

No. 1-15-3652

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SELECTED FURNITURE, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County, Illinois.
v.)	
)	No. 12 M2 000300
GEORGIA’S RESTAURANT AND)	
PANCAKE HOUSE, INC.,)	Honorable
)	Roger G. Fein,
Defendant-Appellee.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* In calculating damages in a breach of contract action, the trial court erred by relying on a report that was not introduced into evidence by either party but was found through the court’s independent research.

¶ 2 Georgia’s Restaurant and Pancake House, Inc., brought a breach of contract suit against Selected Furniture, LLC, alleging that Selected’s failure to deliver restaurant furniture in a timely fashion delayed the opening of Georgia’s restaurant by 38 days. Following a bench trial, the trial court awarded Georgia’s \$2,694.96 in damages for lost profits. Georgia’s appealed to this court in *Selected Furniture v. Georgia’s Restaurant and Pancake House*, 2015 IL App (1st) 141794-U

(*Selected I*). We held that the trial court erred in its calculation of lost profits because it deducted from the damage award fixed overhead expenses that could not have been avoided by Selected's breach of contract. *Id.* ¶ 40. The sole issue in this second appeal is whether, on remand, the trial court correctly computed Georgia's damages.

¶ 3 On remand, the trial court computed Georgia's lost profits as \$43,760. It reached this sum by relying on a "Restaurant Operations Report" prepared by the National Restaurant Association and Deloitte & Touche LLP. The Report had not previously been admitted into evidence, nor was it presented to the court by either of the parties; instead, it was apparently found through independent research by the trial court.

¶ 4 Selected now appeals, arguing that the trial court erred by relying upon the Report. We agree and reverse.

¶ 5 **BACKGROUND**

¶ 6 The detailed facts underlying Georgia's breach of contract claim are set out in *Selected I*, 2015 IL App (1st) 141794-U, ¶¶ 4-15. Georgia's planned to open for business on April 15, 2011. To meet that date, it purchased restaurant furniture from Selected with a delivery date of April 4. Selected did not finish delivering the furniture until May 5, thus delaying Georgia's opening by 38 days, until May 23. Georgia's kept the furniture but claimed that it was defective and refused to pay for it.

¶ 7 Selected filed a breach of contract suit against Georgia's. Georgia's counterclaimed, alleging that Selected breached their agreement by failing to deliver the furniture by the agreed-upon date. Following a bench trial, the trial court entered judgment for Selected on its breach of contract claim and awarded damages of \$12,559.16. The court also entered judgment for Georgia's on its counterclaim, awarding \$2,694.96 in damages for lost profits, plus \$65 for the

cost of an opening day banner. In calculating Georgia's lost profits, the court specifically found that Georgia's could not recover its fixed overhead costs (costs that could not have been avoided as a consequence of Selected's breach, such as rent, expenses due under the lease, and property taxes).

¶ 8 Georgia's appealed the award of damages. In *Selected I*, 2015 IL App (1st) 141794-U, we held that the trial court erred by failing to include Georgia's fixed overhead costs in the computation of damages. Rather, we concluded that the proper measure of Georgia's lost profits was gross revenue minus variable indirect costs (costs Georgia's avoided as a result of the delayed opening, such as labor and supplies). *Id.* ¶ 38 (citing *F.E. Holmes & Son Construction Co., Inc. v. Gualdoni Electric Service, Inc.*, 105 Ill. App. 3d 1135, 1141 (1982); *Sterling Freight Lines, Inc. v. Prairie Material Sales, Inc.*, 285 Ill. App. 3d 914, 918-19 (1987)). We additionally found that Georgia's was entitled to recover \$750 in carpenter fees. We therefore reversed the trial court's damage award and remanded for recalculation.

¶ 9 Following this court's order, Georgia's filed a motion in the circuit court to recalculate damages on its counterclaim. The circuit court considered the arguments of counsel and issued a ruling on December 15, 2015. The court estimated Georgia's gross revenue for its first 38 days of operation as \$136,914 based upon Georgia's federal income tax return for the year 2011, which it characterized as more "credible" than Georgia's Illinois use tax returns for May and June 2011.

¶ 10 As for Georgia's variable indirect costs, Georgia's made various assertions about industry averages for labor costs and cost of goods sold, but it did not provide any citation, affidavit or exhibit in support of those alleged percentages, either at trial or in its motion to recalculate damages. The trial court declined to rely on these unsupported assertions. The court also

declined to rely upon a net cash flow statement introduced by Georgia's at trial, since the court found that it lacked reliability and credibility.

¶ 11 Instead, the trial court calculated Georgia's variable indirect costs according to industry averages contained in the 2013-14 edition of the Restaurant Operations Report, prepared by the National Restaurant Association and Deloitte & Touche LLP. The Report was not admitted as evidence during trial, nor did either party present it to the court. It appears that the Report was new to both parties, since the court stated in its judgment order that "[a] copy of the Report is being provided to counsel along with their copy of this Order."

¶ 12 Based upon unspecified "current websites," the court determined that Georgia's was a full service restaurant with an average check per person of under \$15. According to the Report, restaurants in that category typically spend 33% of their gross revenue on food and beverage costs, and 33.6% of their gross revenue on labor costs. The trial court opined that food and labor costs would be higher for a restaurant in its first month of operation, so it added 0.5% to each of those percentages. Subtracting those adjusted percentages from Georgia's gross revenue for its first 38 days of operation, the trial court computed Georgia's lost profits as \$43,760. The court also added \$750 in carpenter fees and \$65 for a banner, for a total damage award of \$44,575.

¶ 13 Selected filed a timely notice of appeal on December 22, 2015. Georgia's later filed a notice of cross-appeal.

¶ 14 ANALYSIS

¶ 15 Selected raises three contentions of error on appeal: (i) in its original judgment, the trial court found that Georgia's breached its contract with Selected, but not vice versa, thus making it improper for Georgia's to receive *any* damages; (ii) likewise, this court's order in *Selected I* precludes any award of damages because, according to Selected, we never explicitly stated that

Selected breached its contract with Georgia's; and (iii) the trial court erred by basing its damage award on the Report, which was not introduced into evidence and not something of which the court could properly take judicial notice. Thus, Selected asks this court to reverse the trial court's judgment order of December 15, 2015, and reinstate the trial court's prior judgment.

¶ 16 Georgia's agrees that the trial court's reliance on the Report constitutes reversible error—but it argues that, based upon the evidence at trial, it is entitled to an even higher damage award. Georgia's asks this court to award it a total of \$76,443.05 in damages (\$75,628.05 for lost profits in its first 38 days of operation, \$750 in carpenter fees, and \$65 for its opening day banner).

¶ 17 Selected's first two contentions of error are barred by the law of the case doctrine. Under that doctrine, questions of law decided in a previous appeal will not be revisited in a later appeal. *Norris v. National Union Fire Insurance Co.*, 368 Ill. App. 3d 576, 580 (2006). The purpose of this doctrine is "to protect settled expectations of the parties, ensure uniformity of decisions, maintain consistency during the course of a single case, effectuate proper administration of justice, and bring litigation to an end." *Petre v. Kucich*, 356 Ill. App. 3d 57, 63 (2005). When the appellate court reverses and remands a case with a specific mandate, the only proper issue on a second appeal is whether the trial court's order conforms to that mandate. *Id.*

¶ 18 In *Selected I*, Georgia's was the only party to appeal the trial court's judgment. Selected did not file a cross-appeal challenging the trial court's judgment in favor of Georgia's on its breach of contract claim. This court affirmed the judgment in favor of Georgia's and remanded solely for recalculation of damages. Thus, the only proper issue in this appeal is whether the trial court correctly calculated damages according to the standard set forth in *Sterling Freight Lines* and *F.E. Holmes*.

¶ 19 Although there is an exception to the law of the case doctrine that allows this court to depart from that doctrine if we find that our prior decision was palpably erroneous, we find no basis to apply this exception here. A partial breach of a contract by one party does not justify the other party's subsequent failure to perform; both parties may be guilty of breaches, in which case they both have a right to damages. *InsureOne Independent Ins. Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385, ¶ 33 (citing *Israel v. National Canada Corp.*, 276 Ill. App. 3d 454, 460 (1995)). As we stated in *Selected I*:

“[T]he trial court found that Georgia's accepted the furniture despite its untimely delivery, and we cannot say that this finding is against the manifest weight of the evidence. Thus, Georgia's is obligated to pay the contractually agreed-upon price for the furniture. [Citation.] *We note that this does not preclude Georgia's from suing to recover the damages caused by Selected's late delivery—which, in fact, it did.*”

(Emphasis added.) *Selected I*, 2015 IL App (1st) 141794-U, ¶ 30.

Accordingly, Georgia's failure to pay for the furniture does not insulate Selected from liability for failing to deliver the furniture by the promised date. We therefore reject Selected's effort to relitigate Georgia's entitlement to any damage award.

¶ 20 We review the trial court's damage award of \$44,575 under a manifest weight of the evidence standard. *In re Estate of Halas*, 209 Ill. App. 3d 333, 349 (1991). Both parties agree that the trial court erred by using the Report to estimate Georgia's lost profits, but they disagree as to the appropriate relief. Selected argues that we should reinstate the trial court's original damage award of \$2,759.96; Georgia's argues that the evidence at trial shows that it is entitled to a higher damage award of \$76,443.05.

¶ 21 Initially, Selected argues that Georgia's may not seek a higher damage award, since its notice of cross-appeal was not timely filed. Ill. S. Ct. R. 303(a)(3) (eff. Jan. 1, 2015) (cross-appeal must be filed within 30 days of judgment or 10 days of service of notice of appeal, whichever is later); *Canel & Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 922 (1999) (appellate court lacks jurisdiction over untimely-filed cross-appeal). Georgia's does not dispute that its notice of cross-appeal, filed 38 days after the entry of judgment and 31 days after Selected's notice of appeal, was untimely. Accordingly, we lack jurisdiction to consider Georgia's claim that it is entitled to a higher award of damages.

¶ 22 We agree with the parties that the trial court's reliance on the Report was improper. It is well established that in a bench trial, the court may only consider information that has been introduced into evidence or matters of which the court may take judicial notice. *Drovers National Bank of Chicago v. Great Southwest Fire Insurance Co.*, 55 Ill. App. 3d 953, 957 (1977); see also *People v. Steidl*, 177 Ill. 2d 239, 266 (1997) ("Deliberations of the court must necessarily be limited to the record before it"). The reason for this rule is that all parties to an action should be given a fair opportunity to rebut any evidence that is damaging to their positions. *Drovers National Bank*, 55 Ill. App. 3d at 957 (quoting *McGurn v. Brotman*, 25 Ill. App. 2d 294, 298 (1960)). Thus, "it is improper for the trier of fact to conduct experiments or private investigations which have the effect of producing evidence which was not introduced at trial." *People v. Gilbert*, 68 Ill. 2d 252, 259 (1977).

¶ 23 The Report was not part of the evidence at trial but was located through independent investigation by the trial judge. Moreover, the information in the Report is not a matter of which the court could properly take judicial notice. Judicial notice is limited to facts that are "so capable of verification as to be beyond reasonable controversy." *Cook County Board of Review*

v. Property Tax Appeal Board, 339 Ill. App. 3d 529, 541 (2002). It is used to allow the court to acknowledge facts that are commonly known or readily verifiable from sources of indisputable accuracy. *Central Austin Neighborhood Ass'n v. City of Chicago*, 2013 IL App (1st) 123041, ¶ 13; see also *Cook County Board of Review*, 339 Ill. App. 3d at 541 (administrative agency could not take judicial notice of Department of Revenue sales ratio studies whose methodology and results were subject to interpretation). Thus, the trial court's reliance on the Report as a basis to compute Georgia's damages requires reversal.

¶ 24 We therefore turn to consider the computation of Georgia's lost profits. It is well established that plaintiffs bear the burden of establishing a reasonable basis for computation of damages. *First National Bank of Elgin v. Dusold*, 180 Ill. App. 3d 714, 719 (1989) (reversing award of damages where there was an insufficient basis in the record to establish the costs incurred by defendant's breach of warranty). Evidence of damages cannot be speculative or uncertain. *Halas*, 209 Ill. App. 3d at 349.

¶ 25 As noted, the trial court calculated Georgia's gross profits based upon Georgia's 2011 federal income tax return, which the court found to be credible. But it implicitly found insufficient information in the record to compute the variable indirect costs, which is why the court resorted to consulting an outside source. Georgia's argues that the record is sufficient; specifically, it argues that its variable overhead expenses can be calculated using its 2011 federal income tax return.¹

¶ 26 We disagree. The tax return does not contain enough information to determine what proportion of Georgia's costs is variable as opposed to fixed. For instance, the tax return represents that the cost of goods sold was \$355,177. This amount is subdivided into \$301,404 in

¹ Georgia's does not contest the trial court's finding that its net cash flow statement was not credible.

“purchases” and \$58,273 in “supplies,” with \$4,500 left in inventory at the end of the year. In its brief, Georgia’s asserts that “purchases” are variable indirect costs, while “supplies” are fixed overhead costs—but this is not at all clear from the face of the tax return.

¶ 27 In addition, we note that labor costs and cost of goods sold are not necessarily the only variable indirect costs incurred by Georgia’s; there may be other costs that could have been avoided due to Selected’s breach. For instance, the tax return lists expenses for repairs, maintenance, advertising, and utilities. These costs could all plausibly have been diminished as a result of Georgia’s late opening, but the tax return does not disclose whether that is the case, nor does it permit a calculation of what, if any, percentage of those costs was reduced as a result of the delayed opening.

¶ 28 Finally, it is unclear to what extent the year-end figures are representative of Georgia’s first 38 days of operation. The trial court made the assumption that Georgia’s labor and goods costs would each be 0.5% higher during that period. Georgia’s asserts this is “mere speculation” and argues that such costs are in fact lower when a restaurant first opens because of discounts from suppliers. Georgia’s concludes that “[t]he trial court could have easily deducted 0.5% from each of these totals.” But this just illustrates the problem: the record is largely silent as to how the first 38 days compares to the rest of the year, so any adjustment is, as a result, arbitrary and unsupported by the evidence.

¶ 29 We do know that Georgia’s reduced its daily hours of operation on October 3, 2011, from 15 hours to 8 hours per day. Georgia’s argues that this court can account for this change by calculating Georgia’s average hourly revenue and then multiplying that by 15 hours a day for 38 days. But Georgia’s presented no testimony—lay or expert—in the trial court to support the accuracy of such a calculation, and we will not perform one here.

¶ 30 Accordingly, we find that Georgia's has not met its burden of establishing a reasonable basis for computation of its variable indirect costs for its first 38 days of operation. *First National Bank*, 180 Ill. App. 3d at 719. Without such information, we cannot accurately compute Georgia's lost profits, except that the amount is at least \$2,694.96 (the amount in the trial court's original judgment, representing Georgia's net profits over 38 days). Thus, we find that Georgia's is entitled to \$2,694.96 in damages for lost profits, plus \$65 for a banner and \$750 in carpenter fees, for a total of \$3509.96.

¶ 31 CONCLUSION

¶ 32 Because the trial court erroneously relied on the Report in calculating damages, and because the record does not enable us to compute Georgia's variable indirect costs with reasonable certainty, we reverse the trial court's damage award and direct the trial court to enter judgment for Georgia's in the amount of \$3509.96.

¶ 33 Reversed and remanded, with instructions.