IN THE SUPREME COURT OF FLORIDA

COLBY MATERIALS, INC.,

Petitioner,

vs.

CALDWELL CONSTRUCTION, INC.,

Respondent.
_____/

CASE NO.: SC04-774
LOWER TRIBUNAL
CASE NO.: 5D02-3657

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

All references to COLBY MATERIALS, INC's. Initial Brief of Petitioner will be cited as: (IB.___) with the appropriate page reference inserted.

All references to the Appendix will be cited as: (App. _____) with the appropriate page reference inserted.

STANDARD OF REVIEW

Where there is no record of the testimony of witnesses or of evidentiary rulings and where a statement of the record has not been prepared, a judgment which is not fundamentally erroneous on its face must be affirmed. In re: Guardianship of Georgina H. Read, v.Elizabeth Kenefick, 555 So.2d 869, (Fla. 2nd DCA, 1989).

STATEMENT OF THE CASE AND FACTS

COLBY MATERIALS, INC. appeals the Final Default Judgment entered in favor of CALDWELL CONSTRUCTION, INC. (App.1)

Petitioner, COLBY MATERIALS, INC., failed to timely and properly respond to the CALDWELL CONSTRUCTION, INC. Complaint and the Trial Court entered a Default Judgment. (App.2,5) After default was entered, Petitioner, COLBY MATERIALS, INC., obtained counsel and failed to produce or file any affidavits, failed to move to vacate the default, and failed to request an evidentiary hearing. (See Record on Appeal). Moreover, at the appellate level, Petitioner, COLBY MATERIALS, INC., failed to provide the Fifth District Court of Appeal with any affidavits, transcripts of the hearings or a Stipulated Statement of the evidence. (App.2) In fact, the Respondent disagrees with the Petitioner's contention that the Trial Court's basis for entering default was the non-appearance of counsel, but was a combination of factors including: bad faith defenses set forth by the Petitioner; that the Petitioner was dilatory in responding and was given the opportunity, through counsel, to file proper motions, affidavits or record evidence, but failed to do so! (IB.5,6; App.22-28) The Fifth District Court of Appeal affirmed the trial court's ruling

on the basis that COLBY MATERIALS, INC. failed to provide an adequate record and, therefore, failed to meet its burden of establishing error by the Trial Court. (App.2,3)

ISSUE

WHETHER THE FIFTH DISTRICT PROPERLY UPHELD THE TRIAL COURT'S ENTRY OF FINAL DEFAULT JUDGMENT WHERE PETITIONER FAILED TO PROVIDE ANY RECORD OF THE UNDERLYING PROCEEDINGS OR FACTS.

SUMMARY OF ARGUMENT

The Trial Court did not err in this case. The allegations of the Petitioner that the Trial Court entered a default on the basis of nonappearance of counsel are not supported by the facts in this case, and in fact, the only record of the Trial Court's reasoning indicates that the default was entered based upon findings of bad faith defenses set forth by the Petitioner and that the Petitioner was dilatory in responding even after it was given the opportunity, through counsel, to file proper motions, affidavits or record evidence. The Fifth District Court of Appeal's ruling is not contrary to any established law, but is based upon Petitioner's, COLBY MATERIALS, INC., failure to provide the Court(s) with any record evidence to make a record showing that the Trial Court erred. The burden is on the Petitioner to show that the Trial Court erred. Since Petitioner, COLBY MATERIALS, INC., **failed to provide the Fifth District Court of Appeal with any record showing** that the Trial Court erred, the Fifth District Court had no choice but to uphold the ruling. The Fifth District Court of Appeal's opinion affirming the Trial Court's Entry of Default Judgment should be upheld as the Petitioner has failed to establish that the Trial Court's ruling was fundamentally erroneous.

ARGUMENT

1. The Fifth District Court of Appeal's Opinion Affirming the Trial Court's Entry of Default Judgment Should Be Upheld Because There is No Record Evidence to Support a Reversal.

In the Petitioner's Initial Brief, it alleges that the Fifth District Court of Appeal failed to follow the status of the law as set forth in Torrey vs. Leesburg Regional Medical Center, 769 So.2d 1040 (Fla. 2000); (IB.11) To the contrary, the opinion of the Fifth District Court of Appeal is in line with the Torrey decision. In Torrey, the Supreme Court of Florida merely set forth that "there should be no bright-line rule as to whether a complaint filed by an attorney not authorized to practice law in Florida is a nullity and thus not correctable by amendment adding the name of an authorized lawyer . . ." Torrey at 1042. The Supreme Court of Florida noted that the Fifth District Court of Appeal in Torrey, rather than undertake the "excusable neglect approach" had opted for a bright-line rule in holding that the underlying complaint was a nullity not subject to correction. However, in the instant case, the Fifth District Court of Appeal was unable to take any analytical approach because there was no underlying record provided. (App.2) The problem arises because the Petitioner failed to provide any record evidence so that the Fifth District Court of Appeal could

review the Trial Court's reasoning! (App.2,3) As such, it would be of no consequence even if the Fifth District Court of Appeal's reasoning in the instant case is not in conformance with this Court's holding in Torrey since the pivotal factor in the Fifth District Court of Appeal's analysis in the instant case was that there were no affidavits, transcripts or other record evidence that would establish that the Petitioner met its burden in establishing error on the part of the Trial Court. (App.2) See also, Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). Simply because the Fifth District Court of Appeal's opinion mentions the excusable neglect issue, does not make it contrary to the Torrey ruling. Even if the Fifth District Court of Appeal had analyzed the Trial Court's order(s) solely on the basis of whether excusable neglect existed, and that analysis conflicted with Torrey, the Tipsy Coachman doctrine would preclude reversal as the Petitioner has failed to establish fundamental error by the Trial Court.

2. **The Fifth District Court of Appeal's Opinion Affirming the Trial Court's Entry of Default Judgment Should Be Upheld As the Appellant has Failed to Establish that the Trial Court's Order was fundamentally erroneous.**

The standard of appellate review in this case, as there is no record of the underlying proceedings[1], is that the Trial Court's order must be fundamentally erroneous on its face. In re: Guardianship of Georgina H. Read, v.Elizabeth Kenefick, 555 So.2d 869, 871 (Fla. 2nd DCA,1989). The Trial Court's Order Granting Motion to Strike and Motion for Default and its written Final Judgment make no mention of the facts or circumstances upon which Judgment was entered. (App.4,5). As such, since the Petitioner has provided no factual record, the Petitioner has failed to meet the burden of establishing fundamental error and the Orders should be upheld.

The decision of a trial court has the presumption of correctness and the burden is on the appellant (petitioner) to demonstrate error. Id. In this regard, the Petitioner has failed.

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[1] Even after counsel had appeared for Petitioner a record could have been made by the filing of affidavits, motion to vacate with evidentiary hearing, etc., so the lack of record evidence cannot be excused on the basis of the naivete´ of the corporate defendant.

3. **The Only Record of the Trial Court's Reasoning Contradicts the Petitioners Basis for Review.**

The Petitioner's Appeal is based solely on the issue that the Trial Court erred in entering Final Judgment on a Default because the corporate defendant was not represented by counsel. (IB.9). This is not supported by the Orders. (App.4,5). If there is any record of the Trial Court's reasoning in its decision, it is the transcript of the Motion and Ruling for Attorney Fees. (App.6) The transcribed record of the hearing indicates a combination of factors supporting the default, such as findings of bad faith defenses set forth by the Petitioner and finding that the Petitioner was dilatory in responding even after it was given the opportunity, through counsel, to file proper motions, affidavits or record evidence. (App.22-28). At page 16 of the transcript, the Trial Court specifically states: "And, again, I had made a particular finding back then that the default should be granted because there was no valid motion filed in response." (App.22). "A document had been filed but–and it was authored, again by Mr. Adams, the motion to strike the initial complaint of sham by Mr. Adams cited newspaper articles with self-serving comments attributable to Mr. Adams....And, basically, it was obvious to this Court that this was an attempt by Mr. Adams to shift blame, to deflect

responsibility and liability to an innocent third party...” (IB.23) “I’m making a specific finding that this defense was brought in bad faith...” (IB. 23). Here the Trial Court is acknowledging that it ruled on the default, **not because** of failure of the corporation to be represented, but due to intentionally dilatory practices, a bad faith defense and an improper motion in response to the motion for default!! These grounds have not been challenged on appeal and it is not for the Appellate Courts to search for error where it is not brought for review by the Appellant. “This Court will not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention. It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. . . . When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy. Again, it is not the function of the Court to rebrief an appeal.” Johanna White v. William S. White, 627 So.2d 1237 (Fla. 1st DCA, 1993). The scarce record evidence supports that default was entered due

to the Respondent's cumulative actions and abuse of the pleading process, not as a result of nonappearance of counsel. This reasoning has not been challenged on appeal and the Trial Court's Orders should be affirmed.

CONCLUSION

The underlying judgment of the Trial Court and the affirming appellate opinion should be upheld. Clearly, any error that the Petitioner may complain of is its own. Had the Petitioner provided affidavits in the record, the Court may have been able to analyze the factual reasoning for the Petitioner's improper responsive pleading. Had the Petitioner's Counsel moved to vacate the Default Judgment with supporting affidavits or request for an evidentiary hearing, a record may have been established. Had the Petitioner provided the Fifth District Court of Appeals a transcript of the underlying hearing, then the Appellate Court may have been able to assess whether the Petitioner met the burden required with the Trial Court. Had Appellate counsel provided a Stipulated Statement in lieu of a transcript, that may even have provided the Appellate Court with information for the analysis. (App.3) None of these things were done. The Petitioner has had at least four separate opportunities to set forth the facts: an Affidavit filed prior to the default hearing; a court reporter at the default hearing

to transcribe the proceedings; an evidentiary motion and hearing to vacate the default; and a Stipulated Statement for filing with the Appellate Court. The Petitioner failed to do so at all four junctures. (App.2)

The Fifth District Court of Appeal did not base its opinion on whether or not an attorney answered timely. The Fifth District Court of Appeal based its opinion on the fact that there was absolutely no record evidence of Trial Court error. As a result, the decision does not run contra to this Court's decision in Torrey, and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished to Clifford M. Travis, ATTORNEY FOR PETITIONER, P. O. Box 523, Inverness, FL 34451, by U.S. Mail this _____ day of December, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief of Respondent has been prepared in compliance with the font requirements of *Florida Rules of Appellate Procedure* 9.210.

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Michael D. Sechrest