

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1325

**DANNY EDWIN MICHAEL, and SHARON MICHAEL,
as parents and natural guardians of
DANNY EDWIN MICHAEL, II, a minor,**

Petitioners,

vs.

**FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,**

Respondent.

**PETITIONER'S INITIAL BRIEF IN
SUPPORT OF JURISDICTION TO REVIEW
A DECISION OF THE DISTRICT COURT OF
APPEAL FOR THE SECOND DISTRICT OF FLORIDA**

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STATEMENT OF THE CASE AND FACTS

The Second District Court of Appeal reversed a final judgment in favor of Danny Edwin Michael and Sharon Michael, the parents of Danny Edwin Michael, II, whose catastrophic “birth-related neurological injury” had resulted in a settlement with the Florida Birth Related Neurological Compensation Association (NICA).¹ *See* Appendix 2-4. NICA’s alleged failure to abide by the settlement agreement concerning the parties’ administrative proceeding, led to a circuit court suit against NICA for breach of contract and specific performance. Appendix at 6. A key issue in the circuit court was whether NICA was obligated under the settlement agreement to sign the documents necessary to provide the Michaels with a specific structured settlement. Appendix at 2, 6-7.

On cross-motions for summary judgment, the circuit court determined “that NICA had breached an agreement to settle this dispute. Thereafter it conducted non jury trials to determine damages, attorneys’ fees, and costs.” Appendix at 2, 6. Despite the parties’ agreement that there were no undisputed facts and that summary judgment was appropriate as to whether NICA had made, and broken its promise, the Second District held:

¹ To be accepted into the NICA program, a child must have injuries that are “catastrophic” and render the child “permanently and substantially mentally and physically impaired.” §§766.301(2) and 706.302(2), Fla. Stat.

We conclude that the trial court erred in granting the summary judgment. *There is, at least, a question of fact as to whether the parties had reached a settlement in this case that required NICA to sign the documents necessary for a specific structured settlement*

Id. at 2 (emphasis supplied).

The Second District recognized that the cross-motions for summary judgment presented the same undisputed facts: “Both sides moved for summary judgment, each side arguing that they were entitled to judgment on the issue of liability on the claim for breach of contract. The parties relied on the contents of the settlement correspondence and the deposition of NICA’s Executive Director, Ms. Shipley.” *Id.* at 6.

Having held there were disputed facts even though both parties agreed that their shared evidence left only questions of law to be resolved, and even though the trial court’s ultimate findings of liability and damages resulted from two trials, the Second District concluded summary judgment was not appropriate for two reasons:

(1) Here, simply stated NICA *never* expressly agreed that it would execute any specific structured settlement (2) When the summary judgment was granted in this case, the record contained no undisputed evidence establishing as a matter of uncontested law that Ms. Shipley negotiated in error or *bad faith* when she balked

at the various settlement proposals and that her agreement to consider such suggestions compelled her to execute any specific document. Accordingly, the trial court erred in granting this summary judgment.

Id. at 7 (emphasis supplied).

In reversing, the Second District: (1) “reweighed” the evidence, ignored the trial court’s findings of fact, and made a finding of fact that “NICA never expressly agreed that it would execute any specific structured settlement,” despite holding earlier that fact was disputed; (2) imposed a new “bad faith” element upon a simple breach of contract action; and (3) conflicted with controlling case law governing the formation and enforcement of settlement agreements by adding its own take on the facts.²

SUMMARY OF THE ARGUMENT

The Second District's decision expressly conflicts with numerous

² For example, the court found that "... the parties agreed as follows ...," then set forth five provisions of the settlement agreement, and then found that "... NICA only agreed that it 'would consider any suggestions so as to minimize the tax consequences.'" (Appendix at 3-4). At page 5, the court found that Ms. Shipley "objected to [the structured settlement] document because she was concerned that it created potential long-term liabilities for NICA and she thought it was improper." At pages 5-6, the court found that "Ms. Shipley apparently was still concerned about her authority to execute this agreement..." and whether she "could sign binding documents obligating NICA to make periodic payments over many years, as contemplated in the November document, is unclear in this record." Those findings of fact are inconsistent with a holding that there were disputed issues of fact precluding summary judgment. Disputed issues are left to the trial

decisions of other district courts of appeal and of the Florida Supreme Court. Despite concluding that a disputed question of fact exists "as to whether the parties had reached a settlement in this case that required NICA to sign the documents necessary for a specific structured settlement" (Appendix at 2), the Second District reweighed the evidence, ignored the trial court's findings of fact, and made its own *de novo* finding of fact that "... NICA never expressly agreed that it would execute any specific structured settlement." *Id.* at 7. The decision also engrafts a new "bad faith" element to a breach of contract action and contradicts controlling case law governing the formation and enforceability of settlement agreements. *Id.* at 6-7. In so doing, the decision defeats the ability of a catastrophically injured child to receive custodial care benefits that he needs and has a statutory right to receive. This Court should accept jurisdiction.

ARGUMENT

THE SECOND DISTRICT'S DECISION EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS AND THE SUPREME COURT ON THE SAME QUESTION OF LAW³

court, and are not the bailiwick of an appellate court.

³ To trigger "conflict" jurisdiction under Art. V, §3(b)(3), Fla. Const., the decision below must (1) announce a rule of law that conflicts with a rule previously announced by another district court or this Court, or (2) apply a rule of law to produce a different result in a case involving similar facts to a case decided by another district court or this Court. *Mancini v. State*, 312 So. 2d 732 (Fla.1975).

A. Reweighing the Evidence and *De Novo* Fact Finding

When the Second District held that a disputed question of fact exists "as to whether the parties had reached a settlement in this case that required NICA to sign the documents necessary for a specific structured settlement" (Appendix at 2), and then reweighed the evidence and entered its own *de novo* finding of fact that "... NICA never expressly agreed that it would execute any specific structured settlement" (Appendix at 7), the court created conflict with the principle that an appellate court is prohibited from reversing findings of fact that are supported by competent substantial evidence, and prohibited from reweighing the evidence presented to the trial court, substituting its findings for those of the trial court, and engaging in *de novo* fact finding. *Shaw v. Shaw*, 334 So. 2d 13 (Fla.1976); *Crain v. State*, 894 So. 2d 59 (Fla. 2004); *Hellman v. Seaboard Coastline Railroad Co.*, 349 So. 2d 1187 (Fla.1977); *Fote v. Moyer*, 63 So. 2d 622 (Fla. 1953); *Douglass v. Buford*, 9 So. 3d 636, 637 (Fla. 1st DCA 2009); *In re Forfeiture of \$62,200 in U.S. Currency*, 531 So. 2d 352 (Fla. 1st DCA 1988); *Seigel v. Career Services Com'n*, 413 So. 2d 796 (Fla. 1st DCA 1982); *Lewy v. Wohl*, 561 So. 2d 12, 13 (Fla. 3d DCA 1990); *Myrick v. Miller*, 256 So. 2d 255 (Fla. 3d DCA 1971); *Mendoza v. State*, 941 So. 2d 523 (Fla. 3d DCA 2006).

Shaw says it well:

It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test . . . is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject "inherently incredible and improbable testimony or evidence," it is not the prerogative of an appellate court, upon a *de novo* consideration of the record, to substitute its judgment for that of the trial court.

334 So. 2d at 16.

By concluding that there was a disputed issue of fact where the parties below agreed there was none, and then making a new finding of fact that was contrary to the trial court's findings against NICA on the same issue, the Second District usurped the trial court's function and acted in conflict with the axiomatic principles articulated in the cases cited above. Thus, the decision below poses a conflict that this Court should exercise its discretionary jurisdiction to resolve.

B. "Bad Faith" Is Not an Element of a Breach of Contract Action; Another Basis for Conflict Jurisdiction

On two different occasions, the Second District held that the Michaels' breach of contract claim was deficient for failure to prove that NICA acted in "bad faith." On page 6, the decision states, "Nothing in this record establishes, as a matter of undisputed fact or law, that Ms. Shipley was acting in bad faith when she

balked at these settlement proposals." On page 7, the Second District held that "the trial court erred in granting this summary judgment" because "the record contained no undisputed evidence establishing as a matter of uncontested law that Ms. Shipley negotiated in error or bad faith when she balked at the various settlement proposals" The decision contained no citation to authority to support its holding that evidence of bad faith was necessary and lacking in this case.

In *Shuster v. South Broward Hosp. Dist. Physicians' Professional Liability Ins. Trust*, 570 So. 2d 1362, 1368 (Fla. 4th DCA 1990), the court held that bad faith is irrelevant to a breach of contract action. Numerous decisions hold that the only elements of a breach of contract claim are: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach. *See, e.g., Knowles v. C.I.T. Corp.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977); *Murciano v. Garcia*, 958 So. 2d 423, 423 (Fla. 3d DCA 2007); *J.B. Gumberg Co. v. Janis Servs., Inc.*, 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003); *Abbott Labs., Inc. v. Gen. Elec. Capital*, 765 So. 2d 737, 740 (Fla. 5th DCA 2000). The Second District's decision expressly and directly conflicts with these cases, by engrafting a bad faith requirement onto a breach of contract action without explanation or citation.

**C. Settlement Agreements Do Not Have to Definitely Fix
All Details of the Parties' Understanding in Order to Be**

Enforceable; Holding Otherwise Created Another Conflict

The Second District recognized that “[t]he parties cancelled [their administrative] hearing at a point when they believed a settlement had been achieved[,] that “[t]he basic elements of [the] settlement are not in dispute,” and that “the parties agreed” to the material terms listed on pages 3-4 of the decision. Appendix at 3-4. Nonetheless, the court reversed the trial court’s final judgment based on its *de novo* finding of fact that “... NICA never expressly agreed that it would execute any specific structured settlement.” Appendix at 7. The court also made factual findings that “... Ms. Shipley objected to this [structured settlement] document because she was concerned that it created potential long-term liabilities for NICA and she thought it was improper.” Appendix at 5. Aside from being an impermissible *de novo* finding of fact, the Second District’s characterization, consideration and determination as to Ms. Shipley’s subjective concerns or thoughts are contrary to *Robbie v. City of Miami*, 469 So. 2d 1384 (Fla.1985). That decision holds that “The making of a [settlement agreement] depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing, but on their having said the same thing.” *Id.* at 1385. In *Robbie*, this Court also held that “parties to a contract do not have to deal with every contingency” and that the

agreement was enforceable despite subsequent disagreement over interpretation of a provision thereof. *Id.* at 1385-86.

Many Florida decisions stand for the proposition that settlement agreements do not have to definitely fix all details of the parties' understanding in order to be enforceable. In *State Farm Automobile Insurance Co. v. Interamerican Car Rental, Inc.*, 781 So. 2d 500, 502 (Fla. 3d DCA 2001), the court held that a settlement agreement "does not have to definitely fix all details of the parties' understanding in order to be enforceable." In *Nichols v. The Hartford Insurance Co.*, 834 So. 2d 217, 219-20 (Fla. 1st DCA 2003), the court held that "all details of a release need not be absolutely decided on" for a valid settlement agreement to exist. Contrary to the Second District's holding (for which it cites no authority), one party's subsequent refusal to sign a release or other document to memorialize the agreement does not annul a binding settlement that was previously reached. *Mercury Ins. Co. of Fla. v. Fonseca*, 3 So. 3d 415, 417 (Fla.3d DCA 2009). In that situation, "the execution of the settlement documents [is] not a condition precedent to the settlement agreement, but rather a mere procedural formality which both parties to the settlement agreement [are] obliged to perform." *Boyko v. Ilardi*, 613 So. 2d 103, 104 (Fla.3d DCA 1993).

In *Robbie*, this Court held that settlement agreements "are highly favored

and will be enforced whenever possible." *Id.*, 469 So. 2d at 1387. Where there is no disagreement over the material terms of the settlement agreement, "the settlement should be enforced." *Id.* In this case, the Second District expressly acknowledged that the parties "believed a settlement had been achieved" and that "[t]he basic elements of that settlement are not in dispute" and then listed those basic elements in its decision. Appendix at 2-4. Ms. Shipley's subjective concerns about the propriety of structuring the agreed upon amount into future periodic payments are not a legal basis for refusing to enforce a settlement that was the product of undisputed record facts. The Second District's injection and finding of a fact outside the parameters of the settlement agreement conflicted with the *Robbie* maxim of enforcements of settlement agreements, and with the cases cited above in section A., precluding the reweighing of evidence and the formulation and substitution of new findings of facts.

CONCLUSION

The Second District's decision expressly and directly conflicts with well-settled case law of other district courts and this Court. This case involves a catastrophically injured child and an "unusual legal entity . . . [that] supposedly is not a state agency, but it is authorized to use the state seal" and the authority of its "Executive Director . . . [to] sign binding documents obligating NICA to make

periodic payments over many years” Appendix 5-6. The trial court found, both on undisputed facts and after two trials, that NICA breached its obligations to the child and his parents. The Second District’s decision setting aside the trial court’s ruling provides the kind of conflict that merits this Court’s review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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