IN THE SUPREME COURT OF FLORIDA
CASE NO. SC03-1444

Florida Bar No. 184170

OSCAR LAMB,

Petitioner,

vs.

WILLIAM MATETZSCHK,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS
WILLIAM MATETZSCHK

(With Appendix)

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STATEMENT OF THE FACTS AND CASE

The facts were that the plaintiff, Oscar Lamb, was driving on an interstate. William Matetzschk was behind him driving a car he solely owned, and his wife, Margie Matetzschk, was behind William driving a car she solely owned. Oscar Lamb rear-ended a stopped car, William Matetzschk then rear-ended Oscar Lamb, and Margie Matetzschk rear-ended her husband.

The plaintiff filed suit against both William and Margie Matetzschk. The Complaint was not a model of clarity, and the Count against Margie Matetzschk reads as follows:

> 4. That at all times material, Defendant MARGIE MATETZSCHK was an owner of the vehicle causing Plaintiff's injuries and is therefore jointly liable with WILLIAM MATETZSCHK for all damages caused by the events complained of herein.
>
> (R 10-11).

Therefore, the fact that she was described as "an owner" would imply she was being sued through vicarious liability, but the allegation that she was "jointly and severally liable" would indicate she was being sued as a joint tortfeasor. There is no allegation she was "vicariously liable," but only that she was "jointly and severally liable."

It is undisputed that Margie Matetzschk was not a co-owner of William Matetzschk's car, and therefore the only way she could be liable would be for her active negligence for hitting the chain of cars stopped in front of her, in the chain reaction collision.

Prior to settling with Margie Matetzschk, the plaintiff filed two Proposals for Settlement which were made jointly to William and Margie Matetzschk. The first was for $15,000, dated July 19, 1999,

and the second one was for $9,000, dated August 4, 1999. The Proposals for Settlement were undifferentiated as to Margie and William. A third Proposal was later made solely to William Matetzschk for $6,000, which is not germane to this appeal. The three Proposals for Settlement read as follow:

> **Proposal for Settlement (Number 1)**
>
> Plaintiff, OSCAR LAMB, proposes to make a settlement with the Defendants, WILLIAM MATETZSCHK and MARIGE MATETZSCHK, for an amount totalling FIFTEEN THOUSAND ($15,000.00) DOLLARS AND NO CENTS. This proposal for settlement shall be deemed rejected unless accepted by delivery of a written notice of acceptance within thirty (30) days after service thereof.
>
> Dated: July 19, 1999.
>
> * * *
>
> **Proposal for Settlement (Number 2)**
>
> Plaintiff, OSCAR LAMB, proposes to make a settlement with the Defendants, WILLIAM MATETZSCHK and MARGIE MATETZSCHK, for an amount totalling NINE THOUSAND ($9,000.00) DOLLARS AND NO CENTS. This proposal for settlement shall be deemed rejected unless accepted by delivery of a written notice of acceptance within thirty (30) days after service hereof.
>
> Dated: August 4, 1999.
>
> * * *
>
> **Proposal for Settlement (Number 3)**
>
> Plaintiff, OSCAR LAMB, proposes to make a settlement with the Defendant, WILLIAM MATETZSCHK, for an amount totaling SIX THOUSAND ($6,000.00) DOLLARS AND NO CENTS. This proposal for settlement shall be deemed rejected unless accepted by delivery of a written notice of acceptance within thirty (30) days after service hereof.
>
> Dated: August 16, 2000.

During the course of the litigation, the plaintiff settled with Margie Matetzschk for money damages, in exchange for a release. The plaintiff then went to trial against William Matetzschk and recovered a judgment.

Therefore the issue is, when a joint proposal for settlement which fails to itemize the terms and conditions is made to two defendants, who are not vicariously liable, and there was an allegation in the Complaint which was unclearly drawn and may have been a count for vicarious liability, is the proposal valid.

The trial court ruled that the Proposals for Settlement were valid, but the Fifth District reversed based on the Supreme Court's decision in Willis Shaw, infra, which held that proposals for settlement are in derogation of common law, and must be strictly construed. The Fifth District also certified conflict with Barnes v. The Kellogg Company, infra, and this Petition resulted.

It should also be pointed out that although the Petitioner seeks to give the impression that as soon as he discovered Margie did not own the car William was in, that he settled with Margie, the facts do not indicate this.

The case was litigated against Margie Matetzschk for 2½ years before the plaintiff finally settled with her at mediation. One has to assume that either before or upon filing the Complaint, the plaintiff would perform an automobile title search, and knew for certain that she did not own the car. Since he litigated the case against her for 2½ years, this only could have been for her active negligence. Further, the plaintiff settled with Margie Matetzschk,

which could only have been for her active negligence, and the plaintiff then went to trial against William.

At the time of the depositions of William and Margie on February 3, 1999, it was clearly made known to the counsel for the plaintiff that Margie did not own the car. However, the plaintiff continued to litigate this case against her for another 1½ years after the depositions, and both of the two joint Proposals for Settlement that were addressed to Margie and William, were made during this period of time after their depositions, when counsel for the plaintiff knew for certain that she did not own the car.

Therefore, it is clear that he was litigating the case against her for her active negligence, and made the Proposals for Settlement to the defendants jointly for their active negligence.

The following are the relevant dates:

7/16/98	Complaint filed (R 10-11)
2/3/99	Depositions of William and Margie Matetzschk (R 304-354)
7/16/99	First Joint Proposal for Settlement (R 553-673)
8/4/99	Second Joint Proposal for Settlement (R 663-673)
8/16/00	Settlement with Margie Matetzschk at Mediation (R 188-189)

Therefore, in fact the plaintiff did not sue Margie Matetzschk as being vicariously liable, but sued her as a joint tortfeasor. Moreover, he litigated the case against her for 2½ years, including 1½ years after it was clear she did not own his car from the deposition testimony, filed both joint Proposals for Settlement during the time when he knew she did not own the car, and settled with her at mediation, and went to trial against William. Therefore,

it is clear the action was prosecuted against her as a joint tortfeasor, and the proposals were made to William and Margie as joint tortfeasors.

SUMMARY OF ARGUMENT

The Petitioner does not even discuss the clear holding of the landmark case of Florida Supreme Court in Willis Shaw Express, Inc. v. Hilyer Sod Inc., 849 So. 2d 276 (Fla. 2003), because under the holding of Willis Shaw, it is clear that the Fifth District ruled correctly in the present case.

In Willis Shaw, the Supreme Court ruled that: (1) Rule 1.442 requires joint proposals for settlement to be itemized as to each party; (2) statutes awarding attorneys' fees are in derogation of common law and must be strictly construed; and (3) a proposal for settlement which is not itemized does not strictly comply with Rule 1.442 and is invalid.

Therefore, under the clear, express and succinct holding in Willis Shaw, the Proposal for Settlement in the present case is not valid because it is not itemized.

The Petitioner avoids discussing this clear holding, and in effect argues how he thinks the rule should be worded, namely to exempt vicarious liability situations from the itemization requirement. However, Rule 1.442 is not worded the way the Petitioner wishes, and since the proposal in the present case does not comply with Rule 1.442, it is invalid.

Furthermore, six months after Willis Shaw was decided, the Civil Procedure Rules Committee of the Florida Bar petitioned the Supreme Court to amend Rule 1.442(c), to specifically excuse apportionment requirements in proposals for settlement directed to parties who are vicariously liable. The Florida Supreme declined to adopt this proposal. Amendments to Florida Rules of Civil Procedure

(Two-Year Cycle), 2003 WL 22410375, (October 23, 2003).

Therefore, it would appear that it is clear that any proposal for settlement which is not itemized as to the plaintiffs or defendants, is invalid because: (1) the 1996 Amendment to the Rule states that any joint proposal must be itemized; (2) the Florida Supreme Court in Willis Shaw stated that any joint proposal must be itemized, and that there must be strict construction with Rule 1.442; and (3) the Florida Supreme Court declined to amend Rule 1.442 to exempt situations alleging vicarious liability.

If the Florida Supreme Court intended for there to be an exception for vicarious liability situations, the consistent method of creating this exception would have been to adopt the amendment as proposed by the rules committee. Therefore, the Rule would expressly have provided an exception in this situation, which would not violate the strict construction requirement. The Florida Supreme Court did not do so.

Not A Vicarious Liability Situation

The present case is not a vicarious liability situation. Even if there were an exemption for vicarious liability situations, it would not apply to this case, since it is undisputed that Margie Matetzschk was not an owner of William's car, and therefore she was not vicariously liable for the acts of William Matetzschk. It will be recalled that the plaintiff, Oscar Lamb, was driving on an interstate. William Matetzschk was behind him driving a car he solely owned, and his wife, Margie Matetzschk, was behind William driving a car she solely owned. Oscar Lamb rear-ended a stopped car,

William Matetzschk then rear-ended Oscar Lamb
, and Margie Matetzschk rear-ended her husband.

It is undisputed that Margie Matetzschk was not a co-owner of William Matetzschk's car, and therefore the only way she could be liable would be from her active negligence for hitting the chain of cars stopped in front of her, in the chain reaction collision. The plaintiff eventually settled with Margie Matetzschk, and went to trial against William.

Public Policy

After considering the public policy ramifications, it is clear that a joint proposal for settlement, which fails to itemize the terms and conditions as to each party, should not be valid. The Supreme Court in Willis Shaw established a "bright line" rule as to whether proposals for settlement are valid. After the decision in Willis Shaw, all attorneys in the State know what is required in order to file a valid proposal for settlement, namely that it be itemized as to every plaintiff and every defendant. Since Rule 1.442(c) was effective in 1997, there have been at least 31 appellate cases construing various scenarios. Now, as a result of Willis Shaw, there is no uncertainty in the law, and when a party prepares a proposal for settlement, it knows what is necessary in order for it to be valid, and similarly, when a party is served with a proposal for settlement, it can look at this "bright line" rule of Willis Shaw and easily see if it is valid.

However, if this Honorable Court should follow the Petitioner's position, it would bring uncertainty back into the law. Trial courts

would be allowed to engraft judicial exceptions to Rule 1.442, and a body of appellate caselaw would need to be handed down in the future, as to which proposals for settlement will or will not be valid. Therefore, a party being served with some proposals for settlement will not know whether they are valid, until the caselaw develops years in the future.

The following are eight possible exceptions arising just from the fact pattern of the present case, which will need to be judicially decided:

> 1. Would an un-itemized proposal for settlement made <u>to</u> two defendants who are in a vicarious liability situation, be valid?
>
> 2. The same facts as #1, but the proposal is made <u>by</u> the two defendants?
>
> 3. Would an un-itemized proposal for settlement made <u>to</u> two defendants, who are being sued in alternative counts for active negligence and for vicarious liability, be valid, if at trial the jury finds there is no vicarious liability?
>
> 4. The same facts as #3, but the proposal is made <u>by</u> the two defendants?
>
> 5. Would an un-itemized proposal for settlement made <u>to</u> two defendants, who are <u>not</u> vicariously liable, but are sued by the plaintiff under a mistaken theory of vicarious liability, be valid?
>
> 6. The same facts as #5, but the proposal is made <u>by</u> the two defendants?
>
> 7. Would an un-itemized proposal for settlement made <u>to</u> two defendants, who are not vicariously liable, and are being sued on an allegation in the Complaint which is ambiguous as to whether they are being sued for vicarious, or for joint and several liability, be valid?

8. The same facts as #7, but the proposal is made by the two defendants?

It is hard to imagine that the Supreme Court would hold that the Proposal for Settlement is valid in the present case, since the claim of vicarious liability was mistaken and frivolous However, even this scenario has resulted in litigation in the trial court, and two appeals.

Additionally, the plaintiff Lamb made the joint proposal to two defendants, but only recovered a judgment against one defendant. It would seem that strict compliance would require a judgment be recovered against both of the defendants to whom the joint proposal was made. This is another factor that would need to be interpreted by appellate caselaw.

To recede from Willis Shaw and allow trial judges to engraft exceptions on the clear wording of the Rule would create uncertainty of the law for years in the future, and require appellate caselaw to interpret a myriad of exceptions for years in the future. The ingenuity of attorneys in urging exceptions to rules is boundless. Therefore, the public policy would clearly be best served by the Supreme Court, by upholding the "bright line" test of Willis Shaw, such that in the future every plaintiff and every defendant can instantly tell whether a proposal for settlement is valid, by whether it is itemized.

ARGUMENT

THE PROPOSAL FOR SETTLEMENT IN THE PRESENT CASE WAS INVALID BECAUSE IT DID NOT COMPLY WITH A STRICT CONSTRUCTION OF RULE

1.442(C), BECAUSE: (1) IT WAS NOT ITEMIZED; (2) THE PLAINTIFF DID NOT RECOVER A JUDGMENT AGAINST BOTH DEFENDANTS TO WHOM THE PROPOSAL WAS MADE, BUT ONLY AGAINST ONE OF THEM; AND (3) IT IS UNDISPUTED THAT MARGIE MATETZSCHK WAS NOT THE OWNER OF WILLIAM'S CAR AND WAS NOT VICARIOUSLY LIABLE.

A. Rule 1.442(c)

Since Rule 1.442(c) requires:

> A joint proposal for settlement shall state the amount and terms attributable to each party.

Prior to 1996, Fla. R. Civ. P. 1.442 did not require that proposals for settlements be itemized as to each plaintiff or defendant. However, in 1996, the Florida Supreme Court amended Rule 1.442, effective in 1997, to specifically provide a joint proposal "shall state the amount and terms attributable to each party."

Despite the clear wording of this amendment, there continued to be substantial litigation as to whether an undifferentiated joint proposal was valid. To resolve this confusion, in 2003 the Florida Supreme Court decided Willis Shaw, and made clear that there must be strict compliance with the Rule 1.442, because the Proposal for Settlement statute and Rule are in derogation of common law, and that a proposal which is not differentiated, is not valid.

Six months after Willis Shaw was decided, the Rules Committee of the Florida Bar petitioned to amend the Rule 1.442(c) to exempt vicarious liability situations from apportionment requirement. The Supreme court declined to do so, saying:

> The Committee proposed an amendment to rule 1.442(c), Proposals for Settlement: Form

> and Content of Proposal for Settlement, to specifically excuse apportionment requirements in proposals for settlement directed to parties alleged to be vicariously, constructively, derivatively or technically liable. We find that this proposal should not be adopted in light of recent case law from this Court. *See Willis Shaw Express Inc., v. Hilyer Sod, Inc.*, 28 Fla. L. Weekly S225 (Fla. Mar. 13, 2003)(an offer from multiple plaintiffs must apportion the offer among the plaintiffs).
>
> Amendment to Florida Rules of Civil Procedure, infra.

The purpose of the settlement rule is to enable all the defendants to fairly and accurately evaluate the plaintiff's demand, so that the case can be settled early and avoid unnecessary litigation and costs. It is mandatory that the demands be in an amount certain, for claims as to each individual party. This is clearly set forth in Rule 1.442, and without question Plaintiff's first and second Proposals for Settlement are an absolute violation of the Rule.

It is clear that the first two Proposals for Settlement were made to both Defendants as a whole. This is contrary to the explicit language of Florida Rule of Civil Procedure 1.442(c)(3), which states "A joint proposal shall state the amount and terms attributable to each party." From this Offer, it was impossible to tell what amount of money the Plaintiff was willing to settle for, and from which party. It is for this exact reason that the Rule specifically requires that a joint proposal, such as the first and second Proposals for Settlement for $15,000 and $9,000 respectfully, must state both the amount and terms attributable to each named party individually.

The Florida Supreme Court recently decided a case directly on point, in Allstate Indemnity Company v. Hingson, infra. The Court determined that, even under the prior version of Florida Rule of Civil Procedure 1.442, that an offer of settlement made to multiple parties must be specific to each party involved:

> We agree with the district court in *C & S* 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 him or her." 754 So.2d at 797-98. Otherwise, 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 judgment against only one of the parties was at least twenty-five percent more or less than the offer (depending on which party made the offer). Moreover, the plain language of section 768.79 supports the *C & S* court's holding. In subsection (2)(b), the statute refers to "party" in the singular. This, we believe, indicates the Legislature's intent that an offer specify the amount attributable to each individual party.
>
> Hingson, S70.

Accordingly, the trial judge erred when he calculated an attorney's fee, based on an invalid proposal for settlement.

It is completely established that the procedural aspects of Rule 1.442 control the Offer of Judgment Statute, § 768.79. While § 768.79 provides a substantive right to recover attorney's fees, only the Florida Supreme Court, through its Rules of Civil Procedure, can set forth the means and methods of making and enforcing the substantive right, which it does under Rule 1.442. TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995)(the procedural portions of § 768.79 are superseded by Rule of Civil Procedure

1.442); Timmons v. Combs, 608 So. 2d 1 (Fla. 1992)(Fla. R. Civ. P. 1.442 controls procedural aspects of § 768.79 and § 45.061); State Department of Transportation v. Daystar, Inc., 674 So. 2d 754 (Fla. 4th DCA 1996)(there was no period in which there was no applicable procedures governing offers of judgment). In fact, any attempt to change the procedural requirements, such as the time for filing or service of an offer of judgment, has been held to be an unconstitutional violation of the rule making authority of the Florida Supreme Court, under its Rules of Civil Procedure. Knealing v. Puleo, 675 So. 2d 593 (Fla. 1996) (§ 44.102(6)(the mediation statute which alters the time limits for making and accepting an offer of judgment, as incorporated into Fla. R. Civ. P. 1.442 is unconstitutional, as it impermissibly infringes on Supreme Court's rule making authority.)

The application of Rule 1.442(b) voids the Proposal for Settlement in the present case because it was filed in violation of Rule 1.442(c)(3), as neither the first nor second Proposals for Settlement specified any express amount of money demanded from each party. This express requirement in the Rule, is consistent with previous case law and the policy behind the offer of judgment statutes, and Rule 1.442 itself. Therefore, the Plaintiff's first and second Proposals for Settlement were in clear violation of Fla. R. Civ. P. 1.442(c)(3), and must be stricken and the Order below reversed.

B. The Petitioner's Argument

On pages 12 and 13 of the Petitioner's Brief, the Petitioner

argues that even when the plaintiff files a non-meritorious suit against a defendant for vicarious liability and loses, the plaintiff should nevertheless recover attorney's fees. Needless to say, it is not the intent of the proposal for settlement statute and rule, to reward parties who file claims and lose them at trial, by awarding them attorney's fees. Since the proposal was made to two defendants, and the plaintiff only received a judgment against one defendant, and lost as to the other defendant, a strict compliance with the statute and rule would require that the plaintiff not recover attorney's fees in that situation.

C. Derogation of Common Law

Florida law is clear that statutes involving attorney's fees are in derogation of common law and must be strictly construed. The common law rule was that each party would pay his own attorney's fees. It has specifically been held that the Florida Proposal for Settlement Statute, namely § 768.79, Fla. Stat., and the Proposal for Settlement Rule, namely Rule 1.442, are in derogation of common law and must be strictly construed.

The interpretation urged by the Petitioner does not satisfy the requirement of a strict compliance with Rule 1.442(c), so it would not be valid. The Petitioner in his Brief does not even discuss the holding of Willis Shaw, that proposals for settlement must satisfy a strict construction of Rule 1.442.

This rule of law was enunciated most recently by the Florida Supreme Court in its landmark decision in Willis Shaw Express, Inc. v. Hilyer Sod, Inc., supra, where the Florida Supreme Court said:

> Section 768.79 is implemented by Florida Rule of Civil Procedure 1.442 ("Proposals for Settlement"). This rule was amended in 1996 to require greater detail in settlement proposals. *See In re Amendments to Fla. Rules of Civil Pro.*, 682 So.2d 105, 107 (Fla. 1996)(effective Jan. 1, 1997). As amended, rule 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. *A joint proposal shall state the amount and terms attributable to each party.*
>
> (Emphasis added.) This language must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees. *See Major League Basball v. Morsani*, 790 So.2d 1071, 1077-78 (Fla. 2001) ("[A] statute enacted in derogation of the common law must be strictly construed...."); *Dade County v. Pena*, 664 So.2d 959, 960 (Fla. 1995)("[I]t is also a well-established rule in Florida that 'statutes awarding attorney's fees must be strictly construed.' *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n*, 539 So.2d 1131, 1132 (Fla. 1989)."). A strict construction of the plain language of the rule 1.442(c)(3) requires that offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror. *Cf. MGR Equipment Corp. v. Wilson Ice Enterprises, Inc.*, 731 So.2d 1262, 1263-64 n. 2 (Fla. 1999)(noting that rule 1.442, as amended in 1996, "mandates greater detail in settlement proposals, which will hopefully enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation"). We therefore hold that under the plain language of rule 1.442(c)(3), an offer from multiple plaintiffs must apportion the offer among the plaintiffs.
>
> Willis Shaw, 278-279.

The reason for this very strong rule of strict construction was explained by the Florida Supreme Court in the case of Major League

Baseball v. Morsani, 797 So. 2d 1071 (Fla. 2001), where the Florida Supreme Court said:

> Second, as noted above, equitable estoppel is a deeply rooted, centuries old tenet of the common law. On the other hand, fixed time limitations for filing suit, i.e., statutes of limitation, were unknown at common law and are a creature of modern statute. This Court has held that a statute enacted in derogation of the common law must be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise. (FN 15):
>
> > The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless the statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.
>
> Morsani, 1077-1078.

Numerous other cases, when construing the proposal for settlement statute, have applied this rule. The Third District applied this rule of strict construction in Oruga Corporation, Inc. v. AT&T Wireless of Florida, Inc., 712 So. 2d 1141 (Fla. 3d DCA 1998), where the court said:

> We begin our analysis of the attorney's fees issue ever cognizant of the well established rule that: "[S]tatutes authorizing an award of attorney's fees are in derogation of the common law[;] [t]herefore, such statutes must be strictly construed." *Whitten v. Progressive Cas. Ins. Co.*, 410 So.2d 501, 505 (Fla. 1982)(citation omitted); *see also Ciaramello v. D'Ambra*, 613 So.2d 1324, 1325 (Fla. 2d DCA 1991)(citation omitted)....
>
> Oruga, 1145.

It was held that in Nichols v. State Farm Mutual, 851 So. 2d 742 (Fla. 5th DCA 2003) that in order for a proposal for settlement to comply with the requirement of strict construction, it must not require judicial interpretation:

> Rules 1.442(c)(2)(C) and (D), Florida Rules of Civil Procedure, provide that the relevant conditions and all nonmonetary terms of the offer be stated with *particularity*. The terms of any proffered release are subject to this rule. *Zalis v. M.E.J. Rich Corp.*, 797 So.2d 1289 (Fla. 4th DCA 2001); *Gulf Coast Transp., Inc. v. Padron*, 782 So.2d 464 (Fla. 2d DCA 2001). This requirement of particularity is fundamental to the purpose underlying the statute and rule. A proposal for settlement is intended to end judicial labor, not create more. *Lucas v. Calhoun*, 813 So.2d 971 (Fla. 2d DCA 2002); *Jamieson v. Kurland*, 819 So.2d 267 (Fla. 2d DCA 2002). For this reason, a proposal for settlement should be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. *Id*. at 973 (citing *United Servs. Auto Ass'n v. Behar*, 752 So.2d 663, 665 (Fla. 2d DCA 2000). Moreover, the proposal should be capable of execution without the need for further explanation or judicial interpretation. *Id*. The rule and statute must be strictly construed because they are in derogation of the common law. *Willis Shaw Express, Inc. v. Hilyer Sod Inc.*, 849 So.2d 276, 2003 WL 1089304 (Fla. March 13, 2003).
>
> Nichols v. State Farm Mutual, 851 So. 2d 742 (Fla. 5th DCA 2003).

The rule that a proposal for settlement which is ambiguous is unenforceable, was discussed in Barnes v. The Kellogg Company, 846 So. 2d 568 (Fla. 2d DCA 2003), where the court said:

> It is well established that the offer of judgment statute and the related rule must be strictly construed because they are in derogation of common law. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 28 Fla. L.

> Weekly S225, S225 2003 WL 1089304, ____ So.2d __ _, ____ (Fla. Mar. 13, 2003). As a result, virtually any proposal that is ambiguous is not enforceable. *See, e.g., Twiddy v. Guttenplan*, 678 So.2d 488 (Fla. 2d DCA 1996). A proposal to two or more plaintiffs who each have a claim for their own separate damages is normally unenforce-
> able because it requires them to aggregate their damages or settle their separate claims in some collective fashion. *See Allstate Indem. Co. v. Hingson*, 808 So.2d 197 (Fla. 2002); *Allstate Ins. Co. v. Materiale*, 787 So.2d 173 (Fla. 2d DCA 2001). Likewise, a proposal from two or more plaintiffs who each have a claim for their own separate damages is normally unenforceable. *See Hilyer Sod*, 28 Fla. L. Weekly at S225, ___ So.2d at ___. A plaintiff's collective proposal to two or more defendants who have varying degrees of liability and may have rights to contribution between or among one another is also unenforceable. *See C & S Chems., Inc. v. McDougald*, 754 So.2d 795 (Fla. 2d DCA 2000).
>
> Barnes, 571.

Many other cases have also applied to this rule of law:

> ...Since section 768.79 and Florida Rule of Civil Procedure 1.442 are punitive in nature in that they impose sanctions upon the losing party and are in derogation of the common law, they must be strictly construed.
>
> Schussel v. Ladd Hairdressers, Inc., 736 So. 2d 776 (Fla. 4th DCA 1999).

* * *

> Section 768.79(2)(a), Florida Statutes (1991), provides that an offer of judgment must "[b]e in writing and state that it is being made pursuant to this section." McMullen's offer of judgment lacked the specificity required by the statute. It referred merely to "all applicable Florida statutes and the Florida Rules of Civil Procedure." This was not sufficient. Statutes authorizing awards of attorney's fees are in derogation of common law, and must be strictly construed.

> McMullen Oil Company, Inc. v. ISS International Service System, Inc., 698 So. 2d 372 (Fla. 2d DCA 1997).
>
> * * *
>
> Offers of judgment are punitive in nature and are in derogation of the common law, and for those reasons they must be strictly construed. *Schussel v. Ladd Hairdressers, Inc.*, 736 So.2d 776, 778 (Fla. 4th DCA 1999). The circuit court erred in awarding fees based on a defective offer, and we reverse that award.
>
> RLS Business Ventures, Inc. v. Second Chance Wholesale, Inc., 784 So. 2d 1194 (Fla. 2d DCA 2001).

In this regard, see also Twiddy v. Guttenplan, 678 So. 2d 488 (Fla. 2d DCA 1996), which held that a joint offer of judgment was not specific enough to comply with the strict construction of the statute, and was invalid; Pepper's Steel & Alloys, Inc. v. United States, 850 So. 2d 462 (Fla. 2003)(which applied this rule of strict construction to Florida Statute § 627.728, which awards attorney's fees upon the rendition of a judgment against an insurer); Encompass Incorporated v. Alford, 444 So. 2d 1085 (Fla. 1st DCA 1984)(which applied the requirement of strict construction to attorney's fees being sought under the mechanics' lien statute); Ahmed v. Lane Pontiac-Buick, Inc., 527 So. 2d 930 (Fla. 5th DCA 1988)(which applied the rule of strict construction to an offer of judgment under an earlier statute, which did not specifically provide for attorney's fees).

In summary, Florida law is completely clear that statutes awarding attorney's fees, and specifically Florida Statute § 768.79 and Rule 1.442, are in derogation of common law and must be

strictly complied with.

Since the Proposal for Settlement in the present case was a joint proposal which was not itemized, it is clear under the wealth of Florida authority that the Proposal for Settlement was not valid, and attorney's fees can not be awarded.

D. Multiple Litigation of Rule 1.442(c)

There has been extensive litigation trying to engraft exceptions upon the clear language of Rule 1.442(c). This extensive appellate litigation will doubtlessly continue, if the Supreme Court recedes from its "bright line" test of Willis Shaw, and allows trial judges to engraft exceptions onto the clear wording of the rule.

Although Rule 1.442(c) was only effective in 1997, in the less than seven years since then, there have been at least 31 recorded appellate decisions seeking to engraft exception upon this clear language. Security Professionals, Inc. v. Segall, 685 So. 2d 1381 (Fla. 4th DCA 1997); Bodek v. Gulliver Academy, Inc., 702 So. 2d 1331 (Fla. 3d DCA 1997); Crowley v. Sunny's Plants, Inc., supra; McFarland & Son, Inc. v. Basel, 727 So. 2d 226 (Fla. 5th DCA 1999); Flight Express, Inc. v. Robinson, 736 So. 2d 796 (Fla. 3d DCA 1999); Spruce Creek Development Co. of Ocala, Inc. v. Drew, supra; United Services Automobile Association v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000); C & S Chemicals, Inc. v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000); Sparks v. Barnes, 755 So. 2d 718 (Fla. 2d DCA 1999); Strahan v. Gauldin, supra; Danner Construction Company, Inc. v. Reynolds Metals Company, supra; Goldstein v. Harris, 768 So. 2d 1146 (Fla. 4th DCA 2000); Safelite

Glass Corporation v. Samuel, 771 So. 2d 44 (Fla. 4th DCA 2000); Ford Motor Company v. Meyers, 771 So. 2d 1202 (Fla. 4th DCA 2000); Allstate Indemnity Company v. Hingson, 808 So. 2d 197 (Fla. 2002); Stern v. Zamudio, 780 So. 2d 155 (Fla. 2001); Allstate Insurance Company v. Materiale, 787 So. 2d 173 (Fla. 2001); Alanwood Holding Co. v. Thompson, 789 So. 2d 485 (Fla. 2d DCA 2001); Dudley v. McCormick, 799 So. 2d 436 (Fla. 1st DCA 2001); Allstate Indemnity Company v. Hingson, 808 So. 2d 197 (Fla. 2002); Clipper v. Bay Oaks Condominium Association, Inc., 810 So. 2d 541 (Fla. 2d DCA 2002); Lucas v. Calhoun, 813 So. 2d 971 (Fla. 2d DCA 2002); Florida Gas Transmission Company v. Lauderdale Sand & Fill, Inc., 813 So. 2d 1013 (Fla. 4th DCA 2002); Basel v. McFarland & Sons, Inc., 815 So. 2d 687 (Fla. 5th DCA 2002); Hilyer Sod, Inc. v. Willis Shaw Express, Inc., 817 So. 2d 1050 (Fla. 1st DCA 2002); Thompson v. Hodson, 825 So. 2d 941 (Fla. 1st DCA 2002); Pearson v. Gabrelcik, 838 So. 2d 664 (Fla. 1st DCA 2003); Crespo v. Woodland Lakes Creative Retirement Concepts, Inc., 845 So. 2d 342 (Fla. 2d DCA 2003); Barnes v. The Kellogg Company, 846 So. 2d 568 (Fla. 2d DCA 2003); Willis Shaw Express, Inc. v. Hilyer Sod Inc., supra; and Matetszchk v. Lamb, 849 So. 2d 1141 (Fla. 5th DCA 2003).

If the Supreme Court should adopt the argument of the Petitioner, and allow the trial courts to engraft exceptions on to the clear language of Rule 1.442(c), there will continue to be extensive litigation to engraft additional exceptions.

Therefore, the public policy of the law is best served by upholding the "bright line" test, as handed down by the Florida Supreme Court in Willis Shaw.

If the Florida Supreme Court intended for there to be an exception for vicarious liability situations, the consistent method of creating this exception would have been to adopt the amendment as proposed by the rules committee. Therefore, the Rule would expressly have provided an exception in this situation, which would not violate the strict construction requirement. The Florida Supreme Court did not do so.

E. Litigation of Vicarious Liability

It should also be pointed out that the question of vicarious liability is not always a clear cut question, and often needs to be litigated. Therefore, if the Supreme Court receded from the "bright line" test of Willis Shaw, there would need to be judicial interpretation as to the validity of a joint proposal which fails to itemize the terms and conditions as to each party, which is made in a lawsuit, in which a party is being sued for both active negligence and vicarious liability; and whether the proposal for settlement would be valid, depending on whether or not the jury returned a verdict for vicarious liability.

The question of vicarious liability is often litigated in a situation where there is a question as to whether a worker is an independent contractor or an employee. For instance, if there was a question as to whether a truck driver was an employee or an independent contractor, a complaint could have a count for negligence against the employee, a count against the trucking company for vicarious liability for acts of the employee, and a second count against the employer for active negligence, for instance, for

negligent maintenance of the truck. Therefore, issues would arise in this scenario as to whether proposals for settlement were valid, depending on whether or not the trucking company won or lost the vicarious liability question.

For instance, if a proposal for settlement which failed to itemize the terms and conditions was made to the driver and the trucking company, and the jury later held the trucking company was not vicariously liable, but was actively negligent, would that proposal be valid? A second scenario would be whether in that situation, an un-itemized proposal made by the driver and company were valid.

If this Honorable Court recedes from the "bright line" test of Willis Shaw, and allows trial judges to engraft exceptions on the clear wording of Rule 1.442, countless issues will need to be decided by judges in the future, as to whether proposals for settlement are valid.

The plaintiff in his Brief makes the astonishing argument in Point II that whenever a plaintiff files suit for vicarious liability, there is a possibility the plaintiff may not prevail on that issue, so a proposal for settlement should be valid even if he does not prevail on the vicarious liability issue. Clearly, it is not the purpose of the proposal for settlement rule and statute to reward parties who file claims and lose, with attorney's fees.

There are numerous situations where issues of vicarious liability are litigated. See, Danner Construction Company v. Reynolds Metals Company, supra, concerning litigation as to whether the construction company was vicariously liable for an act of a

subcontractor; NME Properties, Inc. v. Rudich, 840 So. 2d 309 (Fla. 4th DCA 2003), concerning litigation as to whether a nursing home was vicariously liable, even though it was operated by an independent contractor; Suarez v. Gonzalez, 820 So. 2d 342 (Fla. 4th DCA 2002), concerning whether the homeowner was vicariously liable for acts of a worker who did construction work at his house, who he contended was an independent contractor; Bowling v. Gilman, 28 Fla L. Weekly, D2236 (Fla. 2d DCA 2003, September 26, 2003), concerning whether a crane owner was vicariously liable for an injury caused by a crane, operated by an independent contractor); Shands Teaching Hospital and Clinic, Inc. v. Juliana, 28 Fla. L. Weekly, D2027 (Fla. 1st DCA 2003, opinion filed April 29, 2003), concerning whether a hospital was vicariously liable for a profusionist, or whether his status as an independent contractor would shield the hospital from vicarious liability; Doles v. Koden International, Inc., 779 So. 2d 609 (Fla. 5th DCA 2001), concerning whether the owners of a vessel which contained a defective signaling device were vicariously liable for the acts of the manufacturer of the defective signaling device, to two fishermen who died on the ship due to the defective signaling device.

The following are eight scenarios arising just from the factual situation in the present case:

> 1. Would an un-itemized proposal for settlement made to two defendants who are in a vicarious liability situation, be valid?
>
> 2. The same facts as #1, but the proposal is made by the two defendants?
>
> 3. Would an un-itemized proposal for settlement made to two defendants, who are

being sued in alternative counts for active negligence and for vicarious liability, be valid, if at trial the jury finds there is no vicarious liability?

4. The same facts as #3, but the proposal is made by the two defendants?

5. Would an un-itemized proposal for settlement made to two defendants, who are not vicariously liable, but are sued by the plaintiff under a mistaken theory of vicarious liability, be valid?

6. The same facts as #5, but the proposal is made by the two defendants?

7. Would an un-itemized proposal for settlement made to two defendants, who are not vicariously liable, and are being sued on an allegation in the Complaint which is ambiguous as to whether they are being sued for vicarious, or for joint and several liability, be valid?

8. The same facts as #7, but the proposal is made by the two defendants?

In summary, there are numerous cases when the issue of vicarious liability is litigated in Florida. Any retreat from the "bright line" test of Willis Shaw, will enable trial court judges to engraft additional exceptions in various factual situations, which will produce years of litigation.

The public policy of the State clearly is to uphold the "bright line" test of Willis Shaw, such that there is complete clarity in the future for all attorneys in the State, as to whether the proposal for settlement is valid.

If the Florida Supreme Court intended for there to be an exception for vicarious liability situations, the consistent method of creating this exception would have been to adopt the amendment as

proposed by the rules committee. Therefore, the Rule would expressly have provided an exception in this situation, which would not violate the strict construction requirement. The Florida Supreme Court did not do so.

F. Plaintiff's Cases not on Point

The cases cited by the plaintiff in his Brief are not on point. The first case relied on by the petitioner, namely Crowley v. Sunny's Plants, Inc., 710 So. 2d 219 (Fla. 3d DCA 1998), is not on point because the proposal for settlement was made under the earlier version of the Proposal for Settlement Statute, and not under the 1996 version. It should be recalled that prior to the revision in 1996, there was no requirement under the statute or rule to itemize joint proposals for settlement, as to each plaintiff and defendant, but in 1996, Rule 1.442, was amended, effective in 1997.

Therefore, Crowley is not on point because it interprets the prior version of the rule, prior to the amendment which required proposals to be itemized as to the parties. The proposals for settlement in Crowley were in September 1994, May 1995 and June 1995.

The second case relied on by the Petitioner, namely Safelite Glass Corporation v. Samuel, 771 So. 2d 44 (Fla. 4th DCA 2000), is also not on point. In Safelite, defendant Haughton was in the course and scope of employment with Safelite Glass Company, and therefore Safelite was vicariously liable for Haughton. However, it will be recalled that in the present case, Margie Matetzschk did not own the automobile driven by William Matetzschk, and therefore undisputedly

was not vicariously liable for any actions of William Matetzschk. Since the defendants in the present case are not in a vicarious liability situation, there is no conflict with Safelite. Even if the plaintiff at the time of making the proposal mistakenly thought Margie was vicariously liable, certainly the defendants knew that she was not, and would evaluate the Proposal knowing that there was no vicarious liability. Therefore, Safelite is not on point, because there was no vicarious liability of the defendants in the present case.

Furthermore, Safelite is not applicable to the present situation, because it was decided prior to the Supreme Court's decision in Willis Shaw. Willis Shaw made clear that since Rule 1.442(c) requires proposals to be itemized, and this rule is in derogation of common law, that any proposal which does not satisfy this simple criteria is not valid.

The next case the Petitioner cites is Danner Construction Company, Inc. v. Reynolds Metals Company, 760 So. 2d 199 (Fla. 2d DCA 2000). However, Danner is not on point for three separate reasons. In the first place, it was decided prior to the decision in Willis Shaw, which clarified the law that proposals for settlement must strictly comply with Statute 1.442.

Secondly, it is not on point because in Danner the court held that it was "undisputed" that the only way defendant TMC would be liable would be for vicarious liability of Danner. In the present case, the facts, in contrast, show it is undisputed that there is no vicarious liability.

Third, the court in Danner followed as controlling, two cases

which the Supreme Court disapproved in Willis Shaw, namely Flight Express, Inc. v Robinson,736 So. 2d 796 (Fla. 3d DCA 1999), and Spruce Creek Development Co. of Ocala, Inc. v. Drew, 746 So. 2d 1109 (Fla. 5th DCA 1999). Therefore, Danner is not controlling in the present case for three separate reasons.

The Petitioner next relies on Crespo v. Woodland Lakes Creative Retirement Concepts, Inc., 845 So. 2d 342 (Fla. 2d DCA 2003). Crespo is of no benefit to the Petitioner because it held the opposite of the Petitioner's assertion in this case. Crespo held that the proposal for settlement in that case was not valid because it was not itemized between the parties.

Strahan v. Gauldin, 756 So. 2d 158 (Fla. 5th DCA 2000) is the next case relied on by the Petitioner in his Brief. Strahan also is not on point for multiple reasons. In the first place the Fifth District expressly stated in the present decision, that the principle of Strahan was rejected by the Florida Supreme Court in Willis Shaw.

Additionally, in Strahan it was undisputed that one defendant was vicariously liable for the act of another defendant, whereas in the present case the opposite is true; it is undisputed that Margie Matetzschk is not vicariously liable for the acts of William Matetzschk.

Third, Strahan was decided prior to the Supreme Court's decision in Willis Shaw, which has made clear that there must be strict compliance with Rule 1.422, because it is in derogation of common law, and that any proposal which is not itemized is not valid.

The Petitioner also relies on the case on which conflict has been certified by the Fifth District in the present case, namely

Barnes v. The Kellogg Company, 846 So. 2d 568 (Fla. 2d DCA 2000). The facts in Barnes were that the plaintiff purchased cereal at Albertson's supermarket, which cereal was made by Kellogg. It was in a sealed container, and the cereal allegedly contained insects, so the plaintiff filed suit for physical and psychological injuries. Albertson's and Kellogg filed a joint proposal for settlement to the plaintiff which was not itemized between Albertson's and Kellogg as to the amount. The court held that the only allegation as to Albertson's was vicarious liability for selling the cereal, and therefore Albertson's was vicariously liable for the acts of Kellogg in manufacturing the cereal with insects. The court held that since the defendants undeniably were in a vicarious liability situation, there was no necessity to differentiate in the proposal for settlement between Albertson's and Kellogg.

However, Barnes is not on point, because in the present case it is undisputed that there was no vicarious liability of the defendant. Since the defendants were only joint tortfeasors in this case, Barnes is not directly on point, and is not in express and direct conflict.

Additionally, the Supreme Court in Willis Shaw made clear that there must be strict construction with the provisions of Rule 1.442 requiring proposal for settlements to be itemized as to each plaintiff and defendant, and therefore in view of Willis Shaw, it is submitted the decision of the Second District in Barnes is incorrect.

Therefore, none of the cases the Petitioner cites in his Brief are controlling in his favor, nor are in express and direct conflict with the holding in the present case.

G. Proposals for Settlement Will Continue

The plaintiff makes a "parade of horribles" argument, that if the Supreme Court requires proposals for settlement to be itemized, that parties will stop filing proposals. Needless to say, it is very unlikely that will happen. There has been no report that parties have stopped filing proposals since the Supreme Court handed down Allstate v. Hingson, supra, or Willis Shaw, supra. Parties will continue filing proposals, but will specify the terms and conditions as to each party, so that the proposal will comply with the rule. If there should prove to be a "glitch" in the workings of the rule, the consistent way to remedy the situation would be for the Florida Supreme Court to adopt an amendment to the rule, and there would then need to be strict compliance with the rule as amended. This would create consistency with the body of law established by the Florida Supreme Court, requiring strict compliance with statutes authorizing an award of attorney's fees.

CONCLUSION

The Supreme Court should affirm its decision in Willis Shaw, and affirm the decision of the Fifth District in this case.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of March, 2004 to:

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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