

65338-5

65338-5

No. 65338-5-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Appellants/Cross-Respondents

v.

ENGSTROM PROPERTIES, LLC,

Respondent/Cross-Appellant.

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

APPELLANTS/CROSS-RESPONDENTS' OPENING BRIEF

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

LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

2010 SEP -8 PM 1:28
FILED
CLERK OF COURT
DIVISION I
COURT OF APPEALS
STATE OF WASHINGTON

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	3
III. ISSUES PRESENTED	5
IV. STATEMENT OF THE CASE	7
A. Engstrom Leases The Westlake Building To Gear Athletics; The Master Lease Requires Engstrom To Indemnify Gear Athletics For Claims Arising From Engstrom’s Acts	7
B. Gear Athletics’ Subtenant Collegegear Sues Gear Athletics Over Water Intrusion Into the Westlake Building	8
C. Gear Athletics Sues Engstrom And Agrees To Arbitrate The Water Intrusion Issue With Collegegear; Engstrom Refuses to Participate In The Arbitration.....	10
D. Engstrom Refuses To Compensate Gear Athletics For Its Lost Rent Due To Water Intrusion; Gear Athletics Seeks To Arbitrate The Rent Abatement Issue.....	11
E. The Arbitration Panel Awards Gear Athletics \$50,000 In Rent Abatement For Loss Of Use Due To Water Intrusion.....	13
F. Gear Athletics Moves To Confirm The Arbitration Decision	15
G. The Trial Court Grants Gear Athletics’ Motion To Confirm The Arbitration Decision On The First Day Of Trial	16
H. The Parties’ Case Is Tried To The Bench.....	17

TABLE OF CONTENTS (Continued)

	<u>Page</u>
I. After A Prolonged Delay, The Trial Court Enters Its Findings Of Fact And Conclusions Of Law	20
J. Gear Athletics Moves To Amend The Findings Of Fact And Conclusions Of Law; The Court Amends Its Conclusions to Allow Gear Athletics A Limited Recovery Of Attorney’s Fees	22
K. The Trial Court Enters Final Judgment	23
V. ARGUMENT.....	25
A. The Trial Court Erred In Refusing To Award Gear Athletics Indemnification Under Section 8.5 Of The Master Lease	25
1. Section 8.5 Required Engstrom To Indemnify Gear Athletics For All Claims Arising From “Any Act of Landlord” And All Attorney’s Fees “Incurred In The Defense Of Any Such Claim”	26
2. Even If “Breach Or Default” Or Loss Of Use Were Prerequisites To Indemnification Under Section 8.5, The Arbitration Decision Precluded Engstrom From Denying Those Facts At Trial	30
B. The Trial Court Erred In Refusing To Consider And/Or Rejecting Gear Athletics’ Failure To Mitigate Defense.....	35
1. The Mitigation Issue Was Tried By Implied Consent Based On Engstrom’s Own Testimony	35

TABLE OF CONTENTS (Continued)

	<u>Page</u>
2. Gear Athletics Carried Its Burden of Proof On The Mitigation Issue	38
C. The Trial Court’s Attorney’s Fee Award Must Be Vacated Because Engstrom Was Not The Prevailing Party	41
D. The Trial Court’s Award Of Interest And Penalties Is Error Because It Contains No Offset For Rate Abatement.....	44
E. Gear Athletics Is Entitled To Attorney’s Fees On Appeal	47
VI. CONCLUSION	47

APPENDIX

Attachment A: Court’s Findings of Fact and Conclusions of Law (CP 430-443)

Attachment B: Order Upon Gear Athletics’ Motion to Amend Court’s Findings of Fact and Conclusions of Law (CP 498-499)

Attachment C: Final Judgment (CP 523-525)

TABLE OF AUTHORITIES

Page

CASES

<i>Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009)	36
<i>Cobb v. Snohomish County</i> , 86 Wn. App. 223, 935 P.2d 1384 (1997).....	38
<i>Crown Plaza Corp. v. Synapse Software Systems, Inc.</i> , 87 Wn. App. 495, 962 P.2d 824 (1997)	38, 39
<i>Eagle Point Condo. Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000).....	41
<i>Edmonson v. Popchoi</i> , 155 Wn. App. 376, 228 P.3d 780 (2010).....	26, 38
<i>Exeter Co. v. Samuel Martin, Ltd.</i> , 5 Wn.2d 244, 105 P.2d 83 (1940).....	39
<i>Fenton v. Contemporary Dev. Co.</i> , 12 Wn. App. 345, 529 P.2d 883 (1974).....	37
<i>Harding v. Will</i> , 81 Wn.2d 132, 500 P.2d 91 (1972).....	38
<i>Hargis v. Mel-Mad Corp.</i> , 46 Wn. App. 146, 730 P.2d 76 (1986).....	38, 39
<i>Hubbard v. Scroggin</i> , 68 Wn. App. 883, 846 P.2d 580 (1993).....	35
<i>Jensen v. Ledgett</i> , 15 Wn. App. 552, 550 P.2d 1175 (1976).....	37
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998).....	42
<i>Marine Enter., Inc. v. Sec. Pac. Trading Corp.</i> , 50 Wn. App. 768, 750 P.2d 1290 (1988).....	42

CASES (Continued)

	<u>Page</u>
<i>Meeker v. Howard</i> , 7 Wn. App. 169, 499 P.2d 53 (1972).....	37
<i>Newton Ins. Agency & Brokerage, Inc. v.</i> <i>Caledonian Ins. Group, Inc.</i> , 114 Wn. App. 151, 52 P.3d 30 (2002).....	30
<i>Neff v. Allstate Ins. Co.</i> , 70 Wn. App. 796, 855 P.2d 1223 (1993).....	30, 31, 33
<i>O'Kelley v. Sali</i> , 67 Wn.2d 296, 407 P.2d 467 (1965).....	36, 37
<i>Rainier Nat'l Bank v. Lewis</i> , 30 Wn. App. 419, 635 P.2d 153 (1981).....	36
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997).....	42
<i>Robinson v. Hamed</i> , 62 Wn. App. 92, 813 P.2d 171 (1991).....	31, 33, 34
<i>Sharbono v. Universal Underwriters Ins. Co.</i> , 139 Wn. App. 383, 161 P.3d 406 (2007).....	26
<i>State v. R.J. Reynolds Tobacco Co.</i> , 151 Wn. App. 775, 211 P.3d 448 (2009).....	47
<i>Transpac Dev., Inc. v. Oh</i> , 132 Wn. App. 212, 130 P.3d 892 (2006).....	42

STATUTES, REGULATIONS AND COURT RULES

	<u>Page</u>
RAP 18.1	47
CR 15(b)	35, 36, 37

I. INTRODUCTION

This case arises from a lease dispute between Appellant/Cross-Respondent Gear Athletics, LLC, f/k/a Alki Sports, LLC (“Gear Athletics”) and Respondent/Cross-Appellant Engstrom Properties, LLC (“Engstrom”) in connection with a building leased by Engstrom to Gear Athletics. When the basement of the building began to suffer significant water intrusion, Gear Athletics and its subtenant complained to Engstrom who, as landlord, was required to promptly remedy the problem. After Engstrom failed to do so, the subtenant sued Gear Athletics who, in turn, sued Engstrom based on an indemnification provision in the parties’ lease. An arbitrator eventually determined that the water intrusion issue had partially damaged the building and awarded the subtenant tens of thousands of dollars in rent abatement. Still, Engstrom refused to indemnify Gear Athletics for its lost rent or the attorneys’ fees it incurred litigating the subtenant’s action.

Left with no choice, Gear Athletics stopped paying rent in an effort to offset its damages and continued to prosecute its indemnification claim against Engstrom. As with the subtenant’s claim, the trial court ordered Gear Athletics and Engstrom to arbitrate the issue of rent abatement. Not surprisingly, the three-member arbitration panel came to the same conclusion as the first arbitrator: unremedied water intrusion had partially

damaged the building, and that Gear Athletics was entitled to substantial rent abatement from Engstrom. When the trial court confirmed the arbitration award, Gear Athletics believed the parties' dispute was largely resolved. But Engstrom had other ideas that would ultimately lead the trial court to make the multiple errors underlying this appeal.

The trial court's fundamental mistake was that it misunderstood the preclusive effect of the arbitration award on the parties' subsequent bench trial. Instead of finding that the award conclusively resolved Gear Athletics' indemnification claim, the court allowed Engstrom to re-litigate the very same facts and issues decided against it at arbitration. That violated the doctrine of collateral estoppel and, worse yet, unfairly prejudiced Gear Athletics—who properly relied on the binding nature of the arbitration when presenting its case at trial. The trial court accepted Engstrom's one-sided evidence, and found (contrary to the arbitrators' earlier findings) that the building had not been partially damaged by water intrusion. As a result, the court rejected Gear Athletics' indemnification claim and found in favor of Engstrom on its counterclaim for past due rent. That was error, as was the trial court's derivative finding that Engstrom was the prevailing party for purposes of attorneys' fees.

The trial court compounded that error when it ignored uncontested evidence that further undermined Engstrom's counterclaim. During cross-

examination, Engstrom admitted that it had done nothing to satisfy its duty to mitigate after Gear Athletics abandoned the building and stopped paying rent. Engstrom offered no evidence to counter that admission, nor did it ask for a continuance to find any such evidence. Nevertheless, the trial court rejected Gear Athletics' mitigation defense on the grounds that Gear Athletics had not asserted it in its written pleadings. In so doing, the trial court erroneously ignored the purpose and effect of CR 15(b), which allows amendments to pleadings to conform to the evidence at trial—particularly where, as here, the evidence is introduced without objection. For this and other reasons as well, the trial court's judgment was error.

II. ASSIGNMENTS OF ERROR

Gear Athletics makes the following assignments of error:

1. The trial court erred when it concluded that Gear Athletics did not prevail on its claim against Engstrom for indemnification under Section 8.5 of the parties' lease agreement. CP 430-443 (Findings of Fact ("FF") and Conclusions of Law ("CL"), at CL ¶¶ 2-9); CP 498-499 (order denying motion to amend FFs and CLs); CP 523-525 (final judgment).¹

¹Gear Athletics has elected to comply with the requirements of RAP 10.3(g) and 10.4(c) by including a copy of the trial court's findings and conclusions, order upon Gear Athletics' motion to amend the findings and conclusions and final judgment as an Appendix to this brief.

2. The trial court erred when it refused to afford preclusive effect, under the doctrine of collateral estoppel, to the facts and issues decided in the prior arbitration between the parties; when it permitted Engstrom to re-litigate those facts and issues at trial; and when it entered findings and conclusions contrary to the arbitration decision. CP 430-443 (FF ¶¶ 16-24, 26-28, 38, 40; CL ¶¶ 3-8, 21); RP (8/10/09) at 115:14-116:6; RP (8/11/09) 134:21-135:22; CP 498-499 (order denying motion to amend FFs and CLs); CP 523-525 (final judgment); CP 557-558 (order granting motion for clarification).

3. The trial court erred when it either refused to consider and/or rejected on the merits Gear Athletics' failure to mitigate defense, and when, as a result, it concluded that Gear Athletics had breached the lease and entered final judgment in favor of Engstrom on that issue. CP 430-443 (CL ¶¶ 16-19, 22); CP 498-499 (order denying motion to amend FFs and CLs); CP 523-525 (final judgment).

4. The trial court erred when it concluded that Engstrom was the prevailing party entitled to attorney's fees pursuant to Section 16.13 of the parties' lease, and when it entered judgment awarding fees to Engstrom. CP 430-443 (CL ¶ 21); CP 498-499 (order denying motion to amend FFs and CLs); CP 523-525 (final judgment).

5. The trial court erred when it refused to award Gear Athletics its attorney's fees or, at the very minimum, the attorney's fees it incurred successfully defeating Engstrom's motion to vacate the prior arbitration decision. CP 523-525 (final judgment).

6. The trial court erred when it entered judgment in favor of Engstrom that included interest and penalties on unpaid rent without first reducing the amount due as a set-off for the rent abatement award Gear Athletics received in the parties' arbitration. CP 523-525 (final judgment).

III. ISSUES PRESENTED

1. Did the trial court err when it concluded that Gear Athletics was not entitled to indemnification from Engstrom pursuant to Section 8.5 of the parties' lease when:

a. the trial court required Gear Athletics to prove that Engstrom was in "breach or default" of the lease, but the lease merely required Gear Athletics to show that it was forced to defend claims "arising from any act of [Engstrom]";

b. the undisputed evidence at trial proved that Gear Athletics paid substantial damages and attorney's fees defending claims brought by its subtenant for acts and omissions solely attributable to Engstrom, including claims based on Engstrom's alleged failure to remedy water intrusion on the premises; and

c. the trial court refused to apply collateral estoppel to the parties' prior arbitration—which the court confirmed prior to trial—in which the arbitrators had specifically found that Gear Athletics' subtenant suffered a loss of use of the premises due to water intrusion problems that Engstrom failed to remedy?

2. Did the trial court err when it rejected Gear Athletics' mitigation defense on the grounds that it was not set forth in the pleadings and/or Gear Athletics failed to carry its burden of proof on the issue when:

a. Gear Athletics did not have a good faith basis to assert the defense until Engstrom's principal Steve Engstrom raised the issue at trial;

b. Civil Rule 15(b) specifically allows amendments to the pleadings to conform to the evidence at trial, particularly where, as here, the evidence is admitted without objection; and

c. Engstrom admitted that he did nothing to attempt to re-let the property after Gear Athletics abandoned it and stopped paying rent, but instead, assumed control of the property in order to conduct extensive environmental remediation for the benefit of a future buyer?

3. Did the trial court err in concluding that Engstrom, and not Gear Athletics, was the prevailing party and awarding it attorney's fees pursuant to Section 16.13 of the lease?

4. Even if Gear Athletics was not the prevailing party, did the trial court err in refusing to award Gear Athletics attorney's fees for successfully defeating Engstrom's motion to vacate the parties' prior arbitration decision?

5. To the extent Engstrom was entitled to recover any lease damages, did the trial court err in awarding interest and penalties on past due rent without first reducing the total amount of rent due to reflect the rate abatement award Gear Athletics received in the parties' arbitration, which the court confirmed prior to trial?

IV. STATEMENT OF THE CASE

A. Engstrom Leases The Westlake Building To Gear Athletics; The Master Lease Requires Engstrom To Indemnify Gear Athletics For Claims Arising From Engstrom's Acts.

Engstrom is the owner of a commercial building at 224 Westlake Avenue in Seattle (the "Westlake Building"). On May 1, 2006, Gear Athletics and Engstrom entered into a lease agreement in which Gear Athletics agreed to lease the Westlake Building until December 31, 2008 (the "Master Lease"). CP 115-136 (Master Lease); *also* Tr. Ex. 1. Under the Master Lease, Engstrom was responsible for the repair of any

“structural, [and] foundation ... damage” to the Westlake Building. CP 119 (Master Lease, Section 7.3(a)). The Master Lease further provided that, “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.” CP 122 (Master Lease, Section 9.5).

To the extent Gear Athletics’ was forced to defend claims or pay damages arising from Engstrom’s failure to comply with either of the foregoing provisions, Section 8.5 provided in relevant part:

Indemnity. ... Landlord shall indemnify and hold harmless Tenant from and against any and all claims arising from any breach or default in the performance of any of Landlord’s obligations under the terms of this lease or arising from any act of Landlord, or any of Landlord’s agents or employees, and from and against all costs, reasonable attorneys’ fees, expenses and liabilities incurred in the defense of any such claim or any action or proceeding brought thereon.

CP 121. Gear Athletics’ appeal primarily addresses the trial court’s refusal to require Engstrom to indemnify Gear Athletics for damages and attorney’s fees Gear Athletics incurred defending claims based on Engstrom’s failure to remedy water intrusion into the Westlake Building.

B. Gear Athletics’ Subtenant Collegegear Sues Gear Athletics Over Water Intrusion Into The Westlake Building.

On September 8, 2006, Gear Athletics subleased the Westlake Building to company named Collegegear.Com (“Collegegear”). CP 4. The sublease was expressly made subject to “all terms, covenants and

conditions contained in” the Master Lease between Gear Athletics and Engstrom. CP 5. In late 2007, Collegegear informed Gear Athletics that it had experienced water intrusion into the basement of the Westlake Building, and that it believed this water had caused the growth of mold. CP 32. Gear Athletics reported Collegegear’s complaints to Engstrom, but Engstrom failed to permanently remedy the problem. *Id.*

This lawsuit began on December 19, 2007 when Collegegear sued Gear Athletics in King County Superior Court alleging that Gear Athletics breached the sublease agreement by, among other things, “[p]ermitting flooding” and the “growth of mold and other toxic substances,” in the basement of the Westlake Building. CP 5-6. Gear Athletics answered the complaint and counterclaimed. CP 8-17. Among other defenses, Gear Athletics stated that Collegegear’s claims were subject to an express arbitration clause contained in the parties’ sublease agreement. CP 9.

While the suit was pending, Collegegear abandoned the sublease in April 2008 and ceased paying the \$15,000 per month sublease rent payments to Gear Athletics. CP 432 (CL ¶ 10). At that point, Engstrom changed the locks to the building and paid to have the building prepared for sale. RP (8/11/09) 174-77. Despite the loss of its sublease income, and the fact that it turned control of the building back to Engstrom, Gear Athletics continued to pay Engstrom the approximately \$20,000 per month

rent and common area maintenance (“CAM”) charges due under the Master Lease from May through August 2008. CP 432 (CL ¶ 12).

C. Gear Athletics Sues Engstrom And Agrees To Arbitrate The Water Intrusion Issue With Collegegear; Engstrom Refuses To Participate In The Arbitration.

Soon after Collegegear abandoned the Westlake Building, on May 8, 2008, Gear Athletics filed a third-party complaint against Engstrom. CP 30-34. In that complaint, Gear Athletics alleged that, to the extent Gear Athletics was found to have breached the sublease agreement with Collegegear because of Engstrom’s acts or omissions, and was required to pay damages or abate Collegegear’s rent as a result, Engstrom likewise must be found liable to Gear Athletics for breach of the Master Lease. CP 32-33; CP 180-181 (amended third-party complaint). Engstrom answered and denied liability. CP 35-37; CP 173-76.

Meanwhile, Gear Athletics and Collegegear agreed to mediate and, if unsuccessful, arbitrate the issue of whether Collegegear’s rent should be abated as a result of the water intrusion. CP 105 (Jan. 7, 2009 Fleming Decl., ¶ 2). Because that same issue was the predicate of Gear Athletics’ third-party complaint against Engstrom for indemnification, and involved Engstrom’s alleged failure to remedy “structural, foundation ... damage” to the Westlake Building (CP 119 (Master Lease, Section 7.3(a)), Gear

Athletics invited Engstrom to participate—but Engstrom refused. *Id.* (¶ 3); CP 69-70 (Dec. 21, 2008 Luppert Decl., ¶ 1); CP 435 (CL ¶ 35).

Gear Athletics and Collegegear arbitrated the water intrusion issue on August 29, 2008 in front of former Judge Terrence Carroll. CP 137.

Judge Carroll found, among other things:

1. The leased premises suffered water intrusion beginning in November of 2006. This condition should have been remedied within a reasonable time, and at least by March of 2007. ...

3. While these actions did not rise to the level of constituting a constructive eviction, they did sufficiently disturb the Lessee's right to quiet enjoyment as to justify a reasonable abatement of the rent due under the Lease.

5. Beginning April 1, 2007 and running until December 31, 2008, the termination date of the Lease, Lessee shall be granted an offset of \$3,000 per month for those 21 months for a total offset of \$63,000.

CP 137 (*also* Tr. Ex. 48). Because the arbitration resolved the dispute between Collegegear and Gear Athletics, the parties stipulated to Collegegear's dismissal from the case on October 14, 2008. CP 60-62.

D. Engstrom Refuses To Compensate Gear Athletics For Its Lost Rent Due To Water Intrusion; Gear Athletics Seeks To Arbitrate The Rent Abatement Issue.

Thereafter, Gear Athletics asked Engstrom to indemnify it for the \$63,000 that it had lost in rental income from Collegegear as a result of the water intrusion and other issues, along with its attorney's fees, for which Engstrom was responsible under the Master Lease. Engstrom

refused. CP 105 (Jan. 7, 2009 Fleming Decl., ¶ 5). Because the amount Engstrom owed Gear Athletics exceeded the rent and CAM charges that would come due over the remaining four months of the lease, beginning in September 2008, Gear Athletics stopped paying rent to Engstrom to offset its damages. CP 111; CP 432 (CL ¶ 12). Engstrom responded by filing a counterclaim and fourth-party claim against Chad Baerwaldt (a guarantor on the Master Lease) for past due rent and CAM charges. CP 63-66.

Left with no alternative but to litigate, on December 11, 2008, Gear Athletics demanded Engstrom arbitrate the rent abatement issue pursuant to an arbitration clause contained in the Master Lease. CP 138-139. The clause provided in relevant part:

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

CP 128 (Master Lease, Section 16.12). As noted above, Section 9 of the Master Lease required Engstrom to abate the rent “in proportion to the degree to which tenant’s reasonable use of the Premises is substantially impaired.” CP 122 (Master Lease, Section 9.5); *also* Tr. Ex. 1.

Engstrom refused to arbitrate. CP 74. Instead, it filed a “Motion for Determination of Arbitrability” with the trial court to stay arbitration on the theory that the arbitration clause required the parties to arbitrate the

“extent” of abatement, but not the “right” to abatement. CP 99-103. Engstrom argued that, despite his finding of water intrusion and rent abatement in favor of Collegegear, Judge Carroll did not actually decide that anyone’s use of the Westlake Building had been impaired. *Id.* For its part, Gear Athletics urged the trial court to compel arbitration. CP 107-114. The court agreed with Gear Athletics, and “direct[ed] the parties to proceed to arbitration under the Lease.” CP 148-149.

E. The Arbitration Panel Awards Gear Athletics \$50,000 In Rent Abatement For Loss Of Use Due To Water Intrusion.

Pursuant to the trial court’s order, the parties’ agreed upon a three-member arbitration panel consisting of experienced real estate appraisers. Arbitration was held on April 8, 2009. CP 186 (June 12, 2009 Fleming Decl., ¶ 2); CP 227 (June 23, 2009 Luppert Decl., ¶ 2). The parties provided the panel with briefs, made arguments, presented exhibits, called witnesses and conducted cross-examination. The parties, counsel and panel members also made a site visit to the Westlake Building. CP 228, 231 (¶¶ 4, 14-17); RP (8/10/09 (motion)) 25:9-26:8. To Engstrom’s chagrin, while at the building, the panel observed dampness in the basement which Engstrom could not explain. CP 231 (¶ 15).²

² Incredibly, hours after the arbitration had ended, counsel for Engstrom sent an email to the panel explaining that one of Engstrom’s witnesses had experienced a revelation regarding the dampness: “it came
(continued . . .)

After the hearing was closed, just as Judge Carroll had found in the prior arbitration between Collegegear and Gear Athletics, the arbitrators found that the Westlake Building had suffered water intrusion and that Gear Athletics was entitled to rate abatement. In a written award entitled “Rent Abatement Decision” (the “Arbitration Decision”), the panel stated:

[T]he majority of arbitrators have concluded that the premises were partially damaged due to water intrusion issues that became apparent in November 2006, and that the Tenant [Gear Athletics] is due Abatement of Rent provided in Section 9.5 from the Landlord [Engstrom] in the amount of \$50,000.

CP 187-188 (*also* Tr. Ex. 18). The arbitrators apportioned the arbitration costs between the parties, but specifically reserved the issue of legal fees to the trial court. *Id.* As discussed below, the court would ultimately award Gear Athletics fees for prevailing at the arbitration, but not for successfully defeating Engstrom’s motion to vacate the award. CP 525.

Based on testimony elicited during the arbitration to the effect that Engstrom knew about, but failed to disclose, the water intrusion issue at the time the Master Lease was signed, Gear Athletics moved to amend its complaint against Engstrom to add claims for fraudulent inducement and negligent misrepresentation. CP 158-164. The trial court granted the

(. . . continued)

to him that the floor had been washed[.]” CP 236-237. Gear Athletics objected to Engstrom’s *post hoc* hearsay evidence. *Id.* The panel informed Engstrom that no new evidence would be considered. CP 354.

motion (CP 171-172), and Gear Athletics promptly filed an amended third-party complaint with these additional claims. CP 177-182.

F. Gear Athletics Moves To Confirm The Arbitration Decision.

Two months passed, and Engstrom neither paid the \$50,000 award nor its share of the arbitration panel's expenses. Accordingly, on June 12, 2009, Gear Athletics moved to confirm the Arbitration Decision. CP 213-216. Engstrom opposed the motion and cross-moved to vacate the award. CP 217-226. Engstrom repeated its earlier argument that the parties did not agree to arbitrate "liability" for rent abatement, only the "extent" of abatement. Engstrom also argued that the award was "procured by undue means" because the panel considered inadmissible evidence, improper argument, and that one of the panel members was biased. *Id.*

In response, Gear Athletics pointed out that the court had already rejected Engstrom's arguments regarding the scope of the arbitration clause; that the arbitration proceedings were fair; that no error appeared on the face of the award; and that there was no evidence to remotely suggest that the Arbitration Decision was tainted by bias. CP 249-263. The hearing on Gear Athletics' motion to confirm was set for July 1, 2009, but was postponed when Engstrom filed a motion for summary judgment, which the trial court ultimately denied. CP 360-361.

G. The Trial Court Grants Gear Athletics' Motion To Confirm The Arbitration Decision On The First Day Of Trial.

This delay affected Gear Athletics' preparations for the August 10, 2009 trial. If the court confirmed the Arbitration Decision, Gear Athletics believed such a ruling would largely resolve its indemnification claim and Engstrom's counterclaim for unpaid rent—leaving only Gear Athletics' fraud claims ripe for trial. If, on the other hand, the court vacated the award, then the parties would have to re-litigate the issues of water intrusion and loss of use; additional witnesses would have to be called, including, in particular, Collegegear representatives to corroborate the facts underlying Judge Carroll's and the panel's arbitration decisions.

Gear Athletics specifically raised this dilemma with the trial court when the court's bailiff asked for an estimate of the length of the trial:

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 most likely spill over into the following week. ...

This response is not an attempt to effect the Courts process in evaluating or ruling on the pending motions but rather explain[s] that the rulings may have a significant impact on the preparation for trial in terms of the issues left to be resolved by the Court.

CP 464-466. Notwithstanding this uncertainty, the trial court did not hear Gear Athletics' motion to confirm until August 10, 2009—the morning of the first day of trial. Following brief argument, the court confirmed the

Arbitration Decision, and entered an “Order and Judgment” in favor of Gear Athletics in the amount of \$50,000 plus interest. CP 362-363.

H. The Parties’ Case Is Tried To The Bench.

Gear Athletics’ Right To Indemnification. In addition to its fraud claims, Gear Athletics’ primary theory at trial was that, under Section 8.5 of the Master Lease, Gear Athletics was entitled to indemnification for the damages and attorney’s fees it incurred defending Collegegear’s claims. The uncontroverted testimony, as well as Judge Carroll’s arbitration award in favor of Collegegear on the rent abatement issue, proved that Gear Athletics lost \$63,000 in rental income from Collegegear due to water intrusion and other issues for which Engstrom was solely responsible under the Master Lease. The evidence was likewise undisputed that Gear Athletics was forced to incur \$19,400 in legal fees and expenses defending and arbitrating Collegegear’s claims. RP (8/10/09) 58:24-60:18; 68:3-69:22; 73:11-19; RP (8/12/09) 443:7-447:18; 450:11-452:20; Tr. Ex. 48.

Engstrom Re-litigates Loss of Use. Engstrom argued that Gear Athletics was not entitled to indemnity under Section 8.5 because there had been no breach of the Master Lease; specifically, that there was no serious water intrusion problem, and that Collegegear had suffered no loss of use of the premises as a result. RP (8/10/09) 24:21-25:17; RP (8/13/09) 614:24-620:6; 628:9-630:6. But those issues had been litigated and

decided in Gear Athletics' favor in the Arbitration Decision the trial court confirmed prior to trial. CP 187-188 (Tr. Ex. 18); CP 362-363. After all, in abating Gear Athletics' rent under Section 9.5, the arbitrators necessarily determined that Collegegear's "reasonable use of the Premises [was] substantially impaired ... because of Landlord's failure to carry out its obligations under Article 7.3(a)." CP 122 (Master Lease, Section 9.5).

Engstrom ignored the Arbitration Decision, and proceeded to put on evidence in an attempt to disprove what the arbitrators (and Judge Carroll) previously found. Gear Athletics objected to the re-litigation of the water intrusion and loss of use issues, but the trial court overruled the objection, stating, "there are other reasons that testimony could be relevant aside from those direct issues." RP (8/10/09) at 115:14-116:6; RP (8/11/09) 134:21-135:22. By the end of trial, however, it was clear that the court had accepted the premise that Engstrom could re-litigate the issues and facts previously decided in the parties' binding arbitration.

Specifically, during closing argument, the court and Gear Athletics' counsel had the following exchange:

THE COURT: How did any water intrusion that actually occurred – so whatever it was, how did that negatively affect Gear's business or [Collegegear's]?

MR. FLEMING: Well, obviously, Gear wasn't there. The arguments that were made in the two arbitrations, first, the–

THE COURT: I don't want to talk about what someone else – how someone else viewed this.

MR FLEMING: Okay. Well –

THE COURT: So I just want to talk about what the evidence is. ...

THE COURT: So I want to – does anyone know how [Collegear's] business was adversely damaged by any water intrusion, whatever it was?

RP (8/13/09) 597:19-598:16. In explaining why Gear Athletics called no Collegear representative to testify about how water intrusion resulted in loss of use, counsel for Gear Athletics told the court:

I didn't think calling [them] was necessary because we've had two rulings already. 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. Remarkably, at that point, the trial court insisted that counsel for Gear Athletics describe the evidence that the arbitrators considered during the arbitration proceedings. RP (8/13/09) 599:9-605:7.

Engstrom Admits Failure To Mitigate. In cross-examination, Engstrom's principal admitted that Engstrom did nothing to find a new tenant for the Westlake Building from April 2008, when Collegear vacated the building, through the end of Gear Athletics' lease, including the final four months of the year for which Gear Athletics paid no rent. RP (8/10/11) 177:20-178:2. Engstrom also admitted that in November and December 2008, it undertook aggressive environmental remediation in

the building's basement to prepare it for sale to a prospective buyer. *Id.* at 178:3-179:4. Both Engstrom and his property manager testified that, despite the work, the property could have been re-leased, had Engstrom made an effort to do so. *Id.* at 179:21-180:8; RP (8/12/09) 369:14-370:14.

Thereafter, Gear Athletics presented the court with a supplemental brief on a commercial landlord's duty to mitigate. CP 374-378. Gear Athletics argued that Engstrom's own admissions proved conclusively that Engstrom failed to mitigate, thereby extinguishing Gear Athletics liability for lease damages. *Id.*; RP (8/13/09) at 593-595. Several days after trial, Engstrom filed a declaration from one of its lawyers contradicting Engstrom's trial testimony. CP 384-385. Gear Athletics filed a motion to strike the declaration (CP 386-392), which the court granted. CP 428-429.

I. After A Prolonged Delay, The Trial Court Enters Its Findings Of Fact And Conclusions Of Law.

A week after trial, the parties submitted proposed findings of fact and conclusions of law. CP 397-410; CP 411-421. Then they waited. Finally, on November 25, 2009—two and a half months after the end of trial—the trial court entered its Findings of Fact and Conclusions of Law. CP 430-443. In addition to the rulings discussed below, the court found that Gear Athletics' fraudulent concealment and misrepresentation claims were barred by the economic loss rule and, in any event, that Gear

Athletics had not proven the elements of fraud. CP 441-442 (CL ¶¶ 12-15). Gear Athletics does not challenge that ruling on appeal.

Gear Athletics' Indemnification Claim. The trial court rejected Gear Athletics' claim that Engstrom breached Section 8.5 of the Master Lease when it failed to indemnify Gear Athletics for the damages and fees it incurred defending Collegegear's claims. Although the court recognized that Judge Carroll had abated Collegegear's rent by \$63,000 as a result of water intrusion (CP 436 (CL ¶ 37); Tr. Ex. 48), and that Engstrom bore ultimate responsibility under the Master Lease for damages of that kind (CP 432 (FF ¶ 14)), it refused to pass on Gear Athletics' damages to Engstrom. The court also refused to order Engstrom to indemnify Gear Athletics for any portion of the \$19,400 in legal fees it had incurred litigating the water intrusion issue with Collegegear. CP 525 (judgment).

As foreshadowed during trial, the court rejected Gear Athletics' indemnification claim based on a purported lack of evidence showing that Collegegear's claim "arose from a breach or default of Engstrom Properties." CP 439 (CL ¶ 2). The court ignored the Arbitration Decision on the grounds that the "panel made no determination of loss of use" (CP 426, ¶ 40)—although the panel could not have awarded rent abatement in the absence of such a finding. Starting from a clean slate, the court found

insufficient evidence that water intrusion had disrupted Collegear's use of the Westlake Building. CP 434 (FF ¶¶ 22, 27 & 28); CP 440 (CL ¶ 8).

Engstrom's Counterclaim for Rent and CAM Charges. Not only did the trial court refuse to award Gear Athletics damages in connection with the rent abatement issue, it concluded that Engstrom was entitled to a judgment against Gear Athletics for the total amount of unpaid rent and CAM charges over the final four months of the lease, without any set-off to account for the Arbitration Award. CP 441-442 (CL ¶¶ 11, 16-19). In so holding, the court also rejected Gear Athletics' mitigation defense. CP 443 (CL ¶ 22). Not surprisingly, the court concluded that Engstrom was the prevailing party, and that it was entitled to recover fees and expenses associated with the trial. *Id.* (CL ¶ 21). The court invited the parties to submit proposed judgments consistent with its findings. *Id.* (CL ¶ 24).

J. Gear Athletics Moves To Amend the Findings Of Fact And Conclusions Of Law; The Court Amends Its Conclusions To Allow Gear Athletics A Limited Recovery Of Attorney's Fees.

Gear Athletics moved to amend the trial court's Findings of Fact and Conclusions of Law. CP 444-455. Gear Athletics pointed out, among other errors, that many of the court's findings, its ultimate conclusions regarding Gear Athletics' right to indemnification and/or set-off, and its determination that Engstrom was the "prevailing party," ignored the binding and preclusive effect of the Arbitration Decision. *Id.* The court

rejected most of Gear Athletics' arguments, but agreed that its Conclusions of Law must be amended to allow Gear Athletics to recover attorney's fees on those matters on which it prevailed. CP 498-499.

Thereafter, on January 28, 2010, Gear Athletics submitted a motion and declaration to support an award of fees. CP 508-519; CP 520-522. Gear Athletics' request was divided into several parts. It sought:

- (1) \$8,840 incurred mediating with Engstrom and successfully defeating Engstrom's motion to stay arbitration;
- (2) \$14,878 incurred preparing for and participating in the arbitration that resulted in the Arbitration Decision in Gear Athletics' favor;
- (3) \$9,003 incurred successfully defeating Engstrom's motion to vacate the Arbitration Decision;
- (4) \$16,797 incurred successfully defeating Engstrom's motion for summary judgment; and

Id. Gear Athletics also repeated its request that the court order Engstrom to indemnify Gear Athletics for the \$19,400 in attorney's fees it incurred litigating the water intrusion issue against Collegegear. *Id.*

K. The Trial Court Enters Final Judgment.

Again the parties waited. Finally, on April 23, 2010—nearly three months later and more than eight months after trial—the trial court entered a final judgment, which contained additional findings and conclusions to support its attorney's fee award. CP 523-525. The court awarded Engstrom \$147,460.62 on its counterclaim. Of this amount, \$69,132.00

was for unpaid rent from September through December 2008, \$43,749.36 was for unpaid CAM charges through the end of the lease, and \$34,579.26 was for interest and late penalties. *Id.* As discussed below, no testimony or trial exhibit supported the final category of damages, which the trial court apparently lifted from Engstrom’s proposed form for final judgment.

The court did not offset any of these amounts by the \$50,000 Gear Athletics was awarded as rent abatement in the Arbitration Decision (or, for that matter, the \$63,000 plus fees that Gear Athletics believed it was entitled on its indemnification claim). In an apparent effort to explain the inconsistency, in a footnote, the court added that its “confirmation of the arbitration amount was done *pre*trial and without the full benefit of the testimony, credibility determinations, and all evidence. Nor did arbitration establish any loss of use of the premises.” CP 525 (emphasis in original).

Regarding attorney’s fees, the court awarded Engstrom \$67,700.64 as the prevailing party, although it did award Gear Athletics fees for a “few distinct matters wherein Gear Athletics initially prevailed.” CP 523-525. Specifically, the court awarded Gear Athletics fees for successfully forcing Engstrom to arbitrate, and prevailing at the arbitration, but nothing else. Incredibly, the court refused to award Gear Athletics the fees it incurred defeating Engstrom’s motion to vacate the Arbitration Decision,

finding that Engstrom motion, “although denied, was reasonabl[y] made give the absence of evidence to support Gear Athletics’ claims ...” *Id.*

Both parties timely appealed. CP 526-550 (Gear Athletics notice of appeal); CP 551-556 (Engstrom’s notice of cross-appeal). In post-judgment proceedings, the trial court confirmed that its judgment confirming Arbitration Decision “remains separately enforceable,” but in a final apparent effort to explain why it allowed Engstrom to re-litigate issues decided in the arbitration, it added that, “the arbitration panel award is, however, of *de minimis* evidentiary value” CP 557-558.

V. ARGUMENT

A. The Trial Court Erred In Refusing To Award Gear Athletics Indemnification Under Section 8.5 Of The Master Lease.

The trial court concluded that “in order for Gear Athletics to obtain indemnification ... it is required to prove that [Collegegear’s] claim arose from a breach or default of Engstrom Properties.” CP 439 (CL ¶ 2). The court concluded that Gear Athletics failed to meet that standard because it failed to prove that Engstrom was in “breach or default” of the Master Lease, or that there was any “substantial loss of use” of the premises by Gear Athletics’ subtenant, Collegegear. CP 439-440 (CL ¶¶ 3-8). The court supported those conclusions with multiple findings regarding the alleged lack of water intrusion or loss of use in the premises by Collegegear. CP 433-434 (FF ¶¶ 16-18, 20-24, 26-28).

The trial court's conclusions were erroneous as a matter of law, and its findings irrelevant given the parties' prior binding arbitration, which the trial court confirmed—and entered judgment on—prior to trial. As explained below, Section 8.5 of the Master Lease did not require Gear Athletics to prove that Engstrom was in “breach or default” in order to receive indemnification. But even if it did, Gear Athletics had the proof. The Arbitration Decision was *res judicata* on Engstrom, and the trial court was not free to ignore the arbitrators' findings or substitute its own.

1. Section 8.5 Required Engstrom To Indemnify Gear Athletics For All Claims Arising From “Any Act Of Landlord” And All Attorney’s Fees “Incurred In The Defense Of Any Such Claim.”

The trial court either misconstrued or ignored the language and meaning of Section 8.5. This Court reviews conclusions of law *de novo*. *Edmonson v. Popchoi*, 155 Wn. App. 376, 382, 228 P.3d 780 (2010). Where, as here, interpretation does not depend on extrinsic evidence, interpretation of a contract is also a question of law reviewed *de novo*. *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 783, 211 P.3d 448 (2009) (citations omitted). Section 8.5 of the Master Lease provided:

Indemnity. ... Landlord shall indemnify and hold harmless Tenant from and against any and all claims *arising from any breach or default in the performance of any of Landlord's obligations under the terms of this lease or arising from any act of Landlord*, or any of Landlord's agents or employees, and from and against all costs, reasonable attorneys' fees, expenses and liabilities incurred

in the defense of any such claim or any action or proceeding brought thereon.

Tr. Ex. 1 (emphasis added). By its unambiguous terms, Section 8.5 required Engstrom to indemnify Gear Athletics for *either* “claims arising from any breach or default” by Engstrom, “or” claims “arising from any act of” Engstrom. The clause is equally clear that Engstrom must also indemnify Gear Athletics for “all costs, reasonable attorneys’ fees, expenses and liabilities incurred in the defense of any such claim ...” *Id.*

The court’s conclusion of law that Gear Athletics was “required to prove that [Collegegear’s] claim arose from a breach or default of Engstrom,” recited the first type of claim triggering a duty to indemnify, “breach or default,” but inexplicably omitted the second, “any act of Landlord.” CP 439-440 (CL ¶ 2). The court’s ensuing conclusions likewise focused improperly on whether there was a “breach or default” by Engstrom. *Id.* (CL ¶ 3 (“Engstrom ... did not breach its obligations to repair or replace”); CL ¶ 4 (“Engstrom ... did not breach any obligation to repair”); CL ¶ 5 (“Engstrom ... was not in default”); CL ¶ 8 (“Absent a substantial loss of use ..., the Lease contains no right to rent abatement”); CL ¶ 10 (“Engstrom ... did not breach a covenant of quite enjoyment”)).

Although most of those conclusions are erroneous in their own right because they impermissibly contradict the Arbitration Decision (*see* Section A.2), the evidence overwhelmingly proved that Gear Athletics

was entitled to indemnification because Collegegear's claims against Gear

Athletics arose from Engstrom's "act[s]." Specifically:

- Collegegear's complaint against Gear Athletics, which began this action, was based on claims that the Westlake Building had suffered unremediated water intrusion, damaging Collegegear's merchandise (CP 4 (¶¶ 6, 7, 15)). Under the terms of the Master Lease, which were expressly incorporated into Collegegear's sublease with Gear Athletics, Engstrom was responsible for failing to prevent or remedy the water intrusion problem. CP 5 (¶¶ 10-12, 15); Tr. Ex. 1 (Section 7.3(a) ("Landlord shall be responsible for the repair ... of structural, foundation ... damage to the Premises"))).
- Collegegear likewise claimed that Engstrom unreasonably demanded access to the building for inspection purposes contrary to the incorporated provisions of the Master Lease. CP 5 (¶¶ 8, 14, 15).
- Gear Athletics' representatives provided uncontroverted testimony at trial that Collegegear's claims, which Gear Athletics was forced to defend at the August 2008 arbitration before Judge Carroll (which Engstrom refused to participate in) were all based on Engstrom's acts. RP (8/10/09) 60:7-18; 68:3-69:7; RP (8/12/09) 450:11-451:16 ("Everything was the result of the landlord, being Engstrom Properties, LLC - - it was in regards to their conduct.").
- That testimony was corroborated by a January 2008 letter from Collegegear's attorneys to Engstrom and Gear Athletics, which Engstrom introduced at trial without objection, complaining about, among other things, "water intrusion and mold issues" and "continued attempts by the Landlord to obtain access to the Premises." Tr. Ex. 44; RP (8/12/09) 385:5-23.
- Finally, of course, Judge Carroll's arbitration award itself, which the trial court also admitted, demonstrated that Gear Athletics had been forced to defend claims stemming from Collegegear's allegations that "water intrusion ... should

have been remedied within a reasonable time,” and it had been “subjected to continued demands for access to the leased premises which exceeded reasonable requests.” Tr. Ex. 48; RP (8/12/09) 443:7-447:18.

The evidence regarding the basis for Collegegear’s claims was undisputed. Thus, whether or not Engstrom was in “breach or default”—and, indeed, whether or not there was actually water intrusion or unreasonable demands for access—Gear Athletics was entitled to indemnification because Collegegear’s claims unquestionably arose from “any act of Landlord,” and not any act or omission on Gear Athletics’ part.

Nor was there any dispute at trial about how much indemnification Gear Athletics was owed. The evidence, including Judge Carroll’s arbitration award, showed that Gear Athletics suffered \$63,000 in damages (amount of sublease rent abated by Judge Carroll), and incurred \$19,400 in attorney’s fees, defending Collegegear’s claims, for a total of \$82,400. Tr. Ex. 48; RP (8/10/09) 69:8-22; 73:11-19; RP (8/12/09) 451:17-452:20.³ Engstrom did not dispute either number. In short, the trial court’s conclusion that Engstrom was not liable to Gear Athletics under Section 8.5 was error, and not supported by substantial evidence. This Court should reverse that conclusion, and order the trial court to enter judgment in favor of Gear Athletics in the amount of \$82,400.

³ In its post-trial request for fees, Gear Athletics confirmed the \$19,400 figure by memorandum and declaration. CP 509-510; 520-522.

2. Even If “Breach Or Default” Or Loss Of Use Were Prerequisites To Indemnification Under Section 8.5, The Arbitration Decision Precluded Engstrom From Denying Those Facts At Trial.

The trial court’s rejection of Gear Athletics’ indemnification claim was error for another reason. Even if, as the court improperly found, Gear Athletics was required to prove “a breach or default of Engstrom,” CP 439 (CL ¶ 2), proof of “breach or default” was conclusively established by the Arbitration Decision, which the trial court confirmed by judgment before the start of trial. CP 362-363. By the same token, the court erred by permitting Engstrom to re-litigate issues previously decided in arbitration (water intrusion and loss of use) and, to make matters worse, by entering numerous findings that conflicted with the Arbitration Decision. CP 433-434 (FF ¶¶ 16-18, 21-24, 26-28). The Arbitration Decision was binding on the parties and the trial court, and the issues decided therein were not subject to dispute or re-litigation. For this reason too, Gear Athletics is entitled to indemnification under Section 8.5 of the Master Lease.

This Court has repeatedly and consistently held that the doctrine of collateral estoppel bars re-litigation of issues previously decided in binding arbitration. *See Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 161, 52 P.3d 30 (2002); *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 799-801, 855 P.2d 1223

(1993); *Robinson v. Hamed*, 62 Wn. App. 92, 96-100, 813 P.2d 171

(1991). For the doctrine to apply, the following elements must be met:

(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party whom the doctrine is to be applied.

Neff, 70 Wn. App. at 800. There is no issue that the third element is met, as Engstrom was a party to, and participated in, the parties' April 8, 2009 arbitration. The remaining three elements are satisfied as well.

Identical Issues. The trial court ordered the parties to arbitrate pursuant to Section 16.12 of the Master Lease, as reflected on the face of the Arbitration Decision. CP 187-188; Tr. Ex. 18. That section requires arbitration regarding the "extent of rent abatement under Section 9" of the Master Lease. CP 204; Tr. Ex. 1 (Master Lease, Section 16.12(b)). Section 9, in turn, provides that: "[i]f the Premises are Partially Damaged, the rent ... shall be abated in proportion to the degree to which Tenant's reasonable use of the Premises is substantially impaired." CP 198; Tr. Ex. 1, Section 9.5. This provision is specifically triggered by the "Landlord's failure to carry out its obligations under Article 7.3(a)." *Id.*

In short, Gear Athletics was entitled to rent abatement only if Engstrom's breach of Section 7.3(a) caused partial damage to and substantially impaired Gear Athletics' (or, here, Collegegear's) use of the

premises.⁴ In finding against Engstrom, that is necessarily what the arbitrators found. Indeed, on its face, the Arbitration Decision states that “the majority of arbitrators have concluded that the premises were partially damaged due to water intrusion issues ... and that [Gear Athletics] is due Abatement of Rent provided in Section 9.5[.]” CP 187-188; Tr. Ex. 18. Therefore, contrary to the trial court’s finding (CP 436 (FF ¶ 40), the arbitrators decided the very same issues (water intrusion and loss of use) that the trial court later decided at trial. CP 432-444 (FF ¶¶ 14-28 (“Findings RE Water Intrusion”)); CP 439-440 (CL ¶¶ 3-8).⁵

Final Judgment on the Merits. There can be no serious dispute on this element either. The trial court confirmed the Arbitration Decision prior to trial in an “Order and Judgment,” which provided that the “arbitration award of April 9, 2009 is confirmed *and judgment is hereby entered in favor of Gear Athletics and against Engstrom Properties ...*” CP 362-363 (emphasis added). Under the Washington Arbitration Act, that judgment could be “recorded, docketed, and enforced as any other

⁴ The panel’s finding was not surprising. Judge Carroll, in the earlier arbitration between Gear Athletics and Collegegear on the same issues, had similarly found “the leased premises suffered water intrusion ... [that] sufficiently disturb[ed] the Lessee’s right to quiet enjoyment as to justify a reasonable abatement of the rent due.” Tr. Ex. 48; CP 137.

⁵ In arguing that the Arbitration Decision should be vacated, counsel for Engstrom conceded this very point: “And there can be no entitlement to rent abatement under the lease unless there’s a substantial loss of the reasonable use of the premises.” RP (8/10/09 (motion)) 34:6-9.

judgment in a civil action.” RCW 7.04A.250(1). Lest there be any doubt on this point, in post-trial proceedings, the trial court confirmed the enforceability of the “Order and Judgment” as a judgment. CP 557-558.

Collateral Estoppel Does Not Work An Injustice. This final requirement “focuses primarily on whether the prior adjudication offered a full and fair hearing on the issue.” *Robinson*, 62 Wn. App. at 100. A party receives a full and fair hearing if the arbitrators afford an opportunity for argument, submission of evidence, and examination and cross-examination of witnesses. *Id.*; *Neff*, 70 Wn. App. at 801-802. Engstrom did all of these things when aggressively defending its position at the April 2009 arbitration. CP 228-231; RP (8/10/09 (motion)) 25:9-26:8. Notably, in confirming the Arbitration Decision, the trial court specifically considered and rejected Engstrom’s argument that the arbitration was somehow unfair or that Engstrom was prevented from making its case. CP 217-226 (Engstrom’s motion to vacate); RP (8/10/09 (motion)) 39:10-41:12 (court’s oral ruling); CP 362-363 (Judgment and Order).

Nor is there injustice simply because Engstrom was able to prove at trial what it could not prove at arbitration. On the contrary, the different result is not surprising and, if anything, shows why collateral estoppel is needed to *prevent* injustice. Gear Athletics justifiably relied on the preclusive effect of the Arbitration Decision when presenting its case, and

that is why it did not call anyone from Collegegear to testify about water intrusion and loss of use. CP 464-466; RP (8/13/09) 599:2-7.⁶ For the trial court to then enter a rash of findings against Gear Athletics based on Engstrom’s one-sided evidence—and to criticize Gear Athletics for failing to present evidence of its own (CP 433 (§ 20))—highlights its error. None of those findings can stand, and certainly none of them can stand in the way of the facts previously established at arbitration.

Finally, the trial court apparently believed that the Arbitration Decision was like any other piece of evidence, noting at one point that “award is ... of *de minimis* evidentiary value[.]” CP 557-558. But the Arbitration Decision was a judgment, not evidence of what occurred at the arbitration. The whole point of *res judicata* is that it bars reconsideration of evidence on issues decided in a previous proceeding. Refusal to apply the doctrine where it applies is *per se* error. *Robinson*, 62 Wn. App. at 103. Whatever the court came to think about the arbitration, it could not confirm the Arbitration Decision on the one hand and ignore its preclusive effect on the other. For these reasons as well, the trial court’s rejection of Gear Athletics’ indemnification claim was error and must be reversed.

⁶ Engstrom pressed this point, and sought to exploit Gear Athletics’ reliance on the binding nature of the Arbitration Decision during closing argument: “I find it ... very significant that Gear Athletics called no witnesses from Collegegear” RP (8/13/09) 628:9-10.

B. The Trial Court Erred In Refusing To Consider And/Or Rejecting Gear Athletics' Failure To Mitigate Defense.

Turning to Engstrom's counterclaim, the trial court concluded that Gear Athletics breached the Master Lease by failing to pay Engstrom rent from September through December 2008, plus CAM charges, interest and penalties accruing since April 2008. CP 442-443 (CL ¶¶ 16-19); *also* CP 438 (FF ¶¶ 51, 55). In so holding, the court rejected Gear Athletics' mitigation defense, concluding that "Gear Athletics is not entitled to any set off for any failure to mitigate by Engstrom Properties because a) Gear Athletics did not plead nor answer failure to mitigate as an affirmative defense and b) the relative burden of proof on the issue." CP 443 (CL ¶ 22). The trial court erred in both respects; it should have considered and accepted Gear Athletics' mitigation defense, which Gear Athletics overwhelmingly proved through Engstrom's own admissions at trial. This Court should reverse the trial court and vacate the judgment of \$147,460.62 in lease damages awarded to Engstrom. CP 524.

1. The Mitigation Issue Was Tried By Implied Consent Based On Engstrom's Own Testimony.

Gear Athletics did not raise failure to mitigate in its pleadings. It simply had no good faith basis to do so—that is, until the midst of trial. CR 15(b) allows the amendment of pleadings to conform to the evidence presented at trial, including affirmative defenses. *Hubbard v. Scroggin*, 68

Wn. App. 883, 889, 846 P.2d 580 (1993); *Rainier Nat'l Bank v. Lewis*, 30

Wn. App. 419, 423, 635 P.2d 153 (1981). The rule states:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

CR 15(b) rulings are reviewed for abuse of discretion. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 483, 209 P.3d 863 (2009). But, “when the evidence, introduced with the express or implied consent of the parties, fairly raises compatible, though alternative, issues, the trial court is **duty bound** to adjudicate the issues ... even though such issues may not have been directly raised by the pleadings.” *O’Kelley v. Sali*, 67 Wn.2d 296, 298-299, 407 P.2d 467 (1965) (emphasis added).

As discussed below, during the second day of trial, Steve Engstrom admitted that he did not attempt to re-let the Westlake Building after Gear Athletics abandoned the premises. RP (8/11/09) 177-178. When evidence

raising an issue beyond the pleadings is admitted without objection, the pleadings are deemed amended. *Jensen v. Ledgett*, 15 Wn. App. 552, 555, 550 P.2d 1175 (1976); *Fenton v. Contemporary Dev. Co.*, 12 Wn. App. 345, 349, 529 P.2d 883 (1974); *Meeker v. Howard*, 7 Wn. App. 169, 175, 499 P.2d 53 (1972). Here, there was no objection; it was Engstrom's own testimony. Gear Athletics later filed a "pocket" brief on the issue (CP 374-378) and argued failure to mitigate during closing argument. RP (8/13/09) 593-595; 645-646. Again, Engstrom did not object, nor did it ask for a continuance. *See* CR 15(b) ("The court may grant a continuance to enable the objecting party to meet such evidence.").⁷

In sum, Engstrom invited Gear Athletics' mitigation defense by injecting it into the trial, and then doing nothing to refute it. The trial court was "duty bound," *O'Kelley, supra*, to consider the issue. Certainly, Engstrom can hardly claim surprise about something that was within his personal knowledge all along and which he first volunteered at trial. The trial court abused its discretion in relying on Gear Athletics' written pleadings to ignore this critical issue. CR 15(b) was designed to prevent that very kind of "tyranny of formalism," and permit implicit amendment

⁷ Only after trial did Engstrom object to Gear Athletics' mitigation defense and offer counter evidence, which the court properly denied as too late. CP 380-385; CP 428-429.

of 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).

2. Gear Athletics Carried Its Burden Of Proof On The Mitigation Issue.

Not only should the trial court have considered Gear Athletics’ mitigation defense, it should have found in Gear Athletics’ favor on the issue. To the extent the trial court concluded that Gear Athletics did not carry its “burden of proof” (CP 443 (CL ¶ 22)), that finding is not supported by substantial evidence. *Edmonson*, 155 Wn. App. at 382-383 (findings must be supported by substantial evidence). To be sure, failure to mitigate is an affirmative defense, for which Gear Athletics had the burden of proof. *See Cobb v. Snohomish County*, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997). But Gear Athletics easily satisfied that burden through Engstrom’s uncontroverted admissions on the issue.

Under Washington law, when a tenant abandons the premises, a landlord is required to mitigate the tenant’s damages by re-letting either for the “tenant’s account” or for the landlord’s “own account.” *Hargis v. Mel-Mad Corp.*, 46 Wn. App. 146, 151, 730 P.2d 76 (1986). As to the former, “[w]hen a tenant abandons property, 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.” *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn.

App. 495, 503, 962 P.2d 824 (1997) (citing *Exeter Co. v. Samuel Martin, Ltd.*, 5 Wn.2d 244, 249, 105 P.2d 83 (1940)). As to the later, if a landlord re-enters and assumes control of the premises for his own benefit, the lease will be deemed terminated and all liability for unaccrued rent generally ends. *Hargis*, 46 Wn. App. at 151.

There is no dispute that the Westlake Building was left vacant following Collegegear's departure in April 2008, at which time Engstrom re-keyed the building. RP (8/11/09) 165:20-166:2. Nor is it disputed that Gear Athletics stopped paying rent after August 2008. CP 432 (FF ¶ 12). At no point, however, did Engstrom make "an honest and reasonable attempt to relet the property." *Crown Plaza*, 87 Wn. App. at 503. On the contrary, Steve Engstrom admitted that he did nothing to mitigate:

Q. So you didn't make any attempts to list or - -

A. It's a 36,000-foot building. It's almost impossible to find a tenant to take that building over for a six-month period of time. It just takes too much effort from a tenant's standpoint to obligate themselves for such a short period of time.

Q. Okay. So you didn't - you didn't make any attempts?

A. Not to my knowledge.

RP (8/11/09) 177:20-178:2. Moreover, to the extent Engstrom believed six months was too short a period to re-let the building, that limitation was

entirely self-imposed; Engstrom had a deal to sell the building to a new buyer on January 1, 2009. *Id.* at 174:21-175:22.

Not only did Engstrom do nothing to re-let the Westlake Building on Gear Athletics' account, Engstrom re-entered the premises on its "own account," terminating the lease. Undisputed testimony from Engstrom and its property manager established that during November and December 2008, Engstrom undertook environment remediation at the premises in preparation for the January 1, 2009 closing. *Id.* at 178:3-179:4; RP (8/12/09) 369:14-370:14. On two occasions, underground fuel tanks were removed—a process that required the jackhammering and excavation of concrete and soil in the building's basement, followed by the cutting of the tanks into pieces for removal through the alley. *Id.* All this was done for Engstrom's sole benefit, and was inconsistent with its continued recognition of Gear Athletics' rights under the Master Lease.

In short, the uncontroverted evidence proved that Engstrom did nothing whatsoever to mitigate its purported damages from April 2008 onward and, indeed, that Engstrom itself treated the lease as terminated no later than November 2008. The trial court's rejection of Gear Athletics' mitigation defense, and its award of \$147,460.62 in lease damages to Engstrom, was error and must be vacated for this reason too.

C. The Trial Court's Attorney's Fee Award Must Be Vacated Because Engstrom Was Not The Prevailing Party.

The trial court concluded that Engstrom was the prevailing party in the action and awarded it \$67,700.64 attorney's fees under Section 16.13 of the Master Lease. CP 443 (CL ¶ 21); CP 523-525 (findings and conclusions in support of fee award). That provision provides:

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

Tr. Ex. 1 (Master Lease, Section 16.13). Whether a party is a "prevailing party" is a mixed question of law and fact that this Court reviews under an error of law standard. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). The trial court's multiple errors rendered its "prevailing party" analysis flawed. Either Gear Athletics is the prevailing party or, at a minimum, the trial court must reconsider the issue on remand. In any event, Gear Athletics is entitled to the fees it incurred defeating Engstrom's motion to vacate the Arbitration Decision.

The trial court's fee award was predicated on its determination that (1) Gear Athletics was not entitled to indemnification under Section 8.5 of the Master Lease, and (2) Gear Athletics was not entitled to a set-off as a result of Engstrom's failure to mitigate. For the reasons described above,

both rulings are wrong and must be reversed. In that event, Gear Athletics is the “prevailing party” because it, and not Engstrom, will be the only party to receive an affirmative judgment in its favor. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). This Court should therefore vacate the fee award in Engstrom’s favor, and order the trial court to award Gear Athletics all of its attorney’s fees pursuant to Section 16.13.

Even if this Court finds in favor of Gear Athletics only on its indemnification claim, it should still reverse the fee award. It is well-established that if neither party wholly prevails, the determination of who is the prevailing party depends on the extent of relief accorded. *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217-19, 130 P.3d 892 (2006); *Marine Enter., Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988). As discussed above, judgment in Gear Athletics’ favor on the indemnification claim will offset Engstrom’s \$147,460.62 damages award—which is overstated (*see* Section D)—by \$82,400. If so, both parties will have prevailed on major issues and the net judgment in Engstrom’s favor will be severely reduced. In that case, the trial court should be required to reevaluate “prevailing party” status and enter new written findings and conclusions on the issue consistent with this Court’s opinion. *See Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

At the very minimum, and even if this Court leaves the trial court's liability findings intact, it must reverse the court's refusal to award Gear Athletics the fees it incurred defeating Engstrom's motion to vacate the Arbitration Award. As noted above, Gear Athletics successfully moved the court to compel arbitration, and then prevailed at the arbitration. CP 148-149; CP 187-188 (Tr. Ex. 18). Pursuant to Section 16.13 of the Master Lease, the trial court properly awarded Gear Athletics its fees for those efforts. CP 525. Inexplicably, however, the trial court refused to award Gear Athletics the fees it incurred defeating Engstrom's subsequent motion to vacate the Arbitration Decision—stating that Engstrom's motion “although denied, was reasonable ... given the absence of evidence to support Gear Athletics' claims” *Id.*

That conclusion was both legally and factually erroneous. Legally, the trial court had no discretion to deny Gear Athletics these fees. Section 16.13 states that if a party brings an action to enforce the terms of the Master Lease, then the prevailing party “shall” be entitled to its reasonable attorney's fees. Tr. Ex. 1. There is no distinction between the fees Gear Athletics incurred successfully moving to compel arbitration (which the court awarded) and the fees it incurred successfully preserving the fruits of that arbitration (which the court denied); they were two sides of the same coin, and both were necessary to enforce the lease's arbitration clause.

Simply put, the trial court could not rule in Gear Athletics' favor on the motion to vacate and then ignore Section 16.13's plain terms.

The factual premise of the trial court's ruling was unsound too. The court apparently believed, based on the "absence of evidence" at trial, that the arbitrators reached the wrong result. But as explained above, and as Gear Athletics told the court, Gear Athletics did not present evidence regarding water intrusion and loss of use because those issues had been decided by the arbitrators. CP 464-466; RP (8/13/09) 599:2-7. Like its ruling on indemnification, the court's fee award demonstrates its mistaken belief that collateral estoppel did not apply to the Arbitration Decision. It did, and Gear Athletics was not required to re-litigate those issues. Even if the court later came to regret its decision to confirm the Arbitration Decision, it could not seek to "make things right" by refusing to award Gear Athletics attorney's fees as required by the Master Lease. Gear Athletics is entitled to the \$9,003 it incurred defeating Engstrom's motion to vacate the Arbitration Decision. CP 508-522 (fee request).

D. The Trial Court's Award Of Interest And Penalties Is Error Because It Contains No Offset For Rate Abatement.

As discussed above, the trial court's award of lease damages must be reversed (or at least offset) because Gear Athletics proved its indemnification claim and mitigation defense at trial. But even if this Court concludes otherwise, the interest and penalty portion of the court's

damages award still must be reversed. As noted, the court awarded Engstrom \$112,881.46 for unpaid rent and CAM charges, plus an additional \$34,579.26 in interest and penalties purportedly due on that base amount under the Master Lease. CP 524. While the lease does call for interest and penalties, the court's judgment cannot stand because it (a) is unsupported by the evidence and (b) fails to set-off the amount awarded to Gear Athletics' by the Arbitration Decision.

To begin with, the final judgment award of \$34,579.26 for interest and penalties (\$12,821.75 + \$21,757.51) is not based on any testimony or exhibit adduced at trial and, thus, not supported by substantial evidence. The closest is Trial Exhibit 19, which purports to identify interest and penalties through April 2009, four months prior to trial. But neither that exhibit nor Engstrom's testimony refer to the interest and penalty figures listed in the final judgment; nor do they describe any methodology by which those amounts can be derived. *See* RP (8/13/09) 526:15-539:13; Tr. Ex. 19. Rather, it appears that—months after trial—Engstrom submitted a proposed form of judgment containing the figures, which the court simply transposed onto the final judgment without additional findings. Of course, Engstrom's proposed order is not evidence, and cannot serve as the basis of the court's unsupported award of interest and penalties.

Equally problematic, it is clear based on the sheer amount of the award (as well as Trial Ex. 19) that Engstrom—and the trial court—calculated interest and penalties for unpaid rent without applying any credit for the \$50,000 rent abatement awarded to Gear Athletics. As noted above, the trial court confirmed the Arbitration Decision’s award of rent abatement in favor of Gear Athletics, and entered judgment thereon in the amount of \$50,000 plus interest. CP 362-363. Yet, the final judgment does not incorporate that prior judgment, nor does it set off the \$50,000 against the \$69,132.00 awarded to Engstrom for unpaid rent. CP 523-525.⁸ As a result, the trial court’s award of interest and penalties was improperly based on the entire \$69,132.00 amount without any reduction to reflect the \$50,000 credit for rent abatement.⁹ The Arbitration Decision concluded that Engstrom was not entitled to that \$50,000 in rent and, therefore, the trial court could not award interest and penalties on that

⁸ In post-judgment proceedings, the trial court reconciled its failure to set-off the \$69,132.00 rent award in favor of Engstrom by the \$50,000.00 rent abatement award in favor of Gear Athletics when it held that the two judgments were separately enforceable. CP 557-558. That ruling, however, does nothing to cure the improper calculation of interest and penalties on the un-abated rent award.

⁹ It also appears that the interest and penalty award was improperly calculated using a base amount that included certain property management fees and attorney’s fees, which the trial court separately determined were not recoverable by Engstrom as CAM charges. *See* CP 442 (CL ¶ 20). Again, there is nothing in the record or the trial court’s findings and conclusions upon which to determine the actual basis for the interest and penalty award, or whether these charges are improperly included therein.

amount under the Master Lease. Even if otherwise affirmed, the portion of the final judgment allotted to interest and penalty under the Master Lease must be reversed for this reason as well.

E. Gear Athletics Is Entitled To Attorney's Fees On Appeal.

Pursuant to RAP 18.1(a) and (b), this Court may award attorney's fees and expenses, upon request, if permitted by "applicable law." "[I]n general, where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal." *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007). As noted above, the Master Lease entitles the prevailing party in any action thereunder, "on trial and/or appeal," to an award of attorney's fees. CP 129 (Master Lease, Section 16.13); Tr. Ex. 1. If this Court reverses any part of the trial court's final judgment in Engstrom's favor (and/or rejects Engstrom's expected cross-appeal), Gear Athletics is entitled to an award of reasonable attorney's fees and expenses.

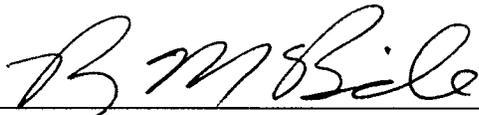
VI. CONCLUSION

For the reasons set forth above this Court should reverse the trial court's judgment and (a) order it to award Gear Athletics \$82,400 because Gear Athletics prevailed on its indemnification claim, (b) vacate its award in favor of Engstrom for lease damages in the amount \$147,460.62 because Engstrom failed to mitigate its damages, (c) vacate its attorney's

fee award and order it to award Gear Athletics all its fees as the prevailing party or, at a minimum, award Gear Athletics the fees it incurred successfully defeating Engstrom's motion to vacate the arbitration award.

RESPECTFULLY SUBMITTED this 8th day of September, 2010.

LANE POWELL PC

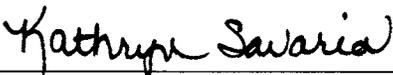
By 
Michael M. Fleming, WSBA No. 06143
Ryan P. McBride, WSBA No. 33280
Attorneys for Appellants/Cross-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2010, I caused to be served a copy of the foregoing **APPELLANTS/CROSS-RESPONDENTS' OPENING 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**



Kathryn Savaria

APPENDIX

ATTACHMENT A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

COLLEGE GEAR.COM, INC., a
Washington corporation,

Plaintiff/Counterdefendant,

v.

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

Defendant/Counterclaimant, Third
Party Plaintiff,

v.

ENGSTROM PROPERTIES, LLC,

Third Party Defendant, Fourth Party
Plaintiff,

v.

CHAD BAERWALDT,

Fourth Party Defendant.

NO. 07-2-39870-8 SEA

COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter was tried without jury before the undersigned judge of the above-entitled Court, the Plaintiff represented by Michael Flemming, the defendant by Sylvia Luppert. The Claims tried were those between Gear Athletics LLC and Engstrom Properties LLC. The Claims Between Collegegear.com, Inc. (AKA Feelgood) and Gear Athletics had been previously resolved.

1
2 The Court heard witnesses' testimony, reviewed the signed lease, all photographic and
3 documentary and exhibits admitted into evidence, and heard closing arguments by learned
4 counsel. The parties subsequently filed revised proposed findings of fact and conclusions of
5 law, as invited by the Court. Gear Athletics filed a post-trial pleading re duty to mitigate, and
6 Engstrom filed a response and new declaration testimony. The Court granted the motion to
7 strike evidence that was submitted after the parties had rested their respective cases.

8 Having considered the foregoing, along with pertinent legal authority, the Court now
9 makes and enters the following findings of fact and conclusions of law.
10

11 **I. FINDINGS OF FACT**

12 **A. GENERAL FINDINGS.**

13 1. On May 01, 2006, Engstrom Properties LLC and Alki Sports LLC, now known
14 as Gear Athletics, entered into a (Master) Lease Agreement for the leased premises. The lease
15 term ran from May 1, 2006 through December 31, 2008 for the property located at 224
16 Westlake Avenue North, Seattle, WA (the Premises). Exhibit 1, § 1.

17 2. Engstrom Properties is the Landlord and Gear Athletics is the Tenant in the
18 Lease. Steve Engstrom is a licensed CPA in the State of WA and experienced commercial
19 businessperson. Mark Baerwaldt, Gear Athletics' lease negotiator, is an highly experienced,
20 educated businessperson and very knowledgeable about commercial leases and negotiations.
21

22 3. Execution of the Lease was part of the consideration for Gear Athletics'
23 purchase of Engstrom's interest in the Athletic Supply Company. Exhibit 51. The
24 shareholders of Athletic Supply Company were Steve Engstrom and Michael Lambert and their
25 spouses. Steve Engstrom is the manager and, with his wife, the member/owners of Engstrom
26 Properties LLC.

1 4. The member manager of Gear Athletics is Chad Baerwaldt. Michael Lambert is
2 currently a member of Gear Athletics.

3 5. The Premises had been previously occupied by Athletic Supply Company.

4 6. Engstrom informed Gear Athletics of the possibility that the sale of the building
5 may be finalized in two months time. This contingency was made part of the written lease.

6 7. The Lease is fully integrated. Exhibit 1, ¶ 16.5

7 8. The base rent under the Lease is \$17,283 monthly. In addition, Gear Athletics
8 agreed to pay all taxes and insurance as additional rent and the costs of operating, maintaining,
9 and repairing the Premises, all utility charges, pest control, lighting systems, fire detection,
10 security services, and landscape maintenance. Exhibit 1, ¶¶ 5.3, 5.4.

11 9. The building was not sold and Gear Athletics proceeded to enter into a sublease
12 agreement with Feelgood Networks, Inc. (AKA, Collegegear.com) for the same period as the
13 Master lease.

14 10. Feelgood eventually vacated the leased premises as of March 31, 2007 and
15 unilaterally stopped paying any rent or CAM charges pursuant the sublease.

16 11. Gear Athletics did not provide written notice to Landlord specifying wherein
17 Engstrom Properties failed to perform any obligation under the Lease, pursuant 16.6.

18 12. Gear stopped paying rent after August 20-08.

19 13. Engstrom entered into a new purchase and sale agreement with a company titled
20 Investco with a scheduled closing date of December 31, 2008.

21 **B. FINDINGS RE WATER INTRUSION.**

22 14. Under the Master Lease, 7.3(a), the Landlord is responsible for the repair of
23 structural, foundation, outside wall, roof, roof covering, and sewer line damage to the premises,
24 except to the extent such damage is caused by the act or omission of the tenant.
25
26

1 15. Gear Athletics moved out of the Premises approximately one month after the
2 Lease commenced. On September 6, 2006 Gear Athletics sublet the premises to Feelgood
3 Networks, for the remainder of the Lease term, through December 31, 2008. Exhibit 47.

4 16. On November 13, 2006, during a heavy rainstorm, Chad Baerwaldt was notified by
5 Feelgood that water was coming into the basement of the Premises. Chad Baerwaldt
6 telephoned Steve Engstrom to report the water intrusion. Engstrom went immediately to the
7 Premises and found a small area of water puddling on the basement floor. He cleaned the water
8 up with a few towels. Chad Baerwaldt responded within a week.

9 17. Engstrom made numerous efforts to determine the cause of the water intrusion. By the
10 end of November 2006, Engstrom Properties retained Brad Olson of BCOre as a property
11 manager for the Premises with an initial task of repairing the water leak. Olson retained a
12 roofing company to repair the suspected cause of water intrusion, a gap between the Premises
13 and the party wall with the building next door.

14 18. On the evening of December 14, 2006, before the roof repair was complete,
15 another heavy rain occurred. Olson sent an email to owner David Turnbull of Feelgood to
16 inquire about water intrusion. Turnbull, in response, claimed that the basement was "flooding."
17

18 Feelgood also complained of "mold" which did not prove accurate.

19 19. Olsen testified that Turnbull was "difficult to communicate with."
20

21 20. At trial, Gear Athletics did not present the testimony of any Feelgood
22 representative.

23 21. Olson went to the Westlake building the next morning to observe the conditions.
24 He saw a large quantity of dry t-shirts strewn across the basement floor, and one damp t-shirt.
25 Exhibits 29-33. In the NE corner of the stairwell, he observed a small (1x1) quantity of
26

1 puddled water. Exhibit 34. Olson did not witness evidence of a "flood", or other signs of
2 water intrusion into the basement.

3 22. There was insufficient evidence presented that the water intrusion in November
4 and December 2006 actually disrupted Feelgood's—or Gear Athletics--use of the Premises.

5 23. The roof repair was completed by early January 2007. Following the roof repair
6 neither Feelgood nor Gear Athletics notified Engstrom Properties or Brad Olson of any further
7 water intrusion.
8

9 24. Chad Baerwaldt testified that he personally witnessed "water on the floor." Mr.
10 Baerwaldt's testimony was compromised when he allowed--after questioning--that it was only
11 during the later walk-thru with the real estate panel that he had "witnessed" water.

12 25. Gear continued to pay its rent, pursuant the lease terms, through August 2008.

13 26. In November 2007, Olson observed an area on the basement floor where water
14 might have puddled. He notified Gear Athletics and sought access to the Premises to further
15 investigate and make any repairs necessary. Exhibit 39.

16 Initially, Feelgood would not permit Engstrom Properties to enter to investigate or
17 repair. In January 2008, Olson and his subcontractor determined that a valve connected to the
18 sprinkler system was dripping on the floor. The valve was repaired promptly.
19

20 27. The two incidents of water intrusion in November and December 2006 and the
21 discovery of the leaking sprinkler system valve (13 ft apart) in November 2007 are the only
22 proven incidents of water intrusion during the period of Gear Athletics' tenancy from May
23 2006 through December 2008.

24 28. Feelgood's use of the Premises between September 2006 and March 31, 2008,
25 when it voluntarily vacated, was not impaired by any substantial damage to the Premises. The
26 photographic evidence does not support Feelgood's claims.

1 C. **FINDINGS RE QUIET ENJOYMENT.**

2 29. The Master Lease allows Engstrom reasonable access with notice. 16.14.
3 Throughout Feelgood's subtenancy Engstrom Properties sought access to the building to
4 inspect the Premises for lease compliance, maintenance, repairs, and insurance inspections.
5 Engstrom Properties also made requests for access to show the Premises to a prospective
6 purchaser.

7 30. Feelgood denied some of Engstrom Properties' access requests-- such as for
8 drilling holes--and granted others.

9 31. Engstrom Properties' access to the Premises during the term of the lease was not
10 unreasonable.

11 32. Engstrom Properties' numerous *requests* for access to the Premises did not
12 cause a substantial loss of use of the Premises or render the Premises uninhabitable.

13 33. There is insufficient evidence that Feelgood's quiet enjoyment was unlawfully
14 disrupted by demands for access, both refused and granted.

15 **D. FINDINGS RE PRIOR/SEPARATE PROCEEDINGS.**

16 34. In December 2007 Feelgood commenced a lawsuit against Gear Athletics. In
17 May 2008 Gear Athletics asserted a third party Complaint against Engstrom Properties.
18

19 33. Feelgood and Gear Athletics agreed to arbitration before retired Judge Terrence
20 Carroll in which they would attempt to resolve their dispute in a morning mediation, which
21 would become an afternoon arbitration if the mediation was unsuccessful.

22 35. Gear Athletics did invite Engstrom Properties to participate in the
23 mediation/arbitration, but Engstrom Properties declined.

24 36. Gear Athletics did not request the attendance of Steve Engstrom or Brad Olson
25 as witnesses in the arbitration.
26

1 37. Gear Athletics was awarded all of its unpaid rent and average monthly expenses
2 through December 31, 2008. Judge Carroll awarded an offset of \$63,000 to Feelgood. Exhibit
3 48.

4 38. Judge Carroll did not find that Feelgood or Gear Athletics suffered any loss of
5 use.

6 39. Gear Athletics subsequently demanded arbitration with Engstrom Properties,
7 pursuant 16.12. Engstrom Properties brought a motion to stay arbitration. Its motion was
8 denied and the parties proceeded to arbitrate before a panel of three real estate appraisers.
9

10 40. Though neither Judge Carroll nor the panel found that there was constructive
11 eviction, the real estate appraiser arbitration panel determined Gear Athletics was entitled to
12 rent abatement of \$50,000. Exhibit 18. The arbitration panel made no determination of loss of
13 use.

14 **D. FINDINGS RE CLAIMS OF FRAUD AND MISREPRESENTATION.**

15 41. Gear Athletics asserted that Engstrom advised that Engstrom Properties would
16 "probably...not 100%" sell the 224 Westlake Building within a few months and its tenancy
17 would be terminated under the terms of the Lease, ¶ 4.3. Given the totality of the
18 circumstances, including Mark Baerwaldt's sophisticated business experience, as well as the
19 written lease itself, it was not reasonable for Gear Athletics to rely on any such assertion.
20

21 42. Mark Baerwaldt negotiated hundreds of leases before the one with Engstrom.
22 Chad Baerwaldt testified that his father handled all lease negotiations with Engstrom.

23 43. No representative of Gear Athletics made inquiry of Steve Engstrom or any
24 other person regarding the condition of the 224 Westlake Building prior to executing the Lease.
25
26

1 44. Neither Baerwaldt hired an inspector, though Mark Baerwaldt generally
2 inspected it himself and Chad Baerwaldt had been inside the building previously. Engstrom
3 denied the assertions that product/clothing racks completely obscure the walls.

4 45. Mark Baerwaldt's assertion that he fully relied upon the prospective purchaser's
5 alleged "due diligence" on the premises was uncorroborated.

6 46. Chad Baerwaldt testified to no conversations with Engstrom re water intrusions.

7 47. Steve Engstrom made no representations of any existing material facts
8 concerning the condition of the 224 Westlake Building to Gear Athletics' representatives at the
9 time of the lease of the building to Gear Athletics.
10

11 48. Steve Engstrom's denial of historical water intrusions at the building is not
12 entirely credible given the general ("everyone knew") testimony of Mike Lambert. However,
13 the evidence does not establish that Engstrom had actual knowledge of any unrepaired water
14 intrusion problems at the 224 Westlake Building relevant at the time of the Lease to Gear
15 Athletics.

16 49. Mark Baerwaldt's testimony that he was to have no discussions with Mike
17 Lambert is not entirely credible in light of the testimony of attorney Richard Wood: "I never
18 told Mark Baerwaldt to discuss solely with me and not Lambert." Additionally, Lambert
19 testified that he did not recall any suggestion to him to not discuss certain things with Mr.
20 Baerwaldt.
21

22 50. The relationship between Gear Athletics and Engstrom Properties and their
23 respective members was that of an arms-length business transaction.
24
25
26

1 **E. FINDINGS RE COUNTERCLAIM FOR RENT OWED.**

2 51. Gear Athletics ceased paying its monthly rent obligation of \$17,283 in
3 September 2008. Consequently, Gear Athletics is in arrears for the four months of September
4 through December 2008.

5 52. Engstrom Properties billed Gear Athletics for expenses assumed by Gear
6 Athletics under the Lease, ¶¶ 5.3 and 5.4. These expenses include maintenance and repairs of
7 the HVAC equipment, insurance, utilities, fire detection and landscape maintenance. Graffiti
8 removal is also required tenant expense under the Lease, ¶ 6.2.

9 53. Chad Baerwaldt testified that the CAM charges were indeed proper under the
10 lease but that he chose to pay "the reasonable ones."

11 54. Mr. Engstrom testified that Chad Baerwaldt was "probably correct about the
12 maintenance fee(s)."

13 55. Gear Athletics began making less than full payment of Common Area
14 Maintenance Charges (CAM) in April 2008, and ceased all CAM payments after July 2008.
15

16 56. Gear Athletics may have been confused by some of the expense charges on
17 invoices it received and understandably scrutinized claimed expenses. By August 8, 2008,
18 however, Engstrom Properties provided its complete accounting of expenses to that date.
19 Exhibit 42.

20 57. The parties through the course of their relationship referred to the Lease as a
21 "triple net lease," or "NNN." The parties agree that a triple net lease requires the tenant's
22 payment of all operating expenses of the property during the tenancy.
23

24 58. The expenses claimed for HVAC, insurance, plumbing, real estate taxes,
25 Streetcar LID, repairs, and utilities are operating expenses allocable to Gear Athletics under the
26 lease.

1 59. The Master Lease, P13.2(c), contemplates the Landlord's reentry and/or taking
2 possession of the premises and the meaning to be accorded such action.

3 60. To the extent and Finding of Fact may be more properly characterized as a
4 Conclusion of Law, or vice versa, it shall be re-characterized as such.

5
6
7 **II. CONCLUSIONS OF LAW**

8 **A. CONCLUSIONS RE GEAR ATHLETICS' CLAIMS FOR BREACH.**

9 1. Paragraph 8.5 of the Lease provides, "Landlord shall indemnify and hold
10 harmless Tenant from and against any and all claims arising from any breach or default in the
11 performance of any of Landlord's obligations under the terms of this Lease or arising from any
12 act of Landlord, or any of Landlord's agents or employees, and from and against all costs,
13 reasonable attorney's fees expenses and liabilities incurred in the defense of any such claim or
14 any action or proceeding brought thereon."

15 2. In order for Gear Athletics to obtain indemnification for retired Judge Carroll's
16 award to Feelgood and its expenses of litigation, it is required to prove that Feelgood's claim
17 arose from a breach or default of Engstrom Properties.

18 3. Paragraph 7.3 (a) describes the Landlord's obligations to repair or replace
19 "structural, foundation, outside wall, roof, roof covering, sewer line damage to the Premises . .
20 .". Engstrom Properties did not breach its obligations to repair or replace under paragraph
21 7.3(a).
22

23 4. Paragraph 9.2 allows Landlord to elect to make repairs to damages to the
24 premises which the Landlord must make as soon as reasonably possible, and to make such
25 election within 30 days after the occurrence requiring repair. Because Engstrom Properties
26 elected and commenced to repair the roof within approximately two weeks following the water

1 intrusion incident in November 2006, Engstrom Properties did not breach any obligation to
2 repair.

3 5. Paragraph 13.3 of the Lease provides, "The failure by Landlord to observe or
4 perform any of the covenants, conditions or provisions of this Lease to be observed or
5 performed by Landlord, and where such failure continues for thirty (30) days after written
6 notice by Tenant to Landlord specifying wherein Landlord has failed to perform such
7 obligation, shall constitute a material default and breach of this Lease by Landlord; provided,
8 however, that if the nature of the obligation is such that more than thirty (30) days are required
9 for performance, then Landlord shall not be in default if Landlord commences performance
10 within such 30-day period and thereafter diligently pursues and prosecutes the same to
11 completion." Because Gear Athletics provided no written notice to Landlord, as required in
12 paragraph 16.6, specifying wherein Engstrom Properties failed to perform any obligation under
13 the Lease, Engstrom Properties was not in default.

14
15 6. Paragraph 9.5 of the Lease, "Abatement of Rent," provides:

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

19 7. Paragraph 9.6 of the Lease defines "Partially Damaged" as "damage to the
20 Premises (excluding any damage to Tenant-owned property or alterations) which is reasonable
21 estimated to cost to repair less than fifty percent (50%) . . . of the reasonable fair market value
22 of the improvements constituting the Premises...".

23 8. Absent a substantial loss of use of the Premises caused by partial damage to the
24 Premises, the Lease contains no right to rent abatement. Because no loss of use of the Premises
25 occurred from any damage to the Premises, Gear Athletics is not entitled to any rent abatement
26 for any portion of the lease term.

1 9. Engstrom Properties' requests for access to the Premises were, while multiple,
2 within the scope of the Lease. 16.14, and not unreasonable.

3 10. Because Engstrom Properties' requests did not make the Premises uninhabitable
4 and because Feelgood suffered no constructive eviction, Engstrom Properties did not breach a
5 covenant of quiet enjoyment of the Premises.

6 11. Gear athletics stopped paying rent and breached the Master Lease.

7 **B. CONCLUSIONS RE FRAUD AND MISREPRESENTATION.**

8 12. The Court applies the economic¹ loss rule which holds parties to their contract
9 remedies when a loss potentially implicates both tort and contract relief. *Alejandre v. Bull*, 159
10 Wn.2d 674, 681, 153 P.3d 864 (2007); *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193
11 (2008).
12

13 13. The rule "prohibits plaintiffs from recovering in tort economic losses to which
14 their entitlement [such as the latent defect claim] flows only from a contract²... tort law is not
15 intended to compensate parties for losses suffered as a result of a breach of duties assumed only
16 by agreement." *Factory Mkt., Inc. v. Schuller Int'l, Inc.*, 987 F.Supp 387, 395 (1997). Gear
17 Athletics' tort claims of fraudulent inducement and misrepresentation are purely economic (vs.
18 "injuries") and, therefore, are barred under the economic loss rule. Indeed, no Washington case
19 has upheld a claim for intentional misrepresentation as outside of the economic loss rule.
20 Accord, *Cox v. O'Brien*, 150 Wn.App. 24, 206 P.3d 514 (2009); *Jackowski v. Borchelt*, 151
21 Wn.App. 1, 209 P.3d 514 (2009)(barring negligent misrepresentation claim).
22

23 14. Further, Gear Athletics did not prove the necessary elements of fraud in the
24 inducement nor negligent misrepresentation. Though claims of fraud in the inducement may be
25

26 ¹ Or "commercial" loss rule, as insightfully observed by Justice Chambers.

² See Section 6.3 of the Master Lease.

1 outside the economic loss rule, pursuant *Alejandro*, citing *Huron Tool & Eng'g Co. v. Precision*
2 *Consulting Servs., Inc.*³, the misrepresentations at issue must be extraneous to the contract itself
3 and not concerning the quality or characteristics of the subject matter of the contract. In so far
4 as Gear Athletics fraud theories are concerned, it did not prove all nine elements of fraud,
5 namely, reliance or that it had right to rely on allegedly fraudulent representations--statements
6 about the condition of the Premises made by Steve Engstrom—as required to support common
7 law fraud claim.
8

9 15. Neither the materiality of nor inducement by the alleged misstatements was
10 proven since there was no actual substantial loss of use and the lease of the building was part
11 and parcel the company purchase.

12 **C. CONCLUSIONS RE RENT OWED**

13 16. Gear Athletics breached its obligations to pay rent and Common Area
14 Maintenance expenses for the full term of the lease.

15 17. Engstrom Properties is entitled to judgment against Gear Athletics for unpaid
16 rent for the months September 2008 through January 2008.

17 18. The CAM expenses, except as noted herein, are valid and payable by Gear
18 Athletics under the Lease.

19 19. Engstrom Properties is entitled to its past due rent, expenses, interest and
20 penalties, pursuant the Master Lease.

21 20. The Court determines, however, that Gear Athletics is not responsible for the
22 property management fee/expense, the outside paint costs, or for billed attorney fees as a CAM
23 expense.
24
25

26 ³ 209 Mich.App. 365, 532 N.W.2d 541 (1995).

ATTACHMENT B

THE HONORABLE TIMOTHY BRADSHAW

FILED
KING COUNTY CLERK OF COURT
SEATTLE, WASHINGTON

DEC 3 0 2009

SUPERIOR COURT CLERK
BY VICTOR A. BIGORNA
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

COLLEGE GEAR.COM, INC., a Washington corporation,
Plaintiff,

v.

ALKI SPORTS, LLC, a Washington limited liability company,
Defendant.

NO. 07-2-39870-8 SEA

ORDER UPON GEAR ATHLETICS' MOTION TO AMEND COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

GEAR ATHLETICS, f/k/a ALKI SPORTS, LLC, a Washington limited liability company,
Defendant - Counterclaim Plaintiff,

v.

COLLEGE GEAR.COM, INC., a Washington corporation,
Plaintiff - Counterdefendant.

GEAR ATHLETICS, f/k/a ALKI SPORTS, LLC, a Washington limited liability company,
Third-Party Plaintiff,

v.

ENGSTROM PROPERTIES, LLC, a Washington limited liability corporation,
Third-Party Defendant.

ORDER UPON GEAR ATHLETICS' MOTION TO AMEND COURT'S FFCL UNDER CR 52(B) - 1

121859.0005/1784218.1

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

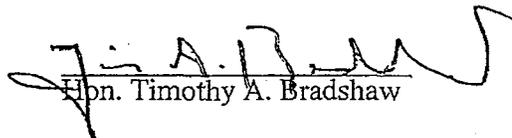
ORIGINAL

1 THIS MATTER came before the Court for hearing on Gear Athletics' Motion to
2 Amend Court's Findings of Fact and Conclusions of Law Under CR 52(b); and the Court,
3 having reviewed and considered Gear Athletics' motion and supporting papers, including
4 Declaration of counsel and proposed revised Findings and Conclusions, Engstrom Properties'
5 Response thereto, and Gear Athletics' reply, the case files and records herein, and being fully
6 advised in this matter, Now, Therefore,

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Gear Athletics'
8 Motion to Amend Court's Findings of Fact and Conclusions of Law is DENIED; the Court
9 however GRANTS, in part, amendment to its Conclusions of Law 21 as follows:

10
11 Engstrom Properties and Gear Athletics are both entitled, pursuant 16.13 of the lease,
12 to their legal expenses and attorney's fees associated with those matters on which they
13 prevailed, in amounts to be determined upon submitted declarations as to
14 reasonableness.

15
16
17
18 So ordered this 30th day of December, 2009.

19
20 
21 Hon. Timothy A. Bradshaw
22
23
24
25
26

ORDER UPON GEAR ATHLETICS' MOTION TO AMEND
COURT'S FFCL UNDER CR 52(B) - 2

121859.0005/1784218.1

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX. 206.223.7107

ATTACHMENT C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

COLLEGE GEAR.COM, INC.,
Plaintiff/Counterdefendant,
v.
ALKI SPORTS, LLC, (GEAR
ATHLETICS, f/k/a ALKI SPORTS),
Defendant/Counterclaimant, Third
Party Plaintiff,
v.
ENGSTROM PROPERTIES, LLC,
Third Party Defendant, Fourth
Party Plaintiff,
v.
CHAD BAERWALDT,
Fourth Party Defendant.

NO. 07-2-39870-8 SEA

JUDGMENT

JUDGMENT SUMMARY

Judgment Creditor:	Engstrom Properties LLC
Judgment Creditor's Attorney:	Sylvia Luppert, Reaugh Oettinger & Luppert, P.S.
Judgment Debtors:	Gear Athletics LLC and Chad Baerwaldt
TOTAL Judgment	\$189,718.26
Lease Damages:	\$147,460.62 (including interest, below)
Attorneys Fees and Costs:	\$67,700.64
Less Offset:	\$25,443.00

1
2 Following trial of this matter, the undersigned Court issued Findings and Conclusions¹,
3 concluding that Engstrom Properties LLC is entitled to judgment against Gear Athletics LLC
4 and Chad Baerwaldt for unpaid rent, certain CAM expenses, interest and penalties pursuant to
5 the master lease, and to attorneys' fees and legal expenses associated with the trial. See
6 Findings & Conclusions pp13-14, Conclusions ¶¶ 17-21².

7 The Lease Damages Amount above is calculated as follows:

8 Unpaid Rent @ \$17, 283.00/month x 4 months	\$69,132.00
9 (September 2008 through December 2008)	
10 Unpaid CAM Expenses thru 12/31/08	
11 (Excluded: Mgmt, legal, outside painting fees)	\$43,749.36
12 Unpaid 8% Interest January 2007 – December 31, 2008	\$2,901.01
13 Unpaid 8% Interest January 1, 2009 to February 5, 2010	\$9,920.74
14 (\$24.74/day for 401 days)	
15 Late Penalties per lease	\$21,757.51
16 Lease Damages	\$147,460.62

17 The Total Judgment shall bear interest at 8 percent per annum, pursuant the lease, until paid.

18 FINDINGS AND CONCLUSIONS IN SUPPORT OF FEE AWARD

19 The Court has considered both parties' claims for attorneys' fees under the Lease. The
20 parties have established the basis for their respective requests, per the Lodestar formulae.
21 Additionally, the Court has reviewed the Declarations of learned counsel and finds that both
22 attorneys' customary rates for legal services to be reasonable and the legal expenses to be
23 reasonable and necessarily incurred to advance their clients respective rights.
24

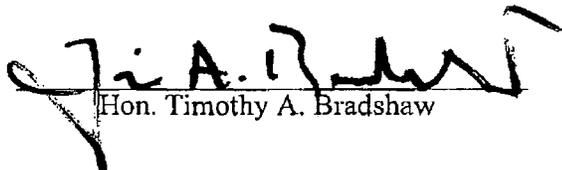
25 ¹ Not "proposed" findings and conclusions as Gear Athletics states.

26 ² Paragraph 16.13 of the master lease addresses attorneys' fees.

1 Engstrom Properties is the substantially prevailing party at the conclusion of this
2 litigation. Gear Athletics proclaims the following: "It is Gear's position that it is the prevailing
3 party for all issues at trial and post trial, except for the ruling on the 'economic loss' doctrine."
4 This is a number of things except accurate. The Court, however, deems it fair and just to
5 additionally consider and credit the few distinct matters wherein Gear Athletics initially
6 prevailed³. See, *Empire State Sur.Co. of New York v. Moran Bros. Co.*, 71 Wash. 171 (1912);
7 *Marassi v. Lau*, 71 Wn.App. 912 (Div. 1, 1993). Specifically, the Court determines that Gear
8 Athletics substantially prevailed in the December 2008 arbitration to Engstrom proceedings
9 before Judges Scott then Mertel (that Engstrom, then a party, refused to participate in), and the
10 April 2009 arbitration with panel.⁴ The corresponding amounts⁵: \$8,840 + \$1,725.00 costs,
11 \$14,878. These amounts are reflected above as combined offsets, and Engstrom's attorney's
12 fees reduced by 62.2 hours, and appraiser fees reduced (\$17,105 + \$7,250).
13

14 The Court finds that Engstrom Properties' Motion for summary judgment and Motion to
15 Vacate award, although denied, was reasonable made given the absence of evidence to support
16 Gear Athletics' claims, as confirmed in this Court's Findings and Conclusions. The Court
17 concludes that no deductions should be made due to Engstrom Properties having made such
18 motions. Similarly, for all other matters the Court awards fees to Engstrom Properties.
19

20 SO ORDERED this 23rd day of April, 2010.

21
22 
23 Hon. Timothy A. Bradshaw

24 ³ As noted by Gear Athletics, it is difficult to draw bright lines for this purpose.

25 ⁴ The Court's confirmation of the arbitration amount was done *pre*trial and without the full benefit of the
26 testimony, credibility determinations, and all evidence. Nor did arbitration establish any loss of use of the
premises.

⁵ See Gear Athletics Declaration of counsel (without billing statements).