

AN OFFER OF JUDGMENT REQUIRES STRICT CONSTRUCTION

by Ted Babbitt

RCP 1.442 and Florida Statute 768.79 (1997) authorize a procedure for Offers of Judgment. Recent cases have required strict construction of these provisions because the Courts consider the granting of attorney's fees when the offer is exceeded as a penalty. When there are multiple joint tortfeasors with potentially different degrees of fault or competing interests, an offer must be made to each of these defendants separately. Strahan v Gauldin, 756 So.2d 158 (Fla. 5th DCA 2000); McFarland & Son, Inc. v Basel, 727 So.2d 266 (Fla. 5th DCA), rev. denied 743 So.2d 508 (Fla. 1999). Each defendant is entitled to evaluate an offer based upon "their individual liability situations." C&S Chem, Inc. v McDougald, 754 So.2d 795 (Fla. 2d DCA 2000); Danner Constr. Co. v Reynolds Metal Co., 760 So.2d 199 (Fla. 2d DCA 2000).

Where there are multiple plaintiffs whose claims are separate or distinct, an Offer of Judgment by a defendant must be separated among the plaintiffs so that each plaintiff can evaluate the offer independently. United States Automobile Ass'n. v Behar, 752 So.2d 663 (Fla. 2nd DCA 2000).

The Fourth District recently had an opportunity to review this law in Safelite Glass Corp. v Samuel, 25 F.L.W. D2326 (Fla. 5th DCA, Sept. 27, 2000).

In that case, Mr. Samuel brought a suit for his own personal injuries and Mrs. Samuel made a claim for her loss of consortium as a result of her husband's injury. They sued both Safelite Glass Corp. and its employee, Ernest Haughton. Safelite was only responsible for Haughton's negligence as a result of vicarious responsibility. A joint Offer of Judgment was made by the plaintiffs against both defendants for \$400,000.00 including all attorney's fees and costs. There was no division between Mr. or Mrs. Samuel nor between the two defendants. The plaintiffs obtained a verdict of close to \$500,000.00 for the husband and \$115,000.00 for the wife for a total of \$610,000.00. The trial court concluded that that amount must be "viewed in the aggregate" resulting in a total judgment which exceeded the \$400,000.00 Offer of Judgment by more than 25%. The defendants argued that the offer was defective because it failed to divide the proposal between the two defendants and was further defective because it did not divide the offer between the two plaintiffs.

The District Court affirmed, holding that since the defendant, Safelite, was only vicariously liable for its employee there was no need to separate the offer between these two defendants.

The defendant/offerees in this case were not joint tortfeasors with potentially different degrees of fault and competing interests. (citing cases.) This was not a case where the tortfeasors were entitled to evaluate the offer independently based on 'their individual liability situations.' (citing cases.)

Safelite was vicariously liable for Haughton's negligence. Both defendants had the same lawyer. The offer's lack of apportionment between Safelite and Haughton did not prevent a meaningful evaluation of the offer. (citing cases.) There was no harmful error in the proposal's failure to allocate damages between two defendants whose interests were so unified under a theory of vicarious liability. This case is distinguishable from United States Automobile Ass'n v Behar, 752 So.2d 663 (Fla. 2nd DCA 2000). In Behar, the defendant's offer was to two plaintiffs whose claims were 'separate and distinct.' The Behar plaintiffs were unlike the defendant/offerees in this case, whose interests were unified.

The Court also found that there was no requirement to separate the offer as to the plaintiffs. The offer was made jointly by both plaintiffs and if it were accepted the defendants would get the one and only thing that they sought, a complete release from both plaintiffs.

Similarly, we find no error in the failure of the plaintiffs/offers to specify the division of damages between them in their proposal for settlement. The lack of such apportionment was 'a matter of indifference' to the defendants; if they accepted the offer, they were entitled to be released by both plaintiffs.

Judge Polen wrote a special concurring opinion to caution the Bar that it should not take comfort in this opinion as a relaxation of the strict compliance requirements imposed by the Courts with respect to the timeliness of an offer.

In contrast, an untimely offer, such as that disapproved by the majority in our recent case of Grip Development, Inc. v Coldwell Banker Residential Real Estate, Inc., 25 F.L.W. D1259 (Fla. 4th DCA May 24, 2000), affects the substantive

rights of the offeree. As we held in Grip, allowing technical violations of the time requirements of the rule ultimately would lead to a 'slippery slope' approach, one that both the legislature and the supreme court have gone to great lengths to avoid. Thus, our opinions which have consistently mandated strict compliance with the *time requirements* of an offer of judgment are readily distinguishable from those like the case before us, where the technical 'joint proposal' requirements are inapplicable to the parties at bar.

This opinion logically considers the purpose behind RCP 1.442. So long as the parties are given a fair chance to evaluate an offer and the resulting acceptance of the offer extinguishes that parties' right or liability, the rule's penalties should be imposed. The Courts will, however, otherwise require strict compliance with all technical provisions of the Rule.