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 JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS[1]

The District Court's opinion, **PRICE v. BEKER, 18 FLW D2526 (Fla. 4th DCA December 1, 1993)**; (A.1), 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. See also, **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)**.

In the District Court's opinion under review, the Fourth District Court of Appeal expressly and directly acknowledged the

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[1]Defendant/Appellee, JFK Medical Center, Inc., a Florida Corp., will be referred to as it stands in this Court, as it stood in the trial court and as JFK. Plaintiff/Appellant Stacy Price as Personal Representative of the Estate of Barry Price, will be referred to as she stands in this Court, as she stood in the trial court or by name.

"A" refers to the Appendix filed with this Brief. Emphasis is supplied by counsel unless otherwise indicated.

holding in **JONES**, and expressly and directly acknowledged that this case presented identical factual and legal questions, but nevertheless elected to create conflict by reversing the summary judgment entered on behalf of JFK by the trial court, which had been entered pursuant to the **JONES** decision. (A.2).

In this case, Price settled with the active tortfeasor, Dr. Beker, and his professional association. 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) (A.2).

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.

Thereafter, the trial court entered summary judgment in favor of JFK under the authority of **JONES v. GULF COAST NEWSPAPERS, supra**.[2]

The Fourth District reversed. (A.8). Said the court:

> We respectfully disagree with the holding in JONES, primarily because it fails to distinguish between an order of dismissal entered by consent of the parties to partially effect a settlement agreement, and a

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[2]Previously, the trial court had entered summary judgment in favor of JFK on the theory that the Plaintiff could not make out a claim for agency, as Dr. Beker was an independent contractor, not an agent of the Hospital. The Fourth District Court of Appeal reversed that summary judgment. See, **PRICE v. JFK MEDICAL CENTER, INC., 595 So.2d 202 (Fla. 4th DCA 1992)**.

> true adjudication on the merits where the active tortfeasor is found not liable.

(A.2). Thus, the District Court's opinion is in express and direct conflict with **JONES**.

SUMMARY OF THE ARGUMENT

This Court should exercise its jurisdiction pursuant to **Fla. Const. Art. V, Section 3(b)(3).** Short of a certification by the district court, it is difficult to imagine an opinion which so expressly and directly conflicts with a decision from another district court of appeal on an identical issue. In **JONES** the Second District Court of Appeal held that the dismissal with prejudice of an action by the plaintiff against an actively negligent tortfeasor acted as a negative adjudication on the merits of the plaintiff's claim against the active tortfeasor, thereby relieving the inactively (vicariously) liable tortfeasor of any liability to the plaintiff.

On the other hand, the Fourth District Court of Appeal opinion sub judice, disagrees with the holding in **JONES** and thus creates conflict. This conflict cannot be reconciled and must be resolved by this Court.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS JURISDICTION TO RESOLVE THE CONFLICT BETWEEN **JONES v. GULF COAST NEWSPAPERS, INC., 595 So.2d 90 (Fla. 2d DCA)rev. den'd. 602 So.2d 942 (Fla. 1992)**, and **PRICE v. BEKER, 18 FLW D2526(Fla. 4th DCA Opinion issued December 1, 1993).**

The following language from the Fourth District Court of Appeal's December 1, 1993 opinion establishes a direct and express conflict which this Court should address:

> The trial court's ruling is supported by the holding in **JONES v. GULF COAST NEWSPAPERS, INC., 595 So.2d 90 (Fla. 2d DCA)rev. den'd. 602 So.2d 942 (Fla. 1992).** We respectfully disagree with the holding in **JONES**, primarily because it fails to distinguish between an order of dismissal by consent of the parties to partially effect a settlement agreement, and a true adjudication on the merits where the active tortfeasor is found not liable.
> Here, as in **JONES**, the claimant settled with the active tortfeasor, and the settlement agreement and release specifically recited that the settlement would not affect the claim against the passive tortfeasor....

(A.2).

The conflict here is express and direct, not inherent or implied. See, **DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES v. NATIONAL ADOPTION COUNSELING SERVICE, INC., 498 So.2d 888 (Fla. 1986).**

In **JONES v. GULF COAST NEWSPAPERS, INC.**, **supra**, the plaintiff Jones was injured in a car accident when the vehicle in which she

was a passenger was struck in the rear by a vehicle operated by Judith S. Camus, while Camus was in the course and scope of her employment with Gulf Coast Newspapers, Inc. Jones filed suit against Camus for active negligence, and against Camus' employer Gulf Coast based solely upon a theory of respondeat superior; her complaint did not allege any active negligence on the part of Gulf Coast. **595 So.2d at 90.** When Jones settled her claims against Camus, she and Camus executed a release which provided that:

> This release expressly and specifically does not release... Gulf Coast Newspapers, Inc. from liability for the above-accident.

Id. However, Jones and Camus then executed a joint motion requesting the court to dismiss the suit against Camus with prejudice. The court did so. Thereafter, Gulf Coast moved for and was awarded summary judgment upon the well-established law that if an employee is not liable, then neither is its allegedly vicariously liable employer. See, **MALLORY v. O'NEIL, 69 So.2d 313 (Fla. 1954).** The dismissal with prejudice of Camus was a negative adjudication on the merits of Jones' claim against Camus, and therefore released Gulf Coast. See, e.g., **WALSINGHAM v. BROWNING, 525 So.2d 996 (Fla. 1st DCA 1988).**[3]

The Fourth District's Opinion in this case does not even

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[3]The district court's opinion sub judice also expressly and directly conflicts with the First District Court of Appeals decision in **WALSINGHAM**, because the district court's opinion holds that a dismissal with prejudice of an action against an actively negligent tortfeasor does not act as a negative adjudication on the merits such that the vicariously liable tortfeasor is thereby released from liability to the plaintiff.

attempt to distinguish **JONES** on either a factual or legal basis, except to say that it believes that the **JONES** decision was incorrectly decided. Indeed, the Fourth District expressly noted that the trial court's order, which it has now reversed, "is supported by the holding in **JONES**...." (A.2). In discussing the **JONES** decision the District Court in the present case had the following to say:

> The **JONES** decision is essentially based upon the following reasoning:
>
> (1) the vicarious tortfeasor's liability depends on the liability of the active tortfeasor.
>
> (2) the entry of dismissal with prejudice of the action against the active tortfeasor was a negative 'adjudication on the merits' as to the liability of the active tortfeasor.
>
> (3) since the active tortfeasor has been found not liable as a matter of law, the claimant could not establish an essential element of the claim against the passive tortfeasor.

(A.2-A.3).

The District Court then recognizes the general rule that an adjudication on the merits in favor of an active tortfeasor may be utilized by the passive tortfeasor as a defense to his own liability. However, the court goes on to state that:

> [I]f the active and passive tortfeasors were sued in the same action, a finding by a jury of no fault by the active tortfeasor would legally mandate a finding of no liability on the part of the passive tortfeasor. But such a finding is

> not present here and was not present in **JONES**.

(A.3).

Thus, the District Court expressly and directly acknowledged that there was no distinction between the facts of the instant case and the facts in **JONES**, and recognized that **JONES** would require an affirmance. Nevertheless, the court "disagreed" with **JONES**, and reversed the summary judgment in favor of JFK. The District Court thus created conflict jurisdiction before this Court. See **Fla. Const. Art. V, Section 3(b)(3).**

CONCLUSION

For the foregoing reasons, Petitioner JFK MEDICAL CENTER, respectfully requests this Court to exercise its jurisdiction and resolve the conflict presented by the Fourth District's decision in this case.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 22nd day of February, 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.

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APPENDIX TO
PETITIONER JFK MEDICAL CENTER, INC.'S
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1993

STACY PRICE, as Personal Representative of the Estate of BARRY PRICE, deceased, for and on behalf of claimants/ survivors, THE ESTATE OF BARRY PRICE, STACY PRICE, PAUL PRICE, ELAINE GADRICH, ROBYN PRICE and LORI DRENNAN, Appellants, v. BERNARDO BEKER, M.D., PALM BEACH ANESTHESIOLOGY ASSOCIATIONS, and JFK MEDICAL CENTER, INC., a Florida corporation, Appellees.	CASE NO. 92-2649. L.T. CASE NO. CL 90-1992 AE.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed December 1, 1993

Appeal from the Circuit Court for Palm Beach County; Edward A. Garrison, Judge.

Arnold R. Ginsberg of Perse, P.A., & Ginsberg, P.A., Miami, and Brian W. Smith, P.A., West Palm Beach, for appellants.

Philip D. Parrish of Stephens, Lynn, Klein & McNicholas, P.A., Miami, for Appellee-JFK Medical Center, Inc.

ANSTEAD, J.

The trial court held the entry of an order of dismissal with prejudice of an injured party's claim against a physician-employee, pursuant to a settlement between those parties, bars the continuation of an action against the physician's employer, in this case the appellee, JFK Medical Center, Inc. We reverse.

The trial court's ruling is supported by the holding in Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992). We respectfully disagree with the holding in Jones, primarily because it fails to distinguish between an order of dismissal entered by consent of the parties to partially effect a settlement agreement, and a true adjudication on the merits where the active tortfeasor is found not liable.

Here, as in Jones, the claimant settled with the active tortfeasor, and the settlement agreement and release specifically recited that the settlement would not affect the pending claim against the passive tortfeasor:

> 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). The parties stipulated to the entry of a dismissal with prejudice of the claim against the active tortfeasor and such an order was entered. It is undisputed that such order (along with the release and other settlement documents) forecloses any later claims by the claimant against the active tortfeasor. However, since it is also undisputed that there was no actual decision on the merits of the claim, the question is whether the dismissal should also bar the claim against the active tortfeasor's employer.

The Jones decision is essentially based upon the following reasoning:

> 1. The vicarious tortfeasor's liability depends on the liability of the active tortfeasor.

> 2. The entry of dismissal with prejudice of the action against the active tortfeasor was a negative "adjudication on the merits" as to the liability of the active tortfeasor.
>
> 3. Since the active tortfeasor has been found not liable as a matter of law, the claimant could not establish an essential element of the claim against the passive tortfeasor.

In a respondeat superior situation, it is the fault of the active tortfeasor that gives rise to the liability of the active tortfeasor's principal, the passive tortfeasor. When there has been an adjudication on the merits in favor of an active tortfeasor, it is clear that the passive tortfeasor may use the adjudication as a defense to his own liability. The three (3) prongs of the Jones ruling fit perfectly in such a situation. For instance, if the active and passive tortfeasors were sued in the same action, a finding by a jury of no fault by the active tortfeasor would legally mandate a finding of no liability on the part of the passive tortfeasor. But such a finding is not present here and was not present in Jones.

Generally, the law, both statutory and court-made, has been progressive in setting aside arbitrary rules that are out of step with current views of justice. For instance, the legislature long ago passed statutes abrogating the rule that the release of one joint tortfeasor operates to release all other tortfeasors. Section 768.041(1), Florida Statutes (1991), provides:

> A release or covenant not to sue as to one tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.

In addition, section 768.31(5) provides:

> RELEASE OR COVENANT NOT TO SUE.--When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release . . . and,
>
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

By virtue of these statutes the parties are free to settle claims on their own terms without jeopardizing claims remaining against others, including passive tortfeasors, although those others are entitled to a credit for any amounts paid to the claimant in settlement for the injury. See Hertz Corp. v. Hellens, 140 So. 2d 73 (Fla. 2d DCA 1962). We question why it should be any different where the parties to the settlement also agree that a dismissal with prejudice be entered on the claim between the settling parties.[1]

While there appears to be little case law on the subject, except for Jones and a subsequent second district case based thereon, there are some cases that offer some guidance. The authority relied on by Jones is Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988). While that case does hold that a dismissal with prejudice is a decision on the merits, its holding

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[1] In Eason v. Lau, 369 So. 2d 600 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1365 (Fla. 1979), the court treated a dismissal with prejudice against a joint tortfeasor as if it were a release for purposes of applying sections 768.041(1) and 768.31(5).

may be flawed because it relies on Lomelo v. American Oil Co., 256 So. 2d 9 (Fla. 4th DCA 1971), and rule 1.420(a)(1), Florida Rules of Civil Procedure, which do not directly support the holding. 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. Further, rule 1.420(a)(1) does not provide that a dismissal with prejudice is a decision on the merits.

On the other hand, in Apstein v. Tower Investments of Miami, Inc., 544 So. 2d 1120 (Fla. 3d DCA 1989), the court held the intent of the settling parties should control the effect of a consent dismissal with prejudice. In Hertz Corp. v. Hellens, 140 So. 2d 73 (Fla. 2d DCA 1962), the second district held a passive tortfeasor (the owner of a vehicle) was not affected or released by a settlement and release of the active tortfeasor (the driver of the vehicle), although Hertz argued that as a vicarious tortfeasor it was not one of the other tortfeasors referred to in

section 768.041(1). The court rejected that argument and held passive tortfeasors were, indeed, covered by the statute.[2]

The Restatement (Second) of Judgments, section 51, treats consent judgments pretty much the same way that sections 768.041(1) and 768.31(5) treat settlements. Section 51(4) provides:

> A judgment by consent for or against the injured person does not extinguish his claim against the person not sued in the first action . . . ."

The comments to subsection (4) provide:

> f. Judgment by consent (Subsection (4)).

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[2] The court also held Hertz was still entitled to indemnity from the active tortfeasor, even though that tortfeasor had been released from liability by the injured party:

> Of course, it is impossible for a court to forecast all of the types of actions which might be permitted between litigants when one of the parties obtains a release or covenant not to sue. We can say that a party defendant who is primarily liable could not plead his covenant or release signed by the plaintiff as a defense to an action for indemnification or exoneration brought against him by parties secondarily liable. Nor could the primary wrongdoer thereafter have a cause of action against the injured party for breach of their covenant not to sue or their contract of release resulting from the injured party bringing an action against parties secondarily liable. In other words, a suit by an injured party against a party secondarily liable does not constitute a breach of a covenant not to sue or contract of release entered into between said injured party and the primary wrongdoer. A primary wrongdoer enters such agreements at the peril of being later held to respond again in an indemnification action brought against him by the vicarious wrongdoer.

Id. at 75.

> The settlement of a claim against one of several obligors generally does not result in the discharge of others liable for the obligation. This rule applies when the obligation is reduced to judgment, see s 50, and even though the liability of one obligor is derivative from another under principles of vicarious responsibility. Moreover, a judgment by consent, though it terminates the claim to which it refers, is not an actual adjudication. See s 27, Comment e. The considerations that lead to denying issue preclusive effect to consent judgments, chiefly the encouragement of settlements, are applicable when an injured person has claims against more than one person for the same wrongful act. It is therefore appropriate to regard the claim against the primary obligor and the person vicariously responsible for his conduct as separate claims when one of them has been settled. Any payment received by the injured person in such a settlement, however, discharges pro tanto the obligation of the other obligor to pay the loss. See s 50(2).

(Emphasis supplied). We elect to treat the consent judgment here the same way for the policy reasons set out in the comments.

By adopting the policy underlying the Restatement of Judgments as set out above, we believe we are following the lead of the legislature in enacting sections 768.041(1) and 768.31(5). Otherwise, we would continue to honor a fiction. The fiction is that there has been a decision on the merits when there has not. In fact, if the active tortfeasor paid compensation to the claimant to secure the dismissal, the fiction is even less justified, since the claimant in such a case has actually prevailed in securing some compensation from the active tortfeasor. 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 little more than upholding that agreement.

Accordingly, we reverse and remand for further proceedings in accord herewith.

GLICKSTEIN, J., and BIRKEN, ARTHUR M., Associate Judge, concur.