LOWER TRIBUNAL CASE NO.: CACE-20-018740 (14)
THE HONORABLE CARLOS A. RODRIGUEZ
CIRCUIT COURT JUDGE

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D2023-2062

MCDANIEL CONSTRUCTION, INC.,

APPELLANT/CROSS-APPELLEE,

v.

CRAFT CONSTRUCTION COMPANY, LLC,

APPELLEE/CROSS-APPELLANT.

APPELLANT'S CROSS CLAIM ANSWER BRIEF AND REPLY

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SUMMARY OF THE ARGUMENT

Craft[1] has submitted one brief addressing its cross-appeal[2] first and its answer to McDaniel's appeal second. The briefing underscores the one core tension at issue – the trial court decided the parties did not submit damages as an issue for trial under the Pre-Trial Stipulation but then examined the damages recoverable under Application 5. Several infirmities arose from that conflict and the Cross Brief did not cure them; McDaniel addresses them in turn.

The Cross Brief first meanders from standard to standard but does not disturb the trial court's decision that the parties did not submit damages for the trial. Craft first argues that the contract terms dictate a different means for calculating damages and then splices that argument into urging the Court the contract terms imposed a different burden of proof on McDaniel. Those 2 arguments are wrong – together or apart.

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1 Capitalized terms in the Answer/Reply filed by McDaniel have the same meaning ascribed to them as defined in the initial brief it filed. Record cites are also the same format as used in the initial brief.

2 References to the cross-appeal and answer brief are "Cross Brief".

Tortured in the Cross Brief is the plain meaning for terms in the Subcontract governing McDaniel's recovery. The Subcontract required Craft to pay McDaniel the amount owed under the pay applications unless Craft showed that the cost plus 7% was less than the amount stated in the pay applications. Not only did Craft leave that issue out of the Pre-Trial Stipulation, it also did not prove that fact at trial. As Craft stated before the trial court in many ways and in many places that there was no objection to the amounts claimed under the pay applications. Only the purported Counterclaim barred McDaniel's recovery. McDaniel met its burden at trial – Craft did not.

The Pre-Trial Stipulation argument Craft has offered ignores that it left damages out as an issue for trial. Craft all but conceded that, but for its Counterclaim, there was no basis to refuse paying McDaniel the amounts stated in Application 3, Application 4, and Application 5. To avoid the consequences, Craft argued that the trial court had to decide the damages issues because it was a necessary sub-issue implied by the trial on issues in the Pre-Trial Stipulation. But neither the facts nor the case law in the Cross Brief

open an escape from courts strictly enforcing the parties' stipulations.

Craft also tries to avoid the plain terms stated in the Pre-Trial Stipulation, arguing it put damages at issue for trial. To make that argument, Craft points to its claim for "setoff" and whether McDaniel is "entitled to payment." *First*, Craft failed to meet its burden to prove setoff from the payments due to McDaniel. But the trial court also decided Craft lost its Counterclaim based on the testimony and evidence, and therefore, failed to show recoverable damages to set off from the amount it owed McDaniel. *Second*, entitlement is different from measuring damages; trial courts often decide two separate issues like entitlement and amount or liability and damages. One does not equal the other. When Craft asked in the Pre-Trial Stipulation whether McDaniel was entitled to recover, it was putting at issue its liability, not damages.

The Cross Brief then turns to answer McDaniel's appeal by stringing together several conclusory statements about the trial court not abusing its discretion. The trial court's discretion does not rescue Craft from its decisions about what the trial court should

have considered for trial. Craft failed to erase the trial court error in refusing to supplement the record or reopen the case for additional evidence or testimony.

Even if the parties had submitted damages for trial, then Craft should have agreed for the trial court to reopen the evidence to consider the facts about whether McDaniel delivered the sheathing as specified in Application 5. To not permit McDaniel that opportunity cuts against the authority Craft cited, suggesting it intended to conduct the trial by ambush. Refusing to supplement the facts in the record or reopen the case was an abuse of discretion here.

It is also hard to ignore the missing evidentiary hearing to decide whether Craft misrepresented facts during trial. But Craft did. The Cross Brief did not address the trial court decision to not hold an evidentiary hearing. Rule 1.540(b)(3) required the evidentiary hearing, and the trial court did not hold one. That is determinative, plain and simple.

* * *

The arguments pushed by Craft underscore a common point: the Pre-Trial Stipulation. Twisting the contract and Pre-Trial Stipulation does not change that the parties agreed (at least until the trial neared its conclusion) that the amount Craft owed McDaniel was not in dispute. The trial court agreed damages were not an issue for it to put on trial, but then, on the last trial day, it received evidence contesting damages. The trial court findings and evidentiary rulings are inconsistent; that was an error. The Court should now correct the error and reverse the trial court's decision to cut McDaniel's recovery.

ARGUMENT

De novo review applies for the cross-appeal but not because the trial court used the wrong measure of damages – that was not an issue in the case. The *de novo* review standard governs because "[p]retrial stipulations are interpreted using the same principles for interpreting written contract[s] . . . ." *Wiener v. The Country Club at Woodfield, Inc.*, 254 So.3d 488, 491 (Fla. 4th DCA 2018). Had Craft identified damages as an issue in the Pre-Trial Stipulation, then the standard would be to decide whether the factual findings had

competent, substantial support. *Alterra Healthcare Corp. v. Bryant*, 937 So.2d 263, 266 (Fla. 4th DCA 2006), review denied, 956 So.2d 455 (Fla. 2007).

I. The Cross Brief attempts to recast events rather than confront the evidence and testimony from trial.

To disturb the judgment, Craft must demonstrate that the trial court did not support its findings with competent, substantial evidence. *Id.*

A. The Cross Brief conflates 2 arguments: (1) the contract terms dictate and (2) the burden of proof for McDaniel's damages – both missed the point at issue from trial.

Craft first attempts to argue the contract governs how to calculate damages because, having wrongly terminated the contract for cause, the parties would treat the termination as one for convenience. *See* Cross Brief at 5. It does not appear that Craft disagrees with McDaniel that the amount it may recover comes from the Subcontract. The argument Craft forces is that McDaniel Applications 3, 4, and 5 do not reflect the pro rata share for work performed.

But Article 20 supports the judgment entered by the trial

court. The damages term Craft has cited sets the amount McDaniel may recover as the pro rata payment completed when compared to the Subcontract Sum. R. 1668. Craft urges the Court to have the subsequent payment cap term swallow the pro rata term:

> In such event, Subcontractor shall be entitled to a pro-rata payment of the Subcontract Sum for Subcontractor's Work properly and timely performed prior to termination, **not to exceed Subcontractor's costs incurred through the date of termination, together with a mark-up of seven percent thereon**, . . .

Id. (emphasis added). It follows that, if Craft contends the pro rata payment amount exceeds the Subcontract Sum, then it bore the burden to prove that fact by presenting evidence that the costs with the 7% markup was less than the amounts stated in the pay applications. Applications 3, 4, and 5 satisfy Article 20, and Craft cannot ignore those terms by jumping to the payment cap clause. Craft did not raise the payment cap clause in the Pre-Trial Stipulation or at trial for any pay application or when it contested the amount stated in Application 5.

But the contract term as argued by Craft would also contradict Article 4 (Progress Payments), which includes Craft's payment

obligation: "The balance of the amount of such requisition, as approved by Contractor and the Architect, and for which payment has been received by Contractor from the Owner, shall be due and paid to Subcontractor on or about the end of the succeeding month." By the time Craft terminated McDaniel, it was already late meeting its payment obligations.

McDaniel submitted Application 3 on May 11, 2020, making the payment due date on or around June 30, 2020. R. 1826. McDaniel submitted Application 4 on June 19, 2020, making the payment due date on or around July 31, 2020. R. 1832. According to the Subcontract, therefore, Craft was past due by about 60 days for Application 3 and 30 days for Application 4. Had Craft not breached the contract, it would have already paid Applications 3 and 4. That means, when Craft terminated its contract, McDaniel was not liquidating its damages – it was collecting a debt. The record is thus competent and substantial supporting the judgment.

That leaves Application 5. McDaniel performed all the work reported under Application 5 before Craft terminated the Subcontract. *See* Trial Testimony of Ronald Pantophlet, May 22-23,

2023 ("Pantophlet Testimony") at 159:9-11[3]. After the termination, McDaniel submitted Application 5, reporting the similar information as it did for Applications 1, 2, 3, and 4. There are no damages due for work performed other than what McDaniel reported in Application 5.

And Craft did not contest the amount stated in any pay application and waited until the last trial day to challenge Application 5. *See* Parts I(B) and II(A), *infra*. Until the trial ended, the only reason Craft gave for not paying McDaniel was its Counterclaim:

> McDaniel materially breached the Subcontract, by *inter alia*:
>
> a. Failing to make payment to lower tier vendors and suppliers;
>
> b. Failing to reimburse Craft for the costs it incurred to correct and complete

3 Given the issues raised in this appeal, McDaniel did not anticipate any trial testimony being relevant, and thus none was included in the Record on Appeal. But as McDaniel prepared its brief, it decided that the Pantophlet Testimony – while not determinative – would be helpful to the Court. Accordingly, McDaniel filed a motion to supplement the Record on Appeal with the Pantophlet Testimony. The Court granted the motion on February 8, 2024.

McDaniel's subcontract;

c. Performing work that was incomplete, defective, and failed to conform with the Subcontract and project specifications;

d. Failing to timely complete it work and remedy defective and improper work;

e. Failing to comply with Craft's schedule requests;

f. Failing to property man the job so as not to delay the work; and

g. Abandoning the work.

R. 194. There are no other facts alleged in the Counterclaim about McDaniel's purported failures under the contract.[4] Once Craft lost its counterclaim, there was nothing to stop the trial court from awarding McDaniel the damages as stated in Applications 3, 4, and 5.

Craft also agreed under the Pre-Trial Stipulation that "Craft did not pay McDaniel's Payment Applications 3, 4, and 5. Craft claims **these sums are not due because of the allegations in its**

[4] There was also nothing revealed in depositions, the Pre-Trial Stipulation, or Craft's opening statement at trial that alerted McDaniel that Craft intended to present evidence on the amount stated in Application 5.

Counterclaim." R. 1530 (emphasis added). Craft did not include issues that "these sums" are wrong or that McDaniel calculated them wrong. There was also nothing offered by Craft showing the amount in Application 5 exceeded the cap under Article 20. Nothing in the Pre-Trial Stipulation raised any other reason for Craft not paying McDaniel for Application 3, Application 4, or Application 5 other than its counterclaim.

When Craft raised the contract issue with the trial court, it stated that argument contradicts the Pre-Trial Stipulation:

> At the conclusion of Plaintiff's case in chief, Defendant filed a Motion for Judgment as a Matter of Law, claiming Plaintiff is not entitled to recover any damages for its partially completed construction contract because of **its failure to prove actual costs incurred as opposed to relying upon the amounts stated in Payment Applications 3, 4 and 5. This claim contradicts the Joint Pre-Trial Stipulation between the parties, which did not put the amount of Plaintiff's damages in disputed controversy.**

R. 8905 (emphasis added).

Craft cannot now conjure a dispute about the amount owed to McDaniel. But when the trial neared the end, Craft elected to testify

McDaniel had not delivered the sheathing under Application 5. *See* Parts I(B) and II(A), *infra*. But Applications 3, 4, and 5 are competent and substantial evidence supporting the amount required under Article 20 in the Subcontract. The trial court thus decided the pay applications were sufficient evidence to prove what Craft owed when it terminated the contract.

If the applications did not prove damages given the disputed issue listed in the Pre-Trial Stipulation, then it was incumbent on Craft to specify what was in dispute under the Pre-Trial Stipulation. Craft could have included the disputed facts concerning damages amounts and questions of law on the measure of damages all for the trial court to resolve during trial. Craft instead decided damages were not an issue for the trial court to resolve; its position is akin to agreeing to the amount claimed. Craft's admissions should thus end this debate.

But Craft has also offered a strawman argument that it did not have to assert an affirmative defense by pleading the contract terms. *See* Craft Cross Appeal at 6-7 (citing *Cessna Aircraft Co. v. Avior Techs., Inc.*, 990 So.2d 532, 539 (Fla. 3d DCA 2008)).

McDaniel has not suggested Craft needed to assert an affirmative defense to argue the contract terms. Craft needed to dispute the damages stated on the pay applications rather than argue only that it should not have to pay because McDaniel purportedly breached the Subcontract.

Craft dropped at footnote to the strawman argument citing various cases to explain there are standards for proving damages. *Id.* at FN 1 (citing *Puya v. Superior Pools, Spas & Waterfalls, Inc.*, 902 So.2d 973, 975 (Fla. 4th DCA 2005); *see also Courtland Grp. Inc. v. Phillips Gold & Co. LLP*, 876 So.2d 629 (Fla. 3d DCA 2004); and *Emerald Pointe Prop. Owners' Ass'n v. Commercial Constr. Indus.*, 978 So.2d 873, 879 (Fla. 4th DCA 2008)). But each case bears little resemblance to the issues presented here.

In *Puya*, the owner had not approved all the work or payments required by the contractor. *See generally* 902 So.2d 973. The contract in *Puya* required 4 payments, and the owner had paid one. *Id.* at 974. The contractor ceased construction, and the owner hired a new contractor to finish the job, paying nothing more to the contractor. *Id.*

But here, Craft did not pay McDaniel, which work it reported in the pay applications. R. 194, 1530, 8905. The owner in *Puya* paid for the work completed. Craft only refused to pay because it expected to prevail on its Counterclaim for breach of contract. McDaniel did not abandon the project like the contractor in *Puya*; Craft terminated it and did so wrongly. Article 20 established the contract terms for deciding how much McDaniel should recover rather than the *quantum meruit* claim by the contractor in *Puya.* The decision in *Puya* thus has little to do with the facts here.

Craft's reliance on *Courtland* is also off base. The *Courtland* court addressed an expert's testimony about the value for accounting services. 876 So.2d at 629. The court reasoned the defense expert could testify there were no damages because the witness was helpful to the trier of fact. *Id.* at 630. The *Courtland* plaintiff was suing for damages from an accounting firm's negligence, negligent representation, and accounting malpractice. *Id.* The case presented complicated damages issues beyond the jurors' understanding. *Id.*

Neither Craft nor McDaniel presented complicated damages

issues difficult for the trial court to understand. Instead, Craft agreed it was not contesting the damages until the last trial day, when Craft adduced testimony claiming McDaniel did not deliver the sheathing. But that testimony remains inconsistent with the facts in the record. *See* Part II(B), *infra.*

The *Emerald Pointe* court decided the contractor had not proved its damages, using a similar damages analysis to the one used in *Puya*. 978 So.2d at 879. The *Puya* damages came from the trial court's calculation arising from evidence presented by the contractor. *Id.* Missing was the evidence underlying the calculations. *Id.*

Unlike *Emerald Pointe*, the trial court concluded the damages amount from the information stated in Application 3 and Application 4. These applications included the details about what work McDaniel performed, what percentage that work represented against the total work required under the Subcontract, and how much to retain from the payment for the final application. Not once did Craft offer evidence to show that it disputed the calculations, or the support McDaniel attached to the pay applications. And for

Application 5, Craft offered testimony that the sheathing did not get delivered, but its testimony contradicts the facts and evidence in the record. *See* Part II(B), *infra*.

Emerald Pointe addressed no issues presented in the trial here. Craft did not contest the damages calculations or the evidence and testimony supporting them. Craft contended it did not have to pay because McDaniel breached first. The trial court entered judgment against Craft on its counterclaim, and therefore, its defense to paying failed.

Even if Craft had not agreed to keep damages out of the trial, it argued McDaniel bore the burden to prove the costs incurred. *See* Cross Brief at 6-10. Craft argued that one measure of damages for an unfinished construction contract is calculating the reasonable construction cost and completion under the contract. *Id.*; *see also Kritikos v. Andersen*, 125 So.3d 885, 888 (Fla. 4th DCA 2013) (citing *Barile Excavating relied on Grossman Holdings Limited v. Hourihan*, 414 So.2d 1037, 1039 (Fla. 1982) (quoting Restatement (First) of Contracts § 346(1)(a)(i) (1932)). But there are other ways to prove damages in a construction case. *Id.* Another way to prove damages

here comes from Article 20 under the Subcontract.[5] *See* Part I(A) at 11, *supra*. To give effect to the Subcontract, Craft cannot avoid Article 20 and the standards for calculating and proving damages in this case.

There is no walking away from the Subcontract terms that provide for McDaniel to recover the amount awarded by the trial court for Applications 3 and 4 as well as awarding McDaniel the amount due under Application 5. Craft cannot shift its burden to show that the amount stated in those pay applications was less than the total costs plus 7%. The cases Craft has cited also fall short. The bottom line is the parties did not submit damages as an issue for trial – they agreed to the amount and disputed only

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[5] Parties to a contract may modify the common law to give effect to the parties' agreement. *See, e.g.*, *Raimondi v. I.T. Chips, Inc.*, 480 So. 2d 240, 242 (Fla. 4th DCA 1985) (contract modified the common law on waiver and estoppel); *Philpot v. Bouchelle*, 411 So.2d 1341, 1344 (Fla. 1st DCA 1982) (contract modified the common law on waiver); *Miami Leak Detection & Services LLC v. Great Lakes Ins. SE*, Case No. 9:23-CV-80999, 2023 WL 6856755, at *3 (S.D. Fla. Oct. 18, 2023) (contract modified the common law on an assignments); *Abraham K. Kohl, D.C. v. Blue Cross & Blue Shield of Florida, Inc.*, 955 So. 2d 1140, 1143 (Fla. 4th DCA 2007) (contract modified the common law on an assignments).

liability.

B. Craft's Pre-Trial Stipulation argument ignores the facts in the record and its plain meaning.

Buried in the last argument for the cross appeal, Craft addressed the Pre-Trial Stipulation. *See* Cross Brief at 8-13 (citing *Schimpf v. Reger*, 691 So.2d 579, 580 (Fla. 2d DCA 1997); *Berwick Corp. v. Kleinginna Inv. Corp.*, 143 So.2d 684, 689 (Fla. 3d DCA 1962)). But neither *Schimpf* nor *Berwick* analyze a pre-trial stipulation that removed damages as an issue for the parties to resolve at trial.

The closest Craft gets to addressing how the Pre-Trial Stipulation removed damages from trial is to argue that courts may exceed the Pre-Trial stipulation when it is necessary to resolve the issues submitted for trial. *See* Cross Brief at 8-9 (citing *Cano, Inc. v. Judet*, 331 So.3d 179 (Fla. 4th DCA 2021); *Broche v. Cohn*, 987 So.2d 124 (Fla. 4th DCA 2008); *Kahle v. Prewitt*, 673 So.2d 121 (Fla. 4th DCA 1996); *City of Hartford v. Am. Arbitration Assn.*, 174 Conn. 472, 391 A.2d 137, 139 (1978)).[6] But deciding the amount

[6] Craft reached into Connecticut for authority to make its

was unnecessary for the trial court to enter judgment against Craft for all McDaniel claimed was due.

Craft, as the master of its pleadings, decided what it wanted to allege in response to the claims McDaniel brought. Nowhere in the Counterclaim did Craft raise verification, approval, and delivery as the bases for withholding payment. Craft also did not specify verification, approval, or delivery as a disputed fact or legal question for the trial court in the Pre-Trial Stipulation. The pleadings and Pre-Trial Stipulation thus align. Craft waived those issues as a defense at trial. *Central Square Tarragon LLC v. Great Divide Ins.,* 82 So.3d 911, 914 (Fla. 4th DCA 2011).

Recharacterizing Craft's decision to exclude damages from the issues requiring trial does not transmogrify McDaniel's trial obligations into raising its burden to recover the amount Craft owed. Craft's argument to the contrary turns the Pre-Trial Stipulation on its head. And the cases Craft has cited cannot change the meaning ascribed to the Pre-Trial Stipulation.

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argument. *City of Hartford* covers the same proposition as *Cano*. 391 A.2d at 139. But for the same reason *Cano* does not apply, *City of Hartford* is inapposite as well as not controlling.

In *Cano*, for instance, the owner terminated the contract claiming the contractor breached and treated it as a total breach. 331 So.3d at 182. The damages the owner sought were inconsistent with affirming the contract and demanding full performance. *Id.* The trial court entered judgment for the owner to place him in the position he held immediately before entering the contract by returning the payments he made to the contractor less the *quantum meruit* value for the work performed. *Id.* The *Cano* trial court had to decide what amount the contractor had to return to the owner. To decide that amount, the trial court had to reduce the owner's overpayment by the *quantum meruit* amount.

For the instant case, there was no claim for total breach, and any claim Craft was due a setoff turned on whether it proved an amount to set off from McDaniel's right to recover. Craft offered no claim for total breach and adduced insufficient evidence to show a setoff. Rather, Craft lost its claim for breach, thus no setoff. Craft had to pay McDaniel for the work completed under the pay applications because there was no dispute about those amounts. Deciding damages was therefore not within any sub-issue the trial

court needed to address when it conducted the trial.

The *Broche* decision also offers Craft no shelter. The stipulation in *Broche* asked the trial court to decide whether the defendant had any right to real property owned by a corporation. 987 So.2d at 127. After the trial court decided the defendant did not have rights in the real property, it also decided that the third party-seller was the rightful owner. *Id.* Thus, the defendant had no right to the proceeds from selling the real property. *Id.* The court decided the defendant had to reimburse the third party-seller as a necessary conclusion given its decision on who had the right to sell the real property. *Id.* at 128. Deciding who should receive the sale proceeds was an issue before the court despite it not falling within the pre-trial stipulation as an issue to decide at trial. *Id.*

The damages issue excluded by Craft under the Pre-Trial Stipulation is not similar to the sale proceeds decision by the *Broche* court. Craft's only objection to paying McDaniel was the allegations in the counterclaim. R. 194, 1530, 8905. And during discovery, Craft made clear that the only reason it did not pay the applications was because it was pursuing its contract claim against

McDaniel. R. 4806-4810, 6950. Under the Pre-Trial Stipulation, measuring McDaniel's damages was not in dispute. Damages were thus not a decision the trial court needed make, and it was not an exception to the rule enforcing Pre-Trial stipulations.

The decision in *Kahle*, cited by Craft, is persuasive here for several reasons but not the ones Craft wants to use. 673 So.2d 121. Although the trial court refused to allow a particular jury instruction about a personal injury claim, the pre-trial stipulation included issues that triggered the need for a jury instruction. *Id.* at 122. The defendants had failed to offer evidence concerning the issue, and they requested the trial court reopen the evidence to cure that defect. *Id.* The trial court refused. The *Kahle* appellate court decided it was error for the trial court to deny the motion to reopen the case to receive evidence on the issue implied under the stipulation. *Id.* The appellate court reversed the judgment and remanded the case for a new trial. *Id.*

The damages issues Craft has raised are not implicit with deciding the breach claim because the parties excluded damages from trial. If it was implicit, then under *Kahle*, Craft should have

agreed that the trial court should receive the additional evidence for a matter the trial court wanted to address. Craft could have also put in the stipulation that it contested the amount due to McDaniel – but it did not contest the amount when the trial commenced. Rather, it was McDaniel's purported breach that Craft used to avoid paying McDaniel. Craft lost that contract claim, and therefore, lost its only defense to paying McDaniel.

Like the trial court in *Kahle*, the trial court here also refused to reopen the evidence to permit McDaniel to provide the missing piece Craft complained about. Reopening the evidence in *Kahle* was more complicated than in this case because it involved a jury trial. The trial court here was the trier of fact, and it was therefore easier to open the evidence as mandated under *Kahle* because there was no jury.

Craft has attempted to inject the damages calculation into the trial by offering testimony about McDaniel delivering the sheathing that remains inconsistent with the Pre-Trial stipulation. *See* Part II(B), *supra*. There should be no dispute that it is inconsistent because the trial court already found that the parties excluded

damages as an issue it would decide at trial. R. 8905. On the last trial day, the trial court departed from its findings that the parties did not submit damages as an issue for trial. That error together with the testimony and evidence in the record support entering judgment for McDaniel for the full amount Craft owed it under Applications 3, 4, and 5.

Craft cannot elude it stipulated that it "did not pay McDaniel's Payment Applications 3, 4 and 5" because McDaniel committed the alleged breaches specified in the Counterclaim. R. 1530. Craft alleged McDaniel breached the Subcontract by abandoning the project, performing defective work, and not paying suppliers. R. 193-95. There was nothing in the pleadings about other reasons for not paying the applications. Craft also did not raise in the Pre-Trial Stipulation other reasons for the trial court to alter the amounts stated in the applications. The only relevant issue Craft raised was "[w]hether McDaniel failed to perform as required under the subcontract." R. 1530. Craft's deposition testimony also showed there was no reason other than the Counterclaim for Craft refusing to pay McDaniel the amount it owed.

And the trial court agreed Craft's only challenge to the damages McDaniel claimed was alleged defects, delays, failure to pay suppliers, and abandoning the work. R. 8905. Once the trial court ruled for McDaniel on the Counterclaim, Craft lost the defense to paying. No theory remained under which Craft could challenge paying the amounts stated in the pay applications. Bringing up testimony that McDaniel did not deliver the sheathing cannot sabotage its recovery; Craft's afterthought cannot be a gotcha.

C. Craft has sought to morph the plain terms stated in the Pre-Trial Stipulation into its putting damages at issue for trial.

Somehow, according to Craft, the Pre-Trial Stipulation included McDaniel's damages as an issue for trial. *See* Cross Brief at 10 (citing R. 1528-1587; quoting "[w]hether Craft is entitled to setoff McDaniel's subcontract balance by the costs of allegedly completing and correcting McDaniel's work and, if so, whether there remains a subcontract balance to be paid to McDaniel" and "[w]hether McDaniel is entitled to payment for the work it provided before Craft terminated its subcontract"). But these issues do not

call into question how much the damages are. At most, the setoff issue imposes on Craft the obligation for it to present evidence showing how much to reduce the damages to award McDaniel based on the damages Craft sustained. And deciding whether a party has established its entitlement to recover is different from deciding how much they should recover[7] – in other words, is Craft liable?

In a case cited by Craft, *Cano*, the trial court entered judgment for the owner to place him in the position he occupied before the parties entered into the contract (the claim was complete breach). 331 So.3d at 182. And only then, the trial court had to reduce those restitution interests by what the contractor would recover for his *quantum meruit* claim. *Id.* at 183. The trial court received evidence showing the owner owed the contractor an amount to setoff against

[7] Courts address the difference between deciding entitlement and measuring the amount to award in various situations. *See*, *e.g.*, *Chodos v. Kjenslie*, 781 So.2d 1194 (Fla. 5th DCA 2001) (citing *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830 (Fla. 1993); *In Re Estate of Platt*, 586 So.2d 328 (Fla. 1991)); *Tutt v. Hudson*, 299 So.3d 568, 572 (Fla. 2d DCA 2020); *Schmidt v. Crusoe*, 878 So.2d 361, 364 (Fla. 2003); *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1262 (Fla. 2006).

what the contractor owed the owner. *Id.*

Craft did not contest the amount due only that it did not owe McDaniel. *See* Parts I(A) and I(B), *supra*. But under *Cano*, and all the other cases Craft has cited, it was not McDaniel's burden to prove the setoff – that was Craft's burden. The trial court did not find that McDaniel breached the Subcontract and did not find setoff. Therefore, Craft's argument about what issues the parties set for trial reflects its burden, not McDaniel's burden.

The other issue Craft pointed to under the Pre-Trial Stipulation was deciding whether McDaniel should recover the payment due for work performed before Craft terminated the subcontract. In other words, the Pre-Trial Stipulation specified the issue to resolve as whether Craft had to **make the payment that was due**, not how much was due. Craft went into the trial not challenging the amount owed – it was contesting whether it was liable. Then, Craft shifted when the trial was drawing to a close and contested the amount it had to pay for Application 5.

To overturn the judgment, Craft must show the support for the trial court findings lacked competent, substantial evidence.

Craft failed. McDaniel presented its case at trial, and the trial court decided the issues based on the evidence, testimony, and governing law. The Court should therefore not disturb the judgment concerning Applications 3 and 4.

II. Craft has failed to show the trial court's decision to reduce McDaniel's damages adhered to the law and facts.

In response to the Pre-Trial Stipulation arguments presented in the opening brief submitted by McDaniel, Craft relies on its arguments interposed in the cross-appeal argument. *See* Cross Brief at 12. Therefore, McDaniel will not trespass the Court's time by repeating the arguments from Parts I(B) and I(C), *supra* here in reply to Craft's opposition. Instead, McDaniel relies on its argument from Part I for the reply to the answer brief Craft has offered.

But Craft offers few responses to McDaniel's other arguments about the trial court abusing its discretion by denying the motions to (i) supplement the record; (ii) reopen the case to admit additional evidence; and (iii) conduct an evidentiary hearing. McDaniel addresses the flaws with Craft's arguments in 2 parts.

A. The trial court should have either supplemented the record or reopened the case to admit evidence on matters outside the Pre-Trial Stipulation.

Craft cited *Kahle*, where a trial court decided whether to reopen the evidence after a trial ended. 673 So.2d 121. In *Kahle*, the trial court denied a motion to reopen after the movant learned there was evidence missing for matters the parties had not listed in the pre-trial stipulation as issues for trial. *Id.* at 122. The trial court ruled that it needed to decide a sub-issue to decide the other issues in the case. *Id.* The movant sought to reopen the evidence and testimony to adduce the missing facts, but the trial court denied the motion. The *Kahle* appellate court decided it was error for the trial court to deny the motion, holding that it should have reopened the case to receive evidence on the sub-issue. *Id.*

McDaniel also rejects Craft's argument that the damages issue related to Application 5 was one the parties implied the trial court needed to decide. *See* Part I(B), *supra*. But if it was a necessary issue for deciding the other issues listed in the Pre-Trial Stipulation, then the trial court should have granted the motion to reopen for the same reasons the appellate court reversed the trial

court in *Kahle.* Craft injects the trial court's reasoning as why this Court should affirm: the motion for rehearing sought to introduce evidence known to McDaniel at trial. *See* Cross Brief at 12-13 (citing *Brown v. Estate of Stuckey*, 749 So.2d 490 (Fla. 1999)). That argument does not end the inquiry because the same would have been true for the movant in *Kahle*.

To grant a motion to reopen to present additional evidence, a trial court should consider whether granting it unfairly prejudiced the non-moving party and whether it served the best interests of justice. *Lovelass v. Hutchinson*, 250 So.3d 701, 705 (Fla. 4th DCA 2018). There are 4 factors controlling the trial court decision: (1) was the request timely; (2) what was the character of the evidence proffered; (3) what was the effect for allowing the evidence; and (4) was there a reasonable excuse justifying the request to reopen. *See id.* Trial courts prefer trying matters on the merits rather than on procedural issues. *See, e.g.*, *Wilmington Trust, N.A. v. Serpa*, 346 So.3d 1218, 1220 (Fla. 3d DCA 2022). Craft opposed the trial court receiving the additional evidence despite the authorities – cases it has cited – would purge the error and eliminate the ambush

that resulted.

Facing authorities that warrant reopening the evidence, Craft relies on the *Brown* decision in which a trial court ordered a new trial despite the jury verdict. The trial court has broad discretion when deciding a motion for new trial for a jury verdict is contrary to the manifest weight of the evidence. *Brown,* 749 So.2d at 497. A trial court should always grant a motion for a new trial when "the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record." *Id.* (quoting *Cloud v. Fallis*, 110 So.2d 669, 673 (Fla. 1959)). These issues are not the ones present in the trial here. The test is whether there was competent, substantial evidence supporting the findings. *Alterra Healthcare Corp.*, 937 So.2d at 266.

The only other opposition offered by Craft is the conclusory statement that the trial court did not abuse its discretion when it denied the motion. *See* Cross Brief at 13 (citing *Gasper Inc. v. Naples Fed. Sav. & Loan Assoc.*, 546 So.2d 764, 766 (Fla. 5th DCA 1989); *First City Developments of Florida Inc. v. Hallmark of Hollywood Condo. Assoc. Inc.*, 545 So.2d 502, 503 (Fla. 4th DCA 1989); *Nudel*

v. Flagstar Bank, FSB, 52 So.3d 692, 694 n.3 (Fla. 4th DCA 2010)).

In *Gasper*, the trial court granted a motion striking defenses. 546 So.2d at 765. The appellant claimed that there was no notice for the trial court to also hear and deny its pending motion to dismiss. *Id.* at 766. But the appellate court reasoned that the notice for the motion to strike was enough for the trial court to deny the motion to dismiss because both motions involved the same or similar grounds. *Id. Gasper* deals with nothing close to the issues presented here.

First City Developments involved a petition for writ of certiorari based on a discovery ruling by the trial court. 545 So.2d at 503. The *First City Developments* appeal did not address the issues presented concerning the trial court abusing its discretion.

Nudel concerned a petition for writ of mandamus for motions to disqualify a judge presiding over the foreclosure division in Palm Beach, which constituted serial motions to disqualify the same judge by the same law firm. 52 So.3d at 695. The appellate court denied the earlier petitions after careful review and denied the pending petition for the similar reasons. *Id.* The footnote Craft cited

also falls short: "We are aware of no rule or law that requires a trial court to hear oral argument on a pretrial, non-evidentiary motion." *Id.* at 694 FN 3. The hearing required was evidentiary. *See* Part II(B), *infra. Nudel* therefore also has nothing to do with the matters before this Court.

But Craft did not address the standards or analysis McDaniel submitted to support its appeal.[8] Nowhere in the opposition did Craft argue the factors governing the trial court's decision: (1) the timeliness of the request; (2) the character of the evidence sought to be introduced; (3) the effect of allowing the evidence to be admitted; and (4) the reasonableness of the excuse justifying the request to reopen. Craft also offered nothing to excuse the policy that courts

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[8] When an "appellee fails to respond to appellants' references to case law facially supporting certain of their essential arguments, appellate courts will decline to exercise the privilege of elaborating on various legal theories on which the action below might or might not be justified." *Auto World Body & Paint, Inc. v. Sun Elec. Corp.*, 471 So.2d 212, 213 (Fla. 1st DCA 1985). "To do otherwise would place this court in the position of offering advisory legal opinions on virtually innumerable points of law that could conceivably be of some or no interest or assistance to counsel or the court below." *Id.* The *Auto World* court disregarded the appellee's and held in the appellant's favor. *Id.*

prefer trying matters on the merits rather than on procedural issues.

First, within 14 days after the trial court rejected McDaniel's argument that the approval and verification were not issues the parties submitted for trial, it sought to redress the gap in the record. *See* Motion for Rehearing or, in the Alternative, to Reopen the Hearing and Admit New Evidence ("Rehearing Motion") at 3-5.[9] McDaniel introduced Mrs. McDaniel's affidavit refuting Craft's claim that McDaniel had not delivered the sheathing. *See* Rehearing Motion. Ex. A, at ¶ 5. *See also, e.g.*, Fla. R. Civ. P. 1.530; *Crum v. State*, 507 So.2d 759, 760 (Fla. 1st DCA 1987). The motion was timely.

Second, the evidence offered by McDaniel supported reopening the trial because Mrs. McDaniel's affidavit showed it submitted Application 5, which included amounts billed for supplying and installing the sheathing. Rehearing Motion Ex. A at 2. Mrs.

[9] The Clerk of Court inadvertently omitted McDaniel's Rehearing Motion from the Record on Appeal. The Court granted McDaniel's motion to supplement the Record on Appeal with the Rehearing Motion on February 6, 2024.

McDaniel also averred that Craft did not return the sheathing or notify McDaniel that it was defective. Rehearing Motion Ex. A at 2. The sheathing McDaniel provided was in the completed Project. Rehearing Motion Ex. A at 2. The evidence is relevant to deciding the merits, and therefore supported reopening the case. *See*, *e.g.*, *Wilmington Trust*, 346 So.3d at 1220.

Third, opening the evidence to consider testimony from Mrs. McDaniel and evidence showing Craft approved and verified the materials and work billed in Application 5 – including that McDaniel delivered the sheathing – would have enabled the court to decide the case on the merits. Instead, the trial court accepted Craft's testimony at the end of trial that McDaniel did not deliver the sheathing. *Wilmington Trust*, 346 So.3d at 1219; *see also Kahle*, 673 So.2d 122.

Fourth, McDaniel's explanation for not introducing Mrs. McDaniel's testimony and the delivery tickets during trial is also reasonable. The Pre-Trial Stipulation does not raise verification, approval, or delivery as a disputed issue of fact or law. Craft did not timely raise this issue at trial to alert McDaniel that it needed to

present the contradicting facts. McDaniel thus had no expectation that approval, verification, or delivery would be issues needing proof at trial. McDaniel asked Craft's corporate representative at his deposition (2 years after submitting Application 5) if there was "any reason why any of those payment applications [3, 4, or 5] are incorrect or that money is not due other than" the Counterclaim. R. 6950. Pantophlet could have testified the money was not due because Craft did not verify or approve Application 5. R. 6950. Pantophlet also could have testified the amount in Application 5 was incorrect because McDaniel did not deliver the sheathing. R. 6950. But Pantophlet did neither. Instead, Pantophlet answered "no." R. 6950. In other words, there was no other reason for not paying McDaniel. Craft raised this argument at trial during re-direct testimony for Pantophlet on the trial's final day. *See* FN 3, *supra* at 12, Pantophlet Testimony at 159:7-18. McDaniel could not adequately respond.

Fifth, uncontested, Craft would not suffer unfair prejudice by allowing the evidence and testimony proffered by McDaniel. *See*, *e.g.*, *Lovelass*, 250 So.3d at 705; *Robinson*, 936 So.2d at 782. There

is no unfair prejudice to Craft. The trial court should have considered Pantophlet's testimony in context with the facts to ensure the record "reflect[ed] the true state of the facts as they existed." *Silber v. Cn'R Indus. of Jacksonville, Inc.*, 526 So.2d 974, 978 (Fla. 1st DCA 1988). There was no prejudice.

Craft elected not to respond to case law supporting McDaniel's arguments; preferring instead to state its conclusion that the trial court did not abuse its discretion. That is not enough. McDaniel has presented facts and authority that entitled it to the relief sought in the Rehearing Motion, and the trial court should have reopened the evidence to decide the case on the merits. The Court should therefore reverse the trial court with instructions to receive in evidence the facts McDaniel has proffered.

B. The trial court should have conducted an evidentiary hearing to decide whether Craft misrepresented facts during trial.

Beyond a conclusory argument that the trial court was right, Craft's answer brief did not address the trial court decision to not hold an evidentiary hearing on the request to reopen: "If a party filed a motion pursuant to rule 1.540(b)(3), pleads fraud or

misrepresentation with particularity, and shows how that fraud or misrepresentation affected the judgment, **the trial court is required to conduct an evidentiary hearing** to determine whether the motion should be granted." *Robinson v. Weiland*, 936 So.2d 777, 781 (Fla. 5th DCA 2006) (emphasis added).

Craft did not tackle the misrepresented facts underscored in the Rehearing Motion or this appeal. Pantophlet stated he would not have approved or verified the work billed in Application 5 because McDaniel did not deliver the sheathing. R. 8907; Rehearing Motion at 3-4; *See* FN 3, *supra* at 12, Pantophlet Testimony at 159:7-18. This testimony affected the judgment because the trial court relied on it as the reason for excluding damages for Application 5. R. 8905. But the testimony was contrary to Pantophlet's deposition; he testified the only bases for refusing payment were its allegations in the Counterclaim – not its decision to disapprove or reject the work billed in Application 5 because it did not receive the sheathing. R. 193-95, 8905. Pantophlet's trial testimony is also contrary to Mrs. McDaniel's affidavit and the references to the signed delivery tickets, showing McDaniel

delivered the sheathing and that Craft tacitly approved and verified the work. Rehearing Motion Ex. A at 2.

Through Pantophlet's deposition and Mrs. McDaniel's affidavit, McDaniel presented Pantophlet's trial misrepresentation with particularity and "raise[d] a colorable entitlement to relief." *See S. Bell Tel. & Tel. Co. v. Welden*, 483 So.2d 487, 488-89 (Fla. 1st DCA 1986). Contrary to the trial court's assertion, it therefore should have held an evidentiary hearing. *See Robinson*, 936 So.2d at 781-82; *Welden*, 483 So.2d at 489. The trial court abused its discretion when it refused the evidentiary hearing.

CONCLUSION

Based on the above, the appellant, McDaniel Construction, Inc., respectfully requests the Court enter an order (i) reversing the trial court's Final Judgment with respect to Application 5; (ii) enforcing the parties' Pre-Trial Stipulation and awarding McDaniel damages for Application 5 in the amount of $81,094.95 or, in the alternative, remanding for the trial court to reopen the trial and accept McDaniel's evidence regarding delivery of the

sheathing billed in Application 5; and (iii) granting such other relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2024, a true and correct copy of the foregoing has been filed with the Court's electronic portal, and furnished via the same to: (1) Allen J. Heffner, Esq. (aheffner@lorenkeanlaw.com, squillen@lorenkeanlaw.com) and Bruce E. Loren, Esq. (bloren@lorenkeanlaw.com, clucht@lorenkeanlaw.com), Loren & Kean Law, 7111 Fairway Drive, Suite 302, Palm Beach Gardens, FL 33418, counsel for appellee/cross-appellant Craft Construction Company, LLC; (2) Vincent F. Vaccarella, Esq. (vincent@v-law.net), Peter Meltzer, Esq. (pmeltzer@v-law.net), and Craig R. Lewis, Esq. (clewis@v-law.net), Vincent F. Vaccarella, P.A., 888 East Las Olas Blvd., Suite 700, Ft. Lauderdale, FL 33301, counsel for appellee/cross-appellant Craft Construction Company, LLC; and (3) Duane A. Daiker, Esq. (ddaiker@shumaker.com, jkerr@shumaker.com) and Michele Leo Hintson, Esq. (mhinston@shumaker.com, kgrotz@shumaker.com), Shumaker, Loop & Kendrick, LLP, 101 E. Kennedy Blvd., Suite 2800, Tampa, FL 33602, counsel for interested party FCCI Insurance Co.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Florida Rule of Appellate Procedure 9.210(a)(2)(B) because, excluding the parts of the document exempted by Florida Rule of Appellate Procedure 9.210(a)(2)(E), it contains 7,587 words.

I further certify that this document complies with the line spacing, type size, and typeface requirements of Florida Rule of Appellate Procedure 9.045(b) and has been prepared in 14-point font Bookman Old Style.

By: */s/ Jon Polenberg*
Jon Polenberg