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

CASE NO. SC01-33
LOWER TRIBUNAL CASE NO. 2D00-1107

ALLSTATE INDEMNITY COMPANY

Petitioner,

vs.

SOLEN HINGSON and ANNETTE HINGSON,

Respondents. /

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON JURISDICTION

Thomas Martin Pflaum
Florida Bar No. 220450
Appellate Co-Counsel for Respondents
17306 S.W. 10th Terrace
Micanopy, Florida 32667
(352) 466-0252
-and-
Associates and Bruce L. Scheiner
Attorneys for Respondents
Post Office Box 60049
Fort Myers, Florida 33906-0049
(941) 939-2900

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STATEMENT OF THE CASE AND THE FACTS

Allstate's statement of the case and the facts neglects to disclose one facet of the proceedings below: Allstate did not provide the District Court—and cannot provide this Court—with transcripts of *either* of the two circuit court hearings that produced and resulted in the order that Allstate challenged on appeal to the Second District. One can only presume that Allstate decided that its position on appeal would be stronger if the appellate courts could not discern what happened at the crucial circuit court hearings, for Allstate decided not to bring a court reporter to the hearings that *Allstate* scheduled on *Allstate's* motion for an award of fees to *Allstate*.

The February 18, 2000 order denying Allstate's motion for award of attorneys' fees was the product of hearings on October 11, 1999, and February 7, 2000, which hearings were scheduled and re-scheduled by Allstate's trial counsel who then, for whatever reason, neglected to bring a court reporter to either hearing. It is therefore impossible to determine what transpired at the hearings that produced the order Allstate challenged in its appeal. It should be noted that Circuit

Judge Rosman's order referred to facts presented at those hearings, which facts are all *de hors* the record and unknowable.[1]

That is the context in which the Second District affirmed the circuit court's ruling. Although the Second District charitably refrained from stating that its ruling was based on the inadequacy of the appellate record—which would only have embarrassed Allstate's legal counsel—the Court was certainly aware that it could not determine the basis for the ruling below. Indeed, that was the Hingsons' principal argument in their brief to the Second District.

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[1]The pre-hearing and post-hearing correspondence between the trial lawyers—which is also *de hors* the record—indicated a number of major disagreements about the facts and various issues of law, including *inter alia* disagreements about discovery and production of fees-related documentation; the possible need for witnesses at the hearings on fees; a proposed settlement of the fee issue in conjunction with the dismissal of a prior appeal in this case (Second District Court Appeal No. 99-2763, voluntarily dismissed in July 1999, prior to the hearings on Allstate's motion); disagreements concerning the legal/factual basis for Judge Rosman's ruling (a dispute which led to a "battle of proposed orders" after the February 7th hearing), and so forth. Even the record reflects that Allstate's trial counsel was deposed with respect to the motion for fees, 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. *However, all such matters are de hors the record because a proper record cannot provided by Appellant.*

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

There is no conflict between the ruling below and the Fourth District's ruling in Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000), because the ruling in Herzog does not stand for the proposition that *all pre-1997 non-apportioned §768.79 offers must be valid*, nor does the ruling below stand for the opposite proposition that *all pre-1997 non-apportioned §768.79 offers must be invalid.* On the contrary, by remanding to the trial court the issue of the validity of the offer, the Fourth District in Herzog made it clear that §768.79 offers may be valid or invalid based on various considerations. Nor is this Court's decision in MGR Equipment Corporation v. Wilson Ice Enterprises, 731 So. 2d 1262 (Fla. 1999) in conflict with the ruling below, for MGR Equipment did not even address the issue which was addressed in this case.

In addition, this case is singularly unsuitable for "conflict" review by this Court because underlying this appeal is the fact that there is no transcript of the proceedings below and therefore no record upon which the appellate court may determine the factual and/or legal basis for the trial court's denial of Allstate's motion for an award of §768.79 fees.

ARGUMENT

I.

THE DECISION OF THE SECOND DISTRICT BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE *HERZOG* OR *MGR EQUIPMENT* DECISIONS

In Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000), Mrs. and Mr. Herzog sued K-Mart for damages in a slip-and-fall case. Prior to trial K-Mart made a $20,001 offer of judgment to both the Plaintiffs jointly. At trial Mrs. Herzog won $8,601 and Mr. Herzog won $3,750, and K-Mart then sought an award of §768.79 fees which motion the trial judge denied. K-Mart appealed.

Reviewing the *transcript of the hearing* on K-Mart's motion, the Fourth District determined that the sole basis for the trial court's denial of the motion was the failure of K-Mart to apportion its offer between the two plaintiffs. The Fourth District reversed the trial court's ruling, stating that because the offer had been

served prior to the 1997 "apportionment" amendment to Rule 1.442(c)(3), the offer was not defective **merely** because it was a joint, non-apportioned offer. Herzog, supra, 760 So. 2d at 1009. *The District Court then remanded the fee issue back to the trial court for further consideration of the "merits of the motion in all other respects."* Id. In other words, merely because the offer was not apportioned did not render it *automatically invalid*, but merely because it was not automatically invalid under the pre-1997 version of Rule 1.442(c)(3) did not make it *automatically valid* either. Hence the remand. Had the Fourth District intended to hold that pre-1997 non-apportioned offers were automatically valid, there would have been no point in the remand.

Thus the Fourth District's remand in Herzog recognizes that non-apportioned offers *may not* warrant an award of §768.79 fees even if the non-apportioned offer was served prior to the 1997 amendment Rule 1.442(c)(3). And the ruling of the Second District below is entirely consistent with that, because it merely confirms that such a non-apportioned offer *may not* warrant an award of §768.79 fees.

By remanding the case to the circuit court the Fourth District in Herzog confirmed that *it was not holding that K-Mart's offer of judgment was necessarily valid and enforceable under §768.79 and Rule 1.442.* By remanding the case, the

Fourth District made it clear that its ruling did not stand for the proposition that in every case, regardless of the particular facts, a pre-amendment non-apportioned offer was conclusively valid. Nor, obviously, did the Second District ruling below stand for the proposition that every non-apportioned offer is conclusively invalid. So there is no irreconcilable conflict in legal doctrine between Herzog and the Second District's ruling below. Rather the two decisions are perfectly compatible:

- *The Fourth District in Herzog, which was provided with a transcript of the hearing below and so knew exactly what the circuit court had decided and why, did not hold that every pre-1997 non-apportioned offer* ***must be valid****—for there would have been no reason for a remand if it had so held.*
- *The Second District in Hingson, which was provided with no transcript of the hearings below and so had no way to determine what the circuit court had decided or why, did not hold that every pre-1997 non-apportioned offer* ***must be invalid****.*

Allstate also asserts that the decision below conflicts with this Court's decision in MGR Equipment Corporation v. Wilson Ice Enterprises, 731 So. 2d 1262 (Fla. 1999), but that is not so. MRG Equipment addressed the validity of a defendant's pre-trial §768.79 offer that did not refer to the defendant's

counterclaim. After a post-trial hearing at which testimony was presented to the trial court, the defendant was awarded fees, and the District Court affirmed and so did this Court. In dictum this Court noted that under the amended Rule 1.442 an offer was required to identify the claims it sought to resolve, but that rule-change made no difference because defendant's offer stated the total amount it was offering to pay for all claims, with no qualification, and therefore could have been accepted and, upon acceptance, would have terminated all claims including the counterclaim. Id. at 1264.

MRG Equipment does not even *address* the issue addressed in the present case, i.e., whether in the factual context actually presented to the trial judge below—which factual context is unknown and unknowable—Allstate's offer was valid and enforceable.[2]

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[2]*See, e.g.,* C & S Chemicals v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000), noting that a joint offer may be unenforceable when a lack of apportionment prevents the offerees from evaluating and accepting the offer, because even prior to the 1997 amendment to Rule 1.442, the **pre-existing law** required that offers "be specific enough to allow each party to evaluate it independently." *See also,* United Services Auto. Ass'n v. Behar, 752 So. 2d 663, (Fla. 2d DCA 2000), *rev. pending* 770 So. 2d 163 (Fla. 2000); 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); Twiddy v. Guttenplan, 678 So. 2d 488 (Fla. 2d DCA 1996); GEICO v. Thompson, 641 So. 2d 189 (Fla. 2d DCA 1994).

II.

BECAUSE ALLSTATE DID NOT PROVIDE A TRANSCRIPT OF THE TWO HEARINGS THAT RESULTED IN THE ORDER CHALLENGED ON APPEAL, THIS IS NOT AN APPROPRIATE CASE FOR SUPREME COURT 'CONFLICT' REVIEW

Although the Second District did not explicitly state in its short opinion that its approval of Circuit Judge Rosman's denial of Allstate's motion for fees was based on Allstate's failure to provide transcripts to demonstrate the basis for Judge Rosman's ruling, that lacuna in the appellate record remains a central and integral feature of this case, and one which renders it **singularly unsuitable** for Supreme Court "conflict" review. Because the record provides no information about what actually transpired at the two circuit court hearings, one can only speculate about the basis (or bases!) for the denial of Allstate's motion for fees. It can never be determined, for example, whether Allstate's motion might have been denied based on statements or concessions by Allstate's trial counsel at the hearings, exactly as occurred in C&S Chemicals v. McDougald, supra, **which decision was explicitly cited by the Second District in its opinion below.**[3]

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[3]In C&S Chemicals there was a similar hearing on a motion for fees and at that hearing the movant's attorney made a fatal pronouncement which constituted a waiver as to one of the settlement offers, and which ultimately resulted in the decision that appellant was not entitled to any award of fees. That outcome resulted from the appellate court *being aware of the statement because there was a*

(continued...)

That 'defective record' issue renders this case inappropriate for conflict review because, quite aside from any conceivable abstract tension in the case-law regarding "non-apportioned" offers of judgment, the decision in this case is **actually governed** by the well-established principles that (1) appellate courts are to affirm lower court rulings that reach the correct result regardless of how the lower court may explain its ruling, Landis v. Allstate, 546 So. 2d 1051 (Fla. 1989), and; (2) lower court rulings must be affirmed when the appellant fails to provide a transcript showing what occurred in the proceedings below, Haist v. Scarp, 366 So. 2d 402 (Fla. 1978).[4]

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[3](...continued)
transcript. Note that the "joint" settlement offers in C&S Chemicals were very similar to those in the present case.

[4]Stated bluntly, if this Court accepted conflict jurisdiction for the purpose of addressing the issue described by Petitioner Allstate (i.e., the validity of pre-1997 non-apportioned offers of judgment), it could hardly decide that issue without first addressing the preliminary issue of how it or any other appellate court can review a circuit court ruling without being provided a proper record so it can determine *why the circuit court ruled as it did.*

CONCLUSION

For the reasons stated above, this Court should decline to accept this case for discretionary review.

Respectfully submitted,

Thomas Martin Pflaum, Florida Bar No. 220450
Appellate Co-Counsel for Respondents
17306 S.W. 10th Terrace
Micanopy, Florida 32667
(352) 466-0252
-and-
Associates and Bruce L. Scheiner
Attorneys for Respondents
Post Office Box 60049
Fort Myers, Florida 33906-0049
(941) 939-2900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Brief on Jurisdiction was furnished via U.S. Mail this 23 day of January 2001, to: Bonita Kneeland Brown, Esq., Fowler, White, et al., Post Office Box 1438, Tampa, Florida 33601-1438 (Appellate Counsel for Petitioner Allstate Indemnity Company); and Clayton W. Crevasse, Esq., Annis, Mitchell, Cockey, Edward, Post Office Box 60259, Fort Myers, Florida 33906-6259.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) and is generated in 14-point Times Roman.

THOMAS M. PFLAUM