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IN THE COURT OF APPEALS OF INDIANA

Castleton Corner Owners Association, Inc.,
Appellant/Cross-Appellee,

v.

Conroad Associates, L.P. and McKinley, Inc.,
Appellees/Cross-Appellants.

October 30, 2020

Court of Appeals Case No. 19A-PL-2687

Appeal from the Marion Superior Court

The Honorable James B. Osborn, Judge

Trial Court Cause No. 49D14-1612-PL-44978

Najam, Judge.

Statement of the Case

[1] Conroad Associates, L.P. ("Conroad") owns a building that it leased to Pier 1 Imports (U.S.), Inc. ("Pier 1"). The lease between Conroad and Pier 1 was set to expire in February 2016, but Pier 1 had the option to extend the lease for two five-year terms. On February 14, 2015, a sewer lift station maintained by the

Castleton Corner Owner's Association, Inc. ("the Association") failed and flooded Pier 1 with sewage. Following the flood, Pier 1 terminated its lease with Conroad.

[2] Conroad filed a complaint for breach of contract, negligence, and breach of fiduciary duty against the Association for failing to properly maintain the lift station. Conroad requested damages for lost rent and other expenses through the end of the base term of its lease with Pier 1 and for lost rent for the two option terms. Following a three-day bench trial, the court found in favor of Conroad on its breach of contract claim and awarded damages for lost rent and other costs through the base term but declined to award Conroad lost rent for the two option terms.

[3] The Association appeals the trial court's judgment and raises three issues for our review, which we revise and restate as follows:

1. Whether the trial court erred when it concluded that the Association had breached its contract with Conroad.

2. Whether the trial court abused its discretion when it admitted an expert's report on the issue of damages.

3. Whether the trial court erred when it calculated Conroad's damages through the end of the base term of the lease with Pier 1.

[4] Conroad cross-appeals and asserts that the trial court erred when it declined to award Conroad damages for lost rent for the two option terms.

[5] We affirm the trial court's judgment that the Association breached the contract and the court's admission of the expert's report. As for the damage award, we reverse the trial court's calculation of damages through the end of the base period and remand with instructions for the court to revise that award, but we affirm the court's denial of damages for the two option terms.

Facts and Procedural History

[6] In early 2006, Conroad purchased a retail building in an area of Indianapolis known as Castleton Corner. At the time Conroad purchased the Castleton Corner building, it was occupied by Pier 1. On February 28, Conroad and Pier 1 entered into a ten-year lease agreement, which was set to terminate on February 29, 2016. However, Pier 1 had the "right, privilege and option" to extend the lease for two five-year periods. Appellant's App. Vol. 3 at 90.

[7] As the owner of the building, Conroad became a member of the Association, which exists to establish "minimum standards pertaining to the development, use and maintenance" of Castleton Corner. Appellant's App. Vol. 2 at 79. Pursuant to the Association's Declaration of Development Standards, Covenants, and Restrictions ("the Declaration"), the Association agreed to pay "all Maintenance Costs in connection with" improvements constructed at Castleton Corner, which costs are then allocated among the members based on their proportionate share. *Id*. at 82.

[8] The Declaration defines "Maintenance Costs" as follows:

> "Maintenance Costs" shall mean *all of the costs necessary* to maintain the Roads, drainage ditches, sewers, utility strips and other facilities within Castle Corner to which the term as used in the relevant sections herein applies, and to keep such facilities operational and in good condition, *including, but not limited to*, the cost of all upkeep, maintenance, repair, replacement of all or any part of such facilities, payment of any taxes imposed on either the facilities or on the underlying fee, easements or rights-of-way, and any other expense reasonably necessary or prudent for the *continuous operation of such facilities*.

Id. at 80 (emphases added). In addition, the Association's Code of By-Laws requires its Board of Directors to provide for the "ownership, operation, maintenance, upkeep, repair, replacement, administration, and preservation of the roads, drainage ditches, utility strips and sewers, *including a sanitary lift station*" in Castleton Corner. *Id*. at 104 (emphasis added).

[9] The sanitary lift station at Castleton Corner collects the toilet and sink runoff from each of the Association's buildings. The lift station then uses two electrically powered pumps to propel the runoff upward until it eventually joins the City of Indianapolis' sewer system. In the event of a malfunction with the pumps, there is a window of two to three hours before the lift station overflows.[1] If the lift station were to overflow, the runoff would flood Conroad's building as it is the lowest one on the Association's sewer system.

[1] It its brief on appeal, the Association asserts that there was an approximately three- to four-hour window before the lift station would overflow. *See* Appellant's Br. at 13. To support that assertion, the Association

[10] Beginning in 2006, McKinley, Inc. ("McKinley") provided maintenance services for the Association. Every Friday, Curtis Pitts, an employee of McKinley, performed visual inspections of the lift station. In addition, every Monday, Pitts would test the generator to ensure that it functioned normally. Pitts was always on call in order to respond to issues with the lift station.

[11] On Friday, February 13, 2015, Pitts conducted his inspection of the lift station and concluded that it was operating normally "with no sign of any issue." Ex. Vol. 3 at 247. However, the next morning, a Pier 1 employee opened the store at 9:00 a.m. and found one-quarter to one-half of an inch of water containing "raw human sewage" in the back of the store, which levels continued to rise. *Id*. at 251.

[12] Instead of calling Pitts, the employee called a plumbing company, but that company was unable to stop the flooding. Pitts was ultimately notified about the flood at Pier 1 at 6:00 p.m. Pitts arrived at the location and confirmed that the lift station's control panel was not receiving electrical power, which had caused the lift station to fail. Pitts called several companies, and a plumbing company arrived with a vacuum truck to remove the sewage. By that time, the raw human sewage in Conroad's building had "seeped" into the cracks and spaces between the flooring squares and into the drywall. *Id*. In addition, an

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directs us to Pitts' trial testimony and the testimony of another witness. But both of those witnesses testified that the window to accommodate an interruption of service was two to three hours. *See* Tr. Vol. 3 at 29, 231.

electrician arrived to work on the lift station and ultimately repaired it the next morning.

[13] Following the flood of sewage, Pier 1 informed Conroad that it would not pay rent until Conroad repaired the building. Conroad retained a restoration company to clean and restore the building. However, Pier 1 never reopened its store. Instead, on March 1, Pier 1 returned possession of the building to Conroad. Pier 1 then terminated its lease and paid Conroad a termination payment of $128,000. On April 12, 2016, Conroad leased its building to Furniture Discounters, Inc., which lease "carried a lower Base Rent than the Base Rent that Pier 1 would have paid if Pier 1 had renewed its lease" with Conroad. *Id*. at 249.

[14] On July 3, 2017, Conroad filed an amended complaint against the Association in which Conroad claimed, in relevant part, that the Association was negligent and that it had breached the terms of the Declaration when it failed to ensure that the lift station operated properly. Conroad also claimed that the Association had breached its fiduciary duty to its members.[2]

[15] The court held a three-day bench trial beginning on June 10, 2019. At trial, Lloyd Abrams, Conroad's general partner, testified that, while Pier 1 had no obligation to extend the lease past February 2016, he believed that Pier 1 would

[2] In addition, Conroad filed claims for negligence and breach of contract against McKinley. However, the trial court entered judgment in favor of McKinley on those claims.

have remained in Conroad's building had the lift station failure not occurred. Specifically, Abrams testified that Pier 1 would have exercised its options to extend the lease because Pier 1 had occupied the building for twenty years at the time Conroad purchased the building, the rent Pier 1 was paying to Conroad was "favorable" to Pier 1, and the exterior of the building was a "signature" of Pier 1. Tr. Vol. 2. at 135-36.

[16] Michael Lady, a real estate appraiser, testified about the value of Conroad's building. During his testimony, Conroad moved to admit Lady's appraisal report, which the court admitted over the Association's hearsay objection. Lady's report indicated that, had Pier 1 remained in the building through February 29, 2016, it would have paid Conroad $125,429 in total rent. *See* Ex. Vol. 3 at 126. The report further indicated that Conroad would have received the following additional income from Pier 1 from March 1 through February 29, 2016: $31,983 in property taxes, $2,641 in building insurance, and $17,604 in common area maintenance ("CAM") charges. *See id*.

[17] At trial, Lady testified that the "effective gross income" Conroad would have received from Pier 1 had Pier 1 remained in the building through February 29, 2016, was $177,656. Tr. Vol. 2 at 111. Lady then acknowledged that Pier 1 had paid Conroad $128,000 to terminate its lease, which resulted in total lost income of $49,656 during the base term of the contract. Lady also testified that, had Pier 1 exercised both of its options to extend the contract, Pier 1 would have paid $485,000 more in rent to Conroad than Furniture Discounters, Inc.

[18] Following the trial, the court entered detailed findings of fact and conclusions thereon in which the court found in favor of the Association on Conroad's claims for negligence and breach of fiduciary duty. However, the court concluded that the "phrase 'continuous operation' in the Declaration imposed a strict liability obligation on the Association. By contract, the Association was required to keep the Lift Station working. The Association did not." Appellant's App. Vol. II at 52-53. Thus, the court found that the Association had breached its contract with Conroad.

[19] The court then found that Conroad had sustained the following relevant damages: $49,656 in lost rent for the remainder of the base term of its lease with Pier 1, $32,248 in lost property taxes, $2,400 in lost insurance premiums, and $14,300 in lost CAM charges. But the court found that "Conroad adduced no evidence that, but for the February 14, 2015, incident, Pier 1 would have exercised its two (2) five (5) year options to extend its lease." *Id*. at 57. Accordingly, the court concluded that Conroad was not entitled to lost rent after February 29, 2016, and awarded Conroad damages in the amount of $213,588.70.[3] This appeal ensued.

[3] The court initially awarded Conroad damages in the amount of $213,288.70. However, following a motion to correct error filed by the Association, the court acknowledged a mathematical error and increased the damage award to $213,588.70.

Discussion and Decision

Standard of Review

[20] The Association appeals the trial court's conclusion that the Association breached the contract and the court's subsequent award of damages. As this Court has recently stated:

> Where, as here, issues are tried upon the facts by the trial court without a jury, and the trial court enters specific findings *sua sponte*, we apply a two-tiered standard and determine whether the evidence supports the findings, and then whether the findings support the judgment. Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences to support them. A judgment is clearly erroneous when our review of the record leaves us with a firm conviction that a mistake has been made.

VanHawk v. Town of Culver, 137 N.E.3d 258, 265 (Ind. Ct. App. 2019) (internal citations omitted).

Issue One: Breach of Contract

[21] The Association first asserts that the trial court erred when it found that the Association had breached its contract with Conroad. In order for Conroad to prevail on its breach of contract claim, it must prove the existence of a contract, that the Association breached the contract, and damages. *See Gerdon Auto Sales v. John Jones Chrysler Dodge Jeep Ram*, 98 N.E.3d 73, 78 (Ind. Ct. App. 2018), *trans. denied*. The parties agree that the Declaration and Code of By-Laws are a contract between the Association and Conroad. In addition, the Association does not dispute any of the underlying facts. Rather, the Association contends

that the court erred when it held that the failure of the lift station constituted a breach of contract.

[22] To resolve this issue on appeal, we must interpret the Declaration. It is well settled that the

> [c]onstruction of the terms of a written contract generally is a pure question of law. The goal of contract interpretation is to determine the intent of the parties when they made the agreement. This Court must examine the plain language of the contract, read it in context, and, whenever possible, construe it so as to render every word, phrase, and term meaningful, unambiguous, and harmonious with the whole.

Layne v. Layne, 77 N.E.3d 1254, 1265 (Ind. Ct. App. 2017) (citations omitted).

[23] As we have noted, the Declaration states that the Association shall pay "all Maintenance Costs in connection with" Castleton Corner. Appellant's App. Vol. 2 at 82. The paragraph that defines "Maintenance Costs" is one sentence. Its several provisions are cumulative. When interpreting this sentence, we are required whenever possible to render every word, phrase, and term meaningful, unambiguous, and harmonious with the whole. *Layne*, 77 N.E.3d at 1265. The paragraph begins by defining maintenance costs as "all of the costs necessary . . . to keep *such facilities* operational," and ends with the words "for the continuous operation of *such facilities*." Appellant's App. Vol. 2 at 80 (emphases added). When read together, these provisions indicate that "operational" means "continuous operation" of the facilities, including the lift station.

[24] Still, the Association contends that the court erred when it relied on the term "continuous operation" to conclude that the Association had agreed to keep the lift station operating at all times. Instead, the Association asserts that the phrase "reasonably necessary or prudent" limits the Association's contractual obligation. But the Association's reliance on these words to the exclusion of other provisions is misplaced. When we interpret a contract, we must also read the plain language of the contract in context. *See Layne*, 77 N.E.3d at 1265. Here, a close reading of the paragraph on maintenance costs reveals that, when the words "reasonably necessary or prudent" are read in context, they are part of an omnibus clause—"any other expense reasonably necessary or prudent"—which expands rather than limits the definition of "maintenance costs."

[25] The omnibus clause is introduced by the conjunction "and," which means "also," "in addition to," "as well as." And the words "any other" signal that the omnibus clause covers matters not previously mentioned in the paragraph. Together, these words—"and" and "any other"—clearly mean that that omnibus clause supplements the other provisions. It is well settled that, when interpreting a contract, specific terms control over general terms. *See G.G.B.W. v. S.W.*, 80 N.E.3d 264, 270 (Ind. Ct. App. 2017). Here, the specific provision requiring the Association to pay "all of the costs necessary" controls over the general omnibus clause providing, in addition, that the Association pay for "*any other* expense reasonably necessary or prudent." Appellant's App. Vol. 2 at 80 (emphasis added). And the phrase "any other expense" correlates with its antecedent, "including, but not limited to."

[26] When the terms of a contract are drafted in clear and unambiguous language, we will apply the plain and ordinary meaning of that language and enforce the contract according to those terms. *See Claire's Boutiques, Inc. v. Brownsburg Station Partners, LLC*, 997 N.E.2d 1093, 1098 (Ind. Ct. App. 2013). The meaning of "all" and of "necessary" is self-evident. The meaning of "continuous" is "uninterrupted." *Continuous*, Black's Law Dictionary (11th ed. 2019). When we unpack the paragraph on maintenance costs, it is apparent that the words "reasonably necessary or prudent" only modify the words "any other expense" within the omnibus clause. The words outside the omnibus clause, including "all of the costs necessary" and "continuous operation," are unqualified. If we were to elevate and apply the words "reasonably necessary or prudent" beyond the omnibus clause, the omnibus clause would usurp the remainder of the paragraph and render meaningless the words "all of the costs necessary" and "continuous operation."

[27] The trial court also found that the "[s]udden failure of electrical components is an inherent risk of lift stations such as the one maintained by McKinley and at issue in this lawsuit." Appellant's App. Vol. 2 at 47. Thus, the consequential damages resulting from the lift station's failure were contemplated and reasonably foreseeable by the parties when the contract was made. *See Johnson v. Scandia Associates, Inc.*, 717 N.E.2d 24, 31 (Ind. 1999) (citing *Hadley v. Baxendale*, 156 Eng.Rep. 145 (1854)). With that risk and those potential damages in mind, the Declaration assigned the risk of a lift station failure to the Association. "When interpreting a written contract, we attempt to determine

the intent of the parties at the time the contract was made . . . by examining the language used in the instrument to express their rights and duties." *Whitaker v. Brunner*, 814 N.E.2d 288, 294 (Ind. Ct. App. 2004). Here, the contract documents do not suggest that as a member of the Association Conroad assumed or is chargeable with any part of the risk of a lift station failure.

[28] Further, the Association asserts that the trial court's judgment that the Association was required to keep the lift station in continuous operation fails to account for numerous other contractual provisions that contemplate that the lift station *would not* operate continuously. *See* Appellant's Br. at 31-32. Specifically, the Association maintains that the repair and maintenance provisions of the Declaration, "including the defined term 'maintenance costs,'" would be "meaningless" if the Association had promised to keep the lift station in continuous operation. *Id*. at 31. The Association contends that, had it committed to keeping the lift station in continuous operation, "it would not have provided for the Lift Station's maintenance, upkeep, repair, or replacement throughout the contract documents." *Id*. at 32. We are not persuaded by this argument. The facts point to the opposite conclusion.

[29] The terms of the Declaration that provide for the ongoing maintenance and repair of the lift station are in furtherance of the requirement that the Association keep the lift station in continuous operation. Even if we were to find that the relevant terms of the Declaration are ambiguous, the Association's course of conduct supports our conclusion that it was required to keep the lift station in continuous operation. The Association hired McKinley to maintain

the lift station. Pitts, who was McKinley's employee, was required to be on call twenty-four hours a day, seven days a week in order to respond immediately to any lift station maintenance issues. And Pitts inspected the lift station every Monday and Friday. This course of conduct, which is undisputed, is a reliable guide to determine the contract's meaning, and we accept it as such. *Highhouse v. Midwest Orthopedic Inst., P.C.*, 807 N.E.2d, 737, 739 (Ind. 2004).

[30] Finally, the Association contends that the court's finding in favor of the Association on Conroad's negligence claim "cannot be reconciled" with the court's conclusion that the Association had breached its contract with Conroad. Appellant's Br. at 29. In other words, the Association asserts that, because the court found that it had acted reasonably, the court could not have found that it breached the contract. This argument is premised on the Association's contention that it was only required to pay for reasonably necessary or prudent maintenance costs. But, as discussed above, the plain language of the Declaration does not so limit the Association's maintenance costs; rather, the Declaration requires the Association to pay for *all* maintenance costs necessary to keep the lift station in continuous operation. Accordingly, a finding that the Association was not negligent does not preclude a finding that the Association breached its contract with Conroad.

[31] In this argument, the Association also conflates the elements of a negligence claim with those of a breach of contract claim. Both of Conroad's claims arise from the failure of the lift station. Those claims are nonetheless different and distinct from one another. To prevail on its negligence claim, Conroad was

required to show that the Association owed it a duty, that the Association had breached that duty by allowing its conduct to fall below the applicable standard of care, and that Conroad had been harmed by the Association's breach of duty. *See King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 484 (Ind. 2003). On the other hand, to prove a breach of contract, Conroad was only required to show that a contract existed and that the Association breached it. *See Gerdon Auto Sales*, 98 N.E.3d at 78. In other words, while acting reasonably and pursuant to a particular standard of care can defeat a negligence claim, Conroad was not required to show that the Association had acted unreasonably in order to prevail on its breach of contract claim. Because the Declaration imposed a strict obligation on the Association to keep the lift station in continuous operation, the court's determination that the Association had acted reasonably in maintaining the lift station is not inconsistent with its determination that the Association had nonetheless breached the contract.

[32] In sum, the plain text of the Declaration requires the Association to ensure that the lift station operates continuously. Because the lift station stopped functioning on February 14, 2015, the Association breached the terms of the Declaration. The trial court's judgment for breach of contract is not clearly erroneous, and we affirm on this issue.

Issue Two: Admission of Lady's Report

[33] The Association next asserts that the court abused its discretion when it admitted Lady's report as evidence of the damages Conroad sustained. As our Supreme Court has stated:

> Generally, a trial court's ruling on the admission of evidence is accorded "a great deal of deference" on appeal. *Tynes v. State*, 650 N.E.2d 685, 687 (Ind. 1995). "Because the trial court is best able to weigh the evidence and assess witness credibility, we review its rulings on admissibility for abuse of discretion" and only reverse "if a ruling is 'clearly against the logic and effect of facts and circumstances and the error affects a party's substantial rights.'" *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind 2014) (quoting *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013)).

Hall v. State, 36 N.E.3d 459, 466 (Ind. 2015).

[34] We first address Conroad's contention that the Association has waived its argument on appeal. Conroad acknowledges that the Association lodged a hearsay objection when Conroad moved to admit the report. However, Conroad asserts that the Association only made "a general hearsay objection" to the report, which unspecified objection Conroad contends was inadequate. Appellee's Br. at 32. We cannot agree.

[35] The overriding purpose of the requirement for a specific objection is to alert the trial court so that is may avoid error or promptly minimize harm from an error that might otherwise require reversal, result in a miscarriage of justice, or waste time and resources. *Camm v. State*, 908 N.E.2d 215, 223 (Ind. 2009). Here, the Association twice objected to the admission of the report on the ground that it was hearsay. *See* Tr. Vol. 2 at 92, 93. Specifically, the Association argued that the report contained "Lady's out of court statements" such that the "whole report is hearsay." *Id*. at 94. Accordingly, we hold that Association's objections were specific enough to alert the trial court to the alleged error, and

the Association did not waive this issue.[4] Thus, we address the merits of the Association's argument.

[36] The Association contends that the trial court abused its discretion when it admitted Lady's report because the report was inadmissible hearsay. Hearsay is defined as a statement that is not made by the declarant while testifying at trial and that is offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Generally, hearsay is not admissible unless the Indiana Rules of Evidence or other law provides otherwise. Evid. R. 802. The Association asserts that Lady's report was inadmissible hearsay because it was prepared in anticipation of litigation and because Lady was compensated for his work. Accordingly, the Association maintains that the report "lacked the element of trustworthiness necessary for admissibility under a hearsay exception." Appellant's Br. at 34.

[37] However, Indiana Evidence Rule 703 provides that an expert "may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Further, this Court has held that an expert may utilize hearsay information in forming his opinion. *Bunch v. Tiwari*, 711 N.E.2d 844, 848 (Ind. Ct. App. 1999). Here, while Lady did not

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[4] To support its contention that the Association has waived its argument on appeal, Conroad relies on *Lehman v. State*, 926 N.E.2d 35 (Ind. Ct. App. 2010). In that case, this Court held that, because the defendant only raised an unspecified hearsay objection instead of a "specific" hearsay objection, he waived his argument on appeal. *Id*. at 38. However, as discussed above, we hold that a hearsay objection was sufficient to alert the trial court to the potential error, and, as such, we decline to follow this Court's holding in *Lehman*.

testify to every opinion contained within his 263-page report, he testified that he prepared the report and that his report contained his opinions, at which time the report was admitted into evidence. *See* Tr. Vol. 2 at 92-93. As such, the report became Lady's testimony. But the Association does not suggest that Lady was not qualified as an expert or that Lady's opinions, which he memorialized in his report, relied on evidence that was not of the type reasonably relied on by experts in his field. Indeed, the Association does not even acknowledge Indiana Evidence Rule 703 or otherwise explain why Lady's report was inadmissible under that rule. Accordingly, we hold that the Association has not met its burden on appeal to demonstrate that Lady's report was inadmissible or that the court abused its discretion when it admitted the report. We affirm the court's admission of the report as evidence.[5]

Issue Three: Damages

[38] The Association next contends that the trial court erred when it calculated Conroad's damages. In reviewing this issue, we will not reverse if the damage award "is within the scope of the evidence . . . ." *Int'l Bus. Machs. Corp. v. State*, 138 N.E.3d 255, 258 (Ind. 2019). A damage award will not be reversed upon appeal unless it is based on insufficient evidence or is contrary to law. *Haas Carriage, Inc. v. Berna*, 651 N.E.2d 284, 289 (Ind. Ct. App. 1995). In

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[5] In its reply brief, the Association asserts that, once it made the hearsay objection, the burden shifted to Conroad to explain why the report was admissible. And the Association maintains that Conroad provided no such explanation. Conroad stated to the court that Lady's report was admissible as an expert report under Indiana Evidence Rules 701 through 704. *See* Tr. Vol. 2 at 94. In any event, it is the Association's burden on appeal to show the trial court abused its discretion.

determining whether the award is within the scope of the evidence, we may not reweigh the evidence or judge the credibility of witnesses. *Id.*

[39] The Association contends that there is "no evidentiary support" for the trial court's award of damages for both lost rent and damages for property taxes, insurance premiums, and CAM charges. Appellant's Br. at 38. In particular, the Association asserts that the figure used by the court to determine Conroad's lost rent already included compensation for taxes, insurance, and CAM charges such that the damage award "compensates Conroad twice" for those expenses. *Id*. at 37. We must agree.

[40] The trial court awarded Conroad $49,656 in lost rent. While the court did not state in its findings and conclusions how it arrived at that number, it is apparent that the court relied on Lady's calculation of "lost income" to support that figure.[6] Ex. Vol. 3 at 126. However, in his calculation of "lost income," Lady included more than just rental payments. Specifically, in that calculation, Lady included lost rent as well as real estate taxes, insurance, and CAM charges. *See* Ex. Vol. 3 at 126. Indeed, Lady testified that his calculation of lost income represented Conroad's lost "effective gross income." Tr. Vol. 2 at 111. In other

[6] In Lady's report, he determined that Pier 1 would have paid Conroad an additional $177,656. However, Lady acknowledged at trial that that "effective gross income" did not include the $128,000 termination payment that Pier 1 had paid to Conroad. Tr. Vol. 2 at 111. Subtracting the termination payment from the effective gross income, as Lady acknowledged must be done, Conroad lost $49,656 in income, which is the exact amount that the trial court awarded to Conroad in lost rent. And we find no other evidence in the record outside of Lady's report to support a calculation of $49,656.

words, the $49,656 figure included both lost rent and the reimbursable expenses that Pier 1 would have paid. *See* Ex. Vol. 3 at 126.

[41] Thus, when the trial court awarded damages both for lost rent based on Lady's calculation of "lost income" and for the additional reimbursable expenses, the court awarded the same damages twice.[7] The evidence supports damages in the amount of $49,656 for lost rent and the other reimbursable expenses Pier 1 would have paid. The evidence does not support the separate and additional award of damages for insurance premiums, real estate taxes, or CAM charges. Accordingly, we reverse the court's damage award and remand with instructions for the court to award damages to Conroad in the amount of $49,656 for lost rent, property taxes, insurance premiums, and CAM charges.[8]

Cross-Appeal

[42] On cross-appeal, Conroad asserts that the trial court erred when it declined to award Conroad an additional $485,000 in damages, which figure represents the additional rental income Conroad would have received had Pier 1 remained in the building and exercised both options to extend its lease. Conroad bore the burden of proof on its claims at trial. While the court generally entered a judgment in favor of Conroad, the court found against Conroad on this specific

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[7] To support its assertion that the court did not award the same damages twice, Conroad contends that Lady testified that Pier 1 would have paid $177,656 just in lost rent. Appellee's Br. at 39. However, Conroad disregards the fact that Lady's calculation of $177,656 in lost income included more than lost rent.

[8] The court also awarded Conroad damages in the amount of $35,025.91 for flooring replacement and $79,958.79 for remediation expenses. Those awards are not at issue in this appeal.

question of damages. Accordingly, Conroad's appeal from the court's order on this issue is an appeal from a negative judgment. *See Brownsburg v. Fight Against Brownsburg Annexation*, 124 N.E.3d 597, 601 (Ind. 2019). A party challenging a negative judgment must generally show on appeal that the evidence leads unerringly and unmistakably to a decision opposite that reached by the trial court. *Id*.

[43] Here, Conroad asserts that the court erred when it declined to award Conroad the additional $485,000 in damages because, it contends, Pier 1 would have remained in the building and exercised both options to extend the lease but for lift station's failure. Specifically, Conroad contends that it was "reasonably foreseeable" that Pier 1 would have extended the lease through February 29, 2026, because Pier 1's rent was "at or below" market value and "less than Pier 1 was paying elsewhere"; the building was "built to suit" Pier 1; Pier 1 had leased the building "since its construction"; and the building's location was "attractive" to Pier 1. Appellee's Br. at 44.

[44] Be that as it may, the evidence also demonstrates that Pier 1 only had one year left on its lease at the time it returned possession of the building to Conroad. In addition, there is no evidence that Pier 1 had taken any steps or otherwise indicated to Conroad that it intended to exercise the options to extend the lease. Indeed, even Abrams agreed that Pier 1 had no obligation to extend the lease. *See* Tr. Vol. 2 at 180.

[45] While Abrams believed that Pier 1 would exercise its options to renew and remain in the building for an additional ten years, an option is just that, an option. Abrams' belief that Pier 1 would exercise the options was speculation. And a fact finder "may not award damages on the mere basis of conjecture and speculation." *Marathon Oil Co. v. Collins*, 744 N.E.2d 474, 482 (Ind. Ct. App. 2001).

[46] Because the record demonstrates that Pier 1 had no obligation to extend its lease, and because there is no evidence in the record beyond mere speculation that Pier 1 would have remained in the building until 2026, the evidence does not lead unerringly and unmistakably to a decision opposite that reached by the trial court. Accordingly, we affirm the court's denial of Conroad's request for an additional $485,000 in damages.[9]

Conclusion

[47] In sum, the trial court did not err when it concluded that the Association breached the terms of the Declaration because the Declaration imposes a contractual obligation on the Association to ensure that the lift station operates continuously. In addition, the court did not abuse its discretion when it admitted Lady's report on the question of damages. However, the court erred

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[9] In its reply brief, the Association asked us to take judicial notice of the fact that Pier 1 has filed for bankruptcy as evidence that it would have been impossible for Pier 1 to have exercised its two options to extend the lease. Conroad filed a motion to strike that portion of the Association's reply brief. In a separate order, we granted Conroad's motion to strike. There was no evidence of the Pier 1 bankruptcy before the trial court.

when it calculated Conroad's damages through the base term of the lease because the court twice awarded Conroad for certain damages. Finally, the trial court did not err when it declined to award lost rent for the two option terms because there was no evidence but only speculation that Pier 1 would have extended the lease. Accordingly, we affirm in part, reverse in part, and remand with instructions for the court to recalculate Conroad's damages.

[48] Affirmed in part, reversed in part, and remanded with instructions.

Bradford, C.J., and Mathias, J., concur.