
IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2024-1274
APPEAL NO.: 4D23-1707
LOWER TRIBUNAL NO.: 312022CC000387

NADJA MACKENSEN and WOLFGANG MACKENSEN,
Respondents/Plaintiffs,

v.

TRACE ELEMENTS, INC.,
Petitioner/Defendants.

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENTS' AMENDED BRIEF ON JURISDICTION

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DESIGNATIONS

Petitioner, Trace Elements, Inc., will hereafter be referenced as “Trace Elements” or “Petitioner”. Individual Respondents, Nadja Mackensen and Wolfgang Mackensens, will hereafter be referenced cumulatively as “the Mackensens” or “Respondents”. The Amended Brief of Petitioner on Jurisdiction will hereafter be referred to as “Petitioner’s Amended Brief.” For ease of reference, the phrase “Joint PsFS” denotes joint proposals for settlement. Reference to Florida Rule of Civil Procedure 1.442 will hereafter be referenced as “Florida’s PFS Rule.”

The “Fourth’s Opinion” will hereafter be utilized when referring to the decision rendered in the present matter by the Fourth District Court of Appeal, as stated in the Opinion of May 15, 2024. Similarly, reference to this honorable Court will hereafter be labeled the “Supreme Court,” with Florida’s specified District Courts of Appeal hereafter referenced as “First DCA,” “Second DCA,” and so on.

Any citation to the appendix of the Fourth’s Opinion and the instant matter will simply employ the designation (Appendix).

STATEMENT OF THE ISSUES

Respondents reject the assessment in Petitioner’s Amended Brief that the Fourth’s Opinion as expressed on May 15, 2024 (Appendix) expressly and directly conflicts with Supreme Court precedent¹ and the cases from the First, Second, Third, and Fifth DCAs.² Petitioner’s resulting plea for discretionary review of the Fourth’s Opinion, which reversed the trial court’s Final Judgment, limited to the denial of Respondents’ Motion for Attorney’s Fees pursuant to a proposal for settlement, should not be granted.

Concerning the first issues, Respondents contend that the Fourth’s Opinion (Appendix) does not expressly or directly conflict with this Supreme Court’s decisions in neither *Willis Shaw*, nor in *Lamb*, nor in *Pratt*. Beyond Supreme Court decisions, the Fourth’s

¹ Petitioner’s Amended Brief specifically mentions *Pratt v. Weiss* (Fla. 2015), *Lamb v. Matetzschk* (Fla. 2005), and *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.* (Fla. 2003).

² Petitioner’s Amended Brief specifically lists *Joseph v. Niosi* (Fla. 1st DCA 2010), *Cobb v. Durando* (Fla. 2d DCA 2013), *Peltz v. Tr. Hosp. Int’l, LLC* (Fla. 3d DCA 2018), *D.A.B. Constructors, Inc. v. Oliver* (Fla. 5th DCA 2005), and the constitutional standard outlined in *Askew v. Florida Dep’t of Children & Families*, 385 So. 3d 1034 (Fla. 2024).

Opinion creates no need for actionable review in relation to Petitioner's listed District Courts of Appeal decisions.³

Accordingly, and addressing the second issue, Respondents seek to demonstrate that the Supreme Court's discretionary jurisdiction should not be invoked in the instant appeal based on this lack of express and direct conflict, the clarity of the Fourth's Opinion and supporting case law, and Florida's public policy.

³ Petitioner does not contend a conflict exists between the Fourth's Opinion (Appendix) and any decision from the Sixth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Respondents accept Petitioner's statement of the case and facts, with the exception of Petitioner's description that all proposals for settlement from or to multiple parties must be separately apportioned and the discounting of the Fourth DCA's opinion in *Hall v. Lexington Ins. Co.*, 895 So. 2d 1161 (Fla. 4th DCA 2005) as to create a need for the Supreme Court's review and decision as to the merits of the Fourth's Opinion (Appendix). Respondents contest the existence of express and direct conflict.

ARGUMENT

I. SUMMARY OF ARGUMENT

The Petitioner has not adequately established the existence of express and direct conflicts between the Fourth’s Opinion (Appendix) and previous decisions of the Supreme Court or any District Courts of Appeal as to warrant this honorable Supreme Court’s discretionary review. Respondents rely on distinctions in the Petitioner’s case law, the succinct clarity of the Fourth’s Opinion (Appendix) alone and within the framework of current case law as found in *Hall v. Lexington*, and Florida’s ever-strengthening public policy preference for the common-sense application of proposals for settlement.

II. ARGUMENT

A. Distinguishing Petitioner’s Cases

Petitioner contends that the Supreme Court’s jurisdictional basis for discretionary review should be extended presently under the threshold of “express and direct conflict”, per the *Askew* standard of decisions resulting “in a conflicting outcome despite ‘substantially the same controlling facts.’” *Askew v. Florida Dep’t of Children & Families*, 385 So. 3d 1034, 1037 (Fla. 2024). Respondents rebut this

position of resulting, untenable conflict with *Willis Shaw*, *Lamb*, and *Pratt* as to warrant Supreme Court review.

Willis Shaw

Earliest of the Petitioner's Supreme Court cases, the *Willis Shaw* decision emphasizes that Joint PsFS

shall state the amount and terms attributable to each party...[t]his language must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rules that each party pay its own fees...[w]e therefore hold that under the plain language of rule 1.442(c)(3), an offer from multiple plaintiffs must apportion the offer among the plaintiffs.

Willis Shaw Exp., Inc. v. Hilyer Sod, Inc., 849 So. 3d 276, 278-79 (Fla. 2003) (excerpted). Instead of conflicting with *Willis Shaw*, the Fourth's Opinion runs parallel to it, distinguishing itself from that earlier decision on the basis of the facts leading up to the rules. *Willis Shaw* consisted of multiple entity plaintiffs, each with separate claims that would logically result in some differentiation in the division of benefits to resolve those claims, that sought separate damages under the proposal for settlement guidelines. *Id.* This stands in contrast to the Fourth's Opinion where the unified nature of the Respondents under a single claim for breach of contract, or

unjust enrichment in the alternative, facing reciprocal, uniform action from the Petitioner supports distinct treatment (Appendix).

Lamb

Subsequently in 2005 in *Lamb*, the Supreme Court noted that Florida's PFS Rule

expressly requires that a joint proposal of settlement made to two or more parties be differentiated. The rule makes no distinction between multiple plaintiffs and multiple defendants, nor does it make any distinction based on the theory of liability.

Lamb v. Matetzschk, 906 So.2d 1037, 1040-41 (Fla. 2005). However, *Lamb* contemplated claims under a theory of vicarious liability not contemplated in this matter, rendering its facts not substantially similar enough as to create direct conflict. Furthermore, Florida's PFS Rule was amended, effective January 1, 2011, to abrogate the *Lamb* decision to permit vicariously liable parties to make or receive proposals for settlement without apportionment in the amount offered. Fla. R. Civ. P. 1.442(c).

Pratt

In *Pratt*, the phrase "bright line rule" as applicable to the apportionment between parties in Joint PsFS was stated "to be applied without exception." *Pratt v. Weiss*, 161 So. 3d 1268, 1271-72

(Fla. 2015). Yet this language was superseded by the Second DCA in *Saterbo*, which held the apportionment of damages between parties was not a requisite component of a valid proposal for settlement. *Saterbo v. Markuson*, 210 So.3d 135 (Fla. 2d DCA 2016). *Saterbo*'s verbiage that Joint PsFS, which provided for the settlement of all claims against both a vehicle driver and a vehicle owner without specific apportionment, was upheld for the purposes of establishing eligibility for the award of attorney's fees, under the aforementioned amendment to Florida's Proposal for Settlement Rule. *Id.* at 138. While Respondents do not seek entitlement under this exemption as the instant case does not consider vicarious liability, *Pratt*'s bright line rule against exceptions to apportionment is no longer so bright.

While the aforementioned Supreme Court cases contemplate comparable scenarios in relation to the instant matter, none resonate so substantially similar as to create a direct conflict with the Fourth's Opinion as to its opinion on this very narrow question of law (Appendix). Respondents also rebut that the express and direct standard of *Askew* necessitates implication of the Supreme Court's discretionary jurisdiction in relation to the following appellate cases.

First DCA – Joseph

Petitioner accurately states that the First DCA’s decision in *Joseph* was promulgated prior to the amending of Florida’s PFS Rule to extinguish the former bright-line rule on apportionment in Joint PsFS. *Joseph v. Niosi*, 50 So.3d 698 (Fla. 1st DCA 2010). In *Joseph*, the First DCA struck down an unapportioned proposal for settlement, while mentioning the rule amendment. *Id.* This mentioning serves to establish that *Joseph* recognizes limited exceptions to the bright-line apportionment requirement, making the Fourth’s Opinion compatible with the *Joseph* decision, with the Fourth’s Opinion not under the vicarious liability exception but under the exception mirrored in the *Hall* case, discussed in greater detail below.

Second DCA – Cobb

Any reliance on a conflict stemming from the *Cobb* decision discredits the valid and persuasive argument presented by *Cobb*’s dissent. *Cobb v. Durando*, 111 So. 3d 277 (Fla. 2d DCA 2013). Dissenting opinions serve a vital purpose as such argument may ultimately evolve into a majority opinion in later cases. Through the *Cobb* dissent, wherein Judge Altenbernd provided nuance that Florida’s PFS Rule must also protect the common law, the factual

resemblance between *Cobb* and the instant matter are apparent with the judge unconvinced that Florida's PFS Rule

must be interpreted to require parties to make proposals to settle that essentially split causes of action, ignore the doctrine of merger, and serve no practical purpose.

Id. at 279.

Directly comparable to the instant matter,

As a practical matter, the contract only has Mr. Durando's name on it. If the single cause of action could be brought by him individually, I do not understand why this rule of procedure must be interpreted to require two offers of judgment. Likewise, if the offer to settle this claim were divided into two parts, it is not clear to me why Mr. Cobb would ever want to pay to settle an undivided half interest in this cause of action, merely to face further litigation on the other undivided half interest. Protecting the common law seems to have achieved form over substance in this line of cases.

Id. at 279-80. By highlighting the seemingly unreasonable result reached by the majority, the *Cobb* dissent elucidates how more nuanced reasoning serves the best interests of justice in interpreting Florida's PFS Rule as to Joint PsFS.

Third DCA – Peltz

Countering *Peltz's* position that “[a joint] proposal for settlement not strictly conforming to rule 1.442(c)(3)'s apportionment requirement is unenforceable,” subsequent caselaw has established

otherwise. *Peltz v. Tr. Hosp. Int’l, LLC*, 242 So.3d 518, 520 (Fla. 3d DCA 2018); *Publix Supermarkets, Inc. v. Alford*, 354 So. 3d 601 (Fla. 5d DCA 2022) (the dispute arose from an asterisk included inadvertently in a proposal for settlement, which despite being included and transmitted, the Court found that did not create an ambiguity sufficient to impact the decision of the recipient of the proposal for settlement, allowing for the offer’s upholding).

Fifth DCA – D.A.B. Constructors, Inc.

D.A.B. Constructors adheres to the broad legal principle that in matters concerning the derogation of the common law, including the American Rule, a strict construction of the rule’s language applies. *D.A.B. Constructors, Inc. v. Oliver*, 914 So. 2d 462, 463 (Fla. 5th DCA 2005). Still, reasonable interpretation must buttress this strict construction to create balanced and just results. In short, proposals for settlements’ validity hinge on conveying offers “sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification,” not on immovably strict standards. *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1070 (Fla. 2006). The Fourth’s Opinion exists in this interplay between *D.A.B. Constructors* and *State Farm*.

B. Clarity of the Fourth’s Opinion and legal sufficiency of *Hall*

The Fourth’s Opinion consisted of a well-reasoned opinion to permit the award of attorney’s fees and costs based on a valid proposal for settlement (Appendix). Florida’s PFS Rule was implemented with the aim to “reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions.” *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 2010, 2018 (Fla. 2003). When considering Joint PsFS, Florida’s PFS Rule “merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification.” *Carey-All Transp., Inc. v. Newby*, 989 So. 3d 1201, 1206 (Fla. 2d DCA 2008) (citing *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006)).

The Fourth’s Opinion neglects to create results that constitute express and direct conflict with the current body of case law, as it relies on precedent established in another Fourth DCA decision in *Hall v. Lexington* (Appendix). *Hall v. Lexington Ins. Co.*, 895 So.2d 1161 (Fla. 4th DCA 2005). *Hall* provided for a narrow exception to the appointment requirement of Florida’ PFS Rule when parties share

all claims and stand completely unified in their position, representation, stance on offers, and all other conceivable metrics worth considering. *Id.*

Hall directly counters the traditionalist principle espoused in *Willis Shaw*, permitting the deviation from strict application of apportionment in Joint PsFS when considering offering parties with a unified, single claim. *Id.* Instead of creating a conflict, the Fourth’s Opinion, based upon *Hall*, clarifies an existing exception to the apportionment requirement.

Despite contention otherwise, the Fourth DCA through the Fourth’s Opinion has reinforced that the principle of *Hall* was not abrogated by *Lamb*. This limited exemption to the apportionment requirement of Joint PsFS encourages the growth of a legal framework to better serve the interests of the public that has too often found itself at odds with this often-contested legal tool.

C. Florida’s Goal of Furthering Justice Not Frustrating It

The Supreme Court recognizes that procedural rules, such as Florida’s PFS Rule, should not be strictly construed merely “to defeat a statute it is designed to implement.” *Kuhajda v. Borden Dairy Co.*

of Alabama, LLC., 202 So. 3d 391 (Fla. 2016). *Kuhajda* expressly holds that

an offer of settlement is not invalid for failing to state whether the proposal includes attorney's fees and whether attorney's fees are part of the legal claim under [Florida's PFS Rule] if attorney's fees are not sought in the pleadings

with the stated principle that proposals for settlement should not fail for a mere technical shortfall, such as a missing statement, when the missing statement's intent is obvious. *Id.* (emphasis added). This premise should extend to the present matter. Should apportionment by the Respondents in their proposal for settlement be considered lacking as stated in the Petitioner's Amended Brief, that minute deficit is inadequate to defeat the overall validity of the joint proposal for settlement.

Additionally, Petitioner relies heavily on decisions entered prior to the amending of Florida's PFS Rule at Fla. R. Civ. P. 1.442(c)(4), wherein an exception was created to the strict, bright line rule of apportionment in Joint PsFS. This reliance fails to capture the recent trend towards a common-sense application of these principles for proposals for settlement interpretation.

Florida's growing public policy preference position encourages statutory construction guided by legislative intent, with such intent favorably weighed even in instances of contraction of the strict letter of the statute. *Hicks v. State*, 595 So. 2d 976 (Fla. 5th DCA 1992). This premise has extended to the indemnity context, which has increasingly established that not every potential defect in Joint PsFS proves fatal. Considering cases wherein parties jointly offer a proposal for settlement with one party providing no financial contribution, allegations that such Joint PsFS are illusory in nature, failing for a lack of consideration from the non-financially contributing party, have been rejected. *SDG Dadeland Associates, Inc., et al. v. Kenya Arias*, 388 So.3d 916 (Fla. 3d DCA 2024).

In *Lemartec*, an analogous decision entered contemporaneously with the Fourth's Opinion, broader interpretation of Florida's PFS Rule and apportionment is accentuated. *Lemartec Corporation, et al. v. East Coast Metal Structures Corp.*, 391 So.3d 426 (Fla. 4th DCA 2024). Therein, a contractor, project owner, and their respective sureties were not required to apportion their respective offers within a joint proposal for settlement to the subcontractor, which the Fourth DCA upheld. *Id.* at 437.

CONCLUSION

The Fourth's Opinion strengthening of the exception from *Hall*, coupled with a rationally-minded interpretation of Florida's PFS Rule on apportionment, does not expressly and directly conflict with decisions from the Supreme Court and the referenced DCAs, instead strengthening a body of case law, while small, already in existence, practiced, and needed. Therefore, this Court should reject any claim for discretionary jurisdiction based upon the premise of such conflict, affirming the Fourth's Opinion and discouraging continued litigation on the minutiae of Joint PsFS against the intent of Florida's PFS Rule.

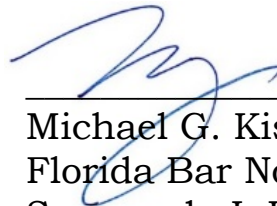
Respectfully submitted, this 23rd day of December, 2024.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically through this Court's E-Portal and via email to James Beagle, Esq., at jb@beagleesq.com, Andrew A. Harris, Esq. at andrew@harrisappeals.com and eservice@harrisappeals.com; and Grace Mackey Streicher, Esq., at grace@harrisappeals.com and eservice@harrisappeals.com; this 23rd day of December, 2024.



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