IN THE SUPREME COURT
STATE OF FLORIDA

WILLIS SHAW EXPRESS, INC.,
An Arkansas corporation, and
EDWARD MCALPINE,

Petitioners

vs.

HILYER SOD, INC.,
A Florida corporation,

Respondent,

CASE NO.: SC02-1521

On Petition for Discretionary Review of the Decision
of the First District Court of Appeal

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Plaintiffs/Petitioners, WILLIS SHAW EXPRESS, INC., an Arkansas corporation and EDWARD McALPINE, shall be herein referred to as "Petitioners" or "Plaintiffs."

Defendant/Respondent, HILYER SOD, INC., a Florida corporation, shall be herein referred to as "Respondent" or "Defendant." All references to the record on appeal shall be herein referenced by "R.," followed by the appropriate volume and page numbers.

All references to the Appendix shall be herein referenced as "Appendix, Section ___."

STATEMENT OF THE CASE AND FACTS

This appeal arises from an underlying cause of action involving an accident between two commercial tractor-trailers.

Petitioner, Edward McAlpine, on November 6, 1996 was a driver for Petitioner, Willis Shaw Express, Inc. [R. Volume I, 94-100][Appendix, Section 2.] Both Petitioners on November 6, 1996, were involved in an accident in which they suffered property damage. [R. Volume I, 94-100][Appendix, Section 2.]

As a result of the accident, Petitioners brought suit against Respondent on the basis of Respondent's driver's negligence. [R. Volume I, 94-100][Appendix, Section 2.] More specifically, Petitioners alleged the following in their complaint;

> On or about November 6, 1996, Defendant Hilyer Sod, Inc., was the owner of a vehicle driven by Elvis Underwood, driven with Defendant's [Respondent's] permission and consent. The motor vehicle was involved in an accident with Plaintiffs [Petitioners] motor vehicle approximately 1.5 miles north of SR 222, (bridge number 59) on SR 93 Gainesville, Alachua County, Florida. [R. Volume I, 94-100]
>
> At that time and place, the Defendant's [Respondent's] permissive driver, Elvis Underwood, negligently operated or maintained Defendant's [Respondent's] vehicle proximately causing the accident between the Plaintiffs [Petitioners] and Defendant [Respondent]. [R. Volume I, 94-100]

Petitioners Willis Shaw Express, Inc. and Edward McAlpine sought to recover property damages incurred in the accident. More specifically, in the complaint, Petitioners set out the exact amount of property damages being sought. Petitioner,

Willis Shaw Express, Inc., sets forth its damages in ¶11 of the complaint.

> 11. As a result of Defendant's negligence, Plaintiff WILLIS SHAW EXPRESS, INC., suffered damages to its tractor/trailer in the sum of $112,000.00 (91,00.00 to unit W12369 and $21,000.00 to unit W11850), highway usage in the sum of $550.00, cargo loss in the sum of $11,804.98, title expense for tractor/trailer $16.00, tag expense for tractor/trailer $1,530.00 ($1,500.00 tractor/$30.00 trailer), expense of wrecker service in the sum of $2,999.00, for a total sum of $128,899.98, for which Plaintiff is entitled to reimbursement. [R. Volume I, 94-100]

Petitioner, Edward McAlpine, sets forth his damages in ¶15 of the complaint.

> 15. That as a result of the Defendant's negligence in the accident which is the subject of this lawsuit, Plaintiff, EDWARD McALPINE, who was a permissive driver of Plaintiff, WILLIS SHAW EXPRESS, INC., lost the personal items listed on Exhibit A, attached to this Complaint, and is entitled to reimbursement for these lost items in the sum of $1,839.00. [R. Volume I, 94-100]

All during the discovery process these numbers never changed. The Petitioners joined their causes of action in one complaint and were represented by the same counsel.

On September 13, 1999, Petitioners filed a joint proposal for settlement on Respondent in the amount of $95,001.00. [R. Volume I, 107-110][Appendix, Section 3] The joint proposal stated the following:

PROPOSAL FOR SETTLEMENT

> Plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, by and through the undersigned attorneys, submit the

following Proposal for Settlement to defendant, HILYER SOD, INC.

This proposal is being made pursuant to Florida Rule of Civil Procedure 1.442 and Florida Statute §768.79.

The claims the proposal is attempting to resolve are all of those now pending in the above matter.

This proposal will require plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, to sign a standard release in favor of defendant HILYER SOD, INC. and to file a notice of dismissal with prejudice of the claims plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, have filed against defendant HILYER SOD, INC., in this action.

The total amount being offered with this proposal is NINETY-FIVE THOUSAND ONE AND NO/100 DOLLARS ($95,001.00).

This action does not include a claim for punitive damages.

This proposal does not include attorney fees, which are not part of the legal claim.

This proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, this proposal is void.

This proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal.

I HEREBY CERTIFY….. [R. Volume I, 107-110][Appendix, Section 3]

Respondent never responded to the proposal. Furthermore, Respondent never

made a counter-proposal or attempted to flush out if they could settle with either party individually.

After a four (4) day jury trial, the jury returned a verdict finding Respondent 85% negligent and Petitioners 15% negligent. [R. Volume I, 1,2] The damages awarded by the jury to Petitioner Willis Shaw Express, Inc. were $106,237.00 and the damages awarded by the jury to Petitioner Edward McAlpine, were $1,500.00. [R. Volume I, 1,2] The total amount of the verdict was $107,737.00, unadjusted for percentages for comparative negligence. [R. Volume I, 1,2] After adjusting the verdict by reducing the comparative negligence and adding the prejudgment interest on the liquidated damages, the net final judgment amount before adding attorneys fees and costs was $123,565.48. [R. Volume I, 83-84] As a result, the net final judgment was more than 25% higher than the proposal for settlement served upon the Respondent entitling the Petitioners to attorneys fees and costs. Without any difficulty, the trial court made the determination that the net judgment was 25% greater than the proposal for settlement on the separate claims by evaluating the aggregate amounts.

Respondents appealed the trial court's decision and on June 6, 2002 the First District Court of Appeal reversed the trial court. *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*, 817 So. 2d 1050 (Fla. 1st DCA 2002.)

However, the First District Court of Appeal certified direct and express conflict with the Third District Court of Appeal's decision in *Flight Express, Inc. v. Robinson*, 736 So. 2d 796 (Fla. 3rd DCA 1999) and with the Fifth District Court of Appeal's opinion in *Spruce Creek Development Co. of Ocala, Inc. v. Drew*, 746 So. 2d 1109 (Fla. 5th DCA 1999)

[1];

[2]. As a result, this court has jurisdiction pursuant to Article V, §3(b)(3), Fla. Const.

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[1] Petitioners respectfully submit that the First District Court of Appeal's opinion also directly and expressly conflicts with the Fourth District Court of Appeal's opinion in *Safelite Glass Corp. v. Samuel*, 771 So. 2d 44 (Fla. 4th DCA 2000). Furthermore, as far as whether to interpret Rule 1.442 pragmatically or strictly the approach taken by the court in *Kuvin v. Ladders*, 797 So. 2d 611 (3rd DCA 2001) seems to directly and expressly conflict with the First District Court of Appeal in its opinion below.

[2] The Second District Court of Appeal in *Allstate Insurance Company v. Materiale*, 787 So. 2d 173 (Fla. 2nd DCA 2001) also certified conflict with *Flight Express* and *Spruce Creek*. In *Materiale*, the Second District Court of Appeal held that pursuant to the facts of that case, i.e., a joint proposal by the Plaintiff Barbara and Gerald Materiale served upon Allstate was invalid due to the Plaintiffs' lack of apportionment in the proposal. However, in that case the parties chose not to seek relief in this court.

SUMMARY OF THE ARGUMENT

At question in this case is whether an offer from two plaintiffs to **one** defendant is invalid per se when the offer does not specify the amount requested by each plaintiff. Petitioners submit that the answer to the question is no because (1) joint proposals are allowed and can be made by or to several parties which proposals can only be accepted or rejected in total; (2) failure to apportion between several Plaintiffs is a matter of indifference to the Defendant; (3) each case has to be evaluated on its own facts to determine whether the lack of apportionment in that case is a matter of indifference to the offeree; (4) to hold otherwise flies in the face of the legislative intent behind the statute and the rule to obviate trial and save scarce judicial resources; and, (5) Fla.R.Civ.P. 1.442(c)(3) was enacted to comply with *Fabre* which is not applicable in this case. The Rule specifically allows "joint proposals" which can be made to and by several parties, which can only be accepted or rejected in total. In the instant case a valid joint proposal was made. Fla.R.Civ.P. 1.442(c)(3) 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.

The validity of a joint proposal for settlement should be evaluated on a case by case basis because in certain instances the lack of apportionment between Plaintiff offerors to one single Defendant may be harmless. The trial court did not err when it awarded the Plaintiffs [Petitioners] attorney fees based upon a joint proposal for settlement to a single Defendant [Respondent]. The “lack of apportionment” in Plaintiffs'

[Petitioners'] proposal for settlement in the instant case was "a matter of indifference" to the Defendant [Respondent]; if it accepted the offer, it was entitled to be released by both Plaintiffs [Petitioners].

There is not a scintilla of evidence in the records, which suggest that it was the failure of the Petitioners' proposal to apportion damages between them which created an obstacle to settlement for the Respondent. As a matter of fact, if it had been a sincere obstacle to the Respondent one would expect that the Respondent would have taken action to try to flush out if they could have settled with either one of the offerors. However, no such action was taken which is indicative of the lack of sincerity of the argument that had the Respondent known the amount it would have settled. For example, a proposal for settlement could have been filed by Respondent [Defendant] as to each Petitioner [Plaintiffs]. Or, simply a phone call or letter stating that the Respondent would settle for a certain amount with one of the offerors or both.

Fla.R.Civ.P. 1.442 and Fla. Stat. 768.79 were enacted to promote settlement, obviate trial and reduce the stress on an overburdened judicial system. Furthermore, a proposal for settlement gives the parties an opportunity to evaluate the claims made and determine their likelihood of success. In the instant case, the proposal for settlement by the Petitioners in the amount of $95,001.00 gave the offeree [Respondent] a realistic chance to evaluate both the claim made by Petitioner Willis Shaw Express, Inc. and Petitioner Edward McAlpine. The way the proposal for

settlement was structured in no way impaired the Respondent's ability to evaluate the joint proposal. Also, the fact that the offer could only be accepted as a whole is in line with the legislature's intent to obviate trial and reduce stress on the system. For example, if the Respondent in the instant case would have been allowed to settle with the minority claim (Petitioner Edward McAlpine) this settlement would have had no effect on the stress of the system nor would it have obviated trial.

It is clear that Fla.R.Civ.P. 1.442 was designed to obviate future conflicts as to the effect of an offer by a Plaintiff or Plaintiffs upon Defendants-offerees. As a matter of fact, the committee notes to Rule 1.442(c)(3) reveal the rule was enacted to conform with *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), which deals with dividing the exposure of various joint tort feasors (Defendants) based on their respective percentages of fault.

As stated, Rule 1.442(c)(3) was amended in 1996, in order to conform the rule to *Fabre*. *Fabre* held that subsection 768.81(3), Fla. Stat. requires that judgment should be entered against a liable party on the basis of that party's percentage of fault. While obviously a Plaintiff making a proposal for settlement cannot know the percentage of fault to assign each Defendant to whom it proposes settlement, the rule requires that a specific amount be set forth as to each Defendant, thus eliminating the possibility of a joint and severable-type settlement which leaves the Defendants in limbo and opens the door to continued litigation between the Defendants. It is clear that the reverse is not true. The amended rule of civil procedure is thus designed to obviate future conflict as to the effect of an offer upon Defendants-offerees. The

alleged failure to follow the rule by Petitioners as offerors, if the rule was not followed (which Petitioners contend was followed), must be considered merely a harmless technical violation, which does not effect the rights of the parties.

As stated, there is no evidence to suggest that the Respondent would have acted any differently had it known how much of the settlement money would go to Petitioner Willis Shaw Express, Inc. and how much would go to Petitioner Edward McAlpine. Also, there is no evidence to suggest that had the Respondent known the settlement allocation that the trial would not have occurred. The joint proposal for settlement specifically states that "The claims the proposal is attempting to resolve are **all** of those now pending in the above-captioned matter between the parties to this proposal." [Emphasis added.] There was no opportunity for Respondent to settle with just one of the Petitioners. For example, if the proposal for settlement had specified that $95,000.00 would go to Petitioner Willis Shaw Express, Inc. and $1.00 to Petitioner Edward McAlpine, Respondent could not have chosen just to settle with Petitioner Edward McAlpine because the joint proposal does not give that option. The bottom line is that the Respondent's only option in the instant case was to settle with both Petitioners for the total amount of $95,001.00 thereby settling all claims and avoiding a trial. Therefore, the fact that Petitioners did not apportion what part of the settlement would go to what party is absolutely a matter of indifference to the Respondent.

Common sense and Florida case law indicate that a joint proposal for settlement from multiple Plaintiffs to one single Defendant is excluded from the mandate of 1.442(c)(3). The reason underlying this exclusion is that the absence of specifying amounts does not hinder the

opposition's appraisal of the proposal. All it had to do was evaluate each Plaintiffs' claims and add them together so as to determine the total value of the case and decide whether to accept the proposal for settlement. The potential problem of a subsequent round of litigation between Plaintiffs over allocation of the attorney fee award is also not an issue in this case because both Plaintiffs retained the same counsel.

In sum, the Petitioners joint proposal for settlement conformed to the requirements of Fla.R.Civ.P. 1.442(c)(3). Even if the joint proposal would have apportioned the settlement amount, practically speaking, it would have made no difference. Respondent's assertion that an apportioned joint proposal for settlement would somehow have made a difference is metaphysical speculation ingeniously created by the Respondent to cover its mistake of not settling the instant case when it had the chance. Based on the foregoing, Petitioners respectfully request that this court reverse the First District Court of Appeal's opinion and affirm the trial court's ruling in the instant case.

ARGUMENT

I. THE FIRST DISTRICT OF APPEAL ERRED BY NOT ALIGNING ITSELF WITH THE THIRD, FOURTH AND FIFTH DISTRICT COURTS OF APPEAL WHICH HAVE HELD THAT A JOINT PROPOSAL FOR SETTLEMENT FROM MULTIPLE PLAINTIFFS (OR PARTIES) TO A SINGLE (OR MULTIPLE) DEFENDANT (OR PARTIES) THAT FAILS TO SPECIFY THE AMOUNT DUE TO EACH PLAINTIFF (OR PARTY) IS A MATTER OF INDIFFERENCE TO THE DEFENDANT (OR PARTIES)

(De Novo Standard of Review)

INTENT OF THE RULE AND STATUTE

The intent of the Florida Rules of Civil Procedure 1.442 and Fla. Stat. 768.79 is to promote settlement and obviate trial. The primary goal for proposals for settlement is to "terminate all claims and disputes, and obviate the need for further intervention of the judicial process." [Emphasis added.] *Unicare Health Facilities, Inc. v. Mort,* 553 So. 2d 159, 161 (Fla. 1989.)

In *Pirelli's Armstrong Tire Corp v. Jensen*, 752 So. 2d 1275, 1277-1278 (Fla. 2nd DCA 2000), rev. dismissed 777 So. 2d 973 (Fla. 2001), Judge Casanueva sets forth the legislative history and intent of Fla. Stat. 768.79 and stated that the sanctions provided for in the statute would encourage settlement of civil cases which could, in turn, result in lower litigation costs. While the foregoing is the general intent behind the rule and the statute, the equally important issue in the instant case with regard to intent is: What is the intent behind the enactment of Fla.R.Civ.P. 1.442(c)(3)?

HISTORY OF THE INTERPRETATION OF FLA.R.CIV.P. 1.442(c)(3)

In order to answer the question of the intent behind the enactment of Fla.R.Civ.P. 1.442(c)(3). it is helpful to first answer some other questions. The first question that needs to be answered is: Pursuant to Fla.R.Civ.P. 1.442 can a party make a "joint proposal"? Of course, the answer to this question is, yes. Fla.R.Civ.P. 1.442(c)(3) 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.

The rule is very specific as to the type of proposal that can be made. As stated, the rule allows a proposal to be made "by or to any combination of parties." As a result, it is clear, that parties may make a joint proposal. Judge Polston in his concurring opinion of the decision below recognized this fact when he stated:

> In this case, the Defendant received a joint proposal from the Plaintiffs which had to be accepted or rejected in total. This is not unusual because many parties wish to settle only if they can be completely done with the case and in most instances, they do not care how the other side splits the money. The rule seems to encourage these types of proposals in order to facilitate settlement. Fla.R.Civ.P. 1.442.(c)(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.")…

Since a joint proposal can be conditioned upon acceptance in its totality, Petitioners submit that the Third, Fourth and Fifth District Courts of Appeal have correctly interpreted the intent of Fla.R.Civ.P. 1.442(c)(3).

On July 14, 1999, the Third District Court of Appeal in *Flight Express, Inc. v. Robinson*, 736 So. 2d 796 (Fla. 3rd DCA 1999), held that lack of apportionment of the amount of the settlement offer among the offerors does not impair the ability of the offerors to recover costs under the offer of judgment rule. *Id.* In *Flight Express*, two defendants had made a $100.00 offer of settlement to the Plaintiff. The trial court refused to consider attorney fees under §768.79, Fla. Stat., 1995 stemming from the plaintiff's failure to accept the $100.00 offer of settlement. The basis of the trial court's ruling was that the $100.00 offer was not divided as to the amounts to be contributed by each of the two defendants. The Third District Court of Appeal in *Flight Express* held that the trial court's decision was error. The court stated that "the amounts that each of the several offerors contributed to the proposed settlement can make no difference to the offeree or otherwise affect its efficacy in any practical way." *Id. at 797.*

The Third District Court of Appeal further stated that:

> Thus, the lack of apportionment in the unaccepted offer should not, and we therefore hold that it does not, impair the ability of the defendants here to recover under §768.79, Florida Statutes (1995).

After that statement, the Third District Court of Appeal cites to footnote 1. In footnote 1 the court analyzed the intent behind the enactment of Fla.R.Civ.P. 1.442(c)(3). The court observes that the committee notes of the 1996 amendment to the rule 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 perspective percentage of fault.

The court then concluded that the amended rule "thus designed to obviate future conflicts as to the affect of the offer upon defendants-offerees." The court went on to state "considered in this light, the failure to follow the rule as to offerors must be considered a harmless technical violation which did not affect the rights of the parties." *Citing Dines v. Florida Unemployment Appeals Committee*, 730 So. 2d 378 (Fla. 3rd DCA 1999).

Subsequent to the *Flight Express* opinion, the Fifth District Court of Appeal on September 24, 1999, published its opinion in *Spruce Creek Development Co. of Ocala v. Drew*, 746 So. 2d 1109 (Fla. 5th DCA 1999). In *Spruce Creek* the court held the following:

> The single offer by Mr. and Mrs. Drew to settle for $1,000,000.00 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.*** *CF. Flight Express, Inc. v. Robinson*, 736 So. 2d 796 (Fla. 3rd DCA 1999), emphasis added.

The following year, on September 27, 2000, the Fourth District Court of Appeal aligned itself with the Third and Fifth District Courts of Appeal as it relates to the interpretation of Fla.R.Civ.P. 1.442(c)(3). In *Safelite,* which the petitioners submit is on point, the Plaintiffs William and Mary Samuel, filed a joint proposal for settlement. The proposal neither allocated the settlement amount between Mr. and Mrs. Samuel, the Plaintiffs, nor between the two defendants. The two defendants rejected the proposal. Defendant Safelite appealed the trial court's decision to award attorney fees to Mr. and Mrs. Samuel on the basis that Samuel's offer was defective for failure to comply with Fla.R.Civ.P. 1.442(c)(3). Safelite argued that the proposal was made jointly by both plaintiffs to both defendants but did not set forth the

amounts attributable to each of the parties. The *Safelite* court found no error in the failure of the plaintiffs/offerors to specify the division of damages between them in their proposal for settlement because the lack of such apportionment was "a matter of indifference" to the defendants: "if they accepted the offer they were entitled to be released by both plaintiffs."[3] *Id. at 46, citing Spruce Creek Development Co. v. Drew,* 746 So. 2d 1109, 1116 (Fla. 5th DCA 1999)(as stated, when plaintiffs file a proposal for settlement with the defendant, the apportionment is irrelevant because the apportionment between the Plaintiffs is of little consequence to the Defendant.); *see Danner Construction v. Reynolds,* 760 So. 2d 199 (Fla. 2nd DCA)[4] at 201-02; *Flight Express, Inc. v. Robinson* 736 So. 2d 796, 797 (Fla. 3rd DCA 1999).

The court further stated that there was nothing in the record to suggest the lack of apportionment between the Plaintiffs and their proposal for settlement created an obstacle to settlement for the Defendants. The same is true in the instant case. There is not a shred of evidence in the record to suggest that Respondent would have done anything different had it known how the settlement amount would be divided between

[3] The same logic holds true in the instant case.

[4] Interestingly, in this case, the Second District Court of Appeal aligns itself with the Third, Fourth and Fifth District Courts of Appeal.

the Petitioners.[5]

The *Safelite* court addressed the intent of Fla. R. Civ. P. 1.442(c)(3). The court stated:

> We agree with the third district's observation that Rule 1.442(c)(3) was "designed to obviate future conflicts as to the effect an offer upon Defendants-offerees." [Emphasis added.]

Citing *Flight Express (supra),* 736 So. 2d at 797 n.1.

Also, the *Safelite* court based its decision on the fact that the offerees were not joint tort feasors with potential degrees of fault and competing interests.[6]

As stated, the Second District Court of Appeal does not seem to completely agree with the Third, Fourth and Fifth District Courts of Appeal and has stated that "we do not accept as a general proposition that the failure of the offerors to divide the amount to be contributed should always be considered a harmless violation of the rule. *Allstate Insurance Company v. Materiale*, 787 So. 2d 173 (Fla. 2nd DCA 2001).

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[5] Respondent has argued that had it known how Petitioners were going to split the settlement money, it would have considered paying the joint proposal for settlement in the amount of $95,001.00. This argument really insults the intelligence. If the Defendant is going to have to pay $95,001.00 in order to obtain a release from both Plaintiffs, why does it matter if $94,000.00 goes to Petitioner Willis Shaw Express, Inc. and $1,001.00 goes to Petitioner Edward McAlpine, or whether $50,000.00 goes to Petitioner Willis Shaw Express, Inc. and $45,001.00 goes to Petitioner Edward McAlpine, or whether $10,000.00 to Petitioner Willis Shaw Express, Inc. and $85,001.00 goes to Petitioner Edward McAlpine. It makes no difference to the Respondent because the Respondent still has to pay $95,001.00 in order to obtain a release from both Plaintiffs.

[6] The same is true in the instant case.

However, by using the terms "as a general proposition" the Second District Court of Appeal leaves the door wide open for a trial court to make its own decision on a case by case basis.

In *Danner Construction Co. v. Reynolds*, 760 So. 2d 1999 (Fla. 2nd DCA 2000), the Second District Court of Appeal had taken a different approach than it took in *Materiale.* In *Danner,* the Second District Court of Appeal agreed with the reasoning in *Spruce Creek* and *Flight Express* as it applied to those two cases. However, in *Allstate Insurance Company v. Materiale*, 787 So. 2d 173 (Fla. 2nd DCA 2001), the second district court of appeal changed its mind and distinguishes the *Danner* case by stating that the *Danner* case held the following:

> [W]e do not 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. Instead, we conclude that where a joint offer is made by the Defendants in a case, the failure to specify the amount to be contributed by each may be harmless if the theory of the Defendants' joint liability does not allow for apportionment under §768.81, Florida Statutes, 1997.

The court recognized and certified conflict with *Spruce Creek* (Supra) and *Flight Express* (Supra).

In *Allstate,* two plaintiffs Barbara and Gerard Materiale served upon Allstate a proposal for settlement in the amount of $105,000. The proposal did not allocate the

$105,000 between the claims of Barbara and Gerard Materiale, and Allstate did not respond to the offer. The court held that the offer was invalid for failure to apportion the $105,000. The Second District Court's rationale in *Allstate* seems to be based on the errant assumption that you can not have a joint proposal for settlement by two Plaintiffs to a single Defendant which can only be accepted in total. First, Judge Whatley states:

> When two offerors make a proposal for settlement to one offeree, the offeree is entitled to know the amount and terms of the offer that are attributable to each offeror in order to evaluate the offer as it pertains to that party. ***This may be particularly important in claims where defendants may choose to settle the claim for a minimal amount and go to trial on the primary claim.*** [emphasis added]

Id. at 175.

In the instant case this logic does not apply. The Petitioners made a joint offer resolving **ALL** claims and this would entitle Respondent to be released by both Petitioners. Respondent could not pick and choose which Petitioner they were going to settle with even if they had known the apportionment.

The Second District Court of Appeal tries to distinguish *Spruce Creek* and *Flight Express* but does not succeed. The court stated that it does not agree with the *Flight Express* court regarding its holding that a failure to apportion between two parties is merely a harmless technical violation. Instead, the court said:

> We do not agree that such failure is harmless. An offer that requires an offeree to make an all or nothing determination regarding an offer made by two parties, without permitting it to evaluate each claim separately does affect the right of that party.

Id. at 175.

However, unfortunately the court does not explain how the rights of the parties are affected. Petitioner submit that the rights of the offeree are not affected at all. This is especially true in the instant case where the Respondent was not allowed to choose who they would settle with even if they had know the apportionment. Furthermore, the Respondent could have made its own proposal as to each Plaintiff if it was serious about settling the matter.

Judge Casanueva in his concurring opinion admits that in some instances the lack of apportionment between plaintiff/offerors of their respective claims is of no import to a single defendant/offeree. *Id. at 176.* Judge Casanueva tries to distinguish *Spruce Creek* by stating:

> Where a consortium claim is joined with a claim for personal injuries, the former claim may be more amenable to settlement than the latter because it may involve less money. If one of the claims is resolved, the Defendant as well as the Plaintiffs will save future expenditure of attorney fees and costs related to this claim.[7]

[7] In the instant case, the claims of the Petitioners was so intertwined that settling with Petitioner McAlpine would have saved little or no time or money.

This reasoning is clearly based on the assumption that in a joint proposal which can only be accepted in total, one claim can be resolved separate from the other. As a result this reasoning does not apply to the instant case. Judge Casanueva further relies on *USSA v. Behar,* 752 So. 2d 663 (Fla. 2nd DCA 2000)

[8] to state:

> Without the potential to differentiate and settle the two claims independently of each other, the Defendant will be exposed to attorney fee liability under the statute on both claims, even though it might have accepted the offer of one claim had the offer been apportioned.

Again, this logic does not apply to the instant case because the proposal was an **ALL** or nothing deal even if it would have been apportioned. In reality, what the second district court of appeal has done is eliminate the ability to file a joint proposal for settlement, if indeed, it is true that in a joint proposal for settlement one of the offers can be accepted independently from the other. Consequently, the "joint proposal for settlement" has now become two separate proposals for settlement in the eyes of the second district court of appeal.

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[8] It is interesting to note that in *Behar* the Second District Court of Appeal, specifically Judge Casanueva agreed that in a *Spruce Creek* situation the lack of apportionment is a matter of indifference to the offeree if the offer is from two plaintiffs. The court stated that: "The several *Spruce Creek* offerors could apportion the amount offered between themselves and there was no problem with apportionment as to the defendant offeree, because it was a single entity." *Behar at 665.* Of course, the same is true in the instant case.

[9];

[10] Petitioners submit that to allow an offeree of a joint proposal for settlement to only settle with one of the offerors goes directly against the legislative intent to obviate trial and reduce litigation. Furthermore, there is nothing that would prevent the offeree of an all or nothing joint proposal from making separate proposals for settlement as to each party.

In the instant case, the proposal is not attempting to resolve only Petitioner Willis Shaw Express, Inc.'s claim or only Petitioner Edward McAlpine's claim, instead it is attempting to resolve **ALL** claims.

[11] Therefore, had the Respondent known the exact amount attributable to each Plaintiff, they still would not have been able to settle each separate claim. Thus, again, the non-apportionment of damages in the instant case, at a maximum, should be considered a harmless technical violation, which does not affect the rights of the parties.

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[9] The proposal for settlement filed in the instant case is clear, in paragraph 2, that "the claims the proposal is attempting to resolve are all of those now pending in the above-captioned matter between the parties to this proposal." The key term is **all.**

[10] It seems that the First District Court of Appeal's opinion also stood for this proposition.

[11] This falls in line with the intent of the Rule and statute to eliminate further litigation.

[12]

THE PROPOSAL COULD ONLY BE ACCEPTED IN ITS TOTALITY

The First District Court of Appeal in its opinion below states that the Respondent could have made a factual decision to settle the driver's smaller personal property claim of Petitioner Edward McAlpine while continuing to litigate the larger corporate claim of Petitioner Willis Shaw Express, Inc. because it may have had supportable defenses to certain damage claims. [Appendix Section 4, page 6.] This argument is flawed because this was not an option. The only option was to pay the entire proposal for settlement amount. It is also flawed because Respondent could have filed separate proposals fast to each Petitioner.

Again, the only action Respondent could have taken as it relates to Petitioners' [Plaintiffs'] proposal for settlement is to settle with both Petitioners because the proposal for settlement stated that, "The claims the proposal for settlement is attempting to resolve is **ALL** of those now pending in the above captioned matter between the parties to this proposal." [See Appendix, Section 3.] There was no possibility for Respondent to settle with either Petitioner individually. But, Respondent could have done a proposal for settlement as to each Petitioner

[12] Petitioners submit that, in the instant case, there has been no violation of the rule because the rule was designed to obviate future conflict as to the affect of an offer upon Defendants/offerees, not Plaintiffs.

separately.

While it is not crystal clear from the First District Court of Appeal's opinion, it seems that the First District Court of Appeal may be implying that an all or nothing joint proposal is invalid per se. The First District Court of Appeal stated "the all or nothing joint proposal is contrary to the statutory goal of encouraging resolution of the disputed claims without the unnecessary consumption of scarce judicial resources." [Appendix, Section 4.] Of course this would be directly opposite to the intent behind the statute and rule to obviate trial. Furthermore, in the instant case, the joint proposal by the Petitioners gave Respondent a realistic chance to evaluate the aggregate value of Petitioners' claims. To argue otherwise is laughable. The Respondent was clearly able to evaluate both Petitioners claims. However, it chose to ignore Petitioners reasonable offer.

The First District Court of Appeal's interpretation (in its opinion below) of the rule and statute is clearly inconsistent with the intent of the rule and statute. Let us not forget that the intent of the rule and statute is to obviate trial and to reduce the volume of cases already suffocating the judicial system. Therefore, if we would allow the defendant to piecemeal settlement with certain plaintiffs in a joint settlement proposal the intent of the rule and statute would be thwarted because litigation would be on

going.

For example, assume there are a hundred plaintiffs and one defendant. The defendant thinks that 50 of the plaintiffs have no claim and 50 do. The total value in the estimation of the defendant of all 50 valid claims is $100,000. And the joint proposal for settlement is $75,000. Why could the defendant not settle with all 100 plaintiffs? Why does the defendant care how all 100 plaintiffs split up the $75,000. What if the proposal is $200,000. Obviously, in our assumed scenario the defendant would not settle on the basis that in their evaluation the 50 claims with merit are not worth that. Why does the defendant need to know what amount would go to what plaintiff if they can't settle with an individual plaintiff pursuant to the proposal? But, the Respondent argues, what if I want to settle with one of the plaintiffs and not with all? The answer is simple. Since there is no opportunity for the Respondent, or the defendant in our created scenario, to settle with a single plaintiff in a joint proposal for settlement and, the Defendant-offeree still wants to settle with only a single or several plaintiffs the defendant (or in the instant case the Respondent) can make a proposal for settlement of its own. Of course, in the instant case that was never done.

In its decision below, like the Second District Court of Appeal, the First District Court of Appeal also tries to distinguish *Flight Express* and *Spruce Creek.* In doing

so, they adopt the arguments set forth by the Second District Court of Appeal in its attempt to distinguish *Spruce Creek* and *Flight Express*. In its opinion, the First District Court of Appeal stated: "We note in particular one potentiality not addressed by the Appellees - - a subsequent round of litigation among Plaintiffs over allocations of the attorney's fee award." [Appendix, Section 4.] Of course, given the facts of the instant case, this is not a "potentiality" that needed to be addressed at this time. In the instant case, both Plaintiffs were represented by the same counsel. Therefore, the First District Court of Appeal's "note" is completely not applicable in the instant case. Even Judge Polston, concurring in the decision below, agreed that in this case "the trial court made the determination by evaluating the aggregate amounts without any difficulty." [Appendix, Section 4, page 11.]

THE RESPONDENT WAS ABLE TO EVALUATE THE CASE AGAINST IT

The rule is also intended to get both parties to evaluate the case. Respondent, in the instant case, was given an opportunity to evaluate both Petitioners' claims. All it had to do, was to evaluate the joint proposal and determine if that is how much it wanted to pay on both claims. The Respondent was clearly able to evaluate the "joint proposal." Petitioners served their complaint on September 23, 1998, the proposal for

settlement was served upon the Respondent on September 13, 1999 at which time the Respondent had plenty of time to properly evaluate the offer.

The complaint is very specific with regard to damages. Both Petitioners' claims arise out of the negligence of the Respondent's driver, Elvis Underwood, as stated in paragraph 9 of complaint.

[13] Paragraph 11 states that as a result of the Defendant's negligence, Plaintiff Willis Shaw Express, Inc. suffered damages to its tractor/trailer in the amount of $112,00.00. ($91,000.00 to unit W12369 and $21,000.00 to unit W11850, highway usage in the sum of $550.00, cargo loss in the sum of $11,804.98, title expenses for tractor/trailer $16.00, tag expenses for tractor/trailer $1,530.00 ($1,500.00 tractor, $30.00 trailer), expense of wrecker service in the sum of $2,999.00 for a total sum of $128,899.98 for which Plaintiff is entitled for reimbursement.) Paragraph 15 of the complaint specifically sets forth Petitioner McAlpine's damages.

[14]

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[13] 9. At that time and place the Defendant's permissive driver, Elvis Underwood, negligently operated or maintained Defendant's vehicle, proximately causing the accident between the Plaintiffs and Defendant. [R.94-100][Appendix, Section 2.]

[14] 15. That as a result of the Defendant's negligence in the accident which is the subject of this lawsuit, Plaintiff, Edward McAlpine, who was a permissive driver of Plaintiff, Willis Shaw Express, Inc., lost the personal items listed on Exhibit "A", attached to this complaint and is entitled to reimbursement of those lost items in the sum of $1,839.00. [R.107-110][Appendix, Section 2.]

Respondent implies that it would have taken a different action had it known the apportionment of damages. This argument has no merit and is difficult to believe because Respondent was to either accept or deny the entire proposal. Again, this was a proposal for settlement which stated that, "The claims the proposal for settlement is attempting to resolve is **ALL** of those now pending in the above captioned matter between the parties to this proposal." [R. Volume I, 107-110][Appendix, Section 3] There was no possibility for Respondent to settle with either Petitioner individually. [15] Petitioners submit that in reality the Respondent evaluated the entire offer as to both claims and decided it was not going to pay.

In sum, the trial court did not err when it awarded attorney fees to the Petitioners based upon a joint proposal for settlement to the single Respondent. The "lack of apportionment" in Petitioners' proposal for settlement truly was a matter of indifference to the Respondent.

II. THE JOINT PROPOSAL FOR SETTLEMENT IS VALID WHEN APPLYING GENERAL RULES OF CONSTRUCTION BECAUSE FLA. R. CIV. P. 1.442 (c)(3) SHOULD BE PRAGMATICALLY, NOT STRICTLY CONSTRUED; FURTHERMORE; ALL PROCEDURAL

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[15] As Judge Polston stated in his concurrence below: "The Rule seems to encourage these types of proposals [all or nothing] in order to facilitate settlement."

RULES SHOULD BE GIVEN AN INTERPRETATION TO FURTHER JUSTICE NOT FRUSTRATE IT.

(De Novo Standard of Review)

FLA.R.CIV.P 1.442 (c)(3) SHOULD BE PRAGMATICALLY INTERPRETED

In order for the strained conclusion of the First District Court of Appeal's below to stand they have to accept the argument that in all cases Fla.R.Civ.P. 1.442 must be strictly and rigidly construed. In its opinion below, the First District Court of Appeal stated:

> Moreover, the offer of judgment statute and rules should be strictly construed because the procedure is in derogation of the common law and is penal in nature.

[Appendix, Section 4, Page 7.]

The First District Court of Appeal's opinion below, ignores the Florida case law which has specifically interpreted Fla.R.Civ.P. 1.442 pragmatically and not strictly. In *Kuvin v. Keller Ladders, Inc.*, 797 So. 2d 611 (Fla. 3rd DCA 2000) the court uses a practical approach to the time requirements set forth by Rule 1.442(b). The court found that:

> As we stated in Flight Express, Inc. v. Robinson, 736 So. 2d 796, 797 (n.1)(Fla. 3rd DCA 1999) any "failure to follow" [rule 1.442] must be considered merely a harmless technical violation which did not effect the rights of the parties. *Accord Danner Const. R.*

Co. v. Reynolds Metals, Co., 760 So. 2d 199 (Fla. 2nd DCA 2000).

The court makes it abundantly clear that they completely agree with the dissent very skillfully articulated by Judge Farmer in *Grip Development, Inc. v. Caldwell Banker Residential Real Estate, Inc.*, 788 So. 2d 262 (Fla. 4th DCA 2000)

[16], review denied, 790 So. 2d 1102 (Fla. 2001).

[17] Judge Farmer's opinion adopted by the Third District Court of Appeal is extremely informative as to the manner in which Fla.R.Civ.P. 1.442 should be interpreted. Judge Farmer correctly argues that Rule 1.442 should be pragmatically and not strictly

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[16] Interestingly, the Fourth District Court of Appeal in *Safelite Glass Corp v. Samuels*, 771 So. 2d 44 (Fla. 4th DCA 2000) specifically distinguishes *Grip* from *Safelite* and states that time requirements of Fla.R.Civ.P. 1.442 should be strictly followed, but joint proposal requirements of the Rule do not have to be strictly followed. The court states:

> "In contrast, an untimely offer such as that disapproved by the majority in our recent case of *Grip*, affects the substantive right of the offeree. As we held in *Grip*, allowing technical violations of the time requirement of the rule ultimately would lead to a "slippery slope" approach, one that both the legislature and the Supreme Court has gone to great lengths to avoid. Thus, our opinions which have consistently mandated strict compliance with the time requirements of an offer of judgment are readily distinguishable from those like the case before us where the "joint proposal" requirements are inapplicable to the parties at bar." *Polen, concurring specially.*

[17] The court specifically stated that they were not uninfluenced by the ardor and eloquence in which Appellant's counsel had urged the correctness of the views of the dissenter. [Judge Farmer.] *Kuvin* at 613. n.5

construed. *Id. at 270*. This proposition is supported by this court's holding in *Gulliver Academy, Inc. v. Bodek*, 694 So. 2d 675 (Fla. 1997).

Furthermore, Judge Farmer relies upon *Spruce Creek* and *Flight Express* to argue against the majority opinion in *Grip* that "shall means shall."

[18] On page 269 he quotes *Flight Express*: "The failure to follow the rule as to offerors must be considered a harmless technical violation which did not effect the rights of the parties." Citation omitted. Furthermore, he states the following:

> More recently, in *Danner Constr. Co. Inc. v. Reynolds Metal Co.*, 760 So. 2d 199 (Fla. 2nd DCA 2000) the defect in *Flight Express* was replicated - - that is, the joint offerors failed to specify how much each would contribute to the offer if accepted. In rejecting the "shall means shall" analysis of the majority and instead adopting the holding of the *Flight Express*, the Second District said: "Both Flight Express and Spruce Creek considered the failure of the offerors to divide the amount to be contributed by each to be a harmless technical violation of the rule. Danner urges this court to align itself with the reasoning set forth in these opinions. *We accept the reasoning as applied to the facts of the cases.* However we do not accept as a general proposition that the failure of offers to divide the amount to be contributed should be considered a harmless violation of the rule. Instead, we conclude that where a joint offer is made by the Defendants in the case, the failure to specify the amount to be contributed by each may be harmless if the theory of the Defendants' joint liability does not

[18] Again, in *Safelite*, the Fourth District Court of Appeal distinguishes its strict interpretation in *Grip* from *Safelite* by stating that the rigid interpretation applies to time requirements but not to joint proposal requirements.

> allow the apportionment under 768.81. This circumstance typically exists in cases where one Defendant is vicariously liable for the negligence of another." [c.o., e.s.]
>
> ***Danner Construction shows that the technical violation of the seemingly mandatory provision of Rule 1.442 as to how offers are to be made must be considered against the facts and circumstances of the case***. Courts must determine whether any discrepancy by an offeror with the rules seemingly mandatory requirements actually effects any interests of a party. Today's decision fails to follow these four decisions and conflicts with all of them and how some of the time provision of the rule should be applied.[19]
>
> As another justification for its mechanical reading of this procedural provision, the majority argues that the 90 day provision is mandatory because it must be strictly construed. ***Of course, in Gulliver Academy, the Supreme Court has held that Rule 1.442 should be pragmatically and not strictly construed. If the majority's logic "shall means shall," were the correct principal governing application of the similarly worded provision in rule 1.442, then Gulliver Academy would have held that the "mandatory" period for filing motions for attorney fees could not be enlarged and the 30 day provision should be - - as the majority insists here - - rigidly enforced.***

In the instant case, the First District Court of Appeal's opinion instead of following *Gulliver Academy,* relies on cases which do not interpret Rule 1.442. Furthermore, instead of following *Gulliver Academy*, the First District Court of

[19] Of course, the same is true in the instant case.

Appeal used impaired logic in its conclusion that "the courts have generally applied a strict construction of section 768.79 and Rule 1.442 by the frequency which they invalidate unspecified offers." *Citing Hingson*

[20], 27 Fla.L.Weekly at s.70; *Dudley*, 799 So. 2d at 441; *Behar*

[21], *752 So. 2d at 664-65*.

Unfortunately, the First District Court of Appeal below fails to mention the fact that there is just as many courts which have validated unspecified offers. See, e.g., *Safelite; Flight Express; Spruce Creek.*

PROCEDURAL RULES SHOULD BE INTERPRETED IN A MANNER SO AS TO FURTHER JUSTICE NOT FRUSTRATE IT

Also, in a famous, well known opinion, the very wise Judge Learned Hand explained why literalistic interpretation of statutory provisions are usually improvident:

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[20] Of course in *Hingson*, the dissent by Harding, Shaw and Ansteadt states: "Rather than worry what may happen 'in many cases,' it is more appropriate to focus on the facts of this case." Petitioners submit that in the instant case it is also more appropriate to focus on the facts of this case instead of worrying about what may happen."

[21] Interestingly, the *Behar* court distinguishes *Spruce Creek* by stating: "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." This suggests in the instant case *Spruce Creek* would apply because the petitioners (offerors) could apportion the amount between themselves and as to the respondent (offerees) there is no problem in apportionment because it is a single entity.

> Courts…have refused to be bound by the letter when it frustrates the patent purpose of the whole statute…Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Cabell v. Markham, 148 F. 2d 737, 739 (2nd Cir. 1945), affirmed, 326 U.S. 404 (1945).

As stated by Judge Farmer, this wisdom articulated by Judge Learned Hand has only intensified application to procedural strictures.

Furthermore, the rigid construction used in the interpretation of statutes is not required in the judicial interpretation of procedural rules. *Hanzelik v. Grotelli and Hudson Inv. Of America, Inc.*, 687 So. 2d 1363 (Fla. 4th DCA 1997). Also, procedural rules should be given a construction calculated to further justice, not frustrate it. *Eastwood v. Hall*, 258 So. 2d 269 (Fla. 2nd DCA 1972).

Fla.R.Civ.P. 1.442(c)(3) is the only rule at issue in this case. And although the comments

[22] to the rule make it clear that the rule was enacted to comply with *Fabre, supra*, the court below held that the apportionment requirement in the Rule does not only apply for proposals to multiple Defendants but that the apportionment requirement in the rule applies to all proposals for settlement. The First District Court of Appeal seems to take this position even if the outcome of strictly interpreting the rule would frustrate justice and would be against the legislative intent behind the statue and the rule.

It is a fundamental rule of statutory construction that the legislative intent is the polestar by which the court must be guided, and the intent must be given effect even though it may contradict the strict letter of the statute. *Hicks v. State*, 595 So. 2d 976 (Fla. 5th DCA 1992) citing *State v. Webb*, 398 So. 2d 820, 824; see also *Garner v. Ward*, 251 So. 2d 252, 256 (Fla. 1971)(the statute should be construed to give effect to the evident legislative intent, even if the result seems contradictory to the rules of construction and the strict letter of the statute; spirit of the law prevails over the letter.) In the instant case, the committee notes to Rule 1.442(c)(3) speak volumes. Fla.R.Civ.P. 1.442(c)(3) was enacted to comply with *Fabre*. *Fabre* has nothing to

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[22] Committee notes are a valuable aid in the interpretation rules. *Putt. v. State,* 527 So. 2d 914 (Fla. 3rd DCA 1988). A court may look to the committee notes as a means of determining the clear intent of the rule. *Kwablum v. Thornhill Estates Homeowner Association, Inc.,* 755 So. 2d 85 (Fla. 2000).

do with multiple Plaintiffs but is a case about multiple Defendants. Therefore, it logically follows, as the third district court of appeal and the fifth district court of appeal have so eloquently stated, that the rule was designed to obviate future conflicts as to the effect of an offer upon Defendants-offerees.

In the instant case, the Respondent had no choice but to accept the joint proposal in its entirety. It was not given a choice to partially accept the proposal. It was an all or nothing deal. If the settlement amounts had been apportioned the outcome would have been exactly the same. Therefore, denying Petitioners attorney fees on the basis of "strict interpretation" would lead to an unjust result.

Furthermore, the First District Court of Appeal's interpretation of the rule frustrates justice. In *Singletary v. State*, 322 So. 2d 551 (Fla. 1975), this court stated:

> [p]rocedural rules should be given a construction calculated to further justice not to frustrate it.

Id. See also *Eastwood v. Hall*, 258 So. 2d 269 (Fla. 2nd DCA 1972).

In the instant case, justice would clearly be frustrated since the apportionment of the settlement amount in the proposal for settlement would have made absolutely no difference at all. It has been a long standing policy of Florida Juris Prudence to interpret and apply the procedural rules with a significant amount of flexibility. This Court said 70 years ago:

> Where the strict enforcement of the letter of the rules of practice tends, in the opinion of the trial judge, to prevent or jeopardize the latter, the rules should yield to the higher purpose.

Demos v. Walker, 126 So. 305 (Fla. 1930); see also *O'Gara v. Hancock*, 79 So. 167 (Fla. 1918). Subsequently, this Court reiterated the same policy:

> Although there is no question that…rules are not to be ignored to rectify counsel's mistakes, if justice to all parties is not thereby denied, in special circumstances, special concession should be made.

Ford v. Ford, 8 So. 2d 495, 496 (1942). Petitioners submit that even under a strict interpretation of Fla.R.Civ.P. 1.442(c)(3), it is clear that the rule only applies to offers made to several joint tort feasors. Be that as it may, at a minimum, the rules should not be interpreted strictly because it would not further justice but frustrate it and the result would be absurd.

In sum, in the instant case, the facts and circumstances warrant the award of attorney fees to the Petitioners on the basis of their proposal for settlement. This holds true whether Fla.R.Civ.P. is strictly or pragmatically construed.

III. EACH CASE SHOULD BE EVALUATED ON AN INDIVIDUAL BASIS TO DETERMINE WHETHER THE TRIAL COURT CAN ENFORCE THE PROPOSAL OF SETTLEMENT

(De Novo Standard of Review)

In its opinion the First District Court of Appeal holds that the Petitioners' joint proposal for settlement was not valid because the court could not determine the amounts due to each Plaintiff in a joint proposal; therefore, the court could not, with any certainty, determine the percentage difference between the final judgment and the joint proposal. See [Appendix, Section 4.] Again, the First District Court of Appeal's opinion is flawed. In his concurrence Judge Polston recognizes this flaw by stating that the trial court had no trouble determining the entitlement and amount due to the offerors.

As stated, the proposal is a "joint proposal with the joint parties represented by the same counsel." As a result, the court does not need to determine the amounts due to each Plaintiff. For example, if the final judgment was only for Petitioner Edward McAlpine, in order for Petitioner McAlpine to recover attorney fees, the final judgment would still have to be 25% greater than the "joint proposal." ($95,001.00)

Also, assume the following facts: Assume the final judgment in the instant case would have been $10,000.00, Petitioner McAlpine, at that time, could not have argued that his part of the proposal was only $1,800.00 and that he therefore should be able to recover his attorney fees. Clearly, that would have been Petitioner McAlpine's loss. However, this is of

no consequence to the Respondent. All the Respondent has to worry about in its evaluation of the "joint proposal" is in evaluating both claims, do we want to settle all claims for $95,001.00? Again, in reality, Petitioners submit that this is exactly what the Respondent did. Unfortunately for Respondent, it decided not to settle. Furthermore, Petitioners submit that each separate case needs to be evaluated on an individual basis.

Clearly, the Third, Fourth and Fifth District Courts of Appeal all evaluate apportionment cases on an individual basis. See, e.g., *Spruce Creek, Safelite* and *Flight Express*. Furthermore, even the Second District Court of Appeal seems to evaluate the validity of the apportionment offers on a case by case basis. See, e.g., *Danner* and *Materiale.*

In the instant case, based on the individual facts in this case, the trial court had no problems enforcing the proposal against the Respondent. As a result, the offer was valid and should be enforced against the Respondent.

CONCLUSION

The joint proposal for settlement served upon the Respondent in the instant case was in compliance with Fla. Stat. 768.79 and Fla. R. Civ. P. 1.442 (c)(3). The Legislative intent behind the statute and the rule is to terminate **all** claims, end disputes, and obviate the need for further intervention of the judicial process. Furthermore, the intent is to give the parties a reasonable opportunity to evaluate their claims. The joint proposal in the instant case is directly in line with the intent behind the statute and the rule.

In the instant case, there was no need for the Petitioners to apportion the settlement amount because it was a matter of indifference to the offeree (Respondent) and because the offer could only be accepted to resolve **all** claims not one individual claim. Furthermore, there was no need to apportion the settlement amount because the comments to Fla. R. Civ. P. 1.442 (c)(3) indicate that only Defendants when making a joint proposal need to apportion the settlement amount in order to comply with *Fabre.* In reality, Respondent was given an opportunity to evaluate both Petitioners' claims, add them up and determine whether they wanted to settle for $95,001.00. Also, there was no need for apportionment because the instant case had sufficient "unity of action" since the claims arose out of exactly the same negligence. Based on the foregoing, Petitioners respectfully request that this court align itself with the Third, Fourth and Fifth District Courts of Appeal and reverse the First District Court of Appeal and affirm the trial courts decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Randy Fischer, Esquire, Post Office Box 4140, Ocala, Florida 34478, Attorney for Respondent, this _____ day of August, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief satisfies the requirements of Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2). The type face used in this brief is Times New Roman 14 pt.

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