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

JETTA D. SCHANTZ AND ROBERT E. SCHANTZ, her husband,

Appellants,

v.

KENNETH SEKINE, M.D. AND SEKINE & RASNER, P.A., a corporation,

Appellees.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D10-3511

Opinion filed March 22, 2011.

An appeal from the Circuit Court for Duval County.
Lance M. Day, Judge.

Joseph V. Camerlengo of Camerlengo Law Group, P.L., Jacksonville, for Appellants.

Michael R. D'lugo and Richard E. Ramsey of Wicker, Smith, O'Hara, McCoy & Ford, P.A., Orlando, for Appellees.

MARSTILLER, J.

After receiving a defense verdict in Appellants' medical malpractice lawsuit, Appellees successfully sought costs and attorney's fees pursuant to section

768.79(1), Florida Statutes,[*] the offer of judgment statute. Appellants challenge the award, arguing that Appellees' settlement proposal was conditioned on Appellants' joint acceptance and is, therefore, invalid under *Attorneys' Title Insurance Fund, Inc. v. Gorka*, 36 So. 3d 646 (Fla. 2010). We agree and reverse the judgment for attorney's fees and costs.

Florida Rule of Civil Procedure 1.442(3) permits joint settlement proposals like the one at issue in this case if they "state the amount and terms attributable to each party." Under this Court's pre-*Gorka* decision in *Clements v. Rose*, 982 So. 2d 731 (Fla. 1st DCA 2008), a joint settlement offer conditioned on both plaintiffs' acceptance, but clearly apportioning the offered amount among the plaintiffs and defendants, was valid and enforceable. But in *Gorka* the supreme court disapproved *Clements*, and now the differentiation rule 1.442 requires is ineffective where the settlement offer is conditioned on joint acceptance.

[*] Section 768.79(1) provides, in pertinent part:

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

The joint proposal in *Gorka* offered to settle the plaintiffs' claims for declaratory relief and breach of contract for $25,000. *Gorka*, 36 So. 3d at 652 (Polston, J., dissenting). Under the express terms of the offer, each plaintiff would receive $12,500. *Id*. The proposal further provided that "'neither Plaintiff can independently accept the offer without their co-plaintiff joining in the settlement.'" *Gorka*, 36 So. 3d at 648. Although rule 1.442(3) permits joint proposals so long as they break out terms and amounts as to each party, the supreme court deemed the offer invalid and unenforceable, stating that a settlement offer "conditioned on joint acceptance . . . is the antithesis of a differentiated offer." *Id*. at 651.

The pertinent terms of the settlement proposal in this case were:

> 3. Defendants will pay the total sum of One Hundred Thousand and No/100 ($100,000.00) Dollars (and of that amount, $95,000.00 to Plaintiff, Jetta Schantz, and $5,000.00 to Plaintiff, Robert Schantz) in full settlement of all of the Plaintiffs' claims of whatever nature which have been or could have been asserted against these Defendants as a result of the matters described in the Plaintiffs' Complaint and any amendments to the Complaint.
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> 4. *Plaintiffs shall execute a general release* in favor of the Defendants . . . . The release will include a requirement that the terms of the settlement remain confidential. Furthermore, Plaintiffs shall hold harmless and defend the Defendants from all claims, liens, subrogation rights and all interests of all third parties which might exist as a result of the matters described in Plaintiffs' Complaint. (See attached Release).
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> 5. *Plaintiffs shall dismiss this case* with prejudice as to the Defendants.
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> 7. *If this Proposal for Settlement is not accepted in writing within thirty (30) days of service, it shall be deemed rejected by the Plaintiffs*.

(Emphasis added.) Although not as direct as the wording of the settlement offer in *Gorka*, the highlighted language above—particularly that in paragraph 7 of the proposal—conditions settlement on Appellants' mutual acceptance of the offer and joint action in accordance with its terms. Appellees contend that because the offer apportioned the settlement amount among the parties, Appellants could independently evaluate the settlement offer and had adequate notice that they could settle their claim(s) individually. Indeed, the proposal specified in a footnote, "Mrs. Schantz is offered $94,000 from Dr. Sekine and $1,000 from Sekine & Rasner, P.A. Mr. Schantz is offered $4,000 from Dr. Sekine and $1,000 from Sekine & Rasner, P.A." Before *Gorka*, the joint settlement offer arguably would have satisfied rule 1.442(3) because it specifies who would get what from whom. But the new rule announced in *Gorka* renders Appellees' proposal invalid and, we believe, "effectively eliminates the ability to make joint offers." *Gorka* 36 So. 3d at 654 (Polston, J., dissenting).

The Final Judgment as to Fees and Costs is REVERSED.

VAN NORTWICK, J., CONCURS; THOMAS, J., SPECIALLY CONCURRING WITH OPINION.

THOMAS, J. SPECIALLY CONCURRING.

I concur with the majority opinion, because under the decision in Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So. 3d 646 (Fla. 2010), this offer of judgment cannot be upheld. I write to urge the legislature to review section 768.79, Florida Statutes, which provides a substantive right to attorney's fees and, just as importantly, provides the legislature's clear intent to facilitate settlements.

The legislature created a substantive right to attorney's fees when it enacted section 768.79, Florida Statutes. See In re Amend. to Fla. Rules of Civ. Proc., 682 So. 2d 105, 105-06 (Fla. 1996) (in which the court rejected a proposed rule which attempted to define entitlement to substantive right which is within province of legislature). This substantive right is meaningless, however, if it cannot be enforced.

Legislative review of section 768.79, Florida Statutes, may be appropriate, because, as Justice Pariente has noted, "Over the years I have expressed concern about whether either [rule 1.442] or [section 768.69, Florida Statutes] is fulfilling its intended purpose of encouraging settlement or at times is having the opposite effect of increasing litigation." Campbell v. Goldman, 959 So. 2d 223, 227 (Fla. 2007) (Pariente, J., specially concurring). This observation is borne out in case law. See, e.g., Gorka, 36 So. 3d 646, 650 (Fla. 2010) (noting the expected result of attorney's fee sanction was to reduce litigation by encouraging settlement, but the

sanction had not produced desired outcome "because the statute and rule have seemingly increased litigation as parties dispute the respective validity and enforceability of these offers."). To illustrate its point, the Gorka opinion included this quote from Security Professionals, Inc. v. Segall, 685 So. 2d 1381, 1384 (Fla. 4th DCA 1997), in which the Fourth District lamented: "We regret that this case is just one more example of the offer of judgment statute causing a proliferation of litigation, rather than fostering its primary goal to 'terminate all claims, end disputes, and obviate the need for further intervention of the judicial process.'") (quoting Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989)). Gorka, 36 So. 3d at 650.

Under the statute, the legislature intended to encourage settlements and reduce litigation costs on society by providing that prevailing parties who make a legitimate offer of judgment will have a reasonable expectation of recovering their attorney's fees. Consequently, I respectfully suggest that the legislature consider clarifying parties' rights and responsibilities in making and receiving offers of judgments.