IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

SUPREME COURT CASE NO. 01-33

ALLSTATE INDEMNITY COMPANY,

Petitioner,

vs.

SOLEN HINGSON and ANNETTE HINGSON,

Respondents.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA
Case No. 2D00-1107

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF CASE AND THE FACTS

Allstate's brief obscures the fact that the challenged circuit court order, denying Allstate's motion for attorneys' fees, was entered after Allstate scheduled two hearings on its motion (on October 11, 1999, and February 7, 2000), but elected not to bring a court reporter to either hearing. The challenged order refers to facts as well as legal arguments presented to the court at those hearings, but there is no transcript to reveal what transpired at the hearings. Therefore all statements in Allstate's brief regarding what did or did not occur at the hearings on Allstate's motion for fees are utterly speculative and *de hors* the record.

ISSUE ON APPEAL

Did the District Court err by affirming a trial court order denying Allstate's motion for attorneys' fees, which motion was based on an undifferentiated Section 768.79 settlement offer to two Plaintiffs jointly, which neither Plaintiff was able to accept or reject because Allstate made no settlement offer to either of the Plaintiffs, when the challenged order was entered after two hearings scheduled by Allstate to which Allstate brought no court reporter so that no transcript exists to reveal the basis for the trial court's ruling?

SUMMARY OF ARGUMENT

The gist of Allstate's argument is that the courts below erred in ruling that Allstate's 1995/1996 settlement offer to the Plaintiffs did not provide a proper basis for an award of §768.79 fees because Allstate's "joint" offer was not directed at, and could not have been accepted by, either of the Plaintiffs individually. Allstate contends that ruling was wrong because Allstate's joint settlement offer was made prior to this Court's amendment of Rule 1.442 which required §768.79 settlement offers in multi-party litigation to apportion the settlement offer to individual offerees. Allstate asserts that because its non-apportioned offer was made before Rule 1.442 was changed to require apportionment, and the new rule was non-retroactive, therefore the offer was *ipso facto* valid under §768.79 notwithstanding that neither of the Plaintiffs was capable of accepting the Allstate "offer" because no offer was made to either of the Plaintiffs. However, even assuming that the basis for the challenged circuit court ruling was that Allstate's offer did not apportion the proposed settlement, Florida law does not preclude a court from invalidating a pre-1997 offer which *was not capable of being accepted by either of the putative offerees.* To the contrary, the pre-existing law of contracts required that all offers be specific enough to allow each offeree to evaluate and accept or reject it independently, and in the present case Allstate's pre-1997 "joint"

settlement offer could not be a valid basis for awarding §768.79 fees because neither of the Plaintiffs was capable of accepting the offer and thereby consummating a legally enforceable settlement contract.

ARGUMENT

I.
BECAUSE ALLSTATE DID NOT PROVIDE A TRANSCRIPT OF THE CIRCUIT COURT HEARINGS RESULTING IN THE TRIAL COURT RULING, THE RULING WAS PROPERLY AFFIRMED.

As the Hingsons emphasized in their brief to the Second District below, it is fundamentally inappropriate to argue about the rightness or wrongness of a circuit court ruling when the appellant (and moving party) elected not to bring a court reporter to the critical circuit court hearings and thereby rendered it impossible to know what issues, statements and information—factual *or* legal—were presented to the circuit court and may have triggered the challenged ruling. Petitioner's brief is based on mere conjecture regarding the basis for the challenged ruling, for there is no appellate record to substantiate any assumption regarding the reason or reasons for the ruling which Allstate seeks to challenge. That the absence of a proper record is more than a mere technical flaw is shown by the decision in C & S Chemicals v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000), where there was a similar hearing

on a similar motion for fees (under *very* similar facts), and at that hearing the movant's attorney made a verbal pronouncement to the circuit judge with respect to a §768.79 settlement offer, and that verbal pronouncement ultimately resulted in the decision that appellant was not entitled to an award of fees. That outcome resulted from the appellate court *being aware of the verbal statement because there was a transcript of the proceedings*. In the present case there is no transcript of the critical hearing (actually, hearings) because Allstate did not bring a court reporter, and therefore it is impossible to know what may have occurred at the hearings and may have led to the ruling under consideration.

Allstate has responded (see Allstate brief at pages 20-22) that the absence of a transcript is unimportant when the circuit court hearing only addressed legal issues and arguments, but that is mere question-begging because without a transcript it is impossible to determine whether or not the hearings of October 11th and February 7th only entailed legal arguments. If there had been no transcript of the hearing in C & S Chemicals, then the appellant might likewise have *asserted* that the hearing entailed only 'legal arguments' so the lack of a transcript was unimportant. As it turned out (*because there was a transcript*), a 'factual' statement was made by a lawyer at the hearing that was case-dispositive as a matter of law. Indeed, Allstate's distinction between "legal argument hearings" (where transcripts are supposedly unnecessary)

and "fact hearings" (where transcripts are needed) is highly strained and unrealistic because, in the context of a dispute over a proposal to settle pending litigation, what the lawyers themselves say to the judge is often a rich blend of "fact" and "legal argument."[1]

To be blunt, the Hingsons' undersigned appellate counsel does not have the slightest idea what occurred at the hearings of October 11th and February 7th, and neither does Allstate's appellate counsel (because neither one attended either hearing), and it seems fundamentally unfair to the Hingsons, and fundamentally hazardous to the interests of justice, for an appellate court to *merely presume* that nothing occurred

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[1]As indicated in this very case by Judge Rosman's February 18, 2000 order which refers to facts as well as legal arguments presented by the attorneys at the hearing. *See, e.g.,* Dicus v. District Board of Trustees, 734 So. 2d 563, 564 (Fla. 5th DCA 1999) ("A party is also bound by factual concessions made by that party's attorney before a judge in a legal proceeding"); Evans v. Piotraczk, 724 So. 2d 1210 (Fla. 5th DCA 1998); Orion Insurance Co. v. Corrigan, 606 So. 2d 707 (Fla. 4th DCA 1992). In the present case, moreover, the correspondence between the trial lawyers reveals a number of disagreements over factual as well as legal issues, including disagreements about discovery and production of fees-related documentation; the need for witnesses at the hearings on fees; a proposed settlement of the fee issue in conjunction with the voluntary dismissal of the Hingsons' original appeal of the final judgment (prior to the hearings on Allstate's motion); and a post-hearing "battle of proposed orders" following the second hearing. Indeed, Allstate's trial counsel was apparently deposed with respect to the fee-motion and apparently there were disputes concerning the timeliness of Allstate's fee motion and/or whether the alleged fees had been properly itemized and documented. In short, there apparently were many potential factual issues that *may* have been addressed at the hearings.

at a circuit court hearing that influenced a challenged ruling and might likewise control the proper disposition of the appeal if only the appellate court could see what transpired. Such a presumption for the benefit of an appellant who could easily have brought a court-reporter to the hearings, but for some reason decided not to, could be highly pernicious to the entire system of justice. *See*, Haist v. Scarp, 366 So. 2d 402, 404 (Fla. 1978): "An accurate and comprehensive record of the proceedings below is absolutely essential to fair and efficient appellate review. This Court should provide every incentive to parties to develop and preserve an adequate record. We trust this decision will serve as such an incentive."

There are two reasons why the absence of a transcript should result in the trial court's ruling being sustained: (i) it is impossible to determine why the trial court made the decision it did, and therefore impossible to determine that the trial court abused its discretion or acted unreasonably or contrary to law; (ii) it is impossible to determine if Allstate might have been responsible for the trial court's ruling. The latter issue lurks particularly large in this case, for while it may be understandable that a *pro se* plaintiff and perhaps even a plaintiff's attorney working on a pure contingency fee might sometimes foolishly decide to save fifty dollars by not bringing a court reporter to a hearing s/he has scheduled on his or her own motion for fees—thus assuming the risk of an adverse ruling which cannot be reviewed by the

appellate courts—it is rather more difficult to imagine such a calculation by a multi-billion dollar enterprise like Allstate, *especially when Allstate was already the prevailing party and entitled to transfer the cost of the court-reporter to the Plaintiffs*. Lurking in this case is thus the implication that Allstate may have had some *reason* for not bringing a court reporter to the hearings, and the most obvious explanation is that Allstate calculated that the prospect of a reversal **without a transcript** would actually be better than the chance of a reversal **with a transcript** which would allow the appellate court to see what transpired.[2]

Therefore, although the Second District did not refer to the lack of a transcript in its opinion, the decision to affirm the trial court order was correct based on the well-established principle of appellate procedure that trial court rulings should be affirmed under these circumstances. *See, e.g*, Haist, 366 So. 2d at 402; Applegate v. Barnett

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[2]Allstate writes on page 20 of its brief that the Hingsons should not be heard to object to the lack of a transcript because the Hingsons opposed Allstate's motion for the District Court to relinquish jurisdiction for a Rule 9.200(b)(4) 'reconstruction' of the record. That is nonsense, for the Hingsons opposed that motion (and the District Court denied it) because the purpose of Rule 9.200(b)(4) is to allow an appellant to attempt such a "refabrication" of the record immediately and in place of directing a court reporter to prepare the transcripts, i.e., within ten days of filing the notice of appeal. Instead Allstate waited *more than half a year*, having filed its initial brief with the full knowledge that it had no transcripts of the critical hearings, apparently in the hope that no one would notice the lack of a proper record on appeal, thereby rendering any 'reconstruction' of the hearings impossible. *See*, Haist, 366 So. 2d at 402.

Bank, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without knowing the factual context, neither can an appellate court reasonably conclude that the trial court so misconceived the law as to require reversal").[3]

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[3]The district courts all commonly affirm trial court orders on motions for attorneys' fees because an appellant has failed to provide a transcript of the hearing:

First District: Hoover v. Sprecher, 610 So. 2d 99 (Fla. 1st DCA 1992) (affirming a trial court's denial of a motion for attorneys' fees because no transcripts were provided of the hearings on the motion for fees and so the district court had no basis for finding an abuse of discretion); Hyster Co. v. Stephens, 560 So. 2d 1334 (Fla. 1st DCA 1990) (affirming a ruling on a motion for award of costs because appellant failed to provide a transcript of the hearing below); Stelk v. Stelk, 442 So. 2d 351, 353 (Fla. 1st DCA 1983) (affirming an order on a motion for attorneys' fees because appellant failed to provide a transcript of the hearing and so the trial court's ruling would be presumed to be correct).

Second District: Lynn v. Allstar Steakhouse, 736 So. 2d 722 (Fla. 2d DCA 1999) (affirming an order on a motion for attorneys' fees because the appellant did not provide the court with a transcript of the hearing below); Chirino v. Chirino, 710 So. 2d 696 (Fla. 2d DCA 1998) (affirming a trial court ruling on fees and other matters because appellant failed to provide a transcript of the hearing below and therefore the appellate court could not "determine conclusively that an error was made"); Southeast Bank v. Steves, 552 So. 2d 292 (Fla. 2d DCA 1989) (affirming a trial court's ruling on a motion for attorneys' fees: "Because this court was not furnished with a transcript of the hearing which generated the order being challenged in this appeal, appellants have failed to demonstrate a basis for reversal in the record, and we must affirm...").

Third District: SPP Real Estate v. Portuondo, 756 So. 2d 182 (Fla. 3d DCA 2000) (affirming an order on a motion for attorneys' fees because appellant failed to provide a transcript of the proceedings below); Thomas v. Perkins, 723 So. 2d 293 (Fla. 3d DCA 1998) (affirming an order on an attorneys' fee motion because the appellant did not provide the court with a transcript of the proceedings below).

Fourth District: Department of Revenue v. Wrobel, 739 So. 2d 670 (Fla.

(continued...)

This Court should affirm the Second District's ruling because the challenged circuit court order was properly affirmed in light of Allstate's failure to provide a record showing an abuse of discretion. Whatever the true explanation for the lack of a transcript, one thing is surely true—neither this Court nor undersigned counsel is capable of determining **what** occurred at the two hearings, and therefore it should be presumed that Judge Rosman acted reasonably and his order affirmed on that basis.

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[3](...continued)
4th DCA 1999) (affirming an order on a motion for attorneys' fees because the appellant did not provide a transcript of the hearing and therefore the trial court ruling "must stand"); Southeast Florida Cable v. Islandia I Condominium Ass'n, 661 So. 2d 91 (Fla. 4th DCA 1995) (affirming an award of costs and expert-witness fees because the appellant failed to provide a transcript of the hearings so as to show the trial court's reasoning, and so failed to prove an abuse of discretion); Gardner v. Gardner, 501 So. 2d 1300 (Fla. 4th DCA 1986) (affirming order on attorneys' fees because appellant did not provide a transcript of the hearing below).

Fifth District: Brooks v. South Seminole Comm. Hospital, 710 So. 2d 1048 (Fla. 5th DCA 1998) (affirming a trial court's ruling on attorneys' fees because appellant failed to file a transcript of the hearing on fees); Department of Health and Rehab. Services v. Coyle, 624 So. 2d 400 (Fla. 5th DCA 1993) (affirming an award of attorney's fees because, in the absence of a transcript of the hearings on fees, the appellate court was required to accept the trial court's findings).

II.

EVEN ASSUMING THAT THE SOLE BASIS FOR THE CHALLENGED CIRCUIT COURT ORDER WAS THAT ALLSTATE DID NOT APPORTION ITS SETTLEMENT OFFER, THE ORDER WAS PROPERLY AFFIRMED BECAUSE FLORIDA LAW DOES NOT PRECLUDE A COURT FROM DECLINING TO AWARD §768.79 FEES ON THE BASIS OF A SETTLEMENT OFFER THAT *WAS NOT CAPABLE OF BEING ACCEPTED BY THE PUTATIVE OFFEREE*.

Let us suppose, as Allstate postulates in its brief, that there was only one reason for Judge Rosman's ruling, and that was his 'legal' conclusion that Allstate was not entitled to fees because Allstate's offers of judgment did not make any specific settlement offer to either Solen Hingson or to Annette Hingson, and that lack of "apportionment" rendered the offer incapable of being "accepted" by either offeree. In other words, let us hypothesize that the exclusive rationale for Judge Rosman's order was his conclusion that Allstate had failed to offer either of the Hingsons anything which either of the Hingsons could have "accepted" and therefore it would be an unjust charade to pretend, for §768.79 purposes, that either of the Hingsons had "rejected" or "declined to accept" settlement offers which, in reality, **neither of them could have accepted.**

Allstate has presented this Court with a syllogism that sounds logical but is actually sophistry: (1) This Court in 1997 adopted the rule that §768.79 settlement

offers made to multiple parties had to apportion the offer so that each offeree was capable of accepting the offer individually and thereby consummating a settlement contract; (2) that new rule was non-retroactive and only applied to post-1997 settlement offers; (3) therefore any pre-1997 settlement offer that made a joint, non-apportioned offer is *ipso facto* a proper basis for awarding §768.79 attorneys' fees; (4) therefore the law prior to 1997 entitled the prevailing party to an award of attorneys' fees when the losing party did not "accept" an "offer" that satisfied the 1996 version of Rule 1.442 **even if no offer was actually made to the losing party that s/he could have "accepted."**

In C & S Chemicals, 754 So. 2d 795, the plaintiffs were likewise an injured husband and his wife with a loss-of-consortium claim. In 1995 and 1996—the same dates as in the present case—the plaintiffs served demands of judgment on the defendants without "apportioning" those settlement offers between the individual defendants so that each could individually evaluate and accept or reject the offer. On that basis the Second District rightly held the offers invalid: "[W]hen a lack of apportionment between offerees prevents them from evaluating the offer independently," the Court stated, "the joint offer is unenforceable." And that statement was immediately followed by footnote 3, in which the Court stated that although both of the demands preceded the 1997 amendment to Rule 1.442, the **pre-**

existing law required that such offers "be specific enough to allow each party to evaluate it independently."[4]

Solen Hingson and Annette Hingson had the same need and the same right as the Defendants in C & S Chemicals to *individually* assess a settlement offer that was amenable to being accepted. *See* USAA v. Behar, 752 So. 2d 633 (Fla. 2d DCA 2000), which held in a situation identical to the situation *sub judice* that an injured husband's claim and his wife's consortium claim were separate and distinct and so each of the plaintiffs was entitled to evaluate a settlement proposal individually as it pertained to each of their claims. In Behar the court confirmed that a non-apportioned offer to a husband and wife—one exactly like the Allstate offers in the present case—could not be "accepted" by either of the plaintiffs and so was illusory:

> There is no suggestion that Mrs. Behar lacks competence to evaluate the offer. Similarly, we are unaware of any legal disability that would preclude Mrs. Behar from exercising

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[4]*See also* McMullen Oil v. ISS International, 698 So. 2d 372 (Fla. 2d DCA 1997) (the laws authorizing awards of attorneys' fees are in derogation of the common law and must be strictly construed); Security Professionals v. Segall, 685 So. 2d 1381 (Fla. 4th DCA 1997) (confirming that settlement offers were required to specify the proposed settlement amounts attributable to each party and each party's individual claim); Twiddy v. Guttenplan, 678 So. 2d 488 (Fla. 2d DCA 1996) (nullifying a defense settlement offer because it failed to apportion the offer between the offerees); GEICO v. Thompson, 641 So. 2d 189 (Fla. 2d DCA 1994) (confirming that the circuit courts may consider the unenforceability of such "joint offers" in deciding whether to award attorneys' fees under §768.79 and Rule 1.442).

> her discretion to resolve the litigation as to her claim. Although Mrs. Behar's claim is derivative, it is her cause of action, not Dr. Behar's and not their joint claim. [Citations omitted.] Because there are two plaintiffs in this suit, itemization of USAA's offer to Mrs. Behar, as well as to Dr. Behar, is required.[5]

The Hingsons submit that this Court's 1997 amendment of Rule 1.442 was intended merely as a codification of a pre-existing and fundamental canon of contract law, one which Florida courts have always recognized and enforced. Allstate's offer was invalid because of fundamental principles of contract law which far transcend the narrow procedural guidelines which happen to be listed a rule of civil procedure. In other words, just because an offer strictly adheres to every express requirement which may happen to be listed in the current year's version of Rule 1.442 does not *necessarily* mean that the offer is a per se valid offer capable of being accepted by the offeree. Otherwise the Rule and §768.79 would be transformed from a mechanism for promoting settlements into a mere ploy for shifting liability for fees, by inviting

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[5]One of the flaws in the Third District's decisions in Bodek v. Guliver Academy, 702 So. 2d 1331 (Fla. 3d DCA 1997), and Crowley v. Sunny's Plants, Inc., 710 So. 2d 219 (Fla. 3d DCA 1998), is the tacit adoption of an irrebuttable presumption that all couples and families should be deemed corporate-like entities into which the personal rights and interests of each spouse and child must be submerged. Whether or not intended by the Third District, Bodek and Crowley revive archaic "chattle" concepts of wives and children, constructs which were long ago buried by the law and which hardly merit disinterment in the year 2001 A.D.

lawyers to concoct "offers" which strictly comply with the current requirements of the Rule, yet are cunningly devised to be incapable of acceptance, e.g., the offer in this case.[6]

The issue before this Court is not just about abstract legal doctrine. It is also one of **elementary fairness**. That can be demonstrated by proposing the following Socratic dialog between Mrs. Annette Hingson and a member of this tribunal who will be personified as *Ms. Justice*:

Ms. Hingson: Your Honor, why should I be required to pay $34,631.25 to Allstate lawyers?

Ms. Justice: Because, madam, the Florida Legislature enacted a law saying that if a plaintiff like you fails to accept a defendant's offer, and then does not win at least 75% of the amount offered, then the plaintiff must pay the defendant's attorneys' fees.

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[6]This Court will hardly be shocked by the suggestion that lawyers have occasionally been known to use §768.79 offers for reasons other than actually fostering settlement. After all, while obtaining a settlement may be very fine, obtaining a *judgment for damages plus attorneys' fees is even better,* so the **ideal** settlement offer is often one that lays the foundation for a fee-award but which is also adroitly drafted to thwart acceptance and consummation. That being so, for courts to limit their inquiry to the question, "Did the offer satisfy the express requirements which are listed this year in Rule 1.442?" would have the most pernicious and perverse impact on the entire 768.79 procedure—it would turn the whole process into another litigation game of "gotcha."

Ms. Hingson: I see. Yet I do not recall *receiving any offer* that I declined to accept. Pray tell what offer was made to me that I failed to accept?

Ms. Justice: The offer by Allstate to pay "Plaintiffs Solen Hingson and Annette Hinson" $30,000 in full settlement of "all pending claims." If you wanted to avoid any risk under the law I mentioned, you should have written back to Allstate's attorney and said "I accept your settlement offer."

Ms. Hingson: *And what would have happened then, your Honor*? Would I have received $30,000? Ten dollars? A plug nickel? With all due respect, your Honor, there was no "offer" I could "accept" because I was offered nothing. If I had written back "I accept your offer" that would be meaningless and no settlement could arise because *Allstate had not offered me anything.* How can I be penalized for not accepting an offer that was never made to me and that I could not accept and thereby achieve an enforceable contract?

Ms. Justice: I begin to see what you are saying....

Ms. Hingson: Let us suppose that I did exactly what you say I should have done to avoid any potential liability for Allstate's attorneys' fees—immediately written back "I accept your offer" and then filed a notice of voluntary dismissal with prejudice of my claim. How much would I have received in settlement? Suppose that Allstate declined to send me a check. Or they sent me a nickel. If I sued to enforce the "settlement," would you have ordered Allstate to pay me

something? How much? *What would I have been entitled to if I had "accepted" Allstate's "offer"?*

Ms. Justice: Hmmm, let me think for a minute..

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No matter how long Ms. Justice considers the issue, there is no answer to Ms. Hingson's question. If Ms. Hingson had responded with a notarized "acceptance" of the Allstate "offer," and performed her part of the bargain by dismissing her claim with prejudice, *there would be no settlement and she would be entitled to nothing*— she could not "enforce" any "settlement contract" by compelling Allstate to do anything. Therefore, notwithstanding dicta in certain decisions cited in Allstate's brief,[7] implying that pre-1997 "joint" settlement offers should always be deemed a *per se* valid basis for awarding §768.79 fees, *at least in this case* Allstate's joint settlement offer could not be a valid basis for awarding §768.79 fees because the Plaintiffs were not individually capable of "accepting" the offer and thereby consummating a legally enforceable settlement contract.[8]

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[7]MGR Equipment v. Wilson Ice, 731 So. 2d 1262 (Fla. 1999); Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000); Bodek, 702 So. 2d at 1331; V.I.P. Real Estate v. Florida Executive Realty, 650 So. 2d 199 (Fla. 4th DCA 1995); *see also* Crowley, 710 So. 2d at 219.

[8]To offer a somewhat different "mind experiment," the Court should hypothesize two appellate judges who are fishing buddies and agree that one will

(continued...)

Under long-standing principles of contract law a valid contract cannot arise from the "acceptance" of an "offer" that fails to specify the essential terms of the proposed contract.[9] Hence, an offer which is not specific with respect to the essential terms of a proposed settlement contract cannot provide a basis for awarding attorneys' fees. To state the matter bluntly, no version of Rule 1.442 is the final word on settlement offers, and no version signifies that the Florida courts are divested of the power to hold that a particular offer is invalid based on elementary principles of contract law. Under the common-law of contracts, as that law has existed for centuries, if an offer is not a valid offer because of some missing term or ambiguity which renders it incapable of being accepted by the

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[8](...continued)
buy a motorboat and outboard and the other will buy an old truck and trailer, which equipment they will have the right to use on alternative weekends. Now imagine that a third judge makes them an offer to buy the entire rig (boat & motor, truck and trailer) for $30,000. The two judges might get together and make a side-deal between themselves to jointly accept the offer and then split the proceeds as they deem fit, but what if they cannot agree on that side-deal yet one of them wanted very much to sell-out her interests? In that case the offer could not be accepted because it was a joint "all or nothing" offer which neither could accept individually. Now let us imagine a lawsuit arises in which a key issue is whether, by not accepting that $30,000 offer, one of the judges had failed to accept a valid offer to sell his interest in the rig. The answer is plainly "No" because it is impossible to say that either judge rejected anything that she could have accepted.

[9]*See e.g.,* Hartford Casualty Insurance v. Silverman, 689 So. 2d 346 (Fla. 3d DCA 1997); Metropolitan Dade County v. Estate of Hernandez, 591 So. 2d 1124 (Fla. 3d DCA 1992); Farrell v. Phillips, 414 So. 2d 1119 (Fla. 4th DCA 1982).

offeree and thereby giving rise to an enforceable contract, then it does not "become" valid merely because the Supreme Court has not yet addressed that particular defect or deficiency in a new "procedural-guideline" appended to Rule 1.442.[10]

Indeed, it is "hornbook" law that an "offer" **which cannot be accepted** and thereby produce a valid contract is not a valid offer. *See Restatement (Second) of Contracts*, at §33; Am. Jur. 2d Contracts §43, and *Corbin on Contracts* at §1.11. Indeed Corbin now cites this Court's opinion in Pierpont v. Lee County, 710 So. 2d 958 (Fla. 1998) as an illustration of that key principle. In Pierpont, the issue was whether in condemnation proceedings a county's good-faith estimate of value should be construed as a settlement offer for purposes of calculating the landowners' entitlement to attorneys' fees. This Court held that a good-faith estimate of value could not be considered a legal "offer" *because the landowner could not "accept" the offer and thereby bind the county to a specified sum.*[11]

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[10]It is important to recall that the only reason there even **is** a Rule 1.442 is that this Court wanted to preserve the Article V prerogatives of the judiciary—Rule 1.442 was hardly intended to serve as a comprehensive exposition of the "law of contracts."

[11]The situation in Pierpont was quite similar to the instant case not merely because the issue was the validity of a putative "offer" for purposes of awarding attorneys' fees. In Pierpont it was argued that the good-faith estimate of value was (continued...)

Annette Hingson may have been perfectly willing, even eager, to settle her claim had Allstate made an offer to her for doing so. To state the matter a little differently, since we can't know whether Annette might have gladly sold-out her claim for even a nominal settlement from Allstate (*which she was never offered*), it would hardly be fair to make her pay for Allstate's attorney fees based on the fiction that she declined or "failed to accept" a settlement offer when in reality no offer was ever made to her.

And that is so irrespective of the 1997 amendment to Rule 1.442, because that amendment merely reinforced and "codified" a pre-existing contract law requirement—it certainly did not in 1997 originate a new 'specificity' requirement governing contract-offers, for it has always been the most fundamental of all principles governing contract-formation that an offer must specify all essential terms of the proposed contract, and that a failure to do so renders a purported contract offer both illusory and unenforceable. In terms of the Allstate offer at issue in this case, no term was more essential than the amount each Plaintiff was

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[11](...continued)
an "offer" because it expressed what the offeror was willing to pay to settle the matter, and pages 2-4 of Allstate's brief make it clear that Allstate's offer was **exactly that**—an expression of the total amount that Allstate was willing to pay to settle the litigation rather than an offer that either Hingson could individually "accept" and thereby bind Allstate to a specific settlement amount.

being offered in exchange for the dismissal and release of that party's claim, for without that essential term neither Plaintiff could appraise much less "accept" the offer.

Because that elementary precept was violated by Allstate's settlement offer in this case, the Second District was correct to have affirmed the trial court's ruling because Judge Rosman was correct to have denied Allstate's motion, even assuming that was the one and only reason why he denied Allstate's motion, which is an assumption undersigned counsel does not make.

CONCLUSION

For the reasons stated above, the Court should affirm the District Court's decision affirming the order of Judge Rosman denying Allstate's motion for an award of attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondents Solen and Annette Hingson has been furnished by U.S. Mail this ___ day of August, 2001, to: Bonita K. Brown, Esq., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601; and Clayton Crevasse, Esq., at Roetzel & Andrews 2320 First Street, Fort Myers,

Florida 33901-3429; and to Bruce L. Scheiner, Esq. at P.O. Box 60049, Fort Myers, Florida 33906-0049.

CERTIFICATE OF TYPE SIZE

I hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Civil Procedure.

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Thomas M. Pflaum