IN THE SUPREME COURT
STATE OF FLORIDA

Case No.: SC03-97

JOHN J. FITZMAURICE and
CAROLE M. FITZMAURICE,

Petitioners,

vs.

PHILIP C. D'ANGELO, M.D., and
PHILIP C. D'ANGELO, M.D., P.A.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

RESPONDENTS' AMENDED ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Petitioners, JOHN J. FITZMAURICE and CAROLE M. FITZMAURICE, were the Plaintiffs at the trial court and the Appellees/Cross-Appellants at the Second District. The Respondents, PHILIP C. D'ANGELO, M.D., and PHILIP C. D'ANGELO, M.D., P.A. (collectively referred to as "DR. D'ANGELO"), were the Defendants at the trial court and the Appellants/Cross-Appellees at the Second District. The parties will be referred to by proper name or by the position they occupied at the trial court.

References to the Record on Appeal will be designated by the letter "R." followed by the corresponding volume and page numbers. References to the Appendix to Respondents' Answer Brief on the Merits will be designated by the letter "A." followed by the corresponding document number.

All emphasis in Respondents' Amended Answer Brief on the Merits is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

The parties are before this Court pursuant to the Second District's certification of conflict. *See* D'Angelo v. Fitzmaurice, 832 So. 2d 135, 137-138 (Fla. 2d DCA 2002).[1] The Second District denied Petitioners/Plaintiffs' Motion for Appellate Attorney's Fees because their Offer of Settlement failed to specify the amount each spouse was willing to accept to settle his/her individual claims. *Id.* DR. D'ANGELO submits the following Statement of the Case and of the Facts which presents matters which he believes are more pertinent to the attorney's fees issue upon which this Court's discretionary conflict jurisdiction is based.

Mr. Fitzmaurice and his wife, Mrs. Fitzmaurice, filed a medical malpractice action against DR. D'ANGELO on March 3, 2000. [R. Vol. 1, pp. 1-5]. They alleged that a laparotomy pad was left in Mr. Fitzmaurice's abdominal cavity during the appendectomy DR. D'ANGELO performed on August 23, 1997. [R. Vol. 1, pp. 1-5]. Mr. Fitzmaurice sought economic and noneconomic damages for his injuries. [R. Vol. 1, pp. 1-5]. Mrs. Fitzmaurice sought separate and distinct damages for her alleged

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[1] Also before this Court is the companion appeal (D'Angelo v. Fitzmaurice, Case No. SC03-33) instituted by DR. D'ANGELO pursuant to the question of great public importance certified by the Second District. *Id.*

loss of consortium. [R. Vol. 1, pp. 1-5].

On June 23, 2000, Mr. and Mrs. Fitzmaurice served a joint Offer of Settlement upon DR. D'ANGELO pursuant to Rule 1.442 and Florida Statutes Section 768.79.[2] [R. Vol. 7, pp. 1051-1052; A. 1]. The Fitzmaurices requested an unapportioned and undifferentiated lump sum amount of $250,000.00 from DR. D'ANGELO (and his professional association) to settle all claims. [R Vol. 7, pp. 1051-1052; A. 1].

During the subsequent four-day jury trial, the jury was instructed regarding, among other things, the damages elements of Mr. Fitzmaurice's claim **and** the elements of damages associated with Mrs. Fitzmaurice's separate consortium claim. [R. Vol. 17, p. T1176]. The verdict form required the jury to separately assess the damages, if any, of each Plaintiff. [R. Vol. 7, pp. 10087-1009].

The jury returned a verdict finding DR. D'ANGELO negligent. [R. Vol. 7, pp. 1008-1009; R. Vol. 17, p. T1183]. Mr. Fitzmaurice was awarded $128,732.81 for past medical expenses and $200,000.00 for past nonecomonic damages. [R. Vol. 7, pp. 1008-1009; R. Vol. 17, p. T1183]. Ms. Fitzmaurice was awarded $50,000,00 for past

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[2] Plaintiffs conveniently failed to mention the stated authority for their Offer of Settlement when they quoted the "pertinent" portions in their Brief. [Initial Brief on the Merits, p. 1].

damages associated with her separate loss of consortium claim. [R. Vol. 7, pp. 1008-1009; R. Vol. 17, pp. T1183-T1184].

The trial court thereafter granted DR. D'ANGELO's Motion for Set-off, in part, and an Amended Final Judgment was entered awarding Mr. Fitzmaurice $260,752.34 and Mrs. Fitzmaurice $50,000.00. [R. Vol. 7, pp. 1101-1102, 1122-1123]. The Fitzmaurices were also awarded $6,042.05 in taxable costs. [R. Vol. 7, pp. 1122 - 1123].

DR. D'ANGELO timely appealed the Amended Final Judgment and Plaintiffs cross-appealed the trial court's set-off determination. [R. Vol. 7, pp. 1124-1130, 1131-1139, 1153-1154]. During the appeal, Plaintiffs filed a Motion for Appellate Attorney's Fees based on their June 23, 2000 Offer of Settlement. DR. D'ANGELO opposed the Motion on the ground that Plaintiffs' joint but undifferentiated Offer of Settlement was invalid. [A. 2]. In particular, DR. D'ANGELO argued Plaintiffs' joint offer failed to allocate the requested settlement amount between Plaintiffs' separate claims and thus violated the specificity requirements of Florida Rule of Civil Procedure 1.442(c)(3). [A. 2]. DR. D'ANGELO relied on the Second District's decision in Allstate Insurance Company v. Materiale, 787 So. 2d 173 (Fla. 2d DCA 2001), and submitted Plaintiffs' Motion should be denied. [A. 2].

The Second District ultimately rejected the issues DR. D'ANGELO raised on appeal; agreed with Plaintiffs' position on cross-appeal and reversed the trial court's set-off Order; certified the set-off issue as one of great public importance; denied Plaintiffs' Motion for Appellate Attorney's Fees; and certified conflict, as it did in Materiale, on the attorney's fees issue. D'Angelo v. Fitzmaurice, 832 So. 2d 135 (Fla. 2002). Plaintiffs have invoked this Court's certified conflict jurisdiction with regard to the denial of their Motion for Appellate Attorney's Fees.

QUESTION PRESENTED

DR. D'ANGELO prefers to more accurately rephrase the question presented as follows:

> WHETHER THE JOINT OFFER OF SETTLEMENT OF HUSBAND AND WIFE PLAINTIFFS MUST SPECIFY THE AMOUNTS REQUESTED TO SETTLE THE HUSBAND'S PERSONAL INJURY CLAIM AND THE WIFE'S SEPARATE CONSORTIUM CLAIM IN ORDER TO SATISFY THE SPECIFICITY REQUIREMENTS OF RULE 1.442(c)(3) OF THE FLORIDA RULES OF CIVIL PROCEDURE (2000)?

SUMMARY OF THE ARGUMENT

DR. D'ANGELO respectfully submits that this Court technically does not have subject-matter jurisdiction over this appeal. The two decisions which the Second District certified conflict with do not "expressly and directly" conflict with the Second District's decision denying Plaintiffs' Motion for Appellate Attorney's Fees based on their undifferentiated and thus invalid joint Offer of Settlement. The unnecessary statements by the Fifth District in Spruce Creek Development Company of Ocala v. Drew, 746 So. 2d 1109 (Fla. 5th DCA 1999), and the Third District in Flight Express, Inc. v. Robinson, 736 So. 2d 796 (Fla. 3d DCA 1999), concerning joint offerors' compliance with the specificity requirements of Rule 1.442(c)(3) were purely *dicta*. *Dicta* cannot be the foundation for this Court's conflict jurisdiction. *See* Ciongoli v. State, 337 So. 2d 780 (Fla. 1976).

Assuming *arguendo* that this Court does have conflict jurisdiction, DR. D'ANGELO submits that the Second District properly denied Plaintiffs' Motion for Appellate Attorney's Fees. Rule 1.442(c)(3) clearly and unambiguously requires that "[a] joint proposal shall state the amount and terms attributable to each party." The mandatory strict construction of Rule 1.442(c)(3) requires that joint offers of settlement by two or more plaintiffs apportion the amounts attributable to each

plaintiff. The joint Offer of Settlement by the Plaintiffs in the instant case did **not** differentiate between or specify the amounts requested to settle the husband's personal injury claim and his wife's separate loss of consortium claim, as required by Rule 1.442(c)(3). Plaintiffs' unapportioned joint Offer thus violated the Rule, was invalid, and did not entitle them to recover attorney's fees.

This Court's recent decision in Allstate Indemnity Company v. Hingson, 808 So. 2d 197 (Fla. 2002), confirms the invalidity of Plaintiffs' joint Offer and the propriety of the Second District's decision. The Hingson court held that a pre-1997 offer of judgment **to** the plaintiff spouses was required to state the amount and terms attributable to each plaintiff. This Court's reasoning in Hingson is even more compelling in the instant case because the current and applicable version of Rule 1.442 expressly requires apportionment.

Furthermore, DR. D'ANGELO submits that the converse of the holding in Hingson is also true. In other words, joint offers **by** plaintiff spouses must apportion the amounts attributable to each spouse. *See* Hilyer Sod, Inc. v. Willis Shaw Express, Inc., 817 So. 2d 1050 (Fla. 1st DCA), *review granted*, 2002 Fla. LEXIS 2402 (Fla. November 5, 2002); Allstate Insurance Co. v. Materiale, 787 So. 2d 173 (Fla. 2d DCA 2001).

Finally, the fact that the Plaintiff offerors are husband and wife does **not** exempt them from the specificity requirements of Rule 1.442(c)(3). This Court abandoned the "unity concept of marriage" over 40 years ago in Gates v. Foley, 247 So. 2d 40 (Fla. 1971). The individual personal injury claim of Mr. Fitzmaurice and the individual loss of consortium claim of Mrs. Fitzmaurice are, unequivocally, "separate and distinct." Busby v. Winn & Lovett Miami, Inc., 80 So. 2d 675, 676 (Fla. 1955). Plaintiffs were therefore required to specify the amount requested for each of their "separate and distinct" claims in order for their joint Offer of Settlement to be valid. Having failed to do so, the Second District correctly denied Plaintiffs' Motion for Appellate Attorney's Fees.

ARGUMENT

THE SECOND DISTRICT PROPERLY DENIED THE PLAINTIFF SPOUSES' MOTION FOR APPELLATE ATTORNEY'S FEES WHERE THEIR JOINT OFFER OF SETTLEMENT DID NOT DIFFERENTIATE BETWEEN OR SPECIFY THE AMOUNTS REQUESTED TO SETTLE THE HUSBAND'S PERSONAL INJURY CLAIM AND HIS WIFE'S SEPARATE LOSS OF CONSORTIUM CLAIM, AS REQUIRED BY FLORIDA RULE OF CIVIL PROCEDURE 1.442(c)(3) (2000).

A. No Express and Direct Conflict Jurisdiction.

Most respectfully, DR. D'ANGELO submits this Court does not have discretionary conflict jurisdiction to review the Second District's denial of the Plaintiffs' Motion for Appellate Attorney's Fees. Although the Second District certified conflict with Spruce Creek Development Co. of Ocala v. Drew, 746 So. 2d 1109 (Fla. 5th DCA 1999), and Flight Express, Inc. v. Robinson, 736 So. 2d 796 (Fla. 3d DCA 1999), DR. D'ANGELO submits those decisions do **not** "expressly and directly" conflict with the decision below.

In Spruce Creek, the Fifth District held that the attorney's fees issue was rendered moot by the court's decision to reverse the judgment. The Fifth District nevertheless gave an advisory opinion for "guidance" on remand, which was nothing

more than *dicta*, to the effect that the plaintiffs/spouses' offer of judgment was valid even though it did not apportion the requested amount between the spouses' separate claims. In Flight Express, the defendants' offer of settlement predated and was not governed by the 1996 Amendment to Rule 1.442. Nevertheless, the Third District suggested, in pure *dicta*, that the defendant offerors were not required to state the amount offered by each of them in order for their joint offer to be valid under the "amended rule." 736 So. 2d at 797 fn. 1. The offerors in Flight Express were not, moreover, spouses.

Express and direct conflict jurisdiction does not exist where, as here, the alleged conflicting language in other decisions is simply *dicta*. *See* Ciongoli v. State, 337 So. 2d 780 (Fla. 1976) (*dicta* not basis for direct conflict jurisdiction); *see also* State Farm Fire & Casualty Co. v. Higgins, 788 So. 2d 992, 1006 fn. 6 (Fla. 4th DCA 2001) (conflict not certified where language in other decision was *dicta*); Hillsborough County Aviation Authority v. Hillsborough County Governmental Employees Association, Inc., 482 So. 2d 505, 509 (Fla. 2d DCA 1986) (same), *quashed on other grounds*, 522 So. 2d 358 (Fla. 1988); State v. Speights, 417 So. 2d 1168 (Fla. 1st DCA 1982) (same), *quashed on other grounds*, 437 So. 2d 1387 (Fla. 1983). In fact, in order for this Court to have conflict jurisdiction, the allegedly conflicting decisions

"must contain a statement or citation effectively establishing a point of law upon which the decision rests." The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). The statements in Spruce Creek and Flight Express on the attorney's fees issue were simply *dicta* and the result in both cases did not rest on those unnecessary statements. The Second District's decision below accordingly does **not** "expressly and directly" conflict with Spruce Creek or Flight Express, and this Court does not, respectfully, have subject-matter jurisdiction to review the Second District's decision on the attorney's fees issue.

B. The Plaintiffs' Joint and Undifferentiated Offer of Settlement Violates Rule 1.442(c)(3) and Is Invalid.[3]

Rule 1.442(c)(3) clearly and unambiguously requires that "[a] joint proposal shall state the amount and terms attributable to each party." Rule 1.442(c)(3), Fla. R. Civ. P. (2000) (emphasis added).[4] Contrary to the Rule, Plaintiffs' joint Offer of Settlement did **not** set forth the amount and terms attributable to each Plaintiff. [R. Vol. 7, pp. 1051-1052; A. 1].

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[3] DR. D'ANGELO is addressing the substantive merits of the attorney's fees issue, out of an abundance of caution, since this Court may determine it does have subject-matter jurisdiction.

[4] This Rule was added in 1996 and took effect on January 1, 1997. *See* In Re Amendments to Florida Rules of Civil Procedure, 682 So. 2d 105 (Fla. 1996).

Court rules are governed by principles of statutory construction. *See* Rowe v. State, 394 So. 2d 1059 (Fla. 1st DCA 1981). The use of the word "shall," as used in Rule 1.442(c)(3), requires a mandatory connotation. *See* Neal v. Bryant, 149 So. 2d 529 (Fla. 1963). Moreover, Rule 1.442 and Section 768.79 of the Florida Statutes are in derogation of the common law and penal in nature, and should therefore be strictly construed. *See* Hilyer Sod, Inc. v. Willis Shaw Express, Inc., 817 So. 2d 1050, 1054 (Fla. 1st DCA) *(and cases cited therein), review granted,* 2002 Fla. LEXIS 2402 (Fla. November 5, 2002); RLS Business Ventures, Inc. v. Second Chance Wholesale, Inc., 784 So. 2d 1194, 1197 (Fla. 2d DCA), *review denied*, 790 So. 2d 1107 (Fla. 2001); *see also* TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 614 (Fla. 1995) (Justice Wells, concurring in part, dissenting in part). Since compliance with Rule 1.442(c)(3) is mandatory and it is undisputed that Plaintiffs' unapportioned joint Offer of Settlement violates the Rule, the Second District correctly denied Plaintiffs' Motion for Appellate Attorney's Fees.[5]

This Court's recent decision in Allstate Indemnity Co. v. Hingson, 808 So. 2d 197 (Fla. 2002), virtually ignored by the Plaintiffs in their Initial Brief on the Merits,

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[5] The standard of review for this issue is *de novo*. *See* Jamieson v. Kurland, 819 So. 2d 267, 268 (Fla. 2d DCA 2002).

confirms the invalidity of Plaintiffs' joint offer and the propriety of the Second District's decision. The defendant offeror in Hingson served a pre-1997 offer of judgment to the plaintiffs, husband and wife. The offer did not differentiate between the amount offered for the injured husband and the consortium claimant wife. After the jury returned a defense verdict, the defendant moved for attorney's fees under Section 768.79. The trial court denied the defendant's motion for attorney's fees, citing the policy considerations regarding undifferentiated offers of judgment. The Second District affirmed and certified conflict. Notwithstanding the fact that the former version Rule 1.442 (which did not contain subparagraph (c)(3)) applied, this Court held that the defendant's offer of judgment was required to state the amount and terms attributable to each plaintiff and approved the decisions below. In so holding, this Court stated:

> We agree with the district court in *C & S [Chemicals, Inc. v. McDougall,* 754 So. 2d 795 (Fla. 2d DCA 2000),] that '[t]o further the statute's goal, each party who receives 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). (footnote omitted). 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, 808 So. 2d at 199. This Court's reasoning in Hingson is even more compelling in the instant case because the current and applicable version of Rule 1.442 expressly requires apportionment in joint offers.

Moreover, DR. D'ANGELO submits that the converse of the holding in Hingson is also true. Specifically, as the Second District stated in Allstate Insurance Co. v. Materiale, 787 So. 2d 173 (Fla. 2d DCA 2001), the decision relied upon below by both DR. D'ANGELO and the Second District (but noticeably missing from the Fitzmaurices' Brief):

> When two offerors make a proposal for settlement to one offeree, the offeree is entitled to know the amount and terms of the offer that are attributable to each offeror in order to evaluate the offer as it pertains to that party. This may be particularly important in claims alleging loss of consortium, where defendants may choose to settle the claim for a minimal amount and go to trial on the primary claim.
>
> ....
>
> ... An offer that requires an offeree to make an all or nothing determination regarding an offer made by two parties, without permitting it to evaluate each claim separately, does

> affect the rights of that party [and cannot be considered harmless].

Materiale, 787 So. 2d at 175 (emphasis added).

The comments of Judge Casanueva in his concurring opinion in Materiale are particularly instructive and persuasive.

> The main purpose of section 768.79, the offer of judgment statute, is to encourage resolution of disputed claims without the unnecessary consumption of scarce judicial resources. The legislature encourages such early resolution by imposing the penalty of attorney's fees against the party that failed to accept a reasonable offer of judgment, ultimately measured by the contrast between the rejected offer and the final verdict. In those instances, as in this case, for example, where a consortium claim is joined with a claim for personal injuries, the former claim may be more amenable to settlement than the latter because it may involve less money. If one of the claims is resolved, the defendant, as well as the plaintiffs, will save future expenditure of attorney's fees and costs related to this claim.
>
> I believe the rationale expressed in *United Services Automobile Ass'n. v. Behar*, 752 So.2d 663 (Fla. 2d DCA 2000), is equally applicable here. If two plaintiffs, the injured spouse and the spouse with the derivative consortium claim, make a joint but undifferentiated offer of judgment, the defendant may refuse based solely on an evaluation that the amount offered is in excess of what that defendant believes is the value of the primary claim. Without the potential to differentiate and settle the two claims independently of each other, the defendant will be exposed to attorney's fees liability under the statute on both

> claims, even though it might have accepted the offer as to one claim had the offer been apportioned. Additionally, the defendant faces the imposition of a multiplier as to both claims. Thus, requiring apportionment as to multiple offerees, as in *Behar*, as well as multiple offerors, as in the instant case, serves to further the important policy of the statute. In fact, from a real world perspective, the impact of this case and *Behar* is to permit almost all consortium claims to have a settlement value.

Materiale, 787 So. 2d at 176-177 (Judge Casanueva, concurring) (emphasis added).[6]

The First District adopted the reasoning of the Materiale court in Hilyer Sod, Inc. v. Willis Shaw Express, Inc., 817 So. 2d 1050 (Fla. 1st DCA), *review granted*, 2002 Fla. LEXIS 2402 (Fla. November 5, 2002), a case currently under conflict review by this Court. In Hilyer Sod, the two non-spouse plaintiffs with separate and distinct property damage claims served a joint proposal for settlement to the defendant. The proposal did not, however, specify the amount and terms each plaintiff was demanding. The trial court eventually granted the plaintiffs' motion for attorney's fees because the ultimate total of the recoveries was more than 25% greater than the proposed amount. The defendant appealed and argued that the joint proposal was invalid because it did not apportion damages between the plaintiffs. The First District

[6] The Second District in Behar held, like this Court in Hingson, that the defendant's lump sum offer to the plaintiff spouses was invalid because it did not specify the amount offered to each spouse.

agreed with the defendant and reversed, reasoning as follows:

> We agree with the Second District's statement that a valid offer should not require the defendant to make an all-or-nothing determination without permitting it to evaluate each claim separately, particularly where the damage claims are related only by the defendant's negligent act.
>
> The all-or-nothing joint proposal is contrary to the statutory goal of encouraging resolution of disputed claims without the unnecessary consumption of scarce judicial resources. *See Materiale, 787 So. 2d at 176.* (Casanueva, J., concurring). The view offered by the appellees would require a defendant, who may be perfectly willing to settle one claim, go to trial on the entire claim and then face the liability for attorney's fees....
>
> ....
>
> We hold that an offer of settlement made jointly by multiple plaintiffs must apportion amounts 'attributable to each party.' Fla. R. Civ. P. 1.442(c)(3).

Hilyer Sod, 817 So. 2d at 1053-1054 (emphasis added).

If this Court upholds the First District's interpretation and application of Rule 1.442(c)(3) in Hilyer Sod, the Second District's denial of Plaintiffs' Motion for Appellate Attorney's Fees in this case should also be affirmed. Plaintiffs incorrectly contend that approval of Hilyer Sod does not require approval of the Second District's decision below. Plaintiffs' attempt to distinguish Hilyer Sod is a distinction

without a difference. Moreover, Plaintiffs' distinction is premised on a legal concept of marriage which this Court rejected several decades ago as being "medieval."

Plaintiffs argue they are exempt from the specificity requirements of Rule 1.442(c)(3) because of the "unity of the marriage relationship" and because their recovery "would therefore likely end up in a joint banking or retirement account." [Initial Brief on the Merits, p. 8]. The problem with Plaintiffs' argument is that this Court abandoned the "unity concept of marriage" over 40 years ago in Gates v. Foley, 247 So. 2d 40 (Fla. 1971).[7]

This Court in Gates recognized that the legal and societal status changes of women in our society required the Court to change the law to permit a wife to assert a cause of action for loss of consortium. 247 So. 2d at 44-45. Sixteen years earlier, this Court had already held that a husband has a loss of consortium claim arising from personal injury to his wife and that the husband's consortium claim and the wife's personal injury claim "are separate and distinct." Busby v. Winn & Lovett Miami, Inc., 80 So. 2d 675, 676 (Fla. 1955). Thus, the Gates court stated "[n]o reasonable

[7] The fact that the law may not have recognized a wife's "separate and distinct" consortium claim when the Fitzmaurices were married in the 1950's is of no consequence. [Vol. 15, p. 717]. This case is governed by the substantive law in effect when Plaintiffs' personal injury and consortium causes of action arose.

distinctions may be made between the wife's claim for negligent impairment of consortium and a similar claim by her husband." 247 So. 2d at 44. Moreover, the Gates court reasoned:

> So it is that the unity concept of marriage has in a large part given way to the partner concept whereby a married woman stands as an equal to her husband in the eyes of the law. By giving the wife a separate equal existence, the law created a new interest in the wife which should not be left unprotected by the courts. Medieval concepts which have no justification in our present society should be rejected.

Gates, 247 So. 2d at 44 (emphasis added).

Accordingly, the individual claims of Mr. and Mrs. Fitzmaurice are unquestionably "separate and distinct." Busby, 80 So. 2d at 676.[8] The fact that Plaintiffs are married obviously entitles Mrs. Fitzmaurice to assert a separate consortium claim, but does **not** make their individual claims indivisible! The "separate and distinct" nature of the Fitzmaurices' claims is, moreover, corroborated by the fact they asserted their "separate and distinct" causes of action in **separate** counts in their Complaint; the jury was instructed on the **different** damages recoverable under **each**

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[8] *See also* Metropolitan Dade County v. Reyes, 688 So. 2d 311 (Fla. 1996) (spouse's consortium claim requires "a separate or distinct" notice pursuant to section 768.28(6)(a)).

spouse's **own** claim; and the verdict form **separated** the damages, if any, to be awarded to **each** spouse. [R. Vol. 1, pp. 1-5; R. Vol. 7, pp. 1008-1009; R. Vol. 17, pp. T1176, T1183-T1184]. The Fitzmaurices' unilateral ability to share or commingle their individual recoveries does not, furthermore, transform the "separate and distinct" nature of their claims to one indivisible claim. To hold otherwise would mean the law in Florida is regressing to previously rejected, outdated and unjustified "[m]edieval concepts."

The reason for Plaintiffs' aversion to the strict construction and application of Rule 1.442(c)(3) is obvious: they did **not** comply with the specificity requirements of the Rule but nevertheless want to reap the economic benefits of their Offer of Settlement. However, as previously indicated, it is axiomatic that rules and statutes which are in derogation of the common law because they provide for the recovery of attorney's fees and are penal in nature, like Rule 1.442 and Section 768.79, must be strictly construed. *See* Hilyer Sod, 817 So. 2d at 1054; RLS Business Ventures, 784 So. 2d at 1197; *see also* TGI Friday's, 663 So. 2d at 614. 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).

Strict construction of Rule 1.442(c)(3) necessarily requires all joint offers, whether by and/or to two or more parties, to specify the amount being offered by each offeror to each offeree. This interpretation is perfectly consistent with the clear and unambiguous language of Rule 1.442(c)(3) when read in its entirety. Moreover, this literal and strict interpretation makes sense under virtually all circumstances, notwithstanding Plaintiffs' contention to the contrary.[9] [10] There simply is no need, as

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[9] DR. D'ANGELO acknowledges that apportionment is not necessary where plaintiffs have a "joint interest" in property or in the vicarious liability setting. *See* DeWitt v. Maruhachi Ceramics, 770 So. 2d 709 (Fla. 5th DCA 2000); Danner Construction Company, Inc. v. Reynolds Metals Co., 760 So. 2d 199 (Fla. 2d DCA 2000); Strahan v. Gauldin, 756 So. 2d 158 (Fla. 5th DCA 2000). The reason why specificity is not deemed necessary in those two circumstances is clear - one deals with unified plaintiffs with **one claim** for the **same damages** and the other deals with the active negligence of one and only one defendant. There simply is no legal, logical or reasonable way to apportion an offer between unified plaintiffs who have the **same** interest in the property at issue or between the active and vicariously liable defendants. Neither circumstance is, notably, at issue in the instant case.

[10] Kuvin v. Keller Ladders, Inc., 790 So. 2d 611 (Fla. 3d DCA 2001), cited by Plaintiffs, is factually distinguishable. The defendant's technically too early offer in Kuvin did not affect the plaintiff's rights. However, the Fitzmaurices' unapportioned joint Offer of Settlement here affected the rights of DR. D'ANGELO because he was prevented from evaluating each of the Plaintiffs' claims separately. *See* Materiale, 787 So. 2d at 175. Furthermore, the court in Thompson v. Hodson, 825 So. 2d 941 (Fla. 1st DCA), *review denied*, 2002 Fla. LEXIS 2745 (Fla. December 30, 2002), was governed by the fact that section 768.20 of the Wrongful Death Act only permits a decedent's personal representative to file a wrongful death lawsuit and the court's holding is perfectly consistent with a strict interpretation of Rule 1.442(c)(3).

Plaintiffs suggest, to overhaul the Rule.

Plaintiffs' reliance on the Committee Notes to the 1996 Amendment to Rule 1.442 in order to limit the applicability of the Rule's specificity requirements is misplaced. Committee notes to rules of civil procedure are not binding on the courts in matters of interpretation. *See* State ex rel. Evans v. Chappell, 308 So. 2d 1, 3 (Fla. 1975). Moreover, committee notes are not even persuasive if disavowed by this Court. *See* International Village Association, Inc. v. Schaaffee, 786 So. 2d 656, 658 (Fla. 4th DCA 2001). In adopting the 1996 Amendments to Rule 1.442, this Court stated "Committee notes are included for explanation and guidance only and are not adopted as an official part of the rules." In Re Amendments to Florida Rules of Civil Procedure, 682 So. 2d 105, 107 (Fla. 1996). Since Rule 1.442(c)(3) is clear and unambiguous in requiring that a joint proposal "state the amount and terms attributable to each party", and not simply to "each defendant", the Committee Notes have no relevance.

DR. D'ANGELO's ability to extend a proposal for settlement to Plaintiffs which stated separate amounts for each Plaintiff did not, contrary to Plaintiffs' suggestion, obviate the need for Plaintiffs to comply with the specificity requirements of Rule 1.442(c)(3). The fact that DR. D'ANGELO could have accepted Plaintiffs'

invalid Offer of Settlement does not, moreover, correct Plaintiffs' failure to abide by the Rule. The Rule applies to all joint offerors, whether plaintiffs or defendants. In the case of a joint offer/proposal by two or more plaintiffs, Rule 1.442(c)(3) clearly and unambiguously requires that the offer "state the amount and terms attributable to each [plaintiff]." The Rule simply does **not** set forth any exceptions!

Plaintiffs' "master of the terms of their own offer" argument has no place where, as here, they were seeking to settle their lawsuit via a Rule and Statute which enabled them to recover attorney's fees as a sanction under specifically prescribed circumstances. We are **not** dealing with a contract-related attorney's fees issue. If the Fitzmaurices, or plaintiffs in general, want the obvious benefits of Rule 1.442 and Section 768.79, it is incumbent upon them to satisfy all prerequisites of the Rule and Statute. By the same token, nothing within the four corners of the Rule or Statute precludes the Fitzmaurices, or plaintiffs in general, from being the "master of the terms of their own offer" so long as the offer is not made pursuant to Rule 1.442 and Section 768.79. Having chosen Rule 1.442 and Section 768.79 as the vehicle for their Offer [A. 1], the Fitzmaurices had to follow that vehicle's operating procedures and requirements.

The Fitzmaurices' proposed subsequent problem with calculating or

apportioning attorney's fees if plaintiffs are required to apportion their joint offers and less than all differentiated amounts trigger entitlement to fees is a problem for the defendant offeree **not** the plaintiff offerors. If fees cannot be apportioned between the plaintiffs' claims, the defendant is arguably responsible for all fees. This is a risk the defendant offeree must weigh when considering the differentiated offers. And, that potential problem is why defendants are, in fact, more inclined to accept a consortium spouse's typically smaller settlement offer. This, in turn, achieves the purpose of the Rule; namely, encouraging settlement of a disputed claim and saving the future expenditure of fees and costs associated with litigating that claim. Undifferentiated joint offers do not, on the other hand, achieve that goal.

Furthermore, Plaintiffs' attempt to circumvent the consequences of their noncompliance with Rule 1.442(c)(3) by proposing interpretations which are contrary to the clear and unambiguous language of the Rule must fail. "The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions." Lucas v. Calhoun, 813 So. 2d 971, 973 (Fla. 2d DCA 2002) (emphasis added). If this Court had intended Rule 1.442(c)(3) to be interpreted as Plaintiffs suggest, then this Court would have written the Rule as Plaintiffs plead this Court should **now** rewrite it. In other words, proof

that Plaintiffs' interpretations were not intended lies in the fact that Rule 1.442(c)(3) does **not** read as Plaintiffs propose it should be amended. Plaintiffs' arguments essentially put the cart before the horse in an effort to validate their undisputed failure to comply with Rule 1.442(c)(3). Finally, this Court should not allow Plaintiffs to get away with ignoring the specificity requirements of Rule 1.442(c)(3) by arguing that the Rule does not mean what it says, but instead means what it does **not** say.

CONCLUSION

Based upon the foregoing arguments, the Respondents/Defendants, PHILIP C. D'ANGELO, M.D., and PHILIP C. D'ANGELO, M.D., P.A., respectfully submit that this Court should affirm the Second District's ruling in D'Angelo v. Fitzmaurice, 832 So. 2d 135 (Fla. 2d DCA 2002), denying the Petitioners/Plaintiffs' Motion for Appellate Attorney's Fees because their joint Offer of Settlement did not satisfy the specificity requirements of Rule 1.442(c)(3) and was therefore invalid.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPEFACE COMPLIANCE

THE UNDERSIGNED COUNSEL certifies that, in accordance with Florida Rule of Appellate Procedure 9.210(a)(2), the foregoing Brief contains 14 point Times New Roman typeface.

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IN THE SUPREME COURT
STATE OF FLORIDA

Case No.: SC03-97

JOHN J. FITZMAURICE and
CAROLE M. FITZMAURICE,

Petitioners,

vs.

PHILIP C. D'ANGELO, M.D., and
PHILIP C. D'ANGLEO, M.D., P.A.

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

APPENDIX TO RESPONDENTS' AMENDED ANSWER BRIEF ON THE MERITS

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