IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY
a/s/o LISA SHECTMAN,
Appellant,

CASE NO. - 4D2024-0010
L.T. No. - CACE17-018014

V

MELISSA A. WILLIAMS; RANDY M. WILLIAMS; ALL AMERICAN BUILDERS & DEBRIS REMOVAL, INC.; and ALADDIN PLUMBING & CONSTRUCTION CORP.,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA

APPELLANT UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY'S AMENDED INITIAL BRIEF

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APPELLANT'S CERTIFICATE OF INTERESTED PERSONS

The Appellant knows of no other person interested in this matter except the interested persons as follows:

1. The Honorable Michael A. Robinson, Circuit Court Judge;

2. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Appellant; c/o Carlos Cruanes, Esq.

3. Carlos Cruanes, Esq., 815 N.W. 57th Avenue, Suite 401, Miami, FL 33126, attorney for the Appellant.

4. Randy M. Williams and Melissa A. Williams, Appellees, c/o Terra L. Sickler, Esq., Twig, Trade & Tribunal, PLLC, 1512 East Broward Boulevard, Suite 204A, Fort. Lauderdale, Florida 33301 at service@twiglaw.com; Attorneys for the Appellees.

5. Winston Cuenant, Cuenant & Pennington, P.A., 101 N.E. 3rd Avenue, #1500, Fort Lauderdale, Florida 33301, at winston@cuenantlaw.com; Attorneys for the Appellees.

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Appellate jurisdiction is pursuant to Fla.R.App.Pro. 9.130(a)(5) as an appeal from a non-final order on a motion for relief from judgment, granting Defendants' Emergency Verified Motion to Vacate Default, Moton for Relief From Judgment, and Motion to Quash Writ of Garnishment, entered on December 8, 2023.

PREFACE

This is an appeal from an order granting Defendants' Emergency Verified Motion to Vacate Default, Moton for Relief From Judgment, and Motion to Quash Writ of Garnishment ("Motion to Vacate"), entered on December 8, 2023, by the Honorable Michael A. Robinson, Circuit Court Judge of the Seventeenth Judicial Circuit in and for Broward County Florida. Accordingly, this appeal followed.

ABBREVIATIONS USED

UNIVERSAL will use the following abbreviations in the brief:

APPELLANT or UNIVERSAL……	UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY
APPELLEES or Williamses……	Randy M. Williams and Melissa A. Williams

ROA.....	Record on Appeal
Supp. ROA.....	Supplemental Record on Appeal
§	Section of Florida Statutes

STATEMENT OF THE ISSUE ON APPEAL

The trial court erred when it granted Defendants' Emergency Verified Motion to Vacate Default, Moton for Relief from Judgment, and Motion to Quash Writ of Garnishment (Motion to Vacate"), on December 8, 2023, by the Honorable Michael A. Robinson, Circuit Court Judge of the Seventeenth Judicial Circuit in and for Broward County Florida. First, the default final judgment was not void and appellee's motion to vacate was thus untimely pursuant to Fla. R. Civ. P. l.540(b); and Secondly, the trial court abused its discretion in granting Defendants' Motion to Vacate as Defendants failed to meet the prongs required for a trial court to set aside the judgment.

STATEMENT OF FACTS AND CASE

Nature of the case and facts: This appeal is of an order vacating a default, default final judgment and continuing writ of garnishment that had been entered in favor of UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY (UNIVERSAL) and against Randy and Melissa Williams ("The Williamses") in a insurance subrogation action. The Williamses were sued by UNIVERSAL on September 26, 2017, for subrogation for their failure to maintain their plumbing which caused extensive damage to their neighbor's unit, which was insured by UNIVERSAL, and for which it paid for the repairs.

Statement of the facts: The Williamses were properly served with the Complaint[1] on October 4, 2017.[2] Their attorney, Winston Cuenant (Cuenant) E-filed his Notice of Appearance and a Motion for Extension of Time to File Answer or Responsive Pleading on November 3, 2017.[3] He did not include his service email address on his Notice, nor on the Motion for Extension, nor did he file a notice of email designation. Mr. Cuenant's email address of

[1] App #1.
[2] App #4 and 5.
[3] App #6 and 7.

winston@cuenantlaw.com, is listed as his service email on the E-Filing Portal.

Mr. Cuenant had two email addresses at the time, winston@cuenantlaw.com, and winston@cmclaw.net. Mr. Cuenant has alleged in his affidavit and during the evidentiary hearing,[4] that the only email address that was active was the winston@cuenantlaw.com.[5]

Regarding the requested extension of time, UNIVERSAL's attorney and Cuenant emailed back and forth several times. Both of Cuenant's email addresses were used by UNIVERSAL's counsel. Several emails were sent to Cuenant at the winston@cmclaw.net, the address which was allegedly inactive, to which a response was sent by Cuenant.[6] One of the emails in the exchange was from Cuenant on November 15, 2017 at 12:45 PM, which was sent from the winston@cmclaw.net.[7]

On November 20, 2017, the proposed order on the Motion for Extension of Time was granted by the Court and submitted to the

[4] Supp. ROA, page 10.
[5] Affidavit of Winston Cuenant, paragraph 10, attached as Ex A to App. #36.
[6] App #43.
[7] App #43.

parties via the E-Filing system as part of the E-Filing submission.[8] Mr. Cuenant received the order granting the extension of time that he sought to file an answer or responsive pleading, at his listed service email address winston@cuenantlaw.com.[9] Mr. Cuenant did not file any document in response. From that moment forward, over 47 docket entries were submitted via the E-Filing system by the multiple parties, which would have served all of the listed attorneys, including Cuenant. Mr. Cuenant took no further action in this matter.

On January 5, 2018, the attorney for Co-Defendant, Aladdin Plumbing & Construction Corporation, e-filed its Answer and Affirmative Defenses.[10] Its certificate of service included Cuenant, and his correct email address, winston@cuenantlaw.com. On February 22, 2018, the attorney for Co-Defendant, Aladdin Plumbing & Construction Corporation, e-filed its Amended Request for Copies.[11] Its certificate of service included Cuenant, and his correct email address, winston@cuenantlaw.com.

[8] App. #8.
[9] Affidavit of Winston Cuenant, paragraph 6, attached as Ex A to App. #36.
[10] App. #9.
[11] App. #11.

On May 9, 2018, Plaintiff's Motion for Default was E-Filed which would have served Cuenant at his service address through the portal, and it was also mailed to him by certified mail.[12] On May 16, 2018, Plaintiff E-Filed its Notice of Hearing on Plaintiff's Motion for Default.[13] On June 5, 2018, the trial court entered its Order Granting Default which was E-Filed and E-served.[14]

On June 7, 2018, Plaintiff E-Filed its Motion for Default Final Judgment as to both Willamses.[15] On June 19, 2018, the trial court entered its Order Granting Default Final Judgment against the Williamses.[16] On August 1, 2018, Plaintiff filed its Motion for Order Compelling Defendants to Respond to the Fact Information Worksheet.[17] On August 28, 2018, the trial court entered its Order Compelling Defendants' Response to Fact Sheet served via E-Filing.[18] On September 27, 2018, Plaintiff E-Filed its Motion for Contempt, etc., against the Williamses, which E-served Cuenant, and it was also mailed to the Defendants.[19] On October 21, 2022,

[12] App #14.
[13] App. #15.
[14]App. #16.
[15] App. #19 and 20.
[16] App. 21 and 22.
[17] App. #23.
[18]App. #24.
[19] App. #25.

Plaintiff filed its Motion for Writ of Continuing Garnishment.[20] On January 12, 2023, the trial court entered its order of Continuing Writ of Garnishment as to Randy Williams. That document lists Cuenant's alleged correct email address in the certificate of service.[21] On February 1, 2023, the Writ was served on Mr. Williamses' employer.[22] On February 6, 2023, Plaintiff served upon the Defendants, its Notice Pursuant to F.S. §77.041, via U.S. Mail to the Williamses' home address.[23] On February 24, 2023, Plaintiff served upon the Williamses, its Notice Pursuant to F. S. 77.055, via U.S. Mail to the Williamses' home address.[24]

Sometime in April 2023, Mr. Williams noticed that money had been garnished out of his paycheck.[25] Thinking that it was a one-time deduction he did nothing further.[26]

On May 4, 2023, Plaintiff filed its Motion for Default Against Garnishee, and served the motion via U.S. Mail to the Williamses' home address.[27] On August 11, 2023, Plaintiff filed its Notice of

[20] App. #26.
[21] App. #27.
[22] App. #28.
[23] App. #29.
[24] App. #30.
[25] App. #36 ¶14 and 15.
[26] App.#36 ¶16.
[27] App. #31.

Extension of Continuing Writ of Garnishment, and served the motion via U.S. Mail to the Williamses' home address and to Cuenant's office address.[28] On August 11, 2023, Plaintiff filed its Notice of Filing Garnishee's Answer, and served the notice via U.S. Mail to the Williamses' home address and to Cuenant's office address.[29] On August 11, 2023, Plaintiff filed its Notice of Withdrawal of Default Against Garnishee, and served the notice via U.S. Mail to the Williamses' home address and to Cuenant's office address.[30]

On August 17, 2023, attorney Terra L. Sickler, filed her Notice of Appearance as Co-Counsel for the Defendants, which was served via E-Filing, and which listed Cuenant on the certificate of service, but did not list an email address.[31] On August 17, 2023, Defendants filed their Emergency Verified Motion to Vacate Default, Moton for Relief From Judgment, and Motion to Quash Writ of Garnishment ("Motion to Vacate"), which was served via E-Filing, and which listed Cuenant on the certificate of service, but

[28] App. #32.
[29] App. #33.
[30] App. #34.
[31] App. #35.

did not list an email address.[32] On August 17, 2023, Defendants filed their Request for Emergency Relief, which was served via E-Filing, and which listed Cuenant on the certificate of service, but did not list an email address.[33]

Defendants next filed three separate Emergency Notices of Hearing on the Motion to Vacate, for August 25, 2023, August 30, 2023, then finally, November 29, 2023.[34] On September 7, 2023, Defendants filed their Motion of Emergency Relief, seeking injunctive relief. The motion was served via E-Filing, and which listed Cuenant on the certificate of service, but did not list an email address.[35] On September 7, 2023, Defendants filed their Emergency Motion for Injunction, seeking injunctive relief. The motion was served via E-Filing, and which listed Cuenant on the certificate of service, but did not list an email address.[36]

On September 7, 2023. Plaintiff filed its Notice of Filing of email communications between UNIVERSAL's counsel, and Cuenant, previously referenced above.[37] On September 18, 2023.

[32] App. #36.
[33] App. #37.
[34] App. #38, 39, and 40.
[35] App. #41.
[36] App. #42.
[37] App. #43.

Defendants filed their Notice of Emergency Zoom Hearing on Motion for Temporary Injunction, which for the first time lists Cuenant's email address on the certificate of service.[38] On September 28, 2023, the trial court entered its Order Denying Defendants' Emergency Injunction to Stay Writ of Garnishment.[39] On October 12, 2023, Defendants filed their Notice of Filing in Support of Motion to Vacate.[40] On November 28, 2023, Defendants filed their Notice of Filing Correspondence in Support of Motion to Vacate.[41] On November 29, 2023, Plaintiff filed its Notice of Evidentiary Hearing, set for December 6, 2023.[42]

Course of the proceedings: Defendants' Emergency Verified Motion to Vacate Default, Moton for Relief from Judgment, and Motion to Quash Writ of Garnishment came up for hearing before the trial court on November 29, 2023, and on December 6, 2023.[43]

[38] App. #44.
[39] App. #45.
[40] App. #46.
[41] App. #47.
[42] App. #48.
[43] Supp. ROA.

Disposition in the lower tribunal: On December 8, 2023, the trial court entered its Order Granting Defendants' Motion to Vacate.[44] Accordingly, this appeal followed on January 2, 2024.[45]

SUMMARY OF UNIVERSAL'S ARGUMENTS

The trial court erred when it granted Defendants' Emergency Verified Motion to Vacate Default, Motion for Relief from Judgment, and Motion to Quash Writ of Garnishment (Motion to Vacate"). First, the default final judgment was not void as argued by Defendants in the trial court for lack of due process. Defendants were properly served with the complaint, and their attorney filed a notice of appearance and a motion for extension of time in which to file a responsive pleading. Then took no further action over the course of the five years of litigation. Clearly they were on notice of the pending action against them, and as such the trial court had jurisdiction. Secondly, the trial court abused its discretion in granting Defendants' Motion to Vacate as Defendants failed to meet the prongs required for a trial court to set aside the judgment. They made no attempt to establish excusable neglect and could not

[44] App. #49.
[45] App. #50.

demonstrate that they acted with due diligence. As such they did not meet the criteria to have the judgment vacated.

ARGUMENTS, CITATIONS OF AUTHORITY & STANDARD OF REVIEW

I. STANDARD OF REVIEW

The applicable standard of review on a trial court's ruling on a motion for relief from judgment filed under Florida Rule of Civil Procedure 1.540(b) is whether there has been an abuse of the trial court's discretion.'" *Foche Mortgage, LLC v. CitiMortgage Inc.,* 163 So. 3d 525 (Fla. 3d DCA 2015). However, where a motion to ***vacate*** depends upon whether the underlying order is void, the determination is a legal question that is reviewed ***de novo***. *See Nationstar Mortgage, LLC v. Diaz, 227 So. 3d 726, 729 (Fla. 3d DCA 2017).*

II. ARGUMENT AND CITATION OF AUTHORITY ARGUMENT

It is respectfully submitted that this Court should reverse the Order granting Defendants' Emergency Verified Motion to Vacate Default, Moton for Relief from Judgment, and Motion to Quash Writ of Garnishment ("Motion to Vacate"), entered on December 8, 2023, and allow the judgment to be reinstated in its

entirety, for the following reasons:

A. THE TRIAL COURT ERRED AS A MATTER OF LAW IN VACATING THE JUDGMENT AS IT WAS NOT VOID

The time frame to bring a Motion to Vacate a judgment is one (1) year under l.540(b) for all the basis's asserted in Defendants' Motion. The Default Final Judgment was entered on June 19, 2018, and Defendants' Emergency Motion to Vacate Default was not filed until August 17, 2023, a full 5 years later.

Defendants assert that the one-year rule does not apply, as the Default Final Judgment was void, pursuant to l.540(b)(4). In support of this, Defendants' lawyer, Winston Cuenant, stated in his affidavit attached to the Emergency Motion to Vacate, that he never received notice of the Default, nor the Default Judgment, and that as such the order of Default Judgment is void for improper service. At the evidentiary hearing conducted by the trial court upon Defendants' Emergency Motion to Vacate Default, Mr. Cuenant provided no explanation for this alleged technical mishap, nor did he provide reasoning that would substantiate his claim of not having received any documents via email for years. [46] Mr. Cuenant

[46] See Supp. ROA, page 11, lines 10-17.

attests that this occurred because Plaintiff, in its certificate of service on these filings had his incorrect email address. He states in his affidavit, and during the evidentiary hearing that his correct email address, winston@cuenantlaw.com, was provided to Plaintiff in November of 2017, but that it cited to his old email address of winston@cmclegal.net. [47]Mr. Cuenant's attestations are implausible as discussed herein.

Regardless, the order of default judgment was not void, at best it may have been voidable. This Court in *Kozinski v. Phillips,* 126 So.3d 1264 (Fla. 4th DCA 2013) stated in pertinent part:

> Florida law clearly distinguishes between void judgments, which a party may move to vacate at any time, and voidable judgments, which a party must move to vacate within one year of the entry of the judgment. *See Cannella v. Auto-Owners Ins. Co., 801 So. 2d 94, 100 (Fla. 2001)* (citing *Decker v. Kaplus, 763 So. 2d 1229, 1230 (Fla. 5th DCA 2000))*. A total lack of service of process renders a judgment void, not voidable. *See M.L. Builders, Inc. v. Reserve Developers, LLP, 769 So. 2d 1079, 1080 (Fla. 4th DCA 2000)* ("[A] judgment entered without service of process on the defendant is void and may be attacked at any time . . . .") (citations omitted). Defective service of process, however, renders a judgment voidable. *See Cannella, 801 So. 2d at 100*; *Decker, 763 So. 2d at 1230*.

[47]Supp. ROA, pg.8-11

As the *Decker* court explained:

> **A distinction is to be noted between a total want of service where the defendant received no notice at all, and a service which is irregular or defective but actually gives the defendant notice of the proceedings against him. The former confers no jurisdiction of the person by the court, but the latter or defective service of process, on the contrary, confers jurisdiction upon the court of the person summoned so that the judgment based upon it is voidable only and not void and cannot be collaterally attacked.** [48] *Decker, 763 So. 2d at 1230* (quoting *State ex rel. Gore v. Chillingworth, 126 Fla. 645, 171 So. 649, 652 (Fla.1936)*).

In the case at bar it is unrefuted that the Williamses received proper service of the complaint, and Cuenant in his affidavit acknowledges that he was hired by the Williamses after they were served with UNIVERSAL's Complaint.[49] Mr. Cuenant acknowledges that he filed a Notice of Appearance and Motion for Extension of Time to File Answer or Other Responsive Pleading, on November 3, 2017. He acknowledges that he received the order of the court granting his motion. [50] Mr. Cuenant further corroborates this

[48] Emphasis added.
[49] Affidavit of Winston Cuenant, paragraph 5, attached as Ex A to App. #36.
[50] Affidavit of Winston Cuenant, paragraph 6, attached as Ex A to App. #36.

during the evidentiary hearing, stating that he received the agreed order on his winston@cuenantlaw.com email address.[51] Yet he does not explain why he never filed a responsive document in compliance with the court's order as he was required to do. Far from this case being a lack of proper service on behalf of the Plaintiff, it was more of a lack of attention by the Defendants. Had Cuenant filed a responsive pleading as he was required to do pursuant to the court's order, the default would never have occurred.

Clearly Mr. Cuenant and the Williamses were on notice of the case pending against them and were subject to the jurisdiction of the trial court. Yet, Mr. Cuenant nor the Williamses ever followed up on the case after that, and only raised the alarm when Mr. Williamses' wages began to be garnished.[52]

Mr. Cuenant does not explain in his affidavit why he did not receive any of these filings when they were all E-Filed and appear on the docket, and that his "correct" email address of winston@cuenantlaw.com, is listed as his service email on the E-

[51] Supp. ROA, pg. 9, lines 4-19
[52] Affidavit of Winston Cuenant, paragraph 8, attached as Ex A to App. #36.

Filing Portal. Mr. Cuenant also testified at the evidentiary hearing that he did, in fact, receive notice of the agreed order on his winston@cuenantlaw.com email address, yet he provides no explanation as to why he failed to file any responsive document.[53] Nor does he explain how he did not receive e-service of any of these documents, when by filing his Notice of Appearance and Motion for Extension of Time to File Answer or Other Responsive Pleading, in November of 2017, he became a listed Filer on the case, and that as such his correct email address would have been automatically added by him and linked to him, and all filings by all parties to this matter, not just the Plaintiff, would have been automatically sent to him. For example, he does not state why he did not receive co-defendant Aladdin Plumbing Corp's Answer and Affirmative Defenses filed on January 5, 2018, which lists his correct service email address in the certificate of service. [54] Nor Aladdin's Amended Request for Copies On February 22, 2018,[55] whose certificate of service also included Cuenant, and his correct email address,

[53] Supp. ROA, pages 9-11.
[54] App. #9.
[55] App. #11.

winston@cuenantlaw.com.

Mr. Cuenant does not explain how he did not receive notice of Plaintiff's Motion for Default, filed on May 9, 2018, when it was mailed to him by certified mail.[56] Nor does he explain why he did not receive all of the other numerous documents which were served upon him or his clients throughout the litigation.[57]

Nor does he explain why he allegedly never received the Court's Order of Continuing Writ of Garnishment, filed in January of 2023, when that document lists his alleged correct email address in the certificate of service, and the e-filing portal shows him as a recipient of that document.

Defendants also never attempt to explain why, in April of 2023, when Mr. Williams' paycheck was garnished by UNIVERSAL, he never raised the alarm or do anything to inquire as to why, or what was going on, as he thought it was a one-time thing.[58] It was only when money started to come out of his paycheck regularly, did he then take action. And this was only in the form of calling his

[56] App. #14, Plaintiff's Motion for Court Default, paragraph 3.
[57] For example, App. #'s 10, 12, 13.
[58] App. #36, ¶14 and 15.

lawyer, Mr. Cuenant.[59]

Finally, Mr. Cuenant never attempts to explain why he sat idly by for approximately five years, taking no action. He acknowledges that he received the order granting the extension of time, yet he never filed anything.[60] During the evidentiary hearing, Mr. Cuenant made no attempt to explain his inaction, and demonstrated his neglect for this case in acknowledging that he had received the agreed order, and still took no further measures until the Williamses informed him of their wages being garnished years after the agreed order was filed.[61]

Continuing with this Court's reasoning in the *Kozinski* case, in addressing a Defendant's almost willful ignorance of a case filed against it, stated:

> Further, cases addressing insufficient service of process have emphasized **that a defendant may not "simply ignore the process, sit idly by, let default be entered against it," and then successfully move to set aside the judgment more than a year after it is rendered.[62]** *Craven v. J.M. Fields, Inc., 226 So. 2d 407, 410 (Fla. 4th DCA 1969)*. Instead, "[a] party complaining of an irregular service or return is required to move diligently to

[59] App. #36, ¶16.
[60] Affidavit of Winston Cuenant, paragraph 6, attached as Ex A to App. #36.
[61] Supp. ROA, pg.11, lines 5-15
[62] Emphasis added.

effectuate those remedies available to [the party] by our rules of civil procedure lest [the party] suffer the consequences." *Id*.

The reality is that Mr. Cuenant's assertions are untenable. His email address was correct in the E-Filing portal, thus the presumption is that he received all of these documents and failed to act. In addition, it is unrealistic to believe that he never received any documents in a case in which he was a registered filer on E-File, and to which he was mailed numerous documents to his office.

More importantly, the Plaintiff fully complied with its responsibilities as to service of documents to the Defendants. The rule on Service on Attorneys, Fla.R.Gen.Prac. & Jud.Admin. Rule 2.516, states in pertinent part:

> RULE 2.516. SERVICE OF PLEADINGS AND DOCUMENTS
>
> (b) Service; How Made. When service is required or permitted to be made upon a party represented by an attorney, **service must be made upon the attorney**[63] unless service upon the party is ordered by the court.
>
> (1) Service by Electronic Mail ("e-mail"). All documents required or permitted to be served on another party must be served by e-mail, unless the parties otherwise stipulate or this rule otherwise provides. **A filer of an electronic document has complied with this subdivision if the Florida Courts e-**

[63]Emphasis added.

> **filing Portal ("Portal") or other authorized electronic filing system with a supreme court approved electronic service system ("e-Service system") served the document by e-mail or provided a link by e-mail to the document on a website maintained by a clerk ("e-Service").[64]**

Thus, the Plaintiff, and every other party to the litigation, as well as the judge, were fully compliant with the service requirements by filing its documents through the E-Filing portal. Once Cuenant filed his first document in the case, he needed to add his own service email address, and the E-portal would have registered his email address to the E-service list for this particular case. Regardless of what may have been stated in the certificate of service as to what the Plaintiff believed Cuenant's correct email address to be, once a document was filed through the E-Portal, it would automatically send a copy to all attorneys of record at their registered email addresses.

Cuenant attempts to point the finger at the Plaintiff, when in fact, it was always his responsibility to ensure that the email address that he was using was the correct one.

Rule 2.516 (b)(1)(A), states in pertinent part:

[64] Emphasis added.

(A) Service on Attorneys. Unless excused pursuant to subdivision (b)(1)(B), **upon appearing in a proceeding, an attorney must**[65] designate a primary e-mail address and may designate no more than two secondary e-mail addresses **and is responsible for the accuracy of and changes to that attorney's own e-mail addresses maintained by the Portal or other e-Service system.**[66]

Thus, Defendants' Motion to Vacate Default should not have been granted solely on this basis, as the Judgment entered against his clients was not void, and the Motion to Vacate was over five years too late.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE JUDGMENT AS DEFENDANTS' MOTION TO VACATE FAILED TO MEET THE REQUISITE THREE PRONG TEST FOR SETTING ASIDE A JUDGMENT

Defendants' Motion to Vacate Default Final Judgment should not have been granted because Defendants failed to meet the prongs required to set aside the judgment. For a trial court to set aside a judgment, the moving party must show: 1) the failure to file a responsive pleading resulted from excusable neglect; 2) the moving party has a meritorious defense; and 3) the moving party acted with due diligence in seeking relief from the default. *Airport*

[65] Emphasis added.
[66] Emphasis added.

Centre, Inc. v. Ugarte, 91 So. 3d 936 (Fla. 2012) (citing *Lazcar, Int'l, Inc. v. Caraballo*, 957 So. 2d 1191, 1192 (Fla. 3d DCA 2007)). **The failure to establish any one of these elements is fatal to the moving party's request for relief from the default.**[67] *Ugarte*, 91 So. 3d at 936; *see also Church of Christ Written in Heaven of Georgia, Inc. v. Church of Christ Written in Heaven of Miami, Inc.*, 947 So. 2d 557, 559 (Fla. 3d DCA 2006) ("A party's failure to satisfy these requirements is fatal to the success of a motion to vacate."). Conclusory claims of excusable neglect, meritorious defenses, or due diligence are not sufficient. *See, e.g., Church of Christ Written in Heaven*, 947 So. 2d at 559.

1. No Excusable Neglect

The Motion to Vacate does not establish excusable neglect. In fact, there is no explanation as to why Defendants took no action whatsoever. The Defendants' attorney, Cuenant, acknowledges that he received the order granting the extension of time he had requested to file an answer or responsive pleading. Yet he took no action. He disregarded an order of the court, with no explanation as

[67] Emphasis added.

to why. No answer or responsive pleading was filed over the course of the five years of litigation. Cuenant nor the Defendants attempt to explain why. All Cuenant had to do was to file a responsive pleading as ordered by the court and none of this would have transpired. This in and of itself is a lack of excusable neglect.

In addition, once they “discovered” that Mr. Willams had been garnished in April of 2023, they once again, took no action whatsoever. Neither in the Motion to Vacate, Cuenant’s Affidavit, or in the evidentiary hearing do they attempt to explain why.

Far from establishing excusable neglect, the Defendants have demonstrated that they and their attorney acted with gross negligence. As stated by the court in *Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC,* 227 So.3d 752 (Fla. 1st DCA 2017):

> Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir.'" Elliott v. Aurora Loan Servs., LLC, 31 So. 3d 304, 307 (Fla. 4th DCA 2010) (quoting Somero v. Hendry Gen. Hosp., 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985)). However, "[t]he law requires certain diligence of those subject to it, and this diligence cannot be lightly excused." John Crescent, Inc. v. Schwartz, 382 So. 2d 383, 385 (Fla. 4th DCA 1980). "A conscious decision not to comply with the requirements of law cannot be 'excusable

> neglect' under the rule or any other equivalent requirement." Peterson v. Lake Surprise II Condo. Ass'n, 118 So. 3d 313 (Fla. 3d DCA 2013). Likewise, gross neglect is not excusable. Brivis Enters., Inc. v. Von Plinski, 8 So. 3d 1208, 1209 (Fla. 3d DCA 2009); Hornblower v. Cobb, 932 So. 2d 402, 406 (Fla. 2d DCA 2006); Lehner v. Durso, 816 So. 2d 1171, 1173 (Fla. 4th DCA 2002); Otero v. Gov't Emps. Ins. Co., 606 So. 2d 443, 444 (Fla. 2d DCA 1992).

Most damning of all, even if assuming arguendo, that the Williamses did not know of any of the events transpiring in the litigation, once Mr. William's wages were being garnished, and he knew that this was happening in April, as stated in Defendants' Motion to Vacate, they did nothing, other than to call their lawyer. This same type of argument was rejected in *Abel, Tony & Aldo Creative Group, Inc. v. Friday Night Investors, Inc.*, 419 So. 2d 1135 (Fla. 3d DCA 1982). In that case, the corporate defendant filed a motion to vacate a default judgment. *Id.* at 1135. In an affidavit, the defendant's president stated that he had referred the complaint to an attorney and "thought" the attorney had responded. *Id.* at 1135. This Court held that the affidavit was insufficient to demonstrate excusable neglect. *Id.* at 1135.

This case is analogous to *Trinka*, where this Court reversed a trial court for vacating a default under facts similar to those present

here. *See Trinka*, 913 So. 2d at 626. This Court reversed. *Id.* at 627-28. In doing so, the Court stated:

> [A] default will *not* be set aside where the defaulted party or his attorney (1) simply forgot or (2) intentionally ignored the necessity to take appropriate action; that is to say, where the conduct could reasonably be characterized as partaking of gross negligence or as constituting a willful and intentional refusal to act.

Id. at 627-28 (quoting *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1105-06 (Fla. 4th DCA 1985) (emphasis added in *Trinka*)). This Court noted that even after the attorney learned about the default, he did not move immediately to set it aside. *Id.* at 628. Although he thought he had time to act, he obviously did not appreciate his duty to immediately seek to vacate the known default. *Id.* Indeed, more than a month passed between the attorney learning of the default and any attempt to vacate it. Thus, this Court stated:

> The entry of the default was caused by the intentional failure of defendant's attorney to act, as was the failure to move to set aside the default, resulting in the entry of the default final judgment. … this conduct cannot be considered excusable neglect.

Id. at 628. As a result, this Court reversed and remanded for the reinstatement of the final judgment. *Id.*

This Court should follow *Trinka* and conclude that Cuenant's failure to do anything throughout the litigation, especially after he admits notice in April or May, 2023, amounted to an intentional failure to act and that his intentional failure to act is not excusable neglect. Consequently, Cuenant's actions were intentional and grossly neglectful, not excusable. *See Fischer*, 511 So. 2d at 1087 (discussed *supra*); *Lehner v. Durso*, 816 So. 2d at 1173 (discussed *supra*); *Bailey*, 351 So. 2d at 357 (discussed *supra*); *Dunfine Fla., Inc. v. Golden Gate Dev. Corp.*, 796 So. 2d 1241, 1243-44 (Fla. 5th DCA 2001) ("The failure of a party to take the required steps necessary to protect its own interest cannot, standing alone, be grounds to vacate judicially authorized acts to the detriment of other innocent parties. The law requires certain diligence of those subject to it, and this diligence is not lightly excused." (quoting *John Crescent, Inc. v. Schwartz*, 382 so. 2d 383, 385 (Fla. 4th DCA 1980)). Therefore, Cuenant's affidavit, did not establish excusable neglect that would justify setting aside the default judgment.

That is the same conclusion the Court should reach here. Defendants did not allege or establish any reason – excusable, exceptional, or otherwise – for their lack of action. Indeed,

Defendants' actions are more along the lines of gross neglect, which is not excusable. *See, e.g.*, *Fischer v. Barnett Bank of S. Fla., N.A.*, 511 So. 2d 1087, 1087 (Fla. 3d DCA 1987) (concluding that gross negligence or neglect is not excusable neglect (citations omitted)); *Trinka v. Struna*, 913 So. 2d 626, 627-28 (Fla. 4th DCA 2005) (same); *Lehner v. Durso*, 816 So. 2d 1171, 1173 (Fla. 4th DCA 2002) (same); *Bailey v. Deebold*, 351 So. 2d 355, 357 (Fla. 2d DCA 1977) (same).

Therefore, because Defendants' Motion to Vacate did not establish excusable neglect by Defendants or Cuenant, it was legally insufficient and should have been denied.

2. Lack of Due Diligence

As stated above, Defendants did not establish that their failure to take any action was due to excusable neglect. In fact, as demonstrated, they don't even seem to address the issue in their Motion to Vacate, Cuenant's Affidavit, or in the evidentiary hearing. However, once again assuming arguendo, that Defendants' attorney of record, Mr. Cuenant, never received any of the documents filed via E-Service, by multiple parties, and over the course of over 4

years, Defendants still would not have demonstrated the requisite excusable neglect or due diligence to vacate the judgment.

Defendants, at a minimum, admit that they became aware that in April of 2023, that Mr. Williams' paycheck was garnished by UNIVERSAL, yet they took no action. Mr. Cuenant admits at a minimum, that he became aware of the default, default final judgment and the Writ of Continuing Garnishment "around May or June 2023…"[68] Yet he took no action.[69] It was not until August 17, 2023, almost three months after he became aware of the situation, for the Motion to Vacate to be filed. This, aside from all the dilatory actions throughout the course of the five-year litigation, is, in and of itself, a clear sign of lack of due diligence. *See Kalb v. The Sail Condominium Association, Inc.* 112 S0.3d 674 (Fla 3rd DCA 2013).

Thus, Defendants' failure to take action once aware, does not satisfy the due diligence requirement for vacating defaults. *See Airport Ctr., Inc. v. Ugarte,* 91 So. 3d 936 (Fla. 3d DCA 2012)(stating that due diligence is required to vacate a default).

[68] Affidavit of Winston Cuenant, paragraph 8, attached as Ex A to App. #36.
[69] Affidavit of Winston Cuenant, paragraph 14, attached as Ex A to App. #36.

The courts have stated that they should look not only at the length of the delay, but also at the reason for the delay. *Apolaro v. Falcon*, 566 So. 2d 815, 817 (Fla. 3d DCA 1990). In this case, the Motion to Vacate provided no explanation for why Cuenant did not seek to set aside the default at any time between April or May, 2023 and August, 2023. In addition, it failed to provide any explanation for why they did not file a sworn Answer and Affirmative Defenses at all. Thus, the Motion to Vacate fails to establish any exceptional circumstances to support the delay between Defendants' becoming aware of the default and Defendants' motion to set it aside or proper assertion of its alleged meritorious defense.

In *Trinka v. Struna,* 913 So. 2d 626 (Fla. 4th DCA 2005), this Court stated "[S]wift action must be taken upon first receiving knowledge of any default. Further delay in excess of the time reasonably necessary to prepare and file a notice to vacate should prove fatal absent some exceptional circumstance." 913 So. 2d at 628 (citing *Westinghouse Credit Corp. v. Steven Lake Masonry, Inc.*, 356 So. 2d 1329, 1330 (Fla. 4th DCA 1978)). Here, Defendants have not established any exceptional circumstance to explain why they did not act between April or May and August, 2023, and then did

not file a proposed answer and affirmative defenses at all. As a result, Defendants did not establish due diligence in this case.

Although there is no bright line test to determine whether a party has acted with due diligence, the case law establishes that a nearly three-month delay from notice of the default until the filing of the motion[70] is too long to be considered duly diligent. *See, e.g.*, *Lazcar Intern., Inc. v. Caraballo*, 957 So. 2d 1191 (Fla. 3d DCA 2007) (concluding that waiting six weeks after entry of default to move to vacate was not duly diligent); *Fischer v. Barnett Bank of S. Florida, NA.*, 511 So. 2d 1087 (Fla. 3d DCA 1987)(five-week delay in contacting counsel after notice of default was inexcusable); *Bayview Tower Condo. Ass'n, Inc. v. Schweizer*, 475 So. 2d 982, 983 (Fla. 3d DCA 1985) (one month delay not duly diligent) *B.R. Fries & Assocs., Inc.*, 448 So. 2d at 1212 (three month delay); *Sunshine Terminal Servs., Inc. v. Nat'l Life Ins. Co.*, 412 So. 2d 419 (Fla. 3d DCA 1982) (four and one half month delay); *Seay Outdoor Adver., Inc. v. Locklin*, 965 So. 2d 325, 327 (Fla. 1st DCA 1007)

[70] *See Szucs v. Qualico Dev., Inc.*, 893 So. 2d 708, 711 (Fla. 2d DCA 2005) (concluding that the relevant time period for determining due diligence is the time between the defendant's notice of the default and the filing of defendant's motion to vacate the default).

(ten-week delay); *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So. 2d 300, 302 (Fla. 2d DCA 2004) (seven-week delay); *Bailey v. Deebold*, 351 So. 2d 355, 356 (Fla. 2d DCA 1977) (six-month delay); *Hepburn v. All Am. Gen. Constr. Corp.*, 954 So. 2d 1250 (Fla. 4th DCA 2007) (four-month delay); *Trinka*, 913 So. 2d at 628 (one-month delay).

Due diligence is generally found only when a party acts within days, not months of receiving notice of a default. *See B.*C. *Builders Supply Co., Inc. v. Maldonado,* 405 So. 2d 1345 (Fla. 3d DCA 1981)(finding due diligence where motion filed within four days of notice of default); *Cocquina Beach Club Condo. Ass'n v. Wagner*, 813 So. 2d 1061 (Fla. 2d DCA 2002) (one week delay was due diligence); *Lindell Motors, Inc. v. Morgan*, 727 So. 2d 1112 (Fla. 2d DCA 1999) (three-day delay was reasonable); *Goodwin v. Goodwin*, 559 So. 2d 109 (Fla. 2d DCA 1990) (six-day delay reasonable); *Marshall Davis, Inc. v. Incapco, Inc.*, 558 So. 2d 206 (Fla. 2d DCA 1990) (fifteen-day delay was acceptable); *Ponderosa, Inc. v. Stephens*, 539 So. 2d 1162 (Fla. 2d DCA 1989) (next-day filing was diligent).

Here, because it took Defendants nearly three months to move to set aside the default and have yet to file a sworn, alleged meritorious defense, Defendants did not act with due diligence.

Therefore, the trial court abused its discretion in granting the Motion to Vacate.

3. Statement of Meritorious Defenses

Plaintiff acknowledges that the Defendants attempted to address its meritorious defenses in its Motion to Vacate. However, Defendants did not file a proposed Answer which included the details of the alleged meritorious defense, as required by the caselaw. ("A meritorious defense is established where a 'proposed answer is attached to its motion to vacate, which answer sets out in detail a number of affirmative defenses.' *Fortune Ins. Co. v. Sanchez*, 490 So.2d 249, 249 (Fla. 3d DCA 1986)." *Elliott v. Aurora Loan Servs. LLC*, 31 So.3d 304 (Fla. App. 2010)). And since the supposed meritorious defenses contained in the Motion itself, were unsworn and unverified, it did not establish the alleged defense as required by the rules. *See Mathews Corp., v. Green Pool Services* 584 So. 2d 1006 (Fla.3d DCA 1990)(finding unsworn proposed answer to be insufficient to establish meritorious defense).

As demonstrated above, at no time did Defendants establish all of the necessary elements required for the trial court to set aside the properly entered and noticed default judgment. Therefore, the trial court abused its discretion by setting the default judgment aside. Thus, the judgment as to liability should be affirmed.

III. CONCLUSION

For the reasons stated above the order of the trial court granting the Motion to Vacate should be reversed, and the judgment should be reinstated in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the E-Filing Portal to all attorneys of record; Terra L. Sickler, Esq., Attorney for Appellee at service@twiglaw.com; and Winston Cuenant, Esq., at winston@cuenantlaw.com.

Dated: August 7, 2024

Respectfully submitted,

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APPELLANT'S RULE 9.210 CERTIFICATE

I HEREBY CERTIFY this brief complies with Fla.R.App.P. 9.210, and with 9.045 font and type standards. I have used Bookman Old Style type, size 14 point. The word count is 7,656.

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