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.

_____/

INITIAL 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 from 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 was a supplemental record transmitted by the trial court, and in cites to this portion of the record, State Farm has used the same format and substituted the abbreviation "Sup. Rec." for "Vol." Cites to the appellate record are abbreviated with "A.C.R." and only include page numbers as there are no volumes. As such, a cite to page 1 of the appellate record would appear as follows: "(A.P.R., 1)".

STATEMENT OF FACTS AND CASE

Nichols sued State Farm to recover personal injury protection ("PIP") benefits arising out of a September 14, 1996, auto accident. (T.C.R., Vol. I, 8-12) State Farm defended Nichols' PIP claim on the assertion that she unreasonably refused to attend a January 20, 1997, Compulsory Medical Examination (the "CME").[1] (T.C.R., Vol. I, 13-15) In this regard, State Farm had twice rescheduled the CME at Nichols' request, and during her second telephone conference with State Farm representative George Heisey, Nichols stated that she did not intend to seek any further treatment for injuries sustained in the auto accident. (T.C.R., Sup. Rec., 609-610, 613-614, 693)

Nichols' primary excuse for failing to attend the CME was that it allegedly conflicted with an appointment (for a condition unrelated to the accident) Nichols had with Bruce Bevitz, M.D., on the same date. (T.C.R., Vol. I, 165, 178) On September 25, 1998, State Farm took Dr. Bevitz's deposition and ascertained that Nichols' excuse was clearly baseless. (T.C.R., Sup. Rec., 497-576) Indeed, upon reviewing the file in preparation for the eventual attorneys'-fee hearing, Nichols' own fee expert, Robert Melton, Esq., offered the following assessment of her PIP claim:

> As far as I'm concerned, this would be a slam-dunk type of case (for the defense) for a first year lawyer fresh out

[1] See § 627.736(7)(b), Fla. Stat. (1996).

> of law school. The jury obviously did not side with the Plaintiff's questionable excuses, and I found in short order that State Farm didn't have to pay for the benefits.
>
> * * *
>
> I would have turned this case down flat if I had been the Plaintiff.

(T.C.R., Vol. I, 385, 390) As of September 25, 1998, therefore, State Farm had a strong foundation for concluding that Nichols' PIP claim was meritless.

On February 2, 1999, State Farm served Nichols with a $250.00 Proposal for Settlement ("Proposal") pursuant to section 768.79, Florida Statutes ("§ 768.79"), and Florida Rule of Civil Procedure 1.442 ("Rule 1.442"). (T.C.R., Vol. I, 288-289) In describing the claims State Farm was attempting to settle, the Proposal stated as follows:

> 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 <u>any and all of Nichols's claims arising in, or arising out of, the above-styled case,</u> including any statutory or prejudgment interest that is allegedly due and owing Nichols.

(T.C.R., Vol. I, 288)(emphasis supplied) State Farm's Proposal also requested Nichols to dismiss the lawsuit with prejudice and to:

> …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) The purpose of the descriptive clause beginning with "which" was to expressly limit the release to present PIP claims in order to comply with the law holding that insureds cannot release future PIP benefits.[2] As such, this clause served to limit the scope of State Farm's Proposal, not expand it. Simply put, the Proposal only sought a general release of Nichols' existing PIP claims.

Nichols refused State Farm's Proposal. Following a two-day trial in January 2000, the jury entered a zero verdict after concluding that Nichols unreasonably refused to attend the CME. (T.C.R. Vol. II, 263) On September 6, 2000, the trial court ruled that State Farm was entitled to recover attorneys' fees from Nichols pursuant to its Proposal. (T.C.R. Vol. II, 374).

On December 21, 2000, the trial court held an evidentiary hearing to determine the amount of attorneys' fees recoverable by State Farm. At this hearing, Nichols asserted that State Farm's Proposal was defective because it asked Nichols to execute a general release at a time when she apparently had a pre-suit, uninsured-motorist ("UM") claim pending with State Farm as a result of the

[2] See Union American Insurance Co. v. Lee, 625 So.2d 112 (Fla. 4th DCA 1993).

September 14, 1996, auto accident.[3] Nichols claimed that acceptance of the Proposal would have required her to also release her UM claim against State Farm.

In response to Nichols' argument, State Farm's counsel, Kenneth Hazouri, testified that: a) he had no knowledge of Nichols' UM claim at the time he prepared and served State Farm's Proposal; b) neither he nor State Farm had any intention of requiring Nichols to release her UM claim in order to settle the PIP lawsuit; c) Nichols' counsel never contacted Mr. Hazouri to clarify whether the Proposal sought a release of the UM claim or expressed any concerns in this regard; and d) had Nichols' counsel contacted Mr. Hazouri and advised that she wished to accept the Proposal but could not release her UM claim, the undersigned would have agreed to, and prepared, a release expressly excluding the UM claim. See Nichols, 851 So.2d at 745-746.

On December 21, 2000, the trial court entered an Order granting State Farm's motion for attorneys' fees and a Final Judgment awarding State Farm

[3] Despite repeated requests, Nichols refused to obtain the transcript of the December 21, 2000, hearing for the 5th DCA appellate record. Accordingly, State Farm moved to dismiss the portions of Nichols appeal asserting that State Farm's Proposal was defective, or in the alternative, to compel Nichols to supplement the record with the December 21, 2000, hearing transcript. (A.P.R. 21-24) The 5th DCA, however, denied State Farm's Motion. (A.P.R. 25) In its Opinion, the 5th DCA accepted both parties' oral descriptions of the evidence presented at the hearing. See Nichols v. State Farm Mutual Automobile Ins. Co., 851 So.2d 742, 745-746 (Fla. 5th DCA 2003). For purposes of this Brief, State Farm has only set forth the testimony from the December 21, 2000, hearing expressly included in the 5th DCA's Opinion.

$21,958 in attorneys' fees.[4] (T.C.R. Vol. II, 374-378) In so doing, the court necessarily rejected any argument that: a) State Farm's Proposal was defective; b) State Farm served the Proposal in bad faith based on the request for the release or otherwise; or c) proposals for settlement are not enforceable in PIP cases. The trial court, however, certified the latter issue to the Fifth District Court of Appeal ("5th DCA") as a matter of great public importance. After the 5th DCA accepted certification, Nichols timely appealed the December 21, 2000, Final Judgment.

Nichols asserted two primary bases for reversal of the Judgment. First, Nichols maintained that proposals for settlement served by defendants in PIP suits are unenforceable. Second, Nichols' asserted that State Farm's Proposal was defective because it asked Nichols to execute a general release while she had a pending UM claim that was not part of the instant lawsuit. State Farm, of course, fully briefed its opposition to these arguments.

On June 13, 2003, the 5th DCA issued its opinion in Nichols' appeal ("Nichols" or the "Opinion"). Nichols v. State Farm Mutual Automobile Ins. Co., 851 So.2d 742 (Fla. 5th DCA 2003). The Opinion affirmed the trial court's ruling that proposals for settlement are enforceable in PIP suits. Nichols, 851 So.2d at 744. The 5th DCA also ruled, however, that State Farm's Proposal was defective and, therefore, unenforceable. Id.

[4] The total judgment amount was $23,199, with the balance comprised of interest and costs.

The basis for the 5th DCA's ruling was that the Proposal's request for a release was a non-monetary condition required to comply with Florida Rule of Civil Procedure 1.442(c)(2)(C) & (D), which reads as follows:

> (2) A proposal shall:
>
> (C) state with particularity any relevant conditions;
>
> (D) state the total amount of the proposal and state with particularity all non monetary terms of the proposal;

Id. at 745. The court concluded that the Proposal's request for a release did not meet this rule's "particularity" requirement because the proposed release's exact breadth (*i.e.*, whether it included Nichols' UM claim) was unclear from the face of the Proposal. Id. at 746. The court believed that such an ambiguity would likely create additional judicial labor in interpretation, which is contrary to the policy behind proposals for settlement. Id.

Based on these conclusions, the 5th DCA held that a party requesting a release in a proposal for settlement should either set forth the proposed language of the release or a summary of its substance in order to comply with the particularity requirements of Rule 1.442(c)(2)(C) & (D). Id. The court further held that proposals should be devoid of ambiguity or they will be ordinarily found to violate

this rule. Id. Pursuant to these holdings, the 5th DCA reversed the fee award to State Farm after finding that the Proposal violated Rule 1.442(c)(2)(C) & (D).

After a denial of State Farm's Motion for Certification, State Farm timely filed its Notice to invoke this Court's jurisdiction. On October 27, 2003, the Court issued an Order postponing its decision on jurisdiction and directing State Farm to file its Initial Brief.

SUMMARY OF ARGUMENT

The Court has jurisdiction over this appeal. The 5th DCA's Opinion expressly and directly conflicts with decisions of other district courts of appeal on the same question of law.

The 5th DCA erred in reversing the award of attorneys' fees to State Farm. The Proposal's request for a release was not a "condition" governed by Rule 1.442(c)(2)(C) & (D). Instead, the request was a "mechanical and legally inconsequential means of effecting" the proposed settlement designed to promote the policy of proposals for settlement to bring a final end to litigation. Nichols' conclusion to the contrary, and the requirements for Proposals established by Nichols, are entirely inconsistent with the protocol and procedure parties generally follow when settling lawsuits. This inconsistency ensures that Nichols will

substantially increase the amount of litigation relating to proposals for settlement, which directly contravenes their stated policy.[5]

The Court should avoid this unwanted and unnecessary result by holding that a request for a typical general release in a proposal for settlement is not a condition subject to the particularity requirements of Rule 1.442(c)(2)(C) & (D). In the rare case that a losing party raises a legitimate concern regarding a proposal for settlement's request for a release, the good-faith provision of § 768.79(7)(a) provides trial courts with an adequate mechanism for reviewing the issue and invalidating the proposal if appropriate. Moreover, using § 768.79(7)(a) in this fashion will not create any more litigation than envisioned by the Legislature.

Assuming *arguendo* that the Rule 1.442(c)(2)(C) & (D) apply to requests for general releases in proposals for settlement, State Farm's Proposal satisfies this Rule's particularity requirements. When all of its provisions are read together, the Proposal clearly requests for only a release of any PIP claims existing through the date of the release's execution. Thus, the Proposal placed Nichols on notice of what terms would settle the case and thereby allowed her to properly evaluate State Farm's Proposal.

[5] In fact, Nichols has placed the validity of literally hundreds, if not thousands, of outstanding proposals for settlement in question.

Based on the foregoing, this Court should reverse the 5th DCA's ruling that State Farm's Proposal for Settlement was defective. In so doing, the Court should reinstate Final Judgment for attorneys' fees in favor of State Farm.

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS APPEAL.

The Court has subject-matter jurisdiction over State Farm's appeal pursuant to Article V, Section 3(b)(3), of the Florida Constitution because the portions of Nichols appealed by State Farm expressly and directly with the cases of Earnest & Stewart, Inc. v. Codina, 732 So.2d 364 (Fla. 3d DCA 1999) and Bd. of Trustees of Florida Atlantic University v. Bowman, 853 So.2d 507 (Fla. 4h DCA 2003). As explained more fully below, Nichols' application of the legal principals relating to a request for a release set forth in a proposal for settlement, and the conclusions derived therefrom, is in direct conflict, and cannot be reconciled, with Earnest or Bowman. Thus, the Court has conflict jurisdiction over the appeal. See, e.g., Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981).

II. THE 5TH DCA ERRED IN RULING THAT STATE FARM'S PROPOSAL WAS DEFECTIVE AND REVERSING THE AWARD OF ATTORNEYS' FEES TO STATE FARM.

The 5th DCA invalidated State Farm's Proposal based on its conclusion that the request for a release therein was a non-monetary condition that failed to satisfy the particularity requirements of Rule 1.442(c)(2)(C) & (D). This ruling is directly

contrary to the holding of Earnest & Stewart, Inc. v. Codina, 732 So.2d 364 (Fla. 3d DCA 1999), which held that the request for a dismissal and release contained in a proposal for settlement is not a "condition" that may invalidate it.

Earnest involved a lawsuit filed by a real-estate broker to recover a commission. Id. at 365. The defendants made separate offers of judgment in the amount of $1,000.00 and $100.00, both of which also requested mutual general releases and dismissals with prejudice. Id. at 366. After the trial court granted the summary judgment for the defendants, they moved to recover their attorneys' fees. Id. The trial court denied the defendants' claim for attorneys' fees upon concluding that the request for a release and dismissal was a condition not permitted under § 768.79 or the former Rule 1.442.[6]

On appeal, the court noted that the trial court had based its ruling on Martin v. Brousseau, 564 So.2d 240 (Fla. 4th DCA 1990), which held that an offer of judgment's request for a release and dismissal rendered it invalid and unenforceable because such requests constitute unauthorized conditions. The court disagreed with Martin's ruling based on the following reasoning:

> (N)one of the documents required in that case (Martin) [or this one] add or subtract anything from what would be the consequences of simply accepting the offer of settlement. Properly viewed, therefore, the dismissal and

[6] Neither § 768.79 nor the version of Rule 1.442 in place prior to the 1996 amendments thereto included any provision for the allowance of non-monetary conditions in offers of judgment.

> releases referred to in the offer were not "conditions" of the settlement, but rather mechanical and legally inconsequential means of effecting it. They thus should be regarded as mere surplusage, the existence of which should not affect substantial rights. We agree with Judge Glickstein's dissenting view in Martin that the "tail [of] additional documents [should not] wag the dog" of the rejected offer.

Id. at 366-367 (bracketed language in original; emphasis supplied). Based on this reasoning, the court reversed the denial of attorneys' fees to the defendants. Id. at 367.

Nichols expressly and directly conflicts with Earnest. Nichols holds that the request for a release contained in State Farm's Proposal is a non-monetary condition subject to the particularity requirements of Rule 1.442(c)(2)(C) & (D). On the contrary, Earnest holds that a request for a release contained in an offer of judgment (now known as a proposal for settlement) is not a condition at all, but is instead a "mechanical and legally inconsequential means of effecting" a settlement. As such, Nichols and Earnest cannot be reconciled. For the reasons set forth below, the Court should resolve this conflict by adopting Earnest and disapproving the portions of Nichols that are contrary thereto.

Florida law establishes that a proposal for settlement is in the nature of a contract. Jamieson v. Kurland, 819 So.2d 267, 268 (Fla. 2d DCA 2002)(citing BMW of North America, Inc. v. Krathen, 471 So.2d 585, 587 (Fla. 4th DCA 1985,

rev. den., 484 So.2d 7 (Fla. 1986)). Thus, an accepted proposal for settlement is essentially a binding settlement agreement and should be treated as such by parties and courts.

As correctly explained in Earnest, releases and dismissals are the "mechanical and legally inconsequential means" through which litigants effectuate settlement agreements on a daily basis. Moreover, parties nearly always first agree to the settlement terms then later draft documents memorializing them, including releases. In the drafting stage, the parties typically negotiate the terms of the release. If the parties cannot agree on such terms, one or both of them may move the court for resolution of the issue. Accordingly, every settlement agreement creates a potential need for judicial intervention. Most settlements are, however, finalized without court assistance. This is because once parties decide to settle, they generally want closure as quickly and inexpensively as possible.

Earnest is entirely consistent with the above protocol for, and practicalities of, settling lawsuits. Parties do not normally include proposed release language in settlement offers, and Earnest likewise does not require proposals for settlement to include such language. Accordingly, Earnest mandates resolution of any dispute over release language **after** acceptance of a proposal for settlement -- a time when parties have little incentive to engage in further litigation. In so doing, Earnest does not encourage any more litigation than would normally be expected to arise

out of a typical settlement agreement. Thus, Earnest promotes the primary policy of proposals for settlement, which is to bring an end to litigation through settlement. See, e.g., Aspen v. Bayless, 564 So.2d 1081, 1083 (Fla. 1990).

On the other hand, Nichols is entirely inconsistent with the standard protocol for, and practicalities of, settling lawsuits. While parties do not normally set forth proposed release language in settlement offers, Nichols requires parties to include such language in proposals for settlement.[7] Accordingly, Nichols allows and invites a losing party to assert there is a problem with the release language that precluded acceptance of the proposal in an effort to avoid liability thereunder. Unlike a settling party seeking closure, a party facing liability on a proposal for settlement has every incentive to initiate litigation over release language. Contrary to Earnest, therefore, Nichols facilitates and encourages such litigation in a context where it is certain to occur -- proceedings to determine entitlement to attorneys' fees under a proposal for settlement. Thus, Nichols will necessarily increase litigation relating to proposals for settlement, which is directly contrary to their purpose. See supra Aspen.

[7] Alternatively, a party serving a proposal for settlement can choose not to a request a release. Without a release, however, the party serving the proposal remains subject to a second lawsuit even after the proposal is accepted and satisfied. Such a result is entirely contrary to the policy behind proposals for settlement. See supra Aspen.

The reality of this unwanted result is vividly demonstrated by two very recent cases: Bd. of Trustees of Florida Atlantic University v. Bowman, 853 So.2d 507 (Fla. 4th DCA 2003) and Hales v. Advanced Systems Design, Inc., 2003 WL 22326983 (Fla. 1st DCA Oct. 13, 2003). These cases clearly establish that the onslaught of proposal-for-settlement litigation certain to arise out of Nichols has already commenced and will rapidly expand unless the Court takes decisive action.

In Bowman, a group of college students sued their university claiming breach of an agreement to use diligent efforts in seeking accreditation for the physical-therapy program. Id. at 507. The university served separate proposals for settlement on each plaintiff offering to settle their claims for $2,001.00. Each proposal required the plaintiffs to execute a "General Release," which was attached as an exhibit to the proposals. Id. at 508. The plaintiffs rejected the proposals. Id.

Following entry of judgment for the defendant, it moved to recover its attorneys' fees pursuant to the proposals. Id. at 509. The trial court denied the motion upon concluding that the language of the "General Release" attached to the proposals required the plaintiffs to release both claims and third parties not involved in the lawsuit. Id. As such, the issue on appeal was whether the terms of the General Release rendered the proposals unenforceable.

The defendant argued that the proposed General Release was simply in the nature of a release designed to terminate litigation, and, therefore, the trial court

should have enforced the proposals. Id. The appellate court agreed and reversed the trial court's denial of attorneys' fees to the defendant. Id. In so doing, the court determined that the disputed language in the proposal's General Release was consistent with the standard release litigants normally use to effectuate settlements.[8] Id. Thus, the court rejected the plaintiffs' attempt to avoid liability for attorneys' fees by arguing that the General Release's terms invalidated the proposals. Id.

Bowman illuminates the problems that are certain to arise out of Nichols. Had the proposals in Bowman simply requested a general release without setting forth the actual release language, the plaintiffs could not have formulated a defense thereto by misconstruing the release language -- a ploy accepted by the trial court and exposed by the appellate court after both spent substantial time and resources analyzing the issue. Under Nichols, however, parties **must** set forth the proposed release language or risk invalidation of their proposals for settlement. Thus, Nichols facilitates and encourages the exact type of litigation seen in Bowman.

In Hales, a prevailing defendant served a proposal for settlement containing a summary of the release the plaintiff would have to execute upon acceptance of the proposal. Hales, 2003 WL 22326983 at 1. The court concluded that the proposed release required the plaintiff to release future claims even though this was

[8] The Bowman court's reasoning on this issue is entirely consistent with Earnest.

not expressly stated in the summary. Id. Based on this reasoning, the appellate court invalidated the proposal upon concluding that the proposed release did not meet the particularity requirements of Rule 1.442(c)(2)(C).[9] Id. Significantly, the court reached this conclusion even though the summary set forth release language that is in the nature of a standard general release. Id.

Hales demonstrates that even a hyper-technical attack on release language set forth in a proposal for settlement can successfully relieve a losing party from liability thereunder. This fact will only further encourage litigation over the release language that Nichols now requires to be included in proposals. Moreover, although Hales and Bowman involved substantially similar release language, the Bowman court enforced the proposal for settlement, while Hales invalidated it. This lack of clarity will "stoke the litigation fires" even more. Nichols enables and sanctions such litigation, and Florida's courts will expend substantial time and resources administering it.

In addition to increasing the amount of litigation related to proposals for settlement themselves, Nichols also decreases proposals' efficacy in bringing an early end to the underlying litigation, which is their primary objective. See supra

[9] In reaching this conclusion, the court relied on Zalis v. M.E.J. Rich Corp., 797 So.2d 1289 (Fla. 4th DCA 2001), which held that releases requesting release of all future claims are incapable of complying with the particularity requirements of Rule 1.442(c). State Farm's Proposal, however, expressly stated the release would not include any future claims of Nichols.

Aspen. Proposals for settlement accomplish this objective by forcing a party served with one to make a realistic assessment of his or her claims or defenses when deciding whether to accept it. See U.S. Security Ins. Co. v. Cahuasqui, 760 So.2d 1101 (Fla. 3d DCA 2000). The more courts establish technical defenses to proposals for settlements, the less parties will consider the merits of their lawsuit when served with them. Instead, parties will focus on whether they can avoid liability under the proposal for settlement even if they lose the case. Nichols directly promotes this type of analysis by opening a "Pandora's Box" of arguments in opposition to the enforceability of proposals for settlement. Thus, Nichols substantially reduces the chances of lawsuits being settled with acceptances of proposals for settlement.

Should this Court rule that requests for releases are not subject to the particularity requirements of Rule 1.442(c)(2)(C & (D), there will be no prejudice imposed on parties defending against liability under proposals for settlement. This is because the good-faith requirement of § 768.79(7)(a) provides courts with an adequate mechanism for addressing legitimate concerns regarding releases requested in proposals for settlement. Indeed, Nichols itself specifically recognizes this fact. See Nichols, 851 So.2d at 746, n.3. A proposal for settlement that genuinely requests a release so oppressive and prejudicial that it precludes

acceptance thereof is, by definition, served in bad faith. Such proposals are, however, exceedingly rare.[10] Nearly all proposals that request releases do so in good faith and simply seek to invoke the time-honored, "mechanical and legally inconsequential means" of ensuring acceptance thereof will bring a final end to the litigation. See supra Earnest.

Contrary to Nichols' reasoning, allowing trial courts to resolve issues concerning release language under the aegis of § 768.79(7)(a) will not result in any more litigation than contemplated by this statute. Section 768.79(7)(a) requires trial courts to analyze the prevailing party's intentions and motivations (*i.e.*, good faith/bad faith) every time a party seeks enforcement of a proposal for settlement. Depending on the specific facts and circumstances of each case, this analysis may be more or less rigorous. It is, however, always contemplated under § 768.79(7)(a). Thus, requiring release-language disputes be resolved under the § 768.79(7)(a) does not promote any litigation over and above that envisioned by this statute. Certainly, the amount of litigation under § 768.79(7)(a) will be

[10] An example of such a proposal is the one at issue in Zalis v. M.E.J. Rich Corp., 797 So.2d 1289 (Fla. 4th DCA 2001), which requested the plaintiff to release "any future action against the defendant or anyone associated with him." Clearly, the terms of the requested release in Zalis are far more expansive than those of a standard general release, which only seek to resolve current claims. The Zalis court invalidated the proposal by ruling that the aberrational release did not satisfy the terms of Rule 1.442(c). The court could have reached the same result by ruling that the proposal violated the good-faith requirement of § 769.78(7)(a).

substantially less than the litigation that will arise over release language set forth in proposals for settlement if Nichols is allowed to stand.

In the instant case, the trial court concluded that State Farm served its Proposal in good faith based on the undersigned's testimony that he never intended for, or would have required, Nichols to release her UM claim in order to settle the PIP suit. Had Nichols accepted State Farm's Proposal, the parties would have agreed to a release that expressly excluded the UM claim. After weighing this evidence, the trial court made the factual determination that State Farm served its Proposal in good faith, and the 5th DCA correctly refused to disturb this ruling.

In summary, Earnest is entirely consistent with the purpose of proposals for settlement, which is to decrease litigation. Nichols, however, has the dual effect of increasing litigation relating to proposals for settlement themselves and promoting the continued litigation of the underlying merits of lawsuits. In cases where a request for release contained in a proposal needs judicial scrutiny, the good-faith requirement of § 768.79 provides an adequate mechanism. Based on the foregoing, the Court should adopt Earnest and reject the portions of Nichols that are inconsistent therewith.

In the instant case, the 5th DCA reversed the award of attorneys' fees to State Farm based on its conclusion that the Proposal did not meet the particularity requirements of Rule 1.442(c)(2)(C) & (D). Should the Court adopt the reasoning

and conclusions of the foregoing paragraph, the 5th DCA's denial of attorneys' fees to State Farm must necessarily be reversed.

III. ASSUMING *ARGUENDO* RULE 1.442(c)(2)(C) & (D) APPLIES TO REQUESTS FOR RELEASES IN PROPOSALS FOR SETTLEMENT, STATE FARM'S PROPOSAL SATISFIES THIS RULE.

As explained above, proposals for settlement are in the nature of contracts and should be interpreted as such. See Jamieson v. Kurland, 819 So.2d 267, 268 (Fla. 2d DCA 2002). It is axiomatic that a "contract should be considered as a whole in determining the intention of the parties to the instrument." Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438 (Fla. 1951). Accordingly, "(c)ourts are not to isolate a single term or group of words (in a contract) and read that part in isolation; the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose." Delissio v. Delissio, 821 So.2d 350, 353 (Fla. 1st DCA 2002). The 5th DCA violated each of the axioms when it invalidated State Farm's Proposal for Settlement.

State Farm's Proposal for Settlement contained the following two provisions:

> 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.

* * *

> 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, 288-289) When these provisions are read in *pari materia* as required by the above-quoted authorities, they clearly demonstrate that State Farm was only requesting a release of Nichols' existing PIP claims. Conversely, the requested release clearly excluded Nichols' UM claim with State Farm.

To reach an opposite conclusion, one must completely ignore paragraph 1 of the Proposal, which expressly states that State Farm was only seeking to settle "Nichols's claims arising in, or arising out of, the above-styled case." Such a construction of the Proposal directly contravenes the hornbook rules of law quoted above. Unfortunately, the 5th DCA engaged in just such a misconstruction when it invalidated State Farm's Proposal. Contrary to the Nichols court's conclusions, the Proposal's request for a release satisfied Rule 1.442(c)(2)(C) & (D) because it clearly set forth Nichols' obligations should she accept the Proposal and thereby allowed her to fully evaluate whether or not to accept it.

In addition to violating hornbook rules of contractual construction, Nichols also expressly and directly conflicts with Bowman. As explained above, the

plaintiffs in Bowman sought to avoid liability under the defendants' proposals for settlement by arguing that the release attached thereto required the plaintiffs to release claims that were not part of their lawsuit. Bowman, 854 So.2d at 509. The court rejected this argument based on its conclusion that the defendant simply requested a standard general release like ones used to settle lawsuits on a daily basis. Id. The court also supported its ruling by quoting the portion of the defendant's proposal stating it was attempting to resolve "*all claims which were raised or could have been raised in this action by any party against any other party*." Id. at 508 (emphasis in original).

In the instant case, Nichols, like the Bowman plaintiffs, asserted that State Farm's Proposal required her to release her UM claim, which was not a part of the lawsuit. Moreover, State Farm's Proposal stated that it was seeking to resolve only those claims arising in, or out of, Nichols' lawsuit, which language is very similar to that contained in the Bowman proposal and quoted above. Unlike the Bowman court, however, the 5th DCA accepted Nichols' erroneous argument and invalidated State Farm's Proposal. As such, Nichols and Bowman cannot be reconciled.

For all the reasons set forth in this Brief, Bowman is far more consistent than Nichols with the policy behind proposals for settlement of bringing litigation to an early and final resolution. Accordingly, the Court should adopt the reasoning of Bowman and disapprove the portions of Nichols that are contrary thereto. In so

doing, the Court should reverse the 5th DCA's denial of attorneys' fees to State Farm, as its Proposal is entirely consistent with the one approved in Bowman.

CONCLUSION

Based on the foregoing, State Farm respectfully requests the Court to:

a) reverse the portion of Nichols holding that: i) requests for releases in proposals for settlement are governed by the particularity requirements of Rule 1.442(c)(2)(C) & (D); and ii) parties requesting a release in a proposal for settlement must set forth the release language or a summary thereof in order to comply with this Rule; or alternatively

b) reverse Nichols' conclusion that State Farm's Proposal did not comply with Rule 1.442(c)(2)(C & (D); and

c) reverse the 5th DCA's denial of attorneys' fees to State Farm pursuant to its Proposal for Settlement and reinstate the Final Judgment entered by the trial court; and

d) remand the case to the trial court for proceedings consistent with the Court's rulings including, but not limited to, the calculation an award of appellate attorneys' fees incurred by State Farm.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail on this ___ day of October 2003 to: THOMAS P. HOCKMAN, Hockman, Hockman, Hockman, 2670 W. Fairbanks Avenue, Winter Park, FL 32789.

Certificate of Compliance with Font Requirements

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

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