IN THE SUPREME COURT OF FLORIDA

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CASE NO.: SC11-285

(Lower Tribunal Case No.: 09-15846)

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SOUTHEAST FLOATING DOCKS, INC., ET AL.

Appellant,

vs.

AUTO-OWNERS INSURANCE COMPANY

Appellee.

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ON APPEAL
FROM THE UNITED STATES ELEVENTH
CIRCUIT COURT OF APPEALS

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# APPELLANT'S INITIAL BRIEF

## ON BEHALF OF SOUTHEAST FLOATING DOCKS, INC.


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## STATEMENT OF THE CASE AND OF THE FACTS

This case is a referral from the United States Eleventh Circuit Court of Appeals of three certified questions, each of which could be determinative of Southeast Floating Docks' appeal of the trial court's denial of Southeast Floating Docks' request for an award of attorney's fees and costs under Fla.Stat. 768.79.

The underlying action was filed by Auto-Owners Insurance Company in the United States District Court for the Middle District of Florida in March, 2005, seeking damages from Southeast Floating Docks and its President, Alan L. Simpson, for the alleged breach of a General Agreement of Indemnity jointly executed by the Defendants. Southeast Floating Docks and Simpson defended the claim alleging that their duty to indemnify Auto-Owners Insurance Company was abrogated by Auto-Owners' bad faith settlement of an underlying performance bond claim. The case was tried to a jury in mid-May, 2006, which resulted in a jury verdict and resultant judgment in Southeast Floating Docks' and Simpsons' favor based upon the jury's express finding that Auto-Owners Insurance Company had acted in bad faith in settling the performance bond claim which provided the basis for the claim for indemnity. [Doc. 179]. Auto-Owners Insurance Company subsequently filed a motion for entry of judgment as a matter of law or alternatively for a new trial. The trial court granted Auto-Owners' motion for a new trial on September 11, 2006 [Doc. 205], and subsequently issued a case

management order on September 25, 2006, setting a new trial date of April 2, 2007. On December 11, 2006, Southeast Floating Docks served its proposal for settlement on Auto-Owners Insurance Company [Doc. 349]. Auto-Owners rejected Southeast Floating Docks' proposal for settlement.

On March 1, 2007, the trial court granted Auto-Owners' motion for summary judgment as to liability and subsequently set a new (third) trial date as to damages. [Doc. 248, 270]. Prior to the re-set trial date for damages, the trial court entered final judgment for damages in favor of Auto-Owners and against Southeast Floating Docks and Simpson, jointly and severally on June 23, 2008. [Doc. 299]. Southeast Floating Docks and Simpson timely appealed the final judgment against them and sought review of the trial court's order granting a new trial.[1]

In Auto-Owners Insurance Company v. Southeast Floating Docks, Inc., 571 F.3d 1143 (11th Cir. 2009), the Eleventh Circuit Court of Appeals found that the jury's verdict, that Auto-Owners had acted in bad faith in settling the underlying performance bond claim, was supported by the evidence and ordered that the jury's verdict be reinstated in favor of Southeast Floating Docks and Simpson. Upon the filing of the mandate from the Eleventh Circuit, the trial court reinstated the jury's verdict and entered a judgment of no liability in favor of Southeast Floating Docks

[1] Under the Federal Rules, Southeast Floating Docks could not seek appellate review of the new trial order. An order granting a new trial is non-appealable and can only be reviewed in conjunction with any review of the final order entered after the new trial.

and Simpson. Upon entry of the judgment in its favor, Southeast Floating Docks filed its motion seeking an award of attorney's fees and costs pursuant to Fla.Stat. 768.79 based upon Auto-Owners' unreasonable rejection of Southeast's proposal for settlement.

The trial court denied Southeast Floating Docks' motion for attorney's fees ruling that the offer was invalid because it was not served more than forty-five days before the first (vacated) trial despite the fact that it was served more than forty-five days before the second, new trial date. The trial court reasoned: "[t]his case was first set for trial on May 30, 2006." Southeast Floating Docks' offer "of December 11, 2006 [was] more than six months beyond the deadline set by Rule 1.442(b)." [Doc. 373, pg. 3]. Southeast Floating Docks timely appealed the denial of its motion for attorney's fees and costs to the Eleventh Circuit.

In order to assist in its disposition of Southeast Floating Docks' appeal, the Eleventh Circuit Court of Appeals has certified three questions to this Court. The certified questions are:

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?

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)?

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 JURISDICITON?

## SUMMARY OF ARGUMENT

As noted by the trial court in its order denying Southeast Floating Docks' motion for attorney's fees and costs, "These parties to this diversity case have an exceptionally long and active litigation history." This appeal is the fall out from Auto-Owners Insurance Company's attempt to avoid Florida's statutory sanction for the unreasonable continuation of litigation after the rejection of a proposal for settlement under Fla.Stat. 768.79. Had Auto-Owners Insurance Company not unreasonably rejected Southeast Floating Docks' proposal for settlement, the "exceptionally long and active litigation history" between the parties would have been significantly shortened. The Eleventh Circuit Court of Appeal has certified three questions to this Court to enable it to review the appropriateness of the District Court's denial of Southeast Floating Docks' application for sanctions under Fla.Stat. 768.79. The answers to the questions clearly show that the trial court erred and that attorney's fees should have been awarded to Southeast Floating Docks.

The clear language of Fla.R.Civ.P. 1.442 mandates that the answer to the Eleventh Circuit's first question, whether or not the statute applies during a second trial, be in the affirmative. The language of the rule and of the statute, the policies behind it, and other courts' interpretations of the analogous Federal Rule of Civil Procedure 68, clearly show that Florida's Statute, Section 768.79, applies in

situations in which a second trial is ordered. There is nothing in the language of the statute itself or the rule which says otherwise, and there is no reason to infer that the legislature sought to distinguish between the conservation of judicial resources in a first or a second trial.

Southeast Floating Docks' proposal for settlement was made by a single party, Southeast Floating Docks. The fact that its acceptance was conditioned upon Auto-Owners Insurance Company dismissing all claims against Southeast Floating Docks and its jointly liable President, Alan L. Simpson, did not convert the proposal into a "joint" offer requiring apportionment. Auto-Owners Insurance Company had the ability to accept or reject the offer without consultation or consideration by any other party. Fla.R.Civ.P. 1.442 does not require the apportionment of an offer made by a single party. Based on the clear dictates of the statute and the rule, the Eleventh Circuit's second inquiry must be answered in the negative.

Florida's legislature has expressed a strong public policy to conserve judicial resources and to protect the 'judicial machinery functions" within the state. Although Florida courts may sometimes apply the substantive law of another state while resolving disputes, Florida's legislature has expressed a clear and overriding policy which is not subject to judicial review. Florida Statute, Section 768.79 applies to <u>any</u> civil action for damages filed in this state. It does not matter if the

action sounds in tort or in contract, nor whether the substantive law of Michigan or Florida applies, the impact on Florida's "judicial machinery" is the same and the expressed legislative intent must be given its due. Section 768.79 does not distinguish between actions sounding in contract or tort. Both parts of the third inquiry by the Eleventh Circuit must be answered in the affirmative.

## STANDARD OF REVIEW

By their nature, certified questions are solely issues of law and, therefore, should be considered under a de novo standard of review, particularly so when the questions call for statutory construction. Card v. Mosaic Fertilizer, LLC, 39 So.3d 1216 (Fla. 2010); Kephart v. Hadi, 932 So.2d 1086 (Fla. 2006).

## ARGUMENT

## QUESTION 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?

Whether or not Fla.Stat. 768.79 allows for offers of judgment to be served prior to a second trial is a question of statutory construction and, therefore, is to be determined by the legislative intent as expressed in the statute. Florida Statute 768.79 does not contain a prohibition against its use when a new trial has been ordered. The procedural implementation of Fla.Stat. 768.79 is governed by Fla.R.Civ.P. 1.442. Fla.R.Civ.P. 1.442(b) provides:

> Service of Proposal. A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. 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.

Just as with the statute, Fla.R.Civ.P. 1.442 does not contain a limitation or restriction on the statute's use prior to a new trial.

### A. Florida's Offer of Judgment Statute.

In Florida, the general rule is that so long as an offer of judgment is timely, served in good faith and otherwise complies with Florida's Offer of Judgment

Statute, a court is without discretion to deny an attorney's fee motion. See TGI Friday's Inc. v. Dvorak, 663 So.2d 606, 611-12 (Fla. 1995), (holding that so long as the express requirements of Florida's Offer of Judgment Statute are met, lack of good faith "is the sole basis on which the court can disallow an entitlement of an award of fees").

The Offer of Judgment Statute is "punitive in nature [and its] purpose is to sanction a party who unreasonably refuses to settle by shifting the payment of attorneys' fees." Miles v. Martinez, 909 So.2d 340, 343 (Fla. Dist. Ct. App. 2005). Although punitive in nature, the Offer of Judgment Statute "should be given a construction calculated to further justice, not to frustrate it." Mills, 909 So.2d at 343. "When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the trial judge should relax them, if it can be done without injustice to any of the parties." Mills, 909 So.2d at 343. Finally, the "general rule of statutory construction in Florida is that courts should not depart from the plain and unambiguous language of a statute." Dade County v. Pena, 664 So.2d 959, 960 (Fla. 1995). Instead, courts should construe "a statute . . . to give effect to the Legislature's intent." Bellsouth Telecomm., Inc. v., Meeks, 863 So.2d 287, 288-89 (Fla. 2003) (citations omitted).

Florida's Offer of Judgment Statute is modeled after Fed.R.Civ.P. 68 and shares a common purpose - to encourage 'litigants to settle by penalizing those

who decline offers that satisfy the statutory requirements." MGR Equip. Corp., Inc. v. Wilson Ice Enters., Inc., 731 So.2d 1262, 1264 (Fla. 1999); Cheek v. McGowan Elec. Supply Co., 511 So.2d 977, 981 (Fla. 1987) (Florida's Offer of Judgment Statute "was modeled" after Rule 68); Kennard v. Forcht, 495 So.2d 924, 925 (Fla. Dist. Ct. App. 1986) (addressing Florida's Offer of Judgment Statute and stating that "cases decided under the parallel Rule 68, Federal Rules of Civil Procedure, are instructive"). See also, Marek v. Chesny, 473 U.S. 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation."); Aspen v. Bayless, 564 So.2d 1081, 1083 (Fla. 1990) (stating that the purpose and intent of Florida's Offer of Judgment Statute is "to encourage parties to settle claims without going to trial").

"Encouraging settlement lowers litigation costs for the parties and reduces the fiscal impact of litigation on the court system." Allstate Ins. Co. v. Materiale, 787 So.2d 173, 176 (Fla. Dist. Ct. App. 2001) (Casanueva, J., concurring) ("[t]he main purpose" of the offer of judgment statute is "to encourage resolution of disputed claims without the unnecessary consumption of scarce judicial resources"); Pirelli Armstrong Tire Corp. v. Jensen, 752 So.2d 1275, 1277-78 (Fla. Dist. Ct. App. 1999). Florida's Offer of Judgment Statute is intended to penalize parties who "fail to act reasonably and in good faith in settling lawsuits." Eagleman v. Eagleman, 673 So.2d 946, 947 (Fla. Dist. Ct. App. 1996). This is

because early settlement of litigation furthers an important public policy - curtailing litigation and conserving judicial resources.

### B. Federal and State Courts Have Upheld the Timeliness of Offers of Judgment Served Under Circumstances Analogous to Southeast Floating Docks' Offer of Judgment Based Upon, Inter Alia, the Policy Supporting Such Offers.

While no Florida appellate court has expressly addressed whether an offer of judgment is timely when served after a first trial and prior to a second trial, every state or federal court that has done so has found such an offer timely and furthering the policy encouraging settlement and the conservation of judicial resources. See Allianz Ins. Co. v. Gagnon, 860 P.2d 720 (Nev. 1993) (concluding that 'appellants' offers of judgment were not untimely because appellants made offers prior to the second trial in the case"); Davis v. Abbuhl, 461 A.2d 473 (D.C. Ct. App. 1983) (holding that an offer of judgment made "prior to the start of the second trial . . . presents a typical application of the [offer of judgment] rule . . . . Appellee made an offer of judgment, appellants rejected it, and the judgment finally obtained was not more favorable than the offer"). See also, McCabe v. Mais, 2009 WL 692293, *6 (N.D. Iowa 2009) (upholding without questioning the timeliness of a Federal Rule 68 offer of judgment made prior to "a partial retrial on damages"); Longfellow v. Jackson County, 2007 WL 2027126 (D. Or. 2007) (affirming without questioning the timeliness of an offer of judgment made "prior to the

second trial"); Cover v. Chicago Eye Shield Co., 136 F.2d 374 (7th Cir. 1943) (upholding a Rule 68 offer of judgment made after the first stage of a bifurcated trial but before the second phase because the two phases constituted separate trials).

Procedurally, the Nevada case of Allianz Ins. Co. v. Gagnon, 860 P.2d 720 (Nev. 1993) is nearly identical to the instant case. In Allianz the Supreme Court of Nevada, relying in part upon the Florida Supreme Court's decision in Cheek v. McGowan Elec. Supply Co., 511 So.2d 977 (Fla. 1987), held that an offer of judgment was timely despite being made after a first trial but before the second. See Allianz, 860 P.2d at 723 (holding that "appellants' offers of judgment were not untimely because appellants made the offers prior to the second trial in the case") (internal quotations omitted).

Allianz involved a bifurcated trial. Following the first phase of the bifurcated trial the "appellants made offers of judgment to each of the respondents" that were rejected. Allianz, 860 P.2d at 722. The appellants prevailed after the second phase of the trial and filed motions to recover their attorneys' fees pursuant to Arizona's offer of judgment statute, which, like Florida's, is modeled after Fed.R.Civ.P. 68. Allianz, 860 P.2d at 722. The trial court denied the appellants' attorneys' fees motions holding, inter alia, "that the offers of judgment were

invalid because appellants failed to make the offers of judgment prior to the first … trial." Allianz, 860 P.2d at 722.

On appeal the appellants contended "that the offers of judgment were effective because appellants made these offers in advance of the second trial, and that existence of a prior trial does not vitiate the offers." Allianz, 860 P.2d at 723. As a preliminary matter, the appellate court held that the two components of a bifurcated trial constitute separate trials for purposes of determining the timeliness of an offer of judgment. Allianz, 860 P.2d at 993-94. Because the two stages of a bifurcated trial are considered separate trials, the Nevada Supreme Court held that "appellants' offers of judgment were not untimely because appellants made the offers prior the second trial in the case." Allianz, 860 P.2d at 723.

The Nevada Supreme Court reasoned that the "offer of judgment statute simply defines the point in time when a trial – **any trial** – commences" and does not preclude offers of judgment between separately held trials. Allianz, 860 P.2d at 724 (citations and quotations omitted) (emphasis added). Accordingly, the Allianz court found no sound "reason why a party should not be able to file. . ." an offer of judgment after a first trial and before a second trial. Allianz, 860 P.2d at 724 (citations and quotations omitted). "The purpose of [Nevada's offer of judgment statute] is to encourage settlement of lawsuits before trial." Allianz, 860 P.2d at 724. "The purpose of the requirement that an offer be made more than ten

days prior to trial is to ensure that an offeree have adequate time after service and before trial to consider the offer." Allianz, 860 P.2d at 724 (citing Cheek v. McGowan Elec. Supply Co., 511 So.2d 977, 981 (Fla. 1987)). "[T]here is no reason why avoiding one of two . . . trials is undesirable." Allianz, 860 P.2d at 724. The Nevada Supreme Court went on to state that:

> Furthermore, the ten-day rule and good faith limitations imposed upon offers of judgment should protect an offeree who receives an offer prior to the second . . . trial as effectively as an offeree who receives an offer prior to the commencement of a single trial. . . . **The offer of judgment is a useful settlement device which should be made available at every possible juncture where the rules allow.**

Allianz, 860 P.2d at 724 (emphasis added).

In Davis v. Abbuhl, 461 A.2d 473 (D.C. Ct. App. 1983), the District of Columbia Court of Appeals likewise held that an offer of judgment made after a first trial but before a second trial is timely. In Davis, after a trial resulted in a jury verdict in favor of the plaintiffs, the trial court granted the defendant's request for a new trial.[2] Davis, 461 A.2d at 475. "Prior to the start of the second trial, appellee made an offer of judgment to appellants", under the District of Columbia's version of Federal Rule 68, that was rejected by the appellant. Davis, 461 A.2d at 477. At

[2] The defendant's motion was for a remittitur, or, in the alternative for a new trial. Because the plaintiff refused to accept the remittitur, the trial court ordered a second trial. Davis, 461 A.2d at 475.

the second trial the appellant received a jury verdict less favorable than the offer of judgment and the appellee's motion for costs was granted.

On appeal, the appellant argued that the offer of judgment should not be permitted after a first trial and before a second trial between the same parties. The appellate court disagreed and upheld the award of costs, reasoning:

> The purpose of Rule 68 is to encourage settlement and put an end to litigation, and not to form a basis for further controversy between the parties. . . . The instant case presents a typical application of the rule. Appellee made an offer of judgment, appellants rejected it, and the judgment finally obtained was not more favorable than the offer.

Davis, 461 A.2d at 477.

Here, as in Allianz and Davis, Southeast Floating Docks' offer was timely served prior to a second trial. As in Allianz and Davis, Auto-Owners argued (and the trial court held) that the offer was ineffective because it was made in advance of the second trial, and not the first. As in Allianz and Davis however, Southeast Floating Docks' offer is valid because it was timely made prior to the second trial date.

Fla.R.Civ.P. 1.442, like Nevada's statute in Allianz and the District of Columbia in Davis, 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. As

in Allianz and Davis, Florida's Offer of Judgment Statute does not preclude an offer of judgment between separately scheduled trials.

Here, as in Allianz and Davis, there is simply no reason why Southeast Floating Docks should not have been able to file an offer of judgment after the first trial and before the second. The purpose of Florida's Offer of Judgment Statute is the same as Nevada's and the District of Columbia's: "[T]o encourage the settlement of lawsuits before trial." Allianz, 860 P.2d at 724; Cheek v. McGowan Elec. Supply Co., 511 So.2d 977, 981 (Fla. 1987) (stating that the "purpose of Rule 1.442 is to encourage settlements and eliminate trials whenever possible…"). The reason that Florida's Offer of Judgment Statute mandates that offers be made more than forty-five days prior to trial is the same as Nevada's. See Allianz, 860 P.2d at 723 (citing Cheek, 511 So.2d at 981 (stating that the timing requirement is designed to ensure "that an offeree who may ultimately be taxed with costs for his failure to accept has adequate time to consider an offer")). In fact, in Florida, the protection afforded an offeree is greater than the protections in Nevada: Florida law requires that an offer be served more than forty-five days prior to trial, whereas Nevada law (consistent with Federal Rule 68) only requires that an offer be made up to ten days prior to trial.

Consistent with the policy underlying Florida's statute, as in Allianz and Davis, there is no reason why avoiding one of two trials is less desirable than

avoiding only one trial – in either case scarce judicial resources may be preserved. In Florida, as in Nevada and the District of Columbia, the offer of judgment is a useful settlement device which should be made available at every possible juncture. Allianz, 860 P.2d at 724; Cheek, 511 So.2d at 981 ("eliminate trials *whenever possible*") (emphasis added).

### C. The Plain Language of Fla.Stat. 768.79 and Fla.R.Civ.P. 1.442 Allow For Service of a Proposal For Settlement Prior to a Second Trial.

The plain language of Florida's Offer of Judgment Statute requires that an offer of judgment must be made "at least forty five 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 added). By holding that the offer was untimely because it was not served at least forty-five days before the case "**was** first" set for trial, the trial court ignored the plain language (*i.e.*, the present "tense") in which Rule 1.442 is phrased and added a requirement that does not exist in the rule.

The plain language of 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 in determining whether the case "is set for trial" more than forty-five days hence. Contrary to the plain language of Rule 1.442, however, the rationale underlying the trial court's order requires that a party considering whether to serve an offer of judgment look back to the past to determine whether a previous trial

date has passed (*i.e.*, when the case "*was* first" set for trial). According to the trial court's order, if a trial date is rescheduled, in many instances the Florida Offer of Judgment Statute is eviscerated. Such an interpretation is inconsistent with the plain language of Rule 1.442.

While the granting of a new trial is certainly not the norm, it does occur with some frequency. There is nothing in the language of the Florida Offer of Judgment Statute or Fla.R.Civ.P. 1.442 that suggests that the legislature did not have an equal interest in encouraging settlement as a means of curtailing litigation and conserving judicial resources when cases are scheduled for a second trial as a result of a decision granting a new trial.

Florida's appellate courts recognize that the forty-five day requirement does not preclude an offer of judgment made *inside* of forty-five days of the "first" trial date if the trial is eventually re-set for a second trial date. See Kuvin v. Keller Ladders, Inc., 797 So.2d 611 (Fla. Dist. Ct. App. 2001) (offer of judgment made less than forty-five days before original trial date was timely where trial was later rescheduled) ("Kurvin"); Progressive Casualty Ins. Co. v. Radiology and Imaging Center, Inc., 761 So.2d 399 (Fla. Dist. Ct. App. 2000) (offer of judgment made on last day of trial docket was timely where trial was later rescheduled)

("Progressive").[3] In summary, there is no statutory or policy reason why Florida's Offer of Judgment Statute would not apply prior to a re-trial. The first part of the first certified question must be answered in the affirmative.

### D. Florida Statute 768.79 and Fla.R.Civ.P. 1.442 Do Not Require a "Nexus" Between the Timeliness Requirement of the Offer of Judgment and the Ultimate Judgment Entered in a Case.

The second part of the Eleventh Circuit's first certified question asks: ". . . and, if so, may offers be deemed valid in instances where an appellate court reinstates the judgment of the first trial?" Once again, the plain language of the statute and rule and the legislative policy expressed in the statute dictate an affirmative answer to this part of the first certified question.

Florida Statute 768.79(1) provides in pertinent part:

> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract

[3] In Progressive, for example, a Florida appellate court held that an offer of judgment was timely despite the fact that it was served the day before the last day on the trial docket that the case was scheduled for trial. The appellate court reasoned that where it appears "from the facts of the individual case that [the offer of judgment] it is intended for the next, as yet, unscheduled trial period" the offer of judgment is timely. Progressive, 761 So.2d at 400. Likewise, in Kuvin, the Florida appellate court found an offer of judgment timely even though it was not filed more than forty-five days prior to trial where the trial was eventually rescheduled.

> from the date of filing of the offer if the judgment is one of no liability . . . . (emphasis supplied)

The statute simply refers to "the judgment" meaning the judgment which ultimately is dispositive of the liability (or the amount thereof) of the defendant. There is no nexus requirement expressed in the statute, nor should there be, between the judgment determining the defendant's liability and any particular trial which may or may not have been scheduled at the time the offer of judgment was made. Nor is any such nexus required in Fla.R.Civ.P. 1.442. The rule simply provides that the offer be made before trial, any trial. The statute simply provides that if the judgment is one of no liability that sanctions shall be awarded. There is nothing in the rule or the statute which would exonerate a party subject to sanctions soley because the judgment is obtained by the reinstatement of a jury verdict after appeal.

In positing the second part of the first certified question, the Eleventh Circuit raises a "fairness issue" and cites Glanzberg v Kaufman, 771 So.2d 60 (Fla. 4th DCA 2000). In Glanzberg, (which was also cited by the District Court in its order denying Southeast Floating Docks' motion for attorney's fees and costs), the Fourth District Court of Appeal ruled that Fla.Stat. 768.79 did not allow a proposal for settlement to be served after final judgment but before appeal to recover fees and costs related to that appeal.

The issue decided in Glanzberg, however, is not the issue presented in this case. Nor is the cautionary advice given in Glanzberg (and referred to by the Eleventh Circuit in its certification order) presented in this case.

In Glanzberg the Fourth District Court of Appeal cautioned "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." Id. At 61.

When Southeast Floating Docks served its offer of judgment the case was not on appeal (nor could it have been). A new trial had been ordered. The new trial was more than forty-five days away. All issues, including liability and damages, were unresolved. The ability of a litigant facing a new trial on all issues to look into the future and to calculate "the exact amount" of an offer of judgment cannot be compared to a party seeking only an affirmance or reversal on appeal. There is no correlation between the situations faced by the respective litigants nor is any issue of "fairness" presented which would justify a court adding a "nexus" requirement that does not exist in the statute or the rule.

Even the Glanzberg court recognized that its expressed concern over applying Fla.Stat. 768.79 to appeals would not apply if a second trial were held. And, Florida courts have awarded attorney's fees pursuant to Fla.Stat. 768.79 in

multiple instances in which no trial is held after the offer of judgment is served (e.g. after a motion to dismiss or a summary judgment is granted). See McMahon v. Toto, 311 F.3d 1077, 10081 (11th Cir. 2002) (summary judgment); Kee v. Baptist Hospital, 971 So.2d 814 (Fla. Dist.Ct. App. 2007) (summary judgment).

Fla.Stat. 768.79 clearly applies to situations in which a new trial is ordered and it matters not that after a new trial is ordered an earlier verdict and judgment is reinstated on appeal. So long as the offer is made while the case is pending in the trial court and it is more than forty-five days before a trial is scheduled, if the ultimate judgment entered is (as in this case) one of no liability, sanctions under the statute must be awarded.

Both parts of the first certified question must be answered in the affirmative.

## QUESTION 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)?

The Eleventh Circuit correctly concluded that Southeast Floating Docks offer was not vague or ambiguous as to the party(ies) who were making the offer. "Only one offeror was named, and this was Southeast, not Simpson. We conclude

that the offer was not ambiguous in this regard." Auto-Owners Insurance Company v. Southeast Floating Docks, Inc., 632 F.3d 1195, 1201 at F.N. 7.

Rule 1.442's apportionment requirement does not apply to Southeast Floating Docks' proposal. Rule 1.442 makes clear that apportionment is only required by a "proposal for settlement made **jointly** by **multiple** parties." Carey-All Transp., Inc., v. Newby, 989 So. 2d 1201, 1204 (Fla. Dist. Ct. App. 2008) (emphasis added). See also, Rule 1.442(c)(3) ("A **joint** proposal shall state the amount and terms attributable to each party") (emphasis added). Where, as here, one party's offer of settlement requires the release of non-offering co-parties, apportionment of the offer is not required. See Eastern Atl. Realty and Inv., Inc. v. GSOMR, LLC, 14 So. 3d 1215, 1221-22 (Fla. Dist. Ct. App. 2009). Instead, "the plain language of Rule 1.442(c)(3) only requires apportionment if the proposal is made jointly by several parties." Eastern, 14 So.3d at 1222.

The facts of Eastern are very similar to this case. There, a defendant/counter-plaintiff was served an offer of settlement by one of two opposing parties. See Eastern, 14 So. 3d at 1221. In order to accept the offer, however, the defendant/counter-plaintiff had to release both the offeror **and** the non-offeror. See Eastern, 14 So. 3d at 1221-22. The defendant/counter-plaintiff rejected the offer. After the offeror prevailed at trial it filed a fee petition. The trial court denied the fee petition because, inter alia, the requirement that the

non-offeror be released rendered the offer a "joint proposal" that violated Rule 1.442 because it was not apportioned. See Eastern, 14 So. 3d at 1221-22. On appeal, the trial court's denial of the fee petition was reversed; the appellate court held it was error to characterize the offer as a "joint proposal." Eastern, 14 So.3d at 1222. Despite the fact that the offer in Eastern made reference to and required release of the non-offeror, the appellate court found that the proposal was not "joint" because it "explicitly state[d] that [only one co-party] was the party making the offer." Eastern, 14 So. 3d at 1221.

As in Eastern, Southeast Floating Docks' proposal clearly states that Southeast Floating Docks was the only party extending the proposal – not Southeast Floating Docks and co-defendant Alan L. Simpson. [See Doc. 354-Pg.2 (stating "Defendant, Southeast Floating Docks, Inc., hereby makes this Proposal for Settlement").] Therefore here, as in Eastern, Southeast Floating Docks was not required to apportion its proposal pursuant to Rule 1.442. As in Eastern, it makes no difference that the proposal referenced Simpson and conditioned settlement on his dismissal. [Doc. 354, Pg.2-4.] Instead, because Southeast Floating Docks' proposal was made only by one party – Southeast Floating Docks – Rule 1.442's apportionment requirement does not apply.

Approximately two weeks after the Third District Court of Appeal decided Eastern, the Fourth District Court of Appeal decided Alioto-Alexander v. Toll

Brothers, Inc., 12 So.3d 915 (Fla. 3rd DCA 2009). In the Toll Brothers case the Fourth District Court of Appeal reached the same conclusion as had been reached by the Third District in Eastern, that Fla.R.Civ.P. 1.442(c)(3) does not require the apportionment of a proposal for settlement made by a single party because it is conditioned upon the dismissal of claims against a non-offeror party. "By its own terms the proposal for settlement was made by Toll Brothers and Toll Brothers alone was offering to pay the sum of $5,000. The dismissal of the entire suit, including the claims against Barr, was simply a condition of the proposal and did not serve to transform the proposal for settlement into one made by multiple offerors.." Alioto-Alexander at 916. Both the Alioto-Alexander and the Eastern court recognized that a condition of dismissal, as allowed by Fla.R.Civ.P. 1.442(c)(2)(c), does not convert an offer by a single offeror into a joint offer requiring allocation under Fla.R.Civ.P. 1.442(c)(3). The second question certified by the Eleventh circuit must be answered in the negative.

## QUESTION 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 JURISDICITON?

Florida Statute 768.79(1) provides that it applies "in any civil action for damages filed in the courts of this state . . . ". Federal courts in Florida have long recognized that Fla.Stat. 768.79 applies to actions pending in federal courts. Menchise v. Akerman Senterfitt, 532 F.3d 1146 (11th Cir. 2008). In Menchise the Eleventh Circuit put to rest any contention that the statute's language was limited to cases in Florida state courts and that it did not apply in cases filed in federal courts in the State of Florida. The Eleventh Circuit ruled that the statute applies in cases filed in federal courts in Florida for two reasons; first, the plain language of the statute; second, because Florida could not discriminate against a federal forum. Menchise at 1150, 1151.

The third certified question now asks whether Fla.Stat. 768.79 applies in cases that are governed by the substantive law of another jurisdiction.

Two Florida district courts of appeal have considered this issue and both have answered in the affirmative. In BDO Seidman, LLP v. British Car Auctions, Inc., 802 So.2d 366 (Fla. 4th DCA 2001), the Fourth District Court of Appeals ruled that because of the statute's clear mandate and the policies behind it, it applied to all civil actions for damages in Florida irrespective of choice of law principles.

> Section 768.79(1), Florida Statutes applies to 'any civil action for damages filed in the courts of this state'. (emphasis supplied). This statute is clear, and on its face is applicable to this action for damages. It is also

> constitutional. See TGI Fridays, Inc. v. Dvorak, 633 So.2d 606, 611 (Fla. 1995). We conclude that, because the statute is clear, it should be applied without engaging in a conflict of laws analysis.

BDO at 368.

> When the Legislature enacted section 768.79 it was making a policy determination that attorney's fees should be recoverable under certain circumstances. The Florida Bar Re: Amendment to Rules of Civil Procedure, 550 So.2d 442 (Fla. 1989). Implicit in that policy determination was the decision that the statute would apply to "any" civil action for damages.

BDO at 368, 369.

As recognized by the Fourth District in BDO, an action for damages based on the substantive law of another jurisdiction has the same impact on the Florida court system as one based on the substantive law of Florida.

In BDO, the majority and the concurring opinions analyze the procedural/substantive nature of Fla.Stat. 768.79 and the applicability of that distinction in the context of applying the statute in a case in which another state's substantive law applies. After reviewing the statute and is objectives and considerations regarding choice of law principles, the Fourth District concluded that Fla.Stat. 768.79 applied to that case even though the Florida court was applying the substantive law of Tennessee. A consideration of the same factors as related to this case reaffirms the analysis in BDO and dictates an affirmative answer to the third certified question.

Section 122 of the Restatement (Second) of Conflict of Laws (cited in BDO) provides:

> A court usually applies its own local law rules prescribing how litigation shall be conduced even when it applies the local law rules of another state to resolve other issues in the case.

Comment A to section 122 provides:

> The forum is more concerned with how its judicial machinery functions and how its court processes are administered than is any other state.

Clearly, Fla.Stat. 768.79 (and Fla.R.Civ.P. 1.442) are primarily concerned with the "judicial functioning" of Florida's courts and their application should not be judicially limited to only actions applying Florida substantive law.

Florida's Fifth District Court of Appeal adopted the reasoning found in BDO in applying Fla.Stat. 768.79 in an action applying the substantive law of Virginia.

> Appellants also argue that section 768.79 should not be applied because the parties agreed the substantive law of Virginia applied to this cause and the award of fees is substantive, not procedural. On this point, we agree with Judge Klein's opinion in BDO Seidman, LLP v. British Car Auctions, Inc., 802 So.2d 366 (Fla. 4th DCA 2001), that section 768.79 applies to all civil actions for damages brought in Florida, even where the substantive law of another jurisdiction is applied.

Bennett v. Morales, 845 So.2d 1002, 1004 (Fla. 5th DCA 2003).

The application of Fla.Stat. 768.79 to a civil action for damages in Florida in which the substantive law of another state is applied does not depend on whether

the action sounds in contract or tort. The policy concerns over the functioning of the judicial machinery are no less implicated in a contract action than they are in a tort action. Nor are the other considerations discussed in BDO any less implicated in a contract action than they are in a tort action.

One could not say that avoidance of Florida's statute sanctioning the unreasonable rejection of settlement offers would be a reason the parties were likely to have given thought to in the course of entering into their contract. Nor could one say that the application of the Offer of Judgment Statute was likely to affect the ultimate result of the case. Section 768.79 only comes into play after the determination of the ultimate result. The application of Fla.Stat. 768.79 to protect the "judicial machinery" of the Florida courts does not deprive the parties from having their dispute decided based upon the substantive laws of a foreign state.

In Weatherly Associates, Inc. v. Balloch, 783 So.2d 1138 (Fla. 4th DCA 2001), the Fourth District applied Fla.Stat. §57.105 to a contract action in which the substantive law of Connecticut applied. Even though the right to attorney's fees under Fla.Stat. 57.105 has been found to be "substantive" for other purposes, the Fourth District applied the statute as it was implicated in the interests of efficient judicial administration. The Weatherly case was cited by the Fourth District in BDO as supportive of its decision. No distinction in the analysis in

BDO or Weatherly is provided by whether the underlying action sounds in tort or in contract.

Based upon the clear language of Fla.Stat. 768.79 and the legislative policies expressed therein, the answer to both parts of the third certified question must be in the affirmative.

## CONCLUSION

The Eleventh Circuit has certified three questions to this Court which may be dispositive to the issue before it, whether or not Southeast Floating Docks is entitled to attorney's fees and costs under Fla.Stat. 768.79. The first question presents a novel issue, but it is an issue that is easily resolved by a reading of the statute. Florida's Offer of Judgment statute can be applied at any time which is greater than forty-five days ahead of trial. The statute does not differentiate or distinguish between a "first" or a 'second" trial. The policies expressed in the statute as it has been interpreted by the courts apply equally before a "first" or a "second" trial. There is no basis or reason for the statute to be judicially limited contrary to the clear legislative intent. Similarly, the "judgment" from which sanctions would be calculated, is the final judgment in the case. It matters not whether the "judgment" springs from a "first" trial, a "re-trial", a jury trial, a non-jury trial, a summary judgment or an order of dismissal. All the statute refers to is a "judgment". The statute is clear, it should not be restricted in its application by a judicially crafted artificial construct of "nexus".

Although the first certified question is novel, the second and third certified questions present issues that various Florida district courts of appeal have addressed and resolved. A proposal by a single party which is conditioned upon

the dismissal of the offeror and a jointly liable non-offeror party is not a joint offer and does not require apportionment under Fla.R.Civ.P. 1.442. Florida's Offer of Judgment Statute applies in all civil actions for damages filed in this state. All means all, it does not mean just contract cases or just tort cases. And Florida's legislature has determined that it will protect the judicial resources of the state in all cases, not just cases applying Florida law.

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

1. Yes, 768.79 applies after a re-trial is ordered and yes, it applies when a judgment is reinstated on appeal.

2. No, an offer by a single party is not a joint offer.

3. Yes, 768.79 applies in actions applying foreign law in the courts of Florida, and yes, it applies to actions in Florida courts in which the parties have contractually agreed to apply foreign law.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this 29th day of April, 2011 to:

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## CERTIFICATE OF TYPE FACE COMPLIANCE

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

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