

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

**ELEAZAR GARCIA d/b/a
ELIAS DRYWALL,**

CASE NO. CVA1 07-58
County Court Case No. 48-04-CC-9387

Appellant,

vs.

**HARBOR SPECIALTY INSURANCE
COMPANY,**

Appellee.

Appeal from the County Court,
for Orange County,
Antoinette Plogstedt, Judge.

Rick L. Martindale, Esquire,
for Appellant.

Eliot H. Ginsberg, Esquire,
for Appellee.

Before POWELL, MIHOK, BRONSON, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART LOWER COURT

Appellee Harbor Specialty Insurance Company (Appellee) filed a two-count complaint against Appellant Eleazer Garcia (Appellant) for breach of contract seeking recovery of allegedly unpaid premiums. Appellant filed an answer, affirmative defenses, and a two-count counterclaim. The counterclaim was dismissed without prejudice on motion of Appellee but Appellant did not re-file. Appellee served Appellant with a proposal for settlement which was not accepted. Later, Appellee filed a notice of dismissal without prejudice. There was no

settlement and no money was recovered. The county court entered an order denying Appellant's motion for attorney's fees and costs.

This appeal followed. This court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Attorney's Fees and Legal Assistant Fees

Appellant makes three arguments as to why he should have received an award of attorney's fees and legal assistant fees below. Appellant's first argument is that Appellee's voluntary dismissal without prejudice was the functional equivalent of a dismissal with prejudice or a confession of judgment, or it was a favorable ruling on the merits. We reject that argument as unsupported by legal authority or by reason and logic, and because it was not raised in the court below.

Appellant's second argument is based upon Appellee's proposal for settlement under rule 1.442, Florida Rules of Civil Procedure. We find this argument to be without merit because: (1) Appellant never accepted the proposal for settlement; (2) the proposal was never filed with the trial court; (3) there was no adjudication on the merits of the case; and (4) Appellant never raised this argument in the lower court.

Appellant's final argument is that he was entitled to attorney's fees under section 627.428, Florida Statutes, and the confession of judgment doctrine. We also find this argument to be without merit. See State Farm Fla. Ins. Co. v. Lorenzo, 969 So. 2d 393 (Fla. 5th DCA 2007)(doctrine does not apply in cases where insureds are not forced to sue to obtain policy

benefits). Since Appellant is not entitled to an award of attorney's fees and legal assistant fees, we need not consider the argument on attorney's fee multiplier.

Taxable Costs

We agree with Appellant that the county court erred in denying the cost portion of his motion. Rule 1.420(d), Florida Rules of Civil Procedure, states that “[c]osts in any action dismissed under this rule shall be assessed and judgment for costs entered in that action.” The Florida Supreme Court has said that this rule is mandatory. See Wilson v. Rose Printing Co. Inc., 624 So. 2d 257, 258 (Fla.1993)(rule 1.420(d) is unambiguous— costs are to be assessed in the action which is the subject of the voluntary dismissal). We have found no exceptions to this rule and Appellee has cited none. However, we note that the trial court has discretion in determining what items are awardable. We think that only *taxable* costs should be awarded, that is those costs authorized by *Statewide Uniform Guidelines For Taxation of Costs in Civil Actions* and current case law.

Consequently, that portion of the order denying costs should be reversed and the case remanded with the following directions. Appellant shall have fifteen (15) days from the date of the mandate in which to file and serve an amended motion for costs. The amended motion shall set forth in detail each cost item requested, the amount, and the legal authority supporting it. Appellant shall also attach a copy of any invoice or receipt relating to such item. Appellee shall, within five (5) days of the date of service of the amended motion, file and serve a response. Appellant shall then, if he so desires, within five (5) days of the date of service of the response or expiration of the time for filing it, either (a) contact the judge's judicial assistant and set a hearing; or (b) file and serve a notice of withdrawal of the amended motion.

