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OK?

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,145

4 DCA No. 92-2649

Fla. Bar No. 137172

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

Petitioners,

vs.

STACY PRICE, etc.,

Respondent.
_____/

BRIEF OF RESPONDENT ON THE MERITS

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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

Page No.

CITATIONS

AUTHORITIES

I.

INTRODUCTION

The respondent, 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, surviving spouse, and children, Paul Price, Elaine Gadrich, Lori Drennan and Robyn Price, was the plaintiff in the trial court and was the appellant in the District Court of Appeal, Fourth District. The petitioner, J.F.K. Medical Center, Inc. a Florida corporation, was the defendant/appellee. In this Brief of Respondent on the Merits the parties will be referred to as the plaintiff and the defendant and, alternatively, by name. The symbol "R" will refer to the record on appeal. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

The facts of this case being neither complex nor lengthy may be stated as follows:

A. Plaintiff sued Dr. Beker (directly) and J.F.K. Medical Center, Inc. (J.F.K.) (vicariously for the acts of Beker) for wrongful death damages (R. 15-22; Complaint, Count III);

B. J.F.K., having filed a first motion for summary final judgment which was granted and ultimately reversed, see: PRICE v. JFK MEDICAL CENTER, INC., 595 So. 2d 202 (Fla. App. 4th 1992), filed a second motion (R. 286-290; 291-312);

C. The basis for the defendant's second motion was the plaintiff's settlement with Dr. Beker (the allegedly negligent anesthesiologist). As to the terms of the settlement, plaintiff received consideration from Dr. Beker and, in exchange:

1. Gave to Dr. Beker a special release (R. 306-309) which, by its specific terms, reserved to the plaintiff the right to continue on with her action against J.F.K.; and

2. Dismissed Dr. Beker from the lawsuit with prejudice (R. 220-222, 310-312).

Hearing on the defendant's second motion for summary judgment was held (R. 1-14). At that hearing the defendant argued as controlling authority and the trial court ultimately embraced the decision of the Second District Court of Appeal in JONES v. GULF COAST NEWSPAPERS, INC., 595 So. 2d 90 (Fla. App. 2d 1992). The trial court, following JONES, ruled that the (plaintiffs') dismissal (of Beker) with prejudice operated as a negative adjudication on the merits (irrespective of the terms and conditions of the special release, irrespective of the intent of the parties thereto, and irrespective of the strong public policy found in the State of Florida favoring settlements) and granted the defendant's motion. Judgment was entered thereon.

D. Plaintiff appealed to the Fourth District which court, in a legally sound and well reasoned opinion, disagreed with JONES, supra, noted the existence of conflict and reversed.

E. This proceeding followed.

The plaintiff accepts the defendant's statement of the case and facts as being substantially correct. So as to eliminate any potential for confusion and to remove any ambiguity, the plaintiff would comment about the following statement found at page 3 of the defendant's brief:

> "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.'" See: brief of defendant, page 3.

At the time the trial court ruled on the defendant's (second) motion for summary final judgment JONES, supra, had only recently been decided. It was the only precedent for the issue. Under extant Florida law the trial court was, therefore, required to follow JONES. See, for example: PARDO v. STATE, 596 So. 2d 665, 666 (Fla. 1992), ". . . In the absence of inter-district conflict, District Court decisions bind all Florida trial courts. . ." 596 So. 2d at page 666. Hence, the defendant's statement ". . . The trial court's order was supported by JONES, supra. . ." is not nearly as significant as the defendant's words make it seem. As the Fourth District stated in the opinion herein being reviewed, PRICE v. BEKER, 629 So. 2d 911 (Fla. App. 4th 1993):

> "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." 629 So. 2d at page 911.

The Fourth District disagreed with the Second District and explained why. It was lawfully entitled to do so.

The plaintiff reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTION PRESENTED

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT.

The above identifies the precise judicial act herein complained of. The answer to the above turns on whether this Court will approve the Fourth District's opinion in this case or the Second District's opinion in JONES.

IV.

SUMMARY OF ARGUMENT

The plaintiff would suggest to this Court that the dismissal of Beker (with prejudice) should neither operate to the detriment of the subject plaintiff nor inure to the benefit of J.F.K. For the reasons which follow, it must be concluded that defendant's argument is without merit, JONES should be quashed and the legally sound and well reasoned opinion of the Fourth District Court of Appeal should be approved as the law in the State of Florida.

It is the plaintiff's contention that JONES v. GULF COAST NEWSPAPERS, a two-one panel decision from the Second District, constitutes bad law and should not be approved by this Court. The decision is short-sighted, is out of harmony with the spirit of all cases on the same subject matter, places form over substance, ignores the intent of the parties to the settlement, and authorizes a result neither contemplated nor desired by either party to the settlement agreement.

Florida has two statutes which govern the instant cause and the subject matter, to wit: the effect of the release of joint tortfeasors. They are Section 768.041, Florida Statutes, entitled "Release or Covenant Not to Sue," which section went into effect in 1957, and Section 768.31(5), Florida Statutes, found in the Contribution Among Tortfeasors Act, also entitled "Release or Covenant Not to Sue" (which section went into effect in 1975). Prior to 1957, it was established common law in Florida (and elsewhere) that in a tort case the release, <u>whether restrictive or not</u>, of one joint tortfeasor released all. In 1957, the Legislature of Florida, in clear recognition of the inequities of the common law rule as applied to the tort context, <u>and to encourage settlement</u>, passed the release of joint tortfeasors statute--then Section 54.28, Florida Statutes--now Section 768.041, Florida Statutes. The statute, without question, abolished the common law rule to the effect that the release of one or more tortfeasors operated as a discharge of all other tortfeasors who might be liable for the same tort.

Florida has been uniform in its holdings that Section 768.041 applies to all tortfeasors, whether joint or several, including vicarious tortfeasors! Since the passage of the two subject statutes, it has become important to prepare a release which evidences the true intentions of the parties, i.e., a general release if the parties thereto intend to release all tortfeasors and a specific restrictive release if the parties intend to release only one tortfeasor.

The plaintiff would suggest to this Court no legal or logical sense can be made of JONES. It is totally out of harmony with the body of case law which has developed since the enactments of Section 768.041 and Section 768.31(5), Florida Statutes. While it is true, as the dissent noted in JONES, there existed no other case in Florida directly on point, as the dissent also correctly noted, the trial court's order (in JONES) granting the motion did not purport to conclude the action as to Gulf Coast or to adjudicate the action on the merits. Given the obvious intent of the parties to the subject special release as well as the fact that both Section 768.041 and Section 768.31(5) have been construed to apply equally to all tortfeasors, direct and vicarious, and that both statutes have been construed (under well settled Florida common law) to control the proceedings and to not take a "back seat" to the documents executed, the plaintiff suggests to this Court that the majority opinion in JONES, supra, be disapproved, the dissent in JONES be approved

by this Court, that the decision in PRICE v. BEKER, supra, be approved as controlling law for the State of Florida and that the matter be remanded to the trial court with directions to deny the defendant's motion for summary final judgment.

V.

ARGUMENT

THE OPINION HEREIN BEING REVIEWED SHOULD BE APPROVED AS THE CONTROLLING LAW IN THIS STATE. THE SECOND DISTRICT'S OPINION IN JONES SHOULD BE QUASHED.

The defendant contends to this Court that "JONES" should be approved and that the opinion in this case should be quashed because:

> "Under the guise of refusing to 'honor a fiction,'. . . 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, apparently disowned one of its own long-standing decisions, and completely ignored a contrary decision which it rendered a mere 13 months prior to the decision under review. (Citation omitted)." See: brief of defendant, page 6.

In reaching its conclusion, the defendant argues:

A. "Price is not right" (brief of defendant, page 7);

B. (The Fourth District utilized) "a hodge podge of rationalizations" (brief of defendant, page 14); and

C. "The filing of the Notice of Dismissal With Prejudice subsequent to the execution of the settlement agreement evidences a new intent" (brief of defendant, page 18).

The plaintiff would suggest to this Court that the dismissal of Beker with prejudice should neither operate to the detriment of the subject plaintiff nor inure to the benefit of J.F.K. For the reasons which follow it must be concluded that defendant's argument is without merit, JONES should be quashed and the legally sound and well reasoned opinion of the Fourth District Court of Appeal should be approved as the law in the State of Florida.

A.

"JONES"

In this proceeding the plaintiff requests this Court to quash "JONES" and to approve "PRICE v. BEKER" as controlling law for the State of Florida. It would, therefore, seem logical that the two cases be discussed.

In JONES, as here, plaintiff filed a negligence action against more than one defendant. In JONES, as here, plaintiff pled one count of a multi-count complaint against one defendant, purely on the theory of vicarious responsibility. In JONES, as here, plaintiff settled with one defendant and executed a release in its favor. In JONES the release contained the following language:

> "This release expressly and specifically does not release George Eugene House or Gulf Coast Newspapers, Inc. from liability for the above accident." 595 So. 2d at page 90.

The parties to the JONES settlement then executed a joint motion requesting the court to dismiss the suit against Mr. and Mrs. Camus with prejudice. The trial court entered an order granting

motion for summary judgment on the ground that the order dismissing with prejudice the claim against Mrs. Camus, the active tortfeasor, barred any claim against the remaining vicariously responsible defendant. The court granted the motion and upon entry of appropriate orders appeal was taken. In affirming the trial court's ruling, the District Court first acknowledged well settled principles of Florida law which recognize that since the passage of certain Florida statutes, the release of one joint tortfeasor would no longer release all joint tortfeasors where the release indicates an intention to still preserve the right to proceed further. The court, however, stated:

> "If we were considering only the release involved in this matter, or if the action had been dismissed without prejudice, we would agree with the appellant's position and reverse the summary judgment entered against them.
>
> "In this case, however, in addition to the release, the court at the request of the parties entered an order dismissing the appellants' claim against Mrs. Camus, the active tortfeasor, with prejudice. The appellants' only theory of liability against the appellee in this matter is based upon the theory of vicarious liability or respondeat superior. In order to recover, the appellants would have to establish liability on the part of the active tortfeasor, Mrs. Camus, the appellee's employee. If the employee is not liable, the employer is not liable (Citations omitted). The dismissal of the action against Mr. and Mrs. Camus with prejudice was a negative adjudication on the merits of the appellant's claim against the active tortfeasor. (Citations omitted.) Accordingly, since the appellants can no longer establish liability on the part of the appellee's employee, they are barred from establishing liability on the part of the appellee. . ." 595 So. 2d at page 91.

It is the plaintiff's contention that JONES v. GULF COAST NEWSPAPERS, a two-one panel decision from the Second District, constitutes bad law and should not be approved by this Court. The decision is short-sighted, is out of harmony with the spirit of all cases on the same subject matter, places form over substance, ignores the intent of the parties to the settlement, and authorizes a result neither contemplated nor desired by either party to the settlement agreement. It is also important to emphasize at this juncture that JONES is not wholeheartedly embraced within the Second District itself. In COEBLER v. KIEFFER, 621 So. 2d 681 (Fla. App. 2d 1993), the Second District "PER CURIAM. affirmed" a similar order of the trial court and did so citing only to JONES. In that case Judge Altenbernd "concurred:"

> "I concur because I must. This case is controlled by the majority opinion in Jones. . . I agree with the dissent in that case. So long as Jones is the law in Florida, plaintiffs' attorneys must be very cautious in structuring settlements with only one of several tortfeasors." 621 So. 2d at page 681.

The plaintiff would agree with Judge Altenbernd's concurring opinion in COEBLER v. KIEFFER, supra, that the dissent in JONES is correct. That dissent acknowledges:

> * * *
>
> ". . .The release the appellants gave to Mr. and Mrs. Camus specifically states that it does not release Gulf Coast, and the parties agree that Gulf Coast paid no part of the settlement and was not an intended beneficiary of the release.
>
> "Although the joint motion is not artfully drawn, its clear intent is to drop Mr. and Mrs. Camus as parties pursuant to Florida Rule of Civil Procedure 1.250(b). The trial court's order granting the motion

> does not purport to conclude the action as to Gulf Coast or to adjudicate the action on the merits. The majority has chosen to put form over substance in determining that this method of partial settlement chosen by the parties resulted in an 'adjudication on the merits' which released Gulf Coast.
>
> * * *
>
> ". . . In such circumstances, this court should look behind those words to determine if the dismissal was intended to be conclusive as to all pending claims. We should not permit the appellants to be trapped into forfeiting their action against Gulf Coast by the procedural method chosen by the lawyers involved. Simply stated, this court should not put form over substance to reach a result that the parties clearly did not intend.
>
> "I would reverse and remand for further proceedings." 595 So. 2d at pages 91 and 92.

Although the dissent is/was correct in conclusion, its analysis of the issue did not stress enough the public policies which necessarily control.

B.

FLORIDA LAW AND PUBLIC POLICY,
RELEASE OF JOINT TORTFEASORS

Florida has two statutes which govern the instant cause and the subject matter, to wit: the effect of the release of joint tortfeasors. They are Section 768.041, Florida Statutes, entitled "Release Or Covenant Not To Sue," which section went into effect in 1957, and Section 768.31(5), Florida Statutes, found in the Contribution Among Tortfeasors Act, also entitled "Release Or Covenant Not To Sue" (which section went into effect in 1975). Prior to 1957, it was established common law in Florida (and elsewhere) that in a tort case the release, whether restrictive or not, of one joint tortfeasor released all (and

that in a commercial case, whether restrictive or not, the release of one joint obligor released all).

In 1957, the Legislature of Florida, in clear recognition of the inequities of the common law rule as applied to the tort context, and to encourage settlement, passed the release of joint tortfeasor statute--then Section 54.28, Florida Statutes--now Section 768.041, Florida Statutes. The statute, without question, abolished the common law rule to the effect that the release of one or more tortfeasors operated as a discharge of all other tortfeasors who might be liable for the same tort. See: SUN FIRST NATIONAL BANK OF MELBOURNE v. BATCHELLOR, 321 So. 2d 73 (Fla. 1975), wherein this Court stated:

> "The statute we are asked to construe was first enacted in 1957. Its purpose was to encourage settlements by abolishing the common law rule that a discharge of one joint tortfeasor will discharge all other tortfeasors. There is no policy reason which we can discern, and there is no legislative intent to which we have been referred, which would warrant the exclusion of actions for conversion, or any other tort, from the scope of this statute. Settlements are facilitated whether the liability of the tortfeasor arises from personal injury, conversion or any other definable form of tortious conduct. . ." 321 So. 2d at page 75.

In HOLLIS v. SCHOOL BOARD OF LEON COUNTY, 384 So. 2d 661 (Fla. App. 1st 1981), decided post passage of the Contribution Act, in footnote one at page 662, the court stated:

> "The release of the active tortfeasor does not, of course, serve also to discharge the tortfeasor vicariously because the Contribution Among Tortfeasors Act, specifically Section 768.31(5), has been interpreted to apply to all tortfeasors whether the liability is active or derivative. (Citations omitted)."

Likewise, Florida has been uniform in its holdings that Section 768.041 applies to all tortfeasors, whether joint or several, including vicarious tortfeasors! See: FLORIDA TOMATO PACKERS, INC. v. WILSON, 296 So. 2d 536 (Fla. App. 3d 1974) and the numerous cases cited therein. Since the passage of the two subject statutes, it has become important to prepare a release which evidences the true intentions of the parties, i.e., a general release if the parties thereto intend to release all tortfeasors, and a specific restrictive release if the parties intend to release only one tortfeasor. See: ALEXANDER v. KIRKHAM, 360 So. 2d 1038 (Fla. App. 3d 1978). See also: SUN FIRST NATIONAL BANK OF MELBOURNE v. BATCHELLOR, 321 So. 2d 73 (Fla. 1975), supra, and RIMER v. SAFE CARE HEALTH CORPORATION, 591 So. 2d 232 (Fla. App. 4th 1991), recognizing both Section 768.041, Florida Statutes, and Section 768.31(5), Florida Statutes, and expressly providing that a joint tortfeasor is not released by the execution of a release in favor of another tortfeasor.

It is clear from an examination of the cases cited that in any action to which Sections 768.041 and/or 768.31(5) apply, the polestar for consideration is the intent of the parties to the settlement as well as the statutes themselves! This is a point totally missed in JONES and a point intentionally ignored by the defendant.

MATHIS v. VIRGIN, 167 So. 2d 897 (Fla. App. 3d 1964), cert. den., 174 So. 2d 30 (Fla. 1965), was a medical malpractice

action seeking recovery for injuries caused by the alleged negligence of a physician in treating injuries sustained by the minor plaintiff in an automobile accident. The physician claimed that a prior satisfaction by plaintiff of a judgment rendered in her favor against the defendant/owner/operator of the automobile worked a complete discharge of the physician's liability! The plaintiff had entered into a voluntary settlement with the drivers of the vehicles involved in the collision giving rise to the action. The appellate court ultimately determined that a satisfaction of judgment was no more than a "release" under the appropriate statutes and that the physician was discharged only pro tanto under the provisions of the then extant statute. More specifically, MATHIS is especially pertinent where, as here, the forerunner to Section 768.041 (Section 54.28, Florida Statutes) was held to govern over an extrinsic "third paper," to wit: a satisfaction of judgment:

> "This stipulation of settlement was confirmed by a court order and, thereafter, a final judgment was rendered pursuant to the stipulation, which was ultimately satisfied. Subsequently, the instant common law action was commenced in the trial court to recover damages from the defendant herein for alleged negligence in the treating of the injuries sustained by the minor plaintiff. . .
>
> "Undoubtedly, without the enactment of Section 54.28, Fla. Stat., in 1957, this cause would be controlled (by common law) (citations omitted). . . However, by the enactment of Section 54.28, Fla. Stat.,. . .it is apparent that a joint tortfeasor is only pro tanto released by the release of another joint tortfeasor. It is clear that the voluntary settlement and release of right and satisfaction of the judgment rendered on the stipulation in the prior

> case was no more than a release under the statute, notwithstanding that its ultimate form was that of a judgment duly satisfied. Therefore, it came within the terms of the statute and could only be pleaded as a pro tanto release and not a release in bar. This is particularly true when the judgment rendered was reached upon a voluntary settlement between the parties, as distinguished from a judgment rendered upon a dispute as to issues and as to amount of damages. . ." 167 So. 2d at page 899.

In MATHIS v. VIRGIN, supra, the District Court applied the "Release Statute" to a satisfaction of judgment entered pursuant to a stipulation for settlement and held that the plaintiff's cause of action was not barred. There is little, if any, distinction between the instant cause and MATHIS v. VIRGIN, supra. Although the legal documents differ, to wit: dismissal with prejudice and satisfaction of judgment, their effects are the same. Yet in MATHIS the court applied the statute and in JONES it refused.

Additionally, if one were to "match up" the "release" with the subject "dismissal with prejudice," it is clear an apparent inconsistency appears. That same inconsistency appeared in MATHIS v. VIRGIN, supra, and was resolved in favor of the plaintiff when the court applied Section 768.041 (or, more precisely, its forerunner) to resolve the inconsistency and decide the legal issue. Interestingly enough, the defendant, at pages 12 and 13 of its brief comments about this argument and states:

> ". . . Therein lies the rub. The dismissal 'with prejudice' should have put someone on notice to check into the effect of that language."

The defendant's argument totally overlooks the significance of a controlling statute and the many consistent authorities construing it. While the defendant vigorously argues the existence of an apparent "inconsistency," it does so in the blind, with its head in the sand, oblivious totally to the nature of the inconsistency and the subject matter involved. In its haste to unravel the Fourth District's opinion and in its zeal to blame plaintiff's counsel for arguably not seeking to have the words "with prejudice" vacated, the defendant ignores the threshold issue. It is precisely for these reasons why the plaintiff has chosen to not chase the defendant's argument down the path presented. The arguments advanced, such as they are, challenge the Fourth District's reasoning. That court's reasoning is sound. The court's conclusion is even more sound. It is the defendant which loses sight of the issue.

C.

"JONES" IS OUT OF HARMONY WITH WELL SETTLED PUBLIC POLICY.

The plaintiff would suggest to this Court no legal or logical sense can be made of JONES. It is totally out of harmony with the body of Florida case law which has developed since the enactments of Section 768.041 and Section 768.35(5), Florida Statutes. True, as the dissent noted in JONES, there existed no other case in Florida directly on point. However, as the dissent also correctly noted, the trial court's order granting the motion did not purport to conclude the action as to Gulf Coast or to adjudicate the action on the merits. Given the

obvious intent of the parties to the subject special release as well as the fact that both Section 768.041 and Section 768.31(5) have been construed to apply equally to all tortfeasors, direct and vicarious, and that both statutes have been construed to control the proceedings and to not take a "back seat" to the documents executed, see: MATHIS v. VIRGIN, supra, the plaintiff suggests to this Court that the majority opinion in JONES, supra (and its rather limited progeny), be disapproved, the dissent in JONES and the concurring opinion in COEBLER v. KIEFFER, supra, be approved by this Court, that the decision in PRICE v. BEKER, supra, be approved as controlling law for the State of Florida and that the matter be remanded to the trial court with directions to deny the defendant's motion for summary final judgment.

D.

DEFENDANT'S ARGUMENT IN SUPPORT OF JONES

Both the dissent in JONES and the opinion of the Fourth District in this case note the existence of "little case law on the subject." However, from a reading of the defendant's brief one gets the impression that there exists in the defendant's favor a body of case law so well settled in its favor that argument against the defendant's position should not ever be attempted. The defendant's rhetoric aside, it must be understood that the defendant presents no argument save for that advanced in JONES. Indicative of this is the sequence of

"argument" found at pages 7-14 of its brief. The defendant's penchant for circular reasoning becomes apparent.

The defendant titles its argument "Price is not right." The defendant then explains JONES. The defendant states:

> "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. . ." See: brief of defendant at page 7.

The defendant then digresses and discusses Florida law on vicarious responsibility, a point of law neither in dispute here nor in dispute in JONES. When defendant next picks up the chase, it is with the case of WALSINGHAM v. BROWNING, 525 So. 2d 996 (Fla. App. 1st 1988) and with a 1990 case which arose out of the Eleventh Circuit Court of Appeals, CITIBANK N.A. v. DATA LEASE FINANCIAL CORP., 904 F. 2d 1498 (11th Cir. 1990). That case does nothing more than embrace JONES. In challenging the Fourth District Court of Appeal's opinion, the defendant suggests that it failed to discuss "CITIBANK," supra. While it is true that the Fourth District did not address the existence of the case, it is equally clear there was no need to. The case was premised upon the existence of JONES. The Fourth District disapproved JONES. The Fourth District explained the flaw (as it saw it) in JONES and proceeded from there. Interestingly enough, the dissent to JONES distinguishes both cases!

The defendant necessarily sides with the JONES majority in seizing upon the existence of a "dismissal with prejudice" as

being the operative event. However, it is important to again emphasize that the essence of the transaction was a settlement and a concomitant special release. The subject matter is governed by statutes and Florida public policy. The JONES opinion was severely criticized by the dissenting judge. The JONES opinion was severely criticized by the "concurring" opinion in COEBLER v. KIEFFER, supra. It is an interesting observation to note that the opinions in JONES and COEBLER did not embrace a panel of totally different judges. The majority opinion in JONES was authored by Judge Schoonover. Judge Scheb concurred. Judge Schoonover was on the COEBLER v. KIEFFER panel with whom Judge Hall concurred. At the very best the judges in the District Court of Appeal, Second District, were split "three-two" as to the issue.

In truth the result reached by the Fourth District Court of Appeal in this case is consistent with Florida public policy and is legally sound and well reasoned given the legislative enactments on the subject matter. The defendant's attempts to suggest that the words "with prejudice" required plaintiff's counsel to take some action to have them removed begs the issue. The words "with prejudice" in the context of what transpired between the parties to the settlement should have had no effect on the end result. See: MATHIS v. VIRGIN, supra.

Lastly, it must be noted that the defendant's challenge to the Fourth District's opinion regarding the Fourth District Court of Appeal's utilization of a "fiction" to create a "new

and larger fiction of its own" is patently unfair. There exists no "fiction" to Florida public policy as to the issue of settlement. There exists no "fiction" as to the long-standing existence, significance, meaning, purpose and scope of Sections 768.041 and 768.31(5), Florida Statutes. There exists no "fiction" as to the intent, purpose and holding of MATHIS v. VIRGIN, supra. There exists no "fiction" as to the intent of the parties to the subject settlement, and there exists no "fiction" in the special release utilized herein. If one needs to deal with "fiction," one turns directly to the argument advanced by the defendant wherein the defendant ignores the existence of extant Florida statutes and case law and reworks JONES, COEBLER, and their "one case progeny" to reach a conclusion that is neither legally sound, fundamentally fair nor in harmony with extant Florida law and public policy. The opinion does not present a legal fiction. However, Circuit Judge Marshall, in the case of LIVINGSTON v. JEFFERSON, 15 Fed. Cas. 660, at page 663, (1811) spoke of "fiction" and stated:

> "It is the creature of the court, and is molded to the purposes of justice, according to the view which its inventors have taken of its capacity to effect those purposes."

If the Fourth District's opinion is premised in whole or in part upon a "legal fiction," so be it. The opinion was molded to the purposes of justice, which purposes are totally consistent with Florida law favoring settlements. The opinion should be approved.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiff respectfully urges this Honorable Court to approve the opinion in PRICE v. BEKER, both as to reasoning and conclusion, to quash the decision in JONES v. GULF COAST NEWSPAPERS, INC. and to remand this cause with directions to the trial court to deny the defendant's Motion For Summary Final Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent on the Merits was mailed to the following counsel of record this 27th day of June, 1994.

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