IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-98
Lower Tribunal Case No.: 3D10-3201

NELSON FRANCOIS, as Personal Representative
of the Estate of CAROLINE FRANCOIS,

Plaintiff/Petitioner,

vs.

UNIVERSITY OF MIAMI, a Florida Corporation,

Defendant/Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT, STATE OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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I. STATEMENT OF THE CASE AND FACTS

A medical malpractice and wrongful death action was brought on behalf of Plaintiff/Petitioner, Nelson Francois, as Personal Representative of the Estate of Caroline Francois, (hereinafter referred to as "Nelson Francois") against Angelica Martinez, R.N., a/k/a Angelica Luzarraga, R.N., (hereinafter referred to as "Nurse Martinez"), Medical Staffing Network Holdings, Inc., (hereinafter referred to as "Med Staffing") and University of Miami (hereinafter referred to as "University").

The decedent, Caroline Francois, was admitted to North Shore Medical Center to deliver her third child. However, after the delivery, Caroline Francois' blood pressure remained severely elevated and she was not properly treated under the nursing care of Nurse Martinez on July 26, 2006, during the time frame of 7:00 a.m. to 7:00 p.m. As a result of non-treatment, Caroline Francois suffered a bleed to her brain. Thereafter, even though Caroline Francois was not brain dead, an employee for University, disconnected Caroline Francois' respirator, causing her death.

Nelson Francois settled his claim against Nurse Martinez and her employer, Med Staffing. The Release and Settlement Agreement released only Nurse Martinez and Med Staffing and was only executed by Nelson Francois. University then filed a Motion for Summary Judgment Based on Release and Equitable

Subrogation related to the settlement with initial tortfeasor, Nurse Martinez. University argued that because it was a subsequent tortfeasor, the Release and Settlement Agreement barred Nelson Francois from bringing the action against University alleged in the Complaint since it had been equitably subrogated to Nurse Martinez. In response to and in opposition of the motion, Nelson Francois presented additional evidence including, but not limited to, an Addendum executed by Med Staffing and a Memorandum of Settlement. The trial court granted University's motion. In so ruling, it held that it did not consider the Addendum because it was not signed by Nurse Martinez and, as such, was not binding on her, but it never held that the addendum was parole evidence.

Thereafter, Nelson Francois filed a Motion for Rehearing and also submitted a second Addendum executed by Nurse Martinez, pursuant to Fla. R. Civ. P. 1.530 (a). Nelson Francois argued that an addendum is part of the original agreement and the parties that executed them are bound by their terms. The trial court agreed, granted said motion and vacated its Order granting Summary Judgment and Final Judgment. Specifically, the trial court held the Addendum to be part of the binding settlement agreement and that University could not suffer double liability.

Based on the trial court's decision, University filed an appeal to the Third

District Court of Appeal to review the trial court's Order Granting Motion for Rehearing. In an opinion dated December 21, 2011, the Third District Court of Appeal reversed, concluding that the trial court should not have considered the Addenda because they were parol evidence, and since they were not executed contemporaneously with the Release and Settlement Agreement, they were not part of the original agreement. The Court then remanded the case with directions to reinstate the order granting motion for summary judgment and final judgment in favor of University. (A conformed copy of decision is annexed hereto as Appendix "A".)

II. SUMMARY OF THE ARGUMENT

The Third District's decision irreconcilably conflicts with well established law that states that the parol evidence rule only applies to "verbal agreements between the parties to a written contract which are made before or at the time of execution of the contract", and does not apply to subsequent written agreements such as the Addenda in the instant case. *Pavolini v. Williams,* 915 So.2d 251 (Fla 5th DCA 2005); *J. Lynn Const., Inc. v. Fairways at Boca Golf & Tennis Condominium Ass'n*, *Inc.,* 962 So.2d 928 (Fla.4th DCA 2007); *Wilson v. McClenny*, 32 Fla. 363, 13 So. 873 (1893).

The Third District's decision also conflicts with well-settled law that a

subsequent addendum can be part of the original agreement. *J. Allen, Inc. v. Castle Floor Covering, Inc.*, 543 So.2d 249 (Fla 2nd DCA 1989); *St. Joe Corporation v. McIver*, 875 So.2d 375 (Fla. 2004) and *Cohen & Cohen, P.A., COBIS v. Gerson, Preston, Robinson & Company, P.A.*, 24 So.3d 805. (Fla 4th DCA 2010).

Finally, the Third District's holding conflicts with well-settled law stating that a genuine issue of material fact exists when Plaintiff presents a subsequent document signed by the initial tortfeasor, which assigns the claims against a subsequent tortfeasor to the Plaintiff, which was done in the instant case. *Schatz v. Haslup,* 6 So.3d 679 (Fla 2d DCA 2009); *Smith v. Harr*, 571 So.2d 575 (Fla. 5th DCA 1990).

As such, under both *Art. V, § 3(b)(3), Fla. Const.* and *Fla.R.App.P.* 9.030 (a)(2)(A)(iv), this Court should grant review, and quash the decision below.

III. JURISDICTIONAL STATEMENT

Under both *Art. V, § 3(b)(3), Fla. Const.* and *Fla.R.App.P.* 9.030 (a)(2)(A)(iv), this Court has jurisdiction to review the decision of the Third District Court of Appeal in *University of Miami v. Nelson Francois,* --- So.3d ----, 2011 WL 6373020 (Fla.App. 3 Dist.), 36 Fla. L. Weekly D2766, since it directly and expressly conflicts with a decision of another district or this Court on the same

question of law on three issues.

Since the Third District Court's decision is contrary to decisions of this Court and other District Courts, it could potentially lead to a serious disruption of law and disparate resolutions of these issues in future cases. As such, Petitioner hereby invokes this Court's jurisdiction pursuant to *Art. V, § 3(b)(3), Fla. Const.* and *Fla.R.App.P.* 9.030 (a)(2)(A)(iv), and requests this Honorable Court to exercise its discretionary jurisdiction to resolve the express conflicts that the Third District decision has created.

IV. ARGUMENT

A. THE DECISION OF THE THIRD DISTRICT HOLDING THAT THE ADDENDA ARE PAROL EVIDENCE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICTS

In the instant case, the Third District Court held that the Addenda to the Release and Settlement Agreement were parol evidence, stating in pertinent part: "We find that the trial court erred in considering this additional evidence, as it was parol evidence." (App. p. 10). In making this finding, the district court had incorrectly determined that in originally granting the summary judgment, the trial court had held that the first Addendum was parol evidence. (App. p. 4)

It is undisputed that the Addenda in the instant case were both written and

executed subsequent to the original agreement. (App. p. 10) As such, this holding irreconcilably conflicts with this Court's decision in *Wilson v. McClenny*, 32 Fla. 363, 13 So. 873 (1893), as well as decisions of other district courts. *Pavolini v. Williams,* 915 So.2d 251 (Fla 5th DCA 2005); *and J. Lynn Const., Inc. v. Fairways at Boca Golf & Tennis Condominium Ass'n*, *Inc.* 962 So.2d 928 (Fla.4th DCA 2007). In *J. Lynn Const., Inc.,* the Fourth District held that "[t]he parol evidence rule applies to verbal agreements between the parties to a written contract which are made before or at the time of execution of the contract. *Id.* As such, this Court should exercise its jurisdiction to resolve this conflict.

B. THE DECISION OF THE THIRD DISTRICT WHICH HELD THAT BECAUSE THE ADDENDA WAS NOT EXECUTED CONTEMPORANEOUSLY WITH THE ORIGINAL AGREEMENT IT WAS NOT PART THEREOF, EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICTS

In addition, an issue was raised by the Third District Court for the first time in these proceedings when it held that because the Addenda were executed subsequent to the original agreement, they were parol evidence and not part of said agreement. The Court stated in pertinent part: "These documents were not executed contemporaneously with the Release and Settlement Agreement and cannot be said to be part and parcel of that Agreement." (App. p. 10)

This holding irreconcilably conflicts with basic principles of contract law which are recognized by other district courts. Specifically, the law is clear that parties can modify a contract with a subsequent agreement. *St. Joe Corporation v. McIver*, 875 So.2d 375 (Fla. 2004). Subsequent addenda merges into the original agreement. *J. Allen, Inc. v. Castle Floor Covering, Inc*., 543 So.2d 249 (Fla 2nd DCA 1989). See also *Cohen & Cohen, P.A., COBIS v. Gerson, Preston, Robinson & Company, P.A.*, 24 So.3d 805 (Fla 4th DCA 2010), (agreement later amended by addendum). Based upon the foregoing, the subsequent addenda in the instant case is part of the original agreement, and the parties that executed said addenda are bound by its terms. As such, this Court should exercise its jurisdiction to resolve this conflict.

C. THE DECISION OF THE THIRD DISTRICT TO REINSTATE THE ORDER GRANTING SUMMARY JUDGMENT EXPRESSLY CONFLICTS WITH OTHER DISTRICTS' DECISIONS

Finally, the Third District's decision, which directs the trial court to reinstate the order granting summary judgment and final summary judgment, directly and expressly conflicts with *Schatz v. Haslup,* 6 So.3d 679 (Fla 2d DCA 2009); and *Smith v. Harr*, 571 So.2d 575 (Fla. 5th DCA 1990). In so ruling, the Court overlooked the rationale behind the initial/subsequent tortfeasor law it quoted from

Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980). (App. p. 7)

In the instant case, under an almost identical set of facts as both *Schatz* and *Smith,* Nelson Francois filed a Second Addendum in opposition to University's motion for summary judgment, which clearly assigned all rights against University to Nelson Francois and was signed by the initial tortfeasor, Nurse Martinez. This document established a genuine issue of material fact, precluding summary judgment in favor of University based upon release and equitable subrogation. Since the parties to the agreements resolved the issue of who owned the right against University, a reformation action was not necessary. *Schatz v. Haslup,* 6 So.3d 679 (Fla 2d DCA 2009). As such, this Court should exercise its jurisdiction to resolve this conflict.

V. CONCLUSION

Based upon the foregoing arguments and citations of authority, Petitioner asserts there is ample cause for this Court to accept jurisdiction for consideration on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Jurisdictional Brief was mailed this 26th day of January, 2012, to MARC J. SCHLEIER, ESQUIRE,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.100(l) Fla.R.App.P., the undersigned certifies that this Answer Brief complies with the font requirements and is typed in Times New Roman 14-point font.

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