FLORIDA
SUPREME COURT

Case No. 92,655

MGR EQUIPMENT CORP., INC.

Appellant,

vs.

WILSON ICE ENTERPRISES, INC.

Appellee

_____/

5th DCA Case No. 97-00935

APPELLEE'S ANSWER BRIEF

Respectfully Submitted,

/s/ _____

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TABLE OF CONTENTS

This Brief is printed in 14 point Times Roman proportionately spaced, per this Court's interim requirements propounded by an Administrative Order dated July 13, 1998 (Chief Justice Major B. Harding).

TABLE OF CITATIONS

CASES

STATUTES AND RULES OF PROCEDURE

STATEMENT OF THE FACTS AND OF THE CASE

Appellee, **WILSON ICE ENTERPRISES, INC.**, ("**WILSON**"), hereby supplements the statement of the facts and the of case provided by the Appellant, **MGR EQUIPMENT CORP.**, ("**MGR**").

WILSON's Offer of Judgment to **MGR**, made on August 26, 1996, provided in its entirety[1]:

> "Defendant, WILSON ICE ENTERPRISES, INC., a Florida corporation, pursuant to Section 768.79, Florida Statutes, hereby makes this Offer of Judgment to the Plaintiff, MGR EQUIPMENT CORP., a foreign corporation, in the amount of $5,000.00, along with the return of the eleven (11) Model DC-44 MGR ice dispensers to MGR EQUIPMENT CORP."

(R. 174-179)

At the time of the accrual of the underlying cause of action, Section 768.79(2), Florida Statutes provided in part "[t]he offer shall be construed as including all damages which may be awarded in a final judgment." Therefore, **MGR**'s argument contained in its Statement of the Facts that **WILSON**'s Offer failed to address its pending counterclaim was and is incorrect.

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[1] Prior to the August 26, 1996, Offer of Judgment, on May 28,1996, **WILSON** submitted its first Offer of Judgment to **MGR**. The Fifth District Court of Appeal held this first Offer of Judgment insufficient under the statute as it failed to address the disposition of the ice makers. **WILSON** did not appeal this holding. For purposes of this brief, therefore, the use of the term "**WILSON**'s Offer of Judgment" or the like pertain only to the Offer of Judgment dated August 26, 1996, unless otherwise specified.

SUMMARY OF ARGUMENT

The Offer of Judgment made by **WILSON** in August 1996 was totally in accordance with Section 768.79, Florida Statutes, and existing case law at the time **WILSON** made it. Case law existed in the Fifth District Courts of Appeal holding that an Offer of Judgment made pursuant to Section 768.79, Florida Statutes included damages for all claims in the action unless otherwise specified. The Fourth District Court of Appeals was also following this reading of the statute, and the Florida Supreme Court had made consistent pronouncements. As such, the trial court's decision that the Offer of Judgment submitted by **WILSON** met all statutory and procedural requirements was consistent with existing precedent.

This position was further clarified by the Fifth District Court of Appeal's decision in MGR Equipment Corp. v. Wilson Ice Enterprises, Inc., 706 So. 2d 376 (Fla. 5th DCA 1998), which recognized that **WILSON**'s Offer of Judgment was consistent with the statute at the time of the accrual of the cause of action. Furthermore, when the trial court assessed attorneys fees, both the statute and cases such as Security Professionals, Inc. v. Segall, 685 So. 2d 1381 (Fla. 4th DCA 1997), existed which were in conflict with Hartford v. Silverman, 689 So. 2d 346 (Fla. 3d DCA 1997).

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN HOLDING THE OFFER OF JUDGMENT VALID AND DID NOT FAIL TO FOLLOW CONTROLLING PRECEDENT BECAUSE BEFORE JANUARY 1, 1997, AN OFFER OF JUDGMENT INCLUDED ALL CLAIMS UNLESS OTHERWISE SPECIFIED

The offer of judgment statute in effect at the time the underlying cause of action accrued is applicable to this case. This Court has previously held that the statutory scheme of §768.79, upon which the instant Offer of Judgment relies, "attaches the right to attorney's fees to the underlying cause of action." Metropolitan Dade County v. Jones Boatyard, Inc., 611 So. 2d 512 (Fla. 1993). In Metropolitan, this Court specifically held that the offer of judgment statute "does not apply to offers of judgment where the underlying cause of action accrued prior to its effective date." Id. At 513, *citing with approval the reasoning of* Mudano v. St. Paul Fire & Marine Insurance Co., 543 So. 2d 876 (Fla. 4th DCA 1989).

Undisputedly, the cause of action in the underlying case accrued in 1995. The offer of judgment statute in effect at that time does not mention offers of judgment made by "counter-plaintiffs" or "counter-defendants." The statute merely references "plaintiffs" and "defendants." The statute says that an offer of judgment must do four (4) things:

(a) be in writing and state that it is made pursuant to this section;

(b) name the party making it and the party to whom it is being made;

(c) state with particularity the amount offered to settle a claim for punitive damages, if any; and

(d) state its total amount.

§768.79, Fla. Stat. (1995). The Offer of Judgment submitted by **WILSON** complied with the statute precisely.

As **WILSON** met all statutory requirements, the trial judge was correct in finding **WILSON** entitled to attorneys fees pursuant to its Offer of Judgment. TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995). In Eagleman v. Eagleman, 673 So.2d 946 (Fla. 4th DCA 1996), the Fourth District Court of Appeal succinctly reiterated the law related to a trial judge's responsibilities under §768.79, Florida Statutes. There is a "mandatory right to attorneys' fees, if the statutory prerequisites have been met. Once the statutory prerequisites have been met, the only discretion afforded the trial judge ... is the authority to disallow the attorney fee award when an offer is not made in 'good faith'." Id. at 947 [citing in part, Schmidt v. Fortner, 629 So.2d 1036, 1040 (Fla. 4th DCA 1993)].

More important, the offer of judgment statute goes on to state that "the offer shall be construed as including all damages which may be awarded in a final judgment." §768.79(2). This means that in 1995, an offer by a defendant who has filed a counterclaim included in the offer of judgment a consideration of what could

be recovered in its counterclaim as well as the main claims in the action. A final judgment is a net judgment and the net judgment would resolve all claims in the action.

Two District Courts of Appeal were following this reading of the statute at the time **WILSON** made its Offer of Judgment. The Fifth District Court of Appeal, the trial court's own appellate court, followed this reading in Hellman v. City of Orlando, 610 So.2d 103 (Fla. 5th DCA 1992). The Hellman Court stated unambiguously that "Section 768.79 states that an offer [of judgment] should be construed as included all damages 'which may be awarded in a final judgment'." Id. at 104 (citing §768.79, Fla. Stat., 1995).

It is also noteworthy that the Supreme Court of Florida had made pronouncements, which were in effect at the time **WILSON** made its Offer of Judgment, that would also indicate that an offer of judgment would include all claims in the action. In Unicare Health Facilities, Inc. v. Mort, 553 So.2d 159 (Fla. 1989), the Supreme Court stated with respect Rule 1.442, Florida Rules of Civil Procedure, which also pertains to offers of judgment, that "the clear intent of the underlying policy of the rule was to determinate all (emphasis added) claims, end disputes, and obviate the need for further intervention of the judicial process." The Court went on to say that "we find the better application of the rules under the circumstances that

are articulated by the Fifth District Court of Appeal in Ahmed and George v. Northcraft, 476 So.2d 758 (Fla. 5th DCA 1985). There is an 'organic right of parties to contract a settlement, which by definition (emphasis added) concludes all claims unless the contract of settlement specifies otherwise'." Id. at 161. Indeed, the Fifth District Court of Appeals in Ahmed v. Lane Pontiac-Buick, Inc., 527 So.2d 930 (Fla. 5th DCA 1988), stated that "the crux of the matter is not the basis for the attorney fee claim, or a determination of the 'prevailing party' but rather the organic right of parties to contract a settlement, which by definition concludes all claims unless the contract specifies otherwise." Id. at 931. Therefore, if an offer of judgment is in the nature of a contract and if this Court had stated that by definition an offer concludes all claims, then the Offer of Judgment made by **WILSON** naturally included all claims if **MGR** had accepted it.

The Fourth District Court of Appeal, at the time **WILSON** made its Offers of Judgment, also construed the statute as applying to all claims in a pending action. In Adamson v. Nathan Putchat Associates, P.A., 528 So.2d 1259 (Fla. 4th DCA 1988), the court held that no substantive issues survived an accepted offer of judgment even where certain counts had been previously dismissed from the lawsuit. Also, in McCutcheon v. Hertz Corporation, 463 So.2d 1226 (Fla. 4th DCA 1995), a plaintiff sued Hertz for personal injuries incurred in an automobile with a Hertz owned car

driven by Hertz lessee. A physician who treated the plaintiff aggravated the injuries and Hertz filed third party claim for indemnity against the physician. On the morning of trial, Hertz, not the physician, made a $1.1 million dollar offer of judgment which the plaintiff accepted. Thereafter, the plaintiff attempted to recover directly from the physician whom she had not sued yet for medical malpractice. The Fourth District Court of Appeal held that the offer of judgment included any claims plaintiff had against the physician even though the offer of judgment was made by Hertz to the plaintiff and made no separate reference to third party claim. The court reasoned that the plaintiff "could have rejected the offer and presented the claim to the jury, or she could have offered to accept upon the condition that the judgment would represent compensation only for damages caused by Hertz and its driver, preserving her claim against Stuart (the doctor)." Id. at 1228.

The McCutcheon Court suggests that when a person in good faith attempts to use §768.79, Florida Statutes, to settle a case, it is incumbent upon the party to whom the offer was made to clarify the offer if there is any ambiguity. This reasoning is consistent with the purpose of the statute which is "to encourage litigants to resolve cases early to avoid incurring substantial amounts of court costs and attorneys' fees." Eagleman v. Eagleman, 673 So.2d 946, 947 (Fla. 4th DCA 1996). In filing its two Offers of Judgment, **WILSON** attempted to advance just this purpose. What is ironic

here is that the party which sought to use the offer of judgment statute as it was intended and resolve this case early is the party **MGR** asks this Court to punish.

If **MGR** had been so concerned about the perceived ambiguities in **WILSON**'s Offer of Judgment, it could have filed a motion to strike or a motion for clarification.[2] **MGR** did not file such a motion for two (2) reasons. First, **MGR** had no intention of settling this case. Secondly, **MGR** knew exactly what the Offer meant and did not consider the Offer ambiguous. **MGR**'s conversion to the *church of ambiguity* occurred one (1) week prior to the hearing on attorneys' fees when doing so was perceived to be advantageous.

At the time the Offer of Judgment was made, the Third District Court of Appeal had yet to decide Hartford v. Silverman, 689 So. 2d 346 (Fla. 3d DCA 1997), *review denied* 707 So. 2d 1124, the case upon which **MGR**'s appeal relies. Thus, at the time of making the Offer, there was no conflict among the various District Courts of Appeal. **WILSON** and its counsel had to rely upon the plain language of the statute, and case law, including Supreme Court and Fifth District Court of Appeal holdings, which state "an offer should be construed as including all damages which

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[2]The undersigned counsel has been involved in litigation where a party receiving an offer of judgment has filed motions to strike said offers due to perceived procedural irregularities. In such instances, the amount of the offer is not disclosed to the trial court and hearing is held to determine the procedural sufficiency of the offer. It would seem that such an approach would foster early settlement of claims and would be preferred to waiting until after trial to raise such issues.

may be awarded in a final judgment" (Hellman at 104) and "by definition, include all claims unless the offer specifies otherwise." (Ahmed at 931). Under the McCutcheon rationale, if **MGR** had accepted **WILSON**'s Offer, it would have resolved all claims in the underlying action and a judgment of $5,000.00 would have been entered against **WILSON** and **WILSON** would have returned the ice makers to **MGR**.

MGR knew this and made no attempt to clarify the offer. Instead, **MGR** took an adversarial approach, a posture that it has followed since the day **MGR** shipped the product. **MGR** sold a defective product to **WILSON** which was to be installed at Walt Disney World. The machines would not produce ice and produced a loud gun-like sound that was replicated at trial and which frightened hotel guests. **WILSON** notified **MGR** immediately of the problem and **MGR** made assurances that they would rectify the problems. **WILSON** spent a significant amount of time and money trying to resolve the problem. Finally, **WILSON** was forced to remove the product and install a different brand of machine which worked beautifully. **MGR** told **WILSON** to hold the machines until they could be placed elsewhere. Instead, **MGR** sued **WILSON**.

WILSON then tried to resolve the dispute without further litigation by using the offer of judgment statute then in effect. **MGR** made no attempt to resolve the case and instead chose to litigate. After a jury trial, the trial court entered a Final

Judgment finding that **MGR** was not entitled to recover on its claims and that **WILSON** was entitled to recover incidental damages pursuant to its counterclaims. **MGR** appealed the decision to the Fifth District Court of Appeal, which affirmed the judgment. MGR Equipment Corp. v. Wilson Ice Enterprises, Inc., 700 So. 2d 700 (Fla. 5th DCA 1997). The trial court also properly awarded attorneys' fees to **WILSON** based upon the Offer of Judgment. **MGR** appealed the award of attorneys' fees to the Fifth District Court of Appeal, which, in a well-reasoned opinion, affirmed the trial court's award of attorneys fees as to the August 26, 1996, Offer of Judgment. MGR Equipment Corp. v. Wilson Ice Enterprises, Inc., 706 So. 2d 376 (Fla. 5th DCA 1998).

MGR's appeal of the Fifth District Court of Appeal's decision affirming the award of attorneys fees rests upon the argument that Third District Court of Appeal's decision in Hartford v. Silverman, 689 So. 2d 346 (Fla. 4th DCA 1997), somehow voids an offer of judgment that was made in accordance with the applicable statute and case law existing at the time **WILSON**'s Offer of Judgment was made.

MGR's makes two arguments that the Offer of Judgment of August 26, 1996, is invalid. First, **MGR** argues the failure of the Offer of Judgment to recite the payment of shipping costs upon the return of the ice makers renders the Offer

ambiguous. Second, **MGR** argues the Offer failed to address **WILSON**'s counterclaim.

MGR asserts in its first argument that the Offer of Judgment is ambiguous because it was silent to costs and expenses for return of the ice makers. **MGR**'s argument on this point fails to consider the plain language of the Offer. In the Offer, **WILSON** offers "return of the eleven (11) Model DC-44 **MGR** ice dispensers **to** MGR EQUIPMENT CORP." (emphasis added). The word "to" is meaningful in this sentence. A simplification of the sentence is that **WILSON** would return the ice makers to **MGR**. There is no ambiguity in this sentence.

MGR attempts to violate the plain meaning of the words and read into the sentence a meaning that is just not present. **MGR** apparently reads "return...to" as possibly meaning **WILSON** would 'make the ice makers available for pick up', or words to that effect. This is simply not what is stated. Further, as previously stated, if **MGR** had found ambiguity in the shipping costs, but otherwise found the Offer of Judgment to be acceptable, **MGR** could have worked toward resolution of the matter by simply asking for clarification on the payment of shipping costs. **MGR** failed to do so, imprudently rejected the Offer of Judgment, and now attempts to create ambiguity in words that are clear. The benefit of hindsight should not be allowed to defeat a valid, and clear, Offer of Judgment.

MGR's second argument is that the failure to reference **WILSON**'s counterclaims makes the Offer of Judgment "void as a matter of law." This argument fails for two reasons. First, at the time the cause of action accrued, the Offer of Judgment statute had but four requirements which may be summarized as (1) being in writing (2) stating to and from whom the offer is made (3) stating the amount offered to settle punitives, and (4) stating the total amount. As previously stated herein, the Offer of Judgment made on August 26, 1996, strictly complied with the statute.

MGR's argument that **WILSON**'s Offer of Judgment is void as a matter of law also fails because §768.79, Florida Statutes, which provides that an offer should be construed as including all damages "which may be awarded in a final judgment," has to have some meaning. As previously stated, when a case with counterclaims is tried, one net judgment is entered. Suppose, for example, that jury had awarded **MGR** $10,000.00 on its complaint and **WILSON** $5,000.00 in incidental damages. In that example, a final judgment of $5,000.00 would have been entered in favor of **MGR** and **WILSON** could have kept the defective ice dispensers. When a case is tried where there are counterclaims, a net judgment is entered which is essentially the difference between the amount awarded plaintiff and the defendant/counter-plaintiff.

See, Williams v. Brochu, 578 So.2d 491 (Fla. 5th DCA 1991) (where plaintiff suffered a "net judgment against her") Id. at 493.

It is noteworthy that at the time the Offer of Judgment was made by counsel for **WILSON**, the Hartford decision had not been decided. All counsel for **WILSON** had to rely upon was the plain language of the statute and existing case law interpreting the statute to mean that an offer of judgment included all claims unless otherwise specified. Then, on the day of the attorneys' fee hearing, counsel for the Appellant disclosed both to the Court and opposing counsel for the first time the Hartford decision. The Court, obviously aware of existing case law in the Fourth and Fifth District Court of Appeals and the Florida Supreme Court, chose not to follow the Hartford decision because case law existed from the Fifth District Court of Appeal and other jurisdictions which clearly indicates that the trial court could determine that the Offer of Judgment was not ambiguous and included all claims unless otherwise specified. The Fifth District Court of Appeals affirmed this decision, specifically relying on its previous holdings and decisions of the Fourth District Court of Appeals and this Supreme Court.

Furthermore, an appellate decision existed at the time of the attorneys' fee hearing which was in conflict with Hartford which was considered and cited in the Fifth District Court's opinion as being in conflict with Hartford. MGR Equipment

Corp. v. Wilson Ice Enterprises, Inc., 706 So. 2d 376, 378 (Fla. 5th DCA 1998). In Security Professionals, Inc. v. Segall, 685 So.2d 1381 (Fla. 4th DCA 1997), also decided in 1997, the Fourth District Court of Appeal held that an offer of judgment made by certain defendants to certain plaintiffs to settle all pending claims included certain pending counterclaims in the case. The Court in Security Professionals concluded that the Defendant, "Martin Paikin conceded at oral argument, and we agreed (emphasis added) that his individual counterclaim against [Plaintiffs] Sandy Segall and Coastline Communication Corp. did not survive the offer of judgment because both Martin Paikin, individually, as offerer, and Sandy Segall and Coastline Communication Corp., as offerees, were parties to the offer of judgment." Id. at 1384.

Of particular importance here was the court's analysis that an offer of judgment is analogous to a "consent judgment, which is in the nature of contract." The court then concluded that "there is an organic right of parties to contract of settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise concluded." Id. at 1388 [citing, Unicare Health Facilities, Inc. v. Mort, 553 So.2d 159, 161 (Fla. 1989)]; see also, BMW North America v. Krathen, 471 So.2d 585 (Fla. 4th DCA 1985) (a judgment entered after an offer of judgment is accepted

is analogous to a consent judgment which is in the nature of a contract, and should be construed by language employed by the parties if it is without ambiguity).

Following the reasoning in BMW, it was incumbent upon the trial judge in the instant case to determine if there was any ambiguity in the Offer of Judgment, and he obviously determined that there was none. Furthermore, it is clear that under the Security Professionals decision, there was no requirement in August of 1996, that counterclaims be referenced in an offer of judgment.[3]

The trial court followed the above-cited precedents. The trial court, sitting in Orange County, Florida, is bound to follow the precedent of the Fifth District Court of Appeal. The holding from a sister district court of appeal becomes precedent only if the trial court's own appellate court has made no pronouncement.

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[3]The issues raised on this appeal have now been modified by the adoption of Rule 1.442(c)(2)(B) which now requires that an offer of judgment "identify the claim or claims, the persons attempting to resolve . . ." Unfortunately, this rule did not take effect until January 1, 1997, and was not published in the Florida Law Weekly until October 31, 1996, after the Offers of Judgment had been made pursuant to Sections 768.79, Florida Statutes..

When the Offers of Judgment were made by **WILSON** in this case, the statute and existing case law interpreted the statute as including all claims unless otherwise specified and the statute itself made no referenced to counterclaims. The court in Security Professionals, lamented the state of the old law when it stated "we regret that this case is just one more example of the offer of judgment statute causing a proliferation of litigation, rather than fostering its primary goal to 'terminate all claims, and disputes, and obviate the need for further intervention of the judicial process.' Unicare Health Facilities, Inc., 553 So.2d at 161. Perhaps the amendments to the Florida Rules of Civil Procedure 1.442, effective January 1, 1997, which require far more detail in settlement proposals will help insure that there are no misunderstandings between an offerer and an offeree about the terms of a settlement proposal." Security Professionals, 685 So.2d at 1384.

MGR argues the only case on point at the time of the trial court's decision was Hartford v. Silverman, 689 So. 2d 346 (Fla. 3d DCA 1997), *review denied* 707 So. 2d 1124. This is untrue. As set forth above more completely, courts other than the Third District Court of Appeal, including the Fifth District Court of Appeal, had considered the offer of judgment statute. At the time the trial court made its order, in addition to the Hartford case, the trial court had before it Hellman v. City of Orlando, 610 So.2d 103 (Fla. 5th DCA 1992), Unicare Health Facilities, Inc. v. Mort, 553 So.2d 159 (Fla. 1989), Security Professionals, Inc. v. Segall, 685 So.2d 1381 (Fla. 4th DCA 1997), McCutcheon v. Hertz Corporation, 463 So.2d 1226 (Fla. 4th DCA 1995), Ahmed v. Lane Pontiac Buick, Inc., 527 So. 2d 930 (Fla. 5th DCA 1988), and George v. Northcraft, 476 So.2d 758 (Fla. 5th DCA 1985). Certainly, the holding of this Court in Unicare and the holding of the trial court's own District Court of Appeal in Hellman impart greater precedential weight than the holding of Hartford. The trial court did not deviate from *stare decisis* in finding the holding of its own District Court of Appeal, which holds that an offer of judgment includes all claims, more persuasive than the holding of a sister District Court of Appeal, which impermissibly added an additional statutory prerequisite not found in the statute as enacted at the time.

The Fifth District Court of Appeal expressly found that the trial court was not bound by the Hartford holding. The opinion authored by Judge Orfinger, Senior Judge, states "the statute and court decisions, including one from this court, require that offers be read as encompassing 'all damages which might be awarded in the final judgment.'" (emphasis added) MGR Equipment Corp. v. Wilson Ice Enterprises, Inc., 706 So. 2d 376, 378 (Fla. 5th DCA 1997), citing Security Professionals and Hellman. Therefore, the Fifth District Court of Appeals confirmed that the trial judge's reading of Hellman bound the trial judge to find the Offer valid. The Fifth District Court of Appeal noted this conflict between its previous holdings and the Third District Court of Appeal, and declined to certify the question to the Supreme Court only because of subsequent amendments to the statute and rule which changed the offer of judgment procedure.

Further, *stare decisis* has less application in the area of procedure than in the area of substantive law. Fields v. Zinman, 394 So. 2d 1133 (Fla.4th DCA 1981). The statute and rules regarding an offer of judgment contain mixed elements of substantive and procedural law, with §768.79, Florida Statute, creating the substantive portion and its identical counterpart, 1.442, Florida Rules of Civil Procedure, creating the procedural aspects. TGI Friday's, Inc. v. Dvorak, 611 So. 2d 606 (Fla. 1995). The entitlement to attorneys fees is a matter of substantive law.

However, the manner of presentation of the offer of judgment is more appropriately considered procedural. As such, the trial court was correct in following enacted procedure rather than taking liberties with that procedure by "torturing the statute" as had the Third District Court of Appeals. The yoke of *stare decisis* was simply not present or binding on trial court in this area of procedure where contrary case law to Hartford existed.

The Fifth District Court of Appeal's opinion herein is correct and should be given the deference it deserves. There were cases in both the Fourth and Fifth District Court of Appeals which had been decided at the time **WILSON**'s Offer of Judgment was made to suggest that the Offer made by **WILSON** complied exactly with the statute and included all claims, including the counterclaims. All statutory provisions in effect at the time the cause of action accrued were satisfied by the August 26, 1996, Offer of Judgment. As such, the trial court was correct in finding **WILSON** entitled to recover attorneys' fees upon determining that **WILSON**'s Offer of Judgment met statutory requirements.

For the reasons stated herein, **WILSON** would respectfully request that this Court affirm the Trial Court's decision below finding that there is no ambiguity in the Offer of Judgment made by **WILSON**, which was in accordance with the statute at the time of the accrual of the cause of action, and which was in accordance with

existing case law now as it relates to offers of judgment made before January 1, 1997.

II. THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION

After the **WILSON** Offer of Judgment was made on August, 26, 1998, and after the case below was tried, Rule 1.442 (c)(2)(B) of the Florida Rules of Civil Procedure was amended, effective January 1, 1997. That Rule now mandates that offers of judgment "identify the claim of claims the proposal is attempting to resolve." Consequently, the Fifth District Court of Appeal correctly concluded that it would be inappropriate to certify the question to this Court. Indeed, a decision of this Court would have no precedential value in light of the rules changes and would only add to the case load of this Court unnecessarily.

In the Committee Notes to Rule 9.030 of the Florida Rules of Appellate Procedure, in discussing the discretionary jurisdiction of this Court, it was noted that the modifications to the Supreme Court's jurisdiction would address the decisions of the District Court of Appeal that "expressly and directly conflict with the decisions of another district court of appeal" and that the "impetus for these modifications was a burgeoning case load and the attendant need to make more efficient use of limited appellate resources." Fla. R. App. P. 9.030 (Committee Notes). These notes went on to further indicate that Subdivision (2) (A), under which the Appellant seeks to have

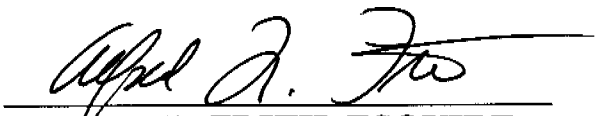
this Court accept jurisdiction, "limits the Supreme Court's appellate, discretionary, and original jurisdiction to cases that substantially affect the law of the state." Id. Here, the law of the state would not be substantially affected by resolution of a conflict, even if it existed, between the two district courts of appeal because the law has changed.

This Court preliminarily accepted jurisdiction. For the reasons set forth above, this Court should enter an order vacating its earlier order accepting jurisdiction.

CONCLUSION

For the reasons stated herein, Appellee, WILSON ICE ENTERPRISES, INC., hereby respectfully requests that this Court that the decision below be affirmed, or in the alternative, enter an order vacating its earlier order accepting jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed by first-class U.S. Mail to the following service list this 18th day of August, 1998.

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Alfred L. Frith, Esq.