SUPREME COURT OF FLORIDA

CASE NO: SC03-1483
Lower Tribunal No: 5D01-3851

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

SHANNON NICHOLS,

Respondent.

APPELLEE'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Shannon Nichols, is the Petitioner in a separate brief on a question of certified to this Court. That appeal number is SC 03-1653.

Respondent, Shannon Nichols, was the plaintiff insured in the trial court and the appellant in the appeal below. She will be referred to as Shannon Nichols.

State Farm	=	Petitioner	=	Insurer	=	Defendant at trial
Shannon Nichols	=	Respondent	=	Insurer	=	Plaintiff at trial

STATEMENT OF THE CASE AND FACTS

Shannon Nichols provides her own statement of the case and facts because State Farm improperly begins argument in its statement of the case and facts and provides commentary and incorrect characterization of argument and opinion.

Shannon Nichols was injured in a vehicle collision in September 1996. (R. 1-4). She was insured for PIP by State Farm. (R. 1 - 4). She received the total value of her car and policy limits of the tortfeasor's bodily injury policy, making her eligible for an underinsured motorist claim from State Farm, as well as for PIP. (R. 1- 4, 347). Shannon received chiropractic and orthopaedic treatment. (R. 8 -12, 478). In December, State Farm contracted with DRS, Inc. to schedule Shannon to submit to an examination by Dr. Westergan, M.D.[1] (R. 472 - 73). The examination time was rescheduled twice by agreement. (R. 147 - 49, 472 -73, 478). The last date for the examination was to be January 20, 1997 at 9:30 a.m. (R. 474).

Shannon had been having lower abdominal pain over her right ovary area. (R. 487). Her ob-gyn doctor ordered an ultrasound to diagnose the pain. (R. 490 -

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[1]F.S. 627.736(7)(a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon the request of an insurer, submit to mental or physical examination by a physician or physicians.

95). Shannon Nichols had 3 abnormal pap smears the prior year. (R. 175 - 77). The ultrasound was scheduled for January 20, 1997, at 10:30, the same day as State Farm's examination. (R. 178). Shannon attended the ultrasound, instead of State Farm's medical examination. (R. 183).

State Farm paid the ambulance, hospital, and prior medical and chiropractic bills, but due to the missed appointment with their orthopaedist, State Farm refused to pay further PIP benefits for any further treatment, and Shannon sued in Orange county court. (R. 8 - 12, 120 ln 4 - 6). State Farm served a Proposal for Settlement of $250 to cover both benefits and attorneys fees in February 1999, about a year after the start of the case. (R. 288 - 89).

At trial, the existence of a contract and properly submitted bills were stipulated to, as well as bills not paid and interest of about eleven hundred dollars. Shannon Nichols lost after a 2 day trial, on the question of whether she unreasonably refused to attend the January 20, 1997 medical examination. (R. 263). State Farm moved for and was denied attorneys fees based on its proposal for settlement. (R. 290 - 91). Based on the holding of the newly published opinion in U.S. Security Co. v. Cahuasqui , 760 So. 2d 1101 (Fla 3d DCA 2000), State Farm moved for reconsideration which was granted. (R. 300 -30). A hearing was held on the amount of fees. (R. 382 - 404). Judgment was entered against Shannon

Nichols for $23,199.00. (R. 374 -76). Collection proceedings were stayed pending resolution of Cahuasqui before the Supreme Court. (R. 405). In Cahuasqui v. U.S. Security Co., 796 So.2d 531 (Fla. 2001), the Supreme Court decided that there was no actual conflict between the offer of judgment in Cahuasqui and the mandatory arbitration decision for doctor's bills in Nationwide v. Pinnacle, 753 So. 2d 55 (Fla. 2000). The trial court then certified the following question to the 5th DCA. (R. 406 -07):

> Are proposals for settlement pursuant to Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 in actions to recover personal injury protection benefits valid and enforceable or applicable to PIP suits?
>
> The 5th District court rephrased the question to read:
>
> May an insurer recover attorney's fees under rule 1.442, Florida Rules of Civil Procedure, and section 768.79, Florida Statutes, in an action brought by its insured to recover under a personal injury protection policy?

In Nichols v. State Farm Mutual Automobile Insurance Company, 851 So.2d 742 (Fla. 5th DCA 2003), the 5th District Court reversed the award of attorneys fees in its opinion, but separately affirmed the application of the offer of judgment in accordance with Cahuasqui, and certified that question to the Supreme Court. That is the subject of Shannon Nichols' separate appeal, SC 03- 1653. This appeal by State Farm is unrelated to that appeal.

SUMMARY OF THE ARGUMENT

No jurisdiction argument has been provided by Shannon Nichols because the parties were instructed not to by this court.

The opinion of the 5th DCA should be affirmed because the proposal for settlement served on Shannon Nichols by State Farm was ambiguous, it violated Fla. R. Civ. P. 1.442(c)(1), 1.442 (c)(2)(B), 1.442(c)(2)(C), 1.442(c)(2)(D), and 1.442(c)(2)(f) because it was not entirely written and testimony was needed to clarify it, it did not identify the claim or claims the proposal was attempting to resolve because it referred to the PIP suit and/or the UIM claim, it was ambiguous, it referred to a document which did not exist, it was vague in that it used words such as "et cetera," it referred to claims in the future, and did not give the required 30 days to accept it.

ARGUMENT

This Court should affirm the decision of the Fifth District Court, that the proposal for settlement delivered from State Farm to Shannon Nichols was defective because it violated Fla. R. Civ. P. 1.442 in that it was not particular in conditions and non-monetary terms, it was ambiguous, and vague. State Farm rejects the reasoning provided by the 5th DCA that a proposal for settlement is supposed to be an end to judicial labor. Nichols, 851 So. 2d at 746. Its justification for voiding the Rule's applicability is that there would still be judicial oversight available because of the good faith requirement of F.S. 768.79(a) for a refused proposal, and to determine the best conditions and non-monetary terms for an accepted proposal.

In response to argument I of State Farm's brief, the parties were instructed that jurisdiction briefing was deferred. Shannon Nichols therefore does not respond to the jurisdictional argument of State Farm, although reading the opinion below shows that it did not express a conflict with any other district and this Answer brief shows that there is no conflict with any other case.

The opinion of the Fifth District Court on the issue of State Farm's offered proposal for settlement was correct because the Proposal was defective on its face and/or was offered in bad faith.

I. STATE FARM'S PROPOSAL FOR SETTLEMENT WAS DEFECTIVE ON ITS FACE.

The proposal for settlement was defective in that it violated Fla. R. Civ. P. 1.442[2]; it was ambiguous as to the identity of claims, it referred to an extraneous document (the General Release), it was vague, had undefined terms, and tried to obtain extra concessions that are not allowed in a valid proposal for settlement.

Because proposals for settlement are punitive in nature and run contrary to the common law, they must be strictly construed. Schussel v. Ladd Hairdressers, Inc.[3]

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[2]Fla. R. Civ. P. 1.442(c) Form and Content of Proposal for Settlement.
(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.
(2) A proposal shall:
(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;
(B) identify the claim or claims the proposal is attempting to resolve;
(C) state with particularity any relevant conditions;
(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;
(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;
(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and
(G) include a certificate of service in the form required by rule 1.080(f).

[3]736 So.2d 776 (Fla. 4th DCA 1999), citing TGI Friday's v. Dvorak, 663 So.2d 606, 614 (Fla. 1999), also, Foreman v. E.F. Hutton & Company, Inc., 568 So.2d 531 (Fla. 3d DCA 1990).

The proposal for settlement fails because it was defective in the five clauses of Fla. R. Civ. P. 1.442(c)(1), (c)(2)(B), (c)(2)(C), (c)(2)(D); and (f)(1).

It does not identify that claim or claims that the proposal attempts to resolve, in violation of R. 1.442(c)(2)(B), does not state with particularity any relevant conditions, in violation of the R. 1.442(c)(2)(C), and does not state with particularity all nonmonetary terms of the proposal, specifically the terms of the General Release, in violation of R. 1.442(c)(2)(D).

It fails in B, stating the claims involved, because paragraph 3 of the Proposal seeks release of more claims than it seeks to settle in paragraph 1 of the Proposal.; and C, stating with particularity any relevant conditions, and D, stating with particularity all non-monetary terms. The appendix is a copy of the proposal for settlement (R. 288-89).

The proposal for settlement was for $250 to settle "*any and all* claims and causes of action in, *or arising out of*, the above styled case," (R. 288, paragraph 1, emphasis added).

The proposal for settlement set a condition of filing a joint release for voluntary dismissal with prejudice for the lawsuit, which is acceptable, as the format for a dismissal is set in the rules. This would have totally disposed of the case, but the proposal then demanded, "*and* Nichols will execute a General Release

in favor of State Farm, which will be expressly limited to *all* claims, causes of action, *etc.*, that have accrued through the date of Nichols's acceptance of this Proposal." (R. 289, paragraph 3, emphasis added). This fails the test of subparagraph B of R. 1.442(c)(2).

The purpose of the "General Release" could only be to obtain more concessions from Shannon Nichols, because State Farm would pay nothing beyond $250, but Shannon Nichols would be required to continue to give up undefined claims and causes of action which were not stated with particularity. Shannon Nichols still had an outstanding claim against State Farm for underinsured motorist coverage, which was not settled until June 1999 for $13,000. (R. 347)

As discussed in J.J. Mae, Inc., v. Milliken & Co.,[4] certain conditions are allowable in a proposal for settlement. However, uncertain conditions should not be allowed.

In the instant case, the proposal for settlement demanded that Shannon Nichols settle all claims that are not particularly or individually identified, but which would have included at least her uninsured motorist claim.

A release with an insurance company is not always "rather mechanical and

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[4]763 So.2d 1106, 1107 (Fla. 4th DCA 1999).

legally inconsequential" as remarked in Earnest & Stewart,[5] which State farm cites, but is often a long and protracted affair with a company that has already sensed victory and has unlimited assets. If the terms of the "General Release" are not agreed to after acceptance, hearings must be held that can be drawn out for months, creating further judicial labor and further labor by the attorneys. In such a case, a plaintiff, having tried to settle a suit, cannot get out of it, as the terms are not yet determined. In the instant case, litigating the terms of the release would wipe out the $250 to be paid by State Farm upon acceptance of the Proposal.

The controversy of releases has become so contentious that the Trial Section of the Florida Bar published a Suggested Standard Language for Release publication stating "It is our hope that adopting the Standard Release Language regarding a specific issue will have the net result of helping to minimize controversy or contention in arriving at acceptable language for a release of claims." Thomas D. Masterson, *Re: Standard Language for Release Preparation*, The Advocate, Vol. XXXII, No. 2, April 2002, at p.8.

State Farm required a "General Release" from Shannon Nichols. However, a "General Release" does not have separate legal existence. No release,

[5]Earnest & Stewart v. Codina, 732 So.2d 364 368 (Fla. 3d DCA 1999).

partial, full, special, or General exists in statute, rule, or code. Since there is no standard available, State Farm should have at least attached its required "General Release" to the proposal for settlement. Then Shannon Nichols and the courts could at least look at the actual language, and not speculate on what language would satisfy State Farm. State Farm's need for judicial interpretation of its General Release terms amounts to requesting the courts to provide an advisory opinion for its "General Release."

Fla. R. Civ. P. 1.442(f)(1) is "A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal." Notice that State Farm's language , ". . . that have accrued through the date of Nichols's acceptance of this Proposal.", makes the Proposal one that is not determinable on the date it was served on Nichols. Nichols had a 30 day window for evaluating the offer. With this wording, the Proposal sought release of any claim that Nichols might accrue in the future 30 days. Nichols might easily have accrued new claims by the mere act of returning to her treating physician and incurring treatment bills.

Stating the proposal in that open ended manner denied Nichols the 30 days that she was allowed by statute to consider the offer. If any new claim accrued during those 30 days, it would be included in the release, and Nichols' time to then

consider the offer would be limited to the date of the expiration of the offer, which would be something less than 30 days for her to consider the offer against the new value of what she was required to give up. The inclusion of that new claim is necessarily a future claim that is prohibited in a proposal for settlement and "is intrinsically a condition which is incapable of being stated with the required particularity. Zalis v. M.E.J. Rich Corp, 797 So.2d 1289, 1290 (Fla. 4th DCA 2001).

II. IF STATE FARM'S PROPOSAL FOR SETTLEMENT WAS NOT DEFECTIVE, IT WAS OFFERED IN BAD FAITH.

If the proposal for settlement was not defective because it was ambiguous, then it did attempt to settle the outstanding UIM claim. If it did so, it was a bad faith attempt to settle a case that it later agreed to settle for $13,000, without bringing to the attention of plaintiff that accepting the $250 would kill off the UIM claim.

Only by the trial court accepting parole testimony that the proposal for settlement was not intended to include the UIM claim, could it find that the proposal was not filed in bad faith. However, the fact that parole testimony was required from State Farm’s attorney means that the Proposal was vague as written, and that it failed to meet the "must be in writing" of Rule 1.422(c)(1).

If Shannon Nichols accepted the proposal for settlement, and later brought suit against State Farm for the UIM claim, State Farm would or could have brought out the proposal for settlement, the General Release, and any other paper it had later demanded she sign, and her chances of persuading the trial court, and an appellate court that they did not apply would have been slim.

Rather than agree with the argument of State Farm, it would be the better rule that if a general release is required, the actual proposed general release should be provided to the releasor. It is more probable that a fair release will be offered at that time, than after the offeree has accepted the proposal for settlement, when the victorious offeror is able to dictate the terms after the fact. If the release is actually mechanical and inconsequential, then it should not have been mentioned.

III. STATE FARM'S CASE LAW AND ARGUMENT DOES NOT SUPPORT ITS POSITION.

The important issue is: Does the offer on the date of its service advise the recipient of what she is being asked to accept. If she has to ask what it means, it is defective. Shannon Nichols as the offeree had no duty, whatsoever, to telephone the offeror to ask exactly what it meant. There is no such requirement in the rule or in the statute.

State Farm argues that its language in the Proposal means something that it

does not say it means. In fact, State Farm argues that it means the opposite of what it says.

State Farm argues that the Nichols opinion and the position of Shannon Nichols is inconsistent with the "standard protocol for, and practicalities of settling lawsuits. (Initial Brief of Petitioner, pg. 12, para. 3). However there is no such thing as a "standard protocol" for settling lawsuits. State Farm has not referenced any such authority, and cannot because none exists.

Sate Farm complains that, "Nichols has placed the validity of literally hundreds, if not thousands, of outstanding proposals for settlement in question. (Initial Brief of Petitioner, p. 7, fn 5). If Nichols requires that hundreds or thousands of outstanding proposals for settlement be made more specific, so that the offerees can know exactly what they mean, and so that there will be no further judicial labor or wrangling by attorneys over them, then, that is a good thing, not a bad thing.

The time for acceptance of the proposal runs for 30 days from the day it is served. R.1.442(f)(1). It does not run from the day it is clarified by telephone, or from the day on which the telephone agreement as to the meaning is confirmed by letter, or from the date on which the confirming letter is responded to with corrections, and so on, *ad infinitum*.

Placing a clarification requirement on the offeree would mean that the offeree would have less than the statutory time to consider acceptance or rejection. After clarification, a rule should be made to give the offeree 30 days to accept.

Defendants like to use the broadest possible language in their releases, and this time Petitioner is caught in a trap which it set itself. It is ensnared in its own overly broad, overreaching language.

Shannon Nichols could not reach the conclusion that Petitioner argues for without ignoring the language of paragraph 3 of the Proposal for Settlement, which reads, in pertinent part, ". . . Nichols will execute a General Release in favor of State Farm which will be expressly limited to *all claims, causes of action, etc., that have accrued through the date of Nichol's acceptance of this Proposal."* (Italics provided.)

This paragraph's reference to *all claims* removes it from the limited realm of "this lawsuit". If it meant this claim only, the language should have been *this claim*, not *all claims.*

The reference to *all causes of actions* applies to all other causes of action, which necessarily included the UM cause of action. If it meant only to kill off this cause of action, the language would have been *this cause of action.*

If State Farm meant to kill off only the PIP claim, and if it intended to

negotiate a release to do that after acceptance of the proposal, as it now argues in its brief, then it needed nothing more in its Proposal than its paragraph number 1, or the Voluntary Dismissal with Prejudice specified in the first 3 lines of its paragraph 3. But, Nichols could not ascertain that intent on the face of the offer because in the rest of paragraph 3, State Farm went further and demanded release of *all claims, causes of actions, etc.* (Italics provided).

State Farm claims that the 5th DCA violates a hornbook rule of contract construction, but does not cite the hornbook reference.

State Farm bootstraps from Jamieson v. Kurland, 819 So.2d 267 (Fla. 2d DCA 2002) which paraphrases from BMW of North America v. Krathen, 471 So.2nd 585 (Fla. 4th DCA 1985) to argue that a proposal for settlement is in the nature of contract, and it should be read in *pari materia* with all other terms in the proposal to arrive at a general meaning. Reading in *pari materia* does not mean that a party can safely ignore a specific term which expands on or contradicts any other more general term.

However, the cases state that only an accepted proposal for settlement is in the nature of a contract. In Martin v. Brousseau, 564 So.2d 240,241 (Fla. 4th DCA 1990), the 4th District Court explained that its holding in BMW, supra, was "only that once an offer of judgment was accepted, the resulting contract should be

construed according to contract law, and governed solely by the language used by the parties if that language is without ambiguity." Martin, 564 So. 2d at 241. In BMW, it was an accepted proposal for settlement which had been entered by the clerk as a judgment for the accepting party that was like a contract. BMW, 471 So. 2d at 587.

Delissio v. Delissio, 821 So.2d 359 (Fla. 1st DCA 2002) is distinguished because the construction of arriving at a reasonable interpretation of the entire contract is predicated on the terms of the contract being unambiguous. Delissio relates to how the courts should interpret contracts in that the offeree cannot be sure of what the value of the offer is and what her obligations are under it. If court interpretation is required, then it is self evident that the proposal in question was ambiguous.

There is little similarity to Bd. of Trustees of Florida Atlantic Univ. v. Bowman, 28 Fla. L. Weekly D1825 (Fla. 4th DCA 2000). In Bowman, the trial court denied the validity of the proposal for settlement because it held that it did not meet the particularity requirement of Zalis v. M.E.J. Rich Corp, 797 So. 1289 (Fla. 4th DCA 2001) as to the phrase "and its agents, employees, and servants" referring to the University's employees. But as held by the appellate court, the rule in Zalis is properly only applied to future unspecified claims, and "agents, employees and

servants" is a specific term. In Hales v. Advanced Systems Design, Inc., 855 So.2d 1232 (Fla. 1st DCA 2003), the court properly used Zalis as precedent that a proposal for settlement that refers to future claims, "not accrued" is not particular enough.

Here, the 5th DCA has found the contract to be ambiguous. State Farm's argument is self-defeating. The mere fact that the contract needed interpretation in the trial court and the appellate court and that they reached different conclusions establishes that Nichols could not read the plain language of the contract and know exactly what rights she would relinquish if she accepted the offer.

The plain language, however, established that she was required to give up all accrued causes of action for a payment to her of $250. The included UM action was ultimately settled for $13,000. Accepting $250 to relinquish $1,100 in claims is a different kettle of fish than accepting $250 to relinquish $14,100 in claims.

If, as State Farms' lead authority, Earnest &. Stewart, Inc. v, Codina, 732 So.2d 364 (Fla. 3d DCA 1999), states, "the releases referred to in the offer were not "conditions" of the settlement, but rather mechanical and legally inconsequential means of effecting it," then it should not be included in the offer, whatsoever. This holding does not comport with the reality that many conscientious and competent attorneys work out the release before accepting or proposing settlement. One can

argue that it is negligent for an attorney not to do so. The diligent party provides a desired release with their first offer of settlement. This prudent policy should not be abrogated just because a proposal for settlement is involved.

The Earnest decision requires the offeree and her attorney to selectively ignore various paragraphs, sentences, phrases, and words in the offer. This goes against the grain of all of the attorney's legal training. How is the offeree to know which parts of the offer to ignore as "mechanical and inconsequential"?

Earnest is distinguished because, in Earnest, there was no separate accrued cause of action which was included by the plain language of the Proposal's requirement of the release, that is comparable with the UM claim that Nichols had outstanding, and there was no vague language like "etc.," and there was no question of the full 30 days to accept the proposal.

If, as stated in Earnest, the "tail [of] additional documents [should not] wag the dog" of the rejected offer then the "tail" should not be included in the offer, whatsoever.

State Farm cites 4 cases, Jamieson, BMW, Triple E Development[6], and Delissio, for the proposition that courts can ignore specific parts of contracts in

[6]51 So. 2d 435 (Fla. 1951).

favor of court determining its own view of what the overall objective of the contract was.

The fallacy in State Farm's position is that it requires judicial rulings on the meanings of the contracts, which is contrary to the objective which State Farm itself admits, of settling cases without further judicial labor.

Nichols had every right to interpret the proposal as meaning exactly what it said. Nichols had no duty, whatsoever, to telephone State Farm's attorney for clarification and correction of a defect in the Proposal. It was State Farm's duty, if it meant something other than what it said in the plain language of the Proposal, to submit a new, corrected proposal that would trigger, anew, the running of the 30 days time for acceptance.

If State Farm intended to limit the demanded release to all claims and causes of action that were brought or that were required to have been brought in the instant lawsuit, that is exactly the language it should have used, not the all inclusive language, " . . .all claims, causes of action, etc., that have accrued through the date of Nichols's acceptance of this Proposal.

The opinion below is consistent with rule and caselaw. It has already been summarized by another court, which in upholding a proposal for settlement as particular enough under Fla. R. Civ. P. 1.442, held that it was not necessary for a

proposal for settlement to refer to claims that did not exist, stating:

> The purpose of the rule is provide an efficient mechanism to convey an offer of settlement to the opposing party free from ambiguities so that the recipient can fully evaluate its terms and conditions. See *Nichols v. State Farm Mut.*, 851 So. 2d 742, 746 (Fla. 5th DCA 2003).

Bennet v. American Learning Systems of Boca Delray, Inc., 28 Fla. Law Weekly D2477 (Fla. 4th DCA 2003).

CONCLUSION

Shannon Nichols requests this Court to either

a) deny review of this appeal, and grant appellate fees and costs to Shannon Nichols for the preparation of this answer.

or,

b)dismiss review of this appeal as improvidently granted and grant appellate fees and costs to Shannon Nichols for the preparation of this answer.

or,

c) affirm the opinion of the 5th DCA as to the reversal of the judgment of attorney's fees against Shannon Nichols and grant appellate fees and costs to Shannon Nichols for the preparation of this answer

or,

d) notice the parties to provide briefs as to jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Ken Hazouri, Esq., of deBeaubien, Knight, Simmons, 332 N. Magnolia Ave., Orlando, FL, 32802, tel. 422-2454, fx 849-1845, by_____ this___day of _____, 2003.

_____

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CERTIFICATE OF FONT

I certify that this brief is submitted in Times New Roman 14-point font, which is proportionately spaced, and complies with the font requirements of Fla. R. App. P. Rule 9.210.

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THOMAS P. HOCKMAN, ESQ.