

DISTRICT COURT OF APPEAL OF FLORIDA  
FIRST DISTRICT

DCA CASE NO.: 1D24-1373  
L.T. CASE NO.: 2022 CA 000219

ESCAMBIA COUNTY, FLORIDA, a political subdivision  
of the State of Florida acting by and through the  
Escambia County Board of County Commissioners

*Appellant*

v.

WHITESELL-GREEN/CADDELL JV, LLC,  
a Florida Limited Liability Company,  
and DLR GROUP, INC.

*Appellees*

**APPELLANT'S INITIAL BRIEF**

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*On Appeal from the Circuit Court of the First  
Judicial Circuit in and for Escambia County, Florida*

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## **INTRODUCTION**

Appellant/Third-Party Plaintiff, Escambia County, Florida, a political subdivision of the State of Florida acting by and through the Escambia County Board of County Commissioners (the “County”) seeks this Court’s review of the trial court’s order granting of final summary judgment against the County and in favor of Appellee/Third-Party Defendant, DLR Group, Inc. (“DLR”), on all third-party claims brought by the County. These third-party claims were premised on the County’s allegations that DLR would be its on-site owner’s representative during the construction of a new correctional facility. Additionally, the trial court abused its discretion in denying the County’s motion for leave to amend its third-party claims against DLR that was filed prior to the summary judgment hearing. For these reasons discussed in this Initial Brief, this Court should reverse since the trial court’s ruling runs contrary to the applicable law and the facts of the case.

Citations to the Record on Appeal will be referenced as “R.” followed by any appropriate PDF reader page numbers.

## **STATEMENT OF THE CASE AND FACTS**

This case involves a construction contract to build a new 1476-bed correctional facility in Escambia County, Florida (the “Project”). The Project consisted of a three-story, 335,000 square foot facility to be built on a 19-acre lot adjacent to a then-existing correctional facility, which the Project would ultimately replace. (R. 44).

To effectuate the Project, the County requested letters of interest (“RLI”) for a Design Criteria Professional to be received by mid-September 2014. (R. 6850-73). The RLI included pertinent information such as the specifications of an interested entity’s proposal, description of the Project, and scope of services. (R. 6850-73). DLR timely provided its letter of interest in response to the RLI. (R. 6875-6936).

On March 3, 2015, the County held a Selection Committee Meeting where DLR presented a PowerPoint presentation to advise of its services related to the Project. (R. 4014-84) (meeting); (R. 4226 - 4305) (DLR PowerPoint presentation). At that meeting, the County questioned DLR about its role as the “owner’s representative” on the Project. (R. 5035). Several months later, on July 28, 2015, the County held a Board of Commissioners’ Meeting, the County again discussed

DLR's role as the "owner's representative" and was reassured by DLR of this understanding. (R. 4178).

### **I. The DLR Contract**

In August 2015, the County entered into Standard Professional Consulting Services Contract, PD 13-14.082 with DLR (the "DLR Contract"). (R. 541-79). The County hired DLR as "its Consultant of Record" with DLR to be "responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other design services furnished pursuant to the [DLR Contract]." (R. 315-16). The DLR Contract defines DLR as the County's "consultant" which was "selected to perform professional services pursuant to [the DLR Contract]." (R. 543) (Art. 1.2). The County hired and paid DLR to perform the task of owner's representative because the County did not have experience with large-scale vertical construction and wanted to have someone representing its interest that did. (R. 3526).

The scope of work for the Projected was defined in Article 3 of the DLR Contract:

The Consultant will provide certain professional consultant services for the tasks outlined in Escambia County's Request for Letters of Interest (RLI) in Specification No. PD 13-14.082, Design Criteria

Professional for the New Escambia County 1476-Bed Correctional Facility, and as represented in the Consultant's Letter of Interest response to PD 13-14.082, subsequent interview, and proposal presentation. In the event of a conflict between the terms of the proposal and this Agreement, the terms of this Agreement shall prevail.

3.1 The basic services to be provided are set forth in Exhibit "A," attached hereto and incorporated by reference herein, and unless otherwise specified, such services shall be completed in accordance with the standard of care in the profession at the time such services are rendered.

3.2 Such services, generally, shall include those services performed by a consultant, its employees, and subcontractors, as more specifically enumerated in the Scope of Work of Exhibit "A" and any other services specifically included therein.

3.3 The Consultant shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the consultant under this Agreement. The consultant shall, without additional compensation, correct or revise any errors or omissions in its designs, drawings, specifications, and other services furnish pursuant to the Agreement. . .

(R. 544-45) (Art. 3.1-3.3).

The DLR Contract also included an agreement that DLR could use subcontractors. (R. 551) (Art. 9.5). Hold harmless and indemnification language was incorporated that also referenced DLR's agreement regarding its subcontractors:

The Consultant agrees to hold harmless and indemnify the County and its agents, officers, and employees from all liabilities, damages, losses, and costs, including attorneys' fees and paralegals' fees, incurred by County to the extent caused by the negligence, recklessness or intentional wrongful misconduct of Consultant or by any person, firm, or corporation to whom any portion of the performance of this Agreement is subcontracted to or used by the Consultant, or by any other person for whom the Consultant is legally liable. Consultant's obligation as provided herein shall be limited to its proportionate share of liability to the extent caused by the negligence, recklessness or intentional wrongful misconduct of Consultant or by any person, firm or corporation to whom any portion of the Work is subcontracted by Consultant, and Consultant shall not be required to indemnify and hold harmless County where County's negligence, recklessness, or intentional wrongful misconduct is determined by a court of competent jurisdiction to be the sole cause of its liabilities, damages, losses and costs, including attorney's and paralegal fees.

(R. 551) (Art. 9.7).

DLR subcontracted with Bay Design Group, later known as Goodwyn Mills Cawood, to perform specific duties on the Project. (R. 3353). Roland Koomen, DLR's on-site representative, reported to and submitted his work to be reviewed by Goodwyn. (R. 3081, 3333-37, 3353).

Koomen acted as DLR's on-site representative "[f]ive days a week, eight hours or more a day." (R. 3081). Koomen provided weekly written reports that were e-mailed to those involved with the Project,

including DLR and George Bush, who served as the County's Division Manager for the Design Construction Administration Team. (R. 3079-81). These weekly reports identified the progress of the Project and any discrepancies Koomen identified. (R. 3081). The reports also identified numerous subcontractors that were present at the construction site. (R. 3081). The County did not have anyone on-site because Koomen "was doing that role for the [C]ounty." (R. 3082).

## **II. The Whitesell Contract**

Along with the DLR Contract, in January 2018, the County contracted with Whitesell-Green/Caddell JV, LLC ("Whitesell") "to design and build [the Project] per the County's design criteria in exchange for the County's payment of a guaranteed maximum price of \$132,445,243.00." (R. 44). The County and Whitesell entered into the Design-Build Services Agreement, PD 16-17.004 (the "Whitesell Contract"). (R. 44); (R. 61-141) (Whitesell Contract). To perform the services identified in the Whitesell Contract, Whitesell hired subcontractors and suppliers. (R. 49).

### **III. The Project**

The Project<sup>1</sup> was “the largest public works project ever undertaken in Escambia County” with work starting in 2018. (R. 44). The work on the Project overlapped with several hurricanes as well as the COVID-19 pandemic, both of which caused delays. (R. 44-45). Pursuant to the DLR Contract, DLR was required to review and analyze Whitesell’s “requests for excusable delays to verify that the time was justified” due to the pandemic. (R. 316); *see* (R. 47-48) (“The County requested its design criteria consultant, DLR Group, Inc., to review the letter and verify that the time requested was justified.”); (R. 3062) (Task VI.10 – Review change Order Requests). During this review, “DLR Group conferred with [Whitesell] about the COVID-19 delays, and at DLR Group’s request, [Whitesell] provided additional requested information and updated impacts. This process was repeated several times, with the County requesting more information and [Whitesell] furnishing more documentation and updates.” (R. 48).

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<sup>1</sup> During the Project, there were several directors for Facility Management: David Wheeler, Bob Dye, and Cassie Boatwright. (R. 3080, 3200). Towards the end of the Project in April 2020, Debbie Bowers became the Assistant County Administrator. (R. 3259).

In February 2021, the Project reached substantial completion. (R. 48). Later that year, in July 2021, Bush requested Goodwyn to provide a copy of Whitesell’s justification for delays on the Project. (R. 3335-36). Bush also asked Tim Gibson (DLR) and Steve Jernigan (Goodwyn) for assistance “in reviewing the attached documents for COVID delays in order to determine if these days are justified.” (R. 3335). The County acknowledged that Bowers and Boatwright spoke to Whitesell, that the County “may agree with the staffing issues” but not necessarily the delay claims and was curious “if any of the other 11 items affected any critical path to completing the jail – that is what I need y’all to tell me.” (R. 3334). The County pointed that Whitesell “emphasized the Fragnet table/graph in the package but it didn’t appear to necessarily show where items affected critical path. Again, that is what I need for y’all to determine so that we can complete this.” (R. 3334). Gibson (DLR) advised the County (Bush) that it previously provided information, which the County was not aware of and continued to inquire about the Fragnet Analysis which showed “a push of substantial completion to February 23, 2021. Are you familiar with this type of analysis and the justifications?” (R. 3333).

Gibson (DLR) responded: “I am not familiar with the Fragnet Analysis.” (R. 3333).

Later that year, in September 2021, the County advised Whitesell it was assessing over \$3.4 million in liquidated damages based on the County’s analysis that out of the 156 days of delays by Whitesell on the Project, only 33 days were excusable. (R. 50). Whitesell subsequently filed suit against the County, alleging one count of breach of the Whitesell Contract due to the County’s alleged failure to issue payments due to the delays, and one count of violating Florida’s Local Government Prompt Payment Act. (R. 43-141). These allegations stemmed from the delays and impacts of the pandemic on the Project and that “COVID-19 and its impacts were discussed in weekly meetings with the County’s representatives.” (R. 47). Whitesell discussed how the County requested a preliminary claim from Whitesell regarding the impacts of the pandemic as well as a preliminary assessment provided by Whitesell in September 2020 that were “early-on impacts and that additional impacts because of manpower and material supply and delivery issues were expected to continue through Project completion.” (R. 47). Whitesell also alleged that the County requested DLR to review Whitesell’s time requests

and that DLR verified the time requests were justified. (R. 47-48). The County denied these allegations and counterclaimed against Whitesell. (R. 159-77, 1878-2043).<sup>2</sup>

Based on the claims by Whitesell that pertained to DLR's scope of work on the Project, and because the County would only be liable to Whitesell due to acts or omissions by DLR, the County filed a third-party complaint against DLR for claims of breach of contract, contractual indemnity, professional negligence, common law indemnity, and unjust enrichment. (R. 525-669, 698-99).

In support of these causes of actions, the County alleged that DLR "contractually agreed to provide continuing direct involvement in the Project representing the County's prime interests as the owner representative" which required DLR to provide

the County with reporting daily field observations, concluding weekly field meetings ("Owner's Meeting") to report to the County observations on progress and issues on the Project, providing the County with technical assistance, reviewing pay applications for the County, reviewing submittals for the County, reviewing change order requests for the County, and providing the County assistance to resolve issues on the Project.

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<sup>2</sup> Ultimately, the allegations between Whitesell and the County were resolved and dismissed. (R. 3414-15).

(R. 530-31).

In short, the County's third-party allegations against DLR pertained to Whitesell's delay requests during the Project that Whitesell claimed were due to the pandemic. (R. 531-32). The County relied on a March 17, 2020 Owner's Meeting where DLR and Whitesell were both present, participated, and discussed potential impacts due to the pandemic. (R. 531). The County further alleged several inadequacies related to DLR's work on the Project despite the DLR Contract:

17. DLR's review and analysis was woefully inadequate and superficial at best. Despite DLR's having been on notice since March 17, 2020 of alleged COVID related issues on the Project and having the contractual responsibility of being the county's "eyes and ears" on the Project daily, DLR failed to make daily field observations, assess and measure daily alleged COVID impacts and formally report alleged COVID impacts to the County to assist the County with its evaluation and more importantly have the tools necessary for DLR's own analysis.

18. Further, DLR lacked the required professional experience as required by the [DLR Contract] to adequately assess [Whitesell's] request for time extensions. In fact, DLR readily admitted to the County that it was not familiar with [Whitesell's] use of the Fragnet Analysis to justify [Whitesell's] request for time extensions.

19. Additionally, the County asserts that DLR failed to properly carry out its duties as owner's representative since entering into the contract with the County as it

relates to observation and oversight relating to alleged delays. More specifically, DLR failed to complete proper oversight, reporting, and data collection that would have allowed both DLR, and in turn the County, to better evaluate whether the delays alleged by [Whitesell] were in fact caused by COVID-19, or rather if they were proximately caused by issues prior to or other than COVID-19.

(R. 532-33). DLR denied these allegations. (R. 2078-87).

#### **IV. DLR Seeks Summary Judgment**

DLR moved for summary judgment on all third-party claims brought by the County. (R. 3347-69). DLR argued the County's third-party claims related to the standard of care for an architect, that only an architect could testify to the standard of care for another architect, and because the County did not have an architect expert, it could not establish any of its third-party claims particularly the claim for professional negligence. (R. 3348-60). DLR acknowledged that the DLR Contract "governs the relationship" between the parties and the DLR Contract "and accompanying exhibits constitute terms of the contract between Escambia County and DLR Group, as established by the merger clause in the contract, as well as Plaintiff's Third-Party Complaint and DLR Group's answer to same." (R. 3351). DLR pointed to the Scope of Work in Article 3 of the DLR Contract, notice provision

in Article 7.5, and the Hold Harmless provision in Article 9.7. (R. 3352).

DLR also asserted that the County had no evidence of causation and all of the County's damages could have been avoided. (R. 3360-63). For the breach of contract claim, DLR stated that the DLR Contract "is clear" and believed summary judgment was appropriate because the County did not provide DLR with notice of any defect regrading DLR's group services. (R. 3364). For contractual indemnification, DLR argued that the County disregarded DLR's analysis of Whitesell's claim for excusable delay and the County determined only 33 days would be allowed, a decision DLR was not involved with making. (R. 3365). For common law indemnification, DLR also argued the County ignored DLR's analysis of excusable delay and that County was "not faultless in the situation . . ." (R. 3366). Lastly, for unjust enrichment, DLR argued that because there was an express agreement between DLR and the County, the County was prohibited from relying on an equitable theory for relief. (R. 3366).

The County opposed DLR's summary judgment motion, responding that the DLR Contract governs the obligations between

the parties, not the standard of care, and that the cause of action for unjust enrichment was pled in the alternative that DLR accepted payment for work it did not perform. (R. 3518). The County acknowledged that the breach of the standard of care would only apply to the one count for negligence. (R. 3518). The County also disputed several facts that DLR represented were undisputed:

- No professional standard of care applied since DLR was working as the owner's representative which did not require an architecture license and simple negligence would apply as to the element of duty;
- The pleadings alone would not constitute an proffer of damages;
- The DLR Contract governs the breach of contract and contractual indemnity claims, while the alternative claims of negligence and unjust enrichment would be governed by information outside the contract;
- A factual question exists as to whether there are additional express or implied agreements between the parties, if DLR committed acts or omissions outside of the DLR Contract, and whether those determinations have any bearing on the claims asserted;
- The DLR Contract incorporated items other than the exhibit to the contract as noted in Articles 2 and 3 of the contract that "incorporated the negotiation proceedings including the presentations and representations of DLR Group in those presentations";
- The DLR Contract did not further define Article 3.1 that provided that the basic services in the contract and attached exhibits would be completed "in accordance with the standard of care in the profession at the time such services are rendered." (R. 3522). Instead, the County pointed to numerous DLR representatives who represented they would act as owner's representative and provided reports entitled

“Owner Representative Daily Construction Report. (R. 3522, 3609, 3611-44).

(R. 3520-21).

The County further identified two distinct areas of services identified in the DLR Contract: design criteria development *prior to* construction, and Task VI requirements that commenced *after* construction. (R. 3518-19). The County argued that only a small portion of Task VI could require training as an architect, with the “vast majority of Task VI constitut[ing] construction management services,” which included: “review of pay application requests (VI.6), field observations (VI.8), weekly field reports (VI.11), photography (VI.12), punch list review (VI.13), and review of substantial completion, final completion, and close out documents (VI. 14, 15, 16).” (R. 3519); (R. 3578-80) (Task VI). Stated differently, the “services offered by DLR under Task VI were that of an on-site Owners representative that was hired to represent the interest of the County in completion of the project.” (R. 3526).

The County highlighted that it relied on DLR’s representations that it was acting as the “owner’s representative” during construction. (R. 3527). These included: statements DLR made

during its proposal presentation at the March 3, 2015, Selection Committee Meeting; and the Board of County Commissioners negotiation meeting on July 28, 2015. (R. 352-20); (R. 4069-73) (March 3, 2015 meeting); (R. 4178) (July 28, 2015 meeting); (R. 4246-4305) (DLR PowerPoint presented at March 3, 2015 meeting). The County also noted this was confirmed by the reports provided by DLR and its subcontractor Goodwyn during construction. (R. 3519); (R. 3609) (Bay Design's Owner Representative Daily Construction Report #28); (R. 3611-44) (Goodwyn's Owner Representative Daily Report #388). These representations by DLR were incorporated into the DLR Contract as set forth in Article 3 of the contract. (R. 3527); (R. 3546) (Article 3, Scope of Work).

Additionally, the County commented that even DLR's expert, William Charvat, agreed with the County's expert that "there is not a widely established standard of care for an Owners Representative." (R. 3519); (R. 3601). The County disagreed that an architecture standard of care applied to *all* of DLR's work because the design services were not part of the third-party claims. (R. 3519). Furthermore, Whitesell "acted as the design build entity" and "DLR's work in developing the design criteria under the earlier sections of

the contract to facilitate the development of the design by [Whitesell] had long been completed.” (R. 3526).

The County noted that Koomen, DLR’s on-site representative, was not an architect and had experience with construction management and inspection instead of architectural design criteria services. (R. 3523, 3529). Koomen was employed by Bay Design, a subcontractor of DLR, was a licensed Construction Inspector, and prepared “Owner Representative Daily Construction Reports” which were unrelated to compliance with design plans. (R. 3524, 3609, 3611-44). Instead, Koomen was required to take photographs and generate daily reports related to construction progress, events that occurred on the construction site, meeting information, and information related to construction status. (R. 3530). The County noted that none of these reports “detail issues with compliance with the design documents, plans, or design criteria.” (R. 3530).

The County also cited to an Owner Meeting sign-in sheet from November 20, 2018, showing Koomen signed in as “owner rep.” (R. 3524). While the County acknowledged that Jernigan (Goodwyn) was an architect who worked closely with Gibson (DLR), the County clarified that he was “not directly involved in the development of the

design criteria” but rather, “a primary contact once construction started as a local contact who provided construction management and administration oversight.” (R. 3523, 3665).

The County also clarified that while DLR asserted the County did not rely on DLR’s opinions regarding Whitesell’s delays, the County’s position was that “DLR did not perform an actual review or analysis of” Whitesell’s delay claims since both Gibson and Jernigan testified that DLR “did not conduct a review of the critical path or any complex analysis of the schedule such as a fragnet analysis.” (R. 3524); (R. 3752) (testimony from Gibson that DLR “did not utilize the fragnet analysis because they did not have experience or expertise to analyze – that data”). Without this analysis, the County did not have information to rely on and the County could only “attempt to do the best it could in determining a path forward, despite having paid DLR Group just under \$4 Million for its services.” (R. 3525). The County also noted that Whitesell’s expert testified that it was “perfectly reasonable for the County to request a complex analysis of the schedule that addressed impact on the critical path schedule.” (R. 3525, 3886).

The County argued that damages were a factual question for the jury and that the duty to mitigate damages/the doctrine of affirmative consequences was an affirmative defense and a question for the jury. (R. 3532-33). For the breach of contract claim, the County explained that Article 7.5 did not require notice as a pre-condition for litigation and that Article 9.21 required DLR to “allow itself to be joined as a party in any legal proceeding that involves the County” related to the contract. (R. 3534). For contractual indemnity, this would require “a court of competent jurisdiction” to determine liability and potential comparative fault of the County prior to DLR being entitled to summary judgment on that claim. (R. 3535). For the common law indemnity claim, the County argued that merely asserting that the County was “not free of fault is not a determination of liability by the trier of fact.” (R. 3535). Lastly, for the unjust enrichment claim, the County advised this was an alternative allegation. (R. 3536).

The day before the summary judgment hearing, DLR replied that Article 9.1 of the contract included a merger clause to “incorporate and include all prior negotiations, correspondence, conversations, agreements, or understandings” but that they were superseded, and any statements made by DLR regarding being the

“owner’s rep” at the construction site was inadmissible. (R. 6625). DLR then acknowledged it was undisputed that Task VI.8 included “full time on site representation” and Task VI.10 addressed change orders. (R. 6626). DLR also acknowledged it was undisputed that the Whitesell litigation involved change order request. (R. 6627).

At the summary judgment hearing, the County noted DLR’s late-filed reply, that it was not allowed under Rule 1.510, and that the reply contained new legal authorities and arguments. (R. 6669-70). Additionally, the County noted that the trial court provided an oral ruling a week prior on DLR’s motion to strike the County’s experts that denied DLR’s motion to strike and that the motion to strike was premised on the same grounds related to the standard of care in the summary judgment motion. (R. 6671). The County believed that because of the trial court’s prior ruling, denial of summary judgment was also necessary to avoid inconsistent rulings. (R. 6671). The County maintained that DLR was acting as an owner’s representative when performing Task VI of the contract and not performing architectural services under Task VI. (R. 6682).

DLR argued that the County could not use parol evidence to demonstrate that DLR was engaged to be the “owner’s representative”

and that the County attempted to use parol evidence to “contradict, vary, defeat, or modify a complete and unambiguous written instrument, which is what the [DLR Contract] is.” (R. 6685). DLR discussed that the contract did not mention “owner’s representative” and that Koomen, while not an architect and was required to documents conditions of the Project, fell within the standard of care for an architect. (R. 6686).

During the summary judgment hearing, trial court asked DLR whether the term “proposal” in Article 3 of the DLR Contract was ambiguous. (R. 6688). DLR advised that “proposal” was “not ambiguous at all” and that “it simply says [that DLR] will provide its services, as they previously discussed, but that are memorialized [in the contract].” (R. 6689). The trial court then posed the same question to the County. (R. 6689). The County noted that to some degree, the word “proposal” was ambiguous and that “I think it’s interesting that the last sentence only refers to what happens if there’s a conflict between the proposal and the contract that leaves out the interviews and the response to the RLI.” (R. 6689).

The trial court agreed with the County that the merger clause did not prevent consideration of “services that DLR was to provide,

which may be included in the [RLI] and the consultant's letter of interest response and subsequent interview and proposal presentation," that the word "proposal" in Article 3 was ambiguous, and that "there is an ambiguity between the introductory paragraph and Article 3 and the merger provision in [Article] 9.10. (R. 6690). The trial court also agreed with the DLR as to the professional negligence count that the cause of action was tied to the design criteria professional standard and announced it would grant summary judgment on that count alone. (R. 6693).

After the summary judgment hearing but prior to the trial court rendering its order, DLR moved for rehearing and/or reconsideration of the trial court's oral ruling ("Motion for Reconsideration"). (R. 6640-55). DLR argued that the court's ruling at the summary judgment hearing "was based on findings with regard to ambiguity, which was not raised by [the County] at any time" and the court "did not have the benefit of briefing on the issue." (R. 6640-41). DLR then identified several ambiguities it believed existed within the DLR Contract. (R. 6641-42).

First, DLR argued the word "proposal" in Article 3 was "incorrectly characterized as a question of fact . . ." (R. 6641). DLR

argued that if this was an ambiguity, it was a patent ambiguity and extrinsic evidence was not admissible to resolve. (R. 6641). Instead, the trial court “must determine whether each alternative interpretation is reasonable, because a contract is only ambiguous if there is more than one ‘reasonable’ interpretation.” (R. 6641).

Second, DLR argued that given its position regarding the word “proposal” and the merger clauses in Articles 2.3 and 9.10, the trial court “must enforce the provisions of Article 3.1” regarding “*all services*” of the DLR Contract, “including Phase VI, are subject to the professional standard of care.” (R. 6641) (*italics in original*). DLR maintained that extrinsic evidence such as “the interview statement characterizing the on-site/field representative as an ‘owner’s rep’” was not admissible “to vary the terms of the contract with respect to the professional standard of care.” (R. 6641). Because this would create the standard of care for all the third-party claims, DLR requested summary judgment for breach of contract, contractual indemnity, common law indemnity, and unjust enrichment. (R. 6641).

Third, DLR argued that if the trial court

somehow determines the County's interpretation of "proposal" is reasonable and concludes that the inartful language of the preamble to Article 3 can somehow trump the incorporation/merger/integration language in Articles 9.10 and 2.3, the County seeks to introduce parol evidence regarding a characterization of DLR's on-site/field representative services as those of an "owner's rep" in an effort to contract the terms of Article 3.1, which states that all services of the [DLR Contract], including Phase VI, are subject to the professional standard of care.

(R. 6642). DLR disagreed with the County's position that a non-architect could perform the services in Phase VI and that "the existence of a standard of care does not turn on whether a non-professional might be capable of performing the same task." (R. 6642).

DLR discussed how the County did not argue ambiguity with the DLR Contract previously, but when asked by the trial court regarding the word "proposal" in Article 3, the County acknowledged that to some degree, it could be ambiguous. (R. 6643-45). DLR cited the trial court's oral findings at the summary judgment hearing that included additional ambiguities in the DLR Contract. (R. 6644-45). While arguing that the County could not raise an issue for the first time at the hearing, DLR then argued that even if permissible to raise

at that time, the County's interpretation of "proposal" was unreasonable. (R. 6645). DLR disagreed with the County's position that "proposal" meant DLR's representations made to the County in response to the RLI but not those in DLR's PowerPoint presentation and contended that "proposal" meant "all pre-agreement representations regarding its proposal, whether in the written response, the oral interview, or otherwise in the proposal presentation." (R. 6646). Lastly, DLR argued that summary judgment should be granted on the third-party unjust enrichment claim. (R. 6652-53).

The County objected to DLR's Motion for Reconsideration on both procedural and substantive grounds. (R. 6768-76). First, the County argued that the Motion for Reconsideration was procedurally improper since it was filed prior to the trial court rendering an order on DLR's summary judgment motion. (R. 6768-69). The County further objected that DLR's argument rehashed prior arguments pending before the court, including the summary judgment motion, motion to strike the County's expert witnesses, and motions in limine. (R. 6769). Additionally, DLR presented arguments for the first time on rehearing that were not included in its summary judgment

motion, prevented the County from being able to respond as required, and otherwise violated Rule 1.510. (R. 6769).

Second, the County argued substantive issues with the Motion for Reconsideration, including its belief that the DLR Contract “specifically incorporates the County’s [RLI], RLI response, [i]nterviews, and proposal presentation” as set forth in Article 3. (R. 6770-71). The County disagreed that there was only one reasonable interpretation of “proposal” but that there are other interpretations that “appear more reasonable than the interpretation of DLR offered here.” (R. 6772). The County maintained there were issues of fact: “What did DLR represent and promise to the County that it would perform that was specifically incorporated into the Contract? Did DLR perform those tasks at all? If it did, did it perform the tasks as agreed to?” (R. 6774). Lastly, the County disagreed that a conflict existed between the DLR Contract and the RLI, RLI response, interviews, and proposal presentation, but even if there was a conflict, the facts must be construed in favor of the County as the non-moving party. (R. 6774).

Subsequently, the trial court rendered an order granting DLR’s Motion for Summary Judgment on Count III for professional

negligence only and denying summary judgment on the remaining third-party claims (the “Summary Judgment Order”). (R. 6765-66). The trial court found “that the merger clause of the [DLR Contract] at section 9.10 does not prevent the jury from considering the services that DLR was to provide, which may be included in the County’s Request for Letters of Interest (RLI), DLR Group’s Letter of Interest response, interviews, and proposal presentation as referenced in Article 3 of the [DLR Contract].” Additionally, the court determined the word “proposal” used in the first paragraph of Article 3 of the DLR Contract to be ambiguous and created “further ambiguity between Article 3 and the merger clause in 9.10.” (R. 6766). Therefore, the court indicated it would require the jury to make that factual determination at trial “to clarify ambiguities of the [DLR Contract] referenced in this Order so that the Court can apply the law to those factual interpretations at or after trial.” (R. 6766). The County moved for rehearing on the trial court’s Summary Judgment Order. (R. 6777-7414).

Then, a hearing was held on DLR’s Motion for Reconsideration. (R. 10018-10099). The trial court rendered an order granting DLR’s Motion for Reconsideration, vacating its Summary Judgment Order,

and granting final summary judgment in favor of DLR on all third-party claims (the “Reconsideration Order”). (R. 7518-26). The trial court found “the merger clauses of Articles 2.3 and 9.10 require enforcement of Article 3.1 which states that all services under the [DLR Contract] are subject to the professional Standard of Care.” (R. 7519). The trial court pointed to Article 9.10 which was cited by DLR in its reply and at the summary judgment hearing. (R. 7522). The court further explained that “[i]n light of the argument that none of the parties had raised the issue that any portion of the [DLR Contract] was ambiguous before October 24[,] 2023 . . . and good cause appearing in the arguments presented in the briefing of the parties, the Court finds that the motion for rehearing and/or reconsideration is appropriate.” (R. 7524).

The court then found the word “proposal” in Article 3 could only be reasonably interpreted to mean “**all** of DLR’s pre-contract representations.” (R. 7524) (emphasis in original). The court dismissed the County’s interpretation since that would be unreasonable and “result in conflict with the preamble of Article 3 and the incorporation/merger clause contained in Article 9.10 and the language of 2.3. (R. 7524). The court found it unreasonable that

the professional standard of care for an architect would not apply to Phase VI and such a result would be irreconcilable with Article 3.1. (R. 7525). The court concluded that the contract was unambiguous, the professional standard of care for an architect applied to all of the County's third-party claims against DLR based on Article 3.1, and no disputed material facts existed to prevent summary judgment. (R. 7525).

#### **V. The County Moved for Leave to Amend its Third-Party Complaint**

Prior to the hearing on DLR's Motion for Summary Judgment and prior to trial, the County moved to amend its third-party claims against DLR based on the evidence ("Motion for Leave"). (R. 4751-5511). The County argued that the DLR Contract involved two distinct areas of services: 1) "the development of the design criteria prior to construction" and 2) "services commenced after construction started." (R. 4752). For the second area of service, the County pointed to the Task VI under the DLR Contract that governed the actions by the parties, explaining that "[o]nly a small portion of Task VI could be construed to require training as an architect." (R. 4752). Instead, the County explained that "[t]he vast majority of Task VI constituted

construction management services including, but not limited to, review of pay application requested (VI.6), field observations (VI.8), weekly field reports (VI.11), photography (VI.12), punch list reviews (VI.13), and review of substantial completion, final completion, and close out documents (VI. 14, 15, 16).” (R. 4752, 4816-18).

The County argued that the record evidence showed that DLR was serving as an “Owners Representative” during the construction of the Project as supported by representations made by and actions of DLR, including authoring an “Owner Representative Daily Construction Report.” (R. 4753). The County further pointed to the report authored by Charvat, DLR’s expert, that stated “there is not a widely established standard of care for an Owners Representative.” (R. 4753, 4969).

The County pointed to the Scope of Work provision in the DLR Contract that identified the pre-contract written documents and discussions and specifically incorporated them into the DLR Contract, noting that DLR had not identified any conflict between the terms of these documents. (R. 4754-55). The County also highlighted the statements made by DLR to the County during the March 3, 2015 Selection Committee Meeting and the July 18, 2014 Final Negotiation

Meeting where DLR represented it would be the Owners Representative. (R. 4755); (R. 5032-36) (March 3, 2015 meeting); (R. 5140-5141) (July 28, 2015 meeting).

The County also explained that recent discovery demonstrated that it had a reasonable basis to alleged that DLR was serving as an Owner's Representative throughout the construction phase of the Project and that there is no recognized professional standard of care for that position. (R. 4757). For example, during a recent deposition, Koomen, a consultant for DLR, testified that he attended Escambia County Correctional Facility Subcontractor Coordination Meeting #4 on October 22, 2018, and wrote his name on a sign-in sheet as "owner's rep." (R. 4758-59); (R. 5241-43) (Koomen deposition). When asked why Koomen signed into the meeting as "owner's rep," Koomen explained: "Because that's what everybody told me I was. You know, everybody said, well, you're the owner's rep. You're the owner's rep. Okay. Okay. Fine." (R. 4759, 5243). Koomen stated he had no reason to dispute that he was the owner's representative based on the work he was performing for the Project. (R. 4759, 5243).

Additionally, the County pointed to testimony by Gibson, a former employee of DLR who was involved with the solicitation and

implementation of scope of services related to the Project, who was present during negotiations with the County and testified that Koomen “was the field observation staff that Bay Design/GMC provided for the project.” (R. 4761); (R. 5317) (Gibson deposition). Gibson was not aware whether Koomen was an architect, a licensed construction inspector, and/or a plan examiner. (R. 4761, 5318). Gibson also testified that he was not aware that a standard of care for a construction manager or a field representative existed. (R. 4762-63, 5318-19).

DLR responded in opposition to the County’s motion to conform third-party claims to the evidence. (R. 6310-21). DLR noted that the County made the request six days prior to a pre-trial conference and that the County “seeks to transform its professional negligence claim into a general negligence claim” to “avoid [its] fatal mistake of not engaging a professional architect as an expert witness[.]” (R. 6312). DLR argued that the County’s request contradicted the DLR Contract and that the motion was untimely since the trial court’s Case Management Order allowed leave to amend pleadings through May 30, 2023. (R. 6312-17). Even if timely made, DLR argued that Rule 1.190(b) only applies when introducing evidence at trial and DLR

would be prejudiced if the County changed its professional negligence claim to a general negligence claim since it would deprive DLR from being able to present a sufficient defense. (R. 6318). Lastly, DLR argued the County misstated legal principles related to professional negligence. (R. 6319).

The trial court denied the County's Motion for Leave, explaining that the court's June 9, 2023, Case Management Order, as agreed by the parties, identified the deadline to amend pleadings was May 30, 2023. (R. 7527-28). However, the County's motion was filed on October 12, 2023, which was nine days after discovery closed. (R. 7528). The trial court cited case law that the liberal stance towards amendments diminishes as the case gets closer to trial and found that DLR would be prejudiced significantly if leave to amend was granted. (R. 7528-29).

The trial court then entered Final Judgment in favor of DLR and against the County on all third-party claims. (R. 7530-31). The County moved for rehearing on the Final Judgment. (R. 8275-9609, 613-71). DLR opposed the rehearing request to the Final Judgment. (R. 9865-96). A hearing was held on the Motion for Rehearing on the Final Judgment. (R. 9909-45). In turn, the trial court denied the

Motion for Rehearing on Final Judgment. (R. 9904-05). This appeal follows. (R. 9963-81).

### **SUMMARY OF THE ARGUMENT**

This Court should reverse for two reasons: 1) the trial court erred by granting summary judgment in favor of DLR; and 2) the trial court abused its discretion by denying the County's Motion for Leave.

First, the trial court erred in granting final summary judgment on all third-party claims brought by the County against DLR for services related to DLR's actions/inactions as its owner's representative. Procedurally, this was improper since summary judgment was granted based on arguments related to ambiguities in the DLR Contract that were presented for the first time in DLR's Motion for Reconsideration. This denied the County due process and violated Rule 1.510. Substantively, the trial court erred in resolving any ambiguity in the DLR Contract, granting summary judgment when genuine disputes of material fact existed, and determining the extent of DLR's duty owed under the contract which is a question of fact, not a question of law. Even though the County's underlying claims related to Task VI requirements that commenced *after* construction, the trial court incorrectly ruled the standard of care for

architects related to design criteria development applied, even though the County did not bring any claims against DLR for design criteria development. This also overlooked the undisputed expert testimony that there is no professional standard of care for an owner's representative, that the individuals/entities who failed to perform the tasks as alleged by the County were acting in that capacity, and that DLR was unaware of what a Fragnet Analysis was.

Second, the trial court abused its discretion in denying the County's request for leave to amend its third-party claims since the amendment did not prejudice DLR, the County did not abuse its privilege to amend its third-party claims, the amendment was not futile and conformed to the evidence, and the request occurred prior to the summary judgment hearing. DLR would not be prejudiced since the requested amendment would change the County's claim for professional negligence to general negligence. Regardless of the classification, the same four elements are required to prove negligence with the distinction being whether an expert, if any, is needed. The County did not previously seek any amendments to its third-party claims. Furthermore, the amendment would not be futile as it would conform to the undisputed evidence that there was no

professional standard of care for an owner's representative and testimony during discovery that DLR's role in the Project was that of an owner's representative. For these reasons, this Court should reverse.

## **ARGUMENT**

### **I. The trial court erred in granting DLR's reconsideration, vacating its original summary judgment ruling, and granting final summary judgment in favor of DLR on all third-party claims.**

#### **A. Standard of review.**

A trial court's decision to grant a motion for summary judgment is reviewed *de novo*. *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000). This Court also reviews questions of law and contractual interpretation under the *de novo* standard. *Ails v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010). Since this Court interprets contracts as questions of law, this Court "may reach a construction contrary to that of the trial court." *Whitley v. Royal Trails Prop. Owners' Ass'n, Inc.*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005). Any factual findings must be supported by competent, substantial evidence. *Klinow v. Island Court at Boca W. Property Owners' Ass'n, Inc.*, 64 So. 3d 177, 180 (Fla. 4th DCA 2011).

“[T]he correct test for the existence of a genuine factual dispute is whether ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The summary judgment rule serves “to avoid the expense and delay of trials when all the facts are admitted, or a party is unable to support a fact contention by any competent evidence.” *Baskin v. Griffith*, 127 So. 2d 467, 473 (Fla. 1st DCA 1961). This furthers a principal purpose of “isolat[ing] and dispos[ing] of factually unsupported claims or defenses.” *In re Amends. to Fla. R. of Civ. P. 1.510*, 309 So. 3d 192, 194 (Fla. 2020) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is not “intended to weigh and resolve genuine issues of a material fact, but only identify whether such issues exist.” *Shanks v. Bergerman*, 334 So. 3d 681, 686 (Fla. 2d DCA 2022). As such, when contesting a motion for summary judgment, an opposing party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *In re Amends. to Fla. R. of Civ. P. 1.510*, 309 So. 3d at 193 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

B. The trial court reversibly erred by granting summary judgment based on arguments first raised by DLR in its Motion for Reconsideration.

“It is well-settled that a trial court violates due process and commits reversible error when it grants a party relief that the party did not request.” *Booth v. Hicks*, 301 So. 3d 369, 370 (Fla. 2d DCA 2020). When moving for summary judgment, Rule 1.510(c) requires the moving party to “state with particularity the grounds upon which it is based and the substantial matters of law to be argued.” *H.B. Adams Distribs., Inc. v. Admiral Air of Sarasota Cnty., Inc.*, 805 So. 2d 852, 854 (Fla. 2d DCA 2001). “The obvious purpose of this rule is to eliminate surprise and to provide the parties a full and fair opportunity to argue the issues.” *Lee v. Treasure Island Marina, Inc.*, 620 So. 2d 1295, 1297 (Fla. 1st DCA 1993) (reversed and remanded order granting summary judgment). A trial court commits reversible error when granting summary judgment on grounds not raised with particularity in the summary judgment motion. *McLlenan v. Cypress Chase N. Condo. No. 4 Ass'n*, 387 So. 3d 321 (Fla. 4th DCA 2024); *Williams v. Bank of Am. Corp.*, 927 So. 2d 1091, 1093 (Fla. 4th DCA 2006) (citation omitted); *Design Neuroscience Centers, P.L. v. Preston J. Fields, P.A.*, 359 So. 3d 1232, 1235 (Fla. 3d DCA 2023).

Here, the trial court erred by granting DLR's Motion for Reconsideration on issues not previously raised in its summary judgment. *See McLlenan*, 387 So. 3d at 326. DLR's summary judgment discussed: the lack of evidence for breach of duty, causation, and damages; the applicable standard of care was that of an architect which required expert opinion by an architect; no notice of defect in services; and no evidence that the County failed to mitigate its damages. (R. 3347-69). However, DLR's Motion for Reconsideration argued: no ambiguity to Article 3's preamble; the County had not alleged previously that the contract was ambiguous; the County's interpretation of the term "proposal was unreasonable; if the term "proposal" prohibited parol evidence, the County would not be able to introduce any evidence in conflict with Article 3.1 regarding standard of care; and no genuine dispute regarding unjust enrichment. (R. 6640-55).

While the trial court inquired into whether an ambiguity existed in the DLR Contract at the summary judgment hearing, (R. 6688), this does not transform the ambiguity issue as to one being raised by the County or otherwise excuse a trial court from interjecting issues not otherwise raised by the parties. *Polyglycoat Corp. v. Hirsch*

*Distributors, Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (explaining that a trial court cannot depart “from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention”). It also does not excuse a trial court from abiding by and ensuring due process are observed. *See Booth*, 301 So. 3d at 370. Yet, the trial court erroneously granted reconsideration and granted final summary judgment after specifically acknowledging that *neither* party argued for an ambiguity in the summary judgment motion, response, or at the summary judgment: “In light of the argument that none of the parties had raised the issue that any portion of the [DLR Contract] was ambiguous before October 24[, ] 2023 . . . and good cause appearing in the arguments presented in the briefing of the parties, the Court finds that the motion for rehearing and/or reconsideration is appropriate.” (R. 7524)

Furthermore, the trial court could not consider the reconsideration request to be a summary judgment request. To allow a different motion to act as summary judgment runs afoul with the requirements of Rule 1.510 and due process concerns. *See Fla. R.*

Civ. P. 1.510; (R. 8346-47). However, even if the reconsideration is an extension of a summary judgment motion or considered its own summary judgment motion, DLR filed its Motion for Reconsideration seven days before the hearing on that motion: reconsideration was filed on October 30, 2023; DLR filed a related Notice of Hearing on November 1, 2023; and the hearing was held on November 7, 2023. (R. 6640-55, 6756-59, 8283, 8330-8411). In the event the Motion for Reconsideration was considered a summary judgment motion, this time was insufficient under Rule 1.510 for the County to respond. See Fla. R. Civ. P. 1.510(b) (time to file motion is 40 days before hearing). Therefore, the trial court erred in granted reconsideration/rehearing on matters solely raised, as admitted by the trial court, for the first time on reconsideration/rehearing. This point alone requires this Court to reverse and remand.

Moreover, the order granting reconsideration and granting summary judgment did not demonstrate the trial court's own analysis but instead adopted DLR's proposed order. Although trial courts are not prohibited from adopting a party's proposed order, the order may not act as a "substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge." *Perlow v.*

*Berg-Perlow*, 875 So. 2d 390 (Fla. 2004); see *Univ. of Miami v. Jones*, 2024 WL 2163965 at \*1 (Fla. 3d DCA May 15, 2024). Indeed, the benefit for an appellate court is an order that “reflect[s] the trial judge’s independent decision on the issues of the case, not that the judge used words drafted by one of the parties to express that decision.” *Flint v. Fortson*, 744 So. 2d 1217 (Fla. 4th DCA 1996); see *King v. Farah & Farah, P.A.*, 358 So. 3d 1271 (Fla. 5th DCA 2023) (reversing a lengthy and detailed 40-page final summary judgment order entered by the trial judge after making no changes to the proposed order made by the law firm, without allowing objection by opposing counsel or giving guidance by way of oral findings on the record).

At the hearing on DLR’s Motion for Reconsideration, the trial court admitted it was “struggling with this” and going “back and forth.” (R. 8386). The trial court’s verbal ruling at the hearing on the Motion for Reconsideration was merely that reconsideration and summary judgment were granted for the reasons stated by DLR. (R. 8387). The trial court then requested DLR to provide a proposed order after the hearing on the Motion for Reconsideration. (R. 8387). The Reconsideration Order rendered by the trial court creates an

appearance that the trial court did not engage in independent analysis when the Reconsideration Order is inconsistent with the trial court's original ruling on the summary judgment motion. See *Perlow*, 875 So. 3d at 390; see also *Tercier of Univ. of Miami, Inc.*, 383 So. 3d 847 (Fla. 3d DCA 2023) ("Justice must satisfy the appearance of justice.") (citing *Offutt v. U.S.*, 348 U.S. 11, 13 (1954)). In sum, the record supports numerous procedural reasons why this Court should reverse the trial court's order reconsidering and vacating the Summary Judgment Order and granting summary judgment in favor of DLR on all third-party claims raised by the County.

C. The trial court erred in granted summary judgment in favor of DLR on all third-party claims based on its interpretation of the DLR Contract and despite genuine factual dispute based on the evidence presented.

Even if the trial court could consider issues of ambiguity not otherwise raised by DLR in its summary judgment motion, the trial court was required to view every possible inference in favor of the County, the non-moving party in the summary judgment proceeding as well as view the evidence in the light most favorable to the County. *Cole Taylor Bank v. Shannon*, 772 So. 2d 546, 550 (Fla. 1st DCA 2000) ("If the record reflects even the possibility of a material issue of

fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party, and summary judgment must be denied.”); *Universal Underwriters Ins. Co. v. Steve Hull Chevrolet, Inc.*, 513 So. 2d 218, 219 (Fla. 1st DCA 1987). Indeed, it is not for a trial court to try a case or weigh facts at the summary judgment stage, *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1096 (Fla. 1st DCA 1999), *rev. denied*, 744 So.2d 453 (Fla.1999), but rather, identify whether factual issues exist. *Shanks*, 334 So. 3d at 686. However, it appears the trial court took a step further than merely identifying factual issues and erroneously resolved them.

*i. Interpretation of “Proposal” in the DLR Contract*

The trial court stated that it believed the County’s interpretation of “proposal” in Article 3 was unreasonable because it “require[d] an illogical assumption that the parties wanted to exclude only certain pre-contract representations” and would also “conflict with the preamble of Article 3 and the incorporation/integration/merger clause contained in Article 9.10 and the language of Article 2.3” (R. 7524). However, the trial court overlooked the plain language of Article 3 that states that services DLR was engaged to provide were “the tasks outlined in [the County’s RLI], and as represented in

[DLR's] Letter of Interest response to [the RLI], subsequent interview, and proposal presentation.” (R. 544) (Article 3). The following sentence includes the word “proposal” on its own for the first time: “In the event of a conflict between the terms of the proposal and Agreement, the terms of this Agreement shall prevail.” (R. 544). Article 9.10 provides that the DLR Contract should be based on the matters identified in the contract, and Article 3 references materials that are incorporated into the contract. (R. 554, 553). These include the RLI, DLR's response to the RLI, DLR's interview, DLR's proposal presentation, and Exhibit A to the DLR contract that included the different task levels. (R. 544) (Article 3 preamble and Article 3.1 identifying the documents and information to be “incorporated by reference”). Article 3.1 not only “incorporated by reference” Exhibit A to the DLR Contract but also the Article 3 preamble identified documents and DLR's interview to be included in the contract. (R. 544). The services to be provided by DLR would apply to any of DLR's employees and subcontractors. (R. 544) (Article 3.2).

Indeed, Article 3 and Article 9.10, a contract “should be considered as a whole, not in its isolated parts.” *Maines v. Davis*, 491 So. 2d 1233, 1235 (Fla. 1st DCA 1986). Because the intent of parties

as expressed through the plain language of a contract controls, it is not for courts to “second guess” the wisdom of the contracting parties, relieve the parties of otherwise agreed to burdens, or rewrite the document. *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014). “[T]he court’s task is to apply the parties’ contract as written, not ‘rewrite’ it under the guise of judicial construction.” *Williams-Paris v. Joseph*, 329 So. 3d 775, 783 (Fla. 4th DCA 2021) (original quotation and citations omitted); see *19650 NE 18th Ave. LLC v. Presidential Estates Homeowners Ass’n, Inc.*, 103 So. 3d 191, 194 (Fla. 3d DCA 2012) (“A court may not rewrite a contract to add language the parties did not contemplate at the time of execution.”).

If it was unclear the meaning of the term “proposal” in the preamble to Article 3, the trial court should have denied summary judgment. The existence of any alleged ambiguity solidified a genuine dispute of material fact that meant summary judgment should be denied, not granted. *Le Scampi Condo. Ass’n v. Hall*, 200 So. 3d 187, 190 (Fla. 2d DCA 2016). (“When a contract is silent on a particular matter, courts should not impose contractual rights and duties on the parties under the guise of construction.”). Nothing in the DLR

Contract defined “proposal,” and the word was used in the preceding sentence only as “proposal presentation.” (R. 544). That same preceding sentence also identified the information, documents, and interview for services to be provided by DLR. (R. 5444).

Additionally, the trial court’s reading of the DLR Contract would render Article 9.5 and Article 9.7 of the DLR Contract meaningless. Article 9.5 allows DLR to use subcontractors for the Project. (R. 551). Article 9.7 includes a hold harmless and indemnification provision of the County that includes anyone subcontracted by DLR: “Consultant’s obligations as provided herein shall be limited to its proportionate share of liability to the extent caused by the negligence, recklessness or intentional wrongful misconduct of Consultant or by any person, firm or corporation to whom any portion of the Work is subcontracted by Consultant . . .” (R. 551).

*ii. The Extent and Existence of Duty Under the DLR Contract*

In granting summary judgment, the trial court determined that, under the DLR Contract, the appropriate standard of care that applied to *all* third-party claims was the professional standard of care for an architect. (R. 7525). “Where an express provision within a

professional services contract provides for a heightened standard of care . . . the professional must perform in accordance with the terms of the contract.” *Sch. Bd. of Broward Cty. v. Pierce Goodwin Alexander & Linville*, 137 So. 3d 1059, 1065–66 (Fla. 4th DCA 2014). Thus, “if the professional contracts to perform duties beyond those required by ordinary standards of care, the quality of that performance must comport with the contractual terms.” *CH2M Hill Se., Inc. v. Pinellas Cnty.*, 698 So. 2d 1238, 1240 (Fla. 2d DCA 1997).

The County acknowledges these principles, but that acknowledgement is of no moment. In granting summary judgment in favor of DLR, the trial court and DLR overlooked a foundational fact to the County’s third-party claims: the allegations against DLR were **silent** on any design issue and only pertained to DLR’s actions or inaction as it relates to providing the contractual agreement “to provide continuing direct involvement in the Project representing the County’s prime interests as the owner representative” regarding Whitesell’s extension requests on the Project. (R. 320). Instead, the allegations addressed DLR’s failure to “complete proper oversight reporting and data collection” that would have allowed the County to assess Whitesell’s extensions/delays regarding construction of the

Project. (R. 322-23). Indeed, while the element of duty is generally a question of law for the trial court to decide, “if the plaintiff alleges that a written instrument establishes the defendant’s duty, and if that instrument contains an ambiguity as to existence or extent of that duty, then the first element becomes a question of fact for the jury to decide.” *Casey v. Mistral Condo. Ass’n, Inc.*, 380 So. 3d 1278, 1284 (Fla. 1st DCA 2024) (citing *Friedman v. Va. Metal Prods. Corp.*, 56 So. 2d 515, 516 (Fla. 1952)).

Looking at DLR Contract, the Phase VI tasks included tasks such as “staff augmentation” and “on-site representative,” none of which require architectural expertise. (R. 576). Neither do providing “on site representation . . . to facility the progress of the work and to expedite identification, resolution or issues as they arise,” (R. 577) (Task VI.8), or logging and reviewing change orders to provide recommendations to the County with a “key element [being] review of proposed cost revisions appropriateness,” (R. 577) (Task VI.10), or taking photographs of the Project. (R. 577) (Task VI.12) (“Project progress and conditions will be recorded through on-going photography as the works progresses.”). While the DLR Contract contains requirements related to the practice of architecture, *none* of

those duties or requirements served as the basis for the third-party claims brought by the County. (R. 322-23). Even Koomen testified that he had no reason to dispute that he was the owner's representative based on the work he was performing for the Project. (R. 4759, 5243).

Furthermore, the evidence demonstrated that DLR admitted it was unaware of what a Fragnet Analysis was. (R. 3333). The evidence also shows that both Gibson (DLR) and Jernigan (Goodwyn) testified that DLR "did not conduct a review of the critical path or any complex analysis of the schedule such as a fragnet analysis." (R. 3524). Gibson further testified that testimony from Gibson that DLR "did not utilize the fragnet analysis because they did not have experience or expertise to analyze – that data"). (R. 3752). To the extent there was a question regarding the extent of the duty owed under the DLR Contract, the evidence supported the County's position and should have resulted in a denial of the summary judgment. *See Casey*, 380 So. 3d at 1284.

Whether DLR or the trial court relied on Charvart, DLR's expert, regarding what duty is owed, that is not the topic of expert opinion. *See Citibank, N.A. v. Olsak*, 208 So. 3d 227 (Fla. 3d DCA 2016)

(explaining that even witnesses, whether fact or expert, “generally are precluded from providing testimony in the form of legal conclusions”); *Palm Beach Cnty. Town of Palm Beach*, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983) (“Regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court.”). Not only is expert testimony that amounts to legal conclusions inadmissible, but also constitutes reversible error if relied upon to determine legal questions. *Thundereal Corp. v. Sterling*, 368 So. 2d 923, 928 (Fla. 1st DCA 1979); *Devin v. City of Hollywood*, 351 So. 2d 1022, 1026 (Fla. 4th DCA 1976).

Charvart discussed DLR’s standard of care as being “determined by the standard of care of an architect” and that “[t]he standard of care also is meeting the intent of the [DLR] Contract” and cited and discussed specific contractual provisions. (R. 3599-3601). Then, Charvart noted the County’s claims related to DLR’s failure to properly document “COVID-19’s impact on construction so that [Whitesell’s] request for delay caused by COVID-19 could be assessed properly.” (R. 3601). Charvart then opined that a “detailed analysis

of time delays using the CPM/Critical Path method was not within DLR Group's responsibilities, nor a service that an architect provides for design and construction administration." (R. 3601). Instead, this required a "specialty experienced scheduler" that Charvart contended was recommended by DLR to the County but not approved. (R. 3601). Overall, any ambiguity that could be determined to exist spoke to the existence or the extent of the duty owed by DLR under the contract, which makes the question of duty a question of fact for the jury, not a question of law for the court. *See Casey*, 380 So. 3d at 1284.

From a policy perspective, the trial court's granting of summary judgment can be read to eliminate any design criteria claims the County may have now or in the future against DLR, including services by DLR that it subcontracted out. As argued below, the County identified two distinct areas of services identified in the DLR Contract: 1) design criteria development *prior to* construction, and 2) Task VI requirements that commenced *after* construction. (R. 3518-19). Only the second area related to DLR's involvement *after* construction formed the foundation of the County's third-party claims. (R. 315-450, 523-24). Both parties' experts agreed that there is no professional standard of care for an owner's representative. (R.

3519); (R. 3601). The evidence shows that those on site for the Project and who attended meetings were present as the owner's representative, and did not even hold architectural licensure. (R. 3523-24, 3529-30, 3524, 3609, 3611-44, 4759, 4761-63, 5241-43, 5318-19).

The litigation between the County and DLR has always been limited to owners' representative liability and is not focused on design criteria. However, the trial court's Reconsideration Order goes further than the allegations raised by the County by denying any perspective relief to the County based on the design criteria issues and finding that, as a matter of law, the DLR Contract requires an architectural standard of care despite the services rendered and even when architectural services are not provided, such as those services provided by Goodwyn and Koomen. Should there be future litigation related to this Project arising from a latent defect that has a non-architectural, design component, then the trial court's ruling effectively reads an architectural standard of care where one is not applicable. This can arguably foreclose any potential claims the County may have on design criteria/architectural services issues that were not, and never have been, at issue in this case and do not

require an architectural standard of care. This further demonstrates the trial court's ruling was in error and calls for reversal.

*iii. Factual Issues Preventing Summary Judgment*

Additionally, genuine disputes of material fact were present and should have prevented summary judgment from being granted in DLR's favor. As the non-moving party, the County presented evidence to dispute the facts alleged in DLR's summary judgment. Koomen, DLR's on-site representative, was not an architect and had experience with construction management and inspection instead of architectural design criteria services. (R. 3523, 3529). Yet, DLR advocated that the professional standard of care for an architect applied. (R. 3348-60). Furthermore, Koomen was a licensed Construction Inspector, and prepared "Owner Representative Daily Construction Reports" which were unrelated to compliance with design plans. (R. 3524, 3609, 3611-44). Koomen's role was to take photographs and generate daily reports related to construction progress, events that occurred on the construction site, meeting information, and information related to construction status. (R. 3530). Additionally, Koomen signed in as "owner" rep at a November 2018 meeting. (R. 3524).

Despite DLR's argument, at no point in the underlying litigation were claims alleged due to DLR's architectural design services or architectural related design criteria. The only issue was whether DLR failure to provide construction oversight and administration alleged in the County's third-party claims. (R. 315-23). The County's claims against DLR were due to DLR's failure to tell the County of issues with Whitesell on the Project that Whitesell's services were late, incorrect, and defective. (R. 315-23). As a result, the County incurred approximately \$3.4 million in liquidated damages due to DLR's failures under the DLR Contract. (R. 50). In granting summary judgment, the trial court appears to have incorrectly weighed the evidence and made inferences against the County.

Koomen's deposition testimony supports the understanding advanced by the County. When asked why Koomen signed into the meeting as "owner's rep," Koomen explained: "Because that's what everybody told me I was. You know, everybody said, well, you're the owner's rep. You're the owner's rep. Okay. Okay. Fine." (R. 4759, 5243). Koomen testified he had no reason to dispute that he was the owner's representative based on the work he was performing for the Project. (R. 4759, 5243). To the extent there was any question

regarding the extent of the duty owed under the DLR Contract, this became a question of fact for the jury to decide. *See Casey*, 380 So. 3d at 1286-87 (reversing order granting summary judgment since genuine dispute of material fact of contract was present). This Court must reserve.

**II. The trial court abused its discretion by denying the County's motion for leave to amend its third-party claims.**

A. Standard of review.

This Court reviews the trial court's denial of a motion for leave to amend the pleadings to conform to the evidence for an abuse of discretion "and admonishes that doubts should be resolved in favor of allowing amendments unless and until it appears that the privilege to amend will be abused." *Brown v. Montgomery Ward & Co.*, 252 So. 2d 817, 819 (Fla. 1st DCA 1971); *see Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

B. The trial court abused its discretion since DLR would not be prejudiced when the County's Motion for Leave was filed prior to the summary judgment hearing and the claim was the same negligence elements already pled, it was the County's first request for leave to amend, and the amendment would not have been futile.

“Although granting leave to amend rests within the sound discretion of the trial court, all doubts should be resolved in favor of allowing amendment. It is the public policy of this state to freely allow amendments to pleadings so that cases may be resolved upon their merits.” *Adams v. Knabb Turpentine Co., Inc.*, 435 So. 2d 944, 946 (Fla. 1st DCA 1983). This comports with Florida Rule of Civil Procedure 1.190 that requires leave to amend “shall be given freely when justice so requires.” Fla. R. Civ. P. 1.190(a). The purpose behind the rule is “to achieve justice and allow the parties to fully present their respective positions.” *Walker v. Senn*, 340 So. 2d 975, 976 (Fla. 1st DCA 1976) (reversing order denying motion for leave revise second amended affirmative defenses); *see, e.g., Morgan v. Bank of New York Mellon*, 200 So. 3d 792, 797 (Fla. 1st DCA 2016) (reversing order denying motion for leave to allow affirmative defenses to be raised even after six years of litigation). Prejudice under Rule 1.190 “appears to turn on whether a litigant’s right to notice of what to

prepare for at trial has been infringed.” *Tracey v. Wells Fargo Bank, N.A. as Tr. for Certificateholders of Banc of Am. Mortgage Sec., Inc.*, 264 So. 3d 1152, 1156 (Fla. 2d DCA 2019). Rule 1.190(b) also allows parties to amend the pleadings to conform to the evidence “at any time, even after judgment . . .” *See Fla. R. Civ. P. 1.190(b)*.

A trial court abuses its discretion in denying a pleading to be amended “unless it is clear that: (1) the amendment would prejudice the opposing party, (2) the privilege to amend has been abused, or (3) the amendment would be futile.” *S. Devs. & Earthmoving, Inc. v. Caterpillar Fin. Servs. Corp.*, 56 So. 3d 56, 62–63 (Fla. 2d DCA 2011); *see Dep’t of Health v. Khan*, 350 So. 3d 87, 93 (Fla. 1st DCA 2022). Because of the liberal attitude towards amendments, no bright-line rule exists as to when a motion for leave to amend is “untimely.” *Morgan*, 200 So. 3d at 795. “Absent exceptional circumstances, motions for leave to amend should be granted, and refusal to do so constitutes an abuse of discretion.” *Id.*

Here, the trial court abused its discretion by failing to allow the County from amending its third-party claims against DLR. This is not a case where, for the first time on the day of trial, the defense sought to allege a *Fabre* defense and subpoena a witness that was not

previously identified on the witness list. See *Bogosin v. State Farm Mut. Auto. Ins. Co.*, 817 So. 2d 968 (Fla. 3d DCA 2002). This is not a case where the defense “failed to affirmatively plead the negligence of a third party or raise the matter at pretrial.” *E.H.P. Corp. v. Cousin*, 654 So. 2d 976, 977 (Fla. 2d DCA 1995). Rather, the County sought to amend its third-party claims for the first time *prior* to the summary judgment hearing and change the claims for professional negligence to one of general negligence. (R. 4751-5511). This amendment was based on evidence that DLR was serving as an “Owners Representative” during the construction of the Project and that Charvat, DLR’s expert, expert opinion *agreeing* with the County’s expert that “there is not a widely established standard of care for an Owners Representative.” (R. 4753, 4969).

DLR cannot claim prejudice since DLR’s concern – shifting a professional negligence claim to a general negligence claim – is eliminated by the fact that both share the same elements of duty, breach, causation, and damages. *Limones v. Sch. Dist. of Lee Cnty.*, 161 So. 3d 384, 389 (Fla. 2015). The only difference being a professional negligence claim requires expert testimony. However,

the evidence demonstrated that no professional standard of care existed for an owner's representative.

Additionally, DLR cannot be prejudiced since it knew of the professional negligence claim, the County's attempt to amend its third-party claims *prior to* the summary judgment hearing. See *JVN Holdings, Inc. v. Am. Constr. & Repairs, LLC*, 185 So. 3d 599, 601 (Fla. 3d DCA 2016) ("Courts should be especially liberal when leave to amend is sought at or before a hearing on a motion for summary judgment."); *Anglo Am. Auto Auctions, Inc. v. Tuminello*, 732 So. 2d 1218, 1221 (Fla. 5th DCA 1999) (reversing and remanding for a new trial since appellees could not have been surprised by statutes of frauds claim that was raised by appellants twice prior to trial); *Viscito v. Fred S. Carbon Co., Inc.*, 636 So. 2d 194, 196 (Fla. 4th DCA 1994). When a party seeks lead to amend at or before a summary judgment hearing, "appellate courts have routinely rejected a finding of prejudice." *Progressive Select Ins. Co. v. Imaging Ctr. of W. Palm Beach, LLC*, 356 So. 3d 842, 845 (Fla. 4th DCA 2023) (collecting cases).

The trial court abused its discretion since the County moved for leave to amend its third-party complaint prior to the hearing on DLR's

Motion for Summary Judgment and prior to trial. (R. 4751-5511). The Motion for Leave was filed on October 12, 2023, with trial set for December 4, 2023, or 53 days prior to the earliest trial date. (R. 8320). Sister appellate courts have determined that denial of a motion for leave to amend with less than 53 days prior to trial constitutes an abuse of discretion. See *Sorenson v. Banck of N.Y. Mellon*, 261 So. 3d 660, 663 (Fla. 2d DCA 2018) (abuse of discretion to deny motion for leave filed the day before the second trial); *Hall v. Hall*, 171 So. 3d 817, 823 (Fla. 4th DCA 2015) (abuse of discretion to deny motion for leave filed 30 days before trial); *Burr v. Norris*, 667 So. 2d 424, 426 (Fla. 2d DCA 1996) (abuse of discretion to deny motion for leave filed one month before trial).

Not only did the trial court abuse its discretion denying the Motion for Leave since DLR would not be prejudiced by the amendment, but also by denying leave to amend when the County did not abuse the privilege to amendment and the amendment would be futile. *S. Devs. & Earthmoving*, 56 So. 3d at 62-63. There were no prior amendments by the County. Furthermore, leave to amend would not have been futile. The Motion for Leave sought to alter the claim for professional negligence to general negligence, which cannot

be deemed insufficient as a matter of law. *See Morgan*, 200 So. 3d at 796 (“Courts have held that proposed amendments are futile when they are not pled with sufficient particularity or are ‘insufficient as a matter of law.’”). For these reasons, the trial court’s decision to deny the County’s Motion for Leave was arbitrary, fanciful, and unreasonable, constitutes an abuse of discretion, and requires this Court to reverse.

### **CONCLUSION**

For the factual and legal reasons previously discussed, the County respectfully requests this Court reverse and remand based on the lower court’s erroneous granting of DLR’s summary judgment motion and abuse of discretion in denying the County’s Motion for Leave.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that on this 25th day of November, 2024, a true and correct copy of the foregoing was electronically filed with the First District Court of Appeal by using the Florida Courts e-Filing Portal, therefore furnished via E-mail to: **Stacy L. Moon, Esquire, Kristina L. Marsh, Esquire, and Lara Breslow, Esquire**, Gordon Rees Scully Mansukhani, P.A., 100 S Ashley Dr., Suite 1290, Tampa, FL 33602, [smoon@grsm.com](mailto:smoon@grsm.com); [kmarsh@grsm.com](mailto:kmarsh@grsm.com); [lbreslow@grsm.com](mailto:lbreslow@grsm.com); [rcalvillo@grsm.com](mailto:rcalvillo@grsm.com); [jsimpson@grsm.com](mailto:jsimpson@grsm.com); [tampapleadings@grsm.com](mailto:tampapleadings@grsm.com), *Counsel for Appellee, DLR Group, Inc.*

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fla. R. App. P. 9.045(b), the undersigned counsel hereby certifies that this brief was submitted in Bookman Old Style 14-point font. This brief also complies with the word count limit requirements, excluding the parts exempted by Fla. R. App. P. 9.045(e).

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