IN THE SUPREME COURT OF GUAM

HRC GUAM CO.,
Plaintiff/Counter-Defendant, Appellant/Cross-Appellee,

v.

BAYVIEW II L.L.C.,
Defendant/Counter-Claimant, Appellee/Cross-Appellant.

Supreme Court Case No.: CVA15-009
Superior Court Case No.: CV0504-08

OPINION

Cite as: 2017 Guam 25

Appeal from the Superior Court of Guam
Argued and submitted on October 3, 2016
Hagåtña, Guam

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

MARAMAN, J.:

[1] This heavily-litigated matter comes before the court following extensive motion practice, a two-day bench trial, and a six-week jury trial, which culminated in an entry of an Amended Final Judgment. On appeal, HRC Guam Co. ("HRC") raises more than ten issues for review. Bayview II L.L.C. ("Bayview") has filed a cross-appeal in which it seeks appellate review of two orders issued by the trial court. For the reasons discussed below, we address only five of these issues. First, we consider whether the trial court erred in failing to bar HRC's parking-related claims in their entirety as a result of HRC's delivery of an estoppel certificate. Second, we address the trial court's summary judgment order in which it interpreted various portions of the Lease concerning common area maintenance charges. Third, we review for clear error the trial court's Findings of Fact and Conclusions of Law following the parties' two-day bench trial. Fourth, we address Bayview's contention that the trial court erred in granting judgment notwithstanding the verdict on its fraud claim. Finally, we consider whether a new jury trial is appropriate as a consequence of Bayview's purported misconduct during trial.

[2] In reviewing these issues, we have determined that: (i) the trial court erred in failing to bar HRC's parking-related claims in their entirety; (ii) the trial court properly interpreted the Lease provisions related to common area maintenance charges; (iii) the trial court did not commit clear error in its Findings of Fact and Conclusions of Law following the bench trial; (iv) the trial court properly vacated the jury's verdict in favor of Bayview on its fraud claim; and (v)

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

due process requires that HRC be granted a new trial in light of Bayview's misconduct during trial.

[3] We therefore vacate the Amended Final Judgment and remand this case for further proceedings not inconsistent with this Opinion.

I. FACTUAL BACKGROUND

A. The Commercial Lease Between Bayview and HRC

[4] HRC and Bayview entered into a commercial lease agreement on July 22, 1996, pursuant to which HRC leased certain premises at the Bayview Commercial Complex ("BCC") from Bayview for the purpose of operating a franchised location for Hard Rock Cafe International (hereinafter, the "Lease"). Under section 1 of the Lease, HRC agreed to take exclusive possession, as commercial tenant, of "part of the BCC" that includes "approximately fourteen thousand square feet (14,000 sqft)" (hereinafter, the "Premises"). Record on Appeal ("RA"), tab 31, Ex. A § 1 (Lease, July 22, 1996) (emphasis omitted). In exchange, HRC agreed to pay to Bayview $60,000 in monthly rent, plus five percent of gross sales (as defined). The Lease also called for a $3 million "Tenant Improvement allowance," which Bayview agreed to pay in order for HRC to build out the Premises so that it would be suitable for operating HRC's business (hereinafter, the "Tenant Allowance"). *Id.*, Ex. A § 7(f)(1).

[5] In addition to providing HRC exclusive use of the leased Premises, Bayview also granted HRC "the right to use in common with [Bayview] and all others the common entrances, staircases, landings and all other common entrances, staircases, landings, lavatories, and elevators provided by [Bayview] in the BCC." *Id.*, Ex. A § 1. In section 12 of the Lease, entitled "Tenant's Right to Use Common Areas; Parking," *id.*, Ex. A § 12 (emphasis omitted), Bayview agreed that HRC—including its employees, authorized representatives, and business

invitees—would have "a non-exclusive right to reasonable use and enjoyment of the common areas . . . ." *Id.*, Ex. A § 12(a). "Common areas, as referred to in this Lease Agreement, shall mean all parts of the BCC commercial complex in which the Premises are a part and related land uses and facilities outside the Premises and available to be used in common by all tenants in the project." *Id.*, Ex. A § 13(b). These areas include, but are not limited to, the following:

> (1) The land upon which the BCC commercial complex is located, pedestrian walkways, sidewalks, loading areas, public parking areas, and roads;
>
> (2) The unexposed electrical, plumbing, water, gas and sewage systems laying outside of Tenant's Premises, for use by the Common Area;
>
> (3) The air-conditioning and back-up power generator systems of the BCC and all air, ventilation and wiring ducts and controls and shafts associated with such systems and laying outside of Tenant's Premises;
>
> (4) Window frames, skylights, gutters, and down spouts on the building in which the Premises are located;
>
> (5) Exterior building surfaces, roof, and exterior window surfaces; and
>
> (6) Quasi-Public lobbies, quasi-public corridors, stairwells, elevators, car-lifts[,] escalators[,] and restrooms in the BCC.

Id.

[6] While the definition of "[c]ommon areas" under section 13(b) of the Lease included "public parking," the parties separately negotiated the extent of access HRC, its employees, and customers would have to the parking available at the BCC. The parties agreed that:

> [HRC's] employees and customers, shall park only in areas designated by [Bayview] from time to time; provided, however, [Bayview] shall provide and assign Eighty-three (83) parking spaces within BCC for the exclusive use by [HRC] for [HRC's] customers, and invitees. [Bayview] shall allocate an additional forty (40) non-exclusive employee parking stalls in the proximity of BCC, in an area to be designated by [Bayview]. [HRC] for itself and its employees, hereby agrees to comply with all parking rules and regulations established by [Bayview].

Id., Ex. A § 12(b).

[7] Under the terms of the Lease, it was Bayview's obligation to maintain the common areas. The costs of maintaining the common areas, however, would be passed on to the tenants of the BCC at cost (hereinafter, "Common Area Maintenance Charges" or "CAMCs"). Accordingly, under section 4(c) of the Lease, the parties agreed that,

> [i]n addition to the Minimum Monthly Rent and the percentage rent, [HRC] shall pay monthly as CAMC its pro rata share . . . of all real or personal property taxes, and any general, special, infrastructure development or maintenance, or other assessment, and any insurance premiums assessed against the BCC in which the Premises are located, common area charges, seasonal decoration, general BCC, utility charges, and property management fees incurred by [Bayview].

Id., Ex. A § 4(c); *see also id.*, Ex. A § 4(c)(2)(d)-(k), 4(c)(4)(n). The pro rata share of the CAMCs paid by HRC, to the extent such charges "cannot be sub-metered," is calculated by determining "the ratio of the total number of square feet comprising the area of the Premises . . . to the total number of leasable square feet in the BCC commercial complex." *Id.*, Ex. A § 4(c).

[8] The original term of the Lease was for a period of ten years. *See id.*, Ex. A § 2. The Lease, however, could be terminated earlier. Pursuant to section 27(b), upon "any default" by HRC, Bayview, "without further notice or demand, shall have the immediate right and option to terminate this Lease Agreement and all rights of Tenant under this Lease Agreement." *Id.*, Ex. A § 27(b). A "material default" under the Lease includes, among other things,

> [f]ailure by [HRC] to observe or to perform any of the covenants, conditions, or provisions of this Lease Agreement, other than the making of any payment, where such failure shall continue for a period of thirty (30) days after notice of such failure from [Bayview] or such [*sic*] for such additional period of time as is reasonable necessary to cure such failure, provided [HRC] diligently prosecutes such cure.

Id., Ex. A § 27(a)(3).

B. The 2002 Amendment to the Lease

[9] The parties entered into an amendment to the Lease on July 1, 2002 (the "2002 Amendment") whereby the minimum monthly rent paid by HRC was lowered to $42,000/month (from a previous monthly payment of $60,000), but the amount of rent paid on gross sales (as defined) was increased from 5% of gross sales to 7% of gross sales. *See* HRC Guam, Co. v. Bayview II, LLC, CV0504-08 (Def. Trial Ex. 23 ¶ 2(a)-(b) (July 1, 2002)) (First Amendment to the Bayview Phase IV Commercial Center Standard Lease Agreement); *see also* RA, tab 31, Ex. A § 4(b) (Lease). The 2002 Amendment further provided that, "[e]xcept as expressly modified by this Amendment, the Existing Lease Agreement is, and shall remain, in full force and effect in accordance with its terms." Def. Trial Ex. 23 ¶ 3.1 (First Amendment to the Bayview Phase IV Commercial Center Standard Lease Agreement).

C. The 2006 Estoppel Certificate

[10] On December 20, 2006, HRC provided, "at the request of Bayview II, L.L.C., as landlord under the lease," an estoppel certificate to UBS Real Estate Securities, Inc. (the "Estoppel Certificate"). RA, tab 51, Ex. B (Estoppel Certificate, Dec. 20, 2006). The Estoppel Certificate was delivered pursuant to section 58 of the Lease, which provides that "[e]ach party shall, within fifteen (15) days after written request from the other party, execute and deliver to the other party, in recordable form if requested, a certificate . . . stating whether, to the knowledge of the party giving the certificate, any event has occurred under this Lease which constitute[s] an event of default hereunder." RA, tab 31, Ex. A § 58 (Lease). In the Estoppel Certificate, HRC certified that "neither the undersigned nor [Bayview] is in default under any of the terms, covenants or provisions of the Lease," except with regard to CAMC overcharges and alterations to the exterior

signage referenced in Exhibit B to the Estoppel Certificate. RA, tab 51, Ex. B (Estoppel Certificate).

D. The Default Letter

[11] On or about June 12, 2009, Bayview sent HRC a letter enumerating nine alleged defaults under the Lease (the "Default Letter"). *See* HRC Guam, Co. v. Bayview II, LLC, CV0504-08 (Def. Trial Ex. 36 (June 12, 2009)) (Default Letter). In addition to six other purported defaults, Bayview claimed that HRC was in violation of sections 8(o), 14, and 50 of the Lease.

[12] First, section 8(o) of the Lease requires HRC to "maintain and operate the Premises at all times in accordance with the international standard of operations maintained by Hard Rock Cafe throughout the world and in a manner consistent with the international image and reputation of Hard Rock Cafe." RA, tab 31, Ex. A § 8(o) (Lease). Bayview claimed that HRC breached this provision "by failing to meet the international standards of Hard Rock Cafe as evidenced by the Licensing Corporation's inspection reports . . . ." Def. Trial Ex. 36 at 2 (Default Letter).

[13] Second, under section 14 of the Lease, HRC is required to "keep, maintain, and preserve the Premises and appurtenances . . . in good condition and repair, and shall, when and if needed, at [HRC]'s sole cost and expense, make all repairs to the Premises and every part of the Premises." RA, tab 31, Ex. A § 14(a) (Lease). According to the Default Letter, "HRC has breached this covenant by failing to repair pipes on its premises thereby causing damage to the Coach premises, a neighboring tenant." Def. Trial Ex. 36 at 2 (Default Letter).

[14] Third, HRC is required under section 50 of the Lease to "comply with all applicable laws, regulations and requirements of any governmental or other competent authority of Guam in relation to the Project, the Premises and operations thereon." RA, tab 31, Ex. A § 50 (Lease). Bayview alleged in the Default Letter that "HRC has breached this covenant by participating in a

scheme to pay a management fee in order to avoid the payment of applicable government taxes that are lawfully owed by both HRC and Astro," HRC's parent company. Def. Trial Ex. 36 at 1 (Default Letter).

[15] Bayview concluded the Default Letter by providing "notice of its intent to terminate the Lease in the event that the defaults identified herein are not corrected within thirty (30) days after the date of this notice." *Id.* at 3.

II. PROCEDURAL BACKGROUND

[16] We summarize below only those proceedings relevant to our disposition of this appeal.

A. The Parties' Affirmative Claims for Relief

[17] HRC filed a civil action in the Superior Court of Guam against Bayview seeking damages for an alleged breach of the Lease and for declaratory relief. HRC later filed a Second Amended Complaint asserting four causes of action. HRC's first claim for relief sought damages for the purported breach of the Lease due to: (a) the "failure to provide the designated parking as required by the lease"; (b) the imposition of certain overcharges for CAMCs and water supply charges; and (c) the reduction in size of exterior signage on the façade of the building. *See* RA, tab 7-21 (Compl., Apr. 16, 2008). HRC's CAMC-related claim for breach of contract was premised on the argument that Bayview failed to include the Outrigger Hotel as "leasable" space in calculating the CAMCs. The second claim for relief in the Second Amended Complaint alleged partial eviction and sought reasonable rental value of the 83 exclusive parking spaces called for under section 12 of the Lease and lost profits purportedly resulting from Bayview's failure to provide the required parking. The third claim for relief sought a judicial declaration of HRC and Bayview's rights and obligations under the Lease. The fourth and final claim for relief

sought specific performance compelling Bayview to provide 83 exclusive parking spaces to HRC.

[18] In response to HRC's lawsuit, Bayview asserted various counterclaims of its own. Shortly following the filing of the Second Amended Complaint, Bayview sent the Default Letter described above. Bayview ultimately filed amended counterclaims in response to the Second Amended Complaint (the "Amended Counterclaims"). In the Amended Counterclaims, Bayview asserted claims for breach of contract, fraud, indemnity, reformation, and termination of the Lease. Bayview alleged that HRC had breached its contract by filing the lawsuit, failing to pay its appropriate share of CAMCs, insisting upon being furnished 83 exclusive parking spaces, and insisting that Bayview was not entitled to move signage on the BCC.

[19] In addition to these breach of contract claims, Bayview asserted a fraud claim based upon alleged misrepresentations by HRC regarding whether it would insist upon being provided the exclusive parking spaces Bayview agreed to provide under section 12(b) the Lease. Bayview alleged that in 1996, HRC President John Monteiro told Bayview representative Michael Ysrael that the exclusive parking clause was for the limited purpose of securing an occupancy permit, but that HRC did not want or require exclusive parking despite its inclusion in the written Lease. Bayview further contended that HRC made misrepresentations in 2002 when HRC General Manager James Cavalaris told Michael Ysrael that HRC preferred to keep the shared parking arrangement. Bayview maintains that it would not have provided HRC with a $3,000,000 Tenant Allowance or a rent reduction but for those two misrepresentations. Moreover, Bayview maintains that it would not have entered into the Lease with HRC, or agreed to the subsequent Amendment, if it knew that HRC did in fact want the 83 parking spaces for its exclusive use. Accordingly, Bayview claimed these purported misrepresentations resulted in damages in the

amount of the $3,000,000 Tenant Allowance, as well as $3,795,810 in lost rental income due to rent reductions.

[20] Bayview's termination claim was premised on various purported breaches of the Lease, including violations of sections 8(o), 14, and 50 of the Lease, as discussed in the Default Letter.

B. Bayview's Motion for Partial Summary Judgment on HRC's Parking-Related Claims Based Upon the Delivery of the Estoppel Certificate

[21] Bayview moved for partial summary judgment on HRC's parking-related claims, arguing that "HRC ha[d] waived any entitlement to the parking arrangements set forth in the Lease by virtue of [the] 2006 estoppel certificate." RA, tab 64 at 2 (Dec. & Order, Apr. 13, 2011) (citation and internal quotation marks omitted). The trial court ruled that HRC was "estopped from claiming any breaches of the Lease that are not listed in the Estoppel Certificate which occurred on or before December 20, 2006." *Id.* at 4 (citation omitted). But, the trial court further held that HRC was "not estopped from claiming any breaches of the Lease that occurred subsequent to signing the Estoppel Certificate." *Id.* (citation omitted). The trial court and the parties all apparently agreed that the practical effect of the trial court's Decision and Order meant that HRC could proceed with its parking-related claims, but it was barred from receiving damages for these claims for the period pre-dating delivery of the Estoppel Certificate.

C. HRC's Pro Rata Share of the CAMCs: Dueling Motions for Partial Summary Judgment and a Bench Trial

[22] Bayview also moved for partial summary judgment on HRC's CAMC-related claims. Bayview argued that "based on the testimony of HRC's own experts, and the undisputed facts, the Court must conclude, as a matter of law, that the [Outrigger] Hotel is not 'leasable' area for purposes of computing CAMC." RA, tab 115 at 2 (Bayview Mot. Partial Summ. J., Jan. 30, 2012). A few days later, HRC likewise moved for partial summary judgment, arguing that, as a

matter of law, the Outrigger Hotel was part of the BCC for CAMC-calculation purposes and that the Hotel's square footage should be "leasable" space included as part of HRC's CAMC calculation. *See* RA, tab 119 (HRC Mot. Partial Summ. J., Feb. 3, 2012).

[23] In deciding these dueling motions for partial summary judgment, the trial court ruled from the bench that "the language in the lease is unambiguous" and that the "[i]nterpretation of this contract is a matter of law and shall not be presented to the jury or be based on experts that are not qualified to interpret contracts." Transcript ("Tr.") at 4-5 (Hr'g Mot. Partial Summ. J., Apr. 4, 2012). The trial court further ruled that the clear terms of the lease "provide that the [CAMCs] are equal to the ratio of the total number of square feet, comprising the area of Hard Rock's premises to the total number of leasable square feet in the BCC." *Id.* at 5. Moreover, the court ruled as a matter of law that under the terms of the lease

> the leasable square feet includes everything on the ground floor and everything on the first floor, but excludes and does not include the front desk, the curtilage of the front desk area, and the space utilized by the elevator, which the Court will refer to as the first floor hotel area, and the hotel floors above the first floor hotel area. The Court finds that the floors above the ground floor and the first floor are exclusively for the hotel operations and are not part of the BCC, because this is not commercial space.

Id. at 5.

[24] Following the court's decision, the parties stipulated to a bench trial for the purpose of determining "the specific square footage of the first floor hotel area[] that is excluded" from the total leasable area of the BCC. *Id.* at 6. At a pre-trial hearing, "the parties submitted to the trial court sketches in preparation for trial reflecting each party's understanding of the Court's ruling on 'leasable' square feet[,]" which "represented differing opinions of the Court's [summary judgment] ruling." RA, tab 196 at 1 (Finds. Fact & Concl. L., May 23, 2012).

[25] After a two-day bench trial, the trial court issued its Findings of Fact and Conclusions of Law enumerating the areas it found to be within (i) the definition of "leasable" space; (ii) those areas that are "common areas" as defined under the Lease; and (iii) those areas that were for the exclusive use of the Outrigger Hotel's lodging operations and thus not included within the definition of the BCC or the calculation of CAMCs. *See id.*

[26] The court classified (i) the lobby/bar area of the Outrigger Hotel; (ii) the roof areas of the Hard Rock Cafe and Phase III of the BCC; and (iii) parking areas of Phases I and III of the BCC as "common areas" under the terms of the Lease. *Id.* at 8. The trial court declined to find that the lobby of the Outrigger Hotel was "leasable" area because "[i]t provides hotel guests, BCC tenants, BCC shoppers and the general public with access to" the hotel recreational facilities, exterior grounds, public beaches, and also provided emergency access. *Id.* at 7. The Findings of Fact and Conclusions of Law also found that "[u]nlike Phase IV ground and basement parking security, the Outrigger Hotel does not maintain strict monitoring of lobby usage," and determined that it was a "quasi-public" space. *Id.* The trial court, however, rejected Bayview's argument that Phase IV parking and roof areas are "common area" because these areas are used exclusively by the Outrigger Hotel. *Id.* Other exclusive hotel areas not part of the BCC included the front desk, administrative offices, hotel storage areas, the hotel communications room, the upper hotel floors, housekeeping facilities, reception areas, luggage room, and employee facilities. All other areas were included as leasable square footage for CAMC-calculation purposes.

D. Jury Trial

[27] In order to establish a final calculation of CAMCs to be paid by HRC and to resolve the parties' remaining claims, the court commenced a jury trial. Bayview pursued claims at trial

seeking termination of the Lease, damages for breach of contract related to CAMCs, and damages for fraud related to the 83 exclusive parking spaces. HRC pursued claims seeking damages for breach of contract relating to the 83 exclusive parking spaces and the imposition of improper CAMCs, as well as a negligence claim related to the loss of water purportedly owned by HRC. The jury returned a verdict against HRC on all of its claims and in favor of Bayview on all of its claims. The jury awarded Bayview: (i) compensatory damages of $977,139 for its CAMC-related claim; (ii) compensatory damages of $6,795,810 for its fraud claim related to the exclusive parking; (iii) punitive damages of $1,000,000 for its fraud claim; and (iv) termination of the Lease.

E. Post-Trial Motion Practice

[28] Following the jury's verdict, HRC filed an omnibus motion seeking judgment as a matter of law and for a new trial pursuant to Guam Rules of Civil Procedure 50(b) and 59(a). HRC petitioned the court to enter "judgment as a matter of law on Bayview's fraud counterclaim; judgment as a matter of law on Bayview's lease termination counterclaim; and for a new trial on all claims and counterclaims." RA, tab 386 at 1-2 (Dec. & Order, Aug. 29, 2014).

[29] In seeking judgment as a matter of law on Bayview's fraud counterclaim (or, in the alternative, a new trial), HRC argued that Bayview failed to establish fraud because it suffered no damages from the alleged misrepresentations. The trial court granted this branch of HRC's omnibus motion, holding that "[b]ecause the evidence was insufficient to establish that Bayview suffered damages as a result of HRC's alleged misrepresentations, the jury could not have found that Bayview presented a complete fraud claim." *Id.* at 9 (internal citations omitted). The trial court therefore dismissed Bayview's fraud counterclaim with prejudice and vacated the jury award for compensatory and punitive damages on that claim. After reaching this determination,

the trial court denied HRC's alternative request for a new trial as moot, but conditionally granted that branch of HRC's motion in the event the trial court's order on HRC's motion for judgment as a matter of law is later reversed or vacated.

[30] In post-trial motion practice, HRC also sought "a new trial as to all claims and counterclaims, based on inflammatory, prejudicial, and inappropriate arguments and comments made by Bayview's counsel . . . throughout trial." *Id.* at 19. Among other things, HRC claimed that: (i) Bayview inappropriately used a xenophobic "us-against-them" strategy that emphasized the fact that Norberto Herrero, the beneficial owner of HRC, was from Bermuda, not Guam; (ii) counsel for Bayview inappropriately expressed personal opinions; and (iii) counsel leveled personal attacks against HRC's witnesses and trial counsel. This motion revived and expanded upon an earlier motion made by HRC following opening statements in which HRC sought a mistrial due to attorney misconduct. The trial court denied that earlier motion, reasoning that trial counsel is afforded great latitude during opening statements and a curative instruction was provided to the jury that same day (before any evidence was taken). In addressing HRC's renewed motion post-trial, the trial court held that "the statements complained of in Bayview's opening statements, alone, are not dispositive of HRC's motion for a new trial."

[31] The trial court next addressed HRC's allegation that Bayview made improper use of an "us-against-them" strategy, among other improprieties, during its closing statement. In rejecting HRC's arguments, the trial court noted: (i) that the parties stipulated to reserve their objections until after each side's closing, unless either party advanced an "outrageous" argument, *id.* at 22-23 (internal citations omitted); (ii) HRC lodged no objections during Bayview's initial closing argument, but did make an objection during Bayview's rebuttal argument, *id.* at 23 n.14 (citing Tr. at 205 (Jury Trial, Dec. 10, 2013)); and (iii) "[a]s a result, the Court did not issue any

contemporaneous admonitions or curative instructions," *id.* Moreover, the court reasoned that statements regarding Herrero's Bermuda residency were relevant to, among other things, the issue of his familiarity with the day-to-day operations of Bayview and that references to Herrero's net worth were not inappropriate or inflammatory because Bayview sought punitive damages.

[32] In addressing HRC's contention that Bayview's counsel expressed personal opinions, beliefs and views, as well as improperly attacked HRC's witnesses and counsel, the trial court noted that HRC did not contemporaneously object to these statements and that counsel is "afforded broad latitude in closing arguments." *Id.* at 28-29 (citations omitted). Thus, "in the general atmosphere and context of a lengthy trial," the curative instructions given by the trial court were sufficient to demonstrate "no resulting prejudice" to HRC. *Id.* at 29. The trial court also denied the request to grant a new trial due to statements made by Bayview's counsel throughout trial, as the trial court found the comments "isolated and the duration of the trial sufficiently diluted any potential effect." *Id.* at 29-30.

[33] Following HRC's post-trial motion, Bayview moved for the award of attorney's fees and costs. This motion was granted, and Bayview was awarded more than a million dollars in attorney's fees. After the completion of post-trial motion practice, an Amended Final Judgment was entered. This appeal followed the trial court's decision on post-trial motions and the entry of the Amended Final Judgment.

III. JURISDICTION

[34] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-90 (2017)); 7 GCA §§ 3105, 3107(b), 3108(a), 25102(a) (2005).

IV. ANALYSIS

[35] While the parties raise more than a dozen claimed errors on appeal, we address only five of these issues. After disposing of these issues, the remaining issues become moot and need not be addressed. While we are aware that certain of these issues—especially the evidentiary issues—may again arise in this litigation, judicial prudence dictates that we not address these issues at this time.

A. The Estoppel Certificate Bars HRC's Parking-Related Claims in Their Entirety

[36] The first issue we address is raised on cross-appeal by Bayview, who argues that HRC's parking-related claims should have been barred in their entirety by virtue of the Estoppel Certificate that was signed by HRC's Vice President, Hiromichi Takamatsu, and dated December 20, 2006. Appellee's Principal & Resp. Br. at 7 (Aug. 25, 2016) (internal citations omitted). Under section 58 of the Lease, both HRC and Bayview were obligated to, "within fifteen (15) days after written request from the other party, execute and deliver to the other party, in recordable form if requested, a certificate . . . stating whether, to the knowledge of the party giving the certificate, any event has occurred under this Lease which constitute[s] an event of default hereunder." RA, tab 31, Ex. A § 58 (Lease). In the Estoppel Certificate, HRC certified that "neither the undersigned nor [Bayview] is in default under any of the terms, covenants or provisions of the Lease," with two limited exceptions regarding CAMC overcharges and alterations to the exterior signage. RA, tab 51, Ex. B (Estoppel Certificate). The Estoppel Certificate did not mention or reference Bayview's failure to provide exclusive parking under section 12(b) of the Lease.

[37] Bayview argues that the trial court erred in holding that the Estoppel Certificate barred only those claims related to exclusive parking that pre-date the Estoppel Certificate and allowing

HRC to continue pursuing claims concerning Bayview's failure to provide exclusive parking for the period after December 20, 2006. Appellee's Principal & Resp. Br. at 7-8. Bayview asserts that an estoppel certificate also bars prospective claims where, like here, "the course of conduct both before and after the Estoppel Certificate was identical . . . ." *Id.* at 8 (quoting *Payless Shoesource, Inc. v. Joye*, No. 2:12-CV-00517-MCE, 2014 WL 466260, at *8 (E.D. Cal. Feb. 5, 2014), *appeal docketed*, No. 14-15432 (9th Cir. Mar. 7, 2014)). In response to Bayview's claims, HRC argues that "the presumption accorded estoppel certificates is based upon a reasonable reliance on those certificates," but "Bayview made no showing that it was unaware of the parking dispute [or] . . . that it relied in any manner upon the representations made by HRC to UBS." Appellant's Resp. & Reply Br. at 43 (Aug. 25, 2016). HRC also argues that Bayview cannot bind HRC to the contents of the Estoppel Certificate because Bayview was not a signatory to the Estoppel Certificate and the Estoppel Certificate was addressed to UBS Real Estate Securities, Inc. ("UBS")—not Bayview. *Id.* at 42-43.[2]

[38] Because these issues present pure questions of law and were decided on summary judgment, we review these issues *de novo*. *See Guam Hous. & Urban Renewal Auth. v. Pac. Superior Enters. Corp.*, 2004 Guam 22 ¶ 14 (citing *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 7).

1. The Evidentiary Presumption of 6 GCA § 5106(2) Attaches to an Estoppel Certificate Delivered Pursuant to the Terms of a Lease Agreement

[39] Bayview's cross-appeal presents a question of first impression for this court regarding the efficacy of estoppel certificates. Black's Law Dictionary defines "estoppel certificate" as:

[2] HRC further argues that the trial court erred in granting even perspective application to the Estoppel Certificate, but it "chose not to appeal the [trial] court's ruling . . . ." Appellant's Resp. & Reply Br. at 43-44. Accordingly, the court need not address this contention.

> [a] signed statement by a party (such as a tenant or a mortgagee) certifying for another's benefit that certain facts are correct, such as that a lease exists, that there are no defaults, and that rent is paid to a certain date. A party's delivery of this statement estops that party from later claiming a different state of facts.

Estoppel Certificate, *Black's Law Dictionary* (10th ed. 2014). Similarly, California courts have defined an "estoppel certificate," also known as an "offset statement," as "a signed certification of various matters with respect to a lease. . . . An estoppel certificate binds the signatory to the statements made and estops that party from claiming to the contrary at a later time." *Plaza Freeway Ltd. P'ship v. First Mountain Bank*, 96 Cal. Rptr. 2d 865, 872 (Ct. App. 2000) (citation omitted).

[40] The purpose behind requiring the delivery of an estoppel certificate in commercial real estate transactions is to "inform lenders and buyers of commercial property of the tenant's understanding of the lease agreement." *Id.* at 874. Estoppel certificates "assure one or both parties to an agreement that there are no facts known to one and not the other that might affect the desirability of entering into an agreement, and to prevent the assertion of different facts at a later date." *Lawyers Title Ins. Corp. v. Honolulu Fed. Sav. & Loan Ass'n*, 900 F.2d 159, 163 (9th Cir. 1990). Every court to address the effect of an estoppel certificate has held that such a certificate estops the signatory from asserting facts in future litigation that are contrary to the facts as set forth in the certificate. Courts, however, have adopted three distinct analytic frameworks in determining whether the estoppel applies.

[41] Under one approach, courts treat estoppel certificates fully within the framework of a claim for equitable estoppel. *See, e.g.*, *Won's Cards, Inc. v. Samsondale/Haverstraw Equities, Ltd.*, 566 N.Y.S.2d 412 (App. Div. 1991); *Homart Dev. Co. v. Sgrenci*, 662 A.2d 1092, 1099-100 (Pa. 1995). Pursuant to this approach, a party seeking to estop another must establish each

element of equitable estoppel under common law, including: (i) a misrepresentation of material fact; (ii) knowing falsehood; (iii) intent that the falsehood be acted upon; (iv) the party asserting estoppel had no knowledge of the true facts; and (v) detrimental reliance. *See generally Homart*, 662 A.2d at 1099-100. If a party asserting the estoppel fails to establish any of these essential elements, the certificate will not estop the signatory from claiming facts contrary to those contained in the certificate. *See generally Won's Cards*, 566 N.Y.S.2d at 416-17.

[42] A second approach adopted by other jurisdictions treats estoppel certificates as a waiver of rights. *See, e.g.*, *Piggly Wiggly of Mansfield, Inc. v. Wolpert Assocs.*, 519 So. 2d 371, 373 (La. Ct. App. 1988) (holding estoppel certificate "constituted an express waiver by that party of any right it might have under the lease"); *Yee v. Weiss*, 877 P.2d 510, 513 (Nev. 1990) (holding signature on estoppel certificate constituted waiver). Courts adopting this approach analyze the facts surrounding the delivery of an estoppel certificate to determine whether a party has adequately waived its rights. *See Piggly Wiggly*, 519 So. 2d at 373 (holding signatory "is presumed to have read and understood the certificate"); *Yee*, 877 P.2d at 512-13 (holding that party that signed but failed to read estoppel certificate is bound by its contents).

[43] A third approach, adopted by California, holds that an estoppel certificate creates an evidentiary presumption in favor of the facts as set forth in the estoppel certificate. Pursuant to California Evidence Code section 622, "[t]he facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration." Cal. Evid. Code § 622 (West, Westlaw through 2017 Reg. Sess.). The leading California case on the effect of estoppel certificates is *Plaza Freeway Ltd. Partnership v. First Mountain Bank*, 96 Cal. Rptr. 2d 865, 872 (Ct. App. 2000). In reviewing California Evidence Code section 622, the *Plaza Freeway* court

determined that applying the presumption in "section 622 to estoppel certificates would promote certainty and reliability in commercial transactions. A contrary conclusion would defeat the purpose behind the wide-spread practice of using estoppel certificates." 96 Cal. Rptr. 2d at 874. Thus, "an estoppel certificate is exactly the type of document to which application of Section 622 would be appropriate." *Id.* at 872 (footnote and citation omitted). Under the evidentiary-presumption approach, "a party does not need to demonstrate detrimental reliance" for the conclusive presumption within section 622 to apply. *Id.* at 874 n.12.

[44] This court recognizes the usefulness and certainty that estoppel certificates provide in the commercial real estate market. The underlying purpose behind giving preclusive effect to such certificates will best be served, we believe, by adopting the evidentiary-presumption approach currently used by California. This approach is also the most likely to limit the potential for unnecessary litigation. Like California, Guam has a statutory provision instructing the courts to accept as a conclusive presumption "[t]he truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title . . . ." 6 GCA § 5106(2) (2005). This statute is sourced to the precursor to California Evidence Code section 622. *See* 6 GCA § 5106(2) (Source); Guam Code Civ. Proc. § 1962 (1953) (Foreword). Thus, we conclude that the presumption afforded by 6 GCA § 5106(2) should attach to estoppel certificates that are delivered under the terms of a commercial lease transaction.

[45] In reaching this conclusion, we specifically reject the approach adopted by some jurisdictions in which all elements of a claim for equitable estoppel, including detrimental reliance, must be established in order for an estoppel certificate to be given preclusive effect. "[A] party can agree to be estopped under circumstances that might not otherwise constitute an estoppel under common law . . . ." *Fundus Am. (Atlanta) L.P. v. RHOC Consolidation, L.L.C.*,

720 S.E.2d 176, 179 (Ga. Ct. App. 2011). Requiring proof of detrimental reliance would be antithetical to the concept of a presumption. Moreover, requiring such proof would have the potential to weaken the certainty and reliability that estoppel certificates are intended to promote. The policy considerations recognized by the *Plaza Freeway* court and others counsel in favor of rejecting such a requirement. Accordingly, Bayview's failure to provide proof of detrimental reliance did not preclude a grant of summary judgment in its favor on Bayview's parking-related claims, as the presumption set forth in 6 GCA § 5106(2) applies even in the absence of such proof.

2. Bayview Was Entitled to Utilize the Presumption of 6 GCA § 5106(2) and Enforce the Estoppel Certificate Because It Was Delivered on Bayview's Request and for Bayview's Benefit

[46] HRC next argues that even if an estoppel certificate gives rise to a presumption that bars certain claims, this presumption would be inapplicable to the facts of this case because Bayview was not a party to, or an addressee of, the Estoppel Certificate. Appellant's Resp. & Reply Br. at 41-43; *see also* RA, tab 51, Ex. B (Estoppel Certificate). Bayview counters that this argument is untenable because estoppel certificates are, by their very nature, unilaterally executed by only one party for the benefit of another. *See* Appellee's Reply Br. at 15-16 (Aug. 1, 2016) (citations omitted).

[47] In support of its argument, HRC relies upon two California cases: *In re Marriage of Brooks*, 86 Cal. Rptr. 3d 624 (Ct. App. 2008), *abrogated on other grounds by In re Marriage of Valli*, 324 P.3d 274 (Cal. 2014), and *Estate of Wilson*, 134 Cal. Rptr. 749 (Ct. App. 1976). Both of these cases, however, are easily distinguishable from the facts presented here. In *In re Marriage of Brooks*, the California court examined a contract for the conveyance of real property made by one spouse to a third party without the other spouse's permission. The third party

argued that the non-consenting spouse should be held to the facts set forth in the contract in accordance with California Evidence Code section 622. *See In re Marriage of Brooks*, 86 Cal. Rptr. at 630. The court, however, rejected this argument and held that section 622 did not apply because the non-consenting spouse was not a party to the instrument. *Id.* Unlike the facts of *Brooks*, HRC—the party against whom estoppel is sought—was in fact a signatory of the Estoppel Certificate. *In re Marriage of Brooks* is therefore inapplicable to the facts presented here. In *Estate of Wilson*, the instrument at issue was a will—not an estoppel certificate. 134 Cal. Rptr. at 751-52. Even if a persuasive analogy could be made between a will and an estoppel certificate, this case was decided decades before *Plaza Freeway* set forth the framework by which California courts apply the presumption under California Evidence Code section 622 to estoppel certificates. *Estate of Wilson* is therefore also unhelpful to our analysis.

[48] The Estoppel Certificate at issue here was, by its own terms, delivered "at the request of Bayview II, L.L.C., as landlord under the lease." RA, tab 51, Ex. B (Estoppel Certificate). Section 58 of the Lease required HRC to provide this certificate "to the other party"—i.e., Bayview. RA, tab 31, Ex. A § 58 (Lease). While the Estoppel Certificate was addressed to Bayview's lender, UBS, the purpose of requiring delivery of such a certificate under section 58 was clearly to benefit Bayview. Not allowing Bayview to utilize the presumption afforded by 6 GCA § 5106(2) in this instance would needlessly place form over substance.

[49] As the *Plaza Freeway* court held, "under section 622, when a tenant signs and delivers an estoppel certificate, as required under the commercial lease agreement, that tenant is bound to the recitations of fact contained therein." 96 Cal. Rptr. 2d at 874 (footnote omitted). Estoppel certificates are intended to be unilateral, with the benefits flowing to a counterparty of a transaction or agreement, even where that counterparty is not the addressee of the certificate.

Indeed, as occurred in this instance, estoppel certificates are commonly used to help one party to a commercial real estate transaction obtain financing. *See, e.g.*, *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 472 (2006) (noting that the estoppel certificates at issue in that case were "required by the contracts to facilitate [a party's] bank financing"). On the facts presented here—where the Estoppel Certificate was delivered "at the request" of Bayview and mandated under HRC's Lease agreement with Bayview—we hold that Bayview was entitled to utilize the presumption afforded by 6 GCA § 5106(2).

3. Estoppel Certificates Bar Claims Post-Dating Delivery Where the Conduct Pre-Dating and Post-Dating Delivery of the Certificate is Identical

[50] Bayview argues that the trial court erred in determining that HRC was barred from pursuing its parking-related claims only to the extent that they pre-dated delivery of the Estoppel Certificate because the conduct about which HRC complains—i.e., failing to provide exclusive parking under the terms of the Lease—was identical both before and after HRC delivered the Estoppel Certificate. In opposing Bayview's motion, HRC does not expressly refute this argument. While only a handful of courts in this country have ever addressed this issue, every court that has been presented with this argument has held that "[a] party who executes an estoppel certificate will not be allowed to raise claims of which it knew or should have known at the time the certificate was executed." *Urban Sites of Chi., LLC v. Crown Castle USA*, 979 N.E.2d 480, 490 (Ill. App. Ct. 2012) (alteration in original) (citation omitted); *see also Fundus Am.*, 720 S.E.2d at 179 ("[A] party who executes an Estoppel Certificate should not be allowed to raise claims of which it knew or should have known at the time the certificate was executed . . . .").

[51] An instructive case is *Office Depot, Inc. v. District at Howell Mill, LLC,* 710 S.E.2d 685 (Ga. Ct. App. 2011). There, the court was presented with a situation in which a lease prohibited a landlord from renting space in a shopping center to any company other than Office Depot that intended to sell school supplies. *Id.* at 686. In breach of this provision, the landlord leased a portion of the shopping center to a company called The School Box, whom the landlord knew intended to sell school supplies. *Id.* at 686-87. Despite this obvious breach, Office Depot delivered an estoppel certificate stating that the landlord was in compliance with the terms of the lease. *Id.* As a result, the court held that Office Depot was entirely barred from suing for breach of the exclusive-use provisions of its lease, even though the breach was ongoing. *Id.*

[52] Likewise, in a recently-decided, unreported case, a court in the Eastern District of California expressly rejected an argument that estoppel certificates can be applied only retroactively "because the course of conduct" at issue in the case "was identical" "both before and after the Estoppel Certificate . . . ." *Payless Shoesource, Inc. v. Joye*, No. 2:12-CV-00517-MCE, 2014 WL 466260, at *8 (E.D. Cal. Feb. 5, 2014), *appeal docketed*, No. 14-15432 (9th Cir. Mar. 7, 2014). As that court persuasively explained, this rule follows from the underlying purpose of requiring the delivery of an estoppel certificate; prospective purchasers of commercial properties rely on estoppel certificates to "ensure that they will not be exposed to a future claim based upon a course of performance that existed prior to the purchase." *Id.* In other words, the "purpose of an estoppel certificate is to give assurance that the party making the estoppel statement 'at a later date will not make claims that are inconsistent with the statements contained in the estoppel certificate.'" *Urban Sites of Chi.*, 979 N.E.2d at 490 (alteration and citation omitted); *see also K's Merch. Mart v. Northgate Ltd. P'ship*, 835 N.E.2d 965, 972 (Ill. App. Ct. 2005) ("By their very nature, estoppel certificates look to the course of performance . . . [and] the

signer is certifying the course of performance has not produced any defaults."). This reasoning is sound.

[53] Permitting HRC to proceed with its parking-related claims that post-date delivery of the Estoppel Certificate—when the conduct complained of post-delivery was either identical to, or a continuation of, the conduct complained of pre-dating delivery of the Estoppel Certificate—would jeopardize the efficacy and usefulness of estoppel certificates. The trial court erred in finding that the Estoppel Certificate barred only HRC's parking-related claims pre-dating delivery of the Estoppel Certificate. For this reason, that portion of the trial court's decision barring HRC from pursuing its pre-certificate parking claims is affirmed, but that portion of the trial court's decision permitting HRC to pursue its post-certificate parking claims is reversed. On remand, judgment should be entered in favor of Bayview on HRC's parking-related claims.

B. The Trial Court Properly Interpreted the Lease Agreement

[54] On appeal, HRC argues that the trial court erred in determining, as a matter of law, that the Outrigger Hotel was not "leasable" space within the BCC as defined under the Lease for CAMC-calculation purposes. Appellant's Br. at 13-15. Bayview contends that the trial court properly concluded that the portion of the Outrigger Hotel related solely to its "lodging" operations is not part of the BCC, and thus not "leasable" space under the terms of the Lease. Appellee's Br. at 22-27 (citations omitted).

[55] The trial court decided this issue below in response to dueling motions for partial summary judgment. We review the trial court's ruling *de novo*. *Guam Hous. & Urban Renewal Auth.*, 2004 Guam 22 ¶ 14 (citing *Iizuka Corp.*, 1997 Guam 10 ¶ 7); *see also B.M. Co. v. Avery*, 2001 Guam 27 ¶ 9 ("[This court] reviews the principles relied upon by the trial court in interpreting a contract *de novo*. . . . 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*." (citation omitted)).

1. The Parties' Disputed Interpretations of the Lease

[56] In asserting their respective positions, each party relies on a different interpretation of section 1 of the Lease, which provides in relevant part:

> *The Premises are part of the BCC, a commercial complex situated in Tumon Bay containing retail stores and restaurants, parking areas, and common facilities* for the use and benefit of all tenants of said commercial complex.
>
> . . . .
>
> Landlord shall not develop, operate, or lease any other space in the BCC and Phase III to any other National or International recognized theme restaurant/logo shop, and *Landlord shall not lease any other space in the BCC* and Phase III to *any other restaurant or eating establishment*, whose sales will exceed five million ($5,000,000.00) dollars annually, *except those which are inside the Landlord's proposed hotel and are part of the Landlord's hotel operations*, and two existing facilities located in the North West corner and South West corner of the property.

RA, tab 31, Ex. A § 1 (Lease) (emphases added).

[57] HRC argues that by including language in the Lease that Bayview "shall not lease any other space in the BCC . . . except those [areas] which are inside the Landlord's proposed hotel and are part of the Landlord's hotel operations," the parties implicitly recognized that the proposed hotel (now known as the Outrigger Hotel) was part of the BCC. Appellant's Br. at 15. In the court below, Bayview argued that the Outrigger Hotel in its entirety should not be part of the BCC because "lodging" is not specifically referenced in the definition of BCC contained in section 1 of the Lease. According to Bayview, only those areas containing retail stores and restaurants, parking areas, and common facilities could be considered part of the BCC and included in the CAMC calculation.

[58] The trial court held that the clear terms of the Lease "provide that the [CAMCs] are equal to the ratio of the total number of square feet, comprising the area of Hard Rock's premises to the total number of leasable square feet in the BCC." Tr. at 5 (Hr'g Mot. Partial Summ. J.). In determining whether the Outrigger Hotel was part of the BCC, the trial court did not adopt either HRC's or Bayview's interpretation of the Lease. Rather, the trial court held that part of the Outrigger Hotel was "leasable" space included within the definition of the BCC, while other areas of the Outrigger Hotel were not part of the BCC at all. The trial court concluded:

> [T]he leasable square feet includes everything on the ground floor and everything on the first floor, but excludes and does not include the front desk, the curtilage of the front desk area, and the space utilized by the elevator, which the Court will refer to as the first floor hotel area, and the hotel floors above the first floor hotel area. The Court finds that the floors above the ground floor and the first floor are exclusively for the hotel operations and are not part of the BCC, because this is not commercial space.

Id.

[59] In reaching this determination, the trial court reasoned that the Lease "did not specifically define 'leasable' to provide a unique understanding of the term," but that "[t]he ordinary meaning of 'leasable' includes all areas that could be leased, regardless of whether or not they are leased, or if the owner operates them in lieu of leasing them." *Id.* at 6. Accordingly, the trial court concluded "that the ordinary person would understand that all of the area of the ground and first floor, including the restaurant and its kitchen facilities, or coffee shop, could be leased . . . to another commercial enterprise to operate the same types of entities instead of the owner operating them" as part of the hotel operations. *Id.* On appeal, Bayview has now adopted the position that the trial court's decision should be affirmed because the trial court's determination that the restaurant, café, and quasi-public lobbies of the Outrigger Hotel are part of the BCC is a reasonable interpretation of the Lease agreement. Appellee's Br. at 26-27.

2. The Trial Court's Interpretation of the Lease Was Correct

[60] In interpreting whether any part of the Outrigger Hotel is part of the BCC under the Lease, we look to the terms of the Lease itself. *See* 18 GCA § 87105 (2005) ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ."). "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." 18 GCA § 87107 (2005). We will not entertain a strained interpretation of a contract, and preference should be given to reasonable interpretations of a contract rather than an unreasonable interpretation. *See Sanchez v. TakeCare Ins. Co.*, Civ. No. 09-00001, 2010 WL 5148074, at *11 (D. Guam Dec. 13, 2010) (citing *Shakey's Inc. v. Covalt*, 704 F.2d 426, 434 (9th Cir. 1983)). While the parties dispute the meaning of the Lease, "[t]he fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous." *Id.* (quoting *Int'l Union of Bricklayers & Allied Craftsman Local No. 20 v. Martin Jaska Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985)).

[61] When read within the context of the entire Lease, HRC's interpretation of the language in section 1 is unjustified. HRC's argument hinges on the exclusionary language set forth in section 1 of the Lease, which states that the Hard Rock Cafe would be the exclusive theme restaurant in the BCC, "except those which are inside the Landlord's proposed hotel and are part of the Landlord's hotel operations . . . ." RA, tab 31, Ex. A § 1 (Lease). In HRC's estimate, "[b]y carving out this explicit exception, Bayview recognized that its proposed hotel was part of the BCC . . . ." Appellant's Br. at 15. While the exception that HRC points to certainly means that at least *a portion* of the "Landlord's hotel operation" is part of the BCC, it does not logically follow that *all* of the "Landlord's hotel operation" is part of the BCC. Rather, this provision

must be read in concert with the definition of "Bayview Commercial Complex" set forth in the Lease.[3]

[62] The Lease explicitly defines the BCC as "a commercial complex situated in Tumon Bay containing retail stores and restaurants, parking areas, and common facilities . . . ." RA, tab 31, Ex. A § 1 (Lease). This definition does not include lodging facilities. As the trial court noted, however, the Outrigger Hotel's operations include not only lodging facilities, but it also includes, among other things, a "restaurant and its kitchen facilities" and a "coffee shop." Tr. at 6 (Hr'g Mot. Partial Summ. J.). The trial court determined that those operations unrelated to lodging were within the definition of the BCC. *Id.* This interpretation is not contrary to, and is in fact supported by, the "exception" language relied upon by HRC. When read as a whole, this language specifically references space that is potentially leasable to "National or International recognized theme restaurant/logo shop" or "other restaurant or eating establishment." RA, tab 31, Ex. A § 1 (Lease). This language therefore specifically references space that is otherwise within the definition of the BCC, and it would not encompass facilities leased for other purposes, such as lodging.

[63] For these reasons, the most natural reading of section 1 is that the portion of the Outrigger Hotel "containing retail stores and restaurants, parking areas, and common facilities" is leasable space within the BCC, while that portion of the Outrigger Hotel that could only be dedicated solely to its lodging operations are not part of the BCC. In deciding this issue below,

[3] HRC also argues that the term "leasable" supports its position because hotel square footage is generally "leasable" as that term is commonly understood. As set forth in section 4(c) of the Lease, HRC's "pro rata share of [CAMCs] . . . shall be equal to the ratio of the total number of square feet comprising the area of the Premises . . . to the total number of *leasable square feet in the BCC commercial complex*." RA, tab 31, Ex. A § 4(c) (Lease) (emphasis added). While HRC may be right that hotel square footage is "leasable" within the ordinary meaning of that word, this contention is entirely irrelevant to the court's analysis; even if the Hotel is "leasable," it must still be "in the BCC commercial complex" for it to be included within the calculation of CAMCs. *Id.*

the trial court adopted the correct reading of the Lease. Accordingly, the trial court's decision on the parties' dueling motions for partial summary judgment is affirmed.

C. The Findings of Fact Issued Following the Two-Day Bench Trial Were Not Clearly Erroneous

[64] Following the trial court's decision on summary judgment, a bench trial was held to determine the exact square footage to be used in calculating the appropriate CAMCs owed by HRC. HRC also challenges on appeal the trial court's factual findings regarding whether specific areas in the first floor of the Outrigger Hotel were properly classified as leasable space, common areas, or exclusive hotel space. In particular, HRC argues that the trial court improperly concluded that various portions of the BCC were "common areas," when such areas should have been classified as either (i) "leasable" square footage or (ii) exclusive hotel space that is not part of the BCC.

[65] "[O]ur standard of review following a bench trial is that the trial court's '[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'" *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 13 (second alteration in original) (quoting *Yang v. Hong*, 1998 Guam 9 ¶ 4) (citations omitted). "We have said '[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed' upon reviewing 'the entire evidence.'" *Ramiro v. White*, 2016 Guam 6 ¶ 16 (quoting *Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶ 22).

[66] The term "common area" as defined under the Lease includes, among other things, "public parking areas," the "roof" of the BCC, "[q]uasi-[p]ublic lobbies," and "quasi-public

corridors." RA, tab 31, Ex. A § 13(b)(1), (5)-(6) (Lease). At trial, the evidence presented supported the trial court's factual findings. With respect to roof areas, for example, testimony indicated that roof areas were considered common space under section 13(b). *See* Tr. at 30 (Bench Trial, May 15, 2012). The trial court carefully parsed the issue of parking, finding some parking areas were exclusively controlled by the Outrigger Hotel, thus not included as part of the BCC, while other areas were public parking and therefore included within the calculation of "common areas." *See* RA, tab 196 at 8 (Finds. Fact & Concl. L.).

[67] With respect to the lobby areas of the Outrigger Hotel, testimony indicated, *inter alia*, that: (a) tenant employees bring their lunch and dine in the lobby area of the hotel; (b) "[a]s a matter of policy, [Bayview has] allowed others to use the lobby facilities for their own use," including "numerous high school senior students and UOG students who come here and use the free Wi-Fi set that we have for them to do their homework" and "local artists – to display their artistic work and sell their artistic work in the lobby area"; (c) other tenants use this area "for promotions, public promotions"; (d) it is used "during Christmas time, for example, by the high school singing choirs in their competition"; and (e) "there is a public walkway in the lobby where the public can walk through on its way back to the beach . . . ." Tr. at 62-64, 144-46 (Bench Trial, May 15, 2012). Based on this testimony, and other evidence submitted at trial, the trial court held:

> The evidence is that although the Outrigger Hotel uses this area for hotel functions and receptions, it is also available to all BCC tenants and their guests. Unlike Phase IV ground and basement parking security, the Outrigger Hotel does not maintain a strict monitoring of lobby usage. The Court agrees that it fits well within the term "quasi-public" lobby of the Lease.

RA, tab 196 at 7 (Finds. Fact & Concl. L.).

[68] Under the deferential standard that we provide to findings of fact issued by a trial court following a bench trial, and upon a review of the evidence admitted during trial, we cannot conclude these findings were clearly erroneous. Accordingly, the trial court's Findings of Fact and Conclusions of Law, dated May 23, 2012, is affirmed in its entirety.

D. The Trial Court Properly Vacated the Jury's Fraud Verdict and Award of Punitive Damages

[69] On cross-appeal, Bayview contends that the trial court erroneously vacated the jury's fraud verdict and misconstrued California law in applying the "out-of-pocket" loss rule to the facts of this case. Appellee's Br. at 21-22. HRC responds that the verdict on Bayview's fraud claim was properly set aside because there was no evidence of damages presented to the jury resulting from the alleged misrepresentations. Appellant's Resp. & Reply Br. at 33-41.

[70] Following the jury's verdict, the trial court granted HRC's motion seeking a judgment notwithstanding the verdict with regard to Bayview's fraud claim, holding that "[b]ecause the evidence was insufficient to establish that Bayview suffered damages as a result of HRC's alleged misrepresentations, the jury could not have found that Bayview presented a complete fraud claim." RA, tab 386 at 9 (Dec. & Order, Aug. 29, 2014). In reaching this conclusion, the trial court reasoned that "[t]he two measures of damages for fraud are the 'out-of-pocket-loss' measure and the 'benefit-of-the-bargain' measure." *Id.* at 5 (citation omitted). At trial, Bayview presented only an "out-of-pocket-loss" theory, which is intended to put a plaintiff in "the position he was in prior to the fraudulent transaction; thus, the award is the difference in actual value, determined at the time of the transaction, between what the plaintiff gave and what he received." *Id.* (citation omitted). "A defrauded plaintiff is entitled only to losses suffered and is

not entitled to be placed in a more beneficial position than he would have been in absent the fraud." *Id.* at 6 (citation omitted).

[71] At trial, Bayview's theory of damages "tied its decision to provide the tenant allowance and rent reductions to HRC's agreement to participate in a shared parking arrangement and not to receive eighty-three exclusive parking spaces, despite the Lease provision." *Id.* at 7. The undisputed evidence at trial "established that HRC *did* participate in the shared parking arrangement since its opening and never received exclusive parking from Bayview." *Id.* (emphasis added). Accordingly, Bayview's "expense on the tenant allowance and lost income from the rent reductions are not additional damages" because "there was no difference in value between what it gave and what it received." *Id.* at 7-8.

[72] A trial court's ruling on a motion for judgment notwithstanding the verdict is reviewed *de novo*. *Kennedy v. Sule*, 2015 Guam 38 ¶ 21 (citing *Guam Top Builders, Inc. v. Tanota Partners*, 2012 Guam 12 ¶ 8). "A motion for a directed verdict and a motion for judgment notwithstanding the verdict is the same as a motion for judgement [sic] as a matter of law." *Id.* (quoting *O'Mara v. Hechanova*, 2001 Guam 13 ¶ 6). "[I]f the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury," then judgment as a matter of law is appropriate. *Id.* (citations omitted).

1. The Measure of Damages for Fraud: Out-of-Pocket-Loss Rule and the Benefit of the Bargain

[73] Under Guam statutory law, "[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." 18 GCA § 90102 (2005). This provision was adopted from the California Civil Code, which contains an identical provision. *See id.* (Source); Guam Civ. Code § 1709 (1953) (Foreword);

Cal. Civ. Code § 1709 (West, Westlaw through 2017 Reg. Sess.). California law is therefore instructive to our analysis. *See, e.g.*, *People v. Castro*, 2016 Guam 16 ¶ 21 n.3 (collecting cases). Generally speaking, under this statute "[t]here are two measures for damages for fraud: out-of-pocket and benefit of the bargain." *Alliance Mortg. Co. v. Rothwell*, 900 P.2d 601, 609 (Cal. 1995) (en banc).

[74] "The out-of-pocket measure of damages is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received." *Id.* (citations and internal quotation marks omitted). Under the out-of-pocket-loss rule, a plaintiff is entitled to recover additional consequential damages suffered as a proximate result of the fraud. *See, e.g.*, *Oliver v. Benton*, 208 P.2d 375, 377 (Cal. Dist. Ct. App. 1949) ("The additional damages that may be recovered include such items as actual expenditures made by the plaintiff, damage to other property, and personal injuries, provided they are the proximate result of the misrepresentation."); *Kenly v. Ukegawa*, 19 Cal. Rptr. 2d 771, 774 (Ct. App. 1993) ("[A] defrauded party may recoup his out-of-pocket losses and expenditures in reliance on the fraud . . . .") (certified for partial publication); *accord Garrett v. Perry*, 346 P.2d 758, 762 (Cal. 1959) (holding "out of pocket" loss rule "must be applied realistically so as to give the defrauded person his actual out-of-pocket loss, and, where necessary to reach that result, the court must consider subsequent circumstances"). A plaintiff, however, is not required to "show 'out-of-pocket' loss in order to be entitled to consequential or additional damages . . . ." *Alliance Mortg.*, 900 P.2d at 601 n.5 (citing *Stout v. Turney*, 586 P.2d 1228, 1235 (Cal. 1978)).

[75] In contrast to the out-of-pocket-loss rule, "[t]he 'benefit-of-the-bargain' measure . . . is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the

position he would have enjoyed if the false representation relied upon had been true." *Id. at* 609 (citations and internal quotation marks omitted). This measure of damages "awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive." *Id.*

[76] The Restatement (Second) of Torts agrees that out-of-pocket loss and benefit-of-the-bargain damages are the proper measure of damages for a claim of fraud. Section 549 of the Restatement (Second) provides:

> (1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> > (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
> >
> > (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.
>
> (2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty.

Restatement (Second) of Torts § 549.

2. The Parties' Respective Positions

[77] There is no dispute in this case that Bayview went forward at trial under an out-of-pocket-loss theory of damages. *See, e.g.*, RA, tab 386 at 5 (Dec. & Order, Aug. 29, 2014) ("[T]he 'out-of-pocket-loss' measure . . . was used in the instant case . . . ."); *id.* at 8 ("[T]he parties do agree that the out-of-pocket-loss rule was an appropriate instruction to the jury and that it was proper to apply to Bayview's claim . . . ." (citation omitted)). The question presented to the court, rather, is whether the rent abatement and Tenant Allowance claimed as damages by

Bayview are properly defined as out-of-pocket losses or whether they are properly defined as additional consequential damages.

[78] HRC argues that because Bayview specifically tied the value of the Tenant Allowance and rent abatement to the exclusive parking spaces, the Tenant Allowance and rent abatement were essentially a *quid pro quo* for HRC's agreement not to insist on the exclusive parking provision as called for under the Lease. In other words, HRC argues that the Tenant Allowance and rent abatement are properly categorized as an out-of-pocket loss as defined under Restatement (Second) of Torts § 549(1)(a). In HRC's view, the rent abatement and Tenant Allowance constitute the difference in value between the exclusive parking required under the Lease and the non-exclusive parking actually provided by Bayview. Because Bayview never actually provided exclusive parking as required under the Lease, HRC argues there is no difference between what Bayview gave and what Bayview received. Thus, Bayview failed to present any evidence of damages.

[79] In contrast, Bayview argues that the Tenant Allowance and rent abatement are consequential damages that have nothing to do with the difference in value between exclusive and non-exclusive parking. Rather, Bayview claims that the Tenant Allowance and rent abatement should be categorized as "consequential reliance damages" compensable under Restatement (Second) of Torts § 549(1)(b). Appellee's Br. at 21.

[80] In deciding this issue below, the trial court agreed with HRC's position and held that Bayview's "expense on the tenant allowance and lost income from the rent reductions are not additional damages" because "there was no difference in value between what it gave and what it received." RA, tab 386 at 7-8 (Dec. & Order, Aug. 29, 2014). Therefore, the trial court

determined that Bayview failed to establish the element of damages necessary to present a complete claim of fraud.

3. The Rent Abatement and Tenant Allowance Were Not Additional Damages, and Bayview Therefore Failed to Present Evidence on the Element of Damages

[81] It is well-established that the elements of fraud are (1) a misrepresentation; (2) knowledge of its falsity; (3) intent to induce reliance; (4) justifiable reliance by the party being defrauded; and (5) resulting damages. *See Taitano v. Calvo Fin. Corp.*, 2008 Guam 12 ¶ 12. If a plaintiff cannot prove each element, including the fact of damages, the defendant will be entitled to judgment as a matter of law. *See, e.g.*, *Adkins v. Wyckoff*, 313 P.2d 592, 596 (Cal. Ct. App. 1957). For purposes of our analysis, the facts testified to at trial must be "construed in the light most favorable" to Bayview. *Kennedy*, 2015 Guam 38 ¶ 21. During trial in this matter, Michael Ysrael testified on various occasions that Bayview would not have entered into the Lease or provided the Tenant Allowance and rent reductions if it knew that HRC would insist on exclusive parking.[4] Assuming this testimony is true, which we must do in deciding this issue, it

[4] Testimony presented at trial included the following:

> MR. MAIR: Okay. Now explain to the jury whether Bayview would have agreed to pay $3 million toward the building of the Hard Rock Cafe but for the representation that was made to Bayview by Montiero.
>
> MR. M. YSRAEL: Again, had we known that [HRC] would insist on trying to disrupt our entire parking scheme and the entire areas, we probably wouldn't have ever entered into, let alone the unusual step of providing an enormous amount of money to this party [as a tenant allowance].

Tr. at 98-99 (Jury Trial, Nov. 26, 2013).

* * *

> MR. MAIR: Okay good. Now, these rent reductions, tell the jury whether or not Bayview would have agreed to those rent reductions had [HRC] advised Bayview in March 2002, no we're going back to the original agreement under the lease?
>
> MR. M. YSRAEL: Absolutely not. Tenant-landlord is a cooperative relationship, and they were asking for some help. And if they were going to be messing up our parking area, I'm not going to be very open to that.

Id. at 125.

* * *

is clear that the Tenant Allowance and rent reductions were each a *quid pro quo* for HRC's agreement that it would not insist on exclusive parking. Because Bayview never provided exclusive parking, the value of what it gave and what it received were identical. Bayview therefore failed to establish the fact of damages, and HRC is entitled to judgment as a matter of law.

[82] Ultimately, the fatal logical flaw in Bayview's position is that the rent abatement and Tenant Allowance are part of the Lease contract itself (and its subsequent modifications). Because these purported damages were part of the Lease itself, Bayview had the option of rescinding the agreement or abiding by the terms of the contract and suing for damages. As

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> MR. MAIR: Okay. Now, please explain to the jury whether Bayview and you would have agreed to this rent reduction on July 1, 2002, if you had been told in March of 2002 that [HRC] was going to insist upon getting the exclusive parking in the lease?
>
> MR. M. YSRAEL: No. Cooperation's a two-way street, and messing up our parking arrangement with all our tenants and customers would not be cooperative.

Id. at 134-35.

* * *

> MR. MAIR: Now, if the jury were to find that HRC made misrepresentations in 1996 and that you relied upon those, just for the sake of argument, the jury found that, what type of damages if any would you be seeking as a consequence of that?
>
> MR. YSRAEL: Well, right of [sic] the bat one of them would be we definitely would not have agreed to a $3 million tenant improvement allowance, probably wouldn't even have signed the lease agreement.
>
> MR. MAIR: Okay, but you spent $3 million?
>
> MR. YSRAEL: Yes, that's a nice hard cost.
>
> MR. MAIR: Now—let's go now to 2002. Are you aware that there is a claim for fraud in the complaint of Bayview against [HRC] based on misrepresentations in 2002?
>
> MR. YSRAEL: Yes.
>
> MR. MAIR: Okay, good. Now, if the jury were to find that [HRC] made misrepresentations to Bayview in 2002, and that Bayview relied on those misrepresentations, what damage[s] if any would Bayview be seeking?
>
> MR. YSRAEL: Again, had we known that they weren't going to be living up to the parking agreement, we definitely would [not] have entered into the July 2002 rent reduction, so our damages would be the lost—potential rents that we lost under that agreement.

Tr. at 87-88 (Jury Trial, Dec. 2, 2013).

noted by the California Supreme Court: "If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; *he must, on his part, comply with the terms of the contract* . . . ." *Bagdasarian v. Gragnon*, 192 P.2d 935, 938 (Cal. 1948) (emphasis added) (quoting *Schmidt v. Mesmer*, 48 P. 54, 56 (Cal. 1897)). Where the terms of the contract that plaintiff was fraudulently induced into entering call for payment (in the form of a tenant allowance) or providing some accommodation (in the form of rent reductions), this payment or accommodation cannot be considered additional damages because it is the actual consideration paid for the property or rights exchanged.

[83] Under Bayview's theory of the case, Bayview agreed to grant the Tenant Allowance and rent reductions and would not have done so "but for" HRC's purported representation that it was not entitled to the exclusive parking under the Lease. *See, e.g.*, RA, tab 56 ¶ 12 (Bayview's First Am. Countercls., Jan. 11, 2011) ("Bayview would not have agreed to substantially reduce the rent to HRC in July 2002, but for an acknowledgement of HRC that the [non-exclusive] parking arrangement . . . could be continued."). In the court below, for example, Bayview specifically referred to its claim as one for "fraud in the inducement," and Bayview won evidentiary rulings on this basis. *See, e.g.*, Tr. at 70 (Jury Trial, Nov. 26, 2013) ("Defense also indicated that the testimony will be received, or intended to be received, will go towards establishing fraud in the inducement."). The Tenant Allowance and rent reductions, therefore, were undoubtedly part of the original bargain and cannot be characterized as additional expenses. As the trial court convincingly reasoned, "[a]dditional damages are actual expenditures made on investments in addition to the original bargain . . . ." RA, tab 386 at 6 (Dec. & Order, Aug. 29, 2014) (citing

Oliver, 208 P.2d at 375; *Buist v. C. Dudley De Velbiss Corp.*, 6 Cal. Rptr. 259, 261-62 (Dist. Ct. App. 1960)).

[84] Bayview attempts to frame the Tenant Allowance and rent reductions as being exchanged for a promise not to sue rather than consideration exchanged under the Lease. *See* Appellee's Reply Br. at 17-18. But, this argument is unavailing. *See Oliver*, 208 P.2d at 377 ("[N]o loss is suffered where a person gets the worth of his money although not all he was promised. The fact that he may anticipate more and be falsely led to expect it . . . does not entitle him to recover for his disappointment in not receiving that which he was led to expect."). Bayview points to no evidentiary support admitted during trial that would lead to a conclusion other than HRC and Bayview exchanged consideration (inclusive of the alleged agreement that HRC would share common parking instead of being provided exclusive parking) of equal value.

[85] Where there is "mutual consideration" paid between contracting parties, "in the absence of any evidence to the contrary[,] we assume that there was a quid pro quo, and that the obligation of [one contracting party] was equal to the value of the property received." *Robinson v. Comm'r*, 97 F.2d 552, 553-54 (9th Cir. 1938); *see also In re Zedda*, 103 F.3d 1195, 1204 (5th Cir. 1997) (defining "the common law concept of consideration" as "an exchange of equivalent values"); *In re Lueder's Estate*, 164 F.2d 128, 135 (3d Cir. 1947) ("'Quid pro quo' in its common acceptance means 'something for something; an equivalent in return; a consideration in the contract' as defined by Webster. Bouvier defines it as 'a term denoting the consideration of a contract.' Consideration, in a contract, is the quid pro quo that the party to whom the promise is made, does or agrees to do in exchange for the contract."). As the trial court noted, "Bayview tied its decision to provide the tenant allowance and rent reductions to HRC's agreement to participate in shared parking," and therefore "Bayview must have placed a $6,795,810 value on

this agreement." RA, tab 386 at 7 (Dec. & Order, Aug. 29, 2014). Bayview points to no evidence admitted at trial that undermines this conclusion.

[86] In addition, adopting Bayview's position would create a windfall for Bayview. It is axiomatic that a plaintiff should not be placed "in a better position than he would have occupied absent the fraud." *Kenly*, 19 Cal. Rptr. 2d at 775; *see also Christiansen v. Roddy*, 231 Cal. Rptr. 72, 78 (Ct. App. 1986) ("A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done." (quoting *Valdez v. Taylor Auto. Co.*, 278 P.2d 91, 98 (Cal. Ct. App. 1954))). If we were to adopt Bayview's argument, Bayview would be awarded everything it bargained for under the Lease (including its claimed agreement that it did not have to provide exclusive parking), but then obtain an additional windfall of millions of dollars that Bayview had specifically agreed to exchange in consideration for obtaining what it bargained for—and ultimately received—under the Lease.

[87] For these reasons, we agree with the trial court's well-reasoned opinion setting aside the jury verdict on Bayview's fraud claim. Judgment was appropriately entered in favor of HRC on Bayview's fraud claim, and the award for compensatory and punitive damages was properly vacated.[5]

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[5] As discussed *infra*, HRC is entitled to a new trial based upon the improper comments Bayview made during closing arguments. This ruling does not affect the court's separate holding that judgment should be entered in favor of HRC on Bayview's fraud claim. *See Hudson v. Dist. of Columbia*, 558 F.3d 526 (D.C. Cir. 2009) (affirming trial court order granting judgment notwithstanding the verdict and ordering new trial on other claims due to evidentiary error)*; cf. Carter v. United States*, 973 F.2d 1479, 1488 (9th Cir. 1992) ("Although we reverse the grant of summary judgment for the government herein, the propriety of the district court's denial of the post-trial motion is nevertheless before us . . . .").

E. HRC is Entitled to a New Trial Based Upon the Prejudicial Comments Bayview's Counsel Made During the Parties' Jury Trial

[88] The final issue we address on appeal is HRC's contention that a new trial is necessary as a result of the inflammatory comments Bayview's counsel made throughout the parties' jury trial. Appellant's Br. 35-41. HRC argues, among other things, that Bayview's counsel inappropriately: (1) employed a xenophobic "us-against-them" strategy, which emphasized the Ysrael family's connection to Guam while portraying HRC's beneficial owner as a foreigner living in Bermuda for tax evasion purposes; (2) made personal attacks against opposing counsel and HRC witnesses; and (3) offered comments as to his own personal opinions, beliefs, and views. *Id.* (citations omitted). Following the jury's verdict, HRC moved for a new trial based upon these improper comments, but the trial court denied this motion. We generally afford significant discretion to a trial court's decision on these matters. *See generally Adams v. Duenas*, 1998 Guam 15 ¶ 16. There must come a point, however, at which comments made by counsel are so out-of-bounds and inflammatory that the length of trial, curative instructions, or other mitigating factors cannot possibly justify upholding the trial verdict consistent with due process. This is that case.

1. Standard of Review

[89] Following the verdict in the parties' jury trial, HRC moved pursuant to Rule 59 of the Guam Rules of Civil Procedure for a new trial based upon opposing counsel's inflammatory comments. "The grounds for which a new trial may be granted under Rule 59 are broad and, in the case of a jury trial, a new trial may be granted 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of . . . Guam . . . . '" *Adams*, 1998 Guam 15 ¶ 15 (alteration in original) (quoting Guam R. Civ. P. 59). However, "[a]ttorney

misconduct warrants a new trial only if such misconduct affected the verdict." *Id.* ¶ 17 (citing *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1990)). "A trial court's decision to grant or deny a motion for a new trial will not be disturbed on appeal except for cases of clear abuse of discretion." *Id.* ¶ 16 (citation omitted); *see also I & F Corp., Guam v. Tumon Hillside Corp.*, Civ. No. 91-00015A, 1991 WL 255833, at *1 (D. Guam App. Div. Nov. 18, 1991) ("A motion for a new trial grounded upon improper and inflammatory argument by counsel is addressed to the sound discretion of the trial judge and we review for abuse of discretion.").

2. HRC Did Not Waive this Argument for Purposes of Appeal

[90] As a threshold matter, Bayview argues that HRC waived any right to have this issue considered on appeal by failing to object properly during trial and failing to appropriately move for a mistrial prior to the verdict. Our prior case law, however, indicates that failure to object at trial to attorney misconduct does not act as a complete bar to appellate review. Rather, our case law indicates that a party's failure to contemporaneously object is an issue for us to consider in weighing whether a party is prejudiced by the misconduct. *See Adams*, 1998 Guam 15 ¶¶ 15, 18.

[91] Immediately following opening statements, HRC moved for a mistrial on the basis that Bayview had engaged in attorney misconduct, but the trial court denied that motion, reasoning that trial counsel is afforded great latitude during opening statements. *See* Tr. at 35 (Jury Trial, Nov. 13, 2013). In response to HRC's motion, however, the trial court instructed the jury that "[w]hat the lawyers say may help you understand the law and the evidence, but their statements and their arguments are not evidence." Tr. at 42 (Jury Trial, Nov. 13, 2013). Following the denial of HRC's initial motion, the parties tried this matter to verdict.

[92] Immediately prior to closing arguments, the parties stipulated that each side would reserve any objections until after both closing statements were complete unless something "really

outrageous occurs" during argument. Tr. at 5-6 (Jury Trial, Dec. 10, 2013). HRC lodged no objections during Bayview's initial closing argument, but did make an objection during Bayview's rebuttal argument. *See* RA, tab 386 at 23 n.14 (Dec. & Order, Aug. 29, 2014) (citing Tr. at 205 (Jury Trial, Dec. 10, 2013)). Because HRC made no contemporaneous objections, the trial court did not provide contemporaneous curative instructions or admonitions for statements made during Bayview's initial closing. *Id.* (citing Tr. at 3-5 (Jury Trial, Dec. 11, 2013)).

[93] Many jurisdictions treat a failure to object at trial to attorney misconduct as a waiver of a party's right to challenge that conduct on appeal. *See, e.g.*, *Dominguez v. Pantalone*, 260 Cal. Rptr. 431, 437 (Ct. App. 1989). Even in these jurisdictions, however, failure to contemporaneously object may be excused when statements by counsel are so outrageous or so infect the trial that the proper administration of justice and upholding due process requires addressing the inappropriate behavior on appeal. *See, e.g.*, *Muhammad v. Toys R Us, Inc.*, 668 So. 2d 254, 258 (Fla. Dist. Ct. App. 1996) ("A new trial is required regardless of the want of an objection where an attorney's prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing the jury's calm and dispassionate consideration of the evidence and the merits.").

[94] This court has on one prior occasion addressed the issue of waiver on appeal with respect to attorney misconduct. In *Adams*, the court reviewed in depth the leading California case on whether failure to contemporaneously object constitutes waiver. *See Adams*, 1998 Guam 15 ¶ 17 (citing *Dominguez*, 260 Cal. Rptr. at 437). Despite finding that the plaintiff in *Adams* failed to contemporaneously object during closing arguments, this court notably did not adopt the California rule. Rather, after finding that the trial court "instruct[ed] the jury through the reading of a jury instruction that statements of counsel were not evidence," the court held that "[t]he jury

instruction, coupled with the fact that the Plaintiff-Appellant failed to raise any objection to the statement at the time it was made, evinces no resulting prejudice against the Plaintiff-Appellant." *Id.* ¶ 18. The court therefore treated the failure to object as an issue of prejudice, not an issue of waiver. *See id.* ¶ 17 ("In determining whether prejudice had occurred due to attorney misconduct . . . the court should consider . . . the efficacy of objection . . . .'" (quoting *Dominguez*, 260 Cal. Rptr. at 437)). HRC's failure to object thus weighs in favor of a finding that it was not prejudiced by Bayview's conduct, but this failure does not act as a complete bar to its appeal.

3. Comments Made by Bayview's Counsel Were Improper

[95] We have previously noted that an attorney "has the freedom at trial to argue reasonable inferences from the evidence." *People v. Mendiola*, 2010 Guam 5 ¶ 15; *see also Beagle v. Vasold*, 417 P.2d 673, 678 (Cal. 1966) (en banc) ("An attorney is permitted to discuss all reasonable inferences from the evidence." (citations omitted)). Generally speaking, "great latitude is accorded counsel in presenting closing arguments to a jury." *United States v. Johnson*, 587 F.3d 625, 632 (4th Cir. 2009) (quoting *United States v. Ollivierre*, 378 F.3d 412, 418 (4th Cir. 2004), *sentence vacated on other grounds*, 543 U.S. 1112 (2005)). This latitude permits counsel to "try their cases with earnestness and vigor," while entrusting the jury "within reason to resolve . . . heated clashes of opposing views." *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935); *Bates v. Lee*, 308 F.3d 411, 422 (4th Cir. 2002)). An attorney's closing argument is an occasion calling for "energy and spontaneity" rather than a simple narration of uncontroverted evidence. *Id.* (citation omitted). Moreover, an attorney "is not barred from commenting on the evidence presented at trial or urging the jury to draw reasonable inferences

from the evidence that support [its] theory of the case . . . ." *State v. Long*, 975 A.2d 660, 666 (2009). Nevertheless, zealous advocacy is not without limits.

[96] In zealously advocating for his or her client's position, an attorney is not permitted to appeal to the prejudices or passions of a jury. This is true regardless of the form that call to the jury takes, whether it is by exhorting the jury to rely upon its "community conscience" to punish an outsider, by lobbing personal attacks against the motives or character of opposing counsel and witnesses, or by expressing personal opinions about witnesses or evidence. Such conduct has no place in the courtrooms of Guam.

a. Bayview Improperly Used an "Us-Against-Them" Strategy

[97] Comments that are meant to appeal to "community conscience" by "pitting 'the community' against a nonresident corporation" are plainly improper. *S.H. Inv. & Dev. Corp. v. Kincaid*, 495 So. 2d 768, 771-72 (Fla. Dist. Ct. App. 1986) (quoting *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985)). Such a plea is not limited to "specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders." *Id.*

[98] As an example, counsel may not characterize a party as "trying to take advantage of the good people" in the local community. *Hall v. Freese*, 735 F.2d 956, 960 (5th Cir. 1984). Nor may counsel urge a jury to punish a foreign investor for purposes of sending a signal to others that wish to do business locally. *S.H. Inv. & Dev. Corp.*, 495 So. 2d at 771-72 (expressing concern and ordering a new trial where attorney stated to the jury that it had an "opportunity . . . to speak with a voice so loud and so strong and so firm that it will reach from here to Miami,

Florida, from Miami, Florida, to the . . . corporations in New York City and throughout all of the . . . corporations that have some kind of collateral dealings here").

[99] On at least one prior occasion, counsel for Bayview was reprimanded for "inject[ing] prejudicial and irrelevant comments about foreign investors" into a trial. *I & F Corp.*, 1991 WL 255833, at *1. In that case, the District Court of Guam, Appellate Division, held that a trial court's order granting a new trial should be affirmed based upon these improper comments. *Id.* The court in *I & F Corp.* did not quote the improper comments that were made in that case. We cannot therefore compare the severity of comments made there—which were severe and prejudicial enough to justify a new trial—with the comments made by Bayview's counsel in this case. We have no doubt, however, that the comments by counsel in this case went far beyond the line of propriety.

[100] Throughout Bayview's closing argument, counsel repeatedly referred to the fact that Herrero, the beneficial owner of HRC, resides in Bermuda and appealed to the passions of the jury to send a message about the proper way to do business in Guam. This in and of itself is improper. Counsel for Bayview, however, compounded this impropriety by contrasting Herrero's status as a Bermuda resident with the Ysrael family's close connections to Guam. At least the following statements made by Bayview's counsel during closing arguments were improper:

- "And we don't need—doing business in Guam is a privilege. If you come here from half way around the world from Bermuda and you start a business like this, the proper solution to a person who starts a business like this and treats it wrong is no thank you. Why don't you go start this business back in Bermuda because we don't need this kind of thing here." Tr. at 106 (Jury Trial, Dec. 10, 2013).

- "They got the nerve to come in here in front of this jury and tell Guam citizens that this elder gentleman, a statesman of Guam, a pioneer in Guam is cheating them." *Id.* at 131-32.

- "And this is wrong. This is wrong. It's wrong anywhere. And you ask yourself, when you go back in that jury room, if Al Ysrael got on a plane and went to Bermuda, and went and leased the most valuable property there in the center of their tourist district and he behaved the way this man [i.e., Herrero] had behaved here, what do you think they'd do to him? They'd run him out of their [sic] on a rail. They'd never put up with that. [I]f he was doing bad in Bermuda, yet this man's got the gall to come here, tell us we're supposed to . . . let him pay 12 cents a square foot for the most valuable property on this island. . . . It ain't right. And he needs to learn a lesson." *Id.* at 161.

- "How do you respond to what HRC and Herrero have done[?] . . . Next you show him that it's a privilege to do business in Guam. It's not a right, it's a privilege. You show him that respect is important. Respect is important. And show him that actions have consequences. You can't just come here and do whatever you want. And speak to him in a language he understands: Money . . . This man speaks—you know how he said English is his second language? You know what's his first language? Money." *Id.* at 206-07.

[101] In opposing HRC's appeal, Bayview does not even attempt to justify the propriety of these statements. *See* Appellee's Br. at 42-44 (mentioning only testimony; not mentioning closing statements). Rather, in an attempt to mitigate this misconduct, Bayview argues that Herrero's residence in Bermuda was relevant to the issues in the case. Appellee's Br. at 42-44 (citations omitted). The trial court agreed that Herrero's Bermuda residence was "relevant to the issue of whether Mr. Herrero was familiar with the day to day operations of Bayview, at the very least." RA, tab 386 at 24 (Dec. & Order, Aug. 29, 2014).

[102] We, too, agree that testimony regarding Herrero's absence from Guam was relevant to, among other things, his credibility in testifying to various events actually occurring at the HRC Premises. *Id.* Likely for this reason, HRC's counsel did not object during the trial testimony regarding Herrero's residence. *Accord* Appellee's Br. at 43. The statements Bayview made in closing, however, used this testimony for purposes much different than the reason for which it was relevant and admissible. Bayview's counsel did not use this evidence to argue that Herrero's testimony was untrustworthy (due to his absence from Guam). Instead, Bayview used

Herrero's nationality as a cudgel to argue that the jury should tell him to "go start this business back in Bermuda because we don't need this kind of thing here," Tr. at 106 (Jury Trial, Dec. 10, 2013), and that "it's a privilege to do business in Guam," *id.* at 206. *Cf. Du Jardin v. City of Oxnard*, 45 Cal. Rptr. 2d 48, 51 (Ct. App. 1995) ("Argument which has no relevance to issues in a case and which is a transparent attempt to appeal to jurors' emotions, is clearly misconduct." (citations omitted)). Inviting the jury to teach Herrero a lesson based upon its community conscience was undoubtedly improper.

b. Bayview Improperly Attacked HRC Witnesses

[103] "Personal attacks on the character or motives of the adverse party, his counsel or his witnesses are misconduct." *Stone v. Foster*, 164 Cal. Rptr. 901, 913 (Ct. App. 1980) (citations omitted); *see also Pesek v. Univ. Neurologists Ass'n*, 721 N.E.2d 1011, 1015 (Ohio 2000) (noting "abusive comments directed at opposing counsel and an opposing party's expert witness during closing argument should not be permitted by any court, and that such comments can indeed be grounds for a new trial" (citations omitted)). Counsel is permitted to question a witness's credibility, or even call a witness a liar, "provided such characterizations are supported by the record." *See Murphy v. Int'l Robotics Sys., Inc.*, 766 So. 2d 1010, 1028 (Fla. 2000) (collecting cases). But, "[t]here can be no doubt that to argue facts not justified by the record" is attorney misconduct. *Malkasian v. Irwin*, 394 P.2d 822, 827 (Cal. 1964) (en banc). "While a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences." *Id.* at 828. While HRC points to various passages throughout the trial transcript where it believes Bayview crossed the line of impropriety by attacking opposing counsel or witnesses, we find one such soliloquy during Bayview's closing particularly troublesome.

[104] As explained above, *see supra* Part II.A., Bayview argued during trial that HRC breached its obligations under the Lease by failing to comply with the operating standards of Hard Rock Cafe International. Bayview alleged, among other things, that HRC failed to comply with these standards when a member of its management team was accused of sexual harassment by an employee. HRC moved *in limine* to prevent Bayview from admitting evidence of this purported sexual harassment, arguing that this was irrelevant to the case. The trial court ultimately permitted admission of certain evidence regarding these complaints, but specifically limited the evidence to "allegations" and not evidence of actual guilt. *See* Tr. at 7-8, 11 (Jury Trial, Nov. 21, 2013). The court reasoned that how HRC "responded to it" (i.e., the complaint) was relevant to whether it was abiding by Hard Rock Cafe International standards. *Id.* at 7. In reaching this conclusion, the trial court specifically stated that it would not permit a "mini-trial" on this issue because it would confuse the issues for the jury, and Bayview immediately acknowledged this limitation. *Id.* at 8. Despite the limited use that Bayview was allowed to make of this evidence, counsel for Bayview stated during closing argument that the manager accused of sexual harassment was "guilty as sin." Tr. at 103-05 (Jury Trial, Dec. 10, 2013). Counsel then asked rhetorically: "Did you hear the words I'm sorry, I wish I hadn't done that[?] Did you hear those words come out of his mouth? No, because he is not sorry. And he has no remorse and he has no respect and he is still this man's [i.e., Herrero's] vice president." *Id.*

[105] These statements by counsel were not supported by the record, and it was inappropriate for counsel to invite speculation of the manager's guilt. *See Malkasian*, 394 P.2d at 827-28. By making "guilt" an issue during closing argument—as opposed to how HRC responded to the "allegations"—counsel not only disregarded the trial court's earlier ruling limiting the use of this evidence, but he also inappropriately attempted to make the conduct appear more egregious than

inferences drawn from the record could adequately support. In doing so, counsel improperly attempted to incite the passions of the jury and invited its members to direct their disgust toward Herrero and HRC in rendering its verdict. This was attorney misconduct.

c. Bayview's Attorney Improperly Inserted His Personal Opinions

[106] In presenting his or her client's case to a jury, an attorney may not express "his personal opinion as to the credibility of a witness, or his personal knowledge of facts." *Lingle v. Dion*, 776 So. 2d 1073, 1078 (Fla. Dist. Ct. App. 2001). Although "an attorney is given broad latitude in closing argument, his remarks must be confined to the evidence, the issues and inferences that can be drawn from the evidence." *Id.* (quoting *Airport Rent-A-Car, Inc. v. Lewis*, 701 So. 2d 893, 896 (Fla. Dist. Ct. App. 1997) (reversing due to misconduct by counsel, including "the repeated use of the term 'B.S.'")). Statements characterizing a litigant's theories and testimony as "ridiculous," for example, "constitute the attorney's personal opinions as to the justness of the cause and the culpability of a civil litigant." *Sacred Heart Hosp. of Pensacola v. Stone*, 650 So. 2d 676, 680 (Fla. Dist. Ct. App. 1995).

[107] Throughout closing statements, Bayview's counsel repeatedly interjected his personal opinions. In one instance, for example, counsel denigrated an exhibit admitted by HRC by stating: "I mean, you take a look at it but I just don't see any damage in here at all and th[ese] have to be the absolute worst photographs I've ever seen in my life and its marked as Plaintiff's exhibit 1." Tr. at 118-19 (Jury Trial, Dec. 10, 2013). This was improper. *See Toys R Us*, 668 So. 2d at 257 (holding it was improper for counsel to make personal comments on photographs introduced as exhibits). In another instance, counsel told the jury that one particular instruction that the trial judge would give was "the most important jury instruction you get in this case in my humble opinion." Tr. at 142 (Jury Trial, Dec. 10, 2013). This was directly contrary to the trial

court's charge the following day that "[a]ll the instructions are important because together they state the law that you will use . . . in this case" and no specific legal rule or "rules are more important than the others." Tr. at 23-24 (Jury Trial, Dec. 11, 2013). Perhaps the most flagrant of counsel's comments came when counsel described one of his own witnesses by stating, "I would respectfully submit to all of you that Alfred [Ysrael] was real. Was not only a credible witness but *in my humble opinion one of the best witnesses I've ever seen*." Tr. at 81 (Jury Trial, Dec. 10, 2013) (emphasis added). This too was highly inappropriate. *See Lingle*, 776 So. 2d at 1078 (holding that a "personal opinion as to the credibility of a witness" is improper); *cf. Mendiola*, 2010 Guam 5 ¶ 17 (holding, in a criminal case, that it was improper for prosecutor to state that "[t]he People and the evidence have been open and honest as have been our witnesses"). Each of these comments amounted to attorney misconduct.

4. Bayview's Misconduct Prejudiced the Jury and a New Trial is Required

[108] Despite the fact that Bayview's counsel made numerous improper comments during its closing arguments, this alone does not entitle HRC to relief on appeal. "Attorney misconduct warrants a new trial only if such misconduct affected the verdict." *Adams*, 1998 Guam 15 ¶ 17 (citing *Mateyko*, 924 F.2d at 828). In assessing "whether prejudice had occurred due to attorney misconduct which would warrant a new trial," we "consider 'the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.'" *Id.* (quoting *Dominguez*, 260 Cal. Rptr. at 437); *see also Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995) ("A new trial is warranted on the ground of attorney misconduct during the trial where the flavor of misconduct . . . sufficiently

permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." (citations and internal quotation marks omitted)).

[109] We afford significant deference to a trial court's determination regarding whether certain comments by counsel prejudicially affected the jury's verdict. This is because "[a] trial judge is not a mere spectator. A judge is entrusted by the people with the duty to maintain orderly decorum and to see that the trial is fair." *I & F Corp.*, 1991 WL 255833, at *1. Thus, "[w]hen, in the judgment of the trial judge, the trial has been made unfair by the misconduct of the parties or their counsel, the judge has broad discretion to set aside a verdict and grant a new trial." *Id.* We defer to the trial judge in such cases unless the party resisting the motion for a new trial proves that the order was a clear abuse of discretion." *Id.*

[110] In denying HRC's post-trial motion seeking a new trial, the court below determined that comments made by Bayview's counsel did not affect the verdict. With regard to improper comments made during HRC's opening statements, the trial court determined that in light of the "broad latitude" afforded to trial counsel and the fact no evidence had yet been heard, the contemporaneous jury instructions were "curative of any prejudicial effect on the jury." RA, tab 386 at 22 (Dec. & Order, Aug. 29, 2014). When Bayview deployed a xenophobic us-against-them strategy in its closing arguments, no such contemporaneous curative instructions were given. *Id.* at 23. Nevertheless, the trial court reasoned that because the evidence of Herrero's location and residence were relevant to issues in the case, comments made by Bayview during closing were "not unwarranted." *Id.* at 24. As noted above, however, Bayview made use of this evidence for the improper purpose of inflaming the passions of the jury, not for arguing that Herrero was not a credible witness—the reason for which this evidence was relevant and admissible. These statements were, contrary to the trial court's determination, unwarranted and

inappropriate. The trial court's determination that Bayview's comments regarding Herrero's residence did not prejudice the jury flows from the faulty premise that these comments were appropriate.

[111] In moving post-trial, HRC cited to at least six cases supporting its position, including the following: *Hall*, 735 F.2d 956; *LeBlanc v. Am. Honda Motor Co.*, 688 A.2d 556 (N.H. 1997); *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1370 (Fed. Cir. 2013), *vacated in part on other grounds*, 135 S. Ct. 1920 (2015); *Szczecina v. PV Holding Corp.*, 997 A.2d 1079 (N.J. Super. Ct. App. Div. 2010); *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552 (Fla. Dist. Ct. App. 2000); and *I & F Corp.*, 1991 WL 255833. The court distinguished each of these cases on the false premise that counsel's comments were appropriate or by the fact that Bayview was seeking punitive damages. Neither of these distinctions, however, is convincing.

[112] While we normally provide broad discretion to a trial court in this context, it makes no sense for us to defer to the trial court when its judgment rests upon a faulty foundation. As noted above, even though Herrero's residence had some relevance to the issues presented to the jury, the use Bayview made of this evidence during closing arguments was plainly improper. So too was Bayview's request to send a message to Herrero.

[113] Even though the justification for seeking punitive damages is often to "send a message" to one of the parties, an award of punitive damages cannot be based upon inappropriate considerations. The "message" to be sent by imposing punitive damages may not be based, for example, upon one party's status as an outsider. This court's prior decision in *Adams* requires that we weigh, among other things, "the nature and seriousness of the remarks and misconduct." 1998 Guam 15 ¶ 15 (citations omitted). In minimizing the severity of counsel's comments by

simply deeming them "relevant" to issues in the case, the trial court failed to give this factor the proper weight it deserved in its analysis.

[114] In addition to weighing the severity of counsel's misconduct, *Adams* also advises that the court must weigh the general atmosphere of trial and the efficacy of any curative instructions or admonition. *Id.* Because the trial court did not find Bayview's comments regarding Herrero's residency improper, it failed to weigh these factors vis-à-vis the severity of Bayview's "us-against-them" comments. More generally, however, the trial court held that other comments made by Bayview's counsel were not prejudicial because: (a) HRC did not object to the comments contemporaneously; (b) the trial court instructed the jury in giving its charge that what the attorneys say is not evidence; and (c) the comments were mostly isolated in comparison to the length of trial. RA, tab 386 at 29 (Dec. & Order, Aug. 29, 2014). Each of these factors merits further inquiry from the court.

[115] Undoubtedly, HRC's failure to object weighs against a finding of prejudice. *See, e.g.*, *Adams*, 1998 Guam 15 ¶ 18. This court does not wish to condone a party idly sitting on its hands while opposing counsel engages in misconduct, but responsibility for ensuring a fair and equitable trial ultimately resides in the trial judge. A presiding trial judge "is not a mere umpire; he may not sit by and allow the grossest injustice to be perpetrated without interference." *Pesek*, 721 N.E.2d at 1016-17 (citations omitted). Rather, a trial judge has an affirmative obligation "to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished." *Id.* Where necessary to protect a litigant's due process right to a fair and impartial jury, a trial judge must "stop argument and require counsel to proceed in an orderly and lawyer-like manner." *Id.* The more severe the misconduct, the greater the duty placed upon the trial judge to step in and

control the trial when one party fails to object. When weighed against the severity of Bayview's misconduct during its closing statements, we believe the trial judge should have done more in this case.

[116] In charging the jury, the trial court instructed that "what the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talked to you about the law and the evidence. What lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence." Tr. at 24-25 (Jury Trial, Dec. 11, 2013). This court does not generally assume that a jury will disregard instructions that it is given. Thus, such boilerplate, standard jury instructions may be sufficient to cure potential prejudice in some instances. The more severe the misconduct, however, the more likely that additional curative instructions or remedial measures are needed in order to cure any potential prejudice. In extreme cases of misconduct, a mistrial may be necessary. On the facts presented here, where Bayview repeatedly engaged in misconduct, we again believe more was necessary to alleviate any prejudice to HRC.

[117] The comments made by Bayview that most trouble us occurred during closing arguments. In the broader scope of a six-week jury trial, misconduct that occurs over the course of one day may, in some sense, be considered isolated. In analyzing the "general atmosphere" of trial as required by *Adams*, however, the quantity and length of inappropriate comments compared to the entire length of trial is not the only consideration. Consideration must also be given to the prominence placed upon these improper comments and the point during trial that such misconduct occurs. Both quantity and quality are important to the court's analysis. For instance, one short but improper comment made at the very end of a party's closing statement is likely to have much greater risk of prejudicing a jury than if that same comment was made off-hand

during the middle of a lengthy cross-examination. Similarly, inappropriate comments made during a closing statement are likely to be more prejudicial where such comments form the theme of a party's closing statement than if such comments are simply made as a side remark. Here, certain of Bayview's comments, if viewed separately, could be considered off-hand remarks that would be unlikely to prejudice the jury. Bayview's comments regarding Herrero's residence in Bermuda, however, were considerably more problematic. Bayview returned to this issue at least four times during its closing argument over the course of 100 pages of transcript. This fact, coupled with multiple other instances of inflammatory or otherwise improper comments discussed above, indicate that prejudicial comments were infused throughout Bayview's closing statement.

[118] Weighing each of these factors, we are left with the firm conviction that the failure to order a new trial based upon Bayview's improper comments was a clear abuse of discretion.

[119] In reaching this conclusion, there are at least three additional observations that we consider worth mentioning. First, with respect to Bayview's comments regarding potential sexual harassment, the trial court specifically noted in limiting this evidence to "allegations" that evidence of guilt (and argument flowing from that evidence) was likely to confuse the jury. The trial court thus specifically recognized the potential for prejudice that Bayview's comments regarding "guilt" could entail. Nevertheless, Bayview proceeded down this line of argument during its closing. Second, we are struck by the flagrancy of certain of Bayview's comments, such as Bayview's proclamation that one of its lead witnesses was "in my humble opinion one of the best witnesses I've ever seen." Tr. at 81 (Jury Trial, Dec. 10, 2013). Finally, it must be noted that the jury in this case awarded Bayview more than six million dollars in compensatory damages (the entire amount Bayview requested) and an additional one million dollars in punitive

damages for a fraud claim that, as discussed above, Bayview failed to prove as a matter of law. A jury may reach its decision for any number of reasons, and juries do at times reach a legally unjustifiable result. That is why protections are built into our Rules of Civil Procedure, including Rule 59, which vests trial courts with the power to set aside a jury verdict as a matter of law. To resolve this appeal, we need not speculate at length why the jury reached the conclusion it did. But, on the facts presented here, the jury's failure to reach the correct legal result is indicative of the passions and prejudices that were incited by Bayview's counsel during closing arguments.

[120] Unlike in *Adams*, where only one inappropriate statement was at issue, Bayview repeatedly engaged in attorney misconduct during its closing. In determining whether Bayview's misconduct affected the verdict, the trial court minimized the severity and pervasiveness of that misconduct. We therefore conclude that the trial court abused its discretion in denying HRC's motion for a new trial. Due process requires that HRC be given an opportunity to present its case before an impartial and dispassionate jury.

V. CONCLUSION

[121] For the reasons set forth above: (i) the trial court's decision and order dated April 13, 2011, determining the effect of the Estoppel Certificate is hereby **AFFIRMED IN PART** and **REVERSED IN PART**; (ii) the trial court's ruling from the bench dated April 4, 2012, interpreting the Lease is hereby **AFFIRMED**; (iii) the trial court's Findings of Fact and Conclusions of Law, dated May 23, 2012, is hereby **AFFIRMED**; (iv) the trial court's decision and order dated August 29, 2014, granting judgment notwithstanding the verdict and denying HRC's motion for a new trial based upon attorney misconduct is **AFFIRMED IN PART** and **REVERSED IN PART**; (v) the trial court's Decision and Order dated March 3, 2015, awarding

attorney's fees to Bayview is **VACATED**; (vi) the Amended Judgment dated March 20, 2015, is **VACATED**; and (vii) we **REMAND** this case for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

TORRES, C.J., concurring in part and dissenting in part:

[122] I write separately to express my disagreement with the court's decision to set aside the jury's verdict based upon the improper comments made by Bayview's counsel. By expressing this disagreement, in no way do I condone the inappropriate remarks made by counsel, and I join my colleagues' opinion in its entirety except with respect to Part IV.E.4. In reversing the trial court's determination that Bayview's misconduct did not affect the verdict, I believe my colleagues have erred in failing to afford the trial court the discretion it is owed.

[123] As my colleagues correctly point out, we generally afford "broad discretion" to a trial court's ruling on a motion to set aside a verdict based upon attorney misconduct. *I & F Corp.*, 1991 WL 255833, at *1. As we previously explained in *Adams v. Duenas*, the underlying rationale for affording this "broad discretion" is that nobody is better positioned to determine the effect attorney misconduct has on the proceedings and the jury's verdict than the trial judge overseeing the matter. *See* 1998 Guam 15 ¶ 21 n.5 ("We will defer to the trial court's good judgment as to the statement's impropriety as the trial court was in a better position than we to assess the prejudicial effect of the statement."); *see also I & F Corp.*, 1991 WL 255833, at *1 ("The trial judge was in a good position to evaluate the total environment of the trial and the effect of the improper comments upon the jury."). This rationale carries even greater weight in the context of a lengthy, hard-fought trial, which appellate courts are generally more apprehensive about disturbing on appeal. *See, e.g., Baker v. Conn. Bank & Trust Co.*, 125 F.R.D. 25, 27-28 (D. Conn. 1988); *cf. Bergland v. Martin Marietta Aluminum, Inc.*, 74 F.R.D. 635, 636 (D.V.I. 1977) (declining to find misconduct of counsel in part because "[t]he trial was lengthy and the jury was particularly attentive throughout").

[124] As we stated in *Adams,* in determining whether attorney misconduct affected the jury's verdict, the court should consider at least the following: (i) "the nature and seriousness of the remarks"; (ii) "the general atmosphere [of the trial], including the judge's control of the trial"; and (iii) "the efficacy of objection or admonition under all of the circumstances." 1998 Guam 15 ¶ 15 (citations and internal quotation marks omitted). In analyzing these factors, I would defer to the trial court's determination and hold that no prejudice accrued to HRC in this case.

[125] The trial judge was in the best position to observe the general atmosphere, and was therefore best positioned to determine whether its curative instructions were in fact sufficient to mitigate any prejudice and whether the trial was sufficiently long such that any prejudice flowing from misconduct was effectively diluted. HRC has not presented this court with evidence—and the majority cites to no evidence—that would suggest that the trial judge in this case did not exercise appropriate control over the trial.

[126] In addition, HRC failed to object contemporaneously at the time that much of the misconduct it now complains of actually occurred. The fact that the parties agreed to hold objections until after closing statements unless something "really outrageous occurs" should offer no salvation to HRC's appeal. Tr. at 5-6 (Jury Trial, Dec. 10, 2013). In fact, just the opposite is true; if the comments made by Bayview were sufficiently outrageous to justify a new trial, then certainly such comments must be sufficiently outrageous to warrant an objection. The fact that HRC did not contemporaneously object indicates that—in the context of the entire trial and in the heat of the moment—the nature and seriousness of the remarks were not as severe as they might appear taken out of context from the cold record currently before the court.

[127] One explanation as to why these remarks may not have seemed as severe in the moment is because HRC's counsel also made comments throughout closing that bordered on the

inappropriate—for example, by repeatedly invoking personal opinions by using the phrase "I think." *See, e.g.*, Tr. at 10 (Jury Trial, Dec. 10, 2012) ("Today I can tell you what I think it all means . . . ."); *see also id.* at 42 ("I think, like I said, they're the smoking gun."); *id.* at 51 ("I like Dave Burger, personally, he is a personal friend of mine, and he has relatives who work for me. But I think he's way off base in this analysis.").[6] Similarly, HRC's counsel also improperly attacked opposing counsel, *see* Tr. at 168 (Jury Trial, Dec. 10, 2013) ("Mr. Mair can get up in front of you and say absolutely anything he wants. He's not supposed to, but he does."); cast aspersions on the opposing party's motivations for bringing suit, framing such argument as his personal opinion, *see id.* at 170 ("sounds like payback to me"); and potentially made baseless allegations against opposing witnesses, *see id.* at 188 ("Just like Rev and Tax doesn't think that HRC cheats on its taxes, only Mike Ysrael does").[7]

[128] In addition, instead of seeking a mistrial or objecting contemporaneously to Bayview's comments regarding sexual harassment, HRC attempted to turn these comments to its advantage. In its rebuttal closing, HRC stated, "There is no evidence of [sexual harassment]. . . . [W]here is the proof?" *See* Tr. at 189 (Jury Trial, Dec. 10, 2012). Counsel then attempted to turn that lack of proof into an attack on Bayview's counsel's credibility. *See id.*

[129] Perhaps the trial court should have done more to rein in both sides, but that is a far different question than whether we should vacate a jury's well-constituted verdict following a

[6] *See People v. Guerrero*, 2017 Guam 4 ¶ 57 ("We do not condone the use of the pronoun 'I' in a . . . closing statement[] . . . .").

[7] This statement can be read in one of two ways. First, counsel may have been stating that while Michael Ysrael believes that HRC cheats on its taxes, the Guam Department of Revenue and Tax does not. Second, counsel may have been stating that, unlike HRC, Michael Ysrael does cheat on his taxes. Had counsel intended the first meaning, this statement would be innocuous and not misconduct. The second interpretation, however, is unsupported by record evidence and plainly improper. The fact that this statement could be viewed alternatively as benign or as inflammatory misconduct further proves my point that this court is in no position to infer prejudice from the cold record before it when the trial court found none to exist.

months-long trial. When passions naturally flare at trial, as they often do, the severity of one comment must be placed in the proper context. When both sides are playing tough—and, yes, even when both sides engage in misconduct—a jury is less likely to be stirred by passion favoring one side over the other.

[130] While I agree that the comments made by Bayview's counsel were certainly inappropriate, I am unwilling to substitute the trial court's determination regarding the risk of prejudice these comments carried with my judgment derived from the cold record presented on appeal. *See People v. Leslie*, 2011 Guam 23 ¶ 19 ("When merely reviewing 'the dry pages of the record,' appellate courts cannot experience 'the tenor of the testimony at trial.'" (quoting *United States v. Alston*, 974 F.2d 1206, 1212 (9th Cir. 1992))). For these reasons, in applying the appropriate deference required under our case law, I cannot conclude that the trial court abused its discretion in denying HRC's motion for a new trial. Therefore, solely with respect to Part IV.E.4 of the court's majority opinion, I respectfully dissent.

/s/
ROBERT J. TORRES
Chief Justice