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.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
PALM BEACH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

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Point I

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

TOWER HILL's primary argument regarding the "particularly" requirement of Rule 1.442 relies solely on its own play on words. Specifically, TOWER HILL posits that because Appellants' Complaint asserts that TOWER HILL breached the policy by denying coverage for the "entire loss" and **by failing to pay all the aforementioned benefits due and owing under the policy**, its Proposal for Settlement properly sought to resolve claims arising from the "subject matter" of the litigation. However, while the Appellants complaint might have been inartfully drafted[1], they did not and could not sue for their entire loss as their claim for replacement cost coverage under the policy and Florida law had not yet accrued and didn't accrue until the Appellants incurred costs to repair their property following the jury's verdict. In other words, replacement cost benefits were not "due and owing under the policy."

Without citing to any legal authority, TOWER HILL asserts that in determining whether a Proposal for Settlement is overbroad it must be compared to the scope of the lawsuit as defined by the Plaintiffs' own pleadings. However, TOWER HILL's

[1] It is evident that Tower Hill did not deny coverage for the entire loss as it paid ACV benefits of $69,230.92

assertion completely misses the mark. The scope of Plaintiffs' pleading is not what is at issue here, but rather whether a discrepancy exists between the Proposal for Settlement and the incorporated Release rendering it unambiguous and unenforceable. TOWER HILL completely fails to address the inherent inconsistency between the narrow language of its Proposal for Settlement and much broader Release attached to the Proposal for Settlement. Indeed, the two are patently ambiguous. Paragraph 3 of the Proposal for Settlement is to resolve all claims and damages **arising out of the cause of action which is the subject matter of this lawsuit and only this lawsuit**, while paragraph 5 is to resolve **all damages that may be awarded in a final judgment in this lawsuit and only this lawsuit**. However, its Release required the discharge of **past, present and future claims and causes of action "which arise out of or relate to the claims or proceedings."**

What did TOWER HILL mean by arising from the cause of action made "subject matter" of this lawsuit? Did TOWER HILL intend "cause of action" to mean any and all claims (past, present or future) whether accrued or not, or did it intend to mean the only cause of action then pending in the lawsuit – breach of contract for TOWER HILL's failure to pay sufficient ACV damages? Likewise, what did TOWER HILL intend to mean by subject matter? Did it mean the water loss generally or did it refer to the only cause of action then pending in this lawsuit – breach of contract for TOWER HILL's failure to pay sufficient ACV damages?

While the paragraph 5 language – **all damages which may be awarded in a final judgment in this lawsuit and only this lawsuit –** is clear in that it does not in any way reference future claims, such language is clearly inconsistent with the Release which requires the discharge of all claims, including future, unaccrued claims. As Appellants' decision whether to accept the PFS was reasonably affected by this ambiguity, the PFS is unenforceable.

The *Ambeca, Inc. v. Marina Cove* case cited by the Appellees nicely illustrates this point. In *Ambeca*, the trial court invalidated a Proposal for Settlement which required a release for issues not raised by the scope of the pleadings. The 1st DCA reversed the trial court. The 1st DCA, citing to *Zalis*, specifically stated that the trial court was correct that an offer of judgment conditioned on a plaintiff relinquishing its right to sue for causes of action that may accrue in the future based on unrelated facts and **events that have not yet occurred**, would not give rise to an entitlement to fees and costs, even if the offeree prevailed. However, the court found the Proposal for Settlement language in *Ambeca* – "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 – distinguishable from that used in *Zalis*. The court stated:

> *"Zalis* expressly provided *any* claim arising in the future would be extinguished, whereas this language does not expressly extinguish potential future claims. Instead, the language in this release is in the present-tense. As such, the release only applies to claims asserted in the instant proceeding, and those Marina Cove "might otherwise have"

> or currently possess, and, although in artfully worded, claims which would be barred by res judicata (i.e., those that could have been brought in the instant litigation under the existing facts). That the release specifically lists punitive damages in the "any other claims" language further indicates it does not attempt to reach future unrelated causes of action. A claim for punitive damages may only be brought in an existing case after an evidentiary hearing and leave of court, based on the facts of the pending litigation."

The court concluded:

> "Because the release language does not contain an invalid obligation to relinquish rights on future causes of action based on facts that have not occurred, it was a valid offer of judgment pursuant to section 768.79, Florida Statutes. The trial court erred by denying Appellant's motion for attorney's fees and costs."

Here, TOWER HILL admits more than once in its Answer Brief that the Appellants claim in the underlying lawsuit was limited to whether TOWER HILL breached the contract by paying insufficient ACV benefits and that Appellants' RCV claim had yet to accrue under both the policy and Florida law:

- 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, less any applicable deductible (Answer Brief, page 3);
- TOWER HILL's counsel argued to the jury that, until the work is performed, TOWER HILL was required to pay only the actual cash value of the insured loss minus any applicable deductible (Answer Brief, page 4);
- 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. (Answer Brief, page 38);

Thus, as explained at length in Appellants' Initial Brief, Appellants RCV claim had not accrued and could not be successfully asserted until expenses for repair or replacement of the damaged property had been incurred. Consequently, Appellants' RCV claim was based on an event and facts that had not yet occurred – the Appellants repair of the damaged property. Pursuant to ***Zalis*** and ***Ambeca***, supra, the Proposal for Settlement is unenforceable as the proposed Release was not limited to the claims at issue in the underlying litigation.

TOWER HILL's reliance on ***Wallen*** is similarly misplaced. In ***Wallen***, the 5th DCA found the Proposal for Settlement enforceable, as the Release terms were consistent with those of the Proposal for Settlement. While TOWER HILL asserts that the Release in the case at bar parallels those in ***Wallen***, that is not the end of the inquiry as the Release terms must be consistent with those of the Proposal for Settlement to be enforceable. TOWER HILL completely fails to address this inconsistency. Here, the Release required the discharge of all claims – past, present or future; discovered or undiscovered; accrued or unaccrued – while paragraph 5 of the Proposal for Settlement is limited to all damages which may be awarded in a final judgment in this lawsuit and only this lawsuit.

Appellants' supplemental claim for RCV benefits, which per TOWER HILL's own admission had not yet accrued, could not be awarded in a final judgment in the underlying lawsuit. Indeed, Appellants' RCV claim could be brought only in a separate lawsuit

after repairs had been made. Thus, unlike *Wallen*, TOWER HILL's Release required the discharge of claims beyond those "in the specifically styled case." For example, in *Saenz v. Campos*, 967 So.2d 1114, 1117 (Fla. 4th DCA 2007), the 4th DCA affirmed the trial court's finding of ambiguity in the context of an unaccrued bad faith claim. Specifically, the 4th DCA found the Proposal for Settlement to be ambiguous where one paragraph of the proposal purported to resolve "all claims" while another paragraph limited the resolution to "the claim raised in this suit." That is exactly what occurred here.

Indeed, not only are the terms of the Release inconsistent with those of the Proposal for Settlement as explained previously, paragraphs 3 and 5 of the Proposal for Settlement are internally inconsistent as well. Paragraph 5 requires the release of only those damages that may be awarded in a final judgment in "this lawsuit and only this lawsuit," while paragraph 3 broadly requires the release of claims beyond the scope of this lawsuit. In *Berbridge v. Sam's East, Inc*., 2017 WL 4938820 (S.D. Fla. Nov. 1, 2017), the Plaintiff argued the Proposal for Settlement was ambiguous because paragraph 3(a) required that she release all past, present and future claims against Defendant without limitation, while paragraph 3(b) limits the release to any claims arising from the incident. The Court agreed with the Plaintiff and found the Proposal for Settlement to be ambiguous and unenforceable, while stating:

"Cases interpreting conflicting provisions, such as is the case here, have

> found such language to be ambiguous and have found the proposal for settlement unenforceable. For example, in *Hernandez v. Target Corp.*, 2016 WL 4006656 (S.D. Fla. Nov. 14, 2016), the proposal for settlement required that plaintiff release any and all of the causes of action arising out of the case while the attached proposed release required plaintiff to release the defendant for any and all claims "ever had, now has . . . from the beginning of the world to the day of these presents." *Id* at *5. There, the district court held that the "language contained in the proposal was ambiguous because it was unclear whether it was intended to resolve all claims or only those raised in the lawsuit." *Id.* Similarly, in *Saenz v. Campos*, 967 So. 2d 1114 (Fla. 4th DCA 2007), in one paragraph of the proposal for settlement it stated that "the proposal would resolve all claims against the insured" while another paragraph stated that the proposal would resolve the claims raised in the lawsuit. *Id* at 1116. The appellate court in *Saenz* held that the conflict within the paragraphs created a patent ambiguity and therefore the proposal "failed to satisfy the 'particularity' requirement" of Rule 1.442. *Id.*"

TOWER HILL's attempt to distinguish the cases upon which Appellants rely is superficial at best. Indeed, while TOWER HILL asserts that "the other cases relied upon by Appellants are even further afield, "TOWER HILL makes no attempt to demonstrate why these cases are further afield.[2]

TOWER HILL's only basis for attempting to distinguish the Florida Supreme Court's *Nichols* decision is its false assertion that here there is no separate claim since Appellants sued for the "entire loss". As argued above, the Appellants did not sue for their entire loss, but rather only for those sums due and owing under the policy at that time – ACV benefits. Even if this Court were to interpret Appellants' Ccomplaint as

[2] The other cases to which TOWER HILL refers are *Hales*, *Dryden*, *Dowd*, and *S.FLA Pool*.

including a claim for RCV in addition to ACV, such claim was a nullity as TOWER HILL admits the actual proceedings, including the trial, were limited to a determination of what was a sufficient ACV payment. TOWER HILL's attempt to distinguish the recent *Dowd* decision based on this same argument is likewise unavailing.

Point II

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

The Proposal for Settlement undoubtedly exceeded the subject matter of the lawsuit, as previously explained at length. Here again, TOWER HILL's only argument to the contrary is it's familiar refrain that Appellants sued for their entire loss. However, the jury was specifically instructed that the issue they must decide is whether TOWER HILL breached the policy by failing to pay the claim in accordance with the policy's Loss Settlement provision. The Loss Settlement provision plainly provides for only an ACV payment until repair costs are made. TOWER HILL doesn't even attempt to address the federal and state court case law the Appellants cited which demonstrate that Florida law is consistent with the policy's Loss Settlement Provision. As stated in *El Faro Assembly of God, Inc. v. American States Ins. Co*., 5:15-cv-00086 (FL. M.D., 2015), "Plaintiff's Complaint does not allege breach of the policy based on Defendant's failure to provide

replacement cost benefits because such a claim is not ripe". Likewise, the Appellants' Complaint does not allege TOWER HILL breached the policy by failing to pay replacement cost benefits. In fact, nowhere in the Complaint is ACV or RCV even mentioned. Thus, this court should reject TOWER HILL's effort to avoid the clear dictates of its own policy and Florida law by its spin on what breaches Appellants' alleged in their complaint.

Florida courts have stated the following with respect to the issue of whether a Proposal for Settlement exceeded the subject matter of the lawsuit:

- The particularly requirement is fundamental to the purpose underlying the statute and rule; a Proposal for Settlement should not include conditions that, if accepted, would cause an offeree to give up a claim or right it could not have otherwise lost in the litigation. *State Farm v. Nichols*, 932 So.2d 1067 (Fla. 2006);
- Proposal ineffective where release attached to proposal was ambiguous as whether it could affect claims outside of the pending action. *Palm Beach Polo Holdings, Inc. v. Village of Wellington*, 904 So.2d 652 (Fla. 4th DCA 2005);
- If proposal includes more than what Defendant would be entitled to upon a dismissal or release by operation of law upon settlement, then proposal cannot be enforced. *Dryden v. Piedmont*, 910 So.2d 854, 859 (Fla. 5th DCA 2005).

Thus, the Florida Supreme Court and the 4th and 5th DCA's have consistently held that a release which exceeds the claims at issue in the lawsuit renders the Proposal for Settlement unenforceable. As that is exactly what TOWER HILL's Release provided for, the Proposal for Settlement is unenforceable.

Point III

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

TOWER HILL cannot have it both ways. They cannot be permitted to successfully limit the underlying proceedings to the issue of whether TOWER HILL breached the contract by failing to pay sufficient ACV benefits and then argue that Appellants sued for the "entire loss" in its attempt to enforce its ambiguous Proposal for Settlement. Again, TOWER HILL wholly fails to address Mr. Steptoe's testimony, counsel's arguments and the trial court's instruction to the jury, all of which demonstrate that the trial was limited to a determination of ACV damages. Rather, without any factual support, it baldly states that "nothing in TOWER HILL's arguments below supports Appellants position on Appeal that their claim was limited to ACV…"

Moreover, although irrelevant to the issue on Appeal, Appellants feel compelled to address TOWER HILL's contention that Appellant should've effected repairs and then submit a supplemental RCV claim, rather than bringing a meritless lawsuit. Such is not the purpose of the policy's Loss Settlement provision or F.S. 627.7011(3). Apparently TOWER HILL has taken the position that Florida law permits an insurer to fully comply with the initial ACV payment requirement by simply paying the amount of its own estimate. This way, TOWER HILL pays the insured an insufficient ACV amount, thereby compelling the insured to sue for a sufficient ACV claim or bear the monetary

burden of effecting repairs and hope that the insurer later honors the supplemental RCV claim. Florida courts have consistently rejected this sort of business practice. See *Mihomme v. Tower Hill Signature Ins. Co.*, 227 So.3rd 724 (Fla. 3rd DCA Sept. 20, 2017); *Siegel v. Tower Hill Signature Ins. Co.*, 2017 WL 3722502 (Fla. 3rd DCA Aug. 30, 2017; *Francis v. Tower Hill Prime Ins. Co.*, 224 So.3d 259 (Fla. 3rd DCA July 12, 2017).

CONCLUSION

Rule 1.442(c) requires that a Proposal for Settlement "state with particularly any relevant conditions". This requires that the Proposal for Settlement be clear enough to allow an offeree to make an informed decision and if any ambiguity could reasonably affect the offeree's decision, the proposal does not satisfy the particularly requirement. The burden of clarifying a condition within a Proposal for Settlement lies with the party who made the proposal, and "cannot be placed on the party to whom the proposal is made." *Dryden*, supra. That is exactly what TOWER HILL is trying to do here by repeatedly contending Appellants sued for their "entire loss".

Because §768.79 is contrary to the common law rule that each party bear its own attorneys' fees, the statute is strictly construed. Here, strict construction requires that portion of the Final Judgment awarding TOWER HILL's attorney's fees be reversed, as a clear discrepancy exists between the terms of the Proposal for Settlement and the incorporated Release.

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; and **SCOT E. SAMIS, ESQ**., Traub Lieberman Straus & Shrewsberry LLP, 360 Central Avenue, 10th Floor, Post Office Box 3942, St. Petersburg, Florida 33731, (flpleadings@traublieberman.com; ssamis@traublieberman.com; sschneider@traublieberman.com) by email, on December ***22nd***, 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.

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