Filing # 10052535 Electronically Filed 02/07/2014 04:15:58 PM

RECEIVED, 2/7/2014 16:18:43, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-1783

ANCEL PRATT, JR., individually,

Petitioner,

-vs-

MICHAEL C. WEISS, D.O.; etc., et al.,

Respondents.
_____/

REPLY BRIEF ON THE MERITS

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

SHELDON J. SCHLESINGER, P.A.
1212 S.E. 3rd Avenue
Ft. Lauderdale, FL 33316
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Petitioner
pmb@FLAppellateLaw.com
aah@FLAppellateLaw.com
jew@FLAppellateLaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Rules

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) - Initial Brief on the Merits

(AB) - Answer Brief on the Merits

(A) - Appellant's Appendix[2]

(R) - Record-on-Appeal

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

STATEMENT OF THE FACTS

As the Plaintiff explained in the Initial Brief, he sued two Hospital Defendants, these two parties made a Proposal for Settlement to the Plaintiff, and these two parties have a Final Judgment against the Plaintiff.

The Hospital Defendants do not disagree with any of those facts. But they misstate and switch the identity of their classifications in their Answer Brief. On the one hand, the Hospital Defendants identify themselves as the "Respondent," "the hospital defendant," the "defendant hospital," or that they were "understood" as one entity (AB1-2, 4, 8-10, 13, 20, 22-25). On the other hand, the Hospital Defendants acknowledge the Plaintiff sued "eleven defendants," including each of them as defendants, that the "Defendants" served the Proposal for Settlement, and that they were two "entities," or "hospital entities" (AB2-3, 8-9, 20-23).

The Proposal for Settlement contains a similar, inconsistent switch from the singular to the plural (A161-62). Though the title of the Proposal refers to "DEFENDANT," the body of the Proposal utilizes the phrase "Defendants" three times (Compare A161 with A161-62). For example, the Proposal notes that, "The Party making this Proposal are Defendants. . . . (A161).

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.

The Hospital Defendants assert that the intent of the Proposal for Settlement statute and rule has been frustrated by the Plaintiff's pursuit of this appeal (AB8, 12). However, the Plaintiff did not serve this Proposal for Settlement; in fact, he was entitled to rely on the clear, contemporaneous invalidity of the Proposal and proceed in litigation. The consequence of rejecting a Proposal is present here: the Hospital Defendants rightly characterize this as a "significant" Judgment that is near $500,000 (AB9).

The Plaintiff recognizes the valid purposes served by the Proposal for Settlement statute and rule in encouraging settlements. At the same time, parties should not be chilled into accepting invalid proposals and foregoing their day in court, when the proposals do not comply with a bright-line rule under Florida law. The Judgment should be reversed because the Hospital Defendants failed to follow the case precedent of this Court, the applicable statute and rule: they made a joint, undifferentiated Proposal for Settlement.

The Hospital Defendants raise the concept of ambiguities that have developed in appellate decisions in this state (AB13-14) (cases quoted therein). Plaintiff has not raised ambiguity as an issue in this Court. Rather, as explained throughout the Initial Brief, Plaintiff requests this Court to strictly construe the statute and rule, and follow the bright-line apportionment rule established by this Court's decisions. The Hospital Defendants profess to understand the statute and rule must be strictly construed (AB14, 16), but divert to an ambiguity angle which is not pertinent before this Court.

Under the Court's bright-line rule, proposals from or to multiple parties must be apportioned. See Willis Shaw Exp., Inc. v. Hilyer Sod, Inc., 849 So.2d 276, 278-79 (Fla. 2003); Lamb v. Matetzschk, 906 So.2d 1037, 1040-42 (Fla. 2005). This rule is not based on whether the parties are treated as multiple entities, or their corporate status, or other events during litigation. This rule is based on the plain language of Fla.R.Civ.P. 1.442(c).

A bright-line rule means a bright-line rule. As noted in the Initial Brief, the Fourth District memorably quoted to a Dr. Seuss riddle in a prior case, explaining that as to apportionment, this Court "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." See Graham v. Peter K. Yeskel 1996 Irrevocable Trust, 928 So.2d 371, 373 (Fla. 4th DCA 2006) (on rehearing); and see IB21-22.

The Hospital Defendants incorrectly state that each apportionment case "involves different circumstances, i.e. different relationships between the parties; different claims against the parties; and different terms in the proposals" (AB16). This Court established a bright-line apportionment rule: when two parties make or receive a proposal, apportionment is required. See Willis Shaw; Lamb, supra. The parties' relationships and claims are irrelevant. The proposal's terms are also immaterial.

The Hospital Defendants assert the Fourth District did not establish an exception to the bright-line rule in the instant case. Respectfully, that is what the Fourth District did in excusing apportionment in this case. A bright-line rule ceases to exist when two parties do not have to make an undifferentiated proposal.

The Hospital Defendants Do Not and Cannot Direct this Court to a Single Appellate Decision Approving their Type of Proposal, from Two Offerors to One Offeree

Other than the decision on review, the Hospital Defendants have not directed this Court to a single appellate case that has excused the apportionment requirement when two parties make or receive a Proposal, since this Court addressed the issue in 2003 and 2005.

The Hospital Defendants assert that five appellate decisions are "particularly instructive" in supporting their argument (AB16). None of these cases implicate the bright-line apportionment rule.

In Dollar Rent A Car, Inc. v. Chang, 902 So.2d 869 (Fla. 4th DCA 2005), a mother brought an individual claim as well as a second claim in her capacity as natural guardian of her son. The Fourth District held the mother did not serve a joint proposal because only her claim as natural guardian was resolved in the proposal. The appellate court examined the proposal's language, and it was clear that the mother's individual claim was excluded. Here, there were two defendants who were sued under separate causes of action, and both served the Proposal to extinguish the Plaintiff's claim against each of them.

The other cases relied upon by the Hospital Defendants address "one party to one party" Proposals which also implicate claims against other parties in the case.[3] Thus, in Andrews v. Frey, 66 So.3d 376 (Fla. 5th DCA 2011); Alioto–Alexander v. Toll Bros., Inc., 12 So.3d 915 (Fla. 4th DCA 2009), and North v. LHB Realty, L.L.C., 2013 WL 2431875 (N.D. Fla. June 4, 2013), one party served a proposal to another party. The proposal included a separate provision that if accepted by the sole offeree, the offeror or offeree would also dismiss another party from the case. The proposals were upheld.

[3] The Hospital Defendants did not rely on these cases in the Fourth District or in their jurisdictional Answer Brief.

It is unclear if this Court would approve those proposals. Two courts have certified questions to this Court to resolve that issue. See Andrews, 66 So.3d at 380; (no review apparently taken to this Court); Auto–Owners Ins. Co. v. Southeast Floating Docks, Inc., 632 F.3d 1195 (11th Cir. 2011), decided on other grounds, 82 So.3d 73 (Fla. 2012).

Arguably, those proposals are valid and apportionment was not required, because one party offered money and one party received money. Stated another way, those may not be deemed joint proposals since there was one offeror and one offeree. The additional provisions which resolved claims against other parties in those cases may be considered "conditions" of the proposal (AB18-19); and see Fla.R.Civ.P. 1.442(c)(2)(C), which authorizes "any relevant conditions." Those "one party to one party" proposals are nothing like the Proposal in this case, which is a "two party to one party" Proposal.

A wrinkle of Andrews, Alioto–Alexander, and the like is presently before this Court. In Eastern Atl. Realty & Inv., Inc. v. GSOMR LLC, 14 So.3d 1215 (Fla. 3d DCA 2009), two plaintiffs sued a defendant, and one plaintiff served a proposal to the defendant. The proposal stated that it would resolve all claims asserted in the case by all parties.

The Third District held the proposal did not require apportionment: only one offeror offered money, and only one offeree was offered money. The court

explained that the proposal "explicitly states that [one party plaintiff] was the party making the offer to pay." Id. at 1221. Also, the second party plaintiff had not sought affirmative relief against the defendant in the real estate dispute, and so the Third District concluded "no reason existed for [the second party plaintiff] to offer payment of any monies to" the defendant. Id.

The proposal in Eastern is somewhat different from those at issue in Alioto-Alexander and Andrews. In Eastern, the plaintiff/offeror promised that another party would take action in the case, i.e., the first party plaintiff promised that the second party plaintiff would also dismiss its case.

Although not addressed by the Hospital Defendants, the First District has disagreed with Eastern's relaxation of the apportionment requirement on this point, and the conflict is now on review in this Court. See Arnold v. Audiffred, 98 So.3d 746 (Fla. 1st DCA 2012) (holding that a proposal made by one plaintiff to the defendant was invalid for failing to comply with the apportionment requirement between that plaintiff and a co-plaintiff), on certified conflict to this Court, SC12-2377. In Arnold, the First District concluded that while the proposal stated it was only made by one plaintiff to the defendant, the proposal was in fact a joint proposal since it promised that both party plaintiffs would dismiss their causes of action. Id. at 749.

Briefing of Arnold is complete in this Court. Regardless of the resolution of those conflict cases, the Hospital Defendants' reliance on all of these cases (save for Arnold, supra, apparently) is misguided. In those cases, only one offeror and one offeree were identified as the parties to the proposal. Co-plaintiffs or co-defendants were implicated but not direct participants in the proposals. Here, both Hospital Defendants were participants and parties to the Proposal. Both offered money to settle the case, albeit undifferentiated, and both are parties to the Fees Judgment.

The Hospital Defendants insist they did not make a joint proposal; "rather it was an offer made by a single hospital defendant which included as a condition the release of both entities" (AB22). The release is not an issue in this Court. And, the Hospital Defendants' characterization as a "single" defendant does not make it so. This is a bright-line apportionment case.

The Statute, Rule and Case Law Do Not Allow for a Relaxation of the Apportionment Requirement Because of the Relationships Connecting the Parties, or the Facts of the Litigation

Fla.R.Civ.P. 1.442(c)(2)(A) requires the "party" or "parties" to be identified in the proposal. Subsection (c)(3) requires a "joint proposal" to state the "amount" that is "attributable to each party." Thus, this Court established the bright-line

apportionment rule for each party or parties. Tellingly, the Hospital Defendants never assert they were only one party.

The Hospital Defendants' remaining arguments are improper attempts around the bright-line rule. The Hospital Defendants rely on the fact they were both doing business as "FLORIDA MEDICAL CENTER" (AB20). Their corporate status is irrelevant to their identity as parties to this lawsuit. The Plaintiff also did not sue both Hospital Defendants for the sake of it. As explained in the Initial Brief, there were sound legal and practical reasons to sue both Hospital Defendants, no matter how their relationship may be characterized (IB23-24).

The Hospital Defendants resort to a "treatment" or "relationship" exception by stating they were understood as a single entity in the case (AB21). As explained in the Initial Brief, how parties are treated is irrelevant to the bright-line apportionment rule. Appellate courts have consistently rejected exceptions based on treatment or relationships (IB16-23). Indeed, the Hospital Defendants appear to have abandoned their reliance in the Answer Brief on Jurisdiction on one decision that refused to relax apportionment due to the treatment or relationship of the parties. See Wolfe v. Culpepper Constructors, Inc., 104 So.3d 1132 (Fla. 2d DCA 2012) (en banc); discussed at IB20. The case precedent is clear.

Plaintiff also disagrees that the Hospital Defendants were understood as one entity (IB24-25). Plaintiff filed separate causes of action against two Defendants

and served process on each Defendant. Plaintiff requested Judgments against each Defendant.

The Hospital Defendants contend that the Plaintiff's use of a semi-colon in the style of the Complaint demonstrates that the parties treated the Hospital Defendants as one entity (AB21). The Hospital Defendants miss the mark in utilizing one character symbol to justify their unapportioned Proposal. Neither Hospital Defendant moved to dismiss this case on account of being inappropriately served, identified and sued as a separate Defendant. Neither Hospital Defendant moved for summary judgment through the expiration of the Proposal. They never sought a ruling on their subsequent summary judgment (A72-96; A173).

The language of the Hospital Defendants' Proposal also undermines their contention they were understood as one entity. The Hospital Defendants could not keep their classifications consistent within the two-page Proposal (A161-162). Did they consider themselves a party or parties? Did they consider themselves a defendant or defendants? The undeniable fact is that both parties served the Proposal, with both offering money. Had the Plaintiff accepted the Proposal, he could have demanded that either party Defendant pay this settlement.

The Hospital Defendants' focus on events occurring after their Proposal for Settlement has no support under Florida law. Proposals are served on a take-it-or-leave-it basis without negotiation. See Sparklin v. Southern Industrial Assocs.

Inc., 960 So.2d 895, 898 (Fla. 5th DCA 2007). Events occurring after-the-fact cannot reasonably shed light on whether parties complied with a bright-line apportionment rule. Either there is a single party making and receiving an offer, or there is not. To the extent later events are relevant, the best indication of the "treatment" of the parties is reflected in the Final Judgment: both Hospital Defendants moved for and can now execute on their Fees Judgment.

The Hospital Defendants' Answer Brief Addresses the Terms of the Proposal for Settlement's Release, but the Plaintiff Does Not Challenge those Terms

In subsection B of the Answer Brief, the Hospital Defendants assert the Proposal was not ambiguous and address the scope of the Release (AB24-25). The Plaintiff did not raise those issues in the Initial Brief, and they are not issues before this Court. Simply stated, the issue on appeal is whether the two Hospital Defendants were permitted to serve a joint, unapportioned Proposal.

CONCLUSION

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

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on February 7, 2014.

Linda A. Alley, Esq.
SHELDON J. SCHLESINGER, P.A.
1212 S.E. 3rd Avenue
Ft. Lauderdale, FL 33316
lalley@schlesingerlaw.com
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Petitioner
pmb@FLAppellateLaw.com
aah@FLAppellateLaw.com
jew@FLAppellateLaw.com

By: /s/ Philip M. Burlington
PHILIP M. BURLINGTON
Florida Bar No. 285862

By: /s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

CERTIFICATE OF TYPE SIZE & STYLE

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

/s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

SERVICE LIST

Pratt v. Weiss
Case No. SC12-1783

Richard T. Woulfe, Esq.
Bunnell & Woulfe, P.A.
One Financial Plaza, 10th Floor
100 Southeast Third Avenue
Fort Lauderdale, FL 33394
(954) 761-8600
rtw@bunnellwoulfe.com
Counsel for Weiss

A. Candace Marcus, Esq.
James C. Sawran, Esq.
Kimberly J. Kanoff, Esq.
McIntosh Sawran & Cartaya, P.A.
1776 East Sunrise Blvd.
Fort Lauderdale, FL 33304
(954) 765-1001
jcspleadings@mscesq.com
Counsel for 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