IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-774
Lower Tribunal No.: 5D02-3657

COLBY MATERIALS, INC.,
a Florida corporation,

Petitioner,

vs.

CALDWELL CONSTRUCTION, INC.,
a Florida corporation,

Respondent.

INITIAL BRIEF OF PETITIONER COLBY MATERIALS, INC.

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STATEMENT OF THE CASE AND FACTS

The dispute arriving at this Court arose over litigation involving a purported overpayment on a construction project. The respondent, CALDWELL, (plaintiff in the trial court below) originally filed an action for damages against the petitioner, COLBY, on August 12, 2002, in the Citrus County Circuit Court, in the Fifth Judicial Circuit. A little over a week later, on August 21, 2002, the return of service in the trial courts' file was shown as "unserved". Eighteen days thereafter on September 9, 2002 (only 27 days after the filing of the circuit court action), a responsive pleading was filed by Scott A. Adams in his capacity as president of the petitioner COLBY. The *pro-se* responsive pleading filed by Mr. Adams on behalf of his corporation was in the nature of a Motion to Dismiss, as well as a Motion to Strike for Sham. On September 19, 2002, the respondent CALDWELL, through its counsel, filed a Motion to Strike, as well as a Motion for Default against COLBY. As grounds therefore CALDWELL alleged that Scott A. Adams was not a member in good standing of the Florida Bar and therefore was not permitted to represent his company, the petitioner COLBY herein, at the circuit court level.

Immediately upon receipt and review of CALDWELL's Motion to Strike and Motion for Default in the trial court (and prior to any hearing upon, or other court action with regard to, CALDWELL's motions), Scott Adams undertook his search for counsel for the petitioner, COLBY. The petitioner retained an attorney to represent COLBY (Christopher Egan, Esquire, of Dunnellon, Florida), who filed his Notice of Appearance on October 3, 2002. Mr. Egan shortly thereafter filed on October 18, 2002, a pleading in the form of a written response to CALDWELL's motions styled "Response to Plaintiffs' Motion to Strike and Motion to Default" which sought leave of the circuit court to withdraw the *pro-se*

motions filed by Scott Adams on behalf of COLBY. Mr. Egan further asserted that COLBY had made a good-faith effort to timely respond to plaintiffs' complaint and should not be penalized with a default judgment imposed by the court. He further sought a brief, but reasonable, period of time within which counsel for COLBY could answer the complaint for damages.

The trial court conducted a hearing on October 22, 2002, upon CALDWELL's Motion to Strike and Motion for Default, at which hearing COLBY appeared with Mr. Egan as counsel for the corporation. The Circuit Court, the Honorable Richard Howard, entered default against COLBY, concluding that a proper responsive pleading had not been timely filed, that the *pro-se* motions filed by Scott Adams were nullities and that the corporation had failed to establish excusable neglect. Specifically, the trial court concluded that Mr. Adams' filings were not authorized responsive pleadings because they were not filed by a licensed attorney and member of the Florida Bar. The trial court provided no enlargement of time for COLBY, through its counsel, to file an answer. The trial court proceeded to enter a Final Judgment for Damages on November 6, 2002, against COLBY and in favor of CALDWELL in the amount of $21,883.00. A timely Notice of Appeal was filed on November 19, 2002, seeking review of the trial court's October 22, 2004, hearing resulting in the Final Judgment on November 6, 2002.

To add insult to injury, the trial court conducted a hearing on December 10, 2002, upon CALDWELL's Motion for an Award of Attorney's Fees. Undersigned counsel for COLBY had filed a Notice of Appearance on petitioner's behalf and appeared at the December 10th hearing on attorney's fees. The trial court conducted an evidentiary hearing as to CALDWELL's Motion for Attorney's Fees and thereafter further awarded CALDWELL the additional sum of $4,830.00 as reasonable attorney's fees, thereby increasing the total monetary

assessment against COLBY to the sum of $26,713.00 based upon the default entered by the trial court.

The petitioner thereafter sought review in the District Court of Appeal, Fifth District of Florida. The issues were briefed by the undersigned counsel on behalf of COLBY and by trial counsel for CALDWELL, Norman C. Polak, Esquire, of Ocala, Florida. The Fifth District, by written opinion dated February 20, 2004, affirmed the decision in the trial court below. COLBY sought a timely review of the lower proceedings by invoking the discretionary jurisdiction of this Court. Jurisdictional briefs were filed by the parties and this Court by order dated November 10, 2004, accepted jurisdiction to review this cause.

ISSUE

WHETHER THE FIFTH DISTRICT ERRED IN UPHOLDING THE TRIAL COURT'S ENTRY OF A FINAL MONEY JUDGMENT AFTER DEFAULTING A PARTY WHO HAD FILED A TIMELY RESPONSIVE PLEADING.

SUMMARY OF ARGUMENT

The Respondent, CALDWELL CONSTRUCTION, INC., at the District Court level relied upon a case which was contrary to other (as well as subsequent) Fifth District authority, as well as this Court's opinion in Torrey vs. Leesburg Regional Medical Center, 769 So.2d 1040 (Fla. 2000). The non-attorney corporate president of COLBY**,** having had his *pro-se* responsive pleadings attacked by motion in the trial court, instantly retained counsel to represent the corporation further. The respondent CALDWELL in the trial court moved to default petitioner and the circuit court confirmed the default and entered judgment thereon. This goes against the decades-old authority from this Court in favor of liberally setting aside defaults to adjudicate disputes on their merits and preserve the right to jury trial. The upholding by the Fifth District Court of Appeal of the default and judgment entered by the trial court is contrary to both its own decisions, as well as the guidance from this Court and should be overturned.

ARGUMENT

The Fifth District Court of Appeal, in its' opinion filed February 20, 2004 (made final after denial of rehearing), upheld the default final judgment entered against the petitioner in the trial court below. It is uncontroverted that the responsive pleadings were timely filed by petitioner (defendant in the trial court) and the dispute finding its way to this Court centers around the fact that the pleadings were filed *pro-se* by the president of the petitioner, Colby Materials, Inc., and not by a licensed Florida attorney.

In its' brief in the Fifth District, the respondent, Caldwell Construction, Inc., relied upon the case of Joe-Lin, Inc. vs. LRG Restaurant Group, Inc., 696 So.2d 539 (Fla. App. 5th DCA 1997). In this case the Fifth District held a pleading signed by a corporate officer who is not a licensed attorney was a nullity and had no legal effect. The Fifth District held that the appellees had failed to establish excusable neglect and, in fact, the Fifth District noted in this case that those appellees "were not only negligent but grossly negligent" Joe-Lin, at page 541. The District Court also pointed out that "the law requires a party to exercise due diligence to protect its interests." As to the facts of this case relied upon by Caldwell, they are distinguishable from the instant case in that the petitioner acted to retain licensed counsel simply upon the filing of the motion attacking its pleadings. Counsel attended with the petitioner the first hearing conducted by the trial court and in doing so thus swiftly took necessary steps to cure any defect in its timely responsive pleadings.

This Court had the opportunity to address the issue several years after the Fifth District in Joe-Lin, Inc. In a case also coming from the Fifth District this Court accepted conflict jurisdiction to review Torrey vs. Leesburg Regional Medical Center, 731 So.2d 748 (Fla. 5th DCA 1999) and the case of Szteinbaum

vs. Kaes Inversionese y Valores, C.A., 476 So.2d 247 (Fla. 3rd 1985). The issue before this Court in Torrey was whether a complaint filed and signed by a non-Florida attorney was a nullity or simply an amendable defect. In this Court's opinion in Torrey, the approach of the Third District in Szteinbaum was approved, thereby confirming that such defective pleading was not a legal nullity. Although in Torrey the pleading was signed by a Michigan attorney who was not a member of the Florida Bar and in the instant case the pleading was filed and served by a *pro-se* corporate officer, the principle and the legal reasoning are the same.

In this Court's analysis of Torrey it was pointed out that the Fifth District had again considered the issue in Moreno Construction, Inc. vs. Clancy & Theys Construction Co., 722 So.2d 976 (Fla. App. 5th DCA 1999). Moreno is factually very similar to this case in that the answer to the complaint was filed by the non-attorney corporate president on its behalf. In Moreno the Fifth District came to an opposite result than it did in the instant case and reversed the trial court, finding excusable neglect where the corporate president indicated that he was not aware the corporation required representation by counsel in the circuit court and the corporation immediately hired counsel to represent it. In its opinion in Moreno the Fifth District noted that:

> "in reaching this conclusion we have considered Florida's common law rule that pleadings filed by a non-lawyer on behalf of another are a nullity. The rule is the product of the policy against the unauthorized practice of law. However, under the facts of this case, to mechanically apply the rule to prohibit a finding of excusable neglect places form over substance and fails to serve the underlying policy. See Szteinbaum vs. Kaes Inversionese y Valores, C.A. 476 So.2d 247 (Fla. 3rd DCA 1985). In this case, Florida's policy that cases should be tried on their merits whenever possible prevails".
>
> Moreno at page 978.

This Court thereafter noted that the approach of the Third District of Szteinbaum "could not be similarly reconciled with that of the Fifth District in Torrey." Torrey, at page 1004.

This Court's opinion in Torrey has only been cited by the Fifth District in a reported decision three times in the four years since this Court's ruling. The first was in the rehearing proceedings in the Fifth District where the case was dismissed on other grounds. Torrey vs. Leesburg Regional Medical Center**,** 796 So.2d 544 (Fla. App. 5th DCA 2001). The next citation to Torrey arose (also out of the Fifth District) and was cited with approval in the context of a criminal case in Pura vs. State, 789 So.2d (Fla. App. 5th DCA 2001). The Fifth District last mentioned Torrey in its' opinion of Wolford vs. Boone, 874 So.2d 1207 (Fla. App. 5th DCA 2004) where the trial court struck pleadings and entered default against a party defendant for failure to comply with discovery requirements. Even there, the District Court acknowledged that "the striking of pleadings or dismissal of a case should be reserved for the most contumacious behavior". Wolford, at page 1210.

The sound public policy of this state has for many years been in favor of adjudication of disputes upon their merits. This Court settled the issue over four decades ago in the case of North Shore Hospital, Inc., vs. Barber, 143 So.2d 849 (Fla. 1962). In North Shore the trial court had set aside a default entered against a defendant who ultimately prevailed on a motion for summary judgment. The District Court reversed the summary judgment and reinstated the default against the defendant below. This Court reviewed the common law principles holding defaults in disfavor and Florida case law on the topic since the adoption of the Florida Rules of Civil Procedure in 1954. In this Court's opinion it again confirmed that

"the true purpose of the entry of a default is to

> speed the case thereby preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim. It is not 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".
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> North Shore, at page 853.

This Court's opinion in North Shore has been cited on 276 occasions in reported Florida decisions, and has been cited by the Fifth District Court of Appeal twice since the issuance of its opinion being reviewed by this Court. The first of these was in Torres vs. ARNCO Construction, Inc., 867 So.2d 583 (Fla. App. 5th DCA 2994), and the second being KFC USA, Inc. vs. Depew, 879 So.2d 55 (Fla. App. 5th DCA 2004). In both of theses cases the Fifth District acknowledged this Court's opinion in North Shore and the long-standing policy of the courts of the state to liberally set aside defaults and allow an adjudication of a case upon its merits. These two references to North Shore by the Fifth District are found in cases where a default has been taken to judgment while the instant case deals only with an effort by a diligent party to set aside an interlocutory default prior to judgment. The policy of the courts should be even more favorable to the setting aside of such a default prior to the finality of the entry of judgment thereon so as to preserve the right to jury trial.

In the instant case, this Court has spoken as to the status of the law in Torrey vs. Leesburg Regional Medical Center. 769 So.2d 1040 (Fla. 2000). The opinion of the Fifth District Court of Appeal in this case is contrary to established law and should be overturned.

CONCLUSION

It cannot be said to be harmless error that the trial court entered default judgment against petitioner for a sum in excess of $25,000.00 without allowing COLBY its' day in court upon the merits. The Fifth District Court of Appeal magnified the injustice to the petitioner by not following this Court's guidance in Torrey and by allowing the default to stand and entering final judgment thereon. The opinion of the District Court in this case is contrary to this Court's opinion in Torrey and should be overturned. This Court should overturn the opinion of the Fifth District entered on February 20, 2004, and enter an order requiring the Fifth District Court of Appeal to return these proceedings to the trial court with instructions to vacate and set aside the default final judgment and allow petitioner, through its' counsel to file an answer or other responsive pleading to the original complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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CLIFFORD M. TRAVIS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to MICHAEL D. SECHREST, ESQ., 5203 SW 91st Ter., Ste, D, Gainesville, FL 32608, Attorney for Respondent, Caldwell Construction, Inc., by U.S. Mail and by facsimile transmission this _____ day of Dec., 2004.

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CLIFFORD M. TRAVIS, ESQUIRE