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SUPREME COURT OF FLORIDA

UNITED SERVICES AUTOMOBILE ASSOCIATION ,

Petitioner,

vs.

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

Respondent.
_____/

Case No.: SC00-595

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

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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OTHER AUTHORITIES:

Florida Rules of Civil Procedure 1.442
Florida Statute 768.79

CERTIFICATE OF FONT SIZE AND STYLE

This brief was prepared using 14 point proportionally spaced Times New Roman.

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 and Mrs. Behar's loss of the services of her husband.

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.

The jury entered a verdict in favor of USAA and a judgment was entered in favor of USAA. The trial court denied an award of attorney's fees to USAA. The Second District agreed, 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.

The Second District denied USAA's Motions for Rehearing and for Certification of Conflict.

SUMMARY OF THE ARGUMENT

USAA's attempt to invoke the discretionary jurisdiction of this Court must fail for two reasons. First, the Second District's decision does not conflict with any cases decided after Rule 1.442(c)(3) was amended to provide that: "[a] joint proposal shall state the amount and terms attributable to each party." These cases establish that where an offer of judgment is directed to multiple plaintiffs or multiple defendants, the offer must allocate the offer between the multiple offerees unless the parties are joint and severally liable. Since the cases decided after the Rule was amended are in agreement, no jurisdictional conflict exists.

Second, the question of law is different between the present case and *Tucker v.*

Shelby Mutual Ins. Co., 343 So. 2d 1357 (Fla. 1st DCA 1977) and *Bodek v. Gulliver Academy*, 702 So. 2d 1332 (Fla. 3d DCA 1997), both of which were decided before Rule 1.442(c)(3) was amended. 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.

In reality, USAA disagrees with the Second District's interpretation of the amended Rule. USAA argues the Second District's interpretation of the amended Rule is in conflict with, not the language of the Rule itself (which is contrary to USAA's requested interpretation), but the Committee Notes. The Committee Notes provide that 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). USAA then argues that the allocation of an offer between multiple offerees is only required when *Fabre* is implicated. The Rule itself, as well as the cases decided after the Rule was amended, do not so limit the Rule. The Second District declined to certify any conflict and this Court should decline to exercise jurisdiction.

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, relying on the Rule's plain language, 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, 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.

In reality, USAA just disagrees with the Second District's interpretation of the Rule. USAA's argument is that, despite the plain language of Rule 1.442(c)(3), the offer of judgment, because it was directed to two plaintiffs rather than to multiple defendants, is not a "joint proposal" under Rule 1.442. In support of this argument, USAA relies on the Committee Notes which provide: "The provision which requires that a joint proposal state the amount and terms attributable to each party is in order to conform with *Fabre* . . .". 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 involved.

USAA's interpretation of the Rule is contrary to the plain language of the Rule --

the Rule certainly does not limit its application to only require an allocation of the amount and terms when a proposal is made to multiple defendants. Nor do the cases cited by USAA, upon which it alleges conflict with the Second District, support its argument. In fact, the cases cited by USAA establish that the law is not in conflict.

Three different factual scenarios addressing Rule 1.442(c)(3)'s requirement that a joint proposal state the amount and terms attributable to each party have arisen in the cases. In those cases, the Districts have not, as urged by USAA, limited "joint proposals" to only those involving *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.

The first factual scenario is where an 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, was defective because the offer denied the offerees the opportunity to independently evaluate the offer. The Second District's opinion is not in conflict with the Fifth District's opinion in *McFarland & Son, Inc. v. Basel*, 727 So. 2d 266 (Fla. 5th DCA 1999). In *McFarland*, the Fifth District 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*, 2000 Fla. App. LEXIS 3673 (Fla. 2d DCA March 29, 2000)(where the Second District denied attorney's fees to the plaintiff who served a 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 scenario that has been addressed by the Districts presents a different factual scenario than the instant case -- where an offer is directed to multiple offerees who are jointly and severably liable. The Fifth District's decision in *Strahan v. Gauldin*, 25 Fla. L. Weekly D 666a (Fla. 5th DCA March 17, 2000), which USAA suggest conflicts with the instant case, addressed this second factual scenario. In *Strahan*, the Fifth District held that since a joint offer does not prevent the defendants

from independently evaluating the offer because each is liable for the entire amount of the offer, the joint offer need not specify the amount attributable to each offeree. However, *Strahan*, because the facts are different, provides no basis for jurisdiction here. In fact, the Fifth District applied the same reasoning as the Second District did in the present case.

The third factual scenario in the cases is where there are multiple offerors who make a combined offer -- again, a different set of facts from the present case. The Third District addressed this factual scenario in *Flight Express, Inc. v. Robinson*, 736 So. 2d 796 (Fla. 3d DCA 1999), which USAA argues is in conflict with the Second District's decision here. Again, because *Flight Express* is factually different, that opinion does not set forth a basis for conflict jurisdiction here. In fact, 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 . . . 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.

The Second District, in *Danner Construction Company, Inc. v. Reynolds Metal Company*, 2000 Fla. App. LEXIS 4216 (Fla. 2d DCA April 12, 2000), addressed the issue presented in *Flight Express*. The Second District, while accepting the reasoning as applied to the facts of *Flight Express*, declined to accept as a general proposition that the failure of offerors to divide the amount to be contributed should always be considered a harmless violation of the rule but instead may be harmless if the theory for the defendants' joint liability does not allow for apportionment, such as where one defendant is vicariously liable for the negligence of another. Importantly, the Second District in *Danner* noted: "[h]owever, those courts [referring to the Third and Fifth Districts] would require a division of amounts to be paid to each of several offerees in a settlement proposal."

USAA suggests the Second District's opinion is in conflict with *Spruce Creek Development Co. of Ocala v. Drew*, 746 So. 2d 1109 (Fla. 5th DCA 1999), because, according to USAA, *Spruce Creek* stands for the proposition that "[t]he "joint proposal" language has not been applied to claims involving loss of consortium." (Petitioner's Brief at 8). 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.

Finally, USAA suggests the Second District's opinion is in conflict with *Tucker* and *Bodek*, both of which were decided before Rule 1.442 was amended to 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, that these pre-rule change cases have continuing validity. 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.

USAA asserts the Second District's decision creates equal protection, due process and access to courts violations under the United States and Florida Constitutions because "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?" (Petitioner's Brief at 10).The Second District did not treat plaintiffs differently than defendants. Instead, the Second District looked to see who was making the offer and to whom the offer was directed. If the offer was directed to two or more offerees, then the offer had to state the amount attributable to each offeree to allow each offeree an opportunity for independent consideration of that offeree's claims. The Second District's decision treats both plaintiffs and defendants the same. USAA's requested construction would, on the other hand, treat plaintiffs and defendants differently because multiple plaintiffs, as the recipients of an offer, would not be entitled to an allocation of the amount of the offer.

CONCLUSION

For the foregoing reasons, this Court should decline to accept jurisdiction of this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 5th day of May, 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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