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Florida Offers of Judgment: Trending Toward a Less Onerous "Good Faith" Standard

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Florida trial courts have the discretion to disallow an award of attorney's fees to a litigant that prevails on an offer of judgment, aka proposal for settlement, if the court determines the offer was not "made in good faith". *See Fla. Stat.* §768.79(7)(a) and *Fla. R. Civ. P.* 1.442(h)(1). Good faith challenges almost always arise when the offer can be characterized as "minimal" or "nominal" compared to the potential damages in the case. Florida appellate courts have applied different good faith standards in these situations over the years. The Fourth District Court of Appeal is leading the trend toward a more lenient good faith standard that allows more offers to be enforced. *Citizens Property Ins. Corp. v. Perez*, No. 4D12-1412 (Fla. 4th DCA April 9, 2014) is a case in point. Citizens insured Perez's home during Hurricane Wilma in October 2005. Perez did not notify Citizens of alleged damage from the storm until June 2009, almost four years later. Citizens requested a sworn proof of loss within 60 days as allowed by the policy. Perez's response was incomplete and untimely. Citizens denied the claim, and Perez filed suit. Citizens served Perez with a $1,000 proposal for settlement, which Perez did not accept. The trial court later granted Citizens' motion for summary judgment based on Perez's failure to provide a proper proof of loss. Citizens then moved for attorney's fees pursuant to the unaccepted settlement proposal. Relying on *Event Services America, Inc. v. Ragusa,* 917 So.2d 882 (Fla. 3d DCA 2005), the trial court ruled that Citizens' proposal was not made in good faith. In *Ragusa*, the Third District articulated the good faith standard for nominal offers as follows: "A reasonable basis for a nominal offer exists only where 'the undisputed record strongly indicate[s] that [the defendant] had no exposure in the case. *Id* at 884 (quoting *Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So.2d 292, 300 (Fla. 3d DCA 1997)) (emphasis added). The Fourth District reversed and rejected the *Ragusa* standard as "too onerous." It held that the trial court abused its discretion by not applying the good faith standard the Fourth District articulated in its prior decision, *State Farm Mut. Auto. Ins. Co. v. Sharkey*, 928 So.2d 1263 (Fla. 4th DCA 2006). In *Sharkey*, the court stated, "The rule is that a minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its

exposure was nominal." *Id.* at 264 (emphasis added) (quoting *Connell v. Floyd*, 866 So.2d 90, 94 (Fla. 1st DCA 2004)). The *Perez* opinion is silent on the insured's total claimed property damages from the hurricane, so the extent to which Citizen's $1,000 offer can be characterized as "minimal" cannot be determined. Nevertheless, the Fourth District stated it found enough evidence in the record to conclude that Citizens only faced nominal exposure based on Perez's delinquent reporting. The court thus remanded the case with instructions for the trial court to enter an order granting attorney's fees to Citizens and determining the amount to be awarded. It is interesting to note that in *Ragusa*, the Third District appears to have misinterpreted its prior *Peoples Gas* opinion. There, the court relied on an earlier Fourth District case for the rule that the obligation of good faith under section 768.79(7)(a) "merely insists that the offeror have some reasonable foundation on which to base the offer." 689 So.2d at 300 (quoting *Schmidt v. Fortner*, 629 So.2d 1036, 1039 (Fla. 4th DCA 1993). The Third District affirmed the trial court's award of attorney's fees to the party that prevailed on a nominal offer because the undisputed record strongly indicated the offeror had no exposure in the case. 689 So.2d at 300. However, the *Peoples Gas* court never held that an "undisputed record of no exposure" was required to find that a nominal offer was made in good faith. That leap was made by the *Ragusa* court. *Ragusa* is also remarkable because the court appears to have equated its "undisputed record of no exposure" standard with the "reasonable basis for nominal exposure" standard adopted by the Fourth District in *Sharkey* and reiterated in *Perez*. In particular, after quoting the "undisputed record of no exposure" language from *Peoples Gas*, the *Ragusa* court continued, "Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal." 917 So.2d at 884 (quoting *Dep't of Highway Safety and Motor Vehicles v. Weinstein,* 747 So. 2d 1019 (Fla. 3d DCA 2000). The Fourth District was correct to distinguish between these two good faith standards in *Perez*. They are plainly different, and the Fourth District chose the more lenient. Florida practitioners should be aware of both and of the anomalies in the *Ragusa* opinion. In fact, the Third District itself may have stopped following the *Ragusa* "undisputed record of no exposure" standard. In a case decided three years after *Ragusa*, the Third District again quoted from its 2000 *Weinstein* opinion, but not to *Ragusa*, and held that the challenged offer was made in good faith because the record contained evidence that the offeror "had a reasonable basis to have concluded that it had limited exposure and liability." *See Downs v. Coastal Systems International, Inc.*, 972 So.2d 258, 262 (Fla. 3d DCA 2008). This language is strikingly similar to the following standard articulated by the *Perez* court: "We conclude that requiring a party to face 'no exposure' in a case in order to make a nominal offer in good faith is too onerous a standard; the standard used by this court only requires that a party's exposure is nominal." *Citizens Property Ins. Corp. v. Perez*, No. 4D12-1412 (Fla. 4th DCA April 9, 2014).

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