SUPREME COURT OF FLORIDA

CASE NO.: SC08-1899

ATTORNEYS' TITLE INSURANCE FUND, INC.

Petitioner,

vs.

JOSEPH GORKA and LAUREL LEE LARSON,

Respondents.

RESPONDENTS GORKA AND LARSON'S BRIEF ON THE MERITS

Conflict of Decisions
Certified by the Second District Court of Appeal

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STATEMENT OF FACTS

Respondents accept the FUND's Statement of Case and Facts with the following exceptions and additions:

1) In its Final Judgment, the Trial Court specifically found as follows:

> "ORDERED and ADJUDGED that the Court finds in favor of the Defendant and that each party is to bear their own attorney fees and costs for which let execution issue" (e.s.) (R33-34)

2) This Final Judgment was affirmed Per Curiam by the Second District Court of Appeal. Gorka v. Attorneys' Title Ins. Fund, Inc., 944 So.2d 991 (Fla. 2d DCA 2006). (Gorka I)

3) As noted, the Second District in Gorka I then remanded the issue of appellate attorney fees to the Trial Court with the following instruction:

> "…If the appellees hereafter establish their entitlement to attorney fees pursuant to section 768.79 and rule 1.442 as further explained in Allstate Insurance v. Sutton, 707, So.2d 760 (Fla. 2d DCA 1998) (concerning the necessity of a judicial finding of bad faith), the trial court is authorized to award them all of the reasonable appellate attorneys' fees they incurred." (R44-45)

In their Response to FUND's Motion for Attorney Fees Respondents argued that such attorney fees should be denied because (1) the Trial Court lacked jurisdiction because there was no reservation of jurisdiction to determine attorney fees and, furthermore, the Trial Court's denial of attorney fees was not cross

appealed and was affirmed and (2) the Offer of Judgment was fatally defective under Florida law. (R78-133, 147-175)

The Trial Court rejected Respondents' first argument but agreed with the second argument by specifically stating as follows:

> "As to the offer of judgment, the Court finds that although the Defendant specifically apportioned the amounts offered to each of the Plaintiffs and stated the conditions and non-monetary requirements, neither party was able to independently evaluate or independently accept the offer as the offer required the acceptance of both parties, and, therefore, the Court finds the proposal invalid. Lamb v. Matetyschk, 906 So.2d 1037 (Fla. 2005). (R176-177)

The FUND appealed this ruling. The Second District affirmed on the basis that the proposal was ineffective because it was conditioned so that neither GORKA nor LARSON could independently settle his or her respective claim by accepting the proposal. Attorneys Title Ins. Fund v. Gorka, 989 So.2d 1210 (Fla. 2 DCA 2008) (Gorka II).

SUMMARY OF ARGUMENT

Because the FUND's proposal for settlement required that it be accepted by both GORKA and LARSON, it is defective under F.S. 768.79 and Fla. R. Civ. P. 1.442 as interpreted by Lamb v. Matetyschk, 906 So.2d 1037 (Fla. 2005) and subsequent opinions because, as stated by the Trial Court, the offer stated conditions so that neither Respondent was able to independently evaluate or independently accept the offer.

Furthermore, the Trial Court reached the correct conclusion for the additional reason that the Second District Court of Appeal previously affirmed the Final Judgment in all respects. Therefore, the provision in the Final Judgment that "each party is to bear its own attorney fees" is the law of the case.

ARGUMENT

A DEFENDANT MAY NOT CONDITION A STATUTORY PROPOSAL FOR SETTLEMENT ON ACCEPTANCE BY BOTH OF THE CO-PLAINTIFFS

In 2002, this Court in Allstate Indemnity Company v. Hingson, 808 So.2d 197, 199 (Fla. 2002) specifically stated that "We agree with the district court in C & S that 'to further the statute's goal, each party who receives an offer of settlement is entitled… to evaluate the offer as it pertains to him or her." Later in Lamb v. Matetyschk, 906 So.2d 1037, 1040 (Fla. 2005) this Court reiterated the exact same language. As recent as 2007, this Court cited Lamb with approval in Campbell v. Goldman, 959 So.2d 223, 226 (Fla. 2007).

This strict construction of the proposal for settlement statute has been uniformly followed in 1 Nation Technology Corp. v. A1 Teletronics, Inc., 940 So.2d 3 (Fla. 2 DCA 2005); D.A.B. Constructors, Inc. v. Oliver, 914 So.2d 462 (Fla. 5DCA 2005); Graham v. Peter K. 1996 Irrevocable Trust, 928 So.2d 371 (Fla. 4DCA 2006); Easters v. Russell, 942 So.2d 1008 (Fla. 2DCA 2006); and most recently, in Brower-Eger v. Noon, 994 So.2d 1239 (Fla. 4 DCA 2008) and Cano v. Hyundai Motor America, Inc., __ So.2d ___ (34 FLW D591)(Fla. 4DCA March 18, 2009).

In the instant case, the subject proposal for settlement clearly flies in the face of the above case law in that neither GORKA nor LARSON could independently

evaluate and accept or reject the proposal. For example, GORKA may have decided that he was willing to risk an eventual award of attorney fees and costs against him by rejecting the proposal yet LARSON may have decided that she was unwilling to take such a risk. Yet as worded since they did not agree the proposal was deemed rejected and LARSON in now subject to a substantial claim for attorney fees and costs against her. This is the exact rationale for the above quoted languages from this Court.

The FUND could have very easily made the required separate proposals to GORKA and LARSON and it would have been in compliance with the case law. Presumably under the above scenario, it would now be able to seek attorney fees and costs against GORKA. Such creative drafting would have been in full compliance with Lamb.

To the extent that Clements v. Rose, 982 So.2d 731 (Fla. 1 DCA 2008) is read to permit a proposal as employed in the instant case Respondents respectfully suggest that Clements was wrongly decided.

Furthermore, to the extent that Petitioner asks this Court to deviate from a long line of cases to allow the subject proposal "for policy reasons," Respondents respectfully suggest that such fee shifting statutes are clearly in derogation of the common law rule that each party should pay its own fees Lamb at 1040 and,

therefore, any policy reasons to change Fla. Stat. 768.79 should be addressed by the legislature.

Finally, Respondents would note that the Trial Court in its Final Judgment specifically held that "each party was to bear its own fees and costs." The FUND did not move for Rehearing to address the proposal for settlement nor did it cross appeal this ruling. When the Second District affirmed the Judgment in Gorka I, this issue became the law of the case and, therefore, the issue of attorney fees should no longer exist. For this reason alone, the Court should decline to overrule Gorka II.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via regular U.S. Mail to John H. Pelzer, Esquire, Robin F. Hazel, Esquire and David L. Boyette, Esquire, Ruden, McClosky, Smith, Schuster & Russell, P.A., P.O. Box 49017, Sarasota, Florida 34230-6017 on this ____ day of April, 2009.

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I hereby certify that this brief complies with the font requirements (Times New Roman, 14 point type) specified in the Rule.

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