OA 10-3-89

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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 REPLY BRIEF

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ARGUMENT

ISSUE

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

Despite plaintiff's assertions to the contrary, the holding in Ahmed v. Lane Pontiac-Buick, Inc., 527 So.2d 930 (Fla. 5th DCA 1988), and in particular, the ultimate result of such holding, is consistent with prior Florida case law regarding the effect of the acceptance of an Offer of Judgment which is silent as to attorney's fees. In support of her claim that Ahmed is contrary to Florida case law, plaintiff cites Wimbledon Townhouse Condominium Association v. Kessler, 425 So.2d 29 (Fla. 4th DCA 1982), Hernandez v. Travelers Insurance Co., 331 So.2d 329 (Fla. 3d DCA 1976), Parliament Insurance Company v. That Girl In Miami, Inc., 377 So.2d 1011 (Fla. 3d DCA 1979), River Road Construction Co. v. Ring Power Corp., 454 So.2d 38 (Fla. 1st DCA 1984), McIntyre v. Lindsey, 488 So.2d 888 (Fla. 1st DCA 1986) and Godbey v. Walsh, 530 So.2d 343 (Fla. 1st DCA 1988). Each of these cases, however, consisted of a one count complaint, which with the exception of River Road Construction, was based upon a statute which specifically provided that the "prevailing party"

was entitled to an attorney's fee. These six cases, together with the decisions in Encompass, Inc. v. Alford, 444 So.2d 1085 (Fla. 1st DCA 1984) and Ahmed, clearly illustrate that contrary to plaintiff's asserted conflict and inconsistency, the decision reached by the Fifth District Court in Ahmed was proper and consistent with prior Florida case law as such decision was based on the clearly distinguishable factual situation presented to the Fifth District Court. A review of these decisions indicates that the Fifth District Court not only reached the proper decision in Ahmed, but that the First District decision in Mort v. Unicare Health Facilities, Inc., 537 So.2d 203 (Fla. 1st DCA 1989), is erroneous and should be reversed.

SINGLE COUNT COMPLAINTS

Wimbledon, Hernandez, Parliament Insurance Co., McIntyre and Godbey, each involved one count complaints based upon a statute which specifically provided that the "prevailing party" was entitled to recover an attorney's fee. In each of these cases, an offer of judgment which was silent as to attorney's fees, was accepted by the plaintiff and a final judgment was entered thereon. The plaintiff thereafter moved for attorney's fees and the appellate court stated that such fees should have been awarded as plaintiff was the "prevailing party" on the statutory count. Such determination by the appellate court was simple under the one count factual situation presented

to it. Where a plaintiff obtains a final judgment and her underlying complaint consists of only one count such final judgment conclusively establishes that plaintiff in fact prevailed on that particular count. Therefore, on a motion for attorney's fees plaintiff by presenting a final judgment entered in her favor on a one count complaint could conclusively establish by record evidence that she was the "prevailing party" on her statutory count and thus would be entitled to the assessment of attorney's fees even where the offer and acceptance of judgment were silent with regards to such fees.

MULTIPLE COUNT COMPLAINTS BASED UPON A STATUTE PROVIDING FOR RECOVERY OF ATTORNEYS FEES

A situation similar to the single-count complaint would exist where a plaintiff brings a multi-count complaint against a defendant where each of her various counts. is based upon a statute providing that the prevailing party would be entitled to an attorney's fee. In such situation, any offer of judgment silent as to attorney's fees which was accepted by the plaintiff with a final judgment entered thereon, would again, conclusively establish that plaintiff was the "prevailing party" under at least one of the several statutory counts. In such a situation, the final judgment, even if it did not specify which of the numerous counts plaintiff prevailed upon, would conclusively establish that plaintiff in fact prevailed upon at least one such

statutory count. Thus, record evidence would again exist for plaintiff to establish she was the "prevailing party" and entitled to the award of an attorney's fee.

MULTIPLE COUNT COMPLAINTS
SEEKING DISSIMILAR RELIEF

A third scenario which has been addressed by Courts of this state is evident from the facts in Encompass, Inc.. In that case, plaintiff brought a multiple count complaint seeking monetary damages in one count and foreclosure of a mechanic's lien in a second count. Again an offer of judgment silent as to attorney's fees was accepted by the plaintiff and a final judgment was entered thereon. As the final judgment did not specify which of the two counts plaintiff prevailed upon, plaintiff requested the First District to assume he had prevailed on his foreclosure count which specifically provided for the recovery of attorney's fees to the "prevailing party". The Court stated that it refused to make such presumption and in fact determine that the offer, acceptance and final judgment entered thereon awarded plaintiff monetary damages which, in fact, were not being sought in the count for foreclosure. Id., 444 *So.* 2d at 1087. Under these facts, the final judgment by its award of monetary damages conclusively established that plaintiff was not the "prevailing party" on his foreclosure count and, therefore, was not the prevailing party" for purposes of assessment of an attorney's fee.

Conversely, had the offer and acceptance of judgment and the final judgment awarded plaintiff the right to foreclose, such judgment would have been record evidence which plaintiff could have presented on a motion for assessment of attorney's fees to establish that he was the "prevailing party" on his statutory claim.

MULTIPLE COUNT COMPLAINTS SEEKING SIMILAR RELIEF

The final possible scenario is the factual situation with which the Fifth District Court was faced in Ahmed. In that case, a multiple count complaint had been brought against the defendants wherein monetary damages were sought in each count but only one of the various counts against each defendant provided by statute for the recovery of attorney's fees to the "prevailing party". The defendants made offer of judgment, silent as to attorney's fees, which were accepted by the plaintiff and a final judgment for monetary damages was entered thereon. Neither the offer, acceptance nor the final judgment specified which particular count or counts the plaintiff was deemed to have prevailed upon. As a result, there was no record evidence which plaintiff could present to the court *to* clearly establish he had in fact prevailed on the one statutory count alleged against either defendant. As a result, the court refused to presume plaintiff had prevailed on any particular count. Rather, the Fifth District stated that the offer and acceptance of judgment

were a contract of settlement and the Court was prohibited from reading additional terms and obligations into such contract as would be necessary in order to determine that plaintiff had prevailed on any particular count. The Court further stated that the determination of the "prevailing party" was not the determinative factor. In fact, faced with plaintiff's inability to present record evidence that he was the "prevailing party", no such determination was possible. Therefore, even if determination of the "prevailing party" were the determinative factor, it was plaintiff's burden to establish "that he is successful in prosecuting his . . . (statutory) . . . cause of action". Encompass, Inc., 444 So.2d at 1087. Unlike the other scenarios discussed above where record evidence established that plaintiff had prevailed, or had not prevailed as was the case in Encompass, Inc., no such record evidence was available in Ahmed and no determination as to the prevailing party on any particular count was possible without resort to mere presumption.

As the foregoing illustrates, a "prevailing party" can easily be determined if the underlying complaint consists of only one count. The party obtaining judgment in such a case is clearly the "prevailing party." Such a conclusion is not so simple where the underlying complaint consists of multiple counts unless each count is based upon a statute awarding attorney's fees to the prevailing party. However, where only one of

party as to that particular count can only be determined by the consent of the parties or by a final judgment specifically stating that plaintiff has prevailed on that particular count and cause of action. It is just this factual distinction between single and multiple count cases that we believe lead the Fifth District to certify its decision in Ahmed as being in direct conflict with Parliament Insurance Company v. That Girl in Miami, Inc. The Court in Ahmed found that the simple task of determining the prevailing party in the single count complaint case was unacceptable in the multiple count case. In light of such distinction, the result in Ahmed is correct even if the Fifth District Court's expressed reasoning is considered erroneous. Whether the denial of attorney's fees in Ahmed was based upon the prohibition of impairment of contracts or plaintiff's inability to present record evidence establishing that he was the "prevailing party", any other result would amount to nothing more than presumption and speculation. As the First District Court stated itself in Encompass, Inc., courts of this state will not presume that a party prevailed on any particular count or theory.

Plaintiff also argues in her answer brief that the defendant, by offering to have judgment entered against it, in effect "acquiesced" in the claims discovered during litigation to be meritorious. By such statement, plaintiff presumes to read the mind of the defense as to which of plaintiff's three distinct claims the defense considered to be meritorious. It is just this

type of argument that illustrates the inherent dangers of applying solutions applicable to a particular set of facts to cases involving dissimilar circumstances.

Plaintiff also argues that the award of attorney's fees where the offer of judgment is silent on such issue, is consistent with the purpose of Rule 1.442. Plaintiff fails to recognize that the basic purpose of Rule 1.442 is to encourage settlement of cases by providing a means of accomplishing such settlement. To this end, the rule provides the defendant with additional leverage in that plaintiff must recover more than the offer or suffer the consequences of paying the defendant's costs from the date of the. offer. The avoidance of such costs is the plaintiff's incentive to accept a reasonable offer. To further encourage and facilitate settlement of cases, the Legislature has also enacted Chapter 768.79, Fla.Stat. and Chapter 45.061, Fla.Stat., both of which also encourage settlement by the threat of post trial penalties.

One final argument advanced by plaintiff in her answer brief is that the defendant could have offered to settle this case outside Rule 1.442 and in such negotiations, made clear to plaintiff that defendant would not pay an additional amount to plaintiff for her attorney's fees. Not only were settlement negotiations prior to the filing of the offer of judgment discussed with plaintiff's attorney, but in fact one such discussion was held before the Honorable Charles Mitchell at the

pretrial conference when Judge Mitchell inquired as to the likelihood of settlement. In response, the defense indicated it might be willing **to** pay Forty Thousand Dollars **($40,000.00)** to plaintiff in settlement, but that the defendant would not pay any attorney's fee to plaintiff. At this point in the discussion, the Honorable Charles Mitchell advised plaintiff's attorney that as he was well aware, an insurance company when settling a case does **so** with the clear understanding that payment will conclude the matter in its entirety. As a result, no insurance company would agree to pay a specific amount in settlement and return at a later date to have the Court assess an additional, unknown amount ***as*** an attorney's fee. Plaintiff's attorney advised Judge Mitchell that he was well aware of such fact. As this discussion indicates, despite plaintiff's inference in her Answer Brief that no settlement negotiations outside Rule 1.442 were engaged in, such discussions did in fact take place and specifically addressed the issue of attorney's fees.

Finally, plaintiff suggests that the offer of judgment could have excluded Count 111. The problem with such a suggestion is that the very purpose **of** an offer of judgment, to put the entire case at issue to rest, would not be accomplished by an offer excluding any one **or** more of plaintiff's claims. In fact, had the defendant made an offer of judgment which excluded Count 111, plaintiff would have gladly accepted such an offer and also proceeded to trial on the excluded issues raised.

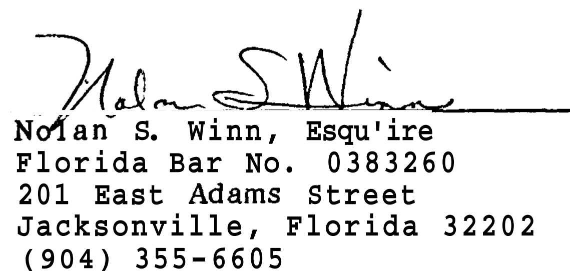
The Fifth District Court in Ahmed has stated that an offer and acceptance of judgment is a contract between the parties to be governed and enforced by its specific terms. As such, the Courts of this State may not read additional terms and obligations into such contract. In contrast, the First District in Mort has read into the clear language of the contract of settlement an obligation upon the defendant to pay attorney's fees to the plaintiff as the "prevailing party" despite no evidence to support such presumption. The better rule of law in such instance is that expressed in Ahmed as even if determination of the "prevailing party" is essential, no such determination is possible from the evidence presented in Mort.

CONCLUSION

Based upon the foregoing argument and citations of authority, Petitioner respectfully requests this Honorable Court reverse the First District Court of Appeal's decision in Mort v. Unicare Health Facilities, Inc..

Respectfully submitted,

WEBB, SWAIN & O'QUINN, P.A.



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CERTIFICATE OF SERVICE

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 12th **day** of April, 1989.

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