IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC16-1164
L.T. No.: 5D14-4386; 2010-CA-025627-O

W. RILEY ALLEN,

Petitioner,

vs.

JAIRO RAFAEL NUNEZ and
GABRIEL ROGELIO NUNEZ,

Respondents.

RESPONDENTS' ANSWER BRIEF ON MERITS

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STATEMENT OF THE CASE

Petitioner, W. Riley Allen ("Allen"), seeks review of a decision of the Fifth District Court of Appeal that reversed a final judgment awarding him $343,590.00 for attorneys' and legal assistants' fees, plus pre-judgment interest in the amount of $10,686.59, plus an expert's fee of $11,580.00. (5D.719-26, App. 4-11).[1] Fees were awarded pursuant to section 768.79, Florida Statutes (2011), and Florida Rule of Civil Procedure 1.442 (5D.719-20, App. 4-5) after Allen recovered a judgment of $29,785.97 against Respondents on his claim for property damage to his motor vehicle (R.1239-40, PDF.1254-55). The issues before the Fifth District were: (1) whether language in paragraph five of Allen's proposals for settlement caused the proposals to be ambiguous and thus unenforceable; (2) alternatively, if the proposals were not ambiguous, then whether the trial court erred in not considering them in the aggregate; (3) if the proposals were enforceable, whether Allen should be awarded fees for representing himself; and (4) whether the amount of the fees awarded was unreasonable and not supported by competent substantial evidence. (5D.722-23, App. 7-8). The Fifth District found the first issue dispositive and did not address the merits of the remaining issues. (5D.723, App. 8).

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[1] References to the circuit court record will be referenced as (R.#, PDF.#). References to the Fifth District record filed in this Court will be referenced as (5D.#). References to the Appendix to Respondents' Answer Brief on Merits will be designated as (App. #).

The proposals served to Respondents on September 29, 2011, provided:

> 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. The Proposal for Settlement is made on behalf of Plaintiff, W. RILEY ALLEN, and is made to Defendant, [GABRIEL ROGELIO] [JAIRO RAFAEL] NUNEZ.
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by Plaintiff, W. RILEY ALLEN, against defendant, [GABRIEL ROGELIO] [JAIRO RAFAEL] NUNEZ.
>
> 4. That in exchange for TWENTY THOUSAND AND 00/100 DOLLARS ($20,000.00) in hand paid from defendant, [GABRIEL ROGELIO] [JAIRO RAFAEL] NUNEZ, Plaintiff agrees to settle any and all claims asserted against Defendant as identified in Case Number 2010-CA-25627-0, brought in and for the Circuit Court in and for Orange County, Florida.
>
> 5. This Proposal for Settlement is inclusive of all damages claimed by Plaintiff, W. RILEY ALLEN, including all claims for interest, costs, and expenses and any claims for attorney's fees.

(5D.720-21; R.71-72, PDF.81-82; App. 5-6). The Fifth District's opinion quoted *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412, 415 (Fla. 5th DCA), *rev'd*, 202 So. 3d 846 (Fla. 2016), for the following propositions:

> 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).

(5D.723, App. 8). Following these guidelines and finding persuasive the reasoning of the Second District in *Tran v. Anvil Iron Works, Inc.*, 110 So. 3d 923 (Fla. 2d DCA 2013), *rev. denied*, 145 So. 3d 821 (Fla. 2014), the Fifth District held that Allen's proposals were ambiguous because it was unclear whether acceptance of the proposal by one of the defendants would resolve Allen's claim for "all damages" against just the named offeree or the entire claim against both offerees. (5D.725-26, App. 10-11). The Fifth District agreed with the *Tran* court's recognition that this could be a significant consideration when one defendant was the permissive driver of the vehicle and the other was only vicariously liable as the vehicle owner. (5D.726, App. 11).

STATEMENT OF THE FACTS

This action arose out of a motor vehicle accident which occurred on October 9, 2010. (R.25, PDF.35). On December 10, 2010, Allen[2] filed a single-count complaint alleging that Gabriel Nunez was operating his father's vehicle with permission and consent when he collided with Allen's parked 2004 GMC Sierra 2500 pickup truck. (R.25-33, PDF.35-43). The complaint alleged that Gabriel

[2] Allen is a lawyer and was awarded fees for representing himself.

negligently operated the vehicle and that Jairo Nunez was vicariously responsible for Gabriel's negligence. (R.26, 31-32; PDF.36, 41-42).

The complaint further alleged that Allen's six-year-old pickup truck with approximately 60,000 miles on it was "show quality," having a value of "well over $70,000.00." (R.27, PDF.37). The complaint sought damages consisting of the unspecified cost of repairs, a $500.00 deductible, loss of use at $150.00 to $200.00 per day, at least $7,500.00 for diminution in value post-repair plus expert witness fees to establish same, and statutory interest. (R.30-31, PDF.40-41). The complaint alleged that estimates of repair were attached as Exhibit "D," but Exhibit "D" consisted only of documents related to repairs of the vehicle following a 2005 accident. (R.29, 50-51; PDF.39, 60-61). On January 24, 2011, Allen filed copies of documents substantiating damages totaling $14,163.88. (R.52-62, PDF.62-72).

Respondents answered the complaint on February 3, 2011. (R.67-68, PDF.77-78). They admitted the case was within the jurisdiction of the court and admitted that both of them resided at the same address in Maitland, Orange County, Florida. (R.25, 67; PDF.35, 77). They generally denied the remaining allegations of the complaint. (R.67, PDF.77).

On June 6, 2011, Respondents served Allen with property damage interrogatories and a request to produce any and all reports, opinions or other writings for any and all expert witnesses whom Allen intended to call at trial.

(5D.145-47). The request also sought all repair estimates for damage to the vehicle. (5D.147). Allen did not respond to this discovery until December 20, 2011. (5D.149-151).

On September 1, 2011, attorney Simon Wiseman entered his appearance as counsel for Allen. (R.70, PDF.80). On September 29, 2011, months before responding to discovery that was already three months overdue, Wiseman served a proposal for settlement to each of the Nunezes. (R.71-72, PDF.81-82). The proposals were identical except for the named offeree. (R.1012-17, PDF.1026-31). The language of the proposals is set forth *supra* page 2.

The case was set for trial during the period beginning May 21, 2012, with a pretrial/scheduling conference on May 14, 2012. (R.73, PDF.83). The uniform order required Allen to disclose not later than 90 days before the date of the pretrial conference all expert witnesses that in good faith he actually intended to call at trial. (R.76, PDF.86). The uniform order specifically defined "disclosure" as furnishing in writing the expert's curriculum vitae or qualifications, his or her field of expertise, and a statement of the specific subjects upon which the expert would testify and offer opinions. (R.76. PDF.86).

On December 20, 2011 -- almost three months after the proposals for settlement were served -- Allen responded to Respondents' discovery requests served on June 6, 2011. (5D.149-54). He stated he had no reports, opinions,

correspondence, memoranda or other writings from any expert witness whom he intended to call at trial. (5D.150, 153). He provided repair estimates totaling $10,746.32 and a receipt showing $2,790.57 for a rental vehicle. (5D.150, 153).

In an e-mail dated April 21, 2012, Allen for the first time claimed that the truck had frame damage. (R.139, 157; PDF.149, 167). He would not agree to a continuance of the trial then scheduled for the period beginning on May 21, 2012. (R.157, PDF.167). On May 3, 2012, Allen's expert, Jay Zembower, issued a report. (R.160-62, PDF.170-72).

Zembower's report indicated the truck had been involved in a previous collision in January 2005. (R.161, PDF.171). Zembower stated that he inspected the vehicle on March 30, 2012, and found it to be out of specifications. (R.161, PDF.171). According to Zembower, the vehicle could not be brought or placed within specifications. (R.161, PDF.171). Because the only event known to have been able to cause this condition was the collision in October 2010, Zembower concluded the condition was a direct result of that collision. (R.161, PDF.171).

Zembower also stated the condition could be corrected but would require frame repairs considered structural in nature and would cause a loss of value. (R.162, PDF.172). He estimated the vehicle's average retail value at $36,000.00 on the date of the accident. (R.162, PDF.172). He opined that diminution in value

would be approximately $30,000.00 if the frame damage was not corrected and approximately $22,000.00 if it was corrected. (R.162, PDF.172).

In his pretrial statement dated May 11, 2012, Allen acknowledged that the initial property damage claim had been resolved, but he was now claiming frame damage and an additional $5,000.00 for replacement of a hub bearing. (R.132, PDF.142). He was claiming loss of use for 39 days from October 9, 2010 to November 17, 2010; the difference in value of a substitute vehicle he secured as a rental and what it would have cost to rent a vehicle similar to the damaged pickup for 27 days; diminution in value of the pickup; and loss of use for an additional six weeks and continuing because the truck was in the shop. (R.132, PDF.142).

At the pretrial conference on May 14, 2012, the court denied defense counsel's motion to continue the trial. (R.164, PDF.174). The court did allow the defense to conduct an additional inspection of the vehicle pursuant to the recent claim of frame damage. (R.169, PDF.179). Defense counsel contacted Allen that same day and attempted to make arrangements for the inspection. (R.170, PDF.180). Upon learning that the truck had been sent to another shop for the frame work, defense counsel requested Allen to cancel any work to be done until after the trial. (R.170, PDF.180). Allen would not stop the work. (R.171, PDF.181).

Defense counsel requested that the court allow the truck to be inspected at a neutral, independent facility to verify and/or confirm the frame damage. (R.172,

PDF.182). Alternatively, defense counsel requested that Allen's claim of frame damage be stricken or the trial continued to allow the Defendants to properly prepare for trial as to the issue of frame damage. (R.172-73, PDF.182-83). The trial court denied the motion. (R.213, PDF.224).

In his trial brief filed May 25, 2012, Allen claimed damages totaling $43,459.57 with loss of use at $150 per day up to $46,759.57 with loss of use at $200 per day. (R.212, PDF.222). These figures included $30,000.00 for diminution of value based on frame damage. (R.211, PDF.221). Allen was also claiming prejudgment interest, an expert fee for Zembower, an additional $2,000.00 for frame work to be done, and additional loss of use. (R.212; PDF.222). He claimed the range of damages could run from $52,959.57 to $56,259.57. (R.212, PDF.222).

Allen stated in his trial brief that he noticed "play" in the steering wheel on a trip to Tallahassee in May 2011. (R.194, PDF.204). He did not attempt to get the problem diagnosed until late March 2012. (R.180, 203; PDF.190, 213). In other words, he knew there was a problem in May 2011 but did not investigate it until March 2012, shortly before the trial was scheduled to begin and six months after he served the proposals for settlement.

The trial on damages began on May 31, 2012. (R.289, p.1; PDF.300) It was not concluded because the judge granted a defense motion to strike the jury panel based on a statement made by Mr. Wiseman during voir dire. (R.323 p.138;

PDF.334). Mr. Wiseman questioned the panel as to whether anyone had opinions that lawsuits "just aren't right – there are way too many of them these days – we shouldn't be bringing them." (R.319 p.123, PDF.330). When a prospective juror stated she felt "there are an awful lot of small ones that clog the system," Mr. Wiseman asked her whose fault that was. (R.319 p.124, PDF.330). She responded it could be some attorneys or individuals, depending on the type of case. (R.319 p.124, PDF.330). The following colloquy then occurred:

> MR. WISEMAN: And I know you referenced earlier, you know, the question, obviously, about insurance companies and things like that.
>
> So what you're saying is a number of people can be responsible?
>
> VENIRE MEMBER 9: Well, it's not always the same person, I believe. I think – you have persons – attorneys who are [out] looking for lawsuits, you know, you've got individuals looking to make a quick, you know, penny.
>
> MR. WISEMAN: Right. Sure.
>
> VENIRE MEMBER 9: There are legit ones, I think there are a lot of them, you know, that are not.
>
> MR. WISEMAN: Okay. Fair enough. Okay. Well, rest assured, we're not one of those in this case.

(R.319-20, pp.124-25; PDF.330-31).

Defense counsel moved to strike the panel for three different reasons but primarily for Mr. Wiseman's comment in response to the prospective juror's views of frivolous cases. (R.322 p.134, PDF.333). Counsel argued that Mr. Wiseman's

remark "rest assured this is not one of them" injected his personal knowledge, vouched for the justice of his cause, and inserted a personal opinion about the case, all of which was impermissible. (R.322 p.135, PDF.333). Wiseman argued that "*my comment* that: Rest assured it's *not frivolous*," was not cause for the panel to be stricken. (R.322-23 pp.136-37, PDF.333-34). The court agreed with defense counsel that the comment was "a vouchsafing of a case and interjected attorney's personal credibility, believability, and opinion" and was impermissible and granted the motion to strike the panel on that basis. (R.323 p.138, PDF.334). Because the court could not get another panel that day, the trial would be reset. (R.323 p.138, PDF.334). The case was rescheduled for trial during the two-week period beginning February 25, 2013. (R.267, PDF.278).

Two months later, Allen moved to reinstate the prior trial order and deny any efforts by the defense to reopen discovery or otherwise add expert witnesses. (R.448-60, PDF.460-72). Without any explanation, Judge Komanski granted the motion. (R.464, PDF.476). The case proceeded to non-jury trial before Judge Komanski on March 12-13, 2013. (R.791, PDF.804). The court did not rule or hear closing arguments but took the trial under advisement. (R.795, PDF.808). The parties submitted proposed verdicts. Defendants' proposed verdict totaled $21,846.52. (R.819, PDF.832). Allen's proposed verdict totaled $50,815.72. (R.821-22, PDF.834-35).

On November 27, 2013, the court issued a verdict finding that Allen sustained the following damages as a result of the accident of October 9, 2010:

1.	Plaintiff, Riley Allen's out of pocket property damage repairs (not paid by insurance) is:	$ undetermined	
2.	What is the reasonable amount per day for the loss of use for Plaintiff, Mr. Allen's vehicle:	$	107.32
3.	Plaintiff, Riley Allen's, loss of use of his vehicle is as follows:		
	(i) Full loss between October 9, 2010 and December 13, 2010:	$	6,975.80
	(ii) Half loss between July 2011 and March 29, 2012 after Defendants were clearly on notice of the need to inspect the truck:	$	0
	(iii) Full loss between March 30, 2012 and May 30, 2012 while waiting on Defendants' experts to inspect the truck and assess the frame damage:	$	6,653.84
	(v) Less $1,000.00 paid	-$	1,000.00
4.	Plaintiff, Riley Allen's, damages for diminution in value to his vehicle:	$	12,348.72
	TOTAL DAMAGES OF PLAINTIFF, RILEY ALLEN (add lines 1, 3 and 4)	$	24,978.36

(R.799-800, PDF.819-20).

Allen filed a motion to enforce proposals for settlement and determine entitlement to attorney's fees pursuant to Section 768.79, Florida Statutes, and

Florida Rule of Civil Procedure 1.442. (R.928, PDF. 942). The motion alleged that Allen served proposals for settlement to Jairo and Gabriel Nunez in the amount of $20,000.00 each and that the proposals were not accepted. (R.929-30, PDF.943-44). Allen alleged that he was entitled to an award of attorney's fees because the verdict rendered by the court "plus taxable costs (not determined at this time) will equate to a judgment that will exceed 25% of each proposal." (R.930, PDF.944).

Respondents moved to strike Allen's proposals for settlement on grounds they were ambiguous. (R.1018-26, PDF.1032-40). As grounds, Respondents asserted that the complaint alleged a single count against both defendants, and Jairo Nunez was only vicariously liable for his son Gabriel's negligence. (R.1018-19, PDF.1032-33). The proposal directed to each offeree stated it was intended to settle all claims by Allen against that offeree in exchange for payment of $20,000.00, but then stated that the proposal was inclusive of "all damages" claimed by Allen. (R.1023, 1037-38, 1040-41; PDF.1037, 1051-52, 1054-55). The proposals were patently ambiguous because there were two defendants, one of whom was only vicariously liable, and it was unclear whether each proposal was intended to settle only with the named offeree or with both defendants since it was inclusive of "all damages." (R.1024-25, PDF.1038-39). It was also unclear whether $20,000.00 or $40,000.00 was required to settle all claims against both defendants. (R.1025, PDF.1039).

In their response[3] to Allen's motion to enforce the proposals (R.1159-67, PDF.1174-82), Respondents asserted that, in determining whether the "judgment obtained" was at least 25 percent more than the amount of the proposals, the proposals should be viewed in the aggregate because the vicariously liable defendant was liable to the same extent as the tortfeasor. (R.1163-65, PDF.1178-80). Respondents noted that Allen recognized in his motion to enforce the proposals that the only way to have ended this litigation would have been by both Defendants accepting the proposals. (R.1166, PDF.1181). Allen's motion specifically stated that a considerable amount of time, effort, and money would have been saved by Allen "had Defendant**s** accepted the Proposal**s** for Settlement served by Plaintiff." (R.1166, PDF.1181).

Judge Komanski retired at the end of 2013, shortly after entering the verdict. The case was reassigned to The Honorable Donald Myers. (R.1236, PDF.1251). Judge Myers granted Allen's motion for entry of partial final judgment and reserved jurisdiction to determine the amount of taxable costs and attorney's fees, if applicable. (R.1237-38, PDF.1252-53). The partial final judgment entered on March 3, 2014, awarded the following:

1.	Full loss of use damages between October 9, 2010 and December 13, 2010	$ 6,975.80

[3] By responding to Allen's motion to enforce the proposals, Respondents did not withdraw or waive any part of their amended motion to strike Allen's proposals for settlement. (R.1160, PDF.1175).

	Statutory Interest (6%) - $1.1467 x 383 days 12/13/10 – 12/31/11	$ 439.19
	Statutory Interest (4.75% - $0.8659 x 776 Days 1/1/12 – through 2/15/2014	$ 671.94
2.	Full loss of use damages between March 30, 2012 and May 30, 2012 while waiting on Defendants' experts to inspect the truck and Assess the frame damage:	$ 6,653.84
	Statutory Interest (4.75%) $0.8659 x 626 Days 5/31/12 through 2/15/14	$ 540.05
3.	Less $1,000.00 paid	- $ 1,000.00
4.	Damages for diminution in value to Plaintiff's vehicle:	$ 12,348.72
	Statutory Interest (6%) - $2.0299 x 449 days 10/9/2010 – 12/31/2011	$ 909.40
	Statutory Interest (4.75% - $1.6070 x 776 Days 1/1/2012 through 2/15/14	$ 1,247.03
	TOTAL DAMAGES OF PLAINTIFF, W. RILEY ALLEN (with interest through 2/15/14)	$ 29,785.97[4]

(R.1239-40, PDF.1254-55). This award, plus interest, has been paid to Allen and is not a subject of this appeal.

[4] This amount should be $28,785.97. The $1,000.00 payment was not subtracted but added into the total. The full $29,785.97 plus interest on that amount was paid to Allen.

At the hearing on Defendants' motion to strike the proposals for settlement and Allen's motion to enforce the proposals, defense counsel argued the proposals were ambiguous because each was directed to a single offeree but also stated that they were "inclusive of all damages claimed" without indicating whether they were inclusive of all damages claimed as to the offeree or all damages claimed in the case. (R.1267, 1270-71; PDF.1283, 1286-87). If the releases were not ambiguous, then they should be viewed in the aggregate, because $40,000.00 would have to be paid to settle the case. (R.1272, PDF.1288). There was only one theory of liability against the two defendants, and the defendants were jointly liable under the dangerous instrumentality doctrine. (R.1273-74, PDF.1289-90).

Allen agreed that the case of *Tran v. Anvil Iron Works*, 110 So. 3d 923 (Fla. 2d DCA 2013), relied upon by Defendants, was "directly on point." (R.1285, PDF.1301). The proposal directed to an individual defendant in *Tran* was ambiguous because it incorporated an attached notice of dismissal as to all defendants. (R.1285, PDF.1301). Allen argued the notice was a non-monetary term that facially conflicted with the language of the proposal. (R.1285. PDF.1301).

Defense counsel argued that paragraph 5 did specify a non-monetary term. (R.1288, PDF.1304). Paragraph 5 did not mention money. (R.1288, PDF.1304). If paragraph 5 had simply stated that the proposal was inclusive of all damages "as to this defendant," any ambiguity could have been eliminated. (R.1288, PDF.1304).

Judge Myers determined that the proposals were sufficiently clear and unambiguous. (R.1289, PDF.1305). He concluded that "all damages" referenced in paragraph 5 alluded to "all claims" against the Defendant named in paragraph 3 of the proposals. (R.1289, PDF.1305). He concluded it would not be appropriate to combine the two proposals because the intent of the rule and statute was to give each offeree an independent opportunity to evaluate and consider settlement for each of their respective claims. (R.1289, PDF.1305). He denied the motion to strike the proposals and held that Allen was entitled to an award of attorney's fees. (R.1290, PDF.1306).

At the hearing as to the amount of fees to be awarded, Allen testified that after suit was filed, he noticed "play" in the steering wheel on a trip back from Tallahassee. (R.1544, PDF.1561). He called Jay Zembower, who told him to bring in the truck on his return from Tallahassee, and Zembower would "get to work on finding out what's wrong with it." (R.1544, PDF.1561). At this same time Allen offered to then defense counsel to settle the case for $15,600.00. (R.1544, PDF.1561). All this occurred prior to August 24, 2011. (R.1545, PDF.1562). Allen did not put the truck in Zembower's shop until 60 days before the first trial date in 2012. (R.1547, PDF.1564).

Judge Myers made no findings at the conclusion of the hearing. (R.1615, PDF.1632). He asked each side to prepare a proposed final judgment and send it to

him electronically. (R.1615, PDF.1632). The proposed final judgment was essentially a closing argument. (R.1615, PDF.1632).

The final judgment for fees was rendered on November 14, 2014. (R.1484-1500, PDF.1501-17). The court rejected Respondents' position that Allen was not entitled to recover a fee for his own time expended. (R.1487, PDF.1504). The court determined that Allen's reasonable hourly rate was $600 per hour, Wiseman's was $400 per hour, and paralegal rates were $100 per hour. (R.1488, PDF.1505). The court concluded that Allen reasonably expended 425.2 hours, Wiseman reasonably expended 205.1 hours, and paralegals reasonably expended a total of 64.3 hours. (R.1497, PDF.1514).

The court awarded $343,590.00 in attorneys' fees plus pre-judgment interest of $10,686.59, for a total of $354,276.59. (R.1499. PDF.1516). The court also awarded $11,580.00 for Allen's expert witness's fee. (R.1499, PDF.1516). The total judgment was $365,856.59. (R.1499, PDF.1516).

SUMMARY OF THE ARGUMENT

The Fifth District correctly ruled that Allen's proposals for settlement were ambiguous. Paragraph 3 of each proposal stated that it was made to settle "all claims . . . by Plaintiff . . . against Defendant," but paragraph 5 stated that the proposal was "inclusive of all damages claimed by Plaintiff" and paragraph 4 defined the claims as those identified in Case No. 2010-CA-25627-O. These

conflicting provisions made the proposals ambiguous because it was unclear whether acceptance would settle the case as to one or both Defendants.

If the proposals were not ambiguous, the Fifth District's decision should be affirmed because the proposals should be viewed in the aggregate under the circumstances of this case. At the time the proposals were served, it was not necessary to apportion offers between an actively negligent and vicariously liable defendant. Because the liability of an actively negligent driver and vicariously liable owner is coextensive and Allen stated on the record that the case would have been settled only if both Defendants accepted the proposals, the judgment should have been measured against the total amount of the proposals.

If the proposals were enforceable, Respondents request that the case be remanded to the Fifth District for consideration of the remaining issues asserted by Respondents in that court. Those issues are whether Allen was entitled to fees for representing himself when he was represented by competent counsel at all times after the proposals for settlement were served and whether the fee award was unreasonable and not supported by competent substantial evidence.

ARGUMENT

A party's entitlement to fees pursuant to Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 is reviewed de novo. *Pratt v. Weiss*, 161 So. 3d 1268, 1271 (Fla. 2015). Both the rule and the statute must be strictly

construed because they are in derogation of the common law rule that each party is responsible for its own fees. *See Campbell v. Goldman*, 959 So. 2d 223, 227 (Fla. 2007) (invalidating a proposal because it failed to refer to the statute upon which the proposal was based); *Design Home Remodeling Corp. v. Santana*, 146 So. 2d 129 (Fla. 3d DCA 2014) (invalidating a proposal because it was served earlier than permitted under rule 1.442(b)). At the time Allen's proposals were served, Rule 1.442(c)(4) permitted a joint offer to be made without apportionment when one of the parties was only vicariously liable. *See In re Amends. to Fla. R. Civ. P.*, 52 So. 3d 579, 581, 588 (Fla. 2010) (amending Rule 1.442 to add subdivision (c)(4) effective January 1, 2011).

I. THE FIFTH DISTRICT CORRECTLY RULED THAT THE PROPOSALS FOR SETTLEMENT WERE AMBIGUOUS.

The Initial Brief does not identify any conflict between the Fifth District's decision in the instant case and *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846 (Fla. 2016), or any other decision of a Florida appellate court. There is no such conflict. Although the language of the proposals for settlement was similar in *Anderson* and the instant case, both the facts and the legal issues were different.

The issue in *Anderson* was whether proposals in different amounts from Troy Anderson to three separate offerees could be reasonably construed as offers to also settle the claims of his wife. The issue in the instant case was whether Allen's proposals in the same amounts to the driver and the vicariously liable

owner of a motor vehicle were ambiguous because the offerees were coextensively liable and the proposals stated they were "inclusive of all damages" claimed by Allen. The issue decided by this Court in *Anderson* was simply not dispositive of the issue in the instant case.

A. The Fifth District did not read one paragraph alone, out of context.

Rule 1.442(c)(2)(D) provides that a proposal shall "state the total amount of the proposal and state *with particularity* all nonmonetary terms of the proposal." (Emphasis supplied.). A "term" is "a contractual stipulation." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1078 (Fla. 2006) (quoting *Black's Law Dictionary* 1209 (8th ed. 2004)). Nonmonetary terms of a proposal must be stated with particularity so as to eliminate any reasonable ambiguity. *Nichols*, 932 So. 2d at 1079. If accepted, the proposal should be capable of execution without the need for judicial interpretation. *Id*. If ambiguity within the proposal "could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement." *Id*. The burden of clarifying the intent or extent of a proposal cannot be placed on the party to whom the proposal is made. *Dryden v. Pedemonti*, 910 So. 2d 854, 855 (Fla. 5th DCA 2005).

The Fifth District's decision was neither "strained" nor "nitpicking" in concluding that Allen's proposals were ambiguous. Paragraph 3 states that the proposal was made "for the purpose of settling *any and all claims* made in this

cause by Plaintiff, W. Riley Allen, *against Defendant*, [Gabriel Rogelio] [Jairo Rafael] Nunez." (R.1037, 1040; PDF.1051, 1054) (emphasis supplied). Paragraph 5 states that the proposal "is inclusive of *all damages claimed by Plaintiff*, W. RILEY ALLEN." (R.1038, 1041; PDF.1052, 1055). Paragraph 4 defines the "claims asserted against Defendant" as those "identified in Case Number 2010-CA-25627-O." (R.1037, 1040; PDF.1051, 1054).

The "claims . . . identified in Case Number 2010-CA-25627-O" consisted of a single count against both Jairo Nunez and Gabriel Nunez. (R.31-33, PDF.41-43). Paragraph 6 of the complaint alleged that Gabriel Nunez operated the motor vehicle "with the express and/or implied consent" of Jairo Nunez and that Jairo Nunez was vicariously responsible for the conduct of Gabriel Nunez associated with his operation of the vehicle. (R.26, PDF.36). The single-count complaint did not differentiate Allen's claims against Gabriel and Jairo Nunez but sought "judgment against Defendants, JAIRO RAFAEL NUNEZ and GABRIEL ROGELIO NUNEZ, for *all compensatory damages*, interest, costs, and such other relief as this Court deems appropriate." (R.33, PDF.43, emphasis supplied).

Because the proposals could reasonably be interpreted as offering to settle all of Allen's claims for damages for $20,000.00, there was a legitimate question as to whether acceptance by only one defendant would settle the entire case or only resolve the case as to that defendant. Allen's proposals did not attach a proposed

release or order of dismissal which might have answered this question. In this respect, the proposals violated the particularity requirements of Florida Rule of Civil Procedure 1.442(c)(2)(C) (requiring a proposal to "state with particularity any relevant conditions") and 1.442(c)(2)(D) (requiring a proposal to "state with particularity all nonmonetary terms of the proposal"). These defendants could not make an informed decision to accept the proposals without clarification. *See Nichols*, 932 So. 2d at 1079 (stating 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").

B. While the proposals in this case and *Anderson* were almost identical, the issues in the cases were different.

The instant case differs from *Anderson v. Hilton Hotels Corp*., 202 So. 3d 846 (Fla. 2016), because the issues were not the same. The proposals in *Anderson* and the instant case were similar, inasmuch as Allen was attorney for the plaintiffs in *Anderson*. However, the issue in *Anderson* was whether the word "PLAINTIFF" in Anderson's proposals for settlement could reasonably be interpreted to include both Troy Anderson and his wife, Paula. *Id*. at 850-51.

This Court concluded that the only reasonable interpretation of Anderson's proposals was that Troy offered to settle only his claims with each of the defendants. *Id*. at 855. Troy Anderson's proposals made no reference to Paula's claim for loss of consortium. *Id*. Thus, the proposals submitted by Troy were

sufficient to allow the defendants to "make an informed decision" about settling Troy's claim "without needing clarification." *Id*.

Allen was the only claimant in the instant case. The ambiguity here was created by the proposals' statements that they were made "to settle any and all claims asserted against Defendant as identified in Case Number 2010-CA-25627-O" and were "inclusive of all damages claimed by Plaintiff, W. RILEY ALLEN." (R.1037-38, 1040-41; PDF.1052-52, 1054-55). The complaint in Case No. 2010-CA-25627-O asserted only one count against both Gabriel Nunez and Jairo Nunez, and that one count demanded judgment against *both* defendants "for *all* compensatory damages." (R.33, PDF.43). It was not unreasonable, nor was it "nitpicking," for Respondents to question whether acceptance of one proposal would settle the entire case or would settle the case only as to that offeree.

Allen suggests that Respondents "invited" the Fifth District to apply the same reasoning it applied in its decision that was reversed by this Court in *Anderson*. (IB.14). Quoting a passage from Respondents' Initial Brief in the Fifth District, Allen apparently contends that Respondents argued the Fifth District should follow its decision in *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014), because the *Anderson* proposals "were identical to those served by Allen in the instant case." (IB.14). Allen omitted the following language that followed immediately after the passage quoted in his Initial Brief herein:

> As discussed above, this discrepancy could clearly affect the offeree's decision in this case, where Dr. Nunez was only vicariously liable for his son's active negligence. The trial court erred in holding that these proposals were unambiguous and that their rejection entitled Allen to recover attorney's fees.

(5D.67). Respondents did not argue that *Hilton Hotels* was dispositive.

The Fifth District issued its decision in *Hilton Hotels* on December 19, 2014. *Id*. at 412. Respondents' Initial Brief in the Fifth District was submitted on June 23, 2015. (5D.141). This Court did not accept jurisdiction in *Anderson* until August 18, 2015, and did not issue its opinion in *Anderson* until November 3, 2016. *See* Docket, Case No. SC15-124. Respondents would have been remiss in not mentioning *Hilton Hotels* in briefing to the very Court that decided that case. However, the issues in the cases are different, and this Court reversed *Hilton Hotels* based on its determination that "the only reasonable interpretation [of Anderson's proposals] is that Troy Anderson offered to settle *only* his claims with each Respondent in his offer." 202 So. 3d at 855 (emphasis by Court). Neither this Court nor the Fifth District in the *Anderson* cases decided the same issue as in the instant case.

C. The proposals were ambiguous because they were directed to individual defendants but explicitly stated that they were "inclusive of all damages claimed by Plaintiff," they referenced the claims identified in Case No. 2010-CA-25627-O that sought judgment against both Defendants for "all compensatory damages," and both Defendants were coextensively liable for "all damages claimed by Plaintiff."

Allen misstates the holding of the Fifth District in this case. The Fifth District found ambiguity not because it was unclear "whether the offer to the Driver, for example, was intended to also cover the Owner." (IB.15). The ambiguity arose because "language in the proposals themselves raised the legitimate question as to whether acceptance resolved Appellee's claim for 'all damages' against just the named offeree or resolved the entire claim against both Appellants." (5D.726, App. 11). Allen's reliance on *Kiefer v. Sunset Beach Investments, LLC*, 207 So. 3d 1008 (Fla. 4th DCA 2017), is misplaced as it is distinguishable both on its facts and on applicable legal principles.

The Fourth District commenced its analysis in *Kiefer* by referencing its opinion in *Sunset Beach Investments, LLC v. Kimley-Horn & Associates*, 207 So. 3d 1012 (Fla. 4th DCA 2017), which affirmed summary judgment in Kiefer's favor. 207 So. 3d at 1009. In *Sunset Beach* the Fourth District held that the circuit court correctly decided that Kiefer could not be liable for professional negligence, the only count asserted against him, because he was not a licensed engineer and could not sign and seal the relevant plans. *Id*. at 1013.

While the case was pending, Kiefer served a proposal for settlement on Sunset Beach. 207 So. 3d at 1009. Each of the other co-defendants – Kimley Horn and the two licensed engineers – served separate proposals for settlement on Sunset Beach. *Id*. Kiefer's proposal stated that it was "made by Defendant,

MICHAEL E. KIEFER JR., and directed to the Plaintiff, SUNSET BEACH INVESTMENTS, LLC." *Id*. at 1009-10. The proposal stated that it was intended to resolve any and all claims of Sunset Beach "solely as to MICHAEL E. KIEFER, JR." *Id*. at 1010. Relevant conditions were that Sunset Beach "shall execute" a release and "shall dismiss with prejudice" MICHAEL E. KIEFER, JR. *Id*. Both the release and the proposed stipulation and order of dismissal with prejudice were attached as exhibits to Kiefer's proposal. *Id*.

The release contained two paragraphs that were not specifically limited to Kiefer and Sunset Beach. *Id*. One paragraph stated that the release covered any and all claims for attorney's fees, costs and premiums related to the lawsuit. *Id*. The other paragraph stated that Sunset Beach released all claims related to the lawsuit. *Id*. Based upon the failure to include Kiefer's name in those two paragraphs, the trial court found Kiefer's proposal to be ambiguous. *Id*.

Looking to the entirety of the proposal, the Fourth District did not find it to be ambiguous. *Id*. at 1011. The court noted that "all nine paragraphs of the *proposal* for settlement *clearly relate solely to Kiefer and Sunset Beach*." *Id*. (Emphasis supplied.) The two paragraphs in the attached release that did not include Kiefer's name were in between other paragraphs that stated:

> (1) Kiefer and Sunset Beach wish to resolve all claims; (2) Kiefer will pay a sum to Sunset Beach in exchange for his dismissal; (3) Sunset Beach would release Kiefer; and (4) Sunset Beach would file a dismissal as to Kiefer.

Id. The court concluded that, when read as a whole, the release related to Sunset Beach and Kiefer and not the other defendants. *Id*.

The Fourth District also noted that this Court's decision in *Anderson* supported its conclusion, because this Court noted "the documents at issue were consistently limited to the defined parties and the claims listed." *Id*., citing *Anderson*, 202 So. 3d at 855. The fact that "other claims remained, and other parties were not mentioned, did not make the proposal for settlement ambiguous." 207 So. 3d at 1011-12, citing *Anderson*, 202 So. 3d at 855 (emphasis supplied). The Fourth District observed that *Anderson* also supported its conclusion:

> In *Anderson*, the court stated that "*if a party receives two simultaneous offers from two separate parties*, common sense dictates that the offeree should possess all the information necessary to determine whether to settle with one or both of the offerors." [Citation omitted.] The same common sense applies in this case where all defendants sent separate proposals for settlement to Sunset Beach.

207 So. 3d at 1012 (emphasis supplied).

Kiefer is distinguishable from the instant case for multiple reasons. Most significantly, *Kiefer* did not arise out of a motor vehicle accident to which the dangerous instrumentality doctrine applied. Because Jairo Nunez was vicariously liable for any negligence of Gabriel Nunez, all paragraphs of Allen's proposals did *not* "clearly relate solely to" the named offeree as in *Kiefer*. Paragraph 5 of Allen's proposals explicitly stated they were "inclusive of *all damages* claimed by Plaintiff." Paragraph 4 stated that those claims were "identified in Case Number

2010-CA-25627-O." The complaint in Case Number 2010-CA-25627-O identified a single claim for compensatory damages and demanded judgment against *both* Jairo and Gabriel Nunez for "*all*" compensatory damages arising out of the motor vehicle accident.

This case also did not involve a situation where "a party receives two simultaneous offers from two separate parties," as in *Kiefer* and in *Anderson*. In this case a single party, Allen, simultaneously served identical offers to two parties who were each liable for all of the damages claimed. Allen's proposals each offered to settle "any and all claims" asserted against only the named offeree but then stated that the proposal was "inclusive of all damages claimed by Plaintiff."

The Fifth District's decision did not rest only on the fact that paragraph 5 did not include the name of the individual offeree, as argued by Allen. (IB.17). It is the fact that paragraph 5 omitted the name of the individual offeree *and* stated that the proposal was "inclusive of *all damages* claimed by Plaintiff." The ambiguity arose because the offerees were coextensively liable for "*all claims* asserted against Defendant as identified in Case Number 2010-CA-25627-O." Read in their entirety, Allen's offers contained a "genuine inconsistency, uncertainty, or ambiguity in meaning" as to whether he intended to settle the entire case for $20,000.00 or only settle as to a named offeree for that amount. *See Kiefer*, 207 So. 3d at 1011, citing *Alamo Fin. v. Mazoff*, 112 So. 3d 626, 630 (Fla. 4th DCA 2013).

D. The separate proposals in the same amount were ambiguous because the proposals referred to "all claims made in this cause," "all claims . . . identified in Case Number 2010-CA-25627-O," and "all damages claimed by Plaintiff."

Subdivision (c)(3) of Rule 1.442 requires a joint proposal to state the amount and terms attributable to each party. The purpose of this requirement is "to allow each offeree to evaluate the terms and the amount of the offer as it pertains to him or her." *Pratt v. Weiss*, 161 So. 3d at 1271, citing *Allstate Ins. Co. v. Materiale*, 787 So. 2d 173, 175 (Fla. 2d DCA 2001). Subdivision (c)(3) was added to conform Rule 1.442 to this Court's decision in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). *See* Fla. R. Civ. P. 1.442, Comm. Note 1996 Amend. In *Fabre* this Court was called upon to interpret Section 768.81(3), Florida Statutes, which provides:

> (3) APPORTIONMENT OF DAMAGES.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability;[5] . . . .

Joined by Justice Anstead and Justice Lewis in her special concurrence in *Lamb v. Matetzschk*, 906 So. 2d 1037, 1043 (Fla. 2005), Chief Justice Pariente noted that requiring differentiated offers may not always advance either the underlying purpose of rule 1.442, which is to promote settlement, or the reason for the rule's amendment to include subdivision (c)(3), which was to conform the rule

[5] This was the language in subsection (3) at issue in *Fabre*. Section 768.81(3) has since been amended so that it now includes only the language quoted above.

to *Fabre*. *Lamb*, 906 So. 2d at 1043 (Pariente, C.J., specially concurring). That anomalous situation was presented in *Lamb,* in which the Court held that Rule 1.442(c)(3) prohibited a joint offer by a plaintiff directed towards two defendants, one of whom was only vicariously liable for the acts of the other. *Id*. at 1044. When the issue of vicarious liability is undisputed, apportionment of an offer between the active tortfeasor and the vicarious tortfeasor is problematic because the liability of both defendants is not apportioned but is coextensive. *Id*.

The majority opinion in *Lamb* acknowledged the difficulty in apportioning an offer between defendants when one was only vicariously liable, noting it may take some "creative drafting." 906 So. 2d at 1041. Chief Justice Pariente commented on this reasoning by referring to the Second District's opinion in *Barnes v. Kellogg Co*., 846 So. 2d 568 (Fla. 2d DCA 2003), as follows:

> In holding that the undifferentiated offer of judgment was permissible, the district court [in *Barnes*] reasoned that "[t]here is no rational method to apportion fault between the strictly liable retailer, who has committed no negligent act, and the manufacturer who produced a product with a hidden defect." [846 So. 2d] at 571. In such a case, both defendants are jointly and severally liable for all damages. *See id*. at 572. *No matter how clever a defendant or plaintiff might be in attempting to frame an offer, the reality is that there is no rational method to apportion fault*.

906 So. 2d at 1044 (emphasis supplied). Chief Justice Pariente asked the Civil Procedure Rules Committee to study this matter further and reconsider modified amendments to rule 1.442(c). 906 So. 2d at 1044.

Justice Lewis concurred with Chief Justice Pariente's concurring opinion in *Lamb* and also wrote a separate concurrence. He agreed that the language of the existing rule was contrary to the manner in which most settlements are effectuated in actual practice give the "impossibility of actually apportioning offers between those who are truly active tortfeasors and those merely vicariously responsible." *Id*. at 1045. Justice Lewis further noted:

> Requiring the apportionment of an offer of settlement between multiple defendants when the liability of one is based solely and exclusively on a theory of vicarious liability is most problematic because the liability of the defendants in that context is coextensive and therefore incapable of being realistically apportioned. . . .

Id. In his view, there should be an attempt to resolve the problem rather than concluding it could be fixed by "creative drafting" on the part of the attorney. *Id*.

Rule 1.442 was subsequently amended, effective January 1, 2011 at 12:01 A.M., to add the following provision to subdivision (c):

> (4) Notwithstanding subdivision (c)(3), when 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*. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

In re Amends. to Fla. Rules of Civ. P., 52 So. 3d 579, 581, 588 (Fla. 2010) (emphasis supplied).

Subdivision (c)(4) is clearly the response to Chief Justice Pariente's request in her concurring opinion in *Lamb*. The amendment was in effect when Allen served his proposals for settlement in this case on September 29, 2011. (R.71, PDF.81).

Allen's complaint alleged that Jairo Nunez was solely vicariously liable for the active negligence of Gabriel Nunez. Because Allen's proposals for settlement were served after the effective date amending Rule 1.442 to add subdivision (c)(4), it was not necessary for him to serve separate proposals to Respondents. The fact that he chose to do so added to the ambiguity asserted in the trial court. Because Defendants were coextensively liable for "all damages claimed by Plaintiff" in Case Number 2010-CA-25627-O, it was unclear whether payment of $20,000.00 would settle "all damages claimed by Plaintiff" or only settle the case as to the named offeree. Allen has not cited conflict with a single case involving the same facts and the 2011 amendment to Rule 1.442.

In *Miley v. Nash*, 171 So. 3d 145 (Fla. 2d DCA 2015), defendant Kyle Miley made a proposal for settlement to plaintiff Martha Nash in "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*. at 147. The proposal required that Martha dismiss both Kyle and Glenn Miley, who owned the vehicle Kyle was driving, in exchange for payment from Kyle of $58,590. *Id*. The proposal did not mention Garfield Nash or his then-pending loss

of consortium claim, which was dropped before trial. *Id*. Martha rejected the proposal, and the jury returned a verdict in her favor in the amount of $17,955. *Id*.

The trial court denied Kyle's motion seeking attorney's fees and costs. *Id*. The trial court determined that the proposal was deficient for (1) "fail[ing] to specifically identify the claim or claims the proposal is attempting to resolve," (2) "fail[ing] to specifically address the pending loss of consortium claim," (3) "fail[ing] to state with particularity any relevant conditions," (4) "fail[ing] to specifically state the amount and terms of the proposal attributable to each party." and (5) "requir[ing] dismissal of Defendants Kyle Miley and Glenn Miley without designating the amount attributable to each Defendant." *Id*. The Second District disagreed with each of these conclusions.

The Second District held: (1) The proposal sufficiently identified the claims to be resolved as those "resulting from the incident or accident giving rise to th[e] lawsuit brought by Plaintiff Martha Nash against Defendant Kyle Miley;" (2) the proposal did not need to address Garfield's separate loss of consortium claim because it was Garfield's separate and distinct claim, despite its derivative nature; (3) The particularity requirements were met because the proposal included and sufficiently described the relevant conditions: the exact amount Kyle would pay, the exact claims the proposal would resolve, the exact action to be taken by Martha (dismissal), the condition that each party would pay its own attorney's fees, and the

condition that Glenn Miley would also be dismissed from the suit as to Martha Nash;[6] (5) the proposal did not need to apportion any amount attributable to Glenn Miley, because he was solely vicariously liable. *Id*. at 148-49. The Second District construed the offer as a joint offer because it resolved claims pending against both Glenn and Kyle Miley, and the 2011 amendment to Rule 1.442 permitted a joint proposal to be made without stating the apportionment or contribution as to a vicariously liable party. *Id*. at 150. Because Glenn Miley was solely vicariously liable, no apportionment was necessary. *Id*.

Allen cited *Miley* for the proposition that "there is no reason to interpret an offer to an individual defendant any differently" than an offer to an individual plaintiff. (IB.18). Respondents disagree. There is every reason to interpret an offer to an individual defendant who is only vicariously liable differently than an offer to an individual plaintiff who has a separate, identifiable claim. This distinction is recognized in subdivision 1.442(c)(4), which explicitly states that a joint proposal made by or served on a party alleged to be "solely vicariously, constructively,

[6] The court distinguished its decision in *Lucas v. Calhoun*, 813 So. 2d 971, 973 (Fla. 2d DCA 2002), which found a proposal deficient because it "failed to indicate whether the claims would be resolved by a release (full or partial), a dismissal, or any other means." 171 So. 3d at 149. Unlike *Lucas*, Kyle Miley specifically requested that Martha Nash's claims be resolved by dismissal in exchange for an explicit monetary amount. *Id*. Allen's proposals were akin to those found deficient in *Lucas*.

derivatively, or technically liable . . . need not state the apportionment or contribution as to that party."

Subdivision 1.442(c)(4) was in effect at the time Allen served his proposals. There was no need for him to serve separate proposals to the driver and vicariously liable vehicle owner. Because there was no such need and the proposals each stated in paragraph 5 that they were "inclusive of all damages claimed by Plaintiff" – damages for which Respondents were coextensively liable – there was a legitimate issue as to whether acceptance of one proposal would settle only as to the offeree or as to the entire case. If Allen intended to settle only as to a named offeree, he could have made that clear with additional language in paragraph 5 or by attaching a proposed release or dismissal order. He did neither.

Allen concedes that his proposals did not refer to any party other than the one to whom each offer was addressed. (IB.19). He does not explain how the reference to "all damages claimed by Plaintiff" can be interpreted as applying only to the named offeree in light of the explicit reference to "all claims for damages" in paragraph 5 and the reference in paragraph 4 to claims "identified in Case Number 2010-CA-25627-O." The complaint in that case specifically identified the claim against Jairo Nunez as being that he was vicariously responsible for the conduct of Gabriel Nunez in operating the vehicle. (R.26, PDF. 36).

Allen claims that Gabriel Nunez, the driver of the vehicle, had "everything he needed" to make a decision to settle for the offer amount. (IB.19). This argument ignores the context of this case when the proposals were served. Respondents had no information as of September 29, 2011, or within 30 days thereafter, to suggest that Allen's damages met or exceeded $20,000.00.

On September 29, 2011, Respondents had documentation of damages totaling $14,163.88 provided by Allen on January 24, 2011. Respondents' discovery requests had been outstanding since June 6, 2011. Shortly before serving the proposals, Allen had offered to settle the entire case for $15,600.00. Under these circumstances, it is absurd to suggest that Gabriel should have accepted the proposal to him only to have the litigation continue as to Jairo Nunez despite the fact that Allen had been fully compensated.

A verdict was ultimately rendered against both Respondents in a single sum. The judgment was entered against both Respondents in a single sum. However, Allen's motion to enforce the proposals for settlement asserted entitlement to fees because the "judgment will exceed 25% of ***each*** Proposal" and further asserted that the case would only have been settled "had Defendant**s** accepted the Proposal**s** for Settlement served by Plaintiff." (R.930, PDF.944) (emphasis supplied). Allen[7] continued to represent on appeal to the Fifth District that acceptance of one of the

[7] Allen himself signed the Answer Brief in the Fifth District. (5D.49).

proposals would not have ended the case. (5D.613). There was no incentive for either Gabriel or Jairo Nunez to accept a proposal under these circumstances.

The case of *Alamo Financing, L.P. v. Mazoff,* 112 So. 3d 626, 629 (Fla. 4th DCA 2013), cited by Allen (IB.19 n.9) does not support his position. There were two defendants in *Mazoff*, the vehicle owner (Alamo Financing, Inc.) and the renter-driver of the vehicle (Paola Alvarado-Fernandez). *Id*. at 627. Alamo served a proposal naming only Alamo Financing as the party making the proposal *and* also stating that the only party to be dismissed from the lawsuit was Alamo Financing. *Id*. at 630. The proposal attached a release which would not have released Alvarado-Fernandez but would have released Alamo Financing and its "parent corporations, subsidiaries, officers, directors, and employees." *Id*. The *Mazoff* court concluded that any potential ambiguity in the proposal was clarified by these provisions. *Id*.

Allen's proposals contained no such clarifying provisions as in *Mazoff*. Allen did not attach a proposed release or a notice or motion for dismissal that would have clarified the proposals. Allen's proposals were contradictory as to whether they offered to settle the entire case or only as to the defendant named in the proposal. Reading Allen's proposals as a whole, the contradictory language rendered them ambiguous because they were susceptible to more than one

reasonable interpretation as to whether they were intended to resolve the case as to only the named offeree or as to "all damages claimed by Plaintiff."

The case of *Land & Sea Petroleum, Inc. v. Business Specialists, Inc*., 53 So. 3d 348 (Fla. 4th DCA 2011), cited by Petitioner (IB.19 n.9), similarly fails to support Petitioner's argument. The controversy in that case arose out of a brokerage commission contract. The brokers sued for a commission after the seller failed to close on a contract with a buyer produced by the brokers. *Id*. at 351. The seller defended on grounds that the brokerage contract was unenforceable because the contract with the buyer was unenforceable due to the buyer's failure to agree to essential terms. *Id*.

The seller served proposals for settlement in the sum of $500.00 each to the brokers and subsequently moved for summary judgment, which was granted by the circuit court. *Id*. at 352. In response to the seller's motion for attorney's fees and costs pursuant to the rejected proposals for settlement, the brokers argued that the proposals were ambiguous because they did not specify which side would pay the $500 and did not specify the claims which the proposals would settle. *Id*. The brokers also argued the proposals were made in bad faith because the seller made the proposals after requesting discovery only from the buyer before making the nominal offers. *Id*. The circuit court denied the seller's motion in its entirety. *Id*. The Fourth District reversed.

The Fourth District rejected the ambiguity claim because the context of the case – that the brokers were suing for a commission and that the seller made no counterclaim – made it apparent that the seller was offering to pay each of the brokers $500 in exchange for resolving the brokers' respective claims. *Id*. at 353. Additionally, the proposals clarified that they were "made for the purpose of resolving all claims as well as any and all claims that could have been or should have been brought by [the brokers] against [the seller]." *Id*. This language complied with Rule 1.442(c)(2)(B) by "identify[ing] the claim or claims the proposal is attempting to resolve." *Id*. Because "the only relationship which existed between the brokers and the seller arose from the brokerage commission contract, there were no other possible claims which could have existed between the parties either within or outside of the action." *Id*. at 353-54.

The Fourth District agreed with the seller that the nominal offers were made in good faith. *Id*. at 354. Noting that good faith offers must bear a reasonable relationship to the amount of damages or a realistic assessment of liability, the Fourth District noted that the seller never wavered from its argument that the brokerage contract was unenforceable because the contract with the buyer was unenforceable. *Id*. The seller needed little or no discovery to support that argument because the lack of essential terms in the contract with the buyer "was apparent from the face of that contract." *Id*. at 355.

Land & Sea does not support Allen's position in this case. With respect to the ambiguity argument, the dangerous instrumentality doctrine clearly did not apply in *Land & Sea* because that case did not arise out of a motor vehicle accident. The brokers in *Land & Sea* were separate entities with no relationship similar to that of a motor vehicle owner and his permitted driver under the dangerous instrumentality doctrine.

While the context of the case made it apparent in *Land & Sea* that the seller was offering $500 to each of the brokers, the context of the instant case did not provide such clarity. Rule 1.442(c)(2)(B) required a proposal to "identify the claim or claims the proposal is attempting to resolve."[8] Allen's proposals were ambiguous because Paragraph 5 in each proposal stated that it was "inclusive of all damages *claimed* by Plaintiff" while paragraphs 3 and 4 referred to claims asserted *against* the named offeree. In the context of this case, Allen's proposals were ambiguous because Respondents were coextensively liable for the claims asserted against them and it was not clear whether each proposal was made to settle the entire case or only as to the named Defendant.

[8] Rule 1.442(c)(2)(B) was amended in 2013 to require that a proposal state that it "resolves all damages that would otherwise be awarded in a final judgment in the action." *In re Amendments to the Fla. R. Civ. P.*, 131 So. 3d 643, 644, 648 (Fla. 2013). This amendment had not been adopted at the time that Allen's proposals were served in 2011.

The analysis of the Fourth District in *Land & Sea* also supports a conclusion that Allen's proposals were not made in good faith. The proposals were made shortly after Allen had offered to settle the entire claim for $15,600. They were made when discovery from Allen was two months overdue and three months before his responses to discovery were provided. Even assuming that Respondents were clearly liable, the proposals did not bear a reasonable relationship to the amount of damages known to them at the time the proposals were made. Allen's failure to provide discovery before serving proposals for settlement strongly suggests that the proposals were not made in good faith. To the extent that the "tipsy coachman rule" applies to this Court's review of the Fifth District's decision, Allen's lack of good faith provides an additional basis for affirmance of that decision. *See Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (noting that the "tipsy coachman" rule does not limit an appellee to arguments that were raised in the lower court).

Petitioner next argued that the Fifth District's decision in this case "cannot survive this court's opinion in *Kuhajda v. Borden Dairy Co. of Alabama, LLC*, 202 So. 3d 391, 393 (Fla. 2016)." (IB.20). Petitioner alleged that *Kuhajda* "involved the service to the defendants of 'identical' offers of judgment that similarly referenced 'all damages or monies recoverable under the complaint and by law.'"

(IB.20). Petitioner asserted that this Court in *Kuhajda* "offered no criticism of the terminology, 'all damages.'" (IB.20).

Kuhajda does not support Petitioner's position herein because there was no issue in *Kuhajda* as to the meaning of the term "all damages." The issue in *Kuhajda* was whether an offer of settlement that failed to address attorney's fees was invalid even though no attorney's fees had been sought in the case. *Id*. at 393. Neither Borden nor Greenrock argued that the failure to include attorney's fees language in the offer created an ambiguity. *Id*. at 396. This Court held that the failure to include attorney's fee language in Kuhajda's offer did not create an ambiguity "because Kuhajda *never sought attorney's fees in her complaint*." *Id*. at 396 (emphasis supplied).

Neither this Court's opinion in *Kuhajda* nor the First District's opinion in *c*sets forth the full text of the proposals at issue in that case. This information is included in the Appendix to this Answer Brief (referenced as (App.#)), which includes documents retrieved from this Court's website at https://efactssc-public.flcourts.org/casedocuments/2015/1682/2015-1682_brief_118813.pdf. The proposals stated:

> COMES NOW the Plaintiff, SUSANNE L. KUHAJDA, by and through the undersigned attorney, pursuant to Fla. R. Civ. P., 1.442 and Florida Statute §768.79, and hereby offers to settle all claims asserted and demands made against BORDEN DAIRY COMPANY OF ALABAMA, LLC and MAJOR O. GREENROCK, in the above-styled cause, in exchange for the following amount:

> Plaintiff proposes to settle all claims against BORDEN DAIRY COMPANY OF ALABAMA, LLC and MAJOR O. GREENROCK, for the total lump sum of $110,000.00 to be paid by said Defendant to Plaintiff, SUSANNE L. KUHAJDA, to settle all of her claims.
>
> *Since any damages awarded would be jointly and severally owed by each Defendant, satisfaction of the aforementioned proposal by either Defendant will satisfy the proposal to the remaining Defendant*. The aforementioned proposal includes costs, interest and all damages or monies recoverable under the Complaint and by law.

(App. 23) (emphasis supplied). Final judgment was entered in favor of Kuhajda in the amount of $430,177.00. (App.30).

As in the instant case, Kuhajda's complaint consisted of a single count against Borden Dairy and Greenrock. https://efactssc-public.flcourts.org/casedocuments/2015/1682/2015-1682_brief_118814.pdf. (App. 19-20). The complaint alleged that Borden Dairy owned the motor vehicle that was operated with its consent by Greenrock when the vehicle collided with the motor vehicle in which Kuhajda was a passenger. (App. 19). Kuhajda's proposals were "identical" not because separate proposals were made to each defendant as in this case but because multiple joint proposals made to both defendants contained the same language except as to the amount.

A joint proposal in the sum of $110,000.00 was made to both defendants on March 7, 2012; and a second joint proposal in the sum of $120,000.00 was made to both defendants on November 14, 2012. (App. 21-26). The proposals made it clear

that satisfaction of the joint proposal by either defendant would have satisfied the proposal as to the remaining defendant. The issue before this Court in *Kuhajda* was not whether the proposals were invalid for ambiguity as to the claims they sought to resolve but whether they were invalid for failure to strictly comply with Rule 1.442(c)(2)(F) even when the complaint did not include a claim for attorney's fees. 202 So. 3d at 393.

Placed in context, this Court's *Kuhajda* decision refutes rather than supports Allen's contention that the proposals herein were not ambiguous. Kuhajda's $110,000 proposal was made after the amendment of Rule 1.442 to add subdivision (c)(4), which permits a joint proposal when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable. Kuhajda's proposal was made to both defendants in a single sum and specifically stated:

> Since any damages awarded would be jointly and severally owed by each Defendant, satisfaction of the aforementioned proposal by either Defendant will satisfy the proposal to the remaining Defendant.

(App. 23).

Kuhajda's proposal demonstrates how simply Allen could have avoided the ambiguity contained in his proposals in this case. If he intended to propose settlement upon payment of $20,000 by *both* Defendants, he could have so stated. If he intended to propose settlement as to both Defendants by payment of $20,000 from *either* of them, he could have so stated in terms similar to that in *Kuhajda*.

Allen's suggestion that the Fifth District's decision "inject[ed] a requirement not found in the statute or the rule" (IB.20) should be rejected. Section 768.79(2) states, "The offer shall be construed as including all damages which may be awarded in a final judgment." Rule 1.442(c)(2)(B) was amended in 2013 to require that a proposal state that it "resolves all damages that would otherwise be awarded in a final judgment in the action," in order to comport with the explicit language in Section 768.79(2). *In re: Amends. to Fla. R. Civ. P.*, 131 So. 3d at 644.

II. THE FIFTH DISTRICT DID NOT "EMPLOY FLAWED REASONING" IN APPLYING *TRAN V. ANVIL* TO THIS CASE.

Allen contends the only similarity between *Tran v. Anvil Iron Works, Inc.*, 110 So. 3d 923 (Fla. 2d DCA 2013), *rev. denied*, 145 So. 3d 821 (Fla. 2014), and the instant case is that the plaintiff was injured in an auto accident and sued the driver of the other vehicle and his employer, the owner of that vehicle. (IB.21). Respondents submit that the context of the instant case is indistinguishable from *Tran*. Just as Allen did, Tran served separate proposals for settlement on both the driver and the owner of the vehicle. Each proposal required a payment of $60,000 and stated that upon acceptance Tran would file a voluntary dismissal with prejudice of any and all claims against the offeree defendant. *Id*. at 924. The proposals attached and incorporated by reference a copy of the proposed notice of voluntary dismissal, which referred to *both* defendants and not just the offeree. *Id*. Neither of the proposals was accepted, and a judgment was later entered against

the defendants in the amount of $93,464.41. Finding the proposals were ambiguous, the circuit court denied Tran's motion to tax attorney's fees pursuant to section 768.79 and rule 1.442.

On appeal Tran argued the proposals were unambiguous, but the Second District disagreed. Language in the body of each proposal stated only that claims against the named defendant would be dismissed, and the proposals were silent as to the unnamed defendant. *Id*. at 926. It was unclear whether acceptance of a proposal would obligate Tran only to dismiss the claims against the offeree defendant or the claims against both defendants. *Id*. This discrepancy could "reasonably affect the offeree's decision" because one defendant might want to accept the proposal only if it knew for certain that its payment would result in the release of both defendants. *Id*. Such a concern could be especially significant in a case such as *Tran*, where one defendant was the employer/owner of the car and the other defendant was the employee who was driving the car. *Id*. The Second District affirmed the order denying Tran's motion for attorney's fees. *Id*. at 927. This Court denied to accept jurisdiction to review that decision. *Tran v. Anvil Iron Works, Inc*., 145 So. 3d 821 (Fla. 2014).

The ambiguity in Tran's proposals was also present in Allen's proposals. (R.1023-24, PDF.1037-38). The only difference was that the ambiguity was not created by an attachment but by language *within the proposals*. (R.1024,

PDF.1038). As discussed above, paragraphs 3 and 4 in this case indicated the proposal was intended to resolve only Allen's claim against the offeree Defendant, but paragraph 5 stated that the proposal was inclusive of "all damages claimed by Plaintiff." Paragraph 4 stated that the claims were identified in Case No. 2010-CA-25627-O, but Respondents were coextensively liable under the dangerous instrumentality doctrine for those claims. Paragraph 5 thus contradicted paragraphs 3 and 4.

Allen concedes that the attached dismissal language in *Tran* "obviously . . . contradicted the actual language of the proposal" and states that "it is easy to see why that would make the proposal ambiguous" but contends that *Tran* is "not analogous to this case at all." (IB.22). Allen ignored the "obvious[] . . . contradict[ion]" within "the actual language of the proposal" in this case. (IB.22). If an attachment can render a proposal ambiguous because it "obviously contradict[s] the actual language" of a proposal, then certainly contradictory terms *within* a proposal can render it invalid for ambiguity.

Allen's proposals were ambiguous, and the Fifth District correctly ruled that their rejection did not entitle Allen to recover attorney's fees.

III. IF THE PROPOSALS WERE NOT AMBIGUOUS, THEY SHOULD BE VIEWED IN THE AGGREGATE FOR THE PURPOSE OF DETERMINING WHETHER THE FINAL JUDGMENT FOR DAMAGES MET THE MONETARY THRESHOLD FOR AN AWARD OF ATTORNEY'S FEES.

If this Court concludes that the proposals were not ambiguous, the Fifth District's reversal of the final judgment should be affirmed because the proposals should be viewed in the aggregate for the purpose of determining whether the final judgment for damages met the monetary threshold for an award of attorney's fees. This issue was raised on appeal to the Fifth District. (App. 7-8). The Court did not address the issue in light of its finding that the proposals were unenforceable due to ambiguity. (App. 8)

The trial court relied on the Ninth Circuit decision in *Zeckser v. Dobbs*, 13 Fla. L. Weekly Supp. 944a (Fla. 9th Cir. Ct. Mar. 30, 2006), in holding that separate proposals made to the owner and driver of the accident vehicle had to be viewed separately as to the judgment entered against the defendants jointly. (R.1289, PDF.1305). The *Zeckser* panel cited *Lamb v. Matetzschk*, 906 So. 2d at 1041, for the propositions that proposals for settlement will be invalid if they do not apportion the amounts and terms between the parties and that a clear differentiation of amounts attributable to each party is required, even in cases of vicarious liability like the instant action. (R.1258, PDF.1273). As discussed above, there was no requirement to apportion the proposals in the instant case because these proposals were served after Rule 1.442 was amended to add subdivision (c)(4), which specifically states that a joint proposal made by or served on a party alleged to be solely vicariously, constructively, derivatively, or technically liable

"*need not state the apportionment or contribution as to that party*." *In re Amends. to Fla. R. of Civ. P.*, 52 So. 3d at 581, 588 (emphasis supplied).

Because Jairo Nunez was only vicariously liable for Gabriel's negligence, Allen could have served a joint proposal to both Respondents without apportioning the amount. Because Allen was not required to apportion an offer and the liability of both Defendants was coextensive, the proposals should be viewed in the aggregate for the purpose of determining whether the judgment for damages exceeded the threshold amount for an award of attorney's fees. Allen admitted as such when he stated in his motion to enforce the proposals that acceptance of both proposals was required to settle the case. (R.930, PDF.944).

Allen treated Respondents as a single entity throughout this case. He sued them in a single count, sent proposals that admittedly would settle the case only if accepted by both Respondents, and obtained a final judgment that awarded a single amount of damages against defendants who were coextensively liable. Because the "judgment obtained" was against Respondents jointly, it should be measured against the sum of both proposals for the purpose of determining whether the judgment exceeded the threshold amount for a fee award.

CONCLUSION

The Fifth District correctly ruled that the fee award should be reversed because the proposals for settlement were ambiguous. If this Court concludes that

the proposals were not ambiguous, Respondents respectfully submit that the Fifth District's reversal of the fee judgment should be upheld because the proposals should be viewed in the aggregate, and the final judgment did not meet the monetary threshold for an award of attorney's fees. If this Court concludes that there is any entitlement to attorney's fees pursuant to the proposals for settlement, Respondents respectfully request that this case be remanded to the Fifth District for consideration of whether the trial court erred in awarding fees to Allen for representing himself and whether the amount of the award was unreasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2017, copies hereof have been served by e-mail to the following: Simon L. Wiseman, 1115 East Livingston Street, Orlando, FL 32803, swiseman@wisemantriallaw.com and ilantigua@wisemantriallaw.com; W. Riley Allen, Riley Allen Law, 429 S. Keller Road, Suite 300, Orlando, FL 32810**,** RileyAllen@floridatriallawyer.com and BonnieRamos@floridatriallawyer.com; Caryn L. Bellus, Kubicki Draper, P.A., 25 West Flagler Street, Penthouse, Miami, FL 33130, cb-kd@kubickidraper.com; Scott A. Turner, Beachside Legal Services, P.L.L.C., 1180 Highway A1A, Satellite Beach, FL 32937, eFiling@beachsidelegal.com; and Thomas D. Hall, The Mills Firm, P.A., The Bowen House, 325 North Calhoun Street, Tallahassee, FL 32301, thall@mills-appeals.com and service@mills-appeals.com.

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