

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT

SAFEPOINT INSURANCE
COMPANY,

Appellant,

CASE NO.: 6D23-4155

L.T. CASE NO. 2019-CA-014520-O

v.

MARISOL ROSA,

Appellee.

_____ /

APPELLEE'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES2

STATEMENT OF THE CASE AND FACTS4

SUMMARY OF THE ARGUMENT 18

ARGUMENT 18

I. Standard of Review: Abuse of Discretion..... 18

II. Section 768.79, Fla. Stat., Is Not a Prevailing Party Statute.20

III. The Trial Court Exercised Its Discretion and Found the Proposal
Was Not issued in a Good Faith Effort to Settle the Case..... 22

A. The Standards Regarding a “Good Faith” Offer..... 22

B. Safepoint’s Stated Foundation for the \$500 Proposal
Was and Is a Pretext.24

C. The Proposal Was Not Founded on a Reasonable and
Realistic Assessment of Liability, and Bore No
Relationship to the Claimed Damages..... 32

CONCLUSION..... 35

CERTIFICATE OF COMPLIANCE37

TABLE OF AUTHORITIES

Cases

<i>Arrowood Indem. Co. v. Acosta, Inc.</i> , 58 So. 3d 286 (Fla. 1st DCA 2011).....	23
<i>Canakaris v. Canakaris</i> , 382 So. 2d 1197 (Fla. 1980).....	19, 20
<i>Coates v. R.J. Reynolds Tobacco Co.</i> , 365 So. 3d 353 (Fla. 2023)	20
<i>Coffman Realty, Inc. v. Tosohatchee Game Pres., Inc.</i> , 381 So. 2d 1164 (Fla. 5th DCA 1980), <i>approved</i> , 413 So. 2d 1 (Fla. 1982).....	20
<i>Dodge v. People’s Trust Ins. Co.</i> , 321 So. 3d 831 (Fla. 4th DCA 2021)	<i>passim</i>
<i>Eagleman v. Eagleman</i> , 673 So. 2d 946 (Fla. 4th DCA 1996)	22, 23, 33
<i>Fox v. McCaw Cellular Comm. of Florida, Inc.</i> , 745 So. 2d 330 (Fla. 4th DCA 1998)	24
<i>Gurney v. State Farm Mut. Auto. Ins. Co.</i> , 889 So. 2d 97 (Fla. 5th DCA 2004)	22
<i>Kuhajda v. Borden Dairy Co. of Alabama</i> , 202 So. 3d 391 (Fla. 2016).....	20, 21
<i>Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc.</i> , 53 So. 3d 348 (Fla. 4th DCA 2011)	19
<i>Mootry v. Bethune-Cookman Univ., Inc.</i> , 186 So. 3d 15 (Fla. 5th DCA 2016)	17, 19, 30, 31
<i>Nants v. Griffin</i> , 783 So. 2d 363 (Fla. 5th DCA 2001).....	22
<i>People’s Trust Ins. Co. v. Gunsser</i> , 373 So. 3d 422 (Fla. 6th DCA 2023)	17, 29
<i>Rosa v. Safepoint Ins. Co.</i> , 350 So. 3d 468 (Fla. 5th DCA 2022).....	11, 29

Rules

Fla. R. Civ. P. 1.442.....20

STATEMENT OF THE CASE AND FACTS

Safepoint issued an HO-3 “all risks” homeowners insurance policy to Marisol Rosa [R. 27-105].¹ The renewal Policy was in effect from January 28, 2019 to January 28, 2020 [R. 35].

The Policy covered all risks of direct physical loss to property while the Policy was in effect, unless otherwise excluded [R. 58]. The Policy excluded loss caused by wear and tear, deterioration and rust or other corrosion; however, it provided coverage for losses that ensued from such causes of loss [R. 58-60]. Furthermore, if wear and tear, deterioration, etc. caused water damage from a plumbing system, the Policy provided coverage for the loss caused by water [R. 59-60]. If such water damage occurred, the Policy also covered the cost of tearing out and replacing parts of the home necessary to repair the plumbing system that suffered from wear and tear, deterioration, etc., and for ensuing losses [R. 59-60]. The Policy did not cover the cost of the pipes themselves [R. 60].

The Policy also contained a Water Damage Exclusion Endorsement (“WDX”) [R. 99]. The WDX excluded specific types of water damage,

¹ The Undersigned’s copy of the record is paginated in accordance with Fla. R. App. P. 9.200(d)(1)(C)(ii): the page numbers displayed by her counsel’s PDF reader exactly match the pagination of the index. Ms. Rosa does not follow the page citation Safepoint employed in its Initial Brief which are off by one page when the record on appeal is searched.

including accidental discharge or overflow water from within a plumbing system; however, this exclusion only applied if the accidental discharge or overflow was “[c]aused by or resulting from human or animal, forces or any act of nature” [R. 99].

On March 22, 2019, Ms. Rosa’s toilet overflowed, and on April 15, 2019, she reported a claim to Safepoint [R. 116]. On June 14, 2019, Safepoint acknowledged she had water damage, but denied her claim based on the grounds that the WDX “excludes full water damage coverage”:

Per our discussion, this letter is regarding the claim reported by you to SafePoint Insurance Company for water damage to your home caused by a floor level water loss, which occurred on or about March 22, 2019. It appears the water damage originated in the bathroom as grout lines cracked lines cracked seem to indicate, and subsequent damage to the cabinet base supports a floor level water loss. As this is the case, per our discussion, your policy includes an endorsement, which excludes full water damage coverage.

[R. 338].

On November 27, 2019, Ms. Rosa filed her Complaint for Safepoint’s failure to pay for her losses [R. 10-12]. The Complaint sought the Policy’s proceeds, as well as interest, attorneys’ fees, and costs [R. 12].

On December 17, 2019, Safepoint served its Answer and Affirmative Defenses [R. 13-17]. Safepoint asserted three Affirmative Defenses.

Safepoint did not name, quote, or cite, the WDX in any of its defenses [R. 15-16].

Safepoint's First Affirmative Defense asserted setoff of the Policy's deductible [R. 15]. Safepoint's Third Affirmative Defense asserted a limitation of liability based on "a \$10,000.00 Limited Fungi, Mold, Wet or Dry Rot, or Bacteria Endorsement" [R. 16].

Safepoint's Second Affirmative Defense generically referred to the terms, conditions, exclusions, and endorsements of the Policy, but did not name, quote, or cite, the WDX:

Plaintiff's damages are precluded, limited, excluded, or otherwise barred in whole or in part, pursuant to the terms, conditions, exclusions, or endorsements of the subject policy regarding water damage, which is expressly excluded under the policy. Specifically, the alleged damage to the bathroom of the subject property was caused by an overflow of water entering through cracks in the grout lines of the bathroom, and did not result from a Peril Insured Against; thus, the alleged water damage including water intrusion through the cracked grout lines, whether or not by back up through sewers or drains, would be excluded in this policy. Subject to these terms and conditions of the Policy and Florida law interpreting the same, Defendant is not obligated to issue any payments under the Policy.

[R. 15-16].

Before it ever served discovery requests, Safepoint served Ms. Rosa a Proposal for Settlement on March 18, 2020 [R. 639-41]. The Proposal offered Ms. Rosa a mere \$500 to resolve "all damages that would otherwise

be awarded in a final judgment against Safepoint and in favor of the Plaintiff,” and included attorneys’ fees which were a part of the legal claim [R. 639-40]. Ms. Rosa did not accept \$500 to settle her entire claim.

At the time the PFS was filed there was no dispositive appellate authority on the precise issue that was ultimately ruled on in this case.

Ms. Rosa’s counsel retained an expert certified general contractor, Advanced Pace Technologies (APT), to inspect Ms. Rosa’s home, evaluate the damages, and provide a plan for corrective action and repairs [R. 218-32; Appendix at 106-17²], along with a licensed master plumber, Clean Cut Plumbing [R. 230-232, Appendix at 118-20]. APT inspected the home on May 8, 2019 [R. 218]. Clean Cut Plumbing inspected the home on May 9, 2019, and sent a report to APT on May 13, 2019 [R. 230-232, Appendix at 118-20].

Three months after Safepoint served its Proposal, on May 20, 2020, Safepoint served its “First Set of Interrogatories to Plaintiff” [R. 1004-15] and “First Request for Production to Plaintiff” [R. 998-1003].

² The Record on Appeal contains scanned copies of the APT and Clean Cut Plumbing reports, attached to Safepoint’s eventual Motion for Summary Judgment. The pages in the Record on Appeal and on the Orange County Clerk of Court’s docket are adulterated and in large part illegible. Appellee attaches legible, unadulterated copies of these documents in an Appendix to this Answer Brief.

On June 7, 2019, APT issued its report and estimate to Ms. Rosa, and attached the Clean Cut Plumbing Report [R. 218-32; Appendix at 106-20].

On September 9, 2020, Ms. Rosa responded to the initial discovery. Ms. Rosa identified APT and Clean Cut Plumbing, and provided their reports [R. 206-17; R. 1017-20; Appendix at 94-105].

A year after serving its \$500 Proposal, Safepoint moved for final summary judgment asking the Trial Court to enter a final judgment in its favor with prejudice, with Ms. Rosa receiving nothing for her loss [R. 115-232; Appendix at 3-120]. Safepoint acknowledged that Ms. Rosa claimed her entire plumbing system failed, that she sought coverage to tear out and replace the portions of her home necessary to access the failed drain lines, and that she was claiming \$50,023.04 to repair the damages to her home and cited to (and attached as exhibits) her answers to interrogatories and the APT and Clean Cut Plumbing reports [R. 117-18; R. 206-32; Appendix at 5-6; Appendix at 94-120]. Safepoint's motion primarily relied on the WDX [R. 119-22]. However, Safepoint did not quote the entire WDX [R. 120; Appendix at 8]. Even though the WDX only applied if an accidental discharge or overflow was "[c]aused by or resulting from human or animal, forces or any act of nature" [R. 99], Safepoint omitted that language from its motion and argument [R. 120; Appendix at 8-11]. The term "act of nature" did not

appear anywhere in Safepoint's Motion [R. 115-24; Appendix at 3-12] and was undefined in the policy.

On September 28, 2021, Ms. Rosa responded to the Motion, and filed her cross-motion for tear out coverage [R. 244-513]. Ms. Rosa's response was entirely reliant upon the "act of nature" aspect of the WDX [R. 244-268]. The Response included 22 Trial Court orders which had ruled against insurers on this exact language and this exact issue [R. 245-48; R. 262-66; R. 270-336].

Ms. Rosa's Response also acknowledged that on June 2, 2021, in *Dodge v. People's Trust Ins. Co.*, 321 So. 3d 831 (Fla. 4th DCA 2021), the Fourth District Court of Appeal ruled against homeowners on the WDX's "act of nature" language. The *Dodge* court determined "rust or corrosion" was an "act of nature" [R. 266].

Safepoint's Motion for Final Summary Judgment was heard on November 8, 2021 [R. 533-59]. Before the hearing began, the Undersigned Counsel acknowledged that the Trial Court was required to rule against Ms. Rosa because of *Dodge* [R. 537:1-7]. Then, for the first time in this litigation, Safepoint mentioned that the claimed cause of loss was an "act of nature" which applied to exclude the loss. Safepoint acknowledged that it never

raised the “act of nature” issue; instead, that issue had been raised by Ms.

Rosa’s counsel. Safepoint’s Counsel stated:

This is Safepoint's motion for final summary judgment regarding a water damage exclusion. The underlying claim is a toilet backup from March of 2019, reported to Safepoint in April of 2019. And Safepoint subsequently denied that claim because there's a water damage exclusion which redefined the definition of water to exclude this particular loss.

Mr. Nation, I think the thing that he was referencing, is that the Fourth DCA in *Dodge v. People's Trust* case, that is 321 So. 3d 831, has **actually provided a definition for this "act of nature," phrase that Mr. Nation raises in his response motion**. And it clearly indicates—the Fourth indicates that rust and corrosion of the cast iron pipe is something that is caused by nature. It's a naturally occurring process and falls within the definition of act of nature.

[R. 537:11 to 538:2, emphasis added³].

To perfect Ms. Rosa’s record on appeal, the Undersigned again set forth the argument why rust and corrosion was not an “act of nature,” how he had secured 22 trial court orders interpreting the phrase in favor of homeowners, and other trial court orders specifically disagreeing with (but necessarily following) *Dodge*; for example, one order saying: “but for the *Dodge* decision, this Court would have denied Defendant’s Motion and granted Plaintiff’s motion” [R. 538:23-554:24].

³ All emphasis is supplied unless otherwise indicated.

On November 9, 2021, the Trial Court entered its Order Granting Final Summary Judgment for Defendant and Denying Partial Summary Judgment for Plaintiff, and Final Judgment [R. 515-20]. The Trial Court noted that but for *Dodge*, it would have ruled for Ms. Rosa, and that it disagreed with the analysis in *Dodge*. The Trial Court amended its Order on November 12, 2021 [R. 521-526].

Safepoint filed a motion to tax attorney's fees pursuant to its Proposal and prevailing party costs [R. 527-29]. The matter of fees was not heard because Ms. Rosa appealed the judgment.

The Fifth District upheld the Trial Court's judgment in *Rosa v. Safepoint Ins. Co.*, 350 So. 3d 468 (Fla. 5th DCA 2022). Safepoint again moved for attorney's fees based on the Proposal and prevailing party costs [R. 569-71]. Ms. Rosa responded [R. 583-89]. Ms. Rosa conceded Safepoint's entitlement to prevailing party costs [R. 583]. However, Ms. Rosa asserted the \$500 Proposal was not made in a good faith effort to resolve the claim, as it bore no reasonable relationship to the damages Ms. Rosa suffered, and did not reflect a realistic assessment of Safepoint's liability for the claim [R. 584-87].

The hearing on Safepoint's motion for attorney's fees was held on November 1, 2023, before a different judge than the one who handled the

initial litigation and summary judgment ruling [R. 764-80]. Safepoint's argument was simple and straightforward: it was the prevailing party, its \$500 Proposal was not accepted, so it was entitled to fees under § 768.79, Fla. Stat. [R. 767:8-768:11]. The Trial Court asked Safepoint's counsel its argument which formed the basis of the judgment, and Safepoint referenced the exclusion for rust and corrosion, not "act of nature":

THE COURT: All right, thank you. [Counsel for Safepoint], what was the basis for my granting Final Judgment? Generally speaking, what was the argument?

[SAFEPOINT'S COUNSEL]: Plaintiff's expert alleged that the plumbing damages to the system contained multiple failures due to corrosion. The policy specifically excludes coverage for rust and corrosion. And as such, based upon that argument, the Court found in favor of Defendant based upon the following exclusion.

[R. 768:22-769:7]. In response, the Undersigned argued that the issue was really over the interpretation of "act of nature", including the 22 trial court orders entered prior to summary judgment hearing; and at the time of summary judgment, the one appellate decision in *Dodge* [R. 769:10-770:14]. After the reference to the 22 orders, the Trial Court cut to the chase to find out whether any were entered before the Proposal to Ms. Rosa was served:

THE COURT: Let me ask you a question.

MR. NATION: Yes, sir.

THE COURT: On those other -- how many Orders had you litigated successfully denying Summary Judgment for the human or animal force or act of nature cases?

MR. NATION: 22, and I had not lost any, and I won Summary Judgment on all of them. And in fact, Judge Meyers in his Order says he's reviewed Dodge and he disagrees with Dodge, and I still have this issue up in the 6th DCA.

THE COURT: Okay. Were those 22 cases or so for which you had success resolved before the Proposal here such that you had a basis made for denying the Proposal for Settlement, a good faith basis for denying it, and win this?

MR. NATION: **Some of them were before the Proposal was settled** [sic] and some were after, but there were 22 prior to the Summary Judgment. And there's no way -- I still wouldn't settle this case. I couldn't for \$500, especially in light of the fact that at the time the Proposal was filed, there was no decision yet from an Appellate Court. It happened afterwards. The Proposal was filed in 2020, Dodge comes out in 2021. And then in my Response to the Motion for Summary Judgment, I list out and attached the 22 Trial Court Orders against carriers with this exact same language, and then Judge Meyers in entering his Order says "But for Dodge, this Court would have denied Defendant's Motion and granted the Plaintiffs" -- it was a long Order. And after this Summary Judgment, I've had six Trial Courts actually enter Orders after Dodge saying they disagree with Dodge.

[R. 770:23-772:8].

The Undersigned pointed out that § 768.79 was not a prevailing party statute, and that Safepoint knew he tried a lot of cases, and that \$500 was not a good faith effort to settle a \$50,000 claim when the question of liability

was still upon in the air and primarily being interpreted in favor of homeowners [R. 772:17-773:15].

In response, Safepoint set forth the reason why the \$500 was allegedly made in good faith—Ms. Rosa’s discovery responses containing her expert reports about the cause of loss:

Your Honor, the \$500 Proposal for Settlement was made in good faith. After assessing Safepoint's potential liability and **Plaintiff's Discovery Responses in which Plaintiff provided expert reports** which determined that the plumbing system contained multiple failures due to corrosion, and the policy specifically excludes coverage for corrosion. So in that event, after assessing that, Defendant determined that a \$500 Proposal for Settlement was a good faith offer to resolve this matter **based upon Plaintiff's Discovery Responses by its own expert.**

[R. 773:21-774:8]. Safepoint also established that Safepoint decided \$500 was reasonable for filing costs and fees:

THE COURT: How did somebody arrive at the bottom line that \$500 was reasonable for the damages?

[SAFEPOINT’S COUNSEL]: Filing costs and fees.

[R. 774:20-23].

The Trial Court reviewed the arguments, summarized the facts, and analyzed applicable case law [R. 776:25-778:4], and made its ruling. The Trial Court found the Proposal did not bear a reasonable relationship to the amount of damages because it was not directed to damages, and that it was

not a realistic assessment of liability because application of the exclusion was unresolved:

The question to be considered by the Court in determining good or bad faith is whether the offer bears a reasonable relationship to the amount of damages suffered and made a realistic assessment of liability.

It doesn't sound like it was directed -- that any damages was directed at filing fees and costs associated with the firm for filing a lawsuit here. There seems to have been a dispute as to the realistic assessment of the liability. So I'm going to deny the Defendant's Motion to Tax Attorney's Fees and Costs.

[R. 778:5-17]. Once again, Ms. Rosa agreed to prevailing party taxable costs, and stated they would probably get worked out [R. 779:9-15].

On November 8, 2023, the Trial Court entered its Order denying Safepoint's Motion to Tax Attorney's Fees and Granting Defendant's Motion to Tax Prevailing Party Costs [R. 599-604]. The Trial Court recognized case law requiring it to determine whether the Proposal bore a reasonable relationship to the amount of damages and was a reasonable assessment of liability [R. 600].

Regarding a reasonable relationship to the amount of damages, the Trial Court recognized that it bore no relationship because according to Safepoint, none of the Proposal was intended for damages:

Safepoint served its Proposal for Settlement on March 18, 2020, in the amount of \$500.00. At the time Safepoint served its Proposal, Plaintiff asserted the amount of damages suffered

were over \$50,000.00 in replacement costs damages and over \$42,000.00 in actual cash value damages. Plaintiff's complaint also claimed entitlement to attorneys' fees, costs, and interest.

At the hearing on this matter, Defendant represented that its \$500.00 offer was only intended to cover Plaintiff's filing costs and attorney's fees and did not include any amount related to Plaintiff's property damages.

[R. 600]; and

Safepoint's insurance policy is a "replacement cost" insurance policy. Evaluating this case on its own facts, the Court finds that Safepoint's nominal \$500.00 Proposal did not bear a reasonable relationship to the amount of damages being claimed by Plaintiff, as the offer was less than 1 % of the replacement cost damages and, by Safepoint's own admission, did not even take into account the amount of damages being sought by Plaintiff.

[R. 601].

Regarding liability, the Trial Court recognized a "hotly contested question of law existed" regarding the "act of nature" language, the issue was being appealed, and "The outcome of these appeals (several of which had not even been filed yet) was far from certain in March of 2020" [R. 601-02],⁴ and "Prior to *Dodge* when the Proposal was served, a realistic assessment of liability did not favor an outcome for Safepoint." Finally, the Trial Court

⁴ No Appeals over 'Act of Nature' had been filed when Safepoint served its Proposal.

drew an analogy to *Mootry v. Bethune-Cookman Univ., Inc.*, 186 So. 3d 15 (Fla. 5th DCA 2016), and held:

When Safepoint served its Proposal, the outcome of Safepoint's "any act of nature" defense was far from certain and the evidence actually reveals that it likely would have been construed in Plaintiffs favor and against Safepoint. The Order on summary judgment in this case certainly reveals the outcome would have in favor of Plaintiff and against Safepoint. The issues in this case had far reaching significance to both parties and to many others throughout the state and who are not parties to the case, as is evidenced by the ongoing litigation and appeals over the "any act of nature" defense. Discovery had just begun, and expert testimony had not yet been elicited. The \$500.00 proposal filed by Safepoint was not a realistic assessment of liability and bore no rational relationship to the apparent importance of the case to both sides, as evidenced from the scope and extent of their actions during this litigation.

[R. 603-04].

The day after the Motion for Fees was denied in this case, this Court issued its opinion in *People's Trust Ins. Co. v. Gunsser*, 373 So. 3d 422 (Fla. 6th DCA 2023), which construed "act of nature" against homeowners and in favor of insurers. Safepoint filed a motion for rehearing of the order denying its motion for fees based on *Gunsser* [R. 605-788]. This time, Safepoint did not say the Proposal was served in good faith because of the corrosion exclusion and Ms. Rosa's expert discovery responses like it had until this point. Safepoint came up with a brand-new foundation for its good faith

attempt to settle the claim: Appellate Courts' interpretation of the term "act of nature" [R. 605-18].

The Trial Court denied Safepoint's Motion for Rehearing [R. 981]. This appeal followed [R. 982-90].

SUMMARY OF THE ARGUMENT

The Trial Court properly exercised its discretion and determined Safepoint's \$500 Proposal was not a good faith attempt to resolve the case. Safepoint's \$500 Proposal did not have a reasonable foundation. Safepoint's alleged "good faith" grounds were simply a pretext.

Safepoint's Proposal was not a realistic assessment of its liability when the Proposal was served, and by Safepoint's own admission the \$500 bore no relationship to the amount of damages Ms. Rosa suffered. Since the Trial Court did not abuse its discretion, the Order disallowing Safepoint's entitlement to attorney's fees must stand.

ARGUMENT

I. Standard of Review: Abuse of Discretion.

Section 768.79(7)(a), Fla. Stat. (2020)⁵ affords the Trial Court discretion to determine a Proposal was not made in good faith and disallow

⁵ The proposal was served in 2020. This language is currently found in subsection (8)(a).

an award of costs and attorney's fees. Similarly, "The standard of review upon a finding that a proposal for settlement was not made in good faith is abuse of discretion." *Mootry v. Bethune-Cookman University, Inc.*, 186 So. 3d 15, 22 (Fla. 5th DCA 2016), quoting *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc.*, 53 So. 3d 348, 354 (Fla. 4th DCA 2011).

In *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980), the Florida Supreme Court referenced Safepoint's high burden. Safepoint must prove that "no reasonable man would take the view adopted by the trial court":

We cite with favor the following statement of the test for review of a judge's discretionary power:

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris at 1203.

The Trial Court's ruling is presumed correct. Safepoint has the burden to prove that no reasonable judge would have ruled the same way. *Coffman Realty, Inc. v. Tosohatchee Game Pres., Inc.*, 381 So. 2d 1164, 1165 (Fla. 5th DCA 1980), *approved*, 413 So. 2d 1 (Fla. 1982) ("In the last few months our Supreme Court has repeated for the umpteenth time that the decisions of trial courts are cloaked with a presumption of correctness, [and] that the burden to demonstrate error is on the appellant....")

II. Section 768.79, Fla. Stat., Is Not a Prevailing Party Statute.

The fact that Safepoint ultimately prevailed in this action is not determinative of whether its Proposal was made in a good faith effort to settle the claim. Section 768.79, Fla. Stat. is not, and never has been, a prevailing party statute. *Coates v. R.J. Reynolds Tobacco Co.*, 365 So. 3d 353, 356 (Fla. 2023) ("Based on the analysis above, we hold that the text of section 768.79 shows that it is not a prevailing-party statute.").

In *Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 3d 391 (Fla. 2016), the Florida Supreme Court explained the purpose of the Statute was to encourage settlement and promote an end to litigation. The only purpose of Fla. R. Civ. P. 1.442 was to implement the Statute:

The purpose of section 768.79 is to "reduce litigation costs and conserve judicial resources by encouraging the settlement

of legal actions.” *Gorka*, 36 So.3d at 650; see *Unicare Health Facilities, Inc. v. Mort*, 553 So.2d 159, 161 (Fla.1989) (explaining that rule 1.442 “was implemented solely to encourage settlements in order to eliminate trials if possible”). The only purpose of rule 1.442 is to provide a procedural framework to implement the substantive requirements of section 768.79 regarding settlement proposals.

Kuhajda at 395.

The Proposal in this case was simply a setup for attorneys’ fees in the event Safepoint prevailed. Notably, Safepoint DID NOT WIN on any of the affirmative defenses pled in its answer and affirmative defenses. As noted above, Safepoint specifically mentioned two exclusions/limitations and generically mentioned “Plaintiff’s damages are precluded, limited, excluded, or otherwise barred in whole or in part, pursuant to the terms, conditions, exclusions, or endorsements of the subject policy regarding water damage, which is expressly excluded under the policy.”

The amount in dispute between the parties was \$50,023.04—proceeds to tear out and replace parts of her home to access Ms. Rosa’s failed drain line plumbing system—plus attorneys’ fees, expert costs, court costs, and prejudgment interest. Safepoint’s Proposal totaling \$500 did not encourage settlement, it guaranteed further litigation.

III. The Trial Court Exercised Its Discretion and Found the Proposal Was Not issued in a Good Faith Effort to Settle the Case.

If a party would normally be entitled to fees under § 768.79, Fla. Stat., a Court is authorized to “disallow” the award of attorneys’ fees when the offer was not made in a good faith attempt to resolve the case:

If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney’s fees.

Section 768.79(7)(a), Fla. Stat. (2020).

A. The Standards Regarding a “Good Faith” Offer.

Safepoint’s Proposal was required to bear a reasonable relationship to the amount of damages suffered, and had to be a realistic assessment of its liability. In *Gurney v. State Farm Mut. Auto. Ins. Co.*, 889 So. 2d 97 (Fla. 5th DCA 2004) the Fifth District recognized:

The question to be considered by the court in determining if an offer of judgment was made in good faith is whether the offer or proposal bears a reasonable relationship to the amount of damages suffered and was a realistic assessment of liability.

Gurney at 99, quoting *Nants v. Griffin*, 783 So. 2d 363 (Fla. 5th DCA 2001).

Similarly, in *Eagleman v. Eagleman*, 673 So. 2d 946 (Fla. 4th DCA 1996) the

Fourth District stated:

Certainly the spirit of the offer of judgment statute is to encourage the parties to settle early. However, trial courts should view with considerable skepticism nominal offers which bear no reasonable relationship to damages and which are not founded

upon a reasonable and realistic assessment of liability. Such nominal offers cannot advance the statutory purpose of encouraging settlement, but instead serve no purpose other than to lay a predicate for a subsequent award of attorney's fees as occurred here.

Eagleman at 948.

Whether an offer was made in a “good faith” effort to settle the claim “rests on whether the offeror has a reasonable foundation on which to base the offer.” *Arrowood Indem. Co. v. Acosta, Inc.*, 58 So. 3d 286, 289 (Fla. 1st DCA 2011). This requires an analysis of both objective and subjective factors. *Id.* at 289–90 (Fla. 1st DCA 2011).

Pertinent objective factors include the amount of the offer, the potential liability, the timing of the offer, the complexity of the case, the justification for the offer, and the totality of the entire case record. *Id.* Pertinent subjective factors are whether the offeror had a subjectively reasonable belief on which to base its offer:

Although the trial court here properly considered objective factors in assessing the reasonableness of Arrowood's offer (e.g., the amount of the offer, Arrowood's potential exposure, and the complexity and closeness of the case), the court erred by not giving any consideration to Arrowood's justification for its offer and by basing its ruling exclusively on the objective factors. Rather, the trial court was required to consider Arrowood's explanation and then determine whether, despite consideration of the objective factors cited by the court, Arrowood had a subjectively reasonable belief on which to base its offer.

Arrowood at 290.

In *Fox v. McCaw Cellular Comm. of Florida, Inc.*, 745 So. 2d 330 (Fla. 4th DCA 1998), the court noted that each case must be evaluated on its own merits, and inquiry must be into the facts and circumstances surrounding the Proposal at the time it was made:

Each case requires its own analysis, and must be considered on its own facts. Whether an offer was made in bad faith involves a matter of discretion reposed in the trial judge to be determined from **the facts and circumstances surrounding the offer**. That determination is not controlled by a legal imperative requiring a finding of bad faith merely because the offer was nominal. Some nominal offers will have been made in good faith; some not so. **The trial judge will have to consider all the surrounding circumstances when the offer was made.**

Fox at 333.

This analysis is key. This analysis reveals the real motivation behind Safepoint's Proposal. Was it a legitimate proposal based on a realistic assessment of liability and the claimed damages, or was it only served to trigger prevailing party attorney's fees in the event Safepoint ultimately prevailed? Safepoint can never establish that the Trial Court abused its discretion in evaluating these factors.

B. Safepoint's Stated Foundation for the \$500 Proposal Was and Is a Pretext.

Safepoint's subjective explanation for the nominal \$500 Proposal was straightforward. At the fee hearing, Safepoint told the Trial Court it was due

to Ms. Rosa's discovery responses which contained her expert reports regarding the cause of loss:

Your Honor, the \$500 Proposal for Settlement was made in good faith. After assessing Safepoint's potential liability and **Plaintiff's Discovery Responses in which Plaintiff provided expert reports** which determined that the plumbing system contained multiple failures due to corrosion, and the policy specifically excludes coverage for corrosion. So in that event, after assessing that, Defendant determined that a \$500 Proposal for Settlement was a good faith offer to resolve this matter **based upon Plaintiff's Discovery Responses by its own expert.**

[R. 773:21-774:8].

That good faith basis was a pretext. The nominal amount *cannot* have been based on Ms. Rosa's discovery responses. It is impossible. Safepoint served its Proposal in March, 2020 [R. 639-41]. Safepoint did not even serve its initial discovery until three months later, in May 2020 [R. 993-1015]. Safepoint did not receive Ms. Rosa's initial discovery responses until six months after the Proposal was served, in September, 2020 [R. 1016-24]. The March, 2020 nominal Proposal could not have been based upon Plaintiff's September 2020 discovery responses as Safepoint had argued.

After the Trial Court determined the \$500 Proposal was not made in a good faith effort to settle the claim, Safepoint's "good faith" basis became a moving target. In its motion for rehearing, Safepoint abandoned its alleged reliance on expert reports and the corrosion exclusion which *provided* tear

out coverage and ensuing loss coverage [R. 797-810]. Safepoint couldn't rely on those grounds, because they were not true and only arose after Safepoint served its Proposal. Safepoint adopted new grounds in its motion for rehearing and focused solely on appellate decisions construing the term "act of nature"—a term it had not relied on until long after the Proposal was served, after Plaintiff's counsel raised the issue in response to summary judgment.

For example, Safepoint argued:

The Court should grant rehearing and reverse the denial of SafePoint's motion to enforce the Proposal. Under well-settled Florida law, nominal offers are fully enforceable where a defendant has a "reasonable basis" to believe it faces no liability. The Sixth District Court of Appeal's decision in *Gunsser*, 2023 WL 7395316, confirms not only that SafePoint's interpretation of the phrase "act of nature" was reasonable but that this interpretation is the **only** reasonable interpretation. *Id.* at *5 (citing *Rosa*, 321 So. 3d at 471). This consensus is now shared by the Third District Court of Appeal, the Fourth District Court of Appeal, the Fifth District Court of Appeal, and the Sixth District Court of Appeal. As a matter of law, SafePoint's interpretation of the policy was reasonable.

[R. 802, alteration in original].

These appellate interpretations came long after Safepoint's served its Proposal. They could not have been the foundation for serving the Proposal in good faith. Indeed, there is *no evidence* Safepoint paid any attention to "act of nature" in the underlying case until Ms. Rosa injected the analysis in

response to summary judgment. To be sure: Safepoint never used the words “act of nature” in its denial letter [R. 339]. Safepoint did not assert “act of nature” as an Affirmative Defense [R. 16-17]. Safepoint’s Motion for Summary Judgment actually quoted the WDX, but *omitted* the “act of nature” language [R. 120; Appendix at 8]. Safepoint cannot now say that its interpretation of “act of nature” was the reason it served a nominal Proposal in good faith effort to resolve the claim. Yet, that new position is the argument Safepoint maintains on appeal.

Safepoint’s new basis for its nominal proposal was not an issue until a year and a half after the Proposal was served, when Ms. Rosa responded to Safepoint’s Motion for Summary Judgment, [R. 240-513]. When Safepoint served its Proposal, the issue was not only “hotly contested” as the Trial Court found, there is no evidence that *any* court had *ever* interpreted “act of nature” in favor of an insurer. The only evidence is that trial courts had ruled *against* insurers on this issue, including in orders dated January 30, 2020, and March 18, 2020 [R. 244-48; R. 261-66; R. 270-336].

To recap: whether Safepoint served its Proposal in good faith required the Trial Court to analyze the circumstances facing Safepoint in March, 2020 when the Proposal was served. This analysis included orders finding against insurers on “act of nature.” This analysis included Safepoint’s false

representation that the proposal was based on its corrosion exclusion and Ms. Rosa's expert reports. This analysis also included the fact Safepoint never relied on any interpretation of "act of nature" before serving the Proposal, and the nominal amount of the offer (1% of Ms. Rosa's damages) which Safepoint admitted wasn't even for Plaintiff's damages, but instead were for her "filing costs and fees."

However, the "good faith" analysis of whether Safepoint served the Proposal in good faith effort to settle the claim *does not* include any of the reasons Safepoint has provided. The following factors which Safepoint relied on cannot be "facts and circumstances surrounding the offer" when it was made on March 18, 2020:

- "The policy specifically excludes coverage for rust and corrosion," but if rust and corrosion caused water damage, it covered tear out and ensuing losses;
- "Plaintiff's Discovery Responses in which Plaintiff provided expert reports which determined that the plumbing system contained multiple failures due to corrosion" which *did not exist* when the Proposal was served and which Safepoint did not receive until 6 months after the Proposal was served;

- Ms. Rosa’s “Discovery Responses by its own expert” which Safepoint did not receive until 6 months after the Proposal was served;
- The *Dodge* opinion regarding “act of nature,” which was released 15 months after the Proposal was served;
- The initial application of the term “act of nature” to Ms. Rosa’s claim (provided by Ms. Rosa, not Safepoint), which was made 18 months after the Proposal was served;
- The order granting Safepoint summary judgment on the “act of nature” exclusionary language based on *Dodge*, which was entered 20 months after the Proposal was served;
- The *Rosa* opinion from the Fifth District Court of Appeal interpreting Safepoint’s “act of nature” exclusion language, which was released 32 months after the Proposal was served;
- The *Gunsse* opinion issued by this Court interpreting “act of nature” exclusion language, which was released 44 months after the Proposal was served.

These issues cannot have had any bearing on whether Safepoint’s March, 2020 Proposal was made in good faith effort to settle the claim. There is no relationship between the Proposal and any ground Safepoint has given. It is

clear Safepoint is now trying to justify the reasons for its nominal Proposal with events which occurred long after the Proposal expired, and was simply using § 768.19, Fla. Stat., as a prevailing party statute.

In *Mootry, supra*, the trial court did not abuse its discretion finding an offer was not made in good faith, even when there was a judgment of no liability:

Following the entry of final judgments finding no liability on the part of BCU or Reed, they timely filed a motion for attorney fees pursuant to rule 1.4426 and section 768.79. Under this statute, if a defendant files an offer of judgment, which the plaintiff does not accept, and the defendant is found not to be liable, then “the defendant shall be entitled to recover reasonable costs and attorney’s fees incurred by him or her....” § 768.79(1), Fla. Stat. (2013). However, “the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney’s fees.” *Id.* § 768.79(7)(a).

For an offer to be made in good faith, the offer must “have some reasonable foundation on which to base an offer.” *Schmidt v. Fortner*, 629 So.2d 1036, 1039 (Fla. 4th DCA 1993). “[T]he question to be considered by the court in determining good or bad faith is whether the offer bears a reasonable relationship to the amount of damages suffered and a realistic assessment of liability.” *Evans v. Piotraczk*, 724 So.2d 1210, 1211 (Fla. 5th DCA 1998).

In denying the motions for attorney’s fees, the trial court found that:

In July 2012, the outcome of the various claims was far from certain. The issues in this case had far reaching significance to both parties and to many others not parties to the case.... Discovery would prove to be extensive and far reaching, yet only

preliminary discovery was completed. In short, the nominal proposals filed by both defendants bore no relationship to the apparent importance of the case to both sides, as evidenced from the scope and extent of their actions.

Mootry at 22, footnotes omitted. The Fifth District determined that the trial court did not abuse its discretion when it found the offers were not made in good faith when they were served. *Id.* That is the rationale the Trial Court followed. That is exactly the rationale this Court should follow.

Safepoint tries to distinguish *Mootry* on the ground that it didn't involve contract interpretation or a purely legal defense, and "discovery played no role in reading the plain language of the insurance policy." Yet, the contract had not been interpreted in Safepoint's favor when it served the Proposal. And discovery certainly played a role. Receipt of discovery—receipt of Ms. Rosa's expert report regarding corrosion—is the ground Safepoint initially gave for serving its nominal Proposal.

When Safepoint served the Proposal, the evidence is that contract interpretation favored Ms. Rosa, and the purely legal defense was not related to "act of nature" that Safepoint ultimately prevailed on. This case is on its second trip to the appellate courts, on an issue that has been decided in four District Courts of Appeal. Just like *Mootry*, "The issues in this case had far

reaching significance to both parties and to many others not parties to the case....”

C. The Proposal Was Not Founded on a Reasonable and Realistic Assessment of Liability, and Bore No Relationship to the Claimed Damages.

Hindsight is 20/20. Safepoint’s good faith grounds are a result of that hindsight. However, that is not how a Section 768.79(7)(a), Fla. Stat. (2020) assessment works. The foregoing section shows Safepoint’s foundation for its “reasonable and realistic assessment of liability” were simply made up *after* the Proposal was served. The only evidence before the Trial Court was that courts had interpreted “act of nature” in favor of coverage, and against insurers like Safepoint.

Even if the Trial Court accepted Safepoint’s explanation—“Plaintiff’s expert alleged that the plumbing damages to the system contained multiple failures due to corrosion. The policy specifically excludes coverage for rust and corrosion”—that ground is insufficient to say Safepoint was absolved of liability. The rust and corrosion exclusion had an ensuing loss clause, and triggered tear out coverage. The applicable exclusion was not the exclusion for rust and corrosion, but instead was the WDX which only applied if the WDX is triggered by an “act of nature.” No appellate law supported Safepoint

at the time it filed its Proposal, and the only trial court orders favored Ms. Rosa.

Ms. Rosa did not claim any losses caused by rust and corrosion—the damage to the pipes themselves [R. 253-54]. The Policy’s “rust and corrosion” exclusion provided coverage for ensuing losses, and Tear Out coverage, and it was those coverages that Ms. Rosa pursued [R. 253].

Safepoint’s \$500 Proposal was not a realistic assessment of its liability. Safepoint knew Ms. Rosa sustained a loss, it told her: “It appears the water damage originated in the bathroom as grout lines cracked lines cracked seem to indicate, and subsequent damage to the cabinet base supports a floor level water loss” [R. 338]. At the time of the Proposal, Safepoint knew the Undersigned tried many of these cases to verdict and had never lost on this WDX exclusion at the circuit court level, and no district court had yet spoken.

Nor did the Proposal bear a reasonable relationship to the amounts Ms. Rosa claimed. Safepoint argues a low probability of exposure may justify a low monetary offer, quoting *Eagleman, supra*:

[A] low probability of exposure may warrant a low monetary offer:

The offer should bear a reasonable relationship both to the amount of damages and a realistic assessment of liability. For example, if the damages in a case have the potential for a verdict of \$100,000 and the

defendant has realistically and reasonably assessed the chances of the plaintiff prevailing at 25%, then a \$25,000 offer might very well be a good faith offer.

Eagleman v. Eagleman, 673 So. 2d 946, 948 (Fla. 4th DCA 1996); (see R. 587-88). As the Fifth District Court of Appeal phrased it, “the court must look to the relative amount of potential damage and factor in the risk of liability in determining whether the offer is in good faith.” *Evans v. Piotraczk*, 724 So. 2d 1210, 1211 (Fla. 5th DCA 1998).

Initial Brief at 20.

A “low” exposure is not “no” exposure. Ms. Rosa’s complaint was for \$50,023.04 in property losses, interest on overdue payments, attorneys’ fees, and costs. Safepoint’s \$500 proposal bore no relationship to these damages, but would have resolved all property losses, all fees, all costs, and all prejudgment interest.

Safepoint plainly said the \$500 was only for “Filing costs and fees” [R. 774:23]. In other words, *nothing* was offered to settle Ms. Rosa’s claim for property losses. By its own admission, Safepoint’s Proposal bore no relationship to the amount of damages suffered, let alone a reasonable one. The Proposal was simply Safepoint’s attempt at prevailing party attorneys’ fees in the event Safepoint prevailed. The Trial Court properly exercised its discretion, looked at the facts and circumstances surrounding service of the Proposal, and determined Safepoint did not engage in a good faith effort to settle the claim.

CONCLUSION

For the foregoing reasons, this Court should affirm the Trial Court's Order denying Defendant's Motion to Tax Attorney's Fees and Order Denying Defendant's Motion for Rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Patrick M. Chidnese, Esq., and Frieda C. Lindroth, Esq. (patrick@bcflalaw.com; frieda@bcflalaw.com), Bickford & Chidnese, LLP, 307 S. Willow Avenue, Suite 100, Tampa, FL 33606 this 11th day of October, 2024.



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CERTIFICATE OF COMPLIANCE

In compliance with Fla. R. App. P. 9.045 and 9.210, counsel for Appellee certifies that this Answer Brief complies with the applicable font and word count limit requirements.

Respectfully submitted,



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