SUPREME COURT OF FLORIDA

CASE NO.: SC12-2377

VALERIE AUDIFFRED,

Petitioner

vs.

THOMAS B. ARNOLD,

Respondent.

On Notice to Invoke Discretionary Jurisdiction to Review
Decision of District Court of Appeal, First District
L.T. CASE NO. 1D11-6583

RESPONDENT, THOMAS B. ARNOLD'S BRIEF ON JURISDICTION

JEFFREY E. BIGMAN
jbigman@daytonalaw.com
Florida Bar No.: 063347
SMITH HOOD BIGMAN
Post Office Box 15200
Daytona Beach, Florida 32118
Telephone: (386) 254-6875
Facsimile: (386) 257-1834

ATTORNEY FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

It is well established that a joint proposal shall state the amount and terms attributable to each party. By holding that Audiffred's proposal for settlement was an invalid joint proposal because she offered to dismiss her claims against Arnold and proposed that her co-plaintiff, Kimmons, would also dismiss his claims against Arnold in exchange for the offeree's payment of $17,500, the First District Court has not created a conflict with decisions of the Third, Fourth and Fifth District Courts. The facts of the case at bar and the cases in the Third, Fourth and Fifth District Courts in *Eastern, Toll Bros.,* and *Andrews*, respectively, are clearly distinguishable. The First, Third, Fourth, and Fifth District Courts relied on the same rules of law and appropriately applied them to the substantially dissimilar facts of each respective case to reach, although different, consistent results. As such, no conflict exists among the First, Third, Fourth and Fifth District Courts and this Court should refuse to accept jurisdiction to review the decision of the First District Court.

ARGUMENT

THE DISTRICT COURT DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM THE THIRD, FOURTH, AND FIFTH DISTRICTS BECAUSE THE PROPOSAL AT ISSUE WAS AN UNDIFFERENTIATED JOINT PROPOSAL TO SETTLE THE CLAIMS OF TWO INDIVIDUAL PLAINTIFFS, IN CONTRAST WITH PROPOSALS MADE IN THE THIRD, FOURTH, AND FIFTH DISTRICT CASES.

The First District Court's decision in this matter does not conflict with decisions from the Third, Fourth, and Fifth Districts because the proposal for settlement in the instant matter was an undifferentiated joint proposal which purported to settle the individual claims of two plaintiffs against a single defendant and thus the decisions from the Third, Fourth and Fifth Districts can be clearly distinguished from the case at bar.

Florida Rule of Civil Procedure 1.442(3) clearly establishes that, "[a] joint proposal shall state the amount and terms attributable to each party." In interpreting this Rule, this Court has made clear that, "a strict construction of the plain language of rule 1.442(c)(3) require[s] offers of judgment made by multiple offerors to apportion the amounts attributable to each offeror." *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010) (citing *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278-79 (Fla. 2003). The *Gorka* Court further took notice that this Court's "precedent has applied the rule of undifferentiated offers equally to all parties." 36 So. 3d at 651. *See also Allstate Indemnity Co. v. Hingson*, 808 So. 2d 197, 199 (Fla. 2002); *Lamb v. Matetzschk*, 906 So. 2d 1037, 1042 (Fla. 2005).

A. The decision of the First District Court does not conflict with the Third District Court's holding in *Eastern*.

Petitioner's reliance upon *Eastern Atl. Realty & Inv., Inc. v. GSOMR, LLC*, 14 So. 3d 1215 (Fla. 3d DCA 2009) to find conflict among the First and Third

District Courts is misplaced. In Eastern, BJV and GSOMR filed suit against Eastern and Eastern, in turn, sued BJV. *Eastern*, 14 So. 3d at 1218. BJV (the offeror) thereafter served a proposal to Eastern (the offeree) which explicitly provided that in exchange for BJV's payment of $20,000 to Eastern, Eastern would dismiss its claims against and execute a release extinguishing all claims asserted by Eastern against BJV and/or GSOMR, and that BJV and GSOMR would dismiss their claims against Eastern and that and/or GSOMR would execute a release extinguishing all claims asserted by BJV and/or GSOMR against Eastern. *Id.* Subsequently, after BJV sought to enforce the unaccepted proposal, Eastern argued that the proposal was a joint proposal because both BJV and GSOMR were identified in the body of the proposal.

Distinguishing this Court's holding in *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006), the *Eastern* court, in reversing the trial court, held that while both BJV and GSOMR are identified in the proposal, the proposal explicitly states that BJV was the party making the offer to pay Eastern and noted that no reason existed for GSOMR to offer payment of any monies to Eastern because Eastern did not seek any affirmative relief against GSOMR. *Eastern*, 14 So. 3d at 1221. [emphasis added]

Eastern is distinguishable from the present action in that both Audiffred and Kimmons sued Arnold for damages. More specifically, Audiffred sued for

personal injury and other related damages and Kimmons sued under a consortium cause of action to which Kimmons had a property right in his own name. *See Metro. Dade Cnty. v. Reyes*, 688 So. 2d 311, 311 (Fla. 1996) (holding that loss of consortium is a separate cause of action and a direct injury to the spouse that has lost the consortium). The proposal at issue here, "stated at the outset that it was submitted by only one party, Audiffred" but "when read as a whole," as we must, the proposal clearly expressed a promise that [both Audiffred and Kimmons] would dismiss with prejudice their individual claims against appellant upon acceptance." *Arnold v. Audiffred*, 98 So. 3d 746, 749 (1st DCA 2012).

Eastern, on the other hand, involved an offeror's proposal to pay an offeree in exchange for, *inter alia*, the offeree's dismissing its action against the offeror and further provided that the offeror as well as a third party (GSOMR) would dismiss their claims against and release the offeree. Thus, that the amount offered to Eastern (the offeree) was not apportioned between BJV (the offeror) and GSOMR is irrelevant as the proposal was not seeking payment from the offeree to settle the offeror's claims as did Audiffred's proposal. Stated more simply, the Eastern proposal was essentially a proposal made by a defendant (BJV) to a plaintiff (Eastern) and included, *inter alia*, that BJV and GSOMR would dismiss their claims against Eastern as part of the offeree's consideration for accepting the offeror's proposal.

The Third District's holding in *Eastern* is not at odds with the First District's holding in *Arnold,* although with facts distinct and distinguishable from those in *Eastern*, and not inconsistent with the established proposition that an undifferentiated joint proposal is invalid. Thus, Petitioner's assertion that this Court's conflict jurisdiction should be invoked is in error as, although the First and Third Districts reached different results in *Arnold* and *Eastern*, the First and Third Districts were dealing with substantially dissimilar facts in *Arnold* and *Eastern* and as such, the *Mancini* principle is not applicable here. (Petitioner's Jurisdictional Brief, P-6) *See also Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). As pointed out by Petitioner, the First District did not certify conflict with the Third District which lends further support for Respondent's contention that no conflict exists. (Petitioner's Jurisdictional Brief, P-7)

B. The decision of the First District Court does not conflict with Fourth and Fifth District Courts' respective decisions in *Toll Bros.* and *Andrews*.

Petitioner's reliance upon *Alioto-Alexander v. Toll Bros., Inc.*, 12 So. 3d 915 (4th DCA 2009) and *Andrews v. Frey*, 66 So. 3d 376 (5th DCA 2011) to find conflict among the First, Fourth, and Fifth District Courts is similarly misplaced. In *Toll Bros.*, Alioto sued Toll Bros. under a vicarious liability theory as well as the tortfeasor, Toll Bros.' employee, Barr. *Toll Bros.*, 12 So. 3d at 916. Toll Bros. served upon Alioto a proposal which stated that it was being made by Toll Bros,

but provided that the offer was conditioned upon the dismissal of Alioto's action against both Toll Bros. and Barr but did not apportion the $5,000 between the claim against Toll Bros. and the claim against Barr. *Toll Bros.*, 12 So. 3d at 916. In finding that the proposal by Toll Bros. was a valid and enforceable proposal, the Fourth District noted that the dismissal of the entire suit was a condition of the proposal and did not serve to transform the proposal into one made by multiple offerors. *Id.* at 917.

Like *Eastern*, *Toll Bros.* is also clearly distinguishable from the facts of the present action. The offeror in *Toll Bros.* was a defendant who proposed to pay $5,000 to the plaintiff-offeree in exchange for release of the offeree's claims against the offeror and another defendant (Barr). In contrast, the offeror in the present matter was a plaintiff (Audiffred) who offered to accept $17,500 in consideration for dismissing her claims and the claims of another plaintiff (Kimmons) who had sued the defendant (Arnold) on his own separate and distinct cause of action and thus would have been entitled to (and in fact did) seek attorneys' fees and costs following jury verdict in excess of the proposal. *Arnold*, 98 So. 3d at 748. "[R]egardless of whether such acceptance would entitle a defendant to be released by both claimants, a defendant should be allowed to evaluate each plaintiff's claim separately." *Allstate Ins. Co. v. Materiale*, 787 So. 2d 173, 175 (2d DCA 2001) (holding that the an undifferentiated joint proposal

made by a plaintiff and her husband who asserted a consortium claim, could not be considered harmless, as the offerors were the plaintiffs, not defendants having joint liability).

Like *Eastern* and *Toll Bros.*, *Andrews* is also clearly distinguishable from the facts of the case at bar and thus Petitioner's reliance on *Andrews* to find conflict between the First and Fifth Districts is again misplaced. *Andrews*, similar to the facts at issue in *Toll Bros.*, involved two identical proposals made by a tortfeasor-defendant (Shannon Frey) to each plaintiff (Kimberly Andrews and Kyla Andrews) wherein Shannon offered to pay each plaintiff a specified amount of money in exchange for their dismissal of their actions against and release of both Shannon and her vicariously liable co-defendant father, Rudolph Frey. *Andrews*, 66 So. 3d at 377-78. On appeal by Andrews after attorneys fees and costs were awarded to the Freys by the trial court, the Fifth District affirmed and found that the subject proposals were valid. *Id.* at 380.

In distinguishing the facts of *Andrews* from the facts of *Gorka*, the Fifth District noted that it was not persuaded by Andrews' argument: that there is no legal or logical reason to differentiate an offer of judgment made by a defendant contingent on acceptance from multiple plaintiffs, from an offer of judgment made by a defendant contingent on dismissal of multiple defendants because the Andrews had no independent claim against Rudolph Frey to evaluate. *Id.* at 379.

The Fifth District went on to note that, "Shannon Frey's proposals for settlement implicitly represented that she could pay the amounts offered and, therefore, Appellants' only decision upon receiving them was whether the total value of their claims exceeded the amount offered." *Andrews*, 66 So. 3d at 379.

In contrast with *Andrews*, Audiffred's proposal represented that she would dismiss her claims and that another Plaintiff (Kimmons) would also dismiss his claims and release the Defendant (Arnold) in exchange for Arnold's payment of $17,500. Arnold's decision (unlike the Andrews) upon receiving said proposal was not simply whether he could pay the $17,500 but also whether his decision *not* to pay the $17,500 would mean that a later jury verdict in favor of Audiffred and more importantly, Kimmons, would mean that he would be required to pay either or both Audiffred and Kimmons' attorneys' fees and costs pursuant to Florida Statute section 768.79. Unlike the offerees in *Andrews*, there was no way for the offeree (Arnold) to make such a clear decision based upon Audiffred's proposal.

While Respondent argues that the *Andrews* Court's certified question to this Court (whether the term "joint proposal" in Rule 1.442(c)(3) applies to cases where acceptance of the offer is conditioned upon dismissal with prejudice of an offeree's claims against an offeror and a third party) lends further support for this Court to accept discretionary jurisdiction to review the First District's decision, Respondent argues that the question is inapplicable to the facts at hand. (Petitioner's

Jurisdictional Brief P-9) *Andrews*, 66 So. 3d at 380. In the instant matter, Audiffred's proposal purported that Audiffred (as the sole offeror) in consideration for $17,500 paid by the offeree, would dismiss her claims and that a co-plaintiff (not a third party) would dismiss his claims and both would release the defendant. Thus, even *if* a party to the *Andrews* action attempts to invoke this Court's jurisdiction to answer said certified question, Respondent contends that such answer would not likely apply to the facts of the case currently before this Court. But, as Petitioner points out, neither party in the *Andrews* action has attempted to invoke this Court's jurisdiction, and this Court has declined to answer a similar question certified by the Eleventh Circuit in *Southeast Floating Docks, Inc. v. Auto-Owners, Inc. Co.*, 82 So. 3d 73, 75 (Fla. 2012).

The Fourth and Fifth Districts' holdings in *Toll Bros.* and *Andrews* are not at odds with the First District's holding in *Arnold,* although with facts distinct and distinguishable from those in *Toll Bros.* and *Andrews*, are not inconsistent just because the Fourth and Fifth Districts reached different results than the First District in determining that challenged proposals were valid in *Toll Bros.* and *Andrews*. Petitioner's assertion that this Court's conflict jurisdiction should be invoked is in error as, although the First, Fourth, and Fifth Districts reached different results in *Arnold, Toll Bros.,* and *Andrews*, the First District and Fourth and Fifth Districts, although dealing with substantially dissimilar facts in *Arnold*

and *Toll Bros.* and *Andrews*, did not apply conflicting rules of law, and as such, this Court should not accept jurisdiction pursuant to the Florida Constitution, Article V § 3(b)(3).

CONCLUSION

For the reasons set out above, Respondent, THOMAS B. ARNOLD, respectfully requests that this Court decline to accept discretionary jurisdiction to review the decision of the First District Court of Appeals because the decision of the First District Court does not conflict with the decisions of the Third, Fourth, and Fifth District Courts.

Respectfully submitted,

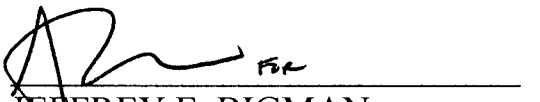
SMITH, HOOD, LOUCKS, STOUT,
BIGMAN, & BROCK, P.A.

BY: _____

JEFFREY E. BIGMAN
Florida Bar No.: 063347
444 Seabreeze Boulevard, Suite 900
Post Office Box 15200
Daytona Beach, Florida 32115
Telephone: (386) 254-6875
Facsimile: (386) 257-1834
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and accurate copy of the original foregoing Brief of Jurisdiction has been served upon counsel by e-mail this 4th day of January, 2013 to: Michelle L. Hendrix, Esquire, Vernis & Bowling, 315 South Palafox Street, Pensacola, Florida 32502; Marcus J. Michles, II, Esquire, 501 Brent Lane, Pensacola, Florida 32503; and Louis K. Rosenbloum, Esquire, 4300 Bayou Boulevard, Suite 36, Pensacola, Florida 32503.



JEFFREY E. BIGMAN
Florida Bar No.: 063347

CERTIFICATE OF COMPLIANCE

Respondent, THOMAS B. ARNOLD, by and through his undersigned counsel of record, hereby certifies and avers to this Court that the size and type style of the print used in this brief is Times New Roman, 14 point type, in compliance with the typeface requirements of Florida Rules of Appellate Procedure 9.210(a)(2). It is further certified that this brief contains a page count of 10 beginning with the Argument and ending with the Conclusion, in compliance with the length and type-volume limitations set forth in Florida Rules of Appellate Procedure 9.210(a)(5).

JEFFREY E. BIGMAN
Florida Bar No.: 063347

HORACE SMITH, JR., P.A.
CHARLES D. HOOD, JR.
JEFFREY E. BIGMAN
JEFFREY P. BROCK
CLAY L. MEEK
TAMARA R. GAINES
AMANDA J. JACOBSEN

Of Counsel:
LARRY R. STOUT
HARRY G. McCONNELL
SHEILA M. ENNIS, PLLC

William E. Loucks (Retired)

Commitment to Excellence

SMITH HOOD BIGMAN

444 SEABREEZE BOULEVARD
SUITE 900
DAYTONA BEACH, FL 32118

Send all correspondence to:
POST OFFICE BOX 15200
DAYTONA BEACH, FL 32115

TELEPHONE: (386) 254-6875
FACSIMILE: (386) 257-1834

www.daytonalaw.com

January 3, 2013

(Via: Federal Express)
Thomas D. Hall, Clerk
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Re:	Case Name	:	Valerie Audiffred vs. Thomas B. Arnold
	Case No	:	SC12-2377
	Lower Tribunal No.	:	1D11-6583

Dear Mr. Hall:

Enclosed please find Respondent, Thomas B. Arnold's original Brief on Jurisdiction to be filed with the Court. A copy of Respondent's Brief will be emailed to this Court upon delivery confirmation on January 4, 2013.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Jeffrey E. Bigman

JEB/dl
Enclosure
cc: Michelle L. Hendrix, Esq.
Louis K. Rosenbloum, Esq.
Marcus J. Michles, II, Esq.