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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D19-1182, 1D19-1577

GROVER BURGAN,

Appellant,

vs. L.T. Case No.: 53-2013-CA-009408

JOHN THOMAS SWINSON, AN INDIVIDUAL, RYAN PAHLOW, AN INDIVIDUAL, AND COASTAL OAKS CONSTRUCTION, INC., A FLORIDA CORPORATION,

Appellees.
_________________________________/

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE JOHN THOMAS SWINSON

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<u>STATEMENT OF THE CASE AND FACTS</u>

The case against John Thomas Swinson is straightforward. There is no case to be made. Although Grover Burgan sued Mr. Swinson for breach of contract, fraud, and indemnity, the evidence presented at trial was clear and uncontested: Mr. Swinson did not sign any contract with Mr. Burgan, and Mr. Swinson never met with, spoke with, or communicated in any way with Mr. Burgan before this lawsuit was filed. Mr. Swinson had no place in Mr. Burgan's lawsuit, and the trial court's entry of a directed verdict in his favor should be affirmed by this Court on appeal. Mr. Swinson rejects Mr. Burgan's incomplete presentation of the facts and restates them below.

I. Background.

In 2010, Ronnie Burgan asked her husband, Mr. Burgan, for a whole-house remodel as a gift for their wedding anniversary. (T. 50-52.) Mr. Burgan, an experienced businessman, agreed and began looking for a builder. (T. 52, 618.)

Mr. Burgan came across Ryan Pahlow as a potential builder because Mr. Pahlow's company, Swinson Pahlow Design and Build, was remodeling a house in the Burgans' neighborhood. (T. 52-55.) Swinson Pahlow Design and Build is a fictitious, or "doing business as," name for Arc-Rite Residential Contractors, Inc. *See* Facts Pertaining to Corporation 1, *infra* at 7-9; Argument I.C.iii, *infra* at 29-31.

After meeting with Mr. Pahlow, and looking at several other projects completed by the company, Mr. Burgan and his wife decided to hire Swinson Pahlow Design and Build to remodel their home. (T. 56-57.)

Mr. Burgan claims that Mr. Pahlow told him Mr. Swinson was his "partner" and brother-in-law, and that he checked into Mr. Swinson's reputation as a builder before signing the contract. (T. 55, 58.) However, Mr. Burgan testified that he never met with Mr. Swinson in connection with the remodel. (T. 60, 612.) In fact, Mr. Burgan testified that, before filing his lawsuit, he had never met with or communicated with Mr. Swinson in any context. (T. 612, 1989.) Mr. Swinson was likewise unaware of the Burgans, or their remodeling project, in any capacity. (T. 1092, 1126-27.)

On March 11, 2011, the Burgans signed a cost-plus building contract with Swinson Pahlow Design and Build (hereinafter, "Corporation 1"). (R. Vol. I 2313.) Mr. Pahlow signed the contract on behalf of Corporation 1. (R. Vol. I 2313.) The parties also signed an addendum to the contract on March 25, 2011 regarding bid details. (R. Vol. I 2313-14.) The contract did not contain a prohibition against assignment. (R. Vol. I 2313-14, T. 672.) When the contract was signed, Mr. Pahlow and Mr. Swinson owned equal shares of Corporation 1. (T. 1416.)

On April 5, 2011, Mr. Pahlow applied for a building permit to begin work on the Burgans' home. (R. Vol. I 3283; T. 1130, 1432.) Mr. Pahlow prepared and signed

the application, and pulled the permit using his general contractor's license. (R. Vol. I 3283, T. 1432.) Mr. Pahlow identified Corporation 1 as the company name on the permit. (R. Vol. I 3283.)

Around this same time, Mr. Pahlow was in the process of creating a new company, Coastal Oaks Construction, Inc. (hereinafter, "Corporation 2"), as well as purchasing Mr. Swinson's interest in Corporation 1. (T. 1208-10, 1426; *see* Facts Pertaining to Corporation 1, *infra* at 7-9.) Mr. Pahlow discussed these opportunities with Mr. Burgan, who owned his own company. (T. 1426-27, 1438, 1440.) According to Mr. Pahlow, Mr. Burgan was excited for him and his business opportunities. (T. 1427, 1438.)

On or around April 19, 2011, Mr. Pahlow applied to move his contractor's license from Corporation 1 to Corporation 2. (T. 1435-36.) On May 17, 2011, Mr. Pahlow also finalized his purchase of Mr. Swinson's interest in Corporation 1. (T. 1210, 1426-27.) Shortly thereafter, Mr. Pahlow assigned the Burgans' contract from Corporation 1 to Corporation 2. (T. 1210; R. Vol. I 3588.)

Although Mr. Burgan claims Mr. Pahlow never discussed the assignment of the contract with him, the invoices and payment history tell a different story. The Burgans wrote approximately four checks to Corporation 1 between the signing of the contract and June 2011. (T. 1445-46.) However, beginning in July 2011, the Burgans were invoiced by, and began to pay, Corporation 2 instead of Corporation

1. (T. 558, 622-23, 628-29, 1446; R. Vol. I 2646-2704.) During the remaining two years of the construction project, the Burgans wrote over twenty-five checks to Corporation 2, and zero checks to Corporation 1. (T. 620-22, 1444-46.) And, in August 2011, the Burgans requested and received a certificate of insurance from Mr. Pahlow, which listed Corporation 2 as the "insured" and included Mr. and Mrs. Burgan as the certificate holder. (T. 623-26; 1440-42; R. Vol. I 3330-32.)

On August 9, 2013, the Burgans' lawyer sent a notice of construction defect and repair demand to Mr. Pahlow, Corporation 2, and "Swinson-Pahlow Design Build." (T. 462, R. Vol. I 2992-97.) Mr. Pahlow testified that, despite the letter, he maintained a good relationship with the Burgans and continued to work on the "punch list" for the project until October 2013, when he was asked to leave. (T. 1469, 1517.) The Burgans' lawyer then sent additional notices of construction defects in 2014 and 2015. (R. Vol. 1 2297-3040.) The Burgans never communicated with Mr. Swinson about any of the alleged construction defects. (T. 629-31.)

II. Facts pertaining to the breach of contract count.

In October 2013, Mr. Burgan filed this lawsuit against Mr. Swinson, Mr. Pahlow, and Corporation 2. (R. Vol. I 3.) In a motion to dismiss, the defendants asserted that Swinson Pahlow Design and Build was the fictitious name for Corporation 1. (R. Vol. I 20, 26.) However, Mr. Burgan never amended his complaint to include Corporation 1 as a defendant.

In August 2017, Mr. Burgan filed a second amended complaint against Mr. Swinson; Mr. Pahlow; "Swinson Pahlow Design Build", as an unregistered general partnership (hereinafter, the "alleged partnership"); and Corporation 2. (R. Vol. I 1697-1712.) Mr. Burgan's second amended complaint included four counts: (1) breach of contract against the alleged partnership, Mr. Swinson, and Mr. Pahlow; (2) negligence against Corporation 2; (3) fraud/theft by false pretense against all defendants; and (4) common law indemnity against all defendants. (R. Vol. I 1701-08.) This brief focuses primarily on the breach of contract claim against Mr. Swinson, Mr. Pahlow, and the alleged partnership, as Mr. Burgan's brief fails to address, and thus abandons, his other claims. [1]

Mr. Burgan did not sue Corporation 1 in any capacity, or Corporation 2 for breach of contract. (R. Vol. I 1697-1712.) He instead pursued only a general partnership theory for his breach of contract claim. (R. Vol. I 1698.) Specifically, Mr. Burgan alleged that Swinson Pahlow Design Build was an "unregistered general partnership engaging in the business of construction and composed of Swinson and Pahlow as general partners;" that Mr. Burgan had entered into the written agreement

[1] In particular, Mr. Burgan has not challenged the directed verdicts in favor of Mr. Swinson on the fraud and indemnity counts and has therefore abandoned those issues. *See* Preservation and abandonment, *infra* at 17-18. These directed verdicts were appropriate in light of the complete lack of evidence connecting Mr. Swinson to the Burgans. Among other things, Mr. Burgan failed to submit any evidence that (1) Mr. Swinson made *any* representation to him, much less a fraudulent one, or that (2) he became obligated to pay a third party because of any act or omission by Mr. Swinson. (R. Vol. I 3385-3400.)

with the alleged partnership; that the alleged partnership had failed to perform their obligations under the agreement and had committed unlicensed contracting; and that, as a result, Mr. Burgan was damaged. (R. Vol. I 1698-1703.) With respect to Mr. Swinson, Mr. Burgan alleged that he had been registered as the qualifying agent for the alleged partnership. (R. Vol. I 1699.) Mr. Burgan did not, however, plead any partnership by estoppel or "purported partner" theory. (R. Vol. I 1698-1703.)

Mr. Burgan's pre-trial stipulation echoed this general partnership theory. (R. Vol. I 2165.) Therein, Mr. Burgan contended that "Swinson Pahlow Design Build … was a partnership or joint venture between Mr. Pahlow and Mr. Swinson." (R. Vol. I 2165.) Defendants disagreed and maintained that "Swinson Pahlow Design Build was a duly registered Florida fictitious name used by a corporation named Arc-Rite Residential Contractors, Inc. …, and that [Corporation 1] was the party who contracted with Plaintiff." (R. Vol. I 2165.)

In the pre-trial stipulation, the parties agreed on a lengthy list of issues remaining to be litigated. (R. Vol. I 2166-69.) This list included "the identity of the party with whom plaintiff contracted," whether the contract was validly assigned to Corporation 2, and whether Mr. Burgan had proved any breach of contract. (R. Vol. I 2166-67.) The list did not include any issue regarding a partnership by estoppel. (R. Vol. I 2166-69, T. 1762.)

III. Facts pertaining to Corporation 1.

Mr. Swinson was not involved with the Burgans' renovation project in any way. *See* Background, *supra* at 1-4. Nevertheless, because Mr. Burgan maintains that Mr. Swinson is liable as a "partner" with Mr. Pahlow, Mr. Swinson next explains the facts pertaining to Corporation 1, the only business relationship between Mr. Swinson and Mr. Pahlow.

Mr. Swinson, a licensed general contractor, formed Corporation 1 sometime before 2010. (T. 1073, 1079.) Mr. Swinson registered Corporation 1 to do business in Florida, and he applied to become the primary qualifying agent[2] for the corporation. (T. 1073-74.) Mr. Swinson also registered Swinson Design and Build, Inc. as the fictitious, or "doing business as," name for Corporation 1. (T. 1078.)

In 2006, Mr. Swinson's brother-in-law, Mr. Pahlow, moved his family from New Orleans to Florida following Hurricane Katrina. (T. 1414-16.) Shortly after the move, Mr. Pahlow began working for Corporation 1, and he became a fifty-percent shareholder with Mr. Swinson. (T. 1416.) At that point, Mr. Swinson and Mr.

[2] A "primary qualifying agent" is "a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, direct, manage, and control the contracting activities of the business organization with which he or she is connected." § 489.105(4), Fla. Stat. (2010).

Pahlow changed the fictitious name of Corporation 1 to "Swinson-Pahlow Design and Build Inc."[3] (T. 1080-81, R. Vol. I 3224.)

Mr. Swinson supervised Mr. Pahlow until Mr. Pahlow obtained his general contractor's license in late 2010 (T. 1416-17, 1419; R. Vol. I 3206), at which point Mr. Pahlow became a secondary qualifying agent for Corporation 1[4] (T. 1417-19). In that role, Mr. Pahlow was entitled to pull permits on his own, including the permit for the Burgan project. (T. 1418.)

In late 2010, Mr. Pahlow expressed an interest in buying Mr. Swinson out of Corporation 1. (T. 1129.) The two shareholders went back and forth on the matter for several months, and they engaged professionals to assist in the process. (T. 1120, 1129.) They signed a stock-purchase agreement in May 2011, in which Mr. Swinson sold all his shares to Mr. Pahlow and stepped down as an officer of Corporation 1. (T. 1085, 1120, 1436-37; R. Vol. I 3291-3320, 3228.) Upon the advice of counsel and an accountant, the parties back-dated the agreement to January 1, 2011. (T.

[3] Mr. Burgan makes much of the fact that the contract, in listing Corporation 1's name, did not include the "Inc." portion of its name. (*See* Initial Br. at 7-15.) This fact has no legal significance. *See* Argument I.C.iii, *infra* at 29-31.

[4] Mr. Burgan's brief wrongly asserts that Mr. Swinson "was the only qualifying agent" that Corporation 1 ever had. (Initial Br. at 1.) A "secondary qualifying agent" is a person who, among other things, "possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, manage, and control construction activities on a job for which he or she has obtained a permit." § 489.105(5), Fla. Stat. (2010).

1085-87.) Mr. Swinson understood the transaction ended his affiliation and any qualification of his license with Corporation 1.[5] (T. 1120.)

In the midst of this buy-out process, and as described above, Mr. Pahlow also (1) signed the contract with the Burgans on behalf of Corporation 1, and (2) formed Corporation 2. *See* Background, *supra* at 1-4. Mr. Pahlow shifted his license to Corporation 2 shortly thereafter because he was unsure whether he and Mr. Swinson were ever going to reach an agreement on the purchase of Corporation 1. (T. 1802-03.) After the purchase agreement for Corporation 1 was eventually finalized in May 2011, Mr. Pahlow decided to move forward with Corporation 2 as his business entity, instead of Corporation 1, because he wanted a trade name (Coastal Oaks Construction, Inc.) that reflected the area where he worked. (T. 1188.) Mr. Swinson testified that he was unaware of the Burgan project's existence, that he and Mr. Pahlow did not have any business relationship beyond their affiliation with Corporation 1, and that he had never been part of a joint venture or a general partnership with Mr. Pahlow. (T. 1101-02.)

[5] At trial, Mr. Burgan's counsel relied on a licensing portal print-out to suggest that Mr. Swinson remained affiliated with Corporation 1 even after he sold the company to Mr. Pahlow. (T. 1078, 1143-44.) The print-out states that Mr. Swinson's license status was "current, inactive" and does not indicate when the status became inactive. (R. Vol. I 3227.) Regardless, Mr. Swinson's affiliation, if any, with a corporation is not indicative of a partnership. *See* Argument I.C.i-ii, *infra* at 24-28.

IV. Facts pertaining to the directed verdicts in Mr. Swinson's favor.

The trial in this case was conducted from February 11, 2019 to February 22, 2019. At the close of Mr. Burgan's case, Mr. Swinson moved, orally and in writing, for directed verdicts in his favor on the breach of contract, fraud, and indemnity counts. (T. 1295, 1335-89; R. Vol. I 3376-3406.)

On the breach of contract claim, Mr. Swinson argued that Mr. Burgan had offered no evidence of a general partnership, or any representation by Mr. Swinson that such a partnership existed. (R. Vol. I 3379.) Rather, all the evidence established that Mr. Swinson's and Mr. Pahlow's business was organized as Corporation 1, and that Corporation 1 had contracted with Mr. Burgan to perform the project. (R. Vol. I 3379.) As such, there could be no contract between Mr. Burgan and Mr. Swinson, as an alleged partner of Mr. Pahlow. (R. Vol. I 3379.) Mr. Swinson further argued that the inclusion of "Inc." on Corporation 1's fictitious name filing (Swinson-Pahlow Design and Build Inc.) did not invalidate the contract between Mr. Burgan and Corporation 1. (R. Vol. I 3379-80.) Finally, Mr. Swinson argued that, even if Mr. Pahlow had told Mr. Burgan that Mr. Swinson was his partner (a disputed assertion), Mr. Swinson could not be personally liable for Mr. Pahlow's actions because Mr. Swinson had never held Mr. Pahlow out as his partner or agent to Mr. Burgan. (R. Vol. I 3380-82.)

After Mr. Burgan rested his case, the court heard argument on Mr. Swinson's directed-verdict motions. (T. 1295, 1355.) At the hearing, the trial court remarked:

> I have been a bit—I don't mean to use the word overwhelmed, but the lack of involvement Mr. Swinson has in any of this.… [W]hat I've been hearing, he's almost like a total nonplayer, nonexistent to all this. And this is just me. I'm not the trier of fact, but I just want to tell you, sitting there being a person just listening, it's pretty apparent how—even the word minimal might be an exaggeration of his involvement.

(T. 1336-37.) The trial court later observed that the record was "devoid about Mr. Swinson's even tangential involvement in this situation." (T. 1383.) On the partnership theory, the trial court noted:

> If it would be true that Mr. Pahlow at one point did refer to Mr. Swinson as his partner, if the jury were to believe that, Mr. Swinson never ratified that. He was not standing there at the time, and he never ratified that. That was something—and correct me if I'm wrong, that is nowhere in the record that at some point he agreed with that representation. And I kind of think it–it could be–like someone walking down the street could say, I'm a partner with Cavendish and partners, I'm a partner with Kallaher and associates or of Milam Howard. That would not mean, simply because someone said it to be, it was so.

(T. 1360.)

At the end of the hearing, the trial court granted Mr. Swinson's motion for a directed verdict on the breach of contract claim, and it took under advisement the motion for directed verdicts on the fraud and indemnity claims. (T. 1369-70, 1407-11; R. Vol. I 3439-40.)

Several days later, the trial court granted Mr. Swinson's motion for directed verdict on the fraud claim. (T. 2079, R. Vol. I 3466-67.) And, just prior to closing

arguments, the trial court granted Mr. Swinson's motion for directed verdict on the indemnity claim. (T. 2229.)

After the trial court had granted Mr. Swinson's motion for directed verdict, defense counsel raised a logistical issue with the court—how to explain to the jury that "Mr. Swinson's no longer a player." (T. 2275.) Specifically, defense counsel asked whether Mr. Swinson should remain at the trial table during closing arguments. (T. 2276.) The trial court was concerned that removing him from the trial table could confuse the jury and said, "unless there's a vehement objection, I think he should just sit there." (T. 2276-78.) The trial court also directed the parties not to talk about any claims asserted against Mr. Swinson in closing. (T. 2277.) Mr. Burgan's counsel did not object to the trial court's proposal. (T. 2276-78.) Instead, he mentioned only that he would have to discuss Mr. Swinson's status as a qualifying agent during closing arguments. (T. 2277.)

V. Facts pertaining to the jury verdict.

At the charge conference, the parties represented to the trial court that the parties had "an agreement on the verdict form." (T. 2268, 2271.) Defense counsel clarified that it maintained an objection to the verdict form related to Mr. Pahlow (that Mr. Pahlow should not appear on the verdict form as an individual on the breach of contract claim where Mr. Burgan had only pled a partnership claim), but Mr. Burgan's counsel did not indicate that he objected to the agreed-upon verdict form

in any other manner. (T. 2268-75, 2294-95.) The parties also agreed to the jury instructions, with the exception of four instructions that are not relevant to this appeal. (T. 2240, 2237-2309.)

After closing arguments, the jury convened to deliberate. (T. 2482.) The agreed-upon verdict form used by the jury provided, in relevant part:

> **I. Breach of Contract**
>
> 1. Who do you find, by the greater weight of the evidence, contracted with Mr. Burgan to perform the renovation services at issue in this case in March of 2011? (**Check one only**.)
>
> Ryan Pahlow _____
>
> or
>
> Arc-Rite Residential Contracting, Inc. d/b/a Swinson Pahlow Design Build _____
>
> Please proceed to Question No. 2.
>
> 2. Do you find that the renovation contract was assigned to Coastal Oaks?
>
> Yes _____
>
> No _____
>
> If you checked "Arc-Rite Residential Contracting, Inc. d/b/a Swinson Pahlow Design Build", **or** that the contract was assigned to Coastal Oaks, please proceed to **Section II – Negligence Claim**. If you checked "Ryan Pahlow" **and** do not find that the contract was assigned to Coastal Oaks, then proceed to Question No. 3.

(R. Vol. I 3587-88.)

The jury found that Mr. Burgan had contracted with Corporation 1 (Arc-Rite Residential Contracting, Inc. d/b/a Swinson Pahlow Design Build), and that the contract had been assigned to Corporation 2 (Coastal Oaks Construction, Inc.). (T. 2496.) The jury rendered a verdict in favor of Mr. Pahlow and Corporation 2 on Mr. Burgan's claims, and in favor of Corporation 2 on its counterclaim. (T. 2495-98.) Final judgments were entered, and this appeal followed. (R. Vol. I 3612.)[6]

SUMMARY OF ARGUMENT

Mr. Burgan's brief is devoid of any facts or law to support his arguments on appeal. He cites eight cases in his brief, six of which pertain to the standard of review. He leaves out record cites. He argues unpreserved points. He relies on evidence that was excluded by the trial court. He misstates the standard of review. He argues red herrings. And, above all, he cannot show that the trial court's entry of a directed verdict in Mr. Swinson's favor constituted reversible error.

Mr. Burgan's first issue on appeal is meaningless. Mr. Burgan's breach of contract claim against Mr. Swinson is premised on a partnership theory of liability. He complains on appeal that the trial court's entry of a directed verdict on the breach of contract claim "improperly ended" this partnership-based claim. But Mr. Burgan

[6] Mr. Burgan filed two appeals: (1) Case No. 1D19-1182, which appealed the final judgment entered in favor of Mr. Swinson, and (2) Case No. 1D19-1577, which appealed the final judgment entered in favor of Coastal Oaks Construction, Inc. and Mr. Pahlow. This Court granted Mr. Burgan's motion to consolidate the appeals for all purposes.

fails to challenge the jury's ultimate findings on this issue: that Mr. Burgan contracted with Corporation 1, and not Mr. Swinson's alleged partner, and that the contract was assigned to Corporation 2. In light of the jury's unchallenged findings that Mr. Burgan contracted with these non-party corporations, the existence or non-existence of any alleged partnership between Mr. Swinson and Mr. Pahlow is irrelevant.

Setting these unchallenged findings aside, Mr. Burgan's arguments are both unpreserved and meritless. Mr. Burgan has abandoned the general-partnership theory pled before the trial court and now has shifted to an unpreserved partnership-by-estoppel theory on appeal. Mr. Burgan offered no evidence at trial that either type of partnership was formed between Mr. Swinson and Mr. Pahlow. Rather, the evidence presented at trial established that their business was organized as Corporation 1 and that Mr. Swinson neither purported to be a partner nor consented to being represented as such. And, although Mr. Burgan places great weight on the exclusion of "Inc." from Corporation 1's fictitious name on the Burgans' contract (a designation not required by Florida law), Florida law is clear that any non-compliance with the fictitious name act will not impair the validity of a contract. No proper view of the evidence could have sustained a verdict in Mr. Burgan's favor on his breach of contract claim against Mr. Swinson.

Mr. Burgan's third issue on appeal is likewise unpreserved and meritless. Mr. Burgan complains that the verdict form and jury instructions did not use "correct names," and that Mr. Swinson "remained at the jury table." Mr. Burgan failed to make these objections to the trial court. Regardless, the verdict form and jury instructions did use the "correct names," including the name of the alleged partnership sued by Mr. Burgan for breach of contract. And, although Mr. Burgan boldly asserts that the trial court should have provided the jury with an "avenue" to make adverse findings against the "real parties in interest"—Corporation 1 and Corporation 2—he fails to acknowledge the glaring and dipositive fact that <u>he did not sue Corporation 1 or Corporation 2 for breach of contract.</u> Finally, Mr. Burgan invited the trial court's decision to keep Mr. Swinson at the defense table during closing arguments, and he has failed to identify any prejudice to him in doing so. This Court should affirm the final judgment in Mr. Swinson's favor.

Mr. Swinson adopts by reference the arguments of Mr. Pahlow and Coastal Oaks Construction, Inc. on Mr. Burgan's second, fourth, and fifth issues on appeal.

ARGUMENT

Preservation and abandonment[7]

Before discussing the merits, Mr. Swinson notes that most of Mr. Burgan's arguments were not preserved, and that his failure to raise certain arguments on appeal means the final judgment in favor of Mr. Swinson must be affirmed.

As the appellant, Mr. Burgan bears the burden of demonstrating reversible error. *E.g., Snowden v. Wells Fargo Bank*, 172 So. 3d 506, 507 (Fla. 1st DCA 2015). To preserve an issue for appellate review, "'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.'" *E.g., Quinnell v. Platt*, 23 So. 3d 746, 747 (Fla. 1st DCA 2009) (quoting *Tillman v. State*, 471 So.2d 32, 35 (Fla.1985)). In addition, an issue may be waived if it is not addressed in a pretrial stipulation that has limited the issues to be tried. *See Esch v. Forster,* 168 So. 229, 231 (Fla. 1936); *Broche v. Cohn,* 987 So.2d 124, 127 (Fla. 4th DCA 2008).

If the trial court extends counsel "an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal." *E.g., Sullivan v. State*, 303 So. 2d 632, 635 (Fla. 1974); *accord Tonnelier Const. Group, Inc. v. Shema*, 48 So. 3d 163, 165 (Fla. 1st DCA 2010).

[7] This preservation and abandonment section of Mr. Swinson's brief is identical to the preservation and abandonment section of the brief filed by Mr. Pahlow and Coastal Oaks Construction, Inc.

Likewise, if counsel reviews the jury instructions and the verdict form before they are presented to the jury, and tells the trial judge that they are acceptable, the party cannot later complain about the instructions or verdict form on appeal. *Millsaps v. Kaltenbach*, 152 So. 3d 803, 805 (Fla. 4th DCA 2014).

To obtain appellate review of a preserved issue, "alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal." *E.g., Fla. Emergency Physicians-Kang & Associates, M.D., P.A. v. Parker*, 800 So. 2d 631, 636 (Fla. 5th DCA 2001). "When an appellant fails to challenge properly on appeal one of the grounds on which the [trial] court based its judgment, [she] is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *E.g., Transp. Eng'g, Inc. v. Cruz*, 152 So. 3d 37, 47 (Fla. 5th DCA 2014) (internal quotes omitted). Moreover, "an argument not raised in an initial brief is waived and may not be raised for the first time in a reply brief." *E.g., Tillery v. Fla. Dept. of Juvenile Justice*, 104 So. 3d 1253, 1255-56 (Fla. 1st DCA 2013).

In the ensuing argument, Mr. Swinson will refer to these preservation and abandonment principles to note specifically Mr. Burgan's arguments not preserved for appellate review or why the judgment must be affirmed because of Mr. Burgan's failure to challenge a basis for the final judgment in Mr. Swinson's favor.

I. Issue A (restated): Whether this Court should affirm the trial court's grant of a directed verdict in Mr. Swinson's favor on the breach of contract claim.

In his first issue, Mr. Burgan appears to seek a reversal of the trial court's entry of a directed verdict on the breach of contract claim. (*See generally* Initial Br.) This Court should not grant Mr. Burgan's requested relief for multiple, independent reasons. First, Mr. Burgan's arguments regarding the alleged partnership are meaningless because he has failed to challenge the jury's findings that he contracted with Corporation 1, and that his contract was assigned to Corporation 2, both non-parties to the breach of contract claim. *See* Argument I.A*, infra* at 20-22. Second, Mr. Burgan's arguments regarding the alleged partnership are both abandoned and unpreserved. *See* Argument I.B*, infra* at 22-24. Third, Mr. Burgan's arguments fail on the merits because he presented no evidence to the jury regarding a partnership between Mr. Swinson and Mr. Pahlow, and because his fictitious-name argument is a red herring. *See* Argument I.C.i-iii*, infra* at 24-31. Thus, based on any one of these three reasons (standing alone or together), this Court should affirm the trial court's entry of the directed verdict in Mr. Swinson's favor on the breach of contract claim.

Standard of review.

Mr. Swinson agrees with Mr. Burgan that the standard of review on a directed verdict is *de novo.* (Initial Br. at 7.) However, even where the standard of review is

de novo, a "trial court's final judgment 'has the presumption of correctness and the burden is on the appellant to demonstrate error.'" *Snowden*, 172 So. 3d at 507.

Merits.

A. Mr. Burgan's arguments on the alleged partnership are of no consequence because, even if they are correct, he has failed to challenge the jury's findings that he contracted with Corporation 1 and that the contract was assigned to Corporation 2.

Mr. Burgan's first issue on appeal suffers from a fundamental defect. Although Mr. Burgan appears to challenge the trial court's directed verdict in favor of Mr. Swinson on the breach of contract claim, he fails to challenge, at all, the jury's factual finding that Mr. Burgan contracted with Corporation 1, a non-party to this case. (*See generally* Initial Br.) Mr. Burgan also fails to challenge, at all, the jury's finding that the contract was assigned to Corporation 2, a non-party to the breach of contract claim. (*See generally* Initial Br.) Because Mr. Burgan has not challenged these jury findings on appeal, he has waived any arguments that the jury was wrong. *See* Preservation and abandonment, *supra* at 17-18. The jury's unchallenged findings on the breach of contract claim render Mr. Burgan's arguments regarding the alleged partnership meaningless, and any alleged error harmless.

To prove his breach of contract claim against Mr. Swinson, Mr. Burgan was required to show, among other things, the existence of a contract between Mr. Burgan and Mr. Swinson. *See A.R. Holland, Inc. v. Wendco Corp.*, 884 So. 2d 1006, 1008 (Fla. 1st DCA 2004) (plaintiff bears burden of proving "(1) a contract existed,

(2) the contract was breached, and (3) damages flowed from that breach."). Of course, Mr. Burgan does not, and cannot, argue that any contract existed between himself and Mr. Swinson, as an individual. (T. 60, 612, 1989; R. Vol. I 2313). Rather, Mr. Burgan's theory of recovery against Mr. Swinson rests on his assertion that Mr. Swinson was a party to the contract by virtue of his alleged partnership with Mr. Pahlow, such that Mr. Swinson would be liable for Mr. Pahlow's actions as a general partner. *See* Facts pertaining to the breach of contract count, *supra* at 4-6. The trial court correctly rejected this unfounded and unsupported theory. *See* Argument I.C, *infra* at 24-25.

Regardless, even assuming *arguendo* the trial court was wrong (it was not), any error was of no consequence because the jury found that Mr. Burgan contracted with Corporation 1, a non-party to the case, and that the contract was assigned to Corporation 2, a non-party to the breach of contract claim. (R. Vol. I 3587-88.) The jury could have, but did not, find that Mr. Burgan contracted with Mr. Pahlow, Mr. Swinson's alleged partner. (R. Vol. I 3587.) Had the jury made this finding, then Mr. Swinson's alleged status as a partner to Mr. Pahlow might have mattered.[8] *See* § 620.8308, Fla. Stat. (2010) (circumscribing liability of a purported partner). But the jury did not make this finding, and Mr. Burgan has not challenged its contrary

[8] Mr. Swinson maintains that it would not have mattered for him because Mr. Burgan presented zero evidence that he "consent[ed] to being represented by another as a partner," such that he could be held liable as a purported partner to Mr. Pahlow. *See* § 620.8308(1),(5), Fla. Stat. (2010); Argument I.C.ii, *supra* at 25-28.

findings. Under these circumstances, there is no reasonable possibility that the trial court's ruling on Mr. Swinson's directed verdict could have contributed to the jury's verdict, and the alleged errors argued by Mr. Burgan are harmless. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256–57 (Fla. 2014) (establishing harmless error analysis in civil cases).

B. Mr. Burgan's arguments regarding the alleged partnership are abandoned and unpreserved.

In light of the unchallenged jury findings, this Court need not consider Mr. Burgan's first issue on appeal. However, in the event this Court disagrees, there are two additional reasons why it need not reach the merits of the first issue: (1) Mr. Burgan has abandoned any argument that a general partnership was formed between Mr. Burgan and Mr. Swinson, and (2) Mr. Burgan has waived any issue of partnership by estoppel.

Mr. Burgan's breach of contract claim was premised on a general-partnership theory. *See* Facts Pertaining to the breach of contract count, *supra* at 4-6. Mr. Burgan has not pursued this theory on appeal or otherwise met his burden of showing reversible error. *See* Preservation and abandonment, *supra* at 17-18. Nowhere in Mr. Burgan's brief does he lay out the requirements for a general partnership under Florida law, and nowhere in Mr. Burgan's brief does he explain how the evidence submitted to the jury could have satisfied these requirements. (*See generally* Initial Br.) Mr. Burgan has thus abandoned any argument that Mr. Swinson and Mr. Pahlow

formed a general partnership under Florida law, such that Mr. Swinson could be liable for a breach of contract with the partnership. *See* Preservation and abandonment*, supra* at 17-18.

Moreover, although Mr. Burgan appears to argue on appeal that Mr. Swinson and Mr. Pahlow created a "partnership by conduct," this issue has been waived by failure to plead it or include it in the pretrial stipulation. (*See* Initial Br. at 9-11 (arguing that "Fla. Stat. § 620.8308 allows the creation of a partnership by conduct".).) A "partnership by conduct" or "purported partner" are descriptive terms for a "partnership by estoppel," which has been codified at section 620.8308, Florida Statutes (2010). *See* § 4:5.Partnerships, 6 Fla. Prac., Personal Injury & Wrongful Death Actions § 4:5 (2019-2020 ed.) (explaining that section 620.8308 "allows the doctrine of estoppel in essence to make the wrongdoer a partner in the partnership"). In this case, however, Mr. Burgan did not plead a partnership by estoppel, or delineate it in the pretrial stipulation as an issue to be tried. (R. Vol. I 1697-1712, 2165.) Nor did Mr. Swinson agree to try the issue by consent. (T. 1339 ("[W]e're not agreeing to try partnership by estoppel."); T. 1353-54 (same); 1359; 1762-63; R. Vol. I 3381 n.2.).) As such, any partnership-by-estoppel argument is unpreserved for appellate review. *See* Preservation and abandonment, *supra* at 17-18.

Regardless, even if it had been preserved, Mr. Burgan's argument on the issue is inadequate to meet his burden of showing reversible error. *See* Preservation and

abandonment, *supra* at 17-18. He provides only a cursory cite to statute, with no explanation of what the statute requires, or how his evidence satisfied the statute. (*See* Initial Br. at 9-11.) Mr. Burgan fails to articulate any factual or legal basis on which this Court could conclude the directed verdict was error.

C. Mr. Burgan failed to present any evidence to establish a partnership between Mr. Swinson and Mr. Pahlow.

This Court should not reach the merits of Mr. Burgan's first issue for the reasons explained above. If it does, however, Mr. Burgan's arguments also fail on the merits. Mr. Burgan failed to present any evidence at trial to establish a general partnership or a partnership by estoppel, *see* Subpart i and ii, *infra* at 24-28, and the fictitious-name argument is a red herring, *see* Subpart iii, *infra* at 29-31.

i. Mr. Burgan offered no evidence of a general partnership.

The law in Florida relating to partnerships has been codified in Chapter 620, Florida Statutes, which includes the Revised Uniform Partnership Act. *See* §§ 620.8101 to 620.9902, Fla. Stat. (2010). Under this statute and case law, a partnership "results from either an express or implied agreement to share profits and carry on the business as co-owners." *Rafael J. Roca, P.A. v. Lytal & Reiter, Clark, Roca, Fountain & Williams*, 856 So. 2d 1, 5 (Fla. 4th DCA 2003); *accord Fla. Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536, 539 (Fla. 1974); § 620.8101 (7), (8), Fla. Stat. (2010). A business is not a partnership under the Revised Uniform

Partnership Act if it is "formed under a statute, other than this act, a predecessor statute, or a comparable law of another jurisdiction." § 620.8202, Fla. Stat. (2010).

A corporation is formed under the Florida Business Corporation Act, Chapter 607, Florida Statutes, and is therefore not a partnership. *See* § 620.8202, Fla. Stat*.;* *cf. Fla. Tomato*, 296 So. 2d at 539 (defining a joint venture, which is similar to a partnership, as a "special combination of two or more persons, who, in some specific venture, seek a profit jointly without the existence between them of any actual partnership, corporation, or other business entity") (emphasis added). The evidence at trial established that Mr. Swinson's and Mr. Pahlow's business was organized as Corporation 1, not a partnership. *See* Facts pertaining to Corporation 1, *supra* at 7-9. The jury concluded it was this corporation, not Mr. Swinson's alleged partner, that contracted with Mr. Burgan. (R. Vol. I 3587.) To the extent Mr. Burgan has not abandoned his general-partnership argument on appeal, he has failed to point to any evidence presented to the jury establishing that Mr. Swinson and Mr. Pahlow had either an express or implied agreement to share profits and carry on the business as co-owners in any business other than Corporation 1. (*See* Initial Br. at 1- 16.)

ii. Mr. Burgan offered no evidence of a partnership by estoppel.

Nor has Mr. Burgan pointed to any evidence that could support a jury finding of a partnership by estoppel, or "purported partner," under section 620.8308, Florida Statutes. That statute provides, in relevant part:

> (1) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as partner, in a partnership or with one or more persons who are not partners, the purported partner is liable to a person to whom the representation is made if such person, relying on the representation, enters into a transaction with the actual or purported partnership.
>
> (2) If a person is thus represented to be a partner in an existing partnership, or with one or more persons who are not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all the partners of the existing partnership consent to the representation, the person acting and partners consenting to the representation are jointly and severally liable.
> …
>
> (5) Except as otherwise provided in subsections (1) and (2), persons who are not partners as to each other are not liable as partners to other persons.

§ 620.8308, Fla. Stat. (2010).

By the plain language of section 620.8308, Florida Statutes, a person may be liable as a purported partner if that person "purports to be a partner," or "consents to being represented by another as a partner," and only then if the person to whom the representation is made can show detrimental reliance. § 620.8308(1), Fla. Stat. (2010). In that same vein, "[a]n extrajudicial admission of partnership can be received into evidence only to affect the person making it, unless it can be shown

that the partner consented to or adopted the admission or otherwise ratified it." *Greenfield v. Cohen*, 432 So. 2d 574, 575 (Fla. 3d DCA 1983).[9]

Mr. Burgan presented no evidence to the jury that Mr. Swinson had "purport[ed] to be a partner" or that he "consent[ed] to being represented by another as a partner." § 620.8308(1), Fla. Stat. (2010). Mr. Burgan likewise presented no evidence to the jury that he entered into the contract in reliance on such a representation. Rather, the evidence presented at trial was clear and undisputed: Mr. Swinson never met with or communicated with the Burgans in any context prior to this lawsuit being filed. (T. 60, 612,1092, 1126-27, 1989.)

As he must, Mr. Burgan points to Mr. Pahlow's words or conduct, not Mr. Swinson's words or conduct, to argue that a partnership existed. (*See* Initial Br. at 9-11 (arguing that Mr. Pahlow told Mr. Burgan that Mr. Swinson was his partner; Mr. Pahlow applied for the building permit; Mr. Pahlow switched his contractor's license; and Mr. Pahlow sent a letter).) But, under the plain language of the statute,

[9] Although *Greenfield* predated Florida's adoption of the Revised Uniform Partnership Act, the court there was applying the former partnership by estoppel statute, which is substantively similar to § 620.8308(1), Florida Statutes. *See Greenfield*, 432 So. 2d at 574-75 (applying § 620.635, Florida Statutes); *see also* § 620.635, Fla. Stat. (1979) ("When a person represents himself, or consents to another representing him, to anyone as a partner in an existing partnership or with one or more persons not actual partners by words spoken or written or by conduct, he is liable to any person to whom the representation has been made who has given credit on the faith of the representation…).

Mr. Pahlow's words or conduct could only affect Mr. Pahlow, not Mr. Swinson. *See* § 620.8308(1), Fla. Stat.; *accord Greenfield*, 432 So. 2d at 575.

The only "evidence" identified in Mr. Burgan's brief even tangentially related to Mr. Swinson—an unrelated building permit signed by Mr. Swinson, and Mr. Swinson's status as a qualifying agent for Corporation 1—is not indicative of any partnership. (Initial Br. at 9-10.) Mr. Burgan fails to inform this Court that the unrelated building permit was excluded at trial on relevancy grounds.[10] (Initial Br. at 9; T. 1054-56, 1058-62.) Even if the permit had not been excluded, the fact that Mr. Swinson may have signed a building permit for an unrelated construction project performed by Corporation 1 has no bearing on his status as an alleged partner for the Burgan project. A corporation's employee or officer may sign a building permit for a corporation, and such a signature would not transform the employee or officer into a "partner" who could be sued for the corporation's actions. Likewise, the fact that Mr. Swinson was a qualifying agent for a corporation is evidence that Mr. Swinson and Mr. Pahlow had formed a corporation, not a partnership. No proper view of the evidence could have sustained a verdict in Mr. Burgan's favor on his partnership-based breach of contract claim against Mr. Swinson.

[10] To the extent Mr. Burgan has any complaints about the trial court's discovery or evidentiary rulings, he has not argued them in his initial brief, and he may not raise them for the first time in his reply brief. *See* Preservation and abandonment, *supra* at 17-18.

iii. A failure to comply with the fictitious name statute does not impair the validity of a contract.

Finally, Mr. Burgan's fictitious-name argument is a red herring. (Initial Br. at 7-9.) Mr. Burgan cites no law to support his argument. (Initial Br. at 7-9.) There is none. Florida law is clear that a failure to comply with the fictitious name statute does not impair the validity of a contract.

"A fictitious name has no independent legal existence;" it is a "fiction involving the name of the real party in interest, and nothing more." *Worm World, Inc. v. Ironwood Productions, Inc.*, 917 So. 2d 274, 275 (Fla. 1st DCA 2005). A fictitious name must be registered with the state, but it "is not required to contain the designation of the type of legal entity in which the person or business is organized, including the terms 'corporation,' … or any abbreviation or derivative thereof." § 865.09(3),(15), Fla. Stat. (2010). The failure to comply with the fictitious name act "does not impair the validity of any contract" entered into by the party conducting business under an unregistered fictitious name. *See* § 865.09(9)(b), Fla. Stat. (2010); *accord Worm World,* 917 So. 2d at 275.

Mr. Burgan cites *Worm World* to argue that "the real party in interest" – Corporation 1 and Corporation 2 – should have been liable for any breach of the contract. (Initial Br. at 14.) But here, unlike in *Worm World*, Mr. Burgan has failed to sue one of the "real parties in interest" for breach of contract. (R. Vol. I 1697-1712.) In this case, the real parties in interest are not Mr. Swinson, but rather

Corporation 2 (which was sued but not for breach of contracts) and Corporation 1 (which was not sued at all).

Corporation 1 registered the fictitious name "Swinson-Pahlow Design and Build Inc.", but used the fictitious name "Swinson Pahlow Design and Build" on the contract. (R. Vol. I 25, 2313, 3224.) This is a distinction without a difference. A corporation is not required to include any designation of its corporate status on a fictitious name filing. § 865.09(15), Fla. Stat. (2010). Regardless, even if this designation was required, Florida law is clear that non-compliance with the fictitious name statute does not impair the validity of a contract. § 865.09(15), Fla. Stat. (2010) (emphasis added); *Worm World*, 917 So. 2d at 275; *see also Avant Capital, LLC v. Gomez*, 254 So. 3d 1042 (Fla. 4th DCA 2018) ("'[S]light departures from the name used by the corporation, such as the omission of a part of its name or the inclusion of additional words, generally will not affect the validity of contracts or other business transaction so long as the identity of the corporation can be reasonably established by the evidence.'" Thus, the distinction between Corporation 1's fictitious name registration, and Corporation 1's fictitious name on the contract, has no legal significance for Mr. Burgan's breach of contract claim.

Mr. Burgan's fictitious-name argument boils down to this: Corporation 1 allegedly converted itself into a partnership by contracting under the name Swinson Pahlow Design and Build instead of Swinson-Pahlow Design and Build Inc., such

that its shareholders should be held individually liable for any breach of the contract. This argument is not tenable under Florida law. No evidence exists of any partnership between Mr. Swinson and Mr. Pahlow, and thus there was no evidence a jury could reasonably rely upon to find the existence of any contract between Mr. Burgan and Mr. Swinson.

II. Issue B (restated): Whether the trial court abused its discretion by relying on the agreed-upon verdict form.

Mr. Swinson adopts by reference the arguments of Appellees, Mr. Pahlow and Coastal Oaks Construction, Inc., in response to Mr. Burgan's second issue on appeal. (Pahlow & Coastal Appellees' Br. 10-13); s*ee Fitts v. State*, 649 So. 2d 300, 301 n. 1 (Fla. 2d DCA 1995) (noting that appellant had adopted his co-defendant's brief).

Mr. Swinson also responds briefly to the issue.

As explained previously, Mr. Burgan has not challenged the jury's findings that he contracted with Corporation 1, or that the contract was assigned to Corporation 2. *See* Argument I.A, *supra* at 20-22. Indeed, in the second issue of his brief, he accepts these findings, and admits that Corporation 1 and Corporation 2 were the real parties in interest. (Initial Br. at 14.) Mr. Burgan nevertheless complains that there should have been a "box on the verdict form the jury could have checked that would have allowed a finding on breach of contract" against Corporation 1 and 2. (Initial Br. at 14.) This objection is both unpreserved and irrational.

First, Mr. Burgan agreed to the verdict form presented to the jury. (T. 2268, 2271; Facts pertaining to the jury verdict, *supra* at 12-14.) Nowhere in his brief does Mr. Burgan identify where he objected to the verdict form, on this basis, in the record. (*See generally* Initial Br.) Mr. Burgan has not preserved this argument for appeal. *See* Preservation and abandonment, *supra* at 17-18.

Second, and critically, Mr. Burgan did not sue Corporation 1 at all or Corporation 2 for breach of contract. (R. Vol. I 1697-1712.) Instead, Mr. Burgan chose to sue Mr. Swinson, Mr. Pahlow[11], and the alleged partnership under a partnership theory. (R. Vol. I 1697-1712.) Thus, once the jury determined that Mr. Burgan had contracted with non-party Corporation 1, and that the contract had been assigned to Corporation 2 (which was not named in the contract count), there was nothing left for the jury to decide for this claim. (R. Vol. I 3588.) Mr. Burgan cannot complain that the jury was precluded from finding a breach of contract against two parties that he had not sued for breach of contract. *See Alger v. Peters*, 88 So.2d 903, 906 (Fla.1956) (*en banc*) ("[T]he rights of an individual cannot be adjudicated in a

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[11] Mr. Burgan makes an oblique reference to the fact that Mr. Pahlow appeared on the verdict form even though Mr. Burgan did not try to prove he contracted with Mr. Pahlow individually. (Initial Br. at 13.) However, only defense counsel, not Mr. Burgan's counsel, objected to Mr. Pahlow's appearance on the verdict form on the breach of contract claim. *See* Facts pertaining to the jury verdict, *supra* at 12-13. A party cannot rely on a co-party's objection, much less an opposing party's objection, to preserve an issue for appeal. *E.g., Eagleman v. Korzeniowski*, 924 So. 2d 855, 859 (Fla. 4th DCA 2006) ("For an issue to be preserved by a defendant in a case involving co-defendants, that defendant must object or that defendant must join in the objection of the other defendant.")

judicial proceeding to which he has not been made a party and from which he has literally been excluded by the failure of the moving party to bring him properly into court."); *Norville v. Bellsouth Advert. & Pub. Corp.*, 664 So. 2d 16, 17 (Fla. 3d DCA 1995) (same); *see also Michael H. Bloom, P.A. v. Dorta-Duque*, 743 So. 2d 1202, 1203 (Fla 3d DCA 1999) ("[A] defendant cannot be found liable under a theory that was not specifically pled."). Mr. Burgan's inability to recover against Corporation 1 or Corporation 2 on his breach of contract claim is a result of his counsel's trial strategy, not a result of any judicial abuse of discretion.

III. Issue C (restated): Whether the verdict form and jury instruction used "correct names."

Standard of Review

The standard of review on the third issue on appeal is not *de novo*, as argued by Mr. Burgan (Initial Br. at 15). Insofar as Mr. Burgan is challenging the jury instructions, the standard of review is for an abuse of discretion, and reversible error occurs only "if the jury was misled by the failure to give the requested instruction." *Howell v. Winkle*, 866 So. 2d 192, 197 (Fla. 1st DCA 2004) (emphasis added). Insofar as Mr. Burgan is challenging the verdict form, the standard of review is also for an abuse of discretion. *Walsh v. Diaz,* 409 So.2d 1186 (Fla. 4th DCA 1982).

Merits

Mr. Burgan again complains that the jury "never had any avenue" to make findings against Corporation 1. (Initial Br. at 15.) Mr. Burgan also complains that

the trial court "used the name Swinson Pahlow Design Build throughout the jury instructions and verdict form;" that Mr. Swinson "remained at the party table throughout the trial;" and that the "jury was never informed" that Mr. Swinson "had already been discharged as a potentially liable party." (Initial Br. at 15.)

Mr. Burgan devotes only two paragraphs to his third issue on appeal. (Initial Br. at 15.) He cites neither facts nor law. (Initial Br. at 15-16.) Mr. Burgan has not met his burden to show any reversible error. *See* Preservation and abandonment, *supra* at 17-18.

There was no error. As explained above, the jury did not have an "avenue" to make findings against Corporation 1 because Mr. Burgan chose not to sue Corporation 1. *See* Argument II, *supra* at 31-33. Likewise, the jury instructions and verdict form referred to "Swinson Pahlow Design Build" because Mr. Burgan had sued "Swinson Pahlow Design Build" under a general partnership theory. (R. Vol. I 1697-98; 2165; 3521-88.) And, finally, Mr. Burgan has not identified any authority that would have required the trial court to remove Mr. Swinson from the party table during closing arguments, or instruct the jury on its directed verdict rulings. (Initial Br. at 15-16.)

Even assuming there was any error (there was not), Mr. Burgan invited it. During the charge conference, defense counsel raised the issue of how to "explain[] to the jury that Mr. Swinson's no longer a player." (T. 2275; *see also* Facts Pertaining

to the directed verdicts in Mr. Swinson's favor, *supra* at 10-12.) The trial court expressed its concern that doing so might "ring a bell" for the jury, and then discussed whether Mr. Swinson should be excused from the trial table. (T. 2275-78.) After a back-and-forth with the parties, the trial court said "unless there's a vehement objection, I think he should just sit there." (T. 2278.)

Mr. Burgan's counsel never objected, even after the trial court gave him an explicit opportunity to do so. (T. 2275-78.) Mr. Burgan cannot now complain about this issue for the first time on appeal. *See* Preservation and abandonment, *supra* at 17-18. Moreover, Mr. Burgan's assertion that Mr. Swinson remained at the trial table "throughout trial," even after the directed verdicts were entered in his favor, is misleading. (Initial Br. at 15.) The trial court did not grant the directed verdict on the indemnity claim against Mr. Swinson until the second-to-last day of trial, just prior to closing arguments. *See* Facts pertaining to the directed verdicts in Mr. Swinson's favor, *supra* at 10-12. Therefore, the only time Mr. Swinson remained at the trial table, after he was no longer a party, was on the last day of trial when only closing arguments remained.

Likewise, with respect to the jury instructions, Mr. Burgan's counsel agreed to them, with the exception of four instructions that he has not addressed on appeal. (T. 2237-2309.) Mr. Burgan's counsel also agreed to the verdict form. (T. 2271, 2290; *see* Facts pertaining to the jury verdict; *supra* at 12-14.) Mr. Burgan never

argued to the trial court that the jury instructions and verdict form should have used different names for the parties or included non-parties, and he never asked the trial court to instruct the jury that Mr. Swinson had been discharged as a potentially liable party. Thus, yet again, Mr. Burgan cannot now complain about the jury instructions and verdict form for the first time on appeal. *See* Preservation and abandonment, *supra* at 17-18.

Finally, even assuming Mr. Burgan had identified an error, and even assuming his arguments had been preserved, "there is no reasonable possibility that the error contributed to the verdict." *Special*, 160 So. 3d at 1256–57. As explained in Argument I.C, *supra* at 24-31, Mr. Burgan presented no evidence to establish a partnership between Mr. Swinson and Mr. Pahlow. Thus, even if the verdict form has provided an "avenue" to make findings adverse to "Swinson Pahlow Design Build" on the breach of contract claim, no proper view of the evidence could have supported such a finding. And, of course, if the verdict form had provided an "avenue" to enter a verdict against Corporation 1, a non-party to the lawsuit, it could have resulted in a fundamental error. *See Yau v. IWDWarriors, Corp.*, 144 So. 3d 557, 560 (Fla. 1st DCA 2014) (observing that "judgments entered without notice that deny due process" constitute fundamental error). Simply put, the "errors" advanced by Mr. Burgan could not have affected the jury's ultimate (and

unchallenged) findings on the breach of contract claim: that Mr. Burgan contracted with Corporation 1, and that the contract was assigned to Corporation 2.

IV. Issue D (restated): Whether the trial court erred by submitting Corporation 2's counterclaim to the jury.

V. Issue E (restated): Whether the trial court abused its discretion by admitting the video of the Burgans' home into evidence without objection.

Mr. Swinson adopts by reference the arguments of Appellees, Mr. Pahlow and Coastal Oaks Construction, Inc., in response to Mr. Burgan's fourth and fifth issues on appeal. (Pahlow & Coastal Appellees' Br. 14-24); s*ee Fitts*, 649 So. 2d at 301 n. 1.

CONCLUSION

This Court should affirm the final judgment in Mr. Swinson's favor.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on January 30, 2020, and an electronic copy has been furnished to the following counsel of record:

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