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FLORIDA SUPREME COURT

CASE NO.: 83,145

FOURTH DISTRICT COURT CASE NO. 92-2649
L.T. CASE NO: CL 90-1992 AE

Fla. Bar. No. 0541877

JFK MEDICAL CENTER, INC.,
a Florida Corp., et al.,

Petitioner/Appellee,

vs.

STACY PRICE, as Personal
Representative, etc.,

Respondent/Appellant.

PETITIONER JFK MEDICAL CENTER, INC.'S BRIEF

STEPHENS, LYNN, KLEIN &
McNICHOLAS, P.A.
Attorneys for Appellee
Two Datran Center, PH2
9130 So. Dadeland Blvd.
Miami, Florida 33156
Telephone: (305) 670-3700

By: PHILIP D. PARRISH, ESQ.

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INTRODUCTION

Petitioner, JFK Medical Center ("Medical Center") was the Defendant in the trial court and the Appellee in the District Court of Appeal. The Respondent Stacy Price, as Personal Representative of the Estate of Barry Price, deceased, for and on behalf of Claimant/Survivors, the Estate of Barry Price, Stacy Price, surviving spouse, and children, Paul Price, Elaine Gadrich, Lori Drennan and Robyn Price, was the Plaintiff in the trial court and the Appellant before the Fourth District Court of Appeal. The Plaintiff/Respondent will be referred to as the Plaintiff. The symbol "R" will refer to the record on appeal. All emphasis is be supplied by counsel unless indicated to the contrary.

STATEMENT OF THE CASE AND FACTS

This Court has accepted jurisdiction of the District Court's Opinion, **PRICE V. BEKER, 529 So.2d 911 (Fla. 4th DCA 1993)**,[1] pursuant to conflict with **JONES v. GULF COAST NEWSPAPERS, INC., 595 So.2d 90 (Fla. 2d DCA) rev. den'd, 602 So.2d 942 (Fla. 1992)**.

The Plaintiff sued Dr. Bernardo Beker, an anesthesiologist, for active negligence sounding in medical malpractice and wrongful death. (Complaint; R.15-22). The Complaint also contained a count against the Medical Center alleging vicarious liability only; there are no allegations of active negligence on the part of the Medical Center. (R.21).

The complaint in this action was filed in February of 1990. By November of 1990 the Plaintiff and Dr. Beker had agreed to settle for the limits of Dr. Beker's insurance policy ($250,000). (R.220;291). The settlement agreement and release between Price and Beker provided as follows:

> It is the intent of this release that the lawsuit styled Stacy Price, et al v. Bernardo Beker, M.D., et al.... remain pending as to JFK Medical Center, Inc., only. (Emphasis in original) (R.306).

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[1]The District Court's Opinion under review was actually the second appearance of this matter before the Fourth District Court of Appeal. See, **PRICE v. JFK MEDICAL CENTER, INC., 595 So.2d 202 (Fla. 4th DCA 1992)**. The trial court had previously granted summary judgment on the Medical Center's behalf upon the determination that Dr. Beker was an independent contractor and not an agent or employee of the Medical Center. The District Court of Appeal reversed noting that "the relationship between hospital and doctor, as here, is often unclear and raises a question for the jury." **595 So.2d at 203**.

However, Price and Beker then stipulated to the entry of a dismissal with prejudice of Price's claim against Beker, and the trial court accordingly entered such an order. (R.220-22).

The Medical Center filed the subject motion for summary judgment premised upon the Second District Court of Appeal's decision in **JONES v. GULF COAST NEWSPAPER, INC., supra**.[2] The Medical Center successfully argued for the subject summary judgment on the basis of **JONES, supra**, in light of the fact that the Plaintiff, following her settlement with Dr. Beker, filed a voluntary notice of dismissal with prejudice. (R.220-222; 310-312).

On appeal, the Fourth District Court of Appeal specifically noted that the trial court's order was supported by **JONES, supra**, but elected to create conflict with **JONES**, and reversed the summary judgment as a matter of law determining that the summary judgment had been based upon a "fiction." **629 So.2d at 913.**

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[2]The Plaintiffs "fall-back" position before the District Court of Appeal on the second appeal was that the Medical Center had waived the **JONES** argument by failing to raise it as a basis for affirmance of the first summary judgment. However, it would have been difficult to argue on the one hand that the record was clear and unequivocal that Dr. Beker was an independent contractor yet argue simultaneously that because he was employed by the Medical Center the dismissal of the claim against the doctor entitled the Medical Center to a dismissal. At any rate, that argument was rejected by the District Court sub silentio and will not be addressed here.

SUMMARY OF THE ARGUMENT

This Court should quash the decision under review, **PRICE v. BEKER, 629 So.2d 911 (Fla. 4th DCA 1993)**, and approve the decision of the Second District in **JONES v. GULF COAST NEWSPAPERS, INC., 595 So.2d 90 (Fla. 2d DCA), rev. den'd., 602 So.2d 942 (Fla. 1992)**.

Contrary to the District Court's opinion, this appeal does not involve the interpretation of a settlement agreement, nor does it involve the legislative history or public policy behind Florida's release of joint tortfeasor statutes. Rather, this case involves the entirely separate issue of the effect of a dismissal with prejudice of an actively negligent party where the only remaining party has been sued on a purely vicarious theory of liability. That issue has previously been decided by two Florida District Courts of Appeal, and by the 11th Circuit Court of Appeal applying Florida law. See, **JONES v. GULF COAST NEWSPAPERS, INC., supra; WALSINGHAM v. BROWNING, 525 So.2d 996 (Fla. 1st DCA 1988); CITIBANK, N.A. v. DATA LEASE FINANCIAL CORP., 904 F.2d 1498 (11th Cir. 1990)**. Each of these decision has appropriately held that a dismissal with prejudice of the actively negligent tortfeasor acts as a negative adjudication on the merits with respect to the Plaintiff's complaint against the passively negligent tortfeasor, and thereby discharges the passive tortfeasor because, as this Court long ago decided, if the employee is not liable, the vicariously sued employer cannot be liable. See, **MALLORY v. O'NEIL, 69 So.2d 313 (Fla. 1954)**.

The District Court of Appeal's opinion essentially ignores or

re-writes a contract (stipulation entered into between the Plaintiff and the actively negligent tortfeasor Dr Beker), and does so through the vehicle of a collateral attack on the judgment in favor of the Medical Center. The only conclusion that can be drawn from the record in this case is that Plaintiff's counsel made an error in judgment when he signed the stipulation for dismissal with prejudice, and that he did not intend the effect which the stipulation would have upon any cause of action against the Medical Center. However, this error in judgment on the part of Plaintiff's counsel does not provide a basis for relief. **MILLER v. FORTUNE INS. CO., 484 So.2d 1221 (Fla. 1986).**

ARGUMENT

THIS COURT SHOULD QUASH THE DISTRICT COURT'S OPINION AND APPROVE THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL IN JONES v. GULF COAST NEWSPAPERS, INC.

Under the guise of refusing to "honor a fiction", **629 So.2d at 913**, the District Court has wrought a new and larger fiction of its own. In doing so it has created express and direct conflict with a decision of the Second District Court of Appeal,[3] apparently disowned one of its own longstanding decisions,[4] and completely ignored a contrary decision which it rendered a mere 13 months prior to the decision under review. See, **CHASSAN PROFESSIONAL WALLCOVERING v. VICTOR FRANKEL, INC., 608 So.2d 91 (Fla. 4th DCA 1992)** (a dismissal with prejudice, even though upon stipulation of the parties, can be considered an adjudication upon the merits sufficient to bar a second suit under the doctrine of res judicata).

The new fiction which the District Court of Appeal has wrought in this case is to transform a dismissal with prejudice of an actively negligent tortfeasor into a "consent judgment" so that the court could then (improperly) rely upon the Restatement (2d) of Judgments, §51, that "a judgment by consent for or against the injured person does not extinguish its claim against the person not sued in the first action...." **629 So.2d at 913**. Thus, the court

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[3]**JONES v. GULF COAST NEWSPAPERS, INC., 595 So.2d 90 (Fla. 2d DCA) rev. den'd, 602 So.2d 942 (Fla. 1992).**

[4]**LOMELO v. AMERICAN OIL CO., 256 So.2d 9 (Fla. 4th DCA 1971).**

has engaged in two successive fictions. First, the court has transformed a dismissal with prejudice into a consent judgment; then it has applied a rule of law which addresses the effect of a consent judgment from a prior action upon a successive action, to the present scenario which involves of a single lawsuit.

PRICE IS NOT RIGHT

The District Court's opinion expressly and directly conflicts with the decision of the Second District Court of Appeal in **JONES v. GULF COAST NEWSPAPERS, INC., 595 So.2d 90 (Fla. 2d DCA) rev. den'd 602 So.2d 942 (Fla. 1992)**. **JONES** holds that where a plaintiff has sued tortfeasor A on a theory of active negligence, and tortfeasor B solely on a theory of vicarious liability and the plaintiff thereafter settles his case with the actively negligent tortfeasor A, enters into a release with tortfeasor A that provides that the plaintiff intends to pursue his action against tortfeasor B, but nevertheless files a voluntarily notice of dismissal with prejudice against tortfeasor A, then tortfeasor B is entitled to summary judgment on the plaintiff's claim because the dismissal with prejudice of the action against tortfeasor A acts as a negative adjudication on the merits of the plaintiff's claim against the active tortfeasor.

Before we embark on a lengthy analysis of the problems inherent with the Fourth District Court of Appeal's approach to this problem, we shall first take a look at the origins of the **JONES** decision. For **JONES** is not the only authority on point for the trial court's decision in this case. First, however, we note

that it is undisputed that the complaint in this case alleged only vicarious liability against the Medical Center.

Thus, in order to recover against the Medical Center, the Plaintiff would first have to establish liability on the part of the active tortfeasor, Dr. Beker. This Court ruled long ago that if an employee is not liable, then the employer is not liable where the employer is sued solely for vicarious liability. See, **MALLORY v. O'NEIL, 69 So.2d 313 (Fla. 1954)**; see also, **BANKERS MULTIPLE LINE INS. CO., v. FARISH, 464 So.2d 530 (Fla. 1985)**.

The first Florida court to address the effect of a voluntary stipulation for dismissal with prejudice as between a plaintiff and an allegedly active negligent tortfeasor upon the plaintiff's still pending action against a vicariously negligent tortfeasor was **WALSINGHAM v. BROWNING, 525 So.2d 996 (Fla. 1st DCA 1988)**. In that case, an off-duty police officer, Thomas Tawes, was involved in an altercation with Walsingham while employed as a security guard at the Thunderbird Lounge. Tawes filed suit against Walsingham for injuries he sustained in the brawl; Walsingham counterclaimed against Tawes in that action, and subsequently filed a separate action against the Thunderbird Lounge owner alleging that the lounge owner was vicariously liable for Tawes' intentional tort. Tawes and Walsingham eventually settled their action whereby Tawes was paid $45,000 in exchange for a release. **525 So.2d at 997**. As part of the release and settlement, Walsingham dismissed its battery counterclaim against Tawes with prejudice. **Id**. Thereafter, the owner of the Thunderbird Lounge, Browning, moved

for summary judgment alleging that the dismissal of the claim against his employee with prejudice was an adjudication on the merits of that action, and that, pursuant to **MALLORY v. O'NEIL, supra**, the lounge owner could not be held liable.

The court held that Walsingham's dismissal with prejudice of his action against Tawes was a negative adjudication on the merits of that claim against Tawes under **Fla. R. Civ. P. 1.420(a)(1)**. Citing to the Fourth District's in **LOMELO v. AMERICAN OIL CO., 256 So.2d 9 (Fla. 4th DCA 1971)**, the court thereafter held that dismissal of the battery claim against Tawes precluded litigation of the vicarious liability issue against the lounge owner. **525 So.2d at 998**. In **LOMELO**, the court held that a dismissal with prejudice acted as a negative adjudication of the action so dismissed, even where the dismissal was the product of a stipulation. **256 So.2d at 11**.

One of the cases cited in **JONES** -- and completely ignored by the Fourth District Court of Appeal -- is even more on point here than is the **JONES** case. See, **CITIBANK, N.A. v. DATA LEASE FINANCIAL CORP., 904 F.2d 1498 (11th Cir. 1990)**. In that case, Citibank originally filed suit against Data Lease to foreclose against collateral posted by Data Lease in connection with loans made by Citibank to Data Lease. Data Lease responded by filing a third party complaint against seven individual directors of Citibank, and a counterclaim against Citibank alleging vicarious liability for the actions of those directors. **904 F.2d at 1499**.

Eventually, Data Lease settled with the seven directors, and

then filed a document entitled "Stipulation and Order Dismissing all Claims by Data Lease Against the Directors with Prejudice." **904 F.2d at 1500**. The District Court approved the stipulation and entered an order of dismissal which states:

> The foregoing stipulation is approved, and all claims by Data Lease solely against the Directors (but not Citibank) as therein defined are dismissed with prejudice.

904 F.2d at 1500. The settlement agreement between Data Lease and the seven directors was every bit as explicit in its intention not to release Citibank as is the settlement agreement and release in this case with respect to the Medical Center. And, unlike the situation in **JONES**, the allegedly vicariously liable party (Citibank) was in no way a party to the stipulation for dismissal. Finally, unlike the present case, the court order recognizing the stipulation of dismissal acknowledged that the parties did not intend to dismiss the vicariously liable party.

The 11th Circuit agreed with Citibank's position that the dismissal with prejudice constituted an adjudication on the merits which had the legal effect of barring Data Lease's claim against Citibank, "regardless of the intention of Data Lease and the seven directors" that the action against Citibank would remain pending. **904 F.2d at 1500**. The 11th Circuit relied principally upon Florida case law, including **BANKERS MULTIPLE LIFE INS. CO. v. FARISH, supra**, and **WALSINGHAM v. BROWNING, supra**.

The 11th Circuit put this matter into perspective from the standpoint of the vicariously sued party as follows:

> It is true that the directors agreed to Data Lease's reservation of claims against Citibank. However, Citibank, not a party to the settlement between Data Lease and the directors, did not so agree. Further, the directors have not in any way relieved Data Lease of the right of the directors to have continued in full force and effect the order of dismissal, with prejudice, sa to all claims against the directors by Data Lease. That means that Data Lease's reservation against Citibank is of no value to Data Lease because, for reasons fully discussed **supra** in this opinion, Data Lease cannot proceed against Citibank on the basis of vicarious liability if the liability of the directors (i.e., the alleged agents of Citibank) has been extinguished.

904 F.2d at 1504.[5]

Finding no refuge in the law with respect to the effect and meaning of a dismissal with prejudice against an actively negligent tortfeasor upon the plaintiff's case against a solely vicariously liable tortfeasor, the District Court relied upon cases which discuss settlements, as opposed to dismissals. As the court pointed out in **JONES**, "if we were considering only the release involved in this matter, or if the action had been dismissed

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[5]Thus, despite the fact that pursuant to dictum in **HERTZ CORP. v. HELLENS, 140 So.2d 73 (Fla. 2nd DCA 1962)**, the vicariously liable party would still be entitled to indemnity from the active tortfeasor, even when the tortfeasor had been released from liability by the injured party, there has been no demonstration here that Dr. Beker's counsel was aware of that language from **HELLENS**, or, if he was aware of it, believed that it was controlling in the event that the Medical Center sought indemnity from Dr. Beker. This is yet another problem with setting aside the stipulation via collateral attack.

without prejudice," perhaps the plaintiff's argument would carry the day. However, the legal issue involved in this appeal is not whether the release entered into between the Plaintiff and Dr. Beker released the Medical Center, as it clearly did not. Rather, the question here is whether the dismissal with prejudice of the Plaintiff's action against Dr. Beker, which is a negative adjudication on the merits of the Plaintiff's action against Dr. Beker, thereby also precludes the Plaintiff from establishing liability on the part of Dr. Beker's alleged employer, the Medical Center. Pursuant to **JONES, WALSINGHAM** and **CITIBANK, supra**, the Plaintiff is precluded from pursuing vicarious liability against the Medical Center. See also, **PEOPLES v. FLORIDA INS. GUARANTY ASSOC., INC., 364 So.2d 79 (Fla. 2d DCA 1978)** (presuit settlement agreement rescinded by plaintiff's subsequent action in bringing suit against FIGA). Here, to the extent that the stipulation of dismissal with prejudice is in conflict with the express intentions of the parties in the settlement agreement, the subsequently filed stipulation of dismissal (i.e., the second contract) governs.

Moreover,the Plaintiff's claims of mistake or inadvertence cannot save the day. As Judge Lenore Nesbitt, whose opinion at **700 F. Supp. 1099 (S.D. Fla. 1988)**, was affirmed by the 11th Circuit in **CITIBANK, supra**, noted:

> The phrase 'with prejudice' is a term of art that every attorney should consider with caution.

700 F. Supp. at 1102. The Plaintiff admits of this much herself (District Court Brief at 15) when she indicates that "if one were

to 'match up' the 'release' with the subject 'dismissal with prejudice' it is clear an apparent inconsistency appears." Therein lies the rub. The dismissal "with prejudice" should have put someone on notice to check into the effect of that language.

The Plaintiff had other options available. The dismissal could have been "without prejudice" or could have been silent on the point, which, pursuant to **Fla. R. Civ. P. 1.420(a)(1)** would have been without prejudice, unless a prior notice of dismissal had been filed. Furthermore, the Plaintiff had the option of filing a notice of dropping party defendant pursuant to **Fla. R. Civ. P. 1.250(b)**, which specifically references **Rule 1.420(a)(1)**.[6]

As Judge Nesbitt noted in **CITIBANK**, although Data Lease intended to dismiss the claims against the directors while reserving its right to proceed against Citibank, what Data Lease did not intend was "the legal consequence of dismissing its claims against the directors with prejudice." **700 F.Supp. at 1102**. Unfortunately for Data Lease, and for the Plaintiff herein, that legal effect is to preclude an action against the vicariously sued tortfeasor. Like, **CITIBANK**, the Medical Center is entitled to summary judgment.

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[6]However, we disagree with the "concurring" opinion of Judge Altenbernd in **KOEBLER v. KEIFFER, 621 So.2d 681 (Fla. 2d DCA 1993)**, that a stipulated dismissal with prejudice should be "treated" as a notice of dropping party defendant pursuant to **Fla. R. Civ. P. 1.250(b)**. To do so would, we believe, constitute nothing more than an "end run" around the rule established by this Court in **MILLER v. FORTUNE INS. CO., 484 So.2d 1221 (Fla. 1986)**, that a plaintiff should not be relieved from his attorney's error of judgment.

A HODGE-PODGE OF RATIONALIZATIONS

The District Court has "patched" together a number of arguments to create a decision out of new cloth. However, when subjected to analysis, the cloth quickly unravels.

First, the District Court opinion improperly relies upon Subsection (4) of the Restatement (Second) of Judgments, §51 (1980) for the proposition that a consent judgment -- the court having previously through some unexplained feat of judicial legerdemain transformed the stipulation of dismissal into a consent judgment -- is similar to a settlement and release, and is therefore subject to the cleansing effects of **Fla. Stat. §768.31(5)**, i.e., that a release or covenant not to sue one tortfeasor does not release another tortfeasor, even a vicarious tortfeasor. **629 So.2d at 913**.

The stipulation of dismissal with prejudice entered into and filed by the Plaintiff and Dr. Beker is not a consent judgment; it is a stipulation of dismissal with prejudice. Thus, the appropriate subsection of Restatement (Second) of Judgment §51 to apply to this case is subsection (3) which provides as follows:

> If the action is brought against the primary obligor and judgment is against the injured person, it extinguishes the claim against the person vicariously responsible if under applicable law the latter is an indemnitor whose liability arises only when the primary obligor is found liable to the injured person.

Even if the stipulation of dismissal with prejudice is considered to be a species of consent judgment, subsection (4) of the Restatement (Second) of Judgments §51 provides that:

> A judgment by consent for or against the injured persons does not extinguish his claim against the person not sued in the first action except:
>
> (a) in the circumstances stated in §(3)...

Thus, subsection (4) does not apply to this case because this case does arise under the circumstances stated in subsection (3) of the Restatement, i.e., a judgment in favor of the actively negligent party and against the injured person which has extinguished the claim of the injured person against the vicariously liable party. This is the precise analysis of the Restatement correctly utilized by the Court in **CITIBANK, N.A. v. DATA LEASE FINANCIAL CORP., 904 F.2d 1498, 1503 (11th Cir. 1990)**. The Fourth District has simply selected a portion of subsection (4) of §51 of the Restatement (Second) of Judgments, and has ignored other (controlling) portions of the Restatement.

This sweeping act of judicial revisionism by the District Court should not be excused as simply a choice of the lesser of two legal fictions. Although it is clear from the language in the settlement agreement and release executed between the Plaintiff and Dr. Beker that the parties thereto intended that the Plaintiff would retain the right to pursue a cause of action against the Medical Center, that settlement agreement and release is not the only document executed by the Plaintiff and Dr. Beker. Subsequent to the execution of that release, the Plaintiff and Dr. Beker filed a stipulation of dismissal with prejudice of the action against Dr. Beker.

There can be no argument that the dismissal with prejudice would -- in the absence of the particular language in the settlement agreement noted above -- be treated as a negative adjudication on the merits. See, e.g., **CHASSAN PROFESSIONAL WALLCOVERING, INC. v. VICTOR FRANKEL, INC., 608 So.2d 91 (Fla. 4th DCA 1992); LOMELO v. AMERICAN OIL CO., 256 So.2d 9 (Fla. 4th DCA 1971); Rule 1.420(a).**

The District Court has distanced itself from its decision in **LOMELO v. AMERICAN OIL CO., supra**, upon the basis that "Lomelo applied the doctrine of res judicata to hold that a dismissal of an earlier claim with prejudice barred a subsequent claim by the same claimant against the same party defendant, a situation not present here." **629 So.2d at 912-13.** But that language fails to recognize that the Medical Center's liability, if any, is strictly vicarious, i.e., derivative or technical. For all intents and purposes, the Medical Center is the same party as Dr. Beker. Indeed, if this matter is remanded for trial, that is precisely what the Plaintiff will argue to the jury. See, **PRICE v. JFK MEDICAL CENTER, INC., 595 So.2d 202 (Fla. 4th DCA 1992).** See also, **ASTRON INDUS. ASSOC., INC. v. CHRYSLER MOTORS CORP., 405 F.2d 958 (5th Cir. 1968)** (holding parent corporation and subsidiary to be "in privity," or same party, for purposes of res judicata). In other words, the Medical Center's liability herein is a "fiction." Apparently it is a fiction with a greater pedigree than the "fiction" represented by the **JONES** and **CITIBANK** decisions.

According to the plain language of **Rule 1.420(a)(1)**, "a notice

of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim." Thus, the Rule itself gives credence to a legal "fiction." The opinion under review results in the anomaly that a plaintiff who twice unilaterally and voluntarily dismisses a cause of action without prejudice has received a "negative adjudication on the merits," whereas a plaintiff who stipulates that he or she has dismissed a cause of action with prejudice, has not received such an adjudication. It has never been an absolute requirement for issue preclusive purposes that a cause dismissed with prejudice or twice without prejudice was actually decided on its merits. Yet that seems to be the reason that the Fourth District has refused to recognize the dismissal with prejudice in this case as "an adjudication on the merits" for purposes of issue preclusion.

Historically, involuntary dismissals that were prompted by motions on the part of defendants for, e.g., plaintiff's failure to follow court orders, constituted an adjudication on the merits, even though it had to be recognized that the merits of the case had never actually been determined by fact-finder. See, **CREWS v. DOBSON, 177 So.2d 202 (Fla. 1964)**. See also, **RASHARD v. CAPPIALLI, 171 So.2d 581 (Fla. 3d DCA 1965)** (dismissal of complaint for violation of rules of civil procedure cannot be upon merits though it might act as adjudication of the merits). The exceptions to this rule were for dismissals for lack of jurisdiction, improper venue, or lack of an indispensable party. **CREWS, 177 So.2d at 204.**

THE FILING OF THE NOTICE OF DISMISSAL WITH PREJUDICE SUBSEQUENT TO THE EXECUTION OF THE SETTLEMENT AGREEMENT EVIDENCES A NEW INTENT

The District Court concluded that:

> In this case it is undisputed that the parties to the settlement agreement resulting in the consent order of dismissal did not intend to preclude the claimant from proceeding against the passive tortfeasor. They said so in writing. We are doing a little more than upholding that agreement.

629 So.2d at 913 (emphasis in original).

While it is not disputed that the intent of the parties to the settlement agreement as expressed in the settlement agreement was to allow the Plaintiff to proceed against the Medical Center, here, as in **JONES**, we are not dealing simply with a settlement agreement. A court is not free to interpret one contract between two parties, and thereafter ignore the clear effect of a subsequent contract, i.e., a stipulation for dismissal with prejudice. The district court has, in effect, rendered that stipulated dismissal with prejudice a nullity.[7]

The court was bound by this second "contract" between the Plaintiff and Dr. Beker. See, **GOODMAN v. AERO ENTERPRISES, 469**

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[7]Elsewhere the district court's opinion suggests that giving the proper legal effect to the stipulation of dismissal with prejudice (i.e., granting summary judgment on behalf of the Medical Center) is not justified because the Plaintiff "has actually prevailed in securing some compensation from the active tortfeasor." **629 So.2d at 913**. This statement is completely at odds with established law in this State that a negotiated settlement in no way establishes liability or represents an admission of negligence. See, **HALLMAN v. STATE, 371 So.2d 482 (Fla. 1979); JOHNSON v. GIRTMAN, 542 So.2d 1033 (Fla. 3d DCA 1989)**.

So.2d 835 (Fla. 4th DCA) (stipulation will be enforced unless it is shown that both parties mistook the law or that the stipulation was explicitly prohibited by law and was therefore an illegal contract), **rev. den., 480 So.2d 1294 (Fla. 1985); KELLY v. WILLIAMS, 411 So.2d 902 (Fla. 4th DCA 1982), pet. for rev. den. 419 So.2d 1198 (Fla. 1982)**, approved of by this Court in **FIDELITY & CASUALTY AND CO. v. COPE, 462 So.2d 459 (Fla. 1985)**.

Nor was the court free to make the Medical Center a party to the settlement agreement. See, e.g., **CITIBANK, N.A. v. DATA LEASE FINANCIAL CORP., 904 F.2d 1498, 1500 (11th Cir. 1990)** (noting that the plaintiff Data Lease did not obtain the consent of the vicariously liable Citibank to the settlement agreement between Data Lease and the seven actively negligent bank directors). Thus, even though the Plaintiff herein had evidenced an intent to pursue a cause of action against the Medical Center by virtue of the language in the settlement agreement (which language was unnecessary in light of Florida's release of joint tortfeasor statute and case law) the Plaintiff nevertheless abandoned those rights when it caused its action against Dr. Beker to be dismissed with prejudice without obtaining any type of waiver from the Medical Center. **CITIBANK, 904 F.2d at 1501**.

KELLY v. WILLIAMS is particularly analogous here because it involved a voluntary stipulation between two parties which had the then unintended effect of relieving a third party from any and all liability to one of the stipulating parties. Kelly sued Williams for injuries which he received in an automobile accident caused in

part by the negligence of Williams' deceased husband. **411 So.2d at 903**. The parties entered into a stipulation, which was filed by the court, in which Allstate, Williams insurance carrier, agreed to pay the plaintiff Kelly, $50,000, which was the liability limit of Williams' policy. **Id**. However the stipulation also provided that the plaintiff Kelly would retain the right to pursue a bad faith judgment against Allstate; and that the $50,000 paid by Allstate in settlement of its insureds liability against Kelly would act as a set off from any judgment against Allstate in the subsequent bad faith action. **411 So.2d at 904**.

However, because the settlement of the insured's liability for $50,000, i.e., the exact limit of the insured's policy with Allstate, meant that the insured could not be exposed to an excess judgment, the trial court dismissed the third party action against Allstate. On appeal Kelly claimed that the stipulation "clearly contemplated its future third party action against the insurer for bad faith negotiations." **Id**. In other words, Kelly claimed the intent of the parties to the stipulation was that he would be allowed to pursue a cause of action against Allstate for bad faith. However, because no cause of action for bad faith can exist where the insured's liability is limited to the policy limits which were paid by Allstate, the court held that there could be no bad faith cause of action. This Court has subsequently approved that decision. See, **FIDELITY & CASUALTY CO. of NEW YORK v. COPE, 462 So.2d 459 (Fla. 1985)**.

Apropos of the present case, the Fifth District Court of

Appeal made the following observation about the effect of the stipulation:

> It is apparent that a mistake was made, at least by Kelly, as to the legal effect of the stipulation. However, he did not make any showing at the trial court level sufficient to establish grounds to release him from the stipulation; nor did he file any motion before the trial court seeking relief from it. Absent a basis to invalidate the stipulation, it is binding and enforceable, and we cannot relieve him from its legal consequences.

411 So.2d at 905 (footnotes omitted).

Here the district court has allowed the Plaintiff to escape the stipulation via a collateral, rather than a direct, attack on that stipulated dismissal. It must be presumed that it was the intent of the Plaintiff and Dr. Beker to dismiss the cause of action against Dr. Beker with prejudice.[8] Otherwise, it would have been a simple matter for the Plaintiff to seek relief from the effect of the dismissal with prejudice by claiming mistake, inadvertence or excusable neglect. See, **MILLER v. FORTUNE INS. CO., 484 So.2d 1221 (Fla. 1986); SHAMPAINE INDUSTRIES v. SOUTH BROWARD HOSPITAL, 411 So.2d 364 (Fla. 4th DCA 1982).** See

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[8]Following the filing of the Medical Center's motion for summary judgment, the Plaintiff did not file a single affidavit, either from her own counsel, or from Dr. Beker or Dr. Beker's counsel. There is absolutely no evidence in this record that both the Plaintiff and Dr. Beker (through their counsel) intended to file anything other than a voluntary stipulation of dismissal with prejudice. Although it can be safely assumed that Plaintiff's counsel did not intend the legal effect that the stipulation would have, it is clear from this record that the Plaintiff's counsel intended to file such a document.

generally, **Florida Rule of Civil Procedure 1.540(b)**.

If, in fact, the words "with prejudice" were included as a mutual mistake, rather than, for instance, as a condition to the settlement agreement required by Dr. Beker, then the Plaintiff and Dr. Beker could have asked the court to consider the "underlying circumstances," **SHAMPAINE, 411 So.2d at 367**, and strike the words "with prejudice." See, e.g., **CLAMPITT v. CLAMPITT, 621 So.2d 586 (Fla. 2d DCA 1993)** (reversing order of dismissal on husband's suit for breach of property settlement agreement, for the express purpose of avoiding **JONES** defense of res judicata to another pending action). However, the Plaintiff utterly failed to present any kind of evidence or testimony that a mutual mistake had occurred. The only conclusion to be drawn is that Plaintiff's counsel made a unilateral mistake of judgment.

As the District Court noted in **SHAMPAINE**, and this Court affirmed in **MILLER v. FORTUNE INS. CO., 484 So.2d 1221 (Fla. 1986)**, while explaining its decision in **RANDLE-EASTERN AMBULANCE SERV. INC. v. VASTA, 360 So.2d 68 (Fla. 1978)**:

> We found that a plaintiff could not be relieved from attorney judgmental error because: the defendant suffers attorney cost and inconvenience; the public suffers the cost of improvident use of judicial resources; the dismissal privilege, which benefits only the plaintiff, and poses a duty on the plaintiff to exercise the privilege with due care; and, correlative with the duty, the plaintiff must bear the risk of an improvident exercise of the privilege.

484 So.2d at 1223. The 11th Circuit Court of Appeal in **CITIBANK,**

N.A., 904 F.2d at 1505, echoed this salutary principle when it held that "an attorney's failure to evaluate carefully the legal consequences of a chosen cause of action provides no basis for relief from a judgment" under Rule 60 (b) (quoting from **NEMAIZ v. BAKER, 793 F.2d 58 (2nd Cir. 1986)**).

The Fourth District Court of Appeal has not previously exhibited a reluctance to uphold the principle established by this Court in **VASTA, supra**, where an attorney's unilateral mistake in judgment has resulted in an unintended effect being given to a voluntarily undertaken course of action. See, **BMW OF NORTH AMERICA, INC. v. KRATHEN, 471 So.2d 585 (Fla. 4th DCA 1985), rev. den'd. 484 So.2d 7 (Fla, 1986); MCCUTCHEON v. HERTZ CORP., 463 So.2d 1226 (Fla. 1985)**.

In **BMW of NORTH AMERICAN, INC. v. KRATHEN**, the defendant BMW made an offer of judgment to the Krathens to settle their dispute over a BMW sold to the Krathens which "had a shimmy in the front end that could not be corrected." **471 So.2d at 587**. The offer of judgment did not specifically address what would be done with the car. When the plaintiffs accepted the settlement, BMW realized its mistake and filed a **Rule 1.540** motion to have the vehicle returned under the premise that the offer of judgment should be "clarified" to reflect the understanding that "return of the vehicle was always a condition precedent" to the settlement negotiations. **Id**. BMW alternatively argued that it should be granted relief under **Rule 1.540** because the offer "was made as a result of mistake, inadvertence, or excusable or neglect" on the part of BMW's

attorney. Id.

Both motions were denied, and the Fourth District Court of Appeal affirmed. In doing so, the Fourth District held:

> A party to a consent judgment who files a Rule 1.540(b) motion is not entitled to relief because he misunderstood the legal effect of his consent, see, In RE WILL OF ASTON, 262 So.2d 246 (Fla. 4th DCA 1972) nor is a party to a stipulation for dismissal entered after a negotiated settlement entitled to relief on grounds of inadvertence or excusable neglect...

471 So.2d at 588.

In **MCCUTCHEON v. HERTZ CORP., 463 So.2d 1226 (Fla. 1985)**, wherein the Fourth District wrote the final chapter in the **STUART v. HERTZ** saga, the court held that the plaintiff, having accepted the automobile accident tortfeasor's offer of judgment without qualification as full settlement of all claims pending against that tortfeasor, could not thereby maintain another lawsuit against the "subsequent tortfeasor" physician in light of the decision by this Court in **STUART v. HERTZ, 351 So.2d 703 (Fla. 1977)**, to the effect that the initial tortfeasor was liable for all of the plaintiff's injuries, including those caused by the physician. **463 So.2d at 1227.**[9]

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[9]Although the **MCCUTCHEON** case has been modified somewhat, such that it does not apply where the settlement agreement between the plaintiff and the initial tortfeasor expressly retains the right to pursue a cause of action against the subsequent tortfeasor, see, **RUCKS v. PUSHMAN, 541 So.2d 673 (Fla. 5th DCA), rev. den'd., 549 So.2d 1049 (Fla. 1989)**, the fact remains that in **MCCUTCHEON** the Fourth District Court of Appeal refused to relieve plaintiff's counsel of the unintended effect of his actions. The **RUCKS** decision has no application here because the Plaintiff and Dr.

One of the decisions relied upon by the District Court, **APSTEIN v. TOWER INVESTMENTS OF MIAMI, INC., 544 So.2d 1120 (Fla. 3d DCA 1989)**, actually supports our position that it is improper to attack a judgment collaterally as the Plaintiff has done. In **APSTEIN** there was a rather complex factual matrix involving a number of transactions. An initial foreclosure action resulted in a settlement agreement amongst the numerous parties.

Thereafter, two of the parties to the settlement agreement filed suit against a third party to the agreement, Tower, seeking damages. Tower moved for summary judgment claiming that the suit was barred by the doctrine of res judicata. **544 So.2d at 1121**. Tower argued that the pleadings in the earlier suit taken in conjunction with the settlement agreement had already put into contention all issues involved in the second lawsuit. **Id**.

The Third District Court of Appeal reversed the summary judgment that was granted in favor of Tower noting that:

> The lower court must resolve the genuine issues of material fact which these differing views evidence -- specifically, the capacity in which appellants, appellee, Corporation and Mehnert acted, both in their respective partition and foreclosure suits and in the entry into the execution of the agreement purporting to settle those suits.... Once the issue of 'capacity' has been decided, the trier-of-fact can and should next resolve the issue of the intentions with which appellants, appellee, Corporation and Mehnert entered into the

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Beker did not simply sign a settlement agreement; they thereafter stipulated to a dismissal with prejudice.

> settlement agreement. Only after these preliminary, yet genuine, issues of material fact are resolved can the trial court reach the issue of the res judicata effect, if any, to be given in the instant suit to the earlier settlement agreement.

544 So.2d at 1122.

Far from supporting the District Court's opinion, the **APSTEIN** decision demonstrates why the Plaintiff should have directly joined issue with Beker on the effect of the stipulation for dismissal with prejudice. Having failed to do so in either the trial court or before the Fourth District, the Plaintiff cannot now do so. **DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981).**

Perhaps the Plaintiff has not done so because, at the very best, all the Plaintiff can hope to establish in such a hearing is that although Plaintiff's counsel intended to file a stipulation with prejudice, he simply did not intend its effect, i.e., to preclude his client from maintaining a cause of action against the vicariously liable Medical Center. This is no grounds for relief. **MILLER v. FORTUNE INS. CO., supra.**

CONCLUSION

For the foregoing reasons, Petitioner MEDICAL CENTER, respectfully requests that this Court quash the decision under review and affirm the summary judgment on the authority of **JONES**.

STEPHENS, LYNN, KLEIN &
McNICHOLAS, P.A.
Attorneys for Petitioner
Two Datran Center, PH2
9130 So. Dadeland Blvd.
Miami, Florida 33156
Telephone: (305) 670-3700

By: _____
PHILIP D. PARRISH, ESQ.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 9th day of May, 1994, to: Arnold R. Ginsberg, Esquire, 410 Concord Building, 66 West Flagler Street, Miami, FL 33130; Brian W. Smith, Esquire, Fogarty & Smith, P.A., 4360 Northlake Blvd., Suite 109, Palm Beach Gardens, FL 33410.

STEPHENS, LYNN, KLEIN &
McNICHOLAS, P.A.
Attorneys for Petitioner
Two Datran Center, PH2
9130 South Dadeland Blvd.
Miami, Florida 33156
Telephone: (305) 670-3700

By: _____
PHILIP D. PARRISH, ESQ.