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IN THE SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING

UNICARE HEALTH FACILITIES, INC.,
d/b/a ARLINGTON MANOR CARE CENTER,

Petitioner,

Case No.: 73,638

vs.

EMMA M. MORT,

Respondent.
_____/

PETITIONER'S BRIEF

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STATEMENT OF THE FACTS AND OF THE CASE

Plaintiff, Emma M. Mort', alleging she was injured on or about July 7, 1984, while a resident at the nursing home operated by the defendant, Unicare Health Facilities, Inc., d/b/a Arlington Manor Care Center, filed a Complaint against the defendant for damages. (R:1-9). Following several Motions to Dismiss and Strike, the case was at issue upon the Plaintiff's Amended Third Amended Complaint consisting of three separate counts against the defendant. (R:42-46). Count I of the Amended Third Amended Complaint sought compensatory damages based on res ipsa loquitor, Count II sought compensatory and punitive damages based upon the negligence of the nursing home staff and Count III sought compensatory damages, punitive damages and attorney's fees based upon the defendant's violation of Chapter 400.022 and 400.023, Florida Statutes. (R:42-46).

On January 29, 1988, the defendant, following various settlement discussions among the parties, filed an Offer of Judgment pursuant to Rule 1.442, Florida Statutes in the amount of

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1 The death of Emma M. Mort, unrelated to the injuries complained of in Plaintiff's Amended Third Amended Complaint, resulted in the substitution of Larry Hoak, as Personal Representative of the Estate of Emma M. Mort. Insofar as the style of this case was never changed to reflect such substitution, throughout the Answer Brief, plaintiff is referred to as Emma M. Mort *as* opposed to her personal representative.

$40,000.00 plus costs accrued to date. (R:76). On February 4, 1988, plaintiff filed a Notice of Acceptance of Offer of Judgment (R:75). On February 9, 1988, plaintiff, despite the clear language of the offer and acceptance, filed a Motion for Assessment and Award of Attorney's Fees (R:77).

On April 7, 1988, a hearing was held before the Honorable Ellis T. Fernandez, Jr. on plaintiff's Motion for Assessment and Award of Attorney's Fee. At that hearing, and pursuant to the evidence presented, a Final Judgment was entered for plaintiff in the amount of $40,000.00 plus costs of $1,400.00. (R:87). Also at that hearing, and upon the evidence presented, Judge Fernandez denied plaintiff's Motion for Assessment and Award of Attorney's Fees as plaintiff had failed to carry her burden of proof with regard to having prevailed specifically as to Count III of the Amended Third Amended Complaint. (R:88).

On May 3, 1988, plaintiff filed her Notice of Appeal as to the Order of Judge Fernandez denying her an attorney's fee. (R:89). On January 20, 1989, the First District Court of Appeal filed its opinion reversing the trial court and remanding the case to the trial court for award of attorney's fees. (A:1-5). In its order, the First District certified its opinion as in conflict with Ahmed v. Lane Pontiac-Buick, Inc., 527 So.2d 930 (Fla. 5th DCA 1988). On January 27, 1989, defendant, filed its

Notice To Invoke Discretionary Jurisdiction based upon the direct conflict certified by the First District Court of Appeal with the Ahmed decision rendered by the Fifth District Court of Appeal.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal is of the opinion that where one of the plaintiff's claims is based upon a statute which also provides for recovery of attorney's fees by the prevailing party, the plaintiff's acceptance of an offer of judgment which is silent as to attorney's fees, does not foreclose recovery of such fees. However, where an attorney's fee is based upon a contract, the First District Court is of the opinion that acceptance of an offer of judgment, again silent as to attorney's fees, does foreclose recovery of such fee.

The Fifth District Court of Appeal in Ahmed v. Lane Pontiac-Buick, Inc., 527 So.2d 930 (Fla. 5th DCA 1988), has stated that an offer of judgment is a contract of settlement between the parties which concludes all claims unless the language in the contract specifies otherwise. Therefore, whether an attorney's fee is based upon statute of contract, if plaintiff has accepted an offer of judgment which is silent as to attorney's fees, plaintiff has in fact entered into a contract settling the case and is bound by the terms of the contract which she freely entered into.

This rule of law with regard to offers of judgment pursuant to Rule 1.442, Florida Rules of Civil Procedure, as adopted by the Fifth District Court of Appeal, binds parties to their own contracts and frees and prevents the courts of this

state from having to engage in construction and interpretation of unambiguous contracts for the sole purpose of rendering a presumption as to a prevailing party for purposes of assessment of attorney's fees. The danger of making such presumptions is clear and apparent under the facts of the instant case as plaintiff could not have recovered judgment on all three counts of her Amended Third Amended Complaint as Counts I and II were basically plead in the alternative. Despite this, the clear language of the Offer of Judgment (R:76) and acceptance of such (R:75), as well as the Final Judgment entered by the trial court below (R:87, the First District Court of Appeal presumed plaintiff to be a prevailing party so as to avoid the terms of her contract of settlement.

The better rule of law therefore is as expressed by the Fifth District Court of Appeal in Ahmed that offers of judgment are in fact contracts of settlement binding on the parties as written, bargained for, agreed to and accepted.

ARGUMENT

1SSUE

WHETHER AN OFFER OF JUDGMENT PURSUANT TO RULE 1.442, FLA. R. CIV. P., ONCE ACCEPTED, IS IN EFFECT AND IN FACT CONTRACT OF SETTLEMENT BETWEEN THE PARTIES TO BE GOVERNED SOLELY BY THE LANGUAGE EMPLOYED BY THE PARTIES AND NOT THEREAFTER SUBJECT TO CONSTRUCTION OK INTERPRETATION WHERE OTHERWISE CLEAR AND UNAMBIGUOUS?

The First DCA has itself certified that its opinion in the instant appeal dated January 20, 1989, (A:1-5) is in direct conflict with the opinion of the Fifth District Court in Ahmed v. Lane Pontiac-Buick, Inc., 527 So.2d 930 (Fla. 5th DCA 1988).

The defendant agrees that such conflict is present and that the opinion of the Fifth District Court of Appeal as expressed in Ahmed, and the factual situation of that case being virtually identical to the factual situation of the instant appeal, is the proper rule of law as regards offers of judgment pursuant to Rule 1.442, Florida Rules of Civil Procedure, at least with regard to cases involving multicount complaints.

The Fifth District Court of Appeal in Ahmed stated that a Rule 1.442 offer of judgment is in fact a contract of settlement between the parties "which by definition concludes all claims unless the contract of settlement specifies otherwise. No legislation or procedural rule can impair such a contract. U.S.

Const., art. I, §10." Ahmed, supra at 931. Thus, whether the case involves attorney's fees pursuant to statute or attorney's fees pursuant to a contract, an offer to settle the action pursuant to a Rule 1.442 offer of judgment which is silent as to attorney's fees, becomes a contract of settlement which when accepted by plaintiff is binding on both plaintiff and defendant pursuant to the clear language of such offer. The court may not thereafter read payment of attorney's fees into an otherwise clearly worded contract.

The Fourth District Court of Appeal in BMW of North America, Inc. v. Krathen, 471 So.2d 585 (Fla. 4th DCA 1985), stated that the trial court in that case acted properly in refusing to look at the pleadings to interpret an offer of judgment which unambiguously stated that "$20,500.00 is offered 'to allow the plaintiffs...to take judgment against them' ". Id. at 587. No conditions precedent would be read into the offer nor should the court read attorney's fees into an offer that did not otherwise include attorney's fees and which the acceptance of such offer also failed to mention. The Krathen court went on to state that:

> "A judgment entered pursuant to Rule 1.442, Fla. R. Civ. P., may properly be analogized to a consent judgment, which is in the nature of a contract. As such, the construction of a Rule 1.442 judgment should be governed solely by the language employed by the parties if it is without ambiguity." See Lyng v. Bugbee Distributing Co., 133 Fla. 419, 182 So. 801 (1938); Royal American Realty, Inc. v. Bank of Palm Beach & Trust Co., 215 So.2d

> 336 (Fla. 4th DCA 1968); Azalia Park Utilities, Inc. v. Knox-Florida Development Corp., 127 So.2d 121 (Fla. 2d DCA 1961). When contractual language is clear and unambiguous, courts cannot indulge in construction or interpretation of its plain meaning. Hurt v. Leatherby Insurance Company, 380 So.2d 432 (Fla. 1980), Frank Maio General Contractor, Inc. v. Consolidated Electric Supply, Inc., 452 So.2d 1092 (Fla. 4th DCA 1984). Further, where a contract is silent as to a particular matter, courts should not, under the guise of construction, impose on parties' contractual rights and duties which they themselves omitted. See Southern Crane Rentals, Inc. v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983).

The First District Court has itself cited Krathen as regards the legal effect of an offer of judgment. In McIntyre v. Lindsey, 488 So.2d 888 (Fla. 1st DCA 1986), the First District Court of Appeal stated that the trial court improperly denied attorney's fees which were expressly included in an offer of judgment. As the First District Court concluded in McIntyre, "in the present case the language in the offer was controlling and the court did not have the discretion to override it". Id. at 888.

Therefore, as the Fourth District Court of Appeal, Fifth District Court of Appeal and even the First District Court of Appeal have stated, an offer of judgment, once accepted, is in effect and in fact a contract of settlement between the parties. The language of the offer is controlling and the court does not have the discretion to override it. As such, the construction of

a Rule 1.442 judgment should be governed solely by the language employed by the parties if it is without ambiguity as was the case in the instant appeal.

In the trial court below, the offer of judgment (R:76) was silent as to payment of attorney's fees. The plaintiff had no reason to believe fees would be paid and in her acceptance of such offer (R:75) she did not refer to payment of attorney's fees. In fact, had plaintiff's acceptance in any way altered the clear terms of the offer of judgment, it is hornbook law that such would not have been an acceptance, but would in fact have been a counter-offer. Plaintiff's acceptance however was of the offer of judgment as written which did not include an attorney's fee.

As regards the defendant's $40,000.00 offer of judgment, the court in Ahmed stated in its final few sentences, with regard to any settlement offer made pursuant to Rule 1.442, that the purpose is:

> "to terminate the case and all the claims they entail, for the specific sum of ($40,000.00 plus accrued costs) against... defendant. Not for ($40,000.00) now and some unspecified amount of attorney's fees at a later date." Id. at 931.

In reversing the trial court's decision below which denied plaintiff's Motion for Assessment and Award of Attorney's Fees, the First District Court in direct conflict with Ahmed, relied upon Wisconsin Life Insurance Company v. Sills, 368 So.2d 920 (Fla. 1st DCA 1979), Godbey v. Walsh, 530 So.2d 343 (Fla. 1st

DCA 1988) and Encompass, Inc. v. Alford, 444 So.2d 1085 (Fla. 1st DCA 1984). Unlike the multicount complaint involved in the instant appeal, Wisconsin Life arose out of a one count complaint by an insured against the insuror with statutory attorney's fees being awarded pursuant to Chapter 628.428, Florida Statutes. Likewise, Godbey, arose out of a one count medical malpractice complaint with statutory attorney's fees being awarded pursuant to Chapter 768.56, Florida Statutes. In its Order of January 20, 1989, (A:1-5) the First District Court stated that the trial court's denial of attorney's fees to plaintiff "defeated the purpose and intent of Rule 1.442 as interpreted by this court in Wisconsin Life Ins. Co. v. Sills and Godbey v. Walsh" to the effect that:

> "Rule 1.442 is to encourage defendants to acquiesce in claims discovered during litigation to be meritorious...". Wisconsin Life, supra, at 922.
>
> "Appellee prevailed on her claims when the final judgment ratified her acceptance of the offer." Godbey, supra at 344.

The statements by the First District Court in Wisconsin Life and Godbey as *to* the purpose and effect of an offer of judgment pursuant to Rule 1.442 are contrary to the purpose and effect as expressed by the Fifth District in Ahmed.

> "When Ahmed's claims against Lane and Allstate were settled, there was no prevailing party. That is the purpose of a settlement - to prevent the adverse party from prevailing. The obvious purpose of the settlement offers was just that: to terminate the cases and

> all the claims they entailed, for the specified sums of $1,001.00 (with accrued costs) against each defendant. Not for $1,001.00 now and some unspecified amount of attorney fees at a later date." Ahmed, supra at 931.

Other Florida cases discussing the purpose and effect of Rule 1.442 differ with the First District's opinion as to purpose and effect but are in line with the purpose and effect as expressed by the Fifth District in Ahmed.

> "The purpose of the rule 1.442 is to encourage settlements and eliminate trials wherever possible." Giglio v. Weaner, 503 So.2d 1380, 1381-82 (Fla. 2d DCA 1987) and Santiesteban v. McGrath, 320 So.2d 476 (Fla. 3d DCA 1975).

Rule 68 of the Federal Rules of Civil Procedure is identical to Rule 1.442, Fla. R. Civ. P. Cases dealing with Rule 68 have, like Ahmed stated that "the very purpose of Rule 68 is to encourage such settlements", Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (D.C. N.Y. 1974), and that "the purpose of Rule 68 is 'to encourage settlements and to avoid protracted litigation'. 7 Moore's Fed. Pract. ¶68.02." Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218, 219 (N.D. Ohio 1969).

The First District Court, in reversing the decision of the trial court, also relied on Encompass, which unlike Wisconsin and Godbey, and in fact, unlike any Florida appellate decision other than the instant appeal and Ahmed, actually involved a multicount complaint in which only one of the various counts provided for recovery of attorney's fees pursuant to statute. In

Encompass, the First District Court proceeded to state that in multicount complaints, despite the otherwise clear language, unless the offer and acceptance indicate an attorney's fee was to be included in the offer of judgment, acceptance of the offer will not preclude the plaintiff from seeking a statutory fee. Id. at 1086-87. According to Encompass, and in direct conflict with Ahmed, the issue in a multicount complaint is whether a plaintiff was the prevailing party on that particular count of the complaint which provided a statutory attorney's fee. In Encompass, however, the court stated that:

> "[I]n the case at bar there was no trial and no ruling upon the validity of appellant's mechanic's lien theory. Appellant asked us to presume that it prevailed on its mechanic's lien theory. Appellant asked too much. Its complaint clearly sought money damages for breach of contract as an alternative to its lien foreclosure claim. The Alford's offer under Rule 1.442 was for Encompass to take judgment against it for a sum certain. The offer was accepted as tendered." Id. at 1087.

The trial court in the instant case denied plaintiff's motion for assessment of attorney's fees for two specific reasons. First, the trial court denied fees based on its review of the First District Court opinion in the Encompass and second, denied fees because "the record does not establish that plaintiff was a prevailing party in an action brought pursuant to Chapter 400.. ." (R:88).

Plaintiff had no right to attorney's fees in the action before the trial court. As Chapter **400.023** states, any plaintiff who prevails in an action under Chapter 400, F.S. may be entitled to recover attorney's fees. Thus, as the First District Court stated in Encompass, while acceptance of an offer of judgment silent as to attorney's fees does not preclude plaintiff from seeking attorney's fees to which she may be entitled pursuant to statute, this alone does not entitle plaintiff to recover an attorney's fee. Encompass, supra, at 1086-87. In fact, whether or not plaintiff will recover a fee depends upon whether plaintiff was in fact the prevailing party. According to the order of the trial court denying attorney's fees, there was no evidence in the record establishing plaintiff to have been the prevailing party on her statutory cause of action. The trial court refused to assume she had prevailed on her statutory claim.

In order to avoid its own clear language in Encompass that it will not presume anyone to be a prevailing party on any particular count, the First District Court in its opinion below stated that a distinction exists between multicount complaints for money damages and those seeking different forms of remedies. The Court then stated that where a "judgment on all three counts" was entered against the defendant by the trial court below, the plaintiff is presumed to have prevailed. **(A:5).** However, there is no "judgment on all three counts" for plaintiff. The final judgment entered by the trial court does

not, as was true with the final judgments in Encompass and in Ahmed, specify which of the three counts plaintiff in fact prevailed upon. In fact, the Order Denying Plaintiffs' Motion For Allowance Of Attorney's Fees specifically states that "the record does not establish that Plaintiff was a prevailing party in an action brought pursuant to Chapter 400, Florida Statutes". (R:88). This Order was entered on April 7, 1988 by the Honorable Ellis T. Fernandez, Jr. as was the Final Judgment dated that same day (R:87).

To be entitled to an attorney's fee utilizing the First District's own interpretation of Rule 1.442 and offers of judgments which are silent as to attorney's fees, it was plaintiff's burden to unequivocably establish that she successfully prosecuted Count III and recovered a final judgment thereon. Plaintiff failed before the trial court below in establishing she met such burden. The error of the First District Court in presuming plaintiff prevailed on "all three counts" is evident as plaintiff's Amended Third Amended Complaint is plead, in effect, in the alternative. (R:42-46). Count I of plaintiff's complaint is based upon res ipsa loquitor, while Count II is mere negligence and Count III is a statutory violation of Chapter 400, Florida Statutes. The First District Court's statement that plaintiff has in fact recovered a "judgment on all three counts" is not possible. Count I and II are virtually identical as both allege negligence on behalf of the appellant. Count I however, seeks to

avail itself of a rule of evidence which permits, but does not compel an inference of negligence under certain circumstances. Marrero v. Goldsmith, 486 So.2d 530 (Fla. 1986). Thus, as this court stated in Marrero,

> "if a case is a proper res ipsa case in other respects, the presence of some direct evidence of negligence should not deprive the plaintiff of the res ipsa inference. There comes a point, however, where a plaintiff can introduce enough direct evidence of negligence to dispel the need for the inference". Id. at 532.

Therefore, in order for plaintiff to have recovered a judgment as presumed by the First District Court under Count II, sufficient evidence would have been required to support such count that a judgment could not have been rendered as well under Count I as the inferences of negligence supplied by the res ipsa loquitor rule of evidence, would have resulted in Count I having been dismissed as "when the facts are known there is no inference, and res ipsa loquitor simply vanishes from the case". Id. It is clear therefore that under no circumstances can plaintiff claim to have recovered a judgment "on all three counts". Likewise, the First District Court erred in failing to adhere to its statement in Encompass that it would not presume plaintiff to have prevailed on any particular count.

It should be quite clear that the better rule of law with regard to Rule 1.442 offers of judgment is as expressed in Ahmed. No assumptions as to prevailing party would be necessary

nor required. The language of the offer of judgment would control and where the offer does not mention attorney's fees, the plaintiff would not be entitled to such fees if the offer were accepted as written. However, there is no requirement that plaintiff accept such offer as written, but, if plaintiff does accept she cannot later be heard to say she should receive more than she bargained for and agreed upon on her own free will. Again, as expressed in Ahmed, the very purpose of any offer of judgment is to settle the case and all of the issues for the specific sum specified in the offer not for a specified sum today plus an unspecified amount of attorney's fees at a later date. Ahmed, supra at 931.

CONCLUSION

Appellant respectfully requests that this Honorable Court clarify the confusion and conflict which presently exists in this particular area of law by adopting the position of the Fifth District Court of Appeal as expressed in Ahmed v. Lane Pontiac-Buick, Inc., and reversing the First District Court of Appeal's opinion of January 20, 1989 (A:1-5) in the instant appeal thereby reinstating the trial court's order denying appellant's attorney's fees as such were not a part of the contract of settlement entered into by the parties herein, nor did plaintiff present any evidence to the trial court below establishing that even if the First District's opinion as to Rule 1.442 is proper, plaintiff was in fact the prevailing party on Count III of her Amended Third Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVZCE

WE DO CERTIFY that a true and correct copy of the foregoing has been furnished to Charles M. Johnston, Esquire, Taylor, Day & Rio, 121 West Forsyth Street, Jacksonville, Florida 32202, by U.S. Mail on this 1st day of March, 1989.

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