O/A 8-29-94

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 REPLY BRIEF

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By: PHILIP D. PARRISH, ESQ.

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ARGUMENT

In an obvious attempt to prove that discretion is the better part of affirmance, the Plaintiff has "chosen to not chase the Defendants' argument down the path presented." (Answer Brief at Page 16). Although the Plaintiff accuses the hospital of "sticking its head in the sand," it is the Plaintiff and the District Court who have argued for and authored a result-oriented piece of jurisprudence without concern for its application to other contexts.

The District Court rejects **JONES**, "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" **PRICE, 629 So.2d at 911.** As we pointed out in our Initial Brief, it has never been a requirement that a dismissal with prejudice actually determine the merits of the case in order to act as an adjudication on the merits. See e.g. **CREWS v. DOBSON, 177 So.2d 202 (Fla. 1964); RASHARD v. CAPPIALLI, 171 So.2d 581 (Fla. 3rd DCA 1965).** Thus, the phrase created by the District Court, i.e., "true adjudication," has never been required in order to give effect to a stipulation of dismissal with prejudice.

Furthermore, the District Court assumes that the order of dismissal with prejudice was entered solely to "partially effect a settlement agreement," between the Plaintiff and Dr. Beker. Once again, although it is clear from the settlement agreement that the Plaintiff wished to continue to proceed against the hospital, and

that Dr. Beker recognized that fact, it also follows from the fact that a stipulation for dismissal with prejudice was filed that Dr. Beker demanded such a stipulation. The obvious reason for the dismissal with prejudice was to protect Dr. Beker from a subsequent claim for indemnity from the hospital.[1]

Thus, the dismissal was not entered simply to "partially effect a settlement agreement." According to the many cases cited by the Plaintiff, such a stipulation was completely unnecessary as between the settling parties. **JONES** recognizes that if the court had been dealing simply with a release, and not a subsequent stipulation for dismissal with prejudice, then the cause of action would remain viable against the vicariously liable party. But that is not what occurred in **JONES** and that is not what occurred here, and the district court is simply not at liberty to ignore a stipulation for dismissal with prejudice or to transform it into something that it is not.

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[1] The stipulation for dismissal with prejudice would be unnecessary for most settling tortfeasors because pursuant to Section 768.31(5)(b), a release or covenant not to sue "discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor". However, where the settling tortfeasor is the actively negligent tortfeasor and the non-settling tortfeasor is solely vicariously liable (if liable at all), Section 768.31(5) does not protect the settling tortfeasor from a claim for common law indemnity in the event that the solely vicariously liable tortfeasor is subsequently held liable. Thus, this case is distinguishable from **EASON v. LAU, 369 So.2d 600 (Fla. 1st DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979)**, where the court treated a dismissal with prejudice against a joint tortfeasor as if it were a release. The truth of the matter is that in that case the dismissal with prejudice could have no other purpose other than to serve as a redundancy to the release. Here, however, the stipulation for dismissal with prejudice would protect Dr. Beker against a common law indemnity claim from the hospital.

If this court affirms the District Court's opinion, and maintains that the stipulation for dismissal with prejudice did not act as an adjudication on the merits, then the hospital, in the event that it is liable to the Plaintiff, will still have a cause of action against Dr. Beker for indemnity. Although there is no testimony on record from Dr. Beker or his counsel concerning their intent with respect to the stipulation for dismissal, it stands to reason that Dr. Beker will rely upon the stipulation of dismissal with prejudice as a defense to that indemnity action.

The Plaintiff's argument is premised almost entirely upon **MATHIS v. VIRGIN, 167 So.2d 897 (Fla. 3rd DCA 1964), cert. denied 174 So.2d 30 (Fla. 1965).** However, as we will demonstrate, the **MATHIS** decision is both factually and legally distinguishable from the present case, and is otherwise of questionable continued applicability.

The factual scenario in **MATHIS** involved a **STUART v. HERTZ,** scenario[2] prior to the Supreme Court's decision in **STUART v. HERTZ.** The question presented in **MATHIS** was whether the satisfaction of a judgment by the Plaintiff against an automobile tortfeasor for injuries received in an automobile accident discharged from liability in a subsequent lawsuit an allegedly negligent physician who treated the injuries that the Plaintiff received in the automobile accident. 167 So.2d at 898.

The physician defendant in the second lawsuit raised as a defense the previous judgment and satisfaction. The court ruled

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[2] **STUART v. HERTZ, 351 So.2d 703 (Fla. 1977).**

that due to the enactment in 1957 of Florida Statutes §54.28 (now Florida Statutes §768.041) - a "joint tortfeasor" is only "pro tanto" released by a release of another joint tortfeasor. The court held that:

> It is clear that the voluntary settlement and release of rights in 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.

167 So.2d at 899.

Of course, pursuant to this Court's ruling in **STUART v. HERTZ,** supra, the automobile tortfeasor and the physician tortfeasor are no longer considered to be joint and several tortfeasors.

The factual underpinning to the decision in **MATHIS** was rejected by the Fourth District Court of Appeal in **STUART v. HERTZ, 302 So.2d 187 (Fla. 4th DCA 1974)**, which was then affirmed by the Supreme Court in **STUART v. HERTZ, 351 So.2d 703 (Fla. 1977).** However, even before the decision in **STUART v. HERTZ**, the "holding" in **MATHIS v. VIRGIN**, was severely restricted by the Third District itself in **TALCOTT v. CENTRAL BANK AND TRUST COMPANY, 247 So.2d 727, 731 (Fla. 3rd DCA 1971)**, which noted that the statute refers to a "release or covenant not to sue," and not a "satisfaction."

MATHIS was rejected by the Fourth District Court of Appeal itself in **WALKER v. U-HAUL COMPANY INC., 300 So.2d 289 (Fla. 4th DCA 1974).** (Rejecting notion that failure to construe Section 768.041 so as to include satisfactions of final judgment as well as releases and covenants not to sue renders the statute

constitutionally infirm). Curiously, despite the Plaintiff's reliance upon **MATHIS** below, the District Court did not rely upon that decision to support its holding.

Both the procedural and substantive posture of the **MATHIS** case differ from the present case. As we have already seen, if the **MATHIS** scenario were to arise today, the ruling would be different because the causes of action against the automobile tortfeasor and a subsequent physician tortfeasor are completely separate. Second, there was no other party Defendant involved in the original **MATHIS** settlement and satisfaction of judgment, such that the satisfaction of judgment clearly could not apply to any other separate cause of action. Here, by contrast, there was a settlement agreement, followed by a completely unnecessary (as between Price and Beker) stipulation for dismissal with prejudice against one of two defendants. As we have previously noted, the fact that the stipulation was unnecessary as between the settling parties does not relieve it of its effect, particularly where the only reasonable explanation for the filing of the stipulation of dismissal with prejudice was that Dr. Beker (the actively negligent tortfeasor) had demanded such a stipulation for fear that the hospital would seek indemnity from Dr. Beker in the absence of a dismissal with prejudice.

This Court need look no further than the decision in **HERTZ CORP. v. HELLENS, 140 So.2d 73 (Fla. 2d DCA 1962)**, to see why, notwithstanding the settlement agreement, Dr. Beker's counsel would have insisted upon the stipulation of dismissal with prejudice.

In that case, the court held that notwithstanding a release and covenant not to sue:

> A primary wrongdoer enters such agreements [release and covenant not sue] at the peril of being later held to respond again in an indemnification action brought against him by the vicarious wrongdoer.

140 So.2d at 75.

Obviously, Dr. Beker's counsel was concerned that Plaintiff would obtain a judgment against the hospital, and that the hospital --which could only have been held responsible on a vicarious liability theory (as that was all that was pled against the hospital by the Plaintiff) -- would then look to Dr. Beker for indemnity.

The District Court's opinion leads to the anomaly that the stipulation for dismissal does not act as an adjudication on the merits and has no effect whatsoever with respect to the continued vitality of the Plaintiff's vicarious liability lawsuit against the hospital, but presumably would be effective to bar an indemnity claim by the hospital against Dr. Beker.

Again, this is the problem with attacking the stipulation for dismissal in collateral fashion. Had the Plaintiff attacked the vitality or efficacy of the stipulation for dismissal -- as opposed to simply attacking our legal theory of the application of that stipulation for dismissal -- we think it is abundantly clear that Dr. Beker's counsel would have wanted to be heard on that matter, particularly where he was undoubtedly relying upon the stipulation for dismissal with prejudice to defeat any future claim for

indemnity from the hospital.

CONCLUSION

For the reasons set forth above and in its Initial Brief, Petitioner JFK Medical Center, Inc., respectfully requests that this Court quash the district court's opinion and adopt the opinion of the court in **JONES v. GULF COAST NEWSPAPER, INC., 595 So.2d 90 (Fla. 2d DCA 1992), rev. denied. 602 So.2d 942 (Fla. 1992).**

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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 July, 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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