

**IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA**

TZADIK ACQUISITIONS, LLC, a)
Delaware limited liability company d/b/a)
KINGS TRAIL APARTMENTS, and)
TZADIK MANAGEMENT GROUP 2,)
LLC, a Florida limited liability company,)

Plaintiffs,)

v.)

BROWN & BROWN OF FLORIDA,)
INC. a Florida Profit Corporation, IAN)
SHINNICK, and ARA DRESNER,)

Defendants.)

CASE NO. 2022-002040-CA-01

**DEFENDANTS’ ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFFS’ FOURTH AMENDED COMPLAINT**

Brown & Brown of Florida, Inc. (“Brown & Brown”), Ian Shinnick (“Shinnick”), and Ara Dresner (“Dresner”) (collectively referred to as “Defendants”), hereby file this their Answer and Affirmative Defenses to Tzadik Acquisitions, LLC, d/b/a Kings Trail Apartments, and Tzadik Management Group 2, LLC (collectively referred to as “Plaintiffs”) Fourth Amended Complaint for Damages (the “Complaint”), and state as follows:¹

PARTIES

1. Without knowledge, therefore denied.
2. Without knowledge, therefore denied.
3. The statement made in Complaint ¶ 3 does not call for a response. To the extent a response is required, admitted that Tzadik Acquisitions, LLC and Tzadik Management Group 2,

¹ Defendants intend to appeal this Court’s Order Denying Defendants’ Motion to Transfer Venue and this Answer and Affirmative Defenses is filed without prejudice to that appeal.

LLC are collectively referred to as “Tzadik Enterprise” in the Complaint, denied that said arbitrary designation creates one entity for any legal or factual purpose.

4. Admitted.

5. Admitted.

6. Admitted that Defendant, Ara Dresner, is an individual and a resident of Volusia County, Florida and that at all times material to this action was employed with Brown & Brown.

In all other respects, denied.

JURISDICTION AND VENUE

7. Admitted for jurisdictional purposes only, denied that said court is the proper venue for this matter.

8. Denied.

NATURE OF THE ACTION

9. Admitted that the Complaint purports to be an action seeking damages in excess of \$30,000.00, in all other respects denied.

10. Admitted that the court record of said case speaks for itself. In all other respects without knowledge, therefore denied.

11. Denied.

12. Without knowledge, therefore denied.

13. Without knowledge, therefore denied.

14. Without knowledge, therefore denied.

GENERAL ALLEGATIONS

15. Without knowledge, therefore denied.

16. Admitted that said policy speaks for itself.

17. Admitted that a United Policy is attached as Exhibit A and that it speaks for itself,

in all other respects, denied.

18. Admitted that the AIG Policy is a commercial excess coverage policy and that it speaks for itself, in all other respects, denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied. To the extent Plaintiffs reference a document, that document speaks for itself, and any attempt to characterize it or selectively quote portions of it out of context is denied.

In all other respects, denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

35. Without knowledge, therefore denied.

36. This allegation does not provide sufficient specific facts that would allow Defendants to fashion a reasonable response, hence Defendants are without knowledge and must

deny this allegation.

37. Denied.

38. Denied.

39. Admitted that Exhibit B is a Brown & Brown insurance proposal, which speaks for itself, denied in all other respects.

40. Admitted that Exhibit C is a Brown & Brown Summary of Bound, which speaks for itself, in all other respects, denied.

41. To the extent Plaintiffs reference a document, that document speaks for itself, and any attempt to characterize it or selectively quote portions of it out of context is denied. In all other respects, denied.

42. Denied.

43. Denied.

44. Admitted that Exhibit D is a Declination of Coverage Letter, which speaks for itself. The remaining allegations reference a document that speaks for itself, and any attempt to characterize it or selectively quote portions of it out of context is denied. In all other respects, denied.

45. Admitted that Exhibit E is a Complaint, which speaks for itself, without knowledge as to the remaining allegations and therefore denied.

46. The Complaint attached as Exhibit E speaks for itself, and any attempt to characterize it or selectively quote portions of it out of context is denied. In all other respects, denied.

47. Without knowledge, therefore denied.

48. Without knowledge, therefore denied.

49. To the extent Plaintiffs reference a document, that document speaks for itself, and

any attempt to characterize it or selectively quote portions of it out of context is denied.

50. Admitted that Shinnick and Dresner were employees of Brown and Brown, in all other respects, denied.

51. Denied.

52. Admitted that Exhibit F is an email from Dresner, which speaks for itself, in all other respects denied.

53. Denied that Exhibit G is a complete copy of the email and attachments, in all other respects, denied.

RESPONSES TO PLAINTIFFS' CAUSES OF ACTION²

RESPONSE TO COUNT I – BREACH OF FIDUCIARY DUTIES (TZA against Brown & Brown)

54. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied. The allegations contained in subparagraphs (a) through (d) are also denied.

61. Without knowledge, therefore denied.

62. Denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count I's ad damnum

² Defendants utilize the section headings included in Plaintiffs' Complaint for the Court's ease of reading only. Defendants deny any and all allegations contained in the section headings.

clause.

RESPONSE TO COUNT II – BREACH OF FIDUCIARY DUTIES
(TZA against Ian Shinnick)

63. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Without knowledge, therefore denied.

71. Denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count II's ad damnum clause.

RESPONSE TO COUNT III – NEGLIGENCE
(TZA against Ara Dresner)

72. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. Denied. The allegations contained in subparagraphs (a) through (b) are also denied.

78. Denied.

79. Without knowledge, therefore denied.

80. Denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count III's ad damnum clause.

**RESPONSE TO COUNT IV – VICARIOUS LIABILITY OF BROWN & BROWN
FOR ACTS OF EMPLOYEES
(TZA against Brown & Brown)**

81. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

86. Denied. The allegations contained in subparagraphs (a) through (b) are also denied.

87. Denied.

88. Without knowledge, therefore denied.

89. Denied.

90. The statement made in Complaint ¶ 90 is a legal conclusion to which no response is required. To the extent a response is required, denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count IV's ad damnum clause.

**RESPONSE TO COUNT V – BREACH OF FIDUCIARY DUTIES
(TzM2 against Brown & Brown)**

91. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

92. Denied.

93. Denied.
94. Denied.
95. Denied.
96. Denied.
97. Denied. The allegations contained in subparagraphs (e) through (h) are also denied.
98. Denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count V's ad damnum clause.

RESPONSE TO COUNT VI – BREACH OF FIDUCIARY DUTIES
(TSM2 against Ian Shinnick)

99. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

100. Denied.
101. Denied.
102. Denied.
103. Denied.
104. Denied.
105. Denied.
106. Denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count VI's ad damnum clause.

RESPONSE TO COUNT VII – NEGLIGENCE
(TSM2 against Ara Dresner)

107. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

- 108. Denied.
- 109. Denied.
- 110. Denied.
- 111. Denied.
- 112. Denied. The allegations contained in subparagraphs (c) through (d) are also denied.
- 113. Denied.
- 114. Denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count VII's ad damnum clause.

**RESPONSE TO COUNT VIII – VICARIOUS LIABILITY OF BROWN & BROWN
FOR ACTS OF EMPLOYEES
(TZM2 against Brown & Brown)**

115. Defendants incorporate by reference their responses to paragraphs 9 through 53 of the Complaint as if set forth in full herein.

- 116. Denied.
- 117. Denied.
- 118. Denied.
- 119. Denied.
- 120. The allegations contained in subparagraphs (c) through (d) are also denied.
- 121. Denied.
- 122. Denied.
- 123. The statement made in Complaint ¶ 90 is a legal conclusion to which no response is required. To the extent a response is required, denied.

Defendants deny that Plaintiffs are entitled to the relief requested in Count VIII's ad damnum clause.

DEMAND FOR JURY TRIAL

Defendants also demand a jury trial on all issues so triable.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Venue is improper in this Court, the 11th Judicial Circuit in and for Dade County, Florida, because the Defendants reside in Volusia County, Florida, and the cause of action accrued in Duval County, Florida. A Notice of Appeal of this Court's Order Denying Defendants' Motion to Transfer Venue is forthcoming.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim for breach of fiduciary duty (Counts I, II, V, and VI) upon which relief can be granted because they have failed to allege facts sufficient to establish that Brown & Brown or Shinnick had a fiduciary obligation under the circumstances or that Brown & Brown or Shinnick intentionally breached or abused a fiduciary relationship.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim for breach of fiduciary duty (Counts I, II, V, and VI) upon which relief can be granted because they have failed to allege facts sufficient to establish a valid and binding agreement that Brown & Brown or Shinnick would procure the alleged "customized" coverage and they have failed to allege that the particular coverage sought was commercially and reasonably available for these insureds in the market at that time.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim for negligence (Counts III and VII) upon which relief can be granted because they have failed to allege facts sufficient to establish that Dresner owed Plaintiffs a duty or that Dresner breached such a duty.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim for vicarious liability (Counts IV and VIII) upon which relief can be granted because they have failed to allege facts sufficient to establish a breach of a fiduciary duty or negligence on behalf of any employee of Brown & Brown toward Plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, because any injuries and damages allegedly sustained by Plaintiffs were the result of Plaintiffs' own negligence in failing to employ adequate security or other protection at Plaintiffs' apartment complex where and when the alleged wrongful death occurred.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, because any injuries and damages allegedly sustained by Plaintiffs were the result of Plaintiffs' own assumption of risk in that Plaintiffs, as sophisticated insureds, knew or should have known that the insurance policy issued by United Specialty did not include Kings Trail Apartments and Plaintiffs' insurance policies issued by other insurers were subject to certain limitations and exclusions, and yet Plaintiffs took no action to procure additional insurance.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' alleged damages, if any, are barred in whole or in part by Plaintiffs' failure to mitigate such damages.

NINTH AFFIRMATIVE DEFENSE

The "customized" insurance coverage that is implied should have been in force did not exist or was not commercially or reasonably available to the Plaintiffs in the marketplace at that time.

TENTH AFFIRMATIVE DEFENSE

Even if the insurance coverage allegedly sought was commercially available to these insureds at that time – which Defendants deny – Plaintiffs would not have purchased such a policy.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs’ errors, in failing to learn, know, and appreciate the contents of their insurance applications and policies, are the intervening or supervening cause of their damages. Plaintiffs’ insurance policy issued by United Specialty did not include Kings Trail Apartments, as found by the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit in Plaintiffs’ case against the insurance carrier. Plaintiffs’ insurance policies issued by other insurers were subject to certain limitations and exclusions. Therefore, Defendants cannot be held liable.

TWELFTH AFFIRMATIVE DEFENSE

Defendants procured the insurance coverage specifically requested by Plaintiffs, satisfying their duties under Florida law.

THIRTEENTH AFFIRMATIVE DEFENSE

The Complaint fails to allege a recognized duty because an insurance agent cannot be liable for the failure to procure insurance coverage that does not exist or was not reasonably commercially available to these sophisticated insureds at that time.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs did not reasonably rely on the purported representations because those representations are impossible and known to be impossible by Plaintiffs where Plaintiffs, as sophisticated insureds, knew, or with the exercise of reasonable diligence would have known, that Defendants cannot guarantee insurance coverage “customized to the Tzadik Enterprise’ business

needs,” or guarantee to provide insurance that would meet the terms of lending requirements in Plaintiffs’ loan agreements.

FIFTEENTH AFFIRMATIVE DEFENSE

Any recovery by Plaintiffs must be reduced or offset by all amounts paid, payable by, or available from collateral sources. Defendants are entitled to credit for any settlement of claims for alleged injuries and damages made by Plaintiffs with any other defendant(s) or other person or entity subsequently joined to this action. Plaintiffs’ claims are barred, in whole or in part, to the extent Plaintiffs have released, settled, entered into an accord and satisfaction, or otherwise compromised their claims by any means.

SIXTEENTH AFFIRMATIVE DEFENSE

Any recovery by Plaintiffs must be reduced in proportion to the amount of fault attributed to Plaintiffs, pursuant to Florida’s Comparative Fault Statute, Fla. Stat. § 768.81.

SEVENTEENTH AFFIRMATIVE DEFENSE

Any recovery by Plaintiffs must be reduced or offset by the amount of additional premium Plaintiffs would have paid for the insurance that allegedly should have been procured.

PRAYER FOR RELIEF

Defendants respectfully request entry of a judgment dismissing the Complaint with prejudice, denying all relief requested by Plaintiffs in their Complaint, and awarding Defendants such other and further relief as the Court may deem just and proper under the circumstances.

Dated: July 18, 2022

Respectfully submitted,

FREEBORN & PETERS LLP

/s/ Robert A Stines

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer and Affirmative Defenses has been filed via Florida Courts' E-filing Portal and served on all counsel listed for the Plaintiffs as shown in the E-filing Portal, on this 18 day of July, 2022.

/s/ Robert A. Stines

Attorney