IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT, WEST PALM BEACH, FLORIDA

Case No. 4D22-2444

Lower Tribunal Case No. 2019-CA-007270

EDDIE'S PROPERTY INVESTMENTS, INC.,

Defendant/Appellant,

v.

A CUT ABOVE LANDSCAPE & MAINTENANCE, INC.,

Plaintiff/Appellee.

CORRECTED ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE AND FACTS

This appeal, the second one in this case, arises out of Eddie's Property Investments, Inc.'s ("Eddie's") continuing efforts to evade compliance with a Vacant Land Sale Contract ("Contract") to convey three parcels of land in Royal Palm Beach (collectively, the "Property") to A Cut Above Landscape & Maintenance, Inc. ("ACA").

The Honorable James Nutt presided over a two-day bench trial on June 7-8, 2021, issuing a Final Order awarding specific performance for ACA. Appendix 612-14. Eddie's filed a substantive appeal which was per-curiam affirmed. Eddie's also moved to vacate the judgment, claiming that only after trial did it first learn that the liens (of public record) on the Property it had been ordered to pay – which everyone at trial agreed would cost $37,324.50– would actually cost over half a million dollars. It then emerged, however, that Eddie's thirteenth-hour misconstruction of the long-known-about and publicly available liens was of no consequence as they could be removed for a payment of $750 through a Palm Beach County lien amnesty program. The liens have been removed, and the Property sold to ACA. Eddie's has nevertheless appealed the denial of its motion to vacate.

A. The Parties Enter into the Contract, but Eddie's Refuses to Close.

1. The Contract

Damon Rockett, President of ACA, drove by the Property, saw a real estate sign, and inquired about purchasing it. Appendix 51. The contract negotiations began in February 2019, and the parties ultimately negotiated the sale for $345,000. Ans. Appendix 22 (Ex. 1 at 0002). The Contract had an effective date of February 28, 2019. Ans. Appendix 47 (Ex. 13).

2. A Cut Above's Efforts to Close

ACA illustrated its readiness, willingness, and ability to close by depositing the first $3,000 of the $345,000 price into escrow. Ans. Appendix 35 (Ex. 9). Eddie's representative sent the Title Commitment, and ACA provided timely objections, including objecting to the County code violation liens. Ans. Appendix 48 (Ex. 18); Appendix 173-74, 206, 452.

From that point forward, ACA continually tried to close, but Eddie's used the County liens as an excuse for refusing to close, despite failing to make a written request to Palm Beach County for lien payoff numbers. A series of communications between March 13

and April 23, 2019, illustrates ACA's readiness and eagerness to close and Eddie's continually leading ACA on and refusing to close the transaction. *See, e.g.*, Ans. Appendix 48-52, 29, 53-54, 55-57 (Ex. 18; Ex. 1 (0009); Ex. 21; Ex. 22).

The Contract's closing date of April 15, 2019 came and went, and Eddie's continued to refuse to close. ACA, however, continued to press for an additional extension and closing. *See, e.g.*, Ans. Appendix 32, 33 (Ex. 1 (0012); Ex. 1 (0013)).

Eddie's indicated that it was contemplating utterly abandoning the Contract on April 16, 2019, in order to seek a better deal, emailing that Eddie's "might have to list [the Property] again at a different price." Ans. Appendix 58-60 (Ex. 23). Eddie's justified this by pointing to the unexpectedly high cost of the liens. *Id.* ACA had to file suit.

3. Pre-Trial Proceedings

ACA filed its original Complaint on June 3, 2019. Appendix 4-18. Eddie's first legal representative appeared, answered the Complaint, and then withdrew. Three weeks later, its second counsel appeared then withdrew. Eddie's third and ultimate trial counsel appeared on February 19, 2021. *See* Ans. Appendix 7 (docket).

The case was initially to be tried sometime between February 22 and April 2, 2021, but Eddie's filed a Motion for Trial Assignment and for Enlargement of Time, which was granted. Then, Eddie's counsel, eight days before trial, requested and received a continuance. Five weeks later the parties agreed to set the non-jury trial for June 7-8. *See* Ans. Appendix 7 (docket entries 59-76).

B. Trial

Judge Nutt tried the case on June 7-8, 2021. The evidence showed that, although ACA always stood ready, willing, and able to close, Eddie's never intended to close. Specifically, documentary evidence and the testimony of Mr. Sookhoo (owner of Eddie's) made clear that, although Mr. Sookhoo knew when he signed the contract that the Property had liens and that he had to convey it free of liens (Appendix 446-47), Eddie's had no intention of paying ***any*** money towards the liens or closing. Appendix 460-61, 471; *see also* Ans. Appendix 61-63, 33 (Ex. 25; Ex. 1 (0013)).

Mr. Sookhoo did not allow his agent to request a payoff amount, and he refused to make any written request to obtain those payoff numbers from February 6 through April 9 (6 days before the extended closing). Appendix 472-73. Finally, despite having the ability simply

to write Palm Beach County at any time for the payoff amount, Eddie's delayed sending a written request for lien payoff amounts until April 9, 2019. *Id.* Once Eddie's finally requested payoffs, it was told on April 11, 2019, that it would have payoff amounts by April 30, 2019. Appendix 482-84. Eddie's, however, refused to communicate any of this to ACA and, instead, refused to provide another extension. Mr. Sookhoo testified that this was "[b]ecause [he] knew [he] couldn't close" and "had no intention of even replying back to" ACA as, once he delayed past April 15, 2019, "the contract was expired" so he "was no longer involved or had any right to do anything, walk away, everybody go their way." Appendix 485-87.

The Court concluded that Eddie's conduct was inequitable and improper:

> I really think the crux of this case is, I believe that this defendant entered into this agreement almost in bad faith but with the idea of negotiating.
>
> He, frankly, admitted on the record that this was intended to be leveraged on the County so he could negotiate his liens down. He wasn't successful. I don't think this was an excuse not to close. He went into this with full knowledge of the liens, full knowledge of the County's position, and I don't think he was unable – I forget the exact terms of the contract – but I don't think he properly put anyone on notice and that he was fully capable of paying off these liens and closing on this deal, and

> he refused to do it because, frankly, he was stubbornly battling with the County and wasn't willing to give in.

Appendix 600-01. The Court found that Eddie's had breached the Contract and awarded ACA specific performance, ordering Eddie's to close on the transaction. Appendix 612-14. Eddie's appealed. Appendix 615-19.

C. Post-Trial Proceedings

Although its appeal was pending, Eddie's did not obtain a stay, and it remained obligated to close. But rather than comply with the Court's Order, Eddie's continued its pattern of using the County liens as an excuse not to comply. Now on its ***sixth*** different lawyer (*see* Appendix 756), it filed a motion to vacate the judgment based on purported "newly discovered evidence" under Florida Rule of Civil Procedure 1.540. Appendix 620-99. Specifically, Eddie's claimed that the one underwriter it had bothered to contact – the same underwriter that was involved during the pendency of the Contract – wouldn't insure the title unless it secured the release of liens for adjoining properties that Eddie's did ***not*** own and that were ***not*** required to be sold in the Contract. Appendix 626-28. Eddie's represented to the Court that it had found "newly discovered

evidence" that it could not remove the liens and obtain clean title unless it paid over half a million dollars – a circumstance that, Eddie's argued, made the Court's pending Order inequitable. *See* Appendix 631 ("Moreover, requiring the Defendant to specifically perform the Contract by paying the full release amount of $507,395.42, transferring the Property and only receiving $345,000.00 is clearly an inequitable result, which should not be permitted."). The motion sought as relief a new trial at which the defenses of mutual mistake, unilateral mistake, and frustration of purpose could be presented. Appendix 635; *see also id.* at 633 ("This evidence is sufficient to warrant a new trial as it makes the relief granted by the Final Order inequitable."). The Motion was filed on October 20, 2021. Appendix 642.

As it happened, however, Palm Beach County had established an amnesty program for liens. Under that program, the entire amount of the lien on each property would be forgiven merely by submitting an application and paying an administrative fee of $250. Appendix 772-77. The letters notifying Eddie's about the amnesty program ***were sent on September 17, 2021, a month before Eddie's filed its motion to vacate***. *Id.* In other words, after

receiving the letters, Eddie's ***knew*** that it could very easily avail itself of the amnesty program, remove the liens, comply with the Court's Order to sell the Property to ACA, and receive a windfall of $37,324.50 (the amount of the liens that Eddie's had thought it needed to pay to close but that would be waived under the amnesty).

Eddie's chose not to do that. Instead, although fully aware that, under the amnesty program, it would not need to pay off the liens, Eddie's falsely represented to the Court in its motion to vacate that the liens "can only be cleared by paying the full release amount of $507,395.42." Appendix 634; *see also id.* at 637 ("[I]f Defendant is required to comply with the Contract and the Final Order, he will be required to pay more than $500,000 to Palm Beach County to obtain a Full Release.").

Once it became clear that Eddie's was going to refuse to avail itself of the amnesty program because it would rather contumaciously defy the Court's Order and delay the sale of the Property than obtain the financial benefit of the program, ACA filed an emergency motion to require Eddie's to participate in the program. Appendix 715-25. The Court granted the motion, ordering Eddie's to take part in the amnesty program. Appendix 726-27. Eddie's

begrudgingly complied with the Court order, availed itself of the program, and the liens were removed from the Property. Appendix 739-40.

The direct appeal proceeded in the background. On May 19, 2022, this Court affirmed specific performance in a unanimous PCA. Appendix 728. After the mandate issued, the Court called a status conference on July 13, 2022, to discuss Eddie's motion to vacate the judgment, which had remained pending throughout the pendency of the appeal. Despite the long delay, the Court well remembered the case – and the nature of Eddie's conduct: "this seller never intended to sell, and he – he was using every method he could to play with these code liens." Appendix 733. When asked for the relief he wanted, Eddie's counsel said, "ultimately Your Honor would hold a new trial based upon those new details because those new details were not available to the parties." Appendix 738.

Eddie's counsel complained that the amnesty program was inconvenient insofar as it destroyed the basis for his request for a new trial: "I thought this was a slam-dunk winnable motion for a new trial, and then that amnesty came out." Appendix 739; *see also id.* ("[A]t the time of the trial, we could not close, and no one knew it.

Now, we can, because of the amnesty that comes in after the trial."). Eddie's counsel characterized the amnesty program – which rendered the motion to vacate frivolous – as "an unbelievable wrench." Appendix 741. The trial court responded that "[i]t's a wrench if your strategy is, is to keep property and shred a contract that you entered in bad faith." Appendix 742. Nevertheless, the Court asked ACA to respond to the motion to vacate.

ACA filed an opposition. Appendix 756-81. ACA pointed out that the motion was moot based on the removal of the liens (Appendix 758-60), that Eddie's had not presented a colorable claim that the newly discovered "evidence" could not have been discovered before trial with the exercise of due diligence (Appendix 761-63), and that the alleged legal status of the liens was not "newly discovered evidence" but, rather, a new construction of long known, publicly recorded and available liens. Appendix 757-58.

The Court heard Eddie's motion to vacate the judgment on July 29, 2022. Appendix 799-816. The Court reviewed Eddie's history of using the liens for improper purposes: "I was very skeptical about the motives and intent and behavior of this defendant, and that he had used the contract for improper purposes. I thought it was incredibly

unclean hands . . . ." Appendix 804. The Court also noted that this pattern had continued post-trial insofar as "the defendant wouldn't even put in for an amnesty program. I had to order him to participate in a program that basically made hi[m] $34,000 – that he expected to pay at trial – zero." Appendix 805. Counsel for Eddie's denied that the Court had forced it to participate, claiming that Eddie's had declined to seek amnesty because doing so would render its motion to vacate frivolous. *See* Appendix 812 ("[I]f we didn't pay that money, we would not have had an equitable basis to come before the Court.").

The Court reviewed what it had learned about Eddie's motion to vacate:

> Your client didn't want to purchase under the amnesty program because it would remove his leverage to vacate the judgment. So what he was doing was saying, no, I want to cling to the underwriters opinion. I don't want to cling to reality, which is, I get to clear off all these liens for nothing instead of the 38,000 that was contemplated.
>
> So he resisted that, basically, to use it to vacate a judgment. Again, something that adds another layer to why I think the conduct on behalf of the defendant is actually inequitable. And it's at the point where it's been so obstructionist that it's contemptuous.

Appendix 812-13. The Court generously decided not to invoke contempt. Rather, it merely denied Eddie's motion "for reasons on

the record – stated in the record and the written materials as well as what's stated on the record here." Appendix 811. The Court memorialized that decision in an Order. Appendix 823-24.

As part of the hearing, the Court ordered the parties to proceed with closing, because the liens had been removed under the amnesty program, leaving no further bar to concluding the transaction. Appendix 813-14. The parties moved to closing and completed the transaction. ACA now owns and is in possession of the Property.[1]

Eddie's appealed from the Court's Order denying the motion to vacate. Appendix 825-28.

SUMMARY OF ARGUMENT

Eddie's seeks to evade selling land under a 2019 contract. Having lost at trial, Eddie's claimed it was entitled to relief from judgment via newly discovered evidence. The trial focused on Eddie's ability to clear County Code Liens of about $37,000. A few weeks later, Eddie's moved under Rule 1.540 claiming to have just learned

[1] Although the closing on the property occurred after the Circuit Court had ruled on Eddie's Motion to Vacate and is therefore not part of the record on appeal, we note that the fact that the Property was sold without any title exception listed for any Palm Beach County lien demonstrates the frivolity of Eddie's interpretation of the liens.

that clearing them would cost $507,395.42. Contemporaneously, Eddie's was compelled to partake of an amnesty program, removing the liens for a $750 fee. Eddie's lost its direct appeal but pressed its Rule 1.540 Motion. The summary denial should be affirmed.

First, **the Motion is rendered *moot* because the liens were cleared** by amnesty. The Court heard counsel for Eddie's concede that the liens were removed via amnesty and that this threw a "wrench" in his Motion. Relief requires that the new evidence change the result at a new trial, and Eddie's admitted the purported new evidence no longer changed anything. Instead, Eddie's develops a conceit – unsupported in caselaw – that the result would have been different ***at the original trial*** had Eddie's been able to invoke its half-million-dollar lien theory. The Circuit Court – openly expressing its frustration with the efforts to evade closing and ruminating about contempt – instead simply denied the motion and told Eddie's to close, which it did. Eddie's asserts that this should have been done via an evidentiary hearing. But Eddie's never disputed the basic facts about the amnesty or the present status of the liens. It offered no colorable showing of anything to litigate at an evidentiary hearing.

Second, the Court expressly adopted all of ACA's written opposition, including that **Eddie's failed the *due diligence* requirement**. 1.540 applicants must prove, via affidavit, vigilance regarding new evidence. Such a showing is impossible here – the liens were public record, and Eddie's own Answer cited the liens to excuse nonperformance. Eddie's demands an evidentiary hearing to vacate a judgment that resulted after a trial focused largely on the liens. The "new evidence" is offered through a trial witness as an underwriter's opinion of the legal operation of the long-known public record liens. Instead of justifying why it could not secure such an opinion – based on the long-known publicly available liens – for use at trial, Eddie's just asserts that the opinion arose after trial. Eddie's failure even to broach efforts to understand the liens earlier, especially given the identification of this issue in Eddie's Answer, is fatal. There is facially no showing of diligence and no basis for an evidentiary hearing.

Third, this Court can affirm on the alternate basis that **Eddie's "new evidence" was *ineligible* under 1.540** in three ways. First, "new evidence" must be evidence in existence at the time of trial. Eddie's asserts that the agent announced the half-million-dollar lien problem for the first time ***after*** trial. Second, 1.540 evidence must be

admissible. Instead of an affidavit from either agent or underwriter, Eddie's relies on its counsel's double-hearsay statement about what the title agent told counsel that the underwriter told her. Third, even assuming a direct affidavit from the underwriter's counsel about the legal operation of the liens, that would be expert opinion on an ultimate legal issue – "evidence" barred by our Supreme Court.

Eddie's constant refrain is that it should get an evidentiary hearing. But Eddie's needed to make a colorable showing of what evidence it would adduce meriting that relief. Its affidavits failed at this in the Circuit Court. Its initial brief fared no better. It may not be heard in reply to articulate what it was required to do long before.

STANDARD OF REVIEW

Denial of relief from judgment under Florida Rule of Civil Procedure 1.540(b) is reviewed for abuse of discretion. *Schuman v. Int'l Consumer Corp.*, 50 So.3d 75, 76 (Fla. 4th DCA 2010); *Freemon v. Deutsche Bank Trust Co. of Americas*, 46 So.3d 1202, 1204 (Fla. 4th DCA 2010). Thus "the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonable' test to determine whether the trial judge abused its

discretion." *J.J.K. International, Inc. v. Shivbaran*, 985 So.2d 66, 68 (Fla. 4th DCA 2008) (*quoting Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980)). Accordingly, "if reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Id.* at 68 (*quoting Canakaris*, 382 So.2d at 1203).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT EDDIE'S MOTION HAD BEEN MOOTED BY THE AMNESTY

"That judgments of trial courts are presumed final is axiomatic." *Junda v. Diez*, 848 So.2d 457, 458 (Fla. 4th DCA 2003) (citing *Bane v. Bane*, 775 So.2d 938, 941 (Fla. 2000)). Because that "finality is eroded by vacating judgments based on a claim of newly discovered evidence," the "remedy should be seldom granted." *Id.* at 458.

This is not one of the rare cases meriting the extraordinary remedy. The entire basis of Eddie's motion was that it suddenly learned for the first time post-trial that removing the liens would cost more than the purchase price, thereby rendering specific performance inequitable. *See, e.g.*, Appendix 631, 633. But that understanding was mistaken. The liens could be removed for a total

cost of $750. They have now been removed. Eddie's has sold the property to ACA. The case is over. Any misunderstanding that Eddie's had about the cost of removing the liens is now moot. That was one of the bases for the Circuit Court denying Eddie's motion. *See* Appendix 811, 823-24.

Strangely, Eddie's spends most of its brief pretending that this state of affairs doesn't exist. It spends pages and pages (*see* Eddie's Br. 14-20) discussing marital dissolution cases regarding valuation of assets, as though this were a case in which the $5 vase bought at a garage sale turns out to be a priceless Ming artifact. Those aren't the facts here; the vase has now shattered, and there is no point holding a trial on what the correct valuation should have been if the vase had still existed.

Eddie's addresses the Circuit Court's rationale for denying the motion in only one sentence of its brief:

> However, as discussed above, the parties' mutual misunderstanding of the true amount required to clear the liens permeated the entire trial, impacting the equities between the parties and the defenses Eddie's could have raised. The result of the trial almost certainly would have been impacted by the newly discovered evidence. ***Whether the fortuitous amnesty program that arose after judgment mooted these concerns was a question of fact that should have been examined in an evidentiary hearing.***

Eddie's Br. 23 (emphasis added). That is more a naked assertion than an argument.

As Eddie's admits (Eddie's Br. 14), in order to obtain an evidentiary hearing on its motion, it was required to provide a "colorable basis" of entitlement to relief. As this Court has observed in the related area of relief for fraud under Rule 1.540(b)(3), evidentiary hearings are wasteful unless the movant shows what it would prove at such a hearing, and that such proof would entitle it to relief. *See Freemon v. Deutsche Bank Trust Co. Americas*, 46 So.3d 1202, 1204 (Fla. 4th DCA 2010) ("If a motion does not set forth a basis for relief on its face, then an evidentiary hearing is unnecessary, the time and expense of needless litigation is avoided, and the policy of preserving the finality of judgments is enhanced.") (citing *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 20 So.3d 952, 955 (Fla. 4th DCA 2009)).

Here, Eddie's has utterly abdicated such a showing. It asserts that it should have been afforded a hearing to determine whether the amnesty program mooted its complaint, but it doesn't ever say what evidence it would bring to such a hearing. The entire basis of its

motion was that the liens had turned out to be so burdensome that it rendered specific performance inequitable. It is now undisputed that basis was wrong; Eddie's has admitted that the liens were removed – and for far ***less*** money than Eddie's anticipated, not grossly more. *See* Appendix 739. The Property has been sold. Eddie's has never articulated a basis on which it would be entitled to relief given what the facts are now known to be. In the absence of such a colorable basis, the Circuit Court did not abuse its discretion in denying the motion without holding an evidentiary hearing.

Knowing that the amnesty program rendered its argument frivolous on a forward-going basis, Eddie's puts blinders on and tries to focus exclusively on whether its purported newly discovered evidence would have changed the result if the facts were what the parties believed them to be on the date of trial. In other words, Eddie's presents its argument as though the proper procedure were to have the parties hop into Doc Brown's DeLorean, travel back in time to June 7, 2021, and litigate in ignorance of what everyone now knows the facts to be. Suffice it to say, the trial court rejected such an approach, Eddie's has offered no authority for such an approach, and ACA's research has uncovered none.

The one case Eddie's cites for its backward-looking approach is *SPS Corp. v. Kinder Builders, Inc.*, 997 So.2d 1232, 1234 (Fla. 3d DCA 2008) ("A review of the record shows that the trial court did not abuse its discretion in finding that Kinder demonstrated due diligence in discovering new evidence as to the alleged relationship between SPS and Exterior, and in concluding that this evidence ***would probably have changed the result of the ruling on the dismissal motion***.") (emphasis added). Eddie's is wrong; the case supports affirmance here.

In *SPS*, the Circuit Court had dismissed one of the counts because one party, Kinder, was not in privity with another party, SPS, with respect to a payment bond. 997 So.2d at 1233. Nearly a year after judgment, Kinder moved under Rule 1.540(b)(2), claiming newly discovered evidence showed that it ***was*** in privity of contract with SPS. *Id.* The Circuit Court granted the motion and, in the course of ruling on the motion, determined that privity of contract between the parties did exist. *Id.*

On appeal, the Third DCA affirmed the Circuit Court's grant of the Rule 1.540 motion but reversed the grant of substantive relief on the merits because hearings on Rule 1.540 motions must be limited

to whether or not the motion itself should be granted. *Id.* at 1234. It therefore vacated that portion of the court's order and remanded for ***subsequent*** proceedings on the merits, in which the newly discovered evidence could be presented and evaluated. *Id.*

That holding demonstrates the purpose of Rule 1.540 motions, which is to determine whether or not the party filing the motion should be entitled to further proceedings to show it is entitled to relief. Thus, when the Court said that the "evidence would probably have changed the result of the ruling on the dismissal motion" (*id.* at 1234), it meant that the evidence would probably have changed the result of the ruling on the dismissal motion ***during a subsequent hearing on the merits***.

The same is true here. Eddie's has said all along, both in its motion papers (*see* Appendix 635) and in hearings (*see* Appendix 738) that the remedy it seeks is a new trial. At that new trial, the facts would be litigated as they are ***at the time of that trial***, ***not*** as of the time of the ***prior*** trial. Eddie's wants the ability to litigate whether the value of performance has been destroyed by the liens (Eddie's Br. 21) and whether the contract is voidable because of a mistake of fact as to the payment amount of the liens (*see id.* at 21-

22). But there is nothing to litigate now. The liens are gone. There can be neither a frustration of purpose of a contract that has already been fully performed, nor a mistake as to the payoff balance of liens that have already been removed. Eddie's failed to make a colorable claim of entitlement to the only relief it seeks (*i.e.*, a new trial) because the facts now undisputedly moot any arguments Eddie's originally intended to make – which Eddie's counsel called a "wrench" in its motion. Under these circumstances, the Circuit Court did not abuse its discretion in denying Eddie's motion without conducting a hearing.

Indeed, it was Eddie's itself that provided the Circuit Court with the binding legal standard for adjudicating its motion in its Notice of Filing of Supplemental Case Law (Appendix 782-98). The very first case cited was *Snook v. Firestone Tire & Rubber Co.*, 485 So.2d 496 (Fla. 5th DCA 1986). That case provided the "requirements for granting relief from a judgment, decree, order, or proceeding on the grounds of newly discovered evidence." *Id.* at 498. The first such requirement is "that it must appear that the evidence is such ***as will probably change the result if the new trial is granted***." *Id.* (emphasis added).

It is undisputed that Eddie's purported "newly discovered evidence" has been mooted by the removal of the liens under the amnesty program. Eddie's has argued only that the result might have been different if the facts were as they were believed to be at the time of trial, never arguing or raising a colorable basis that it could prevail at a subsequent new trial under what the facts are now known to be. The Circuit Court could not have abused its discretion in relying on the legal authority ***Eddie's itself provided***, reaching the only possible conclusion that no colorable basis for forward-going relief had been shown, and denying the motion without holding an evidentiary hearing. The judgment should be affirmed.

II. THE CIRCUIT COURT PROPERLY DENIED RELIEF BECAUSE EDDIE'S FACIALLY FAILED TO DEMONSTRATE DUE DILIGENCE

A. Eddie's Asserted Only the Conclusion that the "Evidence" Could Not Have Been Timely Uncovered.

The Court's decision focused heavily on the most unusual aspect of Eddie's request for relief – the fact that it saved about $37,324.50 by not having to pay off the liens, yet now wants the transaction voided as inequitable. But there is an equally glaring legal shortcoming. Eddie's sought relief for "newly discovered

evidence" a few weeks after trial. That trial focused on the amount/nature of the liens, but Eddie's "new evidence" was that a trial witness told Eddie's weeks later for the first time that the liens were really a half-million dollars, not the roughly $37,000 discussed at trial. Eddie's is literally claiming that it can put ACA and the Court through years of pre-trial and trial proceedings focused on the amount of the liens, lose, but then re-open the judgment because it has found someone to opine that its understanding of the liens was all wrong throughout the proceedings.

One would expect an elaborate showing of due diligence to excuse this staggering lapse. Instead, Eddie's relies exclusively on conclusory assertion. The assertion cannot suffice to reopen the proceedings and waste the Court's time with an evidentiary hearing. ACA argued lack of due diligence in its Response Memo (Appendix 761-63), and the Circuit Court expressly adopted the rationales in that Memo as justifying denial. Appendix 811.

The entirety of Eddie's due diligence position is a single verified sentence in its partially verified Motion to Vacate – a sentence that is at best a legal conclusion lacking any substance, *see infra* at 31

(explaining the legal irrelevance of conclusory assertions). The pertinent, verified portion of the Motion to Vacate read:

> 18. Defendant had no knowledge that a full release was required to obtain marketable title to the Property until after the September 3, 2021 Email was sent.

Appendix 627. Then, in argument, the Motion asserts that "this fact could not have been discovered through due diligence before trial or before the time to move for a new trial because this determination was not made by the Underwriter and this information was not made known by the Title Agent until after these time frames had expired." Appendix 632 (Motion to Vacate at 13). Taken at face value, the verified portion of the Motion asserts that Eddie's did not know of the supposed "direct" vs. "cross-attaching" lien "problem" until a few weeks after the trial and that the "determination" was not made until this point. Missing is any explanation for why Eddie's could not have learned of this earlier; the core information (the liens themselves) was publicly available, and Eddie's had every opportunity to seek discovery, examine witnesses, and/or secure expert opinion about the long-known publicly available liens earlier.

This facially fails to establish due diligence. Rule 1.540(b)(2) permits a court to "relieve a party … from a final judgment" based on

"newly discovered evidence ***which by diligence could not have been discovered in time to move for a new trial or rehearing***." The movant bears the burden of proving due diligence. *Casteel v. Maddalena*, 109 So.3d 1252, 1258 (Fla. 2d DCA 2013) ("[T]o obtain relief from judgment based on newly discovered evidence, the movant must demonstrate that [ ]he could not have discovered the evidence through due diligence within the time to move for rehearing or a new trial."). "It is not sufficient to merely show that the evidence was not known or discovered by counsel prior to trial." *Brown v. McMillian*, 737 So.2d 570, 571 (Fla. 1st DCA 1999). "Rather, the movant must make his or her vigilance apparent." *Id.* (*citing King v. Harrington*, 411 So.2d 912, 915 (Fla. 2d DCA 1982)). Each of Florida's DCAs has applied a longstanding rule – established by our Supreme Court – that a party seeking relief for newly discovered evidence "***must make his vigilance apparent***; for if it is left even doubtful that he knew of the evidence, or that he might, but for negligence, have known of and produced it, he will not succeed in his application." *Mitchell v. State*, 31 So. 242, 244 (1901) (emphasis added) (quoting *Milton v. Blackshear*, 8 Fla. 161 (1858)).

Here, all Eddie's has done is ***assert*** the failure to learn of the title agent's/underwriter's position until September. Left unanswered on the face of Eddie's verified claims is any explanation for ***why*** Eddie's declined to seek the information sooner. Eddie's motion is predicated on an intentional ambiguity as to whether the supposedly new evidence is Eddie's changed belief that the liens were direct, as opposed to cross-attaching, or instead whether it is the opinion issued by the title agent/underwriter that no clean title could be provided. Compare Appendix 627 ("[A]fter the telephone call, Ms. Athanasiou conducted a subsequent review and confirmed that the PBC liens were in fact direct liens and not cross-attaching liens, therefore a full release was required.") with Appendix 632 (arguing that the evidence was new because "this determination was not made by the Underwriter and this information was not made known by the Title Agent" until after the trial). In essence, aware that the fundamental issue concerns the legal nature of the liens on its ***own*** property that it was required to have known about, Eddie's attempts to bootstrap the evidence as being "new" by pointing to the date that a third party told it about the legal nature of the liens on its own property that it was required to have known about.

Either way, the subject plainly affects the Property, the transaction, and the trial. Indeed, the nature and amount of the liens was the ***focus*** of the trial. *See infra* at 33 (block quoting trial testimony about the liens from the same witness touted as providing the "new" evidence after trial). But Eddie's verification does not even broach the subject of efforts – much less vigilance – to ascertain the liens' true nature or even the title agent's/underwriter's opinion of them. As a matter of law, then, Eddie's Motion to Vacate is facially defective for failing even to allege facts bearing upon due diligence – what efforts were undertaken to address the situation earlier. If the evidence is the liens themselves, they are public record, and Eddie's fails to offer any explanation for failing to investigate them at or prior to trial. *See infra* at 34-35 (showing that matters in the public record can never be subject to due diligence). If the "evidence" is characterized as what the title agent told Eddie's about the title agent's opinion of how to secure "marketable" title (*i.e.*, pay a half-million dollars), again there is no explanation for failing to seek this information at or before trial from a witness who testified.

Nor is there any question legally that Eddie's had to make such a showing via affidavit that facially made the case for its vigilance –

not just failure to learn. A Florida treatise is directly on point and contemplates precisely this situation. In § 91 *Requirement that Evidence Could Not Have Been Discovered Before Trial Through Due Diligence – Necessity of Affidavit*, Florida Jurisprudence summarizes longstanding Florida doctrine:

> Where a motion for new trial based on the ground of newly discovered evidence is made, all the necessary facts should be supported by affidavits that specify the means used to secure the evidence in the first instance. It is not sufficient proof of diligence merely to assert in the affidavit that the moving party has used every endeavor to obtain evidence bearing on the issues involved in the case, ***nor is it sufficient proof to show that the newly discovered evidence was not known to the moving party's counsel until after the former trial***. The party applying for a new trial on the grounds of newly discovered evidence ***must make the party's vigilance apparent.*** If the issue of whether the party knew of the evidence or that the party might, but for the party's negligence, have known of and produced it is left doubtful, the party will not succeed in the party's application.

Fla. Jur. 2d § 91 (emphasis added). Eddie's affidavits do precisely what Florida law deems insufficient – assert that the newly discovered evidence was learned after trial without claiming any effort to learn earlier, much less proving "vigilance." That omission was intentional. Eddie's always tried to scuttle the deal on the basis of the liens (*see* Ans. Appendix 14 (Answer paragraph 10)) but failed to develop the issue factually at trial.

Two related points about the verification and affidavit need be made. First, Eddie's principal, Adesh Sookhoo, only partially verified the Motion to Vacate, listing certain verified paragraphs. Appendix 641 (Verification of Defendant's Motion to Vacate listing discrete, verified paragraphs). The entire Motion therefore did not help Eddie's carry its due-diligence burden – only the verified paragraphs.[2] Second, the Motion also attaches an Affidavit from Cory Carano, Esq. Appendix 682-84. Mr. Carano was Eddie's fifth counsel in this matter, and the affidavit recounts events starting with his involvement around August 30, 2021. This is critical because – on the face of his Affidavit alone – he cannot personally testify to events predating his involvement, *i.e.*, the trial, pre-trial and initial transaction periods. He cannot testify to the pre-trial and trial "vigilance" to discover the supposed nature of the liens. As shown above, testimony to the date of discovery is not sufficient to establish vigilance, and thus the Carano affidavit is irrelevant to this inquiry.

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2 Motions under Rule 1.540 must be verified under oath and only affidavit evidence satisfies a movant's burden. *Arriechi v. Bianchi*, 318 So.3d 4, 6 (Fla. 4th DCA 2021); *Wright v. Emory*, 41 So.3d 290, 292 (Fla. 4th DCA 2010).

Eddie's complains bitterly of being deprived of an evidentiary hearing, but facially gave the Circuit Court no basis for one on a critical element. On due diligence, Eddie's verification and affidavit aver only that Eddie's learned after the trial of the supposedly crippling amount of the liens. There was no effort to show earlier vigilance to ascertain the supposed facts even though they would have been central to, even controlling of, any sale. There was facially no basis for an evidentiary hearing. Nor does the bare assertion that the facts "could not have been discovered through due diligence" offer any legal significance given its conclusory nature. Across and between all forms of pleading and argumentation, all Florida courts discount such statements as mere legal conclusions entitled to no weight. *See, e.g.*, *Barrett v. City of Margate*, 743 So.2d 1160, 1163 (Fla. 4th DCA 1999) ("It is insufficient to plead opinions, theories, legal conclusions or argument."). This is a sentiment echoed in countless decisions.[3]

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[3] *Bankers Trust Realty, Inc. v. Kluger*, 672 So.2d 897, 898 (Fla. 3d DCA 1996) (dismissal with prejudice for reliance on "insufficient legal conclusions"); *Ocala Loan Co. v. Smith*, 155 So.2d 711, 716 (Fla. 1st DCA 1963) ("Mere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact…"); *Everglades Protective Syndicate, Inc. v. Makinney*, 391 So.2d 262, 265

B. Even if Eddie's Facially Asserted Due Diligence, it Would Be Contradicted by Considerable Record Evidence Showing Eddie's Deliberately Skipped Myriad Chances to Investigate the Liens.

Eddie's verification/affidavit was not the only information available to the Circuit Court. That is, even if Eddie's had asserted ***any*** efforts to ferret out the supposedly deal-killing liens, it would run squarely into a legal and factual tsunami of contrary record evidence with which the Circuit Court was well acquainted. Central to this is the fact that the Court presided over pre-trial and trial proceedings at which the liens were not merely ***a*** focus, but ***the*** focus. And the Circuit Court's overall conclusions about Eddie's approach to the liens – a pretext to break the Contract verging on contempt – already negate any notion of due diligence, much less vigilance. The failure of Eddie's Motion to even facially broach steps taken to uncover the "new evidence" is all the more glaring in light of these proceedings.

The trial was not just focused on the liens, it was focused on the very witness that Eddie's uses to reveal the "new evidence" -- title

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(Fla. 4th DCA 1980) (quashing mandamus that relied on an "allegation [that was] a mere legal conclusion, insufficient to frame an issue for litigation.").

agent Marianne Terrizzi. *See, e.g.*, Appendix 626 ("Terrizzi advised, for the very first time, that Partial Release was insufficient, and the underwriter would not insure title unless a full release was obtained.") (Motion to Vacate at 7 & ¶14). Terrizzi's trial testimony is fatal to any claim of due diligence because she explained that Eddie's principal insisted on handling the liens himself:

> Q. Do you typically, as a closing agent, ask for payoff amounts?
>
> A. Yes, we ask for them.
>
> Q. Why didn't you do that in this case?
>
> A. Because the seller was going to provide them.
>
> Q. So you relied on the seller. Do you have any idea whether or not he engaged in good-faith efforts to get those numbers?
>
> A. I believe he did.
>
> Q. Tell me what you know.
>
> A. I know he was working directly with the county to negotiate liens, from what I understand, were very high.
>
> Q. He was trying to negotiate them, but he could have got an amount, correct?
>
> A. I don't know. I didn't ask the county for a payoff.

Appendix 175. Elsewhere, Terrizzi confirmed that ***she*** could have called Palm Beach County and got the correct lien payoff number, but that she was relying on Mr. Sookhoo to clear the liens. Appendix 176, 183. Eddie's is a repeat customer of Terrizzi's title agency, and Terrizzi couldn't even recall how many transactions she undertook with Eddie's principal, only committing to "[m]ore than a dozen, probably." *Id.* at 177.

Counsel for Eddie's had ample opportunity to cross-examine Terrizzi and develop the information on which they now rely. Similarly, Eddie's could have subpoenaed agents from Palm Beach County and the underwriter for trial testimony. Nor did Eddie's even take written discovery or depositions of these witnesses, despite the fact that Eddie's Answer in 2019 first raised the issue that the liens were more than contemplated. Ans. Appendix 14, 16-17 (Answer at Paragraphs 10 and 27 stating the "amount demanded by Palm Beach County is significantly in excess of $38,000.00" and invoking frustration of purpose).

Invoking liens as a barrier to selling land requires an even more compelling showing of due diligence given the publicly available

nature of the liens. It is undisputed that the liens were recorded in the Palm Beach County land records. Publicly available information cannot, as a matter of law, remain undiscovered through due diligence. *See Strickland v. Thelman*, 665 So.2d 284, 287 (Fla. 5th DCA 1995); *Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir. 1987) ("evidence that is contained in the public records at the time of trial cannot be considered newly discovered evidence."); Fla. Jur. 2d § 317 *Relief from Judgment for newly discovered evidence* ("An appellate court decision issued after the trial does not constitute newly discovered evidence, ***nor does evidence that was contained in the public records at the time of trial***.") (emphasis added). *See also IMC Mort. Co. v. Vetere*, 142 A.D.3d 954 (N.Y. Ct. App. 2016) ("[e]vidence which is a matter of public record is generally not deemed new evidence which could not have been discovered with due diligence before trial") (quoting *Federated Conservationists of Westchester County v. County of Westchester*, 4 A.D.3d 326, 327, 771 N.Y.S.2d 530 (N.Y. Ct. App. 2004)). The bottom line is that, even if Eddie's had facially averred some diligence with respect to the liens, it would be utterly belied by what the Circuit Court learned of the situation through the trial.

III. NEITHER THE LEGAL STATUS OF THE LIENS NOR THE TITLE AGENT'S TESTIMONY QUALIFIES AS "NEWLY DISCOVERED EVIDENCE" UNDER RULE 1.540, WHICH INDEPENDENTLY JUSTIFIES AFFIRMANCE

A. Introduction: Eddie's "New Evidence" is So Unorthodox as to Simultaneously Run Afoul of Multiple Doctrinal Limits on Relief from Judgment.

The Circuit Court quite properly focused on the most egregious failing of Eddie's argument – the liens Eddie's complained of were extinguished via amnesty, putting Eddie's in ***better***, not worse, position than contemplated by the trial judgment. But, given the stakes of undoing a closed land transaction, ACA does not have the luxury of resting on this most obvious failing or even the secondary point that Eddie's failed to allege, much less prove, its due diligence. Instead, ACA is compelled, given the stakes, to raise the tertiary issue that, even if the supposed evidence could change the result and was subject to due diligence, it would never even qualify as "evidence" subject to relief from judgment to begin with. The Court can affirm on this alternative ground.

Eddie's form of "evidence" – its counsel averring that a title agent told it that a title insurer told her that the liens were "direct attaching" and would cost $500,000 to remove – is not qualifying

under Rule 1.540 for multiple reasons. Eddie's argument is so novel that it stretches the boundaries of relief-from-judgment caselaw by disguising an interpretation of "evidence" arising after trial, presented through hearsay and that would have a title-examiner opine about the legal effect of liens as an expert. None of this is permitted.

B. Relief from Judgment Cannot be Based, as Eddie's Urges, on Evidence that Came into Existence After Trial.

One way that Eddie's seeks to deflect its lack of due diligence is by claiming that "this determination was not made by the Underwriter and this information was not made known by the Title Agent until after these time frames [to seek new trial] had expired." Appendix 632 (Motion to Vacate at 13). If Eddie's is truly seeking to cast the "new evidence" in this light – the "determination" and its announcement rather than the liens themselves – then Eddie's will achieve only a pyrrhic victory. That is, while seemingly augmenting its diligence claim (although ineffectively), all Eddie's does is run squarely into the problem of relying on "evidence" that theoretically would have come into existence ***after*** the trial. That separately destroys any colorable claim for relief.

The newly discovered evidence contemplated by Rule 1.540(b) refers to evidence that ***existed at the time of trial*** but was not discoverable prior to trial despite due diligence. This requirement – that the evidence exist ***at the time of trial*** – has not been the subject of extensive caselaw development in Florida but is still a feature of Florida law. *See, e.g.*, *Mistretta v. Mistretta*, 31 So.3d 206, 208 (Fla. 1st DCA 2010) (explaining that "allegedly 'newly discovered evidence' cannot simply show some change in circumstances since the trial"). *Mistretta* denied a new trial for newly discovered evidence where the evidence concerned valuation of a business affected by a recession that "tend[ed] to prove a change in circumstances occurring after the October 31, 2007, date of valuation, and relates, at least in part, to events that transpired after the trial." *Id.* at 208 (citing *Dulle v. Dulle*, 325 So.2d 441, 442 (Fla. 3d DCA 1976) (refusing post-judgment petition for rehearing based on matters that were not existent prior to or at trial)). *Cf. State v. Kurns*, 397 So.2d 463, 464 (Fla. 2d DCA 1981) ("Newly discovered case law does not constitute newly discovered material evidence capable of changing the result of the trial."). This rule is also fully consistent with Florida's larger Rule 1.540 caselaw requirement of due diligence. That is, if litigants could

rely on evidence arising after trial there would be no generalized ***pre-trial*** due-diligence requirement. This Court can adopt this rule with greater conviction given its doctrinal grounding and its solid grounding in federal and multistate caselaw.

It is widely understood that Florida courts should adopt persuasive federal authority interpreting analogous federal rules – and that body of caselaw confirms this point. *Gleneagle Ship Management Co. v. Leondakos*, 602 So.2d 1282, 1283-84 (Fla. 1992) (Florida and Federal Rules are harmonized where possible and "[t]hus, we look to the federal rules and decisions for guidance in interpreting Florida's civil procedure rules."). The federal analog to Rule 1.540 is relief from judgment under FRCP 60(b)(2).[4] Summarizing federal law, 35B C.J.S. Federal Civil Procedure § 1288 explains, "[t]he phrase 'newly discovered evidence' as used in the Rule, is construed to mean evidence of ***facts in existence at the time of the trial***, of which the aggrieved party was excusably

4 "[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: .... (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2).

ignorant." (emphasis added). Multiple courts of appeals agree. *See Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 498 (8th Cir. 2001) ("The IRS report, as evidence that was not in existence at the time of trial but was prepared after the trial, does not constitute newly discovered evidence."); *Corex Corp. v. U.S.*, 638 F.2d 119, 121 (9th Cir. 1981) ("Cases construing 'newly discovered evidence,' either under 60(b)(2) or Rule 59, uniformly hold that evidence of events occurring after the trial is not newly discovered evidence within the meaning of the rules."). The rule has been unstintingly applied by multiple district courts.[5] *See also* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2859 at 182 (explaining federal requirement that evidence be in existence at time of trial).

Relief from judgment in ***state*** courts is also limited to evidence in existence at the time of trial. Surveying state procedures, Corpus

[5] *Hyde v. Franklin American Mortgage Co.*, 2021 WL 1864032, *2 (D.S.D. 2021) ("Rule 60(b)(2) only permits consideration of facts which were in existence at the time of trial."); *Lapiczak v. Zaist*, 54 F.R.D. 546, 548 (D. Vt. 1972) (witness opinions developed after trial were not "new discovered evidence" that would permit relief from judgment); *Hughes v. Sanders*, 287 F. Supp. 332, 334 (E.D. Okla. 1968) ("It is clear that the 'newly discovered evidence' on which the Defendants seek to base their Motion must have been in existence at the time of trial.").

Juris Secundum concludes, "[o]rdinarily, newly discovered evidence is limited to evidence that was in existence at the time of trial or judgment." 49 C.J.S. Judgments § 407 *Newly Discovered Evidence as Ground for Vacating Judgment, Generally* (citing cases from multiple states). *See also Ford v. Ford*, 578 S.W.3d 356, 365 (Ky. Ct. App. 2019) (denying relief from judgment without evidentiary hearing and noting that "it is improper for a trial court to rely upon evidence of events that occurred subsequent to the trial in ruling on a CR 59.05 motion [Kentucky analog to Florida's Rule 1.540]."); *State ex rel. C.L.*, 166 P.3d 608, 611 (Utah 2007) (listing Utah's criteria for its analog to Florida's Rule 1.540 for newly discovered evidence, including that the evidence "must relate to facts which were in existence at the time of trial.") (quoting *In re Disconnection of Certain Territory*, 668 P.2d 544, 549 (Utah 1983)).

To the extent that Eddie's tries to argue that it was unable to discover the evidence because it was only announced by the title examiner, through Terrizzi, ***after*** trial, such "evidence" would post-date the trial and run squarely afoul of this arcane but solid rule.

C. Eddie's Motion Impermissibly Relied on Inadmissible Evidence.

1. Rule 1.540(b) new evidence must be admissible.

It is axiomatic that the new evidence justifying relief from judgment must be admissible in any new trial -- it has to be capable of changing the result at that new trial. *See supra* at 20-23; *see also* 35B C.J.S. Federal Civil Procedure § 1288 *Newly Discovered Evidence* ("courts will grant relief from a judgment on the ground of newly discovered evidence ***only if that evidence is competent***…") (emphasis added). Other U.S. states have the same requirement. *See* 49 C.J.S. Judgments § 408 *Character of Newly Discovered Evidence Justifying Opening of Judgment* ("To justify opening a judgment, newly discovered evidence ***must be admissible***…") (emphasis added). At least two state supreme courts have emphasized this.[6] Eddie's Motion to Vacate is not predicated on admissible evidence, but rather his fifth counsel's statement about what the title agent

[6] *Frazier v. Burlington Northern Santa Fe Corp.*, 811 N.W.2d 618, 631 (Minn. 2012) ("Moreover, to warrant a new trial the newly discovered evidence must be relevant and admissible."); *Omerod v. Heirs of Kaheananui*, 172 P.3d 983, 1021 (Haw. 2007) (motions for a new trial for newly discovered evidence under Hawaii's Rule 60(b)(2) require the evidence "must be admissible and credible").

told him that an underwriter told her about "direct" versus "cross-attaching" liens and how they should be satisfied. There are two independent barriers to admissibility.

2. Eddie's "new evidence" is inadmissible hearsay.

It should have been very easy for Eddie's to provide its purported new evidence in direct form. If that new evidence was the opinion of the underwriter, it could have provided an affidavit from the underwriter setting forth what the underwriter was and was not willing to underwrite, and the reasons why.

Instead, the "new evidence" is set forth in the Affidavit of Cory Carano. Carano avers that Ms. Terrizzi emailed him that the underwriter's counsel stated that, "[t]he CEB liens must be paid in full and assurances must be provided that the violations are cleared." Appendix 683 (Affidavit of Cory Carano at 2 & ¶5). In other words, Eddie's presents its purportedly new evidence in the form of its lawyer saying that Ms. Terrizzi ***told him*** that the underwriter ***told her*** about the nature of the liens.

Thus, Eddie's evidence is an out-of-court statement (really two layers of out-of-court statements) offered for the truth of the matters asserted. It is point-blank hearsay and inadmissible. *Avilez v. State*,

50 So.3d 1189, 1191-92 (Fla. 4th DCA 2010) (Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") (quoting § 90.801(1)(c), Fla. Stat. (2004)). Hearsay is generally inadmissible because the declarant does not testify under oath, the factfinder cannot observe the declarant's demeanor, and the declarant cannot be cross-examined. *Breedlove v. State*, 413 So.2d 1, 6 (Fla. 1982). Although some proceedings can use hearsay (*e.g.*, warrants and probation), no Florida Court has predicated Rule 1.540(b) relief on it. Given the need to show changed outcome at a new trial, reliance on inadmissible hearsay is plainly grounds for denial; it has been in other jurisdictions. *Laudig v. Marion County*, 585 N.E.2d 700, 710 (Ind. Ct. App. 1992) (denying relief from judgment where affidavits in support contained inadmissible hearsay).

3. Eddie's Motion to Vacate is predicated on using impermissible expert testimony on a legal issue.

Assuming, *arguendo*, that Eddie's evidence did not come into existence after the trial and that it had secured non-hearsay testimony, such testimony itself would still be inadmissible as a form

of expert testimony on an ultimate legal issue. That is, the operation and effect of liens and the concept of "marketability" are plainly legal concepts. Eddie's purportedly new evidence is merely an asserted legal conclusion of how the liens operated. If provided an evidentiary hearing, it would seek to provide a purportedly expert opinion to explain to the Circuit Court how the liens operate as a legal matter. Longstanding precedent renders such testimony inadmissible.

This Court, in *Palm Beach County v. Town of Palm Beach*, 426 So.2d 1063, 1070 (Fla. 4th DCA 1983), explained:

> Regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court.

In *Town of Palm Beach* an issue was whether expert testimony had properly been admitted on whether certain roads provided a "real and substantial benefit." *Id.* at 882. This Court answered "no." On certified question, the Florida Supreme Court affirmed. *Town of Palm Beach v. Palm Beach County*, 460 So.2d 879, 882 (Fla. 1984). *See also Pierpont v. Lee County*, 710 So.2d 958 (Fla. 1998) ("Expert testimony is not admissible concerning a question of law."). The DCAs

consistently apply this rule to bar expert testimony on matters of law.[7]

Eddie's could not secure testimony from the title examiner as to the working of liens, marketable title, and payoff amounts – these are legal questions not amenable to expert testimony. They were inadmissible, and the Circuit Court did not abuse its discretion in denying Eddie's motion to vacate without holding a hearing.

CONCLUSION

For these reasons, the judgment below should be affirmed.

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[7] *Briggs v. Jupiter Hills Lighthouse Marina*, 9 So.3d 29, 32 (Fla. 4th DCA 2009) ("The trial court properly disregarded those portions of the expert witnesses' affidavits which were merely legal conclusions."); *Estate of Murray ex rel. Murray v. Delta Health Group, Inc.*, 30 So.3d 576, 578 (Fla. 2d DCA 2010) ("An expert may render an opinion regarding an ultimate issue in a case, but he or she is not permitted to render an opinion that applies a legal standard to a set of facts. [] An expert should not be permitted to testify regarding a legal conclusion that the jury should be free to reach independently from the facts presented to it.") (internal citations omitted, emphasis added); *see also County of Volusia v. Kemp*, 764 So.2d 770, 773 (Fla. 5th DCA 2000) ("If expert testimony … tells the jury how to decide the case, it should not be admitted."); *In re Estate of Williams*, 771 So.2d 7, 8 (Fla. 2d DCA 2000) ("[O]pinion testimony as to the legal interpretation of Florida law is not a proper subject of expert testimony."); *Lee County v. Barnett Banks, Inc.*, 711 So.2d 34, 34 (Fla. 2d DCA 1997).

Dated January 3, 2023

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I certify that the typeface used in the foregoing is 14-point Bookman Old Style, complying with Fla. R. App. P. 9.045(b) and (e). The word count is 9727.

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