IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 1D22-0312

Lower Tribunal Case No.: 21-000169-CA

REMYFORD RESTORATION SERVICES, LLC
dba APEX DISASTER SPECIALISTS,
a Florida Limited Liability Company,

Appellant,

v.

FIRSTSERVICE RESIDENTIAL FLORIDA, INC.,
a Florida Corporation, et al.,

Appellees.

ANSWER BRIEF OF APPELLEES BROWN INSURANCE SERVICES, LLC, ROBBY TALLENT, and JOHN HANCOCK

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INTRODUCTION[1]

This case involves claims by Appellant Remyford Restoration Services, LLC dba Apex Disaster Specialist, a water damage mitigation company, against three homeowners associations that decided not to retain it following damage to their properties from Hurricane Michael in 2018. Among other things, Remyford asserts the associations were legally bound to retain it to perform this work because exclusive contracts allegedly existed between Remyford and the associations. In addition to suing the associations, Remyford sued other defendants, including Insurance Brokers, for related claims such as tortious interference with the contract, which are not at issue in this appeal.

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[1] Appellee Brown Insurance Services, LLC will be referred to as "Brown." Appellee Robby Tallent will be referred to as "Tallent." Appellee John Hancock will be referred to as "Hancock." Brown, Tallent, and Hancock will be collectively referred to as "Insurance Brokers." Appellant Remyford Restoration Services, LLC DBA Apex Disaster Specialists will be referred to as "Remyford."

The symbol "R." will refer to the record on appeal followed by a page number (e.g., R. 1).

Remyford appeals the trial court's Final Order on Pending Motions to Dismiss and Final Judgment (the "Final Order") where it granted motions to dismiss filed by Reflections Owners Association, Inc. ("Reflections"); Bay Point Residences Association, Inc. ("Bay Point"); and FirstService Residential, Inc. ("FirstService").

While the trial court never directly ruled on Insurance Brokers' then-pending Motion to Dismiss, the trial court found in its Final Order that its rulings warranted dismissal and final judgment on "all claims and causes of action asserted by Plaintiff Remyford against all Defendants." (R. 944). As explained further below, because the arguments raised in all the Appellees' motions were substantially similar, and the trial court found that Remyford had no rights under the subject contracts, the order of dismissal applies equally to Insurance Brokers and should be affirmed.

STATEMENT OF ADOPTION OF CO-APPELLEES' ANSWER BRIEFS

Insurance Brokers adopt the arguments contained in co-Appellees' answer briefs.

STATEMENT OF THE CASE AND FACTS

Remyford Did Not Exist When the Contracts Were Executed

As Remyford alleged in its Complaint, on May 30, 2014, a completely separate entity, Insurance Restoration Contractors, LLC ("Insurance Restoration"), filed an Application by Foreign Limited Company to Transact Business in Florida. (R. 17, 59-63). On June 25, 2014, Insurance Restoration filed an application registering the fictitious name, Apex Disaster Specialists ("Apex"). (R. 17, 64-65).

Three years later, on May 16, 2017, Reflections entered into an Emergency Response Program Agreement ("ERP") with Apex. (R. 23, 538-540).[2] On the same day, Bay Point entered into a substantially

[2] There are over 700 pages of Exhibits A to P to the Complaint. Moreover, the exhibits are **not** in alphabetical order making them and the three contracts (ERPs) very difficult to locate. The exhibits were filed with the trial court and the appellate court in this improper way.

For the benefit of the Court and to clearly identify the three contracts at issue (**Exhibits E, F, and K**), the Exhibits to the Complaint are located on the following Record pages: Exhibit A (R. 59-63); Exhibit B (R. 64-65); Exhibit C (R. 66-256); Exhibit D (R. 379-537); **Exhibit E (alleged Reflections-Apex contract) (R. 538-540); Exhibit F (alleged Bay Point-Apex contract) (R. 541-543);** Exhibit G (R. 257-258); Exhibit H (R. 259-378); Exhibit I (R. 546-661); Exhibit J (R. 662-784); **Exhibit K (alleged Long-Beach-Apex contract) (R. 785-787);** Exhibit L (R. 788-792); Exhibit M (R. 793-795); Exhibit N (R. 796-798); Exhibit O (R. 799-800); and Exhibit P (R. 801-813).

similar ERP with Apex. (R. 27, 541-543). Then, four months later on September 8, 2017, the third and final homeowners association Long Beach entered into another substantially similar ERP With Apex. (R. 32, 785-787).

Significantly, Remyford was first formed three months later in December 2017. Remyford admitted in its Complaint:

> Plaintiff filed Articles of Organization for Remyford Restoration Services, LLC in December 2017, changing the official name of the Plaintiff company, however, the nature of the company remained the same.

(R. 33).

Despite Remyford's claim that the purpose of the filing was to simply "change the official name" of the prior separate entity Insurance Restoration Contractors, LLC to Remyford Restoration Services, LLC, the Articles of Organization does not include any reference to the prior entity Insurance Restoration Services, LLC. (R. 796-798). Rather, the Articles of Organization simply state that Remyford Restoration, Services, LLC was being formed. (R. 796) ("The name of the Limited Liability Company is Remyford Restoration Services, LLC").

Complaint Allegations

Thirteen months later, on October 10, 2018, Hurricane Michael made landfall. (R. 34). On October 12, 2018, Remyford's representatives allegedly visited the Bay Point and Reflections properties to discuss any needed mitigation services. (R. 34). The next day, Remyford's representative allegedly visited the Long Beach property to discuss any necessary mitigation work there. (R. 35). Ultimately, Contractor Connection Group, LLC dba Restore-One ("Restore-One") was allegedly awarded the mitigation and repair jobs at Bay Point, Reflections and Long Beach, not Remyford. (R. 36).

Remyford subsequently filed suit against Appellees alleging three counts of breach of contract, three counts of tortious interference with a business relationship, and three counts of tortious interference with a contract. (R. 14-58).

Appellees' Motions to Dismiss

Reflections, Bay Point, and FirstService moved to dismiss the Complaint on substantially similar grounds:

> (1) Remyford lacked standing since it did not exist as a legal entity at the time the contracts were executed;

(2) The contracts were not enforceable since Remyford was an unlicensed contractor as of the date the contracts were executed;

(3) The contract did not require that the associations use Remyford as their exclusive contractor; and

(4) The contracts were terminable at will. (R. 814-834, 837-858, 891-905).

Insurance Brokers also moved to dismiss the Complaint on those grounds. (R. 861-886).[3]

The Trial Court's Order of Dismissal

On November 2, 2021, the Court held a hearing on Reflections, Bay Point, and FirstService's motion to dismiss. (R. 814-834, 837-858, 891-905).

The trial court granted the motions on four alternative grounds:

(1) "Plaintiff Remyford Restoration Services LLC ("Remyford") lacks standing to file the alleged claims since Remyford did not exist as a legal entity at the time the purported contracts with Defendants were executed, and the mere use of a fictitious name from the prior Arkansas entity known as Insurance Restoration Contractors, LLC did not create legal standing on behalf of

[3] Insurance Brokers also moved to dismiss on other grounds that are not the subject of this appeal. (R. 861-886). As these grounds were not discussed or ruled upon in the Final Order, they are not being discussed herein. Insurance Brokers reserve all rights to raise these grounds for dismissal with the trial court as necessary in the future.

Remyford to maintain these claims. *See Worm World v. Ironwood Prods., Inc.,* 917 So. 2d 274, 275 (Fla. 1st DCA 2005) ("[a] fictitious name has no independent legal existence"); *Premiere Finishes, Inc. v. Maggirias,* 130 So. 3d 238, 241 (Fla. 2d DCA 2013) (holding that "the **real entity** that uses the fictitious name when entering into the contract is the actual party to the contract…");

(2) "Plaintiff Remyford was not licensed as of the date of execution of the purported contracts, and, therefore, the purported contracts are unenforceable under Fla. Stat. § 489.128. Further, this defect cannot be subsequently cured. *See Promontory Enterprises, Inc. v. S. Eng'g & Contracting, Inc.,* 864 So. 2d 479, 481 (Fla. 5th DCA 2004) (noting that the contractor licensing statute was amended in 2000 "to delete the last sentence and **eliminate the cure provision contained therein**.")(emphasis in original);

(3) "Plaintiffs claims fail because the purported contracts did not actually require the "Client" to utilize Apex as its exclusive contractor; rather, they merely permitted the "Client" to obtain "precedence over any non-EPR call," if it chose to utilize Apex exclusively. Here, Defendants clearly chose not to so;" and

(4) "Plaintiff's claims fail because the purported contracts did not actually contain any provisions explaining how termination could be effectuated; thus, the purported contracts were of indefinite duration and terminable at will. *See White v. Strange,* 237 So. 2d 16, 18 (Fla. 1st DCA 1970) (holding that employment agreement "for an indefinite period is

> terminable at the will of either party."). Moreover, since the alleged contracts/business relationships between the Defendants and Plaintiff were terminable at will, the actions for tortious interference asserted by Plaintiff in Counts IV-IX fail as a matter of law for the additional reason that there would have been only a mere expectation that the alleged contracts/business relationships would continue in the future. *Greenberg, M.D. v. Mount Sinai Medical Center Miami, Inc.*, 629 So. 2d 252, 255 (Fla. 3rd DCA 1994)." (R. 944).

(R. 941-945).

Remyford has not supplied a transcript of the hearing or any of the arguments that it purportedly raised to the trial court. Although Remyford appealed the trial court's order as to Reflections, Bay Point, and FirstService, it did not do so as to Insurance Brokers.

SUMMARY OF ARGUMENT

This Court should affirm based on Remyford's failure to appeal the Final Order as to Insurance Brokers. Moreover, Remyford has failed to produce any transcripts or written materials indicating that the arguments contained in the Initial Brief were properly raised before the trial court.

In the event Remyford overcomes those procedural hurdles, the Final Order should be affirmed based on the foregoing four separate

alternative grounds. Significantly, while all four bases should be affirmed, even if this Court upholds only one of the four, the Final Order should still be affirmed since each ground is an independent basis for dismissal of the Complaint with prejudice.

First, the trial court was correct when it ruled that Remyford lacked standing to pursue its claims because it admittedly was not even formed until months after the last of the three contracts was executed. Thus, Remyford lacks standing to sue since it could not have been a party to the contract. Remyford's claims that its December 2017 formation was merely a name change is irrefutably contradicted by the Articles of Organization which makes no reference to the prior entity Insurance Restoration Services. Obviously, if Insurance Restoration were making a filing changing it own name to Remyford, its own name would have had to have been referenced so the Division of Corporations and anyone looking at the filing would know which entity had changed its name.

Second, as the trial court ruled, Remyford was admittedly not a licensed contractor as required by Section 489.128, Florida Statutes. Based on the face of the contracts, it is clear that Remyford met the definition of contractor under Section 489.105(3) as a person who

repairs, alters, remodels, adds to, demolishes, or subtracts from any building or structure. The contracts themselves state that the "partial list of scope of service" includes "removal of unsalvageable building materials" which is clearly an alternation of and subtraction from the associations' buildings. Remyford further meets the definition of "building contractor" to the extent such requirement exists for the same reasons.

Third, the three contracts at issue for water mitigation services between Remyford and the three homeowners associations/appellees Reflections, Bay Point, and Long Beach Resort Community Association Inc. ("Long Beach") did not require that the associations retain Remyford for every water/storm event and therefore were not exclusive. Rather, as discussed further below, the contracts provided the associations with the option to retain the associations. Thus, Remyford lacked any basis to require its retention and its claims which were all premised on this exclusivity assumption were properly dismissed.

Fourth and finally, as the trial court found, the three contracts were of indefinite duration because they did not include any method to terminate them and were accordingly terminable at will. Thus,

Remyford could not require that the associations perform under them when they admittedly refused to retain Remyford after Hurricane Michael. The mere fact that the contracts provided narrow circumstances allowing termination do not provide a method of termination because such termination decision had to be agreed upon by both parties (e.g., only if Apex failed to cure upon written notice of problems by the associations would the contracts terminate). Absent such agreement, the contracts would continue in perpetuity. Remyford also had adequate notice of the termination of any exclusive contracts with the associations when Hurricane Michael hit (assuming they were exclusive) because it admittedly knew Restore-One had been retained by the associations, not it, before it even attempted to begin any work following Hurricane Michael.

The trial court below had four separate independent bases for dismissal of the Complaint with prejudice. Thus, if the Court affirms any one of the four, dismissal with prejudice should be upheld.

STANDARD OF REVIEW

"It is a fundamental premise in appellate procedure that an order of the lower court comes to us with a presumption of correctness and that the burden is upon the appellant to show that it is erroneous." *Lenchner v. City of Miami Beach*, 156 So. 2d 767, 769 (Fla. 3d DCA 1963).

The standard of review for the dismissal of a complaint is *de novo*. *Busuttil v. Certified Home Inspections, LLC*, 32 So. 3d 44, 46 (Fla. 1st DCA 2021).

ARGUMENT

I. REMYFORD WAIVED ANY ARGUMENT THAT THE TRIAL COURT ERRED IN DISMISSING THE CASE AS TO INSURANCE BROKERS.

The trial court dismissed "***all claims and causes of action*** asserted by Plaintiff Remyford against ***all Defendants***," which applies to Insurance Brokers. (R. 944) (emphasis added). Moreover, although Remyford had notice that the legal arguments raised in Insurance Brokers' then-pending motion to dismiss were substantially similar to the arguments in Reflections, Bay Point, and FirstService's motions to dismiss (R. 861-886), the Initial Brief does not contain any arguments as to Insurance Brokers. *Land v. Fla.*

Dep't of Corr., 181 So. 3d 1252, 1254 (Fla. 1st DCA 2015) "It is well-settled that '[a]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief.'").

Consequently, any argument that the trial court erred in dismissing the case as to Insurance Brokers is waived. *See e.g. Osborne v. Shell Oil Co.*, 104 So. 2d 670, 671 (Fla. 1958) ("[w]hen an involuntary dismissal occurs, the suit is dismissed and it carries all the parties and the entire action out of court."); *D'Last Corp. v. Ugent,* 863 F. Supp. 763 (N.D. Ill. 1994) (dismissing complaint even as to party who did not join in motion to dismiss because flaws in complaint were claim-oriented rather than party-specific, substantive rather than mere defects in pleading, and applied to non-moving defendant as well as defendants moving to dismiss.); *Wachtler v. Cnty of Herkimer,* 35 F.3d 77 (2d Cir. 1994) (affirming sua sponte dismissal of claims against defendant who was served but did not appear in lawsuit or join in motion to dismiss where plaintiff had notice of other defendants' motion to dismiss for failure to state a claim); *Hecht v. Commerce Clearing House, Inc.,* 897 F.2d 21, 26 n.6 (2d Cir. 1990) (affirming dismissal against all defendants, despite one defendant's failure to appear or to join in motion, because issues

concerning non-movant were "substantially the same" as those concerning movants and plaintiff "had notice and a full opportunity to make out his claim").

II. REMYFORD FAILED TO PRESERVE THE ARGUMENTS RAISED IN ITS INITIAL BRIEF FOR APPELLATE REVIEW.

Furthermore, while Remyford contends that the trial court erred in dismissing the case for a myriad of reasons, it has not provided a copy of the hearing transcript or cited any written response to the motions to dismiss from which this Court could determine that the arguments contained in the Initial Brief were properly raised before the trial court. *See Estes v. Sassano*, 47 So. 3d 383, 385 (Fla. 1st DCA 2010) (holding that because Appellant failed to meet its burden to provide an adequate record for appellate review, the court was "unable to review the factual or legal basis for the trial court's decision.").

Indeed, Remyford cannot demonstrate that any arguments were properly preserved for appeal. *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1291, fn. 2 (Fla. 4th DCA 2002) (without a transcript, arguments were unpreserved because appellate court could not confirm they were made to trial court). Where a party fails

to so preserve an issue, that party waives the right to seek reversal based thereon. *Keech v. Yousef*, 815 So. 2d 718, 720 (Fla. 5th DCA 2002); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1159 (Fla. 1979).

Here, the trial court's order should be affirmed because Remyford cannot demonstrate that it preserved the arguments raised in its Initial Brief.

III. THE TRIAL COURT CORRECTLY FOUND THAT REMYFORD LACKED STANDING DUE TO ITS LACK OF CORPORATE EXISTENCE AT THE TIME THE THREE CONTRACTS WERE EXECUTED.

Remyford concedes in its Complaint that "Remyford Restoration Services, LLC" was not even formed as a Florida business entity until December 2017, three months after the latest contract was executed. (R. 33). A legal entity that did not exist when the purported contracts were entered into in May and September 2017 could not possibly have legal standing or any enforceable rights with regard to the purported contracts. *See Green Emerald Homes, LLC v. 21st Mortg. Corp.*, 300 So. 3d 698 (Fla. 2d DCA 2019) (holding that legal standing is a prerequisite to filing suit and that, "[a]s a general rule, a person who is not a party to a contract cannot sue for a breach.").

Despite Remyford's protestations, the fact that Insurance Restoration utilized the fictitious name "Apex" in 2017 and Remyford later utilized the same fictitious name "Apex" did not magically transfer the rights and obligations from one entity to the other. Indeed, as the trial court correctly held, "[a] fictitious name has no independent legal existence." *Worm World, Inc. v. Ironwood Prods., Inc.*, 917 So. 2d 274, 275 (Fla. 1st DCA 2005). Instead, the "the real entity that uses the fictitious name when entering into the contract is the actual party to the contract…" *Premier Finishes, Inc. v. Maggirias*, 130 So. 3d 238, 241 (Fla. 2nd DCA 2013). Thus, it is of no legal consequence that Remyford later adopted the same "Apex" fictitious name as the contract party Insurance Restoration. Since Remyford did not exist when the three alleged contracts forming the basis of Remyford's claims were executed, Remyford lacks legal standing and its claims against Bay Point, Reflections, and Long Beach were properly dismissed.

Although Remyford refers to itself with the shorthand "Apex," throughout the Initial Brief, the Articles of Organization attached to the Complaint indisputably states that Remyford's legal name is "Remyford Restoration Services, LLC." (R. 797). Remyford even

introduced itself in the Complaint as "Remyford Restoration Services, LLC d/b/a Apex Disaster Specialists." (R. 14).

Next, in a convoluted attempt to establish that it was the same legal entity as Insurance Restoration, Remyford argues that it should be allowed to backdate its formation from December 12, 2017, the date it admittedly filed its Articles of Organization, to May 16, 2017, the date the first two contracts were entered into. (Initial Brief, pp. 9-14). Remyford's arguments should be rejected.

Specifically, the alleged formation of a holding company, Leendorf Major Holding Company, LLC to become the parent holding company for multiple limited liability companies as alleged in Paragraph 49 of the Complaint (R. 20) and page 11 of the Initial Brief is misleading as there are no allegations or claims here of piercing the corporate veil of a subsidiary to get to a holding company or vice-versa. *See e.g. Johnson v. New Destiny Christian Center Church*, 303 F. Supp. 3d 1282, 1286 (M.D. Fla. 2018) (discussing "very heavy burden" in Florida to penetrate individual companies' corporate veils).

Remyford is just trying to obfuscate the simple and undeniable fact that it was formed months after the contracts were executed.

Under the guise of referring to itself by its fictious name, which was previously utilized by the actual contracting party, Insurance Restoration, Remyford is thus blatantly seeking to mislead this Court to attempt to backdate its actual formation date to prior to the contracts' execution date. If Remyford's position is accepted, any company could backdate its formation date to the date of formation of any previously existing corporation by merely using the same fictious name as the previously formed corporation. This is obviously improper and should be flatly rejected by this Court from a legal and public policy perspective.

Accordingly, for the foregoing reasons, the trial court was correct in finding that since Remyford was not formed until December 2017, it lacked standing to enforce contracts entered into pre-formation by a wholly separate corporate entity, Insurance Restoration.

IV. THE TRIAL COURT PROPERLY FOUND THAT APEX WAS A "CONTRACTOR" UNDER SECTION 489.128, FLORIDA STATUTES AND THAT ITS FAILURE TO BE LICENSED REQUIRED DISMISSAL OF REMYFORD'S CLAIMS.

The trial court correctly determined that Apex's admitted lack of a contractor's license precluded all of its claims because any

alleged contract entered into with unlicensed contractor was unenforceable under Florida law.

Section 489.119(5)(b), Florida Statutes provides that "[t]he registration or certification number of each contractor shall appear in each offer of services, business proposal, bid, contract, or advertisement, regardless of medium, as defined by board rule, used by that contractor or business organization in the practice of contracting." Here, the purported contracts do not contain the registration or certification number for Apex. (R. 538-543, 785-787).

Moreover, "[a]s a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor." § 489.128(1), Fla. Stat.

Next, "Contractor" is statutorily defined as "the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, **repair**, **alter**, remodel, add to, demolish, **subtract from**, or improve any building or structure [...] and whose job scope is substantially similar to the job scope described in one of the paragraphs of this subsection." § 489.105(3), Fla. Stat. (emphasis added). Here, the three purported contracts

clearly call for the repair, alteration, and subtraction from the subject premises. In addition, all three contracts contain an identical services scope provision which provides:

Partial List of Scope of Service

- **Water extraction from building/s, removal of wet unsalvageable building materials, clean up as needed.**
- Set up and monitory of drying equipment as needed
- Air duct cleaning, clean, deodorize and sanitize as needed.
- Provide dehumidifiers, air movers, air scrubbers, generators, power distribution, etc. as needed.

(R. 539, 542, 786) (emphasis added).

As the contracts state, Apex was contractually charged with extracting water and removing "unsalvageable building materials" which are damaged by water events. Obviously, for example, if water gets into the flooring or drywall, those would have to be removed as "unsalvageable building materials" as the contracts state. This would clearly meet the statutory definition of contractor under Section 489.105(3) because Apex would be responsible for "subtracting from" and "altering" water-damaged areas of the condominium association buildings.

Other provisions of the contracts also support that Apex considered itself a contractor. *See e.g.* Section 1.2 (requiring Apex to carry typical contractor's insurance including "all General Liability, Worker's compensation and Vehicle Insurance"); Section 1.4 (referring to itself as "Contractor" which may suspend all work upon non-payment." (R. 540, 543, 787). Furthermore, Remyford refers to itself as a contractor multiple times throughout its Initial Brief. (Initial Brief, pp. 29, 31-32).

Accordingly, since the purported contracts contained no licensing information and the Complaint does not even allege Remyford was a licensed contractor, the alleged contracts are unenforceable as the trial court held and the Complaint was properly dismissed.

V. THE TRIAL COURT PROPERLY FOUND THE CONTRACTS WERE NOT EXCLUSIVE SINCE THEY DID NOT REQUIRE THE ASSOCIATIONS TO USE APEX.

As a third alternative basis for dismissal of the Complaint, the trial court held the three associations were not obligated to retain Apex as its water mitigator in the event of a water event. The trial court was correct because the purported contracts do not actually

require the associations to use Apex as their exclusive contractor. In fact, the contracts make clear that Apex would provide such services only "as needed" by the associations. As the trial court held, the separate "exclusivity" provision is merely a condition precedent for the associations to obtain priority status "over any non-ERP calls" if desired by the associations.

In its Initial Brief, Remyford quotes selected language from the contracts which leaves a false impression of the entirety of the relevant provisions. In full, the relevant provisions provide:

> **EMERGENCY RESPONSE PROGRAM (ERP) AGREEMENT**
>
> I/we the Client/Client's representative (hereinafter referred to as Client/Owner) representing all parties, hereby authorize APEX Disaster Specialists, a Florida corporation, (hereinafter referred to as APEX) (for hurricane/large loss situations) and APEX Disaster Specialists (for daily or standard) to provide or cause to provide complete Emergency Mitigation Services as needed to properties listed on this contract or on the attached list.
>
> **Terms**
>
> 1. In the event of any type of natural or man-made disaster, such as water, fire or storm damage, APEX will provide client precedence over any non-ERP calls. Client will initiate a work order by calling APEX @ 877-307-3088.

2. APEX is willing to provide such guarantees, but only on the understanding that APEX be appointed Client's exclusive contractor for fire, mold and water damage emergency restoration for a period of one year, with continual one year consecutive renewal periods from the date of this agreement (until agreement is terminated according to said agreement)

3. All services provided by APEX to Client in accordance with this Agreement shall be initiated within a twenty-four hour period of notification. Upon failure, Client, at its option, may elect to withdraw from this Agreement without any further penalty or liability to APEX.

4. The pricing set forth in the list annexed hereto as Exhibit "A" will not be subject to change by APEX during this one-year term of this Agreement. Any updates or revisions to Exhibit "A" must be submitted to client for approval prior to the automatic renewal of the next one-year term of this agreement, and will only become effective on the renewal date for the next one-year term.

(R. 539, 542, 786).

It is well established that contracts "must be construed according to their plain language." *Dirico v. Redland Estates, Inc.*, 154 So. 3d 355, 357 (Fla. 3d DCA 2015). Moreover, "in the absence of some ambiguity, the intent of the parties to a written contract must be ascertained from the words used in the contract, without resort to extrinsic evidence." *Real Estate Value Co., Inc. v. Carnival Corp.*, 92

So. 3d 255, 260 (Fla. 3d DCA 2012). Thus, "'[t]he language used in a contract is the best evidence of the intent and meaning of the parties.'" *Jenne v. Church & Tower, Inc.*, 814 So. 2d 522, 524 (Fla. 4th DCA 2002).

Logically considering these five paragraphs (introductory and four numbered paragraphs) in the order that they appear, the first Paragraph is simply an introduction to the contract which sets forth the general scope of services and authorization for the contractual relationship. Specifically, the associations agreed to and authorized Apex to provide water mitigation services ("Emergency Mitigation Services") on their properties. There is no other significance to this mere introduction.

Next, Paragraph 1 states that upon the occurrence of a water, fire, or storm damage event Apex would provide an express "guarantee" or benefit to the associations, specifically it would provide response priority to the associations (defined as ERP calls) over clients that lack such an ERP agreement (defined as non-ERP calls).

Paragraph 2 then qualifies the foregoing Paragraph 1. Such paragraph states that Apex would provide the response priority

"guarantees" but only if Apex was appointed as the associations' exclusive servicer for damage events. Hence, two possible scenarios are contemplated under this provision. If the associations agreed to appoint Apex as its exclusive servicer, then the associations would receive the ERP call priority. However, if the associations did not agree to appoint Apex as its exclusive servicer, then they would not receive the priority call treatment. As the trial court found, by admittedly retaining Restore-One and not Apex after Hurricane Michael, they "clearly chose not to do so" and opted for the latter option. There is nothing in the contracts that states otherwise.

Paragraph 3 then simply states the required time period for Apex's response in the event the associations retain Apex and consequences if Apex does not respond within the stated time.

Paragraph 4 then states information regarding pricing for Apex's different services. The provision states that while the agreement is for a "one-year term", the agreement has an "automatic renewal" for the next one-year term. Any proposed pricing changes must be approved by the associations prior the renewal date.

Remyford makes a number of meritless points that are refuted by the plain language of the subject contracts. First, Remyford claims

the Introductory Paragraph "serves to establish the essential purpose and intent of the parties to have Apex, and only Apex, provide ***any and all*** emergency mitigation services needed at the property that is the subject of the ERP." (Initial Brief, p. 28). Such statement is purely speculative and meritless. A plain reading of the Introduction contains no such language. "[W]hen contract is silent on a matter, the court cannot impose contractual rights and duties under the guise of construction." *Blok Builders, LLC v. Katryniok*, 245 So. 3d 779, 784 (Fla. 4th DCA 2018); *F.H. Paschen, S.N. Nielsen & Associates, LLC v. B&B Site Development, Inc.*, 311 So. 3d 39 (Fla. 4th DCA 2021); *Jacobs v. Petrino*, 351 So. 2d 1036, 1039 (Fla. 4th DCA 1976) ("Where a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the matter, the court should not, under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted.").

Here, there is nothing to suggest by including a general introduction concerning the scope of the agreement the parties somehow meant that the relationship was going to be exclusive. This

Court should reject Remyford's attempt to insert language and re-write the subject contracts. *See Fernandez v. Homestar at Miller Cove, Inc.*, 935 So. 2d 547, 551 (Fla. 3d DCA 2006) (observing "a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties"); *Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955) ("It is well settled that courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain.").

Remyford makes similar unfounded claims allegedly supporting exclusivity regarding the "unequivocal phrasing" granting Apex authority in the Introductory Paragraph to provide its services, and that the ERP "is specified and encompasses every type of loss a mitigation contractor could potentially render services for." (Initial Brief, p. 29). Rather, much like an initial WHEREAS clause in other contracts, the Introductory Paragraph simply serves to summarily introduce the basic scope of services of the agreement. There is no indication or inference that the services provided were going to be exclusive.

Remyford further claims that the use of the word "complete" before "Emergency Mitigation Services" somehow means that the parties intended that Apex was going to be the associations' exclusive mitigation servicer. Appellate Brief at 29. However, "complete" does not mean "exclusive." *See Merriam-Webster, www.merriam-webster/dictionary/complete (last visited August 3, 2022) (defining the word "complete" as "having all necessary parts, elements, or steps") (last visited August 3, 2022).*

The obvious point of the modifier word "complete" was that, **if (and only if)** Apex was selected by the associations as its mitigation servicer for any particular storm or disaster event, then Apex would provide "complete" mitigation services. In other words, a second or third mitigation servicer would not also have to be retained to cover areas missed by Apex.

Remyford next argues that the three numbered paragraphs following the Introductory Paragraph "are intended to elaborate on the exclusivity intent of the ERP by expressing the specific benefits to be conferred upon the property owner as a party to Apex's ERP, the procedure to obtain said benefits, and the remedies available to the property owner in the event that Apex does not confer said

benefits on the property owner in accordance with the terms." (Initial Brief, p. 30). However, as discussed above, Paragraphs 1, 2, and 3 mention simply set forth the specific "Terms" of the contract. They specify the precise circumstances when (and only when) Apex would be appointed the associations' "exclusive contractor for fire, mold and water damage restoration". As discussed above, the exclusivity clause only sprung into effect if the associations elected to accept the "guarantees" that their calls would receive precedence over any non-ERP calls, which elections they never made.

Remyford next argues that the trial court failed to consider the "ERPS in their entirety" but rather only focused on certain "provisions in isolation." (Initial Brief at pp. 30-31). This is untrue. As discussed above, there is a logic and consistency to the trial court's interpretation of the contract. The Introductory Paragraph introduces the general subject matter and scope of the contract. The next four numbered paragraphs, intentionally under the title "Terms", then define the specific provisions. As discussed in detail above, Paragraphs 1 and 2 discuss the issues of whether Apex would provide a priority response to the associations' calls; only if there was such a priority agreement and understanding would the relationship

be exclusive. Paragraph 3 then discusses the time frame of Apex's response and Paragraph 4 states certain pricing terms.

Concerning the interpretation of contract terms, it is important to recognize the general contract principles of including conditional language in a contract:

> In the law of contracts, a "condition" is an event not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due. … Whether a contract contains a condition is to be determined by ascertaining the intent of the parties. Although the language used is important, no particular form of words is necessary to show a condition. However, the word "provided" ordinarily imports a condition. While no particular words are necessary for the existence of a condition, such terms as "if," "provided that," "on condition that," or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. A condition introduced into a contract will be deemed to have been inserted for some purpose and that the purpose was not to leave the rights of the parties as they would have been had no such condition existed.

11 Fla Jur. 2d Contracts § 187 Conditions, generally (Thomson Reuters updated June 2022).

Here, the contracts included the conditional phrase "but only on the understanding that." This phrase is very similar to the

conditional phrases above such as "on condition that." In the contracts here, the condition related to the provision of "guarantees" by Apex in exchange for the right to be the exclusive mitigator. Apex would prioritize the associations' ERP calls over other client's non-ERP calls "but only on the understanding that" Apex would be the associations' exclusive servicer. Here, it is evident from the allegations of the Complaint that there was no such "understanding" between the parties of exclusivity because the associations retained Restore-One after Hurricane Michael. To put it another way, the contractual consequence of the ability of the associations to retain different servicers other than Apex was that the associations would not receive priority treatment by Apex.

To interpret the contract the way Remyford argues, which is exclusivity in all situations, would simply disregard the conditional language above and produce an absurd result of forming an exclusive contract that was not bargained for by the parties. *Famiglio v. Famiglio*, 279 So. 3d 736, 740 (Fla. 2d DCA 2019) (recognizing that "[c]ourts should not employ an interpretation of a contractual provision that would lead to an absurd result.").

In addition, the purported contracts include other language

inconsistent with an interpretation that the parties had an exclusive relationship. Paragraph 1 provides that the associations "will initiate a work order by calling APEX @ 877-307-3088." (R. 539, 542, 786). Presumably then, absent such initiating phone call (not alleged here), Apex would not have been retained for the particular damage event. Also, each responsibility under "Partial List of Scope of Service" states the particular work would be performed "as needed". *Id.* Again, this supports the conclusion that the associations determined whether Apex would perform the tasks (or, for example, some other vendor would perform them).

Finally, Apex contends that the actions of the parties in this case support an interpretation that all parties believed there was an exclusive relationship between the associations and Apex. Yet, the direct opposite is true. In fact, the actions of **three of the four parties** to the three contracts support that the parties believed there was no exclusive relationship when Hurricane Michael hit. After the hurricane made landfall, Remyford alleges that all three associations acted as though there were no exclusive relationship.

Specifically, Remyford alleges in Paragraph 62 of the Complaint that upon visiting Reflections during the passing of Hurricane

Michael, Remyford's representative "noticed that RESTORE had equipment set upon at the REFLECTIONS property." (R. 35). Likewise, on October 13, 2018, soon after Hurricane Michael made landfall, Remyford alleges in Paragraph 64 that during its visit to Long Beach, the Remyford representative "noticed RESTORE already had mitigation equipment set up on the property." (R. 35). Remyford further alleges in Paragraph 66 that Apex was informed "RESTORE was bidding to perform interior and exterior mitigation and repair work at the LONG BEACH property." (R. 35). Additionally, in Paragraph 69, Remyford alleges that RESTORE was awarded the mitigation and repair jobs at all three properties after Hurricane Michael, not Remyford. (R. 36). Clearly, the alleged actions by all three associations contradict any notion that they believed they were under any binding exclusive relationship with Apex. In fact, the only party that allegedly believed in such an exclusive relationship is the party seeking damages in this case.

Yet Remyford still contends that the fact that Apex allegedly sent an e-mail to the associations on October 10, 2018 before Hurricane Michael made landfall supports that the parties intended to have an exclusive relationship. (Initial Brief, p. 33) (referencing

Paragraph 59 of the Complaint). But the e-mail allegedly only stated that "Apex stood ready and willing to assist should [the associations'] managed properties subject to the ERPs require any mitigation services following the passage of the hurricane." Thus, knowing a hurricane and potential resulting damage was coming, Apex was throwing its hat in the ring of potential bidders early to get a jump on them. This does not connote an inference that Apex believed the contracts were exclusive. In any event, whatever Apex may have believed, it is clear from the allegations of the Complaint that all three associations did not share in any belief of an exclusive relationship with Apex.

Accordingly, based on the above reasons, the trial court correctly held that any exclusive relationship was conditioned on an election by the associations to receive the special priority response from Apex over other non-ERP calls, which was obviously not made. Absent an exclusive relationship, any services to be provided were terminable at will and Remyford's claims were properly dismissed.

VI. THE TRIAL COURT CORRECTLY FOUND THAT THE THREE CONTRACTS LACKED ANY METHOD TO TERMINATE THEM, WERE OF INDEFINITE DURATION, AND WERE TERMINABLE AT WILL.

In the Final Order, the trial court's fourth independent ground for dismissal of the Complaint was that the purported contracts lacked any provision explaining how they could be terminated. Therefore, the contracts were in effect indefinitely or for infinity and accordingly terminable at will. The trial court's ruling was proper.

While all three contracts stated they were in effect "for a period of one year", they each had automatic one-year renewals at the end of the first year and all subsequent years. Paragraph 2 of the Terms provided:

> 2. APEX is willing to provide such guarantees, but only on the understanding that APEX be appointed Client's exclusive contractor for fire, mold and water damage emergency restoration **for a period of one year, with continual one year consecutive renewal periods from the date of this agreement (until agreement is terminated according to said agreement).**

(R. 539, 542, 786) (emphasis added).

The everlasting one-year renewal is referenced in other paragraphs of the contracts as well such as Paragraph 4 (referencing

new pricing terms "only become effective on the renewal date for the next one-year term"). *Id.*

Although the three purported contracts all indicated that, after the initial one-year term, they could be "terminated according to said agreement," the three contracts did not actually contain any provisions that described how termination would be effectuated. In cases where a contract's terms are incomplete, as here (i.e., there is no manner in which to terminate and purport to renew indefinitely and in perpetuity), termination can be made at any time with reasonable notice to the other party. *Collins v. Pic-Town Water Works, Inc.,* 166 So. 2d 760, 762 (Fla. 2d DCA 1964) (holding that "[w]hen a contract calls for the rendition of services and it is so incomplete that its intended duration cannot be determined by a fair inference from its terms, either party is ordinarily entitled to terminate it at will after reasonable notice of the intention to do so"); *Fla.-Georgia Chem. Co. v. Nat'l Labs., Inc.,* 153 So. 2d 752, 754 (Fla. 1st DCA 1963) (noting that "[t]he general rule as repeatedly stated is that a contract for an indefinite period, which by its nature is not deemed to be perpetual, may be terminated at will on giving reasonable notice"); *White v. Strange,* 237 So. 2d 16, 18 (Fla. 1st DCA 1970) (holding that

employment agreement "for an indefinite period is terminable at the will of either party.").

Accordingly, the three purported contracts were terminable at will as a matter of law. Thus, absent an enforceable contract, Remyford has no claim for breach of contract against the associations and, therefore, also no claim for tortious interference with contract against Insurance Brokers. Moreover, as the trial court held, since the allegedly interfered with business relationships were based solely on the contracts between Apex and the associations, the tortious interference with business relationship claims against Insurance Brokers also were properly dismissed (as any such business relationships were also terminable at will). *See e.g. Greenberg, M.D. v. Mount Sinai Medical Center of Greater Miami, Inc.,* 629 So. 2d 252, 255 (Fla. 3d DCA 1994).

Remyford argues that even if the contracts were terminable at will, the associations "plausibly breached the contracts by failing to provide Apex reasonable notice of termination of the ERPs." (Initial Brief, p. 33). But as discussed above, the associations correctly believed the contracts were not exclusive so there was no need for them to provide notice of termination of the contracts at any time.

Rather, since they were non-exclusive, it was the associations' decision to contact and retain Apex after each and every storm or damage event. Then, and only then, the terms of the contracts would be in effect for that storm or damage event.

But even assuming the appellate court reverses the trial court's ruling and finds the contracts were exclusive, the indefinite duration of the contracts cannot be disputed and would then automatically revert to terminable-at-will status. At that point, upon deciding not to use Apex, there was obviously no need for the associations to send some formal notice of termination because pursuant to the contracts themselves the associations' actions (or non-actions) in not calling Apex (after Hurricane Michael) effectively provided reasonable notice to Apex that Apex was not being hired for the Hurricane Michael work.

Significantly, Remyford has not alleged Apex performed any work at all for the associations prior to or after Hurricane Michael. Thus, there was no active contract work to halt at the time Hurricane Michael hit. Then, once Apex allegedly saw that Restore-One had been retained for the mitigation work at the associations, Apex clearly knew that it had not been hired. Since Apex had not yet performed

any work for the associations and had not even moved any equipment to the sites, Apex had reasonable notice of termination of the contracts and of any exclusive contractual relationship (assuming one existed which is denied).

If that notice was not enough, Remyford also alleges in its Complaint that at least one association **expressly told** Apex that it was considering bids for Restore-One. (R. 35) ("MIXON immediately ushered [Apex representative] Larry Neel out of the Board of Directors meeting and advised that RESTORE was bidding to perform interior and exterior mitigation and repair work at the LONG BEACH properties."). Obviously then at that point, if Apex did not know before, it certainly knew then that the associations had terminated any exclusive contract with Apex.

Remyford further attempts to confuse the Court by stating "pursuant to the case law cited by Reflections, Bay Point, and Long Beach, reasonable notice to Apex of termination of the ERPs was still required." (Initial Brief, p. 35). While the courts in the cited cases made those statements, the holdings of those cases were fact-specific as to the notice required. For example, in *Collins v. Pic-Town Water Works, Inc.*, 166 So. 2d 760, 761-62 (Fla. 2d DCA 1964), the plaintiffs

alleged they were induced to purchase mobile homes based on a representation that there would be a reduced water maintenance charge ($1.50 per month) when the homes were unoccupied. There was no time duration for the alleged oral and written agreement. "For about four and one-half years the subdividers and their successor, the water company, performed according to the above terms, after which the water company gave notice that there would thereafter be a $3.50 monthly premium water charge whether the trailer was occupied or not." *Id.* That was the extent of the discussion by the court of the notice given except that it was "reasonable notice".

Similarly, in *Florida-Georgia Chemical Co., Inc. v. National Laboratories,* 153 So. 2d 752, 754 (Fla. 1st DCA 1963), the plaintiff agent entered into an undisputed exclusive right-to-sell-agreement with defendant for N.L. (National Laboratory) products within a 150 mile radius of Tallahassee, Florida. The oral agreement was allegedly entered into in 1954 and had no duration. Then, in 1960, while the oral agreement was allegedly still in effect, the defendant allegedly breached the agreement by permitting other dealers to sell its products in the Tallahassee area and committing other acts. The court found that the "allegations of breach occurring during the time

that the said agreement between the plaintiff and the defendant was in effect [i.e., before notice of termination] sufficiently stated a cause of action." *Id.* at 755.

Here, unlike *Florida-Georgia Chemical,* there were no allegations of breach prior to Apex becoming aware it was not going to receive the Hurricane Michael work. For example, there are no allegations that Apex had performed any work for any of the associations after the contracts were entered into in 2017 much less that any work went unpaid pursuant to the purported contracts. There are also no allegations that any other vendor secretly performed mitigation work at the associations before Apex became aware its "exclusive" relationship was being terminated. Accordingly, even if the Court were to conclude the contracts were exclusive, they were still terminable at will based on their infinite duration. Moreover, Apex was clearly given reasonable notice that any exclusive contracts with the associations were terminated because Remyford alleged in its Complaint that Apex visited the associations, saw Restore-One Equipment on the properties, and was told by at least one association that Restore-One was bidding on the Hurricane Michael job.

Finally, Remyford argues that the contracts were both of "specified" duration and had "specified" methods of termination and thus should not be determined to be terminable at will. (Initial Brief, p. 35). Again, Remyford is mistaken.

While the contracts had certain provisions which allowed for termination, the "specified" provisions only went into effect upon either (i) the failure of Apex to initiate services or cure defective services or (ii) Apex raising prices not agreed to by the associations. These narrow situations do not encompass any other reason for termination. Thus, barring these peculiar circumstances coming to fruition, the agreements would continue in perpetuity which makes them of indefinite or infinite duration and terminable at will.

Even if the Court were to find the purported contracts are exclusive, the contracts would still revert to terminable at will status given their infinite duration, as the trial court found. Moreover, any requirement that Apex be provided with reasonable notice of termination of an exclusive relationship was met as discussed above. Remyford further admittedly acknowledges Apex knew it was not getting the contracts because Restore-One had been awarded them: "RESTORE was awarded the mitigation and repair jobs at BAY

POINT, REFLECTIONS, and LONG BEACH."(R. 36). Accordingly, the Complaint was properly dismissed because the contracts were of indefinite duration and lacked any method of termination and were thus terminable at will.

CONCLUSION

Based on the foregoing, Appellee, Insurance Brokers, respectfully request that this Court affirm the trial court's order of dismissal as to them.

Respectfully submitted,

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CERTIFICATION OF TYPE AND FONT COMPLIANCE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been e-filed with the Clerk of Court and furnished to Counsel for Appellant and all other Appellees at the following e-service addresses, via the Florida E-Filing Portal on August 5, 2022: **Ciera Lipps, Esq.,** *Attorney for Appellant Remyford Restoration Services, LLC dba Apex Disaster Specialists,* Kovar Law Group, 6617 Gulfport Blvd S, South Pasadena, FL 33707; clipps@kovarlawgroup.com; khadijah@kovarlawgroup.com; filings@kovarlawgroup.com; kroberts@kovarlawgroup.com; allyson@kovarlawgroup.com; **Steven B. Bauman, Esq. and Kyle Bauman, Esq.,** *Attorneys for Appellees FirstService Residential, Gordon Breen, Will Mixon, Danny Ellis, Scott Whittemore, Tammy Kimble, and Doug Butler,* Anchors, Smith & Grimsley, PLC, 909 Mar Walt Drive, Suite 1014, Fort Walton Beach, FL 32547; sbauman@asglegal.com; bedwards@asglegal.com; kbauman@asglegal.com; **Scott Stevens, Esq.**, *Attorney for Appellee Bay Point Residences Association, Inc.,* Starnes, Davis, Floire, LLP, RSA Battle House Tower, 11 N. Water Street, Suite 20290, Mobile, AL 36602; SDS@starneslaw.com; sstevens@starneslaw.com; mwoods@starneslaw.com; **Mark D. Davis, Esq.,** *Attorney for Appellees Contractor Connection Group, LLC d/b/a Restore-One and PJ Johnson,* Clark Partington, 1414 County Highway 283 South, Suite B, Santa Rosa, Florida 32459; mdavis@clarkpartington.com; fkendall@clarkpartington.com; mvegue@clarkpartington.com; and **Frank C. Bozeman, III, Esq. and Diane Longoria, Esq,** *Attorneys for Appellee Long Beach Resort Community Association,* Quintairos, Prieto, Wood & Boyer, P.A., 114 East Gregory St., 2nd Floor, Pensacola, FL 32502; fbozeman.pleadings@qpwlaw.com; diane.longoria@qpwlaw.com; and maday.gomez@qplwaw.com.

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