IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ANCEL PRATT, JR., individually,

Petitioner,

-vs- CASE NO. SC12-1783

MICHAEL C. WEISS, D.O.; MICHAEL C. WEISS, D.O., P.A.; LOUIS H. ISAACSON, D.O.; LOUIS H. ISAACSON, D.O., P.A.; STERLING HEALTHCARE GROUP, INC.; STERLING MIAMI, INC.; LAUDERDALE ORTHOPAEDIC SURGEONS; MICHAEL C. WEISS, D.O., P.A.; and FMC HOSPITAL LTD., a Florida Limited Partnership d/b/a FLORIDA MEDICAL CENTER; FMC MEDICAL, INC., f/k/a FMC CENTER, INC., d/b/a FLORIDA MEDICAL CENTER,

Respondents.
_____/

BRIEF OF PETITIONER ON JURISDICTION

On appeal from the Fourth District Court of Appeal of the State of Florida

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PREFACE

This is Petitioner's request for discretionary review of a decision of the Fourth District Court of Appeal dated May 2, 2012, affirming the Final Judgment of Attorney's and Expert Witness Fees in favor of the Defendants.

Petitioner, Ancel Pratt, Jr., will be referred to as "Petitioner" or "Plaintiff." Respondents will be referred to as "Respondents" or "Defendants." The following designation will be used:

(A) - Fourth District's Opinion

STATEMENT OF THE CASE AND FACTS

In 2003 and 2005, this Court held that Fla.R.Civ.P. 1.442(c)(3) required all proposals for settlement from or to multiple parties to be separately apportioned. The Fourth District's decision on review appears to be the first decision in the last decade to create exception from this strictly construed bright-line rule.

The Plaintiff/Petitioner brought a medical malpractice action against multiple defendants, including the two Defendants/Respondents who served the Proposal (A1). The Plaintiff alleged the Defendants owned, operated, maintained and controlled the medical facility where the medical treatment occurred (A1-2). The Plaintiff alleged that one Defendant was a limited partnership, and the other was a general partner of the limited partnership (A1-2). Each of the hospital entities was alleged to be responsible for the negligence of a single entity (A2).

The Defendants served a Proposal in 2004 (A2).[1] The Proposal did not apportion the amount offered to resolve the litigation (A2). The Proposal states that "the Party making this Proposal are Defendants," and identifies by name the limited partnership and general partner of the limited partnership (A2). The Proposal states it was intended to resolve all matters with the "Defendants" (A2).

[1] As explained infra, in 2011 this Court adopted an amendment to Rule 1.442(c)(3)'s apportionment requirement in certain situations. It is doubtful the amendment would cover the facts of this case. The Fourth District's Opinion does not discuss the amendment.

The Fourth District noted that this Court adopted a rule of civil procedure requiring offers from two or more parties to state the amount and terms attributable to each party (A5). The Fourth District also noted that this Court has interpreted the rule to require an apportionment of an offer amongst the parties (A5).

Nonetheless, the Fourth District created an exception to the mandatory rule. The Fourth District held that the "defendants . . . were treated as a single entity during the litigation" (A5). The offer "was made on behalf of the single hospital entity allegedly responsible. The release referred to the two companies that owned, controlled, or maintained the single hospital entity allegedly responsible" (A5). The Fourth District also reasoned that the defendants (A5):

> were represented by the same lawyer, filed a single answer, and were listed as FMC Hospital, Ltd., a Florida Limited Partnership d/b/a Florida Medical Center on the verdict form. The singular nature of the entity is most evident in the parties' ultimate agreement that FMC Hospital, Ltd. was the only proper defendant.[2]

The Fourth District did not cite to any prior decisions from its Court, or any Court, to support its conclusion that the apportionment rule is disregarded when parties are treated the same during litigation (A5). The Fourth District also rejected the Plaintiff's other challenges to the validity of the Proposal (A5-6).

[2] The Plaintiff does not agree with the Fourth District's description of how the parties were treated in the litigation; for conflict purposes, the Plaintiff recognizes that could only be addressed if this Court accepts jurisdiction.

SUMMARY OF ARGUMENT

This Court adopted a rule of civil procedure stating that any proposal by multiple offerors must be apportioned as to each. This Court has held this is an absolute rule, which by definition does not allow for any exception.

The Fourth District cited to the rule and case law, and then disregarded it in creating an exception. The Fourth District reasoned that the Defendants had been treated the same. Its creation of an exception expressly and directly conflicts with decisions from this Court and every other District Court.

This Court should accept jurisdiction to resolve the conflict. Proposals for settlement are an area of the law with continuing uncertainty in the intermediate district courts. That uncertainty increases when one court disregards this Court's rule and case precedent in creating exceptions to areas of the law that must be strictly construed, and for good reason.

ARGUMENT

THE FOURTH DISTRICT'S DECISION TO CREATE AN EXCEPTION TO THE JOINT APPORTIONMENT RULE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The Fourth District upheld the Proposal from two parties, even though it was not apportioned. This appears to be the first unapportioned Proposal withstanding appellate scrutiny, since this Court conclusively held in 2003 that apportionment was required. The "parties treated similarly" exception created by the Fourth District expressly and directly conflicts with this Court's decisions, and each of the other District Courts.

A bright-line rule ceases to be one when an exception is created, in disregard of this Court's decisions and the rule adopted by this Court. The disregarding of this Court's decision and rule establishes an unintended but dangerous precedent in other components of the Proposal for Settlement rule and statute.

The Fourth District's Opinion states (A5):

> [Fla. R. Civ. P. 1.442(c)(3) requires that] an offer from multiple plaintiffs must apportion the offer among the plaintiffs.' " Dollar Rent A Car, Inc. v. Chang, 902 So.2d 869, 870 (Fla. 4th DCA 2005), quoting Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So.2d 276, 278-79 (Fla. 2003). The same rule and "logic" applies to an undifferentiated offer from a single plaintiff to multiple defendants, and vice versa. Lamb v. Matetzschk, 906 So.2d 1037, 1040 (Fla. 2005).

The Fourth District then disregarded the absolute rule of this Court. In Willis Shaw, supra, plaintiffs joined their causes of action. This Court ruled that Rule 1.442(c)(3)'s apportionment requirement "must be strictly construed . . . [a] strict construction of the plain language of rule 1.442(c)(3) requires that offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror" (849 So.2d at 278-79) (both emphases added). Strict construction does not allow an exception because of how parties are "treated."

In Lamb, supra, this Court was faced with a different scenario: one party's liability was exclusively vicarious. A plaintiff brought a personal injury action against a vehicle driver and his wife, a co-owner. The wife was not alleged to have done anything wrong other than her co-ownership. The plaintiff served an unapportioned proposal to the defendants.

Once again, this Court strictly construed Rule 1.442(c)(3) and the proposal was invalidated (906 So.2d at 1041). This Court recognized that the wife was only vicariously liable and it "may take some creative drafting to fashion an offer of settlement when one party is only vicariously liable," Id. at 1041. This Court was "confident" that attorneys will satisfy the strict requirement of Rule 1.442, i.e., "state the amount and terms attributable to each party when the proposal is made to more than one party," Id. (emphasis added).

This Court noted it had "specifically declined" to relax the rule where parties were alleged to be vicariously, constructively, derivatively or technically liable. Id. at 1042 n.5; cf. Campbell v. Goldman, 959 So.2d 223, 226 (Fla. 2007) (noting the "bright-line" rule regarding strict construction of Rule 1.442).

In all these relationship situations, the multiple offerors or offerees are frequently treated as one, are represented by the same counsel and maintain the identical litigation position. See also Lamb, 906 So.2d at 1042 (disapproving of a decision which had upheld fees in a vicarious liability scenario where one attorney represented multiple offerors). Accord Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So.3d 646, 650 (Fla. 2010) (stating that Rule 1.442 requires an offer to "state the amount and terms attributable to each party") (emphasis added).[3]

Since Lamb, there does not appear to be a single case that has deviated from that bright-line rule. The Fourth District's Opinion does not mention a case. To the contrary, all of the District Courts have consistently invalidated proposals that lack apportionment, no matter the relationship -- even when courts have reasoned that apportionment was illogical. For example, in Easters v. Russell, 942 So.2d 1008, 1009 (Fla. 2d DCA 2006), Judge Alterbernd wrote:

[3] Gorka involved a different type of proposal, because it was an apportioned proposal from one defendant to two plaintiffs. This Court invalidated the proposal because it prevented either plaintiff from accepting it, notwithstanding apportionment. The decision is relevant here because this Court reinforced Rule 1.442(c)(3)'s apportionment requirement.

> The fact that the professional association is entirely owned and controlled by Dr. Russell, that its liability is purely vicarious for her actions, and that damages could not be logically apportioned between these two defendants is apparently not a basis to permit such an offer of judgment. The fact that the offer permits either or both defendants to pay the proposed settlement and gives them the option to determine whether or how to apportion their contribution to the settlement is likewise not an exception to the rule announced in Lamb.

See also Oasis v. Espinoza, 954 So.2d 632 (Fla. 3d DCA 2007) (invalidating joint unapportioned proposal even though vicarious liability was not disputed); Heymann v. Free, 913 So.2d 11 (Fla. 1st DCA 2005) (invalidating joint unapportioned proposal); D.A.B. Constructors, Inc. v. Oliver, 914 So.2d 462 (Fla. 5th DCA 2005) (while invalidating joint unapportioned proposal, noting that the result was required because of the "extremely broad language" of Lamb, supra).

A recent proposal approved by the Second District demonstrates the clear conflict by the Fourth District, regardless of the underlying facts. See Wolfe v. Culpepper Constructors, Inc., 2012 WL 638732 (Fla. 2d DCA Feb. 29, 2012). A husband and wife were sued in a contract dispute by the contractor who performed work on their residence. The spouses served an apportioned proposal. By any realistic measure, they were treated identically in the litigation.

Even more recently, the Fifth District struck a proposal for settlement as an unapportioned joint proposal. See Duplantis v. Brock Specialty Services, Ltd., 85 So.3d 1206 (Fla. 5th DCA 2012). Although a proposal for settlement was served

from one defendant to one plaintiff, with the condition that if accepted, a second defendant be dismissed, the Fifth District accepted the plaintiff's argument that this was a joint, unapportioned proposal. Willis Shaw, Lamb, and Rule 1.442(c)(3) required apportionment. See DuPlantis, 85 So.3d at 1208-09.[4]

While not the basis for conflict review, past decisions from the Fourth District demonstrate that how parties are "treated" does not impact the joint apportionment rule. See, e.g., Cano v. Hyundai Motor America, Inc., 8 So.3d 408, 411 (Fla. 4th DCA 2009) (while the spouses' breach of car warranty claims were "indistinguishable," apportionment was required under the "bright-line" rule); Graham v. Yeskel, 928 So.2d 371, 373 (Fla. 4th DCA 2006) (though joint owners were sued on a "single unified claim," apportionment was required).

Indeed, in Brower-Eger v. Noon, 994 So.2d 1239 (Fla. 4th DCA 2008), the Fourth District invalidated a proposal made to a partnership and its partners because it was not apportioned, stating, id. at 1241:

> Our supreme court has rejected any deviation from the strict requirements of the statute and rule. When an offer is made to or from two parties, it must specify the amounts attributable to each of them.

(citing to Lamb, Willis Shaw, and a decision under a prior version of the rule).

[4] Petitioner cites to Duplantis only because it reinforces the well-settled precedent regarding apportionment by multiple offerors.

The decision on review declined to mention these prior decisions. The Fourth District's "treatment" exception ignores that there are often different degrees of responsibility associated with parties. A limited partnership and its general partner are not the same. One may not have any legal responsibility. One may have assets to collect on a judgment. There are two Defendants, and the Proposal refers to them as such. Both can now collect on the substantial judgment. If one believed it had no legal role in the litigation, it would have been dismissed.

The Respondents claim their Proposal is different, because they were treated the same in this litigation. However, the Fourth District has treated these parties, the rule, and case law differently than any other court in this state. No sentence from the rule of civil procedure, Willis Shaw, Lamb, or Gorka supports the "parties treated similarly" exception. No sentence from any appellate decision supports this deviation from what is an absolute rule.

A recent amendment to Rule 1.442(c)(3)-(4) eliminated the bright-line rule, where a party is alleged to be solely vicariously, constructively, derivatively or technically liable. See Joseph v. Niosi, 50 So.3d 698 (Fla. 1st DCA 2010) (while striking an unapportioned proposal, mentioning the amendment for future cases).[5]

Still, this Court's rule amendment shows that it was logically impossible to have carved out exceptions to the bright-line apportionment requirement. The fact

[5] Joseph is also in express and direct conflict with the Fourth District's Opinion.

that this Court amended the rule does not lessen the significance of the Fourth District's reasoning. For one, it does not appear the rule change would apply under the facts of this case. The relationship of the Defendants was not alleged to be vicarious, constructive, derivative, or technical.

More significantly, the Fourth District's decision has made it more difficult for courts across the state in the already-uncertain area of proposals for settlement. The Fourth District may have preferred to uphold the Proposal. Intermediate courts are not empowered to disregard rules of civil procedure adopted by this Court, and decisions from this Court that set forth absolute rules. There is no longer any reasonable mechanism for trial and appellate courts to understand how to apply the proposal for settlement statute and rule to other scenarios.

The Respondents may divert from the legal issues by proclaiming this is a "sour grapes" argument. The Petitioner was entitled to reject a Proposal that this Court, every other District Court, and even other panels from the Fourth District have now rejected. This Court should accept jurisdiction of this case.

CONCLUSION

For the reasons stated above, this Court should accept jurisdiction of the Fourth District's decision that expressly and directly conflicts with numerous decisions from this Court, and decisions from each District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on the attached service list, by mail and email, on August 28, 2012.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Jurisdiction is Times New Roman 14pt.

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