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JAN 04 2001
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IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

ALLSTATE INDEMNITY COMPANY,

Petitioner,

vs.

SOLEN HINGSON and ANNETTE HINGSON,

Respondents.

Case No.: SC01-33
DCA Case No.: 2D00-1107

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

PETITIONER'S BRIEF ON JURISDICTION

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

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Allstate Indemnity Company,[1/] adopts by reference the case and facts contained in the decision of the Second District Court of Appeal in this matter, without adopting the legal conclusions therein. (App. 1)[2/] The decision below, which is dated October 11, 2000, was rendered final for appellate purposes by the Second District's order denying the motion for rehearing/certification/clarification entered on November 27, 2000. (App. 2) The Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court on December 20, 2000.

In the decision below, the Second District Court of Appeal affirmed the trial court's denial of the Defendant/Appellant/ Petitioner's motion for attorneys' fees based on an offer of judgment under Section 768.79, Florida Statutes (1995). (App. 1, p. 1) The District Court's opinion relates that Allstate's offer of judgment in the amount of $30,000, served on November 12, 1996 to Solen Hingson and Annette Hingson, husband and wife, did not

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

[2/] All references to the appendix attached hereto will be referred to as "App." followed by the page number assigned to the appendaged document.

differentiate between the amount offered for Mr. Hingson's injuries in an automobile accident and for Mrs. Hingson's resulting consortium claim. (App. 1, p. 2)

The Second District stated the basis for its decision, as follows:

> The trial judge denied appellant's motion for attorney's fees citing the policy considerations regarding undifferentiated offers of judgment annunciated in Section 768.79, Florida Rule of Civil Procedure 1.442, and USAA v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000). Even though Behar can be distinguished because appellant's offer was made prior to the latest amendment to Rule 1.442, we nevertheless affirm on the authority of C & S Chemicals, Inc. v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000). In doing so, we are in conflict with Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000).

(App. 1, p. 2)

ISSUE ON APPEAL

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT'S DECISION IN HERZOG V. K-MART, 760 SO. 2D 1006 (FLA. 4TH DCA 2000) AND THIS COURT'S DECISION IN MGR EQUIPMENT CORP., INC. V. WILSON ICE ENTERPRISES, INC., 731 SO. 2D 1262 (FLA. 1999).

SUMMARY OF ARGUMENT

In its decision below, the Second District Court of Appeal denied the Petitioner's motion for attorney's fees pursuant to an offer of judgment on the grounds that the joint offer of $30,000 to both plaintiffs did not differentiate the amount attributed to Mr. Hingson's injuries and to his wife's resulting consortium claim. In doing so, the Second District noted that the amended rule 1.442, requiring such, had not yet gone into effect when the offer of judgment was made. The Second District also acknowledged that, in affirming the trial court's denial of the motion for fees, it was in conflict with the Fourth District's decision in Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000). The Petitioner asserts that the Second District is also in conflict with this Court's decision in MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262, 1263-64 n.2 (Fla. 1999), which stated that amended Rule 1.442 is not applicable to offers of judgment tendered prior to the effective date of the new rule. (Id.) For these reasons, this Court has jurisdiction to accept this Petition.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT'S DECISION IN HERZOG V. K-MART, 760 SO. 2D 1006 (FLA. 4TH DCA 2000) AND THIS COURT'S DECISION IN MGR EQUIPMENT CORP., INC. V. WILSON ICE ENTERPRISES, INC., 731 SO. 2D 1262 (FLA. 1999).

Under Article V, § 3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with the decision of another appellate court. This Court has recognized conflict jurisdiction when a decision announces a rule of law which conflicts with the rule previously announced by another appellate court. Nielson v. City of Sarasota, 117 So. 2d 731, 735 (Fla. 1960). That conflict must be expressed and contained within the written rule announced by the court. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980). Because the decision of the Second District Court of Appeal in this case directly and expressly conflicts with a reported decision from another district court of appeal, specifically Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000), and with the decision of this Court in MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262 (Fla. 1999), this Court has jurisdiction to resolve this conflict.

In Herzog v. K-Mart Corp., 760 So. 2d 1006 (Fla. 4th DCA 2000), the Fourth District was asked to consider an offer of judgment made in February, 1996. The offer was made to both the injured plaintiff, Marsha Herzog, and her husband, Max Herzog, who sued for consortium, in the undifferentiated total amount of $20,001. After return of the verdict in a May, 1998 trial, K-Mart moved for an order awarding it costs and fees pursuant to the offer of judgment. The trial court denied that motion without comment or explanation. However, the appellate court noted that the hearing transcript demonstrated that the trial court's focus was on the question of whether the offer was ineffective to invoke § 768.79, Florida Statutes, 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, have 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.

In MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262, 1263-64, n. 2, this Court stated:

> The 1995 version of the Florida Rules of Civil Procedure pertaining to offers of judgment only provided that "[p]arties shall comply with the procedures 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.

(emphasis added).

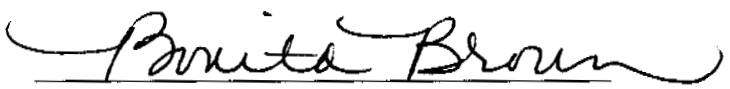
Thus, the decision below is in conflict with this Court's holding in MGR that current rule 1.442, which requires that the settlement offer differentiate the amount between two plaintiffs, applies only to offers of judgment tendered after January 1, 1997, the effective date of the amended rule. The Fourth District reached the same conclusion independently in Herzog v. K-Mart Corp., 760 So. 2d 1006 (Fla. 4th DCA 2000). The Second District's opinion below specifically acknowledges that the Second District is in conflict with the Fourth District on this issue. Consequently,

to eliminate conflict between the district courts of appeal and to uphold its own directive, this Court has jurisdiction to resolve this matter.

CONCLUSION

For all of the reasons stated in this brief, this Court has jurisdiction under the Florida Constitution to review the opinion below which directly and expressly conflicts with a reported decision from another district court of appeal and with a decision from this Court. It is urged that this Court accept jurisdiction to resolve the conflict.

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 TYPE SIZE

The undersigned certifies that this brief is typed with Courier 12-point print, which has 10 characters per inch.

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
Annis Mitchell Cockey Edward
& Roehn, P.A.
P. O. Box 60259
Fort Myers, FL 33906-6259

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

on January 2, 2001.

Bonita Brown
Attorney

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

ALLSTATE INDEMNITY COMPANY,	)	
	)	
Petitioner,	)	Case No.:
	)	DCA Case No.: 2D00-1107
vs.	)	
	)	
SOLEN HINGSON and ANNETTE HINGSON,	)	
	)	
Respondents.	)	
	)	
	)	

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

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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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

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ALLSTATE INDEMNITY COMPANY,

Appellant,

v.

SOLEN HINGSON and ANNETTE HINGSON,

Appellees.

Case No. 2D00-1107

Opinion filed October 11, 2000.

Appeal from nonfinal order of
the Circuit Court for Lee County;
Jay B. Rosman, Judge.

Bonita Kneeland Brown of Fowler,
White, Gillen, Boggs, Villareal &
Banker, P.A., Tampa, for Appellant.

Associates and Bruce L. Scheiner,
Fort Myers and Thomas M. Pflaum,
Micanopy, for Appellees.

PER CURIAM.

Appellant, Allstate Indemnity Company, challenges the trial court's denial of its motion for attorney's fees based on an offer of judgment under section 768.79, Florida Statutes (1995). We affirm.

Appellant, on November 12, 1996, served an offer of judgment on appellees, Solen Hingson and Annette Hingson, husband and wife. Appellant's offer was for $30,000 and was not differentiated between the amount offered for Mr. Hingson's injuries in an automobile accident and Mrs. Hingson's resulting consortium claim.

The trial judge denied appellant's motion for attorney's fees citing the policy considerations regarding undifferentiated offers of judgment enunciated in section 768.79, Florida Rule of Civil Procedure 1.442, and USAA v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000). Even though Behar can be distinguished because appellant's offer was made prior to the latest amendment to rule 1.442, we nevertheless affirm on the authority of C&S Chemicals, Inc. v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000). In doing so, we are in conflict with Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000).

Affirmed.

CAMPBELL, A.C.J., and FULMER and GREEN, JJ., Concur.

1002919

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

November 27, 2000

CASE NO.: 2D00-1107
L.T. No. : 95-4920 CA

Allstate Indemnity Company,	v.	Solen Hingson And Annette Hingson,
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing/certification/clarification is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Randall L. Spivey, Esq. Clayton W. Crevasse, Esq. Thomas M. Pflaum, Esq.

Charlie Green, Clerk Bonita Kneeland Brown, Esq.

bl

James Birkhold
Clerk

DISTRICT COURT OF APPEAL * SECOND DISTRICT * STATE OF FLORIDA

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

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P. O. Box 60259
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Thomas M. Pflaum, Esquire
Route 2, Box 838
Micanopy, FL 32667-9649

on January 2, 2001.

Bonita Brown
Attorney