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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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
ARGUMENT	1
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.	1
A. Audiffred's proposal for settlement was not a "joint proposal" for settlement.	1
B. Audiffred's proposal for settlement was not ambiguous.	2
C. District court decisions support the trial court's ruling.	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF TYPE STYLE AND SIZE	9

TABLE OF CITATIONS

CASES

Alioto-Alexander v. Toll Bros., Inc.,
12 So. 3d 915 (Fla. 4th DCA 2009) 6

Allstate Ins. Co. v. Materiale,
787 So. 2d 173 (Fla. 2d DCA 2001) 1, 7

Andrews v. Frey,
66 So. 3d 376 (Fla. 5th DCA 2011) 6, 8

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

Bradshaw v. Boynton-JCP Assocs., Ltd.,
38 Fla. L. Weekly D823,
2013 WL 1442041 (Fla. 4th DCA April 10, 2013) 6

Campbell v. Goldman,
959 So. 2d 223 (Fla. 2007) 4

Carey-All Transp., Inc. v. Newby,
989 So. 2d 1201 (Fla. 2d DCA 2008) 5

Eastern Atl. Realty & Inv., Inc. v. GSOMR, LLC,
14 So. 3d 1215 (Fla. 3d DCA 2009) 6

Friedman v. Virginia Metal Products Corp.,
56 So. 2d 515 (Fla. 1952) 3

Health First, Inc. v. Cataldo,
92 So. 3d 859 (Fla. 5th DCA 2012) 6

Jacksonville Golfair, Inc. v. Grover,
988 So. 2d 1225 (Fla. 1st DCA 2008) 4, 8

Lambert v. Berkley South Condominium Ass'n, Inc.,
680 So. 2d 588 (Fla. 4th DCA 1996) 3

Palm Beach Polo Holdings, Inc. v.
Madsen, Sapp, Mena, Rodriguez & Co.,
957 So. 2d 36 (Fla. 4th DCA 2007) 8

School Bd. of Palm Beach County v.
Survivors Charter Schools, Inc.,
3 So. 3d 1220 (Fla. 2009) 4

State Farm Mut. Auto. Ins. Co. v. Nichols,
932 So. 2d 1067 (Fla. 2006)....................5

STATUTES

Section 768.79, Florida Statutes .... i, 1, 4, 8

RULES

Florida Rule of Civil Procedure 1.442.................... *passim*

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

As petitioner Audiffred argued in her initial brief, 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). Because Audiffred's proposal for settlement identified Audiffred as the sole offering party (R-6 1168, App. 5), her proposal for settlement was not a joint proposal that required apportionment.

Nevertheless, respondent Arnold argues that the district court correctly construed Audiffred's proposal for settlement as a joint proposal because "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." Answer Brief on the Merits at 5 (quoting proposal for settlement at R-6 1168; App. 5) (emphasis supplied). In response, Audiffred's use of the plural terms "claims" and

"Plaintiffs" did not transform her proposal for settlement into a joint proposal. While acceptance of Audiffred's proposal for settlement would have resolved both Audiffred's bodily injury claim and her husband's derivative consortium claim, the monetary settlement offer ($17,500) was limited to Audiffred's bodily injury claim. Because no part of the $17,500 monetary consideration applied to the consortium claim, there was no reason to apportion the settlement offer between Audiffred and her husband nor did Florida Rule of Civil Procedure 1.442 require it.

B. Audiffred's proposal for settlement was not ambiguous.

Arnold argues Audiffred's proposal for settlement was fatally ambiguous because "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 . . . ." Answer Brief on the Merits at 7. Arnold thus reasons that Audiffred's proposal for settlement was ambiguous because it suggested "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.'" Answer Brief on the Merits at 9. Arnold's argument, however, requires a strained interpretation of the proposal for settlement that does not comport with reason and common sense.

As the district court noted, "[p]roposals for settlement are governed by the rules for interpretation of contracts." Arnold v. Audiffred, 98 So. 3d 746, 748 (Fla. 1st DCA 2012). "A contract is ambiguous when it is reasonably or fairly susceptible to different constructions." Friedman v. Virginia Metal Products Corp., 56 So. 2d 515, 517 (Fla. 1952) (emphasis supplied). "[A] true ambiguity does not exist merely because a document can possibly be interpreted in more than one manner." Lambert v. Berkley South Condominium Ass'n, Inc., 680 So. 2d 588, 590 (Fla. 4th DCA 1996).

Applying these principles, Audiffred's proposal for settlement is not ambiguous because it is susceptible to only one reasonable interpretation, that is, by paying $17,500 for Audiffred's claim alone, the entire action would be dismissed. Arnold's argument that the proposal for settlement suggests "some monetary consideration was attributable to Kimmons' consortium claim" is not a fair and reasonable construction of the document. To the contrary, Kimmons was not listed as an offeror, and dismissal of Kimmons' consortium claim upon acceptance of the offer was stated as a nonmonetary condition. (R-6 1168; App. 6). Given these facts, reason and common sense indicate no monetary consideration was attributable to Kimmons' consortium claim.

Arnold also argues that "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." Answer Brief on the Merits at 6. Contrary to Arnold's argument, however, the trial court, as explained in its order, had no difficulty understanding the terms of the proposal for settlement and found no reason to apportion the monetary consideration between the two plaintiffs:

> [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).

Audiffred acknowledges that both section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 are in derogation of the common law and therefore must be strictly construed. See Campbell v. Goldman, 959 So. 2d 223, 226-27 (Fla. 2007). However, merely because the statute and rule supplant the common law does not mean the Court should abandon reason and common sense when applying them to a proposal for settlement. See School Bd. of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1235 (Fla. 2009) ("We are not required to abandon either our common sense or principles of logic in statutory interpretation."); Jacksonville Golfair, Inc. v. Grover, 988 So. 2d 1225, 1227 (Fla. 1st DCA 2008) ("When reviewing offers of judgment, courts should use reason and common sense and interpret the offer as a whole to avoid unreasonable

results.”). Further, “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 State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1079 (Fla. 2006)).

Florida Rule of Civil Procedure 1.442 requires the offeror to state the terms of a proposal for settlement with “particularity.” See Nichols, 932 So. 2d at 1079. Rule 1.442, however, does not require the offering party to eliminate any possible ambiguity. See id. at 1079. As Audiffred noted in her initial brief, rule 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.” Nichols, 932 So. 2d at 1079. “If ambiguity within the proposal could reasonably affect the offeree’s decision, the proposal will not satisfy the particularity requirement.” Id. (emphasis supplied).

Any supposed ambiguity in Audiffred’s proposal for settlement could not have reasonably affected Arnold’s decision whether to accept the settlement offer. Arnold knew at the time Audiffred served her proposal for settlement that by paying $17,500 for Audiffred’s bodily injury claim he could settle the entire case, including Kimmons’ consortium claim, and end all judicial labors. Arnold made an

informed decision not to accept the proposal, choosing instead to entrust his fate to a jury. Having made an informed decision, Arnold cannot now manufacture an ambiguity to avoid paying attorney's fees by parsing inconsequential wording that had no bearing on his decision whether to accept Audiffred's proposal for settlement.[1]

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

As Audiffred argued in her initial brief, the Third, Fourth and Fifth Districts 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 (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). This is precisely what occurred here.

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[1] The proposal for settlement in this case does not embody the same singular versus plural drafting errors that created ambiguities in the proposal for settlement in Bradshaw v. Boynton-JCP Assocs., Ltd., 38 Fla. L. Weekly D823, 2013 WL 1442041 (Fla. 4th DCA April 10, 2013).

Arnold expends considerable effort in his answer brief distinguishing these cases on their particular facts. Although the fact patterns vary, the cited cases all recognize that rule 1.442 does not require a proposal for settlement to apportion monetary consideration to each affected party. If a proposal for settlement includes monetary consideration for some parties and nonmonetary terms for others, the offer is not an undifferentiated joint proposal that requires apportionment so long as those monetary and nonmonetary terms are stated with sufficient particularity. Nothing in rule 1.442 requires a settlement offer to include only monetary terms.

Arnold's reliance on the Second District's decision in Materiale is misplaced. In that case, the injured party and her husband made a combined proposal for settlement to resolve their respective bodily injury and consortium claims for the total sum of $180,000. The Second District held this undifferentiated offer was invalid because it failed to specify the settlement amount attributable to each offering party. The court reasoned that "[w]hen two offerors make a proposal for settlement 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 as it pertains to that party." Id. at 175.

Unlike the offer in Materiale, the proposal for settlement in this case was not a joint proposal for settlement because it was submitted by only one plaintiff (Audiffred) to only one defendant (Arnold). The fact that Audiffred's proposal for

settlement included the condition that she would dismiss the entire action if Arnold accepted, including her husband's consortium claim, was a nonmonetary condition that did not convert her single proposal for settlement into an undifferentiated joint proposal.[2]

CONCLUSION

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

Respectfully submitted:

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[2] Arnold also argued in the district court that Audiffred's proposal for settlement was invalid because she failed to attach a proposed release or at least summarize the terms of a proposed release. He advances a similar argument in this Court as a ground for distinguishing Andrews. Answer Brief on the Merits at 16. Arnold's release argument is meritless, however, because execution of a release was not a condition or term of Audiffred's proposal for settlement. Instead, she stated that upon acceptance of her offer by Arnold "[b]oth Plaintiffs will dismiss this lawsuit, with prejudice, as to the Defendant." (R-6 1168; App. 5). Nothing more was required. In fact, nothing in section 768.79, Florida Statutes, or Florida Rule of Civil Procedure 1.442 requires a proposal for settlement to specify the procedural mechanism for finalizing the proposed settlement. See Jacksonville Golfair, 988 So. 2d at 1228; Palm Beach Polo Holdings, Inc. v. Madsen, Sapp, Mena, Rodriguez & Co., 957 So. 2d 36, 38 (Fla. 4th DCA 2007).

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 25th day of July, 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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