IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-597

JOHN T. ELSENHEIMER and FRANK JACKSON, individually and on behalf of all others similarly situated
Petitioners

v. **DCA CASE NO. 2D06-1159**

FLORIDA HEALTH SCIENCES CENTER, INC. d/b/a Tampa General Hospital
Respondent
_____/

JURSDICTIONAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioners, John T. Elsenheimer and Frank Jackson were the Appellees in the District Court and the Plaintiffs in the trial court. The Respondent is Florida Health Sciences Center (hereinafter referred to as FHSC). The District Court's opinion is included as an appendix to this brief pursuant to the rule and will be cited as (App. page).

The Petitioner, Mr. Elsenheimer, was injured in an accident involving a 'swamp buggy'. (App-1). The Petitioner was a minor and was Medicaid eligible. (Id.) Frank Jackson (Mr. Elsenheimer's father) was deemed responsible for any bills. (Id.) FHSC undertook collection activity against Mr. Jackson in Charlotte County, actually refusing to bill Medicaid until this suit was filed. (Id). [1]

This class action was filed asserting (Count I) a violation of the FCCPA (§559.55 et seq. (2004)) for the hospital's attempt to collect non-existent or exaggerated bills (covered by Medicaid at an established rate), and (Count II) Illegal Debt Collection Practices, (Count III) a prayer for injunctive relief (banning illegal collection practices) and (Count IV)

[1] Tampa General did not simply 'bill Medicaid and write off the difference' as represented in the opinion. Medicaid was only billed, post-filing, in a failed attempt to pick off the class representative.

equitable relief in the form of disgorgement of illegally collected funds. (App. 3)

The Petitioners filed a pre-discovery Motion for Class Certification pursuant to Fla.R.Civ.P.1.220 (d)(1). An evidentiary hearing was conducted on February 13, 2006. (App. 5). The Petitioners presented evidence of numerosity, commonality, typicality and adequacy that they were able to obtain "pre-discovery". (Id).

The Respondent elected not to present evidence or call witnesses other than the affidavit of a certain Mr. Escobio, who swore to "numerosity" and averred that the charges billed to the plaintiff were typical and customary charges for hospital services[2]. Thus, the evidentiary hearing was "short" and consisted mainly of the argument of counsel. (App. 5)

The trial court granted class certification based upon the petitioner's unrebutted evidence. (App. 6)

The District Court reversed, partly due to the dispute on the "merits" and partly due to its reweighing of the unrebutted evidence. (App. 7) In making this decision, the District Court also declared that the trial court

[2] The District Court's opinion typically makes no mention of the Escobio affidavit while alleging the absence of evidence in support of class certification, although the affidavit is mentioned in regards to venue.

could not rely upon representations made in the Plaintiff's complaint, even if unrebutted. (App. 6).

SUMMARY OF ARGUMENT

The decision of the District Court is in express and direct conflict with decisions of the other District Courts of Appeal on two points:

First, the District Court refused to review this case under the "abuse of discretion" standard. Instead, it reweighed the evidence, substituting its own interpretation of the facts for those in the record (deleting substantial record facts in the process) and then substituted its own findings for those of the trial judge.

Second, the District Court clearly based its decision in large part upon its assessment of the underlying merits of the case as it perceived them, and not on the issues identified as relevant under Fla. R.Civ.P. 1.220, such as "numerosity, commonality, typicality or adequacy" or any factors under part (B) of the Rule.

The case at bar illustrates a deeper problem. Rule 1.220 requires the trial court to conduct a class certification hearing "as soon as practicable" (prior to discovery), but then provides both ongoing trial court jurisdiction to reconsider the class certification decision and simultaneous appellate jurisdiction. Since trial court jurisdiction is ongoing, there is no need for

appellate review at the same time, since the issue of certification will be continuously reconsidered regardless of whether an appeal is filed. The federal courts, under Rule 23, limit interlocutory appellate review and there is no reason for Florida to continue to waste judicial resources on meaningless appeals.

ARGUMENT: POINT I

JURISDICTION SHOULD BE GRANTED ON THE BASIS OF THE DISTRICT COURT'S REJECTION OF THE "ABUSE OF DISCRETION" STANDARD OF REVIEW IN FAVOR OF A "TRIAL DE NOVO ON APPEAL" STANDARD.

Express and direct conflict exists between the decision of the District Court and prior decisions of this Court and the other District Courts of Appeal regarding the standard of review to be utilized in a class certification appeal. Class certification decisions are subject to the "abuse of discretion" standard of review. See, Courtesy Auto Group, Inc. v. Garcia, 778 So.2d 1000 (Fla. 5th DCA 2000).

The District Court, obviously, did not cite to any specific decision in rejecting the abuse of discretion standard, but a specific citation is not necessary when the conflict appears in the court's analysis. In Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981) this Court held:

> The first issue the meaning of the expressly requirement arises from the fact that the district court below did not identify a direct conflict of its decision with any other Florida appellate

> decisions. The court's opinion discusses, however, the basis upon which it reversed the trial court's entry of a directed verdict for Ford. This discussion of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under section 3(b)(3).

Accord, Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Review should be granted in the case at bar because the opinion of the Second District clearly and explicitly manifests express conflict with the entire body of appellate case law in this state identifying and describing the "abuse of discretion" standard of review, including Engle v. Liggett Group, Inc. , 945 So.2d 1246 (Fla. 2006); International Longshoreman's Ass'n. Deep See Local 1408 v. Fisher, 860 So.2d 1078 (Fla. 1st DCA 2003); Cerase v. Dewhurst, 935 So.2d 575 (Fla. 3rd DCA 2006); Reid v. Altieri, 2007 WL 750596 (Fla. 4th DCA 2007); and Lawson v. State, 941 So.2d 485 (Fla. 5th DCA 2006); and Reynolds v. State, 934 So.2d 1128 (Fla. 2006).

The abuse of discretion test is well known. Under that test, the decision of the trial court must be affirmed if the decision is supported by competent evidence (even if contradicted by other evidence) so that the trial court's decision is not arbitrary, capricious, fanciful, or so utterly devoid of record support that virtually no reasonable person could concur. See,

Castillo v. Bush, 902 So.2d 317 (Fla. 5th DCA 2005); Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

In this case, the Hon. Judge Anderson rendered a class certification decision based upon the pleadings, a substantial quantity of documentary exhibits filed by the Petitioner, and the *complete absence of any rebuttal evidence by the Respondent.* The District Court reversed because it disagreed with the *evidentiary weight* accorded to the Petitioner's unrebutted evidence, and then substituted its own opinion for that of the trial court. That act manifests express and direct rejection of the "abuse of discretion" standard that has existed in this state since Canakaris v. Canakaris, 382 So.2d 197 (Fla. 1980).

Finally, the Petitioner regrets having to make this observation, but it is necessary to protect the record. The Second District's opinion does not accurately report the facts. The Court alleged that FHSC "billed Medicaid and wrote off the difference". The record before Judge Anderson was uncontradicted: FHSC refused to bill Medicaid and attempted to place a lien on the recovery in a related tort action. After this class action was filed, FHSC suddenly billed Medicaid and offered to write off the balance in an effort to "pick off" the class representative. Similarly, the District Court's

reference to Marcucilli v. U.G.I. Corp., the "same plaintiff's lawyer" and the "same judge" requires a response.

In the UGI case, the defendant got caught charging ("passing through to") customers of Amerigas a "hazmat surcharge" when, in fact, Amerigas was not paying the surcharge to the government. At the class certification hearing, this attorney presented over 800 pages of documentary evidence, and Amerigas showed up with no witnesses and no evidence of its own. Judge Anderson granted class certification in a detailed order that described and discussed the evidence. The Second District stated in its opinion that the trial court's ruling was not supported by a hearing or any evidence, thereby abolishing over 800 pages of evidence by fiat. That was simply not the truth, but that is the quality of "appellate review" to which we have been repeatedly subjected. (The case settled so no further action was taken.)

ARGUMENT POINT II

THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONAL LAW PROVIDING FOR DEFERENCE TO THE FACTS AS ALLEGED IN THE COMPLAINT, IN A PRE-DISCOVERY, PRELIMINARY, CLASS CERTIFICATION HEARING

The district court, though aware of the fact that the class certification hearing sub-judice was a preliminary, pre-discovery, class certification

hearing, nevertheless refused to accord any deference to the factual averments made in the complaint. That refusal is in express and direct conflict with established law.

Rule 1.220(d) of the Florida Rules of Civil Procedure is patterned after Fed.R.Civ.P. 23, and federal precedent on the issue of class certification is recognized. Both rules require a class certification hearing "as soon as practicable" after suit is filed (with the federal courts actually requiring a hearing within 90 days of filing). The time constraints for preliminary review compel some sort of hearing before discovery has even commenced. Thus, in Chase Manhattan Mortgage Company v. Porcher, 898 So.2d 153 (Fla. 4th DCA 2005) the district court held that the "rigorous analysis" applied to class certification review must yield, in a preliminary (pre-discovery) setting to a standard similar to that employed in motions to dismiss. [3]

The District Court held that the plaintiff's complaint is not to be accorded any preliminary presumption of correctness and the plaintiff must, in a pre-discovery class certification hearing, "prove" the merits of its case (i.e., that FHSC is overcharging its patients). This decision places an unjust burden on a plaintiff who has not yet had the benefit of discovery and who,

[3] In a motion to dismiss the factual averments in the complaint are taken as true. See, Warren v. K-Mart, 765 So.2d 235 (Fla. 1st DCA 2000)

due to the confidentiality of patient records, does not have pre-suit access to medical bills of other potential class members. This opinion is in express and direct conflict with the decision in the Chase Manhattan (supra) and Broin v. Phillip Morris Companies, 641 So.2d 888 (Fla. 3rd DCA 1994) (reversed on other grounds).

A class certification hearing is not concerned with the merits of the case, but looks to the procedural requirements of Rule 1.220 or Rule 23. See, Powers v. GEICO, 192 F.R.D. 313 (S.D. Fla. 1998); Eisen v. Carlisle & Jacquelin, 417 U.S. 157 (1974). Trial on the merits is inappropriate. See, Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451 (1992). Thus, for the limited purposes of class certification, the trial court may accept the averments (regarding the underlying merits of the case) in the complaint as true. See, In re Commercial Tissue Products, 183 F.R.D. 589 (N.D. Fla. 1998).

Finally, Rule 1.220 provides for ongoing trial court jurisdiction to review the class certification issue as evidence develops. That raises the question (argued below) of the need for interlocutory review of a preliminary class determination[4]. Under Rule 23, the federal courts do not

[4] In the case at bar, FHSC has yet to file an answer to the complaint and there have already been three interlocutory appeals. Furthermore, every new

allow appellate review of every preliminary certification order, and it is a waste of judicial resources for Florida to allow meaningless and redundant appeals.

CONCLUSION

It is suggested that the Court should accept this case for review to resolve express and direct conflicts between the decision of the district court of appeal and other decisions of the district courts and the Florida Supreme Court.

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piece of evidence that provokes a new class certification review will generate another round of appeals.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished via U.S. mail to Edward J. Carbone, Esq., Buchanan & Ingersoll PC, 401 East Jackson Street, Suite 2500, Tampa, Florida 33602, by U.S. Mail this 3rd day of April, 2007.

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CERTIFICATE OF COMPLIANCE

I herby certify that this brief was prepared using Times New Roman 14 type as provided by the Rule.

s/ Mark C. Menser
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