# IN THE SUPREME COURT OF FLORIDA

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**CASE NO.: SC11-285**

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## SOUTHEAST FLOATING DOCKS, INC.

Appellant,

VS.

## AUTO-OWNERS INSURANCE COMPANY

Appellee.

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ON APPEAL FROM THE UNITED STATES ELEVENTH
CIRCUIT COURT OF APPEALS
(No. 09-15846-HH)

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# APPELLEE'S ANSWER BRIEF
# ON BEHALF OF AUTO-OWNERS INSURANCE COMPANY

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**DOES FLA. STAT. § 768.79 APPLY TO CASES THAT ARE GOVERNED BY THE SUBSTANTIVE LAW OF ANOTHER JURISDICTION; AND, IF SO, IS THIS STATUTE APPLICABLE EVEN TO CONTROVERSIES IN WHICH THE PARTIES HAVE CONTRACTUALLY AGREED TO BE BOUND BY THE SUBSTANTIVE LAWS OF ANOTHER JURISDICTION**

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## **STATEMENT OF THE CASE** AND FACTS

### A. The Procedural History

Auto-Owners Insurance Company ("Auto-Owners") paid Rivermar Construction Company ("Rivermar") $956,987.00, as surety for Southeast Floating Docks, Inc. ("Southeast"), to settle Rivermar's suit against Southeast arising from Southeast's failure to properly manufacture floating boat docks. On March 3, 2005, Auto-Owners sued Southeast and its President, Alan L. Simpson ("Simpson") in Federal District Court for the Middle District of Florida ("Trial Court") based upon a written indemnification agreement. Defendants contended they were not liable to Auto-Owners based on the surety's alleged bad faith payment to Rivermar.

On November 30, 2005, the Trial Court case was first set for trial on March 1, 2006. [Doc. 119] On May 19, 2006, this case was set for jury trial on May 30, 2006. [Doc. 161] The jury trial concluded on June 1, 2006, with the District Court entering Judgment in favor of Southeast and Simpson. At no time during the discovery proceedings, or even during the first trial, did Southeast make an offer to settle with Auto-Owners pursuant to Section 768.79, Florida Statutes ("Section 768.79") and Florida Rule of Civil Procedure 1.442 ("Rule 1.442"). The offer for settlement at issue in this appeal came significantly later.

On September 11, 2006, the trial court granted Auto-Owners' Motion for New Trial and later entered summary judgment for Auto-Owners. On December 11, 2006, Southeast sent Auto-Owners the Offer of Judgment ("Proposal for Settlement" or "Proposal") that is the subject of this appeal. On June 16, 2009, the Eleventh Circuit reversed the District Court's grant of a new trial and the June 1, 2006 jury verdict was thereafter reinstated. *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 571 F.3d 1143, 1155 (11th Cir. 2009). The Court of Appeals did not reach the merits of any other appealed issues, as they were mooted by reinstatement of the jury verdict. *Id.* No second trial will be held. Appellant contends it is entitled to payment from Auto-Owners of its attorneys' fees and costs based on its post-verdict Proposal for Settlement.

### C. The Post-Judgment Proposal For Settlement

Section 768.79 allows an award of attorneys' fees when a party satisfies the terms of the statute and Rule 1.442. These two provisions, sometimes collectively referred to as Florida's "Offer of Judgment Statute," provide a sanction against a party who unreasonably rejects a settlement offer. Because an award of attorneys' fees is in derogation of the common law, Florida courts require strict construction of the statute and rule.

Southeast's Proposal was intended to comply with the Offer of Judgment Statute, as it tracks the language of the law's timing requirement. It recites that:

> at least 90 days have passed since the commencement of this action, and there are at least 45 days remaining before the first of the docket on which this case is set for trial.

Proposal for Settlement, p. 1. [Doc. 354] The Proposal was served on December 11, 2006—exactly ninety-one (91) days after the District Court granted Auto-Owners' Motion for New Trial on September 11, 2006. The retrial was scheduled for April 2, 2007, but a second trial did not, and will not, occur due to entry of judgment on the June 1, 2006 verdict. [Doc. 357]

A "joint" proposal must "state the amount and terms attributable to each party" under Rule 1.442(c)(3). The proposal at issue was made by Southeast alone, yet it required that Auto-Owners' settle all claims against both "Defendants, Southeast Floating Docks, Inc. and Alan L. Simpson." Auto-Owners could not accept the proposal by settling its claims against one defendant and not the other.

### C. The Motion for Attorney's Fees and Certified Issues

The Federal District Court applied Rule 1.442's requirement that a settlement offer must be served at least forty-five days *before* the trial that is the basis for the fee claim. It found that Rule 1.442 means what it says: No proposal for settlement shall be served "earlier than 90 days after the action has been commenced;" and No proposal shall be served "later than 45 days before the date set for trial or the first of the docket on which the case is set for trial, whichever is earlier." Southeast's Fee Motion was denied based on the following reasoning:

> This case was first set for trial on May 30, 2006. The jury returned its verdict in favor of Southeast and Simpson on June 1, 2006. Southeast served its settlement Proposal on December 11, 2006, more than six months beyond the deadline set by Rule 1.442(b).

Opinion, 10/20/09, p. 3. [Doc. 373] The Court rejected Southeast's argument that the Proposal for Settlement could "relate back" to the first trial that concluded six months before the Proposal was served. Opinion, 10/20/09, p. 4. In short, the Trial Court concluded there must be a nexus between the trial setting utilized to satisfy Rule 1.442's timeliness requirement and the trial that was the basis of the award. Since the verdict preceded the offer, there was no nexus between the two, and the timing requirements were not satisfied.

On appeal, the Eleventh Circuit explained the first certified issue as follows:

> First, we inquire whether an offer of judgment may be viable when filed under the following circumstances: the offer was filed by a defendant after a jury verdict for the defendant had been set aside by the district court's grant of a new trial, and after the new trial date had been scheduled, but more than 45 days before the scheduled retrial; and the defendant ultimately prevailed because the appellate court reversed the grant of a new trial and reinstated the initial verdict.

*Auto-Owners v. Southeast Floating Docks*, 632 F.3d 1195, 1197 (11th Cir. 2011).

As additional grounds for affirming the decision below, Auto-Owners asserted in the Eleventh Circuit that the Proposal for Settlement failed to meet Rule 1.442's requirement for making joint offers. Appellant argued that an offer settling claims of two or more parties is not a joint offer, although it prevented Auto-

Owners from settling with one defendant without the other. The Eleventh Circuit characterized the second certified issue in the case as follows:

> Second, we ask whether the term "joint proposal" in Rule 1.442(c)(3) applies to cases where acceptance of the offer is conditioned upon dismissal with prejudice of an offeree's claims against an offeror and a third party.

*Auto-Owners v. Southeast Floating Docks*, 632 F.3d at 1197.

Finally, Auto-Owners argued to the Eleventh Circuit that the Proposal for Settlement is further unenforceable as Southeast and Auto-Owners reached a pre-suit agreement that Florida law would *not* apply in this case. Under Florida precedent, the State's policy favoring enforcement of written agreements in the commercial setting trumps its policy for awarding attorneys' fees to prevailing parties. The Eleventh Circuit characterized the third certified issue as follow:

> Finally, we seek a determination of whether the Florida offer of judgment statute applies to actions filed in Florida, in which there exists a contractually agreed upon choice-of-law clause providing for the application of the substantive law of another state.

*Auto-Owners v. Southeast Floating Docks*, 632 F.3d at 1197.

## SUMMARY OF THE ARGUMENT

The Eleventh Circuit has certified three important questions relating to Florida's Offer of Judgment Statute. Auto-Owners will prevail in full on appeal and will not be liable to Southeast for attorneys' fees if ***any*** of the three certified questions are answered in its favor.

Regarding the first certified question, this Court should answer ***"YES"*** **a valid offer of judgment may be made before a second trial**. But ***"NO",*** not in this case, because **the required NEXUS between the dispositive judgment and the timeliness requirement of Rule 1.442 is lacking here.** This reading is supported by the language of Rule 1.442, and it avoids opening the door to unreasonable, harsh and absurd consequences that will flow from construing the Offer of Judgment Statute if it is applied without regard to whether the trial occurred before or after the proposal for settlement was made.

Florida's decisional law backs-up this conclusion. Proposals that are too early or too late are nullities, and there are numerous cases so holding. Without exception, every case faced with deciding whether a post-verdict Section 768.79 proposal is valid has held it is not.

This Court should also reject Appellant's argument for an expansion of the Offer of Judgment statute on policy grounds. Mandating that a party serve the proposal forty-five days before the trial setting resulting in the ultimate judgment will *encourage* early settlements and *discourage* litigants from making unfair settlement proposals merely for strategic reasons.

Southeast makes the bizarre argument that it can prevail, despite that the proposal for settlement was made before summary judgment was entered against it and after the trial upon which the fee award was predicated had already concluded.

It contends that the "trial" referred to in Rule 1.442 can be any trial whatsoever --- even one that was cancelled due to Southeast losing summary judgment.

Lacking all support under Florida law, Southeast attempts to take refuge behind cases applying Rule 68 of the Federal Rules of Civil Procedure and other similar state statutes (collectively "Rule 68"). These decisions involved offers of judgment filed after the first stage of a bifurcated trial had concluded, but before the second stage of the trial went to verdict. Appellant's Rule 68 authorities are not applicable here, since the Federal Rule and state counterparts — unlike Rule 1.442 — expressly provide for making offers of judgment between the first and second stages of a bifurcated trial. The Rule 68 cases are further distinguishable, since the parties seeking fees in those actions were dependent on the outcome of the forthcoming trial to determine the reasonableness of their offer.

Southeast failed to serve its Proposal for Settlement forty-five days before the May 29, 2006 trial giving rise to the judgment that it claims gives it a right to fees. Instead, Appellant waited until six months after the trial had concluded. This overture for settlement came too late. When the clock ticked past the forty-fifth day before May 29, 2006, Appellant's opportunity to make a Section 768.79 settlement proposal and recover fees ended. Southeast's failure to establish the required nexus between the timing requirement and judgment renders its offer of settlement nonviable and unenforceable.

Turning to the second certified question, this Court should respond "***YES***," **conditioning an offer of judgment on resolution and dismissal with prejudice of the offeree's claims against multiple parties renders the offer of judgment a "joint proposal" that is void, unless the party is only vicariously, constructively, derivatively, or technically liable**. Both the language of Rule 1.442 and Florida's case law supports the conclusion that *any offer* relating to multiple parties is a joint proposal requiring acceptance by one without the other.

Rule 1.442(c)(4)'s exception to the general prohibition on joint proposals for settlement clarified that a valid joint offer could be made by parties who are only vicariously, constructively, derivatively, or technically liable. The exception found in Rule 1.442(c)(4) does ***NOT*** apply here, as both Southeast and Simpson were potentially liable based on their independent contractual promises.

Furthermore, Appellant cannot ignore the requirements of Rule 1.442 by claiming there was no joint offer, when both Southeast and Simpson would have benefited from a resolution of Auto-Owners' claims, and Simpson had a right to enforce the agreement as a third-party beneficiary. Similarly, Appellant's attorney represented both defendants, so the law of legal ethics required that he obtain authority from both clients before negotiating on their joint behalf. Southeast's requirement that Auto-Owners dismiss both Southeast and Simpson, made its offer void and unenforceable, because it failed to comply with Rule 1.442(3) and (4).

The third certified question should be answered "***NO***", **Section 768.79 is a "substantive" law of Florida that does *not* apply when choice-of-law rules mandate that the case be governed by laws of another jurisdiction.** And, this Court should respond "***NO***", **Section 768.79 does *not* apply when the parties agreed in their contractual choice-of-law provision that disputes would *not* be governed by Florida law.**

Florida's Supreme Court has consistently held that Section 768.79 created a "substantive" right in derogation of the common law American Rule that requires each party pay its own attorneys' fees. Accordingly, Section 768.79 cannot be invoked when the substantive law of another jurisdiction is applicable. However, Florida courts still have authority to sanction frivolous conduct.

Moreover, Florida's legislature has specifically authorized contracting parties to agree that the laws of another state may govern their rights, unless the law of the chosen forum contravenes a "strong public policy" of Florida. The award of attorneys' fees under Section 768.79 is not a strong public policy that would trump the parties' right to freedom of contract. Southeast's contractual agreement that Michigan law would govern disputes between the parties prevents it from now asserting a claim under Section 768.79.

## STANDARD OF REVIEW

The standard of review is *de novo*, as the questions posed are matters of law.

## ARGUMENT

## CERTIFIED QUESTION NO. 1

**DOES FLA. STAT. § 768.79 ALLOW FOR VALID OFFERS OF JUDGMENT IN A SEPARATE SECOND TRIAL; AND, IF SO, MAY OFFERS BE DEEMED VALID IN INSTANCES WHERE AN APPELLATE COURT REINSTATES THE JUDGMENT OF THE FIRST TRIAL?**

### D. A Valid Proposal for Settlement Under Section 768.89 Requires a Nexus Between The Dispositive Judgment And The Timeliness Requirement of the Proposal for Settlement

#### *4. Florida's Proposal For Settlement Law Must Be Applied As Written And Strictly Construed*

When construing Florida's statutes and rules, the analysis must begin with their plain meaning. *Florida Birth-Related Neurological Injury Compensation Assoc. v. Department of Administrative Hearings*, 29 So.3d 992, 998 (Fla. 2010). "[I]f the meaning of the statute is clear then this Court's task goes no further than applying the plain language of the statute." *GTC, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla. 2007). The court should not resort to extrinsic aids, even if it is "convinced the legislature really meant and intended something not expressed" in the statute. *Florida Birth-Related Neurological Injury*, 29 So.3d at 997-98.

This Court has recognized that both Rule 1.442 and Section 768.79 are in derogation of the common law rule that parties are responsible for their own attorneys' fees. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276,

278 (Fla. 2003). It has thus held that the statute and rule must be strictly construed. *Campbell v. Goldman*, 959 So.2d 223, 226-27 (Fla. 2007). Strict construction is also required because these provisions are punitive as they impose sanctions upon the losing party. *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210, 223 (Fla. 2003).

This Court recently explained that strict construction is also required to curb the seemingly endless litigation that Florida's Offer of Judgment law has spawned:

> The expected result of the attorneys' fee sanction was to reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions. The effect, however, has been in sharp contrast to the intended outcome because the statute and rule have seemingly increased litigation as parties dispute the respective validity and enforceability of these offers. . . .

*Attorney's Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010) (internal citations omitted). Based on these guiding principles, Southeast's request for an expansive reading of Florida's Offer of Judgment Statute should be rejected.

### *5. The Language of Rule 1.442 And Section 768.79 Mandates a Nexus Between The Dispositive Judgment and The Proposal for Settlement's Timeliness Requirement*

This Court should respond to the first certified question by concluding a valid offer of settlement can be made more than forty-five days before a subsequent trial setting, but there must be a **nexus** between the **timeliness requirement** of the proposal and the **dispositive judgment** used to measure the offeror's success. Consequently, the proposal served by Southeast in this case

*after* the verdict was rendered in its favor was nonviable, since Florida's Offer of Judgment Statute requires service forty-five days *before* trial. The Rule states that:

> No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

Rule 1.442(b) (emphasis supplied). Assessing the timeliness of a settlement proposal requires little more than pinpointing the date the offer was served and determining if there were forty-five intervening days before the trial commenced or summary judgment was entered.

The Trial Court agreed with this position when it logically determined that the term "trial" used in Rule 1.442(b) means the trial that is the basis for the claimed fee award. Opinion, p. 3. [Doc. 373] It does not mean a trial-setting that had no impact on the assessment of whether fees were due.

On the other hand, Appellant's Brief at pp. 17-18 wrongly asserts that "Rule 1.442 requires that the timeliness of an offer of judgment be measured by standing in the shoes of the offeror at the time the offer is served." The argument continues that such a reading is needed so the offeror is not required to "look back to the past to determine whether a previous trial date has passed."

Appellant's construction of Rule 1.442(b) violates basic rules of statutory construction. The doctrine of *in pari materia* requires that "statutes relating to the same subject or object be construed together to harmonize the statutes" with all

provisions. *Fla. Dep't of Envtl. Prot. v. Contract Point Fla. Parks, LLC*, 986 So.2d 1260, 1265 (Fla. 2008); *Larimore v. State*, 2 So.3d 101, 106 (Fla. 2008). Both Rule 1.442 and Section 768.79 relate to fees and must be construed together.

Section 768.79 provides the formula for determining whether attorneys' fees are due based on linking the amount of the offer made forty-five days before trial and the resulting judgment. When the statute is applied as written, Southeast's Proposal made in connection with a second trial would give rise to no attorneys' fees, as summary judgment was entered *against* it and in favor of Appellee:

> If one looks to the second trial, as Southeast suggests, then Southeast has not qualified for an award of fees, because it did not obtain a judgment in its favor subsequent to its offer. (To the contrary, it was Auto-Owners that prevailed in the leadup to the second trial, obtaining a $1.2 million summary judgment.)

Opinion, p. 4. [Doc. 373] Therefore, when Section 768.79 is applied to a proposal relating to a second trial that never occurred, there is no right to attorneys' fees.

Additionally, Rule 1.442 and Section 768.79 require that a court compare the offer to the judgment to which it relates when assessing the "the reasonableness of the amount of an award of attorney fees." Rule 1.442(h); Section 768.79 (7)(b). Both provisions contain six specifically enumerated factors that must be assessed in connection with the proposal for settlement and ultimate judgment (*i.e.*, whether adequate information was furnished to assess the claim, the closeness of questions of fact and law, etc.). *See Segundo v. Reid*, 20 So.3d 933, 938 (Fla. 3rd DCA

2009) (award of fees when plaintiff's injury picture changed substantially after the proposal was served was an abuse of discretion.). Because the entire scheme of Florida's Offer of Judgment statute is based on the relationship between the proposal for settlement and the ultimate judgment, there is no good reason for uncoupling the two when deciding whether the proposal was timely served.

Another basic tenet of statutory interpretation compels reading laws so as to "avoid a construction that would result in unreasonable, harsh, or absurd consequences." *Larimore,* 2 So.3d at 115. Southeast's "any trial setting is good enough" approach is **unreasonable**, because it caters to those who thwart prompt resolution. If parties know they must make the offer of judgment early in the case or not at all, they will act more promptly. As the action proceeds, litigants are free to make other settlement proposals. Rule 1.442(h)(2)(B); Section 768.79(2) ("The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer."). This Court should reject Appellant's unreasonable reading of Rule 1.442 which encourages delay.

Southeast's argument that a litigant can direct a proposal for settlement toward any trial setting is likely to lead to **harsh** results. For example, an offeree may be deprived of its full forty-five days to evaluate the proposal if there is a trial setting scheduled far in advance, but the ultimate judgment is entered much sooner. This situation would arise when a new, earlier, trial day is set or summary

judgment is granted in favor of the offeror. In either case, Rule 1.442's purpose of affording a party at least forty-five days to respond to an offer without facing the prospect of paying attorney's fees would be thwarted. *Knealing v. Puleo,* 675 So.2d 593 (Fla.1996) (Statute altering the times established by Rule 1.442 for making an offer of settlement held unconstitutional.).

Southeast's claim that it can rely on any trial setting to recover fees also leads to the **absurd consequence** that we have before this Court. Appellant's proposal for settlement was issued *after* the judgment that is the basis for its fee claim. Moreover, if any "trial" can be the benchmark for an award of fees, what is to prevent a party from arguing that any "judgment" will satisfy the requirements of Section 768.79. After all, the language of the statute does not specify it be the final judgment. Using Southeast's absurd logic, Auto-Owners would be entitled to an award of fees based on winning summary judgment, although it was overturned on appeal, if it otherwise complied with Florida's Offer of Judgment law. Such absurd arguments will be laid to rest by simply requiring a nexus between the timing of the offer and final judgment.

### *6. Florida Case Law Disallows Post-Judgment and Other Untimely Settlement Proposals*

Following the well-established principle that Rule 1.442 and Section 768.79 must be strictly construed, numerous Florida courts have found settlement proposals invalid when they did not comply with the timing requirements imposed

by the statute and rule. *See e.g., Grip Dev., Inc. v. Coldwell Banker Residential Real Estate, Inc.*, 788 So.2d 262, 265 (Fla. 4th DCA 2000) (premature settlement proposal nonviable); *In re Estate of Hathaway*, 768 So.2d 525, 526-27 (Fla. 4th DCA 2000) (tardy settlement proposal nonviable).

For example, in *Schussel v. Ladd Hairdressers, Inc.*, 736 So.2d 776, 778 (Fla. 4th DCA 1999), defendant's offer was served on plaintiff within forty-five days of the first day of the trial docket and, thus, was untimely. Arguably, plaintiff was not prejudiced by the tardy offer because discovery was complete, there was no date certain for the trial to commence, and the trial did not actually occur for another six months. But the offer was still void *ab initio. Id.* at 778.

The same result was reached in *Progressive Cas. Ins. Co. v. Radiology & Imaging Ctr. of S. Fla., Inc.*, 761 So.2d 399 (Fla. 3rd DCA 2000) and *Largen v. Gonzalez*, 797 So.2d 635 (Fla. 5th DCA 2001). *Progressive* explained that:

> Under this bright-line rule, any Offer of Judgment made so close to a trial period so as to render it untimely is, in effect, a nullity which cannot be subsequently resurrected by a continuance of the trial period that was in effect at the time the Offer of Judgment was made.

761 So.2d at 400. *Largen* concluded that an offer of settlement served within forty-five days of the first day for a trial was void, even when it was unlikely the matter would be tried then and the case was, in fact, continued. 797 So.2d at 638.

Post-verdict proposal for settlement to recover attorneys' fees on appeal are also nonviable. *Glanzberg v. Kauffman*, 771 So.2d 60 (Fla. 4th DCA 2000). For example, in *Deleuw, Cather & Co. v. Grogis*, 664 So.2d 989, 989 (Fla. 4th DCA 1995), defendant appealed a cost award in favor of the plaintiff. While the appeal was pending, the plaintiff-appellee made an offer of settlement under Section 768.79. The plaintiff-appellee obtained an affirmance and filed a motion for fees in the appellate court. *Id.* *Grogis* held the motion for fees was untimely, since the Offer of Judgment Statute does not support its use merely on appeal. *Id.*

Based on the language of Rule 1.442(b) and well-established precedent decided under both this rule and Section 768.79, the answer to the first certified question should be that there must be a nexus between the dispositive judgment and the timeliness requirement of the offer of judgment.

### E. Florida's Public Policies Of Encouraging Early Settlements and Discouraging Parties From Making Offers For Purely Strategic Reasons Will Be Fostered By Invalidating Post-Judgment Settlement Offers

There are two major public policy grounds supporting the conclusion that there must be a nexus between the proposal for settlement and the judgment that is the basis for the fee award. First, Florida's Offer of Judgment statute is designed to ***encourage early settlements.*** *Gorka*, 36 So. 3d at 650. This policy is advanced by requiring that offers be made forty-five days before the trial setting, not after the case has gone to trial. If Southeast had abided by this rule and waited until the

ninety-first day after the case was commenced as allowed by Rule 1.442, it would have served the proposal on June 2, 2005. Instead, Appellant waited for three months after the new trial was granted, delaying the proposal until December 11, 2006. By this time, all discovery was concluded and the case had been tried to verdict. Allowing Appellant to wait nearly one and one-half years before making its settlement proposal will not advance the public policy of Rule 1.442 that mandates such proposals be served forty-five days before trial.

Second, requiring a nexus between the proposal for settlement and the judgment that is the basis of the fee award will ***discourage litigants from making unfair offers merely for strategic reasons***. The court in *Glanzberg v. Kaufman*, 771 So.2d 60 (Fla. 4th DCA 2000), recognized how post-judgment proposals for settlement would permit strategic posturing. In *Glanzberg*, the defendant made a settlement offer after winning at trial and then sought its fees related to the appeal when the judgment was affirmed. 771 So.2d at 61. The court rejected this tactic finding the purpose of Section 768.79 was to encourage early settlements and reduce fees, not to permit post-judgment fee shifting (emphasis supplied):

> Litigants (particularly defendants) who file after the conclusion of trial have the benefit of knowing the jury's verdict, from which they can calculate the exact amount for which they must offer to settle in order to be entitled to attorney's fees under section 768.79 if they were to win on appeal. . . . To rule otherwise would encourage litigants to serve offers of judgment or settlement after trial has concluded, which in turn would

> adulterate the spirit of section 768.79 by allowing it to become a mechanism for appellate attorney's fees.

*Glanzberg*, 771 So.2d at 61.

Since Florida's Offer of Judgment statute was intended to encourage early settlement, this Court should require a nexus between the ultimate judgment and the settlement offer. Otherwise, litigants can utilize Rule 1.442 as an opportunity to strategically obtain fee awards on appeal.

### F. Appellant's Arguments Do Not Support Altering Florida Law To Permit Post-Judgment Proposals for Settlement

#### *4. Federal Rule 68 And Similar State Statutes Are Distinguishable Since They Expressly Permit Filing Offers of Judgment Between the First and Second Stages of Bifurcated Trials*

Appellant's Brief at pp. 11-17 argues this Court should be guided by opinions from foreign jurisdictions construing Rule 68 of the Federal Rules of Civil Procedure and state statutes containing language similar to that found in the Federal Rule. It should be noted that the original Rule 1.442 was identical to Rule 68, permitting shifting "costs" to adverse party if the judgment ultimately obtained was not more favorable than the offer of judgment. *In re the Florida Bar*, 265 So.2d 21, 40–41 (Fla.1972). The original rule did ***not*** authorize an award of attorney's fees, which is no longer the case. *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210, 218 n. 5 (Fla. 2003).

Appellant's citations to Rule 68 cases involve courts enforcing offers of judgment made between the first and second stages of bifurcated trials. Allowing offers of judgment after the first stage of a bifurcated trial is not just permitted by Federal Rule 68, but required by it. Rule 68 provides as follows:

> When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability.

Fed. R. Civ. Pro. 68(c); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 346, n.1, 101 S.Ct. 1146, 1148 (1981) (Proposals between bifurcated trials dates to 1966).

Florida law is different. There is no provision in Section 768.79 or Rule 1.442 providing a valid offer of settlement can be served between the first and second stages of a bifurcated trial. Southeast's Rule 68 cases are clearly distinguishable. It therefore follows that this Court should discount Appellant's citation to the unpublished opinions in *McCabe v. Mais*, 2009 WL 692293 (N.D. Iowa, Mar. 26, 2009), *Longfellow v. Jackson County*, 2007 WL 2027126 (D. Or., July 5, 2007) and *Lang v. Morant,* 2005 WL 1952930 (Del. Super., July 29, 2005). They were all based on Rule 68 language that expressly allows offers during a bifurcated trial.

### *2. Cases Decided Under Federal Rule 68 and Similar State Statutes Are Distinguishable Since the Recovery of Fees Was Still Dependent On the Outcome of Forthcoming Trials*

Appellant's Brief at p. 16 cites *Allianz Ins. Co. v. Gagnon,* 860 P.2d 720 (Nev. 1993) and *Davis v. Abbuhl,* 461 A.2d 473 (D.C. Ct. App. 1983) for the proposition that these cases held that Rule 68 "merely requires that an offer be served a specific number of days prior to the date on which a trial—any trial—is scheduled to commence." These cases did not so hold.

*Allianz* involved two verdicts, with the defendant making an offer of judgment before the second stage of the bifurcated trial. *Id.* at 722. Importantly, *Allianz* involved the normal progression of an offer of judgment and resulting verdict. *Id. Allianz* did not hold that an offer may be made before any trial.

Likewise, unavailing is Appellant's reliance on *Davis*. In *Davis*, the defendant made an offer of judgment before trial and the case was tried to verdict. *Davis,* 461 A.2d at 475. Again, there was the normal progression with an offer of judgment and subsequent verdict. Southeast, on the other hand, is attempting to collect fees based on an abnormal progression where a verdict was entered first, and then settlement came later. *Davis* does not support Appellant's argument.

Furthermore, *Allianz* and *Davis* were rejected in *Conant v. Whitney*, 947 P.2d 864, 867 (Ariz. 1st DCA 1997), which is much closer factually to the action before this Court. *Conant* involved two motorcyclists making a claim against the

owner of a bull after there was a collision with the animal. *Id.* at 865. The jury returned a verdict for the defendant. *Id.* at 866. The plaintiffs filed a motion for new trial, which was denied, and also filed an offer of judgment. *Id.* The defendant then moved to strike the offer of judgment as being untimely, which motion was granted. *Id.* at 868. On appeal, plaintiffs made the losing argument that their offer should be viewed in relation to the new trial they were granted on appeal:

> We conclude that Rule 68 does not allow a party to file an offer of judgment while a case is on appeal from a final judgment. . . . A post-trial offer of judgment puts more pressure on appellee than appellant. Having already lost at trial, appellant has less to lose on appeal than appellee. A postjudgment offer of judgment injects a new feature into Rule 68; one which will have to be written into the Rule before we see it there.

*Id. (emphasis supplied).* This Court should also conclude that it is too late to make an offer of judgment after the final verdict is entered.

### 3. *Florida Cases Upholding Settlement Proposals Made Before a Continued Trial Setting Are Distinguishable Since the Recovery of Fees Was Still Dependent On the Outcome of Forthcoming Trials and All Parties Knew the Offers Were Directed Toward the Trials That Had Not Taken Place*

Southeast's Brief at pp. 18-19 states that Florida case law supposedly holds that an offer made less than forty-five days before an aborted trial-setting meets the requirements of Section 768.79 and Rule 1.442. Southeast relies on *Kuvin v. Keller Ladders, Inc.,* 797 So.2d 611 (Fla. 3rd DCA 2001) and *Progressive Casualty,* 761 So.2d 399, neither of which supports Appellant's position.

First, neither case stands for the proposition that an offer made after a trial has concluded can relate back to an earlier time, as we have here. Instead, the events in *Kuvin* and *Progressive* triggering the right to fees occurred after the offers were made, not before. *Kuvin,* 797 So.2d at 611-12 (case concluded after entry of dismissal); *Progressive,* 761 So.2d at 400 (case concluded after trial). Thus, the right to fees was still dependent upon events occurring at a future trial.

Second, Southeast's proposal would be untimely even under *Kuvin* and *Progressive,* because they only apply when all parties know at the time the offer is made that it was intended to relate to a second trial and the matter resolves based on the result of the new trial set forty-five days hence. In *Kuvin,* both parties knew when the offer was made the pleadings had been re-opened and "the action was no longer 'at issue' under Florida Rule of Civil Procedure 1.440, therefore, could not proceed to trial on that date as a matter of law." 797 So.2d at 612.

Likewise, in *Progressive,* the case was scheduled to be called for trial during the week of Monday, October 27, 1997. 716 So.2d at 400. When the case still had not been called for trial on Thursday, both parties knew the case would not proceed, so the proposal for settlement mailed that day was timely as measured by the future trial-setting. *Id.* This "very narrow exception" to the general rule only applied because both parties actually knew the trial would be delayed. *Id.*

The *Kuvin* and *Progressive* opinions were explained in *Largen*, 797 So.2d 635, which held a settlement proposal offered within forty-five days of the scheduled trial was a nullity (emphasis supplied):

> Although the defendants/appellants argue their motions to continue were outstanding, when the offer was made, and the likelihood of success of those motions was great, we conclude it would expand the "narrow exception" devised by the third and fourth districts too greatly, and make it difficult to apply, to have it turn on one or even both parties' speculation concerning the probable success of motions for continuance.

Nowhere does Southeast contend that all parties knew when it served its Proposal for Settlement that it would relate to a second trial that was actually held at a later time. Rather, the situation here involves a post-verdict proposal that is attempting to rely on the result in a case that had previously been tried.

Answering the first certified question with one simple, common-sense rule will clarify numerous complex factual scenarios in a way that is consistent with prior case law: A valid offer of judgment may be made before **any trial setting**, but there must be a **nexus** between the **dispositive judgment** that is the basis for the fee award and the **timeliness requirement** of the proposal for settlement. Since that nexus is lacking in this case, **Southeast's proposal for settlement is nonviable** and it is entitled to **no attorneys' fees.**

## CERTIFIED QUESTION NO. 2

**DOES THE CONDITIONING OF AN OFFER OF JUDGMENT ON THE RESOLUTION AND DISMISSAL WITH PREJUDICE OF THE OFFEREE'S CLAIMS IN THE ACTION AGAINST A THIRD-PARTY RENDER THE OFFER OF JUDGMENT A JOINT PROPOSAL, AS THAT TERM IS USED IN FLORIDA RULE OF CIVIL PROCEDURE 1.442(c)(3)?**

### D. An Offer of Judgment that Conditions Acceptance On the Offeree Resolving Pending Claims Against Multiple Parties is a "Joint Proposal" Which Must Meet the Requirements of Rule 1.442(3) and (4)

#### *4. The Language Of Rule 1.442(c)(3)-(4) Requires Finding that An Offer of Judgment Discharging Multiple Parties Is a "Joint Proposal"*

This Court should respond to the second certified question by concluding an offer of judgment **conditioning acceptance on dismissal of multiple parties is an invalid joint proposal, unless it involves parties who are solely vicariously, constructively, derivatively, or technically liable** pursuant to Rule 1.442(c)(4). Southeast made a joint proposal requiring dismissal of multiple parties. Because both Southeast and Simpson were potentially liable to Auto-Owners based on their own breaches of contract, their liability was not merely vicarious or derivative.

The Florida Supreme Court has held that settlement proposals offered to multiple parties are invalid and unenforceable when and conditioned upon acceptance by all. *Attorney's Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 51-52 (Fla. 2010). Likewise, offers made by multiple parties that fail to attribute the

terms applicable to each are not in compliance with Rule 1.442(c)(3). *Willis Shaw*, 849 So. 2d at 278–79. Appellant attempts to side-step these requirements by claiming that the settlement of claims against multiple parties is supposedly not a joint proposal. This argument lacks all merit.

Rule 1.442(c)(3) states as follows:

> 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.

Rule 1.442(3). Accordingly, a joint proposal for settlement is a single proposal made to or from multiple parties. It is a proposal that will benefit a combination of parties (either as offerors or offerees) if accepted. The first sentence of Rule 1.442(c)(3) provides that a "proposal may be made by . . . any combination of parties properly identified in the proposal." No proposal can be made on behalf of a party that is not "properly identified." When the offer is for the benefit of two or more parties, it is a "joint proposal" within the meaning of Rule 1.442(c)(3).

This reading is consistent with the dictionary definition of "joint." *Black's Law Dictionary* 1122 (8th ed. 2004) defines "joint" as a thing "common to or shared by two or more persons or entities." Based on the language of Rule 1.442, an offer made for the common benefit of multiple parties is a joint proposal, even if only one of the two parties is paying or receiving the settlement sum. Thus,

Southeast's proposal to Auto-Owners that would result in the common benefit to Southeast and Simpson, if accepted, was a joint proposal under Rule 1.442.

The Florida Supreme Court added a new Rule 1.442(c)(4) which specifies the only situation when a valid joint proposal can be made without differentiating between multiple parties. That section provides as follows:

> Notwithstanding subdivision (c)(3) [dealing with joint proposals for settlement], when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

Rule 1.442(c)(4) (emphasis supplied). Consequently, the ***only*** instance when a proposal for settlement need not apportion the amount being offered by or to multiple defendants is when they are "***solely***" vicariously, constructively, derivatively, or technically liable. Conversely, this exception to the general rule does ***not*** apply when the defendants are sued based on their own breach of a duty imposed in tort, by contract, pursuant to statute or otherwise.

Both Southeast and Simpson contractually promised to pay Auto-Owners. Their liability was direct and primary, not vicarious, constructive, derivative, or technical. Therefore, Rule 1.442(3) required that the proposal for settlement differentiate the amount being offered by each defendant, and provide Auto-

Owners with the option to accept one or both. Because Southeast made the offer contingent upon a dismissal of Southeast and Simpson, it made was void *ab initio.*

### *5. Well-Established Florida Case Law Requires Finding that An Offer of Judgment Discharging Multiple Parties Is a "Joint Proposal" That Must Apportion the Amounts Attributable to Each Offeror*

Florida's Supreme Court has consistently held that Section 768.79 and Rule 1.442 mandate that proposals for settlement made for the benefit of multiple offerors must apportion the amounts attributable to each offeror. *Allstate Indemnity Co. v. Hingson*, 808 So.2d 197, 199 (Fla 2002) (joint offer made to injured plaintiff and spouse claiming loss of consortium held invalid). Additionally, an offer to or from multiple parties must permit the offeree the opportunity to settle with both or any offeror individually. *Gorka*, 36 So. 3d at 650-51. The recent addition of Rule 1.442(4) provides a small exception to this rule for offers relating to vicariously and derivatively liable parties. This narrow exception to the bar on joint proposal does not apply in this case, as Simpson and Southeast were independently liable to Auto-Owners. This Court's joint proposal decisions bolster this conclusion.

In *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 277 (Fla. 2003), two plaintiffs made their separate personal property damage claims in a single suit. The plaintiffs served a joint lump sum proposal for settlement on the defendant, which was not accepted. After the plaintiffs recovered a judgment in an amount more than 25 percent larger than the joint proposal amount, the trial court

awarded them attorneys' fees. The Supreme Court disapproved of the decision holding the plain language of Rule 1.442(c)(3) requires that joint proposals must "state the amount and terms attributable to each party." *Id.* at 278. *Willis Shaw* also noted that Offer of Judgment Statute is in derogation of the common law rule that each party pay its own fees, so it had to be strictly construed. *Id*.

Likewise, in *Lamb v. Matetzschk*, 906 So. 2d 1037 (Fla. 2005), plaintiff made a personal injury claim against a husband and wife. The wife was not directly involved in causing plaintiff's injuries, but was sued as a co-owner of the vehicle. The plaintiff made a number of undifferentiated proposals for settlement to the defendants. Plaintiff succeeded at trial and was awarded attorneys' fees based on the proposal for settlement. Reversing, the Florida Supreme Court followed the strict approach it established in *Willis Shaw* and held that any undifferentiated joint proposal for settlement was unenforceable. *Id.* at 1042. Each offeree had to be given the opportunity to separately evaluate the proposal.

Most recently, this Court in *Gorka*, 36 So. 3d at 650-51, held that each offeree had to be able to **separately evaluate and accept** a proposal for settlement. Plaintiffs, John Gorka and Laurel Larson, sued a title insurer for alleged failure to defend them in a property dispute. The title company's section 768.79 proposal provided each plaintiff would be paid $12,500 (or a total of $25,000), but was contingent upon both offerees accepting. It provided as follows:

> This offer is conditioned upon the offer being accepted by both John W. Gorka and Laurel Lee Larson. In other words, the offer can only be accepted if both John W. Gorka and Laurel Lee Larson accept and neither Plaintiff can independently accept the offer without their co-plaintiff joining in the settlement.

*Id.* The Court condemned the offer because it did not allow each offeree to independently evaluate and accept the proposal without the other.

> *Lamb* instructs that an offer must be differentiated such that each party can unilaterally settle the action. Therefore, it is inherent that the offer of settlement cannot be conditioned on joint acceptance, which is the antithesis of a differentiated offer.

*Id.* at 650-51. Moreover, Florida's "precedent has applied the rule of differentiated offers equally to all parties," whether they be plaintiffs or defendants. *Id.,* 36 So. 3d at 651 n.5. Any offer that ropes several litigants together is void.

Further support for this position is found in Florida's appellate decisions that hold two defendants cannot make an undifferentiated proposal for settlement to a single plaintiff. *See e.g.*, *D.A.B. Constructors, Inc. v. Oliver,* 914 So.2d 462, 463 (Fla. 5th DCA 2005) (holding that settlement proposal must apportion the amount of the offer between defendant-employee and vicariously liable defendant-employer); *Graham v. Peter K. Yeskel 1996 Irrevocable Trust,* 928 So.2d 371, 371-72 (Fla. 4th DCA 2006) (defendants' failure to apportion offer between them in joint proposal for settlement held fatal to their motion for fees); *Three Keys, Ltd. v. Kennedy Funding, Inc.*, 28 So.3d 894, 905 (Fla. 5th DCA 2009) (offer of judgment conditioned upon joint acceptance of both plaintiffs held invalid and

unenforceable for the purpose of imposing fees against the non-prevailing parties). *1 Nation Tech. Corp. v. A1 Teletronics, Inc*., 924 So.2d 3, 6 (Fla. 2d DCA 2005) (invalidating an unapportioned offer from multiple defendants to a single plaintiff*).*

The second certified question should be answered "**YES**," the conditioning of an offer of judgment on resolution and dismissal with prejudice of the offeree's claims against a third-party renders the offer of judgment a joint proposal. Furthermore, such joint offers for settlement are unenforceable, unless they come within the exception contained in Rule 1.442(c)(4) (i.e., involve a party "solely vicariously, constructively, derivatively, or technically liable").

This Court should further conclude that Appellant's proposal for settlement was nonviable. It tied resolution of Auto-Owners' claims against Southeast to its claims against Simpson without differentiating the sums being offered by each. It prevented Auto-Owners from settling with one defendant without the other, although both were potentially liable. Based on *Gorka* and the inapplicability of Rule 1.442(c)(4), Appellant's proposal for settlement was void *ab initio.*

### *6. The Law of Contractual Third-Party Beneficiaries and Legal Ethics Supports Finding An Offer of Judgment Discharging Multiple Parties Is a "Joint Proposal"*

Support for concluding Southeast made a joint proposal is bolstered by the law of contractual third-party beneficiaries and the law of legal ethics. First, Simpson would have been a third-party beneficiary to the Proposal for Settlement,

if Auto-Owners had accepted it, and he would have had standing to enforce the agreement. For example, in *Enterprise Leasing Co. v. Demartino*, 15 So.3d 711, 714 (Fla. 2d DCA 2009), the court permitted an automobile lessor to rely on a settlement release executed by the injured motorists, although lessor was not expressly mentioned in the document. *Id.* Because the motorists knew at the time they signed the release that lessor owned the vehicle, the lessor was a third-party beneficiary to the contract. *Id.* It would be strange, indeed, if the law permitted Simpson to enforce the proposal for settlement when made by Southeast, but claim it was not party to a joint proposal under the Offer of Judgment Statute.

Second, Simpson and Southeast were represented by the same lawyer, so he was ethically obligated to act for both of his clients jointly when negotiating for a dismissal of the claims against them. Florida law mandates that a person conveying an offer must have actual authority to do so. *Sharick v. Southeastern University of Health Sciences, Inc.*, 891 So.2d 562, 565-66 (Fla. 3d DCA 2004). When an attorney represents more than one defendant, he or she must obtain written consent from all clients before making an offer. Florida Ethics Rule 4-1.8(g) reads thusly:

> (g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client gives informed consent, in a writing signed by the client.

The Comment to this Rule states the requirement for obtaining authority applies "before any settlement offer . . . is made or accepted on behalf of multiple clients."

Accordingly, Appellant's lawyer, who was jointly representing Southeast and Simpson at the time the Proposal for Settlement was made, was ethically obligated to obtain Simpson's written authorization before negotiating on his behalf. These same rules apply when the settlement offer is made pursuant to Section 768.79 and Rule 1.442. *Sosnick v. McManus*, 815 So.2d 759, 763 (Fla. 4th DCA 2002) (settlement proposal made pursuant to Section 768.79 and Rule 1.442 could not be enforced, since the attorney lacked express authority to resolve counterclaim). It is disingenuous for an attorney to obtain authority to negotiate jointly on behalf of two parties and then claim it is not making a joint offer.

Consequently, this Court should answer **"YES"** to the second certified question. Conditioning an offer of judgment on resolution and dismissal with prejudice of the offeree's claims in the action against a third-party renders the offer of judgment a void joint proposal.

### E. Florida's Public Policy Of Discouraging Parties From Collusion and Making Offers For Purely Tactical Reasons Will Be Fostered By Invalidating Proposals Conditioning Acceptance Upon The Release of a Third Party

Permitting a single defendant to make a valid offer conditioned upon releasing multiple parties could result in collusion and the use of Section 768.79 for tactical reasons. For example, a defendant with marginal liability may make a

settlement offer that is rejected solely because plaintiff would be required to also release another defendant with substantial liability. When plaintiff's judgment against the offering defendant is less than 25 percent of the proposal for settlement, the offeror may claim it is entitled to attorneys' fees, although plaintiff's judgment against both defendants far exceeds the 25 percent threshold. Allowing joint proposals under this circumstance will encourage the use of Section 768.79 for the tactical purpose of creating a right to attorneys' fees, rather than for settlement.

Another unfair tactic involves two defendants making proposals at different times, where each conditions the settlement upon release of the other. The amount of the proposals are large enough to cover the offeror's own liability, but insufficient to pay plaintiff's damages against both defendants. First, one defendant makes a proposal, and after the time expires for acceptance, the other defendant proffers his own offer. This approach allows the defendants to hedge their bets with the expectation that the liability of at least one will be less than 25 percent of the proposal. Thus, defense attorneys may become the real parties in interest with the potential for recovering fees driving the litigation.

If Southeast's position is accepted, collusion between two defendants will also be possible where one is solvent and the other is not. This tactic involves a financially precarious defendant making a very large offer of judgment conditioned upon plaintiff releasing the fully collectable co-defendant. This is a win-win for

defendants, because the settlement proposal is an illusion. If plaintiff accepts the offer, the judgment may never be paid by the insolvent offeror and the viable third-party will be released. If the offer is rejected, plaintiff will face the prospect of paying attorneys' fees if the judgment is not at least 25 percent of the offer.

This Court should conclude that the only joint proposals that are allowed are those covered by Rule 1.442(c)(4). Otherwise, parties may engage in collusion and tactical maneuvering, rather than legitimate settlement efforts.

### F. Appellant's Arguments Do Not Support Altering Florida Law to Permit Proposals for Settlement That are Contingent Upon Releasing Multiple Parties Beyond Situations Provided For Under Rule 1.442(c)(3)-(4)

#### *3. Toll Brothers Cited by Appellant Is Distinguishable Because it Involved A Joint Offer Made to a Vicariously Liable Defendant, Which is Allowed By Rule 1.442(c)(4)*

In *Alioto-Alexander v. Toll Bros., Inc.*, 12 So. 3d 915, 916 (Fla. 4th DCA 2009), plaintiff sued an employee and included his employer based on allegations of vicarious liability. The employer alone served a proposal for settlement offering $5,000 without apportioning the $5,000 between employer and employee. Rather, the proposal for settlement included a condition that required the plaintiff dismiss the entire case not only against the employer but also against the employee.

When the employer prevailed at trial and sought its attorneys' fees, plaintiff claimed the proposal was defective because it was a joint proposal which failed to apportion the amount offered between the two defendants. *Id.* Without any real

analysis or discussion, *Toll Brothers* rejected the argument, pointing out that the proposal was not joint because it was made only by the employer. The employer was entitled to recover it fees based on the rejected proposal. *Id*. at 916-917.

The *Toll Brothers* decision is consistent with Rule 1.442(c)(4) which permits undifferentiated offers of settlement to be made where the party is alleged to be "only vicariously, constructively, derivatively, or technically liable." Rule 1.442(c)(4). However, it adds nothing to the question before this Court, since the facts do not involve a situation where one defendant is at fault and the liability of the other is ***solely*** vicarious. Instead, Southeast and Simpson were both claimed to be contractually liable to Auto-Owners. Simpson's potential liability was direct and primary based upon his own breach of contract, not indirect and secondary based on the conduct of Southeast. Therefore, *Toll Brothers* provides no authority for allowing a party to make a proposal which requires the offeree to dismiss with prejudice its claim against the offeror and a third-party.

#### *4. Newby and Eastern Atl. Realty Cited by Appellant Are Distinguishable Because The Offers of Settlement Were Made to Non-Parties*

The Appellant relies on *Carey-All Transp., Inc., v. Newby*, 989 So.2d 1201 (Fla. 2d DCA 2008) and *Eastern Atl. Realty and Inv., Inc. v. GSOMR, LLC,* 14 So.3d 1215 (Fla. 3d DCA 2009) for the proposition that it is appropriate for one party to make a Section 768.79 proposal contingent on the dismissal of multiple

defendants. Because in both cases the additional individual sought to be dismissed was **not a party defendant**, neither case supports enforcing an offer of judgment requiring dismissal with prejudice of two parties.

In *Carey*, Mr. Newby ("Newby") was injured in an automobile accident by a truck driven by Mr. Delerme ("Delerme") that was owned by Carey-All Transport ("Carey"). Newby sued both Delerme and Carey. Eight months ***after*** **Delerme was dismissed from the lawsuit**, Carey made an offer of judgment for $125,000. The offer required that Newby dismiss any current or former employees of Carey. Both sides agreed that Delerme was a former employee. The amount recovered by Newby was less than 75% of the offer of judgment. However, the trial court refused to enforce the offer of judgment, finding it was a joint offer.

The *Carey* court reversed because **Carey was the lone defendant** when it made its offer of judgment. The court explained as follows stated at page 1204:

> We conclude, based on the facts of this case, that this was not a joint proposal for settlement. . . . Delerme was not a "party" to the litigation when the settlement proposal was served because he had been dismissed from the lawsuit. . . . Logically an offer cannot be "joint" where the only defendant in the lawsuit is the party making the offer.

*Carey*, 989 So.2d at 1204-1205.

*Eastern Atl. Realty* is no more helpful to Appellant's position, since the additional individual sought to be dismissed was **not a party defendant**. The facts in *Eastern Atl. Realty* are procedurally somewhat complicated. Biscayne Joint

Venture, Ltd. ("BJV") filed a tortuous interference action against Eastern Alt. Realty and Inv., Inc. ("Eastern") regarding a real estate commission and GSOMR, LLC ("GSOMR") filed a request for an injunction. Eastern filed a counterclaim against BJV, but ***did not*** file a counterclaim against GSOMR. Thus, GSOMR was not a party defendant. BJV made an offer of judgment to pay Eastern $20,000 contingent on Eastern dismissing both BJV and GSOMR. Since, GSOMR was not a party defendant and it was seeking an injunction only, the proposal for settlement was not a joint proposal. The court explained at p. 1221 as follows:

> While both BJV and GSOMR are indentified in the proposal the proposal explicitly states that BJV was the party making the offer, to pay Eastern $20,000. Indeed as Eastern did not seek affirmative relief against GSOMR, no reason existed for GSOMR to offer payment of any monies to Eastern.

Again, unlike the case at bar, the offer in *Eastern Atl. Realty* was made by a single defendant to dismiss both the defendant and a nonparty. Consequently, none of Appellant's cases support finding that Southeast made a valid offer of settlement.

The second certified question should be answered in the affirmative: **conditioning acceptance on dismissal of multiple parties is an invalid joint proposal, unless the Rule 1.442(c)(4) exception applies.** Since Southeast's Proposal failed to comply with the joint offer rules, and the exception contained in Rule 1.442(c)(4) is inapplicable, this Court should conclude that **Southeast's proposal for settlement is nonviable** and it is entitled to **no attorneys' fees.**

## CERTIFIED QUESTION NO. 3

**DOES FLA. STAT. § 768.79 APPLY TO CASES THAT ARE GOVERNED BY THE SUBSTANTIVE LAW OF ANOTHER JURISDICTION; AND, IF SO, IS THIS STATUTE APPLICABLE EVEN TO CONTROVERSIES IN WHICH THE PARTIES HAVE CONTRACTUALLY AGREED TO BE BOUND BY THE SUBSTANTIVE LAWS OF ANOTHER JURISDICTION?**

### C. Section 768.79 Creates a New "Substantive" Right to Attorneys' Fees That Cannot Be Applied to Cases Governed By The Substantive Law of Another Jurisdiction

#### *3. Section 768.79's Right to Attorney's Fees is A "Substantive" Law In Derogation of the Common Law That Should Not be Applied To Cases Governed By The Substantive Law of Another Jurisdiction*

The Florida Supreme Court has consistently described the right to attorney's fees under Section 768.79 as "substantive." *E.g., Knealing v. Puleo*, 675 So.2d 593, 596 (Fla.1996) (Section 768.79's right to attorneys' fees is "substantive").

> *Substantive law* has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which *fix and declare the primary rights of individuals with respect towards their persons and property.*

*Massey v. David*, 979 So.2d 931, 936–37 (Fla.2008) (emphasis in original), *quoting, Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla.1991). The rationale for this rule lies in that Florida has adopted the American Rule requiring each side to pay its own attorney's fee, unless otherwise provided by statute or an agreement between the parties. A statutory requirement for the non-

prevailing party to pay attorney fees is a new obligation that is substantive. *TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606, 611 (Fla.1995) ("The legislature has modified the American rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79.").

In *Timmons v. Combs*, 608 So.2d 1 (Fla. 1992), this Court explained the interplay between the substantive provisions of Section 768.79 and the procedural aspects of Rule 1.422. *Timmons* acknowledged that there was conflict between the statute and the rule on both substantive and procedural issues. The Court ruled that the portions of Section 768.79 creating the right to recover attorneys' fees was "substantive" and thus controlling over rule 1.422. But, Section 768.79's provisions dealing with procedural aspects were subject to the court's rule-making authority. *Timmons* resolved the conflict by adopting the procedural portions of the statute and repealing rule 1.442. *Id*. at 3.

Consistent with these authorities, *McMahan v. Toto,* 256 F.3d 1120 (11th Cir. 2001) (*McMahan I*) concluded that Section 768.79 was a substantive provision when deciding choice-of-law issues. *McMahon I* involved a suit for tortious interference with contractual relations. The Eleventh Circuit concluded Section 768.79 did not apply since Virginia substantive law governed the underlying claim. The Court was persuaded by the mandatory nature of Section 768.79:

> Florida courts have occasionally described §768.79 as a penalty designed to encourage litigants to act reasonably and in good

> faith in settling lawsuits. [Citations] That description does not change the fact that §768.79 provides for a mandatory award of attorney's fees where the offer of judgment is rejected, instead of a discretionary award of attorney's fees designed to sanction frivolous litigation.

*Id.* at 1120. This analysis is sound, but *McMahan I* was reversed in *McMahan v. Toto*, 311 F.3d 1077 (11th Cir. 2002) based on the erroneous decision in *BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So. 2d 266 (Fla. 4th DCA 2001).

#### *4. BDO Seidman, Bennett and Weatherly Cited By Appellant Do Not Support The Conclusion that Section768.79 is a Procedural Statute For Choice-of-Law Purposes*

Appellant contends in its Brief pages 25-30 that *BDO Seidman, Bennett v. Morales*, 845 So.2d 1002 (Fla. 5th DCA 2003), and *Weatherly Associates, Inc. v. Balloch*, 783 So.2d 1138 (Fla. 4th DCA 2001), are authority for treating Section 768.79 as a "procedural" provision for choice-of-law purposes. These decisions do not support this conclusion.

Of the three cases, *BDO Seidman* was the only decision to actually examine the relationship between the conflict of law issue and Section 768.79. The action involved a professional malpractice claim litigated in a Florida state court where Tennessee substantive law applied. 802 So.2d at 367. Each member of the three judge panel wrote their own decision, with one judge dissenting.

Judge Klein concludes Section 768.79 is a *substantive* law, but held that a conflict of laws analysis should *never* be applied to a case arising this fee-shifting

statute. *Id.* at 369. The result was based on a misinterpretation of Section 6 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("RESTATEMENT"), which provides various factors for deciding conflict of law issues. Judge Klein's contended that the RESTATEMENT requires that a Florida court follow the legislative directives of Section 768.79, even if it determines the substantive law of another state applies. *Id.* at 369. Section 6 of the RESTATEMENT does not so provide.

The Commentary to the RESTATEMENT Section 6 explains there are a limited number of state statutes which are expressly directed to the choice-of-law issue.

> An example of a statute directed to choice of law is the Uniform Commercial Code . . . Statutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number.

RESTATEMENT Section 6, Comment on Subsection (1) (emphasis supplied).

Section 768.79 is not a statute that is "expressly directed to choice of law", but a provision directed at facilitating resolution of cases. On the hand, Fl. Stat. § 671.105 is directed to choice-of-law issues, and it expressly allows parties to select the law of another jurisdiction when engaging in commercial transactions. Judge Klein's approach must be rejected, since it misapplied Section 6 of the RESTATEMENT.

Judge Gross's concurring opinion finds that Section 768.79 is a *procedural* law, for purpose of choice-of-law analysis. *BDO Seidman*, at 373-74. Relying on

Section 122 of the RESTATEMENT, the concurrence found that Section 768.79 is a provision "prescribing how litigation shall be conducted." Other examples of procedural rules included in Section 122 of the RESTATEMENT are the "statute of limitations" and rules relating to the "burden of proof" and "burden of going forward." RESTATEMENT, Section 122, Comment. Again, Section 768.79's substantive right to fees is not in the same class as these rules of evidence. Additionally, the RESTATEMENT'S definition of what is a procedural statute conflicts with Florida law. *Fulton County Adm'r v. Sullivan*, 753 So.2d 549 (Fla.1999) (Statutes of limitations are substantive law.).

Judge Polen's dissent had it right. Section 768.79 is a substantive law and its application depends upon a traditional choice-of-law analysis:

> [T]his statute is both procedural and substantive. But we are not here concerned with the procedural aspect. Whether or not the statute may be deemed "punitive" or a "sanction," the departure from common law principles which allows a court to require one party to pay some of the attorney's fees of the other party . . . makes this a substantive provision.

*BDO Seidman*, at 374. The dissent acknowledged that Florida courts may still sanction frivolous conduct under Section 57.105, even where the substantive law of another state applies. *BDO Seidman's* dissent should be adopted by this Court.

For the reasons this Court should discount the majority in *BDO Seidman*, it should also reject *Bennett's* holding. *Bennett* involved plaintiff's securities fraud action brought against her investment advisor under Virginia law. The court

concluded that Section 768.79 was "substantive" and agreed with Judge Klein's position in *BDO Seidman* that it was required to apply Section 768.79 without a conflict of laws analysis. *Bennett,* 845 So.2d at 1004. *Bennett* failed to analyze the relationship between Section 768.79 and the choice-of-law issue, and it failed to discuss *BDO Seidman's* concurring and dissenting opinions, both of which conflict with Judge Klein's decision. *Bennett* provides no support for Appellant's position.

Finally, Appellant relies on *Weatherly* which was decided under Fla. Stat § 57.105. Significantly different from Florida's Offer of Judgment Statute, Fla. Stat § 57.105 only applies when there has been a finding that the action was "frivolous or completely untenable." *Weatherly*, 783 So.2d at 1141. The case arose from a suit brought by a physician recruitment agency against a competitor and former employee for breach of non-disclosure and non-compete agreements and tortious interference with business relationships. The plaintiff lacked all evidence and eventually agreed to dismiss the case. Defendants obtained sanctions based on plaintiff's conduct in continuing to litigate when it was clear there was no case. Plaintiff claimed on appeal that Florida's frivolous litigation statute should not apply, since the parties agreed Connecticut law governed the employment agreement. This argument was rejected, because Plaintiff (and its attorney) continued litigating in bad faith when they knew there was no case. *Id.*

The third certified question should be answered in the negative. Section 768.79 creates a substantive right to attorneys' fees, and it will not apply when the substantive law of another jurisdiction applies. Florida Courts should be free to analyze the applicability of Section 768.79 based on traditional conflict of law principals and free to impose sanctions for frivolous conduct, where warranted.

### D. Florida's Courts Must Enforce Contractual Choice of Law Provisions, Since Section 768.79's Right to Fees Is Not A Sufficiently "Strong Policy" Outweighing the Parties Freedom of Contract

With respect to commercial transactions, Florida's legislature has specifically authorized contracting parties to agree that the laws of another state having a reasonable relation to the transaction may govern their rights. Fl. Stat. § 671.105. The only exception to this rule arises when the law of the chosen forum contravenes a "strong public policy" of Florida. *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So.2d 1166, 1169 (Fla.1985) (Contract "shortening the period of time for filing a suit was not contrary to a strong public policy."); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So.2d 507 (Fla. 1981) (Florida's usury statute prohibiting certain interest rates does not establish a strong public policy against two parties contractually agreeing to apply another state's law).

This law was applied in *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So.2d 306, 311 (Fla. 2000), which held Florida courts are generally required to enforce contractual choice-of-law provisions. The court explained that:

> the countervailing public policy must be sufficiently important that it outweighs the policy protecting freedom of contract.

*Id.* at 312. Hence, routine policy considerations are insufficient to invalidate contractual choice-of-law provisions.

*Mazzoni Farms* involved commercial nurseries which brought a products liability action against a fungicide manufacturer. *Id.* at 308. After a settlement agreement was entered, the nurseries sued the manufacturer alleging they had been fraudulently induced to settle their claims. *Id.* at 309. The district court dismissed the nurseries case based on releases containing Delaware choice-of-law provisions. *Id.* The choice-of-law issue was certified by the Eleventh Circuit to this Court.

Florida's Supreme Court explained the manufacturer need not prove:

> the substantive law of Delaware nor obliged to demonstrate conflict between Delaware and Florida law; on the contrary, the choice-of-law provision is presumptively valid and it is the nurseries' burden to demonstrate why it should not be enforced.

*Id.* at 311. *Mazzoni Farms* also rejected the nurseries' contention that the release was against public policy, as it allowed the manufacturer to contract around its fraud. *Id.* at 313. It noted the Florida legislature had passed a statute authorizing

choice-of-law provisions in contracts when a "transaction bears a reasonable relation to this state and also to another state." *Id.*, *quoting* Fla. Stat. 671.105(1).

> While we both recognize and reaffirm Florida's policy disfavoring fraudulent conduct, we are mindful of the rigorous standard employed in determining whether to invalidate choice-of-law provisions. Accordingly, we hold that enforcement of the choice-of-law provision is not so obnoxious to Florida public policy as to render it unenforceable.

*Id.* (emphasis supplied). Thus, the contractual choice-of-law provisions controlled.

Following *Mazzoni Farms,* the Fourth District in *Precision Tune Auto Care, Inc. v. Radcliffe,* 815 So.2d 708, 710 (Fla. 4th DCA 2002), was called to decide whether a contract containing a provision selecting Virginia as the applicable forum barred reliance on Fla. Stat. §57.105 (2) ("Section 57.105"). Section 57.105—frequently referred to as Florida's attorneys' fee reciprocity statute—provides that if a contract contains a provision entitling one party to attorneys' fees if it prevails in the case, the court may award fees to the other party if it prevails. Although Virginia law does not contain a similar reciprocity statute, the trial court disregarded the contractual choice-of-law provision and applied Florida law.

The *Precision Tune* court reversed holding the choice-of-law provision was "crucial to the outcome" of the case. *Id.* at 711. Where the contract provided attorneys' fees for one party and not the other, the Florida statute could not be used to provide attorneys' fees in light of the choice-of-law provision. *Id.* at 712. *Precision Tune* noted that Florida's public policy favoring the right of both parties

to receive attorneys' fees was not "sufficiently important that it outweighs the policy protecting freedom of contract." *Id.* at 710.

A similar result was reached by the Fifth District in *Walls v. Quick & Reilly, Inc.*, 824 So.2d 1016, 1018 (Fla. 5th DCA 2002), where the prevailing party claimed Florida's reciprocity statute required that it be awarded attorneys fees. 824 So.2d at 1019. The court held Florida's statute could not be enforced, because the contract mandated application of New York law. *Id.* at 1020.

> We find further support for our conclusion in examples of other statutory provisions which the Florida Supreme Court has held are not founded on such strong public policy to justify failure to apply a choice-of-law provision in a contract. For example, usury laws and statute of limitations are not founded on such strong public policy. Surely, if the courts do not attach a strong public policy to Florida's usury laws and statutes of limitations, we should not attach a strong public policy to the provisions of section 57.105 (5), which allows reciprocal attorneys fees in contract actions.

*Id.* at 1019-20 (emphasis supplied).

The third certified question should be answered "No". Because Section 768.79 is a **"substantive" law,** courts should be **free to engage in a conflict of laws analysis to determine whether Section 768.79 applies**, and parties should be **free to allocate the burden of attorneys' fees by agreement**. Michigan is the forum state contractually agreed to by Southeast. Fee allocation is not contrary to a strong public policy, so **Southeast cannot now rely on Florida's Section 768.79** to obtain attorneys' fee from Auto-Owners. Thus, **Southeast has no right to fees.**

## CONCLUSION

The direction to be given to the Eleventh Circuit should be clear:

1. "***YES***", a valid offer of judgment may be made before a second trial, but "***NO***", not here, because the required **NEXUS** between the dispositive judgment and the timeliness requirement of Rule 1.442 is lacking. Southeast made a void and untimely proposal for settlement. Auto-Owners owes Southeast **NO** attorneys' fees based on resolution of the first certified question.

2. ***"YES",*** conditioning an offer of judgment on resolution and dismissal with prejudice of the offeree's claims against multiple parties renders the offer of judgment a "joint proposal" that is void, unless covered by Rule 1.442(c)(4)'s exception to parties who are vicariously, constructively, derivatively, or technically liable. Southeast made a void joint offer that failed to provide Auto-Owners the option of settling with either Southeast or Simpson. Auto-Owners owes Southeast **NO** attorneys' fees based on resolution of the second certified question.

3. "***NO***", Section 768.79 does *not* apply when choice-of-law rules mandate that the case be governed by laws of another jurisdiction. And, "***NO***", Section 768.79 does *not* apply when the parties agreed in their contractual choice-of-law provision that disputes would *not* be governed by Florida law. Southeast contractually agreed that Michigan law would apply here. Auto-Owners owes Southeast **NO** attorneys' fees based on resolution of the third certified question.

No error was committed by the Federal District Court when it concluded that Appellant Southeast was entitled to no attorneys' fees from Auto-Owners pursuant to Section 768.79 and Rule 1.442. The decision of the Federal District Court should be **AFFIRMED.**

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of the foregoing have been furnished by regular U.S. Mail to the Florida Supreme Court this 7th day of June, 2011to the address listed below. Additionally, a true and correct copy of the foregoing has been furnished by regular U.S. Mail this **7th** day of **June, 2011** to the remaining addresses listed below:

**Florida Supreme Court**
**Attention: Clerk's Office**
**500 South Duval Street**
**Tallahassee, FL 32399-1927**

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## CERTIFICATE OF TYPE FACE COMPLIANCE

The undersigned attorney of record for Appellee certifies that this Answer Brief has been prepared in Font Face Times New Roman in pitch size 14.

Respectfully submitted,

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## REQUEST FOR ORAL ARGUMENT

The Appellee Auto-Owners Insurance Company requests the opportunity to present oral argument before the Florida Supreme Court with respect to this appeal certified from the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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