IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1444

OSCAR LAMB,

Petitioner,

-vs.-

WILLIAM MATETZSCHK,

Respondent.

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

PETITIONER'S REPLY BRIEF ON THE MERITS

WASSON & ASSOCIATES
1320 S. Dixie Highway, Suite 450
Miami, FL 33146
Telephone: (305) 666-5053

DAVID J. GOREWITZ
1825 Riverview Drive
Melbourne, FL 32901
Telephone: (321) 984-0046

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

ARGUMENT

THE OFFER OF JUDGMENT WAS VALID BECAUSE APPORTIONMENT OF DAMAGES IS NOT NECESSARY AMONGST TWO DEFENDANTS, ONE OF WHOM IS ONLY VICARIOUSLY LIABLE, IF LIABLE AT ALL

Respondent in his Answer Brief takes issue with the Petitioner's position that Margie Matetzschk was sued only in her capacity as owner of the accident vehicle being driven by her husband. For example, on page 4 of Respondent's brief, Matetzschk cites to the amount of time which elapsed before Margie was dropped as a defendant in support of the argument that "[i]t is clear that he [Plaintiff] was litigating the case against her for her active negligence." Respondent's insistence that Margie Matetzschk's percentage of liability for the Plaintiff's damages could have been different than that apportioned to her husband—due to different degrees of negligence being ascribed to their conduct in driving separate automobiles—is expressly belied by the holding of the Fifth District in the decision under review.

Another argument made by Respondent in support of the implication that Plaintiff sued Margie Matetzschk on some theory other than her vicarious liability as the accident vehicle's owner is that "either before or upon filing the Complaint, the Plaintiff would perform an automobile title search, and [know] for certain that she did not own the car." *See* Answer Brief at 3-4. However, Respondent apparently has

overlooked the long line of cases which recognize that it is not "mere naked title" which gives rise to vicarious liability under the dangerous instrumentality doctrine, but "beneficial ownership." *See Aurbach v. Gallina*, 753 So. 2d 60, 63 (Fla. 2000).

The Fifth District in its opinion, *Matetzchk v. Lamb*, 849 So. 2d 1141, 1143 (Fla. 5th DCA 2003) found that the allegation against Margie was clearly not one of active negligence. Thus, the claim against Margie was one of vicarious liability as co-owner of William's vehicle. If Margie had been found to be vicariously liable, she would have been responsible for all of the judgment. Apportionment between William and Margie was therefore unnecessary.

Respondent argues that the plaintiff who files a non-meritorious suit based on vicarious liability should then be barred from recovering attorney's fees against the defendant from whom he did recover. In this case, the Petitioner did not "lose" to Margie; the count against her was settled when it became clear that she was not the co-owner of William's vehicle. Additionally, Petitioner is not seeking to recover attorney's fees from a defendant against whom he lost, but rather from a defendant against whom he won.

Respondent distinguishes this case from *Safelite Glass Corp. v. Samuel*, 711 So. 2d 44 (Fla. 4th DCA 2000), *Danner Constr. Co. v. Reynolds Metals Co.*, 760 So. 2d 199 (Fla. 2d DCA 2000), and *Barnes v. The Kellogg Co.*, 846 So. 2d 568 (Fla. 2d

DCA 2003) because Margie was not in fact vicariously liable. However, the offer of judgment was made while Margie was still a defendant assumed to be vicariously liable. That the assumption was erroneous should not nullify the proposal.

Further, the Fifth District has incorrectly determined that *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003) implicitly rejects *Strahan v. Gauldin*, 756 So. 2d 158 (Fla. 5th DCA 2000). *Willis Shaw* requires that offers of judgment made by ***multiple offerors*** sustaining different amounts of damages[1] must apportion amounts attributable to each offeror. 849 So. 2d at 278-279. That holding is not in conflict with *Strahan v. Gaudlin*, 756 So. 2d 158 (Fla. 5th DCA 2000), which upholds the validity of an offer made to multiple defendants, each of whom were jointly and severally liable, ***by a single offeror***. 756 So. 2d at 161.

The *Strahan* court correctly determined that the plaintiff in that case could not logically apportion his offer amongst the defendants because each was liable for all of the damages. Neither could Petitioner in this case apportion his offer amongst two defendants who were jointly and severally liable.

This Court's holding in *Allstate Indemnity Co. v. Hingson*, 808 So. 2d 197 (Fla. 2002) does not require that the offer of judgment be held invalid. That case

---

[1] In *Willis Shaw*, one of the plaintiffs had damages of $129,000, while the other plaintiff's damages were only 1.4% of that sum—$1,800—but the offer amount of $95,001 was undifferentiated.

involved an offer by a single defendant to two plaintiffs; it did not determine the validity of an offer made by a single plaintiff to two defendants, both of whom are liable for the entire amount of damages.

Finally, the "slippery slope" of extensive litigation caused by trial courts grafting exceptions to Rule 1.442 predicted by Respondent will not occur. This Court would not be receding from its holding in *Willis Shaw* by overturning the district court; this Court would merely be clarifying the exception already set forth in *Strahan*.

The decision of the Fifth District under review will—if approved by this Court—make settlement proposals more complicated and less likely, resulting in additional litigation in an already over-burdened judicial system. Florida's public policy of encouraging settlements will be furthered by permitting undifferentiated proposals for settlement in this narrow (but common) class of cases where the defendants share liability for all of the damages, if they are liable at all. The decision under review should be quashed.

CONCLUSION

WHEREFORE, because the Petitioner's offers of judgment could not be apportioned between the two Defendants, both of whom were jointly and severally liable as alleged in the Complaint, the first offer of judgment was valid and the issue was erroneously decided by the Fifth District Court.

Respectfully submitted,

WASSON & ASSOCIATES
1320 S. Dixie Highway, Suite 450
Miami, FL 33146
Telephone: (305) 666-5053

DAVID J. GOREWITZ
1825 Riverview Drive
Melbourne, FL 32901
Telephone: (321) 984-0046

Attorneys for Petitioner

By: _____
ANNABEL C. MAJEWSKI
Florida Bar No. 181684

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 12th day of April, 2004.

_____
ANNABEL C. MAJEWSKI
Florida Bar No. 181684

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).

ANNABEL C. MAJEWSKI
Fla. Bar No. 181684