FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3720

JOSEPH and DIANE BODIFORD,

Appellants,

v.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,

Appellee.

On appeal from the Department of Business and Professional Regulation.
Aaron L. Boyette, Chair.

November 30, 2022

KELSEY, J.

Tallahassee residents Joseph and Diane Bodiford (the Homeowners) appeal a final order of the Construction Industry Licensing Board (the Board), denying their claim to the Florida Homeowners' Construction Recovery Fund (the Fund). The Fund exists to provide limited compensation to residential homeowners who suffer from a licensed contractor's "financial mismanagement or misconduct, abandoning a construction project, or making a

false statement with respect to a project." § 489.1401(2), Fla. Stat.* Based on the facts presented and the governing law, we affirm.

In 2015, the Homeowners contracted with Mainstream Construction and Development Corp., owned by James Wilcox (the Contractor), to build them a home in northeast Tallahassee's Centerville Conservation Community for $594,000 (not including the $200,000 lot cost). According to Mr. Wilcox's affidavit of record, he suggested the Homeowners use his longtime bank, First Commerce Credit Union, as the construction lender; and they did. The Contractor began construction of the home, but then abandoned the project after being paid $154,888 of the contract price. The Homeowners sued the Contractor, which stipulated to entry of judgment against it for $419,973, represented to be the amount over the original contract price that the Homeowners had to pay to obtain their completed home. The Homeowners were forced to contract with another builder to repair defective work and complete the project, at a cost that substantially exceeded the original contract price even though rising costs forced them to pare down the scope of the project.

In support of his stipulation to the adverse judgment, Mr. Wilcox submitted to the trial court an affidavit admitting the Homeowners' allegations, and also explaining that the Contractor (himself) "entered into a secret agreement" with the lender, under which the lender "made weekly payments to Mainstream that were intended by Mainstream and the Lender to help Mainstream make current and keep current its payments on loans unrelated to [Homeowners'] project." Mr. Wilcox attested that the shortfall caused by this re-direction of the Homeowners' construction loan funds was "one of the primary reasons that Mainstream could not complete" the Homeowners' project. The Homeowners later disclosed a confidential settlement against an unnamed entity, under which they received $275,000.

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* *See generally* Diane S. Perera & Erik G. Ross, *The Florida Homeowners Construction Recovery Fund: How to Collect from an Uncollectible Contractor*, 91 Fla. B.J. 46 (Jan. 2017) (explaining governing law and procedures).

The Homeowners submitted a claim to the Board, seeking the maximum available payout of $50,000 from the Fund for the Contractor's malfeasance. The Homeowners' counsel submitted all documentation required under the governing statutes and the Board's administrative rules and related standard intake forms, as well as affidavits from Mr. Bodiford, Mr. Wilcox, the replacement contractor, and a Sellers Affidavit, each of which set forth various numbers and calculations (although the record does not appear to include all such materials).

The Board heard the Homeowners' claim in October of 2020, with these calculations and supporting documentation. Neither the Homeowners nor their counsel attended the hearing. The Board's counsel reviewed the materials the Homeowners provided, and presented these figures to the Board:

Contract price:	$581,500
Payment to Contractor:	$157,887.72
Payments to another contractor:	$189,630.22
Payments to a third contractor:	$313,310.86
Unpaid liens:	$19,000

The Board's counsel noted that it is the claimant's burden to establish entitlement to recovery from the Fund. Board counsel calculated a total loss of $82,270.34, and conditionally recommended approval of the $50,000 statutory maximum payout from the fund, depending on whether the Board concluded that the $275,000 settlement should be applied to reduce the Homeowners' damages. During discussion, the Board noted that it does not "necessarily" accept a court judgment amount in calculating entitlement. The Board then concluded that the $275,000 settlement should be applied to reduce damages, meaning the Homeowners obtained a net increase, and thus were not eligible for recovery from the Fund. The Board rendered a final order denying the Homeowners' claims, and the Homeowners timely appealed without first seeking rehearing.

A few months after the Homeowners appealed, the parties filed with this Court a joint motion to relinquish jurisdiction, stating that the Homeowners' counsel had sent the Board an explanatory e-mail in August 2020, but that the Board had

inadvertently overlooked that e-mail before the October hearing. The motion asked that the Board be allowed to consider that overlooked e-mail. This Court granted such relinquishment.

The Homeowners' counsel's August 2020 e-mail set forth proposed calculations of payments and damages, listing the following payments totaling $717,174:

Direct payments to Contractor:	$154,888
Payments to Contractor's subs and suppliers:	$343,936
Payment to replacement contractor:	$218,350
TOTAL:	$717,174

Counsel's e-mail went on to subtract the contract price of $594,000, reaching a damages total of $123,174. Counsel then argued that the damages should be increased by the $125,586 that the Homeowners estimated they would have to pay to their replacement contractor to obtain the contracted-for home. Counsel also acknowledged that the Board would not include cost of repairing defective work as part of the damages amount, disagreeing with, but accepting without argument, that principle as reducing damages. Finally, counsel argued that the $275,000 settlement should not be applied to reduce the Homeowners' damages, because they allocated it to cover other losses not cognizable in the Board's calculations of Fund eligibility (including attorneys' fees and costs, loss of use damages, additional construction loan interest and closing costs, punitive damages, and repair costs for defective work). Accepting counsel's calculations, only $8,621 of the $275,000 settlement funds could be subtracted from the Homeowners' damages, leaving them eligible for an award from the Fund.

Despite the limited scope of the requested relinquishment, the Homeowners' counsel also sent the Board two new affidavits of Mr. Bodiford, both dated after the order of relinquishment. In the first newly created affidavit, Mr. Bodiford explained that the Homeowners believed their $275,000 settlement should not count against their damages because they allocated the settlement to cover incurred expenses not cognizable as damages in a Fund-entitlement analysis, including construction loan interest and

closing costs, loss of use, attorney's fees and costs, and $100,000 in punitive damages that the Homeowners stated they "feel as though we should be paid."

Mr. Bodiford's second newly created affidavit reiterated the amounts the Homeowners believed they could exclude from the settlement funds based on their unilateral allocations as set forth in the first affidavit. This new affidavit also presented new amounts paid toward the house: "$154,888 plus $343,936 plus $230,000 plus $150,000." It then added the amounts the Homeowners believed they were entitled to offset against the settlement proceeds: "plus $20,000 plus $24,000 plus $50,539 plus $100,000." From that total of $1,073,363, Mr. Bodiford claimed damages of "not less than $479,363," leaving damages over contract price of $204,363 even after deducting the entire $275,000 settlement. Alternatively, Mr. Bodiford calculated $9,824 in damages without the claimed offsets against settlement proceeds. Finally, Mr. Bodiford calculated a claim of $104,363 if $180,461 of construction costs were deducted from the $275,000 settlement.

The Board considered the issues again at a meeting in August of 2021, which neither the Homeowners (nor, apparently, their counsel), nor the Contractor, attended. We have no transcript of this meeting. The Board entered an order noting that it considered the Homeowners' counsel's 2020 e-mail that had been overlooked before the first meeting, suggesting by negative implication that it did not necessarily consider the newly created affidavits. The Board's new order granted the Homeowners' motion for reconsideration, and affirmed the Board's prior order denying recovery from the Fund. The Board explained that "the materials [provided by the Homeowners] failed to demonstrate why the Board would not be required to apply the [$275,000 settlement] to any potential payment pursuant to section 489.141(1)(g), F.S." Jurisdiction then returned to this Court.

On appeal, the Homeowners assert the same two basic arguments they presented to the Board. First, they argue that the Board has to accept at face value, and as controlling to the exclusion of all other evidence, the amount of damages to which the Contractor stipulated in support of the circuit court's final judgment. Second, they argue that the Homeowners were entitled

to prevent all or part of the $275,000 settlement from reducing their damages, by unilaterally allocating the settlement funds to damages not otherwise recoverable from the Fund. We have carefully considered the Homeowners' arguments in context of the record presented, and find no merit to them.

The Governing Law.

The Board administers the Fund, which exists to help compensate homeowners for losses incurred due to a licensed contractor's malfeasance. The relevant statute states the purpose of the Fund as follows:

> It is the intent of the Legislature that the sole purpose of the Florida Homeowners' Construction Recovery Fund is to compensate an aggrieved claimant who contracted for the construction or improvement of the homeowner's residence located within this state and who has obtained a final judgment in a court of competent jurisdiction, was awarded restitution by the Construction Industry Licensing Board, or received an award in arbitration against a licensee on grounds of financial mismanagement or misconduct, abandoning a construction project, or making a false statement with respect to a project. Such grievance must arise directly out of a transaction conducted when the judgment debtor was licensed and must involve an act enumerated in s. 489.129(1)(g), (j), or (k).

§ 489.1401(2), Fla. Stat. It is undisputed that the Contractor committed an enumerated act under the statute by abandoning the Homeowners' project.

The governing statute distinguishes between a "judgment, award, or restitution order" on the one hand, and "actual damages" on the other hand:

> A claimant who meets all of the conditions prescribed in s. 489.141 may apply to the board to cause payment to be made to a claimant from the recovery fund in an amount equal to the judgment, award, or restitution

> order or $25,000, whichever is less, or an amount equal to the unsatisfied portion of such person's judgment, award, or restitution order, but only to the extent and amount of actual damages suffered by the claimant, and only up to the maximum payment allowed for each respective Division I and Division II claim. Payment from the fund for other costs related to or pursuant to civil proceedings such as postjudgment interest, attorney fees, court costs, medical damages, and punitive damages is prohibited. The recovery fund is not obligated to pay a judgment, an award, or a restitution order, or any portion thereof, which is not expressly based on one of the grounds for recovery set forth in s. 489.141.

§ 489.143(2), Fla. Stat. The statute also expressly prohibits the Fund from paying for costs "such as postjudgment interest, attorney fees, court costs, medical damages, and punitive damages." *Id*.

Pursuant to its statutory rulemaking authority, the Board has promulgated a rule that defines "actual damages" as used in section 489.143(2), as follows:

> "Actual Damages" as used in Section 489.143(2), F.S., shall mean the general measure of damages suffered as a direct result of a licensee's violation of Section 489.129(1)(g), (j), (k), or 713.35, F.S., for failing to perform a construction contract. Actual Damages are calculated as the difference between the contract price, together with the change orders, and the cost of construction completion by another builder, where the cost of completion is for the same scope of work and materials set out in the original contract. However, if the claimant has paid a deposit or down payment and no actual work is performed or materials are delivered, actual damages shall not exceed the exact dollar amount of the deposit or down payment.

Fla. Admin. Code R. 61G4-21.002(5).

In another rule, the Board provides a detailed list of materials claimants must submit for consideration, for the purpose of allowing the Board to "determine causation of injury or specific actual damages":

> Completed claim forms shall be forwarded to the Board, together with a copy of the complaint that initiated action against the contractor, a certified copy of the underlying judgment, order of restitution, or award in arbitration, together with the judgment; a copy of any contract between the claimant and the contractor, including change orders; proof of payment to the contractor and/or subcontractors; copies of any liens and releases filed against the property, together with the Notice of Claim and Notice to Owner; copies of applicable bonds, sureties, guarantees, warranties, letters of credit; certified copies of levy and execution documents, and proof of all efforts and inability to collect the judgment or restitution order, and other documentation as may be required by the Board to determine causation of injury or specific actual damages.

Fla. Admin. Code R. 61G4-21.003(2).

The Board is required to "either authorize payment of the claim in full or in part, or deny the claim in full, by entry of a Final Order in accordance with Section 489.143, F.S." Fla. Admin. Code R. 61G4-21.004(7).

Issue I: Board's Calculation of Actual Damages.

The Homeowners raise two arguments on this issue. First, they argue the Board lacked authority to do its own calculations of damages. Second, they argue the Final Order lacks evidentiary support because the Board improperly failed to accept the figures provided in Mr. Bodiford's post-appeal affidavits. We reject both arguments and address them in turn.

We find that the Board is entitled to obtain its own evidence and perform its own calculations to determine "actual damages," particularly on the facts presented. The circuit court judgment

resulted from Mr. Wilcox's stipulation as to the Contractor's fault and liability as well as the damages incurred. The stipulation was just that: an undifferentiated lump sum, by agreement between the parties to that lawsuit, for their purposes, not subject to adversarial testing, and not for purposes of the Board's discharging its duties to administer the Fund. Neither the Board, nor we, could determine from the face of the judgment what elements of damages were included in the stipulated amount, nor whether evidence supported the amount or any sub-categories of damages yielding the total amount. Yet the Board is required to *exclude* several categories of homeowner expenses from its calculations for Fund eligibility. *See* § 489.143(2), Fla. Stat. (prohibiting use of Fund resources for costs "such as postjudgment interest, attorney fees, court costs, medical damages, and punitive damages"). The Board is also statutorily authorized to close any case "when after notice the claimant has failed to provide documentation in support of the claim as required by the [Board]." § 489.142(1), Fla. Stat. These provisions of law defeat the Homeowners' challenge to the Board's authority to require supporting evidence and documentation beyond a stipulated damage amount.

More broadly, we read the authorizing statute as distinguishing between a "judgment, award, or restitution order," on the one hand; and "actual damages," on the other. § 489.143(2), Fla. Stat. The phrase "actual damages" appears after an important introductory phrase: "but only." *Id*. The "but only" limitation restricts recovery from the Fund to "actual damages," always subject to the statutory maximum payment allowed. *Id*. The statutory scheme makes the Board a fiduciary of the Fund, and requires it to ascertain both eligibility and amount with evidentiary support, while also limiting awards arising as against any single licensee each year, as but one limitation on disbursements from the Fund. *See* § 489.143(6), Fla. Stat. (limiting aggregate claims against any one licensee both by annual and per-claimant caps). To comply with these cumulative duties and limitations, the Board must be able to collect evidence supporting in detail all aspects of every claimant's potential award. We therefore reject the Homeowners' argument that the Board was required to accept the circuit court stipulation without obtaining or weighing any additional evidence.

Turning to the Homeowners' second argument under this heading, we also reject the claim that the Board erred in failing to accept Mr. Bodiford's and the replacement contractor's affidavits created and filed for the first time after rendition of the Final Order and after we relinquished jurisdiction to the Board. Through these affidavits, the Homeowners attempted to increase their claim to encompass actual or projected expenses allegedly incurred after they filed their claim, *and* after they had already filed their appeal. Both were improper.

When we relinquish jurisdiction to a lower tribunal for a specific and enumerated purpose, the parties and the tribunal lack authority to exceed the scope of our relinquishment. *Hart v. Wachovia Bank, Nat'l Ass'n*, 159 So. 3d 244, 247 (Fla. 1st DCA 2015) ("As to the final judgment, its entry exceeded the limited purpose for which this Court relinquished jurisdiction to the trial court. When a trial court, following relinquishment of jurisdiction by an appellate court, exceeds the scope of the 'specifically stated matters' authorized by the appellate court for consideration on relinquishment, the trial court acts without jurisdiction, and thus, any [resulting] order is invalid." (quoting Fla. R. App. P. 9.600(b), which allows relinquishment for "specifically stated matters")).

Here, the Homeowners sought and obtained relinquishment only because the Board had received, but not considered at the first hearing, the Homeowners' counsel's explanatory e-mail sent before the original hearing in 2020. That, and that alone, was properly before the Board on relinquishment. The Board correctly ignored the post-appeal, newly-created affidavits and additional argument of counsel based on those affidavits, both because of the limited scope of our relinquishment and because alleged developments occurring after the Contractor's breach are irrelevant to calculating the Homeowners' damages. *See Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037, 1040 (Fla. 1982) (holding that damages for breach of construction contract are to be calculated "as of the date of the breach," and that "[f]luctuations in value after the breach do not affect the nonbreaching party's recovery.").

The very fact that the Homeowners decided to provide the Board multiple sets of potential calculations conflicts with the Homeowners' first argument that the Board had to accept the

circuit court stipulation at face value. They can't have it both ways and still claim to have preserved their first argument. Further, the Homeowners' various sets of calculations create a number salad of different, sometimes conflicting, and sometimes mathematically inaccurate details. The record before us does not conclusively support any single set of numbers to the exclusion of all others. *See* § 120.68(7)(b), Fla. Stat. ("[T]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.").

On this record, which as we have noted and the Homeowners acknowledge does not appear to include either all evidence presented to the trial court or all evidence presented to the Board, it is impossible to conclude that the Homeowners' currently preferred figures are any more trustworthy than the figures the Board used. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the [lower tribunal] proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the [lower tribunal's] judgment is not supported by the evidence or by an alternative theory.").

Issue II. Set-off of $275,000 Settlement Proceeds.

As already noted, the Homeowners also argue that the Board was not allowed to deduct from their damages all or any part of the $275,000 they received in a confidential settlement with an unnamed party. The Homeowners argue now as they did below that they were entitled to allocate the settlement funds to expenses and losses that they admit would otherwise not be recoverable from the Fund: "$20,000 of the settlement was applied to construction loan costs, $28,000 was applied to loss-of-use damages, $50,539 was applied to attorneys' fees and costs, and $100,000 was applied to punitive damages." We categorically reject this argument.

As a matter of simple logic, this argument would have the Homeowners recovering indirectly what they could not recover directly from the Fund, thus defeating an important part of the legal boundaries on awards of damages from the Fund. This argument is inconsistent with the definition of "actual damages"

in the governing statute. *See* § 489.143(2), Fla. Stat. The relevant administrative rule defines "actual damages" as "the general measure of damages suffered as a direct result of a licensee's violation of Section 489.129(1)(g), (j), (k), or 713.35, F.S., for failing to perform a construction contract." Fla. Admin. Code R. 61G4-21.002(5). Under this rule, actual damages are equal to "the difference between the contract price, together with the change orders, and the cost of construction completion by another builder, where the cost of completion is for the same scope of work and materials set out in the original contract." *Id*.

Section 489.141(1)(g), Florida Statutes, requires that, as a condition of recovery, "*[a]ny* amounts recovered by the claimant from the judgment debtor or licensee, *or from any other source*, have been applied to the damages awarded by the court or the amount of restitution ordered by the board." (Emphasis added.) Decisively dooming the Homeowners' argument, section 489.143(2) provides that "actual damages" *excludes* "other costs related to or pursuant to civil proceedings such as postjudgment interest, attorney fees, court costs, medical damages, and punitive damages." *Id*. The Board correctly offset the Homeowners' $275,000 settlement receipts and properly denied their claim.

AFFIRMED.

M.K. THOMAS and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Steven E. Sellers, Quincy, for Appellants.

David Axelman, General Counsel, Ian Brown, Deputy General Counsel, Joseph Y. Whealdon, III, Chief Legal Counsel, and Brooke E. Adams, Chief Legal Counsel, Department of Business and Professional Regulation, Tallahassee, for Appellee.