IN THE SUPREME COURT OF FLORIDA
SUPREME COURT CASE NO. 88,772
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.

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# PETITIONERS' BRIEF ON THE MERITS

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

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### Statement of Case

The present controversy reaches this Court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). PATRICIA JANE JONES and LOGAN M. JONES, JR., (hereafter collectively "JONES" or "the JONESES") served their Notice of Appeal on April 26, 1995 (R. 32-34),[1] following the trial court's entry of Final Summary Judgment on April 3, 1995 (R. 27-28), granting SAMUEL G. CROSBY and MILLER, CROSBY & MILLER, P.A.'s (hereafter collectively "CROSBY") Motion for Summary Judgment. (R. 11-12) After the Second District Court of Appeal reversed the trial court's order (A. 1), CROSBY filed a Notice to Invoke Discretionary Jurisdiction on August 15, 1996. (A. 2) This Court accepted jurisdiction on March 12, 1997. (A. 3)

### Statement of 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"). (R. 2-3) In 1987, the JONESES sought the services of CROSBY to represent them in a personal injury action. (R. 2) CROSBY filed suit on behalf of the JONESES against Camus and her husband (the vehicle owners), Gulf Coast, and George House, an uninsured motorist. (R. 3) The JONESES sued Gulf Coast, Camus' employer, since they believed Camus was acting within the scope of her employment when the accident occurred.

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[1] All references to the record on appeal, as prepared by the Clerk of Circuit Court of Polk County, will be designated (R. page number). Critical documents or post record pleadings filed with the Second District and this Court will be attached pursuant to Florida Rule of Appellate Procedure 9.220 as an appendix and will be designated (A. page number).

In 1990, during the course of mediation, JONES reached a settlement with Camus' insurer, State Farm Mutual Automobile Insurance Company (hereafter "State Farm"). State Farm tendered $25,000, Camus' policy limits, in exchange for a release and settlement of JONES' claims against Mr. and Mrs. Camus, individually. (App. Brief at 2)[2] The parties executed a Joint Motion for Dismissal with prejudice (hereafter the "Joint Motion for Dismissal") as to Mr. and Mrs. Camus. (R. 4)

After the trial court dismissed Camus, Gulf Coast moved for summary judgment arguing the release and dismissal of Camus released her employer, as well. (R. 5) The trial court granted Gulf Coast's motion and entered final judgment in its favor. (R. 5) CROSBY timely appealed the trial court's ruling, and on January 24, 1992, the Second District affirmed. (R. 6); Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992). (A. 4)

On July 18, 1994, JONES filed a complaint for legal malpractice against CROSBY alleging CROSBY's filing the Joint Motion for Dismissal was negligent. (R. 7) On November 21, 1994, CROSBY filed a motion to dismiss the malpractice action. (R. 9-10) Before the motion could be heard, this Court handed down its decision in J.F.K. Medical Center v. Price, 647 So. 2d 833 (Fla. 1994). (A. 5) Based on J.F.K., CROSBY filed a Motion for Summary Judgment on January 18, 1995, as to JONES' malpractice action. (R. 11-12) The Honorable Oliver Green heard CROSBY's Motion for Summary Judgment on March 13, 1995, (A. 6) and granted it on April 3, 1995. (R. 27-28) JONES' Notice of Appeal followed on April 26, 1995. (R. 32-34)

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[2] References to JONES' Initial Brief to the Second District, served July 6, 1995, will be designated (App. Brief at page number).

The Second District Court of Appeal reversed the trial court's entry of summary judgment and remanded the case holding that the evaluation of CROSBY's representation should be made by the jury. See Jones v. Crosby, 677 So. 2d 379 (Fla. 2d DCA 1996) (A. 7). CROSBY served his Notice to Invoke Discretionary Jurisdiction on August 14, 1996, arguing the Second District's decision expressly and directly conflicts with this Court's decision in J.F.K. 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) (A. 2). The Court accepted review on March 12, 1997. (A. 3)

## SUMMARY OF ARGUMENT

This case is a perfect example of Murphy's Law. Anything that could go wrong in this case has. CROSBY, while representing the JONESES to the best of his abilities, entered into a favorable settlement with one of several defendants he sued on behalf of the JONESES. He did everything he was supposed to do to reach the settlement with the Camuses without jeopardizing any of the claims against the other defendants. CROSBY specifically provided in the release executed by the settling parties that Camus' employer, Gulf Coast Newspapers, Inc., was not to be released from the lawsuit. CROSBY made sure that there could be no doubt that although Camus was released from the case, her employer would not be. Nevertheless, after Camus was released, her employer moved for summary judgment claiming that because the employee was out of the case the employer should be as well. In what should have been an obvious denial of the motion for summary judgment, the trial court surprisingly granted said motion despite the extensive case law, statutory law and the Restatement (Second) of Judgments, which showed that releasing Camus had absolutely no bearing on her employer. The trial court instead disregarded Florida law and surprisingly granted summary judgment in favor of Gulf Coast. At the appellate level, it appeared CROSBY could easily demonstrate the trial court's error and have the summary judgment reversed. Nevertheless, the Second District, in a split decision, completely ignored the plethora of authority supporting a reversal of the summary judgment and affirmed the trial court's grant of summary judgment. As a result, the JONESES could not pursue their claim against Gulf Coast. As expected, because the JONESES could not pursue Gulf Coast they went after CROSBY.

The JONESES filed a legal malpractice action against CROSBY alleging professional negligence. CROSBY moved for summary judgment on the basis that this Court completely ratified CROSBY's actions in J.F.K. Medical Center v. Price, 647 So. 2d 843 (Fla. 1994). As it should have, the trial court granted CROSBY's motion for summary judgment because CROSBY's actions were completely warranted as is evidenced by J.F.K.. Unfortunately, on appeal, the Second District, **the same court that refused to follow precedent before,** reversed the trial court's entry of summary judgment in favor of CROSBY. The Second District refused to admit its prior error. Instead of affirming the trial court's grant of summary judgment in favor of CROSBY on the legal malpractice claim, the Second District remanded the case stating there was a jury question involved. As a result, CROSBY is forced to defend himself for the "crime" of adequately representing his clients. CROSBY is now forced to defend himself based on the actions of the trial court and the Second District, entities over which he had no control. CROSBY is now facing potential liability for merely doing his job and doing it well. The courts of this state have never imposed liability on an attorney for doing his job adequately. Mr. CROSBY should not be the first attorney to suffer such a price.

The trial court properly granted CROSBY's Motion for Summary Judgment. CROSBY's actions as a matter of law conformed with controlling Florida precedent, because Florida law, at the time CROSBY filed the Joint Motion for Dismissal, provided a dismissal with prejudice of an active tortfeasor did not serve to release a passive or vicariously liable tortfeasor. The Restatement (Second) of Judgments § 51(4), §§ 768.041(1) and 768.31(5), Florida Statutes (1987), and several district court and Florida Supreme Court opinions supported this proposition.

Clearly the law in Florida at the time CROSBY filed the Joint Motion for Dismissal supported his actions. Moreover, even if Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988), as argued below, had cast doubt on the general rule in Florida regarding the release of joint tortfeasors, CROSBY's filing the Joint Motion for Dismissal did not give rise to a claim of malpractice simply because of conflicting case law. Because neither the trial court nor the Second District was required to follow the Walsingham decision, CROSBY reasonably believed his actions complied with Florida law. Even if CROSBY was incorrect in that belief, he cannot be liable for a professional judgment he made in good faith simply because a court saw it differently. Finally, this Court resolved any doubt as to CROSBY's actions in J.F.K. Medical Center v. Price, 647 So. 2d 833 (Fla. 1994). In J.F.K., this Court confirmed the dismissal with prejudice of an actively negligent employee does not release the employer. Thus, the release of Camus did not release Gulf Coast, as argued again and again by CROSBY.

Any argument CROSBY had a duty to warn JONES of the Walsingham decision must fail. CROSBY was not relying on a controversial or questionable point of law in representing the JONESES. CROSBY's filing the Joint Motion for Dismissal was completely supported by the law. CROSBY had no duty to inform JONES his actions were in compliance with the laws of the State of Florida. Moreover, CROSBY had no duty to inform JONES of a single random, noncontrolling decision which completely disregarded well-established rules with respect to the release of joint tortfeasors. Finally, even if CROSBY had a duty to inform the JONESES of the Walsingham decision, the JONESES never alleged how they would have changed their course of action had such information been given. Consequently, the trial court's granting of CROSBY's Motion for Summary Judgment should be have been affirmed by the Second District. The Second

District's refusal to do so was in clear conflict with this Court's ruling in J.F.K., and an obvious refusal to admit it had erred before.

## ARGUMENT

I. THE TRIAL JUDGE PROPERLY GRANTED CROSBY'S MOTION FOR SUMMARY JUDGMENT SINCE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AND AS A MATTER OF LAW CROSBY'S ACTIONS MEET THE REQUIRED STANDARD OF CARE.

Summary judgment is appropriate when there is no question as to the underlying facts and the only questions are of law. Bess v. 17545 Collins Avenue, Inc., 98 So. 2d 490 (Fla. 1957). Unless an opposing party files an affidavit raising a material issue of fact, an opposing party cannot avoid the summary judgment procedure. Smith v. Harr, 571 So. 2d 575 (Fla. 5th DCA 1990), rev. denied, 581 So. 2d 1308 (Fla. 1991). It is crucial, however, to remember the mere filing of an opposing affidavit is not tantamount to creating an issue of fact. TSI Southeast, Inc. v. Royals, 588 So. 2d 309 (Fla. 1st DCA 1991). Mere conclusions and allegations are insufficient for purposes of opposing summary judgment. Id.; Carter v. Cessna Finance Corp., 498 So. 2d 1319 (Fla. 4th DCA 1986).

In opposition to CROSBY's Motion for Summary Judgment, JONES filed the affidavit of A. Woodson Isom, Jr. (hereafter "Isom"). (R. 23-26) Isom's affidavit conveniently states at the time of the Joint Motion for Dismissal well-settled Florida law held a dismissal with prejudice constituted a negative adjudication on the merits, barring any further cause of action against a vicariously liable defendant. (R. 24) Whether Isom's statement was correct or not,[3] it does not raise a disputed issue of fact, but a question of law.

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[3] The absurdity of Isom's claim is patently obvious. It would be unwise and impractical for a party to "temporarily" settle a case by not being dismissed with prejudice. The objective finality that is an essential part of settlement would be defeated.

Whether JONES followed the law at the time of filing the Joint Motion for Dismissal is clearly a question of law. "It is the province and duty of the judicial branch to 'say what the law is.'" Girardeau v. State, 403 So. 2d 513, 516 n.4 (Fla. 1st DCA 1981) (quoting United States v. Nixon, 418 U.S. 683 (1974)). Whether something is judicial error, rather than legal malpractice, is to be made by the court and can be done so on a motion for summary judgment. Pennsylvania Ins. Guaranty Ass'n. v. Sikes, 590 So. 2d 1051 (Fla. 3d DCA 1991). Therefore, the resolution of this matter through a summary judgment procedure was wholly appropriate by the trial court below.[4]

The trial court's entry of Summary Final Judgment should have been affirmed. As discussed more fully below, the trial court properly granted CROSBY's motion finding long standing Florida law supported his actions. Moreover, the trial court correctly determined if there was any conflict as to the law at the time in question, the judgmental immunity rule protected CROSBY's actions.

A. On June 11, 1990, the date of the Joint Motion for Dismissal, Florida law did not automatically release a vicariously liable employer simply because the actively negligent employee had settled.

At the time CROSBY filed the Joint Motion for Dismissal, his conduct was supported by the Restatement (Second) of Judgments, Florida statutes, and the controlling case law. The release of a joint tortfeasor did not serve as a release of another tortfeasor. Hertz v. Hellens, 140 So. 2d 73 (Fla. 2d DCA 1962). Moreover, an active tortfeasor and a passive tortfeasor were treated the same with respect to this rule of law. Florida Tomato Packers, Inc. v. Wilson, 296

[4] The Second District's failure to cite law supporting its contention a jury question is involved here further demonstrates its refusal to correct its prior error.

So. 2d 536 (Fla. 3d DCA 1974), cert. denied, 327 So. 2d 32 (Fla. 1976). Even more importantly, a motion to dismiss with prejudice was viewed as the equivalent to a release. Eason v. Lau, 369 So. 2d 600 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1365 (Fla. 1979). Thus, at the time CROSBY filed the Joint Motion for Dismissal, a dismissal with prejudice of an actively negligent employee did not serve as a release of a passively negligent employer.

The basis for CROSBY's actions can be found in the Restatement (Second) of Judgments § 51(4), §§ 768.041(1), 768.31(5), Florida Statutes, and the case law. The Restatement (Second) of Judgments § 51(4) (1982) states:

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

Comment f to this subsection elaborates, noting:

> 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, 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.** 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.** (citations omitted, emphasis added)

Clearly, the Restatement demonstrates the dismissal of an active tortfeasor does not serve to discharge a plaintiff's claim against the passive or vicariously liable tortfeasor. Here, then, CROSBY's release/dismissal of Camus had no effect upon Gulf Coast's liability as a matter of law. Simply because the trial court in the underlying litigation misunderstood the law does not convert CROSBY's correct interpretation of the law to a misunderstanding as well. Moreover,

the Second District's refusal to correct the trial court's error cannot serve to make CROSBY's appropriate representation into an inadequate one.

Similarly, Florida's statutory law supported CROSBY's actions. Florida courts have long encouraged settlements. J.F.K. Medical Center, Inc. v. Price, 647 So. 2d 833 (Fla. 1994); Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1975). Sections 768.041(1) and 768.31(5), Florida Statutes (1987), codified this philosophy. Specifically, § 768.041(1) stated (and states today):

> 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) stated (and states today):

> 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 and amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; . . .

Neither section excluded dismissals with prejudice or changed the rule pronounced therein based on the procedure used. At the time these sections were drafted, it was standard procedure for releases to be accompanied by dismissals with prejudice. The drafters of §§ 768.041(1) and 768.31(5) would have emphasized the significance of such orders if they were relevant to these sections. Nevertheless, the entry of a dismissal, either with or without prejudice, is not mentioned. Clearly, the type of dismissal has no effect on the statutes' mandate. J.F.K., supra;

Eason, supra. Furthermore, if only releases without dismissals or releases with dismissals without prejudice were contemplated by these sections, the policy behind them, the encouragement of settlements, would be vitiated. If a settling party knew the releasing party could later initiate suit against him, as is possible with dismissals without prejudice, no party would enter into a settlement agreement.

In addition, § 768.31(5) provided a release did not serve to discharge other tortfeasors unless the release specifically provided otherwise. Thus, a release which specifically states that **a fellow tortfeasor is not contemplated by the release**, clearly falls within the protections of §§ 768.041(1) and 768.31(5). In the case at hand, the JONESES and Camus entered into a settlement agreement, which specifically stated:

> This release expressly and specifically does not release, GEORGE EUGENE HOUSE or GULF COAST NEWSPAPERS, INC., from liability for the above accident.

Thus, the JONESES expressly released Camus without releasing her employer, the vicariously liable party. Moreover, Camus was not released as an employee but rather was released as an automobile owner. Such release was procured by her automobile insurance carrier paying the Plaintiff. Camus was not released as a Gulf Coast employee but rather the owner of the auto in question.

Clearly, §§ 768.041(1) and 768.31(5) contemplated settlement agreements and their accompanying motions to dismiss. In Eason, the First District Court of Appeal stated "[w]e agree with the learned trial judge that a dismissal with prejudice under the rule is equivalent to or tantamount to a release." 369 So. 2d at 601. In Eason, plaintiffs sued Eason, a real estate broker, Walter Eason Realty, Inc. and Glenn Virgo, one of Eason's real estate agents, for a tort allegedly

involving breach of trust. The plaintiffs filed a voluntary dismissal with prejudice as to Virgo. Eason and Walter Eason Realty, Inc. moved for summary judgment arguing the voluntary dismissal of Virgo was a release, § 768.041(1) did not apply to a breach of trust and, under the common law, a release of one tortfeasor was a release of all. The trial court entered summary judgment against the defendants finding § 768.041(1) applied, a dismissal with prejudice was tantamount to a release under § 768.041(1) and the dismissal of Virgo with prejudice did not release the other defendants. The First District Court of Appeal affirmed.

Since § 768.041(1) applied to breaches of trust, whether the plaintiffs' dismissal with prejudice released Virgo had to be determined under the statute. Eason, 369 So. 2d at 602. The trial judge in Eason determined under § 768.041(1) a dismissal with prejudice is the equivalent of a release. Id. Thus, a dismissal with prejudice was a release under § 768.041(1), as early as 1978. Thus, JONES' settlement with and dismissal with prejudice of Camus did not discharge Gulf Coast Newspapers, Inc. Again, CROSBY's recognition of this, but the trial court and Second District's refusal to uphold it, should not make him liable. Doing so would make an attorney liable for the courts' actions, entities over which attorneys clearly have no control.

It was not clear in Eason whether Walter Eason Realty, Inc. was sued for the negligent acts of Virgo or for independent acts of the corporation. Nevertheless, the applicability of Eason to this case cannot be doubted. Long before the First District decided Eason, the Second District held § 54.28, Florida Statutes (1957), the predecessor to § 768.041, "applic[d] to all tortfeasors, whether joint or several, including vicarious tortfeasors." Hertz Corporation v. Hellens, 140 So. 2d 73, 73 (Fla. 2d DCA 1962). Thus, the release of Camus, an active tortfeasor, would not release Gulf Coast, the vicarious tortfeasor, unless the parties specified. The JONESES

specifically stated Gulf Coast would not be released, bringing the underlying controversy squarely within the parameters of § 768.041(1).

Finally, at the time CROSBY filed the Joint Motion for Dismissal, his actions were in accordance with not only statutory provisions, but also Florida common law. In Hertz Corporation v. Hellens, supra, this Court specifically held the release of an active tortfeasor does not serve to release a vicariously liable tortfeasor. Thus, since 1962, twenty eight (28) years prior to the Joint Motion for Dismissal, the law in the Second District was the release of the active tortfeasor did not release the passive or vicarious tortfeasor.

After Hertz, the Third District decided Florida Tomato Packers, Inc. v. Wilson, 296 So. 2d 536 (Fla. 3d DCA 1974), cert. denied, 327 So. 2d 32 (Fla. 1976). In Florida Tomato Packers, the plaintiffs were hit by a farm vehicle driven by Arnold Kendall and owned by George Lytton. The plaintiffs sued Kendall, Lytton and Florida Tomato Packers, Inc., Kendall's alleged employer. During trial, the plaintiffs settled with all of the defendants except Florida Tomato Packers, Inc. The plaintiffs subsequently dismissed all settling defendants. The trial continued and the jury returned a verdict against Florida Tomato Packers, Inc.

On appeal from the jury verdict, Florida Tomato Packers, Inc. argued the plaintiffs' release of the only active tortfeasor (i.e., the vehicle driver) released it, the active tortfeasor's employer, from any possible liability for the acts of its employee. The Third District Court of Appeal stated "[i]t has been held that § 768.041, Florida Statutes, F.S.A., [sic.] applies to all tortfeasors, whether joint or several, including vicarious tortfeasors." Florida Tomato Packers, Inc., 296 So. 2d at 540. Thus, the Third District joined the Second holding the release of an actively negligent employee does not release the vicariously liable employer.

The Second and Third District Courts of Appeal were not the only courts addressing this issue. In 1975, this Court decided Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1975). In Batchelor this Court held § 768.041(1) abolished in toto the common law rule that the release of one or more tortfeasors operates as a discharge of all other tortfeasors. The abolishment of the common law rule, through statutes like § 768.041(1), was designed to encourage settlements.

In 1989, the Second District decided Vasquez v. Board of Regents, State of Florida, 548 So. 2d 251 (Fla. 2d DCA 1989), recognizing the First District's ruling in Eason that a dismissal with prejudice is tantamount to a release. The Second District specifically held the release of an actively negligent employee does not serve to release the vicariously liable employer, stating:

> We note at the outset that Vasquez has correctly urged the view that the release she signed did not release Fernandez and the [Board of Regents]. Although Fernandez and the [Board of Regents] assert that the release of an agent or employee operates as a matter of law to terminate the claim asserted against the principal whose liability is based upon the doctrine of respondeat superior, ... this common law rule has been abolished in Florida by section 768.04(1) [sic.], Florida Statutes.[5]

Id. at 252 (citations omitted). Thus, the law in the Second District at the time CROSBY filed the Joint Motion for Dismissal was the release of an actively negligent employee does not release the vicariously liable employer. The Vasquez court clearly recognized the Eason holding and chose not to address the 1988 Walsingham decision of the First District, decided a year earlier. Also, in 1989, the Third District Court of Appeal adopted Eason holding a defendant dismissed with

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[5] In support of its holding in Vasquez, the Second District relied upon Sun First National Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1975); Eason v. Lau, 369 So. 2d 600 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1365 (Fla. 1979); Hinton v. Iowa National Mutual Insurance Agency, 317 So. 2d 832, 835 (Fla. 2d DCA 1975), cert. denied, 328 So. 2d 842 (1976).

prejudice is a released party under § 768.041(3), Florida Statutes.[6] Ellis v. Weisbrot, 550 So. 2d 15 (Fla. 3d DCA 1989).

Thus, in 1989, the year before CROSBY's alleged deviation from the standard of care, the Eason, Florida Tomato Packers, and Vasquez holdings, that the release/dismissal of an employee did not affect the employer's vicarious liability, controlled or had been adopted in the First, Second and Third District Courts of Appeal. This Court's Batchelor decision further supported the statutory interpretation of § 768.041(1) and the growing body of common law in this area. Crucially, all ignored what appeared to be an aberrant decision in Walsingham which did not ever address § 768.041(1). Nevertheless, that single decision has now been used against CROSBY to call into question his clearly appropriate conduct. The Second District had the opportunity to erase the error of its prior decision (in the underlying litigation) but refused to do so. Instead of affirming the trial court's entry of summary judgment in CROSBY's favor, the Second District has punished CROSBY for the error it made before. This Court can change that.

B. The Florida Supreme Court confirmed a dismissal with prejudice of an actively negligent employee does not release the vicariously liable employer.

CROSBY's actions in June 1990 were clearly in accordance with the prevailing law. This Court's decision in J.F.K. Medical Center, Inc. v. Price, 647 So. 2d 833 (Fla. 1994), resolves all doubt as to that issue. In J.F.K., this Court resolved a conflict between the Fourth District Court of Appeal in Price v. Beker, 629 So. 2d 911 (Fla. 4th DCA 1993), and the Second District in Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA), rev. denied, 602 So. 2d

[6] Section 768.041(3) provides "[t]he fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury."

942 (Fla. 1992). In Jones, the Second District determined a dismissal with prejudice of an employee is a negative adjudication on the merits and thus the employer cannot be liable. The Jones court relied on Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988)[7] stating "since the [plaintiffs] 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." Jones, 595 So. 2d at 91.

On the other hand, the Fourth District determined a dismissal with prejudice of a physician did not bar the continuation of the plaintiff's claim against the physician's employer. The Fourth District refused to follow Jones and the case law cited therein. Specifically, the court refused to follow its own decision in Lomelo v. American Oil Co., 256 So. 2d 9 (Fla. 4th DCA 1971), stating it was not applicable to the issue in question and did not support the Walsingham decision which was the basis for Jones. Price, 629 So. 2d at 912.

In agreeing with the Fourth District, and thereby disagreeing with the argument JONES made to the Second District below, the Florida Supreme Court stated:

> 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.

J.F.K., 647 So. 2d at 834. The Florida Supreme Court stated its holding comports with Florida's public policy to encourage settlements. Id. See also Batchelor, supra.

Crucially, in reaching its decision, the Florida Supreme Court in J.F.K. relied upon:

(1) The Restatement (Second) of Judgments § 51 (1982);

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[7] For whatever reason ignoring Hertz, Florida Tomato Packers, Vasquez, and § 768.041(1).

(2) Sections 768.041(1) and 768.31(5), Florida Statutes (1987);

(3) Sun First Nat'l Bank v. Batchelor, 321 So. 2d 73 (Fla. 1973); and

(4) Hertz v. Hellens, 140 So. 2d 73 (Fla. 2d DCA 1962).

These authorities are the identical authorities relied upon by CROSBY in deciding to file the Joint Motion for Dismissal. Furthermore, CROSBY relied upon such authority in his opposition to Gulf Coast's motion for summary judgment and the subsequent appeal to the Second District. (A. 9)[8] This Court's approval of Price demonstrates Walsingham was not the established law of the State of Florida as suggested by JONES on appeal to the Second District,[9] and critically this Court reached its result in J.F.K. based on the very law CROSBY relied on! (A. 9)

C. JONES' steadfast reliance on Walsingham was misplaced as it was not the controlling law at the time CROSBY filed the Joint Motion for Dismissal.

JONES has argued the controlling law at the time CROSBY filed the Joint Motion for Dismissal was Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988). (App. Brief at 11-12). JONES argued "the Walsingham decision stood alone" (App. Brief at 25), yet, in making that statement, ignored Hertz, Florida Tomato Packers, Vasquez, §§ 768.041(1), 768.31(5), Florida Statutes, and the various other cases discussed above.

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[8] Crosby respectfully requests this Court take judicial notice of Second District Case No. 90-3633. Fla. Stat. § 90.202; City of Orlando v. Murphy, 94 F.2d 426 (5th Cir. 1938); Ocala Northern R. Co. v. Malloy, 67 So. 93 (Fla. 1914); Hillsborough County Bd. of County Commissioners v. Public Employees Relations Commission, 424 So. 2d 132 (Fla. 1st DCA 1982).

[9] JONES asserted, not surprisingly without support, this Court's disapproval of Jones constituted a change in the law. Such a proposition is incorrect. This Court did not say Jones was correct and now it is not. On the contrary, this Court relied upon thirty year old case law to state the law in Florida is that the dismissal with prejudice of an actively negligent employee does not release the passively negligent employer.

At the outset, it is important to recognize Walsingham did not address § 768.041(1), Florida Statutes, which specifically provides the release of one tortfeasor will not release other tortfeasors. Second, Walsingham states a voluntary dismissal with prejudice is a negative adjudication on the merits pursuant to Fla. R. Civ. P. 1.420(a)(1). The Walsingham court's reliance on Rule 1.420, however, provided absolutely no basis for this proposition. Rule 1.420(a)(1) reads:

> Except in actions in which property has been seized or is in the custody of the court, an action may be dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim.

Nothing in Rule 1.420(a)(1) transforms a dismissal with prejudice into a negative adjudication on the merits. Thus, Walsingham itself is flawed, relying on an inappropriate Rule to characterize a dismissal with prejudice as a negative adjudication.

Even more devastating, the court in Walsingham relied upon principally one case to support its holding, Lomelo v. American Oil Co., 256 So. 2d 9 (Fla. 4th DCA 1971). In Lomelo, the Fourth District Court of Appeal held a dismissal with prejudice against a party served as an adjudication on the merits of the claims **against that party** in a subsequent suit **against that party** of the same claims.[10] "The two prior suits here involved sought to enforce specific claims

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[10] Thus making Lomelo more akin to a res judicata concept than to a vicarious liability situation.

against the appellee; hence, the dismissal of those actions with prejudice can be said to have adjudicated the merits of the specific claims therein asserted." Lomelo, 256 So. 2d at 12. Thus, as between Camus and JONES this may have been an adjudication on the merits, but not as to Gulf Coast.[11]

The holding in Lomelo, does not support the Walsingham holding or JONES' position below. Consequently, because the First District relied on case law which did not address the issues involved in Walsingham and ignored § 768.041(1) in its opinion, it strains credibility to suggest Walsingham was the controlling law at the time CROSBY filed the Joint Motion for Dismissal. Moreover, the Second District must have recognized Walsingham's limited applicability since a year later in a much more factually analogous situation they reached the same conclusion CROSBY did.[12]

In addition to Lomelo, Walsingham relied upon Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954). In Mallory, a case involving questions of respondeat superior and negligent supervision/ retention, this Court held "as to [respondeat superior,] the negligence of the employer is immaterial since this Court is committed to the rule that if the employee is not liable the employer is not liable." Mallory, 69 So. 2d at 315. The Mallory decision stands for the proposition that if an employee is not found to be acting within the scope of his employment when he commits a

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[11] Lomelo is correct that a dismissal with prejudice by the court (i.e., an involuntary dismissal) may be an adjudication on the merits. See Drady v. Hillsborough County Aviation Auth., 193 So. 2d 201 (Fla. 2d DCA 1966), cert. denied, 210 So. 2d 223 (Fla. 1968). Nevertheless, this case involved a voluntary dismissal entered by the parties pursuant to mediation. This type of dismissal is quite distinguishable from an involuntary dismissal and thus case law addressing the latter should not apply to the former.

[12] Vasquez v. Board of Regents, State of Florida, 548 So. 2d 251 (Fla. 2d DCA 1989)

tort, the employer cannot be liable under respondeat superior for that employee's actions. Nevertheless, the employer can be liable for negligent supervision and retention. The Mallory decision provides no support whatsoever for the holding in Walsingham, other than the choice of words used.

This Court in Smith v. Ryder Truck Rentals, Inc., 182 So. 2d 422 (Fla. 1966), stated "**[e]xcept where modified by statute**, when either a master or a servant being joint tortfeasors is released by an injured party, the other tortfeasor cannot be sued." Smith, 182 So. 2d at 424 (emphasis added). It also recognized § 54.28, Florida Statutes (the predecessor to § 768.041), statutorily modified the general rule. Id.

Finally, JONES' unsupported assertion below that this Court's choice not to review Jones v. Gulf Coast Newspapers, Inc., id., equals an acceptance or approval of the result is incorrect. This Court is required to review only those orders and decisions set forth in Fla. R. App. P. 9.030(a)(1), which provides:

> (A) The supreme court shall review, by appeal (i) final orders of courts imposing sentences of death; (ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution. (Emphasis added)
>
> (B) If provided by general law, the supreme court shall review (i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness; (ii) action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service. (Emphasis added)

The Jones decision did not involve any of the issues requiring mandatory review and thus this Court did not have to review Jones. As for this Court's discretionary review, Fla. R. App. P. 9.030(a)(2) states:

> The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that (i) expressly declare valid a state statute; (ii) expressly construe a provision of the state or federal constitution; (iii) expressly affect a class of constitutional or state officers; (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the state question of law; (v) pass upon a question certified to be of great public importance; (vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the supreme court, and (i) to be of great public importance, or (ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States court of appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

The Florida Supreme Court's discretionary jurisdiction is just that, discretionary. Although the Court can chose to review a decision, it does not have to even if one of the enumerated criteria is set forth. Watson v. Dugger, 945 F.2d 367 (11th Cir. 1991). A denial of review without an opinion should be treated like all other subsequent history in which the reviewing court declines to write an opinion.

> [D]enial of certiorari by an appellate court cannot be construed as a determination of the issues presented in the petition therefor and cannot be utilized as precedent or authority for or against the propositions urged or defended in such proceedings. . . . The denial of certiorari by this Court in [a] case cannot therefore be urged as approval by this Court of the rule announced therein.

Southern Bell Telephone & Telegraph Company v. Bell, 116 So. 2d 617, 619 (Fla. 1959). See also Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983) (per curiam decision without written opinion has no precedential value); Florida Ins. Guar. Assoc. v. Celotex Corp., 547 So. 2d 696 (Fla. 4th DCA 1989) (decision without written opinion has no precedential value); Bevan v. Wanicka, 505 So. 2d 1116 (Fla. 2d DCA 1987) (denial of

certiorari without written opinion is not an affirmance and does not establish the law of the case); State v. Stabile, 443 So. 2d 398 (Fla. 4th DCA 1984) (per curiam affirmance does not establish law of case); Don Mott Agency, Inc. v. Harrison, 362 So. 2d 56 (Fla. 2d DCA 1978) (denial of certiorari without opinion cannot be construed as passing upon any of the issues in the case). Thus, this Court denying review in Jones v. Gulf Coast Newspapers, cannot be interpreted to mean anything other than the Court chose not to exercise its discretion.

D. Even if Walsingham was applicable to the facts involved in the JONESES' suit against Gulf Coast and was not flawed in its legal analysis, neither the trial court nor the Second District was required to adopt its holding.

JONES has argued Walsingham was the law of Florida in June 1990, and has cited Stanfill v. State, 384 So. 2d 141 (Fla. 1980), to support an argument the trial court was required to follow it. (App. Brief at 16). In Stanfill, this Court stated "the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court, . . ." Id. at 143. Admittedly, Walsingham had not been overruled by the Court, however, the argument it is binding is flawed on multiple levels.

First, a trial court in the Second District is obligated to follow decisions of other district courts of appeal "in the absence of conflicting authority if the [Second District Court of Appeal] has not decided the issue." Pimm v. Pimm, 568 So. 2d 1299, 1299 (Fla. 2d DCA 1990); In Re E.B.L., 544 So. 2d 333 (Fla. 2d DCA 1989). Thus, if the Second District has not addressed an issue, and if there is only one court of appeal decision (not overruled by the Supreme Court) and no conflicting decisions from any other district, a trial court in the Second District should follow that decision.

In this case, the Walsingham decision was not the only court of appeal decision addressing the effect of releasing actively negligent tortfeasors on pursuing claims against vicariously liable tortfeasors. Specifically, the courts in Florida Tomato Packers and Vasquez addressed this issue in the context of employer/employee liability (much closer factually) and, contrary to JONES' one-sided assertion, held the release of an actively negligent employee does not bar a claim against the employer. Moreover, as discussed above, the Eason court held a dismissal with prejudice is tantamount to a release. Walsingham was not the only Florida decision addressing the relevant issues. Furthermore, if it had any relevance, it was at most to create a conflict in the districts.

Once beyond the trial court, the Second District was not obligated to rely upon Walsingham. "This court is not bound by the decision of a sister district court." McDonald's Corp. v. Dept. of Transp., 535 So. 2d 323, 325 (Fla. 2d DCA 1988). "The opinion of a court at the same level is merely persuasive." Id. In the absence of a Florida Supreme Court decision affirming Walsingham or its principles, it was merely a non-binding opinion of the First District Court of Appeal. Thus, the Second District had the opportunity to correct the trial court's error but refused to do so. Furthermore, when the court had the opportunity in this case to admit it erred in Jones v. Gulf Coast Newspapers, Inc., it refused to do so. Instead of affirming the trial court's entry of summary judgment and thereby acknowledging it erred in Jones I, the Second District remanded the case stating a fact question existed as to CROSBY's liability. The Second District has simply added insult to injury with its most recent refusal to admit its error.

II. EVEN IF THE LAW AT THE TIME OF THE MOTION TO DISMISS WAS CONFLICTING, THE SUMMARY FINAL JUDGMENT SHOULD HAVE BEEN AFFIRMED BASED ON THE JUDGMENTAL IMMUNITY RULE.

A. An attorney is not an insurer of the efficacy of his advice, and CROSBY cannot be liable for acting in compliance with the greater weight and better reasoned authority.

An attorney cannot be liable for a well reasoned decision made in good faith because a court chooses to disagree with that reasoning. Perhaps the First District said it best in Dillard Smith Const. Co. v. Greene, 337 So. 2d 841 (Fla. 1st DCA 1976),[13]

> A lawyer does not guarantee the efficacy of his advice. His contractual [or legal] interpretations, rendered in the exercise of judgment, in good faith and with the degree of knowledge and skill ordinarily possessed by other lawyers similarly situated, do not become actionable simply because a court later rules against his client.

Id. at 843. JONES has not presented any authority for the proposition lawyers can be liable for the actions of the courts. In fact, JONES has admitted CROSBY did not "guarantee the soundness of his opinions." (App. Brief at 18) As stated so well by the Wisconsin Supreme Court,

> 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 would. A lawyer would need a crystal ball, along with his library, to be able to guarantee that no judge, anytime, anywhere, would disagree with his judgment or evaluation of a situation.

Denzer v. Rouse, 180 N.W.2d 521, 525 (Wis. 1970). As such, CROSBY did not (and clearly could not) guarantee his legal reasoning would be agreed with; CROSBY cannot be liable for the trial court's decision to grant Gulf Coast's motion for summary judgment, contrary to

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[13] See also Kirsch v. Duryea, 578 P.2d 935, 938 (Cal. 1978) ("The attorney is not . . . an insurer of the soundness of his opinions or of the validity of an instrument he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.")

§§ 768.041(1), 768.31(5), Florida Statues, Hertz, Vasquez, and the long history of favoring settlements; Similarly, CROSBY cannot be liable for the Second District's refusal to follow that law either.

It is truly unfortunate JONES is caught in what is obviously a very difficult situation. It is crucial to remember CROSBY is not the cause of this dilemma.[14] He complied with the majority view (both in terms of common and statutory law) and his conduct has been vindicated by this Court in J.F.K. Medical Center v. Price, 647 So. 2d 833 (Fla. 1994). There are occasionally aberrant decisions by courts at every level, but they do not serve to turn attorneys into insurers. What JONES is asking this court to do is choose between two innocents -- JONES and CROSBY -- and mandate CROSBY pay for the trial court and the Second District's deviation from the majority rule. Only this Court can prevent such an injustice from happening.

B. An attorney is not liable on a disputed issue of law until the court of last resort in his state has resolved the issue.

The law at the time CROSBY filed the Joint Motion for Dismissal supported his actions. Nevertheless, even if Walsingham raised a question, CROSBY's conduct is not actionable as a matter of law. If Walsingham created a conflict in the districts regarding the effect of a release of an employee on an employer, then CROSBY's actions are protected by the judgmental immunity doctrine. The judgmental immunity doctrine states:

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[14] Nor is the dilemma as financially devastating as JONES would lead the courts to believe. At the commencement of this litigation, the uninsured/underinsured claim (George House was uninsured) with $1.8 million in coverage was pending. Thus, to suggest the JONESES were deprived of a right of recovery as suggested in their Initial Brief below (App. Brief at 28) is misleading.

> An 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), rev. denied, 518 So. 2d 1276 (Fla. 1987) (citing Hodges v. Carter, 80 S.E.2d 144, 146 (N.C. 1954)). JONES has not challenged the fact Florida recognizes this rule of immunity. (App. Brief at 18)

Clearly, if Walsingham could be characterized as truly governing the issues in this case then the other authorities dating as far back as 1962 show there was a conflict the Florida Supreme Court had not yet resolved. Assuming for the sake of argument, there was no directive from this Court and conflicting authority from the various Districts and the statutes, the decision to file the Joint Motion for Dismissal required, in effect, a professional judgment call. Whether to follow the lead of the Restatement (Second) of Judgments § 51(4), §§ 768.041(1) and 768.31(5), Hertz, Batchelor, Eason, Vasquez, Ellis, and Florida Tomato Packers, or to follow the questionable decision in Walsingham clearly required CROSBY to analyze the possible effects of the dismissal with prejudice of Camus on the JONESES' claims against Gulf Coast. CROSBY made this judgment call in good faith based on the degree of knowledge and skill ordinarily possessed by other lawyers similarly situated. Such judgment calls are immune from liability in Florida. Even JONES recognized "when counsel is faced with a fairly debatable issue of law and acts in good faith belief thereon, he is doing what he should, and that is representing the client with reasonable knowledge and skill." (App. Brief at 21) Consequently, CROSBY cannot be liable for making a professional decision as to the status of the law even if the trial court and appellate court disagreed with his decision.

C. Florida law has never recognized a duty to warn a client where the lawyer's actions fell within the scope of Florida law.

Although a lawyer may have a duty to tell his client when his actions may not be in compliance with the law, no Florida court has ever required a lawyer to tell the client he is acting within the law. CROSBY clearly acted within the law of the State of Florida when he filed the Joint Motion for Dismissal. The original trial court's failure to recognize this is not CROSBY's fault. Furthermore, because the Walsingham decision was not controlling, as discussed above, CROSBY did not have a duty to inform JONES of that holding. The law of the State of Florida, and the Second District in particular, supported CROSBY's actions.

JONES has argued CROSBY somehow had a duty to tell JONES the ramifications of a dismissal with prejudice of Camus on their claims against Gulf Coast based upon McCurry v. Eppolito, 506 So. 2d 1110 (Fla. 1st DCA 1987). McCurry is completely distinguishable from the case in issue. In McCurry the attorney was hired to help his client fire a general contractor and allow the client to finish construction on his house. In order to do that, specific statutory steps needed to be taken. Those steps are clearly outlined in the Florida Mechanics' Lien Statute. The case at hand is not the same. CROSBY was hired to represent the JONESES in a personal injury action against Camus and Gulf Coast. In the course of representation, JONES settled the claims against Camus. CROSBY drafted the settlement to release Camus but maintained the suit against Gulf Coast in compliance with §§ 768.041(1) and 768.31(5) and the extensive case law regarding the release of joint tortfeasors. JONES did not and cannot provide any support for the proposition a lawyer must inform his client that his actions are in accordance with the laws of the state or that a failure to do so is actionable. Such an argument is absurd because it is assumed lawyers act

in accordance with the laws of the state. That is why they are hired — to act on behalf of people who do not know the law.

JONES also relied upon State v. Meyer, 430 So. 2d 440 (Fla. 1983). In Meyer, this Court stated "lack of knowledge of or compliance with prescribed rules of practice and procedure is a dereliction of professional responsibility not easily excused, which may subject the negligent attorney to liability for damages to the client." Id. at 443 (emphasis added). Meyer did not involve analyzing authority or determining the weight of decisions as was involved in this case. Rather, Meyer involved the failure to file a notice of appeal on time. There is no judgment involved in such a decision; the rules of appellate procedure provide the timeline. CROSBY did not fail to follow any "prescribed rules of practice and procedure," thus Meyer provides no support for JONES' claims.

JONES' reliance on Stake v. Harlan, 529 So. 2d 1183 (Fla. 2d DCA 1988), is misplaced, as well. In Stake, the attorney told his clients the law in the State of Florida was based on a particular court decision. The attorney, however, did not tell his clients the particular decision had been certified to the Florida Supreme Court and, therefore, was subject to the Supreme Court's review and potential correction. Consequently, the clients acted according to the law as it was prior to the Supreme Court's review of the decision. When the Supreme Court did review the decision, it changed the law enunciated therein. Consequently, the clients' actions were contrary to the law of Florida.

Stake is wholly inapplicable to this case. CROSBY diligently represented the JONESES and reached a settlement with the active tortfeasor's insurer but specifically excluded the tortfeasor's employer from the settlement. CROSBY did not rely upon only one case or upon a

case which was pending review by the Supreme Court. Stake would be more applicable if CROSBY had relied upon the Walsingham decision, instead of the extensive authority detailed above, and it had been invalidated by J.F.K. Medical Center v. Price.

JONES' suggestion CROSBY had a duty to inform the JONESES of this alleged conflict in the law, if it was truly a conflict, defeats the entire malpractice action. If the law was not settled, then CROSBY's actions are protected. Not only is CROSBY protected by the judgmental immunity rule, but JONES has inexplicably failed to argue or allege that any failure on the part of CROSBY to inform them of the allegedly conflicting law would have changed anything which occurred. The lack of merit to be found in JONES' arguments below betrays JONES' protestation that CROSBY is not "being challenged for an unsuccessful outcome of the litigation." (App. Brief at 18) Neither the complaint (R. 1-8) nor JONES' Initial Brief below shows the JONESES would have done anything differently had they known of the Walsingham decision. Thus, any arguable negligence on the part of CROSBY was not the proximate cause of their alleged injury, which is questionable as well.

## III. IN THE ABSENCE OF MISTAKE, INADVERTENCE, EXCUSABLE NEGLECT OR NEWLY DISCOVERED EVIDENCE FLORIDA RULE OF CIVIL PROCEDURE 1.540 IS INAPPLICABLE.

JONES has argued CROSBY failed to take appropriate steps to correct the alleged error -- the Joint Motion for Dismissal -- by failing to file a motion pursuant to Fla. R. Civ. P. 1.540, asking the trail court to vacate the dismissal or to strike the with prejudice modifier as having been entered through mistake, inadvertence or excusable neglect. (App. Brief at 14-15) Rule 1.540(b) provides:

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

This rule obviously requires the judgment, decree or order be a result of a mistake. There was no mistake here. Any argument CROSBY should have filed a motion under this rule must fail.

First, there is nothing in the record to suggest that CROSBY filed the Joint Motion for Dismissal through mistake, inadvertence or neglect.[15] Consequently, any suggestion the motion resulted from neglect or mistake must be taken as only that, a suggestion. (App. Brief at 7).[16] CROSBY does not contend, and did not contend to the trial court or the Second District on appeal, that the "with prejudice" was a mistake. Although JONES argues a dismissal with prejudice was "not even a result of the insistence of Camus' counsel or a condition of settlement" (App. Brief at 7), again nothing in the record supports this conclusion. As such, JONES' argument is both unfounded and inappropriate. Further, it provides little support in light of the fact it is standard procedure for released parties to request they be dismissed with prejudice. That is an assumption all lawyers make in settling personal injury actions.

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[15] Additionally, JONES' reliance upon Judge Patterson's dissenting comment that the addition of with prejudice to the Motion to Dismiss "was simply the ill-advised choice of words by counsel," Jones, 595 So. 2d at 92, is misplaced. There is nothing in the record on this appeal, nor in the record to the Second District on appeal from Gulf Coast's summary judgment, to suggest that CROSBY's actions were without thought. Moreover, Judge Patterson also said "this court should not put form over substance to reach a result that the parties clearly did not intend."

[16] Any suggestion that CROSBY was not aware of the Walsingham decision, (App. Brief at 8), must fail because there is nothing in the record to suggest such an absurdity. Moreover, all the briefs, memoranda, and arguments presented in the original suit indicate to the contrary. (A. 8)

Second, as CROSBY did not inadvertently add "with prejudice" to the dismissal, JONES cannot be suggesting that CROSBY should have filed a Rule 1.540 motion once summary judgment was granted in favor of Gulf Coast in order to correct the court's error in granting summary judgment; such a motion would have been improper as CROSBY made no mistake. Furthermore, JONES' suggestion CROSBY should have filed a motion under Rule 1.540 to correct his alleged error (App. Brief at 8), suggests CROSBY should have misrepresented the true state of affairs to the court for his clients. For these reasons, a Rule 1.540 motion would have been improper.

Additionally, there is nothing in the record to suggest such motion would have been granted by the trial court. Furthermore, the blanket assertion Camus would not have been prejudiced by changing the dismissal to without prejudice is not supported by the record and is clearly debatable as such a dismissal would subject her to potential suit. CROSBY cannot be liable for failing to file a motion under Rule 1.540 insofar as CROSBY's filing the Joint Motion for Dismissal was not a result of mistake or neglect.

## CONCLUSION

The trial court's decision to grant final summary judgment in favor of CROSBY should have been affirmed by the Second District. The question presented to the trial court was a question of pure law regarding the status of the law at the time CROSBY filed the Joint Motion for Dismissal. Clearly, the law at that time allowed for the release of an active tortfeasor without releasing other tortfeasors, including vicariously liable parties. The form of the release, either a settlement or a motion to dismiss with or without prejudice, did not change this rule of law. In fact, the First District specifically held that a dismissal with prejudice was tantamount to a release under § 768.041(1) and the Second District later adopted the First District's holding.

Any argument that Walsingham controlled is erroneous. First, other authority, including both statutory and common law, clearly held the release of an actively negligent employee through a dismissal with prejudice did not release a vicariously liable employer. Second, Walsingham's applicability to this case was highly questionable because it neglected to address §§ 768.041(1) and 768.31(5) and is premised on questionable authority.

Furthermore, in the event there was a conflict as to the law, CROSBY's decision to follow the extensive authority supporting his actions cannot be actionable. The judgmental immunity rule protects CROSBY in the event his professional judgments are not later determined to be correct. A lawyer is not the guarantor of his advice, and CROSBY should never be liable for making a well reasoned decision which was later disagreed with by a court.

Finally, given CROSBY was in compliance with the laws of the State of Florida, he had no duty to inform JONES of the Walsingham decision. Walsingham was not only contrary to the vast authority supporting CROSBY's actions but its holding was flawed and its applicability was

questionable. Even if Walsingham did create a conflict of authority, CROSBY had no duty to warn JONES of the case because neither the trial court nor the Second District had to follow it.

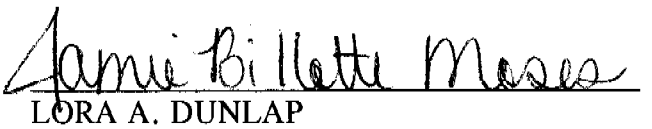
CROSBY cannot be held liable for following the law simply because the trial court and the Second District chose not to follow the authority he relied upon. This Court has specifically held that CROSBY's reasoning was correct and that Florida law for the past thirty (30) years supported his actions.

Without explanation, the Second District has refused to acknowledge this Court's rulings and chosen, instead, to punish CROSBY. There is no fact question involved in this case. The law at the time CROSBY filed the Joint Motion for Dismissal provided the release of Camus would not release Gulf Coast. In fact the release specifically provided that as well. The trial court below properly recognized this and granted summary judgment in CROSBY's favor. What should have been a per curiam affirmance turned into an opinion regarding a jury question. The Second District completely refused to even admit it had erred. Rather, it claimed all of that was irrelevant because of a fact question. Such an argument is patently flawed. CROSBY's actions were in accordance with the law. He did what he was supposed to do. CROSBY cannot be liable under Florida law for following the laws of the state. Unless this Court is willing to impose liability on lawyers for the erroneous decisions of the courts, the trial court's entry of summary final judgment must be affirmed.

WHEREFORE, Petitioners, SAMUEL G. CROSBY and MILLER, CROSBY & MILLER, P.A., respectfully ask this Court to reverse the decision of the Second District and reinstate the decision of the trial court below.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Answer Brief has been furnished by Federal Express 5th day of April, 1997 to HERBERT M. BERKOWITZ, P.A., 4809 E. Busch Blvd., Suite 104, Tampa, FL 33617.



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