

**FILED**

**SID J. WHITE**

**APR 1 1998**

**CLERK, SUPREME COURT**

**By**  
**Chief Deputy Clerk**

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 92,467

SCOTTSDALE INSURANCE COMPANY,  
a foreign insurance corporation,

Petitioner,

vs.

JOHN DESALVO, as Personal Representative  
of the Estate of H. P. Demery,  
deceased, d/b/a Port City Trading,

Respondent.

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**RESPONDENT'S BRIEF ON JURISDICTION**

On Review from the District Court  
of Appeal, First District, State of Florida

FANNIN, TYLER & HAMILTON, P.A.

  
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## **PRELIMINARY STATEMENT**

In this jurisdictional brief, the Respondent/Plaintiff, John DeSalvo, as personal representative of the Estate of H. P. Demery, deceased, d/b/a Port City Trading, will be referred to as "DeSalvo".

The Petitioner/Defendant, Scottsdale Insurance Company, will be referred to as "Scottsdale".

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

Certain facts set forth in Petitioner's brief are incorrectly stated in a manner which might materially affect this Court's decision on jurisdiction.

DeSalvo's building indeed was damaged by fire on or about January 13, 1995. At that time, DeSalvo was insured by Scottsdale. DeSalvo made a claim with Scottsdale, including the submission of a sworn statement in proof of loss. In response to the proof, Scottsdale forwarded a reservation of rights letter and did not accept coverage. Pursuant to the terms of the policy of insurance, Scottsdale had the obligation to notify DeSalvo, within thirty (30) days of receipt of his proof, of Scottsdale's election in terms of how to pay the claim. In fact, Scottsdale made no such election, nor did it notify the insured that it had accepted coverage for the loss. At the expiration of the thirty days, there was no indication whatsoever that Scottsdale was going to accept coverage. DeSalvo then filed suit to enforce the contract.

Several weeks after the civil action was filed, and after service had been effected on Scottsdale, Scottsdale voluntarily and unilaterally paid some \$404,000.00 to DeSalvo. DeSalvo had made a claim for \$563,000.00 (the policy limits), claiming the building was a constructive total loss. When it finally accepted coverage and made a partial payment, Scottsdale disagreed with DeSalvo's position as to the total loss.

Following payment of the initial amount, Scottsdale demanded appraisal which DeSalvo contested. This issue was ultimately taken to appeal and determined in favor of Scottsdale. However, as noted in the First District's Opinion, while that appeal was

pending, DeSalvo attempted to resolve the situation by submitting to appraisal, but Scottsdale refused to do so unless DeSalvo waived any and all rights to interest, costs and attorney's fees.

While the issue of appraisal was pending, Scottsdale began serving Offers of Judgment. Its first Offer of Judgment was served in May 1995, in the amount of \$101.00. In or about December 1995, Scottsdale served an Offer of Judgment in the amount of \$50,001.00. In January 1996, it served the Offer of Judgment at issue, in the amount of \$100,001.00. During the course of the pendency of Appeal, both parties engaged in discovery and otherwise pursued matters which related to the scope of loss and amount of damages.

Ultimately, the matter was appraised and it was determined that Scottsdale owed DeSalvo an additional \$84,133.92. In addition to this figure, the trial Court awarded (and the First District Court of Appeal approved) \$12,014.74 in interest (which Scottsdale had demanded that DeSalvo waive in order to engage in appraisal) bringing the total recovery under the policy, with interest, to \$96,148.66.

After entry of the appraisal award, DeSalvo moved for attorney's fees and costs, both of which were denied by the trial court. Both of these rulings were reversed by the First District Court of Appeal. The trial court's award of interest was affirmed by the First District Court of Appeal.

The trial court denied DeSalvo's Motion for Attorney's Fees based upon Baker Protective Services v. F.P., Inc., 659 So.2d 1120 (Fla. 3<sup>rd</sup> DCA 1995). The operative offer

of judgment upon which the court based its decision was the January 23, 1996, Offer of Judgment in the amount of \$100,001.00.

The District Court of Appeal, relying upon a number of Florida Supreme Court decisions, held that in order to determine whether the insured's recovery was greater than the highest valid offer of settlement, the court would have to add interest, costs and attorney's fees, calculated as of the date of the Offer of Judgment in order to determine if, in fact, the Offer of Judgment was greater than the insured's ultimate recovery. Further, the Court held that DeSalvo would be entitled to attorney's fees until the date the Offer was made. The District Court's finding is misstated by Scottsdale in that there has not been, to date, the calculation of interest, costs, attorney's fees and principal as of January 23, 1996, the date the Offer of Judgment was made.

### **SUMMARY OF ARGUMENT**

The District Court's Opinion in this case does not conflict with the Fourth District's Opinion in Mendez v. Bankers Insurance Company, 696 So.2d 1210 (Fla. 4<sup>th</sup> DCA 1997).

There is apparent conflict between Baker Protective Services v. F.P., Inc., 659 So.2d 1120 (Fla. 3<sup>rd</sup> DCA 1995), on the facts as stated. The facts set forth in Baker are not clear enough to conclusively support direct conflict.



## **JURISDICTIONAL STATEMENT**

If there is a conflict between the Districts, the Florida Supreme Court has discretionary jurisdiction to review the instant decision. Article 5, Section 3(b)(3), Florida Constitution (1980).

## **ARGUMENT**

### **THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION OVER THIS CASE SINCE THERE IS AN APPARENT CONFLICT BETWEEN THE FIRST DISTRICT'S JANUARY 30, 1998, ORDER AND THE THIRD DISTRICT'S BAKER DECISION.**

Scottsdale seeks discretionary jurisdiction in this Court to have it review the decision of the First District Court of Appeal, claiming express and direct conflict with Baker Protective Services v. F.P., Inc., 659 So.2d 1120 (Fla. 3<sup>rd</sup> DCA 1995) and Mendez v. Bankers Insurance Company, 696 So.2d 1210 (Fla. 4<sup>th</sup> DCA 1997). There is no conflict between the First District's decision and the Fourth District's decision in Mendez.

In Mendez, the Fourth District upheld a trial court order denying attorney's fees to an insured where the insured recovered \$1,294.00 (after deductible) and there had been an offer of judgment in the amount of \$3,501.00. Scottsdale failed to point out that in Mendez, the offer of judgment was exclusive of attorney's fees. In this case, all Offers of Judgment propounded by Scottsdale to DeSalvo were inclusive of interest, costs and attorney's fees. In citing conflict with Mendez, Scottsdale apparently misconprehends the holding in that case and the First District's holding in this case. In substance, the First District held that under the authority of Wollards v. Lloyds & Companies of Lloyds, 439 So.2d 217 (Fla. 1983), as well as Danis Industries Corporation v. Ground Improvement Techniques, 645 So.2d 420 (Fla. 1994), the insurance carrier is obliged to pay the insured's attorney's fees to the date the Offer of Judgment/settlement is made. In Wollard,

this court held that an insurer's payment of a claim, after suit has been filed is the substantial equivalent of a confession of judgment and that the provisions of Florida Statute Section 627.428 then apply. The First District's opinion in this case and the Fourth District's decision in Mendez case do no violence to this proposition. Although the Mendez decision is not clear, at least with respect to the award of costs and interest to the date the offer was made, it is clearly apparent that the \$1,294.00, judgment, even combined with reasonable costs and interest, could not approach the offer of judgment amount of \$3,501.00. That is not true in this case, where principal and interest equals \$96,148.66, only \$3,854.34 less than the Offer of Judgment, without consideration of attorney's fees and costs.

There is apparent conflict between the Baker Protective Services v. E.P., Inc., 659 So.2d 1120 (Fla. 3<sup>rd</sup> DCA 1995), based upon certain dicta found in the Baker case and on an express disagreement with the principles of Baker by the First District in this case. However, a close review of Baker does not indicate whether the offers of judgment made in that case were inclusive or exclusive of attorney's fees. In Baker, the operative offer of judgment was in the amount of \$125,000.00, made in July 1992. There is no indication whether this offer of judgment included principal, interest, costs and attorney's fees or whether it was simply directed to principal and interest. It is, however, apparent on the face of Baker, that suit was filed several years before the offers of judgment were made and therefore, under the theories expressed in Wollard and again in Danis, attorney's fees should have been awarded through the date of offer of judgment, a position which the First

District Court of Appeal adopted in this case. There is, in that respect, conflict which would confer upon this Court discretionary jurisdiction to review this matter.

### **CONCLUSION**

DeSalvo concedes this Court has discretionary jurisdiction and may review this case pursuant to Article 5, Section 3(b)(3), Florida Constitution, (1980) and, should this court exercise its jurisdiction, DeSalvo respectfully requests that it resolve the conflict by affirming the First District and disapproving Baker to the extent that it conflicts with Wollard, Danis, and this case.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing document has been furnished by United States Mail this 31<sup>st</sup> day of March, 1998, to Heath B. Nailos, Esq., Neilson and Tosko, P. O. Box 547638, Orlando, FL 32854-7638.

  
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Attorney