IN THE FLORIDA SUPREME COURT

SANDRA FROSTI,

Petitioner/Plaintiff,

v. Case No. SC07-122

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

Respondent/Defendant.

______________________________________/

PETITIONER'S REPLY BRIEF ON THE MERITS
ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

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Statement of the Facts and Case

Respondent/Defendant has set out additional facts which must be addressed by Petitioner/Plaintiff. The facts supporting the Petitioner/Plaintiff's claim against Respondent/Defendant demonstrate extraordinarily egregious conduct on the part of the now deceased Respondent/Defendant Houk. Liability for punitive damages was based upon the fact that the Respondent/Defendant Houk, at 84 years old, was operating a car that he owned, rear-ending the Petitioner/Plaintiff's car at a high rate of speed, forcing it into a third vehicle and resulting in the total destruction of the Petitioner/Plaintiff's car. It was a clear day and nothing obstructed Respondent/Defendant Houk's view of the road in front of him. There were no skid marks or any evidence of braking prior to the point of impact. Mr. Houk's license was revoked in March 1988 for inadequate vision and the crash occurred in February 1996. He was driving without a license and with extremely inadequate vision; Houk had little choice but to admit negligence.

The next point for clarification relates to the filing of the motion for attorney's fees and costs. The Petitioner/Plaintiff's cause of action accrued in 1996. Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442 were both quite different than the 2004 versions of each as well as confusion surrounding the term "filing" c/f Fla. Stat. 768.79 (1), and (3). The procedure decided to be employed by the Petitioner/Plaintiff was to fulfill all requirements within 30 days

of the verdict and thereafter renew the same within 30 days after the entry of the judgment in order to avoid the barrage of challenges offered by the Respondent/Defendant in this matter. This procedure was derailed by the trial court's entry of a judgment without notice to the Petitioner/Plaintiff. The entry of the Judgment without notice, which was obviously in error, was reversed by the trial court upon motion by the Petitioner/Plaintiff. The judgment was set aside, a new judgment was entered and thereafter a timely Renewed Motion for Attorney's Fees and Costs was served. The issue of the timeliness of the filing of the Proposals was raised at that hearing. It was based upon that Renewed Motion for Attorney Fees and Costs that the cost judgment was ultimately entered in this case. The timeliness and efficacy of the Renewed Motion for Attorney's Fees and Costs is not an issue presented in this case or this appeal.

The Respondent/Defendant's Answer Brief attempts to interject issues that are not the subject of this appeal and the Petitioner/Plaintiff must address these issues and their factual underpinnings. First, there were two Proposals For Settlement that were rejected by the Respondent/Defendant. (R168) The Respondent/Defendant conveniently overlooks the first Proposal which was clearly effective. Second, because the first Proposal covers the largest period of time (served March 22, 2001) and was made in the amount of $17,999 the argument interjected by the Respondent/Defendant will never be addressed by any court at

any juncture. If it were addressed it would be a non issue based upon the plain language of Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442 the Proposal is triggered on the "judgment obtained" and not on some artificial apportionment as the Respondent/Defendant would lead one to believe. In fact, the Respondent/Defendant concedes that there is no law supporting their position (Answer Brief, p. 19-21).

Argument

A. The Proposals for Settlement Were Not Prematurely Filed.

Neither Florida Statute 768.79 nor Florida Rule of Civil Procedure 1.442 provides a specific deadline or time parameter for filing a Proposal for Settlement/Offer of Judgment. Rather, they only speak to the specific ***purpose*** for which they may be filed. Additionally, the Statute and Rule direct when Proposals for Settlement/Offers of Judgment may be admitted into evidence. The cases relied on by the trial court and the Respondent/Defendant are easily distinguished and do not control the issue before this court. *Bottcher v. Walsh,* 843 So. 2d 183 (Fla. 2DCA 2002) and *Browning v. Scott,* 884 So. 2d 298 (2DCA 2004) both involve situations where the Proposals for Settlement were filed at the same time they were served. In fact, counsel in both cases concede that they were filed prematurely, and they

were defended on the issue of lack of prejudice to the other party. Additionally, neither case provides any insight into when it might be appropriate to file Proposals for Settlement.

None of the cases cited by the Respondent/Defendant in support of their position relate to the specific issues presented by this appeal. The Respondent/Defendant instead would attempt to portray the Petitioner/Plaintiff's position as an affront to this court's holding in *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.,* 849 So.2d 276, 278 (Fla. 2003) (which requires that the language of the 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). It is easy for the Respondent/Defendant to simply parrot "strict construction" without looking at the obvious issue that there is simply nothing to strictly construe in this case. Each of the cases cited relates to a specific provision that is clear and unequivocal in its requirement. They rely on the recent pronouncement by this Court in *Campbell v. Goldman,* 959 So.2d 223 (Fla. 2007) a case whereby the proposal for settlement failed to set forth the specific statute under which it was brought. The specific requirements were set forth in both the rule and statute and this court followed that strict construction.

There is no such specific requirement in the case at bar. The issue before the court is a simple issue, the Second district held that by filing her proposals for

settlement after the return of the jury verdict that they were filed prematurely and therefore void. Neither the statute nor the rule (or the decisional case law for that matter) define what is premature and certainly there is no remedy for premature filing is outlined by the rule or statute. The Proposals for Settlement were filed in this action for the express purpose of ***enforcement and sanction*** and they were filed at a time after the proposals had long expired and at a time after a jury verdict had been returned in an amount more than five times the original offer in a trial that was devoid of any error, *Houk v. Frosti,* 926 So.2d 1281 (2DCA 2007). The Respondent/Defendant bases much of its argument on the fact that the filing of the Proposal for Settlement was not "necessary". According to Black's Law Dictionary, 5th Edition, the definition of the word "necessary" includes the following: "This word must be considered in the connection in which it is used, as it is a word susceptible to various meanings. It may import absolute physical necessity of inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper, and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the

particular object sought". *Kay County Excise Board v. Atchison, T. & S.F.R. Co.,* 185 Okl. 327, 91 P. 2d 1087, 1088. Clearly, the word in itself is ambiguous and must be read in connection with the rule and statute and its purpose.

It should be noted that Respondent/Defendant's restated issue on appeal is: **Whether the trial court erred in denying Petitioner's motion for fees where the proposal was filed prior to the entry on the judgment?** Nothing in either the rule or statute remotely suggests or even implies that it is the judgment that triggers the necessity for filing of a proposal for settlement although the trial court's ruling seems to rely on that proposition. The statute alludes to the filing of the proposal as a triggering event, after the rejection of the proposal or the expiration of the 30 days in which to accept it. If one were to subscribe to the trial court's logic then under the R. 1.525 it would always be premature to file a proposal for settlement supporting the statutory basis for fees along with an appropriate motion for attorney's fees and costs any time prior to the entry of the judgment.

B. The Judgment does not meet the threshold for a fee award.

(an issue not raised by this appeal, but to which the Petitioner/ Plaintiff must respond)

The Respondent/Defendant raises this issue as a red herring type of argument. There is simply no basis for Respondent/Defendant's position in either law or fact. It is the amount of the "judgment obtained" that dictates the right for sanctions under both Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442. While an amount for punitive damages must be denoted, no such amount need be listed if the pleadings do not contain such a claim. The Second District confronted this issue directly in *Lucas v. Calhoun*, 813 So. 2d 971 (2DCA 2002).

> We conclude that the "if any" language of subsection (E) requires a proposal for settlement [**4] to include terms for settlement of a punitive damage claim only when the pleadings contain a pending claim for punitive damages. In the absence of such a claim, the rule does not require a party to include needless "not applicable" language in the proposal. *Lucas v. Calhoun*, 813 So. 2d 971 (2DCA 2002).

The Plaintiff's original Complaint filed in this action on February 24, 2000 contains no allegations for a punitive damage claim. (R 1-2). It was not until November 14, 2001 that leave was granted to amend the complaint to allege punitive damages. The Proposal for settlement was served on March 22, 2001 some seven months prior to the punitive damage claim (See R-6 Notice of Service). Without question, the first Proposal for Settlement, served on March 22, 2001, was fully effective and undeniably the jury verdict and the ultimate judgment are well beyond the 25% (Twenty Five Percent) more than the offer required by the Statute.

The Fourth District Court of Appeal addressed the issue of multiple proposals in *Kaufman v Smith,* 693 So. 2d 133 (4DCA 1997).

> Where a verdict was more than 25 % less than the first offer of judgment, but exceeded a second offer, and plaintiff rejected both offers, the first offer remained in effect for purposes of entitling defendant to attorney's fees and costs; once plaintiff failed to accept it within the statutory time period, plaintiff no longer had the ability to accept the offer and it was no longer merely an offer, but a statutory right in defendant to recover attorney's fees and costs in the event the judgment was below a certain amount. *Kaufman v Smith,* 693 So. 2d 133 (4DCA 1997).

While Kaufman addresses the issues from a Defendant's perspective, it likewise would apply the Plaintiff's position presented by the facts of this appeal. *Kaufman,* also stands for the proposition that once the time for acceptance of an offer has passes a statutory right to recover attorney's fees has been created.

The Respondent/Defendant's argument is further eroded by the express language of Florida Statute 768.79 (2), "The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must: … (d) State its total amount. The offer shall be construed as including all damages which may be awarded in a final judgment." The Respondent/Defendant's *a la carte* approach to acceptance of a proposal is a direct affront to the purpose of the Statute. They purpose of Florida Statute 768.79 is to encourage early and complete settlement of a lawsuit

This Respondent/Defendant's argument does little more than amplify the continuing conflict of Respondent/Defendant's counsel in attempting to balance

the interest of the client and the interest of his insurer. Clearly, the Respondent/Defendant and his insurer had every opportunity to settle this matter in early 2001 for the sum of $17,999. The compensatory damage award alone was well in excess of this amount. They instead chose to recklessly plot a course of action which allowed Mr. Houk to be personally exposed to liability for significant punitive damages far beyond the damages requested.

CONCLUSION

The Proposals for Settlement were filed for the express purposes outlined in Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442. There was nothing premature about the filing of these Proposals. The Respondent/Defendant's contentions with regard its second argument is without foundation or merit. Appellant respectfully requests that this Honorable Court reverse the trial court's order Striking the Plaintiff's Proposals for Settlement and denying the Plaintiff's Motion for Attorney's Fees.

Alternatively, if the proposals are found to be prematurely filed the appropriate remedy would be to strike them from the trial docket as premature and because they were appropriately moved into evidence at the hearing on Petitioner/Plaintiff's Renewed Motion For Attorney's Fees and Costs the matter

should be remanded to the trial court with direction to enter an award for Petitioner/Plaintiff's attorney's fees from the date of the first proposal,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Scot Samis, Esquire and Jeffery M. Adams, Esquire P.O. Box 1511 St. Petersburg, Florida 33731, 11th day of September 2007.

____
WILLIAM J. CAPITO, ESQUIRE
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this REPLY BRIEF ON THE MERITS 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.

____
WILLIAM J. CAPITO