IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1444

OSCAR LAMB,

Petitioner,

-vs.-

WILLIAM MATETZSCHK,

Respondent.

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

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# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **PAGE**



**OTHER AUTHORITIES** **PAGE**

## STATEMENT OF THE CASE AND OF THE FACTS

This is a Petition for discretionary review of the decision of the Fifth District Court of Appeal rendered on July 18, 2003 (SCR-57-62[1]), holding that the trial court's award of attorneys fees pursuant to §768.79, Fla. Stat. (1997) and Fla. R. Civ. P. 1.442 was erroneous and would be reversed because fee award was based upon "two undifferentiated offers of judgment made by a plaintiff to two defendants, one of whom is allegedly liable only on a vicarious basis as a co-owner of a vehicle." SCR-57.

The following recitation of the facts is taken from the corrected opinion issued by the Fifth DCA as a result of the Plaintiff/Petitioner's Motion for Certification:

> [T]he Plaintiff, Oscar Lamb, rear-ended a stopped car and, in a chain reaction, was rear-ended by an automobile operated by the Defendant, William Matetzschk, who was then rear-ended by an automobile driven by his own wife, Margie Matetzschk, who was driving behind her husband. There is no allegation or other indication that the impact of Margie's car with the rear of William's car propelled it into the rear of Lamb's vehicle for a second time.

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[1]There are three indexes to portions of the record in this case, all of which confusingly duplicate each other's numbering systems. The 75-page record prepared for this Supreme Court proceeding by the Fifth DCA is cited as "SCR-[page]" The records of the two appeals to the Fifth DCA are identified as "R01-[page]" (record in case no. 5D01-3337) and "R02-[page]" (record in case no. 5D02-455).

Lamb brought suit against the Matetzschks for his injuries sustained in the crash. The sole allegation against Margie Matetzschk was that she was "an owner of a vehicle causing Plaintiff's injuries and is therefore jointly and severally liable with William Matetzschk" for Lamb's damages. Clearly, this is not an allegation of active negligence and apparently was based on the erroneous assumption that Margie was a co-owner of the vehicle William was driving.

During the course of litigation, Lamb offered two joint proposals for settlement to the Matetzschks, one for $15,000, dated July 19, 1999, and the second for $9,000, dated August 2, 1999. The offers, neither of which was accepted, were undifferentiated as between the two defendants. Subsequently, Lamb settled with Margie at mediation and proceeded with the case against William.

A third proposal of settlement in the amount of $6,000 was dated August 16, 2000, and directed to William Matetzschk, the sole remaining defendant. This proposal also expired without acceptance, and the case proceeded to jury trial, resulting in a verdict of $73,108. As a result of this verdict (which exceeded any of the three settlement proposals by more than 25%), the trial court conducted two hearings: at the first, the parties stipulated that Lamb was entitled to an attorney fee; at the second, William disputed the validity of the first two offers in 1999 on the basis that they were undifferentiated as to the two party defendants, but the trial court ruled that this argument was waived because it was not raised in the first hearing. The trial court then awarded attorney fees to Lamb's counsel based upon the first proposal of settlement dated July 19, 1999. This appeal ensued.

SCR-57-59. The decision under review is reported at *Matetzschk v. Lamb*, 849 So. 2d 1141 (Fla. 5th DCA 2003).[2]

The Fifth District in that decision receded from its prior decision in *Strahan v. Gaudlin*, 756 So. 2d 158 (Fla. 5th DCA 2000), *review dismissed*, 800 So. 2d 225 (Fla. 2001), which had upheld the validity of an undifferentiated proposal for settlement served upon "one allegedly negligent tortfeasor and several parties whose liability was alleged on a vicarious basis." *Id*. at 161. In the decision under review, the Fifth District held that the Plaintiff's first two offers of judgment dated July 19, 1999 and August 4, 1999 were legally insufficient upon which to base an award of attorneys fees because they did not differentiate between the amount being sought against the active tortfeasor, William Matetzschk, and that sought against Margie Matetzschk, whose only potential liability was vicarious. SCR-61.

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[2]The proposals for settlement mentioned by the Fifth DCA in the decision under review are contained in the Fifth DCA's record in a related appeal, case no. 5D01-3337, which was utilized by agreement of the parties in 5th DCA case no 5D02-455. This Court by its order of January 9, 2004, granted the Petitioner's Motion to Supplement the Record with the record from 5D01-3337. However, because that record had been disassembled by the clerk of the lower tribunal and will require significant time to reassemble, this brief is filed without waiting for supplementation of the record with those documents. When that record is reassembled and transmitted, the proposals for settlement should appear as exhibits to the motion filed at R01-663, et seq.

The Fifth District in its decision of July 18, 2003, "recognize[d] that [its] instant opinion conflicts with *Barnes v. The Kellogg Co.*, [846 So. 2d 568 (Fla. 2d DCA 2003)], which held an undifferentiated offer of settlement from a plaintiff to two defendants, one of whom was only vicariously liable, was proper."[3] The court below granted the Plaintiff/Petitioner's motion for certification and held: "we certify conflict with *Barnes*." SCR-62.

## SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review the decision below under the jurisdictional grant of Fla. Const. Art. V, § 3 (b)(3) because this decision expressly and directly conflicts[4] with decisions of other district courts of appeal on the same point of law, to wit: whether an undifferentiated proposal for settlement/offer of judgment served by a plaintiff upon multiple defendants—only one of whom is actively negligent and

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[1] The Fifth District confused the roles of the parties in *Barnes*—the defendants (one of whom was only vicariously liable, if at all) had jointly served an undifferentiated offer of judgment on the lone plaintiff—instead of the other way around.

[4]Petitioner in his Notice to Invoke relied upon the express and direct conflict ground for jurisdiction, as well as the certified conflict ground. While this Court in its order of November 7, 2003 denied Petitioner's motion seeking leave to file a jurisdictional brief raising the express and direct conflict issue, that denial was without prejudice to raise such a jurisdictional basis in this brief on the merits.

the liability of the others, if any, is based solely upon vicarious responsibility—is sufficient upon which to base an award of attorneys fees against the Defendants.

This Court also has jurisdiction under Fla. Const. Art. V, §3(b)(4), in that the decision is a "decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal." That conflict is on the same issue as the express and direct conflict identified above: the sufficiency of undifferentiated proposals for settlements/offers of judgment to support awards of attorneys fees, where the liability of the defendants would be coextensive due to the doctrine of vicarious liability. Public policy will be thwarted unless this Court resolves that conflict in favor of recognizing the validity of such offers in this narrow situation.

## ARGUMENT

## I.

## THIS COURT HAS JURISDICTION BASED ON THE CERTIFIED CONFLICT AND BASED ON OTHER UNCERTIFIED, BUT EXPRESS AND DIRECT CONFLICT

This Court has jurisdiction to review this case under Article V, §3(b)(4), Fla. Const., because the Fifth DCA certified such conflict with the Second DCA's decision in *Barnes v. The Kellogg Co.*, 846 So. 2d 568 (Fla. 2d DCA 2003). Additionally, this Court has jurisdiction to review the Fifth District's decision in that it expressly and directly conflicts with decisions of several other district courts of appeal on the same question of law. *See* Art. V, § 3 (b)(3), Fla. Const. as implemented by Fla. R. App. P. 9.030(a)(2)(A)(iv).

While there certainly is jurisdiction based upon the ***certified*** conflict between the subject decision and the Second District's decision in *Barnes v. The Kellogg Co.*,[5] there is an even more apparent conflict between the Fifth DCA's decision in this case and decisions from the Second, Third and Fourth District Courts of Appeal. The present case expressly and directly conflicts with *Crowley v. Sunny's Plants, Inc.*, 710 So. 2d 219 (Fla. 3d DCA 1998), *Safelite Glass Corp. v. Samuel*, 771 So. 2d 44 (Fla.

[5] 846 So. 2d 568 (Fla. 2d DCA 2003).

4th DCA 2000), and *Danner Constr. Co. v. Reynolds Metals Co.*, 760 So. 2d 199 (Fla. 2d DCA 2000).

Each of those cases involve the identical factual situation present here of a single plaintiff serving an undifferentiated offer upon defendants whose liability (if any) was co-extensive. The conflict is one which requires this Court to intervene.

## II.

## THE FIFTH DCA'S DECISION SHOULD BE QUASHED BECAUSE THE UNDIFFERENTIATED PROPOSALS FOR SETTLEMENT TO WILLIAM MATETZSCHK WERE SUFFICIENT TO SUPPORT THE ATTORNEYS FEE AWARD

### A. Introduction:

This Court can and should quash the Fifth DCA's decision to approve the trial court's ruling that Plaintiff was entitled to recover his attorneys fees from William Matetzschk from the time the first proposal for settlement was rejected. The proposal did not need to apportion the amounts sought from each Defendant because Margie Matetzschk—if liable at all—was vicariously liable for the whole amount of damages. Such cases involve an exception to the general rule requiring apportionment. "This exception to rule 1.442(c)(3) arose because the theory of vicarious liability simply does not allow for apportionment of fault or damages. Danner Constr. Co., 760 So. 2d at 202. Because apportionment is considered impossible in a vicarious liability case, the

courts have relieved the parties of the requirement to apportion the offer in that type of case." *Crespo v.Woodland Lakes Creative Retirement Concepts, Inc.*, 845 So. 2d 342, 343-44 (Fla. 2d DCA 2003).

**A. Apportionment Not Possible Where One Defendant Vicariously Liable:**

There is no need under the law for a proposal for settlement to differentiate the amounts to be paid by two or more defendants where the theory of liability against one defendant is solely his or her vicarious liability for the negligence of the other defendant. The Florida Supreme Court case upon which the Fifth DCA relies for its holding that differentiation is required did not involve the situation in which the liability of one of the defendants was strictly vicarious. See *Willis Shaw Express, Inc., v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003).

The cases which address the situation present here — of a solely vicariously liable co-defendant — recognize the efficacy of a proposal for settlement to support an award of attorneys fees, without differentiation of the amount of that proposal between the negligent defendant and the defendant alleged to be vicariously liable for that negligence.

The question of whether a proposal for settlement made by a plaintiff to two defendants — one who was negligent and the other who was only vicariously liable,

if liable at all—was addressed by the Third District in *Crowley v. Sunny's Plants Inc.*, 710 So. 2d 219 (Fla. 3d DCA 1998). The plaintiff in that case served offers of judgment which were not accepted, and the jury returned a verdict which was sufficiently greater than those offers to support an award of attorneys fees. However, the trial court denied the plaintiff's motion to determine entitlement to attorneys fees, finding that the plaintiffs "were not entitled to their attorneys fees and costs because their offers of judgment did not specifically identify the parties to whom the offers were made." 710 So. 2d at 220.

The Third District reversed that ruling in *Crowley*, holding that no differentiation of amounts was required under the circumstances, because both defendants, "Sunny's and Perez were jointly and severally liable for any judgment when the offers were made; Sunny's was vicariously liable for the fault attributable to Perez." *Id.* at 221.

The issue was next addressed by the Fifth DCA in *Strahan v. Gauldin,* 756 So. 2d 158 (Fla. 5th DCA 2000). That was a lawsuit for personal injury brought against one defendant for his negligence and several other defendants, based solely on claims of vicarious liability, in which the plaintiff made an undifferentiated proposal for settlement which was rejected by the defendants.

The defendants appealed the award of attorneys fees to them based upon such an undifferentiated proposal for settlement, citing *McFarland & Son, Inc. v. Basel*,

727 So. 2d 266 (Fla. 5th DCA 1999). In affirming the award of attorneys fees in the *Strahan* case, the court agreed that the lack of apportionment of the plaintiff's offer among the defendants did not render it ineffective to support the trial court's award of attorneys fees, holding as follows:

> We do not agree with the Strahans that *McFarland* controls the results in this case. An important difference between *McFarland* and the instant case is that in *McFarland*, liability, pursuant to the allegations of the complaint, could be allocated on the basis of fault among each of the defendants. In *McFarland*, there were separate issues relating to the negligence of each driver and the negligence of the employer of one of the drivers in hiring, training and supervising him. In contrast, the complaint in the instant case alleged only the negligent act of Arthur P. Strahan, Jr. ***The other defendants***, Strahan's parents and Strahan Music, Inc. and Strahan Management, ***were included in the complaint only under theories of vicarious liability***. Unlike the plaintiff in *McFarland*, Gauldin could not logically apportion his offer among the Strahans because each of the individual defendants were liable for the entire amount of damages. ***Because of that joint and several liability, none of the individual defendants were adversely affected by the joint offer.***

756 So. 2d at 161.

The Second District Court of Appeal joined the Fifth District and the Third District in holding that apportionment of an offer's amount is not required to support a fee award where one defendant is only vicariously liable for the negligence of another defendant, in *Danner Constr. Co. v. Reynolds Metals Co.* , 760 So. 2d 199 (Fla. 2d DCA 2000). The defendants in that case made an undifferentiated offer of judgment to the plaintiff in the amount of $1.5 million and the plaintiff recovered a verdict of $109,385 which was reduced to zero after set-offs for prior settlements. The Second District held that it was impracticable and unnecessary for the offer to be apportioned among the defendants, because the liability of one was solely vicarious for the negligence of the other. The court reversed the trial court's denial of attorneys fees.

The Fourth District Court of Appeal joined the majority of districts in rejecting the argument that apportionment is required in the vicarious liability context in *Safelite Glass Corp. v. Samuel*, 771 So. 2d 44 (Fla. 4th DCA 2000). That was a personal injury case brought by the Samuels against Safelite and its employee Mr. Haughton, based upon the employee's negligence and Safelite's vicarious liability for that negligence.

The plaintiffs in *Safelit*e served an undifferentiated proposal for settlement in the amount of $400,000, and recovered a judgment of more than $600,000, thereby exceeding the offer amount by more than twenty-five percent. The defendants

appealed the award of attorneys fees, arguing that the plaintiff's proposal for settlement was made to both defendants jointly and did not apportion the amount attributable to each of them. In affirming the award of attorneys fees and rejecting the argument that the offer had to be apportioned, the Fourth District noted: "The defendant/offerees in this case were not joint tortfeasors with potentially different degrees of fault and competing interests." 771 So. 2d at 45.

The Fifth DCA mistakenly applied this Court's decision in *Willis Shaw Express, Inc., v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003) to reverse the fee award in this case. The *Willis Shaw* case did not involve the situation of co-extensive degrees of liability of the defendants but involved a joint proposal of settlement served by two plaintiffs (who had sustained much different degrees of damage to a single defendant). That distinction is important because one of those plaintiffs might not have been able to approve the amount of its damages against the defendant, while the other had a meritorious damages claim, both simply on evaluation issues not present in this case. Where there is only a single plaintiff, as to whom each defendant's liability would be equal.

**B. Margie's Defense Not Available To William Matetzchk:**

The Fifth DCA in the decision under review makes the point that Margie Matetzchk in the present case apparently had a meritorious defense to the claim of

vicarious liability against her, due to the fact that she was not a co-owner of the accident vehicle after all[6]. The court thus distinguishes this situation from the case in which the vicarious liability of a defendant is not contested, and the defendant concedes responsibility for the same amount of damages proved against the actively-negligent defendant.

While that argument would have some superficial appeal, were the award of attorneys fees to have been made against the allegedly vicariously-liable Defendant (Margie Matetzschk), that is not what happened here. William Matetzschk's liability to the Plaintiff would not be any different, whether or not Margie Matetzschk were successful in her defense that she was not a co-owner of the vehicle. Whether or not Margie was successful in her defense, Mr. William Matetzschk's exposure to the Plaintiff was the same. Therefore, the proposals for settlement were sufficient to

[6]Plaintiff settled with Margie for $100 when he learned that she really did not own the accident vehicle.

support the fee award as against William, as the actively-negligent tortfeasor.[7] The order under review should be quashed.

## III.

## THIS COURT SHOULD EXERCISE ITS JURISDICTION TO ADDRESS THE PUBLIC POLICY CONCERNS RAISED BY THE DECISION UNDER REVIEW

Once this Court recognizes the existence of its conflict jurisdiction in this case, it should exercise its discretion to accept jurisdiction and to consider this case on the merits, due to the existence of very serious public policy concerns resulting from the Fifth DCA's decision. The Fifth District in the decision under review felt obliged to recede from its prior decision recognizing the validity of unapportioned proposals for settlement as a result of this Court's decision in *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003).

That case involved an undifferentiated proposal for settlement served by two plaintiffs upon the single defendant, Hilyer Sod, Inc. While the reversal of the parties'

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[7] Mr. Matetzschk's ultimate responsibility would not be any different, whether or not Margie Matetzschk was successful in her defense that she was not vicariously liable. Even if Margie Matetzschk's defense were successful, the Plaintiff would recover all of his damages against William Matetzschk. Even if Margie Matetzschk were held to be vicariously liable as a co-owner of the vehicle, and had initially paid all or some portion of a verdict or settlement to the Plaintiff, she would be entitled to recover those payments back from William Matetzschk by way of an identity claim, so he would end up being responsible for the full amount of the Plaintiff's damages.

roles from the alignment of the present case does not serve to distinguish the two cases, the distinguishing feature about *Willis Shaw* is that the two plaintiffs in that case did not share a joint interest in the proposal for settlement.

To the contrary, the plaintiffs in the *Willis Shaw* case had totally different claims for damages, with one of them seeking damage to a tractor trailer totaling approximately $129,000 and the other only seeking recovery for the loss of personal property totaling only approximately $1,800. There is no way that a defendant receiving such a proposal could calculate the effect that acceptance of it would have on either one of those plaintiff's claims.

If this Court's *Willis Shaw* decision applies when the liability of multiple recipients of a proposal for settlement is co-extensive, the effect would be that the judicial procedure for effectuating proposals for settlement would be contrary to the overriding public policy underlying §768.79, Fla. Stat. As noted by the Second District in the *Barnes* case, "authorizing joint offers in such cases will facilitate settlements, which is the intended purpose of Section 768.79." 846 So. 2d at 572. Invalidating such joint proposals where liability is co-extensive would, therefore, chill the attainment of the public policy objective of encouraging settlements.

Applying the *Willis Shaw* rationale to undifferentiated proposals for supplement offered to joint tortfeasors whose liability is co-extensive will result in fewer such

proposals for settlement being served, or such proposals being served upon fewer than all of the defendants in a case, or a combination of those things, either of which would result in additional litigation and fewer settlements. For one thing, if a plaintiff agrees to settle for "X" dollars to resolve ***all*** issues against ***all*** defendants, that plaintiff often would be less inclined to allow either one of the defendants to settle for less than the total amount. That would necessitate a proposal for the same settlement amount to each of the defendants separately, which previously would have been made available to both of the defendants collectively, thereby making settlement more expensive for an individual defendant.

Even if one of the defendants in such a case were to accept the proposal for settlement and pay the entire amount, that would result in the other defendant remaining part of the case and a trial being conducted on a claim which would have been settled globally, if a joint proposal were permitted.

The Fifth DCA's approach will raise the ante to settle, because the true settlement value of any case is that which is attainable if the entire case is resolved, not if only a fraction of the case is resolved and the plaintiff is left to litigate against the remaining party. For example, if a plaintiff in a given case were inclined to accept the sum of $10,000 collectively from all of the defendants to settle the entire case, that does not mean that the same plaintiff would be willing to take $5,000 from one of the

defendants, because the value of the case as against the remaining defendant may well drop precipitously with the settling party being absent even if the remaining defendant's liability is vicarious.

Where it would not make economic sense to continue with the litigation against a single remaining defendant after another defendant has settled, the price tag for allowing either defendant out will go up, thereby making settlements more expensive or less available. In addition, the sheer difficulty of evaluating the individual settlement value of the case as to fewer than all of the defendants would naturally make less common the practice of serving differentiated proposals for settlement. Making settlement more difficult and expensive will increase the cost of litigation and clog the court system. We don't need that. The decision under review should be quashed.

## CONCLUSION

WHEREFORE, the decision under review being expressly and directly in conflict with decisions of other district courts of appeal on the same question of law, and resolution of that conflict being necessary to effectuate the public policy in favor of settling litigation, this Court should accept jurisdiction and hold that the Fifth DCA erroneously decided the issue.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that true copies hereof were served by U.S. Mail, upon David J. Gorewitz, Attorney At Law, Co-Counsel for Petitioner, 1825 Riverview Drive, Melbourne, FL 32901; and Richard A. Sherman, P.A., Counsel for Respondent, Suite 302, 1777 South Andrews Avenue, Fort Lauderdale, FL 33316; and Cymonie S. Rowe, Attorney At Law, Dickstein, Reynolds & Woods, Trial Counsel for Respondent, Northbridge Centre, 515 North Flagler Drive, Suite 700, West Palm Beach, Florida 33401on this, the 26th day of January, 2004.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been computer generated in 14 point Times New Roman font and complies with the requirements of Rule 9.210(a)(2).

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