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 REPLY BRIEF ON MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Prior to the amendment of Rule 9.210(c) in 1997, the statement of the case and facts was to be omitted in Answer Briefs unless there were areas of disagreement "clearly specified." *See* Raoul G. Cantero, III, *Changes to the Florida Rules of Appellate Procedure,* Fla. Bar Journal, Vol. LXXI, No. 11, p. 58, December 1997. Since 1997, it "may" be omitted. *Id.* This Court has "encourage[d] appellees not to rewrite the statement of the case and facts except where clearly necessary." *Id.*

Respondents do not specify a single factual area of disagreement with the statement of the case and facts offered by Petitioner. Despite this, Respondents devote 16 pages of a 50-page brief to totally retell what happened below. The retelling is flooded with erroneous, manipulated, and irrelevant facts compelling Petitioner to respond. Respondents have painted an inaccurate picture of the underlying record consistent with their behavior at the trial court level. It is critical to remember that the trial judge heard this case on the merits in a non-jury trial. (R. 791).[1] A second judge conducted the hearing on attorney's fees. (R. 1499). The second judge, after observing Respondents' conduct regarding the attorneys' fee issues, and reviewing the court file, made specific findings in the attorneys' fee

[1] References to the record the district court of appeal had from the trial court, which is docketed on this Court's docket as the Index to the Record on Appeal, will be (R. pg.). References to the record created at the district court, which is docketed on this Court's docket as the Record on Appeal, will be (SCR. pg.).

order, the order now on review, about Respondents' conduct throughout the life of this case in the trial court. As Judge Donald A. Myers, Jr., explained, a strategy of "militant resistance" was employed by Respondents from inception with a "stubborn and unwavering denial of the Plaintiff's claims, and concerted efforts to prove that Plaintiff himself was untruthful in the presentation of those claims," making this case unnecessarily difficult and anything but "routine." (R. 1485-1486).[2]

> Judge Myers further noted that "[r]eview of the pleadings and filings in the record reveals that the litigation was highly contentious. Each side argues that the litigation turned very 'personal,' and it appears to the Court that the Defendants' insurance carrier, Geico General Insurance Company, on behalf of its insureds, decided to 'go to the mat' over the Plaintiff's claim." (R. 1504). (Citations omitted).[3]

The case was set for jury trial in May 2012, about 18 months after the original filing date of the complaint. *Id*. The case was mistried, however, because of statements made by then defense counsel. (R. 1504). Eventually, the parties agreed to a non-jury trial. *Id*.

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[2] *See* Final Judgment Awarding Attorneys' Fees. (R. 1484-1500). "The expenditure of $36,506.65, which was less than the total costs incurred…supports the conclusion that this was not a routine property damage case…It is difficult for this Court to imagine a 'routine' property damage case consisting of 'nine banker's boxes' of file materials." (R. 1495-1496).

[3] The following statement in the order on attorneys' fees demonstrates how prevalent this "go to the mat" strategy was, as Judge Myers further expressed: "Entitlement to attorney's fees was decided prior to the attorney's fee hearing held on September 24, 2014. Nevertheless, Defendants arrived at the fee hearing seeking to again challenge entitlement for Mr. Allen to recover attorneys' fees for his own time expended, relying on their expert, James Nicholas, Esq." (R. 1812).

As demonstrated by Respondents' retelling of the "facts," their "go to the mat" mentality, and strategy, persists today. Whatever the reason, it is wrong. The trial court's order on attorneys' fees says it best:

> Defendants were a father and son, owner and driver respectively of the subject vehicle. Under the dangerous instrumentality doctrine, the father owner was responsible for the negligence of his driver son. Their liability in this case was joint and several. Interestingly, at the entitlement hearing Defendants claimed, without supporting authority, that the Court should combine the two proposals (one each directed by the Plaintiff to the Defendant owner and driver) to determine whether Plaintiff's verdict exceeded the proposal and triggered entitlement to attorneys' fees. The Court rejected this argument. But, had Defendants timely accepted either of the separate proposals they would have been entitled to an offset against the ultimate verdict, and no entitlement whatsoever to attorneys' fees would have been triggered under the remaining proposal. Again, **Defendant's unyielding opposition to the Plaintiff's claim can be cited as the reason for its liability for substantial attorneys' fees.**[4] The Defendants made a "business judgment for which [they] should have known a day of reckoning would come should [they] lose in the end." (R. 1486) (Emphasis added) (Citations omitted).

Respondents' statement of the facts is nothing more than an attempt to distract this Court from the real issues in this case. Just as "red herrings"[5] have been used for hundreds of years to distract hunting dogs from the trail of their quarry,

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[4] The issue of the amount of fees is not before this Court in this review.

[5] A soft-finned bony fish that is preserved by salting and slow smoking, which turns the herring red or dark brown, giving it a very strong smell that is naturally attractive to dogs. *See* https://www.merriam-webster.com/dictionary/red%20herring. ©Merriam-Webster, Incorporated (2017).

Respondents have scattered "red herrings" throughout their Answer Brief in an attempt to distract the Court from what is really being decided in this review. The issue before this Court is whether the two separate offers to the two different defendants were somehow ambiguous. Rather than list all those "red herrings" here, Petitioner has, for clarity, included them in the argument section of the brief.[6]

SUMMARY OF ARGUMENT

This Fifth District's opinion in this case conflicts with previous decisions of this Court and decisions of the district courts of appeal, specifically, the Fourth District's recent opinion in *Kiefer v. Sunset Beach Investments., LLC*, 207 So. 3d 1008 (Fla. 4th DCA 2017).

In proposals for settlement, there is no requirement that the proposals state what will happen to other parties not mentioned in the proposal for settlement, even when one party's liability might be derivative. To demand otherwise would impose a requirement that does not either exist in the statute or rule.

ARGUMENT

I. THIS COURT HAS JURISDICTION

Petitioner relies on the arguments on jurisdiction set forth in Petitioner's Jurisdictional Brief and the Initial Brief on the Merits. In addition, *Kiefer v. Sunset*

[6] References to Respondents' Answer Brief are (AB. #). Not every Red Herring is referenced due to space constraints, but a sufficient flavor is provided.

Beach Investments, LLC, 207 So. 3d 1008 (Fla. 4th DCA 2017), expressly and directly conflicts with the opinion of the Fifth District Court of Appeal in this case.

In *Kiefer*, the Fourth District recently dealt with a proposal for settlement that had nine paragraphs. *Id.* at 1011. Seven of the nine paragraphs specifically referenced the person making the offer. *Id.* The remaining two paragraphs did not. *Id.* The party not accepting the offer, of course, argued that the lack of reference to the person making the offer in those two paragraphs made the offer ambiguous. *Id.* The trial court agreed stating:

> 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 [the person making the offer], as every other paragraph specifically and very carefully does relate to [the person making the offer], in all caps, no less. *Id.* at 1010.

The Fourth District, relying on this Court's reasoning in *Anderson v. Hilton Hotels Corp.*, 202 So.3d 846 (Fla. 2016), specifically rejected that conclusion and explained its reasoning to be clear about why *Anderson* mandated rejecting such a claim of ambiguity:

> The supreme court [in *Anderson*] 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. *Id.*
>
> *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.*

Id. at 1011–12.

The same is true in this case. In this case, the Respondents' argue one paragraph which does not specifically mention the person making the offer or the person to whom the offer is made (when all others did) makes the offer ambiguous. The Fifth District agreed. *Anderson* and *Kiefer* make clear this does not make an offer ambiguous. As such, its opinion in this case expressly and directly conflicts with *Kiefer*, as well as *Anderson*.

II. THE 'RED HERRINGS' AMOUNT TO NOTHING AND SHOULD BE REJECTED.

The Respondents' red herring arguments do not have merit. For example, Petitioner never claimed that his six-year old truck was "show quality," having a value "well over $70,000" at the time the complaint was filed. (AB. 4).[7]

Respondents claim Petitioner admitted the case would only have been settled had both Defendants accepted the offers served (red herring), but to make such an assertion they must ignore the record evidence. (AB. 36, 49). They ignore that Petitioner and the first defense lawyer conducted reasonable discussions trying to

[7] Respondents' expert, Mr. Carpinski, felt the truck pre-loss was "clearly show quality" when he testified at trial in 2013, (R. 1088), and the trial court's order on fees notes it was show quality. (R. 1484).

resolve the claim. (AB. 4-6, 36, 41). Petitioner offered to resolve it reasonably for $15,600.00, while also agreeing to "assume responsibility for whatever additional damage there is" that caused the truck to be unsafe to drive. (R. 203, 205-206, 700-701, 718-719, 1544-1545, 1690). The additional damage was substantial, i.e., frame damage that resulted in the truck being "parked," while also sustaining a significant diminution in value. (R. 799-800, 1239-1240).

After the first lawyer was replaced, Petitioner tried to resolve the case with the second and, two months prior to the first trial, described in writing a range of damages from $17,959.57 to $28,259.57, for settlement purposes, but to no avail with no response. (R. 124-126). The judgment entered against each Respondent for $29,785.97, equates to approximately 149% of the individual offer to each and further supports Petitioner's good faith efforts. (R. 1239-1240). *See Anderson v. Hilton Hotels Corp*., 202 So. 3d 846, 857-858 (Fla. 2016).

Respondents again mislead (red herring) related to the email dated April 21, 2012, asserting that is when Petitioner speciously raised frame damage for the "first" time. (AB. 6). Petitioner felt he had a "duty to preserve the evidence" and Judge Komanski agreed this was a "very fair explanation." (R. 296, 550). He asked defense counsel "many times" to inspect the truck, but they waited until 60 days before trial

to even ask to inspect it. (R. 297, 532, 716, 1546-1547).[8] Respondents' expert, Mr. Carpinski, opined possible "frame damage" on April 18, 2012, and that was the reason for the April 21, 2012, email. (R. 296-298, 555-557, 1690-1692).

Next, Respondents imply Judge Komanski somehow shirked his responsibility because he sanctioned them allegedly "without any explanation" (red herring).[9] (AB. 10). Relatedly, the discussion of mistrial is another misleading red herring, which earned additional sanctions from Judge Komanski.[10] (AB. 9-10). Respondents earned sanctions from Judge Myers as well.[11]

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[8] The truck was in the shop for 60 days waiting to be inspected. (R. 297, 716-17, 748-49, 1546-47). Judge Komanski said Respondents did "nothing" prior to March 30, 2012, with a vehicle that was effectively "down." (R. 297-298, 532-533, 726-729). He found the "60 days" in the shop compensable as a sanction for taking the truck "out of service." (R. 799-800, 1546-1547, 1690).

[9] Petitioner was never sanctioned by the trial court for any reason. Each time Respondents moved for sanctions, to strike, or to continue it was denied as lacking merit. (R. 169-172, 213, 716, 720-721, 724-727, 728-729, 712-738). The trial court expressed its frustration noting defense counsel was "dilatory," did not abide by the court's orders, and squandered time. (R. 296, 531). Each time Petitioner was compelled to move for sanctions against Respondents it was granted. (R. 429-431, 464).

[10] The court sanctioned Respondents for failing to make a contemporaneous objection and recite the alleged "quoted" statement accurately that led to the mistrial. (R. 323, 429-431). The court ordered the parties back to Mediation, where counsel accused Petitioner of committing fraud, (R. 449, 1552), resulting in another motion for sanctions against Respondents, which was also granted. (R. 448-460, 464).

[11] Respondents violated Judge Myers' Order related to the attorney's fee hearing, making him "frustrated to be in this posture having issued a very specific

Yet another example, Respondents have yet to admit, even in their Answer Brief, (red herring), that they were disputing the existence of a "coextensive relationship" they now promote when Petitioner's offers were made. The Owner denied ownership and vicarious responsibility for the Driver until eight months after Petitioner's offers to settle were served. (R. 67-69, 174).[12]

Regardless of Respondents' motivation, it is imperative these misleading statements be challenged.

III. *ANDERSON* AND *NUNEZ* CANNOT BE RECONCILED AND ALLOWING *NUNEZ* TO STAND WOULD REINSTATE THE FLAWED REASONING IN *HILTON HOTELS V. ANDERSON*[13]

Kiefer v. Sunset Beach Investments, LLC, 207 So. 3d 1008 (Fla. 4th DCA 2017), cannot be reconciled with *Nunez*. As the opinion in *Nunez* stated:

> 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. (Emphasis added).

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order that is necessary, this Court finds, for the proper administration and prosecution and defense of these cases before the Court." (R. 1480-1482, 1531).

[12] On March 12, 2012, 5½ months after receiving Petitioner's offer, the "alleged" Owner served his proposal for $100.00, consistent with denying vicarious liability. If he truly was claiming a "coextensive" relationship at the time, then his $100.00 offer was made in bad faith. The Driver offered $4900.00, also consistent with the Owner denying "coextensive" responsibility. (R. 1153-1158).

[13] *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412 (Fla. 5th DCA 2014).

Nunez, 194 So. 3d 558.

Relying on *Anderson*, the Fourth District in *Kiefer* looked to the "entirety" of the proposal "without 'nitpicking' in a search for ambiguity." 207 So. 3d at 1011. "[T]he fifth and sixth paragraphs of the release were…silent as to the defendant to which they applied." *Id.* at 1010. But, "[w]hen the proposal for settlement and release are read as a whole, these two paragraphs do not create an ambiguity." *Id.* at 1012. Here, failing to restate the individual offeree's name in *Nunez* is no different from the two paragraphs that failed to restate Mr. Kiefer's name. To require that every paragraph restate the offeree's name, as suggested by the Fifth District and Respondents, and flatly rejected by the court in *Kiefer*, eviscerates this Court's instruction that the offer be read as a whole. It also imposes a requirement not present in the statute or rule, i.e., that every paragraph contain the name of the offeror. *See Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 3d 391 (Fla. 2016). This Court should adopt the reasoning of *Anderson* and *Kiefer* and reverse the Fifth District's opinion in this case.

Respondents claim the "issue" in the instant case is whether the offers to the Driver and vicariously liable Owner were "ambiguous because the offerees were coextensively liable[14] and the proposals stated they were 'inclusive of all damages'

[14] Respondents are not entitled to claim "coextensive liability" because they consciously chose to deny its existence until long after the settlement offer was made. They can cite no authority to the contrary. *See Duplantis v. Brock Specialty*

claimed by [Petitioner.]" (AB. 19-20). They also claim the instant case differs from *Anderson v. Hilton* because "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." (AB. 22). This was not the issue in *Anderson*, but rather the conclusion reached by the trial court and district court, which this Court described as "unreasonable and in contravention of this Court's direction in *Nichols*." *Anderson*, 202 So. 3d at 855. While analyzing the virtually identical offer made in *Nunez*, this Court said:

> 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. Finally, the offer made by Troy Anderson had no reference to Paula Anderson or her loss of consortium claim, which Anderson was not obliged to address in his claim. (Emphasis added).
>
> *Id*.

Servs, Ltd., 85 So. 3d 1206, 1208-1209 (Fla. 5th DCA 2012) and *Andrews v. Frey*, 66 So. 3d 376 (Fla. 5th DCA 2011).

This lack of forthrightness appears to have affected the District Court's analysis. ("As recognized in *Tran*, this may be significant in a case such as this…" with a permissive driver and vicariously liable owner). *Nunez v. Allen*, 194 So. 3d 554, 559 (Fla. 5th DCA 2016). To find *Tran* persuasive the Fifth District had to inexplicably ignore its own precedent in *Duplantis* and *Andrews.*

Each offer in *Nunez* was directed to only the named offeree and the only parties to be affected were Petitioner and the "designated Respondent." Whether the offer "could have affected the unaddressed claims" of others is irrelevant. *Id.* at 854. Respondents' argument presents "a distinction without a difference."

This Court documented in *Anderson* that the Fifth District created unrebutted conflicts with the Second and Fourth Districts in *Miley*, *Alamo Financing*, and *Land & Sea Petroleum*, each of which held "an offer by a single named offeror to a single offeree was considered sufficiently clear and enforceable, although it did not address separate pending claims of other parties to the litigation." *Id.*

The language of the offer in *Miley v. Nash*, 171 So. 3d 145 (Fla. 2d DCA 2015), "an attempt to resolve all claims and causes of action resulting from the incident or accident giving rise to this lawsuit brought by [Plaintiff] against [Defendant]," did not render the offer ambiguous. (Emphasis added). *Anderson*, 202 So. 3d at 853. Certainly, "inclusive of all damages," claimed by Respondents here to be ambiguous, is no more expansive than "all claims and causes of action…giving rise to the lawsuit." Similarly, this Court affirmed the reasoning in *Alamo Financing, L.P. v. Mazoff*, 112 So. 3d 626 (Fla. 4th DCA 2013), rejecting alleged over-expansive language and the reading of one paragraph "in isolation," focusing instead on reading the proposal as a whole. *Anderson*, 202 So. 3d. at 853-854 (plaintiff contended proposal sought to resolve "all claims" against Alamo Financing, as well

as "all claims made in the present action," including those against other defendants). Here, one need only substitute "damages" for "claims."

Likewise, the broad language used in *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So.3d 348 (Fla. 4th DCA 2011), "all claims as well as any and all claims that could have been or should have been brought by the designated broker-offeree," did not "inject" ambiguity. *Anderson*, 202 So. 3d at 854. Whether "claims" or "damages" is used does not render an offer ambiguous. *American Home Assurance Co. v. D'Agostino*, 211 So. 3d 63, 66 (Fla. 4th DCA 2017).

Respondents have manufactured two additional red herrings in reference to *Land & Sea Petroleum*, first, claiming it did not involve the "dangerous instrumentality doctrine" and, second, that it supports the *Nunez* offers were "not made in good faith." (AB. 40-41). These arguments have been completely debunked because Respondents disputed the "coextensive liability" they now disingenuously wish this Court to believe they admitted, their lawyers clearly overlooked that two

offers were made,[15] there is no evidence of lack of information or good faith,[16] and, absent manipulating "tipsy coachman," no basis to manufacture arguments not raised below. *See Dade County Sch. Bd v. WQAM,*. 731 So. 2d 638, 644-45 (Fla. 1999).[17]

This Court has also rejected additional arguments of Respondents by affirming the "persuasive" reasoning of the Second District in *Hess v. Walton,* 898 So. 2d 1046, 1051 (Fla. 2d DCA 2005) (logical, strategic reasons for making

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[15] Respondents disregard that following the second trial their counsel filed a Motion to Strike Plaintiff's Proposal for Settlement on December 13, 2013, unaware two offers had been made. (R. 836). He then learned there were two and filed an amended motion on December 26, 2013, (R. 1018-1041). Counsel was also unaware of two offers 9½ months earlier when he served Respondents' Pre-Trial Statement, filed February 27, 2013. (R. 759). Yet, Respondents want this Court to believe they were confused in September 2011 when they received the two individual offers their trial lawyer was unaware of until December 26, 2013.

[16] Respondents complain they had "no information" (red herring) to consider the offers, while also claiming a lack of "good faith." (AB. 4-5, 36, 41). Respondents' multiple attorneys at the trial court level never raised lack of information or lack of good faith prior to, at the time of, or after receipt of the offers. (A.B. 36, 41). The "burden [is] on the offeree to prove the absence of good faith." *Schmidt v. Fortner*, 629 So.2d 1036, 1041 n. 6 (Fla. 4th DCA 1993).

[17] Respondents exploit a measured misapplication of "tipsy coachman." (AB. 41). Respondents declare, "The 'tipsy coachman' rule does not limit an appellee [purportedly Respondents] to arguments that were raised in the lower court." (AB. 41). *Dade County Sch. Bd.* does not say that. It says that "a party who is content with the judgment below…is not limited in the appellate courts to the theories of recovery stated by the trial court [internal citation omitted]." *Id.* at 645. Here, "tipsy coachman" does not apply.

differentiated offers to two defendants, "one of whom [is] only vicariously responsible …") and *Thornburg v. Pursell*, 476 So. 3d 323, 324 (Fla. 2d DCA 1985) ("[t]he rule does not provide for combining two separate and distinct offers"). *Anderson*, 202 So. 3d at 857. The offers made in *Nunez* are unequivocally consistent with *Hess*. These two Respondents had two separate offers to settle for a specific amount of money that did not mention the other defendant. They needed no other information. They knew what their potential liability was based on the offer. What might have happened to others in the case is not relevant, certainly not after the Court's decision in *Anderson.*

CONCLUSION

The Fifth District in *Nunez* read one paragraph in isolation rather than reading the offer as a whole. *Anderson* condemns such a practice.[18] Nitpicking one paragraph in isolation conflicts with this Court's clear direction in *Anderson*. Petitioner respectfully requests that this Court reverse the District Court's decision in this case and remand for further proceedings consistent with the opinion.

Respectfully submitted,

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[18] The Fifth District did not have the benefit of this court's opinion in Anderson when it ruled.

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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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