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' REPLY BRIEF ON THE MERITS

Submitted by:

John W. Frost, II
Florida Bar No.: 0114877
Peter W. van den Boom
Florida Bar No.: 0143601
FROST TAMAYO SESSUMS
& ARANDA, P.A.
Post Office Box 2188
Bartow, Fl 33831-2188
(863) 533-0314
ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

CITATION OF AUTHORITIES

Cases

Statutes

Other Authorities

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.

STATEMENT OF THE CASE AND FACTS

Petitioners hereby adopt the Statement of the Case and Facts set forth in their Initial Brief.

ARGUMENT

I. THE FIRST DISTRICT COURT 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)

A. THE INTENT OF THE STATUTE AND RULE

Respondent correctly argues that the intent of the Florida Rule of Civil Procedure 1.442 and Fla. Stat. 768.79 is to promote settlement and obviate trial. [Respondent's Answer Brief on the Merits, page 6] See also, *Unicare Health Facilities, Inc. v. Mort,* 553 So. 2d 159, 161 (Fla. 1989). Respondent also sets forth Petitioners' argument that the Petitioners' proposal for settlement met the intent of the rule and statute. [Respondent's Answer Brief on the Merits, page 6.] Interestingly, Respondent does not specifically address Petitioners' arguments as to why the Petitioners' proposal for settlement met the intent of the rule and statute.

Of course, it is difficult, if not impossible, to argue against the fact that a joint proposal for settlement which can only be accepted in its entirety and was sufficiently

evaluated by the Respondent is against the intent of the rule and statute since the acceptance of the joint proposal would obviate trial. It is clear from the Respondent's Answer Brief on the Merits that the Respondent knew the value of Edward McAlpine's individual claim. On page 1 of Respondent's Answer Brief on the Merits it states:

> Edward McAlpine, sought to recover damages for the loss of personal property that he had stored in the tractor, totaling approximately $1,800.00. [ROA, Vol. 1 pgs. 1-10, Complaint].

[Respondent's Answer Brief on the Merits, page 1.]

Also, on page 22 of Respondent's Answer Brief on the Merits, it states: "…Plaintiff McAlpine had a minimal property damage claim that was virtually undisputed,..." Clearly, Respondent, when evaluating the proposal for settlement in the instant case was aware that Edward McAlpine's proposal for settlement on his virtually undisputed claim was approximately $1,800.00. As a result, Respondent was clearly able to evaluate both Petitioners' claims. However, it chose to ignore Petitioners' reasonable offer and didn't even make its own proposal for settlement as to Edward McAlpine's claim. This is especially interesting since Respondent states that the claim was "virtually undisputed." [Respondent's Answer Brief on the Merits, page 22.]

In the instant case, had the Respondent been able to settle with Petitioner McAlpine for $1,800.00, the intent of the rule and statute to obviate trial would not have been met. A piece meal settlement between Petitioner McAlpine and the Respondent would have saved little or no judicial resources and would not have obviated trial. At best, a settlement between Petitioner McAlpine and Respondent

would have saved maybe fifteen minutes of testimony on his individual damages. Therefore, if the Respondent would have been allowed to piece meal settlement with the Petitioner, the intent of the rule and the statute would be thwarted because such piece meal settlement would not have obviated trial.

B. THE PRECEDENT OF RULE 1.442(c)(3)

Respondent relies heavily upon *Allstate Indem. Co. v. Hingson*, 808 So. 2d 197 (Fla. 2002). Respondent's reliance upon *Hingson* is misplaced. Obviously, the major difference between the joint proposal in *Hingson* is that the Hingson proposal was from one defendant (Allstate, the indemnity insurance company) to two separate plaintiffs. In the instant case, the proposal was from two plaintiffs to one defendant.

In *Hingson*, a four to three decision by this court, the majority stated several reasons for its decision:

First, this court's majority in *Hingson* agreed with *C & S*[1] that "[t]o further the statute's goal, each party who receive[s] an offer of settlement is entitled…to evaluate the offer as it pertains to her." *Id. at 199 citing* 754 So. 2d at 797-98. That is, each Plaintiff had to be able to know how much it was going to receive. However, in the instant case, that statutory goal was met. The Respondent had the opportunity to evaluate the offer as it pertained to it. Furthermore, as stated, the Respondent also had an opportunity to evaluate the offer as it pertained to both Petitioners. All Respondent

[1] *C & S Chemicals, Inc. v. McDougald*, 754 So. 2d 795 (Fla. 2nd DCA 2000).

had to do was subtract $1,800.00 from $95,001.00 to evaluate the offer as it pertained to both Petitioners. If the Respondent had been sincere about settling with Petitioner McAlpine, Respondent could have made a proposal for settlement as to McAlpine. However, it never did. As a result, the statutory goal stated in *Hingson* was met.

Next, the majority in *Hingson* stated that:

> …in many cases, it would be impossible for the trial court to determine the amount attributable to each party in order to make a further determination of whether the judgement against only one of the parties was at least 25% more or less than the offer (depending on which party made the offer.)

This reasoning does not apply to the instant case. The fact that in the instant case, the trial court had no trouble determining the entitlement and the amount due to the offerors (Petitioners) was recognized by Judge Polston in his concurrence in the decision below. Furthermore, the Petitioners respectfully submit that the dissent in *Hingson* hit the nail right on the head by stating:

> Rather than worry about what may happen 'in many cases' it is more appropriate to focus on the facts of this case.

Id.

In this case, Petitioners' failure to proportion the settlement offer was a matter of indifference for the Respondent as well as for the trial court who had no problems determining that the final judgment amount was in excess of 25% of the offer.

C. ACCEPTANCE OF JOINT PROPOSALS

On page 22 of Respondent's Answer Brief on the Merits, it states:

> The argument is, since they [the Petitioners] have drafted a proposal which only accepts settlement of all the claims, they are not required to meet the mandate of Florida Rule of Civil Procedure 1.442(c)(3) or 768.79(b)(2).

This statement is not completely accurate. It is Petitioners' position that when a joint proposal is conditioned upon the acceptance in its totality, any apportionment set forth in the offer should be a matter of indifference to the offeree. For example, what if the wording in the proposal would have been the following:

> The total amount being offered with this proposal is Ninety-Five Thousand One and 00/100 Dollars ($95,001.00.).
>
> One thousand dollars of the settlement amount will be apportioned to Edward McAlpine and Ninety-Four Thousand One and 00/100 Dollars will be apportioned to Willis Shaw Express, Inc. However, this offer can only be accepted in its totality.

To argue that the aforementioned proposal would have lead to a different result in the instant case is fiction. Furthermore, contrary to Respondent's statement that this all or nothing approach contradicts the clear wording of 1.442(c)(3) and 768.79 the history and the intent of both the rule and the statute, Petitioners respectfully submit the all or nothing approach is the appropriate method to try to settle all claims to obviate trial and to limit judicial resources.

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 RULES SHOULD BE GIVEN AN INTERPRETATION TO FURTHER JUSTICE NOT FRUSTRATE IT.
(De Novo Standard of Review)

Section (c)(3) of Rule 1.442 is procedural. The Rule mandates that joint proposals shall attribute amounts and terms attributable to each party. Common sense and logic however dictates that if the "terms attributable to each party" are that the offer can only be accepted in its totality, the "mandate" that amounts need to be apportioned becomes moot and is therefore eliminated. For example, if the offer in the instant case had apportioned the amounts as follows: $1,800.00 for Petitioner McAlpine and $93,201.00 for Petitioner Willis Shaw, this apportionment would be of no value to the offeree because: (1) they already knew the claim by Petitioner McAlpine was $1,800.00 and; (2) they could not settle the case piecemeal due to the totality condition. Therefore, an offer that is conditioned upon total acceptance does not have to be apportioned because it is a matter of indifference to the offeree.

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

Again, there is 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), review denied, 790 So. 2d 1102 (Fla. 2001). 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 construed. *Id. at 270.*

Fla.R.Civ.P. 1.442(c)(3) is the only rule at issue in this case. And although the comments[2] 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

[2] 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).

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 (Fla. 1981); 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 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.

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. It just makes sense.

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)

Respondent's Answer Brief on the Merits is devoid of any arguments against Petitioners' proposition that each case should 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.

IV. IN THE INSTANT CASE THE TRIAL COURT CLEARLY SHOWED THE ABILITY TO DETERMINE THE AMOUNTS REQUESTED BY EACH PLAINTIFF IN ORDER TO APPLY §768.79.

(De Novo Standard of Review)

On page 34 of Respondent's Answer Brief on the Merits it argues that:

> If the court cannot determine the amounts due to each Plaintiff in

> a joint proposal, the court cannot with any certainty determine the percentage difference between the final judgment and the joint proposal.

This argument does not apply in the instant case. In the instant case the trial court had no trouble determining entitlement and the amount due to the offerors (Petitioners). This fact was also recognized by Judge Polston in his concurrence in his decision below. Judge Polston stated:

> Second, I recognize the potential for cases with multiple parties that may be difficult for the trial court to determine whether amounts are due under the rule after the trial. However, in this case, the trial court made the determination by evaluating the aggregate amounts without any difficulty. In the difficult cases, the movants under the rule bear the burden of proof, and if it cannot be determined that amounts are due, then the motion fails.

Therefore, again, based on the individual facts of this case, the trial court had no problems enforcing the proposal against the Respondent. As a result, the offer is valid and should be enforced against the Respondent.

V. SOLELY REQUIRING SPECIFICITY IN A JOINT PROPOSAL AS TO EACH DEFENDANT IS NOT A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION RIGHTS.

(De Novo Standard of Review)

On pages 35 and 36 of Respondent's Answer Brief on the Merits it sets forth an argument that "solely requiring specificity as to each defendant results in the violation of due process and equal protection rights." However Respondent fails to cite any case law for its proposition.

Equal protection is not violated merely because some persons are treated

differently than other persons. It only requires that persons similarly situated to be treated similarly. *Duncan v. Moore*, 754 So. 2d 708 (Fla. 2000). Petitioners respectfully submit that this is not a constitutional question. However, assuming arguendo that it is, the rational basis test would have to be applied to the instant case. In the instant case, there was a rational basis for the enactment of Fla.R.Civ.P. 1.442(c)(3) which is articulated in the committee notes to the rule. Those notes specifically state that Fla.R.Civ.P. 1.442(c)(3) was enacted to comply with *Fabre*. Furthermore, in *Safelite Glass Corp. v. Samuels*, 771 So. 2d 44 (Fla. 2000) 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 on the offeror upon defendants, offerees.' [Emphasis added.]

Flight Express, Inc. v. Robinson, 736 So. 2d 796 (Fla. 3rd DCA 1999), at 797 n.1.

It is important to keep in mind that if the failure to apportion is considered a violation it is a "harmless technical violation" which does not effect the rights of the parties. See *Flight Express, supra.*

As a result, holding that Fla.R.Civ.P. 1.442(c)(3) was enacted to comply with *Fabre*, and therefore was designed to obviate future conflicts as to the effect of an offeror upon defendants, offerees is not a violation of anybody's equal protection rights.

VI. LIMITING THE APPLICATION OF RULE 1.442(c)(3) TO JOINT PROPOSALS TO MULTIPLE DEFENDANTS WITH COMPARATIVE FAULT IS CONSISTENT WITH THE

INTENT OF FLORIDA RULES OF CIVIL PROCEDURE 1.010 AND FLORIDA STATUTES §768.79 AND THE INTENT OF FLORIDA RULES OF CIVIL PROCEDURE 1.442(c)(3)
(De Novo Standard of Review)

Respondent argues that if Fla.R.Civ.P. 1.442(c)(3) is only applied to actions involving proposals to multiple Defendants, that may have comparative fault between themselves, would lead to increased litigation because all other offerees and joint proposals would not be able to reasonably evaluate nonspecific proposals.[3] [Initial Brief of the Respondent, page 28 and 29.]

Respondent further argues that in the instant case Respondent could not evaluate the proposal amounts that each Plaintiff was requesting. [Initial Brief of Appellant, page 29.] Respondent further argues that it couldn't determine the reasonability of each Plaintiff's proposal without the two Plaintiffs specifying the amounts that each requested [Initial Brief of Appellant, page 29.] The aforementioned statements are merely self-serving fiction by the Respondent. Of course, the Respondent was able to evaluate the "joint proposal." Again, the Respondent knew Petitioner McAlpine's claim was $1,800.00 and was virtually undisputed. [Respondent's Answer Brief on the Merits, page 22.] Therefore, all it had to do was subtract $1,800.00 from $95,001.00 to evaluate the different proposals. However, the

[3] Again, Respondent overlooks the fact that the committee notes to rule Fla.R.Civ.P. 1.442(c)(3) was enacted to conform with *Fabre v. Marin*, supra, where the court held that under §768.81(3) that a jury must apportion a percentage of fault to all persons whose negligence combined to cause the injury.

Respondent was insincere about settling the case and never made a proposal for settlement to Petitioner McAlpine.

As a result, Respondent's arguments are completely without merit. Respondent clearly had an opportunity to evaluate the joint proposal for settlement efficiently and effectively. Respondent implies that it would have taken a different action had it known the apportionment of damages[4]. 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 Appellee individually.

In sum, Petitioners' joint proposal was valid and served with the intent to settle the case in order to avoid any further costly litigation. However, as a result of Respondent's unreasonable rejection of the offer, unnecessary costs and attorney's fees were incurred and an already overcrowded court system was jammed up further.

VII. TO THE EXTENT THERE IS A CONFLICT BETWEEN THE RULES AND STATUTE, THE RULES CONTROL PROCEDURE

(De Novo Standard of Review)

---

[4] However, even though Respondent knew that Petitioner McAlpine's claim was virtually undisputed, it never made a proposal to settle with Petitioner McAlpine. [Respondent's Answer Brief on the Merits, page 22]

Petitioners agree that Fla.R.Civ.P. 1.442(c)(3) governs the requirement of a proposal for settlement. Petitioners submit that the proposal for settlement in the instant case met the requirements of the Florida Rules of Civil Procedure and that the proposal is valid.

VIII. RULE 1.442(c)(3) SUPERCEDES THOSE SECTIONS OF FLORIDA STATUTES AND PRIOR COURT DECISIONS

(De Novo Standard of Review)

Petitioners agree that Fla.R.Civ.P. 1.442(c)(3) supersedes the language in the Florida Statutes and prior court decisions to the extent the language of the Florida Statutes and the prior court decisions are irreconcilable with the current version of Fla.R.Civ.P. 1.442 (c)(3).

Furthermore, Respondent agrees that the joint proposal in the instant case met the statutory guidelines of Sec. 768.79. See Initial Brief of Appellant P. 33. Also, Petitioners submit that the joint proposal in the instant case is in compliance with Fla.R.Civ.P. 1.442(c)(3) for the reasons stated in the previous sections and incorporated herein.

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 September, 2002.

FROST TAMAYO SESSUMS
&ARANDA, P.A.

By:_____

John W. Frost, II
Florida Bar No. 114877
Peter W. van den Boom
Florida Bar No. 0143601
Post Office Box 2188
Bartow, FL 33831-2188
(863) 533-0314
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply 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.

FROST TAMAYO SESSUMS
& ARANDA, P.A.

By:_____

John W. Frost, II
Florida Bar No. 114877
Peter W. van den Boom
Florida Bar No. 0143601
Post Office Box 2188
Bartow, FL 33831-2188
(863) 533-0314