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IN THE SUPREME COURT OF FLORIDA

SECOND DISTRICT CASE NO. 95-01785
CIRCUIT CASE NO: GC-G 94-1653

88,772

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

Petitioners/Defendants,

vs.

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

Respondents/Plaintiffs.

PETITIONERS' JURISDICTIONAL BRIEF

On review from the District Court of Appeal
Second District, State of Florida

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TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Statement of the Case

The present controversy reaches this Court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). SAMUEL G. CROSBY and MILLER, CROSBY & MILLER, P.A. ("CROSBY") filed a Notice to Invoke Discretionary Jurisdiction on August 15, 1996 (A. 1)[1], following the Second District Court of Appeal's Order Reversing Final Summary Judgment entered in favor of CROSBY on July 17, 1996. (A. 2)

Statement of the Facts

On June 12, 1986, PATRICIA JONES was in an automobile accident with Mrs. Judith Camus (hereafter "Camus"), an employee of Gulf Coast Newspapers, Inc. (hereafter "Gulf Coast"). In 1987, LOGAN and PATRICIA JONES (hereinafter "JONES") sought the services of CROSBY to represent them in a personal injury action. CROSBY filed suit on behalf of JONES against Camus and her husband (the vehicle owners), Gulf Coast, and George House, an uninsured motorist. JONES sued Gulf Coast, Camus' employer, since JONES believed Camus was acting within the scope of her employment when the accident occurred.

In 1990, during the course of mediation, JONES reached a settlement with Camus' insurer, State Farm Mutual Automobile Insurance Co. (hereafter "State Farm"), who tendered policy limits, in exchange for a release and settlement of JONES' claims against Mr. & Mrs. Camus,

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[1]The Order being appealed and other critical documents and pleadings on record before the court below are attached pursuant to Florida Rule of Appellate Procedure 9.220 as an Appendix and are designated (A. appendix document number).

individually. The parties executed a Joint Motion for Dismissal with Prejudice (hereafter the "Joint Motion for Dismissal").

After Camus' dismissal, Gulf Coast moved for summary judgment arguing the release and dismissal of Camus released her employer, as well. The trial court granted Gulf Coast's motion and entered final judgment in its favor. CROSBY timely appealed the trial court's ruling, and on January 24, 1992, the Second District Court of Appeal affirmed in Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992) ("Jones I") (A. 3).

On July 18, 1994, JONES filed a Complaint for legal malpractice against CROSBY alleging CROSBY's filing of the Joint Motion for Dismissal was negligent. During the suit's pendency, this Court handed down J.F.K. Medical Center v. Price, 647 So. 2d 833 (Fla. 1994). (A. 4) Based on JFK, CROSBY filed a Motion for Summary Judgment on January 18, 1995, as to JONES' malpractice action. (A. 5) The Honorable Oliver Green heard CROSBY's Motion for Summary Judgment on March 13, 1995, and granted it on March 31, 1995. (A. 6) JONES' Notice of Appeal followed on April 26, 1995. After the filing of briefs and oral argument, the Second District Court of Appeal reversed the summary judgment in favor of CROSBY on July 17, 1996 ("Jones II") (A. 2), giving rise to a conflict between this Court and the Second District on two levels.

SUMMARY OF ARGUMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal which conflicts with the Court's decision(s) on a matter of law. In reversing the summary judgment granted in favor of CROSBY, the Second District expressly and directly disregarded this Court's holding in J.F.K. Medical Center, Inc. v. Price, 647 So. 2d 833 (Fla. 1994). Moreover, to get to this stage in the litigation, the Second District had to disregard the Court's decision in Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1977).

A dismissal with prejudice is not an adjudication on the merits and never has been in this State until the Second District held it to be in Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992). This decision, however, came one and a half years after the dismissal filed by CROSBY. As a result of that aberrant ruling, CROSBY was sued for malpractice. After this Court's decision in J.F.K., the Second District had an opportunity to correct its previous error by affirming the trial court's summary judgment in CROSBY's favor based on J.F.K.. Nevertheless, the Second District refused to do so and again rejected this Court's opinion. Not once but twice the Second District expressly and directly conflicted with this Court, on the impact of a release/dismissal of the active tortfeasor on the vicariously liable party.

Although it is the Second District that has chosen to ignore the laws of this State as decreed by this Court, CROSBY is the one that will suffer. CROSBY, in representing JONES, complied with the laws of the State of Florida. He did not and could not ignore this Court's rulings. In the malpractice action, CROSBY again relied upon this Court's opinion of the law to defend the action. The Second District, however, refused to do so by twice ruling contrary to the

law as established by this Court. While trying to couch its rejection of J.F.K. Medical Center and Batchelor, as simply a disputed issue of fact necessitating reversal of the summary judgment, the reality is a rejection of Florida's commitment to settlements and the well established law of not only this Court but other District Courts of Appeal. Therefore, discretionary review should be invoked.

ARGUMENT

A. The Second District's Decision in Jones v. Crosby, Expressly and Directly Conflicts with this Court's Decisions in J.F.K. Medical Center v. Price and Sun First National Bank v. Batchelor

The Florida Supreme Court has discretionary jurisdiction to review any decision of a district court which expressly and directly conflicts with a decision of another district court or the Florida Supreme Court on the same question of law. Fla. Const. art. V., Section 3(b)(3); Ed Ricke & Sons, Inc. v. Green, 609 So. 2d 504 (Fla. 1992); Walsingham v. State, 602 So. 2d 1297 (Fla. 1992); Smith v. Jack Eckerd Corp., 577 So. 2d 1321 (Fla. 1991) (discussing standards for discretionary jurisdiction of a district court's decision conflicting with this Court's decisions). The Second District's decision directly conflicts with Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1975), and J.F.K. Medical Center, Inc. v. Price, 647 So. 2d 833 (Fla. 1994).

In J.F.K. Medical Center this Court expressly held a voluntary dismissal of the active tortfeasor with prejudice is not the equivalent of an adjudication on the merits nor does it serve as a bar to continue the litigation against a passive or vicariously liable tortfeasor. (A. 4) In direct contrast to J.F.K. Medical Center's holding, the Second District in Jones II held it is potentially malpractice to settle with an actively negligent tortfeasor via a dismissal and release.

The trial court in the malpractice action granted summary judgment in favor of CROSBY stating that J.F.K. set forth the long-standing law of Florida regarding this issue. Nevertheless, the Second District, in what appears to be an effort to justify Jones I, states:

> The effect of J.F.K. Medical Center, then was to crystallize what in reality was a conflict in the law of Florida rather than to state a rule of long-standing.

* * *

> In view of the state of the law at the time CROSBY acted, 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.

(A. 2 at 4-5). The court went further to state that "a jury might decide that CROSBY should have been aware of the body of law that led to this court's decision in Jones I." (A. 2 at 5). Not only did the Second District fail to recognize that there was no law supporting Jones I, and in fact law against it—Batchelor, it also failed to recognize what the J.F.K. decision represented. In fact, in its July 17, 1996 Order, the Second District still argues "When Crosby executed the dismissal with prejudice, he foreclosed the Joneses' opportunity to recover from Gulf Coast Newspapers." (A. 2 at 4) For that reason, the Second District's decision is in conflict with J.F.K..

In J.F.K., this Court chose to review Jones I and Price v. Beker, 629 So. 2d 911 (Fla. 4th DCA 1993), due to the conflict between the two decisions. In approving the Price decision, this Court specifically found that Jones I was not only incorrect but created a conflict that did not exist prior to Jones I. In approving the Price decision, the Court relied upon the Restatement (2d) of Judgments § 51 (1982), § 768.041(1), Florida Statutes (1987), § 768.31(5)(a), Florida Statutes (1987), and Sun First National Bank v. Batchelor, 321 So. 2d 73 (Fla. 1975). The exact same law and rational CROSBY relied on in Jones I. This Court did not state that a new development in the law mandated that the Price decision be approved. Rather, in approving Price, this Court used well-established law to demonstrate that the Jones I decision was clearly in error. Nevertheless, the Second District justified its decision in this present controversy by suggesting that J.F.K. cleared up a huge conflict in the law of the State of Florida. Interestingly, though,

the Second District acknowledged that CROSBY's actions were "vindicated by J.F.K.." (A. 2 at 5)

Because this Court approved the decision in Price, it is important to look to that opinion for any insight as to the status of the law when CROSBY filed the Joint Motion of Dismissal. In Price, the Fourth District, like this Court, relied upon the Restatement (2d) of Judgments § 51, § 768.041(1), and § 768.31(5). Moreover, the Fourth District recognized that there was little case law on the subject except for Jones I. Therefore, the Fourth District recognized that there was not the great conflict in the law argued by the Second District in both Jones I and its recent Order. In fact, all of the case law that was on point with respect to the issues involved in this case supported CROSBY's actions. Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1975); Ellis v. Weisbrot, 550 So. 2d 15 (Fla. 3d DCA 1989); Vasquez v. Board of Regents, State of Florida, 548 So. 2d 251 (Fla. 2d DCA 1989); Apstein v. Tower Investments of Miami, Inc., 544 So. 2d 1120 (Fla. 3d DCA 1989); Eason v. Lau, 369 So. 2d 600 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1365 (Fla. 1979); Florida Tomato Packers, Inc. v. Wilson, 296 So. 2d 536 (Fla. 3d DCA 1974), cert. denied, 327 So. 2d 32 (Fla. 1976); Hertz Corp. v. Hellens, 140 So. 2d 73 (Fla. 2d DCA 1962). This just further demonstrates the reality that Jones I was an abhorrent case.

In its July 17, 1996 Order, the Second District concluded that a jury question was present as to the propriety of CROSBY dismissing Camus with prejudice although the suit continued against her employer. In finding that a jury question was present, the Second District expressly rejected this Court's decision in J.F.K. Medical Center, Inc. v. Price, 647 So. 2d 833 (Fla. 1994). Moreover, before ever reaching its July 17, 1996 decision, the Second District had previously

rejected this Court's decision in Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1977), by ruling in Jones I that a dismissal with prejudice was an adjudication on the merits.[2] Therefore, the Second District has twice refused to follow the directives of this Court resulting in CROSBY seeking this Court's discretionary jurisdiction. If the Second District had followed this Court's directives the first time it heard this case, the discretionary review of this Court would not be necessary. Nevertheless, in two consecutive decisions, the Second District has refused to follow those directives.

Specifically, in Jones I, the Second District stated:

> In Sun First National Bank v. Batchelor, 321 So. 2d 73 (Fla. 1975), the supreme court [sic.] held that [§ 768.041(1), Florida Statutes (1985)] abolished the common law rule that a release of one or more tortfeasors operates as discharge of all other tortfeasors who may be liable for the same torts.

Jones, 595 So. 2d at 91. The court further recognized the Third District held in Florida Tomato Packers, Inc. v. Wilson, 296 So. 2d 536 (Fla. 3d DCA 1974), cert. denied, 327 So. 2d 32 (Fla. 1976), that this rule applies even when an active tortfeasor is released. Nevertheless, the court refused to follow Batchelor and Florida Tomato Packers but chose rather to rely on a First District case, Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988), an Eleventh Circuit case, Citibank, N.A. v. Data Lease Financial Corp, 904 F.2d 1498 (11th Cir. 1990), and Florida Rule of Civil Procedure 1.420. Despite the fact that neither Walsingham, Citibank nor Florida Rule of Civil Procedure 1.420 supports the Second District's decision, the Second District specifically chose not to follow Batchelor. Judge Patterson in his dissent recognized the error made by the

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[2]By finding the dismissal to be an adjudication on the merits, the dismissal served to bar future action against the passive tortfeasor, Camus' employer.

majority. "The majority has chosen to put form over substance . . ." Id. at 92 (Patterson, J., dissenting). As a result of the Second District's incorrect decision, JONES filed a malpractice action against CROSBY. After CROSBY prevailed on summary judgment relying upon Batchelor and L.F.K., JONES again appealed to the Second District resulting in the decision of which CROSBY seeks discretionary review.

B. Ironically, Because of the Second District's Refusal to Recognize the Holdings of this Court, an Innocent Advocate Will be Made to Pay for Following Those Same Rulings Rejected by the Second District

This Court should review this case because of the Second District's obvious disregard for the law as established by this Court. Any other conclusion would require a lawyer to essentially be clairvoyant. The Wisconsin Supreme Court said it best in Denzer v. Rouse, 180 N.W.2d 521 (Wisc. 1970), when it held:

> A successfully asserted claim of legal malpractice needs more than the fact, standing alone, that a trial or appellate court interpreted a document differently than the lawyer or his client presumed they did. **A lawyer would need a crystal ball, along with his library, to be able to guarantee that no judge, any time, anywhere, would disagree with his judgment or evaluation of the situation.**

Id. at 525. SAMUEL CROSBY adhered to the law of the State of Florida, particularly this Court's decision in Batchelor and the Second District disagreed with him. Now, in what appears to be an effort to justify that decision which has been expressly and directly rejected by this Court and found in conflict, an even more aberrant situation has developed. If a lawyer can be liable for the whims of an appellate court, a lawyer will always be susceptible to a malpractice action although the law clearly supported his/her actions. CROSBY acknowledges lawyers may be liable for negligent conduct. Nevertheless, CROSBY cannot acknowledge that a lawyer can be liable for unsupported rulings of appellate courts.

In conclusion, the Second District refused to follow the directions of this Court in its first involvement in this case. Specifically, the Second District, while recognizing and understanding the holding of Batchelor, chose to disregard that holding and find that a dismissal with prejudice was an adjudication on the merits. Then, in its July 17, 1996 Order, the Second District, despite recognizing and acknowledging this Court's holding in J.F.K., which only served to reiterate the Batchelor holding, refused to follow the Supreme Court's directive again. By doing so, the Second District's July 17, 1996 Order expressly and directly conflicts with Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1975), and J.F.K. Medical Center, Inc. v. Price, 647 So. 2d 833 (Fla. 1994). Moreover, by doing so, the Second District subjected CROSBY to liability for something only the Second District could control.

CONCLUSION

Based upon all of the above, this Court has discretionary jurisdiction of this matter and should accept review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. Mail this 22nd day of August, 1996, to HERBERT M. BERKOWITZ, P.A., 4809 E. Busch Blvd., Suite 104, Tampa, FL 33617.

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Appendix

IN THE SUPREME COURT OF FLORIDA

SECOND DISTRICT CASE NO. 95-01785
CIRCUIT CASE NO: GC-G 94-1653

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

Petitioners/Defendants,

vs.

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

Respondents/Plaintiffs.

APPENDIX TO PETITIONERS' JURISDICTIONAL BRIEF

On review from the District Court of Appeal
Second District, State of Florida

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INDEX TO APPENDIX TO PETITIONERS' JURISDICTIONAL BRIEF

DOCUMENT NAME **DOCUMENT NUMBER**

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, LAKELAND, FLORIDA
CASE NO. 95-01785

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

Plaintiffs/Respondents,

vs.

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

Defendants/Petitioners.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF SUPREME COURT

NOTICE IS GIVEN that SAMUEL G. CROSBY and MILLER, CROSBY & MILLER, P.A., Defendants/Petitioners, invoke the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered on July 17, 1996. This decision expressly and directly conflicts with the decision of the Florida Supreme Court in *JFK Medical Center, Inc. v. Price*, 647 So. 2d 833 (Fla. 1994) and *Sun First National Bank of Melbourne v. Batchelor*, 321 So. 2d 73 (Fla. 1975), and clearly misinterpreted and misrepresents the holding of those cases on the same question of law. As such, certiorari review is appropriate pursuant to Article V, Section 3(b)(3), Constitution of the State of Florida and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. Mail this 14th day of August, 1996, to HERBERT M. BERKOWITZ, P.A., 4809 E. Busch Blvd., Suite 104, Tampa, FL 33617.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

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

Appellants,

v.

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

Appellees.

Case No. 95-01785

Opinion filed July 17, 1996.

Appeal from the Circuit Court for Polk County; Oliver L. Green, Jr., Judge.

Herbert M. Berkowitz of Berkowitz & Associates, Tampa, for Appellants.

Lora A. Dunlap and Jamie Billotte Moses of Fisher, Rushmer, Werrenrath, Wack & Dickson, P.A., Orlando, for Appellees.

FRANK, Judge.

Patricia Jane Jones and her husband, Logan M. Jones, Jr., contest a final summary judgment entered in favor of their

former lawyers. Because genuine issues of material fact preclude judgment as a matter of law, we reverse.

The backdrop leading to the present malpractice litigation may be summarized as follows. In 1986 Patricia Jones was injured in an automobile accident. She and her husband retained Samuel Crosby and his law firm to represent them in their action against George House, an uninsured motorist, Judith Camus, who drove the car that collided with Ms. Jones, Gulf Coast Newspapers, the employer of Judith Camus, and Timothy Camus, who owned the vehicle that Ms. Camus drove.[1] The Joneses settled with State Farm Mutual Automobile Insurance Company, the insurers of the Camus vehicle, for $25,000, the policy limits. With the advice of Crosby, the Joneses released the Camuses by executing a document specifically providing that it was not intended to release Gulf Coast Newspapers, against which the Joneses intended to pursue their vicarious liability claim. Crosby then entered into a joint motion for dismissal, with prejudice, as to the Camuses. Subsequent events reveal that the entry of the dismissal with prejudice carried with it substantial negative consequences for the Joneses. Gulf Coast Newspapers moved for summary judgment against the Joneses, arguing that the dismissal with prejudice of the employee constituted an adverse adjudication on the merits of the Camuses' claim and thus barred any further action against Gulf Coast Newspapers, a passive

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[1] This appeal does not concern the claim against House.

tortfeasor which under any circumstance could have been only vicariously liable. The circuit judge granted Gulf Coast's motion, and the Joneses appealed. This court affirmed and the Florida Supreme Court denied review. Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992) (Jones I). Because they were precluded from pursuing their claim against Gulf Coast Newspapers, the Joneses sought redress against Crosby and sued him for malpractice. Crosby moved for summary judgment, which the trial court granted on the basis of the Florida Supreme Court's decision in JFK Medical Center, Inc. v. Price, 647 So. 2d 833 (Fla. 1994), and the doctrine of judgmental immunity which insulates an attorney from malpractice based on errors in judgment. Kaufman v. Stephen Cahen, P.A., 507 So. 2d 1152 (Fla. 3d DCA 1987). The Joneses have appealed from the adverse summary judgment.

In entering summary judgment for Crosby in the malpractice proceeding the trial court found there was no genuine issue of material fact and that the issues were purely legal. The legal issue, reasoned the trial court, was resolved by JFK Medical Center, which set forth "the long standing law of Florida." JFK Medical Center dealt with the effect of a voluntary dismissal with prejudice on the vicarious liability of an employer and specifically disapproved the result we reached in Jones I:

> In Jones, the Second District Court of Appeal reasons that a dismissal with prejudice is equivalent to an adjudication on the merits, thereby barring future actions against active and passive tortfeasors. We disagree and disapprove Jones as being inconsistent with our decision today. We agree with the holding in Price that 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. The effect of JFK Medical Center, then, was to crystallize what in reality was a conflict in the law of Florida rather than to state a rule of long standing.

The trial court in this case centered its attention upon the legal principles behind Crosby's actions but did not focus upon the factual issue concerning whether Crosby should have acted as he did. In this respect the court committed error. When Crosby executed the dismissal with prejudice, he foreclosed the Joneses' opportunity to recover from Gulf Coast Newspapers. Indeed, we specifically held in Jones I:

> 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 appellants' position and reverse the summary judgment entered against them.

595 So. 2d at 91. In support of that distinction this court relied upon Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988). Although this principle was disapproved as a matter of policy in the JFK Medical Center case, our holding in 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 this 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. The Joneses have argued that Crosby could have moved to set aside the dismissal through the vehicle of a motion pursuant to Rule 1.540, Florida Rules of Civil Procedure. Whether or not Crosby made a mistake in 1990 or should have attempted to have the summary judgment set aside prior to an appeal, however, must be determined from his vantage point at that time. Judge Patterson, dissenting in Jones I, described the use of the words "with prejudice" as "simply the ill-advised choice of words by counsel." 595 So. 2d at 92. If Crosby had entered the same dismissal with prejudice subsequent to the JFK Medical Center opinion, however, his decision or

inadvertent action would not have caused either his clients or him the woes they face today. In any event, the ultimate evaluation of Crosby's representation of his clients must be rendered by a jury.

Reversed and remanded.

THREADGILL, C.J., and CAMPBELL, J., Concur.

Patricia Jane JONES and Logan M. Jones, Jr., Appellants,

v.

GULF COAST NEWSPAPERS, INC., Appellee.

No. 90-03633.

District Court of Appeal of Florida, Second District.

Jan. 24, 1992.

Rehearing Denied March 31, 1992.

Automobile passenger brought action against employer and employee for injuries sustained by passenger when automobile in which she was riding was struck by automobile driven by employee. Prior to trial, passenger settled claim against employee, and executed release. The Circuit Court, Polk County, Carolyn K. Fulmer, J., granted joint motion of passenger and employee requesting dismissal of suit against employee with prejudice and subsequently granted employer's motion for summary judgment. Passenger appealed. The District Court of Appeal, Schoonover, C.J., held that dismissal with prejudice of suit against employee barred passenger's claim against employer.

Affirmed.

Patterson, J., dissented and filed an opinion.

1. Master and Servant ⇐300

Under doctrine of "respondeat superior," if employee is not liable, employer is not liable.

See publication Words and Phrases for other judicial constructions and definitions.

2. Judgment ⇐570(7)

In action by automobile passenger against employer for injuries sustained when automobile in which passenger was riding was struck by automobile driven by employee, passenger's claim against employer was barred where, upon joint motion of passenger and employee, court dismissed action against employee with prejudice, even though release expressly and specifically did not release employer from liability.

Samuel G. Crosby of Miller, Crosby & Miller, P.A., Lakeland, for appellants.

James R. Freeman and Lee A. Miller of Shear, Newman, Hahn & Rosenkranz, P.A., Tampa, for appellee.

SCHOONOVER, Chief Judge.

The appellants, Patricia Jane Jones and Logan M. Jones, Jr., challenge a final summary judgment in favor of the appellee, Gulf Coast Newspapers, Inc. We affirm.

This action arose out of a motor vehicle accident which occurred in Polk County, Florida. The appellant, Patricia Jane Jones, was a passenger in a motor vehicle which was struck in the rear when it swerved to avoid an automobile owned and driven by George Eugene House. The automobile which struck the motor vehicle in which Mrs. Jones was a passenger was owned by Timothy P. Camus and operated by his wife Judith S. Camus. At the time of the accident, Mrs. Camus was operating her husband's automobile during the course of and within the scope of her employment with the appellee, Gulf Coast Newspapers, Inc.

The appellants filed a negligence action against George House, Mr. and Mrs. Camus, and the appellee, Gulf Coast Newspapers, Inc. The appellants' action against the appellee was based upon the theory of respondeat superior and their amended complaint did not allege any negligence on the part of the appellee.

Prior to trial, the appellants settled their claims against Mr. and Mrs. Camus and their insurance carrier and executed a release in their favor. 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."

The parties to the 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 the motion and dismissing the action against Mr. and Mrs. Camus with prejudice.

The appellee filed a 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 appellee. The court granted the appellee's motion, and after the appellants' motions for rehearing and clarification were denied, they filed a timely notice of appeal from the final summary judgment entered against them.

The appellants contend that the parties to the settlement agreement did not intend to release the appellee from liability and that this is clearly established by the release itself. In support of their position, the appellants point out that section 768.041(1), Florida Statutes (1985), provides:

> **768.041 Release or covenant not to sue.—**
>
> (1) A release or covenant not to sue as to one tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.

In *Sun First Nat'l Bank v. Batchelor*, 321 So.2d 73 (Fla.1975), the supreme court held that this statute abolished the common law rule that a release of one or more tortfeasors operates as discharge of all other tortfeasors who may be liable for the same tort. Furthermore, the Third District in *Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536 (Fla. 3d DCA 1974), *cert. denied*, 327 So.2d 32 (Fla.1976), held that this statute applied even when the active tortfeasor was released. Under the court's holding in *Wilson*, the release of an active tortfeasor is not a bar to imposing liability on one who is only vicariously liable.

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 appellants' position and reverse the summary judgment entered against them.

[1, 2] 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. *Mallory v. O'Neil*, 69 So.2d 313 (Fla.1954). *See also Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530 (Fla.1985). The dismissal of the action against Mr. and Mrs. Camus with prejudice was a negative adjudication on the merits of the appellants' claim against the active tortfeasor. *Walsingham v. Browning*, 525 So.2d 996 (Fla. 1st DCA 1988). *See also Citibank N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir.1990); Fla. R.Civ.P. 1.420. 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. *Walsingham; Citibank.* The trial court was correct in granting summary judgment against the appellants.

Affirmed.

SCHEB, J., concurs.

PATTERSON, J., dissents with opinion.

PATTERSON, Judge, dissenting.

I respectfully dissent. This is not a case involving separate, successive lawsuits. The appellants joined Mr. and Mrs. Camus and Gulf Coast Newspapers, Inc., as defendants in a single negligence action. Gulf Coast successfully sought and obtained mediation which resulted in a partial settlement.

To effect the partial settlement, all parties, including Gulf Coast, filed a joint motion for dismissal with prejudice "as against the Defendants, TIMOTHY P. CAMUS, and JUDITH S. CAMUS." The re-

lease 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.

There is in fact no Florida case on point. To support its position, the majority relies on *Walsingham v. Browning*, 525 So.2d 996 (Fla. 1st DCA 1988), and *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir.1990). Both are distinguishable. In *Walsingham* the plaintiff settled a counterclaim against a defendant employee while a separate action against the employer was pending. The employer had no part in the settlement. In *Citibank* all parties were joined in a single action, but Citibank did not participate in or agree to the settlement reached with the codefendant directors. In the instant case, Gulf Coast was the moving party in mediation and joined in the method the parties chose to effectuate the mediated partial settlement.

The majority acknowledges that had the appellants simply dropped Mr. and Mrs. Camus without prejudice, pursuant to rules 1.250(b) and 1.420(a)(1), their cause of action against Gulf Coast would have been preserved by section 768.041(1), Florida Statutes (1985). 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. It was simply the ill-advised choice of words by counsel. 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 cause of 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.

Kenneth E. WEST and Rita West, his wife, Appellants,

v.

KAWASAKI MOTORS MANUFACTURING CORP., U.S.A. and Nosa, Inc., d/b/a Palmetto Kawasaki, Appellees.

No. 90-2359.

District Court of Appeal of Florida, Third District.

Jan. 28, 1992.

Rehearing Denied April 14, 1992.

Police officer and his wife brought products liability action against manufacturer and retailer of allegedly defective motorcycle. The Circuit Court, Dade County, Philip Bloom, J., entered summary judgment in favor of manufacturer and retailer, and appeal was taken. The District Court of Appeal, Hubbart, J., held that police officer and his wife were barred by doctrine of res judicata from pursuing products liability action against manufacturer and retailer of allegedly defective motorcycle.

Affirmed.

1. Judgment ⇐540

Generally in Florida, in order to invoke defense of res judicata or collateral estoppel so as to bar pending action based on

GRIMES, C.J., and SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

JFK MEDICAL CENTER, INC., etc., Petitioner,

v.

Stacy PRICE, etc., et al., Respondents.

No. 83145.

Supreme Court of Florida.

Dec. 22, 1994.

In medical malpractice and wrongful death action against physician (active tort-feasor) and his employer (passive tort-feasor) in which plaintiff and physician entered into voluntary settlement agreement providing that physician would be dismissed with prejudice, but that claim against his employer would not be affected, the Circuit Court, Palm Beach County, Edward A. Garrison, J., granted employer's motion for summary judgment on ground that dismissal of physician operated as adjudication on merits. Plaintiff appealed. The District Court of Appeal, 629 So.2d 911, reversed. On review, the Supreme Court, Shaw, J., held that dismissal of physician was not equivalent to adjudication on merits that would serve as bar to continued litigation against employer.

District Court's opinion approved.

1. Judgment ⇐570(7)

Medical malpractice plaintiff's voluntary dismissal of physician (active tort-feasor), with prejudice, entered by agreement of parties pursuant to settlement, was not equivalent of "adjudication on the merits" that would serve as bar to plaintiff's continued litigation against physician's employer (passive tort-feasor). West's F.S.A. §§ 768.041(1), 768.31(5)(a); Restatement (Second) of Judgments § 51.

See publication Words and Phrases for other judicial constructions and definitions.

2. Indemnity ⇐12

Judgment ⇐570(7)

Voluntary dismissal of active tort-feasor, with prejudice, entered by agreement of parties pursuant to settlement, is not equivalent of adjudication on merits that will serve as bar to continued litigation against passive tort-feasor; however, voluntary dismissal of active tort-feasor does not impair passive tort-feasor's right to indemnification. West's F.S.A. §§ 768.041(1), 768.31(5)(a); Restatement (Second) of Judgments § 51.

Philip D. Parrish of Stephens, Lynn, Klein & McNicholas, P.A., Miami, for petitioner.

Arnold R. Ginsberg of Perse, P.A. & Ginsberg, P.A., and Brian W. Smith, P.A., Miami, for respondents.

SHAW, Justice.

We have for review *Price v. Beker*, 629 So.2d 911 (Fla. 4th DCA 1993), based on direct conflict with *Jones v. Gulf Coast Newspapers, Inc.*, 595 So.2d 90 (Fla. 2d DCA), *review denied*, 602 So.2d 942 (Fla. 1992), pursuant to jurisdiction granted under article V, section 3(b)(3), of the Florida Constitution. We approve the decision of the court below.

[1, 2] Stacy Price sued Dr. Beker, the active tortfeasor, for medical malpractice and wrongful death. The lawsuit included a claim against JFK Medical Center (Center), the passive tortfeasor, premised upon the theory that the Center, as Beker's employer, was vicariously liable for his negligent actions. Price and Beker entered into a voluntary settlement agreement, which provided that the lawsuit against Beker would be dismissed with prejudice, but the claim against the Center would not be affected. The Center moved for summary judgment asserting that Price's dismissal of Beker operated as an adjudication on the merits, thereby precluding continuation of Price's action against

the Center. The trial court, relying on *Jones v. Gulf Coast Newspapers, Inc.*, 595 So.2d 90 (Fla. 2d DCA 1992), granted the motion for summary judgment. The district court reversed, recognized conflict with *Jones*, but nevertheless concluded that the dismissal of Beker did not bar Price's action against the Center. The Center asks that we quash the decision of the court below. We decline.

The parties agree that when there has been an adjudication on the merits in favor of an active tortfeasor, the passive tortfeasor may use the adjudication as a defense. They disagree as to whether a voluntary dismissal with prejudice acts as an adjudication on the merits under the circumstances of this case. In *Jones*, the Second District Court of Appeal reasons that a dismissal with prejudice is equivalent to an adjudication on the merits, thereby barring future actions against active and passive tortfeasors. We disagree and disapprove *Jones* as being inconsistent with our decision today. We agree with the holding in *Price* that 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.[1]

Our decision comports with Florida's public policy. This policy, as documented in sections 768.041(1) and 768.31(5), Florida Statutes,[2] encourages the settlement of civil actions. *See also Sun First Nat'l Bank v. Batchelor*, 321 So.2d 73 (Fla.1975) (settlements will be encouraged by abolishing the common law rule that a discharge of one joint tortfeasor will discharge all tortfeasors). Florida's public policy would be compromised were we to allow a dismissal of one joint tortfeasor to result in a dismissal of all joint tortfeasors. With this public policy in mind, we hold that voluntary dismissal of the active tortfeasor, with prejudice, under the circumstances outlined above is not the equivalent of an adjudication on the merits, and such a dismissal will not bar continued litigation against the passive tortfeasor.

We also hold that voluntary dismissal of the active tortfeasor shall not impair the passive tortfeasor's right to indemnification. It would be unconscionable to require a passive tortfeasor to compensate an injured party, while at the same time barring indemnification from the active party. *See Hertz Corp. v. Hellens*, 140 So.2d 73 (Fla. 2d DCA 1962).

1. Pursuant to the Restatement (Second) of Judgments, section 51 (1982):

> (4) A judgment by consent for or against the injured person does not extinguish his claim against the person not sued in the first action....

The comments to subsection (4) state:

> f. *Judgment by consent (Subsection (4)).* The settlement of a claim against one of several obligors generally does not result in the discharge of others liable for the obligation. This rule applies when the obligation is reduced to judgment, see § 50, and even though the liability of one obligor is derivative from another under principles of vicarious responsibility. Moreover, a judgment by consent, though it terminates the claim to which it refers, is not an actual adjudication. See § 27, Comment e. The considerations that lead to denying issue preclusive effect to consent judgments, chiefly the encouragement of settlements, are applicable when an injured person has claims against more than one person for the same wrongful act. It is therefore appropriate to regard the claim against the primary obligor and the person vicariously responsible for his conduct as separate claims when one of them has been settled. Any payment received by the injured person in such a settlement, however, discharges pro tanto the obligation of the other obligor to pay the loss. See § 50(2).

2. Section 768.041(1), Florida Statutes (1987), states:

> (1) A release or covenant not to sue as to one tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.

Section 768.31(5)(a), Florida Statutes (1987), states:

> (5) RELEASE OR COVENANT NOT TO SUE.—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater....

We accordingly approve the decision of the court below.

It is so ordered.

GRIMES, C.J., and OVERTON, KOGAN, HARDING and WELLS, JJ., concur.

ANSTEAD, J., recused.

CHARTER REVIEW COMMISSION OF ORANGE COUNTY, Petitioner,

v.

Ernie SCOTT, et al., Respondents.

No. 83010.

Supreme Court of Florida.

Dec. 22, 1994.

County sheriff, property appraiser, tax collector, and others filed suit for declaratory and injunctive relief concerning the constitutionality of the ballot question on proposed amendments to county charter. The Circuit Court, Orange County, Lawrence R. Kirkwood, J., ruled that the ballot question was unconstitutional, and county charter review commission appealed. The District Court of Appeal, 627 So.2d 520, affirmed and certified a question. The Supreme Court, Shaw, J., held that: (1) the single subject rule does not apply to ballot questions containing county charter revisions proposed by the charter review commission, and (2) the ballot question on whether to amend the county charter to create a citizen review board to investigate the use of force or abuse of power by sheriff's department employees and to make the county sheriff, property appraiser, and tax collector elected charter officers, rather than constitutional officers, was sufficient to apprise the voters of the substance of the proposed charter revision.

Certified question answered and decision quashed.

1. Counties ⇐3

Single subject rule does not apply to ballot questions containing county charter revisions proposed by charter review commission; charter review commission must meet and conduct comprehensive study of any and/or all phases of county government, commission must create offices and elect officers, commission must hold public hearings, and commission must submit to the electorate a report of proposed amendments. West's F.S.A. Const. Art. 8, § 1(c); West's F.S.A. § 125.67; Orange County, Fla., Charter § 702.

2. Counties ⇐3

Ballot question on whether to amend county charter to create citizen review board to investigate use of force or abuse of power by sheriff's employees and to make county sheriff, property appraiser, and tax collector elected charter officers, rather than constitutional officers, was sufficient to apprise voters of substance of proposed charter revision. West's F.S.A. § 101.161.

Mel R. Martinez of Martinez & Dalton, P.A., Robert W. Thielhelm, Jr. of Baker & Hostetler, Kevin W. Shaughnessy of Akerman, Senterfitt & Eidson, P.A., and A. Bryant Applegate, Asst. County Atty., Orange County, Orlando, for petitioner.

Debra Steinberg Nelson of Debra Steinberg Nelson, P.A., Alton G. Pitts of Alton G. Pitts, P.A., J.J. Dahl, Staff Atty., Orlando, and Phillip P. Quaschnick of Powers, Quaschnick, Tischler & Evans, Tallahassee, for respondents.

Robert A. Ginsburg, Dade County Atty. and Michael S. Davis, Asst. County Atty., Miami, amicus curiae for Metropolitan Dade County.

SHAW, Justice.

We have for review the following certified question of great public importance:

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND FOR
POLK COUNTY, FLORIDA

CASE NO: GC-G 94-1653

PATRICIA JANE JONES and
LOGAN M. JONES, JR.,
her husband,; and
TERRY E. SMITH, TRUSTEE,

Plaintiffs,

vs.

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

Defendants.

_____/

MOTION FOR SUMMARY JUDGMENT

Defendants, SAMUEL G. CROSBY and MILLER, CROSBY & MILLER, P.A., move this court pursuant to Florida Rule of Civil Procedure 1.510 for entry of a summary judgment, and as grounds therefore would show:

1. The pleadings and other record evidence in this case establish as a matter of law there is no genuine dispute as to any material fact and that defendants are entitled to judgment.

2. As a matter of law, SAMUEL CROSBY's conduct did not fall below the standard of care for attorneys practicing law in the state of Florida. To the extent plaintiff allegedly sustained any damages, it was due to an incorrect interpretation of existing common law by the court as pointed out by the Florida Supreme Court in ***JFK Medical Center, Inc. v. Price***, _____ So.2d _____ (Fla. 1994). Moreover, as a matter of law an attorney cannot be liable where an area of the law is unsettled and his conduct is protected by the doctrine of judgmental immunity.

THEREFORE, Defendants, SAMUEL G. CROSBY and MILLER, CROSBY & MILLER, P.A., respectfully request this court enter summary judgment in their favor.

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. Mail this 18th day of January, 1995 to Herbert M. Berkowitz, P.A., 4809 E. Busch Blvd., Suite 104, Tampa, FL 33617.

LORA A. DUNLAP FLA. BAR #332372
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Attorneys for Defendants

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IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND FOR
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LOGAN M. JONES, JR.,
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Plaintiffs,

vs.

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

Defendants.

_____/

FINAL SUMMARY JUDGMENT

THIS matter came on to be heard upon the Defendants', SAMUEL G. CROSBY and MILLER, CROSBY & MILLER, P.A., Motion for Summary Judgment served January 18, 1995. The Court having reviewed the pleadings, record evidence, legal memoranda of parties, and being otherwise fully advised in the premises, expressly finds:

1. There is no dispute as to any material fact and the issues raised in the summary judgment are purely legal, appropriate for resolution pursuant to Fla. R. Civ. P. 1.510.

2. JFK Medical Center, Inc. v. Price, 647 So.2d 833 (Fla. 1994), controls, setting forth the long standing law of Florida and mandating entry of a summary judgment in the present controversy.

3. Florida recognizes and adheres to the judgmental immunity doctrine as set forth in Kaufman v. Stephen Cahen, P.A., 507 So.2d 1152 (Fla. 3d DCA 1987).

THEREFORE, this court ORDERS AND ADJUDGES that Defendants' Motion for Summary Judgment is hereby **GRANTED**; and Final Summary Judgment is entered pursuant to this Order. PATRICIA JANE JONES and LOGAN M. JONES, JR. shall take nothing by this action and Defendants, SAMUEL G. CROSBY, and MILLER, CROSBY & MILLER, P.A., shall go hence without day. This court specifically reserves jurisdiction to award costs and attorney's fees, if appropriate, upon proper motion.

DONE AND ORDERED in Chambers at Bartow, Polk County, Florida, this 31 day of March, 1995.

/s/ Oliver L. Green, Jr.

OLIVER L. GREEN, JR.
Circuit Court Judge

Copies furnished to:

Lora A. Dunlap
Herbert M. Berkowitz, Esq.

L:\LAD\JONES\ORDER.SJ