

IN THE SUPREME COURT OF FLORIDA

CASE NO:

DISTRICT COURT CASE No: 4D13-717

FILED  
THOMAS D. HALL  
2013 JUN 24 AM 9:57  
CLERK, SUPREME COURT  
BY \_\_\_\_\_

MINERVA MARIE MENDEZ,

Petitioner,

vs.

INTEGON INDEMNITY CORPORATION,

Respondent,

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH  
DISTRICT

**PETITIONER'S BRIEF ON JURISDICTION**

Date

6/20/2013

Minerva Marie Mendez

138 La Mancha Ave

Royal Palm Beach, Florida 33411

**TABLE OF CASES****PAGE**

<i>Bradshaw v. Boynton-JCP Associates</i> 38 Fla. Law Weekly D823 (4DCA 2013)	8
<i>Campbell v. Goldman</i> 959 So. 2d 223(2007), SC06-11; 4DCA	3, 4, 5
<i>Langford v. Paravant</i> 912 So. 2d 359 (5DCA 2005)	1
<i>Lyons v. Chamoun</i> 4D10-872 (2012)	9
<i>McMullen Oil Co. v. ISS International Service System</i> 698 So 2d 372 ( 2DCA 1997)	4
<i>Nationwide Mutual Fire Insurance Co. v. Pollinger</i> 4D09-4383	6
<i>Palm Beach Polo Holdings Inc. v. Madsen, Sapp, Mena, Rodriquez&amp;Co.</i> 957 So. 3d 36 (4DCA2007)	6
<i>Papouras v. Bellsouth Telecommunication</i> 940 So. 2d 479 (4DCA 2006)	9, 10
<i>Pippin v. Latosynski</i> 622 So. 2d 566 (1DCA 1993)	4
<i>Sarkis v. Allstate Ins. Co.</i> 863 So. 2d 210 (2003)	5
<i>Statefarm v. Nichols</i> 932 So. 2d 1067 (2006)	3, 6, 8,9,10
<i>Swartsel v. Publix Super Mkts. Inc.</i> 882 So. 2d 449 (4DCA 2004)	9
<i>TGI Friday's v. Dvorak</i> 663 So. 2d 606 (1995)	3
<i>Willis Shaw Express v. Hilyer Sod Inc.</i> 849 So. 2d 276 (2003)	4

**TABLE OF AUTHORITIES**

Rule 1.442 (c) (1)	3, 6, 7,8,9,10
Rule 768.79	3,7,8,9

## TABLE OF CONTENTS

## PAGE

STATEMENT OF THE CASE AND FACTS

I

---

JURISDICTIONAL STATEMENT

2-3

SUMMARY OF ARGUMENT

4-5

ARGUMENT

6-8

CONCLUSION

9-10

APPENDIX (ORDER OF THE 4DCA)

CERTIFICATE OF SERVICE

CERTIFICATE OF FONT

This action stems from an automobile accident in which insured was injured.

INTEGON INDEMNITY CORPORATION is her personal injury protection (PIP)

insurer. After the accident, insured started receiving medical care. Integon

Indemnity Corporation was billed for medical services provided to Ms. Mendez.

However, Integon Indemnity Corporation stopped reimbursing all medical providers for Ms. Mendez medical care, denied all claims in entirety.

When Integon Indemnity failed to pay the balance allegedly due for medical, insured sued for breach of contract (for failure to pay benefits due).

Integon Indemnity Corporation, subsequently moved for summary judgment claiming fraud., and , without a showing of the affirmative defenses, Integon Indemnity Affirmative Answers and Defenses to Plaintiff's Amended Complaint,

(2) that "the initial Assignment of Benefits that was allegedly unsigned by Ms.

Mendez, **not** countersigned by First Rehabilitation, not signed by Integon

Indemnity Corporation, as required in the insured policy provisions:

Integon's Motion was for Motion, Summary Judgment was GRANTED.

Plaintiff argued assignment was ambiguous for failing to expressly sign and authorize the transfer of rights to which it referred. Based on this determination, the trial court refused to address The decision was trial court's conclusion that the initial assignment is ambiguous acknowledges the existence of a fact issue which precludes summary judgment, is susceptible of two interpretations.

Langford v. Paravant, Inc., 912 So. 2d 359, 360-61 (Fla. 5th DCA 2005)

## **JURISDICTIONAL STATEMENT**

The Florida Supreme Court has the discretion to review district court decisions that expressly declare valid a state statute .

- Express Construction of District Court decisions that expressly construe a provision of the state or federal constitution also fall under the discretionary review jurisdiction of the Supreme Court.

- Express and Direct Conflict on Same Question of Law

The Supreme Court has discretion to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law.

Conflict has been demonstrated by a majority statement or majority citation to Authority that is apparent on the face of the opinion. It is not necessary that the district court explicitly note the conflict. The conflicts have been remanded with a

Petitioners seek to invoke this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution. As set forth below, this Court's discretionary jurisdiction cannot be invoked because the fact that a similar case is being reviewed by this Court does not form a basis for jurisdiction, and because there is no conflict between the decision of the Fourth District Court of Appeal and this Court's decision.

## Standard of Review and Rules of Statutory Construction

As with the first two certified questions, this issue involves a matter of statutory construction that we review de novo. *Borden*, 921 So.2d at 591.

When the language of a contract and statute is free from ambiguity, this Court applies its plain meaning.

*State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1073 (Fla.2006). The language of section 768.79, as well as Florida Rule of Civil Procedure 1.442, must be strictly construed because those provisions are in derogation of the common law rule that a party is responsible for its own attorney's fees, and they are penal in nature.

*Campbell v. Goldman*, 959 So.2d 223, 226 (Fla.2007); *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606, 615 (Fla.1995).

The relevant portion of section 768.79 provides:

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

## SUMMARY OF ARGUMENT

The proposal was never accepted.

This judgment did not meet the statutory requirement that the recovery must be at least twenty-five percent greater than the settlement offer in order to be entitled to attorney's fees and costs.

*Goldman v. Campbell*, 920 So.2d 1264 (Fla. 4th DCA 2006).

*CAMPBELL v. GOLDMAN* 959 So.2d 223 (2007) No. SC06-611.

*Supreme Court of Florida. June 14, 2007.*

This case was before the Court for review of the decision of the Fourth District Court of Appeal in *Goldman v. Campbell*, 920 So.2d 1264 (Fla. 4th DCA 2006).

The district court certified that its decision is in direct conflict with the decisions of the Second District Court of Appeal in *McMullen Oil Co. v. ISS International Service System, Inc.*, 698 So.2d 372 (Fla. 2d DCA 1997), and the First District Court of Appeal in *Pippin v. Latosynski*, 622 So.2d 566 (Fla. 1st DCA 1993).

Supreme Court had jurisdiction. Art. V, § 3(b)(4), Fla. Const.

For the following reasons, quashed the decision of the Fourth District and approved *McMullen Oil Co.* and *Pippin*.

The district court indicated, citing to *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, (Fla.2003), that both rule 1.442 and section 768.79 are in derogation of the common law rule that parties are responsible for their own attorney's fees. District court said the statute and the rule must be strictly construed

Based on the plain language of section 768.79, an offer of settlement must state the statute with particularity on which it is based. Supreme Court quashed the decision of the Fourth District and approve *McMullen Oil* and *Pippin* to the extent that they are consistent with district court decisions.\*

There is now only one statute governing offers of judgments implemented by rule 1.442. *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210, 219 (Fla.2003).

Plain language of section 768.79, Florida Statutes (1999), and Florida Rule of Civil Procedure 1.442 require an offer of settlement to reference the statute upon which the offer is based because the statute and the rule are clear and unambiguous, conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction.

Moreover, if court rules ambiguous, the standard of construction stated in Rule 1.010 would apply.

---

\*The district court noted that rule 1.442(c)(1) states: "A proposal for settlement shall be in writing and shall identify the *applicable Florida law* under which it is being made. *Goldman*, 920 So.2d 1265, Rule 1.442(c).

District court also noted that section 768.79(6)(b) reads: 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.



## ARGUMENT

In this auto accident case, the defendant law firm: one to defended a claim for personal injury protection (PIP) and for Breach of Contract.

The law firm defending the claims served a proposal for settlement appearing to cover all claims. The trial court awarded fees. The Plaintiff found the offer ambiguous and it was unclear. The situation created a latent ambiguity.\*

The standard of review in determining whether a proposal for settlement complies with section 768.79, Florida Statutes [2009], and Florida Rule of Civil Procedure 1.442 is de novo. *Palm Beach Polo Holdings, Inc. v. Madsen, Sapp, Mena, Rodriguez & Co., P.A.*, 957 So.2d 36, 37 (Fla. 4th DCA 2007).

Rule 1.442(c)(2)(B) and (C) requires that settlement proposals identify the claim or claims the proposal is attempting to resolve and state with particularity any relevant conditions. The rule requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification.

*State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1079 (Fla.2006).

Proposal failed to satisfy the 'particularity' requirement created an ambiguity within the proposal which could reasonably affect the offeree's decision, conditioned of admitting more than one meaning.

*NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v. POLLINGER*

*No. 4D09-4383*. \*This ambiguity made it difficult for Plaintiff to make an informed decision without clarification of the terms of the offer.

Release had latent ambiguity requiring resort to parole evidence.

**EXCERPTS INTEGON AMENDED PROPOSAL FOR SETTLEMENT**

**JULY 6, 2010 (Record)**

4. Proposal for Settlement including, as well as all PIP claims..
5. Proposal for Settlement does not include claims for attorney fees
6. The total amount of the Proposal for Settlement and all non-monetary terms of the Proposal for Settlement are set forth above.
7. This Proposal for Settlement expressly incorporates all provisions, limitations and sanctions provided in the Rule 1.442 Florida Rules of Civil Procedures and Florida Statutes 768.79

**GENERAL RELEASE OF ALL PIP CLAIMS**

In consideration release and discharge all insurers, agents, attorneys, successors, and any and all other persons claimed to be liable, from any and all causes of action, controversies, or demands of whatever name or nature, for any and all PIP benefits, as a result of an automobile accident which occurred on October 27, 2008, as well as any and all additional claims, without limiting the foregoing also releases , acquits and forever discharges any and all past or present claims, rights, counts, causes of action, obligations, debts, and demands that may have against Integon Indemnity Corporation under the statutes or common law or other jurisdiction, sounding in tort or breach of contract, which in any manner or fashion arises from or relates to any alleged act, error, omission.

The Fourth District Court of Appeal recently confronted an “apostrophe-challenged” offer of judgment in *Bradshaw v. Boynton-JCP Associates, Ltd., et al.*, 38 Fla. Law Weekly D823(a) (Fla. 4<sup>th</sup> DCA April 10, 2013). The district court reversed an award of attorney’s fees pursuant to an unaccepted offer of judgment because the placement of apostrophes in the offer rendered it ambiguous as to whether it was made by single or multiple defendants, and directed to single or multiple plaintiffs. The document was titled “Defendant’s Joint Proposal for Settlement”. It required “Plaintiff(s)” to execute a stipulation, and further required “Plaintiff(s)” to release “Defendant(s).” In finding the proposal for settlement ambiguous, the *Bradshaw* court relied on Florida Supreme Court precedent holding that *Fla. R. Civ. P.* 1.442 required a settlement proposal to 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)).

*Bradshaw* court pointed out that whether it was fair or logical to apply the specificity requirements of Rule 1.442 was not the relevant inquiry.

The facial ambiguity created by the stray apostrophes was sufficient to invalidate the offer with incurable results.

De novo review of orders concerning section 768.79 and Florida Rule of Civil Procedure 1.442.

*LYONS v. CHAMOUN* Nos. 4D10-872, 4D10-2171. August 29, 2012

*Swartsel v. Publix Super Mkts., Inc.*, 882 So.2d 449 (Fla. 4th DCA [2004] ).

*Papouras v. Bellsouth Telecommunications, Inc.*, 940 So.2d 479, 480 (Fla. 4th DCA 2006).

## CONCLUSION

Supreme Court has held that, PFS must satisfy the requirements of Rule 1.442 and eliminate any reasonable ambiguity about its scope.

*State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1079 (Fla.2006).

The Nichols court agreed with those courts that have treated releases as conditions or nonmonetary terms that must be described with particularity and concluded that Rule 1.442 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.

Even if the owner's insurer, is the unnamed insurance company in the release, it remains unclear whether "a full release of liability" includes a release of the driver.

Without the actual release or a detailed description, the PFS fails to eliminate any reasonable ambiguity about its scope.

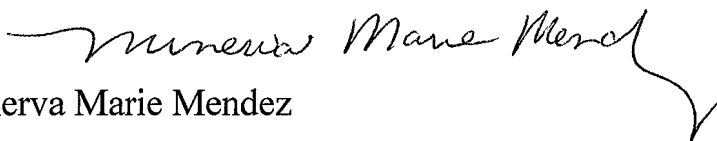
*Papouras v. BellSouth* 940 So.2d 479, as owner of the vehicle under the dangerous instrumentality doctrine and vicariously for the negligence of the driver, denial of fees and costs was the lack of the requisite particularity required by rule 1.442.

Nichols, 932 So.2d 1078-79 concluded:

In this case, the proposal simply provided for the plaintiff to execute a full release without further detail. Just as our supreme court found in Nichols, the proposal for settlement in this case was too ambiguous to satisfy Florida Rule of Civil Procedure 1.442.

Date

6/20/2013



Minerva Marie Mendez

138 La Mancha Ave

Royal Palm Beach, Florida 33411

## CERTIFICATE OF SERVICE

I, Minerva Marie Mendez, certify that a copy hereof has been furnished to

This day of June 20, 2013 by United States Postal Service to:

Attorney Steven Leiter,

Blackstone Building, Third Floor,

707 S.E. Third Ave,

Fort Lauderdale, Florida 33136

## CERTIFICATE OF FONT

I, Minerva Marie Mendez, certify that this is submitted in Times New Roman 14-point font, and complies with the font requirements of Fla. R. App. P. Rule 9.210.

Date

6/20/2013

Minerva Marie Mendez

138 La Mancha Ave

Royal Palm Beach, Florida 33411

*Minerva Marie Mendez*

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM  
BEACH, FL 33401

May 17, 2013

CASE NO.: 4D13-0717

L.T. No.: 502011AP000057XXXXMB

MINERVA MARIE MENDEZ

v. INTEGON INDEMNITY CORPORATION

Appellant / Petitioner(s)

Appellee / Respondent(s)

**BY ORDER OF THE COURT:**

ORDERED that the petition for writ of certiorari filed April 15, 2013, is hereby  
denied on the merits.

WARNER, STEVENSON and CIKLIN, JJ., Concur.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

cc: Steven J. Leiter

Minerva Marie Mendez

dl

*Marilyn Beuttenmuller*  
MARILYN BEUTTENMULLER, Clerk  
Fourth District Court of Appeal

