IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

First Floridian Auto and Home Insurance Company,

Appellant,

v.

Altamonte Springs Diagnostic Imaging, Inc., d/b/a Mid Florida Imaging a/a/o Jose Vazquez,

Appellee.
_____/

CASE NO.: 2015-CV-98-A-O
Lower Court Case No.:
2010-SC-9405-O

Appeal from the County Court,
for Orange County, Florida,
Andrew L. Cameron, County Judge.

David B. Kampf, Esq., and
Sarah M. Sorgie, Esq., for Appellant.

Robert W. Morris, Esq., and Crystal L.
Eiffert, Esq., for Appellee.

Before SHEA, MUNYON, and J. KEST, J.J.

PER CURIAM.

Appellant, First Floridian Auto and Home Insurance Co., seeks review of the trial court's order denying its motion for attorney's fees under Florida Statute section 768.79(1) and Florida Rule of Civil Procedure 1.442. This Court has jurisdiction. § 26.012(1), Fla. Stat. (2015); Fla. R. App. P. 9.030(c)(1)(A). We deny the request for oral argument. Fla. R. App. P. 9.320. Because the trial court applied the wrong standard in evaluating whether First Floridian's nominal proposal for settlement was made in good faith so as to permit an award of attorney's fees, we reverse.

On December 21, 2010, Altamonte Springs Diagnostic Imaging, Inc., sued First Floridian for additional PIP benefits allegedly due to Jose Vazquez, who assigned his benefits to Altamonte Springs Diagnostic. In April 2011, Mr. Vazquez's PIP benefits were exhausted. On November 17, 2011, First Floridian sent Altamonte Springs Diagnostic a proposal for settlement for one dollar. Altamonte Springs Diagnostic did not accept the proposal. First Floridian did not inform Altamonte Springs Diagnostic that Mr. Vazquez's PIP benefits were exhausted until March 2012.

The trial court entered judgment on the merits for First Floridian because the benefits were exhausted, and First Floridian then moved for an award of attorney's fees under Florida's proposal for settlement law. At the hearing on the motion for attorney's fees, Altamonte Springs Diagnostic argued that the trial court should evaluate the nominal proposal for settlement under the Third District Court of Appeals' standard, which is different from the Fifth District's standard. The trial court applied the Third District's standard and denied the motion.

First Floridian then moved for rehearing. The trial court granted the motion for rehearing and again denied the motion for attorney's fees, this time citing the Fifth District's standard.

The trial court's order granting rehearing and once again denying the motion stated that the proposal was not served in good faith because First Floridian did not have a reasonable basis to conclude that it would prevail. First Floridian appeals the trial court's denial of its motion.

The standard of review of a trial court's decision regarding whether a proposal for settlement was made in good faith is abuse of discretion. *Gurney v. State Farm Mut. Auto.*, 889 So. 2d 97, 99 (Fla. 5th DCA 2004).

In determining whether a proposal for settlement is made in good faith, the court looks at whether it "'bears a reasonable relationship to the amount of damages suffered and was a realistic assessment of liability.'" *Gurney v. State Farm Mut. Auto.*, 889 So. 2d 97, 99 (Fla. 5th DCA 2004)

(quoting *Nants v. Griffin*, 783 So. 2d 363, 364-65 (Fla. 5th DCA 2001)). When the proposal for settlement is nominal, whether it was made in good faith depends on the facts and circumstances when the offer was made. *Id.* If "'the offeror had a reasonable basis to conclude that its exposure was nominal[,]'" then a nominal proposal can be one made in good faith. *Id.* (quoting *Nants v. Griffin*, 783 So. 2d at 364-65 (emphasis added)).

In the order denying First Floridian's motion for attorney's fees, the trial court stated that First Floridian did not have a "reasonable basis *to conclude that it would prevail* in the current matter on that argument." (R. 604 (emphasis added).) This is not the standard for judging the good faith basis of nominal offers set forth in *Gurney*.

In *Citizens Property Insurance Corp. v. Perez*, 164 So. 3d 1, 3 (Fla. 4th DCA 2014), the trial court applied a different standard than *Gurney* in evaluating a nominal proposal for settlement for good faith: whether the record conclusively established no liability. The Fourth District reversed the trial court's denial of the motion for attorney's fees, holding that the trial court should have applied the *Gurney* standard. *Id.* The court explained that the "no liability" standard was too high; instead, the offeror must only demonstrate that its exposure was "nominal." *Id.*

The standard that First Floridian must have a reasonable basis to believe that it would "prevail" is equivalent to the "no liability" standard described and rejected in *Citizens Property*, as "prevail" in this situation means "no liability." Thus, the trial court abused its discretion by applying the wrong standard in evaluating whether First Floridian's nominal proposal for

settlement was served in good faith.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The "Order on Defendant's Amended Motion for Rehearing/Reconsideration/and for Clarification," entered on July 28, 2015, is **REVERSED** and this matter is **REMANDED** for the trial court to apply the appropriate standard in determining whether First Floridian's nominal proposal for settlement was served in good faith.
2. "Appellant's Amended Motion for Appellate Fees and Costs," filed on June 20, 2016, is **GRANTED**, contingent on First Floridian demonstrating that it fulfilled the requirements in Florida Statute section 768.79 and Florida Rule of Civil Procedure 1.442. The determination of whether those requirements were fulfilled and the assessment of those fees is **REMANDED** to the trial court. As for costs, First Floridian must file a proper motion with the trial court pursuant to Florida Rule of Appellate Procedure 9.400(a).
3. "Appellee's Motion for Entitlement to Attorneys' Fees Pursuant to Section 57.105, Florida Statutes and Florida Rule of Appellate Procedure 9.410," filed on June 1, 2016, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 25th day of July, 2016.

/S/
TIMOTHY SHEA
Presiding Circuit Judge

MUNYON and J. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Andrew L. Cameron, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **David B. Kampf, Esq., and Sarah M. Sorgie, Esq.,** Ramey & Kampf, P.A., 400 N. Ashley Dr., Ste. 1700, Tampa, FL 33602; and **Robert W. Morris, Esq., and Crystal L. Eiffert, Esq.**, Eiffert & Associates, P.A., 1199 N. Orange Ave., Orlando, FL 32804; on this 25th day of July, 2016.

/S/
Judicial Assistant