IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-285

(Lower Tribunal Case No.: 09-15846)

SOUTHEAST FLOATING DOCKS, INC., ET AL.

Appellant,

vs.

AUTO-OWNERS INSURANCE COMPANY

Appellee.

ON APPEAL
FROM THE UNITED STATES ELEVENTH
CIRCUIT COURT OF APPEALS

APPELLANT'S REPLY BRIEF

ON BEHALF OF SOUTHEAST FLOATING DOCKS, INC.

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QUESTION 1

DOES FLA.STAT. §768.79 ALLOW FOR VALID OFFERS OF JUDGMENT IN A SEPARATE SECOND TRIAL; AND, IF SO, MAY OFFERS BE DEEMED VALID IN INSTANCES WHERE AN APPELLATE COURT REINSTATES THE JUDGMENT OF THE FIRST TRIAL?

1. SOUTHEAST FLOATING DOCKS, INC.'S PROPOSAL FOR SETTLMENT WAS NOT A "POST-JUDGMENT" OR "POST-VERDICT" SETTLEMENT OFFER.

Auto-Owners Insurance Company repeatedly refers to Southeast Floating Docks, Inc.'s proposal for settlement as a "post-judgment" or a "post-verdict" settlement offer. (Answer Brief, pgs. 2, 6, 15, 17). This is not a case wherein a party serves its proposal for settlement after judgment, pending appeal as in Glanzberg v. Kaufman, 771 So.3d 60 (Fla. 4th DCA 2000) cited by Auto-Owners Insurance Company. At the time that Southeast Floating Docks, Inc. served its proposal for settlement, the initial jury verdict and judgment thereon had been set aside by the District Court's order granting Auto-Owners Insurance Company's motion for a new trial. There was no appeal pending when the proposal was served. At the time the proposal for settlement was served, the case was in the procedural posture of a newly filed action. A new case management order was entered setting forth the dates for amendment of pleadings, discovery deadlines, dispositive motion deadlines and a new trial date (which was several months hence). The new trial order had the effect of re-starting the clock on all of the

procedural aspects of the case. The jury verdict and the resultant judgment based thereon had been set aside; procedurally they did not exist when Southeast Floating Docks, Inc.'s proposal was served.

Auto-Owners Insurance Company cites Conant v. Whitney, 947 P.2d 864 (Ariz. 1st DCA 1997) for the proposition that the Arizona First District Court of Appeal rejected the rulings in Allianz Ins. Co. v. Gagnon, 860 P.2d 720 (Nev. 1993) and Davis v. Abbuhl, 461 A.2d 473 (D.C. Ct. App. 1983). Auto-Owners Insurance Company is misreading the Conant case. In Conant the Court did not reject Alllianz and Davis, it distinguished them. The Court distinguished Allianz and Davis because in those cases either a new trial or a bifurcated trial were pending. The offers of judgment in those cases were not made pending appeal, they were therefore distinguishable from the facts in Conant in which the offer of judgment was served pending appeal. Contrary to Auto-Owners Insurance Company's misreading of the case, Conant approved the holdings in Allianz and Davis and recognized the significant distinction between an offer served pending appeal and an offer served pending a new trial or a bifurcated proceeding. Southeast Floating Docks, Inc.'s proposal for settlement was served when a new trial was pending, not an appeal.

2. AUTO-OWNERS INSURANCE COMPANY RECOGNIZES THAT A VALID PROPOSAL FOR SETTLEMENT CAN BE SERVED IN ADVANCE OF A NEW TRIAL.

In its Answer Brief, Auto-Owners Insurance Company states: "This Court should respond to the first certified question by concluding a valid offer of settlement can be made more than 45 days before a subsequent trial setting ...". (Answer Brief, pg. 11). Auto-Owners Insurance Company correctly recognizes that there is nothing in the statute or rule which prohibits the service of a proposal for settlement more than 45 days before a new trial date. That is exactly what transpired here. A new trial was ordered. A new trial date was set. A proposal for settlement was made more than 45 days before the date set for the new trial. The proposal was rejected. Ultimately a final judgment of no liability was entered in favor of the defendant, offeror. Auto-Owners Insurance Company's arguments that Southeast Floating Docks, Inc.'s proposal for settlement, which was valid and timely when made, was rendered unenforceable due to the post-offer procedural progress of the case is not supported by the statutory language or Rule 1.442.

3. SOUTHEAST FLOATING DOCKS, INC.'S PROPOSAL FOR SETTLEMENT, HAD IT BEEN ACCEPTED, WOULD HAVE AVOIDED SUBSTANTIAL JUDICIAL EFFORT.

Auto-Owners Insurance Company makes the argument that Southeast Floating Docks, Inc.'s proposal for settlement would not further the public policy of promoting settlement because it was made after a new trial order had been entered. It is ironic that Auto-Owners Insurance Company, which rejected the offer, seems to imply that if it had only been made earlier that settlement could

somehow have been more likely. After the proposal for settlement was rejected, the parties engaged in substantial discovery and motion practice. Auto-Owners Insurance Company pursued its motion for summary judgment and subsequent final judgment. Several months of intensive litigation efforts could have been avoided had the proposal for settlement been accepted. Auto-Owners Insurance Company's argument that enforcement of Southeast Floating Docks, Inc's proposal would not foster the policies behind the statute and rule lacks logic.

4. THE "VIABILITY" OF A PROPOSAL FOR SETTLMENT SHOULD NOT BE CONDITIONED ON A PARTICULAR SUBSEQUENT TRIAL.

Auto-Owners Insurance Company's argument requiring a "nexus" between the "dispositive judgment" that is the basis of the fee award and a trial which is set at the time an offer is served is simply not required by the statute. Trial dates are commonly continued and re-set. All that the statute and rule require is that a party be given 30 days to consider an offer made at least 45 days before the start of a trial date. If the judgment ultimately obtained is beyond the statutory amounts (or one of no liability), sanctions follow. The sanctions are triggered and measured by the judgment ultimately obtained, not the result of a specific trial period which may be set at the time the offer is served. Cases may be disposed of and judgments obtained in many ways besides trial. Under Auto-Owners Insurance Company's "nexus" requirement, proposals for settlement would be rendered unenforceable

whenever a case was determined and judgment entered pursuant to summary judgment, voluntary dismissal, involuntary dismissal, dismissal for lack of prosecution, dismissal as a sanction, or any other mechanism other than trial. Such a result would be illogical and contrary to the plain language of the statute and rule.

QUESTION 2

DOES THE CONDITIONING OF AN OFFER OF JUDGMENT ON THE RESOLUTION AND DISMISSAL WITH PREJUDICE OF THE OFFEREE'S CLAIMS IN THE ACTION AGAINST A THIRD-PARTY RENDER THE OFFER OF JUDGMENT A JOINT PROPOSAL, AS THAT TERM IS USED IN FLORIDA RULE OF CIVIL PROCEDURE 1.442(c)(3)?

1. NEITHER FLORIDA STATUTE 768.79 OR FLORIDA RULE OF CIVIL PROCEDURE 1.442 CONTAIN A "BENEFITS" ANALYSIS FOR DETERMINING THAT A PROPOSAL FOR SETTLEMENT FROM A SINGLE PARTY CONDITIONED ON THE RELEASE OF A THIRD PARTY IS A "JOINT" PROPOSAL.

Auto-Owners Insurance Company is correct when it states: "Accordingly, a joint proposal for settlement is a single proposal made to or from multiple parties." (Answer Brief, pg. 26). Auto-Owners Insurance Company is incorrect when it goes on to state that a proposal is "joint" if it is a proposal that will "benefit" a combination of parties if accepted. Contrary to Auto-Owners Insurance Company's assertion none of the cases cited by Auto-Owners Insurance Company,

Inc. discuss or establish a "benefits" test in determining the joint nature of a proposal for settlement.

In Allstate Indemnity Co. v. Hingson, 808 So.2d 197 (Fla. 2002), a single undifferentiated offer to multiple plaintiffs with separate damage claims was unenforceable because each party was denied the ability to evaluate the offer as it pertained to him or her. The case does not discuss or establish a "benefits" test to determine the "joint" nature of the proposal.

In Attorney's Title Insurance Fund, Inc. v. Gorka, 36 So.3d 646 (Fla. 2010), an offer to multiple offerees conditioned upon acceptance by all offerees was held invalid because each offeree was deprived of the ability to individually accept or reject the offer. The case does not discuss or establish a "benefits" test as suggested by Auto-Owners Insurance Company.

In Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So.2d 276 (Fla. 2003), an undifferentiated offer from two plaintiffs, each of whom had significantly different and independent claims, was unenforceable, not due to any "benefits" test, but due to the independent and vastly different damage claims of the joint offerors which were undifferentiated.

Similarly, in Lamb v. Matetzschk, 906 So.2d 1037 (Fla. 2005), differentiation of a demand to two defendants was required, due to the plain language of the statute, not the development of a "benefits" test.

Auto-Owners Insurance Company had Southeast Floating Docks, Inc.'s proposal for settlement and knew all of its terms. Auto-Owners Insurance Company's ability to accept or reject the proposal was entirely within Auto-Owners Insurance Company's control. No third party could veto or otherwise influence or override Auto-Owners Insurance Company's decision to accept or to reject the proposal for settlement. Southeast Floating Docks, Inc. and Simpson had a single liability to Auto-Owners Insurance Company for which they were allegedly jointly liable. Auto-Owners Insurance Company had no claims against Simpson that it did not have against Southeast Floating Docks, Inc. Simpson had no defenses to the Auto-Owners Insurance Company's claim that Southeast Floating Docks, Inc. did not. Auto-Owners Insurance Company's fate was in its own hands and its own hands only. None of the considerations in Allstate, Gorka, Willis Shaw or Lamb are implicated in Southeast Floating Docks, Inc.'s individual offer. Southeast Floating Docks, Inc.'s offer explicitly stated that it was being made by Southeast Floating Docks, Inc. alone. Although it was conditioned upon Simpson's release it was clearly not a joint offer. Eastern Atlantic Realty and Inv., Inc. v. GSOMR, LLC, 14 So.3d 1215 (Fla. 3d DCA 2009) rev. denied, 26 So.3d 518 (Fla. 2010).

QUESTION 3

DOES FLA.STAT. §768.79 APPLY TO CASES THAT ARE GOVERNED BY THE SUBSTANTIVE LAW OF ANOTHER JURISDICTION; AND, IF SO, IS THIS STATUTE APPLICABLE EVEN TO CON mTROVERSIES IN WHICH THE PARTIES HAVE CONTRACTUALLY AGREED TO BE BOUND BY THE SUBSTANTIVE LAWS OF ANOTHER JURISDICITON?

1. THE OPINION IN BDO SEIDMAN WAS NOT BASED UPON AN ERRONEOUS INTERPRETATION OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("RESTATEMENT").

In its Answer Brief, Auto-Owners Insurance Company suggests that the opinion in BDO Seidman, LLC v. British Car Auctions, Inc., 802 So.2d 366 (Fla. 4th DCA 2001) was based upon a misinterpretation of Section 6 of the Restatement. Auto-Owners Insurance Company miscomprehends the opinion. In the opinion, Judge Klein acknowledges the procedural/substantive dichotomy of choice of law analysis but then relies upon the statute's clear and unequivocal statement that it applies to "any civil action for damages filed in the courts of this state." BDO at 368, emphasis in original. The holding in this case is that because the statute is clear, a choice of law analysis is inappropriate; the holding is not based, as suggested by Auto-Owners Insurance Company, upon a faulty choice of law analysis.

Florida's legislature has clearly expressed its intention that Fla.Stat. 768.79 applies to "any" civil action for damages filed in this State. The statute has been found to be constitutional. TGI Friday's, Inc. v. Dvorak, 663 So.2d 606 (Fla. 1995). The Courts of this State are not free to disregard the application of the statute based upon policy decisions and neither are parties through contractual choice of law provisions.

"Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The Courts have no veto power, and do not assume to regulate state policy, but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law." City of Jacksonville v. Bowden, 67 Fla. 181, 64 So.2d 769, 772 (Fla. 1914), cited in BDO at 368.

An action for damages based upon the substantive law of another state has an equal impact on the Courts of this State as one based upon the substantive laws of Florida (possibly even more). The legislature has clearly expressed its intention that Fla.Stat. 768.79 applies to "any" civil action for damages, without regard to the substantive law which may apply. Parties are not free to avoid this clear legislative intent by filing actions in Florida courts while seeking to apply a foreign state's substantive laws.

CONCLUSION

Auto-Owners Insurance Company is seeking to have the clear language found in Fla.Stat, 768.79 and Fla.R.Civ.P. 1.442 judicially modified to add restrictions and requirements which do not exist in the statute or rule. Auto-Owners Insurance Company seeks to impose a "nexus" requirement by reading "the judgment" as "the judgment from a trial which actually occurs and which was the trial set when an offer was made". Auto-Owners Insurance Company is seeking to have a joint offer re-defined as "an offer by a single party which may result in any benefit to a third party." And, finally, Auto-Owners Insurance Company is seeking to have this Court rule that parties are free to compel the Courts of Florida to disregard the Florida legislature's clearly expressed intent that Fla.Stat. 768.79 applies to "any" civil action for damages filed in Florida's courts by re-writing the statute to provide that it only applies to "any civil action for damages to which the substantive law of Florida applies." Auto-Owners Insurance Company is incorrect on all three counts.

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 regular U.S. Mail this 23rd day of June, 2011 to:

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CERTIFICATE OF TYPE FACE COMPLIANCE

The undersigned attorney of record for Appellant certifies that this Initial Brief has been prepared in Font Face Times New Roman in pitch size 14.

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