THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

JOHN & JUDITH HELLER,

Appellants,

DCA Case No.: 4D17-1345
L.T. Case No.: 2013-CA-013872

v.

TOWER HILL SIGNATURE INSURANCE COMPANY,

Appellee.
_____/

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit
Palm Beach County, Florida

ANSWER BRIEF

Scot E. Samis
Fla. Bar No. 0651753
Jonathan S. Tannen
Fla. Bar No. 70842
Traub Lieberman Straus
& Shrewsberry LLP
360 Central Avenue, 10th Floor
Post Office Box 3942
St. Petersburg, Florida 33731
(727) 898-8100 telephone
(727) 895-4838 facsimile
flpleadings@traublieberman.com
ssamis@traublieberman.com
jtannen@traublieberman.com
sschneider@traublieberman.com

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases: **Page(s)**

STATEMENT OF THE CASE AND FACTS

Appellants argue that the proposals for settlement (PFS) served by Appellee are invalid because they are ambiguous and overbroad. To see the flaws in Appellants' position, it is essential to examine the action brought by Appellants in comparison to the PFS. Since this aspect of the record is not fully explained in the Initial Brief, Appellee offers the following as a supplement. Some information provided in the Initial Brief is repeated for context.

On March 23, 2013, the insured property sustained water damage from a broken water heater. (R 18). Tower Hill accepted coverage and on May 9, 2013, made an initial payment of $18,579.75 based on its initial estimate of damages. (R 19). In a letter accompanying the payment, Tower Hill explained that the payment was not necessarily a final settlement of the claim, and invited Appellants to submit supplemental claims for damage discovered during the repair process. (R 19, 269-270).

Appellants hired a public adjuster who prepared an estimate in the amount of $170,768.96. (R 19). On May 21, 2013, this figure was submitted to Tower Hill on a Sworn Statement in Proof of Loss that stated, in relevant part, as follows:

***

THE ACTUAL CASH VALUE of said property at the time of the loss was *$ TBD*

THE WHOLE LOSS AND DAMAGE (Coverage A ONLY) was *$170,768.96*

LESS DEDUCTIBLE *$2,500.00*

THE AMOUNT CLAIMED for Coverage A under the above numbered policy is *$168,268.96*

***

(R 863).

Tower Hill had the estimate reviewed, and the decision was made to give Appellants "the benefit of the doubt," on certain items, resulting in an additional payment of $50,651.27. (R 350-351, 370-372). In an August 8, 2013 letter accompanying the second payment, Tower Hill again stated that the payment was not necessarily a final settlement and informed Appellants that they "may submit supplemental claims for any damages discovered in the covered reconstruction and repair of the above mentioned property." (R 20, 271-272).

Rather than commence repairs and submit a supplemental claim, Appellants sued Tower Hill for breach of contract. (R 17-69). The complaint recounted the history of the claim, including the payments made by Tower Hill and Appellants' expert's damages estimate of $170,768.96. (R 17-21). Appellants then alleged that Tower Hill "has breached the policy by denying coverage for the **entire loss**" and "has breached its insurance contract by failing to pay all of the aforementioned benefits due and owing under the policy." (R 20-21) (Emphasis added). The complaint was never amended.

At trial, Appellant John Heller confirmed that he was seeking the full amount of the loss related to the water heater leak, just as set forth on the Sworn Statement in Proof of Loss. He testified:

> Q. And again, how much is it on that proof of loss?
>
> A. $170,768.96.
>
> Q. That's what you're asking Tower Hill to pay you for this proof of --
>
> A. Less my deductible.
>
> Q. And that's what you think they should pay you for this broken water heater incident, right?
>
> A. Yes, I do.

(Supp. R, Transcript p. 59).[1]

Tower Hill's position was that it did not owe what Appellants sought. Tower Hill's corporate representative, Mr. Steptoe, testified that the terms of the policy required Tower Hill to initially pay only the actual cash value ("ACV") of the loss, less any applicable deductible. (R 339-341). ACV is defined as the "replacement cost minus depreciation." (R 341-342). Mr. Steptoe confirmed,

[1] This Court granted a motion to supplement the record with Mr. Heller's trial testimony. The reference to the supplemental record is to the transcript page because, as of this writing, the supplemental index has not been received from the Circuit Court Clerk.

however, that Tower Hill did not deduct depreciation and had therefore paid the replacement cost. (R 342-433, 423-424).

Mr. Steptoe further testified that Appellants could have submitted supplemental claims once repairs to the property commenced if additional damage was discovered. (R 339-341, 352-353, 415-416). He stated that the problem with the $170,768.96 estimate provided by Appellants was that these items were included up front, prior to any attempted repairs. (R 416).

Tower Hill's counsel argued to the jury that, until the work is performed, Tower Hill was required only to pay the actual cash value of the insured loss minus any applicable deductible. (R 460-462). Counsel argued that Tower Hill had in fact paid more than actual cash value, and the only estimate provided by Appellants, for $170,768.96, was a "purely replacement cost value estimate." (R 462-464). Accordingly, Tower Hill's position was that Appellants had "totally failed in their proof." (R 465).

The jury was instructed as follows:

***

> *The issue you must decide on Plaintiffs' claim against the Defendant is: Did the Hellers prove, by the greater weight of the evidence, that Tower Hill breached the policy with the Hellers by failing to pay the claim in accordance with the policy's Loss Settlement provision.*
>
> *The Loss Settlement provision, in pertinent part, provides as follows:*

SECTION I – CONDITIONS

3. Loss Settlement. Covered property losses are settled as follows:

b. Buildings...at replacement cost without deduction for depreciation, subject to the following:

(1) …we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

* * * *

(b) The replacement cost of that part of the building damaged for like construction and use on the same premises; or

(c) The necessary amount actually spent to repair or replace the damaged building.

(4) We will initially pay at least the actual cash value of the insured loss, less any applicable deductible. We shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred. We will not require you to advance payment for such repairs or expenses, with the exception of incidental expenses to mitigate further damage…

***

The Plaintiffs have the burden of proof to establish, by the greater weight of evidence that Tower Hill did not

make sufficient payment for damage caused by the water heater failure pursuant to the terms and conditions of the policy.

If the greater weight of evidence supports Plaintiffs' claim that Tower Hill did not make sufficient payment for damage caused by the water heater failure pursuant to the terms and conditions of the policy, then your verdict should be for the Plaintiffs.

If, on the other hand, Plaintiffs have not proven, by the greater weight of the evidence, that Tower Hill failed to make sufficient payment for damage caused by the water heater failure pursuant to the terms and conditions of the policy, then your verdict should be for the defendant, Tower Hill Signature Insurance Company.

***

If the loss requires repair or replacement of an item or part, any physical damage incurred in making such repair or replacement which is covered and not otherwise excluded by the policy must be included in the loss to the extent of any applicable limits.

If the loss requires replacement of items and the replaced items do not match in quality, color, or size, Tower Hill must make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, Tower Hill may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

***

If you find for Tower Hill, you will not consider the matter of damages. But, if you find for Mr. and Mrs.

> *Heller, you should award Mr. and Mrs. Heller the amount of money that the greater weight of the evidence shows will fairly and adequately compensate Mr. and Mrs. Heller for all of the damages caused to their home as a result the subject loss.*
>
> *You shall consider the following type of damages:*
>
> *1. Compensatory damages*
>
> *Compensatory damages is that amount of money which will put Mr. and Mrs. Heller in as good a position as they would have been if Tower Hill Signature Insurance Company had not breached the contract and which naturally result from the breach.*
>
> ***

(R 75-79).

The jury returned a verdict in favor of Tower Hill. (R 71). The verdict was as follows:

> We, the Jury, return the following verdict:
>
> 1. Did Plaintiffs prove by the greater weight of the evidence that Tower Hill failed to make sufficient payment to John Heller and Judith Heller for damage(s) caused by a water heater failure pursuant to the terms and conditions of the policy and Florida law.
>
> ___ Yes. _X_ No.
>
> 2. What is the total amount owed to the Plaintiffs for damage caused by the water heater failure (the court will reduce this amount by Tower Hill Signature Insurance Company's prior payments and the deductible).

(R 71). Accordingly, final judgment was entered in favor of Tower Hill. (R 131). Tower Hill then moved for attorneys' fees based on Proposals for Settlement served to each Appellant. (R 87-130, 173-215).

The Proposal for Settlement to John Heller that was served on April 14, 2014 stated, in relevant part, as follows:

> ***
>
> 3. This Proposal for Settlement is to resolve any and all claims and damages asserted by the Plaintiff, JOHN HELLER, arising out of the cause of action which is the subject matter of this lawsuit and only this lawsuit.
>
> ***
>
> 5. The relevant conditions of this Proposal for Settlement are that this offer is to be construed as including any and all damages that may be awarded in a final judgment including prejudgment interest, taxable costs and attorneys' fees in this lawsuit and only this lawsuit.
>
> ***
>
> 8. The non-monetary terms and conditions of this offer are set forth with particularity in the Release and Hold Harmless Agreement attached hereto as Exhibit "A" and incorporated by reference as if fully set forth herein.

(R 195-197). The referenced Release was attached. (R 198-204). The Release provided, in relevant part, as follows:

> RELEASE AND HOLD HARMLESS AGREEMENT
>
> WHEREAS, JOHN HELLER acknowledges that he and TOWER HILL SIGNATURE INSURANCE COMPANY ("TOWER HILL"), collectively known as the "Parties", are in litigation over an insurance

claim in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Case No.: 2013-CA-013872, *John & Judith Heller vs. Tower Hill Signature Insurance Company* arising out of and relating to loss, damage, or expense sustained or incurred as a result of a loss occurring on or about March 25, 2013 at 2537 NW 59th Street, Boca Raton, FL 33496 associated with Claim number 2800109809 and Policy number P001799760 (the "Proceedings");

WHEREAS, JOHN HELLER, subject to the last sentence of this paragraph, acknowledges the Parties are desirous of resolving this controversy and settling all claims or demands presently pending in these Proceedings, or which may arise out of the subject insurance claims, claim handling or subject matter of these Proceedings, whether such claims or demands are based in statute, claims for statutory bad faith under Florida law, tort, contract extra-contractual theories, or any other theories in law or equity. JOHN HELLER acknowledges that this provision does not apply to any claims set forth by Plaintiff, JUDITH HELLER as it pertains to the Proceedings;

***

NOW, THEREFORE, in consideration of the terms and conditions contained herein and for other good and valuable consideration, the receipt, adequacy and sufficiency of which are hereby acknowledged, JOHN HELLER avers as follows:

1. The above-referenced recitals are true and correct and are incorporated herein;

***

6. JOHN HELLER, subject to the last sentence of this paragraph, hereby fully, completely, and forever releases and discharges TOWER HILL, its respective stakeholders, directors, officers, agents, representatives, employees, related or affiliated companies, subsidiaries, beneficiaries, heirs, successors, assigns and executors from and against any and all past, present and future losses, liabilities, responsibilities, demands, obligations, actions, causes of action, rights, judgments, interest, damages, compensation of any kind, liens, expenses (including attorney's fees and costs), and claims whatsoever,

> in law or in equity, whether based in statute, any claim or allegation of violation of §624. 155 or §626.9541, Fla. Stat., tort, contract, extra-contractual theories, or any other theories in law or equity, whether known or unknown, whether discovered or undiscovered, whether fixed or contingent, which arise out of or relate to the claim(s) or Proceedings. This provision does not apply to any claims set forth by Plaintiff, JUDITH HELLER as it pertains to the Proceedings.
>
> 7. JOHN HELLER, subject to the last sentence of this paragraph, expressly covenants, promises and agrees that he shall be and is hereby forever barred and permanently enjoined from now or hereinafter instituting, maintaining or asserting, either directly or indirectly, any and all claims, supplemental claims, causes of action or damages because of, arising out of, relating to, or resulting from the Proceedings. This provision does not apply to any claims set forth by Plaintiff, JUDITH HELLER as it pertains to the Proceedings.

(R 198-200).

The Proposal and attached release and dismissal documents served on Judith Heller on April 14, 2014 contained the same terms, but pertained to Judith Heller's claim only. (R 205-214).

Appellants filed a Motion to Strike Defendant's Proposals for Settlement, arguing that the Proposals were invalid because, *inter alia*, they were "not strictly limited to damages arising out of the underlying litigation." (R 132-136).

Tower Hill responded, arguing the PFS and Releases explicitly referred to claims arising from the subject matter of the litigation and were of the kind enforced by Florida courts. (R 216-231).

After hearing, Appellants submitted a supplemental memorandum arguing that the PFS and Releases were inconsistent and therefore ambiguous. (R 273-

282). Tower Hill argued that the Releases, which were incorporated by reference into the PFS, were completely consistent and unambiguous in seeking to resolve all claims arising from the subject matter of the litigation. (R 283-295).

The trial court granted the fee motion, finding the PFS served on April 14, 2014 were unambiguous, valid, and enforceable. (R 433-435).

On March 20, 2017, the trial court entered a Final Judgment for Attorneys' Fees and Costs in favor of Tower Hill. (R 438-441). Appellants sought rehearing, which was denied, and Appellants appealed. (R 442-446, 505-512).

SUMMARY OF ARGUMENT

I. The PFS satisfy the particularity requirement and are unambiguous

The objective of the PFS statute and rule is to create an incentive for parties to settle disputes arising from the subject matter of the lawsuit. Therefore, to determine whether a PFS is overbroad, the starting point must be the scope of the lawsuit itself.

Appellants' complaint described the water heater leak and resulting water damage. It recounted the payments received from Tower Hill and specifically alleged Appellants' estimate of damages. Based on these allegations, the complaint asserted that Tower Hill had "breached the policy by denying coverage for the entire loss." Therefore, when the time came for Tower Hill to formulate a PFS, it properly sought to resolve the case and put an end to any disputes arising from the water loss that was subject of the lawsuit.

The PFS explains the terms of the proposal in precise detail, seeks resolution of all controversy arising from the subject matter of the litigation (with specific reference to the date of loss, lawsuit, and claim number assigned to the water loss), and otherwise satisfies every criterion for enforcement of the fee claim. Appellants sued for their entire loss arising from the water loss identified in their own pleading. That is what the PFS attempted to resolve. Thus, the Tower Hill Releases fall well within the category of those deemed permissible in PFS by Florida courts.

There is no conflict between the terms of the PFS and the Releases that are incorporated into the PFS by reference. The PFS state that they are made to resolve any and all claims and damages arising out of the cause of action which form the subject matter of the lawsuit. The Releases contain similar language and make clear that the Hellers would be prohibited from bringing "any and all claims, supplemental claims, causes of action or damages because of, arising out of, relating to, or resulting from the Proceedings." The fact that the releases also contain standard release language is of no moment, as Florida courts have consistently ruled.

II. The PFS did not exceed the subject matter of the lawsuit

Appellants begin this section by misstating the issue. Their argument is based on the premise that their lawsuit was limited to a partial, ACV-only claim, leaving a replacement cost claim to be litigated separately. This ignores the scope of their lawsuit and their position at trial. By their own admission, they argued throughout the litigation that they were entitled to replacement cost of their entire loss.

The problem with Appellants' position is that they confuse the *subject matter of their lawsuit* with the *outcome of the case*. Appellants sued for something they were not entitled to. That is why they lost at trial. That does not

change the fact that *they sued for it*. And it is the subject matter of the lawsuit, not its outcome, which defines the proper scope of a PFS.

Tower Hill created PFS and Releases that were broad enough to bring the matter to a close, but still limited to the subject matter of the action. It may be fairly said that the wording used by Tower Hill - - i.e., the language limiting the PFS to "this lawsuit" and "the Proceedings" - - is the best way to accomplish the aims of s. 768.79 and Rule 1.442. This is exactly what a PFS is supposed to do – resolve the disputes raised by the pleadings.

III. Tower Hill's position on appeal is consistent with its position at trial

Tower Hill's position prior to the litigation, throughout the lawsuit and the jury trial, and now on appeal, has been the same: this was a meritless lawsuit that should never have been brought. That position is reflected in the corporate representative's testimony, defense counsel's arguments, and the jury's verdict.

Nothing in Tower Hill's arguments below supports Appellants' position on appeal that *their claim* was limited to ACV, let alone that the Proposals and Releases extended to claims not at issue in the litigation. The mere fact that Appellants' attempt to recover the full amount of the restoration costs was premature, and that their breach of contract claim was therefore without merit, does not mean that Tower Hill was prohibited from using a PFS in attempting to settle the claim they brought.

The record reveals that the PFS served in this case satisfied all requirements of section 768.79 and Rule 1.442, including the rule's particularity requirements. Accordingly, Tower Hill was entitled to attorneys' fees, and the judgment on appeal should be affirmed.

STANDARD OF REVIEW

Appellee agrees that orders granting fees based on proposals for settlement are subject to de novo review. *Regions Bank v. Rhodes*, 126 So. 3d 1259, 1260 (Fla. 4th DCA 2013).

ARGUMENT

Issue I

WHETHER THE PROPOSALS FOR SETTLEMENT SATISFY THE PARTICULARITY REQUIREMENT OF FLA. R. CIV. P. 1.442.

In this section, Appellants assert the PFS were unenforceable for two reasons: (A) the Releases exceeded the subject matter of the lawsuit; and (2) the PFS are ambiguous because they conflict with the attached Releases. Neither argument has merit.

A. The PFS and Attached Releases Specifically Refer to the Lawsuit Brought by Appellants and its Subject Matter (Init. Br. pp 5-9).

The objective of the PFS statute and rule is to create an incentive for parties to settle litigation and put an end to disputes arising from the subject matter of the lawsuit. *Board of Trustees of Fla. Atl. Univ. v. Bowman*, 853 So. 2d 507 (Fla. 4th DCA 2003) ("The Florida Supreme Court has held that general releases contained in proposals for settlement are enforceable to further the policy of encouraging settlements," citing *Mazzoni Farms, Inc. v. DuPont De Nemours & Co*., 761 So. 2d 306 (Fla. 2000)); *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989) (explaining that rule 1.442 "was implemented solely to encourage settlements in order to eliminate trials if possible"); *Kuhajda v. Borden Dairy Co*., 202 So. 3d 391, 395 (Fla. 2016) (The purpose of section 768.79 is to "reduce litigation costs and conserve judicial resources by encouraging the settlement of

legal actions"); *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1077 (Fla. 2006) (noting the objective of encouraging plaintiffs to settle where a proposal renders the litigation needless).

Therefore, to determine whether a PFS is overbroad, the starting point must be the scope of the lawsuit itself. See, e.g., *Ambeca, Inc. v. Marina Cove Village Townhome Association*, 880 So. 2d 811 (Fla. 1st DCA 2004) (PFS enforceable where attached release referred to claims set forth in pleadings or arising from the facts giving rise to the lawsuit); *Wallen v. Tyson*, 174 So. 3d 1058, 1059 (Fla. 5th DCA 2015) (PFS enforced where release referred to all claims arising from the accident that was the subject matter of the action).

In the case at bar, Appellants' lawsuit described the water heater leak and resulting water damage. It recounted the payments received from Tower Hill and specifically alleged Appellants' estimate of damages of $170,768.96. Based on these allegations, the complaint asserts that Tower Hill had "breached the policy by denying coverage for the **entire loss**" and by "failing to pay **all of the aforementioned benefits** due and owing under the policy."

When the time came for Tower Hill to formulate a PFS, it properly sought to resolve the case and put an end to any disputes arising from the water loss that was subject of the lawsuit. *Ambeca, Wallen.*

That is exactly what Tower Hill did. The PFS state, in relevant part:

> *3. This Proposal for Settlement is to resolve any and all claims and damages asserted by the Plaintiff, JOHN HELLER, arising out of the cause of action* ***which is the subject matter of this lawsuit and only this lawsuit****.*
>
> ***
>
> *5. The relevant conditions of this Proposal for Settlement are that this offer is to be construed as including any and all damages that may be awarded in a final judgment including prejudgment interest, taxable costs and attorneys' fees* ***in this lawsuit and only this lawsuit****.*

To be sure that acceptance of the PFS would buy Tower Hill its peace with regard to Appellants' claim, it included standard-form Releases which were specifically limited to the subject matter of the action:

> *"…fully, completely, and forever releases and discharges TOWER HILL, its respective stakeholders, directors, officers, agents, representatives, employees, related or affiliated companies, subsidiaries, beneficiaries, heirs, successors, assigns and executors from and against any and all past, present and future losses, liabilities, responsibilities, demands, obligations, actions, causes of action, rights, judgments, interest, damages, compensation of any kind, liens, expenses (including attorney's fees and costs), and claims whatsoever, in law or in equity, whether based in statute, any claim or allegation of violation of §624.155 or §626.9541, Fla. Stat., tort, contract, extra-contractual theories, or any other theories in law or equity, whether known or unknown, whether discovered or undiscovered, whether fixed or contingent,* ***which arise out of or relate to the claim(s) or Proceedings****."* (Emphasis added).

The word "Proceedings" is defined in the preamble of the Releases as follows:

> *WHEREAS, JOHN HELLER acknowledges that he and TOWER HILL SIGNATURE INSURANCE COMPANY ("TOWER HILL"), collectively known as the "Parties", are in* ***litigation over an insurance claim in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Case No.: 2013-CA-013872, John & Judith Heller vs. Tower Hill Signature Insurance Company arising out of and relating to loss, damage, or expense sustained or incurred as a result of a loss occurring on or about March 25, 2013 at 2537 NW 59th Street, Boca Raton, FL 33496 associated with Claim number 2800109809 and Policy number P001799760 (the "Proceedings")****;*** (Emphasis added).

It is difficult to see how Tower Hill could have done a better job of meeting the particularity requirements of Rule 1.442.[2] The PFS explains the terms of the proposal in precise detail, seeks resolution of all controversy arising from the subject matter of the litigation (with specific reference to the date of loss, lawsuit,

---

[2] Rule 1.442(c) states, in relevant part:

> *(c) Form and Content of Proposal for Settlement*
>
> ***
>
> *(2) A proposal shall:*
>
> ***
>
> *(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;*
>
> ***

and claim number assigned to the water loss), and otherwise satisfies every criterion for enforcement of the fee claim. Appellants sued for their entire loss arising from the water loss identified in their own pleading. That is what the PFS attempted to resolve.

The Tower Hill Releases fall well within the category of those deemed permissible in PFS by Florida courts. An apt example is *Ambeca, supra*, where the First District reversed an order denying attorneys' fees that was based on the trial court's conclusion that the offer of judgment "required a release for issues not raised within the scope of the pleadings." *Id*., 880 So. 2d at 812. The release in that case provided:

> If accepted, this proposal for settlement shall settle all claims asserted in this cause against [Appellant], **as well as any other claims which [Marina Cove] might otherwise have or assert against [Appellant],** including punitive damages. The amount specified in this proposal for settlement includes all costs, interest, or other expenses and attorney's fees accrued to date.

Id. at 813 (original emphasis). In finding that this language did not render the proposal unenforceable, the court observed that "a release that contains broad expansive language is not, per se, invalid." *Id.* at 812. It further noted that "although the language may require releases for claims not raised or set forth in the pleadings, it does so only to the extent those claims would arise from the facts giving rise to the underlying litigation." *Id.* Thus, the proposal was valid and enforceable.

The Releases in the case at bar also parallel those in *Wallen, supra*, which involved a personal injury lawsuit following an automobile accident. In that case, the proposal itself stated that it was an offer to settle "all claims of Plaintiff . . . in the above-captioned lawsuit arising from the incident that occurred on or about September 20, 2010." *Id.* Attached to the proposal was a release providing that the plaintiff (Tyson) would release the defendant (Wallen)

> from any and all claims, demands, damages, actions, causes of action or lawsuits of any kind or nature whatsoever for damages for bodily injury, wrongful death, consortium, negligence in any form whatsoever, including, but not limited to, any and all claims for compensatory damages, punitive damages, attorney's fees, costs, or any other damages to which [Tyson] may be entitled relating to that incident on or about September 20, 2010, as described in the Complaint filed in St. Johns County, Florida, Case Number 11-1847.

Id. at 1060. The release further stated that by signing, Tyson:

> acknowledges that he understands that the injuries sustained in the incident may worsen or cause other physical conditions and that he accepts the terms of this settlement for the purpose of making a full and final compromise, adjustment and settlement of any and all claims, disputed or otherwise, on account of any and all injuries or damages, **and for the express purpose of precluding forever any further or additional claims arising out of the above-described incident as against [Wallen]**.

Id. (emphasis added). Distinguishing the cases on which the trial court relied in finding the proposal unenforceable, the Fifth District stated: "Here, the Release specifically limited Tyson's release to his claims against Wallen, arising out of the specific automobile accident, in the specifically styled case." *Id.* at 1061. This

description could be applied with equal validity to the Tower Hill Releases at issue here.

Also instructive is *Carey-All Transport, Inc. v. Newby*, 989 So. 2d 1201 (Fla. 2d DCA 2008), the court approved a proposal for settlement which "applied to any person or entity that needed to be released to prevent Carey-All from ever being sued again by Newby for injuries relating to this particular accident." In so holding, the court stated:

> Our holding is also in keeping with public policy in this area. "[G]eneral releases contained in proposals for settlement are enforceable to further the policy of encouraging settlements." *Bowman*, 853 So. 2d at 509 (citing *Mazzoni Farms, Inc. v. DuPont De Nemours & Co.*, 761 So. 2d 306 (Fla. 2000)). The goal of most settlement proposals is finality. Parties would be discouraged from making reasonable settlement proposals if they knew that minor or nonsubstantive objections – whether real or imagined – could defeat the application of section 768.79's fee-shifting provisions.

Id. at 1206.

The analysis in Carey-All is consistent with this Court's view in *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So. 3d 348 (Fla. 4th DCA 2011), which enforced a PFS that was directed to "resolving all claims as well as any and all claims that could have been or should have been brought by Plaintiff…against Defendant…". The PFS in the present case fall in the same category.

The cases relied upon by Appellants serve only as contrast to the situation at bar. In *Zalis v. M.E.J. Rich Corp.*, 797 So. 2d 1289, 1290 (Fla. 4th DCA 2001),

the Court stated: "The condition that a plaintiff relinquish all rights to sue about anything at any point in the future is intrinsically a condition incapable of being stated with the particularity required under section 768.79 of the Florida Statutes."

Tower Hill's Proposals did not require a release of "any claim that might arise in the future" between the parties. *Id.* Rather, the Releases were expressly limited to "claims, supplemental claims, causes of action or damages because of, arising out of, relating to, or resulting from the Proceedings." (R 200, 210).

This Court explained the distinction in *Bowman*, supra. In *Bowman*, the release pertained to:

> all, and all manner of action and actions…by reason of any matter, cause or thing whatsoever, known and unknown, foreseen and unforeseen, from the beginning of the world to the day of these presents, and including all issues, causes, claims, counterclaims, set-offs, and allegations which were raised or could have been raised relating to or arising out of certain action styled *Laura Bowman, et al., v. Florida Board of Regents, Palm Beach County* Circuit Case No.: CL 99-12145 AI.

Id., 853 So. 2d at 508.

In approving this release, the court noted that the release in *Zalis* was distinguishable because it required Plaintiffs to "relinquish all rights to sue about anything at any point in the future." *Id.* at 509-510 (emphasis in original). In comparing the *Bowman* release, the court observed, "They were not required to release all rights to sue Defendant based on any causes of action accruing in the

future. It was the release of future claims in *Zalis* that this court found to be invalid." *Id.* at 510.

The same distinction applies here, where the Releases pertained to the events giving rise to *these Proceedings*, which is specifically defined in terms of the litigation itself and its subject matter - - just as in *Bowman*. Accordingly, the Tower Hill PFS and Releases, like those in *Bowman*, apply the *specific loss* which was the subject of the lawsuit - - and do not affect future, undefined and non-asserted claims as in *Zalis*.

The other cases relied upon by Appellants are even further afield. In *Hales v. Advanced Systems Design, Inc.*, 855 So. 2d 1232, 1233 (Fla. 1st DCA 2003), the offeror requested "global release of any claim that might arise in the future, against any entity remotely related to appellee, fails to comport with the statute and rule, which require proposals for settlement to state relevant conditions and non-monetary terms with particularity." See also *Palm Beach Polo Holdings, Inc. v. Village of Wellington*, 904 So. 2d 652) (release required the offeree to release all claims against offeror "for upon, or by reason of any matter, cause, or things whatsoever ... including, but not limited to...items of damage or loss which were brought or not brought in [this] lawsuit...'). In *Dryden v. Pedemonti*, 910 So. 2d 854 (Fla. 5th DCA 2005), release terms summarized in the PFS required Plaintiff to indemnify and hold the Defendant and all persons legally liable for the Defendant's

actions harmless from any liens and subrogated interests of any third party by virtue of any health care related liens. *Id*. at 855. The court noted that it was unclear, even at the oral argument, as to whether or not this release would extinguish the Plaintiff's first-party PIP and health insurance claims. *Id*.

Appellants' reliance on *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067 (Fla. 2006), is similarly misplaced. In *Nichols*, the plaintiff was injured in an automobile accident and filed suit for damages against her insurer under the personal injury protection ("PIP") provision of her insurance policy. 851 So. 2d at 744. While the suit was pending, State Farm served a proposal for settlement which included a requirement that the plaintiff "execute a general release in favor of State Farm, which will be expressly limited to all claims, causes of action, etc., that have accrued through the date of [Insured's] acceptance of this proposal." *Id.* at 744-45. At the time the proposal was served, the Plaintiff also had an outstanding claim against the insurer for uninsured motorist ("UM") benefits, which was not a part of the lawsuit. *Id.* at 754. Because it was unclear whether the release applied only to the plaintiff's pending PIP claim, or whether it would also have extended to her pending UM claim, the Fifth District held that the proposal was ambiguous and unenforceable. *Id.* at 745-47.

Here, there is no such separate claim, since Appellants sued for their entire loss relating to the water heater leak. The true application of *Nichols* to the case at bar lies in the following instruction:

> We caution that rule 1.442 is not intended to revolutionize the language used in general releases. Traditionally, general releases have included expansive language designed to protect the offeror from unforeseen developments or creative maneuvering by the other party. Such language can be sufficiently particular to satisfy rule 1.442. For example, in *Board of Trustees of Florida Atlantic University v. Bowman*, 853 So. 2d 507 (Fla. 4th DCA 2003), the Fourth District concluded that the language in a general release, "even though expansive, is typical of other general releases and is clear and unambiguous." *Id*. at 509. The rule aims to prevent ambiguity, not breadth.

932 So. 2d at 1079.

The Releases in this case would have protected Tower Hill from precisely the type of "creative maneuvering" the Florida Supreme Court cautioned against in *Nichols II*. 932 So. 2d at 1079. Clearly, it would not have been in the interest of finality for Tower Hill to enter into a settlement with Appellants – paying them $60,000 to resolve their Complaint to recover "the entire loss" resulting from the broken water heater – only to be hit with a successive lawsuit for further damages based on the same incident. Indeed, the fact that Appellants subsequently filed such a suit after Tower Hill prevailed at trial demonstrates that these concerns were well-founded.

The mere fact that the Proposals, if they had been accepted, would have barred another lawsuit on the same claim does not render the Proposals invalid or unenforceable. On the contrary, that is the fundamental aim of a PFS - - and the reason why releases containing similar language have been consistently approved by Florida appellate courts. *Bowman, Ambeca, Wallen, Carey-All, Land & Sea*.

B. The PFS and Releases are Consistent and Unambiguous (Init. Br. pp. 9-12).

Next, Appellants argue that there is a "discrepancy" between Tower Hill's PFS and the attached Releases which renders the PFS ambiguous. On the contrary, the releases reinforce precisely what the proposed settlement would resolve, and ensures that the nonmonetary terms are stated with particularity as required by Rule 1.442(c)(2)(D).

There is simply no conflict between the terms of the PFS and the Releases. The PFS state that they are made to resolve any and all claims and damages arising out of the cause of action which form the subject matter of the lawsuit. The Releases, which the Proposals incorporate by reference, contain similar language and make clear that the Hellers would be prohibited from bringing "any and all claims, supplemental claims, causes of action or damages because of, arising out of, relating to, or resulting from the Proceedings." The fact that the releases

contain standard release language is of no moment, as the case law discussed above illustrates.

Again, the cases relied upon by Appellants have no application. *Dowd v. Geico General Ins. Co.*, 42 Fla. L. Weekly D1471 (Fla. 3d DCA June 27, 2017) falls into the familiar, distinguishable category of cases where it is unclear whether a release pertaining to one UM or PIP would have the effect of extinguishing the other, unspecified claim. Here, the PFS and Release specifically refer to the subject matter of the Appellants' lawsuit, which encompassed, in their own words, their "entire loss."

South Florida Pool & Spa Corp. v. Sharpe Investment Land Trust, 207 So. 3d 301 (Fla. 3d DCA 2016), is also inapposite. There, a landlord filed suit against a commercial tenant for eviction and raised additional claims for damages claims based on the tenant's alleged negligence and breaches of the lease. The trial court severed the eviction claim from the damages claims and entered a summary judgment of eviction in the landlord's favor, which the tenant appealed. During the pendency of the appeal of the eviction claim, the landlord served a proposal for settlement offering $15,000 to settle the remaining damages claims. However, while the PFS itself stated that it excluded the eviction claims pending on appeal, the release attached to the PFS stated that it covered any and all "claims of consequential damages and expenses, including attorney's fees which have arisen,

arise, or which may hereafter arise out of the matters which were alleged in, or could have been alleged in [the case] . . . ." *Id.* at 303 (alteration in original). As the Third District observed, this language was ambiguous as to whether it was intended to cover attorneys' fees associated with the eviction claim pending on appeal. Thus, because the terms of the proposal and release were ambiguous, the Third District held that it was unenforceable.

These cases bear no resemblance to the situation at bar. The same may be said of *Stasio v. McManaway*, 936 So. 2d 676 (Fla. 5th DCA 2006) (finding PFS ambiguous where the proposal itself stated that the amount to be paid was $60,000, but the release attached to the proposal stated that the consideration was "the sum of FIFTY NINE THOUSAND NO/100 DOLLARS ($60,000.00)").

Appellants' criticism of the Tower Hill Releases is the kind of "nit-picking" rejected by this Court in *Costco Wholesale Corp. v. Llanio-Gonzalez*, 213 So. 3d 944 (Fla. 4th DCA 2017); *Am. Home Assur. Co. v. D'Agostino*, 211 So. 3d 63 (Fla. 4th DCA 2017) and *Land & Sea Petroleum, Inc. v. Business Specialties, Inc.*, 53 so.3d 348 (Fla. 4th DCA 2011), and by the Second District in *Carey All-Transport v. Newby*, 989 So.2d 1201 (Fla. 2d DCA 2008).

As the trial court observed at the hearing on Appellants' motion to strike the Proposals, Appellants' arguments indicated that they fully understood that future supplemental claims for replacement costs arising from the broken water heater

would be barred by the releases; they simply believed the amount being offered was insufficient. (R 539-544). It is also telling that this issue was raised for the first time in a supplemental memorandum delivered after the hearing on the fee motion. This may be the best indication that the purported allegation of an ambiguity could not possibly have "reasonably affected the offeree's decision on whether to accept the proposal for settlement." *Alamo Financing v. Mazojf,* 112 So.3d 626, 629 (Fla. 4th DCA 2013).

Issue II

WHETHER THE PROPOSALS FOR SETTLEMENT EXCEEDED THE SUBJECT MATTER OF THE LAWSUIT.

Appellants begin this section by misstating the issue. Their argument is based on the premise that their lawsuit was limited to a partial, ACV-only claim, leaving a replacement cost claim to be litigated separately. This ignores the scope of their lawsuit and their position at trial.

The Appellants decided to sue Tower Hill for their "entire loss" stemming from the water heater leak, going so far as to state the precise estimate provided by their expert. By their own admission, they argued throughout the litigation that they were entitled to replacement cost. This fact is acknowledged in the Initial Brief (p.2), where Appellants note that they argued from beginning to end that they were entitled to the *full replacement cost of the property damaged by the water heater leak*. There can be no doubt about the subject matter of their lawsuit.

The problem with Appellants' position is that they confuse the *subject matter of their lawsuit* with the *outcome of the case*. Appellants sued for something they were not entitled to. That is why they lost at trial. That does not change the fact that *they sued for it*. And it is the subject matter of the lawsuit, not its outcome, which defines the proper scope of a PFS.

Once this distinction is made, the arguments in this section of the Initial Brief become irrelevant. It should not have been surprising to Appellants that Tower Hill would argue that the evidence and policy do not support their claim for replacement cost. The jury instructions did nothing more than track the relevant language of the policy and ask the jury to determine whether Tower Hill had breached its obligations; *viz*:

> ***
> *The issue you must decide on Plaintiffs' claim against the Defendant is: Did the Hellers prove, by the greater weight of the evidence, that Tower Hill breached the policy with the Hellers by failing to pay the claim in accordance with the policy's Loss Settlement provision.*
>
> ***
>
> *The Plaintiffs have the burden of proof to establish, by the greater weight of evidence that Tower Hill did not make sufficient payment for damage caused by the water heater failure pursuant to the terms and conditions of the policy.*
>
> *If the greater weight of evidence supports Plaintiffs' claim that Tower Hill did not make sufficient payment for damage caused by the water heater failure pursuant to the terms and conditions of the policy, then your verdict should be for the Plaintiffs.*
>
> *If, on the other hand, Plaintiffs have not proven, by the greater weight of the evidence, that Tower Hill failed to make sufficient payment for damage caused by the water heater failure pursuant to the terms and conditions of the policy, then your verdict should be for the defendant, Tower Hill Signature Insurance Company.*

***

If the loss requires repair or replacement of an item or part, any physical damage incurred in making such repair or replacement which is covered and not otherwise excluded by the policy must be included in the loss to the extent of any applicable limits.

If the loss requires replacement of items and the replaced items do not match in quality, color, or size, Tower Hill must make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, Tower Hill may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

***

(R 76-79).

Nothing in the jury instructions or Tower Hill's arguments prevented Appellants from making their counterarguments about being owed their entire claim as pled. On the contrary, the jury instructions invited that possibility:

***

If you find for Tower Hill, you will not consider the matter of damages. But, if you find for Mr. and Mrs. Heller, you should award Mr. and Mrs. Heller the amount of money that the greater weight of the evidence shows will fairly and adequately compensate Mr. and Mrs. Heller for <u>all of the damages caused to their home as a result the subject loss</u>.

You shall consider the following type of damages:

> *1. Compensatory damages*
>
> *Compensatory damages is that amount of money which will put Mr. and Mrs. Heller in as good a position as they would have been if Tower Hill Signature Insurance Company had not breached the contract and which naturally result from the breach.*

(R 79).

Returning to the true issue at hand, the question remains: Did the PFS and Releases go beyond the subject matter of the lawsuit? The answer is still no. Both the PFS and Releases specifically refer to the subject matter of the lawsuit and proceedings. That is what is contemplated under the rule and statute.

Appellants want to avoid the consequences of their own pleading choices by comparing the PFS to the jury's verdict rather than what they claimed. If that logic carried the day, then any party could nullify any PFS by making at least one completely unsupported claim in a lawsuit - - and then, when the jury rejects it, argue that the PFS that attempted to resolve the entire lawsuit was overbroad. That is not the law, nor should it be.

The only way to combat this tactic is to define the scope of the PFS and release by direct reference to the plaintiff's own claims. Tower Hill created PFS and Releases that were broad enough to bring the matter to a close, but still limited to the subject matter of the action. It may be fairly said that the wording used by Tower Hill - - i.e., the language limiting the PFS to "this lawsuit" and "the

Proceedings" - - is the best way to accomplish the aims of s. 768.79 and Rule 1.442. Rather than trying to characterize the scope of Appellants' claims, the PFS and Releases refer to the whole of the lawsuit and its subject matter. This is exactly what a PFS is supposed to do – resolve the disputes that the Plaintiffs have raised.

On page 15 of the Initial Brief, Appellants briefly assert that "the trial court applied the wrong standard in finding the Proposals valid." This argument ignores the whole of the order and, more important, is irrelevant since this Court will determine the validity of the PFS on *de novo* review.

The order below sets out the standards governing whether a proposal for settlement satisfies the particularity requirements of Rule 1.442 and goes on to apply these standards to the Proposals in finding they were "not ambiguous" and were "valid and enforceable," adding: "The Court further finds that the proposal and incorporated release sufficiently put Plaintiffs on notice as to what rights are extinguished via acceptance of the proposal." (R 434).

Appellants' argument is based solely on the trial court's subsequent statement that "Plaintiffs made a calculated decision to proceed to trial because the amount offered at that time was apparently insufficient." (R 434). However, the order makes clear that this statement was based on Appellants' counsel's own representations at the hearing on Tower Hill's motion for fees. Appellants ignore

the trial court's prior statement to this effect in the order: "At the hearing, Plaintiffs' counsel asserted that the amount included in the proposal was insufficient to satisfy Plaintiffs' claim. Insufficiency of the amount does not render the proposal ambiguous." (R 434).

This statement is consistent with the trial court's discussion with Appellants' counsel at the hearing. In responding to counsel's arguments as to why Appellants did not want to accept the amount offered in the Proposals served by Tower Hill, the trial court observed:

> [I]t's not about the dollar figure. It's about whether you know what rights you're giving up. I hear you when you say the dollar figure was insufficient to pay for – or in your client's mind and in your mind it was insufficient to pay for the future damages. But I haven't heard you say, that you didn't understand that in signing the release you were giving up your future rights to make any future claims.

(R 542).

Notably, even if the trial court had applied an incorrect standard, the order on appeal would still have to be affirmed. Under the "tipsy coachman" rule, "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record." *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999). In this case, for the reasons discussed previously, the Proposals satisfy the requirements of section 768.79 and Rule 1.442.

Issue III

WHETHER TOWER HILL'S POSITION ON APPEAL IS CONSISTENT WITH ITS POSITION AT TRIAL.

Finally, Appellants argue that Tower Hill's current position conflicts with the position it took at trial. Again, this misses the point. To determine whether a PFS is overbroad, it must be compared with the scope of the lawsuit as defined by a plaintiffs' own pleading. The fact that Tower Hill argued that Appellants' claims were meritless does not mean that the scope of Appellants' lawsuit changed.

Tower Hill's position prior to the litigation, throughout the lawsuit and the jury trial, and now on appeal, has been the same: this was a meritless lawsuit that should never have been brought. That is what Mr. Steptoe's trial testimony reflects. Tower Hill specifically advised Appellants in its letters accompanying its $18,579.75 and $50,651.27 payments for the damages caused by the broken water heater that these payments were not necessarily a full and final settlement of their claim, and informed them that they "may submit supplemental claims for any damages discovered in the covered reconstruction and repair of the above mentioned property." (R 269-72). These statements accorded with the express language of the policy's loss settlement provision, which provides that Tower Hill is only obligated to "initially pay at least the actual cash value of the insured loss, less any applicable deductible" and "shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred." (R 653).

After Appellants filed suit based on Tower Hill's alleged denial of coverage for "the entire loss," Tower Hill repeatedly cited the policy's loss settlement provision in its defense. (R 21). As set forth in its Answer to the Complaint, argued by its counsel at trial, and attested to by its corporate representative, Tower Hill was only obligated to pay ACV until repairs were performed. (R 339-41, 460-65). And, as further explained by Mr. Steptoe, the problem with the $170,768.96 estimate submitted to Tower Hill by Appellants was that it sought restoration costs up front, even though such amounts would not be due, if they were due at all, until repairs were performed, which had not occurred. (R 461).

Nevertheless, Appellants did not commence repairs and did not submit a supplemental claim; they sued for the "entire loss" set forth on their Sworn Statement in Proof of Loss. Mr. Steptoe's testimony relating to "supplemental claims" involves a recitation of what is on the letters and the process that Tower Hill employs to adjust the claim (which is consistent with the statement on the letter) – the process that Plaintiffs should have gone through and exercised instead of bringing a lawsuit. This simply supports the position that Tower Hill has taken all along: Appellants' suit was meritless. That is why Tower Hill served PFS that specifically referenced Appellants' own claims.

Nothing in Tower Hill's arguments below supports Appellants' position on appeal that *their claim* was limited to ACV, let alone that the Proposals and

Releases extended to claims not at issue in the litigation. The mere fact that Appellants' attempt to recover the full amount of the restoration costs was premature, and that their breach of contract claim was therefore without merit, does not mean that Tower Hill was prohibited from using a PFS in attempting to settle the claim they brought. If accepted, Appellants' position would effectively mean that a defendant can never settle a claim that was filed prematurely because, in Appellants' view, it would constitute an improper attempt to settle a "future" claim.

Section 768.79, Fla. Stat., and Fla. R. Civ. P. 1.442 create a mandatory right to attorney's fees if the prerequisites of the statute and rule have been met. See, e.g., *Dean v. Vazquez,* 786 So. 2d 637, 640 (Fla. 4th DCA 2001); *Mateo v. Rubinales,* 717 So. 2d 133, 134-35 (Fla. 4th DCA 1998); *Williams v. Miami Dade Cty.*, 957 So. 2d 52, 53 (Fla. 3d DCA 2007). If a party obtains a qualifying judgment pursuant to a proposal for settlement that complies with the rule and statute, fees must be awarded. *TGI Friday's,* 663 So. 2d at 611 (citing *Schmidt v. Fortner*, 629 So. 2d 1036 (Fla. 4th DCA 1993)).

The record reveals that the PFS served in this case satisfied all requirements of section 768.79 and Rule 1.442, including the rule's particularity requirements. Accordingly, Tower Hill was entitled to attorneys' fees, and the judgment on appeal must be affirmed.

CONCLUSION

For the reasons stated, Appellee respectfully requests that the judgment on appeal be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2017, a copy of the foregoing document has been electronically served upon the following**:**

Asika Patel, Esq., and **Mabel Caballero, Esq.,** (apatel.pleadings@qpwblaw.com; mcaballero.pleadings@qpwblaw.com; kpena@qpwblaw.com;)

Frederic S. Zinober, Esq., (Shannon@zinoberdiana.com; fred@zinoberdiana.com;);

Richard M. Benrubi, Esq., (rbenrubi@rosenthallevy.com; cgarcia@rosenthallevy.com;).

/s/ Jonathan S. Tannen

Scot Samis
Fla. Bar No. 0651753
Jonathan S. Tannen
Fla. Bar No. 70842
Traub Lieberman Straus
& Shrewsberry LLP
360 Central Avenue, 10th Floor
Post Office Box 3942
St. Petersburg, Florida 33731
(727) 898-8100 telephone
(727) 895-4838 facsimile
Email Designations:
flpleadings@traublieberman.com
ssamis@traublieberman.com
jtannen@traublieberman.com
sschneider@traublieberman.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jonathan S. Tannen
Jonathan S. Tannen
Fla. Bar No. 70842