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

REPLY BRIEF OF PETITIONER ALLSTATE INSURANCE COMPANY

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PRELIMINARY STATEMENT

While in the process of preparing this reply brief, Allstate's counsel found an error in her copy of the Appendix submitted with the initial brief. Specifically, the last page of Donna Mork's affidavit -- submitted as App. "L" -- was erroneously bound as the first page after the tab for App. "M" (which is the order being appealed). If this Court's copies are similarly misbound, Petitioner apologizes for any confusion and inconvenience to this Court in correcting the error.

REPLY 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.

The Hingsons argue that Allstate may not challenge the trial court's ruling because there was no transcript taken of the attorneys' fees hearing. Hingson made the identical argument to the Second District Court of Appeal. The Second District rejected this argument when it issued its opinion below, and with good reason. A brief recapitulation of the record facts demonstrates a sufficient appellate record:

1. The jury returned a verdict in this 1995 lawsuit on March 2, 1999, resulting in the Hingsons receiving nothing and the trial court entering judgment in favor of Allstate. (App. A; B)

2. On March 11, 1999, only nine days later, Allstate served its motion for fees under section 768.79, Florida Statutes, based on a $30,000 offer of judgment (policy limits) rejected by Plaintiffs. (App. G; L)

3. Allstate also filed the submitted $30,000 offer which had been tendered by letter dated November 11, 1996 and served on November 12, 1996, as reflected by the certificate of service. (App. G, Exhibit A)

4. Consequently, on the face of the record, there is no question that Allstate's counsel met all time deadlines required by the statute and the rules of procedure.[1/]

5. Allstate also filed the affidavit of Donna Mork, the Allstate claims adjuster on the Hingsons' file, which attests that the $30,000 offer constituted full UM/UIM policy limits. (App. L)

6. The record reflects that the Hingsons filed no objection to Allstate's entitlement to fees asserting either untimeliness or lack of good faith. (App. J)

7. Plaintiffs' Motion to Strike is grounded solely on their complaint that Allstate's affidavit of fees failed to itemize sufficiently the attorneys fees as required by Rowe, requesting an itemization of every activity. (App. J) This is a matter that involved proving up the proper amount of fees, an issue that the trial court never reached, rather than the threshold issue of entitlement to fees.

1/ Tucked into footnote 1, p. 5 of Hingsons' answer brief is a vague suggestion that "apparently there were disputes concerning the timeliness of Allstate's fee motion and/**or** whether the alleged fees had been properly itemized and documented." The footnote cites to no record document, only to "correspondence between the trial lawyers," which undersigned counsel has never seen and which was never filed with the trial court. The Hingsons make no reference to untimeliness in their motion to strike the fees request, nor does the trial court make any reference to untimeliness in its order. Allstate submits that this is junk argument with no record support and should be disregarded by this Court.

8. The trial court's order denying Allstate's motion for fees contains absolutely no reference to untimeliness or bad faith. (App. M)

9. The trial court's order denying Allstate's motion for fees, instead, cites to policy considerations enunciated in the offer of judgment statute, the procedural rule, and USAA v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000). In Behar, the Second District determined that the amended procedural rule effective January 1, 1997 added new conditions to section 768.79, Florida Statutes, requiring that a joint offer made to an injured plaintiff and consortium spouse must contain a differentiated amount as to each. (App. M)

10. The Second District released the Behar decision on January 21, 2000, only 17 days before the hearing on Allstate's motion for fees. The trial court's order reflects that the court considered this decision to be controlling. (App. M)

Thus, Hingsons' brief raises non-existent concerns about a hearing transcript. Allstate submits that both the record presented and the reasoning in the trial court's order sufficiently show error on the face of the appealed order. Hingsons' brief coyly suggests matters that "may" have occurred at this hearing, but pointedly omits actually stating that either side presented witnesses or other evidentiary testimony at that time or made admissions on the record. Further, had Allstate made "concessions" at the hearing that worked to the benefit of Hingson, logic

dictates that Hingson would have welcomed such a reconstruction of the record. Instead, Hingson strongly objected.[2/]

A party made a similar complaint regarding lack of a transcript in Summerset Village Ltd. Partnership v. Carlton Fields Ward Emmanuel Smith, 26 Fla. L. Weekly D465 (Fla. 3d DCA Feb. 14, 2001). The Fourth District, however, pointed out that the complainant "has not pointed out what factual findings would have been contradicted by such a reconstructed record and, how those factual findings would have somehow changed the outcome." Id. at D466. So, too, the Hingsons make oblique references to what "might have been said" at the hearing to affect this case. Allstate cannot box at shadows and, as the Fourth District noted, there must be more than vague innuendo to support this argument.

Finally, Hingsons' brief cites to C&S Chemicals v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000), as a decision in which a verbal pronouncement at a hearing on attorneys' fees and costs affected

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[2/] Hingsons' brief at p. 7, footnote 2, seeks to disparage Allstate's defense counsel, stating that they did not seek reconstruction of the record (Hingson calls it "refabrication") until after Allstate filed its initial brief in hopes that "no one would notice the lack of a proper record on appeal." The truth is far from devious. In view of the existing record below, Allstate's counsel never considered the possibility that Hingsons' counsel would assert that the trial court could have grounded its order on anything other than the Behar decision and the new rule invalidating undifferentiated settlement offers -- and then accuse Allstate of "gotcha!" litigation -- in the answer brief. Had the Second District been concerned by the lack of a transcript, however, it would have either agreed to Allstate's request to relinquish jurisdiction back to the trial court for a reconstruction of the record (if the court deemed it necessary) or would have addressed the issue in its opinion.

the outcome of the appeal. However, the Hingsons' brief studiously avoids describing this verbal statement and its effect. In fact, in C&S Chemicals, there were two demands, one made in 1995 and one made in 1996. At the hearing on the motion, the offerer's attorney informed the court that his client was dropping his claim under the 1996 demand because it had not been timely served. The case proceeded based on the 1995 demand. Id. at 796. Surely if Allstate had made such a concession at the hearing below, Hingsons' counsel would have actively sought (or agreed to) a reconstruction of the record to include the concession.

The Hingsons' Answer brief at pp. 8-9 cites extensively to decisions offered for the proposition that the Second District should have affirmed the trial court's order solely due to lack of a transcript. These citations, however, merely illustrate the danger of citing and paraphrasing case law without giving it a careful reading. The cases cited by the Hingsons all deal with evidentiary hearings, where there was no record of the testimony of witnesses or of evidentiary rulings. See e.g. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979) (non-jury trial held without a reporter); Haist v. Scarp, 366 So. 2d 402 (Fla. 1978) (non-jury trial with no court reporter, reconstruction of which would have required court to recall witnesses because trial court could not recall testimony). The cases involving attorneys' fees were not merely entitlement hearings, but involved the actual assessment of fees or, in alimony and custody cases, the party's ability to pay. Extensive case law cited in Allstate's

initial brief at pp. 21-22, however, stand for the rule that the absence of a transcript does not preclude a reversal where the hearing consists of legal argument or when an error of law appears on the face of the judgment.[3/]

* * *

The Hingsons' argument on the merits is that the Second District properly affirmed the trial court's order because the offer of judgment was not capable of being accepted by the putative offeree. A lengthy diatribe follows, concluding with the proposition that neither of the Hingsons could have accepted the offer of judgment because it was one amount offered jointly to both. However, the Hingsons overlook the fact that Allstate's offer fulfilled all requirements under the rule and the offer of judgment statute in effect prior to the amendment to the rules on January 1, 1997. The Hingsons could have accepted the offer by accepting the offer jointly. Such a procedure was not only authorized by the statute (and rule) at the time, but was commonly done in cases involving an injured party/consortium spouse. Florida decisional law interpreting the statute in effect also approved such joint offers. (See Initial Brief, pp. 10-11) The

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[3/] The Hingsons erroneously imply at p. 1 of the answer brief that, based on notices of hearing, there were two hearings on Allstate's motion for fees. Although the fee hearing was originally set to be heard in October, 1999, it was rescheduled to February 7, 2000.

Hingsons' failure to accept the offer jointly was a compensable rejection under the law in effect at the time which cannot be overcome by the amendment to the rule the following year.

Indeed, the Hingsons' argument defeats itself because it simply presents a case for why the rule was changed. The rule change would not have been necessary if joint offers such as the one at issue were already invalid. This Court changed the rule for a reason, as opined by this Court in MGR Entertainment Corp., Inc. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262, 1263-64, n.2 (Fla. 1999). In that opinion, this Court noted that the amended rule, unlike its predecessor, required greater detail which would hopefully enable parties to focus with "greater specificity" in their negotiations and thereby facilitate more settlements. This Court also informed the bar and judiciary that the amended rule was not applicable to offers made prior to January 1, 1997, the effective date of the amendment. Id.

It is obvious that this Court designed the amended rule to eliminate the acceptability of joint proposals -- an acceptability that Hingsons' brief illogically argues never existed. Hingsons' brief, in fact, argues that the rule was always such -- requiring the specificity of separating out the amount attributable to each plaintiff in an injured party/consortium spouse context. If that were the case, there would have been no necessity for the rule change.

Thus, Hingsons' brief avoids the obvious -- that the rule change was a change, not a clarification or codification of the

existing rule. The Hingsons' brief also avoids any case law adverse to their position by relegating it to footnotes. For example, the Hingsons address the decision of Herzog v. K-Mart, 760 So. 2d 1006 (Fla. 4th DCA 2000), upon which this Court based its conflict jurisdiction, by burying it in a footnote at page 16 in their brief and describing it as "dicta." Hingsons' brief also ignores the fact that the decision in United Services Auto. Ass'n v. Behar, 752 So. 2d 633 (Fla. 2d DCA 2000), addresses joint offers to injured parties/consortium spouses pursuant to an analysis of the offer analyzed under the amended rule effective January 1, 1997. Additional cases cited in footnote 4 at p. 12 of Hingsons' answer brief are either off-point or thoroughly distinguished in Allstate's initial brief.

Hingsons' brief also submits the argument that the offer of judgment was invalid because it did not meet the requirements of a valid "offer" under contract law. Allstate would disagree with this conclusion even if principles of contract law applied to this case. However, offers of judgment in Florida are not "contracts." They are a creation by statute, and must comply with statutory requirements, not general contract law. As long as Allstate's offer complied with the requirements in the offer of judgment statute and the rule of procedure in effect at the time that it was made, it is valid and enforceable. Consequently, this Court should reverse the appellate decision below affirming 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,

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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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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,

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