SUPREME COURT OF FLORIDA

Case No. SC08-1899

ATTORNEYS TITLE INSURANCE FUND, INC.,

Petitioner,

vs.

JOSEPH GORKA and LAUREL LEE LARSON,

Respondents.

ATTORNEYS TITLE REPLY BRIEF ON THE MERITS

Conflict of Decisions
Certified by the Second District Court of Appeal
L.C. Case No. Case No. 2D07-3369
Circuit Court Case No. 05-0596-CA

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ARGUMENT

WHERE CO-PLAINTIFFS HAVE A SINGLE, INDIVISIBLE CLAIM AGAINST A SINGLE DEFENDANT, THE DEFENDANT MAY CONDITION A STATUTORY PROPOSAL FOR SETTLEMENT ON ACCEPTANCE BY BOTH OF THE CO-PLAINTIFFS.

Gorka and Larson violate the very principle of strict construction that they claim to be applying. Even without any textual basis in the statute or the rule, Gorka and Larson assert that they must be permitted to "independently . . . accept or reject the proposal." Answer Brief, p.4, 5. While the statute and the rule require that a separate amount be stated, there is no requirement in either the statute or the rule that the parties be permitted to accept a proposal on a piecemeal basis.

Gorka and Larson suggest that permitting a joint acceptance condition would create unfairness for a litigant who wishes to accept an offer, while his co-party does not. Gorka and Larson do not even suggest that this is what happened in this case. Moreover, since they made a joint decision to commence this litigation, it is not unreasonable for the Fund to expect them to make the joint decision to terminate it. Should the trial court conclude that any offer was made not in good faith, or was made only to manufacture a right to recover fees, then it retains the ability to deny fees on that basis. Rule 1.442(h)(1), Fla. R. Civ. P.; § 768.79(7)(a), Fla. Stat.

Creating a blanket rule that joint acceptance conditions make an offer invalid would run counter to the motivation of many offerors to bring a complete end to litigation. *See, Carey-All Transport, Inc. v. Newby,* 989 So. 2d 1201 (Fla. 2d DCA 2008); *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*, 817 So. 2d 1050, 1055 (Fla. 1st DCA 2002) (Poston, J., concurring). Requiring parties to subject themselves to piecemeal settlements that neither end the case nor reduce the cost of litigation (or worse, fund the litigation against the offeror), would discourage offers and run counter to the purpose of the statute to encourage settlements.

Moreover, Gorka and Larson completely ignore the fact that the claim they were pursuing was one they owned jointly as tenants by the entireties. Because Gorka and Larson "are legally one person," *Dixon v. Davis*, 155 So. 2d 189, 191 (Fla. 2d DCA 1963), the joint acceptance condition merely recognized that the Fund was being sued on a single claim. This is a stark contrast to the primary claim and consortium claim at issue in *United Services Auto Association v. Behar,* 752 So. 2d 663 (Fla. 2d DCA 2000), where the husband and wife had different claims, with different liability issues, and different damages.

The joint acceptance condition is precisely the type of creative solution that this Court invited in *Lamb v. Matetzschk,* 906 So. 2d 1037 (Fla. 2005). There is strict compliance with each and every requirement of the statute and the rule and therefore there is compliance with the principle of strict construction. At the same

time, such a condition allows offerors to effectuate the purpose of the statute to encourage settlements and bring litigation to a complete conclusion.

Finally, Gorka and Larson attempt to resuscitate an argument that they made in the district court, which did not even merit mention in the district court's opinion. It is true that the trial court, in its Final Judgment, indicated that each party would bear their own attorneys' fees and costs. However, at the time the trial court made this ruling, the Fund had not even filed its Motion for Attorneys' Fees. Indeed, under the statute and the rule, it would have been improper to make such a motion until after a judgment had been entered. Therefore, the trial court was not ruling on the Fund's motion for fees pursuant to the statute and rule. The trial court did not rule on that motion until after Gorka and Larson's appeal on the merits, which was affirmed in a tabled decision. *Gorka v. Attorneys Title Ins. Fund, Inc.*, 944 So. 2d 991 (Fla. 2d DCA 2006). In light of the procedural history and the proper chronology, there is no law of the case issue presented here and the issue is properly before this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the District Court should be quashed, and the matter remanded to the trial court with directions to award attorneys' fees in a reasonable amount to be determined by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to counsel of record as noted below, by U. S. Mail, on April 24, 2009.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

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