NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BURLINGTON COAT FACTORY OF CALIFORNIA, LLC,

Plaintiff and Appellant,

v.

BELLA TERRA ASSOCIATES, LLC,

Defendant and Respondent.

G043568

(Super. Ct. No. 07CC02317)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Tuchman & Associates, Aviv L. Tuchman, Loren N. Cohen; Greines, Martin, Stein & Richland, Robert A. Olson, Marc. J. Poster and Alana H. Rotter for Plaintiff and Appellant.

Horvitz & Levy, Barry R. Levy, H. Thomas Watson, Daniel J. Gonzalez; Seed Mackall, Peter A. Umoff and Alan D. Condren for Defendant and Respondent.

* * *

Plaintiff Burlington Coat of California, LLC (Burlington) rented space at the Huntington Beach mall under a lease it negotiated with the mall's owner. Defendant Bella Terra Associates, LLC (Bella Terra) purchased the mall and billed Burlington for real estate tax at a rate 3.14 times greater than the taxes actually assessed against the building Burlington occupied. Bella Terra argues it simply applied the formula set forth in the lease Burlington negotiated with the prior owner. Burlington, however, contends Bella Terra misconstrues the lease and the only reasonable interpretation requires Burlington to pay the base tax amount designated in the lease plus the actual real estate tax increases without any multiplier. Burlington sued Bella Terra for breach of contract, declaratory relief, and other claims to resolve the dispute. Following a combined jury and bench trial, both the jury and trial court agreed with Bella Terra's interpretation. Burlington appeals from the ensuing judgment.

On appeal, we independently interpret the lease because no conflict existed in the extrinsic evidence admitted to aid in the interpretation of the lease. We conclude the lease's language supports Bella Terra's interpretation when considering the context of the lease as a whole and the facts surrounding the initial lease negotiations. Burlington fails to provide any compelling reason for us to conclude the jury and trial court erred in adopting Bella Terra's interpretation. Accordingly, we affirm the trial court's judgment.

I

FACTS AND PROCEDURAL HISTORY

In 1995, MCA Huntington Associates, L.P. (Macerich) owned the Huntington Beach mall. At the time, the mall was in poor condition and its occupancy rate fell to nearly 50 percent after it lost its two largest tenants, the Broadway and J.C. Penny department stores.

Burlington entered into negotiations with Macerich to occupy most of the building J.C. Penny vacated. Burlington demanded a below market rental rate due to the

mall's poor condition and its low occupancy rate. In April 1995, Burlington and Macerich signed a 30-year lease for 133,500 square feet at an initial annual rent of $750,000.

At Macerich's suggestion, the parties agreed to allocate this initial rent among "Fixed Minimum Rent," "Tenant's Share of Common Area Costs" (CAM Charges), and "Tenant's Share of Real Estate Taxes" (Tax Charges). The lease defined the CAM Charges and Tax Charges as "Additional Rent." Burlington and Macerich set the initial CAM Charges and Tax Charges based on a price per square foot rather than the actual common area maintenance costs Macerich incurred or the actual real estate taxes assessed on the building Burlington would occupy. Specifically, the parties agreed to initial CAM Charges of $1.50 per square foot, or $200,250, and initial Tax Charges of $1 per square foot, or $133,500. The parties allocated the remaining $416,250 of the initial rent to Fixed Minimum Rent.

In negotiating these initial rates for the CAM Charges and Tax Charges, neither Burlington nor Macerich knew the actual common area maintenance costs for the mall or the actual real estate taxes assessed against the building Burlington would occupy. The actual common area maintenance costs and real estate taxes, however, did not concern Burlington because it considered the total amount it owed under the lease to be rent. The actual real estate taxes for the tax year the parties signed the lease was $42,552.54. Neither side presented evidence regarding the actual common area maintenance costs.

The lease provided for each rent component to increase over the lease's 30-year term. The Fixed Minimum Rent increased by an agreed-upon amount every five years. The CAM Charges could increase each year based on the percentage increase in the Consumer Price Index over the previous year, with an annual limit of three percent. The Tax Charges could increase each year based on the percentage increase in the real estate taxes assessed for the lease's first year. The Tax Charges could not decrease below

the $133,500 base amount agreed to in the lease and the lease did not limit the amount the Tax Charges could increase. The lease required Burlington to pay the Fixed Minimum Rent, CAM Charges, and Tax Charges in monthly installments.

This action arises from a dispute over the lease provision regarding the Tax Charges and therefore we quote the relevant section from the lease: "SECTION 16.2 Commencing on the Rent Commencement Date, and continuing for the full Term of this lease, Tenant covenants and agrees to pay to Landlord, as Additional Rent, Tenant's Share of Real Estate Taxes for each Lease Year. Tenant's Share of Real Estate Taxes for the period from the Rent Commencement Date through and including December 31, 1995 shall be One Hundred Thirty-Three Thousand Five Hundred and No/100 Dollars ($133,500) per Lease Year (the 'Base Tax Amount'). . . . For Lease Year 1996 and each Lease Year thereafter during the Term Tenant's Share of Real Estate Taxes shall be the Base Tax Amount increased by a percentage equal to the percentage increase in the total Real Estate Taxes levied and assessed against the land, buildings and all other improvements located on the Tax Parcel as compared to the total Real Estate Taxes levied and assessed against the land, buildings and all other improvements located on the Tax Parcel for tax fiscal year 1995-1996. . . ."

In 1999, Macerich sold the mall to Huntington Center Associates, LLC (HCA). HCA sold the mall to Bella Terra in 2005. For each year they owned the mall, Macerich and HCA billed Burlington for the Tax Charges in the $133,500 Base Tax Amount designated in the lease without any increase. For eight of those 10 years, however, the real estate taxes assessed against the building Burlington occupied were less than or roughly equal to the taxes assessed for the lease's first year. Accordingly, Macerich and HCA had only two occasions when they could have increased Burlington's Tax Charges, but failed to do so.

After acquiring the mall in August 2005, Bella Terra notified Burlington it would continue to bill for the Tax Charges at the $133,500 Base Tax Amount because the

assessed taxes remained less than the taxes assessed in the lease's first year. Bella Terra, however, cautioned Burlington the Tax Charges likely would increase when the tax authorities reassessed the mall.

In September 2005, Bella Terra informed Burlington the real estate taxes on the building Burlington occupied increased to nearly $115,000 and therefore Burlington owed nearly $360,000 as Tax Charges under the lease. Burlington paid that amount in monthly installments over the next 12 months.

In September 2006, Bella Terra informed Burlington the real estate taxes increased again to nearly $326,000 and therefore Burlington owed over $1 million in Tax Charges. In October 2006, Bella Terra sent Burlington a notice of default after it failed to make the monthly payment toward the Tax Charges. To avoid a default, Burlington paid the monthly payments under protest.[1]

Bella Terra interpreted section 16.2 to require Burlington to pay the designated Base Tax Amount increased by the percentage the current year's real estate taxes exceeded the taxes for the lease's first year — that is, the 1995-1996 tax year. Bella Terra's interpretation translates to the following mathematical formula: Base Tax Amount + Base Tax Amount * (current taxes – 1995-1996 taxes / 1995-1996 taxes), which Bella Terra simplifies to Base Tax Amount * (current taxes / 1995-1996 taxes).[2] Under this interpretation, Burlington would pay approximately 3.14 times the current

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[1] During this litigation, the taxes continued to increase and therefore the Tax Charges Bella Terra billed Burlington continued to increase. To avoid a default, Burlington continued paying the Tax Charges under protest. At trial, Burlington claimed it overpaid the Tax Charges by $3,154,497.86.

[2] As an example of Bella Terra's interpretation, the amount Burlington owed as the Tax Charges for tax year 2005-2006 is calculated by considering $133,500 as the Base Tax Amount, $325,796.66 (that is, the 2005-2006 taxes) as the current taxes, and $42,552.54 as the 1995-1996 taxes: $133,500 * ($325,796.66 / $42,552.54) = $1,022,121.22.

taxes because that is the amount by which the Base Tax Amount designated in the lease ($133,500) exceeded the taxes assessed for the 1995-1996 tax year ($42,552.54).

Burlington interpreted section 16.2 to require payment of the Base Tax Amount increased by the amount the current year's taxes exceeded the 1995-1996 taxes. Burlington states its interpretation as the following mathematical formula: Base Tax Amount + 1995-1996 taxes * (current taxes – 1995-1996 taxes) / 1995-1996 taxes, which Burlington simplifies to Base Tax Amount + (current taxes – 1995-1996 taxes).[3]

Burlington filed suit in January 2007 to resolve the dispute over section 16.2. The operative second amended complaint alleged claims for breach of contract, declaratory relief, breach of the covenant of quiet enjoyment, reformation, and constructive trust. Bella Terra filed a cross-complaint alleging a claim for declaratory relief.[4]

The trial court concurrently conducted a jury trial on Burlington's breach of contract claim and a bench trial on the other claims. The court found section 16.2 ambiguous and therefore permitted Burlington and Bella Terra to offer extrinsic evidence to aid the interpretation of section 16.2. The evidence included: (1) testimony by the lease negotiators regarding what they intended on the real estate taxes; (2) testimony regarding the events and circumstances surrounding the lease negotiations; (3) expert testimony regarding how shopping mall leases customarily treat real estate taxes;

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[3] Using Burlington's interpretation, the Tax Charges it owed for tax year 2005-2006 is calculated by considering $133,500 as the Base Tax Amount, $325,796.66 (that is, the 2005-2006 taxes) as the current taxes, and $42,552.54 as the 1995-1996 taxes: $133,500 + ($325,796.66 - $42,552.54) = $416,744.12.

[4] Bella Terra's cross-complaint also alleged a claim for breach of lease, asserting Burlington actually owed more in Tax Charges than Bella Terra billed because the 1995-1996 taxes reduced to $32,181.09 following a tax refund Macerich received. Under Bella Terra's formula, the lower the taxes in 1995-1996, the more Burlington presently owes as Tax Charges under the lease. The jury found against Bella Terra on this claim and Bella Terra did not appeal. Accordingly, we do not address this claim.

(4) testimony regarding how Macerich and HCA applied section 16.2; (5) expert testimony regarding how section 16.2's language should be translated into a mathematical formula; and (6) current conditions at the mall. The trial court allowed the jury to decide how section 16.2 should be interpreted.

The jury returned a special verdict in Bella Terra's favor on the breach of contract cause of action, finding Bella Terra did not breach the lease when it billed Burlington for the Tax Charges. In reaching its verdict, the jury necessarily agreed with Bella Terra's interpretation of section 16.2 and rejected Burlington's interpretation. After the jury returned its verdict, the trial court issued a statement of decision in Bella Terra's favor on all other causes of action. The trial court explained it was bound by the jury's interpretation of section 16.2, but that it nonetheless interpreted section 16.2 in the same manner. The trial court entered judgment in Bella Terra's favor and Burlington timely appealed.

II

DISCUSSION

Burlington contends its construction of section 16.2 is the only reasonable interpretation as a matter of law and we therefore should reverse and direct the trial court to enter a new judgment. As we explain below, Burlington's challenge is without merit.

A. *Contract Interpretation Principles*

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*).) "'The terms of a contract are determined by objective rather than by subjective criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe.

[Citations.]' [Citation.]" (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 184-185 (*Steller*); see also *Founding Members*, at p. 956.)

"The parties' intent is ascertained from the language of the contract alone, 'if the language is clear and explicit, and does not involve an absurdity.' [Citation.] Extrinsic evidence is admissible to explain the meaning of a contract if 'the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' [Citation.]" (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 712 (*DVD Copy*).)

"In order to determine whether the extrinsic evidence is admissible, the trial court first makes 'a preliminary consideration of all credible evidence offered to prove the intention of the parties.' [Citation.] 'If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, "is fairly susceptible of either one of the two interpretations contended for . . ." [citations], extrinsic evidence relevant to prove either of such meanings is admissible.' [Citation.]" (*DVD Copy*, *supra*, 176 Cal.App.4th at p. 712.)

"The threshold issue of whether to admit the extrinsic evidence — that is, whether the contract is reasonably susceptible to the interpretation urged — is a question of law subject to de novo review." (*Founding Members*, *supra*, 109 Cal.App.4th at p. 955; *DVD Copy*, *supra*, 176 Cal.App.4th at p. 713 ["'The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal'"].)

The trial court's ultimate interpretation of a contract also is subject to de novo review when no extrinsic evidence is admitted or the extrinsic evidence admitted is not in conflict. (*DVD Copy*, *supra*, 176 Cal.App.4th at p. 713.) "'However, where the [extrinsic] evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.' [Citation.]" (*Ibid.*) """Substantial evidence" is evidence of ponderable legal significance, evidence that is

reasonable, credible and of solid value. [Citation.]'" (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 309.)

"It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 (*Parsons*).) But, even under the de novo standard of review, an appellate court must determine that the trial court's interpretation of a written contract is erroneous before it may properly reverse a judgment. (*Id.* at p. 866; *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 512-513 (*Sayble*).)

B. *We Independently Interpret Section 16.2 to Determine Its Intended Meaning*

Burlington contends we should interpret section 16.2 de novo while Bella Terra contends we should defer to the jury's and trial court's interpretation by applying the substantial evidence standard of review. As stated above, the standard of review is dictated by whether a conflict exists in the extrinsic evidence admitted to resolve a contractual ambiguity. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-913 (*Morey*); see also *Founding Members*, *supra*, 109 Cal.App.4th at pp. 955-956.)

We interpret a contract de novo when (1) no extrinsic evidence is admitted regarding the contract's interpretation; (2) no conflict exists in the extrinsic evidence; or (3) the extrinsic evidence the trial court admitted is incompetent and should have been excluded. (*Morey*, *supra*, 64 Cal.App.4th at p. 913; *Parsons*, *supra*, 62 Cal.2d at p. 861.) A conflict in the inferences drawn from the extrinsic evidence does *not* prevent de novo review unless the underlying evidence conflicts. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126-1127 (*Wolf*).) Accordingly, the substantial evidence standard of review applies only when the trier of fact must resolve factual conflicts. (*Ibid.*)

Here, the trial court admitted extrinsic evidence because it found section 16.2 ambiguous. Neither Burlington nor Bella Terra challenges the trial court's decision to admit extrinsic evidence and we agree extrinsic evidence was admissible to aid the court in its interpretation of section 16.2. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage, etc. Co.* (1968) 69 Cal.2d 33, 39-40 & fn. 8 [court must consider extrinsic evidence to determine whether a contract is ambiguous and to resolve any ambiguity]; *Morey*, *supra*, 64 Cal.App.4th at p. 912.) Thus, determining which standard of review applies depends on whether a conflict exists in the extrinsic evidence.

Bella Terra contends conflicts exist in "much of" the extrinsic evidence, but fails to identify an actual conflict in the evidence. Instead, Bella Terra relies on conflicts in extrinsic evidence we cannot consider or conflicts in the inferences drawn from undisputed evidence, neither of which supports applying the substantial evidence standard of review.[5]

Bella Terra first argues a conflict exists in the testimony of the various individuals who negotiated the lease on Macerich's and Burlington's behalf. Bella Terra emphasizes the testimony by Macerich's lead negotiator that he asked for and agreed to section 16.2 so that Burlington's Tax Charges would be the Base Tax Amount multiplied by the percentage increase in the actual real estate taxes assessed. Macerich's lead negotiator also testified he did not negotiate a "pass through" provision, which would pass all tax increases through to Burlington on a dollar-for-dollar basis. Bella Terra contrasts that testimony with Burlington's negotiators, who testified they negotiated for a

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[5] We express no opinion regarding whether the trial court properly admitted any particular testimony or documentary evidence. Neither Burlington nor Bella Terra contends the trial court erred in admitting any evidentiary item. Moreover, the interpretation of section 16.2 was not the only issue contested in the trial court. Accordingly, even if particular evidence may not be considered as extrinsic evidence to aid in interpreting section 16.2, it may have been admissible on one or more other issues presented below.

pass through provision and did not agree to using a multiplier to determine Burlington's Tax Charges.

Bella Terra, however, fails to point to any testimony showing Macerich's negotiators shared their view of section 16.2 with Burlington's negotiators, or vice versa. Indeed, Bella Terra does not point to any testimony showing the parties discussed section 16.2's operation or reached a mutual understanding on how to calculate Burlington's Tax Charges. The testimony Bella Terra cites solely relates to the negotiators' individual or subjective understanding and intent, but "'"[t]he parties' undisclosed intent or understanding is irrelevant to contract interpretation." [Citation.]' [Citation.]" (*Steller*, *supra*, 189 Cal.App.4th at pp. 184-185; see also *Founding Members*, *supra*, 109 Cal.App.4th at p. 956.) Consequently, a conflict in the individual negotiators' testimony regarding their subjective intent does not require us to apply the substantial evidence standard of review.

Next, Bella Terra argues a conflict exists in the testimony of the parties' mathematics experts, who offered opinions on how to express section 16.2's language in a mathematical formula. Although the experts presented conflicting opinions, that conflict does not require us to apply the substantial evidence standard of review because section 16.2's proper interpretation is a question of law for the court. Expert opinion regarding section 16.2's intended meaning is irrelevant and inadmissible. (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 51 ["the interpretation of contractual language is a legal matter for the court . . . and '[e]xpert opinion on contract interpretation is usually inadmissible'"]; *Industrial Indemnity Co. v. Apple Computer, Inc.* (1999) 79 Cal.App.4th 817, 835, fn. 4 (*Industrial Indemnity*) ["'[t]he opinion of a linguist or other expert as to the meaning of the [contract] is irrelevant to the court's task of interpreting the [contract] as read and understood by a reasonable lay person'"].)

In reliance on *Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, Bella Terra argues the conflict in the mathematics experts' testimony

presented a credibility dispute for the jury to resolve. The experts in *Warner*, however, testified regarding what certain technical terms meant in the soils engineering field and what processes conformed to a construction project's specifications. (*Id.* at pp. 291, 293.) Unlike the mathematics experts in this case, the experts in *Warner* did not offer opinions on the ultimate question regarding the contract's intended meaning and therefore *Warner* does not apply.

Bella Terra also contends a conflict exists in the testimony of the parties' real estate experts regarding the custom and practice for addressing real estate taxes in shopping mall leases. Bella Terra points to Burlington's real estate expert who testified that the custom and practice of commercial leases is for the tenant to pay the actual taxes rather than some multiple thereof. Based on this custom and practice, Burlington's expert concluded that section 16.2 was a pass through provision and a contrary interpretation requiring Burlington to pay a multiplier would lead to an absurd result. Bella Terra contrasts that testimony with its real estate expert, who testified that parties to a lease try to negotiate the best deal possible regardless of how any particular payment is characterized. Bella Terra's expert concluded section 16.2's plain language required Burlington to pay a multiple of the actual taxes.

None of this testimony, however, requires us to apply the substantial evidence standard of review. The real estate experts' opinions on how they would interpret section 16.2 are just as irrelevant and inadmissible as the opinions of the mathematics experts. (*In re Tobacco Cases I*, *supra*, 186 Cal.App.4th at p. 51; *Industrial Indemnity*, *supra*, 79 Cal.App.4th at p. 835, fn. 4.) Moreover, there is no actual conflict in the experts' testimony on the custom and practice for real estate taxes in shopping mall leases. Burlington's expert testified the tenant usually pays the actual taxes, but then admitted the parties may agree to deviate from the typical arrangement and the language in the lease between Macerich and Burlington was unlike any he had ever seen. Nothing Bella Terra's expert said conflicted with those statements.

Bella Terra also argues conflicts exist in other extrinsic evidence the parties offered, including evidence regarding how Macerich and HCA applied section 16.2, the circumstances existing at the mall when Macerich and Burlington negotiated the lease, and how the total Burlington currently pays under the lease compares to the total paid by other mall tenants. Bella Terra, however, fails to identify a single conflict in the evidence itself. Instead, Bella Terra argues conflicts exist in the inferences or conclusions the parties seek to draw from the evidence. But this is not a conflict that requires us to apply the substantial evidence standard of review. (*Wolf, supra*, 162 Cal.App.4th at pp. 1126-1127, fn. omitted [the de novo standard of review applies "even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation"].)

Because no conflict exists in the extrinsic evidence, we proceed to independently interpret section 16.2.

C. *Section 16.2's Language and the Extrinsic Evidence Support Bella Terra's Interpretation*

In interpreting section 16.2, we begin by examining the lease's language. (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 722.) Our goal is to give effect to the parties' mutual intent at the time they entered into the lease. (*Founding Members, supra*, 109 Cal.App.4th at p. 955.) We follow ordinary rules of grammar in interpreting the lease unless those rules lead to an absurd result or a meaning clearly contrary to the parties' intent. (*Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 188-189, fn. 16; *Department of Transportation v. Chavez* (1992) 7 Cal.App.4th 407, 415; *South Coast Co. v. Franchise Tax Bd.* (1967) 250 Cal.App.2d 822, 826.)

Section 16.2 provides the following formulation for determining the Tax Charges Burlington must pay in each year after the lease's first year: "For Lease Year

1996 and each Lease Year thereafter during the Term Tenant's Share of Real Estate Taxes [that is, Burlington's Tax Charges] shall be the Base Tax Amount increased by a percentage equal to the percentage increase in the total Real Estate Taxes levied and assessed against . . . the Tax Parcel as compared to the total Real Estate Taxes levied and assessed against . . . the Tax Parcel for tax fiscal year 1995-1996. . . ." The "Tax Parcel" is the building Burlington occupies at the mall.

The grammatical object of this provision is the Base Tax Amount, which section 16.2 defines elsewhere as the Tax Charges Burlington paid for the lease's first year. As discussed below, Macerich and Burlington negotiated the Base Tax Amount as one dollar per square foot rather than the actual real estate taxes assessed during the lease's first year. In all subsequent years, the Tax Charges Burlington must pay are the Base Tax Amount "increased by a percentage." By this provision's express terms, the percentage increase operates on the sentence's grammatical object, that is, the Base Tax Amount. The percentage increase is defined as the percentage by which the current year's real estate taxes exceed the real estate taxes for the lease's first year — that is, the 1995-1996 tax year. Consequently, to determine Burlington's Tax Charges the Base Tax Amount is increased by the percentage real estate taxes have increased since the lease's inception. For example, if real estate taxes for the current year are 10 percent greater than at the lease's inception, Burlington's Tax Charges are 110 percent of the Base Tax Amount.

Although this interpretation is based on section 16.2's actual language, Burlington contends we should reject it in favor of an interpretation that assumes section 16.2 omits a necessary term. Specifically, Burlington contends section 16.2's phrase "increased by a percentage equal to" omits the term identifying the reference value for the percentage, that is, the value on which the percentage is based. According to Burlington, this phrase omits a reference to the real estate taxes for the lease's first year so that the percentage increase described in section 16.2 operates on the 1995-1996 real

estate taxes rather than the Base Tax Amount. Under Burlington's interpretation, the percentage by which the current year's taxes exceed the 1995-1996 taxes is multiplied by the 1995-1996 taxes and that product is added to the Base Tax Amount to determine Burlington's Tax Charges. Stated in its simplest form, Burlington's interpretation provides that the Tax Charges are the Base Tax Amount plus the increase in the real estate taxes.

Burlington does *not* contend this interpretation is what it and Macerich intended when they entered into the lease, nor does Burlington cite any evidence showing section 16.2 omits any term to which the parties agreed. Nonetheless, Burlington contends we should adopt its interpretation as the only reasonable interpretation offered by the parties. To support its argument, Burlington cites cases stating courts must adopt reasonable contractual interpretations that avoid harsh or unjust results. (See *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269 ["Interpretation of a contract 'must be fair and reasonable, not leading to absurd conclusions. [Citation.]' [Citation.] 'The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable. [Citation.]' [Citation.]"]; *Sayble*, *supra*, 76 Cal.App.3d at p. 513 ["where one construction would make a contract unusual and extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail"].)

According to Burlington, its interpretation is fair and reasonable because it treats real estate tax increases like all other expenses a landlord incurs and simply passes the increases through to the tenant, but Bella Terra's interpretation is harsh and unjust because it requires Burlington to pay a multiple of all tax increases and turns an ordinary ownership expense into a windfall profit for Bella Terra. Specifically, under its interpretation Burlington pays one dollar for every dollar real estate taxes increase, but Bella Terra's interpretation requires Burlington to pay $3.14 for every dollar taxes

increase. Burlington contends we must adopt its interpretation because it is patently unreasonable to pay $3.14 in Tax Charges for every dollar real estate taxes increase.

Burlington's position, however, improperly focuses on the Tax Charges in isolation, rather than considering them in the context of the entire lease. It also erroneously assumes the Tax Charges are simply a means for Macerich and all subsequent owners to pass real estate taxes through to Burlington.

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647; *California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 144 ["To give effect to the parties' intent, we may look to evidence of the circumstances surrounding execution of the lease"].) "We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation." (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245; Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].)

In negotiating the lease Burlington concedes it focused on the total amount it would pay rather than any particular payment required by the lease. In Burlington's view, all payments under the lease constituted rent and therefore the allocation of the total rent among the categories Fixed Minimum Rent, CAM Charges, and Tax Charges did not concern Burlington provided the total amount fell within the desired range.

Consistent with that view, Burlington agreed to set the initial Tax Charges, or the Base Tax Amount, based on a price per square foot rather than the actual real estate taxes assessed. Neither Burlington nor Macerich knew the actual real estate taxes when they negotiated the lease. Burlington, however, did know the $133,500 it agreed to as the Base Tax Amount exceeded the actual taxes. Although labeled as real estate taxes, the initial Tax Charges had nothing to do with the actual real estate taxes and were not merely a means for Macerich to pass the taxes through to Burlington. Indeed, the initial

Tax Charges were negotiated in the same manner as rent — that is, based on a price per square foot — and therefore the lease designated the Tax Charges "Additional Rent." Although section 16.2 tied all increases in the Tax Charges to increases in the real estate taxes, that does not change the fact the Tax Charges were negotiated and treated like rent.

The Tax Charges assessment was not the only payment the lease labeled as a commonly recognized expense, but treated as a form of rent. Burlington and Macerich also agreed to set the initial CAM Charges based on a price per square foot, rather than the actual costs incurred to maintain the mall's common areas. Moreover, the parties agreed to base all increases in the CAM Charges on increases in the Consumer Price Index (with a cap of 3 percent per year) rather than increases in the actual costs to maintain the mall's common areas. Accordingly, despite the designation "Common Area Costs," neither the initial CAM Charges nor the increases in the CAM Charges bear any relation to the actual costs to maintain the mall's common areas. The CAM Charges are merely another component of the overall rent the lease identifies as "Additional Rent."

When the Tax Charges are properly viewed in the context of the entire lease as one component of the overall rent, Bella Terra's interpretation of section 16.2 is reasonable and does not result in a windfall as Burlington contends. The lease defines three components to the overall rent Burlington must pay: (1) Fixed Minimum Rent; (2) Tax Charges; and (3) CAM Charges.[6] How the Tax Charges and CAM Charges operate is discussed above. The Fixed Minimum Rent provision is typically considered traditional rent. The parties initially set the Fixed Minimum Rent at $416,250, or $3.12 per square foot and Burlington concedes this rent was "very low." The negotiated increases in the Fixed Minimum Rent also are low. Specifically, every fifth year the

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[6] A fourth possible component is "Percentage Rent," which requires Burlington to pay a small percentage of its sales as rent if those sales exceed designated thresholds. The parties do not address this component or explain whether the thresholds were met. Accordingly, we do not address this potential rent component.

Fixed Minimum Rent increases by approximately 8 percent of the *original* amount so that it increases less than $170,000, or approximately $1.25 per square foot, over the lease's 30-year term.

Considered together, all three components of Burlington's rent are low in comparison to the price per square foot paid by all other mall tenants. For example, in 2009, Burlington paid a total of $13.54 per square foot while the tenant with the next lowest cost per square foot paid nearly double that amount ($25.79 per square foot). Moreover, the two largest tenants other than Burlington paid $29.28 and $31.31 per square foot compared to Burlington's $13.54. Hence, there is no basis for Burlington's contention that Bella Terra's interpretation is unjust and results in a windfall.

In Burlington's view, what it pays compared to other tenants is irrelevant to interpreting the lease because Burlington is an anchor tenant. We disagree. Whether Burlington is an anchor tenant is a factor to be considered in determining the overall reasonableness of its rent in the marketplace, but it does not make a comparison between Burlington's rent and the rent paid by other tenants irrelevant to our interpretation of the lease. We are concerned with whether the Tax Charges Burlington pays results in a windfall to Bella Terra when the Tax Charges are viewed in the context of the total amount Burlington pays under the lease. The fact Burlington's total payments are significantly less than all other tenants is relevant to that question regardless of Burlington's status as an anchor tenant.

Burlington also argues the parties' subsequent conduct under the lease demonstrates the jury and the court misinterpreted section 16.2. The parties' post contractual conduct before a dispute arises is admissible to show the intention of the parties when they entered into the contract. (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851.) The three instances of subsequent conduct Burlington describes, however, provide no insight into how Burlington and Macerich intended section 16.2 to be interpreted when they entered into the lease.

The first instance of post contractual conduct Burlington cites concerns the manner in which Macerich and HCA billed Burlington for the Tax Charges when they owned the mall. Specifically, because neither Macerich nor HCA used Bella Terra's interpretation of section 16.2 to bill for the Tax Charges, Burlington contends Bella Terra's interpretation is erroneous. Macerich and HCA, however, also did not use Burlington's interpretation to bill for Tax Charges. Accordingly, this subsequent conduct is irrelevant in determining which interpretation to adopt.

The second instance of subsequent conduct Burlington argues relates to the lease abstract HCA prepared to help it administer the lease. Because the abstract did not identify Bella Terra's interpretation as the methodology to be used in calculating the Tax Charges, Burlington contends the abstract establishes Bella Terra misinterprets section 16.2. The abstract, however, does not mention Burlington's interpretation either and therefore provides no assistance in interpreting section 16.2 for the same reasons Macerich's and HCA's billings for the Tax Charges provided no interpretative guidance.

The final instance of subsequent conduct Burlington cites concerns a comment HCA's lawyer made during negotiations over a 2003 lease amendment dealing with tax refunds under section 16.2. According to Burlington, HCA's lawyer agreed with Burlington's interpretation of section 16.2. Although HCA was the owner of the mall, it was not the owner when Burlington negotiated and entered into the lease. In interpreting the lease, we seek to ascertain the parties' intent at the time of contracting. (*Founding Members*, *supra*, 109 Cal.App.4th at p. 955.) A comment by a subsequent owner's lawyer years later does not establish the prior owner's intent when it entered into the lease. Moreover, the proper interpretation of section 16.2 was not at issue during these negotiations. The parties simply agreed that any tax refunds would be calculated in the same manner as the Tax Charges.

Burlington next argues the custom and practice for addressing real estate taxes in shopping mall leases supports its interpretation of section 16.2. Although the

custom and practice in a particular industry may help interpret a contract (*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 889), the custom and practice evidence Burlington relies upon sheds no light on the issue. Burlington cites expert testimony stating real estate taxes are typically treated as a pass through expense and not as a means for landlords to gain profits. The same expert, however, testified the parties to a lease are free to structure the lease in any way they like and he had not seen a contractual provision like that found in section 16.2. Without testimony showing section 16.2's language is at least similar to that commonly used in other shopping mall leases, the custom and practice evidence offered by Burlington fails to support its interpretation of section 16.2.

Finally, Burlington argues Bella Terra's interpretation is unreasonable because section 16.2 describes the Tax Charges as the "Tenant's *Share* of Real Estate Taxes." (Italics added.) According to Burlington, the term "Share" suggests some lesser portion of the entire real estate taxes, not one that is 3.14 times greater than the actual taxes and allows that "Share" to increase well beyond the Fixed Minimum Rent. Burlington contends interpreting "Share" in this manner violates the cannon of contractual interpretation requiring that words be understood in their ordinary and popular sense. (See Civ. Code, § 1644.) The term "Tenant's Share of Real Estate Taxes," however, is a defined term in the lease that specifies Burlington's "Share" of the taxes would exceed the actual tax levy. The same cannon Burlington relies on applies "unless [the words are] used by the parties in a technical sense . . . in which case the latter must be followed."[7] (*Ibid.*)

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[7] Earlier in this action, Burlington appealed the trial court's ruling sustaining Bella Terra's demurrer to the breach of contract cause of action without leave to amend on the ground section 16.2 was clear and not reasonably susceptible to Burlington's interpretation. We reversed that ruling, explaining we could not conclude as a matter of law that Bella Terra's interpretation was correct because we had to accept any possible interpretation alleged by Burlington as true. In reaching that conclusion we stated Bella Terra's interpretation lead to a "strange result," given section 16.2's use of the word

Although the parties may not have anticipated the steep rise in real estate taxes, the lease nonetheless expressly provides for a formula that supports Bella Terra's interpretation and is reasonable when viewed in the context of the entire lease. Moreover, to the extent Burlington believes any aspect of the lease operates unjustly or unreasonably, the lease gives Burlington the option to terminate the lease in 2006, 2012, and 2018 if sales fall below agreed-upon levels.

Burlington fails to provide any compelling reason for us to conclude the jury and trial court erred in adopting Bella Terra's interpretation of section 16.2. (*Parsons*, *supra*, 62 Cal.2d at p. 866 ["an appellate court must determine that the trial court's interpretation is erroneous before it may properly reverse a judgment"]; *Sayble*, *supra*, 76 Cal.App.3d at pp. 512-513.) Moreover, after independently reviewing the evidence and interpreting section 16.2, we agree with Bella Terra's interpretation.

Our task is to construe the lease as it exists. "'We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there.' [Citation.]" *Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 361; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 809 ["'The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably'"].)

"Share," and therefore extrinsic evidence may be necessary to understand section 16.2. (*Burlington Coat Factory of California, LLC v. Bella Terra Associates, LLC* (Nov. 26, 2008, GO39699) [nonpub. opn.].) We now have that extrinsic evidence and are no longer required to accept Burlington's alleged interpretation as true.

III

DISPOSITION

The judgment is affirmed. Bella Terra shall recover its costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

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Burlington Coat Factory of California, LLC v. Bella Terra Associates, LLC

Superior Court of Orange County

Aviv L. Tuchman
Tuchman & Associates
6080 West Pico Boulevard
Los Angeles, CA 90035

Robert A. Olson
Greines, Martin, Stein & Richland LLP
5900 Wilshire Blvd, 12th Floor
Los Angeles, CA 90036

Peter Anthony Umoff
Seed Mackall LLP
1332 Anacapa Street, #200
P.O. Box 2578
Santa Barbara, CA 93120

Daniel J Gonzalez
Horvitz & Levy
15760 Ventura Blvd 18th Floor
Encino, CA 91436-3000