IN THE SUPREME COURT OF FLORIDA

W. RILEY ALLEN,

Petitioner,

v.

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

JAIRO RAFAEL NUNEZ and
GABRIEL ROGELIO NUNEZ,

Respondents.

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

PETITIONER'S BRIEF ON MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, W. Riley Allen, (Petitioner), seeks review of a decision of the Fifth District Court of Appeal that reversed an award of attorney's fees in his favor. The attorney's fee award was based on proposals for settlement that Petitioner had made to Respondents Gabriel Nunez (Driver) and Dr. Jairo Nunez (Owner) (jointly, the Respondents). The trial court rejected the Respondents' arguments that the proposals were ambiguous and awarded fees. (R. 1486, 1499).[1] On appeal the Fifth District held that the proposals were ambiguous and reversed. *Nunez v. Allen*, 194 So. 3d 554, 556 (Fla. 5th DCA 2016).

This case resulted from a motor vehicle accident that occurred almost seven years ago. Gabriel Nunez (Driver) was operating a motor vehicle, a Mercedes, owned by his father, Dr. Jairo Nunez (Owner), that struck a truck owned by Petitioner. (R. 25-26). At the time of the accident Petitioner's truck was unoccupied and parked lawfully on the street in front of the home of a classmate of Petitioner's sixteen-year-old son. (R. 180). The classmate was hosting a get together, along with her parents, to watch a college football game. (R. 180-181, 1542-1544, 1689). The truck weighed approximately 8,000 pounds. (R. 180). The impact from the crash knocked both passenger side wheels of the truck over a 5-

[1] References to the district court record on appeal will be (R. pg.). References to the Supreme Court Record will be (SCR. pg.).

inch curb and broke off the left front wheel so the truck was sitting on the spindle. (R. 180-81, 746-747, 1491, 1689). The truck was pushed back approximately two feet from its original position leaving a groove in the asphalt. (R. 750, 769, 1550, 1689-90, 1768). The impact was so severe that in addition to the damage done to Petitioner's truck, the Mercedes suffered major damage including a ruptured oil pump, both engine mounts broken, the engine pushed back into the firewall, and damage to the frame. (R. 1491, 1689-90, 1692-93, 1763-66, 1771). At the time, the Respondents did not accept responsibility for the accident, send someone out to inspect the truck, or provide a rental vehicle to Petitioner. (R. 1491, 1510, 1543).

A one count complaint was filed in 2010, against Defendants — Gabriel as driver of the vehicle and, and his father, Jairo, as owner of the vehicle. (R. 25-33). The complaint sought damages for the cost of repairs of the truck, the post-repair diminution in value of the truck, and loss of use of the truck during the period of repair. (R. 25-33). The complaint alleged the Driver was negligent in the operation of the vehicle and the Owner was vicariously liable for the Driver's negligent operation of the vehicle. (R. 25-26, 31-32). Defendants filed an Answer and jointly denied liability for the accident. (R. 67-69). The Owner also denied express and/or implied consent for his son, the Driver, to operate the vehicle. (R. 67-69). The Owner also denied ownership of the vehicle. (R. 67-69).

In late 2011, eight months before the first scheduled trial,[2] Petitioner simultaneously served separate proposals for settlement to each Defendant. (R. 71-72). The proposals were identical except for the names of the defendant to whom the offer was:

> 1. This Proposal for Settlement is made pursuant to Florida Statute § 768.79, and is extended pursuant to the provisions of Rule 1.442, Fla. R. Civ. P,
>
> 2. This Proposal for Settlement is made on behalf of Plaintiff, W. RILEY ALLEN, and is made to Defendant, JAIRO RAFEAL 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.
>
> 4. That in exchange for TWENTY THOUSAND AND 00/100 DOLLARS ($20,000.00) in hand paid from Defendant, JAIRO RAFEAL 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 claim for attorney's fees.

(R. 847-849, 1036-1041, 1128, 1146-1151, 1160, 1177-1182, 1243-1244, 1657-1658). Neither the Owner nor Driver responded to the proposals and by operation of law the proposals were, thus, rejected. (R. 833, 1160).

The Owner did not admit ownership or permission to use the vehicle for

[2] The first trial ended in a mistrial and there was a second trial that went to verdict.

nearly 18 months until the filing of a pretrial statement in 2012, just prior to the first trial and eight (8) months after the proposals were served. (R. 174-175). The Driver did not admit liability for causing the accident until the first day of the first trial on May 31, 2012. (R. 290). In addition, the Owner and Driver did not withdraw their defense that somehow the Petitioner was comparatively negligent, in association with his lawfully parked empty truck, until the first day of trial. (R. 526-527).

Ultimately the case went to trial and a judgment was entered against both Defendants for $29,785.97. (R. 1239-1240). That amount is more than 25% more than the offers in the proposals for settlement. The court reserved jurisdiction to award attorney's fees and taxable costs.[3] (R. 1240). Petitioner moved to enforce the sanction provisions of the offer for judgement statute, and for a determination he was entitled to fees and to determine the amount. (R. 928-931). That included filing the proposals for settlement with the court. (R. 928-931).

The Driver initially moved to strike the proposal for settlement served on the Driver apparently not realizing that two proposals had been served, one to him and one to his father, Jairo Nunez, the Owner. (R. 832-839). The Driver's motion argued that paragraphs 3, 4, and 5 made it unclear whether Petitioner was intending

[3] Taxable costs of $36,506.65 were thereafter awarded by the trial court. (R. 1430-1431).

to settle only with the Driver or whether the offer was intended to settle with both the Driver and the Owner. (R. 835-836). The Driver and Owner subsequently filed an amended motion to strike the proposals for settlement arguing only that paragraph 5 made the proposals ambiguous. (R. 1018-1041). The trial court found the proposals were sufficiently clear and unambiguous. (R. 1426-1427).

The Owner and Driver appealed. (R. 1501-19). On appeal, they raised four issues, only one of which is relevant to this review, namely that: "the language contained in paragraph five of the proposals for settlement caused the proposals to be ambiguous and, therefore, unenforceable."[4] *Nunez*, 194 So. 3d at 557.[5] The Fifth District agreed, reasoning:

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[4] The panel in the Fifth District in this case did not have the benefit of this Court's opinion in *Anderson*. It is, of course, understandable that the panel followed the Fifth District case law and another case which is consistent with the Fifth District's own opinion in *Anderson*. It is even more understandable considering that the author of the opinion in this case was a member of the panel in *Anderson* when *Anderson* was decided by the Fifth District. And, in addition, another member of the panel in this case at the Fifth District was the trial judge in *Anderson* before he was elevated to the Fifth. But, while the reliance is understandable, it is still wrong.

[5] Because the Fifth District held that the proposals for settlement were ambiguous, it did not address the other issues, which were:

> 2) if the proposals for settlement were not ambiguous, then the trial court erred in not considering them in the aggregate, causing [Petitioner] to fail to meet the monetary threshold for attorney's fees; 3) if the proposals for settlement are otherwise enforceable, [Petitioner] should not be awarded attorney's fees for representing himself or, at the very least, should not be awarded attorney's fees for

> We agree with Appellants that the language in paragraph five of the proposals for settlement rendered the proposals ambiguous. Initially, paragraphs two, three, and four in each proposal for settlement make clear that payment of $20,000 by the Appellant named in the proposal would settle Appellee's claims brought in the case against that specific Appellant. However, paragraph five then stated that the proposal for settlement was inclusive of "all damages" claimed by Appellee. As "all damages" claimed arguably are those that could have been (and were) imposed on both Appellants in this case, paragraph five of Appellee's proposal for settlement could be reasonably interpreted to mean that the acceptance of the proposal for settlement by only one of the Appellants resolved Appellee's entire claim against both Appellants. Put differently, if paragraph five had stated that the proposal was inclusive of all damages claimed by Appellee against the *individually named Appellant*, similar to the language in paragraph three of the proposal, there would have been no ambiguity.

Id. at 558.

The Fifth District cited its previous decision in *Hilton Hotels Corp. v. Anderson*, 153. So. 2d 412, 415 (Fla. 5th DCA 2014), for guidance in establishing the law it was relying on. *Nunez*, 194 So. 3d at 557-58. The Fifth District also relied on *Tran v. Anvil Iron Works, Inc*., 110 So. 3d 923 (Fla 2d DCA 2013), for its

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> services he rendered after . . . co-counsel began representing him; and 4) the amount of the attorney's fees awarded for this case was unreasonable and not supported by competent substantial evidence.

Allen, 194 So. 3d at 557.

Those issues are, of course, not before this Court. It is worth noting, however, that the aggregation argument is now unavailing as a matter of law after this Court's opinion in *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 857 (Fla. 2016), where this Court specifically rejected the exact argument made by the defendants in that case.

determination that the offers in this case were ambiguous, even while acknowledging that the decision in *Tran* was "not directly on point." *Nunez*, 194 So. 3d at 558.

Petitioner timely sought review in this Court. (SCR. 163-76). This Court accepted jurisdiction. (SCR. 580.)

SUMMARY OF THE ARGUMENT

The proposals for settlement in this case are not ambiguous. The Fifth District carved out one paragraph of a multi-paragraph proposal in isolation, repeating its flawed analysis from *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014), to reach the incorrect conclusion that the offers were ambiguous based on that one paragraph. The court failed to consider the offers as a whole.

The proposals in this case were virtually identical to the proposals in *Anderson*, which this Court upheld. Indeed, Respondents argued this very point to the district court as a reason the court should follow its own prior decision in *Anderson*. The Respondents cannot now claim that somehow the proposals are different and this Court's opinion in *Anderson* should be ignored.

Petitioner made two separate distinct offers to the two different Respondents, Owner and Driver. Neither offer mentioned the other offer. The failure to mention another offer or another defendant does not make an offer

ambiguous. In this case each Respondent had all it needed to make a decision about whether to accept the offer made to them. No other information, like whether accepting one offer would end the entire case, was necessary.

The use of the word claims as opposed to damages makes no difference in the offers. That word did not create ambiguity.

The Fifth District created additional confusion with its flawed analysis of *Tran v. Anvil Iron Works, Inc*., 110 So. 3d 923 (Fla. 2d DCA 2013). The district court misapplied the facts of *Tran* that it recognized were "not on point." *Tran* dealt with an entirely different kind of offer and ambiguity created because attachments to the offer did not match the actual offer. There was only a dollar amount proposed by Allen to the Respondents - no other conditions or "non-monetary terms" were proposed.

The decision below conflicts with decisions from this Court and other district courts that a plain reading of the offers was unambiguous. The Fifth District's nitpicking of the offers unreasonably injected ambiguity into these offers—where none existed—and created more judicial labor, not less. Section 768.79's goal of encouraging settlement should be upheld. This is another opportunity, like *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846 (Fla. 2016), where this Court can enforce that goal. Reversing this case can send another strong

message about how proposals for settlement should be interpreted by the lower courts in this state.

ARGUMENT

I. THE PROPOSALS FOR SETTLEMENT IN THIS CASE ARE NOT AMBIGUOUS.

The decision by this Court in *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846 (Fla. 2016) and by the Fifth District in this case, *Nunez v. Allen*, 194 So. 3d 554 (Fla. 5th DCA 2016), cannot be reconciled. In this case, like in *Anderson*, separate, but virtually identical,[6] proposals for settlement were made to each defendant at the same time. The Defendants did not respond and, thus, legally, rejected the offers. When Petitioner sought attorney's fees in accordance with the statute and rule, Defendants claimed the proposals were ambiguous based in large part on decisions which have since been discredited. The Fifth District adopted those arguments. For the same reasons this Court rejected the ambiguity arguments in *Anderson*, and a number of district courts have rejected similar arguments, this Court should reject the ambiguity arguments here.

A. One Paragraph Cannot Be Read Alone, Out of Context.

The proposals for settlement made to the Respondents in this case state in their entirety:

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[6] In *Anderson*, the amounts offered were different to each defendant. That's a distinction without real difference and not relevant to the legal discussion here.

> 1. This Proposal for Settlement is made pursuant to Florida Statute §768.79, and is extended in accordance with the provisions of Rule 1.442. Fla.R.Civ.P.
>
> 2. This Proposal for Settlement is made on behalf of Plaintiff, W. RILEY ALLEN, and is made to Defendant, GABRIEL ROGELIO 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 NUNEZ.
>
> 4. That in exchange for TWENTY THOUSAND AND 00/100 DOLLARS ($20,000.00) in hand paid from Defendant, GABRIEL ROGELIO NUNEZ, Plaintiff agrees to settle any and all claims asserted against Defendant as identified in Case Number 201 0-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.

(R. 848-49).

As this Court's well-reasoned decision in *Anderson* makes crystal clear: "Reading the plain language of [the] offers, we hold that these offers to settle [the] claims against the Respondents were unambiguous. The 'nitpicking' of these offers by the courts below to find otherwise unnecessarily injected ambiguity into these proceedings and created more judicial labor, not less." *Anderson*, 202 So. 3d at 858 (citations omitted). This Court made it clear in *Anderson* that the type of strained analysis repeated in *Nunez* is unacceptable:

> The reading of Anderson's offer as espoused by the Respondents, the trial court, and the Fifth District below is unreasonable and in

> contravention of this Court's direction in *Nichols*. The proposal clearly and consistently used the singular term "PLAINTIFF," which was defined as Troy Anderson in Paragraph 2. Moreover, Paragraph 3 indicated that each proposal was designed to settle "any and all claims of PLAINTIFF [Troy Anderson] against [RESPONDENT]," which by its clear terms defined that the only parties to be affected by acceptance of the proposal would be Troy Anderson and the designated Respondent.

Id. at 854-85.

Here, the Fifth District, once again, did exactly what this Court's decision in *Anderson* says it should not do. It took one paragraph out of context and read it in isolation.

> We agree with Appellants that the language in paragraph five of the proposals for settlement rendered the proposals ambiguous. Initially, paragraphs two, three, and four in each proposal for settlement make clear that payment of $20,000 by the Appellant named in the proposal would settle Appellee's claims brought in the case against that specific Appellant. However, paragraph five then stated that the proposal for settlement was inclusive of "all damages" claimed by Appellee. As "all damages" claimed arguably are those that could have been (and were) imposed on both Appellants in this case, paragraph five of Appellee's proposal for settlement could be reasonably interpreted to mean that the acceptance of the proposal for settlement by only one of the Appellants resolved Appellee's entire claim against both Appellants. Put differently, if paragraph five had stated that the proposal was inclusive of all damages claimed by Appellee against the *individually named Appellant*, similar to the language in paragraph three of the proposal, there would have been no ambiguity.

Nunez, 194 So. 3d at 558. It is hard to imagine a better example of the type of nitpicking this court condemned in *Anderson*. Taking one sentence out of context, as the district court undeniably did here, is unacceptable.

B. The Proposals Here Were Almost Identical to the Proposals in *Anderson* and Are Not Distinguishable

In *Anderson*, the proposals for settlement served by Anderson on each of the defendants were identical, except for the amount demanded:

> 1. This Proposal for Settlement is made pursuant to Florida Statute § 768.79, and is extended in accordance with the provisions of Rule 1.442. Fla. R.Civ.P.
>
> 2. This Proposal for Settlement is made on behalf of Plaintiff, TROY ANDERSON ("PLAINTIFF"), and is made to Defendant, HILTON HOTELS CORPORATION, a foreign corporation, doing business as EMBASSY SUITES ORLANDO AT INTERNATIONAL DRIVE AND JAMAICAN COURT, also doing business as HILTON WORLDWIDE ("HILTON").
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against HILTON.
>
> 4. That in exchange for SIX HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($650,000.00) in hand paid from HILTON, PLAINTIFF agrees to settle any and all claims asserted against HILTON, as identified in Case Number 2009–CA–040473–O, brought in the Circuit Court in and for Orange County, Florida.
>
> 5. This Proposal for Settlement is inclusive of all damages claimed by PLAINTIFF, including all claims for interest, costs, and expenses and any claims for attorney's fees.

Anderson, 202 So. 3d at 849.

In this case the proposals for settlement served by Petitioner on each of the Defendants were identical, except for the name of the Defendant, and were almost, in form, identical to the proposals in *Anderson*:

> 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, 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, JAIRO RAFAEL NUNEZ.
>
> 4. That in exchange for TWENTY THOUSAND AND 00/100 DOLLARS ($20,000.00) in hand paid from defendant, 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.

Nunez, 194 So. 3d at 556 (footnote omitted). The only parties or persons identified in the proposals were Plaintiff W. Riley Allen and defendant Gabriel Rogelio Nunez in the first proposal and Plaintiff W. Riley Allen and defendant Jairo Nunez in the second proposal.

As this Court stated in *Anderson*, "this Court has not required the elimination of every ambiguity—only reasonable ambiguities," while noting, "We

recognize that, given the nature of language, it may be impossible to eliminate all ambiguity. The rule does not demand the impossible." 202 So. 3d at 852-53 (quoting *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006)). And, the courts have been specifically "discouraged from 'nit-picking' proposals for settlement to search for ambiguity." *Id.* at 853 (quoting *Carey-All Transp., Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008).

But the Fifth District was invited to make this mistake and apply the same reasoning it applied before in its decision in *Anderson* by the Respondents. Respondents argued below that the proposals in *Nunez* were identical to those found by the Fifth District to be ambiguous in *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014):

> The *Anderson* proposals were identical to those served by Allen in the instant case . . .. As in *Anderson*, paragraphs 3 and 4 in the instant 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" and could reasonably be interpreted to mean that the intent was to resolve the entire case against both Defendants.

(SCR. 67.) In light of the reversal of *Anderson*, it seems highly likely Respondents will now attempt to distance themselves from this Court's decision in *Anderson.* They cannot. As Respondents noted themselves, the offers in both cases were

virtually identical. Those offers were then found by this Court to be non-ambiguous.[7] *Anderson*, 202 So.3d at 848.

C. Not Mentioning the Other Party Did Not Make the Proposals Ambiguous

The Fifth District found some basis for ambiguity because it felt it was not clear whether the offer to the Driver, for example, was intended to also cover the Owner. The recent decision of the Fourth District in *Kiefer v. Sunset Beach Invs., LLC*, 207 So. 3d 1008 (Fla. 4th DCA 2017), demonstrates the correct analysis when there is more than one party.[8] A real estate developer brought a professional negligence action against a project manager, Kiefer, whose proposed settlement agreement the developer rejected. At the same time Kiefer tendered an offer, each of the other co-defendants served separate proposals for settlement on the developer, Sunset Beach, which similarly were rejected.

The offer tendered by Kiefer included reference to a release and a proposed order of dismissal. The issue arose in reference to paragraphs five and six of the release which, like paragraph 5 here, were unlike the other paragraphs of the release, in that they were silent as to the defendant to which they applied. 207 So. 3d at 1009. The trial court took issue with those two paragraphs:

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[7] Mr. Allen, Petitioner here, was primary trial counsel for Mr. and Mrs. Anderson.

[8] As such, the decision on *Kiefer* conflicts with the opinion in *Nunez*.

> And when I'm reading the proposal and the release agreement, I have trouble when I get to page 2 because the two middle paragraphs on page 2 of the release do not relate to Mr. Kiefer, as every other paragraph specifically and very carefully does relate to Mr. Kiefer, in all caps, no less.

Id. at 1010.

The trial court denied fees because of the failure to specifically name Mr. Kiefer as the defendant being released. On appeal the Fourth District applied the proper analysis, "Therefore, we look to the **entirety of a proposal** for settlement when determining whether it is clear and definite, and we do so without 'nitpicking' in a search for ambiguity." *Id*. at 1011 (emphasis added). "In the attached release, there are two paragraphs that do not include Kiefer's name. However, those paragraphs are in between other paragraphs of the release … . When read as a whole, the release related to Sunset Beach and Kiefer, and not the other co-defendants." *Id.*

In relying on this court's opinion in *Anderson*, the Fourth District said:

> The recent decision in *Anderson* also supports our conclusion beyond the reminder to refrain from "nitpicking" in a search for ambiguity. *Anderson*, 202 So. 3d at 846. There, the circuit court and the Fifth District concluded the settlement offer was "ambiguous and unenforceable because it could have affected the unaddressed claims" of a different party. *Id.* at 854. The supreme court rejected the argument, noting the documents at issue were consistently limited to the defined parties and the claims listed. *Id.* at 855. **The fact that other claims remained, and other parties were not mentioned, did not make the proposal for settlement ambiguous.** (Emphasis added).

Id. at 1011-12. The Fourth District went on to state:

> *Anderson* also supports our conclusion for a different reason. 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." *Id.* The same common sense applies in this case where all defendants sent separate proposals for settlement to Sunset Beach.
>
> In this case, the court found an ambiguity in the proposal for settlement based upon two paragraphs in the middle of the attached release. When the proposal for settlement and release are read as a whole, these two paragraphs do not create an ambiguity. Therefore, we reverse the order denying Kiefer's motion for attorneys' fees.

Id. at 1012.

The *Kiefer* decision cannot be reconciled with the Fifth District's opinion in this case. No additional analysis is required other than looking at this statement by the Fifth District in this case:

> Put differently, if paragraph five had stated that the proposal was inclusive of all damages claimed by Appellee against the *individually named Appellant*, similar to the language in paragraph three of the proposal, there would have been no ambiguity.

Nunez, 194 So. 3d at 558. Both this Court's opinion in *Anderson* and the Fourth District's opinion in *Kiefer* make clear that one paragraph that did not include the name of the individual offeror, when every other paragraph did, does not render the proposal ambiguous and unenforceable any more than the two paragraphs that failed to refer to Mr. Kiefer did so in the *Kiefer* case. To require that every paragraph, as suggested by the Fifth District, restate the individual name of the

offeree, already clearly identified, flies in the face of reading the offer as a whole. As the Fifth District did in *Anderson*, it once again has created conflict with other district courts of appeal "that have addressed whether a settlement offer is ambiguous when it does not address other parties to the action." *Anderson*, 202 So. 3d at 853 (citing *Miley v. Nash*, 171 So. 3d 145 (Fla. 2d DCA), *rev. denied*, *Nash v. Miley*, 192 So. 3d 40 (Fla. 2015)).

To permit the Fifth District's decision to stand in this case would in essence reinstate the flawed reasoning of *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014), which this court has already reversed.

D. The Use of "Claims" Did Not Make the Proposals Ambiguous

As stated by this Court in *Anderson*, approving the outcome in *Miley*, use of the terms "all claims" that " '[gave] rise to the lawsuit' … were not so ambiguous to prevent Martha Nash from making an informed decision about her claim." *Anderson*, 202 So. 3d at 853 (quoting *Miley*, 171 So. 3d at 148). The offeror was also not required "to address the pending claim … brought by an entirely different plaintiff." *Id.* (quoting *Miley*, 171 So. 3d at 148-49). *Miley* involved an offer to an individual plaintiff, but there is no reason to interpret an offer to an individual defendant any differently. This fee neutral statute does not contemplate disparate treatment.

The Second District specifically held that "the rule requires that a proposal identify the claims it is 'attempting to resolve' *not every claim related to the suit brought by either plaintiff*." *Miley*, 171 So. 3d at 148 (emphasis added). The offeror does not have to say, "I am not offering to resolve any other claims that might exist in the lawsuit." Saying only that you are offering to settle with, at least, one specific offeree is all that is required.

The Petitioner, Allen, did not make reference to any other party in his settlement offer other than the one to whom each offer was independently addressed (Gabriel Nunez in one and Jairo Nunez in the other). The Respondents had everything they needed to make a decision. The Driver, in particular, whose own negligence caused the accident could have settled for $20,000. He did not need to know what offers, if any, were made to other defendants – in this case, only one, the Owner of the vehicle. All the Driver needed to know was that if he settled for the offer amount, everything would have been over as to him. But he did not settle. When a judgment was entered against him for more than $29,000, he became responsible to pay Petitioner's attorney's fees. The case is really that simple.[9]

[9] Not to belabor the point but as this Court acknowledged favorably in *Anderson*, other courts have rejected "similar attempts to inject ambiguity into otherwise sufficient proposals. *See Alamo Fin., L.P. v. Mazoff*, 112 So. 3d 626 (Fla. 4th DCA 2013); *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc*., 53 So. 3d 348 (Fla. 4th DCA 2011).

Nunez cannot survive this court's opinion in *Kuhajda v. Borden Dairy Co. of Alabama, LLC*, 202 So. 3d 391, 393 (Fla. 2016), which 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." (Emphasis added.) This Court offered no criticism of the terminology, "all damages":

> Kuhajda is entitled to attorney's fees under section 768.79 because the offers of judgment at issue in this case are not ambiguous. As explained previously, Kuhajda served Borden Dairy and Greenrock with identical offers of judgment specifying that the offers included costs, interest, and all damages or monies recoverable under the complaint and by law..

Id. at 396.

The Fifth District's acceptance of the Respondents' alleged strained confusion related to "all damages" reflects that the District Court has once again allowed the "tail to wag the dog" by injecting a requirement not found in the statute or the rule, but which is guaranteed to increase judicial labor and eviscerate legislative intent just as was averted in *Kuhajda*:

> We decline to invalidate Kuhajda's offers of judgment solely for violating a requirement in rule 1.442 that section 768.79 does not require. The procedural rule should no more be allowed to trump the statute here than the tail should be allowed to wag the dog. A procedural rule should not be strictly construed to defeat a statute it is designed to implement.

Id. at 395-96.

II. THE FIFTH DISTRICT INCORRECTLY APPLIED *TRAN V. ANVIL* TO THIS CASE.

The Fifth District also employed flawed reasoning that conflicts with this Court and other district courts in finding *Tran v. Anvil Iron Works, Inc*., 110 So. 3d 923 (Fla. 2d DCA 2013), should apply to this case. The court specifically noted the case was "not directly on point." *Nunez*, 194 So. 3d at 558. Despite that the court stated: "we find the reasoning of our sister court in *Tran v. Anvil Iron Works, Inc.*, 110 So. 3d 923 (Fla. 2d DCA 2013), persuasive." *Id.*

But the facts in *Tran* are so different the case should not apply at all. It is a completely different situation. In *Tran*, the plaintiff was injured in an automobile accident and sued the driver of the other vehicle and the driver's corporate employer, which owned the vehicle. *Id.* at 558. That's all that *Tran* and this case have in common. The **only** similarity initially between *Tran* and *Nunez* is the fact there was an auto accident.

In analyzing *Tran*, Fifth District in *Nunez* stated:

> Each proposal was specific as to the one defendant named therein and each stated that, as a condition of the proposal, the plaintiff would voluntarily dismiss, with prejudice, any and all claims against the specific defendant named in the proposal for settlement. *Id*. Plaintiff attached to the proposal for settlement a copy of the proposed notice of voluntary dismissal with prejudice to be filed if the proposal was accepted. *Id*. However, **the attached dismissal notice named both defendants and indicated that the case would be dismissed against both defendants.** *Id*. at 924-25. (Emphasis added).

Id. Obviously, the attached dismissal language contradicted the actual language of the proposal. It is easy to see why that would make the proposal ambiguous, but that is not what happened in this case. *Tran* is not analogous to this case at all. The Fifth District misapplied the facts in *Tran* creating additional conflict with existing law by injecting ambiguity based on an alleged nonmonetary term. And, moreover, there were no non-monetary terms in this case.

CONCLUSION

As this Court stated *in Anderson*, "Ultimately, proposals for settlement are intended to end judicial labor, not create more. Accordingly, courts are discouraged from nitpicking proposals for settlement to search for ambiguity." 202 So. 3d at 853 (internal quotation marks, citations, and alteration omitted). The reasoning of the Fifth District in *Nunez*, just as its previous decision in *Anderson* did, "ignores . . . the clear requirements of the offer of judgment statute and rule." *Id.* at 857. And, its "nitpicking" of the involved offers has "unnecessarily injected ambiguity into these proceedings and created more judicial labor, not less." *Id.* at 858.

Anderson and *Kuhajda* have recently provided much needed guidance. This case provides yet another opportunity to send a strong and necessary message about how proposals for settlement should be interpreted by the lower courts in this state.

This Court should reverse the decision of the Fifth District and remand it back to the Fifth District for further proceedings consistent with the opinion.

Respectfully submitted,

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

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