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Florida Offers of Judgment: A New Trend To Uphold

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After years of invalidating offers of judgment based on "technical" violations of section 768.79, Florida Statutes, and Rule 1.442 of the Florida Rules of Civil Procedure, Florida appellate courts now, at least anecdotally, seem to be upholding more offers as valid and enforceable. This apparent trend is important since such offers of judgment play a key role in how Florida lawyers and their clients assess the risks of litigation and the potential to resolve cases before trial. A case in point is the Second District Court of Appeal's recent decision in *Wolfe v. Culpepper Const. Inc.*, __ So. 3d __ (Fla. 2d DCA Feb. 29, 2012). **Dream Home Leads to Litigation** In *Wolfe*, a husband and wife, the Wolfes, had pursued their dream of renovating and restoring a historic home in South Florida. But the dream turned into nightmare. Culpepper, their construction contractor, submitted a final invoice of $91,261.65, and the Wolfes refused to pay it, claiming overcharges and defective workmanship. In response, Culpepper recorded a claim of lien and a notice of lis pendens and sued to foreclose the lien and recover damages for breach of contract. Culpepper also sought prejudgment interest, prevailing party attorney fees pursuant to the construction lien statutes, and taxable costs. The Wolfes denied liability, asserted numerous defenses, and filed a counterclaim. These events took place in 2006. Before trial, the Wolfes served a joint offer of judgment (OJ) pursuant to section 768.79 on Culpepper for $25,000, half to be paid by Mr. Wolfe and half by Mrs. Wolfe. The OJ expressly stated it was made to resolve all claims and counterclaims in the litigation, including attorney fees, with several conditions of acceptance: (a) that Culpepper would dismiss all claims against the Wolfes with prejudice; (b) that Culpepper would discharge the claim of lien; and (c) that Culpepper would discharge the notice of *lis pendens*. Culpepper rejected the OJ and the case proceeded to trial. The jury agreed that Culpepper was due its $91,000 with prejudgment interest dating back to 2006, but also found for the Wolfes on their counterclaims. After accounting for interest and set-offs, the trial judge entered a net final judgment for Culpepper in the amount of $9,074.06 and specifically found that neither side was the prevailing party. The Wolfes, however, sought to recover their attorney fees from Culpepper pursuant to the rejected OJ. Culpepper's net final judgment was considerably below $18,750, or 25 percent less than the Wolfes' $25,000 offer, and thus the attorney fee sanction in the OJ statute appeared to apply. The trial court disagreed. It

held that the Wolfes' OJ was an invalid "joint offer" and denied their fee claim. The Wolfes sought relief in the Second DCA and won. **Florida Appellate Court Laments Increased Litigation Over Offers of Judgment** The Second DCA began its analysis by noting that the OJ statute and rule, operating in tandem, were designed to encourage settlement by providing a sanction in the form of an award of attorney fees against a party that unreasonably rejects a properly made OJ. Quoting the Florida Supreme Court's 2010 *Gorka* opinion, however, the Second DCA lamented that the OJ statute and rule "have not had their desired effect." *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010). In fact, they appear to have increased litigation over the validity and enforceability of the OJ "as shown by the circumstances of the case presently before us." This is not surprising to Florida practitioners, who have come to expect a new OJ opinion from one of our five district courts of appeal with each advance sheet, not to mention an OJ opinion from the Florida Supreme Court every other year or so. Much of this jurisprudence has focused on strict compliance with the OJ statute and rule involving joint offers (to or from multiple offerors) and various non-monetary conditions (such as releases) often included in offers. Many of these cases invalidated offers on seemingly "technical" grounds that tended to reduce the incentive to accept an OJ based on the risk of the sanction. Not this time. The Second DCA held that the OJ was a valid joint offer from two plaintiffs to one defendant. The fact that Culpepper would have had to dismiss both Mr. and Mrs. Wolfe upon acceptance did not run afoul of the OJ statute or rule. The Court cited a recent case, *Rossmore v. Smith*, 55 So. 3d 680 (Fla. 5th DCA 2011) as factually indistinguishable and yet another recent Fifth DCA case, *Andrews v. Frey*, 66 So.2d 376 (Fla. 5th DCA 2011) with favor, albeit under different facts. The Court distinguished *Gorka*, which involved a single offeror and joint offerees with a condition that both offerees must accept. In that situation, the joint offer is invalid because the individual offerees do not have independent control over acceptance thereby impermissibly interlocking their fate in the litigation. Here, Culpepper's fate in the litigation was in its own hands, and it could have ended the entire litigation by accepting the Wolfes' joint offer. Having rolled the dice and lost, now Culpepper had to pay the Wolfes' attorney fees. Notably, the Court did not cite the Fourth DCA's decision in *Donovan Marine, Inc. v. Delmonico*, 40 So. 3d 69 (Fla. 4th DCA 2010), but it could have. The facts in *Donovan* were equally indistinguishable on the "joint offer" issue. **Offer Enforced Despite Non-Monetary Conditions** The Court did not devote any detailed analysis to whether the non-monetary conditions contained in the Wolfes' OJ were valid. If Culpeper had accepted the Wolfes' OJ, it would have been required to not only dismiss its complaint but also discharge the statutory construction lien and *lis pendens* upon acceptance. Florida courts have often wrestled with analyzing whether such conditions disturb the simple mathematical calculation contemplated by the OJ statute and rule (comparing the amount of the offer to the amount of the final judgment). In this case, it was implicit that the Wolfes' conditions were nothing more than what they would have been entitled to at the conclusion of the trial and thus were entirely valid. See *Dryden v. Pedemonti*, 910 So.2d 854, 858 (Fla. 5th DCA 2005) (the only permissible non-monetary conditions are those the offeror would be entitled to by operation of law). The same might not have been true in *Donovan*, however, because in that case the offer required the offeree to expressly acknowledge that the offerors were not admitting fault but were merely paying money to buy their

peace. The offeror would have only been "entitled" to the functional equivalent of that non-monetary condition had it prevailed at trial. Notably, the Fourth DCA in *Donovan* did not analyze this issue but instead concluded that the language was clear and unambiguous. **Balancing the Risk of Enforcement** Construction litigation, such as in *Wolfe*, is precisely the type of case that Florida's offer of judgment statute and companion rule were intended to help resolve by increasing the financial risk of an unsuccessful trial to one or both sides. In the past, Florida courts have invalidated so many OJs on technical grounds that parties like Culpepper may have questioned whether any offer would be upheld on appeal and determined that such an offer posed little risk of enforcement. Clearly, this is probably not the type of risk balancing that the Legislature or the Florida Supreme Court intended. As more and more cases like *Wolfe* demonstrate the appellate courts' apparent willingness to uphold more OJs as enforceable, the goal of the statute and rule to reduce rather than increase litigation may eventually become realized.

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