IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT
CASE NO. 3D23-1002
LT. NO.: 16-017123-CA

BRYAN G. BARRISH

Petitioner,

vs.

INTERIORS BY STEVEN G., INC.

Respondent.
_____/

ANSWER BRIEF AND INITIAL BRIEF OF CROSS-APPELLANT INTERIORS BY STEVEN G., INC

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By ***/s/ Robert P. Frankel***
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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

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Statutes

Rules

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STATEMENT OF JURISIDCTION

This Court has jurisdiction over the subject appeal and cross-appeal pursuant to Florida Rules of Appellate Procedure 9.110 and 9.030(b)(1)(A) because the trial court's Final Judgment After Non-Jury Trial is a final order on all claims asserted by both parties, which plaintiff/counter-defendant, Bryan Barrish, timely appealed and defendant/counter-claimant, Interiors by Steven G., Inc., timely cross-appealed.

INTRODUCTION

This appeal arises from the trial court's Final Judgment After Non-Jury Trial (the "Final Judgment"), which was entered by Judge Vivianne del Rio on May 8, 2023. (R. 1417-1419.) The Final Judgment followed a five (5) day bench trial held on March 27 through 30, 2023, and concluded on April 14, 2023. With respect to the documents filed in the Circuit Court below, reference in this brief to "(R. __)" shall refer to the record on appeal of the trial court's proceedings below. With respect to the trial transcripts, reference in this brief to "(Barrish App. ___ at ___:___ of the

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transcript)" shall refer to the appendix submitted by appellant/plaintiff/counter-defendant, Bryan G. Barrish ("Barrish"), and the page(s)/line(s) of the trial transcript. Reference in this brief to "(IBSG App. ___ at ___:___ of the transcript)" shall refer to the appendix submitted by appellee/cross-appellant/defendant/counterplaintiff, Interiors By Steven G., Inc. ("IBSG"), and the page(s)/line(s) of the trial transcript from April 14, 2023, which was the last day of trial, where Judge del Rio announced her ruling.

During the trial, Barrish was precluded from seeking certain alleged contract damages that pertained to the (mistaken) belief of Barrish that he was overcharged by his interior designer, IBSG.

Despite what Barrish argued at trial, the subject interior design contract does not remotely provide Barrish the right to seek an accounting from IBSG that would require, as a matter of contract, a review and audit of IBSG's vendor costs. Essentially, Barrish attempted to repackage his previously-dismissed claim for violation of Florida's Deceptive and Unfair Trade Practices Act

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("FDUTPA") to present a new damages model for his alleged breach of contract action, for the very first time, on the day of trial. (See Barrish App. 374-381 at 17:4-24:3 of the transcript.) Thus, the trial court correctly ruled that Barrish could not recover in excess of alleged $318,000 in damages as presented for the first time by Barrish at trial.

As referenced above, the FDUTPA count was dismissed with prejudice by Judge John Schlesinger on October 26, 2017. (R. 1420-1423.) Reviewing a discovery issue pertaining to Barrish's requests of IBSG's vendor costs and related insider pricing and information, Judge Schlesinger held that such documents are privileged trade secrets of IBSG. (Id. ("[I]t is common knowledge that actual vender and supplier costs are one of an interior designer's closest-held trade secrets.") (emphasis added).) Based on Judge Schlesinger's holding, he also reconsidered his prior ruling on the viability of Barrish's FDUTPA claim and *sua sponte* dismissed the claim with prejudice, as the claim was reliant upon Barrish's demands for IBSG's vendor costs (and his alleged

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entitlement to them). (Id.) Barrish attempted to re-argue and re-litigate the issue on vendor costs in some iteration of a motion to compel filed on two (2) other occasions. (R. 1424; 1425-1426.) Barrish even petitioned for writ of certiorari from this Court, which petition was denied before the trial. See Case No. 3D-22-0368 (Fla. 3d DCA).

Barrish's fifth bite at the apple via the instant appeal provides nothing new to the analysis, nor does it change the plain and simple fact that IBSG's trade secrets are privileged, irrespective of the claim(s) asserted by Barrish, or the manner in which his attorneys creatively allege in his pleadings.

The instant brief of IBSG includes its cross-appeal of the Final Judgment, for the trial court relied solely upon a privileged settlement communication sent by IBSG to Barrish as it relates to the credit for wood flooring awarded to Barrish by Judge del Rio.

Critical to the analysis *sub judice*, there was no finding made by the trial court as to whether IBSG, in fact, provided defective wood flooring to Barrish in breach of the contract. Instead, the trial

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court awarded Barrish the sum of $103,134 (i.e., the price charged to Barrish for the wood floor, exclusive of commission), based on an email from IBSG's principal that tells Barrish he can have the installed and replaced wood flooring for free during the middle of a negotiation of Barrish's outstanding debt to IBSG, and threat of litigation by Barrish against IBSG. (See IBSG App. 141-143 at 139:11-141:25 of the transcript; see also IBSG Tr. Ex. D[1] & R. 521-538 at Ex. 1, Aff. of S. Gurowitz, ¶¶ 10-18.)

The email upon which Barrish's award was based was made in the context of settlement and, thus, it is privileged and cannot be considered as evidence at trial pursuant to Florida Statue section 90.408. IBSG filed a motion in limine on this very issue (R. 521-538), in response and counter to one of Barrish's motions for summary judgment. Although the court entered orders denying Barrish's two motions for summary judgment, it did not issue an order as to IBSG's motion in limine. (R. 579-582.) That said, the

[1] IBSG's trial exhibit "D" was an email thread between Julie Barrish and Steven Gurowitz, where the topic of a potential lawsuit is being discussed. Apparently, it was not made part of the Record on Appeal, but the emails were admitted into evidence, as noted on the Deputy Clerk's final Exhibit List dated March 31, 2023.

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trial court did (opaquely) mention that an issue of fact was presented as to the portions of the invoices to be credited by IBSG based on the email. (R. 581-82 at ¶ 2.) No direct mention is made in the order, however, that it would need to specifically address whether IBSG's offer to give Barrish a credit for his wood floors was, in fact, a settlement communication. (Id.) The trial court's ultimate decision at trial in Barrish's favor on this issue resulted in a set-off, whereby IBSG's trial award on its counterclaim for $71,775.28 was erased by the $103,134 award given to Barrish on the wood flooring. Respectfully, it was error of the trial court to have relied upon the settlement communication of IBSG in Barrish's favor without something more. Indeed, no evidence was submitted by Barrish to show what damages, if any, he sustained on repairs costs to the hardwood floors.

For these reasons, and as more particularly described below, IBSG respectfully requests that the rulings of the Circuit Court be upheld as to Barrish's appeal, and that the Final Judgment be

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reversed solely with respect to the $103,134 in damages awarded to Barrish at trial for the wood flooring.

STATEMENT OF THE ISSUES

Whether the trial court erred in ruling that Barrish is not entitled to the approximate sum of $318,000 of contract damages against IBGS, which sum represents the application of a 40% discount, *carte blanche*, on all sums paid by Barrish during the course of his interior design project with IBSG.

Whether the Circuit Court (Schlesinger, J.) committed reversible error in entering the October 27, 2017 Order, which order precluded Barrish's discovery of IBSG's vendor costs as privileged trade secrets, and *sua sponte* dismissed the FDUTPA claim with prejudice.

On cross-appeal, whether the trial court erred in entering its Final Judgment in favor of Barrish on his claim for defective wood flooring, which judgment was based solely on a privileged settlement communication sent by IBSG to Barrish.

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STATEMENT OF THE CASE

Barrish is a part-time resident of Miami-Dade County, Florida and owner of a luxury condominium located at the St. Regis Bal Harbour, 9705 Collins Avenue, Unit # 1803-North, Bal Harbour, FL 33154 (the "Condo"). (See R. 95-145, Pl.'s Am. Compl. ¶¶ 2, 5.)

IBSG is a Florida licensed interior design firm that specializes in high-end interior design and décor services on residential properties in South Florida. (See id. at ¶¶ 3, 6.)

On March 7, 2012, Barrish hired IBSG to design and decorate the interior of his Condo. (See id. at ¶ 6.) The parties entered into a written contract that included "all furniture, furnishings, wall, floor, window and ceiling coverings, art work and accessories" (hereinafter, the "Contract"). (See id. at Ex. A, the Contract.)

Pursuant to the terms of the Contract, Barrish paid IBSG a $25,000.00 non-refundable interior design fee. (See id.) With respect to pricing, the Contract states:

> All prices quoted are based on Showroom List Price. You will be given a discount of 40% off of Showroom List Price ("Net Price"), on designated items only. Our Fee for Professional Services rendered in the amount

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> of 35% of the Net Price will be added on to the Net Price, together with all applicable State Taxes. Please note that Showroom List Price is not a market-defined price.

(See id. (emphasis added).) Absent from the Contract is any right to seek an accounting of IBSG's actual costs. (See generally id.)

With respect to the above-quoted Contract language, Barrish alleged in his Amended Complaint that he:

> (i) "understood that with respect to those items contained within [IBSG]'s showroom, that the pricing for said items was not necessarily market price" (see R. 95-145, Pl.'s Am. Compl. at ¶ 47 (emphasis added));
>
> (ii) "understood that for those items that were not in [IBSG]'s showroom and of which Barrish purchased directly from third party vendors, that Barrish would be charged a 35% markup above [IBSG]'s cost" (see id. at ¶ 48 (emphasis added)); and
>
> (iii) "believed that [IBSG] would charge and was charging [sic] a mark-up of 35% of what [IBSG] paid the laborer's for installation" (see id. at ¶ 49 (emphasis added)).

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As purported grounds for liability against IBSG, the Amended Complaint alleged that "[i]t was understood that upon completion of the work, [IBSG] would provide a full accounting to [Barrish] so that [Barrish] could verify the amounts billed." (Id. at ¶ 17 (emphasis added).) To that end, the Amended Complaint further stated that Plaintiff, "demanded that [IBSG] produce documentation . . . to ensure that Plaintiff was receiving the agreed upon 40% discount . . . and [] to ensure that [IBSG's] 35% mark-up fee was properly calculated," but IBSG "refused to produce the requested documentation." (Id. at ¶¶ 24, 26.)

Barrish's claim for breach of contract was alleged in Count I of the Amended Complaint. Within this Count, Barrish alleged that he "further demanded that [IBSG] credit [Barrish] for the defective work that [Barrish] paid for, but [IBSG] has refused to do so." (Id. at ¶ 33 (emphasis added).) Barrish hired an architectural firm to prepare a punch list of alleged defective work of IBSG. (Id. at ¶34.) In passing, Barrish also alleged that IBSG "further breached the

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[Contract] by failing to provide [Barrish] with the back-up requested by Plaintiff relative to the cost of the subject items." (Id. at ¶ 36.)

Count II was an action for violation of FDUTPA. Within this Count, Barrish accuses IBSG of engaging in some price-gouging-scheme based on, among other things, IBSG's refusal to provide Barrish "what the actual charges were that [IBSG] incurred for labor and installation." (Id. at ¶ 61.) Indeed, Barrish stridently alleged that he was "entitled to know same to ensure that [IBSG] . . . was not engaging in price gauging [sic]." (Id. at ¶ 62 (emphasis added).)

On July 5, 2016, Plaintiff served his request for production on Defendant. (See R. 58-68; 76-86; 91-94[2].) Request for production nos. 5 through 10 and 13 (collectively, the "Requests") sought the production of communications and documents concerning the various suppliers and vendors with whom IBSG has a long-standing business relationship. Ostensibly, the Plaintiff sought production of back-up information concerning the price/cost paid by IBSG to

[2] The Requests were not made part of the record but clearly argued and referenced in the court documents cited to above.

Law Offices of Robert P. Frankel, P.A.
Royal Palm Office Park, 1000 South Pine Island Road, Suite 410, Plantation, Florida 33324 • Tel: (305) 358-5690 • Fax: (305) 907-5901

its various suppliers and vendors for furniture, furnishings, wall and floor coverings, artwork and fixtures that were, in turn, shipped to and installed at the Condo. (See id. at Requests Nos. 5, 6, 9.) Also, Plaintiff sought an accounting from IBSG of fees for professional services with respect to the Condo, despite having already received invoices (and paying most of them) during the performance of the interior design work on the Condo. (See id. at Request No. 8.)

On August 31, 2016, IBSG moved for a protective order against the production of any and all documents that are the subject matter of the Requests. (See R. 61-68, Def.'s Mot. for Protect. Order.) As argued in its motion, a protective order was warranted in IBSG's favor because the Requests sought the production of proprietary business information and confidential trade secrets. (See id. at ¶ 7 (citing Fla. R. Civ. P. 1.280(c)(7); Cooper Tire & Rubber Co. v. Cabrera, 112 So.3d 731, 733 (Fla. 3d DCA 2013); see also Kobi Karp Architecture & Interior Design, Inc.

Law Offices of Robert P. Frankel, P.A.
Royal Palm Office Park, 1000 South Pine Island Road, Suite 410, Plantation, Florida 33324 • Tel: (305) 358-5690 • Fax: (305) 907-5901

v. Charms 63 Nobe, LLC, 166 So.3d 916, 919-920 (Fla. 3d DCA 2015)).)

The Circuit Court (Schlesinger, J.) granted IBSG's Motion for Protective Order on December 15, 2016. (See R. 1424, Order.) Specifically, the motion was granted as to Plaintiff's Request for Production Nos. 5-10 and 13 (i.e., the Requests), without prejudice. (Id.)

IBSG answered the Amended Complaint and asserted a Counterclaim against Barrish for monies owed. (R. 205-220.) Barrish answered IBSG's Counterclaim on April 5, 2017. (R. 221-224.) This same day, Barrish also filed his "Motion to Compel/Renewed Response to Defendant's Motion for Protective Order and Motion to Quash", which essentially asked the Circuit Court to revisit its order granting IBSG's Motion for Protective Order so that all the back-up and cost information that form the subject matter of the Requests would become discoverable. (See R. 225-277.)

Law Offices of Robert P. Frankel, P.A.
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On October 26, 2017, the Circuit Court (Schlesinger, J.) issued a detailed, four-page order denying Plaintiff's Motion to Compel/Renewed Response to Defendant's Motion for Protective Order and Motion to Quash. (See R. 1420-1423, Order.)

Among the more salient rulings made by Judge Schlesinger, it was held that "the contract language at issue does not require the designer/defendant to disclose his actual costs, nor does it require an accounting." (See id. at p. 2 (emphasis added).) "Those portions of the amended complaint," the Circuit Court added, "that mention plaintiff's desire to verify that defendant 'was not engaging in price gouging' do not establish an actionable breach of contract nor a basis to discover baseline information to investigate how much profit a businessman makes under a given contract for goods/services." (Id. (emphasis added).) Reinforcing its holding, the Circuit Court surmised that "the references in Count I to failure to provide 'back-up' do not establish any right to discovery of back-up actual cost information under the breach of contract count." (Id. (emphasis added).)

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Additionally, the Circuit Court reconsidered its prior ruling on IBSG's motion to dismiss Count II for violation of FDUTPA, and held that it failed to state a cause of action against IBSG. Count II was thereby dismissed with prejudice by virtue of the order. (Id. at pp. 3-4.) Although Barrish's Initial Brief on Appeal decries the ruling of Judge Schlesinger on the basis that it dismissed the FDUTPA claim "at the pleadings phase," the pleadings were technically closed at the time of the *sua sponte* dismissal of the claim, as Barrish had already answered IBSG's Counterclaim and the permitted time to file a reply had passed as of October 26, 2017.

Nearly four (4) years after the above-referenced order denying Plaintiff's motion to compel/renewed response was entered by Judge Schlesinger, Barrish filed another motion to compel that was titled "Plaintiff's Renewed Motion to Compel Production of Backup Documents With Respect To Certain Invoices." (R. 281-296.) Barrish's renewed motion, effectively, was his third plea to the Circuit Court to order the production of documents responsive to

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the Requests concerning IBSG's actual costs and back-up related thereto.

IBSG responded to the Renewed Motion and objected on the grounds that it constituted an untimely, and procedurally improper, motion for rehearing. (See R. 297-313, Def.'s Resp. to Renewed Mot.) Simply stated, Plaintiff should not have the right to keep filing the same motion in substance by calling it something different in form, simply because he disagrees with the previous rulings of the Circuit Court or wishes to have another judge take a "second look" at a prior ruling.[3]

On January 26, 2022, the Circuit Court (del Rio, J.) issued the Order Denying Plaintiff's Renewed Motion to Compel Production of Backup Documents With Respect to Certain Invoices (R. 1425-1426.) Barrish thereafter filed a petition for writ of certiorari on February 25, 2022, with the Third District Court of Appeal on the discovery issue concerning IBSG's back-up/vendor documentation. See Case No. 3D22-0368 (Fla. 3d DCA). Barrish's petition for writ

[3] At this point in time, Judge Schlesinger had retired from the bench and Judge Vivianne del Rio was named presiding judge.

Law Offices of Robert P. Frankel, P.A.
Royal Palm Office Park, 1000 South Pine Island Road, Suite 410, Plantation, Florida 33324 • Tel: (305) 358-5690 • Fax: (305) 907-5901

of certiorari was denied by this Court on April 19, 2022, with the final disposition issued without mandate on May 9, 2022. See id.

Back in the Circuit Court, the parties proceeded to a stipulated bench trial on March 27, 28, 29, 30, and April 14, 2023. Almost six (6) years after filing the complaint, Duane Morris and Scott Kravetz, Esq. had withdrawn from representing Barrish, and Eric Assouline of Assouline and Berlowe took over the representation as of June 6, 2022. (R. 359-368.)

On the first day of trial, during opening statements, Mr. Assouline, on behalf of Barrish, announced a new theory of damages in support of his claim for breach of contract (the only claim that could proceed to trial). Although Mr. Assouline was adamant that he was "not going to get into anything that Judge Schlesinger ruled is [IBSG]'s internal costs, supplier costs or vendor costs. That's off limits by Judge Schlesinger's order," (Barrish's App. 369 at 12:10-15 of the transcript (emphasis added)), he then proceeded to present a theory for breach of contract that is vastly different than what Barrish alleged in his Amended Complaint.

Law Offices of Robert P. Frankel, P.A.
Royal Palm Office Park, 1000 South Pine Island Road, Suite 410, Plantation, Florida 33324 • Tel: (305) 358-5690 • Fax: (305) 907-5901

Specifically, counsel alleged that Barrish "did not ever get any forty percent discount. And without the forty percent discount, [IBSG] is not entitled to mark up the showroom list price by thirty five percent. We have all the invoices and we went through the math, . . . which results in damages back to my client, Mr. Barrish of $318,646.00." (Barrish's App. 373 at 16:3-11 of the transcript.) In other words, and despite alleging in his Amended Complaint that he understood that IBSG is entitled to charge its 35% on everything (see R. 95-145 at ¶¶ 47-49), Barrish changed his position at trial to now argue that IBSG cannot recover its 35% commission on the work unless Barrish is given his 40% discount off the list price (which he concedes he was not given).[4] This also conflicted with the trial testimony of Steven Gurowitz, principal of IBSG, who testified that his firm would be entitled to a commission even if Barrish selected his own vendors that utilized IBSG's design concepts. (See Barrish App. 946-47 at 102:23-103:4 of the transcript.)

[4] Moreover, there was no evidence offered as to what those "designated" items were. Instead, Barrish's lawyers applied their (new) interpretation of the Contract *carte blanche* to all items ordered and approved by Barrish.

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Counsel for IBSG rebutted these contentions, arguing that Barrish failed to plead this new theory in his Amended Complaint. Pursuant to Hart Properties, Inc. v. Slack, 159 So.2d 236 (Fla. 1964), IBSG argued that Barrish should be precluded from presenting a damages model at trial that conflicted with what Barrish actually pleaded. (Barrish's App. 374-77 at 17:4-20:20 of the transcript.)

The trial court agreed and admonished Barrish that "this case [was] going to be about the wood floors. It's going to be about the punch list and whether or not [IBSG] performed on the contract, what they needed to do. And that's it." (Barrish's App. 638 at 13:19-23 of the transcript.) Other than the floor, there were no claims presented as to anything that was provided by IBSG that was not repaired or corrected and, thus, the trial court was correct in limiting the breach of contract to the hardwood floors.

At or around the conclusion of the project, Barrish and IBSG's principal, Steven Gurowitz, held a settlement meeting at Carpaccio's Restaurant in Bal Harbour to "work out the differences

Law Offices of Robert P. Frankel, P.A.
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one way or the other." (App. 964-65 at 120:6-121:6 of the transcript.) By this time, there were already threats or indications that Barrish was preparing to sue IBSG over his project. (Barrish's App. 954 at 110:12-113:25 of the transcript (discussing IBSG's Trial Ex. "D").) During the meeting at Carpaccio's, Barrish demanded $300,000 from Gurowitz to settle his complaints with the project. Gurowitz found this unacceptable and the meeting concluded. (Barrish's App. 966 at 122:2-12 of the transcript.)

Barrish had an outstanding balance with IBSG, and to resolve this debt and any threatened litigation, Gurowitz offered a credit for the wood floors in an email he sent Barrish on May 2, 2014. (R. 521-538 at Ex. 1, Gurowitz Aff., ¶¶ 9-12; see also Barrish's Tr. Ex. No. 10.) Gurowitz' intention in offering Barrish the credit for the wood floor was to avoid a lawsuit and settle their differences. (R. 521-538 at Ex. 1, Gurowitz Aff., ¶¶ 13-17.) Indeed, approximately three (3) months prior to Gurowitz's email, he was discussing a threat of litigation with Barrish's wife, Julie Barrish. (See IBSG's Tr. Ex. D, Bates-stamp Nos. IBSG00152-53.)

Law Offices of Robert P. Frankel, P.A.
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At trial, counsel for IBSG objected to the introduction of the May 2, 2014 email of Gurowitz on the grounds of privilege. (Barrish App. 620-21 at 263:16-264:17 of the transcript; Barrish App. 673 at 4818:-49:4 of the transcript.) The email was admitted as Plaintiff's Exhibit no. 10. IBSG's invoice associated with the wood floors (product and installation) included charges totaling $103,134, exclusive of commission.[5] (Barrish App. 587-88 at 230:19-231:1.) As testified to by two (2) of IBSG's trial witnesses,[6] several wooden planks were replaced throughout the living area of the Condo prior to completion of the project, at no additional charge to Barrish. (Barrish App. 889-890 at 45:10-46:8 of the transcript; see also Barrish App. 1054-1056 at 210:13-212:1 of the transcript.)

[5] Barrish also sought the return of the 35% commission he paid for the wood flooring.

[6] The witnesses were Shawn Graves, who was the lead interior designer from IBSG assigned to the subject project, and Paul Raffa (referred to erroneously in the transcript as "Paul Ralph" or "Mr. Raffle"), the flooring subcontractor used by IBSG for the supply and installation of the wood floors. Paul Raffa's trial testimony was not included with the (incomplete) trial transcripts included in the Appendix to Barrish's Initial Appellate Brief.

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Also, IBSG presented its Counterclaim damages of $71,775.28, as set forth in its money status sheet and balance on account. (Barrish Tr. Ex. 9.) This sum is comprised of $26,000 in shipping and handling charges contested by Barrish through trial, and $45,775.28 of completed work, which Barrish conceded at trial and for which he agreed to be held liable after years of litigating the issue. (Barrish's App. 961 at 117:2-25.)

Ultimately, the trial court held that Barrish prevailed on his claim for defective wood floors and IBSG prevailed on its counterclaim for monies owed.

After a brief intermission, the trial court returned to announce its ruling:

> THE COURT: All right. Okay. All right.
>
> . . .
>
> And another thing that came out in the testimony of many of the witnesses is that everyone wanted very much to make the Barrish's happy. We heard that from Mr. Newman, from Mr. Raffa, from Mr. Graves, from Mr. Gurowitz, that everyone really had the intention to make the Barrish's happy. And I know that, you know, Mr. Frankel once

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suggested that this is a case of buyer's remorse. I got the sense that Mr. Barrish genuinely believes that he overpaid. They met -- they met at Carpaccio, Mr. Gurowitz and Mr. Barrish and it's clear to the Court that Mr. Barrish believes that he overpaid by a sum of about $300,000 and that Mr. Gurowitz, to resolve the issues, was willing to say, hey, I will give you, you know, I will credit you for the cost for the $103,000 that the floor costs. What became of that, it seems that when, you know, Mr. Barrish wanted it to be more along the lines of 300,000 and then, okay, there's no deal. But even after that, the punch list was executed. Mr. Raffa testified that he changed, I don't know if he said 200 or 250 boards that he replaced and that, you know, if the Barrish's had had any more to replace, that he would have done it, that he basically was given carte blanche to replace all of the boards that needed replacement and that when he completed the replacement of the boards, that there were no more issues and that all the little sticky places on the floor marking where the boards needed to be replaced that were put there by Mrs. Barrish, every one of those had been corrected and had been solved.

But the Barrish's, on the other hand, contend that, you know, their floor remains -that there still are boards that have the sap problem or the blond board problem. And I don't know why this wasn't taken care of when Mr. Raffa was replacing the board. If maybe this
blond coloring sort of came out later, maybe as the staining faded, or I don't really know. So

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> there's clearly there was a bit of a disconnect there. But it's clear to the Court that there was an acknowledgment of some kind, you know, by Mr. Gurowitz that, okay, let's, you know, the floors aren't perfect and I'm willing to, you know, to give a credit for the floors. Okay.
>
> So that being said, there is an outstanding balance of 71,775 or something like that. So what the Court is going to do is I am going to find that that $71,775 is still owed to Steven G, however, that there was a credit promised to the Barrish's for $103,000 and therefore that $71,775 is -- is wiped out because of the promise made by Mr. Gurowitz and brought up in email by Mr. Barrish, and at no time was there ever any kind of an email back saying, oh, I changed my mind. You no longer get that credit. So I'm going to find that, you know, the -- that $103,000 credit is still on the books and that when you subtract the 71,775, you come up with, I don't know, $21,000 or so. No, 32,000, is that right? Roughly.

(IBSG App. 141-143 at 139:11-141:25 of the transcript (emphasis added).)

In ruling for Barrish, however, the trial court relied solely upon the May 2, 2014 email of Gurowitz, where he reiterated that Barrish would get a credit for the wood floors. Indeed, the trial court made

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no factual finding that the wood floors provided by IBSG were somehow defective.[7]

The ruling of the trial court was memorialized in the Final Judgment After Non-Jury Trial entered on May 8, 2023 (the "Final Judgment"), which awarded Barrish "a credit for the wood flooring in the amount of . . . [ ] $103,134.00 [ ] owed from [IBSG] to Barrish (the 'Credit')." (R. 1417-1419, Final Judgment at ¶ 1.) Despite his request, Barrish was not awarded a return of the 35% commission he paid IBSG for the wood flooring. The Final Judgment further stated that IBSG was entitled to $71,7775.28 on its Counterclaim, "but this amount is set-off in full by the Credit owed to Barrish." (Id. at ¶ 2.) After applying the set-off, Barrish was awarded $31,358.72 and post-judgment interest. (Id. at ¶ 3.)

Barrish appealed the Final Judgment, the October 26, 2017 order of Judge Schlesinger denying Barrish's motion to compel and dismissing the FDUTPA claim, and other orders and rulings related to the discovery of IBSG's vendor costs. Thereafter, IBSG cross-

[7] Barrish failed to offer or introduce evidence of the costs to repair the allegedly defective hardwood floor.

appealed the Final Judgment. Barrish's Initial Brief is supported by an appendix, which failed to include the transcripts of the trial proceedings conducted on March 30 and April 14, 2023. The appendix also failed to include the Circuit Court's docket.

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STANDARD OF REVIEW

The Circuit Court's Final Judgment is reviewed de novo as to legal issues. See Sanchez v. Renda Broadcasting Corp., 127 So.3d 627, 628 (Fla. 5th DCA 2013).

Under the de novo standard of review, the decision of the trial court is presumed to be correct; however, the appellate court is free to decide the legal issues differently without paying deference to the trial court's view of the law. See Van v. Schmidt, 122 So.3d 243, 258 (Fla. 2013). Indeed, findings of fact are "clothed with the presumption of correctness and will not be disturbed on appellate review absent a showing that they are clearly erroneous or totally without any substantial evidence in their support." In re Donner's Estate, 364 So.2d 742, 748 (Fla. 3d DCA 1978) (citations omitted).

To that end, "'[a] finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law.'" Id. (quoting Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956)).

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A decision of the trial court is deemed "clearly erroneous" and overturned on appeal when "an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or [when] the trial court has misapplied the law to the established facts[.]" Id.

SUMMARY OF THE ARGUMENT

I. The dismissal with prejudice of Barrish's FDUTPA claim was proper because the claim failed to adequately plead one or more essential elements of the claim; namely, the requirements of Florida Statute section 501.203(3)(c) to identify "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive or unconscionable acts or practices" in support of the alleged violation of FDUTPA.

II. The Circuit Court's protective and other related orders correctly prevented Barrish from discovering IBSG's vendor costs, as the trade secrets are privileged irrespective of what Barrish alleges in his Amended Complaint.

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III. Barrish's end-around the Circuit Court's orders precluding IBSG's vendor costs by arguing on the first day of trial that he was overcharged under the terms of the contract is not pleaded in the Amended Complaint and, in fact, it is contrary to what Barrish alleged with respect to his understanding of IBSG's 35% commission structure.

IV. Barrish's appeal should be rejected because he failed to supply this Court with a full transcript of the trial proceedings and the Circuit Court's docket.

V. With respect to IBSG's cross-appeal, the trial court erred in awarding Barrish $103,100 as a credit for the wood flooring, as the decision was based solely on an inadmissible settlement communication sent by Gurowitz/IBSG on May 2, 2014.

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ARGUMENT

I. Barrish's FDUTPA Claim Failed To State A Cause Of Action And, Thus, Dismissal With Prejudice Was Warranted.

"The Florida Deceptive and Unfair Trade Practices Act is intended to 'protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.' Fla. Stat. § 501.204(1); see also Delgado v. J.W. Courtesy Pontiac GMC–Truck, Inc., 693 So.2d 602, 605–06 (Fla. 2d DCA 1997) (discussing the purpose of FDUTPA in light of its legislative history).

A claim under FDUTPA has three elements: (1) a deceptive or unfair practice; (2) causation; and (3) actual damages. Cohen v. Implant Innovations, Inc., 259 F.R.D. 617 (S.D. Fla. 2008) (citing Rollins, Inc. v. Butland, 951 So.2d 860 (Fla. 2d DCA 2006)).

The conduct considered to be a deceptive or unfair for the purposes of a FDUTPA claim may be defined by "[a]ny law, statute,

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rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive or unconscionable acts or practices." Fla. Stat. § 501.203(3)(c). Under FDUTPA, an "unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So.2d 773, 777 (Fla. 2003). Furthermore, the Florida Supreme Court has defined "deception" as "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." Id. (emphasis added).

Although a FDUTPA claim 'may arise from a single contract, this principle does not operate to convert every breach of contract into a claim under the Act,' but instead reaches only that conduct which is unfair or deceptive. Bookworld Trade, Inc. v. Daughters of St. Paul, Inc., 532 F.Supp.2d, 1350, 1364 (M.D.Fla.2007) (citing PNR, Inc., 842 So.2d at 777 n. 2).

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Here, the Contract between Barrish and IBSG states that "[a]ll prices quoted are based on Showroom List Price. You will be given a discount of 40% off of Showroom List Price ('Net Price'), on designated items only. [IBSG's] Fee for Professional Services rendered in the amount of 35% of New Price will be added on to the Net Price, together with all applicable Sales Taxes. Please note that Showroom List Price is not a market-defined price." Despite the plain, unambiguous language of the Contract, coupled with Barrish's own understanding of IBSG's fee structure, as he admitted in paragraphs 47 through 49 of the Amended Complaint, Barrish clearly attempted to impose new conditions and obligations on IBSG to provide him with an accounting despite there being no contractual requirement to do so.[8] Nonetheless, Barrish paid the majority of his invoices and IBSG's 35% fee during the project, without objection. There is no express representation in the Contract that "Showroom List Price" or "Net Price" would be IBSG's

[8] What is more, the Showroom List Price is only applicable to certain designated items and Barrish made no attempt at trial to introduce which items he selected that should have been designated, and provided with, the Showroom List Price.

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actual cost. To the contrary, the Contract specifically says that "Showroom List price" is not a "market-defined price," which totally undermines Barrish's argument that he is entitled to an accounting of IBSG's vendor costs (under FDUTPA, under the Contract, and/or everything in between). Barrish disingenuously attempted to take this language, which was only applicable to a few items, and stretch it to almost everything he approved in writing and paid in full with the exception of those items he failed to pay that were the invoices which were the subject matter of IBSG's counterclaim.

Stated simply, the substantive allegations of Barrish's FDUTPA count directly conflict with the terms of the Contract attached to his pleading. When a complaint's allegations are contradicted by the exhibits attached thereto, the plain language of the exhibit will control, thereby providing a valid basis to dismiss the claim. See Harry Pepper v. Lasseter, 247 So.2d 736, 736-37 (Fla. 3d DCA 1971) ("There is an inconsistency between the general allegations of material facts in the SAC and the specific facts revealed by the exhibit (deposition) and they have the effect of neutralizing each

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allegation as against the other, thus rendering the pleading objectionable.") (internal citations omitted); accord Greenwald v. Triple D Properties, Inc., 424 So.2d 185, 187 (Fla. 4th DCA 1983).

Considering the foregoing, Barrish's FDUTPA claim failed to meet the pleading requirements concerning a deceptive or unfair practice of IBSG and that such deceptive or unfair practice caused injury to Barrish. To illustrate, Barrish's Amended Complaint generally alleges that he suspects he might have been overcharged for the work and services rendered by IBSG. Indeed, the Amended Complaint fails to identify "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive or unconscionable acts or practices," as required by Florida Statute section 501.203(3)(c), in order to marry the alleged proscribed conduct to a legitimate FDUTPA claim. Barrish's subjective belief that he might have overpaid for IBSG's work and services does not, and should not, give rise to a FDUTPA claim. See Rollins, Inc. v. Butland, 951 So.2d at 860-61; see also Rodriguez v. Recovery Performance & Marine, LLC, 38 So.3d 178, 181 (Fla. 3d

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DCA 2010). With respect to the element of causation, Barrish knew and understood that IBSG was entitled to charge a 35% commission on everything. It said so in the Contract. He was provided proposals of each and every item of interior design and approved them for ordering, delivery, and installation at his Condo. Thereafter, invoices were prepared based on the approved proposals, and Barrish, in fact, paid the majority of all invoices without raising any objection as to the reasonableness of charges or that the invoice somehow differed from the proposal(s) he reviewed and approved prior.

Arguably, Barrish's FDUTPA claim failed to meet the damages element, as the measure of actual damages under FDUTPA is limited to "'the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.'" See Rodriguez, 38 So.3d at 180 (finding that buyer of jet boat that sank could not recover the down payment and loan payments she made toward the

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purchase of jet boat as actual damages) (emphasis added) (quoting Rollins, Inc. v. Heller, 454 So.2d 580, 585 (Fla. 3d DCA 1984)). Because the Contract between the parties explicitly states that "Showroom List Price" is not a market-defined price, there can be no FDUTPA damages based on the "market value" of the services as they should have been delivered according to IBSG's Contract.

For these reasons, the dismissal with prejudice of Barrish's FDUTPA claim was proper because the claim failed to adequately plead one or more essential elements of the claim.[9]

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[9] Notably, Barrish argues that such dismissal with prejudice in the "pleadings phase" was inappropriate since a court reviewing a motion to dismiss is required to accept plaintiff's allegations as true. First, the action was technically not in the pleadings phase, as IBSG had answered Barrish's Amended Complaint, and Barrish had answered IBSG's Counterclaim, and the time to reply to each pleading had expired, at the time Judge Schlesinger dismissed the FDUTPA claim. Second, there was nothing preventing Barrish from seeking leave to amend his complaint to assert a different claim after Judge Schlesinger dismissed the FDUTPA claim. Third, the old adage that on review of a motion to dismiss all allegations are accepted as true does not give a claimant free-reign to allege anything he or she wants and have it be accepted as true by a reviewing court. For example, a court should not have to accept as true that the sky is pink simply because that is what plaintiff alleges in his or her complaint, as it is only well-pleaded allegations that must be accepted as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v.

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II. IBSG's Vendor Costs Are Privileged Trade Secrets That Are Indiscoverable.

"Upon motion by a party . . . , the court . . . may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed . . . ." Fla. R. Civ. P. 1.280(c)(7) (emphasis added); see also Cooper Tire & Rubber Co., 112 So.3d at 733 ("Disclosure of discovery material that may reasonably cause material injury of an irreparable nature includes "cat-out-of-the-bag material" that could be used to injure another person or party outside of the context of litigation, such as trade secrets.") (emphasis added); accord Allstate Ins. Co. v. Langston, 655 So.2d 91, 94 (Fla. 1995).

The communications and cost/price paid by IBSG to its suppliers and vendors is exactly the "cat-out-the-bag material" that the Third District Court of Appeal decried in Cooper Tire & Rubber

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Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1968, 167 L. Ed. 2d 929 (2007)) ("'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'")

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Co., 112 So.3d at 733, supra. If produced, the material would most certainly hurt IBSG's business interests (and those business interests of its vendors and suppliers), as competitors and rivals would be able to access IBSG's "vendor list" and other information in order to extract a business advantage over IBSG, and to demand the same cost/price that vendors and suppliers charged to IBSG for their own interior design needs.

Indeed, the disclosure or misappropriation of this kind of information is routinely held to constitute a trade secret. See Sea Coast Fire, Inc. v. Triangle Fire, Inc., 170 So.3d 804, 808 (Fla. 3d DCA 2014) ("Examples of trade secrets include confidential business information such as a customer list, when the list is not just a compilation of information readily available to the public, but rather acquired or compiled through the owner's industry.") (citing Kavanaugh v. Stump, 592 So.2d 1231, 1232 (Fla. 5th DCA 1992); E. Colonial Refuse Serv., Inc. v. Velocci, 416 So.2d 1276, 1278 (Fla. 5th DCA 1982)); see also Kobi Karp Architecture & Interior Design, Inc. v. Charms 63 Nobe, LLC, 166 So.3d 916, 919-920 (Fla. 3d DCA

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2015) (trial court's order requiring architectural and design firm to provide owner the contracts between firm and six of its clients, in addition to communications related to the contracts, would have resulted in material, irreparable harm); East v. Aqua Gaming, Inc., 805 So.2d 932 (Fla. 2d DCA 2001) (finding injunction prohibiting competitor from using corporation's customer list was warranted); Sethscot Collection, Inc. v. Drbul, 669 So.2d 1076 (Fla. 3d DCA 1996) (finding customer list was trade secret entitled to protection).

Fatally, the Contract does not obligate IBSG to provide Barrish with an accounting, nor does it state that IBSG has to provide Barrish with its actual costs in order for Barrish to verify and confirm the charges for IBSG's interior design services. The allegation of Barrish's Amended Complaint that IBSG "breached the [Contract] by failing to provide Plaintiff with the back-up requested by Plaintiff relative to the cost of the subject items" (see R. 95-145, Am. Compl. at ¶ 36), is directly belied by the clear, express terms of the Contract and, thus, does not provide a sufficient basis to pursue the claim in the first place. The Circuit Court clearly agreed

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with IBSG when it granted its request for a protective order and denied the discovery of any documents responsive to Barrish's requests for production of backup documentation.

Accordingly, the Circuit Court's protective and other related orders correctly prevented Barrish from discovering IBSG's vendor costs, as trade secrets are privileged irrespective of what Barrish (creatively) alleges in his Amended Complaint.

III. Barrish's Unsupported Claim Made For The First Time At Trial That He Was Overcharged Per The Contract Directly Conflicts With The Plain, Unambiguous Terms Of The Contract And His Own Allegations.

Barrish's end-around the Circuit Court's orders precluding IBSG's vendor costs, where his counsel argued on the first day of trial that Barrish was overcharged under the terms of the contract despite the fact that same is not pleaded in the Amended Complaint and; in fact, is contrary to what Barrish alleged as to his understanding of IBSG's 35% commission per the Contract.

Where the contractual documents are "clear and unambiguous," the Court is required to construe them as written, since they are the best evidence of the parties' intent. Fernandez v.

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Homestar at Miller Cove, Inc., 935 So.2d 547, 550-51 (Fla. 3d DCA 2006). A trial court "cannot vary the terms of a written agreement to achieve what it may believe is a desirable result." See Clear Channel Metroplex, Inc. v. Sunbeam Television Corp., 922 So.2d 229, 231 (Fla. 3d DCA 2005); see also Beach Resort Hotel Corp. v. Wieder, 79 So.2d 659, 663 (Fla.1955) ("[C]ourts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties**...** in order to relieve one of the parties from the apparent hardship of an improvident bargain.").

On the first day of trial, (new) counsel for Barrish argued during opening statement that Barrish's breach of contract damages were equal to a 40% discount that was not applied by IBSG, but should be applied, *carte blanche*, to all of IBSG's invoices in order for IBSG to be able to charge its 35% designer commission. Indeed, counsel for Barrish said: "[Barrish] did not ever get any forty percent discount. And without the forty percent discount, [IBSG] is not entitled to mark up the showroom list price by thirty five percent. We have all the invoices and we went through the

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math, . . . which results in damages back to my client, Mr. Barrish of $318,646.00." (Barrish's App. 373 at 16:3-11 of the transcript (emphasis added).)

Putting aside the analysis made under FDUTPA, the newly-introduced damages model of Barrish was based on a plainly erroneous interpretation of the Contract. The Contract clearly states that a 40% discount would be applied on designated items only. Because Barrish did not select any of the designated items, IBSG did not apply a 40% discount. It is entitled, however, to still charge Barrish its 35% commission irrespective of the 40% discount on designated items only. Barrish's interpretation of the Contract would practically render the Contract useless as it relates to IBSG's fee for services rendered.

What is more, Barrish's own allegations directly conflict with this notion that IBSG cannot charge its 35% commission unless it first applies a 40% discount on the invoiced items. Indeed, his Amended Complaint acknowledges and agrees with the concept that IBSG is entitled to charge a 35% designer fee even if Barrish went

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with another vendor for an item of furniture, fixture, furnishings, etc. (R. 95-145, Pl.'s Am. Compl. ¶¶ 47-49.) In fact, the Contract included a carve-out provision at the bottom that allowed for Barrish to seek out his own audio-visual ("AV") contractor and general contractor, and, in such event, IBSG agreed not to apply its 35% designer fee accordingly. Barrish did, in fact, retain his own audio-visual contractor and general contractor[10], and the testimony is unrefuted that IBSG did not charge Barrish its designer fee. (See Barrish App. 946-47 at 102:5-103:10 of the trial transcript.) If this Court were inclined to eschew with the plain terms of the contract and focus on the testimony and the intent of the parties, it would also lead to the clear conclusion that the newly-introduced damages model of Barrish directly conflicts with such evidence and is therefore without merit.

"'[L]itigant[s] are bound by the allegations of their pleadings and [] admissions contained in the pleadings as between the parties themselves are accepted as facts without the necessity of

[10] The general contractor was Joey Newman of Newman Construction, who also testified in the case.

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supporting evidence.'" Hart Properties, Inc., 159 So.2d at 238-239 (quoting Carvell v. Kinsey, 87 So.2d 577 (Fla. 1956)). Barrish's re-packaged damages model should be rejected soundly by this Court, as it conflicts with the pleadings and evidence adduced at trial.

IV. Barrish's Appeal Should Be Rejected For Failing To Supply The Full Transcript Of The Trial To This Court.

As routinely held, "[w]hen there are issues of fact, the appellant necessarily asks the reviewing court to draw conclusions about the evidence." Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979) (emphasis added). To that end, "[w]ithout a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternate theory." Id. (emphasis added) (affirming final judgment of the trial court because the "record brought forward by the appellant was inadequate to demonstrate reversible error"); accord Hill v. Hill, 778 So.2d 967, 968-69 (Fla. 2001) (Pariente, J., specially concurring); Connor v. Connor, 899 So.2d 1216, 1217 (Fla. 5th DCA 2005); Albear v. Hillman-Waller, 275 So.3d 690 (Fla.

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3d DCA 2019) (because there was no transcript of the trial below, appellant failed to meet his burden to show error).

Here, there is no question that Barrish is seeking review of the factual findings made by the trial court below. Indeed, the Initial Brief of Barrish challenges the validity of discovery orders (where facts and evidence are considered), and the court's subsequent entry of the Final Judgment following the conclusion of the bench trial. The (entire) trial transcript, however, has not been furnished by the Barrish in connection with his appeal of the trial court's decisions. Accordingly, this Court should affirm the rulings of the trial court below, as they relate to Barrish's appeal, because the factual issues on review cannot be resolved without a full and complete copy of the trial transcript. See Applegate, 377 So.2d at 1152; Boksa v. Hogan, 2023 WL 5944128, *1, n.1, Case No. 21-88-M (Sept. 13, 2023) (citing Applegate); Collazo v. Nationstar Mortgage, LLC, 2023 WL 5597298, *1, Case No. 19-37287 (Aug. 30, 2023) (citing Applegate).

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V. On Cross-Appeal, The Trial Court Committed Reversible Error When It Awarded Barrish A Credit Of $103,100 Based On A Settlement Communication Sent By IBSG.

Pursuant to Rule 90.408 of the Florida Evidence Code, "[e]vidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value." Fla. Stat. § 90.408 (emphasis added).

Here, the trial court relied solely upon the May 2, 2014 email from Gurowitz to Barrish, wherein it was reiterated that Barrish would get a credit for the wood floor. (IBSG App. 141-143 at 139:11-141:25 of the transcript (holding that, among other things, "there was a credit promised to the Barrish's for $103,000 and therefore that $71,775 is -- is wiped out because of the promise made by Mr. Gurowitz and brought up in email by Mr. Barrish . . .") (emphasis added).)

Gurowitz indicated that he intended to resolve or compromise the balance owed by Barrish and Barrish's complaints about the

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wood floors by, among other things, attending a meeting at Carpaccio. (See id. (also holding, "[t]hey met -- they met at Carpaccio, Mr. Gurowitz and Mr. Barrish and it's clear to the Court that Mr. Barrish believes that he overpaid by a sum of about $300,000 and that Mr. Gurowitz, to resolve the issues, was willing to say, hey, I will give you, you know, I will credit you for the cost for the $103,000 that the floor costs. What became of that, it seems that when, you know, Mr. Barrish wanted it to be more along the lines of 300,000 and then, okay, there's no deal. But even after that, the punch list was executed") (emphasis added).)

The Gurowitz email was sent after the project was completed and clearly indicated an attempt to compromise and resolve the issues between the parties. It was contingent upon Barrish accepting and resolving all issues and disputes outside of litigation. Of course, Barrish did not accept this offer and proceeded with filing his lawsuit approximately two (2) years later.[11]

[11] The situation is akin to a "gotcha" litigation tactic, a practice routinely admonished by the courts. See, e.g., Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337, 1339 (Fla. 3d DCA 1979)

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To reiterate, the May 2, 2014 email constitutes an inadmissible settlement communication by IBSG prior to the commencement of this litigation. Despite objection from IBSG, and a motion in limine filed on this very issue, the trial court accepted the email, and further accepted it, as the sole basis to prove IBSG was liable for the credit of the wood flooring. With respect to IBSG's cross-appeal, the trial court erred in awarding Barrish $103,100 as a credit for the wood flooring, as the decision was based solely on an inadmissible settlement communication sent by Gurowitz on May 2, 2014. Moreover, Barrish failed to offer any evidence as to the cost of repairs of the allegedly defective wood floors that have been sued by Barrish for over ten (10) years. This is absolutely fatal to Barrish's ability to prove actual damages under both of his claims for breach of contract and violation of FDUTPA. See Stuart Roofing, Inc. v. Thomas, 2023 WL 6134777, at **2-3, Case No. 20000568CCAXMX (Sept. 20, 2023) (generally, the measure of actual damages is the difference between market value of the

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("[T]he courts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed.").

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product or service received and its market value in the condition in which it should have been delivered and; accordingly, plaintiff's FDUTPA claim was dismissed at trial because he failed to present evidence of the market value of the roof which he received with alleged defects); see also Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati, 715 So.2d 311, 314 (Fla. 4th DCA 1998); Rollins, Inc. v. Heller, 454 So.2d 580, 584 (Fla. 3d DCA 1984); The Dem. Rep. of the Congo v. Air Cap. Grp., LLC, 614 F. Spp'x 460, 472 (11th Cir. 2015); Grossman Holdings Ltd. v. Hourihan, 414 So.2d 1037, 1040 (Fla. 1982) (owners suing contractor for defective construction entitled to damages measured by the difference in value of the home as constructed and the market value of the home without defects); accord Rector v. Larson's Marine, Inc.,479 So.2d 783, 786 (Fla. 2d DCA 1985) (proper damages was difference in value of boat with completed repairs and salvage value of boat prior to repairs).

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CONCLUSION

For all of these reasons, the trial court erred when it entered its Final Judgment as to Barrish's breach of contract claim with respect to the wood flooring. The ruling should therefore be reversed on appeal. All other rulings and orders of the Circuit Court should be affirmed on Barrish's appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045, I HEREBY CERTIFY that the undersigned has complied with all the font and word count requirements and that a copy of this Brief has been filed electronically pursuant to AO2011-2 and supplied to all counsel via electronic mail.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was uploaded to the clerk's portal and served electronically upon Eric N. Assouline, Esquire, Francisco Barreto, Esquire, 100 SE 2nd Street, Suite 3105, Miami, Florida 33131; ena@assoulineberlowe.com; fjb@assoulineberlowe.com on this September 22, 2023.

By: ***/s/ Robert P. Frankel***
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