IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	Case No.:	SC03-1483
	L.T. No.:	5D01-3851

Petitioner,

vs.

SHANNON NICHOLS,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

In this Brief, Petitioner, STATE FARM MUTUAL AUTOMOBILE COMPANY, is referred to as "State Farm," and Respondent, SHANNON NICHOLS, is referred to as "Nichols." Record cites to the trial court record are abbreviated "T.C.R." and include the volume and page numbers. For example a cite to Volume I, Page 1 of the trial court record would be as follows: (T.C.R. Vol. I, 1). There are no cites to the Appellate Record or Supplemental Record previously forwarded to the Fifth District Court of Appeal.

SUMMARY OF ARGUMENT

Nichols' incorrectly argues that State Farm's Proposal for Settlement was defective. The Proposal unambiguously requested Nichols to settle only her current actual or potential PIP claims. Thus, State Farm's Proposal met all of the requirements of Florida Rule of Civil Procedure 1.442 ("Rule 1.442").

After taking evidence, the trial court concluded that State Farm served its Proposal in good faith. This Court has no ability to review this ruling because Nichols did not properly appeal it and has refused to include the fee-hearing transcripts in the appellate record. Regardless, there was substantial competent evidence supporting the trial court's ruling on good faith, and it cannot be disturbed on appeal.

All of Nichols' arguments responsive to those set forth in State Farm's Initial Brief are without merit. State Farm's Proposal requested a release in order to ensure finality to the PIP litigation upon Nichols' acceptance thereof. Furthermore, State Farm does not ask this Court to establish a duty of offerees to contact opposing counsel to inquire about any alleged ambiguities in proposals for settlement. The fact that Nichols' counsel made no such inquiry, however, clearly demonstrates she had no intention of accepting State Farm's Proposal. Nichols now seeks to avoid liability on the Proposal by complaining about issues that played absolutely no role in her decision to reject it. The Court should not sanction

such tactics, as this will dramatically increase the amount of litigation associated with proposals for settlement, which directly contravenes the policy behind them.

ARGUMENT

I. STATE FARM'S PROPOSAL FOR SETTLEMENT IS NOT DEFECTIVE.

Section I of Nichols' Answer Brief erroneously asserts that State Farm's Proposal is defective because it failed to state the claims it sought to resolve and did not set forth conditions and non-monetary terms with sufficient particularity. In so doing, Nichols attempts to create an ambiguity where none exists by improperly construing the terms of the Proposal.

The following language from State Farm's Proposal clearly sets forth the claims it seeks to resolve:

> 1. State Farm agrees to pay Nichols a lump sum of Two Hundred Fifty and 00/100 Dollars ($250.00) as a full and final satisfaction of any and all of Nichols's claims arising in, or arising out of, the above-styled case, including any statutory or prejudgment interest that is allegedly due and owing Nichols.

(T.C.R., Vol. I, 288)(emphasis supplied) The only "claims arising in, or arising out of" this case were the actual and potential PIP claims Nichols had against State Farm.

In this regard, paragraph 9a of the Complaint sets forth specific chiropractic bills Nichols was seeking to recover, which State Farm declined to pay after

Nichols unreasonably refused to attend the CME. (T.C.R., Vol. I, 9) Paragraph 10 of Nichols' Complaint, however, alleges that State Farm failed to timely pay benefits within thirty (30) days, and Paragraph 11 asserts that State Farm failed to pay Nichols' "covered losses" without reasonable proof establishing that such payment was not due. (T.C.R., Vol. I, 9) These allegations indicate Nichols may have had claims for medical or chiropractic bills other than those specifically listed in paragraph 9a because such allegations are wholly unrelated to a withdrawal of benefits based on a refusal to attend a CME. With its Proposal for Settlement, therefore, State Farm sought only to finally resolve the claims for the specific chiropractic bills referenced in paragraph 9a and any other PIP benefits not specifically alleged by Nichols. These are the only claims "arising in, or arising out of" this lawsuit.

It is beyond dispute that the instant lawsuit does not even conceivably involve an uninsured motorist ("UM") claim. Nichols' Complaint made no reference to a UM claim or allegations setting forth the elements of one. (T.C.R., Vol. I, 8-12). Thus, paragraph one of State Farm's Proposal clearly and unambiguously excludes Nichols' UM claim.

In opposition to this necessary conclusion, Nichols erroneously relies on paragraph 3 of the Proposal, which reads as follows:

> 3. Following acceptance of this Proposal and satisfaction of same by State Farm, the parties will file a

> Joint Motion for Voluntary Dismissal with Prejudice in this lawsuit, 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.

(T.C.R., Vol. I, 289)(emphasis supplied). Nichols maintains that the clause "…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" (the "Clause") somehow expands the scope of the claims State Farm's Proposal was seeking to settle.

Nichols is incorrect, however, because the Clause is an **express limitation** on the claims covered by the Proposal. The Clause's purpose was to **limit** the requested release to presently existing PIP claims in order to comply with Union American Insurance Co. v. Lee, 625 So.2d 112 (Fla. 4th DCA 1993), which holds that insureds cannot release future PIP benefits. When the Clause is read in *para materia* with paragraph 1, therefore, the Proposal clearly sought only a release of all of Nichols' current PIP claims.

As explained in State Farm's Initial Brief, proposals for settlement are in the

nature of contracts and should be interpreted as such.[1] See, e.g., Jamieson v. Kurland, 819 So.2d 267 (Fla. 2d DCA 2002). Corpus Juris Secundum sets forth some of the most basic rules of contract interpretation, which are fully applicable to State Farm's Proposal:

> The interpretation of every contract requires ascertainment of the meaning of the words used, which meaning may vary greatly according to **the context** and time in which they are used and must be ascertained in light of **all the relevant circumstances**. The words which the parties have chosen to employ, together with **all else which appears to be clear and explicit** from the contract itself, must be considered.
>
> A word or phrase in a contract is ambiguous, and thus requires interpretation, only when it is of uncertain meaning and may be fairly understood in more ways than one. **Courts will not torture words in order to import ambiguity where the ordinary meaning leaves no room for ambiguity.**

[1] In a very misleading fashion, Nichols erroneously maintains that only accepted proposals for settlement are interpreted as contracts. (Answer Brief, P.11) Specifically, Nichols quotes the following language from Martin v. Brousseau, 564 So.2d 240 (Fla. 4th DCA 1990) for the proposition that proposals are not interpreted as contracts until accepted: "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." When read in context, the quote clearly does not stand for this proposition. Instead, the Martin court was stating that its previous decision in BMW held "only" that accepted proposals for settlement are interpreted as contracts and did not address the issue of one's ability to include conditions therein. Thus, the court used the word "only" to limit the scope of the holding, not to state that "only" accepted proposals for settlement are interpreted as contracts. Moreover, Jamieson clearly holds that an unaccepted proposal for settlement is in the nature of a contract. 819 So.2d at 268.

> Words in a contract may be given any meaning the parties desire, and the true meaning of a word is what the parties desired it to convey. Words will be construed in the sense in which they are employed by the parties. The intention of the parties to an instrument, **when that intention is apparent from the entire instrument** and not repugnant to any rule of law, **will control the meaning of any particular word or phrase unguardedly used and seeming to indicate a different intention.**

17A C.J.S. *Contracts* § 318 (1999)(emphasis supplied). Nichols' proposed interpretation of State Farm's Proposal violates nearly every provision of this commentary.

The context in which the Clause is used clearly demonstrates that it is intended to limit the Proposal's scope, not expand it. Nichols' argument to the contrary tortures the Clause in an effort to create an ambiguity where none exists. Even assuming *arguendo* that the Clause was "unguardedly used," State Farm's intention to settle only Nichols' PIP claims is exceedingly apparent from the entire language of the Proposal. Thus, the Proposal clearly states the claims it seeks to resolve in compliance with Rule 1.442(c)(2)(B).

As explained in State Farm's Initial Brief, State Farm's request for a release is not a condition or non-monetary term falling within the ambit of Rule 1.442(c)(2)(C) or (D), respectively. This fact renders irrelevant Nichols' arguments based on these rules. Assuming *arguendo* that Rule 1.442(c)(2)(C) and (D) do govern the Proposal's request for a release, the above analysis demonstrates

that State Farm's Proposal satisfies these rules' particularity requirements. This is because the Proposal, read in its entirety, particularly explained that it was only seeking a release of Nichols' present PIP claims.

Finally, Nichols maintains that State Farm's Proposal somehow violates Rule 1.442(f)(1). This rule, however, does not set forth any requirements for the content of proposals for settlement. It simply states proposals are deemed rejected unless accepted within thirty (30) days of service. Thus, it is impossible for State Farm's Proposal to be defective based on Rule 1.442(f)(1).

Despite this fact, Nichols asserts that State Farm's Proposal violated this Rule because it requested a release of all PIP claims accrued through the date of Nichols' acceptance of the Proposal. Contrary to Nichols' assertions, this request had no bearing on her ability to evaluate the Proposal. If Nichols chose to accept the Proposal, she would do so with full knowledge that State Farm would be paying $250.00 to settle all PIP claims accrued through the date of her acceptance. The fact that Nichols may have chosen to treat with her chiropractor between the date of State Farm's service of the Proposal and the date of her acceptance thereof does not alter this fact. Accordingly, Nichols' argument that State Farm's Proposal somehow violated Rule 1.442(f)(1) is baseless.

In sum, the arguments set forth in Section I of Nichols' Answer Brief are without merit. As explained above and in State Farm's Initial Brief, State Farm's

Proposal met all of the requirements of Rule 1.442(c) and was, therefore, not defective.

II. STATE FARM DID NOT SERVE ITS PROPOSAL IN BAD FAITH.

Section II of Nichols' Answer Brief incorrectly asserts that State Farm's Proposal should be invalidated under section 768.79(7)(a), Florida Statutes, because State Farm served it in bad faith. The trial court concluded that State Farm served its Proposal for Settlement in good faith, and the Fifth District Court of Appeal ("5th DCA") refused to disturb this ruling. See Nichols v. State Farm Mutual Automobile Ins. Co., 851 So.2d 742, 745-746 (Fla. 5th DCA 2003). Nichols has not appealed this portion of the 5th DCA's Opinion, and, therefore, this Court has no jurisdiction to review the good-faith issue.

Assuming *arguendo* Nichols had properly invoked this Court's jurisdiction, it would still have no ability to review this issue because Nichols has refused to include transcripts of the fee hearings in the appellate record. The trial court's finding of State Farm's good faith is a distinctively factual determination. Accordingly, Nichols' refusal to provide the Court with the evidence supporting and opposing this ruling is fatal to her purported appeal thereof. See, e.g., Orlando Reginal Medical Center, Inc. v. Chmielewski, 573 So.2d 876, 881 (Fla. 5th DCA 1990)(stating that appellant must bring a record sufficient to establish reversible error); All American Soup and Salad, Inc. v. Colonial Promenade, 652 So.2d 911

(Fla. 5th DCA 1995)(affirming final judgment upon appellant's failure to submit a complete transcript of the trial proceedings).

Even if Nichols had properly invoked this Court's jurisdiction and included the requisite transcripts, the Court would not be entitled to reweigh the evidence presented at the fee hearings and reach a conclusion different from the trial court. As described in the 5th DCA's Opinion below, there was substantial competent evidence to support the trial court's finding of good faith. See Nichols, 851 So.2d at 745-746. Thus, this Court has no ability to alter the trial court's conclusion irrespective of the other fatal defects in Nichols' purported appeal. See, e.g., Hill v. Ray Carter Auto Sales, Inc., 745 So.2d 1136, 1138 (Fla. 1st DCA 1999)(holding that an appellate court will reverse a trial court's factual determination "only if there is no competent evidence to support the finding"); Manufacturers Natl. Bank of Hialeah v. Canmont Intl., Inc., 322 So.2d 565, 566 (Fla. 3d DCA 1975)(explaining that an appellate court cannot reverse trial court's factual determinations if there is some competent evidence supporting them).

Finally, Nichols' argument that State Farm served its Proposal in bad faith is based entirely on the faulty premise that her acceptance thereof would have required Nichols to release her UM claim. As explained above, the Proposal, by its express terms, did not seek to resolve Nichols' UM claim, and State Farm would have never required Nichols to release the UM claim upon acceptance.

Accordingly, even if one reaches the merits of Nichols' bad-faith argument, such argument is factually inaccurate.

III. NICHOLS NEVER CONSIDERED ACCEPTING STATE FARM'S PROPOSAL AND IS NOW PLAYING "MONDAY-EVENING QUARTERBACK" IN AN EFFORT TO AVOID LIABILITY THEREUNDER.

In Section III of her Answer Brief, Nichols makes various arguments in opposition to liability under State Farm's Proposal. All of these arguments are without merit, and only certain aspects of them merit discussion.

Contrary to Nichols' assertions, such a release was absolutely essential for ensuring finality to the litigation, which is the primary goal of proposals for settlement. See, e.g., Unicare Health Facilities, Inc. v. Mort, 553 So.2d 159 (Fla. 1989). Had State Farm only accepted a dismissal of the lawsuit with prejudice, State Farm would have been subject to a second lawsuit by Nichols for PIP benefits she alleged were unrelated to those pled in her Complaint. In asking for a release, therefore, State Farm merely sought to finally terminate Nichols' PIP claims and had absolutely no ill intentions (*i.e.*, release of Nichols' unrelated UM claim) as incorrectly asserted by Nichols.

Nichols also erroneously maintains that State Farm has requested this Court to establish a duty of Nichols to inquire about the Proposal's breadth if it was unclear to her. It is true that Nichols' counsel never contacted the undersigned to

question the scope of the Proposal. Nichols, 851 So.2d at 746. State Farm does not, however, assert that Nichols had any duty to do so.

The significance of Nichols' counsel's failure to make this inquiry is that it demonstrates Nichols never had any intention of accepting State Farm's Proposal. The $250.00 offered by State Farm was not sufficient to cover Nichols' outstanding chiropractic bills, much less the significant amount of attorneys' fees incurred by Nichols' counsel, which were expressly included in the Proposal. Although Nichols' own expert recognized "in short order" that Nichols' lawsuit was meritless and that Nichols and her counsel should have just "rolled over" on it,[2] they instead decided to try the case with the hope of recovering some damages and a tremendous fee judgment.

If Nichols had considered accepting the Proposal but had genuine concerns about releasing her UM claim, then her counsel would have contacted the undersigned to discuss the issue. Indeed, Nichols' counsel would likely have been duty-bound by the Florida Rules of Professional Conduct to make this inquiry under such circumstances. Alternatively, Nichols could have moved to strike or clarify the Proposal based on her allegation of ambiguity regarding the UM claim. In conjunction with these alternatives, Nichols could have filed a motion to enlarge the amount of time she had to accept State Farm's Proposal until resolution of this

[2] (T.C.R. Vol. II, 385, 390 & 391)

alleged issue. See Goldy v. Corbett Crane Services, Inc., 692 So.2d 225 (Fla. 5th DCA 1997)(authorizing motions to enlarge the time to accept proposals for settlement). None of this occurred, however, because Nichols and her counsel never even considered accepting State Farm's Proposal.[3]

Based on this fact, Nichols' arguments regarding her purported inability to evaluate State Farm's Proposal are less than genuine. Nichols had every opportunity to gain any necessary clarification regarding the Proposal (which in reality needed no clarification), settle her wholly meritless PIP claims for $250.00 and avoid liability on State Farm's Proposal. Nichols and her counsel made a conscious decision to go to trial, however, and they are now seeking relief from State Farm's fee judgment based on alleged issues that played absolutely no role in their decision-making process.

As explained in State Farm's Initial Brief, acceptance of Nichols' arguments and affirmance of the Opinion below will dramatically increase the already significant amount of litigation relating to proposals for settlement. Such a result

[3] State Farm's Proposal expired long before the issuance of U.S. Security Ins. Co. v. Cahuasqui, 760 So.2d 1101 (Fla. 3d DCA 2000), the first case holding that proposals for settlement are enforceable in PIP cases. Prior to this decision, plaintiffs' PIP lawyers always took the position that proposals for settlement were not enforceable in PIP cases, and the trial court below initially agreed with them. (T.C.R. Vol. II, 300) At the time of State Farm's service of the Proposal, therefore, neither Nichols nor her counsel believed Nichols would become liable to State Farm thereon, even if she lost at trial.

directly contravenes their policy of decreasing litigation and bringing an early end to judicial labor. See, e.g., Aspen v. Bayless, 564 So.2d 1081, 1083 (Fla. 1990).

The Court can avoid this unwanted outcome by requiring offerees to resolve any alleged problems with ambiguities in proposals for settlement: a) prior to acceptance thereof; b) after acceptance thereof; c) or in the context of the good-faith analysis mandated by § 768.79(7)(a). As explained in State Farm's Initial Brief, such a holding will serve the dual interests of adequately protecting all parties while also promoting resolution of such issues at a time when the parties are not inclined to litigate.

On the contrary, allowing offerees to complain after the fact about (alleged) issues that played no role in their rejection of proposals for settlement will open the flood gates of litigation as such offerees seek to avoid liability on significant fee judgments. Nichols has done exactly that herein, and the Court should not sanction such litigation in this case or any subsequent ones.

CONCLUSION

Based on the foregoing, State Farm respectfully requests the Court to grant State Farm the relief requested in its Initial Brief.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail on this ___ day of February 2004 to: THOMAS P. HOCKMAN, ESQ., Hockman, Hockman, Hockman, 2670 W. Fairbanks Avenue, Winter Park, FL 32789; and PHILLIP PARRISH, ESQ., Two Datran Center, Suite 1705, 9130 Dadeland Blvd., Miami, FL 33156.

Certificate of Compliance with Font Requirements

I HEREBY CERTIFY that the foregoing Reply Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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