Electronically Filed 06/11/2013 03:39:52 PM ET

RECEIVED, 6/11/2013 15:43:31, Thomas D. Hall, Clerk, Supreme Court

SUPREME COURT OF FLORIDA

CASE NO.: SC12-2377

VALERIE AUDIFFRED,

Petitioner

vs.

THOMAS B. ARNOLD,

Respondent.

On Review from the First District Court of Appeal
L.T. CASE NO. 1D11-6583

RESPONDENT, THOMAS B. ARNOLD'S ANSWER BRIEF ON THE MERITS

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

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

SUMMARY OF ARGUMENT 1

STANDARD OF REVIEW 2

ARGUMENT 2

I. THE DISTRICT COURT'S DETERMINATION THAT AUDIFFRED'S PROPOSAL FOR SETTLEMENT VIOLATED FLORIDA RULE OF CIVIL PROCEDURE 1.442 AND THUS WAS UNENFORCEABLE, SHOULD BE UPHELD.. 2

A. **Audiffred's proposal for settlement is an impermissible joint proposal and thus invalid. 3**

B. **Audiffred's proposal for settlement is ambiguous and thus invalid... 7**

II. THE TRIAL COURT ERRONEOUSLY RELIED UPON *EASTERN* IN FINDING THAT AUDIFFRED'S PROPOSAL FOR SETTLEMENT WAS ENFORCEABLE AND THE FIRST DISTRICT COURT'S DECISION BELOW DOES NOT CONFLICT WITH DECISIONS RENDERED IN THE THIRD, FOURTH, AND FIFTH DISTRICT COURTS. 11

CONCLUSION 18

CERTIFICATE OF SERVICE 20

CERTIFICATE OF COMPLIANCE 21

TABLE OF CITATIONS

CASES

Alioto-Alexander v. Toll Bros., Inc.,
12 So.3d 915 (Fla. 4th DCA 2009) 11, 17

Allstate Indem. Co. v. Materiale,
787 So. 2d 173 (Fla. 2d DCA 2001) 4, 10, 16

Allstate Ins. Co. v. Hingson,
808 So. 2d 197 (Fla. 2002) 4, 10

Andrews v. Frey,
66 So. 3d 376 (Fla. 5th DCA 2011) ....*passim*

Arnold v. Audiffred,
98 So. 3d 746 (Fla. 1st DCA 2012) ....*passim*

Attorneys' Title Ins. Fund, Inc. v. Gorka,
36 So. 3d 646 (Fla. 2010) 5, 6

Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.,
632 F.3d 1195 (11th Cir. 2011) 15

Busby v. Winn & Lovett Miami, Inc.,
80 So. 2d 675 (Fla. 1955) 3

Campbell v. Goldman,
959 So. 2d 223 (Fla. 2007) 6, 10

Diamond Aircraft Indus. Inc. v. Horowitch,
107 So. 3d 362 (Fla. 2013) 5

Eastern Atl. Realty & Inv., Inc. v. GSOMR, LLC,
14 So. 3d 1215 (Fla. 3d DCA 2009) 11, 12

Frosti v. Creel,
979 So. 2d 912 (Fla. 2008) 2

Health First, Inc. v. Cataldo,
92 So. 3d 859 (Fla. 5th DCA 2012) 11, 13, 14

Jacksonville Golfair, Inc. v. Grover,
988 So. 2d 1225 (Fla. 1st DCA 2008) 8

Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co,
82 So. 3d 73 (Fla. 2012) 15

State Farm Mut. Auto. Ins. Co. v. Nichols,
932 So. 2d 1067 (Fla. 2006) 8

Willis Shaw Express, Inc. v. Hilyer Sod, Inc.,
849 So. 2d 276 (Fla. 2003) 4

RULES

Fla. R. App. P. 9.210(a)(2) 21

Fla. R. App. P. 9.210(a)(5) 21

Fla. R. Civ. P. 1.442 .... *passim*

Fla. R. Civ. P. 1.442(c)(2)(A) 2, 7

Fla. R. Civ. P. 1.442(c)(2)(B) 2

Fla. R. Civ. P. 1.442(c)(2)(C) 2

Fla. R. Civ. P. 1.442(c)(3) 2

Fla. R. Civ. P. 1.442(c)(4) 13

STATUTES

§ 768.79, Fla. Stat. (2008) .... *passim*

§ 768.79(2)(b), Fla. Stat. (2008) 7

§ 768.79(2)(d), Fla. Stat. (2008) 7

SUMMARY OF THE ARGUMENT

The First District Court below correctly held that the proposal for settlement served by Audiffred was an undifferentiated joint proposal because the proposal was made by Audiffred but purported to settle "any and all claims Plaintiffs' have brought against the Defendant...set forth in Plaintiffs' Complaint." Thus, it was not solely Audiffred's inclusion of a non-monetary condition- that acceptance of the proposal by Arnold would result in Audiffred *and* Kimmons dismissing their independent and distinct causes of action against Defendant- that transformed Audiffred's proposal for settlement into an impermissible and ambiguous joint proposal. Audiffred's proposal was not sufficiently clear to allow Arnold to make an informed decision without needing clarification because the proposal sought to extinguish the claims of both Audiffred and Kimmons without apportioning the amount demanded in settlement by Audiffred between Audiffred and Kimmons.

The First District Court's holding below is not contrary to decisions in the Third District, Fourth District, and Fifth District Courts and given the factual dissimilarities the trial court's reliance upon the Third District Court's decision in *Eastern* was erroneous. 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.

STANDARD OF REVIEW

A proposal for settlement's enforceability under section 768.79, Florida Statutes and Florida Rule of Civil Procedure 1.442, is a legal issue subject to de novo review. *Frosti v. Creel*, 979 So. 2d 912, 915 (Fla. 2008).

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT AUDIFFRED'S PROPOSAL FOR SETTLEMENT VIOLATED FLORIDA RULE OF CIVIL PROCEDURE 1.442 AND THUS WAS UNENFORCEABLE, SHOULD BE UPHELD.

Florida Rule of Civil Procedure 1.442 prescribes in pertinent part that a proposal for settlement shall name the party or parties making the proposal, identify the claim or claims the proposal is attempting to resolve, and state with particularity any relevant conditions, and further requires that a joint proposal shall state the amount and terms attributable to each party. Fla. R. Civ. P. 1.442(c)(2)(A), (B), (C), and (c)(3). The District Court's determination that Audiffred's proposal for settlement to Arnold was unenforceable because it did not comply with Rule 1.442, should be upheld because Audiffred's proposal was an impermissible joint proposal which failed to attribute the settlement amount between Audiffred and Kimmons and because the proposal, when read as a whole was ambiguous and thus, Arnold could not make an informed decision without needing clarification.

A. Audiffred's proposal for settlement is an impermissible joint proposal and thus invalid.

Petitioner claims that, "[a]lthough Audiffred was the sole offeror, her proposed settlement included her husband's consortium claim *without additional monetary consideration....*" [emphasis added] *Petitioner's Initial Brief on the Merits*, 2. However, as the District Court below noted, proposals for settlement are "governed by the rules for interpretation of contracts" and "should be looked at as a whole and construed according to its own clear and unambiguous terms." *Arnold v. Audiffred*, 98 So. 3d 746, 748 (Fla. 1st DCA 2012) (internal citations omitted).

Although Audiffred's proposal for settlement in the instant matter indicated that it was made by "Valerie Audiffred," in looking at the proposal as a whole as we must, the claims the proposal was attempting to resolve were, "[a]ny and all claims *Plaintiffs* have brought against the Defendant... set forth in Plaintiffs' Complaint." [emphasis added] *Id*. at 747. Under "[a]ny relevant conditions," the proposal further provided that, "*[b]oth Plaintiffs* will dismiss this lawsuit, with prejudice, as to the Defendant." [emphasis added] *Id.*

While the Petitioner contends that her proposal included her husband's claim without additional monetary consideration, the proposal did not apportion the $17,500 demanded between Valerie Audiffred's personal injury action and Robert Kimmons' separate and independent consortium claim. *Id*. *See Busby v. Winn & Lovett Miami, Inc.*, 80 So. 2d 675, 675 (Fla. 1955) ("A tort of a third person which

causes personal injury to a married woman gives rise to two causes of action- one for her own personal injuries and the other for the husband's loss of her society and services and for medical expenses incurred by him on her behalf. The two causes of action are separate and distinct and the husband's action may be maintained without joinder of the wife."). Thus, Petitioner's assertion that Valerie Audiffred's proposed settlement included her husband's consortium claim "without additional monetary consideration," is not only beyond the scope of Audiffred's proposal, it is contrary to the language of the proposal which reflects that Audiffred sought $17,500 to settle "any and all claims Plaintiffs have brought against the Defendant." *Arnold*, 98 So. 3d at 747.

Florida law is clear on the issue of joint proposals: to be valid, a joint proposal made by or to multiple plaintiffs must apportion the settlement amount among the plaintiffs. *Willis Shaw Express v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278-79 (Fla. 2003) (finding invalid plaintiffs' joint proposal made to defendant which did not specify the amounts and terms each plaintiff was requesting); *Allstate Indemn. Co. v. Hingson*, 808 So. 2d 197, 198-99 (Fla. 2002) (finding invalid defendant's undifferentiated proposal made jointly to plaintiffs, husband and wife who brought respectively, personal injury and consortium claims); *Allstate Ins. Co. v. Materiale*, 787 So. 2d 173, 174 (Fla. 2001) (finding invalid an undifferentiated joint proposal made by plaintiffs, wife and husband, who brought personal injury

and consortium claims, respectively). This Court has even disallowed joint offers of settlement which specify the amounts attributable to each Plaintiff if they are conditioned on mutual acceptance. *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646 (Fla. 2010).

Petitioner contends that Audiffred's proposal was not a "joint proposal" of the kind reported in this line of cases and that her proposal merely included dismissal of her husband's consortium claim upon acceptance of her settlement offer as non-monetary condition. *Petitioner's Brief on the Merits*, 10. Petitioner appears to overlook, however, that Audiffred's proposal sought to resolve "[a]ny and all claims *Plaintiffs* have brought against the Defendant." [emphasis added] Thus, that the technical form of the first numbered section of the proposal reflected that the party making the proposal was "Valerie Audiffred," the substantive purpose and practical effect of the proposal was to resolve, "[a]ny and all claims Plaintiffs have brought against the Defendant" without apportioning the $17,500 demanded between Valerie Audiffred and Robert Kimmons.

Florida law is also clear that "all portions" of section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees. *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 177 (Fla. 2013); *Campbell v. Goldman*, 959 So. 2d 223, 226 (Fla.

2007). This strict construction is "applicable to both the substantive and procedural portions of the rule and statute." *Campbell*, 959 So. 2d at 227.

The *Gorka* Court observed the practical necessity of differentiating between parties in an offer, "...to provide the trial court a basis to correctly determine the amount attributable to each party when evaluating the amount of the final judgment against the settlement offer to apply the statute and the rule." *Gorka*, 36 So. 3d at 650. Audiffred's proposal gave the trial court no basis to determine the amount attributable to each party where both plaintiffs separate and independent claims were sought to be resolved by Audiffred's proposal.

Section 768.79 creates a right to recover reasonable costs and attorney fees only when a party has satisfied the terms of the statute and Rule 1.442. *Gorka*, 36 So. at 649. Hence, the District Court was correct in holding that Audiffred's proposal for settlement made solely by Audiffred but seeking to resolve the claims of both Audiffred and Kimmons for the undifferentiated amount of $17,500 was an invalid joint proposal and Audiffred's proposal is unenforceable. While one possible interpretation of the proposal at issue would be that it is made by Audiffred, the more convincing interpretation is that the proposal in substance, offers to settle the claims of *both* Audiffred and Kimmons without differentiating the amount attributable to each plaintiff, and as such, is an invalid joint proposal.

B. Audiffred's proposal for settlement is ambiguous and thus invalid.

Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes, require proposals for settlement to name the party or parties making the proposal and the party or parties to whom the proposal is being made. Fla. R. Civ. P. 1.442(c)(2)(A); § 768.79(2)(b), Fla. Stat. Rule 1.442(c)(2)(C) further requires that a proposal shall state with particularity any relevant conditions. Section 768.79(2)(d) further provides that, "[t]he offer shall be construed as including all damages which may be awarded in a final judgment."

In the instant matter, Valerie Audiffred and Robert Kimmons each brought separate and independent causes of action against Respondent, Thomas Arnold. Audiffred's proposal for settlement to Arnold sought to settle "any and all claims Plaintiffs have brought." *Arnold*, 98 So. 3d at 747. Audiffred's proposal further included as a relevant condition, that "[b]oth Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant." *Id.*

That the subject proposal was made solely by Audiffred yet offered to settle "any and all claims Plaintiffs have brought" and included as a relevant condition that "both Plaintiffs" would dismiss the lawsuit makes the proposal ambiguous when we construe this proposal as a whole, including all damages which may be awarded in a final judgment against Arnold in favor of Audiffred and Kimmons, as section 768.79(2)(d), Florida Statutes requires we must.

While Rule 1.442 does not "demand the impossible," it does require that, "the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006). "If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement." *Id.*

Petitioner cites *Jacksonville Golfair, Inc. v. Grover*, 988 So. 2d 1225, 1227 (Fla. 1st DCA 2008) for the proposition that, "[w]hen reviewing offers of judgment, courts should use reason and common sense and interpret the offer as a whole to avoid unreasonable results." *Petitioner's Brief on the Merits*, 16. Petitioner alleges that "Arnold knew that paying Audiffred $17,500 for her claims for bodily injury and property damage settled the entire case and ended the litigation with no strings attached" and that "[n]othing could be clearer." *Id.* Petitioner goes on to insist that, "[t]he proposal for settlement made it clear that Audiffred was the only offeror, and that she was offering to settle *her claims alone* for $17,500." [emphasis added] *Id.*

Petitioner's assertions are directly contrary to the actual language of Audiffred's proposal and demonstrate precisely the ambiguity in Audiffred's proposal and why, when Arnold interpreted Audiffred's offer as a whole, Arnold could not make an informed decision without needing clarification. Under

numbered section three of Audiffred's proposal, the identity of the claim or claims the proposal is attempting to resolve reflects, "[a]ny and all claims *Plaintiffs* have brought against the Defendant set forth in the Complaint in the above captioned case and any other claims or claims that may have risen as a result of the subject incident set forth in Plaintiffs' Complaint, including attorney's fees and costs." [emphasis added] *Arnold,* 98 So. 3d at 747.

Using reason and common sense to interpret the foregoing excerpt, Audiffred's proposal certainly does indicate that some monetary consideration was attributable to Kimmons' consortium claim since, although he was not identified as an offeror, he was one of the "Plaintiffs" agreeing to dismiss his consortium claim which was one of the claims set forth in the "Plaintiffs' Complaint." (R-1 1-3.)

Contrary to Petitioner's assertion that, this Court's enforcing Audiffred's proposal for settlement will not impair the common law rule of strict construction of statutes and rules in derogation of common law, Respondent contends that enforcing Audiffred's proposal not only impairs this common law rule but turns the rule of strict construction on its head. *Petitioner's Brief on the Merits*, 17. Petitioner urges that the District Court's decision "exalts form over substance...at the expense of the legislative intent behind section 768.79." *Petitioner's Brief on the Merits*, 17-18. Petitioner overlooks, however, that this Court has made clear that when interpreting a proposal, a district court errs in validating a proposal that

includes even a "mere technical violation." *Campbell*, 959 So. 2d at 226 (holding that proposal was invalid where offeror did not cite the applicable statute, section 768.79 in proposal).

In the instant matter, the ambiguity in Audiffred's proposal reasonably affected Arnold's decision on whether to accept the proposal for settlement. The *Materiale* Court made clear that when two offerors make a proposal to one offeree, the offeree is entitled to know the amount and terms of the offer that are attributable to each offeror in order to evaluate the offer. 787 So. 2d at 175. This sound logic and reason should not be overlooked where a plaintiff has served a proposal for settlement solely in her name, yet offers to settle "all claims"- both her claims, and the independent claims of her co-plaintiff, spouse- in exchange for an undifferentiated amount.

> Otherwise, in many cases, it would be impossible for the trial court to determine the amount attributable to each party in order to make a further determination of whether the judgment against only one of the parties was at least twenty-five percent more or less than the offer (depending on which party made the offer).

Hingson, 808 So. 2d at 199. "This may be particularly important in claims alleging loss of consortium, where defendants may choose to settle the claim for a minimal amount and go to trial on the primary claim." *Materiale*, 797 So. 2d at 175.

Arnold was deprived of an opportunity to fully and properly evaluate Audiffred's because Audiffred sought to settle the claims of *both* Audiffred and Kimmons for one, undifferentiated amount, and the District Court's decision, holding that Audiffred's proposal was invalid should be upheld.

II. THE TRIAL COURT ERRONEOUSLY RELIED UPON *EASTERN* IN FINDING THAT AUDIFFRED'S PROPOSAL FOR SETTLEMENT WAS ENFORCEABLE AND THE FIRST DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS RENDERED IN THE THIRD, FOURTH, AND FIFTH DISTRICT COURTS.

Petitioner asserts that,

> [t]hree district courts have now held that a proposal for settlement, *like the one at issue here,* made by a single offeror to a single offeree which is conditioned upon dismissal of the entire action, including claims for or against a party who is neither an offeror nor offeree, is not an undifferentiated 'joint proposal' that renders the proposal invalid and unenforceable. [emphasis added]

Petitioner's Brief on the Merits, 10. To support this assertion, Petitioner relies upon *Health First, Inc. v. Cataldo*, 92 So. 3d 859, 871 (Fla. 5th DCA 2012); *Andrews v. Frey*, 66 So. 3d 376 (Fla. 5th DCA 2011); *Eastern Atl. Realty & Inv., Inc. v. GSOMR, LLC*, 14 So. 3d 1215 (Fla. 3d DCA 2009); *Alioto-Alexander v. Toll Bros., Inc.*, 12 So. 3d 915 (Fla. 4th DCA 2009). The facts from this line of cases, however, is distinguishable from the facts at bar and thus the proposals in *Cataldo*, *Andrews*, *Eastern*, and *Toll Bros.* are not like the one at issue here.

In the instant matter, the trial court relied on *Eastern* in determining that Audiffred's proposal was valid. (R-7 1266-68.) The trial court erred in relying

upon *Eastern*, however, because *Eastern* is factually distinguishable from the facts at bar.

In *Eastern*, which involved a real estate transaction dispute, BJV and GSOMR sued Eastern and Eastern sued BJV and the cases were consolidated. *Eastern*, 14 So. 3d at 1218. BJV served a proposal for settlement on Eastern providing that payment of $20,000 would resolve "all claims" by Eastern against BJV and/or GSOMR [although Eastern had not sued or asserted claims against GSOMR] and "all claims" by BJV and/or GSOMR against Eastern. *Id.* The proposal required that, upon acceptance, "Eastern [would] immediately dismiss its claims against BJV in [the] action and BJV and GSOMR, LLC [would] immediately dismiss their claims against Eastern in [the] action." *Id.* The Third District Court found that the proposal was enforceable. *Id.* at 1222.

Eastern is distinguishable from the case at bar, as recognized by the First District Court below, in that, as the *Eastern* court noted, Eastern did not seek any affirmative relief from GSOMR. *Id.* at 1221. In the instant case, Kimmons *was* seeking affirmative relief from Arnold- damages under a consortium cause of action to which Kimmons had a property right in his own name. Thus, *Eastern* was not properly relied on by the trial court and further, does not create conflict between the Third District's decision in *Eastern* and the First District's decision in *Arnold*. *Cataldo, Andrews,* and *Alioto-Alexander* are similarly distinguishable.

Health First, Inc. v. Cataldo involved a single plaintiff who served two separate identical proposals for settlement: one to the tortfeasor defendant, and one to the tortfeasor's vicariously liable employer. 92 So. 3d at 869. Each proposal indicated that payment by the defendant named as the offeree in the proposal of $1,475,000 would obtain the release of all defendants. *Id.* The Fifth District Court found the proposals valid and upheld the trial court's award of attorney's fees. *Id.* at 871.

This decision is consistent with the amendment made to Florida Rule of Civil Procedure 1.442, effective January 1, 2011, wherein subsection (c)(4) was added. This new section, which does not apply to the proposal at issue, provides that,

> [n]otwithstanding subdivision (c)(3), [that a joint proposal shall state the amount and terms attributable to each party] 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 part need not state the apportionment or contribution as to that party.

Fla. R. Civ. P. 1.442(c)(4). Thus, that the *Cataldo* settlement amount reflected in the plaintiff's proposal was not differentiated between the two separate defendants is not violative of Rule 1.442 in light of subsection(c)(4). The *Cataldo* court noted, "There was no denial of vicarious liability so that the interests of the defendants were coextensive. Each offer was for a definite amount and was not the equivalent

of a joint offer, even though the plaintiff promised to release all the defendants if the offer was accepted." *Cataldo*, 92 So. 3d at 871.

Further, while Petitioner appears to rely upon *Cataldo* for the condition of settlement contained in the *Cataldo* proposals- that upon payment by offeree of the amount demanded by the offeror defendant would release "all defendants," Petitioner overlooks clearly distinguishable facts of *Cataldo*. Specifically, that the proposal in *Cataldo* was served by a single plaintiff to a single defendant, to extinguish the claims of that single plaintiff, and included as a condition of settlement release of a directly negligent defendant and a vicariously liable defendant. Audiffred's proposal, on the other hand, was purportedly from a single plaintiff to a single defendant, yet sought to extinguish "any and all claims Plaintiffs have brought" and "set forth in Plaintiffs' Complaint." *Arnold*, 98 So. 3d at 747. That Audiffred's proposal included as a condition of settlement that "both Plaintiffs will dismiss this lawsuit" and that the proposals in *Cataldo* indicated that payment of the amount demanded would obtain release of all defendants, does not make the *Cataldo* proposal "like the one at issue here" as Petitioner has urged. *Petitioner's Brief on the Merits*, 10.

In *Andrews v. Frey*, plaintiffs sued Shannon Frey based on direct negligence and her father, Rudolph Frey based on vicarious liability, for injuries suffered in an automobile accident. 66 So. 3d at 377. Shannon Frey served two separate

proposals on plaintiffs, with each proposal offering a different amount. *Id.* Each proposal identified Shannon Frey as the offeror and required, *inter alia*, that the Plaintiffs would dismiss the suit against both Shannon and Rudolph Frey. *Id.* Citing to *Eastern* and *Toll Bros*, the Fifth District Court found that the fact that the proposals conditioned acceptance on releasing the vicariously liable defendant did not create ambiguity or "transform[]" the proposals into joint offers. *Id.* at 378-79. The *Frey* court recognized that the same issue before it was certified by the Eleventh Circuit Court of Appeals in *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 632 F.3d 1195 (11th Cir. 2011).[1] The *Frey* Court certified the question, whether "joint proposal" as used in rule 1.442(C)(3) applies where acceptance is conditioned on dismissal with prejudice of an offeree's claims against an offeror and a third party. *Andrews*, 66 So. 3d at 380. No appeal was taken up by Andrews, however.

Andrews is clearly distinguishable from the facts of this case which were before the First District and are now before this Court. First, and most obviously, the proposals in *Andrews* were made by a single *defendant* to two plaintiffs. This is an important contrasting point because, as the Fifth District Court noted in its

[1] This Court acknowledged jurisdiction over a question certified by the Eleventh Circuit: whether the conditioning of an offer of judgment on the resolution and dismissal with prejudice of an offeree's claims against a third-party render the offer a joint proposal under Rule 1.442(c)(3) in *Auto-Owners* and issued an opinion in *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73 (Fla. 2012) but did not reach the certified question in the decision.

opinion in *Andrews*, the plaintiffs did not have an independent claim against Rudolph Frey to evaluate or settle and thus, that defendant Shannon Frey's proposals to the plaintiffs conditioned settlement on the release of both defendants without apportioning how the $50,000 would be paid by each defendant was of no concern. *Andrews*, 66 So. 3d at 379.

In the present action, Kimmons clearly had a separate and distinct cause of action against Arnold which could have continued on its own had Audiffred's claim been settled. Thus, it was vital that Audiffred's proposal to Arnold which offered to release Arnold from the claims of both Audiffred and Kimmons, apportion the $17,500 settlement amount between the plaintiffs. *See Andrews*, 66 So. 3d at 379. "[R]egardless of whether [acceptance] would entitle a defendant to be released by both claimants, a defendant should be allowed to evaluate each plaintiff's claim separately." *Materiale*, 787 So. 2d at 175.

A second major distinguishing point between *Andrews* and the case at bar is that the *Andrews* proposals included conditions that the plaintiffs would execute a full release and further that the parties would execute a joint stipulation dismissing the suit with prejudice whereas Audiffred's proposal did not attach or even summarize a proposed release or further specify details of the dismissal of the plaintiffs' claims.

A third major distinguishing point between *Andrews* and the matter before this Court is that the defendant offering to settle the claims in *Andrews* was the directly negligent party who had already admitted liability and as such the only consideration was damages. 66 So. 3d at 379. Arnold did not admit liability in the action at hand and the action by Audiffred and Kimmons proceeded to trial on both liability and damages.

Finally, *Andrews* is distinguishable from the case at bar in that Shannon Frey served a clear and unambiguous proposal for settlement upon each plaintiff, individually. *Id.* at 377. As such, each proposal allowed each plaintiff to individually evaluate whether the amount offered in settlement would satisfy their respective damages claims. In the instant litigation, Audiffred's proposal to Arnold purported to settle the separate and distinct claims of both Audiffred and Kimmons, for $17,500 without apportioning the amount Arnold would be effectively tendering to each claimant to resolve each claimant's respective claims.

Not unlike *Cataldo, Andrews, and Eastern, Alioto-Alexander v. Toll Bros., Inc.* is also distinguishable from the case at bar and as such does not create conflict with *Arnold* or support the trial court's determination that Audiffred's proposal was valid. *Toll Bros.* involved a proposal for settlement served by a *defendant* upon a single plaintiff. 12 So. 3d at 916. While the proposal in *Toll Bros.* did not apportion the $5,000 between the two defendants to be released, the proposal was

sufficiently clear to allow the plaintiff-offeree to make an informed decision about whether she would accept the specified amount to satisfy her claimed damages in her liability claim against the defendants. The proposal subject of this appeal was made by a *plaintiff,* Audiffred, to a *defendant,* Arnold, and did not apportion payment of the proposed $17,500 between Audiffred's personal injury claim and Kimmons's consortium claim which Audiffred's proposal sought to extinguish.

The trial court erred by validating Audiffred's Proposal for Settlement and by relying on *Eastern*, which is clearly distinguishable from the facts at bar. 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 District Court's decision in *Arnold* and the decisions of the Third, Fourth and Fifth District Courts in *Eastern, Toll Bros., Cataldo,* and *Andrews*, respectively.

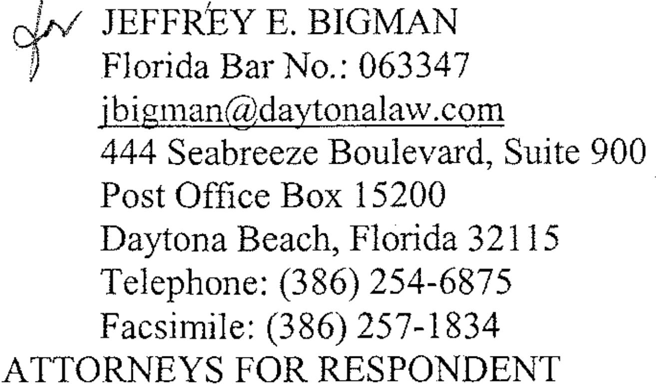
CONCLUSION

For the reasons set forth above, Respondent, THOMAS B. ARNOLD, respectfully requests that this Court uphold the First District Court's decision and holding that Audiffred's proposal for settlement is invalid. Audiffred's proposal was an impermissible and ambiguous joint proposal which failed to apportion the amount demanded by Audiffred among the claims brought by Audiffred and

Kimmons which the proposal sought to extinguish. Further, the trial court erred in relying upon a factually distinguishable case, *Eastern Atl. Realty & Inv., Inc. v. GSOMR, LLC* and given the factual dissimilarity between the facts at bar and those of *Eastern*, *Health First, Inc. v. Cataldo*, *Andrews v. Frey*, and *Alioto-Alexander v. Toll Bros., Inc.*, the First District Court's decision in *Arnold* below is not in conflict with the decisions of the Third, Fourth, and Fifth District Courts.

Respectfully submitted,

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

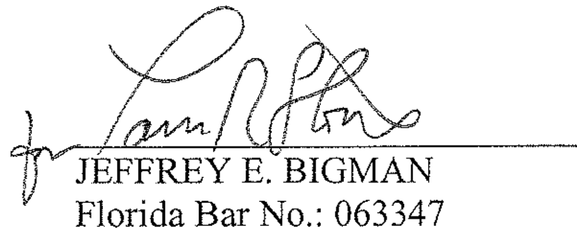


BY: ______________________

JEFFREY E. BIGMAN
Florida Bar No.: 063347
jbigman@daytonalaw.com
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

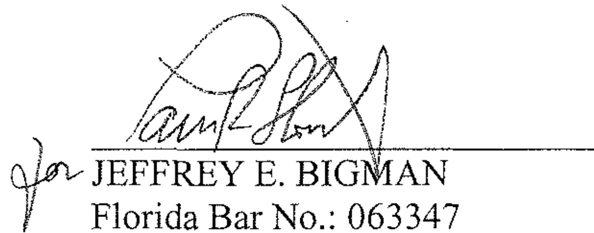
I HEREBY CERTIFY a true and accurate copy of the original foregoing Answer Brief on the Merits has been served upon counsel by e-mail this 11th day of June, 2013 to: Michelle L. Hendrix, Esquire, Vernis & Bowling, mhendrix@florida-law.com, 315 South Palafox Street, Pensacola, Florida 32502; Marcus J. Michles, II, Esquire, marcus@michlesbooth.com, 501 Brent Lane, Pensacola, Florida 32503; and Louis K. Rosenbloum, Esquire, lrosenbloum@rosenbloumlaw.com, lourose49@yahoo.com, 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 19 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