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

FLORIDA STATE ROOFING AND CONSTRUCTION, INC.,

Appellant,

vs.

GULF COAST SUPPLY & MANUFACTURING, LLC,

Appellee.

Case No. 2D23-0882
L.T. No. CACE 15-CA-2925

ON APPEAL FROM THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT, IN AND FOR MANATEE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT, FLORIDA STATE ROOFING AND CONSTRUCTION, INC.

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ARGUMENT I

THE TRIAL COURT ERRED IN ITS INTERPRETATION OF FLORIDA LAW WHERE IT CONCLUDED THAT FSR SHARED THE RESPONSIBILITY FOR QUALITY CONTROL OF METAL ROOF PANELS MANUFACTURED BY GULF COAST

Standard of Review

Gulf Coast acknowledges that combined issues of law and fact are subject to "a mixed standard of review, with this court deferring to the trial court's factual findings that are supported by competent, substantial evidence, and with review of the trial court's legal conclusions to be *de novo*." Answer Brief at p. 26 (citing *Durousseau v. State,* 218 So. 3d 405, 411 (Fla. 2017)). Appellee fails to acknowledge, however, that where the trial court interpreted the Florida Building Code, statutes, and administrative rules governing metal roof panels manufactured pursuant to a Florida Product Approval, the appropriate standard of review is *de novo*. Initial Brief at p. 17 (citing *Johnson v. State,* 78 So. 3d 1305, 1310 (Fla. 2012); *Ganzemuller v. Omega Ins. Co.,* 244 So. 3d 1189, 1190 (Fla. 2d DCA 2018); *Brown v. City of Vero Beach,* 64 So. 3d 172, 174 (Fla. 4th DCA 2011) ("where the question involves interpretation of a statute, it is subject to de novo review")).

Merits

Appellee fails to address any authorities cited in this argument by FSR, instead focusing on a single holding in the Amended Final Judgment. Answer Brief at pp. 28-29. Appellee urges that the "substantial competent evidence at trial" supports this holding in the Amended Final Judgment. The flaw in Appellee's argument is readily apparent – the holding on which it relies is a conclusion of law, not a factual finding, and not even a mixed question of law and fact:

> Plaintiff has also argued that the panels failed to comply with the Product Approval for "0.032" Aluminum Gulf Lok 16" Wide Roof Panel over 15/32 Plywood" referenced in the Force Engineering report (Exhibits 19-23). Plaintiff has urged the court to find that any thickness below 0.032" is non-compliant because the term "Minimum" is used in connection with the thickness of 0.032". However, the "Panel Material Standards" section of Exhibit 23 describes the material as "Minimum 0.032: Aluminum conforming to Florida Building Code 2010 Section 1207.4.3." **The court finds from the reference to the Building Code which incorporates ASTM B 209 and ANSI standards, that applicable tolerances should be considered. The court concludes that the word 28 "minimum" in this context refers to actual thickness as opposed to the nominal thickness, subject to thickness contemplated by Table 7.26.**

Answer Brief at pp. 28-29 (quoting ¶ 21 of the Amended Final Judgment (R: 3782)) (emphasis supplied). Thus, this court reviews this holding *de novo*. *Johnson,* 78 So. 3d at 1310. Since the trial court

also acknowledged that "FSR has demonstrated by the greater weight of the evidence that it received aluminum that did not conform to the tolerances set forth in Table 7.7a" (R:4603), if, on this Court's *de novo* review of the trial court's conclusions regarding the meaning of "minimum," it finds the trial court misconstrued the legal requirements, reversal is required. The authorities cited in the Initial Brief compel this result.

Gulf Coast chose to obtain approval for a product that exceeds the building code minimums, as it is permitted to do. Fla. Stat. 553.842(2) (an approved product may "meet or **exceed** established state requirements."); *In re: Palm Beach County Bldg. Div.,* (Declaratory Statement) DCA04-DEC-069 at p. 2 (Fla. Building Comm. July 22, 2004) (product approval is not limited to any particular standards or requirements adopted within the Florida Building Code"). As the trial court noted in the Amended Final Judgment, the Florida Building Code permits a minimum thickness of 0.024". R:4601. However, Gulf Coast obtained approval for a product that indisputably exceeds the building code requirements. It was error for the trial court to conclude that the Florida Building

Code permitted those roofing panels to be any thinner than the product approval assured they would be.

Appellee next argues that the trial court "merely" noted that neither Appellee nor FSR were aware of the thickness of the metal until the project was halted, claiming this was not a basis for the trial court's conclusion that FSR should not prevail on any of its causes of action. Answer Brief at p. 31. Appellee's claim that the trial court "did not absolve Gulf Coast of any claimed liability because of this" is belied by the plain language of the Amended Final Judgment. *Id.* As Appellee admits, the trial court held that "FSR failed to establish any reasonable measure for recoverable damages for receiving a product that was accepted and installed, performed as expected, but **barely failed to meet one acceptable dimensional tolerance**." *Id.* at pp. 30-31 (quoting Amended Final Judgment ¶ 25). As set forth in the Initial Brief and *supra*, the failure to meet "one acceptable dimensional tolerance," is unacceptable under the statutes and other authorities governing product approvals and the manufacture of products subject to those approvals.

The trial court based its conclusion that FSR was not entitled to relief on its breach of contract, deceptive and unfair trade practices

or its common law indemnity claims on the idea that FSR was somehow responsible for assuring that it received panels that were compliant with Gulf Coast's product approval. The trial court erred when it disregarded the plain requirements of the Florida Statutes and the Florida Administrative Code that place the responsibility for quality assurance on only one party – the manufacturer. *See* § 61G20-3.005(3), F.A.C. (requiring the **manufacturer** to ensure quality of approved product); § 61G20-3.001(1)(c), F.A.C. (establishing that roofing products may be approved by the Commission); Fla. Stat. § 553.842(6) ("product manufacturers **that obtain statewide product approval** operate quality-assurance programs for all approved products"); Section 1507.4, Florida Building Code (2020 – Building, 7th Ed.) ("[m]etal roofing panels shall be factory or field manufactured in accordance with the manufacturers' product approval specifications and limitations of use. Metal roofing panels shall be factory or field manufactured under a quality assurance program that is audited by a third-party quality assurance entity approved by the Florida Building Commission for the purpose."); *Jackson v. L.A.W. Contracting Corp.,* 481 So. 2d 1290, 1292 (Fla. 5th DCA 1986) (holding that the fact that

contractor mixed water with road resurfacing product according to manufacturer instructions did not render the contractor a manufacturer).

ARGUMENT II

THE TRIAL COURT ERRED IN FINDING THAT FSR DID NOT PROVE ITS INDEMNITY DAMAGES WHERE IT MISCONSTRUED THE LAW GOVERNING INDEMNITY AND DID NOT ALLOW TESTIMONY ON GULF COAST'S INVOLVEMENT IN FSR'S SETTLEMENT WITH THE CONDOMINIUMS

Standard of Review

Appellee agrees with FSR that the standard of review of a non-jury trial ruling determining sufficiency of the evidence is the competent, substantial evidence standard. Answer Brief at p. 32. FSR agrees with Appellee's assertion that a *de novo* standard applies to a trial court's ruling on admission of evidence. Answer Brief at p. 32 (citing *Heller v. Bank of America,* 209 So. 3d 641, 643 (Fla. 2d DCA 2017). However, FSR disagrees with Appellee's assertion that this argument is unpreserved and subject to the fundamental error standard. Answer Brief at p. 32.

Merits

Appellee's argument on this point is largely unresponsive to the argument set forth in the Initial Brief and instead raises multiple red herrings that serve only to confuse the very narrow issue raised on appeal. *See, e.g.* Answer Brief at p. 32 (reframing the issue as an

argument regarding whether "FSR was … entitled to common law indemnity"); pp. 32-33 (arguing that the claimed failure to pay was a result of settlement negotiations); p. 34 (argument regarding no admission of fault and complete release of claims in the settlements); p. 34 (argument regarding whether claims were assigned in the settlements); p. 34 (argument regarding whether the dispute resolved in the settlement agreement was over thickness of the roofing or over fasteners and sealant); pp. 35-36 (arguing limits on damages in indemnity); pp. 36-37 (arguing that indemnitee must be without fault); pp. 37-38 (arguing that there was no issue with the metal thickness); and p. 38 (arguing that recoverable damages were not demonstrated). To refocus the issue presented, there are two questions before this Court:

1) Did the trial court misconstrue the law governing indemnity regarding Appellee's **participation in the lawsuit** (a de novo standard); and
2) Did the trial court preclude FSR from eliciting testimony necessary to prove Appellee's **participation in the lawsuit**?

In the portions of Appellee's argument that directly address these issues (Answer Brief at p. 33, 35 (paragraph 1 and 2), and pp. 39-40), Gulf Coast fails to rebut any of the authorities cited in the Initial Brief that discuss the legal standard regarding Gulf Coast's participation in the lawsuit in which the underlying settlements occurred. Gulf Coast acknowledges that it should have "an opportunity to appear and defend the action," but goes no further in its analysis of the legal standard. Answer Brief at p. 35.

Notably, Gulf Coast fails to rebut *MacArthur v. Gaines,* 286 So. 2d 608, 610 (Fla. 3d DCA 1973), in which notice and an opportunity to defend were found to exist where, as here, the indemnitor had knowledge of the liabilities prior to the indemnitee being sued by third parties and was named as a defendant in one of the underlying lawsuits. Here, Gulf Coast was a party to the case for nearly a year when the condominiums' claims were settled at mediation, it was on notice and had an opportunity to defend. *See* T2:188/R:4306 (testimony that Gulf Coast was present at both mediations); R:197-198 (Gulf Coast Certification of Authority for mediation); T:27-28/R:4698-4699. Gulf Coast also fails to address the fact that *Hoskins v. Midland Ins. Co.,* 395 So. 2d 1159, 1161 (Fla. 3d DCA

1981), which was relied upon by the trial court in its Amended Final Judgment at ¶ 27, makes it clear that the cited rule applies to judgments in **separate** actions, not, as is the case here, a settlement within the same case, to which the indemnitor was at all material times, a party.

As to the second issue – whether the trial court precluded FSR from eliciting testimony regarding Gulf Coast's participation in the underlying lawsuits – Appellee's argument makes FSR's point. *See* Answer Brief at p. 33 (there is absolutely no evidence that Gulf Coast was requested by FSR to defend the action…"). The reason there was no evidence on such subjects is because when counsel for FSR attempted to examine on that topic, laying the foundation with the preliminary question of who the parties to the underlying case were, the trial court stopped the examination and assured counsel it could determine this information from the case file. *See* Initial Brief at pp. 36-37. After stopping this line of inquiry, the trial court erroneously held that Gulf Coast was **not** a party to the underlying litigation, and relied on authorities (such as *Hoskins*, 395 So. 2d at 1161) that govern indemnification where there was a **separate** lawsuit. On rehearing, FSR **again** raised this issue, resulting in the trial court

issuing an Amended Final Judgment acknowledging Gulf Coast's participation in the litigation while still citing authorities governing indemnification where there was a separate lawsuit. *See* Initial Brief at pp. 12-13 (citing the Motion for Rehearing (R:3807-3815) and transcript of hearing (T:9-10, 27-28/R:4680-4681, 4698-4699)). Even if, as Gulf Coast contends, the issue was not preserved during trial, the trial court entertained the argument on rehearing on its merits, thus preserving the issue for appeal. *Fitchner v. Lifesouth Community Blood Centers, Inc.,* 88 So. 3d 269, 278 (Fla. 1st DCA 2012) ("trial judge has discretion to decline to consider a new argument on rehearing").

ARGUMENT III

THE TRIAL COURT ERRED WHERE IT FAILED TO MAKE SUFFICIENT FINDINGS TO SUPPORT JUDGMENT IN FAVOR OF GULF COAST ON ITS COUNTERCLAIM FOR BREACH OF CONTRACT

Standard of Review

Both FSR and Gulf Coast agree the appropriate standard of review regarding whether a judgment contains inadequate findings is *de novo.* Answer Brief at p. 41 (citing *Featured Properties, LLC v. BLKY, LLC,* 65 So. 3d 135, 137 (Fla. 1st DCA 2011)) (reversing where findings supporting breach of contract were absent from order). Gulf Coast also contends that where a court made factual findings, the standard of review is competent substantial evidence. Answer Brief at p. 41. While this may be a correct statement of the law, it is irrelevant where the issue on appeal is the total absence of findings, not whether the evidence supports the findings.

Merits

Gulf Coast contends that the trial court was not required to make any specific findings regarding its breach of contract counterclaim. Answer Brief at p. 42. Notably, Appellee acknowledges the holding in *Featured Properties, LLC*, claiming that the judgment

can only be challenged if effective appellate review is rendered impossible by the lack of findings. Answer Brief at p. 42 (citing *Featured Properties,* 65 So. 3d at 137). In *Featured Properties*, the claim was, as here, one for breach of contract. *Id.* at 136. The plaintiff was awarded damages on the breach of contract claim, but the trial court did not address the affirmative defenses, including whether the defendant had the right to void the contract. *Id.* at 137 ("the court did not indicate whether [Plaintiff] was the prevailing party because … [Defendant] had either waived its right to void the contract or was estopped from rescinding same"). Here, there were fifteen (15) affirmative defenses to the counterclaim for breach of contract. Just as in *Featured Properties,* meaningful appellate review is precluded because this Court has no basis for determining which, if any, of the defenses the trial court considered.

Contrary to Appellee's assertion, the affirmative defenses to the Counterclaim were not addressed within the factual findings the trial court devoted to the claims in FSR's complaint. Answer Brief at p. 44. Appellee claims that because the trial court "considered FSR's claims of damages and found against it as to all of them" it sufficiently considered FSR's separately pled defenses to Gulf Coast's

counterclaim. Answer Brief at p.44 (addressing only the set off defense). However, no finding in the Amended Final Judgment touches on multiple defenses raised by FSR, including waiver, estoppel, first material breach, fraud, anticipatory breach, failure to mitigate damages, unclean hands, ratification, fault of third parties, adhesion, bad faith, lack of consideration, and that Gulf Coast's damages were caused in whole or in part by their own acts or omissions. (R:351-356). The failure of the trial court to consider any of these affirmative defenses renders the final judgment on Gulf Coast's counterclaim facially insufficient and precludes meaningful appellate review. *Featured Properties,* 65 So. 3d at 137 (remanding for findings where trial court failed to articulate legal basis for breach of contract award and failed to address affirmative defenses). Accordingly, the case should be remanded for entry of a legally sufficient final judgment.

ARGUMENT IV

THE TRIAL COURT ERRED WHERE IT ALLOWED GULF COAST TO ARGUE A LEGAL ISSUE THAT WAS NOT CONTAINED WITHIN ITS AFFIRMATIVE DEFENSES AND WHERE IT BASED ITS FINAL JUDGMENT, IN PART ON THAT UNPLED DEFENSE

Standard of Review

The parties agree that the standard of review on this issue is *de novo.* Answer Brief at p. 45 (citing *Athienitis v. Makris*, 346 So. 3d 732, 734 (Fla. 2d DCA 2022)).

Merits

Appellee twists this issue into an unrecognizable knot in its effort to evade the plain requirement that it was required to plead as an affirmative defense any purported limitation on the damages to which FSR was entitled, including a limitation on damages imposed by statute – in this case, the UCC. The issue presented was that the trial court improperly held that the damages for breach of contract were limited because FSR accepted the roofing panels. R:4604. Reframing the issue as the "consequences of FSR's acceptance" does not absolve Appellee of the requirement that it plead an affirmative defense where its argument in essence, was that even if the roof panels were defective, Gulf Coast avoids liability to FSR because FSR

accepted the goods. *See* Rule 1.110(d), Fla. R. Civ. P. (requiring a defendant "set forth affirmatively … any … matter constituting an avoidance or affirmative defense").

Appellee claims that "limitations or caps on damages are not, and thus do not need to be raised as, affirmative defenses." Answer Brief at p. 48. Notably, despite its protests to the contrary, Gulf Coast raised an affirmative defense arguing a similar limitation on damages with regard to FSR's FDUTPA claim. In its Fifteenth Affirmative Defense, Gulf Coast asserted that FSR's damages should be limited on its FDUTPA claim to actual damages – "the difference, if any, between the market value of the product or service that was actually **delivered** and its market value…." R:780. Gulf Coast asserted further defenses that contradict the position it now takes that limitations on damages do not need to be pled as affirmative defenses. Gulf Coast asserted defenses that seek to limit damages based on the language in the contract (Fifth Affirmative Defense), to limit damages based on various theories of set-off (Seventh Affirmative Defense and Thirteenth Affirmative Defense), and to limit the damages for which it was liable based on apportionment of fault under *Fabre* (Twelfth Affirmative Defense). R:777-781. According to

the argument it now asserts, none of these defenses were required to be pled.

Authorities in this District recognize the necessity of pleading an affirmative defense relating to limitations on the type of damages that may be recovered. In *Paul Gottlieb & Co., Inc. v. Alps South Corp.,* 985 So. 2d 1, 4 (Fla. 2d DCA 2007), which was cited in the Initial Brief, but not addressed by Appellee, the trial court determined that a limitation of liability clause in a contract was a material alteration to the contract under the UCC and declined to enforce the provision, which would have limited losses to actual damages. On appeal this Court analyzed whether the issue was preserved for appeal and determined that the limitation of liability was not raised as an affirmative defense, and thus would have been waived except for the fact that it was tried by consent. *Id.* at p. 5. *See also Felgenhauer v. Bonds,* 891 So. 2d 1043, 1046 (Fla. 2d DCA 2004) (recognizing that set-off under PIP statute must be pled as an affirmative defense).

Appellee relies on the earlier case of *Lynn v. Feldmeth,* 849 So. 2d 481, 483 (Fla. 2d DCA 2003), for the proposition that "limitations **or caps** on damages are not … affirmative defenses." Answer Brief at p. 48 (emphasis supplied). Appellee's reliance on *Lynn* is misplaced.

The holding in *Lynn* does not support the conclusion that a **limitation** on the type of damages is not an affirmative defense. To the contrary, the holding in *Lynn* is simply that a statutory **cap** is not an affirmative defense because it neither bars nor voids a cause of action. *Id.* Where a statutory cap exists, the cause of action still moves forward, and damages are still assessed in full; they are merely capped by the statute. Limitations, on the other hand, seek to void a portion of claimed damages, such as, in this case, consequential damages.

Appellee's reliance on *Kia Motors America, Inc. v. Doughty,* 242 So. 3d 1172 (Fla. 2d DCA 2018) is similarly unavailing. Not only is *Kia Motors* a case about a claim under the Magnuson-Moss Warranty Act, not a breach of contract, but it also does not mention affirmative defenses at all. In this case, FSR's claims were not brought under the UCC. Thus, it was error to hold FSR to proof for a claim it did not plead, and to allow Gulf Coast to rely on UCC standards where it never before raised the issue in the case. The fact that FSR may have been "familiar with Gulf Coast raising … a limitation on damages" because of its defense to the FDUTPA claim is similarly unpersuasive.

Indeed, this tends to show that if Gulf Coast intended to rely on such a defense to the breach of contract claim, it should have pled it.

The trial court erred in allowing Gulf Coast to raise an argument it had never before raised in five years of litigation, requiring reversal and remand for a new trial. *See Bilow v. Benoit,* 519 So. 2d 1114, 1118 (Fla. 1st DCA 1988) (reversing and remanding where final judgment relied on unpled affirmative defenses raised for the first time at final argument); *Boca Golf View, Ltd. V. Hughes Hall, Inc.,* 843 So. 2d 992, 993 (Fla. 4th DCA 2003) (reversing order of involuntary dismissal that was based on unpled affirmative defense and remanding for new trial).

ARGUMENT V

THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT AND FINAL JUDGMENT IN FAVOR OF GULF COAST WHERE IT CONFLATED GULF COAST'S SEPARATE ROLES AS MANUFACTURER AND SELLER AND IMPROPERLY LIMITED FSR'S DAMAGES IN ITS CLAIMS AGAINST THE MANUFACTURER

Standard of Review

The parties agree that the standard of review applicable here is *de novo*. Answer Brief at p. 53.

Merits

Appellee's own argument, for all of its protestations to the contrary, establishes that it was the manufacturer, and not the mere seller of the roofing products, rendering the trial court's summary judgment erroneous. Further, contrary to Appellee's argument, the trial court held that FSR did prove that the roofing panels were not of the requisite thickness. R:4603 ("FSR has demonstrated by the greater weight of the evidence that it received aluminum that did not conform to the tolerances set forth in Table 7.7a[1].").

Appellee offers an interpretation of the contract that suggests that separate warranty claims only apply to the products that Gulf

[1] As set forth in Argument I, *supra*, the trial court's analysis of the requirements of the Florida Building Code is subject to this Court's *de novo* review.

Coast itself did not manufacture, and that Gulf Coast remains the seller, regardless of its role as the manufacturer of the roofing **panels.** Gulf Coast attempts to confuse the issue by claiming that its role "providing" the roofing panels had "nothing to do with the manufacturer of the **raw** aluminum." Answer Brief at p. 55. This lawsuit was not about raw aluminum. This lawsuit was about the roofing panels manufactured by Gulf Coast out of the raw aluminum it received from its supplier. Indeed, Appellee admits that "[a]ll of FSR's issues with respect to that lie squarely with Gulf Coast" and that the roofing panels were "slit and rolled (sic) formed by **it**." Answer Brief at p. 55; 59 (emphasis supplied).

Since Gulf Coast goes to great lengths in its contract (which must be construed against it) to distinguish its role as seller from its role as manufacturer, it was error to impose contractual obligations on the relationship between Gulf Coast as manufacturer and FSR. Both the Order granting summary judgment and the final judgment to the extent it incorporates the findings from the summary judgment regarding the measure of damages, must be reversed. *Lennar Homes, Inc. v. Masonite Corp.,* 32 F.Supp. 2d 396, 401 (E.D. La. 1998) (construing Florida law) (holding that Lennar sufficiently raised

material issues of fact regarding supplier's knowledge of defects to preclude summary judgment on warranty claim).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 20, 2024, a true and correct copy of the foregoing was served via electronic mail on the attorneys listed on the attached service list.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Bookman Old Style 14 point type and complies with the font requirements of Rule 9.045(b). I further certify that this brief contains 3,866 words, exclusive of the cover page, table of contents, table of citations, certificates of service and compliance, and signature blocks, in accordance with the requirements of Rule 9.210(a)(2)(B) and Rule 9.210(a)(2)(E).

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