IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

UNIVERSAL PROPERTY & CASUALTY
INSURANCE COMPANY,

Appellant,

v.

CASE NO. 3D23-1459
L.T. Case No.: 2019-016494-CA-01

ROBERTO FIGUEROA,

Appellee.

ANSWER BRIEF

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PREFACE AND JURISDICTIONAL STATEMENT

This is the Answer Brief of Appellee, Roberto Figueroa. Appellee shall be referred to as Mr. Figueroa, Plaintiff, or Appellee, as context requires. Appellant, Universal Property & Casualty Insurance Company, shall be referred to as Universal, Defendant, or Appellant, again as context requires.

The appeal is from a final order for which this Court maintains appellate jurisdiction pursuant to Rule 9.030(b)(1)(A) and Rule 9.110(a), Florida Rules of Appellate Procedure. References to the record on appeal shall be made as "(R.____)," with the appropriate pagination of the record as indicated.

STATEMENT OF THE CASE AND FACTS

Universal's statement of the case and facts omits substantive information which would assist this Court in its review. Below are the missing pieces.

A. Background.

This appeal arises from the trial court granting partial summary judgment in favor of Mr. Figueroa and denying Universal's summary judgment motion. (R. 2582-2583). There is no transcript of the summary judgment proceeding. (I.B. 18). Both parties' summary judgment motions turn on Universal's Fifteenth Affirmative Defense in which Universal argued Mr. Figueroa made material misrepresentations when applying for insurance, and thus coverage is void with respect to the entire policy. (R. 2445-2447, 2459-2560, 2563-2568). The Fifteenth Affirmative Defense states in its entirety:

FIFTEENTH AFFIRMATIVE DEFENSE
Concealment, Fraud, Misrepresentation

> Universal affirmatively asserts that the Policy is rescinded and voided from the date of inception due to Plaintiff's material misrepresentation, omission, concealment of fact, and/or incorrect statement during the course of Universal's investigation. Universal believes that Plaintiff misrepresented facts about previous claims and the condition of the insured property during the application process and throughout Universal's claim handling

investigation. Plaintiff also submitted a sworn proof of loss affirming an estimate from Suasponte Claim Experts, Inc. which included multiple entries for items not related to this loss. Consequently, pursuant to the Policy and Fla. Stat. 627.409(l)(a), coverage is void with respect to the entire Policy. See the following Policy provision below:

UPCIC HO3 15 05 18 00 03 04 91
SECTIONS I – CONDITIONS

R. Concealment or Fraud

We do not provide coverage to an "insured" who, whether before or after a loss, has:
(1) Intentionally concealed or misrepresented any material fact or circumstance;
(2) Engaged in fraudulent conduct; or
(3) Made false statements;

relating to this insurance.

(R. 197-198). Section 627.409(1)(a), Florida Statutes, states:

627.409 Representations in applications; warranties.—
(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:
(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

On or about August 22, 2019, Universal submitted payment to Disaster Pros from an Assignment of Benefits, dated January 24,

2019, for water mitigation and mold remediation under the subject claim. (R. 475:4-479:22). This payment occurred approximately three weeks after Universal filed its Affirmative Defense #15 alleging misrepresentations by Mr. Figueroa, which was filed on August 25, 2019. (R. 183 – 198). The trial court, after hearing from both parties, struck Universal's Fifteenth Affirmative Defense, finding that it waived the defense when it made payment to Disaster Pros after being aware of the alleged misrepresentations in the application. The trial court relied on *United Auto. Ins. Co. v. Stand-Up MRI of Miami, Inc.*, 327 So. 3d 386 (Fla. 3d DCA 2021) wherein this court held that an insurance company is precluded from seeking rescission of a policy if it pays a company for work it did on a claim after it becomes aware of an alleged misrepresentation. (R. 2582-2583).

After a two-day jury trial commencing May 22, 2023, the jury found in favor of Mr. Figueroa. (R. 3820-3830). Universal filed its Motion for New Trial and Renewed Motion for Directed Verdict and Remittitur on June 7, 2023. (R. 3831-3851). It did not raise issues concerning fraud, misrepresentation, or other issues stemming from the summary judgment arguments.

The trial court heard arguments on Universal's Motion for New Trial and Renewed Motion for Directed Verdict and Remittitur and denied it on July 14, 2023. (R. 3919-3920). Universal timely appealed the trial court's summary judgment rulings.

B. The summary judgment motions relevant to this appeal.

Universal filed two summary judgment motions in this matter, and Mr. Figueroa filed one partial summary judgment motion, which are relevant to this appeal.

1. <u>Universal's Summary Judgment I</u>: The first summary judgment motion, filed January 3, 2022, alleged the following misrepresentations: (1) D.A.P. R/E Investments, LLC's claim on the subject property on September 8, 2017, (2) Roberto Figueroa's claim on a different property on September 8, 2017, (3) Roberto Figueroa's claim on a different property on September 10, 2017, (4) All In One Landscaping, Inc.'s claim for theft in 2018, (5) a Progressive auto incident in 2015, and (6) a Geico parked parking loss in 2015. (R. 904-905). Universal based its motion on its Affirmative Defense #15 wherein it argued that Mr. Figueroa's alleged misrepresentations or fraud rescinded or voided the entire policy.

Evidence proved that Mr. Figueroa was not a party to the first claim, as he was merely renting the home from D.A.P. R/E Investments, LLC, a limited liability corporation owned by David Perez. (R. 652:14-657:24). Evidence also proved that Mr. Figueroa was not a party to the second two claims, as they belonged to his father. Mr. Figueroa and his father share the same name and the same birthday. (R. 662:4-10, 1739). The All in One Landscaping claim occurred November 28, 2018 (R. 904 – 905), which was after the insurance application was signed on September 25, 2018. (R. 992). Universal admitted the latter three concerning Mr. Figueroa's father and the landscaping claim were not applicable in their Initial Brief as well. (I.B. 7).

The other two incidents stem from auto insurance claims, one with Geico and one with Progressive. (I.B. 7). There is no evidence in the record of these claims aside from the allegations raised in the motion. In his reply. Mr. Figueroa argued that there was no evidence to support those allegations and requested that the trial court not to consider them under Rule 1.510(c)(2). (R. 904, 1439, 1577-78). Mr. Figueroa also provided the trial court with case law that LLCs and

corporations are distinctive and separate from their members. (R. 1578-1579).

Universal's first summary judgment motion was denied "for reasons stated on the record." (R. 2127-2128). There is no transcript of this summary judgment hearing.

2. <u>Universal's Summary Judgment II</u>: The second summary judgment motion, filed February 27, 2023 and titled "Renewed Motion for Summary Judgment and/or Response to Plaintiff's Motion for Summary Judgment" (R. 2551 – 2560), alleged the following misrepresentations: (1) D.A.P. R/E Investments, LLC's claim on the subject property on September 8, 2017, (2) Roberto Figueroa's claim on a different property on September 8, 2017, and (3) Roberto Figueroa's claim on a different property on September 10, 2017. (R. 2552-2553). Universal's Summary Judgment II did not raise issues with the two alleged vehicle claims cited in the Initial Brief. (I.B. 7). It did not raise the post-claim issue with All In One Landscaping. It did not yet acknowledge that the other two claims were from Mr. Figueroa's father. (I.B. 7). Universal again based its motion on Affirmative Defense #15 wherein it argued that Mr.

Figueroa's alleged misrepresentations or fraud rescinded or voided the entire policy.

Universal's motion was heard along with Mr. Figueroa's motion for partial summary judgment (discussed next), and both motions were disposed of with a single order. Universal's motion was denied. (R. 2582-2583). In the order, the trial court found that Universal's Affirmative Defense #15 alleges that the entire policy is void, and that the payment to the mitigation company as an assignee of Mr. Figueroa for services related to the claim constituted a waiver to seek rescission of the policy. It thus struck Affirmative Defense #15.

3. <u>Mr. Figueroa's Partial Summary Judgment Motion</u>: Mr. Figueroa filed his motion for partial summary judgment on December 20, 2022, arguing that the payment to an assignee under the claim precludes Universal from seeking recission of the policy. (R. 2445-2447). This motion was granted on April 3, 2023, in the same order denying Universal's second summary judgment motion, and the court struck Universal's fifteenth Affirmative Defense. (R. 2582-2583).

C. Affirmative Defense #15

At the heart of these summary judgment motions, and the

ultimate argument at issue here, is Universal's Affirmative Defense #15. The entirety of this defense alleges that, due to Mr. Figueroa's alleged misrepresentations or fraud, "the Policy is rescinded and voided" and "coverage is void with respect to the entire Policy" either under the contract or under section 627.409(1)(a), Florida Statutes. Importantly, Universal did not allege that coverage for the loss was being *denied* due to the alleged misrepresentations but that "coverage is *void* with respect to the entire Policy." When read in conjunction with the opening statement of Affirmative Defense #15, "the Policy is rescinded and voided," it is clear that Universal only ever pled recission of the entire policy and *not* a claim-specific denial of the loss.

Universal never sought to amend Affirmative Defense #15 during the four years that the case was pending before trial, and it should not be permitted to recharacterize the defense that was asserted now on appeal.

SUMMARY OF THE ARGUMENT

Mr. Figueroa did not make any misrepresentations or perpetrate any fraud on Universal. The allegations were disproven by record evidence and applicable case law concerning the distinctive and separate classification of corporations and their members. Contrary to the Initial Brief using adjectives such as "undisputedly" and "unchallenged," the record speaks for itself: Mr. Figueroa denied and rebutted each allegation of misrepresentation by Universal throughout the proceedings below. What *is* undisputed is that Universal made a payment to assignee Disaster Pros for water mitigation and mold remediation under the subject claim approximately three weeks after filing Affirmative Defense #15.

However, even if, arguendo, Mr. Figueroa had made misrepresentations on his homeowners insurance application, the remedy that Universal sought as a result of the alleged misrepresentations was to rescind and void the entire policy. Despite being put on notice by the trial court—presumably twice—that its defense was not pled appropriately and Universal could not obtain the relief it sought, Universal did not ever attempt to amend its defense or add another defense. Instead, it proceeded to trial. It

likewise did not raise issues with misrepresentation, section 627.409(1), or the Affirmative Defense #15 in its motion for rehearing after the jury trial.

Universal's argument that there are two avenues of reversal, statutory and contractual, both fail for the same reason: Universal's only relief requested in its Affirmative Defense #15 was to rescind or void the entire policy, not a specific claim. As such, the waiver doctrine relied upon in *Stand-Up MRI* applies and Universal cannot now argue to apply an alternative defense.

Additionally, it is dubious whether Universal could use an alleged instance of misrepresentation that occurred prior to a loss to justify a claim-specific denial as opposed to full recission. The only case cited by Universal to support its argument that Fla. Stat. 627.409 allows for claim-specific denials as opposed to denials of claims coupled with recission of the policy is *Benitez v. Univ. Prop. Ins. Co.*, 350 So. 3d 749 (Fla. 4th DCA 2022). There is an overwhelming body of law in this district which holds that the remedy available under 627.409 is recission of the policy, which has the effect of denying coverage for any given claim but not that an insurer can deny a specific claim without rescinding the policy.

However, regardless of whether a defense for a claim-specific denial based on a pre-loss misrepresentation is available as a legal concept, it certainly was not pled by Universal in this case and cannot be the basis for invalidating the jury's verdict.

This Court should affirm.

STANDARD OF REVIEW

Mr. Figueroa agrees that the appropriate review for a denial of summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). This Court may affirm a trial court's decision "so long as there is any basis which would support the judgment in the record." *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). It need not determine whether other theories could have, or should have, been entertained or granted by the trial court. *Benitez v. Universal Prop. & Cas. Ins. Co.*, 350 So. 3d 749, 750 (Fla. 4th DCA 2022).

LEGAL ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF APPELLANT'S SUMMARY JUDGMENT MOTION AND THE GRANTING OF APPELLEE'S SUMMARY JUDGMENT MOTION.

A. Appellant did not meet its burden under Section 627.409, Florida Statutes.

While it is true that Universal based its material misrepresentation affirmative defense on two separate grounds, it only requested to rescind or void the entire policy under both of those grounds, which were the subject statute and Universal's policy language. Universal never sought to deny the specific claim but instead to rescind void coverage "with respect to the entire policy.". Even after Universal's request to rescind the policy was denied, it chose not to amend its Affirmative Defense #15.

Universal relies quite heavily on *Benitez v. Universal Prop. & Cas. Ins. Co.*, 350 So. 3d 749 (Fla. 4th DCA 2022) to advance its argument, but it does not support Universal's actions below.

First, Universal admitted in its February 27, 2023, Motion for Summary Judgment that it cannot rescind a policy when it continues to collect premiums after it becomes aware of a misrepresentation in

the insurance application. (R. 2558). This is likely why Universal unequivocally made clear in its Motion that, under the statute, "Defendant is not seeking a rescission of the policy, but 'the alternative remedy of denial of the claim.'" (R. 2559). Unfortunately for Universal, it never sought denial of the claim in its Affirmative Defense #15, but specifically sought rescission of the entire policy under the statute. Further, Mr. Figueroa's argument was not that the continued collection of premiums under the policy, but the fact that Universal paid Mr. Figueroa's assignee under the policy for the subject claim. (R. 2567).

The argument Mr. Figueroa did advance—that Universal waived its ability to seek recission, which is the only relief pled in Affirmative Defense #15—was undisputed by Universal. Universal did not mention, or attempt to rebut, the controlling holding in *United Auto. Ins. Co. v. Stand-Up MRI of Miami, Inc.*, 327 So. 3d 386 (Fla. 3d DCA 2021) wherein this Court held that a payment to an assignee constitutes a waiver of an insurer's ability to now seek recission of a policy. Thus, this Court should affirm.

B. The only remedy available to Appellant under section 627.409 was to rescind the policy and not to deny the specific claim without rescission.

Appellant wrongly argues that, in the event a misrepresentation in an insurance application, there are two remedies available under section 627.409: (1) recission of the policy as a whole, and (2) the ability to deny a specific claim without rescinding the policy. In support of this position, Universal cites to *Benitez v. Univ. Prop. Ins. Co.*, 350 So. 3d 749 (Fla. 4th DCA 2022). *Benitez* seems to allow for denials of claims without recission of the policy, which is counter to common sense and the law in this district.

The reasoning of *Beneitez* creates a situation where a carrier could continuously deny distinct and discrete claims based on the same pre-loss misrepresentation but leave the policy in effect (in name only). Instead, the more sound interpretation of 627.409, and the one which this Court has repeatedly made, is that the remedy that is available for a misrepresentation in an insurance application is recission of that policy. *See*, *United Auto. Ins. Co. v. Salgado*, 22 So. 3d 594 (Fla. 3d DCA 2009) (characterizing "an insurer's ability to void the policy *ab initio* pursuant to section 627.409."); *Gonzalez v. Eagle Ins. Co.*, 948 So. 2d 1, 2 (Fla. 3d DCA 2006) ("Florida law indeed

gives an insurer the unilateral right to rescind its insurance policy on the basis of misrepresentation in the application of insurance."); *GR Transp., Inc. v. Certain Underwriters at Lloyd's London*, 896 So. 2d 922, 925 (Fla. 3d DCA 2005) (holding that "[p]ursuant to section 627.409(1)(a) and (b), any misrepresentation, innocent or intentional, will void an insurance contract…"); *Union Am. Ins. Co. v. Fernandez*, 603 So. 2d 653, 653 (Fla. 3d DCA 1992) (reversing and remanding for trial on issue of material misrepresentation in insurance application; stating that "[i]f such a material misrepresentation is established at trial, the subject insurance policy would be void *ab initio* and, accordingly, there would be no liability insurance coverage for the subject accident").

Benitez also seems at odds with *Leonardo v. State Farm Fire & Cas. Co.*, 675 So. 2d 176, 179 (Fla. 4th DCA 1996) in which the Fourth District held that:

> The real issue in a case like this one is an insurer's right to rescind a voidable policy. An insurer can lose the right under *Johnson* by conduct "unequivocally" or "wholly" inconsistent with the continued existence of the policy. An insurer may also lose the right by failing to take those acts

> necessary to effectuate rescission. Section 627.409, Florida Statutes (1995), speaks to the types of misrepresentations, concealments of fact, omissions or incorrect statements in an insurance application which may prevent recovery under the contract. The statute does not create a right, but places limits on contractual and equitable remedies. Construing section 627.409, the Supreme Court has noted that material misstatements in an insurance application subject the insurance contract "to being voided," similar to an "equitable ground for recission [sic]." *Continental Assur. Co. v. Carroll*, 485 So. 2d 406, 409 (Fla. 1986).

Leonardo makes clear that the remedy available under section 627.409 is recission of the policy and that an insurer can waive this right by either taking steps inconsistent with recission or failing to effectuate the recission.

Because the only remedy available under section 627.409 is recission, which results in an accompanying denial of coverage, then acts inconsistent with recission, e.g., payments made under a claim after the facts to support recission are known, will result in a waiver of any defense otherwise available under section 627.409.

C. Even if section 627.409 allows for claim-specific denials without recission, Appellant failed to plead a claim-specific denial and only sought a total recission of the policy.

Universal claims in its Initial Brief that it should have been able to seek an alternative remedy under section 627.409 to deny coverage of an individual claim. While Appellant disputes this interpretation of section 627.409, even if this remedy were available, the method for doing so is revising or amending its affirmative defense to allege an alternative theory of defense. When Universal chose not to amend its pleading, it did not exercise its ability to seek denial of the specific claim. As the Second District held in *Gannon v. Cuckler*, 281 So. 3d 587, 591 (Fla. 2d DCA 2019): "The rule regulates the presentation of defenses in response to a civil complaint. It provides that a defendant must raise all of its defenses to a complaint in an answer, which is a form of 'responsive pleading' provided for in the civil rules. See Fla. R. Civ. P. 1.140(a)(1)."

This Court held in *Mishpaja Shajine, Inc. v. Granada Ins. Co.*, 319 So 3d 762 (Fla. 3d DCA 2021) that it could have been an abuse of discretion for the trial court to deny any such motion to amend a

pleading. *See also Reyes v. BAC Home Loans Servicing L.P.*, 226 So. 3d 354, 356-57 (Fla. 2d DCA 2017) (concluding the trial court abused its discretion in denying the defendant's motion to amend her answer and affirmative defenses). The issue for Universal here is evident: it did not attempt to amend its pleading to add an alternative theory, despite being aware that it only pled for recission, and the trial court relied on that when it denied Universal's summary judgment motion and granted Mr. Figueroa's partial summary judgment motion. It is clear that Universal knew about the issue, not only because Mr. Figueroa raised it time and again in responsive filings, but also because it specifically bifurcated the two recovery theories under section 627.409 in its summary judgment motion. (R. 2559).

As this was the second summary judgment attempt by Universal, and by its own admission the first was denied based on the waiver theory, it was put on notice that it should have amended its defense if it wanted the trial court to consider the issue, especially prior to the second summary judgment hearing. "Any doubt with respect to futility should be resolved in favor of allowing the amendment, especially when leave to amend is sought at or before the summary judgment hearing." *RV-7 Prop., Inc. v. Stefani De La O,*

Inc., 187 So. 3d 915, 917 (Fla. 3d DCA 2016); *see also* Florida Rule of Civil Procedure 1.190(a) ("Leave of court [to amend a pleading] shall be given freely when justice so requires."). This Court has held even in pure negligence cases where a party fails to amend its answer raising new affirmative defenses until shortly before trial, the party should be given the opportunity to correct its error and file the defenses. *Carib Ocean Shipping, Inc. v. Armas*, 854 So.2d 234, 235–37 (Fla. 3d DCA 2003). Thus, is it completely inexcusable that Universal did not take any action to do so.

Playing a game of semantics, Universal contends that it should not have had to amend its Affirmative Defense #15 because it states that "pursuant to the Policy and Fla. Stat. 627.409(1)(a), coverage is void with respect to the entire policy" means a specific claim can be denied while the policy remains intact. (I.B. 24; R. 197). Universal is asking this Court to ignore the modifier "with respect to the entire policy." (I.B. 24). The trial court took this line in Universal's Affirmative Defense #15 to mean exactly what it states—Universal pled that the entire policy was void under the statute *and* the policy. The argument advanced in the Initial Brief that the trial court erred by focusing on the wrong line within the Affirmative Defense #15 is

disingenuous, as the trial court used that exact line from its pleading in its summary judgment denial order. (I.B. 24; R. 2582).

Moreover, the language used by Universal undercuts their argument that it sought a claim-specific denial of the claim based on the alleged misrepresentation. Universal pled that coverage was "void," not "denied."

Mr. Figueroa contends he did not make a misrepresentation on his insurance application. The entity that reported the Hurricane Irma claim was a limited liability company owned by a different person—Mr. Figueroa was merely a tenant at the home when that claim was filed. The form asks for losses reported by the insured. Despite Mr. Figueroa agreeing that the loss should have been on the form, he did not report that loss, he did not own the home at the time of the loss, and he was not affiliated with D.A.P. R/E Investments, LLC at the time of the reported loss. Even if he was, this Court has held that there is a "principle of law deeply ingrained in our legal and economic system that an LLC is an autonomous legal entity, separate and distinct from its members." *Palma v. S. Fla. Pulmonary & Critical Care, LLC*, 307 So. 3d 860, 866 (Fla. 3d DCA 2020). Legally, Universal cannot continually advance the concept of fraud based on

the D.A.P. R/E Investments, LLC claim. It is unsupported by law, the record, and common sense.

D. Appellant waived its right to void coverage once it remitted payment to the plumbing company.

The trial court correctly found that this Court's holding in *United Auto. Ins. Co. v. Stand-Up MRI of Miami, Inc.*, 327 So. 3d 386 (Fla. 3d DCA 2021) applied. Once again, Universal attempts to argue that it should have been allowed to proceed on a theory of claim denial versus policy recission when it was faced with the issue of its payment constituting a waiver of its no-coverage defense by paying other claims arising out of the incident. (I.B. 25). Unfortunately for Universal, as discussed above, even if this argument is persuasive concerning claim denial, it did not plead claim denial below, nor did it amend its pleading once it was on notice that its Affirmative Defense #15 was deficient.

Universal admits in its Initial Brief that, applying *Stand-Up MRI* to the fact pattern here, Universal's payment to Disaster Pros did effect a waiver to rescind or forfeit the entire Policy. (I.B. 26). Thus, the trial court's finding is supported by the record evidence. Its order reads in pertinent part:

> 3. On August 22, 2019, Defendant issued payment to mitigation company as an assignee of Plaintiff for services provided that were related to the claim that is the basis of this lawsuit.
>
> 4. Based on *United Auto. Ins. Co. v. Stand-Up MRI of Miami, Inc.*, 327 So. 3d 386 (Fla. 3d DCA 2021), this Court finds that Defendant's payment to the assignee constitutes a waiver of Defendant's ability to now seek recission of the policy.

(R. 2582). Universal admitted the trial court was correct concerning the entire policy, but claims that it should still have been allowed to deny specific claim coverage—a claim that it never pled below. Unfortunately, it cannot request this Court reverse a matter on a defense that was never pled.

Had Universal believed that the trial court erred in its reading of Affirmative Defense #15, it should have filed for reconsideration or rehearing, or brought it to the trial court's attention in its post-trial motion. The trial court should have the opportunity to correct itself if there is indeed an error in one of its orders prior to an issue reaching a reviewing court.

In *Jockey Club III Ass'n v. Jockey Club Maint. Ass'n*, 306 So. 3d 185, 194 (Fla. 3d DCA 2020), this Court held that "[t]he purpose of a motion for rehearing is to give the trial court an opportunity to

consider matters which it overlooked or failed to consider and to correct any error if it becomes convinced that it has erred." Rehearing is a tool in which a party preserves any perceived errors for a reviewing court, and its existence is an important one:

> Parties are required to preserve arguments because it allows the lower tribunal to consider and resolve errors when they arise, rather than wait for the process of an appeal and expend the judicial resources that come with that procedure. *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005) (stating that the purpose of the preservation rule is to notify the trial judge of possible error and offer a chance to correct it at an early stage); *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). The preservation requirement also serves the purpose of treating the parties, the court, and the judicial system fairly. *City of Orlando v. Birmingham*, 539 So. 2d 1133, 1134 (Fla. 1989); *Eaton v. Eaton*, 293 So. 3d 567, 568 (Fla. 1st DCA 2020).

State v. Clark, 373 So. 3d 1128, 1131 (Fla. 2023).

Further, and just as important, Universal did not raise this below. While it did mention the concept of denying the specific claim based on misrepresentation in its response to Mr. Figueroa's reliance on *Stand-Up MRI*, Universal did not plead this specific defense below. As the Florida Supreme Court held in *Clark*,

> It is well established that issues not properly preserved are waived. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (holding that it is "not appropriate for a party to raise an issue for the first time on appeal"); *Tillman v. State*, 471 So. 2d 32, 35 (Fla.

> 1985); *see also DeLisle v. Crane Co.*, 258 So. 3d 1219, 1237 (Fla. 2018) (Canady, C.J., dissenting) ("Parties every day make choices in litigating cases that limit their options for review. And parties ordinarily must live with the choices they make."); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

Id. at 1131. *See also Gannon*, 281 So. 3d at 591 (a defendant must raise all of its defenses to a complaint in an answer). This is precisely what happened here when Universal chose not to move to add the defense to its theory of the case, even after it was on notice that the trial court found that its Affirmative Defense #15 only requested relief as to voiding its entire policy.

Just as it waived its ability to argue that the policy was void or able to be rescinded, Universal waived its ability to complain to this Court about a defense it did not raise below. This Court should affirm.

II. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF SUMMARY JUDGMENT ON UNIVERSAL'S POLICY PROVISIONS.

Universal argues that even if it cannot deny Mr. Figueroa's claim for the alleged misrepresentations under section 627.409, it should

have been allowed to deny the claim while not rescinding the policy, pursuant to the Concealment or Fraud provision of the policy. Universal's Concealment or Fraud provision in the Policy states:

> We do not provide coverage to an "insured" who, whether before or after a loss, has:
> (1) Intentionally concealed or misrepresented any material fact or circumstance;
> (2) Engaged in fraudulent conduct; or
> (3) Made false statements;
>
> relating to this insurance.

(R. 3997). This argument likewise fails because (1) Universal failed to meet its burden to prove a violation of the Concealment or Fraud provision, (2) Universal failed to plead a defense of a claim-specific denial but sought instead to void the policy, and (3) the Concealment or Fraud provision does not allow for claim-specific denials but instead effectively only provides for recission of the policy.

A. Universal did not meet its burden to prove a violation of the Concealment or Fraud provision.

Although Universal cites case law that states intent is only required when a misrepresentation occurs after the loss, the plain language of its policy states the intent must be present "whether before or after a loss." To the extent Universal is arguing its third provision, that Mr. Figueroa "made false statements," this argument

cannot survive. Mr. Figueroa showed Universal that two of the three alleged "false statements" were actually claims made by his father for different properties, and the third was made by D.A.P. R/E Investments, LLC. This is important both because Mr. Figueroa was merely D.A.P. R/E Investments, LLC's tenant at the time of the loss and thus was not the claimant. Even if, arguendo, he was involved with the LLC on that date and made the claim on its behalf, an LLC is an autonomous legal entity, separate and distinct from its members. *Palma*, 307 So. 3d at 866; *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status."); *Robertson-Ceco Corp. v. Cornelius*, 2007 WL 1020326, at *6 (N.D. Fla. Mar. 30, 2007) ("[S]ummary judgment should not be granted against [the defendant] unless there is a specific showing that she was the alter ego of [her corporation] and that she engaged in the improper conduct."). Thus, there are no false statements made by Mr. Figueroa as a matter of law.

Furthermore, Universal relies on one line in Mr. Figueroa's deposition and attempts to stretch the meaning of his two-word answer, "That's correct," to mean all sorts of things. (I.B. 30). However, Mr. Figueroa testified that he did not own the home until April 2018, when he purchased it from D.A.P. R/E Investments, LLC. (R. 652-657). Universal's counsel agreed that the dates matched up with Sunbiz.org's record when the amendment to the articles of organization was submitted on April 18, 2018 that added Mr. Figueroa and his wife. The evidence shows that the "That's correct" line on which Universal bases its misrepresentation argument cannot mean what it purports it to mean.

Even if it did mean what Universal is advancing on appeal, it cannot get around the fact that it waived its right under its Policy to void the contract by paying Disaster Pros, which is why the trial court granted summary judgment. To the extent that Universal is arguing that the trial court did not consider its arguments, this cannot be known because no transcript exists, as outlined below in Point III.

B. Universal failed to plead a claim-specific denial pursuant to the Concealment or Fraud Provision of the Policy

Even if Universal did meet its burden to prove that Mr. Figueroa made a false statement in the insurance application, Universal failed to plead that it was seeking to only deny the subject loss and not rescind the entire policy based on the alleged misrepresentation. As argued above, Affirmative Defense #15 specifically states "pursuant to the Policy and Fla. Stat. 627.409(1)(a), *coverage is void with respect to the entire Policy*." (R. 197) (emphasis added). Universal specifically and explicitly sought to void the entire policy based on the alleged misrepresentations instead of only denying the subject loss. As such, even if correctly decided *Benitez* is clearly distinguished, and the waiver doctrine announced in *Stand-Up MRI* applies to the policy defense as well as the statutory defense.

Universal advanced the idea that the trial court should assume that the word "coverage" in its Concealment or Fraud provision means coverage of a specific claim within the Policy. (I.B. 34). Even if those extra words were assumed, the trial court was constrained by the language of its affirmative defense. *Gannon*, 281 So. 3d at 591; Fla. R. Civ. P. 1.140(a)(1). Universal's Affirmative Defense #15 only alleged a right to rescind or void its entire Policy, which the trial court found it could not do based on its payment to Disaster Pros.

C. The Concealment or Fraud provision of the policy does not allow for claim-specific denials but instead acts to effectively rescind the policy.

The Concealment or Fraud provision of the policy is unique amongst the provisions that exclude coverage. This provision states that Universal will not provide coverage to "an insured" if it is violated, as opposed to not providing coverage for "a loss" should the provision be violated.

Throughout the rest of the policy, exclusions reference situations in which a particular "loss" will not be covered: e.g., (1) Section I – F. Additional Coverages – 8. Collapse – e (excluding "loss" to a fence, awning patio, deck, pavement, swimming pool, underground pipe, etc.), (2) Section I – F. Additional Coverages – 9. Glass Or Safety Glazing Material - b (excluding loss to covered property caused by broken glass); (3) Section I – Perils Insured Against – A. Coverage A Dwelling and Coverage B Other Structures – 2 "We do not insure, however, for loss: [of over a dozen different cause of loss], (4) Section I Exclusions (listing 13 classes of loss for which there is no coverage). (R. 357 – 361, 363 – 364).

The Concealment or Fraud provision is not loss-specific, however. Instead, it denies any and all coverage, under both Section I and II,

to "an insured" in the event that the provision is violated. To preclude any coverage whatsoever to "an insured," regardless any particular loss, is to effectively rescind the policy. This interpretation is all the more reasonable in light of the fact that loss of coverage under this provision applies to misrepresentations that are made either before or after a given loss. If the Concealment or Fraud provision were limited to misrepresentations made after or in conjunction with a loss, then it would be reasonable to interpret the provision as providing a loss-specific defense. However, because all coverage can be denied to an insured regardless of when the alleged misrepresentation was made, this provision in effect acts as a recission provision. As a result, the waiver doctrine that applies to recission should also apply to pre-loss misrepresentations under the Concealed or Fraud provision.

D. Universal's claim that there was a disputed material fact preventing summary judgment is unpersuasive.

In order for this Court to entertain Universal's argument that there was a disputed fact question that precluded partial summary judgment for Mr. Figueroa, it would have to stack a handful of inferences that are simply unsupported by the record. First, it would

have to assume the trial court was considering Universal's Policy, not the statute. Then, it would have to assume the trial court determined that intent must be proven whether a misrepresentation is made before or after the subject loss. Next, it would have to assume that the trial court determined whether Mr. Figueroa made a misrepresentation. Then, it would have to assume that the trial court made a determination on whether or not Mr. Figueroa had intent to make a misrepresentation. This Court cannot guess what happened at the hearing below. It can only look to the order to determine if any issues exist on its face. There is no evidence in the entirety of the record that the trial court made any determination as to intent, and the ruling concerning waiver does not require any such determination. Intent was not a material fact in that the determination of waiver did not hinge on intent—it did not even matter whether the alleged misrepresentation was indeed an actual misrepresentation at all.

The order was clear that it struck Universal's Affirmative Defense #15 due to its payment to a mitigation company as an assignee of Mr. Figueroa for services provided that were related to the subject claim, and it found that the payment constitutes a waiver to

seek recission of the policy. (R. 2582). This is a legally sound reason to grant Mr. Figueroa's partial summary judgment as to Affirmative Defense #15. This Court must affirm.

III. THE LACK OF A TRANSCRIPT HINDERS THIS COURT FROM A MEANINGFUL REVIEW.

A. Appellant did not provide a trial transcript for this Court's review.

The Supreme Court of Florida summed it up best more than nine decades ago: "Any case worth the trying is worth the preserving of the testimony." *State ex rel. Globe & Rutgers Fire Ins. Co. v. Cornelius*, 129 So. 752, 758 (Fla. 1930). In other words, a case that is worth the time, cost, and effort involved with a trial court's time is worth transcribing if one desires to later allow for a meaningful appeal.

After reaching this observation, the Court further noted with a statement that remains remarkably applicable today: "In these modern days when courts and counsel handle many times as much business in a given time than formerly, it becomes impracticable to properly preserve" the record by means of a substitute for a transcript. *Id.* With regard to this observation, it must be noted that

no substitute for a transcript has been offered in lieu of the missing transcript itself.

The lack of a record transcript or substituted record means that the legal arguments and purported testimony alluded to by Universal were not preserved and therefore cannot be raised on appeal. Any included arguments in Universal's Initial Brief may or may not have been presented below at the summary judgment hearing and may or may not have had countering argument. It matters naught. Any arguments are not preserved, and Universal may not now raise arguments that it cannot demonstrate were raised at the trial level. *Colin v. Colin*, 146 So. 3d 112, 113 (Fla. 5th DCA 2014). This failure is simply fatal to the present efforts of Universal to proceed. The appeal should be denied and the order on appeal affirmed.

Universal cannot seek to infer that the trial court's reasoning from the summary judgment order is to the exclusion of its other arguments, whether contractual or statutory. The only truth that can be gleaned without speculation from the order is that the legal argument of waiver was argued. It is not clear whether the other arguments under the parties' contract or under section 627.409 were raised or argued before the trial court. An assumption based on the

arguments contained in Universal's Renewed Motion for Summary Judgment would be just that: an assumption.

This Court cannot assume, speculate, or guess what happened at the hearing below. This is precisely why the lack of preservation can and must be fatal to the effort now by Universal to overturn the determination of the trial court below. Outside of the facts within the underlying judgment itself, this Court cannot know what arguments were proffered, whether they were the same arguments now raised on appeal, nor can this Court know the actual content of the subject hearing.

In the event that there is no transcript, the Florida Rules of Appellate Procedure provide a secondary means to attempt to create a substitute record outlined by Rule 9.200(b)(5). Universal did not seek to follow this methodology either. Accordingly, not only is there no transcript, but there is no alternate means by which there would be any possible way for this Court to review the arguments presented to the trial court without engaging in precisely the type of speculation that it is the hallmark of appellate courts to avoid. *Trans-Continental Finance Corp. v. Baxter*, 402 So. 2d 1289, 1290 (Fla. 5th DCA 1981) ("The law is quite clear that an appellate court cannot speculate on

the ruling of the trial court and the appellate court will have no choice but to uphold the trial court if an adequate record is not presented on appeal," citing *Lyden v. DePiera*, 147 So. 2d 573 (Fla. 3d DCA 1963)).

With no record transcript and no substitute attempted, Universal's failure to preserve arguments concerning the underlying summary judgment causes any appeal of that judgment to fail. The order of the court below should be affirmed accordingly.

CONCLUSION

The trial court did not err. It considered Universal's pleading, applied it to the undisputed fact that Universal paid Disaster Pros after it knew of the alleged misrepresentation, and determined that it waived the right to argue its Affirmative Defense #15 as a matter of law. Without a transcript, this Court must look to the subject order to determine whether there is error on its face. There is none. This Court should affirm the trial court's order denying Universal's summary judgment motion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 20, 2024, I electronically filed the foregoing with the Clerk of the Third District Court of Appeal by utilizing the Florida Courts E-Filing Portal which will send a notice of electronic filing and a true and correct copy of the foregoing to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(b) and Florida Rule of Appellate Procedure 9.210(a)(2)(B), I hereby certify that this brief was prepared using proportionately spaced Bookman Old Style 14-point font and complies with the applicable font and word count limit requirements.

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