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

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

MIGUEL CHAMAH, M.D.,

Appellant,

v.

ADP TOTALSOURCE, INC., et al.,

Appellees.

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

REPLY BRIEF OF APPELLANT

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
CStruven@MontesinoLaw.com

Counsel for Appellant Miguel Chamah, M.D.

TABLE OF CONTENTS

REPLY BRIEF OF APPELLANT..... 1

TABLE OF CONTENTS 2

TABLE OF CITATIONS 3

SUMMARY OF ARGUMENT..... 5

ARGUMENT 8

 THE COURT SHOULD DISREGARD ADP’S DISTORTIONS OF THE RECORD .. 8

 THE JUDGMENT WAS *NOT* VOID 10

ADP had Notice and an Opportunity to be Heard Regarding its Potential in personam Liability for Failure to Answer the Writ, and the Amount Sought was Liquidated 10

The Finding of Voidness is Impossible to Square with Current Case Law: The Judgment was at Worst, Voidable..... 12

The BellSouth Cases are No Longer Good Law..... 15

 THE LOWER TRIBUNAL CRAFTED AN EVIDENTIARY HEARING IN WHICH DISPROVING EXCUSABLE NEGLIGENCE WAS IMPOSSIBLE..... 15

The Lower Tribunal Abused its Discretion..... 15

The Obligation for a Timely Response was Absolute and Cannot Be Extended 16

The Lower Tribunal Impermissibly Interfered with Dr. Chamah’s Ability to Try the Motion to Vacate..... 17

 THE LOWER TRIBUNAL GRANTED THE WRONG REMEDY 17

 THIS CASE PROVIDES A VEHICLE FOR REVISITING *BELLSOUTH* 18

CONCLUSION..... 19

CERTIFICATE OF SERVICE 20

CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS..... 21

SERVICE LIST 21

 VIA E-SERVICE:.....21

 VIA U.S. MAIL:22

TABLE OF CITATIONS

CASES

Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc. (AME),
982 So. 2d 628 (Fla. 2008)15

BNP Paribas v. Wynne, 944 So. 2d 1004 (Fla. 4th DCA 2005)16

Bowman v. Kingsland Dev., Inc., 432 So. 2d 660 (Fla. 1983)15

Carpenter v. Benson, 478 So. 2d 353 (Fla. 5th DCA 1985)11

Cellular Warehouse, Inc. v. GH Cellular, LLC, 957 So. 2d 662
(Fla. 3d DCA 2007) 15, 17

Curbelo v. Ullman, 571 So. 2d 443 (Fla. 1990)14

Fiber Crete Homes, Inc. v. Div. of Admin., 315 So. 2d 492, 493
(Fla. 4th DCA 1975)14

Garel & Jacobs, P.A. v. Wick, 683 So. 2d 184 (Fla. 3d DCA 1996)
.....16

Gulf Maint. & Supply, Inc. v. Barnett Bank of Tallahassee,
543 So. 2d 813 (Fla. 1st DCA 1989) 9

Quintero-Chadid Corp. v. Gersten, 582 So. 2d 685 (Fla. 3d DCA
1991)11

Sec. Bank, N.A. v. BellSouth Advert. & Publ’g Corp. (BellSouth I),
679 So. 2d 795 (Fla. 3d DCA 1996), *aff’d in part*, 698 So. 2d
254 (*BellSouth II*) (Fla. 1997).passim

Specialty Sols., Inc. v. Baxter Gypsum & Concrete, LLC,
325 So. 3d 192 (Fla. 5th DCA 2021)12, 13

State ex rel. Fulton Bag & Cotton Mills v. Burnside, 15 So.2d 324
(Fla. 1943)14

Sterling Factors Corp. v. U.S. Bank Nat’l Ass’n, 968 So. 2d 658
(Fla 2d DCA 2007)10

STATUTES

§ 77.06, Fla. Stat.12

§ 77.081, Fla. Stat.18

§ 77.083, Fla. Stat.16

Ch. 77, Fla. Stat.11

RULES

Fla. R. App. P. 9.110(b)13

Fla. R. App. P. 9.420(e)13

Fla. R. Civ. P. 1.01016

Fla. R. Civ. P. 1.090(a)	8
Fla. R. Civ. P. 1.100(d)	16
Fla. R. Civ. P. 1.500(a)	9
Fla. R. Civ. P. 1.500(b)	9
Fla. R. Civ. P. 1.500(e).....	9
Fla. R. Civ. P. 1.530	13
Fla. R. Civ. P. 1.540(b)(4)	12
Fla. R. Civ. P. Form 1.907(b)	10, 11
Fla. R. Civ. P. Form 1.980	9
Fla. R. Gen. Prac. & Jud. Admin. 2.514(a)	8, 13

TREATISES

Henry P. Trawick, Jr., <i>Trawick’s Florida Practice and Procedure</i> (2012–2013 ed. 2012)	9, 18
--	-------

SUMMARY OF ARGUMENT¹

ADP's arguments confuse the issues, misstate the record, and above all, expose the tenuous legal footing upon which the *BellSouth* cases have always rested. In replying to ADP's brief, Dr. Chamah first rebuts ADP's distortions of the record, then makes clear that Dr. Chamah is both challenging the determination of voidness *and* that *BellSouth* is still good law, reasserts that the lower tribunal improperly found excusable neglect, and finally addresses the fact that the improper remedy was granted.

ADP distorts the record in multiple ways, and Dr. Chamah briefly corrects this. ADP implies that it was entitled to notice of the application for default, and to notice of the default judgment motion. It was not.

Dr. Chamah next replies to ADP's contention that the default judgment was void, and that *BellSouth* remains good law. The default judgment was *not* void precisely because ADP had notice that

¹ Citations to the briefs and appendices used in this document are as follows:

- Initial Brief: "I.B.";
- Appendix to Initial Brief: "I.A.";
- Answer Brief: "A.B."

judgment for the full amount could be entered against it, and it had an opportunity to be heard that flowed from the service of the writ. The notice within the writ had the effect of liquidating the amount. To the extent that *BellSouth* requires *more*, it is a departure from the requirements followed in current case law, and moreover, does not properly result in a void judgment either on its own terms or any others. At worst, not holding trial on damages resulted in error that ADP had to cure—and could have cured—through direct appeal of that judgment.

The lower tribunal likewise grossly abused its discretion in its handling of the motion to vacate on excusable neglect grounds by disallowing discovery, tightly confining the scope of testimony from ADP's sole witness, and disallowing judicial notice. In short, the lower tribunal crafted an evidentiary hearing that led to the conclusion it reached, rather than permitting the evidence to do the talking. ADP's brief cannot credibly controvert this.

Finally, and unaddressed in ADP's brief, the lower tribunal reached the wrong conclusion. If the judgment indeed was void, it was *only* void as far as to the amount of damages, and trial needed to be held. The default and the default judgment as to liability should

have remained undisturbed. Indeed, even if excusable neglect were properly found, ADP only requested, and the lower tribunal only granted vacatur of the *judgment*, not the *default*. Consequently, even if the lower tribunal properly vacated the judgment on excusable neglect grounds, it should have re-entered judgment for Dr. Chamah as to liability, rather than dismissing ADP.

ARGUMENT

THE COURT SHOULD DISREGARD ADP'S DISTORTIONS OF THE RECORD

As a preliminary matter, Dr. Chamah must assert that ADP's presentation of the record is distorted at best, if not downright deceptive.

The answer brief focuses on the relatively quick timeline of Dr. Chamah's actions upon ADP's default, (A.B. 2), and the fact that certain papers were not served on ADP (A.B. 2 n.2). These were all proper actions.

The Answer Brief notes that ADP's response to the writ was due on December 7, and that five days later Dr. Chamah applied for a default of ADP. A.B. 2. This is actually incorrect. ADP's answer was due December 11, 2023, because the date of service was a Friday. Fla.R.Civ.P. 1.090(a); Fla.R.Gen.Prac. & Jud.Admin. 2.514(a)(1)(A). See I.A. 10. Dr. Chamah's application for default was filed as soon as possible after ADP's answer was late. This was appropriate simply because ADP had failed to respond or to communicate with Dr. Chamah. And once the default was entered, Dr. Chamah moved

for default judgment immediately, as was his right.² Fla.R.Civ.P. 1.500(e). The purpose of default proceedings is to expedite litigation.

An application for entry of a default need not be served on a party that has failed to file or serve any document in an action. Cf. Fla.R.Civ.P. 1.500(b) (notice of application for *court* default need only be served if the defaulting party has previously filed or served any document); *Gulf Maint. & Supply, Inc. v. Barnett Bank of Tallahassee*, 543 So.2d 813, 816 (Fla. 1st DCA 1989). While the default in this case was entered pursuant to Rule 1.500(a), there is absolutely no need to serve an application for clerk's default,³ and ADP's focus on the lack of notice of the default is at best deceptive.

² At least one authority suggests that it is unnecessary to move for default judgment once default is entered. Henry P. Trawick, Jr., *Trawick's Florida Practice and Procedure* § 25:4 (2012–2013 ed. 2012).

³ While the undersigned's experience is that some attorneys have captioned motions for clerk defaults as "*ex parte*," in light of the strictness with which clerks' policies operate, the undersigned considers it a risky practice as it represents a departure from the supreme court's form. See Fla.R.Civ.P. Form 1.980.

THE JUDGMENT WAS NOT VOID

ADP correctly states that a judgment is said to be void where it “is so defective that it is deemed never to have had legal force and effect.” *Sterling Factors Corp. v. U.S. Bank Nat’l Ass’n*, 968 So.2d 658, 665 (Fla 2d DCA 2007). But this is not the end of the analysis.

There are two grounds that ADP claims the judgment is void: First, for want of notice and opportunity to be heard as to the amount of unliquidated damages. Second, it would seem, for want of notice and opportunity to be heard as to the fact that *its own property* could be threatened for failure to answer.

ADP had Notice and an Opportunity to be Heard Regarding its Potential *in personam* Liability for Failure to Answer the Writ, and the Amount Sought was Liquidated

As Dr. Chamah noted in his initial brief, one of the key issues here is that the notice given to ADP under a continuing writ of garnishment differed materially from the notice given to other garnishees in essentially every other case. The language used in Form 1.907(b) includes the key warning, and this was used in the writ:

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 language used in legal process, whether a writ of garnishment or a summons, matters. The legal process “notifies the defendants that they have twenty days in which to file an answer or a default will be entered for the relief demanded.” *Quintero-Chadid Corp. v. Gersten*, 582 So.2d 685, 687–88 (Fla. 3d DCA 1991). The writ states the relief demanded and very clearly gives notice of the consequences of failure to respond.

In *Carpenter v. Benson*, the Fifth District found want of notice because the writ and statute did not provide notice to the garnishee that it could suffer *in personam* liability. 478 So.2d 353, 355 (Fla. 5th DCA 1985). The writ used here absolutely provides for *in personam* liability of the garnishee. Furthermore, the garnishment statute, Chapter 77, Florida Statutes, contains numerous indications that *in personam* liability might occur to the garnishee. First, as Dr. Chamah discussed in his initial brief, *continuing* garnishment differs from classical garnishment because it renders the garnishee liable for periodic payments that were not due during the garnishment period. See I.B. 23–25. Second, a garnishee that wrongfully fails to retain property of a defendant would still be liable

to the plaintiff for the amount wrongfully disbursed. See § 77.06, Fla.Stat.

As to the opportunity to be heard, ADP had twenty days to answer the writ, with full notice of the possible consequences. That is all due process requires.

Similarly, as argued extensively in the initial brief, the amount was liquidated because it was capable of straightforward calculation based on the well-pleaded allegations in the motion or the writ. See I.B. 21–23, and cases cited therein. We need not recite more.

The Finding of Voidness is Impossible to Square with Current Case Law: The Judgment was at Worst, Voidable

In a recent case, the Fifth District moved towards a more nuanced understanding of voidness. *Specialty Sols., Inc. v. Baxter Gypsum & Concrete, LLC*, 325 So.3d 192 (Fla. 5th DCA 2021). In *Specialty Solutions*, the court concluded that summary judgment for unliquidated damages was *not* automatically void, and thus *could not* be set aside on a Rule 1.540(b)(4) motion. 325 So.3d at 200 & n.14. Realistically, this was never seriously in doubt: *BellSouth I*, which was adopted by the supreme court, stated that summary judgment in garnishment was, “of course, permissible.” *Sec. Bank*,

N.A. v. BellSouth Advert. & Publ'g Corp. (BellSouth I), 679 So.2d 795, 800 n.5 (Fla. 3d DCA 1996), *aff'd in part*, 698 So.2d 254 (*BellSouth II*) (Fla. 1997). This is a critical distinction that ADP completely misses in its Answer Brief.

Thus, if we suppose that the entry of judgment below *was* error, ADP could have moved for rehearing or appealed the judgment. Fla.R.Civ.P. 1.530(a)–(b); Fla.R.App.P. 9.110(b). Indeed, a notice of appeal could have been filed by January 12, 2024. Fla.R.App.P. 9.420(e); Fla.R.Gen.Prac. & Jud.Admin. 2.514(a). It is worth noting that ADP filed its motion to vacate on January 11, 2024. A.B. 3; I.A. 22–68. As the *Specialty Solutions* court noted, “[w]hether a judgment is reversible on direct appeal is far different than whether a purported erroneous judgment, unchallenged by direct appeal, can be set aside, perhaps years later, as void under a rule 1.540(b)(4) motion.” 325 So.3d at 197. As the Fourth District has held:

Rule 1.540 was intended to provide relief from judgments, decrees or orders under a limited set of circumstances; it was neither intended to serve as a substitute for the new trial mechanism prescribed by Rule 1.530 nor as a substitute for appellate review of judicial error.

Fiber Crete Homes, Inc. v. Div. of Admin., 315 So.2d 492, 493 (Fla. 4th DCA 1975). See also *Curbelo v. Ullman*, 571 So.2d 443 (Fla. 1990) (quoting *Fiber Crete* and noting that a court determining damages without a jury does not result in a void judgment).

In *Curbelo*, the supreme court was even clearer:

It is well settled that where a court is legally organized and has jurisdiction of the subject matter and the adverse parties are given an opportunity to be heard, then errors, irregularities or wrongdoing in proceedings, short of illegal deprivation of opportunity to be heard, will not render the judgment void.

Curbelo, 571 So.2d at 445 (citing *State ex rel. Fulton Bag & Cotton Mills v. Burnside*, 15 So.2d 324 (Fla. 1943)). In short, ADP needs to demonstrate its due process rights were violated by the judgment, which as discussed *supra* and in Dr. Chamah's initial brief, did not occur.

Having established that ADP had notice of the relief sought and that could be obtained against it, we must determine whether ADP had the opportunity to be heard as to the amount of damages. This is, yet again, answered in the affirmative: The notice and the twenty days to respond was the opportunity to be heard.

BellSouth I only holds that awarding unliquidated damages without notice and proof is “fundamental error.” 679 So.2d at 800 (citing *Bowman v. Kingsland Dev., Inc.*, 432 So.2d 660, 663–64 (Fla. 1983)). Fundamental error is not the same as voidness.

The *BellSouth* Cases are No Longer Good Law

As argued in the initial brief, *BellSouth I* and *II* lie on infirm ground and have at least arguably been receded from. I.B. 22–23 (citing *Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc. (AME)*, 982 So.2d 628 (Fla. 2008)). While ADP cites to a variety of cases indicating that the *AME* holding has not previously been held to abrogate *BellSouth II*, (A.B. 22–23), this does not make it good law. The citation to *Cellular Warehouse* as supporting the ongoing viability of *BellSouth II*, (A.B. 22), is particularly perplexing: *Cellular Warehouse* was decided by the Third District in 2007, *AME* by the supreme court in 2008.

THE LOWER TRIBUNAL CRAFTED AN EVIDENTIARY HEARING IN WHICH DISPROVING EXCUSABLE NEGLIGENCE WAS IMPOSSIBLE

The Lower Tribunal Abused its Discretion

As discussed in the initial brief, the lower tribunal prevented Dr. Chamah from obtaining discovery from ADP on its motion to vacate. If we assume that Section 77.081(1), Florida Statutes, truly

does not apply to post-judgment garnishment, then discovery should have been available under Section 77.083, Florida Statutes, based on subpoena or on a motion in lieu of *scire facias*. See Fla.R.Civ.P. 1.100(d).

The Obligation for a Timely Response was Absolute and Cannot Be Extended

Garnishment is well-understood to be a special statutory proceeding. See, e.g., *Garel & Jacobs, P.A. v. Wick*, 683 So.2d 184, 186 (Fla. 3d DCA 1996). In special statutory proceedings, unless a rule expressly provides to the contrary, the statute controls. Fla.R.Civ.P. 1.010. There is no discretion to extend the deadline to answer a writ of garnishment. See *BNP Paribas v. Wynne*, 944 So.2d 1004, 1005–06 (Fla. 4th DCA 2005).

Consequently, the relief requested below by ADP, and argued with respect to the issue of excusable neglect, was simply unavailable. The judgment could not reasonably be vacated for excusable neglect because ADP had no right to answer the writ anymore. Put differently, the neglect was inexcusable as a matter of law.

The Lower Tribunal Impermissibly Interfered with Dr. Chamah's Ability to Try the Motion to Vacate

As discussed in the initial brief, the lower tribunal did not require ADP's witness to turn over materials on which she relied during testimony, which continued from day to day. See I.B. 26–28. ADP distorts the situation by describing these materials as *not* being used during testimony. A.B. 32–34. But as was argued below, and in the initial brief, ADP's witness reviewed materials during testimony, and those materials should have been furnished to Dr. Chamah. The prevention of discovery on the motion to vacate only made this interference worse, and created a situation in which Dr. Chamah could not possibly prove the extent of ADP's gross negligence.

THE LOWER TRIBUNAL GRANTED THE WRONG REMEDY

Even under the pre-*BellSouth II* case of *Cellular Warehouse*, the fact that an “error in notice, however, does not void the entire judgment, only that portion awarding unliquidated damages.” *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So.2d 662, 666 (Fla. 3d DCA 2007). Consequently, assuming the lower tribunal properly vacated the judgment, it should *only* have vacated as to

damages, and immediately reentered judgment. *See also* Trawick, *supra*, at § 25:4.

THIS CASE PROVIDES A VEHICLE FOR REVISITING *BELLSOUTH*

When this Court decided *BellSouth I*, it effectively nullified Section 77.081, Florida Statutes, and made answering writs of garnishment optional. *See BellSouth II*, 698 So.2d at 256 (Harding, J., dissenting). Because of the incompatibility of this with civil procedure and subsequent case law (such as *AME*, as discussed in the initial brief), to the extent this Court feels bound by *BellSouth I* and *II*, it should give Dr. Chamah a written opinion sufficient to seek review in the Supreme Court of Florida.

CONCLUSION

Garnishment is complex, to say the least. As a special statutory proceeding of venerable pedigree, there is naturally a great deal of case law on it. As stated in the initial brief, the lower tribunal erred in multiple ways, and the answer brief does not adequately address those errors. This Court should reverse, at least in part, because ADP sought the wrong remedy, failed to prove excusable neglect, failed to demonstrate voidness, and moreover, the lower tribunal should not have vacated the entire judgment.

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 December 20, 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 4,000 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
ebryson@sgrvlaw.com
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

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
abeaulieu@avilalaw.com
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
alicia.franchino@jacksonlewis.com
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@faegredrinker.com
legalresourceteam@faegredrinker.com
docketgeneral@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

VIA U.S. MAIL:

Armando De La Cruz
266 E. 16 St.
Hialeah, FL 33010