IN THE SUPREME COURT OF GUAM

KIA RAHMANI,
Plaintiff-Appellee,

v.

JAE SEUNG PARK and HEE SOOK PARK,
Defendants-Appellants.

OPINION

Cite as: 2011 Guam 7

Supreme Court Case No.: CVA09-008
Superior Court Case No.: CV1985-03

Appeal from the Superior Court of Guam
Argued and submitted on March 10, 2010
Hagåtña, Guam

Appearing for Defendants-Appellants:
Robert P. Kutz, *Esq.*
Law Office of Robert P. Kutz
130 Maleyuc Cir.
Yona, GU 96915

Appearing for Plaintiff-Appellee:
Jehan'Ad G. Martinez, *Esq.*
Blair Sterling Johnson Martinez & Leon Guerrero, P.C.
Ste. 1008 DNA Bldg.
238 Archbishop F.C. Flores St.
Hagåtña, GU 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

TORRES, C.J.:

[1] Defendants-Appellants Jae Seung Park and Hee Sook Park (collectively, "the Parks") appeal from a final judgment entered in favor of Plaintiff-Appellee Kia Rahmani on his claim of negligence against the Parks in the amount of $31,671.00, and in favor of the Parks on their breach of contract claim against Rahmani in the amount of $47,361.13.

[2] For the reasons set forth below, we reverse in part the judgment of the trial court, vacate the trial court's damage awards to both parties, and remand for findings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Defendants-Appellants Jae Seung Park and Hee Sook Park are the owners of the Oka Plaza building located in Tamuning. On September 1, 2000, Plaintiff-Appellee Dr. Kia Rahmani entered into an agreement with the Parks to lease commercial office space in Oka Plaza to be used as Dr. Rahmani's medical clinic. The parties executed a written lease agreement on November 13, 2000, wherein Dr. Rahmani agreed to lease the premises for a period of five years commencing January 1, 2001, and ending January 1, 2006.

[4] Pursuant to the lease agreement, Dr. Rahmani was responsible for the payment of rent, common area fees, utilities, and any late payment fees subject to compound interest. The amount of rent due was to increase at certain intervals over the five-year lease period, starting at $3,581.99 per month and gradually increasing to $4,884.53 by the end of the lease term. Dr.

[1] On January 18, 2011, Justice F. Philip Carbullido was sworn in as Chief Justice of the Supreme Court of Guam. The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

Rahmani was also responsible for securing at his expense both property damage liability insurance and a policy of fire insurance with standard form extended coverage endorsements including typhoon coverage. Because his clinic was located on the second floor, Dr. Rahmani declined to purchase typhoon or flood insurance for his property.

[5] Under the terms of the lease agreement, the Parks were responsible for the maintenance of the common areas and the maintenance of the back-up power generator. They were also responsible for any major repairs to Oka Plaza's infrastructure, including the plumbing system.

[6] According to Dr. Rahmani, a variety of problems existed with the condition and maintenance of Oka Plaza. These problems included inadequate cleaning of the common areas, leaking windows, periodically failing elevator service, and periodically failing back-up generator service. Dr. Rahmani gave written notice about these problems to the Parks on October 30, 2001.

[7] On or about February 12, 2002, Dr. Rahmani abated the amount of his monthly rental payments on the basis of the aforementioned alleged conditions of Oka Plaza. He continued to abate his rental payments until he vacated the premises on or about August 31, 2003.

[8] In 2002, prior to Dr. Rahmani's vacating of the premises, Dr. Rahmani's property was damaged during Typhoons Chata'an and Pongsona. Dr. Rahmani suffered extensive water damage to the leased premises and the equipment therein. In the aftermath of each typhoon, Oka Plaza experienced intermittent power failures resulting from the failure of the Plaza's back-up generator. Each typhoon and subsequent power interruption caused damages to Dr. Rahmani's clinic and the equipment therein.

[9] According to Dr. Rahmani, his clinic and equipment were damaged in two separate incidents during the cleanup from Typhoon Chata'an in August 2002. On August 25, 2002, Oka

Plaza lost power when the generator failed due to what Dr. Rahmani believed to be reversed polarity. Two days later, Dr. Rahmani's clinic flooded ("the flood") when a common area bathroom spigot was left open and water was restored to Oka Plaza, which had been without water since the typhoon.

[10] On or about August 31, 2003, Dr. Rahmani vacated Oka Plaza before the expiration of his five-year lease term. On March 31, 2004, the Parks agreed to lease the abandoned premises to an existing tenant, Dr. Lizama, who had been leasing space on the first floor of Oka Plaza. The Parks agreed to rent the second floor space to Dr. Lizama for $4,000.00 per month, which was the amount Dr. Lizama had been paying for the smaller first floor space he previously occupied.

[11] The first floor space remained vacant until October 1, 2004, when a portion of the space was leased out to a Dr. Mitchell for $1,650.00 per month. Neither Dr. Mitchell nor Dr. Lizama paid any common area fees for the first floor space between the time of Dr. Lizama's transfer to the second floor space in March 2004 and the end of Dr. Rahmani's lease term on January 1, 2006.

[12] Subsequently, Dr. Rahmani filed a complaint in the Superior Court against the Parks for negligence, seeking damages in the amount of $210,000.00. Along with the damage claims, Dr. Rahmani sought recovery of his $9,769.06 security deposit and discharge from the lease agreement on a theory of constructive eviction.

[13] The Parks filed a counterclaim against Dr. Rahmani on the basis of Dr. Rahmani's failure to pay contractually-agreed rental and common area fees, together with late fees and interest, both before Dr. Rahmani abandoned the premises in August 2003 and thereafter. Both parties sought to recover attorney fees and costs pursuant to the lease agreement.

[14] The parties filed cross-motions for summary judgment, which were denied by the trial court. The case was scheduled for trial several times between 2005 and 2008 while the parties attempted settlement. After negotiations failed, a five-day bench trial was held in early 2008.

[15] Several months later, the trial court issued its Findings of Fact and Conclusions of Law on October 6, 2008. Judgment was entered thereafter, granting partial relief to each party: Dr. Rahmani was awarded $31,671.00 against the Parks for lost revenue and property damage as a result of the flood, while the Parks were awarded $47,361.13 against Dr. Rahmani for lost rent and common area fees resulting from Dr. Rahmani's abatement of rent and subsequent abandonment of the premises before the expiration of the lease term. The trial court declined to award either party for its respective attorney fees and costs.

[16] Both parties sought reconsideration of the trial court's decision. Dr. Rahmani filed a Guam Rules of Civil Procedure ("GRCP") Rule 52(b) motion to amend the trial court's findings of fact, while the Parks filed a GRCP Rule 60(b) motion to vacate the judgment. Both motions were denied. The trial court declined to amend any of its evidentiary findings, but did indicate that because both parties prevailed on significant issues of their respective claims, attorney fees and costs were not warranted.

[17] The Parks timely filed their Notice of Appeal.

II. JURISDICTION

[18] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 112-3 (2011)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[19] Findings of fact made following a bench trial are reviewed for clear error, while conclusions of law are reviewed *de novo*. *Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶ 21 (citing *Guam United Warehouse Corp. v. DeWitt Transp. Servs. of Guam, Inc.*, 2003 Guam 20 ¶ 13); *see also Macris v. Swavely*, 2008 Guam 18 ¶ 9. "A finding of fact is 'clearly erroneous' if 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Macris*, 2008 Guam 18 ¶ 9 (quoting *Fargo Pac., Inc.*, 2006 Guam 22 ¶ 22). Under this standard, the reviewing court does not substitute its judgment for that of the trial court. *Id.* (citing *People v. Flores*, 2004 Guam 18 ¶ 7).

[20] The interpretation of a contract is a question of law reviewed *de novo*. *Pangelinan v. Camacho*, 2008 Guam 4 ¶ 6 (quoting *Guam Hous. & Urban Renewal Auth. v. Pac. Superior Enters. Corp.*, 2004 Guam 22 ¶ 29).

[21] Generally, we review attorney fee awards for an abuse of discretion. *Cruz v. Cruz*, 2005 Guam 3 ¶ 8 (citing *Fleming v. Quigley*, 2003 Guam 4 ¶ 14). This would include the trial court's determination of prevailing party status. *See Halloran v. State, Div. of Elections*, 115 P.3d 547, 550 (Alaska 2005); *L & W Supply Corp. v. Chartrand Family Trust*, 40 P.3d 96, 103 (Idaho 2002) ("'Determination of who is a prevailing party is committed to the sound discretion of the trial court and will not be disturbed absent abuse of discretion.'" (quoting *Bouten Constr. Co. v. H.F. Magnuson Co.*, 992 P.2d 751, 762 (Idaho 1999))). However, an interpretation of the law governing the award of attorney fees is reviewed *de novo*. *Fargo Pac., Inc.*, 2006 Guam 22 ¶ 24 (citing *Tanaguchi-Ruth & Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 22); *see also Halloran*, 115 P.3d at 550 ("We exercise our independent judgment in reviewing whether a trial court has applied the appropriate legal standard in making its prevailing party determination.").

IV. ANALYSIS

A. The Parks' Liability for Damages Arising from the Bathroom Flood

1. The lease agreement does not protect the Parks from liability for losses resulting from their ordinary negligence.

[22] The Parks argue that the trial court erred in awarding Dr. Rahmani for damages stemming from the flood because under the terms of the lease agreement, the Parks are relieved of such liability. Specifically, section 17.1 of the lease agreement provides that "Landlord shall not be responsible for or liable to Tenant for any damage or injury which is the direct or indirect result of . . . [a] typhoon . . . ." Appellants' Excerpts of Record ("ER") at 42 (Commercial Lease, Nov. 14, 2000). Furthermore, section 13.1 of the lease agreement provides:

> 13.1. **Tenant's obligation.**
>
> 13.1.1. ***Indemnity.*** Tenant [Dr. Rahmani] shall indemnify and hold Landlord [the Parks] and the property of Landlord, including the Premises and the building, free and harmless from any and all liability, claims, loss, damages, or expenses, including attorney fees and costs, . . . by reason of damage to or destruction of any property, including property owned by Tenant or any person who is an employee, agent or representative of Tenant or by any other person or government agency, or caused by any other reason, including, but not limited to:
>
> 13.1.1.1. Any cause arising while such person or property is in or on the Premises or in any way connected with the Premises or the common areas or with any personal property on the Premises or the common areas, including but not limited to:
>
> (a) A condition of the Premises or the common areas;
>
> (b) An act or omission on the Premises of Tenant or any person in, on, or about the Premises or the common areas with the permission of Tenant; or
>
> (c) Any matter connected with Tenant's occupation and use of the Premises, or the common areas, including Tenant's actual or alleged breach of any contract affecting Tenant's use or occupancy of the premises.

Id. at 37-38. The following subsection, 13.1.2, provides that the tenant shall carry and maintain specific types of insurance during the term of the lease, including typhoon coverage. *Id.* at 38-39.

[23] Finally, section 13.2 of the lease agreement provides the Parks' indemnity obligations to Dr. Rahmani:

> 13.2. ***Landlord's obligations.***
>
> 13.2.1. ***Indemnity.*** Landlord [the Parks] shall indemnify and hold Tenant [Rahmani] and the property of Tenant, free and harmless from any and all liability, claims, loss, damages, or expenses, including attorney fees and costs, . . . by reason of damage to or destruction of any property, including property owned by Landlord or any person who is an employee, agent or representative of Landlord or by any other person or government agency caused by the intentional or grossly negligent actions of Landlord's employees, agents or representatives.

Id. at 39.[2]

[24] The Parks argue that section 13.1 of the lease agreement relieves them of liability for damages caused by the flood because under that provision of the lease, Dr. Rahmani is obligated to indemnify the Parks for their ordinary negligence. The Parks point to section 13.2 of the lease, wherein the landlord is obligated to indemnify the tenant for any and all losses caused by the intentional or grossly negligent acts of the landlord or its employees, to support their contention that they are liable only for their intentional or grossly negligent actions, and that they must be indemnified and held harmless for their ordinary negligence. The Parks argue that because there has been no finding that the flood was caused by the willful conduct or gross negligence of either the Parks or their employees, instead there being only a finding of

---

[2] Section 13.3 provides the Parks' insurance obligations under the lease:

> 13.3. ***Insurance.*** Landlord shall carry liability insurance on the basic structure of the building in which the Premises is situated and on the common areas. All such insurance against liabilities in the common area shall be secondary to Tenant's insurance coverage under this Lease.

ER at 40 (Commercial Lease). According to Dr. Rahmani, the Parks did not possess this liability insurance at the time of the flood. Appellee's Br. at 6 (Oct. 30, 2009).

negligence based on the theory of *res ipsa loquitur*, they are protected from liability for the flood based on Dr. Rahmani's duty to indemnify them for their ordinary negligence under section 13.1. Finally, the Parks point to Dr. Rahmani's obligation under subsection 13.1.2 of the lease to obtain typhoon insurance coverage as further support for their argument that the parties agreed that the risk of this type of damage was to be shifted away from the Parks.

[25] Rahmani argues that given the significant amount of testimony on this matter, and that "it is within the purview of the trial court to weigh the credibility of witnesses and their testimony," the trial court "could rationally have found as it did," and, thus, its determination of the Parks' negligence based on *res ipsa loquitur* should be affirmed. Appellee's Br. at 13 (Oct. 30, 2009) (quoting *Nissan Motor Corp. in Guam v. Sea Star Grp. Inc.*, 2002 Guam 5 ¶ 32) (internal quotation marks omitted).

[26] In general, a contract of indemnity is construed in accordance with the rules for the construction of contracts generally. *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 378 S.E.2d 56, 57 (S.C. Ct. App. 1989) (citing *Longi v. Raymond-Commerce Corp.*, 113 A.2d 69 (N.J. Super. Ct. App. Div. 1955)); *see also Buenz v. Frontline Transp. Co.*, 882 N.E.2d 525, 528 (Ill. 2008) ("An indemnity agreement is a contract and is subject to contract interpretation rules." (citation omitted)); *McGill v. Cochran-Sysco Foods*, 818 So. 2d 301, 305 (La. Ct. App. 2002) ("The general rules governing the interpretation of contracts apply in construing indemnity contracts."). However, because it is somewhat unusual for an indemnitor other than an insurance company to indemnify the indemnitee for losses resulting from the indemnitee's own negligence, a lease containing an indemnity provision purporting to relieve the landlord as an indemnitee from the consequences of his own negligence is strictly construed. *Fed. Pac. Elec.*, 378 S.E.2d at 57 (citing Annotation, *Tenant's Agreement to Indemnify Landlord Against All Claims as Including*

Losses Resulting from Landlord's Negligence, 4 A.L.R.4th 798, 801 (1981)); *see also Park Pride Atlanta, Inc. v. City of Atlanta*, 541 S.E.2d 687, 689 (Ga. Ct. App. 2000) (holding that the language in a contract of indemnification must be strictly construed against the indemnitee, and every presumption is against such intention); *McGill*, 818 So. 2d at 306 ("Agreements to indemnify are strictly construed, and the party seeking to enforce such an agreement bears the burden of proof.").

[27] Accordingly, as a general rule, a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. *Fed. Pac. Elec.*, 378 S.E.2d at 57 (citations omitted); *see also Rapid Leasing, Inc. v. Nat'l Am. Ins. Co.*, 263 F.3d 820, 828 (8th Cir. 2001) ("[A]n indemnity agreement generally will not be construed to cover losses to the indemnitee caused by his own negligence. In order to do so the agreement must be clear and unequivocally expressed." (alteration in original) (citations and internal quotation marks omitted)); *Buenz*, 882 N.E.2d at 529 ("[I]t is quite generally held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract . . . or such intention is expressed in unequivocal terms." (citation and internal quotation marks omitted)); *McGill*, 818 So. 2d at 306 (stating that an indemnity contract will not be construed to indemnify an indemnitee against losses resulting from his own negligence unless such an intent is expressed in unequivocal terms); *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 791 (Minn. 2005) ("Agreements seeking to indemnify the indemnitee for losses occasioned by its own negligence are not favored by the law and are not construed in favor of indemnification unless such intention is expressed in clear and unequivocal terms . . . ." (citation and internal quotation marks omitted)).

[28] Courts have split on the question of how the clear and unequivocal requirement is met when the requirement is applied to indemnity provisions that contain general language such as "any and all claims." *Fed. Pac. Elec.*, 378 S.E.2d at 57. The first major view is that the clear and unequivocal requirement is satisfied only by specific reference in the indemnity clause to the landlord's negligence. *Id.* Thus, those courts of the first view have held that lease provisions which do not specifically refer to the landlord's negligence but merely contain words of general import whereby the tenant agreed to indemnify the landlord for any and all losses are not sufficiently clear and unequivocal so as to require the tenant to indemnify the landlord for the landlord's negligent acts. *See, e.g.*, *Rapid Leasing, Inc.*, 263 F.3d at 828 ("General, broad and all-inclusive language is insufficient . . . ." (citation omitted)); *Park Pride Atlanta, Inc.*, 541 S.E.2d at 689 (finding that although sweep of indemnification wording may initially appear to indemnify the City "against any and all claims," language is bereft of any express or explicit statement about coverage for the City's own negligent acts or omissions, and thus, contract did not satisfy clear and unequivocal requirement); *Serpa v. N.J. Transit*, 951 A.2d 208, 213 (N.J. Super. Ct. App. Div. 2008) ("An indemnification agreement will not be construed to provide indemnification to a party for that party's own negligence unless the indemnification clause expressly states that it does."); *Fed. Pac. Elec.*, 378 S.E.2d at 58-59 (use of the general terms "indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the Leased Premises during the term of [the] lease" does not disclose an intention to indemnify for consequences arising from landlord's own negligence).

[29] The other major view is that specific reference to the landlord's negligence is not necessary in order for the tenant to be liable to indemnify the landlord for its own negligence as long as the intent to indemnify can be found in the indemnity provision or from the entire

contract. *See Rios v. Field*, 270 N.E.2d 98, 100 (Ill. App. Ct. 1971) ("An agreement to indemnify may include indemnification for injuries or loss caused by the indemnitee's own negligence in the absence of specific language to that effect, where the language employed clearly indicates such to have been the intent of the parties.").

[30] Typically, in courts holding to this second view, words of general import are sufficiently clear and unequivocal. *Fed. Pac. Elec.*, 378 S.E.2d at 57. Thus, these courts have held that where a lease provided that the tenant was to indemnify the landlord for any and all losses, the plain meaning of those words fairly included liability for the landlord's own negligence. *See, e.g.*, *Waggoner v. Or. Auto. Ins. Co.*, 526 P.2d 578, 581 (Or. 1974) (intent is clearly expressed in sufficiently broad and comprehensive terms that lessor was to be held harmless for "any" condition of the premises, regardless of whether or not such condition may have resulted from lessor's active negligence).

[31] Of those courts which adhere to the second view, that the indemnity clause does not have to expressly mention the indemnitee's negligence in order for indemnification to include such negligence, some will find words of general import to suffice only if other parts of the contract indicate the intent to hold the indemnitee harmless for his own negligence. These courts have looked to the provisions in the lease which exclude from indemnification the landlord's gross negligence or which require the tenant to obtain insurance to cover potential injuries to persons and property as support for the interpretation that the parties, by agreeing that the tenant would indemnify the landlord for any and all losses, intended such losses to include those arising from the landlord's ordinary negligence. *See, e.g.*, *Kuhn v. Wells Fargo Bank of Neb., N.A.*, 771 N.W.2d 103, 115-16 (Neb. 2009); *Waggoner*, 526 P.2d at 580-81.

[32] The majority of courts that have addressed this issue adhere to the first view that words of general import are neither clear nor unequivocal, and that the language of the indemnity clause must expressly state that the tenant shall indemnify the landlord for the latter's negligence in order for the landlord to be protected under the clause. 4 A.L.R. 4th 798, § 2[a].

[33] This court has yet to have occasion to adopt one of the two major views. We are persuaded, however, by the reasoning underlying the decisions of those courts which adhere to the first view. Thus, we hold that an indemnity provision in a lease agreement will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms, and words of general import that do not specifically reference an indemnitee's negligence do not satisfy the clear and unequivocal requirement. We reject the minority approach for public policy reasons, recognizing the future ramifications of such an approach on unsophisticated parties or individuals with little to no bargaining power, such as residential tenants.

> Public policy is reluctant to cast the burden for negligent actions upon those who are not actually at fault. Public policy seeks to encourage people to exercise due care in their activities for fear of liability, rather than to act carelessly cloaked with the knowledge that an indemnity contract will relieve such indifference.

Park Pride Atlanta, Inc., 541 S.E.2d at 689 (citations omitted).

[34] Accordingly, in the instant case, the language of the indemnity provision found in section 13.1 of the lease agreement, obligating the tenant to indemnify and hold the landlord free and harmless from "any and all liability, claims, loss, damages, or expenses," does not meet the clear and unequivocal requirement because it does not include an explicit reference to the landlord's negligence. Thus, Dr. Rahmani is not obligated to indemnify the Parks or hold them harmless for damages that arise out of their ordinary negligence.

2. The trial court erred in invoking the doctrine of *res ipsa loquitur* to support its finding that the bathroom flood was caused by the Parks' negligence.

[35] First, the Parks briefly argue that the trial court erred in finding them liable for damage to Dr. Rahmani's property as a result of the flood because the damage was an indirect result of a typhoon, and section 17.1 of the lease agreement relieves the Parks of liability for any typhoon damage. Instead of finding the Parks free from liability based on section 17.1, the trial court determined that the Parks were liable for the property damage because the flood was caused by the Parks' negligent repairs of the plumbing system.[3] The court determined that under Guam law a landlord has no duty to repair or maintain property except in order to make it tenantable. ER at 16 (Finds. Fact & Concl. L., Oct. 6, 2008) (citing 18 GCA § 51101 (2005)). However, when a landlord covenants to repair the premises, the landlord is exposed to liability and must undertake any repairs with due care. *Id.* (citing *Camacho v. Du Sung Corp.*, No. CV95-00126A, 1996 WL 104528, at *2 (D. Guam App. Div. 1996)).

[36] The trial court found that the Parks specifically covenanted to repair the plumbing system of the building, pointing to section 9.2 of the lease, which provides that the Parks "will be responsible for any major repairs, including . . . plumbing . . . ." *Id.*; *see also* ER at 35 (Commercial Lease). Because there was no evidence pointing to the exact person responsible for leaving the bathroom spigot open, the trial court relied on the doctrine of *res ipsa loquitur* and concluded that because such a flood does not normally occur in the absence of mistake or negligence, and because of the Parks' duty to maintain and repair the plumbing system as well as

[3] Although the trial court did not explicitly determine that the flood damages were not an indirect result of a typhoon, within this section of the trial court's discussion, the court declined to award Dr. Rahmani for certain damages that were not sufficiently distinguished as resulting from the flood rather than from the typhoon itself. *See* ER at 18 (Finds. Fact & Concl. L., Oct. 6, 2008). Thus, the trial court impliedly determined that the damage to that property for which the court awarded Dr. Rahmani was not incidental to a typhoon, but rather was the result of negligent repairs to the plumbing system.

their right under section 4.4 of the lease "to temporarily close or restrict access to any of the common area for maintenance purposes and to make changes in the common area," the Parks were liable for the flood damages. ER at 17 (Finds. Fact & Concl. L.); *see also* ER at 32 (Commercial Lease).

[37] *Res ipsa loquitur* literally means "the thing speaks for itself." Restatement (Second) of Torts § 328D, cmt. a (1965). In its inception the principle of *res ipsa loquitur* was merely a rule of evidence, permitting the jury to draw from the occurrence of an unusual event the conclusion that it was the defendant's fault. *Id.* The doctrine enables a jury presented only with circumstantial evidence to infer negligence simply from the fact that an event happened. *Id.* at cmt. b. The Restatement (Second) of Torts provides the following concerning the doctrine of *res ipsa loquitur*:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Id. § 328D(1). The Parks argue that the trial court based its finding of the Parks' negligence upon elements (a) and (c) of the Restatement definition, but failed to take into account element (b). Appellants' Reply Br. at 3 (Nov. 19, 2009). They argue that because Dr. Rahmani, his employees, and other tenants of the building all had access to the common area bathroom in which the flooding occurred, their fault was not sufficiently eliminated by the evidence. *Id.* at 3-4. The Parks also point out that the only evidence that supports the trial court's finding that the flood resulted from the Parks' negligent repairs of the plumbing was Dr. Rahmani's testimony at

trial that he had been told "they were working on the faucets." *See id.* at 3; Transcripts ("Tr.") at 115 (Bench Trial – Day 2, Feb. 28, 2008).

[38] Several courts have adopted the Restatement's formulation of the doctrine of *res ipsa loquitur* and agree that in order to prevail upon such theory, the plaintiff must sufficiently eliminate his conduct or that of a third party as a responsible cause for the injury. *See, e.g.*, Restatement (Second) of Torts § 328D, cmts. f, i ("[I]n any case where there is no doubt that it is at least equally probable that the negligence was that of [the plaintiff or] a third person, . . . the plaintiff has not proved his case."); *St. Paul Fire & Marine Ins. Co. v. City of New York*, 907 F.2d 299, 302-04 (2d Cir. 1990) (holding that submission of case to jury on theory of *res ipsa loquitur* was improper because there was ample evidence in the record to show that people other than defendant's employees had access to unlocked machine room, so leak from open valve on air conditioning unit could have been caused by something other than defendant's negligence); *De Witt Props., Inc. v. City of New York*, 377 N.E.2d 461, 465-66 (N.Y. 1978) (proof that third parties have had access to the instrumentality generally destroys premise of *res ipsa loquitur*, and owner's negligence cannot be inferred unless there is sufficient evidence that third parties probably did nothing to cause the injury); *Smith v. King's Grant Condo.*, 640 A.2d 1276, 1277-79, 1281 (Pa. 1994) (holding that plaintiff failed to support claim under the rule of *res ipsa loquitur* because she failed to show that she and third parties were not causes of the harm alleged).

[39] We agree with the Parks that the trial court erred in relying upon the doctrine of *res ipsa loquitur* to find them at fault for the damages to Dr. Rahmani's property resulting from the flood absent a determination that other responsible causes for the flood were sufficiently eliminated by the evidence. There was evidence at trial that prior to the flood, people other than the Parks and

their employees had access to the unlocked common area bathroom, which means that someone other than the Parks or their employees, such as Dr. Rahmani, his employees, or other tenants, may have been responsible for leaving the spigot open. Because the evidence did not sufficiently eliminate the possibility that Dr. Rahmani or some third party was responsible for leaving the spigot open, the trial court erred in finding the Parks negligent based on a theory of *res ipsa loquitur*. However, this does not necessarily mean that Dr. Rahmani failed to prove that the Parks were liable for the flood damages. Instead, the trial court should have determined whether the Parks were at fault under a standard negligence theory of liability. Indeed, it appears that at trial Dr. Rahmani's claim for the flood damages was advanced on a theory of ordinary negligence.

[40] Interestingly, in their appellate briefs the Parks do not contend that Dr. Rahmani failed to establish a prima facie case of ordinary negligence. Instead, the Parks merely argue (1) that their negligence could not be established through the theory of *res ispsa loquitur*; (2) that absent evidence that the Parks or their employees actually left the bathroom spigot open, the Parks could not be found to have been *grossly* negligent; and (3) that the insurance and indemnity provisions of the lease agreement bar recovery for injury stemming from the Parks' ordinary negligence. Appellants' Br. at 7-8.

[41] In any event, the question of whether the evidence is sufficient to establish the Parks' ordinary negligence in causing the flood is a determination best left to the trial court to decide in the first instance. Thus, we reverse the trial court's finding of negligence based on *res ipsa loquitur*, vacate the award of damages to Dr. Rahmani, and remand to the trial court to determine whether the Parks are liable for the flood damages under a standard negligence theory. In order to prevail under a cause of action for negligence, Dr. Rahmani must prove: (1) a duty or

obligation, recognized by law, requiring the Parks to conform to a certain standard of conduct for the protection of others against unreasonable risks of harm; (2) a breach of that duty, or failure to conform to the required standard; (3) proximate cause; and (4) actual loss or damage resulting to Dr. Rahmani. *See Fenwick v. Watabe Guam, Inc.*, 2009 Guam 1 ¶ 12 (quoting *Merchant v. Nanyo Realty, Inc.*, 1998 Guam 26 ¶ 14). Should the trial court on remand find that the flood arose from the negligent acts or omissions of the Parks or their employees, the Parks are liable to Dr. Rahmani for the damages he sustained as a result of the flood, notwithstanding the indemnity provisions in the lease agreement as explained above, and the trial court shall re-award damages accordingly.

B. The Parks' Liability for Dr. Rahmani's Lost Gross Revenue

[42] The Parks maintain that the trial court erred in awarding Dr. Rahmani damages for the loss of $17,273.50 in gross revenue he suffered during the three days in which his clinic was closed for business as a result of the bathroom flood. We address this issue in the event the trial court determines that the Parks are liable for the flood damages under a theory of standard negligence.

[43] The Parks argue that in order to recover lost profits, Dr. Rahmani must show loss of net pecuniary gain, not just loss of gross revenue. Appellants' Br. at 9 (citing *Kids' Universe v. In2Labs*, 116 Cal. Rptr. 2d 158 (Ct. App. 2002)). They point to Dr. Rahmani's testimony at trial to argue that even he did not expect to recover gross revenue but rather he expected to recover gross profits. *Id.* (citing ER at 75 (Tr. Bench Trial Excerpts, Mar. 4, 2008) (Dr. Rahmani answers "No" to the question of whether his medical practice earns 100% profit); ER at 76 (Tr. Bench Trial Excerpts) (Dr. Rahmani states, "Well, I know that we cannot obviously claim lost income as a loss. I mean, there's no way of doing that.")).

[44] From our review of the record, it is clear that Dr. Rahmani sought to recover the lost gross revenue he suffered as a result of the flood rather than just his lost profit. While it is true that Dr. Rahmani testified that he "cannot obviously claim lost income as a loss," this statement was in response to defense counsel's question during cross-examination, "Do you know whether or not any of these [typhoon or flood losses] were treated as catastrophic losses for tax purposes?" Tr. at 104 (Bench Trial – Day 3, Mar. 4, 2008). Dr. Rahmani did not testify that he did not expect to recover gross revenue as damages at trial, and we find the Parks' characterization of Dr. Rahmani's testimony as such to be disingenuous at best. Dr. Rahmani emphasized that he was seeking to recover gross revenue because he continued to incur overhead costs during the three-day closure of the clinic. *Id.* at 104-05 ("[B]ut I'd also add to that our cost didn't stop during that time. . . . I mean, we continued to pay our employer -- our employees, we continued to cover their insurance, we continued to pay our taxes, we continued to pay for the power, water."). Indeed, the trial court understood that Dr. Rahmani sought to recover gross revenue, as it pointed out in its Findings of Fact and Conclusions of Law that "Rahmani demonstrated an estimated loss of $17,273.50 in revenue that would have gone to staff wages and other costs." ER at 18 (Finds. Fact & Concl. L.). If the trial court were to have awarded Dr. Rahmani solely for the loss of net profits for the three days, it would not have fully compensated the doctor, for he would still be out the money he used to pay the overhead costs during the three days. Accordingly, the trial court did not err in awarding Dr. Rahmani for his lost gross revenue. Should the trial court on remand determine that the Parks are liable for the flood, it shall re-enter its award of lost revenue to Dr. Rahmani.

C. The Parks' Liability for Loss of a Persian Carpet

[45] The Parks appeal the trial court's award of $4,480.00 to Dr. Rahmani as compensation for the damage caused by the flood to a Persian rug that was on the floor of Dr. Rahmani's office and was considered by Dr. Rahmani to be a family heirloom. Appellants' Br. at 9. Again, we address this issue in the event the trial court on remand finds the Parks liable for the flood. The Parks argue:

> As a commercial landlord for medical-office space, PARK has no duty to[]protect such property. The loss of such an heirloom is not reasonably foreseeable as an element of damage to a business operation, and should be disallowed. To require PARK to pay for the loss of RAHMANI'S Persian carpet puts PARK in the position of being an insuror [sic] for RAHMANI'S family heirlooms, thus putting RAHMANI in as good or better condition then [sic] he would have been had the carpet had been typhoon-damaged in RAHMANI'S home.

Id. (citation omitted).

[46] We do not agree that because Dr. Rahmani's Persian rug is a family heirloom, he should not be compensated for its loss. While Dr. Rahmani admitted that the rug was a personal item rather than typical office equipment, we do not see how an award for the loss of the rug is much different than had the entire clinic been carpeted, albeit with standard carpeting, and the trial court had awarded Dr. Rahmani for damage to that type of carpet. We also find the Parks' contentions to be unconvincing because this is not a case in which Dr. Rahmani recovered or even attempted to recover the intrinsic value of the rug, but rather he recovered only what it would cost to replace the rug with another of similar size. Indeed, courts often allow plaintiffs to recover damages for heirlooms, with damages typically accounting for the personal value to the plaintiff rather than just market price. *See Mackey v. Goslee*, 244 S.W.3d 261, 265 (Mo. Ct. App. 2008) ("Damages for "unique" property most often contemplates the value of sentimental items such as family heirlooms and pictures . . . ."); *Brown v. Frontier Theatres, Inc.*, 369

S.W.2d 299, 305 (Tex. 1963) ("[I]n a suit to recover for the loss or destruction of items which have their primary value in sentiment. . . . the allowance of damages in compensation for the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for such property [is required]."); 4 Sutherland on Damages § 1099 (4th ed. 1916) ("One criterion of damage may be its actual value to the owner, and this is the rule where it is chiefly or exclusively valuable to him. Such articles as family pictures, plate and heirlooms should be valued with reasonable consideration of and sympathy with the feelings of the owner."). Accordingly, we find the trial court did not err in awarding damages to Dr. Rahmani for the loss of the rug. Thus, should the trial court on remand find the Parks liable for the flood, it shall re-enter its award of damages to Dr. Rahmani for the loss of the rug.

D. The Parks' Mitigation Efforts

[47] According to the Parks, after Dr. Rahmani abandoned the leased premises on August 31, 2003, the Parks attempted to relet Dr. Rahmani's space to a new tenant by advertising the property on television, placing signs on the building, advertising in the Pacific Daily News, and contacting real estate brokers. Appellants' Br. at 11; *see also* Tr. at 114-15 (Bench Trial – Day 5, Mar. 11, 2008). After these efforts proved unsuccessful, on March 31, 2004, the Parks agreed to rent Dr. Rahmani's former second floor space to Dr. Lizama, an existing first floor tenant. Appellants' Br. at 11; *see also*, Tr. at 115-16 (Bench Trial – Day 5). The Parks agreed to rent the second floor space to Dr. Lizama at the same rental rate he had been paying for the first floor space (i.e., $4,000.00 per month), which was less than the amount Dr. Rahmani had been obligated to pay for the second floor space (i.e., $4,233.25 per month at the time of abandonment on August 31, 2003, to increase to $4,884.53 during the last 24 months of the lease, January 1, 2004 through December 31, 2005). Tr. at 69-70 (Bench Trial – Day 5). The first floor space

vacated by Dr. Lizama remained vacant until October 1, 2004, when a portion of it was rented to Dr. Mitchell for $1,650.00 per month. *Id.* at 72.

[48] The trial court found that Dr. Rahmani breached the lease by abandoning the premises prior to the expiration of his lease term. ER at 20 (Finds. Fact & Concl. L.) ("Rahmani vacated the premises in breach of this agreement when he left on August 31, 2003 and discontinued payments of rent."). In awarding damages to the Parks, the court offset Dr. Rahmani's liability by the Parks' mitigation efforts. Thus, the court found that Dr. Rahmani was not liable for rent and common area fees beyond the seven months between Dr. Rahmani's wrongful abandonment of the premises and Dr. Lizama's transfer to Dr. Rahmani's former space. *Id.*

[49] However, the Parks argue that the trial court erred in not giving "full consideration . . . to the overall effect of RAHMANI'S abandonment of the premises – this being a loss of income for both upstairs and downstairs rental spaces, offset to RAHMANI'S credit by the total rent and common area expenses actually received by PARK from Drs. Mitchell and Lizama." Appellants' Br. at 12. Essentially, the Parks argue that they should have been awarded the difference between Dr. Rahmani's rental amount and Dr. Lizama's rental amount for the second floor space, as well as the amount Dr. Lizama had previously been paying for the first floor space, with appropriate offset for the amounts eventually paid by Dr. Mitchell when he leased out part of the first floor space.

[50] When a tenant abandons property, the landlord is entitled to recover the rent that would be due for the remainder of the lease term less the amount actually received from subsequent tenants of the abandoned property during that time, so long as the landlord makes an honest and reasonable attempt to mitigate his losses by reletting the property. *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 962 P.2d 824, 828 (Wash. Ct. App. 1997); *see also Guam United*

Warehouse Corp., 2003 Guam 20 ¶ 26 ("[A] commercial landlord has a duty to make reasonable efforts to mitigate its damages when its tenant abandons the leased property." (alteration in original) (citation omitted)). Whether the Parks' efforts at mitigation were reasonable is not an issue in this case. Instead, the issue here is whether Dr. Rahmani should be liable for the rental amounts Dr. Lizama would have been paying on the first floor space had he not moved to Dr. Rahmani's former space.

[51] In *Marco Kona Warehouse v. Sharmilo, Inc.*, a case from the Intermediate Court of Appeals of Hawai'i, the defendant-tenant wrongfully vacated three bays (bays 2, 4, and 6) it was renting in plaintiff-landlord's warehouse. 768 P.2d 247, 249 (Haw. Ct. App. 1989). An existing tenant who had been renting three different bays (bays 7, 9, and 10) in the same warehouse asked the landlord if it could move to defendant-tenant's abandoned bays, thereby vacating its three bays. *Id.* In an action against the defendant-tenant, the landlord sought to recover the rental amount on bays 7, 9, and 10. *Id.* at 250.

[52] The appellate court found that the lower court did not err in denying recovery to the landlord for the net rent lost for bays 7, 9, and 10 because the defendant-tenant had not consented to such liability. *Id.* at 251-52.

> We are reluctant to hold a lessee liable for the vacancy of space which it neither leased nor consented to be liable for. The difficulty in comparing the desirability of different locations from a prospective lessee's point of view and in accurately determining what might have been had the lessor not elected to engage in such musical chairs makes it too difficult to determine the objective reasonableness of the lessor's decisions to fill the wrongfully abandoned leased premises by permitting and facilitating current lessees to move and to hold the lessee who wrongfully abandoned the leased premises liable for the resulting vacated spaces . . . . When the lessor owns all of the vacated spaces, its added self-interest compounds the problem.
>
> If [landlord] wanted to hold [defendant-tenant] liable for the net lost rent for bays 7, 9, and 10 . . . it had to obtain [defendant-tenant's] consent. Until it consented

> to such an extension of its liability, [defendant-tenant] was, as a matter of law, liable only for bays 2, 4, and 6 and not for bays 7, 9, [and] 10 . . . .

Id. at 252; *see also Centerline Inv. Co. v. Tri-Cor Indus., Inc.*, 80 S.W.3d 499, 503-04 (Mo. Ct. App. 2002) ("The law [limits] consequential damages to those that are within the contemplation of the parties at the time of contracting, or foreseeable to them. . . . [Thus, landlords should] obtain the defaulting tenant's consent before holding it responsible for rent on space it never contracted to lease." (citations and internal quotation marks omitted)); *Crown Plaza Corp.*, 962 P.2d at 828-29 ("[T]he mitigation cases suggest that the breaching tenant is only liable for rent related to the premises it actually leased. This is consistent with the remedies provision in the parties' lease, which gives no indication that a breaching tenant could be liable for the rent of any other premises." (citation omitted)).

[53] We agree with the logic underlying the decisions in *Marco Kona* and those cases with similar conclusions and hold that a tenant who wrongfully abandons premises in breach of its lease is only liable for the rent and other fees related to the premises it actually leased, unless the tenant otherwise consents.[4] In the instant case, the Parks do not assert that Dr. Rahmani consented to becoming liable for the rent on the downstairs space vacated by Dr. Lizama after he moved to Dr. Rahmani's former space. Moreover, the remedies provision in the lease agreement did not provide any indication that Dr. Rahmani might have become liable for the rent due on

[4] We note that such a rule is particularly prudent in a case such as the instant one, where presumably Dr. Rahmani's second floor space was entirely different from Dr. Lizama's first floor space. Dr. Rahmani made several thousands of dollars of leasehold improvements to transform his space into a surgical center. While the reasonableness of the Parks' mitigation efforts is not at issue, the record would suggest that in the eyes of prospective tenants, the space vacated by Dr. Rahmani was arguably more desirable than the first floor space previously occupied by Dr. Lizama, as evident by Dr. Lizama's request to transfer upstairs. It is difficult to determine what might have been had the Parks declined Dr. Lizama's request. It is possible that they may have found a tenant willing to lease the abandoned space for the same amount of rent charged to Dr. Rahmani. While Dr. Rahmani probably knew that he was at least potentially liable for the rent on the abandoned premises for the remainder of his lease term, notwithstanding his claims against the Parks, Dr. Rahmani likely did not foresee that his liability might hinge on the marketability of premises unlike his own.

any other spaces in Oka Plaza should he prematurely abandon his space. *See* ER at 40-42 (Commercial Lease). Therefore, Dr. Rahmani is not liable for any rent or common area fees on the downstairs space, and the trial court did not err in failing to award such to the Parks.

[54] The trial court did err, however, in failing to award the Parks the difference between the rent that would have been payable under the lease agreement for the second floor space and the rent the Parks actually received from Dr. Lizama when he moved to that space. Section 15.1 of the lease provides:

> If at any time during the term of this Lease, Tenant abandons the Premises or any part thereof, Landlord may at its option, enter the Premises by any means . . . and may, at its discretion, act as agent for Tenant, relet the demised Premises, or any part thereof, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such reletting, and, at Landlord's option, *hold the Tenant liable for any difference between the rent that would have been payable under this Lease during the balance of the unexpired term, as if this Lease had continued in force, and the rent for such period realized by Landlord by means of such reletting.*

Id. at 42 (emphasis added). Thus, Dr. Rahmani remained liable for the difference between his rental amounts and common area fees under the lease and the rental amounts and common area fees charged to Dr. Lizama for the abandoned space for the remainder of Dr. Rahmani's lease term. Accordingly, we vacate the trial court's award of damages to the Parks for lost rent and common area fees and remand to the trial court for recalculation of such damages.

E. The Trial Court's Reliance on Slater's Interim Report in Calculating Damages

[55] The Parks assert that the trial court erred in relying on calculations made by the Parks' expert witness, CPA Roger Slater, in his interim report rather than on calculations in his final report. According to the Parks, the interim report was marked as an exhibit but was neither moved nor admitted into evidence. On the other hand, the final report was admitted into evidence and formed the basis for Slater's testimony at trial. The interim report was incomplete

as to the calculation of default charges and interest under the lease agreement, as well as to Slater's final determination of lost rents.

[56] It is a well-settled principle that a trier of fact may only consider admitted evidence when reaching its decision. *See, e.g.*, *United States v. Rana*, 944 F.2d 123, 126 (3d Cir. 1991) ("[I]t is . . . error for a jury to rely on items not admitted into evidence to reach its verdict." (quoting *United States v. Hans*, 738 F.2d 88, 92 (3d Cir. 1984))); *Spicewood, Inc. v. Dykes Paving & Constr. Co.*, 364 S.E.2d 298, 300 (Ga. Ct. App. 1987) ("It is error to permit the trier of fact to consider documents which have not been tendered or admitted into evidence. We reject [the] argument that any error was harmless as the erroneously considered evidence was incorporated into and is reflected in the jury's verdict."); *Runner v. Cadle Co.*, 511 S.E.2d 132, 134 (W. Va. 1998) ("Allowing a jury to take exhibits to the jury room not admitted in evidence . . . may constitute reversible error where prejudice results therefrom.").

[57] Dr. Rahmani contends that the interim report was proffered by the Parks during their direct examination of Slater, and therefore the trial court did not mistakenly rely upon this report. Appellee's Br. at 19. Dr. Rahmani cites to the following exchange during direct examination of Slater to support the contention that the interim report was proffered by the Parks:

> Q Okay. So did you also prepare a formal report for use at this trial?
>
> A Yes, I did.
>
> Q Okay. And did you also prepare an interim report prior to your final report?
>
> A Yes, I did.
>
> Q And what were the differences between those two, if you recall?
>
> A The difference between the two reports was the inclusion of default payment fees and interests.
>
> Q Okay. Except for that, the substance is the same in both the interim and the final report, with the exception - -
>
> A Substan- --

Q I'm sorry.

A No, go ahead.

Q -- with the exception of calculation of interest after default; is that right?

A Correct.

Tr. at 56 (Bench Trial - Day 5). Dr. Rahmani does not point to any other parts of the trial in which Slater discussed the contents of the interim report.

[58] In essence, Dr. Rahmani argues that the Parks "invited" the trial court's error of relying on the interim report by referencing the report during Slater's direct examination. However, this brief reference to the interim report, without more, is not sufficient to negate the effect of the trial court's consideration of a document not admitted into evidence. This is unlike the situation in *Jones v. Jesse's Disposal Service*, where the Supreme Court of Wyoming declined to apply the "invited-error" rule because the evidence and testimony received at the hearing were identical to that contained in the reports not offered or received into evidence, and thus, no prejudice resulted to the appellant. 702 P.2d 1299, 1301 (Wyo. 1985). In the instant case, Slater's interim report lacked many calculations that were later included in his final report, including calculations of default charges and interest.[5] Thus, the information in the two reports appears to be markedly different, and the Parks were prejudiced by the trial court's reliance on the interim report when calculating damages. Accordingly, we vacate the trial court's award of damages to the Parks based on Slater's interim report and remand to the trial court to use Slater's final report to make any necessary changes to its calculations of the Parks' damages.

[5] Section 14.2 of the lease agreement provides for the assessment of late fees and interest in the event of Dr. Rahmani's default in the payment of rent. ER at 40 (Commercial Lease).

F. The Trial Court's Failure to Designate a Single Prevailing Party for the Purposes of Awarding Attorney Fees and Costs

[59] With regard to attorney fees in civil cases, Guam follows the "American Rule," which provides that each party bears its own litigation expenses, including attorney fees. *Sule v. Guam Bd. of Dental Exam'rs*, 2008 Guam 20 ¶ 52 (quoting *Fleming*, 2003 Guam 4 ¶ 7). Statutory or contractual provisions authorizing attorney fees are exceptions to the American Rule. *Id.* (citing *Fleming*, 2003 Guam 4 ¶ 20).

[60] In the instant case, attorney fees are authorized under the terms of the lease agreement, which provides that "[i]n the event of a dispute between the parties, the prevailing party in any litigation shall be entitled, in addition to all other damages, to an award of actual attorneys' fees and costs incurred." ER at 47 (Commercial Lease). However, the trial court, finding that "both parties prevailed on significant issues in this case," denied an award of attorney fees to either party. ER at 26 (Dec. & Order, Mar. 30, 2009) (citing *Fargo Pac., Inc.*, 2006 Guam 22 ¶ 53).

[61] Generally, the prevailing party to a suit, for the purpose of determining who is entitled to attorney fees, is the one who successfully prosecutes the action or successfully defends against it, prevailing on the merits of the main issue. 20 Am. Jur. 2d *Costs* § 11 (2010). In cases in which the plaintiff had established a right to recover on his complaint against the defendant, and the defendant had established a right to recover on his counterclaim against the plaintiff, the courts have generally expressed the view that costs should be awarded to the party in whose favor a net judgment was entered. *See, e.g.*, *Worthington v. Lick*, 783 F.2d 1369, 1370 (9th Cir. 1986); 1 Attorneys' Fees § 6:8 (3d ed. 2009) (citing cases).

[62] Other courts, however, have rejected the "net judgment" rule and have opted for other approaches. *See, e.g.*, *Halloran*, 115 P.3d at 553 (holding that when each party prevails on some issue, it is within trial court's discretion to refuse to designate either party as the prevailing

party); *Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194, 1200-01 (Fla. 2009) (applying the "significant issues" test to mechanic's lien cases, requiring trial court's determination of prevailing party to rest on whether the party succeeded on any significant issue in litigation which achieved some of the benefit party sought in bringing suit; fact that a claimant received a net judgment is a factor to be considered, but it is not determinative of whether that party is the prevailing party); *Landis v. Hannaford Bros. Co.*, 2000 ME 111, ¶ 6, 754 A.2d 958, 959-60 (applying a "functional analysis" approach, which requires trial court to look at lawsuit as a whole to determine which party was the "winner" and which the "loser"); *A.K. & R. Whipple Plumbing & Heating v. Guy*, 2004 UT 47, ¶¶ 11-13, 94 P.3d 270 (applying the "flexible and reasoned" approach, which requires not only consideration of significance of net judgment but also looks at amounts actually sought by the parties and then balances them proportionally with what was recovered); *cf. A. V. DeBlasio Constr., Inc. v. Mountain States Constr. Co.*, 588 F.2d 259, 263 (9th Cir. 1978), *construed in Anderson v. Melwani*, 179 F.3d 763, 766 (9th Cir. 1999) (holding that even if one claimant is the prevailing party, the trial court has discretion to deny attorney's fees if an award of fees would be "inequitable and unreasonable" because both parties had acted improperly (citing 11 Williston on Contracts § 1418 at 656-59 (3d ed. 1968))).

[63] The Parks argue that they are the sole prevailing party under several different approaches. First, they contend that they would prevail under the net judgment rule because they recovered a net award of $15,690.13[6] against Dr. Rahmani. Appellants' Br. at 16. The Parks argue that they would also be considered the prevailing party under an approach that compares the extent to which each party succeeded or failed to succeed on its claim, because Dr. Rahmani sought $219,769.06 and failed to recover on any of his claims for equitable relief, whereas the Parks

[6] In the Parks' opening brief, they miscalculate the difference between their damages award ($47,361.13) and Dr. Rahmani's award ($31,670.00) as $15,961.00. *See* Appellants' Br. at 16 n.4.

sought $179,056.05 in contract damages and "clearly prevailed" on their contract claims. *Id.* Finally, the Parks contend that the trial court abused its discretion under the Ninth Circuit's approach because an award of fees would not have resulted in inequity, as "the contract was created between experienced businessmen acting at arms' length, and was breached from its inception by RAHMANI'S failure to adequately insure his premises against typhoon-related damage." *Id.* at 16-17; *see also Melwani*, 179 F.3d at 766 ("The general rule is that a court 'abuses its discretion if it awards contractually-authorized attorney's fees under circumstances that make the award inequitable or unreasonable or fails to award such fees in a situation where inequity will not result.'" (quoting *McDonald's Corp. v. Watson*, 69 F.3d 36, 45 (5th Cir. 1995))).

[64] We are persuaded by those courts which have rejected the net judgment rule as the sole criterion for determining prevailing party status for the purpose of awarding attorney fees. We believe the better rule to be one which requires the trial court to look at the lawsuit as a whole to determine which party, if any, prevailed. The recovery of a net judgment is but one of several factors for the trial court to consider, others being whether the party prevailed on any significant issue in litigation, and the proportion between what was sought by the party and what was actually recovered. We reject the Parks' contention that there must always be a single prevailing party to a lawsuit; it is within the sound discretion of the trial court to determine that, based on the overall circumstances of the case, both parties prevailed and, thus, each is entitled to recover attorney fees from the other or, instead, each is to bear its own fees. Likewise, the trial court may determine that neither party prevailed, and, thus, neither party is entitled to an attorney fee award.

[65] In the instant case, it seems the trial court rejected the net judgment rule and applied a rule akin to the one we adopt today. *See* ER at 26 (Dec. & Order) ("[B]oth parties prevailed on significant issues in this case, and attorney's fees should not be awarded."). However, because the damage awards in this case may change upon remand, and because the trial court did not have the benefit of our instant analysis, we remand the issue of attorney fees in order to allow the court to reconsider the matter in light of this opinion and any potential change in the judgment amounts. In making its determination, the trial court shall articulate the reasons for its decision. Should the trial court find that there indeed is a prevailing party in this case, it shall also award attorney fees relating to the instant appeal. *See Mobil Oil Guam Inc. v. Tendido*, 2004 Guam 7 ¶ 49 ("[C]ontractual provisions providing for the allowance of attorney['s] fees to the winning party are construed to include fees incurred both at the trial level and on appeal." (alterations in original) (citations omitted)).

G. Dr. Rahmani's Failure to File a Cross-Appeal

[66] Dr. Rahmani throughout his opposition brief attempts to argue for reversal of the trial court's judgment against him for breach of the lease prior to the expiration of the lease term. Dr. Rahmani contends that because the Parks failed to fulfill their obligations under the lease (e.g., by failing to properly maintain the premises and to obtain insurance on the common areas), Dr. Rahmani in turn was not obligated to perform his respective obligations under the lease. Appellee's Br. at 8-11. In other words, Dr. Rahmani asserts that the performance of his obligations under the lease was conditioned upon the Parks having first fulfilled their obligations. *Id.* at 8-9 (quoting *Pry Corp. of Am. v. Leach*, 2 Cal. Rptr. 425, 429 (Ct. App. 1960); 18 GCA § 80406 (2005)). The Parks failure to do so, Dr. Rahmani argues, rendered the lease

unenforceable, and, therefore, the Parks cannot avail themselves of any remedies provided by the lease, including the trial court's award of damages for lost rent. *Id.* at 10.

[67] The Parks argue that Dr. Rahmani is precluded from challenging the trial court's award of damages to the Parks for Dr. Rahmani's breach of the lease absent the filing of a cross-appeal. Reply Br. at 1-2. We agree.

[68] It is a well-settled rule that, absent a cross-appeal, an "appellee may not attack the [judgment] with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . . ." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). As a corollary to the principle enunciated in *American Railway*, there is the equally well-accepted rule that the appellee may, despite a failure to file a cross-appeal, *defend* a judgment on any ground consistent with the record, even if rejected or ignored by the lower court.[7] *See Guam Hous. & Urban Renewal Auth. (GHURA) v. Dongbu Ins. Co.*, 2002 Guam 3 ¶ 8 ("[A]n appellee is entitled to assert any ground supported by the record regardless of whether the argument was rejected or ignored by the trial court, so long as the appellee's rights under the judgment are not enlarged." (quoting *In re Leon Guerrero*, 2001 Guam 22 ¶ 37) (citing *Am. Ry. Express Co.*, 265 U.S. at 435)); 36 C.J.S. *Federal Courts* § 584 (2011) ("On an appeal to a Court of Appeals an appellee may urge *in support of the judgment* under review any matter appearing in the record, without the necessity of taking a cross-appeal." (emphasis added)); *cf. Greenlaw v. United States*, 554 U.S. 237, 247 (2008) (noting that in every case in which correction of a plain error would result

[7] We find that Dr. Rahmani's conditional performance argument was not overlooked by the trial court. *See* ER at 25 (Dec. & Order) ("When Rahmani discovered dilapidations in the leasehold premises, his proper remedy was to repair and deduct, or to vacate the premises under 18 GCA § 51102. Rahmani cannot cease payment and remain in possession under the contractual theory that the Parks breached a condition precedent or concurrent to the lease."); ER at 20-21 (Finds. Fact & Concl. L.) (holding that Dr. Rahmani was not constructively evicted because he continued to occupy the premises for twenty-two months after his initial complaint to the Parks about the condition of the building).

in the modification of a judgment to the advantage of a non-appealing party, the Court has invoked the cross-appeal rule to bar the correction).

[69] In the instant case, Dr. Rahmani's argument regarding conditional performance does not fall within this exception to the general cross-appeal rule because rather than raise the issue as a cross-issue or alternative theory *in support of the judgment*, Dr. Rahmani raises the issue to urge this court to reverse the trial court's award of damages to the Parks. In other words, Dr. Rahmani does not argue that the judgment in favor of the Parks should at the very least be affirmed because of their purported breach of the lease, but rather that the judgment should be reversed.[8] Because a finding in Dr. Rahmani's favor on the issue would potentially reduce his liability under the judgment to zero, and thereby reduce if not eliminate altogether the Parks' right to recover under the judgment, the issue is not one that can be raised absent a cross-appeal; thus, it is not properly before this court for review.

V. CONCLUSION

[70] We **REVERSE** the trial court's finding that the Parks were liable for the flood under a theory of *res ipsa loquitur*, and we **VACATE** the award of damages to Dr. Rahmani. We **REMAND** to the trial court to determine whether the Parks are liable for damages stemming from the flood under a standard negligence theory of liability. Should the trial court find that the Parks were indeed negligent, it shall re-enter its damage award to Dr. Rahmani, including the awards for lost gross revenue and for loss of the Persian carpet.

[71] The trial court was correct in holding that Dr. Rahmani was not liable for the loss of rent and common area fees on the first floor space vacated by Dr. Lizama when he transferred to Dr.

[8] Any instance in Dr. Rahmani's brief in which he asserts that the judgment in favor of the Parks should be affirmed is on the alternative grounds that the trial court did not clearly err in its calculation of damages, not on the grounds of the Parks' failure to comply with the lease. *See* Appellee's Br. at 16, 19, 20.

Rahmani's former space. However, we find that the trial court erred in failing to award the Parks the difference between Dr. Rahmani's rental amounts and common area fees under the lease agreement and the rent and common area fees charged to Dr. Lizama for Dr. Rahmani's abandoned space for the remainder of Dr. Rahmani's lease term. We also find that the trial court erred in relying upon Slater's interim report rather than his final report to calculate the Parks' damages. Thus, we **VACATE** the trial court's award of damages to the Parks and **REMAND** to the trial court for recalculation of such damages.

[72] Finally, we **REMAND** the issue of attorney fees to allow the trial court's reconsideration of the matter in light of this opinion and of any potential changes in the parties' respective damage awards upon remand.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice