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A History of Apportioning Joint Offers of Judgment in Florida: Is Willis Shaw Really the Bottom Line, or Is There an Exception?

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A HISTORY OF APPORTIONING JOINT OFFERS OF JUDGMENT IN FLORIDA: IS *WILLIS SHAW* REALLY THE BOTTOM LINE, OR IS THERE AN EXCEPTION?

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I. INTRODUCTION

Attorney’s fees are near and dear to the hearts of most lawyers, and an award of fees by the court is much desired among attorneys. A decision that awards attorney’s fees stipulates that one party will pay the other party’s legal costs and expenses. An award for attorney’s fees allows attorneys to satisfy their clients, and at the same time, ensure their own payment.

A. *The American Rule*

Prior to the American Revolution, the courts in the American colonies followed the “English Rule” and customarily awarded attorney’s fees to the prevailing party in civil cases.¹ However, the institution of a new govern-

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1. Fla. Patient’s Comp. Fund v. Rowe, 472 So. 2d 1145, 1147–48 (Fla. 1985).

ment, and new courts in the United States, ended the reliance on this British tradition.² The majority of American courts branched off from the traditional “English Rule” and ceased in the award of fees to prevailing parties.³

In Florida, the courts follow the common law “American Rule” regarding the entitlement to attorney’s fees.⁴ Usually fees are only awarded if there is an exception to the common law rule.⁵ An exception can be imposed by either the judiciary⁶ or the legislature,⁷ or by contractual agreement between the parties.⁸

B. Section 768.79 of the Florida Statutes and Rule 1.442 of the Florida Rules of Civil Procedure

The most common exceptions to the “American Rule” are created by the legislature.⁹ Section 768.79 of the *Florida Statutes* is one such legislative exception that awards fees for offers of judgment.¹⁰ An offer of judgment is “[a] settlement offer by one party to allow a specified judgment to be taken against the party,”¹¹ and the words *offer of judgment*¹² are sometimes used interchangeably with *demand for judgment*¹³ or *proposal for settlement*.¹⁴ Section 768.79 stipulates that a party is entitled to fees and costs if it serves an offer of judgment that is not accepted within thirty days, and the resulting court judgment is either twenty-five percent greater than or less than the offered judgment depending upon the party.¹⁵ This section of the *Florida Statutes* is applied through the procedural power of rule 1.442 of the *Florida Rules of Civil Procedure*.¹⁶

2. *Id.* at 1148.

3. *Id.*

4. *Dade County v. Peña*, 664 So. 2d 959, 960 (Fla. 1995) (citing *Rowe*, 472 So. 2d at 1148).

5. *Id.*

6. *See Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998). The judiciary has imposed one small exception to the American Rule, and, in a very narrow scope, judges are permitted to award fees based on a party’s wrongdoing. *Id.* This rare type of judgment is called “[t]he inequitable conduct doctrine [and] permits the award of attorney’s fees where one party has exhibited egregious conduct or acted in bad faith.” *Id.*

7. *Peña*, 664 So. 2d at 960.

8. *Rowe*, 472 So. 2d at 1148.

9. *See Peña*, 664 So. 2d at 960.

10. *See* FLA. STAT. § 768.79(1) (2002).

11. BLACK’S LAW DICTIONARY 1112 (7th ed. 1999).

12. § 768.79.

13. *Id.*

14. FLA. R. CIV. P. 1.442.

15. *See* § 768.79(1).

16. *See* FLA. R. CIV. P. 1.442.

The award of attorney's fees becomes a penalty for a party who neglects to accept the offer of judgment to end the case.¹⁷ However, offers of judgment were not designed as devices of intimidation.¹⁸ Their purpose is "as a tool of encourage[ment]" to persuade the parties to settle.¹⁹ It is beneficial to all parties to "terminate all claims, end disputes, and obviate the need for further intervention of the judicial process."²⁰ Costs, attorney's fees, and extensive time can all be saved with a resolution through an offer of judgment. Thus, there is quite a bit of persuasion for all parties involved to attempt to settle a dispute before actually progressing with litigation.

This article will discuss awards of attorney's fees for offers of judgment in Florida. Although there have been various notes of contention about this type of award, this piece will focus primarily on the conflict of apportioning the offer of judgment among all parties. Part II of this article separately analyzes the history of section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*, and then studies how the two function together for an award of attorney's fees. Part III specifically focuses on apportioning offers of judgment among multiple parties. It looks at the treatment of the issue by various District Courts of Appeal, focusing on whether they strictly construed the apportionment requirement, or found an exception. Part IV will discuss *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*,²¹ the case in which the Supreme Court of Florida attempted to finally resolve the apportionment issue. It will also analyze lingering questions that are evident among the Florida District Courts of Appeal after the *Willis Shaw Express, Inc.* ("Willis Shaw") decision.

II. COMBINING THE STATUTE AND THE RULE

While section 768.79 of the *Florida Statutes* provides the substantive law for offers of judgment, rule 1.442 of the *Florida Rules of Civil Procedure* presents the means of properly applying the statute.²² Because rule 1.442 supplements section 768.79, the two function mutually, and when pro-

17. Julie H. Littky-Rubin, *Proposals for Settlement: Minding Your P's and Q's Under Rule 1.442*, 75 FLA. B.J. 12 (Feb. 2001) (citing *Abbott & Purdy Group Inc. v. Bell*, 738 So. 2d 1024, 1026 (Fla. 4th Dist. Ct. App. 1999)).

18. *Kaufman v. Smith*, 693 So. 2d 133, 134 (Fla. 4th Dist. Ct. App. 1997) (Hazouri, J., concurring) (suggesting that the statute should do more to clarify the purpose of the rule).

19. *Id.*

20. *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989).

21. 849 So. 2d 276 (Fla. 2003), *reh'g denied*, No. SC02-1521, 2003 Fla. LEXIS 1168, at *1 (Fla. June 26, 2003).

22. Gary M. Pappas & Joye B. Walford, Trial Lawyers Forum, *Proposals for Settlement — More Traps for the Unwary*, 76 FLA. B.J. 69 (Dec. 2002).

posing an offer of judgment, it is always best to use them together, and refer to both, to prevent any mistakes or unnecessary misunderstandings.²³

A. Section 768.79 of the Florida Statutes

Through section 768.79 of the *Florida Statutes*, the Florida Legislature implemented a compulsory right to attorney's fees, if the requirements of the statute have been fulfilled.²⁴ Although section 768.79 is found in the negligence section, in Title XLV, of the *Florida Statutes*, there is no uncertainty in the language of section 768.79, which declares it applicable "[i]n any civil action for damages filed in the courts of this state"²⁵

The Fourth District Court of Appeal addressed this language in *Beyel Bros. Crane & Rigging Co. of South Florida v. Ace Transportation, Inc.*,²⁶ and found section 768.79 unambiguous and comprehensive in scope, holding it applicable to all civil actions in Florida where one party claims damages from another.²⁷ In *Beyel Bros.*, the district court overruled the circuit court's holding that section 768.79 was only applicable to negligence, and indicated the extensive scope of the section.²⁸ In its decision, the district court noted that in 1990 the legislature had specifically changed the wording of section 768.79 to include all civil actions,²⁹ in contrast to the earlier version that only applied section 768.79 to the negligence part of the *Florida Statutes*.³⁰

Section 768.79 of the *Florida Statutes* applies to all parties, either plaintiff or defendant, who file offers of judgment.³¹ Also, the offer of judgment will still be valid even if it is a joint offer.³² If the defendant in a civil action

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 . . . from the date of filing of the offer if the

23. Littky-Rubin, *supra* note 17, at 14.

24. See *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995); *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993).

25. § 768.79(1).

26. 664 So. 2d 62 (Fla. 4th Dist. Ct. App. 1995).

27. *Id.* at 64.

28. *Id.*

29. *Id.*

30. *Id.*

31. See § 768.79(1).

32. *V.I.P. Real Estate Corp. v. Fla. Executive Realty Mgmt. Corp.*, 650 So. 2d 199, 201 (Fla. 4th Dist. Ct. App. 1995) (per curiam).

judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer.³³

The same is true for a plaintiff:

[i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.³⁴

Thus, section 768.79 establishes an "'entitlement' to fees,"³⁵ which is determined by the judgment, subject to any payments received or settlement amounts.³⁶ However, the judgment is not measured by the jury verdict,³⁷ and section 768.79 does not apply to a voluntary dismissal where there would be no finding of liability, unless it is dismissed with prejudice.³⁸

After the basic circumstances of entitlement are established, section 768.79 of the *Florida Statutes* provides four requirements that an offer must fulfill in order to be used as the basis for an award of attorney's fees and costs.³⁹ First, to be in full compliance, an offer must reference section 768.79, and be in writing.⁴⁰ Second, it needs to state the names of the offeror and the offeree.⁴¹ Also, the offer must "[s]tate with particularity the amount offered to settle a claim for punitive damages," and finally, to comply with the section 768.79, an offer has to "[s]tate its total amount."⁴² If the offer complies with the four elements, the statutory requirements are met, and attorney's fees should be awarded.

In *Schmidt v. Fortner*,⁴³ the Fourth District Court of Appeal addressed the basic fulfillment of section 768.79 requirements and found a basis for an offer of judgment where the amount of the offer was in the general range of the value of the missing assets.⁴⁴ The court held that an award of fees only

33. § 768.79(1).

34. *Id.*

35. *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993).

36. § 768.79(6)(b).

37. *Allstate Ins. Co. v. Sutton*, 707 So. 2d 760, 761 (Fla. 2d Dist. Ct. App. 1998) (citing *Stewart v. Progressive Am. Ins. Co.*, 595 So. 2d 272 (Fla. 1st Dist. Ct. App. 1992)).

38. *MX Invs., Inc. v. Crawford*, 700 So. 2d 640, 642 (Fla. 1997).

39. *See* § 768.79(2)(a)-(d).

40. § 768.79(2)(a).

41. § 768.79(2)(b).

42. § 768.79(2)(c)-(d).

43. 629 So. 2d 1036 (Fla. 4th Dist. Ct. App. 1993).

44. *Id.* at 1039.

hinges on the amount offered and the amount of the judgment, not on the reasonableness of the offer.⁴⁵ Two years later, the Supreme Court of Florida followed the holding in *Schmidt*, and upheld the constitutionality of section 768.79 in *TGI Friday's, Inc. v. Dvorak*.⁴⁶ In *Dvorak*, the Supreme Court of Florida ruled that the only way a court could refuse to award fees under section 768.79 was if the offeror did not make the offer in good faith.⁴⁷

However, good faith is not an easy determination, and each case must be examined in depth, on its own merits.⁴⁸ In *Fox v. McCaw Cellular Communications of Florida, Inc.*,⁴⁹ the defendants gave the plaintiffs an offer of judgment for \$100, which strictly followed the statutory requirements of section 768.79.⁵⁰ The plaintiffs argued that the offer was not made in good faith because of the proposal's nominal amount, but the Fourth District Court of Appeal disagreed.⁵¹ The court reasoned that if the offeror "had a reasonable basis at the time of the offer to conclude that their exposure was nominal," the offer was in good faith.⁵² Because the offer of \$100 was in good faith, with a reasonable basis, the court in *Fox* agreed that the defendant was entitled to fees.⁵³ Accordingly, awards for offers of judgment, pursuant to section 768.69, are based solely on the statutory requirements, without room for judges' discretion.⁵⁴

45. *Id.* at 1039–40. The district court stated:

To require the exacting proof that a prima facie case entails would be both contrary to the text and quite antithetical to the purpose and intent of the statute. It would clearly discourage making good faith offers of settlement early in a case, i.e. before the parties have expended substantial sums in attorney's fees and costs for discovery and preparation for trial.

Id. at 1039.

46. 663 So. 2d 606, 611 (Fla. 1995).

47. *Id.* (citing *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993)). The Supreme Court of Florida reasoned "the statute as a whole leaves no doubt that the reasonableness of the rejection is irrelevant to the question of entitlement. However, it is equally clear that these enumerated factors are intended to be considered in the determination of the amount of the fee to be awarded." *Id.* at 613.

48. *Fox v. McCaw Cellular Communications of Fla., Inc.*, 745 So. 2d 330, 333 (Fla. 4th Dist. Ct. App. 1998) (per curiam).

49. *Id.* at 330.

50. *Id.* at 333.

51. *Id.*

52. *Id.*; accord *State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So. 2d 874 (Fla. 2d Dist. Ct. App. 1997) (per curiam).

53. *Fox*, 745 So. 2d at 333.

54. David L. Kian, *The 1996 Amendments to the Florida Rule of Civil Procedure 1.442 — Reconciling a Decade of Confusion*, 71 FLA. B.J. 32, 35 (July/Aug. 1997).

B. Rule 1.442 of the Florida Rules of Civil Procedure

Rule 1.442 of the *Florida Rules of Civil Procedure* is in place for the same purpose as section 768.79 of the *Florida Statutes*, which “is to encourage settlements and eliminate trials whenever possible by imposing cost sanctions against an offeree who fails to accept a timely offer which equals or exceeds the amount of the offeree’s ultimate recovery.”⁵⁵ However, because of discrepancies between the provisions in rule 1.442 and section 768.79, there has always been conflict among litigants and courts regarding offers of judgment.⁵⁶ As a result, rule 1.442 does not fulfill its intended purpose to alleviate the judicial system of its burdensome caseload; instead, it adds to it.⁵⁷

Consequently, in 1988, the Supreme Court of Florida noted the continuing conflict and asked “the Civil Procedure Rules Committee (the ‘Committee’) to examine” the problem.⁵⁸ When the court did not think that the Committee had come up with a satisfactory decision in 1989, the court substituted its own method, which combined parts of section 768.79 with rule 1.442, resulting in a custom tailored provision.⁵⁹ At the same time, the court ensured the support of its new rule and held “[t]o the extent the procedural aspects of new rule 1.442 are inconsistent with sections 768.79 and 45.061, the rule shall supersede the statutes.”⁶⁰ Unfortunately, the Supreme Court of Florida was not specific enough and much of the conflict continued.⁶¹

In 1992, attempting to put an end to the confusion that continued in the trial and appellate courts, the Supreme Court of Florida decided *Timmons v. Combs*.⁶² In *Timmons*, rule 1.442 of the *Florida Rules of Civil Procedure* and section 768.79 of the *Florida Statutes* were procedurally in conflict, and

55. *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 981 (Fla. 1987) (per curiam); see also *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989) (reasoning that rule 1.442 of the *Florida Rules of Civil Procedure* is in place to prevent necessity of judicial interaction).

56. Littky-Rubin, *supra* note 17, at 12 (citing *Sec. Prof’ls, Inc. v. Segall*, 685 So. 2d 1381, 1384 (Fla. 4th Dist. Ct. App. 1997)); see also *Timmons v. Combs*, 608 So. 2d 1, 1–2 (Fla. 1992) (clarifying that section 45.061 and section 768.79 of the *Florida Statutes* are also similar because both allow awards of attorney’s fees, but under section 45.061 the award is granted only if the settlement is unreasonably rejected). See generally Kian, *supra* note 54, at 36 n.2 (explaining section 45.061 not applicable to claims arising after October 1, 1990).

57. Littky-Rubin, *supra* note 17, at 12.

58. Fla. Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442, 550 So. 2d 442 (Fla. 1989) (per curiam).

59. Kian, *supra* note 54, at 34.

60. Fla. Bar Re: Amendment, 550 So. 2d at 443.

61. Kian, *supra* note 54, at 34.

62. 608 So. 2d 1 (Fla. 1992).

caused the court to address the proper process for obtaining attorney's fees by using offers of judgment.⁶³ In its opinion, the court repealed rule 1.442, and stated that because section 768.79 was the only current statute on offers of judgment, the court would use its procedural powers to implement the procedural aspects of section 768.79 as its own rule 1.442.⁶⁴

Rule 1.442 of the *Florida Rules of Civil Procedure*, as adopted in *Timmons*, continued to be the standard until 1996, when it was once again amended, and changed to include the supreme court's decision in *Timmons*.⁶⁵ The committee in charge of analyzing the needed amendments to rule 1.442 noted that the new rule was an attempt to resolve the continuing problems the courts had construing the rule.⁶⁶ They added that the new rule 1.442 "supercedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions."⁶⁷

After being amended once more in 2000, rule 1.442 of the *Florida Rules of Civil Procedure* still reflects the recommendations of the committee in 1996.⁶⁸ It is valid for all offers or proposals for settlement, "and supercedes all other provisions of the rules and statutes that may be inconsistent with this rule."⁶⁹ Among its various provisions, the rule lists procedural requirements that an offer of judgment must satisfy.⁷⁰ The specific language of

63. *Id.* at 3.

64. *Id.*

65. *In re Amendments to Fla. Rules*, 682 So. 2d 105, 125–26 (Fla. 1996) (per curiam) (underlining omitted). The "rule was amended to reconcile, where possible, sections . . . 768.79, [of the] Florida Statutes, and the decisions of the Florida Supreme Court in . . . *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995), and *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992)." *Id.*

66. *Id.*

67. *Id.* at 126 (underlining omitted).

68. See FLA. R. CIV. P. 1.442(a).

69. *Id.*

70. See FLA. R. CIV. P. 1.442(c). The requirements for offers of judgment under rule 1.442 of the *Florida Rules of Civil Procedure* are as follows:

(c) Form and Content of Proposal for Settlement.

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

rule 1.442 allows joint offers by noting, “[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.”⁷¹ Also, rule 1.442 delves further into the specificities of joint proposals with a provision that is in the middle of most of the conflict and insists “[a] joint proposal shall state the amount and terms attributable to each party.”⁷²

C. *The Statute and Rule in Conflict*

Presently, section 768.79 of the *Florida Statutes* is the only statute that governs offers of judgment. After years of revising and amending rule 1.442 of the *Florida Rules of Civil Procedure*, it would seem that the statute and rule should be in complete accord; however, there is still a problem when using section 768.79 and rule 1.442. The problem stems from the 1996 amendment of rule 1.442 that was partially implemented to correspond with the Supreme Court of Florida’s decision in *Fabre v. Marin*,⁷³ which required the comparison of fault among all defendants.⁷⁴ As a result, even though section 768.79 has no such requirement,⁷⁵ rule 1.442 differs, and specifically requires that offers of judgment be apportioned among multiple parties.⁷⁶

Clearly, the difference in the requirements of rule 1.442 and section 768.79 cause difficulties since the rule requires something that the statute makes no mention of. The inconsistency makes it difficult for attorneys to serve legally sufficient offers of judgment when there is a conflict in the law. Usually, the *Florida Rules of Civil Procedure* provide attorneys with clear procedural requirements, but when substantive law conflicts with a rule, interpretation tends to vary among attorneys and judges. The requirement of apportionment in offers of judgment is found in the *Florida Rules of Civil Procedure*.⁷⁷ However, the provision must be analyzed to see if it is truly

(F) state whether the proposal includes attorneys’ fees and whether attorneys’ fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080(f).

FLA. R. CIV. P. 1.442(c)(1)-(2).

71. FLA. R. CIV. P. 1.442(c)(3).

72. *Id.*

73. 623 So. 2d 1182 (Fla. 1993). The court held joint and several liability applicable to economic damages, and required the jury to apportion fault among the parties who contributed to the injury. *Id.* at 1185.

74. Littky-Rubin, *supra* note 17, at 14.

75. *See* § 768.79 (2002).

76. FLA. R. CIV. P. 1.442(c)(3).

77. *See id.*

procedural, and thus controlling, since many areas of substantive and procedural law overlap or conflict.⁷⁸

A test cited by the Supreme Court of Florida is that “[p]ractice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. ‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof.”⁷⁹ The requirement to include specific apportionments in an offer of judgment is a method or step to enforce substantive rights and, therefore, it is a procedural requirement.

The Florida Constitution addresses the power of the courts over procedure.⁸⁰ Article V, § 2 states: “The supreme court shall adopt rules for the practice and procedure in all courts”⁸¹ Article V, § 2, does give the legislature the power to retract procedural rules; however, nowhere in Article V, or the rest of the Florida Constitution, does the legislature have procedural rulemaking power.⁸²

Since the Supreme Court of Florida has the ultimate procedural power, when a statute attempts to control procedure in a way that conflicts with, or encroaches on, the power of the court to create rules, the legislature’s statute is required to acquiesce to the court’s rule.⁸³ A case on point is *Leapai v. Milton*,⁸⁴ where section 45.061 of the *Florida Statutes* was found to be in conflict with rule 1.442 of the *Florida Rules of Civil Procedure*.⁸⁵ In its holding, the Supreme Court of Florida was able to filter out the substantive law in the statute, allowing rule 1.442 to control the procedure and act in conjunction with only the substantive aspects of section 45.061.⁸⁶

78. *In re* Clarification of Fla. Rules of Practice & Procedure, 281 So. 2d 204 (Fla. 1973) (per curiam).

79. *In re* Fla. Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (per curiam).

80. FLA. CONST. art. V, § 2(a) (1885).

81. *Id.*

82. *Carmel v. Carmel*, 282 So. 2d 9, 10 (Fla. 3d Dist. Ct. App. 1973) (per curiam). The legislature required awards of attorneys’ fees to be remanded, but the Third District Court of Appeal found the law was beyond legislative powers and invalid because it was a procedural rule. *Id.* The district court stated:

while the legislature could, pursuant to the Constitution, repeal a rule of practice adopted by the Supreme Court, it was without constitutional authority to promulgate a rule of practice or procedure for the appellate or trial courts, to operate as a substitute or an alternative to the rule thus repealed, or otherwise.

Id.

83. *Ong v. Mike Guido Props.*, 668 So. 2d 708, 710 (Fla. 5th Dist. Ct. App. 1996) (citing *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992)).

84. 595 So. 2d 12 (Fla. 1992).

85. *Id.* at 15.

86. *Id.*

That same reasoning is found in the supreme court's opinion regarding the 1989 amendments to the *Florida Rules of Civil Procedure*, where the court held that rule 1.442 would supercede any conflicting provisions in section 768.79 of the *Florida Statutes*.⁸⁷ The actual language of the rule follows the same train of thought and provides for its own superiority.⁸⁸

Thus, the fact that section 768.79 does not address apportioning offers of judgment among multiple parties is of no consequence. As a procedural rule implementing section 768.79, rule 1.442 has priority and requires that any offers of judgment "state the amount and terms attributable to each party."⁸⁹

III. JOINT OFFERS

As previously noted, the *Florida Rules of Civil Procedure* permit joint offers of judgment by stating: "[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."⁹⁰ While, section 768.79 of the *Florida Statutes* is silent on this issue, the case law of this state illustrate that Florida courts have continuously accepted joint offers.⁹¹

One case that exemplifies the courts' continuing acceptance of joint offers is *Government Employees Insurance Co. v. Thompson*,⁹² decided by the Second District Court of Appeal.⁹³ In *Thompson*, the court disagreed with the appellee's argument that the joint offer of judgment, proposed by the two offerors, was invalid because it was not joint and several.⁹⁴ The court rationalized its decision to permit the joint offer by indicating that they "found no cases that hold a joint offer invalid per se, while numerous cases have recognized, without comment, the validity of joint offers."⁹⁵

Similarly, in *V.I.P. Real Estate Corp. v. Florida Executive Realty Management Corp.*,⁹⁶ the appellants argued that attorney's fees should not have been awarded, because the demand for judgment submitted by the appellee

87. Fla. Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442, 550 So. 2d 442, 443 (Fla. 1989).

88. See FLA. R. CIV. P. 1.442(a).

89. FLA. R. CIV. P. 1.442(c)(3).

90. *Id.*

91. JAMES C. HAUSER, ATTORNEY'S FEES IN FLORIDA 4-52 (2d ed. 2002).

92. 641 So. 2d 189 (Fla. 2d Dist. Ct. App. 1994).

93. *Id.*

94. *Id.* at 190.

95. *Id.* The court further stated that the character of the offer as a joint offer, might be relevant on remand to the analysis of whether an offer is made in good faith. *Id.*

96. 650 So. 2d 199 (Fla. 4th Dist. Ct. App. 1995) (per curiam).

was invalid for being a joint offer.⁹⁷ Denying the appellants' argument, the Fourth District Court of Appeal found that on other occasions, Florida courts recognized joint offers and that in the instant case, the joint offer of judgment was valid.⁹⁸

Given that cases clearly interpret section 768.79 of the *Florida Statutes* and the language of rule 1.442 of the *Florida Rules of Civil Procedure* to permit joint offers, under Florida law the use of a joint offer of judgment is not objectionable.⁹⁹ However, while there is no question that joint offers are permitted, confusion arises in the implementation of such offers. Although rule 1.442 clearly states that joint offers "shall state the amount and terms attributable to each party,"¹⁰⁰ that amended provision requiring apportionment did not become effective until January 1, 1997.¹⁰¹ Thus, there was a problem of various courts' interpretations of the amendment's retroactive effect, and the requirement that offers of judgment *shall* be apportioned among multiple parties.¹⁰²

A. Offers to Multiple Offerees

Courts have strictly interpreted the effect that the amended portion of rule 1.442 has on offers of judgment, served to multiple offerees, after the amendment became effective in 1997.¹⁰³ However, there was a split among the courts on the issue of whether offers of judgment served prior to the amendment's effective date had to be apportioned among multiple parties.¹⁰⁴ The uncertainty questioned whether the amended provision was retroactively effective on offers of judgment served prior to 1997; or whether section 768.79, or the former version of rule 1.422, had the same, or similar requirements as the current rule's apportionment specification.¹⁰⁵

97. *Id.* at 201.

98. *Id.* (citing *Thompson*, 641 So. 2d at 190).

99. *See Thompson*, 641 So. 2d at 190; *V.I.P. Real Estate*, 650 So. 2d at 201.

100. FLA. R. CIV. P. 1.442(c)(3).

101. *Allstate Indem. Co. v. Hingson*, 808 So. 2d 197, 199 n.2 (Fla. 2002) (per curiam).

102. *Pappas & Walford*, *supra* note 22, at 72. Specifically, multiple decisions have differed on apportionment among offers from joint offerors. *Id.*

103. *Id.* at 69; *e.g.* *United Servs. Auto. Ass'n, v. Behar*, 752 So. 2d 663, 664 (Fla. 2d Dist. Ct. App. 2000); *see also Ford Motor Co. v. Meyers*, 771 So. 2d 1202, 1204 (Fla. 4th Dist. Ct. App. 2000) (holding that offer of judgment to multiple defendants must provide the specific amount for each party even if there is an indemnification agreement between the defendants).

104. *Allstate Indem. Co. v. Hingson*, 774 So. 2d 44 (Fla. 2d Dist. Ct. App. 2000) (per curiam).

105. *See id.*; *see generally* HAUSER, *supra* note 91 (discussing the various decisions of the Florida District Courts of Appeal).

Bodek v. Gulliver Academy, Inc.,¹⁰⁶ a Third District Court of Appeal case, addressed the issue and found that apportionment was not required for offers served prior to the 1997 amendment.¹⁰⁷ In *Bodek*, the plaintiffs were served with an offer of judgment in 1993.¹⁰⁸ In its December 1997 decision, the court found that the words “the Plaintiffs” in the offer fulfilled the provisions of section 768.79 as applicable to multiple plaintiffs.¹⁰⁹ The court went further to deny the Bodeks’ contrasting arguments, and found no requirement of apportionment in section 768.79 of the *Florida Statutes*.¹¹⁰ However, the court did note in dicta that rule 1.442 of the *Florida Rule of Civil Procedure* had been amended.¹¹¹

The Fourth District Court of Appeal followed the Third District Court of Appeal’s analysis, in *Herzog v. K-Mart Corp.*,¹¹² a slip and fall case in which K-Mart served an offer of judgment on the plaintiffs in 1996.¹¹³ The court denied any requirement for apportionment among multiple parties, stating that before the 1997 amendment to rule 1.442, neither the rule, nor section 768.79, required that offers of judgment be apportioned among multiple parties.¹¹⁴ It further held that K-Mart’s “offer of judgment, served prior to the amendment to the rule, was not rendered ineffective to trigger the sanctions of the statute merely because it was a joint offer which failed to specify the amount attributable to each plaintiff.”¹¹⁵

Conversely, the Second District Court of Appeal took an entirely different approach than the Third and Fourth District Courts of Appeal.¹¹⁶ In 1996, before the amendment to rule 1.442 became effective, the Second District Court of Appeal decided *Twiddy v. Guttenplan*.¹¹⁷ In *Twiddy*, an offer of judgment was filed on behalf of two defendants who agreed to pay the plain-

106. 702 So. 2d 1331 (Fla. 3d Dist. Ct. App. 1997) (per curiam).

107. *Id.* at 1332.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Bodek*, 702 So. 2d at 1332. In its note, the Third District Court of Appeal illustrates how the Bodeks’ arguments were in line with the new amendment, but makes no mention of how, or if, it would retroactively affect this decision. *Id.* at 1332 n.1.

112. 760 So. 2d 1006 (Fla. 4th Dist. Ct. App. 2000), *overruled in part by* Allstate Indem. Co. v. Hingson, 808 So. 2d 197 (Fla. 2002).

113. *See id.* at 1009.

114. *Id.*

115. *Id.*; *see also* V.I.P. Real Estate Corp. v. Fla. Executive Realty Mgmt. Corp., 650 So. 2d 199, 200–01 (Fla. 4th Dist. Ct. App. 1995) (per curiam) (holding that single demand for judgment made to both appellants, was invalid because joint offers were permitted).

116. *See* Allstate Indem. Co. v. Hingson, 774 So. 2d 44, 44 (Fla. 2d Dist. Ct. App. 2000).

117. 678 So. 2d 488 (Fla. 2d Dist. Ct. App. 1996).

tiff \$5000 in exchange for a release applicable to all defendants.¹¹⁸ In rendering the decision the court noted that the total offer on behalf of both defendants was for \$5000, making it

impossible to determine the amount attributable to each offeree in order to make a further determination whether the judgment against only one of the offerees for \$2,100 was at least twenty-five percent less than the offer on her behalf. The fact that the offer was made on behalf of two defendants who were not joint tortfeasors makes the necessary determinations as to the applicability of section 768.79 impossible to perform with any certainty.¹¹⁹

Thus, the court denied any entitlement to an award of attorney's fees, not in reference to rule 1.442, but because it found that the offer of judgment was not specific enough to comply with the requirements of section 768.79 of the *Florida Statutes*.¹²⁰

Four years later, in March of 2000, the Second District Court of Appeal followed its *Twiddy* judgment with a similar decision in *C & S Chemicals, Inc. v. McDougald*.¹²¹ *C & S Chemicals* relates how in 1996, the plaintiffs served a joint demand for judgment, but failed to apportion the amount among the three defendants.¹²² Since the failure to apportion the demand prevented the defendants from applying their "right to evaluate the 1996 demand independently based on their individual liability situations," the Second District Court of Appeal decided that the demand for judgment was unenforceable, and there was no entitlement to attorney's fees.¹²³ When resolving the problem, the court mentioned that the 1997 amendment to rule 1.442 of the *Florida Rules of Civil Procedure* was not effective in regards to this demand.¹²⁴ The court held that prior cases, such as *Twiddy*, unmistakably stood for the same interpretation of section 768.79 and earlier versions of the rule, which required apportionment.¹²⁵

Later the same year, the conflicts between the district courts came to a head in *Allstate Indemnity Co. v. Hingson*.¹²⁶ At that time, the Second District Court of Appeal affirmed the circuit court's holding that attorney's fees

118. *Id.* at 489.

119. *Id.*

120. *Id.*

121. 754 So. 2d 795 (Fla. 2d Dist. Ct. App. 2000) (per curiam).

122. *Id.* at 796.

123. *Id.* at 798.

124. *Id.* at 797 n.3.

125. *Id.* at 797-98.

126. 774 So. 2d 44 (Fla. 2d Dist. Ct. App. 2000) (per curiam).

could not be awarded for an offer of judgment in which the offeror failed to apportion the amount offered for two plaintiffs' claims.¹²⁷ The district court of appeal also specifically mentioned the conflict between the courts, citing the Fourth District Court of Appeal's decision in *Herzog v. K-Mart*.¹²⁸

Thus, when the Supreme Court of Florida was faced with the appeal of *Allstate Indemnity Co. v. Hingson*¹²⁹ it cited its jurisdiction from the district courts' conflict between *Hingson* and *Herzog*.¹³⁰ In the appeal of *Hingson*, the question proposed by the court was "whether the former version of Florida Rule of Civil Procedure 1.442 required an offer of settlement made by a defendant to multiple plaintiffs to state the amount and terms attributable to each plaintiff."¹³¹ Citing to *C & S Chemical* and *United Services Automobile Ass'n v. Behar*,¹³² the Supreme Court of Florida remarked on the purpose of section 768.79, and the requirement of apportionment, which promotes the statutory objective by allowing an offeree to evaluate the specific terms of the offer personal to that offeree.¹³³ Furthering the importance of the point, the court reasoned that if there is no specific basis to ascertain the exact amount an individual was offered, there is no way to compare it to see if the judgment is within twenty-five percent of the offer.¹³⁴ The court presented additional support by interpreting legislative intent in section 768.79, finding "'party' in the singular . . . [to indicate] intent that an offer specify the amount attributable to each individual party."¹³⁵ Accordingly, the Supreme Court of Florida followed the reasoning of the Second District Court of Appeal, and held that rule 1.442 and section 768.79, both before, and after the

127. *Id.*

128. *Id.*; see *Herzog v. K-Mart Corp.*, 760 So. 2d 1006 (Fla. 4th Dist. Ct. App. 2000).

129. 808 So. 2d 197 (Fla. 2002) (per curiam).

130. *Id.*; see FLA. CONST. art. V, § 3(b)(3). The Supreme Court of Florida has the power to:

review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Id.

131. *Hingson*, 808 So. 2d at 199 (footnote omitted).

132. 752 So. 2d 663 (Fla. 2d Dist. Ct. App. 2000). A single defendant served an offer of judgment after the 1997 amendment became effective. *Id.* at 664. However, the defendant failed to fully comply with rule 1.442, and because the offer was served as a "lump sum amount" that did not provide the necessary specifics as to each of the two plaintiffs, it was defective, and no attorney's fees were awarded. *Id.*

133. *Hingson*, 808 So. 2d at 199. The purpose, or statutory objective, of section 768.79 is as a "tool to encourage" the parties to settle. *Kaufman v. Smith*, 693 So. 2d 133, 134 (Fla. 4th Dist. Ct. App. 1997) (Hazouri, J., concurring).

134. *Hingson*, 808 So. 2d at 199.

135. *Allstate Indem. Co. v. Hingson*, 7800 So. 2d 197, 199 (Fla. 2002) (per curiam).

1997 amendment, require that offers of judgment to multiple parties be apportioned to each offeree.¹³⁶

After the *Hingson* decision, and the amendment to rule 1.442 of the *Florida Rules of Civil Procedure*, the courts still found exceptions in wrongful death and vicarious liability cases, and have permitted awards of attorney's fees for undifferentiated offers of judgment served to multiple offerees in those two circumstances.¹³⁷ As discussed in *Thompson v. Hodson*,¹³⁸ in which the personal representative of an estate received a valid "lump-sum, non-specific" proposal for settlement, a wrongful death case is atypical under rule 1.442.¹³⁹ Whereas there might be multiple claimants, Florida law requires that one plaintiff bring the action as the decedent's personal representative, and claim for the estate and all survivors.¹⁴⁰ The First District Court of Appeal addressed this in a similar case, *Dudley v. McCormick*,¹⁴¹ and stated:

[a] defendant in a wrongful death action need not apportion a proposed settlement among the estate and survivors on behalf of whom the personal representative is acting in order to comply with the requirements of section 768.79 and Florida Rule of Civil Procedure 1.442. No such proposed apportionment would bind the personal representative in any event.¹⁴²

This is because the representative, as a singular party, is authorized to accept an offer and then later apportion it among the claimants, subject to court approval if needed.¹⁴³ Since multiple parties cannot bring a wrongful death action, the representative is viewed individually and is excepted from the apportionment requirement.

The second exception in apportionment among offerees, is vicarious liability, and although it was not addressed in the Supreme Court of Florida's *Hingson* opinion, it is questionable after that ruling.¹⁴⁴ In *Strahan v. Gauldin*,¹⁴⁵ the Fifth District Court of Appeal found an undifferentiated offer

136. *Id.*

137. See 4 HON. DAVID M. GERSTEN, FLORIDA CIVIL PRACTICE GUIDE 92-14 to 16 (2003).

138. 825 So. 2d 941 (Fla. 1st Dist. Ct. App. 2002), *rev. denied*, 835 So. 2d 266 (Fla. 2002).

139. See *id.* at 948-49.

140. *Id.* at 949 (citing FLA. STAT. § 768.20 (1993)).

141. 799 So. 2d 436 (Fla. 1st Dist. Ct. App. 2001).

142. *Id.* at 441.

143. *Hodson*, 825 So. 2d at 950.

144. See HAUSER, *supra* note 91, at 4-55 to 58; GERSTEN, *supra* note 137, at 92-14-16.

145. 756 So. 2d 158 (Fla. 5th Dist. Ct. App. 2000), *overruled by* *Matetzschk v. Lamb*, 849 So. 2d 1141 (Fla. 5th Dist. Ct. App. 2003).

of judgment to multiple offerees valid where two of the defendants were vicariously liable to the third.¹⁴⁶ Holding that apportionment is illogical when all the offerees are liable for everything, the court rationalized that “[b]ecause of that joint and several liability, none of the individual defendants were adversely affected by the joint offer.”¹⁴⁷ Following the same line of reasoning, in *Safelite Glass Corp. v. Samuel*,¹⁴⁸ the Fourth District Court of Appeal found that a lack of differentiation in an offer was “no[t] harmful error” and did not inhibit a true assessment of the offer, where one offeree was vicariously liable for the other offeree’s negligence.¹⁴⁹ Later case law addresses these findings and their viability.

B. *Offers from Multiple Offerors: The Divergence*

While, with few exceptions, the apportionment rule regarding joint offerees seemed to be clear, until recently the districts were split, with no clear path to follow, concerning decisions of apportioning offers of judgment among multiple offerors.¹⁵⁰ Much of this disagreement between the district courts concerns the purpose behind the amendment to rule 1.442 of the *Florida Rules of Civil Procedure* and the method of construction that should be used in the interpretation of the rule.

In *Flight Express, Inc. v. Robinson*,¹⁵¹ where two defendants made an offer of judgment for \$100 without stating the amount that each would contribute, the Third District Court of Appeal reversed the circuit court’s denial of attorney’s fees.¹⁵² The Third District Court of Appeal found that the offerors should not be denied fees because a lack of apportionment among the offerors would not make a difference on whether the offeree would accept the proposal, and it “does not, impair the ability of the defendants . . . to recover under section 768.79”¹⁵³ Delving into the intent behind rule 1.442

146. *Strahan*, 756 So. 2d at 161.

147. *Id.*; see also *Crowley v. Sunny’s Plants, Inc.*, 710 So. 2d 219, 221 (Fla. 3d Dist. Ct. App. 1998) (holding a general joint offer to two defendants valid when represented by the same attorney, with no conflict of interest between defendants and insurance company, and when one defendant is vicariously liable for the other defendant’s liability).

148. 771 So. 2d 44 (Fla. 4th Dist. Ct. App. 2000).

149. *Id.* at 46; see also *Ford Motor Co. v. Meyers*, 771 So. 2d 1202, 1204 n.1 (Fla. 4th Dist. Ct. App. 2000) (supporting vicarious liability exception in *Safelite Glass* by reference that current case differed because the indemnification agreement between the parties did not prevent recovery from a defendant).

150. Pappas & Walford, *supra* note 22, at 72.

151. 736 So. 2d 796 (Fla. 3d Dist. Ct. App. 1999), *overruled in part* by *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003).

152. *Flight Express, Inc.*, 736 So. 2d at 797.

153. *Id.*

of the *Florida Rules of Civil Procedure*, the court indicated that the rule was amended in 1997 to correspond with the decision in *Fabre v. Marin*.¹⁵⁴ In the court's view, the purpose of rule 1.442 is to prevent problems with multiple offerees, and for that reason the failure of offerors to specifically follow the rule creates no difficulties and "must be considered merely a harmless technical violation which [does] not affect the rights of the parties."¹⁵⁵

Following the Third District Court of Appeal, the Fourth District Courts of Appeal decided *Safelite Glass Corp. v. Samuel*, a case where two plaintiffs, as offerors, did not indicate any partition in their offer.¹⁵⁶ The offer was not accepted, but because the failure to apportion among the offerors was not the reason, the district court affirmed the circuit court's award of attorney's fees.¹⁵⁷ Since rule 1.442 was created to protect multiple offerees, the Fourth District Court of Appeal held that the failure to divide the damages in the offer was not in error.¹⁵⁸ Similarly, in *Spruce Creek Development Co., of Ocala v. Drew*,¹⁵⁹ two plaintiffs did not indicate any differentiation in an offer of judgment, but the Fifth District Court of Appeal found that the offer "was not void for having failed to separate the offer . . . [because] [t]he lack of apportionment between claimants is a matter of indifference to the defendant."¹⁶⁰

Again, the Second District Court of Appeal had a more stringent view of the requirements for multiple offerors, this time for apportionment among multiple offerors.¹⁶¹ The case of *Allstate Insurance Co. v. Materiale*¹⁶² is another instance where two plaintiffs offered a proposal for settlement, but neglected to separately indicate the amount and terms attributable to each offeror.¹⁶³ Referring to *United Services Automobile Ass'n v. Behar*,¹⁶⁴ the Second District Court of Appeal held that the same requirements, found in that case for offerees, apply to offerors.¹⁶⁵ The court applied the same apportionment requirements because an offeree who receives a proposal from mul-

154. *Id.* at 797 n.1; see *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

155. *Flight Express, Inc.*, 736 So. 2d at 797 n.1.

156. *Safelite Glass*, 771 So. 2d at 45.

157. *Id.* at 46.

158. *Safelite Glass Corp. v. Samuel*, 771 So. 2d 44, 46 (Fla. 4th Dist. Ct. App. 2000).

159. 746 So. 2d 1109 (Fla. 5th Dist. Ct. App. 1999), *overruled in part* by *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003), and *overruled in part* by *Matetzschk v. Lamb*, 849 So. 2d 1141 (Fla. 5th Dist. Ct. App. 2003)).

160. *Id.* at 1116.

161. See *Pappas & Walford*, *supra* note 22, at 72 (citing *Clipper v. Bay Oaks Condo. Ass'n*, 810 So. 2d 541 (Fla. 2d Dist. Ct. App. 2002)).

162. 787 So. 2d 173 (Fla. 2d Dist. Ct. App. 2001).

163. *Id.* at 174.

164. *United Servs. Auto. Ass'n v. Behar*, 752 So. 2d 663 (Fla. 2d Dist. Ct. App. 2000).

165. *Materiale*, 787 So. 2d at 174–75.

multiple offerors “is entitled to know the amount and terms of the offer that are attributable to each offeror in order to evaluate the offer as it pertains to that party.”¹⁶⁶ The Second District Court of Appeal went even further, and expressly stated its disagreement with the decisions of the Fifth and Third District Courts of Appeal, certifying a conflict with *Spruce Creek* and *Flight Express*.¹⁶⁷

Another Second District Court of Appeal case, *Clipper v. Bay Oaks Condominium Ass’n, Inc.*,¹⁶⁸ included an undifferentiated offer of judgment from three offerors to one offeree, which caused the court to deny any entitlement to attorney’s fees.¹⁶⁹ The court cited its own strict compliance with the rule, and found the offer flawed, because the offeree did not know what particular amounts each of the offerors were presenting.¹⁷⁰

However, while noting that it did not apply in this case, in dicta the Second District Court of Appeal recognized an exception to its requirement of strict compliance of apportionment among multiple parties.¹⁷¹ Citing a previously decided case, *Danner Construction Co. v. Reynolds Metals Co.*,¹⁷² the court stated “a failure to apportion may be harmless error if ‘the theory for the defendant’s [sic] joint liability does not allow for apportionment.’”¹⁷³ In *Danner Construction*, the Second District Court of Appeal had specifically stated that in no way should this exception be construed too broadly, but in cases where there is vicarious liability among the defendant offerors, there is no way to differentiate the parties’ joint liability.¹⁷⁴ Thus,

166. *Id.* at 175.

167. *Id.* The Second District Court of Appeal opposed the Fifth District Court of Appeal by reasoning that even if accepting the proposal would equally release the defendant from both plaintiffs’ claims, that defendant has the right to know how much of the agreement is attributable to each party. *Id.* In regards to the Third District Court of Appeal, the Second District Court of Appeal held that the finding of a “harmless technical violation” was incorrect, and the Second District Court of Appeal did “not agree that such failure is harmless. An offer that requires an offeree to make an all or nothing determination regarding an offer made by two parties, without permitting it to evaluate each claim separately, does affect the rights of that party.” *Id.*

168. 810 So. 2d 541 (Fla. 2d Dist. Ct. App. 2002).

169. *Id.*

170. *See id.* at 542–43. The court stated:

Only two of the three offerors, the condominium association and Midnight Pass, prevailed against Clipper. [Since] the proposal did not state the specific amount each defendant was willing to pay, the circuit court had no way to determine whether the condominium association and Midnight Pass had offered anything to settle the suit.

Id. at 543.

171. *Id.* at 542.

172. 760 So. 2d 199 (Fla. 2d Dist. Ct. App. 2000).

173. *Clipper*, 810 So. 2d at 542 (quoting *Danner Constr.*, 760 So. 2d at 202).

174. *Danner Constr.*, 760 So. 2d at 202.

an offer of judgment that fails to apportion the amounts among the offerors may be considered “a harmless violation of the rule.”¹⁷⁵

Siding with the Second District Court of Appeal, the First District Court of Appeal favored a strict interpretation of rule 1.442, in *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*,¹⁷⁶ a case that would eventually result in an ultimate decision on the issue from the Supreme Court of Florida.¹⁷⁷ In *Hilyer Sod*, two plaintiffs joined their causes of action, and failing to apportion damages among themselves, offered a joint settlement to the defendant.¹⁷⁸ The court required strict construction of section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*, and found that the plaintiff’s offer of settlement was invalid, preventing an award of attorney’s fees under section 768.79.¹⁷⁹ Accordingly, the First District Court of Appeal also certified a conflict with *Flight Express* and *Spruce Creek*.¹⁸⁰

IV. THE SUPREME COURT OF FLORIDA DECIDES *WILLIS SHAW*

A. *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*¹⁸¹

Finally, in March 2003, the Supreme Court of Florida addressed the years of conflict in the district courts and issued the *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.* opinion, in which the court endeavored to set forth a definitive rule regarding apportioning offers of judgment.¹⁸² Like the First District Court of Appeal, the Supreme Court of Florida addressed the joint proposal of settlement that was presented to the defendant Hilyer Sod, Inc.¹⁸³ The proposal was from two plaintiffs to one defendant and pertinent portions read as follows:

3. The proposal will require plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, to sign a standard release in favor of defendant, HILYER SOD, INC., and to file a notice of dismissal with prejudice of the claims plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, have filed against

175. *Id.*

176. 817 So. 2d 1050 (Fla. 1st Dist. Ct. App. 2002).

177. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003), *reh’g denied*, No. SC02-1521, 2003 Fla. LEXIS 1168, at *1 (Fla. June 26, 2003).

178. *Hilyer Sod*, 817 So. 2d at 1051–52.

179. *Id.* at 1054.

180. *Id.*

181. 849 So. 2d 276 (Fla. 2003).

182. *See id.*

183. *Id.* at 277.

defendant, HILYER SOD, INC., in this action.
 4. The total amount being offered with this proposal is NINETY-FIVE THOUSAND ONE AND NO/100 DOLLARS (\$95,001.00).¹⁸⁴

As the plain language of this offer confirms, the offer failed to differentiate terms or amounts between the offerors, and it did not afford the offeree a chance to evaluate the proposal as it pertained to each plaintiff. In their briefs to the Supreme Court of Florida, both the petitioners, and the respondent, primarily focused on methods of interpreting section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*.¹⁸⁵ The direct focus on differing methods of interpretation stemmed from the First District Court of Appeal's ruling that required strict compliance.¹⁸⁶ Whichever method of interpretation the supreme court chose would result in an absolute decision of the construction of the law governing apportionment of offers of judgment.¹⁸⁷

Petitioners, Willis Shaw Express and Edward McAlpine, argued that according to section 768.79 and rule 1.442, there was no need to differentiate between offerors, the offer they served on the defendant was valid, and they were entitled to attorney's fees.¹⁸⁸ Their brief to the court maintained that rule 1.442 "should be pragmatically, not strictly construed," and contended that because it was a procedural rule, it "should be given an interpretation to further justice not frustrate it."¹⁸⁹

Conversely, the respondent, Hilyer Sod, requested that the supreme court affirm the First District Court of Appeal's holding, and find the offer invalid, because it was an undifferentiated offer and did not state the amounts attributable to each offeror.¹⁹⁰ Further, the respondent claimed that both section 768.79 of the *Florida Statutes*, and rule 1.442 of the *Florida Rules of Civil Procedure*, should be strictly construed because they "are punitive in nature and are in derogation of the common law."¹⁹¹ Then, protecting itself from any alternative analysis by the court, the petitioner further asserted that

184. *Id.* at 277–78 (quoting *Hilyer Sod*, 817 So. 2d at 1051–52).

185. See Petitioners' Initial Brief on the Merits at 28, *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003) (No. SC02-1521); Respondent's Answer Brief on the Merits at 6, *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003) (No. SC02-1521).

186. *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*, 817 So. 2d 1050, 1054 (Fla. 1st Dist. Ct. App. 2002).

187. See Petitioners' Brief at 28, *Willis Shaw* (No. SC02-1521); Respondent's Brief at 6, *Willis Shaw* (No. SC02-1521).

188. Petitioners' Brief at 6, *Willis Shaw* (No. SC02-1521).

189. *Id.* at 27–28 (emphasis omitted).

190. Respondent's Brief at 6, *Willis Shaw* (No. SC02-1521).

191. *Id.* at 24 (emphasis omitted).

“[i]f statute 768.79 or [rule] 1.442 are not strictly construed, then general rules of construction would be applied,”¹⁹² to give the language of the rule its “plain and ordinary meaning,” which would act to invalidate the offer.¹⁹³

Ultimately, the supreme court followed the respondent’s reasoning, affirming the district court’s finding that the proposal for settlement was invalid for failure to follow the requirements of rule 1.442.¹⁹⁴ In rendering its decision, the court cited established case law, and presented two grounds on which to base its decision that the language in rule 1.442 must be strictly construed.¹⁹⁵ The first reason the court gave, was that, courts in Florida generally follow the common law American Rule, which does not allow for awards of attorney’s fees, and because rule 1.442 and section 768.79 are in conflict with the common law, they have to be strictly construed.¹⁹⁶ Secondly, the court referred to “a well-established rule in Florida that ‘statutes awarding attorney’s fees must be strictly construed.’”¹⁹⁷

Consequently, with strict construction of the plain language of rule 1.442, the Supreme Court of Florida overruled the decisions in *Flight Express* and *Spruce Creek*, which had assumed that a failure to differentiate between offerors was of no consequence.¹⁹⁸ Now, just as amounts of offers of judgment must be apportioned among offerees, offerors must also allocate the total among themselves.¹⁹⁹ Accordingly, the *Willis Shaw* decision clarified the multitude of unreliable interpretations of section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*.²⁰⁰ The Supreme Court of Florida conclusively held that the use of section 768.79 and rule 1.442 requires that the “language must be strictly construed.”²⁰¹

192. *Id.* at 28 (emphasis omitted).

193. *Id.* at 29 (quoting *Castillo v. Vlaminck de Castillo*, 771 So. 2d 609, 611 (Fla. 3d Dist. Ct. App. 2000) (citing *In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993))).

194. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 279 (Fla. 2003), *reh’g denied*, 2003 Fla. LEXIS 1168, at *1 (Fla. June 26, 2003).

195. *Id.* at 278.

196. *Id.*; *see Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077–78 (Fla. 2001). “This court has held that a statute enacted in derogation of the common law must be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise . . .” *Id.*

197. *Willis Shaw*, 849 So. 2d at 278. (quoting *Dade County v. Peña*, 664 So. 2d 959, 960 (Fla. 1995) (quoting *Gershuny v. Martin McFall Messenger Anesthesia Prof’l Ass’n*, 539 So. 2d 1131, 1132 (Fla. 1989))); *see also Peña*, 664 So. 2d at 960 (holding that Florida courts must heed the “plain and unambiguous language” in the law) (citing *Citizens of State v. Pub. Serv. Comm’n*, 425 So. 2d 534, 541–42 (Fla. 1982)).

198. *Willis Shaw*, 849 So. 2d at 279.

199. *Id.* at 278.

200. *Id.*

201. *Id.*

B. *Is There Still a Vicarious Liability Exception?*

The Supreme Court of Florida intended *Willis Shaw* to be the final decision on apportioning offers of judgment. Nevertheless, in the two months that followed the court's decision, cases emerged that suggest there still may be an exception to *Willis Shaw*. No exceptions were addressed anywhere in the supreme court's opinion, but it would seem that the court's designation requiring strict interpretation of section 768.79 and rule 1.442 was an all-encompassing decision.²⁰²

The Fifth District Court of Appeal did follow *Willis Shaw*, strictly interpreting section 768.79 and rule 1.442 in *Matetzschk v. Lamb*,²⁰³ where the plaintiff had failed to apportion an offer of judgment between two defendants on the basis of vicarious liability.²⁰⁴ In its decision, the Fifth District Court of Appeal applied the strict construction demanded in *Willis Shaw* and reversed the trial judge's award of attorney's fees.²⁰⁵ The court expressly denied any vicarious liability exception, and stated that the court's previous decision in *Strahan*, which allowed an exception, had been "implicitly reject[ed]" by *Willis Shaw*.²⁰⁶

However, the Second District Court of Appeal followed a different line of reasoning in *Barnes v. Kellogg Co.*²⁰⁷ and *Crespo v. Woodland Lakes Creative Retirement Concepts, Inc.*²⁰⁸ Each case was decided in the two months following the *Willis Shaw* decision, and in both the Second District Court of Appeal found an exception to the rule of strict interpretation.²⁰⁹

In *Barnes*, two defendants, one of whom was strictly liable for the other's error, served a joint proposal for settlement on the plaintiff, without apportioning terms or amounts.²¹⁰ The Second District Court of Appeal related this situation in *Barnes* to the vicarious liability exception previously established in *Danner Construction*, and held that because the defendants in *Barnes* were joint and severally liable, the proposal was valid.²¹¹ Justifying

202. See *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 279 (Fla. 2003).

203. 28 Fla. L. Weekly D1148 (5th Dist. Ct. App. May 9, 2003), *opinion corrected and superceded by* No. 5D02-455, 2003 WL 21672984, at *1 (Fla. 5th Dist. Ct. App. July 18, 2003) (re-emphasizing the holding of the Fifth District Court of Appeal and rejecting the Second District Court of Appeal's analysis).

204. *Id.*

205. *Id.* at D1149.

206. *Id.*

207. 846 So. 2d 568 (Fla. 2d Dist. Ct. App. 2003).

208. 845 So. 2d 342 (Fla. 2d Dist. Ct. App. 2003).

209. See *id.* at 343; *Barnes*, 846 So. 2d at 571.

210. *Barnes*, 846 So. 2d at 569.

211. *Id.* at 571-72.

its decision, the court noted that the purpose of section 768.79 is to act as a catalyst towards settlement, and reasoned that unified joint offers in cases, like *Barnes*, should be permitted in order to further that goal.²¹² The court did not ignore *Willis Shaw*; instead, the court claimed that *Willis Shaw* had been thoroughly considered in the Second District Court of Appeal's decision that it did not overturn *Danner Construction*.²¹³ The court said, "we do not interpret that opinion [*Willis Shaw*] . . . as prohibiting the offer made in this case under these circumstances."²¹⁴ Thus, through its decision, not only did the Second District Court of Appeal uphold a vicarious liability exception, but it broadened that exception to all circumstances of joint and several liability.²¹⁵

Less than a month later, the Second District Court of Appeal supported a vicarious liability exception in *Crespo*.²¹⁶ Without mentioning the *Willis Shaw* decision, the court found an offer of judgment invalid because the proposal to two plaintiffs did not apportion the total between the plaintiffs.²¹⁷ However, in dicta, the court noted the validity of the vicarious liability exception to rule 1.442, found in *Danner Construction*, and explained, "[b]ecause apportionment is considered impossible in a vicarious liability case, the courts have relieved the parties of the requirement to apportion the offer in that type of case."²¹⁸

Therefore, once again there are conflicting decisions among the District Courts of Appeal. It remains to be seen if the rest of the district courts will follow the Fifth District Court of Appeal and strictly interpret the *Willis Shaw* decision as all-encompassing, or if they will follow the Second District Court of Appeal and the liberal construction of the holding that allows for an exception.

V. CONCLUSION

The Supreme Court of Florida meant for *Willis Shaw* to be the final ruling regarding apportioning offers of judgment. The court clearly required strict interpretation of section 768.89 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*. Strict interpretation of the plain language results in the requirement that all offerees, and all offerors, appor-

212. *Id.* at 572.

213. *Id.*

214. *Id.*

215. *See Barnes*, 846 So. 2d at 571-72.

216. *Crespo*, 845 So. 2d at 343-44.

217. *Id.* at 343.

218. *Id.* at 344.

tion offers of judgment among multiple parties. Joint offers are common, and the requirement that offerors differentiate among multiple parties protects everyone involved, especially the offerees. No matter if the offeree is a plaintiff or defendant, the offeree must be able to inspect the offer as it pertains to him personally. Otherwise, the offer is not clearly defined in regards to each party involved. This results in a multitude of problems, including further litigation, especially if judgment is not rendered on all of the parties. A strict construction of the law allows no exceptions, and acts to protect every party, which is what the supreme court intended with its *Willis Shaw* decision.

However, within two months of the supreme court's decision, the Second and Fifth District Courts of Appeal issued different decisions on the applicability of the rule on undifferentiated offers pertaining to joint and several liability. With a disagreement so soon after *Willis Shaw*, more are sure to follow. Most likely, the Supreme Court of Florida will have to make another decision on this issue that appears so frequently throughout the Florida courts.

In fact, because of the of the extensive conflict, the Fifth District Court of Appeal sought to strengthen its viewpoint and issued a corrected opinion of *Matetzschk v. Lamb*.²¹⁹ In the new opinion, the court criticized the *Barnes* and *Crespo* decisions of the Second District Court of Appeal. The Fifth District Court of Appeal maintained that "the language of *Willis Shaw* is applicable whether the offer emanates from joint plaintiffs or is directed to joint defendants," and the supreme court decision unquestionably requires apportionment for every joint offer.²²⁰ The Fifth District Court of Appeal also reasoned that the decisions of the Second District Court of Appeal were "inconsistent with the purpose and language of the rule," especially since vicarious liability is such a disputed issue in most cases.²²¹

As the Fifth District Court of Appeal remarked, vicarious liability is a frequently litigated issue. Since, in many cases, liability is not established until the final judgment, the allegedly vicariously liable party may not even be part of the case when attorney's fees are awarded. If attorney's fees are awarded as a result of a lump-sum, joint offer, there is no way to tell what amount each party is responsible for. The confusion over responsibility is very likely to lead to judicial intervention, which is in complete degradation of the purpose of both, rule 1.442 of the *Florida Rules of Civil Procedure* and section 768.79 of the *Florida Statutes*. Therefore, the strict construction

219. 849 So. 2d 1141 (Fla. 5th Dist. Ct. App. 2003).

220. *Id.* at 1144.

221. *Id.*

of rule 1.442 and section 768.79, required by the Supreme Court of Florida, in *Willis Shaw*, does not allow for any exceptions, not even if it is only a harmless technical error. Offers of judgment *must be apportioned among every party*.

This frequently litigated area will continue to confuse attorneys and courts alike. Attorneys repeatedly use offers of judgment to protect their own liability, to ensure that they are paid, and to safeguard their clients' interests. Attorneys cannot afford to lose an award of fees for failing to follow the rules concerning offers of judgment. Therefore, they must apportion the terms and amounts of an offer to each party, no matter if offeror, offeree, plaintiff, or defendant. Using such a strict construction, and following every letter of the rule, is the only way to ensure that the courts will not invalidate an offer of judgment.