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 JURISDICTION

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PRELIMINARY STATEMENT

Petitioner's Brief on Jurisdiction will be cited as (Pet. Br. at #). Pages in the Appendix to Petitioner's Brief on Jurisdiction will be cited as (Pet. App. #).

STATEMENT OF THE CASE AND OF THE FACTS

Respondents, Jairo Rafael Nunez and Gabriel Rogelio Nunez, supplement Petitioner's Statement of the Case and of the Facts as follows:

The complaint against Respondents consisted of only one count. *Nunez v. Allen*, 194 So. 3d 554, 556 (Fla. 5th DCA 2016). (Pet. App. 2). Respondents jointly answered the complaint. *Id*. The trial court awarded $343,590 in attorney's fees and legal assistant's fees to Petitioner. *Id*. at 555 (Pet. App. 2).

The Fifth District did not rule on the basis of "one paragraph as opposed to the entire document." (Pet. Br. at 3). The Fifth District noted that paragraphs two, three, and four made clear that payment of $20,000 by the named Respondent would settle Petitioner's claims against that Respondent; but paragraph five then stated that the proposal was inclusive of "all damages" claimed by Petitioner. 194 So. 3d at 558 (Pet. App. 4). Because "all damages" claimed "could have been (and were) imposed" on both Respondents, paragraph five could reasonably be interpreted to mean that acceptance of the proposal by only one of the Respondents resolved Petitioner's entire claim against both Respondents. *Id*.

SUMMARY OF ARGUMENT

This Court should deny review because the Fifth District's decision does not conflict with any decisions from this Court or any other district court of appeal. The Fifth District did not "nitpick" the offers in this case.

The Fifth District read the offers in their entirety and applied pragmatic reasoning in reaching its conclusion.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE FIFTH DISTRICT'S DECISION IN THIS CASE AND *JOLLIE v. STATE* OR ANY OTHER APPELLATE COURT DECISION.

A. *Jollie* Does Not Support Jurisdiction.

In *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this Court clarified a procedural issue regarding jurisdiction that arose in light of the 1980 amendment to article V, section 3, of the Florida Constitution. This Court previously held in *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980), that under the 1980 amendment it did not have jurisdiction to review *per curiam* decisions of the district courts of appeal rendered without opinion when the basis for such review was an alleged conflict of that decision with a decision of another appellate court. In *Jollie* the Court reiterated that it would not reexamine cases referenced in a "citation PCA" to determine whether the contents of that case now conflicted with other appellate decisions. 405 So. 2d at 419. However, a district court of appeal *per curiam* opinion that cited as *controlling* authority a decision that was either pending review in or had been reversed by this Court continued to constitute *prima facie* express conflict and allowed this Court to exercise its jurisdiction. *Id*. at 420.

Petitioner argues that *Jollie* "mean[s] there is jurisdiction" in this case simply because the Fifth District cited *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014), in its opinion at 557-58 (Pet. App. 3); and *Hilton Hotels* was reversed by this Court in *Anderson v. Hilton Hotels Corp*., 202 So. 3d 846 (Fla. 2016). (Pet. Br. at 5). *Jollie* does not apply because the Fifth District neither rendered a "citation PCA" nor cited *Hilton Hotels* as controlling authority on the question of law actually decided in the instant case. *Jollie* did not create jurisdiction where it did not otherwise exist.

B. There Is No Express and Direct Conflict of Decisions.

In *Florida Star v. B.J.F*., 530 So. 2d 286 (Fla. 1988), this Court explained that article V, section 3(b)(3), of the Florida Constitution requires some statement or citation *in the opinion* that hypothetically could create "express and direct" conflict with another opinion. *Id*. at 288. This statement implicitly recognized the principle that a district court's discussion of the legal principles upon which the court based its decision is necessary to satisfy the requirement of "express" conflict. *See Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 42 (Fla. 1981). In determining whether there is "direct" conflict, the Court "will examine the opinion upon which the district court of appeal decision is based." *Seaboard Airline R.R. Co. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958). The "opinion" represents the reasons for the decision. *Id*. *See also Kennedy v. Kennedy*, 641 So. 2d 408, 409

(Fla. 1994) (noting that, in determining whether there is direct conflict, this Court must look to the "opinion" upon which the district court's "decision" is based).

Petitioner has not identified any such conflict between the Fifth District's opinion in this case and this Court's opinions in either *Anderson* or *Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 2d 391 (Fla. 2016). Petitioner also alleges that the opinion conflicts with "all the cases cited in this Court's opinion in *Anderson* that were in conflict with the Fifth District's opinion in *Anderson*." (Pet. Br. at 5). This contention should be rejected since Petitioner has neither identified such cases nor explained how or why there is any purported conflict.

There is no conflict between *Anderson* and the instant case because different issues were decided. The issue in *Anderson* was whether the proposal from Troy Anderson could be reasonably construed as an offer to also settle the claims of his wife. The issue in the instant case was whether proposals were ambiguous because they were separately directed to offerees who were coextensively liable and stated they were "inclusive of all damages" claimed by Petitioner.

In *Anderson* this Court concluded that reading the proposals of Troy Anderson to include the claims of Paula Anderson was unreasonable because the proposals consistently used the singular term "Plaintiff," which was defined as Troy Anderson. 202 So. 3d at 855. Furthermore, the offers made no reference to Paula Anderson or her loss of consortium claim, which Troy Anderson was not

obliged to address in his claim. *Id*. In reading the entirety of Anderson's proposals, this Court concluded the only reasonable interpretation was that Troy Anderson offered to settle only his claims with each Respondent in his offer. *Id*.

In the instant case each proposal stated that it was made to the named offeree to settle any and all claims made against that offeree, but each proposal also stated that it was "inclusive of all damages" claimed by Petitioner. 194 So. 3d at 556 (Pet. App. 2). The amount of each proposal was the same -- $20,000.00. *Id*. As correctly noted by the Fifth District, the "all damages" claimed "arguably are those that could have been (and were) imposed on both [Respondents] in this case." 194 So. 3d at 558 (Pet. App. 4).

The Fifth District did not cite *Hilton Hotels* as controlling authority as to the issue in this case but for the following general concepts:

> As we wrote in *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014):
>
> > 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).

Nunez v. Allen, 194 So. 3d 554, 557-58 (Fla. 5th DCA 2016) (Pet. App. 3). This passage was the only reference to *Hilton Hotels* in the Fifth District's opinion in this case. The concepts set forth in this passage were not criticized by this Court in *Anderson*. None of the cases cited in the above passage were reversed or limited, nor even mentioned, in *Anderson*. Petitioner identified no statement or citation in the decision in the instant case that could create conflict with this Court's decision in *Anderson*.

The Fifth District did not read one clause without considering the whole document in this case. To the contrary, the Fifth District determined that paragraph five rendered the proposals ambiguous *in light of* the language in paragraphs two, three and four. The Fifth District's decision in this case does not expressly and directly conflict with *Anderson*.

Petitioner failed to identify even a hypothetical conflict as to the points of law actually decided by this Court in *Anderson* and by the Fifth District in this case. There are none. The full opinion does reveal a *lack* of any conflict, because the decisions did not address the same point of law.

The Fifth District's citation of *Tran v. Anvil Iron Works, Inc*., 110 So. 2d 923 (Fla. 2d DCA 2013), did not create conflict with *Anderson*. The Fifth District acknowledged that *Tran* was not directly on point because the

proposals in *Tran* stated that, as a condition of the proposal, the plaintiff would voluntarily dismiss with prejudice any and all claims against the specific offeree. 194 So. 2d at 558 (Pet. App. 4). The ambiguity arose in *Tran* because the proposals, made separately to each defendant, were inconsistent with the attached notice of voluntary dismissal, which named both defendants and indicated that the case would be dismissed against both defendants. 194 So. 2d at 558 (Pet. App. 4). This Court denied review in *Tran v. Anvil Iron Works, Inc*., 145 So. 3d 821 (Fla. 2014).

In the instant case the ambiguity arose because the proposals were *internally* inconsistent. There were no specific nonmonetary terms, such as dismissal of the action, described in the proposals. 194 So. 3d at 559 (Pet. App. 4). However, the language in the proposals raised the "legitimate question" as to whether acceptance would resolve Petitioner's claim against only the named offeree or would resolve the entire claim against both Respondents. *Id*. As in *Tran*, this may be significant where one defendant is the permissive driver of the vehicle and the other defendant is vicariously liable as the owner of the vehicle. *Id*. In the instant case this "legitimate question" was significant because Respondents were father and son.

The Fifth District's decision in this case does not conflict with *Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 3d 391 (Fla. 2016), as argued by Petitioner. (Pet. Br. at 8). In *Kuhajda* this Court held that if attorney's fees are not sought in

the pleadings, a proposal is not invalid for failing to state whether it includes attorney's fees and whether attorney's fees are part of the legal claim. *Id*. at 393. This was not an issue in the instant case. 194 So. 3d n.8 (Pet. App. 5).

Petitioner attempts to show conflict between *Kuhajda* and the instant case by focusing on the statement that Kuhajda served the defendants with "identical" offers of judgment.[1] (Pet. Br. at 8, citing 202 So. 3d at 393). This factor was not mentioned in this Court's analysis of the issue in *Kuhajda*. The instant case did not impose a requirement that does not exist in either Section 768.79 or Rule 1.442.

Rule 1.442(c)(2)(C) and (D) requires proposals to "state with particularity any relevant conditions" and "all nonmonetary terms of the proposal." These particularity requirements are "fundamental to the purpose underlying the statute and rule." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1078 (Fla. 2006). The particularity requirements intend that a proposal "be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. *Id*. at 1079, citing *Lucas v. Calhoun*, 813 So. 2d 971, 973 (Fla. 2d DCA 2002). In *Lucas* the Second District held that Lucas's proposal was legally insufficient because it stated he intended to release and discharge the defendants

[1] This Court's records show that the word "identical" should have been "successive." The Appendix to Kuhajda's Initial Brief on Merits shows that two joint proposals were directed to both defendants. *See Kuhajda v. Borden Dairy Co*., Case No. SC15-1682, Appendix to Petitioner's Initial Brief on Merits, Exhibit 4 (PDF.12, 14).

from liability for his bodily injury claims but failed to indicate whether the claims would be resolved by a release, a dismissal, or any other means. *Id*. In reaching its conclusion, the court noted:

> [W]here, as here, the proposal seeks to resolve fewer than all of the damage claims the better practice is to identify the specific damage elements encompassed within the proposal. . . . When the proposal indicates that it seeks to resolve all claims identified in the complaint, or in a specific count, it is unnecessary to identify the various elements of damages in the settlement proposal.

Id. at 972 n.1. This passage highlights the ambiguity in this case.

The ambiguity did not arise in this case because the offers did not mention the other defendant, as argued by Petitioner. (Pet. Br. at 9). The ambiguity arose because separate proposals in the same amount were made to two defendants who were coextensively liable for "all damages claimed by Plaintiff." Under these circumstances, the proposals were not sufficiently clear and definite to allow the offerees to make an informed decision without needing clarification as to whether payment of $20,000.00 would settle the case as to one or both of the defendants. *See Nichols*, 932 So. 2d at 1079.

II. THERE IS NO CONSTITUTIONAL AUTHORITY FOR THIS COURT TO ACCEPT JURISDICTION BASED ON ALLEGED "LACK OF CONFUSION" IN A PROPOSAL FOR SETTLEMENT.

There was no "nitpicking" involved in the Fifth District's analysis. It was not mere use of the term "damages" but the context that rendered these proposals ambiguous. Paragraph five stated that each proposal was "inclusive of all damages

claimed by Plaintiff" in a case where the father and son defendants were coextensively liable for "all damages claimed by Plaintiff." Petitioner dismisses this ambiguity as "irrelevant" in arguing that he was entitled to an award of attorney's fees against Gabriel Nunez.

Petitioner erroneously argues that Gabriel Nunez was "no different than defendant SecurAmerica was in *Anderson*." (Pet. Br. at 10). The jury determined that both SecurAmerica and "Embassy Suites" were actively negligent and assigned a percentage of negligence to each of them. 202 So. 3d at 850. The judgment apportioned the damages between SecurAmerica and "Embassy Suites." The issue decided in *Anderson* was not whether the proposal to SecurAmerica was ambiguous because it was "inclusive of all damages claimed by Plaintiff" but whether the term "Plaintiff" could reasonably be construed to include both Troy Anderson and his wife, Paula. *Id*. The issue decided in *Anderson* was simply not dispositive of the issue in the instant case.

CONCLUSION

For the reasons stated above, the Court should decline to accept jurisdiction and deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of February, 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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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was prepared in Time New Roman 14-point font.

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