

No. 38113-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STIERS, INC., a Washington corporation,

Respondent,

v.

JARA, INC., an Oregon corporation,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Defendant Stiers, Inc. asks the Court to affirm the July 7, 2008, Judgment, setting the base market rent to be paid by plaintiff to defendant from July 1, 2007, through June 30, 2012, and awarding plaintiff damages and attorney fees for the rent it has overpaid since July 1, 2007.

Each of the Court's Findings of Fact is supported by substantial evidence, and the Findings of Fact support the Conclusions of Law reached by the Court. No reversible error occurred in the course of this bench trial, and the judgment should be affirmed.

II. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES RELATED TO THEM

1.1 The trial court's finding that plaintiff's car wash facility was intended to be an anchor tenant was supported by substantial evidence, was not integral to the court's ultimate ruling in any event, and should therefore be affirmed.

1.2. The trial court properly admitted testimony from the principal of plaintiff, Jim Stiers, regarding language that was contained in the leases of other tenants, given that Mr. Stiers himself drafted the leases and language at issue. His testimony was therefore made from personal knowledge, was not hearsay, and provides substantial evidence for the

finding that the leases of other tenants contained language similar to the language in plaintiff's lease.

1.3. Substantial evidence supports the trial court's finding that the renewal language in the lease is broad. Based upon this finding, the Court acted well within its discretion in setting the then market rental rate for the lease extension, based upon the evidence presented to it.

1.4. Substantial evidence supports the trial court's findings concerning rents paid by comparable car washes in Clark County, and by other tenants in Mill Plain Center, and substantial evidence supports the findings as to those amounts and their midpoint. Based upon these findings, the Court properly concluded that the then market rental rate to be charged to plaintiff was \$20.02 per square foot.

1.5. The trial court acted within its discretion in awarding plaintiff prevailing party attorney fees based upon the attorney fee provision in the parties' lease, especially given that plaintiff was awarded money damages for breach of contract, due to defendant's having overcharged plaintiff.

2.1. The trial court acted within its discretion under ER 614 in questioning the witnesses at this bench trial, and defendant waived any objection to the Court's interrogating witnesses by not raising this issue at trial.

3.1. The trial court properly denied defendant's cross-motion for summary judgment because that motion was utterly lacking any support, including facts and legal authority. Although defendant now takes the position that principles of issue preclusion or collateral estoppel should be applied to the 2002 arbitration decision between the predecessors to these parties, defendant's position before the trial court was exactly the opposite. Moreover, defendant obtained exactly what it sought with its cross-motion: a ruling that the proper market rent would be freshly determined after considering the relevant evidence.

III. STATEMENT OF THE CASE

A. Procedural History.

Plaintiff originally filed this action for declaratory relief, seeking a determination of the base rental rate it was to pay for the five year lease renewal term beginning on July 1, 2007.

Shortly thereafter, plaintiff filed its First Amended Complaint. With this claim, plaintiff continued to seek a declaratory judgment regarding the rent it was to be charged, but also asserted a claim for breach of contract, contending that defendant had demanded and been paid rent which was above the price plaintiff should have been charged since July 1, 2007. Plaintiff also requested an attorney fee award under section 12.01 of the lease.

In its answer to the First Amended Complaint, among other denials, defendant denied that the 2002 arbitration decision of Retired Superior Court Judge John Skimas was binding or had any collateral estoppel or issue preclusion effect.

In March 2008, plaintiff filed a motion for summary judgment. With that motion, plaintiff asked the Court to find that Judge Skimas's 2002 arbitration ruling was binding on grounds of issue preclusion or collateral estoppel, and that plaintiff should again pay rent equivalent to that paid by Kaady Car Wash. In response to that motion, defendant contended that the arbitration ruling had no preclusive effect, asked the Court to deny the motion for summary judgment, and took the position that the issue for trial was the fair market rental value of the premises as of July 1, 2007. Steve Mikulic filed a declaration to the same effect.

Following a hearing, the trial court denied the motion for summary judgment and the cross-motion for summary judgment. Although a written order was not entered by the Court, it left for trial the questions of the market rent to be charged for the renewal period beginning July 1, 2007, and any damages to be awarded to plaintiff for overpayment.

Shortly before trial, defendant produced rent rolls to plaintiff. These rent rolls revealed for the first time that the other tenants in the Mill Plain Center were being charged substantially less rent than was plaintiff.

At the trial on June 2, 2008, plaintiff therefore argued that it should be charged rent which was similar to that being charged the other tenants in the Mill Plain Center. Defendant continued to assert that it was properly charging plaintiff \$30 per square foot.

Following the June 2 trial, the Court entered findings of fact and conclusions of law, and a final judgment, on July 7, 2008.

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

Although plaintiff agrees that defendant has fairly accurately set forth the testimony presented at trial in its statement of the case, it offers the following facts which were not contained in defendant's statement of the case.

Jim Stiers testified that there is no car wash rental market in the area served by plaintiff's car wash facility (RP 80). He also testified that Thunder Car Wash does not compete with car washes in Wilsonville, southern Portland, Beaverton, or Aloha, as customers tend to stay localized (RP 85).

Defendant's expert, Dean Meyer, provided a definition of "market rent" as being "the rental income a property would probably command in the open market indicated by the current rents that are either paid or asked for comparable space as of the date of the appraisal" (RP 175; Exhibit 5). In determining market rent, he must therefore decide what constitutes the

“open market” and what constitutes “comparable space” (RP 175). In reaching his opinions in this case, however, he did not even consider what other tenants of the Mill Plain Center were paying for their commercial space (*Id.*). He did not consider the rents being paid by any businesses other than car washes (RP 159).

Mr. Meyer also provided the Court with a definition of “market area” as being “the defined geographic in which the subject property competes for the attentions of market participants...” (RP 180; Exhibit 5). Mr. Meyer agreed that the market area is the area where the property competes for business (RP 180). Mr. Meyer even provided the Court with a “market area map,” reflecting the market area as being approximately an area two miles in all directions from the Mill Plain Center (RP 179-180; Exhibit 5). Despite his definition of “market area,” however, the six “comparable” facilities that Mr. Meyer considered in reaching his conclusions are all located outside the market area (RP 182). Within the market area, Mr. Meyer testified that commercial space generally was rented at approximately \$14-\$15 per square foot per year (RP 181). It could go as high as \$30 for newer developments such as a nearby center anchored by a new Target store (*Id.*). Mr. Meyer agreed that there are no comparable leased car washes in the market area of Thunder Car Wash (RP 189).

Throughout this bench trial, the trial judge questioned each witness. He invited counsel to object if there were any issues or concerns about his questioning of the witnesses (RP 161). Neither party made any objection. At the beginning of the trial, the Court had indicated that it would be questioning the witnesses under ER 614 because there was no jury and because he wanted to understand the testimony (RP 14-15). Again, no objection was made to this procedure.

At the conclusion of the trial, the Court announced its oral ruling. It noted that the key issue was the plain meaning of the “then market rental rate” language in the renewal provision of the lease (RP 230). It found that the lease neither says fair market rental rate of other comparable car washes, nor market rate for other businesses in the Mill Plain Center (*Id.*). As a result, the trial court considered both the rents being paid by other rented car wash businesses in Clark County, as well as the rents being paid by the other businesses in the Mill Plain Center (RP 233-235). Taking into account all of this evidence, the Court concluded that the then market base rental rate for the Thunder Car Wash, as of July 1, 2007, was \$20.02 per square foot (RP 235-37).

IV. ARGUMENT

A. Standard of Review.

Plaintiff agrees with the standards of review set forth in defendant's opening brief, but adds the following authority. Findings of fact that are supported by substantial evidence will not be disturbed on appeal. *Jarrard v. Seifert*, 22 Wn. App. 476, 478 (1979):

When a trial court has based its findings of fact on conflicting evidence and there is substantial evidence to support the findings, the appellate court will not substitute its judgment for that of the trial court, even though it might have resolved a factual dispute differently.

In addition, plaintiff notes that ER 614 grants a trial court broad discretion to question witnesses, particularly in a case being tried without a jury. *Bernsen v. Big Bend Electrical Co-Op, Inc.*, 68 Wn. App. 427, 436 (1993) (holding that a trial court may question witnesses and is presumed to have considered only admissible evidence). *See also Jarrard v. Seifert*, 22 Wn. App. at 478:

The trial court has broad discretion in propounding questions to witnesses in order that it may gain all of the information possible to aid in correctly determining the disputed questions presented by the respective parties.

As for the denial of defendant's cross-motion for summary judgment, that ruling is reviewed de novo. *Rivas v. Overlake Hospital Medical Center*, 164 Wn.2d 261 (2008).

B. Substantial Evidence Supports the Finding of Fact that Thunder Car Wash was an Anchor Tenant for the Mill Plain Center.

The trial court found that the initial concept of the Mill Plain Center involved having anchor tenants to draw traffic into the Center for the benefit of all the businesses. This was the concept behind the creation of the Mill Plain Center (RP 228-29). Contrary to defendant's assertion, 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. Instead, that was merely one factor the Court considered in trying to interpret the language of the contract (RP 248):

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.

Accordingly, the anchor tenant finding was merely an incidental finding by the Court. If that finding had been in error, it would have been a harmless error, in no way meriting a reversal of this case.

Regardless, the Court need not rely upon a harmless error analysis because substantial evidence does support the Court's finding. The Court found, at Finding of Fact 7, that Thunder Car Wash was one of the anchor tenants of the Mill Plain Center (CP 143). That finding was amply supported by the testimony of Mr. Stiers. He testified that the concept for the Center was to have one large service/retail tenant in one section of the

Center and an automotive anchor tenant at the other end of the Center (RP 31). World Gym was the flagship for the Center (RP 32). The car wash was the large traffic generator for the automotive portion of the Center (RP 32-33).

Notwithstanding its position as an anchor tenant, Thunder Car Wash paid above market rate because Mr. Stiers was acting as the property manager and leasing agent, and he wanted to avoid the perception of a conflict of interest (RP 34). Furthermore, Mr. Stiers testified that the Center was architecturally designed to include a car wash as one of the anchor tenants (RP 51-52).

The foregoing evidence certainly satisfies the substantial evidence standard. Accordingly, Finding of Fact No. 7 should not be set aside.¹

C. The Trial Court Properly Allowed Mr. Stiers to Testify to the Language He Included in Leases that He Prepared, Over Defendant's Hearsay Objection.

Defendant erroneously contends that Mr. Stiers provided inadmissible hearsay testimony when he testified that six other tenants at the Mill Plain Center had the same lease renewal language in their leases that plaintiff has in its lease. Mr. Stiers' testimony in that regard was not

¹ Defendant apparently argues that plaintiff received a "discounted rental rate" because it was an anchor tenant (Defendant's Opening Brief, at 16). There is no evidence whatsoever in the record that plaintiff sought or was awarded a "discounted" rental rate. From the inception of this lease, and continuing through the present, plaintiff has paid a higher rental rate than virtually every other tenant at the Mill Plain Center.

hearsay at all. The trial judge therefore acted within his discretion in admitting this testimony.

From 1990 until July 1996, Mr. Stiers was the property manager and leasing agent for the Mill Plain Center (RP 18). This was his full-time position (*Id.*). Among other accomplishments, Mr. Stiers installed 14 tenants, negotiated the leases, and performed the duties of the landlord (RP 18-19).

The lease provision at issue, section 1.07, provides for an option to extend the lease at “the then market rental rate” (Exhibit 1). Mr. Stiers created this language himself (RP 20). The language Mr. Stiers created first appeared in a Mill Plain Center lease in 1991 (*Id.*). Six of the tenants Mr. Stiers installed had this same language in their leases (RP 23). Mr. Stiers knows this because he was the drafter of the leases.

Defendant objected to this testimony to the extent it related to the language in leases other than plaintiff’s (RP 20-21). The trial court properly ruled that the testimony was not hearsay (RP 21-23).

ER 801(c) defines hearsay as “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.” Mr. Stiers’ testimony about the language he inserted in the leases of six other tenants is no more hearsay than if he had testified, “I saw that the stop light was red” or “I put mayo

on three tuna sandwiches yesterday.” Mr. Stiers was providing a non-hearsay statement, in court, as to actions he personally took. *See, e.g., Naylor v. Lovell*, 109 Wash. 409, 412 (1920):

It appears appellant...insists that the testimony of the witnesses upon the subject as to what occurred at the time of execution and delivery of the note and mortgage and the way in which the mistake occurred was hearsay and not binding upon the appellant because he was not present at that time, and because it was an attempt by parol testimony to defeat the terms of the written instrument...It is difficult to understand how it can be well claimed the evidence complained of was hearsay. It was the positive evidence of persons present and taking part in the transaction...

Moreover, the statement was made in court, with an opportunity for cross-examination. To argue that this testimony constitutes hearsay is frivolous.

The trial court properly found that this evidence was not hearsay. Furthermore, there is nothing in the record to suggest that the trial court relied on the fact that other tenants had the same language in reaching its decision. For these reasons, the trial court’s ruling should be affirmed and Finding of Fact 13 should not be set aside.

D. The Trial Court Properly Admitted and Considered All Evidence Regarding the Meaning and Intent of the Renewal Language in the Lease.

The trial court properly considered testimony from Jim Stiers and from Dean Meyer in attempting to determine what the parties intended by allowing for the lease to be renewed at “the then market rental rate”. In

admitting that evidence, the Court was attempting to “make sense out of this very nebulous language of a contract” (RP 248). The Court ruled properly, consistent with Washington law, in admitting this evidence.

Although defendant’s assignment of error is that the Court incorrectly determined that the renewal language was broad or ambiguous, defendant really seems to be asking this Court to substitute its judgment for that of the trial court and rule that the lease language must be given the meaning attributed to it by defendant’s expert, Dean Meyer. This claim is without merit, as the trial court properly allowed evidence as to the meaning of the renewal language at issue, and then properly set the market rent to be charged to plaintiff after considering rental rates for other rented car wash facilities in Clark County and other tenants in the Mill Plain Center.

Contrary to defendant’s apparent position, the trial court was not required to find that the renewal language was ambiguous before considering extrinsic evidence to interpret the meaning of the language. *See Stephens v. Gillispie*, 126 Wn. App. 375, 380 (2005). Washington courts have long been allowed to consider extrinsic evidence to determine the intention and meaning of written words. *Berg v. Hudesman*, 115 Wn.2d 657, 669-70 (1990), *quoting J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49 (1944):

[P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed.

This is a case where the parties dispute the meaning of the written language in the renewal section of the lease. Where there is such a dispute regarding the intention of the original parties, extrinsic evidence is properly considered by the trial court. *See Stephens*, 126 Wn. App. at 381:

In sum, these parties dispute the *meaning* of the written terms in the stipulated agreement. They dispute the meaning of the words actually used. The intent of the parties is relevant to that question. *Berg*, 115 Wn.2d at 668-70. How should the court interpret them? Extrinsic evidence of that intent is then admissible on the question. *Id.* (Emphasis in original.)

In *Stephens*, the parties disputed whether a stipulation and order of dismissal was intended to include all of the defendants or only the defendants who entered into a settlement with the plaintiff. Extrinsic evidence was held admissible on that issue. In this case, extrinsic evidence was similarly admissible to determine what the original parties to the lease intended when they provided for the lease to be renewed at “the then market rental rate.”

The trial court acted completely properly, as extrinsic evidence is admissible to ascertain the intent of the parties. *See, e.g., Lopez v. Reynoso*, 129 Wn. App. 165, 170-71 (2005). The trial court's findings of fact regarding the admissibility of extrinsic evidence are reviewed for substantial evidence, and that evidence is viewed in the light most favorable to the prevailing party. *Id.* at 170.

In this case, the Court allowed Mr. Stiers to testify regarding the concept of the Mill Plain Center, that the parties intended Center tenants to pay similar rental rates, and that rental rates were to be adjusted at the time of renewal to reflect the success or failure of, and the current rental rates at, the Center as of that time (RP 41-42, 110). Mr. Stiers was in a unique position to provide this testimony, as he not only rents space for a business in the Center, but also served as the original landlord's property manager and leasing agent. Indeed, he himself drafted the renewal language at issue. As a result, the Court acted well within its discretion in allowing Mr. Stiers to testify as to what was intended by himself and the landlord in including this particular renewal language.

After considering this evidence, the Court found that the language did not clearly limit the "market" to rents being paid by other Mill Plain Center tenants, and neither did it limit the "market" to rents being paid by other car washes. As a result, the trial court considered the rents being

paid by both types of businesses, and also considered testimony from Dean Meyer regarding market rents generally being paid by other commercial tenants in the market area served by plaintiff's Thunder Car Wash. These determinations were supported by substantial evidence and were well within the Court's discretion, given the testimony presented at trial.

E. The Trial Court's Findings as to the "Then Market Rental Rate" are Supported by Substantial Evidence.

Although defendant asks this Court to reverse the trial court on the ultimate issue of the market rental rate to be charged to plaintiff, it provides no evidence to contradict the monetary figures utilized by the trial court in reaching its conclusion. The figures as to the average rental rate being charged to other tenants of the Mill Plain Center come from defendant's own rent rolls, and are uncontradicted. The rents charged by other rented car wash facilities in Clark County came from defendant's own expert, and are similarly uncontradicted. The trial court's decision not to consider the rents being charged to car washes dozens of miles away from plaintiff's facility was within the Court's discretion. The calculation to determine the midpoint between the Mill Plain Center average rent and the comparable car wash rent was a simple mathematical

function, and is uncontradicted. Accordingly, the figures used by the Court are correct and supported by substantial, uncontradicted evidence.

In challenging the Court's ultimate ruling, defendant merely reasserts its position that Mr. Stiers should not have been allowed to testify as to the intent and meaning behind the renewal language. That contention has previously been addressed. See § D, *supra*.

F. The Trial Court Properly Awarded Prevailing Party Attorney Fees to Plaintiff.

This lawsuit involved two claims: First, for a declaratory judgment as to the proper amount of rent to be charged to plaintiff, and second, for an award of monetary damages because defendant overcharged plaintiff since July 1, 2007, in breach of the parties' lease. The trial court set the then market rental rate and concluded that plaintiff was entitled to monetary damages. Because plaintiff prevailed on its claim for breach of contract, the trial court properly awarded attorney fees to plaintiff as the prevailing party under section 12.01 of the parties' lease. There was no abuse of discretion, and this ruling should be upheld.

Defendant misleadingly states that this action "did not involve a dispute regarding an alleged breach of the lease..." (Defendant's Opening Brief, at 37). Clearly the second claim for relief in plaintiff's First

Amended Complaint was for a breach of the lease. Plaintiff prevailed on that claim, entitling it to an award of attorney fees under the parties' lease.

Furthermore, defendant disingenuously contends that both parties were prevailing parties in this action. Defendant asked the trial court to find that the appropriate rental rate was \$30 per square foot. The court instead found that the proper rate was \$20.02 per square foot, or only 67% of what defendant sought. This was even a lesser amount than plaintiff had asked the Court to award by way of summary judgment, using issue preclusion principles, so as to avoid the need for trial. When the Court denied that motion, requiring the issue to be tried, plaintiff sought a lower base rental amount, primarily based upon the belatedly produced rent rolls that revealed the amounts defendant had been charging the other tenants in the Mill Plain Center.² The Court found that plaintiff's rent should be reduced from the amount it had been paying, that it was an amount significantly lower than that deemed proper by defendant, and that defendant is obligated to pay plaintiff damages for the rent that had been overpaid. Without question, plaintiff was the prevailing party in this matter.

² As Mr. Stiers testified (RP 110): "...until last week when we received the tenant rent roles [sic] because it is confidential information, I had no idea that it was gonna be fifteen thirty-two. All I know is 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."

G. The Trial Court Acted Properly in Questioning Witnesses Under ER 614.

The trial court announced at the beginning of trial that it intended to question witnesses under ER 614, thereby enabling it to understand the issues presented. Defendant did not object to that announcement or to any questions. When the trial court later invited objections to the questioning of witnesses from the bench, defendant declined to object. To the extent defendant now argues that the trial court acted improperly by questioning witnesses, defendant waived that claim by not asserting an objection at trial. *See Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 141 (1980) (where there are frequent and marked actions by a trial judge which are felt to be improper, “counsel should object to the Court’s conduct, and a failure to object deprives the trial court of an opportunity to mitigate the effect of the conduct”).

Moreover, the Court acted within its authority under ER 614 by questioning witnesses in the course of this bench trial. Defendant’s authorities provide no support for a contention to the contrary. In *Brister v. Council of the City of Tacoma*, 27 Wn. App. 474 (1980), the contention was that the trial judge prejudged the case, was biased, and should have been disqualified. No such contention is asserted in this case. In *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127 (1980), the contention

was made that the trial judge expressed disbelief as to witness testimony, improperly threatened perjury prosecutions, cross-examined witnesses in front of the jury, and in effect failed to provide an impartial trial. Again, such a contention is not made in this case. Rather, defendant complains only that the Judge asked extensive questions. However, he asked questions of all witnesses, announced his intention to do so, and did not ask questions in a manner which suggested partiality for one side or the other. The trial court's questioning, particularly in the context of a bench trial, was proper under ER 614.

Finally, the facts of *State v. Eisner*, 95 Wn.2d 458 (1981) go far beyond the facts of the present case. There, in a trial for first degree statutory rape, the prosecution failed to elicit facts from the very young witness to prove the charge. The trial judge then asked questions to an extent that additional facts were elicited which did prove the charge. The court found that the questioning went so far beyond the norm that the court's conduct violated Washington Constitution Article IV, § 16. The questioning from the trial judge in this case, in contrast, was for the purpose of clarifying and understanding the testimony, and in no way reflected an attitude toward the merits of the case. Such questioning is proper. *Eisner*, 95 Wn.2d at 463.

ER 614 allows a trial judge to ask questions, and the trial judge is given broader discretion to do so when no jury is present. The trial judge did nothing improper in this case. Its questioning under ER 614 was not only proper and within its discretion, but in addition, defendant waived any objection to the questioning by not making a single objection during an entire day of trial.

H. The Trial Court Properly Denied Defendant's Cross-Motion for Summary Judgment.

Plaintiff filed a motion for summary judgment in March 2008, asking the trial court to recognize the 2002 arbitration decision as binding on the parties, and to declare that the appropriate rental rate for the July 2007 renewal should be \$24.51 per square foot per year, substantially similar to that being paid by Kaady Car Wash. Plaintiff's intention was to attempt to avoid a trial on the merits for a new determination of what the then market rental rate was as of July 2007. Furthermore, plaintiff had not yet received rent rolls from defendant, reflecting the comparatively low rents being paid by the other tenants at the Mill Plain Center.

In response, defendant filed a cross-motion for summary judgment asking the court simply to determine that the rent to be paid by plaintiff "shall be the fair market rental value on July 1, 2007" (CP 78). Defendant disputed that plaintiff should continue to pay the same amount Kaady Car

Wash was paying for its leased premises, and instead demanded that the trial court make a fresh determination as to the appropriate rental rate to be charged as of July 2007.

This is precisely what the trial court did. It denied plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, considered new evidence, and made an independent determination as to the then market rental rate to be paid by plaintiff as of July 1, 2007. In other words, the trial court did exactly what defendant asked it to do; defendant just does not like the result the trial court reached.

Indeed, defendant filed the declaration of Steve Mikulic (CP 76), in which Mr. Mikulic stated that he had previously explained to plaintiff that:

...at the beginning of each option period, of which this was the last, the fair market value would be determined at that time and any annual adjustment thereafter would be based on the market rental value established for the period beginning July 1, 2007.

Again, this is precisely what happened at trial. Nevertheless, defendant now takes the position that collateral estoppel principles should have been applied and that this lawsuit should not have proceeded to trial (Defendant's Opening Brief, at 45-47). Defendant may not now be heard to complain that the trial court refused to apply collateral estoppel

principles on the motions for summary judgment when defendant vigorously opposed the application of collateral estoppel principles at the time.

V. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1, plaintiff requests an award of attorney fees and costs as the prevailing party on appeal. If the judgment is affirmed, plaintiff has a contractual right to an award of attorney fees as a prevailing party pursuant to section 12.1 of the parties' lease (Exhibit 1, at 15).

VI. CONCLUSION

Despite defendant's lengthy recitation of the record below, defendant has failed to set forth any reversible errors made by the trial court. Each of the trial court's findings of fact was supported by substantial evidence. Each of the trial court's conclusions of law are supported by the facts so found. The trial court's rulings and judgment were properly supported, and were within the trial court's discretion. As a result, the judgment below should be affirmed.

DATED this 29 day of October, 2008.

HEURLIN, POTTER, JAHN,
LEATHAM & HOLTMANN, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondent

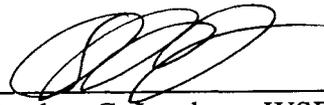
CERTIFICATE OF SERVICE

I certify that I caused the foregoing BRIEF OF RESPONDENT to be served on the following:

Mr. Ronald W. Greenen
Greenen & Greenen, PLLC
1104 Main Street, Suite 400
Vancouver, WA 98660

by delivering via courier a true copy to the foregoing on the 29 day of October, 2008.

HEURLIN, POTTER, JAHN,
LEATHAM & HOLTSMANN, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondent

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