IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO: SC 00-595

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner,

v.

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

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On August 25, 1994, a motor vehicle driven by Francis Bassano ("Bassano") rear-ended a motor vehicle driven by Raymond Behar, M.D. *(A-1)*. As a result of the automobile accident, Behar claimed that he sustained a herniation of the disc at level L5-S1 and an aggravation of a pre-existing cervical condition. *(A-10)*. At the time of the automobile accident, the alleged tortfeasor, Bassano, had in full force and effect an automobile liability policy with Allstate Insurance Company which provided single occurrence limits of $10,000. *(A-1)*. Behar also had in full force and effect an automobile liability policy with USAA which provided stacked uninsured/underinsured motorist coverage in the amount of $500,000 per person/ $1,000,000 per accident. *(A-1).*

Allstate tendered its policy limits of $10,000 to Behar and USAA executed a Notice of Consent and Waiver of Subrogation Rights. *(A-1)*. USAA, however, refused to tender its policy limits and Behar, along with his wife, instituted an action against USAA. *(A-1)*. Count I of the Complaint sought underinsured motorist benefits for the damages sustained by Behar. Count II of the Complaint sought loss of consortium for Behar's wife, Susan Behar. *(A-1)*. On May 13, 1997, USAA served an Offer of Judgment pursuant to §768.79, Fla. Stat., and a Proposal for Settlement pursuant to Fla.R.Civ.P. 1.442, each in the amount of $125,001.00. *(A-3).* USAA's Offer of

Judgment and Proposal for Settlement did not separately allocate the amounts that would be paid to the Behars and provided that USAA "will pay the plaintiffs, Raymond J. Behar and Susan L. Behar, his wife, the total sum of one-hundred twenty-five thousand and one/100 dollars." *(A-3).* On October 17, 1997, the Behars similarly served an unallocated single Demand for Judgment and Proposal for Settlement in the amount of $395,000. *(A-13)*. As with USAA's Offer of Judgement and Proposal for Settlement, the Behars' Demand for Judgment and Proposal for Settlement did not designate what portion of the settlement offer was allocated to Raymond Behar and what portion was allocated to Susan Behar. Neither party accepted the offers. Further, no party objected to the form of the settlement proposals as being contrary to the mandates of Fla.R.Civ.P. 1.442 as amended January 1, 1997.

The case proceeded to trial and on April 17, 1998, the jury returned a verdict determining that there was no negligence on the part of the alleged underinsured motorist, Bassano, which was the legal cause of damage to the Plaintiff, Raymond J. Behar, M.D. *(A-4)*.[1] On May 2, 1998, USAA served a Motion for Taxation and Entry of Judgment for Costs and Attorney's Fees stating as follows:

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[1] The Behars filed a Motion for New Trial which was denied by the Court on June 5, 1998. *(A-5)*. The Behars also filed an appeal in the Second District. However, the appeal was subsequently voluntarily dismissed. *(A-6)*.

> As no award was made in favor of RAYMOND J. BEHAR, M.D. and SUSAN L. BEHAR, his wife, the Defendant, UNITED STATES AUTOMOBILE ASSOCIATION is entitled to payment of their taxable costs which has accrued since this case was filed, pursuant to §57.041, Fla. Stat., and a taxation of their attorney's fees and costs incurred since May 13, 1997, pursuant to §57.041, Fla. Stat.; §768.79, Fla. Stat.; and/or Rule 1.442, Fla.R.Civ.P. *(A-7)*.

A Final Judgment was subsequently entered on May 8, 1998 in favor of USAA with a reservation of jurisdiction on attorney's fees and costs. *(A-4)*. On February 17, 1999, two years after the Proposal for Settlement was served, the Behars filed a 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 alleging, in pertinent part, as follows:

> 3. At the time the . . . 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."
>
> ...
>
> 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)*.[2]

After conducting two separate hearings on February 4, 1999 and March 1, 1999, the Court, relying on Fla.R.Civ.P. 1.442 as amended January 1, 1997, entered a Final Judgment Denying Defendant's Motion for Entry of Judgment for Attorney's Fees. *(A-8, 11, 12)*. The Final Judgment provides, in pertinent part, as follows:

> The court finds that the proposal of settlement was made in good faith. However, the assessment of attorney's fees against the Plaintiffs in favor of the Defendant is denied because of the Defendant's failure to comply with the mandates of procedural Rule 1.442(c)(3).... *(A-12)*.

The Second District Court of Appeal affirmed the ruling of the trial court stating, in pertinent part, as follows:

> 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 was offered, without the necessary specificity as to Dr. or Mrs. Behar. (citation omitted). There were two claims in this case, Dr. Behar's and Mrs. Behar's, and each was separate and distinct from the other...
>
> Although Mrs. Behar's claim is derivative, it is her cause of action, not Dr. Behar's and not their joint claim. (citations omitted). Because there are two plaintiffs in this suit, itemization of USAA's offer to Mrs. Behar, as well as to Dr. Behar, is required.

The Second District denied USAA's Motions for Rehearing and Certification. This court subsequently accepted jurisdiction.

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[2] The Behars also served on March 1, 1999 a Response for USAA's Motion for Taxation and Entry of Judgment for Costs and Attorneys Fees. *(A-10)*.

SUMMARY OF ARGUMENT

USAA made a single offer of judgment/proposal for settlement to Dr. Behar and Mrs. Behar. Section 768.79, Fla, Stat., as it has existed since 1990, allows a defendant to make a single offer to an injured plaintiff and their spouse who seeks loss of consortium. USAA prevailed on both Dr. and Mrs. Behar's claims as a defense verdict was returned. Hence, USAA is entitled to attorney's fees pursuant to §768.79, Fla. Stat.

The January 1, 1997 amendment of Fla.R.Civ.P. 1.442 does not require a different result. Rule 1.442 applies to joint offers to conform with *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993). As *Fabre* deals with parties and non-parties who have potential liability, *Fabre* does not apply to the case on appeal and USAA need not comply with the joint offer provision of rule 1.442. To require USAA to serve separate offers, would be contrary to the purpose of §627.7403, Fla. Stat., which requires loss of consortium claims be brought with the underlying injury claim.

If rule 1.442 required USAA make separate offers, the Behars waived USAA's breach of the rule by: one, failing to timely object to the joint offer; and two, by serving a joint demand for settlement to USAA.

ARGUMENT

I. USAA IS ENTITLED TO TAXATION OF ATTORNEY'S FEES AND COSTS PURSUANT TO §768.79, FLA. STAT.

On January 1, 1973, the Court enacted the offer of judgment rule. *See* Fla. R. Civ. P. 1.442 (repealed 1992). The rule penalized a plaintiff by mandating taxation of costs for failing to accept an offer where the net judgment obtained was less favorable than the offer. *See* Fla. R. Civ. P. 1.442 (repealed 1992). Subsequently, as part of the Tort Reform Act of 1986, the Florida Legislature enacted an offer of judgment statute. *See* §768.79, Fla. Stat. (1986). Unlike the originally enacted rule 1.442, the new statute made the offer of judgment device bilateral and substantially increased the sanctions, to include both an award of costs and attorneys fees where the failure to accept the offer was 25% less favorable than the offer. Bruce J. Berman, *Florida Civil Procedure*, §442.1 (1998 Ed.). The offer of judgment statute was amended in 1990 to provide that a defendant is entitled to attorney's fees if the "judgment is one of no liability." §768.79, Fla. Stat. (1990). The addition of this language allowed for a defense verdict to entitle a defendant to an award of attorney's fees. *See e.g. Stofman v. World Marine Underwriters, Inc.*, 729 So. 2d 959 (Fla. 4th DCA 1999).

Litigation subsequently ensued regarding the application of the statute and rule. In an attempt to resolve the confusion, this Court modified rule 1.442 to provide that "to

the extent that the procedural aspects of new rule 1.442 are inconsistent with §768.79, Fla. Stat. and §45.061, Fla. Stat., the rule supersedes the statutes."[3] *See In Re Amendment to Rules of Civil Procedure*, 550 So.2d 442, 443 (Fla. 1989). This new rule, however, did not achieve the desired result. Hence, in 1992, rule 1.442 was repealed leaving §768.79, Fla. Stat., as the single offer of judgment vehicle in Florida. *See Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992).

A. Unallocated Joint Offers In Cases Involving Loss Of Consortium Claims.

Florida Courts have enforced unallocated joint offers directed to two plaintiffs, one of whom solely has a derivative loss of consortium claim. This Court has clearly held that a loss of consortium claim is a derivative right and recovery may only be had if the injured spouse has the ability to recover. *See Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971). It is based on the long-standing principle that loss of consortium claims are "derivative" in nature, that courts have enforced unallocated joint offers involving loss of consortium claimants.

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[3] In 1987, the Florida Legislature enacted §45.061, a second offer of judgment statute. Three years later, the legislature, recognizing the confusion created by the statute, effectively repealed the statute by rendering the statute inapplicable to causes of action accruing after October 1, 1990.

The First District was the initial court to expressly reject the contention that an unallocated joint offer served on two plaintiffs, one of whom had a loss of filial consortium claim, had to set forth a specific amount as to each party stating as follows:

> ...since the claims of the respective parties arose from the same transaction, their interests may be joined in the same action. Fla. R. Civ. P. 1.210(a). Thus where the claims of a father and his minor daughter are properly joined in one action, we fail to see that violence has been done to the rule by a defendant making one offer to both parties.

See Tucker v. Shelby Mut. Ins. Co. of Shelby, Ohio, 343 So.2d 1357, 1358 (Fla. 1st DCA 1977).

Tucker was recently followed by the Third District in *Bodek v. Gulliver Academy, Inc.* 702 So. 2d 1331 (Fla. 3d DCA 1997), when an unallocated joint offer directed to two plaintiffs, one of whom had a loss of filial consortium claim, was enforced after a defense verdict was entered in favor of the defendant. The *Bodek* court stated as follows:

> ...contrary to Plaintiffs' assertion Section 768.79 does not require that in circumstances where the offer of judgment is being made to <u>multiple plaintiffs</u> 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 "state its total amount." (emphasis added).

Bodek, 702 So. 2d at 1332. The *Bodek* court, adopting the reasoning in *Tucker,* stated that no violence is done to the rule or statute by making one offer to both parties when consortium claims are joined with the main claim. *See Bodek,* 702 So. 2d at 1332-1333.

B. Unallocated Joint Offers When No Recovery is Made From Any Defendant.

Pursuant to §768.79, Fla. Stat. a "judgment of no liability" entitles the defendant to an award of attorney's fees. §768.79, Fla. Stat. (1997). Based on this provision, Florida courts have uniformly enforced unallocated joint offers made by multiple defendants when the defendants obtain defense verdicts or summary judgments. *See Government Employee's Ins. Co. v. Thompson,* 641 So. 2d 189 (Fla. 2d DCA 1994)(defense verdict rendered). Challenges to the joint offers have been rejected by the courts because "entitlement to attorney's fees under Section 768.79 is established by a finding of no liability." *See Government Employee's Ins. Co.,* 641 So. 2d at 190; *See also Lennar Corp. v. Muskat*, 595 So. 2d 968 (Fla. 3d DCA 1992). As such, the "lack of apportionment...does not, impair the ability of the defendants...to recover under section 768.79, Florida Statutes." *See Flight Express, Inc. v. Robinson*, 736 So.2d 796,797 (Fla. 3d DCA 1999)(defendants obtained summary judgment). Put simply, when judgments of no liability are obtained the amount each defendant "technically" offered is irrelevant because no calculation is required to determine enforceability under §768.79 Fla. Stat.. In fact, after §768.79, Fla. Stat. was amended to allow for a judgment of no liability to entitle a defendant to attorney's fees no Florida court, until *Behar*, invalidated an unallocated joint offer upon entry of a defense verdict.

C. Unallocated Joint Offers When Some Recovery is Made From At Least One Defendant.

Joint offers have resulted in an award of costs and attorney's fees when the court can determine if the amount recovered by or against an individual party satisfies the requirements of §768.79, Fla. Stat. For instance, in *Crowley v. Sunny's Plants, Inc.*, 710 So.2d 219 (Fla. 3rd DCA 1998), the plaintiffs served an offer of judgment to two defendants for $60,000 without allocating an amount to each defendant. One of the defendants was voluntarily dismissed and a judgment was eventually entered against the second for $90,000. In taxing attorney's fees and costs against the remaining defendant, the Third District stated:

> Even though the Crowleys' offers of judgment did not name Sunny's and Perez individually, the general offers made to the defendants were valid under section 768.79. (citations omitted). Both these defendants were represented by the same attorney, there was no conflict of interest between the defendants and the insurance company representing both defendants...Furthermore, Sunny's and Perez were jointly and severally liable for any judgment when the offers were made. (emphasis added).

Crowley, 710 So. 2d at 221.

Florida courts have refused to tax costs and attorney's fees when the court cannot determine if a recovery has triggered §768.69, Fla. Stat., when the recovery was made by or against multiple parties. For instance, in *Twiddy v. Guttenplan*, 678 So.2d 488 (Fla. 2nd DCA 1996), the court refused to tax costs and attorney's fees as it was impossible to determine if the party had prevailed pursuant to §768.69, Fla. Stat. In

Twiddy, two defendants served single offers of judgement for $5,000. The offer did not state the amount being offered by each defendant. The jury returned a defense verdict for one of the defendants and awarded $2,100 from the other. In refusing to award costs and attorney's fees, the Court stated it was "impossible to determine...whether the judgment against only one of the offerees for $2,100 was at least twenty-five percent less than the offer...." *See Twiddy v. Guttenplan*, 678 So.2d 488, 489 (Fla. 2nd DCA 1996).

D. §768.79, Fla. Stat., Allows For Recovery of Costs and Attorney's Fees By USAA Pursuant to Foregoing Authorities.

Pursuant to the authority cited above, USAA is clearly entitled to taxation of costs and attorney's fees pursuant to §768.79, Fla. Stat. The Behars' claims involved a main claim and a derivative loss of consortium claim and USAA obtained a defense verdict. Florida courts have expressly recognized the enforceability of joint offers under these scenarios. Therefore, unless the January 1, 1997 amendment to Fla.R.Civ.P. 1.442 prevents recovery, USAA is entitled to costs and attorney's fees.

II. THE JANUARY 1, 1997 AMENDMENT OF FLA.R.CIV.P. 1.442 DOES NOT PREVENT USAA FROM TAXING COSTS AND ATTORNEY'S FEES.

At the same time that the legislature enacted the offer of judgment statute, the legislature enacted §768.81, Fla. Stat., limiting the doctrine of joint and several liability among tortfeasors. *See* §768.81, Fla. Stat. (1986); *See also Conley v. Boyle Drug Co.*,

570 So.2d 275 (Fla. 1990). This Court interpreted §768.81, Fla. Stat., to mandate that tortfeasors, both named and unnamed, be liable only for their percentage of fault.[4] *See Fabre v. Marin*, 623 So.2d 1182, 1185-1186 (Fla. 1993), *receded from on other grounds, Wells v. Tallahassee memorial Regional Medical Center, Inc.*, 654 So.2d 249 (Fla. 1995).

Effective January 1, 1997, this Court amended Fla.R.Civ.P. 1.442 entitled "Proposals for Settlement." *See In re Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105 (Fla. 1996). The new rule 1.442 provides, in pertinent part, as follows:

> 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.

See Fla. R. Civ. P. 1.442(c)(3). The Committee Notes expressly state that "the provision which requires that a joint proposal state the amount and terms attributable to each party is in order to conform to *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993)." *See Committee Notes*, Fla. R. Civ. P. 1.442. The Committee Notes expressly state "this rule...supersedes those sections of the Florida Statutes and the prior decisions of the

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[4] Factually, in *Fabre*, the plaintiff, Mrs. Marin, was unable to bring suit against her husband due to interspousal immunity. As a result, Mrs. Marin took the position that the named defendant should be required to pay 100% of her damages even though a jury found her husband to be 50% at fault. The court rejected Mrs. Marin's argument as "inherently unfair" and contrary to §768.81, Fla. Stat., holding that under §768.18, Flat Stat., a defendant can only be held liable for its percentage of fault regardless of whether a tortfeasor is named as a party to the litigation.

court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions."

Since the enactment of rule 1.422, Florida appellate courts, with the exception of the Second District's decision in *United Services Automobile Assoc. v. Behar*, 752 So. 2d 663 (Fla. 2d DCA 2000), have limited the "joint proposal" language to cases involving offers to or by multiple defendants. Therefore, under rule 1.442, if *Fabre* principles are implicated, an unallocated joint offer is invalid *per se.* However, in all other cases, the earlier decisions of the courts enforcing unallocated joint offers are still good law. *See e.g. Vasilinda v. Lozano*, 631 So. 2d 1082 (Fla. 1994) (reliance on committee notes is appropriate to determine intent of rule). In fact, the rule itself clearly states 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." *See* Fla. R. Civ. P. 1.442.

A. Unallocated Joint Offers Unenforceable Under New Rule 1.442 When *Fabre* Principles Implicated.

The Fifth District in *McFarland & Son, Inc. v. Basel*, 727 So.2d 266 (Fla. 5th DCA 1999) was the first Florida court to address the application of the "joint proposal" language. Expressly acknowledging that the rule was "intended to conform to the rule in *Fabre,"* the court invalidated an unallocated joint demand directed to multiple defendants, some of whom were not joint tortfeasors. *See McFarland*, 727 So. 2d at

270. According to the court, the "general offer to a group of defendants without assigning to each defendant a specific amount" was held to "lack the particularity required by the rule." *See McFarland*, 727 So. 2d at 270.

B. Unallocated Joint Offers Enforced Under Rule 1.442 Where *Fabre* Principles Not Implicated.

The holding in *McFarland* was, however, aptly distinguished by the Fifth District, when it enforced an unallocated joint demand served by a plaintiff on multiple defendants where there was only one allegedly negligent actor and the remaining defendants' liability was solely vicarious. *See Strahan v. Gauldin,* 756 So. 2d 158 (Fla. 5th DCA 2000). The *Strahn* court stated as follows:

> Unlike the plaintiff in *McFarland*, Gauldin could not logically apportion his offer among the Strahans because each of the individual defendants were liable for the entire amount of damages. Because of that joint and several liability, none of the individual defendants were adversely affected by the joint offer.

See Strahan, 756 So. 2d at 161. Therefore, the *Strahn* court, in recognition of the fact that rule 1.442 only applies when *Fabre* principles are implicated, correctly refused to apply the "joint proposal" language and taxed attorney's fees and costs.

The Second District recently reached the same result when an unallocated joint offer was enforced following a defense verdict. *See Danner Const. Co. v. Reynolds Metals Co.*, 25 Fla. L. Weekly D946 (Fla. 2d DCA April 12, 2000). Like the court in *Strahn*, there was only one negligent actor and the remaining defendant's liability was

solely vicarious. The *Danner Construction Co.* court, focusing on the rule, stated that "TMC could not be a *Fabre* defendant because TMC was vicariously liable without personal fault." *Danner Const. Co.*, 25 Fla. L. Weekly at D947. The court, discussing its earlier decision in *Twiddy,* went on to state as follows:

> This court concluded [in *Twiddy*] that 'the fact that the offer was made on behalf of two defendants who were not joint tortfeasors makes the necessary determinations as to the applicability of section 768.79 impossible to perform with any certainty and reversed the award of attorney's fees. It is this situation that the rule amendment was intended to address according to the committee note. (emphasis added).

See Danner Const. Co., 25 Fla. L. Weekly at D947. Thus, in *Danner Construction Co.*, the Second District enforced the unallocated joint offer because, as in *Strahn*, the offer did not implicate *Fabre* principles and could be calculated with certainty.

C. The "Joint Proposal" Language of Rule 1.442 Does Not Apply to the Case on Appeal.

The "joint proposal" language in new rule 1.442 applies only when *Fabre* principles are implicated. Since the unallocated joint offer served by USAA did not implicate *Fabre* principles, the "joint proposal" language did not apply. As such, USAA could, under new rule 1.422, make a "proposal by or to any party or parties or to any combination of parties." *See* Fla. R. Civ. P. 1.442. This is exactly what USAA did. Nevertheless, the Second District wrongfully applied the "joint proposal" language to invalidate *per se* USAA's offer of judgment. This was simply not the intent of the

rule. In essence, the court has applied a rule, which did not apply, and by doing so issued a decision contrary to well-settled law in this State which holds that joint offers directed to two plaintiffs, one of whom has a loss of consortium claim, are enforceable. *See Tucker v. Shelby Mut. Ins. Co. of Shelby, Ohio*, 343 So.2d 1357 (Fla. 1st DCA 1977); *Bodek v. Gulliver Academy, Inc.* 702 So. 2d 1331 (Fla. 3d DCA 1997).

This Court should adopt the decisions in *Tucker* and *Bodek*. The main claim and consortium clam arise out of the same transaction, the claims typically involve representation by the same attorney, and the total amount of the damages for all practical purposes inures to the benefit of the martial relationship. In fact, the legislature clearly intended for the consortium claims to be joined with the main claim when it enacted §627.7403, Fla. Stat. The statute provides as follows:

> In any action brought pursuant to the provisions of s. 627.737 claiming personal injuries, all claims arising out of the plaintiff's injuries, including all derivative claims shall be brought together, unless good cause is shown why such claims should be brought separately.

§627.7403, Fla. Stat. (1997). Thus, the Florida Legislature has clearly indicated that it is the public policy of this State that consortium claims, such as the one in *Behar*, be litigated in one action. Since such claims must be litigated in one action, the claims should similarly be settled together, or not at all. Otherwise, a defendant will be forced to risk settling one claim and having to litigate the remaining claim. Such a result frustrates the public policy of this State in two significant respects. First, permitting

claims to proceed forward separately violates §627.7403, Fla. Stat. Second, defendants will not avail themselves of the provisions of rule 1.442 as litigation may continue even when a plaintiff accepts an individual offer.

The only decision to address the enforceability of an unallocated joint demand involving a loss of consortium claim since the enactment of new rule 1.442 stated, in *dicta,* that the demand was valid. *See Spruce Creek Development Corp. v. Drew*, 746 So. 2d 1109 (Fla. 5th DCA 1999). The *Spruce Creek* court noted that two plaintiffs' offer to a single defendant could serve as a basis for taxation of fees and costs because "the lack of apportionment between the claimants is a matter of indifference to the defendant. If he accepts, he is entitled to be released by both claimants." *Spruce Creek*, 746 So. 2d at 1115. *See also Goodpaster v. Evans,* 570 So. 2d 354 (Fla. 2d DCA 1990) (court enforced unallocated joint demand made by two plaintiffs, one of whom had loss of consortium claim).

The Second District, however, found that *Spruce Creek* was distinguishable. According to the Second District, the undifferentiated offer directed to the multiple plaintiffs was not a matter of indifference because the intent of the "joint proposal" language was to "allow the recipient an opportunity for independent consideration of that recipient's claims." *See Behar*, 752 So. 2d at 665. The Second District failed to recognize that requiring allocation of offers directed to two plaintiffs, one of whom has

a loss of consortium claim, is directly contrary to the public policy of this State, conflicts with well-settled law, and is contrary to new rule 1.442 which only requires allocation when *Fabre* principles are implicated.

D. If the "Joint Proposal" Language of Rule 1.442 Does Not Apply to the Case on Appeal, USAA May Tax Costs and Attorney Fees as the Behars Have Not Been Prejudiced.

When a defense verdict is rendered, such as occurred in the present case, the award is necessarily less than 75% of the offer as to each plaintiff. Thus, even assuming that the specific amount should have been set forth as to each plaintiff under rule 1.442, the clear language of §768.79, Fla. Stat. entitles USAA to an award of fees. Unlike *Twiddy*, the calculation necessary to determine the applicability of §768.79, Fla. Stat. was possible to perform with certainty. Hence, the Behars have not been prejudiced by USAA's failure to allocate a specific amount as to each plaintiff.

The Second District Court of Appeal suggests the Behars have been prejudiced by the form of USAA's offer as "each party has a right to evaluate an offer as it pertains to him or her." However, no other Florida Court has recognized the "separate evaluation right" when taxing costs and attorneys fees pursuant to §768.79, Fla. Stat.

E. The Behars' Failure to Timely Object to the Form of the Proposal for Settlement Waives any Alleged Defect in USAA's Proposal for Settlement.

No Florida court has directly addressed when, or if, an objection must be filed for alleged procedural defects and the rule is silent on this issue. Such a requirement, however, would further the statutory purpose of encouraging settlements by giving the party making the offer at least one opportunity to correct the form of the offer before being denied an award of attorney's fees. The court in *Mateo v. Rubiales*, 717 So. 2d 133 (Fla. 4th DCA 1998), at least implicitly recognized the viability of requiring an objection. In *Mateo*, defendants asserted that they were confused by three demands for judgment. The Fourth District, in addressing the defendants alleged confusion, stated as follows:

> At oral argument in this matter, the Rubialeses conceded that they never tried to call Mateo to clarify such confusion upon receipt of the demands, but rather, simply filed a motion to strike in response. Moreover, they waited until after trial to set the hearing on their motion. Had they made the call or set the hearing prior to trial, Mateo would had the opportunity to timely rectify whatever defect, if any existed in the demands.

Mateo, 717 So. 2d at 135.

In the present case, USAA served its proposal for settlement approximately one year before the jury returned a defense verdict. The Behars responded with a proposal for settlement which likewise did not allocate the individual claims of Dr. and Mrs. Behar. As the Behars did not object to form of the offer at any time prior to trial, USAA was not given an opportunity to correct the alleged procedural defect. Rather, it was not until almost two years after the Proposal for Settlement was served, that the Behars filed

their first objection to the Proposal for Settlement based on alleged procedural deficiencies. The Behars failure to object prior to trial should waive any challenges to taxation of costs and attorney's fees. As such, even if this court finds the offer procedurally defective, the offer should be enforced.

CONCLUSION

Since the enactment of new rule 1.442 Florida courts, with the exception of the *Behar* decision, have limited the "joint proposal" language to cases which implicate *Fabre* principles. If *Fabre* principles are not implicated unallocated joint offers are not *per se* invalid. Rather, the nature of the offer and its validity and enforceability are still factors in determining whether the offer provides a basis for attorney's fees. In the present case, USAA's joint offer did not implicate *Fabre* principles making the "joint proposal" language inapplicable. As such, the joint offer could only be deemed unenforceable based on justified reasoning and settled principles. No such justification existed in the present case. On the contrary, the *Behar* decision is directly contrary to well-settled law enforcing similar offers, is directly contrary to rule 1.442 which permits offers to be made "by or to any party or parties or to any combination of parties" and completely vitiates USAA's substantive entitlement to fees based on the judgment of no liability entered in its favor. Therefore, USAA respectfully requests that this Honorable Court render a decision reversing *Behar* and awarding USAA attorney fees

from the time of the serving of its offer through the conclusion of these proceedings. Further, USAA requests costs to the extent the costs have not already been paid by the Behars.

CERTIFICATE OF TYPEFACE AND SIZE

The type face used in this brief is Times New Roman, 14 pt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via United States Mail to **Steve Segall, Esquire**, LEVINE, HIRSCH, SEGALL & NORTHCUTT, P.A., Post Office Box 3429, Tampa, FL 33601-3429, Counsel for Respondents, and **David Maney, Esquire**, Maney, Damsker & Jones, P.O. Box 172009, Tampa, FL 33672-2009, Co-counsel for Respondents, on this _____ day of September, 2000.

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