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IN THE SUPREME COURT OF FLORIDA

JAMON A. JOHNSON and CHAKA JOHNSON,

Petitioners,

v. L. T. Case No. 1D12-0891

UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondent.
_____/

PETITIONERS' JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

C. Phil Hall
Florida Bar No. 621145
TAYLOR, WARREN & WEIDNER, P.A.
1823 N. 9th Avenue
Pensacola, FL 32503-5270
T: 850-438-4899
F: 850-438-4044
Primary e-mail: phall@twwlawfirm.com
Attorneys for Petitioners

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STATEMENT OF THE CASE AND FACTS SUPPORTING JURISDICTION

Since as early as 1935, this Court has recognized that contract-based rescission for a false statement requires the insurer to demonstrate that such statements were intentionally made in order to void coverage under the policy. See American Ins. Co. of Newark, N.J. v. Robinson, 120 Fla. 674, 163 So. 17 (Fla. 1935), holding that where an insurer attempts to defeat a claim on the basis of fraud or false swearing, the burden of proof should be upon the insurance company to show that the insured knowingly and willfully made a false answer. The First District reached the same conclusion in Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996), holding that where the policy of insurance provided rescission in "case of any fraud or **false swearing**," the insurer would be entitled to void coverage only where the falsity was intentional.

Universal's **"Concealment or Fraud"** provision entitles Universal to void coverage if an insured "**Intentionally concealed or misrepresented any material fact or circumstance**; **Engaged in fraudulent conduct; or Made false statements**" relating to the policy of insurance. Section 627.409, Florida Statutes, allows an insurer to rescind a policy of insurance for **unintentional misrepresentations** if the misstatements are material to the acceptance of the risk. Section 627.409 does not apply if the contract has a more stringent rescission

standard. Green v. Life and Health of America, 704 So. 2d 1386 (Fla. 1998). The trial court found 627.409 inapplicable. The First District reversed and created direct and express conflict with multiple decisions of this Court and courts throughout Florida. Accordingly, this Court has jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution because the First District's decision in this case expressly and directly conflicts with two decisions of this Court and multiple decisions of other District Courts of Appeal.

Case law is clear that if an insurer drafts a rescission standard that is more favorable to the insured, the contract controls, and the insurer forfeits the protections of 627.409. See Green v. Life and Health of America, 704 So. 2d 1386 (Fla. 1998), barring resort to the statutory protections of 627.409 where the insurer drafted a rescission standard more stringent than the rescission standard set forth in Section 627.409; see also, Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996), barring resort to 627.409 where the policy of insurance provided rescission in "case of any fraud or **false swearing** by the insured relating thereto." See Gainsco v. ESC/Choicepoint Services, Inc., 853 So. 2d 491 (Fla. 1st DCA 2003), barring resort to 627.409 where the court determined that intentional misrepresentation of material fact was the contractual basis for voiding the contract.

Petitioners argued below that the "**Concealment or Fraud**" heading and the

plain language which explicitly requires "**intentional concealment or misrepresentation of material fact or circumstance, fraudulent conduct or false statements**" unflinchingly required intentional acts and was, therefore, more stringent than 627.409. The trial court agreed and found that consistent with American Ins. Co. of Newark, N.J. v. Robinson, 120 Fla. 674, 163 So. 17 (Fla. 1935); Green v. Life and Health of America, 704 So. 2d 1386 (Fla. 1998); Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996); and Gainsco v. ESC/Choicepoint Services, Inc., 853 So. 2d 491 (Fla. 1st DCA 2003), Universal's policy of insurance provided a more stringent basis for rescission and barred resort to 627.409. A jury found that the statement at issue was not intentionally false, and a verdict was entered for Petitioners, Plaintiffs below.

Universal timely appealed to the First District Court of Appeal. The First District agreed that the majority of the contractual provision at issue required intentionality but found the phrase "false statements" dispositive. Black's Law Dictionary defines "false statement" as a "Statement knowingly false, or made recklessly without honest belief in its truth, and with intent to deceive." Black's Law Dictionary 602 (6th ed. 1990). The Seventh Edition continues to acknowledge the intentional nature of a false statement: "[a]n untrue statement knowingly made with the intent to mislead" Black's Law Dictionary 619 (7th ed.

1999). Against this "plain meaning" backdrop and this Court's 1935 holding in American Ins. Co. of Newark, N.J. v. Robinson and the First District's more recent 1996 holding in Strickland Imports, Inc. v. Underwriters at Lloyds, London, the First District held that the phrase "false statements" meant the opposite of what the precedent found and the opposite of what the dictionary provided. The First District concluded that "False statements" meant "unintentionally false statements" and reversed the Final Judgment April 30, 2013. Petitioners timely moved for rehearing, rehearing *en banc*, or alternatively certification. The First District denied the motions and the opinion became final on June 21, 2013. Notice to Invoke Discretionary Review was timely filed on July 17, 2013.

SUMMARY OF ARGUMENT

Contracts of insurance which provide rescission on the basis of falsity require a showing of intentional falsity. Accordingly, the First District opinion directly and expressly conflicts with American Ins. Co. of Newark, N.J. v. Robinson, 120 Fla. 674, 163 So. 17 (Fla. 1935); Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996); and Gainsco v. ESC/Choicepoint Services, Inc., 853 So. 2d 491 (Fla. 1st DCA 2003).

Moreover, Petitioners contend that the manner by which the First District reached its holding conflicts with rules of construction established by this Court's decisions in Garcia v. Federal Insurance Co., 969 So. 2d 288 (Fla. 2007), Taurus

Holdings, Inc. v. United States Fid. & Guaranty Co., 913 So. 2d 528 (Fla. 2005), Swire Pacific Holdings Inc. v. Zurich Ins. Co. 845 So. 2d 161 (Fla. 2003); and Flores v. Allstate Ins. Co., 819 So. 2d 740 (Fla. 2002), all holding that insurance contracts must be construed according to their plain meaning. The decision conflicts with Green v. Life and Health of America, 704 So. 2d 1386 (Fla. 1998), holding that where an insurer drafts a rescission standard more stringent than those provided by 627.409, the contract controls.

Accordingly, Petitioners urge this Court to exercise its discretionary review to correct the First District's conflicting opinion. This Court has jurisdiction for each and both of the following reasons:

1. The First District's Opinion fails to apply the plain meaning of the phrase "false statement" as one which requires a showing of intentionality and in doing so creates express and direct conflict with American Ins. Co. of Newark, N.J. v. Robinson, 120 Fla. 674, 163 So. 17 (Fla. 1935) and Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996). Additionally, the Opinion misconstrues the rules of construction as established by this Court in Garcia v. Federal Insurance Co., 969 So. 2d 288 (Fla. 2007), Taurus Holdings, Inc. v. United States Fid. & Guaranty Co., 913 So. 2d 528 (Fla. 2005), Swire Pacific Holdings Inc. v. Zurich Ins. Co. 845 So. 2d 161 (Fla. 2003); and Flores v. Allstate Ins. Co., 819 So. 2d 740 (Fla. 2002).

2. The First District's Opinion misapplies Section 627.409, Florida Statutes to a contract of insurance seeking rescission where the contract's "**Concealment or Fraud**" provisions explicitly provide for rescission "whether before or after a loss, an "insured" has . . . **Intentionally concealed or misrepresented any material fact or circumstance**; Engaged in fraudulent conduct; or **Made false statements**; relating to this insurance" in direct and express conflict

with Green v. Life and Health of America, 704 So. 2d 1386 (Fla. 1998); Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996); and Gainsco v. ESC/Choicepoint Services, Inc., 853 So. 2d 491 (Fla. 1st DCA 2003).

ARGUMENT

I. The First District's Opinion fails to apply the plain meaning of the phrase "false statements" as one which requires a showing of intentionality.

Universal's rescission standard clearly and unequivocally requires proof of an intentional act in order to warrant rescission under the policy of insurance. In fact, there is little in the entire section to suggest otherwise:

> **Concealment or Fraud**: The entire policy will be void if, whether before or after a loss, an "insured" has:
> a. **Intentionally concealed or misrepresented any material fact or circumstance**;
> b. Engaged in **fraudulent conduct**; or
> c. Made **false statements**; relating to this insurance.

The heading sets the tone for the body. Both "concealment" and "fraud" are well understood to require intentionality, and "a word is known by the company it keeps." See Nehme v. Smithkline Beecham Clinical Lab. Inc. 863 So. 2d 201(Fla. 2003), applying the doctrine of *noscitur a sociis* to verify the connotations associated with "concealment." In the instant provision, each section explicitly requires intentionality. The second section discusses **fraudulent conduct**, and so does not apply, but it is important to note that it is in keeping with the intentionality requirement of the heading as well. The First District focused on

section (c)'s phrase "false statements" but declined to accord the phrase its plain meaning—either the judicially-recognized plain meaning or dictionary-supplied plain meaning because it reasoned that if "false statements" included intentionally false statements, it would be superfluous to section (a). Insurance contracts are construed according to their plain meaning. See Garcia v. Federal Insurance Co., 969 So. 2d 288 (Fla. 2007). Where a term at issue in a policy of insurance is not defined, the first step in determining the plain language is to look the word up in a dictionary. Id. See also, Penzer v. Transportation Ins. Co., 29 So. 3d 1000 (Fla. 2010). Where the plain language of the policy is clear and unambiguous, the courts are not empowered to supply additional meanings nor are they empowered to engage the rules of construction to supply a different meaning. See Green v. Life and Health of America, 704 So. 2d 1386 (Fla. 1998). The dictionary definition should be supplied to establish the plain meaning of the word or phrase in question. See, Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984). Black's Law Dictionary defines "false statement" as a "Statement knowingly false, or made recklessly without honest belief in its truth, and with intent to deceive" … "[a]n untrue statement knowingly made with the intent to mislead." Black's Law Dictionary 619 (7th ed. 1999).

The First District's opinion not only declines to apply the plain meaning as set forth in Black's, the opinion is entirely silent on the two Florida cases that most

strongly speak to the issue of how the phrase "made false statements" should be interpreted in a policy of insurance. American Ins. Co. of Newark, N.J. v. Robinson, 120 Fla. 674, 163 So. 17 (Fla. 1935), holding that the phrase "false swearing" in an insurance policy required that the false statement be knowingly and willfully made. The First District reached the identical result on the following contract language in 1996:

> **Concealment, Fraud**: This entire policy shall be void if, whether before or after a loss, the insured has **willfully concealed or misrepresented any material fact or circumstance** concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud **or false swearing** by the insured relating thereto.

Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996), holding that this contract language would "**void the contract only for intentional misrepresentation**." See id. at 253.

The First District declined to apply the plain meaning because interpreting the phrase to include intentionally false statements would result, they reasoned, in a provision superfluous to 2(a) which allows for rescission where an insured **intentionally conceals or misrepresents a material fact**. However, that reasoning completely ignores the fact that 2(c) has no materiality requirement. Petitioners contend that Universal purposefully omitted the materiality requirement in 2(c) in order to lessen the insurer's burden to demonstrate materiality so long as insurer could demonstrate a false statement. See Cox v. American Pioneer Life

Ins. Co., 626 So. 2d 243 (Fla. 5th DCA 1993), holding that even where an applicant knowingly "neglected to [reveal] that a female surgical procedure had been performed on [her] in 1988 because it 'was a very private thing,'" jury could have concluded that the omission was not material. Under a plain meaning analysis of the Universal policy, the insurer could have prevailed without having to submit the materiality component to the jury. Uncertainty of jury results regarding materiality is a justifiable basis for wanting to eliminate the materiality requirement.

II. The First District's Opinion Misapplies Section 627.409.

Section 627.409, Florida Statutes is wholly inapplicable to the instant dispute, and the First District created direct and express conflict when it used 627.409 to interpret the phrase "false statements" in the policy of insurance. In dismissing the conclusions reached by courts in Michigan and Maryland that held that the phrase "false statements" in an insurance policy required "a showing of intent on the part of the insured," the First District said simply, "Florida law differs" and cited a series of cases that held rescission under 627.409 proper even where unintentional or unknowing misstatements prevented recovery. See Appendix A. The issue before the court was whether that statute should apply at all. See Green v. Life and Health of America, 704 So. 2d 1386 (Fla. 1998), holding that 627.409 was wholly inapplicable where the insurer drafted a more

stringent rescission standard; Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996), specifically finding that "false swearing" created a more stringent rescission standard. See Gainsco v. ESC/Choicepoint Services, Inc., 853 So. 2d 491 (Fla. 1st DCA 2003), precluding 627.409 analysis where the policy provided for cancellation in the event of intentional misrepresentation. The policies in each of these instances—like the policy in the instant case—provide for a more stringent rescission standard and therefore bar application of 627.409. The cases cited for "the law in Florida" only explain situations in which 627.409 apply and are, therefore, not illuminating.

Conclusion

Petitioners request that the Court grant review.

Respectfully submitted,

/s/ C. Phil Hall

C. Phil Hall
Florida Bar No. 621145
TAYLOR, WARREN & WEIDNER, P.A.
1823 N. 9th Avenue
Pensacola, FL 32503-5270
T: 850-438-4899
F: 850-438-4044
Primary e-mail: phall@twwlawfirm.com
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to attorneys for Universal Property and Casualty Insurance Company: Hinda Klein; Kasey L. Prato; Diane H. Tutt; Conroy, Simberg, Ganon, Krevans, Abel, Lorvey, Morrow & Schefer, P.A., 3440 Hollywood Boulevard, Second Floor, Hollywood, FL 33021 via e-mail to: kprato@conroysimberg.com and eservicehwdappl@conroysimberg.com on this 24th day of July, 2013.

/s/ C. Phil Hall

C. Phil Hall
Florida Bar No. 621145
TAYLOR, WARREN & WEIDNER, P.A.
1823 N. 9th Avenue
Pensacola, FL 32503-5270
T: 850-438-4899
F: 850-438-4044
Primary e-mail: phall@twwlawfirm.com
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and format requirements of Florida Rule of Appellate Procedure 9.210. The lines are double-spaced, the margins are no less than one inch, and the lettering is black, Times New Roman 14-point font.

/s/ C. Phil Hall

C. Phil Hall
Florida Bar No. 621145
TAYLOR, WARREN & WEIDNER, P.A.
1823 N. 9th Avenue
Pensacola, FL 32503-5270
T: 850-438-4899
F: 850-438-4044
Primary e-mail: phall@twwlawfirm.com
Attorneys for Petitioners