based on untenable

grounds. 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.

**F. Assignment of Error 1.3 - the trial court's finding that the renewal language in the lease was broad was not supported by substantial evidence and thus the trial court acted outside of its discretion in setting the then market rental rate for the lease extension.**

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. Plaintiff is correct in its assessment that Defendant is asking this Court to rule that the lease language be given the meaning attributed to it by its expert Dean Meyer. Defendant is requesting this because the testimony presented by Plaintiff was inadmissible parole evidence and should not have been allowed. Therefore, Mr. Meyer's expert testimony is the only remaining evidence presented as to what "the then market rental rate" should be.

Plaintiff argues that Washington courts have long been permitted to consider extrinsic evidence to determine the intent of the parties. While this may be true, as stated in Plaintiff's brief, such evidence is not admitted for the purpose of importing into a writing an intention not expressed therein. (Respondent's Brief 13) There is absolutely nothing in

the entire 19 page lease that mentions anything about determining the market rental rate based on the success and failure of the Center as a whole. (EX 1, 2) This testimony is completely unsubstantiated. Plaintiff was allowed 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) This testimony, provided by Mr. Stiers, was an attempt to "write in" a formula for calculating "the then market rental rate," basing it off of the success or failures of the Center as a whole. (RP 110) This is the exact type of testimony the parol evidence rule is designed to exclude. Plaintiff provided no evidence to the trial court as to how the success or failure of the Center was to be determined. Plaintiff additionally failed to provide any evidence as to what would be deemed a success or failure of the Center or who would determine whether the Center was a success or not.

Plaintiff should not have been allowed to testify as to the intent of the phrase because, not only is it his subjective and unilateral testimony that goes to advance only his side of the case, it modifies and adds to the lease a completely unsubstantiated formula for calculating the rental rate. There simply is no evidence as to how the unsubstantiated formula is supposed to work, what defines success or failure for the Center, and who

determines what is success or failure for the Center. There is not substantial evidence to support the trial court's conclusion of law. Therefore, Defendant requests that the appellate court reverse the trial court's finding and direct the trial court to enter a finding that the language is not ambiguous and should be defined by the only substantiated testimony regarding "the then market rental rate," the testimony of the only expert, Mr. Meyer.

**G. Assignment of Error 1.4 – the trial court's findings concerning rents paid by comparable car washes in Clark County, and by other tenants in the Mill Plain Center were not supported by substantial evidence and thus the conclusion that the then market rental rate to be charged Plaintiff was \$20.02 per square foot was improper.**

Plaintiff mischaracterizes the assignment of error set forth by Defendant regarding its challenge to Findings of Fact 19, 21, and 22, as well as Conclusions of law 2, 3, 4, and 5. Defendant does not dispute that the trial court correctly performed the calculation that the court used in setting the rental rate at \$20.02. Defendant does, however, dispute the trial court's setting of the market rental rate as the average between other comparable businesses in Clark County and the other commercial tenants in the Center. None of the findings set forth above are supported by any evidence whatsoever.

There is absolutely no evidence in the record to support the trial court's Findings of Fact and Conclusions of Law. This formula used by the trial court is something that it completely fabricated on its own. Mr. Meyer testified and submitted a report as to what he, as an expert in the field of rental appraisal, feels should be taken into account in the setting of the market rental rate. (EX 5) Mr. Meyer testified that "the then market rental rate" should be established by looking at other comparable car washes in Clark County, WA/Portland, OR metropolitan area. (EX 5) Plaintiff provided no evidence as to any sort of method of averaging out comparable Clark County car washes and the rent of the other commercial tenants at the Center.

Defendant once again reasserts its argument that Mr. Stiers was incorrectly allowed to testify as to his unilateral, subjective and self-serving testimony because it was an attempt to modify and add to the lease a completely unsubstantiated formula for calculating the rental rate. There simply is not substantial evidence to support the trial court's findings of fact and conclusions of law and therefore Defendant requests that the appellate court reverse the trial court's finding and direct the trial court to enter a finding that the language is not ambiguous and should be defined

by the only substantiated testimony regarding “the then market rental rate,” that of defendant’s expert, Dean Meyer.

**H. Assignment of Error 1.5 - the trial court did abuse its discretion by awarding Plaintiff attorneys’ fees and costs under Section 12.01 because there was no prevailing party as required by the lease.**

Defendant objects to the Plaintiff’s characterization of its argument regarding attorney fees as misleading. Plaintiff states that both parties to this action were not prevailing parties and only Plaintiff prevailed because Defendant received 67% of what it was seeking in rent before the trial. (Respondent’s Brief 18) This argument seems to only strengthen Defendant’s argument that either both parties or itself was actually the prevailing party in this matter. The trial court set the rent at \$20.02 per square foot; this is \$9.98 per square foot less than Defendant was asking for. However, Plaintiff was requesting that the court set the rental rate at \$15.32 per square foot, which is \$4.70 more per square foot than requested by Plaintiff, thus entitling Defendant to \$8,789.00 more per year. Thus it is difficult to argue that Defendant did not prevail in this matter. Plaintiff is not the prevailing party merely because it filed the complaint or because it received a judgment against Defendant. Defendant requests that the trial court’s award of attorneys’ fees and costs to Plaintiff be reversed and that Defendant be awarded its attorney’s fees and costs as the prevailing party.

**I. Assignment of Error 2.1 – the trial court did not act within its discretion under ER 614 in questioning the witnesses and did deny Defendant its due process rights to a fair trial. Further Defendant did not waive its right to object to the Court’s interrogating of witnesses.**

Defendant contends that Plaintiff is barred from raising the issue of how its due process rights to a fair trial were violated because it failed to object at the time. In support of its argument, Plaintiff cites Egede-Nissen v. Crystal Mountain, 93 Wn.2d 127, 606 P.2d 1214 (1980). However, Plaintiff fails to state that the reference he cites is dicta, in fact the appellate court states that “[t]imeliness of objection is not an issue in this case. . .” 93 Wn.2d at 141. It is easy to argue that Defendant should have objected to the continuous questioning by the trial court judge, but Defendant did not want offend the trial court judge by appearing to be a party who was not interested in listening to stories about topless carwashes or about the trial court judge’s airplane. (RP 234, 21) It should once again be noted Defendant was granted a continuous objection by the trial court judge. (RP 40) Even if the Defendant did fail to object to the trial court’s extensive questioning of the witnesses, Defendant is not barred from contesting this issue now under RAP 2.5(a)(3), which allows Defendant to raise issues of manifest error affecting constitutional rights for the first time on appeal. Parmelee v. O’Neel, 145 Wn. App. 223, 232,

186 P.3d 1094 (2008). Manifest error affecting Defendant's constitutional right to due process is exactly what we have in this case.

Contrary to Plaintiff's assertion, the authority Defendant cited does provide authority to support its argument that Defendant's due process rights were violated. Plaintiff argues that the facts in State v. Eisner go "far beyond the facts of the present case." (Respondent's Brief 20) This is erroneous. In Eisner, the trial court judge did exactly what the trial court judge did in this case; he asked inappropriate questions of witnesses to elicit additional facts to help Plaintiff establish its case. The appellate court stated that "[w]hile a trial judge may, of course question witnesses and ask clarifying questions, 'it must [not] appear that the court's attitude toward the merits of the case [is] reasonably inferable from the nature or manner of the court's statements.'" Eisner, 95 Wn.2d at 463. The questions asked by the judge of the witness in Eisner are similar in nature to the questions asked by the trial court judge in our case. The appellate court in Eisner held that "[t]he questions of the trial court went far beyond clarifying questions to a witness. It is clear from the report of the proceedings that at the end of the prosecutor's examination" there was insufficient evidence to prove the State's case thus resulting is a clear violation of defendant's constitutional right to a fair trial. Id. at 463.

Defendant will not recite all the testimony again but would direct the court to its Appellant's Brief regarding the copious amount of times the trial court judge inappropriately entered the "fray of combat." The questioning in this case was not for the purpose of clarifying and understanding testimony, the questioning was done to help Plaintiff establish its case. Thus, the questioning was a blatant violation of ER 614 and of Defendant's right to due process.

Plaintiff states that ER 614 gives a trial judge broader discretion to ask questions of witnesses when a jury is not present but cites nothing in support of this contention. (Respondent's Brief 21) Therefore, Defendant asks the court to disregard this statement in Plaintiff's brief.

The trial court's questioning in our case was prolific throughout the entire trial. The questioning was not, as Plaintiff argues, for clarification and understanding the testimony. It is quite apparent that the frequent and persistent questioning of witnesses (for 87 out of 206 pages of the trial transcript) by the trial court judge essentially establishing Plaintiff's case does not comply with ER 614 and was therefore not harmless 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.

**J. Assignment of Error 3.1 – the trial court did err by failing to grant Defendant's cross-motion for summary judgment**

Plaintiff argues that Defendant should not be allowed to argue that the trial court's denial of its cross-motion for summary judgment was done in error because "defendant vigorously opposed the application of collateral estoppel principles" at the motion for summary judgment. (Respondent's Brief 23) This is incorrect and Plaintiff has once again mischaracterized Defendant's position.

Plaintiff states that "defendant filed a cross-motion for summary judgment asking the court to simply determine that the rent to be paid by plaintiff 'shall be the fair market rental value on July 1, 2007.'" (Respondent's Brief 21) Defendant's cross-motion for summary judgment does make this statement, but as noted before, nothing in Defendant's motion argues that the arbitration decision was not binding. (CP 17) Rather, Defendant disagreed with how Plaintiff felt that decision should be binding, disagreeing that the rental rate for Thunder Car Wash was tied directly to the rent being paid for the Gentle Car Wash/Kaady facility. Defendant submits, as it did at the motion for summary judgment, that the arbitration decision is binding on the parties via issue preclusion/collateral estoppel to the effect that the fair market rental value is to be determined based on the value of the property as of July1, 2007.

In its answer to the first amended complaint, Defendant specifically stated that it admits the content of Judge Skimas' written decision and Defendant denied that the rental rate be set as that being paid for the Gentle Car Wash/Kaady facility. (CP 6) Further, Defendant denied that he was precluded from challenging Plaintiff's perception of Judge Skimas' decision, not that Judge Skimas' decision was not controlling. (CP 6)

Plaintiff cites the declaration of Steve Mikulic in support of its argument (Respondent's Brief 22); however, this declaration only bolsters Defendant's claim that the rental rate for Thunder Car Wash was to be determined according to the market rental value established as of July 1, 2007 and not directly tied to the rental rate of the Gentle Car Wash/Kaady facility and in no way advances Plaintiff's argument.

In addition, Plaintiff offers no authority to support its argument that Defendant is precluded from contesting this issue on appeal. "When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court." Paopao v. DSHS, 145 Wn. App. 40, 45, 185 P.3d 640 (2008). Defendant is completely within its rights to challenge the trial court's denial of its cross-motion for summary judgment. 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. Defendant requests that the rental rate be set at \$30.00 per square foot based on the only admissible evidence offered in regards to rental rate at trial, the testimony by Defendant's expert witness, Dean Meyer.

**K. Request for Attorney Fees**

Defendant reiterates its request that the appellate court award Defendant its attorneys' fees and costs incurred while defending against this lawsuit at the trial court level and at the appellate level pursuant to Section 12.01 of the lease and RAP 18.1. (EX 1)

**III. CONCLUSION**

In conclusion, throughout Plaintiff's reply brief, it has attempted to mischaracterize Defendant's issues on appeal. Defendant once again requests that 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 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 Center and that it be granted a new trial; (e) adopt the expert, Dean 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 also 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. Lastly, Defendant asks the appellate court to grant is motion for cross-summary judgment against Plaintiff and order that the rental rate for this lease option be set in accordance to the prior arbitration that occurred between these two parties.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of November, 2008.

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

## APPENDIX

### REPLY BRIEF OF APPELLANT

#### A. Findings of Fact

1. **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.*

2. **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.*

3. **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. 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.*

2. **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.*

3. **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.*

4. **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.*

C. **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.

**D. Rules of Appellate Procedure**

1. **RAP 2.5 – Circumstances Which May Affect Scope of Review**

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A

party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

**2. RAP 10.3 – Content of Brief**

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) Title Page. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) Introduction. A concise introduction. This section is optional. The introduction need not contain citations to the record of authority.

(4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a

concise statement of the standard of review as to each issue.

(7) Conclusion. A short conclusion stating the precise relief sought.

(8) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

(b) Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

(c) Reply Brief. A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed.

(d) [Reserved; see rule 10.10]

(e) Amicus Curiae Brief. The brief of amicus curiae should conform to section (a), except assignments of error are not required and the brief should set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus. Amicus must review all briefs on file and avoid repetition of matters in other briefs.

(f) Answer to Brief of Amicus Curiae. The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae.

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(h) Assignments of Error on Review of Certain Administrative Orders. In addition to the assignments of error required by rule 10.3(a)(3) and 10.3(g), the brief of an appellant or respondent who is challenging an administrative adjudicative order under RCW 34.05 or a final order under RCW 41.64 shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.

### **3. RAP 18.1 – Attorney Fees and Expenses**

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses,

each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

**E. Exhibits**

1. **Exhibit 1**

Copy of Commercial Lease

2. **Exhibit 2**

Addendum to Lease dated 6/25/92

3. **Exhibit 5**

Summary Market Rent Analysis Report

FILED  
COURT OF APPEALS  
DIVISION II

08 NOV 26 AM 9: 23

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: REPLY 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 25<sup>th</sup> day of November, 2008, I mailed by United States Postal Service regular mail to:

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

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

The document(s) described as: REPLY BRIEF OF APPELLANT

Karen M. Manker  
KAREN M. MANKER

SUBSCRIBED AND SWORN to before me this 25<sup>th</sup> day of November, 2008.



J. M. Carner  
NOTARY PUBLIC in and for the State of  
Washington. Residing at Vancouver.  
My commission expires: 7.29.2010

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