

**IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA**

PEGASUS GENERAL CONTRACTORS,
INC.,

Appellant,

vs.

CASE NO: 2D24-0120

DONNA BRICKHOUSE,

Appellee.

*****/

ANSWER BRIEF OF APPELLEE, DONNA BRICKHOUSE

**APPEAL FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL
CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA**

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TABLE OF CONTENTS

	PAGE
Table of Contents.....	i
Table of Citations.....	ii
Introduction.....	1
Statement of the Case and Facts.....	1-7
Standard of Review.....	8-9
Summary of Argument.....	9-10
Argument.....	10-15
 THE TRIAL COURT CORRECTLY RULED IN FAVOR OF APPELLEE ON APPELLANT'S CLAIM FOR UNJUST ENRICHMENT BECAUSE ITS FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE. 	
A. Preliminary Argument.....	10-12
B. Argument on the Merits.....	12-15
Conclusion.....	15
Certificate of Service.....	16
Certificate of Typeface Compliance.....	16

TABLE OF CITATIONS

CASES	PAGE
<i>Flatirons Bank v. Alan W. Steinberg, L.P.</i> , 233 So. 3d 1207 (Fla. 3d DCA 2017).....	8
<i>Gutierrez v. Sullivan</i> , 338 So. 3d 971 (Fla. 3d DCA 2022).....	9
<i>Hudson Pest Control, Inc. v. Westford Asset Management, Inc.</i> , 622 So. 2d 546 (Fla. 5 th DCA 1993).....	11
<i>Kvinta v. Kvinta</i> , 622 So. 2d 546 (Fla. 5 th DCA 1993).....	11
<i>Shaw v. Shaw</i> , 334 So. 2d 13 (Fla. 1976).....	14
<i>Stone v. Bankunited</i> , 115 So. 3d 411 (Fla. 2d DCA 2013).....	9
 OTHER AUTHORITIES	
Fla. R. App. P. 9.200(e).....	10

INTRODUCTION

Appellant, PEGASUS GENERAL CONTRACTORS, INC., (“Pegasus” or “Appellant”) seeks review of the portion of a final judgment entered in favor of Appellee, DONNA BRICKHOUSE, (“Brickhouse” or “Appellee”) on Appellant’s claim for unjust enrichment. References to the record on appeal and supplemental record on appeal will be as R. ____ followed by a page number. References to Appellant’s initial brief will be as IB. ____ followed by a page number.

STATEMENT OF THE CASE AND FACTS

This case arises out of a Construction Management Agreement (“CMA”) entered into on February 23, 2020 between Pegasus and Brickhouse, under which Pegasus was to act as a contractor to oversee the project of building a home for Brickhouse on property she owned in Venice, Florida. R. 29-35, 462-468.

Brickhouse was unhappy with Pegasus’ performance under the CMA and repeatedly questioned the pay requests submitted by Pegasus, as the spreadsheets provided contained mathematical errors. She had the right to know which items had been completed for payment. R. 520, 613-620. On April 4, 2021, Pay Request #4 was submitted by Gary Turner,

Pegasus's President, ("Turner"), which showed that Brickhouse owed an additional \$40,096 over and above what she had already paid. R. 959, 470-478. Column E on the last page was blank, and was supposed to represent the work completed. R. 478. The previous pay requests had contained a list of items in Column E. R. 520, 521.

Brickhouse repeatedly requested documentation from Turner to show what the additional \$40,000 was for, as well as an explanation for the mathematical errors in the spreadsheets, but Turner never provided it. R. 345, 350, 355, 520, 521.

Pegasus refused to continue work on the project until Brickhouse paid \$40,000, in addition to the \$184,000 she had already paid, but failed to correct the obvious mathematical errors on the spreadsheets and failed to explain what the additional \$40,000 was for. Ultimately, Brickhouse terminated Pegasus by written notice received by it on July 6, 2021. R. 352, 364, 368. Pegasus filed and recorded a claim of lien in the amount of \$60,495.00. R. 36-37, 346.

This action commenced when Pegasus filed a complaint against Brickhouse to foreclose its construction claim of lien and set forth an alternative claim for unjust enrichment. R. 24-37. Brickhouse filed an

answer, affirmative defenses, and a counterclaim for breach of contract and conversion. R. 53-62. Pegasus responded to the counterclaim and raised affirmative defenses. R. 73-76.

At trial, it was established that Brickhouse paid Pegasus a total of \$184,000.00 which included a deposit and five draws as follows:

Date	Amount
3-11-2020	\$ 25,000
8-27-2020	20,000
9-29-2020	5,000
10-16-2020	30,000
12-29-2020	54,000
1-21-2021	50,000
	<hr/>
	\$184,000

R. 365. Turner acknowledged that \$184,000 had been paid by Brickhouse as of April 1, 2021. R. 986, 1013-1014, 599, 951. The two payments made in December, 2020 and January, 2021, which totaled \$104,000, were for the most recent work done until that point. The April, 2021 pay request, asking for an additional \$40,000 showed that no additional work had been done, by virtue of the lack of entries in Column E. R. 531, 478. Column E, as filled out in the previous pay requests, showed the work and materials that supported that amounts due and paid by Brickhouse. Pay

request 4 demonstrated that no additional work had been done on the house after Brickhouse paid the two draws in the total sum of \$104,000.

After a two-day bench trial, the trial judge entered a final judgment. R. 765-782. The court found that Pegasus failed to prove its entitlement to foreclosure of its lien and failed to prove, by a preponderance of the evidence, its claim for unjust enrichment. R. 766-771. As to Brickhouse's counterclaim, the court found that Brickhouse failed to prove, by a preponderance of the evidence, that Pegasus materially breached the CMA and that conversion occurred. R. 771-779. Final judgment was entered accordingly. R. 779-780.

The sole issue presented to this Court by Pegasus is whether the trial court erred in finding that it failed to prove, by a preponderance of the evidence, its claim for unjust enrichment. IB. 3-6. Pegasus argued that the court erred in finding that it did not show that it conferred a benefit upon Brickhouse over and beyond what she paid for in services. IB. 3-6.

The record on appeal does not contain a transcript of the bench trial, other than the direct and redirect examination of Turner. R. 955-1041; 36. Turner's testimony did not support Pegasus' position that it conferred a benefit upon Brickhouse above what she paid for. Further, the

documentary evidence at trial did not support Pegasus' position.

Relative to Pegasus's unjust enrichment claim, the final judgment stated:

For Pegasus to prevail on an unjust enrichment claim, they had to show, by a preponderance of the evidence that they conferred a benefit upon a (sic) Brickhouse for which Brickhouse failed to pay. Similar to a Section 713.05 claim of lien foreclosure action, unjust enrichment is not a substitute for a breach of contract cause of action and it requires that an *actual* benefit was conferred that was not paid for.

Pursuant to the analysis on Pegasus' Count I, above, Pegasus has failed to prove, by a preponderance of the evidence, that it has conferred any benefit valued over and above the \$184,000.00 that has already been paid by Brickhouse. Unjust enrichment does not provide a cause of action for damages over and above the value of the actual benefit conferred on the Defendant. Unjust enrichment does not allow for damages based on what Pegasus claims "could have been" had the CMA been completed...

R. 771.

The analysis the final judgment referred to regarding Pegasus's Count I which was relevant to the unjust enrichment claim addressed the \$40,496.00 that Pegasus claimed it was owed based on a benefit conferred on Brickhouse. The judgment stated:

The question then becomes: Did Pegasus prove, by a preponderance of the evidence, that they furnished \$224,496.00 worth of labor, services, or materials, of which \$40,496.00 has not been paid? The Court answers this question in the negative.

Exhibit 16B, entered at trial, provides the pay applications submitted to Brickhouse for what Pegasus claims to be amounts owed for “work completed”. See Ex. 16B. However, the Court seriously questions the credibility of the information contained in Exhibit 16B and the testimony of Mr. Turner and Mr. Picciano in explaining said pay applications.

The pay applications included in Exhibit 16B include a pay application named “1” (pg.1), two pay applications named “2” (pg. 2 and 3), a pay application named “3A” (pg. 6 and 7), and two pay applications named “4” (pg. 8 and 9). Even after a careful review of these applications, the Court cannot determine what labor, services, or materials were provided to improve Brickhouse’s property that exceeds the \$184,000.00 she had already paid prior to the Claim of Lien being recorded. Both Parties agreed that the pay application named “4” and appearing on Page 9 of Exhibit 16B was the final pay application received by Brickhouse.

This pay application contains a myriad of mathematical and accounting errors. If one were to add the totals of Column D (titled “Work Completed from Previous Application”) and F (titled “Materials Presently Stored (On Site)”) on the pay application named “4” and located at page 9 of Exhibit 16B, the total comes to \$168,200.00, less than the \$184,000.00 Brickhouse had paid at the time of the issuance of pay application 4, and far less

than the \$224,096.00 found in the Total line for Column G (which is titled “Completed and Stored To Date” and indicates that it is the sum of Columns D, E and F). The Court notes that there are no entries in Column E. Simply put the numbers do not add up.

Moreover, the \$224,096.00 total found in Column G does not match the \$224,496.00 amount found in the Claim of Lien. And, the \$224,096.00 total found in Column G, less the \$184,000.00 previously paid, equates to the line “Amount Due Now” of \$40,096.00 – not \$60,495.00 claimed on the Claim of Lien.

The testimony of Gary Turner and Jason Picciano provided no insight as to this discrepancy for the Court as neither could account for the mathematical errors. Further, neither Mr. Turner or Mr. Picciano provided any testimony that the amounts indicated in Column G accounted for actual labor, services, materials, or other items required by, or furnished in accordance with, the direct contract between Pegasus and Brickhouse.

* * * * *

Additionally, no evidence was presented at trial in the form of receipts, cancelled checks, or invoices for payments made by or owed by Pegasus for materials, subcontractor services, or labor payments that would indicate that more than \$184,000.00 in labor, services, or materials had been provided for the benefit of the property owned by Brickhouse.

R. 767-768.

Appellant timely filed its notice of appeal. R. 911.

STANDARD OF REVIEW

Appellee agrees with Appellant's statement in its Standard of Review section of its brief that this Court reviews the trial court's findings of fact regarding Pegasus' unjust enrichment claim for competent, substantial evidence. IB. 3; *Flatirons Bank v. Alan W. Steinberg L.P.*, 233 So. 3d 1207 (Fla. 3d DCA 2017). However, Appellee disagrees with Appellant's contradictory statement that a trial court's findings of fact regarding an unjust enrichment claim are subject to de novo review. IB. 3. Appellant cited the *Flatirons Bank* case, supra, to support that statement, but that case stated:

After conducting an extensive evidentiary hearing on Flatiron's unjust enrichment claim, the trial court entered a detailed final judgment in Steinberg's favor. Essentially, the trial court found that Flatirons had failed to establish the elements of unjust enrichment. We affirm because the trial court's findings are supported by competent, substantial evidence.

The only issues subject to de novo review in *Flatirons Bank* were the rulings of the trial court on the pure legal claims of whether a dismissal of a statutory civil theft claim was warranted and whether a claim was barred by the statute of limitations. The de novo review standard does not apply to review of factual findings.

This cause was tried without a jury. When reviewing a judgment rendered after a nonjury trial, the trial court's findings of fact come to the appellate court with a presumption of correctness and will not be disturbed unless the Appellant can demonstrate that they are clearly erroneous.

Gutierrez v. Sullivan, 338 So. 3d 971 (Fla. 3d DCA 2022); *Stone v.*

Bankunited, 115 So.. 3d 411 (Fla. 2d DCA 2013).

SUMMARY OF ARGUMENT

The sole issue on appeal is whether the trial court erred in concluding that Pegasus failed to prove, by a preponderance of the evidence, its claim for unjust enrichment. In order to succeed on its claim, Pegasus was required to prove that it had conferred a benefit upon Brickhouse that was accepted and retained by her without paying the value thereof. The trial court found that Brickhouse did not receive any benefit to improve her property over and above the \$184,000 that she had already paid to Pegasus. The factual findings in the final judgment were supported by competent substantial evidence.

Further hindering Appellant's position that it is entitled to a reversal of the final judgment based on the trial court's mistake of fact, is its failure to meet its burden to provide a complete record for this Court's appellate

review. Rather than provide a complete transcript of the two-day bench trial, Pegasus only included the direct and redirect testimony of its President, Gary Turner. Consequently, this Court must give the utmost credence to the trial judge's fact findings and assume there was the best imaginable evidence adduced to support them.

ARGUMENT

THE TRIAL COURT CORRECTLY RULED IN
FAVOR OF APPELLEE ON APPELLANT'S
CLAIM FOR UNJUST ENRICHMENT BECAUSE
ITS FINDINGS ARE SUPPORTED BY COMPETENT
SUBSTANTIAL EVIDENCE.

A. Preliminary Argument

It is well-established that the Appellant has the burden of providing a proper record to the reviewing court, and the failure to do so is usually fatal to the Appellant's claims. Fla. R. App. P. 9.200(e). In this case, the record on appeal does not contain a transcript of the two-day bench trial, other than the direct and redirect examination of Gary Turner, the President of Pegasus. R. 955-1041, 36. The Appellant availed itself of the opportunity to supplement the record, but chose only to provide this Court with a very brief excerpt of testimony of one witness from the two-day trial.

Consequently this Court has no basis to evaluate the factual

underpinnings of the trial court's facially correct legal conclusion that Pegasus was not entitled to damages for unjust enrichment. When there is no transcript of the testimony presented to the trial judge, an appellate court should give the utmost credence to her fact findings, and assume there was the best imaginable evidence adduced to support them. *Kvinta v. Kvinta*, 277 So. 3d 1070 (Fla. 5th DCA 2019), citing *Hudson Pest Control, Inc. v. Westford Asset Management, Inc.*, 622 So. 2d 546 (Fla. 5th DCA 1993).

This Court must accept as established fact because it was so found by the trial judge, that:

- Pegasus did not confer any benefit valued over and above the \$184,000 that has already been paid by Brickhouse;
- Pegasus did not prove that it furnished \$224,496.00 worth of labor, services, or materials, of which \$40,496.00 has not been paid;
- The pay applications, Exh. 16B, submitted to Brickhouse for what Pegasus claimed to be the amounts owed for work completed lacked credibility;
- The testimony of Mr. Turner and Mr. Picciano attempting to explain the pay applications lacked credibility;

- The pay applications included in Exh. 16B did not establish that Pegasus provided labor, services, or materials to improve Brickhouse's property that exceeded the \$184,000 she had already paid;
- The pay application, Exh. 16B, contained a myriad of mathematical and accounting errors;
- Adding Columns D and F, representing the work completed from the previous application and the materials presently stored on site, the total is \$168,200, which is less than the \$184,000 Brickhouse had paid at the time of the issuance of pay application 4 and far less than the \$224,496.00 found in the Claim of Lien.

R. 767-768.

Given the absence of a trial transcript of a great majority of the trial, and provided with a reasonable explanation of how the trial court arrived at its decision as to Pegasus' failure to establish that Brickhouse received any benefit valued over and above the \$184,000 Brickhouse had already paid, this Court must affirm the final judgment.

B. Argument on the Merits

On April 4, 2021, Gary Turner issued Pay Request #4 to Brickhouse, requesting an additional \$40,000 over what Brickhouse had already paid.

R. 470-478. Although Brickhouse repeatedly asked for documentation to show what that amount represented, Turner never provided any. R. 345.

Nor did he ever explain to her what the \$40,000 was being requested for. Column E of the pay request was blank, which, if filled in, would have set forth the work covered by the pay request. There were no itemized expenses that were unpaid which is why Column E was empty. There was simply no evidence presented to show what materials, labor or services had been provided to justify the demand for an additional \$40,000.

Appellant argued that the trial court disregarded Turner's testimony that Column G of Exhibit 16B in Pay Application 4 provided the amount due of \$40,096.00. IB. 5. This argument is fatally flawed for two reasons. First, the final judgment on its face reflected that the trial judge carefully considered Turner's testimony as well as Exhibit 16B and concluded that it could not determine what labor, services, or materials were provided to improve Brickhouse's property that exceeded the \$184,000 she had already paid, and that the numbers on the exhibit simply do not add up. R. 767. The court specifically found that, at trial, Turner was unable to account for the mathematical errors in the pay application. R. 768.

Secondly, Appellant's argument ignored the fact that the trial judge considered Turner's testimony, and seriously questioned the credibility of his testimony in explaining the pay applications in Exh. 16B. R. 470-478,

767. It is well-established that the trier of fact is the sole arbiter of witness credibility and it is not the place of the appellate court to substitute its judgment. *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976). As stated by the Florida Supreme Court in *Shaw*, it is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test is whether the judgment of the trial court is supported by competent evidence.

In the instant case, Appellant is asking this Court to overturn the trial court's final judgment because the trier of fact failed to correctly evaluate the credibility of Turner. But a trial judge had the right believe one witness and discredit contrary testimony of another, and the appellate court may not re-evaluate that decision. Appellant chose not to provide the testimony of any witnesses besides Turner, and this Court may not speculate as to whether or not there was contrary testimony.

To the extent that Appellant's brief referred to a separate final judgment awarding Appellee attorneys fees and costs, that is not an issue in this appellate proceeding. IB. 1, 2. Rather, it is the subject of a separate appeal in this Court, *Pegasus General Contractors, Inc. v. Donna*

Brickhouse, Case No: 2D24-1347. Appellee filed a Notice of Related Case in the later appeal apprising this Court of the related appeal.

The final judgment contained an extensive analysis of the evidence and testimony presented at trial. From that analysis, the trial judge made a great many factual findings which were supported by competent substantial evidence. Appellant has failed to establish reversible error, and the judgment must be affirmed.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Appellee, *Brickhouse*, respectfully requests that this Court affirm the trial court's final judgment on Appellant, *Pegasus's*, claim of unjust enrichment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by electronic mail via the Florida Courts E-Filing Portal to Tonya Willis Pitts, Esquire, Pitts Law Firm, 3034 University Parkway, Sarasota, Florida 34243 at tonya@pittsfirm.com and eservice@pittsfirm.com and Harry W. Haskins, Esquire, 3400 S. Tamiami Trail, Suite 201, Sarasota, Florida 34239 at hwh@haskinslawfirm.com on this 2nd day of July, 2024.

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that I have complied with the font standards required by Fla. R. App. P. 9.210 and 9.045(b) for computer-generated briefs, by submitting this brief in Arial 14-point font and by meeting the word count limit requirements.

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