FIFTH DIVISION
December 21, 2012

1-10-0606

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FORTECH, L.L.C., Plaintiff-Appellee, v. R.W. DUNTEMAN COMPANY, INC., DU-KANE ASPHALT COMPANY, INC., ESTATE OF ALLAN J. DUNTEMAN, and PAUL J. DUNTEMAN, Defendants-Appellants	)
Du-Kane Asphalt Company, Inc., Counterplaintiff-Appellant, v. Fortech, L.L.C. Counterdefendant-Appellee	) Appeal from) the Circuit Court) of Cook County) 94 M1 704556
Du-Kane Asphalt Company, Inc., Third-Party Plaintiff-Appellant, v. K-Five Construction Company, and Donald West, Third-Party Defendants-Appellees	) Honorable) Daniel J. Pierce,) Judge Presiding
R.W. Dunteman Company, Inc., As Assignee of Metropolitan Water Reclamation District of Greater Chicago, Intervenor-Third-Party Plaintiff-Appellant, v. Fortech, L.L.C., and Reclamation Construction Corp., Third-Party Defendants-Appellants.	)

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

O R D E R

HELD: Judgment entered after civil bench trial for damages, including punitive damages, for failure to leave leased property in good condition was supported by the law and manifest weight of the evidence adduced.

¶ 1 The former subtenant, new subtenant/tenant, and property owner have spent nearly two decades disagreeing about their rights and liabilities for a 16-acre parcel of land in Lemont, Illinois and to rubble deposited there which the former subtenant contended was valuable, stockpiled road-building material, the new subtenant/tenant contended was worthless, abandoned debris, and the property owner contended was environmental contamination. In an earlier appeal, we determined that a construction company which moved some of the departing subtenant's many piles of material could not avoid liability for "conversion" by claiming it acted at its principal's direction; we vacated the circuit court's partial summary judgment on that question of law; and we remanded for further proceedings. *Fortech, L.L.C. v. R.W. Dunteman Co.*, 366 Ill. App. 3d 804 (2006) (*Fortech I*). A 10-day bench trial in 2010 culminated in judgment for the property owner, the new subtenant/tenant, and the construction company against the former subtenant that had accumulated the material. On appeal, the former subtenant contends the trial judge erred in rejecting the claim of conversion on its merits, finding the piled material had only nominal value, and awarding damages for breach of lease, the costs of returning the land to its pre-lease condition, punitive damages for trespass for failing to leave the property, and attorney fees.

¶ 2 The real property belongs to the Metropolitan Water Reclamation District of Greater

Chicago (District) and is located southwest of Chicago where it is bordered by Lemont Road, the Des Plaines River, and the Chicago Sanitary and Ship Canal. In 1954, the District leased 100 acres of its land for 50 years to Reclamation Construction Corporation (Reclamation). Reclamation's lease became known as the prime lease because this company sublet 21 acres of the property to Ramco, Ramco sublet the land to Dorac, Dorac sublet 16 acres to one of the parties here, R.W. Dunteman Company ("R.W. Dunteman"), and R.W. Dunteman orally sublet to another party here, its sister company, Du-Kane Asphalt Company ("Du-Kane"). Reclamation's lease was also known as the prime lease because it entitled the District to give or withhold its consent to each successive sublease or assignment and because each successive contract had to incorporate the terms and conditions of the prime lease. Thus, Ramco, Dorac, and R.W. Dunteman agreed in writing to comply with the provisions of the prime lease and to pay all costs, attorney fees, and expenses in enforcing the obligations of the prime lease. R.W. Dunteman was a land excavation and road and highway builder whose government contracts required and compensated it for hauling away and properly disposing of the old road debris. Its sister company Du-Kane manufactured asphalt on the Lemont property and recycled old concrete and asphalt road debris into its product. The corporate officers of R.W. Dunteman and Du-Kane were Paul J. Dunteman and his brother Allan J. Dunteman, however Allan died during this protracted litigation and the executor of his estate was substituted as a party. We will refer to the companies collectively as the Duntemans and to the two men by their given names.

¶ 3 The R.W. Dunteman sublease was for a 10-year term ending October 31, 1996. In 1994, Reclamation filed an action to evict R.W. Dunteman and other sublessees, alleging they

failed to pay rent. The suit was pending in 1996 when Reclamation assigned its ligation rights and sublet the 16-acre parcel and some adjoining District land to Fortech, L.L.C. ("Fortech"). Fortech wanted to renovate the existing building and use the open land to make and cure "GFRC" or glass fiber reinforced cement products such as architectural cladding. Du-Kane, however, remained on the land, even after the expiration of R.W. Dunteman's sublease, and continued to use its asphalt production equipment and stockpiles of stones, sand, and old road debris.

¶ 4 The holdover caused the subsequent circumstances and litigation to become much more complicated. More specifically, Fortech, as Reclamation's assignee of the 1994 lawsuit, pursued damages accruing during R.W. Dunteman's sublease, the costs of restoring the land as required by the prime lease to "good clean and orderly condition" by removing all debris and environmental contaminants, and damages for willful trespass by staying over and leaving the road debris after the expiration of the sublease. Fortech also filed its own eviction action against R.W. Dunteman and Du-Kane in 1996, and in this action obtained a court order on May 22, 1997, for possession of the property, which, at R.W. Dunteman's request, was stayed from enforcement until June 21, 1997.

¶ 5 Fortech's principal, Donald West, would later testify that Paul Dunteman had repeatedly said his companies did not want to vacate and intended to abandon most of their accumulated debris. Therefore, on May 23,1997, one day after the order for possession was granted, West directed his contractor K-Five Construction Corporation ("K-Five"), which had been readying adjacent District land for Fortech's use, to enter the Dunteman parcel and redistribute some of the piled material as it graded the site and constructed a road, a parking lot,

and an extensive berm. According to Paul Dunteman's subsequent, disputed testimony, on May 23 and May 27, 1997, he verbally asked K-Five to stop disturbing or removing the piles of road construction materials. It is undisputed that on May 28, 1997, the Duntemans' lawyer sent a cease-and-desist letter to Fortech about "removing" material from the realty, and on May 29, 1997, counsel filed an emergency motion to enjoin Fortech from trespassing on the land and converting the stockpiles. Even so, on June 28, 1997, the Cook County Sheriff enforced Fortech's order for possession in the 1994 suit by changing the locks and taking possession of excavation and loading equipment. The Duntemans then filed an emergency motion to enjoin seizure of their equipment, and on June 30, 1997, the motion was granted and they were given until July 8, 1997, to remove the asphalt making plant. A K-Five employee testified in this case that the Duntemans then worked around the clock for about a week to remove their equipment and some of the materials. Fortech countered with a motion to compel the Duntemans to also remove their concrete bunkers, footings and debris; oil contaminants, asphalt piles; crushed rock; and other debris. On July 8, 1997, Fortech's motion was granted and the Duntemans were ordered to take no more than "ten [additional] days or until July 18, 1997 to remove the remaining debris consisting of all remaining piles of material." In 2000, Du-Kane filed a third-party counter-complaint in the 1994 lawsuit seeking damages for K-Five and West's conversion and unjust enrichment of stockpiled materials purportedly worth $300,000. These claims became the subject of crossmotions in 2003 for full or partial summary judgment. After a hearing, Du-Kane lost to Fortech on the conversion count, and although the judge ruled for Du-Kane on its unjust enrichment count, the judge subsequently vacated the damage award. Also, Du-Kane lost

to K-Five on both counts, but as we noted above, on Du-Kane's interlocutory appeal, this appellate court vacated the conversion ruling on grounds that an agent could be held liable for tortious conduct taken at a principal's direction. See *Fortech I*, 366 Ill. App. 3d 804 (2006).

¶ 6 Of particular relevance here is that on remand, Du-Kane again sought summary judgment against K-Five for converting the stockpiles. In 2008, the judge found that K-Five moved the materials while Du-Kane still had possessory rights, which entitled Du-Kane to summary judgment on this limited question, but there were triable questions about the real value and quantity of materials and whether Du-Kane abandoned/waived its rights. Also, in 2004, the District was allowed to intervene due to an environmental study identifying 10 problems, including asphalt and construction debris. As an intervening plaintiff, the District alleged that tenant Reclamation and subtenant Fortech failed to keep the property free of environmental conditions as required by Fortech's sublease and had failed to remediate the problems pursuant to the prime lease and a prime lease amendment executed when Fortech assumed Reclamation's rights. In 2004, the trial judge granted summary judgment to the District against Reclamation and Fortech for the costs of investigating and remediating the conditions. In 2006, the District joined R.W. Dunteman as a third-party defendant and alleged it was another entity that violated the prime lease terms to "yield up" the property in the same "clean and sanitary" condition it had been when first leased to Reclamation in 1954. In 2008, the judge granted the District's motion for partial summary judgment against R.W. Dunteman as to liability for investigation and remediation of environmental conditions pursuant to the prime lease.

¶ 7 The litigation finally culminated in the bench trial now at issue. In early 2010, the

trial judge heard Fortech's trespass claims against the Dunteman defendants; Du-Kane's conversion and unjust enrichment claims against Fortech, West, and K-Five; and the District's "yield up" claims against Fortech, the Duntemans, and Reclamation. The Duntemans lost at every turn. After considering the law and evidence, the judge found that the Duntemans abandoned materials which had nominal value only, and thus Fortech was entitled to judgment as to the claim of unjust enrichment, and Fortech, West, and K-Five were entitled to judgment on the claim of conversion. The trial judge also entered judgment in favor of Fortech and against the Duntemans for trespass and assessed compensatory damages at $250,000 and punitive damages at $250,000. The judge also found that the Duntemans would have to indemnify Fortech for any judgment in favor of the District. Therefore, although the District proved its "yield up" clause against Reclamation, Fortech, and the Duntemans to recoup $73,261 for the environmental contamination studies, a judgment was entered in favor of Fortech and against the Duntemans for indemnity. The District also prevailed against Reclamation and the Duntemans for $1.2 million in site restoration expenses. Fortech, as Reclamation's assignee, was awarded $102,600 against the Duntemans for "breach of contract/nonpayment of rent." After the trial and further briefing, the judge found the Duntemans were contractually obligated to pay the attorney fees that the District and Fortech incurred to enforce their rights. The Duntemans and Reclamation were ordered to pay the District $112, 207; and the Duntemans alone were ordered to pay Fortech $510,000.

¶ 8 The Duntemans now challenge all the adverse rulings. In addition, the District and the Duntemans entered into a post-judgment settlement agreement which the Duntemans contend

lets them step into the District's shoes and pursue Fortech for not cleaning up the Duntemans' debris and environmental contamination in order to "yield up" the property to the District in its pre-1954 condition. In order to answer the Duntemans' arguments, we set out the trial testimony.

¶ 9 West testified that the property was essentially debris-free when he first considered subletting it from Dorac in the 1980's to use the building and large, open yard to make and cure GFRC. When he did not sublet the 21 acres, R.W. Dunteman took a 10-year sublease which did not include the building itself or the U-shaped parcel of land that surrounded the building. Eight years into the 10-year lease, Reclamation filed suit to evict its subtenants, so West began talking with Dorac about partnering in a GFRC enterprise on the site. In March 1994, West observed that the building was badly deteriorated and that the Duntemans' materials covered much of the land and were piled against the building and in other areas that they had no right to occupy. His negotiations with Dorac stalled when one of the principals became ill and died, so in December 1995, West resumed negotiations with Reclamation and then formed Fortech without Dorac. In response to the allegations that he should be held personally liable in this case, West testified that he was not a company owner or officer. When the company was formed, 95% of it was owned by a trust established by his mother to benefit her extended family and 5% was owned by an Illinois management company that employed West. West later sold 75% of Fortech to private investors to raise cash. In May 1996, with the eviction case still pending but the Duntemans' sublease about to expire, Reclamation and its subtenant Dorac agreed that Fortech could become Reclamation's sublessee. Under this agreement, Dorac, which had been unable to collect rent and taxes from its subtenant R.W. Dunteman, would step aside and assign its rights to Fortech;

Fortech would satisfy Dorac's back rent and taxes totaling about $104,000, pay for an environmental study, and renovate the building; and Reclamation could drop its pending count against Dorac for the building restoration costs. West, who was an experienced attorney, was confident that Fortech was not agreeing to remove the Duntemans' piles; instead, Reclamation had to return the property to its prior state. In an amendment to the sublease agreement, Fortech became obligated to pay more rent and to cover an additional $4,613 that Reclamation was incurring to evict the Duntemans, which brought Fortech's cost to obtain entry to the land to about $125,000. The "phase I" environmental study that Fortech was contractually required to commission in mid-1996 indicated "the subject property is deemed to contain a significant environmental liability" and that comprehensive sampling should be done to determine the extent and costs of correction. On October 3, 1996, the District consented to Fortech's sublease effective November 1996 and West and his daughter took numerous photographs to document the poor state of the property. Reclamation was also a party to this agreement which specified that Reclamation was liable for remediating "environmental conditions *** which would impose health hazards or impair property values" and that Fortech only had to "cooperate with all efforts of Reclamation to environmentally remediate." The agreement specifically exempted Fortech from liability to the District for any "hazardous substance" release "that occurred prior to Fortech's occupancy of the property." R.W. Dunteman's sublease lapsed at the end of October 1996, and in November 1996, Reclamation assigned its litigation rights to Fortech. Thus, except for R.W. Dunteman and its sister company Du-Kane, the various tenants had made way for Fortech. Notably, Reclamation did not assign its lease obligations to Fortech; Reclamation

assigned "right, title and interest in any right of action it may currently have for forcible entry and detainer and/or back rent or value of use and occupancy against sub-sublessee, R.W. DUNTEMAN COMPANY, particularly Cause No. 94-M1-704556 now pending in the Circuit Court of Cook County, Illinois."

¶ 10 West also testified that when he began negotiating for the property in 1994, he visited Paul Dunteman's office in March to ask about his intentions, but Paul Dunteman was unwilling to talk until West had obtained a sublease and the necessary written consent from the District. During the summer and fall of 1996, while environmental remediators Hydrodynamics and STS were addressing the identified environmental issues, West was also regularly on site doing general clean-up because cars and other debris had been left by "fly dumpers," part of the building had been used as a vehicle "chop shop," and the office had been used as living quarters for a person and some goats and pigs. West recalled at least two other specific conversations with Paul Dunteman in August and October. He told Paul Dunteman that Fortech had executed a sublease which only needed the District's approval and that the Duntemans would have to vacate, to which Paul Dunteman replied he still did not want to move and would not do anything until he had to do it. Regarding the piles of broken asphalt and concrete, which West considered a useless nuisance and referred to as "garbage," Paul Dunteman said, "I guess it is all yours." West had no doubt that the Duntemans would take the "good" material, so in November, West got two estimates to remove the remainder. K-Five's estimate was $960,000. In December 1996, West sold 75% of Fortech to private investors to raise cash. K-Five's president was one of the buyers. During a meeting in West's office in December 1996, West rejected Paul Dunteman's proposal to

continue operating on the property "through the season" and rejected Paul Dunteman's suggestion to move some of his piles so that temporarily both he and West could operate on the property. West responded that he would not "give any ground" and "you have had plenty of time to clear off." Nonetheless, Paul Dunteman "was adamant that he was entitled on some basis *** to finish up his operating season and that he didn't really intend to clear up all the piles." West again asked Paul Dunteman to remove the garbage piles, Paul Dunteman responded the material was "not worth much" and "I guess it is all yours," and West replied that he did not want any of it. Fortech's attorney subsequently sent R.W. Dunteman a demand to vacate and in early December filed Fortech's action for forcible entry and detainer. West was regularly on the property during the next few months and observed that as the eviction case progressed, the Duntemans not only failed to remove their piles of broken asphalt and concrete but continued to add to them.

¶ 11 The record indicates the parties' relationship did not improve. For instance, in a letter dated March 26, 1997 (which was well past the District's notice to cure, notice to quit, eviction filing, and the expiration of R.W.'s written sublease), the Duntemans' attorney asked Fortech to identify the latest possible date and exact areas it needed to occupy in order to begin its operations. The next day, Fortech's attorney threatened to seek sanctions.

¶ 12 West testified that Fortech leased about twice the acreage the Duntemans leased and by March 1997, he directed K-Five to start cleaning up some of this other land. For example, the waste materials and trash the Duntemans piled to the north were causing flooding in the building and were delaying the county approval's of Fortech's operations. West's testimony was substantiated by a civil engineer's plan depicting 5-to-6' piles that would need to be graded to

construct a GFRC curing shed outside the building. K-Five graded there to prepare for the shed, to expand the main building, and to pour a 12' wide concrete pad the length of the building. On the east side of the property, K-Five removed old concrete bins and trash and began erecting a berm out of abandoned railroad ties and other materials that never belonged to the Duntemans. West denied that K-Five used the Duntemans' stockpiles of PGE or CA-6 (crushed rock) to build the berm or disturbed "clean," or "new, raw" materials stored on the west and south sides of the property. K-Five also reduced the height of a decades-old road known as Old Donohoe Road, in order to improve drainage. The materials that K-Five moved off the road were used to expand the base of the existing parking area and to fill holes near Des Plaines River Road, and the remainder went into the berm. K-Five also created a new entrance onto the property and installed new drain tiles. West's statements were supported by various photographs. While K-Five was working outside the building, Fortech's other contractors were working on the building itself to remove asbestos, reroof, rewire, update the plumbing, rebuild the office, and install windows and heating and ventilation equipment. Fortech was contractually required by the May 6th agreement to make these property improvements as a form of rent. Pursuant to this agreement, Fortech also hired civil engineers and architects. Fortech's trial exhibits included checks drawn to its contractors and lawyers between November 1996 and August 1997 and a check and invoice for deliveries of CA-6 coarse aggregate from Vulcan Materials Company in March 1997, which was a base material that K-Five used on the property to facilitate drainage and that the Duntemans were claiming had been converted from their piles once Fortech was granted possession in May 1997. Fortech invested $1.87 million to ready the property.

¶ 13 West testified that in April he decided that instead of paying to haul away the broken asphalt and concrete the Duntemans said they did not want and apparently were not taking, Fortech would, at some point, just move it over to the berm that was on the north side of its parcel. After Fortech was awarded possession on May 22, 1997, he told K-Five to start relocating the Duntemans' waste to the berm. The environmental contaminants that were listed in the environmental study Fortech commissioned had been properly removed and were not incorporated into the berm. A photo West took on June 3, 1997, showed Paul Dunteman's white or silver Lincoln automobile and that the asphalt plant was still on the property. On June 27, 1997, West and Paul Dunteman watched a deputy sheriff tape Fortech's order for possession onto the door of the Duntemans' office trailer, West asked Paul Dunteman if "he was going to get off now," and Paul Dunteman replied, "I guess it's all yours" and then left in his car. Photos that West took on July 8, 1997, indicated the Duntemans had removed the asphalt plant and only some of their material piles. On July 8, 1997, the court granted Fortech's motion to require the Duntemans to remove "all remaining piles of material within 10 days." On July 11, 1997, Fortech's lawyer sent the Duntemans' lawyer a letter reiterating the 10-day deadline and rejecting the suggestion that Fortech wanted to buy any of Duntemans' materials or had become obligated to pay for them. Nevertheless, the Duntemans invoiced Fortech in July, August, September, and October and declined Fortech's invitations to come get the materials. Photos of piled broken concrete mixed with debris were admitted into evidence and West testified they showed that the material was abandoned because it was "too dirty" to use on any State projects. West testified that K-Five removed some of the material in the photographs, but the rest of it was still there,

was of no use to Fortech, had prevented Fortech from using the property to the extent it needed to be profitable, and was part of what Reclamation specifically agreed to remove before West executed the lease. In a letter dated August 14, 1997, Fortech's attorney again advised Duntemans' attorney that Fortech had no use for the poor quality material and that if Dunteman followed through on its threat to sue for taking of this material, Fortech would motion for dismissal and sanctions. In a letter dated November 6, 1997, Fortech told Du-Kane to stop sending its spurious monthly invoices which Fortech had no intention of paying and which would be addressed in its pending litigation.

¶ 14 West testified that during this time frame, Fortech was still submitting plans and requested revisions in order to get District approval, Lemont Township approval, and Cook County permits for building and occupancy. Correspondence substantiated his testimony. By February 1998, Fortech addressed everything it was contractually required to do and capable of doing to begin GFRC production. In April 1998, Fortech received District approval and an occupancy permit and began a limited production line within the existing building. On August 31, 1998, K-Five invoiced Fortech $279,499 for site work done in 1997 and 1998 as Fortech had worked toward getting the occupancy permit. Investor money was running out, so West talked with K-Five about the possibility of removing the Dunteman materials themselves. On November 20, 1998, K-Five estimated there were more than 100,000 tons of waste and it offered to excavate, load, haul, and dispose of it for $8.50 per ton. Accordingly, Fortech continued to pursue its court case against the Duntemans. The material remained there after Fortech's lease expired on April 30, 2005 and was still there when West visited the property just three days

before testifying in February 2010.

¶ 15 On cross-examination, West acknowledged that numerous documents he signed on behalf of Fortech indicated he was the company's "president," even though this was not his official title and he was an employee of the management entity. The Duntemans presence or their remaining stockpiles were not the only hinderance to Fortech's start up. The berm was a barrier to dust stirred up by passing trucks. Fortech did not pay every K-Five invoice. The Duntemans removed a little more than half of the materials K-Five estimated it would cost Fortech $950,000 to remove.

¶ 16 George Krug testified he had been the president of K-Five for the past 43 years and that his company did "raw construction," built roads, operated five asphalt manufacturing plants, and competed with R.W. Dunteman for public jobs. He invested about $1.5 million in Fortech in 1996. He denied ever removing materials from the site or preventing the Duntemans from retrieving their materials. It cost money to load, haul, and unload/spread materials, so it was not cost effective to move materials from site to site. The CA-6 and PGE in dispute were different sizes of rocks used as base materials for roads. Krug could have bought CA-6 or PGE from a quarry for $4.50 a ton in 1997 and it would have cost the Duntemans more than that to relocate its stockpiles to its plant in Addison, given that trucking costs were $60 to $75 an hour, a round trip took about 80 minutes, if there was no other traffic, and it cost about 50 cents to load and 50 cents to unload/spread a ton of material. In fact, it would not have been cost effective for K-Five to haul the material to its own asphalt plant which was just four miles away. Also, Krug could see the material was a "contaminated" mix of asphalt, concrete, dirt, twigs, garbage, "and

whatever," meaning that it fell below the standard for Illinois road projects and was not something he could ever use in his road contracting business. Krug recalled receiving a phone call from the Duntemans on May 27, 1997, about the work that K-Five was doing on the site, but he did not recall the conversation. Krug acknowledged a letter authored by the Duntemans' attorney telling K-Five to stop "removing" Duntemans' stockpiles. When questioned by the District's attorney, Krug said he did not know what Lutz (the K-Five job supervisor) had used to build the berm, but Krug himself would have been willing to use poor quality materials like the Dunteman materials, because this berm was not a structural support.

¶ 17 Mark Alan Sniegowski testfied as K-Five's CFO and said he became familiar with Fortech's finances when Krug was considering investing in the company. Fortech failed because it could not build the facility it needed to get the customers it needed. His invoices were legitimate and were not prepared to bolster Fortech's damage claim. The Duntemans removed about half the materials that K-Five estimated would cost about $950,000 to remove.

¶ 18 Real estate appraiser Michael S. MaRous testified for the Duntemans. The Duntemans were contending the District was not legally entitled to the costs of restoring the property if those costs exceeded the diminution in fair market value caused by leaving the property "as is." MaRous testified he had experience appraising vacant land, District land, and property near the parcel at issue. The parcel was rectangular and essentially level, but the berm running along one entire side was generally 60-to-100' wide and 1,200' long. With or without the berm, the highest and best use for the property was as outside storage of bulk material. The marketability of the property was fair to average because it did not compare well with the

modern, good quality industrial parks in Bolingbrook, Romeoville, and Woodridge, Illinois. This property had only a narrow gravel road, did not provide off-site stormwater detention or retention, was close to "older, heavier *** dirtier" industries, lacked immediate access to public sewage and water, and was at the edge of Cook County, where it was subject to significantly higher taxes than in nearby Will and DuPage Counties. It provided access to the shipping canal and the I-55 corridor that provided truck access to Chicago and New Orleans and to freight trains along the corridor that were bringing products from the West coast. As of September 9, 2009, with the berm intact, the property was worth $1.35 per square foot, or $1,250,000. Without the berm, the useable space increased by 84,000 square feet and the property was worth 1.50 per square foot, or $1,370,000. The difference between these two estimates was $120,000, which was significantly smaller than the costs of removing the berm material. When questioned by the trial judge, MaRous confirmed that the property value increased by about 10% without the berm.

¶ 19 On cross-examination by the District, MaRous said he used the market approach, relying on what he deemed comparable sales and listings, and that although those five properties were somewhat different from this one, they shared similar highest and best uses. Gauging environmental contamination and remediation costs were outside his expertise, so he did not take it into account in his valuation. He thought the berm might be providing flood control and he treated the berm as a "positive" in his valuation. He relied on his personal observations and general estimates rather than an environmental report or a surveyor's measurements of the berm and materials stored on the property. In this valuation, he disregarded the appraisal standard to deduct for a detrimental condition, reasoning that (a) the cost of remediating the berm exceeded

the difference in market value caused by its presence, (b) he could not find any similar impaired sites, and (c) he could only speculate about the actual reduction in rental income and increase in costs. He valued the property as if there were no significant environmental problems, even though the 1996 environmental report listed illegally dumped construction debris that should have been taken to a regulated landfill, he observed this debris on the property in 2009, and a potential purchaser could find the property listed on the Illinois Environmental Protection Agency's webpage of environmental issues. He acknowledged that a $10 million property with a building that needed to be demolished at a cost of $2 million would have a market value of $8 million, but on this particular assignment he did not calculate the cost of remediation.

¶ 20 Patricia McGarr was called by the District as an expert in real estate appraisals. One of her largest clients is Waste Management and she also worked for Allied Asphalt, so she had experience evaluating sites containing stockpiles like this property in Lemont and she considered property value impact to be one of her fields of expertise. She also completed numerous appraisals for the Army Corps of Engineers. She was critical of MaRous' figures and deemed them to be wrong for several reasons. First, he did not adhere to uniform appraisal standards indicating he should deduct not only the cost of getting the property into compliance, but also for the loss of time and the risk of unexpected problems or market resistance even after the detrimental condition was cured. Second, he relied on his personal, substantial underestimate of the size of the berm based on the dimensions of the property instead of the professional engineer's survey that McGarr used that was stated in cubic yards/volume. In McGarr's opinion, no one in the market would classify the structure as a "berm," because that term referred to a

grassy knoll, typically 5' to 6' tall, that acted as a buffer, however, even after it snowed, McGarr could see giant slabs of concrete, rebar rods, and different types of stone protruding out from the pile at huge angles. This was clearly an illegal disposal of construction and demolition debris which had to be taken to a permitted site. Third, none of MaRous' so-called comparables were comparable, because they were not impaired, on navigable water, had a seawall, had a berm, or allowed stockpiling. Fourth, it did not appear MaRous took into account that the existing stockpiles diminished the useable space and posed a risk of environmental liability. Finally, he erred by using the market approach to value this property, because the only proper method under the circumstances was the cost approach. McGarr concluded the accurate market values were $2.75 a square foot, or $2,515,000 if the stockpiled materials were removed and no substantial remediation was necessary and $732,000 if the materials remained, resulting in a diminution of $1,783,000 as of September 9, 2009. She agreed with MaRous' opinion that the highest and best use of the property was for stockpiling materials, but she would also expand to boat storage and repair.

¶ 21 On cross-examination, by Fortech, McGarr stated she knew the District leased its property for what it believed was 8-to-12% of the property value, but her calculations were based on property sales, not leases. She evaluated the property as a whole, rather than considering whether the District could lease just the section of open land next to the seawall and grant an easement to use the road through the bermed area. There was no benefit to having the berm and McGarr considered a fence or landscaping to be better ways to shield the property from traffic or provide security. On cross-examination by the Duntemans, McGarr testified she was not aware

that one of the litigants improved the road, building, and drainage. (The building had since been torn down.) She had taken into consideration the environmental regulations which authorized the temporary storage of waste above-ground until it was recycled and returned to the economic mainstream, however, these were not clean materials and they had been stored longer than the regulations permitted. McGarr agreed there were differences between the Lemont property and the comparables in her report, but said she had adjusted for those differences. The site had been reported as an environmental concern, but no remediation letter had been issued, meaning the site could be considered in compliance.

¶ 22 Paul J. Dunteman testified as an officer of the Dunteman companies that he reached a settlement agreement with his landlord, Dorac, which excused rent payments from 1989 until Dorac brought the building into compliance with local codes, but Dorac never gave him proof that it satisfactorily completed the repairs. Near the end of his lease in 1996, he began negotiating to stay, but in December 1996, West said he was the new lessee. Paul Dunteman denied giving the stockpiles to West or giving West or K-Five permission to buy, remove, or move them. During "the Spring" of 1997, the Duntemans were consuming and/or relocating their stockpiles. In May and June, Paul Dunteman saw K-Five move some of the Duntemans' CA-6 and PGE and haul more construction debris onto the site. On June 2 and 3, 1997, he took photographs that showed K-Five's "front end loaders, small dozers, [and] trucks," that Duntemans' materials had been contaminated by "fly dumping," that some of Duntemans' broken asphalt and concrete piles had been moved closer to a pile of CA-6, and that the berm was being built. In late June 1997, the appellate court declined to stay Fortech's order for possession and

the Duntemans brought an emergency motion informing the court that they had ordered a crane to dismantle and move the asphalt plant and road-building equipment, had applied for a permit to transport the property over the streets, and had people standing by to do the work. On July 1, 1997, the Duntemans began disassembling the plant. On August 1, 1997, they invoiced Fortech $304,754 for 30,000 tons of CA-6, 18,000 tons of PGE, and 360 tons of sand "that were taken" by K-Five, but decided not to charge for any broken asphalt because it had minimal value until it was crushed. The invoiced rate of $5.85 per ton was customary and invoiced quantities were accurately based on inventory taken at the end of the 1996 May–to-October work season. Fortech never paid the invoice and so for the next four years the Duntemans sent monthly invoices and added 24% annual interest. The broken concrete, broken asphalt, garbage, and an old car and boat that could be seen in photos taken in 2000 and 2009 were not the Duntemans and must have been brought in by fly dumpers after the Duntemans left.

¶ 23 On cross-examination by Fortech, Paul Dunteman acknowledged receiving written notices from Reclamation on June 2, 1993, and July 26, 1993, indicating Dorac was in default and R.W. Dunteman had the option to cure and remain on the property, and that on February 1, 1994, he received Reclamation's notice to quit and demand for immediate possession. This document or these documents warned Dorac and R.W. Dunteman they were contractually obligated to "correct all decay, detrius, junk and refuse on the land, *** and disrepair of building(s)," and that R.W. Dunteman's two subtenants, Triple Construction and Fleet Equipment Center, had to "vacate immediately" and "take with them *** all junk, refuse, property, persons or things each of them have brought or suffered to be brought there." Paul Dunteman also

acknowledged that his lease obligated his companies to "leave the premises in a good, clean, and orderly fashion whenever *** [the] lease terminated," but they overstayed, took only some of their materials from the south side of the property, and never took the "large piles of broken asphalt and broken concrete" they steadily accumulated north of the building throughout their tenancy. Also, when bidding on government road-replacement projects, the Duntemans would include the costs of hauling away and dumping the old road materials, but he considered the "tipping fees" charged by permitted dumps to be "expensive," and said the Duntemans could avoid paying tipping fees by dumping the material on land they already had. The 90,000 tons of broken asphalt and 70,000 tons of broken concrete that the Duntemans left behind was unmarketable and "basically worthless" until someone went to the expense of crushing it into much smaller pieces. Crushing the material would "save [the Duntemans] all of 75 cents from buying it from somewhere else" and so they deliberately left the asphalt and concrete behind, even though it was "abundantly clear" that Fortech wanted it removed. The Duntemans' operations were profitable in 1997.

¶ 24 On cross-examination by K-Five, Paul Dunteman testified that nothing prevented him from removing materials before the sheriff posted the order for possession. Also, he took photographs of K-Five moving materials on the property that the Duntemans were contractually obligated to leave in good, clean and orderly condition. He did not tell K-Five to stop even though he knew the job supervisor, Lutz, and had more than one occasion to speak to him directly. It would have cost $4.25 to $4.50 per ton for the Duntemans to remove the materials at issue and it would have taken four months to do the job. He took the stance that once K-Five

touched any bit of the large broken asphalt and broken concrete, those materials no longer belonged to him, but he did not take the same stance regarding his sand and he took what was left after K-Five used about 360 tons of sand. Sand is a necessary component of asphalt.

¶ 25 On cross-examination by the District, Paul Dunteman acknowledged getting a State permit to make and recycle asphalt on the District property but not to dump construction or demolition debris there, that he avoided paying tipping fees, and that the debris the Duntemans did not recycle into asphalt production would have to be taken to a permitted dump. The lease he negotiated in 1986 expressly authorized crushing and recycling concrete and stockpiling road-building materials, but it also expressly required the removal of any Dunteman materials at the expiration or early termination of the lease and it obligated the Duntemans to "observe, heed and perform" all the terms imposed by the prime lease. He understood this meant he had to remove all the materials when he surrendered possession of the property. At no time, however, did he or anyone else at his companies remove or ask for the removal of what the Duntemans piled on the property. He was concerned he might incur penalties or liability for dumping, but he never did anything about it. Furthermore, he did not use any security measures or try to stop people who occasionally trespassed onto the property and fly dumped from their passenger vehicles or used larger equipment to leave "a load or concrete or asphalt." In fact, he would "talk to these people" and "allow them to go ahead and fly dump on the property," reasoning, "I always felt they were not doing any damage to my equipment, I had no reason to really interfere as such, but that was going on throughout the years I was there." When shown photographs of the piled waste as it appeared in 1997 and 2009, the only change he noticed was the natural growth of vegetation.

The large piles of broken concrete and broken asphalt left on the property were all dumped by the Duntemans; the garbage was brought in by fly dumpers. When he saw K-Five moving the Duntemans' materials into the berm in 1997, he inspected it several times and saw that the materials in the berm could not legally be left above-grade; he knew then that environmental regulations allowed construction debris to be temporarily stored above-grade only until it was recycled.

¶ 26 After a break and on redirect examination, Paul Dunteman testified that his companies removed all their broken concrete by July 8, 1997, and that he had misspoken when he testified that he never asked anyone to remove debris from the site. He had ordered that the broken concrete, sand, asphalt grindings, and CA-6 be trucked to the Duntemans' facility in Addison.

¶ 27 George Ragain was a retired heavy equipment operator who worked for R.W. Dunteman between 1970 and 1987 and for K-Five for about one year beginning in July 1996. Under Lutz's supervision, he spread out the materials at issue. K-Five never removed any materials from the site. He could see that the piles of PGE and CA-6 were dirty, not in the condition they would be when purchased from a quarry, and denied that K-Five added any dirt or foreign material to the Dunteman piles. One of Paul Dunteman's two sons filmed his work but did not speak to Ragain. The berm was built from various materials on the property and then covered with dirt hauled in for that purpose. The parking lot and road were graded with PGE and CA-6 from the property and additional CA-6 that was trucked in, and then more stone was hauled in from a quarry to cover this road base. Ragain's personal log book showed that his first day on

the site was April 23, when he worked 9 hours moving dirt so standing water could drain and his last day was July 30, when he spread topsoil on the berm. When the Duntemans did come in to remove their material, they worked around the clock, seven days a week, and he saw them use about 100 trucks on the day shift.

¶ 28 John F. Lutz worked as a K-Five project superintendent for 14 years, simultaneously supervising multiple projects in Cook and DuPage Counties until leaving the company in 2001. Prior to that he worked for the Duntemans for seven years and left on good terms. When he first went to the Lemont property in April 1997, it "looked like a bomb had hit it," it "was a mess," and there were piles of railroad ties, dirt, broken concrete, and broken concrete "everywhere." He directed the construction of the berm, parking lot, roadway, and storm water service. K-Five did not disturb the large pile of "clean" broken concrete, curb, and sidewalk pavement. K-Five did not touch the pile of sand that had been there so long that grass and weeds were growing on it; eventually Dunteman hauled the sand away. Based on Lutz's 46 years experience, it was his opinion that the small piles of CA-6 and PGE were not clean enough to be crushed for use in government road construction. The material was dirtier than any he ever used while working for the Duntemans or K-Five. He dug into the material to inspect it and photographed what he found because he knew the rains wash down the outside layer of a pile and make the pile appear cleaner than it actually is. Excessive dirt or fine materials would make it impossible to build a compact, stable base for a road or parking lot and the material would remain very expansive with the weather. He needed CA-6 or PGE to construct Fortech's storm sewer system around the building, but he was unwilling to use the Duntemans' materials, because the Corps of Engineers

had jurisdiction over the waterway and would require certified materials. The Duntemans did not take those piles either. K-Five had to move them to make way for the new drainage system. K-Five also brought in a "rock breaker" and a big hoe to dig a trench for the storm system, and intended to crush the resulting chunks of limestone along with the Duntemans' materials, but he got only as far as piling up 125 tons of limestone before West suspended the job. Also, there was a large junk pile perhaps 600' long and 25' tall which included both concrete and asphalt and it covered the area Fortech wanted to use for its building addition. Using end loaders and bulldozers, K-Five used the "good" PGE and CA-6 as a base for the northeast corner of the parking lot and the "bad" material for the berm, and then hauled in clay and topsoil to cap the completed portion of the berm. Once in May or June, Paul Dunteman stopped by to chat with Lutz and never gave the impression K-Five should not be using the Duntemans' PGE or CA-6. The Duntemans hauled off their asphalt plant and materials from the west of the building, leaving behind holes and ponding water, so Lutz had to tell his bulldozer operator to level the surface in order to remedy the poor drainage. Lutz disagreed with the amounts of PGE and CA-6 that the Duntemans were claiming had been left on the property. His records indicated only 124 tons of CA-6 and 12,840 tons of PGE. West suspended operations before Lutz finished preparing the whole site to be paved; only a small spot in front of the building was paved for use to park cars. The substandard base of the parking lot would require the use of extra asphalt.

¶ 29 On cross-examination by Dunteman, Lutz "believed" he recalled that West told him the berm was needed for wind protection. On cross-examination by the District, Lutz said that there were still many undisturbed piles of Dunteman "junk" on the land.

¶ 30 Attorney Susan Morakalis testified that she began working in the District's legal department in 1997, after Fortech's sublease was approved. Shortly before the expiration of the prime lease and subleases in 2004, she reviewed the entire file to determine tenant liability for vacating and cleaning up the property and became concerned about their compliance with the environmental remediation clauses because there was obviously so much material piled on the property that it would take a very long time to remove it. The District paid $37,386 for a preliminary environmental report and $35,877 for a follow up report and was claiming those amounts from the Duntemans.

¶ 31 On cross-examination by Fortech regarding the environmental reports, Morakalis testified the only issue remaining on the property was the piled debris. On cross-examination by the Duntemans, Morakalis testified Fortech paid $91,000 for a permit to remain on the property for an extra year, that one of reasons the permit was issued was so Fortech would remove "the materials" from the property, but this was not stated in the permit. Morakalis' opinion that Fortech agreed to remove "the materials" was based on her interpretation of Reclamation's 1996 agreement with Fortech and the District's 1997 consent to Fortech's sublease.

¶ 32 Attorney Carlton Lowe testified that he managed the District's real estate department and supervised Morakalis and the other attorneys. In 1996, while in a less senior position, he reviewed and approved Reclamation's proposed District consent to sublease to Fortech. This consent was coupled with an amendment to the lease, which was an unusual measure, but the District wanted be certain that the lessee understood that the paragraph imposing certain responsibilities on the subtenant did not relieve the lessee of the same responsibility. The

District knew at the time about the debris accumulated on the property, had become increasingly concerned and diligent about environmental issues on its land, and wanted to reinforce the tenant's obligation to clean up. Some people referred to the construction debris, asphalt and other materials left on the property as a "berm," but Lowe did not use this term because debris was debris even if it was reconfigured. The District did not authorize the Duntemans, Fortech, or any other party to leave without removing the piled debris. The District was aware that Fortech contemplated relocating some of the debris in order to use the land, but considered the berm to be a temporary solution, and thought it would be ludicrous to use public land to permanently bury or deposit a private party's debris. The District, however, would not get involved in whatever the tenants worked out amongst themselves during their temporary possession of the property, other than to say that upon the expiration of the lease, all the debris had to be removed.

¶ 33 When cross-examined by Fortech, Lowe testified that Fortech did not assume Reclamation's lease and that Fortech's sublease expired one day before Reclamation's lease expired on April 30, 2004. When cross-examined by the Duntemans, Lowe testified that the general permit that the District gave Fortech in April 2004 to use the Lemont property for an additional year for the express "purpose of manufacturing concrete molds and addressing certain environmental conditions" (article 1.01) required Fortech to obtain a performance bond (article 5.02), "remove or cause to be removed, any and all debris on the premises described in this Permit" and "yield up said premises to the District in as good condition as when the same was entered upon by Permittee" (article 7.06). Fortech did not remove the berm, but the District took no action on the bond. When questioned directly by the trial judge, Lowe agreed that the

District's consent to Fortech's sublease from Reclamation "deals with specific items and specific parties" and "when it really zeros in on something it zeros in on the party it's talking about." Lowe also acknowledged under the judge's questioning that in paragraph 5, Reclamation agreed it was liable for the remediation of specific items; that paragraph 6, which stated "Reclamation agrees that it will remediate all environmental conditions," was specific to Reclamation and was not a reference to Fortech; that paragraph 7 "essentially provides that Fortech is going to cooperate with Reclamation", that paragraphs 8 and 10, which stated "Reclamation agrees to *** undertake any corrective actions to address on-site contamination identified by said sampling and analysis" and "Reclamation hereby agrees that the subleased premises and the leased premises shall remain free of any environmental conditions which would impose health hazards or impair property values or violate any *** statutes, ordinances, rules or regulations" were specific to Reclamation only. Lowe offered, "I guess the concern was we didn't want to leave the impression that by consenting to *** [the] sublease we were letting Reclamation off the hook."

¶ 34 On redirect by the District, Lowe stated the consent referred to the sublease and that paragraph 4 of the sublease provided for lessee Fortech to "observe, keep and perform all the covenants and agreements to be observed, kept and performed by" lessor Reclamation. Further, the purpose of the statement in paragraph 7 of the consent that Fortech cooperate with Reclamation's efforts to environmentally remediate the subleased premises was "to try to merge the two documents to make sure the site would get cleaned up," the District did not want Fortech or Reclamation "standing in the way" of the other, and the District wanted to "minimize the chance we get caught in a finger-pointing between the two parties," or "a lawsuit."

¶ 35 When questioned further by Fortech, Lowe said the District interpreted paragraph 4 of the sublease to require Fortech to clean the property.

¶ 36 Allen Schmidt testified as an expert in environmental remediation design and costs and the author of the phase II site study performed in July 2005 and updated in October 2007. According to Schmidt, State environmental rules and regulations required all the broken concrete, broken asphalt, and other discarded material on the site be taken to a permitted landfill. This would cost $1.6 million, $6.8 million, or $13.2 million, depending on whether testing revealed it to be clean fill, special waste, or hazardous waste. There were no ground water issues. When questioned by the Duntemans, Schmidt said there was no environmental reason to remove the berm and it would cost about $698,000 to simply grade the site with the materials. However, on redirect by the District, Schmidt said that even if material was crushed on site, there would be too much of it to spread over the Fortech property.

¶ 37 As we summarized above, this testimony led the trial judge to rule in favor of the District regarding its contractual right to be given "clean" property at the end of the Duntemans' possession. Also, even though Fortech was part of the chain of sublesees, it was the Duntemans who brought the material at issue on to the site, it was the Duntemans and to some extent Reclamation who were liable for removing it, and it was the Duntemans who would pay the attorney fees and costs incurred by Fortech and the District.

¶ 38 On appeal, the Duntemans state that their post-judgment settlement agreement with the District entitles the Duntemans to assert the District's claims against Fortech and Reclamation. The Duntemans then argue "for the District," that each lessee, including Fortech,

was contractually obligated to return the property to the condition it was in when Reclamation took possession under the prime lease, and so Fortech should be held liable for the $1.2 million expense of remediating the Duntemans' debris. Thus, apparently, the Duntemans are trying to overcome the trial judge's deliberate and clear findings that Fortech was not liable for undoing the Duntemans' impact to the property:

> "Judgment in favor of [the District] *** and against R.W. Dunteman Company, Du-Kane Asphalt and Reclamation Construction Corporation for breach of contract/removal and restoration of the site. Damages are assessed at $1,200,000, joint and several, after consideration of the opinion testimony, and the basis thereof, concerning cost of removal, the date of said opinion and the various dates relevant to the lease and defendants obligations thereunder;
>
> ***
>
> "Judgment in favor of Fortech and against [the District] *** for any claim related to breach of contract/cost of removal and remeditation of the site due to the debris placed thereon by Dunteman."

¶ 39 Fortech responds to the merits of this opening argument, but contends the argument should not be resolved on the merits because neither the District nor the Duntemans may assert it here. Fortech informs us that the District was fully compensated by its settlement with the Duntemans, argues a party is entitled to but one compensation for an injury, points out that the Duntemans did not appeal this issue in their own name, and concludes the Duntemans should not be permitted to pursue "the District's" interests.

¶ 40 The Duntemans do not deny paying the District's damage award in full. Instead, they attempt to redirect our attention to contract language and testimony they believe supports "the District's" appeal. We construe the Duntemans' omission as concessions that the District's claims regarding the remediation of its property were fully satisfied by payment from the Duntemans, that the District's entitlement to any damages were extinguished, and that "the District's" appeal against Fortech is moot. Accordingly, we dismiss this portion of the appeal as moot. *La Salle National Bank v. City of Chicago*, 3 Ill. 2d 375, 378 (1954) (where a reviewing court has notice of facts which show that only moot questions are involved, it will dismiss the appeal as moot even though such facts do not appear in the record).

¶ 41 All of the Duntemans' remaining arguments are based on their own rights. The Duntemans next contend the trial judge erred in awarding Fortech, as the assignee of Reclamation's lease rights, $102,600 for "rent" accruing for the period beginning January 31, 1994 and ending October 31, 1996. The Duntemans contend reversible error occurred because (a) several years before the trial, at a partial summary judgment proceeding on December 22, 2006, a different judge correctly ruled that Fortech could not collect back rent from R.W. Dunteman for this time period because it was not in privity of contract with R.W. Dunteman; (b) during the trial in 2010, Fortech's attorney told the judge his client was not seeking rent accruing before November 1, 1996, however, (c) the trial judge *sua sponte* addressed the issue in the judgment order without giving the Duntemans notice and opportunity to address it, and (d) awarded back rent to which Fortech had no rightful claim. The Duntemans cite *Peterson* and *Stewart* for the proposition that the American judicial system affords a party notice and

opportunity to respond to substantive issues and that *sua sponte* rulings violate these fundamental rights. *Peterson v. Randhava*, 313 Ill. App. 3d 1 (2000) and *Stewart v. Lathan*, 401 Ill. App. 3d 623 (2010). They cite *Wilson-Broadway Building Corp. v. Northwestern Elevated R.R. Co.*, 225 Ill. App. 3d 306, 312 (1922), for the proposition that it is well-settled in Illinois that no privity of contract exists between a sublessee and the landlord, and thus, the landlord's only remedy against a sublessee is eviction.

¶ 42 Fortech responds that the Duntemans are misstating the record about what was at stake at the trial and compounding their error by failing to disclose that when they raised a similar argument at a post-judgment hearing regarding attorney fees on May 27, 2010, the trial judge reiterated the basis for the damage award and emphasized that it was not merely for back rent. Fortech contends due process was observed, there was privity of contract, and the manifest weight of the evidence supports the damage award. After careful review of the record, we find Fortech's contentions persuasive.

¶ 43 The trial judge's findings of fact are subject to reversal only if they are manifestly erroneous. *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 812 (2006) (on appeal from a bench trial, findings of fact will not be disturbed unless manifestly erroneous); *Schatz v. Abbott Laboratories*, 51 Ill. 2d 143 (1972) (use of the manifest error standard when reviewing a bench trial is so firmly established as to require no citation to authority). Manifest error occurs when all reasonable persons would find the opposite conclusion is clearly apparent. *City of Chicago*, 364 Ill. App. 3d at 812; Black's Law Dictionary 563 (7th ed. 1999) (manifest error is one that is plain and indisputable). See also *Board of Education, School District No. 90,*

Cook County, Illinois v. United States Fidelity & Guaranty Co., 115 Ill. App. 2d 416, 425 (1969) (the "manifest" weight of evidence means the "clearly evident, plain and indisputable" weight of the evidence). Further, "the credibility of the witnesses and the weight to be accorded their testimony is a matter solely within the province of the trial court" and will not be disturbed on review. *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1019 (1996).

¶ 44 Fortech cites West's testimony that pursuant to the May 6, 1996, agreement amongst Reclamation, Fortech, and Dorac, Fortech was required to pay Reclamation $104,240.51 to cure the defaults under the Ramco-Dorac-Dunteman sublease, receive the assignment of Reclamation's rights against Dorac and R.W. Dunteman, and gain the right to sublease the property. Section 5 of the agreement indicates this amount was for back rent, back taxes, legal fees, and court costs related to the breaches of the subleases and West testified this amount increased to $120,853.36, due to additional months of unpaid rent and additional litigation costs to evict the sublessees. Also, the District's consent to Fortech's sublease was conditioned on Reclamation paying $13,500 attributable to R.W. Dunteman's sublease. A closing document issued by Chicago Title and Trust on November 5, 1996, substantiates that Fortech's total payment to Reclamation exceeded the amount the Duntemans are challenging on appeal. Thus, there is sufficient record evidence to support damages of at least $102,500 pursuant to the contract.

¶ 45 Furthermore, the Duntemans' contention that they had inadequate notice and opportunity to address these claims at trial is baseless. The 2006 partial summary judgment order the Duntemans rely upon indicates there remained material questions of fact about the

Duntemans' liability to Reclamation (Reclamation assigned its rights to Fortech) for possession as alleged trespassers between January 1, 1994, and December, 1996, and the Duntemans' liability to Fortech for possession as trespassers after December 16, 1996. Thus, even the judge who entered the 2006 order believed it left open grounds for awarding damages from the Duntemans. The partial summary judgment also indicates there were questions of fact about the Duntemans' liability to Fortech for failing to "vacate the premises in a good clean and orderly condition as provided in the various lease agreements," *i.e.*, for breach of the contract. This order was attached to Fortech's pretrial "Outline of Outstanding Issues with Respect to Fortech's 6th Amended Complaint." More importantly, though, at a pre-trial conference, Fortech plainly stated it would be arguing as damages the funds it paid Reclamation "up front just to get into the sublease, there was *** rental payments, there was the payment of taxes and other stuff." During closing arguments regarding damages, Fortech referred to the Chicago Title and Trust closing document and "the money Fortech had to pay to get the lease." During their own closing arguments, the Duntemans acknowledged Fortech was seeking funds that Fortech paid to cure defaults that occurred under the prior lease or leases. More specifically, during closing arguments, the Duntemans stated there were a few ways to calculate Fortech's damages and "[i]f the amount that is sought by Fortech includes the cost of curing the old rent, *** [we know] they had to pay *** in Paragraph 5 an additional $104,240 to cure the defaults under the old lease." Continuing, the Duntemans told the trial judge "[i]t is arguably possible that that should be included in the amount of the rent to be paid [by the Duntemans as damages], but it's not [fair to award] the full 104,000." Instead, the attorney asked the judge to conclude, "the total [back] rent

[award] *** would be $16,351, *** I think Your Honor actually called it once, I think, like the cost of admission," "That was the cost that they [(Fortech and West)] had to pay to get this lease." In other words, the Duntemans admitted Fortech could be awarded damages for the Duntemans' continued use and occupancy of the property after January 31, 1994, while in breach of contract. The report of proceedings indicates the Duntemans challenged only the amount of damages to be awarded, not the award itself. The record does not support the Duntemans' contention that while deliberating the trial evidence the judge *sua sponte* decided to award damages which Fortech had not requested at trial and was not entitled to receive.

¶ 46 Moreover, the Duntemans would like this court to conclude that the trial judge found the Duntemans liable solely for rent damages. However, (a) the order they are challenging states the damage award is due to "breach of contract/non-payment of rent," and (b) when the Duntemans argued at the post-trial hearing that the judge has mistakenly awarded rent, the judge replied:

> "No. I said it was for breach of, contract, slash, nonpayment of rent. I awarded that specific dollar amount to Fortech as the assignee of Reclamation. In other words, if Reclamation had been in court and participated, based on the evidence I heard and considered, I would have found Dunteman breached the contract and damaged Reclamation as a result of that breach."

Thus, the record is clear that the damage award was not simply for rent due under the written sublease.

¶ 47 Also, we are perplexed by the statement that the Duntemans cite in the 2006 partial

summary judgment order to the effect that Fortech's lack of contractual privity with R.W. Dunteman meant Fortech was not entitled to rent from that company for 1994 to 1996. The trial judge wrote: "The Court finds that no privity of contract [exists] between Fortech and RWD, so claims for rent under such lease are precluded as a matter of law under *Ford v. Jennings*, 70 Ill. App. 3d 219 [(1979)]." We do not understand the statement, because, there is a clear chain of lease and consent contracts, as well as Reclamation's undisputed written assignment to Fortech of all rights in Reclamation's then-pending 1994 eviction suit against the Duntemans. Even if Fortech had no other connection to the land or Reclamation or the Duntemans, the written assignment of Reclamation's rights as a landlord allowed Fortech to step into Reclamation's shoes and enforce those rights. There was a contractual connection or privity which entitled Fortech to pursue R.W. Dunteman for its possession of the property between 1994 and 1996 (as well as its failure to yield up the property in good, clean, and orderly condition at the end of its lawful possession). We do not understand the reliance on *Ford*, which indicates an oral sublessee could not rely on an exculpatory clause in a written lease. *Ford*, 70 Ill. App. 3d at 223. It is one of many cases the Duntemans have cited throughout their brief in which a tenant who is not a party to a valid written contract, either because they orally subleased or because the written contract lapsed, attempts to rely on a contract clause which would relieve a proper tenant of liability for fire damage or other injuries beyond its control. *Ford* has no apparent relevance to the current case. *Ford*, 70 Ill. App. 3d 219. In any event, what the judge concluded in 2006 was based on arguments and facts presented at the time and the judge's particular thought process was not binding on any subsequent court. At the post-judgment hearing regarding attorney fees, the

trial judge expressed sentiments similar to our own regarding the extensive record that had accumulated over the years and includes the 2006 partial summary judgment order. After discussing the legal grounds for his damage award to Fortech, the trial judge remarked:

> "I stated I think more than once, I was going to rule based upon what I heard from the witness stand and the documents admitted into evidence. I was not going to deal with 14 or 15 years of briefs, motions[,] arguments and other things. So with all due respect to [the prior judge], I don't know what he did and I don't want to get into why he did what he did, and I know you're not asking me to."

¶ 48 Thus, on the one hand, Fortech has cited trial testimony, various documents, and oral arguments that support the ruling at issue, including closing arguments in which the Duntemans appear to dispute only the amount of damages they owed for back rent and other violations of their sublease. And, on the other hand, the Duntemans have not identified or discussed any specific documents or oral arguments that led the judge presiding over the partial summary judgment motions in 2006 to conclude there was a lack of contractual privity. We do not understand the basis or intention of the 2006 ruling that the Duntemans rely upon. What we are certain of is that this has been protracted litigation involving multiple parties, changing attorneys, evolving discovery and legal theories, different judges, and many interlocutory orders. It is not our role as a reviewing court to guess at or search the record in order to understand the numerous theories that have been argued over the years or the significance of the partial, interlocutory ruling in 2006. It is not our role to develop the appellants' argument in order to dispel it. We conclude that the Duntemans have failed to meet their burden as the appellants to

substantiate that the trial judge manifestly erred in awarding damages to Fortech.

¶ 49 The Duntemans next contend it was wrong to award Fortech $510,000 for attorney fees and costs when (a) there was no contractual privity between them, (b) even if there was privity, the contract did not shift attorney fees, or (c) even if the contract shifted attorney fees, the trial judge did not account for and deduct litigation fees attributable to non-contract work such as advocating Fortech's trespass claims or defending against the District's breach of lease claims and Du-Kane's conversion and unjust enrichment claims. The Duntemans rely on the general rule that litigants ordinarily bear their own attorney fees and litigation expenses, unless there is a contract provision, statutory right, or equitable basis for making an exception. *DeFontaine v. Passalino*, 222 Ill. App. 3d 1018, 1033 (under the American Rule, each party must bear its own litigation costs and attorney fees); *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987) (provisions in contracts for awards of attorney fees are an exception to the general rule that the unsuccessful litigant is not responsible for his or her opponent's fees). Even when there is a contractual right to attorney fees, the trial judge awards only reasonable charges for reasonable services. *Kaiser*, 164 Ill. App. 3d at 983. The party seeking fees bears the burden of presenting sufficient evidence from which the trial judge can render a decision as to the reasonableness of the request. *Kaiser*, 164 Ill. App. 3d at 983. Fortech counters that it was contractually entitled to its award, the Duntemans failed to contest the necessity or amount of even a single entry in the 825 detailed time records that supported the fee petition and instead gambled on the argument that Fortech was not entitled to any award, and, in any event, the judge reduced the award from the $615,945.37 that Fortech requested.

¶ 50 We will reverse a fee award only when we conclude that an abuse of discretion has occurred, meaning that, in view of all the circumstances, no reasonable person would have taken the view adopted by the trial judge. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 51 (2010). We point out that the Duntemans' argument does not acknowledge that the trial judge explained his rationale for shifting the attorney fees and costs. On May 27, 2010, the judge read into the record the series of contracts (leases, assignments, and consents), specified the paragraph or section numbers, and quoted the specific contract language that led him to conclude Fortech was entitled to collect from the Duntemans the attorney fees and costs Fortech incurred in enforcing the lease agreements. The Duntemans seem to be advocating, however, that unless parties execute the same contract, there is no privity. The Duntemans do not accept that the terms of the prime lease authorizing recovery of attorney fees and costs were carried over by the subsequent chain of documents which put Fortech and the Duntemans on opposite sides of this case.

¶ 51 The Duntemans rely on *Troccoli v. L & B Products of Illinois, Inc.*, 189 Ill. App. 3d 319 (1989), arguing it concerns analogous circumstances and indicates the Duntemans were not in privity with Fortech and were not subject to the contractual obligation to pay attorney fees. In our opinion, the case is readily distinguishable. The tenant in *Troccoli* stayed beyond the term of its lease, but paid rent, creating a tenancy at sufferance. *Troccoli*, 189 Ill. App. 3d at 322. The building was then destroyed by fire. *Troccoli,* 189 Ill. App. 3d at 320. A tenant at sufferance "has only naked possession; he has no privity with the landlord." *Troccoli*, 189 Ill. App. 3d at 322. Accordingly, the tenant was not protected by a provision in the expired lease which would

have relieved the tenant of liability for fire damage or other injuries beyond its control. *Troccoli*, 189 Ill. App. 3d at 322. Essentially, the tenant could not benefit from its status as a tenant at sufferance. The Duntemans, however, did not pay rent and create a tenancy at sufferance – they stopped paying rent long before the lease expired. Also, the Duntemans are not trying to enforce a contractual term – they are trying to avoid its enforcement by the landlord's assignee. And, finally, *Troccoli* concerned an exculpatory clause for injury by fire rather than what is at stake here. *Troccoli*, 189 Ill. App. 3d 319. We do not find the case relevant. It does not support the Duntemans' argument that they are not obligated to pay Fortech's attorney fees.

¶ 52 Furthermore, we have reviewed the Duntemans' written response in opposition to the fee petition and agree with the trial judge's observation that the Duntemans did not "attempt to contest the amount or reasonableness of the petition, relying, rather, on the general position that Fortech is entitled to nothing under the facts, testimony and law applicable to this case." Thus, the Duntemans waived objection to any specific fees or costs and left it entirely to the judge to determine reasonable attorney fees and costs after 16 years of litigation. The Duntemans nonetheless now complain "the trial court utterly failed to account for the myriad fees Fortech expended on [non-contract theories of relief]." We are not persuaded that it was an abuse of discretion for the trial judge to conclude, "After due consideration of the nature and extent of the litigation, the implied covenant of good faith and fair dealing, and mindful of the Court's duty to ensure a fair and just result for all parties, the Court finds attorney fees and costs in the amount of $510,000 due Fortech."

¶ 53 The Duntemans next argue Fortech, West, and K-Five converted Du-Kane's raw

materials or were unjustly enriched by their use, however, the trial judge erroneously held that Du-Kane abandoned materials of only nominal value and failed to offer credible evidence of the quantity that was taken. The Duntemans also contends that their previous appeal should have foreclosed certain arguments from K-Five and Fortech regarding the conversion claim. We disagree.

¶ 54 To begin with, the interlocutory appeal was from a summary judgment ruling based on purportedly undisputed facts, when there was actually considerable disagreement about the facts. As we noted above, the judge who ably conducted the bench trial in 2010 was aware of the age of the case, that various parties, attorneys, and judges had been involved in the proceedings, that there were various claims, crossclaims and defenses, and that a considerable number of arguments and interlocutory rulings had been entered over the years. All of this resulted in discrepancies between the parties' positions at the summary judgment proceedings in 2005 and their trial presentations in 2010. At the outset of his memorandum opinion and judgment order, the trial judge pointed out, "While the Court is cognizant that earlier judicial rulings set the stage for this [post-trial] memorandum and judgment order it must be emphasized that this decision is based upon the record at trial." The judge acknowledged the interlocutory appeal and correctly noted:

> "This [circuit] court did not, at the time of its earlier order, have the benefit of sworn testimony or the opportunity to observe the witnesses' demeanor and manner while testifying or to judge their credibility and weigh the testimony in light of all the evidence, both testimonial and documentary. A trial is a superior

> method of resolving these issues because it provides context and perspective in the fact finding process. This is especially true in this case."

Moreover, the interlocutory appeal addressed the prior judge's conclusion of law – not conclusions of fact – that K-Five could not be held liable for conversion because it acted merely as an agent of Fortech and K-Five's counterargument that it could not be held liable because the Duntemans no longer had legal possession of the property when K-Five began moving some of the material piles. This appellate court's factual statements were not binding on a trial court and were subject to adjudication on remand. *Zokoych v. Spalding*, 84 Ill. App. 3d 661, 666 (1980). In addition, we specifically "remand[ed] the cause with directions to reconsider the [conversion] claim in light of our findings [of law], and, if necessary *** conduct further proceedings to resolve any questions of fact regarding the claim."

¶ 55 Furthermore, the record supports the trial judge's rejection of the claims of conversion and unjust enrichment and his conclusions that Du-Kane abandoned materials that had only nominal value and failed to put on credible evidence of the quantity that was taken. The Duntemans emphasize that their possessory rights were still in effect when Fortech directed K-Five to move some of the stockpiled materials to the drainage system, parking lot, road, and berm. There was, however, considerable, credible trial evidence that the Duntemans never intended to remove all the materials that they dumped on the property over the course of a decade, that they retrieved nearly all the materials they deemed valuable and cost-effective to transport, and that the materials that were redistributed on the property were "dirty," substandard quality and were hindering Fortech's ability to use the land pursuant to its lease. The Duntemans

also emphasize the statement in the 2005 appellate decision that the raw construction material that Du-Kane piled on the property "ceased to exist" as early as May 23, 1997, while Du-Kane still had possessory rights to the land. This statement, however, was based on the facts as they were presented to this appellate court at the time and it was subsequently shown at trial that there were numerous piles of what could be considered raw construction materials. The Duntemans then point to correspondence and motions they generated in March and May 1997 to protect their purportedly valuable materials, such as their attorney's letter asking whether Fortech knew of any potential buyers, and they argue that Paul Dunteman verbally demanded that K-Five cease-and-desist its grading and berm-making activities on the property. The manifest weight of the evidence suggests that the Duntemans' letters and motions were merely posturing about materials that the Duntemans knew were more of a liability than an asset – there were extensive piles, they were of dubious quality, and it was undisputed that it would have been more expensive to gather, haul, and unload them at the Duntemans' facility in Addison than it would to buy new material from a quarry. In fact, there was so much material that K-Five's back hoe operator, George Ragain, testified the Duntemans worked around the clock with 100 trucks removing material for a week, yet the environmental remediation expert, Allen Schmidt, testified there was still so much material heaped on the site that it could not be simply crushed and spread over the 16 acres. Paul Dunteman admitted that the piles his companies left behind were "basically worthless" unless they were crushed into much smaller pieces and that he and his brother deliberately left it behind, despite having a contractual obligation to leave the District's premises "clean" and despite it being "abund antly clear" that Fortech wanted the material removed.

Furthermore, Paul Dunteman could not recall at trial that he made a verbal demand that K-Five stop its work. Also, the K-Five employees that he could have spoken to, Lutz (the job supervisor) and Ragain (the equipment operator), both testified to the contrary. Accordingly, we conclude the manifest weight of the evidence supports the finding of abandonment of essentially worthless materials and the finding of a failure to put on credible evidence of the quantities of materials that Fortech moved about the property. The trial judge did not err by rejecting the Duntemans' claims of conversion and unjust enrichment. We could stop our analysis here, but we will also respond to the Duntemans' contention that West should have been held personally liable for conversion of the raw material stockpiles. The Duntemans rely on *Miller v. Simon*, 100 Ill. App. 2d 6, 10 (1968) and *National Acceptance Co. of America v. Pintura Corp.*, 94 Ill. App. 3d 703, 706 (1981) for the proposition that a corporate officer is individually liable for the corporation's tortious conduct. There was no conversion, but even assuming, *arguendo*, that there was conversion, the record establishes that West could not be held personally liable because he was not a corporate officer. The record indicates West was an employee of a management company which is not a party to this action, rather than a corporate officer or employee of Fortech, regardless of the fact that West sometimes referred to himself as the "president" of Fortech.

¶ 56 The Duntemans' sixth contention on appeal is that it was error to find them liable for intentional trespass for failing to leave the property at issue and failing to remove their debris from the property. A trespass is an invasion in the exclusive possession and physical condition of land of another. *Millers Mutual Insurance Ass'n of Illinois v. Graham Oil Co.*, 282 Ill. App.

3d 129, 139 (1996). In other words, trespass is the invasion of someone else's real property rights. 34A Ill. Law and Prac. Trespass § 4 (2012). The Duntemans contend they cannot be held liable for an "invasion" with road building materials when they had legal possession of the property *at the time* they brought the materials onto the land. This argument reflects either a misapprehension or intentional misstatement of the trespass allegations Fortech lodged against the Duntemans, and, thus, the judge's subsequent ruling.

¶ 57 Fortech did not allege that the Duntemans committed trespass by invading the property with debris during the Duntemans' own rightful tenancy. Rather, Fortech alleged the Duntemans trespassed by remaining on the land during Fortech's tenancy and by failing to take their materials with them when the Duntemans finally vacated in 1997. More specifically, Fortech pled separate trespass counts against the two Dunteman entities. In each count, Fortech first alleged that Fortech leased the real property from Reclamation with the consent of the District. Further:

> "3. That Fortech, L.L.C. has faithfully performed all requirements of the lease with Reclamation and was entitled to quiet enjoyment of the land beginning November 1, 1996.
>
> 4. That when Fortech, L.L.C. entered upon the leased premises on November 1, 1996, it found it to be occupied by R.W. Dunteman, Inc. and Du-Kane Asphalt Co. in the form of buildings, structures, debris, piles of asphalt and environmentally damaging spills and thereafter filed an action to gain possession of its land (Fortech L.L.C. v. Dunteman, *et al*, 96-M1-739824).

5. The defendants Dunteman and Du-Kane conducted an active blacktopping business on Fortech's leasehold from November 1, 1996 to July 7, 1997.

6. That Dunteman and Du-Kane refused to leave the premises even when Fortech was granted possession by order of Court on May 22, 1997 (Exhibit J).

7. That after June 8, 1997, the date of eviction of Dunteman and Du-Kane by the Sheriff of Cook County and, when the defendants were finally forced from the land by order of the court on July 7, 1997, the land was still occupied by debris, piles of asphalt and environmental violations left by Dunteman and Du-Kane and the parcel continues to be so occupied to the date of this Complaint.[1]

8. That in refusing to leave the premises of Fortech, L.L.C. on and after November 1, 1996, the defendant Dunteman acted intentionally with malice, wantonness, and willfulness, which acts constituted the tort of trespass."

There is no plausible way to construe these as allegations that the Duntemans trespassed during their own leasehold by bringing debris onto the property. These are allegations that the trespass began during Fortech's leasehold in 1996 and consisted of the Duntemans' presence on the property through July 7, 1997, and the Duntemans' subsequent abandonment of various forms of debris.

¶ 58 Accordingly, we have disregarded authority the Duntemans cite which indicate a

[1] Fortech's Sixth Amended Complaint is filed-stamped June 4, 1999.

party cannot be sued for trespassing during their own leasehold or ownership because their conduct was not wrongful or tortious at that time. See *e.g.*, *Hanna v. ARE Acquisitions*, 400 Md. 650, 659 (2007) (Maryland environmental contamination case indicating landlord could not sue for trespass where the hazardous waste entered the land during the tenant's lawful possession of the land, the intrusion was not to land of another); *Patton v. TPI Petroleum, Inc.*, 356 F. Supp. 921, 930 (2005) (Arkansas environmental pollution case indicating a person in lawful and exclusive possession of property, whether a former owner or former tenant, will not be held liable for trespass based upon the original act of contaminating the property, because at the time of contamination, the intrusion was not to the land of another); *Lilly Industries, Inc. v. Health-Chem Corp.*, 974 F. Supp. 702, 709 (1997) (Indiana environmental contamination case indicating courts around the country have rejected efforts to sue someone for having trespassed on what was his or her own property at the time the action was taken); *325-343 E. 56th Street Corp. v. Mobil Oil Corp.*, 906 F. Supp. 669, 681 (1995) (District of Columbia environmental contamination case dismissing trespass claim where "affected property is not that of another but property that was either leased or owned by the defendants when the alleged trespass occurred); *Graham Oil Co. v. B.P. Oil Co.*, 885 F. Supp. 716, 725 (1994) (Pennsylvania environmental contamination case indicating landlord could not sue former tenant under trespass theory for activities during the term of the lease); *55 Motor Avenue Co. v. Liberty Industrial Finishing Corp.*, 885 F. Supp. 410 (1994); Restatement (Second) of Torts § 161(1) (1965) ("[a] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has *tortiously* placed there, whether or not the actor has the ability to remove it.") (Emphasis

supplied.) This line of authority is irrelevant because Fortech did not allege the Duntemans tortiously entered the property and tortiously placed material on the property; Fortech alleged the Duntemans tortiously remained on the property during Fortech's right as leaseholder to exclusive possession of the land and tortiously failed to remove materials from the land that the Duntmans were under a duty to remove.

¶ 59 The Duntemans also rely heavily upon a unpublished federal trial court's memorandum opinion and order, which is inappropriate. Federal court opinions and unpublished opinions of any kind are not binding authority on this Illinois appellate court. *Horwitz v. Sonnenschein Nath & Rosenthal LLP*, 399 Ill. App. 3d 965, 976 (2010) (an unpublished federal decision is not binding on Illinois courts); *Zahl v. Krupa*, 365 Ill. App. 3d 653, 662(2006) (a federal case is not binding on this court).

¶ 60 We also reject the Duntemans' reliance on *National Fire and Indemnity Exchange v. Ali and Sons, Inc.*, 346 Ill. App. 3d 107 (2004), which is an insurance coverage case in which a land owner and oil company were sued for allowing spilled gasoline to permeate a neighbor's land. Fortech correctly points out, "the defendant was trying to shoe horn a trespass claim against it into the definition of the policy term 'wrongful entry' in an attempt to claim a 'personal injury' in hopes of circumventing an express pollution exclusion under the policy." That case is nothing like this case. It does not concern a tenancy, a holdover tenancy, accumulated materials, or a failure to remove accumulated materials at the conclusion of a leasehold.

¶ 61 The Duntemans also misconstrue the significance of statements in the eviction order entered against them in 1997 and in the subsequent appellate decision known as *Fortech I*. The

Duntemans emphasize that the order for possession in Fortech's favor dated May 22, 1997, states "[e]forcement of this judgment [against the Duntemans] is stayed until June 21, 1997," and that this appellate court indicated the stay of enforcement meant Du-Kane was entitled to "retain undisturbed possession of the real property and to continue storing its materials there until *** [the stay expired on] June 21, 1997." The Duntemans contend these statements entitled the Duntemans to dump debris onto the property during Fortech's leasehold. This is not true. Neither of these orders gave the Duntemans tenancy or ownership in the property. Fortech was the lawful tenant in May and June 1997 whose possessory rights were being invaded by the Duntemans remaining on the land through the summer of 1997. The stay of enforcement merely gave the trespassers time to make an orderly departure from Fortech's leasehold.

¶ 62 In short, the Duntemans fail to address the trial judge's actual ruling and they cite authority that lends no support to their appeal from the finding of trespass. Pertinent authority includes what the trial judge relied upon: Section 158 of the Restatement (Second) of Torts, which indicates there are three basis for liability for intentional trespass to land:

> "One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) fails to remove from the land a thing which he is under a duty to

remove." Restatement (Second) of Torts § 158 (1965).

The trial judge properly found the Duntemans liable for trespass under subsections (b) and (c). See also *River Valley Assoc. v. Consolidated Rail Corp.*, 182 A.D. 2d 974, 975 (1992) (*prima facie* case for trespass existed where contractor that had permission to store materials on property did not remove them when given notice by the new property owner; contract to purchase property "as is" did not negate the trespass claim). R.W. Dunteman's sublease lapsed by its own terms at the end of October 1996, and it is undisputed the Duntemans remained on the property through the summer of 1997. Also, the prime lease, to which the Duntemans became sublessees, required the sublessees to remove all the material they brought onto the land and the manifest weight of the evidence indicates Paul Dunteman (an owner and officer of R.W. Dunteman and Du-Kane) was aware of this requirement yet the Duntemans deliberately left materials on the land after the expiration of their lease. Thus, the law and record support the trial judge's determination that the Duntemans were trespassers as of November 1, 1996.

¶ 63 The Duntemans' seventh and eighth arguments are that the $250,000 award for trespassing must be reversed because the trial judge picked the dollar amount out of thin air and that the $250,000 awarded as punitive damages was based on the erroneous conclusion that the Duntemans wilfully trespassed by failing to leave the property. We have already addressed the contention that the Duntemans were not trespassers. Regarding the contention that the trial judge randomly picked an award figure, the trial transcript reflects that the trial judge was fully aware that a damage award could not be based on conjecture or speculation. At various points during the trial, the judge questioned certain evidence and how it supported the damage claims. For

instance, when West testified about spending money to renovate the building so it could be used in GFRC production, the judge interrupted the line of questioning to remark that counsel had not connected those costs to the claim of trespass. The judge also expressed his concern about calculating a damage award when the experts testified that the cost of removing Dunteman's debris would vary greatly depending on whether the material turned out to be suitable for a "clean" landfill or required more expensive, special or hazardous disposal. Fortech tendered cancelled checks, bank statements, invoices, other documents, and testimony to support what it claimed were damages totaling $1,861,349.61. The rent and real estate taxes Fortech paid while Dunteman's asphalt production or stockpiles remained on the property ($69,074.02 for rent between 1998 and 2002 and $179,496.34 for real estate taxes between 1999 and 2002), totaled nearly $250,000, and it is undisputed that Fortech paid more than $250,000 to move or remove some of the material piles. Furthermore, the judgment order reflects the judge's careful and conscientious analysis of the damages. The judge specified that the $250,000 award for trespass was "after consideration of the testimony regarding the duration of the trespass, the cost of partially clearing the site of the Dunteman materials for Fortech's occupancy and adjusting for site work which would have been necessary regardless of *** whether there was a trespasser." The purpose of awarding compensatory damages is to make an injured party whole and restore him to the position he was in before the loss. *Gambino*, 398 Ill. App. 3d at 61*; Rodrian v. Seiber*, 194 Ill. App. 3d 504, 509-09 (1990). The record indicates the $250,000 damage award was grounded in the facts presented, was not based on speculation or conjecture, and was consistent with the manifest weight of the evidence.

¶ 64 Finally, Dunteman argues the punitive damages should be vacated because a landowner cannot collect punitives when a party intentionally trespasses pursuant to a "mistaken" claim of right. Punitive damages are not compensatory, instead they are intended to punish the wrongdoer and deter that party and others from committing similar acts in the future. *Slovinski v. Elliot*, 237 Ill. 2d 51, 58 (2010). Punitive damages are not favored by the law and may be awarded only when the wrongdoer's conduct demonstrates "a high degree of moral culpability, that is, when the tort is 'committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.' " *Slovinski*, 237 Ill. 2d at 58, quoting *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978). See also *Gambino*, 398 Ill. App. 3d at 68 (punitive awards are not favored and are available only where the defendant's conduct is "willful or outrageous due to evil motive or reckless indifference to the rights of others"). "To determine whether punitive damages are appropriate, 'the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.' " *Slovinski*, 237 Ill. 2d at 58, quoting Restatement (Second) of Torts § 908(2) (1979). On appeal from a bench trial, (a) the question of whether the facts establish willfulness or other aggravating factors is a factual determination that is reviewed under the manifest weight standard, (b) the question of whether punitive damages should be awarded is reviewed for an abuse of discretion, and (c) the question of whether the award was properly computed is reviewed for indications of excessiveness or motivation by passion, partiality, or corruption. *Gambino*, 398 Ill. App. 3d at 69.

¶ 65 The Duntemans' only contention is that the facts do not establish willfulness. They do not argue that the trial judge abused his discretion by awarding punitive damages or that the amount of the award was excessive or the result of passion, partiality or corruption. Citing *Wetmore v. Ladies of Loretto*, 73 Ill. App. 2d 454, 467 (1966), the Duntemans contend that as a matter of law, punitive damages cannot be assessed against a party intentionally trespassing pursuant to a mistaken claim of right. In our opinion, this is an overstatement of *Wetmore*'s holding, but, in any event, there is no indication in the record that the Dunteman defendants were mistaken or confused about their right to remain on the property. *Wetmore*, 73 Ill. App. 2d 454. There is no factual basis for their reliance on *Wetmore*. *Wetmore*, 73 Ill. App. 2d 454.

¶ 66 Rather, the manifest weight of the record supports the trial judge's conclusion that the Duntemans' occupancy of the Lemont land after the expiration of the sublease on October 31, 1996, was an intentional and wilful trespass, committed with wanton disregard of Fortech's rights to the property. Paul Dunteman testified at trial that he received from Reclamation a notice of default in June 1993 and another notice in July 1993, both of which indicated R.W. Dunteman had the option to cure and remain on the property. Paul Dunteman also admitted that in February 1994, he received Reclamation's notice to quit and demand for immediate possession. This document reminded R.W. Dunteman that it was contractually obligated to "correct all decay, detrius, junk and refuse on the land," and that R.W. Dunteman's subtenants had to "vacate immediately" and "take with them *** all junk, refuse, property, persons or things each of them have brought or suffered to be brought there." Paul Dunteman also admitted that West told him more than once that Fortech was negotiating to lease the property effective November 1996 and

that West made it "abundantly clear" that Fortech was not interested in any of the Duntemans' debris piles. Thus, the Duntemans' occupancy of the land after October 31, 1996, was no mistake. It was willful and intentional trespass, in wanton disregard of Fortech's rights, which was what the trial judge concluded. We, therefore, reject the Duntemans' contention that the trial judge's award of punitive damages was unsupported by the record.

¶ 67 We have carefully considered the Duntemans' numerous arguments for reversal in light of the record and relevant legal principles. None of them has been persuasive. Accordingly, we affirm the judgment of the circuit court.

¶ 68 Affirmed.