SUPREME COURT OF FLORIDA

Case No. SC08-1899

ATTORNEYS' TITLE INSURANCE FUND, INC.,

Petitioner,

vs.

JOSEPH GORKA and LAUREL LEE LARSON,

Respondents.

ATTORNEYS' TITLE BRIEF ON THE MERITS

Conflict of Decisions
Certified by the Second District Court of Appeal

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STATEMENT OF CASE AND FACTS

Gorka and Larson are husband and wife, and are insureds of the Fund on a policy of title insurance on their home. Gorka and Larson sued the Fund for declaratory judgment and breach of contract arising out of the title insurance policy issued to them by the Fund. R.1. The Fund made a proposal for settlement to Gorka and Larson which stated, in pertinent part:

> The total amount of the proposal, the relevant conditions of the proposal, and the non-monetary terms of the proposal are as follows. Within 20 days of Plaintiffs, John W. Gorka and Laurel Lee Larson, serving a notice of accepting this Proposal for Settlement, Defendant shall make a payment of $12,500.00 to Plaintiff, John W. Gorka, and a payment of $12,500.00 to Plaintiff, Laurel Lee Larson. Within 10 days of receiving the $12,500.00 payments, Plaintiffs John W. Gorka and Laurel Lee Larson shall file a Notice of Voluntary Dismissal with Prejudice of the above captioned action. This offer is conditioned upon the offer being accepted by both John W. Gorka and Laurel Lee Larson. In other words, the offer can only be accepted if both John W. Gorka and Laurel Lee Larson accept and neither plaintiff can independently accept the offer without their co-plaintiff joining in the settlement.

R.37, 38. Gorka and Larson did not accept this proposal for settlement, and accordingly, it was deemed rejected. *Id.*

After a non-jury trial the trial court entered final judgment in favor of the Fund. R.33, 34. The Fund filed a timely motion for attorneys' fees based on the proposal for settlement. R.35-38. The motion for attorneys' fees was not then scheduled for hearing.

Gorka and Larson timely appealed the trial court's judgment in favor of the Fund. The Fund filed a motion for an award of appellate attorneys' fees in the District Court of Appeal. R.69, 70. The District Court of Appeal affirmed on the merits in a table decision, *Gorka v. Attorneys' Title Ins. Fund, Inc.*, 944 So. 2d 991 (Fla. 2d DCA 2006), and remanded the issue of attorneys' fees to the trial court. R.41, 43.

The trial court then conducted a hearing on both the trial court and appellate court motions for attorneys' fees. The trial court concluded that the Fund was not entitled to attorneys' fees based on the proposal for settlement because "although the defendants specifically apportioned the amounts offered 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 . . . ." R.122.

The Fund appealed. In an opinion dated September 3, 2008, the Second District Court of Appeal affirmed, concluding that by "conditioning the proposal, [so that] neither Gorka nor Larson could independently settle his or her respective claim by accepting the proposal," the proposal was made ineffective under Fla. Stat. § 768.79. *Attorneys' Title Ins. Fund, Inc. v. Gorka,* 989 So. 2d 1210, 1214 (Fla. 2d DCA 2008); App. p.6. The court discussed and certified conflict with *Clements v. Rose,* 982 So. 2d 731 (Fla. 1st DCA 2008). *Id.;* App. p.7.

The Fund timely sought review in this Court, and this Court entered its order accepting jurisdiction.

SUMMARY OF ARGUMENT

This Court has emphatically stated that proposals for settlement will be required to comply strictly with all of the requirements of § 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442, and that any deviation, however minor or inconsequential, will invalidate such a proposal. At the same time, this Court has invited lawyers in the state to be creative to craft proposals for settlement that meet the legitimate requirements of offerors while remaining in strict compliance with the statute and the rule. The condition imposed by the Fund on its proposal for settlement in this case is such a creative solution to the requirement that a separate sum be offered to each offeree, while meeting the legitimate need that acceptance of the proposal would terminate the litigation.

The district court's invalidation of the Fund's proposal for settlement finds no support in the strict construction of the statute or the rule. Contrary to the district court's ruling, there is no requirement in the statute or the rule that each offeree be allowed to accept the portion of the proposal related to them individually. In fact, the Fund dotted every "i" and crossed every "t" and complied with each and every requirement.

The rule of law announced for the first time by the district court would undermine the public policy of the statute and the rule – to promote settlements. According to the district court, an offeror in multiple party litigation is required to

open itself up to the risk of piecemeal settlements that neither reduce the cost nor narrow the risks of litigation. If allowed to stand, the district court opinion will discourage or even preclude proposals for settlement.

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.

This Court has recently and repeatedly announced that Florida's Offer of Judgment Statute, § 768.79, Fla. Stat., (the "statute"), and the Proposals for Settlement Rule, Fla. R. Civ. P. 1.442, (the "rule"), will be strictly construed, and all of the requirements contained therein will be enforced as written. *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007). Parties attempting to make offers or proposals are "on notice that all 't's' must be crossed and 'i's' dotted" in order for a proposal for settlement to be effective under the statute and the rule. *Campbell*, 959 So. 2d at 227 (Pariente, concurring). Whether this strict construction is mandated because the statute is in derogation of common law or simply by application of the plain language of the statute, the same result obtains. *See Campbell*, 959 So. 2d at 228 (Bell, concurring, and discussing the concurring opinion of Judge Farmer in *Goldman v. Campbell*, 920 So. 2d 1264, 1267 (Fla. 4th DCA 2006), *quashed*, 959 So. 2d 223 (Fla. 2007). *See also, Hauss v. Waxman*, 914 So. 2d 474, 475 (Fla. 4th DCA 2005) (Farmer, J., concurring). All requirements must be met even if a requirement is purely technical and apparently serves no useful purpose, *e.g. Campbell*, or where it is a matter of indifference, *e.g.*

Allstate Indemnity Co. v. Hingson, 808 So. 2d 197 (Fla. 2002) (offer to husband and wife plaintiffs ineffective because it did not state separate amounts and terms for each spouse); *Crespo v. Woodland Lakes Creative Retirement Concepts, Inc.,* 845 So. 2d 342 (Fla. 2d DCA 2003) (same), or where the damages that may be owed by the defendant offerees after trial are indivisible, *Lamb v. Matetzschk,* 906 So. 2d 1037 (Fla. 2005).

As it relates to offers that are either made by or to multiple parties, the statute and the rule require that the proposal state a separate amount from and to each party, regardless of the parties' relationships. Thus, an offer from one plaintiff to two defendants must state a separate amount for each, even if one defendant's liability is purely vicarious. *Lamb; 1 Nation Technology Corp. v. A1 Teletronics, Inc.,* 924 So. 2d 3 (Fla. 2d DCA 2005). *See also, Brower-Eger v. Noon,* 994 So. 2d 1239 (Fla. 4th DCA 2008) (offer to defendants who are jointly and severally liable must apportion separate amounts to each defendant.) Also, offerors cannot propose to share a liability or the proceeds of a settlement in accordance with their own, unstated agreement, but instead must separately state the amount of the liability each will bear or the amount of a settlement sum that each will obtain. *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.,* 849 So. 2d 276 (Fla. 2003); *Graham v. Peter K. Yeskel 1996 Irrevocable Trust,* 928 So. 2d 371

(Fla. 4th DCA 2006); *Jones v. Double D Properties, Inc.*, 901 So. 2d 929 (Fla. 4th DCA 2005).

The "'bright line rule' regarding strict construction of the offer of judgment statute and rule," *Campbell*, 959 So. 2d at 225, has not been without its critics. For example, in *D.A.B. Constructors, Inc. v. Oliver*, 914 So. 2d 462, 462 (Fla. 5th DCA 2005), the district court of appeal noted that it was "constrained to affirm the trial court's ruling" declining to give effect to proposals for settlement because the proposals failed to apportion the offer made by two defendants, one of which was only vicariously liable. The *D.A.B.* court noted Chief Justice Pariente's specially concurring opinion in *Lamb* questioning why a differentiated offer was being required when the vicarious liability was not disputed. *D.A.B.*, 914 So. 2d at 464, *quoting Lamb*, 906 So. 2d at 1044 (Pariente, concurring). The *D.A.B.* court found the result to be contrary to "[l]ogic and common sense," but agreed that it was required for legal consistency. *Id.* 464, 465. Similarly, in *Heymann v. Free,* 913 So. 2d 11 (Fla. 1st DCA 2005), an offer made by a plaintiff to two defendants, one of whom was admittedly vicariously liable, was deemed ineffective because it failed to state separate amounts for each defendant. Again, applying "'the plain language of rule 1.442(c)(3)'" 913 So. 2d at 12, *quoting Lamb,* 906 So. 2d at 1042, the district court of appeal was "constrained by *Lamb* to reverse the award of attorneys' fees and costs." *Id.* The *Heymann* court likewise made reference to

Chief Justice Pariente's specially concurring opinion and specifically addressed the impact of the bright line rule on the statutory purpose of promoting settlements. The *Heymann* court stated:

> In our view, the facts of this case demonstrate that the invalidation of such offers will discourage settlements. Such a result is contrary to the legislative intent to encourage settlements through offers of judgment, as clearly expressed in section 768.79, Florida Statutes . . . . As noted by the Chief Justice and two concurring Justices, Florida Rule of Civil Procedure 1.442 may, in fact, discourage such settlements."

Heymann, 913 So. 2d at 12. *See also, Cano v. Hyundai Motor America, Inc.*, __ So. 2d __, 2009 WL 690875 (Fla. 4th DCA March 18, 2009) (Hazouri, J., concurring).

Indeed, this court in *Lamb* expressly anticipated this criticism, and deflected the concern.

> It may take some creative drafting to fashion an offer of settlement when one party is only vicariously liable. However, we are confident that the lawyers of this State can and will draft an offer that will satisfy the requirements of the rule, that is, state the amount and terms attributable to each party when a proposal is made to more than one party.

Lamb, 906 So. 2d at 1041 (footnote omitted). The same creativity is required when the offeree parties have an indivisible claim as when they had an indivisible liability.

Not surprisingly, "the lawyers of this State," *id*, have risen to the invitation in *Lamb* to use their creativity to fashion proposals for settlement that satisfy the bright line rule and strict construction, and are nevertheless effective under the statute and rule. This creativity has a salutory effect of promoting settlements by making the statute and the rule effective, and thus overcoming the objections of the critics of *Lamb, Goldman, Willis Shaw* and the bright line rule.

For example, in *Easters v. Russell*, 942 So. 2d 1008 (Fla. 2d DCA 2006), a plaintiff sued a doctor and the doctor's professional association. The plaintiff made an offer of settlement to both, leaving it up to the defendants to choose which would pay the settlement sum. The court properly deemed this offer to be ineffective under *Lamb*, but laid out a different strategy that would have been effective. If the plaintiff had simply made the offer to one defendant, and indicated that the entire lawsuit would be dismissed with prejudice against both upon payment of the settlement sum, the proposal for settlement would have been effective. In so doing, the offeror would strictly comply with the language of the statute and rule and make a proposal for settlement that is effective. 942 So. 2d at 1009, 1010.

Unfortunately, this strategy does not work for a defendant offeror sued by multiple plaintiffs. While the plaintiff offeror in *Easters* had the ability to make an offer to one defendant, with the condition that both defendants would be dismissed,

an offeror defendant lacks the ability to make an offer to one plaintiff with the condition that another plaintiff would dismiss its claims. An offer by one defendant to multiple plaintiffs for all to dismiss in exchange for a payment to one plaintiff would also be problematic. An agreement by one plaintiff to dismiss in exchange for a payment to another plaintiff would arguably not be supported by consideration.

Another creative approach to the multiple party issue that solves this problem was developed in *Clements v. Rose,* 982 So. 2d 731 (Fla. 1st DCA 2008). In *Clements,* the plaintiff had a claim against two defendants, the husband and wife owners of a dog that had bitten the plaintiff. The plaintiff made an offer to the dog owners that specified a separate amount for each, thereby satisfying the particularity requirements of the statute and the rule. In addition, the "settlement proposal [was] conditional upon both Appellees – who are, after all, husband and wife – accepting it and paying their respective portions." *Clements*, 982 So. 2d at 732. The *Clements* court found that this offer was effective under the statute and the rule, and reversed the trial court's order denying the plaintiff's motion for attorneys' fees predicated on the offer of proposal for settlement. The proposal for settlement crossed every "t", dotted every "i" and conformed with every element required by the statute and the rule. The offer merely included a condition that it must be accepted, if at all, by both offerees.

In this case, the Fund did exactly the same thing. The Fund made an offer to Gorka that stated a separate amount for each plaintiff, thus satisfying the particularity requirements of the statute and the rule. In every other respect, the Fund's offer complied with each and every requirement of the statute and the rule. As permitted by both the statute and the rule, the Fund included a condition – that both parties must accept for the acceptance to be effective and create a binding settlement agreement. If anything, it was more appropriate for the Fund to include this condition in its proposal for settlement than it was for the plaintiff in *Clements*. The offeror plaintiff in *Clements* could have agreed to settle with one of the two dog owners, and then continue to pursue his claim against the other if he so chose. Here, because the Fund as the defendant sought to terminate the litigation, it was appropriate to include a condition that would ensure that that goal was met.

The district court in this case violated this Court's recent and frequent admonition that the statute and rule must be strictly construed. Rather than limiting itself to the plain language of the statute and rule to determine the sufficiency of the Fund's offer, the district court went beyond the language of the statute and the rule to find an entirely new requirement for a proposal for settlement that has no textual support in either the statute or the rule. The district court divined an additional requirement for an effective proposal for settlement to multiple parties, requiring that each individual party must have the independent

ability to accept his or her portion of the proposal for settlement in order for the proposal for settlement to be effective as to any of the offerees. This new rule announced by the district court is not supported by the language of the statute or the rule, undermines the creativity that this Court invited in *Lamb,* and is detrimental to the policies advanced by the statute and the rule because it will discourage proposals for settlement.

The reason that the statute and the rule require separate amounts be stated for offers to and from each party, rather than lump sums, is to ensure that the trial court will be able to perform the arithmetic necessary after judgment to determine whether an entitlement to attorneys' fees has been triggered. In addition, the party receiving the offer must be able to analyze the offer and predict the likelihood that the offer will, if rejected, trigger an entitlement to attorneys' fees. Going beyond the language of the statute and rule to imply a prohibition against joint acceptance conditions violates the very principle of strict construction that invalidates undifferentiated lump sum offers. "[T]he principle of strict construction should not be extended to add a meaning to language that is clear." *Spiegel v. Williams,* 545 So. 2d 1360, 1362 (Fla. 1989).

The district court misread a sentence from this Court's opinion in *Lamb* in order to create a previously unknown requirement that each offeree is required to have an independent ability to accept his or her portion of a proposal for settlement

in order for that proposal for settlement to be effective under the statute and rule. When this Court stated in *Lamb* that, "[e]ach defendant should be able to settle the suit knowing the extent of his or her financial responsibility," *Lamb,* 906 So. 2d at 1040, *quoted in Gorka,* 989 So. 2d at 1213, App. p.5, this Court was discussing "an undifferentiated offer from a single plaintiff to multiple defendants." *Lamb,* 906 So. 2d at 1040. Thus, this Court was saying that the party should know how much he or she would pay or receive if the offer was accepted, not that each individual party was required to be given the right to make a piecemeal settlement. Again, the source of the requirement that proposals state separate amounts to be paid from each party to each party is the strict construction of the language of the statute and rule themselves, not some gloss on the language used that in turn implies a prohibition against joint acceptance conditions. The ability to evaluate an offer individually to determine the effect that acceptance will have on each party does not even imply that each party must have the ability to accept their own portion of a proposal for settlement.

Prohibiting a joint acceptance condition such as the one in the Fund's proposal for settlement would discourage a party situated like the Fund from ever making any settlement proposal, and thereby undermine the policy of promoting settlements. *See, Hilyer Sod, Inc. v. Willis Shaw Express, Inc.,* 817 So. 2d 1050, 1055 (Fla. 1st DCA 2002) (Polston, J., concurring). In that case, "the defendant

received a joint proposal from the plaintiffs which had to be accepted or rejected in total. This is not unusual because many parties wish to settle only if they can be completely done with the case and in most instances they do not care how the other side splits the money." *Id.* While the undifferentiated offer in that case was defective, the motivation of the offeror to be done with the case remains. In fact, the same district court that decided this case recently concluded that an offeror properly included a condition that the offeree release a non-party as a condition of their proposal for settlement, in order to ensure that the proposal for settlement would actually result in a termination of litigation. *Carey-All Transport, Inc. v. Newby*, 989 So. 2d 1201 (Fla. 2d DCA 2008).

While an undifferentiated, lump sum offer cannot be used under these circumstances because the statute and rule expressly require the amounts to be stated separately, a party who desires to terminate litigation may still place a joint acceptance condition in its offer without violating any clause of the statute or the rule. If a party situated like the Fund were not able to include such a joint acceptance condition in a proposal for settlement, then that party would be required to open itself to the possibility of piecemeal settlements that do not have the effect of terminating litigation. Indeed, the offeror would be exposing itself to funding the very litigation against itself, through a piecemeal settlement that neither reduces the cost of litigation nor reduces the offeror's aggregate exposure to

liability. In a case such as this, where a husband and wife are pursuing a claim that they own as tenants by the entireties they are, in the eyes of the law, only one person. *Dixon v. Davis,* 155 So. 2d 189, 191 (Fla. 2d DCA 1963). Unlike the plaintiffs in *United Services Auto Assn. v. Behar,* 752 So. 2d 663 (Fla. 2d DCA 2000), Gorka and Larson are not pursuing separate claims. The use of a joint acceptance condition merely conforms the offer to the legal fiction of tenancy by the entireties, and the economic realty of the couple's shared financial interest. Using the joint acceptance condition strategy re-invigorates the proposal for settlement process for defendants like the Fund who are sued on a single, indivisible joint claim. Absent this strategy, the proposal for settlement procedure is neither legally nor practically available, and the public policy of encouraging settlements is disserved.

The only policy reason given by the district court for rejecting the joint acceptance condition was a hypothetical that Gorka and Larson did not claim was true in this case. The district court supposed that one of the plaintiffs might have wished to accept the settlement while the other did not, thereby exposing the first plaintiff to attorneys' fees based on the decision of the other. Of course, no authority was cited for the proposition that this rendered the proposal for settlement ineffective, because the decision below was the first opinion ever to hold that such a joint acceptance condition invalidated a proposal for settlement.

This Court should not adopt the lower court's reasoning. The husband and wife in this case made the joint decision whether to commence this litigation, and to deal with the consequences. It is not unreasonable for the Fund to expect them to make a similar joint decision whether to terminate the litigation, and to deal with the consequences.

In their Answer Brief, Gorka and Larson may posit any number of hypothetical scenarios in which a joint acceptance condition might render a proposal for settlement ambiguous, or not in good faith. However, the statute and the rule inherently provide a trial court with the discretion to prevent such abuses. Of course, if the conditions are such that the proposal for settlement is rendered ambiguous, then it would be ineffective for that reason. Moreover, if an unscrupulous litigant used any condition knowing that it would make the proposal for settlement impossible to accept, but would give rise to a right to collect fees against one of the offerees, then the trial court would be empowered to disqualify the proposal for settlement as not being made in good faith. Of course, there has been no assertion in this case that the proposal for settlement made by the Fund to Gorka was either ambiguous or not in good faith.

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 March 23, 2009.

CERTIFICATE OF COMPLIANCE

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

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