SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

UNITED SERVICES AUTOMOBILE ASSOCIATION ,

Petitioner,

vs.

RAYMOND J. BEHAR, M.D. and SUSAN L. BEHAR, his wife,

Respondents.
_____/

Case No.: SC00-595

District Court of Appeal,
2d District - No. 99-01592

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondents, Raymond J. Behar and Susan L. Behar, his wife, shall be referred to herein collectively as "the Behars" or individually as "Dr. Behar" or "Mrs. Behar". The Petitioner, United States Automobile Association, shall be referred to as "USAA." An Appendix with the pertinent pleadings, motions, and orders was filed simultaneously with this brief. References to the Respondent's Appendix are referred to herein as "A:" followed by the appropriate numbered tab.

STATEMENT OF THE FACTS AND OF THE CASE

An automobile accident occurred between vehicles driven by Dr. Behar and Francis Bassaro. At that time, Dr. Behar was insured by USAA. After settling his claim with Mr. Bassaro's insurance carrier for the policy's limits, the Behars filed a two count complaint against USAA based on their policy's underinsured motorist coverage seeking Dr. Behar's damages from the accident in count one and Mrs. Behar's loss of the services of her husband in count two. A:1.

On May 13, 1997, USAA served both an offer of judgment and a proposal for settlement directed to both Dr. and Mrs. Behar to settle all claims for $125,001. Neither the offer or the proposal allocated this sum between Dr. Behar and Mrs. Behar. A:3.

After the jury trial, judgment was entered in favor of USAA. The trial court reserved jurisdiction to determine entitlement to costs and attorney's fees. A:4. The Behars' Motion for New Trial was denied on June 5, 1998. A:5. The Behars appealed the judgment but later voluntarily dismissed the appeal. A:6.

On May 5, 1998, USAA filed its Motion for Taxation and Entry of Judgment for Costs and Attorney's Fees pursuant to *Fla. Stat.* §768.79 and/or Rule 1.442, *Fla.R.Civ.P.* seeking attorney's fees and costs incurred since service of the offer of judgment and the proposal for settlement. A:7.

USAA's Motion was originally scheduled for hearing on February 4, 1999 but was rescheduled to March 1, 1999. A:8.

On February 17, 1999, the Behars served their Motion in Opposition to USAA's Motion for Taxation and Entry of Judgment for Costs and Attorney's Fees or, in the Alternative, Motion to Strike. The basis of the Behars' Motion was:

> 3. At the time the above Offer of Judgment and Proposal for Settlement were served on the Plaintiffs, said Offer and Proposal were governed by the provisions of Florida Rule of Civil Procedure 1.442(c)(3) as amended, effective January 1, 1997, which provides that "[a] proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party."
> 4. Raymond J. Behar, M.D. and Susan L. Behar, his wife, are each separate parties to the litigation and each has separate and distinct claims.
> 5. The terms of the Defendant's Offer of Judgment and Proposal for Settlement do not comply with the express requirements of Rule 1.442(c)(3), as amended, effective January 1, 1997, because the Offer and Proposal fail to state the amount and terms attributable to each party and, therefore, the Offer and Proposal are void for failure to comply with the particularity requirements of Rule 1.442(c)(3).

A:9.

On March 23, 1999, the trial court entered its Final Judgment Denying Defendant's Motion for Entry of Judgment for Attorney's Fees. The trial court found USAA's proposal of settlement was timely filed, was rejected by the Plaintiffs, the verdict was at least 25% less than the Defendant's offer, and the offer was made in

good faith. The trial court denied an award of attorney's fees to USAA because USAA failed to comply with Rule 1.442(c)(3). The Final Judgment stated:

> Rule 1.442(a) provides "This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule." This rule became effective January 1, 1997, approximately four and a half months prior to the Defendant's Proposal of Settlement. Furthermore, subsection (c)(3) of Rule 1.442 provides "A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party." (Emphasis supplied). The Defendant's Proposal of Settlement offered the sum of One Hundred Twenty Five Thousand One Dollars to "Raymond J. Behar, M.D. and Susan L. Behar, his wife". On its face the offer appears to violate the mandate of the Rule. The only possible argument to the contrary would be that the claim is indivisible or the nature of the parties and their causes of action are inseparable.
>
> On April 7, 1971, the Florida Supreme Court overruled the common law and its prior decisions that a wife did not have a cause of action for loss of consortium. In Gates v. Foley, 247 So. 2d 40 (Fla. 1971), the high court determined that although a wife had a right to this cause of action it was a derivative right which would be barred if the husband's claim was terminated by adverse judgment on the merits.
>
> Subsequently courts have examined the extent to which this derivative claim is independent of the injured spouse's action. In Resmondo v. International Builders of Florida, 265 So. 2d 72 (1 DCA 1992), the appellate court determined a consent judgment in favor of the husband against the tortfeasor did not abate the wife's cause of action for loss of consortium. Similarly, in Ryter v. Brennan, 291 So. 2d 55 (1 DCA 1994), the Court held the fact that the claim is derivative does not abate the cause of action vested in the wife under circumstances where the husband executed a release. The Ryter opinion specifically finds, "It is her property right in her own name". (The Florida Supreme Court denied cert at 348 So. 2d 944).

More recently the Supreme Court addressed the issue in Metropolitan Dade County v. Reyes, 688 So. 2d 311 (Fla. 1996). There, the court examined the question of whether a spouse's derivative loss of consortium claim requires a separate or distinct notice pursuant to the provisions of F.S. 768.28(6)(a). The Reyes opinion determined the claim was distinct enough to require separate notice. Importantly, the body of the opinion cites with approval both Ryter and Rosmondo opinions.

The Court reasons that Mrs. Behar had an independent right to evaluate her claim for her damages. The joint offer deprived her of that right. Furthermore, it does not seem logical that the spouse with a loss of consortium claim should be jointly and severably liable for all of the attorney's fees chargeable by the Defendant for defending both the primary tort claim and the loss of consortium claim. The spouse's claim is dependent and derivative upon his/her spouse's primary tort claim. The loss of consortium claim may be limited to the amount of the main claim or less. Coral Gables v. Prats, 502 So. 2d 969 (Fla. 3DCA 1997). Finally, a joint unallocated offer does not give the spouse with a loss of consortium claim the option of independently abandoning the litigation.

A:10.

The Second District affirmed, stating:

The trial court correctly found that USAA's offer of judgment was defective because it failed to comply with the mandate of rule 1.442(c)(3) to specify the amounts offered to each party. Here, a lump sum amount was offered, without the necessary specificity as to Dr. or Mrs. Behar. . . . There were two claims in this case, Dr. Behar's and Mrs. Behar's, and each was separate and distinct from the other. The purpose of section 768.79 is to encourage the resolution of litigation. . . To further the statute's goal, each party who receives an offer of settlement is entitled, under the rule, to evaluate the offer as it pertains to him or her.

To accept USAA's position, that its unspecified joint proposal satisfies the requirements of the rule, would mean that Mrs. Behar would not have an independent right to evaluate and decide the conduct of her own claim merely because her count for consortium damages was joined in the same lawsuit with her husband's claim. We reject this notion and

> ask: if not Mrs. Behar, who then has the right to accept or reject the USAA offer to settle her claim? There is no suggestion in this record that Mrs. Behar lacks competence to evaluate the offer. Similarly, we are unaware of any legal disability that would preclude Mrs. Behar from exercising her discretion to resolve the litigation as to her claim. Although Mrs. Behar's claim is derivative, it is her cause of action, not Dr. Behar's and not their joint claim. . . . Because there are two plaintiffs in this suit, itemization of USAA's offer to Mrs. Behar, as well as to Dr. Behar, is required.

A:11; *United Services Auto. Ass'n v. Behar*, 752 So. 2d 663, 664-665 (Fla. 2d DCA 2000). The Second District denied USAA's Motions for Rehearing and for Certification of Conflict.

SUMMARY OF THE ARGUMENT

Rule 1.442(c)(3), *Fla.R.Civ.P.*, provides: "A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party." (Emphasis added). Here, the trial court, strictly applying the plain language of the Rule, denied an award of attorney's fees to USAA because USAA's offer of judgment did not comply with Rule 1.442 -- the offer, directed to both Dr. Behar and Mrs. Behar, who had separate and distinct claims, failed to state the amount and terms attributable to each party. The Second District agreed with the trial court.

Ignoring the plain language of Rule 1.442(c)(3), USAA asserts that a joint proposal under the Rule only occurs where an offer is directed to multiple defendants who are comparatively negligent and, therefore, its offer here directed to multiple plaintiffs is enforceable because the offer did not need to allocate the amount between Dr. Behar and Mrs. Behar. This Court should reject USAA's assertion as contrary to both the plain language of the Rule and the case law decided after Rule 1.442(c)(3) was amended. The case law, including the Second District's decision in the present case, establishes that where an offer is directed to multiple plaintiffs or multiple defendants, the offer must allocate the offer between the multiple offerees unless the offerees are somehow unified (such as jointly and severally liable) so that the offerees can

independently evaluate the offer in order to accomplish the Rule's purpose of facilitating settlements.

USAA's continued reliance on *Tucker v. Shelby Mutual Ins. Co.*, 343 So. 2d 1357 (Fla. 1st DCA 1977) and *Bodek v. Gulliver Academy, Inc.* 702 So. 2d 1331 (Fla. 3d DCA 1997), both of which were decided before Rule 1.442(c)(3) was amended to require the allocation of a joint proposal, is misplaced. The Committee Notes to the Rule provide that the amended Rule does not overrule prior decisions unless reconciliation is impossible. Here, as the Second District implicitly concluded, both *Bodek* and *Tucker* are impossible to reconcile with the amended Rule.

Similarly misplaced is USAA's assertion that since *Fla. Stat.* §768.79 does not require a joint proposal to allocate the sum between multiple offerees its offer pursuant to the statute is enforceable. (Initial Brief at 5). USAA's offer made pursuant to *Fla. Stat.* §768.79 is still governed by the requirements of Rule 1.442, as amended. The amended Rule 1.442, which was in effect at the time of USAA's offer, provides: "This rule applies to <u>all</u> proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule." (Emphasis added).

Contrary to USAA's contention, the Behars had no obligation to advise USAA that it had served a faulty offer of judgment and the Behars did not waive their right to object to the defective offer on this basis -- USAA cited no authority to support this position. Nor were the Behars required to establish that USAA's defective offer of judgment caused them prejudice. Even so, the trial court found that the Behars were prejudiced by the lack of allocation in USAA's offer.

ARGUMENT

I. AWARD OF ATTORNEY'S FEES TO USAA WAS PROPERLY DENIED WHERE USAA'S OFFER OF JUDGMENT FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 1.442, *FLA.R.CIV.P.*

Rule 1.442(c)(3), *Fla.R.Civ.P.*, provides: "A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party." (Emphasis added).[1] Here, the trial court, relying on the Rule's plain language, properly denied an award of attorney's fees to USAA because USAA's offer of judgment did not comply with Rule 1.442 -- the offer, directed to both Dr. Behar and Mrs. Behar who had separate and distinct claims and damages, failed to state the amount and terms attributable to each party. The Second District agreed. Both Courts recognized that, to further the goal of offers of judgments -- to encourage the resolution of litigation -- Rule 1.442 requires a joint proposal to state the amount attributable to each offeree so that each offeree can independently evaluate the offer.

USAA first argues, at pages 6-11 of the Initial Brief, that USAA is entitled to attorney's fees because its offer meets the requirements of *Fla. Stat.* §768.79. In the

[1]This Rule became effective January 1, 1997, prior to service of USAA's offer of judgment.

Second District, USAA made this same argument, albeit in different form. In the Second District, USAA argued that even if USAA did not comply with the joint proposal provision of Rule 1.442(c)(3), USAA's offer made pursuant to *Fla. Stat.* §768.79, as contrasted with its offer under Rule 1.442, should still be enforced because the statute, as contrasted with Rule 1.442, is "silent on the validity of joint offers." (Second District Initial Brief at 17).

In making this argument, USAA scrupulously avoids discussing, for the first six pages if its argument, Rule 1.442(c)(3), the Rule applicable to this case. Instead of squarely addressing the applicable Rule, USAA goes into a six page historical discussion of the law in effect prior to this case. The first six pages of USAA's argument, although interesting, is irrelevant because USAA's offer made pursuant to *Fla. Stat.* §768.79 is still governed by the requirements of Rule 1.442, as amended. Rule 1.442 provides: "This rule applies to <u>all</u> proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule." (Emphasis added). In addition, USAA's argument was rejected in *McFarland & Son, Inc. v. Basel*, 727 So. 2d 266 (Fla. 5th DCA 1999). In *Basel*, the plaintiffs' offer of judgment, as here, stated it was being made pursuant to *Fla. Stat.* §768.79. After trial, the plaintiffs moved, again pursuant to section 768.79, for an

award of attorney's fees. The defendants successfully argued the offer of judgment was void for failure to comply with the particularity requirements in Rule 1.442(c)(3). The Fifth District affirmed. Therefore, if this Court affirms the denial of attorney's fees to USAA because USAA failed to comply with the requirements of Rule 1.442, USAA's offer based on *Fla. Stat.* §768.79 is also unenforceable.

A. USAA's requested interpretation of Rule 1.442 is contrary to the plain language of the rule.

Rules of construction apply equally to both statutes and rules of procedure. See, *Walker v. City of Bartow Police Dep't. (In re 1982 Ford Mustang*, 725 So. 2d 382 (Fla. 2d DCA 1998); *McCarty v. Skievaski*, 629 So. 2d 1114 (Fla. 1st DCA 1994)(all addressing the plain language of a rule of procedure). When interpreting a statute (or a rule of procedure), the courts must determine intent from the plain meaning of the statute (or rule). If the language of the statute (or rule) is clear and unambiguous, a court must derive intent from the words used without involving rules of construction. *State v. Dugan*, 685 So. 2d 1210 (Fla. 1996); *Harvesters Group, Inc. v. Westinghouse Electric Corp.*, 527 So. 2d 257 (Fla. 3d DCA 1988).

Moreover, since Rule 1.442 is punitive in nature because the Rule imposes sanctions upon the losing party and is in derogation of common law, the Rule must be

strictly construed. *Grip Dev., Inc. v. Coldwell Banker Residential Real Estate*, 2000 Fla. App. LEXIS 11908 (Fla. 4th DCA Sept. 20, 2000).

Finally, as noted by this Court, Rule 1.442 should be strictly construed to avoid confusion as to the terms of settlement in order to facilitate such settlements. In *MGR Equip. Corp., Inc. v. Wilson Ice Enterprises, Inc.*, 731 So. 2d 1262, 1263-1264, footnote 2 (Fla. 1999), this Court noted:

> . . . Unlike its predecessor, the current rule mandates greater detail in settlement proposals, which will hopefully enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation. *See* Fla.R.Civ.P. 1.442(c)(b).

See, also, *Security Professionals, Inc. v. Segall*, 685 So. 2d 1381, 1384 (Fla. 4th DCA 1997)(where Justice Pariente stated "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 [of settling cases]. [citation omitted]. Perhaps the amendments to [Rule] 1.442, effective January 1, 1997, which require far more detail in a settlement proposal, will help ensure that there are no misunderstandings between an offeror and an offeree about the terms of a settlement proposal.")

Here, the trial court and the Second District, strictly construing the plain language of Rule 1.442(c)(3) that "[a] joint proposal shall state the amount and terms attributable to each party," correctly denied an award of attorney's fees to USAA

because USAA's offer failed to state the amount and terms of the offer attributable to Dr. Behar and to Mrs. Behar.

Despite the plain language of Rule 1.442(c)(3), USAA argues the offer, because it was directed to multiple plaintiffs rather than to multiple defendants, is not a "joint proposal" under Rule 1.442. Therefore, USAA asserts, the offer was in compliance with the Rule because the offer did not need to state the amount and terms attributable to each plaintiff. In support of its argument, USAA must go beyond the plain language of Rule 1.442(c)(3) to the Committee Notes which provide:

> This rule replaces former rule 1.442, which was repealed by the *Timmons* [*Timmons v. Combs*, 608 So. 2d 1 (Fla.1992)] decision, and supersedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions. The provision which requires that a joint proposal state the amount and terms attributable to each party is in order to conform with *Fabre v. Martin*, 623 So. 2d 1182 (Fla.1993).

Extrapolating from the Committee Notes, ignoring the language of the Rule itself, USAA asserts a "joint proposal" under Rule 1.442 only occurs when *Fabre* is implicated -- that is when comparative negligence between multiple defendants is implicated. USAA argues, in effect, that the Rule only applies where the offer is directed to multiple defendants and has no application where the offer is directed to multiple plaintiffs.

USAA's interpretation of Rule 1.442(c)(3) is contrary to the plain language of the Rule that "A joint proposal shall state the amount and terms attributable to each party." (Emphasis added). The Rule certainly does not limit its application such that joint proposals requiring the amount and terms attributable to each party are only required when a proposal is made to multiple defendants. To hold otherwise would be contrary to the plain language of the Rule.

B. USAA's requested interpretation of Rule 1.442 is contrary to the cases decided after the Rule was amended.

The case law decided after Rule 1.442 was amended to require that a joint proposal state the amount and terms attributable to each party shows the other Districts have also strictly construed the Rule. In those cases, the Districts have not, as urged by USAA, limited "joint proposals" to only those involving multiple defendants subject to *Fabre*. Instead, the Districts have considered the operative fact to be whether a proposal is directed to multiple offerees. In those cases, the Districts have applied the same reasoning -- to make sure that an offeree is able to independently evaluate the offer as it pertains to him or her. If the multiple offerees have separate and distinct claims or liability, the offer must allocate the sum between the multiple offerees to be enforceable. If, on the other hand, the multiple offerees are unified, such as jointly and severally liable, then an offer which does not allocate between the offerees does not

prevent the offerees from evaluating the offer and the offer is enforceable. The Second District's decision in the instant case is in conformity, both in its holding and its reasoning, with all of the cases decided since the Rule was amended. All of the cases decided since the Rule was amended are contrary to USAA's unique interpretation of the amended Rule.

The Districts have addressed three different factual circumstances that have arisen since Rule 1.442(c)(3) was amended.

The first factual circumstance to be addressed by the Districts is where an unallocated offer is directed to multiple offerees. This is the situation presented in the instant case where the Second District held USAA's unallocated offer, directed to both Dr. and Mrs. Behar who had separate and distinct claims, was defective because the offer denied the offerees the opportunity to independently evaluate the offer.

Contrary to USAA's assertion, the Districts have not limited the joint proposal language as only applying to offers directed to multiple defendants. In addition to the present case addressing an unallocated offer to multiple plaintiffs, the Fourth District in the recent case of *Goldstein v. Harris*, 2000 Fla. App. LEXIS 11019, 25 Fla. L. Weekly D 2066 (Fla. 4th DCA 2000) reversed an award of attorney's fees to a defendant entered pursuant to an unallocated offer of settlement directed to multiple plaintiffs. In *Goldstein*, the plaintiffs, husband and wife, filed a complaint alleging

abuse of process, false imprisonment, and intentional infliction of emotional distress based upon the enforcement of a civil contempt order which the plaintiffs claimed violated the stay provisions of the bankruptcy code. In another proceeding, Harris had obtained a money judgment in favor of his client against the Goldsteins. In pursuing collection of the judgment, Harris moved to compel the production of various financial records, which the Goldsteins refused to produce. The trial court found the Goldsteins in contempt and gave them 48 hours to comply. Instead, the Goldsteins filed a Chapter 7 petition in bankruptcy. The bankruptcy court determined the judgment debt was nondischargeable. Harris then sought and obtained in the trial court a writ of bodily attachment. Mr. Goldstein was taken into custody and ultimately produced the documents. That incarceration led to the filing of the complaint by the Goldsteins.

In reversing the award of attorney's fees to Harris, the Fourth District held:

> [Harris] made an undifferentiated settlement offer of $1,500 to both appellants [the Goldsteins] prior to the summary judgment hearing. Each appellant had a separate claim, the husband having been incarcerated and the wife in hiding while attempting to avoid the writ of attachment. Each would have different damages. Offers which do not comply with the mandate of rule 1.442(c)(3) of the Florida Rules of Civil Procedure, by failing to specify the amounts offered to each party, are invalid. See *United States Auto. Ass'n v. Behar*, 752 So. 2d 663 (Fla. 2d DCA 2000).

The Fifth District, in *McFarland & Son, Inc. v. Basel*, 727 So. 2d 266 (Fla. 5th DCA 1999), held, as the Second District held in the instant case, that the plaintiff was

not entitled to fees because the plaintiff's unallocated offer, directed to multiple defendants, did not comply with the express requirements of rule 1.442(c)(3). The Fifth District reasoned, at page 270:

> In order to give effect to rule 1.442(c)(3), a general offer to a group of defendants without assigning each defendant a specific amount must be held to lack the particularity required by the rule. The rule was amended in 1996, the Committee Note informs, in order to conform the rule to *Fabre* . . . While obviously a plaintiff making an offer of judgment cannot know the percentage of fault to assign to each defendant to whom it proposes a settlement, the rule requires that a specific amount be set forth as to each defendant, thus eliminating the possibility of a joint and several-type settlement which leaves the defendants in limbo and opens the door to continued litigation between the defendants.

See, also, *C&S Chemicals, Inc. v. McDougald*, 754 So. 2d 795 (Fla. 2d DCA 2000)(where the Second District denied attorney's fees to a plaintiff who served an unallocated joint offer on three defendants who were not joint tortfeasors because the lack of apportionment between the offerees prevented them from independently evaluating the offer).

The second factual circumstance that has been addressed by the Districts is where an unallocated offer is directed to multiple offerees who are jointly and severably liable -- a different sets of facts than the present case. Even so, the Districts have applied the same reasoning as the Second District applied in the present case -- looking to see if the lack of allocation of the offer prevented the multiple offerees from

independently evaluating the other. See, for example, the Fifth District's decision in *Strahan v. Gauldin*, 756 So. 2d 158 (Fla. 5th DCA 2000). In *Strahan*, the plaintiff extended an offer in the amount of $50,000 to the Strahans collectively. The Strahans argued the trial court should not have awarded fees because the plaintiff failed to allocate the amount between each of the co-defendants. The Fifth District disagreed because the complaint alleged only the negligent act of one of the defendants while the remaining defendants were included in the complaint only under theories of vicarious liability. The Fifth District held that since the joint offer did not prevent the defendants from independently evaluating the offer because each is liable for the entire amount of the offer, the joint offer was enforceable and did not need to specify the amount attributable to each offeree.

The third factual circumstance addressed by the Districts since Rule 1.442 was amended is where there are multiple offerors who make an unallocated offer -- again, a different set of facts from the present case. The Third District addressed this set of facts in *Flight Express, Inc. v. Robinson*, 736 So. 2d 796 (Fla. 3d DCA 1999). Again, the reasoning applied by the Third District is the same as applied by the Second District in the present case. In *Flight Express*, an offer of settlement was made by two defendants to the plaintiff which did not set forth the amounts to be contributed by each

of the two offerors. The Third District held the failure to follow the rule was a harmless technical violation, reasoning, at page 797:

> While there is good reason, based on the need to avoid further litigation over the distribution of the proceeds, to require a division of amounts to be paid to each of several offerees in a settlement proposal [citations omitted], the amounts which each of several offerors contribute to the proposed settlement can make no difference to the offeree or otherwise affect its efficacy in any practical way.

(Emphasis in the original text).

USAA suggests *Spruce Creek Dev. Co. of Ocala v. Drew*, 746 So. 2d 1109 (Fla. 5th DCA 1999) stands for the proposition that "[t]he "joint proposal" language has not been applied to claims involving loss of consortium." In reality, the Fifth District's decision in *Spruce Creek* involved the third factual scenario set forth above -- an unallocated offer from multiple offerors to a single offeree. The Fifth District held, at page 1116:

> The single offer by [the two plaintiffs/offerors] to settle for $ 1 million was not void for having failed to separate the offer for each plaintiff. The lack of apportionment between claimants is a matter of indifference to the defendant. If he accepts, he is entitled to be released by both claimants.

Here, the Second District explained why *Spruce Creek* was different:

> In Spruce Creek two plaintiffs made a joint offer of settlement to a single defendant. In such a situation, the lack of apportionment between the plaintiffs, as offerors, "is a matter of indifference to the defendant. If he accepts, he is entitled to be released by both claimants." Id. At 2218. The several Spruce Creek offerors could apportion the amount offered

> between themselves and there was no problem in apportionment as to the defendant offeree, because it was a single entity. Spruce Creek provides no support to USAA here where we have the converse of the Spruce Creek posture. USAA, as the single offeror, made an undifferentiated offer to multiple offerees. The significance of rule 1.442's requirement that a joint proposal state the amount attributable to each party is to allow each recipient an opportunity for independent consideration of that recipient's claims. Because USAA did not provide the Behars an opportunity to do this, USAA's motion for fees based on its defective offer was properly denied.

The Second District, in *Danner Constr. Co., Inc. v. Reynolds Metal Co.*, 760 So. 2d 199 (Fla. 2d DCA 2000), again addressed the third factual circumstance. In *Danner*, the plaintiff sued Danner, TMC, and others seeking to recover damages. Prior to trial, Danner and TMC served an offer of judgment proposing to settle all claims against Danner and TMC for $1.5 million. The offer did not state the amount and terms by which that sum would be attributable to each offeror. The plaintiff did not accept the offer. The Second District held the unallocated joint offer was enforceable because TMC was vicariously liable for the negligence of Danner. The Second District concluded that where an unallocated joint offer is made by the defendants, the failure to allocate the amount to be contributed by each may be harmless if the theory for the defendants' joint liability does not allow for apportionment under section 768.81, such as where one defendant is vicariously liable for the negligence of another. Importantly, the Second District in *Danner* pointed out in a footnote that: "[h]owever, those courts

[referring to *Flight Express* and *Spruce Creek*] would require a division of amounts to be paid to each of several offerees in a settlement proposal."

In conclusion, the case law decided after Rule 1.442 requires an offer directed to multiple offerees to allocate the offer between the offerees if, as here, the offerees have separate and distinct claims or obligations.

C. USAA's requested interpretation relies exclusively on cases decided prior to the amendment of Rule 1.442.

USAA relies, almost exclusively, on *Tucker v. Shelby Mut. Ins. Co.*, 343 So. 2d 1357 (Fla. 1st DCA 1977)[2] and *Bodek v. Gulliver Academy, Inc.*, 702 So. 2d 1331 (Fla. 3d DCA 1997),[3] both which were decided before Rule 1.442 was amended to

[2] In *Tucker*, a minor, through her father, brought a personal injury action against Goldman and the insurance company based upon the negligent operation of an automobile by Goldman. The minor sought damages for bodily injury. The father sought damages for medical expenses and the denial of the services of his child resulting from the accident. The insurance company served an unallocated offer of $6,000 for the combined claims. The plaintiffs argued an offer of judgment addressed to two parties is void unless it directs the specific amount to be paid to each party. Rule 1.442 at the time provided that "[a]t any time more than ten days before the trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer with costs then accrued . . . ". In affirming, the Court concluded that where the claims of a father and his minor child are properly joined in one action, the defendant could make one offer to both parties.

[3] In *Bodek*, Gulliver Academy served the plaintiffs with an offer of judgment which was directed to "the Plaintiffs." The trial court granted Gulliver's motion for fees and costs based on its offer of judgment. The plaintiffs appealed contending the trial court erred because the offer failed to specify the amount being offered to each

require that "[a] joint proposal shall state the amount and terms attributable to each party."

USAA contends, despite the plain language of Rule 1.442(c)(3) and the cases decided since the Rule was amended, that these pre-rule change cases have continuing validity because joint offers directed to multiple plaintiffs are not "joint proposals" under Rule 1.442 since the comparative negligence principles of *Fabre* are not implicated. As previously stated, Rule 1.442 and the cases decided since the Rule was amended do not support USAA's unique interpretation of Rule 1.442. The Committee Notes to the Rule provide that the amended Rule 1.442 will not overrule prior decisions unless reconciliation is "impossible." Both *Tucker* and *Bodek*, as the Second District implicitly concluded, are impossible to reconcile with the present version of Rule 1.442 and should be overruled to clarify the law.

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plaintiff. In affirming the trial court, the Court stated: . . . section 768.79 does not require that in circumstances where the offer of judgment is being made to multiple plaintiffs, that the offer of judgment state the amount that is being offered to each plaintiff. In fact, section 768.79(2)(d) merely provides that the offer of judgment must '[s]tate its total amount.'" At 1332. In a footnote, the Court then noted that Rule 1.442 had subsequently been amended, effective, January 1, 1997, to require that the proposal for settlement identify the claims or claims that are attempting to be settled.

D. Policy reasons militate against USAA's requested interpretation of Rule 1.442.

Moreover, the interpretation of Rule 1.442 advocated by USAA, that is that different rules should apply depending on whether the offer is directed to multiple plaintiffs or multiple defendants, will cause further confusion and litigation. It simply does not make sense to make distinctions based on to whom the offer is directed. Instead and as advocated by the Second District, a bright line rule should be applied when the offer implicates more than one offeree -- the offer must allocate the amount of the offer between the offerees unless the multiple offerees are jointly and severally liable. Requiring the allocation of an offer between multiple offerees allows each offeree an opportunity for independent consideration of that offeree's claims. A bright line rule, as contemplated by the amended Rule, which is easy to apply by both litigants and trial courts, will prevent the further proliferation of litigation on the issue of offers of judgment and will accomplish the purpose of the amended Rule -- the resolution of litigation.

II. THE BEHARS NEED NOT BE PREJUDICED AS A RESULT OF USAA'S DEFECTIVE OFFER; EVEN SO, THE TRIAL COURT FOUND THE BEHARS WERE PREJUDICED.

USAA has cited no authority for the proposition that the Behars had to be prejudiced as a result of USAA's defective offer of judgment. The Rule, which should

be strictly construed, imposes no such requirement. Nor has any case standing for this proposition been found. In addition, the trial court found and the Second District agreed that Mrs. Behar was prejudiced -- she was deprived of her right to independently evaluate her claim for damages. USAA cleverly states, at page 18 of its Initial Brief, that "no other Florida Court has recognized the separate evaluation right when taxing costs and attorneys fees pursuant to §768.79, *Fla. Stat.*" (Emphasis added). In making this statement, USAA alludes only to §768.79, not Rule 1.442. The cases addressing amended Rule 1.442, which are summarized in section I B of this brief, all discuss this separate evaluation right!

USAA's position is that, even though it failed to comply with the express requirements of the law, the Behars should pay USAA's attorney's fees. USAA, despite its own failure to comply with the express requirements of the Rule, seeks to impose a new burden on the Behars to establish prejudice, a burden which is not supported by any authority, in its attempt to get its attorney's fees. USAA's position should be rejected.

III. THE BEHARS WERE NOT REQUIRED TO ADVISE USAA THAT IT HAD SERVED A FAULTY PROPOSAL OF SETTLEMENT AND DID NOT WAIVE THEIR RIGHT TO OBJECT TO USAA'S NONCOMPLIANCE WITH THE REQUIREMENTS OF RULE 1.442.

Neither Rule 1.442 or section 768.79 requires the recipient of an offer of judgment to ever advise the opposing party and its counsel that the offer of judgment does not comply with the procedural requirements of Rule 1.442. Nor does the law impose a burden on an offeree to object to an offer which fails to meet the requirements of the amended Rule. USAA concedes the Rule is silent on the requirement of an objection. In fact, there are numerous cases, many of which have been cited herein and in USAA's Initial Brief, holding invalid an offer of judgment for failure to comply with the requirements of Rule 1.442. In such cases, no courts have held that the recipient of a facially invalid offer had an obligation to the opposing side to advise of such invalidity or object to the defective offer. USAA was represented by counsel who presumably knew the requirements of the Rule, the statute, and the case law and the consequences of failing to comply with those requirements.

USAA cites *Mateo v. Rubiales*, 717 So. 2d 133 (Fla. 4th DCA 1998) as support for its argument that an offeror should be given "at least one opportunity to correct the form of the offer before being denied an award of attorney's fees." (Initial Brief at 19).

As stated, neither the Rule or the case law provides any such opportunity. Moreover, in order for an offeror to avail itself of the benefits of the Rule, which is in derogation of common law, that offeror should have to strictly comply with the Rule. Finally, *Mateo* does not stand for the proposition for which it was cited by USAA. In *Mateo*, the Court did not hold, either explicitly or implicitly, that the recipient of a defective offer had to object to the deficiency or the defect would be deemed waived. The Court in *Mateo* was addressing the issue of bad faith in the making of an offer.[4]

Again, without the benefit of authority, USAA asserts the Behars waived their right to object to USAA's defective offer because the Behars also failed to comply with the Rule. (Initial Brief at 19). The Behars served an offer directed only to USAA

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[4]Mateo made numerous demands for judgment directed both individually and jointly to the two defendants. Mateo prevailed in her jury trial. The trial court denied Mateo an award of fees based on her demands for judgment because, based "on multiple judgments, we cannot determine which one would settle the case." At 134. In reversing, the Court noted that it was "undisputed that Mateo met the statutory requirements for an award of attorney's fees under section 768.79 by obtaining a net judgment that was more than 25% greater than any of the demands. After the prerequisites of section 768.79 are met, an award of fees may be denied only upon a finding of 'bad faith' on the part of the demanding party." At 134. The defendants argued that although the trial court did not find that the demands were made in bad faith, such a finding of bad faith could be inferred because they were confused, as was the trial court, as to which of the three demands were designed to promote settlement. The Court found this "inference of bad faith" argument problematic because had the defendants attempted to clarify the confusion or set the hearing on the issue prior to trial, Mateo would have had the opportunity to timely rectify whatever defect, if any, existed in the demands.

to resolve both Dr. and Mrs. Behar's claims. The Behars' offer directed to only one defendant is similar to *Flight Express*, *Spruce Creek*, and *Danner*. The failure to allocate the offer between the two offerors, Dr. and Mrs. Behar, is a matter of indifference to USAA. The significance of Rule 1.442's requirement that a joint proposal state the amount attributable to each party is to allow each offeree an opportunity for an independent evaluation of that offeree's claims. The Behars' offer was only directed to one offeree.

Even if the Behars' offer is not in compliance with Rule 1.442, this Court should still affirm. Because of the jury verdict in favor of USAA, the trial court never ruled on whether the Behars' offer was enforceable. Perhaps, if the jury verdict had been in the Behars' favor, the trial court may have reached this issue. Perhaps, if this occurred, which it did not, the trial court may have denied the Behars' request for fees based on the alleged failure to comply with Rule 1.442. If so, this appeal would have dealt with this issue. But this is not what happened and this is not the issue on appeal.

CONCLUSION

For the foregoing reasons, this Court should affirm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this ____ day of October, 2000 by U. S. Mail to Kimberly Staffa Mello, Esquire and David J. Abbey, Esquire, Post Office Box 1511, St. Petersburg, Florida 33731-1511.

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