IN THE SUPREME COURT OF GUAM

B.M. Co.,
A Guam Partnership
Plaintiff-Appellant/Cross-Appellee

vs.

JIMMY K. AVERY AND MARIA F. AVERY
Defendants-Appellees/Cross-Appellants

Supreme Court Case No.: CVA00-026
Superior Court Case No.: CV0422-95

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on September 21, 2001
Hagåtña, Guam

Appearing for Plaintiff-Appellant/
Cross-Appellee:
Ron Moroni, *Esq*.
Law Office Thomas M. Tarpley, Jr.
A Professional Corp.
Suite 201, American Life Bldg.
137 Murray Blvd.
Hagåtña, Guam 96910

Appearing for Defendants-Appellees/
Cross-Appellants:
Maria T. Cenzon-Duenas, *Esq*.
Mair, Mair, Spade, & Thompson
A Professional Corp.
Suite 807, GCIC Bldg.
414 W. Soledad Ave.
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice (Acting)[1], JOHN A. MANGLONA, Designated Justice, and RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] The Appellant, B.M. Co., A Guam Partnership (hereinafter, "BM Co."), appeals from a judgment entered in the Superior Court awarding damages to the Appellees, Jimmy and Maria Avery (hereinafter "Averys") in a breach of contract action. BM Co. argues that the trial court erred in excluding two expert witnesses. BM Co. further contends that the trial court erred in denying its post-verdict motions in which BM Co. made the following arguments: (1) the evidence did not support the award of damages for the cost of repairing construction defects; (2) BM Co. was not legally obligated to indemnify the Averys for damage caused to a neighboring property; (3) BM Co. was not legally obligated to pay damages for loss rentals; and (4) the jury's verdict was the product of passion or prejudice. The Averys filed a cross-appeal, arguing that the trial court erred in reducing the jury's award of liquidated damages. We reject the Averys' argument on cross-appeal. We similarly reject BM Co.'s challenge to part of the jury's award for construction defects and its argument that the jury's award was based on passion or prejudice. We agree with B.M. Co.'s challenges to the trial court's exclusion of its expert witnesses, which we hold was an abuse of discretion, and the jury's award for lost rentals and the indemnity claim, which we hold were erroneous as a matter of law. Accordingly, we affirm in part, reverse in part, and remand for a new trial as to the Averys' claim for damages for certain construction defects.

[1] Chief Justice Siguenza recused himself from deciding this matter. Justice F. Philip Carbullido, as next senior member of the panel, was designated as the acting Chief Justice.

I.

[2] The instant appeal arises out of a breach of contract action filed by BM Co. against the Averys. The parties entered into a construction contract on July 23, 1992. Under the contract, BM Co. was required to build a two-story commercial building with a warehouse in Barrigada, Guam. The original contract price was $975,000.00. The Averys were obligated to make monthly progress payments and to deduct five percent of each payment as retainage due at the end of the project. Shortly after signing the contract, the parties added a supplement which included a clause which allowed for liquidated damages of $265.00 per day in the event BM Co. inexcusably failed to complete the work by the completion date.[2]

[3] BM Co. was required to construct the building "per the approved contract drawings," Appellee's Supplemental Excerpts of Record, tab 9 (Art. 2 of Construction Contract), and A.E.S. Inc. was designated as the architect. The A.E.S. Inc. drawings entailed work that was more expensive and time consuming than BM Co. originally anticipated. Due to the added work, a change work order was made which increased the contract price by $170,000.00 and added forty-five calendar days to contract, bringing the contract price to $1,145,000.00 and moving the completion date to November 9, 1993. The parties later extended the completion date to November 15, 1993. BM Co. did not complete the project by the specified completion date.

[4] Subsequent to the Averys' occupation of the building, BM Co. filed an action in the Superior Court claiming damages for money owed to them for additional work performed at the Averys' request. The Averys filed a counterclaim alleging that the work was defective and that repair costs

[2] The liquidated damages clause provided: "The Contractor shall pay $265.00 per day as Liquidated Damage to the Owner in the event of [sic] that the entire contract work [sic] not completed within the contract completion date without any reasons described in Article 3 of the agreement." Appellee's Supplemental Excerpts of Record, tab 10, p.1 (Supplement to Agreement) (emphasis added).

should be deducted from any money owed to BM Co. under the contract. The Averys also claimed liquidated damages for the delays.

[5] The case went to trial and the jury returned a verdict for the Averys on all claims and counterclaims, and determined that the Averys were entitled to liquidated damages for 2,367 days totaling $627,255.00. Included in the 2,367 days were the days that the Averys occupied the building. The trial court filed a judgment on the verdict on May 26, 2000.

[6] Subsequent to the verdict, BM Co. made a motion for judgment notwithstanding the verdict (hereinafter "JNOV") and for a new trial. On September 13, 2000, the trial court filed a Decision and Order granting the motion for JNOV as to the liquidated damages award, reducing the award by $603,935.00, which represented the days that the Averys took occupancy and began renting out the building. The trial court did not amend the remainder of the jury award, and the Amended Judgment was filed on October 6, 2000. This appeal and cross-appeal followed.

II.

[7] This court has jurisdiction over the appeal of a final judgment of the Superior Court of Guam pursuant to Title 7 GCA § 3107 (1994).

III.

A. The Trial Court's Reduction of the Jury's Award of Liquidated Damages.

[8] In its cross-appeal, the Averys argue that the trial court erred in granting JNOV in favor of BM Co., reducing the jury's award of liquidated damages. We find this issue to be significant and therefore discuss it at the outset. Appellate courts review the grant of JNOV using the same standard

the trial court employs. *See Phillips v. Ceribo*, Civ. No. 81-000124, 1982 WL 30792, at * 2 (D. Guam App. Div. Nov. 15, 1982) (citing *William Inglis, Etc. v. ITT Cont. Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1982)). "Viewing the evidence and its inferences most favorably to the nonmoving party, the court determines whether the evidence reasonably supports only judgment for the moving party." *Id*. (citations omitted). A trial court's grant of a motion for JNOV is proper only if there is no substantial evidence to support the jury's conclusions and the movant is entitled to judgment as a matter of law. *See id*.; *see also Leon Guerrero v. DLB Constr. Co.*, 1999 Guam 9, ¶ 11.

[9] An appellate court reviews the principles relied upon by the trial court in interpreting a contract *de novo. Shiroma v. Ysrael*, Civ. No. 86-0029A, 1987 WL 109889, at *2 (D. Guam App. Div. July 17, 1987) (citation omitted). When the trial court looks merely to the contract language in interpreting the contract, and not to extraneous facts, the court's interpretation is a legal conclusion and is thus reviewed *de novo. See Apana v. Rosario*, Civ. No. 95-00024A, 1995 WL 604354, at *2 (D. Guam App. Div. Sept. 29, 1995); *see also Pesino v. Atlantic Bank*, 709 A.2d 540, 545 (Conn. 1998) ("[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law.") (citation omitted); *see also Scarborough v. Ridgeway*, 726 F.2d 132, 135 (4th Cir. 1984).

[10] In the instant case, our role is to step into the shoes of the trial court in determining whether JNOV was proper. Standing in the shoes of the trial court, this court must determine whether, viewing the contract language, the parties intended that liquidated damages stop accruing upon substantial completion.

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[11] The liquidated damages clause provides:

> Liquidated Damage: The Contractor shall pay $265.00 per day as Liquidated Damage to the Owner in the event of [sic] that the entire contract work [sic] not completed within the contract completion date without any reasons described in Article 3 of the agreement.

Appellee's Supplemental Excerpts of Record, tab 10, p.1 (Supplement to Agreement).

[12] Article 3 of the contract provides:

> TIME OF COMMENCEMENT AND SUBSTANTIAL COMPLETION: The work to be performed under this Contract shall be commenced within 10 calendar days after receipt of written Notice to Proceed. Substantial Completion of the Work shall be achieved not later than 365 calendar days from the date the Written Notice to Proceed [sic] received, however, the completion time can be adjusted in accordance with the following occasions.
>
> 1. Severe weather and Act of God.
> 2. Differing site conditions.
> 3. Stoppage or suspension of the work by the Owner.
> 4. Owner's failure to obtain necessary permits on time.
> 5. Other reasons beyond the Contractor's control.

Appellee's Supplemental Excerpts of Record, tab. 9, p. 2 (Standard Form Agreement).

[13] As referenced above, the liquidated damages clause provides that liquidated damages are recoverable if the contract is not fully completed by the contract completion date and the delay in completion was not attributable to the causes listed in Article 3 of the contract. While the liquidated damages clause references when liquidated damages are triggered, the clause does not address the issue in this case, that is, when the liquidated damages stops accruing. We must determine whether other provisions of the contract resolve this issue.

[14] The trial court relied upon Article 3 of the contract in determining that liquidated damages would stop accruing upon substantial completion. We similarly find Article 3 to be determinative. Article 3 evidences the parties' intent that the requisite degree of completion, for purposes of defining a delay, was substantial completion, and not full completion. Specifically, pursuant to

Article 3, barring a delay caused by an event enumerated under the Article, BM Co. was required to substantially complete the project by the date specified in the contract. A delay to the project was therefore delineated as a failure to substantially complete the work by the specified date. In light of the parties' intent that a delay to the work is defined with reference to substantial completion rather than full completion, we interpret the contract to mean that a delay compensable under the liquidated damages clause is the period of time that the contract was not substantially completed. *Cf. Phillips v. Ben M. Hogan Co.*, 594 S.W.2d 39, 41 (Ark. Ct. App. 1980) ("[W]here a construction contract is substantially performed within the time limit, delay in the completion of minor details which does not cause material damage to the project will not subject the builder to liquidated damages.").

[15] Our interpretation of the contract comports with case law interpreting liquidated damages clauses. As a general rule, courts construe liquidated damages clauses to allow for damages up to the point of substantial completion of the contract, substantial completion being defined as the time which the owner occupies the building. *See Page v. Travis-William County Water Control & Improvement Dist.*, 367 S.W.2d 307, 311 (Tex. 1963). Courts reason that liquidated damages should not accrue beyond the period that the project could be used for its intended purposes. *See id.*; *see also Stone v. City of Arcola*, 536 N.E.2d 1329, 1338 (Ill. Ct. App. 1989). A liquidated damages clause in a construction contract is specifically designed to approximate the owner's loss before occupancy, i.e., the damages for delays in completion. *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d 364, 376 (N.J. 1992). Once the owner takes possession and uses the building for its intended purpose, it cannot be said that there exists the type of delay for which the liquidated damages clause was intended to remedy. *See Page*, 367 S.W.2d at 31; *see also Phillips*, 594 S.W.2d

at 41. Thus, courts have held that "after the date of occupancy, the owner is entitled only to his actual damages," and not liquidated damages. *Page*, 367 S.W.2d at 311.

[16] Moreover, courts hold that liquidated damages should cease accruing upon substantial completion unless the contract unambiguously provides otherwise. *Perini*, 610 A.2d at 375 (citation omitted). The contract in the instant case does not unambiguously provide otherwise. Therefore, in accordance with the contract language and relevant case law, we interpret the liquidated damages clause to mean that liquidated damages stop accruing upon substantial completion. Accordingly, we hold that the trial court did not err in finding that, under the terms of the contract, the liquidated damages were to stop accruing upon substantial completion.

[17] After making the legal determination that liquidated damages could only be awarded until the point of substantial completion, the trial court was required to determine the point at which the contract at issue was substantially completed. Thus, we must next decide whether the trial court erred in determining that the project was substantially completed at the time the occupancy permit was issued. Generally, a finding of substantial completion is a question of fact. *See Stone*, 536 N.E.2d at 1338. We review factual determinations for clear error. *Yang*, 1998 Guam 9 at ¶ 4. "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake." *Id*. at ¶ 7 (citation omitted).

[18] Substantial completion is defined as the "date when construction is sufficiently complete . . . so the owner can occupy or utilize the building." *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1093 (N.J. 1996) (internal quotation marks omitted). The contract in the instant case similarly defines substantial completion as "the Date certified by the Architect when construction

is sufficiently complete, in accordance with the Contract Documents, *so that the Owner or separate contractors can occupy or utilize the Work or a designated portion thereof for the use for which it is intended*." Appellant's Excerpts of Record, tab 11 (General Conditions of the Contract for Construction, Article 8.1.3). One factor indicating that a project is substantially completed, i.e., may be used by the owner for its intended purpose, is the issuance of an occupancy permit. *See Russo Farms*, 675 A.2d at 1093; *Miller v. Bourgoin*, 613 A.2d 292, 294-95 (Conn. Ct. App. 1992); *see also* Richard H. Lowe & Elisa H. Walthall, *When Architects Withhold Certificate of Substantial Completion, and Other Problems*, CONSTRUCTION LAW., Oct. 1999, at 6. Other factors include:

> [T]he extent to which the injured party will be deprived of the benefit reasonably expected, the extent to which that party can be adequately compensated for the deficiency of performance, the extent to which the performing party will suffer forfeiture, the likelihood that the performing party will cure his failure in light of the circumstances and his reasonable assurances, and the extent of good faith and fair dealing on the part of the performing party.

Miller, 613 A.2d at 295.

[19] Evidence that the occupancy permit was issued February 11, 1994, coupled with the fact that the Averys began to rent the building out soon thereafter, supports a finding that, as of that date, the Averys were able to use the building for its intended purpose. Moreover, the Averys' ability to rent the building soon after February 11, 1994 indicates that the remaining deficiencies in the building were not so grave so as to deprive them of the benefit they reasonably expected to receive under the contract. Finally, at the point the occupancy permit was issued, the deficiencies in BM Co.'s performance were capable of being adequately remedied by monetary compensation. In view of the foregoing facts, we hold that the trial court's finding that the work was substantially completed on February 11, 1994 was not clearly erroneous. Accordingly, we find that the trial court did not err in granting JNOV in favor of BM Co., reducing the jury's award of liquidated damages.

B. The Trial Court's Exclusion of BM Co.'s Expert Witnesses.

[20] On appeal, BM Co. argues that the trial court erred in excluding two of their expert witnesses. "[A] trial court's decision on the admissibility of expert testimony is reviewed for an abuse of discretion or manifest error." *In re N.A.*, 2001 Guam 7, ¶ 19; *see also Duenas v. Yama's Co.*, Civ. No. 90-00062A, 1991 WL 255834, at *3 (D. Guam App. Div. Nov. 18, 1991). "A trial judge abuses his [or] her discretion . . . when the decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *In re N.A.*, 2001 Guam 7 at ¶ 19 (quoting *Midsea Indus., Inc. v. HK Eng'g Ltd.*, 1998 Guam 14, ¶ 4). Furthermore, when reviewing a trial court's decision for an abuse of discretion, "a reviewing court does not substitute its judgment for that of the trial court. Instead, we must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion." *People v. Tuncap*, 1998 Guam 13, ¶ 12.

[21] On August 16, 1995, five years prior to trial, the Averys submitted interrogatories requesting the identity and reports of BM Co.'s expert witnesses. On April 26, 2000, two weeks prior to trial, BM Co. submitted the names and reports of two rebuttal expert witnesses. One expert, Mr. Arce, was prepared to testify that, contrary to the Averys' expert testimony that the roof of the building was structurally unsound and therefore needed to be repaired, the strength of the allegedly defective roof was structurally adequate and met the design specifications. *See* Appellant's Excerpts of Record, tab G, (Avery's Motion to Exclude, Exhibits A and B, May 3, 2000). The other expert, Mr. Holwitz, was prepared to testify that the repairs for which the Averys claimed to have spent $67,000.00 for three additional defects – the sidewalk, uneven parking slab, and concrete patching on the roof - could have been made for less than $10,000.00. Appellant's Excerpts of Record, tab

G, (Avery's Motion to Exclude, Exhibits A and B, May 3, 2000). Mr. Acre's report was one and a half pages long, and Mr. Holwitz's report was one page long. *See* Appellant's Excerpts of Record, tab G (Avery's Motion to Exclude, Exhibits A and B, May 3, 2000).

[22] The Averys filed a motion to exclude the experts; which the trial court granted in a Decision and Order filed on May 8, 2000. The court based its exclusion on BM Co.'s late disclosure of the existence of the experts. *See* Appellant's Excerpts of Record, tab E, p. 4 (Decision and Order, May 8, 2000).

[23] Guam Rule of Civil Procedure 26(b)(4)(A)(i) allows a party to request the identity of proposed expert witnesses through interrogatories. *See* Guam R. Civ. P. 26(b)(4)(A)(i). Guam Rule of Civil Procedure 26(e)(1)(B) imposes a duty on parties to supplement interrogatories with the identity of each proposed expert witness and the substance of the expert's testimony. *See* Guam R. Civ. P. 26(e)(1)(B). The Rules of Civil Procedure do not specify the appropriate sanction for a violation of GRCP 26(e)(1)(B). However, courts operating under the Federal Rules, as enacted in Guam, consistently hold that a trial court has the discretion to exclude a witness's testimony as a sanction for a party's failure to identify the witness in interrogatories or supplemental interrogatories. *See Thibeault v. Square D Co.*, 960 F.2d 239, 245 (1st Cir. 1992); *Sowell v. Butcher & Singer, Inc*., 926 F.2d 289, 302 (3d Cir. 1991); *Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 234 (5th Cir. 1981); *cf. Davis v. Marathon Oil Co.*, 528 F.2d 395, 404 (6th Cir. 1975) (determining that the trial court's exclusion of non-expert witnesses comported with the policy underlying Federal Rule of Civil Procedure 37); *In re N.A.*, 2001 Guam 7 at ¶ 48 (holding that courts may exclude expert testimony in accordance with their inherent powers to manage their dockets).

[24] Factors to consider in determining whether a trial court has abused its discretion in excluding a witness include:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure that prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order.

Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904-05 (3d Cir. 1977), *overruled on other grounds by Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985). The importance of the underlying testimony is another factor in determining whether the witness was properly excluded. *See id*. at 904; *see also Sowell*, 926 F.2d at 302.

[25] In the instant case, the trial court balanced several factors and found that, while BM Co. did not act in bad faith, BM Co. was ultimately responsible for informing its new counsel of these experts so as to allow BM Co.'s counsel to supplement the interrogatories. The court further found that the Averys were unable to effectively review and prepare to rebut the testimony of the experts because BM Co. notified the Averys of the experts' identities only two weeks prior to trial. Therefore, the Averys would be prejudiced by the admission of the experts. Finally, the court found that a continuance of the case would be inappropriate due to the fact that the case had been pending for five years and was continued several times during that time period.

[26] Notwithstanding the trial court's balancing, the facts of the instant case support our conclusion that the trial court abused its discretion by excluding the witnesses. *Meyers v. Pennypack Woods Home Ownership Association* is of particular relevance to the analysis of the instant issue. In *Meyers*, the trial court set a date to submit a list of all expected witnesses. *See Meyers*, 559 F.2d at 903. The plaintiff filed a list of witnesses by the designated date and sent a letter to the defendant

informing the defendant that the plaintiff wished to supplement the list with the names of three newly discovered fact witnesses. *See id*. At trial, the plaintiff attempted to call the witnesses and the trial court sustained the defendant's objection to the testimony, excluding the witnesses. *See id*. at 904. The appellate court reversed, holding that the exclusion was an abuse of discretion. *See id*. at 905. The appellate court recognized that "the exclusion of critical evidence is an 'extreme sanction' . . . not normally to be imposed in the absence of showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." *Id*. (citations omitted). The court found that there was no showing that the plaintiff's action in failing to timely identify the witnesses was made in bad faith or was willful. Further, the court found that allowing the testimony would not have prejudiced the defendant because the defendant was informed of the witnesses three weeks prior to trial, which was an adequate amount of time to conduct discovery regarding these witnesses in preparation for their proposed testimony, and which would have minimized the alleged prejudice and surprise at trial. *See id*. Finally, the appellate court determined that the orderly and efficient trial of the case and other cases would not have been compromised by a less drastic and more appropriate sanction, such as ordering a few days of adjournment to allow the defendant to prepare with costs taxed to the plaintiff. *See id*. The court's holding was made in light of its finding that the witnesses' testimony may have led to a different outcome, and thus the exclusion was not harmless. *See id*. at 904.

[27] The *Meyers* court focused on the effect of the evidence on the outcome of the case, the proponent's actions, and whether it was flagrant or willful, the prejudice to the other party, and the availability of less drastic measures measured against the court's interest in efficiency. *See id*. at 904-05; *see also Murphy*, 639 F.2d at 234-35 (holding that the trial court abused its discretion in

excluding the appellant's expert *rebuttal witnesses* because the fact that the witnesses intended to rebut the appellee's evidence shows that the appellee would not have been prejudiced and the nature of the evidence "struck at the heart" of the appellant's case and was therefore essential evidence). The case relied upon by the trial court, *Tibeault v. Square D Co.*, similarly identifies the importance of the testimony as a relevant factor, and further recognizes the proponent's good faith as an important factor to consider when determining an appropriate sanction. *Tibeault*, 960 F.2d at 244-45, 245 n.4.

[28] In the instant case, the trial court did not discuss or attribute weight to the fact that (1) BM Co. did not act in bad faith, (2) the Averys would not be prejudiced or surprised because BM Co. intended to call the witnesses to *rebut* the testimony of the Averys' witnesses, (3) there were still two weeks until trial in which the Averys could review and prepare for the testimony, and (4) the expert testimony was important to rebut testimony on the issue of damages. *Cf. Meyers*, 559 F.2d at 903-05; *Murphy*, 639 F.2d at 234-35. Accordingly, in failing to adequately consider the above facts, the trial court failed to weigh the relevant factors in reaching its judgment.

[29] Furthermore, we find the most compelling factors in determining whether to exclude a witness to be the importance of the testimony, the likelihood of prejudice, and the possibility of other sanctions, such as a short continuance with costs taxed to the proponent. *Cf. Meyers*, 559 F.2d at 905. We agree that preparing for the cross-examination of an opponent's expert witness is one of counsel's most important responsibilities, thus necessitating the timely disclosure of that witness' identity and opinions. *See In re N.A.*, 2001 Guam 7 at ¶ 48. Moreover, the trial court is clearly in the best position to decide whether alternative remedies, such as a continuance, are feasible and appropriate in each individual case. *Cf. Davis*, 528 F.2d at 403. However, we find that in the

absence of an incurable prejudice to the opposing party, trial judges should err on the side of affording the parties the opportunity to fully present the case on the merits. Because, in the instant case, (1) the expert testimony was valuable in rebutting the Averys' claims for a significant amount of damages, thus favoring the imposition of a less drastic sanction, (2) the witnesses were rebuttal witnesses thus negating a finding of prejudice, and (3) the trial was still two weeks away, we have a definite and firm conviction that the trial court committed a clear error of judgment in reaching its conclusion. *See, e.g., Meyers*, 559 F.2d at 904-05; *Murphy*, 639 F.2d at 234-35. Accordingly, we hold that, under the facts of this case, the trial court abused its discretion in excluding BM Co.'s expert witnesses.

C. The Trial Court's Denial of BM Co.'s Post-Verdict Motions.

[30] On appeal, BM Co. argues that the trial court erred in failing to enter judgment in their favor, or grant a new trial, as to the jury's award of damages for: (1) repair costs for construction defects (for a defective roof panel, sidewalk, parking lot, roof deck, drain clean-out collars, vent pipe inverts, and door); (2) lost rental income; and (3) the indemnity claim. BM Co. also argues that a new trial is warranted because the jury's award was excessive and the result of passion or prejudice.

[31] We review a trial court's denial of a new trial for abuse of discretion. *See J.J. Moving Services v. Sanko Bussan (Guam) Co.*, 1998 Guam 19, ¶¶ 14, 26. We review the denial of a motion for JNOV *de novo*. *See Leon Guerrero*, 1999 Guam 9, at ¶¶ 11, 20. When reviewing either the denial of a motion for a new trial or a denial of a motion for JNOV, the inquiry is "whether the verdict is either supported by substantial evidence or whether the jury's decision is against the clear weight of the evidence." *Id*. at ¶ 21. We will not disturb the jury's verdict or find that a new trial is warranted if the verdict is based on "relevant evidence which reasonable minds might accept as

adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id*. at ¶ 20.

1. The Jury's Award for Construction Defects

[32] BM Co. makes two arguments in support of its contention that the trial court erred in denying their motion for a new trial or JNOV as to the jury's award of damages for construction defects. First, BM Co. argues that the jury's use of the "cost to repair" measure of damages was erroneous and that the proper measure should have been the diminution of value of the property with the defects. Second, BM Co. argues that even if the cost of repairs is used as the measure, the Averys failed to meet its burden to adequately prove the cost of repairing the defects and that these costs were reasonable.

[33] With regard to BM Co.'s first argument, we reiterate that this court generally declines to hear issues presented for the first time on appeal. *See Dumaliang v. Silan*, 2000 Guam 24, ¶ 12. BM Co. did not previously raise the issue of the proper measure of damages for construction defects, and has therefore waived that argument on appeal. *See id*.

[34] As for the second argument, where the measure of damages is cost of repairs, the party seeking damages has the burden to "prove by a preponderance of the evidence the necessary and reasonable cost to complete the building in accord with the original tenor of the agreement." *Jones v. Honchell*, 470 N.E.2d 219, 222 (Ohio Ct. App. 1984). The burden then shifts to the defaulting party "to show the unreasonableness of these expenditures." *Centex-Rooney Constr. Co. v. Martin Canty*, 706 So. 2d 20, 27 (Fla. Dist. Ct. App. 1997). Moreover, the exact amount of damages need not be proven, and a jury's award will stand so long as there is a reasonable basis in the evidence for the amount awarded. *Id.* at 28. So long as the award is not based on speculation and conjecture

and a prudent impartial person can estimate the amount with reasonable certainty, the award should be left standing. *See Senato v. Querimit*, Civ. No. 93-00050A, 1994 WL 550053, at *1 (D. Guam App. Div. Oct. 3, 1994). Testimonial evidence regarding the cost of repairs is sufficient to support a jury award that is consistent with such testimony. *See, e.g., Jim Mahoney, Inc. v. Galokee Corp.*, 522 P.2d 428, 432-35 (Kan. 1974).

[35] In the instant case, the jury's award was based on evidence presented at trial. The estimated cost to repair the roof was based on trial testimony by Mr. Avery on May 15, 2000. During direct examination, the Averys' counsel posited the following question to Mr. Avery: "What is it your understanding of what it's going to cost you to replace that roof panel?" Transcript, vol. V, p. 168 (Trial, May 15, 2000). Mr. Avery responded: "A hundred and sixty-thousand dollars." Transcript, vol. V, p. 168 (Trial, May 15, 2000). The Averys' project engineer and expert witness, Mr. John Sherman, also testified that he estimated the cost to replace the roof panel to be $160,000.00. *See* Transcript, vol. VI, p. 204 (Trial, May 16, 2000). Mr. Avery testified that he hired a contractor to repair the sidewalk, parking lot, and roof deck, for a total cost of $67,000.00. *See* Transcript, vol. V, p. 152 (Trial, May 15, 2000). Therefore, the jury's award for those defects was supported by the evidence; however, because we previously held that the trial court erred in excluding BM Co.'s expert witnesses who were offered to rebut the Averys' evidence as to those defects, we accordingly hold that the trial court erred in denying B.M. Co.'s motion for a new trial as to that aspect of the jury's award.

[36] As for the defective door, drain clean out collars, and vent pipe inverts, Mr. Avery testified at trial that he thought it would cost $1,200.00 to fix the drain collars, $3,000 to fix the pipe inverts, and "around $5,000" to fix the door. Transcript, vol. V, pp. 174, 177, 178 (Trial, May 15, 2000).

The jury's award was consistent with the amounts testified to. Thus, the testimony regarding the repair costs for those construction defects formed a sufficient basis to support the award. *Cf. Jim Mahoney, Inc.*, 522 P.2d at 432-35. Consequently, the trial court did not err in denying BM Co.'s motion for a new trial or JNOV as to that aspect of the jury's award.

2. The Jury's Award for Lost Rentals.

[37] BM Co. argues that the trial court erred in denying its motion for JNOV regarding the jury's award for lost rentals. BM Co. claims that because the liquidated damages included lost rentals, the award for lost rentals must be overturned as a matter of law. We agree.

[38] A party may recover actual damages in addition to liquidated damages if the actual damages were not contemplated under the liquidated damages clause. *See Moses v. Autuono*, 47 So. 925, 926 (Fla. 1908); *Meyer v. Hansen*, 373 N.W.2d 392, 395 (N.D. 1985). *See generally J.E. Hathaway & Co. v. United States*, 249 U.S. 460, 464 (1919). It is axiomatic that damages for breach of contract are intended to put the injured party in the same position, and *not* a better position, than he would be had the contract not been breached. *Cantrell v. Knox County Bd. of Educ.*, No. E1999-01557-SC-R11CL, 2001 WL 957456, at *2 (Tenn. Aug, 23, 2001). Accordingly, an award of actual damages that are contemplated under the liquidated damages provision is not allowed as it would amount to an improper double recovery for the same element of damages. *See Hillsborough County Aviation Auth. v. Cone Bros. Contracting Co.*, 285 So. 2d 619, 621 (Fla. Dist. Ct. App. 1973). Thus, the instant issue is whether the parties intended that the liquidated damages clause include lost rentals. If so, then the Averys would not be entitled to recover both liquidated damages and lost rentals.

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[39] In the contract at issue, the liquidated damages clause was designed to replace damages caused by a delay in the construction. *See* Appellee's Supplemental Excerpts of Record, tab 10, p.1 (Liquidated Damages Clause, Supplement to Agreement). "As a rule, the measure of damages for failure to complete the work within the time fixed by the contract is the value of the use of the building. This 'use' of the building is ordinarily its *rental value* for the period of delay." *Ryan v. Thurmond*, 481 S.W.2d 199, 206 (Tex. Civ. App. 1972); *Olson v. Quality-Pak Co.*, 469 P.2d 45, 49 (Idaho 1970); *Muller v. Light*, 538 S.W.2d 487, 488 (Tex. Civ. App. 1976); *cf. Int'l Fid. Ins. Co. v. County of Chautauqua*, 667 N.Y.S.2d 172, 173-74 (App. Div. 1997) (providing that "lost income" is attributable to the delay in completing the project).[3]

[40] Therefore, lost rentals are generally recoverable for a contractor's delay. Thus, to the extent that the liquidated damages provision of the instant construction contract was intended to remedy BM Co.'s delay to completion, it is properly interpreted as including lost rentals. In the absence of a separate contract clause that specifically allows for recovery of lost rentals, the Averys should not be able to recover lost rentals in addition to liquidated damages. *See Hathaway*, 249 U.S. at 464 ("There is no reason why parties competent to contract may not agree that certain elements of damages difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner.")

[41] Accordingly, we find that the trial court erred in failing to grant BM Co.'s motion for JNOV as to the jury's award of lost rentals. The jury's award of lost rentals duplicates the liquidated damages award and is erroneous as a matter of law.

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[3] Other damages that are attributable to delay in completion are the expenses relating to extending a construction loan and interest paid on a construction loan. *See* 5 AM. JUR. 2d *Proof of Facts* 371 § 11 (1975).

3. The Jury's Award for the Indemnity Claim.

[42] Prior to filing the instant action, the Averys were sued by a neighboring landowner Besta Market (hereinafter "Besta") for damages to their building suffered as a result of the construction of the warehouse. The Averys and Besta agreed to a stipulated judgment which was entered in favor of Besta in the amount of $100,000.00. In a counterclaim in the instant action, the Averys claimed indemnification for amounts paid to Besta in accordance with the stipulated judgment. The jury found for the Averys and included in its damages award the claimed amount of $100,000.00. BM Co. argues that the trial court erred in not directing a verdict as to Averys' indemnity claim. BM Co. contends that it cannot be held to indemnify the Averys because it was neither notified of Besta's claim against the Averys, nor given the opportunity to defend against the claim. *See* Appellant's Opening Brief, pp. 31-39.[4] The Averys contend that the jury's award should not be disturbed because there was evidence at trial that BM Co.'s negligence caused the damages suffered by Besta and that the parties agreed that BM Co. would indemnify the Averys for damages caused by BM Co.'s negligence.

[43] The construction contract contained an indemnity provision in which BM Co. was responsible for indemnifying the Averys "from and against all claims, damages, losses, and expenses . . . [if such claim] is caused in whole or in part by any negligent act or omission of . . . [BM Co.]." Appellee's Supplemental Excerpts of Record, tab 11, p. 11. The Guam statute governing express

[4] There is evidence that BM Co. knew of the claim. *See* Transcript, vol. II, pp. 152-60 (Trial, May 10, 2000). At trial, Mr. Kang of BM Co. testified that Besta called him as a witness in the Besta Market v. Averys trial for the limited purpose of identifying a document. Thus, BM Co. was made aware of the claim through efforts of Besta, not the Averys. In fact, Mr. Kang further testified that the Averys never notified BM Co. of the Besta claim, nor did the Averys ask BM Co. to participate in the defense at the trial. *See id*. Mere knowledge of the existence of an action is insufficient notice of the claim for purposes indemnification, and the indemnitee must show that it affirmatively made the indemnitor aware that it sought the indemnitor's help in defending the claim. *See J.W. Theisen v. County of Los Angeles*, 343 P.2d 1001, 1007 (Cal. Ct. App. 1959), *superceded on other grounds by* 352 P.2d 529 (1960).

contracts for indemnity is found in Chapter 30 of Title 18 of the Guam Code Annotated. Title 18 GCA § 30107(6) provides:

> In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: . . . If the person indemnifying, whether he is a principal or surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive against the former.

Title 18 GCA § 30107(6) (1998). It is therefore necessary to determine whether a stipulated judgment is the equivalent of a "judgment" as provided for in section 30107(6).

[44] In determining whether consent judgments are encompassed under 18 GCA § 30107(6), we must first look to language of the statute. *Pangelinan v. Gutierrez*, 2000 Guam 11, ¶ 23 ("In cases involving statutory construction, the plain language of a statute must be the starting point."). The statute plainly addresses the effect of "judgments." While a stipulated judgment has the force of a judgment after trial in regards to collection of judgments after trial, that is, it may be collected upon in the manner prescribed for executing court judgments, all other aspects of consent judgments resemble settlements, as opposed to judgments after trial. For instance, in *Commercial Union Assurance Co. v. Am. Cent. Ins. Co.*, 68 Cal. 430 (1886), the court characterized a settlement as devoid of "adjudication of the question of liability," and in which the settling defendant "acknowledge[s] its liability by abandoning all defenses to it . . . ." *Id*. at 432-33. Similarly, a consent judgment is defined as "[a] judgment, the provisions and terms of which are settled and agreed to by the parties to the action." BLACK'S LAW DICTIONARY, 6th ed. Seen in this light, in contrast to a judgment after trial, parties to a consent or stipulated judgment do not adjudicate the question of liability, but rather, the parties settle the claim, and the defendant admits liability by abandoning all defenses to the claim and judgment is entered in favor of the plaintiff accordingly.

[45] Moreover, unlike judgments after trial, consent or stipulated judgments are generally not appealable. *See White v. Comm'r of Internal Revenue*, 776 F.2d 976, 977-78 (11th Cir. 1985). The consent-to judgment doctrine instructs that, in general, "a party may not appeal a consent judgment." *Norgart v. Upjohn Co.*, 981 P.2d 79, 90, 21 Cal. 4th 383, 400, 87 Cal. Rptr. 2d 453, 465 (1999) (citation omitted); *see also White*, 776 F.2d at 977; *Sauer v. Rhoades*, 62 N.W.2d 634, 635 (Mich. 1954). The rationale underlying the rule was succinctly explained as follows by Judge Posner in *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, 99 F.3d 261 (7th Cir. 1996):

> The purpose of a consent judgment is to resolve a dispute without further litigation, and so would be defeated or at least impaired by an appeal. The presumption, therefore, is that the consent operates as a wavier of the right to appeal.

Id. at 262.

[46] Thus, a consent judgment is more properly characterized as a settlement in that both are meant to be a binding agreement on the merits of the claim, most important, the issue of liability. This similarity between a consent judgment and a settlement is revealed by the exceptions to the consent-to-judgment doctrine. Consent judgments are only appealable where (1) the parties manifest an intent that the judgment be appealable, such as a reservation of the right to appeal, (2) an attack on the judgment alleges that the court entering the judgment lacked jurisdiction, or (3) an attack on the judgment implicates a defect in formation of the agreement, which would nullify the agreement, such as a lack of consent, fraud, collusion, mistake, or misrepresentation. *See id.*; *Coughlin v. Regan*, 768 F.2d 468, 469 (1st Cir. 1985); *Mitchelson v. Sandstrom (In re Estate of Sandstrom)*, 580 P.2d 1310, 1315 (Kan. 1978); *Henke v. Peoples State Bank*, 6 S.W.3d 717, 720

(Tex. App. 1999); *White*, 776 F.2d at 977. Thus, like a settlement, a party to a consent or stipulated judgment cannot later attack portions of the judgment that represent the parties' agreement regarding the *merits* of the plaintiff's claim. In effect, because the judgment is conclusive on the issue of liability, as a party to a stipulated judgment, the defendant waives the right to assert on appeal that the facts do not support the plaintiff's claim for relief.

[47] Further, in the indemnity context, courts equate stipulated judgments with settlements. In *Lamb v. Belt Casualty Co.*, 40 P.2d 311, 3 Cal. App. 2d 624 (Ct. App. 1935), the court iterated the rule that a person bound by contract to indemnify another is "bound by the *result of a litigation* to which such other is a party, provided he had notice of the suit and an opportunity to control and manage it." *Id*. at 314, 3 Cal. App. 2d at 631 (citation omitted) (emphasis added). The court then differentiated that rule with the rule governing indemnification cases wherein "there is no trial and no judgment establishing the liability of the [indemnitee] . . . ." *Id*. The court provided that the latter includes cases where the indemnitee is party to a "settlement, *or a judgment rendered upon stipulation of such a settlement*." *Id*.; *cf. Six v. Am. Family Mut. Ins. Co.*, 558 N.W.2d 205, 207 (Iowa 1997) (using the terms "stipulated judgment" and "settlement" interchangeably).

[48] Thus, although stipulated judgments have the force of judgments, and can be executed upon like any judgment of the court, they are more akin to settlements and are more properly characterized as such. Title 18 GCA § 30106 speaks only to "judgments," and not both judgments and settlements. Viewing stipulated judgments as settlements, then under a plain reading of the statute, it does not fall within the ambit of 18 GCA § 30107(6). Therefore, section 30107(6) does not provide the rule for stipulated judgments, and the Averys cannot get the benefit of the evidentiary presumption set forth in that section.

[49] Our interpretation that judgments do not include stipulated judgments in the context of the indemnity statute furthers the policy against collusion. Under a stipulated judgment between a third party and an indemnitee, the ultimate payer is the indemnitor. In the situation, such as here, where the third party and the indemnitee are engaged in a separate dispute to establish liability and damages, and the indemnitor is not provided notice of the dispute and the opportunity to defend, the likelihood of collusion is high. This is unlike the case where a judgment is obtained after a contested proceeding.

[50] Because 18 GCA § 30107(6) does not provide the rule for stipulated judgments, the statute is inapplicable in the instant case. Therefore, we must next determine the proper rule to apply under the facts of this case. There are two lines of authority in this regard. One line of cases provides that a failure to prove proper and timely notice to the indemnitor is a condition precedent to recovery in an indemnity action, and thus acts as a complete bar to maintaining the action. *See United Services Auto. Ass'n v. Barger*, 910 F.2d 321, 324-25 (6th Cir. 1990) (applying Ohio law). The second line of cases provides that in an action for indemnification the indemnitee has the burden of proving three elements: "(1) that he was liable; (2) that the settlement was reasonable; and (3) that his liability was of such a character that, in spite of it, he may recover over against the defendant." *Jennings v. United States*, 374 F.2d 983, 987 (4th Cir. 1967). We adopt the latter rule. If an indemnitee settles a claim, he should be able to successfully seek indemnification if he did not pay the claim as a volunteer and the indemnitor is contractually obligated to indemnify him. The three elements in a claim for indemnification, set forth in the second line of cases, properly ensure that the indemnitee did not act as a volunteer in agreeing to and satisfying the judgment. In a case where the indemnitee could successfully prove the above-mentioned three elements, it would be a windfall

to the indemnitor if he were able to avoid his contractual obligation simply by virtue of the fact that he was not notified of the claim.

[51] Having set forth the appropriate rule for this case, the success of BM Co.'s challenge to the jury's award for the Averys' indemnity claim rests on whether the Averys met their burden to prove the elements of their claim, which were: (1) that the Averys were legally liable to Besta; (2) that the stipulated amount was reasonable; and (3) that the Averys' liability was of such a character that, in spite of it, they may recover against BM Co. *See Jennings*, 374 F.2d at 987. A review of the record reveals that the Averys provided evidence regarding the first and third elements. The remaining issue is whether the Averys proved that the settlement amount was reasonable.

[52] Contracts of indemnity are interpreted to exclude losses "which the indemnitee is not liable to a third person or for which the indemnitee improperly pays." *Peter Cully & Assoc. v. Superior Court*, 13 Cal. Rptr. 624, 629, 10 Cal. App. 4th 1484, 1493 (Ct. App. 1992). Amounts paid as a volunteer are improperly paid, and are therefore not recoverable in an indemnity action. *See id.* In an indemnity action wherein the indemnitee pays the claim pursuant to an agreement with the third party, such as a settlement or stipulated judgment, the critical question is whether the underlying agreement was reasonable, and specifically, "whether the settling indemnitee acted unreasonably by paying too much, thereby acting as a volunteer." *Heppler v. J.M. Peters Co.*, 87 Cal. Rptr. 2d 497, 514, 73 Cal. App. 4th 1265, 1284 (Ct. App. 1999).

[53] The reasonableness of a settlement is determined by "comparing the nature of the injury and the damages incurred to the size of the settlement." *Int'l Minerals & Chem. Corp. v. Avon Products Inc.*, 889 S.W.2d 111, 118 (Mo. Ct. App. 1994). Evidence probative of the reasonableness of a settlement includes testimony or other proof regarding the cost of remedying the injury caused by

the indemnitor's alleged negligence. *See Heppler*, 87 Cal. Rptr. 2d at 514, 73 Cal. App. 4th at 1284. In the instant case, there was no evidence regarding the reasonableness of the amount agreed to in the stipulated judgment, that is, whether the amount was unreasonably high. A review of the record reveals that the Averys did not present evidence proving the actual damages suffered by Besta or the amounts necessary to remedy Besta's alleged injury, thus, there was no evidence that the jury could use to determine whether the $100,000.00 paid in accordance with the stipulated judgment accurately reflected the injury, or put another way, was unreasonably high. Because the burden was on the Averys to establish reasonableness, and this element of the claim for indemnity was not proven, the Averys failed to prove their *prima facie* claim for indemnification. Accordingly, the jury's award for the indemnity claim was in error, and the trial court therefore erred in denying BM Co.'s motion for JNOV as to this aspect of the jury's award.

D. The Jury's Overall Award.

[54] Finally, BM Co. argues that they are entitled to a new trial because the jury's award was the product of passion or prejudice. BM Co. contends that because the jury found in favor of the Averys on all issues, and because the damages were not supported by the evidence, including the excessive liquidated damages award, it is clear that the jury's decision was made under the influence of passion and prejudice. We disagree.

[55] Initially, we note that BM Co. did not raise this issue previously and is therefore improperly before the court on appeal. *See Dumaliang*, 2000 Guam 24 at ¶ 12. Moreover, we find BM Co.'s argument to be completely lacking in merit. Pursuant to 7 GCA § 21501, a new trial may be granted if the damages award was excessive and appeared to be given "under influence of passion or prejudice," and the award materially affects the substantial rights of the parties. Title 7 GCA §

21501(4) (1994). When a party seeks a new trial based on a claim that damages are excessive and a result of passion, a reviewing court will not determine the amount it would have awarded as compensation for the injured party; rather, we must determine whether the jury's award is supported by the record when viewed in the light most favorable to the non-moving party. *See Barrett v. Larson*, 846 P.2d 1012, 1018 (Mont. 1993) (citations omitted). As shown earlier in this opinion, the jury's award for the cost to repair the construction defects was supported by the evidence; and our reversal of part of the award is grounded on the trial court's erroneous exclusion of BM Co.'s expert witnesses. *See id*. (holding that because the damage award reflected the testimony and exhibits adduced at trial, it was supported by the evidence and therefore not a result of passion or prejudice). Furthermore, while the jury's award of liquidated damages, the indemnity claim, and lost rentals may have been improper as a matter of law; the legal nature of their error negates an inference that the award was influenced by passion or prejudice. We therefore reject BM Co.'s argument that a new trial should be granted on the ground that the jury's award was the product of passion or prejudice.

IV.

[56] We find that the trial court did not commit error in reducing the jury's award of liquidated damages. However, we hold that the trial court abused its discretion in excluding BM Co.'s proposed expert witnesses and, therefore, a new trial is warranted on the issue of damages for the defects in the roof panel, sidewalk, parking lot, and roof deck. We find that the court properly denied BM Co.'s post-verdict motions as to the jury's award for all other construction defects. Finally, we hold that the jury's award of damages for the indemnity claim and lost profits were

erroneous as a matter of law, therefore, the trial court erred in denying BM Co.'s motion for JNOV as to those aspects of the award. In accordance with the foregoing, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for proceedings consistent with this Opinion.

RICHARD H. BENSON
Justice *Pro Tempore*

JOHN A. MANGLONA
Designated Justice

F. PHILIP CARBULLIDO
Chief Justice (Acting)