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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 INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner Valerie Audiffred, appellee below, seeks review of the decision of the District Court of Appeal, First District, in Arnold v. Audiffred, 98 So. 3d 746 (Fla. 1st DCA 2012), rev. granted, No. SC12-2377 (Fla. May 3, 2013) (App. 1-4),[1] 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.

The question presented in this case is whether 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 offered to settle the offeror's bodily injury and property damage claims for a certain sum was an undifferentiated, unenforceable "joint proposal" because it provided for dismissal of the offeror's husband's consortium claim upon acceptance. The broader question presented is whether proposals for settlement conditioned upon dismissal of claims for or against a party who is neither an offeror nor offeree are undifferentiated "joint proposals" that render the proposals for settlement invalid and unenforceable.

[1] Petitioner will cite the record on appeal filed in the district court by designation "R" and the appendix to this brief by designation "App.," both followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

Valerie 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. (R-1 1-3). Audiffred requested damages for bodily injuries and property damage while Kimmons requested damages for loss of his wife's consortium. (R-1 1-3). During the course of the proceedings, Audiffred, as the sole offeror, served Arnold with a proposal for settlement pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 offering to settle her claims for bodily injury and property damage for $17,500. (R-1 21; R-6 1168-69; App. 5-6). Although Audiffred was the sole offeror, her proposed settlement included her husband's consortium claim without additional monetary consideration with the following language:

> 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 [sic] as a result of the subject incident set forth in Plaintiffs' Complaint, including attorney's fees or costs.

(R-6 1168; App. 5). In addition to the monetary terms ($17,500), Audiffred identified the following non-monetary conditions:

4. Any relevant conditions:

Both Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant.

(R-6 1168; App. 5). Audiffred's proposal for settlement was signed by the attorney of record for both plaintiffs who had permission from both clients to submit the proposal for settlement solely on Audiffred's behalf.[2] (R-6 1169; R-7

[2] The entire proposal for settlement is quoted in the district court 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 [sic] 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*:

1219).

After Arnold failed to accept Audiffred's proposal for settlement, the cause proceeded to trial resulting in a jury verdict finding Arnold negligent and awarding Audiffred her past medical expenses totaling $26,055.54. (R-4 783). The jury determined Audiffred did not sustain a permanent injury caused by the accident and, consequently, awarded no damages to Audiffred for past and future pain and suffering and no damages to Kimmons for past and future loss of consortium. (R-4 784). After assessing attorney's fees and costs against Arnold for failing to admit negligence, the trial court entered final judgment in plaintiffs' favor for $45,506.89 and reserved jurisdiction to determine the issue of attorney's fees pursuant to Audiffred's proposal for settlement.[3] (R-6 1161-63).

Audiffred thereafter timely served a motion for attorney's fees and costs based on her previously rejected proposal for settlement. (R-6 1164-77). She alleged in her motion she was entitled to attorney's fees and costs pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 because

---

> Seventeen Thousand Five Hundred Dollars and no cents ($17,500.00).

Arnold, 98 So. 3d at 747 (App. 2) (italics the court's).

[3] The final judgment mistakenly entered judgment in favor of both Audiffred and Kimmons. (R-6 1163). This error was corrected in the amended final judgment which entered judgment in favor of Audiffred only. (R-7 1350).

the judgment she obtained against Arnold exceeded the offer made in her proposal for settlement by the requisite statutory amount.[4] (R-6 1164-65).

Arnold moved to strike Audiffred's proposal for settlement on two grounds: (1) "Ms. Audiffred does not have the authority to make a proposal for settlement on behalf of Mr. Kimmons;" and (2) Audiffred's proposal for settlement was an ambiguous, impermissible "joint" or "lump sum" proposal. (R-6 1180). 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 based on the following rationale:

> This Court finds that the offer in this case was clear and unambiguous in that it identified the parties and clearly identified the monetary and non-monetary conditions, that both plaintiffs would dismiss their lawsuit with prejudice. Regardless of whether or not Valerie Audiffred had the authority to bind Robert Kimmons to a voluntary dismissal in the event that the defendant had accepted the proposal for settlement, the defendant clearly had the ability to evaluate the proposal and accept it on its terms. . . . Under the circumstances of this case where Kimmons was represented by the same attorney that represented Audiffred, the Court finds that the proposal for settlement, including a provision that both plaintiffs would dismiss their lawsuit against the defendant, was unambiguous and legally sufficient.

[4] Under section 768.79, Florida Statutes, "[i]f a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the from the date the offer was served." § 768.79(6)(b), Fla. Stat. (2008).

(R-7 1267-68; App. 8-9). The trial court thereafter entered an amended final judgment awarding Audiffred attorney's fees and costs pursuant to her proposal for settlement. (R-7 1347-50). Arnold appealed. (R-7 1351-58).

Finding Audiffred's proposal for settlement was an invalid joint proposal, the District Court of Appeal, First District, reversed the amended final judgment awarding Audiffred attorney's fees and costs. In so holding, the district court cited Willis Shaw in which this 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.'" Arnold, 98 So. 3d at 748 (App. 3) (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:

> [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.

Arnold, 98 So. 3d at 748 (App. 4).

Audiffred thereafter sought review in this Court based on express and direct conflict between the district court decision below and three decisions from the Third, Fourth and Fifth District Courts of Appeal, 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).

SUMMARY OF ARGUMENT

The district court below erred by holding that the proposal for settlement served by Audiffred pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 was an invalid, undifferentiated joint proposal because it offered to dismiss her husband's consortium claim as a non-monetary condition for acceptance of the proposal. The addition of the non-monetary condition did not transform the proposal for settlement from a one offeror-one offeree settlement offer into an undifferentiated, unenforceable joint proposal as the district court determined. Audiffred's proposal for settlement also was unambiguous; its terms were sufficiently clear to permit respondent to make an informed decision without needing clarification.

The First District's holding in this case also is contrary to several decisions from other district courts which have held that a proposal for settlement 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 for settlement invalid and unenforceable. See 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). Petitioner urges the Court to approve these decisions and quash the decision below.

ARGUMENT

I. The district court erred by holding 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 offered to settle the offeror's bodily injury and property damage claims for a certain sum was an undifferentiated, unenforceable "joint proposal" because it provided for dismissal of the offeror's husband's consortium claim upon acceptance.

A. Standard of Review

The enforceability of the proposal for settlement in this case raises a question of law reviewed de novo. See, e.g., Campbell v. Goldman, 959 So. 2d 223, 225 (Fla. 2007).

B. Audiffred's proposal for settlement was not a "joint proposal" for settlement.

Florida Rule of Civil Procedure 1.442 requires proposals for settlement served pursuant to section 768.79, Florida Statutes, to "identify the claim or claims the proposal is attempting to resolve" and "state with particularity any relevant conditions." Fla. R. Civ. P. 1.442(c)(2)(B), (C). In the case of "joint proposals," rule 1.442 also provides:

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) (emphasis supplied).[5] Applying this subsection, 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 pursued 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. See also Cobb v. Durando, 38 Fla. L. Weekly D847, 2013 WL 1629226, at *1 (Fla. 2d DCA Apr. 17, 2013) (holding that a demand for judgment made jointly by co-plaintiffs who

[5] A copy of rule 1.442 is included in the appendix at pages 10-13.

were husband and wife for the undifferentiated sum of $39,992.13 was an invalid joint proposal).

Audiffred's proposal for settlement was not a "joint proposal" of the kind decried by this Court in the line of cases cited above. Her proposal for settlement was not an undifferentiated offer by two plaintiffs to one defendant as in Willis Shaw and Allstate v. Materiale. It was not an undifferentiated offer by one defendant to two plaintiffs as in Allstate v. Hingson. It was not an undifferentiated offer by one plaintiff to two defendants as in Lamb. Instead, it was it was an offer made by one plaintiff to one defendant. The provision in Audiffred's proposal for settlement which included dismissal of her husband's consortium claim upon acceptance of her settlement offer was merely a non-monetary condition that did not transform a one offeror-one offeree settlement offer into an undifferentiated, unenforceable joint proposal as the district court found.

C. District court decisions support the trial court's ruling.

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 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). Petitioner suggests these decisions were correctly decided and should be approved by this Court.

In contrast to Materiale, the proposal for settlement in Eastern Atlantic illustrates an offer that is not an invalid joint proposal for settlement even though the proposal involves multiple parties. In that case, 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 Atlantic, 14 So. 3d at 1218-19. The Third District disagreed and reversed. After first determining

the proposal for settlement was unambiguous, the court 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.

The same result should follow in this case. While the claims of both plaintiffs are identified in the proposal for settlement, the proposal explicitly states that petitioner Audiffred was the sole party offering to accept $17,500 from Arnold in return for dismissal of the entire action, including Kimmons' consortium claim. Because Audiffred was the only offering party, no apportionment of the settlement amount between Audiffred and Kimmons was required.

The district courts in Toll Bros. and Andrews reached the same result as Eastern Atlantic 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.[6] Toll Brothers served Alioto-Alexander with a $5,000

[6] 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).

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.

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.

Toll Bros., 12 So. 3d 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. The Fifth District recently followed Andrews in interpreting a similar proposal for settlement. See Health First, 92 So. 3d at 871 ("Nor were the offers invalidated because of Cataldo's promise to release the remaining defendants as a nonmonetary term of the settlement. This covenant does not transform the offer into an undifferentiated joint offer.").

Although the offeror and offeree are reversed, the rationale from Toll Bros., Andrews and Health First 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.

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." Arnold, 98 So. 3d at 749 (App. 4-5). 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.[7]

D. Petitioner's proposal for settlement was not ambiguous.

It is now settled that a proposal for settlement fraught with ambiguous conditions and non-monetary terms is unenforceable. See State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1079 (Fla. 2006); Mix v. Adventist Health System/Sunbelt, Inc., 67 So. 3d 289, 292 (Fla. 5th DCA 2011). The Court in Nichols, however, "recognize[d] that, given the nature of language, it may be impossible to eliminate all ambiguity." Nichols, 932 So. 2d at 1079. The Court further explained that rule 1.442 "does not demand the impossible." Id. "It merely requires that the settlement proposal be sufficiently clear and definite to allow the

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[7] The Eleventh Circuit in Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 632 F.3d 1195, 1202 (11th Cir. 2011), certified the following question to this Court:

> DOES THE CONDITIONING OF AN OFFER OF JUDGMENT ON THE RESOLUTION AND DISMISSAL WITH PREJUDICE OF THE OFFEREE'S CLAIMS IN THE ACTION AGAINST A THIRD–PARTY RENDER THE OFFER OF JUDGMENT A JOINT PROPOSAL, AS THAT TERM IS USED IN FLORIDA RULE OF CIVIL PROCEDURE 1.442(c)(3)?

The court noted that Toll Brothers required a negative answer but certified the question nevertheless since Toll Brothers was an intermediate appellate court decision. This Court, however, decided the case on other grounds and therefore did not answer the certified question. See Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co., 82 So. 3d 73 (Fla. 2012). The court in Andrews certified a similar question but neither party filed a notice to invoke this Court's jurisdiction. See http://199.242.69.70/pls/ds/ds_docket.

offeree to make an informed decision without needing clarification." Id. "If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement." Id. (emphasis supplied).

"When reviewing offers of judgment, courts should use reason and common sense and interpret the offer as a whole to avoid unreasonable results." Jacksonville Golfair, Inc. v. Grover, 988 So. 2d 1225, 1227 (Fla. 1st DCA 2008). Consistent with this guidance, "parties should not 'nit-pick' the validity of a proposal for settlement based on allegations of ambiguity unless the asserted ambiguity could 'reasonably affect the offeree's decision' on whether to accept the proposal for settlement." Carey-All Transp., Inc. v. Newby, 989 So. 2d 1201, 1205 (Fla. 2d DCA 2008) (quoting Nichols, 932 So. 2d at 1079).

The proposal for settlement in this case was "sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification." Nichols, 932 So. 2d at 1079. As the trial court noted:

> [T]he offer in this case was clear and unambiguous in that it identified the parties and clearly identified the monetary and non-monetary conditions, that both plaintiffs would dismiss their lawsuit with prejudice. . . . [T]he defendant clearly had the ability to evaluate the proposal and accept it on its terms.

(R-7 1267; App 8). In other words, 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. Nothing could be clearer. Any supposed

ambiguity could not possibly have affected Arnold's decision whether to accept the settlement offer.

Any suggestion that Audiffred's proposal for settlement required Arnold to speculate how much of the $17,500 offer was attributable to Audiffred's claim for bodily injury and property damage and how much was attributable to her husband's consortium claim distorts the unambiguous language of the proposal. The 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. (R-6 1168; App. 6). Dismissing her husband's consortium claim upon acceptance of the offer was a non-monetary condition, and it was identified as such in the proposal. (R-6 1168; App. 6). Given these facts, reason and common sense indicate no monetary consideration was attributable to Kimmons' consortium claim since he was not identified as an offeror.

Petitioner recognizes that "[b]oth section 768.79 and rule 1.442 are in derogation of the common law rule that each party is responsible for its own attorney's fees which requires that [this Court] strictly construe both the statute and the rule." Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 376 (Fla. 2013) (emphasis the court's). Nevertheless, petitioner suggests enforcing the proposal for settlement in this case will not impair the common law rule. Further, the district court's decision exalts form over substance in the name of the common

law at the expense of the legislative intent behind section 768.79 "to reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions." Gorka, 36 So. 3d at 650. This case represents yet another example where the statute has had the opposite effect. See id. ("The effect, however, has been in sharp contrast to the intended outcome because the statute and rule have seemingly increased litigation as parties dispute the respective validity and enforceability of these offers.").

CONCLUSION

For the foregoing reasons, this Court should quash the district court decision.

Respectfully submitted:

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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 24th day of May, 2013.

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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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98 So.3d 746, 37 Fla. L. Weekly D2373
(Cite as: 98 So.3d 746)

District Court of Appeal of Florida,
First District.
Thomas B. ARNOLD, Appellant,
v.
Valerie AUDIFFRED and Robert Kimmons, husband and wife, Appellees.

No. 1D11–6583.
Oct. 10, 2012.

Background: Injured motorist brought negligence action against driver of other automobile involved in collision, and motorist's husband asserted claim for loss of consortium. After jury awarded motorist $26,055.54 for past medical expenses, motorist and husband moved for costs and attorney fees pursuant to the offer of judgment statute and rule, based on an unaccepted proposal to settle the case for $17,500. The Circuit Court, Escambia County, Michael G. Allen, J., entered order denying driver's motion to strike the proposal for settlement, and granting the motion for fees. Driver appealed.

Holding: The District Court of Appeal, Wolf, J., held that proposal for settlement was a joint proposal on behalf of motorist and husband, and thus proposal's failure to apportion the settlement precluded recovery of fees.

Reversed.

West Headnotes

[1] Costs 102 42(2)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of judgment in general. Most Cited Cases

Under the offer of judgment statute and rule, 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; 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. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442(c)(3).

[2] Compromise and Settlement 89 11

89 Compromise and Settlement
89I In General
89k10 Construction of Agreement
89k11 k. In general. Most Cited Cases

Proposals for settlement are governed by the rules for interpretation of contracts.

[3] Compromise and Settlement 89 11

89 Compromise and Settlement
89I In General
89k10 Construction of Agreement
89k11 k. In general. Most Cited Cases

A proposal for settlement should be looked at as a whole and construed according to its own clear and unambiguous terms.

[4] Costs 102 42(2)

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102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of judgment in general. Most Cited Cases

Costs 102 194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of offer of judgment or pretrial deposit or tender. Most Cited Cases

Proposal for settlement of injured motorist's negligence action against driver of other automobile involved in collision was a joint proposal on behalf of motorist and her husband, who asserted claim for loss of consortium in the action, and thus proposal's failure to apportion the settlement between the two offerors precluded recovery of attorney fees and costs pursuant to the offer of judgment statute and rule, even though proposal stated that it was submitted only by motorist; proposal expressed a promise that motorist and husband would both dismiss their claims against driver, and proposal was submitted by attorney for both motorist and husband. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442(c)(3).

***747** 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.

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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 ***748** 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).

[1] 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

[2][3] 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).

[4] 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.

***749** 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.

Fla.App. 1 Dist.,2012.
Arnold v. Audiffred
98 So.3d 746, 37 Fla. L. Weekly D2373

END OF DOCUMENT

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

VALERIE AUDIFFRED and
ROBERT KIMMONS, husband
and wife,

Plaintiffs,

vs.

CASE NO.: 2009 CA 000625
DIVISION: D

THOMAS B. ARNOLD,

Defendant.

PROPOSAL FOR SETTLEMENT

Plaintiff, Valerie Audiffred, by and through the undersigned counsel hereby make 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 and 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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished to Michelle L. Hendrix, Esq., 315 S. Palafox Street, Pensacola, FL 32502 by U.S. Mail, on this 29 day of April, 2010.

R. Adrian Bridges
FL Bar No.: 58877
MICHLES & BOOTH, P.A.
501 Brent Lane
Pensacola, FL 32504
Phone: 850-438-4848
Fax: 850-437-5556
Attorneys for Plaintiffs

IN THE FIRST JUDICIAL CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

VALERIE AUDIFFRED AND ROBERT KIMMONS,
Husband and Wife,
Plaintiffs,

vs.

THOMAS B. ARNOLD,
Defendant.
_____/

CASE NO. 2009 CA 0625
DIVISION D

ERNIE LEE MAGAHA
CLERK OF CIRCUIT COURT
ESCAMBIA COUNTY, FL
2011 SEP -9 P 1:47
CIRCUIT CIVIL DIVISION
FILED & RECORDED

ORDER DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S PROPOSAL FOR SETTLEMENT

THIS MATTER was before the Court on August 31, 2011 for hearing on the motion of the plaintiff, Valerie Audiffred, for Attorney's Fees and on the defendant's Motion to Strike the Plaintiff's Proposal for Settlement. Counsel for both parties were present with witnesses and prepared for the hearing. Because of an emergency matter, the Court was delayed in beginning the hearing and plaintiff's witness was unable to remain for the hearing because of an urgent medical appointment. The Court conducted a hearing on the defendant's Motion to Strike the Plaintiff's Proposal for Settlement and reserved ruling on it. The Court heard evidence from the defendant's witness with regard to the plaintiff's Motion for Attorney's Fees and announced that it would schedule additional hearing to allow the testimony of the plaintiff's expert. The additional hearing has not yet been conducted.

The defendant moved to strike the plaintiffs' proposal for settlement alleging that the proposal for settlement is defective because it was served only by the plaintiff, Valerie Audiffred, and that it purported to offer to dismiss the consortium claim of her husband, Robert Kimmons. It is undisputed that the proposal for settlement is not joined by Robert Kimmons. It is also undisputed that Robert Kimmons was represented by the same attorney who represented his wife. The defendant has argued that the proposal should be stricken because it is either a joint proposal which fails to apportion the settlement between the plaintiffs, or it was a proposal only by Valerie Audiffred

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purporting to dismiss the claim of her husband, Robert Kimmons, without the authority of Valerie Audiffred to compel such dismissal.

The Court has considered the argument of counsel and has reviewed the cases submitted by counsel. The Court finds the case of Eastern Atlantic Realty And Investment, Inc. v. GSOMR, LLC and Biscayne Joint Venture, Ltd., 14 So. 3d 1215 (Fla. 3d DCA 2009) to be most instructive. In Eastern v. GSOMR and BJV, the original lawsuit was brought by BJV and GSOMR against Eastern. Eastern then sued BJV. The cases were consolidated by the trial court. Prior to trial, BJV made a proposal for settlement to pay Eastern $20,000. The non-monetary conditions included the provision that Eastern would dismiss its claim against BJV and BJV and GSOMR would each dismiss their claims against Eastern. The trial court found 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. The Third District Court of Appeal reversed the trial court and held that the proposal was not ambiguous in that it clearly identified the parties to be released and the scope of the release. The Court noted that when there were relevant non-monetary conditions, Fla. R. Civ. P. 1.442 "merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification." (Carey-All Transp., Inc. v. Newby, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008) and State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067 (Fla. 1st DCA 2006)). The Third District further held that the plain language of the rule only requires apportionment if the proposal is made jointly by several parties.

This Court finds that the offer in this case was clear and unambiguous in that it identified the parties and clearly identified the monetary and non-monetary conditions, that both plaintiffs would dismiss their lawsuit with prejudice. Regardless of whether or not Valerie Audiffred had the authority to bind Robert Kimmons to a voluntary dismissal in the event that the defendant had accepted the proposal for settlement, the defendant clearly had the ability to evaluate the proposal and accept it on its terms. Valerie Audiffred had no less authority to bind Robert Kimmons than did BJV have authority to bind GSOMR. (Eastern Atlantic, id) Under the circumstances of this case where Kimmons was represented by the same attorney that represented Audiffred, the Court

finds that the proposal for settlement, including a provision that both plaintiffs would dismiss their lawsuit against the defendant, was unambiguous and legally sufficient. Therefore, the defendant's Motion to Strike the Plaintiff's Proposal for Settlement is DENIED.

It is therefore **ORDERED AND ADJUDGED** as follows:

1. The defendant's Motion to Strike the Plaintiff's Proposal for Settlement is DENIED.
2. Counsel shall schedule additional evidentiary hearing for the Court to hear testimony of plaintiff's witness and for counsel to make argument to the Court.

DONE AND ORDERED in Chambers on this 9th day of September 2011, at Pensacola, Escambia County, Florida.

Michael G. Allen, Circuit Court Judge

Copies to:

9-9-11 W

✓Adrian Bridges, Esquire, Attorney for Plaintiffs (Michles & Booth, P.A.)
Michelle L. Hendrix, Esquire, Attorney for Defendant (Vernis & Bowling of Northwest Florida, P.A.)

Rule 1.442. Proposals for Settlement

(a) Applicability. This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

(b) Service of Proposal. A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

(c) Form and Content of Proposal for Settlement.

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080.

(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.

(4) Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

(d) Service and Filing. A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

(e) Withdrawal. A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, a proposal is void.

(f) Acceptance and Rejection.

(1) A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of rule 1.090(e) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

(2) In any case in which the existence of a class is alleged, the time for acceptance of a proposal for settlement is extended to 30 days after the date the order granting or denying certification is filed.

(g) Sanctions. Any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with rule 1.525.

(h) Costs and Fees.

(1) If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorneys' fees.

(2) When determining the reasonableness of the amount of an award of attorneys' fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

(A) The then-apparent merit or lack of merit in the claim.

(B) The number and nature of proposals made by the parties.

(C) The closeness of questions of fact and law at issue.

(D) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

(i) Evidence of Proposal. Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

(j) Effect of Mediation. Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.

COMMITTEE NOTES

1996 Amendment. This rule was amended to reconcile, where possible, sections 44.102(6) (formerly 44.102(5)(b)), 45.061, 73.032, and 768.79, Florida Statutes, and the decisions of the Florida Supreme Court in *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996), *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995), and *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992). This rule replaces former rule 1.442, which was repealed by the *Timmons* decision, and supersedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions. The provision which

requires that a joint proposal state the amount and terms attributable to each party is in order to conform with *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

2000 Amendment. Subdivision (f)(2) was added to establish the time for acceptance of proposals for settlement in class actions. "Filing" is defined in rule 1.080(e). Subdivision (g) is amended to conform with new rule 1.525.

2012 Amendment. Subdivision (c)(2)(G) is amended to reflect the relocation of the service rule from rule 1.080 to Fla. R. Jud. Admin. 2.516.