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O'Halloran v. Harris Corporation (In re Teltronics, Inc.), Case No. 161140 (11th Cir. 2018).

A bankruptcy judge's *Daubert* decision on economic testimony regarding insolvency will not be disturbed on appeal absent the decision being "manifestly erroneous."

Allen v. Nunez, Case No. SC16-1164 (Fla. 2018).

Two codefendants who receive a proposal for settlement in which they are specifically and individually named, possess all the information necessary to determine whether to settle and an attachment which names both codefendants does not make the proposal ambiguous.

The Florida Bar re: Advisory Opinion – Shore v. Wall, Case No. SC17-1510 (Fla. 2018).

A non-lawyer company is engaged in the unlicensed practice of law when it holds itself out as having special knowledge on how to recover excess proceeds from tax deed sales held by the Clerk of Court under Florida Statutes Chapter 197.

Atlantic Civil, Inc. v. Swift, Case No. 3D15-1594 (Fla. 3d DCA 2018).

A joint proposal for settlement which does not differentiate between co-defendants and requires all co-defendants to execute the same general release which refers to another co-defendant is not enforceable.

Federal National Mortgage Association v. JKM Services, LLC, as Receiver for Cedar Woods Homes Condominium Association, Inc., Case No. 3D17-370 (Fla. 3d DCA 2018).

A lender is entitled to intervene in a proceeding where a receiver is appointed to collect unpaid condominium assessments under Florida Statute section 718.116(6)(c).

Ocean Bank v. Gato, Case No. 3D18-1608 (Fla. 3d DCA 2018).

A foreclosure sale should not be canceled to permit a defendant time to arrange a short sale because "[a] defendant's claim that they might be able to arrange for payment of the outstanding debt during an extended period of time does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other."

Darden Restaurants, Inc. v. Ostanne, Case No. 4D17-3590 (Fla. 4th DCA 2018).

A valid delegation clause such as "[t]he arbitrator has the sole authority to determine the eligibility of a dispute for arbitration and whether it has been timely filed" removes jurisdiction from a trial court to determine arbitrability.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16140

D.C. Docket No. 8:15-cv-02788-CEH,
Bkcy No. 8:11-bkc-12150-KRM

In re: TELTRONICS, INC.,

Debtor.

KEVIN T. O'HALLORAN,
as Trustee of the Liquidating Trust of Teltronics, Inc.,

Plaintiff - Appellant - Cross Appellee,

versus

HARRIS CORPORATION,
RPX CORPORATION,

Defendants - Appellees - Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(October 2, 2018)

Before TJOFLAT and JULIE CARNES, Circuit Judges, and KAPLAN,* District Judge.

KAPLAN, District Judge:

This is an appeal from a judgment that affirmed an order of the Bankruptcy Court dismissing a fraudulent conveyance claim by the trustee of the liquidating trust of Teltronics, Inc. ("Teltronics") against Harris Corporation ("Harris") and RPX Corporation ("RPX"). The trustee claims principally that the bankruptcy judge erred in (a) concluding that the trustee had not sustained his burden of proof on the issue of whether Teltronics received reasonably equivalent value in exchange for the transfer and (b) receiving certain expert testimony offered by defendants, ostensibly on the issue of whether Teltronics was insolvent at the time the transfer was made. We affirm on the basis that (1) the Bankruptcy Court made no material error in ruling on the admissibility of evidence and (2) there was no error in the conclusion that the trustee failed to prove that Teltronics was insolvent at the time of the transfer. We therefore do not reach the lower courts' decisions as to reasonably equivalent value.

I. FACTS

* Honorable Lewis A. Kaplan, United States District Judge for the Southern District of New York, sitting by designation.

Teltronics was in the telecommunications business until its assets were sold in bankruptcy. Harris is an international communications technology company that provides communications products, systems and services. RPX is a defensive patent aggregator the business of which is acquiring patents to protect operating companies from frivolous enforcement litigation.

In 2000, Teltronics purchased a portfolio of patents from Harris in exchange for a promissory note to Harris in the amount of approximately $6.8 million. The obligations were restructured in 2002, with the amount due on the promissory note increased to roughly $9.2 million.

Teltronics defaulted on the promissory note in 2004. In an effort to reduce its debt, it entered into a patent transfer agreement (the "Transfer Agreement") pursuant to which it transferred the patent portfolio back to Harris in exchange for (1) a credit of approximately $1.275 million on the amount that Teltronics owed Harris, and (2) a non-exclusive license to use the patent portfolio to make and sell digital telephone switch products. Under the Transfer Agreement, Teltronics retained certain other rights as to the patents, including a limit until July 31, 2010 on Harris' ability to transfer the patents (the "Blocking Right") and a right of first refusal that gave Teltronics an ability to reacquire the patent portfolio in the event that Harris intended to sell it after July 31, 2010 (the "Teltronics ROFR").

In 2008, Harris began discussions with RPX about selling the patent portfolio. On December 19, 2008, the companies agreed in principle to a price of $12 million.

While reviewing documents to be sent to RPX for purposes of its due diligence, Harris realized that it needed to address Teltronics' Blocking Right, which remained in effect until July 31, 2010, in order to close the sale to RPX. On January 7, 2009, Harris contacted Teltronics with a request that Teltronics modify its rights. Harris did not then disclose that it had any specific plans to sell the patents.

After some back and forth, Harris and Teltronics executed an amendment to the Transfer Agreement (the "Amendment") on January 21, 2009. Pursuant to the Amendment, Harris, in exchange for $5,000, acquired the right to transfer the patents until April 16, 2009 unencumbered, except to a Teltronics competitor. The Amendment provided also that the Teltronics ROFR would become effective on April 16, 2009, rather than on July 10, 2010. Five days later, on January 26, 2009, Harris transferred the patents to RPX (the "Assignment").

Teltronics filed a Chapter 11 petition on June 27, 2011 in the United States Bankruptcy Court for the Middle District of Florida. As part of Teltronics'

confirmed reorganization plan, a liquidating trust was established for the benefit of certain Teltronics creditors and Kevin O'Halloran was appointed trustee.

II. PROCEEDINGS BELOW

The trustee filed this adversary proceeding against Harris and RPX on June 25, 2013. He claimed that the transfer of the Blocking Right and the Teltronics ROFR were constructively fraudulent and sought to (1) avoid both the modification of the Blocking Right and the Teltronics ROFR and the transfer of the patents pursuant to the Assignment, and (2) recover, pursuant to Sections 544 and 550 of the Bankruptcy Code and Florida Statutes 726.105(1)(b) and 726.106(1), the value of those transfers.

A. Competing Experts at Trial in Bankruptcy Court

The adversary proceeding was tried before Bankruptcy Judge Michael Williamson. In order to prevail on his claims that the Blocking Right and Teltronics ROFR had been subjects of constructively fraudulent transfers, the trustee had to establish that the modifications of the rights constituted transfers by Teltronics. Assuming that they were indeed transfers, he had to prove two additional elements in order to prevail. First, he had to establish that Teltronics

received less than reasonably equivalent value in the transfers. Second, he had to establish that Teltronics was insolvent at the time of the transfers.

At trial, the parties called competing experts as to Teltronics' solvency at the time of the transfers. This appeal turns on the trial court's denial of the trustee's motions to strike certain of the testimony of Harris and RPX's expert, Steven Oscher.

In order best to present the questions raised on appeal, it is useful first to describe the expert testimony on both sides. To that end, we summarize the competing expert testimony and then, against that background, move on to the trustee's motions to strike.

1. Mr. Mukamal's Testimony

Barry Mukamal, who testified for the trustee, had undertaken a solvency analysis as to Teltronics. He opined that the company was insolvent – in other words, that the adjusted value of the company's liabilities exceeded the adjusted value of its assets – as of December 31, 2008, in his view by approximately $5.6 million.

2. Mr. Oscher's Testimony

The competing expert, Mr. Oscher opined that (1) Mr. Mukamal's solvency opinion was flawed because it improperly failed to account separately for the value

of three longstanding maintenance contracts to which Teltronics was a party, (2) the value of the assets on Teltronics' balance sheet should have been increased by the aggregate value of those three contracts, and (3) Teltronics was solvent at the time of the transfer. Mr. Oscher did not give an opinion as to the extent by which Teltronics' assets exceeded its liabilities. But his opinion as to solvency necessarily implied that the value of the three contracts, in Mr. Oscher's view, was more than $5.6 million, even if only slightly.[1]

In considering Mr. Oscher's testimony, it is critical to understand that the burden of proof was on the trustee to show that Teltronics was insolvent at the time of the transfer. *See Kardash v. Comm'r of IRS*, 866 F.3d 1249, 1256 (11th Cir. 2017) ("In order to establish the insolvency element of constructive fraud under [Florida fraudulent conveyance law], a claimant must show either that the debtor was insolvent at the time of the transfer or became insolvent as the result of the transfer."). Perhaps in consequence of the fact that the burden was on the trustee,

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[1] The reasoning is this: First, Mr. Mukamal testified that Teltronics was insolvent by $5.6 million without separately reflecting the value of the three contracts as assets on the balance sheet. Second, essentially the only aspect of Mr. Mukamal's opinion with which Mr. Oscher took issue was Mr. Mukamal's failure to reflect those assets on the balance sheet. Accordingly, it follows that Mr. Oscher's opinion that Teltronics was solvent necessarily depended on the premise that the addition of the value of the contracts to Mr. Mukamal's otherwise materially undisputed balance sheet would have rendered Teltronics solvent. In order for that premise to be true, the contracts in Mr. Oscher's view must have been worth at least somewhat more than $5.6 million.

Mr. Oscher did not offer any opinion as to the specific value of the three maintenance contracts aside from the necessary implication that they were worth at least $5.6 million. At one point, however, he did illustrate the impact that increasing the value of Teltronics' assets by the value of the contracts could have had on Teltronics' balance sheet. In doing so, he testified that *if* the fair market value of the contracts had been $8.5 million, a figure that he took from a valuation conducted by a third-party that Mr. Oscher used for "demonstrative purposes," the value of Teltronics' assets would have been sufficient to render the company solvent on the date that the Amendment was executed.

3. Mr. Mukamal's Rebuttal Testimony

In rebuttal, Mr. Mukamal did not dispute that the contracts, if accounted for separately, might be worth at least $5.6 million. To be sure, he identified issues that might have led a factfinder to question the accuracy of the $8.5 million figure that Mr. Oscher used for "demonstrative purposes," but he set forth no alternative value for the contracts. Rather, his principal dispute with Mr. Oscher was over whether the value of the contracts should have been included as a separate item on Teltronics' balance sheet. He therefore focused his rebuttal not on the precise value of the contracts, but on what he claimed would have been the impropriety of

increasing the value of Teltronics' assets by the value of the contracts, whatever that may have been.

B. *Daubert* Motions

In sum, then, Mr. Oscher's testimony set forth the following:

1. His opinion that the value of Teltronics' assets on its balance sheet should have been increased by the value of the three maintenance contracts,
2. His opinion that Teltronics was solvent at the time of the transfers, which necessarily implied that the value of the contracts, in his view, was at least somewhat greater than $5.6 million, and
3. No opinion as to the precise value of the three contracts; although to illustrate his point, he testified that *if* the contracts had been worth $8.5 million, a borrowed figure that he used for "demonstrative purposes," *then* Teltronics would have been comfortably solvent at the time of the transfers.

At the close of Mr. Oscher's direct examination, the trustee moved, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to strike Mr. Oscher's opinion that Teltronics had been solvent at the time of the transfer.

The motion was brief and specific:

> "*[W]ith respect to the solvency opinion* that Mr. Oscher is rendering, he did not perform any valuation analysis of his own. What he said is, 'I looked at three other valuations and came to a conclusion.'
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> . . . .
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> . . . [H]e has done nothing in the way of his own analysis to present an expert opinion. He has merely adopted the analyses and valuations that have been prepared by others." (Emphasis added).[2]

The trustee briefly renewed his *Daubert* motion at the close of Mr. Oscher's testimony, saying, "[N]ot only did [Mr. Oscher] rely upon the analysis of others, he doesn't know anything about the reliability of those underlying analyses." Indeed, Mr. Oscher acknowledged during cross-examination that he had not conducted an independent analysis of the validity of the assumptions and projections underlying the reports that he reviewed in preparing his expert report. Nor had Mr. Oscher independently analyzed the discount rate and range of values incorporated into the Empire valuation of the three maintenance contracts.

The thrust of both motions thus was essentially the same. The trustee challenged the admissibility of Mr. Oscher's opinion that Teltronics had been solvent at the time of the transfers on the ground that Mr. Oscher did no work to back that opinion up nor verified the reliability of the materials to which he referred by way of illustration. The trustee, however, did not challenge the

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[2] Although the trustee did not precisely say so, he apparently was referring to Mr. Oscher's review for demonstrative purposes of various analyses conducted by third parties and of valuations conducted by Wells Fargo and Empire Valuation Consultants, LLC ("Empire").

admissibility of Mr. Oscher's opinion that the value of the three maintenance contracts should have been included on the list of assets on Teltronics' balance sheet.

The Bankruptcy Court denied the motions from the bench. Judge Williamson concluded that these issues did not reach the threshold of excluding the testimony, but went to the weight that it should be given in considering the evidence. Although the Bankruptcy Court ruled without prejudice to the trustee's renewing his *Daubert* motion after trial, the trustee did not renew the motion to strike Mr. Oscher's testimony.

C. Bankruptcy Court's Opinion

In a written opinion following trial, the Bankruptcy Court concluded that Teltronics in fact had transferred the Blocking Right under the Amendment, but nonetheless entered judgment in favor of Harris and RPX because the trustee had failed to prove by a preponderance of the evidence that Teltronics was insolvent at the time of the transfer. *O'Halloran v. Harris Corp. (In re Teltronics, Inc.)*, 540 B.R. 481, 484, 487-90 (Bankr. M.D. Fla. 2015).

The court began by finding that Mr. Oscher was more credible than Mr. Mukamal on the narrow issue of whether the maintenance contracts ought to have been valued separately and their value listed as assets on the balance sheet. *Id.* at

489. In other words, the court credited Mr. Oscher's opinion, the admissibility of which the trustee had not challenged, that the value of Teltronics' assets should have been increased by the value of the three contracts.

Having made this credibility judgment, the court proceeded from the proposition that the burden of proof was on the trustee to "prove the value of the maintenance contracts, when added to the other assets, [did] not exceed Teltronics' liabilities." *Id.* at 490. But the trustee had "offered no evidence of the value of the maintenance contracts." *Id.* Consequently, the court concluded, the trustee had failed to establish that Teltronics was insolvent at the time that it transferred the Blocking Right. *Id.*

Crucially, although the Bankruptcy Court, over the trustee's challenge, had admitted into evidence Mr. Oscher's opinion that Teltronics had been solvent at the time of the transfer, it neither credited nor relied on that opinion in entering judgment for defendants. Nor did the court accept or reject the $8.5 million figure that Mr. Oscher had used for "demonstrative purposes." Indeed, the court made no findings at all as to the value of the three maintenance contracts.

The Bankruptcy Court concluded also that the trustee had failed to prove by a preponderance of the evidence that Teltronics had received less than reasonably equivalent value in the transfer. *Id.* at 485-87.

On these two independent, alternative bases, the Bankruptcy Court held that the transfer was not constructively fraudulent and could not be avoided. The district court affirmed the Bankruptcy Court's ruling in full. *O'Halloran v. Harris Corp.*, No. 8:15-cv-2788-T-36, 2016 WL 4467254, at *3-5 (M.D. Fla. Aug. 24, 2016) (Honeywell, J.).

III. DISCUSSION

The trustee here argues that the Bankruptcy Court erred in (1) admitting any of the testimony of Mr. Oscher, and (2) concluding that the trustee failed to establish that Teltronics (A) was insolvent at the time of the transfer, and (B) received less than reasonably equivalent value. The trustee argues also that the district court erred in affirming.

We hold that the Bankruptcy Court's receipt of Mr. Oscher's opinion that the value of the maintenance contracts, whatever it was, should have been included in the assets on Teltronics' balance sheet in order to determine its solvency – an opinion that was not objected to at trial – and the court's decision to credit that testimony were well within the bounds of its discretion. We find also no error in its conclusion that the trustee failed to prove that Teltronics was insolvent at the time of the transfer. We affirm on this basis and decline to reach either the

question of reasonably equivalent value or the admissibility of Mr. Oscher's solvency opinion.

A. Legal Framework of Fraudulent Transfers

Section 544(b) of the Bankruptcy Code authorizes bankruptcy trustees to avoid certain "transfer[s] of an interest of the debtor in property" that are "voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title." 11 U.S.C. § 544(b). Section 550 creates additional remedies for transfers that have been avoided under Section 544, including a right on the part of the trustee to "recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . . the initial transferee of such transfer or the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a).

The trustee alleges constructive fraudulent transfer under Florida Statutes 726.105(1)(b) and 726.106(1).

Under Section 726.105(1)(b), a transfer made by a debtor is fraudulent as to a creditor if the debtor (1) made the transfer "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation," and (2) either (A) "[w]as engaged or was about to engage in a business or a transaction for which the

remaining assets of the debtor were unreasonably small in relation to the business or transaction" or (B) "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due."

Similarly, under Section 726.106(1), a transfer made by the debtor is fraudulent as to a creditor if (1) "the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation;" and (2) "the debtor was insolvent at that time or . . . became insolvent as a result of the transfer or obligation."

B. *Daubert* Motions

We begin with a discussion of the trustee's motions to strike under *Daubert*.

1. Deferential review of evidentiary decisions

A trial court's decisions regarding the admissibility and reliability of expert testimony are reviewed for abuse of discretion. *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S.136, 141-43 (1997)).[3] This Court will "not reverse an evidentiary decision of a district court 'unless the ruling is manifestly erroneous.'" *Id.* (quoting *Joiner*,

[3] "In a bankruptcy case, this Court sits as a second court of review and thus examines independently the factual and legal determinations of the bankruptcy court and employs the same standards of review as the district court." *In re Fisher Island Investments, Inc.*, 778 F.3d 1172, 1189 (11th Cir. 2015) (citation omitted).

522 U.S. at 142). This is so because, by virtue of the trial court's role in presiding over trial proceedings, it is in the best position to decide such matters. *See United States v. Brown*, 415 F.3d 1257, 1264-65 (11th Cir. 2005); *see also Frazier*, 387 F.3d at 1259. Accordingly, lower courts "enjoy[] 'considerable leeway' in making these determinations." *Frazier*, 387 F.3d at 1258-59 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)); *accord Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1027 (11th Cir. 2014).

2. The trial court's gatekeeping function

A trial court is obliged to perform a gatekeeping function in considering the admissibility of technical expert evidence. *Frazier*, 387 F.3d at 1260 (citing *Kumho Tire*, 526 U.S. at 147). This duty "inherently require[s] the trial court to conduct an exacting analysis of the *foundations* of expert opinions to ensure they meet the standards for admissibility under Rule 702." *Id.* (alteration in original) (internal quotation marks and citations omitted).[4]

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[4] Rule 702 provides:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

Fed. R. Evid. 702.

In the context of a *Daubert* ruling, the district court has considerable flexibility. As we have stated before:

> "[I]t is difficult to persuade a court of appeals to reverse a district court's judgment on *Daubert* grounds. The theme that shapes appellate review in this area is the limited nature of it. . . .
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> What is true about the review of evidentiary issues in general applies with equal or even greater force to *Daubert* issues in particular, an area where the abuse of discretion standard thrives. Immersed in the case as it unfolds, a district court is more familiar with the procedural and factual details and is in a better position to decide *Daubert* issues. The rules relating to *Daubert* issues are not precisely calibrated and must be applied in case-specific evidentiary circumstances that often defy generalization. And we don't want to denigrate the importance of the trial and encourage appeals of rulings relating to the testimony of expert witnesses."

Brown, 415 F.3d at 1264-66 (citations omitted); *see also McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002) ("[O]ur review of

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> "[I]n determining the admissibility of expert testimony under Rule 702, we engage in a rigorous three-part inquiry. Trial courts must consider whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."

Frazier, 387 F.3d at 1260 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). The proponent of the expert testimony bears the burden of establishing that each of these criteria is satisfied. *Knight through Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 808 (11th Cir. 2017) (citing *Frazier*, 387 F.3d at 1260).

evidentiary rulings by trial courts on the admission of expert testimony is very limited." (internal quotation marks and citation omitted)).

Our review is "even more relaxed in a bench trial situation, where the judge is serving as a factfinder and we are not concerned about 'dumping a barrage of questionable scientific evidence on a jury.'" *Brown*, 415 F.3d at 1268 (quoting *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999)); *see also id.* at 1269 ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.").

3. The *Daubert* Rulings

a. Including contracts on Teltronics' balance sheet

The trustee contends that Mr. Oscher's testimony should have been excluded in its entirety. He fails to note, however, that he did not object below to Mr. Oscher's opinion that the contracts should have been included in the assets on Teltronics' balance sheet, although he did offer a competing opinion. The sole question of admissibility he raised was to Mr. Oscher's opinion that Teltronics had been solvent at the time of the transfer.

Rule 103(a) of the Federal Rules of Evidence states, "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . a party, on the record: (A) timely objects or moves to

strike; and (B) states the specific ground, unless it was apparent from the context . . . ." Given that the sole focus of the trustee's *Daubert* objections to Mr. Oscher's testimony was directed to his opinion as to Teltronics' solvency, he failed to preserve any objection to the other portions of Mr. Oscher's testimony. The omission is aggravated by the trustee's failure to renew the motion to strike following trial despite the Bankruptcy Court's invitation to do so.

Even if the question were properly before us, the trustee's argument, insofar as it is directed to Mr. Oscher's opinion that the maintenance contracts should have been included on the balance sheet, would fail. The Bankruptcy Court did not abuse its discretion in admitting and then crediting this opinion.[5]

Mr. Mukamal, the trustee's expert, acknowledged that the practice of including intangible assets as separate items on a company's balance sheet "may not be flawed," but rather that it was a matter of the facts and circumstances of the

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5 "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985); *accord Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1335 (11th Cir. 1999); *see also Brown*, 415 F.3d at 1267 ("'The credibility of a witness is in the province of the factfinder,' and we 'will not ordinarily review the factfinder's determination of credibility.'" (quoting *United States v. Copeland*, 20 F.3d 412, 413 (11th Cir. 1994) (per curiam))). Accordingly, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575.

case at hand. Mr. Mukamal argued that the contracts in this case were so embedded in the overall enterprise, indeed they were "necessary for the overall operation and value stream in a . . . discounted cash flow model, with respect to the entire organization," that they could not be valued distinctly from the enterprise. Mr. Oscher, on the other hand, maintained that the contracts were "clearly seen as separate entities or separate assets of Teltronics," as evidenced by the lending that was being done against the contracts.

The testimony presented a classic "battle of the experts." It was not clear error, and certainly not an abuse of discretion, for the bankruptcy court to admit Mr. Oscher's testimony on this point and then to find him more credible than Mr. Mukamal on the question of whether to include the contracts as separate assets on Teltronics' balance sheet.

b. Solvency opinion

The trustee did preserve his objection to the Bankruptcy Court's receipt of Mr. Oscher's opinion that Teltronics was solvent. We decline to reach this objection, however, because it is immaterial on appeal.

Mr. Oscher's opinion that Teltronics was solvent at the time of the transfer necessarily implied his opinion that the value of the contracts was at least $5.6 million. It is true also that Mr. Oscher provided no basis for that view. It may well

be that there was a valid argument under *Daubert* to exclude this opinion, but the judge neither relied upon nor credited this opinion in his ultimate disposition of the case. Accordingly, the issue is academic.

c. Illustration representing value of the contracts as $8.5 million

Finally, the trustee's argument that the Bankruptcy Court erred in admitting Mr. Oscher's use of the borrowed $8.5 million figure for "demonstrative purposes" is unhelpful and immaterial to his appeal. As the trustee acknowledges in his brief, Mr. Oscher in fact did not opine that the value of the contracts was $8.5 million – that figure was used to demonstrate the impact that increasing the value of Teltronics' assets by the value of the contracts could have had on Teltronics' balance sheet.

The trustee nonetheless criticizes Mr. Oscher's "methodology" of taking the midpoint of the value range set forth in the Empire valuation as not generally accepted in the field of accounting. He points also to the fact that Mr. Oscher "did no analysis of the state of Teltronics' remaining balance sheet, or the cost to liquidate Teltronics' remaining assets, if the contracts were sold" and to Mr. Oscher's assignment of a value to the contracts without considering the costs involved with administering the contracts. These contentions might present serious

concerns had Mr. Oscher set forth an opinion that the contracts, in his view, were worth $8.5 million. But as this testimony was merely used to demonstrate a point, the trustee's criticisms miss the mark.

Moreover, the Bankruptcy Court plainly did not rely on this illustration and in fact made no findings at all as to the value of the three contracts. The only portion of Mr. Oscher's testimony that was credited by the Bankruptcy Court was his opinion that *some* value for the three contracts should have been reflected separately on the balance sheet for purposes of the solvency analysis. The admissibility of the testimony related to Mr. Oscher's use of the $8.5 figure was immaterial.[6]

C. Insolvency

We now turn to the Bankruptcy Court's conclusion that the trustee failed to establish that Teltronics was insolvent at the time of the transfer. We already have concluded that the Bankruptcy Court was entitled to find that Mr. Oscher was more credible than Mr. Mukamal on the narrow issue of "whether the maintenance

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> In any case, we doubt that it was an abuse of discretion for the Bankruptcy Court to conclude that the objections to Mr. Oscher's illustration using the $8.5 million figure went to the weight, rather than the admissibility, of the testimony. A movant under *Daubert* "must establish that the district court 'abdicat[ed]' its duty, or that it 'applie[d] the wrong law, follow[ed] the wrong procedure, base[d] its decision on clearly erroneous facts, or commit[ted] a clear error in judgment.'" *United States v. Hollis*, 780 F.3d 1064, 1070 (11th Cir. 2015) (alterations in original) (quoting *Brown*, 415 F.3d at 1266). Although we note that this is a tall order for an appellant, we need not reach this question for purposes of this appeal.

contracts ought to be separately valued and added into the balance sheet." *In re Teltronics, Inc.*, 540 B.R. at 489. Nor were the Bankruptcy Court's subsequent analytical steps erroneous.

The trustee had the burden of proving by a preponderance of the evidence that Teltronics was insolvent at the time of the transfer. *Kardash*, 866 F.3d at 1256 ("In order to establish the insolvency element of constructive fraud under [Florida fraudulent conveyance law], a claimant must show either that the debtor was insolvent at the time of the transfer or became insolvent as the result of the transfer."). Having accepted that the value of the assets listed on the balance sheet as presented by Mr. Mukamal was incomplete without the inclusion of the value of the three maintenance contracts, the burden was on the trustee to prove that the value of those contracts was so small as to leave Mr. Mukamal's opinion as to insolvency unaffected. But he offered no such evidence. As the Bankruptcy Court properly found, he therefore failed to establish an essential element of his claim.

IV. CONCLUSION

The judgment appealed from is AFFIRMED. Appellees' cross-appeal is DISMISSED as moot.

Supreme Court of Florida

No. SC16-1164

W. RILEY ALLEN,
Petitioner,

vs.

JAIRO RAFAEL NUNEZ, et al.,
Respondents.

October 4, 2018

LEWIS, J.

W. Riley Allen seeks review of the decision of the Fifth District Court of Appeal in *Nunez v. Allen*, 194 So. 3d 554 (Fla. 5th DCA 2016), on the basis that it expressly and directly conflicts with several appellate decisions of courts of this State regarding proposals for settlement, pursuant to section 768.79, Florida Statutes (2017), and Florida Rule of Civil Procedure 1.442, for the purpose of assessing attorney's fees. We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

FACTUAL AND PROCEDURAL BACKGROUND

This case originates from a motor vehicle accident in which Gabriel Nunez was operating a vehicle owned by his father, Jairo Nunez,[1] when he struck a truck owned by Allen, which was lawfully parked along a street and unoccupied. *Id.* Allen filed a one-count complaint against Gabriel and Jairo alleging that Gabriel negligently operated the vehicle and that Jairo, as the owner of the vehicle, was vicariously liable for his son's negligent driving. *Id.* Allen sought damages for, among other things, the post-repair diminution in the value of his truck, the cost of the repairs, and the loss of use of his truck. *Id.* Respondents jointly answered the complaint. *Id.* Allen then served a separate proposal for settlement on each Respondent pursuant to Florida Rule of Civil Procedure 1.442. *Id.*

The proposal to Jairo provided:

> 1. This Proposal for Settlement is made pursuant to Florida Statute § 768.79, and is extended in accordance with the provisions of Rule 1.442, Fla. R. Civ. P.
>
> 2. The Proposal for Settlement is made on behalf of Plaintiff, W. RILEY ALLEN, and is made to Defendant, JAIRO RAFAEL NUNEZ.
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by Plaintiff, W. RILEY ALLEN, against defendant, JAIRO RAFAEL NUNEZ.

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1. Hereinafter, Gabriel and Jairo Nunez may be referred to collectively as Respondents or individually according to their first names.

> 4. That in exchange for TWENTY THOUSAND AND 00/100 DOLLARS ($20,000.00) in hand paid from defendant, JAIRO RAFAEL NUNEZ, Plaintiff agrees to settle any and all claims asserted against Defendant as identified in Case Number 2010–CA–25627–0, brought in and for the Circuit Court in and for Orange County, Florida.
>
> 5. This Proposal for Settlement is inclusive of all damages claimed by Plaintiff, W. RILEY ALLEN, including all claims for interest, costs, and expenses and any claims for attorney's fees.

Id. at 556 (footnote omitted). Allen contemporaneously served an identical proposal for settlement on Gabriel, except that Gabriel's name was substituted in place of Jairo. *Id.* Neither Respondent accepted his respective proposal; thus the proposals were considered rejected. *Id.*; *see also* Fla. R. Civ. P. 1.442(f)(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.").

After securing a final judgment in the sum of $29,785.97, Allen filed a motion for attorney's fees pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. *Nunez*, 194 So. 3d. at 556. Respondents moved to strike Allen's proposals for settlement, contending that because paragraph 5 of the proposals stated that the monetary settlement was inclusive of all damages claimed by Allen, the proposals were ambiguous as to whether acceptance and payment of one of the $20,000 proposals for settlement would have resolved the case against both Respondents or only against the individual Respondent accepting the proposal. *Id.* at 557.

The trial court granted Allen's motion to enforce the proposals after finding the proposals for settlement were sufficiently clear and unambiguous; it was determined that Allen was entitled to be reimbursed $343,590 in attorney's fees and legal assistant's fees. *Id.* at 555, 557. Respondents appealed, asserting that the language contained in paragraph 5 of the proposals for settlement caused the proposals to be ambiguous and therefore unenforceable. *Id.* The Fifth District agreed, reasoning:

> Initially, paragraphs two, three, and four in each proposal for settlement make clear that payment of $20,000 by the [Respondent] named in the proposal would settle [Allen]'s claims brought in the case against that specific [Respondent]. However, paragraph five then stated that the proposal for settlement was inclusive of "all damages" claimed by [Allen]. As "all damages" claimed arguably are those that could have been (and were) imposed on both [Respondents] in this case, paragraph five of [Allen]'s proposal for settlement could be reasonably interpreted to mean that the acceptance of the proposal for settlement by only one of the [Respondents] resolved [Allen]'s entire claim against both [Respondents]. Put differently, if paragraph five had stated that the proposal was inclusive of all damages claimed by [Allen] against the individually named [Respondent], similar to the language in paragraph three of the proposal, there would have been no ambiguity.

Id. at 558 (emphasis omitted).

The district court relied on *Tran v. Anvil Iron Works, Inc.*, 110 So. 3d 923 (Fla. 2d DCA 2013), for support. *Nunez*, 194 So. 3d at 558. In *Tran*, the plaintiff was injured in an automobile accident and filed an action against the driver of the other vehicle and his corporate employer, which owned the vehicle. *Tran*, 110 So.

3d at 924. During litigation, plaintiff tendered separate proposals for settlement to the individual defendant and the corporate defendant. *Id.* Each proposal was specific as to the one defendant named therein and each stated that, as a condition of the proposal, the plaintiff would voluntarily dismiss, with prejudice, any and all claims against the specific defendant named in the proposal for settlement. *Id.* Attached to the proposal for settlement was a copy of the proposed notice of voluntary dismissal with prejudice to be filed if the proposal was accepted. *Id.* However, the attached dismissal notice named both defendants and indicated that the case would be dismissed against both defendants. *Id.* at 924-25. The Second District Court of Appeal affirmed the trial court's finding that the proposals for settlement were ambiguous because, while the body of the proposals did not indicate that both defendants would be dismissed, the notices of dismissal attached to the respective proposals did. *Id.* at 927. The district court held that the discrepancy could reasonably affect the decision to accept the proposal because one defendant might want to accept the proposal directed to it only if it knows for certain that its payment would result in the release of both defendants. *Id.* at 926 ("This may be especially significant in a case such as this where one defendant is the employer/owner of the car and the other defendant is the employee who was driving the car.").

Likewise, the decision below held that the language in the proposals themselves raised the legitimate question as to whether acceptance resolved Allen's claim for "all damages" against solely the named offeree or resolved the entire claim against both Respondents. *See Nunez*, 194 So. 3d at 559.

This review follows.

ANALYSIS

Attorney's fees under offers of judgment are governed by section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. In relevant part, section 768.79 reads:

> (1) In any civil action for damages filed in the courts of this state . . . [i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the demand. . . .
>
> (2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:
>
> (a) Be in writing and state that it is being made pursuant to this section.
>
> (b) Name the party making it and the party to whom it is being made.
>
> (c) State with particularity the amount offered to settle a claim for punitive damages, if any.
>
> (d) State its total amount.

> The offer shall be construed as including all damages which may be awarded in a final judgment.
>
> . . . .
>
> (6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary dismissal or involuntary dismissal, the court shall determine the following:
>
> . . . .
>
> (b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

§ 768.79, Fla. Stat. The relevant portions of the current version of rule 1.442 provide:

> (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) 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;
>
> (F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and
>
> (G) include a certificate of service in the form required by rule 1.080.
>
> (3) A proposal may be made by or to any party or parties and by or to any combinations 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 the rights of contribution or indemnity.

Fla. R. Civ. P. 1.442(c). Proposals under the offer of judgment statute must strictly conform to these statutory and procedural requirements to entitle the offeror to attorney's fees because the statute is in derogation of the common law that ordinarily requires each party to pay for its own attorney's fees. *See, e.g.*, *Pratt v. Weiss*, 161 So. 3d 1268, 1271 (Fla. 2015) (citing *Willis Shaw Express, Inc. v. Hilyer Sod*, 849 So. 2d 276, 278 (Fla. 2003); *Gershuny v. Martin McFall Messenger Anesthesia Prof'l Ass'n*, 539 So. 2d 1131, 1132 (Fla. 1989)). This Court reviews a party's entitlement to attorney's fees pursuant to section 768.79 and rule 1.442 de novo. *E.g.*, *Pratt*, 161 So. 3d at 1271 (citing *Frosti v. Creel*, 979 So. 2d 912, 915 (Fla. 2008)).

Additionally, the proposal must be sufficiently clear and free of ambiguity to allow the offeree the opportunity to fully consider the proposal. *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006). Nonetheless, this Court has not required the elimination of every ambiguity—only reasonable ambiguities:

> We recognize that, given the nature of language, it may be 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 the offeree's decision, the proposal will not satisfy the particularity requirement [of rule 1.442(c)(2)(C)-(D)].

Id. Ultimately, "[p]roposals for settlement are intended to end judicial labor, not create more." *Id.* (quoting *Lucas v. Calhoun*, 813 So. 2d 971, 973 (Fla. 2d DCA 2002)). Accordingly, courts are discouraged from "nitpicking" proposals for settlement to search for ambiguity. *Carey-All Transp., Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008) (citing *Nichols*, 932 So. 2d at 1079).

This Court recently rejected an argument that a nearly identical settlement proposal was ambiguous and therefore unenforceable on the matter of attorney's fees. *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846 (Fla. 2016). *Anderson* involved an armed robbery, carjacking, and shooting that occurred in the parking lot of an Embassy Suites hotel in Orlando, Florida. *Id.* at 848. Troy Anderson filed an action against Hilton Hotels Corporation (Hilton), W2007 Equity Inns

Realty, LLC (W2007), Interstate Management Company, LLC (Interstate), and SecurAmerica, LLC, for negligence. *Id.* Anderson's wife, Paula Anderson, also sought damages for loss of consortium. *Id.* at 849. Anderson proposed offers of settlement to Hilton, W2007, Interstate, and SecurAmerica. *Id.* The offer made to Hilton, it its entirety, stated:

> *PROPOSAL FOR SETTLEMENT ON BEHALF OF PLAINTIFF, TROY [ANDERSON], PURSUANT TO RULE 1.442*
>
> Plaintiff, TROY ANDERSON, by and through his undersigned attorneys, hereby serves his Proposal for Settlement, pursuant to Rule 1.442 of the Florida Rules of Civil Procedure, to Defendant, HILTON HOTELS CORPORATION, a foreign corporation, doing business as EMBASSY SUITES ORLANDO AT INTERNATIONAL DRIVE AND JAMAICAN COURT, also doing business as HILTON WORLDWIDE, and states in support thereof as follows:
>
> 1. This Proposal for Settlement is made pursuant to Florida Statute § 768.79, and is extended in accordance with the provisions of Rule 1.442. Fla. R. Civ. P.
>
> 2. This Proposal for Settlement is made on behalf of Plaintiff, TROY ANDERSON ("PLAINTIFF"), and is made to Defendant, HILTON HOTELS CORPORATION, a foreign corporation, doing business as EMBASSY SUITES ORLANDO AT INTERNATIONAL DRIVE AND JAMAICAN COURT, also doing business as HILTON WORLDWIDE ("HILTON").
>
> 3. This Proposal for Settlement is made for the purpose of settling any and all claims made in this cause by PLAINTIFF against HILTON.
>
> 4. That in exchange for SIX HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($650,000.00) in hand paid from HILTON, PLAINTIFF agrees to settle any and all claims asserted against HILTON, as identified in Case Number 2009–CA–040473–O, brought in the Circuit Court in and for Orange County, Florida.

> 5. This Proposal for Settlement is inclusive of all damages claimed by PLAINTIFF, including all claims for interest, costs, and expenses and any claims for attorney's fees.

Id. The offers to each defendant were identical other than the specifically designated party and the specific amount proposed. *Id.* Paula Anderson also made separate offers, identical to those of Anderson, to each of the defendants. *Id.* Prior to trial, however, Paula dismissed her cause of action. *Id.* Anderson obtained a favorable jury verdict that was twenty-five percent greater than the settlement offer and subsequently sought attorney's fees. *See id.* at 850, 857-58. The trial court and the Fifth District both concluded that the term "PLAINTIFF" in paragraph 5 of Anderson's offer could reasonably be interpreted to include both Anderson and his wife, Paula. *Id.* at 850-51.

On appeal, this Court acknowledged that the proposal clearly and consistently used the singular term "PLAINTIFF," defined as Troy Anderson in paragraph 2. *Id.* at 855. This Court also recognized that paragraph 3 indicated that each proposal was designed to settle "any and all claims of PLAINTIFF [Troy Anderson] against [RESPONDENT]," clearly delineating that the only parties to be affected by acceptance would be Troy Anderson and the designated Respondent. *Id.* This Court further noted that the offer made by Troy Anderson made no reference to Paula Anderson or her loss of consortium claim, "which Anderson was not obliged to address in his claim." *Id.* Paula Anderson had made

her own separate, nearly simultaneous offers to each of the Respondents. *Id.* This Court then held that

> [i]f a party receives two simultaneous offers from two separate parties, common sense dictates that the offeree should possess all the information necessary to determine whether to settle with one or both of the offerors. In reading the entirety of Anderson's proposals, the only reasonable interpretation is that Troy Anderson offered to settle only his claims with each Respondent in his offer.

Id. (emphasis omitted) (citation omitted). Thus this Court quashed the Fifth District's holding that Anderson's proposals for settlement were ambiguous. *Id.* at 858.

The Second District has also rejected arguments that similar settlement proposals were ambiguous and therefore unenforceable on the matter of attorney's fees. *See Miley v. Nash*, 171 So. 3d 145 (Fla. 2d DCA 2015); *Bright House Networks, LLC v. Cassidy*, 242 So. 3d 456 (Fla. 2d DCA 2018).

Miley involved an accident between Martha Nash and Kyle Miley in a car owned by his father, Glenn Miley. 171 So. 3d at 147. Martha filed a complaint against Kyle and Glenn seeking damages for her injuries; Garfield Nash, Martha's husband, also sought damages for loss of consortium. *Id.* Martha and Garfield Nash pursued their claims against Glenn Miley solely under a theory of vicarious liability. *Id.* Prior to trial, Kyle offered a settlement proposal to Martha in "an attempt to resolve all claims and causes of action resulting from the incident or accident giving rise to this lawsuit brought by Plaintiff Martha Nash against

Defendant Kyle Miley." *Id.* The proposal contained a condition that Martha dismiss her claims against both Kyle and Glenn, but did not address Garfield Nash's pending claim for loss of consortium, which was ultimately dropped prior to trial. *Id.* After Martha obtained a favorable jury verdict that was significantly less than the amount in Kyle's offer, the trial court denied Kyle's motion for attorney's fees for five reasons: the proposal (1) failed to specifically identify the claims to be resolved by it; (2) failed to address Garfield Nash's loss of consortium claim; (3) failed to state with particularity any relevant conditions; (4) failed to state the amount and terms attributable to each party; and (5) required dismissal of both Kyle and Glenn without attributing the payment owed. *Id.*

On appeal, the Second District reversed and concluded that the proposal complied with rule 1.442. *Id.* Although the district court acknowledged that the language in the terms "all claims" that "[gave] rise to the lawsuit" could have been more definite, it concluded that these terms were not so ambiguous as to prevent Martha Nash from making an informed decision about settling her claim. *Id.* at 148. The district court also held that the proposal did not need to address Garfield Nash's claim for loss of consortium, which was a separate and derivative claim. *Id.* at 148-49 ("Because the proposal explicitly stated that it was to cover all claims brought by Martha Nash, it was not deficient for failing to address the other pending claim in the lawsuit brought by an entirely different plaintiff."). The

district court also concluded that the particularity requirement had been satisfied and further held that apportionment with respect to Glenn Miley was not required because he was only alleged to be vicariously liable. *Id.* at 149 (citing Fla. R. Civ. P. 1.442). Thus the Second District reversed the trial court's order denying attorney's fees. *Id.* at 150.

In *Cassidy*, five members of the Cassidy family filed a one-count complaint for breach of contract against Bright House. 242 So. 3d 458. Bright House served one proposal for settlement on Albert B. Cassidy, who did not accept the proposal. *Id.* Bright House filed a motion for attorney's fees and costs after the trial court entered summary judgment in its favor. *Id.* The trial court denied Bright House's motion because paragraph 4 of the proposal stated that acceptance of the offer would dismiss "all claims" against Bright House. *Id.* The trial court found that paragraph 4 created ambiguity with regard to which claims were to be dismissed. *Id.* The Second District reversed, holding that the proposal did not contain a level of ambiguity that would "render Albert B. Cassidy unable to make an informed decision without needing clarification." *Id.* at 460.

> Albert B. Cassidy has no authority to cause the other plaintiffs' claims to be dismissed. It is clear that the Proposal was made only to Albert B. Cassidy and that the Proposal defines the claims to be resolved as those asserted in this action by Offeree (Albert B. Cassidy) against Offeror (Bright House).

Id. The district court held that, when read as a whole, there was no ambiguity within the proposal that would reasonably affect Albert B. Cassidy's decision. *Id.* Thus the district court reversed the trial court's order denying attorney's fees. *Id.*

The Fourth District Court of Appeal has likewise rejected similar attempts to inject ambiguity into otherwise sufficient proposals. *See Kiefer v. Sunset Beach Invs., LLC*, 207 So. 3d 1008 (Fla. 4th DCA 2017); *Costco Wholesale Corp. v. Llanio-Gonzalez*, 213 So. 3d 944 (Fla. 4th DCA 2017); *Alamo Fin., L.P. v. Mazoff*, 112 So. 3d 626 (Fla. 4th DCA 2013); *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc.*, 53 So. 3d 348 (Fla. 4th DCA 2011).

In *Kiefer*, Sunset Beach Investments, LLC (Sunset Beach), filed an action asserting claims of professional negligence against Kiefer, Kimley-Horn, and two licensed engineers. 207 So. 3d at 1009. While the case was pending, Kiefer served Sunset Beach a proposal for settlement that included a required release as a condition of the agreement. *Id.* Simultaneously, each of the other codefendants served separate proposals for settlement on Sunset Beach. *Id.* Sunset Beach did not accept any of the proposals. *Id.* Kiefer prevailed on a motion for summary judgment, obtained judgment in his favor as to the only claim asserted against him, and subsequently filed a motion for attorney's fees based upon the rejected proposal for settlement. *Id.* at 1009-10. The trial court denied Kiefer's motion after finding the release attached to the proposal for settlement to be ambiguous.

Id. at 1010. The trial court found ambiguity with the fact that, unlike each of the other paragraphs of the proposal for settlement and release, the fifth and sixth paragraphs of the release were not specifically limited to Kiefer and Sunset Beach. *Id.* The fifth paragraph in question stated that the release covered "any and all claims for attorney's fees, costs and premiums, as a result of the incident and matters set forth in the lawsuit." *Id.* The sixth paragraph stated that Sunset Beach would release all claims that related to the lawsuit. *Id.* On appeal, the Fourth District reversed and held that the settlement proposal was unambiguous. *Id.* at 1011. The district court held that, when read as a whole, the release related to Sunset Beach and Kiefer and not the other codefendants. *Id.* The district court relied on *Anderson* in holding the proposal for settlement was not ambiguous due to the fact that other claims remained and other parties were not mentioned. *Id.* at 1012. Thus the Fourth District reversed the trial court's order denying attorney's fees. *Id.*

In *Llanio-Gonzalez,* Costco Wholesale Corporation (Costco) served a proposal for settlement on Elaine Llanio-Gonzalez, who brought an action for her injuries in a slip and fall. 213 So. 3d at 945. Costco also served a proposal for settlement on Luis Gonzalez for his loss of consortium claim. *Id.* Each proposal included a required release as a condition of the agreement. *Id.* The attached releases provided that each plaintiff would release Costco and "all related,

associated or affiliated companies" from any and all claims. *Id.* The plaintiffs did not accept Costco's proposals for settlement and Costco ultimately prevailed on a motion for summary judgment. *Id.* at 946. Costco then moved for attorney's fees after obtaining judgment in its favor. *Id.* The trial court denied Costco's motion after finding the releases attached to the proposals for settlement to be ambiguous. *Id.* The trial court found ambiguity with the fact that each proposal for settlement contained narrow language offering to release only the defendant but the attached releases contained broader language releasing individuals and entities in addition to Costco. *Id.* On appeal, the Fourth District agreed with Costco that the proposals were unambiguous and were therefore enforceable. *Id.* at 947. The district court held that although the attached releases were more expansive, their effect was the same. *Id.* The district court held that the proposals for settlement and accompanying releases were sufficiently clear and definite to allow the plaintiffs to make an informed decision on whether to accept the proposals. *Id.* Thus the Fourth District reversed the trial court's order denying attorney's fees. *Id.*

Alamo Financing involved a motor vehicle accident between plaintiff, Matthew Mazoff, and defendant, Paola Alvarado-Fernandez; Alamo Financing owned the vehicle driven by Alvarado-Fernandez, while a separate entity, Alamo Rental (US), Inc., leased the vehicle to Alvarado-Fernandez. 112 So. 3d at 627. Mazoff sought damages from Alamo Financing and Alvarado-Fernandez, alleging

specifically that Alamo Financing was vicariously liable for Alvarado-Fernandez's negligence. *Id.* Alamo Financing proposed an offer of settlement to Mazoff that contained a condition that Mazoff would release Alamo Financing and "their parent corporations, subsidiaries, officers, directors, and employees" from any and all claims. *Id.* Mazoff subsequently moved to add Alamo Rental as a defendant after learning that Alamo Rental was the entity that leased the car. *Id.* at 628.

Alamo Financing unsuccessfully moved for attorney's fees after obtaining judgment in its favor. *Id.* On appeal, the Fourth District agreed with Alamo Financing that the proposal was not ambiguous and was therefore enforceable. *Id.* The district court rejected Mazoff's argument that the language "all Claims made in the present action by the party to whom this proposal is made including any claims that could be made against Defendant ALAMO FINANCING, L.P., which arise out of the same occurrence or event set forth in this action," could extinguish Mazoff's claims against Alvarado-Fernandez. *Id.* at 629-30. Specifically, the district court acknowledged that when read in isolation, this clause could suggest that Mazoff's separate claims against Alvarado-Fernandez may be affected by his acceptance of Alamo Financing's offer; nonetheless, the context of the entire offer indicated that Alamo Financing was the only offeror and the only party to be dismissed from suit upon Mazoff's acceptance. *Id.* at 630. The Fourth District similarly dispensed with Mazoff's suggestion that the proposal was unenforceably

ambiguous because it could have constituted a release of Alamo Rental, which was not a party to the lawsuit at the time the offer was made. *Id.* at 630-31.

In *Land & Sea Petroleum*, a seller made two separate proposals for settlement with the two different brokers with whom it was engaged in a contract dispute. 53 So. 3d at 351-52. Other than the name of the individual broker, the proposals were identical and indicated that they would resolve "any and all claims that could have been or should have been brought" by the individually named broker against the seller upon payment of $500. *Id.* at 352. Neither broker accepted its respective proposal. *Id.* The seller prevailed on a motion for summary judgment and subsequently moved for attorney's fees. *Id.* In response, the brokers contended that the proposals were ambiguous because they did not specify which side would pay the $500 and did not specify the claims that the proposals would settle. *Id.* The trial court ultimately denied the seller's motion for attorney's fees; on appeal, however, the Fourth District reversed. *Id.* at 352-53. The district court held that, because the only relationship that existed between the brokers and the seller arose from the brokerage contract, there were no other possible claims which could have existed between the parties either within or outside of the action. *Id.* at 353-54. The district court also held that it was apparent that the seller was offering to pay each of the brokers $500 in exchange for resolving the brokers' respective claims because the brokers were suing for a commission and the seller raised no

counterclaim. *Id.* at 353 ("The brokers' reliance on the fact that the seller did not expressly state that it would be the party paying the $500 seems to be the type of 'nit-picking' which the second district cautioned against in *Carey-All*.").

There can be no doubt this Court possesses discretion to exercise jurisdiction in this case. The dissent convolutes and misstates discretionary and subject-matter jurisdiction within the Florida Constitution. Jurisdiction exists where a decision of a district court expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. Art. V, § 3(b)(3), Fla. Const.; *see also Knowles v. State*, 848 So. 2d 1055, 1056 (Fla. 2003) (accepting jurisdiction based on conflict created by misapplication of decisional law); *Robertson v. State*, 829 So. 2d 901, 904 (Fla. 2002) (stating that misapplication of decisional law creates conflict jurisdiction); *Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986) (accepting jurisdiction based on conflict created by misapplication of decisional law). The decision below expressly and directly conflicts with this Court's decision in *Anderson* and the decisions of the Second and Fourth Districts in *Miley*, *Cassidy*, *Kiefer*, *Llanio-Gonzalez*, *Alamo Financing*, and *Land & Sea Petroleum*. In each of the *seven* conflict cases discussed, the point of law at issue was whether an offer by a single offeror to a single offeree was considered sufficiently clear and enforceable, although it did not address separate pending claims of other parties to the litigation. However, in the decision below the Fifth

District determined that such an offer was ambiguous and unenforceable because it could have possibly affected the unaddressed claims of the other codefendant. Therefore, we properly have jurisdiction on this matter and quash the decision below.[2]

The reading of Allen's offers as espoused by the Respondents and the Fifth District was unreasonable under these circumstances and in contravention of this Court's direction in *Nichols*. Each proposal clearly and consistently used the singular term "PLAINTIFF," which was defined as W. Riley Allen in paragraph 2. Moreover, paragraph 3 indicated that each proposal was designed to settle "any and all claims of PLAINTIFF against [RESPONDENT]," which by its clear terms suggested that the only parties to be affected by the proposal would be Allen and the designated Respondent. In reading the entirety of this proposal, the only reasonable interpretation is that Allen offered to settle his claims with only the Respondent specified in each respective proposal.

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2. Tellingly, the dissent states that this Court's jurisprudence "in this area of the law seems inconsistently applied and unpredictable," but "[e]ven if there are other cases . . . in conflict, I would not exercise jurisdiction." Dissenting op. at 27 note 3. However, the purpose of conflict review is the elimination of inconsistent views about the same question of law. *See* Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1231 (1994). Therefore it is paramount this Court exercise jurisdiction to eliminate any inconsistencies in this area of law. *See, e.g.*, *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985).

If two codefendants each receive a proposal for settlement, in which they are specifically named, each codefendant should possess all the information necessary to determine whether to settle. *See Nichols*, 932 So. 2d at 1079 ("[T]he settlement proposal [must] be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification."). In this context, it appears disingenuous to assert that there exists a legitimate question as to whether one codefendant's acceptance could have settled the offeror's claim against the other codefendant.

The Respondents' interpretation of the proposal for settlement ignores the well-established principle that "the intention of the parties must be determined from an examination of the entire contract and not from separate phrases or paragraphs." *Moore v. State Farm Mut. Auto. Ins. Co.*, 916 So. 2d 871, 875 (Fla. 2d DCA 2005). Thus, any potential ambiguity in paragraph 5 is resolved by examining the proposal for settlement as a whole.

Therefore, we conclude that the proposal was unambiguous for the purpose of determining Allen's entitlement to attorney's fees.

CONCLUSION

Reading the plain language of Allen's offers, we hold that these offers to settle his claims against the Respondents were unambiguous. The "nitpicking" of these offers by the district court below to find otherwise unnecessarily injected

ambiguity into these proceedings and created more judicial labor, not less. *Cf.* *Nichols*, 932 So. 2d at 1079. Furthermore, the plain language of both section 768.79 and Florida Rule of Civil Procedure 1.442 indicate that Allen's entitlement to attorney's fees was actualized after he submitted sufficient offers and obtained satisfactory judgments in his favor. Therefore, we quash the decision below and remand for further proceedings consistent with this opinion.

It is so ordered.

PARIENTE, QUINCE, and LABARGA, JJ., concur.
PARIENTE, J., concurs with an opinion.
POLSTON, J., dissents with an opinion, in which CANADY, C.J., and LAWSON, J., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., concurring.

I fully concur in the majority's conclusion that the proposal for settlement in this case was unambiguous, and thus enforceable. Majority op. at 22. I write separately to, once again, highlight the proliferation of litigation surrounding proposals to settle, which runs counter to the entire purpose of these proposals—to reduce litigation. In light of the exorbitant amount of litigation, I urge courts to focus on the goal of reducing litigation when reviewing a proposal for settlement. Additionally, because it is "impossible to eliminate all ambiguity," courts must remember that a proposal need only "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).

As the majority explains, proposals for settlement are governed by section 768.79, Florida Statutes (2017), and Florida Rule of Civil Procedure 1.442. Majority op. at 6. Under section 768.79, if a plaintiff serves a proposal for settlement, which the defendant does not accept "and the plaintiff recovers a judgment in an amount at least 25 percent greater" than the proposal, the plaintiff is entitled to recover reasonable costs and attorney's fees. § 768.79(1). The defendant can, likewise, recover reasonable costs and attorney's fees if the plaintiff fails to accept the defendant's proposal and "the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than" the defendant's proposal. *Id.* Rule 1.442 sets forth the procedure for serving proposals for settlement, the form these proposals should take, and the substance they should include.

This Court has explained that rule 1.442 "was implemented solely to encourage settlements in order to eliminate trials if possible." *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989); *see Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 981 (Fla. 1987). Despite the intended purpose of the rule, however, I have expressed concern as to "whether either the rule or the statute is fulfilling its intended purpose of encouraging settlement or at times is

having the opposite effect of increasing litigation." *Campbell v. Goldman*, 959 So. 2d 223, 227 (Fla. 2007) (Pariente, J., specially concurring); *see Lamb v. Matetzschk*, 906 So. 2d 1037, 1042-43 (Fla. 2005) (Pariente, C.J., specially concurring); *Sec. Prof'ls Inc. v. Segall*, 685 So. 2d 1381, 1384 (Fla. 4th DCA 1997).

In *Lamb*, the Court interpreted rule 1.442 "to require differentiated offers of judgment, regardless of whether the offer emanates from or is directed to joint parties who have a common interest." 906 So. 2d at 1042 (Pariente, C.J., specially concurring). Specifically, the Court "prohibit[ed] a joint offer by a plaintiff directed towards two defendants, one of whom [wa]s only vicariously liable for the acts of the other defendant." *Id.* at 1044 (Pariente, C.J., specially concurring). I questioned whether this approach would actually foster the primary goal of rule 1.442 to encourage settlements and reduce litigation, particularly in cases "where the liability of one defendant is based on vicarious liability and the issue of vicarious liability is undisputed." *Id.* (Pariente, C.J., specially concurring).

Likewise, in *Campbell*, I "reluctantly agree[d]" with the majority's conclusion that section 768.79 and rule 1.442 "require[d] that an offer of settlement cite the Florida law on which it is based." 959 So. 2d at 227 (Pariente, J., specially concurring). My reluctance stemmed from the fact that "there was no lack of clarity, uncertainty, or confusion" in the offer in *Campbell*, because

although the plaintiff's offer did not mention the statute, the offer did specify that it was made pursuant to rule 1.442. *Id.* (Pariente, J., specially concurring). Thus, it was a minor omission, not an actual ambiguity, that spawned an unnecessary amount of litigation.

This case presents another example of unnecessary litigation prompted by a clearly unambiguous proposal for settlement. As the majority explains, by "nitpicking" the precise wording of the proposals in this case, the district court "unnecessarily injected ambiguity into these proceedings and created more judicial labor, not less." Majority op. at 22-23. Rather than comb through the terms of a proposal in search of ambiguity, I again urge courts to refrain "from 'nitpicking,' " and find a proposal unenforceable only when there is a *reasonable* ambiguity as to its meaning. *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 853 (Fla. 2016) (quoting *Carey-All Transp., Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008)).

POLSTON, J., dissenting.

Because the Fifth District's decision in *Nunez v. Allen*, 194 So. 3d 554, 556 (Fla. 5th DCA 2016), does not expressly and directly conflict with the decisions

argued by the Petitioner during jurisdictional briefing, this Court does not have the constitutional authority to review this case.[3] Accordingly, I respectfully dissent.

Specifically, this case is distinguishable from *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846 (Fla. 2016). In *Anderson*, 202 So. 3d at 849, 854-55, this Court considered whether the term "Plaintiff" in separate proposals for settlement from two different plaintiffs to multiple defendants could reasonably be construed to include both plaintiffs. This Court held that the proposals for settlement were unambiguous as they were clearly only intended to settle the claims of the individual plaintiff named in the proposals. *Id.* In contrast, in this case, there was only one plaintiff who sent two proposals for settlement to two different defendants, a father and son. *Nunez*, 194 So. 3d at 556. The Fifth District determined that the proposals for settlement were ambiguous because it was unclear whether the language "all damages claimed by the Plaintiff" (where both defendants were coextensively liable for all of the alleged damages) meant that payment of the delineated amount (which was the same figure in both proposals) would settle the case as to one or both of the defendants. *Id.* at 558. Therefore, because there was only one plaintiff in *Nunez* rather than the two plaintiffs

3. In my view, our jurisprudence in this area of the law seems inconsistently applied and unpredictable. Even if there are other cases cited by the majority (not argued by the Petitioner) that are in conflict, I would not exercise jurisdiction.

involved in *Anderson*, and because different clauses were analyzed, *Nunez* and *Anderson* do not conflict.

Additionally, *Nunez* is not in conflict with *Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 3d 391 (Fla. 2016). In *Kuhajda*, 202 So. 3d at 395, this Court considered whether an offer for settlement must meet a requirement stated in Florida Rule of Civil Procedure 1.442 that is not listed in section 768.79, Florida Statutes. This Court in *Kuhajda*, 202 So. 3d at 395, also considered whether "the failure to include the attorney's fees language in the offer of judgment" created ambiguity when attorney's fees were not sought in the pleadings. Therefore, because *Kuhajda* addressed different issues of law than *Nunez*, the decisions do not conflict.

Accordingly, because there is no express and direct conflict between *Nunez* and the decisions argued by the parties during jurisdictional briefing, this Court does not have the authority to review this case. I respectfully dissent.

CANADY, C.J., and LAWSON, J., concur.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Fifth District - Case No. 5D14-4386

(Orange County)

W. Riley Allen of Riley Allen Law, Orlando, Florida; and Thomas D. Hall of The Mills Firm, P.A., Tallahassee, Florida,

for Petitioner

Elizabeth C. Wheeler of Elizabeth C. Wheeler, P.A., Orlando, Florida,

for Respondents

Supreme Court of Florida

No. SC17-1510

**THE FLORIDA BAR RE: ADVISORY OPINION—
SHORE v. WALL, et al.**

October 4, 2018

PER CURIAM.

James Wall filed with the Standing Committee on the Unlicensed Practice of Law (Standing Committee) a request for issuance of an advisory opinion pursuant to the procedures set forth in Rule Regulating the Florida Bar 10-9.1 and this Court's opinion in *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905 (Fla. 2010). In the request, Wall alleged that Jeffrey Paine and his company, Jupiter Asset Recovery, LLC (collectively "JAR"), engaged in the unlicensed practice of law in connection with JAR's attempt to recover surplus funds from the Manatee County Clerk of Court's registry on Wall's behalf. The Standing Committee held a public hearing where it considered live and written testimony, *see* Rule Regulating the Florida Bar 10-9.1(f), and ultimately filed with this Court a

proposed advisory opinion concluding that JAR's conduct, as alleged by Wall and if taken as true, would constitute the unlicensed practice of law.[1]

After the Standing Committee's proposed advisory opinion was filed, interested parties were permitted to file briefs in support of or in opposition to the proposed advisory opinion. *See* R. Regulating Fla. Bar 10-9.1(g)(3). JAR and Global Discoveries, Ltd., filed briefs in opposition to the proposed advisory opinion; the Standing Committee filed a response to the briefs. After considering the proposed opinion and the briefs of the interested parties, the Court approves the proposed advisory opinion as set forth in the appendix to this opinion.[2]

It is so ordered.

PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA and LAWSON, JJ., concur.
CANADY, C.J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

CANADY, C.J., dissenting.

I adhere to the view that "the Florida Constitution gives this Court no

1. We have jurisdiction. *See* art. V, § 15, Fla. Const.; R. Regulating Fla. Bar 10-9.1(g).

2. References in the Appendix to TABS A, B, and C, are to the attachments to the proposed advisory opinion originally filed by the Standing Committee in this case on August 15, 2017.

authority to issue" the advisory opinions regarding pending litigation contemplated by rule 10-9.1. *Fla. Bar re Advisory Op.—Scharrer v. Fundamental Admin. Servs.*, 176 So. 3d 1273, 1279 (Fla. 2015) (Canady, J., dissenting). I therefore would dismiss this proceeding.

Original Proceeding – The Florida Bar Re: Advisory Opinion

Kellie D. Scott, Chair, Jeffrey T. Picker, and William A. Spillias, Standing Committee on Unlicensed Practice of Law, Tallahassee, Florida,

for Petitioner

Kevin P. Tynan of Richardson & Tynan, P.L.C., on behalf of Jupiter Asset Recovery, LLC and Jeffrey Paine, Tamarac, Florida; Amy L. Dilday, Starlett M. Massey, and Jonathan D. Kaplan of McCumber, Daniels, Buntz, Hartig, Puig, & Ross, P.A., on behalf of Global Discoveries, Ltd., Tampa, Florida,

Responding

APPENDIX

THE FLORIDA BAR
STANDING COMMITTEE ON THE
UNLICENSED PRACTICE OF LAW

FAO #2017-1, *SHORE V. WALL, ET. AL.*
_____/

PROPOSED ADVISORY OPINION

August 15, 2017

INTRODUCTION

This request for a formal advisory opinion is brought pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar and *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905 (Fla. 2010); (TAB A).[1] The Petitioner, James Wall (hereinafter, "Wall"), is a defendant in an interpleader action filed by the Clerk of the Circuit Court of Manatee County (Case No. 2014 CA 3155). In Wall's Answer to Complaint For Interpleader and Objection and Defenses to Jupiter Asset Recovery, LLC's Claim to Surplus Funds, he asserted that Jupiter Asset Recovery, LLC (hereinafter, "JAR") engaged in the unlicensed practice of law. The Circuit Court, citing *Goldberg*, found that it did not have jurisdiction over the unlicensed practice of law claim and stayed the case pending a determination by the Supreme Court of Florida whether JAR's conduct constitutes the unlicensed practice of law (TAB A, p. 23).

Pursuant to Rule 10-9.1(f) of the Rules Regulating The Florida Bar, public notice of the hearing was provided on The Florida Bar's website, in The Florida

[1] Petitioner filed an unlicensed practice of law complaint/request for formal advisory opinion, which was originally investigated by the local circuit committee under Rules 10-5 and 10-6 of the R. Regulating Fla. Bar. Finding that respondent, Jeffrey Paine, and his company, Jupiter Asset Recovery, LLC, engaged in the unlicensed practice of law, the circuit committee offered respondent a cease and desist affidavit, which he refused to sign. Because there is no Florida case law on point, the local circuit committee closed its investigation and forwarded the request for formal advisory opinion to the Standing Committee on the Unlicensed Practice of Law (hereinafter, "Standing Committee").

Bar *News*, and in the *Orlando Sentinel*. The Standing Committee held a public hearing on January 26, 2017. Testifying on behalf of the petitioner were attorneys Ryan J. Hittel and Christopher M. Hittel. Testifying on behalf of JAR was attorney Kevin Tynan and Jeffrey Paine (hereinafter, "Paine"). Also testifying were attorneys Starlett Massey and Jonathan D. Kaplan (Tab B). In addition to the testimony presented at the hearing, the Standing Committee received written testimony from the Petitioners and JAR/Paine which has been filed with this Court (Tab C).

The question presented for consideration by the Standing Committee is whether a nonlawyer company is engaged in the unlicensed practice of law when it holds itself out as having special knowledge on how to recover excess proceeds from a tax deed sale held by the Clerk of Court under Chapter 197, Fla. Stat.; identifies and contacts owners of excess tax deed sale proceeds for the purpose of offering to recover the excess proceeds on their behalf from the Clerk of Court; offers the owners of excess proceeds a contingency arrangement using a purported assignment modified by an agreement to share the excess proceeds upon recovery, with the owner retaining a 60% interest in the excess proceeds; requests from the Clerk of Court the surplus funds based on the purported assignment; and files pleadings in interpleader actions to recover the surplus funds.

GOLDBERG V. MERRILL LYNCH CREDIT CORP.

In *Goldberg*, the petitioners filed class action lawsuits to recover document preparation fees charged by respondent Merrill Lynch for services performed by its clerical personnel in processing mortgage loans. Merrill Lynch moved to dismiss the complaints, arguing, among other things, that the circuit court lacked jurisdiction to hear any claims relating to the unlicensed practice of law. The circuit court granted the motions and dismissed the cases. The Fourth District Court of Appeal affirmed the dismissals because the respondents had not previously been prosecuted for the unlicensed practice of law by The Florida Bar or disciplined by this Court. This Court approved the Fourth District's decision to affirm the dismissals finding that:

> To state a cause of action for damages under any legal theory that arises from the unauthorized practice of law, we hold that the pleading must state that this Court has ruled that the specified conduct at issue constitutes the unauthorized practice of law. (citation omitted) Stated another way, a claimant must allege as an essential element of any cause of action premised on the unlicensed practice of law that this Court has ruled the activities are the unauthorized practice of law. (citations omitted)
>
> * * *
>
> [A] plaintiff will not be able to state a cause of action premised on the unauthorized practice of law on a case of first impression (where this Court has not ruled on the actions at issue). In those cases, the pleading may be dismissed without prejudice or the action may be stayed

> until a determination from this Court pursuant to the advisory opinion procedures of rule 10-9.1 or the complaint and injunctive relief procedures of rules 10-5, 10-6, and 10-7 of the Rules Regulating The Florida Bar. (citations omitted)

Goldberg at 907-8.

In staying the Manatee County interpleader action at issue here, the circuit court cited to *Goldberg*, and noted that the Supreme Court of Florida has exclusive jurisdiction to determine the issue of unlicensed practice of law (TAB A, p. 23).

RULE 10-9.1 OF THE RULES REGULATING THE FLORIDA BAR

In *Goldberg*, this Court recognized that rule 10-9.1(c) of the Rules Regulating The Florida Bar prevents a proposed formal advisory opinion from being issued "with respect to any case or controversy pending in any court or tribunal in this jurisdiction" thereby prohibiting the Standing Committee from issuing a proposed formal advisory opinion while the underlying action is stayed or dismissed without prejudice. The Court, therefore, suspended the rule in the circumstances described in *Goldberg* and directed The Florida Bar to propose a rule change according to the opinion. Subsequently, rule 10-9.1 was amended to add language to provide that "the [Standing Committee] shall issue a formal advisory opinion under circumstances described by the court in *Harold Goldberg v. Merrill Lynch Credit Corporation*, 35 So. 3d 905 (Fla. 2010) when the petitioner is a party to a lawsuit and that suit has been stayed or voluntarily dismissed without

prejudice." The Court, sua sponte, amended rule 10-9.1(c) in *In re: Amendments to Rule Regulating The Florida Bar 10-9.1*, 176 So. 3d 1273 (Mem) (Fla. 2015).[2] Consequently, if a proper *Goldberg* request is brought, a proposed advisory opinion must be issued.[3]

Because this is a case of first impression, and the circuit court stayed the action pending a determination from this Court, this was a proper *Goldberg* request. A public hearing was held on January 26, 2017, after which the Standing Committee voted to issue the proposed formal advisory opinion that follows.

FACTS

The factual allegations relating to Wall's claim that JAR engaged in the unlicensed practice of law are contained in paragraphs numbered 15 – 47 of Defendant, James M. Wall's Answer to Complaint for Interpleader and Objection and Defenses to Jupiter Asset Recovery, LLC's Claim to Surplus Funds (TAB A, pp. 12 – 17), Mr. Wall's April 15, 2015 statement accompanying his unlicensed practice of law complaint (TAB A, pp. 3 – 4), and the January 13, 2017, Statement of Petitioner, James M. Wall, For Hearing on Request for *Goldberg* Advisory

[2] Consistent with *Goldberg*, the amendment deleted the requirement for a "voluntary" dismissal.

[3] Footnote 3 of *Goldberg* provides "To be clear, the Florida Bar shall issue a formal advisory opinion upon request of a party in the circumstances described herein." 35 So. 3d at 908.

Opinion (TAB C, pp. 2 – 17). Wall alleged the following operative facts which are summarized in relevant part as follows:

1. Paine/JAR contacted Wall regarding a tax deed surplus being held in the court's registry after a tax deed sale of Wall's property. (TAB A, p. 3 and p. 12, paragraph 15)

2. Paine convinced Wall to hire JAR/Paine to recover the surplus funds on his behalf (TAB A, p. 12, paragraph 16). Wall assumed he was dealing with a licensed attorney (TAB C, p. 3, paragraph 6).

3. Paine sent a notary to Wall's business with two documents to sign, an "Agreement" (TAB A, p. 5) and an "Absolute Assignment of Interest in Tax Deed Surplus Proceeds" (TAB A, p. 6). Wall signed both documents. (TAB A, p. 13, paragraphs 17 and 19)

4. Wall believed at the time he signed the Agreement and Absolute Assignment that Paine was agreeing to represent him. (TAB A, p. 4)

5. The Agreement attempts to allow JAR to file documents to recover the tax deed surplus on Wall's behalf, with 60% of the proceeds going to Wall and the remainder (minus any costs) going to JAR. (TAB A, p. 13, paragraph 18)

6. Under the Agreement, Wall purports to transfer his interest in the surplus funds to JAR so that JAR can "file all necessary documents in order to recover any

and all monies available as a result of the tax deed sale." (TAB A, p. 15, paragraph 33)

7. The Agreement also states that JAR shall "make every effort to obtain any available funds through the Clerk of Court." (TAB A, p. 15, paragraph 34)

8. The essence of the Agreement is clear, JAR will file the necessary court documents to obtain payment from the Clerk of Court on a contingency basis, for a 40% fee (which would amount to a fee near $94,000). (TAB A, p. 16, paragraph 35)

9. Because JAR is not a law firm, and Paine is not an attorney, the only way JAR could file documents with the court on Wall's behalf was to come before the court as a straw-man assignee. (TAB A, p. 16, paragraph 36)

10. JAR did not disclose the Agreement when filing his proof of claim with the Clerk of Court to recover the surplus tax deed funds nor did it disclose the Agreement to the court in the interpleader action so that it would not be apparent on the face of its claim that it was representing another party. (TAB A, p. 16, paragraph 37, and TAB A, pp. 7 – 9)

11. Even though Wall signed the Absolute Assignment and Agreement he understood that JAR/Paine would receive 40% of all funds recovered in return for their work to recover the funds. (TAB A, p. 3)

12. At the time Wall signed the Absolute Assignment and Agreement, liens on the property held by the IRS and Manatee County Code Enforcement exceeded the amount of the surplus. (TAB A, p. 13, paragraph 20)

13. After the tax deed sale, the IRS lien was paid in full at the closing of the sale of another property Wall owned, and the Manatee County Code Enforcement lien was substantially reduced. The payment of the IRS lien and the reduction in the code enforcement fine resulted in the surplus funds available to the owner increasing from $0 to approximately $235,000. (TAB A, p. 13, paragraphs 21 – 23)

14. JAR seeks to recover 40% of this $235,000. (TAB A, p. 13, paragraph 24)

15. Paine drafted a letter for Wall's signature to the attorney for the Clerk of Court in the interpleader action (TAB A, p. 10). The letter, which Wall did not sign, includes the following language: "I understand that Jupiter has filed an Answer and Cross Claim in this matter which protects my interest in these funds[]" and "Please consider this letter as notice that I shall not file a responsive pleading in this case and I consent to a default against me in this case." (TAB A, p.10 and p. 16, paragraphs 38 – 40)

DISCUSSION

As this Court noted in *The Florida Bar re: Advisory Opinion – Scharrer v. Fundamental Administrative Services*, 176 So. 3d 1273, 1278 (Fla. 2015), it is not the Standing Committee's role to sit as the trier of facts or to decide disputed facts:

> Although we recognize that the Standing Committee does not sit as a trier of fact, and it is not the Committee's role to decide disputed issues of fact, our decision in Goldberg does authorize the Standing Committee to determine whether the specific facts as alleged in a petition for an advisory opinion, if those facts are taken as true, would constitute the unlicensed or unauthorized practice of law.

Thus, in reviewing the alleged facts the Standing Committee takes as true those facts, and applies existing case law to the facts to determine whether the activity in question constitutes the unlicensed practice of law.

Essentially, Wall alleged that JAR/Paine: (1) held himself out as an attorney and as having special knowledge on how to recover excess proceeds from a tax deed sale, (2) represented him in the interpleader action, and (3) prepared legal documents for him which affected his important legal rights.

Holding Out

Allegations regarding Paine holding himself out as an attorney are contained within paragraphs 2 and 4 above, and paragraph 43 of Wall's Interpleader Answer (TAB A, p. 17), which states that:

> Mr. Paine also holds himself out to be an attorney on his website, despite not being licensed to practice law in Florida. See Composite Exhibit 'E', attached (Google

search showing title of jupiterassetrecovery.com to be "Jupiter Asset Recovery | Jeffrey Paine Attorney"; Source code of jupiterassetrecovery.com containing the page title "Jupiter Asset Recovery | Jeffrey Paine Attorney".)

Taken as true, these allegations raise unlicensed practice of law concerns because it constitutes the unlicensed practice of law for nonlawyers to hold themselves out as lawyers. *The Florida Bar v. Warren*, 655 So. 2d 1131 (Fla. 1995). As this Court found in *The Florida Bar v. Gordon*, 661 So. 2d 295 (Fla. 1995), it constitutes the unlicensed practice of law for nonlawyers to "impliedly or expressly, personally or by use of advertisement, hold[] themselves out as lawyers and authorized to practice law in Florida and describing themselves as lawyers, attorneys, attorneys at law, esquire, counselor, counsel, or any other title that is designed to lead a member of the public into believing that respondents are licensed to practice law in Florida and able to render assistance with legal matters."

By contacting owners of excess tax deed sale proceeds for the purpose of offering to recover the excess proceeds on their behalf from the Clerk of Court, JAR/Paine is implicitly holding out as having special knowledge on how to recover the excess proceeds. This raises unlicensed practice of law concerns because it constitutes the unlicensed practice of law for a nonlawyer to hold himself out as having special knowledge or expertise in legal areas. *The Florida Bar v. Davide*, 702 So. 2d 184 (Fla. 1997) (nonlawyer engaged in unlicensed practice of law and

enjoined from advertising that his or her company specializes in legal areas or that gives the public the expectation that the company has expertise in the field of law, and that describes legal procedures).

Representation in Interpleader Action

The gravamen of the allegations in paragraphs 3 – 15 above are that JAR/Paine had Wall execute both an Absolute Assignment and an Agreement to assist Wall in obtaining the tax deed surplus from the Clerk and the court. However, JAR/Paine only filed the Absolute Assignment with the Clerk and the court in the interpleader action, so that it would appear to the Clerk and court that Wall assigned his interest in the tax deed surplus to JAR/Paine. The Absolute Assignment provides "This Agreement is complete, in and of itself, representing the entire agreement between all Parties hereto[.]" However, the Agreement, executed contemporaneously with the Absolute Assignment, indicates that there was not an absolute or complete assignment. The Agreement, which mandates that JAR make every effort to obtain the surplus funds, provides that Wall will receive 60% of the surplus funds recovered by JAR. The remaining 40% would go to JAR. The effect of this Agreement, which was not disclosed to the Clerk or the court, is that any action that JAR took with the Clerk or the court in the interpleader action to obtain the tax deed surplus it took not only on its own behalf, but on behalf of Wall as well. Before Wall filed his Answer in the interpleader

action, JAR/Paine prepared and sent him a letter to sign and send to the Clerk's attorney, wherein Wall asserts his understanding that JAR filed an Answer and Cross Claim which protects his interest in the surplus funds and that he would not be filing a responsive pleading in the interpleader case and that he consents to a default judgment against him. Wall did not sign this letter.

Taken as true, the allegations in paragraphs 3 – 15 above raise unlicensed practice of law concerns because it constitutes the unlicensed practice of law for a nonlawyer to represent another in court. As this Court stated, axiomatically, "It is generally understood that the performance of services in representing another before the courts is the practice of law."[4] *See The Florida Bar v. Smania*, 701 So. 2d 835 (Fla. 1997) (nonlawyer enjoined from appearing in court on behalf of others other than as a witness); *The Florida Bar v. Eubanks*, 752 So. 2d 540 (Fla. 1999) (nonlawyer engaged in unlicensed practice of law and enjoined from appearing in any Florida court, directly or indirectly, as a spokesperson or representative for litigants in any court proceeding); *The Florida Bar v. Snapp*, 472 So. 2d 459 (Fla. 1985) (nonlawyer engaged in unlicensed practice of law and enjoined from representing an individual other than himself in court proceedings); *The Florida Bar v. Strickland*, 468 So. 2d 983 (Fla. 1985) (nonlawyer engaged in

[4] *The Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *judg. vacated on other grounds*, 373 U.S. 379 (1963).

the unlicensed practice of law and enjoined from appearing in Florida courts on behalf of a party in family law matters); *The Florida Bar v. Rich*, 481 So. 2d 1221 (Fla. 1986) (nonlawyer engaged in unlicensed practice of law and enjoined from representing others in court in eviction and criminal matters).

Here, JAR/Paine was representing Wall because Wall still had an interest in the litigation. This was not a situation where Wall signed over all of his interests in the proceeds of the sale to JAR/Paine so that JAR/Paine became the party to the action. Instead, JAR/Paine offered Wall a contingency fee agreement where Wall retained an interest in the proceeds of the sale as he stood to gain 60% from any recovery. Wall was, therefore, a party to the action and was being represented by JAR. By so representing Wall, JAR/Paine engaged in the unlicensed practice of law.

Preparation of Documents Affecting Legal Rights

Taken as true, the allegations in paragraphs 9 and 15 above raise unlicensed practice of law concerns because it constitutes the unlicensed practice of law for a nonlawyer to prepare a document for another which affects their important legal rights. *The Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *judg. vacated on other grounds*, 373 U.S. 379 (1963); *The Florida Bar v. Gordon*, 661 So. 2d 295 (Fla. 1995) (nonlawyer engaged in unlicensed practice of law and enjoined from allowing members of the public to rely on respondents to properly prepare

legal forms or legal documents affecting an individual's legal rights); *The Florida Bar v. Eidson*, 703 So. 2d 442 (Fla. 1997) (nonlawyer enjoined from preparing and filing legal documents on behalf of another); *The Florida Bar v. Williams*, 388 So. 2d 564 (Fla. 1980) (nonlawyer enjoined from assisting customers in preparing documents or forms necessary for submission to any court or governmental agency); *The Florida Bar v. Miravalle*, 761 So. 2d 1049, 1051 (Fla. 2000) ("This Court has repeatedly held that the preparation of legal documents by a nonlawyer for another person to a greater extent than typing or writing information provided by the customer on a form constitutes the unlicensed practice of law." (citations omitted)). Both the letter to the Clerk's attorney consenting to a default judgment and the answer filed by JAR/Paine in the interpleader action would certainly affect Mr. Wall's important legal rights by requesting from the Clerk of Court surplus funds.

Further, taken as true, the above allegations raise unlicensed practice of law concerns to the extent Wall relied on JAR/Paine to file with the Clerk and court the necessary documents to obtain the surplus tax deed funds. As this Court noted in *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1193-4 (Fla. 1978), "it is clear that her clients placed some reliance upon her to properly prepare the necessary legal forms for their dissolution proceedings. To this extent we believe that Ms. Brumbaugh overstepped proper bounds and engaged in the unauthorized practice

of law." *See also The Florida Bar v. Williams*, 388 So. 2d 564 (Fla. 1980) (nonlawyer enjoined from allowing members of the public to rely on her to properly prepare legal forms or legal documents affecting a customer's legal rights).

PUBLIC HARM

Separate from the unlicensed practice of law issue, the Standing Committee was also concerned that JAR/Paine's business model of only filing the Absolute Assignment with the Clerk and court, and not also disclosing the contemporaneously executed Agreement, when attempting to recover the tax deed surplus was, at a minimum, misleading, and perhaps, a fraud on the court, because the true relationship between JAR/Paine and its customers is not disclosed to the Clerk and court. Without knowledge of the Agreement, the court would have no way of knowing about the unlicensed practice of law occurring before it. If an attorney filed misleading documents with a court that hid his or her true relationship with the client, the attorney would be subject to discipline for lack of candor toward the tribunal. Just as lawyers must avoid conduct that undermines the integrity of the adjudicative process, this Court must ensure that nonlawyers do not undermine the integrity of the adjudicative process. As this Court noted in *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980), "the single most important

concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation."

The Standing Committee had similar concerns about the language in the Absolute Assignment, which provides that "This Agreement is complete, in and of itself, representing the entire agreement between all Parties hereto." The statement was patently false. The Absolute Assignment did not represent the entire agreement between JAR/Paine and Wall; there was also the contemporaneously executed Agreement between the parties. It was this Agreement which resulted in JAR/Paine's improper representation of Wall before the Clerk and the court in the interpleader action. The Standing Committee felt that this patently false language in the Absolute Assignment was, at a minimum, misleading, and perhaps a fraud on the court, and warrants the public's protection by this Court.

CONCLUSION

It is the opinion of the Standing Committee on the Unlicensed Practice of Law that a nonlawyer company is engaged in the unlicensed practice of law when it holds itself out as having special knowledge on how to recover excess proceeds from a tax deed sale held by the Clerk of Court under Chapter 197, Fla. Stat.; identifies and contacts owners of excess tax deed sale proceeds for the purpose of offering to recover the excess proceeds on their behalf from the Clerk of Court; offers the owners of excess proceeds a contingency arrangement using a purported

assignment modified by an agreement to share the excess proceeds upon recovery, with the owner retaining a 60% interest in the excess proceeds; requests from the Clerk of Court the surplus funds based on the purported assignment; and files pleadings in interpleader actions to recover the surplus funds.

The Standing Committee is not sitting as the trier of fact in this matter. Should this Court adopt the Standing Committee's proposed formal advisory opinion, it would establish the precedent required by *Goldberg* and be the standard to be applied by the trier of fact in ultimately deciding whether the defendants engaged in the unlicensed practice of law.

Respectfully Submitted,

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Third District Court of Appeal

State of Florida

Opinion filed October 3, 2018.
This Opinion is not final until disposition of any further motion for rehearing and/or motion for rehearing en banc. Any previously-filed motion for rehearing en banc is deemed moot.

No. 3D15-1594
Lower Tribunal No. 09-1214-K

Atlantic Civil, Inc., etc.,
Appellant,

vs.

Edwin O. Swift, III, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Monroe County, Timothy J. Koenig, Judge.

Shubin & Bass, P.A., and Jeffrey S. Bass and Katherine R. Maxwell; Hershoff, Lupino & Yagel, LLP, and James S. Lupino, for appellant.

Cole Scott & Kissane, P.A., and Kathryn L. Ender, for appellees.

Before ROTHENBERG, C.J.,[1] and SUAREZ and LAGOA, JJ.

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[1] Chief Judge Rothenberg did not participate in oral argument, but participated in the decision.

LAGOA, J.

ON MOTION FOR REHEARING

Appellees, Edwin O. Swift, III ("Swift") and Key Haven Estates, LLC ("Key Haven"), move for rehearing of this Court's opinion, Atlantic Civil, Inc., v. Swift, 42 Fla. L. Weekly D516 (Fla. 3d DCA Mar. 1, 2017). Upon consideration of the motion for rehearing and Appellant Atlantic Civil, Inc.'s ("Atlantic Civil") response, we grant the motion for rehearing, withdraw our prior opinion, and substitute the following opinion it its place.[2]

Atlantic Civil appeals the denial of its second renewed motion for attorneys' fees based upon a Proposal for Settlement (the "Proposal") served pursuant to the offer of judgment statute, section 768.79, Florida Statues (2010), and Florida Rule of Civil Procedure 1.442. We hold that the Proposal was invalid under Attorneys' Title Insurance Fund, Inc. v. Gorka, 36 So. 3d 646 (Fla. 2010), and affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In 2008, Atlantic Civil entered into a contract with the Florida Department of Transportation that required it to excavate fill material along a section of highway located in Monroe County. Atlantic Civil temporarily stored the fill material on land owned by Key Haven. Swift is the managing member of Key

[2] In the same motion, the appellees also moved for certification of conflict to the Supreme Court of Florida. That aspect of the motion is denied.

Haven. A dispute arose concerning ownership of the fill material, and as a result, Atlantic Civil filed suit against Swift, individually, and Key Haven. The operative complaint alleged a count for conversion against Swift and Key Haven (Count I), a count for unjust enrichment against Key Haven (Count II), and a count for tortious interference against Swift and Key Haven (Count III).

On February 4, 2010, Atlantic Civil served the Proposal on Swift and Key Haven pursuant to section 768.79, Florida Statutes, and rule 1.442. The Proposal provided, in relevant part, as follows:

PROPOSAL FOR SETTLEMENT

> Plaintiff Atlantic Civil, Inc. ("ACI"), by and through undersigned counsel and pursuant to Section 768.79, Florida Statutes and Rule 1.442, Florida Rules of Civil Procedure, makes the following proposal for settlement to defendants Edwin O. Swift, III ("Swift") and Key Haven Estates, LLC ("Key Haven") (collectively, "Defendants"), the terms of which are as follows.
>
> 1. Nature of Resolved Claims. ACI proposes to resolve all claims brought by ACI against Defendants in the above-captioned action . . . .
>
> 2. Amount of Proposal. . . . ACI proposes that Defendants pay ACI the total amount of FIFTY THOUSAND DOLLARS ($50,000.00) apportioned as follows: from Swift to ACI, the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000), and from Key Haven to ACI, the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), in full and complete settlement of the claims identified in paragraph (1) above.

> 3. Proposal Inclusive of Attorney's Fees. The total amount of FIFTY THOUSAND DOLLARS ($50,000.00) demanded in paragraph (2) above includes attorney's fees and costs.
>
> * * *
>
> 5. Nonmonetary or Other Conditions. This proposal is conditioned on the mutual exchange of general releases (attached hereto as Exhibits A and B) as described in this paragraph. ACI will dismiss this action with prejudice and execute a general release, in favor of Defendants, of the claims identified in paragraph (1) above. Likewise, Defendants will execute a general release, in favor of ACI, of all counterclaims arising from or connected to this action which, if not asserted herein, would be barred by final judgment in this matter.
>
> 6. Acceptance or Rejection of Proposal. This proposal shall be deemed rejected unless Defendants accept it by delivering written notice of acceptance to ACI within thirty (30) days . . . . If Defendants do not timely accept this proposal, Swift and/or Key Haven may be liable for reasonable attorney's fees and costs incurred by ACI from the date of filing this proposal pursuant to Section 768.79, Florida Statutes.

The Proposal was not accepted, and the matter proceeded to a bench trial.

The trial court found Swift and Key Haven not liable on all counts and entered final judgment in their favor. Atlantic Civil appealed the final judgment to this Court in Atlantic Civil, Inc. v. Swift, 118 So. 3d 271 (Fla. 3d DCA 2013). This Court affirmed in part and reversed in part, finding that Atlantic Civil established its claim for conversion as a matter of law, and remanded for entry of a judgment in favor of Atlantic Civil. Id. at 271. On remand, the trial court entered

an amended final judgment in favor of Atlantic Civil and against Swift and Key Haven, jointly and severally, in the amount of $86,108.51.

Atlantic Civil moved for attorneys' fees based on the Proposal. In its second renewed motion for attorneys' fees, Atlantic Civil argued that "[b]ecause the Final Judgment for [Atlantic Civil] is greater than $62,500, which amount is 25 percent greater than the Proposal for Settlement the Defendants rejected, [Atlantic Civil] is entitled to recover the attorneys' fees and costs it incurred from February 4, 2010, the date of the Proposal for Settlement," pursuant to section 768.79.[3] Swift and Key Haven filed a memorandum in opposition to Atlantic Civil's motion for attorneys' fees, arguing that the Proposal was invalid because, among other reasons, it was conditioned on both Swift and Key Haven accepting the Proposal, and thereby deprived each defendant of independent control of his or its decision to settle. The trial court conducted a hearing on the motion and made an oral finding that the language of the proposal "defeats the required opportunity to independently evaluate and settle the claim." The trial court entered an order

[3] Section 768.79 states in relevant part:

> If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

§ 768.79(1), Fla. Stat. (2010).

denying Atlantic Civil's second renewed motion for attorneys' fees, finding "for the reasons stated on the record, that the Plaintiff's Proposal for Settlement fails to satisfy the particularity requirement of Rule 1.442 of the Florida Rules of Civil Procedure and is ambiguous." This appeal followed.

II. 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." Pratt v. Weiss, 161 So. 3d 1268, 1271 (Fla. 2015); see also Key W. Seaside, LLC v. Certified Lower Keys Plumbing, Inc., 208 So. 3d 718, 720 n.1 (Fla. 3d DCA 2015) ("This Court reviews de novo a trial court's ruling on a motion to award attorney's fees and costs pursuant to the offer of judgment statute and rule.").

III. ANALYSIS

Florida courts are required to strictly construe the provisions of the offer of judgment statute, section 768.79, and rule 1.442, which implements section 768.79. Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003); see, e.g., Audiffred v. Arnold, 161 So. 3d 1274, 1279 (Fla. 2015) (applying "the required strict construction of the rule and the statute" in finding that the offer, which would have resolved all pending claims by two plaintiffs against one defendant, must be treated as a joint proposal). This is so because the statute and rule "are in derogation of the common law rule that each party should pay its own

fees." Kuhajda v. Borden Dairy Co. of Ala., LLC., 202 So. 3d 391, 394 (Fla. 2016); see also Pratt, 161 So. 3d at 1271 ("This Court has held that subdivision (c)(3) of rule 1.442, which requires a joint proposal to state the amount and terms attributable to each offeror or offeree, must be strictly construed because it, as well as the offer of judgment statute, is in derogation of the common law rule that each party is responsible for its own fees.").

In Attorneys' Title Insurance Fund, Inc. v. Gorka, 36 So. 3d 646 (Fla. 2010), the Florida Supreme Court's strict application of the apportionment requirement of rule 1.442(c)(3)[4] resulted in the invalidation of a joint proposal for settlement "where one defendant presented an offer to two plaintiffs that was conditioned upon the acceptance of both plaintiffs." Pratt, 161 So. 3d at 1272 (stating that "[s]trict application" of the apportionment requirement of rule 1.442 resulted in invalidation of proposal for settlement in Gorka). In Gorka, the issue before the Court was "whether a joint offer of settlement or judgment that is conditioned on the mutual acceptance of all of the joint offerees is valid and enforceable." 36 So. 3d at 649. The specific proposal for settlement at issue was made by defendant, Attorneys' Title Insurance Fund, Inc., to two plaintiffs, Gorka and Larson, and

[4] Rule 1.442(c)(3), which sets forth the requirements for joint proposals such as the one at issue here, provides as follows: "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."

"offered payment of $12,500 to Gorka and payment of $12,500 to Larson in full settlement of all claimed damages, attorneys' fees, and costs." Attorneys' Title Ins. Fund, Inc. v. Gorka, 989 So. 2d 1210, 1211 (Fla. 2d DCA 2008). The proposal was further "'conditioned upon the offer being accepted by both John W. Gorka and Laurel Lee Larson. In other words, the offer can only be accepted if both John W. Gorka and Laurel Lee Larson accept and neither Plaintiff can independently accept the offer without their co-plaintiff joining in the settlement.'" Id.

The Court held that the proposal was invalid "because it is conditioned such that neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal." Gorka, 36 So. 3d at 647; see also Audiffred, 161 So. 3d at 1279 ("We held that the proposal in Gorka was invalid because the conditional nature of the offer divested each plaintiff of independent control over the decision to settle."); Pratt, 161 So. 3d at 1272 (same). In reaching its conclusion, the Court explained that:

> we have 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. A review of our 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.

Gorka, 36 So. 3d at 650 (emphasis added) (citation omitted).

Significantly, the rule set forth in Gorka that a joint proposal for settlement must be structured such that each offeree can independently evaluate and settle his or her respective claim irrespective of any other offeree's decision has been applied in the absence of language expressly requiring mutual acceptance. See Pacheco v. Gonzalez, 43 Fla. L. Weekly D1084, D1086 n.6 (Fla. 3d DCA May 16, 2018) ("[W]e find no logical basis to prevent Gorka from applying to proposals for settlement where the text, though not explicitly requiring mutual acceptance, clearly prevents either offeree from independently evaluating the settlement offer."); see also Chastain v. Chastain, 119 So. 3d 547, 550 (Fla. 1st DCA 2013) (applying Gorka to invalidate a proposal for settlement that "did not expressly require joint acceptance," but was "clear . . . that there was one offer in the amount of $5,002 and that the offer . . . was conditioned on joint acceptance"); Schantz v. Sekine, 60 So. 3d 444, 446 (Fla. 1st DCA 2011) (finding proposal for settlement invalid under Gorka where "[a]lthough not as direct as the wording of the settlement offer in Gorka, the . . . language [stating that 'Plaintiffs shall execute a general release' and that the proposal 'shall be deemed rejected by the Plaintiffs' if not accepted] . . . conditions settlement on Appellants' mutual acceptance of the offer and joint action in accordance with its terms").

Applying these principles to the instant case, we find the Proposal to be invalid and unenforceable. Paragraph 2 of the Proposal requires that "Defendants pay ACI the total amount of FIFTY THOUSAND DOLLARS ($50,000.00)" in order to settle Atlantic Civil's claim. Paragraph 3 reiterates that Atlantic Civil demands "[t]he total amount of FIFTY THOUSAND DOLLARS ($50,000.00)." The Proposal therefore seeks the single sum of $50,000. And although the Proposal apportions that total sum as a payment from Swift to Atlantic Civil in the amount of $25,000 and a payment from Key Haven to Atlantic Civil in the amount of $25,000, it does not state how much either party would be required to pay to settle Civil Atlantic's claim on his or its own. Additionally, the Proposal requires that the "Defendants will execute a general release" and that the Proposal "shall be deemed rejected unless Defendants accept it," thereby conditioning settlement on Swift and Key Haven's "mutual acceptance of the offer and joint action in accordance with its terms." See Schantz, 60 So. 3d at 446. We therefore find that the Proposal fails to meet Gorka's requirement that both offerees—Swift and Key Haven—be able to "independently evaluate or settle his or her respective claim by accepting the proposal."[5] 36 So. 3d at 647. Accordingly, we hold that the

[5] Atlantic Civil argues that Swift possessed the authority to bind Key Haven at least to an amount of $25,000. The fact that Swift had full authority to do so, however, does not relieve the Proposal of its conditional nature. Indeed, Swift's considerations in determining whether to settle the individual claims may be different from those at issue in determining whether to settle on behalf of Key Haven.

Proposal is an invalid joint proposal for settlement, which cannot form the basis of an award of attorneys' fees under section 768.79 and pursuant to rule 1.442.[6] See Pacheco, 43 Fla. L. Weekly at D1086 (holding joint proposal for settlement that was unclear as to how much each defendant would have to pay if either wanted to settle and required "'acceptance of this offer by the . . . DEFENDANTS'" to be invalid under Gorka).

IV. CONCLUSION

"[P]roposals for settlement made under section 768.79 and rule 1.442 have . . . generated significant ancillary litigation and case law." Id. And although expressly permitted under rule 1.442(c)(3), "joint proposals have become a trap for the wary and unwary alike" under the principle set forth in Gorka. Id. at D1087. For that reason, we once again take the opportunity to caution counsel in our district to avoid joint proposals. See id.

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[6] We note that neither of the two exceptions to the rule articulated in Gorka is applicable here. First, as we explained in Pacheco, Gorka "does not apply to a proposal for settlement made by multiple offerors to a single offeree." 43 Fla. L. Weekly at D1086. In the instant case, the Proposal was made by a single offeror to joint offerees. Thus, this exception does not apply. The second limitation on Gorka applies when "a party is alleged to be solely vicariously, constructively, derivatively, or technically liable" pursuant to rule 1.442(c)(4). Id. Atlantic Civil does not assert that it is entitled to attorneys' fees pursuant to subdivision (c)(4) of rule 1.442 and a review of the Amended Complaint shows that Atlantic Civil does not allege that Swift or Key Haven is solely vicariously liable. See id. ("The plain language of rule 1.442(c)(4) limits its application to scenarios where a party's liability is alleged to be solely vicarious or otherwise indirect.").

Because the Proposal deprived Swift and Key Haven of the ability to independently evaluate and accept Atlantic Civil's offer to settle its claims, we hold that the Proposal is invalid under the dictates of Gorka. Accordingly, the trial court's order denying Atlantic Civil's second renewed motion for attorneys' fees is affirmed.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed October 3, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-370
Lower Tribunal No. 09-55435

Federal National Mortgage Association,
Appellant,

vs.

JKM Services, LLC, as Receiver for Cedar Woods Homes Condominium Association, Inc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Samantha Ruiz-Cohen, Judge.

Levine Kellogg Lehman Schneider + Grossman and Jeffrey C. Schneider and Marcelo Diaz-Cortes; Greenspoon Marder and Aaron T. Williams (Fort Lauderdale), for appellant.

Shir Law Group and Stuart J. Zoberg and Guy M. Shir (Boca Raton), for appellee.

Before SALTER, EMAS and LINDSEY, JJ.

SALTER, J.

Federal National Mortgage Association ("FNMA") appeals a final circuit court order denying its motions to intervene in, and to terminate, a receivership proceeding insofar as it affected three condominium units recently subject to FNMA foreclosure proceedings, and to determine the amount owed by FNMA to Cedar Woods Homes Condominium Association, Inc., the appellee ("Association"), under the so-called "Safe Harbor Statute," section 718.116(b), Florida Statutes (2014). FNMA's motions presented the circuit court, and now present us, with several novel issues that arose within condominium associations in the real estate downturn and foreclosure crisis of the past decade.

Based on the analysis which follows, we are constrained to reverse the orders denying relief to FNMA, and to remand the receivership case to the trial court for further proceedings.

I. Background and Proceedings in the Circuit Court

In this case, the Association reached a point in 2009 where over ninety percent of its 165 condominium units were delinquent in assessment payments, and the majority of those units were also in foreclosure. The Association needed the assessments to cover repairs, maintenance, and capital improvements.

For a variety of reasons, the lenders and loan servicers on the units in foreclosure were slow to prosecute their cases. Notwithstanding delays measured in years rather than months, by law the foreclosing lenders obtaining title were not

obligated to pay any accrued arrearages for assessments beyond the lesser of "unpaid common expenses and regular periodic assessments which accrued or became due during the 12 months immediately preceding the acquisition of title [by the lender]" or one percent of the original mortgage debt (quoting from the Safe Harbor Statute cited above).

A. The 2009 Receivership

In law as in engineering, necessity is the mother of invention. In 2009, the Association filed an emergency petition in the circuit court seeking the appointment of a receiver to preserve and protect the condominium property in light of the overwhelming delinquency rate by unit owners. The Association claimed, and a magistrate judge found, that the great majority of units were subject to bank foreclosure actions, with several units "abandoned and vacant for as long as two years." The property manager's affidavit in support of the petition reported that the Association appeared to be insolvent and had received final notices that water, common area electricity, and garbage service would soon be terminated.

The Association's petition was based on a provision of the Condominium Act, section 718.116(6)(c), Florida Statutes (2009):

> If the unit is rented or leased during the pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent. The expenses of the receiver shall be paid by the party which does not prevail in the foreclosure action.

The petition sought the appointment of a receiver "over those units subject to foreclosure actions or soon-to-be-filed foreclosure actions by the Association to collect unpaid assessments" and to "(a) collect rents due to unit owners currently being sued by the Association to foreclose assessments liens; (b) hire a management company to manage, maintain and lease units subject to assessments lien foreclosures; (c) hire a locksmith to break door locks and change door locks to vacant units subject to assessments lien foreclosures; (d) lease or rent units and evict non-paying tenants; (e) contract with contractors to repair and maintain units subject to foreclosure lien assessments; and [pursue other relief as permitted by the court]."

After various hearings and orders, in 2010 the trial court appointed a receiver ("Receiver") to manage and preserve all "Foreclosure Rented Units" and "Foreclosure Abandoned Units," with assessments delinquent for sixty days or more and subject to foreclosure by the Association. The Receiver was to collect all rental income from such units, initiate eviction for non-payment of rent on such units, and use the collected income to pay back-owed assessments, the Receiver's costs and expenses, and "any and all expenses associated with the Condominium."

The emergency petition for the appointment of the Receiver was filed by the Association and as a separate action. It did not join or name the owner or mortgagee of any unit as a party when filed. A magistrate judge recommended

relief regarding the Association's petition, and the circuit court entered orders appointing the Receiver and expanding the Receiver's authority. The orders relating to the Receiver did not attach property descriptions or otherwise place the mortgage lenders in this case on notice of the Receiver's powers.[1]

B. FNMA's Title to Three Units

The three condominium units at issue in this appeal, each within Cedar Woods Homes, are identified as Unit 10-105, Unit 10-102, and Unit 17-103. Each was subject to a recorded mortgage ultimately owned by FNMA. Each of the mortgages was recorded in 2006, years before the commencement of the receivership by the Association. The foreclosing plaintiffs (in three separate circuit court foreclosures) were GMAC in April 2009 (Unit 10-105); Nationstar Mortgage in 2012 (Unit 10-102); and Bank of America in 2013 (Unit 17-103). These entities held and serviced the mortgage loans on behalf of the owner, FNMA.

Apparently unaware of the Receiver's appointment and powers, the foreclosing lenders did not move to intervene in the separate receivership proceeding during the pendency of their respective foreclosure cases. Similarly, the Receiver never asserted liens or other claims against the foreclosing mortgagees during the pendency of the three foreclosure cases. Final judgments of

[1] The Association sent written notice of the emergency petition for appointment of a receiver to individual unit owners two months after commencing the case.

foreclosure were entered in all three cases, the three units went to foreclosure sale by the clerk, and FNMA received certificates of title in 2014.

After FNMA obtained title, it requested an estoppel certificate from the Association to pay the amount dictated by the Safe Harbor Statute for each unit. But the Receiver responded on behalf of the Association with a much more substantial, itemized demand for multiple years of past-due assessments, Receiver's fees, attorney's fees for the Receiver's attorneys, and other charges.

C. FNMA's Motions to Intervene in the Receivership Case

After attempts to negotiate a settlement with the Receiver and Association, in 2016 FNMA filed motions to intervene in the 2009 receivership case, to terminate the receivership as to each of the three units, to determine amounts due under the Safe Harbor Statute, and to compel an accounting and quarterly financial reports by the Receiver. The circuit court denied the motions as to all three units, finding FNMA waited too long to seek relief, "became subject to this receivership" on obtaining title in 2014, and accepted the benefit of work performed by the Receiver. The trial court also found that "receiver amounts" were payable by FNMA above and beyond the condominium unit assessments capped by the Safe Harbor Statute. This appeal followed.

II. Analysis

We address, in turn, a collection of four issues with varying standards of review and sources of controlling authority.

A. Intervention

Was FNMA entitled to intervention in the receivership case under Florida Rule of Civil Procedure 1.230?

The trial court denied FNMA's motions to intervene as moot, concluding that FNMA became subject to the receivership as a party when it received certificates of title to units subject to the receivership proceeding. Rulings on motions to intervene are reviewed for an abuse of discretion. Union Cent. Life Ins. Co. v. Carlisle, 593 So. 2d 505, 507 (Fla. 1992).

The receivership had not concluded, and the Receiver had not been discharged, when FNMA sought intervention. FNMA clearly had a direct (ownership) interest in the three units; the Receiver claimed a lien and assessment and other amounts substantially in excess of the amount computed by FNMA. These factors supported intervention. Id. at 507-08. Although we do not agree that FNMA's motion to intervene was unnecessary or moot because FNMA "became subject to this receivership" upon taking title to the units,[2] the trial court correctly concluded that FNMA's motions should be heard and determined.

[2] In the order under review—which was prepared and submitted by counsel for the Receiver—FNMA is characterized as if a third-party purchaser at a foreclosure sale "who does not need to intervene under Rule 1.230 in order to have standing to appeal" (quoting Arsali v. Deutsche Bank Nat'l Tr. Co., 82 So. 3d 833, 835 (Fla.

B. Validity of the Receivership Orders as Against FNMA

Were the receivership orders valid as against FNMA?

The trial court's authority to appoint a receiver for condominium units in arrears on condominium assessments, whether by statute or as a matter of equity and common law, is a legal issue reviewable under the de novo standard of review, but the decision to appoint a receiver is reviewed for an abuse of discretion. Puma Enters. Corp. v. Vitale, 566 So. 2d 1343, 1344 (Fla. 3d DCA 1990).

As already noted, the Condominium Act expressly authorizes the appointment of a receiver to collect rent payable by the occupant of a unit during the pendency of "the foreclosure action." § 718.116(6)(c). When read in context, however, this refers to the foreclosure of a condominium association's lien on a unit "to secure the payment of assessments," section 718.116(5)(a); section 718.116(6)(a) authorizes an action in the association's name "to foreclose a lien for assessments in the manner a mortgage of real property is foreclosed."

So the statutory authority in the Condominium Act for a receiver relates to a unit which has accrued, unpaid assessments, but has been leased by the owner to a tenant. The receiver is then able to collect the rent and apply it (after allowed expenses) to the unpaid assessments. The statutory assessment does not extend to

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4th DCA 2011), and citing similar cases). Those cases relate to intervention in underlying foreclosure actions rather than the situation presented here. In this case, FNMA was seeking intervention in a separate action, the 2009 receivership case.

all units, or all units in pending mortgage foreclosure proceedings, or in foreclosure proceedings which might eventuate after the appointment of the receiver for a specific unit.

Nonetheless, Florida common law provides substantial authority for the appointment of a receiver to take custody of real property embroiled in litigation in order to preserve and protect the property as the rights of the parties are determined. See, e.g., Metro-Dade Invs. Co. v. Granada Lakes Villas Condo., Inc., 74 So. 3d 593 (Fla. 2d DCA 2011); see also Fla. R. Civ. P. 1.620. We conclude that the trial court had the authority to appoint a receiver to preserve and protect enumerated units that were in arrears regarding their assessment payments and subject to an Association lien. We need not reach the validity of the receivership orders insofar as they purported to affect units other than the three units involved in this appeal.

This power, whether based on (1) the court's statutory authority conferred by section 718.116(6) of the Condominium Act, or (2) the court's inherent equitable authority, was limited in scope to the owners and occupants of the units subject to an Association lien for unpaid assessments. The Receiver's authority and trial court's jurisdiction in the 2009 receivership case did not automatically implead existing or subsequent lenders foreclosing mortgage loans on units in Cedar Woods Homes. More specifically, FNMA neither authorized the

appointment of the Receiver nor agreed to compensate the Receiver and Receiver's attorneys for any work they may have done.

C. Validity and Priority of the Parties' Claims

As between the Receiver's claims regarding each of the three units and FNMA's final judgment lien and certificate of title, which of the Receiver's claims are valid and enforceable against the units, and if so, what is the extent and priority of each claim?

The priority of lien claims in real estate as between condominium associations for assessments and foreclosing mortgage lenders is governed by statute, and our review is de novo. U.S. Bank Nat'l Ass'n v. Farhood, 153 So. 3d 955, 958-59 (Fla. 1st DCA 2014).

These issues are generally determined by the operation of sections 28.222, (regarding clerks of court, official records, and register of recorded instruments), 695.11 (sequence per official records book and page to determine priority), and 695.01 (conveyances, transfers, or mortgages of real property, or of any interest therein, required to be recorded to establish priority "against creditors or subsequent purchasers for a valuable consideration and without notice"). City of Palm Bay v. Wells Fargo Bank, N.A., 114 So. 3d 924, 927 (Fla. 2013).

Applying these statutes and the particular provision governing liens for condominium assessments vis-a-vis first mortgages of record (section

718.116(5)(a)), the FNMA mortgage liens enjoyed priority over the condominium assessment liens, save for (1) those arrearage amounts for which the mortgage lenders became responsible under the Safe Harbor Statute, and (2) duly-imposed Association assessments for the period commencing with FNMA's certificate of title and continuing through FNMA's subsequent conveyance of title, if that has occurred.

The Receiver's compensation, attorney's fees, and costs, are payable by the non-prevailing party if the receivership was commenced under subsection 718.116(6). Paragraph (c) of that provision specifies that the expenses of a receiver appointed pursuant to that statute "shall be paid by the party which does not prevail in the foreclosure action."

In the case of a common law receivership established for the preservation and protection of property involved in a pending lawsuit, the "courts are generally vested with considerable discretion in determining who shall pay the cost and expenses of receiverships," though "[r]eceivership fees, being a part of costs, follow the result of the suit." Barredo v. Skyfreight, Inc., 430 So. 2d 513, 514 (Fla. 3d DCA 1983). Where there are no remaining assets in a receivership from which to make payments, "such costs, if recoverable at all, must be recovered in a separate action for that purpose." Id.

Under either of these scenarios and sources of authority, FNMA did not move for the Receiver's appointment and was not a party to the 2009 receivership lawsuit until its interests in intervention were asserted by motion. FNMA thus has no apparent obligation on this record to pay the Receiver and related receivership expenses.[3]

D. Extent of the Association's Claim: the Safe Harbor Statute

Is FNMA's liability for condominium assessments during the foreclosure proceedings, and through and including issuance of the certificates of title, limited to the amount computed according to the Safe Harbor Statute?

For the reasons already detailed in preceding sections of this opinion, the computation of FNMA's "safe harbor" amount is a factual issue that was not addressed by the trial court because of its determination that FNMA's claims were untimely. The amount payable by FNMA to the Association will be a matter for determination by the trial court on remand, although it should be a matter of arithmetic and agreed resolution.[4]

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[3] One can posit circumstances in which, for example, a foreclosing lender lacking a security interest in rents paid by a non-borrower tenant during the foreclosure case nevertheless received those rents—in derogation of the right of a court-appointed receiver designated under section 718.116(6)(c) to collect those rents. But no such facts are apparent in this record, and we therefore decline to address the merits or outcome of such a hypothetical case.

[4] The Safe Harbor Statute is clear that the liability of FNMA is for the lesser of (a)

FNMA's entitlement to the statutory cap on liability for accrued, unpaid condominium assessments prior to the date it obtained title is well-established. When FNMA initiates a foreclosure in its own name, we have affirmed the application of the Safe Harbor Statute. Catalina W. Homeowners Ass'n v. Federal Nat'l Mortg. Ass'n, 188 So. 3d 76, 81 (Fla. 3d DCA 2016). FNMA's entitlement to the limitation as a loan purchaser and assignee of a final judgment of foreclosure obtained by a servicer on FNMA's behalf is equally well-settled. Beltway Capital, LLC v. Greens COA, Inc., 153 So. 3d 330, 334 (Fla. 5th DCA 2014) ("In making this decision, this Court joins the long line of trial courts to find [FNMA] was entitled to safe harbor under similar circumstances"); see also Hemingway Villa Condo. Owners Ass'n v. Wells Fargo Bank, N.A., 240 So. 3d 104 (Fla. 3d DCA 2018).

III. Conclusion

The Association's petition for a multi-unit, flexible receivership for abandoned, delinquent, and in-foreclosure condominium units was innovative and

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"**unpaid** common expenses and regular periodic assessments" that became due during the 12 months immediately preceding FNMA's certificate of title, "**and for which payment in full has not been received by the association**," and (b) one percent of the original mortgage debt. (Emphasis provided). The "one percent" alternative would be considered here because the foreclosing lender "joined the association as a defendant in the foreclosure action." § 718.116(1)(b)1.a., 1.b. On remand, this computation could require an evidentiary hearing to establish the date and amount of unpaid common expenses and assessments during the 12-month period as affected by any rent collections by the Receiver and the manner in which those amounts may have been applied to the unit arrearages.

responsive to a crisis at Cedar Woods Homes. The resulting stand-alone receivership lawsuit, however, is a departure from the traditional adversarial array of parties with disputed claims, liens, and interests in property.[5]

As a result, the Receiver essentially became little more than an officious intermeddler vis-à-vis the foreclosing mortgage lenders, with no authorization to act on behalf of those lenders. The Receiver served as a court-authorized property manager for certain units and also acted as an eviction and collection agency for the Association.

On this record, the receivership expenses were not ratified by the Association for apportionment and assessment to all unit owners as other capital and operating expenses would be, and the Receiver's itemized claims evidence no such apportionment or authorization with the requisite Association corporate formalities.

Due process required notice to the foreclosing first mortgagees before they could be taxed, after the fact, with receivership expenses for services they never sought or authorized. We reiterate, however, that the Receiver's expenditures at the behest of, and for the benefit of, the Association may provide a basis for claims

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[5] The receivership proceeding in the circuit court is thus styled, In re Cedar Woods Homes Condominium Association, Inc., Petitioner. Until FNMA objected to the Receiver's claims against its three units, the Association and Receiver were the only parties in the case. A successor trial judge (who had not entered the receivership orders) was tasked with the unenviable duty of evaluating and ruling on FNMA's motions in a unique proceeding.

against persons or entities other than FNMA: defaulting unit owners, tenants, or the Association itself, to the extent that the Receiver paid for common area improvements, for example. As no such claims are before us, we express no opinion regarding them.

We reverse the order denying FNMA's motions and remand the case for further proceedings to compute the amount specified by the Safe Harbor Statute. Upon payment of any such amount, FNMA's units are to be released from further claims or proceedings in the receivership case and by the Receiver. As a unit owner from and after the certificate of title, and through its term of ownership, FNMA is responsible for condominium assessments as they become due.

Reversed and remanded for further proceedings.

Third District Court of Appeal

State of Florida

Opinion filed October 3, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1608
Lower Tribunal No. 17-3410

Ocean Bank, etc.,
Appellant,

vs.

Magaly Pico Gato,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Miguel M. De La O, Judge.

Louis K. Nicholas II, for appellant.

Loan Lawyers, LLC, and Samantha Neides (Ft. Lauderdale), for appellee.

Before SALTER, LOGUE, and LINDSEY, JJ.

PER CURIAM.

Following a February 29, 2016 loan payment default by Magaly Pico Gato, Ocean Bank initiated a foreclosure action on February 10, 2017 and obtained a final judgment of foreclosure on January 31, 2018. As of February 12, 2018, upon Gato's agreement to Ocean Bank's entitlement to costs in the amount of $885.00, Ocean Bank's foreclosure judgment secured repayment of $372,834.55, plus interest and attorney's fees. The foreclosure sale was scheduled for March 15, 2018.

Subsequently, Gato filed for Chapter 13 bankruptcy and the foreclosure sale was canceled on March 14, 2018. After Gato's bankruptcy case was dismissed, the trial court rescheduled the foreclosure sale for August 8, 2018. On July 26, 2018, Gato filed an emergency motion to cancel the foreclosure sale and attached to the motion a short sale contract dated July 14, 2018 in the amount of $350,000.00. A hearing was held on August 1, 2018 to consider Gato's motion to cancel the foreclosure sale. At the hearing, Ocean Bank explicitly objected to the short sale:

> [Ocean Bank]: We object. We filed a written objection. The bank has declined the short sale which would leave us tens of thousands of dollars short. We have filed our objection in writing and the law says that under those circumstances the motion to cancel the sale should not be granted
>
> The Court: So what I'm going to do is give it a 90-day resale date with no further continuances.
>
> . . . .

> [Ocean Bank]: Judge, respectfully, over Ocean Bank's objection.

Thus, the foreclosure sale was rescheduled for October 30, 2018. Ocean Bank filed a timely notice of appeal on August 3, 2018.

Pursuant to section 45.031, Florida Statutes (2018), a foreclosure sale is to be conducted "not less than 20 days or more than 35 days after the date" of the order or judgment. § 45.031(1)(a). A defendant's claim that they might be able to arrange for payment of the outstanding debt during an extended period of time "does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other." Republic Fed. Bank, N.A. v. Doyle, 19 So. 3d 1053, 1054 (Fla. 3d DCA 2009); see also Firstbank Puerto Rico v. Othon, 190 So. 3d 110, 111 (Fla. 4th DCA 2015) (explaining that neither the wife's medical problems nor the fact that the respondents listed their property in hopes of obtaining a short sale are grounds to cancel the foreclosure sale in contravention of section 45.031(1)(a)).

Because the August 8, 2018 foreclosure sale date has already passed, the relief requested by Ocean Bank is no longer available. Similar to Doyle and Othon, reversing the trial court's order in the instant case may actually delay the foreclosure sale further. For this reason alone, relief will be denied. However, we direct that the sale shall proceed on the assigned October 30, 2018 date with no further continuances absent a legally cognizable basis.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DARDEN RESTAURANTS, INC., a Florida Corporation, **DUKE DEMIER**, an individual, and **JEDLER St. PAUL**, an individual,
Appellant,

v.

WILFRED OSTANNE,
Appellee.

No. 4D17-3590

[October 3, 2018]

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael L. Gates, Judge; L.T. Case No. 17-800 CACE (12).

Patrick G. DeBlasio, III, and Laurie M. Weinstein of Littler Mendelson, P.C., Miami, for appellant Darden Restaurants, Inc.

Chris Kleppin and Chelsea A. Lewis of Glasser & Kleppin, P.A., Plantation, for appellee.

FORST, J.

Darden Restaurants, Inc. ("Darden") appeals from the trial court's order denying its motion to compel arbitration and stay the underlying employment discrimination action filed by former employee Wilfred Ostanne. Darden argues the court erred in denying the motion, in part, because the parties had specifically agreed to delegate the issue of arbitrability to the arbitrator. We agree with this argument and reverse for an order submitting the issue of arbitrability to the arbitrator. Because this issue is dispositive, we decline to address the remaining issues.

Background

In 2010, the parties signed an agreement titled "Dispute Resolution Process" ("DRP"). The DRP was a stand-alone agreement, not part of an employment contract. The DRP provides for a four-step process to address and resolve "covered employment-related disputes": open door, peer review, mediation, and arbitration. The first three steps apply to all

employment-related disputes or claims brought by the employee against the company (or vice versa) other than those listed as exceptions. The employee initiates the first two steps, and from there "the dissatisfied party can submit the matter to mediation." Thereafter, "[u]pon receiving the timely written notice that mediation has concluded without resolution . . . and if the dispute involves a legal claim, either the Employee or the Company can submit the matter to binding arbitration."

Regarding arbitration, the DRP provides:

> Only disputes which state a legal claim may be submitted to Arbitration, which is the fourth and final step of DRP. The arbitrator has the authority to dismiss disputes that do not state a legal claim. Examples of legal claims may include but are not limited to: claims that arise under the Civil Rights Act of 1964, Americans With Disabilities Act, Fair Labor Standards Act, Age Discrimination in Employment Act, Family Medical Leave Act, Employee Retirement Income Security Act, unfair competition, violation of trade secrets, any common law right or duty, or any federal, state or local ordinance or statute.
>
> **The DRP is the sole means for resolving covered employment-related disputes, instead of court actions. Disputes eligible for DRP must be resolved only through DRP, with the final step being binding arbitration heard by an arbitrator. This means DRP-eligible disputes will NOT BE RESOLVED BY A JUDGE OR JURY. Neither the Company nor the Employee may bring DRP-eligible disputes to court. The Company and the Employee waive all rights to bring a civil court action for these disputes.**

The DRP also contains a delegation clause, which provides that "[t]he arbitrator has the *sole authority to determine the eligibility of a dispute for arbitration and whether it has been timely filed*." (emphasis added).

In January 2017, Ostanne sued Darden and two Darden employees after filing charges of racial/ethnic discriminatory and retaliatory practices against Darden with the Florida Commission on Human Relations and the Equal Employment Opportunity Commission (EEOC). Ostanne alleged that he was subjected to ongoing racial slurs by co-workers; that management was aware but unwilling to act; that the slurs worsened after he complained; that two employees battered him; that he was overlooked for management positions for which he qualified; that he was demoted for

complaining; that his hours were reduced to next to nothing; and that he was ostensibly fired despite Darden's denial of such, and then suspended indefinitely.

Counts 1 through 4 alleged Florida Civil Rights Act violations against Darden for the discharge, discriminatory terms and conditions of employment, retaliation, and creating a hostile work environment. Counts 5 and 6 alleged civil battery and assault against Darden and two of Ostanne's former co-workers. Ostanne alleged that the former co-workers' actions were so "open, obvious, and pervasive" that Darden knew or should have known of the conduct.

Darden moved to stay the proceedings and to compel arbitration based on the DRP. Over Ostanne's objection, the matter was first heard at a motion calendar hearing. Ostanne requested an evidentiary hearing, arguing he did not recall signing the agreement and Darden had waived arbitration by not following the dispute resolution process, i.e., Darden did not afford Ostanne the requisite peer review or mediation before seeking arbitration. Ostanne also suggested that Darden's position during the EEOC process, urging a "no cause finding," was inconsistent with arbitration.

Darden disputed the need for an evidentiary hearing as Ostanne had not furnished an affidavit in opposition to the motion to compel to create a factual issue. It also argued that its participation in the EEOC process was not a waiver. Darden did not address its failure to invoke peer review or mediation before arbitration, which as the DRP is drafted, are conditions precedent to arbitration. The trial court summarily denied Darden's motion without prejudice.

Darden then filed a renewed motion to compel arbitration, which incorporated its first motion and also pointed to the DRP's "delegation clause." Ostanne again responded that a valid agreement to arbitrate did not exist, and that Darden had waived arbitration. He attached a supporting affidavit stating that he was unaware of the DRP, contending that it was never reviewed or discussed with him.

At the hearing, Darden directed the court to Ostanne's 2010 signing of the DRP and the delegation clause which provides that the arbitrator is to decide issues of arbitrability. Darden also cited case law which holds that the party opposing arbitration must specifically challenge the delegation provision (not just the arbitration provision itself), or "the delegation provision remains enforceable as a matter of law." *See*, *e.g.*, *Allied Prof'ls Ins. Co. v. Fitzpatrick*, 169 So. 3d 138, 141-42 (Fla. 4th DCA 2015) (citing,

e.g., *Rent–A–Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (unless the plaintiff "challenged the delegation provision specifically, we must treat it as valid . . . , leaving any challenge to the validity of the [arbitration] [a]greement as a whole for the arbitrator.")).

Ostanne opposed the motion to compel on six grounds: (1) Darden waived the "delegation clause" argument for failure to raise it during the first hearing; (2) Darden waived the right to arbitrate having failed to follow the "mandatory" steps preceding arbitration; (3) the DRP contains exceptions to arbitration, some of which were raised in the complaint (though Ostanne did not identify any); (4) the Florida Civil Rights Act "itself states that the claims can't go to arbitration" since it provides that the right to trial by jury is preserved; (5) Darden acted inconsistently with and waived arbitration when it asked the agency to dismiss the charge during the administrative proceedings; and (6) because the claims did not concern a breach of the employment contract, they did not fall within the clause.

Darden replied that it did not waive its "delegation clause" argument because the court did not address the merits of the motion at the first hearing. Darden maintained that the sole issue for the court was whether Ostanne signed an agreement which contained an arbitration clause with a delegation provision.

The trial court summarily denied Darden's motion to compel arbitration.[1]

Analysis

Darden argues the court erred in denying its motion to compel arbitration because, among other reasons, the parties' DRP agreement specifically delegated the issue of arbitrability to the arbitrator. We apply the de novo standard of review. *See Allied Prof'ls Ins. Co.*, 169 So. 3d at 141 (citing *BDO Seidman, LLP v. Bee*, 970 So. 2d 869, 874 (Fla. 4th DCA 2007) ("[T]he standard of review applicable to the trial court's construction of an arbitration provision, and to its application of the law to the facts found, is de novo.") (citation omitted)).

[1] *See Arrasola v. MGP Motor Holdings, LLC*, 172 So. 3d 508, 514 (Fla. 3d DCA 2015) ("The Revised Florida Arbitration Code authorizes the trial court 'summarily to decide' a motion to compel arbitration 'unless it finds that there is no enforceable agreement to arbitrate.'") (citing § 682.03(1)(b), Fla. Stat. (2014)).

We agree with Darden's argument. The plain language of the DRP's arbitration provision states that "[t]he arbitrator has the sole authority to determine the eligibility of a dispute for arbitration and whether it has been timely filed." Ostanne did not challenge the delegation clause itself in his discrimination lawsuit. "Absent a direct challenge, we must treat the delegation provision as valid and allow the arbitrator to determine the issue of arbitrability." *Newman for Founding Partners Stable Value Fund, LP v. Ernst & Young, LLP*, 231 So. 3d 464, 467 (Fla. 4th DCA 2017) (quoting *Angels Senior Living at Connerton Ct., LLC v. Gundry*, 210 So. 3d 257, 258 (Fla. 2d DCA 2017)); *see also Allied Prof'ls Ins. Co.*, 169 So. 3d at 141-42 (citing *Rent–A–Center, W., Inc.*, 561 U.S. at 74).

We further agree with Darden's contention that its participation in the EEOC process was not a waiver. An employer does not waive arbitration by participating in EEOC proceedings. *See Gordon v. Shield*, 41 So. 3d 931, 934 (Fla. 4th DCA 2010) (citing *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 16 (1st Cir. 1998)).

Lastly, we note that each party has accused the other of failing to follow the four-step dispute resolution process.[2] To the extent that Darden has failed to comply with conditions precedent to arbitration, the delegation clause leaves that issue to be addressed by the arbitrator. *See Cooper v. Fine*, 705 So. 2d 131, 131 (Fla. 4th DCA 2005) (finding that "whether conditions precedent to arbitration were fulfilled . . . is a question for the arbitrator").

Conclusion

Based on the foregoing, we reverse the trial court's order denying Darden's motion to compel arbitration and remand for entry of an order submitting the issue of arbitrability to the arbitrator. *See Allied Prof'ls Ins. Co.*, 169 So. 3d at 142.

Reversed and remanded.

TAYLOR and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

[2] As stated, the DRP provides that the *employee* initiates the first two steps (open door and peer review) of the four-step process.