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No. 65338-5-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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GEAR ATHLETICS LLC (f/k/a ALKI SPORTS LLC) and CHAD  
BAERWALDT,

Appellants/Cross-Respondents

v.

ENGSTROM PROPERTIES, LLC,

Respondent/Cross-Appellant.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Timothy Bradshaw)

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**APPELLANTS/CROSS-RESPONDENTS'  
ANSWERING AND REPLY BRIEF**

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2010 NOV -4 AM 9:18

FILED  
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## I. INTRODUCTION

Engstrom concedes that there is an “irreconcilable contradiction” between the trial court’s confirmation of the Arbitration Decision, which found Engstrom liable to Gear Athletics for rent abatement, and the court’s rejection of Gear Athletics’ indemnification claim. Engstrom Br. at 1. That “irreconcilable contradiction” is a manifest error that permeates all aspects of the judgment below, including its erroneous award of attorney’s fees in Engstrom’s favor. In the face of this error, Engstrom does the only thing it can do: it cross-appeals so it can argue the trial court was wrong when it confirmed the Arbitration Decision, but inadvertently right when it later ignored that decision. Engstrom has it backwards.

The trial court properly confirmed the Arbitration Decision. The parties’ rent abatement dispute fell within the intended scope of the Master Lease’s arbitration clause, which must be construed in favor of arbitrability. Engstrom had ample opportunity to present its best case to the arbitrators through briefs, witnesses, exhibits and arguments. It simply lost. The trial court correctly recognized that it could not reconsider the evidence or outcome on the merits, and that there was no legal error on the face of the award. This Court should come to the same conclusion.

Although right when it confirmed the Arbitration Decision, the trial court was wrong when it rejected Gear Athletics’ indemnification

claim and its failure to mitigate defense at trial. Gear Athletics was entitled to indemnity under the unambiguous language of the Master Lease, the undisputed evidence and the preclusive effect of the arbitrators' findings, all of which the trial court ignored. Gear Athletics was also entitled to judgment in its favor on Engstrom's claim for past due rent because it properly raised and proved its failure to mitigate defense at trial. Engstrom offers no compelling defense of the trial court's errors in either regard, or to the court's other errors. For the reasons set forth in Gear Athletics' opening brief and below, the judgment below must be reversed.

## **II. COUNTERSTATEMENT OF ISSUES ON CROSS-APPEAL**

For purposes of Engstrom's cross-appeal, Gear Athletics submits the following counterstatement of issues.

1. Did the trial court properly confirm and refuse to vacate the Arbitration Decision when Engstrom had the opportunity to, and did in fact, present arguments, witnesses, exhibits and arguments at the arbitration, and there is no legal error on the face of the award?

2. In the event that the trial court's attorney's fee award is not reversed or remanded (which Gear Athletics seeks in its appeal), did the court properly award Gear Athletics fees for prevailing at arbitration on its discrete and severable rent abatement claim?

### III. ARGUMENT

#### A. **The Trial Court Properly Confirmed And Entered Judgment On The Arbitration Decision Prior To Trial.**

Engstrom ignores the stringent standard of review it faces in asking this Court to reverse the trial court's confirmation of the Arbitration Decision. It cannot overcome that burden. Engstrom argues that the trial court should have vacated the arbitration award because (1) there was no agreement to arbitrate liability for rent abatement, (2) the arbitrators' award exceeded their authority, and (3) the Arbitration Decision was procured through "undue means." None of the arguments have any merit.

##### 1. **The Trial Court Correctly Found That The Parties Agreed To Arbitrate The Issue Of Rent Abatement.**

Engstrom first argues that the trial court erred in confirming the Arbitration Decision because the parties didn't actually agree to arbitrate the issue of rent abatement. Engstrom Br. at 15-17. The arbitration clause in the parties' Master Lease stated in relevant part:

If any dispute arises between Landlord and Tenant regarding the extent of rent abatement under Section 9 or Section 14 ..., either party may request arbitration and each party shall appoint as it's arbitrator an appraiser who has been a member of the American Institute of Real Estate Appraisers for not less than 10 years.

Tr. Ex. 1 (Section 16.12). Without citation to authority or extrinsic facts, Engstrom plucks the word "extent" from the clause and argues that it "limits the scope of arbitration to ... the *amount* of rent abatement."

Engstrom Br. at 16 (emphasis added). Engstrom made the same argument to Judges Mertel and Bradshaw (CP 101-102; 222-223; 484-485), both of whom rejected it. CP 148-149; 362-363. Even after trial, Judge Bradshaw refused to reconsider the meaning of the parties' agreement. CP 443 (CL ¶ 23 ("The Court has confirmed, pretrial, the arbitration panel award.")); CP 558 (the Arbitration Decision "remains separately enforceable").

This Court should likewise reject Engstrom's strained reading of the arbitration provision. Washington law reflects a strong public policy favoring arbitration. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301 n. 2, 103 P.3d 753 (2004). Arbitration is required except in the rare case where it can be said "with positive assurance that no interpretation" of the agreement would cover the parties' dispute. *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 46, 17 P.3d 1266 (2001). "If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 456, 45 P.3d 594 (2002). Because arbitration is favored, Engstrom bears the burden of showing that its claims were not subject to arbitration. *Id.* at 453. Engstrom cannot carry that burden.

Engstrom's narrow interpretation ignores the language of the arbitration clause, the policy favoring arbitrability, and common sense. On its face, and especially when construed in favor of arbitration, the word

“extent” encompasses a determination on both liability and damages. The parties agreed to arbitrate “*any dispute* ... under Section 9 or Section 14.” Engstrom’s interpretation improperly nullifies this express “any dispute” language in favor of an implied (and implausible) bifurcated process, contrary to settled rules of interpretation. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351, 103 P.3d 773 (2004) (arbitration agreements must be construed as a whole). Nor does the fact that the parties elected to have appraisers serve as arbitrators somehow limit the scope of arbitration; one thing has nothing to do with the other. The parties are free to agree on any method of appointing arbitrators, and they understandably chose to have real estate professionals decide the entire “dispute.” RCW 7.04A.110(1).

Indeed, Engstrom’s interpretation would frustrate the whole point of having an alternative dispute resolution process with respect to rent abatement. *See Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992) (arbitration “avoid[s] what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation”). Engstrom would have the parties first file suit, litigate the issue of *liability* for rent abatement for months or years in court, and then, if liability were found, initiate a separate arbitration for yet another round of litigation on the issue of *damages*. Such a convoluted process would not only render illusory the parties’ broad agreement to arbitrate “any dispute” related to

rent abatement, it would increase the time and expense required to actually resolve the issue. The trial court properly construed the parties' agreement in favor of arbitration to avoid this absurd result. So should this Court.

**2. The Arbitration Decision Did Not Exceed The Arbitrators' Authority.**

Engstrom next argues that the trial court's confirmation of the Arbitration Decision should be vacated because the arbitrators exceeded their authority. Engstrom Br. at 17-18 (*citing* RCW 7.04A.230(1)(d)). Washington courts accord substantial finality to arbitration awards and, thus, judicial review is "exceedingly limited." *Davidson v. Hensen*, 135 Wn.2d 112, 118-119, 954 P.2d 1327 (1998). This Court's review of the Arbitration Decision is the same as the trial court's and, therefore, limited to the express statutory grounds for vacating an arbitration award enumerated in RCW 7.04A.230. *See Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992). The party seeking to vacate the award bears the burden of proof. *Hanson v. Shim*, 87 Wn. App. 538, 546, 943 P.2d 322 (1997). Engstrom cannot carry this heavy burden either.

An arbitrator exceeds his or her powers only when the award exhibits an "obvious error of law" that is recognizable from the language on the "face of the award." *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 238-39, 236 P.3d 182 (2010); *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). In *Broom*, the Supreme Court recently

emphasized that the facial error standard is a “very narrow ground for vacating an arbitral award.” 169 Wn.2d at 239. “[C]ourts may not search the arbitral proceedings for any legal error; courts do not look to the merits of the case, and they do not reexamine evidence.” *Id.*; *Davidson*, 135 Wn.2d at 119 (judicial review “does not include a review of the merits of the case ... [t]he evidence before the arbitrator will not be considered”).<sup>1</sup>

Engstrom does not and cannot identify any error of law on the face of the Arbitration Decision. The award correctly cites to the provisions in the Master Lease governing arbitration and rent abatement (Sections 9.5 and 16.12), and it specifically notes the limits of the arbitrators’ authority. CP 187-188; Tr. Ex. 18 (“Section 16.12 does not give the arbitrators the authority to provide rent abatement for interruption of Quiet Enjoyment.”). Engstrom points to nothing in the Arbitration Decision that is contrary to the terms of the Master Lease or Washington law. Indeed, other than the actual amount of rent abatement awarded—which Engstrom apparently believes should be zero—Engstrom does not claim that any specific language in the Arbitration Award is legally erroneous. Engstrom Br. at

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<sup>1</sup> In emphasizing the exceedingly limited application of the facial legal error standard, the Supreme Court noted that “[t]hrough the years, our courts have applied the facial legal error standard carefully, vacating an award based on such error in only four instances, one of which was the case below.” *Broom*, 169 Wn.2d at 239. *See* fn. 2.

17-18. To be sure, this case is nothing like the few reported decisions where courts have vacated awards on the basis of facial legal error.<sup>2</sup>

What Engstrom really wants is for the Court to go behind the face of the Arbitration Decision and review the evidence the arbitrators considered, the methodology they employed and, ultimately, the decision they reached. Engstrom says so expressly. Engstrom first argues that “there was no evidence of any loss [of use]” at the arbitration and, thus, the arbitrators “could not perform a calculation of the amount of rent to be abated”; it then purports to demonstrate why the arbitrators’ award must be wrong based on its own calculations; and, finally, it surmises that the arbitrators blindly “accepted Judge Carroll’s offset amount” from the earlier Gear Athletics/Collegegear arbitration. *Id.* In short, Engstrom’s real complaint is that the Arbitration Decision is wrong on the merits, not erroneous on its face. This Court, however, will not reconsider the evidence or review the merits of the arbitrators’ award. *Broom*, 169 Wn.2d at 239; *Davidson*, 135 Wn.2d at 119; *Barnett*, 119 Wn.2d at 157. Engstrom’s cross-appeal must be rejected on this basis as well.

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<sup>2</sup> See *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 32 P.3d 289 (2001) (remanding for clarification of internal inconsistencies on face of award); *Federated Services Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (2000) (face of award included damages not cognizable under Washington law); *Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 790 P.2d 228 (1990) (remanding for clarification because language on face of award contradicted Washington statute).

**3. The Arbitration Decision Was Not Procured By “Corruption, Fraud, Or Other Undue Means.”**

In a final effort to assail the Arbitration Decision, Engstrom argues that the award was procured by “undue means,” as that term is used in RCW 7.04A.230(1)(a). This argument is simply more of the same: an improper request that this Court revisit the evidence and arguments considered by the arbitrators and reverse the award on the merits. No reported Washington decision has ever vacated an arbitration award on this basis; this Court should not be the first. There was no “undue means.”

To begin with, Engstrom’s undue means argument is really aimed at the evidence and arguments presented at the arbitration. Citing only to the self-serving declaration of its own attorney (CP 227-231), Engstrom complains that Gear Athletics did not call anyone from Collegegear to testify about loss of use; had no photographs of flooding; and proffered purportedly inadmissible evidence, including an unsworn letter, settlement offers, Judge Carroll’s earlier arbitration decision, and Judge Mertel’s order compelling arbitration. Engstrom Br. at 10-11, 19. But, as noted, this Court simply cannot reconsider the evidence or the merits. *Davidson*, 135 Wn.2d at 118-19. Engstrom’s argument about admissibility is off-base anyway; the arbitrators can decide the relevance and materiality of evidence without conformity to the rules of evidence. *Id.* at 122-23; RCW

7.04A.150(1) (arbitrators authority includes “power to ... determine the admissibility, relevance, materiality, and weight of any evidence”).

Perhaps realizing that this Court will not second guess the merits, Engstrom resorts to accusing Gear Athletics’ attorney of making “false statements and improper assertions.” Engstrom Br. at 20. It is true that an arbitration award procured by perjured testimony about a material fact may be vacated, *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 972 P.2d 577 (1999), but Engstrom’s declaration in support of its motion to vacate did not (and could not) point to any false statement of material fact. CP 227-231. Rather, Engstrom complained (as it does now) about Gear Athletics’ counsel’s purported *arguments* and, in particular, “what he claimed to be the meaning of Judge Mertel’s order and the binding nature of Judge Carroll’s arbitration decision.” Engstrom Br. at 20. Regardless of how Engstrom characterizes them, counsel’s arguments cannot constitute “undue means” within the meaning of RCW 7.04A.230.

As an initial matter, the arbitrators were the judge of “both the law and the facts.” *Boyd*, 127 Wn.2d at 263; *Pegasus Const. Corp. v. Turner Const. Co.*, 84 Wn. App. 744, 749, 929 P.2d 1200 (1997). Thus, it was for the arbitrators to determine the “res judicata effect of Judge Carroll’s decision.” Engstrom Br. at 20. On that score, Engstrom’s counsel conceded that she was able to, and did in fact, make her own arguments on

these issues during arbitration. CP 231 (¶ 18); RP (08/10/09 (motion)) 36:14-15. The arbitrators apparently sided with Gear Athletics. CP 231 (“As an advocate, my attempts to instruct them on the law did not appear to be heeded.”). With no error on its face, the Arbitration Decision cannot be vacated based on Engstrom’s speculation that the “legally untrained” arbitrators got it wrong. Engstrom Br. at 20. Nor can Engstrom complain about the qualifications of the arbitrators; after all, it was Engstrom who insisted on appraisers as arbitrators. RP (08/10/09) 62:22-63:13.

Moreover, even had Gear Athletics’ attorney misstated the law (it did not), there would be no “undue means.” Engstrom correctly cites the nearly insurmountable standard for undue means under analogous federal law: “behavior that is immoral if not illegal.” *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992).<sup>3</sup> Engstrom ignores, however, how the standard was actually applied in that case—for obvious reasons. In *A.G. Edwards*, the plaintiff argued that the arbitration award

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<sup>3</sup> Engstrom suggests that “undue means” also “arguably” requires some kind of judicial due process analysis. Engstrom Br. at 19. That suggestion can be rejected out of hand. The process which is due to parties who agree to arbitrate is largely defined by the terms of their agreement, RCW 7.04A and the arbitrator. At most, Washington courts hold that in the arena of arbitration, due process guarantees the right to be heard and to present evidence, after reasonable notice of the time and place of the arbitration hearing. *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 152-53, 634 P.2d 296 (1981). Certainly, Engstrom does not and cannot claim that any of those guarantees were abridged here.

should be vacated because defense counsel purportedly made “facially meritless” defenses at the hearing. As the court of appeals explained, the district court properly refused to vacate the award on the basis of “fraud”:

It also rejected their argument that the award was procured through fraud because Edwards & Sons made knowing misstatements of the law by raising the meritless defense. The court noted that federal courts must be slow to vacate an arbitral award on the grounds of fraud and that fraud is only a viable ground for vacatur when it is undiscoverable during the proceeding. The Court held the McColloughs failed to make out fraud because all the alleged misstatements had been pointed out to the arbitrators.

*Id.* at 1402. Washington law is identical; arbitration awards procured by fraud will not be vacated where it is known before the close of the hearing. *Seattle Packaging*, 94 Wn. App. at 487-88. As discussed above, Engstrom presumably did not raise “fraud” as grounds for vacatur because it vigorously made its objections to and disagreement with Gear Athletics’ arguments to the arbitrators at the hearing. CP 227-231 (¶¶ 5, 13, 18).

The analysis regarding “undue means” is the same. In *A.G. Edwards*, the court of appeals concluded that purported misstatement of the law by counsel did not constitute “undue means.” *First*, as with Washington law, absent an error on the face of the award, the court would not presume that the alleged misstatements had influenced the arbitrators. *Id.* at 1403. *Second*, allegations of “sloppy or overzealous lawyering” do not amount to “behavior that is immoral if not illegal,” because,

“[o]ffering a meritless defense ... is part and parcel of the business of litigation; it carries no connotation of wrongfulness or immorality.” *Id.* at 1403-04. And *three*, the alleged “undue means”—misstatements of law—were pointed out to the arbitrators at the hearing. *Id.* at 1404. Like the party in *A.G. Edwards*, Engstrom should “not be given a second bite at the apple” for all the same reasons. *Id.* Engstrom’s cross-appeal should be rejected; the trial court properly confirmed the Arbitration Decision.

**B. Gear Athletics Is Entitled To Indemnification From Engstrom For “Claims Arising From Any Act Of Landlord.”**

In its opening brief (pp. 26-30), Gear Athletics showed that the trial court erroneously rejected its indemnification claim because the court construed the Master Lease’s indemnification provision to require Gear Athletics “to prove that [Collegegear’s] claim arose from a breach of default of Engstrom,” CP 439 (CL ¶ 2), when, in fact, the provision only required Gear Athletics to show that it defended “claims arising from ... any act of Landlord.” Tr. Ex. 1 (Section 8.5). In response, Engstrom asks the Court to repeat the trial court’s mistake, and ignore the plain language of the parties’ agreement and the facts which triggered Engstrom’s duty to indemnify. This Court should do neither. It should reverse and order that judgment be entered in Gear Athletics’ favor on its indemnification claim.

**1. The Indemnification Provision Does Not Require Proof Of Breach Or Default.**

In an effort to defend the trial court's erroneous construction of the indemnification provision, Engstrom studiously avoids its plain language and, instead, urges the Court to apply rules of construction to literally read the term "any act of Landlord" out of the parties' contract. This Court's role is the opposite. If the language is clear and unambiguous, the Court must enforce the agreement as written; it may not modify the agreement or create ambiguity where none exists. *Lehrer v. Dep't of Soc. and Health Servs.*, 101 Wn. App. 509, 515, 5 P.3d 722 (2000). More to the point, where no ambiguity exists, as here, this Court need not resort to rules of construction, including the inapposite rule of "ejusdem generis" discussed further below. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 286 n. 9, 883 P.2d 1387 (1994).

The Master Lease's indemnification provision could not be clearer. It required Engstrom to indemnify Gear Athletics from two distinct type of claims. Section 8.5 stated in relevant part:

Indemnity. ... Landlord shall indemnify and hold harmless Tenant from and against any and all claims **[1]** arising from any breach or default in the performance of any of Landlord's obligations under the terms of this lease **or [2]** arising from any act of Landlord ....

Tr. Ex. 1 (emphasis and brackets added). The trial court relied exclusively on the first, "any breach or default," and ignored the second, "any act of

Landlord.” CP 439 (CP ¶ 2). But a plain and ordinary reading of Section 8.5 and, in particular, the word “or,” shows that either event will trigger a duty to indemnify. *Caven v. Caven*, 136 Wn.2d 800, 807, 966 P.2d 1247 (1998) (“the word ‘or’ ... is a coordinating particle signifying an alternative”); Webster’s Ninth New Collegiate Dictionary 829 (1986) (“or” is “a function word to indicate an alternative”). Lest there be any doubt on the parties’ intent, they used the same language when describing Gear Athletics’ reciprocal duty to indemnify—again differentiating between “any breach or default ... or ... any act of Tenant.” Tr. Ex. 1.

Pointing to the maxim of *ejusdem generis*, Engstrom argues that the “any of Landlord” term should be construed in light of the “any breach or default” term to require “some fault or wrongdoing on the party of the landlord”; that is, the two terms should mean the same thing. Engstrom Br. at 22. That construction would violate an even more basic rule of interpretation: “Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it. An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective.” *Seattle-First Nat. Bank v. Westlake Park Assoc.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). This Court should

reject Engstrom’s invitation to construe the indemnification provision in a way that would render the “any act of Landlord” term superfluous.

The rule of *ejusdem generis* could not apply in any event. When a general term follows a series of specific terms, the general term may be interpreted to mean those things of the same nature as the specific terms. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 590-91, 964 P.2d 1173 (1998). The rule applies “to general and specific words clearly associated in the same sentence in a pattern such as ‘[specific], [specific], or [general]’ .... Where the general and specific words are not so connected, the reasoning underlying the *ejusdem generis* rule loses its force.” *Nat’l Elec. Contractors Ass’n v. Pierce County*, 100 Wn.2d 109, 116-117, 667 P.2d 1092 (1983). Here, the indemnification provision does not contain a list of specific terms followed by a general one; it contains two completely separate, specific and independent clauses. Moreover, the rule does not apply where it would render any term superfluous. *Allstate*, 136 Wn.2d at 591. Engstrom’s use of the *ejusdem generis* rule would do just that.

Lastly, Engstrom’s reliance on *Jones v. Strom Contr. Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974), and *Scruggs v. Jefferson County*, 18 Wn. App. 240, 567 P.2d 257 (1977), to support its argument is misguided. Those cases hold that indemnity provisions “which purport to exculpate an indemnitee from liability from losses flowing solely from his own acts or

omissions are not favored and must be clearly drawn and strictly construed.” *Jones*, 84 Wn.2d at 520; *Scruggs*, 18 Wn. App. at 243. But Gear Athletics never claimed that Section 8.5 required Engstrom to exculpate Gear Athletics for *Gear’s* acts. It claimed, consistent with *Jones* and *Scruggs*, that it required Engstrom to exculpate Gear Athletics for *Engstrom’s* acts. Tr. Ex. 1 (“claims ... arising from any act of Landlord”). Engstrom’s suggestion that Gear Athletics seeks to hold Engstrom liable for being “a passive, nonculpable party to the Lease,” Engstrom Br. at 25-26, distorts its argument and the undisputed facts. The opposite is true. The indemnification provision was intended to protect the tenant where, as here, it is forced to defend lawsuits caused by the landlord’s conduct.

**2. Collegegear’s Claims Against Gear Athletics Arose Exclusively From Engstrom’s Own Acts.**

Engstrom’s claim that Gear Athletics cannot “identify a single *act* of Engstrom from which [Collegegear’s] claims arose,” Engstrom Br. at 23, simply ignores the evidence. As detailed in Gear Athletics’ opening brief (pp. 28-29), all of Collegegear’s claims arose from Engstrom’s acts. That’s what Collegegear alleged in its complaint (CR 4-5); that’s what Collegegear argued in the first arbitration (Tr. Ex. 44); that’s what Judge Carroll found when he awarded Collegegear damages (Tr. Ex. 48); and that’s what Gear Athletics’ witnesses testified to at trial (RP (8/10/09) 60:14-18; RP (8/12/09) 450:11-451:16 (“[e]verything was the result of the

landlord, being Engstrom Properties, LLC”). In particular, Collegegear’s claims arose from, and the subject of the first arbitration was, *Engstrom’s* demands for unreasonable access to the premises and *Engstrom’s* failure to remedy water intrusion, which was Engstrom’s responsibility under the Master Lease. CP 5 (¶¶ 10-14); Tr. Ex. 1 (Section 7.3(a)). Judge Carroll’s arbitration award identifies both acts as the sole basis of his rent abatement decision in favor Collegegear. Tr. Ex. 48.<sup>4</sup>

Engstrom dismisses all of this with the circular argument that “[n]one of these claims resulted in any Findings that any *act* of Engstrom caused [Collegegear’s] claims.” Engstrom Br. at 24. But that is the whole point. The court did not make findings on the issue because it erroneously ignored Section 8.5’s “any act of Landlord” language as a basis for indemnification. Engstrom’s brief is perhaps most revealing in what it does not say. If not Engstrom’s acts, what did Collegegear’s claims arise from? Poignantly, Engstrom never argues that Collegegear’s claims arose from anything other than Engstrom’s own conduct, and it certainly does

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<sup>4</sup> Engstrom suggests that neither the trial court nor this Court should consider Judge Carroll’s arbitration award because it is hearsay. The trial court admitted the award over Engstrom’s hearsay objections (RP (08/12/09) 443-447. Engstrom does not challenge the trial court’s ruling on appeal. In any event, Gear Athletics did not use the award to prove the truth of the matter, *i.e.*, that Engstrom actually failed to remedy water intrusion problems or Collegegear suffered loss of use. Rather, it was offered as a “verbal act” to show what Judge Carroll did, *i.e.*, that he awarded damages to Collegegear based on Engstrom’s alleged acts.

not suggest that Gear Athletics' conduct was the source of those claims. In the end, the evidence is undisputed that Gear Athletics was forced to incur \$82,400 in damages and fees to defend claims "arising from any act of Landlord," under the plain and unequivocal terms of the Master Lease.

Lastly, Engstrom does not dispute the amount of indemnification due Gear Athletics for lost rent (\$63,000), but suggests that some of Gear Athletics' costs (\$19,400) were incurred, not in *defending* Collegegear's claims, but in *prosecuting* its claim for unpaid rent. *Id.* at 26. The two things were one and the same; Collegegear stopped paying rent because it claimed to have been constructively evicted *as a result of Engstrom's acts*. Indeed, it was due to Gear Athletics' vigorous defense that Engstrom's duty to indemnify was modest relative to the damages Collegegear sought. Tr. Ex. 48 ("While these actions did not rise to the level of constituting a constructive eviction, they [do] ... justify a reasonable rent abatement"). Also without any sense of irony, Engstrom suggests that Gear Athletics could have done even better at the arbitration had someone from Engstrom testified. But Engstrom only has itself to blame; Gear Athletics invited Engstrom to participate, but Engstrom refused. CP 435 (CL ¶ 35). Gear Athletics is entitled to the entire \$82,400 on its indemnification claim.

**C. Gear Athletics Is Also Entitled To Indemnification From Engstrom As A Result Of Collateral Estoppel.**

This Court can reverse the trial court's ruling on Gear Athletics' indemnification claim based on the "any act of Landlord" analysis alone. But as Gear Athletics showed in its opening brief (pp. 30-34), the court's ruling was erroneous even on its own terms: the Arbitration Decision established that Engstrom was in "breach or default" under the Master Lease, and that decision was res judicata at trial.<sup>5</sup> In response, Engstrom briefly suggests that the issues were different, but argues primarily that Gear Athletics neither argued nor relied on the binding effect of the Arbitration Decision at trial. Neither argument has any merit.

**1. The Arbitration Decision Established That Engstrom Breached The Master Lease.**

Engstrom does not dispute that collateral estoppel bars relitigation in court of an issue previously decided in binding arbitration between the parties. *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 855 P.2d 1223 (1993); *Robinson v. Hamed*, 62 Wn. App. 92, 813 P.2d 171 (1991). Thus, the only issue is whether the Arbitration Decision determined that Collegegear's

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<sup>5</sup> Engstrom's suggestion that Gear Athletics cannot dispute the trial court's contradictory rulings because it did not "challenge" the trial court's underlying findings (FF ¶¶ 38, 40) is wrong. Engstrom Br. at 1, 17. Gear Athletics assigned error to both the trial court's characterizations of the prior arbitration decisions and its findings regarding loss of use. *See* Gear Athletics' Op. Br. at 4 (Assignment of Error 2).

claims arose from Engstrom’s “breach or default” of the Master Lease (or “any act of [Engstrom]”) and, in particular, whether Engstrom’s failure to remedy water intrusion impaired Collegegear’s use of the premises. It did. Engstrom’s argument that the Arbitration Decision contained no findings on the “issue of loss of use” is simply wishful thinking. Under the unambiguous terms of the Master Lease, which Engstrom ignores, the arbitrators could not have awarded Gear Athletics rent abatement in the absence of a finding that its subtenant, Collegegear, suffered “loss of use.”

The Master Lease specifies, and Engstrom does not dispute, that Engstrom, as landlord, was responsible for repairing water intrusion. Tr. Ex. 1 (Section 7.3(a)). The arbitrators concluded that Engstrom failed to do so. The Arbitration Decision states: “the majority of arbitrators have concluded that the premises were partially damaged due to water intrusion issues ..., and that Tenant is due Abatement of Rent provided in Section 9.5 from the Landlord ...” Tr. Ex. 18. Pursuant to Section 9.5:

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

Tr. Ex. 1 (emphasis added). In awarding Gear Athletics rent abatement under Section 9.5, therefore, the arbitrators necessarily concluded that Collegegear’s “reasonable use of the Premises [was] substantially impaired” when Engstrom did not remedy the water intrusion problem.

Without such loss of use, the rent abatement provision would not have been triggered. Engstrom's mantra that the arbitrators found no loss of use defies the plain terms of the Arbitration Decision.

**2. Gear Athletics Raised And Relied On The Binding Effect Of The Arbitration Decision During Trial.**

Engstrom's other arguments regarding collateral estoppel can be summed up like this: Gear Athletics did not raise the issue in the trial court, did not object to Engstrom's effort to relitigate loss of use, and offered evidence of its own on the issue. Engstrom is wrong on all counts. Gear Athletics did raise the binding effect of the Arbitration Decision to the trial court, and it promptly objected when Engstrom sought to relitigate the arbitrators' findings. For its own part, Gear Athletics never attempted to relitigate loss of use, but rather put on evidence of water intrusion because it was directly relevant to its other claims.

Gear Athletics understood that, if the Arbitration Decision were confirmed, issues decided at arbitration would be binding.<sup>6</sup> Thus, when

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<sup>6</sup> Engstrom's assertion that its motion for summary judgment "put Gear on notice that it would be required to produce evidence of loss of use," is without merit. Engstrom Br. at 29. At the time Engstrom filed its motion, the court had not yet confirmed the Arbitration Decision, and Engstrom had filed a motion to vacate the award. Had the court vacated the Arbitration Decision, then the parties would have had to relitigate the issues from scratch. But the court did the opposite: it confirmed the Arbitration Decision and denied both of Engstrom's motions.

the court's bailiff emailed the parties prior to trial asking them to "provide the court with more information," Gear Athletics' counsel responded:

If there is an order confirming the previous Arbitration Award then the estimate of three or four days will be more than enough for the remaining issues. If the parties need to re-litigate the issues presented in the Arbitration the trial will mostly likely spill over into the next week.

CP 464-466. Counsel repeated that basic assumption to the trial court the morning of the first day of trial, when the parties argued Gear Athletics' motion to confirm the Arbitration Decision:

[T]he issue of the summary judgment motion goes into ... rearguing some of the issues that were in front of the arbitrators on the quiet enjoyment ... [¶] [I]t seems to make sense to decide whether we have an arbitration ruling that's in effect or whether we throw out the arbitration ruling ...

RP (08/10/09) (motion) 5:11-18. When the court finally ruled that it would confirm the Arbitration Decision, counsel again informed the court that, "[b]ecause of the rulings that you've made, we have a perhaps significantly different trial that might be a lot shorter." *Id.* at 41:14-15.

Engstrom, of course, had different expectations. During the first day of trial, Engstrom made it clear that it intended to disprove what the arbitrators had already found. Gear Athletics objected immediately:

MR. FLEMING: Your Honor, as a general objection, we seem to be getting into testimony about whether there was water intrusion and how much water intrusion. I think we settled that with the confirmation of the arbitration award which said there was partial damage from the water intrusion and rent abatement.

I've tried not to be too – to be objecting and be restrictive, but are we going to go through all this again? I mean, this is what we went through in the arbitration. And I don't know how this goes to the issue of – the two issues that are left ...

So I think there's a relevance objection and an objection that this is something that's already been ruled on by the Court.

THE COURT: Overruled.

RP (08/10/09) 115:14-116:6. Nothing more was required to preserve Gear Athletics' objection to Engstrom's improper effort to relitigate the issues previously decided in arbitration. *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) (“an objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error”).

But there is more. Beyond its objections, during closing argument, when the trial court asked Gear Athletics why it didn't call anyone from Collegegear to testify, Gear Athletics' counsel replied:

So the issue of water intrusion affecting or causing partial damages and loss of use has been determined. The arbitration award that you confirmed makes a specific finding of that.

RP (8/13/09) 599:02-7. Similarly, after the court issued its findings and conclusions, but more than four months before it entered judgment, Gear Athletics filed a CR 52(b) motion, in which it argued specifically:

When [on] a motion by Gear Athletics, this court confirmed that [Arbitration Decision] and entered judgment thereon, that part of the case was over. ... [¶] The many findings and conclusions contained in the court's [findings of fact and conclusions of law] which are based on the court's review of the merits of the underlying arbitration or a stated lack of evidence presented at trial as it relates to the issues decided by the arbitration, exceed the scope of this court's jurisdiction and should be stricken.

CP 449-450. The court rejected the motion (CP 498-499), and entered a judgment showing apparent regret that it had confirmed the Arbitration Decision in the first place. CP 525 n. 4 (“The Court’s confirmation of the arbitration amount was done *pretrial* without the full benefit of the testimony, credibility determinations, and all evidence.”). But the court did confirm the award—and, short of vacating it, which the court refused to do—it could not ignore the preclusive effect of the arbitrators’ findings.

Finally, there is no merit to Engstrom’s argument that it would be unfair to apply collateral estoppel because Gear Athletics was complicit it relitigating the issues. The opposite is true. After initially overruling Gear Athletics’ objection to Engstrom’s effort to revisit the arbitrators’ findings on loss of use, the trial court explained its rationale:

THE COURT: We’re in the middle of trial, and if the objection you’re referring to is Mr. Fleming stating that a finding via arbitration therefore made the allegations of water intrusions irrelevant or something along those lines, I did not go along with it at the time ... and I still wouldn’t because there are *other reasons that testimony could be relevant aside from those direct issues*. So again, we’re in the middle of trial. I think what’s important is – and what I

really want to do is give both sides the opportunity to litigate the case as you see fit.

\* \* \*

MR. FLEMING: Just for clarification and maybe that – maybe I’m just the – the confirmation of the arbitration where there was a finding of partial damage and rent abatement, that rent abatement was – we’re not relitigating that or are we?

THE COURT: My hesitation is I can see relevance beyond what you strictly have said ... to testimony about that. But I don’t want to try either party’s case for them.

RP (8/11/09) 134:21-135:22 (emphasis added). If anything, this reasoning led Gear Athletics to believe that the trial court *agreed* that the arbitrators’ findings were binding, but that the same evidence could be introduced if relevant for “other reasons ... aside from those direct issues.” *Id.*<sup>7</sup> That is what occurred. Gear Athletics put on evidence of *water intrusion* because that evidence was relevant to its indemnification (whether Collegegear’s claims arose from Engstrom’s acts) and fraud claims (whether Engstrom failed to disclose water intrusion and whether the fraud damaged Gear Athletics). *See* RP (08/10/09) 47-53, 76-78, 104-107; RP (08/11/09) 140-157, 168-169, 181-186, 196-202, 282-284, 304-310.

But Gear Athletics never tried to prove Collegegear’s *loss of use*; as Gear Athletics’ counsel told the trial court, the pre-trial confirmation of

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<sup>7</sup> Indeed, later on, in admitting the Arbitration Decision itself over a hearsay objection, the court appeared to recognize that, unlike ordinary evidence, he “understood [the Arbitration Decision] has legal effect and that it’s part of the record.” RP (8/11/09) 459:1-14.

the Arbitration Decision made that unnecessary. RP (8/13/09) 599:2-4 (“I didn’t think calling [Collegegear] was necessary because we’ve had two rulings already.”). Gear Athletics only learned of the court’s error months later when it belatedly issued its findings and conclusions. It asked the court to reconsider, to no avail. CP 498-499. In sum, Gear Athletics repeatedly argued that the Arbitration Decision was binding, and it properly relied on such when presenting its case at trial. To refuse collateral estoppel in this circumstance would work on manifest injustice on Gear Athletics. For this reason as well, this Court should reverse the trial court’s denial of Gear Athletics’ indemnification claim.

**D. Gear Athletics’ Mitigation Defense Was Tried By The Parties Without Objection And Proven Based On The Evidence.**

Engstrom apparently concedes that if Gear Athletics proved its mitigation defense at trial, which Gear Athletics did, then the entirety of Engstrom’s counterclaim judgment (and attorneys’ fee award) must be reversed. The trial court gave two grounds for rejecting mitigation: (1) Gear Athletics “did not plead nor answer” mitigation, and (2) “the relative burden of proof on the issue” (CP 443 (CL ¶ 22)), both of which were erroneous for the reasons stated in Gear Athletics’ opening brief. Engstrom’s effort to defend both grounds is unavailing.

**1. CR 15(b) Required The Trial Court To Consider Gear Athletics' Mitigation Defense.**

Engstrom does not dispute that CR 15(b) allows a trial court to treat issues tried by the parties as though they had been raised in the pleadings. Engstrom does not dispute that motions to amend the pleadings to “conform to the evidence” may be made at any time, and that such amendments must be freely allowed. CR 15(b). And Engstrom does not dispute that Gear Athletics specifically asked the trial court to consider its mitigation defense during trial. Engstrom Br. at 33. Under these circumstances, it was an abuse of discretion for the trial court to shrug-off Gear Athletics’ request because it could not find failure to mitigate in its “pleadings” or “answer.” The whole purpose of CR 15(b) is to “adjust the pleadings to reflect the case as it was actually litigated in the courtroom.” *Harding v. Will*, 81 Wn.2d 132, 136, 500 P.2d 91 (1972).

Engstrom claims that CR 15(b) should not apply because it had no idea Gear Athletics was asserting a mitigation defense until closing argument and, thus, it was “unable to present evidence regarding its ability to rent the building for the four months after Gear Athletics stopped paying rent.” Engstrom Br. at 33. Nonsense. During *opening* statements, Gear Athletics’ counsel told the court: “I think the evidence will be there was absolutely no activity by Mr. Engstrom to try and re-lease that space, which is his obligation under the law.” RP (08/10/09) 17:10-13. Sure

enough, as discussed below, the next morning, counsel asked Engstrom point blank if he made any effort to list the premises; he answered: “Not to my knowledge.” RP (8/11/09) 177-178. Based on that testimony, Gear Athletics filed its supplemental brief on mitigation and argued the issue during closing. CP 374-378; RP (8/13/09) 593-595; 645-646.

Critically, Engstrom never objected to Gear Athletics’ argument or evidence on mitigation, nor did it seek a continuance. As Gear Athletics explained in its opening brief, when that happens, CR 15(b) applies and Engstrom cannot argue otherwise. Gear Athletics Br. at 37 (citing cases); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766-67, 733 P.2d 530 (1987) (“Where evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof); *Daves v. Nastos*, 105 Wn.2d 24, 27, 711 P.2d 314 (1985) (“If a continuance is not requested, a CR 15(b) objection is not available on appeal.”). Moreover, after Engstrom’s damning testimony on the mitigation issue, Engstrom’s counsel had ample opportunity to offer contrary testimony over the next three days of trial; Engstrom himself was subject to direct exam later that day (08/11/09), the next day (08/12/09), and the following day (08/13/09). Engstrom simply chose to ignore the issue at trial. There was no unfair surprise; CR 15(b) applies.

**2. Gear Athletics Carried Its Burden Of Proof On The Failure To Mitigate Defense.**

Engstrom testified that, following Gear Athletics' abandonment of the Westlake Building in April 2008 and cessation of rent payments in September 2008, Engstrom *did nothing* to find another tenant. RP (8/11/09) 177:20-178:2. That testimony alone proves that Engstrom did not fulfill its duty to mitigate at any point during the relevant period and, thus, was not entitled to recover past rent and CAM fees. *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn. App. 495, 503, 962 P.2d 824 (1997) ("the landlord is entitled to recover the rent that would be due for the remainder of the term ..., so long as the landlord makes an honest and reasonable attempt to relet the property"). There was no contrary evidence. Rather, Engstrom speculated that it would have been "almost impossible" to find another tenant, but that excuse was refuted by the testimony of Engstrom's own property manager, Brad Olson, who confirmed that the building "could have been leased to someone." RP (8/12/09) 370:11-14. Gear Athletics carried its burden of proof.

Engstrom ignores the testimony, and instead throws up several legal arguments to justify its failure to mitigate. None of it works. *First*, citing to *Metropolitan Nat. Bank v. Hutchinson Realty Co.*, 157 Wash. 522, 289 Pac. 56 (1930), Engstrom argues that the parties contractually waived Engstrom's duty to mitigate. But Section 13.2 of the Master Lease

doesn't say that. It says only that, upon the tenant's default, the landlord may *either* (i) terminate the lease, or (ii) re-enter without terminating the lease, and relet the premises on the tenant's account. Tr. Ex. 1. Engstrom has never taken the position that it considered the Master Lease terminated in April 2008 (or any other date) because, if it did, Engstrom would surrender its right to rent and CAM fees from that date. Rather, Engstrom concededly re-entered the Westlake Building without terminating the lease, and therefore had a duty to mitigate for Gear Athletics' benefit.

The *Metropolitan* case addresses a totally different kind of lease provision—one that permits a landlord to *both* terminate the lease *and* recover accruing rent through the end the lease. 157 Wash. at 529 (“lessor may cancel this lease ..., reenter said premises, but notwithstanding such re-entry by the lessor, the liability of the lessee for the rent ... shall not be extinguished”); *Hargis v. Mel-Mad Corp.*, 46 Wn. App. 146, 151, 730 P.2d 76 (1986) (“Landlord may ... declare the lease forfeited ..., re-enter the premises, ... but notwithstanding such re-entry by Landlord, the liability of Tenant for the rent ... shall not be extinguished”). Section 13.2(a) doesn't allow for termination and accruing liability. It requires the landlord to choose between the two. Engstrom chose the latter. In any event, the Supreme Court has held that even where the *Metropolitan* rule applies, the landlord still must make “honest and reasonable” efforts to

relet the premises. *Exeter Co. v. Samuel Martin, Ltd.*, 5 Wn.2d 244, 249-50, 105 P.2d 83 (1940) (“under a covenant such as that ..., the lessor is entitled to recover the rent reserved to the end of the term ..., provided it makes an honest and reasonable attempt to relet”) (citing *Metropolitan*).

*Second*, Engstrom argues that it had no duty to mitigate because Gear Athletics’ rent obligations under the Master Lease were part of the consideration it paid for Engstrom’s interest in Athletic Supply Company. It is true that the Master Lease was part of the consideration paid under the parties’ Asset Purchase Agreement. Tr. Ex. 51. But that is as far as it goes. Gear Athletics agreed only to become Engstrom’s tenant, subject to the rights and obligations set forth in the Master Lease and Washington law. Gear Athletics never agreed to pay Engstrom a sum certain in lieu of rent, and it certainly never waived its right to insist that Engstrom fulfill its duty to mitigate in the event of a default. Engstrom’s entire argument in this regard is further belied by the fact that, when the parties’ signed the Master Lease, they both expected Gear Athletics’ rent obligations to last for only two months. Tr. Ex. 1 (“the parties acknowledge that Landlord is under contract ... to sell the Property ... with a closing scheduled for June 30, 2006. If such closing occurs ..., this Lease Term will terminate”).

*Finally*, Engstrom argues that Gear Athletics’ mitigation argument is somehow “undercut” because Gear Athletics itself failed to mitigate

damages and/or would receive a windfall if this Court finds, as it should, that Gear Athletics proved its mitigation defense at trial. Putting aside the fact that Engstrom never raised these issues below, they don't make any sense. Those would be affirmative defenses that *Collegegear* could have asserted against Gear Athletics' claim in the first arbitration. They are not remotely relevant to affirmative defenses that *Gear Athletics* could and did assert against Engstrom's claims based on their separate landlord/tenant relationship and Engstrom's duty to mitigate. To be sure, Engstrom is hardly in a position to complain about an "unjustified windfall"; had Engstrom simply indemnified Gear Athletics for its own conduct, as it was required to do, Gear Athletics never would have stopped paying rent in the first place. Engstrom cannot avoid Gear Athletics' mitigation defense on the merits. This Court can and should reverse the trial court on this issue and vacate its judgment in Engstrom's favor.

**E. The Trial Court's Award Of Interest And Late Fees Was Not Supported By The Evidence.**

Gear Athletics showed in its opening brief (pp. 44-47) that, even if the judgment against it for past due rent and CAM charges is affirmed, the interest and penalty portion of that award (\$34,579.26 (CP 524)) must be reversed because it was (a) unsupported by the evidence and (b) calculated without first setting-off the \$50,000 in rent abatement awarded to Gear Athletics in arbitration. Engstrom offers no sound rebuttal to either point.

On the first point, Engstrom spends most of its time arguing that the judgment amount for past due rent and CAM charges was correct. But Gear Athletics did not challenge those figures on appeal. Rather, Gear Athletics argued that there was no exhibit or testimony supporting the \$34,579.26 *interest and penalty* award. Gear Athletics Br. at 45. Engstrom concedes the point, and cannot point to any evidence in the record evidencing that amount or the methodology to support it. Instead, and in violation of RAP 9.11, Engstrom asks the Court to consider a newly created chart appended to its brief that purportedly “validates” the trial court’s award. Engstrom Br. at 38-39 & Appendix 1. Engstrom’s new evidence should be stricken and, in any event, cannot serve to justify the trial court’s unsupported interest and penalty award post hoc.

On the second point, Engstrom likewise throws up a straw man. Gear Athletics did not argue that the court should have set-off the \$69,132 unpaid rent award by the \$50,000 arbitration award; there is no need since both judgments are separately enforceable. Gear Athletics’ Br. at 46 n. 8. What it did argue was that the court should have taken into account the \$50,000 rent abatement award when calculating *interest and penalties*, since Engstrom was not entitled to either based on rent which Gear Athletics never owed. On this issue, Engstrom does not even defend the court’s erroneous interest calculation; rather, it candidly admits that “the

trial court may be required to recalculate interest.” Engstrom Br. at 40. Engstrom does defend the penalty calculation, but its emphasis on when the Arbitration Decision was confirmed misses the point entirely. The arbitration established that Gear Athletics was entitled to rent abatement during the term of the lease (Tr. Ex. 18); yet the trial court calculated penalties for unpaid rent during the same period without affording Gear any credit for the abatement (CP 524). That too was error.

In sum, Engstrom failed to prove its claim for interest and penalties at trial, and it cannot do so for the first time on appeal. Even if the judgment otherwise stands, the trial court’s interest and penalty award must be reversed, and Engstrom should not get a second bite at the apple on remand to put on the evidence it should have put on in the first place.

**F. The Trial Court’s Attorney’s Fees Award Must Be Vacated.**

Gear Athletics argued that if this Court reverses the trial court’s erroneous indemnification and/or failure to mitigate rulings, then so too must it reverse the court’s attorney’s fee award. Gear Athletics’ Br. at 41-42. Reversal would either promote Gear Athletics to “prevailing party” status or, at a minimum, require a remand to reevaluate that issue in light of reversal. *See Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993) (“If neither party wholly prevails then the party who substantially prevails is the prevailing party, a determination that turns on the extent of

the relief offered the parties.”). Engstrom apparently agrees, for it offers no response to Gear Athletics’ argument in this regard. All Engstrom says is that, given the *existing* judgment, the trial court properly deemed it the prevailing party – a proposition that Gear Athletics did not dispute.

Even if the judgment stands, though, Engstrom isn’t satisfied. The trial court granted Gear Athletics’ motion for fees with respect to (1) its motion to compel arbitration, which was granted, and (2) the arbitration itself, which it won, but not (3) its opposition to Engstrom’s motion to vacate the Arbitration Decision, which Gear Athletics also won. CP 525. On cross-appeal, Engstrom argues that, because it ultimately received a judgment in its favor, the court erred in awarding Gear Athletics any fees. Engstrom Br. 42-43. Engstrom is right that the trial court’s fee award is erroneous, but for the opposite reason. As Gear Athletics argued in its opening brief (pp. 43-44), even if this Court otherwise affirms the judgment below, it must reverse the trial court’s refusal to award Gear Athletics the \$9,003 it incurred defeating Engstrom’s motion to vacate.

Both Gear Athletics’ appeal and Engstrom’s cross-appeal are controlled by *Marassi v. Lau*—a case Engstrom studiously ignores. In *Marassi*, this Court held that where there are “distinct and severable” claims, a “proportionality approach” is appropriate. 71 Wn. App. at 917. “A proportionality approach awards the plaintiff attorney fees for the

claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset.” *Id.* The trial court cited *Marassi* in its fee award (CP 525), and followed it—but only part way. Gear Athletics’ arbitrable rent abatement claim was “distinct and severable,” and Gear Athletics certainly prevailed on that claim at every stage. The trial court therefore properly followed *Marassi* and the parties’ attorney’s fee provision (Tr. Ex. 1, Section 16.13) when awarding Gear Athletics its fees for moving to compel arbitration of the rent abatement claim, and then winning at arbitration. CP 525.

But *Marassi* required more. Because Gear Athletics prevailed on its rent abatement claim, the proportionality rule required that it receive *all* the fees incurred prevailing on that claim. While the court was willing to award fees incurred compelling and winning the arbitration, it inexplicably refused to award fees incurred defending the arbitration award. There is no difference between the two; Gear Athletics was forced to incur fees at all stages to win its rent abatement claim. Indeed, Engstrom does not even defend the illusory distinction the trial court drew, but instead falls back on its primary argument that the Arbitration Decision was wrongly decided on the merits. Engstrom Br. at 42-43. For the reasons discussed above, that was and is no basis to vacate the award. Having confirmed the award, the trial court was obliged to award Gear Athletics its fees.

Engstrom's cross-appeal on the fees issue should be rejected. If this Court reverses the judgment below, it must likewise reverse the trial court's fee award. Under any circumstance, Gear Athletics is entitled to the fees it incurred defeating Engstrom's motion to vacate the Arbitration Decision.

#### IV. CONCLUSION

For the reasons set forth above and in Gear Athletics' opening brief, this Court should reverse the trial court's judgment and order it to (a) award Gear Athletics \$82,400 on its indemnification claim, (b) vacate Engstrom's \$147,460.62 damages award for failure to mitigate, and (c) vacate the attorney's fee award with directions to award fees to Gear Athletics based on the Court's opinion. Further, this Court should deny Engstrom's cross-appeal. The trial court's order and judgment confirming the Arbitration Decision should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of November, 2010.

LANE POWELL PC

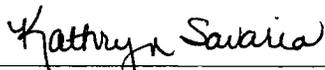
By   
Michael M. Fleming, WSBA No. 06143  
Ryan P. McBride, WSBA No. 33280  
*Attorneys for Appellants/Cross-Respondents*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 4, 2010, I caused to be served a copy of the foregoing **APPELLANTS/CROSS-RESPONDENTS' ANSWERING AND REPLY BRIEF** on the following person(s) in the manner indicated below at the following address(es):

Sylvia Luppert, Esq.  
Reaugh Oettinger & Luppert, P.S.  
1601 Fifth Avenue, Suite 2200  
Seattle, WA 98101-1651

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

  
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Kathryn Savaria