IN THE SUPREME COURT OF FLORIDA

SAMUEL G. CROSBY and
MILLER, CROSBY & MILLER, P.A.,

Petitioners/Defendants,

v. Case No. 88,772

PATRICIA JANE JONES and
LOGAN M. JONES, JR., her husband,

Respondents/Plaintiffs.
_____/

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**CORRECTED ANSWER BRIEF ON THE MERITS
OF RESPONDENTS
PATRICIA JANE JONES and LOGAN M. JONES, JR.**

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On Review From the District Court of Appeal
Second District of Florida

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## INTRODUCTION

This is an appeal from an appellate decision which reversed a summary judgment. Petitioners/Defendants Samuel G. Crosby and his law firm, Miller, Crosby & Miller, P.A. ("Crosby") contend the Second District erred in holding the existence of material fact disputes precludes summary judgment in their favor on the legal malpractice claims of Respondents/Plaintiffs Patricia Jones ("Jones") and her husband.

As it disapproves summary judgment in favor of trial on the merits, the Second District's decision should be affirmed as long as the record yields even one dispute of material fact or one competing inference. In this case, material fact disputes and competing inferences abound. Crosby, however, has filed a Statement of the Case and of the Facts which understates, misapprehends, and in some instances completely overlooks facts that conflict with his version of events, including facts involving his own conduct. Crosby has also made unfounded and unsupported assertions of fact in the *argument* section of his brief. To correct these serious deficiencies and place the issues in a context in which they can be fairly considered under the summary judgment standard of review, the following statement of the case and of the facts is provided. See Fla. R. App. P. 9.210(c).

## STATEMENT OF THE CASE AND OF THE FACTS

Patricia Jones was seriously injured when the automobile in which she was a passenger was struck from behind by a car driven by Judith Camus ("Camus"), an employee of Gulf Coast Newspapers, Inc. ("Gulf Coast"). Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90, 90 (Fla. 2d DCA ), rev. denied, 602 So. 2d 942 (Fla. 1992) ("Jones I"); App. 13.[1] Ms. Jones and her husband hired Samuel G. Crosby and his law firm to represent them in connection with the injuries and losses they suffered as a result of the crash. App. 12.

On Jones' behalf, Crosby sued Camus.[2] Jones II, 677 So. 2d at 380; App. 13. Crosby also sued Camus' employer Gulf Coast on a *respondeat superior* theory. Jones I, 595 So. 2d at 90; App. 13. Crosby took this step because Camus was within the scope of her employment at the time of the collision, which made Gulf Coast vicariously liable for her actions. Jones I, 595 So. 2d at 90; Jones II, 677 So. 2d at 380; App. 13.

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[1]Many of the facts are stated in the two reported appellate decisions this litigation has spawned, Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA ), rev. denied, 602 So. 2d 942 (Fla. 1992) ("Jones I"), and Jones v. Crosby, 677 So. 2d 379 (Fla. 2d DCA 1996), rev. granted, 690 So. 2d 1299 (Fla. 1997) ("Jones II"). Additional facts are contained in pleadings, filings, and other record materials. For the Court's convenience, these materials have been compiled chronologically and attached in an appendix. The appendix is cited "App. ___".

[2]Crosby also sued George House, an uninsured motorist. House has no bearing on this appeal. Jones II, 677 So. 2d at 380 n.1.

**Crosby Unnecessarily Dismisses Camus "With Prejudice" Without Discussing This Step With His Clients and Gulf Coast Moves for Summary Judgment**

Crosby knew Jones' injuries were serious and her damages substantial. App. 13. He also knew Gulf Coast had a million dollars in insurance coverage. App. 16.

Crosby was unable to reach an agreement with Gulf Coast, but he did settle with Camus' insurer for $25,000, the policy limits. Jones II, 677 So. 2d at 380; App. 14. On Crosby's advice, Jones released Camus by executing a document which stated it was not intended to release Gulf Coast. Jones I, 595 So. 2d at 90; Jones II, 677 So. 2d at 380; App. 14. The release specifically excluded Gulf Coast, the only party with adequate insurance coverage. Jones I, 595 So. 2d at 90; Jones II, 677 So. 2d at 380; App. 14.

In addition to executing a release, Crosby joined with Camus' attorney and Gulf Coast's attorney in a motion to dismiss the case against Camus ***"with prejudice."*** Jones I, 595 So. 2d at 90-91; Jones II, 677 So. 2d at 380; App. 1, 14. The trial court entered an agreed order of dismissal with prejudice. Jones I, 595 So. 2d at 91; Jones II, 677 So. 2d at 380; App. 2, 14.

Crosby does not dispute that he never discussed the meaning or significance of a "with prejudice" dismissal with Jones. There is nothing in the record to explain why Crosby dismissed Camus "with prejudice" in the first place. The record does not

indicate that a dismissal "with prejudice" was required or even suggested by Camus as a condition of settlement.

In any event, Crosby's dismissal of Camus with prejudice soon had an extremely serious impact on Jones. A little over a month after the order of dismissal with prejudice was entered, Gulf Coast filed a motion for summary judgment. Jones I, 595 So. 2d at 91; Jones II, 677 So. 2d at 380; App. 15. In its motion Gulf Coast argued the dismissal with prejudice of its employee, the active tortfeasor, constituted an adverse adjudication on the merits which barred Jones' action against Gulf Coast, a passive tortfeasor subject only to vicarious liability. Jones I, 595 So. 2d at 91; Jones II, 677 So. 2d at 380; App. 15.

**Crosby Uses Improper Ex Parte Means in an Unsuccessful Attempt to Escape the Consequences of His Dismissal of Camus with Prejudice**

Without offering a citation to the record, in the *argument* section of his brief, Crosby asserts that by the time he dismissed Camus "with prejudice," he had thoroughly analyzed the law of vicarious liability and was confident that a "with prejudice" dismissal of an actively negligent employee would not bar a claim against the employer. Init. Br. at 18, 27, 31, 33. Crosby's brief states he was aware of conflicting case law — in fact, that it would be "an absurdity" to suggest otherwise, Init. Br. at 31 n.16 — but that the conflicting case was "flawed" and "questionable." Init. Br. at 19, 23, 27, 33, 34. According to Crosby's brief, at the time he "decid[ed] to file

the Joint Motion for Dismissal," he "relied upon" the "identical authorities" the Florida Supreme Court would come to rely on *four and a half years later* in deciding JFK Med. Ctr., Inc. v. Price, 647 So. 2d 833 (Fla. 1994).[3] Init. Br. at 17, 18. JFK Med. Ctr. held "a voluntary dismissal of the active tortfeasor, with prejudice, entered by agreement of the parties pursuant to settlement, is not the equivalent of an adjudication on the merits that will serve as a bar to continued litigation against the passive tortfeasor." 647 So. 2d at 834.

There is literally no evidence in the record — not a shred — to support Crosby's hindsight depiction of his intent and understanding of the law in June1990, the date he dismissed Camus with prejudice. What Crosby actually did when Gulf Coast filed its summary judgment motion and the vicarious liability issue was first brought to light gives rise to an inference that is inconsistent with Crosby's factual representations on appeal as to his confidence in the correctness of his actions.

In that regard, the record shows that when Crosby received Gulf Coast's motion, his first reaction was *not* to articulate a carefully thought out legal argument constructed from the "identical" authorities the Florida Supreme Court would in later

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[3]Crosby specifically asserts that he relied on the Restatement (Second) of Judgments, two sections of the Florida Statutes, a 15-year-old Florida Supreme Court decision, and a 28-year-old decision of the Second District Court of Appeal. Init. Br. at 17-18.

years rely on in JFK Med. Ctr. Crosby used improper means in an attempt to avoid the substantive legal argument in Gulf Coast's motion.

On the morning of the day Gulf Coast's summary judgment motion was to be heard, Crosby presented to the trial court a paper he and counsel for Camus had signed called a "Joint Stipulation." App. 3; App. 6-7. The joint stipulation asked the trial court to "set aside nunc pro tunc" its previous order dismissing Camus with prejudice. App. 4, 7. Without disclosing Gulf Coast's motion for summary judgment was then pending and set for hearing, the joint stipulation recited only that Gulf Coast had asserted the "with prejudice" dismissal of Camus barred the action against it. App. 3. The joint stipulation called Gulf Coast's position "unexpected, unintended and unfair." App. 4. In other words, Crosby argued the result urged by Gulf Coast would be harsh, *not* that it was without legal support. The trial court entered Crosby's proposed order and set aside the "with prejudice" dismissal of Camus. App. 5.

It was not until later in the day when Gulf Coast's summary judgment motion was called for hearing that the truth emerged — Gulf Coast did not know of the joint stipulation, much less agree to it. App. 7. The trial court specifically found Crosby had led it to believe "the joint stipulation addressed a matter on which all parties were in agreement" and never disclosed that the stipulation and proposed order he submitted had to do with "a [summary judgment] hearing . . . later in the day." App. 7. The trial court also found Crosby never served Gulf Coast "with any notice or copies of the joint

stipulation and corresponding order." App. 7. The trial court withdrew the order it had signed earlier in the day vacating the "with prejudice" dismissal of Camus. App. 8.

Gulf Coast's summary judgment motion was then heard, briefed, and granted.[4] App. 9-10. Crosby appealed, but in an opinion Crosby now decries as error, the Second District affirmed. Jones I, 595 So. 2d at 91. When Crosby petitioned the Supreme Court of Florida for discretionary review of the Second District's decision, review was denied. Jones v. Gulf Coast Newspapers, Inc., 602 So. 2d 942 (Fla. 1992).

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[4]The trial court relied upon Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988), and Citibank, N.A. v. Data Lease Fin. Corp., 904 F. 2d 1498 (11th Cir. 1990), finding:

> 3) The Order of this Court dismissing the Plaintiffs' claims against [the driver and her spouse] with prejudice operates as an adjudication on the merits under Rule 1.420 of the Florida Rules of Procedure of the Plaintiffs' claim against [these defendants].
>
> 4) As a matter of law, the Plaintiffs' [Jones] dismissal with prejudice of its claim against Gulf Coast's alleged employee has the legal effect of barring the Plaintiffs' claims against Defendant Gulf Coast Newspapers, Inc. (citations omitted)

App. 9-10.

## The Second District Holds the Existence of Material Fact Disputes Going to the Reasonableness of Crosby's Conduct Precludes Summary Judgment

Having lost the ability to collect for her serious injuries from Gulf Coast, Jones sued Crosby for legal malpractice. App. 11-18. In response, Crosby filed a half-page motion for summary judgment. App. 19-20. In his motion, Crosby argued he bears no responsibility for Jones' inability to recover from Gulf Coast. App. 19. According to Crosby, Jones' problems are due to the Second District's "incorrect interpretation" of the law when it ruled against him in Jones I. App. 19. Crosby also argued his actions were shielded under "the doctrine of judgmental immunity." App. 19.

Crosby's summary judgment motion was not supported by a sworn affidavit, a deposition, or anything else which would purport to explain Crosby's thinking or his knowledge of the law at the time he dismissed Camus "with prejudice." Similarly, Crosby submitted nothing to explain why he took such a step in an "unsettled" area of the law when it was not required as a condition of settlement. Nor did Crosby offer anything to rebut the facts set out in the complaint.

Jones opposed Crosby's motion with the sworn affidavit of a board certified personal injury trial lawyer. App. 21-24. The affidavit states that under the law at the time, Crosby's "with prejudice" dismissal of Camus fell below the minimum standards of acceptable legal representation. App. 22, 24. It also states that Crosby exacerbated the problem when he failed to move to set aside the dismissal under Florida Rule of

Civil Procedure 1.540(b). App. 23. As a result of Crosby's malpractice, Jones' expert stated, Jones lost her claim against Gulf Coast and seriously compromised her claim under her own uninsured motorists coverage.[5] App. 23-24.

Without addressing the factual disputes as to Crosby's knowledge of the law and the reasons for his actions, the trial court granted Crosby's motion for summary judgment. App. 25-26. Although the Supreme Court of Florida did not resolve the conflict in the determinative legal question until JFK Med. Ctr., which was decided four and a half years after Crosby dismissed Camus with prejudice, the trial court characterized JFK Med. Ctr. as "setting forth the long standing law of Florida." App. 25. Without explaining how the doctrine might apply to this case, the trial court also stated, "Florida recognizes and adheres to the judgmental immunity doctrine." App. 25.

The Second District reversed. Jones v. Crosby, 677 So. 2d 379 (Fla. 2d DCA 1996), rev. granted, 690 So. 2d 1299 (Fla. 1997) ("Jones II"). It held the trial court erred in failing to focus on "the factual issue concerning whether Crosby should have

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[5]The summary judgment in favor of Gulf Coast provided Jones' insurer defenses that otherwise would not have been available. Cigna asserted the summary judgment for Gulf Coast that resulted from Camus' dismissal with prejudice voided the insurer's obligation to pay uninsured motorist benefits because its subrogation rights had been impaired. In addition, the insurer argued it was entitled to set off for the full amount of Gulf Coast's available liability coverage. Jones' claim for uninsured motorist benefits ultimately was settled for a greatly reduced amount. App. 23-24. Contrary to Crosby's assertion that this is "misleading," Init. Br. at 26 n.14, the effect of the dismissal with prejudice was financially devastating.

acted as he did," id. at 381, and that the existence of material facts concerning what Crosby knew, when he knew it, and whether he exercised reasonable judgment in seeking the employee's dismissal "with prejudice" precluded summary judgment. Id. at 380-81.

The District Court also held JFK Med. Ctr. did not articulate "the long standing law of Florida." Id. at 380. Instead, it "crystallize[d] what in reality was a conflict in the law of Florida rather than to state a rule of long standing." Id. at 381. The court concluded:

> Jones I, as well as the trial court's decision in that matter, was not fabricated in a vacuum. If given the opportunity to consider this issue, a jury might decide that ***Crosby should have been aware of*** the body of law that led to [the] court's decision in Jones I, as well as to the adverse summary judgment entered against his clients. On the other hand, that same jury might decide that Crosby, indeed, knew all of the ramifications of the dismissal with prejudice but exercised reasonable judgment in deciding to sign it, since that decision was essentially vindicated by JFK Medical Center.
>
> In view of the ***state of the law at the time Crosby acted***, however, it is the ***province of a jury*** to decide whether Crosby's execution of the dismissal with prejudice, either deliberately or unintentionally, fell below the standard of care required of an attorney handling a lawsuit involving principles of vicarious liability.

Id. (emphasis added).

## ISSUES PRESENTED ON APPEAL

I. WHETHER THERE ARE GENUINE ISSUES OF MATERIAL FACT AND CONFLICTING INFERENCES WHICH PRECLUDE SUMMARY JUDGMENT REGARDING CROSBY'S CONTENTION THAT HE DID NOT HAVE TO GUARD AGAINST THE CASE LAW WHICH COST THE JONESES THEIR PERSONAL INJURY CLAIM BECAUSE THE CASE LAW WAS "ABERRANT" AND "FLAWED."

II. WHETHER THERE ARE GENUINE ISSUES OF MATERIAL FACT AND CONFLICTING INFERENCES WHICH PRECLUDE SUMMARY JUDGMENT REGARDING CROSBY'S CONTENTION THAT HE IS INSULATED FROM LIABILITY UNDER THE JUDGMENTAL IMMUNITY DOCTRINE.

III. WHETHER THERE ARE GENUINE ISSUES OF MATERIAL FACT AND CONFLICTING INFERENCES WHICH PRECLUDE SUMMARY JUDGMENT REGARDING CROSBY'S CONTENTION THAT HE DID NOT NEGLECT HIS PROFESSIONAL DUTY WHEN HE FAILED TO MOVE TO SET ASIDE THE DISMISSAL WITH PREJUDICE UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.540.

## SUMMARY OF THE ARGUMENT

The Second District correctly held material fact disputes exist as to whether Crosby's dismissal of Camus with prejudice fell below the standard of care required of an attorney handling a lawsuit involving the principles of vicarious liability. Crosby's unsupported assertion that he fulfilled his duty of knowing and taking into account the relevant law before he dismissed Camus with prejudice is without any support in the record. In fact, there is nothing in the record to indicate Crosby had ever before heard of the vicarious liability issue that cost the Joneses their claim against Gulf Coast, much less that, as he now claims, he mastered the relevant law. Had Crosby really known the law at the critical time, he would not have exposed his clients to the risk that their claim would be lost by dismissing Camus with prejudice, especially in light of the fact that there is nothing in the record to indicate Camus even asked for a dismissal with prejudice in the first place.

Crosby's belated appellate claim that he knew the law at the relevant time is also inconsistent with his own conduct. In that regard, the record shows Crosby attempted to escape the consequences of dismissing Camus with prejudice by using improper, *ex parte* means instead of meeting the legal issue head on.

That Crosby's mistake would have caused the Joneses no harm if he had made it four and a half years later, after the Florida Supreme Court decided JFK Med. Ctr., Inc. v. Price, 647 So. 2d 833 (Fla. 1994), is irrelevant. When Crosby dismissed Camus

with prejudice, there was no binding or controlling precedent to prohibit the trial court from following the case law Gulf Coast urged. Under that case law the dismissal with prejudice of Camus operated as an adjudication on the merits in favor of Gulf Coast, her vicariously liable employer. Crosby's complaint that the case law Gulf Coast urged and the trial court followed was "flawed" or an "aberration" does not change the fact that the case law existed and the courts could follow it if they decided to do so. As such, Crosby was charged with the responsibility of knowing the adverse authorities and taking them into account in his representation of the Joneses. In conflict with his claim he is entitled to summary judgment, there is no evidence Crosby did either.

Because there is nothing in the record to indicate he knew anything about the potentially devastating effect of a "with prejudice" dismissal at the time he dismissed Camus with prejudice, Crosby cannot possibly establish there is no material fact issue or conflicting inference going to his claim that he should be exonerated under the judgmental immunity doctrine. The doctrine is inapplicable if the attorney is not informed as to what the law *is*.

Crosby's bald assertion that it is unknown whether the Joneses would have "done anything differently" if he had advised them of the risk involved in dismissing Camus with prejudice is self-defeating. It blinks reality to suggest that the Joneses would have dismissed Camus with prejudice if Crosby had fulfilled his duty and given them the information to which they were entitled — that by dismissing Camus with

prejudice in return for $25,000 they risked losing their claim against Gulf Coast's million dollar insurance policy.

Crosby's final argument — that he was under no obligation to file a motion to set aside under Florida Rule of Civil Procedure 1.540 because he was neither mistaken nor negligent — fails for the same reasons as his first two arguments. There is no evidence Crosby knew the relevant vicarious liability law or that Camus even asked for a dismissal with prejudice, much less that Crosby had to give her one to settle. In this situation, Crosby cannot be heard to argue that there is not at least a material fact dispute as to whether his undiscussed and apparently gratuitous action was mistaken or negligent. That Crosby resorted to a furtive *ex parte* attempt to vacate the dismissal with prejudice undercuts any assertion to the contrary.

## ARGUMENT

I. THERE ARE GENUINE ISSUES OF MATERIAL FACT AND CONFLICTING INFERENCES WHICH PRECLUDE SUMMARY JUDGMENT REGARDING CROSBY'S CONTENTION THAT HE DID NOT HAVE TO GUARD AGAINST THE CASE LAW WHICH COST THE JONESES THEIR PERSONAL INJURY CLAIM BECAUSE THE CASE LAW WAS "ABERRANT" AND "FLAWED."

In his first argument, Crosby attempts to sidestep the material fact disputes and conflicting inferences that preclude summary judgment in this case by recasting the entire controversy as having to do only with a question of law. According to Crosby, he should not be faulted for dismissing Camus "with prejudice," presumably even if Camus never made dismissal with prejudice a condition of settlement.[6] This is so, Crosby's first argument runs, because the reasoning in the case law against him was "aberrant" and "flawed," as evidenced by the Florida Supreme Court's subsequent approval of the conflicting rule years later.

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[6]Crosby asserts there is "nothing in the record" to support the conclusion that Camus did not require a dismissal with prejudice as a condition of settlement. Init. Br. at 31. This assertion is typical of Crosby's appellate strategy, which is to ignore the summary judgment standard of review by assuming in *his* favor facts and inferences which are either in dispute or nonexistent. This strategy fails because in an appeal by an unsuccessful summary judgment movant like Crosby, all fact disputes and inferences — including the facts and inferences bearing on whether Camus made dismissal with prejudice a condition of settlement — must be construed in favor of Jones, the nonmoving party. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985); Wills v. Sears, Roebuck & Co., 351 So. 2d 29, 32 (Fla. 1977); Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966).

If the issue on review were whether a voluntary dismissal with prejudice of an active tortfeasor should operate as an adjudication on the merits as to the passive tortfeasor, then Crosby's elaborate 17-page discussion of the relative merits of the two legal approaches to the question would be relevant. In such a setting, the strengths and weaknesses of the authorities underlying the two conflicting approaches would be important to consider.

But this case does not present the substantive question of whether a voluntary dismissal with prejudice of an active tortfeasor acts as an adjudication on the merits to bar a future action against the passive, vicariously liable tortfeasor. As noted, that question was answered in the negative in IFK Med. Ctr., Inc. v. Price, 647 So. 2d 833 (Fla. 1994), roughly four and a half years *after* the conduct in issue here.

Instead, this is a summary judgment appeal in a legal malpractice case against an attorney who allegedly made an unnecessary and devastating mistake which cost his seriously injured client dearly. As such, this appeal does not turn on how the substantive law came to be resolved years after the conduct in issue. Instead, the issue is whether there exists any material fact dispute or conflicting inference as to whether Crosby possessed and exercised the knowledge and skill of lawyers of ordinary ability and skill when, without ever discussing the matter with his clients and apparently without even being asked to do so, he dismissed Camus "with prejudice." See Stake v. Harlan, 529 So. 2d 1183, 1185 (Fla. 2d DCA 1988) (attorney liable for failure to

employ that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill). Whether an attorney neglected his or her fiduciary duty to the client "is ordinarily a factual issue upon which reasonable persons may differ."[7] Hatcher v. Roberts, 478 So. 2d 1083, 1087 (Fla. 1st DCA 1985).

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[7]See also Ard v. Aulls, 477 So. 2d 1032, 1032 (Fla. 5th DCA 1985) (whether attorney breached legal duty and caused injury are jury questions). The same principle prevails in other states. See, e.g., Skinner v. Stone, Raskin & Israel, 724 F. 2d 264, 265-66 (2d Cir. 1983) (summary judgment precluded by material fact questions regarding whether attorneys were negligent before and after allowing default judgment); Merchant v. Kelly, Haglund, Garnsey & Kahn, 874 F. Supp. 300, 304 (D. Colo. 1995) (summary judgment on basis of judgmental immunity denied; it is for the trier of fact to determine whether reasonably prudent attorney would have become better informed, chosen more conservative approach, or pursued other alternatives in challenged action; breach of duty usually one of fact for jury to resolve); Freeman v. Pittman, 469 S.E.2d 543, 544-45 (Ga. Ct. App. 1996) (summary judgment reversed; attorney failed to negate claim of negligent breach of standard of care and fact issues existed regarding whether attorney's negligence caused alleged damages); Bruning v. Law Offices of Ronald I. Palagi, P.C., 551 N.W.2d 266, 270-73 (Neb. 1996) (summary judgment reversed; genuine issues of fact regarding standard of care and whether that standard was breached); Fishkill Health Related Ctr., Inc. v. Van DeWater & Van DeWater, 651 N.Y.S.2d 986, 988 (N.Y. App. Div. 1997) (summary judgment reversed; fact questions exist regarding whether attorneys departed from standard of skill that would have been exercised by ordinary member of legal community); Valhila v. Hall, 674 N.E.2d 1164 (Ohio 1997) (summary judgment reversed; material fact questions existed regarding attorney's liability for malpractice); Post Oak Oil Co. v. Stak & Barnes, P.A., 913 P.2d 1311, 1313-15 (Okla. 1996) (summary judgment reversed; trial court improperly assumed attorney's good faith and honest belief that his advice and acts were well founded; "These facts were either in dispute or no evidence was given to support them."); Collas v. Garnick, 624 A. 2d 117, 120 (Pa. Super. Ct. 1993), appeal denied, 636 A.2d 631 (Pa. 1993) (summary judgment reversed; fact issues regarding lawyer's failure to meet standard of care), Hager v. Fitzgerald, 934 S.W.2d 668, 670-71 (Tenn. Ct. App. 1996) (summary judgment reversed; genuine issue of material fact as to whether attorney breached duty owed to clients).

Because this is an appeal from a decision disapproving summary judgment, the facts relevant to the substantive law of legal malpractice must be measured against the summary judgment standard of review. A motion for summary judgment should not be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c). The party moving for summary judgment has the burden of establishing irrefutably that the nonmoving party cannot prevail. Almand Constr. Co. v. Evans, 547 So. 2d 626, 628 (Fla. 1989); Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966). It is only *after* the moving party has met this heavy burden that the nonmoving party is called upon to show the existence of genuine issues of material fact. Almand Constr. Co., 547 So. 2d at 628; Holl, 191 So. 2d at 43-44.

"If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) (citations omitted). See also Carroll v. Moxley, 241 So. 2d 681, 683 (Fla. 1970). Additionally, even when the facts are uncontroverted, the proof submitted by the movant must overcome all reasonable inferences in favor of the opponent, or summary judgment must be denied. Wills v. Sears, Roebuck & Co., 351 So. 2d 29, 32 (Fla. 1977); Holl, 191 So. 2d at 43. Relatedly, the appellate court

must draw every possible inference in favor of the party opposing summary judgment. Moore, 475 So. 2d at 668; Aloff v. Neff-Harmon, Inc., 463 So. 2d 291, 293-94 (Fla. 1st DCA 1984) ("[W]here the evidence before the trial court is susceptible of more than one inference, one of which will support the plaintiff's view of the facts, a summary judgment for the defendant should not be entered."). In sum, to be entitled to a summary judgment, the movant must sustain the heavy burden of conclusively demonstrating the complete absence of any genuine issue of material fact, and the facts must be so crystallized that nothing remains but questions of law. Moore, 475 So. 2d at 668.

**A. There exist material fact disputes and conflicting inferences going to the key question of whether Crosby knew *anything at all* about the law of vicarious liability and "with prejudice" dismissals at the time he dismissed Camus with prejudice, much less whether he had the depth of knowledge he now credits himself with in his appellate brief.**

It is well settled and Crosby does not dispute that an attorney employed to render advice must make inquiry and be informed of the law applicable to the issue at hand. State v. Meyer, 430 So. 2d 440, 443 (Fla. 1983); Daytona Dev. Corp. v. McFarland, 505 So. 2d 464, 466 (Fla. 2d DCA 1987) (citing Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841, 843 (Fla. 1st DCA 1976)). Indeed, an attorney's negligent failure to be informed may be actionable even if some reasonably careful attorneys might have given the same advice. This is because the client is entitled to the "superior

advice that would have resulted from an informed use of the lawyer's judgment." Dillard Smith Constr. Co., 337 So. 2d at 843.

In this case, Crosby is adamant that there is no material fact dispute that at the time he dismissed Camus with prejudice, he was fully informed of and understood the relevant law. Crosby states that at the time he "decid[ed] to file the joint motion for dismissal" with prejudice, he had in mind and "relied upon" the "identical authorities" the Florida Supreme Court would rely on four and a half years later in deciding JFK Med. Ctr. Init. Br. at 17-18. Although he was aware of the potentially problematic decision in Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988), Init. Br. at 31 n.16, Crosby insists he was neither required to advise his clients of it nor to discuss the significance of a "with prejudice" dismissal. Init. Br. at 28. This was so, Crosby argues, because he had determined Walsingham was not "controlling" and its reasoning was "flawed."[8] Init. Br. at 6, 19, 20, 23, 24, 33.

Crosby's factual arguments are so inconsistent with the record in this case that the very fact that he has resorted to them actually illuminates his inability to meet his heavy summary judgment burden of showing the nonexistence of any material fact

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[8]Although Crosby focuses his attack on Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988), Walsingham was not the only authority supportive of the proposition Crosby claims he studied and rejected. In Citibank, N.A. v. Data Lease Fin. Corp., 904 F. 2d 1498 (11th Cir. 1990), a diversity case decided just before Gulf Coast moved for summary judgment, the United States Court of Appeals for the Eleventh Circuit relied on Walsingham and held it stated the Florida rule. Id. at 1500.

issues or conflicting inferences. First, it is well settled that unsworn, unsupported assertions of counsel are not facts and cannot serve as the basis for an appellate argument. Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd., 636 So. 2d 838, 840 (Fla. 2d DCA 1994). In this case, there is nothing in the record to support Crosby's appellate assertion that before he dismissed Camus with prejudice in 1990 — without discussing this step with his clients and apparently without even being asked by Camus for a "with prejudice" dismissal — he went through the detailed analysis of primary and secondary authorities that now appears in his brief.[9] In fact, there is nothing in the record to support the assertion that at the relevant time Crosby knew *anything* at all about the lurking vicarious liability issue and the potentially disastrous consequence of dismissing an active tortfeasor "with prejudice."

Second, Crosby's present insistence that he knew and understood all of the relevant law when he decided to dismiss Camus with prejudice flies in the face of reason and common sense. As noted, there is nothing in the record to indicate that as a condition of the settlement Crosby struck with Camus, Camus had to be dismissed

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[9]That there is no deposition of Crosby or even an affidavit from him highlights the inappropriateness of summary judgment. When a case is in its infancy — for example, in this case no discovery has been conducted, no answer has been filed — courts are generally reluctant to grant motions for summary judgment. Spradley v. Stick, 622 So. 2d 610, 613 (Fla. 1st DCA 1993).

"with prejudice."[10] The more reasonable inference is that Camus did not care whether her dismissal was "with prejudice" because the record shows that when asked by Crosby, Camus agreed to join in a stipulation to vacate the dismissal with prejudice.[11] App. 3-4.

In such a situation, no well-informed, reasonably prudent attorney would gratuitously[12] insert the words "with prejudice" in a proposed dismissal

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[10]Without record support, Crosby also argues for the first time in the history of this litigation that Camus was not released in her capacity as an employee of Gulf Coast but only "as an automobile owner." Init. Br. at 12. Putting to one side that neither the release nor the dismissal order contain such a qualification and that Crosby has presented no authority to show that it would have made a difference if they had, this argument need not be reached. Crosby cannot advance a new argument for the first time on appeal. See Lunsford v. Allstate Ins. Co., 637 So. 2d 345, 347 (Fla. 5th DCA 1994); W.R. Grace & Co.-Conn. v. Dougherty, 636 So. 2d 746, 749 (Fla. 2d DCA 1994).

[11]Contrary to Crosby's unsupported assertion that at the time he dismissed Camus settlements could not be achieved without dismissals with prejudice, there is nothing in the stipulation or anywhere else in the record to indicate that vacation of the dismissal with prejudice disturbed the underlying release of and settlement with Camus. App. 3-4.

[12]Crosby asserts dismissals without prejudice are "unwise and impractical" and, without record support or citation of authority, that it was "standard practice" to dismiss a settling defendant with prejudice. Init. Br. at 8 n.3, 11, 12, 31, 32. Crosby's contention is contradicted by the record in this very case, which shows that when Gulf Coast made Crosby aware of the threat to Jones' claim, Camus readily joined in Crosby's effort to vacate the order dismissing Camus with prejudice. App. 3-4. It is also refuted by the sworn affidavit of Jones' civil trial expert, App. 23, as well as the common sense observation by the *dissenting* judge in Jones I, who stated "The release given to Mr. and Mrs. Camus fully discharged their liability and there was no legal or other reason which compelled the use of the words 'with prejudice' in their dismissal." Jones I, 595 So. 2d at 92 (Patterson, J., dissenting).

order.[13] However "flawed" Crosby now insists he considered the opposing case law to be, there was absolutely no reason for him to expose his clients to its application when the opposing party did not even ask him to do so.

Simply put, Crosby's dismissal of Camus with prejudice in June 1990 cannot be squared with the legal knowledge he now claims — without record support — to have had at the time. This irreconcilable inconsistency is, standing alone, enough to affirm the Second District's conclusion that the issues of knowledge and intent in this case must be resolved by a jury.

But there is a third material fact dispute going to Crosby's knowledge at the relevant time. Although Crosby's jurisdictional and merits briefs do not mention it, the record shows Crosby's first response to Gulf Coast's motion was an improper, *ex parte* one — his so-called "joint stipulation" to vacate the dismissal of Camus with prejudice.

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[13]The words "with prejudice" are a proverbial red flag of warning to attorneys that a serious and permanent action is being taken and as such heightened scrutiny is required. See Drady v. Hillsborough County Aviation Auth., 193 So. 2d 201, 205 (Fla. 2d DCA 1966) (dismissal with prejudice is an adjudication on the merits); Citibank N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1501 (11th Cir. 1990) (phrases "with prejudice" and "on the merits" are synonymous terms both of which invoke doctrine of claim preclusion). See also Tyson v. Aikman, 159 Fla. 273, 31 So. 2d 272 (1947) (error not to order dismissal "without prejudice" because a final decree is presumed to be on the merits unless stated to be "without prejudice"); Suniland Assoc., Ltd. v. Wilbenka, 656 So. 2d 1356, 1358 (Fla. 3d DCA 1995) (dismissal with prejudice filed pursuant to stipulation may operate as adjudication on the merits); Capital Bank v. Needle, 596 So. 2d 1134, 1136 (Fla. 4th DCA 1992) (general rule is that voluntary dismissal with prejudice operates as adjudication on the merits barring subsequent action on same claim); Cordell v. World Ins. Co., 352 So. 2d 108, 108 (Fla. 1st DCA 1977) (inclusion of "with prejudice" indicates finality).

App. 3-4. If as Crosby now asserts he was truly brimming with confidence in the correctness of his "decision" to include the words "with prejudice" in the dismissal order, why did he resort to furtive, *ex parte* means to attempt to undo what he had done rather than address the issue on the merits?

True, Crosby eventually argued the merits of the "with prejudice" issue in opposition to Gulf Coast's summary judgment motion and on appeal. Jones I, 595 So. 2d at 91. But he did so only *after* Gulf Coast had already brought the issue to light and only *after* his attempt to sidestep the issue through improper means had failed.

The record shows Crosby behaved like a person caught in a serious mistake, not like an informed, reasonable attorney. There is no support for Crosby's assertion that he ever investigated, analyzed, or gave any thought at all to the vicarious liability implications of a dismissal with prejudice before he received Gulf Coast's admittedly "unexpected" motion. App. 4. On this record, it is just as reasonable to infer Crosby simply used a form without giving this critical issue any thought at all.[14] The best that can be said for Crosby is that material facts going to this critical issue are sharply in dispute, and, as the Second District held, must be resolved by a jury. Jones II, 677 So. 2d at 381.

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[14]As noted, even the dissenting judge in Jones I, who wanted the panel to rule in Crosby's favor, recognized that "there was no legal or other reason which compelled the use of the words 'with prejudice' in the dismissal. It was simply the ill-advised choice of words by counsel." 595 So. 2d at 92 (Patterson, J., dissenting).

**B. The material fact disputes and conflicting inferences going to the reasonableness of Crosby's conduct are not negated by the Supreme Court of Florida's eventual resolution of the conflict in the law in such a way that Crosby's unnecessary "with prejudice" dismissal of Camus would have not harmed Jones if it had occurred four and a half years later.**

When distilled, Crosby's four-part first argument is as follows: Although there was "relevant" case law in June 1990 which could have been applied to bar Jones' claim against Gulf Coast upon Camus' dismissal with prejudice, that case law was poorly reasoned and not "controlling." Init. Br. at 6, 9, 16, 18, 20, 24. When the Supreme Court of Florida adopted the conflicting rule in JFK Med. Ctr. four and a half years later, Crosby contends, it effectively "ratified" the correctness of Crosby's dismissal of Camus with prejudice. This means the courts which ruled against Crosby were intentionally "disregarding" or "refusing to follow" the correct rule all along, which in turn means Crosby cannot now be sued for legal malpractice Init. Br. at 4, 5, 6, 7, 9 n. 4, 10-11, 13, 16, 18.

Just as the factual premise for Crosby's first argument ignores and creates facts in violation of the rules of appellate procedure and the standard of review for summary judgment, his legal premise distorts and ignores the fundamental principles that govern the courts' decision making process. Crosby's legal premise does this in at least two ways, each of which defeats summary judgment and compels affirmance of the Second District's decision.

First, although Crosby is exceedingly harsh in his criticism of the *quality* of *one* of the cases the trial court relied on when it granted Gulf Coast's motion for summary judgment,[15] he does not and cannot argue that, as a matter of law, the trial court was *precluded* from relying on the authorities it chose to follow. At the time the trial court ruled, there was no decision on point decided on substantially the same vicarious liability facts and issues, which means there was no binding precedent the trial court was legally compelled to follow.[16] Ex Parte Amos, 93 Fla. 5, 112 So. 289, 294 (1927) (Whitaker, J., concurring); see also Pearson v. Taylor, 159 Fla. 775, 32 So. 2d 826, 827 (1947); 13 Fla. Jur. 2d Courts & Judges § 143 (1997).[17]

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[15]Although Crosby repeatedly attacks the reasoning in Walsingham, he declines to criticize the United States Court of Appeals for the Eleventh Circuit for its decision in Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1500 (11th Cir. 1990). Citibank, which was relied on by both the trial court and the Second District in Jones I, applied Walsingham's rule in a diversity case. Id. at 1500.

[16]Crosby does not argue otherwise. Instead, he sidesteps the point by using his familiar strategy of arguing in the negative. Crosby states in his argument headings that at the time he dismissed Camus with prejudice "Florida law did not automatically release" the vicariously liable employer and that the case law holding such a release occurred was not "controlling." Init. Br. at 9, 18. But Crosby scrupulously avoids mentioning the other side of his observation: That at the time the trial court ruled, there was no binding precedent and the trial court was free to follow either approach to the use of the words "with prejudice."

[17]Crosby misuses the term "controlling" law to describe the path the trial court declined to take. As there was no binding, on point precedent at the time the trial court ruled, it was not "controlled" by the cases Crosby favors.

This means that regardless of the relative strengths and weaknesses of the divergent cases in existence at the time, the trial court had the right to do what it did and rely on the authorities Crosby now calls poorly reasoned.[18] In the absence of binding contrary precedent the trial judge was entitled to and did make an independent exercise of judgment. McGauley v. Goldstein, 653 So. 2d 1108, 1109 (Fla. 4th DCA 1995). Similarly, when in Jones I the Second District followed the First District's opinion in Walsingham — which was the case most closely on point[19] — it was doing what it had a perfect right to do. It was not "disregarding" the law.

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[18]Crosby asserts under the controlling law, that of this Court and of the Second District, a dismissal with prejudice of the active tortfeasor did not bar litigation against the passive, vicariously liable tortfeasor. Init. Br. at 14-16. The decisions relied on for this assertion are all distinguishable based on the one fact that the Second District deemed determinative in Jones I and that previously had not been squarely addressed — the dismissal with prejudice. Sun First Nat'l Bank v. Batchelor, 321 So. 2d 73 (Fla. 1975); Vasquez v. Board of Regents, 548 So. 2d 251 (Fla. 2d DCA 1989), and Hertz Corp. v. Hellens, 140 So. 2d 73 (Fla. 2d DCA 1962), were decided on the basis of releases. Sun First Nat'l Bank is further distinguishable by the fact that it was the employer and not the employee who was released in that case. 321 So. 2d at 74. Eason v. Lau, 369 So. 2d 600 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1365 (1979), predated Walsingham and did not discuss the issue of active and passive tortfeasors that was the basis of Gulf Coast's liability. It is telling that this Court's rationale in JFK Med. Ctr., the case that definitively decided the issue, was premised on the public policy of Florida and did *not* characterize Jones I as contrary to precedent, 647 So. 2d at 834, as Crosby contends. Init. Br. at 34.

[19]The court in Price, which followed the case law Crosby prefers, acknowledged that Jones I was uniquely a case on point and that there was otherwise "little case law on the subject." Price, 629 So. 2d at 912.

Stated differently, contrary to Crosby's core argument, it does not matter if the reasoning underlying the case law the trial court followed when it granted Gulf Coast's summary judgment motion and the Second District followed when it affirmed was really "aberrant," "flawed," or "questionable." What *does* matter is that, as Crosby put it, the law the trial court and Jones I followed "address[ed] the relevant issues," Init. Br. at 24, and that there was no binding, controlling precedent to preclude either court from applying it.

The upshot is that by dismissing Camus "with prejudice," Crosby unnecessarily exposed his clients to the risk that the trial court would and did apply an available rule of law that decimated the Joneses' personal injury claims. Crosby's failure to avoid or even discuss this easily sidestepped pitfall was far below the standard of care expected of a reasonably competent attorney.

After all, Crosby insists he knew of Walsingham at the time he dismissed Camus — in fact, he argues vehemently that to suggest otherwise would be "an absurdity." Init. Br. at 31 n.16. To have this knowledge and run the risk of losing the Jones' claim against Gulf Coast by dismissing Camus with prejudice was indefensible.[20] At the very least, this set of circumstances precludes summary judgment because it gives rise to a

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[20]Crosby's actions are equally indefensible if, as may be inferred from the record, he was ignorant of the case law that cost the Joneses their claim. An attorney's lack of knowledge of the law and resultant inability to advise the client properly also falls below the standard of care. See Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841, 843 (Fla. 1st DCA 1976).

material fact dispute as to whether Crosby failed to employ the reasonable knowledge and skill possessed by other members of his profession. See Stake, 529 So. 2d at 1185. No reasonably informed and careful attorney would run the risk that a trial court might follow problematic case law — no matter how "aberrant," "flawed," or "questionable" the attorney might believe it to be — *especially* if there is no reason to use language that would expose the client to such "bad law" in the first place.

Second, Crosby was not retroactively insulated from liability for legal malpractice or, to use his words, his actions were not "ratified," Init. Br. at 5, when the Florida Supreme Court resolved the conflict in the law of vicarious liability in such a way that Crosby's mistake would have been harmless if he had made it four and a half years later. No case has been cited by Crosby or found by the undersigned holding a subsequent favorable construction of harmful language erroneously and unnecessarily used by an attorney absolves the attorney from malpractice liability when a reasonably knowledgeable and skillful lawyer would have excluded the questionable language in the first place. See First Interstate Bank of Denver, N.A. v. Berenbaum, 872 P.2d 1297, 1300 (Colo. App. 1993) (attorney's duty to anticipate reasonably foreseeable risks includes avoidance of language that spawned litigation).

In addition, nothing in JFK Med. Ctr. suggests Crosby was "ratified" in the sense that he must establish for his argument to succeed — that the conflicting body of law Crosby should have been aware of and could have avoided years earlier was so

"flawed" and "aberrant" that he did not need to avoid it because no court would follow it. To the contrary, in JFK Med. Ctr. the Supreme Court expressly declares it is performing its constitutional function of resolving a conflict in the cases. 647 So. 2d at 833. True, it disapproves the rule the trial court and Jones I applied as "being inconsistent with our decision ***today***." 647 So. 2d at 834 (emphasis added). But notably absent from JFK Med. Ctr. is any suggestion that JFK's holding reiterated "the long standing law in Florida on the issue," Init. Br. at 9-24, much less that it agrees with the proposition Crosby must establish to prevail — that the authorities the trial court and Jones I applied were so bereft of merit that they were somehow effectively purged from the body of law a competent attorney should have been aware of in June 1990 when Crosby dismissed Camus with prejudice.

Crosby cannot establish as a matter of law that neither the trial court nor the Second District in Jones I was legally precluded from following the authorities that were later disapproved in JFK Med. Ctr. This means Crosby was responsible for knowing of those authorities and protecting the Joneses from them. Presumably because he recognizes that this combination of facts defeats summary judgment, Crosby resorts to a stunningly counterproductive tactic. In an apparent effort to persuade the Court that an attorney should not be faulted for failing to know of or take "flawed" or "aberrant" law into account, Crosby launches an attack that goes not just to the reasoning but also to the good faith of the Second District and other courts

which, before JFK Med. Ctr. resolved the conflict, followed the rule that a dismissal with prejudice of the active tortfeasor bars a claim against the vicariously liable passive tortfeasor.

In that regard, Crosby complains that he lost in the trial court on summary judgment not because the trial court followed conflicting case law, but instead because it "disregarded Florida law" in a "deviation from the majority rule."[21] Init. Br. at 4, 26. Crosby claims he lost the appeal in Jones I not because the Second District made a legitimate judicial decision to follow an opposing body of law but because it had "chosen to ignore the laws of this State as decreed by this Court," "rejected this Court's opinion [in Sun First Nat'l Bank]," "refused to follow" precedent, and issued an "abhorrent" decision in an "obvious disregard for the law as established by this Court." Juris. Br. at 3, 7, 8, 10; Init. Br. at 4, 10, 11, 13, 24, 25, 26.

Crosby reserves his most colorful attacks for the motives of the Second District in the decision on review, Jones II. Jones II, which was decided by a different panel than Jones I, reversed Crosby's summary judgment for the straightforward reason addressed above — the existence of material fact disputes on the critical malpractice issues of whether "Crosby should have acted as he did" and whether he was even "aware of the body of law" that tripped him up in the trial court. Id. at 381. The

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[21]Crosby did not enhance his own credibility or put his clients in the best position to defend against Gulf Coast's summary judgment motion when the trial judge caught him trying to make an ex *parte* end run instead of meeting the merits head on.

Second District cites and quotes JFK Med. Ctr. in Jones II and makes the correct observation — also established above — that JFK Med. Ctr. "crystalize[d]" a conflict in Florida law rather than "state of rule of long standing." Jones II, 677 So. 2d at 381.

Notwithstanding the factual and legal bases for the decision in Jones II, Crosby insists the analysis the Second District offers is but a pretext. According to Crosby, the District Court's real agenda in Jones II was to defy the Supreme Court of Florida by refusing to acknowledge the mistake it made in Jones I. Crosby argues that in Jones II, the Second District "refus[ed] to admit its error" and "tr[ied] to couch its rejection" of Supreme Court precedent "as simply a disputed issue of fact" in "an effort to justify" the "abhorrent" decision it made in Jones I. Juris. Br. at 3, 4, 5, 6, 7, 8, 9, 10; Init. Br. at 5, 6, 7, 9 n. 4, 16, 24, 34.

As the analysis that defeated Crosby is based in part on the decision of the First District in Walsingham, Crosby has some choice words for the First District as well. Crosby urges that the First District, like the Second, "completely disregarded well-established rules with respect to the release of joint tortfeasors." Init. Br. at 6.

Little need be said to refute an argument that seeks to shift blame for a lawyer's mistake by disparaging the trial and appellate courts that ruled against him. Inevitably, such an argument crashes from its own weight. For example, Crosby states "Jones has not presented any authority for the proposition lawyers can be liable for the *actions of the courts*." Init. Br. at 25 (emphasis added). But "actions of the courts" are legal

*decisions — case law* — which attorneys are responsible for knowing and being guided by in their representation of clients. Contrary to Crosby's characterization, such "actions" cannot be disregarded as mere "whims" or "arguments," Juris. Br. at 6, 9, even if the attorney disagrees with them.

The extremity of Crosby's argument to one side, one need do no more than read the decisions Crosby assails to know that neither the trial court, the two panels of the Second District, the Eleventh Circuit, nor the First District actually "ignored," "disregarded," or "refused to follow" the law to achieve an otherwise unsupportable result.[22] But even if Crosby's criticisms were accurate, the result in this case would be the same. At the time Crosby gratuitously dismissed Camus with prejudice, the law

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[22]The trial court and the Second District in Jones I concluded the adjudicative effect of a dismissal with prejudice barred the Joneses from further litigation against Gulf Coast Newspapers. App. 9-10; Jones I, 595 So. 2d at 91. As the Second District explained, "If we were considering only the release involved in this matter, or if the action had been dismissed without prejudice," 595 So. 2d at 91, the outcome would have been different. Crosby's extended discussion of the cases preceding Jones I overlooks these distinctions. As the Second District pointed out in Jones II, Crosby's conduct can only be assessed "from his vantage point at that time." 677 So. 2d at 381. Like Crosby's decisions, the Second District's decision must be determined from its vantage point. The First District's Walsingham decision — unlike the release cases — turned on the significance of a dismissal with prejudice. Not until the Fourth District's decision in Price v. Beker, 629 So. 2d 911 (Fla. 4th DCA 1993) approved, 647 So. 2d 833 (Fla. 1994), was there any authority directly contrary to Jones I, and the Fourth District recognized there was "little case law on the subject." Id. at 912. Not until this Court's decision in JFK Med. Ctr. resolved the conflict was there any contrary controlling authority. The Second District was simply fulfilling its obligation to decide the case before it based on its best current understanding of the state of the law. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991).

was unsettled. There was no binding, controlling authority on all fours the trial court was required to follow, and it is undisputed that relevant, potentially harmful case law existed. Crosby had a duty to know of and take that case law into account. Because the very best that can be said for Crosby is that the material facts as to whether he satisfied this duty are in dispute, the Second District should be affirmed.

### C. If adopted, the rule Crosby proposes will eliminate the objective requirement that attorneys in Florida have a reasonable duty to exercise judgment in good faith and with the degree of knowledge and skill ordinarily possessed by other lawyers similarly situated.

In Florida as elsewhere, an attorney's representation of his or her client is gauged by an objective standard. An attorney must "exercise . . . judgment, in good faith and with the degree of knowledge and skill ordinarily possessed by other lawyers similarly situated." Dillard Smith Constr. Co., 337 So. 2d at 843. See also Resolution Trust Corp. v. Holland & Knight, 832 F. Supp. 1528, 1530 (S.D. Fla. 1993) (attorney's reasonable duties include duty of care which requires attorney to have knowledge and skill necessary to confront the circumstances of each case); State v. Meyer, 430 So. 2d 440, 443 (Fla. 1983) (lack of knowledge of or compliance with prescribed rules of practice and procedure may subject negligent attorney to liability for damages to the client); Stake v. Harlan, 529 So. 2d 1183, 1185 (Fla. 2d DCA 1988) (attorney undertakes that he is possessed of that reasonable knowledge and skill ordinarily possessed by other members of profession).

Crosby's approach in this case — to defend what he did by attacking the decisional law he dislikes as flawed and improperly motivated — collides with these well settled principles. In this regard, Crosby's brief is sprinkled with expressions of his opinion that he was "doing his job and doing it well," "did everything he was supposed to do," acted in "good faith," and "diligently represented" Jones, "to the best of his abilities."[23] Init. Br. at 4, 5, 6, 27, 29. But Crosby's self-evaluation, like his professed knowledge of the law at the time he dismissed Camus with prejudice, is not objectively supported by the record. To the contrary, as established above, there is nothing in the record to indicate Crosby knew anything about the relevant principles of vicarious liability law at the time he unnecessarily dismissed Camus with prejudice. Consistent with this, the Second District stated, "[A] jury might decide that Crosby should have been aware of the body of law" that cost the Joneses their claim against Gulf Coast. Jones II, 677 So. 2d at 381.

Crosby's strategy of blaming the courts for making bad decisions while praising himself for detecting the courts' supposed ill motives points out yet another flaw that goes to the core of Crosby's entire argument. Under Crosby's approach, in contravention to the existing established malpractice test, Stake, 529 So. 2d at 1185;

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[23]It is difficult to determine precisely what Crosby means when he insists he was "doing his job and doing it well." Init. Br. at 5. If Crosby had dismissed Camus *without* prejudice, which the record indicates he could have done, neither he nor the Joneses would be in this predicament. See Jones I, 595 So. 2d at 91. How could Crosby have done his job worse?

Dillard Smith Constr. Co., 337 So. 2d at 843, an attorney is not necessarily to be faulted for failing to apply the degree of knowledge and skill ordinarily possessed by lawyers similarly situated. Instead, under Crosby's reasoning, an attorney may unnecessarily expose his or her client to the operation of an undesirable rule of law with impunity as long as the attorney believed the reasoning underlying the harmful rule is so "flawed" and "aberrant" that any court following it could be said to be "disregarding," "refusing," or "rejecting" the correct or better rule.

The law does not and cannot permit a lawyer to base his or her actions and advice (or lack of action or advice) on the lawyer's own subjective, unilateral evaluation of the relative quality and persuasiveness of the conflicting authorities. Instead, it is fundamental that an attorney must know and allow for the law that relates to the client's case, Resolution Trust Corp., 832 F. Supp. at 1530; Meyer, 430 So. 2d at 443, whether the attorney agrees with the law or not. Stated differently, an attorney cannot gratuitously put his or her client at risk by ignoring a body of law on the theory that the body of law is "abhorrent" or an "aberration."

Ironically, if the test Crosby proposes were the law, he would fail it. Even under Crosby's rule, a lawyer must at least know enough about the body of law relevant to the client's issue to be able to make the subjective determination that a case or a line of cases is not worth taking into account. In the instant record, however, there is nothing to indicate that at the time he dismissed Camus with prejudice, Crosby knew

*anything* about the possible consequences of his apparently unnecessary dismissal of Camus with prejudice. At the very least there is a material fact dispute on this point.

As the Second District correctly held in Jones II, this case turns on factual issues as to "whether Crosby should have acted as he did" and whether he "should have been aware of the body of law" that defeated him in the trial court and in Jones I. Jones II, 677 So. 2d at 381. That Crosby's "decision or inadvertent action would not have caused either his clients or him the woes they face today" if it had occurred after JFK Med. Ctr. was decided four and one-half years later, Jones II, 677 So. 2d at 381, does not resolve these factual questions. The Second District should be affirmed.

## II. THERE ARE GENUINE ISSUES OF MATERIAL FACT AND CONFLICTING INFERENCES WHICH PRECLUDE SUMMARY JUDGMENT REGARDING CROSBY'S CONTENTION THAT HE IS INSULATED FROM LIABILITY UNDER THE JUDGMENTAL IMMUNITY DOCTRINE.

Crosby's second argument — that he should be insulated from malpractice liability because his dismissal of Camus with prejudice was a "well reasoned decision made in good faith" — closely resembles and is inextricably intertwined with his first argument. As such, Crosby's second argument is, like his first, hobbled by the fact that there is nothing in the record to indicate Crosby knew anything about the law governing the vicarious liability issue that confronted his clients when he dismissed Camus with prejudice, much less that he made a "well reasoned" or "good faith"

decision under that law. In addition, even if in June 1990 Crosby had the legal knowledge he now claims to have had, he still would not be shielded by the doctrine of judgmental immunity. The doctrine does not protect a lawyer from failing to take into account harmful case law on the theory that the lawyer acted in keeping with what he or she believed to be what Crosby calls the "greater weight and better reasoned authority." Init. Br. at 25.

**A. Crosby cannot meet his heavy burden of establishing there is no material fact issue or conflicting inference going to the threshold judgmental immunity requirement that he had to know the relevant vicarious liability law at the time he dismissed Camus with prejudice.**

As Crosby acknowledges, under the judgmental immunity doctrine,

> [a]n attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his state and on which reasonable doubt may be entertained by well-informed lawyers.

Kaufman v. Cahen, 507 So. 2d 1152, 1153 (Fla. 3d DCA 1987) (citation omitted); Init. Br. at 27. By definition, then, an attorney cannot be judgmentally immune unless that attorney has educated himself or herself about the law governing the client's case. Absent this step, an attorney cannot act "in good faith" or with "an honest belief" that the advice given and actions taken are "well founded" and in the "best interest of the client." It also automatically follows that an attorney cannot claim to have made a

"mere error of judgment" or a mistake in a point of unsettled law in which "reasonable doubt may be entertained by well-informed lawyers" unless the lawyer involved is himself or herself first "well informed." In other words, an attorney is "not immune from responsibility if he fails to employ in the work he undertakes that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill." Stake, 529 So. 2d at 1185.

Against the background of the instant record, to recite the judgmental immunity doctrine is enough to explain why it does not support Crosby's bid for summary judgment. There is not a scintilla of evidence as to Crosby's knowledge of the law at the time he signed the joint motion to dismiss Camus with prejudice. Crosby's bald assertion that he "relied on the identical authorities" discussed years later in JFK Med. Ctr. is refuted by the true sequence of events. The record shows Crosby never articulated reliance on *any* legal authority relevant to his dismissal of Camus with prejudice until *after* Gulf Coast's motion for summary judgment brought the problem to light approximately one month later. Even then Crosby's first response to Gulf Coast's motion was not "in good faith,""honest," or "reasonable." Instead, Crosby made an unsuccessful ex *parte* attempt to circumvent the mess he had made by filing a joint stipulation to vacate Camus' dismissal with prejudice without Gulf Coast knowing about it. Significantly, in seeking to vacate the dismissal, Crosby complained that Gulf Coast's legal position was "unexpected." App. 4. This is not the action or the

explanation of an attorney who had only one month earlier made a "good faith," "honest," "well informed" decision.

Neglect of an attorney's reasonable duty is ordinarily a question of fact on which reasonable persons could differ.[24] Hatcher v. Roberts, 478 So. 2d 1083, 1087 (Fla. 1st DCA 1985). The Second District correctly concluded genuine issues of material fact in the instant record preclude summary judgment as a matter of law.

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[24]See cases cited *supra*, note 7.

**B. Crosby cannot circumvent the material fact dispute going to the threshold judgmental requirement of knowledge of the law by arguing he "complied with the majority view" and that the Florida Supreme Court did not resolve the conflict in the law until four and a half years later.**

Assuming for the sake of argument that Crosby is correct in his assertion that until JFK Med. Ctr. was decided the "majority view" was that dismissal "with prejudice" did not discharge the passive tortfeasor, he remains ineligible for summary judgment based on the judgmental immunity doctrine. This is so for at least two reasons.

First, as explained above, the doctrine is inapplicable unless the attorney acts "in good faith" and holds "an honest belief" that his actions are "well founded" and "in the best interest" of the client. As stated, there is no evidence in this case that Crosby even knew a vicarious liability issue existed at the time he dismissed Camus with prejudice, much less that he considered it in good faith and honestly believed his actions were well founded and in Jones' best interests. This is enough to defeat summary judgment and affirm the Second District.

Second, even if Crosby could show he was actually aware of the majority or minority rules at the relevant time, his actions would remain indefensible or at the very least incapable of resolution on summary judgment. There is nothing in the judgmental immunity doctrine or in the cases construing it to indicate that a reasonable lawyer can ignore or fail to take into account a minority view, however "flawed" and "aberrational" the attorney may believe that view to be, even if the majority rule is later

adopted by the state court of last resort. And no reasonable attorney would ever expose a client to the operation of such a minority view when that exposure can be avoided entirely by the selection and use of the appropriate language. Yet in this case Crosby dismissed Camus "with prejudice" even though there is nothing to indicate Camus ever asked for, much less required a "with prejudice" dismissal as a condition of settlement.[25] To the contrary, when Crosby received Gulf Coast's summary judgment motion he asked Camus to agree to stipulate to vacate the dismissal with prejudice. Camus did so.

The point is that an attorney who *unnecessarily* exposes his or her client to a harmful rule cannot possibly meet the judgmental immunity doctrine's threshold requirements of acting "in good faith" and "in the best interest of his client." In this case, Crosby's error is especially egregious because he insists he was aware of the potentially harmful case law but exposed Jones to it anyway, without ever bothering to discuss the issue with his clients.

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[25]Even if Crosby could establish Camus required her dismissal to be with prejudice, Crosby still is not entitled to immunity. The law required Crosby to share his knowledge of the potential adverse effect of a dismissal with prejudice. His failure to do so made it impossible for Jones to make an informed decision whether to risk the loss of Gulf Coast's $1 million insurance coverage in return for Camus' $25,000 policy limits.

### C. Crosby cannot circumvent the material fact dispute going to the threshold judgmental immunity requirement of knowledge of the law by arguing his actions were "within the scope" of one of the two legal approaches then being followed on the vicarious liability issue.

Crosby's stacking of erroneous premises reaches its apex in his third sub-argument. According to Crosby, because his dismissal of Camus with prejudice would not have harmed Jones if the trial court had followed the majority view, he had no "duty to warn" Jones of the possible loss of the claim. Init. Br. at 28. Crosby insists it would be "absurd" to impose a requirement that an attorney must tell the client that he or she is acting "in accordance" with "the law and, in any event, there is no evidence that if he had told Jones of the conflicting bodies of law, it "would have changed anything which occurred." Init. Br. at 28, 30.

Manipulation of language and accusations of "absurdity"[26] cannot substitute for or divert attention from the record and the law. Crosby is not being sued because he failed to warn about actions he took which "fell within the scope of Florida law." The "action" Crosby took — which undeniably falls *outside* the scope of Florida law — was to insert the words "with prejudice" into a dismissal order, without being required to do so, with the result that his clients' claim could be and was lost. That there existed a body of law under which his possibly uninformed and undisputedly undiscussed

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[26]Crosby uses the word "absurd" three times, Init. Br. at 8 n.3, 28, 31 n. 16, and, as noted above, Crosby's entire brief is laced with indecorous language. Experience teaches that the use of such language ordinarily says more about the quality of the argument its author is advancing than the point under attack.

action might have done his clients no harm is completely beside the point. There also existed a devastatingly harmful body of law which the trial court could and did apply.

Crosby's final argument is that he did not proximately cause the Joneses' injury because the Joneses have never indicated that, had they been informed of the conflict in the law, they "would have done anything differently." Init. Br. at 6, 30. This assertion is question begging, self-serving, and self-defeating. An attorney has a duty to give clients the benefit of the attorney's knowledge if it is foreseeable that the clients, once informed, would avoid acting to their material detriment. Stake, 529 So. 2d at 1185. Had the Joneses been correctly and reasonably advised, they would have been told that by dismissing Camus with prejudice in return for $25,000, they ran the risk that their claim against Gulf Coast's million dollar policy might be lost. Crosby's suggestion that with this crucial information the Joneses would have still instructed him to dismiss Camus with prejudice, even if Camus was not demanding to be dismissed with prejudice, blinks reality and strains credulity. It is far more reasonable to draw the conflicting inference that the Joneses would not have taken an unnecessary risk.[27]

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[27]Crosby's assertion is also contradicted by the sworn expert opinion of Jones' witness, a board certified civil trial attorney, who stated the "dismissal of Gulf Coast, clearly was foreseeable and not subject to a difference of opinion among lawyers who undertake to handle personal injury claims." App. 24.

III. THERE ARE GENUINE ISSUES OF MATERIAL FACT AND CONFLICTING INFERENCES WHICH PRECLUDE SUMMARY JUDGMENT REGARDING CROSBY'S CONTENTION THAT HE DID NOT NEGLECT HIS PROFESSIONAL DUTY WHEN HE FAILED TO MOVE TO SET ASIDE THE DISMISSAL WITH PREJUDICE UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.540.

An additional act of malpractice claimed in this case has to do with Crosby's failure to file a motion to set aside the order dismissing Camus with prejudice under Florida Rule of Civil Procedure 1.540.[28] Crosby argues he was under no obligation to take this step because he "made no mistake" and did not act inadvertently or with neglect. Init. Br. at 31-32.

As established above, Crosby is incorrect or, at the very least, there exist issues of material fact and conflicting inferences going to the question of whether Crosby made a "mistake" or acted inadvertently or with excusable neglect. As pointed out, there is nothing in the record to indicate Crosby knew anything about the pertinent law at the relevant time, and there is nothing the record to indicate that Camus required or even suggested Crosby expose the Joneses to the risk an informed lawyer would know the "with prejudice" dismissal would pose.

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[28]In pertinent part, Rule 1.540 provides:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . .

Fla. R. Civ. P. 1.540(b).

Also as pointed out, Crosby's own furtive behavior — the use of an ex *parte* joint stipulation in a failed attempt to vacate his dismissal of Camus with prejudice — suggests he *knew* he had made a serious mistake or had been negligent. In fact, in his ex *parte* joint stipulation Crosby described Gulf Coast's legal position as "unexpected" and "unintended." App. 4. Crosby's joint stipulation did not urge what he now urges — that Gulf Coast's position was weak from a legal standpoint.

When the trial judge learned Crosby had obtained the order vacating the dismissal without Gulf Coast's involvement or consent, she correctly vacated it. App. 8. Rather than move to set aside the reinstated judgment under Rule 1.540,[29] Crosby opposed the summary judgment. App. 9. The trial court granted summary judgment for Gulf Coast based on its holding that Jones' claim could no longer be maintained against Gulf Coast due to the "negative adjudication on the merits" granted its employee. Jones I, 595 So. 2d at 91; App. 10.

The record shows Crosby was apprised at least by the time he received Gulf Coast's summary judgment motion that there existed a risk that the trial court would rule against his clients. Yet Crosby did not take the simplest available step to head off a disaster for Jones — file a Rule 1.540 motion to set aside the order dismissing Camus with prejudice. Crosby's inaction is yet another reason why Jones' legal malpractice

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[29]This would have been Crosby's only choice at this point because the time for filing a motion for rehearing or notice of appeal had "long since expired." App. 7.

claim cannot be disposed of on summary judgment. See, e.g., Rodriguez v. Morales, 426 So. 2d 1149, 1149 (Fla. 3d DCA 1983) (summary judgment precluded where material facts exist regarding attorney's negligent failure to file appropriate motion to rehear or modify trial court order); Cohen v. Lipsig, 459 N.Y. S.2d 98, 99 (N.Y. App. Div. 1983) (viable legal malpractice claim where settlement compelled by attorney's mistake).

Finally, in the opinion of Jones' board certified civil trial expert, Crosby's failure to take the appropriate step to remedy the unexpected and unintended effect of the dismissal with prejudice by filing a Rule 1.540 motion fell below the minimum standards of acceptable legal representation.[30] This affords yet another reason why this is a factual issue inappropriate for resolution on summary judgment. The Second District should be affirmed.

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[30]Crosby erroneously argues the expert's affidavit should be disregarded because it contains "conclusions of law." Putting to one side that the affidavit was not stricken by the trial court and is a part of the record, the rule is that a legal malpractice case, an expert may be required to discuss the law in order to illustrate the standard of care. See Urbanek v. Cohn, 531 So. 2d 427, 428 (Fla. 4th DCA 1988); Willage v. Law Offices of Wallace & Breslow, 415 So. 2d 767, 768 (Fla. 3d DCA 1982).

## CONCLUSION

For the foregoing reasons, the Second District's decision that this case presents material fact disputes as to whether Crosby's execution of the dismissal with prejudice fell below the requisite standard of care should be affirmed.

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## CERTIFICATE OF SERVICE

I CERTIFY that a copy of the Corrected Answer Brief on the Merits has been furnished by U.S. Mail, on July 24, 1997, to:

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