IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
FOURTH DISTRICT

DCA NO. 4D17-1345

L.T. NO.: 50 2013 CA 013872 XXXX MB

JOHN HELLER and
JUDITH HELLER,

Appellants,

v.

TOWER HILL SIGNATURE
INSURANCE COMPANY,

Appellee.
_____/

An Appeal OF A FINAL ORDER OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA (CIRCUIT CIVIL DIVISION)

APPELLANTS'INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES Page(s)

STATEMENT OF THE CASE AND FACTS

The Appellants appeal from an Amended Order and Final Judgment awarding Tower Hill attorneys' fees pursuant to a Proposal for Settlement ("Proposal or PFS"). The Appellants contend that the trial court erred as a matter of law when it failed to find Tower Hill's PFS ambiguous and unenforceable due to a discrepancy between the language of the PFS and the much broader Release attached to it.

The Appellants sued Tower Hill for breach of contract under a homeowner's insurance policy for damage caused by a burst hot water heater, alleging that Tower Hill had failed to compensate them sufficiently for their loss. (R. 17 – 69). While the Heller's public adjuster had estimated the loss to be $170,768.96, Tower Hill had issued payment to the Hellers for $69,230.92 on an actual cash value ("ACV") basis, commensurate with the estimates it obtained. (R. 19 – 20). Pursuant to the subject policy and Florida law, the actual cash value is the only amount the Hellers could recover until they made repairs – which had not been done at the time of suit or trial. If the cost of repairs once made exceed Tower Hill's ACV payment, the policy entitles the Hellers to recover those additional sums once incurred. This is pursuant to the Policy's replacement cost coverage. Tower Hill, in its letters issuing payment to the Hellers, explained these very concepts in great detail. (R. 297 – 300).

On March 27, 2014, Defendant, Tower Hill Signature Insurance Company (hereinafter "Tower Hill" or Defendant") served separate Proposals for Settlement on

Plaintiffs, John Heller and Judith Heller, in the amount of $20,000.00 each, exclusive of attorneys' fees, costs, and prejudgment interest. (R. 179 – 194). Additionally, on April 14, 2014, Defendant served upon Plaintiffs, John Heller and Judith Heller, separate Proposals for $30,000.00 each, inclusive of attorneys' fees, costs, and prejudgment interest. (R. 195 – 214). The Plaintiffs did not accept any of the Proposals within 30 days of service of same.

A jury trial commenced on January 25, 2016. During the February charge conference, a lengthy discussion occurred regarding the language of the second question to appear on the verdict form dealing with damages. (R. 558 – 582). Specifically, the parties disputed whether the jury should determine the Hellers damages on the basis of Actual Cash Value ("ACV") or Replacement Cost Value ("RCV"). (R. 566 – 582). The Hellers argued for a RCV basis while Tower Hill argued for ACV, contending that the policy provides for only ACV until repair or replacement of the damaged property occurs. (*Id.*) The trial court sided with Tower Hill and the verdict form given the jury read: (R. 71):

> 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.
>
> **If your answer to Question 1 is "Yes", please proceed with answering question 2. If on the other hand, your answer to Question 1 is "No", your verdict is for the Defendant and you should sign and date the verdict form.**

> 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)?

On February 3, 2016, a verdict was rendered on behalf of Tower Hill, the jury having determined that Tower Hill had made sufficient payment to the Hellers pursuant to the policy and Florida law. (*Id*.) Final Judgment in favor of Defendant was entered on March 14, 2016. (R. 131). On February 22, 2016, Tower Hill filed its Motion for Attorneys' Fees and Costs pursuant to Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442, attaching copies of the Proposals. (R. 87 – 130). Tower Hill also filed an Amended Motion to Tax Attorneys' Fees and Costs pursuant to Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442 and also attached copies of the Proposals. (R. 173 – 215).

Plaintiffs filed their Motion to Strike Defendant's Proposals for Settlement Served on March 27, 2014 and April 14, 2014 ("Plaintiffs' Motion to Strike"), identifying three reasons why Tower Hill's Proposals are invalid pursuant to the policy and Florida law. (R. 132 – 172). First, Plaintiffs contended that the Proposals are invalid because they require Plaintiffs to relinquish claims that may arise in the future and which are not part of the pending claim. Second, Plaintiffs claimed that the Proposals are invalid because the Proposals require Plaintiffs to release their right to file a supplemental claim which, they allege, was contrary to Defendant's position at the trial of this matter. Finally,

Plaintiffs contended that the Proposals are invalid because the Proposals are joint proposals which require both Plaintiffs to accept same.

Following an October 14, 2016 hearing on Tower Hill's Amended Motion to Tax Attorneys' Fees and Costs, the trial court entered an Amended Order finding the March 27, 2014 Proposals ambiguous because it did not extinguish the entire matter with acceptance but found the April 14, 2014 Proposals to be unambiguous and enforceable. (R. 433 – 435). The trial court further found that:

> "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. Plaintiffs made a calculated decision to proceed to trial because the amount offered at that time apparently was insufficient."

On April 4, 2017, Appellants filed a Motion for Rehearing. (R. 442 – 446). On April 6, 2017, the Court entered an order denying rehearing without explanation. (R. 505 – 506). This timely appeal followed.

STANDARD OF REVIEW

Tower Hill's claim to attorneys' fees is solely based on the Proposal for Settlement it filed in this action. As such, this Court's review is de novo. *Kuhajda v. Borden Dairy Co. of Ala., LLC*, 202 So.3d 391, 393-94 (Fla. 2016).

SUMMARY OF ARGUMENT

Florida law is well-settled that where a discrepancy exists between the conditions stated in a Proposal for Settlement and those stated in a broader Release, the Proposal is ambiguous and thus unenforceable. Here, the language of the Release is not strictly

limited to damages arising out of the underlying action as stated in the Proposals. Rather, Tower Hill's Proposals state in multiple paragraphs that Appellants acceptance was to resolve all damages arising from the cause of action which is the subject matter of this lawsuit and only this lawsuit, but required the execution of an attached release which would have extinguished all claims, including future claims which were not and could not be brought in this lawsuit. Florida law also invalidates Proposals which include conditions which, if accepted, would cause an offeree to give up a claim or right that it could not have otherwise lost in the litigation. Pursuant to both the subject policy and Florida law, the Hellers did not and could not bring a claim for replacement cost coverage as such cost must be actually incurred as a precondition to coverage. As such, the Hellers acceptance of the Proposals would have required them to release a claim that is could not have otherwise lost in the litigation. These discrepancies and ambiguities run afoul of Rule 1.442's "particularly" requirements, thereby rendering Tower Hill's Proposals invalid and unenforceable.

ARGUMENT

POINT I

TOWER HILL's PROPOSALS FAIL TO SATISFY RULE 1.442's PARTICULARITY REQUIREMENT RENDERING IT AMBIGUOUS AND UNENFORCEABLE

A PFS must satisfy the particularity requirement of Rule 1.442 to be enforceable. The critical provision relating to "particularity" as to any relevant conditions, and

specifically those relating to nonmonetary terms are set forth in Rule 1.442(c)(2), Florida Rules of Civil Procedure. Pursuant to that rule, a proposal must: "(C) state with particularity any relevant conditions;" and "(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal." This "particularity requirement" is "fundamental to the purpose underlying the statute and rule. A proposal for settlement is intended to end judicial labor, not create more." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1078 (Fla. 2006) (internal citation and quotation omitted). Therefore, these rules intend for a Proposal for Settlement to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the Proposal should be capable of execution without the need for judicial interpretation. *Id*. at 1079 (internal citation and quotation omitted).

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." *Zalis v. M.E.J. Rich Corp*., 797 So. 2d 1289, 1290 (Fla. 4th DCA 2001); see also, *Hales v. Advanced Systems Design, Inc*., 855 So. 2d 1232 (Fla. 1st DCA 2003) (release that covered any claim that plaintiff may have, whether known or unknown, accrued or not accrued, against the defendant and any affiliated entities, rendered the proposal invalid); *Nichols*, 851 So. 2d 742 (proposal invalid because release that applied to "all claims, causes of action, etc., that have accrued

through the date of the acceptance of proposal" was not properly limited to claims or causes of action that were brought or that were required to have been brought in the lawsuit). Thus, proposals for settlement must be limited to the claims at issue in the subject litigation. See *Panama City Beach Condos, Ltd Partnership v. Int'l Colo., Inc*., 2009 WL 5214970 (N.D. Fla. 2009) (applying Fla. Stat. §768.79). As the Fifth District Court of Appeals aptly stated in Nichols:

> A proposal for settlement should not include conditions that, if accepted, would cause an offeree to give up a claim or right that it could not have otherwise lost in the litigation. Otherwise, an offeror might seek to use the coercive aspects of the offer of judgment statute to exact concessions not legally available. When an offer contains as a condition a "general release," care should be taken to insure that the proposed release does not seek to extinguish claims that are extrinsic to the litigation.

851 So. 2d 742, 746 n. 3 (Fla. 5th DCA 2003) (Internal citations omitted).

The April 14, 2014 PFS to John Heller states, in pertinent part:

> ¶3: **This Proposal for Settlement is to resolve all 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 the 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 in this law suit and only this lawsuit.**

The April 14, 2014 to Judith Heller states, in pertinent part:

> ¶3: **This Proposal for Settlement is to resolve all damages**, asserted by the Plaintiff, Judith 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 the 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 in this law suit and only this lawsuit.**

However, paragraph 6 of the Release attached to each proposal required the Hellers to:

> "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)

Here, as in Nichols, the language of the Release is not strictly limited to damages arising out of the underlying action as stated in the Proposals. Tower Hill's Proposals state in multiple paragraphs that Appellants acceptance was to resolve all damages arising from the cause of action which is the subject matter of this lawsuit and only this lawsuit, but required the execution of an attached release which would have extinguished all claims, including future claims which were not and could not be brought in this lawsuit. Such discrepancy renders the Proposals ambiguous and unenforceable. See, *Palm Beach Polo Holdings, Inc. v. Village of Wellington*, 904 So. 2d 652 (Fla. 4th DCA 2005) (proposal ineffective where release attached to proposal was ambiguous as to whether it

could affect claims that were outside of the pending action); *Dryden v. Pedemonti*, 910 So. 2d 854, 859 (Fla. 5th DCA 2005) (explaining that if the proposal includes more than what the defendant would be entitled to upon a dismissal or release by operation of law upon settlement, then proposal cannot be enforced).

Just last month, the Third District Court of Appeal, in a case with remarkably similar facts, held that "a discrepancy between a limited proposal of settlement and a much broader release, creates the type of ambiguity that runs afoul of the particularity requirement in the Rule. See *Dowd v. Geico Gen'l Ins. Co.*, ___ So. 3d ____ (Fla. 3rd DCA June 28, 2017). In Dowd, the Plaintiff sued for underinsured motorist ("UM") benefits following a collision. Geico served two proposals for settlement upon the Plaintiff, with attached releases that contained "noticeably broader language." After prevailing at trial, Geico moved for attorneys' fees and cost based on its proposals. The Plaintiff argued that the proposals were ambiguous due to a discrepancy in the language between the actual proposals and the respective releases attached to each one. The trial court granted Geico's motion for fees and costs. On appeal, the Third District reversed, finding the proposals ambiguous and the Plaintiff's decision to accept or reject the proposals was reasonably affected by the ambiguity created among the documents. The Court reasoned that the Plaintiff may still have had a viable PIP claim against Geico and it was unclear whether such claim was intended to be included among those released.

The Court cited to its own precedent to support its holding. See, *S. Fla. Pool and Spa Corp. v. Sharpe Inv. Land Tr.*, 207 So. 3d 301, 303 (Fla. 3d DCA 2016) (holding that where it was unclear when reading a proposal for settlement in tandem with its accompanying release whether a claim for fees was included or excluded from the settlement, the "lack of clarity creates an ambiguity rendering the proposal unenforceable").

In *S. Fla Pool*, the Court noted, as is often the case, that the release attached to the proposal caused, rather than clarified, confusion and ambiguity. *Stasio v. McManaway*, 936 So. 2d 676, 679 (Fla. 5th DCA 2006) (discrepancy between settlement proposal and attached release created an ambiguity as to the settlement amount offered by defendant); see also *Palm Beach Polo Holdings, Inc. v. Vill. Of Wellington*, 904 So. 2d 652, 653-54 (Fla. 4t h DCA 2005) (proposed general release attached to proposal for settlement caused confusion as to whether the release would extinguish claims unrelated to those in the pending action). Finally, the Court stated:

> "No doubt, some courts have encouraged the practice of attaching to the proposal the release that the offeror is requiring. When the offeror does include the release as part of the proposal, great care should be taken to ensure that the release precisely and carefully mirrors the terms of the proposal so that no discrepancy between the two documents exists."

Here, the Release attached to Tower Hill's Proposals does not precisely mirror the terms of the Proposals rendering them ambiguous and unenforceable. Tower Hill's

Proposals for Settlement state they are only releasing damages/coverages brought in in this lawsuit and only this lawsuit, but attach a much broader release which require(s) a release of all claims, including future claims, that could not and were not brought in this action, such as replacement cost, additional living expenses, hidden damages discovered during repairs, extra-contractual claims, etc.

In *Board of Trustees of Florida Atlantic University v. Bowman*, 853 So. 2d 507 (Fla. 4th DCA 2003), the Court distinguished *Zalis* due to an important distinction between the Release in *Zalis*, and in *Bowman*. The Release in *Bowman* required the Plaintiff's to release any and all claims they had up to the date of the Proposal for Settlement, unlike *Zalis* which required the Plaintiff to release all rights to sue Defendant based on any causes of action accruing in the future. The Fourth District specifically noted that, "it was the release of future claims in *Zalis* that this court found to be invalid." *Bowman* at 510.

Recently, in *Costco Wholesale Corp. v. Llanio-Gonzalez*, 213 So. 3d 944 (Fla. 4th DCA Mar. 22, 2017), the Fourth District revisited this issue and reiterated that as long as Plaintiff were only required to release any and all claims they had up to the date of the PFS, and is not required to release all rights to sue the Defendant based upon actions in the future, the PFS passed muster and was enforceable. Here, Tower Hill's Release rendered its Proposals invalid as the Hellers would have had to give up their future

replacement cost claim, among others. This was relief that Tower Hill did not obtain when it prevailed at trial on the Heller's ACV claim. See *Hales*, supra.

POINT II
THE HELLERS ACCEPTANCE OF THE PROPOSALS WOULD HAVE REQUIRED THEM TO RELEASE THEIR FUTURE REPLACEMENT COST CLAIM.

Pursuant to the subject policy, Tower Hill was required to pay only the ACV (which they did) until actual repairs are made, which the Hellers had not done at the time of the Proposals or at trial. Indeed, the jury was instructed that the issue they must decide is whether the Hellers proved, by the greater weight of the evidence, that Tower Hill breached the policy by failing to pay the claim in accordance with the policy's Loss Settlement Provision, which states:

> **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. (Emphasis added).

Thus, per the terms of the policy, the Hellers could not have brought a Replacement Cost Value (RCV) claim in the instant action as they had yet to make any repairs or incur any costs for repair. Florida law is consistent with the Loss Settlement provision of the Tower Hill policy.[1] In *State Farm Fire and Cas. Co. v. Patrick*, 647 So. 2d 983 (Fla. 3rd DCA 1994), the Court noted:

> "Replacement cost insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property. It is insurance on a property's depreciation. Leo L. Jordan, *What Price Rebuilding?*, 19 ABA Fall Brief 17 (1990). Courts have almost uniformly held that an insurance company's liability for replacement cost does not arise until the repair or replacement has been completed. *Id.; see, e.g., Tamco Corp. v. Federal Ins. Co. of New York*, 216 F.Supp. 767 (N.D.Ill. 1963). Patrick's contract provides that State Farm "will not pay for any loss on a replacement cost basis until the lost or damaged property is actually repaired or replaced... ."

In *El Faro Assembly of God, Inc. V. American States Ins. Co*., (5:15-CV-86-JSM-PRL (M.D. Fla. Feb. 23, 2017)), the court stated as follows:

> The Court briefly notes that American States' argument regarding El Faro's entitlement to replacement cost benefits is premature at this time. While El Faro does not dispute the replacement cost benefits do not arise until the repair or replacement has been completed, this does not foreclose El Faro

[1] F.S. §627.7011(3) provides, in pertinent part, that in the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs: (a) for a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses incurred.

> from seeking replacement cost benefits at some point in the future when they are incurred. And American States' argument on this issue is not relevant to the alleged claims in this case, i.e., whether American States breached the Policy by failing to provide coverage for the full subsurface repairs required by the Policy and by failing to provide coverage for the full costs to repair the direct physical above ground damages to Premises 1. Plaintiff's Complaint does not allege a breach of the Policy based on Defendant's failure to provide replacement cost benefits because such a claim is not ripe. Again, the Court will not render advisory opinions on premature issues. American States' motion on this point is denied.

See also *Buckley Towers Condominium, Inc. v. QBE Ins. Corp.*, Case No. 09-13247 (11th Cir. Sept. 14, 2010) (unpublished)("Indeed, the Florida courts have upheld similar contracts that expressly require repair before claiming RCV damages. The Florida Supreme Court has explained that, with contracts such as the one in this case, replacement cost damages do not "arise until the repair or replacement has been completed."); *Vantage View, Inc. v. QBE Ins. Corp.*, Case No. 07-61038-civ-MARRA (S.D. Fla March 3, 2009).

After the adverse jury verdict on their ACV claim, the Hellers did the repairs and incurred $270,000 in damages.[2] TOWER HILL's ACV payment of $69,230.91 represents approximately a third of those damages. Florida law is clear that whether an ambiguity in a Proposal for Settlement reasonably affected the offerees' decision to accept the Proposal is the dispositive question. If so, then the Proposal is not sufficiently clear and is not enforceable. *Nunez v. Allen*, 194 So. 3d 554 (Fla. 5th DCA 2016). How

[2] The Hellers claim to recover the replacement cost damages incurred subsequent to the trial is the subject of a second lawsuit the Hellers filed against Tower Hill on April 16, 2016, Heller v. Tower Hill Signature Ins. Co., Case No. 50-2016-CA-003772, in the Palm Beach Circuit Court.

could the HELLERS accept a proposal for settlement for $20,000/$30,000 that said it was only to resolve damages/coverages in this and only this lawsuit, but required them to sign a release that said otherwise? If the HELLERS solely read the proposals for settlements, the proposals for settlements only required them to sign a release to resolve any and all claims and damages asserted in this lawsuit and only this lawsuit. However, the release attached actually required the HELLERS to release any and all claims that could not and were not in this lawsuit. The documents are conflicting, and therefore ambiguous.

Moreover, the trial court applied the wrong standard in finding the Proposals valid. Rather than determine whether the discrepancy between the Proposals and the attached releases reasonably affected the Hellers decision to accept the Proposals, the trial court determined that, "Plaintiffs made a calculated decision to proceed to trial because the amount offered at that time was apparently insufficient." (R. 433 – 434). Aside from the impropriety of making this finding of fact without taking any evidence, the amount was insufficient as acceptance would have required the Hellers to release future claims for which they had no way to value or weigh its chances of prevailing at trial. *Bowman*, supra at 510 (" 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. No reasonable estimate can be assigned to such a waiver. The defendant's offer simply did not give the plaintiff a determinable value with which to weigh his chances at trial.").

POINT III
TOWER HILL'S CURRENT POSITION CONFLICTS WITH THE POSITION IT TOOK AT TRIAL.

If there were ever a doubt that Tower Hill's Proposals required the Hellers to release their future replacement cost claim, it was put to rest by the trial testimony of Tower Hill's Rule 1.310 (b)(b) corporate representative, Bruce Steptoe, and trial counsel's closing argument to the jury. Mr. Steptoe testified, under direct examination, regarding the interplay between the ACV and RCV provisions of the policy. Mr. Steptoe testified: (R. 351 – 353).

(Excerpt of Trial Transcript [01/26/2016]: Testimony of Bruce Steptoe: 62:17 – 64:6)

Q. So again, you then go ahead on August 8th and send an additional check for $50,651.27, which is a total of 71,731, minus the deductible and minus the 18,000 that you had already sent, right?
A. Yes, sir, that's correct.
Q. And in that letter, as in the previous letter, we have this -- and again, I don't need to pull up the other letter; it's pretty much the same thing. It's a form letter, right?

A. Yes, sir.
Q. It says here, "**We also want to bring your attention that the amount of $50,651.27 does not necessarily constitute a full and final settlement of your claim for damages associated with your claimed loss. You may submit supplemental claims for any damages discovered in the covered reconstruction and repair of the above mentioned property**."
"As mentioned above, if you believe you may have any supplemental damage, please contact me to

discuss the matter or send in any information that would help substantiate the claim damages. We encourage you to have any estimates we supplied to you as well as those prepared by other vendors available during our discussion to help pinpoint any area of concern."

Does it say that?

A. Yes, sir, it does.

Q. What does that mean basically when you're saying, if you have supplemental damage, I guess, that's above this amount, what does that mean?

A. **Well, I mean, in a nutshell, it basically says, look, when you start making the repairs, you tear into it, you may find something that we haven't accounted for or possibly the damages may go further once you start doing the repairs than we believe. If that's the case, call us, let us know. We're happy to come back out, we're happy to review any information. And if we owe you more money, we're definitely going to pay it**.

Q. As long as it's reasonable?

A. As long as it's reasonable, yes.

Tower Hill's trial counsel then emphasized the point in his closing argument (R. 460 – 468):

(Excerpt of Trial Transcript [02/03/2016]: Defense Closing Statement: 12:23 – 13:9)

Look at what it says. "We will initially pay at least the actual cash value of the insured loss less any applicable deductible." So the way they pay for it at first, they have to give them what's called the actual cash value.

And you'll remember we spent a lot of time, on opening statement, I went through my little drawing with my daughter, you know, when Mr. Balzer was on the stand about what actual cost value is. Actual cost value, very simply, is what is the replacement cost value minus depreciation is actual cost value of the insured loss, okay?

(Excerpt of Trial Transcript: Defense Closing Statement: 17:15 – 18:16)

The only one that presented the actual cash value estimate was Mr. Osterberger. Right there, they have totally failed in their proof.

I'm just going on the language of the contract. I didn't write this. But I did show you that that is totally consistent, word for word, with Florida law. There is a statute that says exactly what that says, which was incorporated into the contract, and that's how Tower Hill makes its payment. No sneaky thing on Tower Hill's part.

"We shall pay any remaining amounts necessary to perform such repairs as the work is performed and the expenses are incurred." I hope you wrote it down when -- not only is the evidence totally 100 percent obvious that they didn't do any work; Mr. Heller admitted it. The absolute last thing I asked him on cross-examination was, Mr. Heller, do you agree that the work has not been performed and the expenses have not been incurred? And he answered the only way he could: Yes. Yes. The only work that was performed was the water mitigation, which Tower Hill paid already in that letter that I can't find right now. But you know they've already paid for that. Much more than that. That was like 6300 or something. And that was in the initial payment that Tower Hill paid $18,000 for.

(Excerpt of Trial Transcript: Defense Closing Statement: 19:7 – 20:18)

And, by the way, the other thing I want to talk about is, as Mr. Kubiak predicted I would, both the original letter in which -- I don't know where I put it, the May 9th letter where they paid the 18,000 and the subsequent letter where they

paid the additional 50,000 says, "We also want to bring to your attention that that amount does not necessarily constitute a full and final settlement of your claim. You may submit supplemental claims for any damages discovered in the covered reconstruction and repair of the above-mentioned property." If you believe you have more, then let's talk about it. As Mr. Steptoe said, We'll come out and investigate. If it's reasonable, we pay it. So don't let anybody convince you -- and I don't think Mr. Kubiak will, but I'm talking about back in the jury room where we can't be, don't let anybody try to convince you that if the reasonable payments, once the work is being done, goes over the $70,000 that they've already paid, that that's it. I think Mr. Balzer tried to convince you that at some point. No.

Mr. Steptoe, as he said and as the language says, as they're doing the work, that's where you find out what's going on. That's where you find out if more money is needed. If more money is needed, they'll pay it. Right now they have to give that initial cash value. But again, they gave more, and they gave more, and they gave them $70,000 to get the work done. As the work is being done, if supplemental payments need to be made, they're made. They didn't breach the contract.

If Tower Hill -- if reasonable supplemental payments came up and Tower Hill didn't pay it, then we could be in here talking about whether or not they should have made the payment. We've never gotten to that point.

CONCLUSION

Florida case law has clearly and repeatedly stated that because Florida Statute section 768.79 (2011) and Florida Rule of Civil Procedure 1.442 are in derogation of the common law, Proposals for Settlement must and will be strictly construed. Where settlement proposals are in contravention of the creating statute and/or implementing rule, they will be deemed unenforceable. The terms must be strictly construed against an award of fees. The Florida Supreme Court reiterated that parties seeking such awards must strictly adhere to the requirements of statute and rule to be eligible for an award of attorneys' fees and costs. *Pratt v. Weiss*, 161 So. 3d 1268 (Fla. 2015) and *Attorneys Title Ins. Co. v. Gorka*, 36 So. 3d 646 (Fla. 2010).

The instant case is a classic example of why courts require strict compliance with the statute and rule and require that the claims subject to the proposal be identified with sufficient specificity so that the party served with the proposal clearly understands the proposed terms of the proposal. Because the terms of Tower Hill's Release did not mirror the terms of its Proposal and the Proposals would have required the Hellers to release future claims, the Proposals are conflicting, ambiguous and unenforceable. As such, the Hellers respectfully request that this Honorable Court determine *de novo* that Tower Hill's Proposals are invalid, and reverse the judgment below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished to **ASIKA PATEL, ESQ**. / **MABEL CABALLERO, ESQ**. (apatel.pleadings@qpwblaw.com; mcaballero.pleadings@qpwblaw.com; kpena@qpwblaw.com), 9300 S. Dadeland Blvd., 4th Floor, Miami, Florida 33156, and **FREDERIC S. ZINOBER, ESQ**. (Shannon@zinoberdiana.com; fred@zinoberdiana.com), 150 Second Ave., Ste. 1700, St. Petersburg, Florida 33701; by email, on July *13th*, 2017.

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Certificate of Type Size and Format

I HEREBY CERTIFY that the motion was prepared in 14 point Times New Roman in Microsoft Word format.

Attorney for Appellee

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