IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO: 10-CA-7199-08-L

RONALD JAQUES, INDIVIDUALLY,

Plaintiff/Counter-Defendant,

vs.

VIVIAN L. ROY, INDIVIDUALLY,

Defendant/Counter-Plaintiff.

_____ /

COUNTER-PLAINTIFF VIVIAN ROY'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO TAX COSTS AND ATTORNEYS' FEES

COMES NOW the Counter-Plaintiff, VIVIAN L. ROY, individually, by and through the undersigned counsel and submits the following memorandum of law in opposition to Defendant's Motion to Tax Costs and Attorneys' Fees:

Introduction

The Defendant's Proposal For Settlement is unenforceable for the reasons that follow. Alternatively, the factors under Rule 1.442, Fla. R. Civ. P. should be applied to reduce the claim for attorneys' fees and costs should be limited to those taxable under the State Uniform Guidelines For The Taxation of Costs In Civil Cases and applicable Florida statutes.

I. General Requirements For Valid Offer of Judgment Under *Section 768.79, Fla. Stat.* and Summary of Plaintiff's Argument Against Any Award of Attorneys' Fees and Costs

In order for it to be a valid offer, the offer must:

1. ***Be in writing and state that it is being made pursuant to Section 768.79, Fla. Stat.***
2. Name the party making the offer and the party to whom the offer is being made;
3. State with particularity the amount offered to settle a claim for punitive damages;
4. State the total amount being offered.

See *Section 768.79(2), Fla. Stat.*

Pursuant to Rule 1.442, Fla. R. Civ. P., any offer must also state the applicable law under which the proposal is being made. *Rule 1.442(c)(1), Fla. R. Civ. P.; McMullen Oil Co. v. ISS International Service Systems,* 698 So.2d 372 (Fla. 2nd DCA 1997). Specifically, Rule 1.442, Fla. R. Civ. P. provides, *inter alia*:

> (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) ***identify the claim or claims the proposal is attempting to resolve***;

> (C) ***state with particularity any relevant conditions***;
>
> (D) ***state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal***;
>
> (E) state with particularity the amount proposed to settle a claim for punitive damages, if any…

Defendant's Proposal for Settlement failed to meet the requirements of the above-italicized language in the statute and rule. Moreover, Defendant's Proposal for Settlement was not made in good faith in that the amount did not bear a reasonable relationship to the damages suffered, did not involve a realistic assessment of liability by Defendant, did not have a reasonable basis, and was not intended in good faith to settle the case. Alternatively, the Court should consider all the factors delineated in *Rule 1.442, Fla. R. Civ. P.* in reducing any claim for attorneys' fees and should award only those costs taxable under the State Uniform Guidelines for Taxation of Costs in Civil Actions.

II. The Proposal for Settlement is invalid and unenforceable because it failed to unequivocally state that it was being made pursuant to Section 768.79, Fla. Stat.

Rule 1.442, Fla. R. Civ. P. does not provide a basis for an award of attorneys' fees. Rather, it "applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals." If there is a conflict between the rule and the statute under which a proposal is served, the procedural aspects of the rule supersedes the procedural aspects of the statute. See *Rule 1.442(a)*.

Defendant's Proposal for Settlement states it is "pursuant to *Florida Rules of Civil Procedure 1.442*, or in the alternative, if applicable, *Florida Statutes Section 768.79*".

Accordingly, Defendant's Proposal for Settlement does not specifically and unequivocally state that is being made pursuant to *Section 768.79, Fla. Stat.* as required by that statute. See *Section 768.79(2)(a), Fla. Stat.*; *Campbell v. Goldman,* 959 So.2d 223, (Fla. 2007); *City of Punta Gorda v. Burnt Store Hotel, Inc*., 650 So.2d 142 (Fla. 2nd DCA 1995); *Versprill v. School Board,* 641 So.2d 883 (Fla. 5th DCA 1994). In resolving a conflict among the district courts of appeal and in considering *Rule 1.442, Fla. R. Civ. P.* and *Section 768.79, Fla. Stat.*, the Supreme Court of Florida in *Campbell* held that "the offer *must* state that it is being made pursuant to this section".[1] In so holding, Justice Quince stated:

> This is a mandatory requirement for this penal, fee-shifting provision. Because the overall subject is in derogation of the common law, all portions must be strictly construed.

Statutes authorizing awards of attorneys' fees are in derogation of common law and must be strictly construed. *McMullen Oil v. ISS International Service System, Id.*[2] On this ground alone, Defendant's Proposal for Settlement is invalid and Defendant's motion for sanctions should fail. Because *Section 768.79, Fla. Stat.* is in derogation of common law, it must be strictly construed. The failure to specifically and unequivocally state that it was made pursuant to *Section 768.79, Fla. Stat.* renders Defendant's Proposal for Settlement invalid.

III. The Proposal for Settlement was not an "Offer of Judgment" pursuant to Section 768.79, Fla. Stat.; therefore, there is no statutory basis for any award of attorneys' fees.

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[1] The Supreme Court of Florida was referring to *Section 768.79, Fla. Stat.*

[2] The offer of judgment in *McMullen* referred merely to "all applicable Florida statutes and the Florida Rules of Civil Procedure" and was held invalid and lacking in specificity.

The "Proposal for Settlement" does not "offer any judgment" as contemplated by Section 768.79, Fla. Stat. which only provides for a right to attorneys' fees "if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days". The pleading is not entitled "Offer of Judgment" and does not offer any judgment. Instead, it required Plaintiff to execute a "Release of All Claims." Since *Rule 1.442, Fla. R. Civ. P.* does not alone provide a substantive right to attorneys' fees and the Proposal for Settlement was not an "Offer of Judgment" as required by *Section 768.79(1), Fla. Stat.*, it is unenforceable for the purpose of awarding attorneys' fees as it lacks any basis in substantive law for an award of attorneys' fees. The statute is in derogation of common law and as such, must be strictly construed against the offeror.

IV. The "Proposal For Settlement" was ambiguous as to whether it was an "offer of judgment" in that either "dismissal" or "judgment" was contemplated; therefore, there is no statutory basis for any award of attorneys' fees.

The Proposal for Settlement was ambiguous as to whether it is an "offer of judgment". Instead of providing that Plaintiff can "accept it within thirty days" it contains a section entitled "Relevant Conditions" that requires Plaintiff to execute a Release of All Claims and further requires either "entry of a Final Order of Dismissal with Prejudice or a Satisfaction of Judgment, whichever is elected by" Defendant. Since the statute is in derogation of common law, the Proposal for Settlement is unenforceable as ambiguous as to its statutory basis for any award of attorneys' fees. At best, the Proposal for Settlement is ambiguous as to what it was offering in that the legal effects of a "dismissal" are different than the legal effects of a "satisfaction of

judgment". Plaintiff could not determine at the time of any acceptance, what the consequences of the acceptance would be insofar as "dismissal" versus "satisfaction of judgment".

V. The Proposal for Settlement was not made in good faith as required by *Section 768.79, Fla. Stat.* because:

A. The offer did not bear a "reasonable" relationship to the amount of damages suffered; and

B. There was not a realistic assessment of liability.

C. There was no reasonable basis for the $ 7,500 offer and no intent to settle the case.

- **Applicable Law**

Section 768.79(2)(a), Fla. Stat. provides as follows:

> If a party is entitled to costs and fees pursuant to the provisions of subsection (1), the court may, in its discretion, determine that an offer of judgment was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

The legislature has created a mandatory right to attorneys' fees if the statutory prerequisites have been met. The statute begins by creating an "entitlement" to fees. That award may then lead to an "award" of fees. The award may then be lost by a finding that the entitlement was created "not in good faith" or the amount of the award may be adjusted upward or downward by a consideration of the statutory factors. *TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606 (Fla. 1995).

In the Fifth District, the determinations for the court on whether an offer was made in good faith are:

1. Whether the offer bears a reasonable relationship to the amount of damages suffered; and
2. Whether there has been a realistic assessment of liability.

Evans v. Piotraczk, 724 So.2d 1210 (Fla. 5th DCA 1998). **The court must look to the relative amount of potential damage and factor in the risk of liability in determining whether the offer was made in good faith.** *Id.* [Emphasis supplied.]

Settlement offers, nominal or otherwise, ***must bear a reasonable relationship to the amount of damages or a realistic assessment of liability*** in order to entitle the offeror to an award of attorney fees and costs after entry of judgment for at least 25 percent less than the amount offered. *State Farm Mutual Automobile Insurance Company v. Sharkey,* 928 So.2d 1263 (Fla. 4th DCA 2006). When a court determines the existence or non-existence of good faith, the ***court must consider whether or not there was a reasonable basis for making the offer and intent to settle the case.*** *See Downs v. Coastal Systems International, Inc.,* 972 So.2d 258 (Fla. 3rd DCA 2008); *Talbott v. Am. Isuzu Motors, Inc.,* 934 So.2d 643 (Fla. 2d DCA 2006). As stated by the court in *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2006):

> The good faith requirement "insists that the offeror have some reasonable foundation on which to base an offer." *Schmidt v. Fortner,* 629 So.2d 1036, 1039 (Fla. 4th DCA 1993). ***A reasonable basis for a nominal offer exists only where "the undisputed record strongly indicate[s] that [the defendant] had no exposure" in the case.*** *Peoples Gas Sys., Inc. v. Acme Gas Corp.,* 689 So.2d 292, 300 (Fla. 3d DCA 1997). ***Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal.*** *Dep't of Highway Safety and Motor Vehicles, Florida Highway Patrol v. Weinstein,* 747 So.2d 1019 (Fla. 3d DCA 2000).

See also, *General Mechanical Corporation v. Williams, 103 So.3d 974 (Fla. 1st DCA 2012); McGregor v. Molnar,* 79 So.3d 908 (Fla. 2nd DCA 2012); *Pickett v. R.J.Reynolds Tobacco Co.,* 2013 WL 2431841 (M.D. Fla. 2013).

Whether an offer of judgment is made in good faith and supports award of attorney fees and costs is a matter of discretion with the trial court after considering the circumstances at the time the offer was made. *Gurney v. State Farm Mutual Automobile Insurance Co.*, 889 So.2d 97 (Fla. 5th DCA 2004). The standard of review of a decision on a motion for costs under offer of judgment statute is whether the trial court abused its discretion. *Id.*

A court may, in its discretion, disallow an entitlement to fees under the offer of judgment statute, but only if it determines that a qualifying offer of judgment was not made in good faith, and the burden of proving the absence of good faith is on the offeree. *McGregor v. Molnar,* 79 So.3d 908 (Fla. 2nd DCA 2012).

- **The offer of $ 7,500 did not bear a reasonable relationship to Plaintiff's damages:**

The Proposal for Settlement contained a "nominal" offer of $ 7,500 that did not bear a reasonable relationship to the amount of damages suffered by Plaintiff.

This case arose from what was essentially a head-on automobile collision at the intersection of Country Club Road and Lake Mary Boulevard in Seminole County, Florida on September 8, 2010. Plaintiff was northbound and Defendant was southbound on Country Club Boulevard, and Plaintiff intended to make a left turn to go west on Lake Mary Boulevard. While the evidence was disputed regarding the precise angle of the collision, the wealth of testimony supported the characterization of a head-on or almost head-on collision.

Plaintiff sustained rather severe head injuries and other bodily injuries and was emergently transported to Central Florida Regional Hospital. As a result of head lacerations she required multiple stitches and staples. Over the course of her care over the next several years, Plaintiff was diagnosed and treated for post-concussion syndrome, closed head injury, post-traumatic encephalopathy, fractured ribs, contusions of arms and legs, back pain and neck injuries. Ultimately, Plaintiff was diagnosed with multiple cervical disc herniations and underwent a C 5-6 anterior cervical discectomy, a C 5-6 anterior cervical intervertebral arthroplasty, a Pro-disc cervical implant, biplanar fluoroscopy, and intraoperative micro dissection, all by Robert L. Masson, M.D., a neurosurgeon. Dr. Masson's post-operative diagnosis was C 5-6 disc herniation with radicular myelopathy and vertical disc incompetence. In addition, she continued to treat for and suffer with her other injuries, including post-traumatic encephalopathy, post-concussion syndrome, and closed head injuries, which left her prone to the development of seizure disorder, Alzheimer's disease and the need for earlier long term care, such as assisted living and nursing home care, according to her treating neurologist, Dr. Marc Sharfman. Dr. Joseph Trim, a licensed mental health counselor, also diagnosed her with post-traumatic stress disorder.

Plaintiff underwent numerous and extensive diagnostic tests and examinations during her course of care and was prescribed various medications and rehabilitative care. Her total medical expenses were in excess of $ 200,000 before Medicare and insurance reductions, and by the time of trial, over $ 47,000 of those expenses had been paid and over $ 50,000 remained due and owing. The amount unpaid was and remains Plaintiff's personal responsibility after all insurance adjustments and payments.

Attached as Exhibit "A" is a Microsoft PowerPoint Presentation prepared by Plaintiff's attorneys to assist in negotiations and trial preparation. This slide show contains even more detail of Plaintiff's injuries and damages.

It is evident to anyone that Defendant's Proposal For Settlement of $ 7,500.00 did not bear any reasonable relationship to the amount of damages suffered. Given the enormous medical expenses and severe injuries sustained by Plaintiff and Defendant's conduct approaching trial, Plaintiff has met her burden of proving that Defendant's offer of $ 7,500 did not bear any reasonable relationship to Plaintiff's damages.

- **There was not a realistic assessment of liability by Defendant.**

There were only four witnesses called to testify on liability. Plaintiff, Plaintiff's passenger, Cheryl Chane, Defendant, and Defendant's accident reconstruction expert, Dr. Khaled Mostafa. Plaintiff testified that although she was on her telephone at the time of the accident, she entered the traffic light controlled intersection just as the green left turn arrow turned yellow and was struck head-on by Defendant in her own lane of travel in the middle of the intersection. Cheryl Chane testified at varying times that she saw a green ball or a green arrow, but in any event, agreed that the collision was essentially head-on and testified at varying times that the point of impact was "in the left turn lane" or at a point where Plaintiff was not yet facing west. Defendant testified, rather, that the impact occurred in his southbound through lane and that Plaintiff turned into him. All witnesses agreed that another northbound vehicle made the same left turn Plaintiff intended to maneuver, and Defendant testified that he "tapped" his brakes to yield to that vehicle but denied that he swerved left at any time. While the testimony was not heard at trial, Defendant, his counsel and his insurance company all know that the police officer

would have testified that Defendant indeed told him at the scene that he veered left just before the impact with Plaintiff. Defendant would have denied this. This evidence was not presented to the jury because it was inadmissible pursuant to *Section 316.066(4), Fla. Stat.* known as the traffic accident report privilege. Moreover, Plaintiff could not cross-examine Defendant's accident reconstruction expert with this evidence given the privilege.

The photographs of the vehicle, which are contained in the attached Microsoft PowerPoint presentation, depicted front end damage consistent with a head-on, rather than intersectional, collision. Dr. Mostafa was cross-examined extensively on the angle of impact and point of impact. Notwithstanding the photographs, he testified that they were inconsistent with front driver's corner to front driver's corner impact and that the impact was more to the passenger front side of Plaintiff's vehicle. He also testified that the point of impact was in Defendant's southbound through lane, notwithstanding the testimony of Cheryl Chane and Plaintiff that the impact was in the northbound left turn lane.

It is important to note that Defendant never moved for summary judgment on liability and that at the trial, Defendant made no serious argument for a directed verdict on liability at the close of the evidence. It is clear that Defendant and his insurer never engaged in a realistic assessment of liability for purposes of arriving at the monetary offer contained in the Proposal for Settlement served upon Plaintiff just a few short weeks before trial. The amount of the offer, when considered in light of the above evidence, other evidence known at the time of the offer, the amount of medical expenses, the amount of subrogation interests, and all the evidence, establishes very clearly that there was no realistic assessment of liability. Defendant was confident of a potential defense verdict because Plaintiff admitted to being on her cell phone at

the time of the accident but ignored the other physical evidence and testimony entirely when arriving at the offer amount. This is not a realistic assessment of liability.

Given the hotly contested liability issues and Defendant's conduct approaching trial, Plaintiff has met her burden of proving that Defendant did not engage in a realistic assessment of liability issues.

- **There was no reasonable basis for making the offer and no intent to settle the case.**

When a court determines the existence or non-existence of good faith, ***the court must consider whether or not there was a reasonable basis for making the offer and intent to settle the case.*** *See Downs v. Coastal Systems International, Inc.,* 972 So.2d 258 (Fla. 3rd DCA 2008); *Talbott v. Am. Isuzu Motors, Inc.,* 934 So.2d 643 (Fla. 2d DCA 2006). For all of the foregoing reasons, it should be clear that there was no reasonable basis for such a low offer of settlement and certainly no intent to settle the case. Such relatively nominal offers of settlement should be viewed as suspect by the courts. As stated by the court in *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2006):

> The good faith requirement "insists that the offeror have some reasonable foundation on which to base an offer." *Schmidt v. Fortner,* 629 So.2d 1036, 1039 (Fla. 4th DCA 1993). ***A reasonable basis for a nominal offer exists only where "the undisputed record strongly indicate[s] that [the defendant] had no exposure" in the case.*** *Peoples Gas Sys., Inc. v. Acme Gas Corp.,* 689 So.2d 292, 300 (Fla. 3d DCA 1997). ***Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal.*** *Dep't of Highway Safety and Motor Vehicles, Florida Highway Patrol v. Weinstein,* 747 So.2d 1019 (Fla. 3d DCA 2000).

See also, *General Mechanical Corporation v. Williams, 103 So.3d 974 (Fla. 1st DCA 2012); McGregor v. Molnar,* 79 So.3d 908 (Fla. 2nd DCA 2012); *Pickett v. R.J.Reynolds Tobacco Co.,* 2013 WL 2431841 (M.D. Fla. 2013).

Given the hotly contested liability issues and the enormous medical expenses and severe injuries sustained by Plaintiff and Defendant's conduct approaching trial, Plaintiff has met her burden of proving that Defendant had no reasonable basis for the offer and had no good faith intent to settle the case.

- **Conclusion**

For the forgoing reasons, Plaintiff has met her burden of proving that the Proposal for Settlement was not made in good faith, that the offer did not bear any reasonable relationship to Plaintiff's damages, that Defendant did not realistically assess liability, that there was no reasonable basis for the offer and that Defendant did not in good faith intend to settle the case by making the offer of $ 7,500. It would not be an abuse of discretion for this Court to find that the Proposal for Settlement was not made in good faith, and it would be well within this Court's discretion to find that the Proposal for Settlement was not made in good faith.

VI. The Proposal For Settlement failed to state with particularity any relevant conditions and nonmonetary terms in that it failed to identify what subrogated interests were intended to be the subject of a hold harmless and indemnity agreement and failed to provide the specific language of any such agreement.

Rule 1.442(c)(2)(C), Fla. R. Civ. P. requires Defendant to "state with particularity any relevant conditions." Defendant's Proposal for Settlement included among its "Relevant

Conditions" the requirement of a Release of All Claims "including a provision under which the Releasor shall *indemnify and hold harmless their Releasees as to any and all liens and subrogated interest of any third party by virtue of any services or benefits provided to the Releasors, including but not limited to hospital liens, doctors' liens, workers compensation liens, Champus liens and any other liens*". The Proposal for Settlement lacks sufficient particularity regarding these relevant conditions. The "particularity" required by the rule is indispensable and not a mere formality. The term "particularity" means that the offeror must supply the specific details of any condition. See *Merriam-Webster Dictionary* at www.merriam-webster.com (defining "particular" as "of, related to, or concerned with details" and defining "particularity" as "attentiveness to detail"). See *Swartsel v. Publix Super Markets, Inc.,* 882 So.2d 449 (Fla. 4th DCA 2004).[3] Although Plaintiff acknowledges that a summary of a release and confidentiality agreement in a Proposal for Settlement can satisfy the particularity requirement of the rule, Plaintiff submits that the summary in Defendant's Proposal for Settlement, which states it will contain hold harmless and indemnity provisions, is insufficiently particular to satisfy the rule.

A hold harmless agreement is in substance a contract of indemnity. It is "a contract in which one party agrees to indemnify the other." *Black's Law Dictionary 800 (9th Ed. 2011)*. Thus, the Defendant was demanding that Plaintiff hold Defendant harmless in the event of claims by third persons or entities that were not presently parties to the action. Without identifying those claims with specificity, Plaintiff could not reasonably determine the value of the Proposal for Settlement and what her financial and monetary obligations really were under it.

The rule intends for a proposal for judgment to be as specific as possible, leaving no

[3] Plaintiff acknowledges that *Swartsel's* holding requiring more particular detail on the release and confidentiality agreement language or a proposed copy of same to be attached to the Proposal For Settlement was abrogated by the Supreme Court of Florida in *State Farm Mutual Auto. Ins. Co. v. Nichols,* 932 So.2d 1067 (Fla. 2006) which held that a summary of the proposed release can be sufficient to satisfy the particularity requirement.

ambiguities so that the recipient can fully evaluate its terms and conditions." *Lucas v. Calhoun,* 813 So.2d 971, 973 (Fla. 2d DCA 2002); *see also Jamieson v. Kurland,* 819 So.2d 267, 268-69 (Fla. 2d DCA 2002); *Connell v. Floyd,* 866 So.2d 90, 92 (Fla. 1st DCA 2004). Further, because the offer of judgment statute and its companion rule of civil procedure are in derogation of the common law rule that each party shall bear its own attorneys' fees, the language of any offer must be construed in favor of the offeree when it does not make clear precisely what is being proposed. *See MGR Equip. Corp. v. Wilson Ice Enters., Inc.,* 731 So.2d 1262, 1263-64 n. 2 (Fla.1999) (noting that Rule 1.442 "mandates greater detail in settlement proposals, which will hopefully enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation").

An award of attorneys' fees is in derogation of the common law principle that each party pays its own attorneys' fees. The Supreme Court of Florida strictly construes the language of the statute and rule when reviewing the several requirements. In these cases, the Supreme Court of Florida has drawn from the plain language of *Rule 1.442* the principle that to be valid and enforceable a joint offer must (1) state the amount and terms attributable to each party, and (2) state with particularity any relevant conditions. *See Fla. R. Civ. P. 1.442(c)(3)*. A review of this precedent reveals that this principle inherently requires that an offer of judgment must be structured such that either offeree can independently evaluate and settle his or her respective claim by accepting the proposal irrespective of the other parties' decisions. Otherwise, a party's exposure to potential consequences from the litigation would be dependently interlocked with the decision of the other offerees. *Attorneys' Title Insurance Fund, Inc. v Gorka, 36 So.3d 646 (Fla. 2010).*[4]

[4] While this case pertained to joint offerees, the instant case implicates non-valued and unspecified obligations to nonparties.

Since the Proposal for Settlement's relevant conditions and summary of the language of any proposed hold harmless and indemnity agreements, on these facts, lacked sufficient particularity for Plaintiff to identify the contractual hold harmless and indemnity obligations she would be bound by upon acceptance of the Proposal for Settlement, Defendant's Proposal for Settlement was and is invalid and unenforceable.[5]

In *State Farm Mutual Auto. Ins. Co. v Nichols*, 932 So.2d 1067 (Fla. 2006), the Supreme Court of Florida reviewed a release that appears to have contained hold harmless and indemnity language virtually identical to the language in this case. The Court stated, "We agree that a summary of the proposed release can be sufficient to satisfy *Rule 1.442*, as long as it eliminates any reasonable ambiguity about its scope." The Supreme Court of Florida then went on to quote the Second District Court of Appeal in *Lucas v. Calhoun, supra:*

> The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities *so that the recipient can fully evaluate its terms and conditions*. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.

The Supreme Court of Florida held that the Proposal for Settlement in *Nichols* was too ambiguous to satisfy *Rule 1.442, Fla. R. Civ. P.*, at least in part because there were both PIP and UM claims pending between the parties that rendered the summary of the release language ambiguous. In so holding, the Supreme Court of Florida stated as follows:

> We recognize that given the nature of language, it may be

[5] Plaintiff acknowledges that certain cases have held that hold harmless and indemnity language was not ambiguous, but Plaintiff submits this language and these facts are distinguishable. For example, in *Kee v. Baptist Hospital of Miami, Inc.,* 971 So.2d 814 (Fla. 3rd DCA 2007), the following hold harmless and indemnity language was held not to be ambiguous: "[F]rom any and all existing, or potentially existing, liens or other claims which any person or entities may have on the damages sought in this lawsuit arising out of [the **Kees**'] claims or potential claims in this case."

> impossible to eliminate all ambiguity. The 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. *If ambiguity within the proposal could reasonably affect offeree's decision, the proposal will not satisfy the particularity requirement.*

On these facts, Plaintiff submits that the summary of the language in Defendant's Proposal for Settlement lacked sufficient particularity and specificity for Plaintiff to fully evaluate its terms and conditions. The lack of particularity of the indemnification and hold harmless provisions as summarized could reasonably affect the offeree's decision. The Proposal for Settlement does not satisfy the particularity requirement of *Rule 1.442, Fla. R. Civ. P.*

The "Relevant Conditions" of the Proposal for Settlement required Plaintiff to execute a Release of All Claims "including a provision under which the Releasor shall *indemnify and hold harmless their Releasees as to any and all liens and subrogated interest of any third party by virtue of any services or benefits provided to the Releasors, including but not limited to hospital liens, doctors' liens, workers compensation liens, Champus liens and any other liens*".

Defendant did not specify, even generally, which "services or benefits" were being referenced in this broad language that was intended to summarize the hold harmless and indemnity agreements Defendant would have Plaintiff execute if the Proposal for Settlement were accepted. This broad language lacked sufficient particularity to permit Plaintiff to fully evaluate its terms and conditions, required Plaintiff to read the Defendant's mind as to which such "liens" or "subrogated interests" Defendant intended to included, and was insufficiently particular to permit Plaintiff to identify and evaluate what contractual indemnity and hold harmless obligations the acceptance of Defendant's Proposal for Settlement would require her to assume.

In this case, there were letters of protection from certain physicians, as well as payments toward medical bills by Medicare, AARP Medicare Complete Choice Plan and AARP Health Care Options, both United Health Insurance Company plans with subrogation claims being administered by Optum/Ingenix. The medical treatment was for spinal injuries and cervical surgery, as well as head injuries. Defendant contested the injuries, initially had scheduled numerous compulsory examinations before stipulating to bifurcate liability, and intended to contest the causal and factual relationship of these injuries to the accident. The total medical bills Plaintiff related to the accident totaled nearly $ 200,000 in charges. Prior to trial Plaintiff had in excess of $ 50,000 in letters of protection, liens, and subrogated interests she was required to satisfy if she recovered compensation from Defendant. Complex federal regulatory and contractual obligations dictated Plaintiff's exposure and obligations to such subrogated interests in the event of a settlement that included compensation for "accident related" expenses paid by Medicare or Medicare contractors or subject to letters of protection. The Proposal for Settlement was not particular regarding which such subrogated interests or expenses Defendant was obligating Plaintiff to indemnify against. Accordingly, Plaintiff could not possibly determine the monetary value of the indemnity and hold harmless provisions and what, specifically, Defendant's Proposal For Settlement was requiring of Plaintiff, as far as hold harmless and indemnity provisions were concerned.

The Proposal for Settlement was not sufficiently particular to permit Plaintiff to fully evaluate its terms and conditions and, specifically, the financial and monetary obligations of indemnification to which Defendant sought to obligate and bind her in exchange for the sum of $ 7,500.00. Since the Proposal for Settlement was lacked the particularity required by *Rule 1.442, Fla. R. Civ. P.*, it was and is invalid and unenforceable.

VII. Alternatively, the Court should substantially reduce the amount of attorneys' fees and costs sought by considering the following factors pursuant to *Rule 1.442, Fla. R. Civ. P.*:

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.

For all of the reasons previously stated, should this Court award any attorney's fees, the award should be limited. Liability was hotly contested and there were close questions of fact. Moreover, Defendant unreasonably failed to provide Plaintiff meaningful answers to expert interrogatories and the specific identity of the expert who would be testifying until the week before trial. Plaintiff chose to cross-examine Dr. Mostafa at trial without having taken his deposition or having the benefit of a written report or meaningful answers to interrogatories.

VIII. Finally, only costs taxable pursuant to the State Uniform Guidelines for Taxation of Costs in Civil Actions.

Pursuant to *Section 57.071(2), Fla. Stat.* any expert witness expenses incurred by Defendant are not taxable because Defendant did not provide Plaintiff a timely written report regarding the expert's opinions, a prerequisite for taxing costs of experts. On this and other

costs sought by Defendant, the Court should follow the State Uniform Guidelines for Taxation of Costs in Civil Actions and award only costs allowed under those guidelines.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail – postage paid, this _____ day of September, 2013, to: Wayne Tosko, Esquire, wtosko@vasko.net, nel@vasko.net; and Jane H. Clark, Esq., JClarkefile@centurylink.net..

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