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 JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner W. Riley Allen (Petitioner) seeks review of the Fifth District Court of Appeal's decision 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 Jairo Nunez and Gabriel Nunez (owner or driver, respectively or collectively, Defendants) that they rejected. Unlike the trial court, the Fifth District concluded that the proposals were ambiguous. *Nunez v. Allen*, 194 So. 3d 554, 556 (Fla. 5th DCA 2016).

This case resulted from a motor vehicle accident in which Gabriel Nunez was operating a vehicle owned by his father, Jairo Nunez. *Id*. Gabriel struck a truck owned by Petitioner. *Id*. At the time of the accident, Petitioner's truck was legally parked on the street and was unoccupied. *Id*. Petitioner sued the owner and driver and sought damages for the truck's post-repair diminution in value, the cost of repairs, and the truck's loss of use. *Id.* The complaint alleged that the driver was negligent in the operation of the vehicle and that the owner was vicariously liable for his driver's negligent operation of the vehicle. *Id*. Defendants filed a joint answer. *Id.*

Before trial, Petitioner served separate proposals for settlement, at the same time, to each defendant. *Id.* The proposals were identical except for the names of the Defendants. *Id.* Neither the owner nor driver responded to the proposals. Thus,

by operation of law, the proposals were rejected. *Id.* Except for the difference in names of the person to whom the offer was being made, each of the proposals 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. This Proposal for Settlement is made on behalf of Plaintiff, W. RILEY ALLEN, and is made to Defendant, JARIO RAFAEL NUNEZ.[1]
> 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, JARIO RAFEAL NUNEZ.
> 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.

Id.

The case went to trial and a judgment was entered against both defendants for $29,785.97. *Id*. The court reserved jurisdiction to award attorney's fees. *Id*.

Petitioner moved to enforce the proposals for settlement and the determination that he was entitled to attorney's fees. *Id.* at 557. Defendants moved to strike the proposals for settlement arguing that paragraph five made the proposals ambiguous. *Id*. The trial court found the proposals sufficiently clear and

[1] As noted, in the offer to the son, the defendant's name was changed to GABRIEL NUNEZ.

unambiguous and awarded petitioner attorneys fees. *Id.*

Defendants appealed. On appeal, Defendants again argued the proposals were ambiguous.[2] The Fifth District, reading one paragraph as opposed to the entire document, ruled that since paragraph five referenced "all damages," it could be read to mean damages imposed on both defendants and not just the defendant named in the offer. *Id.* at 558. As such, the Fifth District concluded the offers were ambiguous. *Id*. at 559. The Fifth District opined that paragraph five would not have been ambiguous had it used the same language as paragraph three. *Id.* at 558. The Fifth District cited its previous decision in *Hilton Hotels Corp. v. Anderson*, 153. So. 3d 412, 415 (Fla. 5th DCA 2014) for the standard to be applied in evaluating whether proposals for settlement are valid. *Nunez*, 194 So. 3d at 557-58. The Fifth District also relied on *Tran v. Anvil Iron Works, Inc*., 110 So. 3d 923, 925 (Fla 2d DCA 2013) for its determination that the offers in this case were ambiguous, but admitted that the decision in Tran was "not directly on point." *Nunez,* 194 So. 3d at 558.

Petitioner timely sought review in this court.

[2] Defendants raised three other issues as well. Because the Fifth District ruled that the proposals were ambiguous, it did not address the other issues.

SUMMARY OF ARGUMENT

This Court should grant review because 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. THIS COURT HAS JURISDICTION BASED ON *JOLLIE V. STATE* AND BASED ON EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DIRECT COURTS OF APPEAL.[3]

A. Jurisdiction Based On *Jollie.*

In *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981), this Court held that if a district court opinion cites to a case pending in this Court at the time jurisdiction is invoked or to an opinion that has been reversed by this Court, then there is

[3] The decision conflicts with all the cases cited by this court in its *Anderson* opinion that were in conflict with the Firth District's opinion in *Anderson*. Because the conflict in those cases is explained explicitly in this court's opinion in *Anderson*, Petitioner is not going to repeat those conflicts here.

jurisdiction for review of the cited case in this Court. *Jollie* is an exception to the normal requirement that the petitioner must establish express and direct conflict or some other basis for jurisdiction. *See Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988). The Fifth District's opinion in this case cites to its previous opinion in *Hilton Hotels Corp.*, 153 So. 3d 412. At the time the notice seeking discretionary review was filed in this case, the Fifth District's decision in *Anderson* was pending in this Court. Subsequently, *Anderson* was reversed by this Court. *Anderson*, 202 So. 3d 846. Both of those events, the pendency and the reversal of *Anderson*, create jurisdiction to review this case. It does not mean, of course, that Petitioner wins or even that the Court will take jurisdiction since jurisdiction is discretionary.[4] But it does mean there is jurisdiction.

B. **Jurisdiction Based On Express And Direct Conflict.**

The Fifth District's opinion in this case expressly and directly conflicts with this Court's decisions in *Anderson* and *Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 3d 391 (Fla. 2016), and all the cases cited in this Court's opinion in *Anderson* that were in conflict with the Fifth District's opinion in *Anderson*.

In *Anderson*, this Court dealt with proposals for settlement that were, for purposes of the issue in this Court, virtually identical to the proposals for

[4] The discussion starting at page 9 of this brief sets forth the reasons the Court should take accept jurisdiction.

settlement made here.[5] In *Anderson*, offers were made to multiple defendants contemporaneously that, except for the names of the defendants, and in that case the amount offered, were virtually identical. 202 So. 3d at 849. The offers did not mention the other defendants or the other plaintiff. *Id.* There, the defendants argued that since there was no reference to the other plaintiff in paragraph four of the offer they could not tell if the offer was intended to settle the claims of one or

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[5] **PROPOSAL FOR SETTLEMENT ON BEHALF OF PLAINTIFF, TROY ANDERSON'S [sic], PURSUANT TO RULE 1.442**

Plaintiff, TROY ANDERSON, by and through his undersigned attorneys, hereby serves his Proposal for Settlement, pursuant to Rule 1.442 of the Florida Rules of Civil Procedure, to [RECIPIENT], and states in support thereof as follows:

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 [RECIPIENT].

3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against [RECIPIENT].

4. That in exchange for [amount demanded] in hand paid from [RECIPIENT], PLAINTIFF agrees to settle any and all claims asserted against [RECIPIENT], 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.

both Plaintiffs. This Court rejected that argument stating "[t]he reading of Anderson's offer as espoused by the Respondents, the trial court, and the Fifth District below is unreasonable." *Id.* at 854.

> The proposal clearly and consistently used the single 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. Finally, the offer made . . . no reference to [the other plaintiff].

Id. at 855. This Court made clear 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 offers." *Id.*

Those holdings by this Court in *Anderson* apply just as much to the facts in this case as they did to the facts in *Anderson.* Every reference in the proposals in this case were to the single plaintiff, Riley Allen, and to a single named defendant, either Jairo Nunez or Gabriel Nunez. There was no reference to the other defendant. The proposals were made at same time. Both defendants had everything they needed to make a decision. Although here the separate offers were from one person and was made to two defendants, the reasoning is the same. The Fifth District in this case, just as it did in *Anderson*, read one clause without considering the whole document and determined the proposals were ambiguous.

That analysis is even more egregious in this case because the court admits that if paragraph 5 read as just as paragraph 3 there would be no ambiguity. *Nunez*, 194 So. 3d at 558. This Court rejected that type of analysis in *Anderson.* That analysis and the resulting decision truly fly in the face of this Court's holding in *Anderson* and is accordingly in express and direct conflict with *Anderson*.

The Fifth District's reliance on *Tran*, which the Fifth District admitted was not on point, does not change this result. The ambiguity in *Tran v. Anvil Iron Works, Inc.*, 110 So. 3d 923 (Fla. 2d DCA 2013) existed because the proposal and the attachment to the proposal were inconsistent. That's why the court held the proposal ambiguous. *Id*. at 926-27. But to the extent *Tran* relied on the statement in the opinion that the two offers do not mention the other defendant, and that somehow created the confusion, then it is in conflict with *Anderson*. *Anderson* makes clear mentioning another party is not required. 202 So. 3d at 854-56.

The decision of the Fifth District in this case is also in conflict with this Court's recent decision in *Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 3d 391 (Fla. 2016). *Kuhajda* makes clear that ambiguity cannot be obtained by imposing a requirement that does not exist. *Id.* at 395. *Kuhajda* also involved identical offers to two defendants. *Id.* at 393. The offers specified that the offers "included costs, interest and all damages or monies recoverable under the complaint and by law." *Id*. The issue was whether the failure to mention attorneys

fess which Rule 1.442 required invalidated the offers. This Court held it did not because the rule imposed a requirement the statute did not. Here, the Fifth District effectively imposed a requirement that the offer to one defendant had to explain whether it would result in a settlement as to both defendants. That requirement does not exist in the statute or, for that matter, the rule. Thus, the holding conflicts with the holding in *Kuhajda*. The statements in both *Tran* and this case that ambiguity is created because one defendant might want to know if settlement of its claim would result in settlement as to both defendants injects ambiguity into an otherwise unambiguous offer. Neither the statute nor the rule require such information. Here, both defendants were free to accept or reject the offer they had before them.

II. THE COURT SHOULD ACCEPT JUSICTION TO REJECT OUTDATED INTERPETATIONS OF THE STATUTE AND RULE.

The decision of the Fifth District in this case and this Court's opinion in *Anderson* cannot be reconciled and this Court's well-reasoned decision, reversing the Fifth District made it crystal clear: "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. *Cf.* [*State Farm Mut. Auto Ins. Co. v.*] *Nichols*, 932 So. 2d at 1079." (emphasis added). *Anderson*, 202 So. 3d at 853. The Fifth District relied on the fact that the term "damages" was used in

paragraph 5 but the statute and rule both specify that "damages," plural must be specified. Fla. R. Civ. P. 1.442. How can using the exact term the statute and rule require create an ambiguity?

This Court should take jurisdiction to once again correct the error the lower courts, particularly the Fifth District, are making in an overly strict reading of the authorities resulting in unreasonable interpretations of otherwise reasonable offers. This applies in particular to Gabriel Nunez, the driver of the car. Contrary to the theory the Fifth District expressed in this case and the Second District expressed in *Tran*, there could be no confusion about the offer to him. Even if the offers were somehow ambiguous to the owner of the car because his liability was based vicious liability, Gabriel's liability, as driver of the car, was based solely on his own negligence. He cannot seek indemnification from anyone else. Thus, the other offer is irrelevant. In other words he is no different than defendant SecurAmerica was in *Anderson*. Whatever alleged confusion there may have been as to the other defendants in *Anderson* (which of course this Court rejected), none existed as to SecurAmerica. *Anderson*, 202 So.3d at 852-853. No ambiguity existed for the driver, Gabriel. When judgment was entered against him the driver Gabriel in this case, petitioner Riley Allen was entitled to an award of attorney's fees against him.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction.

Respectfully submitted,

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I HEREBY CERTIFY that the foregoing document has been furnished to the following counsel by email on January 23, 2017:

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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.

/s/ Thomas D. Hall

194 So.3d 554
District Court of Appeal of Florida,
Fifth District.

Jairo Rafael NUNEZ and Gabriel Rogelio Nunez, Appellants,
v.
W. RILEY ALLEN, Appellee.

No. 5D14–4386.
|
June 24, 2016.

Synopsis

Background: Following a motor vehicle accident, offeror served a proposal for settlement on offeree, which the offeree rejected. The Circuit Court, Orange County, Donald A. Myers, Jr., J., entered judgment in favor of offeror, and awarded attorney's fees. Offeror appealed.

[Holding:] The District Court of Appeal, Lambert, J., held that offeror's proposal of settlement made to offeree after vehicle accident was ambiguous.

Reversed.

West Headnotes (8)

[1] Appeal and Error
Cases Triable in Appellate Court

The eligibility to receive attorney's fees and costs pursuant to the offer of judgment statute and the rule for attorney's fees after a proposal of settlement is reviewed de novo. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442.

Cases that cite this headnote

[2] Costs
Effect of offer of judgment or pretrial deposit or tender

An award of attorney's fees under the offer of judgment statute, is a sanction against the rejecting party for the refusal to accept what is presumed to be a reasonable offer. West's F.S.A. § 768.79.

Cases that cite this headnote

[3] Costs
Offer of judgment in general

Because the offer of judgment 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. West's F.S.A. § 768.79.

Cases that cite this headnote

[4] Costs
Effect of offer of judgment or pretrial deposit or tender

Strict construction of the offer of judgment statute is required because the statute is in derogation of the common law rule that each party is to pay its own attorney's fees. West's F.S.A. § 768.79.

Cases that cite this headnote

[5] Costs
Offer of judgment in general

Because the offer of judgment statute must be strictly construed, a proposal that is ambiguous will be held to be unenforceable. West's F.S.A. § 768.79.

Cases that cite this headnote

[6] Costs
Offer of judgment in general

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. West's F.S.A. § 768.79.

Cases that cite this headnote

[7] **Costs**
Offer of judgment in general

If ambiguity in a proposal for settlement reasonably affected the offeree's decision to accept the proposal, then the proposal for settlement is not sufficiently clear and is not enforceable. West's F.S.A. RCP Rule 1.442.

Cases that cite this headnote

[8] **Costs**
Offer of judgment in general

Offeror's proposal of settlement made to offeree after vehicle accident was ambiguous and unenforceable, where proposal for settlement stated it included settlement for "all damages" suffered by offeror, but it was not clear if that proposal encompassed damages incurred from both offerees involved in the accident, or just the offeree named in the proposal of settlement. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442.

Cases that cite this headnote

***555** Appeal from the Circuit Court for Orange County, Donald A. Myers, Jr., Judge.

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Opinion

LAMBERT, J.

Jairo Rafael Nunez and Gabriel Nunez (collectively "Appellants") appeal from a final judgment awarding W. Riley Allen ("Appellee") $343,590 in attorney's fees and legal assistant's fees pursuant to section 768.79, Florida Statutes (2011), and Florida Rule of Civil Procedure 1.442.[1] ***556** Concluding that the proposals for settlement served and filed by Appellee were ambiguous and therefore invalid, we reverse the final judgment.

This case resulted from a motor vehicle accident in which Gabriel Nunez was operating a vehicle owned by his father, Jairo Nunez, when he struck a truck owned by Appellee, which was lawfully parked in the street and unoccupied. Appellee filed a one-count complaint against Appellants, alleging that Gabriel Nunez negligently operated the vehicle and that Jairo Nunez, as the owner of the vehicle, was vicariously liable for his son's negligent driving. Appellee sought damages for, among other things, the post-repair diminution in the value of his truck, the cost of the repairs, and the loss of use of his truck. Appellants jointly answered the complaint.[2]

Appellee then served a separate proposal for settlement on each Appellant pursuant to rule 1.442. The proposal to Jairo Nunez 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, 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.[3]
>
> 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.

Appellee contemporaneously served an identical proposal for settlement on Co–Appellant, Gabriel Nunez, except that Gabriel Nunez's name was

substituted in place of Jairo Nunez. Neither Appellant accepted the proposal for settlement; thus the proposals were considered rejected. *See* Fla. R. Civ. P. 1.442(f)(1) ("A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal.").

Following a bench trial, the lower court rendered an amended final judgment in favor of Appellee against both Appellants in the sum of $29,785.97, reserving jurisdiction to award attorney's fees. [4] Because this award exceeded the proposal for settlement by more than twenty-five percent, [5] ***557** Appellee moved to enforce his proposals for settlement and for a determination that he was entitled to attorney's fees under the rule and statute. [6] Appellants moved to strike Appellee's proposals for settlement, essentially arguing that because paragraph five of the proposal stated that the monetary settlement was inclusive of all damages claimed by Appellee, the proposal was ambiguous as to whether acceptance and payment of one of the $20,000 proposals for settlement would have resolved the case against both Appellants or only against the individual Appellant accepting the proposal. Appellants also responded to Appellee's motion to enforce the proposals for settlement, arguing that, under the circumstances of the case, the separate $20,000 proposals for settlement should be considered in the aggregate, resulting in Appellee failing to meet the monetary threshold for an award of attorney's fees under section 768.79(1).

The trial court denied Appellants' motion to strike the proposals for settlement and granted Appellee's motion to enforce the proposals, finding that the proposals for settlement were sufficiently clear and unambiguous and, thus, valid and enforceable. Following an evidentiary hearing, at which each side presented expert witness testimony, the trial court entered the final judgment now on appeal.

Appellants raise the following arguments on appeal: (1) the language contained in paragraph five of the proposals for settlement caused the proposals to be ambiguous and, therefore, unenforceable; (2) alternatively, if the proposals for settlement were not ambiguous, then the trial court erred in not considering them in the aggregate, causing Appellee to fail to meet the monetary threshold for attorney's fees; (3) if the proposals for settlement are otherwise enforceable, Appellee should not be awarded attorney's fees for representing himself or, at the very least, should not be awarded attorney's fees for services he rendered after Appellee's 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. We find the first issue dispositive, and therefore we decline to address the merits of the remaining issues.

[1] [2] [3] [4] [5] [6] "The eligibility to receive attorney's fees and costs pursuant to section 768.79 and rule 1.442 is reviewed de novo." *Pratt v. Weiss,* 161 So.3d 1268, 1271 (Fla.2015) (citing *Frosti v. Creel,* 979 So.2d 912, 915 (Fla.2008)). 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.* ***558** *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).

153 So.3d at 415.

[7] **[8]** In this case, the threshold question is whether the proposal for settlement is ambiguous. Our supreme court has told us that, "given the nature of language, it may be impossible to eliminate all ambiguity" from a rule 1.442 proposal for settlement. *State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So.2d 1067, 1079 (Fla.2006). The dispositive question then is whether ambiguity in a proposal for settlement reasonably affected the offeree's decision to accept the proposal. *See id.* If so, then the proposal for settlement is not sufficiently clear and is not enforceable. *See id.*

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.

Although not directly on point, we find the reasoning of our sister court in *Tran v. Anvil Iron Works, Inc.,* 110 So.3d 923 (Fla. 2d DCA 2013), persuasive. In *Tran,* the plaintiff was injured in an automobile accident and sued the driver of the other vehicle and his corporate employer, which owned the vehicle. *Tran,* 110 So.3d at 924. During the course of the litigation, plaintiff tendered separate proposals for settlement on the individual defendant and on the corporate defendant. *Id.* 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.

Neither defendant accepted the proposal for settlement. *Id.* at 925. Based on the result at trial, plaintiff moved to enforce the proposals. *Id.* The trial court denied the motion, finding that the proposals for settlement were ambiguous because, while the body of the proposals did not indicate that both defendants would be dismissed, the notices of dismissal attached to the respective proposals did. *Id.*

***559** The Second District Court of Appeal affirmed on this issue. [7] *Id.* at 926. The court held that the document was ambiguous because it was unclear whether acceptance of the proposal by one of the defendants would result in a dismissal only against that defendant or against both defendants. *Id.* The court stated that this discrepancy could reasonably affect the decision to accept the proposal because:

> [O]ne defendant might want to accept the proposal directed to it only if it knows for certain that its payment would result in the release of both defendants. This may be especially significant in a case such as this where one defendant is the employer/owner of the car and the other defendant is the employee who was driving the car.
>
> *Id.*

Admittedly, in the instant case, there were no specific nonmonetary terms, such as dismissal of the action, described in the respective proposals. However, as previously discussed, the 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. As recognized in *Tran,* this may be significant in a case such as this where one defendant is the permissive driver of the vehicle and the other defendant is vicariously liable by being the owner of the vehicle.

Accordingly, because we find that the proposals for settlement in this case were ambiguous and therefore invalid, we reverse the final judgment on appeal in its entirety. [8]

REVERSED.

All Citations

194 So.3d 554, 41 Fla. L. Weekly D1487

WALLIS and EDWARDS, JJ., concur.

Footnotes

1 The final judgment also awarded Appellee interest in the sum of $10,686.59, plus an $11,380 expert witness fee to counsel who testified on Appellee's behalf at the attorney fee hearing.

2 Appellants were represented by the same counsel.

3 Case No. 2010–CA–25627–0 is the underlying negligence case between the parties.

4 The damages awarded, post-judgment interest, and court costs have all been paid and are not part of this appeal.

5 Section 768.79(1), Florida Statutes (2011), provides in pertinent part:

> In any civil action for damages filed in the courts of this state, ... [i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

6 "Section 768.79 provides the substantive law concerning offers and demands of judgments, while Florida Rule of Civil Procedure 1.442 provides for its procedural mechanism." *Winter Park Imports, Inc. v. JM Family Enters.,* 66 So.3d 336, 338 (Fla. 5th DCA 2011) (citing *Saenz v. Campos,* 967 So.2d 1114, 1116 (Fla. 4th DCA 2007)).

7 The court reversed on a separate issue not relevant to the present proceedings.

8 The proposals for settlement also neglected to include a separate statement as to whether attorney's fees were part of the legal claim. The Fourth District Court of Appeal in *Deer Valley Realty, Inc. v. SB Hotel Assocs., LLC,* 190 So.3d 203 (Fla. 4th DCA 2016), and the First District Court of Appeal in *Colvin v. Clements & Ashmore, P.A.,* 182 So.3d 924, 925–26 (Fla. 1st DCA 2016), have recently held that proposals for settlement lacking this specific language were invalid and unenforceable. However, this issue was not raised in the instant case and, therefore, we do not consider it.