IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

NATIONWIDE INSURANCE COMPANY OF AMERICA,

Appellant,

vs.

AUTO GLASS AMERICA, LLC, A/A/O NICK MAY,

Appellee.

Appeal No.: 2D2024-1635

L.T. Case No.: 16-CC-014457

ON APPEAL FROM THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT, NATIONWIDE INSURANCE COMPANY OF AMERICA

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PRELIMINARY STATEMENT

Appellant, Nationwide Insurance Company of America, is referred to in this brief as “Nationwide.”

Appellee, Auto Glass America, LLC a/a/o Nick May, is referred to as “Auto Glass.”

Nationwide provides an appendix of critical portions of the record to facilitate review. This brief cites to the appendix as (A. **).

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case.

This is an appeal from a non-final order setting aside a 2017 order dismissing the action for lack of prosecution. (A. 48.) The dismissal order was entered on July 19, 2017. (A. 37.) Auto Glass did not seek rehearing or appeal the order. (*See* A. 4-8.) Instead, Auto Glass filed a motion over six years later pursuant to Florida Rule of Civil Procedure 1.540(b) on March 13, 2024. (A. 39-45.) That motion was not verified or supported by any affidavits. (*See* A. 39-45.) The trial court granted the motion based on "representation by a licensed member of The Florida Bar and officer of the Court that the Motion to Set Aside was filed immediately upon learning of the improper Dismissal." (A. 59.) Nationwide appeals from the written order based on this ruling. (A. 68-70.)

B. Course of Proceedings.

On May 6, 2016, Auto Glass, as assignee of Nationwide's insured Nick May, brought one count of breach of contract against Nationwide.[1] (A. 9-10.)

[1] Auto Glass incorrectly named Allied Property & Casualty Insurance as the original defendant. By joint stipulation, Allied Property & Casualty Insurance was dropped as the defendant and Nationwide was substituted in its place. (A. 12.)

It claimed that it provided necessary material and labor to repair Mr. May's windshield, and Nationwide failed to adequately reimburse it. (A. 9-10.)

The case proceeded under the Florida Rules of Civil Procedure. (A. 20.) Auto Glass filed an amended complaint (A. 22-24), and on August 22, 2016, Nationwide filed its answer and affirmative defenses to the amended complaint. (A. 25-30.) That was the last record activity prior to the court issuing the notice of intent. (A. 5.)

C. The Trial Court Dismisses the Action for Lack of Prosecution in 2017.

On May 9, 2017, the trial court issued a notice of intent because the last record activity occurred over six months prior. (A. 31.) The notice of intent stated:

> If good cause why this action should remain pending is filed as stated above, a hearing on the question will be held before the Honorable **Daryl M Manning** at **Courtroom 300, 800 E Twiggs St., Tampa, FL 33602,** on **July 19, 2017,** at **9:30 AM.**

(A. 31.) (emphasis in original.) The notice of intent further advised:

> Failure to file written good cause may result in **DISMISSAL**. If good cause is filed, failure to appear after filing good cause may also result in **DISMISSAL. PLEASE BE GOVERNED ACCORDINGLY**.

(A. 31.) (emphasis in original.)

Auto Glass conceded that it received the notice of intent when it filed a statement of good cause "respond[ing] to the Clerk of Court's Notice of Intent to Dismiss for Failure to Prosecute." (A. 32-36.) Within the statement, Auto Glass advised it "will continue to actively pursue this matter through discovery," and that it "intends to notice this case for trial at the appropriate time." (A. 32.)

On July 19, 2017, the trial court judge, the Honorable Daryl M. Manning, called up for hearing the notice of intent. (A. 43.) Neither party contends it attended the hearing. The trial court entered an order dismissing the action for lack of prosecution that same day. (A. 37.) The trial court explained in the dismissal order that there was no record activity within the six months immediately preceding service of the notice, no record activity during the sixty days following the notice, and no good cause shown for why the action should remain pending. (A. 37.) The dismissal order contained no reservation of jurisdiction. (A. 37.)

On August 28, 2017, Auto Glass filed a notice that the action was at issue and ready to be set for trial. (A. 38.) After Auto Glass filed its notice that the action was at issue, the case remained dormant for over six years. (A. 5.)

D. Auto Glass Files its Motion to Set Aside the Dismissal Order in 2024.

The next filing was Auto Glass's March 13, 2024 motion to set aside the dismissal order ("motion"). (A. 39-45.) That motion was not verified. (*See* A. 39-45.) Auto Glass did not file an affidavit in support of the motion. (*See* A. 39-45.)

In the motion, Auto Glass argued that it filed a statement of good cause twelve days after the trial court clerk set the matter on the dismissal docket. (A. 39.) Auto Glass's entire argument was as follows:

> 11. Patently, the Plaintiff did file record evidence "*within the 60 days immediately following the service of such notice*" intent to dismiss pursuant to Rule 1.420.
>
> 12. From the irrefutable record evidence, the matter was dismissed by mistake. The order of Dismissal is void and should be set aside. *See F. R. C. P.; Rule 1.540(b).*

(A. 40.)

Notably, attached to the motion as an exhibit is a copy of the trial court docket as it existed on March 13, 2024. (A. 43-44.) The highlighted portions reflect the notice of intent was filed on May 10, 2017, that a hearing was conducted on the dismissal docket on July 19, 2017 at 9:30 am, and the trial court entered the dismissal order on July 19, 2017. (A. 43.) Auto Glass did not contend that it appeared for the hearing. Auto Glass also did not contend that the trial court failed to properly serve the dismissal order.

Nationwide filed an opposition to the motion ("opposition"), arguing that Auto Glass was not entitled to relief under Rule 1.540(b)(1). (A. 46-47.) Even if the trial court entered the dismissal order by mistake, Nationwide asserted that the motion was untimely because it was not filed in a reasonable time and, in any event, it was filed over one year after the dismissal order was entered. (A. 46-47.)

E. The Trial Court Conducts a Hearing on the Motion and Grants It.

On June 3, 2024, the Honorable James Giardina, a successor judge assigned to the action, conducted a hearing on the motion. (A. 50.) Attorney Keith Goan appeared for Auto Glass, covering for lead counsel Attorney Anthony Prieto. (A. 51, 52.) Auto Glass argued during the hearing that it timely filed a statement of good cause; therefore, the trial court entered the dismissal order in error. (A. 53.)

Attorney Goan explained the years-long delay in filing the motion was because "Mr. Prieto had let me understand that they didn't—they didn't realize, they didn't know that they didn't have the Notice or it was dismissed." (A. 56.) Attorney Goan stated, "[u]pon realizing the case was dismissed, whether it was because the case was in a batch of cases that they were working on to get resolved or for whatever reasons, once it was brought to the attention of Mr. Prieto, he immediately filed the Motion timely." (A. 56.)

Auto Glass framed the issue as one of "timeliness of when [Auto Glass] realized this happened, you know, became aware of it..." (A. 57.) Auto Glass did not explicitly state that the trial court did not serve it with the dismissal order. Auto Glass also did not state that it appeared for the July 19, 2017 hearing.

Nationwide argued that even if Auto Glass entered a statement of good cause, Auto Glass failed to timely set aside the dismissal. (A. 54-55.) Under Rule 1.540, Auto Glass was required to file its motion within a reasonable time and no more than one year after the dismissal order was entered. (A. 54.) However, Nationwide argued, Auto Glass failed to do so until nearly seven years later and outside the statute of limitations. (A. 58.) Nationwide further argued that Auto Glass did not contend that it did not receive the notice of intent or the dismissal order. (A. 58.)

The trial court stated that it saw "there was in fact record activity after the Notice, good cause shown, but doesn't see the actual hearing. While there is an Order, there's no hearing, no record of the hearing." (A. 59.) Inexplicably, the docket entry confirming the hearing took place, as highlighted in Auto Glass's exhibit to its March 13, 2024 motion, has since disappeared from the current docket. (*Compare* A. 43 *with* A. 5.)

"Notwithstanding" the lack of hearing entry noted on the record, the trial court announced, "this Court has heard representation by a licensed member of The Florida Bar and officer of the Court that the Motion to Set Aside was filed immediately upon learning of the improper Dismissal. And for that reason, the Court will grant the Motion to Set Aside." (A. 59.)

The trial court then entered the order vacating the dismissal on June 17, 2024. (A. 48.) Nationwide timely appealed (A. 68.) and moved to stay the trial court proceedings pending this appeal. (A. 71-73.) Auto Glass does not oppose the stay. (A. 71.) The trial court has not yet entered an order on the motion to stay.

SUMMARY OF THE ARGUMENT

The trial court erred in granting the motion to set aside the 2017 dismissal order because the motion was untimely. Auto Glass moved to vacate the dismissal order under Rule 1.540(b) and argued mistake. It claimed that it did not become aware of the dismissal order's existence until immediately before it filed its motion. But Rule 1.540(b) limits the court's authority to grant relief on the ground of mistake to one year from the date of the at-issue order. Because the motion was filed over six years after entry of the dismissal order, the motion was untimely. *Renovaship, Inc. v. Quatremain*, 208 So. 3d 280, 284 (Fla. 3d DCA 2016).

Auto Glass also claimed the order of dismissal should be set aside on the ground that it was void. Assuming hypothetically the order was void (it was not), Rule 1.540(b) authorizes a court to grant relief from a void order "within a reasonable time." *Waiswilos v. Feacher*, 370 So. 2d 1250, 1251 (Fla. 4th DCA 1979), held that "[a] motion filed over five years after the dismissal was not filed within such reasonable time." Here, the motion was filed over six years after the 2017 dismissal order. Thus, to the extent the motion claimed the dismissal order was void, the motion was still untimely.

The trial court did not, and could not, find that the dismissal order was void. Instead, it ruled that it had the discretion to set aside the dismissal

order because it "heard representation by a licensed member of The Florida Bar and officer of the Court that the Motion to Set Aside was filed immediately upon learning of the improper Dismissal." (A. 60.) But Florida law does not empower a trial court judge to exercise its jurisdiction under these circumstances. *See Renovaship*, 208 So. 3d at 285 (finding trial court lacked jurisdiction to set aside an order dismissing an action for lack of prosecution when the order was not void and the motion to vacate was filed more than one year after it was rendered).

Because Auto Glass was not deprived of due process here, the dismissal order is not void. There is no dispute that Auto Glass received the notice of intent, which further notified Auto Glass of the July 19, 2017 hearing on the trial court's motion to dismiss for lack of prosecution. There is also no dispute that Auto Glass was aware of the trial court's caution that failing to attend the hearing, even if good cause was filed, could result in the court dismissing the action. Auto Glass provided no proof that it attended the hearing, and the trial court entered the dismissal order in accordance with its notice of intent.

Once the dismissal order became final, the trial court lacked case jurisdiction over the action. Auto Glass had the option to file a notice of

appeal within 30 days or a Rule 1.540 motion within one year of the 2017 dismissal order. *Renovaship*, 208 So. 3d at 284. Auto Glass did neither.

The Florida Supreme Court has stressed that "[t]he importance of finality in any justice system ... cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end." *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). This Court should apply Rule 1.540(b)'s plain one-year deadline, consistent with the sound policy that litigants and courts alike deserve finality. Therefore, the Court should reverse the trial court's order setting aside the 2017 dismissal order and remand with directions to reinstate the dismissal order.

ARGUMENT

Standard of Review: Although the terms are sometimes used interchangeably, whether a trial court has subject matter or case jurisdiction is a question of law reviewed de novo. *Magloire v. Bank of New York*, 147 So. 3d 594, 596 (Fla. 4th DCA 2014) (referring to the question of a trial court's jurisdiction over a case after a dismissal for lack of prosecution as subject matter jurisdiction) (internal citation and quotation omitted); *but see Renovaship, Inc. v. Quatremain*, 208 So. 3d at 285 (clarifying that trial court lacked case jurisdiction to set aside order dismissing action for lack of prosecution). Regardless of the term used, "a party cannot waive a challenge to subject matter or case jurisdiction." *Schmidt v. JJJTB, Inc.*, 357 So. 3d 208, 211 (Fla. 2d DCA 2023), *review granted,* No. SC2023-0915, 2023 WL 7132835 (Fla. Oct. 30, 2023).

Assuming a trial court has case jurisdiction, its ruling on a motion to vacate under Florida Rule of Civil Procedure 1.540 is generally reviewed for an abuse of discretion. *Buckman v. Beighley*, 128 So. 3d 133, 134 (Fla. 1st DCA 2013) (affirming denial of motion to vacate judgment). However, where there "appears to be no factual dispute upon which the trial court based its determination to vacate" a judgment, then the issue is a "pure question of law," and an appellate court's review is de novo. *Mourning v. Ballast Nedam*

Constr., Inc., 964 So. 2d 889, 892 (Fla. 4th DCA 2007) (reversing order vacating judgment).

I. A Plain Reading of Rule 1.540(b) Did Not Lend the Trial Court Jurisdiction to Set Aside the Dismissal Order Six Years Later Due to Mistake.

The trial court lacked jurisdiction to set aside the dismissal order over six years after it was entered. The dismissal order contained no reservation of jurisdiction, and it became final when Auto Glass did not move for rehearing within fifteen days of its issuance. *See* Fla. R. Civ. P. 1.530(b). The trial court therefore "lo[st] jurisdiction over the subject-matter of the suit, other than to see that proper entry of judgment or decree is made and that the rights determined and fixed by it are properly enforced." *Paulucci v. General Dynamics Corp.,* 842 So. 2d 797, 800-01 (Fla. 2003) (internal citation and emphasis omitted); *see also Renovaship,* 208 So. 3d at 283 ("As a general rule, a trial court loses jurisdiction upon rendition of a final judgment and expiration of the time allotted for altering, modifying or vacating the judgment.") (internal citation and quotation omitted).

Florida law recognizes that after the trial court loses jurisdiction over a case, it may act again in the case "only if a motion properly invoking its jurisdiction is timely filed." *Porter v. Chronister*, 295 So. 3d 310, 312 (Fla. 2d DCA 2020). Florida Rule of Civil Procedure 1.540 provides a method for

obtaining relief from judgments, decrees, or orders. Pursuant to Rule 1.540(a), a trial judge is authorized to correct "clerical mistakes ... at any time." A trial court is also authorized to correct non-clerical or substantive mistakes under Rule 1.540(b)(1); however, a motion to correct a non-clerical mistake, such as Auto Glass claims here, must be filed "not more than 1 year after the judgment, decree, order, or proceeding was entered or taken." Rule 1.540(b) states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:
>
> **(1) mistake, inadvertence, surprise, or excusable neglect;**
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) that the judgment, decree, or order is void; or
>
> (5) that the judgment, decree, or order has been satisfied, released, or discharged, or a prior judgment, decree, or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment, decree, or order should have prospective application.
>
> The motion shall be filed within a reasonable time, **and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken.**

(emphasis added). Thus, when an order is not void, like here, a plain reading of Rule 1.540(b) shows it limits a party to no more than one year after the order was entered to seek relief.

Auto Glass filed its motion under Rule 1.540(b) over six years after the issuance of the dismissal, arguing the trial court entered the dismissal order by mistake. (A. 39-40.) Auto Glass claims the trial court mistakenly entered the dismissal order because Auto Glass had filed a statement of good cause prior to the expiration of the sixty-day deadline. (A. 39-40.) Assuming the trial court had not also required Auto Glass to appear for the July 19, 2017 hearing and the dismissal order was indeed entered by mistake, Nationwide correctly argued that Auto Glass was required to raise its Rule 1.540(b) motion no later than one year after the entry of the dismissal order. (A. 46-47.) Auto Glass failed to do so. (A. 39-40.) *See Purdue v. R.J. Reynolds Tobacco Co.*, 259 So. 3d 918, 921 (Fla. 2d DCA 2018) ("So while [the plaintiff's] claim that she did not receive the master dismissal order is generally cognizable under rule 1.540(b)(1), her motion, filed twenty-eight months after the entry of that order, is untimely."); *Renovaship*, 208 So. 3d at 284 (Fla. 3d DCA 2016) (declining to reach the merits of whether the order dismissing the case for lack of prosecution was a mistake because the plaintiff failed to file his Rule 1.540(b)(1) motion within one year of the order).

Instead, Auto Glass all but ignored the plain language of the one-year deadline—which clearly states "1 year after the judgment decree, order, or proceeding was entered"—and argued that the timeliness should be considered based on when the mistake was discovered. (A. 57.) (emphasis added.) Attorney Goan, appearing in place of Auto Glass's lead counsel, Attorney Prieto, argued at the hearing that it was his "understanding" that Attorney Prieto was not aware that he did not have the order of dismissal until over six years after it was entered. (A. 56.) When Attorney Prieto made the discovery, he "immediately" filed the motion. (A. 56.) Attorney Goan's argument to the trial court was that the motion was timely because Attorney Prieto filed the motion immediately after his discovery. (A. 56.) Of course, "counsel's argument is not evidence." *Deutsch v. Global Fin. Servs., LLC*, 976 So. 2d 680, 683 (Fla. 2d DCA 2008). Attorney Prieto offered no affidavit to support the factual assertions of when and how the dismissal order was discovered. And Auto Glass offered no authority in support that its diligence after discovery could subvert the plain language of Rule 1.540(b)'s one-year deadline. The trial court erroneously adopted this reasoning—based on nothing more than unsworn argument of counsel—and granted the motion because "the Motion to Set Aside was filed immediately upon learning of the improper Dismissal." (A. 59.)

But this reasoning effectively eviscerates Rule 1.540(b)'s bright-line one-year deadline and defies its plain meaning. Auto Glass's argument seeks to blur, if not erase, Rule 1.540(b)'s limitation. This Court should not create such an exception here. No support for Auto Glass's position exists under the facts of this case or in the case law, nor is it logical.

To the contrary, this Court has previously held that issues of diligence in seeking relief under Rule 1.540 can be considered only after there has been a determination that the relief was timely sought. *Dage v. Deutsche Bank Nat. Tr. Co.*, 95 So. 3d at 1023–24. In *Dage*, the defendants waited more than two years after an entry of final judgment before moving to vacate the default and judgment due to excusable neglect. *Id*. Before considering the question of whether the defendants were diligent in seeking relief under Rule 1.540(b), this Court first addressed whether the defendants timely filed their motion to vacate. *Id*. This Court found that waiting more than two years was untimely under Rule 1.540(b) and was grounds for the trial court to deny the motion to vacate. *Id*. at 1024. Only after assuming the motion was timely, did this Court then entertain whether the defendants were diligent in seeking relief. *Id*.

Here, the trial court erred when it put the cart before the horse and ruled based on the question of diligence only. Moreover, nothing about the

trial court's position as a successor judge to the action provided it with the authority to exercise jurisdiction after the expiration of Rule 1.540's one-year deadline. *Tingle v. Dade Cty. Bd. of Cty. Comm'rs*, 245 So. 2d 76, 78 (Fla. 1971). ("While a judge should hesitate to undo his own work, and should hesitate still more to undo the work of another judge, he does have, *until final judgment*, the power to do so and may therefore vacate or modify the Interlocutory rulings or orders of his predecessor in the case.") (emphasis added). Once the 2017 dismissal order was entered and Rule 1.540(b)'s one-year deadline expired, the trial court lost jurisdiction to set aside the dismissal order based on mistake.

II. Assuming the Dismissal Order was Void, Six Years Was Not a Reasonable Time within which to Bring the Motion.

Auto Glass also argued the dismissal order was void in the motion, but it appears to confuse two distinct principles of law. It asserted that the dismissal order was entered by "mistake" because Auto Glass filed the statement of good cause within the sixty days following the notice of intent. (A. 41.) Auto Glass seemingly believes this made the dismissal order "void." (A. 41.) Auto Glass is incorrect.

As discussed more fully in the section below, while a "mistake" may be challenged under Rule 1.540(b)(1), it does not render an order void. *See*

Fla. R. Civ. P. 1.540(b)(1). An order "may only be deemed void if: (1) the trial court lacked subject matter jurisdiction; (2) the trial court lacked personal jurisdiction over the party; or (3) there is a violation of the due process guarantee of notice and an opportunity to be heard." *Dabas v. Boston Inv'rs Group, Inc.*, 231 So. 3d 542, 545-46 (Fla. 3d DCA 2017) (citing *Tannenbaum v. Shea*, 133 So. 3d 1056, 1061 (Fla. 4th DCA 2014)). If none of the three elements is satisfied, all other claims of procedural or judicial error—including any "errors, irregularities, or wrongdoing in proceedings"—may render the decision voidable, but not void. *Dabas*, 231 So. 3d at 546.

The trial court made no specific finding that the dismissal order was void. Even assuming the dismissal order could be void under subsection (b)(4) due to mistake, which it was not, Rule 1.540(b) still imposed upon Auto Glass a "reasonable time" limitation for bringing the motion to set the dismissal order aside. Six years is not reasonable. *See Harvard Fin. Servs., LLC v. Remy-Calixte*, 283 So. 3d 847, 851 (Fla. 3d DCA 2019) (holding order dismissing case for lack of prosecution was void for lack of notice, but affirming order because the plaintiff failed to bring the Rule 1.540(b)(4) motion within a reasonable time); *Coral Gables Imports, Inc. v. Suarez*, 219 So. 3d 101, 102 (Fla. 3d DCA 2017) (finding fourteen months was a reasonable time for to file a Rule 1.540(b)(4) motion); *Waiswilos*, 370 So. 2d

at 1251 (Fla. 4th DCA 1979) (holding that a Rule 1.540(b)(4) motion "filed over five years after the dismissal was not filed within such reasonable time."). This is particularly true when Auto Glass was aware of the notice of intent and scheduled hearing on the matter but failed to monitor the court docket for the trial court's ruling. *See Emerald Coast Utilities Auth. v. Bear Marcus Pointe, LLC*, 227 So. 3d 752, 757 (Fla. 1st DCA 2017) (collecting cases on a counsel's duty to check court docket when pending motions are before the court.)

III. The Dismissal Order is Not Void Because Auto Glass was Not Deprived of Due Process.

The trial court did not make a specific finding that the dismissal order was void. It limited its ruling based on the "diligence" with which Auto Glass discovered the alleged mistake. (A. 59.) However, to the extent it can be construed the trial court found the dismissal order was void, such finding would be erroneous. The decision in *Renovaship, Inc. v. Quatremain* is dispositive of that point.

In *Renovaship*, the court rejected the plaintiff's argument that the order dismissing the case for lack of prosecution was void because he did not receive a copy of it. 208 So. 3d at 286-87. There, the trial judge in *Renovaship* sua sponte issued a notice of lack of prosecution. *Id*. at 282.

The notice required the party opposing dismissal to timely file a showing of good cause and to attend a hearing date to avoid dismissal. *Id*. The notice provided the date and time for the hearing and warned that any failure to attend would result in dismissal. *Id*. at 282-83.

In response, the plaintiff filed a notice of trial before the hearing date occurred. *Id*. at 283. However, the plaintiff did not attend the hearing, so the judge dismissed his case. *Id*. at 283. The plaintiff did not seek rehearing and did not appeal. *Id*. Fifteen months after the entry of the order dismissing the action, the plaintiff filed a motion to vacate the order under Rule 1.540(b) because it was void. *Id*.

In support of the motion, the plaintiff filed an affidavit, claiming that the clerk failed to properly serve the dismissal order and he never received it. *Id*. He continued to litigate the case, under the belief that the action remained pending. *Id*. The trial court granted the Rule 1.540 relief on that basis. *Id*.

The defendant appealed the order, and the appellate court reversed because:

> The fact that [the plaintiff] and his counsel never received a copy of the order entered at the conclusion of the hearing of which they had notice (and at which they were required to appear) does not constitute a denial of due process so as to render that order void and subject to vacatur at any time.

Id. at 285.

The court reasoned that the plaintiff did not claim he was not given notice of the hearing or that his failure to attend was the result of any lack of notice. *Id*. The court further pointed out that the plaintiff knew from the express language of the notice that failure to attend the hearing could result in dismissal. *Id*. This made the case distinguishable from other cases where a party did not receive notice of the hearing, which amounted to a denial of due process. *Id*. The order may have been voidable for a procedural irregularity in its service, but the court explained upon "failing to appear at the hearing, counsel should have, at the very least, checked the court docket or contacted the trial court or opposing counsel to ascertain what action the trial court took at the hearing, and should have obtained a copy of the order entered at that hearing." *Id*. at 286; *see also Purdue*, 259 So. 3d at 922 ("[W]hile the lack of receipt of a judgment or order arising out of a hearing of which the litigant had notice will not render a judgment or order void, lack of notice and an opportunity to be heard can, <u>if proven</u>, render the judgment or order void.") (emphasis in original).

That reasoning holds true in this case. In fact, even more so. Auto Glass concedes that it received the notice of intent. (A. 32.) Contained within the notice of intent was the notice of the July 19, 2017 hearing on the lack of prosecution. (A. 31.) Auto Glass does not claim that it was unaware

that failure to appear at the hearing even "after filing good cause may also result in **DISMISSAL.**" (A. 31.) Auto Glass provides no sworn proof that it attended the hearing. It provides no proof that the trial court failed to properly serve it with the dismissal order. Nor does it provide proof that it subsequently checked the court docket to determine if the hearing went forward or how the trial court ruled. It only argues that it did not discover the dismissal order until six years later.

Notably, Auto Glass attached a copy of the trial court docket as an exhibit to its motion and highlighted the entries that showed the hearing went forward as noticed on July 17, 2019 and the trial court's rendering of the dismissal order that same day. (A. 43.) Had Auto Glass performed this same exercise in 2017, as the *Renovaship* court explained, it would have discovered the dismissal order. Thus, like in *Renovaship*, "[t]he mere fact that [the plaintiff's] counsel asserted, more than a year later, that he never *received the dismissal order* that was entered on the day of a hearing which he chose not to attend, provides no rational basis for a conclusion that the dismissal order was void on due process grounds." 208 So. 3d at 286.

Auto Glass cannot possibly claim a lack of notice or a due process violation, and its indifference to what occurred does not render the dismissal order void. This case is therefore distinguishable from circumstances where

an order to dismiss for lack of prosecution is void because a party did not receive notice and was therefore denied due process. *See, e.g., First Call 24/7, Inc. v. Rios*, 373 So. 3d 1176, 1177 (Fla. 3d DCA 2022) (reversing order dismissing case for lack of prosecution as void when the parties were not served with the notice of lack of prosecution and order to appear for hearing prior to the date of the hearing).

CONCLUSION

For the reasons set forth above, the trial court was without jurisdiction to enter the June 17, 2024 order setting aside the dismissal. This Court should reverse the June 17th order and remand with directions to vacate that order and reinstate the dismissal order entered on July 19, 2017.

Respectfully submitted,

/s/ *Petra L. Justice*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2024, the foregoing was filed and served via the State of Florida's E-Filing Portal to:

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/s/ Petra L. Justice
Petra L. Justice, Esq.

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/s/ *Petra L. Justice*
Petra L. Justice, Esq.