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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-2194
LWR. CT. APPEAL CASE NO.: 3D12-1825
LWR CIR. CT. CASE NO.: 10-07498 CA 04 *CONSOLIDATED WITH* CASE NO.: 11-19139

ANAMARIA SANTIAGO,

Plaintiff/Appellee/Petitioner,

VS.

MAUNA LOA INVESTMENTS, LLC

Defendant/Appellant/Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, THIRD DISTRICT

RESPONDENT'S *CORRECTED* ANSWER BRIEF ON THE MERITS [2014©]

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I. STATEMENT OF THE CASE AND FACTS[1]

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Respondent rejects Petitioner's statement of facts as inaccurate and incomplete. Anamaria Santiago ("Santiago"/"Petitioner") sued Mauna Loa Investments, LLC ("ML")[2] in February 2010 for premises liability for her July 2, 2008 accident at an Iberia warehouse complex in Hialeah Gardens, Florida.[3] Mawanphy Gil, ML's President, immediately retained attorney Libio Calejo. A.1; *see also* A.4 and A.28 at 1. Unbeknownst to ML, Calejo failed to Answer. A.28 at 1. In May 2010, Santiago was granted a default. A.5; A.6. At the very time Calejo's office led ML to believe Calejo was working to get the default set aside, Calejo announced in August 2010 that he was ceasing ML's representation. A.11 at 1–2; A.12 at 1. ML immediately retained new counsel, Aubrey Rudd, who worked promptly to vacate the default. A.11 at 1–2; A.12 at 1; A.29 at

[1] The answer brief is corrected as to typographical errors and omitted words only. The record on appeal refers to a "Vol. 4 Tab A", which is the core record on appeal that was before the Third District Court of Appeal entitled "Record Appendixes". Because Petitioner would not agree to a stay on execution of the judgment to allow the Third District time to speak on these issues and ML did not have the resources to post a supersedeas bond, with Petitioner's agreement the Third District granted ML leave to waive clerk preparation of the record on appeal (to expedite that portion of the appeal) and to allow ML's counsel to prepare the record themselves: the "Record Appendixes". R.4-8, 9. These Vol. 4 Tab A "Record Appendixes" will be referred to as A.__ at __, to reflect the Record Appendix document number and page within that document number. Transcripts will also be referred to A.__ at __. All emphasis is added unless otherwise noted. The parties will be referred to as they were below unless otherwise noted herein.

[2] Mawanphy Gil, President of ML, was not personally sued in Santiago's 2010 complaint. A.3 at 1–2.

[3] A.3 at 1–2. The address of the Iberia warehouse complex is 9325 Okeechobee Road, Hialeah Gardens, Florida. A.3 at 1–2.

1; A.8.

But Santiago filed a second complaint in June 2011, suing ML again, for the same accident. A.15. And this time Santiago sued other defendants as well, for the same accident, on the same day, for the same injuries (*Santiago v. Iberia, NV, LLC; Antonio Martinez Marmol, as trustee and member of Iberia NV, LLC; Mauna Loa Investments LLC; Mauna Loa Investments LLC as member of Iberia, NV, LLC; and Mawuampy Gill* [sic], Case No: 11-19139 CA 04, the "2011 complaint"). A.15.

Consistent with all the recorded and official public records,[4] Santiago's 2011 complaint acknowledged that "[a]t the time of the accident, [defendants] Iberia and [Antonio Martinez Marmol] were owners of the commercial property and they were responsible to maintain and control" it. A.15 at 4. Santiago continued: It was not until "three months following SANTIAGO'S accident, [that defendant] IBERIA transferred [the Iberia warehouse] property to [defendant] MAUNA LOA". *Id.* at 8 (emphasis in original). She attached the public-record, recorded deed showing the post-accident, ownership transfer.[5] *Id*. at 1–2, 12. In August 2011, Santiago's 2011 *Santiago v. Iberia-Marmol-ML-Gil* matter was transferred and consolidated with Santiago's 2010 *Santiago*

[4] Antonio Martinez Marmol (Martinez Sr.'s son) formed Iberia NV, LLC, February 26, 2008 after his father's death, and Iberia NV, LLC, was voluntarily dissolved December 31, 2008. ML was never an officer or member of Iberia NV, LLC, the Defendant in the 2011 complaint. *See* Florida Dept. of State Sunbiz.org, Iberia NV, LLC (http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail/EntityName/flal-l08000020600-b6671291-7384-48e8-9436-1b63a0747f2e/Iberia%20NV/Page1).

[5] Meaning, this was not a corporate stock sale that includes corporate liabilities, but an asset sale of real property—a warehouse complex and the land it was on.

v. just-ML matter, for all purposes, before the same judge, in all forms, and without objection from Santiago. A.1, A.2, A.17; A.22; A.23.

ML then moved to set aside the default a third time [A.18], but then Santiago tried to un-allege her concessions that Iberia owned, possessed, or controlled the property, by filing a voluntary dismissal of the already-consolidated 2011 *Iberia-Marmol-ML-Gil* matter shortly before the hearing on the motion to vacate default. A.31; A.32. ML's continued attempts to vacate the interlocutory default were denied, and the consolidated case was tried before a successor judge and jury on damages only. *See* A.112 at 10–21; A.113 at 31–35. Over ML's continued objections to repugnant and inconsistent allegations, unpled theories of liability, and unpled damages, and with ML precluded from defending liability, Santiago was awarded a lumped verdict of $1,099,874.30 in damages roughly five to seven times greater than any reported Central or South Florida premises liability verdict with more injuries, surgeries and impairments, one verdict even in a wrongful death.[6] ML timely moved for remittitur, new trial, arrest of judgment,

[6] A.3 at 2; A.59; A.86; A.116 at 99; A.111 at 58–64; A.116 at 100–01. *See Maria E. Robert v. Jorge L. Fernandez and Alcida Guerra*, 2009 WL 1324809 (Fla. 11th Jdcl. Cir. Ct. 2009) (premises liability default judgment with trial on damages only, surgery, lost half patella, jury awarded $183,661); *Pepler v. D & J Props.*, 2004 WL 6013836 (Fla. 9th Jdcl. Cir. Ct. 2004) (Orlando nightclub patron injured when metal tank toppled and landed on her left foot; jurors awarded $215,298.62); *Sergio Cruz Lopez v. El Pueblo De Vera Condominium Association, Inc.*, 2010 WL 4926784 (Fla. 11th Jdcl. Cir. Ct. 2010) (premises liability plaintiff, taken to emergency room, diagnosed with left ankle fracture requiring three total ankle surgeries, including external fixation, hardware removal, and fusion, permanent limp and scarring, residual pain, and a limited range of motion; award of $175,000.00); *Sloley v. Dollar Tree Stores*, 2005 WL 6702803 (Fla. 13th Jdcl. Cir. Ct.

vacate judgment as void, and after all were denied, timely appealed. R.1-3; A.94-99, A.100.

The Third District Court of Appeal reversed with instructions to vacate the judgment as void (as ML had warned in its trial level motions and earlier-filed certiorari petition).[7] Before ML could proceed to enforce the mandate in the trial court, Santiago filed her notice to invoke discretionary jurisdiction, and, though she sought no stay of the mandate, ML immediately ceased all efforts to vacate the judgment during the pendency

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2003) (premises liability action, jury awarded $361,000, which trial judge reduced to $223,757.75); *Wolff v. M2 Realty Corp.*, 2004 WL 6005674 (Fla. 15th Jdcl. Cir. Ct. 2004) **(**trip and fall, jury awarded $205,104.66); *Milstein v. H&J Tequesta Assocs.*, 2001 WL 36365416 (Fla. 15th Jdcl. Cir. Ct. 2001) (slip and fall in parking lot; jury awarded Lila $100,000 for past and future medical expenses, $100,000 for past and future pain and suffering, and awarded husband $50,000 for past and future loss of consortium; trial judge reduced to $150,000); *Cardenas v. Tasse's Am. Fashions Corp.*, 2011 WL 7809520 (Fla. 11th Jdcl. Cir. Ct. 2011) (trip and fall, asserting losses were permanent or continuing in nature; awarded $237,109.02); *Mandell v. Fort Lauderdale Rescue Tabernacle*, 2006 WL 6814357 (Fla. 15th Jdcl. Circ. Ct. 2006) (trip and fall, sustaining injuries; jury apportioned fault 25 percent to the plaintiff, 75 percent to the defendant, and awarded $500,000); *Alonso v. R.J. Gators of Okeechobee*, 2005 WL 6702601 (Fla. 15th Jdcl. Cir. Ct. 2005) (slip and fall of minor child; awarded $250,000); *Fahn v. Coombs*, 2004 WL 6005537 (Fla. 15th Jdcl. Cir. Ct. 2004), (Slip and fall, claiming poorly maintained floors and negligent construction; awarded Fahn $148,331.45; trial judge reduced award to $113,823); *Diamond v. Scan Design Furniture*, 2003 WL 26080833 (Fla. 17th Jdcl. Cir. Ct. 2003) (slip and fall from furniture display platform; awarded $262,353); *Owens v. CFI Resorts Mgmt.*, 2002 WL 34670202 (Fla. 9th Jdcl. Cir. Ct. 2002) (trip and fall while walking through a "rolling barrel" due to an unrepaired mechanism; jury awarded Owens $30,050.30; trial judge reduced award to $21,944.41); *Estate of Ciolino v. Boca Mar Condo. Ass'n*, 2002 WL 34670004 (Fla. 15th Jdcl. Cir. Ct. 2002) (slip and fall on a slippery walkway, sustained injuries and subsequently died; jury awarded Estate $154,000).

[7] R.399-400. Not until after oral argument did Santiago move to place before the Third District unsigned affidavits from Iberia's president Martinez Marmol showing a "back door" deal Santiago's counsel had attempted unsuccessfully to negotiate with Martinez Marmol, along with affidavits from her trial counsel executed just the day before as her "evidence" of ML's control, which were stricken. R.16-20, R.26-326, 395-402.

of these Supreme Court proceedings. This Court granted jurisdiction.

B. STATEMENT OF FACTS

1. ArtCrafts leases the Iberia Warehouse Complex from Iberia.

Petitioner launches her Initial Brief [IB] by stating as "fact" that Santiago was a tenant of ML at the time of her accident. IB at 1. Petitioner also represents that the "undisputed testimony" established that ML oversaw the operation of the premises through Gil and her daughter Maria. IB at 11–12, 35 fn.12, 36. Both are inaccurate.

Santiago was not a tenant of ML. Santiago owned and operated ArtCrafts, Inc., a Florida corporation [A.66 at 2–26], and for eight years ArtCrafts was an Iberia NV tenant, in the Iberia warehouse complex, pursuant to an Iberia lease.[8] In July 2006, ArtCrafts signed the most recent of those commercial leases, which again was solely between ArtCrafts and Iberia, NV.[9] And as to whom ArtCrafts might have conceivably 'thought' it paid rent, Santiago admitted that ArtCrafts had "never been told to pay rent to any other entity other than Iberia" and "was given a notice to collect rent by IBERIA N.V., LLC and not by MAUNA LOA INVESTMENTS, LLC." R.10-15, A.39-A at 1 (emphasis in

[8] A.3 at 2; A.114 at 86, 122. Even conducting a word search of all the OCRd leases in this record, "Mauna Loa" appears nowhere in them. A.66 at 2–26. ArtCraft's lease agreements showed: (1) Iberia was Santiago's landlord at the time of Santiago's accident; (2) Iberia was designated as the premises manager; and (3) Iberia was designated exclusively responsible for the maintenance and control of all common areas of the premises, (4) for which Iberia, as Landlord, collected a monthly fee for common area maintenance. A.66 at 2, 5, ¶9, 7–8, ¶14, 8-9 ¶17. ArtCrafts' rent was due and was paid exclusively to Iberia. A.15 at 13-14; R.10-15.

[9] A.66 at 2. Santiago had previously attested in a lawsuit just months before to all these same facts. A.15 at 13.

original). Sometimes ArtCrafts delivered the rent check directly to Martinez Sr.; other times to Martinez Sr.'s paramour and Santiago's friend, Mawanphy Gil;[10] other times to one of Martinez Sr.'s daughters.[11] Santiago admitted ArtCrafts was never told to deliver its rent check to or on behalf of any entity other than Iberia and certainly never to ML.[12]

Santiago omits that before her July 2008 accident, Iberia's Martinez Sr. died and Martinez Marmol, the son, became Iberia's owner of the Iberia warehouse complex.[13] Also more accurately, Antonio Martinez Sr. ("Martinez Sr."), from Venezuela, was Iberia's president, not ML, a corporation not even formed until 2008. A.15 at 2; A.53 at 1; A.54; A.69. Martinez Sr.'s son, Antonio Martinez Marmol ("Martinez Marmol"),[14] was

[10] Santiago's counsel continually represented to the trial court that Mawanphy Gil and Martinez Sr. were husband and wife and uses those false assertions from counsel as record citations in Santiago's initial brief despite having no evidence and despite repeated correction that this is false. A.108 at 10; A.110 at 17-18; R.83-85 and citations therein. Ms. Gil was Martinez Sr.'s paramour in Florida, they have never produced any Gil-Martinez Sr. marriage license, and Mr. Martinez's lawful wife still lives in Venezuela. And a docket search of Miami-Dade reflects no probate administration of a Martinez Sr. estate or even the Iberia warehouse complex purportedly distributing ownership of the Iberia warehouse complex to Gil upon Martinez Sr's death. *Id*.; A.110 at 19-20. At this point, one can only conclude that these continuing misrepresentations and omissions to this Court are intentional.

[11] A.110 at 17-18; A.114 at 88-89, 94-95; A.115 at 18, 102, 105.

[12] A.15 at 13-14; R.10-15 of A.39-A at 1. Martinez Sr.'s daughters were collecting rent for Iberia years before ML was even in existence. *See* A.115 at 102. ML was not even *formed* until April 2008; assuming that a corporation can ever be an officer in a corporation, ML was never an officer or member of Iberia.

[13] A.54 at 2; A.115 at 104. In addition to being in Martinez Marmol's executed "of record" affidavits [A.53; A.54], it is also in the sunbiz.org public records for all to see.

[14] Martinez Sr.'s son, Antonio Martinez Marmol, bears the surname of his father and the second surname, Marmol, is that of his mother (who was at all times the lawful wife of Martinez Sr., until his death, and is now his widow is still living in Venezuela).

an officer in Iberia.[15]

As to her management-and-control "support", Santiago represents to this Court that Maria was told by her mother, Gil, to forgive Santiago's rent. IB at 11–12 (citing A.115 at 102–03, 105–07). Her cited pages do not say that. These pages say that Maria collected rent for her father, Martinez Sr., before he died and then collected rent for her half-brother, Martinez Marmol (Iberia Presidents). A.115 at 102-03, 105-07. Maria's half-brother Martinez Marmol--not ML--would even pay Maria $100 each time she collected rent. *Id.* at 105. And nowhere does Maria testify that she was told to "forgive" rent.[16] As for the sued defendant ML, ML "did not own, possess, control, or maintain the [property owned by Iberia NV,67 LLC] until the property was sold to [ML] in October 6, 2008."[17] As such, Petitioner's "ML-as-manager" theory in her brief postured as "fact" is at odds with her proof and contradicted by her own citations. The Third District saw this.

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[15] *Id*. More accurately, Mawanphy Gil was Martinez Sr.'s paramour, not his wife; Martinez Sr. and Gil had two out-of-wedlock daughters; they are Martinez Marmol's half-sisters. A.114 at 262; A.115 at 79, 129. Santiago also omits that it was Iberia's Martinez Sr. who begrudgingly gave Santiago special treatment for chronically-late rent payments. A.114 at 91; A.115 at 102, 111. Petitioner omits that she and Gil, Martinez Sr.'s lover, had been friends for some eight years. A.112 at 68; A.114 at 90, 93; A.115 at 81, 97, 103–04, 124, 136. She omits that Gil would buy Santiago's artwork to help Santiago. A.112 at 68-69; A.114 at 90-93; A.115 at 81-82, 103-04.

[16] *See* A.115 at 101-19. Maria was collecting rent for her Dad, Martinez Sr., when he was Iberia President, and later her half-brother when he became Iberia President. *Id.* at 102–03, 105. She also omits that Martinez Marmol, a Venezuelan citizen and resident, traveled frequently to the United States. A.54 at 1. Also, Santiago's testimony that Gil was the landlord was highly disputed, in conflict with her earlier attestations and with all the documentary evidence, even Santiago's. *See* A.15 at 13; R.10-15, A.39-A at 1; A.66 at 2, 5, ¶9 7–8, ¶14; 8–9 ¶17; A.115 at 80; A.42.

[17] A.69. ML was not formed until two months before Santiago's accident. A.15 at 2.

2. Santiago's 400 lb. statue of Venus falls onto her ankle while she and her then-teenage son are moving it on a pallet jack in the Iberia parking lot.

In the same sentence that Petitioner inaccurately states Santiago was a ML tenant at the time of her accident, she inaccurately states she was injured when she tripped and fell. IB at 1. A few words later, she inaccurately represents that the accident occurred inside ML's warehouse. IB at 1. All--even Santiago's own son, who was moving the pallet jack--recognized that Santiago was injured when her 400-lb. statue, that she and her son were moving back to her store to paint, fell over onto Santiago's right ankle, while Santiago walked alongside and tried to stabilize it.[18] Her son also testified the pallet jack hit no bumps or holes.[19] Her own counsel conceded the first day of trial (to secure redaction of these facts from the jury in Santiago's medical records) that the statue falling on her ankle was the cause of her injuries.[20] Her brief, just like her complaint, never mentions the Iberia parking lot, or her own son pushing the statue on the pallet jack too hard, or her statue severing her ankle and that she remarkably recovered.[21]

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[18] A.70 at 1; A.89 at 2-4; A.114 at 17; A.115 at 66-67, 83-84; A.116 at 26; A.127 at 14, 59; A.137 at 13, 15-16; A. 140 at 30-33. The record is the statue was 400 lbs. [A.69 at 2, 7], which seems incredible. But it was, indeed, a very large, heavy statue.

[19] A.137 at 15–16.

[20] A.89 at 2-4. On May 15, 2012, before trial commenced, Santiago's counsel conceded: "**I think we are all in agreement that a statue fell on her. And that's what caused her injuries**." A.112 at 9-10.

[21] *Compare citations supra with* IB. The record is that Santiago and her son were "outside the warehouse", not on the walkway, not inside. *See citations supra*; *see also* A.3 at 2; A.70 at 1; A. 110 at 31-37; A.114 at 23; A.139 at 16; A.140 at 30-33. After Martinez Marmol, the son, became Iberia's owner [A.54 at 2], Santiago was injured by her own statue toppling off the pallet [A.3 at 2; A.70 at 1; A.114 at 17, 23] and made a remarkable

3. Months after Santiago's accident, ML purchases the Iberia warehouse property--not a stock or corporation purchase--from Iberia. After ML evicts Santiago, Santiago sues only ML. ML immediately retains counsel.

Santiago also omits that three months after her July 2008 accident ML, formed in April 2008, purchased the Iberia warehouse property from Iberia, which was transferred by special warranty deed to ML.[22] Then, over two years after Santiago's injury and a few months after being evicted, Santiago filed her February 17, 2010 complaint against one party: ML. Her paltry, 1.5 page complaint said simply: She was caused to "trip and fall on Defendant's [ML's] property due to the walkway surface being in an unsafe condition . . . holes and uneven areas where [sic] created and caused [her] to lose her footing and fall." A.3 at 1–2. No mention of the statue. Or ML possession. Or what ML was maintaining or controlling or how. No factual allegations. Just legalese. *See* A.3.

The 2010 complaint was served on Mawanphy Gil, as ML's principal, and that same day, Gil hired attorney Libio Calejo. A.1 at 3, 6; A.4; A.18; A.28 at 1; A.108 at 14. Calejo assured Gil that he would review the file and take the necessary measures. A.11 at 1. He then filed an appearance on behalf of ML. A.1 at 6; A.28 at 1; A.108 at 14-17. Originally from Venezuela, Gil contacted Calejo's office multiple times for case status. A.11 at 1. The secretary assured Gil everything was "fine" and she would let Gil know of

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recovery. A.114 at 139-41, 145-47; A.115 at 88, 96; A.141 at 4; A.142 at 2; A.143 at 2.

[22] A.15 at 9, 12; A.27 at 3; A.110 at 18, 22; A.115 at 106-07. When ML was formed, Mawanphy Gil became its President, and still is. A.11 at 1; A.115 at 101, 106. Only after Santiago had not been paying rent (by then reaching one year) did ML evict Santiago in 2009, and Santiago then wrecked her warehouse unit. A.110 at 20; A.115 at 111-12, 115–16, 119-20.

"any news." *Id.* Calejo failed to file an answer (A.28 at 1–2), and Santiago then moved for default on May 5, 2010. A.5. Calejo did nothing and failed to appear at a hearing on the motion to default. A.28 at 1. As to his inaction? He extensively cited "personal issues" with his secretary, with whom he had a "falling out". A.28 at 2. The court entered a default May 13, 2010. A.6.

4. After the default was entered, Calejo's office led ML to believe the default was being set aside, but later pronounced Calejo would no longer represent ML after doing nothing. ML again immediately acted. After retaining new counsel, ML's new counsel worked diligently to vacate the default despite an unresponsive Calejo and an over-crowded court system.

Santiago inaccurately states in her Brief that ML waited three-and-one-half months to move to set aside a default, and cites as "support" the docket sheet to morph Calejo's inaction as proof of ML's inaction. IB at 6. Not so. She leaves out all of ML's actions and that ML did not wait at all.[23] She also leaves out that, at the very time that Calejo's office had been reassuring ML to believe the default was being resolved, his office then called ML's President Gil on August 30, 2010 to pronounce, without explanation, that his firm would no longer represent ML. A.11 at 1. The very next day, following Calejo's abrupt departure, ML retained new counsel, Aubrey Rudd. A.11 at 2; A.29 at 1. Petitioner's

[23] Petitioner has never refuted that ML's President Gil continually attested that as soon as she received service for ML, she retained Calejo, who assured that he would take care of the matter but failed to do so. A.29 at 9. When she tried to contact Calejo, the secretary told her that everything was fine. *Id.* Once ML's President Gil received the default, Gil immediately went to Calejo's office, and the secretary assured Gil, educated in a Venezuelan legal system, that everything was "fine", that papers must have gotten "crossed", and that this type of thing "happens all the time". A.11 at 1; A.29 at 9, ¶ 4.

Brief omits this.

Two days after ML retained Rudd, and Rudd still conducting due diligence, Rudd promptly acted; he filed a Verified Motion to Set Aside Default and faxed a Stipulation for Substitution of Counsel to Calejo. A.8; A.29 at 7. Three-weeks-of-prodding later, Calejo returned the signed stipulation, and Rudd promptly filed it along with a proposed order on September 24, 2010, to enable filing an appearance and setting the Verified Motion for hearing. A.29 at 11–14. Petitioner's Brief omits this as well.

More weeks passed before Rudd received the signed order granting the substitution to allow Rudd to set the hearing, received around October 27, 2010, and he sought a hearing on that Motion to Set Aside. A.29 at 2, 15. Rudd's first noticed hearing did not make motion calendar, so he promptly re-noticed the hearing for the next earliest possible date, January 14, 2011.[24]

As to that January 14th hearing before now-retired Judge Amy Steele Donner, four days before the hearing, Rudd filed ML's Answer and Affirmative Defenses. A.1 at 6; A.9; A.29 at 17–18. But ML's January 10, 2011 answer and affirmative defenses had not yet shown up in the trial court's computerized docket and Rudd did not have stamped copies with him to conclusively verify they had been filed; Judge Donner denied the motion. A.1 at 6; A.10; A.29 at 3–4, 17. He later confirmed that the answer and

[24] A.1 at 6; A.29 at 2–3. Petitioner's Brief and timeline skip over all of this and omit all of Rudd's efforts to get the order of substitution and to get a hearing on the motion to vacate at the earliest possible date. IB at 6; IB App'x C.

affirmative defenses[25] were filed and that it was merely that the pleading had not appeared yet in Miami-Dade's computer docket system. A.29 at 3–4. Petitioner has also inaccurately told this Court that ML has never challenged her allegation that ML was responsible for maintaining the premises. IB at 7. Even ML's answers and defenses show that is absolutely untrue.[26]

ML then filed its Verified Motion for Rehearing on Verified Motion to Set Aside Default one week later (January 20, 2011).[27] Petitioner tries to create some inconsistency but not once has Gil, or anyone else--except the Petitioner [IB at 7]--stated Gil spoke to Calejo after ML retained him to handle the lawsuit. *See* A.11 at 1–2; A.29 at 1–2. ML's motion for rehearing states that Odalys, Calejo's secretary, told Gil "everything was fine"

[25] Petitioner makes much of the Answer and Affirmative Defenses being unverified, as they did with the Third District. Our response remains: Nothing in the Florida (or Federal, for that matter) Rules of Civil Procedure require that Answers be "verified".

[26] *See* A.9: ML denied that when Santiago's statue fell on her foot ML **owned**, **maintained**, or **controlled** the property; ML also denied that ML was responsible for the **operation, maintenance, and safety** of the premises; and as an affirmative defense, ML asserted it did not have ownership, custody, or control of the premises and, thus, did not have a duty to **maintain** the premises. A.9 at 1 ¶3. ML was so confident that the truthfulness of its position would prevail that it asked that the court dismiss Santiago's complaint with prejudice and reimburse ML's attorney fees and costs. A.9 at 2.

[27] Petitioner tries to make something out ML's first motion filed just two days after Rudd began to represent ML when Rudd was still gathering information, in which Gil stated she had no knowledge of the default, and her amended motion. IB at 7. ML amended the original motion and has consistently acknowledged that it received the order ever since. A.11 at 1; A.12 at 1. That does not mean that ML or Gil, from Venezuela, understood its implications, particularly given the Calejo secretary's continued assurances that "everything was fine", "the papers must have gotten crossed", and "this type of thing happens all the time." A.29 at 9, ¶ 4. Gil continually attested that as soon as she received service for ML, she retained Calejo, he assured that he would take care of the matter but failed to do so, she tried to contact Calejo after receiving the default, and Gil's communications were with his secretary, Odalys. *Id.*

and Gil understood it was being remedied.[28]

5. While ML's motion for rehearing to vacate default remains pending, Santiago files another lawsuit, against the same ML, and adds the correct defendant Iberia, provides detailed ownership history of the property, attaches the official public-record deed, references official public-record Iberia officer history, all showing ML bought the property after Santiago's accident and that ML was never an Iberia officer.

On June 21, 2011, Santiago filed her second lawsuit against ML—*Santiago v. Iberia, NV, LLC, etc.* No. 11-19139 CA 04—for the same injuries, from the same accident, on the same day. *See* A.15. She sued ML again, but also sued Iberia, NV, LLC, and its only member, Antonio Martinez Marmol, and sued Mawanphy Gil individually. A.15, the 2011 complaint. Unlike her skeletal 2010 complaint, Santiago's 2011 complaint detailed Iberia's formation and officer history, ML's short history since formation in 2008, and the subject Iberia property ownership history. *See* A.15. She conceded that at the time of the accident, Iberia and Martinez Marmol not only owned the Iberia warehouse complex, but were also responsible for maintaining and controlling it. A.15 at 1–2, 12. She attached the Special Warranty Deed, admitting Iberia transferred the property to ML three months after Santiago's accident. A.15 at 12.[29]

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[28] A.11 at 1–2. Santiago also suggests to this Court that ML sat around for the next eight months before filing another motion with new argument. *See* IB at 6–7. She skips over the fact that motion for rehearing on the motion to vacate remained pending, skips over entire motions, and leaves out her second lawsuit filed, for the same accident, against ML and against the correct defendants, Iberia and Martinez Marmol, and all the activity going on in the consolidated cases. *Id.*; A.1; A.2; A.15.

[29] Petitioner represented to the Third District that ML had filed an unauthenticated Deed [R.297-98], and she implies that in her arguments here again. The Deed is what Santiago

6. Santiago's two cases for the same incident were consolidated.

The cases were transferred, and the lawsuits were mutually consolidated for all purposes without objection from Santiago. *See* A.2; A.17 at 1; A.22 at 1-2; A.23; A.110 at 22. After Santiago filed admissions with the court that Iberia, not ML, owned and controlled the property, ML filed its Motion to Set Aside Default Based upon Misrepresentation or Mistake.[30] Petitioner calls this a "unique" argument raised "late" in which ML contended the default should be vacated because Santiago fraudulently filed suit against the wrong defendant. IB at 3. More accurately, ML's counsel was calling these contradictory allegations a "mistake" to give Santiago's counsel, as a fellow Bar member, the benefit of the doubt and an opportunity to correct clearly wrong allegations. So the motion stated that it appeared the first lawyer was negligent in verifying the true owner at the time of the accident and that the allegations were repugnant and failed to state a claim for relief. A.18 at 2-3. Santiago instead used the fully consolidated cases to parlay her 2010 complaint default as a shield against ML discovery into her 2011 complaint. A.19 at 2; A.20; A.21 at 1-4; A.22; A.23.

ML contended that the just-filed lawsuit against Iberia showed exactly what ML had been stating from the beginning: Santiago conceded ML did not own, manage, or

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located in the Public Records, with official book and page stamps, that Santiago, herself, attached to her 2011 complaint. A.15 at 1-2, 12.

[30] A.18. Petitioner seems to suggest that there is an issue with these motions, saying they are "unverified." IB at 7, 8, 43, 45. All ML's motions to vacate were verified by affidavits.

control the property at the time of Santiago's accident.[31] Moreover, Austin Carr was a second attorney that ML retained, in addition to Rudd, after Santiago's filing of her 2011 lawsuit, and he filed this motion.[32] ML then amended its Motion to Set Aside Default Based upon Misrepresentation (or Mistake) and filed that on November 11, 2011. A.27. This is the motion the Third District considered. Petn'r App'x B at 2–3.

ML contended—just as it had in its certiorari petition and briefs to the Third District during its pendency in the trial court—that the default should be set aside because it was based on a false, defective pleading, and the conflicting allegations were repugnant:

The default in the first lawsuit should not be maintained because it is based

[31] A.18 at 1; A.19 at 1-2. Petitioner also asserts that ML never raised these objections and failure-to-state-a-claim arguments until appeal [IB at 2, 3, 8] and accuses the Third District Court of Appeal judges of considering an issue presented for the first time on appeal. IB at 5, 17. That is absurd. ML argued this in multiple trial court motions and repeated them in hearings. *See, e.g.*, A.42; A.38; A. 110 at 29, 39. ML contended in the trial court, not just on appeal, that Santiago could not prevail because the allegations in the complaint were "unequivocally false and fail to state a claim." A.38. at 2. ML's Motion for Summary Judgment Alternative Motion to Set Aside Default, which is Void, also asserted: "Default is also void here for being improperly pleaded," that along with the complaint being improperly pled, Santiago's complaint "is flawed for failing to state a claim" [A.42 at 14], that Santiago "failed to properly allege a cause of action" [A.42 at 16], and any "judgment entered thereon is void." *Id.*

ML continued: Not only did ML have meritorious defenses, it contended in the trial court that, even assuming a default, a default only operates as an admission of well-pleaded allegations. A.38 at 6; A.42 at 8. Santiago merely provided mere "legal conclusions, fictions, and misrepresentations." A.38 at 9; A.42 at 13. ML repeated these arguments at the hearing on injunctive relief in January 2012. A.109 at 4–5.

[32] A.16; A.18 at 4. After doing so, neither ML nor Carr "waited around and did nothing" for three months as Petitioner also insists. *See* IB at 8. ML filed a Motion to Continue Trial on August 26, 2011, asking for time to take depositions and conduct discovery now that the second lawsuit had been consolidated with the first. A.19 at 1-3. And on September 10, 2011, ML filed a Motion to Compel and to Continue Trial Date because Santiago refused to comply with any discovery. A.21.

> upon a fiction: [that in truth] Mauna Loa was admittedly NOT the owner of the property. Moreover, the allegations of negligence and causation are incorrect. The plaintiff did not fall. An object fell on her foot.

A.27 at 4. Calejo's affidavit was attached to this motion, explaining he neglected to make the appropriate filings and appearances and his office-administration mistakes.[33] Rudd's affidavit, also attached, detailed the steps he took immediately upon being retained to vacate the default. *Id.* 1–4. ML included the already-consolidated complaints against it, already before the same trial judge, with the repugnant allegations and concessions that Iberia owned, managed, and controlled the property. A.29 at 19–30.[34]

Santiago's response was to move to strike ML's amended motion to vacate, and, in further attempt to un-allege her concessions, she filed a Notice of Voluntary Dismissal Without Prejudice of the now-consolidated 2011 lawsuit against ML and Iberia. A.31; A.32. Santiago also filed a response to ML's amended motion in which she represented to the trial court—which she now repeats to this Court as her "concrete evidence" [IB at 3, 10, 27]—that she had "verified information" that ML owned, maintained, and controlled

[33] A.28. This was not "another version of events" [IB at 8], but Calejo's detailed explanation. And contrary to Petitioner's representation by accusation [IB at 9], there were no "earlier misrepresentations" to correct. ML has never stated that Gil spoke to Calejo—Gil's access to Calejo was through his secretary. A.11 at 1; A.29 at 9.

[34] ML alternatively asked the court to take judicial notice of that complaint and an affidavit from Santiago in connection with the ArtCrafts eviction proceeding back in February of 2009, in which Santiago attested that Art Crafts' "rental agreement is with and has always been with Iberia;"; and "rent[s were collected] by Iberia NV, LLC, and not by Mauna Loa Investments", which Santiago opposed in the trial court. R.10-15, A.39-A at 2–3, 7–8; A.15 at 13–14; A.39.

the property, purportedly found in an affidavit by Martinez Marmol. A.32 at 10.[35] This is absolutely false. Martinez Marmol had not executed an affidavit stating this.[36] And

[35] Iberia's Martinez Marmol affidavit was originally filed on December 13, 2011. A.1 at 5. On February 2, 2012, ML resubmitted the affidavit of Martinez Marmol [A.1; A.53; A.54], attesting that Iberia owned the property in July 2008. A.54 at 1-2. On March 5, 2012, ML filed an amplified affidavit from Martinez Marmol also attesting that ML did not "own, possess, control or maintain" the Iberia property and ownership was not transferred to ML until October 6, 2008. A.69 at 1-2. The executed Antonio Martinez Marmol affidavits filed in the Record Appendix do not attest that ML "owned", "maintained", or "controlled" the property when the statue fell on Santiago's foot. *See id*. He attested that he controlled the property even if he wasn't in day-to-day control, stating he personally reviewed all documentation that related to Iberia, including all leases. A.54 at 1. Santiago has, nevertheless, misrepresented ML's ownership and control of the premises in July 2008 and prior proceedings content. A.110 at 14-25.

After the Third District heard oral argument Petitioner attempted filing post-oral argument appendixes and affidavits never part of the record. *See* Santiago's Notice of Filing Original Affidavits; Santiago's Motion to File an Untimely Supplemental Appendix. R.264-66. One of the filings includes previous emails regarding Martinez Marmol's affidavit along with a previous version of an affidavit never signed by Martinez Marmol, and her filing makes clear that Martinez Marmol would not sign an affidavit stating that ML or Mawanphy Gil managed, operated, or maintained the property. *Id*.

[36] Santiago unsuccessfully represented the same to the Third District about phantom non-record evidence to prove their claims of ML management and control; despite all their opportunities to present any such evidence [A.1 Multiple Notices of Deposition], they were never able to do more than they do here: accuse and argue by innuendo to plant fallacy as fact in a presumed inattentive reader's mind. The Third District was troubled during the recorded oral argument by Santiago counsel's trial artifice and machinations, from the gamesmanship of dogged pursuit of a defendant Santiago knew was the wrong party while attempting a back-door deal with Marmol to name ML (which he ultimately refused to do), and after Santiago's counsel had scoured the public records incontrovertibly showing Marmol and Iberia NV were the correct defendants.

We are constrained to state that Santiago's extensive misstatements concerning representations of counsel as if they are "facts", misstating a public record Deed that Santiago attached as "unauthenticated", references to post-oral-argument appendixes and to non-record filings violate both the appellate rules and The Florida Bar's Rules of Professional Conduct that require a duty of candor toward the Tribunal. Fla. Bar Rule 4–3.3(a)(1). Pursuant to the statement of "Ideals and Goals of Professionalism" adopted by the Board of Governors of the Florida Bar, "The lawyer should not knowingly ***misstate, distort, or improperly exaggerate*** any fact or opinion and ***should not improperly permit the lawyer's silence or inaction to mislead anyone.***" Ideals and Goals of Professionalism,

Petitioner only claimed to have—and has never filed—this "concrete evidence" of ML "management" and "control".[37] She produced evidence to the contrary when she filed her second lawsuit. A.15. And at the hearing on the amended motion to vacate, Santiago's counsel misrepresented to the trial court that Martinez Marmol's affidavit stated ML owned the property,[38] which misrepresentation Petitioner repeats to this Court and coyly

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No. 3 (emphasis added). Efforts to violate the integrity of the record on appeal through motions to supplement a record with Appendixes and matters never part of the record below may result in the imposition of sanctions on counsel for the movant, including public reprimand. *See Thornber v. City of Fort Walton Beach*, 534 So. 2d 754 (Fla. 1st DCA 1988) ("It is inappropriate and will subject movant to sanctions to inject matters into the appellate proceedings which were not before the trial court."), *citing Rosenberg v. Rosenberg*, 511 So. 2d 593 (Fla. 3d DCA 1987)).

[37] The executed Antonio Martinez Marmol affidavits filed in the Record Appendix do not once attest that ML "owned", "maintained", or "controlled" the property at the time the statue fell on Santiago's foot. *See* A.53; A.54; A.69. He attested that he was an officer of Iberia and that he became the owner of all Iberia property upon the death of his father. A.54 at 2. He attested that he controlled the property even if he wasn't in day-to-day control, stating he personally reviewed all documentation that related to Iberia. *See id.; see also supra* note 35.

[38] A.108 at 10. Petitioner represented to the trial court that (1) she did not sue ML in the 2011 complaint when she did, (2) Martinez Sr. was Mawanphy Gil's "husband" when he wasn't, (3) the Iberia property went through some probate administration of Martinez Sr.'s "estate" transferring all property to ML, when it never did, and (4) ML always managed and controlled the property, still as untruthful today as it was then [*compare* A.108 at 9-11 *with* A.108 at 12-13], and for which Petitioner has never presented any proof. Petitioner's counsel continually uses those false assertions from counsel as record citations in her Initial Brief despite having no evidence and despite repeated correction that these attorney representations are false. A.108 at 10; A.110 at 17-18; R.83-85 and citations therein. Gil was Martinez Sr.'s paramour in Florida, Santiago has never produced, despite all the discovery opportunities she wanted, any Gil-Martinez Sr. marriage license; Mr. Martinez's lawful wife still lives in Venezuela and a docket search of Miami-Dade reflects no probate administration of a Martinez Sr. estate or even the Iberia warehouse complex purportedly distributing ownership of the Iberia warehouse complex to Gil upon Martinez Sr's death in February 2008. *Id.*; A.at 110 at 19-20. Yet she still misrepresents and conducts trial by accusation.

postures it as "evidence." IB at 10.[39]

7. ML preserves objections of failure to state a cause of action and unpled theories of liability, causation, and damages.

The Honorable Amy Steele Donner retired, and at the first hearing before the successor judge [*compare* A.43, A.45 *with* A.50] ML further argued, in addition to its previous arguments, *supra*, that a default only operates as an admission of well-pled allegations and the complaint does not allege ultimate facts.[40] The successor judge

[39] Petitioner's counsel also represented to the trial court that this was some sort of estate situation, without proof, and cites to these trial counsel representation pages to again assert before this Court that there was "concrete evidence" that ML owned the property. IB at 10-11, 26, 27, 36. Again untruthful [A.108 at 9-13, A.110 at 17–18] and Petitioner notably never cites the pages of the multiple hearings in which ML corrected those misstatements at those hearings. *See id.*; A.110 at 17–18. ML cannot prove the nonexistence of a negative, but again correcting, Martinez Marmol did not so attest. A.53; A.54; A.69. But this is "concrete" non-evidence. *Advertects, Inc. v. Sawyer Indus., Inc.*, 84 So.2d 21, 23–24 (Fla.1955) ("It isn't sufficient merely to show that the corporation exists and that there are a limited number of stockholders doing business in good faith through the corporate entity.").

[40] A.110 at 29, 39. Further, the day after, Santiago filed a Motion for Temporary Injunctive Relief prohibiting ML from the sale or encumbrance of property, asserting that there was a significant likelihood that Santiago would prevail. A.36 at 1–2. Based on Petitioner's misrepresentations and innuendo, the trial judge denied ML's amended motion and ordered ML not file further pleadings to vacate default. A.37. Further preserving, ML responded and moved for summary judgment on January 4, 2012 [A.38; A.42], and also asked the court to also take judicial notice of the already-consolidated second lawsuit against Iberia on January 5, 2012. A.39.

As to further preservation, ML moved the trial court to determine issues of causation for trial, including whether there was a "causal relationship between the damages claimed and the liability established by the default" as an issue still to be tried. A.74 at 3. At final pre-trial hearing, the court prohibited all reference to insurance at trial. A.111 at 34. The court overruled ML's renewed objections of insufficient pleadings that should have rendered ML responsible only for allegations actually pled. *Id*. at 43–45, 63. On March 9, 2012, ML also petitioned for Writ of Certiorari (Third District Court of Appeal Case no. 3D12-644), to quash February 8, 2012 and February 23, 2012 orders denying summary judgment and IME of Santiago, also giving notice to her that her

deferred to the predecessor judge, denied the motion, and ordered that ML "not file any more motions seeking to have the default set aside."[41] The case was tried on damages only.[42]

The court overruled ML's renewed objections before trial that Petitioner was not trying the "trip and fall" pled in the defaulted complaint. A.112 at 31. **During his opening to the jury, Petitioner's attorney did not even mention the "trip and fall"**. A.112 at 58-59. **He conceded her injury was caused by a statue falling on and severing her ankle**. *Id.* Santiago and her son, who was helping her move the statue when it fell, also conceded that the statue fell while they were moving it and that they hit no

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judgment will be deemed void on appeal with the statute of limitations to sue the correct party due to expire in July 2012. Pet. Cert. at 1-3, 23. On March 23, 2012, the Third District denied ML's Petition for Writ of Certiorari "without prejudice to appellate review." *See* Order, Case no. 3D12-644.

[41] A.58. Petitioner accuses ML of "violating" this interlocutory order [IB at 12], but her own Brief shows ML did not file any more motions seeking to have the default set aside. *Id.* Then Santiago's counsel before trial conceded: "I think we are all in agreement that a statue fell on her. And that's what caused her injuries." A.112 at 9-10.

[42] A.112 at 10–21; A.113 at 31–35. As to Santiago's proffer throughout her Brief that her due process rights were somehow violated because she was precluded from presenting evidence of ML's ownership, management, and control of the Iberia warehouse complex, it was Santiago who had every discovery opportunity and adduced no such evidence and it was Santiago who objected and moved in limine to prevent ML from presenting any further evidence and argument about these points. A.51 at 2-5. Santiago also filed two motions in limine to prohibit ML's use of any and all records related to liability or causation and to preclude ML from asking any questions or presenting any evidence about how the accident occurred, or presenting evidence on negligence, causation, and liability, irrespective of whether Santiago's injury was due to "a trip and fall" as alleged. A.51 at 2-3. And Santiago was the beneficiary of those in limine requests; the court granted the motions. *Id.* at 1.

holes in the lot where they were pushing it.[43] Before day two of trial, the court overruled ML's renewed objections that causation, even after default, must still be proven and tried with evidence. A.113 at 8.

Also, Dr. Moya, an orthopedic surgeon retained to testify on Petitioner's medical bills and on both causation and damages, testified over ML's objections on these bases as well. A.13 at 33–35, 41–42. Because both Petitioner, tearfully, and her counsel raised Santiago's lack of insurance before the jury despite court instruction not to, ML moved in limine, which was also denied, to present evidence that it did not have insurance at the time of the accident in July 2008 because ML was not the owner of the premises and could not obtain insurance.[44] So on this record, *citations supra*, Petitioner's strident representations that ML failed to preserve these arguments before appeal [IB at 2, 3, 8]

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[43] A.114 at 139, 169, 184; A.137 at 13–16. Santiago testified in deposition that there were holes where they were pushing the statue. A.138 at 3, 5, 17, 26. Another tenant and witness, Miriam de Ravelo's proffered testimony was also there was not a hole there. A.140 at 24.

[44] A.85; A.94; A.112 at 61; A.113 at 25, 141; A.114 at 70-71, 107, 161; A.115 at 62-64. As further preservation, ML moved for, and was denied, directed verdict on eight more grounds: (1) ML did not own the premises on July 2, 2008; (2) ML did not control the premises on July 2, 2008; (3) No landlord/tenant relationship existed between ML and Petitioner on July 2, 2008; (4) The complaint was defective (this was not a "trip and fall" trial); (5) There was no proof that walkway disrepair caused the injuries (unpled causation); (6) There was no proof that walkway maintenance deficiencies caused the injuries (a judgment on unproven causation); (7) It was undisputed the statue fell on Santiago, which was not alleged in the defaulted complaint (*see supra*); and (8) Unpled theories of liability and lost wages were being tried. A.115 at 51–57.

Completely precluded from presenting evidence to the jury as to causation [A.51 at 1; A.113 at 8], ML proffered deposition testimony from Santiago, herself, Santiago's son (who was maneuvering the pallet jack carrying the statue), Dr. Hutson, and Miriam Ravelo, who witnessed the statue fall on Santiago while Santiago walked alongside it and her son was pushing it across the parking lot. A.115 at 65–69; A.137 at 15.

and that the Third District Court of Appeal judges sua sponte considered an issue presented for the first time on appeal [IB at 5, 17] are reckless.

The jury awarded Santiago $1,099,874.30 in damages [A.86; A.116 at 99] and the trial court denied ML's further motion for remittitur, new trial, objections of unpled liability and damages, in a lumped verdict.[45] All remaining pertinent facts are set forth in the Arguments. *See also* Attached Appendix at App.1, ML Timeline.

II. ARGUMENTS SUMMARY

Petitioner never denies the truth of the allegations in the consolidated 2011 complaints. The core of Petitioner's argument is that where the pleadings against the same defendant (here, ML) are before the same court, are before the same judge, and concern the same incident, on the same date, trial judges must ignore the truth of the claimant's own consolidated allegations, consolidated public record references, and consolidated attachments. All allegations and factual assertions the Petitioner placed before the court. And all of this on the basis that the Petitioner can unallege the truth and use trial gamesmanship and artifice to obstruct a default against the wrong party in fairness and justice from being vacated. The Third District disagreed. It was entirely correct, both on the law and on the equities undergirding it.

[45] A.3 at 2; A.86 at 2; A.111 at 58–64; A.116 at 100–01. The jury awarded: $59,874.30 for past medical expenses; $30,000.00 for future medical expenses; $40,000.00 for past lost wages; $30,000.00 for lost future earnings; $159,874.30 for Santiago's total economic damages. The jury awarded: $420,000.00 for past pain and suffering; $520,000.00 for future pain and suffering; $940,000.00 for total noneconomic damages. Total damages to Santiago: $1,099,874.30. A.86.

Cited in courtrooms across Florida is the quote: "We who labor here seek only truth"; a quote so pervasive in the judicial system that its authorship and provenance are never challenged. As part of the lawyers' admission, we "solemnly swear. . .[to] not counsel or maintain any suit or proceedings which shall appear. . .to be unjust, nor any defense except such as. . .to be honestly debatable under the law of the land; . . .and will never seek to mislead the judge or jury by any artifice or false statement of fact or law". Oath of Admission to The Florida Bar. Decades ago, this Court stated in *Coggin v. Barfield*, 150 Fla. 551, 554, 8 So. 2d 9, 11 (1942), that "[t]he true purpose of the entry of a default is to speed the cause thereby preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim. It is not [a] procedure intended to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by the defendant." ML was not dilatory. It did not procrastinate.

Petitioner's position counterturns these principles, through the employment of dramatic hyperbole and guile to paint appellate correction of error of a default plainly unjust as 'unprecedented' and a violation of *her* due process rights. But the record incontrovertibly shows the Third District did not "usurp" what Petitioner treats as unfettered trial judge discretion, or "grant relief on a voidable judgment more than one year after its entry", or grant some unstated "summary judgment" that victimizes Petitioner, or tramples some unfettered right to plead anything the pleader wants and then

retreat without consequence when her allegations are shown to be irreconcilably negating and untrue. [IB at 17]. The true question is whether elaborate procedural arguments and stratagem trump substance and the reasons for our rules and our courts: to advance fairness and justice. We respectfully submit that this is really a case where the Petitioner has lost perspective and refuses to accept undeniable facts, to rationalize clinging to a fortuitous default and large judgment on unpled liability and damages at any price. Petitioner is fundamentally wrong. The Third District Court of Appeal was correct.

III. ARGUMENTS

ISSUE I. THE DOCUMENT "FRAUGHT WITH ERROR" IS THE PETITIONER'S INITIAL BRIEF STATEMENT OF FACTS AND LAW, NOT THE THIRD DISTRICT'S DECISION.

[Petitioner's Issues I A-H restated]

A. THE APPELLATE COURT, A LAW-MAKING AND REVIEWING TRIBUNAL, DID NOT "USURP" TRIAL JUDGE DISCRETION.

Once the Supreme Court accepts jurisdiction over a cause to resolve a legal issue in conflict, it has jurisdiction over all issues raised on appeal.[46] We raise those herein.

At the same time that Petitioner contends that trial-court discretion to vacate a default may not be unfettered, she argues it is. That by failing to defer to trial judges who denied ML's motions to vacate, the Third District "usurped" judge discretion. IB at 16-18. First, Petitioner never disputes the merits of ML's defenses. And Petitioner's arguments concede that the trial court based its decisions on the conclusion that ML's affidavits

[46] *Murray v. Regier*, 872 So. 2d 217 (Fla. 2002); *Schreiber v. Rowe*, 814 So. 2d 396, 398 (Fla. 2002); *Fulton County Administrator v. Sullivan*, 753 So. 2d 549, 553 n. 3 (Fla. 1999).

failed to show ML acted with due diligence in seeking relief from the default judgment [*id.*],[47] not on the conclusion that ML's defenses were not meritorious. *Those* kinds of the trial court rulings are rulings made as a matter of law subject to the de novo, not abuse of discretion, standard of review.[48] So the Third District, in its capacity as an appellate court, "usurped" no unfettered trial judge discretion. It properly exercised its authority as a law-reviewing and law-making tribunal.

Petitioner also advances an erroneous "gross negligence" rule. IB at 45. She cites to, but then skirts the key facts in, *Fischer v. Barnett Bank of S. Fla., N.A.*, 511 So. 2d 1087 (Fla. 3d DCA 1987), where the court actually concluded that, because that foreign defendant was fully aware of a pending controversy (defendant had been represented by counsel in Miami during part of pre-litigation negotiations in the matter in question), but chose to leave the country for a two-month vacation to Europe without having someone

[47] Petitioner illogically argues that ML was required to file a sworn explanation for why her first attorney of record Calejo did not file a timely response to Santiago's Complaint or why he took no action to set aside the default immediately [IB at 44-45], but cites no legal authority for that impossible rule: that a client must climb into the thought processes of her attorney and swear to them. Petitioner's cited *Scherer v. Club, Inc.*, 328 So. 2d 532, 533 (Fla. 3d DCA 1976), actually holds that a corporate officer or agent must swear to the *corporate officer's/corporation's*, "excusable neglect", not trial counsel's thought processes. A corporation could not properly swear in an affidavit (which must be admissible evidence), let alone divine, what steps someone else (outside trial counsel) took leading up to that outside counsel's excusable neglect and subsequent default. *See* A.8, A.11, A.12, A.18, A.27; A.30, A.42. In accordance with *Scherer*, ML President Gil did just that. Gil correctly swore in ¶¶ 2-5 of her (first) Verified Motion to Set Aside Default (Petitioner suggests in error that none was filed until months later), to **ML**'s diligent efforts and meritorious defenses. *See* A.8; A.9.

[48] *See, e.g., Florida Eurocars, Inc. v. Pecorak*, 110 So. 3d 513, 515 (Fla. 4th DCA 2013); *Mourning v. Ballast Nedam Constr. Inc.*, 964 So. 2d 889, 892 (Fla. 4th DCA 2007).

monitor the defendant's mail while away *and* because that defendant failed to leave instructions regarding how to respond to any lawsuit in the pending controversy in Miami, *those* acts were the kind of neglect that were entirely inexcusable. *Fischer*, at 1088. The court stopped short of considering the *Fischer* inaction as "gross neglect" and *Fischer* is completely distinguishable.

Petitioner proposes an unacceptable "lay persons are at fault for trusting their lawyers" rule. That is, the receipt by Gil, originally from Venezuela, of a mailed copy of the May 2010 default order "proves" ML's "gross neglect" in not moving to vacate *pro se*. But the record evidence—the only evidence--is that Gil immediately upon receiving the default order did what we expect responsible laypersons to do: Gil went to Calejo's office to know what was going on; but his secretary told Gil not to worry, everything was "fine," that the documents must have "crossed in the mail," and this "happens all the time."[49] "[I]t is the tendency of the courts of the present age to stand less upon strict rules of practice than formerly, and to keep the door a long time open to a defendant who seems

[49] A.11 at 1. Gil on the same day of service retained trial counsel and diligently inquired about the status of the case, but Calejo's office misrepresented the gravity of the default. On August 13th, a notice of jury trial was filed, but never sent to Gil (Calejo would have received the notice because he was still ML's attorney of record at that time). On August 30th, Calejo's secretary called Gil and informed her Calejo would no longer represent her. A.11 at 1-2, A.12 at 1. Neither Calejo nor his secretary provided a reason. A.11 at 1-2, A.12 at 1. Gil immediately retained new counsel who acted promptly. *See* A.29 at 2-3. These facts are not a basis in the decisional law to punish ML and reward Santiago with a $1 million plus judgment against a clearly wrong defendant.

to be honestly striving to get in what he believes to be a good defense.'"[50] Defaults are not "intended to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by the defendant.'' *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 853 (Fla. 1962).

Petitioner incorrectly contends the case law firmly establishes that a "four-month delay" from notice of the default until the filing of the motion is too long to be considered duly diligent and excusable [IB at 7, 47], citing *Lazcar, Int'l, Inc. v. Caraballo*, 957 So. 2d 1191 (Fla. 3d DCA 2007). What the court actually emphasized in *Lazcar* at 1192-93, was not six versus sixteen weeks, but the *unsworn explanation of counsel* in the motion to vacate. Here, ML acted promptly and submitted sworn explanations and defenses, and more than what the law requires.[51]

Petitioner cites, but omits from, *Abel, Toney and Aldo Creative Group, Inc. v.*

[50] *Gables Club Marina, LLC v. Gables Condo. & Club Ass'n, Inc*., 948 So. 2d 21, 25 (Fla. 3d DCA 2006) (finding setting aside default extremely reasonable *quoting N. Shore Hosp., Inc.*, 143 So. 2d at 853 (citing *Waterson v. Seat & Crawford*, 10 Fla. 326 (Fla. 1863))).

[51] Petitioner's cited *B.C. Builder's Supply Co., Inc. v. Maldonado*, 405 So. 2d 1345, 1348 (Fla. 3d DCA 1981), decision actually says: "The requirement that the defendant demonstrate excusable neglect requires more than a conclusionary statement. . .[and] must set forth facts explaining or justifying the mistake or inadvertence by affidavit or other sworn statement," which ML exceeded. Petitioner's *Airport Centre, Inc. v. Ugarte*, 91 So. 3d 936 (Fla. 3d DCA 2012), adds, in the very same paragraph, that defenses need not be in a verified answer: "Concerning a meritorious defense, it must be asserted *either by a pleading or in an affidavit* and a general denial is insufficient to demonstrate the existence of a meritorious defense." *Geer v. Jacobsen*, 880 So. 2d 717, 721 (Fla. 2d DCA 2004), also recognizes: "If a defendant is relying on a factual defense to obtain relief from a default judgment, the ultimate facts establishing the defense must be set forth in a verified answer, sworn motion, or affidavit, ***or*** *other competent evidence*."

Friday Night Investors, Inc., 419 So. 2d 1135, 1135-36 (Fla. 3d DCA 1982) [IB at 44], *Abel*'s "demonstrate excusable neglect" part and its key language:

> The affidavit of the defendant's president that he had referred the complaint to an attorney whom he 'thought' had responded was insufficient to demonstrate excusable neglect, *particularly since the plaintiff subsequently gave notice*, which was not responded to, of its intention to seek a default because no answer had been filed. [Citations omitted]. *Moreover*, *the bare statement that the defendant had an unspecified 'complete defense to the Complaint,' accompanied by a motion to dismiss claiming only technical deficiencies, was manifestly insufficient* to show the existence of a meritorious defense."

Abel at 1136. In stark contrast to ML, the *Abel* corporate president defendant was (1) given actual notice, (2) mentioned nothing about following up with his attorney, and (3) filed no concrete affirmative defenses. ML did much more.

Petitioner's *Trinka v. Struna*, 913 So. 2d 626, 627-28 (Fla. 4th DCA 2005) [IB at 46-47], is also completely distinguishable: (1) there was no affidavit as part of the motion to vacate in *Trinka*, unlike ML's here; and (2) that court concluded the *Trinka* defendant's attorney had strategically caused the default by the "***intentional failure of defendant's attorney to act***." The only evidence here is *Calejo's negligent* failure to act--not intentional, certainly not strategic, and definitely not ML's failure to act.

Petitioner engages in "law mining" to string cite selective decisions as "representative" of a supposed rigid Florida rule that courts deem defaults untimely based on the passage of a formulaic number of days before the default motions were filed and set for hearing and courts must robotically apply the rule lest their discretion be deemed

abusing; but even if the standard here were one of discretion, and not de novo, the placement of the word "discretion" in that standard of review means. . . discretion. That in deciding whether a party acted with due diligence, courts consider not just the number of days and extent of the delay, but the reasons for the delay.[52] In all Petitioner's cases, the facts showed defendant notice, indifference, and inaction. The opposite is here.[53]

Petitioner also incorrectly relies on *Scherer v. Club, Inc.*, 328 So. 2d 532, 533 (Fla. 3d DCA 1976) [IB at 43-44], omitting its very next sentence: "Since neither affidavit or other proof appear in the record to show excusable neglect by an officer or agent of the defendant nor was it made to appear the defendant had a meritorious defense, the motion should have been denied." *Id.* In contrast to ML where even ML's first Motion to Set Aside affidavit was from its President Gil,[54] the *Scherer* corporate defendant filed no

[52] 5 FLA. PRAC., § 9:4.

[53] *Compare* Petitioner's string citations in IB at 47-48 *with* ML's statement of facts A.1 at 3; A.2; A.8; A.9; A.11; A.12; A.28; A.29; A.108 at 14, 47 *and with WJA Realty v. Schofill*, 640 So. 2d 1165 (Mem), 1166 (Fla. 3 DCA 1994) (timely despite months passing); Cunningham v. White, 390 So. 2d 467, 468 (Fla. 3d DCA 1980) (timely despite six months); Franklin v. Franklin, 573 So. 2d 401 (Fla. 3d DCA 1991) (timely despite nine-month delay); *Apolaro v. Falcon*, 566 So. 2d 815, 816 (Fla. 3d DCA 1990) (similar); *Yeiser v. Lone Pine Mobile Home Park, Inc.*, 629 So. 2d 299, 300 (Fla. 2d DCA 1993) (confusion constituted excusable neglect); *Rogozinski v. Sullivan*, 624 So. 2d 822, 823 (Fla. 2d DCA 1993) (similar); *Sportatorium, Inc. v. Kamilar*, 407 So. 2d 929, 930 (Fla. 3d DCA 1981) (four weeks); *GAC Corp. v. Beach*, 308 So. 2d 550 (Fla. 2d DCA 1975) (11 month delay to vacate a judgment against wrong defendant).

[54] *See* A.8; *see also* Apps. 11-12, 18, 27-30. Contrast *Scherer*, where two representatives from the corporate defendant's ***insurance company***--not an officer or agent of the corporate defendant itself--swore to the affidavit showing excusable neglect. The fact that these two affiants were not a corporate officer or agent was dispositive to this Court. *Id.*

affidavit from any officer or corporate agent, to show excusable neglect.[55]

Petitioner's arguments artificially inflate Florida's liberal standards for setting aside defaults to impose the most Draconian of standards [IB at 42-48], at the same time that she insists her defective pleadings should be construed under the most liberal of standards, to undo the Third District and reinstate a default against a defendant receiving no notice of Petitioner's actually tried, unpled theory of liability and unpled damages, to avoid violating Petitioner's due process rights. That is a hard sell. This Court instructs that our courts are to strive to advance justice and justice is not served when a party is denied its day in court because of attorney error.[56] The Third District's decision accords with Florida's "liberal policy. . .to grant motions to set aside defaults."[57]

ML demonstrated excusable neglect, meritorious defenses to the claim, and reasonable diligence in requesting relief from the default promptly after the default was discovered.[58] Justice favors deciding issues on the merits, not by default.[59] Florida courts

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[55] *See also* 32A FLA. JUR. 2D *Judgments and Decrees* § 235 (2011) (citing *Fla. Bar v. Tipler*, 8 So. 3d 1109 (Fla. 2009); *Baptiste v. Baptiste*, 992 So. 2d 374 (3d DCA 2008)).

[56] *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993) ("[A] fine, public reprimand, or contempt order may often be the appropriate sanction to impose on an attorney in those situations *where the attorney, and not the client, is responsible for the error*.").

[57] *Reicheinbach v. Se. Bank, N.A.*, 462 So. 2d 611, 612 (Fla. 3d DCA 1985) (and citations therein); *see also* Trawick, Fla. Prac. & Proc. § 25:3 (2012 ed.) (discussing *Coggin*, 150 Fla. 551, 8 So. 2d at 9 and *Garcia Insurance Agency, Inc. v. Diaz*, 351 So. 2d 1137 (2d DCA 1977), "Judge Ott carefully and ably distinguishes and applies the doctrines of liberality in vacating defaults and of requiring the appellant to show gross abuse of discretion to reverse the trial court's order on vacating a default. An analysis in 1968 of appellate decisions on vacating defaults showed over 90% either affirmed the trial court in vacating the default or reversed the trial court for failure to do so.").

[58] *Kozel*, 629 So. 2d at 818; 5 FLA. PRAC., *Civil Practice* § 9:4 (2011 ed.).

find clerical error, including error like the one here rooted in an attorney's secretary, constitutes excusable neglect where no substantial prejudice to the plaintiff would result,[60] of which there was none here (she had, afterall, two lawsuits against ML going at the same time). In Florida, any reasonable doubt in vacating a default is to be resolved against allowing the default to stand.[61] While ML's first attorney and his staff may have been dilatory, ML certainly was not.

B. THE JUDGMENT IS VOID, NOT JUST BASED ON LACK OF PREMISES OWNERSHIP, BUT BECAUSE OF DEFICIENT PLEADINGS, UNPLED THEORIES OF LIABILITY, UNPLED DAMAGES, AND REPUGNANT, UNTRUTHFUL ALLEGATIONS. PETITIONER IS NOT ENTITLED TO A "DO OVER."

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[59] *See* 32A FLA. JUR. 2D *Judgments and Decrees* § 235 (2011) (citing *Fla. Bar*, 8 So. 3d at 1109; *Baptiste*, 992 So. 2d at 374).

[60] *See Fla. Aviation Acad., Dewkat Aviation, Inc. v. Charter Air Ctr., Inc.*, 449 So. 2d 350, 353 (Fla. 1st DCA 1984) (holding default judgment taken against defendants resulted from "excusable neglect" of defendants' attorney, where failure to file or serve pleadings was caused by legal secretary's failure to calendar the time for filing an answer to complaint, contrary to established office policy and procedure, and where no substantial prejudice resulted to plaintiff); *Cnty Nat'l Bank of N. Miami Beach v. Sheridan*, 403 So. 2d 502, 503 (Fla. 4th DCA 1981) (excusable neglect established when attorney's secretary failed to set up a file and calendar for proper response because she was ill). A.28 at 1, ¶¶1-2. Calejo admitted in his signed affidavit that his error occurred as a result of relying solely on his secretary, with whom he had had a "falling out" [A.28 at 2, ¶ 4], to note all relevant dates in his calendar and she failed to do so. A.28 at 1-2, ¶¶ 2, 5. Upon finally receiving notice of the default, ML contacted Calejo's office and was assured by his secretary that "everything was fine and that the papers must have gotten crossed and that this type of thing happens all the time." A.29 at 9, ¶ 4. And after those assurances that it would be rectified, some months later Calejo's office contacted ML to withdraw from representation, and only advised ML to consult another attorney. A.29 at 5, ¶4, 9-10. The very next day, ML obtained new counsel, who advised ML of the gravity of the default and promptly filed a Verified Motion to Set Aside Default. The new attorney was hired August 31, 2010. That Motion was filed September 3, 2010. A.29 at 1-2.

[61] *See N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849 (Fla. 1962); *Elliott v. Aurora Loan Servs., LLC*, 31 So. 3d 304, 307 (Fla. 4th DCA 2010) (requiring verification of facts that establish excusable neglect either in a motion to set aside default or in a supporting affidavit).

There are three defects here, not one, that render the judgment void: (1) repugnant allegations as to ML's ownership, management, and control, (2) unpled theories of liability and only legal conclusions pled, and (3) unpled damages. Where "a party asserts that the underlying judgment is void, 'it is necessary to evaluate the underlying judgment in reviewing the order denying the motion. A judgment is void if the complaint fails to state a recognizable claim against the defendant.[62] A judgment is also void where the judgment is based on liability and damages entirely outside the scope of the pleadings.[63] And a default only admits liability as claimed in the pleading by the party seeking affirmative relief against the party in default; "*[i]t does not admit facts not pleaded, not properly pleaded or conclusions of law*." [64] Fair inferences will be made from the pleadings, but ***forced*** *inferences will not*.[65] If it is determined that the judgment entered is

[62] *Horton v. Rodriguez Espaillat Y Asociados*, 926 So. 2d 436, 437 (Fla. 3d DCA 2006); *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486 (Fla. 3d DCA 1989).

[63] *See generally Cortina v. Cortina*, 98 So. 2d 334 (Fla. 1957); *Cravero v. Florida State Turnpike Authority*, 91 So. 2d 312 (Fla. 1956); *Krivitsky v. Nye*, 155 Fla. 45, 19 So. 2d 563 (1944); *Lovett v. Lovett*, 93 Fla. 611, 112 So. 768 (1927).

[64] *Becerra*, 551 So. 2d at 488; *see also Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490 (Fla. 3d DCA 1994); *Phenion*, 940 So. 2d at 1192; *S.E. Land Developers, Inc. v. All Fla. Site & Utils., Inc.*, 28 So. 3d 166 (Fla. 1st DCA 2010) (judgment void because complaint failed to state cause of action). This standard is not exclusive to Florida. *See, e.g., Mut. Savings & Loan Assoc. v. McKenzie*, 266 S.E.2d 423, 424 (S.C. 1980) ("An objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default." (citing *Gadsden v. Home Fertilizer & Chemical Co.*, 72 S.E. 15 (S.C. 1911)).

[65] *Coggin*, 150 Fla. at 554 (justice required vacating judgment).

void, the trial court has no discretion, but is obligated to vacate the judgment.'"[66] All three defects are present in the judgment on this 2010 Complaint.

1. First fundamental defect: Petitioner completely skirts that she falsely alleged in paragraph 7 of her 2010 Complaint that she was "caused to trip and fall on Defendant's [ML, not Iberia's] property" at the time of her accident, and that she conceded in multiple court documents the opposite.[67] This was not ML's doing. It was Petitioner's. Petitioner and her counsel already knew that Iberia, not ML, owned that property in July 2008.[68] They investigated the public records, cited them, and drafted these repugnant allegations, and then they tried to un-allege the truth by voluntarily dismissing her 2011 Complaint [A.31] after it was already consolidated with this case, and after ML moved to vacate because they were irreconcilable and repugnant. *See* A.17, A.21; A.27. The Third District's decision to not ignore this was correct.

Florida courts regularly look to both exhibits *attached* and documents *referenced* in the complaints in determining whether they fail to state claims for relief, and this is true

[66] *Horton*, 926 So. 2d at 437 (quoting *Dep't of Transp. v. Bailey,* 603 So. 2d 1384, 1386-87 (Fla. 1st DCA 1992)); *Phenion Dev. Group, Inc. v. Love*, 940 So. 2d 1179 (Fla. 5th DCA 2006).

[67] Belaboring, Santiago's consolidated 2011 Complaint alleged: "That at all relevant times material hereto [July 2008], the Defendant, MAUNA LOA, *owned, maintained and/or controlled* the commercial property" that was the subject of her accident. A.3 at 2, ¶ 4. That allegation is false and a matter of public record of which Santiago and her counsel have notice. Her consolidated 2011 Complaint attached a copy of the deed from Iberia to ML, showing the property was not sold to ML until months after the accident. A.15 at 12.

[68] A.15 at 2-3, 4 at ¶ 11, 5 at ¶ 12; A.29 at 20-21, 30; A.66; A.69.

not only in the Third District Court of Appeal,[69] but statewide.[70] Courts nationwide do this.[71] For decades the law has been: if the exhibits attached to or documents referred to in

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[69] *Bott v. City of Marathon*, 949 So. 2d 295, 296 (Fla. 3d DCA 2007); *see also K.R. Exch. Services, Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 894-95 (Fla. 3d DCA 2010); *Moynet v. Courtois*, 8 So. 3d 377, 378 (Fla. 3d DCA 2009); *Ginsberg*, 645 So. 2d at 493; *Am. Seafood, Inc. v. Clawson*, 598 So. 2d 273 (Fla. 3d DCA 1992); *Becerra*, 551 So. 2d at 488-89; *Sloan v. Sax*, 505 So. 2d 526 (Fla. 3d DCA 1987); *Harry Pepper & Assoc. v. Lasseter*, 247 So. 2d 736, 736-37 (Fla. 3d DCA), *cert. denied*, 252 So. 2d 797 (Fla. 1971). *Sloan*, 505 So. 2d at 526; *Buckner v. Lower Fla. Keys Hosp. Dist*., 403 So. 2d 1025, 1029 (Fla. 3d DCA 1981), *rev. denied*, 412 So. 2d 463 (Fla. 1982).

[70] *Id*.; *see Liappas v. Augoustis*, 47 So. 2d 582 (Fla. 1950); *S.E. Land Developers, Inc.*, 28 So. 3d at 168 (held: subcontractor's complaint against a contractor failed to state a claim, rendering the default judgment in the subcontractor's favor void. "An allegation that a debt is unpaid is not sufficient. . . .As such, the complaint failed to state a claim, and the default judgment is void."); *Florida-Georgia Chem. Co. v. National Laboratories, Inc*., 153 So. 2d 752 (Fla. 1st DCA 1963); *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 715-16 (Fla. 1st DCA 1963); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011) (same rule: referenced documents will also be considered in evaluating whether a complaint states a claim for relief and whether its allegations are repugnant. *Veal argued on appeal that the trial court erred by considering the contents of a settlement agreement that was not attached to the complaint*. He correctly argued, the Second District Court of Appeal recognized, the general rule, in deciding a motion to dismiss, that the trial court is limited to the contents of the pleadings; Second District further looked to a settlement agreement that the complaint "impliedly incorporated" to conclude that the complaint failed to state a claim for relief); *Franz Tractor Co. v. J.I. Case Co.*, 566 So. 2d 524, 526 (Fla. 2d DCA 1990); *GAC Corp.*, 308 So. 2d at 550; *see also generally Hooters of America, Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231 (Fla. 1st DCA 1995) (damages award barred on default judgment because it violated due process due to lack of well-pled allegations in complaint); *Nguyen v. Roth Realty, Inc.*, 550 So. 2d 490 (Fla. 5th DCA 1989) (failure to allege conditions precedent are met renders complaint fatally defective in that it fails to state a cause of action.).

[71] *See, e.g., E. H. Morrill Co. v. State*, 423 P.2d 551 (Cal. 1967) (Matters properly judicially noticed may be considered in determining sufficiency of complaint); *Scott v. JPMorgan Chase Bank, N.A.*, 154 Cal. Rptr.3d 394 (Cal. App. 1st Dist. 2013) (demurrer may be sustained where judicially noticeable facts render the pleading defective); *Peters v. McKay*, 238 P.2d 225, 229 (Or. 1951) (allegations of the petition are amplified by facts judicially known to this court which need not be specially pleaded.); *Kaplan v. Morgan Stanley & Co., Inc.*, 987 A.2d 258 (Vt.,2009) (trial court properly consider Summary Plan Description (SPD) in motion to dismiss, without converting motion to one for summary judgment; SPD specifically referred to in complaint); *Forshey v. Jackson*, 222 W.Va.

a complaint contradict the allegations within the complaint the pleading is deemed repugnant. The inconsistent or repugnant exhibit or referenced document controls; and the complaint cannot not state a claim for relief.[72]

Santiago's attempt to voluntarily dismiss less than her entire action against the party, is considered an attempt to partially dismiss, which, because not authorized by law, is a nullity and ineffective.[73] Rule 1.420(a)(1), Fla. R. Civ. P., does not authorize dismissal of less than all causes of action against fewer than all parties.[74] Once consolidated, the allegations and also referenced public record, do not just unilaterally dissipate by a voluntary dismissal.[75]

743, 671 S.E.2d 748 (W.Va. 2008) (circuit court ruling on motion to dismiss for failure to state a claim may properly consider exhibits attached to complaint without converting motion to one for summary judgment); *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001) (when complaint relies upon a document, such document merges into the pleadings and the court may properly consider it under motion to dismiss); *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 13 n. 3 (2d Cir. 2001) (appropriate for the district court to refer to the documents attached to the motion to dismiss since the documents were referred to in the complaint); *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir. 1994) (court not err in considering document referred to in complaint in granting motion to dismiss); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (court may consider materials referred to in plaintiff's complaint and central to her claim in ruling on motion to dismiss).

[72] Fla. R. Civ. P. 1.130(b); *see* decisions discussed *supra*.

[73] *Gonzalez v. Turner*, 427 So. 2d 1123 (Fla. 3d DCA 1983).

[74] *Lauda v. H.F. Mason Equip. Corp.*, 407 So. 2d 392 (Fla. 3d DCA 1981); *Deseret Ranches of Fla., Inc. v. Bowman*, 340 So. 2d 1232 (Fla. 4th DCA 1976).

[75] In a common law premises liability action, only persons who own, possess, or control the premises may be subject to liability for injuries sustained by a third party. *See Regency Lake Apts. Assoc., Ltd. v. French*, 590 So. 2d 970 (Fla. 1st DCA 1991); *Haynes v. Lloyd*, 533 So. 2d 944 (Fla. 5th DCA 1988); *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661 (Fla. 5th DCA 1987); *Arias v. State Farm Fire & Cas. Co.*, 426 So. 2d 1136 (Fla. 1st DCA 1983).

What the Third District did is not unprecedented. Courts do vacate judgments when the wrong party is sued or proof of ownership is incorrect.[76] In *GAC Corp. v.*

Martinez Marmol attested that, "upon the death of Antonio Martinez, my father, I became the owner of all properties owned by Iberia N.V." A.54 at 2, ¶ 9. The lease agreements expressly show Iberia as Iberia warehouse landlord, and the Landlord (also designated as the premises Manager) was exclusively responsible for the maintenance and control of all common areas of the premises or, at a minimum, show ML was not property manager or landlord. A.66 at 2, 5 ¶9, 7-8 ¶ 14, 8-9 ¶ 17. These common areas were expressly subject to the Landlord's (Iberia) exclusive management and control. A.66 at 7-8, ¶14. In the event of a holdover tenant situation, such as ArtCrafts', all terms still applied [*Id.* at 19, ¶34], and to the extent that the lease terms did not apply, Santiago/ArtCrafts was a mere trespasser without any business invitee rights at the time of the incident, were still only in relation to Iberia, not ML. "[L]andlord must decide whether to treat the holdover as a tenant or a trespasser." *Lincoln Oldsmobile, Inc. v. Branch*, 574 So. 2d 1111, 1113 (Fla. 2d DCA 1990).

Section 768.0755, limiting premises liability for transitory foreign substances in a business establishment, was not enacted until two years after Santiago's accident. The Florida legislature amended FLA. STAT. § 768.075 to include limitations on the civil liability of land owners for injuries to trespassers. *See also* § 768.075(3)(b); § 768.075(3)(a)(2).

Petitioner sustained the injury on the premises in July 2008; ML did not purchase the property until October 2008. A.15 at 12; A.69 at 2. This is incontrovertible. All of Petitioner's assertions in her brief about ownership, management, and control, are just that—assertions by her attorneys, without any allegations in her complaint and without a shred of proof to support them. Petitioner's argument that ownership was not 'conclusive' is raised for the first time before this Court, also without a shred of record support, and ignores all "delivery and acceptance of deed" and "recordation" law. *See June Sand Co. v. Devon Corp.*, 156 Fla. 519, 523, 23 So. 2d 621, 623 (Fla. 1945); § 695.01 (recordation establishes priority); *Rice v. Greene*, 941 So. 2d 1230, 1232 (Fla. 5th DCA 2006); Am. Jur. 2d, Deeds § 276 (2014).

[76] *Saacks v. Target Corp*., So. 3d 450 (La. Ct. App. 5th Cir. 2011) (court vacated the judgment when plaintiff alleged in her complaint that defendant owned the property where her slip and fall occurred but the record did not prove that. (citing the following cases where no proof of ownership was offered and judgment was vacated: *White v. Esplanade Prop. Corp.*, 665 So. 2d 579 (La. Ct. App. 5th Cir. 1995); *Greenwood v. Pellissier*, 672 So. 2d 1166 (La. Ct. App. 5th Cir. 1996); *Ables v. Anderson*, 800 So. 2d 1006 (La. Ct. App. 5th Cir. 2001); *Griffin v. Pecanland Mall Ass'n, Ltd.* 535 So. 2d 770 (La. Ct. App. 2d Cir. 1988); *Cunningham v. M&S Marine, Inc.*, 923 So. 2d 770 (La. Ct. App. 4th Cir. 2006)); *see also Guardian Alarm Co. v. Mahmoud*, 166 Ohio App. 3d 51 (Ohio 6th Dist. Ct. App. 2006) (vacating judgment after defendant did not move to vacate

Beach, 308 So. 2d 550 (Fla. 2d DCA 1975), the plaintiff sued a negligent driver and an employer who defaulted after being served, and court vacated the judgment against the employer because the complaint failed to provide allegations that would establish a claim against the employer. In *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747 (Fla. 4th DCA 1997), the court vacated a judgment until liability of an indispensable party could be determined because, without the indispensable party, the result could be unjust, absurd, or logically inconsistent.

Petitioner and her counsel repeatedly represented, without proof and knowing full well this was untrue,[77] that ML owned the property at the time of her accident [A.3 at 1-2, ¶¶ 3-6], and doggedly pursued ML through three levels of litigation while electing not to pursue the real defendants, Iberia and Martinez Marmol. Indispensable parties must be

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for two years; no proof defendant owned premises as alleged in complaint); *Crane v. Kampe*, 225 Cal. App. 2d 200 (Cal. 5th Dist. Ct. App. 1964) (similar); *Haynes v. New Orleans Archdiocesan Cemeteries*, 716 So. 2d 499 (La. Ct. App. 4th Cir. 1998) (similar)).

[77] Petitioner's concessions that ML did not own or control or maintain the property where Santiago's accident occurred in the 2011 Complaint and her 2009 Affidavit are also binding judicial admissions. A.15 at 1-2, 4-5, 9, 11; A.18 at 1-2; A.27 at 2-4, A.29 at 19-21, 22; A.36 at 1-2, A.38 at 2-3; *see also* Notice of Filing A.39-A (Affidavit of Santiago). *See Metropolitan Dade County v. Yearby*, 580 So. 2d 186, 189 (Fla. 3d DCA 1991); *Payton Health Care Facilities, Inc. v. Estate of Campbell By and Through Campbell for and on Behalf of Campbell*, 497 So. 2d 1233, 1238 (Fla. 2d DCA 1986), *rev. denied*, 500 So. 2d 545 (Fla. 1986); *Best Canvas Prod. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618 (11th Cir. 1983) (third-party complaint/counterclaim); *Tucker v. Housing Auth. of Birmingham Dist.*, 507 F. Supp. 2d 1240 (N.D. Ala. 2006) *aff'd*, 229 Fed. App'x 820 (11th Cir. 2007)(" unsworn statements in motions and briefs as binding admissions."); *Young & Vann Supply Co. v. Gulf Fla. & Ala. Ry. Co.*, 5 F.2d 421, 423 (5th Cir. 1925) ("statements in the brief as admissions of facts."); *Contractor Utility Sales Co., Inc. v. Certain-teed Products Corp.*, 638 F.2d I 061, I 084 (7th Cir. 1981) (amended or withdrawn pleading).

included in the litigation; if they are not added under Fla. R. Civ. P. 1.250(c), the action is subject to dismissal. Under Rule 1.140, a party can raise this defect at any time, even at trial. As discussed in depth *supra*, ML did raise this defect before and during trial and before the Third District. Even if the consolidated complaint could be partially, voluntarily dismissed (as to Iberia and Martinez Marmol, but not ML) without a court order, the court below could have, as requested, still judicially noticed the 2011 Complaint and attached Deed [A.15], the public Corporate records [A.98], and Petitioner's 2009 Affidavit [A.39-A] showing *she and her lawyers knew* Iberia was the actual owner and landlord in July 2008,[78] which Petitioner opposed below. A.39; A.42.

The Third District was correct on the rules and the reasons for the rules. This $1million-plus judgment against the wrong party is the very unjust, absurd, and logically inconsistent result that *GAC* and *Days Inns* discussed *supra.* A party is bound by her

[78] *Hunt v. State*, 613 So. 2d 893 (Fla. 1992) (granting appellant's motion to judicially notice record in another case.); *Manchec v. Manchec*, 951 So. 2d 1026 (Fla. 4th DCA 2007) (taking judicial notice of financial affidavits filed in divorce action.); *Falls v. Nat'l Envtl. Prods*., 665 So. 2d 320 (Fla. 4th DCA 1995) (taking judicial notice of pleadings and briefs "of other actions filed which bear a relationship to the case at bar."); *Trice v. State*, 755 So. 2d 808 (Fla. 3d DCA 2000) (taking judicial notice of traffic court's civil record to determine that defendant had been adjudicated guilty of traffic infraction and foreclose argument on motion to suppress which asserted officer had no reasonable cause to stop defendant's car); *Allstate Ins. Co. v. Greyhound Rent-A-Car, Inc*., 586 So. 2d 482, 483 (Fla. 4th DCA 1991) ("Judicial notice may be taken of all judicial records. Sec. 90.202(6). However, the fact that the deposition may be judicially noticed does not render all that is in it admissible."); *Collinsworth v. O'Connell*, 508 So. 2d 744 (Fla. 1st DCA 1987) (psychological evaluation of mother introduced at initial hearing); *S. Cal. Funding, Inc. v. Hutto*, 438 So. 2d 426, 430 (Fla. 1st DCA 1983) ("the trial judge was probably in error in rejecting the deposition [in another case]. It would seem that the trial judge could properly take notice, under § 90.202(6), Florida Statutes (1981) of a deposition taken and actually filed in another court proceeding,").

allegations or admissions of fact in her own pleadings.[79] The Third District honored the judicious policy that a litigant cannot simply un-allege and switch "off and on" the truth, and employ gamesmanship and machinations, to make a "mockery of the court system". Not holding a judgment against the wrong defendant to be void goes against the most basic principles of due process. Petitioner's contrary argument is the "procedural tail

[79] *See U.S. Fidelity & Guaranty Co. v. Snite*, 106 Fla. 702, 143 So. 615, 616 (1932). A party is not permitted to maintain pleadings inconsistent with its prior positions. *AON Trade Credit, Inc. v. Quintec, S.A.*, 981 So. 2d 475, 479 (Fla. 3d DCA 2008); *Southchase Parcel 45 Cmty. Ass'n, Inc. v. Garcia*, 844 So. 2d 650, 652 (Fla. 5th DCA 2003); *Williams v. Kloeppel*, 537 So. 2d 1033, 1037 (Fla. 1st DCA 1988) ("The principle is well settled "that litigants are not permitted to take inconsistent positions in judicial proceedings." *Federated Mutual Implement & Hardware Insurance Co. v. Griffin*, 237 So. 2d 38, 41 (Fla. 1st DCA), *cert. denied*, 240 So. 2d 641 (Fla.1970)."). "The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Drew Estate Holding Co., LLC v. Fantasia Distribution, Inc.*, 875 F. Supp. 2d 1360, 1370-71 (S.D. Fla. 2012) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (internal quotation marks and citation omitted)).

"[E]stoppel [is] 'an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings.'" *Smith v. Avatar Prods., Inc.*, 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998)). In 2001, the Florida Supreme Court expanded the applicability of the judicial estoppel doctrine under Florida law by holding that the "mutuality of parties" element need not be satisfied in certain situations where fairness or policy considerations predominate. *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001). In *Grau v. Provident Acc. & Life Ins. Co.*, 899 So. 2d 396, 399 (Fla. 4th DCA 2005), the Fourth Circuit District Court of Appeal noted that "[t]he supreme court reshaped the doctrine of judicial estoppel in *Blumberg*," by among other things, creating an exception to the mutuality of parties requirement and "dispens[ing] with the . . . requirement that the 'party claiming the estoppel must have been misled and have changed his position' by the other party's conduct in the earlier suit." *Blumberg*, 790 So. 2d at 1066, recognized that the doctrine of judicial estoppel prevents a party from "making a mockery of justice by inconsistent pleadings," or "playing fast and loose with the Courts". *Citing American National Bank v. Federal Deposit Insurance Corporation*, 710 F.2d 1528, 1536 (11th Cir. 1983) and *Rusell v. Rolft*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

wagging the substantive dog."

2. The 2010 complaint's second fundamental defect: judgment on legal conclusions and unpled theory of liability. Petitioner's alleged theory of "trip and fall on the walkway" liability [A.3 at 2, ¶ 7], nowhere mentions the statue falling on her, but it is the statue falling on Petitioner that is the case that Petitioner tried, the case Petitioner argued before the jury, and the theory that is the basis for the judgment on an unpled theory.[80] The 2010 default admitted only Petitioner's well-pleaded (actually pleaded) factual allegations in her complaint [*supra*], and did not constitute an adjudication of facts not pleaded, matters not properly pleaded, or conclusions of law [*supra*], and did not allow forced inferences from the pleadings.[81] The pleading of a legal theory is

[80] No evidence was presented that Petitioner "tripped and fell on a walkway" as alleged in her defaulted complaint. There was no evidence at trial of the alleged "trip and fall [in a] . . . walkway". A.3 at 2, ¶ 7. The trial court recognized the pleading as alleged sounded "significantly different" from the evidence, but later ruled they were "not inconsistent" because it was subsumed within the default. A.110 at 32-33. But Santiago conceded at her trial on damages only, and her witnesses testified that this accident had nothing to do with non-maintenance of the Iberia warehouse complex walkway and her bare-bones alleged "slip, trip, and fall on a walkway". A.70 at 1; A.114 at 17, 169, 184; A.115 at 65-69. All--even Santiago's own son who was moving the pallet jack--recognized that Santiago was injured when her large, heavy statue, that she and her son were moving back to her store to paint, while Santiago walked alongside and tried to stabilize it, fell over onto Santiago's right ankle. A.70 at 1; A.89 at 2-4; A.114 at 17, 172, 184; A.115 at 65-67, 83-84; A.116 at 26; A.127 at 14, 59; A.137 at 13, 15-16; A. 140 at 30-33. Santiago's own counsel conceded the first day of trial (to secure redaction of these facts from the jury in Santiago's medical records) that the statue falling on her ankle was the cause of her injuries. A.89 at 2-4; A. 112 at 9-10. **Petitioner's own Jackson Memorial Hospital medical records showed that Petitioner "while moving a very large statue, had this statue fall on her right foot."** A.27 at 6.

[81] FLA. PRAC. & PROC. § 25:4 and citations therein. *See also N. Am. Accident Ins. Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910); *Bd. of Regents v. Stinson–Head, Inc.*, 504 So.

indispensable to a finding of liability on the basis of that theory; an unpled theory of liability should not be submitted to a jury because holding a defendant liable under a theory not pled by the plaintiff or tried by consent of the parties, deprives the defendant of its right to defend, thus violating due process.[82] "Unlike the pleading requirements in the federal courts where notice-pleading is the prevailing standard, the Florida Rules of Civil Procedure require fact-pleading"[83] and "at the outset of a suit," litigants must "state their pleadings with sufficient particularity."[84]

3. The same defect is in the 2010 Complaint legal conclusory allegation of ML's "management or control" without any factual assertions to support it. *See* Decisions *supra.* These unpled and poorly pled allegational defects deprived ML of due process, and the judgment is void.[85]

2d 1374 (4th DCA 1987); *Contractors Unlimited, Inc. v. Nortrax Equipment Co. Se.* 833 So. 2d 286 (5th DCA 2002); *Security Bank, N.A. v. BellSouth Advertising & Pub. Corp.*, 679 So. 2d 795 (3d DCA 1996); *Rich v. Spivey*, 922 So. 2d 326 (1st DCA 2006)).

[82] *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126 (Fla. 1985); *Cedars Med. Ctr., Inc. v. Ravelo*, 738 So. 2d 362 (Fla. 3d DCA 1999).

[83] *Ranger Const. Indus., Inc. v. Martin Co. of Daytona, Inc.*, 881 So. 2d 677, 680 (Fla. 5th DCA 2004). *See also* FLA. R. CIV. P. 1.110(b)(2) (requiring that "[a] pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief"). Under the new federal court *Iqbal-Twombly* "plausibility" pleading standard, even federal court "notice pleading" is no longer a standard that is real.

[84] *Horowitz v. Laske*, 855 So. 2d 169, 173 (Fla. 5th DCA 2003) (citing *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988)).

[85] See *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988) (law firm sued its client for nonpayment of fees and the client counterclaimed for legal malpractice, alleging general negligence. In the counterclaim, client alleged several ways in which it contended that the law firm had been

4. The third defect is a judgment on unpled damages: Petitioner alleged a "trip and fall" and all evidence presented was damage due to a statue falling on Petitioner's foot.[86] Under the Fla. R. Civ. P. 1.110(b), (c), 1.140(b), 12.110 and 12.140, the issues for trial must be pled in the complaint.[87] Theories of liability and damages cannot be, as posited in the trial court, raised and noticed through "discovery."[88]

Even if the default here stands, Santiago still had to prove her damage was caused by a trip and fall as alleged in her 2010 complaint, and all the evidence here was that this

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negligent, but shortly before trial, the client advanced an unpled theory of negligence; reversing the ensuing verdict for the client, both the Third District and the Supreme Court found that the general allegations were not sufficiently specific to permit the law firm to prepare a defense to the new claim. The Supreme Court concluded the remedy was *no judgment at all* and precluded recovery on the unpled claim); *Cedars Med. Ctr., Inc.*, 738 So. 2d at 367-68. A defendant need not even show excusable neglect when the motion to set aside default is based on a defective complaint. 537 So. 2d at 563, 527 So. 2d at 213; *see also Michael H. Bloom, P.A. v. Dorta-Duque*, 743 So. 2d 1202 (Fla. 3d DCA 1999) (similar); *Robbins v. Newhall*, 692 So. 2d 947 (Fla. 3d DCA 1997) (similar); *Doyle v. Flex*, 210 So. 2d 493, 495 (Fla. 4th DCA 1968) (similar).

[86] *Id*.; *see also Mulline v. SeaTech Const. Inc.*, 84 So. 3d 1247 (4th DCA 2012) (vacated judgment and held the trial court could not award relief not requested by the complaint) (citing *Fine v. Fine*, 400 So. 2d 1254, 1255 (Fla. 5th DCA 1981) ("The jurisdiction of the court can be exercised only within the scope of the pleadings in the action. . . ."); *Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n,* 968 So. 2d 658, 665 (Fla. 2d DCA 2007) (similar)).; *Yawt v. Carlisle*, 34 So. 3d 217, 220 (Fla. 4th DCA 2010) (held: defendants' defaults "moot once the requested relief changed."); *see also Ellish v. Richard*, 622 So. 2d 1154, 1155 (Fla. 4th DCA 1993) (court vacated a judgment for failure to allege damages resulting from defendant's false statements because plaintiff did not make sufficient damages allegations.). *See* A.3 at 2-3; A.111 at 35-39.

[87] *See also Hart Prop., Inc. v. Slack*, 159 So. 2d 236 (Fla. 1963).

[88] Disability and disfigurement, mental anguish, and lost wages were not alleged in this complaint but were awarded at trial. A.3 at 2, ¶10; A.86. The trial court overruled ML's objections [A.111 at 37-39], **reasoning that the case is "not limited to the 'four corners of the complaint' . . . that's what discovery is for**". A.111 at 63-64. This was error. *Romans v. Warm Mineral Springs, Inc.*, 155 So. 2d 183 (Fla. 2d DCA 1963); *Provident Nat'l Bank v. Thunderbird Assoc.*, 364 So. 2d 790 (Fla. 1st DCA 1978).

was caused by a very large, heavy Venus statue falling on her foot. In a premises liability action, issues relating to liability for maintaining the premises and failing to warn must still be connected to causation and damages.[89] A defaulted defendant is only responsible for damages that were foreseeable or were proximately connected to his breach.[90] "The right to contest unliquidated damages in any negligence action encompasses the right to challenge the causal relationship between the damages claimed and the liability established by the default."[91] A plaintiff who does not know what caused her fall cannot recover, even if the landowner is negligent per se; no causal relation exists between the negligence and the fall.[92]

In *Moransais v. Heathman,* 744 So. 2d 973 n.3 (Fla.1999), this Court merged the causation and damages elements of a tort claim and that a party must allege and prove "that the injury or damage to the plaintiff resulted from" "the failure of the defendant to

[89] *Roseman v. Town Square Assoc., Inc*., 810 So. 2d 516 (Fla. 4th DCA 2001); *see generally, BDO Seidman, LLP v. Banco Espirito Santo Int'l*, 38 So. 3d 874 (Fla. 3d DCA 2010) (recognizing causation is intertwined with damages); *Diamond v. Whaley, Chapman & Hannah, M.D.s, P.A*., 550 So. 2d 54 (Fla. 2d DCA 1989) (liability issues separated from the issues of causation and damages).
[90] *Ries v. Ries*, 984 So. 2d 612, 613 (Fla, 4th DCA 2008); *Robbins v. Thompson*, 291 So. 2d 225 (Fla. 4th DCA 1974).
[91] *Talucci v. Matthews*, 960 So. 2d 9, 10 (Fla. 4th DCA), *rev. denied* (Fla. 2007).
[92] 79 AM. JUR. 285; *see Alls v. 7-Eleven Food Stores, Inc*., 366 So. 2d 484 (Fla. 3d DCA 1979) (summary judgment for the defaulted defendant when it was apparent that the plaintiff could not recover damages from it); *Robbins*, 291 So. 2d at 225 (held error to deny motion to set aside a default and enter judgment against the defendant because still had a right to contest the amount of damages by way of introduction of evidence in mitigation or by cross-examination.).

protect the plaintiff from injury".[93] The mere fact that an accident occurred is, standing alone, insufficient to satisfy a plaintiff's burden of proving causation and damages connected to that accident. 79 AM. JUR. *Trials* 285 (2011). The damages portion of this case still required Petitioner to connect ML's negligence by default with her injury and damage[94] and that the dangerous condition now admitted by default was the proximate cause of all her claimed damages.[95]

Over objection, Petitioner was permitted to try her case on a different theory of liability: She "suffered a devastating injury when her right ankle was nearly severed when she fell while moving a statue with her son, Joel" at the "Mauna Loa Warehouse complex."[96] The existence of a proximate causal connection between the condition that was alleged to have been defective (Petitioner alleged and a default was entered on a "trip and fall" on a negligently maintained "walkway") and the connection with her unalleged

[93] *See also IBP, Inc. v. Hady Enters., Inc.*, 267 F. Supp. 2d 1148 (N.D. Fla. 2002). Over 1700 cases cite *Moransais* for its various applications to tort law.
[94] *See Roseman*, 810 So. 2d 516 (treating liability issues related to maintaining premises and failing to warn as separate from issues relating to causation and damages in premises liability case); TRAWICK, FLA. PRAC. & PROC. § 25:4 (2011 ed.).
[95] In *Talucci*, 960 So. 2d at 10, the Fourth District underscored this: "The default on liability obtained by plaintiff against defendant in this personal injury, medical malpractice action did not have the effect of making defendant necessarily liable as a matter of law for all damages claimed by plaintiff. For more than a century it has been the law in Florida that a defaulted defendant has the right to contest the amount of unliquidated damages and may offer evidence in mitigation thereof." (Citing *Watson v. Seat*, 8 Fla. 446 (1859) (default admits nothing more than plaintiff's right to recover on the cause of action, but defendant has the right to controvert the amount of damages).
[96] A.112 at 58-59; A.116 at 37. Petitioner's trial counsel: "I think we are all in agreement that a statue fell on her. And that's what caused her injuries." A.112 at 10.

damages (an ankle severed by her statute falling on her foot) was not subsumed by default. There was no evidence of any causal connection presented or allowed at trial for jury consideration. A.113 at 8; A.51 at 1. These decisions make clear that, even in a default posture, the lack of evidence and jury consideration of the causation issues and evidence here were reversible error.[97]

Even focusing solely on the 2010 Complaint, this judgment on unpled liability, without any factual assertions as to ML's ownership, ML's management, ML's control and on unpled damages was still reversible error.[98] Having proceeded to judgment on unpled theories of liability and damages and insufficient proof, Petitioner was not entitled to get a 'do-over'.[99]

Implicitly recognizing her position and her 2010 Complaint, standing alone, are weak, Petitioner now argues, as "new" decision, *La Mer*,[100] to raise an entirely new theory for the first time, in this Court, in her initial brief: that this judgment is voidable, but not void, and this Court should find the Third District erred in not affirming the default judgment against ML on this basis. IB at 23-25. We vigorously object. This is not

[97] 79 AM. JUR. 285; *see Talucci*, 960 So. 2d 9.
[98] *Hooters of Am., Inc.*, 655 So. 2d at 1233.
[99] *See, e.g., Loiaconi v. Gulf Stream Seafood, Inc.*, 830 So. 2d 908 (Fla. 2d DCA 2002); *Van Der Noord v. Katz*, 481 So. 2d 1228 (Fla. 5th DCA 1985) (if plaintiff proves facts only to support wrong measure of damages, plaintiff would not be entitled to new trial to try again); *J.F.H. v. State*, 849 So. 2d 1151, 1153 (Fla. 5th DCA 2003) (similar).
[100] *Condo. Ass'n of La Mer Estates, Inc. v. Bank of New York Mellon Corp.*, 137 So. 3d 396 (Fla. 4th DCA 2014).

"new"; the issue of "void" versus "voidable" has been discussed for roughly 80 years.[101] Petitioner could have raised it if she truly believed it worthy of argument. It is not. Her argument only matters if the motion to vacate were raised for the first time post-judgment by way of a collateral Fla. R. Civ. P. 1.540(b)(4) motion, filed more than one year post-judgment,[102] flatly not the case here where the motions to vacate were raised

[101] *See, e.g., generally Malone v. Meres*, 91 Fla. 709, 109 So. 677 (1926); *Southeast Land Developers, Inc.*, 28 So. 3d at 168; *Krueger v. Ponton*, 6 So. 3d 1258 (Fla. 5th 2009); *Johnson v. State, Dept. of Revenue ex rel. Lamontagne*, 973 So. 2d 1236 (Fla. 1st DCA 2008); *Sterling Factors Corp.*, 968 So. 2d at 658.

[102] Petitioner's argument about the void versus voidable distinction is also error because collaterally attacking voidable judgments by way of a Rule 1.540(b)(4) motion instead of rehearing and appeal are not at issue here, where the judgment is based on liability and damages entirely outside the scope of the pleadings and, thus, void, and was, indeed, also attacked, not collaterally, but under Rule 1.530 and this appeal. *See Cortina v. Cortina*, 98 So. 2d 334 (Fla. 1957); *Cravero*, 91 So. 2d at 312; *Krivitsky*, 155 Fla. 45, 19 So. 2d at 563; *Lovett*, 93 Fla. 611, 112 So. At 768. *See, e.g.*, A.3 at 2; A.38. at 2; A.42 at 14, 16; A.86 at 2; A.110 at 29, 39; A.111 at 58–64; A.116 at 100–01; ML Petition for Writ of Certiorari proceeding, Third DCA Case No. 3D12-644. "A voidable judgment can be challenged by motion for rehearing or appeal and may be subject to collateral attack under specific circumstances, but it cannot be challenged at any time as void under rule 1.540(b)(4)." *Sterling Factors Corp.*, 968 So. 2d at 665 (quoting *Malone*, 91 Fla. 709, 109 So. at 677; citing *State v. Chillingworth*, 126 Fla. 645, 171 So. 649, 652 (1936); *Chisholm v. Chisholm*, 98 Fla. 1196, 125 So. 694 (1929); *Paleias v. Wang*, 632 So. 2d 1132 (Fla. 4th DCA 1994) (Klein, J., concurring).). But judgments predicated on complaints that fail to state a cause of action or are not well pleaded or judgment that exceed the relief requested, like the judgment here, are **void**. *S.E. Land Developers, Inc. v. All Florida Site and Utilities, Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010); *Moynet*, 8 So. 3d at 378-79 (citing *Becerra*, 551 So. 2d at 486, and *Ginsberg*, 645 So. 2d at 493); *GAC Corp.*, 308 So. 2d at 550; *see generally Hooters of America, Inc.*, 655 So. 2d at 1231 (damages award barred on default judgment violated due process due to lack of well-pled allegations in complaint); *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662, 666 (Fla. 3d DCA 2007); *Viets v. American Recruiters Enterprises, Inc.*, 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006); *De Shlesinger v. De Sleyzynger*, 653 So. 2d 1135, 1135 n.1 (Fla. 3d DCA 1995) (in default situation, where relief not requested is awarded, relief from judgment will be granted); *Gelkop v. Gelkop*, 384 So. 2d 195, 201 (Fla. 3d DCA 1980), *abrogated on other grounds in Montano v. Montano*, 520 So. 2d 52 (Fla. 3d DCA 1988).

prejudgment, by certiorari petition during trial, on rehearing, and then on appeal.[103] This is also not some procedural defect,[104] but a failure to state a claim for relief as to this named defendant, ML. Even if it were a "procedural defect", this was attacked both under Rule 1.540 and under Rule 1.530[105] and there's more than 100 years of well-settled law that a default judgment may not be entered against a defendant on a complaint that fails to "state a cause of action against that defendant."[106] Petitioner cannot retract her admissions that the property was not owned by defendant ML as Petitioner originally alleged.[107] And she cannot dispute that she has no allegations in her 2010 Complaint as to the statue falling on her, and no factual allegations supporting her management and control legal

[103] Here, it was not only raised in the multiple motions to vacate from the inception of this case, and in a petition for writ of certiorari filed with the Third District during the case pendency, in which Petitioner was again warned a judgment on unpled theories of liability and damages and on a claim that failed to state a claim for relief as to this defendant, ML, would be deemed void and again warned that the statute of limitations against the correct party would expiring in two months, and renewed through trial and final judgment, and again immediately post-judgment, as well as appeal. ML Petition for Writ of Certiorari proceeding, Third DCA Case No. 3D12-644. *Falls*, 665 So. 2d at 321 ("it is fitting and proper that a court should take judicial notice of other actions filed which bear a relationship to the case at bar.") (citing *Gulf Coast Home Health Servs. of Florida, Inc. v. Department of HRS*, 503 So. 2d 415 (Fla. 1st DCA 1987)).

[104] "Procedural defects not affecting jurisdiction must be addressed by a timely motion for rehearing, an appeal, or a timely motion for relief from judgment pursuant to rule 1.540(b)(1), (2), or (3)." *Sterling Factors Corp.*, 968 So. 2d at 666 (citing *Demars v. Village of Sandalwood Lakes Homeowners Ass'n*, 625 So. 2d 1219 (Fla. 4th DCA 1993) and *Craven v. J.M. Fields, Inc.*, 226 So. 2d 407 (Fla. 4th DCA 1969)).

[105] Robustly preserved, *see:* A.8, A.11, A.12, A.18, A.27-A.30, A.38, A.42, A.45, A.53-54, A.70, A.74, A.82-83, A.85, A.88-89, A.92, A.94, A.98-99.

[106] *See North American Accident Insurance Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910); *Fernandez–Aguirre v. Gall*, 484 So. 2d 1286 (Fla. 3d DCA 1986); *Bay Products Corp. v. Winters*, 341 So. 2d 240 (Fla. 3d DCA 1976); *GAC Corp.*, 308 So. 2d at 550.

[107] A.3 at 1–2; A.15 at 1–2, 12.

conclusions. Courts do not ignore repugnant and defective allegations.

ML further objects to this continuing tactic that Petitioner employed throughout this litigation, of violating the rules of appellate procedure,[108] violating notice, and reversing its positions to its advantage and to due process prejudice to ML, such that ML is cast as the only party bound by the rules while Petitioner files and argues whatever she desires, without accurate record citation and without consequence. Now Petitioner attempts to raise new arguments for the first time in the Supreme Court,[109] while concurrently representing ML did not preserve its arguments when the record shows ML so vigorously and continually raised these issues and arguments that the trial court and all counsel recognized ML's arguments were "preserved".[110] Petitioner's statement to this

[108] *See, e.g*, Petitioner's constant motions for leave to reply to responses to motions with replies attached, Petitioner's post-oral argument "supplemental" appendixes of selected portions of the record already before the Third District to present further argument, Petitioner's post-oral argument filings of affidavits executed the day before by trial counsel, Petitioner's post-oral argument filings of unexecuted draft affidavits from Antonio Martinez Marmol that he refused to sign, all non-record, to proffer them to the Third District as some kind of "evidence"; Petitioner requesting for the first time on appeal that the Third District take judicial notice of the Santiago eviction proceeding for which ML sought—and Petitioner opposed—in the trial court. ML follows the rules of procedure while Petitioner breaks them and erratically takes inconsistent positions on them when it suits her. R.26-28, 29-76, R.88-92, R.93-263, R.264-66, R.272-80, R.289-90, R.310-26.

[109] *Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Florida*, 97 So. 3d 204 (Fla. 2012); *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494 (Fla. 1999).

[110] Petitioner erroneously states: "At no time in the trial court or on appeal, did [ML] argued the final judgment was void or voidable because [Petitioner's complaint] wholly failed to state a cause of action against it." IB at 24. They were preserved and all counsel and the trial court recognized this. *See, e.g.,* A.38. at 2 ((allegations in the complaint were "unequivocally false and fail to state a claim."); A.42 at 14 (complaint "failing to state a claim"); A.42 at 16 (complaint "failed to properly allege a cause of action" and "judgment

Court that they were not raised and that the Third District divined these issues on its own exceeds credulity.[111]

This case is the culmination of a long procedural history wherein Petitioner has about-faced on the factual and legal positions she has pled, and skirted the civil and appellate rules and the court's warnings thereon. She chose this path of inconsistent and negating positions in her pleadings below and on appeal, both as to the warehouse complex ownership and control and as to what really caused her own unfortunate accident,[112] with her only consistent position throughout this litigation being that procedural and substantive rules are to be applied strictly and solely as to ML. While Petitioner was warned of this void judgment throughout these proceedings,[113] she stubbornly refused to sue the right party on the right theory of liability while the statute of limitations ticked. Her refusal now to respect firmly established law on the basis of

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entered thereon is void."); A.110 at 29, 39; A.94 at 1; A.115 at 73; A.116 at 31; *see also* A.1; A.2; A.38; A.49; A.50; A.51 at 1; A.52-59; A.61-65; A.67-A.72; A.76; A.78-81; A.85; A.88-89; A.113 at 8; A.115 at 65-72, 87-88, 90-95; A.116 at 25-31; A.136-A.143; ML Petition for Writ of Certiorari proceeding, Third DCA Case No. 3D12-644.

[111] *See* record citations *supra*. We will not dignify Petitioner's arguments that her due process rights were violated because the Third District did not affirm a default against ML. IB at 25-26. Petitioner had every opportunity to sue the correct defendants, Martinez Marmol and Iberia, she was warned the statute of limitations was going to expire, and she withdrew her complaint against the correct parties to cling to a default that she knew was wrong. Her argument is akin to the man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.

[112] A.3; A.70 at 1; A.114 at 17, 169, 184; A.115 at 65-69 After a two-day hospital stay, Santiago returned home. A.112 at 65; A.113 at 122. She made a remarkable recovery, returned to work, and months later walked without a limp. A.112 at 67; A.113 at 123.

[113] A.9; A.18 at 1-2 ¶¶ 3, 5; A.42; *see also* Third District Court of Appeal Case no. 3D12-644; *see also* Initial Brief at 5 n.5. And a word search shows that ML raised and briefed the void judgment 25 times in her Initial Brief in the Third District.

professed surprise that the appellate court would actually apply it to her is not a viable basis to complain and certainly not "unprecedented" appellate law-making.[114]

CONCLUSION

FOR THE REASONS AND LEGAL AUTHORITIES SET FORTH HEREIN, Respondent MAUNA LOA INVESTMENTS, LLC, respectfully requests that the Court approve the decision below of the Third District Court of Appeal for the reasons stated in the decision and set forth herein, or approve the result of the district court's decision below for the reasons set forth herein.

Dated this 10th day of September, 2014 and *corrected* this 12th day of September, 2014.

Respectfully submitted,

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[114] Again, in the court below, ML repeatedly warned Santiago that this judgment would be deemed void. There were no "well pleaded" allegations as to liability and causation because they were negated by her *own* exhibits and expressly referenced public records in her 2011 Complaint consolidated with her 2010 Complaint. A.15 at 1-3, 4 at ¶ 11, 5 at ¶ 12, 8-9, 11-12. Santiago's Consolidated Complaint further alleged that Iberia and Marmol "were the owners of the commercial property and they were responsible to maintain and control the commercial property" at issue here, and "[a]t all times material hereto, Iberia and Marmol were responsible for the operation, maintenance and safety of the premises, and had a duty to maintain said premises in a safe condition." A.15 at 4 at ¶ 11, 5 at ¶ 12.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and attached Appendix were served electronically via email *or* via the firm's electronic dropbox, this 12th day of September, 2014 to all Counsel on the Attached Service List.

BY: /S/DOROTHY F. EASLEY

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the typeface and font size, Times New Roman 14 point proportionately spaced, as set forth in Rule 9.210, Fla. R. App. P.

BY: /S/DOROTHY F. EASLEY

ANAMARIA SANTIAGO, PETITIONER, VS MAUNA LOA INVESTMENTS, LLC, RESPONDENT
CASE NO.: SC13-2194

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-2194
LWR. CT. APPEAL CASE NO.: 3D12-1825
LWR CIR. CT. CASE NO.: 10-07498 CA 04 *CONSOLIDATED WITH* CASE NO.: 11-19139

ANAMARIA SANTIAGO,

Plaintiff/Appellee/Petitioner,

vs.

MAUNA LOA INVESTMENTS, LLC

Defendant/Appellant/Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, THIRD DISTRICT

APPENDIX TO RESPONDENT'S *CORRECTED* ANSWER BRIEF ON THE MERITS: MAUNA LOA INVESTMENTS, LLC, TIMELINE

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MAUNA LOA INVESTMENTS, LLC TIMELINE

July 1, 2006 – ArtCrafts, Anamaria Santiago's corporation, enters into the most recent commercial lease with Iberia NV, Venezuelan Antonio Martinez Sr.'s (and later his son Antonio Martinez Marmol's upon Martinez Sr.'s death) company, for the ArtCrafts shop at the Iberia Warehouse Complex. A.66 at 2–26; A.114 at 86.

February 2008 – Martinez Sr. dies. His son Martinez Marmol, per his affidavits and per Venezuelan law that land goes to the only legitimate son,[115] becomes the owner of the Iberia Warehouse Complex. A.54 at 2; A.69; A.115 at 104-05; A.140 at 6.

April 21, 2008 -- Mauna Loa Investments LLC ("ML") is formed, of which Mawanphy Gil, formerly of Venezuela, is President. A.15 at 2; A.98

July 2, 2008 – While Santiago and her sixteen-year-old son are moving one of her very large, heavy statues on a pallet jack across the Iberia Warehouse Complex parking lot, the statue falls off the pallet jack, onto Santiago's ankle and severs her ankle, which her son photographs for her. A.3; A.70 at 1; A.114 at 17, A.115-65-69; A.116 at 26.

October 6, 2008 – ML purchases the property from now-Martinez Marmol's Iberia, and Iberia transfers the property by special warranty deed to ML. A.3 at 1; A.11 at 1; A.15 at 9, 11-12; A.27 at 3; A.68 at 1; A.110 at 18, 22; A.115 at 106.

January 2009 – After Santiago does not pay rent for almost one year, ML, now owner of the Warehouse Complex, evicts Santiago. A.110 at 20; A.115 at 115–16.

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[115] *See* FAO Econimic and Social Development Dept.: FAO Corporate Document Repository, *The Legal Status of Rural Women in 19 Latin American Countries*, website address: http://www.fao.org/docrep/u5615e/u5615e03.htm (last visited Aug. 7, 2014) ("While civil law recognizes the companion (male or female) as entitled to a share of the legitim, the woman is not accorded priority, following the death of the first allottee, to land granted under agrarian legislation. This is the situation in Paraguay and Venezuela."); Anna Knox, Nata Dvvury, Noni Milici, *Connecting Rights to Reality: A Progressive Framework of Core Legal Protections for Women's Property Rights*, at 6 ICRW (2007), website address: http://www.icrw.org/publications/connecting-rights-reality ("Most Latin American countries grant all children--boys and girls--equal inheritance rights under their civil codes. However, some countries, including. . .Venezuela, exclude land from these provisions. Instead, under agrarian law, land may be allocated to a single heir or daughters, and spouses may be excluded from land inheritance. Although such laws tend to be gender-neutral, tradition favors inheritance by eldest sons.").

February 2009 – Santiago attests that Iberia was the only ArtCrafts Landlord and that Iberia was the only one to which she was only told to pay rent and did pay rent. A.15 at 13-14; R.13-15 of A.39-A at 2-3. Santiago's ArtCraft is evicted. A.110 at 20; A.112 at 72; A.115 at 115-19.

February 17, 2010 – After Santiago is evicted, she retaliates, sues only ML for Santiago's 2008 accident at the Iberia Warehouse Complex, alleging she was caused to "trip and fall on Defendant's property due to the walkway surface being in an unsafe condition . . . holes and uneven areas where [sic] created and caused [her] to lose her footing and fall." A.3 at 1–2.

February 17, 2010 – Santiago serves that 2010 Complaint on ML's President, Mawanphy Gil. App.1 at 6; A.4; A.18; A.28 at 1; A.108 at 14.

February 17, 2010 – ML hires Attorney Libio Calejo the same day that ML is served with the summons and complaint. A.1; *see also* A.4 and A.28 at 1; A.108 at 14.

February 26, 2010 – After ML immediately retains Attorney Libio Calejo, Calejo appears on behalf of ML. A.6; A.11 at 1. During the months after ML hires Calejo, Gil contacts Calejo's office multiple times and is assured Calejo will review the file, take all necessary measures, that everything is "fine", and they would let Gil know when there was "any news". A.11 at 1.**

May 5, 2010 – After Calejo fails to file an Answer and Affirmative Defenses, Santiago files her Motion for Default. A.5.

May 13, 2010 – Trial court enters default. A.6. When ML President Gil receives the default she does not understand what it means, "immediately went" to Calejo's office, where she is told by Calejo's secretary that this "happens all the time", the papers must have gotten "crossed", and everything would be "fine." A.11 at 1.

August 30, 2010 – ML continues to follow up with Calejo's office and Calejo's office suddenly calls and states that his office will no longer represent ML, with no explanation. A.11 at 1–2; A.12 at 1.

August 31, 2010 – ML immediately retains new counsel Aubrey Rudd the very next day, Rudd promptly pulls the docket, determines a default had been entered, explains the gravity of the default to ML. A.11 at 2; A. 8 at 1-2; A.29 at 1-2, 4-5, 8.

September 3, 2010 – ML's new counsel Rudd, still conducting due diligence, promptly files a Verified Motion to Set Aside Default and on that same day sends via facsimile a Stipulation for Substitution of Counsel to Calejo so that Rudd can appear and set the Motion for Hearing. A.29 at 1, 5, 7; A.8 at 2.

September 24, 2010 – After three weeks of requests, Calejo returns a signed Stipulation for Substitution to Rudd and Rudd promptly files that Stipulation along with a proposed order, and calls and then sends the same to the trial court to enter an order so that Rudd can appear and set the Verified Motion to Set Aside Default for hearing. A.29 at 11-14.

October 29, 2010 – Rudd receives the signed order from the trial court, around October 27, 2010 or a few days after, granting substitution of counsel. A.29 at 2, 15; A.1 at 6.

November 1, 2010 – After Rudd receives the order granting substitution, he promptly sets for hearing the Verified Motion to Set Aside the Default supported by Affidavit, for the earliest available date, December 2, 2010. A.29 at 2, 15. The notice of hearing was sent, but the motion for reasons unknown to Rudd did not make motion calendar or even the trial court docket and Rudd had to again renotice the Verified Motion to Set Aside Default for the next earliest available date, January 14, 2014, which was eventually heard. A. 12 at 2-3; A. 1 at 6.

January 10, 2010 – Along with the Verified Motion to Vacate set to be hearing January 14, 2010, ML files its Answer and Affirmative Defenses and includes defense that it did "did not have ownership, custody, or control of the premises where [Santiago] was allegedly injured", owed "no duty", and denials that ML did not maintain or control the premises. A.9; A.12 at 2; A. 29 at 3, 17 (showing Jan. 10, 2011 court stamp); A. 1 at 6 (2010 docket); A.2 (2011 docket).

January 14, 2010 – Predecessor judge denies ML's Motion: ML's affirmative defenses were not yet showing in the computer docket and Rudd did not personally have a stamped copy with him to verify they were filed. A.10; A. 29 at 2-4, 17; A.12 at 2-3.

January 20, 2010 – ML files a Verified Motion for Rehearing on its Verified Motion to Set Aside Default, with the Answer and Affirmative Defenses now appearing in the docket, in which Gil further attests that when she tried to contact Calejo after the default, his secretary told her that everything was "fine", that the documents must have "crossed in the mail," and this "happens all the time.". A.11; A.12; A.1 at 6. That Motion for Rehearing remains pending and not ruled upon.

June 21, 2011 – Santiago files another complaint against ML, and also against the correct defendants—Iberia and Martinez Marmol, *Santiago v. Iberia, NV, LLC, etc.* No. 11-19139 CA 04—for the same injuries, from the same incident, on the same day, acknowledging that at the time of the accident Iberia owned the Iberia Warehouse Complex, cites to public records of Iberia NV corporate ownership at the time of Santiago's accident (no records including ML, or even ML's President, Mawanphy Gil), and Santiago attaches to her complaint a public record, officially stamped Deed showing Iberia ownership. A.15; A.2 at 2.

August 23, 2011 – The *Santiago v. Iberia NV etc.* lawsuit is transferred to the same court as the *Santiago v. Maua Loa* lawsuit, without objection from Santiago, and both complaints are before the same trial court judge. A.17.

August 26, 2011 – ML files Motion to Set Aside Default Based Upon Misrepresentation (or Mistake [declined to use fraud or sham to be professional to Santiago's counsel]) because the now-consolidated complaints and attached Deed show Santiago admits she sued the wrong defendant in the first complaint and these conflicting allegations render claims a nullity. A.16; A.18.

September 10, 2011 – After Santiago refuses to comply with discovery and provide dates to be available for deposition; ML files its Motion to Compel and Continue Trial Date. A.19-A.21.

September 20, 2011 – The lawsuit against Iberia and ML is consolidated with the lawsuit against solely ML, for all purposes, to which Santiago does not object. A.22.

September 20, 2011 – The 2010 lawsuit against ML is consolidated with the 2011 lawsuit against Iberia and ML, for all purposes, to which Santiago does not object. A.23.

September 20, 2011 – Trial court also grants ML's Motion to Compel because Santiago will not answer interrogatories, will not respond to requests for production, and will not provide dates for deposition on stated basis that ML's counsel, despite a notice of appearance, does not really represent ML, and ML seeks to continue trial date as a result. A.21; A.23, A.29 at 32.

September 20, 2011 – Santiago also moves to extend time to respond to ML's discovery efforts in the 2011 lawsuit against Iberia and ML, which the trial court grants. A.22, A.29 at 31.

November 11, 2011 – The cases now consolidated for all purposes, ML files an Amended Motion to Set Aside Default Based Upon Misrepresentation (or Mistake [declined to use fraud to be professional to Santiago's counsel]) and sets the hearing for November 29, 2011. A.1; A.27.

November 11, 2011 – ML attaches a series of affidavits, including finally Calejo's affidavit stating that he, not ML, neglected to file an answer and attend a hearing on behalf of ML because of secretarial error and personal issues. A.28 at 1-3; A.29 at 1. Also attaches Rudd's affidavit detailing the steps he promptly took to vacate the default. A.29-A.30.

November 16, 2011 – Santiago files Motion to Strike Defendant's Motion to Set Aside Default from Calendar claiming that she would be "materially and substantially prejudiced" if ML was allowed to proceed with its hearing on its Motion to Vacate, which the trial court grants. A.1; A.26.

November 16, 2011 – Trial court cancels the November 29, 2011 hearing on ML files an Amended Motion to Set Aside Default Based Upon Misrepresentation (or Mistake). A.1.

December 2, 2011 – Santiago files a voluntarily dismissal for the already-consolidated 2011 *Iberia and Mauna Loa* complaint before hearing and moves to strike ML's Amended Motion to Set Aside Default Based Upon Misrepresentation (or Mistake). A.2; A.31; A.32.

December 2, 2011 – Court grants Santiago's Motion to Strike the Amended Motion to Set Aside Default and denies ML's Motion for Rehearing on its Motion to Vacate Default that was pending since January of 2011. A.33; A.34.

December 15, 2011 – Hearing is held on ML's Amended Verified Motion to Set Aside Default Based Upon Misrepresentation (or Mistake). A.1; A.108. Santiago's counsel misrepresents to the trial court that Mawanphy Gil was married to Martinez Sr. and that the property was transferred in connection in probate with "the wrap-up of the husband's estate." *Compare* A.108 at 10; A.110 at 17-18; R.83-85 *with* A.110 at 17–18, 29, 39.

December 16, 2011 – With ML's Amended Verified Motion to Vacate denied at the December 15, 2011 hearing [A.108 at 17], Santiago files Motion for Temporary Injunctive Relief prohibiting the sale and encumbrance of the warehouse complex property stating there is "significant likelihood that [Santiago] will prevail." A.36.

December 16, 2011 – Trial court denies Amended Motion Verified Motion to Set Aside Default Based Upon Misrepresentation (or Mistake), and prohibits—on Santiago's urging for sanctions—ML from filing any additional motions to vacate the default. A.37.

January 4, 2012 – ML files Response Memorandum of Law in Opposition to Santiago's Motion for Injunction contending that Santiago could not recover because ML did not own, operate, maintain, or control the property, Santiago's complaint was not properly pled, and it failed to state a claim. A.38.

January 5, 2012 – ML files Motion to take Judicial Notice of Related Cases—namely the lawsuit against Iberia and ML and the attached deed, and the eviction against Santiago along with Santiago's affidavit in which she attested rent payments were made to and were collected by Iberia and not by ML. A.39.

January 5, 2012 – ML, in an effort to present evidence that Santiago was suing the wrong defendant—files Motion for Summary Final Judgment Alternative Motion to Set Aside the Default Based on Defective Pleading as Void [A.42], in which ML contends that along with the complaint being improperly pled, Santiago's complaint "is flawed for failing to state a claim," [A.42 at 14] and Santiago "failed to properly allege a cause of action" [A.42 at 16] and any "judgment entered thereon is void." *Id.*

January 5, 2012 – After brief hearing on Santiago's motion for temporary injunction during which ML does not get an opportunity to show why Santiago cannot prevail [A.110 at 4–5] or argue its motion for final summary judgment, the trial court denies Santiago's motion for temporary injunction and denies ML's motions for summary final judgment and judicial notice. A.43; A.110 at 4–6.

January 18, 2012 – ML moves for clarification on the denial of summary judgment because there was no hearing even yet set or argument heard on its summary judgment motion. A.45.

January 19, 2012 – Hearing in front of new successor judge on ML's Motion for Summary Final Judgment Alternative Motion to Set Aside the Default Based on Defective Pleading, which is Void. A.110. When Santiago's counsel again misrepresents to the trial court that the property was transferred through probate, and presents no supporting evidence [A.110 at 15–16], the successor judge allows ML's counsel to correct this misrepresentation and ML's counsel also corrects that Gil was Martinez Sr.'s mistress, not his wife, and this was not a probate estate situation. A.110 at 18.

January 23, 2012 – Santiago moves to strike and for sanctions against ML and Aubrey Rudd personally, alleging that ML's attorney have violated court orders by continuing to renew (and preserve) these arguments. A.48.

February 1, 2012 – Santiago files motion for protective order with regard to three depositions set by ML to obtain discovery from Santiago. A.56.

February 2, 2012 – ML files affidavit of Martinez Marmol in which he attests that he became the owner of all Iberia NV's properties—including the Iberia Warehouse complex where Santiago was injured—upon the death of his father, Martinez Sr., in February 2008. A.53; A.54.

February 8, 2012 – Court denies Motion for Summary Final Judgment Alternative Motion to Set Aside Default and Motion for Judicial Notice, and Santiago's Motion to Strike. A.58.

March 5, 2012 – ML files, as further evidence, the lease between Santiago's corporation, ArtCrafts, and Martinez Marmol's corporation, Iberia, which shows that Iberia was ArtCraft's landlord and Iberia was also designated as the premises manager, and was exclusively responsible for the maintenance and control of all common areas of the premises. A.66 at 1, 5-9.

March 9 and 23, 2012 – Santiago filed two motions in limine to prohibit ML's use and presentation of any and all records related to liability or causation and to preclude ML from asking any questions or presenting any evidence about how the accident occurred or presenting any evidence on negligence, causation, and liability and for the redaction of medical records showing the cause of Santiago's accident was not a trip and fall, but a large, heavy statue falling on her ankle [A.51 at 2–5], which the trial court granted.

March 9, 2012 – ML files Petition for Writ of Certiorari with the Third District Court of Appeal to quash the February 8, 2012 order denying an Independent Medical Examination of Santiago and denying summary judgment and to vacate, also giving notice to Santiago that her judgment will be deemed void and that the statute of limitations to sue the correct parties, Iberia and Martinez Marmol, are due to expire in three months (July 2012). Pet. Cert. at 1-3, 23; A.70.

March 22, 2012 – ML files Motion for Stay Pending Third District's Review of Petition of Certiorari. A.70.

March 23, 2012 – Third District denies ML's Petition for Writ of Certiorari "without prejudice to appellate review." *See* Order, Case no. 3D12-644.

May 10, 2012 – Trial court prohibits all references to insurance at trial [A.111 at 33-34] and overrules ML's renewed objections that Santiago's pleadings are defective and insufficient pleadings that render ML responsible only for allegations actually pled in the complaint as to both the theories of liability and damages. *Id*. at 43–45, 63.

May 15, 2012 – May 18, 2012 – Case proceeds to trial on damages only, over ML's court-recognized standing objections to the defective pleadings, unpled liability, and unpled damages, which Petitioner's trial counsel also conceded were all sufficiently preserved for appeal. *See* A.112–A.116; A.115 at 73 at 74; *see also* A.8, A.11, A.12, A.18, A.27-A.30, A.38, A.42, A.45, A.53-54, A.70, A.74, A.82-83, A.85, A.88-89, A.92, A.94, A.98-A.99.

May 15, 2012 – In his opening statement, Santiago's counsel concedes to the jury that Santiago's accident was caused by a statue falling on and severing her ankle, not by a "slip, trip, and fall in a walkway." A.112 at 9-10, 58-59.

May 16, 2012 – Santiago testifies tearfully during trial that she does not have health insurance, and her counsel adduces further testimony on her lack of insurance. A.113 at 141; *see also* A.85; A.94; A.112 at 61; A.113 at 25, 141; A.114 at 70-71, 107, 161; A.115 at 62-64.

May 17, 2012 – ML requests leave to explain to the jury that ML did not have property insurance, not because ML was irresponsible, but because at the time of Santiago's accident ML did not own the premises so it could not obtain insurance, in an effort to balance fairness and the jurors' written questions about insurance, which the court denies. A.115 at 62–64.

May 18, 2012 – ML files Memorandum of Law on the Admissibility of Santiago's statements in her pleadings. A.92.

May 18, 2012 – Over ML objections to defective, inconsistent pleadings, unpled liability and unpled damages, the jury awards a lumped verdict to Santiago of $1,099,874.30. A.3 at 2; A.86; A.116 at 99; A.111 at 58–64; A.115 at 51–57; A. 116 at 100–01.

May 25, 2012 – ML moves post-trial to Arrest Judgment, Judgment Notwithstanding the

Verdict, renews to Vacate Judgment as Void, and for Remittitur, along with an alternative Motion for a New Trial, without Waiving the Issues of Default and Liability to be Raised on Appeal, includes public record Corporate documents, and special sets the Motions for the earliest available court date, which is in July 2012. A.94; A.98.

June 2012 – Before the July hearing, the trial court enters Final Judgment in favor of Santiago, reflecting a collateral source set off amount. A.96, A.97.

June 29, 2012 – Court denies all ML's post-trial motions. A.99.

July 6, 2012 – ML timely appeals. A.100.