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

BENCHMARK CONSULTING INC D/B/A CASTLE ROOFING & CONSTRUCTION, INC., A/A/O PHILIP LEMONS,

Appellant/Plaintiff,

v.

SAFEPOINT INSURANCE COMPANY,

Appellee/Defendant.
_____/

Case No. 2D2024-1519
L.T. Case No. 21-5425-CO

INITIAL BRIEF OF APPELLANT BENCHMARK CONSULTING INC D/B/A CASTLE ROOFING & CONSTRUCTION INC, A/A/O PHILIP LEMONS

ON APPEAL FROM A FINAL ORDER OF THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA THE HONORABLE JOHN CARASSAS, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES[1]

MISCELLANEOUS

[1] Because the subject insurance policy was issued in September of 2020 before the enactment of Ch. 2022-268 and Ch. 2022-271, Laws of Fla., the 2020 version of these statutes apply. Menendez v. Progressive Express Ins. Co., Inc., 35 So. 3d 873, 876, 878 (Fla. 2010) ("the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract."); cf., Buis v. Universal Prop. & Cas. Ins. Co., 394 So. 3d 738 (Fla. 2d DCA 2024).

PREFACE

This is an appeal from a final order granting defendant property insurer's affirmative defense-based motion for judgment on the pleadings in an action for breach of insurance contract damages by a roofing contractor following an assignment of benefits.

Appellant/Plaintiff BENCHMARK CONSULTING INC D/B/A CASTLE ROOFING & CONSTRUCTION, INC., A/A/O PHILIP LEMONS will be referred to as "Appellant" or "Plaintiff."

BENCHMARK CONSULTING INC D/B/A CASTLE ROOFING & CONSTRUCTION, INC. will be referred to as "Benchmark."

Appellant's assignor PHILIP LEMONS will be referred to as "Mr. Lemons" or the "Assignor."

Appellee/Defendant SAFEPOINT INSURANCE COMPANY will be referred to as the "Appellee", "Defendant", or "Insurer."

For ease of reference, the following symbols will be used:

(R.)- followed by the page number in the record (this symbol will also be used for hearing transcript cites, which are located at (R. 1049-86) and (R. 1088-1127).

IB- followed by the page number of this Initial Brief.

ISSUES ON APPEAL

1. Whether it was reversible error to grant defendant's lack-of-standing/invalid assignment of benefits-based motion for judgment on the pleadings where, among other things:

a. The trial court's ruling is based on documents selected by defendant but not attached to the operative complaint;

b. Plaintiff alleged and the record provides support for at least one basis to avoid or deflect defendant's lack-of-standing/invalid assignment of benefits affirmative defense;

c. Defendant argued factual and expert matters beyond the face of the pleadings in support of its motion; and

d. Defendant's affirmative defense-based motion for final judgment on the pleadings was prematurely filed over a week before plaintiff's reply to defendant's affirmative defenses were due.

2. Whether the subject assignment of benefits complies with Fla. Stat. Sec. Fla. Stat. Sec. 627.7152(2)(a)4. (2020).[2]

3. Whether it was reversible error to deny plaintiff's motion for rehearing and request for leave to amend.

[2] Fla. Stat. Sec. 627.7152 was amended in 2022; as a result, Fla. Stat. Sec. 627.7152(2)(a)4 (2020) has been renumbered and is now found at Fla. Stat. Sec. 627.7152(2)(a)5. (2024).

STATEMENT OF THE CASE AND FACTS

A. The parties.

Benchmark is a Florida corporation that provides roofing services. (R. 14-17, 553) Mr. Lemons is the owner of residential property located at 515 Sandy Hook Road, Palm Harbor, FL 34683 (the "Home"). (R. 14-15, 584) The Insurer issued a homeowners' insurance policy bearing Policy No. SFLH2002613-03 covering the Home for the policy period of September 30, 2020, to September 30, 2021 (the "Policy"). (R. 14-15, 153-54)

B. The covered Loss, Benchmark and Mr. Lemons enter into an AOB contract to remedy the covered Loss, and the Insurer fails to fully pay Benchmark for remedying the covered Loss.[3]

Mr. Lemons' Home sustained direct physical wind damage on Christmas Eve, 2020 (the "Loss"). (R. 15, 595-97)

Between February 5 and February 15, 2021, Benchmark and Mr. Lemons entered into a nine-page assignment agreement ("AOB") to remove and replace Mr. Lemons' wind-damaged roof and remediate resulting damage (the "Lemons AOB"). (R. 160-68, 204-12, 584, 586-94) The Insurer is not a party to the Lemons AOB. (R. 160-68, 204-12, 584-94) Among other things, the Lemons AOB provides:

[3] The following is provided for context only, and is not intended to waive any issues on appeal.

> Supplemental Claims: Castle [Benchmark] reserves the right to file supplemental claims with the Owner's insurance company in the even that the original estimate is incorrect and/or additional damage is discovered after commencement of the work. (R. 164, 209, 590)

The Lemons AOB includes a four-page estimate of the total cost to repair the covered roofing damage, ($27,000.00) check marks next to certain goods/services related to that repair, and the estimated quantity of various repair-related goods or services (The "AOB Estimate"). (R. 160-63, 204-07, 586-89) The AOB Estimate also expressly provides:

> This estimate can be amended, modified, or added-to as deemed necessary by Castle, and/or due to adjustments made to Xactimate pricing. If additional damage is detected, Castle reserves the right to file supplemental claims directly with your insurance company. (R. 161, 205, 587)

Following is an example of the AOB Estimate's detail:

Services Provided:

- ☑ Tear Off _Layer(s) Shingles Sq. _
- ☑ Tear Off Underlayment
- ☑ Clean Up and Haul Off Roofing Debris
- ☐ Ice and Water Shield: _LF
- ☐ Install _ Felt

Install Metal Drip Edge. Color: _

- ☑ Install Starter Strip
- ☑ Install _ Shingles
- ☑ Shingle Color: Max Def Sunrise Cedar
- ☑ Manufacture Warranty
  - ☐ 20 ☐ 25 ☑ 30 ☐ Limited Lifetime
- ☑ Craftsmanship of Roof _years
- ☑ Install _Vent(s) Color _
- ☑ Ridge: _LF
- ☑ Evaluate insurance coverage
- ☑ Coordinate insurance and claim info
- ☑ Submit documentation to insurance carrier
- ☑ Coordinate submission of claim for damages
- ☑ Schedule Adjuster Meeting
- ☑ Meet adjuster for property inspection
- ☑ Valley: _
- ☐ Other: _
- ☐ Chimney Flashing Qty: _ Color _
- ☑ Clean Around Bushes and Shrubs
- ☑ Roll Yard with Magnetic Roller
- ☑ Protect Landscaping
- ☐ Clean Out Gutters
- ☑ Permit Furnished by Castle Roofing
- ☑ Castle will Provide General Liability at Least $1,000,000
- ☑ Guide and direct carrier rep through evaluation of damages
- ☑ Commensurate with carrier for scope of loss
- ☑ Evaluate the final scope of loss
- ☑ Oversee all required documentation required by insurance carrier
- ☑ Obtain mortgagee information

Special Instructions

* * *

Total Estimated Cost: $27,000.00

* * *

#	Description	Remove	Replace	Per
1	R&R Exhaust cap - through roof - up to 4"	21.22	69.04	EA
2	R&R Flat roof exhaust vent / cap - gooseneck 8"	21.22	71.13	EA
3	R&R Flat roof exhaust vent / cap - gooseneck 12"	21.22	82.04	EA
4	R&R Roof vent - turtle type -Metal	21.22	54.32	EA
5	R&R Roof vent - turbine type	21.22	106.49	EA
6	R&R Roof vent - off ridge type -4	37.27	107.52	EA
7	R&R Roof vent - off ridge type - 8	59.45	208.07	EA
8	R&R Valley metal	1.39	4.86	LF
9	R&R Ridge cap - composition shingles	2.39	3.64	LF
10	Taxes, insurance, permits & fees (Bid Item)	0	0	EA
11	Gutter / downspout - Detach & reset	0	2.79	LF
12	Digital satellite system - Detach & reset	0	28.59	EA
13	Digital satellite system - alignment and calibration only	0	85.76	EA
14	Remove Laminated - comp. shingle rfg. - w/ felt	120.49	0	SQ
15	Laminated - comp. shingle rfg. - w/ felt	0	226.8	SQ
16	Remove Laminated - comp. shingle rfg. - w/out felt	120.49	0	SQ
17	Laminated - comp. shingle rfg. - w/out felt	0	197.81	SQ
18	R&R Drip edge/gutter apron	0.78	2.26	LF
19	Asphalt starter - peel and stick	0	2.11	LF
20	Step flashing	0	8.38	LF

(R. 160-62, 204-06, 586-88)

The Loss was reported to the Insurer on February 15, 2021, which assigned it claim number 41614 and inspected Mr. Lemons' Home. (R. 584, 595, 597) The Insurer admits it received a copy of the Lemons AOB. (R. 48)

Thereafter, Insurer sent a letter advising that the Insurer had "completed our investigation," which "revealed wind damage" to Mr. Lemons' Home. (R. 584, 595) The Insurer also issued a check made payable to Mr. Lemons ***and Benchmark*** for Insurer's estimate of the replacement cost value of the Loss less Mr. Lemons' deductible. (R. 419, 584-85, 595-607)

The Insurer expressly noted that it had paid the replacement cost value/released the depreciation in recognition of Mr. Lemons' "signed work authorization / contract" with Benchmark. (R. 584-85, 595) The Insurer also explained that its payment "does not necessarily constitute a full and final settlement of your claim for damages," and welcomed Mr. Lemons to: "submit supplemental claim(s) for any additional damages discovered during the covered reconstruction and repair of the [Home]." (R. 595)

Insurer also provided an estimate specifying, among other things, Insurer's calculation of the replacement cost value of the Loss. The Insurer estimated a replacement cost value of $17,613.65 to replace Mr. Lemons' approximately-3,100 square foot roof wind-damaged roof, and an additional $3,350.90 to repair other covered damage ("Insurer's Estimate"). (R. 584-85, 597-603) Following is an example of the Insurer's Estimate's detail:

QUANTITY	UNIT	TAX	O&P	RCV	AGE/LIFE	COND.	DEP %	DEPREC.	ACV
1. Re-nailing of roof sheathing - complete re-nail									
3,124.56 SF	0.26	4.37	162.48	979.24	4/150 yrs	Avg.	2.67%	(21.78)	957.46
Line item estimated for renail as Policy has Ordinance & Law endorsement; prior roof replaced in 2004 per Pinellas County Property report.									
2. Remove Laminated - comp. shingle rfg. - w/out felt									
31.25 SQ	49.91	0.00	311.94	1,871.63	4/30 yrs	Avg.	NA	(0.00)	1,871.63
3. Laminated - comp. shingle rfg. - w/out felt									
36.00 SQ	222.92	238.97	1,605.02	9,869.11	4/30 yrs	Avg.	13.33%	(1,101.88)	8,767.23
4. Roofing felt - 30 lb.									
31.25 SQ	39.95	28.55	249.68	1,526.67	4/20 yrs	Avg.	20%	(255.40)	1,271.27
5. R&R Ridge cap - composition shingles									
83.25 LF	7.15	5.83	119.04	720.11	4/25 yrs	Avg.	16%	(57.54)	662.57
6. R&R Continuous ridge vent - aluminum									
60.00 LF	9.97	14.95	119.64	732.79	4/35 yrs	Avg.	11.43%	(64.73)	668.06
7. R&R Flashing - pipe jack									
4.00 EA	52.56	3.41	42.04	255.69	4/35 yrs	Avg.	11.43%	(21.42)	234.27
8. R&R Flat roof exhaust vent / cap - gooseneck 12"									
1.00 EA	100.50	2.66	20.10	123.26	4/35 yrs	Avg.	11.43%	(10.83)	112.43
9. R&R Flat roof exhaust vent / cap - gooseneck 8"									
1.00 EA	89.50	1.89	17.90	109.29	4/35 yrs	Avg.	11.43%	(9.49)	99.80
10. R&R Chimney flashing - average (32" x 36")									
1.00 EA	426.26	5.49	85.24	516.99	4/35 yrs	Avg.	11.43%	(47.35)	469.64
11. Step flashing									
14.00 LF	10.09	1.51	28.26	171.03	4/35 yrs	Avg.	11.43%	(16.31)	154.72
12. R&R Valley metal									
37.94 LF	6.34	5.39	48.12	294.05	4/35 yrs	Avg.	11.43%	(25.77)	268.28
13. Asphalt starter - peel and stick									
150.00 LF	2.42	8.19	72.60	443.79	4/20 yrs	Avg.	20%	(74.24)	369.55
Totals: Dwelling Roof		**321.21**	**2,882.06**	**17,613.65**				**1,706.74**	**15,906.91**

(R. 584, 598)

The record also includes an estimate from Plaintiff dated May 25, 2021 ("Plaintiff's Estimate"). (R. 170-75, 214-19) Similar to Insurer's Estimate, Plaintiff's Estimate includes, among other things, a specific estimated cost to replace Mr. Lemons' approximately-3,100 square foot roof ($36,933.90), and to remedy related damage. (R. 170-75, 214-19) Following is an example of the Insurer's Estimate's detail:

Roof

DESCRIPTION	QTY	RESET	REMOVE	REPLACE	TAX	O&P	TOTAL
Tear off, haul and dispose of comp. shingles - 3 tab	31.25 SQ		142.31	0.00	0.00	889.44	5,336.63
Laminated - comp. shingle rfg. - w/out felt	36.00 SQ		0.00	222.92	238.97	1,652.82	9,916.91
Ice & water barrier	3,593.24 SF		0.00	1.46	83.00	1,065.82	6,394.95
Re-nailing of roof sheathing - complete re-nail	3,124.56 SF		0.00	0.26	4.37	163.36	980.12
R&R Ridge cap - composition shingles	91.58 LF		2.73	4.16	7.05	127.62	765.65
R&R Drip edge/gutter apron	292.14 LF		0.95	2.63	19.22	213.00	1,278.08
R&R 2" x 6" lumber (1 BF per LF)	20.00 LF		0.63	3.58	2.51	17.34	104.05
R&R 1" x 10" lumber (.83 BF per LF)	310.00 LF		2.80	5.65	44.49	532.80	3,196.79
Asphalt starter - peel and stick	292.14 LF		0.00	2.42	15.95	144.60	867.53
R&R Valley metal	41.73 LF		1.70	5.80	5.93	63.76	382.66
R&R Continuous ridge vent - aluminum	60.00 LF		2.33	8.70	14.24	135.20	811.24
R&R Exhaust cap - through roof - 6" to 8"	1.00 EA		22.56	88.35	2.39	22.68	135.98
R&R Exhaust cap - through roof - up to 4"	2.00 EA		22.56	79.14	3.50	41.38	248.28
R&R Flashing, 14" wide	80.00 LF		1.63	4.12	8.79	93.76	562.55
R&R Gable cornice strip - 3 tab	8.00 LF		5.94	9.99	1.62	25.80	154.86
Stucco patch / small repair - ready for color	1.00 EA		0.00	150.98	1.22	30.44	182.64
R&R Flat roof exhaust vent / cap - gooseneck 8"	1.00 EA		26.08	81.14	1.89	21.82	130.93

(R. 171, 215)

Mr. Lemons averred that Insurer's check for the Loss was signed over to Plaintiff. (R. 584)

Plaintiff alleges it performed the necessary repairs to Mr. Lemons' wind-damaged home to remediate the Loss, and submitted reasonable bills to the Insurer for those goods and services. (R. 14-16, 554) Insurer allegedly failed to fully pay Plaintiff for remedying the covered Loss. (R. 14-17)

C. Plaintiff files suit against the Insurer to recover the outstanding balance for the covered repairs, and the trial court grants Insurer's motion for judgment on the pleadings based on documents not attached to the operative complaint.

In July of 2021, Plaintiff filed a complaint for damages and demand for jury trial against the Insurer alleging a single count for breach of the Policy following an AOB. (R. 14-18) Plaintiff alleged Insurer breached by failing to pay the full reasonable cost to remedy the Loss covered by the Policy despite demand. (R. 14-18) Plaintiff's operative pleading does not include any attachments, but alleges that there is a valid AOB, or in the alternative, that the AOB requirement has "been waived." (R. 14-18, 16)

A little over three weeks after being served with process, (R. 188) Insurer filed a motion to dismiss or for more definite statement "for failure to identify any specific contractual term [Insurer] allegedly breached." (R. 42-46, 43) Insurer never noticed that motion for hearing. (R. 5-7)

Approximately 18 months after being served with process, (188) on March 15, 2023, Insurer filed its answer, nine affirmative defenses, and demand for jury trial. (R. 152-75) Of note, Insurer's ninth affirmative defense avers that Plaintiff lacks standing because the Lemons AOB "fails to contain an itemized, per-unit cost estimate of the services to be performed by the assignee, in violation of Fla. Stat. §627.7152(2)(a)(4) [sic]." (R. 156-57) Insurer supported that affirmative defense by attaching a copy of the Lemons AOB and Plaintiff's Estimate to Insurer's defensive pleadings. (R. 160-175)

Nine (9) calendar days later, Insurer filed *Defendant's Motion for Judgment on the Pleadings*. (R. 180-219) Through that motion, Insurer argued Plaintiff lacked standing because the Lemons AOB was purportedly unenforceable for failure to "contain" an estimate that complies with Fla. Stat. Sec. 627.7152(2)(a)4. (R. 183-85) Insurer also attached a copy of the Lemons AOB (which includes the AOB Estimate) and Plaintiff's Estimate to that motion. (R. 204-19) Insurer argued through its motion that the AOB Estimate was a "menu" which included "different roofing materials irrelevant to Plaintiff's services," lacked line-item totals, and is purportedly "devoid of any total "cost estimate" for the project at all." (R. 183-85) (emphasis in the original (e.o.))

In due course, Plaintiff filed a response in opposition to Insurer's Motion for Judgment on the Pleadings. (R. 402-19) Among other things, through that filing, Plaintiff argued that Insurer's affirmative defense-based motion for judgment on the pleadings presented factual issues inapt for resolution at the pleading stage, Insurer's lack-of-standing affirmative defense was deflected by waiver, and the Lemons AOB complied with the statute. (R. 406-16)

Insurer's motion for judgment on the pleadings had to be set for hearing twice because Insurer initially set it for an insufficient amount of time. (R.

178-79, 420-21, 551-52, 1049-71) At the second hearing, Insurer recognized that “the Court's consideration [should be] limited to the undisputed facts supported only by the information contained in the four corner of the pleadings.” (R. 1054), Still, Insurer argued that factually, none of the items listed on the AOB estimate “apply to this specific project,” (R. 1056-57) and that it was “physically impossible for a GC or an engineer * * * to take this information that's been provided and apply it into an estimated cost, per item estimated cost, per unit estimate.” (R. 1059) Insurer also stated:

> We're not calling into question this entire service contract, so the roof has already been put on. What we're arguing is that they have no claim to an assignment of benefits based under the statute. (R. 1065)

In response, Plaintiff argued, among other things, that Insurer’s motion for judgment on the pleadings should be denied because Insurer’s arguments were based on factual matters, and Insurer’s reliance on the Lemons’ AOB to issue an (inadequate) payment for the replacement cost value of the goods and services waived any argument as to AOB invalidity. (R. 1061-63, 1068-69) The Court commented it was “looking at” the waiver argument, (R. 1064) but ultimately granted the motion for judgment on the pleadings because, it reasoned, the “Court only sees a total amount and a -- what we've called a menu or just a list of, I guess, potential charges[.]” (R. 1070)

Thereafter, the trial court entered a final judgment which provides, in relevant part:

> Upon review of the pleadings, this Court ***finds*** that there are no material facts at issue as the AOB fails to comply with Florida Statute §627.7152(2)(a)(4) (2019). Specifically, the AOB fails to "[c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee." (R. 575-77) (emphasis supplied (e.s.))

In addition, the trial court's final judgment contains a number of material inaccuracies, including misstating the date of loss as having occurred in August of 2020 (it occurred on Christmas Eve of 2020), and stating the lawsuit was filed in January of 2022 (it was filed in July of 2021). (R. 575)

D. <u>The trial court denies Plaintiff's timely-filed motion for rehearing, which includes a request for leave to amend.</u>

After the hearing, Plaintiff timely filed a motion for rehearing. (R. 553-72) Through that motion, Plaintiff argued, among other things: (i) the Lemons AOB includes an appropriate estimate in compliance with Fla. Stat. Sec. 627.7152(2)(a)4.; (ii) Insurer's standing affirmative defense should not have been adjudicated at the pleadings stage; and (iii) the parties to the Lemons AOB intended a valid AOB. (R. 561-71) Plaintiff's rehearing motion also requests leave to amend Plaintiff's operative (initial) complaint. (R. 571-72)

Plaintiff's motion for rehearing was supported by an affidavit from Mr. Lemons. (R. 581-607) Mr. Lemons' affidavit authenticated a number of the

documents described in subsection B. of this *Statement of Case and Facts*, and averred "Safepoint Insurance Company's estimate and corresponding payment modified the written, itemized, per-unit cost estimate for the assignment of post loss insurance benefits." (R. 585)

The trial court conducted a hearing on Plaintiff's motion for rehearing in April of 2024. (R. 1088-1111) Plaintiff's argument was generally consistent with those presented in its motion, and Plaintiff noted it would not have performed the work without Insurer providing Insurer's estimate and an (inadequate) payment. (R. 1091-93) Insurer countered by arguing, among other things, that the standard for rehearing is unmet, Plaintiff bore the burden of demonstrating the trial court's ruling was "unreasonable," and that while Insurer was "not challenging the contract itself," (i.e. Insurer was amenable to Plaintiff remedying Insurer's insured's covered loss), it was "challenging" Plaintiff's compliance with the statute (and therefore, Plaintiff's ability to get paid by Insurer for remedying Insurer's insured's covered loss). (R. 1093-97) After hearing argument, the trial court announced it would deny Plaintiff's rehearing motion. (R. 1098) Thereafter, the trial court entered an unelaborated order denying Plaintiff's rehearing motion. (R. 1030)

This appeal timely follows. (R. 1032-37)

SUMMARY OF THE ARGUMENT

Simply, the trial court's final judgment granting Insurer's standing/inadequate AOB affirmative defense-based motion for judgment on the pleadings is the product of multiple prejudicial errors. The final judgment should be reversed.

Initially, the trial court improperly looked beyond the four corners of the operative complaint, and reviewed and relied on documents that were not attached to the operative complaint, to grant an affirmative defense-based motion for final judgment on the pleadings. That legal error was especially problematic because Plaintiff pled an avoidance or deflection (waiver) ***which would have deflected Insurer's subject affirmative defense at the pleading stage***. See, Apex Roofing and Restoration a/a/o Williams v. United Services Automobile Ass'n,, --- Fla. 3d ----, 49 Fla. L. Weekly D1982, 2024 Fla. App. LEXIS 7602 (Fla. 1st DCA Oct. 2, 2024) (motion for rehearing pending). The record includes materials which would support avoidance or deflection of Insurer's subject affirmative defense. (R. 584-607) This alone warrants reversal.

But even if it were appropriate for the trial court to evaluate the Lemons AOB at the pleading stage in the face of Plaintiff's "waiver" allegations, the trial court's determination that the AOB Estimate is not an "itemized, per-unit

cost estimate of the services to be performed by the assignee" as required by Fla. Stat. Sec. 627.7152(2)(a)4. is plainly refuted by the document's face. Contrary to Insurer's representation, (R. 185) the AOB Estimate includes a specific estimated cost of repair ($27,000.00). (R. 161, 205, 587) The AOB Estimate also includes checkmarks next to the specific services to be provided (e.g., "tear off underlayment"), blank boxes next to those which would not be provided (e.g. "install felt"), and the specific quantity of numerous materials/service items related to the repair. (R. 160-63, 204-07, 584-89) Accordingly, the AOB Estimate is unquestionably a "written, itemized, per-unit cost estimate of the services to be performed by the assignee". §627.7152(2)(a)4., Fla. Stat. (2020).

And even if the AOB Estimate was somehow inadequate (it is not), any inadequacy was cured by either Insurer's Estimate or Plaintiff's Estimate. At the trial court level, Insurer relied on case law that has recently been called into question by Apex Roofing and Restoration a/a/o Williams v. United Services Automobile Ass'n,, supra. Although the trial court might have been bound by the analysis of earlier case law, this Court is not,[4] and Plaintiff respectfully submits that the Apex Roofing analysis (as set forth in Judge Tanenbaum's concurrence) is correct and should be adopted.

[4] See, Pardo v. State, 596 So. 2d 665, 667 (Fla. 1992).

The trial court compounded the above errors by denying Plaintiff's rehearing motion in its entirety, which included a request for leave to amend Plaintiff's first attempt at pleading its claim. Under binding or persuasive case law and the circumstances presented, denial of Plaintiff's request for leave to amend was an abuse of discretion.

Respectfully, in light of the multiple material and highly-prejudicial legal errors, reversal is most appropriate.

STANDARD OF REVIEW

Orders adjudicating motions for judgment on the pleadings are reviewed de novo. Martinez v. Florida Power & Light Company, 863 So. 2d 1204, 1205 (Fla. 2003). A de novo standard of review also applies to pure questions of law, statutory interpretations, contract interpretation, formation and validity, and standing. Morris v. Muniz, 252 So. 3d 1143, 1155 (Fla. 2018) (pure questions of law); Boyle v. Samotin, 337 So. 3d 313, 317 (Fla. 2022) (statutory interpretations); KRG Oldsmar Project Co. LLC v. CQI, Inc., 358 So. 3d 464, 465 (Fla. 2d DCA 2023) (contract interpretation); LoanFlight Lending, LLC v. Bankrate, LLC, 378 So. 3d 1280, 1286 (Fla. 2d DCA 2024) (contract formation and validity); and Salyer v. Tower Hill Select Ins. Co., 367 So. 3d 551, 554 (Fla. 5th DCA 2023) (contract interpretations and standing).

While orders on rehearing motions are usually reviewed for an abuse of discretion, a de novo standard applies where the motion addresses only questions of law. Lopez v. Avatar Prop. & Cas. Ins. Co., 313 So. 3d 230, 236 (Fla. 5th DCA 2021); cf., Mistretta v. Mistretta, 31 So. 3d 206, 208 (Fla. 1st DCA 2010) (applying de novo standard to motion for new trial raising questions of law).

Generally, the de novo standard requires reviewing the trial court's determinations "anew, as if it had never been heard before." Florida Ass'n of

Realtors v. Orange County, 350 So. 3d 115, 123 (Fla. 5th DCA 2022). Accordingly, appellate courts “need not defer to the trial court's interpretation[.]” State Farm Fla. Ins. Co. v. James, 374 So. 3d 934, 935 (Fla. 5th DCA 2023). Rather, appellate courts “perform [their] own independent legal analysis.” Id.

Orders adjudicating motions for leave to amend are reviewed for an abuse of discretion. See e.g., Kimball v. Publix Super Mkts., Inc., 901 So. 2d 293, 296 (Fla. 2d DCA 2005). “Refusal to allow an amendment is an abuse of the trial court's discretion ‘unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.’ " Id.

ARGUMENT

Fla. R. Civ. P. 1.140(c) authorizes motions for judgment on the pleadings. That rule provides: "After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." Id.

Generally, "[a] motion for judgment on the pleadings is governed by the same legal test as a motion to dismiss for failure to state a cause of action." Henao v. Professional Shoe Repair, Inc., 929 So. 2d 723, 725 (Fla. 5th DCA 2006). The Court recently summarized the applicable legal standard as follows:

> It is well settled that in ruling on a defendant's motion for judgment on the pleadings, all the allegations set forth in the complaint must be taken as true and all the allegations in the answer, which are automatically denied, must be accepted as false. Whether to grant a motion for judgment on the pleadings must be decided wholly on the pleadings, without the aid of outside matters. Judgment on the pleadings is appropriate ***only*** if the moving party is ***clearly*** entitled to judgment as a matter of law. It is ***improper to enter a judgment on the pleadings if factual questions remain*** to be resolved.

Driscoll v. Knellinger, 380 So. 3d 1237, 1241 (Fla. 2d DCA 2024) (internal cites and quotes omitted) (e.s.).

Moreover, a valid affirmative defense does not, standing alone, entitle a defendant to a judgment on the pleadings. This is especially true for the affirmative defense of standing. In the analogous context of motions to

dismiss, the Court recently explained that a dismissal for lack of standing is appropriate "***only*** where the face of the complaint contains allegations which demonstrate the existence of a lack of standing." Rigollet v. Le MacAron Dev., LLC, 383 So. 3d 132, 136 (Fla. 2d DCA 2024) (e.s.). But even then, "dismissals with prejudice based on a lack of standing are generally improper." Id.

The Court's holding is consistent with other district courts of appeal. For example, the First District Court of Appeal has explained:

> [L]ack of standing is an affirmative defense. Generally, this affirmative defense must be asserted in the responsive pleading and the issue is then determined upon ***evidence*** presented or the party's inability to produce sufficient evidence of its standing.

Wells Fargo Bank, NA v. Reeves, 92 So. 3d 249, 253 (Fla. 1st DCA 2012) (e.s.).

These holdings are consistent with the general rule that an affirmative defense usually should not result in a dismissal or judgment on the pleadings, "[b]ecause affirmative defenses may be avoided by facts pled in a reply[.]" Grove Isle Ass'n, Inc. Grove Isle Associates, LLLP, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014). Accordingly, dismissals or judgments on the pleadings should ***only*** be granted where the allegations of the complaint "***conclusively*** negate the plaintiff's ability to allege facts in avoidance of the defense by way of reply." Id. (e.s.); see also, Rigby v. Liles, 505 So. 2d 598,

601 (Fla. 1st DCA 1987). Even where a plaintiff endeavors to deflect an affirmative defense in the complaint, the burden of proof remains with the defendant, and dismissal is improper absent the defense appearing conclusively on the complaint's face. Cf., Green v. Cottrell, 204 So. 3d 22, 30 (Fla. 2016) (holding trial court incorrectly dismissed prisoner's claims based on failure to exhaust administrative remedies affirmative defense).

Application of the foregoing well-settled rules of law to this case reveals multiple legal errors which deprived Plaintiff of its due process right to present its case. Plaintiff respectfully but firmly requests reversal.

I. NUMEROUS PREJUDICIAL ERRORS REQUIRE REVERSAL.

A. The trial court improperly relied on Insurer's selection of documents not attached to the operative complaint to grant final judgment on the pleadings.

Under the legal standard set forth above (IB at 19-21), motions for judgment on the pleadings should be adjudicated based only on the four corners of the complaint, and its attachments.

In this case, Plaintiff's operative (initial) complaint had no attachments, and alleges:

> Plaintiff has complied with all statutory prerequisites and conditions precedent to entitle Plaintiff to file suit and recover under the Policy, including but not limited to, entering into a valid assignment agreement with the insureds and timely providing written notice of intent to initiate litigation before filing this lawsuit

as required by Florida Statute §627.7152, ***or in the alternative, the conditions have been waived***.

(R. 16) (e.s.)

In light of Plaintiff's "waiver" allegation, Insurer should have answered the complaint, proceeded through discovery, and sought to adjudicate its defense with evidence at a later stage. Apex Roofing & Rest. LLC v. United Servs. Auto. Ass'n**,** 49 Fla. L. Weekly D1982, 2024 Fla. App. LEXIS 7602 at *7 (Fla. 1st DCA Oct. 2, 2024) (motion for rehearing pending) (AOB contractor's waiver and estoppel avoidances or deflections of insurer's standing/inadequate AOB defense "***cannot*** be rejected as a matter of law where asserted facts are not resolved, either by summary judgment or trial." (e.s.)). Plaintiff's decision to refrain from attaching any AOB to its complaint does not change the analysis, because there is "nothing within Florida Rule of Civil Procedure 1.130 (entitled 'Attaching Copy of Cause of Action and Exhibits'), or within case law interpreting rule 1.130, requiring an assignee" of insurance benefits to attach a copy of an assignment of benefits to a complaint. See e.g., Robert J. Hanopole, D.C., P.A. v. State Farm Mut. Auto. Ins. Co., 345 So. 3d 303, 307 (Fla. 4th DCA 2022).[5]

[5] Of course, because documents evidencing Insurer's waiver of Fla. Stat. Sec. 627.7152's AOB requirements are not "documents on which action may be brought or defense made," Plaintiff was not obligated to attach documents evidencing waiver either. See, Fla. R. Civ. P. 1.130(a).

But instead of proceeding in the manner required by binding case law and confirmed by Apex Roofing & Rest. LLC v. United Servs. Auto. Ass'n, supra., Insurer filed an affirmative defense-based motion for judgment on the pleadings ***supported by Insurer's selection of documents***. (R. 180-219) Insurer omitted highly-relevant documents adverse to its position on the dispositive issue of compliant AOB ***or waiver***, including ***Insurer's written communications, Insurer's Estimate, and Insurer's (inadequate) replacement cost value payment (issued in recognition of the Lemons AOB) for Plaintiff's services to remedy the Loss.*** (R. 584-607).

The trial court entertained Insurer's inappropriate tactics, and based its ruling granting Insurer's Motion for Judgment on the Pleadings on a "review" of the Lemons AOB. (R. 1070) Respectfully, that was structural harmful legal error under the Court's binding precedent. Driscoll v. Knellinger, 380 So. 3d at 1241 (all of the complaint's allegations must be taken as true; all of defendant's allegations must be rejected as false; and the motion should be adjudicated without resort to outside matters); Rigollet v. Le MacAron Dev., LLC, 383 So. 3d at 136 (standing-based motions for judgment on the pleadings should be rarely granted, should only be granted if the lack of standing is apparent on the face of the complaint, and even then should not be granted with prejudice); see also, Apex Roofing & Rest. LLC v. United

Servs. Auto. Ass'n, 49 Fla. L. Weekly D1982, 2024 Fla. App. LEXIS 7602 at *7 (order granting standing/inadequate AOB motion for judgment on the pleadings reversed because plaintiff alleged matters avoiding or deflecting affirmative defense).

At a minimum, Insurer's standing-based final judgment on the pleadings should be reversed so that the factual issues raised by the Plaintiff's operative (and initial) complaint avoiding or deflecting Insurer's standing/inadequate AOB affirmative defense may be properly developed and resolved at the appropriate stage of litigation. Id.

B. It was also prejudicial legal error to grant Insurer's motion for judgment on the pleadings for (purported) lack of standing where Plaintiff alleged and the record reflects at least one basis to avoid or deflect that affirmative defense.

In Apex Roofing & Rest. LLC v. United Servs. Auto. Ass'n, supra, the First District Court of Appeal recognized that a standing/inadequate AOB affirmative defense ***can*** be deflected by waiver or estoppel at the pleading stage. Id. at *7. Consistent with Apex Roofing, Plaintiff's operative (initial) complaint alleged waiver to avoid or deflect any lack-of-standing affirmative defense based on any alleged inadequacy of the Lemons AOB. (R. 16). The record reveals a sound basis for asserting that avoidance or deflection, including ***Insurer's issuance of an (inadequate) replacement cost value payment for Plaintiff's services (seemingly in recognition of the***

Lemons AOB), ***only to change course after Insurer had gotten the benefit of Plaintiff's goods and services for Insurer's insureds***. (R. 584-607) Insurer cannot treat the Lemons AOB as valid for purposes of inducing Plaintiff to perform work for Insurer's insured, and invalid for purposes of avoiding the obligation to pay Plaintiff the fair value of its good and services for Insurer's insured. In light of the circumstances presented, Plaintiff has a colorable waiver avoidance or deflection against Insurer's purported lack of standing affirmative defense as alleged in the complaint. See e.g., Raymond James Financial Services, Inc. v. Saldukas, 896 So. 2d 707, 709-11 (Fla. 2005) (defining waiver).

Plaintiff may also have an estoppel or unclean hands avoidance. Major League Baseball v. Morsani, 790 So. 2d 1071, 1076-77 (Fla. 2011) (defining estoppel); US Bank Nat'l Ass'n v. Qadir, 342 So. 3d 855; 859 (Fla. 1st DCA 2022) (defining unclean hands). Insurer's course of dealing in this matter can be described as designed to induce detrimental reliance, delay, or other prejudice. In recognition of the Lemons AOB, Insurer made an (inadequate) replacement cost value payment to Mr. Lemons ***and Benchmark/Plaintiff***, which was "not necessarily * * * a full and final settlement," to induce Benchmark/Plaintiff to remedy Insurer's insured's covered Loss. (R. 584-607, 595) Understandably, Benchmark/Plaintiff would not have expended

the time, labor, resources, and hard costs needed to repair Mr. Lemons' roof and home without Insurer's representations and actions.

But then, after Insurer obtained a material benefit from Benchmark/Plaintiff in the form of completely remedying the covered Loss of Insurer's insured (Mr. Lemons) for significantly less than Plaintiff's estimate of the value of its goods and services, Insurer reversed course and took the position that the Lemons AOB (which it seems to have relied on to issue a purported replacement cost value payment) was not valid**.** (R. 152-75, 180-219)

Insurer's course of dealing has forced Plaintiff to pursue this litigation. While Insurer appears to argue that the Lemons AOB is valid as to Plaintiff's obligation to provide goods and services to remedy Insurer's insured's loss, it maintains it is invalid as to Insurer's obligation to pay for those goods and services. (R. 1065) Accepting Insurer's premise would multiply litigation, as Benchmark would need to sue Mr. Lemons for payment, who in turn would sue Insurer for insurance policy benefits. All of this begs the question—why? There does not seem to be any practical reason for Insurer's treatment of Plaintiff, Mr. Lemons, or Benchmark.

Regardless of Insurer's motives, the prejudice suffered by Plaintiff in this case is the exact harm which appellate courts have sought to prevent by

repeatedly instructing that affirmative defenses should be asserted in responsive pleadings, not dispositive motions. See e.g., Wells Fargo Bank, NA v. Reeves, 92 So. 3d at 253; Grove Isle Ass'n, Inc. Grove Isle Associates, LLLP, 137 So. 3d at 1088-89; see also, Apex Roofing & Rest. LLC v. United Servs. Auto. Ass'n, 49 Fla. L. Weekly D1982, 2024 Fla. App. LEXIS 7602 at *7. The limited exception to this general rule is inapplicable here because the face of Plaintiff's complaint does not conclusively refute all possible deflections of Insurer's lack-of-standing/inadequate-AOB affirmative defense. Id.; see also, Rigby v. Liles, 505 So. 2d at 601. To the contrary, ***Plaintiff specifically pled waiver as an avoidance or deflection of Insurer's lack-of-standing/inadequate-AOB affirmative defense in Plaintiff's operative (initial) pleading***. (R. 16) But even if Plaintiff had not (it did), it is still "generally improper" to dismiss with prejudice or enter final judgment at the pleading stage based on a lack of standing affirmative defense. See e.g., Rigollet v. Le MacAron Dev., LLC, 383 So. 3d at 136; see also, Apex Roofing & Rest. LLC v. United Servs. Auto. Ass'n, supra. Reversal is warranted by both the Court's binding case law and other highly-persuasive and analogous authorities.

C. The trial court engaged in further harmful error by relying on Insurer's references to factual and expert matters at the judgment on the pleadings stage.

At the motion for judgment on the pleadings hearing, the trial court entertained improper Insurer arguments based on alleged facts or expert opinions. Following is an example:

> [N]o roof in the State of Florida that contains all of these roofing materials, if not multiple -- majority of all roofs if not all of them just have a single type of roofing material. And that's the generic scope throughout all the houses throughout the State of Florida. The additional line items that I call into question are line items for steep roof, high roof. This is a single story ranch home. None of those apply. We also have line items for skylight flashing, digital satellite alignment and calibration. Solar panel detached reset. I think my point has been cleared. None of these apply to ***this specific project***.

(R. 1056-57) (e.s.)

Insurer's above-quoted argument is not based in any way on the four corners of the operative (initial) complaint or its attachments. Rather, it is based on Insurer's counsel's factual representations regarding "roof[s] in the State of Florida," the "specific project," and matters which appear to require expert analysis (e.g., that it's purportedly "physically impossible for a GC or an engineer * * * to take this information that's been provided and apply it into an estimated cost, per item estimated cost, per unit estimate." (R. 1059)). They are patently improper.

Even if it were appropriate for Insurer to present argument based on factual matters or speculation regarding expert impressions at the pleading stage (it is not), Insurer's attorney's characterizations, argument, and

speculation are not evidence, and should never be relied on to resolve disputed issues of material fact. Cf., Harrell v. Ryland Group, 277 So. 3d 292, 294 (Fla. 1st DCA 2019) ("general allegations and legal argument do not constitute evidence of disputed issues of material fact." (internal quotes and citation omitted)); §90.702, Fla. Stat. (only expert witnesses may testify on matters involving "scientific, technical, or other specialized knowledge").

It was harmful legal error to rely on and permit such argument. The final judgment on the pleadings based on Insurer's standing affirmative defense should be reversed.

D. Insurer's motion for judgment on the pleadings was prematurely filed in violation of Fla. R. Civ. P. 1.140(c).

Insurer "jumped the gun" by filing its motion for judgment on the pleadings before Plaintiff's reply to the affirmative defenses where due and before the pleadings were closed. The applicable rule states in no uncertain terms that a party must wait until "***After*** the pleadings are closed" to "move for judgment on the pleadings." Fla. R. Civ. P. 1.140(c) (e.s.).

That did not happen here. Insurer filed its answer and affirmative defenses on March 15, 2023. (R. 152-75) By operation of Fla. R. Civ. P. 1.140(a)(1), Plaintiff had until April 4, 2023 to file a reply to those affirmative defenses, which would close the pleadings. Id.; see also, Fla. R. Civ. P. 1.440(a) ("An action is at issue after any motions directed to the last pleading

served have been disposed of or, if no such motions are served, 20 days after service of the last pleading."). But Insurer did not wait until April 4, 2023; rather, it hastily filed its motion for judgment on the pleadings on March 24, 2023—nine (9) calendar days after its answer and affirmative defenses were filed. (R. 6-8, 180-219) Accordingly, the pleadings were open at the time Insurer's motion for judgment on the pleadings was filed. The final order granting Insurer's motion for judgment on the pleadings should be reversed.

II. IT WAS ALSO REVERSIBLE ERROR TO GRANT INSURER'S MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE PLAINTIFF HAS STANDING UNDER FLA. STAT. SEC. 627.7152.

The trial court's reason for granting judgment on the pleadings is extremely narrow. Specifically, it is based solely on the "***find[ing]*** that there are no material facts at issue as the [Lemons] AOB fails to comply with Florida Statute §627.7152(2)(a)(4) [sic] (2019)." (R. 576) (e.s.) That subsection requires AOBs to "[c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee." Id. Even if the trial court could make a "find[ing]" on this issue at the pleading stage in the face of the complaint's waiver allegations (it should not), it would still be legal error for the trial court to "find" at the pleading stage that the Lemons AOB does not "contain" a "written, itemized, per-unit cost estimate" for at least two independent reasons. First, the AOB Estimate is written, itemized, specifies

units, and includes the cost of the remediation. And second, even if it is not, under the circumstances presented, the Lemons AOB may "contain" such an estimate by virtue of the Lemons AOB's unique language the other estimates found in the record.

A. The AOB Estimate is "a written, itemized, per-unit cost estimate of the services to be performed by the assignee."

The Insurer persuaded the trial court to adopt its interpretation of the Lemons AOB (and AOB Estimate) without making any mention of the applicable rules of AOB interpretation. A review of these rules confirms that the Insurer led the trial court into harmful legal error by persuading it to "find" at the pleading stage that Plaintiff lacked standing because the Lemons AOB purportedly fails to comply with Fla. Stat. Sec. 627.7152(2)(a)4. (R. 545)

Generally, courts resort to the rules of contract interpretation when evaluating AOBs. See e.g., Salyer v. Tower Hill Select Ins. Co., 367 So. 3d at 554. "The intention of the ***parties*** [i.e., Benchmark and Mr. Lemons, ***not*** the Insurer] generally governs the interpretation of contracts." Republic Services, Inc. v. Calabrese, 939 So. 2d 225, 226 (Fla. 5th DCA 2006) (e.s.).

The parties' intent "should be determined from the words of the contract as a whole," with consideration given to "the conditions and circumstances surrounding the parties and the objects to be obtained in executing the contract." City of Tampa v. Ezell, 902 So. 2d 912, 914 (Fla. 2d

DCA 2005). Contracts should be construed in a manner that does not render any provision of the contract meaningless. Massey Servs. v. Sanders, 312 So. 3d 209, 214 (Fla. 5th DCA 2021). Generally, "if a contract is ambiguous, the parties' intent becomes a question of fact for the fact-finder[.]" Life Care Ponte Vedra, Inc. v. Wu, 162 So. 3d 188, 191-92 (Fla. 5th DCA 2015).

When viewed under the foregoing rules of AOB interpretation, the trial court's harmful legal error becomes apparent. The plain language of Fla. Stat. Sec. 627.7152(2)(a)4. merely requires the Lemons AOB to "[c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee." It did. Unquestionably, the AOB Estimate "contain[ed]" within the Lemons AOB is "written." (R. 160-63, 204-07, 586-89) It is also "itemized;" it distinguishes the items which are included in Plaintiff's remediation work from those that are not with check marks:

Services Provided:

- ☑ Tear Off _Layer(s) Shingles Sq. _
- ☑ Tear Off Underlayment
- ☑ Clean Up and Haul Off Roofing Debris
- ☐ Ice and Water Shield: _LF
- ☐ Install _ Felt

Install Metal Drip Edge. Color: _

- ☑ Install Starter Strip
- ☑ Install _ Shingles
- ☑ Shingle Color: Max Def Sunrise Cedar
- ☑ Manufacture Warranty
  - ☐ 20 ☐ 25 ☑ 30 ☐ Limited Lifetime
- ☑ Craftsmanship of Roof _years
- ☑ Install _Vent(s) Color _
- ☑ Ridge: _LF
- ☑ Evaluate insurance coverage
- ☑ Coordinate insurance and claim info
- ☑ Submit documentation to insurance carrier
- ☑ Coordinate submission of claim for damages
- ☑ Schedule Adjuster Meeting
- ☑ Meet adjuster for property inspection
- ☑ Valley: _
- ☐ Other: _
- ☐ Chimney Flashing Qty: _ Color _
- ☑ Clean Around Bushes and Shrubs
- ☑ Roll Yard with Magnetic Roller
- ☑ Protect Landscaping
- ☐ Clean Out Gutters
- ☑ Permit Furnished by Castle Roofing
- ☑ Castle will Provide General Liability at Least $1,000,000
- ☑ Guide and direct carrier rep through evaluation of damages
- ☑ Commensurate with carrier for scope of loss
- ☑ Evaluate the final scope of loss
- ☑ Oversee all required documentation required by insurance carrier
- ☑ Obtain mortgagee information

Special Instructions

(R. 160, 204, 586)

It also specifies the number of "units" of each "item" to be used to repair the covered Loss; see e.g.:

#	Description	Remove	Replace	Per
1	R&R Exhaust cap - through roof - up to 4"	21.22	69.04	EA
2	R&R Flat roof exhaust vent / cap - gooseneck 8"	21.22	71.13	EA
3	R&R Flat roof exhaust vent / cap - gooseneck 12"	21.22	82.04	EA
4	R&R Roof vent - turtle type -Metal	21.22	54.32	EA
5	R&R Roof vent - turbine type	21.22	106.49	EA
6	R&R Roof vent - off ridge type -4	37.27	107.52	EA
7	R&R Roof vent - off ridge type - 8	59.45	208.07	EA
8	R&R Valley metal	1.39	4.86	LF
9	R&R Ridge cap - composition shingles	2.39	3.64	LF
10	Taxes, insurance, permits & fees (Bid Item)	0	0	EA
11	Gutter / downspout - Detach & reset	0	2.79	LF
12	Digital satellite system - Detach & reset	0	28.59	EA
13	Digital satellite system - alignment and calibration only	0	85.76	EA
14	Remove Laminated - comp. shingle rfg. - w/ felt	120.49	0	SQ
15	Laminated - comp. shingle rfg. - w/ felt	0	226.8	SQ
16	Remove Laminated - comp. shingle rfg. - w/out felt	120.49	0	SQ
17	Laminated - comp. shingle rfg. - w/out felt	0	197.81	SQ
18	R&R Drip edge/gutter apron	0.78	2.26	LF
19	Asphalt starter - peel and stick	0	2.11	LF
20	Step flashing	0	8.38	LF

(R. 162, 206, 588)

Finally, it specifies the "cost" of the remediation work:

Total Estimated Cost: $27,000.00

(R. 161, 205, 587)

In light of the foregoing, it was reversible error for the trial court to "find" at the pleading stage that the Lemons AOB was invalid/Plaintiff lacked standing because the AOB Estimate did not comply with Fla. Stat. Sec. 627.7152(2)(a)4. The AOB Estimate contained all the elements required by that statute. It is apparently: (i) written, (R. 160-63, 204-07, 586-89) (ii) itemized (it has numerous line items), (R. 162-63, 206-07, 588-89) (iii) indicates the number of units for each line item (e.g., "tear off, haul and dispose of comp. shingles – 3 tab" 118.84 square feet; "3 tab - 20 yr. - comp. shingle roofing - w/out felt" 170.42 square feet); (R. 162, 206, 588) and (iv) contains a price estimate of the service to be performed ($27,000.00). (R. 161, 205, 287)

Accordingly, the AOB Estimate is materially distinguishable from those at issue in the cases relied on by Insurer— Kidwell Grp., LLC v. United Prop. & Cas. Ins. Co., 343 So. 3d 97 (Fla. 4th DCA 2022) ("Kidwell I") and Air Quality Experts Corp. v. Family Sec. Ins. Co., 351 So. 3d 32 (Fla. 4th DCA 2022). Preliminarily, Kidwell I is inapplicable to this issue because ***Kidwell I did not address the adequacy of an AOB estimate***. Rather, it concluded

that the subject AOB was invalid merely because the estimate was unsigned and dated five days after the AOB execution date. Id. Accordingly, Kidwell I did not reach, and is inapplicable to, the specific issue presented. See e.g., Heid v. Florida Ins. Guar. Ass'n, 311 So. 3d 94 (Fla. 2d DCA 2020) (statement in an opinion is dicta where it is not on the decisional path).

Reliance on the Air Quality case is also severely misplaced. The details of the Air Quality "estimate" are included in that opinion, and are materially distinguishable:

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[1] 9. PRICE LIST FOR MOLD ASSESSMENT
1. Visual Inspection of Arca/ Digital Photography $20.00 (per room).
2. FLIR Assessment of Area/ Moisture Readings $ 40.00 (per room).
3. Visual Inspection of HVAC Unit/ Digital Photography $ 75.00 (per unit).
4. Surface Sample/ Lab Results $ 95.00 (per sample).
5. Air Sample/ Lab Results $ 95.00 (per sample).
6. Report I Protocol $150.00 (per report issued).

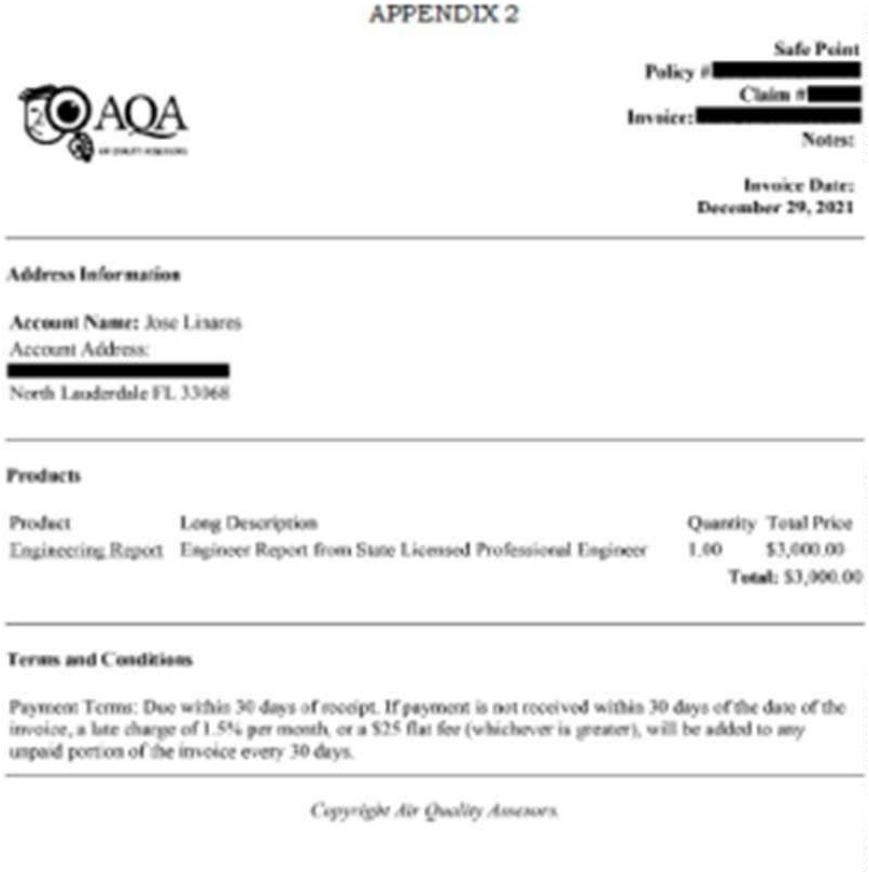
10. PRICE LIST FOR POST REMEDIATION ASSESSMENT
1. Visual Inspection of Area/ Digital Photography $20.00 (per room).
2. Surface Sample/ Lab Results $ 95.00 (per sample).
3. Air Sample/ Lab Results $ 95.00 (per sample).
4. Clearance Report $150.00 (per report issued).

Id. at 35 n.1. While the Air Quality AOB estimate might be "written" and include costs "per-unit," it is not "Itemized" (i.e., does not specify which of the available items will be used), does not specify the number of "units" used, and does not include an "estimate" of the cost to remedy the loss. That is materially distinguishable from the AOB Estimate at issue in this case, which ***does*** include an estimated cost to remedy the covered Loss/replace the

wind-damaged roof, ($27,000.00) and identifies specific line-items, units, and quantities. (R. 160-63, 204-07, 586-89)

Rather, the AOB estimate which is the subject of this appeal is more like those at issue in MVP Plumbing, Inc. v. Citizens Property Insurance Corp., 359 So. 3d 885 (Fla. 3d DCA 2023) and Kidwell Grp., LLC v. Safepoint Ins. Co., 376 So. 3d 48 (Fla. 4th DCA Dec. 20, 2023) ("Kidwell II"). The MVP Court concluded that the requirements of Fla. Stat. Sec. 627.7152(2)(a)4. were met by an undifferentiated $750 statement of claim because the service provider provided "a single service, a pipe inspection." MVP Plumbing, Inc. v. Citizens Property Insurance Corp., supra. The Kidwell II Court held that the "itemized, per unit cost estimate" requirement was met for pleading purposes by the following:

APPENDIX 2



Safe Point
Policy #[redacted]
Claim #[redacted]
Invoice:[redacted]
Notes:

Invoice Date:
December 29, 2021

Address Information

Account Name: Jose Linares
Account Address:
[redacted]
North Lauderdale FL 33068

Products

Product	Long Description	Quantity	Total Price
Engineering Report	Engineer Report from State Licensed Professional Engineer	1.00	$3,000.00

Total: $3,000.00

Terms and Conditions

Payment Terms: Due within 30 days of receipt. If payment is not received within 30 days of the date of the invoice, a late charge of 1.5% per month, or a $25 flat fee (whichever is greater), will be added to any unpaid portion of the invoice every 30 days.

Copyright Air Quality Assessors

Id. at 52-53. The Kidwell II Court reasoned that unlike Air Quality and another AOB case which included a "general list for services that could be performed, without any indication of what services were estimated to be performed," the Kidwell II AOB was "sufficiently detailed because it listed a single service of an engineer report with an estimated cost of $3,000." Id. at 52.

At the pleading stage, on a surface level, the AOB Estimate is also for a single service—replacing a wind-damaged roof. Accordingly, the rationale of MVP and Kidwell II should apply here to result in reversal of the adverse judgment on the pleadings. But unlike the estimates in MVP and Kidwell II, the AOB Estimate in this case goes further—Plaintiff has broken down the

component tasks within the single service of replacing Mr. Lemons' roof, and provided quantities for each individual item within that single service. (R. 160-63, 204-07, 586-89) Plaintiff should not be punished for seeking to include more detail in its AOB Estimate than the ones at issue in MVP and Kidwell II (both of which resulted in reversals of final judgments or dismissals at the pleading stage).

To the extent there was any ambiguity in the Lemons AOB or the AOB Estimate, it should be resolved based on the evidence ***after*** the pleading stage. Cf., Marina v. Grove Bay Inv. Grp., LLC, 394 So. 3d 1199, 2024 Fla. App. LEXIS 3754 at *10-*11 (Fla. 3d DCA 2024) (reversing summary judgment because the contracting parties' intent becomes a question of fact for the fact-finder where the contract is ambiguous).

Moreover, the situation presented would strongly support a finding that the Lemons AOB and AOB Estimate are statutorily-compliant and enforceable. At the time of execution, Mr. Lemons just suffered an expensive covered Loss to his home, and needed his roof replaced. Surely, he wanted his roof and resulting damage repaired without hassle and delay from his Insurer, and Benchmark/Plaintiff offered to assist. Construing the AOB Estimate and the Lemons AOB in the manner requested by Insurer, a non-party to these documents, would render them unenforceable and

meaningless. To the extent the Lemons AOB and AOB Estimate are ambiguous, they should be construed in a manner that gives them meaning consistent with the parties' wishes. (R. 584-85) Reversal is warranted.

B. The Lemons AOB contains "a written, itemized, per-unit cost estimate of the services to be performed by the assignee."

Under the unique circumstances presented, any inadequacy of the AOB Estimate was cured by either Insurer's Estimate or Plaintiff's Estimate. See, (R. 161, 164, 170-75, 205, 208, 214-19, 584-85, 587, 590, 597-606)

Plaintiff appreciates that at the time Insurer's motion for judgment on the pleadings was heard, Kidwell I was binding on the trial court and required the trial court to forego consideration of estimates other than the AOB Estimate when evaluating the viability of the Lemons AOB. But the Second District Court of Appeal is not bound by Kidwell I (see Pardo v. State, supra), and that opinion's analysis has persuasively been called into question by the First District Court of Appeal in Apex Roofing & Rest. LLC v. United Servs. Auto. Ass'n, supra. The analytical infirmity in Kidwell I is best described by Judge Tannenbaum's concurrence:

> In [Kidwell I]—the Fourth District (ironically) considers the "plain language" of section 627.7152(2)(a), Florida Statutes, to "require[] that *at the time the assignment of benefits is signed*, the assignor must be provided with a list of the itemized services to be performed by the assignee, as well as the costs thereof." Kidwell Grp., LLC v. United Prop. & Cas. Ins. Co., 343 So. 3d 97, 97 (Fla. 4th DCA 2022) (emphasis supplied). I say "ironically"

> because rummage as one might through the text of that statute, there will be no finding a "same-time" requirement.

Id. at *8 (e.o.) (bracketed [Kidwell I] added).

From there, Judge Tanenbaum notes that under Florida law, contracts like the Lemons AOB:

> [D]o not need to be contained in one document, executed all at once, to be considered a binding agreement. See J.M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So. 2d 484, 486 (Fla. 1957) (observing "the rule that where an agreement is evidenced by two or more writings, the writing must be construed together, . . . is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; *instruments entered into on different days, but concerning the same subject matter,* may under some circumstances be regarded as *one contract* and interpreted together" (emphases supplied) (internal quotation omitted)); see also Gardenia Ests. v. Grove Land & Timber Co., 140 So. 787, 789 (Fla. 1932) (analyzing "corelated parts of one and the same general transaction" to discern the intent of the parties); Jackson v. Parker, 15 So. 2d 451, 459-61 (Fla. 1943) (same); Cushman v. Smith, 528 So. 2d 962, 964 (Fla. 1st DCA 1988) ("However, the rule is that where an agreement is evidenced by two or more writings, the writings must be construed together. This rule is not necessarily confined to instruments executed at the same time *by the same parties* for the same purpose; instruments entered into *on different days but concerning the same subject matter* may under some circumstances be regarded as one contract and interpreted together." (second emphasis supplied)); Comput. Sales Intern., Inc. v. State, Dep't of Rev., 656 So. 2d 1382, 1384 (Fla. 1st DCA 1995) ("[T]he rule requiring that writings which evidence a single agreement must be construed together is *not necessarily confined to instruments executed at the same time by the same parties for the same purpose.* Rather, instruments entered into [sic] *on different days* but containing the same subject matter may, under

> appropriate circumstances, be regarded as one contract and interpreted together." (emphases supplied)).

Id. at *8 (e.o.).

After noting that the Apex Roofing plaintiff's complaint included a signed and dated assignment agreement and a detailed cost sheet that was dated the following day, Judge Tanenbaum explained:

> For [the Insurer] to prove up its contention that the assignment agreement is invalid and unenforceable under the statute, it must establish—through evidence—that these documents are not two parts of one agreement. How the parties intended for those documents to operate together and govern their agreement for repair services to be provided is a question of fact, one that cannot be resolved on a motion to dismiss. See Jackson, 15 So. 2d at 459 ("[T]he primary purpose of [contract] construction is to ascertain the intention of the parties. This is done not only from the face of the instrument, but also from the situation of the parties and the nature and object of their transactions." (internal quotations omitted)); see also J.M. Montgomery Roofing Co., 98 So. 2d at 486; see also Strama v. Union Fid. Life Ins. Co., 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001) ("Where the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment." (internal quotation and citation omitted)).

Id. at *11-*12 (bracketed [the Insurer] added).

Judge Tanenbaum then concludes that reversal was appropriate because "The trial court made assumptions of fact that it could not make when it dismissed the amended complaint." Id. at *12.

Application of Judge Tanenbaum's analysis to the instant case would provide an additional ground for reversal. The Lemons AOB and the AOB

Estimate contemplate that Benchmark/Plaintiff may "file supplemental claims with the Owner's insurance company in the event that the original estimate is incorrect," or that the AOB Estimate may be "amended, modified, or added-to as deemed necessary by [Benchmark/Plaintiff]." (R. 164, 208, 590, 161, 205, 587) Also, Mr. Lemons has averred that the Insurer's Estimate and corresponding payment "modified" the AOB Estimate within the Lemons AOB. (R. 584-85) Both Insurer and Plaintiff have issued additional estimates for the work contemplated by the Lemons AOB. (R. 170-75, 214-19, 595-606) Insurer cannot dispute that the Insurer's Estimate (or Plaintiff's Estimate) satisfies Fla. Stat. Sec. 627.7152(2)(a)4.'s requirements. (R. 170-75, 214-19, 595-606) Consistent with Judge Tanenbaum's analysis, the trial court should have allowed this case to proceed past the pleading stage so that a factual determination could be made as to whether the Insurer's Estimate or the Plaintiff's Estimate were "contained" within the Lemons AOB.

III. PLAINTIFF'S MOTION FOR REHEARING SHOULD HAVE BEEN GRANTED, AND PLAINTIFF SHOULD HAVE BEEN PROVIDED LEAVE TO AMEND OR REPLY TO THE INSURER'S AFFIRMATIVE DEFENSES.

The grounds for motions for rehearing under Fla. R. Civ. P. 1.530 are broad and "include the contention that the final order conflicts with the governing law and is otherwise simply wrong on the merits." Balmoral Condominium Ass'n v. Grimaldi, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013).

A rehearing motion provides the trial court with an opportunity to entertain matters that it previously misapprehended, overlooked, or failed to consider, and to correct any associated error. Gaffney v. Gaffney, 965 So. 2d 1217, 1221 (Fla. 4th DCA 2007); Carollo v. Carollo, 920 So. 2d 16, 19 (Fla. 3d DCA 1994). When considering rehearing motions, courts may take additional evidence and address earlier rulings. See e.g., Shuman v. Winnick, 725 So. 2d 1199, 1200-01 (Fla. 5th DCA 1999); Srybnik v. Ice Tower, Inc., 183 So. 2d 224, 225 (Fla. 3d DCA 1966).

In light of the matters discussed above and argued to the trial court, it was reversible error to deny Plaintiff's motion for rehearing. That motion raised material matters that were either not considered, overlooked, or misapprehended. See, (R. 553-72); see generally, IB at 19-41.

Equally erroneous was the trial court's refusal to grant Plaintiff's request for leave to amend included within Plaintiff's rehearing motion. Leave should be denied only when the privilege has been abused in the past, when amendment would create undue prejudice to the opposing party, or when amendment would be futile. See Fields v. Klein, 946 So. 2d 119, 121 (Fla. 4th DCA 2007). Indeed, the Court has held it is reversible error to deny motions for leave to amend when the opposing party cannot show those factors. See e.g., Thompson v. Jared Kane Co., Inc., 872 So. 2d 356, 360

(Fla. 2d DCA 2004) (reversing the trial court's denial of a motion for leave to amend its answer served two months prior to trial, finding that requiring a party to prove its allegations did not constitute prejudice so as to warrant the denial of the motion); see also, Cousins Rest. Assoc. v. TGI Friday's, Inc., 843 So. 2d 980, 981-82 (Fla. 4th DCA 2003) (trial court abused its discretion in denying leave to amend pleadings despite the fact that motion for leave to amend was served after case was already set for trial); Azemco (North America), Inc. v. Brown, 553 So. 2d 1245, 1246 (Fla. 3rd DCA 1989) (trial court committed reversible error in denying motion to amend made on the first day of trial despite existence of lawsuit for nearly six years, as there was neither prejudice nor surprise to opposing party); Overnight Success Constr., Inc. v, Pavarini Constr. Co., Inc., 955 So. 2d 658, 659 (Fla. 3rd DCA 2007) (trial court did not abuse its discretion in allowing party to amend pleadings three months prior to trial); K.D. Lewis Enterprises Corp., Inc. v. Smith, 445 So. 2d 1032, 1036-1037 (Fla. 5th DCA 1984) (trial court did not abuse its discretion in allowing amendment to pleadings ten days prior to trial, where no prejudice was shown).

With regard to requests for leave to amend included in a rehearing motion, Port Marina Condo. Ass'n v. Roof Servs., 119 So. 3d 1288 (Fla. 4th DCA 2013) is instructive, and strongly supports reversal. Similar to this case,

the trial court dismissed the Port Marina plaintiff's claims against one of several defendants at the pleading stage, and the plaintiff requested leave to amend in a motion for rehearing. Id. at 1290-93. The trial court denied the request, and the Fourth District Court of Appeal reversed. Although the Fourth District agreed with the trial court that dismissal was proper, it still held that the trial court abused its discretion when denying leave to amend because, among other things: (i) leave to amend should be liberally granted when justice so requires; (ii) plaintiff had not abused the privilege, as this was plaintiff's first request; and (iii) the complaint was amendable to state a cause of action if Plaintiff could allege certain facts. Id. at 1292-93.

Application of the above-described factors to the instant case requires reversal for, at a minimum, leave to amend. This was Plaintiff's first (and only) request for leave to amend. The action was still at a relatively early stage; Plaintiff's motion for rehearing containing the request for leave to amend was filed less than seven (7) months after Insurer answered the initial complaint. (R. 6-8) The complaint was amendable to assert viable claims which avoid or deflect Insurer's standing/non-compliant AOB affirmative defenses. Apex Roofing & Rest. LLC v. United Servs. Auto. Ass'n, supra. Also, there would be no undue prejudice to Insurer as it should have been aware of Plaintiff's position from the waiver allegations in the complaint and

Mr. Lemons' affidavit. (R. 16, 584-85) To the contrary, denial of the motion would be contrary to Florida's laudable public policy of adjudicating matters on their merits. See, Lindsey v. King, 894 So. 2d 1058, 1060 (Fla. 1st DCA 2005) ("Public policy in Florida favors deciding controversies on their merits[.]").

Thus, even if dismissal or judgment on the pleadings was appropriate, the trial court's denial of Plaintiff's requests for leave to amend was an abuse of discretion. Reversal is appropriate.

CONCLUSION

The trial court committed several harmful errors when prematurely granting final judgment on the pleadings based on a standing/non-compliant AOB affirmative defense. For all of the foregoing reasons, Insurer's standing-based motion for judgment on the pleadings should have been denied. But even if dismissal were appropriate, it was an abuse of discretion to deny Plaintiff leave to amend its pleadings to allege bases to deflect Insurer's lack-of-standing affirmative defense, as the record reveals multiple viable avoidances or deflections of that affirmative defense.

For all the foregoing reasons, Appellant respectfully but steadfastly requests that the Honorable Court reverse the final judgment on the pleadings in favor of Insurer, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been furnished to the following by e-mail or e-service on December 16, 2024:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Brief complies with the applicable word and font requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2) (Jan. 1, 2021) (specifically, excluding cover sheet, the tables of contents and citations, the certificates of service and compliance, and the signature block for the brief's author, there are 9,072 words in this Brief, according to undersigned's word processing software).

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