SUPREME COURT OF FLORIDA

CASE NO. SC12-2377

VALERIE AUDIFFRED,

Petitioner,

vs.

THOMAS B. ARNOLD

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
L.T. CASE NO. 1D11-6583

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner Valerie Audiffred, appellee below, seeks review of the decision of the District Court of Appeal, First District, in Arnold v. Audiffred, No. 1D11-6583, 37 Fla. L. Weekly D2373 (Fla. 1st DCA Oct. 10, 2012), based on express and direct conflict with three decisions from the Third, Fourth and Fifth District Courts of Appeal. See Art. V, § 3(b)(3), Fla. Const. A copy of the district court's opinion is appended to this brief which petitioner will cite as "A" followed by the appropriate page number.

Audiffred and her husband, Robert Kimmons, filed an action for damages against respondent Thomas B. Arnold arising from a motor vehicle accident caused by Arnold's negligence. (A. 2). Audiffred requested damages for bodily injuries and property damage while Kimmons requested damages for loss of consortium. (A. 2). Audiffred and Kimmons were represented by the same attorney. (A. 2).

During the course of proceedings, Audiffred served Arnold with a proposal for settlement pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 which the court below quoted in its opinion:

> Proposal for Settlement
>
> Plaintiff, Valerie Audiffred, by and through the undersigned counsel hereby make [sic] the following proposal for settlement pursuant to F.S. § 768.79 and Rule 1.442 F.R.C.P., to wit:
>
> 1. Name of party or parties making this proposal:
> Plaintiff: Valerie Audiffred

2. Party or parties to whom the proposal is being made:
Defendant: Thomas B. Arnold

3. Identify the claim or claims the proposal is attempting to resolve:
Any and all claims Plaintiffs have brought against the Defendant set forth in the Complaint in the above captioned case and any other claim or claims that may have risen as a result of the subject incident set forth in Plaintiffs' Complaint, including attorney's fees or costs.

4. Any relevant conditions:
Both Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant.

5. Total amount of proposal:
Seventeen Thousand Five Hundred Dollars and no cents ($17,500.00).

(A. 2-3) (emphasis the court's).

After Arnold failed to accept her offer, the jury awarded Audiffred $26,055.54 for past medical expenses. (A. 3). Audiffred then sought attorney's fees and costs pursuant to her proposal for settlement since the amount of her judgment against Arnold exceeded her settlement offer by more than twenty-five percent. (A. 3). Although Audiffred was the sole offeror, Arnold moved to strike Audiffred's proposal for settlement, arguing it was an invalid joint proposal because it failed to apportion the offer between Audiffred and Kimmons. (A. 3). Relying on Eastern Atl. Realty & Inv., Inc. v. GSOMR, LLC, 14 So. 3d 1215 (Fla. 3d DCA 2009), the trial court denied Arnold's motion to strike and awarded

Audiffred costs and attorney's fees. (A. 3).

Finding Audiffred's proposal for settlement was an invalid joint proposal, the First District reversed the order awarding Audiffred costs and attorney's fees. In so holding, the district court cited this Court's decision in Willis Shaw in which the Court determined 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.'" (A. 4) (quoting Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278-79 (Fla. 2003)) (emphasis supplied). Although the district court acknowledged that Audiffred was the sole offeror, it concluded nevertheless (A. 5):

> [W]hen read as a whole, the proposal clearly expressed a promise that the two appellees would dismiss with prejudice each of their individual claims against appellant upon acceptance. Their shared attorney, an individual who had the apparent authority to make this proposal for settlement, submitted this proposal. Therefore, reading the proposal as a whole, it was a joint proposal.

SUMMARY OF ARGUMENT

Three 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. See 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). By holding that Audiffred's proposal for settlement was an invalid joint proposal because her offer was conditioned upon dismissal of the entire action, including her husband's consortium claim, the district court decision in Arnold expressly and directly conflicts with Andrews, Eastern and Toll Bros.

ARGUMENT

The district court decision below expressly and directly conflicts with decisions from the Third, Fourth and Fifth Districts which hold that a proposal for settlement served pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 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.

A. The decision under review conflicts with Eastern.

Pursuant to Florida Rule of Civil Procedure 1.442(c)(3), "[a] joint proposal shall state the amount and terms attributable to each party." Applying this provision, this Court has held that joint proposals for settlement are invalid and unenforceable unless the settlement offer apportions the amounts attributable to each offeror or offeree. See Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So. 3d 646, 649-52 (Fla. 2010); Lamb v. Matetzschk, 906 So. 2d 1037, 1040-41 (Fla. 2005); Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278-79 (Fla. 2003); Allstate Indem. Co. v. Hingson, 808 So. 2d 197, 199 (Fla. 2002).

A "joint proposal" for settlement that requires apportionment occurs "when one offeror makes a proposal for settlement to more than one offeree" or, conversely, "[w]hen two offerors make a proposal for settlement to one offeree . . . ." Allstate Ins. Co. v. Materiale, 787 So. 2d 173, 175 (Fla. 2d DCA 2001). For example, in Materiale, the injured party and her husband who had a claim for loss of consortium made a combined proposal for settlement to resolve their respective claims for the total sum of $105,000. The Second District held this undifferentiated offer submitted by two parties was invalid because it failed to specify the settlement amount attributable to each offering party.

In contrast to Materiale, the proposal for settlement in Eastern illustrates an offer that is not an invalid joint proposal for settlement even though the proposal involves multiple parties. In Eastern, BJV and GSOMR filed suit against Eastern, and Eastern in turn sued BJV in a separate action that was consolidated with the first suit. Before trial, BJV served a proposal for settlement offering to pay Eastern $20,000 to resolve all claims asserted by Eastern against BJV and GSOMR and vice versa. Although GSOMR was not a party to the offer, the proposal for settlement provided that upon acceptance, Eastern would dismiss all its claims against BJV and BJV and GSOMR would dismiss all their claims against Eastern.

After BJV and GSOMR prevailed at trial, the trial court denied a claim for attorney's fees based on BJV's proposal for settlement, concluding "that the

proposal was sufficiently ambiguous to preclude its enforceability and that the proposal, as drawn, constituted a joint proposal on behalf of BJV and GSOMR that failed to apportion the amount attributable to each party." Eastern, 14 So. 3d at 1218-19. The Third District disagreed and reversed. After first determining the proposal for settlement was unambiguous, the court flatly rejected the contention that the proposal for settlement was invalid as an undifferentiated joint proposal that failed to apportion the amount offered by BJV and the amount offered by GSOMR. The court noted that "[w]hile both BJV and GSOMR are identified in the proposal, the proposal explicitly states that BJV was the party making the offer to pay Eastern $20,000." Id. at 1221. The court further observed "[b]ecause the proposal at issue here was made solely by BJV, no apportionment between BJV and GSOMR was required." Id. at 1222.

This Court's conflict jurisdiction is invoked when a district court applies "a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Applying this principle, although the facts in Eastern and this case are substantially the same, the district courts reached different results. While the claims of both plaintiffs in this case are identified in the proposal for settlement, the proposal explicitly states, as in Eastern, that Audiffred was the sole party offering to accept $17,500 from Arnold in return for dismissal of the entire action. Because

Audiffred was explicitly identified as the only offering party, no apportionment of the settlement amount between Audiffred and Kimmons was required under Eastern's rationale. The two cases, therefore, are irreconcilable.

Although not actually certifying conflict with Eastern, the district court below stated: "The Third District's reasoning is somewhat unclear. To the extent the opinion can be read to say that the prefatory language in a proposal identifying the offeror binds the court, we reject this contention." (A. 6). This statement, as well as the disparate holdings between the present case and Eastern, are sufficient to create jurisdictional conflict.

B. The decision under review conflicts with Toll Bros. and Andrews.

The district courts in Toll Bros. and Andrews reached the same result as Eastern based on analogous facts. In Toll Bros., Alioto-Alexander sued the employee, Barr, and Barr's employer, Toll Brothers, which was vicariously liable for Barr's actions.[1] Toll Brothers served Alioto-Alexander with a $5,000 proposal for settlement. Although Toll Brothers was the only offeror, the proposal for settlement conditioned acceptance upon Alioto-Alexander dismissing her claims against Barr in addition to her claims against Toll Brothers. The proposal for settlement did not apportion the $5,000 payment between Toll Brothers and Barr.

[1] Toll Bros. predates the 2011 amendment to Rule 1.442 which authorizes undifferentiated joint proposals for settlement served by parties whose liability is solely vicarious. See Fla. R. Civ. P. 1.442(c)(4).

After Toll Brothers and Barr prevailed, the trial court awarded Toll Brothers attorney's fees based on its proposal for settlement. On appeal, Alioto-Alexander argued, much like Arnold argued here, that Toll Brothers' proposal for settlement was an invalid joint proposal because it failed to apportion the $5,000 settlement offer between Toll Brothers and Barr. Noting that Willis Shaw applies to "multiple offerors," the Second District disagreed and affirmed the fee award based on the following analysis:

> By its own terms, the proposal for settlement was made by Toll Brothers and Toll Brothers alone was offering to pay the sum of $5,000. The dismissal of the entire suit, including the claims against Barr, was simply a condition of the proposal and did not serve to transform the proposal for settlement into one made by multiple offerors.

Id. at 917. The Fifth District in Andrews reached the same result as Toll Bros. under similar facts:

> The dispute in this case concerns the condition in the proposals for settlement requiring the individual offeree release both Shannon and Rudolph Frey, even though Shannon Frey was identified as the sole offeror. We reject Appellants' initial argument that this provision rendered the proposals ambiguous because it was unclear whether they were joint proposals. The proposals for settlement clearly and unequivocally stated that Shannon Frey was the sole offeror. The fact that the proposals conditioned acceptance on releasing Rudolph Frey neither created an ambiguity, nor transformed them into joint offers.

Andrews, 66 So. 3d at 378.

Although the offeror and offeree are reversed, the rationale from Toll Bros. and Andrews applies to this case with equal force. The proposal for settlement was

made solely by Audiffred, and she alone offered to accept $17,500. As in Toll Bros., dismissal of the entire action against Arnold, including dismissal of Kimmons' consortium claim, "was simply a condition of the proposal and did not serve to transform the proposal for settlement into one made by multiple offerors." Toll Bros., 12 So. 3d at 917. By holding that Audiffred's proposal for settlement was an invalid joint proposal even though Audiffred was the only offeror and Arnold was the only offeree, the decision below cannot be reconciled with Toll Bros. and Andrews.

The district court found Toll Bros. and Andrews distinguishable because the proposals for settlement in those cases "did not promise that another individual would take affirmative action upon acceptance of the proposal." (A. 5-6). This factual distinction, however, does not detract from the holding of those cases that a proposal for settlement, like the one in this case, made by a single offeror to a single offeree which is conditioned upon dismissal of the entire action is not an undifferentiated "joint proposal" that renders the proposal invalid.

As an additional reason for accepting jurisdiction in this case, the Andrews court certified the following question as one of great public importance:

> 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?

Andrews, 66 So. 3d at 380. Because neither party attempted to invoke this Court's jurisdiction, the certified question remains unanswered. See also Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co., 82 So. 3d 73, 75 (Fla. 2012) (declining to answer a similar question certified by the Eleventh Circuit). By accepting jurisdiction in this case, the Court can answer this question as well as resolve the conflict created by the district court decision in this case.[2]

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction based on express and direct conflict of decisions. See Art. V, § 3(b)(3), Fla. Const.

Respectfully submitted:

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[2] In a recent article discussing the case under review, James C. Hauser argues that Arnold conflicts with Toll Bros. and Andrews. See James C. Hauser, "Is a Contingent Offer of Judgment a Joint Offer and Therefore Defective?," Attorney's Fees Update (Nov. 14, 2012), http://us2.campaign-archive1.com/?u=ac77e732592f6a4752a63ee2d&id=f905cbeaa3&e=e17ee41f7f. The author concludes with this comment: "Hopefully the Florida Supreme Court will be able to resolve this conflict once and for all." Id.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the below named attorneys for respondent by e-mail this 16th day of November, 2012.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Florida Rule of Appellate Procedure 9.210(a)(2).

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APPENDIX
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THOMAS B. ARNOLD,

Appellant,

v.

VALERIE AUDIFFRED and ROBERT KIMMONS, husband and wife,

Appellees.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-6583

Opinion filed October 10, 2012.

An appeal from the Circuit Court for Escambia County.
Michael G. Allen, Judge.

Jeffrey E. Bigman of Smith Hood Bigman, Daytona Beach, for Appellant.

Marcus J. Michles II of Michles & Booth, P.A., Pensacola; and Louis K. Rosenbloum of Louis K. Rosenbloum, P.A., Pensacola, for Appellees.

WOLF, J.

Appellant challenges the trial court's order awarding costs and attorney's fees, pursuant to section 768.79, Florida Statutes (2008). He alleges that a proposal for settlement served by appellee Audiffred was invalid because it was a joint proposal that failed to apportion the proposed amount between appellees. We agree and reverse.

Facts

Appellees Audiffred and Kimmons, who have been represented by the same attorney through the entire proceedings, filed a complaint against appellant for negligently driving a vehicle, which resulted in a collision. Audiffred requested damages for her personal injuries and car repairs, and Kimmons, her husband, requested damages for loss of consortium. Audiffred served appellant with a proposal for settlement, which stated:

Proposal for Settlement

> Plaintiff, Valerie Audiffred, by and through the undersigned counsel hereby make [sic] the following proposal for settlement pursuant to F.S. § 768.79 and Rule 1.442 F.R.C.P., to wit:
>
> 1. Name of party or parties making this proposal:
> Plaintiff: Valerie Audiffred
>
> 2. Party or parties to whom the proposal is being made:
> Defendant: Thomas B. Arnold
>
> 3. Identify the claim or claims the proposal is attempting to resolve:
> Any and all claims Plaintiffs have brought against the Defendant set forth in the Complaint in the above captioned case and any other claim or claims that may have risen as a result of the subject incident set forth in Plaintiffs' Complaint, including attorney's fees or costs.
>
> 4. Any relevant conditions:
> *Both Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant.*

5. Total amount of proposal:
Seventeen Thousand Five Hundred Dollars and no cents ($17,500.00).

(Emphasis added). Appellant constructively rejected the proposal for settlement by not responding within thirty days.

At the end of the trial, the jury awarded Audiffred $26,055.54 for her past medical expenses and did not award anything to Audiffred for permanent damages or to Kimmons for his loss of consortium claim. Appellees requested costs and attorney's fees pursuant to section 768.79, which allows a plaintiff to recover reasonable costs and attorney's fees when he or she recovers a judgment at least twenty-five percent greater than the plaintiff's offer of settlement. Appellant filed a motion to strike the proposal for settlement arguing that the proposal was a joint one, and as such, it should have apportioned the amount between the appellees, but failed to do so. After a hearing regarding attorney's fees, the trial court relied on Eastern Atlantic Realty & Investment, Inc. v. GSOMR LLC, 14 So. 3d 1215 (Fla. 3d DCA 2009), and entered an order denying appellant's motion to strike the proposal for settlement and granting appellees' motion for fees.

Joint Proposals

Florida Rule of Civil Procedure 1.442(c) sets out the required format and content of proposals for settlement. It specifically states that a joint proposal must apportion the amount and terms attributable to each party:

(c) Form and Content of Proposal for Settlement

. . . .

(3) 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.

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

The Florida Supreme Court stated in Willis Shaw Express, Inc. v. Hilyer Sod, Inc. 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." 849 So. 2d 276, 278-79 (Fla. 2003). When multiple offerors make a proposal for settlement to a single offeree, that individual is entitled to know the amount and terms attributable to each offeror in order to properly evaluate the offer. Allstate Ins. Co. v. Materiale, 787 So. 2d 173, 175 (Fla. 2d DCA 2001). Moreover, apportioning the amount and terms between the parties "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." Id.

The Proposal for Settlement Was a Joint Proposal

Proposals for settlement are governed by the rules for interpretation of contracts. Pratt v. Weiss, 92 So. 3d 851, 854 (Fla. 4th DCA 2012) (citing Dorson

v. Dorson, 393 So. 2d 632, 633 (Fla. 4th DCA 1981)). The proposal should be looked at as a whole and construed "'according to its own clear and unambiguous terms.'" Id. (quoting Cueto v. John Allmand Boats, Inc., 334 So. 2d 30, 32 (Fla. 3d DCA 1976)). An offer is defined as a "promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance, or return promise being given in exchange for the promise or its performance." Black's Law Dictionary (9th ed. 2009).

In the case at hand, the proposal for settlement stated at the outset that it was submitted by only one party, Audiffred. However, when read as a whole, the proposal clearly expressed a promise that the two appellees would dismiss with prejudice each of their individual claims against appellant upon acceptance. Their shared attorney, an individual who had the apparent authority to make this proposal for settlement, submitted this proposal. Therefore, reading the proposal as a whole, it was a joint proposal.

In arguing the proposal was not joint, appellees rely on Alioto-Alexander v. Toll Bros., Inc., 12 So. 3d 915 (Fla. 4th DCA 2009), and Andrews v. Frey, 66 So. 3d 376 (Fla. 5th DCA 2011), in which courts found that a proposal from one party that was conditioned on the offeree also releasing another individual from liability does not transform the offer into a joint proposal. The proposals in Toll Bros. and Andrews, however, did not promise that another individual would take affirmative

action upon acceptance of the proposal. Therefore, Toll Bros. and Andrews are distinguishable.

The trial court and appellees also relied on Eastern, 14 So. 3d 1215. Eastern is more similar to the case at hand because the proposal for settlement identified one party as the offeror and proposed that the offeror and another party would dismiss their claims against the offeree. In Eastern, Biscayne Joint Venture, Ltd. (BJV) and GSOMR filed claims against Eastern, who then counterclaimed against BJV. Id. at 1218. BJV then served a proposal for settlement offering $20,000 and dismissal of both BJV's and GSOMR's claims against Eastern, if Eastern dismissed its claims against BJV. Id. The Third District held the proposal was not joint, and therefore did not need to apportion between BJV and GSOMR, because it explicitly identified only one offeror: "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 $20,000." Id. at 1221. The district court, however, also discussed the context of the case: "Indeed, as Eastern did not seek any affirmative relief against GSOMR, no reason existed for GSOMR to offer payment of any monies to Eastern." Id.

The Third District's reasoning is somewhat unclear. To the extent the opinion can be read to say that the prefatory language in a proposal identifying the offeror binds the court, we reject this contention. Here, while the first two

paragraphs stated appellee Audiffred was the sole offeror, the proposal as a whole offered that both appellee Audiffred and appellee Kimmons would dismiss their claims against appellant upon appellant's acceptance. Therefore, the proposal was a joint proposal. Thus, it should have apportioned the settlement amount between appellees.

We, therefore, reverse the trial court's order awarding costs and attorney's fees.

REVERSED.

DAVIS and ROBERTS, JJ., CONCUR.