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FILED
SID J. WHITE
JUL 25 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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.

PETITIONERS' REPLY BRIEF ON THE MERITS

LORA A. DUNLAP
FLA. BAR #332372
JAMIE BILLOTTE MOSES
FLA. BAR #0009237
Fisher, Rushmer, Werrenrath,
Wack & Dickson, P.A.
20 N. Orange Ave., Suite 1100
P. O. Box 712
Orlando, FL 32802
(407) 843-2111
Attorneys for Appellees

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SUMMARY OF ARGUMENT

As stated in CROSBY's Initial Brief on the Merits, CROSBY's filing of the dismissal with prejudice complied with Florida law at the time he did it. The mere presence of the Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st DCA 1988) decision does not mean CROSBY committed malpractice. Taking aside all of the JONESES' personal attacks on CROSBY and his appellate counsel, and the unsupported coloring of the facts, JONES fails to show how the law at the time of the filing of the dismissal with prejudice was anything other than what CROSBY thought it to be.

The joint stipulation presented by CROSBY to the trial court in the underlying litigation should not be considered by this Court, as it was not presented to the trial court below. Nevertheless, if it is considered, it does not suggest or prove CROSBY was unaware of the law at the time the dismissal with prejudice was filed. The joint stipulation merely reiterated the JONESES' and Camus' intent not to release Gulf Coast. Nothing in the joint stipulation shows a lack of knowledge of the law as suggested by JONES. JONES refuses to acknowledge CROSBY's arguments in his Memorandum of Law in Opposition to Gulf Coast's Motion for Summary Judgment, his appeal to the Second District and his appeal to this Court wherein he argued the exact same case law relied upon by this Court in disapproving the Second District's decision in Jones v. Gulf Coast Newspapers, Inc., 595 So. 2d 90 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992).

This Court has held the dismissal with prejudice of an actively negligent tortfeasor does not release a vicariously liable party. As such, CROSBY cannot be liable for the trial court's and the Second District's opinion that it does. Therefore, the Second District's reversal of the trial

court's entry of summary judgment in favor of CROSBY in this malpractice action should be reversed and the summary judgment in favor of CROSBY should be affirmed.

ARGUMENT

As a preliminary matter, CROSBY wishes to draw the Court's attention to the numerous unnecessary attacks upon CROSBY and his appellate counsel. JONES repeatedly attacks CROSBY and his appellate counsel, accusing them of disparaging the trial and appellate courts and having to resort to "indecorous language" in CROSBY's brief. The JONESES do exactly what they accuse CROSBY of doing by attacking CROSBY and appellate counsel. Such comments are unnecessary and add nothing to the merits of an appeal. Furthermore, in what is to be a dispassionate statement of the case and facts, JONES uses bolded topic headings to argue the facts of this case. For example on pages 3 and 4 of the Answer Brief, JONES uses the bold topic headings to make unsupported accusations without the inclusion of record cites. CROSBY asks this Court to disregard the coloring of the facts and the personal attacks upon CROSBY and his appellate counsel. Obviously, such accusations and insinuations have no place in this appeal.

I. NO MATTER HOW STRENUOUSLY JONES ARGUES TO THE CONTRARY, THE LAW AT THE TIME THE DISMISSAL WITH PREJUDICE WAS FILED SUPPORTED CROSBY'S ACTIONS.

The law at the time CROSBY filed the dismissal with prejudice supported his actions and CROSBY will rely upon the arguments made in his Initial Brief on the Merits with respect to that issue. Nevertheless, there are two points raised in JONES' Answer Brief which must be addressed here.

First, JONES relies heavily on the joint stipulation between the JONESES and Camus in the underlying litigation as some sort of evidence CROSBY had no idea what he was doing. JONES, however, never presented the joint stipulation to the trial court below. Furthermore, it was not presented to the Second District on appeal until the JONESES filed their Reply Brief and

CROSBY could not respond. The Second District apparently recognized this error and chose not to consider it in its opinion. Despite the fact the joint stipulation does not represent the error JONES would like this Court to believe it to be, the stipulation was not a part of the record as presented to the trial court and should not be considered. Patterson v. Weathers, 476 So. 2d 1294 (Fla. 5th DCA 1985).

Nevertheless, in the event this Court considers the joint stipulation, it must be considered in the proper context. Along with this Reply Brief CROSBY has filed an appendix consisting of CROSBY's memorandum of law in opposition to Gulf Coast's motion for summary judgment, CROSBY's brief on appeal to the Second District Court of Appeal and CROSBY's brief to this Court on review of the Second District's decision.[1] These documents show the joint stipulation was not CROSBY's admission he was unaware of the law as the JONESES would have this court believe.

JONES puts far too much weight on the joint stipulation. Specifically, the reference to the "unexpected, unintended and unfair result of the release of GULF COAST" is argued by JONES to be an admission CROSBY was unaware of the law surrounding dismissals and vicariously liable parties. Such an argument must fail. The joint stipulation merely reiterated what the law was at the time of the dismissal and what the release itself provided:

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

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[1] These documents are attached pursuant to Florida Rule of Appellate Procedure 9.220 and will be designated (A. page number).

All the joint stipulation said was only Camus was expected to be (and should have been) released from the suit. The joint stipulation did not say CROSBY was unaware of the law at the time the dismissal with prejudice was filed. Rather, it merely reiterated, as did the release, the parties' intent to release only Camus and not Gulf Coast. The fact the trial court chose not to honor that stipulation and instead to grant summary judgment in Gulf Coast's favor is wholly outside the control of CROSBY. The joint stipulation is not the "smoking gun" JONES suggests it to be.

Furthermore, as discussed above, the stipulation is evidence of nothing in light of CROSBY's extensive efforts on behalf of the JONESES. CROSBY was well aware of the law at the time the joint dismissal was filed, at the time Gulf Coast moved for summary judgment, at the time he appealed, at the time the Second District refused to follow that law and at the time he was sued for malpractice. He has been well aware of the law through out the underlying litigation of this matter and through out this action. The record, and not the argument of counsel, clearly supports this statement. Still, despite all that, JONES argues CROSBY should be liable for malpractice. This Court has told CROSBY he was right. As such, the trial court properly granted summary judgment in CROSBY's favor. The Second District's reversal of that summary judgment was improper and must be reversed.

Second, JONES repeatedly argues there is absolutely no evidence in the record CROSBY knew what he was doing when filing the dismissal with prejudice. JONES categorizes the statement CROSBY was aware of the law surrounding this issue as merely an assertion by his appellate counsel. As such, JONES argues these comments should be disregarded. Nevertheless, JONES refuses to acknowledge the extensive argument made by CROSBY in opposition to Gulf Coast's motion for summary judgment and on appeal after the motion was granted.

In his memorandum of law in opposition to Gulf Coast's motion for summary judgment, CROSBY went through an extensive analysis of the law as it applied to the release of actively negligent tortfeasors and vicariously liable parties. CROSBY stated:

> The above referenced annotation shows that not only is there no black letter rule that the vicariously liable employers gets [sic] off, but if there is a black letter rule in Florida, that rule (by virtue of the statute, F.S. 768.041), is that the vicariously liable employer does not escape liability when the employee is released and dismissed from the lawsuit.

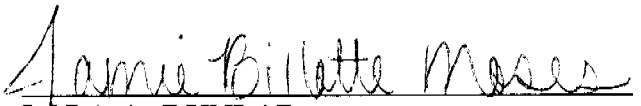
(A.1 at pages 10-11) On appeal, CROSBY reiterated that argument. JONES cannot seriously contend CROSBY was not aware of the relevant case law when he filed the dismissal with prejudice.

JONES also fails to acknowledge the fact there is nothing in the record to suggest CROSBY did not know the law surrounding dismissals with prejudice and vicarious liability. The mere fact the trial court relied upon case law which did not support its ruling does not mean CROSBY was not aware of the law at the time. The courts' opinion of the law at the time Gulf Coast's motion was granted and on appeal does not automatically translate into an error by CROSBY. That, however, is what JONES would have the law to be with respect to legal malpractice in Florida. Despite the fact an attorney strenuously argues the correct law to the courts, an attorney should be liable when the courts disagree. This is so, according to JONES, even if the Florida Supreme Court has said "you were right." CROSBY asserts this has never been the law of Florida. A lawyer is not liable for the opinions, interpretations or whims of the courts. A finding of malpractice in this case will make that the law.

CONCLUSION

CROSBY's actions complied with Florida law. This Court has impliedly stated as such in J.F.K. Medical Center v. Price, 647 So. 2d 833 (Fla. 1994). Because CROSBY cannot be liable for the decisions of the trial court or the appellate court, the Second District's reversal of the trial court's order granting summary judgment in CROSBY's favor must be reversed.

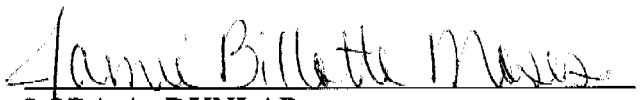
Respectfully submitted,



LORA A. DUNLAP
FLA. BAR #332372
JAMIE BILLOTTE MOSES
FLA. BAR #0009237
Fisher, Rushmer, Werrenrath,
Wack & Dickson, P.A.
20 N. Orange Ave., Suite 1100
P. O. Box 712
Orlando, FL 32802
(407) 843-2111
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail this 23rd day of July, 1997, to STUART C. MARKMAN, ESQ., P.O. Box 3396, Tampa, FL 33601-3396.



LORA A. DUNLAP
FLA. BAR #332372
JAMIE BILLOTTE MOSES
FLA. BAR #0009237
Fisher, Rushmer, Werrenrath,
Wack & Dickson, P.A.
20 N. Orange Ave., Suite 1100
P. O. Box 712
Orlando, FL 32802
(407) 843-2111
Attorneys for Appellees

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