

FOURTH DISTRICT COURT OF
APPEAL STATE OF FLORIDA

Case No. 4D2024-1810

L.C. Case No.
50-2020-CC-007651

JOSHUA DAVIS,

Appellant,

v.

CITIZENS PROPERTY
INSURANCE COMPANY,

Appellee.

REPLY BRIEF

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ARGUMENT¹

I. THE PROPOSAL FOR SETTLEMENT IS DEFICIENT AND UNENFORCEABLE FOR FAILURE TO COMPLY WITH Fla. R. Civ. P. 1.442.

No amount of argument can change the words on the page of the Insurer's Proposal for Settlement. While the Insurer's Proposal for Settlement stated that attorney's fees were included in the amount of the Proposal for Settlement, the Proposal for Settlement never states "whether attorneys' fee [sic] are part of the legal claim" made by Davis. Fla. R. Civ. P. 1.442(c)(2)(F). The Proposal for Settlement was ineffective for its failure to comply with the rule and statute.

This case is indistinguishable from this Court's opinion in *Deer Valley Realty, Inc. v. SB Hotel Associates, LLC*, 190 So. 3d 203 (Fla. 4th DCA 2016), following the decision of the Florida Supreme Court in *Diamond Aircraft Indus., Inc. v. Horowitz*, 107 So. 3d 362 (Fla. 2013). In both of these cases, as in the case currently before the Court, the proposal for settlement failed to state whether the claim

¹ Each of the points on appeal in this case independently require reversal. The Insurer must prevail on both points to achieve an affirmance, while Davis need only prevail on one to achieve reversal.

being settled included a claim for attorney's fees. More specifically, in *Deer Valley*, the proposal for settlement stated that the proposal was inclusive of attorney's fees, but "neglected to include a statement that 'attorney's fees [were] part of the legal claim.'" *Deer Valley*, 190 So. 3d at 207 (emphasis by the court). Thus, the proposal for settlement in *Deer Valley* "satisfied only half of rule 1.442(c)(2)(F)'s requirements." *Id.*

Oddly, the Insurer claims in the Answer Brief that Davis cited no authority in the trial court on this point. However, the Insurer quotes Davis' argument below, citing to Fla. R. Civ. P. 1.442(c)(2)(F) and noting that the Insurer had omitted "required language in its proposal." See Answer Brief at 10; R. 1034. Davis' citation of the same statute relied upon by the Florida Supreme Court and this Court in *Diamond Aircraft* and *Deer Valley* is more than adequate authority. Also, Davis cited *Diamond Aircraft* in support of its argument that the second prong of Fla. R. Civ. P 1.442(c)(2)(F) was not satisfied. R. 1033, 1034.

Even more oddly, the Insurer claims that Davis has abandoned this argument on appeal "because it is not specifically asserted in the Initial Brief." *Id.* But this point was not abandoned – it constitutes

the entirety of Davis' first point on appeal, asserting the same position that Davis preserved in the trial court. The Insurer cannot see in Davis' filings that he made the appropriate arguments that preserved this issue and argued it on appeal, but somehow the Insurer can see language in its own Proposal for Settlement that simply does not exist. Answer Brief at 6, 7.

What has been waived in this appeal is any reliance by the Insurer on *Kuhajda v. Borden Dairy Co. of Ala., LLC*, 202 So. 3d 391 (Fla. 2016) or its progeny. By failing to address this point, the Insurer has conceded that these cases do not apply here because Davis requested attorney's fees in his pleadings. R. 10.

Merely stating that attorneys' fees are included in the proposed settlement amount is insufficient to comply with the statute and rule. As predicted, Initial Brief at 6, the Insurer relies on its statement that attorneys' fees were included in the amount offered as though that meets its separate obligation to state whether the claim carried an entitlement to attorneys' fees, Answer Brief at 9. Both *Diamond Aircraft* and *Deer Valley* state that the Insurer is wrong. The Proposal for Settlement is deficient, and the Insurer is not entitled to fees.

II. THE PROPOSAL FOR SETTLEMENT IS VOID AND UNENFORCEABLE BECAUSE IT IS AMBIGUOUS.

The Insurer argues that the ambiguity in its Proposal for Settlement was the result of typographical error, but at the same time concedes that its argument is not supported by the record. Answer Brief at 12. (“*Although it may not be apparent in the record, the inclusion of this statement in the PFS was a typographical error.*”) (emphasis added). The Insurer is correct. This assertion is not supported by the record. Not surprisingly, the Insurer cites no evidence in the record to support its claim that its reference to “any past, current or future claim of Yvette Smith” is a mere typographical error that should be overlooked by this Court. R. 1008.

In its Answer Brief, the Insurer addresses various forms of typographical error that may occur in proposals for settlement, such as using a misgendered pronoun for the sole offeree and plaintiff, *e.g.* *Floyd v. Smith*, 160 So. 3d 567 (Fla. 1st DCA 2015), or a mistyped statutory citation that was corrected elsewhere in the document, *e.g.* *Jefferson v. City of Lake City*, 965 So. 2d 174 (Fla. 1st DCA 2007). The Insurer also addresses proposals for settlement that are clearly made by fewer than all the opposing parties, expressly allowing the

offeree to continue to pursue claims against the intentionally omitted party, *e.g. Mathis v. Cook*, 140 So. 3d 654 (Fla. 5th DCA 2014). None of these situations are remotely like the case here where a complete stranger to the litigation was named in an essential term of the Proposal for Settlement.

This case is not governed by *Sanchez v. Cinque*, 238 So. 3d 817 (Fla. 4th DCA 2018), where the offeree argued that a proposal was ambiguous because it “named individuals who were not parties to the litigation.” 238 So. 3d at 825. Here, the name of Yvette Smith and the reference to her claims were not merely dropped into the Proposal for Settlement. Rather, these claims were singled out by the Insurer in the Proposal for Settlement as being unaffected by the Proposal for Settlement, suggesting that the Insurer was allowing some claims to remain pending as an additional moving inducement or consideration flowing to Davis for the acceptance of the Proposal for Settlement, like the retention of claims against an omitted party in *Mathis*. In other words, it was an integral part of the consideration offered by the Insurer to Davis in the Proposal for Settlement. This renders the entire Proposal for Settlement insufficiently “clear and definite to allow the offeree to make an informed decision without

needing clarification.” *State Farm Mut. Auto Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006) (*Nichols II*) (quoting *Lucas v. Calhoun*, 813 So. 2d 971, 973 (Fla. 2d DCA 2002)).

The Insurer cites *Sanchez* because it uses the phrase “‘cut and paste’ typographical error” to describe the language in the proposal, *Sanchez*, 238 So. 3d at 826; Answer Brief at 13, and the Insurer implies without evidence that its inclusion of Yvette Smith’s claims falls into the same category. *Sanchez* does not announce a rule that ambiguities are ignored if they can be traced to a cut and paste error (and if it did, there would be intra-district conflict with *Bradshaw v. Boynton-JCP Associates, Ltd.*, 125 So. 3d 289, 289 (Fla. 4th DCA 2013) on this point). Regardless of the source of the ambiguity, the test remains whether the ambiguity could reasonably have affected the offeree’s decision whether to accept the proposal. *Sanchez*, 238 So. 3d at 826. “The issue is not whether it is ‘fair or logical to apply the requirements’ of rule 1.442(c) in a given case. The rule requires that ‘the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification.’” *Bradshaw*, 125 So. 3d at 289, 290 (quoting *Graham*

v. Peter K. Yeskel 1996 Irrevocable Trust, 928 So.2d 371, 374 (Fla. 4th DCA 2006) and *Nichols II*).

The Insurer's inclusion of Yvette Smith's claims in its Proposal for Settlement required clarification before Davis could evaluate the Proposal for Settlement and determine whether to accept it. In its Answer Brief, the Insurer makes no effort to address any of the questions set forth in the Initial Brief at page 10 that made the Proposal for Settlement unclear and therefore ineffective. At the very least, Davis would have been required to clarify what the Insurer admits is not clear from the record, that the exclusion of these claims from the Proposal for Settlement was a typographical error. An offeree must be able to simply accept or reject a proposal for settlement, without being required to request a clarification. *Nichols v. State Farm Mut. Auto Ins. Co.*, 851 So. 2d 742, 746 (Fla. 5th DCA 2003), *affirmed*, *Nichols II*; *Dryden v. Pedemonti*, 910 So. 2d 854, 855 (Fla. 5th DCA 2005) (“[T]he burden of clarifying the intent or extent of a settlement proposal cannot be placed on the party to whom the proposal is made.”).

This is not a mere typographical error that is cured by reviewing the Proposal for Settlement in its entirety. The Insurer does not and

cannot point to any other provision of the Proposal for Settlement that resolves the questions inserted by discussion of Yvette Smith's claims. There were such clarifying points in *Floyd* (the offeree was the only plaintiff of any gender), *Jefferson* (the statute number was correctly typed elsewhere) and *Sanchez* (there were no claims for indemnification). As the Insurer has conceded, there is nothing in the record clarifying that this was a mere typographical error.

This Court has specifically stated that using "a form without sufficient editing" invalidates a proposal for settlement. *Bradshaw*, 125 So. 3d at 289. The statutory and rule requirements that are imposed on offerors seeking to create a liability for attorneys' fees that otherwise would not exist place a burden on the offeror to use due care in drafting. An error in drafting should fall "on the parties seeking to enforce the proposal." *Government Employees Ins. Co. v. Ryan*, 165 So. 3d 674, 676 (Fla. 4th DCA 2015).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the award of attorneys' fees be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 9.045(e) because this brief contains approximately 1,629 words excluding the parts of the brief exempted. This brief complies with the typeface requirements of Rule 9.045(b) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Bookman Old Style 14-point font.

s/ John H. Pelzer
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing and e-served through CM/ECF on counsel of record, as noted below, this 20th day of December, 2024.

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