

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

MIKE COBB,)
)
 Appellant,)
)
 v.)
)
 DAVID DURANDO and JANE DURANDO,)
 husband and wife,)
)
 Appellees.)
 _____)

Case No. 2D12-1991

Opinion filed April 17, 2013.

Appeal from the Circuit Court for Hardee
County; Marcus Ezelle, Judge.

Michael L. Keiber of Michael L. Keiber,
P.A., Sebring, for Appellant.

J. Steven Southwell, II, of Morrell, Watson,
Southwell & Mank, Wauchula, for
Appellees.

WALLACE, Judge.

Mike Cobb challenges the circuit court's award of attorney's fees to David Durando and Jane Durando following the entry of a judgment in favor of the Durandos on their claim against Mr. Cobb for breach of a contract for roofing services. The

Durandos sought attorney's fees against Mr. Cobb in accordance with section 768.79, Florida Statutes (2011), and Florida Rule of Civil Procedure 1.442 based on his rejection of their demand for judgment. Because the Durandos' demand for judgment failed to apportion the amount of their demand between them, we reverse.

The Durandos' demand for judgment provided, in pertinent part, as follows:

Plaintiffs, David Durando and Jane Durando[] ("Durando")[,] pursuant to § 768.79, Fla. Stat., demands [sic] judgment against Defendant, MIKE COBB, in the amount of \$39,992.31[] (Thirty Nine Thousand Nine Hundred Ninety Two and 31/100 Dollars), in full settlement of the above captioned case, including prejudgment interest for all claims brought by Durando in the Complaint.

Thus the demand for judgment failed to "state the amount . . . attributable to each party," as required by Florida Rule of Civil Procedure 1.442(c)(3).

The apportionment requirement of rule 1.442(c)(3) is strictly construed, and an offer from multiple plaintiffs must apportion the offer among the plaintiffs. Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 279 (Fla. 2003); Allstate Ins. Co. v. Materiale, 787 So. 2d 173, 175 (Fla. 2d DCA 2001); McElroy v. Whittington, 867 So. 2d 1241, 1242-43 (Fla. 4th DCA 2004); Meyer v. Hutchinson, 861 So. 2d 1185, 1189 (Fla. 5th DCA 2003). Accordingly, the Durandos' demand for judgment was invalid because it failed to apportion the demand between Mr. and Mrs. Durando.

The Durandos argue that apportionment of their demand was not required because their claim for breach of contract derived from their ownership of real property as tenants by the entireties; therefore, they conclude that the apportionment of the amount attributable to each party was not feasible. We find this argument unpersuasive

for two reasons. First, the Durandos' claim against Mr. Cobb did not arise directly from their ownership of entireties property. Instead, their claim was for the breach of a contract for roofing services. Second, the rule requiring apportionment of proposals for settlement made by multiple plaintiffs does not recognize an exception for joint proposals made by tenants by the entireties. See Feldkamp v. Long Bay Partners, LLC, No. 2:09-cv-253-FtM-29SPC, 2012 WL 3941773, at *2 (M.D. Fla. Sept. 10, 2012) (holding that a proposal for settlement made by a "husband and wife is not necessarily an offer by 'one person' "); cf. Graham v. Peter K. Yeskel 1996 Irrevocable Trust, 928 So. 2d 371, 372 (Fla. 4th DCA 2006) (rejecting the defendants' argument that their unapportioned offer of settlement was valid because "they were sued on a 'single unified claim' directed at their joint ownership of real property" and holding that a "proposal for settlement as tenants by the entireties does not alter the bright line rule").

For the foregoing reasons, the trial court erred in awarding the Durandos attorney's fees based on their unapportioned demand for judgment. It follows that we must reverse the final judgment awarding attorney's fees to the Durandos based on their invalid demand.

Reversed.

DAVIS, J., Concurs specially with opinion.
ALTENBERND, J., Dissents with opinion.

DAVIS, Judge, Concurring specially.

Although I find the reasoning expressed by the dissent to be attractive and supported by common sense, I concur with the majority. The case law requires a strict construction of the applicable statute and Florida Rule of Civil Procedure 1.442(c)(3). Feldkamp and Graham hold that a tenancy by the entirety status, such as the one involved in this case, does not exempt the offer from the strict requirement of apportionment between the offerors. Feldkamp, 2012 WL 3941773, at *2; Graham, 928 So. 2d at 372. Accordingly, I concur.

ALTENBERND, Judge, Dissenting.

I recognize that the court's outcome today is supported by the decisions in Feldkamp v. Long Bay Partners, LLC, No. 2:09-cv-253-FtM-29SPC, 2012 WL 3941773 (M.D. Fla. Sept. 10, 2012), and Graham v. Peter K. Yeskel 1996 Irrevocable Trust, 928 So. 2d 371 (Fla. 4th DCA 2006). I further acknowledge my own poor track record at determining when joint or separate proposals are required under Florida Rule of Civil Procedure 1.442. See Barnes v. Kellogg Co., 846 So. 2d 568 (Fla. 2d DCA 2003), disapproved of by Lamb v. Matetzschk, 906 So. 2d 1037 (Fla. 2005); RDR Computer Consulting Corp. v. Eurodirect, Inc., 884 So. 2d 1053 (Fla. 2d DCA 2004), implicitly overruled by Lamb, 906 So. 2d 1037, as stated in Easters v. Russell, 942 So. 2d 1008, 1009 n.1 (Fla. 2d DCA 2006). Nevertheless, Mr. and Mrs. Durando jointly own a single

cause of action against Mr. Cobb for breach of a single contract to replace the roof on their home. I do not believe we should reverse the trial court's award of attorney's fees in this case. I am unconvinced that Florida Rule of Civil Procedure 1.442 must be interpreted to require parties to make proposals to settle that essentially split causes of action, ignore the doctrine of merger, and serve no practical purpose.

David and Jane Durando are husband and wife. They own a home and an adjacent barn in Hardee County. In August 2004, Hurricane Charley did substantial damage to the property. The Durandos entered into a contract with Mr. Cobb to install new roofing. The contract specified a single amount of \$40,000 to remove the old roof and replace it with new roofing. It included another \$1400 for "emergency dry-in." The new roofing leaked. The Durandos eventually had someone else replace the roof for \$45,050. The Durandos then sued Mr. Cobb for this amount, describing themselves as husband and wife and attaching Mr. Cobb's contract. Following a nonjury trial, the trial court found "for the plaintiffs against the defendant in the amount of \$49,990.39."

Following entry of the judgment, the Durandos sought attorney's fees because Mr. Cobb had rejected their offer of judgment. The language of their offer is accurately recited in the court's opinion. Interestingly, they use the phrase "demands judgment" instead of "offer judgment." The discussion at the hearing on the motion indicates that the Durandos' simply revised a form that Mr. Cobb had served on them first. This form is now rarely used because most lawyers use the language of rule 1.442 and the phrase "proposal for settlement." Under this older form, the Durandos were not

requiring that Mr. Cobb pay them; they simply offered full settlement in exchange for entry of judgment.¹

I recognize that the supreme court requires this court to construe section 768.79, Florida Statutes (2011), and Florida Rule of Civil Procedure 1.442 strictly because they are in derogation of the common law.² Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003). I simply do not understand how the requirement for dual offers of judgment in this case does anything to protect the common law.

The Durandos have sustained a single monetary loss. Mrs. Durango cannot logically make a claim for the roofing over the living room, while Mr. Durango demands payment for roofing over the garage. In this context, even the division between the house and the barn does not provide a logical split. Certainly, Mr. Cobb was not confused or placed into an unusual bargaining position by this joint offer, which mirrors his own offer.

¹The offers used in this case did not expressly discuss punitive damages or attorney's fees, but the case did not involve these issues and Mr. Cobb has not objected to the form as a result of these issues. See Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362 (emphasizing that section 768.79 and rule 1.442 explicitly require a proposal to state whether fees are included).

²The rule requiring strict construction of statutes in derogation of the common law is a substantive canon. Substantive canons of construction are controversial. See Peter D. Webster et al., Statutory Construction in Florida: In Search of a Principled Approach, 9 Fla. Coastal L. Rev. 437, 519-21 (2008). I agree that a statute created by the legislature can be construed strictly to preserve the common law that was created by the judiciary prior to the statute. I am not entirely convinced that this substantive canon should be used to narrowly construe a judicial rule of procedure by which a court with common law power has chosen to procedurally implement a statute that changes the common law.

If the Durandos had each filed an offer of judgment for \$18,500, for example, in compliance with the rule described in Graham, 928 So. 2d 371, what would have been the result? If Mr. Cobb had accepted the husband's offer, a judgment would have been entered in his favor for \$18,500. Under the doctrine of merger, this single cause of action would have merged into that judgment. See Whitehurst v. Camp, 699 So. 2d 679, 682-83 (Fla. 1997); Variety Children's Hosp. v. Perkins, 445 So. 2d 1010, 1012 (Fla. 1983); Weston Orlando Park, Inc. v. Fairwinds Credit Union, 86 So. 3d 1186 (Fla. 5th DCA 2012). Absent some exceptional legal gymnastics, the wife would not have a cause of action to pursue following this partial payment.

Even if this case involved a proposal for settlement in which a release was contemplated, absent special language in the joint offers and in the first release, the cause of action might be released by a release executed by the first of the two partners who owned the cause of action. See Hennessy v. White Mop Wringer Co., 693 So. 2d 1088 (Fla. 2d DCA 1997).

As a practical matter, the contract only has Mr. Durando's name on it. If the single cause of action could be brought by him individually, I do not understand why this rule of procedure must be interpreted to require two offers of judgment. Likewise, if the offer to settle this claim were divided into two parts, it is not clear to me why Mr. Cobb would ever want to pay to settle an undivided half interest in this cause of action, merely to face further litigation on the other undivided half interest. Protecting the common law seems to have achieved form over substance in this line of cases.