IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-98
DISTRICT CASE NO.: 3D10-3201
L.T. CASE NO. 07-3515

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

Petitioner,

vs.

UNIVERSITY OF MIAMI,

Respondent,

ON DISCRETIONARY REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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RESPONSE STATEMENT OF THE CASE AND FACTS

Nelson Francois ("Francois"), as Personal Representative of the Estate of Caroline Francois, seeks discretionary review of the Third District Court of Appeal's decision ("Opinion") that reversed the trial court's order granting rehearing and remanded with instructions to reinstate the order granting motion for summary judgment and final summary judgment that had been previously entered in favor of the University of Miami. In the order granting motion for summary judgment and final summary judgment, the trial court had determined that Francois was barred from pursuing a claim against the University of Miami, an alleged subsequent tortfeasor, because the release and settlement agreement entered into between Francois and an initial tortfeasor did not reserve a cause of action against the University of Miami or any other subsequent tortfeasors.

The facts that are pertinent to this Court's jurisdictional inquiry are as set forth in the Opinion:

> On July 24, 2006, twenty-six-year-old Caroline Francois was admitted to North Shore Medical Center ("North Shore") to give birth to her third child. Caroline Francois' blood pressure was severely elevated after she delivered a healthy baby. On July 26, 2006, from 7:00 a.m. to 7:00 p.m., Mrs. Francois was under the care of Angelica Martinez, R.N. ("Nurse Martinez"), an employee of Medical Staffing Network Holdings, Inc. ("Medical Staffing"), which provided nursing staff services to North Shore. Nurse Martinez failed to treat Mrs. Francois' spiking blood pressure and, as a result, Mrs. Francois suffered a brain bleed, requiring her to be placed on life support.

> Shortly thereafter, Robert Kerns, a coordinator of the University of Miami's Life Alliance Organ Recovery Program ("the University of Miami"), entered Mrs. Francois' hospital room without her husband's consent; wrote a physician's order pronouncing Mrs. Francois brain dead (despite the fact that Kerns is not a physician); ordered the removal of Mrs. Francois from life support without her husband's consent and while she continued to exhibit spontaneous respiration.[1] She died on July 27, 2006.
>
> In July of 2008, Nelson Francois ("Francois"), Mrs. Francois' husband, filed a wrongful death action against Nurse Martinez, Medical Staffing, and the University of Miami (vicariously for the actions of Kerns). On January 5, 2010, after entering into a settlement with Nurse Martinez and Medical Staffing, Francois executed a Release and Settlement Agreement. In relevant part, that Agreement released Nurse Martinez and Medical Staffing from
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> > any and all claims, including bad faith claims, appellate claims, demands, damages, actions, causes of action, suits at law or in equity, or sum of money arising from any act or occurrence, or on account of any and all personal injury, death, disability, property damage, loss or damage of any kind whatsoever, known or unknown, already sustained or which may be hereafter sustained or allegedly sustained in consequence of any incidents, casualties, events, acts or omissions to act, from the beginning of time down to the date hereof, arising out of or resulting from the incidents occurring at the North Shore Medical Center, while Caroline Francois was

[1] Although the Third District recited the allegations made by Francois in his claim against the University of Miami as facts, they were never adjudicated or admitted below.

> under the care of the Defendants, Medical Staffing Network Holdings, Inc. . . and [Nurse Martinez] which is the subject matter of the action brought by Nelson Francois . . . .

Based upon the terms of the Release and Settlement Agreement, the University of Miami, on March 16, 2010, filed a motion for summary judgment, based on principles of release and equitable subrogation. The University of Miami argued that Nurse Martinez was the initial tortfeasor, and as such was liable for all subsequent negligent acts, including those of the University of Miami. The University of Miami contended that Francois' action against it was barred because the settlement agreement did not clearly reserve a cause of action against the University of Miami and therefore Francois' rights were equitably subrogated to Nurse Martinez as a result of the Release and Settlement Agreement.

Francois responded to the University of Miami's motion for summary judgment by asserting that he had reserved a cause of action against the University of Miami when he settled his claims with Nurse Martinez and Medical Staffing as evidenced by two additional documents: (1) a mediation "memorandum of settlement" entered into at a mediation in December 2009, which led up to the settlement between Francois, Nurse Martinez and Medical Staffing; and (2) an "Addendum" to the Release and Settlement Agreement.

On August 2, 2010, following a hearing, the trial court entered an order granting the University of Miami's summary judgment, finding, inter alia, that Francois failed to reserve a cause of action against the University of Miami, and that the documents provided by Francois in opposition to the motion were parol evidence and could not be considered. The trial court also determined that if there was a mutual mistake between the parties to the Release and Settlement Agreement, Francois' remedy was a reformation action. Final judgment was entered on September 7, 2010.

> Francois filed a motion for rehearing, arguing that the Addendum was a legally binding component of the original agreement, rather than parol evidence. Francois also presented a Second Addendum, containing the same language as the first, but this time signed by Nurse Martinez. Following a hearing, the trial court granted Francois' motion for rehearing and vacated both its final judgment and its order granting summary judgment.

Opinion at pp. 1-6 (footnote added).

On appeal, the Third District held that, because the terms of Francois' release and settlement agreement with Nurse Martinez were clear and unambiguous, the trial court erred in considering additional evidence of the parties' intent. *See id. at pp. 11-12.* While the document submitted in support of Francois' motion for rehearing was labeled an "Addendum," the Third District concluded that the document was parol evidence and not a part of the original release and settlement. *See id. at p. 12.* The Third District noted that, not only was the document not executed contemporaneously with the release and settlement agreement (the document was executed nearly eight months after the release and settlement agreement and after the trial court had already heard and granted the motion for summary judgment) and thus not part and parcel of the agreement, the document created an ambiguity which would not otherwise exist in the release and settlement agreement. *See id. at pp. 12-13.* Thus, the Third District held that the trial court erred in granting rehearing and in considering the Addendum in an attempt to discern an intent which was already clearly expressed by the terms of the release and settlement agreement. *See id. at p. 14.*

Francois elected not to move for rehearing, clarification, certification, or rehearing en banc in the Third District with respect to the decision at issue.

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the Third District's decision and any decisions of this Court or another district court to justify this Court's exercise of discretionary conflict jurisdiction under Art. V, § 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court should deny review because the Opinion does not announce a rule of law that expressly and directly conflicts with a decision of this Court or another district court, or otherwise apply a rule of law to produce a different result in a case that involved substantially similar controlling facts as a prior case disposed of by this Court or another district court. The Third District correctly applied this Court's precedent in *Sheen v. Lyon*, 485 So. 2d 422 (Fla. 1986) to the particular facts of this case and determined that the intent of the parties was to be determined from the four corners of the release and settlement agreement between Francois and Nurse Martinez, not through the consideration of extrinsic evidence. Given the absence of any express and direct conflict between the Opinion and any decision of this Court or any other district court on the same question of law, this Court should deny review.

ARGUMENT

Article V, § 3(b)(3) provides that this Court may review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another

district court of appeal or of the supreme court on the same question of law." The jurisdiction of this Court may be invoked to review district court decisions based upon express and direct conflict in two circumstances: (1) the announcement of a rule of law that expressly and directly conflicts with a rule previously announced by this Court or another district court; or (2) the application of a rule of law to produce a different result in a case that involves substantially similar controlling facts as a prior case disposed of by this Court or another district court. *See Wallace v. Dean*, 3 So. 3d 1035, 1039 n. 4 (Fla. 2009); *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960). There is simply no express and direct conflict between the Third District's decision and any decisions of this Court or another district court to justify this Court's exercise of discretionary conflict jurisdiction.

A. THE DECISION OF THE THIRD DISTRICT HOLDING THAT THE ADDENDA WERE PAROL EVIDENCE DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICTS

Contrary to Francois' contention, the Third District's determination that the Addenda constituted parol evidence does not "irreconcilably conflict" with this Court's decision in *Wilson v. McClenny*, 32 Fla. 363, 13 So. 873 (1893), the Fifth District Court of Appeal's decision in *Pavolini v. Williams*, 915 So. 2d 251 (Fla. 5th DCA 2005), and the Fourth District Court of Appeal's decision in *J. Lynn Const., Inc. v. Fairways at Boca Golf & Tennis Condo. Ass'n, Inc.*, 962 So. 2d 928 (Fla. 4th DCA 2007). Although the foregoing decisions held that the 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 (and does not apply to the admission of subsequent oral agreements that alter, modify, or change the former existing agreement between the parties), they did ***not*** expressly hold (or even suggest) that written documents cannot constitute parol evidence. To the extent that the Third District's determination that the Addenda constituted parol evidence could be interpreted as an announcement of a rule of law that a written document may be considered parol evidence, it does not expressly and directly conflict with any decision of this Court or any other district. To the contrary, the Third District's decision is consistent with the Fifth District's decision in *Garcia v. Tarmac Am., Inc.*, 880 So. 2d 807 (Fla. 5th DCA 2004) and the Fourth District's decision in *V & M Erectors, Inc. v. The Middlesex Corp.*, 867 So. 2d 1252 (Fla. 4th DCA 2004) (both of which were cited in the Opinion), wherein the courts rejected written affidavits which attempted to demonstrate the intent of the parties, finding them to be parol evidence.

Moreover, the Third District's decision did not address the rule announced in *Wilson, Pavolini*, and *J. Lynn* – that a written contract may be modified by a subsequent oral agreement – let alone announce a rule in express and direct conflict with such rule. Rather, the Third District only addressed the question of whether it was proper for the trial court to consider evidence beyond the four corners of the release and settlement agreement in determining the intent of the settling parties to

reserve a cause of action against the University of Miami.[2] *See Opinion at p. 8.* The Third District correctly applied the rule of law announced by this Court in *Sheen v. Lyon*, 485 So. 2d 422 (Fla. 1986) (and subsequently followed in *Garcia* and *V & M*) that, where, as here, the language of a release is clear and unambiguous, a court ***cannot*** entertain extrinsic evidence to determine the intent of the parties.

Accordingly, the Third District's decision does not expressly and directly conflict with any decisions of this Court or another district court on this issue.

B. THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICTS REGARDING THE MODIFICATION OF CONTRACTS OR THE EFFECT OF ADDENDA ON A CONTRACT

The Opinion did not announce ***any*** rule of law as to whether parties may modify a contract's terms with a subsequent agreement, let alone announce a rule of law in express and direct conflict with this Court's decision in *St. Joe Corp. v. McIver*, 875 So. 2d 375 (Fla. 2004). Moreover, the Opinion and this Court's decision in *St. Joe* clearly do not have substantially similar controlling facts. In *St. Joe*, this Court held that genuine issues of material fact remained as to whether parties to a brokerage contract had orally modified the contract. This case involves neither brokerage contracts nor an oral modification of a contract; rather, it involves a document

[2] Notably, none of the cases cited by Francois involved the interpretation of a release.

executed months after a release attempting to explain the intent of the parties thereto. Thus, the Opinion does not expressly and directly conflict with *St. Joe*.

The Opinion also did not announce any rule of law in express and direct conflict with the rule announced by the Second District Court of Appeal in *J. Allen, Inc. v. Castle Floor Covering, Inc.*, 543 So. 2d 249 (Fla. 2d DCA 1989)[3] that subsequent addenda merge into the original agreement. Such a rule would have required the Third District to have determined that the document submitted by Francois in support of his motion for rehearing was an addendum in the first place, which it did not. Given that neither *J. Allen* nor any other decision sets forth any rule as to the factors that a court may consider in determining whether a document may properly be deemed to be an addendum and there are no cases with substantially similar controlling facts, the Third District's decision was not in express and direct conflict with *J. Allen* or any other decision of this Court or another district court.

C. THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF OTHER DISTRICTS REGARDING ASSIGNMENT OF RIGHTS

Finally, the Opinion did not announce ***any*** rule of law as to the assignment of rights to a cause of action by an initial tortfeasor to a plaintiff, let alone announce a

[3] Francois also cites the Fourth District Court of Appeal's decision in *Cohen & Cohen, P.A. v. Gerson, Preston, Robinson & Co.*, 24 So. 3d 805 (Fla. 4th DCA 2010), but that decision merely notes that a retainer agreement was amended by addendum and announces no rule of law regarding addenda.

rule of law in express and direct conflict with the Second District Court of Appeal's decision in *Schatz v. Haslup*, 6 So. 3d 679 (Fla. 2d DCA 2009) and the Fifth District Court of Appeal's decision in *Smith v. Harr*, 571 So. 2d 575 (Fla. 5th DCA 1990). Both *Schatz* and *Smith* held that summary judgment was improperly entered in favor of a subsequent tortfeasor because the plaintiff had demonstrated that the initial tortfeasor had reassigned any rights back to the plaintiff that had been inadvertently acquired as a result of a release. Nothing in the Opinion indicates that any rights were assigned or reassigned back to Francois in the "Addendum." If Francois believed that the document "clearly assigned all rights against the University" back to Francois and that the Opinion overlooked or misapprehended this fact, he should have filed a motion for rehearing in the Third District. He cannot now argue that the Opinion is in express and direct conflict with *Schatz* and *Smith* when nothing therein suggests that any assignment of rights ever occurred. In any event, the record below established that the "Addendum" only stated the purported intent of the parties and did not specifically reassign any rights back to Francois.

CONCLUSION

For the foregoing reasons, this Court should decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of February, 2012 to Loreen I. Kreizinger, Esq., *Counsel for Petitioner*, Northern Trust Centre, Ste 300, 2601 E Oakland Park Blvd, Ft. Lauderdale, FL 33306.

Marc J. Schleier

CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that the typeface of this brief is 14 point Times New Roman and complies with the font standards prescribed by Fla. R. App. P. 9.210.

Marc J. Schleier

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