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.

USAA'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Nineteen cases from the Florida District Court have specifically addressed the issue whether an Offer of Judgment or Proposal for Settlement by more than one party or directed to more than one party may allow for the taxation of fees and costs under various Florida Rules of Civil Procedure or Statutes. The opinions have been inconsistent. Florida Courts and attorneys are in need of guidance from this Court.

There may be no requirement that USAA's Offer or Proposal conform to the 1996 Amendment of Fla.R.Civ.P. 1.442 because the pending appeal does not include multiple active tort-feasors, as in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993) , If the 1996 Amendment does apply, the Trial Court and the Second District erred in determining USAA was required to make separate offers to Raymond Behar and Susan Behar. Rule 1.442 allows joint offers, but requires the amount attributable to each party be stated. The Behars had no right to "separately evaluate" USAA's Offer or Proposal. The true purpose for requiring a separate statement of the amount attributable to each party, is to allow a Court to determine whether the offeror was awarded 25% more or less than the amount offered. This Court has determined a defense verdict allows an uninsured motorist carrier collect fees from two plaintiffs when a joint Offer of Judgment had been made prior to Trial. Hence, the failure of

USAA to allocate between Raymond and Susan Behar was harmless error which did not adversely affect the Behars.

ARGUMENT

Nineteen opinions from Florida District Courts of Appeal have addressed whether an Offer of Judgment or Proposal for Settlement made by more than a single party, or directed to more than a single party, may allow for taxation of costs or fees.' Counsel for USAA has summarized the nineteen relevant District Court opinions in Tables I through VII. (AI-A7). Eleven cases have allowed for taxation of costs or fees and eight have denied taxation. (A-2) Five of the eight cases refusing to allow fees or costs have come from the Second District. (A-3). Of the ten cases decided prior to the 1996 Amendment of Fla. R. Civ. P. 1.442, (hereinafter referred to as "the 1996 Amendment") which became effective January 1, 1997, only the Second District refused to tax costs or fees while the First, Third and Fourth Districts allowed taxation. (A-6). Prior to the 1996 Amendment, the Second District also allowed

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1 ***Tucker*** v. ***Shelby Mut.*** Ins. Co. of ***Shelby, Ohio,*** 343 So.2d 1357 (Fla. 1st DCA, 1977); ***Government Employees*** Ins. Co. *v.* ***Thompson,*** 641 So.2d 189 (Fla. 2d DCA, 1994); ***Twiddy v. Guttenplan,*** 678 So.2d 488 (Fla. 2d DCA, ***1996); Bodek v. Gulliver Academy Inc.,*** 702 So.2d 1331 (Fla. 3rd DCA, 1997); *Crowley* ***v. Sunny's Plants Inc.,*** 710 So.2d 219 (Fla. 3rd DCA, 1998); ***Di Paola*** *v.* ***Beach Terrace Ass'n Inc.,*** 718 So.2d 1275 (Fla. 2d DCA, 1998); ***McFarland & Son,*** *Inc.* v. *Basel*, 727 So.2d 266 (Fla. ***5th*** DCA, 1999); ***Flight Express Inc. v. Robinson, 736*** So.2d 796 (Fla. 3rd DCA, 1999); ***Spruce Creek Dev.*** Co. v. ***Drew,*** 746 So.2d 1109 (Fla. ***5th*** DCA, 1999); ***United*** *Servs.* ***Auto, Ass'n v. Behar, 752*** So.2d 663 (Fla. 2d DCA, ***2000); Liguori*** *v.* ***Daly, 756*** So.2d 268 (Fla. 4th DCA, 2000); C&S ***Chems, Inc. v.*** *McDougald*, 754 So.2d 795 (Fla. 2d DCA, ***2000); Danner Constr. Co. Inc. v. Reynolds Metals Co., 760*** So.2d 199 (Fla. 2d DCA, ***2000);*** *Herzog* ***v.. K-Mart*** Corp., 760 So.2d 1006 (Fla. 4th DCA, 2000); ***Goldstein v. Harris,*** 25 Fla. L. Weekly Supp. D2066a (Fla. 4" DCA, August ***30, 2000);*** *Safelite* ***Glass*** *Corp.* v. ***Samuel,*** 25 Fla. L. Weekly Supp. D2326a (Fla. 4" DCA, September 27, 2000); ***Allstate*** *Indem.* ***Co. v.*** *Hingson*, 25 Fla. L. Weekly Supp. D2431a (Fla. 2d DCA, October 11, 2000); *DeWitt* ***v. Maruhachi Ceramics*** *of America, Inc.*, 25 Fla. L. Weekly D2449a (Fla. 5"' DCA, October 13, 2000); ***Ford Motor Co.*** v. ***Meyers,*** 25 Fla. L. Weekly Supp. D2484d (Fla. 4th DCA, October 18, 2000).

taxation in one of it's five decisions. (A-6). The Second, Fourth and Fifth have applied the 1996 Amendment to disallow fees on four occasions and have allowed fees in five decisions. (A-7). The First and Third Districts have published no opinion addressing the issue which applies the 1996 Amendment. (A-7).

Taking the opinions as a whole, the District Courts have made little distinction whether an offer was made by multiple offerors, directed to multiple offerees, or both. (A-2). In applying the relevant rule, statute or statutes prior to the 1996 amendment the District Courts have both granted and denied fees. (A-4) Since the 1996 amendment, the District Courts continue to reach no consistent result. (A-5) As a consequence, both Petitioner in its Initial Brief and Respondent in their Answer Brief have been able to support a smorgasbord of arguments.

This Honorable Court has yet to squarely address the issue. As ten of the nineteen opinions from the Florida District Court have been published during the first ten months of this year, there can be no doubt Florida's lawyers and judges are in need of direction from this Court.

I. A JOINT PROPOSAL IS AN OFFER MADE BY MULTIPLE DEFENDANTS OR DIRECTED TO MULTIPLE DEFENDANTS AS *FABRE* PRINCIPLES ARE IMPLICATED IN SUCH CASES.

The 1996 amendment to Fla. R. Civ. P. 1.442 (c) (3) states:

> (3) 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.

The 1996 amendment of 1.442 (c)(1) contains no definition of the term "'joint proposal". However, the Committee Note to the 1996 amendment states:

> 1996 Amendment. This rule was amended to reconcile, where possible, sections 44.102(6) (formerly 44.102(5)(b)), 45.061, 73.032, and768.79, Florida Statutes, and the decisions of the Florida Supreme Court in *healing v. Puleo*, 675 So.2d 593 (Fla.1996), *TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606 (Fla. 1995), and *Timmons v. Combs, 608* So.2d 1 (Fla. 1992). This Rule replaces former Rule 1.442, which was repealed by the *Timmons* 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. *Marin, 623* So.2d 1182 (Fla. 1993). In *re: Amendments to Florida Rules of Civil Procedure, 682* So.2d 105, 125 (Fla. 1996).

Counsel for the Behars have argued the reference to *Fabre* in the Committee Note provides no guidance regarding the meaning of "joint proposal." USAA's Initial Brief on the Merits sets forth USAA's arguments to the contrary. USAA will not repeat the arguments made earlier in this Brief. In USAA's Initial Brief on the

Merits, USAA cited and examined, *McFarland & Son, Inc., 727* So.2d *266; Strahan, 756* So.2d 158; and *Danner Constr.* Co. *Inc.,* 760 So.2d 199. Since the Initial Brief was drafted, *Ford Motor* Co., 25 Fla. L. Weekly D2484d has been published. *Ford* again affirms that 1.442 (c) (3) addresses multiple tort-feasor cases.

The Committee Note for 1.442 as adopted by the Florida Rules of Civil Procedure Committee September 8, 1995, contained no reference to *Fabre* and was approved as follows:

Committee Note

> 1996 Amendment. This rule was amended to reconcile, where possible, sections 44,102(6) (formerly 44.102(5) (b)), 45.061, 73.032, and 768.79, Florida Statutes, and the decision of the Florida Supreme Court in *Timmons* v. *Combs,* 608 So.2d 1 (Fla. 1992). This rule replaces former Rule 1.442, which was repealed by the *Timmons* 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.
> (A-8, P.4)

The version of the Committee Note appearing above was the final form approved by the Civil Procedure Committee. Hence, it is apparent this Court added the last sentence to the Committee's Note which arguably limits the application of 1.442 (c)(l) to cases involving multiple tort-feasors and may be considered as an expression of the Court's intention. Of course, *Fabre* involves multiple potentiality responsible tort-feasors. The case on appeal does not involve multiple Defendants,

only multiple Plaintiffs: Raymond and Susan Behar. Therefore, if the term "joint proposal" is limited to multiple tort-feasor cases, it has no application to the case on appeal.

II. A JOINT PROPOSAL IS AN OFFER MADE BY MORE THAN ONE OFFEROR OR DIRECTED TO MORE THAN ONE OFFEREE.

As earlier stated, the 1996 amendment to Fla. R. Civ. P. 1.442 (c) (3) states:

> (3) 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.

Although "joint proposal" is not specifically defined in Rule 1.442, reason may dictate that the first sentence of 1.442(c) (3) provides a workable definition: "A proposal.. .made by or to any.. .parties.. .or by or to any combination of parties properly identified in the proposal." Hence, contrary to the position set forth in Section I above, the term 'joint proposal" may apply to all proposals made by or directed to more than one party. Of course, if this Court gives "joint proposal" such meaning, USAA violated 1.442(c) by failing to state what portion of the offer of USAA's $125,000 offer was attributable to each of the Behars. In spite of such potential violation, USAA submits the opinion of the Second District should be quashed and this Court determine USAA is entitled to fees.

In Circuit Judge John C. Lenderman's Order denying USAA fees, Judge Lenderman reasoned, "Mrs. Behar had an independent right to evaluate her claim for

damages." (A-8). In *USAA,* 752 So.2d ***663*** the Second District accepted Judge Lenderman's reasoning stating:

> The purpose of section 768.79 is to encourage the resolution of litigation. ***See*** *Eagleman* ***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...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 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. *USAA,* at 664.

More recently in C & *S Chems,* ***Inc.,*** 754 So.2d 795 the Second District denied fees to plaintiffs who directed an unallocated offer to two defendants prior to the 1996 Amendment:

> Since Perry, C & S, and Ryder were not joint tort-feasors, they each had the right to evaluate the 1996 demand independently based on their individual liability situations. The form of the 1996 demand, however, made this impossible. Since the 1996 demand did not apportion specific amounts to each defendant, no defendant could evaluate it independently. Therefore, the 1996 demand is unenforceable, and the Trial Court's Order finding McDougald entitled to fees must be reversed. C & *S* ***Chems,*** at 797.

The "independent evaluation" reasoning originally enunciated by Judge Lenderman and adopted by the Second District should not be accepted by this Court as:

A. §768.79 Fla. Stat. does not reauire separate offers bv offerors nor does it reauire separate offers be directed to offerees. *Government Employees Ins. Co.*, 641 So.2d 189; *Bodek, 702* So.2d 1331; *Crowley*, 710 So.2d 219; *Flight Express, Inc.,* 736 So.2d 796; and *Herzog, 760* So.2d 1006.

B. Fla. R. Civ. P. 1.442 (c) (3) does not reauire separate offers bv offerors nor does it reauire separate offers be directed to offerees.

As cited above, Fla. R. Civ. P. 1.442 (c)(3) states:

> 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.

Rather than prohibiting offers made by multiple offerors or to multiple offerees, 1.442 (c)(3) specifically allows such offers in its first sentence. The second sentence requires a joint proposal to state "the amount and terms attributable to each party." Judge Lender-man and the Second District have incorrectly interpreted the requirement of amount allocation set forth in this second sentence to cancel out the allowance for a joint offer set forth in the first sentence of 1.442 (c) (3).

C. A joint proposal must state the terms attributable to each party to allow a Court to determine whether a particular offeror satisfies the 25" provision of 4768.79. Fla. Stat. as to an individual offeree.

Why would the Rule allow joint proposals and yet mandate the "amount and terms attributable to each party" be stated? For the simple reason that after an award has been made it may be impossible for a Court to determine whether the 25% requirement of §768.79, Fla. Stat. was satisfied.

In *GEICO,* 641 So.2d 189 the Second District, for the first time by any Florida Appellate Court, addressed the issue whether a joint Offer of Judgment made pursuant to $768.79, Fla. Stat., provided a basis for taxing fees and costs. A defense verdict had been rendered. In allowing fees the Second District stated: "We decline to hold a joint offer invalid per se". *GEICO,* at 190.

Two years later in *Twiddy,* 678 So.2d 488 the Second District refused to allow a defendant fees after two defendants directed a Joint Offer of Judgment to a plaintiff. One of the defendants was dismissed and a verdict was rendered against the other defendant. In overturning the assessment of fees in favor of the defendant who was the subject of the verdict, the Second District stated:

> . ..we are required to reverse because the Joint Offer of Judgment was not specific enough to enable the trial judge to determine that the $2,100 verdict against Guttenplan was at least twenty-five percent less than the offer made on her behalf. We have previously held that a joint offer

> pursuant to section 768.79 is not invalid per se, but may be found invalid by reason of the nature of the offer and its validity and enforceability against an offering party. *Gov't Employees Ins. Co. v. Thompson,* 641 So.2d 189 (Fla. 2d DCA 1994)....Moreover, the total offer on behalf of both the Rocas and Guttenplan was for $5,000. It is, therefore, impossible to determine the amount attributable to each offeree in order to make a further determination whether the judgment against only one of the offerees for $2,100 was at least twenty-five percent less than the offer on her behalf. *Twiddy,* at 488.

USAA submits the Second District's use of the words "amount attributable" and the appearance of these same two words in the second sentence of the 1996 amendment is no coincidence, The Second District opinion in *Twiddy* was the sole Florida Appellate opinion decided before this Court adopted the 1996 amendment which refused attorney fees based on a joint offer.

In *Timmons,* 608 So.2d 1 at 2, this Court reflected "it is clear that the circumstances under which a party is entitled to costs and attorney fees is substantive and our rule can only control procedural matters." As a result of their failure to recognize the true purpose of the provision requiring the amount attributable to each party be stated, the Trial Court and the Second District have improperly created a substantive right to independent evaluation of Proposals for Settlement pursuant to Rule 1.442(c)(3).

D. Requiring an offeror make a separate proposal to each offeree would undermine the purpose of 6768.79. Fla. Stat: to promote settlements of entire cases.

Tf this Court were to accept Judge Lenderman and the Second District's "separate evaluation" reasoning, the Behars had a right to separately accept or to reject an individual offer from USAA. Not only is such a determination contrary to the first sentence of 1.442 (c) (3), the acceptance of such a "separate evaluation" standard by this Court would result in the settlement of individual claims - not the settlement of entire cases.

As recognized by this Court in *MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc.,* 73 1 So.2d 1262, 1263, 1264 (Fla. 1999):

> §768.79(2) FLA. STAT. (1995). SUBSECTION (2) also provides that the "offer shall be construed as including all damages which may be awarded in a final judgment." *Id.* The purpose of this mechanism is to "terminate all claims, end disputes, and obviate the need for further intervention of the judicial process" by encouraging parties to exercise their "organic right...to contract a settlement, which by definition concludes all claims unless the contract of settlement specified otherwise." *Unicare Health Facilities, Inc. v. Mort,* 553 So.2d 159, 161 (Fla. 1989).

The termination of "all claims" is not encouraged by piece meal settlements involving some, but not all parties. For example, requiring separate offers would allow for the continued litigation of one spouse's claim after settlement of either an injury claim or a loss of consortium claim.

E. Given the defense verdict. USAA's failure to state the amount attributable to each party should not m-event taxation of fees.

In spite of USAA failing to state the amount attributable to each Raymond Behar and Susan Behar in its Offer of Judgment and Proposal for Settlement, USAA is still entitled to tax attorney fees as $768.79, Fla. Stat., requires taxation when a single defendant receives a defense verdict after directing an Offer of Judgment to two plaintiffs. In *Timmons* v. *Combs*, 608 So.2d 1, 2 (Fla. 1992) this Court stated: "The plaintiffs recovery of nothing will always be greater than 25% less than a defendants offer of something.. ." In *State Farm Mut. Auto. Ins. Co. v. Malmberg, 639* So.2d 615 (Fla. 1994) this Court quashed a decision from the Fifth District and allowed an uninsured motorist carrier to tax attorney fees and costs against an injured plaintiff and her spouse who sought lost consortium. The UM carrier had served an Offer of Judgment and received a defense verdict. In justifying the award, this Court cited the above language from *Timmons.*

In *TGI Fridays, Inc. v. Dvorak, 663* So.2d 606 (Fla. 1995), this Court approved of the following construction of $768.79, Fla. Stat., as presented in *Schmidt v. Furtner, 629* So.2d 1036 4 DCA 1993):

> Turning to the substance of section 768.79 itself, we conclude that the legislature has created a mandatory right to attorney's fees, if the statutory prerequisites have been met...To begin, the words "shall be entitled" [e.s.] in subsection (1) quoted above cannot possibly have any

> meaning other than to create a right to attorney's fees when the two preceding prerequisites have been fulfilled: i.e., (1) when a party has served a demand or Offer for Judgment, and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. These are the only elements of the statutory entitlement. No other factor is relevant in determining the question of entitlement. The Court is faced with a simple, arithmetic, calculation.

The Behars had no right to receive separate offers from USAA, only separate statements of the amount attributable to each of them. Hence the Behars were not prejudiced by USAA's failure to state the amount attributable to each when a defense verdict was returned. USAA complied with the requirements of 768.79, Fla. Stat. as set forth in *TGI Friday, Inc.*, 663 So.2d 606.

F. In similar cases. the Florida District Courts have applied Rule 1.442(c)(3) to allow for fees when a settlement proposal did not state the amount attributable to each party.

In various circumstances, the District Courts have allowed fees when an offeror did not state the amount attributable to each offeree, in a settlement proposal. *Flight Express, Inc., 736* So.2d 796, *Strahan, 756* So.2d *158;* and *Danner Constr. Co. Inc.*, 760 So.2d 199 were discussed in the Initial and Answer Briefs. Since USAA's Initial Brief, fees have been allowed when offerors did not state an amount attributable to each offeree in *Safelite Glass Corp.*, 25 Fla. L. Weekly D2326a and *DeWitt*, 25 Fla. L. Weekly D2449a.

CONCLUSION

USAA requests this Court quash the Decision of the Second District and remand for proceedings consistent with this Court's Opinion.

Further, USAA requests the Court grant it's Renewed Motion for Appellate Attorney's Fees.

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 13 day of November, 2000.

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