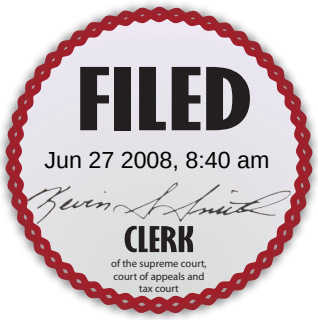

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IN THE
COURT OF APPEALS OF INDIANA

LAWRENCE GUNKEL and JUDY LYNN GUNKEL,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 76A03-0609-CV-407
RENOVATIONS, INC, by WAGLER and MENNO D. WAGLER, d/b/a RENOVATIONS, INC, by WAGLER, and J & N STONE, INC,	)	
Appellees-Defendants.	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0010-CT-754

June 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Lawrence and Judy Gunkel appeal the trial court's dismissal of their negligence claims against J & N Stone, Inc., and Renovations, Inc., pursuant to Indiana Trial Rule 41(B) and the trial court's judgment in favor of Renovations on the Gunkels' breach of contract claim. On appeal, the Gunkels raise eight issues, which we consolidate and restate as five:

> 1. Whether the trial court properly denied the Gunkels' motion to amend their complaint to add a breach of contract claim against J & N;
> 2. Whether the trial court properly dismissed the Gunkels' negligence claims against J & N and Renovations pursuant to Trial Rule 41(B);
> 3. Whether the trial court properly awarded the Gunkels damages on their breach of contract claim against Renovations;
> 4. Whether the trial court properly awarded Renovations prejudgment interest; and
> 5. Whether the trial court properly awarded Renovations attorney fees.

We affirm in most respects, concluding the trial court properly denied the Gunkels' motion to amend, properly dismissed the Gunkels' negligence claims pursuant to Trial Rule 41(B), and properly awarded prejudgment interest. However, we reverse the trial court's refusal to award two of the damages on the Gunkels' breach of contract claim and remand another for further consideration. We also remand with instructions that the trial court make proper findings with respect to its award of attorney fees to Renovations.

Finally, we conclude Renovations is entitled to appellate attorney fees, but remand with instructions that the trial court conduct a hearing and make a determination as to the proper amount.

Facts and Procedural History

This is the third time an appellate court has addressed this case. Although the two prior appellate decisions provide background on the facts and procedural history of this litigation, see Gunkel v. Renovations, Inc., 822 N.E.2d 150, 151-52 (Ind. 2005); Gunkel v. Renovations, Inc., 797 N.E.2d 841, 842-43 (Ind. Ct. App. 2003), vacated, 822 N.E.2d 150, resolution of this appeal requires that we retread some of that history and elaborate on it.

On March 9, 1999, the Gunkels entered into a contract with Renovations (the "Construction Contract") to construct a three-story, single-family residence (the "Residence") on property the Gunkels owned in Steuben County, Indiana. The Construction Contract provided, among other things, that Renovations would perform its services in a "good and workmanlike manner," that the Gunkels would pay Renovations $435,000 for its services, and that the Residence would be built "in substantial conformity" with an architectural plan the Gunkels had submitted to Renovations. Plaintiffs' Exhibit 12 at 2. One of the architectural plan's specifications required that a stone façade be installed on the exterior of the Residence; J & N was hired for this task.

Construction began shortly after the Gunkels and Renovations executed the Construction Contract and continued throughout 1999. From October to December 1999, after framing was completed and a roof had been installed, the Gunkels noticed water

entering around the doors and windows of the Residence. Renovations explained to the Gunkels that the water entry would cease after J & N installed the stone façade, which J & N began to construct in early November 2000. However, by the time J & N finished in late March 2000, water was still entering. Renovations attempted to fix the problem during the summer of 2000 by recaulking and reflashing the doors and windows, but the problem persisted. Dissatisfied with the work of Renovations and J & N, the Gunkels hired a series of contractors to tear down the stone façade and install a new one, remove and reinstall some of the doors and windows, and replace others. These efforts solved the water entry problem, but not without the Gunkels having expended substantial time and money.

On October 24, 2000, the Gunkels filed a complaint against Renovations for breach of contract and fraud,[1] alleging that their damages included lost use of the Residence and repair costs associated with the water damage. On December 14, 2000, the Gunkels amended their complaint to add a count against J & N. That count applied the allegations of the original complaint to J & N and added a negligence claim against J & N. The new count also alleged the existence of a separate contract between the Gunkels and J & N, but did not purport to add a breach of contract claim. On February 8, 2001, J & N answered the complaint, admitting that it contracted with the Gunkels to install a stone façade and asserting a counterclaim for breach of that contract.

[1] The Gunkels subsequently conceded their fraud claim lacked merit, and the trial court granted Renovations summary judgment on that claim.

On April 29, 2002, Renovations moved for partial summary judgment on the status of J & N, arguing that the contract between the Gunkels and J & N meant that J & N was not a subcontractor of Renovations. On May 10, 2002, J & N moved for partial summary judgment, arguing that it could not be liable on the first count of the amended complaint because the Gunkels did not allege J & N was a party to the Construction Contract. On July 5, 2002, the trial court granted the defendants' motions, finding with respect to Renovations' motion that J & N "had a direct contract with [the Gunkels] to furnish and install stone on the residence in controversy. Further, J & N . . ., for purposes of installing the stone, was not a sub-contractor of defendant, Renovations . . . ." Appellants' Appendix at 245.

On September 17, 2002, the Gunkels filed a second motion to amend their complaint, seeking to add a negligence claim against Renovations. On October 7, 2002, the trial court granted the Gunkels' motion, leaving three claims: a negligence claim against Renovations, a breach of contract claim against Renovations, and a negligence claim against J & N. On October 16, 2002, J & N answered the complaint, abandoning its previous admission that it had contracted with the Gunkels. J & N still asserted a counterclaim, but revised it to avoid explicit breach-of-contract-type language, characterizing the counterclaim instead as one for "failure to pay for the full value of the goods and services received . . . ." Id. at 423.

On November 6, 2002, J & N filed a motion for summary judgment, arguing that under the economic loss rule, any damages it caused to the Residence were recoverable under only a breach of contract claim. Apparently realizing that this motion threatened to

foreclose recovery from J & N, on January 8, 2003, the Gunkels filed a third motion to amend their complaint, this time seeking to add a breach of contract claim against J & N. On January 14, 2003, the trial court granted J & N's motion and denied the Gunkels'.

The trial court's grant of summary judgment resulted in an appeal by the Gunkels and the two appellate decisions mentioned above. A panel of this court affirmed the trial court, but our supreme court vacated that decision and reversed. In doing so, the court explained the economic loss rule:

> damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected.

Gunkel, 822 N.E.2d at 153. The court also explained that determining whether damaged property is "other property" for purposes of the economic loss rule "turns on whether it was acquired by the plaintiff as a component of the defective product or was acquired separately." Id. at 151. Applying these principles, the court concluded the stone façade was "other property" because "J & N installed the façade under an arrangement with the Gunkels that was independent of the contract with Renovations to build the home." Id. at 156. Accordingly, the court reversed the trial court's grant of summary judgment and remanded for further proceedings.

Our supreme court's application of the economic loss rule and its rather decisive language regarding the existence of a contract between the Gunkels and J & N resulted in additional focus on the nature of the Gunkels' relationship with J & N. On March 1, 2005, J & N petitioned for rehearing, contending the court made a "factual error" when it

stated J & N had an independent contract with the Gunkels. Appellants' App. at 437. On May 25, 2005, the court denied J & N's petition, but stated in its order that whether an independent contract existed between the Gunkels and J & N "is a matter for the trial court to resolve on remand." Id. 334. On August 23, 2005, the Gunkels filed a fourth motion to amend their complaint, again seeking to add a breach of contract claim against J & N.

On September 27, 2005, the trial court conducted a hearing on the Gunkels' motion and the first phase of a bifurcated trial on the remand issue of whether an independent contract existed between the Gunkels and J & N.[2] On October 7, 2005, the trial court entered an order denying the Gunkels' motion to amend and finding as follows regarding the remand issue:

> The Gunkels, since the inception of the March 9, 1999, Construction Contract, intended for the exterior masonry work on their home to be a part of said Construction Contract and, further, intended for the materials to be supplied by J & N. The Gunkels did not enter into a contract with J & N for the purchase and installation of cultured stone which was independent of the Construction Contract.

Id. at 22. The trial court based this finding on evidence that the Gunkels and Renovations had discussed using J & N as a subcontractor as early as January 1999, that Renovations specified a $41,000 allowance for masonry work in a February 1999 bid proposal submitted to the Gunkels, that Renovations paid J & N directly for J & N's work, and that the Gunkels had submitted affidavits in opposition to Renovations' April 29, 2002, summary judgment motion stating that "[i]t has always been and continues to be my

[2] The trial court later explained in its judgment that it tried the remand issue before the other trial issues because resolution of the former "could possibly promote an amicable resolution of this case." Id. at 26.

understanding of the construction contract of March 9, 1999, that J & N Stone, Inc. is and was a subcontractor to Renovations, Inc." Plaintiffs' Exhibits 4A at 3; 4B at 2.

The second phase of the bifurcated trial proceeded in two segments, from November 30 to December 2, 2005, and from March 15 to 17, 2006. At the close of the Gunkels' case-in-chief on March 16th, Renovations and J & N moved to dismiss the Gunkels' negligence claims pursuant to Trial Rule 41(B), arguing that the economic loss rule prevented the Gunkels from recovering the types of damages they sought in negligence.[3] The trial court granted these motions, and Renovations presented its case-in-chief on the Gunkels' breach of contract claim and its breach of contract counterclaim. On May 12, 2006, the trial court entered findings of facts and conclusions of law. The findings and conclusions incorporated the trial court's October 7, 2005, order on the remand issue, elaborated on its decision to dismiss the negligence claims against Renovations and J & N pursuant to Trial Rule 41(B), and addressed the Gunkels' breach of contract claim and Renovations' breach of contract counterclaim. Based on these findings and conclusions, the trial court entered judgment in favor of the Gunkels in the amount of $31,826.41 on their breach of contract claim and judgment in favor of Renovations in the amount of $211,935.46 on its counterclaim. The Gunkels now appeal.

[3] J & N also argued the Gunkels had not presented sufficient evidence to establish that J & N's negligence caused the damage, but the trial court rejected that argument. See Transcript at 1146 (trial court, after characterizing J & N's causation argument as a factual one and J & N's economic loss rule argument a legal one, stating, "you lose on the factual argument"); Appellants' App. at 29 (trial court's May 12, 2006, findings of facts and conclusions of law stating that it granted J & N's motion to dismiss because the economic loss rule applied to bar the negligence claim against J & N).

Discussion and Decision

I. Motion to Amend Complaint

The Gunkels argue the trial court improperly denied their August 23, 2005, motion to amend their complaint to add a breach of contract claim against J & N. Indiana Trial Rule 15(A) permits a party to "amend his pleading once as a matter of course" and thereafter "by leave of court . . . when justice so requires." The trial court has broad discretion in deciding whether to permit amendments to pleadings, and this court will reverse only when the trial court has abused that discretion. Gordon v. Purdue Univ., 862 N.E.2d 1244, 1253 (Ind. Ct. App. 2007). Abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances before it. General Motors Corp. v. Northrop Corp., 685 N.E.2d 127, 142 (Ind. Ct. App. 1997), trans. denied. In deciding whether to grant or deny a motion to amend, the trial court may consider factors such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of amendment." Gordon, 862 N.E.2d at 1253 (quoting United of Omaha v. Hieber, 653 N.E.2d 83, 87 (Ind. Ct. App. 1995), trans. denied).

The August 23, 2005, motion to amend was not the first time the Gunkels attempted to add a breach of contract claim against J & N. Indeed, on January 8, 2003, the Gunkels filed a substantially similar motion. See Appellants' App. at 284 (January 8, 2003, motion stating that "Plaintiffs seek leave of the Court to Amend their Second Amended Complaint to add a claim of breach of contract against Defendant, J & N Stone, Inc."); id. at 342 (August 23, 2005, motion stating that "Plaintiffs seek leave of Court to

amend their Complaint to add a claim for Breach of Contract as between Plaintiffs and J & N Stone, Inc."). The trial court denied these motions on January 14, 2003, and October 7, 2005, respectively.

Given that the trial court already denied a substantially similar motion nearly three years earlier, the Gunkels have not explained why the trial court's denial of their August 23, 2005, motion constitutes an abuse of discretion. Moreover, the Gunkels overlook that they were aware of a possible breach of contract claim as early as December 14, 2000, because the amended complaint they filed on that date alleged they had contracted with J & N. The Gunkels offer no reason for this delay,[4] and the trial court could have justifiably concluded it was undue.[5] Cf. MAPCO Coal, Inc. v. Godwin, 786 N.E.2d 769, 777 (Ind. Ct. App. 2003) (concluding trial court did not abuse its discretion in denying a motion to amend where the plaintiff "waited almost three years to assert a claim that could have been raised in its initial complaint" and there was no new evidence to justify the amendment); Hendrickson v. Alcoa Fuels, Inc., 735 N.E.2d 804, 818 (Ind. Ct. App. 2000) (concluding the trial court's denial of a motion to amend nearly four years after the

[4] The previous appellate decisions touched on this issue, Gunkel, 822 N.E.2d at 151-52 ("According to J & N, the Gunkels sought to position J & N as a subcontractor of Renovations in order to bolster their claim against Renovations. Whether for that reason or not, the Gunkels elected to forego any contract claim against J & N and relied solely on J & N's alleged negligence."); Gunkel, 797 N.E.2d at 845 ("The reason for the Gunkels' abandonment of their contract remedy is not apparent. Undoubtedly, it appears that a claim for breach of contract could go forward."), and we add our own observation that to the extent the Gunkels were concerned a breach of contract claim against J & N might undermine their attempt to establish J & N as a subcontractor of Renovations, nothing in the record suggests that at the outset of the litigation such a concern was warranted, as the trial rules permit plaintiffs to plead alternative theories of recovery, see Ind. Trial Rule 8(E)(2); Liggett v. Young, 877 N.E.2d 178, 185 (Ind. 2007).

[5] The dissent would conclude the trial court abused its discretion in denying the motion to amend because "[t]here was no good reason not to allow the amendment." Dissent, slip op. at 30. Denying a substantially similar motion three years earlier – a denial the Gunkels did not appeal – coupled with the fact that the Gunkels were aware of the conduct giving rise to the motion to amend (that is, the existence of a contract with J & N) at nearly the outset of the litigation seem to us two good reasons not to allow the amendment.

original complaint was filed and after the defendant filed two summary judgment motions was not an abuse of discretion). Thus, we are not convinced that the trial court's refusal to allow the Gunkels to amend their complaint to add a breach of contract claim against J & N was an abuse of discretion.

II. Trial Rule 41(B) Motions

The Gunkels argue the trial court improperly dismissed their negligence claims against J & N and Renovations pursuant to Trial Rule 41(B). We will examine the propriety of each dismissal in turn, but note initially that Trial Rule 41(B) states in pertinent part as follows:

> After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

As the rule indicates, a trial court may weigh the evidence, determine the credibility of witnesses, and decide whether the party with the burden of proof has established a right to relief during the case-in-chief. TMC Transp., Inc. v. Maslanka, 744 N.E.2d 1052, 1054 (Ind. Ct. App. 2001), trans. denied. In reviewing the grant or denial of a Trial Rule 41(B) motion, this court will not reverse the trial court's decision unless it is clearly erroneous. Id.

Moreover, where, as here, the trial court made special findings of fact and conclusions of law pursuant to a party's request, we first determine whether the evidence

supports the findings and then whether the findings support the conclusions. Id. We will not set aside findings unless clearly erroneous. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). Findings are clearly erroneous if the record lacks any evidence or reasonable inferences to support them. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. We will not conclude a finding or conclusion is clearly erroneous unless our review of the evidence leaves us with a firm conviction that a mistake has been made. Id.

A. J & N

The Gunkels argue the trial court improperly dismissed their negligence claim against J & N because it erroneously applied the economic loss rule. As mentioned above, application of the economic loss rule requires a determination of whether damaged property is "other property," which in turn requires an inquiry on whether the damaged property "was acquired by the plaintiff as a component of the defective product or was acquired separately." Gunkel, 822 N.E.2d at 151. In its October 7, 2005, order following the first phase of the bifurcated trial, the trial court found that "[t]he Gunkels did not enter into a contract with J & N for the purchase and installation of cultured stone which was independent of the Construction Contract." Appellants' App. at 22. Based on this finding, the trial court concluded in its May 12, 2006, findings of fact and conclusions of law that the economic loss rule applied. The Gunkels do not argue that the trial court's finding does not support its conclusion; instead, they argue the law of the

case doctrine prevented the trial court from reconsidering whether there was an independent contract with J & N.[6]

"The 'law of the case' doctrine provides that when an issue is once litigated and decided, the decision becomes and remains settled and binding on the parties unless successfully challenged on appeal." Haskell v. Peterson Pontiac GMC Trucks, 609 N.E.2d 1160, 1162-63 (Ind. Ct. App. 1993). Nevertheless, this court has never interpreted the doctrine as a limitation on the trial court's power to revisit one of its prior decisions. Id. at 1163. To the contrary, we have characterized the doctrine as "a discretionary rule of practice" and explained that "a trial court has inherent power to reconsider, vacate, or modify any previous order so long as the case has not proceeded to final judgment." Id.

The earlier finding to which the Gunkels refer is one the trial court made when it granted Renovations' April 29, 2002, motion for summary judgment regarding J & N's status: "J & N . . ., had a direct contract with [the Gunkels] to furnish and install stone on the residence in controversy. Further, J & N Stone, Inc., for purposes of installing the stone, was not a sub-contractor of defendant, Renovations . . . ." Appellants' App. at

[6] The Gunkels also make a related argument that the law of the case doctrine prevented the trial court from reconsidering its earlier finding in light of our supreme court's observation that "J & N installed the façade under an arrangement with the Gunkels that was independent of the contract with Renovations to build the home." Gunkel, 822 N.E.2d at 156. Although we agree with the Gunkels that the law of the case doctrine binds a trial court where an appellate court decides an issue and remands for further proceedings, see Humphreys v. Day, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000), trans. denied, our supreme court's observation was not decisive. In this respect, it is important to note that the observation was made in the context of reviewing the propriety of the trial court's grant of J & N's November 6, 2002, motion for summary judgment. As such, the court was acknowledging the designated evidence presented a genuine issue of material fact that precluded summary judgment, not that the existence of a contract between the Gunkels and J & N had been conclusively established. Lest there be any doubt, in denying J & N's petition for rehearing, the court stated that whether an independent contract existed between the Gunkels and J & N "is a matter for the trial court to resolve on remand." Appellants' App. at 334.

245. Although we agree with the Gunkels that this finding contradicts the trial court's subsequent finding that "[t]he Gunkels did not enter into a contract with J & N for the purchase and installation of cultured stone which was independent of the Construction Contract," id. at 22, the law of the case doctrine does not prevent the trial court from reconsidering the earlier finding.[7] See Haskell, 609 N.E.2d at 1163. Thus, because the trial court's finding that no independent contract existed between the Gunkels and J & N supports the trial court's conclusion that the economic loss rule applies to bar the Gunkels' negligence claim against J & N, it follows that the trial court's dismissal of the negligence claim against J & N pursuant to Trial Rule 41(B) was not clearly erroneous.

B. Renovations[8]

The Gunkels argue the trial court improperly dismissed their negligence claim against Renovations because some of the property damaged by Renovations' negligence was "other property" and therefore not subject to the economic loss rule.[9] Specifically, the Gunkels contend that Renovations' negligence resulted in damage to the carpeting,

[7] We note as an aside that at a hearing on the morning of the second phase of the bifurcated trial, the trial court acknowledged that its rulings had been contradictory and, in doing so, provided an extemporaneous yet succinct explanation why the law of the case doctrine is discretionary:

> There have been several motions presented to the court prior to ruling on those motions the court would like to observe the following: The record in this case which is lengthy if nothing else, does appear to have inconsistencies in it. I fully acknowledge that. But on behalf of all judges that have preceded me and will succeed me I wish to say only this, records are developed at a certain moment in time based upon the facts that are presented to the judges at that moment in time. That is why the rulings that this court has made in this case could arguably be construed as being inconsistent. Stated differently, what you see is what you get.

Tr. at 81.

[8] Renovations argues the Gunkels have waived this issue on appeal because they failed to present a cogent argument or authority for their position. Although the Gunkels' argument on this issue is brief, it nevertheless allows for meaningful appellate review. Thus, we conclude the Gunkels have not waived this issue.

[9] The Gunkels also make this argument with respect to J & N. However, because our analysis of this argument yields the same result whether applied to Renovations or J & N, we choose to address the argument as applied to Renovations for the sake of brevity.

landscaping, and two security cameras and an audio system and that this property "was not covered by the contract with Renovations." Appellants' Br. at 23. Among other arguments, Renovations counters that, even assuming this property was other property and that Renovations' negligence caused the damage to it, the Gunkels did not present sufficient evidence for the trial court to determine a damage award.

Putting to the side whether this property was other property and therefore not subject to the economic loss rule, we note that although "the plaintiff need not prove the amount of damages suffered to a mathematical certainty, the award must be supported by evidence in the record," Gigax v. Boone Vill. L.P., 656 N.E.2d 854, 856 (Ind. Ct. App. 1995), and not "on the mere basis of conjecture or speculation," Noble Roman's, Inc. v. Ward, 760 N.E.2d 1132, 1140 (Ind. Ct. App. 2002). The trial court apparently concluded the latter was the case, as it stated in its conclusions of law that it "cannot . . . speculate as to the amount of . . . damages" associated with "general interior repairs and cleanup" (which included carpeting and electronic equipment) and that "the Gunkels should not recover from Renovations the sum of $9,759.22 paid to Franz Nursery" for damages associated with the landscaping. Appellants' App. at 44. We will examine the evidence of damages with respect to this property separately, but note that because the Gunkels bore the burden of proving damages, and are now appealing from a negative judgment, they must demonstrate the trial court's refusal to award damages is either clearly erroneous or contrary to law to have it set aside. Noble Roman's, 760 N.E.2d at 1140.

1. Carpeting

The Gunkels cite Judy's testimony that the carpet and padding was "kinda totaled" due to the water entry problem as proof of damages, tr. at 208, but Lawrence testified he was able pull up the wet portions of the carpet and dry them out with dehumidifiers and fans, see id. at 561 ("Q. . . . And have [sic] drying them out seemed to work? A. There [sic] dry, yes."). Moreover, the Gunkels have not cited to any portion of the record indicating the amount of damages they sustained in drying out the carpeting. One of the exhibits admitted into evidence states a tentative estimate of $100,000 to $125,000 for interior repairs "as a result of the improperly installed cultured stone and window flashings," plaintiffs' exhibit 29 at 1, and lists removing and replacing the carpeting as one such repair, but does not state the costs associated with the removal and replacement. Thus, we are not convinced the trial court's conclusion that the Gunkels were not entitled to damages for the carpeting was contrary to law.

2. Landscaping

The Gunkels cite Lawrence's testimony that he originally paid $9,759.22 for landscaping and "[a]bout eighty percent" was damaged during the course of tearing down and replacing the stone façade as proof of damages. Tr. at 553. On cross-examination from Renovations' counsel, however, the following exchange occurred:

> Q. In fact with regard to this $10,000 landscaping figure you testified to, did you spend any money out-of-pocket to anybody, or do it yourself?
> A. Yes, it [sic] had to spend money for equipment and gas.
> Q. Okay. How much did you spend?
> A. I'd only be taking a guess, I wouldn't know.
> Q. Well, what would you guess it was, $10,000?
> A. No.

Q. Would you guess it was $1,000?
A. No.
Q. Less than $1,000?
A. Yes.

Id. at 577. Because Lawrence's "guess" that he spent less than $1,000 repairing the landscaping does not compel a conclusion that the Gunkels are entitled to damages, it follows that the trial court's conclusion was not contrary to law.

3. Security Cameras and Audio System

The Gunkels cite to Lawrence's testimony that he paid $280 for the security cameras and audio system as proof of damages. However, no evidence was admitted to indicate how much it cost to replace them. Lawrence later testified on cross-examination that he "called the manufacturer [and asked] what it would take to replace [the security cameras]," but he did not testify to the replacement amount. Id. at 606. Moreover, the exhibit mentioned above lists "Removal and reinstallation of all electronic equipment" as a repair, but does not specify the costs associated with such removal and reinstallation. Plaintiffs' Ex. 29 at 1. Thus, we are not convinced the trial court's conclusion that the Gunkels were not entitled to damages for the security cameras and the audio system was contrary to law.

The Gunkels have not carried the heavy burden of establishing they are entitled to damages for the carpeting, landscaping, and security cameras and audio system as a matter of law. Thus, it follows that the trial court's dismissal of the negligence claim against Renovations pursuant to Trial Rule 41(B) was not clearly erroneous.

III. Breach of Contract Claim Against Renovations[10]

The Gunkels argue the trial court's damages award on their breach of contract claim is inadequate as a matter of law. Specifically, the Gunkels challenge several specific findings by the trial court and contend they were entitled to recover damages from Renovations for the carpeting, landscaping, security cameras and audio system, and loss of use of the Residence as a matter of law. We will address the Gunkels' challenges to the specific findings and whether they were entitled to damages for loss of use of the Residence as a matter of law. However, we have already determined in the context of the Gunkels' negligence claim against Renovations that they are not entitled to recover damages for the carpeting, landscaping, and security cameras and audio system as a matter of law, and therefore conclude their damages claims with respect to this property

[10] In addition to reversing on the motion to amend, see supra, note 5, the dissent also would reverse and remand for a new trial on the grounds that the trial court failed to specify whether J & N was a subcontractor of Renovations or an independent contractor. We agree with the dissent that confusion over J & N's status caused this case to get "off the tracks," dissent, slip op. at 30, and ultimately resulted in it descending into "Litigation Hell," id. at 29. However, the dissent's observation that the trial court "held that J & N was neither a subcontractor, nor an independent contractor" is not entirely correct. Id. at 30. Following the first phase of the bifurcated trial, the trial court found that "[t]he Gunkels did not enter into a contract with J & N for the purchase and installation of cultured stone which was independent of the Construction Contract." Appellants' App. at 22. However, in its findings of fact and conclusions of law, the trial court made the following conclusion: "The court has previously ruled, based upon timely filed evidentiary materials it had before it, that J & N was not a sub-contractor of Renovations. Therefore, Renovations cannot have assessed against it on an agency theory any damages which the Gunkels sustained and which were the result of any negligent acts of J & N during the course of this construction project." Id. at 41.

To the extent this conclusion conflicts with the trial court's finding following the first phase of the bifurcated trial, the Gunkels do not point out in their brief that such a conflict exists, let alone argue that such a conflict requires reversal of the trial court's decision. Although we acknowledge our authority to address issues not raised by the parties, and interpret the dissent as endorsing sua sponte review of this issue and reversal based on that review, the decision to exercise such authority involves countervailing policy considerations. "There are sound reasons for requiring a party to present all known arguments or claims to an appellate court before its decision is rendered," Northern Ind. Commuter Transp. Dist. v. Chicago SouthShore and South Bend R.R., 685 N.E.2d 680, 686 (Ind. 1997), not the least of which are that an eagerness by this court to conduct sua sponte review deprives opposing parties of an opportunity to be heard and creates the appearance that this court is more of an advocate for a particular side than it is a neutral arbiter of disputes. Consistent with these considerations, we cannot reverse based on an issue the Gunkels have not raised in their brief.

also must fail in the context of their breach of contract claim.[11] Before addressing the Gunkels' arguments, we note the standard of review described above applies here, specifically the applicable standard of review where the trial court enters findings of fact and conclusions of law pursuant to a party's request, see TMC Transp., 744 N.E.2d at 1054, and our observation that the party appealing the trial court's refusal to award damages must establish that they are entitled to such damages as a matter of law, Noble Roman's, 760 N.E.2d at 1140.

1. Specific Findings

The Gunkels challenge several specific findings as clearly erroneous; namely, the trial court's findings that the Gunkels were not entitled to damages for repairing a power line Renovations had cut and that the Gunkels were not entitled to damages for removing and reinstalling several doors.[12] With respect to damages for repairing the power line, Renovations apparently concedes these findings were clearly erroneous, see Renovations' brief at 15 (quoting the trial court findings and reiterating the Gunkels' arguments without attempting to rebut them), and, more to the point, the Gunkels presented

[11] We recognize that damages in negligence and damages in breach of contract are not necessarily coextensive. See, e.g., Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975, 984 (Ind. 1993) ("Unlike torts, where the duty is owed to all and a broad measure of damages is available, contract obligations are owed only to the parties to the contract and damages are limited to those reasonably within the expectations of the parties when the contract is made."). However, both claims require that sufficient evidence support a damages award, Noble Roman's, 760 N.E.2d at 1140 ("In actions for breach of contract, damages must be proven with reasonable certainty."); Widmeyer v. Faulk, 612 N.E.2d 1119, 1121 (Ind. Ct. App. 1993) (indicating that damages are an element of negligence and that the plaintiff must prove each element by a preponderance of the evidence to obtain relief), and because our discussion above concluded the Gunkels did not present sufficient evidence to establish damages as a matter of law with respect to this property, see, supra, Part II.B.1 to 3, that conclusion yields the same result in the context of the Gunkels' breach of contract claim.

[12] The Gunkels also argue for the first time in their reply brief that they are entitled to damages for two other doors that had been replaced entirely. See Appellants' Reply Brief at 17. However, because a party may not raise an argument for the first time in a reply brief, Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005), the Gunkels have waived this issue on appeal.

uncontroverted evidence that Renovations had cut the line and that the Gunkels had spent $757.50 repairing it, see tr. at 419-20 (Lawrence testifying that Renovations damaged the power line and that he incurred expenses in repairing it); Plaintiffs' Exhibit 42 (invoice to Lawrence for $357.50 to "service wire damaged with post by contractors"); Plaintiffs' Exhibit 43 (invoice to Lawrence for $400 for work "done due to contractor hitting line installing South porch"). Thus, we are convinced the trial court's refusal to award the Gunkels $757.50 for costs incurred in repairing the power line was contrary to law. Cf. Garriot v. Peters, 878 N.E.2d 431, 443 (Ind. Ct. App. 2007) (concluding plaintiffs had established the elements of adverse possession as a matter of law and rejecting possibility that trial court's conclusion to the contrary could be sustained on the basis that uncontroverted evidence was unbelievable because "a party appealing [a negative] judgment is not given the impossible task of refuting the hypothesis that a trial court, for no identified or apparent reason, found uncontroverted evidence incredible").

With respect to damages for removing and reinstalling the doors and windows, the trial court admitted an invoice into evidence indicating that the Gunkels were charged $15,201 to fix the water entry problem. From this figure, the trial court subtracted $5,815 because that amount was "not in fact associated with repairing the leaking windows and doors," appellants' app. at 35, and awarded the difference, $9,386, to the Gunkels. One of the itemized expenses the trial court excluded as damages was $320 to remove and reinstall flashing for eight sliding glass doors. See J & N's Exhibit 7 at 1. Specifically, it found that

> [s]ix of the sliding glass doors which were replaced could have been used again thus reducing the cost from $420.00 to $80. They were not used again because of the insistence of the Gunkels that they be replaced.

Appellants' App. at 35. Implicit in this finding is that the $320 (which the finding misstates as $420) represents costs related to replacing the doors (that is, removing the doors and replacing them with new ones), when in fact the invoice on which the trial court based this findings indicates the $320 is for removing and reinstalling the flashing for such doors, not for replacing them altogether. Because of this oversight, we remand this issue to the trial court for a finding on whether the $320 "pertained to necessary work to stop water leakage around the Gunkels' windows and doors," and, if so, to correct its judgment accordingly.[13]

2. Loss of Use of the Residence

The Gunkels argue the trial court's conclusion that they were not entitled to damages for loss of use of the Residence is contrary to law. The trial court noted the Gunkels claimed they were entitled to $11,989 for such damages, but also noted that "[n]o evidence was presented . . . as to the nature of the living expenses incurred by the Gunkels in excess of $4,311.00." Appellants' App. at 45. The trial court further found that the $4,311 represented rental expenses the Gunkels incurred while living in an apartment from November 1999 to August 2000, but concluded they were not entitled to recover this amount from Renovations because the Construction Contract contemplated "delay in construction caused by an act or neglect of Buyer," Plaintiffs' Ex. 12 at 2, and any delay during this period was attributable to the Gunkels' decision to install a spiral

[13] On remand, the trial court need not conduct a hearing with respect to this issue.

staircase, which was not completed until August 2000 and "no occupancy permit could have been obtained before that date," appellants' app. at 45.

It is difficult to pin down the Gunkels' argument regarding why this conclusion is contrary to law, but they appear to argue briefly that they were entitled to loss-of-use damages because Renovations was responsible for obtaining an occupancy permit and because the trial court never found that the Gunkels' decision to install the spiral staircase delayed occupancy. The former argument overlooks the provision in the Construction Contract excusing Renovations from completing the Residence on time in the event of delay on the Gunkels' part, and the latter overlooks that the reasonable inference to be drawn from the trial court's findings and conclusions is that the Gunkels' decision to install the spiral staircase was such a delay. See Appellants' App. at 31 (trial court's finding that "[t]he Gunkels made a decision to install a spiral staircase during the summer of 2000. The staircase arrived and was installed during August, 2000"); id. at 32 (trial court's finding that "[t]he Gunkels knew at the time they moved from their home in Fort Wayne that the exterior of their home had yet to be covered with stone, the stairway had yet to be installed, and no occupancy permit could be obtained at this point in the construction project"); id. 45 (trial court's conclusion of law stating that "[t]he spiral staircase requested by the Gunkels was not installed in the Gunkels' home until August, 2000, and no occupancy permit could have been obtained before that date"). Thus, we are not convinced the trial court's refusal to award the Gunkels damages for loss of use of the Residence was contrary to law.

IV. Prejudgment Interest

The Gunkels argue the trial court improperly awarded Renovations prejudgment interest on its breach of contract counterclaim. "[T]he purpose of prejudgment interest is to compensate a party for having been deprived of the use of money . . . ." Koppers Co., Inc. v. Inland Steel Co., 498 N.E.2d 1247, 1256 (Ind. Ct. App. 1986). An award of prejudgment interest is considered proper if the damages may be ascertained as of a particular time and the trier of fact need not exercise its judgment to assess the amount of damages. Noble Roman's, 760 N.E.2d at 1140. Stated differently, "[a]n award of prejudgment interest is proper only where a simple mathematical computation is required. Damages that are the subject of a good faith dispute cannot allow for an award of prejudgment interest." Bopp v. Brames, 713 N.E.2d 866, 872 (Ind. Ct. App. 1999), trans. denied.

The trial court determined that Renovations was entitled to $96,435.40 on its breach of contract counterclaim and that prejudgment interest began to run on this amount from November 12, 2001. The $96,435.40 represents the amount the trial court determined was due to Renovations as the fifth and final installment payment under the Construction Contract. The Gunkels do not appear to dispute that this amount was owing to Renovations as of November 12, 2001; instead, the Gunkels argue that the trial court's resolution of the breach of contract claim and the counterclaim constituted an exercise of judgment that precluded a prejudgment interest award. See Appellants' Br. at 27 ("To determine the amount, if any, owed to Renovations it was necessary for the trial court to decide whether it had properly performed its contract with the Gunkels. That was not a

simple matter of calculation. Quite the contrary, it generated a transcript over 1,200 pages in length, five volumes of exhibits and a lengthy decision."). This argument overlooks that a trial court's exercise of judgment precludes a damages award when such judgment pertains to the amount due, not whether such damages are due in the first place. See J.S. Sweet Co., Inc. v. White County Bridge Comm'n, 714 N.E.2d 219, 225 (Ind. Ct. App. 1999) (concluding trial court properly awarded prejudgment interest on several itemized expenses where "the trial court found either that the items were uncontested by the parties or made a mere determination that the amounts were recoverable under the contract"). Indeed, if the rule precluding prejudgment interest was consistent with the one the Gunkels appear to put forth, it is difficult to imagine a situation where prejudgment interest would ever be awarded, as the trial court necessarily must initially exercise its judgment in determining whether an amount is due before it determines whether to award prejudgment interest on that amount. Because our review of the record reveals that the amount of prejudgment interest was ascertainable as of November 11, 2001, see, e.g., plaintiffs' exhibit 9 at 2 (letter from Judy to Renovations stating, "We would like to state one more time that we will pay you the adjusted and final fifth draw when you have the leaking fixed and the other unfinished items and repairs completed"); J & N's exhibit 1 at 21 (Gunkels' response to interrogatory stating that "[t]he Plaintiffs owe the Defendants approximately $96,000 from Standard Bank Draw 5 designated $108,500"); appellants' app. at 36 (trial court's finding that "on or about November 12, 2001, the leaking problem around the windows and doors in the Gunkels' home

stopped"), it follows that the trial court's decision to award Renovations prejudgment interest was proper.

V. Attorney Fees

The Gunkels argue the trial court improperly awarded attorney fees because its "findings" merely reiterate testimony on this issue. Specifically, the trial court found:

> Counsel for Renovations testified at trial that the total attorney fee obligation incurred by Renovations in this case was in the amount of $73,253.00. Of this amount, $27,000.00 was associated with tort claims, therefore, leaving a balance payable by Renovations of $46,253.00 associated only with contract claims which are recoverable under the Construction Contract executed between the Gunkels and Renovations. Stated differently, of the total attorney fee incurred by Renovations to counsel, sixty-four percent (64%) of said attorney fees dealt with contract claims only.

Appellants' App. at 39. We recently explained that "[f]indings of fact are a mechanism by which a trial court completes its function of weighing the evidence and judging witnesses' credibility" and that "'findings' that merely inform this court that witnesses testified as to certain facts do not aid this court in its review." Garriott, 878 N.E.2d at 438. In the latter situation, the appropriate remedy is not to reverse the conclusion upon which those findings are based, but to treat them as "mere surplusage." Perez v. U.S. Steel Corp., 426 N.E.2d 29, 33 (Ind. 1981). The practical effect of treating findings in this manner is that the reviewing court may not be able to determine the propriety of the trial court's decision, and therefore will remand with instructions to enter proper findings. See, e.g., Parks v. Delaware County Dept. of Child Servs., 862 N.E.2d 1275, 1281 (Ind. Ct. App. 2007).

Although we agree with the Gunkels that the trial court's "findings" merely recite testimony, we are skeptical the foregoing principles apply here, as the parties apparently agree the Construction Contract provides for an award of attorney fees and Renovations presented uncontroverted evidence as to the amount of attorney fees incurred with respect to the breach of contract claim and counterclaim. Nevertheless, because we are already remanding to the trial court for it to determine other issues, we will remand with instructions for it to make proper findings on this issue as well.

VI. Appellate Attorney Fees

As a final matter, Renovations argues it is entitled to appellate attorney fees. The Construction Contract states, "In any action at law or in equity, including enforcement of an award from Dispute Resolution, or in any Dispute Resolution involving a claim of $5,000 or more, the prevailing party shall be entitled to reasonable costs and expenses, including attorney fees." Plaintiffs' Ex. 12 at 5. This court has explained that "[w]hen a contract provision provides that attorney fees are recoverable, appellate attorney fees may also be awarded," Humphries v. Ables, 789 N.E.2d 1025, 1036 (Ind. Ct. App. 2003), but has limited recovery where the provision contains a "prevailing party" clause to the portion upon which the party seeking such fees actually prevailed, see Gershin v. Demming, 685 N.E.2d 1125, 1131 (Ind. Ct. App. 1997). Thus, although we conclude Renovations is entitled to appellate attorney fees, we remand with instructions that the trial court conduct a hearing and determine the amount in a manner consistent with our discussion of the foregoing principles.

Conclusion

The trial court properly denied the Gunkels' motion to amend, properly dismissed the Gunkels' negligence claims against J & N and Renovations pursuant to Trial Rule 41(B), properly awarded prejudgment interest and attorney fees to Renovations. However, we reverse the trial court's refusal to award damages on two items and remand with instructions on a third. We also remand with instructions that the trial court make proper findings with respect to its award of attorney fees to Renovations. Finally, Finally, we conclude Renovations is entitled to appellate attorney fees, but remand with instructions that the trial court conduct a hearing and make a determination as to the proper amount.

Affirmed in part, reversed in part, and remanded with instructions.

BARNES, J., concurs.

KIRSCH, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

LAWRENCE GUNKEL and JUDY LYNN GUNKEL, Appellants-Plaintiffs, vs. RENOVATIONS, INC. by WAGLER and MENNO D. WAGLER, d/b/a RENOVATIONS, INC. by WAGLER, and J & N STONE, INC., Appellees-Defendants.	)	No. 76A03-0609-CV-407

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0010-CT-754

KIRSCH, Judge, *dissenting.*

Multiple motions. Multiple hearings. Multiple judges. Parties admitting they entered into a contract, then denying that they entered into a contract. Bifurcated trials. Inconsistent positions. Inconsistent rulings. Summary judgments granted. Summary judgments denied. Summary judgments granted but not followed. Three appeals. Eight years and still unresolved. Attorney fees in excess of the amount in controversy.

It will soon be ten years since the Gunkels entered into a contract for construction of their new home. During this decade, they have not been served well by either their contractors or our legal system. Were Dante Alighieri alive today, this case would

provide him with the material to add a tenth circle to his *Inferno* and call it "Litigation Hell."

This is not a difficult case. It involves one set of homeowners, two contractors and one new house that leaked. New houses should not leak. The leaks were the fault of one or both of the contractors. The contractor or contractors that were at fault should fix the leaks or pay to have them fixed and pay for the damage that the leaks caused to the other property of the homeowners. To the extent that a contractor failed to perform the work set forth in contract, the contractor is liable for breach of contract. To the extent a contractor damaged other property of the homeowners during the performance of its work, the contractor is liable for negligence. Determine the relationship of the parties. Determine whether the contractors failed to perform the work as agreed. If so, determine the amount of the damages. Enter judgment. Next case.

Here, Renovations, Inc. was the general contractor. J & N Stone, Inc. was the contractor for the installation of the stone façade on the Gunkels' home. J & N was *either* in a direct contractual relationship with the Gunkels or was a subcontractor of Renovations. If J & N failed to perform its work according to applicable standards, it is liable for its failure to do so. If it is in a direct contractual relationship with the Gunkels, it is directly liable to them, and Renovations is not liable. For its failure to perform the work called for in the contract, J & N is liable because it breached its contract. To the extent it damaged other property of the Gunkels during the course of the performance of its work, it is liable for negligence. If J & N was a subcontractor, it is liable to Renovations, and Renovations is liable to the Gunkels.

I believe the trial court erred in denying the Gunkels' motion to amend their amended complaint. There was no good reason not to allow the amendment. The parties were already before the court. Amendment of the complaint would not cause prejudice to any party, nor would it further delay the resolution of this matter. When the trial court denied the motion to amend, it foreclosed its own ability to fully and fairly adjudicate this dispute, because it was no longer possible to determine the respective rights and obligations of the parties.

As stated above, J & N was *either* a subcontractor of Renovations or an independent contractor of the Gunkels. The trial court, however, without saying what J & N was, held that J & N was neither a subcontractor, nor an independent contractor. I believe that this holding was erroneous, and, as a result, the entire judgment entry should be vacated and this matter remanded once again to the trial court for resolution.

Whenever a case gets off the tracks, it is very hard to get it back on, and this case got off the tracks early on as everyone involved focused on a hyper-technical procedural elements and not on doing substantial justice for the parties. The most important rule of procedure is the first which directs that all the rules of procedure "shall be construed to secure the just, speedy and inexpensive determination of every action." Ind. Trial Rule 1. I believe that we have failed all three of these parties on all three of these standards.

Given the inordinate amount of time this case has already taken, I am loath to remand this case to the trial court for further proceedings. Nevertheless, I would vacate the trial court's judgment and remand with instructions to allow the amendment and then proceed to fully determine the rights and obligations of the parties.