

**IN THE SUPREME COURT  
STATE OF FLORIDA**

Case Number: SC10-1325  
Lower Tribunal Case No.: 2D09-585

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

*Petitioners,*

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY  
COMPENSATION ASSOCIATION,

*Respondent.*

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**RESPONDENT'S JURISDICTIONAL BRIEF**

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ON DISCRETIONARY REVIEW FROM A DECISION OF THE  
SECOND DISTRICT COURT OF APPEAL

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## **PRELIMINARY STATEMENT**

In this Jurisdictional Brief, the Petitioners, Danny and Sharon Michael, as parents and natural guardians of Danny Edwin Michael, II, a minor, will be referred to as the “Petitioners” or “the Michaels.” The Respondent, Florida Birth-Related Neurological Injury Compensation Association, will be referred to as “NICA.” The Florida Birth-Related Neurological Injury Compensation Plan will be referred to as “the Plan.” The Second District Court of Appeal will be referred to as the “Second District.” Citations to the Appendix are noted as “[A, p.\_\_\_\_].”

## **STATEMENT OF THE CASE AND FACTS**

Respondent objects to the Statement of the Case and Facts in the Petitioners’ Jurisdictional Brief as being contrary to those facts set forth in the Second District’s decision<sup>1</sup> and as containing improper argument. Accordingly, NICA submits its version of the Statement of the Case and Facts.

NICA is a statutorily created association which implements and administers the Florida Birth-Related Neurological Injury Compensation Plan. [A, p. 5] The

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<sup>1</sup> In addition, the facts alleged by the Petitioners are incorrect and represent an attempt to morph the actual nature and posture of this case into something that it was not. For example, on page 2 of the Brief, the Petitioners state “even though the trial court’s ultimate findings of liability and damages resulted from two trials. . . .” That statement is patently incorrect. The issue of liability was determined at a hearing on summary judgment. As acknowledged by the Second District, the non-jury trial was limited to the issue of damages and attorneys’ fees. See [A, p. 2]

Plan, funded with state monies, provides limited compensation for the life of a child suffering from a birth-related neurological injury. [A, p. 3] Danny Edwin Michael, II, was accepted into the Plan in 1997. [A, p. 3] This case stems from the parties' failed attempt to settle a dispute which was pending before the Division of Administrative Hearings regarding Danny's parents' alleged entitlement to be compensated for the time they spent caring for their son. [A, pp. 2,3]

After settlement attempts failed, the Petitioners "initiated suit in circuit court seeking breach of contract damages for the failure of NICA to execute specific settlement documents." [A, p. 2,6] The Petitioners maintained that "NICA was compelled to enter into a structured settlement that deferred tax payment" which NICA refused to sign. [A, p. 6] NICA, however, maintained that it did not agree to sign such structured settlement documents as proposed by the Petitioners.

[A, pp. 4, 7] Both parties filed Motions for Summary Judgment and relied on the contents of the settlement correspondence and the deposition of Ms. Kenney Shipley, the Executive Director of NICA, as summary judgment evidence. [A, p.6] Ultimately, the trial court determined on the Petitioners' Motion for Summary Judgment, as a matter of law, that NICA had breached an agreement to settle this dispute. [A, p. 2] The trial court then conducted two non-jury trials to determine damages, and attorneys' fees and costs. [A, p. 2] The trial court entered a Final

Judgment against NICA which NICA timely appealed, including the Order granting the Petitioners' summary judgment as to NICA's liability. [A, p. 2]

On appeal, the Second District held the trial court granted summary judgment in error because there the record contained no evidence establishing as a matter of uncontested law that Ms. Shipley's agreement to consider suggestions to minimize tax consequences compelled her to execute any specific document. [A, p. 7] The Second District reversed the judgment on the issue of liability and accordingly reversed the Final Judgment including damages and attorneys' fees as well. The Petitioners' Motion for Rehearing was denied. [A, pp. 7-8]

### **JURISDICTIONAL STATEMENT**

Pursuant to Article V, Section 3(b)(3), of the Florida Constitution, this Court lacks discretionary jurisdiction to review the Second District's decision in this case.

### **SUMMARY OF THE ARGUMENT**

There is no basis for this Court to exercise its discretionary jurisdiction to review the Second District's decision. This case involves review of an improvidently granted summary judgment. In its decision, the Second District properly identified and applied the well-established rules governing the *de novo* appellate standard of review for such orders. There is no basis to find that the instant decision expressly and directly conflicts with any decisions by this Court or

another district court of appeal on the same question of law. In addition, because this case is fact-driven and party-specific, the instant decision does not have far-reaching implications as to warrant review by the Florida Supreme Court.

### **ARGUMENT**

#### **The Second District's Decision DOES NOT Expressly Conflict with Decisions of other District Courts and the Supreme Court on the Same Question of Law.**

The Second District's decision in this case does not expressly and directly conflict with any prior decisions of the Florida Supreme Court or any other district court of appeal on the same question of law. Pursuant to Article V, Section 3(b)(3) of the Florida Constitution, the Florida Supreme Court is authorized to “. . . review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another court of appeal or of the Supreme Court on the same question of law.” (Emphasis added.) There are three instances where discretionary jurisdiction may be invoked pursuant to Article V, Section 3(b)(3) of the Florida Constitution:

(1) the announcement of a rule of law that conflicts with a rule previously announced by [the Florida Supreme Court] or another district court;

(2) the application of a rule of law to produce a different result in a case which involves substantially similar controlling facts as a prior case disposed of by [the Florida Supreme Court] or another district court. See Wallace v. Dean, 3 So. 3d 1035, 1039 n.4 (Fla. 2009) (citing Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960));



or

(3) the misapplication of decisions from the Florida Supreme Court.  
Id. at 1040, n. 6.

The express and direct conflict must appear on the face of the decision at issue. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); J.C. v. State, 988 So. 2d 1202, 1203 (Fla. 3d DCA 2008).

The instant case involved the review of an improvidently granted summary judgment. In its decision, the Second District properly acknowledges and applies the *de novo* appellate standard of review to review the record and conclude that, as a matter of law, the parties did not reach an enforceable settlement agreement. [A, pp. 6-7] The Second District explained:

We review orders granting or denying motions for summary judgment *de novo*. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is appropriate only “if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.” *Id.* “The moving party carries the heavy burden of showing conclusively that the non-moving party cannot prevail.” *Shaw v. Tampa Elec. Co.*, 949 So 2d 1066, 1069 (Fla. 2d DCA 2007). “If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.” *Holland v. Verheul*, 583 So. 2d 788, 789 (Fla. 2d DCA 1991).

Here, simply stated, NICA never expressly agreed that it would execute any specific structured settlement. The Michaels needed to establish that, before they filed this lawsuit, Ms. Shipley nor NICA was obligated to enter into a specific structured settlement agreement because NICA had agreed to consider suggestions to minimize tax

consequences and the Michaels' proposed structured settlement was so straightforward that NICA's agreement to consider such suggestions compelled them to actually agree to the specific structured settlement . . . 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 suggestion compelled her to execute any specific document. Accordingly, the trial court erred in granting this summary judgment. [Emphasis added.]

See [A, p. 6-7] This decision does not meet any of the above-referenced instances in which this Court is authorized to invoke its discretionary jurisdiction.

**A. The Second District did not improperly reweigh the evidence and *De Novo* Fact Find.**

The Petitioners attempt to establish conflict jurisdiction by alleging that the instant decision conflicts with the general standard that an appellate court may not substitute its judgment for that of a trial court by reweighing the evidence. The Petitioners' argument, however, is fundamentally flawed in that it is based on the application of the wrong standard of review. As discussed above, this case involves a review of an order granting summary judgment for which it is well-established that the proper standard of review is *de novo*. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000); Muldrow v. Jones, -- So. 3d --, 35 Fla. L. Weekly D 729 (Fla. 1<sup>st</sup> DCA 2010). When reviewing an order *de novo*, a court must necessarily review all the summary judgment evidence as well as the issues of law presented to determine: (1) whether any

genuine issues of material fact exist to preclude summary judgment; and (2) whether the party is entitled to summary judgment as a matter of law. See Volusia County, 760 So. 2d at 130.

As acknowledged in the Second District's decision here, this case does not involve a situation where the trial court determined that NICA was liable for breach of contract after a full trial on the merits. [A, pp. 2, 6-7] Instead, the trial court determined NICA's liability on a motion for summary judgment. [A, pp. 2, 6-7] The subsequent non-jury trial involved only the issue of damages, attorneys' fees and costs. [A, p. 2] Not one of the ten (10) cases cited by the Petitioners involve review of an order granting or denying summary judgment.<sup>2</sup> Instead, the majority of the cited cases address instances where the trial court held an evidentiary hearing or trial and thus the standard of review applied on appeal was necessarily different than in this instant case.<sup>3</sup> As such, the cases cited by the

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<sup>2</sup> See, e.g., Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976) (addressing the proper standard for reviewing a final divorce decree after a trial court entered such decree based on hearing and weighing the evidence); Crain v. State, 894 So. 2d 59 (Fla. 2004) (addressing whether the trial court committed a fundamental error in its jury instructions as to felony murder and kidnapping and determining whether the evidence is sufficient to sustain the convictions); Hellman v. Seaboard Coastline Railroad Co., 349 So. 2d 1187 (Fla. 1977) (reversing an appellate court decision that found there was no competent evidence to support the jury verdict in favor of the plaintiff).

<sup>3</sup> In its decision, the Second District cites to three cases regarding *de novo* review of orders granting summary judgment. There is no other case law cited in the

Petitioners do not serve as a basis for invoking this Court's discretionary jurisdiction.

**B. The Second District's comments about "Bad Faith" are not a basis for conflict jurisdiction.**

The Petitioners also argue that the Second District engrafts a bad faith requirement into a breach of contract claim because it makes comments regarding the fact that there was no evidence that Ms. Shipley acted in bad faith in not signing the structured settlement documents proposed by the Petitioners. As stated earlier, to invoke the discretionary jurisdiction of this Court the alleged conflict must be express and direct, appearing within the four corners of the decision. Reaves, supra. The cases cited by the Petitioners merely set forth the three elements of a breach of contract claim.<sup>4</sup> There is no express and direct statement

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opinion. It is patently clear that the Second District applied the established standard of review for orders granting summary judgment. The Petitioners have gathered a mixture of inapplicable case law in an attempt to demonstrate some form of conflict, since there is no case cited in the opinion that provides a basis for a conflict.

<sup>4</sup> In addition, the Petitioners cite to Shuster v. South Broward Hospital District Physicians' Professional Liability Inc. Trust, 570 So. 2d 1362, 1368 (Fla. 4<sup>th</sup> DCA 1990) for the proposition that "bad faith is irrelevant to a breach of contract action." See Petitioners' Jurisdictional Brief, p. 7. That case is not applicable here as that case involved the specific issue of "whether an insured can maintain a common law action for bad faith against his insurer where the insurer has settled a cause of action against the insured within the policy limits of the insurance contract, exposing the insured to no excess liability." Id. at 1363. Further, the statement cited by the Petitioners in that case is with respect to a party exercising

in the instant decision which in any way attempts to modify the three elements of a breach of contract claim. Any implications the Petitioners believe arise from the statements made by the Second District Court regarding the fact that the evidence shows Ms. Shipley did not act in bad faith cannot support a finding of a conflict for purposes of invoking this Court's discretionary jurisdiction. See Dep't of Health and Rehab. Services v. National Adoption Counsel Service, Inc., 498 So. 2d 888 (Fla. 1986) ("... inherent or so called "implied" conflict may no longer serve as a basis for this Court's jurisdiction.").<sup>5</sup> As such, there is no conflict over which this Court may exercise its discretionary jurisdiction to review.

**C. The Second District's holdings regarding the failed settlement agreement do not create a conflict.**

The Petitioners further attempt to create a conflict by rearguing the merits of the main issue presented and thoroughly argued to the Second District with respect to whether the execution of the structured documents proposed by the Petitioners

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its clear right under a contract, not with respect to the determination as to whether there is a contract in the first instance.

<sup>5</sup> Further, the face of the decision evidences that the statements made by the Court regarding Ms. Shipley's conduct in not signing the proposed structured settlement documents addresses issues raised below by the Petitioners through their unrelenting criticism of Ms. Shipley's actions in not agreeing to sign the structured settlement documents they proposed. Being that this case is fact-intensive, without the benefit of the record, this Court is at a disadvantage to fully understand some of the comments made by the Second District in its decision. Regardless, the comments do not rise to the level of announcing a new element in a breach of contract action as suggested by the Petitioners.

was a material term of the alleged settlement agreement or a mere contingency that could be resolved later. This argument is improperly included in the Petitioners' Jurisdictional Brief pursuant to Rule 9.120(d), Florida Rules of Appellate Procedure, which provides that arguments presented in the Jurisdictional Brief shall be "limited solely to the issues of the Supreme Court's jurisdiction." Whether the Second District was correct in determining that the structured settlement documents were a material term to which there was no agreement goes to the merits of the case and not to any alleged conflict for jurisdictional purposes. For this Court to accept jurisdiction on this basis would require this Court to accept the Petitioners' view of the evidence and the case which this Court is not at liberty to do. See, e.g., Reaves, 485 So. 2d at 830; J.C. v. State, 988 So. 2d at 1203. The cases cited by the Petitioners are not applicable to the instant decision and the instant decision does not expressly or directly conflict therewith.

### **CONCLUSION**

For the forgoing reasons, Respondent respectfully requests that the Court deny the Petitioners' request for discretionary review of the Second District's decision.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail this 2nd day of August, 2010, to the following:

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### **CERTIFICATION OF FONT SIZE AND STYLE**

I HEREBY CERTIFY that this JURISDICTIONAL BRIEF has been typed using the 14 point Times New Roman font as required by Rules 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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