

**November 2005**

**THE WACKY WORLD OF OFFERS OF JUDGMENT  
By Ted Babbitt**

By the passage of Fla. Stat. 768.79 and Fla.R.Civ.P. 1.442, the Legislature and the Supreme Court have done more to contribute to the volume of appellate cases than any other act in the history of Florida jurisprudence. Fla. Stat. 768.79 is the offer of judgment statute which was implemented by Fla.R.Civ.P. 1.442. In Hess v. Walton, 898 So. 2d 1046 (Fla. 2<sup>nd</sup> DCA 2005), the District Court of Appeal was faced with an offer of judgment that had been made in a medical malpractice case against a physician and his employer. The joint offers were made in differing amounts. The one to the physician was in the amount of \$100,000.00 while the amount of the offer to the employer was \$15,000.00, despite the fact that the employer's liability was purely for vicarious responsibility, there being no allegation of independent negligence of the part of the employer. The defendants made a joint offer to settle to the Plaintiff in the amount of \$25,000.00. The jury returned a verdict for \$23,500.00 thereby exceeding the magic 25% threshold with respect to the employer but not with respect to the physician. The defendants' offer was far closer to the jury's actual award than the plaintiffs but not large enough to meet the 25% requirement. Finding that the offer of judgment statute requirements had been met as to the vicariously liable employer, the Court awarded the plaintiff almost \$100,000.00 in attorney's fees and the appeal ensued.

In Sarkis v. Allstate Ins. Co., 863 So.2d 210 (Fla. 2003), the Supreme Court recognized that both the rule and the statute were in derogation of the common law and created a penalty, thus both the statute and the rule had to be strictly construed. In that case, at Page 224, Justice Wells, in his concurring opinion, stated it as follows:

“The reason that the statute and rule are to be strictly construed is not because either is ambiguous but because the statute authorizes and the rule implements an award of attorney fees and because the assessment of attorney fees pursuant to the statute and rule is a sanction. It is the long-standing precedent of this Court that statutes and rules authorizing attorney fees or imposing penalties are to be strictly construed as written and not extended by implication.” *Sarkis*, 863 So. 2d at 224.

Nevertheless, the District Court concluded that there was nothing in either the rule or the statute which precluded a disparate offer among two defendants even though one defendant was only responsible based upon respondent superior. In fact, Fla.R.Civ.P. 1.442 specifically states:

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

The Court thus concluded that the rule unambiguously permits the plaintiff to make two different offers to the defendants despite the vicarious nature of the liability of one of those defendants. The Court certified to the Supreme Court the question of whether the common law, which requires parties to pay their own attorneys, supersedes the rule and statute under these circumstances. The

Court recognized that by permitting the plaintiff to make these disparate offers, pressure was put upon one of the defendants to settle for the lesser sum because of the danger of the payment of attorney's fees. Nevertheless, the Court concluded, the rule failing to preclude that tactic, cannot be forceably amended by the Courts so that the seemingly unfair result of imposing a penalty upon a defendant under these circumstances cannot be avoided.

This case permits a plaintiff to make differing offers to defendants even when the liability of one of those defendants is dependent upon the responsibility of the other and authorizes attorney's fees disproportionate to the amount recovered when justified by the work performed by that attorney.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.