Colby Materials Inc. v. Caldwell Construction, Inc.

PLEASE RIS E . LADIES AND GENTLEMEN, THE FLORIDA SUPREME COU RT. PLE ASE BE S EATE D .

THE NEXT C ASE ON T HIS MORNING'S DOCKET IS C OLBY MAT ERIALS VERSU S C AL DWEL L CONSTRUCTION. WE HAVE TUR NED BAC K W E H AVE T UR NE D THE MIC S B AC K ON. UNFORTUNATELY THE L AST ORAL ARGUMENT WAS N OT B ROAD CAST . HOPEFULLY THE PROBLEM HAS BEEN CORRECTED. ARE THE PAR TI ES READY? YOU MAY PRO CE ED .

MAY IT PLEASE THE C OURT . MY NAME IS LANCE LAN GSTO N. I REPRESENT THE PETITIONER IN THIS CASE , COL BY ppMATERIALS. ppALSO PRESENT HERE IS SCOTT ADAMS, THE PRESIDENT OF COLBY MATERIALS. WOULD YOU ADD RESS T HE JURISDICTIONAL ASPECT , THE CONFLICT ISSUE AND HOW YOU THINK THERE IS EXPRESS A ND DIRECT CONFLICT IN THIS CASE?

SURELY. I BELIEVE T HA T T HE 5TH D CA ppCASE IS DIREC TL Y I NFLICT WITH THIS C OURT 'S HOL DI NG I N TORREY VERSUS L EESB UR G MED ICAL CENTER. THE 5TH DCA A PP AR ENTL Y APPLIED THE EXC US EABL E NEGLE CT STANDARD T HAT I S HELD IN DEF AU LT JUD GMENT CASES. FOR THE MOS T PART , T HE R EPORTED D EF AU LT J UDGM ENT CASES COME T O T HE A PP ELLA TE C OURT AFTER A DEF AULT JUDGMENT HAS BEEN ENTERED AND THEN ON A SUBSE QU EN T MOTION TO VACATE T HE D EFAU LT . THE 5TH D CA

WELL , I N T OR RE Y THE Q UESTION WE WERE ASKED TO ANSWER IS WHETHER THE FILIN G IS A N UL LI TY O R A N A MEND ABLE D EFECT.

CORRECT, YOUR HON OR .

AND C OLBY N EV ER ADDRE SS ED NEVER D EC LA RED THE ppNULLITY.

THE FILE US WAS N OT ppDECLARED A N ULLI TY . THE P LAINTIFF R ESPONDED IN THE CASE , R AI SE D A S A DEFENSE IN THEIR MOT IO N T O S TRIKE THAT THE P LEAD IN G W AS FILED B Y SCOTT ADA MS . THE PRO S E - - P RO S E ppDEFENDANT ON B EHAL F OF COL BY MATERIALS.

AND AT THE HEARING T HE RE WAS A HEARING ON T HE SE MOTIONS A ND AT THAT H EARING AN ATTORNEY FIL ED A ND D ID N'T A P RO PO SE D AME ND MENT PLEADING OR A RES PO NS IV E PLE ADING?

CORRECT, YOUR HONOR . AFTER M R. A DA MS FIL ED A MOTIO N TO S TRIK E A ND M OTION TO DISMISS , AS A PRO S E DEFENDANT , THE P LAIN TI FF MOVED TO STRIKE T HA T A S IMPROPER.

WAS THE BAS IS O F THE MOTION SIMPLY BECAU SE IT W AS PRO SE O R BEC AUSE I T INCLUDED INFLAMMATORY MATERIALS OR DO WE REALLY KNOW?

THE MOTION SIM PL Y S TA TE D THAT IT WAS I MP ROPE R BECAU SE HE WAS P RO S E AND NOT A MEMBER OF THE FLORI DA BAR . T HE ORI GINAL HEARING W AS N OT ppREPORTED. THERE I S N O I ND IC AT ION IN T HE I N THE ORD ER THA T WAS ENTERED, BUT THE O RD ER SIMPLY S TA TE D THE PLAINTIFF'S MOTION TO STRIKE AND MOTION FOR DEFAULT I S GRANTED , AND W IT HOUT A NY NOTAT ION, T HE C OU RT R EFUS ED COLBY MATER IALS' REQUEST F OR EVEN LARGEMENT OF TIM E . T HE KEY IN THI S C ASE I S IMMEDIATELY AFTER M R. A DAMS RECEIVED PLAINTIFF'S M OTIO N TO STRIKE F OR FIL IN G A N IMPROPER PLEADING , HIM BEI NG A PRO S E D EFEN DANT , H

E SOUGHT TO R ET AI N C OU NS EL. HE DID RETAI N C OU NSEL , C HRIS EGAN, WIT HI N S EV ERAL D AY S THEREAFTER CHRIS EGAN ENTERED AN A PPEARANCE IN T HE C ASE. TEN DAYS

BUT NEVER FIL ED A RESPONS IVE PLEADING?

NEVER FILED A R ES PO NS IV E PLEADING. CLEARLY HE COULD HAVE F ILED A RESPONSIVE PLEAD ING AND W E WOULD NOT BE HERE.

AND THERE WAS TIME TO D O SO?

THERE WAS TIME TO D O S O. I NSTEAD HE FILED A R ESPO NSE. I N HIS RESPONSE H E A LL EG ED THAT M R. ADA MS , AS P RESI DE NT OF C OLBY MAT ER IALS , HAD ACTED IN GOOD FAITH TO RESPOND TO THE C OM PLAINT , AND HE ALSO R EQ UEST ED A N E NLARGEMENT OF TIM E W IT HI N WHICH TO FILE AN A NSWE R. ppMR. E GAN WAS - - A PP EA RED A T THE HEARING . HE W AS N OT GRA NTED A N E NLARGEMENT OF TIME AND THE DEFAULT WAS ENTERED.

WHEN WAS THE HEA RING H ELD ?

GIVE ME O NE S EC OND , YOUR HONOR . THE COMPLAINT WAS FILED O N AUGUST 12T H OF 200 2. MR. ADAMS FILED H IS R ESPONS E SEPTEMBER 9TH , 200 2. S EPTEMBER 1 9T H T HE P LAIN TI FF FILED HIS MOTION TO S TR IK E N OTICE OF APPEARA NC E W AS ppFILED OCT OB ER 2ND B Y C HRIS EGAN ON O CT OBER 11T H H E FILED HIS RESPONSE , AND O N OCTOBER 2 2N D HEA RING WAS HELD ON THE ORD ER F OR MOTIO N FOR DEFAULT.

SO BY THE O CTOBER 22N D , THERE HAD STILL B EE N N O ppAMENDED PLE ADIN G PRO POSE D?

N O A MEND ED P LE AD ING H AD BEEN FILED .

WHERE DID T HE T RIAL J UDGE GO WRONG IN THIS CASE?

WELL, I BEL IEVE

ACCORDING TO OUR C ASE LAW?

I BEL IEVE , BAS ED ON T HIS COURT'S HOLDING IN TOR RE Y VERSUS LEESBURG MEDICAL CENTER, WHI CH ADDRE SS ED TWO ppCASES O N CON FL IC T. THE T OR RE Y CAS E OUT O F THE 5TH DCA, WHI CH I NV OLVE D THE F ILING OF A C OMPL AI NT B Y A NONLICENSED LAWYER, ppNONFLORIDA-LICE NSED LAWYER A ND ALSO THE CASE O F STEINBAMU VERSUS V ALOR ES , W HICH IS A 3 RD D CA CAS E AND T HAT HELD THAT A COM PL AI NT FILED BY A PRO S E COR PO RATE ppREPRESENTATIVE IN T HE T OR REY CASE IN THE 5TH S DC HL T R A , THE 5TH D CA SAI D T HAT W AS A NULLITY. IN T HE S TEIN BAUM C AS E T HE Y SAID IT W AS AN A MENDABLE D EFECT BUT THEN APPLI ED THE EXCUSEABLE NEGLECT STA NDAR DS IN DETERMINING WHETHER OR NOT TO ALLOW T HE P LEAD IN G T O STAND . THIS COU RT L OOKE D A T B OT H O F T HOSE CASES AND D ETER MI NE D THAT IN EITHE R CAS E A P LEADING FILED B Y A NON LAWYER PRO S E L IT IG AN T O R A NON -F LORI DA L AWYE R IN A FLORIDA CASE WAS NOT A NULLITY BUT RATHER IT WAS A N AMENDABLE DEFECT. AND THAT JUSTICE IS B ES T SERVED BY A RULE OF LAW T HA T ALLOWS AMENDMENT OF THE DEFECTIVE PLEADINGS W IT HOUT REQUIRING ANY EST ABLISHMENT OF EXCUSEA BLE N EGLECT . > > NOW , W AS T HE RE A N A TT EM PT M ADE H ER E T O A ME ND ?

C OU NSEL A PPEA RE D , ppREQUESTED ADDITIONAL T IM E T O FILE A R ES PO NS IVE P LE ADIN G . pp

IS THAT WHERE THE TRI AL JUDGE WEREN'T W RONG? HE SHOULD H AVE G RA NTED T HE MOTION FOR ADDITIONAL TIM E TO AMEND?

ABSOLUTELY. WHEN A L ICEN SE D F LO RI DA LAWYER IS T HERE P RE SE NT , ENTERS AN A PPEA RA NCE PRIOR TO THE ENTRY O F D EFAULT A ND R EQUESTS THAT THE C OU RT ALLOW APPROPRIATE TIME T O RES POND, T HE COURT S HO ULD HAVE TREAT ED T HA T U NDER pp1.140 AS A R EQ UEST F OR A MENDMENT AND A LL OW ED A T EN-DAYTIME PER IO D WIT HI N WHICH TO R ES POND TO THE COMPLAINT.

THAT WAS NOT WHAT T HE 5 TH DISTRICT DEALT WITH.

NO.

THEY DEALT WIT H 1 .1 5 B .

THEY SIMPL Y S TATE D U NDER 1 .500 THAT THE TRIAL COURT HAD THE AUTHORITY T O E NTER A DEFAULT JUDGMENT.

RIGHT. AND YOU DIS PU TE T HA T H E HAD THE AUTHO RI TY T O E NTER T HAT? > > RES PECTFULLY, YO UR HONOR , BASED ON THE HOLDING IN TORREY, I B EL IEVE A DEF AU LT JUDGMENT SHOULD NOT H AVE BEEN ENTERED.

BUT T ORRE Y D IDN'T D EAL WITH A DEFAULT .

NO, I T D IDN' T. IT DID NOT.

SO

IT DEALT WITH

THAT IS THE BAS IS FOR JUSTICE BELL I S ASKIN G T HE ppJURISDI CTIONAL QUESTIONS , ppAND WE COULD G O B ACK A ND LOOK FURTHER IN THIS RECORD , I GUESS , A ND D ETER MI NE WHETHER T HE M OT IO N T O - - FOR A LEAVE S HOULD H AV E BEE N GRANTED AND G RANT MORE TIME BUT T HAT'S N OT REA LLY WHAT THE FOCUS OF THE A PPELLA TE ppCOURT DECISION THAT WE A RE HERE TO M AK E A D ET ERMI NA TION ABOUT WAS .

THAT'S CORRECT. THE 5TH D CA ADD RE SSED T HE APP ROPRIATENESS OF THE ENTRY OF DEF AULT A ND FUR TH ER STATED THAT BECAUSE T HE RE W AS NO - - THE REC OR D - - THERE WAS NO HEARI NG, T HE RE WAS NO TRANSCRIPT O F T HE H EARING O N T HE M OTIO N FOR DEFAULT, AND THA T N O AFFIDAVITS HAD BEEN FILED B Y C OUNSEL FOR COLBY , T HA T THE -- ppAPPELLANT HAD NOT MET T HEIR S TANDARD OF PROOF.

AND THAT ASS UMES T HA T THAT HEARING WOULD HAVE COVERED THE E XCUS EA BLE NEGLECT ELEMENT THAT THIS COURT S AID IS NOT EVE N A PRO PER CONSIDERATION?

CORRECT.

WHAT ELSE WOULD YOU HAVE AN AFFIDAV IT FOR B UT T O ESTABLISH THE G OO D CAUSE?

CLEARLY, AND I N THO SE CASES , AGAIN, A LL O F T HE ppDEFAULT CASES DEA L WIT H COUNSEL COMING BAC K A FTER A ppDEF AULT H AS E NTER ED BY A COURT WHERE C OUNS EL W AS N OT P RESENT AND REQUESTING THAT THE COURT VAC AT E T HE DEFAULT. AT THAT POINT , C LE AR LY , THE RE NEEDS TO B E A N EVIDENTIARY BASIS TO SHOW EXCUSEABLE NEGLECT. HERE IN THIS CAS E , P RI OR T O THE ENTRY OF DEF AULT , CHRIS E GAN, A M EMBER O F T HE FLORIDA BAR, ENTERED AN APPEARANCE.

THE QUESTION, THOUGH , THAT IS THE HAUNT ING QUESTION: W HY D ID N' T T HE Y JUST FILE S OMETHING OR ADOPT THE PLEADING?

YOUR HONOR, I HAVE NO IDEA. CLEARLY HE COULD HAV E FILED AN ANS WER AND T HE Y WOULD B E IN THE TRIAL COURT.

AND HE DID, I N FAC T , F IL E A MOTION TO STRIKE , D ID N' T HE?

YOUR HONOR , HE DI D NOT FILE THE MOTION TO STRIKE. FIRST

WELL , H E F ILED - - ppWHATEVER H E F IL ED I S G OI NG TO WITHDRAW THE MOTIO N T O STRIKE?

WELL, HE STA TED T HA T H E ppWAS W ITHD RA WI NG T HE P RO SE MOTION T O STRIKE F ILED B Y MR. ADAMS.

SO AT THAT POINT HE COULD HAVE ALSO HAVE BEEN ANSWERING THE COM PLAINT? I MEAN, THAT S EEMS T O B E THE REAL STICKING P OI NT H ERE.

I WILL NOT S TA ND H ER E AND REFUTE THA T C OU NSEL A T T HA T TIME COULD HAVE ANSWE RED THE COMPLAINT. CLEARLY HE COULD HAVE.

AND IF WEE LOOK A T W HA T THE T RANSCRIPT W E D O H AVE FROM THE CHA PT ER 5 7 HEA RI NG , C ORRECT M E W HE RE I A M WRO NG , WE HAD A DISPUTE GOING O N FOR SEVERAL YEARS, A ppCOMPLAINT WAS F IL ED I N AUGUST THAT W AS S OMEW HAT I N THE J UDGE'S P ERSP EC TIVE A N I NFLAMMATORY PRO S E F ILIN G BY THE C ORPO RA TE R EPRESENTATIVE. WHILE LATER AN A TTOR NEY W AS H IRED , M AD E AN A PP EARANCE AT THAT TIME DID NOT FILE A RESPONSIVE PLEADING. THE HEARING WAS SET. SO IT WAS TWO A ND A HAL F MONTHS LATER AND THERE W AS STILL NO RESPONSIVE PLEADIN G OFFERED THAT WAS R ES PO NSIVE TO THE C OMPL AI NT F IL ED .

CORRECT. THE JUDGE DID STATE T HA T I N THAT 5 7 H EARING. NOW , > > BUT A LS O T HE RES PO NS E FILED BY T HE A TT ORNE Y ppWITHDREW WHAT WOULD H AVE BEEN THE INFLA MMAT OR Y PLEADING, W ITHD RE W T HE MOTION TO DIS MISS AND MOTION TO STRIKE?

HE W IT HDRA W S T HE INFLAMMATORY PLEADING. IT WAS NOT W IT HDRA WN WIT H LEAVE OF COURT. ppHE DID NOT R EQUE ST L EA VE O F COURT BUT HE SOUGHT TO WITHDRAW THAT P LE AD ING. IF WE GO T O T HE H EA RING ON THE MOTION FOR S ANCT IONS , ppTHE JUDGE MADE A FAC TU AL DETERMINATION THAT THE P LEADING FILED BY M R. A DA MS ppATTACKED THE S TA TE ATT ORNE Y , THAT T HE RE W AS - - T HE O NL Y EVIDENCE AT THAT HEARING WAS AS TO ATTORNEY'S FEE S N OT T O THE UNDERLYING F ACTS .

BUT H E F OU ND I N T HE O RDER THERE HAD BEEN NO FILING DIRECTE D TO T HE S PE CIFI C ALLEGATIONS IN THE COMPLAINT ABOUT THE DOUBLE PAY ME NT A ND ppOWING THE MONEY, ET C ETERA?

I BELIEVE THAT W AS INCORRECT. I BELIEVE IF YOU LOOK AT T HE RECORD, M R. A DAMS S TA TE S THAT T HE COR PO RA TION DID N OT OWE T HAT M ON EY . AS B AC KG RO UND, I N FACT , A T THE TIME , A T T HE T IM E P REVIOUS C OLBY MAT ERIA LS WAS ppSEEKING TO HAV E C RIMI NAL CHARGES BRO UGHT AGAINST CERTAIN EMPLOYEES.

IS T HIS IN O UR R ECORD?

THIS IS NOT I N YOU R RECORD. IT MAY A PP EA R I N THE R ESPONSE FILED BY MR. ADA MS . N OW , C ER TA INLY I WOULD NOT HAVE FILED THE R ES PO NS E MR. ADAMS FILED, A ND H E M US T L IVE WITH THAT , BUT HE IS NOT A M EMBER OF THE F LORIDA B AR. HE IS NOT COLLEGE E DUCA TE D. HE IS SER VE D A S S UR VI VING ppDIRECTOR OF A C ORPORA TI ON THAT HAD BEE N ADMINISTRATIVELY D ISSO LV ED ON A MATTER T HAT A RO SE T HR EE YEARS EAR LIER .

SO B ACK TO THE RULE OF LAW THAT YOU ARE ASKING US TO HOLD IS W HEN A CORPORATION IS SERVE D , THE O NLY THING T HEY NEED TO D O TO BUY TIME IS HAVE A CORPORATE REPRESENTATIVEFILE SOMETHING, WAIT UNTIL A MOTION FOR DEFAU LT O R A MOTION TO S TRIKE IS F ILED , IT IS HEARD AND T HE A TT ORNEY MAKES AN APPEARANCE AND I T COULD BE MONTHS BEFORE YOU GET A H EARING BEFORE T HE JUDGE BEFORE A NY BODY I S R EQUIRED T O F IL E A RESPONSIVE PLEADING?

ABSOLUTELY I WOULD N OT SUGGEST THAT. BUT WHAT I AM SUG GE STIN G I S THAT THE PLE ADIN G FILED , T HE ppPRO SE PLE AD IN G FILED B Y A CORPORATE REPRESENTATIVEUNDER THIS COURT'S HOLDING IN TOR RE Y CON STIT UT ES A N ppAMENDABLE DEF ECT, AND I T WAS I MPROPER T O E NT ER DEF AU LT BASED ON THAT P LE AD IN G . pp

IS THAT WHY A D EFAU LT W AS ENTERED ? DO WE KNOW F RO M THE REC OR D BEFORE THAT'S WHERE T HE DEFAULT WAS ENTERED?

WE DON'T KNOW F RO M T HE RECORD AT THAT HEARING. THERE WAS NO TRANS CR IPT A T THAT HEARING. -- ppSIMPLY THE O RD ER S TATE S. EXCUSE M E ONE SEC ON D . > > THERE WAS A T WO - PAR AG RA PH ORDER, I ASSUME PREPARED BY THE P LA INTIFF . PLA INTIFF'S MOTION T O STRIKE AND MOTION F OR D EFAULT I S GRANTED .

SO I S T HE J UD GE T HE N - - THE JUDGE COULD , IN FACT , B E ENTERING A DEF AU LT BAS ED O N ppTHE FACT THAT THE RE W AS N O RESPONSE TO THE C OM PL AI NT A S O PPOSED TO T HE R ES PO NS E W AS INFLAMMATORY.

THAT IS ENT IRELY POS SIBLE , BUT AT THE TIME THA T D EF AU LT WAS ENT ER ED S TA NDIN G B EF OR E THE JUDGE WAS A MEMBER OF THE BAR , REP RESE NT IN G T HA T HE HAD BEE N R ET AI NE D T EN DAYS EARLIER A ND R EQUEST ING A REASO NA BLE T IM E T O RESPOND TO THE COMPLAINT . ppTHERE WAS A D IL ATOR Y T AC TI C THAT THE H EA RING , T HE -- ppTRANSCRIPT ON THE HEARING FOR FEES WOU LD I ND ICAT E . THREE YEARS P OS T AFT ER T HE CORPORATION IS D ISSO LVED A C OMPLAINT IS FILED , A ND A MEETING

ACT UA LL Y THE A TT ORNEY WAS RETAINED ON OCTOBER 1ST , T HE HEARING WAS O N OCTOBER 22N D.

THAT'S CORRECT.

SO THIS W AS B AC K I N AUGUST SO THERE WAS STILL THE NORMA L 2 0-DA YT IM E P ER IO D PRIOR TO THE HEARING T O F ILE A R ESPONSIVE P LEADING AND NONE WAS EVE R F ILED.

THAT'S C ORRECT, YOUR HONOR.

YOU ARE IN YOUR REB UT TA L IF YOU WOULD LIKE TO S AVE TIME FOR REBUTTAL.

THANK YOU . > > MAY IT P LEASE THE COURT , MY NAME IS ROBER T B UT TS A ND I REPRESENT T HE RES PO NDEN T IN THIS CASE . CALDWELL C ON ST RU CT IO N . T HE ISS UE B EF OR E THE COU RT TOD AY IS N OT I N T HI S PARTICULAR CASE IS NOT REALLY THE SAME ISSUE IN TORREY. IT IS NOT NECESSARILY WHETHER THE I NI TI AL PLEAD INGS WERE A N UL LITY OR WHETHER OR NOT THEY WERE ppAMENDABLE . I NSTEAD, THE ISS UE I S WHETHER THE DEFEN DA NT USE D THE LEVEL OF DILIGENCE THA T WAS D EMONST RA TE D B Y THE LAWYERS I N F OR K PA FE R KFC , ppMORENO, T HESE ARE CAS ES CITED BY THE PET ITIO NE R , STEINBAUM AS WELL AS TORREY TO MITIGAT E THE PRO BLEM THAT WAS C REATED B Y T HE P LEAD IN GS TO START WITH.

BUT IF YOU LOOK A T T OR REY , REALLY AS A S TATE MENT O F IT IS A P LEADING T HAT I S FIL ED ppIS NOT A N UL LITY S IMPL Y BECAUSE IT WAS NOT FILED B Y A MEMBER O F T HE F LORI DA BAR , AND IT IS SUB JECT T O - - A ND THE PERSON FIL ING IT SHOULD BE GIVEN AN OPPORTUNITY TO

AMEND, AND THAT A PP LI ES I N TORREY WE ARE TALKING ABOUT THE COMPLAINT, S O T HA T APPLIES TO THE P LA IN TI FF . WOULDN'T THE SAME K IN D OF OPPOR TUNITY, SHOUL DN'T THE SAME KIND O F OPPORTUNI TY B E GIVEN TO A DEF EN DA NT W HO FIL ES A PLE AD IN G N OT B Y A FLORIDA A TT OR NEY , SHOUL DN 'T ppTHAT PARTY BE G IV EN T HE S AM E KIND OF O PP ORTU NITY T O AMEND?I MEAN, IF YOU LOO K A T TORREY AS A B RO ADER K IN D O F STATEMENT, WOULDN'T THAT BE TRUE?

W EL L , WIT H D UE RES PECT , YOUR HONOR , T HA T S IT UA TION ACTUA LLY TOOK P LACE IN T HE ppMORENO CAS E W HE RE T HE CORPORATE OFFICER ANSWE RE D A COMPLAINT AND I T WAS, IN FACT, A D EF AU LT M AT TE R UNLIKE TORREY W AS A M OT IO N TO DISMISS . THE D IF FERENCE HER E BET WE EN WHAT HAPPENED IN M OR EN O FOR E XAMPLE AND WHAT HAPPENED I N THIS CASE IS IN M OREN O A CORPORATE OFFICER ANSWERED THE C OMPLAI NT A ND T HE 5 TH DCA F OU ND T HA T THE RE WAS EXCUSEABLE NEGLECT. BECAUSE THE DEFENDANT IMMEDIATELY FILED A MOT ION TO SET ASIDE THE DEF AU LT THAT DIDN'T HAPPEN I N THIS CASE.

WAIT A MINUTE. YOU ARE GOING BACK TO THI S EXCUSEABLE NEGLECT OR EXCUSEABLE REASON. WE SPE CIFI CALLY R EJECTE D THAT AS PART OF T HE A N A L SIS , A ND - - A NA LYSI S AND ppEMPHATICALLY S TA TE D W E APPROVED THE S ZT EI NB AU M APPROACH THAT IT WAS NOT A NULLITY ONL Y TO T HE EFFEC T IT WAS CONSISTENT W IT H TORREY AND IN TORRE Y W E S AI D THE ISSUE WAS NOT GOOD CAUSE. SO ARE YOU S TAND IN G H ERE TELLING US THAT T HI S C AS E BELOW THAT T HE DEF AU LT IS APPROPRIATE BECAUSE THERE ISNOT A HEARING OF A GOO D CAUSE HEARING TO S HOW , GIV E THEM GOOD C AUSE T O AME ND . IS THAT W HAT YOU ARE T EL LI NG US?

YES, YOUR HONOR , AND THE D ISTINCTION THAT I SEE I N BOTH S ZT EI NBAU M AND T OR RE Y THAT WAS A MOTIO N T O DISMISS. THIS IS A DEFAULT AND UND ER 1.500 AND 1 .5 40 B CLE AR LY S AY , L AYS OUT THE C RITE RI A T O ppOVERCOME A DEFAULT AND TO OVERCOME A DEFAULT J UDGMEN T .

BUT HOW C AN Y OU E NTER A DEFAULT IF T HE LAW YE R H AD FILED AN ANSWER? IT COULD BE A N A WF UL A NSWE R , BUT YOU CAN'T ENTER A DEFAU LT EVEN IF IT IS A TERRIBLE ANSWER AND IT IS JUST AWFUL AND IT IS NOT RESPONSIVE YOU STILL CAN 'T ENTER A D EFAULT, CAN Y OU ? SO IT IS NOT A N ISSUE O F D EFAULT, BECAUSE THAT'S W HAT IT SAYS. IT IS NOT A N ULLITY . > > WEL L , I N T HI S C AS E I SEE PLEADINGS THAT ARE - - DOCUMENTED THAT WERE FILED AND THEN W ITHD RAWN B Y T HE ATTORNEY. SO WE H AVE N O RES PO NS IV E P LEADINGS AT ALL.

BUT T HE MOT IO N - - A FT ER ppCOLBY FIL ED I TS M OT ION.

YES, M A' AM .

C AL DWEL L C ON ST RU CT ION'S MOTION TO S TRIKE AND MOT IO N FOR DEFAULT I SN 'T SAY T HI S pp DOESN'T START WITH SAY ING THIS IS A FRI VO LO US P LEAD IN G , NOT A UTHO RIZE D AND IT SAY S SCOTT ADAMS , LACKE D S TA NDIN G TO R EP RESENT C OLBY M ATERIALS IN ANY LEGAL P RO CEEDING FILED AGAINST COLBY M ATERIALS BECAUSE T HE CORPORATION IS AN ART IFICIA L ENTITY CRE AT ED BY L AW AND A S SUCH IT CAN NO T P RA CTIC E L AW . IT GOES ON TO THAT. IT W AS T HAT T HE J UDGE ppGRANTED - - E NDED U P G RANT IN G THAT MOTION T O STRIKE AND MOTION FOR D EF AU LT . C ORRECT?

THAT'S CORRECT.

WELL , AND THA T WAS BAS ED ON THE FACT THAT YOU H AD A NONLAWYER RESPONDING TO T HE COM PLAINT , A ND A GA IN I ppUNDERSTAND THAT THIS I S ISN'T IDENTICAL BUT G OING BACK TO THE P OS TURE OF T HI S AND I DON'T - - I 'M JUS T HAVING A HARD TIME ppUNDERSTANDING W HERE T HE T RU E DISTINCTION IS W IT H TOR REY AND THE P OS TU RE O F T HI S C AS E , GIVEN THAT THE BAS IS FOR THE MOTION TO STRIKE B Y C AL DW EL L WAS T HE LAC K O F STAND IN G

OF THE PERSON THAT FILED T HE PLEADING AS AN ATTORNEY.

ONE D ISTINCTION, YOUR HONOR, IS T HA T THO SE DOCUMENTS THAT YOU ppREFEREN CED WERE W IT HD RAWN PRIOR T O T HE HEA RI NG .

WHAT WAS GRANT ED THE N WHEN THE JUDGE G RANTED A MOTION TO S TR IKE?

IT IS CURIOUS T O M E WHY ppTHAT W AS EVE N N EC ES SA RY , BECAUSE T HE ATT OR NE Y , MR. EGAN, FOR T HE D EFEN DANT FIL ED A D OC UMENT AND H E S AI D FOUR THINGS. HE JUST MADE A RECIT AL THA T HE HAD DONE A N OT IC E O F APPEARANCE WEEKS EAR LIER , A COUPLE OF WEE KS E ARLIER . THAT H E W IT HDRE W H IS M OTIO N TO DISMISS AND M OT IO N T O S TRIKE. WHEN I SAY H IS I M EA N MR. COLBY'S. THE DEFENDANT W AS NOW R EPRESENTED BY A LAW YE R , AND ppHE JUST M AK ES AN ASSER TION THAT MR. COLBY MADE A G OOD-FAITH EFFORT TO R ES PO NDTO THE PLA INTIFF'S COMPLAINT.

S O T HE T RIAL J UDGE SHOULDN'T THERE W AS NOTHING THEN TO GRANT, WHEN HE GRANTED A M OTIO N T O STRIKE, THERE WAS NOT HING T O GRANT.SO HOW COULD IT BE THA T H E DIDN'T ERR WHE N H E F AILE D T O GIVE THE ATTOR NE Y W HO I S N OW ENT ERED A P LEAD IN G TIM E T O ANSWER ?

WELL, I THI NK T HA T PAR T OF T HE PRO BL EM I N THE C AS E OF M R. C OLBY WAS T HA T THE D OCUMENTS THAT H E HAD F IL ED WER E T HEOR ETIC AL LY H IS DEFENSE. THEY WERE REVIEWED B Y T HE COURT, EVEN THOUG H TH EY W ER E SUBSEQUENTLY WITHDRAWN, A ND THEY W ER E NOT A D EFENSE I N THE OPINION OF T HE C OU RT .

DIDN'T HE DENY THAT H E OWD ANY MONEY?

I BEG YOUR PARDON?

WAS THERE NOT A D EN IA L? I MEAN, THE RE M AY H AV E B EE N EXTRANEOUS STUFF BUT W ASN' T THERE AN UNDER LY IN G D EN IA L THAT THESE PEOPLE ARE ENTITLED TO MONEY?

WE DON'T HAVE ANY RECOR D OF THAT. WE DON'T HAV E ANY RECORD THAT THERE WAS A D EN IAL. > > SO W HAT W AS I N THE MOTION? WHAT WAS IN T HE THING HE FILED? IS THAT NO LONGE R IN O UR COURT FILE?

I BEL IE VE THAT - - Y OU K NOW, I BELIE VE T HAT IT IS , BUT I T DOESN'T SAY I N T HI S D OCUMENT, LET ME JUS T B E CERTAIN OF THIS .

SURE.

IT SAY S D EFENDANT MADE A GOOD FAITH EFFORT T O RES PO ND TO PLAINTIFF'S COMPLAINT IN THE TIM E R EQUIRED AND SHOULD NOT BE P ENAL IZ ED W IT H DEF AULT.

I'M TALKING ABOUT THE INITIAL PLEADING FIL ED B Y THE NONLAWYER.

THAT'S NOT A PART OF THE RECORD . ppI'M NOT A WA RE THAT IT I S PART OF THE REC ORD.

THE PLE AD IN G E NT IT LE D MOTION TO S TRIK E I NI TIAL C OMPLAINT WHICH IS I N REC OR D 3 . THE FIRST P LE AD IN G T HA T G OT ADAMS FILED. WHAT DID HE T HAT' S I N T HE -- ppRECORD.

I'M SORRY, I DON'T H AVE A COPY OF THAT . T HE FIRST - - T HE SHA M , T HE ONE HE SAID WAS A SHA M?

THE RES PONSE W AS THA T COLBY MATERIALS G OT ADA MS FILES. HOW COULD THAT NOT BE IN THE REC ORD?

I DON'T KNOW , YOUR HON OR , BUT THERE IS NOTHING IN THE RECORD. THERE IS NO TRA NS CR IP T, THERE I S NOTHING F RO M T HE TRIAL THAT I'M AWARE O F EXCEPT FOR A T RA NS CRIP T A T THE F EE HEARI NG W HE RE THE T RIAL C OU RT JUD GE

WELL, THE T RA NS CRIP T , AREN'T THOSE THE DOCUMENTS THAT YOU SOU GH T TO S TR IKE?

I'M SORRY, SAY T HA T AGAIN , PLEASE.

W HEN T HE C OR PO RA TE OFFICER A CTING PRO S E F ILED DOCUM ENTS WITH THE C OURT I N A PPAR ENT RESPONSE TO THE COMPLAINT , YOU SOUGH T O R S OMEBODY R EPRESENTING YOU R CLIENT SOUGHT T O STRIKE THOSE ; IS T HA T COR RE CT ?

YES.

J US TICE P AINT HAS REA D P ARTIAL - - J USTICE P ARIE NT E HAS R EAD PAR TI ALLY F ROM THE MOTION TO S TRIKE BECAUSE IT WAS A C OR PORA TION AND T HE DOCUMENTS WERE NOT FILED BY A LAWYER.

YES .

THAT IS A C ORRECT STATEMENT?

THAT'S CORRECT.

SO ARE YOU S AYIN G T HA T THOSE DOC UMEN TS T HA T SOMEBODY ACTING ON B EH ALF O F YOUR CLIENT SOUGHT TO S TRIKE ARE NOT I N O UR R EC OR D?

YES.

THEY ARE N OT I N OUR RECORD?

I HAV E NOT SEE N T HE M . pp

WERE THEY FILED I N T HE COURT BELOW ?

I D ON'T K NO W T HA T T O BE A FACT.

W HY WOU LD Y OU S EE K T O STRIKE THEM I F THEY WER EN'T FILED IN THE COURT BELOW?

WELL, I CAN ONL Y T HINK THAT THEY MUST H AVE B EE N FILED , BUT SOME OF THE C ASES THAT I'VE R EA D W ERE TH EY WERE NOT REALLY F IL ED. THEY WERE JUST SIMPL Y LETTERS , I'M NOT S AY IN G THAT'S THE CASE IN THI S SITUATION, BUT THAT' S P AR T OF THE

LET'S T AK E O UR C AS E LAW HERE WITH R EFERENCE TO WHETHER S OMETHING IS A NULLITY O R THE GRO UN DS YOU SET OUT IN Y OU R M OTION T O STRIKE. IF THIS HAD J UST GONE T O HEARING ON Y OU R M OT IO N T O S TRIKE, OKAY , B EC AUSE T HE RE WAS N O LAWYE R T HA T F IL ED THOSE T HINGS , U ND ER O UR C AS E LAW WOU LD NOT THE COURT H AVE BEEN O BL IGAT ED , N UM BE R ONE , HE WOULD HAVE BEEN AUTHORIZED T O STR IK E T HOSE -- ppPLEADINGS, BUT U ND ER OUR CASE LAW HE WOULD HAV E BEE N REQUIRED, WOULD HE NOT, T O HAVE GIV EN L EAVE T O THE PARTY TO F IL E AME NDED ppPLEADINGS . ISN'T THAT WHAT O UR C ASE LAW SAYS, IF YOU F IL E S OM ET HING PRO SE AS A COR PO RA TE ppOFFICER O R A N OUT O F S TATE L AWYER OR WHATEVER THE T HI NG IS, IT SAY S Y OU D ON'T T REAT THOSE THINGS AS A NULLITY , YOU TREAT T HE M A S AME ND ABLE PLEADINGS , AND S O , Y ES , Y OU CAN STRIKE THE M B UT YOU H AV E ppTO GIVE THAT PAR TY A N OPPORTUNITY TO F URTH ER PLEAD. ISN'T THAT WHAT O UR CAS E L AW SAYS?

YES, YOUR H ON OR .

HOW DID THE T RIAL JUD GE HERE ERR THE N B Y CAS E L AW B Y NOT SAYING REG AR DL ESS OF WHAT THE SHORT TIM E M AY HAV E BEEN, BUT OF S AY IN G , Y ES , I'M GOING TO S TRIK E THOSE R ESPONSES BECAUSE THEY ARE IMPROPERLY FILED B Y A N ONLAWYER AND OUR R UL E I N ppFLORIDA I S I F I T I S A CORPORATION YOU HAVE TO HAVE A LAWYER, BUT I'M G OING TO GIVE YOU FIVE DAY S THE N T O FILE A PROPER RES PONSIV E PLEADING, A ND I F Y OU DON 'T DO IT IN FIV E DAY S T HEN I WILL ENTER A DEFAULT. WHY SHOULDN'T THAT HAVE BEEN THE ACTION OF THE TRIAL JUDGE HERE UNDER OUR C AS E LAW?

I THINK, YOUR H ONOR , T HE ANSWER TO T HAT IS T HA T T HERE WAS NO R ES PONSIV E PLE AD IN G ATTACHED D EM ONST RA TI NG ANYTHING CLO SE T O A MER ITORIOUS D EF EN SE . IF WE E VEN GAVE THE BEN EF IT OF THE D OUBT T O T HO SE ORIGINAL PLEAD IN GS A S B EING RESPONSIVE THOSE WERE WITHDRAWN BY COUNSEL P RI OR TO THIS HEARING. NOTHING WAS REP LACE D.

BUT D OESN'T OUR CAS E L AW , THOUGH, SAY THERE HAS T O B E AN OPPORTU NITY A FT ER Y OU S TRIKE THE P RO S E FIL IN GS AND M AYBE T HAT'S , I NDEE D , WHAT WOULD HAVE HAPPENED IS THAT THEY WOULDN'T HAVE B EEN ABLE TO FILE ANYTHING THAT SAID I DON'T O WE T HE M MON EY OR WHATEVER IT WOULD B E I N GOOD FAITH, BUT THE Y WER EN'T GIVEN T HAT OPPORTUNI TY H ER E ppWHEN THE L AWYE R A PPEA RE D , WERE THEY?

I D ON'T T HINK THAT O UR CASE LAW N ECES SA RI LY S AY S THAT IN THE CASE O F A D EFAULT. IT SAYS T HA T I N TOR RE Y I N THE CASE O F A M OTIO N T O D ISMISS , A ND I T HINK I UNDERSTAND THE C OU RT 'S PROPENSITY TO FOL LO W THE NORTH SHORE CASE A ND G IV E SOMEBODY WHO MAYBE MAK ES A MISTAKE IN T HEIR PLE ADIN GS A N AMPLE OPPORTU NI TY T O B E HEARD ON THE MERITS. HOWEVER, WE STILL HAVE T HE RULES OF CIVIL P ROCE DURE THAT SET O UT W HA T HAS T O HAPPEN IN T HESE SITUA TI ON S IN THE CASE OF A DEFAU LT , AND THERE WAS NOT HING F ILED. THERE WAS N O R ESPO NS IV E PLEADING.

BUT IF W E SAY T HA T T HE RE W AS SOMET HI NG F ILED T HA T THIS COURT SAY S SHOULD NOT BE TREATED AS A N ULLITY , AND THA T IF T HE C OURT FIN DS THA T IT HAS BEE N FIL ED I MP ROPE RL Y BY N OT BY A LAWYE R A S I T SHOULD BE , B UT T HE COU RT HAS THE AUTHORITY TO STR IK E T HA T , ppBUT I T M US T G IV E L EAVE T O T HE PARTY T O A ME ND T HOSE PLEADINGS, AND ALLOW T HE P ROFILING B Y A L AW YE R I N T HAT I NSTANCE AND T HAT'S THE PART THAT D IDN'T HAP PE N H ER E , ISN'T IT?

WELL , YES, S IR , BUT W HA T ALSO DIDN'T HAP PE N W AS T HOSE DOC UMENTS WERE NOT PAR T O F WHAT WAS IN FRONT OF THE JUDGE FOR THAT H EARING , BECAUSE THEY HAD BEEN WITHDRAWN.

WELL, IF THEY H AD BEE N WIT HDRAWN, AND I A SS UME T HE JUDGE MADE A MIS TA KE W HE N H E GRA NTED A M OT ION T O S TR IK E , BEC AUSE HE STR UC K THO SE , D ID HE NOT? HE DIDN'T ENT ER AN ORDER SAY ING I A LL OW T HE M T O BE WITHDRAWN. HE ENTERED AN ORDER S TRIKIN G THEM.

HE D ID E NT ER T HA T ORDER, BUT THA T WAS NOT T HE I SSUE ON APPEAL WITH THE 5 TH D CA . THE ONLY ISSUE ON A PPEA L WAS A DEFAULT. THAT WAS NOT RAI SED.

IN THE 5 TH DIS TR IC T WAS THE TORREY CAS E A RGUE D ? I THINK WE ARE H ER E ON THE BASIS OF A C ONFL IC T W IT H TORREY , AND T ORRE Y C AM E OUT IN 200 0 A ND THI S O PI NION OUT OF THE 5 TH D ISTRIC T C AM E OUT IN 200 4 AND T ORREY IS NOT MENTIONED IN I T . WAS IT ARG UE D T HE RE ?

WAS IT A RG UED A T THE HEARING?

AT T HE 5TH DIS TR IC T I N THE B RIEFS IN T HE 5TH DISTRICT.

YES, SIR. IT WAS A RGUE D AND I T W AS - - LET M E B E C ERTAIN OF T HI S .

IT WAS C ITED T O T HE 5TH DISTRICT .

I D ON 'T KNO W W HE THER I T ppWAS A RGUED A T T HE 5TH DISTRICT. I'M READING IN THE 5 TH DISTRICT'S OPINION, AND I DON'T S EE T ORRE Y .

NOT IN THE 5TH D IS TR ICT OPINION. THE QUESTION IS REALLY WAS IT CITED IN THE B RI EF S ? pp

I DON'T HAV E THO SE B RIEF S , YOUR HONOR.

YOU D ON'T K NOW WHETHER IT WAS OR NOT?

I DON'T K NOW. > > OKAY , T HA NK Y OU .

I DO KNOW THAT T HE 5 TH DISTRICT HAS SEVER AL C ASES ON THIS ISS UE . C ITED B Y B OT H S ID ES , AND I N OTE T HA T T HERE ARE D EF AULT ppCASES AND THEY ARE VER Y ppINSTRUCTIVE IN THIS REGARD , AND T HE COURT M AK ES A D ISTINCTION, I N M Y O PINI ON , THAT C ASES L IK E K FC AND MORENO ACTUALL Y SZT EINB AU M AND T ORREY WAS A 5TH D CA BUT CAME UP ON APP EAL. IN EACH OF THOSE CASES T HE DEFAULT WAS SET A SI DE . SZTEINBAUM WAS A D EFAU LT . IN EACH CAS E T HE DEFAU LT WAS SET ASIDE. HOWEVER, IN EACH CASE T HE DEFENDANT ESTABLISHED A DILIGENT EFF ORT TO DEMONSTRATE THAT THERE WAS E XCUSEABLE NEGLECT A ND ALS O A MER IT OR Y US D EFEC T - - MERITORIOUS DEFECT.

HAVE YOU READ THE T ORRE Y CASE?

YES.

CAN YOU TELL M E HOW Y OU I NTERPRET O UR S AY IN G T HA T W E ppREJECT THAT AS PART OF THE ANALYSIS AND WHY AFTER WE SAID THAT W HY THIS EXCUSEABLE NEGLECT IS EVE N BEING DISCUSSED? I 'M JUST - - I'M MISSING IT ppTOTALLY. HELP ME.

THE REASON T HAT I 'M DIS CUSSING EXC US EABLE NEGLECT IS BECAUSE UNDER RULE 1.5 40 B , EXCU SE M E , ppUNDER RULE 1 .540 B I T SAY S T O SET A SIDE A DEF AU LT THERE HAS TO BE A D EMONSTRA TI ON O F AMONG OTHER THI NG S , AMO NG OTHER O PPORTU NI TIES E XCUSEABLE NEGLECT. THERE ARE T HE C AS E L AW I N ppMORENO CITED BY THE PETITIONER DISCUSSES AND K FC D ISCUSSES E XCUS EA BL E N EG LECT AS ONE OF THE THINGS THAT HAVE TO BE PRESE NT T O OVERCOME A DEFAULT. TORREY, T HOUGH

LET'S T AKE ONE S TE P BAC K , THEN. DO YOU AGREE T HA T IF A N ANSWER IS FILED THA T A DEFAULT CANNOT BE ENTERED?

YES.

DO YOU A GR EE THA T I F A P LEADING THA T I S A - - O R A PAP ER I S FIL ED I N R ESPO NS E TO A COM PLAI NT THA T S AY S , YOU KNOW, T HI S SHO UL D B E DISMISSED OR THIS IS A N -- ppINVALID COMPLAINT T HA T A DEFAULT CANNOT BE ENTERED UNTIL THAT'S DETERMINED?

I AGREE.

OKAY. SO IN T HIS CASE, YOU M US T B E T HEN R IDIN G O N THE BAS IS ppTHAT THEY ARE N O L ONGE R W AS ANYTHING STANDIN G , B ECAUSE IT HAD BEEN W ITHD RAWN B Y THE

ppDEFENDANT AND, THEREFORE , DEFAULT WAS P ROPER TO BEGIN WITH; IS THAT WHAT YOU R ARGUMENT IS?

YES, THAT'S PART O F M Y ARGUMENT.

OKAY. AND THAT'S EVEN THOUGH T HE TRIAL JUDGE RUL ED UPO N SOMETHING T HAT YOU A RE SAYING WAS NO LONGER A PAR T OF IT AND THAT W AS THE B ASIS OF THE TRIAL C OU RT 'S R UL ING TO STRIKE W HATEVER T HI S GENTLEMAN FILED ON BEHALF O F HIS BUSIN ES S ? IS THAT COR RECT?

THAT'S CORRECT.

OKAY.

BUT IN ADDITION T O T HAT , T HERE WAS NO D EMON STRA TI ON GIVEN OF A D EF EN SE .

IF I UNDERSTAND WHAT YOU ARE S AYIN G CLE ARLY , O NC E T HE TRIAL JUDGE SAI D I'M GOING TO STRIKE THESE P LE ADINGS , AND I'M GOING TO E NTER A DEFAULT, THAT T HE DEFENDANT EVEN THO UG H H E - - A LAW YE R HAD COME BEFOR E T HE C OURT AND ASKED FOR A TIM E T O F ILE A RES PONS IVE P LE AD ING , T HA T AT THA T P OI NT W HA T T HE LAWYER SHOULD H AVE DONE WAS FILE A MOTION T O S ET ASI DE THE DEFAULT?

SHOULD HAVE DONE IT THEN AND ALSO SHOULD H AV E W HE N H E M ADE A NOTICE O F A PP EARA NC E WAY BACK IN T HE BEGINNING OF OCTOBER OF T HA T Y EA R , T HE ppFIRST DOCUMENT HE SHOULD HAVE FILED SHOULD HAV E BEE N A MOTION TO SET A SIDE T HE DEFAULT, A MOTION

WAS THERE A DEFAU LT ?

AT L EAST AN A NS WE R . > > OF D EFAULT AT T HE T IME H E ENTERED HIS APPEARANCE? I THOUGHT THE DEFAULT WAS AFTER HE HAD ENTERED HIS APPEARANCE AND IT WAS ACTUALLY THE J UDGE S AI D I 'M GOING T O ENTER THIS D EF AU LT AT A H EARI NG T HA T THE A TTORNEY A TT EN DE D ?

THE MOT ION F OR D EF AULT WAS ENTERED, I MEA N WAS ppFILED O N T HE 19T H O F S EPTEMBER. MR. EGAN MADE A NOTICE O F APPEARANCE ON O CTOBER 2ND . THE HEARING WAS N' T U NT IL OCTOBER 22N D . ppTHE C ORRE CT P RO CEDU RE TO DEM ONSTRATE JUST A ppRUDIMENTARY LEVEL O F D ILIGENCE WOULD HAVE GN TO FILE AN A NSWER AND GIVE THE REASON THAT H E H AD N' T F ILED AN ANSWER.

I THINK WITH OUR HELP YOUR TIME HAS E XP IRED. THANK YOU. REBUTTAL ? > > YES.

LET ME ASK Y OU - -

GO AHE AD.

JUSTICE WELLS?

W OU LD YOU A GREE T HA T ppWITHIN THE FOUR COR NE RS O F WHAT THE 5 TH DIS TR ICT DEA LT WITH, THEY WERE D EA LI NG W IT H A D EF AU LT R IGHT FU LL Y O R WRONGFULLY, THEY WERE ONLY DEALING WITH A DEFAULT? THEY DIDN'T M ENTION THE W ORD NULLITY, CORRECT?

THEY DID NOT M EN TI ON T HA T IN THEIR OPINION, YOUR HONOR.

NO WHERE I N THEIR OPINION. WAS TORRE Y A RGUED?

I WAS NOT A PP ELLATE COUNSEL AT THE D ISTR ICT COURT LEVEL , BUT I N T HE BRIEF T ORREY WAS A RG UED. CLEARLY IT WAS ARG UED . I HAVE A COPY OF T HAT BRIEF IN MY B RI EF CA SE . TORREY WAS CITED T O T HE 5TH DCA. NOW , I F I CAN A NSWE R A COUPLE OF QUESTIONS. JUSTICE QUINCE

LET ME ASK Y OU A QUE ST ION . ppAS OF - - U ND ER TOR RE Y , W HA T -- ppWAS FILED BY THE P RO S E C ORPORATE M EM BER W AS N OT A NULLITY, BUT IT WAS A DEFECTIVE PLEADING. DO YOU AGREE?

ABSOLUTELY, AND CLE AR LY THAT

OKAY. SO AS O F OCT OB ER 1 W HE N T HE ATTORNEY WAS RETAINED , H E K NEW UNDER TOR RE Y T HA T T HE P LEADING THAT WAS F ILED W AS DEFECTIVE?

ARE YOU ASKING IF T HE ATT ORNEY KNEW?

KNEW OR S HOULD H AVE KNOWN UNDER THE LAW UNDER T OR RE Y , IF IT WASN'T A N UL LI TY B UT IT WAS DEFECTIVE.

SURE. HE SHOULD HAVE K NO WN T HAT. PERHAPS HE SHOULD HAVE FILED AN ANSWER. PERHAPS HE SHOULD HAVE M OVED TO V ACATE T HE D EF AULT A FTER IT WAS ENTERED , B UT I T S TILL

BUT NO DEFAULT WAS ENTERED UNTIL AFTER THE OCTOBER 22ND HEARI NG .

RIGHT, A ND PERHAPS HE SHOULD HAVE M OVED IMMEDIATELY AFTER THAT TO VACATE THE DEFAULT BUT I T STILL DOES NOT EXCUSE THE ERR THAT THE TRIAL C OURT MADE IN ABSOLUTEL Y I GN OR IN G T ORREY.

BUT W AS T ORRE Y I GN OR ED? MY QUESTION IS UNDER RULE 1.140A HE HAD A R ESPONS IV E PLEADING HAD TO BE F ILED WITHIN 20 DAY S OF S ER VI CE , AND HE KNEW A S O F O CT OBER 1 THAT THE FILIN G THAT H AD BEEN MADE UNDER TOR REY W AS A DEFECTIVE P LEADING , A ND THERE WAS N O E FFEC TIVE PLEADING BEFORE THE COURT. AND HE WAITED 2 2 D AY S T O G O TO A H EA RING A ND STILL HAD NOT FILED AN EFFEC TIVE PLEADING.

YOUR H ONOR , I CAN 'T SUBMIT THAT C OUNSEL AT THA T T IME WAS AWARE O F TOR RE Y. WHAT I CAN S TATE C LE AR LY I S THAT THE PLE ADINGS FIL ED B Y M R. ADD - - A DA MS I S A PAR T OF THE RECORD. THE PRO S E PLE AD IN G T HA T I S IN THE RECORD. IT WAS REL IED ON B Y T HE ppCOURT IN AWA RD ING S ANCT IONS W HEN T HE Y S AI D M R. A DAMS WAS ATTEMPTING TO DELAY T HE C ASE AND HAD BROUGHT THE S TA TE ATTORNEY WRONGFULLY INTO IT , BUT CLEARLY THAT PLE AD IN G SET OUT A D EF ENSE , S TA TE D THAT THE AMOUNT WAS N OT OWD , AND F URTHER THA T I N T HA T P LEADING T HA T T HI S L AWSU IT HAD BEEN BROUGHT I N RETALIATION FOR M R. ADA MS GOING TO THE S TA TE A TT OR NE Y WITH ALLEG AT IONS AGAINST EMPLOYEES OF CALDW EL L CONSTRUCTION.

WE DON'T HAVE A TRANSCRIPT OF THA T O CT OB ER 22ND HEARING, C ORRECT?

WE DO NOT HAVE THAT TRANSCRIPT. THO SE A LL EGAT IONS ARE IN THE COMPLAINT, THOUGH, WHICH IS PART OF THE RECORD.

RIGHT. WHAT I AM GETTING A T I S A LS O THE O RDER D OE S N OT S TA TE WHETHER IT WAS B AS ED O N THE FACT T HAT A PRO SE D EF ENDA NT FILED ON B EHAL F O F A CORPORATION OR WHETHER IT WAS BASED ON THE F ACT THA T ONCE A N A TT OR NEY E NT ER A N APPEARANCE HE HAD 2 1 D AY S T O FILE SOMETHING AND S TI LL DID NOT FILE S OMET HING .

IT DOES NOT STATE THAT , YOUR HONOR.

CLEARLY WHA T W E DO KNOW IS THAT A PRO S E P LEAD IN G WAS FILED AND WAS PART OF THE REC OR D. WHEN P LA INTI FF 'S C OU NS EL SOUGHT TO S TRIKE THAT , T HE BASIS FOR STR IK IN G T HAT , T HE ONLY BASIS A RG UE D W AS THA T IT WAS FILED BY A P RO S E ppREPRESE NTATIVE OF A CORPORATION AND NOT A MEMBER OF THE FLORIDA BAR . A T THAT P OI NT , A S J US TICE QUINCE POINTED OUT , T HE RE HAS TO BE THE DET ER MI NATI ON THAT EITHER THIS P LE AD IN G I S A N ULLITY O R I T I S A N AMEND ABLE DEFECT.

LET ME ASK YOU A Q UESTION : AT THE T IM E P LA INTIFF 'S COUNSEL FILED A MOT ION TO STRIKE, T HERE WAS N O ATTORNEY OF REC ORD , CORRECT?

THAT IS CORRECT.

SO T HE O NLY P RO PER BASIS FOR A M OTION TO S TRIK E W OU LD BE THAT THE RE W AS N OT A COUNSEL OF RECORD? ANY OTHER MATTER A S TO T HE S UBSTANCE OF THE F ILING WE REALLY WOULD NOT HAVE BEEN PERTINENT , BEC AUSE T HE ATTORNEY DIDN'T REALLY S HOW UP UNTIL THE MOTION T O STRIKE WAS FILED A PPAREN TL Y AND T HE C ORPORATE REPRESENTATIVE WENT T O AN ATTORNEY?

CORRECT. AT THE POI NT P LA IN TIFF MOVED TO STRIKE THE R ESPO NS E , H E M OVED TO STRIKE I T A S IMPROPER BECAUSE IT WAS FILED BY A NON LA WYER .

AND THEN THE C LI ENT GOT AN ATTORNEY AND THE A TTORNE Y FILED THE MOTION?

THE CLIENT THEN WENT A ND OBTAINED AN ATTORNEY . N OW , COU NS EL FOR COL BY , I N HIS RES PO NS E , S OUGH T T O W ITHDRAW THE PLEAD IN G . ppLEA VE OF C OU RT WAS NOT GRANTED TO WITHD RA W THE PLEADING.

AS A MATTER RIGHT U ND ER RULE 1 .190 A , Y OU H AV E A S A M ATTER OF RIGHT THE A BI LITY TO AMEND A P LEADIN G . IT IS A MAT TER O F R IGHT TO AMEND , B UT N OT SPECIFICALLY WITHDRA W IT. NOW, CLEARLY T HE C OU RT IN ITS MOT IO N I T I N ITS ORD ER, E XCUSE ME , I T E NT ER ED AN ORDER STRIKING THE P RO S E PLE ADING. IT C OU LD N OT H AV E B EE N WITHDRAWN. OTHERWISE THERE IS NOTHINGTO RULE O N . ppAT THAT

W IT H OUR QUE ST IO NS , YOU R T IME HAS E XPIRED . T HANK YOU.