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**IN THE FOURTH DISTRICT COURT OF APPEAL,  
STATE OF FLORIDA**

**CASE NO.: 4D23-1707**

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**NADJA MACKENSEN and WOLFGANG MACKENSEN,**

*Appellants,*

*v.*

**TRACE ELEMENTS, INC.,**

*Respondent.*

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**INITIAL BRIEF OF APPELLANTS**

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**ON APPEAL FROM THE COUNTY COURT  
IN AND FOR INDIAN RIVER COUNTY, FLORIDA  
TRIAL COURT CASE NO.: 31-2022-CC-000387**

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**DESIGNATIONS IN BRIEF**

Plaintiffs/Counter-Defendants/Appellants

NADJA

MACKENSEN and WOLFGANG MACKENSEN will hereinafter be referred to as “the Mackensens” or individually “Nadja” and

“Wolfgang.” Defendant/Counter-Plaintiff/Respondent TRACE

ELEMENTS, INC. will hereinafter be referred to as “Trace Elements.”

Reference to the Record on Appeal will be made as “R. [Page

Number].” Unless otherwise noted, the words "Rule" and "Rules"

mean the Florida Rules of Civil Procedure.

## **STATEMENT OF THE CASE AND FACTS**

This appeal arises from a dispute between the Appellants NADJA MACKENSEN and WOLFGANG MACKENSEN and the Respondent TRACE ELEMENTS, INC. The Mackensens hired Trace Elements for its professional design services related to improving their residential property at 1995 Anglers Cove, Vero Beach, FL 32963 (hereinafter the “Property”). R. 13-14. The subsequent jury trial that ensued between the Mackensens and Trace Elements included claims from the Mackensens against Trace Elements for Breach of Contract, or in the alternative, Unjust Enrichment. R. 30-49. The competing counterclaims from Trace Elements against the Mackensens consisted of claims for Breach of Contract and Tortious Interference with a Business Relationship<sup>1</sup>. R. 13-23. A Proposal for Settlement was served on Trace Elements and rejected during the proceedings. R. 56, 57. The trial culminated in a jury verdict for the Mackensens. R. 480-482. A posttrial hearing on the Motion for Attorney’s Fees based on the Proposal for Settlement resulted in the entry of an Order denying the attorney’s fees, despite the jury’s

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<sup>1</sup> The lower tribunal issued a directed verdict as to Tortious Interference with a Business Relationship counterclaim. R. 442.

verdict being in excess of twenty five percent greater than the Proposal for Settlement's offer, as the lower tribunal found the Proposal for Settlement's lacking in sufficient apportionment language. R. 496-498.

The Mackensens now request the reversal of the lower tribunal's Final Judgment, entered June 13, 2023, limited to the portion of the Final Judgment denying the Plaintiff's Motion for Attorney's Fees and Costs, as rendered on April 5, 2023. The Mackensens fulfilled all requisite and appropriate procedural and legislative guidelines and obligations in forming the Proposal for Settlement; for that reason, the Final Judgment, limited to the improvident denial of the attorney's fees based on the Proposal for Settlement, should be reversed with an attorney's fee hearing ordered.

## **SUMMARY OF THE ARGUMENT**

Two independent rationales support reversing the portion of the Final Judgment that upholds the Order on Plaintiff's Motion for Attorney's Fees and Costs, as to the denial of the award of attorney's fees based on alleged insufficiencies in the Proposal for Settlement, in the instant case. First, the trial court erred in denying fees where the underlying Proposal for Settlement satisfied all elements required under the guiding Rule. Next, the significance of completely unified parties making this settlement offer, to resolve unified claims, negated the need for explicit division or apportionment terms.

1. **Satisfaction of Elements:** The Mackensens timely filed their Proposal for Settlement, which included all requisite terms as to its contents and form, under the Proposal for Settlement Rule, outlined in Fla. R. Civ. P. 1.442 (hereinafter the "Proposal for Settlement Rule" or the "Rule") and thus are entitled to an award of reasonable attorney's fees per Florida Statute Section 768.79 (hereinafter the "Attorney's Fee Statute" or "Statute"). A flexible construction and application of this Rule and strict construction and application of this Statute are appropriate under the present circumstances to allow for an attorney's fee award.

2. **Unified Offerors:** Even if the potential receipt of Proposal for Settlement offer were not strictly and explicitly apportioned between Nadja and Wolfgang, a married couple with unified interactions with, claims against, and counterclaims from Trace Elements, the situation still would support an attorney's fee award in the current case.

The terms and offer of the Proposal for Settlement came from two individuals who were effectively a single, unified being for purposes of the dispute and lawsuit. No punitive damages or obscure liability differentiations required separating out. The resulting verdict at trial was overwhelmingly in favor of the Mackensens, with the initial jury award in excess of the then jurisdictional upper limit. While the norm in American jurisprudence calls for a party to pay its own attorney's fees, the pertinent Rule and Statute play an integral role in this determination and permit exceptions under the appropriate circumstances.

Under either analysis, the lower tribunal's ruling as to the portion of the Final Judgment at issue, denying an award of attorney's fees, must be reversed.

## **STANDARD OF REVIEW**

This Court should review this purely legal issue with the least amount of deference to the lower tribunal under the appellate standards, by utilizing the de-novo standard of review. “The eligibility to receive attorney’s fees and costs pursuant to Section 768.79 and Rule 1.442 is reviewed de novo.” *Kuhajda v. Borden Dairy Co. of Ala., LLC* 202 So. 3d 391, 393-94 (Fla. 2016). The interpretation of the proposal for settlement guidelines, and the significance of the resulting award or denial of reasonable attorney’s fees, are ripe for a fresh round of appellate interpretation, as those guidelines find themselves applied to an ever-expanding swathe of diverse pieces of civil litigation and areas of law.

## **ARGUMENT**

### **I. THE LOWER COURT INCORRECTLY HELD THAT THE PROPOSAL FOR SETTLEMENT TERMS WERE NOT SATISFACTORY UNDER THE RULE.**

#### **A. The Mackensens Satisfied All Essential Elements of the Proposal for Settlement Rule and Are Entitled to Attorney's Fees.**

While the parties and the lower tribunal appropriately identified the Rule controlling the viability of proposals for settlement, the Court misapplied a portion of that Rule to the Mackensens' Proposal for Settlement in finding that the Mackensens failed to satisfy all elements of the Rule and, thus, denying an associated award of attorney's fees to the Mackensens under the Statute.

Following the timely filing of the Mackensens' Motion for Attorney's Fees and Costs, within the requisite thirty-day timeline of the then-yet to be entered Final Judgment, a hearing on the Mackensens' Motion for Attorney's Fees and Costs was set pursuant to Fla. R. Civ. P. 1.525. R. 463-486. The subsequent hearing on the Motion for Attorney's Fees and Costs was held on March 17, 2023. This occurred prior to the entry of the Final Judgment and culminated in the Order on Plaintiffs/Counter-Defendants' Motion for Attorney's Fees and Costs, which was then incorporated into the

Final Judgment, promulgated on June 13, 2023. R. 494-496, 500-501.

The Rule at issue<sup>2</sup> is outlined in the Florida Rules of Civil Procedure, with the lower court's main focus on the portion

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<sup>2</sup> In full, Fla. R. Civ. P. 1.442 states:

**(a) Applicability.** This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

**(b) Service of Proposal.** A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

**c) Form and Content of Proposal for Settlement.**

**(1)** A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

**(2)** A proposal shall:

**(A)** name the party or parties making the proposal and the party or parties to whom the proposal is being made;

**(B)** state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F);

**(C)** exclude nonmonetary terms, with the exceptions of a voluntary dismissal of all claims with prejudice and any other nonmonetary terms permitted by statute;

**(D)** state the total amount of the proposal;

**(E)** state with particularity the amount proposed to settle a claim for punitive damages, if any;

**(F)** state whether the proposal includes attorneys' fees and whether attorneys' fee are part of the legal claim; and

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**(G)** include a certificate of service in the form required by Florida Rule of General Practice and Judicial Administration 2.516.

**(3)** A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

**(4)** Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

**(d) Service and Filing.** A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

**(e) Withdrawal.** A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, a proposal is void.

**(f) Acceptance and Rejection.**

**(1)** A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of Florida Rule of General Practice and Judicial Administration 2.514(b) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

**(2)** In any case in which the existence of a class is alleged, the time for acceptance of a proposal for settlement is extended to 30 days after the date the order granting or denying certification is filed.

**(g) Sanctions.** Any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with rule 1.525.

**(h) Costs and Fees.**

**(1)** If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorneys' fees.

encapsulated in Fla. R. Civ. P. 1.442(c)(3). The entire purpose of the Rule exists to encourage reasonable demands for settlement and to provide an opportunity for certain parties to recover reasonable attorney's fees. *State Farm Mut. Auto Ins. Co. v. Nichols*, 932 So. 2d 1067, 1078 (Fla. 2006). In this case, the offer in the Mackensens' Proposal for Settlement of \$10,000.00 was more than reasonable when viewed against the ultimate award to the Mackensens at trial.

Returning to the Proposal for Settlement Rule specifically, the Mackensens aptly served the Proposal for Settlement/Demand for

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**(2)** When determining the reasonableness of the amount of an award of attorneys' fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

**(A)** The then-apparent merit or lack of merit in the claim.

**(B)** The number and nature of proposals made by the parties.

**(C)** The closeness of questions of fact and law at issue.

**(D)** Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

**(E)** Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

**(F)** The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

**(i) Evidence of Proposal.** Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

**(j) Effect of Mediation.** Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.

Judgment, dated June 23, 2022 (hereinafter the “Proposal for Settlement”), on Trace Elements, with an accompanying Notice of Service of Proposal for Settlement/Demand for Judgment filed contemporaneously. R. 56.

The Proposal for Settlement at issue consisted of an offer from the Mackensens to Trace Elements to fully settle all claims and counterclaims in exchange for a one-time payment of \$10,000.00 from Trace Elements to the Mackensens. R. 474-476. Pursuant to the Proposal for Settlement Rule, the proposal was timely served, as it was transmitted over ninety days from the service of process on Trace Elements and the commencement of the lawsuit and well ahead of the forty-five days prior to the date set for the trial in this action, which pursuant to the Agreed Case Management Plan and Order specified as occurring in early 2023. Fla. R. Civ. P. 1.442(b) and R. 56. The Court approved of the Mackensens’ service and timing of service efforts in relation to the Proposal for Settlement. R. 495. Trace Elements then appropriately communicated its rejection of the Proposal for Settlement through the filing of the Defendant/Counter-Plaintiff’s Notice of Rejection of Proposal for Settlement/Demand for Judgment, filed on July 22, 2022. R. 57.

A jury trial took place from February 8, 2023, through February 10, 2023, concluding in damages' award in the amount of \$41,273.70 for the Mackensens on their Breach of Contract claim. R.460-462. The jury award, as well as the jurisdictionally permitted ultimate award of \$30,000.00 from the lower court, stood well in excess of twenty-five percent greater than the Proposal for Settlement offer<sup>3</sup>, accordingly, permitting the Mackensens' entitlement to their reasonable costs and attorney's fees incurred from the date of rejection of the Proposal for Settlement. Fla. Stat. Section 768.79.

Even had the Proposal for Settlement suffered some minor procedural blemish, the basis for a fee award is exceptionally strong when considering the amount of the offer, namely \$10,000.00, the jury's desired award at the conclusion of trial in excess of \$40,000.00, and the ultimate award from the lower tribunal, specifically \$30,000.00, or \$36,146.90 with costs. Fla. Stat. Section 768.79. Clearly, any of these figures stands well beyond the 125% threshold justifying an award of fees based on the Proposal for Settlement offer.

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<sup>3</sup> For the math adverse, threshold amount of 125% greater than the offer term of \$10,000.00 in the Proposal for Settlement is \$12,500.00.

The Order on Plaintiffs/Counter-Defendants' Motion for Attorney's Fees and Costs takes issue with the form and content of the Proposal for Settlement. R. 494-496. Specifically, the lower tribunal designated the Proposal for Settlement a joint proposal. R. 495. The relevant portion of the Proposal for Settlement Rule states

“[a] proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.”

Fla. R. Civ. P. 1.442(c)(3). The lower tribunal incorrectly asserted that the Mackensens' Proposal for Settlement constitutes a joint proposal that warrants apportionment language, and thus failed to satisfy the Proposal for Settlement Rule's apportionment provision.

In pertinent part, the language of the Proposal for Settlement at Paragraph 5 states

The Plaintiffs/Counter-Defendants offer to accept a total sum of TEN THOUSAND DOLLARS and 00/100 (\$10,000.00) from the Defendant/Counter-Plaintiff in full settlement of this action and, upon acceptance and clearance of the payment, the Plaintiffs/Counter-Defendants will file a voluntary dismissal, with prejudice, of the Complaint filed against the Defendant/Counter-Plaintiff and the Defendant/Counter-Plaintiff will file a voluntary

dismissal, with prejudice, of the  
Countercomplaint filed against the  
Plaintiffs/Counter-Defendants.

R. 474-476. Crucially, objections to the Proposal for Settlement on this basis fail to take into consideration the potential applicable exception to this otherwise valid position on a deficit in apportionment terms as to the Mackensens. One such persuasive exception includes the following:

An offer may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal must state the amount and terms attributable to each party [Fla. R. Civ. P. 1.442(c)(3)]. However, when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, a joint proposal made by or served on that party need not state the apportionment or contribution as to that party. Acceptance by any party is without prejudice to rights of contribution or indemnity [Fla. R. Civ. P. 1.442(c)(4)].

See 4 Florida Torts Sec. 141.24 and R. 467. In the instant case, Trace Elements was judged to be the only directly liable party. Accordingly, this lack of need for apportionment for indirect liability cases should be extended to the Mackensens as the servers of the Proposal for Settlement in this direct liability instance.

Secondary sources further emphasize that proposals for settlements turning on joint offer terms should be afforded deference in interpretation.

It is possible that compliance [with Rule 1.442] could result in abandonment of the joint proposal for settlement as a viable tool for settlement purposes and a reliance upon proposals by one defendant conditioning acceptance of the proposal on a release including all defendants, or other such nonmonetary conditions discussed later in this article...**Construction of [the rule’s] language to require proposals to state ‘an’ amount attributable to each party renders compliance in drafting untenable and actually discourages settlement.**

See Drafting and Analyzing Joint Proposals for Settlement, 80 Fla. Bar. J. 8 (emphasis added).

Should the Proposal for Settlement Rule simply require apportionment verbiage, the instant Proposal for Settlement contains such. R. 474-476. The Proposal for Settlement includes specific distribution language, but only to clarify that “no part of this Proposal for Settlement/Demand for Judgment is apportioned to settle any claims for punitive damages, as no such claim for punitive damages exists.” R. 474-476.

In their Proposal for Settlement, the Mackensens validly adhered to the fundamental sections of the Proposal for Settlement Rule. Moreover, the Proposal for Settlement Rule “does not demand the impossible. It merely requires that the settlement proposal be sufficiently 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). Here, Trace Elements received a sufficiently clear offer of what it needed to pay to fully settle all claims and counterclaims with both individuals, from both individuals, that would be binding on all parties, if accepted. Trace Elements never sought clarification as to whether the \$10,000.00 offered to resolve the case would be split in any unexpected or unusual manner. In all likelihood, Trace Element’s probably took the most rational approach to the offer, knowing that the Mackensens were a married couple and all interactions with them were as an amalgamated party of two, to assume the settlement sum would be deposited into their marital bank account, with both Nadja and Wolfgang possessing access.

Furthermore, in contravention to the upholding of a denial of the granting of attorney’s fees based on a perceived proposal for

settlement flaw in apportionment in *Lamb*, the defendants in *Lamb* would be uncertain as to their ultimate extent of payment under that proposal for settlement. *Lamb v. Matetzschk*, 906 So.2d 1037, 1042 (Fla. 2005). Here, Trace Elements could be unequivocally certain that it would be paying the full \$10,000.00 to settle the claims. There could be no confusion as to the extent of Trace Element's financial responsibility under the Proposal for Settlement terms.

Trace Elements never asserted that a different destination for the settlement funds or alteration of terms within the instant Proposal for Settlement would change or otherwise impact its decision to reject the offer. R. 57. Unless the asserted ambiguity, here the apportionment, or alleged lack thereof, of the accepted funds by the Mackensens, could "reasonably affect the offeree's decision" on whether to accept the settlement proposal, courts are discouraged from reviewing Proposals for Settlement with an overly critical eye. *Anderson v. Hilton Hotels, Corp.*, 202 So. 3d 846, 853 (Fla. 2016). Whether Nadja would have received all of the \$10,000.00 of the Proposal for Settlement or whether Wolfgang would have received all of the \$10,000.00 of the Proposal for Settlement, there is only one

place the funds would be deposited: in the couple's shared Bank of America account. R. 335.

Additionally, individual parties should be able to use a proposal for settlement to make an independent evaluation of a proposal. *Allstate Indemnity Co. v. Hingson*, 808 So.2d 197 (Fla. 2022). Trace Elements was the sole party making this evaluation and privy to sufficient information to make its determination.

In the instant matter, the Proposal for Settlement was sufficiently clear under the Rule, allowing Trace Elements to make an informed decision to ultimately reject the Proposal for Settlement.

**II. THE APPLICATION OF THE PROPOSAL FOR SETTLEMENT RULE TO UNIFIED PARTIES NEGATES THE REQUIREMENT FOR DIFFERENTIATION OR APPORTIONMENT BETWEEN THOSE PARTIES.**

**A. Caselaw and Public Policy Provides a Distinction in Certain Contexts.**

While the lower tribunal appropriately identified the relevant Rule and Statute serving as the dominant, governing framework in this matter, the relationship of the Mackensens, and their position to each other and to Trace Elements within the lawsuit, overcome any minor deviation from the essential elements of the Proposal of Settlement Rule.

The Mackensens are a married couple, residing primarily in Germany. R. 13. The interactions between the Mackensens and Trace Elements were never so singular as to discount a unified offer for settlement from the Mackensens. Nadja and Wolfgang brought the same claims against Trace Elements. R. 13-23. Nadja and Wolfgang faced the same affirmative defenses and counterclaims from Trace Elements. R. 30-49. None of these claims or counterclaims differentiate between damages or liabilities between Nadja and Wolfgang. R. 30-49. How would one even apportion the damage between these married co-owners of the property at the heart of the design dispute with Trace Elements? Did Wolfgang suffer more at having to find a new designer or did Nadja? Did Trace Elements harm Nadja more at the lack of communication or did that harm pierce Wolfgang more sharply? It is immaterial as these harms, and any accompanying damage or liability, as identified in the Complaint and Counterclaim were identical. R. 13-23, 30-49.

The body of caselaw referenced by the lower tribunal in the Order on Plaintiffs' Motion for Attorney's Fees and Costs primarily

consists of the *Hilyer Sod* case and its progeny<sup>4</sup>. R. 494-496. The *Hilyer Sod* line of cases generally holds that joint offers or proposals must apportion amounts attributable to each party to be enforceable for purposes of awarding attorney's fees.

However, that line of cases is comprised of variations of entities and individuals facing distinguishable fact patterns. In *Hilyer Sod*, there existed multiple entity plaintiffs, each with separate claims. Logically, separate claims should result in a differentiation in the division of benefits to resolve the claims. *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003). In the instant case, the Mackensens were two individual plaintiffs, a married couple owning the same residential property, bringing a single claim for breach of contract, or unjust enrichment in the alternative, concerning work performed or to be performed at the residential property and facing uniform counterclaims from Trace Elements with counts for breach of contract and tortious interference with a business relationship. R. 13-23, 30-49. The counts in the claim and counterclaim were applied

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<sup>4</sup> *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003); *Graham v. Peter K. Yeskel 1996 Irrevocable Tr.*, 928 So. 2d 371 (Fla. 4th DCA 2006); *Audiffred v. Arnold*, 161 So. 3d 1274 (Fla. 2015); *Pratt v. Weiss*, 161 So. 3d 1268 (Fla. 2015).

uniformly against Trace Elements and against the Mackensens together as one. R. 13-23, 30-49. There was no claim for separate damages, as occurred in *Hilyer Sod*, nor could there be.

The *Hilyer Sod* line is similarly distinguishable. In *Pratt*, separate entities were involved. *Pratt v. Weiss*, 161 So. 3d 1268 (Fla 2015). Obviously separate entities present an entirely different situation than a longtime married couple, facing uniform claims and repercussions. In *Audiffred*, where the plaintiffs were husband and wife, those individuals, again, had separate claims against the defendant. *Audiffred v. Arnold*, 161 So. 3d 1274 (Fla. 2015). Moreover, the wife in *Audiffred* was the only plaintiff to submit the proposal for settlement there. *Id.* Again, this is distinguishable from the Mackensens' case with its unified claims, positions, and proposal from Nadja and Wolfgang together. R. 13-23, 30-49. The *Graham* court, faced with a boating slip and fall case, held that a single unified claim directed at joint ownership of real property as tenants by the entirety could not overcome the apportionment standard set in Fla. R. Civ. P. 1.442(c)(3). *Graham v. Peter K. Yeskel 1996 Irrevocable Tr.*, 928 So. 2d 371 (Fla. 4th DCA 2006). Once more, the Mackensens are patently distinct, being married property owners, dealing with a claim

that fails to incorporate any notion of vicariously liability or any other forms of liability, such as joint and severable, that might necessitate bright-line allotment in the Proposal for Settlement. R. 13-23, 30-49. Distinct apportionment, as the *Hilyer Sod* line generally calls for, would be inappropriate and completely arbitrary if required in the case of the Mackensens.

The scenario of identical claims versus separate claims proves revealing in this vein. In the *Hingson* case, the Florida Supreme Court examined two separate scenarios in which a single defendant submitted a joint proposal for settlement to multiple plaintiffs, including the injured plaintiff and the spouse. *Allstate Indemnity Co. v. Hingson*, 808 So. 2d 197 (Fla. 2002). The *Hingson* spouse was distinct from the Mackensens as the *Hingson* spouses sought different claims and damages.<sup>5</sup> *Id.* and R. 13-23, 30-49. The *Hingson* joint proposal aimed to resolve the claims of both plaintiffs with a single lump sum, without specifying how much each plaintiff would receive. *Id.* Here, the Mackensens were making the unified offer to Trace Elements to resolve the unified claims, as opposed to Trace

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<sup>5</sup> Additional claims in *Hingson* consisted of loss of consortium.

Elements making the offer to the Mackensens or involving some scenario where only one plaintiff was contemplated and addressed, or one count of the Complaint or Counterclaim contemplated or addressed. R. 474-476.

The lower tribunal also failed to properly consider the *Hall* case.<sup>6</sup> *Hall v. Lexington Ins. Co.*, 895 So. 2d 1161 (Fla. 4th DCA 2005) and R. 467-468. In *Hall*, another married couple brought claims together against a party but, unlike the instant matter, contested an award of attorney's fees based on a proposal for settlement. *Id.* The granting of fees in *Hall* was upheld even though the proposal for settlement there lacked apportionment of the amounts between the spouses, because the damages and claims were joint. *Id.*

While this court agrees that a proposal to two or more plaintiffs who each have a claim for their own separate damages is normally unenforceable because it requires them to aggregate their damages or settle their separate claims in some collective fashion, in the matter sub judice, the Halls filed a unified, single insurance claim for damages to their home from a burglary. Both plaintiffs had the same lawyer, and there was no conflict of interest between the plaintiffs. See *Safelite*, 771 So. 2d at 46. The record from below reflects that the Halls

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<sup>6</sup> Certain cases in the *Hilyer Sod* line contest the conclusions of this case.

submitted one unified verdict form for the damages. Furthermore, the judgment entered against the Halls was joint and several. See *Barnes v. Kellogg*, 846 So.2d 568, 572 (Fla. 2d DCA 2003); *Crowley v. Sunny's Plants, Inc.*, 710 So.2d 219, 221 (Fla. 3d DCA 1998). **This case is distinguishable from *Hilyer Sod* in that the Halls' claims were unified, not separate and distinct.** Furthermore, the cases of *Crespo v. Woodland Lakes Creative Retirement Concepts, Inc.*, 845 So.2d 342 (Fla. 2d DCA 2003), *McElroy v. Whittington*, 867 So.2d 1241 (Fla. 4th DCA 2004), and *Cohen v. Arvin*, 878 So.2d 403 (Fla. 4th DCA), are **distinguishable from this matter in that those cases also involved separate and distinct claims.** As such, **we do not interpret the holding in *Hilyer Sod* as prohibiting the offer** made in this case under these unique circumstances. See *Barnes*, 846 So.2d at 572.

*Id.* at 1166 and R. 468 (emphasis added).

In the simplest terms, the Mackensens status as a unified, married couple, bringing uniform counts and facing the same counterclaim issues, creates a unique situation under the Proposal for Settlement Rule and its typical apportionment requirement. Nadja did not claim any damages separate from Wolfgang. R. 474-476. Wolfgang did not claim any damages separate from Nadja. R. 474-476. Trace Elements consistently treated Wolfgang and Nadja as “the

Mackensens,” as opposed to individual plaintiffs/counter-defendants. R. in full.

### **CONCLUSION**

The Mackensens reject the premise that the Proposal for Settlement issued to Trace Elements renders itself and any subsequent award of attorney’s fees under the Statute invalid. A reasonable conclusion from the Mackensens’ adherence to all procedural guidelines in formulating and conveying the Proposal for Settlement, coupled with their unique status as largely interchangeable names in the case style and the contents of the lawsuit, make the Proposal for Settlement more than sufficient and coupled with the large figure awarded at trial, entitle the Mackensens to their reasonable attorney’s fees from the date of the Proposal for Settlement’s rejection, which was recorded in the case docket via the Defendant/Counter-Plaintiff’s Notice of Rejection of “Proposal for Settlement/Demand for Judgment,” filed on July 22, 2022.

Accordingly, the lower tribunal’s decision in the portion of the Final Judgment that upholds the Order on Plaintiff’s Motion for Attorney’s Fees and Costs, as to the denial of the award of attorney’s fees based on alleged insufficiencies in the Proposal for Settlement,

should be reversed without further imposition on this Court and an attorney's fee hearing scheduled with the lower tribunal.

Respectfully submitted, this 6th day of November, 2023.



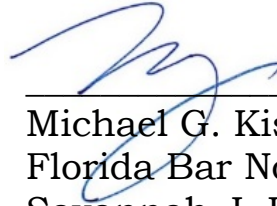
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**[CERTIFICATE OF SERVICE TO FOLLOW]**

**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](mailto:jb@beagleesq.com), this 6th day of November, 2023.



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**CERTIFICATE OF FONT COMPLIANCE**  
**FOR COMPUTER GENERATED DOCUMENTS**

**I HEREBY CERTIFY** that this Motion is submitted in Bookman Old Style 14-point font, in compliance with Fla. R. App. P. 9.045(e) and in compliance with the requisite word and page count per Fla. R. App. P. 9.210.



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