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

ALLSTATE INDEMNITY COMPANY,	)	
	)	
Petitioner,	)	Case No.: SC01-33
	)	
vs.	)	
	)	
SOLEN HINGSON and ANNETTE HINGSON,	)	
	)	
Respondents.	)	
	)	

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
LAKELAND, FLORIDA

INITIAL BRIEF OF PETITIONER ALLSTATE INSURANCE COMPANY

Bonita Kneeland Brown, Esquire
FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, FL 33601
813 228-7411
Florida Bar No.: 607355
Attorneys for Petitioner

STATEMENT OF THE CASE AND FACTS

In 1995, Solen Hingson and Annette Hingson, his wife, sued Allstate Indemnity Company,[1/] its underinsured motorist (UM) carrier. The suit claimed damages for injuries Mr. Hingson allegedly received on May 28, 1994 in a collision with a motor vehicle owned and operated Dora E. Greene, and for Mrs. Hingson's loss of consortium. (App. A)[2/] According to the Hingsons' complaint, Ms. Greene's bodily injury liability limits of $30,000 were insufficient to compensate Hingson for his own injuries and his wife's consortium claim. (App. A, p. 2) The Hingsons' complaint sought UM benefits through Allstate to fully compensate them over and above Ms. Greene's policy limits. (App. A, pp. 3-4) The Hingsons' UM policy limits were $30,000. (App. L, p. 3)

The case went to trial and the jury returned a verdict in favor of the Defendant, Allstate, on March 2, 1999. Consequently, on June 29, 1999, the trial court entered a final judgment for Allstate. (App. B) Subsequently, the trial court entered an order denying the Plaintiffs' motion for new trial. (App. C) The Hingsons filed a notice of appeal of the final judgment on the merits. (App. D) Two weeks later, the Hingsons filed a notice of

---

1/ For ease in reference, the Plaintiffs/Respondents, Solen and Annette Hingson will be referred to as "the Hingsons" or "Plaintiffs." The Defendant/Petitioner, Allstate Indemnity Co., will be referred to as "Allstate" or "Defendant."

2/ An Appendix accompanies this brief in accordance with Rule 9.130(e), Fla. R. App. P.

dismissal of their appeal (App. E), and this Court dismissed the appeal on July 19, 1999. (App. F)

On March 11, 1999, nine days after the return of the verdict, Allstate timely filed a motion for an award of attorneys' fees pursuant to Section 768.79, Florida Statutes. (App. G) The motion attaches a notice of service of an offer of judgment dated November 12, 1996. (App. G, Exhibit A) The motion also attaches Allstate's letter offer of judgment dated November 11, 1996, with a certificate of service dated November 12, 1996. In the letter, Allstate offered to settle with the Plaintiffs, Solen Hingson and Annette Hingson, in the total, undifferentiated amount of $30,000. (App. G, Exhibit A, p. 2)

Allstate's amended motion for attorneys' fees attached an earlier offer to Plaintiffs to settle, dated November 17, 1995, for the total, undifferentiated amount of $15,501. (App. H, Exhibit A) The amended motion reiterated the contents of the original motion, citing again to the November 12, 1996 offer of judgment, and again attaching it as an exhibit. (App. H., Exhibit B, pp. 1-2) The face of the record reflects that Allstate's counsel met all time deadlines required by the statute and the rules of procedure as to the service of the offer and the filing of the motion for fees following the verdict.

In conjunction with the motion for fees, defense counsel for Allstate filed an affidavit of attorneys' fees and legal assistant fees, requesting $34,631.25. (App. I) Plaintiffs responded with a motion to strike Defendant's claim for attorneys' fees. (App. J)

The Hingsons' motion to strike offered no objection to Allstate's motion for entitlement to attorneys' fees on either timeliness or lack of good faith grounds. Instead, Plaintiffs' motion to strike was based solely on Plaintiffs' claim that Allstate failed to itemize sufficiently their attorneys' fees as required by Rowe. (App. J) In response, Allstate filed affidavits of attorneys' fees and legal assistant fees demonstrating time spent and hourly rates for all attorneys and legal assistants participating in the litigation of this case. (App. K)

Allstate also filed the affidavit of Donna Mork, the claims representative for Allstate. (App. L) Ms. Mork attested that, in her position as claims representative handling the instant case, she had reviewed all information with respect to the issues of liability, causation, and damages, including a review of all medical information and other information pertaining to the damages alleged. (Id., pp. 1-2) She used this information in preparing an evaluation of this case, originally concluding that a reasonable settlement value was $15,500. Accordingly, she requested counsel for Allstate to serve the offer of judgment on November 17, 1995, for the sum of $15,501. (Id., p. 2)

As Ms. Mork received additional information, including updated medical bills and records indicating that the Plaintiff had undergone additional treatment and surgery, she instructed defense counsel to prepare a subsequent offer of judgment for a total sum of $30,000 to the Hingsons. (App. L) Ms. Mork also attested that

the $30,000 offer constituted the entire policy limits under Plaintiffs' UM policy. (Id., p. 3)

On February 7, 2000, the trial court held a hearing on entitlement to fees. On February 18, 2000, the trial court entered an order denying the Defendants' motion for attorneys' fees. (App. M) The order contains no reference to untimeliness or lack of good faith. The order states, as the only grounds for the denial of the motion, the policy considerations enunciated in Section 768.79, Florida Statutes; Rule 1.442, Fla. R. Civ. P.; and USAA v. Behar, 25 Fla. L. Weekly D222 (Fla. 2d DCA, Jan. 21, 2000)[3/] (which held that undifferentiated offers of judgment made jointly to the plaintiff and his/her consortium spouse were invalid under Rule 1.442). (Id.) In the same order, the trial court granted the Defendant's motion for entitlement to costs as prevailing party. The court's order also stated that if the parties could not agree on the amount of costs, the court would schedule a future hearing to determine the amount. (Id.)

Allstate appealed the order as an appeal of a non-final order entered after a final order. Allstate's position was that even its later offer of judgment, served November 12, 1996, was made prior to the amendment of Rule 1.442. The amendment, which took effect on January 1, 1997, required that offers of judgment involving a joint proposal state the amount and terms attributable to each party separately. Allstate's brief to the Second District cited to

---

[3/] Now USAA v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000).

this Court's opinion in MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262, 1263-64, n.2 (Fla. 1999) (wherein this Court noted that the amended Rule 1.442 would not be applicable to offers of judgment tendered prior to the effective date of the amended rule.)

Nevertheless, on October 11, 2000, the Second District issued a decision affirming the trial court. The district court relied on its previous authority in C&S Chemicals, Inc. v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000), noting that, in doing so, it was in conflict with Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000). On June 21, 2001, this Court accepted conflict jurisdiction of this cause pursuant to Allstate's petition.

ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR ATTORNEYS' FEES BASED ON AN UNDIFFERENTIATED OFFER OF JUDGMENT TO AN INJURED PARTY AND SPOUSE UNDER SECTION 768.79, FLORIDA STATUTES, WHEN THE OFFER WAS TENDERED PRIOR TO THE JANUARY 1, 1997 AMENDMENT TO RULE 1.442, FLA. R. CIV. P., WHICH NOW REQUIRES THAT JOINT PROPOSALS DELINEATE THE AMOUNT ATTRIBUTABLE TO EACH PARTY.

SUMMARY OF ARGUMENT

The district court erred in affirming the trial court's denial of the Defendant's motion for attorneys' fees based on an undifferentiated offer of judgment to the injured parties, Solen Hingson and his spouse, Annette Hingson. The offers were tendered prior to January 1, 1997, before the amendment to Rule 1.442 of the Florida Rules of Civil Procedure. Thus, Allstate was not required to delineate the amount attributable to each party in its joint proposal under Section 768.79, Florida Statutes

Indeed, prior to January 1, 1997, the courts in Florida held that the rule and statute involving offers of settlement were satisfied as long as the offer named the party or parties to whom it was being made and stated its total amount. Bodek v. Guliver Academy, Inc., 702 So. 2d 1331 (Fla. 3d DCA 1997). Bodek involved an offer of judgment tendered prior to the rule change. However, the Bodek opinion noted, in a footnote, that the amendment to Rule 1.442, Florida Rules of Civil Procedure, which went into effect on January 1, 1997, would require that the proposal for settlement identify the amount and terms attributable to each party individually. Id. at 1332, n.1.

There is no question that the offers of judgment in the instant case were made in 1995 and 1996, prior to the 1997 rule change. Any question as to whether the rule change should be applied retroactively to those offers of judgment has already been answered by this Court in MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262 (Fla. 1999). MGR involved

offers of judgment tendered in 1996. In that decision, the this Court held:

> The 1995 version of the Florida Rules of Civil Procedure pertaining to offers of judgment only provided that "[p]arties shall comply with the procedure set forth in Section 768.79 . . . ." Fla. R. Civ. P. 1.442 (1995). The current Rule 1.442 is not applicable to the instant case since it became effective four months after the instant offer of judgment was tendered. Unlike its predecessor, the current rule mandates greater detail in settlement proposals, which will hopefully enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation.

Id., 1263-64, n.2.

The Fourth District reached the same conclusion independently in Herzog v. K-Mart Corp., 760 So. 2d 1006 (Fla. 4th DCA 2000). In that decision, the Fourth District reversed the trial court's order denying the defendant's motion for fees based on an undifferentiated total amount offered to the injured plaintiff and her consortium spouse. In doing so, the Fourth District stated:

> Rule 1.442(c)(3) of the Florida Rules of Civil Procedure was amended effective January 1, 1997, to require that a joint proposal state the amount and terms attributable to each party. Prior to that amendment neither the rule nor the statute had a requirement that the amount attributable to each person be specified. Thus, cases involving a joint offer of judgment served prior to the amendment to the rule, as K-Mart's was, has held such joint offers valid, despite the failure to specify the amounts attributable to each plaintiff. [case citations omitted] On the authority of these cases, we agree with K-Mart's argument that its offer of judgment, served prior to the amendment to the rule, was not rendered ineffective to trigger the sanctions of the statute merely because it was

> a joint offer which failed to specify the amount attributable to each plaintiff.

Id. at 1009.

Consequently, the trial court in the instant case erroneously denied Defendant's motion for attorneys' fees under the offer of judgment statute by misapplying the new rule and the decisions that have interpreted it. The Second District erred in affirming. This Court should reverse and remand with directions that the trial court enter an order entitling the Defendant to attorneys' fees.

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR ATTORNEYS' FEES BASED ON AN UNDIFFERENTIATED OFFER OF JUDGMENT TO AN INJURED PARTY AND SPOUSE UNDER SECTION 768.79, FLORIDA STATUTES, WHEN THE OFFER WAS TENDERED PRIOR TO THE JANUARY 1, 1997 AMENDMENT TO RULE 1.442, FLA. R. CIV. P., WHICH NOW REQUIRES THAT JOINT PROPOSALS DELINEATE THE AMOUNT ATTRIBUTABLE TO EACH PARTY.

A. Offers of Judgment Prior to January 1, 1997:

Prior to the January 1, 1997 rule change with regard to proposals for settlements, Florida law permitted undifferentiated offers of judgment to two or more plaintiffs. Specifically, before January 1, 1997, Florida Rule of Civil Procedure 1.442 set forth that, with respect to offers of judgment:

> [p]arties shall comply with the procedure set forth in section 768.79, Florida Statutes (1991).

Section 768.79, Florida Statutes, does not require that offers of judgment differentiate amounts attributable to each plaintiff when joint offers are made. The statute provides only that an offer must "[n]ame the party making it and the party to whom it is being made."

In Bodek v. Gulliver Academy, Inc., 702 So. 2d 1331 (Fla. 3d DCA 1997) (on remand from this Court), the Third District addressed the issue of whether an offer of judgment made to "the Plaintiffs" satisfied that statutory requirement that the offer "name the party to whom it is being made." Bodek involved an offer of judgment made in April, 1993, prior to the change in Rule 1.442. The plaintiffs contended that the trial court erred by granting the

defendant's motion on the grounds that the offer was "not in proper form because it failed to specify the amount that is being offered to each plaintiff." The appellate court bluntly stated: "We disagree with these arguments." Id. at 1332.

The Bodek court found that an offer satisfied Section 768.79 when it is being made to "the Plaintiffs." The court also held that the statute merely required that the offer of judgment "[s]tate its total amount." Id. Additional cases involving a joint offer served prior to the rule amendment have held that joint offers are valid despite the failure to specify the amount attributable to each plaintiff. See V.I.P. Real Estate Corp. v. Florida Executive Realty Management Corp., 650 So. 2d 199 (Fla. 4th DCA 1995); Gross v. Albertson's, Inc., 591 So. 2d 311 (Fla. 4th DCA 1991).

The most significant statement in the Bodek decision for purposes of this case, however, is located in a footnote. In that aside, the Third District points out that Rule 1.442, Florida Rules of Civil Procedure, had been amended, effective January 1, 1997, to require that the proposal for settlement identify the amount and terms attributable to each party. Id. at 1332, n.1. The Bodek decision issued December 10, 1997, is obviously alerting the bar and judiciary to the fact that offers of judgment made on or after January 1, 1997 would be subject to stricter standards.

B. Offers of Judgment As of January 1, 1997:

Although Section 768.79, Florida Statutes, has never been amended to require that a joint proposal state the amount and terms attributable to each party, this Court amended the rule of civil procedure as of January 1, 1997, as follows:

> Rule 1.442. Proposals for Settlement.
>
> (c) Form and Contents of Proposal for Settlement
>
> (3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

The instant case involves Allstate's joint offers of judgment to the Plaintiffs made in 1995 and 1996, prior to the changes in Rule 1.442. The issue here is whether the January 1, 1997 rule change, as noted in USAA v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000), applies to this case. This Court had already answered that question in Allstate's favor in MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262 (Fla. 1999). In that decision, for the benefit of the bar and the bench, this Court stated in a footnote:

> The 1995 version of the Florida Rules of Civil Procedure pertaining to offers of judgment only provided that "[p]arties shall comply with the procedure set forth in Section 768.79 . . . ." Fla. R. Civ. P. 1.442 (1995). The current Rule 1.442 is not applicable to the instant case since it became effective four months after the instant offer of judgment was tendered. Unlike its predecessor, the current rule mandates greater detail in settlement proposals, which will hopefully enable parties to focus with greater specificity in their

> negotiations and thereby facilitate more settlements and less litigation.

Id., 1263-64 n.2.

Thus, this Court made clear in MGR that current Rule 1.442, which requires that the settlement offer differentiate the amount between two plaintiffs, applies only to offers of judgment tendered after January 1, 1997, the effective date of the amended rule. Consequently, the trial court in the instant case erroneous denied Defendant's motion for attorneys' fees under the offer of judgment statute by misapplying the new rule and the decision of the Second District in USAA v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000). The Second District erroneously affirmed the trial court's order which relied on Behar.

The Behar case involves a situation in which the defendant made a joint, but undifferentiated, offer of judgment to an injured party and his wife as the consortium claimant. The defendant made the proposal for settlement on May 23, 1997, after amended Rule 1.442 had gone into effect. The "policy considerations" enunciated in Behar state that the purpose of Section 768.79 is to encourage the resolution of litigation, and that to further the statute's goal each party receiving an offer of settlement is entitled, under rule 1.442, to evaluate the offer as it pertains to him or her. Id. at 664. The Behar court held that an unspecified joint proposal failed to satisfy amended rule 1.442, as it did not provide each plaintiff an opportunity to independently evaluate his or her own claim. Id. at 665.

This Court has already stated in MGR that the stringent requirements in amended rule 1.442 would not apply in cases such as this one, where Allstate tendered its offers of judgment in 1995 and 1996, prior to the 1997 amendment to the rule. The Fourth District reached the same conclusion independently in Herzog v. K-Mart Corp., 760 So. 2d 1006 (Fla. 4th DCA 2000). In Herzog, the defendant served an offer of judgment in February, 1996, to the injured plaintiff and her consortium spouse in the undifferentiated total amount of $20,001. After return of a defense verdict in May, 1998, the defendant moved for an order awarding fees pursuant to an offer of judgment. The trial court denied the motion in an order that contains no comment or explanation. The appellate court noted, however, that the hearing transcript demonstrated that the trial court's focus was on the question of whether the offer was ineffective to invoke Section 768.79, due to it being a joint offer without specifying the amount offered to each individual plaintiff. Id. at 1009.

In reversing the trial court's order denying the defendant's motion for fees, the Fourth District stated:

> Rule 1.442(c)(3) of the Florida Rules of Civil Procedure was amended effective January 1, 1997, to require that a joint proposal state the amount and terms attributable to each party. Prior to that amendment neither the rule nor the statute had a requirement that the amount attributable to each person be specified. Thus, cases involving a joint offer of judgment served prior to the amendment to the rule, as K-Mart's was, has held such joint offers valid, despite the failure to specify the amounts attributable to each plaintiff. [citations omitted] On the

> authority of these cases, we agree with K-Mart's argument that its offer of judgment, served prior to the amendment to the rule, was not rendered ineffective to trigger the sanctions of the statute merely because it was a joint offer which failed to specify the amount attributable to each plaintiff.

Id. at 1009.

Three years earlier, in Security Professionals, Inc. v. Segall, 685 So. 2d 1381-1383 (Fla. 4th DCA 1997), the Fourth District had noted that at the time of the 1996 offer -- "the relevant period of time" -- the rule required compliance only with the specifics mandated by the offer of judgment statute. The court specifically noted:

> Rule 1.442 has been amended, effective January 1, 1997, to require greater specificity in what will now be referred to as a "proposal for settlement." In addition to other details which must be placed in the settlement proposal, the rule mandates that the proposal shall identify the claim or claims the proposal is attempting to resolve. Rule 1.442(3) states: "A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party."

Id. at 1384, n.2 (citations omitted).

Although in Herzog, the Fourth District does not specifically mention this court's directive in MGR, the logic is identical. Furthermore, even the Second District, which decided otherwise in this case, appears to have had second thoughts in the matter. In two decisions issued subsequent to the Second District's holding in

this case, the Second District appears to have receded from its holding below.

Specifically, in Stern v. Zamudio, 780 So. 2d 155 (Fla. 2d DCA 2001), the Second District reversed a trial court order granting attorneys' fees to a defendant pursuant to Section 768.79, Florida Statutes, and Rule 1.442. The defendant made the offer on October 29, 1999, well after the rule amendment. The offer did not specify the amount attributable to the injured plaintiff as differentiated from her consortium spouse. In ruling that the offer was defective, the Second District held:

> While the trial court correctly applied the substantive portions of the statute in effect at the time of the accident (section 768.79, Florida Statutes (1993)), it erred in failing to apply rule 1.442, which applies to all proposals for settlement authorized by Florida law made after its effective date, January 1, 1997. Subsection (c)(3) of the rule provides that: "[a] joint proposal shall state the amount and terms attributable to each party."

Id. (emphasis added).

Thus, in Stern, the Second District quite clearly states that the requirement of differentiated amounts applies when the proposal for settlement is made after the effective date of the rule change. Yet, the Stern decision inexplicably cites to the instant case, even though Stern espouses the opposite of the conclusion reached below, wherein the Second District does not make such a distinction. Clearly, the Second District is in conflict with itself at this point.

Likewise, in Gulfcoast Transportation, Inc. v. Padron, 26 Fla. L. Weekly D806 (Fla. 2d DCA March 21, 2001), the Second District again holds that one must abide by "the rule in effect at the time" that an offer is made. In that case, the Second District distinguished one of its earlier cases because the amendment to Rule 1.442 had changed the specifics required in the offer and the offer was required to comply with the rule in effect at the time.

In its decision below, the Second District apparently felt compelled to affirm based on its own recently-decided opinion in C&S Chemicals, Inc. v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000). However, the C&S Chemicals decision is completely distinguishable on its facts. In C&S Chemicals, the plaintiff sued three independently liable defendants for injuries arising out of a motor vehicle accident. The plaintiff and his wife served a $200,000 demand for judgment on all three defendants jointly. Shortly before trial, the plaintiff voluntarily dismissed one defendant and the injured plaintiff's wife voluntarily dismissed her consortium claim. The jury returned a verdict in favor of the remaining plaintiff in the amount of $250,000, after finding one defendant 90% at fault, and the other defendant only 10% at fault. Id. at 781.

Under those facts, it is not surprising that the Second District determined that lack of apportionment in the settlement demand was fatal to its effectiveness as a vehicle for obtaining attorneys' fees. The C&S court found that since the defendants were not joint tortfeasors, each had the right to evaluate the

demand separately based on their individual liability situations. However, the demand, as structured, made this impossible. In a footnote, the Second District recognized that the demand for judgment in C&S Chemicals had been made prior to the change in Rule 1.442. Id. at 797, fn.3. Nevertheless, the court found support for its decision in its earlier interpretation of the former rule and statute, specifically Twiddy v. Guttenplan, 678 So. 2d 488 (Fla. 2d DCA 1996).

Twiddy, however, is also inapplicable to the instant case. Twiddy also involved defendants who were not joint tortfeasors. One of the tortfeasors filed an offer of judgment for a single amount, conditioned on a requirement that the plaintiff release all defendants. Id. at 489. After a trial, the jury found no liability on the part of the defendant who had tendered the settlement offer, and only a small damage award against the other. The plaintiff appealed the trial judge's award of fees to both defendants, and the Second District reversed, stating:

> ... the joint offer of judgment was not specific enough to enable the trial judge to determine that the $2,100 verdict against Guttenplan was at least 25% less than the offer made on her behalf. We have previously held that a joint offer pursuant to section 768.79 is not invalid per se, but may be found invalid by reason of the nature of the offer and its validity and enforceability against an offering party.

Id. at 489. (emphasis added)

In so ruling, the Second District cited to its earlier decision of Government Employees Ins. Co. v. Thompson, 641 So. 2d

189 (Fla. 2d DCA 1994). In Thompson, a decision involving an offer made prior to the rule change, the court held "We decline to hold a joint offer invalid per se." Id. at 190. (emphasis added). Significantly, the Second District noted that research had disclosed to the court no cases holding a joint offer invalid per se, while numerous cases recognized, without comment, the validity of joint offers. Id.

Even the Second District has never held that all joint undifferentiated offers of judgment made prior to the rule change are invalid per se. Consequently, it is obvious that the C&S Chemicals decision is restricted to the facts of that particular case, which are similar to Twiddy. Thus, even prior to the rule change, the type of joint offer described in those cases would be held invalid where, mathematically, it could not be enforced. There is no such problem in the instant case where the Plaintiffs obtained no money judgment in their favor. Indeed, the case at hand is a perfect example of when a joint, undifferentiated offer to an injured party and consortium spouse is valid -- an offer of total policy limits for a claim and derivative claim based on a single occurrence.

To date, the Hingsons have had no good response to these arguments. What they focused on below and in response to Allstate's petition for review by this Court was the absence of a hearing transcript to corroborate the reason for the trial court's decision. Obviously, even the Second District did not accept that argument as viable, and for good reason. When Allstate discovered,

upon receipt of the Hingsons' answer brief, that this was to be the Hingsons' tactics, Allstate moved to relinquish the case to the trial court to reconstruct the judge's reasoning (there had been no court reporter). The Hingsons vehemently opposed Allstate's request and the Second District denied it. (See motion and order below). However, the Second District's opinion makes known that a hearing transcript or reconstruction was not necessary. The opinion below clearly notes that the trial judge denied Allstate's motion due to the policy considerations regarding undifferentiated offers of judgment enunciated in the statute, rule, and the Behar case.

Moreover, Hingson's argument that the order could be based on other grounds finds no support in record fact. First, this was not an evidentiary hearing, but simply a hearing on entitlement. The court did not even determine an amount for Allstate's cost judgment, which the court states in its order will be held at another time, if necessary. Second, the only logical interpretation of the trial court's order is that the trial court found the offer legally deficient under Behar and the amended rule. The record facts demonstrate that not only were Allstate's offers and the motion for fees timely, but that its offer of full policy limits demonstrated good faith. Indeed, for the trial court to have ruled otherwise on those points would have constituted a gross abuse of discretion. Logically, however, neither of these grounds -- the only other grounds possible -- could have formed the basis

of the trial court's order. Thus, the trial court denied Allstate's motion for fees based on a purely legal issue.

Case law earlier cited by the Hingsons to bolster their argument that a transcript of the hearing is necessary all deal with evidentiary hearings, such as non-jury trials held without a court reporter. The absence of a transcript does not, however, preclude a reversal where an error of law appears on the face of the judgment. Chirino v. Chirino, 710 So. 2d 696 (Fla. 2d DCA 1998); Casella v. Casella, 569 So. 2d 848 (Fla. 4th DCA 1990); Compton v. Compton, 701 So. 2d 110 (Fla. 5th DCA 1997). This is such a case.

Recently, the decision of Somerset Village Limited Partnership v. Carlton Fields Ward Emmanuel Smith, 26 Fla. L. Weekly D465 (Fla. 3d DCA February 14, 2001), reiterated the long-held principle that a hearing transcript is unnecessary when the hearing consists of legal argument of counsel, not the taking of evidence. Nor is it necessary to reconstruct the record of a hearing where counsel can anticipate only legal argument, not the taking of evidence. Id. The entitlement to attorneys' fees was the only matter before the trial court in the instant case. Thus, there was no testimonial evidence from the hearing that would be relevant in this appeal.

In sum, at the time that Allstate made the settlement proposal in the instant case, settlement proposals that offered a single amount to both the injured plaintiff and consortium spouse were not only valid under the statute and procedural rules, but commonplace. The trial court erred as a matter of law in

retroactively applying the amended rule and by applying the Behar decision which involved a proposal made after the amendment to the procedural rule. The Second District erred in affirming the trial court. This Court should reverse both the decision below and the trial court's order denying Allstate's motion for attorneys fees.

CONCLUSION

For all of the reasons stated in this brief, this Court should resolve the conflict between the Second and Fourth District Courts of Appeal by reversing the Second District and remanding with directions that the trial court enter an order granting Allstate's entitlement to attorneys' fees and, subsequently, determine an appropriate amount.

Respectfully submitted,

Bonita Kneeland Brown, Esquire
FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, FL 33601
813 228-7411
Florida Bar No.: 607355
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to:

Randall L. Spivey, Esquire
Associates & Bruce L. Scheiner
Personal Injury Lawyers, P.A.
P. O. Box 60049
Fort Myers, FL 33906-6049

Clayton W. Crevasse, Esquire
Roetzel & Andress, P.A.
2320 First Street, Suite 1000
Fort Myers, FL 33901-3429

Thomas M. Pflaum, Esquire
Route 2, Box 838
Micanopy, FL 32667-9649

on January 18, 2002.

_____
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

_____
Bonita Kneeland Brown, Esquire
FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, FL 33601
813 228-7411
Florida Bar No.: 607355
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

OTHER AUTHORITY