

**In the District Court of Appeal of the State of Florida
Fourth District**

Case No. 4D24-0010

T.C. No. CACE17-018014

Universal Property & Casualty Insurance Company a/s/o Lisa
Sheckman,

Appellant,

v.

Melissa A. Williams and Randy M. Williams, et al.,

Appellees.

Appellees' Answer Brief

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Table of Contents

Statement of the Case and Facts.....1

Summary of the Argument.....6

Argument.....6

 I. Standard of Review.....6

 II. The trial court did not err at all, let alone grossly abuse its discretion, in vacating the default final judgment or setting aside the default.....7

 A. The insurance company’s arguments on appeal are waived or not preserved because the insurance company has failed to provide a transcript of the evidentiary hearing upon which the order on appeal is premised.7

 B. The trial court did not err at all, let alone grossly abuse its discretion, in setting aside the default and vacating the default judgment because of the initial denial of the rights to procedural due process..... 11

 C. The trial court did not err at all, let alone grossly abuse its discretion, in vacating the default final judgment because the property owners sufficiently met the three-pronged test for setting aside a judgment.....18

Conclusion.....36

Certificate of Service.....37

Certificate of Compliance.....37

Table of Authorities

Cases

<i>Abel, Tony & Aldo Creative Group v. Friday Night Investors</i> , 419 So. 2d 1135 (Fla. 3d DCA 1982)	23
<i>Allstate Floridian Ins. Co. v. Ronco Inventions, LLC</i> , 890 So. 2d 300 (Fla. 2d DCA 2004)	32, 33
<i>American Bankers Ins. Co. v. Zapata</i> , 761 So. 2d 1216 (Fla. 2d DCA 2000)	9
<i>Apolaro v. Falcon</i> , 566 So. 2d 815 (Fla. 3d DCA 1990)	29, 31
<i>Applegate v. Barnett Bank of Tallahassee</i> , 377 So. 2d 1150 (Fla. 1979)	8
<i>Autustin v. Dade County Sch. Bd.</i> , 766 So. 2d 406 (Fla. 3d DCA 2000)	10
<i>B.R. Fries & Assocs., Inc. v. Meagher</i> , 448 So. 2d 1211 (Fla. 3d DCA 1984)	31, 32
<i>Bailey v. Deebold</i> , 351 So. 2d 355 (Fla. 2d DCA 1977)	24, 25, 33
<i>Bayview Tower Condominium Asso. v. Schweizer</i> , 475 So. 2d 982 (Fla. 3d DCA 1985)	30, 31
<i>Bueno v. Workman</i> , 20 So. 3d 993 (Fla. 4th DCA 2009)	36
<i>Carillon Corp. v. Devick</i> , 554 So. 2d 630 (Fla. 4th DCA 1989)	21
<i>Chester v. Marchese</i> , 383 So. 2d 734 (Fla. 3d DCA 1980)	21
<i>Crawford Residences, LLC v. Banco Popular North America</i> , 88 So. 3d 1017 (Fla. 2d DCA 2012)	14
<i>Dabas v. Boston Inv'r Grp., Inc.</i> , 231 So. 3d 542 (Fla. 3d DCA 2017)	7

Cases

<i>Decker v. Kaplus</i> , 763 So. 2d 1229 (Fla. 5th DCA 2000)	14
<i>Dunfire Fla., Inc. v. Golden Gate Dev. Corp.</i> , 796 So. 2d 1241 (Fla. 5th DCA 2001)	24, 26
<i>Elliott v. Aurora Loan Servs., LLC</i> , 31 So. 3d 304 (Fla. 4th DCA 2010)	26
<i>Encarnacion v. Encarnacion</i> , 877 So. 2d 960 (Fla. 5th DCA 2004)	9
<i>Estrada v. Estrada</i> , 274 So. 3d 426 (Fla. 3d DCA 2019)	12
<i>Finegan v. U.S. Bank Nat'l Ass'n</i> , 362 So. 3d 254 (Fla. 2d DCA 2023)	9
<i>Fischer v. Barnett Bank of S. Fla., N.A.</i> , 511 So. 2d 1087 (Fla. 3d DCA 1987)	24, 25, 30
<i>Freemon v. Deutsche Bank Trust Co. Ams.</i> , 46 So. 3d 1202 (Fla. 4th DCA 2010)	18
<i>George v. Radcliffe</i> , 753 So. 2d 573 (Fla. 4th DCA 2000)	7
<i>Halpern v. Houser</i> , 949 So. 2d 1155 (Fla. 4th DCA 2007)	35
<i>Hendrix v. Dep't Stores Nat'l Bank</i> , 177 So. 3d 288 (Fla. 4th DCA 2015)	12
<i>Hepburn v. All Am. Gen. Constr. Corp.</i> , 954 So. 2d 1250 (Fla. 4th DCA 2007)	33
<i>HSBC Bank USA v. Cook</i> , 178 So. 3d 548 (Fla. 1st DCA 2015)	9
<i>In re Guardianship of Read v. Kenefick</i> , 555 So. 2d 869 (Fla. 2d DCA 1989)	10

Cases

<i>Kalb v. Sail Condo. Ass’n</i> , 112 So. 3d 674 (Fla. 3d DCA 2013)	27
<i>Kozinski v. Phillips</i> , 126 So. 3d 1264 (Fla. 4th DCA 2013)	14
<i>Lamoise Grp., LLC v. Edgewater S. Beach Condo. Ass’n</i> , 278 So. 3d 796 (Fla. 3d DCA 2019)	13
<i>Lazcar Int’l, Inc. v. Caraballo</i> , 957 So. 2d 1191 (Fla. 3d DCA 2007)	30
<i>Lehner v. Durso</i> , 816 So. 2d 1171 (Fla. 4th DCA 2002)	24, 25
<i>Lloyd’s Underwriters at London v. Ruby</i> , 801 So. 2d 138 (Fla. 4th DCA 2001)	6, 7
<i>Pash v. Mahogany Way Homeowners Ass’n</i> , 310 So. 3d 430 & n. 1 (Fla. 4th DCA 2021)	10
<i>Pertz v. Zohar</i> , 556 So. 2d 459 (Fla. 2d DCA 1990)	9
<i>Precision Tune Auto Care, Inc. v. Radcliffe</i> , 804 So. 2d 1287 & n. 2 (Fla. 4th DCA 2002)	10-11
<i>Quest Diagnostics, Inc. v. Haynie</i> , 320 So. 3d 171 (Fla. 4th DCA 2021)	19, 20
<i>Regions Bank v. Big Bend Invs. Grp. of Fla., LLC</i> , 311 So. 3d 181 (Fla. 2d DCA 2020)	7
<i>Richard v. Bank of Am., N.A.</i> , 258 So. 3d 485 (Fla. 4th DCA 2018)	11-12, 12
<i>Rolfs v. First Union Nat’l Bank</i> , 604 So. 2d 1269 (Fla. 4th DCA 1992)	9
<i>Seay v. Outdoor Adver., Inc. v. Locklin</i> , 965 So. 2d 325 (Fla. 1st DCA 2007)	32

Cases

Segalis v. Roof Depot USA, LLC,
178 So. 3d 83 (Fla. 4th DCA 2015) 16, 17

Sunshine Terminal Servs. v. Nat’l Life Ins. Co.,
412 So. 2d 419 (Fla. 3d DCA 1982) 32

Trinka v. Struna,
913 So. 2d 626 (Fla. 4th DCA 2005) 23, 24, 28, 33

Vercosa v. Fields,
174 So. 3d 550 (Fla. 4th DCA 2015) 7, 13, 14

Viets v. Am. Recruiters Enters.,
922 So. 2d 1090 (Fla. 4th DCA 2006) 12

Watson v. Watson,
583 So. 2d 410 (Fla. 4th DCA 1991) 12, 13

Zarate v. Deutsche Bank Nat’l Trust Co.,
81 So. 3d 556 (Fla. 3d DCA 2012) 8

Statutes

Fla. Stat. § 77.041 3

Rules of Procedure

Fla. R. Civ. P. 1.500 20-21, 21

Fla. R. Civ. P. 1.540 9, 11, 18

Statement of the Case and Facts

The insurance company incepted the trial court case by filing a three-count complaint sounding in negligence. (A. 5-11.) The law firm of Cuenant & Nazareth, PA appeared on behalf of the property owners, who were named as defendants in the trial court case. (A. 18.)

The property owners moved to extend the time to respond to the complaint. (A. 19-20.) Subsequently, the insurance company moved for a court default against the property owners. (A. 37-38.) A hearing was noticed on the motion. (A. 39.) The trial court granted the court default, finding that the property owners not only failed to serve or file a response to the complaint, but also that they failed to appear for the hearing. (A. 40.)

The insurance company then moved for default final judgment. (A. 45-46; A. 55-56.) The trial court entered default final judgments against each of the property owners. (A. 65; A. 68.)

The property owners then, in addition to not responding to the insurance company's correspondence, in addition to failing to appear for the hearing on the motion to default, and in addition to not filing anything in response to the motion for default final

judgment, also failed to respond to the fact information sheet. (See A. 71-72.) After entry of an order compelling a response, the insurance company moved for contempt, amongst other remedies, because the property owners did not respond following the court order, either. (See A. 74-75.)

Much later, Terra Sickler, of Twig, Trade, & Tribunal, PLLC, appeared on behalf of the property owners. (A. 97-99.) New counsel moved to vacate the default, for relief from the final judgment, and to quash a writ of garnishment that had been entered. (A. 100-114.)

In the motion, the property owners explained:

5. On November 20, 2017, an Agreed Order on Defendants' Motion for Extension of Time was granted and served on Defendants' counsel at the service email of winston@cuenantlaw.com, counsel's service email.
6. However, on May 9, 2018, when Plaintiff filed a Motion for Court Default on Defendants, Plaintiff's counsel improperly served Defendants' attorney, Cuenant & Nazareth, P.A. at winston@cmclegal.net, which was never received

(A. 100-101.) The property owners attached an affidavit to confirm this fact. (A. 112-114.) The hearing on the motion for court default,

the motion for default final judgment, and “every other Motion, Order or pleading” was served on the second, ineffective address. (A. 101.)

The insurance company also purported to mail a notice pursuant to section 77.041, Florida Statutes, but did not present proof of mailing same. (See A. 101.) It was only after the property owners noticed money coming out of a garnished account that they realized something could be amiss. (See A. 101.)

The property owners argued, in light of the failure to receive proper service, that their neglect was excusable. (A. 103-104.) The property owners also argued that the judgment was void because it had been procured in the absence of fair notice or a meaningful opportunity to be heard and violated the property owners’ rights to procedural due process. (A. 102-103; A. 106-107.)

The property owners further asserted meritorious defenses to the insurance company’s negligence action, including: improper notice, improper legal process, waiver of subrogation, negligent conduct of contractors, proof of claim and recovery, lack of real party in interest, and apportionment of fault. (A. 104.) The property owners asserted that the insurance company lacked standing to

pursue its claim because “No agreement or policy was attached to the Complaint to show that Plaintiff is the party that incurred damages” (A. 104.) The property owners then discussed the four affirmative defenses that would frame their discussed theories of defense. (A. 105.)

The property owners likewise asserted that they acted with due diligence. (A. 105-106.) Immediately upon receipt of notice via the garnished account status, the property owners worked with counsel to resolve these issues. (A. 106.)

Moreover, the property owners asserted that the judgment was void. (A. 106-107.) The matter arose out of a dispute as to personal jurisdiction. (A. 107.)

Premised on the notion that the default and judgment should be set aside and vacated, respectively, the property owners further moved to quash the writ of garnishment effectuated thereby. (A. 107-108.)

The insurance company filed a notice of filing of email communications. (A. 137-145.) The insurance company did not append any argument to the notice of filing or state for what it would be used. (See A. 137-145.)

The motion to set aside the default, vacate the final judgment, and for other relief was set for an “**Evidentiary Hearing . . .**” (A. 160. *See also* A. 161.) (Emphasis in original.)

The trial court granted the motion, finding that the matter should be heard on the merits. (A. 162.)

This appeal follows. The insurance company has failed to supply this Court with a transcript of the evidentiary hearing upon which the order on appeal is premised.

The property owners take issue with the following facts discussed in the initial brief:

- Regarding the request 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; and
- 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.

(*See* I.B. 13-14.) These statements are made without reference to the appendix.

Summary of the Argument

The property owners duly moved to vacate the judgment and set aside the default following discovery of the filings that had been served to their prior counsel's incorrect email address. The property owners argued that the judgment and default were void as they did not comport with the requirements of procedural due process and that, alternatively, the property owners had demonstrated excusable neglect, due diligence, and a meritorious defense.

The trial court agreed with the property owners' position regarding service of the subject documents and vacated the default. It cannot be said that the trial court abused its discretion in entering its order, both because the trial court was correct and because the insurance company has failed to supply this Court with a transcript of the evidentiary hearing on the subject motion.

Argument

I. Standard of Review.

An order granting a default is not simply reviewed for whether the trial court abused its discretion but is instead "reviewed under a gross abuse of discretion standard." *Lloyd's Underwriters at London v. Ruby*, 801 So. 2d 138, 139 (Fla. 4th DCA 2001). This elevated

standard is in place because “Florida public policy favors the setting aside of defaults so that controversies may be decided on the merits.” *Id.* Thus, “a greater showing is required to reverse an order granting a motion to vacate a default than is required to reverse a denial of such a motion.” *George v. Radcliffe*, 753 So. 2d 573, 574 (Fla. 4th DCA 2000). (Internal quotations omitted.)

And, while review of whether a judgment is void is performed *de novo*, “if a judgment previously entered is void, the trial court must vacate the judgment.” *Regions Bank v. Big Bend Invs. Grp. of Fla., LLC*, 311 So. 3d 181, 184 (Fla. 2d DCA 2020). *See also Dabas v. Boston Inv’r Grp., Inc.*, 231 So. 3d 542, 545 (Fla. 3d DCA 2017); *Vercosa v. Fields*, 174 So. 3d 550, 552 (Fla. 4th DCA 2015).

II. The trial court did not err at all, let alone grossly abuse its discretion, in vacating the default final judgment or setting aside the default.

A. The insurance company’s arguments on appeal are waived or not preserved because the insurance company has failed to provide a transcript of the evidentiary hearing upon which the order on appeal is premised.

The trial court heard the motion at an evidentiary hearing. (A. 160. *See also* A. 161.) Based on the evidence at that hearing, the trial court entered its order. (A. 162.) The insurance company has

failed to present a transcript of that hearing and has thus failed to preserve the issues for review.

In “appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error.” *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). The insurance company bears the “burden to present a record that will overcome the presumption of the correctness of the trial court’s findings.” *Zarate v. Deutsche Bank Nat’l Trust Co.*, 81 So. 3d 556, 557-58 (Fla. 3d DCA 2012). Where there exists “no transcript of the summary judgment hearing at which . . . issues should have and could have been raised,” this Court cannot “know if” the insurance company “argued these concerns at the hearing, or if any objection was made to the court’s consideration of the issues.” *Id.* See also *Applegate*, 377 So. 2d at 1152 (holding, the lack of a “transcript or a proper substitute” is “fatally flawing” to an appellate court’s ruling that a lower tribunal’s decision was not supported by the facts).

In light of the insurance company’s failure to present a record that demonstrates proper preservation of this issue for this Court’s review, the insurance company has failed to preserve a reviewable

issue. See *Rolfs v. First Union Nat'l Bank*, 604 So. 2d 1269, 1270 (Fla. 4th DCA 1992) (holding that preservation requires a record of the objection at a summary judgment hearing); *HSBC Bank USA v. Cook*, 178 So. 3d 548 (Fla. 1st DCA 2015) (holding, “[w]ithout a hearing transcript, the record on appeal is not sufficient to demonstrate reversible error”).

As the Fifth District has opined, in collecting cases:

Without a transcript, in an appeal from an evidentiary hearing, this court is unable to provide an appellate remedy because it has nothing to review and the presumption is there was competent evidence to support the trial court’s rulings.

Encarnacion v. Encarnacion, 877 So. 2d 960, 963 (Fla. 5th DCA 2004).

This requirement for reviewability operates in the context of a rule 1.540(b) motion. This Court “cannot adequately review” claims “absent a transcript of the hearing in the trial court.” *Finegan v. U.S. Bank Nat’l Ass’n*, 362 So. 3d 254, 256 (Fla. 2d DCA 2023) (discussing a rule 1.540 motion). See also *American Bankers Ins. Co. v. Zapata*, 761 So. 2d 1216, 1216-17 (Fla. 2d DCA 2000); *Pertz v. Zohar*, 556 So. 2d 459, 459-60 (Fla. 2d DCA 1990).

As the court noted in *In re Guardianship of Read v. Kenefick*, 555 So. 2d 869, 871 (Fla. 2d DCA 1989), because “the trial court’s order was not erroneous on its face and the correctness of the trial court’s order depended not only on Mr. Kenefick’s written records but also upon evidence presented at the hearing but not furnished to us, we must affirm.” *See also Autustin v. Dade County Sch. Bd.*, 766 So. 2d 406, 406-07 (Fla. 3d DCA 2000).

Here, this Court cannot know whether the insurance company raised any of the issues raised in this brief. The problems for this Court’s review are magnified because the insurance company did not file a response to the motion to vacate and set aside, and nor does the insurance company have any evidence that it utilized its notice of filing email correspondence in any way. *See Pash v. Mahogany Way Homeowners Ass’n*, 310 So. 3d 430, 434 & n. 1 (Fla. 4th DCA 2021) (reasoning that a transcript would be necessary, even where the hearing is non-evidentiary, if there is no other evidence of preservation of a legal argument). *See also Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1291 & n. 2 (Fla. 4th DCA 2002) (reasoning, “The remaining arguments made by PTAC on this issue are not preserved as without a

transcript of the hearing, there is no record they were made to the trial court”).

Based on the foregoing, this Court cannot adequately review the issues raised in the initial brief.

B. The trial court did not err at all, let alone grossly abuse its discretion, in setting aside the default and vacating the default judgment because of the initial denial of the rights to procedural due process.

Florida Rule of Civil Procedure 1.540(b)(4) provides that, on motion and upon such terms as are just, the trial court is permitted to relieve the property owners from judgments, decrees, orders, or proceedings for the reason that they are void. The property owners argued that their rights to procedural due process had been violated where they were on notice of the lawsuit, but not of the motion for court default, the hearing on same, or any of the subsequent motions or orders, including the motion for and order entering default final judgment. The trial court determined, “the above-referenced case shall be heard on the merits, as there [are] questions of fact as to service of prior pleadings.” (A. 162.)

A judgment is void where the trial court lack jurisdiction to enter it or where there is a violation of due process. *Richard v. Bank*

of Am., N.A., 258 So. 3d 485, 487-88 (Fla. 4th DCA 2018). Due process requires “fair notice and an opportunity to be heard.” *Estrada v. Estrada*, 274 So. 3d 426, 430 (Fla. 3d DCA 2019). Where a defendant is served with the complaint and is “subsequently served with the motions for default and notice of hearing on appellant’s motion for default final judgment, thereby providing them with notice and an opportunity to be heard,” there is no due process violation. *See id.*

But where a party either lacks fair notice or an opportunity to be heard, the judgment is void. *See Richard*, 258 So. 3d at 488 (collecting cases). *See also Hendrix v. Dep’t Stores Nat’l Bank*, 177 So. 3d 288, 290 (Fla. 4th DCA 2015); *Viets v. Am. Recruiters Enters.*, 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006); *Watson v. Watson*, 583 So. 2d 410, 411 (Fla. 4th DCA 1991). Such is the case where notice of a hearing is mailed to the incorrect address:

Several courts have held that if the notice of hearing was mailed to the incorrect address, the final judgment is void

Similarly, in this case, while appellants were given notice of the trial, the location was changed without notice, thus depriving appellants of their due process right to be

heard. We therefore reverse and remand for a new trial on damages.

Vercosa v. Fields, 174 So. 3d 550, 552-53 (Fla. 4th DCA 2015) (collecting cases).

Here, the property owners asserted that the insurance company served the motions at the incorrect email address for their attorney. If true, the property owners' rights to procedural due process were, in fact, violated. *See Vercosa*, 174 So. 3d at 552-53; *Watson*, 583 So. 2d at 411. Moreover, the property owners asserted that the trial court mailed orders to the incorrect email address. That, too, constitutes a violation of the property owners' rights to procedural due process. *See Vercosa*, 174 So. 3d at 552-53; *Watson*, 583 So. 2d at 411. *See also Lamoise Grp., LLC v. Edgewater S. Beach Condo. Ass'n*, 278 So. 3d 796, 800 (Fla. 3d DCA 2019) (reasoning, "Here, the failure to furnish appellant with a copy of the final disposition, in combination with the earlier deprivation of notice, rendered the decree void").

The insurance company quibbles with the statements in the affidavit filed by the property owners in advance of the hearing. However, there are two problems with the insurance company's

attempts in this regard. First, the insurance company offers neither a counter-affidavit nor a deposition transcript where it examined the affiant, instead merely attempting to undermine the affidavit provided by the property owners. Second, the affidavit is of less importance than it would be in a non-evidentiary context. The motion proceeded to a full evidentiary hearing where the trial court was able to analyze the witness and the testimony. The trial court's findings in this regard should not be disturbed under the best of circumstances. But, as discussed above, this Court cannot even review the testimony, much less the demeanor of the witness to make any plausibility determinations. *See Crawford Residences, LLC v. Banco Popular North America*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012).

The insurance company attempts to rely on *Kozinski v. Phillips*, 126 So. 3d 1264 (Fla. 4th DCA 2013) and *Decker v. Kaplus*, 763 So. 2d 1229 (Fla. 5th DCA 2000). Neither case is applicable herein because each discusses service of initial process. These cases do not undermine the holding in *Vercosa*, 174 So. 3d at 552-53 and like cases that a failure to provide fair notice of a motion or

hearing or a meaningful opportunity to appear at the hearing constitute their own violations of procedural due process.

The insurance company argues, “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-Filing Portal.” (I.B. 25.) The property owners would submit that: (a) there is no record in the appendix of Mr. Cuenant’s service email on the E-Filing Portal; and (b) there was testimony on this point at the evidentiary hearing, but this Court cannot know that because of the insurance company’s failure to provide this Court with that which it needs for review.

The insurance company questions how Mr. Cuenant could have not received the motion for court default because it had been sent to him via certified mail. (I.B. 26.) In support of this proposition, the insurance company direct this Court to appendix entry 14, at pages 37-38 of the insurance company’s appendix. (I.B. 26.) At those pages, the insurance company states that Mr. Cuenant received such a letter notifying him of the insurance company’s intent to move for court default. (See A. 37.) The

insurance company, however, neither states that it sent the motion via certified mail nor produced the subject letter as record evidence.

Finally, the insurance company attempts to absolve itself of responsibility to email documents to the correct email address by stating that it filed its documents through the E-Filing Portal. But the insurance company's certificate of service specifically lists the email addresses to which documents were served. (See A. 38; A. 39; A. 41; A. 46; A. 65; A. 68; A. 72; A. 73; A. 75. Compare with A. 79; A. 86.) What is conspicuously absent from the appendix is an e-service email showing that the insurance company actually served the property owners at an address different from that on the certificate of service or that the insurance company presented such emails to the trial court as evidence at the evidentiary hearing on the matter.

This case presents a similar dispute as to that in *Segalis v. Roof Depot USA, LLC*, 178 So. 3d 83, 84-85 (Fla. 4th DCA 2015). In *Segalis*, a plaintiff filed a lawsuit against a corporation. *Id.* at 84. The corporation dissolved. *Id.* The plaintiff attempted to hold the principals liable. *Id.* The plaintiff filed a motion for entry of a show cause order against one of the principals. *Id.* No new lawsuit was

filed that would have required service of process of the lawsuit upon the individual principal. *See id.* Neither the motion nor the order to show cause were mailed to the principal at his personal address. *Id.* However, the judgment was ultimately mailed to the principal's personal address. *Id.* The principal then retained counsel, who filed an appearance and moved to vacate the judgment. *Id.* at 84-85.

This Court held:

The judgment against Segalis is clearly void for lack of jurisdiction and denial of due process Roof Depot does not dispute that Segalis was never personally served with the order to show cause and was not provided notice or an opportunity to be heard before the judgment was entered.

Id. at 85. This Court further expressed that the trial court was without discretion to deny the motion. *Id.* at 85-86.

The judgment was void because it was entered in violation of the property owners' rights to procedural due process. Based on the foregoing, the trial court's order should be affirmed in all respects.

C. The trial court did not err at all, let alone grossly abuse its discretion, in vacating the default final judgment because the property owners sufficiently met the three-pronged test for setting aside a judgment.

The insurance company argues that the time under Florida Rule of Civil Procedure 1.540(b)(1) for alleging excusable neglect had run. (I.B. 22.) But the insurance company has provided no record of ever raising this argument with the trial court. Thus, any error in this regard is waived or not preserved. *See Freemon v. Deutsche Bank Trust Co. Ams.*, 46 So. 3d 1202, 1205 (Fla. 4th DCA 2010) (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) as holding, “In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved”).

The insurance company has also argued that the property owners failed to meet the test under rule 1.540(b)(1). The insurance company is incorrect. The property owners were required to show that the default resulted from excusable neglect, that they had a meritorious defense, and that they used due diligence in seeking

relief from the default. *Quest Diagnostics, Inc. v. Haynie*, 320 So. 3d 171, 174 (Fla. 4th DCA 2021). As a general rule, “Florida courts prefer to decide cases on the merits of the claims rather than on a technicality.” *Id.* As a result, “there is a principle of liberality in setting aside defaults so that lawsuits may be decided on the merits.” *Id.* (Internal quotations omitted.) Where there is any reasonable doubt in the matter of setting aside a default, it should be resolved in favor of granting the motion. *Id.*

First, the only record evidence shows that there was excusable neglect. Again, the insurance company has failed to provide a transcript of the evidentiary hearing or the evidence that was, in fact, introduced at that hearing. But the motion, itself, shows excusable neglect.

Excusable neglect occurs “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.” *Id.* (Internal quotations omitted.) As this Court summarized:

The pattern which emerges from these and the myriad of cases not cited here is best stated negatively: 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. (quoting *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1105-06 (Fla. 4th DCA 1985)).

Excusable neglect must be proven by sworn statements or affidavits. *Id.* The property owners first submitted an affidavit, then presented live testimony at the evidentiary hearing on the matter.

The insurance company did not prove that either counsel or the property owners simply forgot to defend against the motion for default or any of the subsequent motions. *See id.* And nor did the insurance company prove that either counsel or the property owners intentionally ignored the necessity to defend against the motion for default or any of the subsequent motions. *See id.*

The insurance company argues that prior counsel was aware of the extension of time to respond to the complaint. (See I.B. 31-32.) But that says nothing about whether prior counsel was aware of the motion for default. Of course, “a party may plead or otherwise defend at any time before default is entered.” Fla. R. Civ. P.

1.500(c). *See also Carillon Corp. v. Devick*, 554 So. 2d 630, 632 (Fla. 4th DCA 1989); *Chester v. Marchese*, 383 So. 2d 734, 735 (Fla. 3d DCA 1980).

The trial court could have been permitted to enter a default for failure to plead or otherwise defend as provided by its order. *See Fla. R. Civ. P. 1.500(b)*. But upon proper notice of the application for that default, the property owners would nevertheless have had the opportunity to defend prior to its entry. *See Fla. R. Civ. P. 1.500(c)*. The insurance company's position that notice of the extension, itself, is sufficient, therefore misses the point of the procedure of rule 1.500.

The insurance company goes on to argue that the property owners were aware of the garnishment in April 2023 and did nothing at that point aside from calling their attorney. (I.B. 33.) In making this point, the insurance company relies on the motion to vacate filed by the property owners. (I.B. 33.) In the property owners' view, this statement by the insurance company mischaracterizes the timeline in the motion. In the motion, the property owners state:

14. Sometime April 2023 Defendant, RANDY WILLIAMS, noticed money coming out of his paycheck, causing a shortage in his monthly budget.
15. Assuming it was a one-time deduction, Defendant did not further inquire.
16. By June and again in July additional moneys had again been deducted from Defendant's paycheck and after learning of the garnishment, Defendant contacted his counsel, Cuenant & Nazareth, P.A., who stated that they had not received any of the previously mentioned filings (Exhibit "A").
17. Defendants then immediately sought to retain additional counsel to reverse the damaging effects caused by Plaintiffs' failure to properly serve Defendants and their lawyer.

(A. 101-102.)

Based on this language in the motion, there are three problems with the insurance company's characterization. First, the property owners were not aware of the garnishment in April 2023, but were instead aware of what they believed to be a one-time deduction, with no claimed knowledge of the source of that deduction. Second, the property owners did not truly know of the garnishment until months after the first deduction. And third, the

property owners did more than just call their attorney; they hired new counsel and immediately worked on the subject motion.

The insurance company relies on *Abel, Tony & Aldo Creative Group v. Friday Night Investors*, 419 So. 2d 1135, 1135-36 (Fla. 3d DCA 1982) for the proposition that an affidavit by a party that states that they thought their attorney had responded is insufficient to demonstrate excusable neglect. That opinion has no bearing on this case, where the attorney, himself, filed an affidavit in which he claimed he had not received the filings.

The insurance company also relies on *Trinka v. Struna*, 913 So. 2d 626 (Fla. 4th DCA 2005). But *Trinka* presents a completely inapposite set of facts. In *Trinka*, 913 So. 2d at 627-628, the defendant's attorney elected to fail to respond to the complaint or seek an extension and then, even after recognizing that a default had been entered, elected to wait before filing a motion to vacate that default. This Court reasoned:

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 [T]his conduct cannot be considered excusable neglect.

Id. at 628.

Here, none of those facts are present. The property owners had sought an initial extension of time. There is no record of prior counsel intentionally failing to act. And there is no record of prior counsel intentionally failing to move to set aside the default. Instead, the motion and affidavit posit that prior counsel was unaware of the motions and orders due to the service issues outlined throughout the motion and this answer brief. And such was the trial court's finding. (A. 162.)

The insurance company then cites four other opinions, which will be discussed in order: *Fischer v. Barnett Bank of S. Fla., N.A.*, 511 So. 2d 1087 (Fla. 3d DCA 1987); *Lehner v. Durso*, 816 So. 2d 1171 (Fla. 4th DCA 2002); *Bailey v. Deebold*, 351 So. 2d 355 (Fla. 2d DCA 1977); and *Dunfire Fla., Inc. v. Golden Gate Dev. Corp.*, 796 So. 2d 1241, 1243-44 (Fla. 5th DCA 2001). The cases each consist of a circumstance in which defendants were armed with ample notice and neglected to act for lengthy periods of time.

In *Fischer*, 511 So. 2d at 1087-88, the defendants were served at the correct address after having embarked on a two-month visit

to Europe without having anyone check their physical mail or leaving instructions for how to respond in the event they were served with a lawsuit. Here, however, the property owners argued that the documents were not served to the correct email address and had hired an attorney to respond to motions and orders furnished in the lawsuit. Additionally, in stark contrast to the defendants in *Fischer*, 511 So. 2d at 1088, the property owners contacted their counsel immediately upon discovering the nature of the garnishment.

In *Lehner*, 816 So. 2d at 1172-73, although the defendant denied being served with papers subsequent to initiation of the lawsuit, this Court reasoned that the defendant had “been personally served by the sheriff for the first deposition in aid of execution and by a certified process server for the rescheduled deposition.” There is no such record of service of the pertinent filings and orders in this appeal.

In *Bailey*, 351 So. 2d at 357, the defendant admitted to notice of a default, notice of a subsequent judgment, notice of two separate garnishments judgments, all before “he initiates a response” Here, the property owners do not admit to notice of

the default, the judgment, or the garnishment prior to understanding that money was routinely being taken out of an account.

Finally, in *Dunfire Fla., Inc.*, 796 So. 2d at 1243-44, the court explained that neglect was inexcusable where a corporation was required to hire replacement counsel and failed to do so for eighteen months. Here, the property owners are not a corporation and had duly hired counsel.

None of the authority relied on by the insurance company is apposite. The neglect was excusable.

Second, the property owners acted with due diligence upon becoming aware of the default and final judgment. Due diligence is a test of reasonableness that must be established with evidence. *Elliott v. Aurora Loan Servs., LLC*, 31 So. 3d 304, 308 (Fla. 4th DCA 2010). An unrefuted sworn allegation that the date of discovery of a default is different than the date of the default constitutes such evidence. *See id.*

The affidavit provides unrefuted, sworn testimony. The insurance company did not offer a counter-affidavit. The insurance company did not depose the affiant. The insurance company did not

file a response in the trial court, discussing any potential infirmities with the affidavit. And nor did the insurance company present a transcript to show whether the testimony was consistent or different at the evidentiary hearing.

The insurance company cites *Kalb v. Sail Condo. Ass'n*, 112 So. 3d 674 (Fla. 3d DCA 2013). Presumably, the insurance company is referencing footnote one of that opinion, which is the only portion that discusses due diligence. *See id.* at 675 & n. 1. Therein, the court notes a delay of 18 months after an affidavit discussing discovery of the lawsuit before the motion to vacate was filed. Here, there is no such delay.

The insurance company then discusses prior counsel's purported discovery of the garnishment in April 2023. As discussed above, there is no such record discovery of any garnishment at that time. In fact, the affidavit attached to the motion at issue provides the following:

14. After learning of the garnishment, I advised the Defendants of various options they could take to try and remedy this matter.

15. As such, they immediately have retained the law firm of TWIG, TRADE, & TRIBUNAL, PLLC, to pursue the issues raised in this case.

(A. 113-114.)

The motion provides, “By June and again in July additional moneys had again been deducted from Defendant’s paycheck and after learning of the garnishment, Defendant contacted his counsel” (A. 101-102.) Testimony concerning the exact date that the property owners learned of the garnishment, the judgment, and the default, is not present on the face of the motion, and the testimony adduced at the evidentiary hearing on the matter is unavailable in the appendix furnished by the insurance company. But the motion provides that the real discovery was made after noticing that moneys were being deducted from somewhere, with the first piece of the puzzle falling into place in July; the motion was filed in the middle of August.

The insurance company further attempts to rely on *Trinka v. Struna*, 913 So. 2d 626 (Fla. 4th DCA 2005), again. This reliance is equally unavailing as applied to a due diligence analysis as it is in the context of excusable neglect. The property owners had sought

an initial extension of time. There is no record of prior counsel intentionally failing to act. And there is no record of prior counsel intentionally failing to move to set aside the default. Instead, the motion and affidavit posit that prior counsel was unaware of the motions and orders due to the service issues outlined throughout the motion and this answer brief.

The insurance company also places reliance on *Apolaro v. Falcon*, 566 So. 2d 815 (Fla. 3d DCA 1990). In *Apolaro*, 556 So. 2d at 816, the court reasoned, “Where there exists reasonable doubt in the matter, and where there has been no trial on the merits the trial court is to exercise its discretion in the direction of vacating the default.” In *Apolaro*, the court found that the delay at issue was the result of the plaintiff’s counsel, and not the defendant’s counsel. *See id.* at 817. The court’s reasoning that it must evaluate the reason for any delay is set against that finding. *See id.* Here, the reason for the delay was that the property owners’ attorney had been served, repeatedly, at an incorrect email address. The holding in *Apolaro* thus supports the property owners’ motion and the trial court’s order.

The insurance company string cites a number of cases that provide, in the insurance company's estimation, that a three-month delay in moving to vacate a default judgment is not diligent. (I.B. 40.) As discussed above, there was no such three-month delay. Those cases will be discussed in turn.

The insurance company relies on *Lazcar Int'l, Inc. v. Caraballo*, 957 So. 2d 1191 (Fla. 3d DCA 2007), which provides that the unsworn argument of counsel cannot establish due diligence. See *id.* at 1192. The court also reasoned that a six-week delay in filing a motion to vacate a default could be considered diligent, depending on the circumstances as established by competent, substantial evidence. *Id.* at 1193. Here, the matter proceeded to an evidentiary hearing.

The insurance company again relies on *Fischer*, which turns on the defendants failing to diligently contact their own counsel, a scenario not at issue in this appeal. See *Fischer*, 511 So. 2d at 1088.

The insurance company cites *Bayview Tower Condominium Asso. v. Schweizer*, 475 So. 2d 982 (Fla. 3d DCA 1985), in which an insurance company inexcusably failed to find a file and then the

defendant “waited a month after its insurance company was informed of the default herein before moving below to vacate the default.” *Id.* at 983. Here, the property owners had no proper notice of the default until after entry of the final judgment and, in fact, the garnishment. Regardless, the Third District limited the opinion in *Schweizer* to its facts in another opinion relied on by the insurance company. *See Apolaro v. Falcon*, 566 So. 2d 815, 817 (Fla. 3d DCA 1990).

The insurance company cites *B.R. Fries & Assocs., Inc. v. Meagher*, 448 So. 2d 1211 (Fla. 3d DCA 1984). In that case, suit papers were received by the defendants and then subsequently misplaced. *Id.* at 1211-12. The court reiterated that it is “the duty of the trial court, not the appellate courts to make the determination of whether or not the facts constitute excusable neglect, mistake, or inadvertence sufficient to excuse compliance with the rules.” *Id.* at 1212. (Internal quotations omitted.) The opinion does not provide that the defendants failed to act with diligence, but instead reasons that the *trial court* found a lack of diligence and a lack of excusable neglect, with the appellate court addressing only the trial court’s excusable neglect findings. *See id.* Regardless, the opinion supports

the property owners' position inasmuch as the trial court in this appeal exercised its duty to make the determination that this Court should refrain from usurping. *See id.*

In *Sunshine Terminal Servs. v. Nat'l Life Ins. Co.*, 412 So. 2d 419, 419 (Fla. 3d DCA 1982), the defendant admitted that an amount was due and attempted to defer payment until after a judgment was entered, having notice of the judgment. As discussed throughout this answer brief, those facts are not at issue in the instant appeal.

In *Seay v. Outdoor Adver., Inc. v. Locklin*, 965 So. 2d 325, 328 (Fla. 1st DCA 2007), "Locklin testified that he received the final judgment but gave no reason for the ten-week delay in filing his motion to vacate, and the issue was not addressed by the trial court." The court reasoned that the defendant could present "evidence to explain her six-week delay" *See id.* (Internal citations omitted.) Here, this Court does not have the benefit of the testimony adduced at the hearing or the trial court's oral findings.

The court's discussion in *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So. 2d 300, 304 (Fla. 2d DCA 2004) finds the court noting that there is no brightline rule for determining due

diligence and that one of the factors is whether the defendants “were served with numerous documents leading up to the final judgment.” Here, the defendants were not so served. Also of import was that the defendants were large corporations that “are certainly familiar with legal actions.” *Id.* The same has not been said about the property owners herein. Most fatally, the defendants’ representative admitted to recognition of the implications of the final judgment but “was too busy with a new project to deal with the legal notices he received prior to final judgment” *Id.* Here, nothing of the sort is the case. The court found that the defendants had received a “shower” of notices which are simply not present in this appeal. *See id.*

The insurance company again relies on *Bailey*, 351 So. 2d at 356 and *Trinka*, 913 So. 2d at 628. The property owners repeat their analysis of those cases.

Finally, the insurance company relies on *Hepburn v. All Am. Gen. Constr. Corp.*, 954 So. 2d 1250 (Fla. 4th DCA 2007). That opinion discusses the evidentiary standard involved in assessing due diligence. *See id.* at 1252.

The property owners acted with due diligence.

Third, the property owners demonstrated a meritorious defense. The insurance company argues that the motion to vacate was unverified and no proposed answer was filed, procedurally prohibiting the proffered defenses from being meritorious. Notably, the insurance company takes no issue with the content of the numerous defenses framed in the motion to vacate.

The motion to vacate contains the following affirmative defenses:

- Lack of standing;
- Failure of conditions precedent;
- Waiver of subrogation and limitations on liability;
- Comparative negligence; and
- Set-off.

(A. 104-106.)

The defenses are, in fact, supported by an affidavit. (A. 113-114.) The property owners' prior counsel testified that "affirmative defenses to the Complaint had been identified" (A. 113-114.)

Prior counsel further advised:

14. After learning of the garnishment, I advised the Defendants of various options

they could take to try and remedy this matter.

15. As such, they immediately have retained the law firm of TWIG, TRADE, & TRIBUNAL, PLLC, to pursue the issues raised in this case.

(A. 113-114.) Those issues raised in the trial court case include the defenses as framed in the motion, to which the affidavit is appended.

Regardless, the trial court's conduct of an evidentiary hearing cured any potential issue with regard to the motion initially being unsworn, as sworn testimony was taken at the evidentiary hearing. *See Halpern v. Houser*, 949 So. 2d 1155, 1157 (Fla. 4th DCA 2007).

The property owners demonstrated a meritorious defense.

The insurance company may attempt to argue that the trial court did not premise its finding on excusable neglect, due diligence, and a meritorious defense. But the insurance company has argued against that exact basis for granting the relief granted by the trial court in the initial brief. Moreover, it is without question that the issues were raised in the motion to vacate and the affidavit attached thereto. If the trial court reached "the right result, but for

the wrong reasons, it will be upheld if there is any basis which would support” the result in the record. *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009). Although the trial court would have to make factual finding on the issue, *see id.*, the insurance company is the party seeking review and has failed to provide a transcript containing the trial court’s factual findings or lack thereof.

The insurance company has waived or failed to preserve any argument regarding the timing of the property owners’ motion. The property owners sufficiently established excusable neglect, due diligence, and a meritorious defense. Based on the foregoing, the trial court’s order should be affirmed in all respects.

Conclusion

The trial court’s order should be affirmed in all respects.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was furnished via the Florida E-Filing Portal on March 15, 2024 to all parties on the attached service list.

Certificate of Compliance

I hereby certify that the undersigned has complied with the formatting requirements of Florida Rule of Appellate Procedure 9.045. This brief was prepared using Bookman Old Style 14-point font and contains 7,001 words.

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