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**IN THE DISTRICT COURT OF APPEAL  
THIRD DISTRICT OF FLORIDA**

**CASE NO.: 3D2024-1146  
L.T. NO.: 06-17883-CA-01**

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**MIGUEL CHAMAH, M.D.,**

***Appellant,***

**v.**

**ADP TOTALSOURCE, INC., *et al.*,**

***Appellees.***

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ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH  
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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**INITIAL BRIEF OF APPELLANT**

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Armando Montesino  
Christian Paul Struven IV  
Montesino Law  
5201 Blue Lagoon Drive, Ste. 800  
Miami, FL 33126  
Telephone: (305) 900-6529  
Email: [AMontesino@MontesinoLaw.com](mailto:AMontesino@MontesinoLaw.com)  
[CStruven@MontesinoLaw.com](mailto:CStruven@MontesinoLaw.com)

*Counsel for Appellant Miguel Chamah, M.D.*

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## **STATEMENT OF THE CASE AND OF THE FACTS<sup>1</sup>**

In 2006, Appellant, Miguel Chamah, M.D. ("Dr. Chamah") sued Appellee, Armando De La Cruz ("De La Cruz"). On November 13, 2006, Dr. Chamah obtained a final judgment against De La Cruz in the total amount of \$161,370.82 plus interest at 7%. I.A. 4. Some initial attempts to collect on the judgment from 2007 to 2009 proved fruitless, and the case largely languished until 2022 when new collection attempts began. Dr. Chamah was able to compel De La Cruz to complete a Fact Information Sheet, and on the basis of the information revealed, moved for a continuing writ of garnishment on November 15, 2023, naming ADP Totalsource, Inc. ("ADP") as garnishee. I.A. 5. The Court granted this on November 16. I.A. 8. The writ was served on November 17. I.A. 10.

The language of the writ, which tracks the language mandated by the Florida Supreme Court, included the following:

**FAILURE TO FILE AN ANSWER WITHIN THE TIME  
REQUIRED MAY RESULT IN THE ENTRY  
OF JUDGMENT AGAINST THE GARNISHEE FOR**

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<sup>1</sup> Combined as the facts relevant to this appeal arose entirely in the context of the proceedings below.

Citations to the Appendix to this Initial Brief are rendered as "I.A. ##" with the page number within that appendix.

**THE ABOVE TOTAL AMOUNT OF \$353,494.94 PLUS INTEREST.**

I.A. 9. *Compare* Fla. R. Civ. P. Form 1.907(b). ADP failed to answer the writ within the twenty days required. That is, on or before December 11. Fla. R. Civ. P. 1.090; Fla. R. Gen. Prac. & Jud. Admin. 2.514(a)(1). Thus, on December 12, Dr. Chamah moved for and obtained a default against ADP. I.A. 13. The same day, Dr. Chamah moved for final judgment against ADP. I.A. 14. On December 13, final judgment was entered against ADP for the amount of \$353,494.94 plus post-judgment interest. I.A. 19.

On January 11, 2024—twenty-nine days after the judgment was entered and nearly **ten weeks** after the original writ was served—ADP moved to vacate the judgment against it. I.A. 22. Initially, ADP argued that the judgment against it was void because it lacked any funds of De La Cruz, I.A. 26–29, and because ADP’s failure to answer the writ was the result of excusable neglect. I.A. 29–33. On May 1, ADP filed a supplemental brief, I.A. 69, arguing that the judgment against it was void because it was for an unliquidated sum. I.A. 69–71.

Appellant filed his opposition on May 3, I.A. 75, which detailed ADP's systematic and widespread failure timely to respond to writs of garnishment, I.A. 81–84, and countered its arguments regarding voidness. I.A. 77–78.<sup>2</sup> Additionally, Appellant requested the lower tribunal to take judicial notice of numerous other cases in Miami-Dade County in which ADP failed timely to respond to writs of garnishment. I.A. 184.

On May 7, ADP filed a reply brief to Appellant's opposition, reasserting many of the same arguments in its previous briefs. I.A. 188. ADP also filed an objection to Appellant's request for judicial notice. I.A. 235.

Evidentiary hearings were held on May 8 and 9 as to ADP's motion to vacate.<sup>3</sup> Testimony was taken over these two days from ADP's corporate representative. On the second day, the witness, who was still under oath from the previous day, (I.A. 306:1–6), was noted to have used recollection materials while she was actively testifying and overnight during the continuance between the two days of

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<sup>2</sup> This opposition was accompanied by an Appendix of supplemental authorities from another appeal. I.A. 85.

<sup>3</sup> The transcripts of the hearing are found in the Appendix. I.A. 241–301; 302–67.

testimony. I.A. 324:24–326:13, 328:21–329:11. Counsel for Appellant orally requested that the witness provide her materials consulted during testimony pursuant to Section 90.613, Florida Statutes. I.A. 329:12–331:1. These materials were not provided to Appellant. After taking testimony from ADP’s corporate representative, the Court held that ADP established excusable neglect, meritorious defenses, and had acted with due diligence; and that moreover, the judgment against ADP was void. The Court entered its order on May 26, vacating the judgment and dismissing ADP as a garnishee. I.A. 368. On June 24, Dr. Chamah timely filed his notice of appeal. I.A. 371.<sup>4</sup> These proceedings followed.

### **SUMMARY OF ARGUMENT**

The Court should reverse the lower tribunal’s order vacating the final judgment against ADP and dismissing it as a garnishee.

First, the fact that ADP was defaulted means that the allegations in the writ of garnishment are deemed admitted,

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<sup>4</sup> The Order was entered on Sunday, May 26, 2024. The following day was Memorial Day, which is a statewide holiday. § 110.117(c), Fla. Stat. (2023). Therefore, June 24, 2024, was the thirtieth day after the entry of the Order appealed. Fla. R. App. P. 9.420(e); Fla. R. Gen. Prac. & Jud. Admin. 2.514(a)(1)(A), (a)(6)(A). Consequently, the Notice of Appeal was timely. Fla. R. App. P. 9.130(b).

except as to unliquidated damages. The default was not vacated in the Order—nor should it have been. Therefore, dismissal of ADP was improper. Additionally, in the context of a default, ADP should not be allowed to answer the writ.

Second, the damages claimed in the writ of garnishment were *not* unliquidated. Unliquidated damages are damages that cannot simply be calculated, and of which the party responding to the process has no notice. The classic example is a judgment for attorney’s fees that specifies an amount—a judgment for entitlement may be entered without hearing. Here, ADP had notice that judgment against it in the full amount of the judgment against De La Cruz, plus accrued interest (that is, \$353,494.94) would be entered against it if ADP failed to respond to the writ. It is undisputed that ADP was validly served, and undisputed that ADP failed to respond. Consequently, the Court should hold that the damages *were* liquidated as to ADP, because ADP had notice that a judgment against it for the amount of the judgment could be entered against it. Additionally, ADP had an opportunity to be heard: It was on notice that it could answer the writ. Dr. Chamah is specifically requesting

that this Court distinguish the *BellSouth* cases<sup>5</sup> in the continuing garnishment context and recognize that the Supreme Court of Florida has receded at least in part from *BellSouth* based on the *AME* case.<sup>6</sup> Should the Court not distinguish, Dr. Chamah requests that the Court provide a full written opinion so as to enable him to apply to the supreme court to revisit *BellSouth*.

As to ADP's claim of mistake or inadvertence, the Court should reverse for two reasons: First, ADP failed to establish the elements necessary: ADP needed to establish excusable neglect, a meritorious defense, and due diligence. Dr. Chamah asserts that ADP's conclusory statements supposedly constituting "excusable" neglect are in fact the result of intentional business decisions and a longstanding pattern of disregarding legal process, which was on full display for the lower tribunal, and which the lower tribunal impermissibly discounted. Indeed, the Court improperly refused to take judicial notice of the court records demonstrating ADP's

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<sup>5</sup> *Sec. Bank, N.A. v. BellSouth Advert. & Publ'g Corp.* ("*BellSouth I*"), 679 So. 2d 795 (Fla. 3d DCA 1996), *rev'd in part*, 698 So. 2d 254 ("*BellSouth II*") (Fla. 1997).

<sup>6</sup> *Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc.* ("*AME*"), 982 So. 2d 628 (Fla. 2008).

willful flaunting of legal process. There can be no excusable neglect where the neglect is intentional. Second, the order as to mistake or inadvertence *only extended to the judgment*. As stated above, with the default still in place, ADP should not have been dismissed as a garnishee.

Additionally, the lower tribunal's failure to permit Appellant to view the witness's recollection materials prejudiced Appellant in being able to rebut ADP's arguments regarding excusable neglect.

## **ARGUMENT**

### **JURISDICTION**

The Florida Constitution provides,

District courts of appeal shall have jurisdiction to hear appeals, . . . They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

Art. V, § 4(b)(1), Fla. Const. By rule, this Court has jurisdiction to review a nonfinal order “entered on an authorized and timely motion for relief from judgment.” Fla. R. App. P. 9.130(a)(5). The motion that gave rise to the order appealed was a motion for relief from judgment,<sup>7</sup> which was granted. Consequently, this Court has jurisdiction.

### **PARTIES**

A brief note as to the parties to this appeal: While several additional garnishees are provided in the service list, these garnishees were part of subsequent garnishment proceedings on

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<sup>7</sup> It does not appear to be contested that the motion was authorized and timely. In the event that the Court concludes that it was not, however, this appeal should still proceed. *Cf. Fla. Organic Aquaculture, LLC v. Advent Envtl. Sys., LLC*, 268 So. 3d 910 (Fla. 5th DCA 2019) (reversing order granting unauthorized motion for reconsideration). Alternatively, the Court may construe this appeal as a petition for a writ of certiorari.

the judgment against ADP. Thus, in terms of the definition of “appellee,” these additional garnishees were not “part[ies] in **the proceeding** in the lower tribunal.” Fla. R. App. P. 9.020(g)(2) (emphasis added). See also *Barnett Bank of Broward Cty. v. Tabatchnick*, 401 So. 2d 1166 (Fla. 4th DCA 1981) (“Garnishment, while ancillary in nature, is nonetheless a separate and distinct proceeding . . . .”). Appellant therefore respectfully suggests that, should said garnishees attempt to file briefs in this appeal, they be required to seek leave to file briefs as *amici* rather than be treated as appellees proper.

#### **STANDARD OF REVIEW**

Orders on motions to vacate final judgments are ordinarily reviewed for abuse of discretion. *Clear 2 Close Title, LLC v. Zap Cap., Inc.*, 373 So. 3d 1183, 1187 (Fla. 3d DCA 2023) (quoting *Rinconcito Latino Cafeteria, Inc. v. Ocampos*, 276 So. 3d 525, 527 (Fla. 3d DCA 2019)). Where there is no factual dispute, however, and the trial court’s ruling is made as a matter of law, the standard of review is *de novo*. *Fernandez v. Difiore*, 279 So. 3d 174, 176 (Fla. 4th DCA 2019). Additionally, the parties may not bring up for review the merits of the final judgment attacked by the motion. *Bland v. Mitchell*,

245 So. 2d 47, 48 (Fla. 1970). In this case, Appellant argues that the Court may conduct *de novo* review with respect to the finding that the judgment below was void, as at least this portion of the decision below was made as a matter of law. With respect to the findings of excusable neglect, these portions of the ruling would be under an abuse of discretion standard. A trial court abuses its discretion in vacating a default judgment when it does not rule on competent, substantial evidence. *Lazcar Int'l, Inc. v. Caraballo*, 957 So. 2d 1191, 1193 (Fla. 3d DCA 2007) (collecting cases). Even under an abuse of discretion standard, however, Appellant should prevail.

**THE JUDGMENT WAS NOT VOIDABLE BECAUSE THERE WAS NO SHOWING OF EXCUSABLE NEGLIGENCE**

ADP's failure to respond to the continuing writ of garnishment was the result of a reckless, if not intentional, pattern of disregarding legal process. The lower tribunal impermissibly ignored substantial evidence rebutting ADP's claim that its failure to respond was the result of "clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir." I.A. 29 (quoting *Ocwen Loan Serv'g, LLC v. Brogdon*, 185 So. 3d 627, 629 (Fla. 5th DCA 2016); *Zap Cap.*,

*Inc.*, 373 So. 3d at 1187 (quoting *Edwards v. Najjar*, 748 So. 2d 1101, 1103 (Fla. 3d DCA 2000))). “On the other side of the coin is the established principle that gross negligence cannot constitute excusable neglect.” *Otero v. Gov’t Emps. Ins. Co.*, 606 So. 2d 443, 444 (Fla. 2d DCA 1992) (reinstating final default judgment, noting “GEICO is not a mom-and-pop business confronted by an occasional lawsuit.”).

As noted in Appellant’s opposition below, (I.A. 81–82), and as was discussed extensively in the hearings, ADP *habitually* fails to respond to writs of garnishment in a timely fashion. A survey of cases just in Miami-Dade County<sup>8</sup> revealed a substantial late response rate. *See* I.A. 83.<sup>9</sup> Indeed, ADP’s corporate representative

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<sup>8</sup> Appellant had sought discovery as to ADP’s garnishment practices generally, which would have provided the lower tribunal with a clearer picture. The lower tribunal instead held that Appellant was not entitled to discovery on a motion to vacate. *See* I.A. 255:23–256:2. This order is not directly part of this appeal.

<sup>9</sup> Initially this was believed to be 60%. I.A. 83. At the hearing, however, it was revealed that certain cases were not writs served on actual ADP entities, but on “ADP, LLC.” I.A. 293:19–22, 309:19–310:9. Once the cases involving “ADP, LLC” are excluded, the late response rate, in fact, *increased*.

Moreover, the lower tribunal only permitted inquiry as to *three* cases (including the instant case). Of the cases that were in evidence, ADP’s late response rate was *100%*. I.A. 335:8–336:3.

admitted that ADP lacked any process for ensuring that writs of garnishment were responded to in a timely fashion. I.A. 337:15–:18. This is no mere “foible to which human nature is heir.” *Contra Zap Cap., Inc.*, 373 So. 3d at 1187.

**ADP’s Own Evidence Demonstrates that this was Not Excusable Neglect**

ADP’s corporate representative, Laura Maddox, testified that there was “no real reason” why ADP failed to answer the writ other than “things fall through the cracks.” I.A. 277:21, :23. Such testimony is insufficient to show excusable neglect in this context.

To demonstrate excusable neglect, a party moving to vacate a default judgment must provide more evidence than a conclusory statement. *Inter-Atl. Ins. Servs., Inc. v. Hernandez*, 632 So. 2d 1069, 1070 (Fla. 3d DCA 1994). Although Maddox testified to the events leading to the writ being labeled as referencing a different person with the same name, (I.A. 271:18–:23), this does not explain the total failure of ADP to file or to serve *any document* on Appellant. See Fla. R. Civ. P. 1.500(a). The lower tribunal, in fact, questioned why, if ADP had identified the incorrect De La Cruz, it did not answer with respect to him. I.A. 277:13–:16, 279:16–:24. Maddox’s response was

completely inapposite: She stated that “things fall through the cracks,” and that “there’s no real reason I can tell you, other than it was missed.” I.A. 277:20–:24. ADP could have introduced testimony as to why it failed to respond as to the incorrect De La Cruz, but chose not to do so.

**ADP’s Practices Constitute at least Gross Negligence, and are therefore Not Excusable Neglect**

Assuming, however, that “fell through the cracks” and “no real reason” were *not* mere conclusory statements, Appellant provided extensive evidence that ADP’s practice was one of repeated failure to respond, such that the lower tribunal should have concluded that ADP’s failure to respond was *not* isolated, but was at least gross negligence on ADP’s part, and consequently insufficient to merit vacating the judgment.

As the Second District recently noted, “We have recognized several times that an *isolated breakdown in established procedures* may constitute excusable neglect and have little difficulty concluding that that authority applies here.” *All My Sons Moving & Storage of Sw. Fla., Inc. v. A & E Truck Serv., LLC*, 347 So. 3d 529, 532 (Fla. 2d DCA 2022) (emphases added) (collecting cases). As the evidence provided

by Appellant demonstrated, there was no *isolated* breakdown in established procedures, but a systematic breakdown. Alternatively, there was no breakdown at all in the instant case: ADP’s “established procedures” *were* to disregard response deadlines.

Once again, as the *Otero* court noted, “gross negligence cannot constitute excusable neglect.” 606 So. 2d at 444. Moreover, just as GEICO in *Otero* was not “a mom-and-pop confronted by an occasional lawsuit,” *id.*, ADP is likewise not a “mom-and-pop”: ADP is likely the largest payroll provider in the United States. As noted above, ADP’s excuse, *vis-à-vis* Maddox’s testimony, could not account for why ADP failed to respond at all in this case. Upon further inquiry as to the two other cases in Miami-Dade County that the lower tribunal permitted questioning, Maddox’s responses were merely variations on the same excuses. I.A. 316:12–:13, 318:23–:25.<sup>10</sup>

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<sup>10</sup> Appellant further notes that since the evidentiary hearing, ADP has failed timely to respond to a writ of garnishment in yet another case. *JPMorgan Chase Bank, N.A. v. Rodriguez Barrios*, No. 2022-037416-CC-26 (Fla. Miami-Dade Cty. Ct., filed Nov. 21, 2022). Appellant requests the Court take judicial notice of this additional case and the record therein.

## **THE JUDGMENT WAS NOT VOID**

A final judgment may be vacated at any time if said judgment is void. Fla. R. Civ. P. 1.540(b)(4). A judgment is said to be void where, “in the proceedings leading up to the judgment, there is a violation of the due process guarantee of notice and an opportunity to be heard.” *Maiuri v. First Am. Title Ins. Co.*, 356 So. 3d 276, 277–78 (Fla. 3d DCA 2023) (quoting *Nationstar Mortg., LLC v. Diaz*, 227 So. 3d 726, 729 (Fla. 3d DCA 2017)).

A judgment for an unliquidated amount entered without notice and an opportunity to be heard is generally considered to be void as a deprivation of due process. *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662, 666 (Fla. 3d DCA 2007) (quoting *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983)). See also Fla. R. Civ. P. 1.440(c) (requiring service of an order setting trial upon parties in default where the damages are not liquidated). Additionally, under normal circumstances, a judgment in garnishment against funds not actually held for a judgment debtor is considered void. *Suntrust Bank v. Arrow Energy, Inc.*, 199 So. 3d 1026, 1028 (Fla. 4th DCA 2016) (quoting *Ruth v. Dep’t of Legal Affs.*, 684 So. 2d 181, 185 (Fla. 1996)). We say “normal circumstances”

here because continuing garnishment represents a departure from the usual state of affairs in garnishment, as a final judgment in continuing garnishment attaches funds that were not due at the time the writ was served, the time the writ was answered, or at any time between such times. *See* § 77.0305, Fla. Stat. (2024). *See also* § 77.06(1), Fla. Stat. (2024).

**There was no Deprivation of Due Process because the Writ was for a Liquidated Amount of which ADP had Notice**

The continuing writ of garnishment with which ADP was served, as noted above, contained the warning mandated by the Florida Supreme Court's form, and stated:

**FAILURE TO FILE AN ANSWER WITHIN THE TIME REQUIRED MAY RESULT IN THE ENTRY OF JUDGMENT AGAINST THE GARNISHEE FOR THE ABOVE TOTAL AMOUNT OF \$353,494.94 PLUS INTEREST.**

I.A. 9. *Compare* Fla. R. Civ. P. Form 1.907(b). The amount is clearly stated in the writ, as is the penalty for failure to respond.

The amount of the writ was, furthermore, liquidated: It was determined through simple mathematics by taking the principal owed on the original judgment and adding post-judgment interest at

the fixed 7% per annum specified in the judgment.<sup>11</sup> “Damages are liquidated when the exact amount due may be determined from the pleadings. Where evidence must be presented to determine the amount, however, damages are unliquidated.” *Maiuri*, 356 So. 3d at 278 (quoting *Wellspring Invs., S.A. v. Frangi*, 327 So. 3d 444, 445 (Fla. 3d DCA 2021)).

In *Frangi*, the court concluded that the damages were unliquidated because “they cannot be determined with exactness from the cause of action pleaded, . . . by an arithmetical calculation or by application of definite rules of law.” 327 So. 3d at 445 (internal quotation marks omitted) (quoting *Cellular Warehouse, Inc.*, 957 So. 2d at 665).

The *BellSouth* case must, however, be addressed. In this case, the Court concluded that Section 77.081(2), Florida Statutes, only applied to *pre-judgment* writs of garnishment. *BellSouth II*, 698 So. 2d at 256. This decision, however, appears to have been

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<sup>11</sup> This is the correct rate as the original judgment was entered prior to the July 1, 2011 effective date of a revision to Section 55.03, Florida Statutes establishing adjustable judgment interest rates. See *Townsend v. R.J. Reynolds Tobacco Co.*, 192 So. 3d 1223 (Fla. 2016).

receded from in the twenty-seven years since it was decided. Specifically, we refer to the *AME* case. This case established the ability of judgment creditors to garnish funds in attorney trust accounts.

Despite the *AME* case being on the posture of a post-judgment writ of garnishment, the Supreme Court of Florida cited to Section 77.081(1)–**(2)**, Florida Statutes, in support of the outcome. 982 So. 2d at 632. *AME* furthermore *expressly* bases its holding on the application of Section 77.081(2) to a post-judgment writ: The law firm appellant in *AME* had failed fully to answer the writ, or to take any of the other steps required, and consequently subjected itself to the liability imposed by the garnishment statute. 982 So. 2d at 640. The Court went on to state, “At a minimum, *AME* had an obligation to fully answer the writ by explaining the status of the funds as part of its good faith obligation imposed by the garnishment statute.” *Id.*

**The Lower Tribunal had Jurisdiction over the Funds because this was Continuing Garnishment**

As noted in the *Suntrust Bank* case, the jurisdiction of a court on a writ of garnishment extends “to the extent of the property garnished, as the extent of the garnishee’s liability is the amount that

it owes to the judgment debtor.” 199 So. 3d at 1028. More properly put, it is the property of the judgment debtor in the possession of the garnishee “at the time of the service of the writ or at any time between the service and the time of the garnishee’s answer.” § 77.06(1), Fla. Stat.

The language in *Suntrust Bank* and Section 77.06(1), Florida Statutes, is essentially impossible to square with the status of *continuing* garnishment, which attaches, on a continuing basis, to salary or wages “as the salary or wages *become due*.” § 77.0305, Fla. Stat. (emphasis added). That is, wages becoming due *after the service of the garnishee’s answer* (and indeed, in practice, wages becoming due after a judgment in garnishment on the continuing writ). *See, e.g., Pineiro v. Am. Express Card Servs. Co.*, 105 So. 3d 614 (Fla. 4th DCA 2013) (discussing validity of final judgment in continuing garnishment generally).

This is not a fine technicality: If the garnishment statute only attaches funds actually held during the “answer period” (that is, between service of the writ and service of the answer), then continuing garnishment as to salary or wages earned *after* the service of the answer is a jurisdictional impossibility, and Section 77.0305,

Florida Statutes, is essentially a less-useful form of the ordinary garnishment practices employed prior to the enactment of Section 77.0305, Florida Statutes, in 1988. Ch. 88-295, § 1, Laws of Fla. See, e.g., *Carpenter v. Benson*, 478 So. 2d 353 (Fla. 5th DCA 1985) (pre-1988 case demonstrating how wage garnishment was formerly accomplished). See also Antonin Scalia & Bryan A. Garner, *Reading Law* 176 (2012) (surplusage canon operates to block interpretations that render a provision pointless).

Other cases demonstrate that the jurisdictional limitation asserted below simply does not apply in the default context. For example, in a 2023 decision, this Court noted that Section 77.081, Florida Statutes, *permits* the imposition of post-judgment interest against a defaulted garnishee. *Taso Grp., LLC v. Gould*, 358 So. 3d 450, 452 (Fla. 3d DCA 2023) (reading §§ 77.081 & .083, Fla. Stat., *in pari materia*). To allow this imposition of post-judgment interest against a garnishee would seem to fly in the face of the *BellSouth* decisions.

**ADP Must Still Prevail on Excusable Neglect in Order to Vacate the Judgment as Void**

In the recent *Zap Capital* case, this Court considered an order denying a motion to vacate a default judgment against a garnishee on a continuing writ of garnishment. 373 So. 3d at 1184–85. Throughout the facts and analysis in this case, this Court focused solely on the issues of excusable neglect, meritorious defense, and due diligence. *See generally id.* Before the Court then were the same arguments as to voidness that are before the Court now.<sup>12</sup> Despite these arguments, this Court vacated and remanded, directing the trial court to conduct the excusable neglect, meritorious defense, and due diligence inquiry. *Id.* at 1188. As discussed more fully in the preceding sections, ADP failed to prove excusable neglect.

**THE LOWER TRIBUNAL ERRED IN NOT REQUIRING MADDOX TO FURNISH APPELLANT WITH THE MATERIALS USED DURING HER TESTIMONY**

Counsel for appellant was entitled to, requested, and was not provided with the writings and other items that Maddox used during

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<sup>12</sup> This is made plain from the briefs in *Zap Capital*. Initial Br. of Appellant, 2022 FL APP. CT. BRIEFS LEXIS 2697; Answer Br. of Appellee, 2022 FL APP. CT. BRIEFS LEXIS 3620; Reply Br. of Appellant, 2022 FL APP. CT. BRIEFS LEXIS 4678.

her testimony to refresh her memory. I.A. 324:24–331:2. Florida law provides,

When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

§ 90.613, Fla. Stat.

Maddox testified for two successive days, and remained under oath. I.A. 306:1–:6. She testified that she had accessed materials in this period. I.A. 325:4–:13. Counsel for Appellant requested these materials. I.A. 329:12–:23, 330:11–331:2. They were not furnished. *Id.*

The statute uses the phrase “while testifying.” § 90.613, Fla. Stat. The construction of the meaning and scope of the term “while” is not entirely straightforward. *See, e.g., Univ. of N.C. Health Care*

*Sys. v. ITPEU Health & Welfare Plan*, No. 4:20-cv-246, 2022 U.S. Dist. LEXIS 177563, at \*37–43 (S.D. Ga. Sept. 29, 2022) (whether “while” means “during” or “as a result of” when interpreting ERISA plan).

In the instant case, the term “while” in the statute could mean one of two things: Either a more restrictive definition that applies only to when the witness is actively speaking, or a broader definition that covers the time between when Maddox was first sworn and when she was dismissed as a witness. Merriam-Webster provides two definitions of “while” that cover these: First, “a period of time esp. when short and marked by the occurrence of an action or a condition,” and second, “during the time that.” *Merriam-Webster’s Collegiate Dictionary* 1425–26 (11th ed. 2003).

If the more restrictive definition applies, then Maddox should have produced what she identified as “the list of cases from your plaintiff request” that she referenced. I.A. 328:25–329:1. If instead, “while” is more broad, and includes materials referenced between the time she was sworn in and the time her testimony concluded, Maddox should have produced all the records to which she referred. I.A. 330:5–:19. She produced neither, and the lower tribunal failed to compel her to do so.

**UPHOLDING THE LOWER TRIBUNAL’S DECISION CREATES AN IMPERMISSIBLE  
PERVERSE INCENTIVE TO DISREGARD LEGAL PROCESS**

Deadlines must mean something. While excusable neglect can and should be met with fairness and equitable treatment taking full account of the circumstances, there must be a limiting principle.

As the Fourth District noted some years ago,

While this court has been liberal in its application of the excusable neglect doctrine, relying on that doctrine should not be a litigation strategy. A party cannot obtain relief from a foreclosure sale solely by reference to that party’s own lack of diligence.

*SunTrust Mortg. v. Torrenca*, 153 So. 3d 952, 954 (Fla. 4th DCA 2014) (internal quotation marks omitted) (quoting *John Crescent, Inc. v. Schwartz*, 382 So. 2d 383, 386 (Fla. 4th DCA 1980)). Appellant provided uncontroverted evidence below that ADP routinely fails to answer writs of garnishment on time. The lower tribunal abused its discretion by improperly disregarding this evidence, or in failing to allow discovery directed towards ADP’s pattern of misconduct.

Moreover, we are dealing with a *statutory* deadline. The plain meaning of the garnishment statute is that ADP is required to answer writs of garnishment within twenty days. The lower tribunal’s order renders the Florida Legislature’s determination of when an answer is

due to be a nullity. *See BellSouth II*, 698 So. 2d at 256 (Harding, J., dissenting). Justice Harding's prophetic words in *BellSouth II* have been borne out in the twenty-seven years since that decision: ADP's ongoing flaunting of garnishment deadlines is on full display in this case. As his dissent further noted, numerous other states treat parties defaulting in garnishment as liable for the full amount. *Id.* at 257 (citing *Webb v. Erickson*, 655 P. 2d 6, 11 (Ariz. 1982); *Miss. Action for Cmty. Educ. v. Montgomery*, 404 So. 2d 320, 322 (Miss. 1981); Ga. Code Ann. § 18-4-115(a) (1996); N.M. Stat. Ann. § 35-12-4B (Michie 1978)). *See also* 735 Ill. Comp. Stat. 5/12-706(a) (procedure for conditional judgment after garnishee default in Illinois).

As the Supreme Court of Florida's decision in *AME* shows, the limiting principle is simply that garnishees *must* respond to writs of garnishment. This Court should hold that the decision in *BellSouth* has been receded from in light of the holding in *AME*.

## **CONCLUSION**

The lower tribunal erred in multiple ways, and even if the Court does not accept every claim of Appellant as to the errors, it should reverse at least in part on the following grounds:

The judgment below should not have been vacated for mistake or excusable neglect. ADP's business practices were presented to the lower tribunal in great detail. ADP employs a pattern and practice of what can *at best* be characterized as gross negligence, but is more likely deliberate strategy. The lower tribunal abused its discretion (1) by failing to allow Appellant discovery directed towards ADP's business practices, (2) by failing to allow consideration of most of the garnishment cases Appellant wished to ask ADP's corporate representative about, (3) by failing to order ADP's corporate representative to furnish the materials she had relied on during testimony, and (4) by accepting ADP's corporate representative's conclusory arguments as to why ADP failed to answer in this case.

The judgment below was not void for want of due process or jurisdiction. As to ADP's due process rights, the amount of the judgment was liquidated because ADP had notice and an opportunity to be heard due to the use of the Supreme Court's

form for continuing writs of garnishment. The amount claimed was trivially calculated based on the judgment and the simple interest formula. If this warning was not sufficient, then *no* default judgment in *any* case could be entered. Additionally, the jurisdiction of the lower tribunal in this continuing garnishment action extends beyond funds of De La Cruz that were actually owed at the time the writ was served, distinguishing this case from those in standard garnishment. Similarly, the jurisdictional argument fails because post-judgment interest is allowed against a defaulted garnishee, which moreover demonstrates the limited applicability of (and receding from) *BellSouth*. Finally, ADP was required to establish excusable neglect and, as discussed above, failed to do so.

Assuming *arguendo* that the lower tribunal should have vacated the judgment against ADP, that vacatur should only have extended to the *amount*, as that was the only portion that was either unliquidated or otherwise required a trial (and consequently notice thereof). Consequently, even if the Court agrees that the lower tribunal correctly vacated the judgment against ADP, the Court must remand for a trial as to damages (and *only* as to damages). Although the distinction here is a fine one, it creates an actual difference in

practice, and moreover provides critical guidance to litigants in garnishment.

Respectfully submitted,

**Montesino Law**

*Attorneys for Appellant*

5201 Blue Lagoon Dr., Ste. 800

Miami, FL 33126

Tel: (305) 900-6529

By: /s/ Christian Paul Struven IV

Christian Paul Struven IV

Florida Bar No.: 1055402

CStruven@MontesinoLaw.com

Armando Montesino

Florida Bar No.: 100771

AMontesino@MontesinoLaw.com

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 21, 2024, a true and correct copy of the foregoing was filed with the Clerk of the Court and served on counsel of record for Appellees via the Florida Courts eFiling portal, and on Appellee, Armando De La Cruz, via U.S. Mail, each according to the Service List at the end of this document.

By: /s/ Christian Paul Struven IV  
Florida Bar No.: 1055402  
CStruven@MontesinoLaw.com

**CERTIFICATE OF COMPLIANCE**  
**FOR COMPUTER-GENERATED BRIEFS**

Counsel for Appellant certifies that the size and style of type used in this document is Bookman Old Style 14-point font. Additionally, this Brief does not exceed 13,000 words, exclusive of the cover page, tables of contents and citations, certificates of service and compliance, and signature block. Fla. R. App. P. 9.210(a)(2)(B), (a)(2)(E); 9.045(e).

By: /s/ Christian Paul Struven IV  
Florida Bar No.: 1055402  
CStruven@MontesinoLaw.com

## **SERVICE LIST**

### **VIA E-SERVICE:**

For Appellee, ADP Totalsource, Inc.:

John T. Asher, III  
Spector Gadon Rosen Vinci LLP  
360 Central Ave., Ste. 1550  
St. Petersburg, FL 33701  
Tel: (727) 896-4600  
Fax: (727) 896-4604

[jasher@sgrvlaw.com](mailto:jasher@sgrvlaw.com)  
[ebryson@sgrvlaw.com](mailto:ebryson@sgrvlaw.com)  
[pleadings@sgrvlaw.com](mailto:pleadings@sgrvlaw.com)

For Appellee, JPMorgan Chase Bank, N.A.:

Andrew R. Herron  
Homer Bonner Jacobs Ortiz, P.A.  
1200 Four Seasons Tower  
1441 Brickell Ave.  
Miami, FL 33131  
Tel: (305) 350-5117  
Fax: (305) 372-2738

[gservice@homerbonner.com](mailto:gservice@homerbonner.com)

For Appellee, Amazon.com Services LLC:

Martha R. Mora  
Andrew E. Beaulieu  
Avila Rodriguez Hernandez Mena &  
Garro LLP  
2525 Ponce de Leon Blvd., Ste. 1225  
Coral Gables, FL 33134  
Tel: (305) 779-3567

[mmora@avilalaw.com](mailto:mmora@avilalaw.com)  
[abeaulieu@avilalaw.com](mailto:abeaulieu@avilalaw.com)  
[jabaunza@avilalaw.com](mailto:jabaunza@avilalaw.com)

For Appellee, Pfizer Inc.:

Lin J. Wagner  
Jackson Lewis P.C.  
390 N. Orange Ave., Ste. 1285  
Orlando, FL 32801  
Tel: (407) 246-8440  
Fax: (407) 246-8441

[Lin.Wagner@jacksonlewis.com](mailto:Lin.Wagner@jacksonlewis.com)  
[alicia.franchino@jacksonlewis.com](mailto:alicia.franchino@jacksonlewis.com)  
[OrlandoDocketing@jacksonlewis.com](mailto:OrlandoDocketing@jacksonlewis.com)

For Appellee, Lenovo (United States) Inc.:

Emmanuel L. McMiller

Faegre Drinker Biddle & Reath LLP

300 N. Meridian St., Ste. 2500

Indianapolis, IN 46204

Tel: (317) 237-0300

Fax: (317) 237-1000

[manny.mcmiller@](mailto:manny.mcmiller@faegredrinker.com)

[faegredrinker.com](http://faegredrinker.com)

[legalresourceteam@](mailto:legalresourceteam@faegredrinker.com)

[faegredrinker.com](http://faegredrinker.com)

[docketgeneral@](mailto:docketgeneral@faegredrinker.com)

[faegredrinker.com](http://faegredrinker.com)

For Appellee, TD Bank, National Association:

Barry J. Glickman

Zeichner Ellman & Krause LLP

730 Third Ave.

New York, NY 10017

Tel: (212) 223-0400

[flservice@zeklaw.com](mailto:flservice@zeklaw.com)

**VIA U.S. MAIL:**

Armando De La Cruz

266 E. 16 St.

Hialeah, FL 33010