IN THE SUPREME COURT OF THE STATE OF FLORIDA

BECKY S. TORREY, etc.
Personal Representative of the Estate
of HELEN ROSE WOODWARD, Deceased,

Plaintiff- Appellant

vs.

CASE NO. 95,841

LEESBURG REGIONAL MEDICAL
CENTER, et al.

Defendants-Appellee
_____/

PETITIONER'S REPLY BRIEF

On Appeal from the
Fifth District Court of Appeal
No. 98-2024

ROGER E. CRAIG & ASSOCIATES

By:_____
ROGER E. CRAIG
Florida Bar No. 628158
Attorney for Plaintiff
1250 North Tamiami Trail
Suite 201
Naples, Florida 34102
(941) 434-5454

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

IN THE SUPREME COURT IN THE STATE OF FLORIDA

BECKY S. TORREY, Duly Appointed
Personal Representative of the Estate
of HELEN ROSE WOODWARD, Deceased,

Plaintiff-Appellant,

vs.

CASE NO: 95,841
FIFTH DCA CASE NO. 98-02024
L.T. CASE NO. 97-2313-CA

LEESBURG REGIONAL MEDICAL
CENTER, KENNETH KUPKE, M.D.,
and ROBERT HUX, M.D.,
Jointly and Severally,

Defendants-Appellees
_____/

PETITIONER'S REPLY BRIEF

Neither of the Respondent's briefs to this Court address its well established philosophy that cases should be decided on their merits.

While other jurisdictions, including the federal courts, (for reasons of expediency, petitioner would argue), have relaxed the requirements for summary judgment, this Court has not.

Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985) is consistent with that philosophy. In that case, the Court held that while preventing the unauthorized practice of the law was a compelling public policy, it could be achieved without violating the at least equally compelling policy of deciding cases on their merits.

The brief on behalf of the Respondent Doctors (at iv) which Petitioner has taken the liberty of separating into its components, accurately states as the "question presented" "Whether a pleading signed by a non-Florida attorney, in violation of Florida Rule of Judicial Procedure 2.060,

- Constitutes a Nullity,

- [Constitutes] a nullity unless the product of excusable neglect or

- [Constitutes] a defective pleading curable by amendment."

The first possibility, that the pleading is a nullity, is an expression of the holding in Nicholson Supply Co. v. First Federal Savings and Loan, 184 So.2d 438 (Fla. 2d DCA 1966), an opinion characterized by rote recitation of precedents and similarly adopted in the instant case. In neither Nicholson nor this case did the Court discuss the policy of this state in favor of trial on the merits nor alternative methods of preventing unauthorized filings.

The second possibility has been viewed as the holding in Lincoln American Life Ins. Co. v. Parris, 390 So. 2d 148 (Fla. 1st DCA 1980). In fact, this was the case on which the trial court relied to conclude the filing by foreign counsel would be "a nullity unless the product of excusable neglect."

Yet that is not the message found in the in the single paragraph constituting that appellate opinion. It was the trial court that deemed the Tennessee attorney's filing a nullity. The language of the appellate court gently but implicitly rejects that conclusion (at 149):

> "We quite agree with the circuit court that the lawyer's casual practice of appearing in a foreign court without permission, Fla. R. Jud. Admin. 2060(b), deserves rebuke;"

The Court proceeds to discuss mitigating factors, ultimately concluding that the "default should be considered the result of excusable neglect."

In effect, without using the magic words, the Lincoln Life Court was opting for disposition of the case on its merits.

The third possibility postulated by Respondent Doctors in their statement of the issue: that the instant pleading constitutes "a defective pleading curable by amendment," while implicit in Lincoln Life is the explicit holding of Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985), and the position that Petitioner urges here.

It is disingenuous to argue that Szteinbaum and Nicholson Supply can be reconciled because the Szteinbaum Court (at 249) declares that they cannot.

> "In our view, Nicholson, with which our holding today directly conflicts, was wrongly decided."

Szteinbaum, then, footnotes and all, makes its compelling case for the proposition that the prevention of the unauthorized practice of law is subordinate to, and does not require abandonment of the proposition that cases should be decided on their merits.

In their brief (at p. 130), Respondent Doctors destroy their own credibility when they assert that "By its own terms, the Szteinbaum decision is limited to the facts of

that case." On the contrary, Szteinbaum was an invitation for an appeal to this Court; an invitation the appellants in that case wisely rejected.

It is pointless to refute decisions from other jurisdictions cited by Respondents that support Nicholson Supply. None of them consider the merits of the philosophy that cases are to be determined on their merits.

Moreover, the Szteinbaum Court (at 250) provides foreign authority in support of its position, including reference to a collection of such cases to be found in 7 A.L.R 4th 1146 (1981).

It is a fair statement that there is some authority for harsh rule of Nicholson, at least as much for the well reasoned position of Szteinbaum, and none which expressly addresses the proposal that cases should, if possible, be decided on the merits.

Respondents make much of the quote from The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980) relating to the protection of the public from "incompetent, unethical, or irresponsible representation."

It is a noble expression of principle, but is no basis for denying Petitioner Torrey a decision of her case on the merits. In Moses, licensed attorneys were protecting their turf against the instrusion of union reprentatives in Unfair Labor Practices cases. In the grand tradition of law givers, this Court cut the baby in half. As prophetic as the title of the

case may be, Moses has no application to the instant issue.

Finally, and desperately, Respondents contend that even under Szteinbaum Petitioner Becky Torrey should be denied a hearing

on the merits because the sins of her foreign counsel were so manifold.

That argument is pure tripe and is without any record support.

As Respondent Doctors Brief accurately asserts, (pp. 1-2) the Complaint was filed on September 16, 1997. "In response to the Complaint, defendants filed a panoply of motions."

Included was a "Motion to Disqualify" Plaintiff's counsel because he was not "a member of the Florida Bar." Those motions were heard on Janaury 29, 1998.

As Respondent Hospital candidly admits in its brief (p. 2).

"At the hearing, Kupke revised his Motion to Disqualify counsel to a Motion to Dismiss, which was adopted by Leesburg."

So the first notice Petitioners had that the rule of Nicholson Supply was being invoked was on the day of hearing. No responsive pleading had yet been filed by any defendant. Moreover, before the motion to disqualify had been revised to become a motion to dismiss, local counsel had entered his appearance. (Appendix to Appellants' Brief on the merits, "C".)

The other factual assertions in the Respondents' briefs relate to motions considered and rejected by the trial court. They are pure blue smoke and mirrors and irrelevant to the issue

under consideration here.

Szteinbaum (250, F,N,6) adopts the requirement that

> "Where, however, a court can conclude that the nature of the non-lawyer's activity "was not casual but [was] persistent and continuous" the drastic remedy of nullifying the non-attorney's

previous acts may of course, be employed." (Citation omitted.)

Here, local counsel had already appeared in the case: before the motion to disqualify Michigan counsel had been revised to a motion to dismiss, before it was argued, and five months before it was ruled on by the trial court.

CONCLUSION

Petitioner renews her request that this case be remanded to the trial court with the instruction that the Szteinbaum criteria be applied.

Respectfully submitted,

ROGER E. CRAIG & ASSOCIATES

By:_____
ROGER E. CRAIG
Florida Bar No. 628158
Attorney for Plaintiff
1250 North Tamiami Trail
Suite 201
Naples, Florida 34102
(941) 434-5454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by regular U.S. Mail to WILLIAM J. McHENRY, ESQUIRE, 19390 West Ten Mile Road, Southfield, Michigan 48075; G.

FRANKLIN BISHOP, III, ESQUIRE, Johnson, Bussey & Baughan, P.A., Post Office Box 531086, Orlando, Florida 32853-1086; RAFEAL E. MARTINEZ, ESQUIRE/JEFFERY BADGLEY, ESQUIRE, Sanders, McEwan, Martinez, Luff & Dukes, P.A., P.O. Box 753, Orlando, Florida 32802-0753 and LARRY D. HALL, ESQUIRE/WILLIAM W. LARGE, ESQJUIRE, Adams, Hill, Reis, Adams, Hall & Schieffelin, 1417 E. Concord Street, Orlando, Florida 32803 this _____ day of _____, 1999.

ROGER E. CRAIG & ASSOCIATES

By:_____
ROGER E. CRAIG
Florida Bar No. 628158
Attorney for Plaintiff
1250 North Tamiami Trail
Suite 201
Naples, Florida 34102
(941) 434-5454