**IN THE DISTRICT COURT OF APPEAL**
**OF THE STATE OF FLORIDA, SECOND DISTRICT**
CASE NO.: 2D22-2750
L.T. CASE NOs.: 17-CA-3938; 17-CA-8392

HEMANT N. SHAH a/k/a HEMANTKUMAR NATHUBAHI SHAH, individually, and MADHVI H. SHAH, individually,

Appellants,

REGIONS BANK, an Alabama state Chartered Bank, as successor in interest to AMSOUTH BANK, et al.

Appellees.
_____/

# APPELLEE, REGIONS BANK'S ANSWER BRIEF

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

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## INTRODUCTION

The facts surrounding the dispute between Regions Bank ("Regions") and Hemant N. Shah ("H. Shah") and Madhvi H. Shah ("M. Shah") are not foreign to this Court. To be sure, H. Shah was an appellant in the following appeals before this Court, all of which stemmed from the same underlying litigation: 2D14-4290, 2D16-5538, 2D17-1224, 2D17-1510, 2D17-1584, 2D17-2187, and 2D17-3509, the vast majority of which were dismissed for failure to prosecute. In addition to the foregoing, Regions and H. Shah were parties to yet another appeal – 2D19-2530 – this time initiated by Regions, and adjudicated in favor of Regions, thereby reversing the order of the trial court. It was in that most recent appeal, that this Court, Judge Lucas writing, offered the following truncated summary:

> A decade ago, Regions Bank instituted civil litigation to recover on a loan it had extended in connection with a failed commercial office project in Riverview. We need not recount the wending course the bank's proceedings took in the circuit, bankruptcy, and appellate courts. Suffice to say that by July of 2011 the various lawsuits proceeded to the point where Regions Bank had set a hearing on its motion for summary judgment against the debtor and, pertinent here, the guarantors of the loan, May J. Mehta (Dr. Mehta) and [H. Shah].

> Neither of the guarantors, who appeared pro se at the summary judgment hearing, requested a continuance of the hearing. Nor did they ever proffer any rebuttal evidence or argument against Regions Bank's motion. The circuit court granted Regions Bank's motion and on September 7, 2011, entered a final judgment that adjudicated the amount owed to Regions Bank (a little over two million dollars), determined that various defendants – including the guarantors – were jointly and severally liable for the judgment, and granted foreclosure of the bank's lien over the property that secured the loan.

Regions Bank v. Big Bend Investments Group of Florida, LLC, 311 So.3d 181, 182-183 (Fla. 2d DCA 2020).

Now, after another three years of hindering Regions' lawful action to enforce its multimillion dollar judgment, and once again failing to (i) provide any opposition to Regions' summary judgment motion, (ii) request a continuance of the hearing, (iii) offer any rebuttal evidence or argument against Regions' motion, or (iv) even bother to appear at the hearing, the Shahs request that this Court undue the final judgment of foreclosure, predicated entirely upon arguments not raised before the Trial Court below.

The Trial Court's Final Judgment therefore should be affirmed.

## STATEMENT OF THE CASE AND FACTS

As an initial mater, the Shahs' "Statement of the Case and Facts" points to "facts" and arguments which were not filed and not raised in opposition to Regions' Summary Judgment Motion, as more fully defined below, in derogation with the mandatory procedure and timing requirements for opposing and disputing facts and supplying objections to a motion for summary judgment that are contained within Florida Rule of Civil Procedure 1.510, and therefore includes issues and arguments which were not preserved in the lower court action and which were, therefore, waived. Therefore, Regions respectively provides its own Statement of the Case and Facts. See Fla. R. App. P. 9.210(c).

As noted by this Court in prior appeals, in 2011 Regions obtained a final foreclosure judgment against H. Shah and others in the amount of $2,067,749.27. The property serving as collateral securing H. Shah's indebtedness to Regions was subsequently sold at a foreclosure sale. As this Court found, "the foreclosure sale in 2011 did not generate sufficient funds to satisfy the bank's judgment." Big Bend Investments, 311 So.3d at 183. Regions proceeded to obtain a deficiency judgment as against H. Shah in the

amount of $812,073.12. A certified copy of Regions' judgment was properly recorded, thereby providing Regions with a perfected judgment lien on all real property owned by H. Shah within Hillsborough County, Florida. See O.R. Book 20526, Beginning at Pg. 1680; O.R. Book 22620, Beginning at Pg. 367. [Apx. 3 at 16-20].

"Over the course of the ensuing years, [Regions and H. Shah have] engaged in more postjudgment litigation, mediation, and appellate proceedings." Big Bend Investments, 311 So.3d at 183. This includes the present lawsuit from which this newest appeal stems from. In the Trial Court below, Regions sought to foreclose H. Shah's interest in certain real property located in Hillsborough County, Florida, more fully described as:

> Lot 51, Block D. HIDDEN OAKS AT TEMPLE TERRACE PHASE 2, according to the map or plat thereof in Plat Book 104, Page 24, Public Records of Hillsborough County, Florida.

(the "Temple Terrace Property"). [Apx. 3, at 19].

After five years of litigating, on February 21, 2022, Regions moved for summary judgment thereby seeking to foreclose its judgment lien on the Temple Terrace Property – a copy of which was served on then counsel for H. Shah and on M. Shah, personally, at

two different locations. [Apx. 76, at 620-627]. On May 19, 2022, Regions noticed its summary judgment motion for hearing to be held on July 19, 2022, at 11:00 a.m. – a copy of which was served on H. Shah and M. Shah, both personally and through their then respective counsel of record. [Apx. 78, at 632-634].

On June 16, 2022, Regions amended its summary judgment motion (the "Summary Judgment Motion"), and served the same, along with an amended notice of hearing, upon H. Shah personally and upon M. Shah both personally and through her counsel of record. [Apx. 80, at 638-645]. The hearing date of July 19, 2022 remained unchanged.

Having failed to file any objection or response to the Summary Judgment Motion, or otherwise seek continuance of the July 19, 2022 hearing date, the motion proceeded to hearing (the "Summary Judgment Hearing") on July 19, 2021. Neither of the Shahs appeared at the Summary Judgment Hearing either pro se or through counsel. Accordingly, the Summary Judgment Motion was unopposed. On July 20, 2022, the Trial Court entered its order (the "Summary Judgment Order") granting the Summary Judgment Motion and entering final summary judgment in favor of Regions, thereby

foreclosing Regions' judgment lien on the Temple Terrace Property. [Apx. 83, at 874-879]. The Trial Count found that H. Shah was the "sole owner of the [Temple Terrace] Property." [Id. at 875].

Thirty days later, without seeking rehearing or reconsideration of the Summary Judgment Order, the Shahs filed their notice of appeal. [Apx. 88, at 903-912].

## SUMMARY OF ARGUMENT

The Summary Judgment Order granting summary judgment in favor of Regions and thereby allowing Regions to foreclose H. Shahs' interest in and to the Temple Terrace Property should be affirmed. On appeal, the Shahs raise entirely new arguments never once raised before the Trial Court below. Having never filed a written response to the Summary Judgment Motion, having failed to appear and be heard at the Summary Judgment Hearing, and having failed to seek continuance of the Summary Judgment Hearing or rehearing/reconsideration of the Summary Judgment Order, all of the arguments raised in the Initial Brief are unpreserved and have been waived.

Regardless of the Shahs' attempts to inject new issues on appeal that could have been but were not raised below, the Shahs were

afforded all the due process that is required under the law. Instead of appearing at the Summary Judgment Hearing as noticed and voice their collective objection, the Shahs declined to take advantage of that opportunity. Having opted to sit idly by and allow the Summary Judgment Order to be entered against them and in favor of Regions, the Shahs should not be afforded the opportunity to raise issues for the first time in their Initial Brief. The time for the Shahs to oppose the Summary Judgment Motion was at the trial court level, not here.

The Shahs failure to challenge Regions' Summary Judgment Motion by failing to file any written response and facts in opposition to the same within the time and manner mandated by amended Rule 1.510 constitutes an unpreserved error and waiver of all arguments raised by the Shahs. The Shahs' argument fails to discuss, identify, or apply the new standard for summary judgments effective May 1, 2021, and does not include any summary judgment standard to decide the arguments made by them or to determine error committed by the trial court's decision to grant summary judgment in favor of Regions under the new summary judgment standard.

The Initial Brief wholly fails to meet the Shahs' burden to show reversible error in any way. Summary judgment was properly entered, and the Summary Judgment Order should be affirmed.

## STANDARD OF REVIEW

The parties agree that, under normal circumstances, a trial court's ruling on a motion for summary judgment is reviewed de novo. Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001). However, as a general rule, trial court orders are clothed with a presumption of correctness and will remain undisturbed unless the petitioning party can show reversible error." Smith v. Coalition to Reduce Class Size, 827 So. 2d 959 (Fla. 2002) (quoting Operation Rescue v. Women's Health Ctr., 626 So. 2d 664 (Fla. 1993)). An appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to the reasons given by the trial court for its decision. The appellate court must affirm the trial court judgment if it is legally correct for any reason. Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999).

Notwithstanding the foregoing, in circumstances where the non-moving party fails to respond to a motion for summary judgment – as in the case at bar – the standard of review is whether or not the

trial court abused its discretion "by considering the moving party's facts as undisputed and granting summary final judgment." See Lloyd S. Meisels, P.A. v. Dobrofsky, 341 So.3d 1131, 1133 (Fla. 4th DCA 2022); Fla. R. Civ. P. 1.510(e)(2).

## ARGUMENT

### A. COUNSEL ISSUE IS A RED HERRING

Regions takes this time to briefly respond to the suggestion by the Shahs that because they were "unrepresented" at the time of the filing of the Summary Judgment Motion or the time the Summary Judgment Hearing occurred, that is an excuse to their failure to respond, appear, or otherwise do anything before the Trial Court below.

For starters, the Shahs had ample opportunity to obtain subsequent counsel. Curry Law Group, P.A. filed its motion to withdrawal as counsel for H. Shah on July 15, 2021. [Apx. 73, at 610-613]. H. Shah clearly knew then that he needed to begin looking for additional counsel. Curry Law Group's motion was initially scheduled for hearing on August 18, 2021, but was cancelled by the same. Curry Law Group then filed an amended motion for withdrawal on April 19, 2022 [Apx. 77, at 628-631], setting the same

for hearing on May 26, 2022. On June 3, 2022, following hearing on May 26, 2022, the Trial Court entered its order granting Curry Law Group's amended motion to withdrawal as counsel for H. Shah, and provided H. Shah with thirty days to obtain new counsel – that being July 3, 2022, or sixteen days before the Summary Judgment Hearing. [Apx. 79, at 635-637]. H. Shah apparently was content with doing nothing during all this time.

Moreover, although the McIntyre Firm, appellant counsel now – who filed the first paper on behalf of the Shahs in the action below [Apx. 7, at 48-49] - filed a motion for withdrawal and notice of client consent [Apx. 13, 148-150], the record is devoid of any corresponding "written order of the court" or "substitution of counsel" pursuant to subdivision of the applicable rules as required under Rule 2.505(f)(1) or (2) of the Florida Rules of General Practice and Judicial Administration. See Fla. R. Gen. Prac. & Jud. Admin. 2505(e) and (f) ("The appearance of an attorney for a party in a proceeding shall terminate only in one of the following ways: (1) Withdrawal of Attorney. **By order of court**… [and] (2) Substitution of Attorney. Substitution of counsel pursuant to subdivision (e)(3) or (e)(4)" with subdivision (e)(3) providing "Order on Substitution of Counsel. **Filing**

**of a written order by the court**…") (emphasis added); see also Fla. R. Jud. Admin. 2.505(f) (2017) ("The appearance of an attorney for a party in a proceeding shall terminate only in one of the following ways: (1) Withdrawal of Attorney: **By order of court**…[and] (2) Substitution of Attorney: **By order of court**…"); see also Fidelity & Guar. Ins. Co. v. Ford Motor Co., 707 F. Supp. 2d 1300, 1317 n. 24 (M.D. Fla. 2010) (…which the State Court neither approved nor entered as an order. As a matter of law, then, it is not entirely clear that Ford ever withdrew its defense of Heintzelman's."). Accordingly, with no order approving the McIntyre Firms' withdrawal, the McIntyre Firm was still counsel of record for the Shahs.

Similarly, while the Litchfield Cavo, LLP firm also sought to withdraw as counsel below [Apx. 61, 563-564], the firm only obtained a written order from the Trial Court as to its representation of H. Shah, and others, but not M. Shah. [Apx. 70, at 594-596]. Accordingly, Litchfield Cavo, LLP was still counsel of record for M. Shah at the time of the Summary Judgment Hearing.

Much like their decision to fail to oppose the Summary Judgment Motion or appear at the Summary Judgment Hearing, their decision to hire "new" counsel only after the Summary

Judgment Order was entered was calculated. As was the decision not to seek rehearing or reconsideration below.

### B. The Shahs' New Complaint Regarding The Timeliness of the Summary Judgment Hearing Has Been Waived

As to the entirety of the Shahs' present argument, the Summary Judgment Order should be affirmed based on waiver principles. The Shahs did not file a written response or objection to the Summary Judgment Motion below. Neither did the Shahs seek a continuance of the Summary Judgment Hearing. At the Summary Judgment Hearing, both Shahs failed to appear either in person or through counsel. [Apx. 83 at 875]. And neither of the Shahs sought to raise their newly contrived arguments through rehearing or reconsideration of the Summary Judgment Order before the Trial Court below. There is simply no indication in this record that the Shahs raised any of the arguments that they raise on appeal in the Trial Court before the entry of the Summary Judgment Order or after.

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." Sunset

Harbour condominium Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) (citation omitted). On this record, there is no indication that the Shahs raised the arguments asserted herein at any time before the Trial Court – because the Shahs did not. Accordingly, the arguments they raise here are waived.

This rule holds especially firm when the issue raised for the first time on appeal is procedural in nature – such as filing a summary judgment motion in less days than required by the rules of procedure. There is no exception to having offered the objection below. See E.J. Associates, Inc. v. John E. and Aliese Price Foundation, Inc., 515 So. 2d 763, 764 (Fla. 2d DCA 1987) (finding that appellant waived any objection to the procedural irregularities in the appellee's untimely summary judgment affidavits or prematureness of the summary judgment and therefore could not raise them for the first time on appeal where the appellant failed to pursue any action before the trial court as to the same, failed to appear at the hearing on the summary judgment, and did not even file a motion for rehearing after the entry of the final judgment of foreclosure) (citing Allstate v. Gillespie, 455 So. 2d 617 (Fla. 2d DCA 1984)); see also Goncalves v. South Tower at Point Condominium,

Inc., 347 So. 3d 1290 (Fla. 3d DCA 2022); RM & Assocs. Consulting, Inc. v. People's Tr. Ins. Co., 336 So. 3d 762 (Fla. 3d DCA 2021) (citing Estate of Herrera v. Berlo Indus., Inc., 840 So. 2d 272, 273 (Fla. 3d DCA 2003) ("[Appellant] seeks to raise issues which were not raised in the trial court. However, issues not presented in the trial court cannot be raised for the first time on appeal. Thus, [appellant] is precluded from raising new arguments on appeal.")) Azanza v. Priv. Funding Grp., Inc., 24 So. 3d 586, 587 (Fla. 4th DCA 2009) ("This court has held that any error in failing to give twenty days' notice prior to a summary judgment hearing is waived if the party does not object to insufficient notice either before a summary judgment hearing, at the summary judgment hearing, or in a motion for rehearing") (citing E & I, Inc. v. Excavators, Inc., 697 So. 2d 545, 546 (Fla. 4th DCA 1997) (holding that "where, as in the present case, there was no objection to the insufficient notice prior to the [summary judgment] hearing, at the [summary judgment] hearing, nor in the motion for rehearing, the issue has been waived.")).

Thus, the Shahs' procedural argument as to the timeliness of the Summary Judgment Motion, like all of their arguments, have

been waived and should not be countenanced by this Court. The Summary Judgment Order is therefore due to be affirmed.

### C. THE SHAHS DUE PROCESS GAMBIT FALLS FLAT AS IT IS UNDISPUTED THAT THEY RECEIVED PROPER NOTICE AND AN OPPORTUNITY TO BE HEARD AND SIMPLY CHOSE TO LIE IN WAIT AND DO NOTHING

The Shahs next complain that Regions' filing of the Summary Judgment Motion somehow deprived them of due process.[1] This is not so. For starters, the Shahs appear to focus entirely upon paragraph 13 of the Summary Judgment Motion, that argued:

> With respect to the Real Property, while it appears on the title that M. Shah owns an interest (the "M. Shah Interest") in the same, H. Shah is the actual sole owner, as is evidence by his tax returns and deposition testimony. Given the same, the M. Shah Interest should be foreclosed as well. Copies of joint tax returns for H. Shah and Alka H. Shah are attached hereto and incorporated herein by reference as Composite Exhibit "A."

But in focusing on this singular paragraph, the Shahs ignore the Trial Court's actual ruling.

The Trial Court did not foreclose M. Shah's feigned interest in the Temple Terrace Property. Instead, as is clear in the Summary Judgment Order, the Trial Court found that the "[Temple Terrace]

[1] This is not the first time that H. Shah has argued that he was deprived notice and a meaningful opportunity to be heard. See Big Bend Investments, 311 So.3d at 184-85 (rejecting the argument).

Property [is] owned by H. Shah" [Apx. 83, at 875] and that "H. Shah is the sole owner of the [Temple Terrace] Property." [Apx. 83, at 875]. The Court then went on to hold that "the Defendants have failed to establish any basis to oppose the relief requested in the Complaint and therefore this final summary judgment is hereby entered…". [Apx. 83, at 876]. Thus, the Trial Court, after finding that H. Shah was the sole owner of the Temple Terrace Property, foreclosed his interest in the same in light of Regions' judgment lien. [Apx. 83, at 876].

Regardless, even if the Shahs were to take error with the Trial Court's findings, such findings appeared for the first time in the Summary Judgment Order. Neither of the Shahs filed a motion for rehearing or reconsideration in an attempt to correct this purported error. Consequently, the Shahs have failed to preserve this argument. Topvalco Inc. v. Wolff, -- So. 3d --, 2023 WL 1999969, *1 (Fla. 4th DCA Feb. 15, 2023) (affirming trial court because issue on appeal was not preserved for review where error appeared for the first time on the face of an order and the appellant failed to move for rehearing, to vacate, or for relief from judgment in order to bring the error to the attention of the lower tribunal); Pensacola Beach Pier,

Inc. v. King, 66 So. 3d 321, 324 (Fla. 1st DCA 1022) (finding that although appellants' argument on a point was "well taken" they had waived it because the error appeared for the first time in the final judgment and appellants did not file a motion for rehearing or otherwise attempt to correct the error); Michael A. Marks, P.A. v. Geico Gen. Ins. Co., 332 So. 3d 11, 12 (Fla. 4th DCA 2022) (agreeing with provider that trial court erroneously dismissed provider's declaratory judgment action but affirming because the argument raised on appeal was not raised in the proceedings below); D&T v. Fla Dep't of Children & Families, 54 So. 3d 632, 633 (Fla. 1st DCA 2011) (holding appellant failed to preserve argument that court's order was deficient due to lack of statutorily required findings because she did not file a motion for rehearing); Holland v. Cheney Bros., Inc., 22 So. 3d 648, 650 (Fla. 1st DCA 2009) (holding, "'[i]n workers' compensation cases, **as in other cases**, we will not consider arguments which were not presented in a meaningful way to the lower tribunal.'") (quoting Jellison v. Dixie S. Indus., Inc., 857 So.2d 365, 366 (Fla. 1st DCA 2003) (emphasis added)); Lake Sarasota Inc. v. Pan. Am. Sur. Co., 140 So. 2d 139, 142 (Fla. 2d DCA 1962) (holding, where appellants raised for the first time on appeal that they

disagreed with the trial court's statement in its summary judgment order that the facts were undisputed, "[i]t is the duty and responsibility of the attorneys in a cause to see that the orders entered by the trial court are in proper form and substance and that they correctly recite the record. Any incorrect statements made in any order should be promptly brought to the attention of the court."). Accordingly, to the extent that any purported error appeared in the Trial Court's Summary Judgment Order for the first time, the Shahs were obligated to attempt to correct it in the Trial Court before raising it here. They did not.

As set forth in the preceding paragraph and in Section B. above, because the Shahs have failed to raise the present issue before the Trial Court at any time, in opposition to the Summary Judgment Motion, at the Summary Judgment Hearing, or in motions for rehearing or to set aside the Summary Judgment Order, they are precluded from raising it for the first time on appeal now. The "function of the appellate court [is] to review errors allegedly committed by the trial courts, not to entertain for the first time on appeal issues which the complaining party **could have, and should have, but did not**, present to the trial court." Abrams v. Paul, 453

So. 2d 826, 827 (Fla. 1st DCA 1984) (emphasis added); ; see also Rolfs v. First Union Nat. Bank of Florida, 604 So. 2d 1269, 1270 (Fla. 4th DCA 1992) (where appellant failed to preserve the alleged error by objecting in the trial court) (citing Coquina v. East West Company, 255 So. 2d 279 (Fla. 4th DCA 1971)); see also Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) ("The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.").

Although not clear, given the newly contrived issue raised by the Shahs for the first time on appeal, it appears the Shahs are attempting to invoke a limited exception to their failure to have raised any of the present arguments below – "fundamental error." However, this desperate last-minute ploy should be rejected by this Court. For starters, the Shahs do not even make an effort to articulate why the exceedingly rare "fundamental error" exception should be employed in the case at bar. See Caldwell v. Florida Dept. of Elder Affairs, 121

So. 3d 1062, 1064 (Fla. 1st DCA 2013); see also Coolen v. State, 696 So. 2d 738, 742, n.2 (Fla. 1997) (finding that raising an argument in a footnote without fully briefing the issue constituted a waiver of that argument); Stanton v. Florida Dept. of Health, 129 So. 3d 1083 (Fla. 1st DCA 2013) (finding that a perfunctory argument without any supporting argument or authority will not be addressed on appeal). Accordingly, the Shahs failure to offer any real argument as to how the "fundamental error" exception would apply ironically constitutes a waiver of the same.

But "[e]ven where the exception might be employed, the court stressed that it **must** be used only '**very guardedly**' adding that it is a matter of judicial discretion. The clearest teaching in Sanford is, thus, that it is an **extremely rare exception** to the usual rule of waiver of issues not argued below and is properly reserved **only for the exceedingly unusual case** where a substantial injustice would be otherwise perpetrated." Moorman v. American Safety Equipment, 594 So. 2d 795, 800 (Fla. 4th DCA 1992). As set forth by the Florida Supreme Court:

> In contrast to criminal cases where the "fundamental error" doctrine is utilized, in civil cases, reversal based on the concept of "fundamental error" where a timely

> objection has not been made is **exceedingly rare**. This Court has gone so far as to explain that fundamental error most implicate a constitutional right, such as due process, or the error must be so significant that requiring a new trial is essential to maintain public trust in our jury trial system. See, e.g., Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1026 (Fla. 2000). In other words, the error must have been so significant that it deprived one party of the right to a fair trial and due process.

Coba v. Tricam Industries, Inc., 164 So. 3d 637, 646 (Fla. 2015).

Such a circumstance is not before this Court where the Shahs were given proper notice and afforded a meaningful opportunity to be heard and simply elected to ignore the same.

Even if they had offered such an argument, based upon the fact that the Shahs received proper notice and an opportunity to be heard and simply chose to ignore both, does not rise to the level of a violation of due process. As the Shahs concede, the constitutional guarantee of due process requires only that each litigant be given a full and fair opportunity to be heard. County of Pasco v. Riehl, 635 So. 2d 17, 18 (Fla. 1994); E.I DuPont De Nemours & Co. v. Lambert, 654 So. 2d 226, 228 (Fla. 2d DCA 1995). To be sure, as confirmed by this Court in Big Bend Investments – where similar arguments were advanced,

> Due process requires only that a person be afforded the opportunity to be heard. It does not require more than one opportunity where a party declines to take advantage of that opportunity, absent extraordinary circumstances not present in this case.

Big Bend Investments, 311 so.3d at 185 (quoting Monts v. Washington, 764 So. 2d 831, 833 (Fla. 5th DCA 2000)).

Neither of the Shahs were deprived of the opportunity to present a defense or seek continuance of the Summary Judgment Hearing. See Id. Instead, the Shahs simply made a calculated decision to (i) ignore the Summary Judgment Motion, (ii) ignore the notices of hearing, (iii) not show up and be heard at the Summary Judgment Hearing, and (iv) fail to seek rehearing or reconsideration before the Trial Court. But electing not to respond or appear at the Summary Judgment Hearing and voice an objection does not equate to a denial of due process. As held by this Court in Allstate Ins. Co. v. Gillespie, 455 So. 2d 613 (Fla. 2d DCA 1984),

> We find no merit in this point. Although Gillespie's motion to dismiss Allstate's complaint was unresolved at the time of trial, Gillespie was served with two motions to set the case for trial and two order setting the trial dates. Gillespie never objected to the motions nor sought relief from the orders. Gillespie also failed to appear either in person or though counsel at trial. In addition, he never sought a hearing on his motion to dismiss. **A litigant may not sit on his hands, fail to voice his objection, and then claim**

> **prejudice when a final judgment is entered which may adversely affect him**. Furthermore, he may not raise his objection for the first time on appeal.

455 So.3d at 620 (citing Liberty Mutual Insurance Co. v. Dilenge, 312 So. 2d 251 (Fla. 3d DCA 1975) and Marsh v. Sarasota County, 97 So. 2d 312 (Fla. 2d DCA 1957), cert. denied, 101 So. 2d 816 (Fla. 1958)) (emphasis supplied); see also Carmona v. Wal-Mart Stores, East, L.P, 81 So. 3d 461, 464 (Fla. 2d DCA 2011) (rejecting the appellants argument that they were deprived due process where it was undisputed that they were served with notice of the summary judgment hearing, raised no objection to the date or duration of the hearing, and appeared at the hearing).

Having sat on their collective hands, failing to respond to the Summary Judgment Motion, seek continuance of the Summary Judgment Hearing, appear in person or through counsel at the Summary Judgment Hearing, and seek rehearing/reconsideration of the Summary Judgment Order, this Court should not indulge the Shahs' attempts to turn this Court into the trial court below. To be sure, and as the Florida Supreme Court has explained, the "fundamental error" exception "is not to protect the interests of a particular aggrieved party, but rather to protect the interests of

justice itself." Maddox v. State, 760 So.2d 89, 99 (Fla. 2000). This Court should not expand the "fundamental error" exception to this case, where the appellants themselves were content to sit idly by and do nothing in the Trial Court below.

For any of the reasons argued above, this Court should find that the Shahs did not preserve the argument raised in their Initial Brief, that this case does not rise to the "exceedingly unusual case" requiring application of the "fundamental error" exception, and no due process violation occurred. With that, the Summary Judgment Order should be affirmed in favor of Regions.

### D. UNDER THE PROPER SUMMARY JUDGMENT STANDARD, THE SHAHS' NEW ARGUMENT RINGS HOLLOW

The Shahs' last argument on appeal purports to summarily suggest that there were "genuine issues of material fact" below that would have precluded the Trial Court from entering summary judgment in favor of Regions. However, because this argument was not made in the Trial Court, it cannot be presented for the first time here on appeal. See Kocik v. Fernandez, 2023 WL 152158, *3 (Fla. 3d DCA Jan. 11, 2013) (finding no error with the trial court's conclusion at summary judgment that the undisputed evidence supported the

appellees' position and that the appellant had waived its argument for failing to raise it before the trial court below).

Rule 1.510 was amended effective May 1, 2021. Florida now follows the federal summary judgment standard. In re Amends to Fla. R. Civ. P. 1.510, 309 So.3d 192 (2020). Accordingly, at the time of filing the Summary Judgment Motion and Summary Judgment Hearing, the new federal summary judgment standard controlled. See Wilsonart, LLC v. Lopez, 308 So. 3d 961, 964 (Fla. 2020) (explaining that the amendment to rule 1.510 is prospective); In re Amends. To Fla. R. Civ. P. 1.510, 317 So. 3d 72, 77 (Fla. 2021) (explaining that the new rule "must govern the adjudication of any summary judgment motion decided on or after that date, including in pending cases."). Thus, the Shahs' reliance on the prior version of the rule is inapplicable.

Under the revised summary judgment rule, summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Therefore, "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party." In

re Amends. to Fla. R. Civ. P. 1.510, 317 So.3d at 75 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Put simply, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50.

As this Court recently held:

> A summary judgment movant under the federal standard need not "preemptively tackle all of [the nonmovant's] affirmative defenses." Rather, "on a plaintiff's motion for summary judgment on its claims, the defendant bears the initial burden of showing that [a] affirmative defense is applicable." Only upon such a showing does the burden shift to the plaintiff regarding the affirmative defense. This is because the defendant bears the burden of proof on his or her affirmative defenses at trial.

G&G In-Between Bridge Club Corporation v. Palm Plaza Association, Ltd., -- So. 3d --, 2023 WL 1806108 at *5 (Fla. 2d DCA Feb. 8, 2023) (internal citations omitted).

The requirements to preserve an error for review prevents a party – such as the Shahs – from strategically allowing errors to go unchallenged by objection and then later trying to use the error to a party's tactical advantage. See F.B. v. State, 852 So.2d 226, 229 (Fla. 2003). This same rationale was acknowledged and given as a reason for including in the amended Rule 1.510 the **mandatory** requirement

that the non-moving party **must** file the party's opposing facts and objection no later than 20 days prior to the hearing to reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions. In re Amendments to Fla. R. Civ. P. 1.510, 317 So.3d at 77.

The record discloses that nothing was filed by the Shahs in opposition to Regions' Summary Judgment Motion. Accordingly, the Shahs' failed to preserve and/or waived their objections to either the facts and/or the law presented in the same. Amended Rule 1.510(c) provides in pertinent part that "At least 20 days before the time fixed for the hearing, the nonmovant **must** serve a response that includes the nonmovant's supported factual position as provided in subdivision (1) above." Fla. R. Civ. P. 1.510(c) (emphasis supplied). Amended Rule 1.510(e), added in pertinent part the following: "If a party … fails to properly address another party's assertion of facts as required by rule 1.510(c), the court may: … (2) consider the fact undisputed for purposes of the motion." Fla. R. Civ. P. 1.510(e)(2).

Accordingly, "[t]he amended rule required the [Shahs] to serve a response to the motion for summary judgment." Lloyd S. Meisels,

P.A., 341 So.3d at 1135. As the Fourth District Court of Appeal held in Lloyd S. Meisels, P.A.,

> Rule 1.510(c)(5) states that "the nonmovant must serve a response." There is no wiggle room in the word "must." That word makes the filing of the response mandatory. On a motion for summary judgment, by requiring the nonmoving party to take a definite, detailed position, the rule promotes deliberative consideration of the motion.

Lloyd S. Meisels, P.A., 341 So.3d at 1135.

By failing to respond to the Summary Judgment Motion as required under Rule 1.510, "the trial court was permitted to consider the facts set forth in [Regions'] motion for summary judgment as 'undisputed for purposes of the motion.'" Id. at 1136 (quoting Fla. R. Civ. P. 1.510(e)(2)). The Shahs make no argument as to how the Trial Court abused its discretion in considering the only evidence and argument before it at the time of the Summary Judgment Hearing. Instead, the Trial Court did precisely what the amended Rule 1.510 provides. Without filing a response as required, the Shahs "pursue[d] a risky course by waving at the record, leaving the trial court to mine for nuggets of triable fact that would preclude summary judgment." Id. at 1135. But the Trial Court is not required to "comb through record to find some reason to deny a motion for summary judgment."

Id. Instead, the Trial Court need only consider the materials actually cited, and it is the opposing party's obligation to direct the trial court to specific triable facts. Fla. R. Civ. P. 1.510(c)(3). The Shahs utterly failed in this regard.

The Shahs offer nothing more than their own conclusory arguments that there is some genuine issue of material fact that they are presenting to this Court for the first time on appeal. As stated herein supra, any argument as to the evidence presented in support of summary judgment should have been made before the Trial Court below at the Summary Judgment Hearing that the Shahs received proper notice of – not once, but twice. Having failed to resolve themselves of their opportunity to be heard below, the Shahs have waived their argument here.

Accordingly, the Shahs failure to offer any argument before the Trial Court, coupled with their failure to set forth a satisfactory argument as to how the Trial Court abused its discretion in granting the unopposed Summary Judgment Motion requires affirmance of the Summary Judgment Order.

Regardless, and based upon the undisputed evidence presented at the Summary Judgment Hearing, the Trial Court was free to

conclude that H. Shah was the sole owner of the Temple Terrace Property. [Apx. 83, at 875]; See Moore v. Moore, 401 So.2d 841, 843 (Fla. 5th DCA 1981) (Although there is a presumption of beneficial ownership when a person's name appears on title to property, that presumption is rebuttable). "Although the trial court is permitted to consider other materials in the record when ruling on a motion for summary judgment, it is not required to do so, as the amended rule states that the court 'need consider only the cited materials.'" Lloyd S. Meisels, P.A., 341 So.3d at 1136 (quoting Fla. R. Civ. P. 1.510(c)(3)).[2]

Having failed to bother to show up to the Summary Judgment Hearing and present argument, the Shahs cannot now attempt to raise issues that they were unwilling to raise below. The Summary Judgment Order is due to be affirmed.

[2] While Rule 1.510(e)(1) permits the trial court to "give an opportunity to properly support or address the fact" when a party – such as the Shahs – fail to do so in accordance with subdivision (c), because the Shahs elected not to even show up and attend the Summary Judgment Hearing, the Shahs opted not to avail themselves to this subsection and therefore this rule never came into play.

## CONCLUSION

Based on the foregoing reasons and authorities, Regions respectfully requests that this Court affirm the Summary Judgment Order entered in favor of Regions in its entirety.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the font and margin requirements as described in Rule 9.045 and Rule 9.210(a)(2), Florida Rules of Appellate Procedure, in that it has been prepared in Bookman Old Style, 14-point font and contains less than 13,000 words.

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