IN THE SUPREME COURT OF FLORIDA

TROY ANDERSON,

Petitioner,

v.

Case No.: SC15-124
L.T. No.: 5D13-2552, 5D13-2553

HILTON HOTELS CORP. et al.,

Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Troy Anderson invokes this Court's jurisdiction to resolve two conflicts involving proposals for settlement: (1) whether an isolated ambiguity that is eliminated when the proposal is read as a whole will invalidate the proposal, and (2) whether the amounts of separate proposals to multiple defendants must be combined when comparing them to a judgment entered against them jointly.

After he was attacked in the parking lot of an Embassy Suites in Orlando, Mr. Anderson and his wife Paul sued SecurAmerica LLC, the company providing security at the hotel, and the three entities that collectively franchised, owned, operated, and managed the hotel, Hilton Hotels Corporation, W2007 Equity Inns Realty, LLC, and Interstate Hotels & Resorts, Inc. (collectively, the "Hotel Defendants"). (App. 1-2.)

Mr. Anderson served separate proposals for settlement on SecurAmerica for $300,000, Hilton for $650,000, W2007 for $100,000, and Interstate for $650,000. (App. 3.) Each proposal contained the following language:

> 1. This Proposal for Settlement is made pursuant to Florida Statute § 768.79, and is extended in accordance with the provisions of Rule 1.442, Fla. R. Civ. P.
>
> 2. This Proposal for Settlement is made on behalf of Plaintiff, TROY ANDERSON ("PLAINTIFF"), and is made to [Defendant].
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against [Defendant].

> 4. That in exchange for [amount demanded] in hand paid from [Defendant], PLAINTIFF agrees to settle any and all claims asserted against [Defendant], as identified in Case Number 2009-CA- 040473-O, brought in the Circuit Court in and for Orange County, Florida.
>
> 5. This Proposal for Settlement is inclusive of all damages claimed by PLAINTIFF, including all claims for interest, costs, and expenses and any claims for attorney's fees.

(App. 5.) None of the defendants accepted Mr. Anderson's proposals, Mrs. Anderson subsequently dismissed her claims for loss of consortium, and the case went to trial against all four defendants on Mr. Anderson's claims. (App. 3.)

At trial the parties agreed to treat the Hotel Defendants collectively as "Embassy Suites" and to instruct the jury to treat them as "one and the same." (App. 3-4.) After a plaintiff's verdict, the trial court entered judgment for approximate $500,000 against SecurAmerica and approximately $1.2 million against the Hotel Defendants. (App. 4) The trial court denied Mr. Anderson's motions for attorney's fees finding his settlement proposals invalid. (App. 4, 6)

The defendants appealed the judgment, and Mr. Anderson appealed the denial of his motion for fees. The district court summarily affirmed the judgment in Case No. 5D13-1722, and it affirmed the denial of fees in Nos. 5D13-2552 and 2553. (App. 1-2, 8.) The district court recognized that the third paragraph "reflects that the proposal was intended to resolve only Troy Anderson's claim," but concluded that language in the fourth paragraph "rendered each of the demands

vague, ambiguous, and unenforceable" because it could "reasonably be interpreted to mean that the intent of the demands for judgment was to resolve the claims of both Troy and Paula Anderson." (App. 6)

The district court also held that the amounts of the three proposals to the three Hotel Defendants had to be added together before comparing them to the amount of the joint judgment against them to prevent "the purpose behind the enactment of section 768.79 (i.e., to sanction a party for rejecting a presumptively reasonable proposal for settlement)" from being "ill-served." (App. 7-8.)

Mr. Anderson invoked this Court's conflict jurisdiction on the fee issues in Case Nos. 5D13-2552 and 2553, while the defendants allowed the affirmance of the judgment to become final in Case No. 5D13-1772.

SUMMARY OF ARGUMENT

This Court should grant review because the decision below conflicts with decisions from the Fourth District and reasoning from this Court that a proposal for settlement should be enforced despite isolated ambiguity that is eliminated by other parts of the proposal. It also has jurisdiction because the decision below conflicts with decisions from the Second District that the amount of separate proposals against multiple defendants should be compared individually and not collectively against the ultimate judgment entered against the defendants jointly. The Court should exercise its discretion to resolve these conflicts because it is impossible to

eliminate all ambiguity and litigation against defendants who may be jointly liable is common. Section 768.79's goal of encouraging settlement is an important policy for this Court to promote, and the applicable law on these two issues should not depend on the location in which suit is filed.

ARGUMENT

I. The Decision Below Conflicts With Decisions Prohibiting Courts From Reading Provisions of a Proposal For Settlement in Isolation.

The Fifth District's opinion expressly and directly conflicts with decisions of the Fourth District and reasoning in a decision from this Court because the Fifth District invalidated the proposal based on the conclusion that one sentence of the proposal was ambiguous even though the previous sentence resolved the ambiguity. Specifically, it concluded that paragraph 3 – "This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against [Defendant]" – reflects that the proposal was intended to resolve only Troy Anderson's claim. (App. 6.) Despite that clarity, which was amplified by Paragraph 2's definition of "Plaintiff" as "Plaintiff, TROY ANDERSON" and statement that the proposal was made on his behalf, the court invalidated the proposal because paragraph 4's use of the phrase "PLAINTIFF agrees to settle any and all claims asserted against [Defendant]" "can reasonably be interpreted to mean that the intent of the demands for judgment was to resolve the claims of both Troy and Paula Anderson." (App. 6)

The court found that the ambiguity in paragraph 4 as to whether Mr. Anderson was proposing to just settle his own claim or was somehow also trying to settle his wife's claim[1] rendered the proposal invalid. It found that this result is consistent with its prior decision in *Hibbert ex rel. Carr v. McGraw*, 918 So. 2d 967 (Fla. 5th DCA 2005), which noted that "virtually any proposal that is ambiguous is not enforceable." *Id.* at 971. That observation from *Hibbert* and the holding in this case conflict with several decisions from the Fourth District that enforce proposals that possess an isolated ambiguity that is resolved by the rest of the proposal.

For example, *Alamo Financing, L.P. v. Mazoff*, 112 So. 3d 626 (Fla. 4th DCA 2013), involved a proposal to the plaintiff from one of two defendants, Alamo Financing, that included a sentence stating that it was intended to resolve "[a]ll Claims made in the present action by [the plaintiff] including any claims that could be made against Alamo Financing." *Id.* at 629. The plaintiff contended that this sentence was ambiguous as to whether the reference to "all claims" which included the claims against the other defendant. *Id.* at 629-30. The Fourth District

[1] His wife's claims belonged solely to her and could not be controlled by Anderson because that a claim of loss of consortium can continue even if the injured settles his claims and releases the defendants. *Metro Dade County v. Reyes*, 688 So. 2d 311,312 (Fla. 1996); *Ryter v. Brennan*, 291 So. 2d 55 (Fla. 1st DCA 1974); *Resmondo v. International Builders of Fla., Inc.* 265 So. 2d 72 (Fla. 1st DCA 1972).

conceded that this sentence was ambiguous because "when read in isolation, the complained-of sentence could be plausibly interpreted as resolving 'all claims made in the present action' by the plaintiff." *Id.* at 630. But it rejected the plaintiff's argument and enforced the proposal in terms that would require the proposal in this case to be enforced. The court concluded that "while the plaintiff's reading of the complained-of sentence is grammatically possible, it is substantively unreasonable" because "any potential ambiguity is clarified by reference to the proposal for settlement as a whole." *Id.*

> The plaintiff's interpretation of the proposal for settlement ignores the well-established principle that "the intention of the parties must be determined from an examination of the entire contract and not from separate phrases or paragraphs."

Id. (quoting *Moore v. State Farm Mut. Auto. Ins. Co.*, 916 So. 2d 871, 875 (Fla. 2d DCA 2005)). The court concluded that the ambiguity was resolved because "the proposal for settlement named only [one party] as the party making the proposal," "named *only* Alamo Financing as the party making the proposal," and contemplated the dismissal of the suit against and release of only Alamo Finance and its related entities. *Id.* These terms clarified that the proposal would only resolve claims against Alamo Finance to the same extent that paragraph 2 and 3 of the proposals in this case clarified that they would only resolve the claims by Mr. Anderson. This is express and direct conflict.

The decision below also expressly and directly conflicts with other district court decisions enforcing proposals because the opponent's claim of ambiguity is resolved by reviewing the proposal as a whole. *See Pratt v. Weiss*, 92 So. 3d 851, 854 (Fla. 4th DCA 2012) (holding that a proposal stating that the defendants' agents would be released was not ambiguous as to whether it would release an agent that was a named codefendant because the proposal also "specifically stated that acceptance would NOT release other named defendants"); *Ledesma v. Iglesias*, 975 So. 2d 1240, 1243 (Fla. 4th DCA 2008) (enforcing a proposal because even though the appellant claimed some language was "confusing" the language was not ambiguous when "looking at the document as a whole").

Even if the conflict may not be sufficiently direct to independently support jurisdiction, the decision below expressly conflicts with this Court's prior reasoning that proposals that contain ambiguities can still be enforceable if the proposals as a whole can be read to eliminate the uncertainty:

> We recognize that, given the nature of language, it may be impossible to eliminate all ambiguity. The rule does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement.

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

Because the paragraphs 2 and 3 make clear that these proposals only cover Mr. Anderson's claim, they eliminate the potential ambiguity in paragraph 4 as to whether Mrs. Anderson's claim might also be covered. Thus, the defendants were able to make an informed decision despite the ambiguity found when paragraph 4 is read in isolation. This Court should grant review lest the Fifth District (and apparently the First[2]) continue to demand the impossible of litigants seeking to take advantage of section 768.79's policy of using proposals to encourage settlement.

II. The Decision Below Conflicts With Decisions Holding That Separate Offers Cannot Be Combined When Comparing Them to a Judgment Against Multiple Defendants.

An additional conflict not only further supports jurisdiction, but also makes this case all the more appropriate for review to prevent proposals for settlement from becoming impossible to use appropriately in cases involving multiple defendants with joint liability. In a ruling it recognized it did not even have to reach, the district court ruled that the amounts of separate offers made to

[2] In *Paduru v. Klinkenberg*, 2014 WL 7202828, Nos. 1D12-5712, 1D13-2562, 1D13-4597 (Fla. 1st DCA. Dec. 17, 2014), the court invalidated a proposal because one sentence in a proposal to Ms. Paduru was ambiguous because it could be interpreted as conditioning the proposal on the acceptance of her husband, Mr. Anugu, even though other sentences in the proposal "stated that it was directed only to Paduru" and that "there were no relevant conditions for acceptance, other than those provides in the applicable statute and rule."

defendants who are ultimately held jointly liable must be added together when compared to the amount of the judgment. (App. 7-8.) This determination expressly and directly conflicts with the decisions in *Hess v. Walton*, 898 So. 2d 1046 (Fla. 2d DCA 2005), and *Thornburg v. Pursell*, 476 So. 2d 323 (Fla. 2d DCA 1985).

In *Hess*, the plaintiff sued a doctor and his practice for malpractice and made separate proposals to settle with the doctor for $100,000 and the practice for $15,000. 898 So. 2d at 1047. They rejected the proposals and ultimately suffered a $23,500 verdict. *Id.* Thus, the judgment exceeded the proposal to the practice by more than 25%, but did not exceed either the proposal to the doctor or, obviously, the combined total of the two proposals. Directly contrary to the holding in this case, the Second District affirmed the trial court's order awarding fees against the practice. *Id.* at 1048. Recognizing a point of tremendous importance in any case where a plaintiff sues defendants with joint liability, the court noted that "there are logical, strategic reasons why a plaintiff might settle cheaply with one of these parties while demanding a more reasonable settlement from the other." *Id.*

Finally, in *Thornburg*, the Second District directly held that Florida Rule of Civil Procedure 1.442 "does not provide for combining two separate and distinct offers" and therefore enforced separate proposals even though their combined amount would not have triggered enforcement in relation to the amount of the joint judgment against the defendants. 476 So. 2d at 324-25. While it was

addressing a prior version that provided only for an award of costs when an offer of judgment was beaten, that difference has no impact on the conflict regarding whether the amounts must be combined.

Litigation against defendants with joint potential liability is quite common, and the rules for determining under what circumstances separate proposals to the defendants are triggered are tremendously important. The Court should grant review to ensure that the result is the same throughout the state.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following counsel by email on March 5, 2015:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Thomas D. Hall
Attorney

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

HILTON HOTELS CORPORATION, ETC., ET AL.,

Appellants,

v.

Case No. 5D13-1722

TROY ANDERSON AND PAULA ANDERSON,

Appellees.

_____/

Opinion filed December 19, 2014

Appeal from the Circuit Court for Orange County, F. Rand Wallis, Judge.

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Barbara A. Eagan and Margaret E. Kozan, of Eagan Appellate Law, PLLC, Orlando, W. Riley Allen, of Riley Allen Law, Orlando, and Simon L. Wiseman, of The Wiseman Law Firm, Orlando, for Appellee Troy Anderson.

No Appearance for Appellee Paula Anderson.

TROY ANDERSON,

Appellant,

v.

Case Nos. 5D13-2552
5D13-2553

HILTON HOTELS CORPORATION, ETC., ET AL.,

Appellees.

_____/

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EVANDER, J.

Hilton Hotels Corporation ("Hilton"), W2007 Equity Inns Realty, LLC ("W2007"), Interstate Hotels & Resorts, Inc. ("Interstate"), and SecurAmerica, LLC ("SecurAmerica") appeal from a final judgment in a personal injury/negligent security case in which the jury awarded Troy Anderson ("Anderson") damages in excess of $1.7 million. Anderson filed a separate appeal from the trial court's post-trial orders denying his request for an award of attorney's fees under section 768.79, Florida Statutes (2011). We affirm the

final judgment in all respects and write only to address the issues raised in Anderson's appeal.

On September 26, 2008, Anderson was the victim of a criminal attack in the parking lot of an Embassy Suites Hotel in Orlando, Florida. The hotel was owned and operated by W2007 pursuant to its franchise agreement with Hilton. Interstate managed the hotel pursuant to its contract with W2007. SecurAmerica was retained by Interstate to provide security services on the hotel's property. Following the attack, Anderson and his wife, Paula, filed a multi-count second amended complaint against the four defendants. The complaint asserted that each of the defendants was negligent and, notably, was devoid of any allegations of vicarious liability.

On October 5, 2011, Anderson served separate demands for judgment on Hilton, W2007, and Interstate. In his demands for judgment, Anderson sought $650,000 each from Hilton and Interstate, and $100,000 from W2007. On March 16, 2012, Anderson served a demand for judgment on SecurAmerica in the amount of $300,000.

Shortly before the trial commenced in late October 2012, Paula Anderson and her loss of consortium claim were dropped from the lawsuit. As a result, only Anderson's claims were presented to the jury. During the charge conference, the defendants' counsel proposed that the jury instructions and the verdict form reference defendants Hilton, W2007, and Interstate collectively as "Embassy Suites." The proposal was accepted by Anderson's counsel and, at his request, the jury was given the following instruction:

> Members of the jury, you can assume, for purposes of your deliberation, that Interstate Hotels and Resorts, Inc., Hilton Hotels Corporation, and W2007 Equity Inns Realty, LLC are

> one and the same. These defendants will be referred to in the jury instructions and verdict form as Embassy Suites.

The jury returned a verdict finding the "Embassy Suites" defendants 72% at fault, SecurAmerica 28% at fault, and Anderson 0% at fault. Anderson's total damages were determined to be $1,702,066. After consideration of collateral source set-offs and the imposition of taxable costs, the trial court entered a partial final judgment against the "Embassy Suites" defendants in the amount of $1,252,188.74, and against SecurAmerica in the amount of $486,962.28. In its partial final judgment, the trial court reserved jurisdiction for the determination of all attorney's fees issues.

Anderson claimed entitlement to attorney's fees pursuant to section 768.79, Florida Statutes (2011). That statute provides that where a plaintiff files a demand for judgment that is not accepted by the defendant within thirty days, and the plaintiff recovers the judgment in an amount of at least twenty-five percent greater than the demand, the plaintiff is entitled to recover reasonable attorney's fees incurred from the date of the filing of the demand. § 768.79(1), Fla. Stat. (2011). A demand for judgment must be in writing, state that it is being made pursuant to the statute, identify the offeror and offeree, and state the total amount of the demand. § 768.79(2), Fla. Stat. (2011); *see also* Fla. R. Civ. P. 1.442.[1]

An award of attorney's fees under section 768.79 is a sanction against the rejecting party for the refusal to accept what is presumed to be a reasonable offer. *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 222 (Fla. 2003). Because the statute is

[1] Section 768.79 provides the substantive law concerning offers and demands of judgment, while rule 1.442 provides for its procedural mechanism. *Winter Park Imports, Inc. v. J.M. Family Enterprises*, 66 So. 3d 336, 338 (Fla. 5th DCA 2011). Rule 1.442 utilizes the term "proposal for settlement" in referring to both offers of judgment and demands for judgment.

penal in nature, it must be strictly construed in favor of the one against whom the penalty is imposed and is never to be extended by construction. *Id*. at 223. Strict construction of section 768.79 is also required because the statute is in derogation of the common law rule that each party is to pay its own attorney's fees. *Campbell v. Goldman*, 959 So. 2d 223, 226 (Fla. 2007). Because the statute must be strictly construed, a proposal that is ambiguous will be held to be unenforceable. *Stasio v. McManaway*, 936 So. 2d 676, 678 (Fla. 5th DCA 2006). Furthermore, the burden of clarifying the intent or extent of a proposal for settlement cannot be placed on the party to whom the proposal is made. *Dryden v. Pedemonti*, 910 So. 2d 854, 855 (Fla. 5th DCA 2005).

In the instant case, the demands for judgment served by Anderson on each of the defendants were identical, except for the amount demanded:

> 1. This Proposal for Settlement is made pursuant to Florida Statute §768.79, and is extended in accordance with the provisions of Rule 1.442, Fla.R.Civ.P.
>
> 2. This Proposal for Settlement is made on behalf of Plaintiff, TROY ANDERSON ("PLAINTIFF"), and is made to [Defendant].
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against [Defendant].
>
> 4. That in exchange for [amount demanded] in hand paid from [Defendant], PLAINTIFF agrees to settle *any and all claims asserted against* [Defendant], *as identified in Case Number 2009-CA-040473-O*, brought in the Circuit Court in and for Orange County, Florida.
>
> 5. This Proposal for Settlement is inclusive of all damages claimed by PLAINTIFF, including all claims for interest, costs, and expenses and any claims for attorney's fees.

(Emphasis added).

The trial court found that the language "PLAINTIFF agrees to settle any and all claims asserted against [Defendant]" rendered each of the demands vague, ambiguous, and unenforceable. We agree with the trial court's conclusion. Although Paragraph 3 of the demand for judgment reflects that the proposal was intended to resolve only Troy Anderson's claim, Paragraph 4 can reasonably be interpreted to mean that the intent of the demands for judgment was to resolve the claims of both Troy and Paula Anderson.

In *Hibbard ex rel. Carr v. McGraw*, 918 So. 2d 967 (Fla. 5th DCA 2005), this court was confronted with similar language in an offer for judgment. There, Amanda Carr, through her mother, Faith Carr Hibbard, filed suit against defendants Michael McGraw and his employer, Dual Incorporated, for injuries sustained in a motor vehicle crash. At the time of the crash, Carr was a minor. The defendants tendered the following offer of judgment:

> Defendants, MICHAEL MCGRAW and DUAL INCORPORATED . . . hereby submit their proposal for settlement in favor of Plaintiff, AMANDA K. CARR, in the total sum of THIRTY FIVE THOUSAND AND ONE DOLLARS ($35,001.00), exclusive of attorneys' fees and costs, in exchange for an executed full release and voluntary dismissal with prejudice *as to all claims against Defendants, MICHAEL MCGRAW and DUAL INCORPORATED.*

Id. at 969 (emphasis added). Subsequently, the defendants moved to amend the pleadings to show Carr as the "sole" plaintiff because she had attained the age of majority. *Id*. at 970. The trial court ordered that "Amanda Carr is an adult and shall appear on her own behalf as to her individual claims. Faith Carr Hibbard shall remain

as a party Plaintiff as to her parental claim for general damages and claim for medical bills while Amanda Carr was a minor." *Id*.

When the defendants obtained a favorable judgment, the trial court awarded attorney's fees pursuant to section 768.79 against Amanda Carr, based on the unaccepted offer of judgment. *Id*. This court reversed, observing that it was unclear whether the offer of judgment was directed only to Amanda Carr's claims as opposed to being directed to the claims of both Amanda and her mother:

> At the time the defendants served their proposal, "Plaintiff, Amanda K. Carr" was *not* the named plaintiff. In addition, given the defendants' position that Carr was the *sole* plaintiff, it is unclear whether the proposal to settle "*all* claims against the Defendants" included all damages of any kind arising out of the accident (Carr's claims as well as the claims of her mother) or only Carr's claims for future medical expenses, (future lost earning capacity and pain and suffering) and not her mother's claims (medical expenses and loss of consortium).

Id. at 971-72 (emphasis in original).

As we did in *Hibbard*, we conclude that the proposals for settlement in this case were ambiguous. Specifically, it cannot be clearly determined from the language of the demands for judgment whether the demands were intended to resolve only Troy Anderson's claims, or the claims of both Troy and Paula Anderson.

Although not necessary for the resolution of this appeal, we also agree with the trial court's conclusion that the three separate demands for judgment offered to each of the "Embassy Suites" defendants were unenforceable for an additional reason. Because Anderson requested to have these three entities treated as one by the jury, and given that the judgment obtained against the "Embassy Suites" defendants was actually less than the sum of the demands for judgment made against them, the

purpose behind the enactment of section 768.79 (i.e., to sanction a party for rejecting a presumptively reasonable proposal for settlement) would be ill-served by assessing attorney's fees against Hilton, W2007, and Interstate.

AFFIRMED.

BERGER and LAMBERT, JJ., concur.