IN THE SUPREME COURT OF FLORIDA

TROY ANDERSON,

Petitioner,

v.

HILTON HOTELS CORPORATION, d/b/a EMBASSY SUITES ORLANDO AT INTERNATIONAL DRIVE AND JAMAICAN COURT; W2007 EQUITY INNS REALTY, LLC; INTERSTATE HOTELS & RESORTS, INC.; and SECURAMERICA, LLC,

Respondents.
_____/

CASE NO.: SC15-124
L.T. NOS.: 5D13-2552, 5D13-2553

RESPONDENTS' BRIEF ON JURISDICTION

Shelley H. Leinicke, Esq.
WICKER, SMITH, O'HARA, McCOY & FORD, P.A.
Counsel for Hilton Hotels Corp. W2007 Equity Inns Realty, LLC, Interstate Hotels & Resorts, Inc.
515 E. Las Olas Boulevard
SunTrust Center, Suite 1400
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: (954) 847-4800
Fax: (954) 760-9353
E-mail: SHLeinicke@wickersmith.com
ftlcrtpleadings@wickersmith.com

Pamela A. Chamberlin, Esq.
MITRANI RYNOR ADAMSKY & TOLAND, P.A
Counsel for SecurAmerica, LLC
301 Arthur Godfrey Road,
Penthouse
Miami Beach, Florida 33140
Phone: (305) 358-0050
Fax: (305) 358-0550
E-mail: PChamberlin@mitrani.com
service@mitrani.com

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE**

Other Authority

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal properly affirmed the trial court's denial of the motions for attorneys' fees against respondents.[1] That decision of the does not conflict—and certainly does not expressly and directly conflict—with the decisions Anderson cites or any other decision of another district court or of this Court on the same question of law. *See* Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

***Alamo Financing, L.P. v. Mazoff*:** Petitioner first cites *Alamo Financing, L.P. v. Mazoff*, 112 So.3d 626, 628 (Fla. 4th DCA 2013), which cites to the legally correct statement in *Hibbard v. McGraw*, 918 So.2d 967 (Fla. 5th DCA 2005), that "virtually any proposal that is ambiguous is not enforceable," *id.* at 971 [Pet. Brf. p. 5], despite the fact that the instant decision did not quote that language.

In *Alamo Financing,* the defendant vehicle owner served a proposal for settlement that specifically stated that only the offeror, and not the co-defendant driver, was to be released. The proposal attached a release that was clearly worded so as not to release a potentially liable rental agency affiliate of the owner that had not been named as a defendant at the time of the proposal for settlement. *Id*. at

[1] Respondents Hilton Hotels Corporation, d/b/a Embassy Suites Orlando at International Drive and Jamaican Court, also d/b/a Hilton Worldwide; W2007 Equity Inns Realty, Inc.; and Interstate Hotels & Resorts, Inc., are referred to herein as "Hilton," "W2007," and "Interstate," respectively, and are collectively referenced herein as "the Embassy Suites respondents."

629-31. The Fourth District held the proposal was not ambiguous as to what claims and parties were to be released. *Id.* at 630-31.

By contrast, Anderson's proposals did not contain any explicit language stating whether Paula Anderson's claim would remain pending if the proposal was accepted, and did not attach a release that might have clarified that issue. *Alamo Financing* applied the same legal principles as the present case, and the results of the two cases are legally consistent.

***Pratt v. Weiss*:** Anderson wrongly claims conflict with *Pratt v. Weiss*, 92 So.3d 851 (Fla. 4th DCA 2012), which holds that when reviewing the enforceability of a proposal for settlement, "the opponent's claim of ambiguity is resolved by reviewing the proposal as a whole." [Pet. Brf. p. 7]. Anderson parenthetically describes *Pratt* as "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'." [Pet. Brf. p. 7]. That language demonstrates that *Pratt* is fully consistent with the instant case.

In *Pratt*, the claimed ambiguity was whether an offer requiring a release of the offeror's "agents," would also release co-defendants alleged to be agents of the offeror. *Id*. at 854. The Fourth District held it did not, because the attached release

stated, "This Release does not in any way release other named Defendants." *Id.* at 853. The *Pratt* offer was not ambiguous because, "[r]ather than create a latent ambiguity, the language provided for the release of only unnamed agents of the hospital." *Id.* at 854.

Here, the court properly held that the proposals were ambiguous because they purported to offer to "settle *any and all claims asserted against [Defendant], as identified in Case Number 2009–CA–040473–O*." App. 5 (emphasis in original). The district court held that this language "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. Nothing in the proposals clarified that ambiguity, and no release was attached. The instant decision correctly relied on binding precedent of this Court[2] in finding those proposals ambiguous.

***Ledesma v. Iglesias*:** The decision in *Ledesma v. Iglesias*, 975 So.2d 1240

---

[2] The Fifth District stated:

> 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 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).

App. 4-5.

(Fla. 4th DCA 2008) does not conflict with the instant decision. The *Ledesma* offeree argued that a no-lien affidavit attached to the proposal for settlement was "confusing" because it required the plaintiff to attest that there were no claims to the settlement proceeds and also indemnify the offeror against any such claims. *Id.* at 1242-43. The Fourth District held, "[W]e find the language of the release is clear and unambiguous," because the challenged language clearly stated that by signing the release and affidavit, the plaintiff was "releasing Iglesias from any payments above and beyond the settlement amount and indemnifying him from any third party claims arising from this accident." *Id.* at 1243.

Ledesma does not conflict with the instant decision because each of Anderson's proposals contained language that reasonably could be interpreted to mean that the offer was intended to settle "any and all claims against" the offeree, including his wife's then-pending loss of consortium claim. App. 6. No release was attached to the proposals, and nothing in the offers clearly stated whether acceptance of the offer would leave Paula Anderson's claim pending, or would resolve the entire case. While the instant case and *Ledesma* had differing facts, they applied the same legal principle, and are in no way in conflict. *Ledesma* illustrates what was needed to achieve clarity in a proposal for settlement. Anderson's failure to achieve such clarity rendered his proposals unenforceable.

***State Farm Mut. Auto. Ins. Co. v. Nichols*:** Anderson concedes that there is

no direct conflict with any decision of this Court, but nevertheless states that the *Anderson v. Hilton* decision "expressly conflicts" with this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067 (Fla. 2006). [Pet. Brf. p. 7]. Far from conflicting with the decision below, the *Nichols* decision fully supports the Fifth District's ruling. As *Nichols* said at page 1079:

> The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.

Nichols held, "If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement" of Florida Rule of Civil Procedure 1.442, which demands that such proposals "state with particularity any relevant conditions" and "state with particularity all nonmonetary terms." *Id.* at 1079. In this case, the ambiguity as to whether the proposals were offers to end the litigation or to continue to trial on Paula Anderson's consortium claims was an "ambiguity within the proposal could reasonably affect the offeree's decision." Under *Nichols*, it was Anderson's burden to make the proposals "as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions." *Id.* at 1079. The Fifth District's holding here did not "demand the impossible" from Anderson.

The ambiguity in Anderson's proposals was easy to resolve—simply state clearly whether Paula Anderson's claims were or were not included in the proposals.

***Hess v. Walton*:** The instant decision harmonizes with *Hess v. Walton*, 898 So.2d 1046 (Fla. 2d DCA 2005). Anderson wrongly states that "the district court ruled that the amounts of separate offers made to defendants who are ultimately held jointly liable must be added together when compared to the amount of the judgment." [Pet. Brf. pp. 8-9]. The Fifth District made no such ruling, and in fact stated:

> 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.

App. 7-8. The court of appeal also noted, "The complaint asserted that each of the defendants was negligent and, notably, was devoid of any allegations of vicarious liability." App. 3.

The instant decision is factually dissimilar to *Hess*, and the two cases are not in conflict. In *Hess*, the plaintiff sued a doctor for active negligence and his practice for vicarious liability. The plaintiff "did not allege any separate or

independent active negligence on the part of FOI. From the earliest stages of this litigation, it was conceded that Dr. Hess had been negligent and that FOI was vicariously liable." *Id.* at 1047. The plaintiff made separate offers of settlement to each defendant, and the unapportioned verdict against the defendants was larger than the offer to the medical practice defendant, though lower than the offer to the doctor defendant. *Id.* at 1047. The trial court awarded attorneys' fees against the medical practice, and the court of appeal affirmed. *Id.* at 1048.

The medical practice defendant argued that the separate and unequal offers to an actively negligent defendant and a solely vicariously liable defendant were impermissible. The court rejected that argument, stating at page 1048:

> While we agree with FOI that such offers may often, if not always, be contrary to the public policies that caused the legislature to create these fee-shifting provisions, they are permitted by the language of both the statute and the rule. Moreover, 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. Thus, it cannot be argued that the offers were made in bad faith. We are simply unable to articulate and announce any rule barring such proposals to settle. Accordingly, we affirm the judgment and leave to the legislature the task of reviewing its policies as they relate to defendants who are merely vicariously liable for the acts of another.[3]

[3] In 2010 the Court approved the amendment of rule 1.442 to add subsection (c)(4), which permitted an undifferentiated joint offer to or by "a party . . . alleged to be solely vicariously, constructively, derivatively, or technically liable." *In re Amendments to The Florida Rules of Civil Procedure*, 52 So.3d 579, 588 (Fla. 2010).

Unlike the present case, the parties in *Hess* pled and conceded that the defendant medical practice's liability was solely vicarious. *Id.* at 1047. By contrast, the complaint here "was devoid of any allegations of vicarious liability." App. 3. The three separate offers of judgment served on Hilton, W2007 and Interstate were made on the basis of each defendant's alleged active negligence. In evaluating the offers, the recipients were not called upon to consider vicarious liability for the negligence any other defendant. Hilton, W2007 and Interstate could not be sanctioned for rejecting offers on the basis of vicarious liability when no such vicarious liability was pled. The fact that Hilton, W2007 and Interstate were referred to in the jury instructions and verdict as "Embassy Suites" did not and could not retroactively change the meaning and effect of the offers of settlement that had been served and rejected a year earlier.

Moreover, as the Fifth District stated, because Anderson requested that the three Embassy Suites defendants be treated as "one and the same", App. 3-4, "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." App. 7-8. This is because the undifferentiated judgment against the Embassy Suites defendants was significantly less than Anderson's proposals for settlement on those three defendants. The facts of *Hess* and *Anderson* are fully distinguishable,

and the holdings of the two cases are not in conflict on any issue of law.

***Thornburg v. Pursell*:** *Thornburg v. Pursell*, 476 So.2d 323 (Fla. 2d DCA1985), has no bearing whatsoever on the instant case, as it dealt with the now withdrawn 1972 version of rule 1.442. *See The Florida Bar Re Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment),* 550 So.2d 442 (Fla. 1989); *In re the Florida Bar: Rules of Civil Procedure*, 265 So.2d 21 (Fla. 1972).

In any event, the *Thornburg* holding does not conflict with *Anderson*. In *Thornburg*, the various separately served defense offers exceeded the amount of the plaintiffs' ultimate recovery at trial, and the defendants argued that they were entitled to recover their costs under the then-existing rule 1.442. The court of appeal rejected that argument, stating, "Since the plaintiffs never had an opportunity to consider the offers collectively, it would be inequitable to permit the trial court to treat the offers as such for purposes of awarding or denying costs." 476 So.2d at 325.

That outcome is consistent with the holding of the Fifth District in this case. Here, Anderson served separate offers based on his claims of active negligence against each defendant. The defendants had no opportunity to consider the offers as based on collective liability, especially because vicarious liability was not alleged in the second amended complaint. Thus, it would have been inequitable to enforce the offers of judgment against the Embassy Suites defendants based on an

unpled theory of vicarious liability. There is no conflict on any point of law between *Thornburg* and *Anderson v. Hilton*.

CONCLUSION

For the reasons set forth herein, respondents request that the Court deny the petition for review.

Respectfully submitted,

/s/ Pamela A. Chamberlin
Pamela A. Chamberlin, Esquire
Florida Bar No. 444006
MITRANI RYNOR ADAMSKY & TOLAND, P.A.
Attorneys for SecurAmerica, LLC
301 Arthur Godfrey Road, Penthouse
Miami Beach, Florida 33140
Phone: (305) 358-0050
Fax: (305) 358-0550
pchamberlin@mitrani.com

Respectfully submitted,

/s/ Shelley H. Leinicke
Shelley H. Leinicke, Esquire
Florida Bar No. 230170
WICKER, SMITH, O'HARA, McCOY & FORD, P.A.
Attorneys for Hilton Hotels Corporation, d/b/a Embassy Suites Orlando at International Drive and Jamaican Court, d/b/a Hilton Worldwide, W2007 Equity Inns Realty, LLC, and Interstate Hotels & Resorts, Inc.
515 E. Las Olas Boulevard
SunTrust Center, Suite 1400
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: (954) 847-4800
Fax: (954) 760-9353
shleinicke@wickersmith.com
ftlcrtpleadings@wickersmith.com

CERTIFICATE OF COMPLIANCE PURSUANT TO Fla. R. App. P. 9.210(a)(2)

Counsel for the respondents certify that this document complies with the requirements of Fla. R. App. P. 9.210(a)(2). The attached Jurisdictional Brief of Respondents is printed using a proportionally spaced 14-point Times New Roman typeface.

Dated: March 26, 2015.

/s/ Pamela A. Chamberlin
Pamela A. Chamberlin, Esquire
Florida Bar No. 444006
MITRANI RYNOR ADAMSKY & TOLAND, P.A.
Attorneys for SecurAmerica, LLC
301 Arthur Godfrey Road, Penthouse
Miami Beach, Florida 33140
Phone: (305) 358-0050
Fax: (305) 358-0550
pchamberlin@mitrani.com
service@mitrani.com

/s/ Shelley H. Leinicke
Shelley H. Leinicke, Esquire
Florida Bar No. 230170
WICKER, SMITH, O'HARA, McCOY & FORD, P.A.
Attorneys for Hilton Hotels Corporation, d/b/a Embassy Suites Orlando at International Drive and Jamaican Court, d/b/a Hilton Worldwide, W2007 Equity Inns Realty, LLC, and Interstate Hotels & Resorts, Inc.
515 E. Las Olas Boulevard
SunTrust Center, Suite 1400
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: (954) 847-4800
Fax: (954) 760-9353
shleinicke@wickersmith.com
ftlcrtpleadings@wickersmith.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been furnished to all parties on the attached Service List by e-mail on this 26th day of March, 2015.

/s/ Pamela A. Chamberlin
Pamela A. Chamberlin, Esquire
Florida Bar No. 444006
MITRANI RYNOR ADAMSKY & TOLAND, P.A.
Attorneys for Respondent SECURAMERICA, LLC
301 Arthur Godfrey Road, Penthouse
Miami Beach, Florida 33140
Phone: (305) 358-0050
Fax: (305) 358-0550
pchamberlin@mitrani.com

/s/ Shelley H. Leinicke
Shelley H. Leinicke, Esquire
Florida Bar No. 230170
WICKER, SMITH, O'HARA, McCOY & FORD, P.A.
Attorneys for Respondents Hilton Hotels Corporation, d/b/a Embassy Suites Orlando at International Drive and Jamaican Court, d/b/a Hilton Worldwide, W2007 Equity Inns Realty, LLC, and Interstate Hotels & Resorts, Inc.
515 E. Las Olas Boulevard
SunTrust Center, Suite 1400
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: (954) 847-4800
Fax: (954) 760-9353
ftlcrtpleadings@wickersmith.com
shleinicke@wickersmith.com

SERVICE LIST

W. Riley Allen, Esquire
Riley Allen Law
429 S. Keller Rd., Suite 300
Orlando, FL 32810
rileyallen@floridatriallawyer.com
BonnieRamos@floridatriallawyer.com

Steven R. Adamsky, Esquire
Mitrani, Rynor, Adamsky & Toland, P.A.
1200 Weston Rd., PH
Weston, FL 33326
sadamsky@mitrani.com;
service@mitrani.com

Pamela A. Chamberlin, Esquire
Mitrani, Rynor, Adamsky & Toland, P.A.
301 Arthur Godfrey Road, Penthouse
Miami Beach, Florida 33140
pchamberlin@mitrani.com

Simon L. Wiseman, Esquire
The Wiseman Law Firm
1115 E. Livingston Street
Orlando, FL 32803
swiseman@wisemantriallaw.com

Michael E. Reed, Esquire
Wicker, Smith, O'Hara, McCoy & Ford, P.A.
100 N. Tampa St., Suite 3650
Tampa, FL 33602
tpacrtpleadings@wickersmith.com
MReed@WickerSmith.com

Barbara A. Eagan, Esquire
Eagan Appellate Law, PLLC
13835 Kirby Smith Rd.
Orlando, FL 32832
beagan@eaganappellate.com

John S. Mills, Esquire
jmills@mills-appeals.com
Thomas D. Hall, Esquire
thall@mills-appeals.com
service@mills-appeals.com
203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301