IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D2024-2400
Lower Tribunal Case No. CACE 20-010370

16TH STREET DRYSTACK, LLC
Appellant,

vs.
THE MARKER GROUP, LLC d/b/a
MARKER CONSTRUCTION GROUP
Appellee.

On Appeal from Final Judgment Order and
Order Denying Summary Judgment
Of Circuit Court of the Seventeenth Judicial Circuit
of Florida in and for Broward County

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

16th Street Drystack, LLC, who will be referred to as Appellant, Owner, or by its proper name in this brief, is the owner of certain real property, located at 1335 SE 16th Street, Fort Lauderdale, Florida. The Marker Group, LLC, who will be referred to as Appellee, Contractor, or by its proper name, is a general contractor. (R. 1240-1337). On November 12, 2019, Appellant and Appellee entered a modified AIA A102 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with A Guaranteed Maximum Price (the "Contract") for the construction of the F3 Marina project (the "Project. (R. 2337 Ln 5-7; R. 1240-1337).

When Appellant acquired the subject real property, it had an existing structure on it, was surrounded by water to the north, had adjacent properties on the east and west sides, and had overhead powerlines running the length of the street on the south side. (R. 2335-2336, Ln 19-10.). Appellant and Appellee had previously entered other contracts in connection with the demolition of the existing structure that already existed on the subject property. (R. 2371-2372, Ln 25-2). Appellant and Appellee are both experienced and sophisticated entities and both actively participated in the negotiation of the unique and specific terms of the Contract that is at issue

in this case based upon the nature of the property and the needs of the parties. (R. 2337 Ln. 5-22).

During the construction of the Project, a dispute arose between Appellant and Appellee. On June 25, 2020, Appellant filed its original Complaint against Appellee, and then on September 22, 2020, it filed its Amended Complaint alleging claims for Breach of Contract, Fraudulent Lien, and Accounting. (R. 29-35). In July 2020, Appellee filed a separate Complaint against Appellant under a different case number, which was consolidated with the existing matter as a counterclaim.[1] On September 15, 2020, Appellee recorded a Claim of Lien against the Project and Appellant bonded the lien through Old Republic Surety ("Lien Transfer Bond Surety"). (R. 1876-1882). On June 24, 2021, Appellee amended its Counterclaim to add the Lien Transfer Bond Surety and asserted claims for Foreclosure of Lien, Breach of Contract, and Unjust Enrichment. (R. 400-479). As a result of Appellee recording its Claim of Lien, on October 15, 2020, Appellant was required to transfer the Claim of Lien to a Bond, which was provided by the Lien Transfer Bond Surety, as security pursuant to Fla. Stat. 713.24 ("Lien Transfer Bond"). (R. 1876-1882).

[1] The Appellee's Complaint was not made part of the Lower Court's record or the Record on Appeal.

During the pendency of the litigation, Appellant filed a Motion for Summary Judgment. (R. 494-506). In the Motion for Summary Judgment, Appellant requested that the trial court ("Lower Court"), review and interpret the terms of the Contract pursuant to Florida law, evaluate the express terms relating to the contractual limitation of General Conditions Costs in Section 4.1, and enter a partial judgment as a matter of law with respect to Appellee's entitlement to and maximum recovery of said General Conditions Costs. On December 17, 2021, the Lower Court entered its Order on Appellant's Motion for Summary Judgment, denying the Motion. (R. 558). One of the matters at issue in this Appeal is this Order on Motion for Summary Judgment ("Summary Judgment Order Under Review").

This case subsequently proceeded to a bench trial before the Lower Court on April 17-21, 2023, August 8-9, 2023, and February 14-15, 2024. The main subject of the dispute related to the terms of the Contract, the parties' actions, and interpretation of the Contract.

The Contract contained several particular and precise terms and obligations that the parties agreed would have to be explicitly followed given the nature of the property and the Project that was going to be constructed. Specifically, Section 4.1 of the Contract addresses the time frame and conditions for the date of commencement of Contractor's Work, and the

commencement of the Contract Time. The same section outlines the right of Appellee to mobilize, commence its work on the Project, and commence work on the FPL vault *prior* to the Date of Commencement, which the Contract defines as the "Early Work." (R. 1242).

This Section 4.1 limits Appellant's obligation to pay for the Early Work to the express limits set forth in that Section. (R. 1242). Section 4.1 states the Date of Commencement of the Project would not occur until the seven (7) Early Work conditions were met:

> § 4.1 The Contractor's Work shall commence and proceed upon the later of the following:
> 1) Signed &executed prime Contract between Owner and Contractor.
> 2) Proof of financing by Lender/Financial Institution.
> 3) Copy of "Builder's Risk" and/or "All Risk" Insurance certificate which includes Contractor as additional insured.
> 4) Copy of recorded Notice of Commencement by Owner.
> 5) Issuance of Main building permit.
> 6) Notice to Proceed with the Work.
> 7) Fully energized FPL vault.

Section 4.1 provides a limitation on Marker's entitlement to General Conditions Costs of only one (1) month while it was still performing the "Early Work":

> Contractor shall mobilize, commence its work on the Project, and commence work on the FPL vault prior to the Date of Commencement (the "Early Work"). For the Early Work only, in addition to the Cost of the Work Contractor shall be entitled to bill Owner for only one month of General Conditions Costs based on the Schedule of Values. In the event the Early Work is delayed because of delays caused by Florida Power & Light and such delay was not caused in whole or in part by the acts and/or omissions of Contractor, Contractor shall provide notice as required by the Contract Documents and shall be entitled to its extended general conditions costs in a sum not to exceed $82,000. No other compensation shall be due to Contractor as a result of delays or impacts associated with the Early Work.

The Contract did not prohibit Appellee from performing other work at the Project, but regardless of what work it performed, it was restricted to only

one (1) month of General Conditions Costs until it completed the "Early Work". (R. 2396, Ln. 7-12; R. 1242). One (1) month of General Conditions Costs is based upon the Schedule of Values attached to the Contract as Exhibit A, which identifies total General Conditions Costs of $1,239,160. Using this figure proportionately, Appellee was entitled to bill Appellant for only $88,511.00 as General Conditions Costs. (R. 2396, Ln. 7-12; R. 1242). Both parties to the Contract recognized the purpose of the one (1) month limitation and demonstrated this understanding by including language in the same Section to allow for a scenario where Appellee could be afforded additional General Conditions Costs in the event of delays caused by Florida Power & Light. (R. 2395, Ln. 7-20; R. 2410, Ln. 13-19; R.2458, Ln. 6-14; R. 1242). Appellant also hired an architect, Rinka, and a structural engineer, Sky Structures[2], to design this Project. (R. 2336, Ln. 11-17).

On November 15, 2019, Appellee mobilized and commenced with the Early Work on the Project, as described in Section 4.1 of the Contract. (R. 810, Ln. 16-18; R. 1242). Appellant subsequently discovered that Appellee had been improperly billing for its General Conditions Costs beyond that allowed by Section 4.1. (R. 2453, Ln. 20-25). On March 26, 2020, Appellant made demand upon Appellee for return of monies improperly billed and

[2] During the Early Work, Sky Structures was replaced by Jezerinac Group.

terminated Appellee for convenience, as provided under the terms and conditions of the Contract. (R. 2487, Ln. 18-19; R. 1716-1720).

At that time, Appellee had not completed the "Early Work", as defined by Article 4.1 of the Contract, and the seven (7) conditions which would trigger the Commencement of the Work at the Project (and the start of the Contract Time) entitling it to more than one (1) month of General Conditions Costs had not yet been achieved. (R. 1240-1337; R. 2433, Ln. 1-11; R. 2473, Ln. 11-13; R. 3126, Ln. 7-8). Only five (5) of the seven (7) required conditions were achieved by this time:

a. Condition #1: Signed and executed Contract – The Contract was executed by the Parties on November 12, 2019.
b. Condition #2: Proof of Financing – The Construction Loan Agreement had an effective date of January 29, 2020.
c. Condition #3: Builder's Risk Insurance – The Builder's Risk Insurance policy was issued with an effective date of January 31, 2020.
d. Condition #4: Notice of Commencement – the Notice of Commencement was recorded on February 12, 2020.
e. Condition #5: Main Building Permit – The Main Building Permit was issued by the City of Fort Lauderdale on January 28, 2020.

(R. 2487, Ln. 22-24; R 2440, Ln. 9).

Condition #6, a Notice to Proceed with the Work by Appellant, was *never* issued by Appellant prior to the termination of Appellee. (R. 2548, Ln. 2-5). The email communications between the parties, such as "let's build something amazing" and "let's go build a damn thing", did not constitute a Notice to Proceed with the Work. (R. 2366, Ln. 21-23; R. 2393, Ln. 4-18).

Condition #7, a Fully Energized FPL Vault, was not completed by Appellee prior to its termination at the Project. (R. 2387-2388 Ln. 23-4). The energization of the FPL Vault was critical to the Project schedule and the completion of the FPL vault was a necessity because the vertical construction of the building could not commence until it was completed and the overhead powerlines were removed and relocated underground for mandatory safety reasons. (R. 2473, Ln. 3-4; R. 3437-3438, Ln. 20-9; R. 3462-3464, Ln. 15-7).

Although there was a structural redesign that occurred during December 2019 into January 2020, that structural redesign never altered the express requirement that the FPL Vault be completed and energized because the exterior face of the south side of the building remained on the same plane with the power lines running along the street side of the Project, and the FPL Vault was required to be completed to relocate the power lines

underground. (R. 2458, Ln. 16-19; R. 3437-3438, Ln. 20-9; R. 3462-3464, Ln. 15-7). This was a life-safety issue (because workers and equipment could not build near power lines), and the majority of the building couldn't be built without relocating the power lines underground, which first required the completion of the FPL Vault. Yet, this Condition #7 never occurred during Appellee's tenure on the Project and was completed by a subsequent general contractor.

Article 1.1.1 of the Contract states: "The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification." (R. 1267). There was no Modification to the Contract to remove Conditions #6 or #7 from the Contract or change Appellee's obligations to perform those Conditions for the Date of Commencement of the Work to be triggered. (R. 2462, Ln. 9 – 2463, Ln. 10; R. 3061-3062 Ln. 1-25; R. 3062-3063, Ln.9-15).

The Date of Commencement of the Work never occurred and the Contract Time as defined in Article 4.2 and 4.3.1 of the Contract had not commenced. (R. 2385-2387, Ln. 11-13; R. 2472-2474, Ln.11-6; R. 3028, Ln. 6-10; R. 1242). Moreover, Appellee was still performing the "Early Work" at the Project when it was terminated. (R. 2487, Ln. 14-24; R.3048-

3049, Ln. 17-17). Accordingly, Appellee was bound by the terms of Article 4.1 of the Contract which limited Appellee to only being "entitled to bill Owner for one month of General Conditions Costs based on the Schedule of Values." (R. 12412).

However, Appellee improperly billed Appellant for five (5) months of General Conditions Costs on the Project.

a. Payment Application No. 1 – Appellee billed a full month of General Conditions Costs, even though the billing period was only two (2) weeks. (R. 1349-1374).
b. Payment Application No. 2 – Appellee billed a second full month of General Conditions Costs. (R. 1471-1515).
c. Payment Application No. 3 – Appellee billed a third full month of General Conditions Costs. (R. 1564-1584).
d. Payment Application No. 4 – Appellee billed a fourth full month of General Conditions Costs. (R. 1665-1685).
e. Payment Application No. 5 - Appellee billed a fifth full month of General Conditions Costs. (R. 1697-1715).

Appellee was only entitled to $88,511.00 of General Conditions Costs but billed Appellant $455,262.14 of General Conditions Costs. (R. 1727-1833; R. 2063-2123). In addition to being paid for all amounts billed by

Appellee's subcontractors and suppliers on the Project, Appellee was paid $285,960.00 by Appellant for its General Conditions Costs. (R. 2302-2303, Ln. 5-10; R. 1716-1720). As a result, Appellee was overpaid by Appellant for its General Conditions Costs. (R. 2302-2303, Ln. 5-10; R. 1716-1720).

Articles 12.1.7.2.5 and 12.3 of the Contract permit Appellant to withhold monies or reduce shortfalls "resulting from errors subsequently discovered by the Owner's auditors in such documentation" in connection with Payment Applications submitted by Appellee. (R. 1240-1337). Appellant demanded that Appellee refund the overpayment of General Conditions Costs, but Appellee refused to refund the overpayment. (R. 1716-1720; R. 2534, Ln. 9-25; R.2808-2809, Ln. 22-5; R. 3151-3152, Ln. 25-14; R. 3250-3252 Ln. 20-6).

Appellee was also paid $221,284 by Appellant as full payment for the Payment and Performance Bond Premium and Appellee paid $221,284 as the Bond Premium for the Payment and Performance Bonds at the Project. (R. 2402-2403, Ln. 17-24; R. 3650-3651, Ln. 23-1). Upon Appellee's termination, Appellant also requested that Appellee obtain a refund of the unused portion of the Bond Premium from its surety, Travelers ("P&P Bond Surety"). (R. 1716-1720; R. 2534, Ln. 9-25; R. 2808-2809, Ln. 22-5; R.3151-3152, Ln. 25-14; R.3250-3252, Ln 20-6). Appellant was entitled to receive

the unused portion of the Bond Premium back from Appellee. (R. 3152, Ln. 15-18; R. 3251, Ln. 5-8). Appellee failed and refused to obtain the requested refund of the unused portion of the Bond Premium. (R. 1716-1720; R. 2534, Ln. 9-25; R. 2808-2809, Ln. 22-5; R.3151-3152, Ln. 25-14; R.3250-3252, Ln 20-6).

On or about May 4, 2020, Appellee recorded a Claim of Lien on the Project in the amount of $1,111,109.58 (CFN 116486973) in the Official Records of Broward County, Florida ("Claim of Lien"). Trial Ex. 46. Appellant ensured that all the subcontractors and suppliers were fully paid for their work, services, and materials. (R. 2667, Ln. 6-15; R. 3267, Ln. 16-19).

As a result of Appellant's direct payment of any and all remaining amounts owed to the subcontractors and suppliers who were performing work on the project, on July 17, 2020, Appellee recorded a Partial Satisfaction of Lien, reducing the amount of the Claim of Lien to $701,154.52 ("Partial Release 1"). (R. 1870-1872). Then, on September 15, 2020, Appellee recorded another Partial Satisfaction of Lien, further reducing the amount of the Claim of Lien to $320,257.80 ("Partial Release 2"). (R. 1873-1875). Appellee testified at trial that the amount of its Claim of Lien remained at $320,257.80, which is the amount Appellee demanded in damages under its claim for foreclosure of its lien, which was transferred to

the Lien Transfer Bond, for which Appellant paid additional premium. (R. 1873-1875; R. 3159-3160, Ln. 6-20; R. 3163-3164, Ln. 18-3; R. 3250, Ln 1-9; R. 3498, Ln. 23-25). Appellee further testified that $290,730.62 of its Claim of Lien is for General Conditions Costs, including fees and insurance (R. 3405-3406, Ln. 24-8; R.3494, Ln. 22-25). Appellee testified that the remaining difference of $29,527.18 of its Claim of Lien was for amounts owed to an unknown number of subcontractors whom they were unable to identify. (R. 3582-3584, Ln. 2-23; R. 3726-3727, Ln. 2-22; R. 3728-3729, Ln 20-18; R. 3730-3733).

Appellee admitted at trial that no claims or demands for payment were made by any of its subcontractors when it recorded its Partial Release 2, no liens were filed by any of its subcontractors for non-payment for work performed at the Project, and no claims were made on its payment bond. (R. 3582-3584, Ln. 2-23; R. 3726-3727, Ln. 2-22; R. 3728-3729, Ln 20-18; R. 3730-3733). Appellee further admitted that it made no effort to contact its subcontractors to determine if the $29,527.18 was owed or which of its subcontractors were allegedly owed money, no discovery was conducted by Appellee to determine if its subcontractors had not been paid by Appellant, and no calls were made to confirm whether payment had been made to its

subcontractors. (R. 3582-3584, Ln. 2-23; R. 3726-3727, Ln. 2-22; R. 3728-3729, Ln 20-18; R. 3730-3733).

Appellee admitted at trial that Appellant had confirmed that it had paid all of the subcontractors who had performed work at the Project and that no outstanding payments were owed to any subcontractors. (R. 3582-3584, Ln. 2-23; R. 3726-3727, Ln. 2-22; R. 3728-3729, Ln 20-18; R. 3730-3733). Appellee's Claim of Lien contained amounts for Subcontract Change Orders that were signed after Appellee had been terminated and were for changes in the work which were never approved by Appellant. (R. 1721-1723; R. 1724-1726; R. 3245-3246, Ln.10-2; R.3501-3502, Ln.23-3). As a result of Appellee recording its Claim of Lien, Appellant incurred costs and fees directly associated with obtaining the Lien Transfer Bond at a sum higher than the amount sought by Appellee for damages at trial. (R. 1876-1882).

Six (6) months after the conclusion of the disjointed trial, which occurred over nine (9) days spread across eleven (11) months, the Lower Court entered its order of Final Judgment in this action. (R. 1111-1159). At issue in this appeal is the Lower Court's Summary Judgment Order Under Review and the Order of Final Judgment after the conclusion of the bench trial (the "Final Judgment Order Under Review"). (R. 558, 1111-1159).

SUMMARY OF ARGUMENT

The rulings of law and factual findings by the Lower Court in the Final Judgment Order Under Review were flawed and constituted legal error due to several key reasons. The Lower Court failed to properly apply Florida law regarding contract interpretation, ignoring clear and unambiguous terms in the Contract, particularly Article 4.1, which expressly limited Appellee's entitlement to General Conditions Costs during the "Early Work" stage. The Lower Court improperly reformed the contract by incorporating terms, conditions and context, based solely on Appellee's subjective interpretation, but were not part of the original agreement, rendering Section 4.1 of the Contract meaningless. This reformation of the Contract, which was not requested by Appellee prior to or during the trial, violated established principles of Florida law relating to the obligation of a court to uphold and apply clear and unambiguous contract terms since no evidence was presented at trial that a mutual mistake occurred and no clear and convincing evidence that a reformation of the Contract was requested or warranted.

In the Final Judgment Order Under Review, the Lower Court failed to properly consider or apply two significant provisions in the Contract, including the "No Oral Modification" and "Non-Waiver" clauses, which explicitly required any modifications to be in writing and signed by both

parties. Instead, the Lower Court rewrote, altered, and modified the terms of the Contract, and substituted her judgment for that of the parties in order to relieve Appellee from an alleged hardship of an improvident bargain. The Lower Court did not ever include any finding in the Final Judgment Order Under Review that Appellee obtained a written modification or waiver of its obligations to perform the requirements of Section 4.1 of the Contract and Appellee repeatedly admitted in trial that no written waivers or modifications existed. The ruling in the Final Judgment Order Under Review that an exception existed was erroneous because it disregarded Florida law which required that Appellee both plead and prove the requirements necessary to avoid the express provision in the Contract that prohibited oral modifications or waivers. Additionally, nothing in the Final Judgment Order Under Review demonstrated that Appellee ever provided new consideration for any oral modification, which fundamentally changed the Contract terms.

The Lower Court further erroneously relied on extrinsic parol evidence in multiple instances to change the plain meaning of the Contract's unambiguous written terms. First, the Lower Court improperly relied on Appellee's subjective opinion of its "understanding" of the Contract terms and obligations, which directly contradicted the Contract's written terms. Second, the Lower Court incorrectly imposed and relied upon her own personal

subjective belief of a non-existent “industry standard” to replace the express Contract terms selected and agreed to by the parties. Furthermore, the Lower Court not only failed to disregard evidence she had deemed inadmissible on multiple occasions during the trial but expressly referred to and relied upon that inadmissible evidence in the Final Judgment Order Under Review as a primary basis supporting her finding in favor Appellee. This reliance on parol evidence to change the plain meaning set forth in the Contract was erroneous since the Lower Court never performed an analysis or determined in the Final Judgment Order Under Review that any of the Contract terms were legally ambiguous.

Additionally, there were several errors made by the Lower Court in its Final Judgment Order Under Review in relation to the misinterpretation and misstatement of the factual witness testimony presented at trial. Despite the testimony from multiple witnesses, which the Lower Court deemed credible, that confirmed that the FPL Vault was always a Critical Path item necessary for the vertical construction of the project, the Lower Court disregarded this competent and credible testimony and instead solely relied upon Appellee’s testimony, leading to an erroneous and inaccurate finding in the Final Judgment Order Under Review that the FPL Vault was no longer on the Critical Path, misunderstanding its essential role in the project.

The Lower Court improperly interchanged and misstated the terms "Early Work" and "Early Start", misinterpreting these terms in the Contact and the construction Schedule. The Lower Court improperly ignored substantial and competent evidence differentiating the Contract terms and instead chose to use the unrelated headings found in the Schedule to improperly and inaccurate define the term “Early Work” and its relationship with the occurrence of the Commencement Date in the Contract.

Furthermore, despite uncontroverted evidence presented at trial, an unequivocal acknowledgement by Appellee that Appellant was entitled to an award in the amount of the overpayment of the Bond premium, and the Lower Court's own findings in the Final Judgment Order Under Review, the Lower Court failed to enter a ruling and judgment in Appellant's favor on its claim for the return of the proportional amount of the Performance Bond premium that was overpaid to Appellee. This ruling by the Lower Court is fundamental error and Appellant is entitled to an award in the amount of the refund of the proportional amount of the Bond premium.

Finally, the Lower Court failed to provide a legal basis for previously denying Appellant's Motion for Summary Judgment, in violation of Florida Rule of Civil Procedure 1.510(a) and its mandatory requirement that the court must state the reasons for its decision with enough specificity to provide

useful guidance to the parties and, if necessary, to allow for appellate review. Similar to the Final Judgment Order Under Review, the Trial Court did not make any legal finding or ruling in the Summary Judgment Order Under Review that the Contract terms were ambiguous and failed to properly apply Florida law.

STANDARD OF REVIEW

This Court ordinarily reviews a trial court's interpretation of a contract under the de novo standard. *See Klinow v. Island Ct. at Boca W. Prop. Owners' Ass'n, 64* So. 3d 177, 180 (Fla. 4th DCA 2011). However, "mixed questions of fact and law require the application of two different standards of review. The factual findings must be supported by competent, substantial evidence, while legal findings are reviewed de novo." *Id*. (internal citation omitted); *see also Greenberg v. Bekins of S. Fla*., 337 So. 3d 372, 375 (Fla. 4th DCA 2022). "When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence. ... However, where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is de novo." *Jasser v. Saadeh*, 91 So. 3d 883, 884 (Fla. 4th DCA 2012); *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008).

ARGUMENT

I. LOWER COURT FAILED TO PROPERLY APPLY FLORIDA LAW ON THE CONSTRUCTION OF CONTRACTS

The Lower Court in this case failed to properly apply Florida law relating to the construction of contracts and failed to consider key provisions of the Contract in the Final Judgment Order Under Review. One of the main issues of law in this case was the interpretation of the terms and provisions of the subject Contract. The interpretation of a contract is a question of law to be decided by the court. *DEC Electric, Inc. v. Raphael Constr. Corp*., 558 So. 2d 427 (Fla. 1990). Florida courts must give effect to the plain language of the contract when that language is clear and unambiguous. *Homes & Land Affiliates, LLC v. Homes & Loans Magazine, LLC*, 598 F. Supp. 2d 1248, 1269 (M.D. Fla. 2009). Words and phrases in a contract should be given their common and ordinary meanings absent specific contractual definitions or if the fact finder decides that the parties intended the words to have a special meaning. *Murley v. Wiedamann*, 25 So. 3d 27, 29 (Fla. 2d DCA 2009).

Courts are required to interpret contracts to give effect to all provisions in such a way that gives reasonable meaning to all provisions and to avoid an absurd result or render a provision meaningless. *Herrington v. Certain Underwriters at Lloyd's London*, 342 So. 3d 767 (Fla. 4th DCA 2022); *see*

also Tita v. Tita, 334 So. 3d 646 (Fla. 4th DCA 2022). "An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless, or inexplicable." *Id*. at 650; *PNC Bank, N.A. v. Progressive Emp. Servs. II*, 55 So. 3d 655, 658 (Fla. 4th DCA 2011) ("[An] interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable." *Premier Ins. Co. v. Adams*, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994)). A court must construe a contract in a manner that accords with reason and probability and avoid an absurd construction. *F.H. Paschen, S.N. Nielsen & Associates LLC v. B&B Site Development, Inc*., 311 So. 3d 39 (Fla. 4th DCA 2021); *Katz v. Katz*, 666 So. 2d 1025, 1028 (Fla. 4th DCA 1996).

"A contract should be read as a whole." *Discover Prop. & Cas. Ins. Co. v. Beach Cars of W. Palm, Inc*., 929 So. 2d 729, 732 (Fla. 4th DCA 2006); *F.H. Paschen*, 311 So. 3d at 44. Contractual ambiguity does not exist merely because the language can be interpreted in more than one way, and courts should not permit absurd interpretations of plain language. *Am. Med. Int'l, Inc. v. Scheller*, 462 So. 2d 1, 7 (Fla. 1984).

For nearly a century, the law in Florida has been well-settled, "competent parties shall have the utmost liberty of contracting and their

agreements voluntarily and fairly made will be upheld and sustained by the courts.... And, the fact that one of the parties to a contract made a hard bargain will not avoid a contract." *Pierce v. Isaac*, 184 So. 509, 513 (1938). The words of a contract matter and the terms in a contract have meaning.

Furthermore, under Florida law, parties may contractually limit damages. *Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 151 (Fla. 4th DCA 2005); *see also, Amoco Oil Co. v. Gomez*, 125 F. Supp. 2d 492, 511 (S.D. Fla. 2000) ("Florida courts allow parties to limit remedies contractually, and if such provisions are made, a court may not award greater compensatory damages").

a. Improper Reformation of the Contract Provisions

In this case, clear, concise and uncontroverted evidence was presented to the Lower Court of the contractual terms contained within Article 4.1 of the Contract which expressly limited Appellee's entitlement to General Conditions Costs during the "Early Work" stage of the Project. Article 4.1 of the Contract addressed the time frame and conditions for commencement of Appellee's Work and the Contract Time. The same section outlined the right of Appellee to mobilize, commence its work on the Project, and commence work on the FPL vault prior to the Date of Commencement, which the Contract defined as the "Early Work." The Lower Court was further provided

evidence demonstrating that Article 4.1 limited Appellant's obligation to pay General Conditions Costs for the Early Work to the express constraints set forth in that provision.

The plain language of Section 4.1 of the Contract presented at trial expressly established both a set of conditions that must be met and a clear and unambiguous limitation for Appellee's entitlement to charge for General Conditions Costs. The purpose of the limitation with respect to the Early Work was to create a cap on Appellant's liability to pay for General Conditions Costs during that Early Work period, but to otherwise allow the main construction work to progress at any pace Appellee desired until all of the conditions identified in Section 4.1 had been satisfied, at which time the Early Work phase would end and Appellee would proceed beyond the Early Work phase.

Rather than accepting the express and plain language of the Contract that was, albeit, unique and situationally specific for this particular construction project, the Lower Court improperly attempted to incorporate different contractual terms and conditions that the Lower Court felt were more appropriate as "well-established industry practices". The Lower Court failed to accept the clear and unambiguous language that the sophisticated parties purposefully chose to include in the Contract using words and

phrases that were easy to understand, and instead, the Lower Court elected to redraft and reform the Contract to have different terms that would render most of Section 4.1 meaningless. If the parties had chosen to create and enter a contract that did not include any limitation on Appellee's right to General Conditions or set any conditions precedent to Appellee's entitlement to more than one (1) month of General Conditions, they would have written the Contract to reflect those terms. Instead of following Florida law on the interpretation of contracts, the Lower Court improperly changed fundamental terms of the Contract simply because she thought they were "complicated" and "differed from most project contracts".

In this case, the Lower Court essentially engaged in an improper reformation of the Contract to rewrite it to eliminate Section 4.1 and eliminate the limitation on Appellee's right to General Conditions before the completion of the Early Work conditions precedent in order to make it less "complicated" and less different than other project contracts. However, that was not the parties' intent when they negotiated and agreed to the express and unequivocal terms of this particular, unique, and project specific Contract.

Appellee never asserted any claim in equity for reformation and when asked during the trial whether Appellee was seeking a reformation of the

contract, Appellee unequivocally testified that Appellee was NOT asking the Lower Court to reform or rewrite the Contract:

> Q. Are you asking this Court for reformation?
> A. I'm sorry?
> Q. A reformation, which is you are asking the Court to rewrite this contract?
> A. No, I'm not.

(R. 3381, Ln 22 - 3382, Ln. 1).

Moreover, even if a claim for reformation was presented by Appellee, due to the strong presumption that a written agreement accurately expresses the parties' intent, the party seeking reformation based on a mutual mistake must prove its case by clear and convincing evidence. *BrandsMart U.S.A. of W. Palm Beach, Inc. v. DR Lakes, Inc.*, 901 So. 2d 1004, 1005–06 (Fla. 4th DCA 2005; *see also Resort of Indian Spring, Inc. v. Indian Spring Country Club, Inc*., 747 So. 2d 974, 976–77 (Fla. 4th DCA 1999) (A party must prove by clear and convincing evidence that a mutual mistake occurred to overcome the strong presumption that a contract expresses the intent of the parties.) “A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument.” *Id.* at 1066; *Circle Mortgage Corp. v. Kline*, 645 So. 2d 75, 78 (Fla. 4th DCA 1994). In this case absolutely no evidence was presented at trial that a mutual mistake occurred, much less clear and

convincing evidence that a reformation of the Contract was being requested by Appellee.

The Lower Court's *sua sponte* reformation of the Contract rendered Section 4.1 meaningless. This violated "a cardinal principle of contract interpretation in that the contract must be interpreted in a manner that does not render any provision of the contract meaningless." *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 755 (Fla. 3d DCA 2020).

b. Failed to Cite to or Consider Key Contract Provisions

The Lower Court further failed to apply Florida law on the construction of contracts by failing to consider the whole Contract. It is a manifest principle under Florida law that "a contract should be read as a whole." *Talbott v. First Bank Fla*., FSB, 59 So. 3d 243, 245 (Fla. 4th DCA 2011); *Hillcrest Country Club Ltd. P'ship v. Zyscovich, Inc*., 288 So. 3d 1265, 1269 (Fla. 4th DCA 2020). In this case, the Lower Court did not properly apply or even consider in the Final Judgment Order Under Review two significant provisions in the Contract.

i. No Oral Modification

As discussed above, parties are entitled to choose the terms and conditions of their contracts and courts are required to give effect to those clear and unequivocal terms. "Contracts are voluntary undertakings, and

contracting parties are free to bargain for—and specify—the terms and conditions of their agreement. That freedom is indeed a constitutionally protected right." *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014).

Section 1.1.1 of the Contract expressly defines a Modification to the Contract, stating that "[a] Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect." (R. 1267). Section 1.1.2 further states that "The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. (R. 1267). The Contract may be amended or modified only by a Modification." (R. 1267). Accordingly, the Contract can only be modified by one of the four methods provided for in Section 1.1.1 and no oral modifications are permitted. (R. 1267).

While the Lower Court briefly acknowledged in the Final Judgment Order Under Review that the Contract requires Modifications to be in writing, the Lower Court promptly digressed into ruling that an oral Modification to the Contract occurred in direct contravention of the express terms of the Contract and outside of the defenses that were pled by Appellee. The Lower

Court acknowledged in the Final Judgment Order Under Review that the evidence and testimony all indicated that the removal of the FPL Vault from the Project Critical path was not contemplated by the parties at the time they entered the Contract. It is quite common for circumstances to arise during the construction of a project which would require parties to modify the terms of their contract, which is why construction contracts, including the Contract at issue, contain express and detailed provisions describing how Modifications to the Contract can be performed by the parties. All of the witnesses undisputedly agreed that there were no written or signed Modifications or waivers to the Contract and there was no evidence presented to the Lower Court during the trial by either party that a Modification to the Contract ever occurred.

When contracting parties elect to adopt a term or condition, including one addressing the question of modification, it is not the province of a court to second guess the wisdom of their bargain, or to relieve either party from the burden of that bargain by rewriting the document. *Okeechobee Resorts,* 145 So. 3d at 993; *see also Pol v. Pol*, 705 So. 2d 51, 53 (Fla. 3d DCA 1997) ("[A] court cannot rewrite the clear and unambiguous terms of a voluntary contract."). "Courts may not rewrite, alter, or add to the terms of a written agreement between the parties and may not substitute their judgment for

that of the parties in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So.2d 29, 30–31 (Fla. 3d DCA 1973). "Rather, it is a court's duty to enforce the contract as plainly written." *Okeechobee Resorts*, 145 So. 3d at 993. "[W]hen a contract plainly provides that any modification must be in writing, all claims—however labeled—founded upon an alleged oral modification should generally be disposed of as a matter of law… and courts should in most cases do no more than enforce the contract as written." *Id*. "Where a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the matter, the court should not, under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted." *Gulf Cities Gas Corporation v. Tangelo Park Service Company*, 253 So. 2d 744 (Fla. 4th DCA 1971); *Jacobs v. Petrino*, 351 So. 2d 1036, 1039 (Fla. 4th DCA 1976).

"Modifications of contracts must be supported by new consideration as well as the consent of both parties. Moreover, a party who alleges a contract has been modified has the burden of proving it." *Newkirk Constr. Corp. v. Gulf Cnty*., 366 So. 2d 813, 815 (Fla. 1st DCA 1979). In order to prove a modification, a party must provide evidence of new consideration for the

modification. *See Id.*; *Wilson v. Odom*, 215 So. 2d 37, 39 (Fla. 1st DCA 1968); *Excess Risk Underwriters, Inc. v. Lafayette Life Ins. Co*., 328 F. Supp. 2d 1319, 1341 (S.D. Fla. 2004). Modifications of contracts must be supported by new consideration and the same money cannot act as consideration for both the original contract and the modification. *World-Class Talent Experience, Inc. v. Giordano*, 293 So. 3d 547, 549 (Fla. 4th DCA 2020).

In this case, the Lower Court has improperly rewritten, altered, and modified the terms of the written Contract between the parties and substituted her judgment for that of the parties in order to relieve Appellee from an alleged hardship of an improvident bargain. In the Final Judgment Order Under Review, the Lower Court astoundingly found that an "oral" Modification occurred and the requirement that the "FPL Vault was mutually eliminated as a Critical Path Project line item" and "that Condition seven (7), the energized FPL Vault, became moot". (R. 1129). The Lower Court's finding was in direct contravention of both Florida law, the testimony presented at trial, and the clear and unambiguous terms of Section 4.1 of the Contract. Furthermore, the Lower Court's holding in the Final Judgment Order Under Review that the "FPL Vault was mutually eliminated as a Critical Path Project line item" and "that Condition seven (7), the energized FPL

Vault, became moot" directly violates the Modification provision of the Contract which prohibited oral modifications as well as Florida law which requires new consideration for a modification. (R. 1149).

Additionally, when quoting this Court holding in *Okeechobee Resorts* in the Final Judgment Order Under Review, the Lower Court intentionally edited out a crucial part of the requirements for the application of the limited exception to the well-settled rule requiring that courts enforce contracts as written provided under *Professional Insurance Corp. v. Cahill*, 90 So. 2d 916, 918 (Fla.1956). This Court specifically held in *Okeechobee Resorts* that in order to apply the limited exception in *Cahill*, it "requires that **a plaintiff plead** (and again eventually prove): (a) that the parties agreed upon and accepted the oral modification (i.e., mutual assent); and (b) that both parties (or at least the party seeking to enforce the amendment) performed consistent with the terms of the alleged oral modification (not merely consistent with their obligations under the original contract); and (c) that due to plaintiff's performance under the contract as amended the defendant received and accepted a benefit that it otherwise was not entitled to under the original contract (i.e., independent consideration).[3] Absent such a showing, the

[3] The Lower Court used Appellant's exact language from its Proposed Findings of Fact and Conclusions of Law in the Order Under Review but edited out this crucial element from the Order. (R. 2302).

parties will be held to the bargain as negotiated and memorialized in their written agreement." *Okeechobee Resorts*, 145 So. 3d 995. (Emphasis added.)[4] In this case, Appellee never pleaded in either its Amended Complaint or in its Affirmative Defenses that an oral Modification occurred, much less pleaded all three of the requirements necessary to avoid the express provision in the Contract that prohibits oral Modifications.

Furthermore, the Lower Court fails to include any finding in the Final Judgment Order Under Review that there was new consideration provided by Appellees for the supposed oral modification to the Contract. In fact, the existence or non-existence of consideration is never even mentioned by the Lower Court in its Final Judgment Order Under Review. No evidence or testimony was ever presented to the Lower Court by any party to this action relating to new consideration being provided by Appellee to Appellant in connection with a modification to the Contract terms.

Florida courts have made it explicitly clear that the party who alleges that a contract has been modified has the burden of proving that new consideration was provided for that modification. Nothing in either the trial

[4] The Lower Court's reliance on *St. Joe Corporation v. McIver*, 875 So. 2d 375 (Fla. 2004), is wholly improper and misplaced since that case involved parties making an oral modification to an oral contract that contained neither a no oral modifications clause nor an anti-waiver clause.

record or the Lower Court's Final Judgment Order Under Review demonstrates that Appellee ever provided new consideration for the oral modification the Lower Court ruled took place that fundamentally changed the Contract terms. While Appellee's witnesses provided their opinions on what Appellee's "understanding" was regarding its obligations under the Contract after it had been executed, these alleged "understandings", which differed from the express terms of the Contract, are not part of the Contract and do not constitute an oral Modification.

As discussed earlier, the clear language of the Contract does not create any prohibition or limitation that would restrict Appellee to only be permitted to perform the Early Work on the Project or preclude Appellee from performing any other work it wanted to at the Project to facilitate its needs, get ahead of its own internal construction schedule, to be ahead of the Contract Time once it commenced, or mitigate any risk of liquidated damages. But, regardless of what work it performed, it was restricted to only one (1) month of General Conditions Costs until the seven (7) conditions precedent required of the Early Work were achieved.

ii. Anti-Waiver

In addition to the provisions precluding any oral modification, the Contract contained an express and unambiguous anti-waiver provision that

the Lower Court failed to consider in the Final Judgment Order Under Review. Section 15.7.8 of the Contract states, “Neither course of dealing, nor the failure to exercise, or the delay in exercising, any right, power or privilege hereunder, shall operate as a waiver thereof. A waiver shall not be effective unless it is in writing and signed by the Party against whom the waiver is being enforced.” (R. 1257).

In *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519, 521-522 (Fla. 4th DCA 1991) this Court held that the trial court's reading of the parties’ written contract was contrary to its unambiguous meaning and implicitly disregarded the anti-waiver clause of the contract. This Court reversed the trial court's refusal to give effect to an unambiguous anti-waiver clause contained in the parties' written contract and held that under the anti-waiver provision of the agreement certain provisions could not have been waived unless there was a writing signed by the party against whom the waiver was asserted. *Id*. Neither parties’ course of dealings nor written amendments of contract resulted in a waiver of the contract’s other provisions since it contained specific anti-waiver provision pursuant to which there had to be writing signed by party against whom waiver was asserted. *Id.* at 521.

Non-waiver provisions that specify that certain types of behavior will not constitute a waiver will be upheld and enforced. *W. World, Inc. v.*

Dansby, 603 So. 2d 597, 601 (Fla. 1st DCA 1992). Florida courts have recognized that non-waiver clauses will be enforced where the non-waiver clause specifically states that certain conduct will not constitute a waiver. *Tim Hortons USA, Inc. v. Singh*, 2017 WL 4837552, at *11 (S.D. Fla. 2017); *see also Bradley v. Sanchez*, 943 So. 2d 218, 222 (Fla. 3d DCA 2006) (finding a contract provision that provided "[m]odifications of this Contract will not be binding unless in writing, signed and delivered by the party to be bound" was language that prevented an oral waiver or modification to the written contract).

In this case, there was no evidence presented at the trial and the Lower Court did not ever include any finding in the Final Judgment Order Under Review that Appellee obtained a written waiver of its obligations to perform the requirements of Section 4.1 of the Contract or a written waiver of the restriction limiting Appellee to only one (1) month of General Conditions until the Early Work was completed that was signed by Appellant. (R. 1242). Contrary to the Lower Court's ruling in the Final Judgment Order Under Review, Florida law does not even permit a parties' dealings to act as a waiver of these provisions of the Contract since the Contract contained a specific non-waiver provision that prohibit such waivers unless it is in writing

and signed by the party against whom the waiver is being enforced, which would be Appellant.

Additionally, the third requirement to invoke the limited exception to a no oral modification clause created under *Cahill* (cited above) is that the opposing party receive and accepted the benefit that it otherwise would not be entitled to under the original contract. *Okeechobee Resorts*, 145 So. 3d at 993. The parties' inclusion of a non-waiver or anti-waiver provision in the Contract expressly defeats this third requirement. (R. 1257). Non-waiver provisions provide that a party may accept benefits of the other party's failure to perform a covenant or condition of a contract without waiving their rights under the contract. *Raimondi v. I.T. Chips, Inc*., 480 So. 2d 240, 241 (Fla. 4th DCA 1985). The Court's failure to consider the anti-waiver provision is a failure to give credence to the whole Contract and contrary to Florida law.

II. LOWER COURT IMPROPERLY RELIED UPON PAROL EVIDENCE

If a contract provision is clear and unambiguous, a court may not consider extrinsic or parol evidence to change the plain meaning set forth in the contract. *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. 2d DCA 2012); *Jenkins v. Eckerd Corp*., 913 So. 2d 43, 52 (Fla. 1st DCA 2005). The operation of the parol evidence rule encourages parties to

embody their complete agreement in a written contract and fosters reliance upon the written contract. *Id.* at 1200.

a. Improperly Relied Upon Appellee's Different "Understanding"

In the Final Judgment Order Under Review, the Lower Court cited and referred to testimony by Appellee's witnesses wherein they provided their opinions on what Appellee's "understanding" was regarding its obligations under the Contract after it had been executed. (R.1129 & R.1130). During their testimony, Appellee's witnesses repeatedly stated what their "understanding" was regarding Appellee's obligations under the Contract, even though these alleged "understandings" completely differed from the express terms and obligations Appellee agreed to in the Contract. (R. 3020, Ln 9-25; R. 3021, Ln. 11 - 3022, Ln 13, R. 3033, Ln. 13 – 3035, Ln. 5; R. 3073, Ln. 5 – 3074, Ln. 19; R. 3106, Ln. 22 – 3107, Ln. 10; R. 3211, Ln. 14 – 3212, Ln. 4; R. 3214, Ln. 21 – 3215, Ln. 4; R. 3347, Ln 17 – 3348, Ln 8; R. 3363, Ln 5-21; R. 3379, Ln 8 – 3381, Ln 16; R. 3389, Ln 20 – 3392, Ln 2).

This testimony and evidence of Appellee's "understanding" is barred by the parol evidence rule. In *Knabb v. Reconstruction Finance Corp*., 197 So. 707, 715 (Fla. 1940), the Florida Supreme Court recognized that "[i]t is well settled that parol or extrinsic testimony cannot be received to change, add to or subtract from the terms of a valid written contract." *See also Carlon,*

Inc. v. Southland Diversified Co., 381 So. 2d 291, 293 (Fla. 4th DCA 1980) ("This rule serves as a shield to protect a valid, complete and unambiguous written instrument from any verbal assault that would contradict, add to, or subtract from it, or affect its construction. Any testimony or other evidence that the Parties' agreement was anything other than what is unambiguously set forth in the Contract will be disregarded.").

Furthermore, a trial court should not admit parol evidence until it first determines that the terms of a contract are ambiguous. *Sunrise of Coral Gables Propco, LLC v. Current Builders, Inc*., 2023 WL 6638050, at *5 (S.D. Fla. 2023); *Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009). A court is not permitted to turn to parol evidence before issuing a finding that a contract term is ambiguous, and if a court does expressly find the term is ambiguous, it must limit itself to defining the ambiguous term instead of effectively removing it. *Downs v. U.S. Army Corps of Engineers*, 333 F. App'x 403, 411 (11th Cir. 2009). Ambiguous contract terms do not obviate contract duties and it is improper for a court to conflate an ambiguity relating to a party's contractual duties with whether the party had a duty at all. *Id.* Parol evidence is not admissible to add new terms to a contract - it can only be used to explain ambiguous terms. *See Friedman v. Va. Metal Prods. Corp.*, 56 So. 2d 515, 517 (Fla.1952); *Langford v. Paravant, Inc*., 912 So. 2d

359, 362 (Fla. 5th DCA 2005); *E. Portland Cement Corp. v. F.L. Smidth Inc*., 2009 WL 3583603, at *4 (M.D. Fla. 2009).

In this case, the Lower Court never performed an analysis or determined that any of the Contract terms were legally ambiguous. In fact, the only reference made by the Lower Court is in a footnote, where the Lower Court made the conclusory statement that "the suggestion that the Contract is clear and unambiguous is contrary to the substantial compelling evidence and testimony". (R.1158, Order FN 87) Instead, the Lower Court stated in the Final Judgment Order Under Review that the limitation cap on Appellee's right to General Conditions before completing the Early Work was "not clear". The Lower Court based her conclusion that the limitation cap in Article 4.1 was "not clear" on the fact that the parties agreed it was a different and unique type of provision and that Appellee testified that he felt it was "confusing".

This does not constitute a legal finding that a contract term was ambiguous and does not permit the Lower Court to use parol evidence of the "understanding" of Appellee to convert, modify and redefine the terms of Article 4.1.

b. Improperly Relied Upon Non-Existent "Industry Standard"

In the Final Judgment Order Under Review, the Lower Court also found that the cap limiting Appellee to only one (1) month of General Conditions until it completed the seven (7) Early Work conditions precedent under Article 4.1 was “not clear” because it was not “common” and did not comport with “well-established industry practices”. The Lower Court even went so far as to make a unilaterally unsupported conclusion in a footnote that “Industry practice is for General Contractors to be paid based upon the percentage of the Project completed”, despite not having a shred of testimony or evidence presented at trial on what “industry standards” would be for the payment of General Contractors.

Not only does no such “industry standard” exist,[5] the Lower Court’s decision to replace the express terms selected and agreed to by the parties when they drafted and entered into the Contract and impose her own idea of an “industry standard” in its place is directly contrary to Florida law. The Lower Court not only improperly used parol evidence of Appellee’s “understanding” to change and redefine the terms of Article 4.1, but then took

[5] The billing and payment framework for General Contractors is as varied as blades of grass, depending on whether a project is based upon a lump sum, cost plus, time and materials, guaranteed maximum price, unit pricing, or any number of unique project specific circumstances, all individually determined and negotiated by the parties at the time the enter into a contract together.

it a step further to eliminate the limitation terms of Article 4.1 as agreed to by the parties and insert her own whole new “industry standard” provision that Appellee was to be paid solely based upon the percentage of the Project that had been completed. Such a finding leads to bad precedence for any contracting parties.

III. LOWER COURT IMPROPERLY RELIED UPON EXCLUDED EVIDENCE

During the trial, Appellee attempted several times to introduce an e-mail document from Mr. John Matheson to Mr. Grey Marker, dated November 11, 2019, that Appellee purportedly wanted to use as evidence to support its contention that the e-mail constituted a Notice to Proceed that satisfied Condition #6 of the conditions precedent set forth in Article 4.1 of the Contract. However, Appellee had not previously disclosed this e-mail on its exhibit list. The Lower Court held that since Appellee had violated the pretrial order specifying that all documents a party wished to admit at the trial had to be disclosed on the party’s exhibit list in advance of the trial, that the e-mail exhibit was excluded and it was not admitted as evidence at the trial (“Excluded E-mail”).

> “MS. SLYE: Your Honor's court order, pre-trial order was pretty specific about having exhibit lists, and it is not on their exhibit list. We have objected to it. We've objected to it consistently during this trial, and we continue to have that same objection. It is not on their exhibit list.

> THE COURT: Okay. So go ahead and tell me how you would be prejudiced, Mr. Soto.
> MR. SOTO: By not being allowed to enter it?
> THE COURT: Yeah.
> MR. SOTO: Your Honor, we believe, and my client believes, this is the notice to proceed on the job from F3, a company with the contractor.
> ...
> THE COURT: Okay. Mr. Soto, I'm not going to allow it. It wasn't disclosed, and the trial order is very, very, very clear, and says anything that's not properly listed, not only listed, but not properly and fully listed, will not be allowed. Go ahead. Go ahead and get whatever you want on the record.
> ...
> MR. SOTO: Judge, I said what I said. You ruled. That's the end of it."
> (R. 3415).

Appellee attempted several more times during the course of the trial to use this Excluded E-mail, over the express objections of Appellant, as evidence during the questioning of several different witnesses. During one such attempt by Appellee while Mr. Behnke was testifying, the Lower Court explicitly stated:

> "Let me just be very clear from a legal standpoint. **This is not a notice to proceed, okay?** So from that standpoint, if that's why you're trying to get this in, the contract is very clear about a notice to proceed. It doesn't say an email that says build us a marina, okay? And we have testimony over why he used that term before. It's a term Stephanie Toothaker used. It's a term that, you know, he was trying to team build. Your client is very obviously a sales guy, and he was trying to build the team." (Emphasis added.)

(R. 2564).

At no time during the trial did the Lower Court ever change her ruling or admit the Excluded E-mail into evidence. Since it was explicitly excluded and not allowed into evidence at the trial by the Lower Court, the Excluded E-mail was also not ever made part of the Record on Appeal.

Yet astoundingly, in the Final Judgment Order Under Review the Lower Court almost exclusively based her finding that Appellee had satisfied Condition #6 of the conditions precedent in Article 4.1 and was therefore entitled to a judgment in its favor. The Lower Court held in the Final Judgment Order Under Review that the Excluded E-mail constituted "substantial competent evidence" and that "the clear and unambiguous meaning of and intent of Matheson's email [the Excluded E-mail] was for Marker to proceed with the Project."

When an appellate court is reviewing a bench trial, it should presume that the trial court judge rested its judgment on admissible evidence and disregarded inadmissible evidence, unless the record demonstrates that the presumption is rebutted through a specific finding of admissibility or another statement that demonstrates the trial court relied on the inadmissible evidence. *Petion v. State*, 48 So. 3d 726, 737 (Fla. 2010); *see also Parks v. Zitnik*, 453 So. 2d 434, 437 (Fla. 2d DCA 1984)(A trial judge is presumed to rest his judgment on admissible evidence and to disregard inadmissible

evidence, but if the specific findings by the trial court demonstrate that it failed to disregard inadmissible evidence, the case can be remanded); *State v. Arroyo*, 422 So. 2d 50, 53 (Fla. 3d DCA 1982), *disapproved of on other grounds by Petion v. State*, 48 So. 3d 726 (Fla. 2010)(On a motion to suppress the trial court heard inadmissible evidence and later referred to that inadmissible evidence in the written order, demonstrating the trial court's reliance on that inadmissible evidence, which was deemed to be error warranting a reversal by the appellate court). In this case, the presumption that the Lower Court disregarded inadmissible evidence is directly contradicted by the Lower Court's own reference to and direct reliance upon this evidence the Lower Court repeatedly determined was inadmissible. That same inadmissible evidence ended up being the sine qua non of the Lower Court's decision in the Final Judgment Order Under Review, which was not harmless error.

IV. LOWER COURT MISSTATED, MISQUOTED, AND ALTERED THE FACTUAL TESTIMONY OF WITNESSES

In several instances, the testimony cited to in the Final Judgment Order Under Review and relied upon by the Lower Court in making her ruling is strikingly different than the actual testimony in the trial transcripts.

a. Improperly Concluded the FPL Vault Was No Longer On the Critical Path

In the Final Judgment Order Under Review, the Lower Court based her ruling that Appellee had met the Condition #7 of conditions precedent set forth in Article 4.1 on the erroneous concept that the FPL Vault had "ceased to be part of the Critical Path" and the condition was no longer needed because it "became moot".

The Lower Court misunderstood what a Critical Path was and the role of a project's Critical Path. A project's Critical Path is the longest path from the start to the end of the project needed to perform all the essential tasks to the project's completion. In other words, the longest sequence of scheduled activities determines the project's minimum duration. A project's Critical Path is calculated when the Contract Time has started pursuant to a commencement date. While projections can be made in advance in a schedule to assist with the determination of the sequencing of activities, the actual Critical Path of a project does not ensue until the commencement date occurs and the Contract Time begins to run.

In this case, the Lower Court failed to understand that the contractual requirements of Article 4.1 that were mandated to be completed before the Commencement Date would occur were not the same or reliant upon the Critical Path of the Project. The competent and substantial evidence

presented at trial clearly demonstrated that the field work adaptations by Appellee to avoiding the overhead power lines which enabled them to perform other work did not in any way negate the requirement that the FPL Vault be completed and energized. The testimony confirmed that while Appellee was able to perform some other tasks by going over and around the overhead lines, Appellee would have never been able to take the construction vertical unless and until the FPL Vault was energized. As a result, the construction and energization of the FPL Vault remained on the Critical Path of the Project because neither Appellee nor the replacement contractor would have ever been able to commence the vertical construction of the Project without its completion and energization due to the safety and hazards discussed during the testimony of various witnesses at trial.

The Lower Court based its erroneous conclusion exclusively on the testimony of Mr. Marker, who she referred to as having a “demeanor to reflect a pattern of inability to recall potentially unfavorable information”, while ignoring the overwhelming substantial and competent evidence to the contrary in the actual language of the Contract the testimony of multiple other witnesses.

During his testimony Mr. Behnke acknowledged that his inclusion of the phrase “the FPL vault engineering is no longer a critical path item” in a

prior email was a “misnomer” and “not accurate” because “the FPL vault is always going to be a critical path item because if you can't get the power lines down, you can't go vertical.” (R. 2469, Ln 22 – 2470, Ln 6). Mr. Behnke further testified:

> “The lines being up and coming down is a critical path item...once the vault is completed and once those lines are down, then we can commence and start the project.” (R. 2412, Ln. 12-17)
>
> “[C]ommon sense will tell you that if Grey Marker finished the entire foundation, which he did not, if Grey Marker had finished the entire sea wall, which he did not, we still would never be able to do anything because the power lines would be in the way, and we'd be, basically, we would be watching the grass grow. Okay? So obviously, the power lines were always going to be a critical path item, and they were an important item to take down... I told you it was a critical path. You can't go vertical.” (R. 2645, Ln 14 - 2646, Ln 19).
>
> “I should have probably said seawall, for that matter. But the power lines were not in -- in the way. And the FPL vault energizer is no longer a critical path item for the foundation, I guess, to seawall. So that, that's -- so it's always a critical path item. I mean, because you cannot go -- I can't build a building or 95 percent of that building is above the ground, so I can't do anything with those power lines up. So it's always going to be a critical path item...Again, it's always going to be a critical path item. This is talking about the foundation. I just explained that I could have said foundation seawall. Anything that could fit underneath those wires would have been something that could have been done probably. The wires would always be a critical path item because I could never be able to build a building.” (R.2660, Ln 5 – 2661, Ln 19).

This testimony by Mr. Behnke was directly supported by the testimony of Mr. Ron Jezerinac, the structural engineer. When asked whether the

existence and replacement of the power lines running along the street side of the project prevent construction upwards until they were removed, Mr. Jezerinac testified:

> "Yeah. So I was in a number of meetings early on in which it was -- it was identified that -- that the FPL Vault had to get constructed very soon because we had to move the power lines from above ground to below ground. Okay? We couldn't do that until that FPL Vault was constructed and energized... Okay, so the idea was that we had a crane on -- on the slab, and we constantly had -- we would have had to constantly be reaching over onto the street to pick the steel up and to fly it back into -- into the building footprint. And the presence of those -- of those power lines were, would have simply made that operation very dangerous, very unsafe. And -- and I believe, to my knowledge, it was actually forbidden by both the utilities and -- and from -- from a, you know, from an OSHA, from an occupational safety hazard standpoint." (R. 3459, Ln 19 – 3461, Ln 7).

Despite the Lower Court stating in the Final Judgment Order Under Review that she found Mr. Jezerinac's testimony and demeanor to be responsive and candid, the Lower Court failed to even acknowledge or consider this critical testimony of Mr. Jezerinac relating to the necessity that the FPL Vault be energized as a Critical Path item.

It was also supported by the testimony of Mr. Cole Manning, who was the project manager of the replacement contractor who completed the work at the Project after Appellee was terminated. Mr. Manning, who the Lower Court found to be "transparent and credible", testified that the replacement contractor completed the construction of the FPL Vault and when asked if

they were able to go vertical with the project with power lines running along the street side of the Project, stated:

> "No. It would be an OSHA violation if you erected a building, because it was within ten feet of the power lines. So the FP&L Vault must have been completed to relocate the power lines underground to go vertical with the building...Because the -- the power lines, there's a shopping center to the south. The power lines put power to the shopping center to the south, so instead of just running straight through the site, we had to put an FP&L Vault to provide power to [the Project], provide power to the south, and continue power to the east." (R. 3434, Ln 23 – 3435, Ln 9).

Even Mr. Marker on behalf of Appellee testified in a sworn statement that "installing the FPL Vault prior to progressing with other scope of work is absolutely critical", and then subsequently acknowledged and verified that prior sworn statement during trial. (R. 3219, Ln 23 – 3220, Ln 5.; R. 1895-1900).

It is clear that the competent and substantial evidence before the Lower Court confirmed that while some foundation work could be performed by using a crane to go over the power lines, those power lines had to be removed for the Project work to move forward and for the vertical construction work at the Project to take place. In order for those power lines to be removed, the FPL Vault was required to be fully constructed and energized. This meant that the FPL Vault was always a Critical Path item and could never be "removed from the Critical Path" as claimed by the Lower

Court because its removal from the Critical Path would preclude the removal of the overhead power lines and the vertical construction of the Project.

The Lower Court's error in failing to acknowledge and refer to this extensive testimony and evidence was further exacerbated by the Lower Court's claim in the Final Judgment Order Under Review that Mr. Marker allegedly testified that "We were able to take the Vault out of the picture which completely changed the whole program" – except this testimony never actually occurred and is nowhere to be found in the trial transcript or Record on Appeal.[6] In fact, during direct examination, Mr. Marker was completely unable to state when the FPL Vault was allegedly removed from the Critical Path, even when shown the Exhibit 16 email wherein Appellee stated the installation of the new FPL poles relating to the removal of the existing power lines "are on my critical path and I need your help to expedite this process in any way possible".

Accordingly, the Lower Court's ruling that Condition #7 of the conditions precedent in Section 4.1 of the Contract had been satisfied because the FPL Vault had been supposedly removed from the Critical Path and was "moot" is not supported by the substantial and competent evidence

[6] The Lower Court also improperly references Exhibit 20 as alleged "corroboration" of this non-existent testimony, despite the fact that Exhibit 20 was never used or referenced by any party or witness during the trial.

presented at trial. To the contrary, the substantial and competent evidence clearly establish that the construction of the FPL Vault, the energization of the FPL Vault to allow for the removal of the overhead power lines in order to proceed with the vertical construction of the Project remained on the Critical Path and remained a mandatory condition precedent in Section 4.1 that was never satisfied by Appellee.

b. Improperly Interchanged and Misstated Early Work Term

During the trial several witnesses were asked to describe the meaning of some of the terms of the Contract and construction schedule which was attached to the Contract as Exhibit "D" ("Schedule"). One set of terms that required explanation was the differing use of the term "Early Work" and "Early Start" in the Schedule and the term "Early Work" as used in the Contract itself. Multiple witnesses testified that Appellant and Appellee had entered more than one contract in connection with different phases of the work that was being performed at the Project, including an earlier demolition contract for the demolition of the existing structure and the preparation of the site for the construction of the new structure.

The Schedule that was attached to the Contract at issue in this Appeal was created by Appellee and created several months prior to the execution of the Contract in November, as demonstrated by the fact that the work

contemplated in it was scheduled to commence in mid-July[7]. The Schedule used the terms “Early Work” and “Early Start” in some of its headings which included some of the work from the other separate and earlier contracts, including the demolition contract. As a result, the use of the terms “Early Work” and “Early Start” in the headings was not precisely consistent between the earlier created Schedule and the later created Contract.

The definition of the term “Early Work” that is set forth in Section 4.1 of the Contract should not be qualified or interpreted by the use of that same “Early Work” or “Early Start” terms found in the headings of the Schedule. Section 1.1 of the Contract states the order of precedence of the Contract Documents that states,

> “If any portion of the Contract Documents is inconsistent or in conflict with any other portion of the Contract Documents, the various documents comprising the Contract Documents shall govern and be interpreted in the following ranked order of precedence: (a) executed Modifications, if any, with those of a later date having precedence over those of an earlier date; (b) this Agreement; (c) the MA Document A201-2017 General Conditions, as modified; and (d) the Clarifications (e) the Drawings (f) Specifications, with the more stringent requirements having precedence over the less stringent requirements…”

[7] Pursuant to Article 12.1.4.1.9, the Appellee was required to update the Schedule as a condition precedent to receiving any payment for each of their submitted progress payments, but the Appellee failed to ever update the Schedule.

Section 1.1 states that, other than Modifications, the Agreement (herein the Contract) shall have precedence over any other document in the event of an inconsistency or conflict. Section 16.1 lists in order the documents that make up the Contract: the A102, the A201, the Drawings, the Specifications, the Addenda, and the Other Exhibits[8]. Pursuant to Section 1.1, all the documents after the A102 are considered to be lower in the order of precedence. Consequently, the terms such as "Early Work" as found in Section 4.1 of the A102 should not be governed and interpreted by lower precedence documents such as the Schedule, particularly since the Contract was not even drafted or executed at the time the Schedule was generated.

The Lower Court stated in the Final Judgment Order Under Review that "[Appellant] consistently and repeatedly instructed [Appellee] to proceed with the work beyond the Early Work". (R. 1114). The Lower Court improperly categorized the Schedule as an "essential component, to which the Lower Court is charged with giving effect" and gave higher precedence to a heading reference in the Schedule than to the unambiguous definition of Section 4.1 for the term "Early Work". (R. 1145). In fact, the Lower Court

[8] The E203 referenced in Section 16.1 was never made part of the Contract and is not included in the Contract.

went so far as to minimize the entirety of the “Early Work” defined in Section 4.1 to just mean “the FPL Vault” itself and then minimized that further by saying “the FPL Vault was only one (1) of twenty (20) Schedule line items that [Appellee] completed”.

The Lower Court acknowledged that Appellee admitted the occurrence of the Commencement Date was tied to the completion of the FPL Vault, but then held that the very terms that set the time for when the Commencement Date would occur – the seven (7) conditions precedent set forth in Section 4.1 – did not apply. Accordingly, despite acknowledging the competent and substantial evidence that established the meaning of the term “Early Work” as expressly and unambiguously defined in in Section 4.1, the Lower Court improperly ignored this evidence and instead chose to use the unrelated headings found in the Schedule to improperly and inaccurate define the term “Early Work” and its relationship with the occurrence of the Commencement Date in the Contract.

c. Failed to Award Entitlement to Bond Premium

In its Amended Complaint, Appellant asserted a claim for Breach of Contract and that it was seeking the return of funds due and owing to it, which included Appellee’s return of the proportional amount of the Performance Bond premium that was overpaid to Appellee. The Lower Court entirely

failed to award Appellant its claim relating to its entitlement to the return of the proportional amount of the Performance Bond premium. During the trial there was unrefuted testimony presented by Appellant conclusively establishing through competent and substantial evidence that Appellant was entitled to a refund of the Bond premium. It was effectively stipulated by both parties that Appellee had been overpaid for the full amount of the Bond premium and that since it was terminated, Appellant would be entitled to a refund of the Bond premium.

In addition to testimony by Appellant's witnesses, Appellee, through its witness Mr. Marker, fully admitted that Appellant was entitled to a refund of the proportional amount of the Bond premium. (R. 3150). The Lower Court even quoted Mr. Marker's testimony in the Final Judgment Order Under Review, stating that "the [Appellant] is entitled to its share of the Bond premium…the [Appellant is] entitled to that…he believes that [Appellant] is entitled to the Bond premium refund". (R.1133).

However, despite this unequivocal acknowledgement that Appellant was entitled to an award in the amount of the overpayment of the Bond premium, the Lower Court ruled in the Final Judgment Order Under Review that Appellant "shall take nothing by their action and go hence without this day" and that Appellant "prevails on none of its claims". This ruling by the

Lower Court is in direct contravention of the competent and substantial evidence presented in the trial and the Lower Court's own findings in the Final Judgment Order Under Review. Accordingly, since such competent and substantial evidence exists, Appellant is entitled to an award in the amount of the refund of the proportional amount of the Bond premium.

V. LOWER COURT FAILED TO FOLLOW FLORIDA LAW IN DENYING APPELLANT'S SUMMARY JUDGMENT MOTION

Prior to the commencement of the trial, Appellant filed its Motion for Summary Judgment and the Lower Court entered the Summary Judgment Order Under Review. Florida Rule of Civil Procedure 1.510(a) provides:

> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. **The court shall state on the record the reasons for granting or denying the motion.** The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard. (Emphasis added.)

To comply with this requirement, it is not enough for the court to make a conclusory statement - the court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review. *Jones v. Ervolino*, 339 So. 3d 473, 475 (Fla. 3d DCA 2022); *Mech v. Brazilian Waxing By Sisters, Inc.*, 349 So.

3d 453, 455 (Fla. 4th DCA 2022). "Busy trial judges need not write lengthy opinions, but must take reasonable steps to ensure the parties and appellate courts are informed as to the reasons for granting or denying the motion on which their rulings rest under our new standard." *Jones,* 339 So. 3d at 475. The wording of the new rule makes clear that the court's obligation in this regard is mandatory. *Martinez v. Bank of Am., N.A*., 388 So. 3d 1037, 1038 (Fla. 3d DCA 2024); *Fla. Gulf Coast Chapter Associated Builders & Contractors, Inc. v. City of St. Petersburg*, 374 So. 3d 946, 947 (Fla. 2d DCA 2023).

In the Summary Judgment Order Under Review, the Lower Court stated, "the Court finds inappropriate at this time to rule on one particular section of the contract without review of the contract in its entirety and the conduct of the parties." However, the entirety of the Contract was referenced in the Motion, attached to both Appellant's Complaint and Amended Complaint and to Appellee's Complaint, and was fully available for the Lower Court to review in its totality. The Lower Court had sufficient time to consider the issues brought up in Appellant's Motion and to review the Contract terms after the conclusion of the special set hearing where both parties' had presented their arguments.

Additionally, Appellee only argued that the Motion should be denied because the Contract terms at issue were ambiguous, but similar to the Final Judgment Order Under Review, the Trial Court did not make any legal finding or ruling in the Summary Judgment Order Under Review that the Contract terms were ambiguous. Instead, the Lower Court merely stated that it could not rule on the Motion without reviewing the Contract in its entirety, despite the Contract being available to the Lower Court to review.

In this case, the Lower Court entirely failed to state any legal basis for her decision to deny the Motion and failed to provide enough reasonable specificity to provide useful guidance to the parties and allow for appellate review in violation of Florida Rule of Civil Procedure 1.510(a). The issues relating to the construction of the Contract terms pursuant to established Florida law in the Motion that were before the Lower Court are the same as those that are before this Court on appeal and discussed above.

In this circumstance, Appellant is not requesting a remand for the Lower Court to modify the Summary Judgment Order Under Review because the Lower Court's failure to apply Florida law in the Summary Judgment Order Under Review are reflective of the same errors made by the Lower Court in the Final Judgment Order Under Review. Appellant is requesting that the Lower Court's consistent misapplication of law in both

Orders Under Review be reviewed by this Court de novo relating to the construction of the terms of the Contract as a matter of law.

CONCLUSION

Based on the foregoing, both the Final Judgment Order Under Review, inclusive of the award of attorney's fees and costs, and the Summary Judgment Order Under Review should be reversed with directions to the Lower Court to enter a judgment for Appellant in accordance with the competent and substantial evidence presented at trial and current Florida law.

Respectfully submitted,

/s/ Warren E. Friedman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2024, a true and correct copy of this Motion was electronically filed using the Florida Court's E-Filing Portal which will provide an electronic copy to: Alexander O.

Soto, Esq., The Soto Law Group, P.A., 2400 East Commercial Boulevard, Suite 400, Fort Lauderdale, Florida 33308 (Alex@sotolawgroup.com).

/s/ Warren E. Friedman
Warren E. Friedman

CERTIFICATE OF COMPLIANCE

I certify that this brief was generated using the 14-point Ariel font in the Microsoft Word program. *See* Fla. R. App. P. 9.210(a)(2).

/s/ Warren E. Friedman
Warren E. Friedman