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IN THE SUPREME COURT OF FLORIDA

TROY ANDERSON,

Petitioner,

v.

Case No.: SC15-124
L.T. No.: 5D13-2442, 5D13-2553

HILTON HOTELS CORP. et al.,

Respondents.

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

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

This case poses two questions involving proposals for settlement: (1) whether an ambiguous provision renders a proposal invalid even if the ambiguity is directly resolved by other provisions in the proposal and (2) whether the amounts of separate proposals to multiple defendants must be combined when comparing them to a judgment against the defendants jointly. The Court having accepted conflict jurisdiction, Petitioner asks it to quash the decision below by answering both questions in the negative.

After he was attacked in the parking lot of an Embassy Suites in Orlando, Petitioner Troy Anderson and his wife Paula sued four defendants: SecurAmerica LLC, the company that provided security for the hotel, and three entities that collectively franchised, owned, and operated the hotel: Hilton Hotels Corporation, W2007 Equity Inns Realty, LLC, and Interstate Hotels & Resorts, Inc. (collectively, the "Hotel Defendants"). (App. 1-7.)[1] Mr. Anderson made claims for several different kinds of personal injury damages, including mental anguish, disfigurement, pain and suffering, lost earning capacity, and numerous types of medical expenses. Mrs. Anderson made claims for loss of consortium damages. (App. 21-38.)

[1] The cited portions of the record are included in the appendix for the convenience of the Court. Citations to the appendix are used in this brief, and citations to the record below are contained in the index to the appendix.

On October 5, 2011, Mr. Anderson and Mrs. Anderson each served separate proposals on each of the four defendants. Mr. Anderson offered to settle with SecurAmerica for $650,000 (App. 40-41), Hilton for $650,000 (App.42-43), W2007 for $100,000 (App. 44-45), and Interstate for $650,000 (App. 46-47). His proposals were all identical except for the recipient's name and the amount:

> **PROPOSAL FOR SETTLEMENT ON BEHALF OF PLAINTIFF, TROY ANDERSON'S [sic], PURSUANT TO RULE 1.442**
>
> Plaintiff, TROY ANDERSON, by and through his undersigned attorneys, hereby serves his Proposal for Settlement, pursuant to Rule 1.442 of the Florida Rules of Civil Procedure, to [RECIPIENT], and states in support thereof as follows:
>
> 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 [RECIPIENT].
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against [RECIPIENT].
>
> 4. That in exchange for [amount demanded] in hand paid from [RECIPIENT], PLAINTIFF agrees to settle any and all claims asserted against [RECIPIENT], 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.

Mrs. Anderson served her proposals the same day. She offered to settle with SecurAmerica for $25,000 (App. 48-49), Hilton for $15,000 (App. 50-51), W2007 for $15,000 (App. 52-53), and Interstate for $25,000 (App. 54-55). Her proposals were otherwise identical to Mr. Anderson's except that her name replaced his throughout. The certificates of service reveal that the Andersons' counsel served each of the eight proposals on all defense counsel on the same day. Thus, the Defendants were all aware that Mr. and Mrs. Anderson served separate proposals on each defendant on October 5, 2011. None of the proposals were accepted.

Finally, Mr. Anderson served SecurAmerica with a second proposal for only $300,000 on March 16, 2012. (App. 56-57.) It was otherwise identical to the prior proposal and was similarly never accepted.

Mrs. Anderson subsequently dismissed her claims for loss of consortium and was dropped as a party, so the case went to trial against all four defendants on Mr. Anderson's claims only. (App. 58-59.) After a mistrial based on the defendants' misrepresentations to the jury, Mr. Anderson' claims went to trial again a month later. (App. 62-64.)

At trial (and on appeal) the same counsel represented all The Hotel Defendants. They objected to any jury instructions regarding agency or vicarious liability. (App. 67-68.) Defendants' counsel argued there was no reason for the instructions because the parties had stipulated that the Hotel Defendants would be

lumped together as "Embassy Suites" for purposes of the trial. (App. 68-69.) Counsel emphasized that the Hotel Defendants' joint liability was not "a disputed issue in this case" and that the Hotel Defendants should be treated as a single entity for the jury's purposes.[2] (App. 70.) In light of the parties' agreement that the verdict form would just list them together as a single entity, the court declined to give Mr. Anderson's proposed vicarious liability instructions. (App. 70.)

Each of the Hotel Defendants separately moved for a directed verdict, but the trial court denied those motions finding sufficient evidence that they each had knowledge of the security risks and sufficient control to do something. (App. 78-83.) The Hotel Defendants never sought apportionment of fault among themselves and agreed to the verdict form which called for the jury to apportion fault among "Embassy Suites," SecurAmerica, and Mr. Anderson. (App. 94.)

Although the Hotel Defendants asked to be treated as a single entity, they objected to the jury being told because they did not "think there's any need for any special instruction or advisory to the jury on that." (App. 71.) The court overruled their objection because the jury had already heard testimony about the different

[2] The district court's statement in the decision below that "Anderson requested to have these three entities treated as one by the jury" is mistaken. (DCA:216.) *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412, 416 (Fla. 5th DCA 2014). It was the Hotel Defendants' request, and both Mr. Anderson and the trial court merely acceded to it.

entities. (App. 71-73.) Subject to their objection, the Hotel Defendants agreed to the following language, which the court read to the jury just before its instructions:

> Members of the jury, you can assume, for purposes of your deliberation, that Interstate Hotel and Resorts, Inc., Hilton Hotels Corporation, and W2007 Equity Inns Realty, LLC are considered as one and the same. These defendants will be referred to in the jury instructions and verdict form as Embassy Suites.
>
> (App. 76, 95.)

In closing argument and without objection, Mr. Anderson's counsel reminded the jury that in determining negligence and the percentages of fault, the Hotel Defendants "are all, as far as you heard, W2007, Hilton, Interstate, they're all clumped together, it's Embassy Suites." (App. 99.) The Hotel Defendants' counsel presented a unified closing argument on their behalf, referring to them simply as "Embassy Suites" without ever distinguishing among them and arguing why they believe they were not negligent. (App. 100-49.)

The jury ultimately returned a verdict finding that "Embassy Suites" and SecurAmerica were both negligent and apportioning fault between them 72% and 28%, respectively. (App. 150-51.) It awarded just over $1.7 million in damages. (App. 151.) After accounting for collateral source set-offs and taxable costs, the final judgment awarded $1,252,188.74 against the three Hotel Defendants and $486,962.28 against SecurAmerica. (App. 152-53.) The precise language of the judgment as to the Hotel Defendants was as follows:

> The Plaintiff, TROY ANDERSON, shall recover from Defendants: HILTON HOTELS CORPORATION, a foreign corporation, doing business as EMBASSY SUITES ORLANDO AT INTERNATIONAL DRIVE AND JAMAICAN COURT and also doing business as HILTON WORLDWIDE; INTERSTATE HOTELS RESORTS, INC., a Florida corporation; and, W2007 EQUITY INNS REALTY, LLC, a foreign corporation, (collectively hereinafter referred to as EMBASSY SUITES pursuant to the Verdict form agreed to by Plaintiff and all Defendants), the sum of $1,142,937.07 (which reflects an agreement between the parties as to the collateral source set-off) plus taxable costs in the amount of $109,251.67 agreed to by the parties, for a partial final judgment total of $1,252,188 .74, for which let execution issue at the applicable statutory interest rate.
>
> (App. 152.)

Mr. Anderson moved for attorney's fees based on his October 5, 2011, proposals to the Hotel Defendants and his March 16, 2012, second proposal to SecurAmerica (the judgment against SecurAmerica being insufficient to trigger fees based on the first proposal). (App. 154-61.) The motion noted that the amount of the judgment, less costs, was $1,142,937.07 against the Hotel Defendants and $555,475.52 against SecurAmerica. The trial court ultimately denied the motion against SecurAmerica on the ground that his proposal was ambiguous as to whether he sought to settle just his own personal injury claims or to settle both his own claims and also his wife's loss of consortium claims. (App. 163-65.) Citing Florida Rule of Civil Procedure 1.442(i), the court declined to consider the fact that Mrs. Anderson had served her own proposals because Mr. Anderson did not seek enforcement of his wife's proposal. (App. 164.)

By separate order, the trial court denied Mr. Anderson's motion against the Hotel Defendants for the same reason and also because the jury's verdict did not apportion fault among the three Hotel Defendants. (App. 173-77.) The court reasoned that without an allocation of fault, it was not possible to determine whether the judgment against each defendant was 25% greater than each proposal and the total judgment was not 25% greater than the sum of the three proposal amounts. (App. 175.)

The defendants appealed the merits judgment in Case No. 5D13-1722. Mr. Anderson appealed the orders denying his motions for attorney's fees in Case Nos. 5D13-2552 and 5D13-2553, which were consolidated together (App. 178) and later ordered to share the record with No. 5D13-1722 (App. 179).

In a single opinion, the district court affirmed all three rulings. (App. 180-87.) *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014). It affirmed the merits judgment without comment. (App. 181-82.) *Id.* at 414. It affirmed the two fee rulings finding that the trial court correctly ruled the proposals were ambiguous as to whether they resolved Mrs. Anderson's loss of consortium claim. (App. 186.) *Id.* at 416. The court recognized that the third paragraph of each proposal "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. 185.) *Id.* It alternatively affirmed the fee ruling as to the Hotel Defendants and reasoned,

> 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. 186-87.) *Id.* at 416-17. Consistent with its ruling on the merits, the district court denied Mr. Anderson's motion for appellate attorney's fees. (App. 188-92.)

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. In his jurisdictional brief, Mr. Anderson argued that both rulings conflicted with decisions from this Court and other district courts of appeal. The Court ordered Mr. Anderson to show cause why its decisions in *Pratt v. Weiss*, 151 So. 3d 1268 (Fla. 2015), and *Audiffred v. Arnold*, 161 So. 3d 1274 (Fla. 2015), which issued after jurisdictional briefing had concluded, did not control and warrant the Court declining jurisdiction. After he filed his response arguing that the cases did not control, and, if anything, only

provided further justification to grant review, the Court accepted jurisdiction. (Lewis, Quince, Polston, & Perry, JJ., concurring; Canady, J., dissenting).

SUMMARY OF ARGUMENT

Amid the sea of decisions correctly invalidating ambiguous or otherwise non-compliant proposals, this case presents the Court with an important opportunity to make clear that proposals for settlement are viable in Florida and the legislative goal of encouraging settlements to reduce the costs to litigants and the court system may be realized. The Court should quash the decision below on both points Petitioner raises here.

I. The Fifth District's invalidation of all of Mr. Anderson's proposals should be quashed because they are not ambiguous. The Fifth District did not heed this Court's prior teachings that not every ambiguity will invalidate a proposal for settlement and that the test is whether the proposal is sufficiently clear despite any arguable ambiguity so that the recipient can intelligently evaluate whether to accept it. And the district court violated the admonition of its sister courts not to nit-pick proposals for minor ambiguities that can be found in nearly any legal writing.

As an initial matter, the courts below erred in finding any ambiguity in paragraph 4 in the first place. Nothing in that paragraph refers to Mrs. Anderson's claims, and the reference to "Plaintiff's," singular, agreement to resolve "any and

all claims" is standard language courts have long recognized as sufficient to identify just the offeror's claims. Indeed, in order to strain to find ambiguity, the defendants would have to believe that one plaintiff has the authority to unilaterally settle another plaintiff's claims. The law does not work that way. Absent something in the proposal stating that Mr. Anderson purported to have the authority to settle Mrs. Anderson's claims, paragraph 4 simply cannot be reasonably read to reach her claims.

But even if that provision were ambiguous in isolation, the law requires the proposal be read as a whole to eliminate ambiguities if possible. As the Fifth District expressly acknowledged, the sentence immediately prior to paragraph 4 unequivocally states that the proposals were made to resolve Mr. Anderson's claims. That intent is further driven home by the rest of the proposal: from its title to its introduction to its various other provisions.

Finally, even if reading the proposal as a whole did not eliminate the ambiguity, these defendants could not possibly have been confused because each defendant received, at the same time, an identical proposal from Mrs. Anderson that merely substituted her name for Mr. Anderson's and reduced the amounts proposed. This Court has taught that ambiguities may be removed by looking beyond the proposal to the context in which it was made. And the trial court's refusal to consider Mrs. Anderson's proposal reflected a clear misunderstanding of

Rule 1.442(i), which explicitly makes proposals admissible in proceedings seeking sanctions for a party's rejection of a proposal.

II. The Fifth District's alternative holding that the proposals to the Hotel Defendants were not valid because they had to be added together before being compared to the judgment obtained holds even less water. First, the court made its ruling based upon a clearly mistaken factual premise. Mr. Anderson did not ask for the Hotel Defendants to be treated as a single entity on the verdict form: the Hotel Defendants did. They were represented by the same counsel who successfully objected to the submission of any instructions or questions to the jury regarding the individual liability of the Hotel Defendants. The failure of the jury to apportion liability among them is the result of the Hotel Defendants' own doings.

Moreover, regardless of who requested their liability be treated jointly, the fact remains that a judgment was entered against them jointly. The offer of judgment statute's plain language mandates an award of attorney's fees because that judgment amount exceeds the proposal to each defendant by well over 25%. The courts below had no authority to decline to follow this plain language. As other courts have recognized it is perfectly valid for a plaintiff to propose different amounts to jointly liable defendants without having to add them together. Why else are joint offers required to be apportioned? Up until recently, this Court made clear that was the case even where the recipients had purely vicarious liability, and the

only reason for apportionment is so each amount can be compared to the judgment against each defendant. Each defendant here had the chance to avoid a much larger judgment by accepting Mr. Anderson's reasonable settlement proposals. Now they must suffer the sanction imposed by the Legislature for prolonging the litigation.

ARGUMENT

This case presents the Court with the opportunity to strike an important balance in the law on proposals for settlement. This balance will help promote the important public policy of encouraging settlements thereby reducing legal costs to Florida's citizens and conserving our judiciary's resources. The validity of proposals for settlement under section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 has featured prominently in this Court's jurisprudence in the past decade. Most of the Court's opinions have emphasized that the statute and rule should be strictly construed against an award of attorney's fees because this statutory basis for fees is both penal and in derogation of common law. The result has typically been to hold a given proposal invalid.[3]

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[3] *See, e.g., Pratt v. Weiss*, 161 So. 3d 1268, 1272-73 (Fla. 2015) (invalidating proposal for failing to apportion the amount between two offerors even if they had coextensive liability and there was no logical basis to apportion); *Audiffred v. Arnold*, 161 So. 3d 1274, 1279-80 (Fla. 2015) (invalidating proposal for failing to apportion between two plaintiffs even though offer stated that it was only made by one plaintiff because the proposal stated that both plaintiffs would dismiss the complaint if it were accepted); *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 377-78 (Fla. 2013) (invalidating proposal for failing to state whether attorney's fees were included in the amount where fees were a part of

At the same time, the Court has recognized that this approach serves, at least in the short term, to undermine the clear legislative goal behind section 768.79 to reduce litigation by encouraging settlements and has looked for ways to bring certainty to this area of the law so that this public policy objective may finally be achieved.[4] As the First District has observed, section 768.79 "created a property

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the legal claim at issue); *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 649-52 (Fla. 2010) (invalidating proposal to two plaintiffs that was conditioned on both accepting because each offeree is entitled to independently decide whether to settle); *Campbell v. Goldman*, 959 So. 2d 223, 225-27 (Fla. 2007) (invalidating proposal for failing to state statutory basis as required by Rule 1.442 even though section 768.79 is now the only possible statutory basis); *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1078-80 (Fla. 2006) (invalidating proposal for failing to describe terms of required release with particularity).

[4] *See, e.g., Gorka*, 36 So. 3d at 650 (acknowledging that § 768.79's expected result of reducing costs and conserving judicial resources has been undermined by increased litigation over the validity and enforceability of specific proposals); *id.* at 652 (finding that legislative policy of encouraging settlement is furthered by prohibiting proposals that are conditioned on being accepted by multiple offerees); *id.* at 653-54 (Polston, J., dissenting) (arguing legislative policy would be better served by allowing defendants to condition proposals on acceptance by all plaintiffs); *Campbell*, 959 So. 2d at 227-28 (Pariente, J., concurring) (lamenting that litigation over proposals for settlement undermines their purpose, but emphasizing that as specific questions are resolved by the courts, that policy will be more likely to prevail); *Lamb v. Matetzschk*, 906 So. 2d 1037, 1042-44 (Fla. 2005) (Pariente, J., concurring) (expressing concern that holdings invalidating proposals based on strict construction undermined legislative goal of encouraging settlements and asking Civil Procedure Rules Committee to consider amendments to Rule 1.442 that would allow proposals to more directly encourage settlement); *See MGR Equip. Corp. v. Wilson Ice Enters.*, 731 So. 2d 1262, 1264 (Fla. 1999) ("The purpose of [§ 768.79] is to 'terminate all claims, end disputes, and obviate the need for further intervention of the judicial process' by encouraging parties to exercise their 'organic right … to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies

right to an award of attorney's fees" and the rules of strict construction "should not eviscerate the legislature's policy choice." *Jacksonville Golfair, Inc. v. Grover*, 988 So. 2d 1225, 1227 (Fla. 1st DCA 2008).

The first issue in this case affords an opportunity to discourage the endless nit-picking that leads to satellite litigation over the enforceability of proposals for settlement that are not perfectly drafted. The second issue affords an opportunity to nip in the bud a new line of attack on the strategic right of parties to make offers of differing amounts to settle claims of joint liability and to give meaning to the oft-litigated rules requiring apportionment of joint proposals.

I. ANY AMBIGUITY IN THE REFERENCE TO "ANY AND ALL CLAIMS" IN PARAGRAPH 4 COULD NOT HAVE REASONABLY AFFECTED THE DEFENDANTS' DECISION TO REJECT THE PROPOSALS FOR SETTLEMENT.

Standard of Review. Whether a proposal for settlement should be invalidated due to ambiguity is a question of law reviewed de novo. *E.g., Wallen v. Tyson*, 174 So. 3d 1058, 1061 (Fla. 5th DCA 2015); *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc*., 53 So. 3d 348, 353 (Fla. 4th DCA 2011).

The courts below invalidated all of Mr. Anderson's proposals because they concluded the proposals were ambiguous as to whether Mr. Anderson was

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otherwise.") (quoting *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989)).

proposing to settle just his own claims or was also proposing to settle his wife Paula's claims as well. Again, the proposals provided as follows:

PROPOSAL FOR SETTLEMENT ON BEHALF OF PLAINTIFF, TROY ANDERSON, PURSUANT TO RULE 1.442

Plaintiff, TROY ANDERSON, by and through his undersigned attorneys, hereby serves his Proposal for Settlement, pursuant to Rule 1.442 of the Florida Rules of Civil Procedure, to [RECIPIENT], and states in support thereof as follows:

> 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 [RECIPIENT].
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against [RECIPIENT].
>
> 4. That in exchange for [amount demanded] in hand paid from [RECIPIENT], PLAINTIFF agrees to settle any and all claims asserted against [RECIPIENT], 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

The lower courts erred by focusing on paragraph 4 to find this language ambiguous because (A) they did not apply the proper test set, (B) whatever ambiguity

paragraph 4 might contain is eliminated by the rest of the proposal, and (C) the defendants' receipt of companion proposals by Mrs. Anderson demonstrates that their claim of confusion is spurious.

A. The Proper Test Is Whether Any Ambiguity Could Have Reasonably Affected the Defendants' Decision to Reject the Proposals, and This Court Should Approve Other District Court Decisions Condemning the Kind of Nit-Picking Represented by the Decision Below.

At the time the proposals at issue were served, Rule 1.442 required that they "name the party or parties making the proposal" and "identify the claim or claims the proposal is attempting to resolve." Fla. R. Civ. P. 1.442(c)(2)(A), (B) (2011). This Court has made clear that a material ambiguity in a proposal's attempt to comply with a requirement of Rule 1.442 can render a proposal invalid, adopting the following explanation by the Second District:

> 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, 932 So. 2d at 1079 (quoting *Lucas v. Calhoun*, 813 So.2d 971, 973 (Fla. 2d DCA 2002)). But the Court did not stop there. It balanced the need for clarity with a clear recognition that not every ambiguity will invalidate a proposal:

> 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.

Id.[5]

This is not the first time that the Fifth District has taken a strict approach of demanding the impossible. In an earlier decision on which it relied in this case, the court stated that "virtually any proposal that is ambiguous is not enforceable." *Hibbard ex rel. Carr v. McGraw*, 918 So. 2d 967, 971 (Fla. 5th DCA 2005). Indeed, in the decision this Court reviewed in *Nichols*, the Fifth District had made a similar pronouncement: "The terms and conditions of the proposal should be **devoid of ambiguity**, patent or latent." *Nichols v. State Farm Mut.*, 851 So. 2d 742, 746 (Fla. 5th DCA 2003) (emphasis added). Although it affirmed the ultimate ruling in *Nichols* and held that the provision in the proposal in that case, which required a release without summarizing or attaching it, was too ambiguous for the recipient to make an informed decision, this Court clearly rejected the notion that proposals must be "devoid of ambiguity." Why else would the Court use that case to opine that "it may be impossible to eliminate all ambiguity" and Rule 1.442 does not require that?

[5] As Judge Beranek noted long ago, "A true ambiguity does not exist merely because a contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible. It is the duty of the trial court to prevent such interpretations." *Am. Med. Intern., Inc. v. Scheller*, 462 So. 2d 1, 7 (Fla. 4th DCA 1984).

Indeed, that is the exact lesson the Second and Fourth Districts have taken from *Nichols*. In *Alamo Financing, L.P. v. Mazoff*, 112 So. 3d 626 (Fla. 4th DCA 2013), the court began its review of the proper standard by quoting the passage in *Hibbard* that "virtually any proposal that is ambiguous is not enforceable," but quickly qualified that by quoting this Court's passage from *Nichols* making clear that not every ambiguity will render a proposal invalid. *Id.* at 628-29. Quoting an earlier Second District decision, the court read *Nichols* to its natural conclusion:

> Therefore, 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.

Id. at 629 (quoting *Carey-All Transp., Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008) (in turn quoting *Nichols*, 932 So. 2d at 1079)). Other decisions have similarly read *Nichols* as prohibiting courts from nit-picking for ambiguities. *Miley v. Nash*, 171 So. 3d 145, 149 (Fla. 2d DCA 2015); *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc.*, 53 So. 3d 348, 353 (Fla. 4th DCA 2011).

But the Fifth District apparently does not read *Nichols* the way these other courts have. For example, in *Stasio v. McManaway*, 936 So. 2d 676 (Fla. 5th DCA 2006), the court repeated its mantra about virtually any ambiguity rendering a proposal invalid and followed that by a "see also" citation to *Nichols* with a parenthetical characterizing this Court's ruling as approving the notion that "terms and conditions of proposal should be devoid of ambiguity, patent or latent." *Id.* at

678. But this Court clearly rejected that notion, despite its approval of the result in *Nichols*. The error in the Fifth District's approach is epitomized by its nit-picking invalidation of Mr. Anderson's proposals, which clearly satisfy the *Nichols* test.

B. To Whatever Extent Paragraph 4 of Troy's Proposal Could Be Read as Including an Offer to Settle His Wife's Claims Without Her Authorization, the Remainder of the Proposal Makes Clear That He Only Proposed to Settle His Own Claims.

The only provision that the Fifth District found ambiguous in Mr. Anderson's proposals was paragraph 4, which provided,

> 4. That in exchange for [amount demanded] in hand paid from [RECIPIENT], PLAINTIFF agrees to settle any and all claims asserted against [RECIPIENT], as identified in Case Number 2009-CA-040473-O, brought in the Circuit Court in and for Orange County, Florida.

As an initial matter, it strains credulity to read this language in a manner that would cover Mrs. Anderson's claims. "PLAINTIFF" is the subject in this sentence; it is singular and clearly refers to Mr. Anderson. To read "PLAINTIFF agrees to settle any and all claims" to mean that he agrees to settle not just his claims, but also the claims of another plaintiff altogether, is to suggest that one plaintiff has the authority to settle another plaintiff's claims. But nothing in this sentence, in the rest of the proposal, or even in the law generally supports that notion.[6] The only reasonable reading of this sentence is to understand that it is

[6] Whether Mr. Anderson's settlement of his own claim would preclude Mrs. Anderson from proceeding on her claims is a different question, but one that

focusing on the opening clause, which requires not just acceptance of the proposal but the amount demanded "in hand paid from" the recipient.

The flaw in the district court's reasoning is highlighted by this Court's recent amendment of Rule 1.442. Rule 1.442(c)(2)(A)'s requirement that the proposal "identify the claim or claims the proposal is attempting to resolve" was amended effective January 1, 2014, to require the proposal to "state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served." *In re Amendments to Fla. R. Civ. P.*, 131 So. 3d 643, 648 (Fla. 2013). If anything, this language, which this Court now requires every proposal to contain, is more susceptible to a claim of ambiguity than the language Mr. Anderson used because it is clearly talking about identifying the claims that are addressed by the proposal.

If the Fifth District was correct, then every proposal using the language of the rule in a case where there are claims by other plaintiffs not parties to the proposal would be invalidated. That, of course, cannot possibly be the law. Thus, the ambiguity analysis should end before it begins because there is simply no ambiguity in this provision.

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likely has the same answer. *See Miley*, 171 So. 3d at 149 ("Garfield Nash was still free to pursue his loss of consortium claim even if Martha Nash accepted the proposal [to settle her personal injury claims] because it would only dismiss her claims; the proposal required no action or input on the part of Garfield Nash whatsoever because his cause of action was his own.").

A case involving very similar facts that reached an opposite result from the Fifth District is currently pending in this Court awaiting a decision on jurisdiction. *Nash v. Miley*, No. SC15-1482. Martha Nash sued Kyle and Glenn Miley for her own personal injuries suffered in a car crash, and her husband Garfield joined the lawsuit seeking to recover for his loss of consortium. *Miley*, 171 So. 3d at 147. Kyle served a proposal for settlement on Martha that contained a provision remarkably similar to paragraph 4 in this case, stating that it was "an attempt to resolve all claims and causes of action resulting from the incident or accident giving rise to this lawsuit brought by Plaintiff Martha Nash against Defendant Kyle Miley." *Id.*[7] As with the proposal here, Kyle's proposal made no mention of the loss of consortium claim or the plaintiff spouse asserting it. *Id.*

The court concluded that the reference to "all claims," plural, did not suggest that the proposal applied to the claims by Garfield the spouse, even though Martha only asserted a single count against the Mileys. Everything else in the proposal made clear that it was made solely by Martha. Additionally the "use of the phrases

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[7] Unlike the proposal here, Kyle's proposal required not only dismissal of the claims against him, but also the claims against Glenn, who was alleged to be vicariously liable for Kyle's negligence. *Id.* Martha has invoked this Court's jurisdiction on a claim of conflict with *Audiffred* because the proposal did not apportion the amount between Kyle and Glenn. That is a wrinkle not present in this case because each of the proposals in this case was made to a single defendant without promising or requiring dismissal of claims against any other defendant. Thus, whatever conflict there might be between *Miley* and *Audiffred* has no impact on this case.

‘all claims’ and ‘giving rise to th[e] lawsuit’ is appropriate because, although Martha Nash brought only one ‘count’ in the complaint, within that count she specifically sought” several different types of damages, just as Mr. Anderson did in this case. *Id.* at 147-48.

The court also explained why no requirement exists for the proposal to address what would happen to Garfield’s loss of consortium claim if Martha accepted the proposal:

> The proposal did not need to address Garfield Nash’s separate loss of consortium claim. As explained above, the rule requires that a proposal identify the claims it is “attempting to resolve,” not every claim related to the suit brought by either plaintiff. Although the loss of consortium claim was pending against the Mileys at the time of the proposal, that claim was not affected by the proposal for settlement because it was Garfield Nash’s separate and distinct claim, despite its derivative nature. Garfield Nash was still free to pursue his loss of consortium claim even if Martha Nash accepted the proposal because it would only dismiss her claims; the proposal required no action or input on the part of Garfield Nash whatsoever because his cause of action was his own. Because the proposal explicitly stated that it was to cover all claims brought by Martha Nash, it was not deficient for failing to address the other pending claim in the lawsuit brought by an entirely different plaintiff. This reasoning is consistent with the supreme court’s statement in *Nichols* that ‘settlement proposals must clarify which of an offeree’s outstanding claims against the offeror will be extinguished by any proposed release.” Because Garfield Nash was not an offeree under the proposal, there was no need to address his claim. Accordingly, the failure to mention the loss of consortium claim did not render the proposal defective.

Id. at 148-49. For the same reasons, paragraph 4’s use of the plural “any and all claims” language in Mr. Anderson’s proposal and its failure to specifically

exclude Mrs. Anderson's claims does not render it ambiguous. *See also Jacksonville Golfair, Inc.*, 988 So. 2d at 1227 ("Even though Appellant's proposal did not address the claims or interests of other parties to the action, this did not create ambiguity, and it is irrelevant.").

But even if paragraph 4 could reasonably be interpreted to apply to both Mr. and Mrs. Anderson's claims in isolation, that ambiguity is quickly resolved when looking at the proposal as a whole. The logical starting point is to look at the preceding sentence of the proposal, which specifically identifies the claims the proposal is intended to settle:

> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against [RECIPIENT].

In fact, The Fifth District did not overlook this sentence; the court expressly recognized that it "reflects that the proposal was intended to resolve only Troy Anderson's claim." (App. 185.) *Hilton Hotels Corp.*, 153 So. 3d at 416. The court held that this clear statement was overcome by the next sentence not because paragraph 4 clearly stated to the contrary, but merely because the court determined that 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." (App. 185.) *Id.*

While paragraph 3 should be sufficient to uphold Mr. Anderson's proposals, it is far from the only part of the proposals making clear he proposed to settle his claims only. Unlike the proposal this Court invalidated in *Pratt*, 161 So. 3d at 1270, Mr. Anderson's proposal consistently referenced the offerors in the singular, never referencing Mrs. Anderson by name or otherwise. The title of the proposals stated it was made on behalf of "Plaintiff, Troy Anderson." The introductory paragraph did as well. Paragraph 2 expressly stated the proposals were "made on behalf of Plaintiff, TROY ANDERSON ("PLAINTIFF"), and paragraph 5 explained the proposals were "inclusive of all damages claimed by PLAINTIFF." And, of course, even paragraph 4 stated that "PLAINTIFF," singular, agreed by the proposals to settle claims.

None of these defendants could have reasonably been confused about whether the proposals would have also settled Mrs. Anderson's claims, even if they had nothing to go by but the proposals themselves. The proposals were sufficiently clear and definite to allow them to make an informed decision without needing clarification.

In sum, the Fifth District's error occurred in its holding that when one provision could reasonably be read two different ways, but other provisions make clear which way is intended, the proposal must still be invalidated for ambiguity. In contrast, *Alamo Financing* involved a proposal that was made by one of two

defendants, Alamo Financing, and 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." 112 So. 3d at 629. The plaintiff contended that this sentence was ambiguous as to whether the reference to "all claims" included the claims against the other defendant. *Id.* at 629-30. The Fourth District 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 that this rendered the entire proposal ambiguous and unenforceable.

The court reasoned 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)); *see also Land & Sea Petroleum*, 53 So. 3d at 354 (holding that one paragraph stating that proposal was to resolve "all claims" without making clear it was referring to claims "in this action" was not ambiguous as to whether it covered

claims outside the action where other provision made that clear); *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 whole").

The court concluded that the ambiguity was resolved because "the proposal for settlement named only [one party] as the party making the proposal," It "named *only* Alamo Financing as the party making the proposal," and contemplated the dismissal of the suit against and release of only Alamo Financing and its related entities. *Alamo Fin., L.P.*, 112 So. 3d at 630. These terms clarified that the proposal would only resolve claims against Alamo Financing, just as paragraphs 2 and 3 of the proposals in this case clarified that they would only resolve Mr. Anderson's claims.

This is the sounder reasoning as it adheres to the generally accepted rule of construction for deciding a question of ambiguity that each portion must be considered together with and as part of the whole.

C. Paula's Proposals, Which Were Served the Same Day, Further Removed Any Basis for Uncertainty by the Defendants.

Finally, whatever possible confusion the defendants might have had from reading Mr. Anderson's proposals as a whole was utterly unreasonable because at the same time they received his proposals, they received separate proposals from Mrs. Anderson that were identical to his other than replacing Mr. Anderson's

name with hers and proposing much reduced amounts, commensurate with the nature of her derivative claims. She had the same language in her paragraph 4 as Mr. Anderson, so the district court's interpretation of this language would have meant that the Andersons were proposing at the same time to settle their claims for two dramatically different amounts on otherwise identical terms. That is simply not a reasonable interpretation when viewed in this context.

Pratt supports looking beyond the four corners of the proposal to understand the context in which the proposal was made. The title of the proposal in that case indicated it was made by "Defendant, Florida Medical Center[]," using the singular, but the text of the proposal stated that it was being made by "Defendants, FMC HOSPITAL LTD., a Florida Limited Partnership d/b/a FLORIDA MEDICAL CENTER; FMC MEDICAL, INC. f/k/a FMC CENTER, INC. d/b/a FLORIDA MEDICAL CENTER," using the plural. *Pratt*, 161 So. 3d at 1270. The singular title notwithstanding, the court concluded this was a joint offer requiring apportionment. The court found support for its conclusion by looking to the complaint, which treated FMC Hospital Ltd. and FMC Medical, Inc. as separate defendants subject to different counts. *Id.* at 1272.

Similarly, in *Land & Sea Petroleum, Inc.*, the court found that a proposal's failure to state whether the amount of the proposal was to be paid by the offeror or the offeree was not ambiguous because the complaint provided the necessary

context to make clear that the offeror was proposing to pay the offeree. 53 So. 3d at 353.

The Fifth District chose not to even acknowledge Mrs. Anderson's proposals, perhaps agreeing silently with the trial court's conclusion that Rule 1.442(i) prohibited consideration of her proposals because Mr. Anderson was not seeking their enforcement. (App. 164.) But the rule provides no justification for this decision. It provides, "Evidence of a proposal … is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions." The proceedings at issue in this appeal are for the imposition of sanctions for the defendants' failure to accept proposals for settlement. Nothing in Rule 1.442(i) limits the court's consideration to just the proposal that is the basis for seeking sanctions. Evidence of other proposals may be relevant for a variety of reasons including whether the proposal to be enforced was made in good faith or, as in this case, was ambiguous.

It is clear from the language of paragraph 4 when read in context with the rest of the proposal and with the knowledge the identical proposals were made by Mrs. Anderson at the same time that Mr. Anderson's proposals sought to settle only his claims against each defendant and not Mrs. Anderson's claims. The proposals were therefore valid and should be enforced.

II. THE PROPOSALS TO EACH OF THE HOTEL DEFENDANTS MUST BE COMPARED TO THE TOTAL JUDGMENT AGAINST THEM BECAUSE THEY CONCEDED JOINT LIABILITY.

Standard of Review. Whether the amount of a judgment is sufficient to support an award of fees under a proposal for settlement is a question of law reviewed de novo. *Frosti v. Creel*, 979 So. 2d 912, 915-17 (Fla. 2008).

The Fifth District's alternative reason for invalidating Mr. Anderson's proposals to the three Hotel Defendants is puzzling in that it contains no legal reasoning or citation of authority and appears to be based on a mistaken view of the law and the facts. The court stated:

> 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. 186-87.) *Hilton Hotels Corp.*, 153 So. 3d at 416-17.

First, the factual basis for this ruling is untrue. Mr. Anderson did not request to have the Hotel Defendants treated as one by the jury at all. He was requesting jury instructions regarding their liability under agency theories when the Hotel Defendants, all represented by the same counsel, objected. Defense counsel was the one to request they be treated as a single entity, including on the verdict form.

Thus, the only reason the jury did not apportion liability separately for each of the Hotel Defendants was because **the Hotel Defendants** did not want that.

But even if Mr. Anderson had been the one to propose that they be treated jointly as a single entity, so what? Neither of the courts below cited any law to support their ruling. The governing law is section 768.79, which provides,

> If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

§ 768.79(1), Fla. Stat. (2011). Mr. Anderson has recovered a judgment against each of these defendants that is at least 25 percent greater than the proposal he made to each defendant. Mr. Anderson was free to execute on this full amount of the judgment against any one of the Hotel Defendants. Each Hotel Defendant could have avoided this result by accepting the proposal Mr. Anderson made it.

Absent a finding that a literal interpretation of clear language would lead to a ridiculous result, the courts below had no authority to depart from this plain language, no matter what policies they thought would be "ill-served." *See generally Fla. Dep't of Bus. & Prof. Reg. v. Inv. Corp. of Palm Beach*, 747 So. 2d 374, 382-83 (Fla. 1999). Not only did the courts below fail to articulate what legislative policy would be ill-served, but at least one other court has expressly recognized that there is no legislative policy prohibiting plaintiffs from making

offers of different amounts to jointly liable defendants for strategic reasons. *Hess v. Walton*, 898 So. 2d 1046, 1051 (Fla. 2d DCA 2005). In finding that such offers are not made in bad faith, Judge Altenbernd explained the permissible strategies plaintiffs have historically been allowed to employ that the decision below now threatens:

> It is worth explaining that the plaintiff may have a logical, strategic reason to make such differentiated offers. It forces one defendant to settle. The plaintiff obtains money that can be used to further prosecute the lawsuit or which can be safeguarded from the risk of a future judgment if the defendants obtain the right to a judgment for their fees. The plaintiff can eliminate the defendant for whom the jury may have sympathy, or the defendant who may be on the brink of bankruptcy. If more than one lawyer is involved, the plaintiff can remove the defendant with the best lawyer. We doubt that these are considerations addressed by the legislature when enacting these fee-shifting provisions, but they are logical considerations and we cannot rule that they are matters that a plaintiff's attorney should disregard when making a good faith offer to settle a case.

Id. He also explained how defendants can use similar strategies to their advantage. *Id.* at 1051-52. He concluded this discussion by recognizing the lower courts proper role in this area, a role violated by the Fifth District here:

> We emphasize again that we did not create these rules. We are merely the messenger. The legislature and the supreme court collectively have clearly and unequivocally overruled the common law relating to attorneys' fees under these circumstances, and the result we reach is required by their efforts.

Id. at 1052.

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.

As *Hess* involved imposition of attorney's fees sanctions against the party that was vicariously liable for the direct negligence of the other party, the holding speaks even more strongly in the circumstances here where each defendant was directly liable for its negligence.

In *Thornburg v. Pursell*, 476 So. 2d 323 (Fla. 2d DCA 1985), 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. *Id.* at 324-25. While the court was addressing a prior version of the rule that provided only for an award of costs when an offer of judgment was beaten, that difference has no impact on whether the amounts must be combined.

Finally, the decision below conflicts with the whole notion that even offers to jointly liable defendants can be apportioned. For example, in *Lamb v. Matetzschk*, 906 So. 2d 1037 (Fla. 2005), this Court held that a prior version of Rule 1.442 required apportionment of a single proposal made to two defendants, even when one defendant's liability was purely vicarious to the other's. This Court addressed that requirement again in its recent decision in *Pratt* that apportionment was **required** "[e]ven where no logical apportionment can be made." 161 So. 3d at 1272-73.[8]

The decision below is directly contrary to the idea of apportionment. Instead of serving a single proposal on the Hotel Defendants apportioning liability among them, Mr. Anderson served each with a separate proposal for a specific amount. That is a distinction without a difference. The only possible reason for requiring apportionment in the first place is to be able to compare the final judgment obtained against the defendants to the amount apportioned to each one, not the total amount.

In short, each of the Hotel Defendants had the opportunity to settle the claims against it for much less than the jury ultimately awarded. In that instance,

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[8] Joint offers to vicariously liable defendants no longer have to be apportioned since a 2011 amendment, *In re Amends. to Fla. Rules of Civ. Pro.,* 52 So.3d 579, 588 (Fla. 2010), but that clearly does not mean that they cannot be apportioned if the offeror chooses to do so.

the legislature has created a property right for Mr. Anderson to recover his attorney's fees as a sanction for their refusal to settle.

CONCLUSION

For the foregoing reasons, the decision below should be quashed with directions to reverse and remand for a judgment awarding trial and appellate attorneys fees against all four defendants.

Respectfully submitted,

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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.

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