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
DCA CASE NOS. 5D13-2552, 5D13-2553

ANSWER BRIEF OF RESPONDENTS

Shelley H. Leinicke, Esq.
WICKER, SMITH, O'HARA, McCOY & FORD, P.A.
Counsel for Hilton Hotels Corp. 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
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

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STATEMENT OF THE CASE AND FACTS

Preliminary Statement

This case arises from the denial of petitioner Troy Anderson's[1] motions for attorneys' fees on the ground that the proposals for settlement were defective under Florida Statutes section 768.79 and Florida Rules of Civil Procedure 1.442. The Fifth District Court of Appeals affirmed the trial court's ruling. *Hilton Hotels Corp. v. Anderson*, 153 So.3d 412 (Fla. 5th DCA 2014).

Anderson sought review of the Fifth District's opinion on the basis of express and direct conflict with decisions of other courts of appeal. Notably, one of the decisions that Anderson contended conflicted with the Fifth District's opinion was the Fourth District's decision in *Pratt v. Weiss*, 92 So.3d 851 (Fla. 4th DCA 2012), which has since been reversed by the Court. *Pratt v. Weiss*, 161 So.3d 1268 (Fla. 2015). After the issuance of the Court's decisions in *Pratt* and in *Audiffred v. Arnold*, 161 So.3d 1274 (Fla. 2015), the Court entered an order on May 11, 2015, directing the petitioner to show cause why the *Pratt* and *Audiffred* decisions were not controlling and why the Court should not decline to accept jurisdiction in this case.

Although the Court has accepted jurisdiction, the respondents respectfully argue that the Fifth District's decision in this case does not expressly and directly

[1] The petitioner will be referred to herein as "Anderson" or "Troy Anderson".

conflict with the decision of another district court or of this Court on the same question of law. Nowhere in his initial brief does Anderson identify any decision of any other district court or this Court that expressly and directly conflicts with the Fifth District's decision. In fact, the Fifth District's decision is wholly consistent with the Court's recent decisions in *Pratt* and *Audiffred*, and Anderson's petition for review should therefore be dismissed.

The Claims Alleged in the Second Amended Complaint

Anderson was the victim of a shooting at an Embassy Suites Hotel in Orlando. Anderson and his wife Paula filed suit against the four respondents: Hilton, W2007, Interstate, and SecurAmerica.[2]

The operative second amended complaint set forth seven separate counts. Anderson alleged one count entitled "Negligence" against each of the three respondents Hilton, SecurAmerica, and W2007. Anderson alleged three counts against respondent Interstate, entitled "Negligent Failure to Provide Safe Premises," "Failure to Warn of Known Danger," and "Fraudulent Misrepresentation." Paula Anderson alleged one separate count, for loss of

[2] 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. Hilton, W2007, and Interstate are collectively referenced herein as "the Embassy Suites defendants." SecurAmerica, LLC, is referred to herein as "SecurAmerica."

consortium, against all four respondents. Each of the counts incorporated the same factual allegations. (R 232-270 at ¶¶ 1-50).[3]

The second amended complaint contained no allegation that any respondent was solely vicariously, constructively, derivatively, or technically liable for the fault or negligence of any of the other respondents. Although there were allegations of agency relationships among the respondents, (R 235-236, 238, 251, 261 at ¶¶ 11, 15, 24, 48, 80), no count alleged that agency was the *sole* basis for the liability of any respondent. Rather, the second amended complaint alleged direct and active negligence against each of the respondents. (R 233, 235-238, 245-246, 253-254, 257-258, 261-267 at ¶¶ 7, 11, 16, 18, 21, 26, 41-44, 52-53, 57a, 61-64, 66, 69a, 69d, 80-83, 88, 97, 101, 109).

Anderson's Proposals for Settlement

On October 5, 2011, Anderson served separate proposals for settlement on Hilton, Interstate, W2007, and SecurAmerica. (A 40-47).[4] The amounts of the proposals were $650,000, $650,000, $100,000, and $650,000 respectively. The key provision of each of these proposals, *i.e.*, what was being offered in exchange for the payment of money, was as follows:

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[3] References to specific pages of the Record on Appeal filed September 17, 2015 and 2nd Supplemental Record on Appeal filed December 9, 2015, shall be indicated herein as (R _____).

[4] References to specific pages of the Appendix to petitioner's Initial Brief on the Merits shall be indicated herein as (A ____).

> That in exchange for [XXX] HUNDRED THOUSAND AND 00/100 DOLLARS ($[XXX],000.00) 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.

Id. (emphasis added). Although the proposal offered to settle "any and all claims" in the case, which included both Anderson's and Paula Anderson's claims, it was unclear whether the offer included Paula Anderson's consortium claim as well as Anderson's negligence claim.

Also on October 5, 2011, Paula Anderson served proposals for settlement on each of the four respondents in the amount of $15,000 or $25,000. (A 48-55).[5] None of the October 5, 2011 proposals was accepted by the respondents.

On March 16, 2012, Anderson served a second proposal in the amount of $300,000 on SecurAmerica. (A 56-57). Except for the amount, the form of the proposal was otherwise identical to the proposal Anderson served on SecurAmerica in October 2011. SecurAmerica did not accept that proposal. Paula Anderson did not serve a second proposal on SecurAmerica.

In this case, Anderson sought to enforce his October 2011 proposals against Hilton, W2007, and Interstate, and the March 2012 proposal against SecurAmerica.

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[5] Because Paula Anderson's claim was voluntarily dismissed before trial, the plaintiffs never sought to enforce that proposal for settlement, and the lower court never ruled on the enforceability of Paula Anderson's proposals.

Pretrial Proceedings and Trial

On August 31, 2012, Paula Anderson was voluntarily dropped as a plaintiff in the case. (R 271-272).

The case was tried from October 22 to November 2, 2012. Anderson's theory of the case as tried was consistent with the allegations in the second amended complaint of active negligence by each respondent. Anderson did not pursue his fraud claim against Interstate. There was never any evidence or argument that any respondent was *solely* vicariously, or derivatively liable for the negligence of any other respondent.

At the charge conference, Anderson requested a jury instruction on agency, and argued that there was evidence that agency relationships existed between or among the defendants. (T2 2252-53).[6] There was no discussion or argument that any respondent was "solely" constructively, derivatively, or technically liable for any other respondent. Anderson in fact expressly argued that each of the respondents was actively negligent. In opposing the defense motions for directed verdict at the close of all the evidence, Anderson argued the active and direct fault of each of the four defendants. (T2 2360-67). Anderson's opposition to the directed verdict motions did not include argument that any respondent was solely

[6] References to pages of the trial transcript of the trial that took place from October 22 to November 2, 2012, contained in the First Supplemental Record on Appeal filed October 27, 2015, are referred to herein as (T2___).

vicariously liable for the negligence of any other respondent.

At the conclusion of the evidentiary portion of the trial, counsel for Hilton, Interstate, and W2007 requested that those three defendants be referred to collectively as "Embassy Suites" in the jury instructions and verdict form. (T2 2253-54). However, the Embassy Suites defendants did not enter into any stipulation or agree to the giving of any jury instruction that the Embassy Suites defendants were vicariously liable for one another's negligence. (T2 2256, 2258).

Anderson requested a jury instruction to the effect that Embassy Suites, Interstate, and W2007 were all "clumped together" under the name Embassy Suites in the instructions and on the verdict form because these three defendants were all in "the same pot." (T2 2254-55). Over the Embassy Suites' defendants' objection, the court gave Anderson's requested jury instruction:

> Members of the jury, you can assume, for purposes of your deliberation, that Interstate Hotels and Resorts, Inc., Hilton Hotels Corporation, and W2000 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.

(T2 2346, 2387). Anderson did not request an interrogatory verdict to apportion fault among the three Embassy Suites defendants so that judgment could be entered separately as to each of them.

The jury returned a verdict finding the Embassy Suites defendants 72% at fault, SecurAmerica 28% at fault, and Troy Anderson 0% at fault. Following

collateral sources setoffs, the court entered judgment against the Embassy Suites defendants in the amount of $1,252,188.74, and against SecurAmerica in the amount of $486,962.28. (A 152-153). Thus, the amount of the judgment obtained against the Embassy Suites defendants was less than the total amount of the proposals for settlement against them ($1,400,000), and the total judgment obtained against all four respondents ($1,739,151.02), was not more than twenty-five percent greater than the total amount of the four proposals for settlement against all respondents ($1,700,000).

Post-Trial Proceedings on Motion for Attorneys' Fees

Anderson moved for attorneys' fees pursuant to the three October 5, 2011 proposals for settlement to Hilton, W2007, and Interstate and pursuant to the March 2013 proposal served on SecurAmerica. (R5 31-38).[7]

Anderson's motions for fees were based on the premise that acceptance of his proposals would have ended the litigation in its entirety. Anderson stated that, had the respondents accepted the proposals, the trial would have been avoided. (R5 32-33). Anderson filed a supplemental motion for fees and costs reiterating Anderson's position that acceptance of the proposals would have avoided the expenditure of fees to establish the defendants' liability at trial. (R5 428-30).

[7] References to specific pages of the record on appeal of the Fifth District Court of Appeal transmitted to the Court on September 4, 2015 and entered on the docket on September 17, 2015, shall be indicated herein as (R5 ____).

The respondents argued in opposition to Anderson's motion that the proposals were unenforceably vague and ambiguous because they did not state what, if any, portion of the settlement was apportioned to the settlement of Paula Anderson's then-pending claims. (R5 696-701, TH 50).[8] The Embassy Suites defendants also argued that none of the three subject October 2011 proposals was enforceable because there was no corresponding separate judgment as to any the three Embassy Suites defendants (R5 712-716).

Hearing on Motions for Attorneys' Fees

At the hearing on Anderson's motion for fees, Anderson conceded that his proposals were intended to resolve "any and all claims" in the case, including Paula Anderson's consortium claim. Anderson's counsel, who represented both Anderson and Paula Anderson throughout the case, admitted that the plaintiffs intended that the claims of Paula Anderson would be dismissed as well if Anderson's offers were accepted. Anderson's counsel stated:

> . . . [W]e didn't do one on Paula's behalf for strategical reasons because, at the end of the day, we knew going into the trial that we were going to dismiss her as a Defendant [*sic*] in the lawsuit. Voluntarily dismiss her. . . .
>
> . . . .
>
> In fact, if Troy Anderson's Proposal for Settlement would have been taken, his wife's claims would have

[8] Citations to specific pages of the transcript of the May 23, 2013 hearing on the petitioner's motions for attorneys' fees, indexed at R5 833-94, will be referred to herein as (TH ____).

> been automatically disposed of because she no longer would have had a derivative claim.

(TH 51-52).

The respondents also argued that Anderson's statements in his motions for fees that acceptance of the proposals would have concluded the litigation entirely indicated that the proposals included Paula Anderson's claim. (TH 44-45). Because "any and all claims" in the case included Paula Anderson's claim, the respondents argued that the proposals were joint proposals that were required to be apportioned between the two offerors, even if Anderson was to get all of the settlement money and Paula Anderson none. (TH 23, 33-36, 42, 49-50).

The respondents objected to Anderson's attempt to clarify his own settlement proposals by offering Paula Anderson's proposals as evidence of his own proposals' meaning. The respondents argued that rule 1.442(d) and section 768.79(3) precluded the filing of a settlement proposal except for purposes of enforcing the proposal. Because Paula Anderson had voluntarily dismissed her claim and did not seek to enforce her settlement proposals, the respondents argued it was improper for Anderson to file Paula Anderson's settlement proposals in order to enforce his own settlement proposals. (TH 45-47).

As to the Embassy Suites defendants, Anderson acknowledged that the three proposals to the Embassy Suites defendants "were all separate proposals; all offered to settle the case for an amount of money in exchange for *settlement of only*

that Defendant's claim." (TH 9) (emphasis added). Anderson also acknowledged that the judgment that was entered against the Embassy Suites defendants did not correspond to the separate proposals for settlement. (TH 10).

The Embassy Suites defendants also argued that an offer must strictly comply with the statute and rule on proposals for settlement to be successful. (TH 23-24). The Embassy Suites defendants pointed out that if Anderson had wanted to preserve his right to enforce the individual settlement proposals to the three Embassy Suites defendants, he could have insisted on referring to these three defendants separately on the verdict form in order to preserve his potential ability to obtain a judgment against defendant corresponding to each offer. (TH 25, 28, 31-32). The Embassy Suites defendants also argued that even taking the three proposals together they did not add up to a sum that would result in an award of attorneys' fees because the judgment against the Embassy Suites defendants was not twenty-five percent greater than the total of the three proposals for settlement. (TH 24-27).

The trial court entered separate orders denying Anderson's motions for attorneys' fees against the Embassy Suites defendants and SecurAmerica. (R5 778-793).

Orders Affirmed on Appeal

On appeal to the Fifth District Court of Appeal, the court affirmed the lower

court's orders denying Anderson's motions for attorneys' fees. *Hilton Hotels Corp. v. Anderson*, 153 So.3d 412 (Fla. 5th DCA 2014). The court 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). 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).

Id. at 415.

The court of appeal held that Anderson's proposals were ambiguous and thus unenforceable. The court stated that although nominally made on behalf of only Anderson, the offers "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." *Id*. at 416. The court held:

> As we did in *Hibbard* [*ex rel. Carr v. McGraw*, 918 So.2d 967 (Fla. 5th DCA 2005)], 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.

Id.

The court also held that the proposals directed to Hilton, W2007, and Interstate were unenforceable for an additional reason. 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.

Id. at 416-17.

Petition for Review

Anderson filed a petition for review to this Court on the asserted ground of express and direct conflict with decisions of other district courts. As discussed more fully below, the respondents contend that no such express and direct conflict exists, and they ask the Court to dismiss Anderson's petition.

SUMMARY OF ARGUMENT

Anderson's proposals for settlement which offered, in exchange for a payment of money by each offeree, "to settle any and all claims asserted against [that offeree], as identified in Case Number 2009-CA-040473-0" was reasonably subject to the interpretation that the offer was one to resolve "any and all claims," including the derivative consortium claim of his wife Paula Anderson, who was a party to the case at the time of the offers. The offers were therefore required to apportion the amount demanded between the petitioner and his wife, pursuant to Fla. R. Civ. P. 1.442(c)(3). Anderson represented to the trial court that it was the plaintiffs' intent to dismiss wife's claim if the offers were accepted, and his inconsistent argument on that point on appeal demonstrates the ambiguity of the offers.

The question of whether the offers included "any and all claims" as they plainly stated, or whether they included only the claim for direct negligence asserted Anderson against each offeree, was a question of the utmost importance to the offerees. If the offers were intended to in fact resolve "any and all claims" against the offeree, then acceptance would have ended the litigation against that defendant. If, as the petitioner now inconsistently contends, the offers were intended to settle only his direct negligence claim, then acceptance would have resulted in continued litigation over liability and damages related to the consortium

claim. That difference in outcome was a material issue. Because an offer must be as specific as possible, leaving no ambiguities so that the offeree can fully evaluate the offer, the petitioner's failure to clarify that critical point rendered the offers unenforceable.

The fact that Paula Anderson served proposals for settlement at the same time as three of the four subject proposals by Anderson did not clarify the meaning of the petitioner's offers. To be enforceable, the meaning and effect of a proposal for settlement must be capable of being determined without resort to clarification or judicial interpretation. If Anderson's proposals were in need of clarification by reference to his wife's separate proposals, then his proposals were, by definition, ambiguous and therefore unenforceable.

The separate proposals for settlement against the respondents Hilton, W2007, and Interstate are unenforceable for the additional reason that there was no separate judgment obtained as to each of those defendants based on a determination of each defendant's fault. Anderson alleged active negligence against each defendant, and did not allege or prove that any defendant was solely vicariously liable for the negligence of any other defendant. Anderson's proposal to each defendant was based on his theory of the case of active negligence. By electing to group those three defendants together as the Embassy Suites defendants on the verdict and judgment, Anderson failed to obtain a judgment against any of

them that could be compared to the separate proposals for settlement. Moreover, even if the proposals could be collectively compared to the collective judgment, the proposals would not support an award of fees, because the aggregate judgment was less that the total of the aggregate proposals for settlement.

ARGUMENT

I. Petitioner Concedes that his Proposals were Ambiguous, and the Record Demonstrates that this Ambiguity was Material to the Respondents' Ability to Evaluate the Offers

The Fifth District's affirmance of the orders denying attorneys' fees is wholly consistent with this Court's recent decisions in *Pratt v. Weiss*, 161 So.3d 1268 (Fla. 2015), and *Audiffred v. Arnold*, 161 So.3d 1274 (Fla. 2015), as well as other controlling case law interpreting Florida Statutes section 768.79 and rule 1.442 of the Florida Rules of Civil Procedure.

This Court's jurisprudence reflects the need for clarity and precision in drafting a proposal for settlement. As the Court stated in *Pratt*, rule 1.442 "must be strictly construed because it, as well as the offer of judgment statute, is in derogation of the common law rule that each party is responsible for its own fees." 161 So.3d at 1271. This is so that the party receiving the offer can fairly evaluate the offer and know what the effect of acceptance will be. As the Court stated in *Audiffred*, "the proposal must be sufficiently clear to permit the offeree to reach an informed decision without the need of clarification." 161 So.3d at 1279. The burden is thus on the drafter to make his proposal as clear and unambiguous as reasonably possible. *Dryden v. Pedemonti*, 910 So.2d 854, 855 (Fla. 5th DCA 2005) ("The burden of clarifying the intent or extent of a settlement proposal cannot be placed on the party to whom the proposal is made.").

Here, petitioner starts his argument with the words "any ambiguity in the reference to 'any and all claims'.'' [Ini. Brf. Merits p. 14]. Petitioner admits that the language of his proposals was internally contradictory and inconsistent, but argues that "any ambiguity" cannot have affected respondents' decisions whether to accept the offers. In fact, the ambiguity went to the heart of the case because the ambiguity made it uncertain whether acceptance of the offers would end the litigation or result in further litigation. That was, obviously, a material point for the respondents as offerees, and ambiguity on that point rendered the offers unenforceably ambiguous, as the trial court and court of appeal correctly ruled.

In this case, the putative sole offeror was one of two plaintiffs who were husband and wife asserting direct and derivative claims arising out of the same incident. As the Fifth District correctly held, the language of the proposals "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." *Hilton Hotels Corp. v. Anderson*, 153 So.3d 412, 416 (Fla. 5th DCA 2014). As the record shows, the petitioner himself stated below that his intent was to dismiss both his and his wife's claims if the offers were accepted. (TH 51-52). However, even if the intent of the petitioner's proposal was, as he now inconsistently contends, to resolve only his own direct claim and leave his wife's derivative consortium claim pending, then resolving the ambiguity on that point would have been a simple matter. All

Anderson had to do was to state explicitly that the offer did not include his wife's claim. As the drafter of the proposal, the burden was on Anderson to make that clear in the proposal itself. In any event, affirmance of the ruling below is mandated by Anderson's own inconsistent assertions of what claims he intended to resolve by his proposals.

The respondents were not required to guess at the meaning of the offers. As this Court held in *Pratt* and *Audiffred*, the respondents were entitled to know what would happen if they accepted the proposals. Whether acceptance of the proposals would have ended the litigation altogether or would have entailed continued litigation over Paula Anderson's claim was a matter of the utmost and material importance to each offeree, and that issue was not clearly resolved in the proposals.

The lower court and the Fifth District correctly determined that the proposals were ambiguous and thus unenforceable. The respondents request that the Court approve the Fifth District's decision.

A. Far from "Nit-Picking," the Admitted Ambiguity as to what Claims were Included in the Proposals was a Matter of Material Importance to the Respondents

The Court in *Pratt* and *Audiffred* set forth the practical rationale for the legal standard of strict construction. The Court stated that in order to be enforceable, "the proposal must be sufficiently clear to permit the offeree to reach an informed decision without the need of clarification." *Audiffred*, 161 So.3d at 1279 (citing

State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So.2d 1067, 1079 (Fla. 2006)). The legal basis of the rule was set forth in *Pratt* as follows:

> This Court has held that subdivision (c)(3) of rule 1.442, which requires a joint proposal to state the amount and terms attributable to each offeror or offeree, must be strictly construed because it, as well as the offer of judgment statute, is in derogation of the common law rule that each party is responsible for its own fees. *See* [*Willis Shaw Express, Inc. v.*] *Hilyer Sod*, 849 So.2d [276,] 278 [(Fla. 2003)]; *see also Gershuny v. Martin McFall Messenger Anesthesia Prof. Ass'n*, 539 So.2d 1131, 1132 (Fla. 1989) ("[T]he rule in Florida requires that statutes awarding attorney's fees must be strictly construed."). Thus, to be valid, an offer of judgment presented by multiple offerors must apportion the amount that is attributable to each offeror. *Hilyer Sod*, 849 So.2d at 278-79.
>
> The purpose of the apportionment requirement in the rule is to allow each offeree to evaluate the terms and the amount of the offer as it pertains to him or her. *See id*. at 278 (quoting *Allstate Ins. Co. v. Materiale*, 787 So.2d 173, 175 (Fla. 2d DCA 2001)).

Pratt, 161 So.3d at 1271-72. The purpose of requiring strict compliance with the rule and statute is not to make it difficult for offerors to propose settlements, but rather to protect offerees from being penalized by guessing wrong as to the meaning of an ambiguous offer.

In *Pratt*, the Court strictly applied the requirements of Florida Rules of Civil Procedure 1.442 and Florida Statutes section 768.79, and held that a defense offer of settlement nominally made by one of several affiliated defendants was

nonetheless a joint proposal under rule 1.442 because acceptance would have resulted in the dismissal of claims against all defendants. *Id*. at 1271-73. The Court stated that "under a strict construction of section 768.79 and rule 1.442, apportionment of the settlement amount was required." *Id*. at1273. The Court in *Pratt* focused on what would be the effect of acceptance, not on an abstract concept of imposing a harsh drafting requirement on the offeror.

In *Audiffred*, the Court held that ambiguity as to whether a co-party's claim would be resolved by acceptance of the offer was fatal. Under the rule of strict construction, the Court held that "due to this patent ambiguity, the offer lacked sufficient clarity to permit Arnold to reach an informed decision with regard to the settlement amount against the pending claims by [both plaintiffs]," and was therefore "fatally ambiguous." 161 So.2d at 1280 (citing *Nichols*).

As in *Pratt* and *Audiffred*, the problem with the offers here was that it was unclear what would happen to the litigation if the respondents accepted the offers. In violation of the clarity required by the controlling law of *Pratt* and *Audiffred*, the offers in this case were not "sufficiently clear to permit the offeree to reach an informed decision without the need of clarification." Nothing in Anderson's proposals cleared up the ambiguity about whether Paula's claim was included in "any and all claims." Although the proposals stated that they were made by Anderson, that did not clear up the question of whether Paula's claim would also

be dismissed, even if all of the money was to go to Troy. Even if it was intended that all of the money would go to Anderson, that left open the issue of what would happen to Paula's consortium claim. Was her claim to be dismissed, too, albeit without any monetary payment to her? No apportionment was set forth in the offers, but the language proposing to settle "any and all claims asserted against [the offeree], as identified in Case Number 2009-CA-040473-0" reasonably suggested as much, as the district court held. The respondents' insistence on knowing what exactly they were being asked to pay for in the proposed settlement was not nit-picking. This was a real, material, and unresolved issue of what the effect would be if the offerees accepted the proposals.

Anderson cites to the Court's decision in *Nichols* for the proposition that the lower courts' rulings here demanded "the impossible" of him in order to eliminate ambiguity. Far from the impossible, all that was demanded was straightforward and clear expression of what the offer entailed. What *Nichols* requires is that "a proposal for judgment . . . be *as specific as possible*, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions." 932 So.2d at 1079 (emphasis added, quoting *Lucas v. Calhoun*, 813 So.2d 971, 973 (Fla. 2d DCA 2002)).

One of the cases cited by Anderson, *Alamo Financing, L.P. v. Mazoff*, 112 So.3d 626 (Fla. 4th DCA 2013), illustrates the ease with which the ambiguity in

this case could have been avoided. *Alamo* involved one of two defendants, whose settlement proposal specifically stated that only the offeror vehicle owner, and not the co-defendant driver, was to be released, and where the language of the attached release was clearly worded so as not to release a potentially liable rental agency affiliate that had not been named as a defendant at the time of the proposal for settlement. *Id*. at 629-31. That case is distinguishable from the present case, where Anderson's proposals did not contain any explicit language stating that Paula Anderson's claim would remain pending if the proposal was accepted. There was nothing "impossible" about achieving simple clarity in this case, as *Alamo* illustrates.

Notably, *Nichols* notes that the requirement of clarity is needed to prevent "creative maneuvering by the other party" after an offer is accepted. *Id*. at 1079. Had the respondents accepted the proposals under the reasonable expectation that "any and all claims" against them would be settled, and then been blindsided by Paula Anderson's continuing to litigate her consortium claim, this would have been an egregiously unfair situation. The rationale of the rule—to permit the offeree to reach an "informed decision" before accepting the offer—would be thwarted in such a situation.

It was Anderson's obligation to make the proposals "sufficiently clear and definite to allow the offeree to make an informed decision without needing

clarification." *Nichols*, 932 So.2d at 1079. As the Florida Supreme Court held:

> 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.*

Id. (emphasis added, quoting *Lucas v. Calhoun*, 813 So.2d 971, 973 (Fla. 2d DCA 2002)). Thus, "[i]f ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement." *Id.*

The law as stated by the Court requires strict construction of and strict compliance with rule 1.442 and section 768.79. Notably, there is no provision in either the rule or the statute for an offeree who is uncertain as to the meaning of a formal offer of settlement to seek judicial clarification of that meaning before the deadline for acceptance of the offer. Indeed, *Nichols* states that an offer must be sufficiently clear so that no clarification or interpretation is needed. 932 So.2d at 1079. Because no clarification can be provided, the law of strict construction protects offerees who might otherwise have to guess at the meaning of an unclear offer. If an offer is such that it requires clarification or interpretation to explain its meaning, then the offeree cannot be penalized for not accepting that offer.

B. The Fact that One Paragraph of the Offer is Inconsistent with Another Paragraph Cannot and Does Not Clarify the Offer, but Instead Renders the Whole Offer Ambiguous

Contrary to the petitioner's argument, the fact that Anderson was designated as the sole offeror in the proposals for settlement is not dispositive of whether or not the offers were joint ones requiring apportionment in order to be enforceable. As held by this Court in *Audiffred*:

> We hold that when a single offeror submits a settlement proposal to a single offeree pursuant to section 768.79 and rule 1.442, and the offer resolves pending claims by or against additional parties who are neither offerors nor offerees, it constitutes a joint proposal that is subject to the apportionment requirement in subdivision (c)(3) of the rule. We conclude that the statute and the rule mandate apportionment under such circumstances to eliminate any ambiguity with regard to the resolution of claims by nonofferor/nonofferee parties.

161 So.3d at 1280.

Audiffred was an automobile accident case in which the wife asserted a claim for her personal injuries and her husband asserted a loss of consortium claim. The proposal for settlement, though nominally made by only the wife, "had the effect of settling claims by two plaintiffs against one defendant." *Id*. at 1279. Although the plaintiffs apparently advised the lower court that they intended that the wife would receive all of the proceeds and the husband receive nothing, this was not clearly stated in the proposal itself. *Id.* Therefore, under the rule of strict construction, the Court held that "due to this patent ambiguity, the offer lacked

sufficient clarity to permit Arnold to reach an informed decision with regard to the settlement amount against the pending claims by [both plaintiffs],” and was therefore “fatally ambiguous.” *Id*. (citing *Nichols*). In *Pratt* as well, the subject proposal was nominally made by one entity, but the Court determined that it was nonetheless a joint offer of behalf of multiple co-parties. 161 So.3d at 1272.

In *Audiffred*, *the Court* cited *Allstate Ins. Co. v. Materiale*, 787 So.2d 173, 175 (Fla. 2d DCA 2001) in stating that “apportionment of the settlement amount can be particularly important where a loss of consortium claim is involved.” *Audiffred*, 161 So.3d at 1279 (quoting *Materiale*). Here, the significance of the disposition of the consortium claim by acceptance of the direct claim was recognized by Anderson himself, where he conceded that the consortium claim would also be dismissed if the direct negligence claim was resolved.

The situations in *Audiffred* and *Pratt* are analogous to the situation in this case, where Anderson was the nominal offeree, but the language of the offers reasonably could be understood to propose a settlement of “any and all claims asserted against [the offeree], as identified in Case Number 2009-CA-040473-0”, including the claim of Paula in that case. Corroborating the reasonableness of this possible interpretation of the proposal as a joint offer, Anderson’s counsel told the trial court that the intent was to dismiss Paula’s claim if Anderson’s offer was accepted. (TH 51-52). The petitioner now argues the opposite position and says

that he was mistaken as to the legal effect of dismissal of his claim and that Paula Anderson's consortium claim would not have been automatically lost had Anderson's negligence claim been dismissed, thus irrefutably establishing the ambiguity of the proposals' wording. Petitioner intended to resolve both his and his wife's claims if the offers nominally made by Anderson were accepted. That intent was reflected in the language of the offers, as reasonably understood by the respondents and by the lower courts, and as required by *Audiffred* and *Pratt*.

Even if a direct negligence claim may theoretically be capable of resolution without settling the spouse's derivative consortium claim, that is not a typical situation. Here, Anderson's counsel (who represented both plaintiffs and therefore must be presumed to have been authorized by both his clients) told the trial court that the plaintiffs' intention was to dismiss Paula Anderson's claim if Anderson's proposals were accepted. Because this was one of two possible outcomes from the plaintiffs' standpoint, then it was equally reasonable for the respondents to be unable to interpret Anderson's ambiguous proposals as to which outcome was intended.

Anderson's admission in the trial court (that the plaintiffs intended to dismiss Paula's claim) indicated his apparent view at the time that the derivative claim had no practical value as a litigation vehicle apart from Troy's claim.

Anderson's subsequent, and directly contrary, argument (that his proposal

could not be viewed as affecting his wife's claim because he did not have "authorization" to settle that claim) not only confirms the ambiguity created by the wording of the proposals themselves, it also ignores the record in this case and the case law. Anderson and his wife were represented throughout this litigation by the same lawyers, and presumably every pleading and paper filed in the case was authorized by both of their clients. In the First District's opinion in *Audiffred*, as in this case, the court noted that the two plaintiffs "have been represented by the same attorney through the entire proceedings," and that the proposal was made by their "shared attorney." *Arnold v. Audiffred*, 98 So.3d 746, 747, 748 (Fla. 1st DCA 2012). The proposal for settlement in that case, as here, "stated at the outset that it was submitted by only one party," the spouse with the direct negligence claim. *Id*. at 748. Nonetheless, the court found that the proposal nominally made by only one plaintiff was a joint proposal by both plaintiffs. The court stated, "Their shared attorney, an individual who had the apparent authority to make this proposal for settlement, submitted this proposal. Therefore, reading the proposal as a whole, it was a joint proposal." *Id*. Anderson's retreat from his original position so as to now argue that the proposal submitted by his and his wife's joint lawyer was not "authorized" by his wife is not only without basis, it also reflects a factual distinction from *Audiffred* that precludes a conflict.

Anderson cites the Second District case of *Miley v. Nash*, 171 So.3d 145

(Fla. 2d DCA 2015), in support of his new-found argument that his offer precluded any reasonable interpretation that the offer included Paula Anderson's claim. However, an examination of the language of the proposals in *Miley* and in this case shows that Anderson's proposal did not approach the level of clarity of the offer in *Miley*. The operative language of Anderson's proposal stated: "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.". The language did not state that it was an offer to settle any and all claims asserted *only by Troy Anderson* against the offeree in the case. By contrast, in *Miley*, the proposal stated that it was to settle "all claims and causes of action resulting from the incident or accident giving rise to th[e] lawsuit *brought by Plaintiff Martha Nash against Defendant Kyle Miley*." 171 So.3d at 147 (emphasis added). There is no conflict between the Second District's decision in *Miley* and the Fifth District's decision in this case.

The other cases cited by Anderson also do not support his argument that the Court should abandon its strict construction precedent. *Ledesma v. Iglesias*, 975 So.2d 1240 (Fla. 4th DCA 2008), did not involve or address any issue of what claims were included or excluded from the offer. Rather, the defense offer there was accompanied by and incorporated a general release that specifically detailed the terms of the proposed settlement, which the court held was clear and

unambiguous. *Id*. at 1244. Unlike *Ledesma*, the proposals at issue here did not include any release clarifying what claims were or were not included in the proposal, and as the Fifth District correctly held in this case, the language of the proposal was reasonably susceptible of the construction that it included both Anderson's and Paula Anderson's claims, rendering it ambiguous.

Similarly, *Jacksonville Golfair, Inc. v. Grover*, 988 So.2d 1225 (Fla. 1st DCA 2008), cited by Anderson, is distinguishable from this case. There the proposal for settlement identified exactly which counts and which parties' claims were involved in the settlement proposal. *Id*. at 1226. The First District therefore found the offer to be unambiguous and enforceable. *Id*. at 1228.

In another case cited by Anderson, *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So.3d 348 (Fla. 4th DCA 2011), brokers sued the seller seeking to recover commissions, and the defendant seller made separate proposals for settlement to the plaintiffs in the amount of $500. The ambiguity asserted there was that the offer did not state which side was to pay the $500. *Id*. at 352. The court rejected that argument, stating that it was clear that the defendant, who was making the offer and who had not asserted any counterclaim, was offering to pay the plaintiff, not vice-versa. *Id*. at 353. In *Land & Sea*, there was no question as to what claims were to be settled, or whether the litigation would or would not continue if the offer were accepted. That case is wholly distinguishable from this

case, where Anderson concedes that his offers contained ambiguous language as to whether one of both plaintiffs' claims were to be resolved by the offer.

Anderson argues that his proposals were subject to a lesser standard of clarity because they were made prior to the 2014 amendment to rule 1.442(c)(2)(B). *See In re Amendments to Florida Rules of Civil Procedure*, 131 So.3d 643, 644, 648 (Fla. 2013). Prior to that amendment, the subsection stated that a proposal for settlement "shall . . . identify the claim or claims the proposal is attempting to resolve." After the amendment, the subsection states that a proposal "shall . . . 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." *Id*. at 648. The Court did not indicate that this change was a heightening of the standard of clarity for proposals for settlement. Rather, the Court amended the rule based on the determination that "the amendment was needed to curtail partial proposals for settlement and to comport with section 768.79(2), Florida Statutes (2012), which states, in pertinent part, that '[t]he offer [to settle] shall be construed as including all damages which could be awarded in a final judgment'." *Id.* at 644. As the Court pointed out in *Audiffred*, "Section 768.79, Florida Statutes, governs offers of judgment, and rule 1.442 delineates the procedures that implement this statutory provision." 161 So.3d at 1277.

The 2014 amendment to rule 1.442(c)(2)(B) did not effect a substantive

change to the law governing proposals for settlement. Under the prior version of that rule as well as under the current version, Anderson's proposals in this case fall short. The subject proposal did not comply with the version of the rule 1.442(c)(2)(B) in effect in 2011, and the amendment in 2014, although not applicable to the subject proposal, suggests why the proposal was ambiguous.

If, as Anderson now argues, he intended by his offer to settle only part of the pending litigation, namely only the direct negligence claim and not the derivative consortium claim, then that intention was not clearly expressed in the proposal itself. The former language of 1.442(c)(2)(B), required the proposal to clearly state that he was offering to settle only his own claim and not Paula's claim. Anderson's offer did not so state. That alone was a source of ambiguity. Set against background of section 768.79(2)(d), which set forth the substantive basis for fee-shifting, the ambiguity was only heightened. That subsection said that the "total amount" of the offer "shall be construed as including all damages which may be awarded in a final judgment." Thus, there were several sources of ambiguity:

- The language of the proposal itself, which stated that a certain payment would result in a settlement of "*any and all claims* asserted against [the offeree], as identified in Case Number 2009-CA-040473-0, brought in the Circuit Court in and for Orange County, Florida" ;
- The offer's failure to comply with the then-effective rule

1.442(c)(2)(B), to clarify whether "any and all claims" did or did not include any claim by Paula; and

- The mandatory construction, required by section 768.79(2)(d), that the amount of the offer included all damages that would be included in a final judgment, namely damages for Troy as well as damages for Paula, and to identify the apportionment between the two plaintiffs.

Anderson had the burden of clarity. This was not asking the impossible of Anderson; rather, all he had to do was to state whether his wife's derivative claim was included in the offer and what sum—even if zero—would be apportioned to her. Because Anderson has, at different times, argued both alternatives to his purported intent, he himself proves the ambiguity and unenforceability of his proposals. The rulings of the trial and district courts should therefore be affirmed.

C. If Anderson's Proposals can only be Understood by Reference to Paula Anderson's Proposals, then Anderson's Proposals were, by Definition, Ambiguous

Anderson contends that any ambiguity in his proposal was eliminated by other proposals made by Paula Anderson. Far from clarifying Anderson's proposals, reference to Paula's proposals only underscores the ambiguity of Anderson's proposals. If Anderson's proposals can only be understood by referring to Paula Anderson's proposals, then Anderson's proposals by definition are latently ambiguous and thus unenforceable. As held in *Dryden*, "In order to

qualify under the rule, the terms of the proposal must be devoid of ambiguity, patent or latent, and not require any clarification or later judicial interpretation. 910 So.2d at 855-56. In *Nichols*, the Court held that the rule "requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision *without needing clarification*." 932 So.2d at 1079. The Court stated that "[i]f ambiguity *within the proposal* could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement." *Id*. A court may not resort to extraneous documents to provide "clarification," and that if there is ambiguity "within the proposal" that failure may not be cured by looking outside the proposal itself. The Fifth District decision in *Nichols* stated that if a proposal "could not be determined without resort to clarification or judicial interpretation," it was too ambiguous to be enforced. The Fifth District also stated that "[t]he terms and conditions of the proposal should be devoid of ambiguity, patent or latent." *Nichols v. State Farm Mut. Ins. Co.*, 851 So.2d 742, 746 (Fla. 5th DCA 2003). This Court quoted the foregoing language from *Nichols*, 932 So.2d at 1072, and approved the Fifth District's decision "in full." *Id.* at 1070, 1080. Anderson's demand for judicial interpretation of his proposals, and clarification of their ambiguity by resort to Paula Anderson's irrelevant proposals, must be rejected.

II. The Proposals for Settlement to the Embassy Suites Defendants were Unenforceable because the Proposals did not Correspond to the "Judgment Obtained" against those Defendants

The conceptual underpinning of the offer of judgment statute and rule is that if, given an opportunity to settle a claim for a reasonable amount on explicit terms, the offeree then unreasonably refuses to settle and loses the case, then the offeror may obtain attorneys' fees as a sanction for the offeree's unreasonable refusal to settle. A *sine qua non* of this arrangement is that there be a correlation between the offer made and the judgment, so that it can be determined that the "judgment obtained" was more favorable than the offer by the requisite percentage. *See* Fla. Stat. § 768.79(1).

The petitioner argues, with no citation to authority whatsoever, that because the judgment was not apportioned among the Embassy Suites defendants, those defendants were all vicariously liable for each other. That assertion is without any basis in the record. Vicarious liability was not pled and certainly was not proved, and in any event, no proposal for settlement based on vicarious liability was ever served on any defendant.

Rule 1.442 provides:

> [W]hen a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party.

Fla. R. Civ. P. 1.442(c)(4); *In re Amendments to The Florida Rules of Civil Procedure*, 52 So.3d 579, 581, 588 (Fla. 2010). No such proposal was ever served on any of the defendants in this case. Had the petitioner pled (and then proved) that any one or more of the defendants was solely vicariously liable for the others' negligence, then the petitioner could have made a proposal to that defendant for all of the damages claimed against all of the defendants, without apportionment as to that solely vicariously liable defendant.[9] However, no such claim of solely vicarious liability was pled in the second amended complaint, and no proposal for settlement was or could be made on that basis.

One of the mandatory provisions of any proposal for settlement is that it "identify the claim or claims the proposal is attempting to resolve." Fla. R. Civ. P. 1.442(c)(2)(B). Here, each proposal stated that it was intended to settle "any and all claims" pending against each offeree. Notably, the claims against each offeree were for active negligence. There was no claim against any defendant based solely on vicarious liability. Because there was no offer to settle any claim based on vicarious, or any other theory of joint, liability, the district court correctly said

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[9] Notably, apportionment would still have had to be stated as to the other defendants that were not alleged to be solely vicariously liable—it is impossible that all of the Embassy Suites defendants could all be solely vicariously liable. The petitioner does not reveal which defendant or defendants he contends were solely vicariously liable for which other defendant's or defendants' active negligence because there is nothing whatsoever in the record to support any such theory.

there can be no recovery based on comparison of the offered settlement amount and the amount of the judgment against the Embassy Suites defendants.

Anderson's assertion that the parties conceded vicarious liability by collectively referring to Hilton, W2007, and Interstate as the "Embassy Suites defendants" has no support in the record. There is not one word in the entire record reflecting any such stipulation or agreement. In any case, even if there had been such an agreement at trial, it would not have made the settlement proposals to Hilton, W2007, and Interstate enforceable.

Section 768.79(2)(d) states, "The offer shall be construed as including all damages which may be awarded in a final judgment." The offer must be based on the claims as pled at the time of the offer, as recognized by the Court in *White v. Steak and Ale of Florida, Inc*., 816 So.2d 546 (Fla. 2002). The comparison between the offer and the "judgment obtained" must be evaluated based on amounts to which the offering party "would be entitled if the trial court entered the judgment *at the time of the offer or demand*." *Id*. at 550 (emphasis added); *see also Duplantis v. Brock Specialty Services, Ltd*., 85 So.3d 1206, 1208-09 (Fla. 5th DCA 2012)(where vicarious liability was conceded at trial but disputed throughout prior litigation, an unapportioned defense offer of judgment was unenforceable). In this case, Anderson made proposals for settlement based on "any and all claims" against the offeree at the time. At that time and at all times up to and including the

trial and verdict, the claims were for active and individual, not joint or vicarious, negligence. Anderson could have recovered based on a "judgment obtained" for solely vicarious liability only if he had made an offer based on solely vicarious liability. Because he made no such offer, there was no "judgment obtained" that would entitle Anderson to fees in this case.

The Court in *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So.3d 646 (Fla. 2010), discussed at length the legal requirement as well as the practical reasons for apportionment of an offer among multiple offerees:

> Moreover, we evaluated the practical necessity of differentiating between parties in an offer to provide the trial court a basis to correctly determine the amount attributable to each party when evaluating the amount of the final judgment against the settlement offer to apply the statute and rule.

Id. at 650. Thus, the comparison between the proposal for settlement and the judgment must be "apples-to-apples"; otherwise it is impossible to determine whether the judgment was greater or less than the offer by the requisite percentage. As stated by Judge Griffin in his concurring opinion in *Dryden*:

> Section 768.79, Florida Statutes, appears to contemplate a straightforward and exclusively mathematical test: compare the amount of the rejected offer to the amount of the plaintiff's verdict, and apply the twenty-five percent differential.

910 So.2d at 857 (citing *Zalis v. M.E.J. Rich Corp*., 797 So.2d 1289 (Fla. 4th DCA 2001)); *see also Sparklin v. Southern Indus. Assocs., Inc.*, 960 So.2d 895, 898 n.1

(Fla. 5th DCA 2007) (citing Judge Griffin's concurring opinion in *Dryden*). This means that there has to be a mathematical basis for comparing the proposal to the judgment and applying the percentage differential set forth in the statute.

In this case, there was no proposal to settle Anderson's claims against the three Embassy Suites defendants collectively. Each proposal to Hilton, W2007 and Interstate was a separate proposal, and in order to determine whether sanctions could be imposed for non-acceptance, there would have to be a corresponding verdict and judgment against each of those defendants. In this case, Anderson neither sought nor obtained a separate judgment against any of these three defendants. As the drafter and offeror of the proposals for settlement, it was up to Anderson to obtain an apportioned verdict against the Embassy Suites defendants if he wanted to preserve his potential right to enforce the proposals for settlement against those offerees.

Anderson did not have to agree to those defendants being referred to collectively as the Embassy Suites defendants on the verdict, and the petitioner could have requested an interrogatory verdict that allowed the jury to identify and apportion any finding of the separate negligence of Hilton, W2007, and Interstate in order to obtain a jury determination of each defendant's negligence. Because petitioner did not do so, he has not preserved any error on that point. Whether an error of judgment by petitioner's counsel or a calculated trial strategy, by failing to

obtain separate judgments against each defendant, Anderson effectively abandoned any ability to recover attorneys' fees against them based on his separate proposals for settlement.

Anderson's reliance on *Thornburg v. Pursell*, 476 So.2d 323 (Fla. 2d DCA 1985), is misplaced. That case held that defendants who had made separate offers to the plaintiff could not add their offers together to establish that the defendants were the prevailing parties in the litigation for purposes of recovering costs under a prior version of rule 1.442. The court held:

> Because each offer in the case before us expired upon rejection, the offers could not be considered collectively for purposes of denying the plaintiffs' costs in the second trial.
>
> 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.

Id. at 325. The argument rejected in *Thornburg* is essentially what Anderson is proposing to do here. Anderson's three separate proposals to Hilton, W2007, and Interstate did not propose to settle as to all three of those defendants for one lump sum, and did not condition acceptance by any one of them on acceptance by the others. The proposals did not, therefore, give the Embassy Suites defendants the opportunity to consider the offers collectively, and as held by the court in *Thornburg*, it would have been inequitable for the lower court in this case to treat

the three separate offers as one collective offer for purposes of awarding or denying attorneys' fees.

Anderson's reliance on the case of *Hess v. Walton*, 898 So.2d 1046 (Fla. 2d DCA 2005) is similarly unavailing. In *Hess*, the plaintiff "did not allege any separate or independent active negligence" against the defendant medical practice, the employer of the actively negligent defendant doctor. *Id*. at 1047. Indeed, "from the earliest stages of th[e] litigation," it was conceded that the claims against the medical practice were for vicarious liability only. *Id*. That case is factually dissimilar to the present case, where none of the defendants was alleged to be solely vicariously liable, no settlement proposal was ever made on the basis of solely vicarious liability against any defendant, and no judgment was entered against any defendant on the basis solely of vicarious liability.

Finally, even if it was legally possible for Anderson to compare the proposals to Hilton, W2007, and Interstate with the judgment against the Embassy Suite defendants, this could only occur if the proposals were considered together. In the aggregate, Anderson's proposals to Hilton, W2007, and Interstate did not "beat" the judgment against the Embassy Suites defendants and cannot support recovery of fees. The three proposals for settlement to Hilton, W2007, and Interstate totaled $1,400,000, and the judgment against these Embassy Suites defendants totaled only $1,252,188.74. Therefore, it is mathematically impossible

for the aggregated proposals to provide a basis for recovery of fees. Anderson's argument that the three Embassy Suites defendants must be treated as one for purposes of the settlement proposals is flawed, but even if that argument were correct, it would not entitle Anderson to attorneys' fees.[10]

CONCLUSION

On the basis of the arguments and authorities set forth above, the respondents respectfully requests that the Court dismiss the petition for lack of conflict jurisdiction or that the Court approve the decision of the Fifth District in this case.

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

[10] Moreover, if one looks globally at the amount of the proposals to all defendants and compares that amount to the total judgment obtained, Anderson is still mathematically unsuccessful. The total of the four settlement proposals at issue was $1,700,000. The total judgment against all four respondents was $1,739,151.02, which does not exceed the total amount of the proposals by twenty-five percent.

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

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

/s/ Pamela A. Chamberlin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by e-mail on this 19th day of January, 2016 to the following:

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

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

Margaret E. Kozan, Esquire
MARGARET E. KOZAN, P.A.
803 Maryland Avenue
Winter Park, FL 32789
amie@kozanlaw.com

/s/ Pamela A. Chamberlin