ORIGINAL

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO: SCOO-595

UNITED SERVICES AUTOMOBILE ASSOCIATION

Petitioner,

v.

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

Respondents.

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This action involves the application of new rule 1.422, enacted January 1, 1997, when a single defendant makes an offer to two plaintiffs, one of whom has a loss of consortium claim.[1] The plaintiffs herein, Raymond Behar, M.D., and his wife, Susan Behar, filed a claim against USAA seeking underinsured motorist benefits. As part of the underinsured motorist proceeding, USAA served an Offer of Judgment and Proposal for Settlement pursuant to 4768.79 and new rule 1.442 in the amount of $125,001.00. USAA's Offer of Judgment and Proposal for Settlement did not separately allocate the amounts that would be paid to the Behars. The Behars similarly served a single Demand for Judgment and Proposal for Settlement in the amount of $395,000.

Neither the Behars nor USAA accepted the settlement offers and the case proceeded to trial with the jury returning a verdict finding no negligence on the part of the alleged tortfeasor which was the legal cause of damage to the Plaintiff, Dr. Behar. A Final Judgment was subsequently entered in favor of USAA with a reservation of jurisdiction on attorney's fees and costs. USAA subsequently moved for attorney's fees and costs pursuant to $768.79. The trial court, relying on new rule 1.442, denied USAA's motion for attorney's fees finding:

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[1] Prior to the institution of the underinsured motorist claim, Dr. Behar was paid full policy limits by Allstate Insurance Company, the alleged tortfeasor's carrier.

> 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). . . .

The Second District Court of Appeal affirmed the trial court's ruling, holding 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.

SUMMARYOFARGUMENT

This Court held in ***Fabre v.*** *Marin* that a defendant can only be held liable for its percentage of fault regardless of whether the tortfeasor is named as a party to the litigation. Following ***Fabre,*** offers of judgment filed against multiple defendants who were not jointly and severally liable, were unenforceable because the calculation required under 4768.79 could not be performed with certainty. In response to the difficulty caused by ***Fabre*** in enforcing these types of offers of judgment, this Court enacted new rule 1.442 to provide as follows:

> A proposal may be 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. Fla. R. Civ. P. 1.442(c)(3) (emphasis added).

The Committee Notes state that the "joint proposal" language is in order to conform to *Fabre v. Marin.*

The Second District held in the instant action that USAA's proposal to two plaintiffs, one of whom had a loss of consortium claim, was defective because it did not separately allocate the amounts and terms attributable to each plaintiff. This holding is directly and expressly contrary to cases prior to the enactment of rule 1.442 which found similar offers enforceable, and is also directly and expressly contrary to decisions interpreting new rule 1.442 which hold that the "joint proposal" language is to be applied only when *Fabre* principles are implicated. This case is the first opportunity for this Court to address the interpretation of new rule 1.442 and clearly has far reaching implications on civil litigation in this State.

ARGUMENT

I. THE SECOND DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE DISTRICT COURTS OF APPEAL HOLDING THAT OFFERS OF JUDGMENT SERVED ON TWO PLAINTIFFS, ONE OF WHOM HAS A LOSS OF CONSORTIUM CLAIM, CAN BE SERVED WITHOUT THE AMOUNTS BEING ALLOCATED AS TO EACH PLAINTIFF.

Prior to the enactment of new rule 1.442, Florida courts enforced offers of judgment directed to two plaintiffs, one of whom had a loss of consortium claim, where the defendant did not separately allocate the amounts attributable to each plaintiff. In *Tucker v. Shelby Mut. Ins.* Co. *of Shelby, Ohio,* 343 So.2d 1357 (Fla. 1 st DCA 1977), a claim involving loss of filial consortium, an offer of judgement was served under prior Rule 1.442 which provided:

> At 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 this offer with costs then accrued.

The plaintiffs argued that the offer was not enforceable because it did not separately allocate the amounts attributable to each plaintiff. The First District, acknowledging that the claims were separate and distinct, held that the offer ofjudgment did not have to set forth a specific amount as to each party:

> . ..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. 1.2 1 O(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.

Tucker was recently followed by the Third District in *Bodek v. Gulliver Academy, Inc.* 702 So. 2d 133 1 (Fla. 3d DCA 1997), when an offer directed to two plaintiffs, one of whom had a loss of filial consortium claim, was enforced even

though the offer did not state the amount attributable to each plaintiff .[2] The ***Bodek*** court stated as follows:

> -contrary to Plaintiffs' assertion Section 768.79 does not require that in circumstances where 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 "state its total amount". ***Bodek, 702*** So.2d at 1332. (emphasis added).

The Second District's decision in the instant action clearly conflicts with ***Tucker*** and ***Badek*** . Like the earlier versions of rule 1.442 and $768.79, new rule 1.442 does not require that the amounts attributable to each plaintiff be separately allocated when the plaintiffs claim is solely derivative in nature. 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.

Under the language of new rule 1.442, proposals may be made by or to any party or parties, and by or to any combination of parties, properly identified in the proposal. This is exactly the type of proposal made by USAA. USAA's offer ofjudgment and proposal for settlement is not a 'joint proposal" as contemplated by new rule 1.442.

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[2] Section 768.79, Fla. Stat. provided, that an offer of judgment must "state its total amount. "

A. The "joint proposal" language is limited to cases implicating *Fabre*.

As part of the 1986 Tort Reform Act the legislature adopted §768.81, Fla. Stat., abolishing joint and several liability except in the limited situations expressly set forth in the statute. See *Conley* v. *Boyle Drug* Co., 570 So.2d 275 (Fla. 1990). Based on the abolition of joint and several liability, this Court held in *Fabre* that 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. Following *Fabre*, if damages were awarded against multiple defendants who were not jointly and severally liable, the offer of judgment was unenforceable because the calculation required under $768.79 was impossible to perform with any certainty. *See Twiddy v. Guttenplan, 678* So.2d 488 (Fla. 2d DCA 1996). *But see Crowley v. Sunny's Plants, Inc.*, 710 So.2d 219 (Fla. 3d DCA 1998).

In response to the difficulty caused by *Fabre* in enforcing offers of judgment involving multiple defendants not jointly and severally liable, this Court enacted new rule 1.442. The Committee Notes to rule 1.442 provide as follows:

> 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. Marin*, 623 So. 2d 1182 (Fla. 1993).

Since the enactment of new rule 1,442, Florida courts have limited the "'joint proposal" language to decisions involving the application of *Fabre* principles. In

McFarland & Son v. *Basel*, 727 So. 2d 266 (Fla. 5th DCA 1999), the court held that under new rule 1.442, a proposal directed to multiple defendants, who were **not** jointly and severally liable, was unenforceable where the offer did not assign a specific amount as to each defendant:

> 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 v. Mark,* 623 So. 2d 1182 (Fla. 1993), *receded from on other grounds, Wells v. Tallahassee Memorial Regional Medical Center, Inc.,* 659 So. 2d 249 (Fla. 1995).

Recently, the same court in *Strahan v. Gaudlin, 25* Fla. L. Weekly D666a (Fla. 5th DCA, March 17, 2000), held that its earlier decision in *McFarland* did not control where a single plaintiff served a joint offer ofjudgment on multiple defendants where there was only one allegedly negligent actor and the remaining defendants' liability was solely vicarious. Thus, in *Strahan,* the offer ofjudgment, which did not allocate the amounts attributable to each defendant was enforceable.

The reasoning in *McFarland* and *Strahan* has been adopted by the Third District in *Flight Express, Inc. v. Robinson,* 736 So.2d 796 (Fla. 3d DCA 1999), which enforced an offer made by two plaintiffs to one defendant where *Fabre* principles were not implicated. The *Flight Express* court noted that the joint proposal language only applied when *Fabre* principles were implicated:

> the committee notes to the ... amendment state that the provision was enacted "to conform with *Fabre* v. *Marin*, 623 So. 2d **1182** (Fla. 1993)" which deals with dividing the exposure of various parties based on their respective percentages of fault. The amended rule is thus designed to obviate future conflicts as to the effect of an offer upon defendants-offerees. (Citation omitted). Considered in this light, the failure to follow the rule as to offerors must be considered merely a harmless technical violation which did not affect the rights of the parties.

Thus, the Second District's decision finding that an offer made by a single defendant to two plaintiffs, one of whom is claiming loss of consortium, is unenforceable is in express and direct conflict with the earlier decisions in *Tucker* and *Bodek* and the subsequent decisions in *McFarland, Flight Express* and *Strahan*. The offer made by USAA does not implicate *Fabre*. Moreover, the Committee Notes state that the rule should not supersede prior decisions of the court unless reconciliation is impossible. The Second District's decision in the instant action does exactly this.

B. The "joint proposal" language has not been applied to claims involving loss of consortium.

The Fifth District's decision in *Spruce Creek Dev. Co. of Ocala v. Drew, 746* So.2df 1109 (Fla. 5th DCA 1999) is the only decision to address the enforceablility of an offer ofjudgment involving a loss of consortium claim since the enactment of new rule 1.442. In *Spruce Creek,* a proposal for settlement served by multiple plaintiffs, one of whom was claiming loss of consortium, to a single defendant was

enforced even though the plaintiffs did not indicate the respective amounts to be paid by each plaintiff. The *Spruce Creek* court cited *Flight Express* with approval and stated that the 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."

The Second District found that *Spruce Creek* was distinguishable from the instant action, stating as follows:

> This case is unlike *Spruce Creek Development Co. of Ocala v. Drew*, which USAA cites as support for its position In *Spruce Creek* two plaintiffs made a joint offer of settlement to a single defendant. In such a situation, the lack of apportionment between plaintiffs, as offerors, "is a matter of indifference to the defendant. If he accepts, he is entitled to be released by both claimants. (citation omitted). 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.

The Second District's decision refused to acknowledge that the Fifth District's earlier decision in *McFarland* had already limited the "joint proposal" language found in rule 1.442 to offers which implicate *Fabre* principles. Importantly, *Fabre* principles

were clearly not implicated in *Spruce Creek* nor in *Flight Express* cited by *Spruce Creek* with approval. Therefore, the Second District's attempt to distinguish *Spruce Creek* is simply unavailing and express and direct conflict exists. As with *Spruce Creek*, the instant action involving loss of consortium does not implicate *Fabre* principles.

Moreover, why should multiple plaintiffs/offerors be allowed to serve a proposal either jointly or for a separate amount, but a defendant/offeror not be afforded the same option? By treating plaintiffs differently than defendants, the court's decision creates equal protection, due process and access to courts violations under the United States and Florida Constitutions.

CONCLUSION

The Petitioner respectfully requests that this Honorable Court accept jurisdiction based on express and direct conflict.

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 13th day of April, 2000.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Appellant,

vs.

Appeal No.: 99-01592
L.C.No,: 96-3266-CI-13

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

Appellees.

/

APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Appellant,

v.

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

Appellees.

Case No. 2D99-1592

Opinion filed January 21, 2000.

Appeal from the Circuit Court for Pinellas County; John C. Lenderman, Judge.

Kimberly Staffa Mello of Adams, Byelick & Kieman, St. Petersburg, for Appellant.

David A. Maney and Lorena L. Kiely of Maney, Damsker & Jones, Tampa, for Appellees.

CASANUEVA, Judge.

In this appeal we construe the language of Florida Rule of Civil Procedure 1.442 in the context of a proposal for settlement made by a single defendant to two plaintiffs. The trial court denied the appellant, United Services Automobile Association (USAA), attorney fees under the offer of judgment statute, section 768.79, Florida

Statutes (1995), and rule 1.442, and USAA appealed that judgment. Finding that the trial court properly applied the rule, we affirm.

On August 25, 1994, the appellee, Raymond Behar, M.D. was involved in a motor vehicle accident when the automobile he was operating was struck in the rear by an automobile operated by Francis Bassano. At that time, Dr. Behar was insured by an automobile liability policy issued by USAA. After settling his claim with Mr. Bassano's insurance carrier for the policy's limits, Dr. Behar and his wife, appellee Susan L. Behar, instituted an action against USAA under the terms of their policy's underinsured motorist coverage. In Count I, Dr. Behar sought benefits for damages he alleged resulted from the accident. Mrs. Behar, in Count II, claimed damages resulting from a loss of consortium.

Pursuant to section 768.79 and rule 1.442, USAA served upon the Behars an offer of judgment and proposal for settlement in the amount of $125,001. Neither Dr. nor Mrs. Behar timely responded to this offer and, accordingly, by statutory operation, it was deemed rejected. Later during the litigation, Dr. and Mrs. Behar served USAA with a demand for judgment pursuant to the same statute in the amount of $395,000.00, which USAA rejected. Because the parties were unable to reach a settlement agreement the case went to trial.

The jury returned a verdict determining that there was no negligence by Mr. Bassano that was the legal cause of Dr. Behar's damages, In posttrial proceedings USAA moved for attorney's fees based on the offer of judgment statute and its rejected offer. The trial court denied the motion for fees concluding that USAA had not complied with the provisions of rule 1.442.

Effective January 1, 1997, rule 1.442 applies to all proposals for settlement authorized by Florida law, regardless of how they are denominated. See Fla. R. Civ. P. 1.442(a). Subsection (c)(3) of the rule requires that "[a] joint proposal shall state the amount and terms attributable to each party." USAA's proposal, made on May 23, 1997, offered, in relevant part, "to settle the above-styled cause by allowing the Plaintiffs, Raymond J. Behar, M.D. and Susan L. Behar, his wife, to take a judgment against the Defendant, USAA, for a total sum of One Hundred Twenty-Five Thousand and One and No/100 Dollars ($125,001.00)."

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. See DiPaola v. Black Terrace Ass'n, 718 So. 2d 1275, 1277 (Fla. 2d DCA 1998) (holding that if it is impossible to perform, with any certainty, the calculation necessary to determine the applicability of section 768.79, then the offer cannot support an award of fees). 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. See Eaaleman v. Eagleman, 673 So. 2d 946 (Fla. 4th DCA 1996). 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 USA4 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. See Orange County v. Piper, 523 So. 2d 196 (Fla. 5th DCA 1988) (holding that loss of consortium is separate cause of action belonging to spouse of injured married partner, and though derivative in sense of being occasioned by injury to spouse, it is a direct injury to spouse who has lost consortium); see also Metropolitan Dade County v. Reves, 688 So. 2d 311 (Fla. 1996). Because there are two plaintiffs in this suit, itemization of USAA's offer to Mrs. Behar, as well as to Dr. Behar, is required.

This case is unlike Spruce Creek Development Co. of Ocala v. Drew, 24 Fla. L. Weekly D 2215 (Fla. 5th DCA Sept. 24, 1999), which USAA cites as support for its position. 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 daimants." 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, 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.

Affirmed.

PARKER, A.C.J., and GREEN, J., Concur.