Electronically Filed 10/23/2013 05:01:34 PM ET

RECEIVED, 10/23/2013 17:03:31, Thomas D. Hall, Clerk, Supreme Court

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 ORTHOPEDIC 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.
_____/

INITIAL BRIEF ON THE MERITS

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

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PREFACE

Petitioner/Plaintiff, ANCEL PRATT, JR., individually, Appellant below, appeals the decision of the Fourth District Court of Appeal, see Pratt v. Weiss, 92 So.3d 851 (Fla. 4th DCA 2012), review granted, 2013 WL 4516441 (Fla. July 18, 2013). Petitioner sought review based on express and direct conflict with decisions from this Court and each of the other District Courts of Appeal.

The question presented is whether a joint, undifferentiated proposal for settlement by two parties, the Respondents/Defendants, and Appellees below, identified as 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[1] (the "Hospital Defendants"), is permitted. The trial court and Fourth District approved the Respondents' Proposal for Settlement. Respondents were awarded a Final Judgment of over $425,000 in attorneys' fees against the Petitioner, plus post-judgment interest.

[1] However, the Final Judgment was entered in favor of "FMC HOSPITAL, LTD. d/b/a FLORIDA MEDICAL CENTER and FMC MEDICAL, INC. f/k/a FMC CENTER, INC. d/b/a FLORIDA MEDICAL CENTER" (A242-43). The first Hospital Defendant was no longer identified as a "Florida Limited Partnership." Id.

The parties are referred to as Plaintiff or the Hospital Defendants, except when their individual names are relevant. The following designations will be used:

(IB) - Appellant's Initial Brief in the Fourth District Court of Appeal

(A) - Appellant's Appendix[2]

(R) - Record-on-Appeal

[2] To the Initial Brief in the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

This appeal addresses the validity of a joint, undifferentiated Proposal for Settlement. Plaintiff brought a medical malpractice lawsuit against multiple parties. Relevant to this appeal before this Court, Plaintiff sued "FMC HOSPITAL LTD., a Florida Limited Partnership d/b/a FLORIDA MEDICAL CENTER," and separately sued, "FMC MEDICAL INC., f/k/a FMC CENTER INC., d/b/a FLORIDA MEDICAL CENTER" (collectively referred to herein as the "Hospital Defendants" (A1, 33-59).[3] Plaintiff alleged that the first Hospital Defendant was a "Florida Limited Partnership," while the second Hospital Defendant was a "General Partner" of that Florida Limited Partnership (A5). Corporate records confirmed the limited partnership and general partner status (A171-74, 244-59).

Plaintiff brought separate negligent hiring/retention and direct negligence claims against each Hospital Defendant, or four causes of action against these Defendants (A33-59). Each Hospital Defendant was served process (A172, 244-45). The Hospital Defendants answered the Complaint, and identified themselves as separate entities (A60, 67).

[3] The other Defendants are not parties to this appeal (A8, 13). Plaintiff prevailed at trial against one defendant physician and his professional association, while the jury found in favor of the other defendant physician and his professional association (A123-24, 159-60, 242-43). The underlying facts of this civil action are discussed in Weiss v. Pratt, 53 So.3d 395 (Fla. 4th DCA 2011).

On March 18, 2004, six years into the litigation, the Hospital Defendants served a Proposal for Settlement to the Plaintiff (A161-69). As of that date, neither entity had moved to dismiss the causes of action against them.

The title of the Proposal stated that it was being made on behalf of (A161):

> Defendant, FLORIDA MEDICAL CENTER'S, PROPOSAL FOR SETTLEMENT/OFFER OF JUDGMENT TO THE PLAINTIFF. . . .

Plaintiff had not sued a defendant named as "Florida Medical Center." Rather, the two Hospital Defendants were identified in the first sentence of the Proposal (A161) (emphasis added):

> The Defendant(s), 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, by and through their undersigned counsel, and pursuant to Florida Statute §768.79 and Fla.R.Civ.P. state as follows: . . . . :

The Proposal's next sentence stated that (A161-62) (emphasis added):

> The Party making this Proposal are Defendants, 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. . . .

Paragraph 1 of the Proposal then stated (A162, at ¶1) (emphasis added):

> 1. This Proposal for Settlement is made in an attempt to resolve all pending matters between the Plaintiff and the named Defendants as noted above.

Paragraph 2 of the Proposal stated (A162, at ¶2):

> 2. The relevant conditions of this Proposal for Settlement are that the lawsuit be settled, each Party to bear their own costs and attorney's fees. . . .

The Proposal offered $10,000 to the Plaintiff to settle the lawsuit (A162, at ¶3). The Proposal was not apportioned between the Hospital Defendants (A162). The final paragraph of the Proposal referenced and identified both Defendants, and stated (A162) (emphasis added):

> This Proposal for Settlement includes all costs and attorneys' fees incurred by Plaintiff in the prosecution of the case, and by making this Proposal for Settlement, the Defendants, 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, does not admit the allegations contained in Plaintiff's Complaint, and deny each and every allegation.

Subsequent Proceedings

Plaintiff did not accept the Proposal. Over a year after the Proposal was rejected, the Hospital Defendants moved for Summary Judgment (A72-96). They contended, inter alia, that the second identified Hospital Defendant, "FMC MEDICAL, INC. f/k/a FMC CENTER, INC. d/b/a FLORIDA MEDICAL CENTER," was not a proper party (A72, 93). Although a hearing was held, the trial court did not rule on the motion (A173).

Over four years after the Plaintiff did not accept the Proposal, this case proceeded to a jury trial against both Defendants, as well as the co-defendants. See

IB1, n.3. Jury instructions noted that the Plaintiff "arrived in the emergency department at Florida Medical Center," and identified the Hospital Defendants as "FMC Hospital, Limited, a Florida Limited Partnership doing business as Florida Medical Center" (A109-12, 115). The verdict referred to the Hospital Defendants as "FMC HOSPITAL LTD., a Florida Limited Partnership d/b/a FLORIDA MEDICAL CENTER" (A124).

The Hospital Defendants prevailed, and they were awarded a merits Judgment against the Plaintiff (A159-60). The Hospital Defendants were identified in the Judgment as they were identified in the operative Complaint, in the Answer to the Complaint, and the Proposal, except for one difference (A160). The Final Judgment eliminated a semi-colon between the two Hospital Defendants, whereas the Plaintiff's Complaint includes that semi-colon (Compare A1-2, A160).

The Fourth District affirmed the verdict and merits Final Judgment in the Hospital Defendants' favor. See Pratt v. Weiss, 53 So.3d 1044 (Fla. 4th DCA 2011) (per curiam affirmed).[4]

The Hospital Defendants moved for fees and costs (A126-31). They identified themselves as "Defendants" (A127). The Hospital Defendants also stated that they had served a Proposal for Settlement and that they were entitled to fees (A127-28). Plaintiff filed a response in opposition asserting, inter alia, that

[4] The Fourth District also affirmed the verdict and merits Final Judgment regarding the Plaintiff's claims against the other Defendants. See IB1, n.3.

the Proposal was unenforceable because it failed to apportion the amount of the Proposal between the joint offerors (A132-35).

A fees entitlement hearing was held (A138-47). The trial judge believed that "[t]his is really only one defendant" (A141). The trial judge stated that the fact two entities may have been "improperly named" was insignificant, because "as this case proceeded, it was clear there was no legal or factual basis to naming two defendants" (A141). Plaintiff noted that when the Proposal was served -- six years into litigation -- the Hospital Defendants were in the lawsuit and neither had moved to dismiss the Complaint (A141). The trial court commented that (A141):

> [W]hat gives this case a different twist is whether there was, in fact, a good faith pleading and evidentiary basis to have two separate Florida Medical Center entities as Defendants throughout this case. Because as the time –as the case was ultimately tried, there was only one Florida Medical Center defendant.

The trial court asked the parties to submit supplemental memorandum to address the Hospital Defendants' corporate status (A141). The Hospital Defendants filed a Memorandum of Law in support of their motion for fees (A148-69). The title and body of this Memorandum, without explanation, switched the identification of the entities serving this pleading (A148-69). The title identified only one Defendant, and avoided identifying either Hospital Defendant (A148):

> DEFENDANT FLORIDA MEDICAL CENTER'S MEMORANDUM OF LAW IN SUPPORT OF ITS

> MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES AND COSTS.

However, the Memorandum correctly identified both Hospital Defendants (A148-49):

> DEFENDANT, FMC HOSPITAL LTD., a Florida Limited Partnership d/b/a FLORIDA MEDICAL CENTER and FMC MEDICAL, INC. f/k/a FMC CENTER, INC. d/b/a FLORIDA MEDICAL CENTER (hereinafter "Florida Medical Center"), pursuant to Florida Rule of Civil Procedure 1.525, hereby submits this memorandum of law in support of its previously filed motion for entitlement to attorneys' fees and costs.

The Hospital Defendants conceded that proposals served by "multiple parties" must be apportioned (A151). The Hospital Defendants did not state they had ever been a single party to this lawsuit (A151-54). Rather, the Hospital Defendants claimed their Proposal was not joint, since it was made on behalf of a "single entity" that they identified as Florida Medical Center (A151-52).

Plaintiff filed a Memorandum in Response (A170-78), noting that two separate party defendants had been served process (A172, 244-45). Additionally, the corporate filings and answers to interrogatories in this case were provided to the trial court, which demonstrated that the Plaintiff sued these two distinct business entities, comprised as a general partner to a larger limited partnership structure (A172-77, 246-59).

Plaintiff also pointed to the Complaint and Answer by the Hospital Defendants, where they admitted that two different hospital entities had a stake in this litigation (A171, 173-74). Both of these entities were alleged to have an agency or employer relationship with the named defendant physicians or, alternatively, the limited partnership and general partner of the limited partnership were alleged to be in a joint venture with the named defendant physicians (A174).

A second hearing was held (A179-206). The trial judge concluded that the Proposal had been made by "one offeror, the hospital defendant" (A186, 194).

Second Proposal for Settlement

While the plenary appeals were pending in the Fourth District and prior to the Final Judgment for fees, a second Proposal for Settlement was served on the Plaintiff (A270-74). This Proposal was served by "Defendant, FLORIDA MEDICAL CENTER" (A272). This Proposal stated that it was "made in an attempt to *only* resolve Defendant FLORIDA MEDICAL CENTER's claim for attorney's fees pursuant to its previously-served proposal for settlement" (A272) (emphasis in original).

Plaintiff filed a Motion to Strike this Proposal, arguing that the second Proposal was served by a non-entity which was never a party to the litigation (A261). The trial court granted this motion (A239).

Final Judgment

A final fees Judgment was entered in favor of the "Defendants," awarding attorneys' fees of $426,580 (A240-43).[5] The Hospital Defendants are identified as two party defendants (A242-43) (all emphases added):

> Defendants, FMC HOSPITAL, LTD. d/b/a FLORIDA MEDICAL CENTER and FMC MEDICAL, INC. f/k/a FMC CENTER, INC. d/b/a FLORIDA MEDICAL CENTER (5000 West Oakland Park Blvd., Fort Lauderdale Lakes, Florida).

There was one corporate identity change. The first Hospital Defendant was no longer identified in the fees Judgment as a "Florida Limited Partnership," as it had been identified in the Plaintiff's Complaint, admitted in the Hospital Defendants' Answer, identified in the Hospital Defendants' Proposal for Settlement, and identified in the corporate records. Compare A1-2; A5, at ¶12; A61, at ¶12; A161-62).

[5] The Hospital Defendants were also awarded $6,000 in expert witness fees (A240-43).

SUMMARY OF ARGUMENT

The Plaintiff sued each Hospital Defendant for direct negligence. The Hospital Defendants served a joint undifferentiated Proposal for Settlement. This Court has unequivocally held that when a proposal is served by or to multiple parties, it must be apportioned. This Court strictly construed the applicable rule of civil procedure and statute in establishing this bright-line rule.

The Fourth District recognized this Court's prior case law. However, it held that the Hospital Defendants were not required to apportion the Proposal, because the Fourth District believed the Hospital Defendants were "treated" as one entity during the litigation. The apportionment rule, however, is not subject to any exceptions. Each of the four other district courts of appeal has followed this Court's precedent in holding that proposals must be apportioned when served by or to multiple parties. So, too, had the Fourth District in its previous decisions.

The Fourth District's reasoning that there is an apportionment exception when parties are treated as one entity is also inaccurate under the facts of the instant case. The Plaintiff sued two hospital entities in good faith. One was a general partnership, while the other was a limited partner of the general partnership. Plaintiff could not know of the corporate structure of ownership, financial responsibility, and legal responsibility for the acts of negligence as alleged in the Plaintiff's Complaint. Each Hospital Defendant answered the

Complaint. Neither claimed it was wrongly sued at that time, or any point before they served their joint, undifferentiated Proposal. Both Hospital Defendants are judgment creditors of a very significant fees judgment.

This Court approved a rule of civil procedure change in 2011, which allows for joint, undifferentiated Proposals in certain situations, such as vicarious liability. The Hospital Defendants have never claimed the rule change governs their Proposal served many years earlier. Furthermore, the amended rule does not allow a joint, undifferentiated Proposal under the facts as pled in the Plaintiff's Complaint. The Hospital Defendants were each sued for their own negligence.

The Fourth District's decision is not just incorrect on the merits. It also creates much uncertainty for trial judges, attorneys and parties. As this Court recently reiterated, the Proposal for Settlement rule and statute must be strictly construed. When lower courts create exceptions to what is a bright-line rule, this leaves many other aspects of the Proposal for Settlement rule and statute in doubt.

This Court should quash the Fourth District's decision, and hold that the Proposal for Settlement was invalid.

ARGUMENT

POINT-ON-APPEAL

THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO THE HOSPITAL DEFENDANTS SHOULD BE REVERSED, AS THE DEFENDANTS SERVED A PROPOSAL FOR SETTLEMENT BUT FAILED TO APPORTION THE AMOUNT OF THE PROPOSAL.

Standard of Review

The standard of review in determining whether a proposal for settlement is valid is de novo. See Frosti v. Creel, 979 So.2d 912, 915 (Fla. 2008); Campbell v. Goldman, 959 So.2d 223, 225 (Fla. 2007).

Merits

The Proposal for Settlement is Invalid Where the Hospital Defendants Served a Joint, Unapportioned Proposal

As this Court recently reiterated, statutes and rules that award attorney's fees are in derogation of the common law rule that each party pay its own attorney's fees and must be strictly construed. See Diamond Aircraft Industries, Ins. v. Horowitch, 107 So.3d 362, 367 (Fla. 2013) (citing Willis Shaw Exp., Inc. v. Hilyer Sod, Inc., 849 So.2d 276, 278 (Fla. 2003)). Accordingly, the Proposal for Settlement rule, Fla.R.Civ.P. 1.442, and statute, §768.79, Fla. Stat., must be strictly construed. See Horowitch, 107 So.3d at 367; Willis Shaw, 849 So.2d at 278.

Fla.R.Civ.P. 1.442 (c)(3), as applicable to this case,[6] states that:

> A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

This Court has explained that "[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." Willis Shaw, 849 So.2d at 278-79 (emphasis added); see also Lamb v. Matetzschk, 906 So.2d 1037, 1040-42 (Fla. 2005) ("the plain language of rule 1.442(c)(3) mandates that a joint proposal for settlement differentiate between the parties, even when one party's alleged liability is purely vicarious") (emphasis added); and see Allstate Indemnity Co. v. Hingson, 808 So.2d 197, 199 (Fla. 2002) (concluding that the prior version of rule 1.442(c)(3), and §768.79, prohibits joint, undifferentiated proposals).

Even more recently, this Court noted in Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So.3d 646, 650 (Fla. 2010), "that Rule 1.442 requires an offer to 'state the amount and terms attributable to each party'") (emphasis added). Gorka involved a different type of proposal, because one defendant served an apportioned proposal to two plaintiffs. This Court invalidated the proposal because it prevented

[6] As discussed infra, in 2011, this Court approved an amendment to Fla.R.Civ.P. 1.442 (c)(3). The amended rule authorizes joint, undifferentiated proposals for settlement in certain situations. Id. The amendment is inapplicable to the Hospital Defendants' Proposal served in 2004, and the amendment also does not apply under the facts of this case. See infra, at IB25-27.

either plaintiff/offeree from independently accepting it. Gorka is relevant because it reinforced the apportionment requirement when proposals are made by or to multiple parties.[7]

The Fourth District's Opinion on review to this Court noted this Court's precedent. See Pratt v. Weiss, 92 So.3d 851, 854 (Fla. 4th DCA 2012), review granted, 2013 WL 4516441 (Fla. July 18, 2013). However, the Fourth District then [Petitioner respectfully believes] declined to follow this Court's precedent in creating an exception to the mandatory apportionment rule. The Fourth District reasoned that the "defendants . . . were treated as a single entity during the litigation." Pratt, 92 So.3d at 854. The district court stated 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." Id. The Fourth District also reasoned that the Hospital Defendants, id.:

> 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.

[7] The Gorka dissent did not suggest apportionment could be relaxed, either. Rather, the dissent reasoned that Fla.R.Civ.P. 1.442(c)(3) authorized joint, apportioned proposals to multiple offerees even where one offeree is unable to accept the respective proposed amount of his or her claim.

The Fourth District's reasoning is not reconcilable with the strict construction required of Rule 1.442(c)(3). The rule requires proposals to state the "amount" for "each party." In Carey-All Transport, Inc. v. Newby, 989 So.2d 1201 (Fla. 2d DCA 2008), a plaintiff sued an employer and employee for injuries arising from a car accident. The Second District concluded that the employer's proposal did not have to be apportioned, because the employee had already been dismissed from the case. Id. at 1204-05. The Second District reasoned that the employee was no longer a "party," as the phrase is defined in Black's Law Dictionary:

> [A] technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought ... the party plaintiff or defendant ...; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.

Black's Law Dictionary 1122 (6th ed. 1990). In the instant case, both Hospital entities were sued, and both served the Proposal. Both were party Defendants through the litigation, both were directly affected by the suit, and both are judgment creditors. They were "parties." Neither has ever suggested to the contrary (A151-54).

The Fourth District did not cite to any prior decisions from this Court, or any Court, to support its conclusion that apportionment is not required when multiple parties are treated like one entity during litigation. In Willis Shaw, supra, plaintiffs

joined their causes of action. Consistent with strict construction and the "plain language" of Fla.R.Civ.P. 1.442 (c)(3), this Court held that the undifferentiated joint proposal was invalid. See Willis Shaw, 849 So.2d at 278-79.

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. She was sued only because of her co-ownership. The plaintiff served an undifferentiated 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); cf. Campbell, 959 So.2d at 226 (Fla. 2007) (noting the "bright-line" rule regarding strict construction of another provision of Rule 1.442).

A vicarious liability situation is similar in many respects to what the Fourth District believed was the relationship between the Hospital Defendants in this case. Often, one attorney represents a vehicle owner and a permissive user. Under the dangerous instrumentality doctrine, liability against one results in liability against

the other. See, e.g., Lamb, 906 So.2d at 1041 n.4 (rejecting the plaintiff's argument that he could not apportion the proposal when one defendant was only sued under the dangerous instrumentality doctrine) (citation omitted). The vehicle owner likely has no active role, if any, in the litigation. The parties may be treated as one in the litigation. This Court did not suggest in either Willis Shaw or Lamb, supra, that apportionment is excused in those scenarios.

In Lamb, for example, this Court noted that in a conflict case on review, "both defendants were represented by the same attorney. The attorney submitted a proposal for settlement on behalf of both defendants. . . ." See Lamb, 906 So.2d at 1042 (discussing the facts in Barnes v. Kellogg Co., 846 So.2d 568 (Fla. 2d DCA 2003)). Still, because the joint proposal served in Barnes was not apportioned, this Court held it was invalid. See Lamb. 906 So.2d at 1042.

The Hospital Defendants did not cite any cases in their briefing in the Fourth District, or in their Answer Brief on Jurisdiction, that have upheld joint, unapportioned proposals. All district courts have consistently invalidated undifferentiated proposals by or to multiple parties, no matter the relationship between the parties.

For example, in Easters v. Russell, 942 So.2d 1008, 1009 (Fla. 2d DCA 2006), Judge Alternbernd stated:

> 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.

The plaintiff had argued, inter alia, that the defendants were represented by one law firm, that the defendants had jointly made undifferentiated proposals to the plaintiff, that there were no other doctors in Dr. Russell's professional association, and that she had "total control of both her personal decision and that of her professional association." Id. By any reasonable measure, the defendants were treated as one entity during the litigation. Nonetheless, the Second District concluded (Id. at 1010):

> The supreme court [] has held that rule 1.442 must be strictly construed, and we conclude that we cannot validate this proposal even under these circumstances.

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

Recent decisions continue to follow the plain language of Rule 1.442(c)(3) and the bright-line rule as articulated by this Court. In Duplantis v. Brock Specialty Services, Ltd., 85 So.3d 1206 (Fla. 5th DCA 2012), the plaintiff served a proposal for settlement to one defendant. The proposal included a condition that if accepted, a second defendant would also be dismissed. The plaintiff only requested money from the first defendant. The Fifth District concluded this was a joint proposal and, accordingly, it was invalid for failing to apportion amongst the two defendants. See Duplantis, 85 So.3d at 1208-09.

In Arnold v. Audiffred, 98 So.3d 746 (Fla. 1st DCA 2012), review granted SC12-2377 (Fla. May 5, 2013), a similar but slightly different proposal was also stricken because it lacked apportionment. The plaintiff served a proposal for settlement to the one defendant. The proposal included a condition that if accepted, both plaintiffs' claims against the defendant would be dismissed. Id. at 747. The First District concluded that when reading the proposal in its entirety, it was a joint proposal. Id. at 748-49. Since there was no apportionment for each plaintiff, the proposal was invalid. Id. at 748-49.

Plaintiff does not address whether the district courts in Duplantis and Arnold correctly concluded the proposals were joint proposals. Plaintiff cites these cases, though, because they reinforce the well-settled precedent that apportionment is required when joint proposals are made by or to multiple parties. Indeed, even the

plaintiffs in Arnold concede that if their proposal was joint, it cannot be enforced. See Case No. SC12-2377, Initial Brief at pp.8-9.

In Cobb v. Durando, 111 So.3d 277 (Fla. 2d DCA 2013), two homeowners who owned their home as tenants by the entirety sued a contractor for breach of contract. Id. at 277-78. The homeowners served an undifferentiated proposal, and the trial court upheld the proposal after the homeowners prevailed on their contract claim. Id. at 277-78. The appellate court reversed. Id. at 278 (emphasis added):

> The [homeowners] argue that apportionment of their demand was not required because their claim for breach of contract derived from their ownership of real property as tenants by the entireties; therefore, they conclude that the apportionment of the amount attributable to each party was not feasible. We find this argument unpersuasive for two reasons. First, the [homeowners'] claim against [the contractor] did not arise directly from their ownership of entireties property. Instead, their claim was for the breach of a contract for roofing services. Second, the rule requiring apportionment of proposals for settlement made by multiple plaintiffs does not recognize an exception for joint proposals made by tenants by the entireties. See Feldkamp v. Long Bay Partners, LLC, No. 2:09–cv–253–FtM–29SPC, 2012 WL 3941773, at *2 (M.D.Fla. Sept. 10, 2012) (holding that a proposal for settlement made by a "husband and wife is not necessarily an offer by 'one person'"); cf. Graham v. Peter K. Yeskel 1996 Irrevocable Trust, 928 So.2d 371, 372 (Fla. 4th DCA 2006) (rejecting the defendants' argument that their undifferentiated offer of settlement was valid because "they were sued on a 'single unified claim' directed at their joint ownership of real property" and holding that a "proposal for settlement as tenants by the entireties does not alter the bright line rule").

In the Hospital Defendants' Answer Brief on Jurisdiction, they compared their Proposal to that approved in Wolfe v. Culpepper Constructors, Inc., 104 So.3d 1132 (Fla. 2d DCA 2012) (en banc). The Hospital Defendants' citation is curious. In Wolfe, a contractor sued homeowners for breach of contract. The homeowners, a husband and wife, counter-sued. The spouses served an apportioned proposal for $25,000, each offering $12,500 to resolve all claims.

The contractor prevailed at trial, but after set-offs, was awarded a final judgment well below the $25,000 proposal. The homeowners moved to enforce their proposal. The Second District relied on Willis Shaw in upholding this joint, apportioned proposal. See Wolfe, 104 So.3d at 1134-35. By any realistic measure, the homeowners were treated as one entity during the litigation. The contractor sued them for the same damages, and they counter-claimed and raised the same defenses. A judgment against one spouse would be the same against the other spouse. Just as the Wolfe homeowners properly apportioned their proposal, the Hospital Defendants improperly failed to apportion their Proposal.

While not the basis for conflict review, past decisions from the Fourth District demonstrate that the bright-line apportionment rule applies even when parties are "treated" the same during litigation. As quoted above by the Second District in Cobb, one such Fourth District case was Graham.

An owner of a townhouse brought an action against joint owners of another townhouse, asserting claims of trespass, ejectment, and declaratory and injunctive relief regarding use and conversion of a boat slip. See Graham, 928 So.2d at 372. The defendants/joint owners owned their townhouse as tenants by the entirety. They served an unapportioned proposal for settlement, it was rejected, and they prevailed at trial. The trial court denied fees.

On appeal, the defendants argued they were sued on a "single unified claim" directed at their joint ownership of real property, so that apportionment would be excused (928 So.2d at 372). The Fourth District's initial panel decision affirmed the fees denial. The panel followed the "bright-line" apportionment rule of Willis Shaw and Lamb, supra. See Graham, 928 So.2d at 372.

On rehearing of Graham, the Fourth District still affirmed the denial of fees, but explained the decision in detail (Id, at 373) (emphasis added):

> More significantly, as we wrote in the original panel opinion, we read Lamb v. Matetzschk, 906 So.2d 1037 (Fla. 2005), as adopting "a bright line rule requiring apportionment under rule 1.442(c)(3)." To us a bright line rule means that it applies in all proposal for settlement cases, without exception. Rule 1.442 applies to "all proposals for settlement authorized by Florida law ..." Fla. R. Civ. P. 1.442(a). In Lamb and rule 1.442(a), we believe that the supreme court, like Dr. Seuss's Horton the elephant, FN1 meant what it said and said what it meant- rule 1.442(c) applies in all cases where proposals for settlement are authorized by Florida law, without an exception for claims against litigants relating to property they own as tenants by the entirety.

> FN1. Dr. Seuss, Horton Hatches the Egg (Random House, Inc., 1982) (1954).

The Fourth District has applied the bright-line rule in other cases as well. In Cano v. Hyundai Motor America, Inc., 8 So.3d 408 (Fla. 4th DCA 2009), a husband and wife, buyers of a vehicle, sued the seller for breach of warranty. The claims were identical, as the spouses sought the identical damages for this contractual violation. The seller served an unapportioned proposal to the plaintiffs, which was rejected. Demonstrating that the buyers' claims were identical, one was later dropped as a party. The seller prevailed against the remaining buyer, and the trial court granted fees.

The district court reversed, noting that Rule 1.442's apportionment requirement was a "bright line rule" that applied in all cases "without exception" (8 So.3d at 411 (quoting Graham, 928 So.2d at 373)). Though the plaintiffs' claims "were indistinguishable, this could not change the outcome." Id.

Similarly, in Brower-Eger v. Noon, 994 So.2d 1239 (Fla. 4th DCA 2008), a partnership and its partners served a joint unapportioned proposal. The district court affirmed the denial of fees (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 or more parties, it must specify the amount attributable to each of them.

The Fourth District did not cite these cases in the Opinion on review to this Court.[8] The Fourth District's "parties treated as one entity" exception is not only wrong on the merits, but wrong under the facts of this case. The trial court ordered supplemental briefing to assess whether the Plaintiff in "good faith" sued the Hospital Defendants. There is no legal basis for the trial court to have inquired into whether each Defendant was properly named in this lawsuit. They were parties, so apportionment was mandatory.

Plaintiffs also have good-faith reasons for suing what are often complicated and unclear corporate ownership and responsibility structures. Plaintiffs are entitled to sue all possible parties who could be liable and ultimately responsible for a judgment. If a plaintiff sues the wrong corporate entity and that entity is dismissed outside the statute of limitations, then the plaintiff may have no legal remedy against the responsible party or parties. They have no way to know if they could obtain or collect on a judgment against corporate entities if they prevail at trial.

In this case, one Hospital Defendant was a limited partnership, while the other was a general partner of the limited partnership. Under the Limited Partnership Act, a limited partnership is "distinct from its partners," §620.1104(1), Fla. Stat. There may have been "different degrees of responsibility by each

[8] Plaintiff cited the past decisions in the briefing.

Hospital Defendant. Cf. Graham, 928 So.2d at 373 (noting that the different causes of actions brought by the plaintiffs "may have given rise to different degrees of responsibility"). So the Plaintiff clearly sued both Hospital Defendants in good-faith, and both remained through the entire case.

As argued above, it is irrelevant how the Hospital Defendants were "treated," since they were parties to the lawsuit. However, Plaintiff notes that the Hospital Defendants were not treated as a single entity during the litigation. The Plaintiff sued each one separately, for direct negligence. Both Hospital Defendants answered the separate counts of the Complaint. The fact that they filed a joint Answer and retained one attorney was their decision, but they were not treated as one entity for purposes of the pleadings and their legal responsibility. If one Defendant believed it had no role in the litigation, it would have moved for dismissal and been dismissed.

The Proposal for Settlement identifies both Hospital Defendants as parties. If the Hospital Defendants believed there was only a single entity in this case, then only a single entity would have served the Proposal. Both Hospital Defendants moved for fees, both are identified in the Final Judgment, and both are judgment creditors on the substantial judgment. If one Hospital Defendant believed it had no

legal interest in this case, that Defendant would not have been added as a judgment creditor.[9]

The Change to Rule 1.442 Does Not Retroactively Apply, But Even So Would Not Apply Under the Allegations of the Operative Complaint

The Hospital Defendants served their Proposal in 2004. Subsequently, Fla.R.Civ.P. 1.442 was amended. See Fla.R.Civ.P. 1.442(c)(4). The amendment states:

> Notwithstanding subdivision (c)(3) [the subdivision requiring joint proposals to be apportioned], when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party.

The Hospital Defendants have never asserted the amendment is applicable to their Proposal for Settlement. When this Court approved the amendment, it stated the amendment was effective January 1, 2011. See In re Amendments to the Florida Rules of Civil Procedure, 52 So.3d 579, 581, 588 (Fla. 2010); see also Joseph v. Niosi, 50 So.3d 698 (Fla. 1st DCA 2010) (while striking an undifferentiated proposal, mentioning the amendment's applicability for future

[9] Even in the Final Judgment, though, the corporate structure of the first Hospital Defendant was altered: the phrase "a Florida Limited Partnership" was eliminated. This change shows all the more reason why the Plaintiff sued the Hospital Defendants separately and proceeded with direct negligence claims against each one. See IB vi n.1; IB8 supra.

cases); Duplantis, 85 So.3d at 1208 n.3 (holding that the rule change did not apply to the proposal for settlement served in 2009).[10]

Also, the amended rule does not authorize a joint, undifferentiated Proposal under the facts of the Plaintiff's Complaint. Plaintiff sued each Hospital Defendant for direct negligence. Their liability was not alleged to be vicarious, constructive, derivative or technical, let alone "solely" as such. See Fla.R.Civ.P. 1.442(c) (4).

The rule change is important, though, in demonstrating the Fourth District's express and direct conflict, and erroneous decision. If there were a "the parties are treated as a single entity" apportionment exception before the rule amendment, there would have been little reason for the rule amendment. Cf. Joseph, 50 So.3d at 700 ("[A]cknowledging the rigidity of the present regime, our supreme court has amended rule 1.442(c), effective January 1, 2011").

The Fourth District's incorrect decision has obvious adverse consequences for the Plaintiff. The Proposal was served in 2004, after this Court's decision in Willis Shaw, supra. Plaintiff was entitled to reject the joint, undifferentiated Proposal and not expect fees exposure of any amount. The Final Judgment is over $425,000, with interest accruing.

[10] Joseph is also in express and direct conflict with the Fourth District's Opinion on review to this Court.

A bright-line rule ceases to be one when an exception is created, in not following this Court's decisions and the rule adopted by this Court. There were unintended but very real consequences when the Fourth District did so.

The Fourth District's decision has brought more uncertainty in the already-uncertain area of proposals for settlement. 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. It is more difficult for trial judges, intermediate courts, attorneys, and parties, to understand how to apply the proposal for settlement statute and rule to other scenarios.

The other Proposals for Settlement Should Not Be Relevant, But in Any Event Do Not Assist the Hospital Defendants

Below, the Hospital Defendants noted that the Plaintiff served a Proposal in 2006, directed to one Hospital Defendant, and then identified both hospital entities within the body of the Proposal (A97-99). This Court should not consider any Proposals outside the Hospital Defendants' Proposal. Two flawed proposals do not create a valid proposal. Plaintiff also would have been precluded from receiving fees, had he prevailed at trial against the Hospital Defendants. Cf. Easters, 942 So.2d at 1009 (trial court noted that the fact the defendants served an undifferentiated proposal to the plaintiff did not mean the plaintiff's similar proposal was enforceable; instead, both were unenforceable).

The Hospital Proposals served a second Proposal during the post-verdict fees litigation (in 2010). The second Proposal was likely an attempt to resurrect the earlier proposal, i.e., the one at issue. While the 2010 Proposal addressed an effort to resolve the yet-to-be liquidated fees Judgment, and not the underlying case, this Proposal was made by the "Defendant, FLORIDA MEDICAL CENTER." The Proposal elaborated that it was made to resolve this Defendant's "previously served proposal for settlement." Of course, "this Defendant" never served a prior proposal. This entity was not a defendant in this case, to have been capable of ever serving a proposal. There were two Hospital Defendants, and since they were two parties, they had to apportion their Proposals for Settlement.

CONCLUSION

For the reasons stated above, this Court should quash the Fourth District's decision, and hold that the Respondents' joint, undifferentiated Proposal for Settlement is invalid.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on October 23, 2013.

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