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

REPLY BRIEF OF PETITIONER

EAGAN APPELLATE LAW, PLLC

Barbara A. Eagan
beagan@EaganAppellate.com
13835 Kirby Smith Road
Orlando, Florida 32832

RILEY ALLEN LAW

W. Riley Allen
RileyAllen@floridatriallawyer.com
429 S. Keller Rd., Suite 300
Orlando, Florida 32810

THE WISEMAN LAW FIRM, P.A.

Simon L. Wiseman
swiseman@wisemantriallaw.com
1115 E. Livingston Street
Orlando, Florida 32803

THE MILLS FIRM, P.A.

John S. Mills
jmills@mills-appeals.com
Thomas D. Hall
thall@mills-appeals.com
The Bowen House
325 North Calhoun Street
Tallahassee, Florida 32301

MARGARET E. KOZAN, P.A

Margaret E. Kozan
amie@kozanlaw.com
803 Maryland Avenue
Winter Park, Florida 32789

Attorneys for Petitioner Troy Anderson

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT

SECONDARY SOURCES

STATEMENT OF THE CASE AND OF THE FACTS

One point of clarification of the "facts" from the Respondents' Answer Brief is required. On page nine of the Answer Brief Respondents state that "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." That is factually correct but misleading under the circumstances. Respondents' statement overlooks that Respondents/Defendants were the ones who specifically requested that the Hotel Defendants be treated as one – the "Embassy Suites" Defendants – and had stipulated to that for the purposes of trial. (SR1:T2:2254.)[1] Anderson's request for a jury instruction of proposed vicarious liability was rejected by the trial court specifically because there had already been a stipulation that Hotel Defendants be treated as one. (SR1:T2:2255-56.) The statement that they did not agree to the jury instruction is specious. The Hotel Defendants had **already** stipulated they were to be treated as "one." (SR1:T2:2254.) The record is clear that the three Hotel Defendants were treated as one for the purpose of determining negligence. (SR1:T2:2346, 2387.) SecurAmerica was treated separately. The Hotel Defendants objected to the jury instruction that they were to be treated as one by stating they did not think "there's

[1] References to the record and the supplement record are in the form "R:[Clerk's Record Index Vol.]:[Page]" or "SR1:T[Transcript Index Vol.]:[Page]."

any need for any special instruction or advisory to the jury on that." (SR1:T2:2256.) In closing argument counsel for both sides, without objection, referred to the Hotel Defendants as "Embassy Suites." (SR1:T2:2431, 2446-95.) The jury found the Embassy Suite Defendants and SecurAmerica at fault. A joint and several liability judgment was entered against all the Embassy Suites defendants in the amount of $1,252,188.74 and against SecurAmerica in the amount of $486,962.28. (R1:1-2; R3:447-48.)

ARGUMENT

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.

The offers made in this case were not ambiguous.[2] Troy Anderson had no legal right to make an offer on behalf of the other Plaintiff, Paula Anderson. Her claim was for loss of consortium, a legally separate claim from Mr. Anderson's claims. *See Miley v. Nash*, 171 So. 3d 145, 148-49 (Fla. 2d DCA 2015); *United Servs. Auto. Ass'n v. Behar*, 752 So. 2d 663, 665 (Fla. 2d DCA 2000). Any reasonable reading of the offers could not lead to a conclusion that Mr. Anderson's offers to settle included Mrs. Anderson's claims. The Respondents' claim that

[2] Respondents' Answer Brief does not track the issues as raised by the Petitioner. Petitioner will address the arguments raised by the Respondents but within the issues as formatted from Petitioner's Initial Brief.

somehow the "any and all" language made the offers ambiguous ignores the law. Any confusion is not reasonable.

Respondents' assert that Petitioner concedes the proposals were ambiguous. (Resp. Brief at 19). He did not. To the contrary, Petitioner's brief makes clear that any reading of the proposals to find ambiguity "strains credulity." (Pet. Brief at 19). That is hardly an admission of ambiguity. All the Initial Brief argues is that if there were any ambiguity, reading the "rest of the proposal" in its entirety would make clear Mr. Anderson was only proposing to settle his own claims. (*Id.*) The analysis by the courts below should have ended with a review of each of Mr. Anderson's proposals as a whole.

Troy Anderson offered to settle separately for differing amounts with each of the Defendants. (R1:5-6, 9-10, 13-14, 17-18; R4:750-51.) The offers to each Defendant were the same, except for the amounts. (*Id*.) There was no mention of any other plaintiff in the offers. (*Id*.) Nevertheless, Respondents argue the offers were ambiguous because one paragraph, paragraph 4, stated in part that the "PLAINTIFF agrees to settle any and all claims asserted." (*Id*.) To Respondents, apparently, the language "any and all" could mean claims of someone other than Troy Anderson. That conclusion is not reasonable under the circumstances.

There is no way Respondents can legitimately argue they were unable to "make an informed decision without needing clarification." *See State Farm Mut.*

Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1079 (Fla. 2006). As this Court made clear in *Nichols*, "it may be impossible to eliminate all ambiguity. The rule does not demand the impossible." *Id.*

It is undisputed what the Respondents had before them at the time the decision had to be made. They had Mr. Anderson's and Mrs. Anderson's legally separate proposals served upon each of the four Defendants on the same day. Mr. Anderson offered to settle with SecurAmerica for $650,000 (R4:750-51), Hilton for $650,000 (R1:5-6), W2007 for $100,000 (R1:17-18) and Interstate for $650,000 (R1:13-14). Mrs. Anderson's separate offers included SecurAmerica for $25,000 (R4:752-53), Hilton for $15,000 (R4:756-57), W2007 for $15,000 (R4:758-59) and Interstate for $25,000 (R4:754-55). Mr. Anderson's SecurAmerica offer was later changed to $300,000. (See R1:9-10; R4:788-89.) Thus, each of the Respondents had everything it needed "to make an informed decision." *Id.* Each one could settle with Mr. Anderson, settle with Mrs. Anderson, settle with both or settle with neither. At their peril, they chose the latter.

Much of Respondents' brief is devoted to argument that the offeror cannot later clarify the offer. (Resp. Brief at 27-35). The argument is simply not pertinent to the actual circumstances since no clarification is needed. First as noted in the Initial Brief, page 24, Mr. Anderson's proposals were sufficiently clear, when read

as a whole. Respondents had all the information they needed to decide whether or not to accept Mr. Anderson's proposals.

The test as noted above is did the Respondents have enough information "to make an informed decision." *Id.* That could include things other than the proposals. This court undertook a similar review in *Pratt v. Weiss*, 161 So. 3d 1268 (Fla. 2015) to confirm that an offer which purported to be on behalf of one party was actually made on behalf of two parties. The Court looked to the amended complaint and the motion for attorney's fees and costs filed by the parties. *Id*. at 1272. If it was permissible in *Pratt*, it should be permissible here. Respondents argue that even looking to Paula Anderson's offers constitutes impermissible clarification and makes the offers ambiguous by definition. (Resp. Brief at 35). These claims are hollow and devoid of merit. It is not clarification. It is understanding what they knew at the time, the real test.

The Second District Court of Appeal faced substantially similar facts in *Miley v. Nash*, 171 So. 3d 145 (Fla. 2d DCA 2015) and performed a correct analysis. As here, the issue involved a separate loss of consortium claim. *Id.* at 147. One of the defendants made an offer to settle to one plaintiff, Martha Nash, and the offer included a provision to settle "all claims . . . giving rise to this lawsuit brought by Plaintiff Martha Nash." *Id.* That defendant made no mention of the loss of consortium claim of the other plaintiff, Garfield Nash. *Id.* The Second

District specifically held that "[t]he proposal did not need to address [the husband's] separate loss of consortium claim." *Id*. at 148. The court explained "the rule requires that a proposal identify the claims it is 'attempting to resolve,' not every claim related to the suit." *Id*. In other words, there is no need to mention claims you are not attempting to settle, in this case Paula's claim. As the court stated, "it was not deficient for failing to address the other pending claim in the lawsuit brought by an entirely different plaintiff." *Id*. 149. The same should be true here.

If you extend the reasoning of the Respondents and the Fifth District's opinion in this case to its logical conclusion an incorrect result is reached: any offer of settlement which offers to settle "any and all" claims of one party would, when there is more than one party on the same side of the case, be necessarily ambiguous. Every offer would have to include language stating, "I am not offering to settle any claims of any other parties." The statute and the rule do not require that.

Respondents seek to distinguish *Miley* by arguing that the offer in *Miley* said "Plaintiff Marsha Nash against Defendant Kyle Miley." (Resp. Brief at 31). The argument tacitly admits that if Troy Anderson had stated in paragraph four

"Plaintiff, Troy Anderson" instead of "Plaintiff", the offer would have been clear.[3] This absurd result cannot be the law. That is exactly the kind of nit-picking condemned by the Second and Fourth Districts in a series of cases discussed in detail in Petitioner's Initial Brief at page 18, but best expressed in *Alamo Financing, L.P., v. Mazoff*, 112 So. 3d 626 (Fla. 4th DCA 2013). "[P]arties 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." *Id.* at 629 (citation omitted). *Mazoff* and all of the other decisions from the Second and Fourth Districts relied on this Court's decision in *Nichols*. *Id.*

Respondents also argue that the statement made by counsel for Mr. Anderson that Paula's claims would have been dismissed somehow makes the offers ambiguous or constitutes an admission the offers were ambiguous. That argument is fatally flawed. At best it is simply candor on the part of counsel about what would have happened later from a practical perspective. For determining whether the defendants had all the information they needed to decide whether to

[3] Respondents also argue that this tiny difference in language means that *Miley* and this case are not in conflict. *Miley* holds there is no need to mention the other Plaintiff's claim for loss of consortium. *Id.* at 149. The Fifth's District's decision in this case holds that the failure to mention the loss of consortium claim of the other plaintiff makes the offer ambiguous. *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412, 416 (Fla. 5th DCA 2014). The conflict could not be more express and direct.

accept the offers, it is irrelevant and not germane to the decision. Mr. Anderson's offers in this case should be found valid and enforced.

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

Respondents continue to misstate and confuse this issue. Mr. Anderson made separate offers to actively negligent defendants with non-delegable duties, who were found to be and are now jointly and severally liable to Mr. Anderson.[4] The Fifth District held, **based entirely on a mistaken view of the record,** that "the purpose behind . . . section 768.79 (i.e., to sanction a party for rejecting . . . a settlement) would be ill-served." *Anderson*, 153 So. 3d at 416-17. The Court cited no authority for its conclusion.

But even if Anderson had made the suggestion, which he did not, he still obtained a judgment against EACH defendant which was greater than 25%, of the proposed offer to each defendant. Hilton could have settled with Mr. Anderson for $650,000, but a judgment was entered against it for in excess of $1,200,000. (R4:779-81.) The same is true for Interstate. (*Id*.) W2007 could have settled for $100,000, but a judgment was also entered against it for in excess of $1,200,000. (*Id*). Additionally, SecurAmerica could have settled for $300,000, but instead incurred a judgment over $480,000. (R4:788-90.)

[4] The judgment has now been paid.

None of the argument about the Hotel Defendants applies to SecurAmerica. SecurAmerica was treated separately throughout the trial. If nothing else, the Court should quash the decision as to SecurAmerica.

The Fifth District and Respondents fail to recognize that *Anderson* was not a vicarious liability case, but rather a case involving non-delegable duties that included agency relationships as well as direct negligence on the part of each Defendant. Anderson never asserted nor argued that any of the Defendants were innocent of direct negligence. The concept of vicarious liability arises only when one party, which is innocent, is being held responsible for another party's negligence. *See Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 874-75, (Fla. 2d DCA 2010). Non-delegable duties and vicarious liability do not coexist as is often assumed. *Id.*

One can clearly be the agent of another and yet responsible for one's own direct negligence. Similarly, a principal can be held responsible for its agent and also be directly negligent in its own stead. Where non-delegable duties are involved, the parties can be the agents of one another as well as directly negligent. *U.S. Sec. Servs. Corp. v. Ramada Inn*, 665 So. 2d 268, 269-70 (Fla. 3d DCA 1995).

It is clearly permissible to provide separate, differentiated offers to actively negligent defendants with non-delegable duties and it is, in fact, <u>required</u> by this

Court and Rule 1.442(c)(3), Fla. R. Civ. P.[5] The Hotel Defendants were each actively negligent and individually liable because each had the non-delegable duty to provide reasonably safe premises for Mr. Anderson.[6]

Respondents assert there were no allegations in the operative complaint of "vicarious liability" against any of the three Respondents. But, they acknowledge there were allegations of "agency relationships." (*See* Resp. Brief at 6.) They assert that no count alleged agency as the sole basis for liability against any of the Respondents. But, they acknowledge there were allegations of direct and active negligence against each of the three Respondents. (*See* Resp. Brief at 6.)

---

[5] This Court "has rejected any deviation from the strict requirements of the statute and rule. When an offer is made to or from two or more parties, it must specify the amount attributable to each of them." *Brower-Eger v. Noon,* 994 So. 2d 1239 (Fla. 4th DCA 2008). This is so regardless of whether the parties are the defendants or the plaintiffs. *Lamb v. Matetzschk,* 906 So. 2d 1037, 1040 (Fla. 2005); *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.,* 849 So. 2d 276, 278-79 (Fla. 2003); *Allstate Indemn. Co. v. Hingson,* 808 So. 2d 197, 199 (Fla. 2002). As this Court noted in *Lamb,* 906 So. 2d at 1042: "Rule l.442(c)(3) expressly requires that a joint proposal of settlement made to two or more parties be differentiated. The rule makes no distinction between multiple plaintiffs and multiple defendants, nor does it make any distinction based on the theory of liability."

[6] The trial court denied the motions for directed verdict filed by each Defendant and found there was sufficient evidence that each had knowledge of the security risks and the ability and control to do something about it so as to prevent injury to Anderson. (SR1:T2:2360-65.)

Respondents accurately note that at the charge conference Anderson requested a jury instruction on agency and argued the agency relationships between the Respondents. (SR1:T2:2252-53.) (*See* Resp. Brief at 8.) The Respondents objected to Anderson's requested agency instruction. (SR1:T2:2253-54.) As also noted, Anderson did not argue that any individual Respondent was "solely" constructively, derivatively, or technically liable for any other Respondent. Anderson "expressly argued that each of the respondents was actively negligent." (*See* Resp. Brief at 8.) And, in opposing each individual Respondent's motion for directed verdict, which the trial court denied, Anderson did not argue that any Defendant was solely vicariously liable for any other Defendant, but rather that each Defendant was independently negligent in accord with the evidence. (*See* Resp. Brief at 8-9.) The trial court found there was sufficient evidence that each Defendant had knowledge of the security risks and sufficient control to do something that could have prevented the injury to Anderson. (SR1:T2:2360-65.)

When Anderson requested a jury instruction regarding his theories under agency, he was interrupted by counsel for the Defendants who indicated very clearly there was no reason to have an instruction on agency because "agency" has "not been a disputed issue in this case." (SR1:T2:2255.) Anderson's counsel advised the court and Defense counsel that "if the relationships [of agency] are stipulated to, that they are all in the same pot, then we don't have a problem with

that." (*Id*.) Hotel counsel's response was, "Embassy Suites is the entire penumbra of the Embassy Suites people…." (SR1:T2:2256.) The Defendants unequivocally admitted agency and requested that they be treated as a single entity. (SR1:T2:2255.)[7] Defense counsel, not Anderson's counsel as the Fifth District erroneously stated, proposed that the jury instructions and verdict form reference the Hotel Defendants together as "Embassy Suites." Anderson's counsel accepted the defense proposal with the caveat as noted that all parties had stipulated to the relationships.[8]

[7] Agency was never an issue until post-verdict proceedings. Unfortunately the district court accepted the strained version of the facts provided by the Defendants. The Hotel Defendants "sandbagged." This Court has condemned that practice before. *See Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1128 (Fla. 1985). Here, the parties agreed on the verdict form and Defendants advocated for not apportioning fault. (SR1:T2:2256, 2346, 2387.) Then, post-trial, the "sandbagging" began; the Defendants used the agreement they requested against Plaintiff in asserting their untenable position and unfortunately for reasons difficult to explain it was ratified by the district court. *Anderson*, 153 So. 3d at 416-17. Apportionment is not required where the parties agree not to apportion. *See generally*, Michael S. Hooker and Guy P. McConnell, *Joint and Several Liability in Florida: Are Reports of Its Demise Greatly Exaggerated?*, Fla. Bar Jour. (Dec. 2006).

[8] The court so as not to confuse the jury at the request of Anderson's counsel read a short statement, "for purposes of your deliberations… Interstate Hotel Resorts, Inc., Hilton Hotels Corporation, and W2007–Equity Inns Realty, LLC are considered as one and the same." (SR1:T2:2387.) (Emphasis added).

The Hotel Defendants were admitted agents of one another and actively negligent in the presence of non-delegable duties that were owed to Mr. Anderson.[9]

A. The Hotel Defendants each had non-delegable duty to keep the premises safe

The Fifth District concluded the complaint charged active negligence against the Hotel Defendants and "notably was devoid of any allegations of vicarious liability." 153 So. 3d at 414. The operative complaint was in fact "devoid" of allegations of vicarious liability because the underlying case was not based on "vicarious liability" against the three Hotel Defendants. It was based on the non-delegable duty each Defendant owed to provide reasonably safe premises.

There is no standard jury instruction on non-delegable duties.[10] Nor is a claim based on the breach of a non-delegable duty a separate and distinct cause of action from a cause of action based on "direct" or "active" negligence that needs to be pled separately. *Armiger*, 48 So. 3d at 869, 871, 876 (three direct claims of

[9] As stated in their Answer Brief, "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. (SR1:T2:2253-54)." (Resp. Brief at 9.)

[10] Standard Jury instruction, 401.14 PRELIMINARY ISSUES—VICARIOUS LIABILITY, is ripe for visitation by this Court and a recommendation for modification. The terminology "vicarious liability" is misleading in that this case involved non-delegable duties and derivative, but not vicarious, liability, where one can be both directly negligent and responsible for the negligence of another who serves as his/her agent, both of which are distinguishable from vicarious liability.

negligence against the defendant for failure to maintain reasonably safe premises and failure to warn established direct - not vicarious - liability for breach of defendant's non-delegable duty of care and all pleading elements necessary were satisfied without necessity to separately plead breach of non-delegable duty).

There was simply no need in *Anderson* to plead the allegations the Fifth District asserted to be missing because it was not a vicarious liability case. Anderson properly pled Agency of each of the Hotel Defendants. This was conceded at the charge conference as well as in the Answer Brief of the Respondents. (*See* Resp. Brief at 6).

In *U.S. Security Services Corporation v. Ramada Inn*, 665 So. 2d 268 (Fla. 3d DCA 1995), the pertinent facts were very similar to *Anderson* and involved a negligence action arising from a criminal attack by a third party against the plaintiff while he was a business invitee of the defendants, Ramada Inn, Inc., Prime Motor Inns, Inc. and State Southern Management Company [collectively referred to as "Ramada"]. The Ramada defendants were treated identically to the three Hotel Defendants in *Anderson* and for the same reason; they were the agents of one another and each had a non-delegable duty to provide reasonably safe premises. 665 So. 2d at 269-270. The collective "Ramada" defendants were found to be jointly and severally responsible for their own "active" negligence and also jointly and severally responsible for USS, an independent contractor, because of their non-

delegable duties. *Id.* (citing *Prosser and Keeton on the Law of Torts* § 71, at 511-12 (W. Page Keeton et al., 5th ed. 1984); *see also Mortg. Guarantee Ins. Corp. v. Stewart*, 427 So. 2d 776, 780 (Fla. 3d DCA 1983), *rev. denied*, 436 So. 2d 101 (Fla. 1983); *Goldin v. Lipkind*, 49 So. 2d 539, 541 (Fla 1950).

Respondents claim that Petitioner's failure to request an apportioned verdict against the Embassy Suites Defendants waived or abandoned his right to enforce the proposals. To the contrary, the real failure is on the part of the Embassy Suites Defendants in relying on their misconceptions. They overlook that each of them has a judgment entered against them for the full amount of the judgment. Their failure to request apportionment makes them responsible for Mr. Anderson's attorney's fees.

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,

EAGAN APPELLATE LAW, PLLC

/s/ Barbara A. Eagan
Barbara A. Eagan
Florida Bar No. 0767778
beagan@EaganAppellate.com
13835 Kirby Smith Road
Orlando, Florida 32832

THE MILLS FIRM, P.A.

/s/ Thomas D. Hall
John S. Mills
Florida Bar No. 0107719
jmills@mills-appeals.com
Thomas D. Hall
Florida Bar No. 0310751

(407) 286-2204

RILEY ALLEN LAW

W. Riley Allen
Florida Bar No. 338583
Florida Bar No. 338583
RileyAllen@floridatriallawyer.com
429 S. Keller Rd., Suite 300
Orlando, Florida 32810
(407) 838-2000

THE WISEMAN LAW FIRM, P.A.

Simon L. Wiseman
Florida Bar No. 0395110
swiseman@wisemantriallaw.com
1115 E. Livingston Street
Orlando, Florida 32803
(407) 420-4647

thall@mills-appeals.com
service@mills-appeals.com
The Bowen House
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 facsimile

MARGARET E. KOZAN, P.A.

Margaret E. Kozan
Florida Bar No. 165026
amie@kozanlaw.com
803 Maryland Avenue
Winter Park, Florida 32789
(407) 975-3372

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following counsel by email on March 23, 2015:

Pamela A. Chamberlin, Esquire
PChamberlin@mitrani.com
301 Arthur Godfrey Road, Penthouse
Miami Beach, Florida 33140

Counsel for Respondent SecurAmerica LLC

Michael R. D'Lugo, Esquire
orlcrtpleadings@wickersmith.com
Bank of America Center
390 North Orange Avenue, Suite 1000
Orlando, Florida 32801

Counsel for Respondents Hilton Hotels Corporation, d/b/a Embassy Suites Orlando at International Drive and Jamaican Court, d/b/a Hilton Worldwide, W2007 Equity Inns Realty, LLC, and Interstate Hotels & Resorts, Inc.

/s/ Thomas D. Hall
Attorney

CERTIFICATE OF COMPLIANCE

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

/s/ Thomas D. Hall
Attorney