

**THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT OF FLORIDA**

INCIDENT365 FLORIDA,
LLC.,

Appellant,

v.

OCEAN POINTE III
CONDOMINIUM
ASSOCIATION, INC.,

Appellee.

_____ /

INCIDENT365 FLORIDA,
LLC.,

Appellant,

v.

OCEAN POINTE V
CONDOMINIUM
ASSOCIATION, INC.,

Appellee.

_____ /

INCIDENT365 FLORIDA,
LLC.,

Appellant,

v.

OCEAN POINTE IV
CONDOMINIUM
ASSOCIATION, INC.,

Appellee.

_____ /

Consolidated Case Nos.:

3D22-2239

3D22-2240

3D22-2241

INITIAL BRIEF OF APPELLANT INCIDENT365 FLORIDA, LLC

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PRELIMINARY STATEMENT

This appeal addresses an issue of first impression: are water extraction, drying, and clean-out services provided to homeowners by disaster mitigation companies after a natural disaster (such as hurricanes) “repair and improvements” that can only be provided by a licensed building contractor? The trial court said “yes,” and barred Incident365 Florida, LLC, from enforcing its Time and Material agreements under a Florida statute that bars enforcement of contracts requiring a licensed contractor.

The trial court erred in two ways by granting summary judgment. First, it erred in concluding that because disaster mitigation services “make homes better” or “restore [homes] to a sound or healthy state,” they “repair and improve” homes, requiring a building contractor’s license. Evidence and case law prove otherwise. Water extraction, drying, and clean-out services help maintain *status quo* and prevent mold intrusion; they do not add to or improve a structure. The trial court effectively required an entire industry to license-up, rather than allow the legislature to make that momentous decision.

But even if some of the work required a contract, the majority of the services Incident365 provided do not require a building contractor’s license. Florida law enforces portions of bilateral contracts not requiring a license. The trial court erred in rejecting this law.

STATEMENT OF THE CASE AND FACTS

A. Incident365 Contracts With, And Provides Disaster Mitigation Services To, Condominiums Suffering Water Intrusion from Hurricane Irma

Hurricane Irma hit Florida in September 2017, causing widespread and catastrophic damage, including major water intrusion into many buildings and facilities. (R693, 1295; T11).^{1/2} Appellees, Ocean Pointe III Condominium Association, Inc., Ocean Pointe IV Condominium Association, Inc., and Ocean Pointe V Condominium Association, Inc. (collectively the “Condos”), all in the Florida Keys, were condominium associations for buildings heavily affected by Irma and suffering major water intrusion into individual condominiums. (R701, 773, 883, 1299-1300; T11).

Incident365 is a disaster mitigation service company that provides water extraction, drying, and clean-out services after storms and other water

¹ Because this is an appeal from a summary judgment, Incident365 states the facts in the light most favorable to the non-moving party. *Morales v. Citizens Prop. Ins.*, 338 So. 3d 320, 322 (Fla. 3d DCA 2022).

² Incident365 filed three separate lawsuits, one against each condominium association. The trial court did not consolidate the cases; this Court consolidated the three appeals for appellate purposes, but each appeal has a separate record. For ease of reference, Incident365 cites to the record for Condo III, 3D22-2240 (R), but when necessary, will cite to the record for Condo V, 3D22-2239 (R2) and Condo IV, 3D22-2241 (R3). The summary judgment hearing transcript is (T), followed by the clerk’s assigned page number.

leak events. (R1583). These services typically include providing equipment such as industrial grade fans, blowers, dehumidifiers, and other such equipment used to extract water and dry out building material that becomes wet. (R1583). Additional services include laying plastic sheeting, disposing of removed materials, applying anti-microbial solutions for sanitation, and general clean up services. (R1131, 1581-83). Incident365 also detaches and removes unsalvageable wet carpeting, drywall, ceilings and cabinets that is hauled off to the dump. (R947-948, 1131-34, 1581-83).

Incident365 understood that none of these services required a contractor's license under Chapter 489, Florida Statutes. (R1584). Prior to performing services in Florida, Incident365's president contacted the Florida Department of Professional Regulations, and described the disaster mitigation services Incident365 would perform in Florida. (R1136-1137). Its president explained to the Department that extracting water might require Incident365 to cut openings in the drywall to access wall cavities to dry them out or remove dangerous conditions (such as removing wet and hanging acoustical tiles or drywall). (R1136-1137, 1142, 1186).

The Department advised no license was required to perform those removal services. (R1136-1137).

Other disaster mitigation service companies have operated in the same manner and provided the same services in Florida for decades without licenses. (R1588-89). Further, the demolition industry does not consider the removal of building finished materials—such as wet or dry drywall, carpet, or cabinetry—demolition work. (R1578). Instead, the industry recognizes this work as “clean-out” work which often occurs because of storm damage or hazard damage, such as fires. (R1578). As one witness explained, “Any time you remove something, it falls under the demo category. So it’s a general term.” (R1185). That would include a wet sofa. (R1185).

After Hurricane Irma struck the Florida Keys on September 10, 2017, Incident365 was included on a list of disaster mitigation service companies providing water extraction and clean-out services, which list was circulated by NGM Insurance to its insureds, including the Condos. (R1583-84). NGM Insurance did not require Incident365 to be licensed under Florida law to be included on the list of companies that could perform the water extraction, drying, and clean-up services required in the aftermath of Hurricane Irma. (R1584).

Effective September 13, 2017, the Condos retained Incident365 to provide water damage mitigation services following damage sustained to property owned by the Condos due to Hurricane Irma. (R34-41, R2:31-38,

R3:32-39). The parties signed a “Time and Material Services Agreement” memorializing the services to be provided. (R34-41, R2:31-38, R3:32-39).

The identical Agreements stated Incident365 would provide these services:

- water damage mitigation
- general dehumidification
- structural dehumidification
- structural removal of affected substrates³
- disposal of removal materials off property location
- anti-microbial application
- mold remediation as necessary

(R35, R2.31, R3.32). Each agreement contained a severability provision: “if any provision of this Agreement is deemed unenforceable, the remaining provisions shall remain in full force and effect.” (R40, R2:37, R3:38).

B. After Incident365 Provides the Disaster Mitigation Services to The Condos, The Condos Refuse to Pay, Forcing Incident365 To Sue

Incident365 provided the water extraction, drying, and clean-out services the Agreement required. In addition to the removal of wet carpet, drywall, and cabinets, it is undisputed that Incident365 provided these services to the Condos:

³ A “substrate” is a subfloor, usually carpet, something soft to the touch. (R755, 1155-56, 1463).

- employing drying and air filtration equipment
- utilizing water extraction equipment
- laying plastic sheeting
- providing dehumidification services
- disposing of removed materials
- applying anti-microbial solutions for sanitation; and
- cleaning up the effects of Hurricane Irma.

(R589, 757, 759, 797).

The services Incident365 provided were reviewed by consultants the insurance company retained to monitor and supervise the disaster mitigation services. (R765-66, 767-69; 797, 799). The consultants reviewed, adjusted and approved the bills before presenting to the insurance company for payment. (R792-93, 797, 1197, 825-26). Incident365 ultimately billed \$526,114.27, \$443,532.33, \$433,232.80 to Condos III, IV and V, respectively, for these services. (R46; R2:40, R3:41; T12).

Although the Condos received funds from the insurance company to pay for these services, after issuing payment for a portion of the billings, the Condos did not remit the balance of those payments to Incident365. (R1289-90; T46-47, 54). Incident365 sued, seeking recovery of the amounts to which the Agreements entitled Incident365. (R27-32). Even though the Condos had no such requirement at the time of entering into the Agreements or at any

time while the services were being provided and accepted the benefits of all of the services, the Condos raised the affirmative defense that Incident365 was not a licensed contractor, so the Agreements were unenforceable under Section 489.128(1), Florida Statutes. (R144, 1584). However, Subsection (a) states that

For purposes of this section, if a state license is not required for the scope of work to be performed under the contract, the individual performing that work is not considered unlicensed.

(R144). Accordingly, Incident365 replied that the disaster mitigation services it provided did not require a state contractor's license. (R165).

C. The Condos Move for Summary Judgment on the Basis That Incident365's Disaster Mitigations Services Require a Contractor's License.

After substantial discovery, the Condos sought summary judgment based upon their unenforceable-contract affirmative defense. (R701). Their amended summary judgment argued that Incident365 supplied demolition services and that demolition services required a contractor's license. (R710). The Condos focused on evidence that Incident365 removed and disposed of wet drywall, ceilings, and cabinetry. (R705, 710-711). The Condos also argued that the drywall, ceiling and cabinet removal were "repairs and alterations" that required a state license. (R712). The Condos never argued that providing equipment for removing humidity, drying services, laying down

plastic, sanitizing services, or general clean-up constituted “repairs or alterations.” (R701-715).

In defense of the summary judgment motion, Incident365 produced evidence that the services Incident365 provided to the Condos is not contractor work. (R1578-79). Rather, the evidence showed the water extraction services Incident365 provided at the Condos, including removing wet building finish materials from the interior of units, is considered “clean-out” after a natural disaster. (R853-57, 1578). The evidence further proved that Incident365 altered no structural components of any units or buildings, did not demolish, destroy, or remove structures of any units or buildings, and did not remove entire ceilings in the units of the condominiums when performing their services. (R1585).

Although Incident365 may have loosely used the word “demolition” in its field notes, industry witnesses explained why clean-out work for mitigation disaster services is not “demolition.” (R1492-93, 1581, 1585). Rather, the evidence showed the field notes’ use of the term “demolition” of ceiling areas and demolition within the building referred to the selective removal of non-structural material, including drywall, that had become dislodged or was unsalvageable, or to allow for inspecting and drying the structure. (R1581). The evidence showed the services are handled “on an emergency basis to

immediately sanitize and preserve the area to mitigate the need for a comprehensive tear down or remodel of the area.” (R1581).

Further, Incident365 argued that even if some small portion of the services provided required a license—which it did not—***the vast majority of Incident365’s services*** were not services for which a party required a license—and should be compensated accordingly. (R1369, n. 2; T37).

In support of its argument, Incident365 cited a Middle District of Florida decision, which denied summary judgment on an unlicensed-contract affirmative defense under Section 489.128. (R1369, n.2, citing *Full Circle Dairy LLC v. McKinney*, 467 F. Supp. 2d 1343, 1345 (M.D. Fla. 2006)). Given that the *Full Circle Dairy* court could not ascertain what portion of a \$900,000 bill related to work for which the plaintiff did not require a license, it denied summary judgment because “[a] bilateral contract is severable where the illegal portion of the contract does not go to its essence and, where, with the illegal portion eliminated, there still remain valid legal promises on one side which are wholly supported by valid legal promises on the other.” *Id.*

The trial court held a hearing on the Condos’ partial summary judgment motion on February 11, 2022. (T3).⁴ The Condos’ counsel argued that the

⁴ The parties agreed with the trial court that resolving one summary judgment motion resolved all three cases. (T9-13).

services Incident365 provided involved “demolition,” which included removal of water-logged carpet and drywall, non-salvageable kitchen cabinets, and ceilings. (T18-20). The Condos’ counsel argued the notes prepared by Stefan Schaming using the word “demolition” should be afforded “great weight” because they were contemporaneously written. (T21). He argued this work fit under the statutory definition of work performed by a contractor—altering and subtracting from a building and demolition—and thus required a license. (T17, 22-28). However, the Condos’ counsel never argued that the majority of the services provided required a license. (T18-33).

Conversely, counsel for Incident365 highlighted disputed record facts. He noted the conflicting evidence proving that the disaster mitigation services Incident365 provided were not demolition or contractor work. (R1372-1590; T35). He explained the evidence showed that the **essence** of the services under the Agreements were building drying services. (T36). That is because the **majority** of the services provided was supplying industrial commercial grade drying equipment, blowers and water extraction equipment to extract water from buildings to dry them out. (T37). Counsel for Incident365 argued there is “no [statutory] requirement for any license to bring blowers, fans and dryers into a building to dry out the building after a disaster such as Hurricane Irma.” (T37-38).

Further, the president and mitigation manager of Incident365, Scott Schaming and Stefan Schaming, stated they performed no demolition work. (R1578, 1581; T49). Stefan Schaming also explained that his use of “demolition” in his field notes was not a reference to a statutory definition. (R873-74, 884, 1578; T49). Rather, Incident365 provided building drying services, and when materials such as the carpet or drywall could not be dried out, those materials were detached with small saws or power tools and then removed from those buildings (R1028, T.42). Counsel for Incident365 explained that “if there is a question at all in that regard, then there is a question of fact.” (T41). Such a fact issue must “be resolved through the presentation of evidence to be decided by the jury.” (T41).

In addition, counsel for Incident365 argued that even if some services required a license, the absence of one did not preclude Incident365 from recovering for the majority of services not requiring a license. (T50). He asked the trial court to permit the jury to determine what services required a license, and to award damages for services that did not require a license. (T51-52). Counsel cited *Full Circle Dairy* for this request. (T50-52). The Condos’ counsel responded that *Full Circle Dairy* was non-binding and contrary to Florida law. (T60). The trial court took the partial summary judgment motion under advisement. (T62-63).

Presumably unbeknownst to the trial court or either party, the Fourth District Court of Appeal had rendered *ABA Interior Inc. v. The Owen Grp. Corp.*, 338 So. 3d 264, 267 (Fla. 4th DCA 2022), two days before the summary judgment hearing. (R1790-94). There, Owen and ABA Interior contracted for the interior improvement of a commercial project in Palm Beach County. Owen made payments for the work until it learned that ABA Interior failed to obtain required Palm Beach County licenses. *Id.* ABA Interior sued for breach of contract. The trial court granted Owen’s partial summary motion, finding that ABA Interior did not have the required certificates of competency for specialty contracting. *Id.*

The Fourth District reversed. *Id.* It noted that Section 489, Florida Statutes, provides that “if a state license is not required for the scope of work to be performed under the contract, the individual performing that work is not considered unlicensed.” *Id.* at 266, citing § 489.128 (1)(a), Fla. Stat. (2019). The court observed that “ABA claimed that some of the work performed, such as the flooring installation, did not necessarily require a specialty license from Palm Beach County.” *Id.* The *ABA Interior* court concluded that the trial court “did not expressly find that **all** of ABA Interior’s work required a license.” *Id.* (emphasis in original). Thus, the Fourth District reversed and held that these “unresolved factual issues preclude[d] the entry of summary judgment.” *Id.*

D. After The Summary Judgment Hearing, The Trial Court Enters a Summary Judgment Finding That All Services Incident365 Provided Required a License

Shortly after the summary judgment hearing, Incident365 discovered *ABA Interior* and filed a notice of supplemental authority, attaching a copy to support its *Full Circle Dairy* argument. (R1790). Nonetheless, the trial court rendered summary judgment for the Condos five months later on August 8, 2022. (R1900-1911).

In doing so, the trial court sidestepped the Condos' argument that the issue was whether Incident365 was performing demolition services. (R1968). Instead, the trial court held that Incident365 required a building contractor license under Section 489.105(3)(b) because it reads:

"Building contractor" means ... a contractor ***whose services are limited to remodeling, repair, or improvement of any size building*** if the services do not affect the structural members of the building.

(R1968) (emphasis supplied). According to the trial court, the "primary function" of Incident365's service proposal was to make the property damaged by a natural disaster "better" and "restore it to a sound or healthy state." (R1907). The trial court held these were the dictionary definitions of "repair" and "improve," requiring a contractor's license. (R1907).

The trial court made these findings despite evidence that Incident365 did not repair the floors, ceilings, or cabinets, much less improve the condos

in any common sense understanding of the word. (R1581). Rather, Incident365 dried-out water-logged condos with water extraction machinery, along with detaching and hauling-off unsalvageable water damaged elements that belonged in the trash heap. (R947-48, 986). In short, Incident365 sought to maintain the *status quo* so the condominium owner would not suffer further damages. (R1144, 1152).

“[O]ther repair contractors” were brought in to “perform...repairs.” (R787, 931). In fact, building contractors followed Incident365’s services to repair and build-out the damaged condos. (R787, 865, 869, 957-59, 985-86, 987-88, 989-90). “[T]he repair... to the unit [was performed]... by someone else to restore it to a pre-loss condition.” (R959).

Notably, the Condos had not taken the position that all the services Incident365 provided were demolition or repairs and improvements. Rather, the Condo had focused on certain services (removing carpeting, floors, drywall and cabinets) to argue contract illegality. (R704-705, 710-711).

However, and despite the above record evidence to the contrary, the trial court found all services described in the Agreements and actually provided fell under the definitions of “repairs” and “improvements.” (R1907). Because the trial court found **all** services Incident365 provided required a

licensed contractor, it presumably did not address whether Incident365 could recover for services it provided that did not require a licensed contractor.

Within 15 days, Incident365 sought rehearing/reconsideration. (R1912). It argued, among other things, that Incident365 did not repair or improve the residences, but was providing water extraction, drying, and clean-out services. (R1917-18). As to the removal and disposal of unsalvageable carpet, drywall, cabinets and ceilings, it cited *Cepcot Corp. v. Dept. of Business & Professional Regulation*, 658 So. 2d 1092, 1096 (Fla. 2d DCA 1995), for the proposition that such cleanup services are unlike the activities governed by Chapter 489—activities that significantly change the physical nature of the structure—that require a license. (R1917-20). It further argued there was no evidence that **all** its services were repairs or improvements. (R1917-20).

Concomitantly, Incident365 argued that the trial court had overlooked *ABA Interior* and *Full Circle Dairy*, which allowed the trial court to permit payment for services not requiring a license. (R1924). Incident365 highlighted that its services included providing equipment (such as the air movers, dryers, fans, blowers, generators), removing debris, spraying disinfectant, and laying down plastic sheathing. (R1925). These services

were in addition to the removal of saturated building materials, which services were the only items that could arguably require a license. (R1925).

The trial court required a response from the Condos. (R1935). After receiving it, the trial court denied Incident365's motion for reconsideration, without explanation. (R1956). This timely appeal followed. (R1958).

SUMMARY OF ARGUMENT

The trial court committed reversible error when it granted the Condos' summary judgment based on their unlicensed-contractor defense. The Condos argued Section 489.128(1) barred enforcement of Incident365's agreements because Incident365 required a contractor's license. Side-stepping the Condos' argument that Incident365 provided demolition services requiring a license, the trial court instead found the services Incident365 provided were "repairs and improvements" because they made the homes better and brought them to a healthy state.

The trial court misunderstood the nature of the services provided. Incident365 provided two basic services: water extraction and drying service, which eliminated water intrusion to prevent mold growth, and hauling off unsalvageable materials. Incident365 completed the first service by employing massive drying machines, applying sanitizers, and isolating areas for drying. Incident365 completed the second service by removing carpets, drywall, ceiling tiles and cabinets that were water-logged, occasionally using power tools to do so, then hauling them off.

None of these services are repairs or improvements in the normal sense of those words as used in the building industry. Indeed, the residences remained unlivable after Incident365 performed its services. Rather, these

“clean-out” services maintain the *status quo* to avoid mold growth and allow the homeowner to hire a licensed building contractor to install new flooring, cabinets, ceilings, and drywall. Incident365 provided no building contractor services.

Equally problematic, the trial court’s ruling effects an entire industry. Absent any legislative intent requiring this industry to license, the decision to impose such a requirement should be left to Florida’s Legislature, not one trial judge. Likewise, absent from this record is an industry “evil” that would cause the Legislature to require the time and expense of licensing an industry that provides needed emergency services to homeowners during the worst of times.

But even if the Legislature intended to require disaster mitigation services to hold building contractor licenses, disputed facts exist surrounding which services Incident365 provided required a license. For instance, detaching and disposing of a kitchen cabinet might require a building contractor’s license, but applying sanitizers certainly does not. The jury should resolve these fact-dependent issues. If no license was required for certain services, Florida law allowed the trial court to enforce severable contract provisions. The trial court erred in finding otherwise.

ARGUMENT

I. GIVEN OVERWHELMING EVIDENCE AND COMMON SENSE TO THE CONTRARY, THE TRIAL COURT ERRED IN CONCLUDING THAT THE DISASTER MITIGATION SERVICES INCIDENT³⁶⁵ PROVIDED WERE “REPAIRS OR IMPROVEMENTS” THAT REQUIRED A BUILDING CONTRACTOR’S LICENSE UNDER FLORIDA LAW.

The new summary judgment rule permits summary judgment when “the evidence is such that a reasonable jury could not return a verdict for the nonmoving party.” *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). However, “the general rule remains intact: credibility determinations and weighing the evidence ‘are jury functions, not those of a judge,’ when ruling on a motion for summary judgment.” *Gracia v. Sec. First Ins. Co.*, 347 So. 3d 479, 482 (Fla. 5th DCA 2022) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

The Court reviews a summary judgment de novo, *CFLB P’ship, LLC v. Diamond Blue Int’l, Inc.*, 352 So. 3d 357, 359 (Fla. 3d DCA 2022), viewing all facts in the light most favorable to the non-moving party. *Morales*, 338 So. 3d at 322; *Austin Bldg. Co. v. Rago, Ltd.*, 63 So. 3d 31, 33 (Fla. 3d DCA 2011) (licensure case).

A. The Trial Court Failed to Properly Construe the Purpose and Language of Chapter 489, Which Regulates the Construction Industry.

Incident365 argued its emergency disaster mitigation services do not “repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure...” for Section 489.105(3) to apply. (R589). To support its argument, Incident365 provided affidavits and deposition testimony that no one in the industry understands disaster mitigation service to constitute demolition, repairs, or improvements.⁵

An expert from the demolition industry explained that none of the services Incident365 provided are understood in the industry to be demolition work. (R1578).⁶ Rather, detaching and removing wet carpets, drywall, ceilings and cabinets are characterized as “clean-out” services. Similarly, the president of Southern Cat, Inc., a Florida disaster mitigation company and

⁵ Incident365 acknowledges that industry affidavits cannot bind a court’s construction of statutory language. *T.J.R. Holding Co. v. Alachua County*, 617 So. 2d 798, 800 (Fla. 1st DCA 1993). Rather, Incident365 recites these affidavits to show industry understanding and how the trial court’s unwarranted construction of the language “repair and improve” upends an entire industry, a policy decision best left to the legislature.

⁶ Although the trial court did not find that the services Incident365 provided constituted demolition work, Incident365 anticipates the Condos will argue it was demolition work and ask the Court to affirm under a “Topsy Coachman” argument.

member of the Coalition of Disaster Responders⁷, confirmed none of the Coalition's members obtain building contractor's license to perform the identical services Incident365 performed in Florida. (R1588-89).

The Condos urged the trial court to ignore the industry affidavits, instead suggesting the trial court follow "judicial decisions." (R1595). However, the Condos failed to cite case law addressing whether disaster mitigation services, as involved here, constitute demolition, repairs or improvements.

The trial court did ignore the industry affidavits, along with any judicial decisions the Condos cited. Instead, the trial court engaged in a statutory construction analysis of Section 489.105(3)(b), which provides that a building contractor is a contractor "whose services are limited to **remodeling, repair, or improvement** of any size building if the services do not affect the structural members of the building." (R1906) (emphasis supplied).

The trial court found that Miriam Webster dictionary defined "remodel" as to "alter the structure"; defined "repair" as to "restore by replacing a part or putting together what is torn or broken or restore to a sound or healthy state"; and defined "improve" as to "enhance in value or quality make better

⁷ <https://www.cdr247.com>

and to increase the value of land or property by making it more useful to humans.” (R1906).

In doing so, the trial court failed to acknowledge that Section 489.101, was enacted because “[t]he Legislature deems it necessary in the interest of the public health, safety, and welfare to regulate the construction industry.” *Central Florida Lumber Unlimited, Inc. v. Qaqish*, 12 So. 3d 766, 770 (Fla. 2d DCA 2009) (“Section 489.128 was passed to aid homeowners who have hired unlicensed contractors who performed substandard work.”). Incident365 is a service company, mainly renting equipment. (R1129, 1131, 1196). Service industries supporting homeowners like disaster mitigation service companies are not the target of the construction industry in Section 489.128.

Because it did not acknowledge the purpose of Chapter 489—regulating the construction industry—the trial court never considered the usage of the terms remodel, repair, or improve in the construction industry context, but only their ordinary, everyday meaning. See *Indus. Comm’n v. Manpower, Inc.*, 91 So. 2d 197, 199 (Fla. 1956) (holding that it is “a settled principal of statutory construction” that the “legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the

actual conditions to which the act will apply, that is, the needs and usages of such activity.”) (citation omitted).

So, after reviewing dictionary definitions of the words used in their ordinary sense, the trial court held that the services in the Agreements and actually provided by Incident365 were “repairing or improving.” (R1907). The trial court reached this conclusion “[b]ecause the primary function of Incident365’s service proposal in this case was to make the property damaged by a natural disaster ‘better’ and ‘restore it to a sound or healthy state.’” (R1907).

In short, under the trial court’s ruling, every Florida mitigation services company must now be licensed as a building contractor—despite overwhelming evidence that disaster mitigation services do not. Indeed, when the trial court’s ruling is carried to its extreme, any individual or company a homeowner employs to work on their home—that is not there to make it worse, but to make it better—must be a licensed building contractor. With all due respect, the trial court was “duty-bound to avoid an absurd, illogical or unreasonable construction of a statute.” *Brock v. Garner Window & Door Sales, Inc.*, 187 So. 3d 294, 295 (Fla. 5th DCA 2016) (citing *Wakulla Cty. v. Davis*, 395 So. 2d 540, 543 (Fla. 1981)).

B. The Trial Court Improperly Invaded the Province of The Legislature by Adding a New Category of Licenses Required for Disaster Mitigation Services.

This remarkable policy decision cannot withstand scrutiny. *Cepcot Corp. v. Dept. of Business & Professional Regulation*, 658 So. 2d 1092, 1096 (Fla. 2d DCA 1995), supports the conclusion it is the legislature's role to decide this pure policy issue. There, the legal issue was whether a person who performs routine swimming pool cleaning is a "contractor" under chapter 489. *Id.* at 1093. Cepcot petitioned for a declaratory statement under section 120.565. *Id.* at 1094.

The Board's order held that some functions of pool cleaning do not require a contractor's registration or certificate, while other functions require such a license. *Id.* "The Board reasoned that a contractor is a person who 'alters' or 'improves' any structure, and 'whenever the equipment of a pool or spa or the surface of a pool or spa is maintained in any fashion that requires physical contact[,] the act is to be considered one which alters or improves a structure.'" *Id.* at 1095.

Cepcot appealed; the Second District reversed, finding that "pool cleaning, in the absence of other repair or replacement activity," was not contracting. *Id.* at 1096.

In doing so, the Second District noted that the activities used to define a contractor within the statute are “construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure.” *Id.* at 1095. The court observed that a “clean pool is certainly an improvement over a dirty pool.” *Id.* However, the Court held that “Legislative intent is the primary factor in construing a statute” and that “intent should be derived from the language of the statute.” *Id.*

The Second District court was “influenced by the omission of any concept of ‘maintenance’ or ‘cleaning’ within the definition of contractor.” *Id.* The court rejected “that the legislature intended the hypertechnical definition of ‘alter’ and ‘improve’ that the Board employed.” *Id.* The court further found that “[m]any of the provisions in chapter 489 describe activities that significantly change the physical nature of the structure, **as compared to activities that maintain the status quo.**” *Id.* (emphasis supplied). Finally, the court reasoned that the statute does not “regulate residential maids, janitors, or residential cleaning companies.” The court held that a pool contractors “physical contact with dirty homes” does not “transform[] them into residential contractors.” *Id.*

The Second District acknowledged “a legitimate debate” that the activities of persons who clean pools “impacts... our health and safety to

warrant this type of regulation.” *Id.* at 1096. However, the court held that any “dangers Floridians face from pool cleaners” work “is an issue for the legislature and not this court.” *Id.* The Second District found the legislature had not addressed this issue “in the existing statutes.” *Id.*

Given *Cepocot’s* rationale, the trial court erred in creating a new category of licenses required because disaster mitigation service companies “make homes better” or “restore them to a sound or healthy state.” Disaster mitigation service companies are clean-out companies. Like pool companies, they make homes better. Like pool companies, they maintain the *status quo* (by extracting water to prevent mold growth and cleaning up so that the licensed building contractors can follow to finish a build-out).

But like *Cepocot’s* conclusion, there is no legislative intent that clean-out activities and maintaining the *status quo* from the aftermath of hurricane water intrusion, which concomitantly might require the detachment and removal of water damaged and unsalvageable carpets, walls or cabinets, but does not change the physical structure of the building, requires a contractor’s license. This conclusion is especially so when a court has more power to limit the application of a statute than to expand it, as the trial court did here. *Doe v. Dept. of Health*, 948 So. 2d 803, 809 (Fla. 2d DCA 2007).

Similarly, courts should be “less likely, to interfere with the legislature’s role in establishing public policy because its action, guards against statutory overbreadth.” *Id.* And if the trial court thought it was its duty to address an issue absent from the statutes, it is not the function of the judicial branch to supply omissions of the legislature. *Devin v. City of Hollywood*, 351 So. 2d 1022, 1024 (Fla. 4th DCA 1976).

Further, the Court effectively enacted a statutory license required for service companies that help make homes “better” or restore them “to a sound or healthy state.” As noted by Incident365’s disaster mitigation service expert, the services provided by Incident365 are identical to those provided by all disaster mitigation service companies in Florida. But the trial court has categorically concluded disaster mitigation service companies require contractor licenses because they “make the residence better.”

While the legislature has power to make such a categorical policy decision, a trial court cannot. *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 669 (Fla. 2003) (Wells, J. dissenting) (“A single trial judge’s determination of facts could not reasonably be substituted for the legislative branch’s findings of fact on any lesser standard and honor the separation of powers.”). In Florida, where the need for disaster mitigation services is critical after the devastation of a hurricane, this policy decision

should be made by Florida’s legislature. *Lake Worth Utilities Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985) (court’s statutory interpretation “denigrate[d] the supremacy of the legislature as a state policy-making body.”); *Rotwein v. Gersten*, 36 So. 2d 419, 421 (Fla. 1948) (“Under a democratic society, the legislature is the policy making authority...”).⁸

This Court should reverse the trial court’s rejection of both evidence and common sense that proved disaster mitigation services are not “repairs or improvements,” which triggers the need for a building contractor’s license. To do otherwise invades the province of the legislature and imposes a statutory license that will impede the public’s access to services necessary during the time of a Florida natural disaster.

⁸ The Condos cited an exemption for disaster mitigation service work, then noted that Incident365 did not meet the definition to be exempt. (T26-27). That section does not support the Condos’ argument. Section 489.103(19) applies to a disaster recovery mitigation organization “repairing or replacing a one-family, two-family, or three-family residence” when such organization: (a) Is using volunteer labor to assist the owner of such residence in mitigating unsafe living conditions at the residence; (b) Is not holding itself out to be a contractor; (c) Obtains all required building permits; (d) Obtains all required building code inspections; and (e) Provides for the supervision of all work by an individual with construction experience. The trial court did not reference this exemption because this language does not reveal legislative intent that disaster mitigation service companies **not repairing or replacing residences** should be licensed for work such as water extraction services or removing and hauling off unsalvageable materials. If anything, this section supports Incident365’s argument.

II. EVEN IF SOME SERVICES UNDER THE AGREEMENTS REQUIRED A BUILDING CONTRACTOR'S LICENSE, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THE MAJORITY OF THE SERVICES PROVIDED WERE RELATED TO WATER EXTRACTION AND CLEAN-UP SERVICES FOR WHICH FLORIDA REQUIRES NO LICENSE.

The trial court should have not granted summary judgment on the disaster mitigation services because the water extraction and clean-out services Incident365 provided do not require a building contractor's license. However, if only some of the disaster mitigation services required a license, then the services that did not were compensable. Two courts—one federal, one state—have both similarly concluded.

In 2006, applying Florida law, the Middle District of Florida addressed this identical issue in *Full Circle Dairy*, 467 F. Supp. 2d at 1354-55. There, defendants constructed plaintiff's commodity barns, a mechanic's shop, a fuel depot, a milking center, four barns and two travel lanes. *Id.* at 1345. A dispute arose during construction, which resulted in plaintiff terminating the agreement. *Id.* Plaintiff argued defendants did not hold the proper licenses for the work required under the parties' contract. *Id.* The district court found defendant held the proper license for some work, not all. *Id.* at 1354.

Plaintiff asserted that the licensed portion of the work could not be severed from the remaining portions of the work. *Id.* The district court

rejected this argument. It found that under Florida law, “[a] bilateral contract is severable where the illegal portion of the contract does not go to its essence and, where, with the illegal portion eliminated, there still remain valid legal promises on one side which are wholly supported by valid legal promises on the other.” *Id.* The district court denied summary judgment under Section 489.128 because the record did not establish what portions of the \$900,000 in dispute related to unlicensed work. The court agreed defendant could recover payment for work performed that did not require a license. *Id.*

While the Condo’s counsel argued that *Full Circle Dairy* is “non-binding” federal precedent (T76-77), in *SG 2901, LLC v. Complimenti, Inc.*, 323 So. 3d 804, 806 (Fla. 3d DCA 2021), the Third District cited with approval the trial court’s reliance on *Full Circle Dairy*’s two-prong analysis for determining whether a party qualifies as a “contractor” to determine if the party provided unlicensed services proscribed by Section 489.128(1).

Like *Full Dairy Circle*, the contract here is bilateral because there was mutuality of obligations with severable provisions. See *McIntosh v. Harbour Club Villas Condominium*, 468 So. 2d 1075, 1076 (Fla. 3d DCA 1985); see also *Balter v. Pan American Bank of Hialeah*, 383 So. 2d 256, 257 (Fla. 3d DCA 1980) (holding mutuality of obligation is essential to the formation of a bilateral contract). A bilateral contract is severable where the illegal portion

of the contract does not go to its essence, and where, with the illegal portion eliminated, there remains valid legal promises on one side wholly supported by valid legal promises on the other. *United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. Local 234 v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 822 (Fla. 1953) citing Williston on Contracts, rev. ed., Vol. 6, sec. 1782.

Thus, like *Full Dairy Circle*, the Agreements provided distinct services:

- water damage mitigation
- general dehumidification
- structural dehumidification
- ***structural removal of affected substrates***
- disposal of removal materials off property location
- anti-microbial application
- mold remediation

If the structural removal of affected substrates required a building contractor's license, then under the parties' severance provisions (R40, R2:37, R3:38), those portions of the contract can be severed. *Cf. Harrison v. Palm Harbor MRI, Inc.*, 703 So. 2d 1117, 1119 (Fla. 2d DCA 1997) (remanding to trial court for evidentiary hearing of severability of contract where no severance provision in contract).

Further, Incident365 provided the trial court with the Fourth District’s recent *ABA Interior* decision. There, the Fourth District adopted the same argument Incident365 made in opposition to the motion for summary judgment. While *ABA Interiors* was decided under a Palm Beach ordinance, it establishes that where work can be attributable to licensed and unlicensed work, a court can order the trier-of-fact to separate unlicensed and licensed work to award damages. *Pimm v. Pimm*, 568 So. 2d 1299 (Fla. 2d DCA 1990) (trial court “obligated to follow decisions of other district courts of appeal... if the appellate court in its own district has not decided the issue.”).

On remand, if this Court determines that the removal of wet carpet, drywall, ceiling tiles, or cabinets are repairs or improvements requiring a license, the jury should answer a question for each defendant that assess either the percent attributable or dollar amounts owed as to these services:

- water damage mitigation _____% or \$
- general dehumidification _____% or \$
- structural dehumidification _____% or \$
- structural removal of affected substrates _____% or \$
- disposal of removal materials off property location _____% or \$
- anti-microbial application _____% or \$
- mold remediation _____% or \$

These factual decisions are unquestionably jury issues. *A-1 Quality Corp. v. Oak Park Terrace, Inc.*, 32 So. 3d 166 (Fla. 4th DCA 2010) (reversing because “a genuine issue of material fact remains regarding whether the parties’ contract contemplated that A-1 would perform services requiring a contractor’s license.”). As trial counsel for Incident365 so succinctly stated:

“for summary judgment purposes, the Court has decided that no reasonable jury could conclude that removing trash and debris from units, providing generators for power, and applying sanitation disinfectant does not constitute a “repair” or “improvement” pursuant to §489.105(3), Fla. Stat. Respectfully, such a determination should be left to the jury to decide.”

(R1921). Once the jury resolves these fact disputes, the trial court would then eliminate amounts related to unlicensed activities from the damages awarded to Incident365.

CONCLUSION

For all the foregoing reasons, the Court should reverse the summary judgment entered against Incident365. No license is required to provide the disaster mitigation services Incident365 provided; those services did not repair or improve a residence as the words are used in the construction industry. The trial court's contrary decision invades the province of the legislature and will wreak havoc for Florida citizens requiring disaster mitigation services after a natural disaster given that the industry is largely unlicensed. If any portion of the services provided required a license, the Court should order a trial to resolve what services are not repairs or improvements for which Incident365 is entitled to payment.

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2023, a true and correct copy of the above was filed via the Florida e-portal which will serve it upon the attorneys on the Service List below.

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CERTIFICATE OF COMPLIANCE

I HERBY CERTIFY that this brief complies with the font requirements and word limitations of Florida Rules of Appellate Procedure 9.045 (b) and 9.100(g).

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