DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

CASE NO. 5D23-3618

DAIMON J. MCNAMARA,

Appellant,

vs.

BENDERSON DEVELOPMENT COMPANY, LLC,

Appellee.

On appeal from a final order of the Eighteenth Judicial Circuit in and for Seminole County, Florida, Case No. 2018-CA-002503

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Nature of the case

Daimon McNamara, a construction worker, sued the project owner, Benderson Development Company, LLC ("Benderson"), after he fell from a boom lift as it tipped over. A jury found Benderson was not liable.

The trial involved a dispute over the events leading to the accident: did McNamara remain in the lift basket after it started to tip, or did he lower the lift basket out of harm's way, chain the boom lift to a forklift, and attempt to pull it from the mud, before getting back in and elevating the basket? Also at issue were two exceptions to the general rule that an owner is not liable for a contractor's injuries: first, did Benderson control the "means and methods" of the work subcontracted to McNamara, *i.e.*, *how* the work is performed, rather than *what* was built, and second, did Benderson negligently create or negligently approve a dangerous condition that caused the injury?

The trial court excluded a geotechnical (soil) engineering report that predated the project by over a decade and was not used for the construction, directed a verdict on the first exception to owner non-liability, and denied McNamara's request to present specific expert rebuttal as cumulative and improper expert opinion. This appeal challenges each of those rulings.

B. Statement of the facts

In the early 2000s, Benderson purchased property in Orlando, Florida, near Universal Studios and many surrounding hotels. R.3063:24–3064:8, 3440:7–3441:9, 3640:23–3641:9. Benderson retained a geotechnical engineer, Ardaman & Associates ("Ardaman"), to evaluate the property for a proposed Towne Place Suites. R.4565. Ardaman produced a Subsurface Soil Exploration and Geotechnical Engineering Evaluation dated June 24, 2005 ("Ardaman Report") with findings and recommendations for supporting the structure. R.3066:4–15, 4565. Benderson did not move forward with the project, and the property sat for over a decade. R.3064:21–3065:2.

In 2015, Benderson began considering a different project, a Home2 Suites by Hilton. R.3065:3–3066:3. At that time, Benderson retained another geotechnical engineer, Universal Engineering Sciences ("Universal"), to perform a soil and foundation evaluation, and Universal provided its report on February 5, 2015 ("Universal Report"). R.583, 3066:4–25. The Universal Report noted "moisture sensitive" soils and offered recommendations for the proposed construction. R.590 at ¶7.2.2; 3066:4–15, 3068:24–25. The project was ultimately constructed using the Universal Report. R.3082:25–3083:21.

In early 2017, Benderson hired Cleveland Construction Inc. of Nevada ("Cleveland") as general contractor for the project. R.862. After pouring the

concrete floors and walls, Cleveland hired McNamara's company, Allstar Concrete Cutting ("Allstar"), as a subcontractor to cut excess concrete to prepare the building for sheathing. R.3846:9–13, 3847:13–3849:19.

On the day of the accident, McNamara arrived on site late. R.3917:18–21. He missed Cleveland's subcontractor meeting, where the superintendent discussed safety. R.3445:20–3446:5, 3969:25–3970:5. He did not walk his travel path before operating the lift, as required. R.3327:13–14, 3963:21–24. Yet, McNamara admitted he saw a puddle on the southeast corner of the site where he was working and knew the ground was muddy. R.3913:5–3914:24.

Just before the accident, McNamara was in the lift basket, elevated 30 feet in the air, with the base less than 10 feet from the south side of the building, and he began moving east along the construction path. R.3444:18–25, 3862:18–3863:4, 3870:22–3871:4. As he approached the puddle with the boom extended, the front right tire lost traction. R.3920:6–3923:2, 3931:4–8, 3965:25–3966:13, 3977:7–17. The lift became stuck and uneven as the tire sank. R.3870:20–22, 3877:22–3878:13.

The parties dispute what happened next. According to McNamara, the controls in the basket became disabled, he yelled for help, and two workers, Alejandro Diaz and Paulo Mendez, attempted to rotate and bring the basket down using the ground controls. R.3878–3882. Other witnesses, including

Diaz himself, explained that McNamara brought the basket down, got out, chained a lull (forklift) to the stuck boom lift, and attempted to pull it from the mud. R.2962, 3362–3370, 3399:23–3400:2, 3535–3536. McNamara then got back in the boom lift basket to turn it away from the building. R.3366–3367, 3389, 3400:19–20, 3459:25–3460:2.

Either way, the boom lift tipped over, and McNamara—whose safety harness was not anchored as required—was ejected to the ground. R.2578:12–21, 3450:21–22, 3459:18–20, 3899:6–9, 3940:18–21. Accident scene photographs show the boom lift chained to the forklift with McNamara lying on the ground and Cleveland's superintendent, David Bryan, on his cell phone with 911. R.1092, 3461:19–3463:5, 3984:10–22.

C. Pretrial procedural history

McNamara sued Cleveland, Bryan, the owner of the boom lift, Sunbelt Rentals, Inc., and later, Benderson. R.2212, 4552. As defenses, Benderson asserted that it owed no duty of care to McNamara because it did not direct or influence the manner in which the construction work was performed and did not create a dangerous condition that injured him. R.2227 at ¶¶1–2. Benderson also pointed to the negligence of McNamara and others as intervening and superseding causes. R.2228–29 at ¶¶7, 10.

Benderson filed a third-party complaint against Diaz and Mendez's employer, Midstate Caulking and Construction Services, LLC. R.4029. Benderson did *not* adopt McNamara's version of the facts but "dispute[d] the allegations" and sought indemnity only "in the event Plaintiff McNamara successfully established the liability of Benderson" that "related to or ar[o]se from Midstate's work on the Project." R.4034 at ¶16.

In response to a motion to add a claim for punitive damages, Benderson filed a February 8, 2021 affidavit from a civil engineer, C. William Brewer, P.E.—the affidavit McNamara repeatedly quotes in his initial brief. R.54. Brewer, however, was not Benderson's only expert witness.

By June 27, 2022, over a year before trial, Benderson had disclosed several expert witnesses, including Christopher Stewart, P.E., who had a different specialty than Brewer—mechanical engineering and accident reconstruction—and would testify as to "the cause of [McNamara's] accident" and "rebut the opinions of [McNamara's] expert Anthony E. Bond." R.4609. Stewart had been jointly retained by Cleveland, and Cleveland disclosed that Stewart would further "testify regarding analysis and preservation of evidence and scene documentation." R.4615. Stewart was also the subject of interrogatories served by McNamara. R.4208:13–17. Although claiming to

be dissatisfied with the disclosure, McNamara never moved to compel better answers and never deposed Stewart. R.4208:12–19.

On July 27, 2022, Benderson and Cleveland moved to exclude the Ardaman Report as unfairly prejudicial and likely to mislead the jury given:

> (1) the age of the Report; (2) the uncertainty and impossibility of determining any and all change(s) in condition of the property from the time of the Ardaman Report to the time of the Universal Report ten years later; (3) the advancements in the field of geotechnical engineering over a ten year span; and (4) the fact that the Report was never used in the construction in which [McNamara] was engaging when injured.

R.103. The motion also asked to exclude photographs of Ardaman's truck stuck in the mud for similar reasons: their age, "the fact that the ground was native at the time with no improvements made" which "was an entirely different condition than when [McNamara] was on site," and, as a geotechnical engineer, Manuel Irizarry, testified, it is not uncommon for trucks to become stuck before soil is treated with geotechnical recommendations. R.111–14. Lastly, the motion asked to exclude a 2017 Universal daily inspection report.

The trial court was "very concerned with the period of time between when the Universal report was prepared versus when the Ardaman report was prepared." R.2334:13–20. When asked for evidence the soil conditions remained the same as a decade earlier, McNamara responded, "[t]here's no

evidence that anything happened." R.2330:5–2331:23. McNamara argued the Ardaman Report was relevant to show notice of drainage issues with the soil. R.2333:10–16. The trial court questioned, "why wouldn't the Universal plan that was prepared back in 2017, much closer to the accident, be what you'd rely upon as far as that notice…?" R.2334:13–20. McNamara argued the Ardaman Report put Benderson "on notice of a safer approach, a more rational approach considering the drainage problems that this property always demonstrated." R.2334:21–2335:18, 2340:4–16. Benderson countered that a "comparison of recommendations is only probative if they're close in time," and it would be unfair to argue to the jury that "Benderson chose the cheaper alternative" to one a decade older. R.2337:18–2338:20.

The trial court ruled to exclude the Ardaman Report and photographs, pointing to the "period of over a decade" and "the Universal plans being the plans that were used by the defendants related to the construction, combined with the deposition testimony of Mr. Irizarry that was attached to the motion." R.2340:20–2341:8. But the trial court declined to exclude the daily inspection report, finding it was "not so remote in time, especially since Universal was the entity that provided the construction plans … and … did the analysis of the soil at the time to determine what was the appropriate way to build the

structure." R.2341:9–16. However, before a written order was entered, the trial judge recused himself. R.40 (Dkt. 653, 655).

A successor judge, after hearing additional argument, entered an order excluding the Ardaman Report and photographs:

> The remoteness in time in combination with the lack of evidence to support that Benderson relied on the Ardaman Report to construct the subject property in 2017 … make the 2005 Ardaman Report and photographs[’] … probative value substantially outweighed by the danger of unfair prejudice.

R.2457–58. The trial court would later reiterate the same rulings again during trial. R.3036:5–3037:1, 3052:10–18.

D. The trial

The case went to trial[1] over 3 weeks in September 2023. R.4767. The jury heard from 19 different witnesses: 14 in McNamara's case-in-chief, 4 in Benderson's case, and 1 in McNamara's rebuttal case. R.4768–804.

1. McNamara's case-in-chief

a. McNamara's expert testimony about the accident

McNamara began his case by calling an expert witness, Anthony Bond, P.E., remotely by Zoom. R.2492. Although McNamara claims "unusual technical difficulties," IB at 10, he did not request a delay or object to

[1] Before trial, McNamara dismissed Bryan and Sunbelt, R.22 (Dkt. 236), and Cleveland prevailed on summary judgment. R.40 (Dkt. 649); *McNamara v. Cleveland Constr., Inc. of Nev.*, 391 So. 3d 604 (Fla. 5th DCA 2024).

completing Bond's testimony. Bond testified for almost 6 hours, spanning some 150 transcript pages. R.2492–640, 4777–79.

Bond, who is a mechanical engineer by trade, did not visit the accident site, did not physically observe or measure the equipment involved in the accident, and did not run any calculations. R.2510:7–12, 2512:13–25, 2580:15–2582:13. Rather, Bond formulated his opinion from photographs, including a large composite of photographs taken by Benderson's expert, Stewart, who was on site the day of the accident. R.1272–1326, 2510:7–12.

Bond summarized his theory of the accident:

> The tip over incident took place due to the poor soil conditions. Having the boom lift tilted at an angle greater [than] would allow for the platform controls to operate, so Daimon [McNamara] could bring himself down. Daimon couldn't bring the boom down anyway, because the building was an obstruction to him bringing the boom lift down. Daimon relied on people on the ground to rotate the boom, and lower the boom to the ground for his safety. When the boom was rotated clockwise, the tip over occurred, due to the extra counterweight was shifted to between the tires. And then, the tip over occurred, ejecting Daimon out of the platform because he did not have a harness and lanyard attached to the platform.

R.2565:19–2566:6.

To counter Diaz's deposition testimony (that McNamara would present in his own case, R.3352), McNamara elicited Bond's opinion that after the boom lift tire sunk in the mud, McNamara could not "bring the arm down," "get back in the basket, and control the boom lift from the basket controls."

R.2533:3–2534:18, 2535:13–19, 2605:9–14. Once the boom lift is "at an angle of five degrees slope or greater, the upper controls in the back platform would … cease to function" and "an alarm as well as an indicator light, would go off in the platform." R.2509:3–7. Thus, based on his "understanding from [McNamara]," Bond opined McNamara "was stuck in the boom lift," "couldn't do any type of movement with the boom lift," and "[t]he building was in his way, so he couldn't just lower the boom lift." R.2564:20–2565:2.

Later, Bond clarified the basket controls stop functioning at "some percentage above" a five-degree tilt. R.2605:9–2607:3. He acknowledged the boom lift operation manual describes a "creep mode" that automatically activates if the lift tilts, and he admitted the same manual does not reference losing the ability to use the basket controls. R.2607:4–2610:18.

Bond opined that "the chain had to be hooked up after the tip over event." R.2564:20–21. He testified, at length, that it was not physically possible for the boom lift and forklift to be attached before the tip-over, based on "the physical evidence, and the photographs taken immediately after the accident." R.2517:4–2533:2. Using Stewart's photographs, Bond showed "the left fork is touching the axle of the boom lift, and it's below the cylinder," and the "right fork … is above the axle." R.2518:18–2519:14. Bond explained, "if the forklift was connected prior to the tip over, you would expect

both forks to be driven underneath the axle, the front axle, prior to the tip over." R.2519:14–25, 2522:5–8. He opined that "there is no way that a right fork could be above the tire, and the left fork be below the axle, and a tip over accident occur." R.2521:22–2523:4.

When asked which "scientific methods" he used "to determine that it is impossible to get [the forklift] tines in this position, if it was connected with a chain to the boom lift," Bond answered: "The laws of physics." R.2626:4–7. When pressed, all he offered was "the mechanics of -- how these machines operate." R.2626:7–13. Bond conceded that he did not physically observe or measure the machines, and he would not answer whether he made any calculations, despite being asked several times. R.2580:15–2582:13.

Bond was specifically asked whether his "opinion take[s] into account, that the boom lift was tilted a little bit, at the time that the forklift might have been connected with [the] chain," and he answered, "Sure." R.2630:13–18.

Bond was shown one of Stewart's photographs of the forklift tines and asked "whether or not this left hand tine is being curved up?" R.2620:16–2621:4. He responded, "I can't tell that from the picture." R.2621:5.

Bond was also shown a photograph of the boom lift chained to the forklift with McNamara lying on the ground—before the paramedics arrived. R.2617:12–22. After it was pointed out that his opinion meant someone

would have ignored the injured McNamara to chain the machines together, Bond speculated, "maybe someone was concerned that it would tip over further." R.2617:23–2619:17. But he had no such evidence. R.2619:18–21.

b. McNamara's fact witness testimony about the accident

McNamara testified next. R.3839. His story was that the boom lift's tire became stuck in the mud, and when he tried to back out, the boom lift "started to tip." R.3870:22–3872:15. Then, "it all collapsed. And as it collapsed, the lift sunk into it, and started to go over." R.3874:2–14. McNamara testified he could not move the basket down because it "would have crashed into the building." R.3874:15–21. McNamara insisted he did not come down, get out of the boom lift basket, and chain the lifts together. R.3896:22–3897:1.

On cross, McNamara confirmed that he was "on the ground, looking up, and the boom lift [was] right in front of" him, and he "recalled everything from the time [he] hit the ground." R.3899:7–9, 23–25. Yet, he "didn't see anyone put the chain on it," and he had no explanation for how the boom lift got chained to the forklift after the accident. R.3899:17–19, 3900:1–7, 3903:8–15. On redirect, when his own counsel suggested he might have lost consciousness, McNamara testified he remained conscious, and "d[i]dn't think [he] ever lost consciousness once [he] hit the ground." R.3985:5–13.

After calling several witnesses, McNamara presented the video deposition of Diaz, who was on the site at the time of the accident. R.3352, 3360. Diaz testified that he and a co-worker, Mendez, were inside the first floor of the building when McNamara approached on foot asking for help. R.3361:23–3363:5. When he went outside, Diaz saw McNamara's "machine was stuck" with two wheels tilted, the boom lift basket was lowered down, and the "boom lift was tied to a forklift with a chain." R.3363:6–17, 3364:15–17, 3365:17–3366:3, 3401:12–23, 3402:9–12. McNamara asked for help driving the forklift, but Diaz declined. R.3363:12–16, 3364:18–21.

Diaz explained that McNamara got back into the boom lift (without tying his safety harness) and raised himself up using the basket controls, minutes before it tipped over, launching him into the air. R.3366:4–3367:16, 3388:25–3389:14. A minute later, Diaz took a photograph that shows the boom lift already chained to the forklift while McNamara laid on the ground and Bryan called 911. R.3368:7–3369:8, 3461:19–3463:20. Diaz did not see anyone attach the chain to the machines. R.3390:24–3391:5, 3395:15–22.

After Diaz's deposition, McNamara called Bryan, who testified that he came from the other side of the building when he saw black smoke, and he also did not see anyone attach the chain. R.3449:13–19, 3463:21–24. Bryan prepared an incident report "based on what [he] gathered on that day."

R.3449:5–9. The report, offered without objection, states: McNamara "got the lift stuck in the mud"; he "then attempted to … attach the chain to the forklift, and pull the lift from the mud"; and "[f]or reasons unknown, [McNamara] then raised the lift approximately 30 plus or minus feet, and it overturned." R.3446:12–24, 3448:16–3449:4.

2. McNamara's evidence of who controlled the means and methods of work

a. Control under the Owner-Contractor Agreement

McNamara introduced the Owner-Contractor Agreement, under which Benderson hired Cleveland as general contractor for the project. R.862. The contract specifically gave Cleveland complete authority over the means and methods of construction and made Cleveland solely responsible for safety:

> 3.5.2 In no event shall the Owner have control over, charge of, or any responsibility for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work, notwithstanding any of the rights and authority granted the Owner in the Contract Documents.
>
> ***
>
> 4.4.1 Contractor shall supervise and direct the Work using its best skill and attention. It shall be solely responsible for all construction means, methods, techniques, sequences and procedures for Work done by its forces and those under its direction or control, for coordinating all portions of the Work under the Contract, and for safety as well as conformity and timeliness of all portions of the Work under the Contract.

R. 876, 880.

b. Control on the project

McNamara's evidence showed the project was performed consistent with the above-quoted provisions of the Owner-Contractor Agreement.

To grade the dirt and prepare the site, Cleveland hired a site-work subcontractor, Red Fox Trucking, whose vice president, Scott Feldman, testified that all aspects of his work were directed and supervised by Cleveland, *not* by Benderson. R.3686:1–9, 3690:11–3693:21. He reviewed the Universal Report and followed its recommendations for the soil, with Cleveland selecting the means and methods of the work. R.3693:22–3696:24, 3701:15–3705:3, 3811:16–19.

Feldman confirmed that Cleveland was responsible for staging and controlling the path on which vehicles would travel during construction, as part of its chosen means and methods of constructing the project. R.3696:9–20. To maintain access around the site, Cleveland would direct construction traffic and alter the construction path as the project progressed. R.3697:4–8. Benderson's project manager, Terry Yensen, testified similarly. R.3128:6–17, 3155:15–16.

Construction of the drainage system that would service the completed Home2 Suites fell within Red Fox's scope of work. R.3642:22–3643:8. Both Feldman and Yensen testified the completed drainage system was not

expected to function during construction but only *after* finishing the building and pouring the pavement. R.3165:5–9, 3698:3–7, 3705:10–20. Cleveland controlled the sequencing of construction, and the pavement was not to going to be installed until the end of the project. R.3165:8–9, 3697:23–3699:3. During construction, Cleveland selected the means and methods to manage drainage on the site; Benderson was not involved in the decision. R.3167:15–3168:4, 3705:21–3706:25.

McNamara called a civil engineer, Steven Boyd, to give an expert opinion on the drainage. R.3766. Boyd agreed Cleveland was responsible for following the geotechnical recommendations for the soil, and Cleveland was responsible for selecting (and implementing) the means and methods of establishing the construction path, of constructing the drainage system, and of managing the water on site until the drainage system was functioning with the building complete and the pavement poured. R.3796:12–3797:4, 3801:2–9, 3806:21–3807:20, 3811:12–24.

Boyd opined that, at the time of the accident, the southeast corner of the site did not allow proper drainage. R.3782:13–25. He also opined there "would have been an adequate construction path" had Benderson approved a request, known as RFI 65, to install a layer of concrete to cover underground pipes in the southeast corner to protect them from damage.

R.3783:1–15, 3784:17–25. But there was no discussion about safety or drainage in the southeast corner in the communications surrounding RFI 65, and Boyd confirmed the material used to cover the underground pipes did not matter because McNamara was not driving over a pipe at the time of the accident. R.3805:8–3810:16, 3811:25–3812:12, 3816:5–3817:15.

Boyd had no criticism of Benderson for developing the site, no criticism of the civil engineer's design for the drainage system, and no criticism of the Universal Report or its geotechnical recommendations for the soil (which did not include pouring concrete). R.3789:11–3793:10, 3795:1–23.

c. Control of McNamara's work

McNamara testified that Cleveland directed his work, and he received all instructions from Cleveland, including where to cut concrete. R.3919:12–13, 3966:14–21. Each day on site, McNamara checked in with a Cleveland representative at the construction trailer before starting work, and someone from Cleveland locked the fence behind him when he left. R.3968:2–20. Cleveland provided several boom lifts on the project and told McNamara which one to use. R.3851:25–3852:2, 3917:22–24, 3968:21–3969:5.

McNamara testified that he had no interaction with Benderson, received no direction from Benderson, and was not given the boom lift by

Benderson. R.3903:21–3904:7, 3969:22–24. In fact, Benderson did not even know McNamara's company, Allstar, was working on the site. R.3126:5–10.

3. The directed verdict motion

Benderson moved for a directed verdict, arguing that a project owner is not liable for an independent contractor's injuries, and neither of the two exceptions applied. R.4260:5–10, 4261:8–4262:10. For the first exception, the Owner-Contractor Agreement gave Cleveland full authority over the means and methods of construction, which was not overridden by the limited rights Benderson retained. R.4264:8–4266:25. As owner, Benderson "can tell the contractor what it wants the contractor to build," meaning it "can choose what the finished product will be like," but it "cannot tell the contractor … the method" of installation. R.4266:25–4267:23. Testimony of Yensen, Feldman, Bryan, and Boyd confirmed that Cleveland was responsible for the means and methods of construction during the project, including the location and surfacing of the construction path and managing water on the site. R.4267:23–4271:16. For the second exception, McNamara failed to identify a dangerous condition on the property that Benderson approved or created. R.4272:11–4280:16.

The trial court agreed with Benderson on the first exception, ruling, "no reasonable jury could find [Benderson] controlled the manner or methods of

Cleveland or All Star's work and exercised that control in a negligent manner." R.4309:10–4310:2, 4808–09. But the trial court denied the motion as to the second exception. R.4327:14–4328:14, 4808–09.

4. Benderson's case

Benderson began its case with Rosario Sacco, an eyewitness who had been working on the building's fifth floor. R.2955, 2961:10–16. Sacco testified that he saw "one of the lifts stuck" with "a lull[2] up against it," and he saw McNamara "carrying a chain towards it." R.2961:24–2963:8, 2968:20–2969:3. Five minutes later, he saw black smoke. R.2964:6–19, 2969:4–8. He ran to the window, where he took a photograph of the boom lift chained to the lull and McNamara lying on the ground. R.1269–70, 2965:16–2969:14.

Later, Benderson presented testimony from Officer Alex Rivera Adorno of the Orlando Police Department, who was dispatched to the accident scene. R.3517:10–25. Officer Rivera prepared a field report, which included voluntary witness statements from Bryan, Diaz, and Mendez. R.3520:13–18, 3522:12–23. The report, and his related testimony, were received into evidence without objection. R.3520:24–3521:10. Based on his observations of the scene, "the totality of all the statements, and the physical evidence," Officer Rivera reported that: "McNamara hooked a Sunbelt forklift … with a

[2] "Lull" and "forklift" were used interchangeably at trial.

chain, in order to get the boom lift unstuck from the mud"; he "jumped into the boom lift basket, and did not secure his safety harness to the equipment"; he "decided to rotate the boom lift, since it was too close to the building"; and "as McNamara rotated it, the boom lift tilted even more so, causing McNamara to fall…." R.3535:10–3536:22, 3537:20–25.

Benderson's final witness was its expert, Christoper Stewart, P.E. R.2682. Stewart testified that Sunbelt had retained him the day of the accident, and he visited the site that afternoon. R.2685:13–2687:3. Stewart inspected the machines involved, took photographs and specific measurements, and ran calculations. R.2694:15–2695:25, 2714:9–2719:16, 2730:9–23. Based on his evaluation, Stewart opined on the events that led to the accident:

> [T]he boom lift was traveling from east to west, coming around the corner, it got stuck. The driver brought it down, got out of the basket, and connected the forklift to the boom lift using a chain. Attempted to get some assistance in pulling that vehicle out. And then, returned to the basket, and began operating the unit in the stuck position. Did not tie off within the basket. Raised the basket up, and began rotating the turntable in a clockwise rotation. And as the counterbalances got close to perpendicular to the chassis itself, and the wheels, it created a tip over. And as that vehicle tipped over, because the boom was extended, it created a catapulting event that threw him out of the basket. And since he wasn't tied off, he fell from the basket to the ground.

R.2730:24–2731:21.

Stewart's evaluation thus led him to opine that McNamara "came down after [the boom lift] got stuck." R.2725:19–2726:7. Stewart testified the boom lift is equipped with a tilt sensor, and even if the sensor detects that the boom lift is uneven, the user can operate the basket controls and lower the basket using creep mode. R.2709:5–2710:14. He explained that the basket controls remain operational at any degree of tilt. R.2739:23–2740:22.

Stewart disagreed with Bond's opinion that it would have been physically impossible for the machines to be chained together before the tip over. R.2722:12–17. Using the data he collected from the accident scene, Stewart created 3D scans that placed the boom lift at approximately 12 degrees tilt before the tip-over. R.2722:17–2723:16, 2743:3–12. He explained that, based on the evidence, "it's very easy for one fork to be below the cylinder, and the other fork to be above the suspension because of the initial angle that [the boom lift] was at before it tipped." R.2723:16–21. When the boom lift finally came to rest, Stewart measured its tilt at 30 degrees. R.2743:23–2744:1, 2749:3–23.

Pointing to his photograph, Stewart testified that one of the forklift forks was bent upward at the end, which indicated the boom lift and forklift were already chained together when the boom lift tipped over. R.2720:13–24.

Stewart was “100 percent sure” the machines were chained together before the accident and saw no evidence to the contrary. R.2782:5–24.

5. McNamara’s rebuttal case

McNamara asked to present a limited rebuttal case. McNamara first asked to present a fact witness to rebut Sacco’s testimony, which the trial court allowed without objection. R.4524:16–4525:19. McNamara then asked to rebut Stewart’s testimony by re-calling Bond on just three specific items: (1) whether one of the forks was bent in the accident, (2) whether the boom lift’s basket controls would operate if the boom lift was tilted as much as 12 degrees, and (3) whether “the two forks could be put one on one side of the axle, and the other on the other side of the axle at a 12-degree” tilt, or differently stated, whether, “when the lift was tilted 12 degrees, that one fork could be put on one side of the cylinder and one fork could be put on the other.” R.4527:12–25, 4530:6–4531:14, 4536:16–4537:3, 4537:17–20.[3]

Significantly, McNamara did not ask to present testimony from Bond about what happened *after* the initial 12-degree tilt, that is, whether the placement of the forks would have then made it physically impossible for the

[3] McNamara also mentioned rebuttal to the “concept of a box,” referencing testimony of the two forks, the body, and the chain “creat[ing] a box that would allow forces to be exchanged,” R.4420:15–18, 4527:14–15, 4530:8, but he later waived the request. R.2947:17–18.

boom lift to tip *an additional* 18 degrees—from the initial 12-degree tilt to the final resting spot of 30 degrees.

In addressing the requests, the trial court *did not* deny that McNamara could present evidence in rebuttal of Stewart's opinion that the accident had caused a bend in the fork, stating, "I think the bent fork comes in," and again, after excluding other requested rebuttal, "The bent fork we can discuss." R.4536:18, 4538:19. However, McNamara later described the substance of the expert testimony he wanted to present—that in the photographs (which McNamara had used as trial exhibits and Stewart later marked on as a demonstrative), "both forks … [are] the same shape," the left fork was "not really bent," rather, "[i]t's an optical illusion" where "there isn't a bend," but "[i]t is the shape of the fork naturally." R.2938:19–21, 2944:11–12, 2945:2–3, 2946:1. And, pointing to the pictures, McNamara argued, "There, Your Honor, that's the fork that they say was not impacted, and it's bent in the same way, and he just drew a line underneath it." R.2946:5–7.

Addressing the proposed testimony on the first item, the trial court questioned, "Okay, then why do we have to have an expert to rebuttal to say that? The jury can see that." R.2946:2–4. Benderson pressed the same point: "So, Your Honor's correct. Whether it's bent or not is a factual question and doesn't require an expert opinion." R.2946:8–10. Benderson also

pointed to Bond's earlier testimony that he could not tell whether the picture showed the fork being curved up. R.2946:11–23. The trial court then ruled:

> And the curved up, that's the jury can see if it's curved up or not curved up. If you think it's a picture distortion, okay. And the expert has already talked about something about curved up, and they can see that. They can see whether that's curved on the line or not curved. They can see that picture if they want to.
>
> Those opinions are not going to be offered now in rebuttal from the expert.

R.2947:4–15.

On the second rebuttal item, whether the basket controls could operate if the boom lift were tilted 12 degrees, the trial court denied the request: "Say it in closing. We talked about the 5.1, 5.2 percent, 13 percent… that argument could be saved for the jury, as opposed to 5.1, 5.2, 5.3; what about 12.1?" R.4535:17–23.

And on the third rebuttal item—"the idea that the … two forks could be put one on one side of the axle, and the other on the other side of the axle at a 12-degree" tilt—the trial court ruled: "I believe we've already covered that area extensively." R.4536:24–4537:8. McNamara made sure his position was clear: "I'm talking about the concept that when the lift was tilted 12 degrees, that one fork could be put on one side of the cylinder and one fork could be put on the other." R.4537:17–20. The trial court reiterated its ruling: "Well, we've already covered that." R.4538:12.

After having ruled on all three requested items, the trial court specifically asked, “I don’t know if there were other opinions that you were asking about?” R.2947:15–16. And McNamara—never having asked for expert rebuttal as to whether the boom lift could have tipped from its initial 12 degree tilt to the final 30 degree tilt if the forklift tines were positioned one on either side of the axle—confirmed, “No, that's all I really wanted, Your Honor.” R.2947:17–18.

6. The verdict

Ultimately, the jury returned a defense verdict, finding Benderson did not “negligently create or negligently approve a condition that Benderson knew or should have known was dangerous, which was a legal cause of loss, injury, or damage to Damion McNamara.” R.2461 at ¶1.

E. Post-trial proceedings

On October 6, 2023, McNamara moved for a new trial, based on the exclusion of the Ardaman Report, the directed verdict on the first exception to owner non-liability, and the denial of his expert rebuttal requests. R.2124–32. Twenty-one days later, and four days after Benderson filed a response in opposition, R.2134, McNamara filed an affidavit of Bond to support his new trial motion. R.2147–67. The affidavit included calculations that, according to Bond, made the “story of the accident, as told by Mr. Stewart …

not physically possible." R.2152. Benderson moved to strike the affidavit as untimely under Fla. R. Civ. P. 1.530(b) and (c). R.2466–67.

After hearing the motion, the trial court reiterated and reaffirmed its prior rulings. R.4199:16–4200:15, 4207:4–21. The trial court denied the motion for new trial, R.2464, and entered final judgment for Benderson, R.2168.

This appeal followed. R.2170, 2179.

SUMMARY OF THE ARGUMENT

McNamara has not shown any error in the orders excluding the Ardaman Report, directing a verdict on the first exception to owner non-liability, denying the expert rebuttal he requested, or denying a new trial.

The trial court excluded the Ardaman Report only after finding the danger of unfair prejudice substantially outweighed its minimal probative value. This was well within the trial court's discretion: the Ardaman Report was more than a decade old; it was prepared for a different project; and a contemporaneous report—which was actually used in the construction—addressed the soil conditions at the time of the project.

The trial court correctly directed a verdict after finding Benderson did not control the means and methods of the work Cleveland subcontracted to McNamara. The contract gave Cleveland sole responsibility for the means and methods of construction and project safety, and Benderson could not interfere. All evidence showed that Benderson left McNamara entirely free to do the concrete cutting work his own way.

There was no abuse of discretion in denying McNamara's specific expert rebuttal requests. The trial court denied the first item—whether a photograph depicted forklift tines that were bent—as cumulative and improper for expert testimony, yet McNamara does not challenge either

ground. The second item—whether the boom lift could have tipped from a 12 degree tilt to a 30 degree tilt with the forklift tines placed where they were—was never ruled on during trial because McNamara never asked to present it until his new trial motion. The request came too late and, in any event, it would have been cumulative of the testimony in his case in chief.

Nor was McNamara entitled to a new trial. The trial court properly ruled on each issue, and his new arguments of fraud, newly discovered evidence, and surprise are improperly presented and incorrect.

The trial court should be affirmed in all respects.

ARGUMENT

I. MCNAMARA HAS NOT SHOWN ANY ERROR IN THE EXCLUSION OF THE ARDAMAN REPORT AND PHOTOGRAPHS

A. The abuse of discretion standard governs the exclusion of the Ardaman Report and photographs

"A trial court has wide discretion in determining the admissibility of evidence, and, absent an abuse of discretion, the trial court's ruling on evidentiary matters will not be overturned." *LaMarr v. Lang*, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001). McNamara acknowledges this standard but suggests that "when the evidence excluded is relevant and probative, the exclusion of necessary evidence will result in a finding of error for which a reversal is warranted." IB at 22 (citing *Lumbermens Mut. Cas. Co. v. Poling*, 823 So. 2d 805 (Fla. 5th DCA 2002)). In *Lumbermens,* however, the decision to exclude the evidence was based in part on a legal error, specifically, an incorrect application of the collateral source rule. 823 So. 2d at 807. Here, by contrast, the trial court excluded the Ardaman Report and photographs under §90.403, Fla. Stat. after finding the danger of unfair prejudice substantially outweighed their probative value.

"Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of

discretion." *Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991) (quotation omitted). "The weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two." *Id.* And in making such decisions, the trial court's "[d]iscretion is abused only where no reasonable person would view the matter as the trial court did." *Ramirez v. State,* 810 So. 2d 836, 852 n.51 (Fla. 2001). Accordingly, there is no abuse of discretion where an evidentiary ruling does "not fall within the parameters of being 'arbitrary, fanciful, or unreasonable.'" *H & H Elec., Inc. v. Lopez*, 967 So. 2d 345, 348 (Fla. 3d DCA 2007) (quoting *Canakaris v. Canakaris,* 382 So. 2d 1197, 1203 (Fla. 1980)).

B. Exclusion of the Ardaman Report and photographs was well within the trial court's discretion

The trial court excluded the Ardaman Report and photographs after finding "the probative value substantially outweighed by the danger of unfair prejudice" due to the "remoteness in time in combination with the lack of evidence to support that Benderson relied on the Ardaman Report to construct the subject property in 2017." R.2457 at ¶1. The same ruling was first pronounced from the bench by a predecessor judge before he recused himself, then in the successor judge's written order, and finally, it was reaffirmed during the trial and again in denying McNamara's new trial motion. R.2168, 2340:20–2341:8, 2457–58, 3036:5–3037:1, 3052:10–18. On this

record, with the same ruling made by two different judges and reaffirmed multiple times, McNamara failed to show that "no reasonable person would view the matter as the trial court did." *Ramirez,* 810 So. 2d at 852 n.51.

To frame the minimal probative value of the Ardaman Report, recall that trial concerned the two exceptions to the general rule that an owner is not liable for an independent contractor's injuries. The first exception—discussed in significantly greater detail below in Section II—arises where the property owner "has been actively participating in the construction to the extent that he directly influences the manner in which the work is performed." *Conklin v. Cohen*, 287 So. 2d 56, 60 (Fla. 1973). The second exception arises where the owner engages in acts of "either negligently creating or negligently approving the dangerous condition" that caused the injury. *Id*.

McNamara appears to argue that the Ardaman Report was relevant, at least in part, to the first exception—by claiming, for example, that Benderson knew the ground "needed appropriate drainage and dirt work to prepare the site for construction," that the Ardaman Report introduced a "more conservative approach which would have allowed for drainage during the construction process," and that "Cleveland did not have the Ardaman Report or the only viable means and methods it presented to alleviate the soaking wet mud filled property." IB at 25–26.

But Benderson's *knowledge* about a particular means or method is not the standard for the first exception; what matters is whether the owner *controlled* the means and methods of the work. The record is devoid of evidence that Benderson directly controlled, or could even weigh in on, the means and methods of the construction work. Each witness who testified on the subject—including several called by McNamara—agreed that during construction, the general contractor, Cleveland, was responsible for the soil, construction path, and site drainage as part of its means and methods. And, under the Owner-Contractor Agreement, Benderson had no authority to interfere. All of this led the trial court to direct a verdict in favor of Benderson on the first exception, and correctly so, as discussed below in Section II. McNamara has not shown that anything in the Ardaman Report would have changed Benderson's lack of control over the means and methods of the work, including the site drainage during construction.

McNamara's suggestion that the Ardaman Report introduced "a conservative approach of creating wet ponds to permit drainage during the construction process," IB at 25, could, arguably, relate to the second exception, as well. But nothing prevented McNamara from providing expert testimony on this alternative approach; the ruling only precluded reference to the Ardaman Report itself. In fact, McNamara's expert, Boyd, explained

the differences and potential benefits of wet pond versus dry pond drainage. R.3772:22–3774:8. Boyd's testimony informed the jury of the alternative approach, which meant the Ardaman Report was simply cumulative evidence on the issue. And despite testifying about the alternative wet pond approach, Boyd testified that he had no criticism of the Universal Report and no criticism of Benderson for accepting the design.

Claims that the Ardaman Report demonstrated Benderson's knowledge of the property conditions also arguably relate to the second exception. Yet, the Ardaman Report does not show Benderson's "superior knowledge" of "the quality of the soil and drainage needs regarding the property" any more than the closer-in-time Universal Report. IB at 24. The Universal Report—which formed a central part of the evidentiary record—gave notice of the soil conditions as they existed in 2015, along with several geotechnical engineering options for dealing with the conditions at that time. And Cleveland actually constructed the project using the Universal Report. McNamara protests that Cleveland did not have the Ardaman Report to consider. But that only highlights the trial court's reason for excluding the Ardaman Report: no one relied on it in any way, and it was not relevant to the construction of a project a decade later.

Finally, McNamara insists the Ardaman Report has "great probative value" because it shows Benderson's knowledge of the soil quality and drainage concerns "for such a significant period of time." IB at 24–25. But that misses the point. The unobjected-to verdict form asked whether Benderson negligently created or negligently approved a condition "that Benderson knew or should have known was dangerous"—not *how long* Benderson had knowledge about the property. R.2461.

The trial court acted well within its discretion when it weighed the danger of unfair prejudice against the risk of confusing or misleading the jury if McNamara were allowed to introduce the Ardaman Report and argue that Benderson should have used those drainage recommendations—made for a different project a decade earlier—but chose a cheaper alternative. McNamara has not shown that the trial court made an "arbitrary, fanciful, or unreasonable" decision in excluding the Ardaman Report and photographs after finding that any probative value was substantially outweighed by the danger of unfair prejudice. *H & H Elec.* 967 So. 2d at 348.

II. THE TRIAL COURT PROPERLY DIRECTED A VERDICT ON THE FIRST EXCEPTION TO OWNER NON-LIABILITY

Under well-settled law, "a property owner who employs an independent contractor to perform work on his property will not be held liable for injuries sustained by the employee of an independent contractor during the performance of that work." *Williams v. Weaver*, 381 So. 3d 1260, 1264 (Fla. 5th DCA 2024). The parties agreed the general rule applied in this case,[4] subject to its two exceptions. *See id.*; R.2446–48 at ¶5, 4808.

And the rule makes sense: Because "the employer of an independent contractor 'has no power of control over *the manner* in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise,' and it is the contractor that is the 'proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." *Sterling Fin. & Mgmt. Inc. v. Gitenis*, 117 So. 3d 790, 794 (Fla. 4th DCA 2013) (quoting Restatement (Second) of Torts § 409, cmt. b (1965)) (italics added).

The first exception thus arises where an owner "has been actively participating in the construction to the extent that he directly influences *the manner* in which the work is performed" and "controls the *methods* of work."

[4] In *Williams*, the rule did not apply because the "injuries were not sustained in the course of performing the work..." 381 So. 3d at 1265. Here, the parties agreed to its application, and McNamara testified the accident occurred as he moved between cuts during his concrete cutting work.

Cecile Resort, Ltd. v. Hokanson, 729 So. 2d 446, 447–48 (Fla. 5th DCA 1999) (quoting *Conklin*, 287 So. 2d at 60) (italics added). An owner that "interferes or meddles with the job to the extent of assuming detailed direction of it, … thus becomes the master of the independent contractor's employee." *Indian River Foods Inc. v. Braswell*, 660 So. 2d 1093, 1097 (Fla. 4th DCA 1995) (quoting *City of Miami v. Perez*, 509 So. 2d 343, 345–46 (Fla. 3d DCA 1987)); *Juno Indus., Inc. v. Heery Int'l, Inc*., 646 So. 2d 818, 822 (Fla. 5th DCA 1994). Such an owner can then be liable for negligently exercising that control over the means and methods of work, if it results in injuries to the contractor's workers. *Fuentes v. Sandel, Inc.*, 189 So. 3d 928, 932–33 (Fla. 3d DCA 2016).

The reason for the first exception is as sensible as the rule: It "allocate[s] risk to the entity best situated to prevent the loss." *Sterling*, 117 So. 3d at 794. The "deciding question," then, is "who exercised control *of the work*, and thus was in the position to prevent the harm which occurred." *Cecile*, 729 So. 2d at 448 (quoting *Armenteros v. Baptist Hosp. of Miami, Inc.*, 714 So. 2d 518, 522 (Fla. 3d DCA 1998)) (italics added).

Here, section 4.4.1 of the Owner-Contractor Agreement placed sole responsibility for project safety and all construction means and methods on Cleveland, and section 3.5.2 prohibited Benderson from interfering. R.876,

880; *see Juno*, 646 So. 2d at 822 (quoting similar provisions which "clearly show[] that [contractor] was responsible for the safety of the workers"); *Eiler v. Camp, Dresser & McKee, Inc.,* 583 So. 2d 1086, 1087 (Fla. 5th DCA 1991) (pointing to similar provision); *Van Ness v. Indep. Constr. Co.*, 392 So. 2d 1017, 1019 (Fla. 5th DCA 1981) (pointing to similar provision); *see also Eguia v. The Landings, Ltd*., 507 So. 2d 134, 135 (Fla. 2d DCA 1987); *Lowe v. U.S.*, 611 F.2d 76, 77 (5th Cir. 1980).

McNamara points to no "actual facts" demonstrating that Benderson exercised control over the means and methods of his work—in violation of the contract. *Sterling*, 117 So. 3d at 794. "[T]he amount of control needed to pierce the shield of liability must be extensive." *Morales v. Weil*, 44 So. 3d 173, 176 (Fla. 4th DCA 2010). An "owner could perform a number of activities and still not expose himself to liability, if the activities were not directed at manner and method of work." *Armenteros*, 714 So. 2d at 523.

So it does not matter that Benderson may have retained rights to "order the work stopped or resumed," to "inspect" the work, to "receive reports," to "prescribe alterations and deviations" through change orders, or to "insist[] that the building be completed on time." *Cecile*, 729 So. 2d at 448 (quoting *Armenteros*, 714 So. 2d at 522); *Van Ness*, 392 So. 2d at 1020; *see also Juno*, 646 So. 2d at 823; *Perez*, 509 So. 2d at 346–47. Nor does it matter

that Benderson had a representative on site, especially where there is no record evidence that he "supervised or attempted to supervise anyone." *Juno*, 646 So. 2d at 823; *Van Ness*, 392 So. 2d at 1019–20. But these are precisely the items McNamara relies on. IB at 9, 30.

Similarly irrelevant is the allegation that Benderson "retained control of the soil" because Cleveland's bid understood "Site Preparation" to include "the proposed ground improvement beneath the Hotel and Pool Structures only" and to exclude "[m]oisture conditioning or undercutting of existing soils." IB at 32, R.937. Not only do these vague assertions fail to support what McNamara suggests, since the evidence unequivocally established that Cleveland hired Red Fox as the site work subcontractor responsible for grading the soil, and Red Fox did perform the prescribed site preparation work. R.3686:1–3687:23. These assertions are, at most, relevant to the rule's second exception—for a property owner that "negligently creates or negligently approves a dangerous condition," *Williams*, 381 So. 3d at 1264—which is precisely what McNamara was permitted to argue to the jury. Allegedly retaining control *of the soil* has nothing to do with controlling *the means and methods of work*.

Even receiving soil compaction testing reports from the engineer and directing the contractor to "fix" failing areas, IB at 9, 32, does not equate to

control of the means and methods of work. Owners have a right "to determine that the work conforms to the contract and to reject unsatisfactory work and demand that it be made satisfactory." *Van Ness*, 392 So. 2d at 1019.

McNamara looks to a letter where Benderson "take[s] responsibility" for its selection of a particular piping material, and testimony of the contractor "[w]aiting on direction from Benderson," specifically its approval of a change order, before constructing the parking lot. R.630, 3281–93. But the selection of materials and approval of requested design changes are decisions about *what* to build, not *how* the work is performed. *See Indian River Foods*, 660 So. 2d at 1098 (owner requested to change size of pipe but did not "instruct on the means or methods for accomplishing that goal"); *Morales*, 44 So. 3d at 178 (owner dictated "results" of demolition job, not "the means used to accomplish this result"); *Perez*, 509 So. 2d at 346 (owner "may retain a broad general power of supervision and control as to the results of the work").

And, finally, McNamara points to testimony where Yensen agreed, "if I was on site, and saw something that had a safety hazard to it, and that no one noticed, yes. I would bring it to their attention that I saw something." R.3168:17–20. But these "skillfully and carefully phrased general questions about [an owner's] responsibility for safety" cannot overcome the owner's shield of liability. *Sterling*, 117 So. 3d at 793. As the Fourth District made

clear, “[m]erely exercising a general right to recommend a safe manner for the independent contractor's employees to perform their work is insufficient to subject a party to liability.” *Id.* at 794 (quotation omitted).

McNamara has offered nothing to distinguish this case from the long line of cases that found the first exception inapplicable because the owner did not retain, let alone exercise, such “a right of supervision” over the work being performed that the contractor was “not entirely free to do the work his own way.” *Cecile*, 729 So. 2d at 448 (quoting *Armenteros*, 714 So. 2d at 522); *Van Ness*, 392 So. 2d at 1019.

For example, in *St. Lucie Harvesting & Caretaking Corp. v. Cervantes*, a contractor’s employee suffered injuries while driving a loaded “goat” from one fruit grove to another. 639 So. 2d 37, 39 (Fla. 4th DCA 1994). Although the grove owners directed “the amount of fruit to be harvested and from which grove,” they were not liable under the first exception because they “had no control over what equipment was used by the independent contractor, how that equipment was used or by whom it was used.” *Id.* at 40.

In *Indian River Foods*, a contractor’s employees were injured while changing a pipe. 660 So. 2d at 1095. Again, the owner was not liable under the first exception because, despite requesting the change, “[the contractor]

and its employees were just as free to change the pipe in their own way as the goat driver [in *Cervantes*] was to move the goat his way." *Id*. at 1098.

In *Morales*, property owners hired a contractor to demolish a barn and allegedly directed the workers "to throw the panels of the barn's roof 'here and there'" to imitate hurricane damage. 44 So. 3d at 175. When a worker fell through the roof, once again, the owners were not liable under the first exception, despite having instructed workers "to get on the roof and scatter the panels by hand," because "[t]hey did not tell the workers how to get on the roof, where to stand on the roof, what tools to use, or what safety equipment to either use or not use." *Id.* at 177–78.

And in *Sterling*, an independent contractor's worker fell from a ladder as he came down from the roof. 117 So. 3d at 793. Yet again, the property manager was not liable under the first exception: None of its representatives had "ever communicated with the plaintiff," and none ever "told [the contractor's] workers 'how to get on the roof, where to stand on the roof, what tools to use, or what safety equipment to either use or not use." *Id.* at 798 (quoting *Morales*, 44 So. 3d at 178).

This case is no different. Benderson had no control and no supervision of the concrete cutting work. Benderson did not tell McNamara how to cut the concrete, what equipment to use, or how to move that equipment from

one location to the next. Benderson had no contact with McNamara and did not even know he was working on the project. In short, McNamara was entirely free to perform the concrete cutting work his own way.

There was no contrary evidence. The Owner-Contractor Agreement gave Cleveland complete control over project safety and the means and methods of construction. Cleveland provided McNamara with the lift, and Cleveland directed all aspects of his work. The trial court correctly directed a verdict for Benderson on the first exception.

III. MCNAMARA HAS NOT SHOWN ANY ERROR IN THE DENIAL OF HIS REQUEST TO RE-CALL BOND IN REBUTTAL

McNamara asked to rebut Stewart's opinions with three specific pieces of expert testimony from Bond. Rather than denying expert rebuttal altogether, the trial court ruled only on each specific request. McNamara has not shown any of those rulings amounted to error.

A. Rebuttal testimony is subject to the court's broad discretion

"A trial court has broad discretion regarding the admissibility of rebuttal testimony." *Castillo v. Bush*, 902 So. 2d 317, 324 (Fla. 5th DCA 2005); *Gutierrez v. Vargas*, 239 So. 3d 615, 626 (Fla. 2018).

B. The trial court never denied the "opportunity for rebuttal," but properly ruled on each item McNamara requested

1. McNamara abandoned any claim of error in the exclusion of rebuttal to the "first novel opinion"

"An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue." *Doe v. Baptist Primary Care, Inc.*, 177 So. 3d 669, 673 (Fla. 1st DCA 2015) (quoting *Davis v. State*, 153 So. 3d 399, 401 (Fla. 1st DCA 2014)); *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959). And when a ruling rests on multiple grounds, each must be challenged in the initial brief; if not, the claim of error is abandoned, and the ruling must be affirmed. *Doe*, 177 So. 3d at 673–74; *Jones v. State*, 279 So. 3d 342, 348–49 (Fla. 5th DCA 2019).

McNamara focuses on surprise, claiming to have had "no reason to anticipate" Stewart's opinion that the fork had been bent in the accident, and thus, no reason to dispel that theory in his case-in-chief. IB at 34–36. That, however, was not the basis of the trial court's ruling.

Instead, the trial court considered the specific testimony McNamara asked to present—an expert opinion that the photographs did not depict a bent fork but, instead, showed that each fork had the same shape. IB at 36; R.2945:16–2946:7. The trial court denied this request for two reasons. First, it was cumulative of Bond's earlier testimony as to whether the fork was

curved in the photographs, and second, it was not the proper subject of expert testimony because jurors could see for themselves whether the fork was bent in the photographs. R.2947:4–15.

Of course, plaintiffs are not entitled to rebuttal that is "cumulative to the evidence presented in [their] case-in-chief." *Castillo*, 902 So. 2d at 324. Nor was expert opinion testimony appropriate to tell the jury what the photographs showed. *See* §90.702, Fla. Stat. (expert may only give opinion where "scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence"); *Fla. Power Corp. v. Barron*, 481 So. 2d 1309, 1310 (Fla. 2d DCA 1986) (reversing improper admission of expert testimony that "merely consisted of a statement of fact which … is within the common understanding of the jury").

Regardless, the initial brief failed to make any argument as to why the trial court's ruling was incorrect on either ground, resulting in the abandonment of these claims of error.

2. During trial, McNamara never asked to present his late-proffered rebuttal to the "second novel opinion"

To "properly preserv[e]" a claim of error in the exclusion of testimony, parties must "inform[] the court that they wish[] to elicit *the particular testimony*" at issue. *Diaz v. Rodriguez*, 384 So. 2d 906, 906–07 (Fla. 3d DCA 1980) (italics added). And it must be done during trial. *Id.* at 907. Otherwise,

the court has no "opportunity *at the trial* to rule on the contentions…" *Id.* (italics added). Offers of proof during "post-trial proceedings" come "too late" to cure the preservation problem. *Id.* at 907 & n.1 (distinguishing preservation of error in exclusion of testimony from timeliness of proffer for appellate purposes); *see Barclay v. Rivero*, 388 So. 2d 321, 322 n.7 (Fla. 3d DCA 1980) (proffer must be made during trial to demonstrate *error* in exclusion of testimony, and post-trial proffer can only demonstrate *harm* from ruling).

At trial, the only expert rebuttal testimony McNamara requested and obtained a ruling on consisted of the bent fork (discussed above in Section III.B.1), the operability of the basket controls if the boom lift were tipped 12 degrees (not challenged on appeal), and whether it was possible for the forklift tines to be placed one below and one above the boom lift's cylinder or axle after the boom lift had tipped the initial 12 degrees (also not challenged on appeal). R.2947:4–18, 4527:12–25, 4530:6–4531:14, 4535:12–4536:1, 4536:16–4538:12.

Yet, on appeal, McNamara argues he was not allowed to present Bond's expert testimony that Stewart's opinion describing the "*movement* of the axle" from that initial 12-degree tilt to its final resting spot of 30 degrees "could not have taken place with the left fork below the steering cylinder or axle." IB at 37. Or, more specifically, Bond's testimony that the axle *would*

have rotated "substantially more than a foot," which was not possible "based on the position of the left fork in relation to the steering cylinder post-accident – and the lack of damage to the forks and two lifts." IB at 37.

But the only request McNamara can point to is the proffer contained in his new trial motion and untimely supporting affidavit. IB at 37 (citing R.2124–33, 2147–67). While he does cite his in-trial argument on the rebuttal issue, that involved only the proposed testimony on the three issues noted above. IB at 37–38 (citing R.4525–31). The record reflects no request to present this specific "expert testimony, measurements, and calculations" *during the trial*. IB at 38. In fact, Bond had testified that he did not take measurements, and he would not identify any calculations he had done. R.2580:24–2582:13.

The trial court never heard—and thus, never denied—any request to present this specific expert testimony before McNamara rested his rebuttal case; before closing argument; before the jury retired, deliberated, and returned a verdict; or before the verdict was announced and the jury dismissed. *See Hernandez v. Feliciano,* 890 So. 2d 401, 405 (Fla. 5th DCA 2004) ("[T]he very purpose of preserving error below is to afford the trial court a chance to consider an issue so as to obviate the need for a new trial."); *Rodriguez*, 384 So. 2d at 907 (same); *Johnson v. State*, 494 So. 2d 311, 313 (Fla. 1st DCA 1986) (attempted proffer "after the close of the evidence and

the court's denial of the defendant's motion for judgment of acquittal" was "too little, too late").

Even apart from McNamara's untimely post-trial rebuttal request, the substance of that testimony would have been cumulative, at best. During McNamara's case-in-chief, Bond testified for six hours, giving extensive and emphatic expert opinion testimony that it was physically impossible for the tip-over accident to have occurred with the machines chained together and the forklift tines in that position. R.2517:4–2533:2. He explained, in depth, that "there is no way that a right fork could be above the tire, and the left fork be below the axle, and a tip over accident occur." R.2521:22–2523:4.

The measurements and calculations that McNamara now seeks to introduce—which Bond had not even done at the time of trial—are simply reinforcing the opinion he already covered in his case-in-chief testimony. Although he had every opportunity during his direct, cross, and redirect examinations, Bond did not offer any "measurements" or "calculations" to support his extensive opinion testimony that the accident occurred before the vehicles were chained together.

McNamara cannot now claim error in the failure to present Bond's late-proffered expert testimony on whether the axle could have moved from the initial 12-degree tipped position to the final 30-degree tilt with the left fork

placed below the steering cylinder or axle, whether the axle would have rotated more than a foot, and whether that rotation was possible. *See Rodriguez*, 384 So. 2d at 906–07.

C. The trial court properly denied McNamara's new trial motion.

A motion for new trial is "directed to the sound, broad discretion of the trial judge," and the resulting order is reviewed only for an abuse of discretion. *Cloud v. Fallis*, 110 So. 2d 669, 673 (Fla. 1959).

1. McNamara failed to show an abuse of discretion in the denial of his new trial motion

The trial court was well within its discretion to deny a new trial, having properly denied each specific item of rebuttal expert testimony that McNamara requested during trial. Nor was McNamara entitled to a new trial as a result of the expert opinion he proffered, for the first time, with his new-trial motion. *See KMart Corp. v. Hayes*, 707 So. 2d 957, 957 (Fla. 3d DCA 1998) ("Granting a new trial under circumstances where a party did not properly preserve the issue is an abuse of discretion.").

Indeed, McNamara points out that he "filed [his] expert report post-trial"—all but acknowledging this was the first time he had proffered Bond's opinion concerning the movement of the axle from 12 degrees to 30 degrees, the distance of its rotation exceeding one foot, and whether he believed that was possible given the placement of the forks. IB at 39. McNamara insists a

new trial should have been granted, first, for this "newly discovered evidence," and then, based on his view that the "new evidence" "established that the novel opinions offered were physically impossible and therefore false." IB at 39–40.

Yet, McNamara never raised these arguments in his rule 1.530 motion for new trial, R.2124–33, or at a hearing on that motion, R.4172–220. Instead, they appear to come from a subsequent motion, filed several months *after* this appeal, which seeks relief under Fla. R. Civ. P. 1.540(b)(2) and (3) on grounds of "newly discovered evidence" and "fraud," based on the same allegations of "false testimony."[5] R.4221–56. This Court denied a motion to relinquish jurisdiction, *see* Order dated Apr. 10, 2024, so the trial court has never heard, let alone decided, the motion for relief from judgment. McNamara cannot claim error in a ruling that has not even been made. *See Mariani v. Schleman,* 94 So. 2d 829, 831 (Fla. 1957) ("It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court.").

[5] Of course, the possibility that experts on each side of a case may develop different, competing scientific opinions—something that arises in nearly every case involving scientific expert testimony—does not equate to either one of them giving "fraudulent" or "false," *i.e.*, perjured, testimony.

2. McNamara's surprise does not warrant a new trial

Without making any legal argument, McNamara suggests Stewart gave expert opinions that differed from Brewer, another expert Benderson had engaged. McNamara cites no authority that would prevent a defendant from retaining two experts or deciding to call just one of them at trial.

Nor could he claim entitlement to a new trial as a result of "surprise testimony." This case involved nothing of the sort. The key fact McNamara sought to disprove was that the boom lift had been chained to the lull before the accident, since it meant that McNamara would have descended safely and gotten out of the basket after becoming stuck. Yet, it was McNamara who introduced the video deposition of Diaz in his case-in-chief, including Diaz's testimony that the vehicles were chained together prior to the accident. The excerpts of Brewer's affidavit that McNamara cites disclose an opinion that the accident occurred when the lull was being used to tow the boom lift, meaning they were chained together—the key opinion McNamara sought to refute by presenting Bond's testimony as his first witness.

Benderson had disclosed both Stewart *and* Brewer as expert witnesses in June of 2022. R.4608–09, 4612–13, 4615. McNamara acknowledged to the trial court that he chose not to depose Stewart. R.4208:12–13. And although McNamara claimed to have been dissatisfied

with an interrogatory answer concerning Stewart's opinions, he just "let that drop." R.4208:13–19.

At trial, McNamara did not object to Benderson calling Stewart as an expert witness, and his opinions were presented without objection. R.2685:4–2732:6. Of course, "surprise testimony," like any other objectionable testimony, must be preserved for review with a "contemporaneous objection" and "timely" motion for mistrial. *Spalding v. Zatz*, 70 So. 3d 692, 697–98 (Fla. 5th DCA 2011). While fundamental error could be an exception, McNamara omitted that argument from his initial brief. *See Calabrese v. State*, 325 So. 3d 938, 942 (Fla. 5th DCA 2021).

Benderson's presentation of an expert witness that McNamara failed to depose affords no reason for a new trial.

3. McNamara's disagreement with Stewart's opinions does not warrant a new trial

McNamara's attempt to present a competing expert opinion after the verdict also does not warrant a new trial. Rule 1.530(c) demands that affidavits supporting a motion for new trial "must be served with the motion." Without explanation, McNamara served Bond's affidavit 21 days late, R.2124, 2147, resulting in a motion to strike the affidavit as untimely, R.2466.

McNamara has never explained why he could not have obtained this expert opinion in time for trial—especially when Bond had formed numerous

other opinions before trial and testified extensively as to his views of the accident and why, in his opinion, the vehicles were not chained together at the time. *See, e.g.*, *Jerrico, Inc. v. Washington Nat. Ins. Co.*, 400 So. 2d 1316, 1319 (Fla. 5th DCA 1981) (new trial based on newly discovered evidence requires a showing that the evidence could not have been obtained before trial in the exercise of diligence).

Although not completely clear from the transcript, it appears the trial court did not see or review the affidavit, or at least the motion to strike, before the hearing. R.4217:16–4218:4. McNamara, however, acknowledged his argument "didn't refer to that here." R.4218:8. So, there was no reason for the trial court to consider the untimely expert affidavit, and in any event, McNamara's initial brief makes no argument that the failure to consider the untimely affidavit amounted to error.

Instead, McNamara cites and argues extensively from another affidavit of Bond, filed months later, as part of his still-pending rule 1.540 motion. IB 44–47 (citing R.4237–4256). The subsequent affidavit could not have been considered by the trial court in making its ruling on the new trial motion. *See Hillsborough Cnty. Comm'rs v. PERC*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982) ("An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to

determine whether the lower tribunal committed error based on the issues and evidence before it.").

In short, there was no error in declining to grant a new trial based on Bond's new post-trial opinions.

CONCLUSION

McNamara has not demonstrated any error in the rulings excluding the 2005 Ardaman Report and photographs, directing a verdict on the first exception to a project owner's non-liability for a contractor's injuries, and denying the specific expert rebuttal testimony McNamara requested. Nor has McNamara identified any error entitling him to a new trial. The trial court should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 12, 2024, the foregoing was filed electronically using the Florida Courts E-Filing Portal and will be electronically served upon all counsel of record listed below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font requirements in rule 9.045(b) and the word count requirements in rule 9.210(a)(2)(B), in that the brief is printed in Arial 14-point font and contains 11,738 words excluding the items listed in rules 9.045(e) and 9.210(a)(2)(E).

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