2008 WL 3849683 (Fla.App. 4 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Fourth District.

Walter BIRO and David Swinscoe, Appellants/Plaintiffs,
v.
Michael BIRO, Appellee.

No. 4D08-1855.
July 16, 2008.

On Appeal from a Non-Final Order from the Seventeenth Judicial Circuit in and for Broward County, Florida
Circuit Court Case No.: 02-14385 (25)

Initial Brief of Appellants/Plaintiffs Walter Biro and David Swinscoe

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*1 I. JURISDICTION

This appeal arises from a July 13, 2007, Order by the trial court. The Court has jurisdiction over this appeal on the basis set forth in *Reliable Reprographics Blueprint & Supply, Inc., v. Florida Mango Office Park, Inc.*, 645 So.2d 1040 (Fla. 4th DCA 1994), where the court held that the denial of a post-judgment motion for fees is an appealable non-final order under rule 9.130(a)(4). Specifically, that rule provides for review of certain non-final orders entered after a final order.

The Order, discussed supra, is a non-final Order granting Defendant/Counter Plaintiff's motion for entitlement to attorney's fees pursuant to a proposal for settlement, while still reserving jurisdiction to determine the amount of fees. This appeal is

timely pursuant *Schwenzer v. School of Visual Arts,* 706 So.2d 941 (Fla. 2nd DCA 1998), whereby, until the amount of fees is awarded regarding a judgment which reserves jurisdiction to determine the amount of fees, that portion of the order that reserves jurisdiction is a non-appealable non-final order. *Id.* at 942; *see also Scullin v. City of Pensacola,* 667 So.2d 215 (Fla. 1st DCA 1995).

II. PARTIES TO THE PROCEEDINGS

WALTER BIRO and DAVID SWINSCOE - Appellants/Plaintiffs

MICHAEL BIRO - Appellee /Defendant

*2 III. STATEMENT OF THE CASE AND OF THE FACTS

A. STATEMENT OF THE CASE

On November 12, 2002, Appellee served Appellants/Plaintiffs individually with two a Proposal for Settlement, ("Proposals"), for each Appellant/Plaintiff individually, pursuant to Florida Statute §768.79 and Rule 1.442, Fla.R.Civ.P. *See* Proposals for Settlement attached hereto as Exhibit "A". At trial Appellee/Defendant's Counterclaim was dismissed voluntarily and after a jury verdict, Appellee/Defendant prevailed on Appellants/Plaintiffs' claim. On August 2, 2006, after Appellee/Defendant had prevailed on Appellants/Plaintiffs' claims, Appellee/Defendant filed a Motion to Determine Entitlement to Attorney's Fees on the grounds that Appellants/Plaintiffs failed to recover seventy-five percent (75%) of the amount offered. *See* Motion to Determine Entitlement to Attorney's Fees attached hereto as Exhibit "B". Upon a hearing on the matter, the court held that the Proposals for Settlement for each Appellants/Plaintiffs were valid because they:

[F]ully satisfy the requirements of Rule 1.442, Fla. R. Civ. P., in that both Proposals are unambiguous and each of the Proposals is capable of execution without the need for any judicial interpretation and labor... [and] are sufficiently clear and definite to allow each of the [Appellants/Plaintiffs to make an informed decision without the need of judicial clarification and labor... [and] they were made in 'good faith.'

***3** *See* Order dated July 13, 2007, attached hereto as Exhibit "C". On January 22, 2008, Appellee/Defendant filed a motion to determine the amount of attorneys' fees. On April 7, 2008, the Court entered the Final Judgment. Accordingly, Appellants/Plaintiffs timely filed a Notice of Appeal of the Non-Final Order on May 5, 2008.

IV. ISSUES ON APPEAL

1. THE PROPOSALS FOR SETTLEMENT WERE AMBIGUOUS SO AS TO RENDER THEM UNENFORCEABLE AND NOT IN COMPLIANCE WITH RULE 1.442(c)(2)(b) AND, THEREFORE, SHOULD NOT BE RELIED UPON IN GRANTING APPELLEE ATTORNEYS' FEES PURSUANT TO THE RULE AND PERTINENT FLORIDA STATUTES

2. THE PROPOSALS FOR SETTLEMENT WERE NOT MADE IN GOOD FAITH AND WERE NOT A GENUINE ATTEMPT TO SETTLE THE UNDERLYING MATTER BEWTEEN THE PARTIES

V. SUMMARY OF ARGUMENT

In the instant matter, Appellee/Defendant's Proposals for Settlement were ambiguous, as Appellee/Defendant failed to attach the general release referred to in the proposals nor did he provide a synopsis of the release terms and the proposals did not specifically articulate what, if any, claims were to be resolved if Appellants/Plaintiffs accepted the proposals.

Pursuant to *Swartsel v. Publix Super Markets, Inc.,* 882 So.2d 449, 452-453 (Fla. 4th DCA 2004), "it would be essential to know what is being released [pursuant to a general release], who is being released, and any conditions or terms ***4** of the release." *Id.* at 453. Appellee/Defendant must describe the terms of the general release with particularity in order for

Appellants/Plaintiffs to fully understand what they are releasing. If the terms are not sufficiently described, or not described at all, as was the case with the underlying Proposals for Settlement, the proposals must be deemed ambiguous and too vague to allow an award of attorneys' fees.

Because the terms of the general release must be described with particulanty in order for Appellants/Plaintiffs to fully understand what they are releasing, the general release must be attached the proposal for settlement. In this case, even though a general release is referred to in both Proposals for Settlement, no general release was attached nor terms described therein are required by law to effectuate an enforceable proposal for settlement. Identical to the underlying matter, the defendant in *Swartsel* offered a proposal for settlement with a reference to a general release but failed to provide a synopsis of the terms of the release or attach a copy of it with the proposal.

Rule 1.442(c)(2)(C)-(D) requires that a qualifying offer 'shall ... state with particularity any relevant conditions' and shall also 'state with particularity all nonmonetary terms of the proposal.' In this case, defendant's offer of settlement included the following conditions or nonmonetary terms: 'Publix's Proposal for Settlement is conditioned upon Plaintiffs acceptance of same pursuant to Rule 1.442, a stipulation for an order dismissing this action with prejudice, *and Plaintiffs execution of a confidential settlement agreement and general release.'* [e.s.]. No other details of the proposed 'confidential settlement agreement' and 'general release' were stated in the offer. ***5 No copy of the actual 'confidential settlement agreement' and 'general release' being proposed were attached as separate documents to the offer. Thus, plaintiff was left to guess at what these terms and conditions might require of her.**

Id. at 452-453. The Court in *Swartsel* did not allow an award of attorneys' fees, as the underlying Court in the instant matter should have done as well.

Appellee/Defendant's proposals were also flawed in that they do not comply with Rule 1.442 (c)(2)(b), by failing to clearly identify the claim or claims the proposals were attempting to resolve. In paragraph one (1) of Appellee/Defendant's Proposals for Settlement, Appellee/Defendant stated that the "claim or claims sought to be resolved are liability, damages and all other issues in this action between the parties." The claims brought by Appellants/Plaintiffs were breach of fiduciary duty and fraud, neither of which was identified in Appellee/Defendant's proposals. Therefore, because the proposals do not specifically articulate what, if any, claims, were to be resolved if Appellants/Plaintiffs accepted the proposals, Appellee/Defendant's Proposals for Settlement are unclear, ambiguous, and noncompliant with Rule 1.442 (c)(2)(b).

On or about September 19, 2002, Appellee/Defendant filed his Counterclaim alleging (i) Libel; (ii) Conspiracy to Defame; and (iii) Tortious Interference. The counts descnbed in Appellee/Defendant's Counterclaim's were not articulated in his Proposals for Settlement. The proposals therefore, cannot be deemed clear and unambiguous when the specific claims of a separate pending claim are not ***6** addressed therein. It was unclear to Appellants/Plaintiffs whether by accepting the terms of the proposals they were also disposing of Appellee/Defendant's counterclaims. Even though Appellee/Defendant stated that "all other issues in this action between the parties" were to be resolved, Appellants/Plaintiffs should not have to make the determination for themselves if Appellee/Defendant is also referring to the claims contained within his Counterclaim or simply discussing only the counts of Appellants/Plaintiffs' Complaint. The claims to be agreed upon and the procedure for how they will be settled should be clearly stated in a proposal for settlement. *Swartsel* at 453. Appellee/Defendant failed to state what counts were to be settled pursuant to Appellants/Plaintiffs' Complaint or his own Counterclaim or the procedure for how those claims were to be resolved.

Assuming *arguendo* that Appellee/Defendant's Proposals for Settlement were not ambiguous, they still fail due to their lack of "good faith." §768.79(7)(a), Fla. Stat., provides in pertinent part, "[i]f a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." Appellee offered only $250.00 for a claim by Appellants/Plaintiffs amounting in excess of $150,000.00. Clearly this offer was not made in good faith, as Appellants/Plaintiffs could not have been expected to accept such an offer, as they had already spent more than what was offered in legal ***7** fees up to that point in the litigation. Additionally, Appellants/Plaintiffs had sufficient justification to reject Appellee/Defendant's offer of $250.00 as evidenced by the fact that Appellants/Plaintiffs survived

Appellee/Defendant's motion for sanctions pursuant to Fla. Stat. §57.105 on January 3, 2005 and his motion for summary judgment which was denied April 24, 2006.

For these reasons, the trial court erred in finding that Appellee/Defendant's Proposals for Settlement were unambiguous, sufficiently clear and definite, and made in good faith.

VI. ARGUMENT

POINT I: APPELLEE/DEFENDANT'S PROPOSALS FOR SETTLEMENT WAS AMBIGUOUS

A. STANDARD OF REVIEW

An appellate court applies the *de novo* standard of review in determining whether an offer of settlement comports with Rule 1.442, Fla.R.Civ.P. and section 768.79, Fla.Stat., because a "proposal for settlement is in the nature of a contract." *Jamieson v. Kurland,* 819 So.2d 267, 268 (Fla. 2nd DCA 2002); *Miami-Dade County v. Ferrer,* 943 So.2d 288, 290 (Fla. 3rd DCA 2006).

*8 B. APPELLEE/DEFENDANT'S PROPOSALS FOR SETTLEMENT WAS AMBIGUOUS

In the instant matter, Appellants/Plaintiffs contend that Appellee/Defendant's Proposals for Settlement are ambiguous, as the Proposals do not specifically articulate what, if any, claims were to be resolved if Appellants/Plaintiffs accepted the proposals. The proposals are also insufficient allow an award of attorneys' fees due to Appellee/Defendant's failure to include a copy or provide a synopsis of the terms of the general release referred to in his Proposals for Settlement.

Section 768.79, Fla. Stat. provides for an award of reasonable costs and attorney's fees when, "(1) a party has served a demand or offer for judgment; and (2) that party has recovered a judgment at least twenty-five percent more or less than the demand or offer." *Hannah v. Newkirk,* 675 So.2d 112, 114 (Fla. 1996). In addition, the Florida Rules of Civil Procedure, Rule 1.442 requires that a settlement proposal:
(A) [N]ame the party or parties making the proposal and the party or parties to whom the proposal is being made;

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

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

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

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

*9 (G) include a certificate of service in the form required by rule 1.080(f). Fla. R. Civ. P. 1.442(c)(2). Appellee/Defendant's proposals are flawed in that they do not comply with Rule 1.442 (c)(2)(b), by failing to clearly identify the claim or claims the proposals are attempting to resolve and by failing to include or provide a synopsis of the terms of the general release referred to by Appellee/Defendant in his Proposals for Settlement. For these reasons the proposals are ambiguous and too vague to allow an award of attorneys' fees.

As described supra, the language of both of the Proposals for Settlement reference a general release. "The proposal is conditioned on Plaintiff/Counter-Defendant, DAVID SWINCOE (and Walter Biro) dismissing with prejudice his Complaint against Defendant/Counter-Plaintiff, MICHAEL BIRO, and the parties executing a general release in favor of each other." Exhibit A, ¶ 2. No general release was attached to the Proposals and no terms for the release were discussed in the Proposals for Settlement.
In *Nichols v. State Farm Mutual,* 851 So.2d 742 (Fla. 5th DCA 2003), *decision approved,* 932 So.2d 1067 (Fla. 2006), for example, we observed that the terms of a proffered release are subject to the particularity requirement for conditions and nonmonetary terms contained within rule 1.442. We then held that the proposal for settlement used in that case was ambiguous, and thus unenforceable, because the general release associated with it could have required the plaintiff-insured to relinquish her first party insurance claim for uninsured motorist coverage against the defendant-insurer. We said in this connection that '[t]he terms and conditions of the proposal should be devoid of ambiguity, patent or latent.' *Id.* at 746.

***10** *Sparklin v. Southern Indus. Associates, Inc.,* 960 So.2d 895, 897 (Fla. 5th DCA 2007). The Court in *Sparklin* did not allow an award of attorneys' fees due to the ambiguity of the terms of the general release attached to defendant's proposal for settlement. In the instant matter there can be no clear and concise determination of the terms of the general release either as Appellee/Defendant failed to attach it to his proposals or discuss the terms therein. Without an express determination of the terms of the general release, Appellee/Defendant's Proposals for Settlement must be deemed void for ambiguity.

An analogous case to the underlying matter is *Swartsel v. Publix Super Markets, Inc.,* 882 So.2d 449, 452-453 (Fla. 4th DCA 2004). Identical to the underlying matter, the defendant in *Swartsel* offered a proposal for settlement with a reference to a general release but failed to provide a synopsis of the terms of the release or attach a copy of it with the proposal.
Rule 1.442(c)(2)(C)-(D) requires that a qualifying offer 'shall ... state with particularity any relevant conditions' and shall also 'state with particularity all nonmonetary terms of the proposal.' In this case, defendant's offer of settlement included the following conditions or nonmonetary terms: 'Publix's Proposal for Settlement is conditioned upon Plaintiffs acceptance of same pursuant to Rule 1.442, a stipulation for an order dismissing this action with prejudice, *and Plaintiff's execution of a confidential settlement agreement and general release.'* [e.s.]. No other details of the proposed 'confidential settlement agreement' and 'general release' were stated in the offer. **No copy of the actual 'confidential settlement agreement' and 'general release' being proposed were attached as separate documents to the offer. Thus, plaintiff was left to guess at what these terms and conditions might require of her.**

***11** *Id.* at 452-453. The Court in *Swartsel* did not allow an award of attorneys' fees.

Parallel to the underlying matter, Appellants/Plaintiffs were left to guess at the terms of the general release referred to in Appellee/Defendant's Proposals for Settlement. "As for the proposed general release... it would be essential to know what is being released, who is being released, and any conditions or terms of the release." *Swartsel* at 453. Appellee/Defendant must describe the terms of the general release with particularity in order for Appellants/Plaintiffs to fully understand what they are releasing. If the terms are not sufficiently described, or not described at all, as was the case with the underlying Proposals for Settlement, the proposals must be deemed ambiguous and too vague to allow an award of attorneys' fees.
The *particularity* required by rule 1.442(c)(2)(C)-(D) is indispensable and not a mere formality. The term *particularity* as used in rule 1.442 means that the offeror must supply in haec verba the 'specific details' of any condition or nonmonetary term. *See* AMERICAN HERITAGE DICTIONARY 1320 (3d. ed.) (defining *particular* and *particularity* to mean 'of, relating to, or providing details,' 'exactitude of detail,' 'attention to or concern with detail,' 'an individual characteristic'). We therefore read the rule to require that an offeror state all the terms of any 'confidential settlement agreement' and any 'general release' or, instead, attach a copy of the actual documents themselves to the offer. Defendant's proposal failed in this essential (and, we might say, particular) detail and was therefore insufficient to authorize attorneys fees on account of its rejection by plaintiff

Id. at 453.

***12** Because "the offer of judgment statute and its companion rule of civil procedure are in derogation of the common law rule that each party shall pay its own fees, the language of an offer must be construed in favor of the offeree when it does not make clear precisely what is being proposed." *Swartsel* at 449. In fact, the "rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions." *United Serv. Auto. Ass'n v. Behar,* 752 So.2d 663, 665 (Fla. 2nd DCA 2000). If accepted, the proposal should be capable of execution without the need for judicial interpretation, as proposals for settlement are intended to end judicial labor, not create more. *Lucase v. Calhoun,* 813 So.2d 971 (Fla. 2nd DCA 2002). A proposal cannot be capable of execution without the need for judicial interpretation when it refers to a general release but does not provide a copy of the release attached to the proposal or a synopsis of the terms incorporated therein. *Papouras v. BellSouth Telecommunications, Inc.,* 940 So.2d 479, 480-481 (Fla. 4th DCA 2006) is an example of such a case in which a proposal was in need of judicial interpretation and therefore vague, ambiguous and unenforceable.

> In this case, the proposal simply provided for the plaintiff to execute a full release without further detail. A copy of the release was not attached and no summary of the terms was included in the proposal. BellSouth argues, and we agree, that this proposed release lacked sufficient detail to eliminate any reasonable ambiguity about its scope... 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. We therefore affirm the trial court's order ***13** denying the plaintiff attorney's fees, pursuant to the plaintiffs proposal for settlement.

Aside from Appellee/Defendant's failure to provide a synopsis of the terms of his proposed general release or attach a copy of it to the proposals, Appellee/Defendant also failed to sufficiently state the claims to which his Proposals for Settlement applied, which is mandatory pursuant to Florida Rules of Civil Procedure, Rule 1.442. The rule requires that a settlement proposal "identify the claim or claims the proposal is attempting to resolve." Appellee/Defendant failed to identify any claims he was attempting to resolve pursuant to his proposals.

In paragraph one (1) of both of Appellee/Defendant's Proposals for Settlement, the proposals state that the "claim or claims [Appellee/Defendant] sought to be resolved are liability, damages and all other issues in this action between the parties." Exhibit A. The claims brought by Appellants/Plaintiffs were breach of fiduciary duty and fraud. Appellee/Defendant failed to specifically state these claims, or mention them at all in his Proposals for Settlement, which is a requisite for the awarding of fees pursuant to Fla. R. Civ. P. 1.442(c)(2)(B). According to *Saenz v. Campos,* 967 So.2d 1114, 1116 (Fla. 4th DCA 2007), a proposal is facially defective if it fails to state, as a non monetary term or as a relevant condition, how the case would be resolved. Appellee/Defendant failed to state how, if at all, the underlying matter was to be resolved if Appellants/Plaintiffs accepted his proposals. For this reason alone, Appellee/Defendant's proposals fail ***14** due to their ambiguity and failure to comply with Fla. R. Civ. P. 1.442(c)(2)(B), described *supra.*

Additionally, at this point in the underlying matter Appellee/Defendant had filed a Counterclaim alleging (i) Libel; (ii) Conspiracy to Defame; and (iii) Tortious Interference. The Counterclaim's counts were not mentioned in Appellee/Defendant's Proposals for Settlement. The proposals cannot be deemed clear and unambiguous when the specific claims of a separate pending claim are not addressed therein. It was unclear to Appellants/Plaintiffs whether by accepting the terms of the proposals they were also disposing of Appellee/Defendant's counterclaims. Even though Appellee/Defendant stated that "all other issues in this action between the parties" were to be resolved, Appellants/Plaintiffs should not have to make the determination for themselves if Appellee/Defendant is also referring to the claims contained within his Counterclaim or simply discussing only the counts of Appellants/Plaintiffs' Complaint. The claims to be agreed upon and the procedure for how the case will be settled should be clearly stated in a proposal for settlement. Saenz at 1116. Appellee/Defendant failed to state what counts were to be settled pursuant to Appellants/Plaintiffs' Complaint or his own Counterclaim or the procedure for how the case was to be resolved. Further, due to Appellee/Defendant's failure to specifically articulate what, if any, claims, were to be resolved if Appellants/Plaintiffs accepted the proposals, or the

procedure for ***15** how the case was to be resolved, Appellee/Defendant's Proposals for Settlement must be deemed vague, ambiguous and unenforceable.

Because the proposals do not specifically state the claims to be resolved and require judicial labor in order to interpret their terms, Appellee/Defendant's proposals are improper. Notably, the proposals must articulate "which of an offeree's outstanding claims against the offeror will be extinguished by any proposed release." *State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So.2d 1067 (Fla. 2006). Appellee/Defendant's proposals, as discussed *supra,* fail to articulate any outstanding claims and only mention "liability, damages and all other issues in this action between the parties." Appellee/Defendant fails to discuss breach of fiduciary duty or fraud, which are the specific claims brought by Appellants/Plaintiffs in the underlying Complaint and must be addressed along with the claims in Appellee/Defendant's Counterclaim, discussed supra, in a proposal for settlement in order to avoid ambiguity or vagueness. Appellee/Defendant failed in this respect.

Additionally, according to *Lucase,* if accepted, the proposal should be capable of execution without the need for judicial interpretation, as proposals for settlement are intended to end judicial labor, not create more. *Id.* at 971. Because the terms of the proposals are so vague and ambiguous it must be left the Court to determine their meaning and the proposals must be deemed too vague to provide ***16** an award of attorneys' fees. Moreover, "[b]ecause the offer of judgment statute and related rule must be strictly construed, virtually any proposal that is ambiguous is not enforceable. *Hibbard; Barnes v. The Kellogg Company,* 846 So.2d 568 (Fla. 2nd DCA 2003), *disapproved on other grounds, Lamb v. Matetzschk,* 906 So.2d 1037 (Fla. 2005). *See also Nichols v. State Farm,* 851 So.2d 742 (Fla. 5th DCA 2003), *approved,* 932 So.2d 1067 (Fla.2006) (terms and conditions of proposal should be devoid of ambiguity, patent or latent; moreover, proposal should be capable of execution without the need for further explanation or judicial interpretation)." *Stasio v. McManaway,* 936 So.2d 676, 678 (Fla. 5th DCA 2006).

Accordingly, because Appellee/Defendant failed to attach a copy of a proposed general release or provide a synopsis of its terms and also failed to sufficiently state the claims to which his Proposals for Settlement were to be applied, Appellee/Defendant's Proposals for Settlement are improper and Appellee/Defendant should not be awarded attorneys' fees pursuant to Fla. R. Civ. P. 1.442(c)(2) and § 768.79 Fla. Stat.

POINT II: ASSUMING *ARGUENDO* THAT APPELLEE/DEFENDANT'S PROPOSALS FOR SETTLEMENT WERE NOT AMBIGUOUS, APPELLEE/DEFENDANT'S OFFER WAS NOT MADE IN GOOD FAITH

Assuming *arguendo* that Appellee/Defendant's Proposals for Settlement were not ambiguous, Appellee/Defendant's offer was not made in good faith. §768.79, Fla. Stat., provides in pertinent part:
***17** 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 him... if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer....

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

Therefore, once the statutory prerequisites have been met, the only discretion afforded the trial court by section (7)(a) is the authority to disallow the attorneys' fee award when an offer is not made in "good faith." *Eagleman v. Eagleman,* 673 So.2d 946, 947 (Fla. 4th DCA 1996); *See also Schmidt v. Fortner,* 629 So.2d 1036, 1040 (Fla. 4th DCA 1993). "The rule is that a minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal." *Connell v. Floyd,* 866 So.2d 90, 94 (Fla. 1st DCA 2004). "The offer need not equate with the total amount of damages that might be at issue." *Gurney v. State Farm Mut. Auto. Ins. Co.,* 889

So.2d 97, 99 (Fla. 5th DCA 2004). "The trial judge will have to consider all the surrounding circumstances when the offer was made." *Fox v. McCaw Cellular Commc'ns of Fla.,* 745 So.2d 330 (Fla. 4th DCA 1998).

In the instant matter, at the time the Proposals for Settlement were made the parties had already engaged in several months of litigation. Appellee/Defendant ***18** offered each Appellants/Plaintiffs only $250.00, inclusive of attorney's fees on a claim by the Appellants/Plaintiffs amounting in excess of $150,000.00, when Appellee/Defendant was aware that Appellants/Plaintiffs had already spent well over the offered amount.
It is not enough that a defendant's offer of judgment be based on its own unilateral belief and subjective determination that it is not liable. *Eagleman* at 948. As the court in *Eagleman* held, 'trial courts should view with considerable skepticism nominal offers which bear no reasonable relationship to damages and which are not founded upon a reasonable and realistic assessment of liability. Such nominal offers cannot advance the statutory purpose of encouraging settlement, but instead serve no purpose other than to lay a predicate for a subsequent award of attorney's fees...'

James v. Wash Depot Holdings, Inc., 489 F. Supp. 2d 1336 (S.D. Fla. 2007). It is clear that by only offering $250.00 on a claim by the Appellants/Plaintiffs amounting in excess of $150,000.00, Appellee/Defendant's offer bore "no reasonable relationship to [the] damages and [were] not founded upon a reasonable and realistic assessment of liability." *Id.* at 12. The purpose behind Appellee/Defendant's nominal offer was not to settle. Appellee/Defendant knew that Appellants/Plaintiffs had already expended more than the offered $250.00 in their legal fees and costs and therefore, the only reason for the nominal offer was "to lay a predicate for a subsequent award of attorney's fees." *Id.* at 12.
The good faith requirement 'insists that the offeror have some reasonable foundation on which to base an offer.' *Schmidt v. Fortner,* 629 So.2d 1036, 1039 (Fla. 4th DCA 1993). A reasonable basis for a nominal offer exists only where 'the undisputed record strongly ***19** indicate[s] that [the defendant] had no exposure' in the case. *Peoples Gas Sys., Inc. v. Acme Gas Corp.,* 689 So.2d 292, 300 (Fla. 3rd DCA 1997). Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal. *Dep't of Highway Safety and Motor Vehicles, Florida Highway Patrol, v. Weinstein,* 747 So.2d 1019 (Fla. 3rd DCA 2000).

Event Servs. Am., Inc. v. Ragusa, 917 So.2d 882, 884 (Fla. 3rd DCA 2005). The record does not reflect that Appellee/Defendant had a reasonable basis to conclude that he had no or nominal "exposure" and therefore was in the right to only offer a nominal $250.00 as a settlement on a claim by the Appellants/Plaintiffs amounting in excess of $150,000.00. In fact Appellants/Plaintiffs survived a motion for summary judgment on April 24, 2006 as it was the trial court's determination that, at the time Appellee/Defendant offered his Proposals for Settlement, there were issues of material fact still in dispute between the parties that needed to be investigated, researched, and resolved or litigated. As Appellee/Defendant was aware, this process is time consuming and expensive. Appellee/Defendant should have known that Appellants/Plaintiffs had already spent in excess of the offered $250.00. Appellants/Plaintiffs could not legitimately accept this offer, and the decision by Appellants/Plaintiffs not to accept was bolstered by the fact that Appellants/Plaintiffs survived Appellee/Defendant's motion for sanctions on January 3, 2005 and his motion for summary judgment was denied April 24, 2006 after his Proposals for Settlement were submitted to Appellants/Plaintiffs. Obviously the trial court believed that the underlying issues were serious enough to ***20** allowed the action to proceed to trial, which amounted to more fees and expenses.

Even if Appellee/Defendant was cleared on liability on the initial claim, an offer, such as the one made in the underlying matter, still should not support an award of attorney's fees pursuant to Florida Statute §768.79 and Rule 1.442, Fla.R.Civ.P. In *Ragusa,* even though the defendant was eventually cleared of liability early on in the litigation, it made only a nominal offer of settlement when there was still a sufficient basis to indicate that it would still reasonably face liability. *Id.* at 884. The District Court of Appeals found that the trial court was correct in not awarding attorney's fees even though the defendant was eventually cleared of liability. "Here, the trial court did not abuse its discretion by striking the proposals because the Appellees' claim had merit and it appeared [the defendant] had at least some exposure at the time the offers were made." *Id.* at 884. The same is true for the instant matter. It was not abundantly clear that Appellee/Defendant would eventually be cleared of liability on the initial claim; there were strong tendencies towards full liability at the time of the offer. Similarly, because the offer in the instant matter was also not made in good faith, there can be no award of attorneys' fees.

VII. CONCLUSION

Appellee/Defendant's Proposals for Settlement are ambiguous, as Appellee/Defendant failed to attach the general release referred to in the proposals ***21** nor did he provide a synopsis of the releases terms and the proposals do not specifically articulate what, if any, claims were to be resolved if Appellants/Plaintiffs accepted the proposals. Also, assuming *arguendo* that Appellee/Defendant's proposals were not ambiguous, they still fail due to their lack of "good faith."

Pursuant to *Swartsel,* a general release should be clear upon what is being released, who is being released, and any conditions or terms of the release. *Id.* at 453. Appellee/Defendant must describe the terms of the general release with particularity in order for Appellants/Plaintiffs to fully understand what they are releasing. If the terms are not sufficiently described, or not described at all, as was the case with the underlying Proposals for Settlement, the proposals must be deemed ambiguous and too vague to allow an award of attorneys' fees. Appellants/Plaintiffs could not possibly have determined what if anything they were releasing according to the general release because Appellee/Defendant failed to attach it to the proposals or provide a synopsis of the terms therein. By their very nature, the Proposals for Settlement must be deemed ambiguous.

Appellee/Defendant's proposals were also flawed in that they do not comply with Rule 1.442 (c)(2)(b), by failing to clearly identify the claim or claims the proposals are attempting to resolve. In paragraph one (1) of both of Appellee/Defendant's Proposals for Settlement, Appellee states that the "claim or ***22** claims sought to be resolved are liability, damages and all other issues in this action between the parties." Appellants/Plaintiffs' claims in the underlying Complaint were breach of fiduciary duty and fraud, which Appellee/Defendant failed to mention at all in his proposals which is a requirement pursuant to Rule 1.442 (c)(2)(B).

Assuming *arguendo* that Appellee/Defendant's Proposals for Settlement were not ambiguous, they still fail due to their lack of "good faith." §768.79(7)(a), Fla. Stat., provides in pertinent part, "If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." Appellee mockingly offered only $250.00 for a claim by the Appellants/Plaintiffs amounting in excess of $150,000.00. Clearly this offer was not made in good faith, as Appellants/Plaintiffs could not have been expected to accept such an offer as they had already spent more than what was offered in legal fees up to that point in the litigation.

Therefore, because a general release was not attach to the proposals and the terms were not discussed therein, and the proposals do not specifically articulate what, if any, claims, were to be resolved if Appellants/Plaintiffs accepted the proposals making Appellee/Defendant's Proposals for Settlement ambiguous and improper, and Appellee/Defendant's Proposals for Settlement were obviously not ***23** made in "good faith," Appellee should not be awarded any attorneys' fees pursuant to Fla. R. Civ. P. 1.442(c)(2) and §768.79 Fla. Stat. and the underlying Order should be withdrawn.

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