IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

SANDRA FROSTI,

Appellant/Petitioner,

Case No.: SC07-122
vs. DCA No.: 2D05-3270

LA VERNE CREEL, as personal representative of the estate of WILLIAM H. HOUK,

Appellee/Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Scot E. Samis
Abbey, Adams, Byelick Kiernan, Mueller & Lancaster, L.L.P.
360 Central Avenue, 11th Floor
Post Office Box 1511
St. Petersburg, Florida 33731-1511
(727) 821-2080 telephone
(727) 823-6535 facsimile
Florida Bar No. 0651753/SPN No. 705713
Attorney for Respondent

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STATEMENT OF THE CASE AND FACTS

The Initial Brief omits the date of the Final Judgment, the operative language from the Proposal for Settlement, and other relevant facts from the record. The following statement is offered as a supplement.

This is a rear-end collision case in which the Defendant, William Houk, admitted negligence.[1]

Petitioner served an initial Proposal for Settlement in the amount of $17,999.00 for compensatory damages only. (R7, 171). After a claim for punitive damages was permitted, Petitioner served a second Proposal for Settlement that separated the amounts proposed for compensatory damages ($24,998) and punitive damages ($1). (R85, 172).

At trial, the jury found that Petitioner did not sustain a permanent injury as a result of the accident, and awarded total compensatory damages of $20,670.66 (lost wages and medical expenses). (R165-167). The jury also found that Petitioner was entitled to punitive damages in the amount of $73,800 due to Mr. Houk's driving with poor eyesight. (R165-167, T586-587).

The verdict was rendered on August 12, 2004. (R165-167). On August 19, 2004, Petitioner's counsel filed the subject Proposal for Settlement without an

[1] Mr. Houk died while the case was pending in the Second District.

attendant motion for attorney's fees. (R168, 171-172). The Petitioner's Motion for Attorney's Fees based on the proposal was filed on September 13, 2004. (R184).

The Final Judgment was not entered until September 20, 2004.[2] (R189). The relevant Proposal for Settlement reads, in pertinent part:

> * * *
>
> 4. ONE DOLLAR $1.00 is demanded to settle the claim for punitive damages which sum, ONE DOLLAR $1.00 is a part of and is contingent upon acceptance of the total amount of this proposal set forth below.
>
> 5. Attorney's fees are not part of this claim.
>
> 6. The total amount demanded is TWENTY FOUR THOUSAND NINE HUNDRED NINETY NINE DOLLARS $24,999 inclusive of costs.
>
> (R172).

Respondent argued that the Petitioner's Motion for Attorney's Fees should be denied because (1) the proposal was filed prior to entry of the Final Judgment in

[2] Through a clerical error, copies of that judgment were not forwarded to counsel. (R229-232). Therefore, the trial court vacated the original final judgment and entered a new final judgment on March 23, 2005. (R247-251). Petitioner then filed a renewed Motion for Attorney's Fees which was denied on June 21, 2005. (R252-254). This portion of the record is mentioned only to explain why there are two judgments in the record. This aberration has no effect on the issues before the Court.

violation of Fla. R. Civ. P. 1.442 and Fla. Stat. 768.79; and (2) the Final Judgment did not meet the required threshold for a fee award, since the compensatory damage award was less than the amount demanded. (R190-218). The trial court denied the motion for fees based on the premature filing, without addressing the second issue. (R252-254).

On appeal, the Second District affirmed based on *Bottcher v. Walsh*, 834 So.2d 183 (Fla. 2d DCA 2002), and certified conflict with *Mills v. Martinez*, 909 So.2d 340 (Fla. 5th DCA 2005). *Frosti v. Creel*, 943 So. 2d 1023 (Fla. 2d DCA 2006).

SUMMARY OF ARGUMENT

The are two independently dispositive reasons to affirm the order denying the Petitioner's Motion for Attorney's Fees in this case. First, the district court was correct in denying fees where the underlying Proposal for Settlement was filed prematurely. Second, the judgment obtained did not meet the threshold for an award.

1. Premature filing

It is undisputed that the Petitioner filed her proposal 33 days prior to the original Final Judgment and 23 days prior to her original Motion for Attorney's Fees. The relevant statute and rule prohibit filing a proposal until it is necessary for enforcement of the fee claim. The statute and applicable Florida Supreme Court precedent establish that it is the judgment, not the verdict, that triggers the right to seek fees. Hence, filing is not necessary until after a judgment is entered that allows enforcement. By filing her proposal prior to the entry of judgment, the Petitioner violated the statute.

The Second District correctly affirmed the trial court's ruling that a prematurely filed proposal for settlement will not support a fee claim. This view is consistent with several prior rulings by the Florida Supreme Court that strictly apply the requirements of both Rule 1.442 and s. 768.79, and has been further

vindicated by the subsequent opinion in *Campbell v. Goldman*, 32 FLW S320 (Fla. June 14, 2007).

Petitioner argues for a broad construction of the Rule 1.442 and s. 768.79. The only way for Petitioner to prevail would be for this Court to abandon the strict construction it has repeatedly set forth in this area of the law, and adopt a view contrary to the longstanding tenet that fee awards are in derogation of common law and can only be obtained by strict adherence to all required procedures. There is no reason to do so. This Court has sent a consistent message on these issues that should not be undermined by a reversal here.

2. The judgment does not meet the threshold for a fee award.

Even if the Proposal for Settlement had been properly filed, it still would not support a fee award in this case.

Petitioner's Proposal for Settlement separated the amounts proposed for compensatory ($24,998) and punitive ($1) damages. In addition, the proposal provided that neither could be accepted individually. The result at trial was an award of compensatory damages that was less than the amount demanded for compensatory damages in the proposal, but a punitive damages award that exceeded the one dollar demand.

Again, the rule and statute are in derogation of the common law, and therefore must be strictly interpreted in favor of the rule that a party pays his own

attorneys' fees. Neither the statute nor rule gives instruction on the issue of a judgment that exceeds the punitive damages part of a proposal, but does not exceed the threshold for the compensatory damages demand. Given this ambiguity, and since Mr. Houk was unable to accept one portion of the proposal without accepting the other, both awards must exceed the 125% threshold in order to justify an award of fees. That did not occur. Hence, there would be no basis for a fee award even if the proposal had been properly filed.

Such a result would also be consistent with the objectives of the rule and statute in encouraging reasonable demands and settlements. By the Petitioner's own design, Mr. Houk could not have accepted the punitive damages offer and litigated the disputed compensatory damage offer. When the Petitioner imposed the all-or-nothing condition of accepting both offers, she accepted, as a consequence, the requirement of passing the threshold on both offers as well.

Under either analysis, the ruling below must be affirmed.

STANDARD OF REVIEW

Appellee agrees that a ruling construing the time and form requirements of s. 768.79 Fla. Stat. and Fla. R. Civ. P. 1.442 is reviewed *de novo*. See, e.g., *Campbell v. Goldman*, 32 FLW S320 (Fla. June 14, 2007).

ARGUMENT

Issue on Review (Restated)

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR ATTORNEY'S FEES WHERE:

(1) THE PROPOSAL WAS FILED PRIOR TO ENTRY OF FINAL JUDGMENT; AND

(2) THE COMPENSATORY DAMAGES OBTAINED DID NOT EXCEED THE THRESHOLD AMOUNTS.

1. The Premature Filing of the Proposal is Fatal to the Petitioner's Fee Claim.

It is undisputed that the Petitioner filed her proposal 33 days prior to the original Final Judgment and 23 days prior to her original motion for fees. Both Fla. R. Civ. P. 1.442(d) and Fla. Stat. s. 768.79(3) provide that the offer/proposal shall be served upon the party to whom it is made, but shall not be filed unless filing is necessary to enforce the provisions of the rule/statute. The relevant provisions are as follows:

> Rule 1.442. Proposals for Settlement
>
> * * *
>
> (d) Service and filing. A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

768.79 Offer of Judgment and Demand for Judgment. –

* * *

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

* * *

Petitioner argues that "nothing in either provision speaks to the timing of the filing of the proposals." [Initial Brief, p. 6]. This fails to recognize the obvious consequence of prohibiting parties from filing proposals until it is necessary to pursue a fee award. This creates a time frame that begins when a party has established the right to fees. The event that triggers that time frame is the entry of a judgment in a qualifying amount, as made clear by s. 768.79(1):

(1) ...If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

The obvious import of this language was recognized by this Court in *White v. Steak & Ale of Florida, Inc.*, 816 So. 2d 546 (Fla. 2002), where it was ruled that pre-offer costs would be included in calculating the "judgment obtained" in determining whether the 125% threshold was reached. This removes any doubt

that it is the judgment, and not the verdict, that allows enforcement of a fee claim under s. 768.79 and Rule 1.442.[3] Hence, until the judgment is obtained, it is not necessary to file the proposal for settlement - - and consequently, filing a proposal before entry of a judgment violates the statute and rule.

In the present case, not only did the Petitioner file her proposal prior to the Final Judgment, she filed it 23 days prior to her original motion for fees. It is difficult to see how filing was then "necessary," since there was no qualifying judgment, post-trial motions were still pending, and the fee motion itself was not even filed until over three weeks later. The trial court and Second District had no choice but to deny the Petitioner's fee claim in this case.

A review of Florida Supreme Court jurisprudence in this area vindicates the Second District's view. If there is a single message that this Court has attempted to convey in addressing compliance with Rule 1.442 and s. 768.79, it is this: Statutes and rules permitting fee-shifting are in derogation of common law, and must be strictly construed. Therefore, any deviation from the stated procedural requirements will prevent a fee award.

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[3] On page 16 of the Initial Brief, Petitioner points to a comment in *Norris v. Treadwell*, 907 So. 2d 1217 (Fla. 1st DCA 2005) that "the jury verdict triggered entitlement [to fees]." That case addressed a separate issue involving Fla. R. Civ. P. 1.525. More importantly, the comment is contrary to the language of s. 768.79(1) and the correct analysis by this Court in *White*.

One of the best illustrations of this view may be the most recent. In *Campbell v. Goldman*, 32 FLW S320 (Fla. June 14, 2007), the plaintiff served a proposal for settlement on the defendant which made reference to Florida Rule of Civil Procedure 1.442, but did not cite s. 768.79. After obtaining a judgment that exceeded the necessary threshold, the plaintiff sought fees based on the proposal. The trial court denied the motion, but the Fourth District reversed, despite recognizing this Court's repeated admonitions of strict construction in *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 278 (Fla. 2003), *Sarkis v. Allstate Insurance Company*, 863 So.2d 210, 218 (Fla. 2003), *Major League Baseball v. Morsani*, 790 So.2d 1071, 1078-79 (Fla. 2001), and *TGI Fridays, Inc. v. Dvorak*, 663 So.2d 606, 615 (Fla. 1995). Not surprisingly, this Court quashed the Fourth District's ruling and reinstated the trial court's order denying fees, concluding that the strict construction rule applies to the requirement that the offer must cite the statute.

The *Campbell* opinion is simply the latest example of a message this Court has been sending for over a decade. See, e.g., *TGI Fridays, Inc. v. Dvorak*, 663 So.2d 606, 614-615 (Fla. 1995)(observing that s. 768.79 should be strictly construed due to the longstanding adherence in Florida law to the "American Rule" and the penal nature of a fee award)(Justice Wells, concurring and dissenting in part); *Major League Baseball v. Morsani*, 790 So.2d 1071, 1078-1079 (Fla.

2001)(statutes in derogation of the common law must be strictly construed); *Allstate Indemnity Co. v. Hingson*, 808 So. 2d 197 (Fla. 2002)(denying fees where party violated statute by serving joint, undifferentiated proposal for settlement); *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 278 (Fla. 2003)(language of rule and statute dealing with proposals for settlement must be strictly construed because they are in derogation of the common law rule that each party pay its own fees); *Sarkis v. Allstate Insurance Company*, 863 So.2d 210, 223 (Fla. 2003)(denying fee multiplier under a proposal for settlement: "...a statute imposing a penalty must by strictly construed in favor of the one against whom the penalty is imposed and is never extended by construction."); and *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005)(strictly construing Rule 1.442(c)(3) to deny fees when joint proposal for settlement failed to apportion between two defendants, even where one of the defendant's alleged liability was purely vicarious).

The Second District's view is faithful to this body of law. In *Hess v. Walton*, 898 So. 2d 1046, 1048 (Fla. 2d DCA 2005), Chief Judge Altenbernd noted that there are two reasons for strict construction of the subject rule and statute, since they are both in derogation of the common law and create a penalty [citing *Sarkis* and *Willis Shaw*]. The present case is no exception.

Petitioner does not discuss or even recognize any of the Supreme Court decisions, but rather argues for an interpretation of the rule and statute based on her perception of the "intent of the framers of the Rule" and the conflicting decision in *Mills v. Martinez*, 909 So. 2d 340 (Fla. 5th DCA 2005). [Initial Brief, pp. 8,17]. This broad construction is diametrically opposed to virtually every opinion issued by this Court on the topic, as illustrated by the *Mills* court's reliance on *In re Rutherfurd's Estate*, 304 So. 2d 517, 520 (Fla. 4th DCA 1974) for the view that a trial court should "relax procedural requirements" in favor of reaching their "great object." This may be appropriate in cases like *Rutherfurd*, which dealt "special circumstances" involving the technical requirements for a continuance in a probate case - - but is exactly the type of analysis this Court has rejected in cases addressing fee-shifting. In the case at bar, the proper guidance comes from this Court's consistently strict reading of the relevant rule and statute, and rejection of fee claims whenever there is any deviation from the required procedures.

It is worth noting that even a broad construction of the rule would not justify a fee award in the present case. The objective of the rule is not only, as Petitioner argues, to prevent the jury from hearing evidence of settlement efforts. In fact, that aim is addressed separately in Rule 1.442(i) and s. 768.79(8), which limit the admissibility of proposals to enforcement proceedings. If excluding proposals from the evidence were the only objective, there would be no need for the

additional prohibition against filing contained in Rule 1.442(d) and s. 768.79(3). It is axiomatic that statutory provisions should be construed to exist for a purpose and not interpreted as superfluous. See, e.g., *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003)("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute as possible, and words in a statute should not be construed as mere surplusage."). Hence, the proper interpretation of Rule 1.442 and s. 768.79 is that the framers did not want proposals for settlement appearing in the court file until filing is absolutely necessary - - which is after the judgment has been rendered.

There is no support in Florida law for Petitioner's suggestion that the proper remedy for a violation of Rule 1.442..."would have been to strike the proposal from the record" to give her an opportunity to file the proposal within the proper time period. [Initial Brief, p. 7]. In this Court and all five districts, the consequence of violating the rule or statute concerning proposals for settlement is forfeiture of the right to obtain attorneys' fees. See, e.g., *Campbell*, supra, *Heyman v. Free*, 913 So. 2d 11 (Fla. 1st DCA 2005), *Easters v. Russell*, 942 So. 2d 1008 (Fla. 2d DCA 2006), *Oasis v. Espinoza*, 954 So. 2d 632 (Fla. 3d DCA 2007), *Graham v. Peter K. Yeskel 1996 Irrevocable Trust*, 928 So. 2d 371 (Fla. 4th DCA 2006), *D.A.B. Constructors, Inc. v. Oliver*, 914 So. 2d 462 (Fla. 5th DCA 2005).

On pages 9-10 of the Initial Brief, Petitioner argues that the reasoning of prior Second District cases *Bottcher v. Walsh*, 843 So. 2d 183 (Fla. 2d DCA 2002) and *Browning v. Scott*, 884 So. 2d 298 (Fla. 2d DCA 2004), do not apply to the present situation because they involved proposals that were filed prior to verdict. This misses the point. The fact that *Bottcher* and *Scott* involved proposals that were filed even earlier in the proceedings than Ms. Frosti's does not change the fact that Ms. Frosti's proposal was premature as well. Filing a proposal prior to judgment violates the rule. Whether it is filed a day before or months before - or before or after the verdict - is irrelevant.[4]

Next, Petitioner asserts that defense counsel filed the Respondent's proposal for settlement at the time it was served, apparently to imply that an improper filing by opposing counsel would excuse her own violation of the Rule. Respondent would first point out that the assertion is false - - defense counsel filed a one-page Notice of Service of Offer of Judgment/Proposal for Settlement, which only stated that such a document was served. The actual proposal itself was not attached or otherwise filed - - because to do so would violate the rule and statute. More importantly, if defense counsel had in fact filed a proposal prematurely, then the

[4] If the Petitioner's argument is that this case does not create conflict due to this distinction, then the present review should be dismissed for lack of jurisdiction.

consequence would be exactly the same as it is for the Petitioner here - - the denial of any motion for fees based on the proposal.

The requirement that claims for attorneys' fees must be pled as stated in *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991) has no bearing on the present case. The general view that a party should be put on notice of a claim for attorneys' fees deals with entirely separate issues and has no bearing on the requirements of Rule 1.442.

The remainder of the Initial Brief discusses conflicting District Court cases dealing with the timing of fee motions under the old version of Fla. R. Civ. P. 1.525. The Second District properly applied the same rule of strict construction in those cases. See, e.g., *Diaz v. Brown*, 832 So. 2d 200 (Fla. 2d DCA 2002), *Gulf Landings Association, Inc. v. Hershberger,* 845 So. 2d 344 (Fla. 2d DCA 2003), *Swann v. Dinan,* 884 So. 2d 398 (Fla. 2d DCA 2004) and *Lyn v. Lyn,* 884 So. 2d 181 (Fla. 2d DCA 2004). The conflicting case on Rule 1.525 cited by Petitioner, *Norris v. Treadwell*, 907 So.2d 1217 (Fla. 1st DCA 2005), was originally accepted for review by the Florida Supreme Court, but review was later dismissed because Fla. R. Civ. P. 1.525 was amended to set a deadline rather than a window. *Norris*

v. Treadwell, 934 So.2d 1207 (Fla. 2006).[5] This does not "overrule" the Second District decisions.

More importantly, even if this Court ultimately decides that the old version of Rule 1.525 created a deadline rather than a window, such a result does not support a reversal in the present case. The policy discussed in the cases surrounding both the old and new versions of Rule 1.525 deal with notice and the desire to avoid open-ended time frames for filing motions for fees. Rule 1.442 and s. 768.79 deal with the separate issue of excluding settlement proposals from court files unless and until they must be introduced in support of a fee claim triggered by a final judgment. The evolution of Rule 1.525 provides no support for the Petitioner's arguments here.

Returning to the issue at bar, all of the Second District's decisions, including the ruling under review here, are consistent with the overarching principle that fee-shifting statutes and rules are in derogation of common law must be strictly construed. This view has underpinned virtually every Supreme Court decision interpreting the relevant rule and statute. The only way for Appellant to prevail

[5] It appears this issue may be addressed in *Barco v. School Board of Pinellas County*, 946 So.2d 1244 (Fla. 2007), where this Court has granted review in a case in which the Second DCA denied a motion to tax costs since it was not served within 30 days after filing the judgment in accordance with the prior version of 1.525.

would be for this Court to abandon its longstanding position and adopt a broad interpretation that would cast new uncertainty in this area of the law.

2. The judgment does not meet the thresholds for a fee award.

Although it is not necessary for the court to reach this issue, there is an additional, independent reason for denying fees in this case: The judgment obtained by the Petitioner in this case does not meet the thresholds necessary to support a fee claim under her Proposal for Settlement.

The language of Fla. Stat. s. 768.79(2) requires that an offer of settlement, "[s]tate with particularity the amount offered to settle a claim for punitive damages, if any." Therefore, when a lawsuit involves a claim for punitive damages, the statute calls for, in effect, two distinct offers; one for compensatory damages and one for punitive damages.

In the case at bar, Petitioner served a proposal for settlement that properly separated the amounts proposed for compensatory ($24,998) and punitive ($1) damages. In addition, the proposal provided that acceptance of the punitive damages proposal was contingent on accepting the entire amount for compensatory damages. Therefore, if Mr. Houk believed the compensatory portion of the offer was excessive, he did not have the option of settling the punitive portion and defending the compensatory damages claim. Mr. Houk opted to go to trial, with

the result being an award of compensatory damages that was less than the amount in Ms. Frosti's proposal, but a punitive damages award that far exceeded the one-dollar proposal.

The statutory provision that addresses qualifying judgments is s. 768.79(6)(b) which states:

> If a plaintiff serves an offer of judgment which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25% more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorneys' fees...for the purpose of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any post-offer collateral source payments received or due as of the date of the judgment, plus any post-offer settlement amounts by which the verdict was reduced. For the purpose of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any post-offer settlement amounts by which the verdict was reduced.

It is unclear whether the terms "offer" and "judgment obtained," refer to the compensatory and punitive damages offers separately, or in combination. Neither the statute nor the rule provides instruction on the issue of a judgment that exceeds the punitive damages part of a proposal but does not exceed the threshold for the compensatory damages.

This is a classic case of a vague and ambiguous statute. See, e.g., *Hess v. Walton*, 898 So.2d 1046, 1049 (Fla. 2d DCA 2005), citing William D. Popkin,

Materials on Legislation: Political Language and the Political Process 185 (2d Ed. 1997)(statute is ambiguous when its language may permit two or more outcomes, and "vague" when it does not clearly announce any required outcome). Where a vague or ambiguous statute works in derogation of the common law, it must be construed in favor of the common-law outcome (which, in this case, is a denial of fees). *Id*.

Although there appear to be no cases directly on point, some helpful parallels are found in cases addressing the issue of joint proposals for settlement. See, e.g., *Willis Shaw Express, Inc v. Hilyer Sod Inc.*, 849 So.2d 276 (Fla. 2003). *Hilyer Sod* and its progeny generally hold that joint offers or proposals must apportion amounts attributable to each party. The concept is that this allows each party to separately and independently evaluate the offer. See also, *United Servs. Auto. Ass'n v. Behar*, 752 So. 2d 663 (Fla. 2nd DCA 2000) and *Allstate Indemnity Co. v. Hingson*, 808 So. 2d 197 (Fla. 2002)(observing the need for individual parties to be able make an independent evaluation of a proposal). Based on this reasoning, the statutory requirement that offers must separate out the amounts attributable to compensatory and punitive damages implies a separate evaluation of those distinct offers. Therefore, the presence of a punitive damages component requires a two-part calculation.

In the present case, the threshold was exceeded for punitives, but not for compensatories. At first blush, this would seem to require an award of fees for litigating the punitive damages claim, but no award for litigating the compensatory damages aspect. This analysis fails, however, since the underlying proposal did not give the Respondent the option of settling one component of the claim and defending the other. Since Mr. Houk was forced to accept both figures in order to settle, it is only fair and logical to require that the threshold be met for both the compensatory and punitive judgments. When the Petitioner imposed the all-or-nothing condition of accepting both offers, she must accept, as a consequence, the requirement of beating the threshold on both offers as well.

The significance of independent versus contingent offers was also observed in *Miami-Dade County v. Ferrer*, 943 So.2d 288 (Fla. 3d DCA 2006). In that case, the defendant county served an offer of judgment specific to two separate counts of the complaint in exchange for dismissals with prejudice of those specific counts. One offered to pay $1,000.00 in exchange for dismissal with prejudice of a battery claim. A separate offer of $1,000.00 was made in exchange for dismissal with prejudice for his claim of false imprisonment. The offers were rejected, and the jury found that the county was not liable. When the county moved for fees, the court acknowledged the strict construction rules of *Willis Shaw*, but still found that the offers were clear and unambiguous. It was noted that "The two claims are not

conditioned on each other, and Ferrer could have settled one claim and proceeded to trial on the other," citing *Connell v. Floyd*, 866 So.2d 90 (Fla. 1st DCA 2004) for the statement "While a proposal for settlement may settle only a portion of a lawsuit, a valid proposal for settlement must at least settle that portion with certainty," and *Lucas v. Calhoun*, 813 So.2d 971, 972 Note 1 (Fla. 2nd DCA 2002)(suggesting it may be better practice to identify the specific damage elements where the proposal addresses fewer than all the damage claims, but such is not necessary when the proposal seeks to settle a specific count).

The lack of guidance in the statute for the present circumstances, coupled with the case law emphasizing the right of parties to independently evaluate separate offers, can lead to only one conclusion: the failure of the Petitioner to exceed the compensatory damages threshold is fatal to her fee claim.

The order below must be affirmed if it is supported under any theory apparent in the record. See, e.g., *Dade County School Board v. Radio Station WRBQ*, 731 So. 2d 638, 644-645 (Fla. 1999). Therefore, even if this Court decides that the filing of the proposal did not violate the rule, the order denying fees should still be affirmed.

CONCLUSION

For the reasons stated, Appellee respectfully requests this Honorable Court affirm the order denying the Appellant/Petitioner's Motion for Attorney's Fees.

Respectfully submitted,
ABBEY, ADAMS, BYELICK, KIERNAN, MUELLER & LANCASTER, L.L.P.

SCOT E. SAMIS
SPN#705713/FBN#0651753
JEFFREY M. ADAMS
SPN #374540/FBN#0457442
Post Office Box 1511
St. Petersburg, Florida 33731
(727) 821-2080 telephone
(727) 823-6535 facsimile
Attorneys for Respondent/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to WILLIAM J. CAPITO, ESQUIRE, 511 Old Grove Drive, Lutz, FL 33549this 20th day of August, 2007.

SCOT E. SAMIS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief of Appellee satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2) and is submitted in Times New Roman 14-point font.

_____

SCOT E. SAMIS