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IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case Number 4D23-0623
L.T. Case No. 2021-CA-008608

DMA ROOFING CORPORATION,
Plaintiff/Appellant,

v.

MARY & HESTON, INC. AND MARY BETH ROMAN,
Defendants/Appellees.

Final Appeal from the Circuit Court of the Fifteenth Judicial Circuit,
Palm Beach County, Florida, Case Number 21-CA-008608

APPELLEES' ANSWER BRIEF

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INTRODUCTION

The trial court's dismissal of the negligent misrepresentation claims against third-party defendants, Manry & Heston ("Manry") and Mary Beth Roman ("Roman") (collectively, "Appellees"), was not in error. To the contrary, the ruling was based upon the court's careful consideration of the allegations of the third-party complaint in conflict with the express language of the controlling documents, and followed a full briefing and extensive oral argument by the parties.

Critically, the trial court determined the third-party complaint's allegations were meritless as a matter of law and could not be cured through any amendment because the very documents forming the basis of the Appellant's negligent misrepresentation claims directly refuted their allegations and claims. Thus, the trial court's ruling was properly considered and supported, and should not be reversed.

Appellant's appeal disregards the court's thorough analysis and clear factual basis for dismissal. Instead, Appellant attempts to rely on unsupported and theoretical arguments that contradict the clear record, including the very allegations set forth in their third-party complaint. Further, the record evidence directly refutes Appellant's own allegations, proving amendment would be futile.

Appellant also raises several legal issues on appeal that were not part of the briefing or oral argument. The newly raised arguments were not preserved for review on appeal. It is axiomatic that waived arguments cannot form the basis for reversal.

CORRECT STATEMENT OF THE FACTS

Appellant's initial brief is replete with factually unsupported allegations and arguments. Appellant largely ignores the underlying facts presented to the trial court, and mischaracterizes the court's ruling and reasoning.

Appellees agree that the "relationship between DMA and Custom Architectural Roofing ("CAR"), Appellees' insured, CAR was governed by a Subcontract Agreement," which required that "CAR maintain a certain level of general liability insurance and that DMA be named as an additional insured under CAR's general liability policy for operations performed under the Subcontract." (Appellant's Initial Brief, dated August 15, 2023 ("App. Brief"), at p. 3.) Further, CAR requested that Appellees were to "communicate directly with DMA 'for the guidance of DMA in its business transaction with CAR.'" (App. Brief at p. 3.) Reading these two allegations together, the "business transaction" between DMA and CAR, under which Appellees were asked to provide the Certificate of Insurance ("COI"), was embodied by the Subcontract Agreement. Appellees provided Appellant with

the COI "representing there was a general liability policy in place, with DMA added as an Additional Insured." (App. Brief at p. 3.) The foregoing shared agreement concerning the facts ends here.

By providing the COI to Appellant, Appellees only made representations about the levels of insurance coverage in CAR's insurance policy, and did not make any representations as to the exclusions, terms, and conditions of CAR's policy. In fact, the COI clearly provides that it was being provided to DMA:

> TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. . . . THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES.

(A.2210.)[1]

Further, the COI expressly cautioned that insurance compliance may be in conflict with other contractual obligations:

> THIS CERTIFICATE OF INSURANCE REPRESENTS COVERAGE CURRENTLY IN EFFECT AND MAY OR MAY NOT BE IN COMPLIANCE WITH ANY WRITTEN CONTRACT.

(A.2210.)

The foregoing disclaimer language is contained in the COI document

[1] The record citations in this brief are to Appellant's "Record on Appeal Index," dated April 18, 2023 ("A._").

that formed the very basis for the third-party claims against Appellees. This express language reflect that the purpose of the certificate of insurance was solely to put the certificate holder on notice that the insured had the level of insurance listed in the certificate, but did not provide the holder with all applicable terms, exclusions or conditions of such policies. Instead, the holder was put on inquiry notice.

Appellant submits as fact that it "believed there was insurance coverage for the project and started construction at the Botelhos' Florida residence." (App. Brief at p. 3.) This argument, which only constitutes a subjective belief, is not a "fact" for purposes of appeal, particularly when it is contradicted by the very documents attached by Appellant in support of the third-party complaint.

Appellant also argues that Appellees failed "to procure the coverage necessary to protect DMA in the Botelho Lawsuit." (App. Brief at p. 4.) Appellant fails to note that Appellees were not hired to procure *any* insurance for DMA. Instead, they procured general liability coverage for their client, CAR, and their only interaction with DMA was to provide the COI, evidencing that CAR in fact had certain levels of General Commercial Liability Insurance. Thus, Appellant's factual representation of a relationship between DMA and Appellees is unsupported by the record and should be disregarded.

Appellant also misstates that "Insurance Brokers represented that CAR maintained a valid and applicable insurance policy *that would apply to the project*." (App. Brief at p. 4.) (emphasis added). The foregoing argument is not factually accurate. Again, Appellees only represented that CAR maintained certain levels of general liability insurance. Appellant fails to cite a factual basis for its conclusory assertion that Appellees represented that the policy would apply to work at the plaintiffs' Florida home.

The trial court considered the argument of reliance and the oral allegations raised in support thereof, and wholly rejected the proposition that DMA "justifiably relied" on the alleged "misrepresentations and lack of disclosures." Specifically, the court rejected the argument that, simply because Appellees were communicating directly with DMA and knew that DMA was a Florida corporation, that Appellees "knew or should have known that CAR's general liability policy did not cover the specific work that CAR was hired to complete." (App. Brief at pp. 4-5.) The court rejected this argument based on the express language in the COI and the Subcontract Agreement. Appellant's statements are based on the unsupported and incorrect theory that Appellees somehow had a duty to disclose the terms, exclusions, and conditions of CAR's policy to DMA, when Appellees were not asked for that information. (*See* App. Brief at p. 5.) Appellant provides no

citation for this argument, because there is none. The record reflects that Appellees provided the COI for the sole purpose of identifying CAR's *amount* of general commercial liability insurance at CAR's request, nothing more.

The record demonstrates that the only Restatement of Torts Section 552 argument made before the trial court was that DMA "only needed to allege that the Insurance Brokers failed to exercise reasonable care in failing to disclose material limitations to the policy." (App. Brief at p. 7.) Appellant did not, however, argue, in either its opposition or during the hearing, that the elements of Section 552 were met.

Appellant erroneously states that the trial court considered only the Subcontractor Agreement allegations when deciding the negligent misrepresentation claims were unsupported. To the contrary, the trial court carefully considered the oral allegations argued (at length) by Appellant's counsel at hearing, but remained unpersuaded that any cause of action could be validly pled based on the evidence incorporated into the third-party complaint. The trial court found that, even if DMA and Appellees were in direct communications, and even if Appellees know that DMA was a Florida corporation (because they saw DMA's Florida address in the COI), these allegations were insufficient to impute knowledge of the Florida project upon Appellees. Specifically, the trial court soundly found that: "the Florida

contractor can work anywhere, you know, they're licensed to . . . ." (A.2498:4-6.)

Appellant took great liberties in setting forth its version of purported "facts" in its Statement of the Case and the Facts. The record, however, speaks for itself.

SUMMARY OF ARGUMENT

This Court should affirm the trial court's order. The trial court's dismissal of the negligent misrepresentation claims against Appellees was legally correct, based on the court's careful consideration of the allegations and claims, the express language of the operative documents that formed the basis of the alleged claims, and followed full briefing and lengthy oral argument. The trial court did not ignore the allegations in the third-party complaint. To the contrary, the court determined that the allegations were meritless as a matter of law and could not be cured through any amendment because the very documents incorporated as support for the negligent misrepresentation claims directly refuted those allegations. The record demonstrates the trial court's ruling was fully supported, legally and factually correct, and should not be reversed on appeal.

STANDARD OF REVIEW

Appellees accept the standard of review set forth in Appellant's Initial

Brief.

ARGUMENT

I. APPELLANT DID NOT PROPERLY STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION UNDER SECTION 552

Appellant's argument, that it properly stated a claim for negligent misrepresentation claim, is based upon an unfounded theory that the trial court failed to consider whether Appellant's claim satisfied the elements of Section 552, Restatement (Second) of Torts. Appellant argues that because it pled the elements of a negligent misrepresentation claim under Section 552, knowledge was not a necessary element of the claim. (*See* App. Brief at p. 14.)

A. SECTION 552 IS INAPPLICABLE TO THIS CLAIM

The crux of Appellant's argument, that it properly stated claims for negligent misrepresentation, focuses on a theory that the asserted claims satisfied the elements of Section 552, Restatement (Second) of Torts. However, Florida courts view the adoption of Section 552 as a limitation on negligent-misrepresentation claims, applicable only to situations in which the parties *do not* have a contract:

> Section 552 was adopted in Florida to define the limited circumstances under which *those not in privity with a purveyor of information could nonetheless bring suit* to recover its economic losses for information negligently supplied. . . . In adopting section 552, our supreme court in no way indicated that it intended to abolish the contractual privity economic loss

> rule for all contracts that call for the delivery of information. Rather, the court explained section 552 in terms of the "substantial erosion in Florida" of the contractual privity doctrine, which started with "cases involving injuries caused by negligently manufactured products."

Vesta Const. & Design, L.L.C. v. Lotspeich & Assoc, Inc., 974 So. 2d 1176, 1182-83 (Fla. App. 2008) (emphasis added) (citing *See First Fla. Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990) ("[W]e have decided to adopt the rationale of section 552, Restatement (Second) of Torts (1976), as setting forth the circumstances under which accountants may be held liable in negligence to persons who are not in contractual privity.")). In other words, Section 552 should be applied only to parties damaged outside of contractual privity, in order to provide these parties – who did not limit their remedies by contract – with some chance at a remedy:

> In other words, the section 552 exception is best understood as an extension of the products liability economic loss rule line of cases. Both spring from the need to avoid unlimited liability for a party when abolishing the common law privity requirement, so as to allow an aggrieved party not in contractual privity with the alleged wrongdoer to recover losses caused by the wrongdoer under some circumstances.

Id. at 1183.

The Certificate of Insurance attached to the Third-Party Complaint reflects that Appellant was an "additional insured" on CAR's insurance policy. (A.2210.) Specifically, the COI lists DMA Construction Corporation and DMA

Roofing Corporation as “ADDITIONAL INSURED[S] WHEN REQUIRED BY WRITTEN CONTRACT.” (A.2210.) “A certificate of insurance issued by the insurer stating that the certificate holder is an additional insured, standing alone, is evidence of ‘additional insured’ status.” *Int’l Ship Repair & Marine Servs. v. N. Assur. Co. of Am.*, 2011 U.S. Dist. LEXIS 135347, *16, 2011 WL 5877505, *6 (M.D. Fla. 2011) (quoting *Int’l Metalizing & Coatings, Inc. v. M & J Constr. Co.*, 2010 WL 3517038, at *4 (M.D. Fla. 2010)). Similar to this case, in *International Ship*, a contractor had a Certificate of Liability Insurance indicating that it was a Certificate Holder/Additional Insured. *Id*. The *International Ship* court held that the Certificate of Liability Insurance was enough to grant additional insured status to the Contractor. *Id*.

It is undisputable, based on the record, that DMA was an additional insured to CAR’s insurance policy, making Appellees in contractual privity. *See Ins. Co. of N. Am. v. Whatley*, 558 So. 2d 120, 122 (Fla. Dist. Ct. App. 1990) (“[A]n insurance company is in privity with its insured.”).

Accordingly, Section 552 is inapplicable to Appellant’s negligent misrepresentation claims, and the trial court’s analysis of knowledge as an element of common law negligent misrepresentation was legally and factually correct.

B. THE TRIAL COURT DID NOT DISREGARD FLORIDA SUPREME COURT PRECEDENT

Appellant's next argument, that the trial court disregarded Florida Supreme Court precedent, is unfounded and misrepresents the issues presented to the trial court. (App. Brief at pp. 15-18.) Specifically, Appellant argues that "the trial court failed to consider whether the unique elements of Section 552 were met, including failing to consider whether DMA was in the group of persons the Insurance Brokers intended to influence when it supplied the information to DMA or whether the information was supplied in the course of a business transaction." (App. Brief at p. 17.)

However, Appellant fails to acknowledge that the trial court reviewed the briefings and also heard oral arguments from the parties. (A.2468-2500). The application of "unique elements" under Section 552 was not raised in Appellant's opposition or during the hearing. Rather, DMA merely referenced Section 552 when arguing that "DMA only needs to prove that Third-Party Defendants failed to exercise reasonable care or competence in obtaining or communicating the information." (A.2414.) Likewise, Appellant's oral argument regarding Section 552 was limited to the following:

> And I believe my client should be – has alleged and set forth in the restatement, Section 552 of the second restatement of torts, the third-party defendants have a duty of reasonable care in communicating and obtaining information, and they failed to do so, and that's what is alleged, . . . and specified to circumstances

relating to the falsehood.

(A.2491:11-19.)

Now, Appellant attempts to raise, for the first time on appeal, the issues of "whether the unique elements of Section 552 were met, including . . . DMA was in the group of persons the Insurance Brokers intended to influence when it supplied the information to DMA or whether the information was supplied in the course of a business transaction." (App. Brief at p. 17.) Given that these issues were not raised before the trial court, they were not properly preserved for appeal and should be considered waived. *Reznik v. FRCC Prod., Inc.*, 15 So. 3d 847, 849 (Fla. Dist. Ct. App. 2009) ("[I]t is not appropriate for a party to raise an issue for the first time on appeal. 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.") (quoting *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005)); *Lacey v. State*, 831 So. 2d 1267, 1268 (Fla. 4th DCA 2002) ("[I]n 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."); *Mariani v. Schleman*, 94

So. 2d 829, 831 (Fla. 1957) ("It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this court on appeal.").

Appellant's argument that the trial court erred in failing to consider application of the "unique elements" of Section 552 is without merit, due to Appellant's own failure to raise and properly preserve the issue for appeal. Accordingly, Appellant's waived argument does not provide a basis for reversal.

C. Appellant Failed to Properly Plead Negligent Misrepresentation Under Section 552

Even if Section 552 applied to this case and the issues had been raised at the trial court level, which is not the case, Appellant nonetheless failed to properly plead its negligent misrepresentation claims under Section 552, which requires:

> § 552. Information Negligently Supplied for the Guidance of Others
>
> (1) One who, in the course of his business, profession or employment, or any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or

> competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

§ 552.

Although Appellees agree that Section 552 and the *Gilchrist* case support the general proposition that a party who negligently transmitted false information may be held liable if the recipient is able to establish a negligent misrepresentation cause of action as set forth in Section 552, Appellees disagree that Appellant properly asserted an applicable negligent misrepresentation in this matter.

Appellant attempts to advance the general proposition that "DMA properly pled a claim under *Gilchrist*" (App. Brief at p. 18), without regard to the actual allegations asserted and the undisputed facts of record. Notably, Appellant fails to analyze the specific elements of a properly pled Section

552 claim, and instead makes broad sweeping allegations and arguments without evidentiary support.

Indeed, Appellant argues that the following allegations are sufficient to state a claim under *Gilchrist* and section 552:

> DMA's Third-Party Complaint alleged that CAR requested the Insurance Brokers to work and communicate directly with DMA for the purpose of guiding DMA on matters involving CAR's insurance policy and DMA's business transaction with CAR. (R. 2160). DMA alleged the Insurance Brokers represented that CAR maintained valid and applicable insurance policy that would apply to the project, that Insurance Brokers also 'provided DMA with a certificate of insurance on behalf of CAR indicating that CAR was maintaining general liability insurance', and that Insurance Brokers failed to disclose material limitations of the liability policy relating to exclusions for work in Florida. (R. 2160-3). DMA then alleged that these misrepresentations and the lack of disclosures were negligent, and that DMA justifiably relied on these misrepresentations when it permitted CAR to commence work at the project. (R., p. 2163).

(App. Brief at pp. 18-19.) This argument is flawed for several reasons.

1. *Appellants provided truthful information*

The record shows that Appellees provided DMA with the COI, which *only* made representations about the existence and limits of CAR's general liability insurance policy. To be clear, this record is devoid of any representations by DMA about the terms, exclusions, conditions, or applicability of CAR's insurance policy. To the extent Appellant now suggests there were additional terms or assurances regarding the insurance's

application, such representations are wholly unsupported by the record; no proffer was made below; and cannot be raised on appeal.

Even if Section 552 was deemed applicable, dismissal of Appellee's negligent misrepresentation claims was still proper. To properly allege a claim for negligent misrepresentation under Section 552, a plaintiff is required to allege "that the defendant "'supplie[d] false information . . . .'" *See* Section 552. In the Third-Party Complaint, DMA alleges that Appellees "provided DMA with a certificate of insurance on behalf of CAR, indicating that CAR was maintaining general liability insurance," (A.2161 at ¶21; A.2164 at ¶42), that [Appellees] made representations "that CAR maintained valid and applicable insurance meeting the requirements of the Subcontract Agreement," (A.2161 at ¶21; A.2164 at ¶42), and that "CAR had met the contractual insurance requirements prior to commencing work." (A.2163 at ¶37; A.2165 at ¶52.) These representations were demonstrably true, and it is undisputed that CAR had the amount of general liability insurance represented in the COI.

Any allegations that Appellees represented to DMA that CAR was insured for the specific project at Plaintiffs' property is at best, unsupported, and contradicted by the exhibits attached to the third-party complaint. "When exhibits are attached to a complaint, the contents of the exhibits control over

the allegations of the complaint." *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 938 (Fla. 2d DCA 2010) (citing *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So. 2d 399, 401 (Fla. 2d DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss.")); *Blue Supply Corp. v. Novos Electro Mech., Inc.*, 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008); and *Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So. 2d 736, 736-37 (Fla. 3d DCA 1971) (when there is an inconsistency between the allegations of material fact in a complaint and its attachments the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable")). "The conclusions of the pleader, as to the meaning of the exhibits attached to the complaint, are not binding on the court." *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490 (Fla. 3d DCA 1994) (citing *N.C. Brandon v. Cnty. of Pinellas*, 141 So. 2d 278 (Fla. 1962)).

The COI, which forms the basis of Appellant's claims and an exhibit to the complaint, does not contain any representations that CAR's insurance policy covered the work to be performed at Plaintiff's Florida property. To the contrary, the COI only provides information regarding the amount of coverage available under CAR's general liability policy, which were accurate

and otherwise in compliance with the requirements under the Subcontractor's Agreement.

Accordingly, Appellant's allegations that Appellees represented to DMA that CAR was insured for the specific project at Plaintiffs' property is contradicted by exhibits attached to the complaint, the allegations were properly disregarded by the Court. The information Appellees provided to DMA was not false and, therefore, could never form the basis of the negligent misrepresentation claims.

2. *Appellees did not provide the COI for use in the work at Plaintiffs' Property*

Under Section 552, an actionable negligent misrepresentation claim requires an allegation that the information was provided for the "guidance of others in their business transactions." § 552. Appellant's third-party complaint alleges that Appellees provided the COI "for the guidance of DMA in its business transaction with CAR," (A.2160 at ¶18), and that the "business transaction" between DMA and CAR was the execution of the Subcontractor Agreement. (A.2161 at ¶¶20-22; A.2164 at ¶¶42-44.) The "business transaction" was not, however, an agreement to perform work at the plaintiffs' property.

The case of *Cooper v. Brakora & Associates, Inc.*, 838 So. 2d 679 (Fla. 2d DCA 2003), is instructive on this issues. In *Cooper*, the plaintiff filed a

claim for negligent misrepresentation against an appraiser hired by Barnett Bank to help it evaluate the plaintiff's mortgage loan application in conjunction with his purchase of residential property. *Id*. at 679. The trial court dismissed the complaint with prejudice based on the lack of privity between the buyer and the appraiser. *Id*. Although the Second District held that privity was not determinative of the issue, it affirmed the dismissal with prejudice stating that "Cooper cannot state a claim for negligent misrepresentation against [the appraiser] because the appraisal ***was intended to assist in the loan transaction, not in the purchase and sale transaction.***" *Id*. (emphasis added). There, the plaintiff argued that the appraiser's duty to exercise reasonable care and competence in rendering the appraisal extended to him under Section 552 because the appraiser knew that the plaintiff was the buyer of the property appraised and that he was a party to the loan transaction the appraisal was intended to influence. *Id*. at 681. The plaintiff contended that he was within the "group of persons" the appraisal report was intended to benefit and guide. *Id*. The appraiser argued that although the report noted that the plaintiff was the borrower, the report was prepared for the benefit of the Bank, not the plaintiff. *Id*.

In affirming the dismissal of plaintiff's claim with prejudice, the Second District wrote:

> We conclude that Cooper cannot allege a section 552 claim [negligent misrepresentation] against [the appraiser] for the expense associated with repairing termite damage discovered after Cooper purchased his house. Assuming that [the appraiser] negligently supplied false information indirectly to Cooper, ***this information was provided exclusively for a loan transaction, not for the transaction between the buyer and seller of the real estate. Cooper has not been economically damaged in his loan transaction with the bank. Accordingly, he has no viable claim against [the appraiser] in this case.***

Id. at 682 (emphasis added). In reaching its conclusion, the appellate court further stated:

> The tort theory announced in section 552 could easily overwhelm the law of contracts if it is not a limited theory. . . . Although the duties established by the law of negligence may play an appropriate role in commerce, section 552 will create great uncertainty unless the concept of a business transaction is narrowly defined. Accordingly, the "transaction" associated with an appraisal that is obtained purely for financing purposes after a contract for sale has been executed is the loan transaction. To permit section 552 to create a tort claim . . . under the circumstances of this case would expand the meaning of "transaction" beyond that contemplated in the ordinary business relationship within which an appraisal for a lender is performed.

Id.

Appellant's argument in this case, that "Insurance Brokers represented that CAR maintained a valid and applicable insurance policy *that would apply to the project*," (App. Brief at pp. 18-19) (emphasis added), is contradicted by the allegations in the Third-Party Complaint. Specifically, the third-party complaint correctly alleges that Appellant provided the "certificate of

insurance on behalf of CAR indicating that CAR was maintaining general liability insurance." (A.2161 at ¶ 21.) The operative pleading further alleges that "DMA relied upon the representations from Manry Heston that CAR maintained valid and applicable insurance meeting the requirements of the Subcontract Agreement." (A.2161 at ¶ 22.) These allegations, indisputably supported by attachments to the third-party complaint, make clear that the Certificate of Insurance was provided solely to satisfy the requirements set forth in the Subcontractor Agreement, and not for the project at issue.

Importantly, the Certificate of Insurance clearly states that it was provided, "TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. . . . THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES." (A.2210.) (emphasis in original). The COI further cautions that, "THIS CERTIFICATE OF INSURANCE REPRESENTS COVERAGE CURRENTLY IN EFFECT AND MAY OR MAY NOT BE IN COMPLIANCE WITH ANY WRITTEN CONTRACT." (A.2210.) (emphasis in original). These emphasized disclaimers unquestionably prove that the purpose of the COI was solely to put the certificate holder (DMA) on notice that the insured (CAR) had the

levels of general liability insurance listed in the Certificate, and not to provide all applicable policy terms, exclusions or conditions.

Comparing the foregoing to the facts in *Cooper*, the business transaction here is akin to the loan transaction, and the project at issue (i.e., roof work at Plaintiffs' property) is comparable to transaction between the buyer and seller of the real estate. The Certificate of Insurance was provided to put DMA on notice of the amount of general liability insurance, but was not provided for the transaction that gave rise to alleged damages (i.e., damages arising from the roof work project at Plaintiffs' property). Thus, the trial court properly found that Appellant cannot establish that the Certificate of Insurance was provided for the business transaction that forms the basis of Appellant's alleged damages.

3. *Appellees neither supplied information regarding specific terms, exclusions, and conditions of CAR's insurance policy to third-party certificate holders, nor had a pecuniary interest in the transaction between CAR and DMA*

Section 552 imposes liability upon a party who: " in the course of its business, or in any other transaction in which it has a pecuniary interest, supplies false information negligently is liable to a party harmed by that false information." § 552; *City of St. Petersburg v. Total Containment, Inc.*, 2008 WL 5428179 (S.D. Fla. Oct. 10, 2008); *Blu-J, Inc. v. Kemper C.P.A. Grp.*,

916 F.2d 637, 640 (11th Cir. 1990). Crucial to this case is whether it was "in the course of [Appellees'] business, profession or employment" to provide information regarding CAR's policy's terms, exclusions and conditions, or if the information as provided "in any other transaction in which [they had] a pecuniary interest." *Id.*

Comments to Section 552 underscore the importance of the context in which a negligent misrepresentation is made. Comment c describes the necessity of a pecuniary interest to trigger a legal duty:

> The rule stated in Subsection (1) applies only when the defendant has a pecuniary interest in the transaction in which the information is given. If he has no pecuniary interest and the information is given purely gratuitously, he is under no duty to exercise reasonable care and competence in giving it.

§ 552, cmt. c. Comment d further describes the type of pecuniary interest necessary to support a cause of action for negligent misrepresentation:

> The defendant's pecuniary interest in supplying the information will normally lie in a consideration paid to him for it or paid in a transaction in the course of and as a part of which it is supplied. It may, however, be of a more indirect character. Thus the officers of a corporation, although they receive no personal consideration for giving information concerning its affairs, may have a pecuniary interest in its transactions, since they stand to profit indirectly from them, and an agent who expects to receive a commission on a sale may have such an interest in it although he sells nothing.
>
> The fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he

> receives no consideration for it at the time. It is not, however, conclusive. But when one who is engaged in a business or profession steps entirely outside of it, as when an attorney gives a casual and offhand opinion on a point of law to a friend whom he meets on the street, or what is commonly called a "curbstone opinion," it is not to be regarded as given in the course of his business or profession; and since he has no other interest in it, it is considered purely gratuitous. The recipient of the information is not justified in expecting that his informant will exercise the care and skill that is necessary to insure a correct opinion and is only justified in expecting that the opinion will be an honest one.

Id. at cmt. d.

Reimsnyder v. Southtrust Bank, N.A., 846 So. 2d 1264 (Fla. 4th DCA 2003) addresses this issue. In *Reimsnyder*, the bank and its manager were sued for negligent misrepresentation for advising a third party that the bank's customer was a reputable company. *Id.* at 1265. The third party invested in the company (the bank's customer), which the SEC later investigated for fraud and, as a result, the investor (third party) suffered damages. *Id.* The third party argued that, but for the negligent misrepresentation of the bank, he would not have invested in the company and lost money. *Id.* The bank responded that it did not owe a duty to the third party and that its statements were either true or only opinions, not facts, which could not form the basis of a misrepresentation claim. *Id.* The trial court agreed. On appeal, this Court agreed, explaining that the bank did not owe a duty of care to the third party:

> Southtrust and Richardson were not in the business of supplying information regarding the financial health of companies. A bank

> may have information regarding the size of deposits and the credit worthiness of its customers based upon their dealings with the bank, but there is neither evidence, nor did Reimsnyder allege that Southtrust's business included the dissemination of information regarding the intricacies of its customers' particular businesses. . . .
>
> Further, neither Southtrust nor Richardson had any pecuniary interest in the transaction between Reimsnyder and ICM [the bank's customer]. The bank did not receive any compensation, nor was there any evidence of even an indirect pecuniary interest on behalf of the bank or Richardson, such as a loan between ICM and the bank which would have been paid off with the proceeds of the investment. In short, Richardson's information was given gratuitously to a person inquiring about a bank customer, not because there was any pecuniary interest in the transaction.

Id. at 1267-68. Thus, in *Reimsnyder*, the bank did not have a pecuniary interest in the transaction between the third party and its customer. *Id.* at 1270. This Court found that the bank could not be held liable to the third party for its negligent misrepresentation. *Id.*

Similarly here, Appellees were not in the business of supplying information regarding the specific terms, exclusions, and conditions of CAR's insurance policy to DMA, a third-party additional insured. Instead, Appellees were only in the business of providing information confirming the amounts and types of insurance that CAR maintained. This is clearly evidenced by the language contained in the COI, and specifically the statement that the COI was being provided, "TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED

NAMED ABOVE FOR THE POLICY PERIOD INDICATED. . . . THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES." (A.2210.) (emphass in original).

Moreover, Appellant did not allege (nor can it) that Appellees were in the business of supplying information regarding the specific terms, exclusions, and conditions of CAR's insurance policy to DMA, as merely an additional insured. Absent the foregoing, Appellant would have to allege that Appellees had a pecuniary interest in the transaction in order to overcome dismissal. Appellant did not make this allegation in its third-party complaint, did not advance this argument in opposition to Appellees' Motion to Dismiss, at oral argument, or even in this appeal. Accordingly, the trial court did not err, dismissal was proper, and should be affirmed.

II. THE TRIAL COURT REJECTED APPELLANT'S UNSUPPORTED ARGUMENT CONCERNING THE KNOWLEDGE ELEMENT OF ITS NEGLIGENT MISREPRESENT CLAIMS

Appellant next argues that, "CAR requested the Insurance Brokers to communicated directly with DMA regarding CAR's insurance policy for the purposes of guiding DMA in its business transaction with CAR . . . [and] that Insurance Brokers 'knew or should have known that the work CAR was contracted to be performed was to take place in Florida and involved an

Insurance Brokers property." (App. Brief at pp. 20-21.) These assertions are based solely on the facts that: (1) the COI was provided to DMA; and (2) "DMA was a Florida corporation as the COI contained a Florida address for DMA." (App. Brief at p. 21.)

During the Motion to Dismiss hearing Appellant's counsel plainly admitted to the trial court that the knowledge Appellant attempts to impute upon Appellees is based entirely upon the allegation that Appellees "communicated with DMA, who they knew was a Florida contractor." (A.2491:5-11; *see also* A.2490:4-13, A.2494: 25-2495:1, A.2495:21-25.)

The trial court considered and rejected these arguments for good reason. Relying on its review of the allegations in the third-party complaint and the documents attached in support, the trial court correctly rejected untethered references to alleged oral conversations that fell outside of the four corners of the Subcontractor Agreement, and which contradicted the express language contained therein. (A.2495:11-17). Accordingly, Appellant's attempt to categorize the trial court's invocation of the parol evidence rule as improper is unfounded.

To be clear, the trial court nonetheless considered and rejected Appellant's parol evidence argument that the knowledge requirement was satisfied by oral conversations between the parties. Specifically, the trial

court correctly explained that the location of a contractor is not dispositive of its work location, noting that: "the Florida contractor can work anywhere, you know, they're licensed to . . . ." (A.2498:4-6.) Thus, Appellant's argument that the trial court erred "when it determined that knowledge of the misstated facts could have only come from the Subcontract," misconstrues the trial court's considerations and ruling. (App. Brief at p. 24.) The record demonstrates that the trial court's ruling was based upon careful consideration of both Appellant's written and oral arguments. The trial court did not, as Appellant posits, "create[ ] facts not alleged in the third-party complaint and ruled that this unpled fact is the only version of the facts that can prove the knowledge element of a negligent misrepresentation claim." (App. Brief at p. 24.)

In sum, whether or not the parol evidence rule can preclude admission of extrinsic evidence is irrelevant in this case because the trial court did consider the Appellant's arguments concerning "knowledge" as alleged in the operative pleading, and rejected these allegations as insufficient to overcome dismissal. The trial court did not err and its dismissal should be affirmed.

III. APPELLANT WAS RESPONSIBLE FOR INVESTIGATING INFORMATION THAT A REASONABLE PERSON IN ITS POSITION WOULD BE EXPECTED TO INVESTIGATE

Appellant's argues that the trial court "erred in ruling that the COI's

limiting language negates any potential justifiable reliance on the same" is likewise flawed (App. Brief at p. 25); and that it was an error for the trial court to find that the disclaimer/warning in the COI "negates DMA's allegations of negligent misrepresentations" because "the ruling again failed to adhere to *Gilchrest* and also filed to take into account for other allegations contained in the Third-Party Complaint." (App. Brief at p. 25.) The assertions are contrary to the record.

First, Appellant did not raise these issues in its opposition to Appellees' motion to dismiss or during the oral argument before the trial court. Thus, these arguments were not properly preserved for the record, were waived, and should be disregarded. *Reznik*, 15 So. 3d at 849 (finding wavier where party did not preserve an issue raised for the first time on appeal); *Lacey*, 831 So. 2d at 1268 (to preserve an issue on appeal the specific legal argument must be presented to the lower court). Even if properly preserved, which they are not, Appellant's arguments erroneously rely upon a mischaracterization of the Court's *Gilchrist* ruling.

While *Gilchrist* does explain that "[o]ne should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance," Appellant omits the remainder of that ruling. *Gilchrist*, 969 So. 2d at 339 (quoting *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla.

1997)). The omitted portion of the *Gilchrist* opinion reflects the Court's decision to impose the responsibility of "investigating information that a reasonable person in the position of the recipient would be expected to investigate" upon the recipient of information. *Id.* at 339.

Appellant is a sophisticated company that had ample opportunity to inquire about the coverage and limitations of the insurance policy, especially in light of the clearly emphasized disclaimer/warning that the coverage may not be compliant with any contractual requirements. As and additional insured, Appellant could have discovered the applicable exclusions through the exercise of ordinary diligence. *See Agrobin, Inc. v. Botanica Dev. Assocs., Inc.*, 861 So. 2d 445, 446 (Fla. 3d DCA 2003) (per curiam) (holding, in the context of the doctrine of caveat emptor, that "a sophisticated purchaser of commercial property who agreed to an 'as is' purchase contract, had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud"). A reasonable company in Appellant's position should have looked into the disclaimer/warning and discovered that the policy did not provide coverage for work performed in Florida. As the *Gilchrist* Court held, Appellant did "not have to investigate every piece of information furnished; [it was] only responsible for

investigating information that a reasonable person in [its] position would be expected to investigate." *Gilchrist*, 696 So. 2d at 339.

Appellant does not dispute that it had an obligation to investigate the information, but argues that the trial court erred in ruling that the COI's warning "should have raised some issues" (A.2494:16-17), by pointing to the allegations that: "(1) the COI's indication that DMA, having an address in Florida, was an additional insured, (2) that Insurance Brokers were providing guidance to DMA, and (3) that Insurance Brokers and DMA were directly communicating with each other." (App. Brief at p. 28.) These allegations do not, however, negate DMA's own duty to investigate the coverage provided for contractual compliance purposes.

Further, Appellant argues error by the trial court in "solely focus[ing] on the disclaimer language of the certificate of insurance without giving credence to other relevant allegations of the Third-Party Complaint." (App. Brief at pp. 28-29.) The record contradicts this position. The trial court both considered and rejected Appellant's proposition, finding these allegations were squarely contradicted the documents referenced by and incorporated into the operative pleading. The trial court held, in relevant part:

> I'm going to dismiss this motion. The main reason is that the pleading does not come forth with the attachments. The attachments say one something completely different, and so we have to go by the attachments which is the agreement – the

> contract agreement which is absolutely silent on any specificity other than commercial liability insurance.
>
> And also, *on the actual certificate, it does give a warning that should have raised some issues*. . . .

(A.2494:8-17.) (emphasis added). Thus, the trial court did consider Appellant's arguments, but rejected them as inconsistent with the operative pleading's supporting documents.

Finally, Appellant cites *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91 (Fla. 2002), to support its argument that there can still be justifiable reliance, even if the representation is contradicted by statements in the public record. (App. Brief at pp. 27-28.) However, the *Schottenstein* facts are in inapposite to this case. The *Schottenstein* plaintiffs were home purchasers, not a sophisticated company like Appellant. Moreover, the information in *Schottenstein* was located in the public record and was not provided directly to the recipient, unlike Appellant in this case.

Although Appellant focuses on only a portion of the ruling, it's worth noting the *Schottenstein* Court also acknowledged that "[k]nowledge of clearly revealed information from recorded documents contained in the records constituting a parcel's chain of title is properly imputed to a purchasing party, *based upon the fact that an examination of these documents prior to a transfer of the real property is entirely expected.*" *Id*. at

95 (emphasis added) (citing *Mercer v. Keynton*, 99 Fla. 914, 127 So. 859, 861 (1930); *Field Properties, Inc. v. Fritz*, 315 So. 2d 101, 103 (Fla. 2d DCA 1975); *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 311-12 (Fla. 2d DCA 1966); *Tri-Cty. Produce Distribs., Inc. v. Ne. Prod. Credit Ass'n*, 160 So. 2d 46, 51 (Fla. 1st DCA 1963); *Maule Indus., Inc. v. Sheffield Steel Prods., Inc.*, 105 So. 2d 798, 801 (Fla. 3d DCA 1958)). The Court also explained that "there may be situations in which a party's allegations of fraudulent misrepresentation fail to state a cause of action. Where the pleadings of the parties make it evident that reliance on the part of a purchaser was not justified as a matter of law, a trial court may certainly be correct in ruling as a matter of law that no cause of action exists." *Id.*

Following the *Schottenstein* ruling, the trial court properly found that Appellant was expected to review the COI it was provided after being put on notice of the disclaimer/warning, cautioning the COI holder that "THIS CERTIFICATE OF INSURANCE REPRESENTS COVERAGE CURRENTLY IN EFFECT AND MAY OR MAY NOT BE IN COMPLIANCE WITH ANY WRITTEN CONTRACT." (A.2210.) (emphasis in original.)

Based on the foregoing, the trial court did not err in dismiss Appellant's third-party claims against Appellees, with prejudice.

IV. DISMISSAL WITH PREJUDICE WAS APPROPRIATE BECAUSE AMENDMENT WOULD BE FUTILE

For its last argument, Appellant asserts that the trial court erred in dismissing the Third-Party Complaint without leave to amend:

> [T]he Third-Party Complaint at issue has never been amended and the Insurance Brokers have yet to file a responsible pleading. Thus, the trial court was without discretion to dismiss the complaint without allowing DMA the opportunity to amend, even if it appears an amendment would be futile. The trial court did not understand this rule and such is evidenced by the trial court's oral statement at hearing that the reason am amendment is not being allowed is that "I don't think its curable." Although DMA disagrees that allowing an amendment would be futile, the disagreement is of no importance. Case law is clear that DMA should have been given an opportunity to plead additional facts, provide more clarity on certain allegations already made, or even plead an entirely different cause of action, such as failure to procure insurance. Thus, the trial court committed reversible error.

(App. Brief at p. 33.)

Appellant also raises this argument for the first time on appeal. Again, Appellant did not properly preserve the issue and, thus, waived the argument on appeal. *See Reznik*, 15 So. 3d at 849 (finding wavier on appeal where party raised an issue for the first time, explain, "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.") (quoting *Robbins*, 914 So. 2d at 928); *Lacey*, 831 So. 2d at 1268 ("[I]n 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."); *Mariani*, 94 So. 2d at 831 ("It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this court on appeal.").

Appellant waited until after the Court's oral ruling on the motion to dismiss to request leave to amend. Even then, Appellant simply argued,: "*I think I can cure that* because the allegations as I mentioned, is the fact they new or should have known that they were communicating with a Florida corporation. That should have * * * limited the contractor of whether the third-party defendants should have investigated or they should have exercised additional caution knowing that there was a Florida contractor in play." (A.2494:23-2495:7.) Likewise, Appellant's Initial Brief argues for the first time that the Motion to Dismiss was not a responsive pleading. Appellant also failed to seek reconsideration in order to seek leave to amend or otherwise seek to cure any perceived deficiencies at any time before filing this appeal and cannot submit this new, but waived argument at the appellate phase.

Moreover, as the Appellant highlights, "[a] dismissal with prejudice should not be ordered without giving the party offering the defective pleading an opportunity to amend ***unless it is clear that the pleading cannot be amended so as to state a cause of action.*****"** (App. Brief at p. 29) (citing *Cent. Fla. Invests., Inc. v. Levin*, 659 So. 2d 492, 493 (Fla. 5th DCA 1995) (citing *Delia & Wilson, Inc. v. Wilson,* 448 So. 2d 621, 622 (Fla. Dist. Ct. App. 1984))); *Hansen v. Cent. Adjustment, Bureau, Inc.*, 348 So. 2d 608 (Fla. 4th DCA 1977) ("A dismissal with prejudice for failure to state a cause of action should not be ordered without giving the party offering the defective pleading an opportunity to amend, unless it is apparent that the pleading cannot be amended so as to state a cause of action."); *Kimball v. Publix Super Markets, Inc.*, 901 So. 2d 293, 296 (Fla. 2d DCA 2005) ("Refusal to allow an amendment is an abuse of the trial court's discretion 'unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.") (quoting *State Farm Fire & Cas. Co. v. Fleet Fin. Corp.*, 724 So. 2d 1218, 1219 (Fla. 5th DCA 1998)); *see also Posey v. Magill*, 530 So. 2d 985, 985 (Fla. 1st DCA 1988) ("Unless it is clear from the face of a complaint that amendment would be futile, failure to grant a plaintiff at least one opportunity to amend his complaint constitutes an abuse of discretion.").

At the conclusion of oral argument on the Motion to Dismiss, following the trial court's oral ruling, Appellant identified the allegations that it thought could cure the identified deficiencies. The trial court considered these additional allegations at that time and determined that Appellant could not, under any set of allegations, overcome dismissal. It was incumbent upon Appellant to raise any other bases as to why an amendment would not be futile. Given that no such argument was advanced after careful consideration by the trial court, Appellant waived its argument that dismissal with prejudice was unwarranted.

V. CONCLUSION

The Court should affirm the trial court's order of dismissal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2023, a true and accurate copy of the foregoing was served on all counsel of record on the service list below, via electronic email through Florida's E-Portal e-filing system, in accordance with Rule 2.516 of the Florida Rules of General Practice and Judicial Administration and Rule 9.420(d) of the Florida Rules of Appellate Procedure, via electronic mail to:

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I HEREBY CERTIFY that the foregoing complies with the type-volume limitation and font requirement set forth in Florida Rule of Appellate Procedure Rule 9.045. This brief contains 8,412 words. It has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Arial font.

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