IN THE SUPREME COURT OF THE
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.
_____/

DISCRETIONARY REVIEW OF A CERTIFIED CONFLICT
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

PETITIONERS' BRIEF ON THE MERITS

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AUTHORITIES

I.
STATEMENT OF THE CASE AND FACTS

The petitioners, John J. Fitzmaurice and Carole M. Fitzmaurice, were plaintiffs below in a medical malpractice action against the respondents, Philip C. D'Angelo, M.D. and Philip C. D'Angelo, M.D., P.A. (hereinafter simply Dr. D'Angelo) (R. 1). Mr. Fitzmaurice sought damages for injuries caused when, during a routine appendectomy, Dr. D'Angelo left a laparotomy pad in his abdomen which later eroded through his cecum, migrated downstream to his colon, and ultimately caused a complete intestinal blockage requiring several subsequent surgeries (T. 386-403). Mrs. Fitzmaurice joined in the action, seeking damages for loss of consortium.

During the course of the proceedings, the Fitzmaurices served a "Offer of Settlement" upon Dr. D'Angelo. The portions of the proposal pertinent to the issue presented for decision here read as follows:

> C. CLAIMS TO BE RESOLVED: All claims the Plaintiffs, JOHN J. FITZMAURICE and CAROLE M. FITZMAURICE, have brought against Defendant, PHILIP D'ANGELO, M.D., as set forth in the above captioned complaint, including all claims against PHILIP D'AN-GELO, M.D., P.A.
>
> D. AMOUNT OF THE PROPOSAL: $250,000.00. This claim is inclusive of all attorney's fees and costs and is made to settle all claims of Plaintiffs, JOHN J. FITZMAURICE and CAROLE M. FITZMAURICE, against Defendant, PHILIP D'ANGELO, M.D., and all claims against PHILIP D'ANGELO, M.D., P.A.
>
> E. CONDITIONS: Upon acceptance of the offer of settlement, Plaintiffs will enter a dismissal with prejudice against Defendant, PHILIP D'ANGELO, M.D. and PHILIP D' ANGELO, M.D., P.A., with regard to any and all claims brought by the Plaintiffs against PHILIP D'ANGELO, M.D. and PHILIP D'ANGELO, M.D., P.A. This demand for settlement is not to be considered

> a demand to be aggregated with any other demand that may be made in conjunction with this demand.

(R. 1051). The offer was not accepted.

The case was thereafter tried to a jury and Dr. D'Angelo was found liable (R. 1008-09). The jury awarded Mr. Fitzmaurice his stipulated past medical expenses of $128,732.81; $200,000.00 for six elements of his past intangible damages; and nothing in future damages (*id.*). The jury also awarded Mrs. Fitzmaurice $50,000.00 for the loss of her husband's services, comfort, society, and attention in the past, and nothing in future damages (*id.*). Judgment was initially entered on the verdict in the aggregate amount of $378,732.81 (R. 1008). And because the judgment was in excess of 125% of the proposal for settlement, the Fitzmaurices moved the trial court for an award of attorney's fees pursuant to §768.79, Fla. Stat. (R. 1049-52).

The trial court thereafter granted Dr. D'Angelo's motion for a setoff in part, and entered an amended final judgment in the reduced amount of $316,794.00 (R. 1101, 1122). This judgment included taxable costs in the amount of $6,042.05 (R. 1122). In order to obtain an award of attorney's fees, the Fitzmaurices were required to obtain a net judgment of 125% of $250,000.00, or at least $312,500.00. If the award of taxable costs were considered, the plaintiffs were entitled to an award of attorney's fees. If the award of taxable costs were not considered, the plaintiffs were not entitled to an award of attorney's fees. Unfortunately, the district courts were divided on the question at the time; the question was pending review in this Court; and because a resolution of the conflict was expected in the near future, ruling on the motion for

attorney's fees was withheld pending this Court's decision.

Dr. D'Angelo appealed the final judgment, contending (among numerous other things) that he was entitled to a substantially larger setoff than he had received. The Fitzmaurices cross-appealed, contending that Dr. D'Angelo was not entitled to any setoff from the verdict. During the pendency of the appeal, this Court resolved the inter-district conflict noted above in *White v. Steak & Ale of Florida, Inc.*, 816 So.2d 546 (Fla. 2002), holding that pre-offer taxable costs could be included in determining whether a prevailing party could recover attorney's fees under §768.79. Because the taxable costs included in the Fitzmaurices' reduced judgment did not distinguish between pre-offer costs and post-offer costs, this decision did not really resolve the conundrum inherent in the motion for attorney's fees that remained pending in the trial court.

In the decision sought to be reviewed here, the district court rejected Dr. D'Angelo's numerous issues on appeal; ruled that the trial court had erred in granting Dr. D'Angelo a setoff from the verdict; and remanded the case for entry of a judgment in the full amount of the verdict and the previously-taxed costs. *D'Angelo v. Fitzmaurice*, 832 So.2d 135 (Fla. 2d DCA 2002). Because the judgment to be entered on remand will exceed $312,500.00 by a substantial amount, the conflict addressed in *White v. Steak & Ale, supra*, is no longer an issue in the case (unless it is ultimately determined that the amended final judgment entered by the trial court was the correct result, which seems highly unlikely to us). The district court also certified that, with respect to the setoff issue, its decision passed upon a question of great public

importance. Dr. D'Angelo invoked the certified question jurisdiction of this Court to review the district court's resolution of that issue, and that case is pending here as Case No. SC03-33.

The issue before the Court in this separate proceeding arises from the motion for appellate attorney's fees that the Fitzmaurices filed in the district court. Dr. D'Angelo opposed the motion, contending that the proposal for settlement was invalid because it contained a joint offer, rather than stating separate offers for the two plaintiffs. The district court resolved the motion as follows:

> We deny the motion for appellate attorney's fees filed by the Fitzmaurices. *See Allstate Ins. Co. v. Materiale*, 787 So.2d 173 (Fla. 2d DCA 2001) (reversing award of attorney's fees based on offer of settlement where offer was invalid because it failed to state amount and terms due to each offeror). As we did in *Materiale*, we certify 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).

832 So.2d at 137-38. The Fitzmaurices invoked the certified conflict jurisdiction of this Court to review the district court's resolution of that issue.[1/]

II.
ISSUE PRESENTED FOR REVIEW

IS A PROPOSAL FOR SETTLEMENT MADE PUR-SUANT

[1/] An agreed motion to consolidate the two proceedings was filed, with the request that this second proceeding be treated as in the nature of a cross-appeal for briefing purposes. Unfortunately, at the time it became necessary to draft the petitioners' brief in this case, the Court had not ruled on the motion to consolidate. We have therefore complied with the separate briefing schedule initially ordered in this case.

TO §768.79, FLA. STAT., THAT OFFERS TO SETTLE THE PRINCIPAL CLAIM OF A HUSBAND AND THE DERIVATIVE LOSS OF CONSORTIUM CLAIM OF A WIFE FOR A SINGLE, UNDIFFER-ENTIATED AMOUNT VALID OR INVALID?

III.
SUMMARY OF THE ARGUMENT

The district court gave a literal reading to Rule 1.442(c)(3), Fla. R. Civ. P. Other district courts, for good reason, have not. The problem with a literal reading and a strict application of the rule is that it makes sense in some circumstances, but makes no sense whatsoever in other circumstances -- which is why the district courts have reached conflicting results in nearly every permutation that presents itself under the rule. The rule is ambiguous and badly in need of an overhaul, and because it is a rule, it is within this Court's power to fix it. After examining the circumstances in which a literal reading of the rule makes sense and the circumstances in which a literal reading of the rule makes no sense whatsoever, we will propose a solution to the multiple problems created by the present version of the rule. In essence, we will propose that (with one necessary exception) parties making proposals for settlement should be the master of the terms of their own offer, and should be permitted to make any type of offer -- separate or joint, undifferentiated or apportioned -- as they wish.

The only circumstance in which the parties should be deprived of the opportunity to be the master of the terms of their own offer is the case in which there are multiple defendants who would not be jointly and severally liable to the plaintiff (or plaintiffs) for the whole, and which might therefore result in a finding of liability against some and

the exoneration of others, or different net judgments against each. In that circumstance, separate proposals for settlement made by a plaintiff (or plaintiffs) must be directed to individual defendants. And conversely, in that type of case, individual defendants must make separate proposals of settlement to a plaintiff (or plaintiffs). That, of course, is the type of case for which Rule 1.442(c)(3) was initially designed, according to the Committee Notes, and that is the type of case to which the requirement for proposing separate amounts to separate parties should be confined. And if the Court adopts our proposed solution to the numerous conundrums presented by the present wording of the rule, the portion of the district court's decision that denied the Fitzmaurices' motion for appellate attorney's fees should be quashed.

IV.
ARGUMENT

THE DISTRICT COURT ERRED IN DECLARING INVALID A PROPOSAL FOR SETTLEMENT MADE PURSUANT TO §768.79, FLA. STAT., THAT OF-FERED TO SETTLE THE PRINCIPAL CLAIM OF A HUSBAND AND THE DERIVATIVE LOSS OF CON-SORTIUM CLAIM OF A WIFE FOR A SINGLE, UNDIFFERENTI-ATED AMOUNT.

The conflict certified to the Court in this case was previously certified to the Court by the First District in *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*, 817 So.2d 1050 (Fla. 1st DCA 2002), and the issue is presently before the Court (on similar, but not identical, facts) in *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, Case No. SC02-

1521. Because that case was submitted to the Court for disposition in early November, 2002, it is likely to control the result in this case. And because the issue may already have been resolved in that case, we will spare the Court an elaborate reargument of the issue in this case. Nevertheless, because it is possible that the two cases will be considered together (as we have requested in a separate "Notice of Related Case"), we have a few brief observations to make.

In *Hilyer Sod*, the First District declared invalid a joint proposal for settlement that did not apportion the damages between two plaintiffs claiming separate items of property loss. Certainly, if the Court quashes the First District's decision, it must quash the Second District's decision in this case as well. That much is clear. But it is not so clear that, if the Court approves the First District's decision, it must also approve the Second District's decision in this case. There is a distinction between the two cases that may make a difference.

Hilyer Sod involved an accident between two tractor-trailers. One plaintiff, the owner of the tractor-trailer, was seeking to recover for damages sustained by the tractor-trailer and its cargo, towing costs, loss of use, and prejudgment interest, totaling approximately $129,000.00. The other plaintiff (apparently the driver of the tractor-trailer) was seeking to recover damages for the loss of personal property he had stored in the tractor, with a value of approximately $1,800.00. There was an obvious misjoinder of the two claims. The owner's claim belonged in circuit court; the driver's claim belonged in county court. The misjoinder appears not to have been raised by the defendant, however, so we note it only in passing. What is important to

note is that the claims of the two plaintiffs involved separate and distinct property losses "related only by the happenstance that both losses were caused by the same tortious act," and recovery upon the two claims would most certainly end up in two separate pockets. 817 So.2d at 1053.

In contrast, the plaintiffs in the instant case were husband and wife and the wife's loss of consortium claim was purely derivative of the husband's claim, arising only by virtue of the unity of the marriage relationship, and a recovery upon the two claims would therefore likely end up in a joint banking or retirement account. That distinction made a difference to the Fifth District in *Spruce Creek Dev. Co. of Ocala, Inc. v. Drew*, 746 So.2d 1109, 1115 (Fla. 5th DCA 1999), where it held a joint proposal for settlement by a husband and wife valid, on the ground that "[t]he lack of apportionment between claimants is a matter of indifference to the defendant. If he accepts, he is entitled to be released by both claimants." *Accord Safelite Glass Corp. v. Samuel*, 771 So.2d 44 (Fla. 4th DCA 2000), *review dismissed*, 786 So.2d 1188 (Fla. 2001).

That distinction would probably not have made a difference to the panel that decided *Hilyer Sod*, however, because it based its conclusion upon a strict construction and a literal reading of Rule 1.442(c)(3), Fla. R. Civ. P.:

> A proposal may be made by or to any party or parties and by or two any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

The problem with a literal reading and a strict application of this rule (quite apart from the fact that the rule is a model of ambiguity) is that it makes sense in some circum-

stances, but makes no sense whatsoever in other circumstances.

A literal reading and a strict application of the rule certainly makes sense when a plaintiff makes an offer of settlement to multiple defendants who cannot be found jointly and severally liable for the whole. Indeed, according to the Committee Notes to the 1996 Amendment to the Rule, that is the very circumstance for which it was designed: "The provision which requires that a joint proposal state the amount and terms attributable to each party is in order to conform with *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993)." And the rule has been sensibly enforced in that circumstance. *See Ford Motor Co. v. Meyers*, 771 So.2d 1202 (Fla. 4th DCA 2000), *review denied*, 800 So.2d 615 (Fla. 2001); *McFarland & Son, Inc. v. Basel*, 727 So.2d 266 (Fla. 4th DCA), *review denied*, 743 So.2d 508 (Fla. 1999). *See also Danner Constn. Co., Inc. v. Reynolds Metals Co.*, 760 So.2d 199 (Fla. 2d DCA 2000); *Flight Express, Inc. v. Robinson*, 736 So.2d 796 (Fla. 3d DCA 1999).

A literal reading and strict application of the rule makes no sense whatsoever, however, where there are two defendants, one of whom is vicariously liable for the tort of the other -- like employer/employee, owner/driver, principal/agent, or the like -- and both of whom will be jointly and severally liable for the whole. In the instant case, for example, Dr. D'Angelo's P.A. is jointly and severally liable for the whole with Dr. D'Angelo -- and just as it would make no sense to require Dr. D'Angelo and his P.A. to make separate proposals for settlement apportioned between them, it would make no sense to require the plaintiffs to propose to settle with each for half the total amount they were willing to take from both. And when the latter circumstance has presented

itself, one district court has sensibly refused to read the rule literally and apply it strictly. *See Strahan v. Gauldin*, 756 So.2d 158 (Fla. 5th DCA 2000). In a similar vein, the Fifth District declined to read the rule literally where a defendant made an unapportioned proposal to settle with two plaintiffs who "share[d] a joint interest" in the outcome of the case. *Dewitt v. Maruhachi Ceramics of America, Inc.*, 770 So.2d 709, 713 (Fla. 5th DCA 2000).[2/]

Given the unity of the marriage relationship between Mr. and Mrs. Fitzmaurice, they certainly shared a "joint interest" in the outcome of the case, and would ultimately divide the proceeds of their lawsuit between themselves in any manner they wished -- so why should they be required to make separate proposals for settlement to Dr. D'Angelo at the outset? How the proceeds of an unapportioned settlement is to be divided between two or more plaintiffs is, after all, truly a matter of indifference to a defendant. All that Dr. D'Angelo had to do was accept the Fitzmaurices' unapportioned proposal, and he would have been done with the litigation (at considerably less cost to him or his insurance carrier than what he presently owes). And if he preferred to deal separately with the two plaintiffs, all he had to do was send

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[2/] In addition, *see Kuvin v. Keller Ladders, Inc.*, 797 So.2d 611 (Fla. 3d DCA 2001), in which the district court declined to read Rule 1.442 literally where it would serve no useful purpose to do so. For an interesting wrinkle on the apportionment problem, *see Thompson v. Hodson*, 825 So.2d 941 (Fla. 1st DCA 2002) (proposal for settlement in wrongful death action, made by defendant to personal representative of estate, was valid notwithstanding that proceeds had to be apportioned between the estate and multiple survivors of the decedent), *review denied*, ___ So.2d ____ (Fla. Dec. 30, 2002).

them a proposal for settlement that stated separate amounts for each. To hold otherwise would appear to subvert the salutary purpose of §768.79; to deprive parties of the flexibility they often need to structure a settlement of their claims; and to reward technical nitpicking at the conclusion of the litigation.

There is one other significant problem in the Second District's resolution of the issue that the district courts appear not to have considered. Assume that Mrs. Fitzmaurice had proposed to settle her loss of consortium claim for $10,000.00 and Mr. Fitzmaurice had proposed to settle his claim for $240,000.00. Assume as well that Dr. D'Angelo had accepted neither offer. Assume further that, at the trial of the case, Mrs. Fitzmaurice recovered $25,000.00, but Mr. Fitzmaurice recovered only $250,000.00. In that circumstance, Mrs. Fitzmaurice would be entitled to an award of her attorney's fees, but Mr. Fitzmaurice would not. Of course, both were represented by a single law firm and the time and effort devoted to prosecution of both claims was, like the unity of the Fitzmaurices' marriage relationship, simply indivisible into its separate parts. How would a court determine what portion of the Fitzmaurices' total attorney's fees were incurred on behalf of each? That is a practical problem that has no ready solution, we submit. But it can easily be avoided by holding that a joint proposal of settlement made by a husband and wife in a typical case involving a loss of consortium claim is a valid proposal under §768.79.

In any event, it should be apparent from the conflicts in the decisional law and the inconsistent rationales upon which their results are based that Rule 1.442(c)(3) is badly in need of an overhaul. The rule was promulgated by this Court; it can therefore be

overhauled by this Court; and there is nothing in §768.79 that prevents a more carefully reasoned approach to the multiple problems caused by the present language of the rule. *See Gulliver Academy v. Bodek*, 694 So.2d 675 (Fla. 1997). We propose the following interpretation of the present language of the rule as a solution (and suggest that the rule ultimately be rewritten in conformity therewith):

1. If two or more plaintiffs wish to make a joint, unapportioned proposal for settlement to a defendant (or to two or more defendants who would be jointly and severally liable for the whole), they should be permitted to do so, and their entitlement to attorney's fees should be determined by aggregating the net judgments they ultimately receive.

2. If two or more plaintiffs wish to make a proposal for settlement to a defendant (or to two or more defendants who would be jointly and severally liable for the whole) stating separate amounts for each, they should be permitted to do so, and the entitlement of each to attorney's fees should be determined by reference to the separate net judgments they ultimately receive.[3/]

3. If a defendant (or two or more defendants who would be jointly and severally liable for the whole) wishes to make an unapportioned offer to two or more plaintiffs, the defendant should be permitted to do so, and the defendant's entitlement to attorney's fees should be determined by aggregating the net judgments ultimately

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[3/] Similarly, if a single plaintiff wishes to make a joint proposal for settlement to two or more defendants who would be jointly and severally liable for the whole, he should be permitted to do so.

recovered by the plaintiffs.[4/]

4. If a defendant (or two or more defendants who would be jointly and severally liable for the whole) wishes to make a proposal for settlement stating separate amounts for each plaintiff, the defendant should be permitted to do so, and the defendant's entitlement to attorney's fees should be determined by reference to the separate net judgments each plaintiff ultimately recovers.[5/]

5. The only circumstance in which the parties should be deprived of the opportunity to be the master of the terms of their own offer is the case in which there are multiple defendants who would *not* be jointly and severally liable to the plaintiff (or plaintiffs) for the whole, and which might therefore result in a finding of liability against some and the exoneration of others, or different net judgments against each. In that circumstance, separate proposals for settlement made by a plaintiff (or plaintiffs) must be directed to individual defendants. And conversely, in that type of case, individual defendants must make separate proposals of settlement to a plaintiff (or plaintiffs). That, of course, is the type of case for which Rule 1.442(c)(3) was initially designed, according to the Committee Notes, and that is the type of case to which the requirement for proposing separate amounts to separate parties should be confined.

[4/] Adopting this interpretation of the rule would require the Court to recede from its recent four to three decision in *Allstate Indemnity Co. v. Hingson*, 808 So.2d 197 (Fla. 2002).

[5/] Similarly, if two or more defendants who would be jointly and severally liable for the whole wish to make a joint offer to a single plaintiff, they should be permitted to do so. *See Danner Constn. Co., Inc. v. Reynolds Metals Co.*, 760 So.2d 199 (Fla. 2d DCA 2000).

See Danner Constn. Co., Inc. v. Reynolds Metals Co., 760 So.2d 199 (Fla. 2d DCA 2000).

Most respectfully, in every other context involving settlement agreements in the law of contracts, an offeror is the master of the terms of his offer, and the offeree can either accept or reject the offer as he wishes. No good reason suggests itself why a Rule 1.442 proposal for settlement should be treated any differently (except in the circumstance forced by Florida's comparative fault statute, §768.81, in the paragraph numbered 5 above). If a defendant receiving a joint, unapportioned proposal from two or more plaintiffs would prefer to deal with each plaintiff separately, it will be simple enough for the defendant to send each of them a separate proposal for settlement in turn. And if two plaintiffs receiving an unapportioned proposal from a defendant would prefer to deal with the defendant separately, it will be simple enough for each plaintiff to serve a separate proposal in turn. Parties to litigation should not be deprived of the ability to propose a settlement on their own terms by a rule that is needed in only one particular context, and we respectfully submit that Rule 1.442(c)(3) should be limited to the context for which it was initially designed.

That could be accomplished by retaining the first sentence of Rule 1.442(c)(3), and substituting a new sentence for its second sentence, resulting in the following:

> 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. In cases where the comparative fault of multiple defendants is in issue, however, proposals by plaintiffs must be directed to individual defendants and individual defendants must make separate proposals to plaintiffs.

We commend this solution to the numerous conundrums presented by the present wording of the rule.

V.
CONCLUSION

It is respectfully submitted that the portion of the district court's decision that denied the Fitzmaurices' motion for appellate attorney's fees should be quashed.

Respectfully submitted,

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By:_____

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 18th day of February, 2003, to: Esther E. Galicia, Esq., George, Hartz, Lundeen, et al., 3rd Floor - Justice Building East, 524 South Andrews Avenue, Fort Lauderdale, FL 33301.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

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JOEL D. EATON