

IN THE SUPREME COURT OF FLORIDA

COLBY MATERIALS, INC.,
Petitioner,

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

vs.

CALDWELL CONSTRUCTION, INC.,
Respondent.

_____ /

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

All references to COLBY MATERIALS, INC's. Amended Jurisdictional Brief of Petitioner will be cited as: (JB.____) with the appropriate page reference inserted.

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

STATEMENT OF THE CASE AND FACTS

COLBY MATERIALS, INC. appeals the Final Default Judgment entered in favor of CALDWELL CONSTRUCTION, INC. (App.1) The Final Default Judgment was affirmed by the Fifth District Court of Appeal. (App.2) Petitioner, COLBY MATERIALS, INC., seeks review in the Supreme Court of Florida and sets forth jurisdiction on the basis that "The opinion of the Fifth District Court of Appeal in this case is contrary to established law and should be overturned." (JB.9)

At the trial court's hearing on the Motion for a Final Default Judgment, Petitioner, COLBY MATERIALS, INC., failed to provide any affidavits. (App.2) Additionally, Petitioner, COLBY MATERIALS, INC., failed to provide the Fifth District Court of Appeal with either a transcript of the hearing or a Stipulated Statement of the evidence. (App.2)

The Fifth District Court of Appeal affirmed the trial court's decision 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.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's ruling is not contrary to any established law, but is entirely based upon Petitioner's, COLBY MATERIALS, INC., failure to provide the Court(s) with any record evidence of excusable neglect or a 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 of Appeal properly found that Petitioner, COLBY MATERIALS, INC., failed to meet its burden. This ruling does not contradict any established law or otherwise invoke jurisdiction of the Supreme Court of Florida under *Florida Rule of Appellate Procedure* 9.030(a).

JURISDICTIONAL ARGUMENT

The Amended Jurisdictional Brief of Petitioner appears to set forth jurisdiction pursuant to *Florida Rule of Appellate Procedure* 9.030(a)(2)(A)(iv). (JB.10) As such, the Petitioner is required to establish that the decision "expressly and directly conflict(s) with the decision of another District Court of Appeal or of the Supreme Court on the same question of law." (JB.10) The Petitioner has failed in this regard.

In the Petitioner's Jurisdictional 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). (JB.9) 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 followed the excusable neglect approach. The problem arises because the Petitioner failed to provide any record evidence so that the Fifth District Court of Appeal could review the issue of excusable neglect. (App.2,3) As such, the Fifth District Court of Appeal's opinion in the instant case is in conformance with this Court's holding in Torrey. 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).

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 assess and place weight on the issue of excusable neglect. 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 excusable neglect analysis.

(App.3) None of these things were done. The Petitioner has had three 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; and for a Stipulated Statement for filing with the Appellate Court. The Petitioner failed to do so at all three junctures. (App.2)

The Fifth District Court of Appeal did not base its opinion on whether or not excusable neglect existed. The Fifth District Court of Appeal based its opinion on the fact that there was absolutely no record evidence of excusable neglect or trial court error. As a result, the decision does not run contra to this Court's decision in Torrey, and jurisdiction is not invoked under *Florida Rule of Appellate Procedure* 9.030(a)(2)(A)(iv).

CONCLUSION

Pursuant to *Florida Rule of Civil Procedure* 9.030(a), the jurisdiction of the Supreme Court of Florida is not invoked in this case. The underlying decision of the Fifth District Court of Appeal does not expressly and directly conflict with a decision of another District Court of Appeal, or of the Supreme Court on the same question of law.

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 June, 2004.

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CERTIFICATE OF COMPLIANCE

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

Michael D. Sechrest