IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEAR ATHLETICS LLC (f/k/a ALKI SPORTS LLC), a Washington limited liability company, and CHAD BAERWALDT, Appellants/Cross Respondents, v. ENGSTROM PROPERTIES LLC, a Washington limited liability company, Respondent/Cross Appellant.	))))))))))))))	NO. 65338-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 29, 2011

Lau, J. — A superior court's authority in a chapter 7.04 RCW arbitration proceeding is limited. It can confirm, vacate, modify, or correct the arbitration award under RCW 7.04.150. Once the court confirms the arbitration award, it is not free to disregard the award and proceed with a trial de novo. Because the trial court here confirmed the arbitration award and then conducted a trial de novo, we reverse the judgment in favor of Engstrom Properties LLC and remand for entry of judgment in Gear Athletics LLC's favor consistent with this opinion.

FACTS

Engstrom Properties LLC and Gear Athletics LLC executed a lease (master

lease) in which Engstrom agreed to lease a building in Seattle to Gear from May 1, 2006, until December 21, 2008. The lease was part of the consideration for Engstrom's sale of a business, Athletic Supply Company,[1] to Gear. On September 6, 2006, Gear subleased the building to Collegegear for the remainder of the master lease term.[2]

The master lease provided for arbitration of certain disputes:

> If any dispute arises between Landlord and Tenant regarding the extent of rent abatement under Section 9 or Section 14 and such dispute is not resolved within (20) days after notice by either party to the other of such disagreement, 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.

Master Lease (ML) § 16.12(b). Section 9.5 of the lease describes when rent abatement is owed:

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

The indemnification clause, section 8.5, provides:

> 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.

On November 13, 2006, the subtenant notified Gear principle Chad Baerwaldt

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[1] The shareholders of Athletic Supply Company were Engstrom principals Steve Engstrom and Michael Lambert.

[2] The record refers to the subtenant as "Collegegear," "Collegegear.com," "Feelgood," and "Feelgood Networks." To avoid confusion, we use "subtenant."

that water was coming into the building basement and Baerwaldt reported it to Steve Engstrom[3] of Engstrom Properties. Steve Engstrom[4] "went to the site within two hours and witnessed personally . . . a small, small thing," something "basically, [the size] of a spilled soft drink." Report of Proceedings (RP) (Aug. 11, 2009) at 150-51. By December 1, Engstrom hired property manager Brad Olson to undertake repairs. On December 14, before repairs were complete, a heavy rain storm occurred. Olson e-mailed the subtenant to check for any water in the basement. The subtenant again reported flooding. Olson went to the building the next day and saw a "one-and-a-half by one-and-a-half foot puddle in the stairwell" and a pile of t-shirts on the floor, one which was wet. RP (Aug. 11, 2009) at 215. Olson photographed what he saw, and the photographs were admitted at trial. Roof repairs were completed in January. Neither Gear nor the subtenant notified Engstrom or Olson of any subsequent water intrusion. Gear never notified Engstrom of any failure to perform a lease obligation. A January 22, 2007 letter from Gear's attorney to Steve Engstrom stated, "It appears that the water problem may have been resolved."

On December 19, 2007, the subtenant sued Gear, alleging Gear had breached the sublease by "permitting flooding" and the "growth of mold and other toxic substances" in the basement. Gear later filed a third party complaint against Engstrom

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[3] "Steve Engstrom is the manager and, with his wife, the members and owners of Engstrom Properties LLC." Finding of fact (FF) 3.

[4] For clarity, we refer to Steve Engstrom by his full name to avoid confusion with Engstrom Properties LLC.

alleging Engstrom's obligation to indemnify it under the master lease for any damages for which Gear was liable to the subtenant. Gear answered and filed a fourth party claim against Chad Baerwaldt as guarantor of the master lease for unpaid rent and common area maintenance (CAM) charges. Gear later filed an amended complaint to add fraudulent inducement and negligent misrepresentation claims, alleging Engstrom knew about the building's water intrusion history, but failed to disclose it.

On March 31, 2008,[5] the subtenant moved out of the building and stopped paying all rent and CAM charges to Gear. Gear stopped paying some CAM fees in April 2008, stopped all CAM payments in July, and stopped rent payments in September.

The subtenant and Gear agreed to mediate whether rent abatement is due subtenant resulting from water intrusion. The parties agreed on retired judge Terrence Carroll to mediate and then proceed to binding arbitration if unable to resolve the dispute. Gear requested and Engstrom initially agreed to participate in this mediation but not arbitration and to make Steve Engstrom available to testify at the arbitration. But later, Engstrom refused to participate in the mediation and retracted its offer to allow Steve Engstrom to testify at the arbitration. Neither Steve Engstrom nor Olson testified at the arbitration. The parties proceeded to arbitration, presented and cross-examined witnesses, and submitted exhibits. Judge Carroll awarded Gear

[5] Gear's brief claims the subtenant vacated the building on May 8, 2008. The court's findings are contradictory: Finding of fact 10 lists the date as March 31, 2007, while finding of fact 28 lists March 31, 2008.

unpaid rent through December 31, 2008, but ordered an offset of $63,000 for rent abatement to the subtenant. Regarding water intrusion, Judge Carroll found:

> 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 rent due under the Lease.

On December 11, 2008, Gear wrote to Engstrom demanding arbitration. Engstrom opposed arbitration and moved to stay arbitration, arguing that under the master lease "arbitration is limited to the determination of the amount of damages and not to the determination of liability . . . ." The court denied Engstrom's motion and ordered arbitration on liability and damages. At arbitration, Gear did not call any subtenant witnesses to testify about the water intrusion. The only Gear employees who testified were Mark Baerwaldt and his son Chad. According to Engstrom, none of the witnesses testified that they had seen any flooding. An arbitration panel of three real estate appraisers "concluded that the premises were partially damaged due to water intrusion issues that became apparent in November 2006, and that the Tenant is due Abatement of Rent provided in Section 9.5 from the Landlord in the amount of $50,000." Ex. 18. They also allocated an award of costs and arbitration expenses between Gear of 20.64 percent and Engstrom of 79.36 percent.[6]

[6] Engstrom notes that this is the same as the proportion of the appraiser's rent abatement award of $50,000 to Judge Carroll's award of $63,000. Appellant's Br. at 11.

Gear moved to confirm the arbitration award and enter judgment in King County Superior Court. Engstrom opposed confirmation and moved to vacate the award under RCW 7.04A.230 because “there was no agreement to arbitrate the issues decided, the arbitrators exceeded their powers, and the award was procured by undue means.” Engstrom argued that it agreed to arbitrate the damages issue but not the liability issue. Engstrom further argued that the arbitrators prematurely decided damages before

a court ruling on the issue of liability for loss of use of the leased premises. On August 10, 2009, the morning of trial on Gear’s and Engstrom’s outstanding claims,[7] the trial court confirmed the arbitration award and entered an order and final judgment for $50,000.[8] On the same day, the trial court denied Engstrom’s motion for summary judgment, which argued there was no evidence of loss of use, a condition precedent to rent abatement.

At the bench trial, Gear called no witnesses from the subtenant. Steve Engstrom testified that he had seen a small puddle of water after the November event. Brad Olson testified he saw a “one-and-a-half by one-and-a-half foot puddle in the stairwell” after the December 14, 2006 storm. RP (Aug. 11, 2009) at 215. No other witnesses

[7] Gear had outstanding claims for indemnification, breach of the lease, fraudulent inducement, and negligent misrepresentation. Engstrom had an outstanding counterclaim for unpaid rent.

[8] The order originally contained no judgment summary. A correctly formatted judgment was entered on July 1, 2010.

testified that they saw water in the building.[9] Olson testified that he noted no change in the subtenant's use of the building or inventory moved around due to water intrusion.

Gear objected on relevancy grounds to testimony regarding water intrusion: "[T]here's a relevance objection and an objection that this is something that's already been ruled on by the Court." RP (Aug. 10, 2009) at 116. The court overruled the objection, explaining, "[T]here are other reasons that [water intrusion] testimony could be relevant aside from those direct issues." RP (Aug. 11, 2009) at 115. The court reiterated this decision the next day. At the close of the trial, the court reserved ruling on all issues.

On November 25, 2009, the court entered its written findings of fact and conclusions of law. The court concluded that the economic loss rule barred Gear's fraudulent inducement and negligent misrepresentation claims and failure to prove the fraud elements. Gear does not challenge those conclusions. On the indemnification issue, the court concluded that Gear was required to show that the subtenant's claims "arose from a breach or default of Engstrom Properties" and that "[b]ecause Engstrom . . . commenced to repair the roof within approximately two weeks following the water intrusion . . . Engstrom . . . did not breach any obligation to repair." Conclusions of Law (CL) 2, 4. The court also concluded Engstrom was entitled to a judgment for the amount of unpaid rent and CAM charges without an offset for rent

[9] Although Chad Baerwaldt testified that he had seen "water on the floor," he later conceded that "it was only during the later walk-thru with the real estate panel that he had 'witnessed' water." FF 24.

abatement. The court concluded that Gear failed to establish that water intrusion resulted in a loss of use of the premises: "Because no loss of use of the Premises occurred from any damage to the Premises, Gear Athletics is not entitled to any rent abatement for any portion of the lease term." CL 8. The court concluded that Engstrom was the prevailing party and entitled to attorney fees and expenses from the trial.

On April 23, 2010, the court entered final judgment, awarding Engstrom $147,460.62 on its counterclaim ($69,132.00 for unpaid rent from September through December 2008, $43,749.36 for unpaid CAM charges through the end of the lease, and $34,579.26 for interest and late penalties). The court did not offset these amounts by the previous $50,000 rent abatement arbitration award and judgment. The court reasoned in a footnote: "[C]onfirmation of the arbitration amount was done pretrial and without the full benefit of the testimony, credibility determinations, and all evidence. Nor did arbitration establish any loss of use of the premises." The court awarded Engstrom $67,700.64 in attorney fees, awarded Gear attorney fees for prevailing at arbitration and opposing Engstrom's motion to stay arbitration, but denied attorney fees for Gear's successful motion to confirm the arbitration award. In postjudgment proceedings, the trial court confirmed that its judgment confirming arbitration decision "remains separately enforceable" but noted, "[t]he arbitration panel award is, however, of de minimis evidentiary value . . . ."

Gear appeals the trial court rulings that (1) denied its indemnification and rent abatement claims and its failure to mitigate defense, (2) refused to give preclusive

effect to the August 10, 2009 arbitration confirmation order, and (3) denied its attorney fees request. In its cross appeal, Engstrom challenges the trial court's denial of its motion to vacate arbitration and attorney fee awards to Gear.

ANALYSIS

Confirmation of the Arbitration Award

Engstrom argues that the trial court erred when it confirmed rather than vacated the arbitration award. He specifically asserts vacation was proper under

RCW 7.04A.230 because no agreement to arbitrate existed, the arbitrators exceeded their authority, and the award was procured by undue means.

1. Agreement to Arbitrate

The parties dispute whether liability and damages are arbitrable. Engstrom contends that the award should be vacated because the parties never agreed to arbitrate the issue of liability for loss of use. Gear counters that the arbitration clause requires arbitration on both liability and damages because of the presumption in favor of arbitration and its broad language.

We review questions of arbitrability de novo. Kamaya Co., Ltd. v. Am. Prop. Consultants, Ltd., 91 Wn. App. 703, 713, 959 P.2d 1140 (1998). The duty to arbitrate arises from a contractual relationship. Satomi Owners Ass'n v. Satomi LLC, 167 Wn.2d 781, 225 P.3d 213 (2009). Generally, "parties are free to decide by contract whether to arbitrate, and which issues are submitted to arbitration . . . ." Godfrey v. Hartford Cas.

Ins. Co., 142 Wn.2d 885, 894, 16 P.3d 617 (2001). Whether a contract or a provision of a contract is subject to arbitration is a question of law. Satomi, 167 Wn.2d at 816. Courts interpret agreements in favor of arbitrability. Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004). Contractual disputes are generally arbitrable "unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute." Stein v. Geonerco, Inc., 105 Wn. App. 41, 46, 17 P.3d 1266 (2001). If the parties' agreement to arbitrate is valid, then the question of which claims they agreed to arbitrate will depend upon the nature of the claims and the scope of the clause that provides for arbitration. Townsend v. Quadrant Corp., 153 Wn. App. 870, 224 P.3d 818 (2009), review granted, 169 Wn.2d 1021 (2010). If there are doubts or questions as to the scope of the arbitration clause in an agreement, the agreement will be construed in favor of arbitration unless the agreement cannot be interpreted to cover such a dispute. Townsend, 153 Wn. App. at 881. Because arbitration is favored, Engstrom bears the burden of showing that its claims were not arbitrable. Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 453, 45 P.3d 594 (2002).

The arbitration provision under section 16.12(b) of the lease provides:

> If any dispute arises between Landlord and Tenant regarding the extent of rent abatement under Section 9 or Section 14 and such dispute is not resolved within (20) days after notice by either party to the other of such disagreement, 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.

(Emphasis added.) And section 9.5's rent abatement provision provides, "If the Premises are Partially Damaged, the rent payable while such damage, repair or restoration continues shall be abated in proportion to the degree to which Tenant's reasonable use of the Premises is substantially impaired."

Section 9.6 defines "'Partially Damaged' . . . to mean damage to the Premises . . . which is reasonably estimated to cost to repair less than fifty percent (50%) . . . of the reasonable fair market value of the improvements constituting the Premises . . . ." According to Engstrom, "extent" means "amount." Therefore, the amount of rent abatement, not the right to rent abatement, is arbitrable. Or, as it argued in its motion to stay arbitration below, "the lease provides for arbitration to determine the amount of damages, but not to determine liability for damages."

Here, the parties agreed to submit to arbitration "any dispute aris[ing] between Landlord and Tenant regarding the extent of rent abatement under Section 9 or Section 14." Under Engstrom's interpretation, the parties agreed to a bifurcated process in which liability would be decided first by court action and then damages resolved through arbitration. But as our Supreme Court reasoned, "The very purpose of arbitration is to avoid the courts . . . ." It is designed to settle controversies, not to serve as a prelude to litigation. Thorgaard Plumbing & Heating Co. v. King County, 71 Wn.2d 126, 133, 426 P.2d 828 (1967).

As Gear correctly observes, Engstrom's bifurcated process "would frustrate the whole point of having an alternative dispute resolution process." Appellant's Reply Br.

at 5. Arbitration "avoid[s] what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation." See Barnett v. Hicks, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992).

Engstrom urges us to interpret the meaning of the arbitration clause it drafted based on its proposed definition of "extent." But the arbitration clause must be construed as a whole. Adler, 153 Wn.2d at 351. When read in context, the broadly worded clause shows the parties agreed to arbitrate "any dispute" between them over section 9's rent abatement provision, which requires proof of partial damage and loss of use before rent abatement is triggered.

Engstrom counters that the lease's requirement that the arbitrator be an "appraiser who has been a member of the American Institute of Real Estate Appraisers for not less than 10 years" indicates that the parties intended to arbitrate only the amount of damages. ML § 16.12(b). Engstrom argues that appraisers are qualified to determine rental and property values, not to construe agreements to determine if a claimed loss falls within the lease provisions. But appraisers are capable of determining whether the fact of damage occurred as much as they are able to determine the amount of that damage. And the parties are free to contract for any arbitration procedure they desire. See RCW 7.04A.110 ("If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails."). Engstrom's complaint that appraisers are unqualified to arbitrate the dispute is unpersuasive since it drafted the master lease.

Engstrom cites no persuasive or controlling authority to support its narrow arbitration clause interpretation. In light of the strong public policy favoring arbitration and the broad arbitration clause language, we conclude that the trial court properly ordered arbitration on liability and damages.

2. Arbitrators' Authority

Engstrom also argues that because the arbitrators exceeded their authority under RCW 7.04A.230(1)(d), vacation of the arbitration award is warranted. Gear counters that vacation under this provision is disfavored and Engstrom fails to meet the exacting burden necessary to establish grounds for vacation.

This court reviews de novo a trial court's decision to confirm or vacate an arbitration award. Fid. Fed. Bank FSB v. Durga Ma Corp., 386 F.3d 1306, 1311 (9th Cir. 2004). Washington courts give substantial finality to a decision by an arbitration panel rendered in accordance with the parties' contract and chapter 7.04A RCW.

An arbitrator exceeds his or her powers within the meaning of RCW 7.04A.230(d) when the arbitration award exhibits an error of law. Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 236 P.3d 182, 183-86 (2010). The error, if any, should be recognizable from the language of the award. Federated Servs. Ins. Co. v. Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000). In considering such a challenge, we review only the face of the award to determine whether it manifests an erroneous rule of law or a mistaken application of law. Boyd v. Davis, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). We will not review the merits of the case and, ordinarily, will not

consider the evidence before the arbitrator. Davidson v. Hensen, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998). Examination of the underlying evidence is permissible only to the extent necessary to ascertain the law governing the disputed point. Boyd, 127 Wn.2d at 260. We may not extend our review to discern the parties' intent or interpret contracts underlying the merits of the dispute because such an act is essentially a trial de novo. Boyd, 127 Wn.2d at 261-62.

Engstrom argues that the arbitrators exceeded their authority because there is insufficient evidence to justify the rent abatement. Specifically, Engstrom maintains "Since no one from the Subtenant testified at the arbitration, there was no evidence of any loss, so the appraisers could not perform a calculation of the amount of rent to be abated." Resp't's Br. at 18 (internal citation omitted). But Engstrom impermissibly challenges the evidence considered by the arbitrators and the merits of their decision. Neither challenge constitutes facial invalidity in the arbitration award. This challenge merits no vacation, as a matter of law under RCW 7.04A.230. Davidson, 135 Wn.2d at 119; Boyd, 127 Wn.2d at 260. Engstrom maintains further that an error exists on the face of the arbitration award based on the proportion of costs amount. It claims, "The strange percentage of 79.36 [of costs Engstrom had to pay] exactly coincides with the ratio of 50 to 63, or the appraisers' award of $50,000 and Judge Carroll's award of $63,000." Resp't's Reply Br. at 9. From this, Engstrom concludes that the arbitrators merely "accepted Judge Carroll's award as the entire basis for their award." Resp't's Reply Br. at 9. Engstrom's speculative conclusion demonstrates no clear facial error.

The evidence before the arbitrators will not be considered. Westmark Props., Inc. v. McGuire, 53 Wn. App. 400, 401, 766 P.2d 1146 (1989).

3. Undue Means

Engstrom next argues that the trial court erred in denying its motion to vacate the arbitration award because it was procured by undue means under RCW 7.04A.230(1)(a). That provision provides for vacation where an "award was procured by corruption, fraud, or other undue means." RCW 7.04A.230(1)(a).

Our search shows no Washington court has ever vacated an arbitration award on the ground of undue means. Engstrom "acknowledges that vacation of an arbitration award on the grounds that it was procured through fraud or undue means is exceedingly rare." Resp't's Reply Br. at 11. Federal authority based on an analogous provision of the uniform arbitration act provides persuasive guidance on the standard for finding undue means. See Seattle Packaging Corp. v. Barnard, 94 Wn. App. 481, 486, 972 P.2d 577 (1999) (relying on federal authority to construe fraud under RCW 7.04A.230(1)(a)). The parties agree that "'undue means' connotes behavior that is immoral if not illegal." A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403-404 (1992).

Engstrom argues that the decision was procured by undue means because Gear Athletics (1) presented no subtenant witness to testify about loss of use; (2) offered no photographs to show flooding; and (3) offered inadmissible evidence, including an unsworn letter, settlement offers, Judge Carroll's arbitration decision, and the court's

order compelling arbitration. But these arguments relate to the decision's merit and the sufficiency of the evidence to support it. They provide no basis for vacation.

We conclude the trial court properly denied Engstrom's motion to vacate and confirmed the arbitration award.

Collateral Estoppel[10]

Gear contends that collateral estoppel precludes Engstrom from relitigating the water intrusion, rent abatement, and indemnification issues in a subsequent lawsuit because the panel arbitration proceeding decided these issues.[11] Engstrom counters that Gear fails to satisfy the doctrine's four essential elements and failure to raise collateral estoppel at trial waives the issue.

"Washington public policy strongly favors finality of arbitration awards." S&S Constr., Inc. v. ADC Props. LLC, 151 Wn. App. 247, 254, 211 P.3d 415 (2009). An arbitration award is a final judgment on the merits. RCW 7.04A.250(1) provides that after confirming an arbitration award, "the court shall enter a judgment in conformity with the order." That "judgment may be recorded, docketed, and enforced as any other judgment in a civil action." See also Dunlap v. Wild, 22 Wn. App. 583, 590-91, 591 P.2d 834 (1979) (noting that parties did not challenge arbitration award as final

[10] The doctrine of collateral estoppel differs from res judicata in that instead of preventing a second assertion of the same claim or cause of action, collateral estoppel prevents a second litigation of issues even though a different claim or cause of action is asserted. Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978).

[11] Although Gear also references res judicata in passing, it does not analyze the elements of that doctrine, and we therefore decline to address it.

judgment and not analyzing issue further); Scheer-Erickson v. Haines, noted at 120 Wn. App. 1042, 2004 WL 440213 at *2 ("An arbitration award is a final judgment on the merits.").

"The superior court's authority in arbitration proceedings generally . . . is limited. It can only confirm, vacate, modify, or correct the arbitration award." Munsey v. Walla Walla College, 80 Wn. App. 92, 95-96, 906 P.2d 988 (1995) (citing RCW 7.04.150-.170). An appellate court's review of an arbitration award is limited to the court that confirmed, vacated, modified, or corrected that award. Pegasus Constr. Corp. v. Turner Constr. Co., 84 Wn. App. 744, 747, 929 P.2d 1200 (1997).

"[A]n arbitration proceeding may be the basis for collateral estoppel or issue preclusion." Neff v. Allstate Ins. Co., 70 Wn. App. 796, 800, 855 P.2d 1223 (1993).

Collateral estoppel requires proof of four elements:[12]

> "(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 against whom the doctrine is to be applied."

Neff, 70 Wn. App. at 800 (quoting Shoemaker v. Bremerton, 109 Wn.2d 504, 507 745 P.2d 858 (1987)).

1. Identical Issue.

This element is satisfied. Section 9.5 of the lease provides that rent abatement is proper where "the Premises are Partially Damaged" and "in proportion to the degree

[12] No dispute exists over the party and privity element.

to which Tenant's reasonable use of the Premises is substantially impaired." The arbitration award states "the majority of arbitrators have concluded that the premises were partially damaged due to water intrusion issues . . . and that the Tenant is due Abatement of Rent provided in Section 9.5 . . . ." Ex. 18 (emphasis added). The trial court reached the opposite conclusion—"Because no loss of use of the Premises occurred from any damage to the Premises, Gear Athletics is not entitled to any rent abatement for any portion of the lease term." CL 8. The issue decided in the arbitration is identical to the one presented in the trial court—whether partial damage from water intrusion substantially impaired the tenant's use warranting rent abatement. Engstrom counters no identity of issues because the two proceedings addressed dissimilar issues. The arbitration decided the partial damage question, unlike the bench trial that decided both partial damage and loss of use of the premises. We disagree. Our review of the arbitration award demonstrates that the arbitrators specifically mentioned section 9.5's loss of use clause when it awarded rent abatement.

2. Final Judgment.

As discussed above, arbitration is a final judgment on the merits. Here, the trial court confirmed the arbitration award and entered an order and a judgment that the "arbitration award of April 9, 2009 is confirmed and judgment is hereby entered in favor of Gear Athletics and against Engstrom Properties . . ."[13]

3. Injustice.

[13] The court later entered another order and judgment reaffirming this decision posttrial.

When weighing this element, “Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue.” Neff, 70 Wn. App. at 801. Gear argues that this element is satisfied because the parties represented by counsel submitted briefs, made opening remarks, introduced exhibits, examined and cross-examined witnesses, and made closing remarks. Engstrom requested a site visit to the premises. The arbitrators, witnesses, and counsel toured the premises for one hour and discussions occurred between the arbitrators, witnesses, and counsel. Engstrom’s counsel also proffered postarbitration evidence, which the arbitrators ruled inadmissible. In Robinson v. Hamed, 62 Wn. App. 92, 100, 813 P.2d 171 (1991), we held:

> The parties made opening statements, introduced 36 exhibits, examined and cross-examined witnesses and made closing arguments. The general counsel for the union submitted an extensive posthearing brief and the arbitrator entered exhaustive findings supporting his conclusions. The proceedings clearly furnished a full and fair hearing.

Like Hamed, the three-member arbitration proceeding here constitutes a full and fair hearing.

Engstrom asserts arbitration irregularity because Gear’s counsel “testified throughout the proceeding, frequently falsely, and despite his lack of personal knowledge.” Resp’t’s Br. at 10. But Engstrom had an opportunity to object and seek appropriate rulings from the arbitrators. In addition, Engstrom fails to demonstrate that the arbitrators relied on the alleged false statements of counsel. The burden of showing the absence of a full and fair opportunity to litigate rests on the party opposing

preclusion. Neff, 70 Wn. App. at 801 (citations omitted). Engstrom fails to establish the absence of a full and fair opportunity to litigate the issues in the arbitration proceeding.

We conclude that the panel's arbitration determination is entitled to collateral estoppel effect precluding Engstrom from relitigating at trial whether partial damage from water intrusion substantially impaired "Tenant's reasonable use of the Premises" justifying abatement of rent. ML § 9.5. The trial court erred when it failed to recognize the arbitration award's preclusive effect. Instead, it conducted a trial de novo on the very issues determined with finality by the arbitration panel. "Arbitration's desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial de novo." Boyd, 127 Wn.2d at 263. When the

trial court confirmed the award as it was required to do here, it was not then free to relitigate the issues in a trial de novo.[14]

The parties also contractually agreed to be bound by the written arbitration decision. Master lease section 16.12 provides in part:

> 16.12 Binding Effect; Choice of Law; Arbitration.
> . . . .
> (b) . . . . The written decision of the three arbitrators or a majority of them . . . shall be final and binding upon both parties, and a judgment may be entered thereon in a court of competent jurisdiction. . . .

(Emphasis added.)

[14] Understandably, Gear assumed, based on its trial objection and the trial court's assurances, no water intrusion, partial damage, or loss of use evidence need be presented at trial.

That April 9, 2009 decision states, "[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 is due Abatement of Rent provided in Section 9.5 [rent abatement due if reasonable use is substantially impaired] from the landlord in the amount of $50,000."

Engstrom also counters that Gear failed to preserve its collateral estoppel claim by failing to raise it below. Engstrom correctly notes that Gear made no specific collateral estoppel objection below. But the record shows it repeatedly argued to the court that the water intrusion issue had been earlier decided by arbitration, that the trial court confirmed the arbitration award, and that the arbitration decision binds the parties and the trial court. Gear argued:

> Your Honor, as a general objection, we seem to be getting into testimony about whether there was water intrusion and how much water intrusion. I think we settled that with the confirmation of the arbitration award which said there was partial damage from the water intrusion and rent abatement.
>
> I've tried not to be too -- to be objecting and be restrictive, but are we going to go through all this again? I mean, this is what we went through in the arbitration. And I don't know how this goes to the issue of -- the two issues that are left are the negligent misrepresentation, which happened before the lease, and then the rent due or offsets, which happened, theoretically, after the rent stopped being paid in September through December of '08. So I think there's a relevance objection and an objection <u>that this is something that's already been ruled on by the Court</u>.

RP (Aug. 10, 2009) at 115-16 (emphasis added). Gear properly preserved its collateral estoppel argument. Engstrom's preservation claim fails.

Indemnification

Gear next argues that the plain language of the master lease indemnity clause creates a duty by Engstrom to indemnify Gear for the subtenant's rent abatement claim because subtenant's claim arose from Engstrom's failure to remedy water intrusion, which resulted in loss of use of the premises. Gear further argues that the trial court misconstrued the indemnity provision by requiring it to prove that the subtenant's claim arose from a breach or default by Engstrom, while ignoring the "any and all claims arising from any . . . act of Landlord" clause. Relying on the ejusdem generis rule, Engstrom argues its duty to indemnify requires fault or wrongdoing by the landlord.

Engstrom drafted the master lease agreement. This agreement contained an indemnification clause, which provided:

> 8.5 Indemnity. Except to the extent responsibility therefor is waived pursuant to Section 8.4 above, Tenant shall indemnify and hold harmless Landlord from and against any and all claims arising from Tenant's use of the Premises or from the conduct of Tenant's business in or about the Premises, and shall further indemnify and hold harmless Landlord from and against any and all claims arising from any breach or default in the performance of any of Tenant's obligations under the terms of this Lease or arising from any act of Tenant, or any of Tenant's agents, employees or invitees, 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. Except to the extent responsibility therefor is waived pursuant to Section 8.4 above, 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 thereof.

Interpretation of contract terms is a question of law. Pac. Indem. Co. v. Bloedel Timberlands Dev., Inc., 28 Wn. App. 464, 466, 624 P.2d 734 (1981). Indemnification clauses are subject to the fundamental rules of contractual construction, which require "'reasonable construction so as to carry out, rather than defeat, the purpose . . . .'" Cont'l Cas. Co. v. Mun. of Metro. Seattle, 66 Wn.2d 831, 835, 405 P.2d 581 (1965) (quoting Union Pac. R.R. Co. v. Ross Transfer Co., 64 Wn. 486, 488, 392 P.2d 450 (1964)). Because we construe indemnity clauses realistically, we must address the intent of the parties to allocate risk of loss or damages arising out of the contract. Jones v. Strom Constr. Co., 84 Wn.2d 518, 520-21, 527 P.2d 1115 (1974). We resolve any ambiguity against the contract drafter. N. Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920, 922, 540 P.2d 1387 (1975).

A duty to indemnify generally "'arises when the plaintiff in the underlying action prevails on facts that fall within coverage.'" Knipschield v. C-J Recreation, Inc., 74 Wn. App. 212, 216, 872 P.2d 1102 (1994) (quoting George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc., 67 Wn. App. 468, 475, 836 P.2d 851 (1992)).

Under the plain terms of the indemnification clause, Engstrom's duty to indemnify Gear arises on default, breach, or any act by Engstrom. The subtenant's complaint against Gear alleged, "Defendant [Gear], either through itself or the acts of Engstrom" was liable for "[p]ermitting flooding of the basement area at the Premises, and failing to proper[l]y respond to the same." A January 11, 2008 letter from the subtenant's attorney to Gear similarly asserted, "[T]he Landlord's property

manager/agent had either ignored the flooding or taken the position that a reported flooding event had not occurred." Ex. 44 at 3. Under the master lease, "Landlord shall be responsible for the repair . . . of structural, foundation . . . damage to the Premises . . . ." ML § 7.3(a). Judge Carroll's arbitration award concluded:

> 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.

Ex. 48. At trial, Chad Baerwaldt explained the basis for Judge Carroll's arbitration award:

> [Counsel for Gear]: Do you have a recollection of what the award was and what it was based on?
> [Chad Baerwaldt]: Yes. It was based on water intrusion and disruption of his quiet enjoyment.
> Q. Okay. Was there anything, to your recollection, decided by the arbitrator that involved something that you or your company did wrong?
> A. No. Everything was the result of the landlord, being Engstrom Properties, LLC -- it was in regards to their conduct.

RP (Aug 12, 2009) at 451. Given that Judge Carroll awarded rent abatement because of water intrusion and the lease allocates the maintenance of structural and foundation problems to Engstrom, Gear's damages "ar[ose] from any act of [the] Landlord."

In addition, as discussed above, the panel arbitration award is a final judgment that determined the premises suffered partial damage due to water intrusion resulting in substantial loss of use of the premises. As discussed above, the doctrine of collateral

estoppel precludes Engstrom from relitigating this issue in a subsequent proceeding.

Engstrom counters that under principles of contract interpretation, the indemnification provision applies only where fault can be attributed to its actions. Engstrom relies on the rule of ejusdem generis,[15] to argue that the "any act of Landlord" language should be construed with reference to the "any breach or default" term to require "some fault or wrongdoing on the part of the landlord."[16] Resp't's Br. at 21-22. But where no ambiguity exists, a court need not rely on maxims of construction to interpret contracts. See Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 276 n.9, 883 P.2d 1387 (1994) ("Because no ambiguity exists . . . ., we need not resort to rules of contract construction, such as the rule of ejusdem generis . . . ."). And "a court will not read an ambiguity into a contract that is otherwise clear and unambiguous." Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." Mayer, 80 Wn. App. at 421. Engstrom fails to establish that the indemnification provision or the term "any act of Landlord" is ambiguous. Accordingly,

[15] The maxim of ejusdem generis provides, "[W]hen general words follow specific words, the general words are construed to embrace a similar subject matter." Burns v. City of Seattle, 161 Wn.2d 129, 149, 164 P.3d 475 (2007).

[16] Engstrom's proposed interpretation of the indemnification clause would frustrate the original intent of the indemnification clause's risk allocation. Engstrom agreed to indemnify Gear from any acts or breach or default in its performance of any landlord obligations. Gear made nearly identical reciprocal promises as tenant.

the doctrine of ejusdem generis is inapplicable. See Eurick v. Pemco Ins. Co., 108 Wn.2d 338, 340-41, 738 P.2d 251 (1987) ("rules of construction are not goals in themselves but only aids to interpretation; the goal is to give effect to the apparent clear intention of the parties.").[17]

The master lease's indemnification clause required Engstrom to indemnify Gear "from and against any and all claims arising from any breach or default . . . or arising from any act of Landlord . . . ." ML § 8.5 (emphasis added).

We read the indemnification clause as dependent on Engstrom's breach or default of its lease obligations or any claims arising from any act by Engstrom. We conclude subtenant's rent abatement claim triggered the indemnification clause because the water intrusion and failure to remedy arose from breach, default, or acts by Engstrom. And we reject Engstrom's assertion that Gear cannot "identify a single act of Engstrom from which the Subtenant's claims arose." Engstrom Br. at 23. The trial court erred when it declined to order Engstrom to contractually indemnify Gear against the subtenant's rent abatement claim.

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[17] Engstrom also cites to Jones, 84 Wn.2d 518, and Scruggs v. Jefferson County, 18 Wn. App. 240, 567 P.2d 257 (1977), to argue that as a "passive, nonculpable party to the Lease [between the subtenant and Gear] . . . the Subtenant's mere claims against Engstrom do not invoke the indemnification provision" without some fault on Engstrom's part. Resp't's Br. at 26. But those cases hold that indemnity provisions "which purport to exculpate an indemnitee from liability from losses flowing solely from his own acts or omissions are not favored and are to be clearly drawn and strictly construed . . . ." Jones, 84 Wn.2d at 520; see also Scruggs, 18 Wn. App. at 243. Here, the indemnity provision does not exculpate Gear "from liability from losses flowing solely from his own acts or omissions . . . ." Jones, 84 Wn.2d at 520. Those cases are inapposite.

Failure to Mitigate

Gear next argues that the court erred in rejecting its failure to mitigate affirmative defense to Engstrom's counterclaim for unpaid rent. Gear argues that the trial court's rationale—failure to plead the affirmative defense—was erroneous because the parties tried the issue by implied consent under CR15(b).[18] Engstrom disagrees and asserts the trial court rejected Gear's motion to amend its pleadings—a decision reviewed for an abuse of discretion.

Failure to mitigate is an affirmative defense that may be waived if not affirmatively pleaded in the answer. Fed. Signal Corp. v. Safety Factors, Inc., 125 Wn.2d 413, 886 P.2d 172 (1994). But under CR 15(b), "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." "At the discretion of the trial court, the pleadings may be amended to conform to the evidence at any stage in the action, including at the conclusion of a trial, and even after judgment." Green v. Hooper, 149 Wn. App. 627, 636, 205 P.3d 134 (2009). "[B]ut failure so to amend does

[18] CR 15(b) provides: "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."

not affect the result of the trial of these issues." CR 15(b). A trial court's ruling on CR 15 is reviewed for manifest abuse of discretion. Green, 149 Wn. App. at 636. "An abuse of discretion occurs only when no reasonable person would take the view adopted." In re Disciplinary Proceedings Against Bonet, 144 Wn.2d 502, 510, 29 P.3d 1242 (2001).

"'The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.'" Del Guzzi Constr. Co. v. Global Nw. Ltd., 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (analyzing amendment under CR 15(a)) (quoting Caruso v. Local 690, Int'l Bhd. of Teamsters, 100 Wn.2d 343, 350, 670 P.2d 240 (1983)).

> In determining whether the parties impliedly tried an issue, an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue.

Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847 (1999.)

> "However, amendment under CR 15(b) cannot be allowed if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties."

Green, 149 Wn. App. at 636 (quoting Harding v. Will, 81 Wn.2d 132, 137, 500 P.2d 91 (1972)).

On August 13, 2009, the last day of trial, Gear submitted a supplemental brief on the duty to mitigate issue. The brief did not expressly move for amendment under CR

15(b). Yet the trial court viewed it as such a motion and denied it. The court ruled Gear was "not entitled to any set off for any failure to mitigate . . . because . . . Gear Athletics did not plead nor answer failure to mitigate as an affirmative defense . . . ." CL 22. The parties agree that this decision constitutes a CR 15(b) amendment ruling reviewable for an abuse of discretion.

Here, the record shows that Gear gave Engstrom notice that it intended to introduce failure to mitigate evidence at trial. Gear discussed it in opening remarks, elicited testimony on Engstrom's effort to relet the building, and submitted a brief on the issue; and Gear's closing remarks argued failure to mitigate. Gear remarked in opening statements, "I think the evidence will be there was absolutely no activity by Mr. Engstrom to try and re-lease that space, which is his obligation under the law. He didn't necessarily want to re-lease it because he was selling it for $4 million closing in January." RP (Aug. 10, 2009) at 17. At trial, Gear asked Steve Engstrom about his efforts to relet the building:

> [COUNSEL FOR GEAR]: So you didn't make any attempts to list it or --
>
> [STEVE ENGSTROM]: 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.

At trial, Engstrom did not object, argue surprise, or move for a continuance to introduce rebuttal mitigation evidence. Consideration of the record as a whole demonstrates no prejudice to Engstrom under the circumstances here. Reichelt v. Johns-Manville Corp.,

107 Wn.2d 761, 766-67, 733 P.2d 530 (1987) ("Where evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof."). We conclude the trial court abused its discretion in finding Gear had waived the duty to mitigate defense by not pleading it. And a failure to request a continuance at trial waives the CR 15(b) issue on appeal. Daves v. Nastos, 105 Wn.2d 24, 27, 711 P.2d 314 (1985). The issue was tried by implied consent of the parties. CR 15(b).

Gear next argues that the trial court erred by concluding that it had failed to meet its burden of proof to establish a failure to mitigate.[19] Gear points to Steve Engstrom's undisputed testimony that he did not make any efforts to relet the building. Engstrom counters that there was a limited duty to mitigate given Steve Engstrom's testimony that "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." RP (Aug. 11, 2009) at 177. But that testimony was contradicted by Engstrom's own property manager, Olson, who testified

> [COUNSEL FOR ENGSTROM]: Okay. Based on your experience as a property manager, could the building have been leased to a third party during the period of time when this remediation[20] was taking place?
> [OLSON]: It could have been leased to someone.
> Q. For $20,000 a month?
> A. In an arm-length's [sic] transition -- or transaction, it could be whatever

[19] Despite its ruling that Gear waived the mitigation defense, the trial court also ruled on the merits, concluding that Gear failed to satisfy "the relative burden of proof on the issue." CL 22.

[20] The building underwent environmental remediation in October, November, and December 2008.

a party was going to pay for the use of the building at the time.

Q. With that disruption?

A. I think there's a use for every property out there, quite frankly.

RP (Aug. 12, 2009) at 370. And the duty to mitigate requires a landlord to make an honest and reasonable effort to relet the premises. Crown Plaza Corp. v. Synapse Software Sys., Inc., 87 Wn. App. 495, 503, 962 P.2d 824 (1997). Here, Steve Engstrom admits that he made no effort. While the difficulty of re-leasing a commercial space for a short rental term may inform the reasonable degree of effort that a landlord must exert attempting to relet the premises, it does not suspend the landlord's obligation imposed by law to make reasonable efforts.

While Engstrom raises several grounds for why no duty to mitigate applies here, none is persuasive. Citing to Metropolitan National Bank v. Hutchinson Realty Co., 157 Wn. 522, 289 P. 56 (1930) and Hargis v. Mel-Mad Corp., 46 Wn. App. 146, 151, 730 P.2d 76 (1986), it argues the lease specifically absolved it of a duty to mitigate. But in those cases, the leases unequivocally provided that the tenant would be responsible for unpaid rent even after termination of the lease and reentry by the landlord. Metropolitan, 157 Wn. at 529 ("lessor may cancel this lease . . . , reenter said premises, but notwithstanding such re-entry by the lessor, the liability of the lessee for the rent . . . shall not be extinguished"); Hargis, 46 Wn. App. at 152 ("'Landlord may . . . declare th[e] lease forfeited . . . , re-enter the premises, . . . but notwithstanding such re-entry by Landlord, the liability of Tenant for the rent . . . shall not be extinguished . . . .'" (emphasis omitted) (quoting lease)). By contrast, the lease here provides that the

landlord may either terminate the lease and take possession of the premises or not terminate the lease but relet the premises on the tenant's account:

> 13.2 Remedies of Landlord
>
> (a) Upon any material default and breach by Tenant, . . . Landlord may either (i) terminate this Lease and pursue re-entering and taking possession of the Premises . . . or (ii) re-enter, as herein provided, and take possession of the Premises . . . and without terminating this lease, relet said Premises or any part thereof for the account of the Tenant . . . .

Metropolitan and Hargis are inapposite.

Engstrom argues no duty to mitigate applies because the lease constituted partial consideration for its sale of Athletic Supply Company to Gear. But as Gear correctly notes and not disputed by Engstrom, that sale included no waiver of applicable contract and landlord tenant law. Gear argues, "Gear Athletics never agreed to pay Engstrom a sum certain in lieu of rent, and it certainly never waived its right to insist that Engstrom fulfill its duty to mitigate in the event of a default." Appellant's Reply Br. at 32. And when the parties signed the lease, they expected that the building would be sold and the lease terminated within two months. See Ex. 1 ("[T]he parties acknowledge
that Landlord is under contract . . . to sell the Property . . . with a closing schedule for June 30, 2006. If such closing occurs . . ., this Lease Term will terminate . . . ."). While the trial court made no findings of fact on its mitigation ruling, the undisputed evidence establishes that Engstrom made no effort to relet the premises in violation of its duty to mitigate.

We conclude the trial court erred when it ruled Gear waived its failure to mitigate defense and failed to meet its mitigation defense burden of proof. We also conclude Engstrom's failure to mitigate its damages for lost rent entitles Gear to an offset in an amount to be determined on remand.

Attorney Fees

Gear and Engstrom both argue that they were entitled to attorney fees below and are entitled to fees on appeal. Whether a party is a "prevailing party" is a mixed question of law and fact that we review 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 question as to which party substantially prevailed is often subjective and difficult to assess. Marassi v. Lau, 71 Wn. App. 912, 917, 859 P.2d 605 (1993). As a rule, the prevailing party is one who receives an affirmative judgment in its favor. Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). But if neither party wholly prevails, the determination of who is the substantially prevailing party depends on the extent of the relief accorded. Transpac Dev., Inc. v. Oh, 132 Wn. App. 212, 217-19, 130 P.3d 892 (2006); Marine Enters., Inc. v. Sec. Pac. Trading Corp., 50 Wn. App. 768, 772, 750 P.2d 1290 (1988). In Marassi, the court concluded that where multiple and distinct claims were at issue, the trial court should take a "proportionality approach." Marassi, 71 Wn. App. at 917. But if both parties prevail on major issues, both parties bear their own costs and fees. Phillips Bldg. Co. v. An, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996).

Here, Gear has prevailed on its indemnification claim and rent abatement claims based on the arbitration award confirmation. It also prevailed on its failure to mitigate defense. Engstrom prevailed below on Gear's claims for fraudulent inducement and negligent misrepresentation but failed here on its motion to vacate arbitration award issue. Because there is no wholly prevailing party, right to attorney fees depends on a proportionality analysis under Marassi. Engstrom acknowledges, "If this Court does anything other than affirm . . ., an award of attorneys fees and costs will probably require recalculation." Resp't's Reply Br. at 15. Accordingly, we remand to the trial court for entry of findings and conclusions on the appropriate apportionment of attorney fees.[21] See JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 970 P.2d 343 (1999) (vacating fee award and remanding for entry of findings and conclusions pursuant to Marassi); Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998) (holding that findings of fact and conclusions of law are required to support a fee award.).

On appeal, however, Gear is entitled to fees as the sole prevailing party. A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal. Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). Section 16.13 provides for prevailing party fees.

> 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

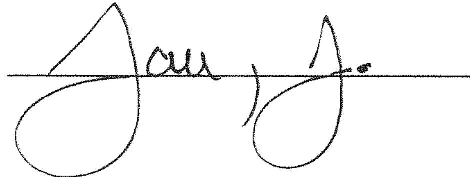
[21] The trial court did enter findings and conclusions to support its original fee award, but those findings were based on its erroneous conclusion that Engstrom had prevailed on the rent abatement and indemnification issues.

nonprevailing party as fixed by the court or adjudicating authority.

Gear has prevailed on all claims on appeal and is thus entitled to attorney fees.

CONCLUSION

We reverse the April 23, 2010 judgment with instructions (1) to enter judgment in favor of Gear on its indemnification claim, rent abatement claim, and failure to mitigate defense and (2) recalculate attorney fees and the judgment consistent with this opinion.



WE CONCUR: