

IN THE SUPREME COURT OF FLORIDA

SANDRA KENT WHEATON,

Petitioner,

Case No.: SC17-716

v.

L.T. Case Nos.: 3D16-490
15-CA-190

MARDELLA WHEATON,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case presents a certified conflict on an issue that frequently arises in Florida's lower courts. Specifically, the issue is whether Florida Rule of Judicial Administration 2.516 applies when a party initially serves a proposal for settlement. Rule 2.516 requires service by e-mail and delineates nine specific items that a service e-mail must contain – technical, detailed things like the words “SERVICE OF COURT DOCUMENT” in all caps in the subject line and the telephone number of the attorney serving the document in the body of the e-mail.

The First, Second, and Fourth District Courts of Appeal have all held, consistent with this Court's precedent that form should not trump substance, that rule 2.516 and its email requirements do not apply when initially serving a proposal for settlement – so that, for example, serving a proposal by U.S. Mail instead of email or serving via an email that does not contain a specific phrase in all caps does not render a proposal unenforceable. The case before this Court, wherein the Third District held that strict compliance with rule 2.516 is a prerequisite to enforcing a proposal for settlement, is the lone wolf. As of the date of this brief, the Fifth District has not yet weighed in.

As shown below, the overwhelming weight of authority is correct. Indeed, the analysis contained in the Third District's outlier opinion, which relied on prior cases from the First and Fourth Districts, has since been rebuked by those very

courts. Among other things the First, Second, and Fourth Districts have all criticized the Third District's reasoning as fundamentally flawed and inconsistent with the plain language of rule 2.516. Accordingly, for the reasons set forth below, this Court should quash the Third District's opinion; approve the First, Second, and Fourth Districts' opinions; and reverse and remand for proceedings consistent with that decision.

The statutory framework

To understand the procedural history of how this issue percolated up to this Court, we must start at the beginning. Here, the beginning involves a discussion of the relevant portions of Florida's proposal for settlement statute, the governing Rule of Civil Procedure, and the Rule of Judicial Administration that has created the conflict.

Section 768.79, Florida Statutes, which is Florida's proposal for settlement law, says that a proposal "shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section." § 768.79(3), Fla. Stat. That is the only mention of "service" in the proposal for settlement statute.

The Rule of Civil Procedure that implements the statute, rule 1.442, says that a proposal shall "include a certificate of service in the form required by rule 1.080." Fla. R. Civ. P. 1.442(c)(2)(G). Rule 1.080, however, no longer contains a

certificate of service provision. Instead, the rule states that “[e]very pleading subsequent to the initial pleading, all orders, and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516.” Fla. R. Civ. P. 1.080(a).¹

Rule 2.516, which is the focus of the conflict in this case, says at subsection (a) that “every pleading subsequent to the initial pleading and every other document filed in any court proceeding [except documents not relevant here] must be served in accordance with this rule on each party.” Fla. R. Jud. Admin. 2.516(a). At subsection (b)(1), the rule says that “[a]ll documents required or permitted to be served on another party must be served by e-mail, unless the parties otherwise stipulate or this rule otherwise provides.” Fla. R. Jud. Admin. 2.516(b)(1). Then, for any document served by e-mail, the e-mail itself must meet at least nine different criterion specified in subsection (b)(1)(E): it must be “sent to

¹ Rule 1.080(f) used to contain a certificate of service provision, but it was deleted in 2012 when rule 2.516 was adopted. *See In re Amends. to Fla. Rules. of Jud. Admin.*, 102 So. 3d 505, 510 (Fla. 2012). The opinions on the pertinent revisions of the civil rules reflect an awareness that rule 1.080 changed, but do not explain why rule 1.442(c)(2)(G) continues to require a “certificate of service in the form required by rule 1.080” when rule 1.080 no longer requires a certificate in any particular form. *In re Amends. to Fla. Rules of Jud. Admin.*, 102 So. 3d 505 (Fla. 2012) (modifying rule 1.442(c)(2)(G) to delete the reference to subdivision (f) of rule 1.080, but continuing to provide that a proposal for settlement must “include a certificate of service in the form required by rule 1.080”); *In re Amends. to Fla. Rules of Civ. Proc.*, 131 So. 3d 643 (Fla. 2013) (leaving the certificate of service requirement of rule 1.442(c)(2)(G) unchanged).

all addresses designated”; have a subject line that begins with “SERVICE OF A COURT DOCUMENT” in all caps, followed by the case number; the body of the e-mail must identify the court in which the case is proceeding, the case number, the name of the initial party on each side, the title of each document being served in the e-mail, and the name and telephone number of the person serving the document. We collectively refer to these as the nine “formatting requirements.” (Although not applicable to the cases currently before the Court, the rule was recently amended, effective January 1, 2018, to add the requirement that the case style be included in the subject line – thereby bringing the formatting requirement count to ten. *See In re Amends. to Fla. Rules of Jud. Admin.-2017 Regular-Cycle Report*, 226 So. 3d 223, 228 (Fla. 2017).)

The question presented by this case is whether failure to strictly comply with rule 2.516 – either because the proposal was not served by e-mail, or because it was served by e-mail but the service e-mail did not satisfy all nine of the formatting requirements – renders an otherwise valid proposal for settlement unenforceable.

The *Wheaton* case

The facts giving rise to this case emanate from a family law dispute. Mardella Wheaton sued her ex-daughter-in-law, Sandra Wheaton, for unlawful detainer. R.15. Mardella alleged that Sandra was illegally residing with

Mardella's son in a house owned by Mardella. R.8, 15. Sandra later served a proposal for settlement on Mardella, via e-mail. R.8, 15, 31. It is undisputed that the service e-mail did not strictly comply with all nine of the formatting requirements. R.31. It is likewise undisputed that Mardella received, but chose not to accept, the proposal for settlement. R.36.

After Sandra won summary judgment, she moved to enforce her proposal for settlement and collect her attorneys' fees.² R.9. Naturally, Mardella opposed the motion. R.9. Mardella had three grounds for her opposition: that the proposal was vague, that it was not made in good faith, and that it failed to strictly comply with the e-mail service requirements of rule 2.516. R.10. The trial court rejected the vagueness argument (R.10-11), but it agreed that failure to strictly comply with all nine of the formatting requirements voided the proposal for settlement. R.9-10. (Since it held the proposal unenforceable, the trial court elected not to reach the issue of whether the offer was made in good faith. R.10-11.)

The basis for the trial court's ruling was that Sandra's service e-mail "did not include a certificate of service, a subject line containing the words 'SERVICE OF COURT DOCUMENTS,' and [failed to comply with] other requirements of rules 1.442, 1.080 and 2.516 of the Florida Rules of [Civil Procedure and Judicial

² Apparently, Sandra voluntarily moved out of the house. R.36. Nevertheless, Mardella appealed her summary judgment loss to the Third District, and, that court affirmed with a PCA. *Wheaton v. Wheaton*, 194 So. 3d 1036 (Fla. 3d DCA 2016).

Administration.]” R.7-8. In support, the trial court cited to *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014), a case involving service of a section 57.105 sanctions motion, and found that *Matte* was applicable to this proposal for settlement case. R.9. More precisely, relying on this Court’s precedent that section 768.79 and rule 1.442 must be strictly construed, the trial court found that rule 2.516 applies to proposals for settlement and, strictly construing that provision as well, because Sandra failed to serve her proposal in accordance with all nine of rule 2.516(b)(1)(E)’s formatting requirements, the proposal for settlement was unenforceable. R.9-10.

In the very brief opinion before this Court on review, the Third District affirmed. *Wheaton v. Wheaton*, 217 So. 3d 125, 126 (Fla. 3d DCA 2017). The Third District agreed with the trial court that proposals for settlement “must comply with the e-mail service provisions of rule 2.516.” *Id.* The Third District acknowledged that subsection (a) of rule 2.516 says it applies only to documents that are filed in court proceedings, and that section 768.79 and rule 1.442 expressly forbid a party from filing a proposal for settlement when it is initially served. *Id.* at 127. Nevertheless, the court believed that subsection (b) and its reference to documents that “are permitted to be served” created a broader catch-all that requires proposals for settlement to be served via e-mail. *Id.* And since the catch-all requires e-mail service, the Third District reasoned that strict compliance with

all nine of the formatting requirements is necessary in order for the proposal to be enforceable. *Id.* at 127-28.

The Third District expressly noted that “[i]n so holding, we agree with the decision and analysis” of the First District in *Floyd v. Smith*, 160 So. 3d 567 (Fla. 1st DCA 2015). *Id.* at 128. The Third District also cited favorably to the Fourth District case that the trial court relied upon, *Matte v. Caplan*. *Id.*

Sandra filed a motion for rehearing. She pointed out that, after briefing was completed, this Court had published its opinion in *Kuhajda v. Borden Dairy Co. of Alabama, LLC*, 202 So. 3d 391 (Fla. 2016). Sandra argued that the Third District’s holding was inconsistent with *Kuhajda*. R.83-87.

Not surprisingly, Mardella opposed the motion for reconsideration. Without providing any explanation, she argued that *Kuhajda* was “inapposite” and she maintained that the First District’s *Floyd* decision and the Fourth District’s *Matte* decision were controlling. R.90. She also argued that the motion for rehearing, which brought to the court’s attention a case which was issued after briefing was completed, was improper because it raised a new issue for the first time in a motion for rehearing. R.90-92.

The Third District summarily denied Sandra’s motion. R.94.

The Second District reaches the opposite conclusion in *Boatright*.

Three weeks after the Third District denied rehearing in *Wheaton*, the Second District issued an opinion in *Boatright v. Philip Morris USA Inc.*, 218 So. 3d 962 (Fla. 2d DCA 2017), where it reached the opposite conclusion regarding the applicability of the e-mail service provisions of rule 2.516 to proposals for settlement. In *Boatright*, the proposal's opponent argued that the proposal failed to comply with rule 2.516 because it was served by U.S. mail instead of by e-mail. *Id.* at 964. In contrast to the Third District's brief analysis, the Second District engaged in a lengthy and thorough analysis of section 768.79, rule 1.442, and rule 2.516. *Id.* at 964-71. The Second District concluded that "proposals for settlement are not subject to the service requirements of rule 2.516 because the proposals" are not "filed in the action." *Id.* at 965. Thus, the plaintiff's failure in *Boatright* to strictly comply with rule 2.516 did not render the proposal for settlement unenforceable. *Id.* at 971. As part of its opinion, the Second District certified the conflict with the Third District. *Id.*

Which meant, at that point, a proposal for settlement served in the Third District had to be served by e-mail and comply with all nine of the minutia requirements in rule 2.516, while a proposal served in the Second District did not. The question was open in the other three districts. But, since proposals for

settlement are fought over nearly every day, it wasn't long before the Fourth and First Districts waded into the water.

In *McCoy*, the Fourth District rejects the Third District's reasoning.

Six months after the Second District's decision in *Boatright*, the Fourth District issued its opinion in *McCoy v. R.J. Reynolds Tobacco Co.*, 229 So. 3d 827 (Fla. 4th DCA 2017). In *McCoy*, the proposals were served on the defendants both by U.S. mail and by e-mail. *Id.* at 828. When the plaintiff moved to recover fees based on the proposals, the defense objected, arguing that the proposals were unenforceable both because they were served by U.S. mail and because the service email did not comply with all nine of the formatting requirements. *Id.* The trial court agreed that strict compliance with rule 2.516 was required and, because neither type of service was in strict compliance with rule 2.516's e-mail service provisions, the trial court denied the motion for fees. *Id.* The Fourth District reversed.

As an initial matter, the Fourth District noted that "the focus of [section 768.79] is on actual notice," which is why the statute requires a proposal to "be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section." *Id.* (quoting § 768.79(3), Fla. Stat.). (In *McCoy*, there was no question that the defendants received the proposals (both the e-mail and U.S. mail copies) and chose

not to accept them. *Id.* at 828.) The Fourth District, like the Second, then reasoned that the e-mail service provisions of rule 2.516 do not apply to proposals for settlement since section 768.79 and rule 1.442 are both unequivocal that proposals for settlement “shall not be filed,” and rule 2.516(a) plainly says that its email provision requirements only apply to documents that are “filed in any court proceeding.” *Id.* at 829 (quoting Fla. R. Jud. Admin. 2.516(a)). Hence, the Fourth District concluded that failure to comply with rule 2.516 was not a basis for rendering a proposal unenforceable. *Id.* at 829.

Importantly, the Fourth District – the same court that wrote the *Matte* opinion upon which the Third District relied – expressly stated that “[w]e disagree with [the Third District’s decision in] *Wheaton*.” *Id.* at 829.

In *Oldcastle*, the First District concurs with the Second and Fourth Districts.

Two months after *McCoy*, the other court upon which the *Wheaton* opinion relied would rebuff *Wheaton* and side instead with its Fourth and Second District sister courts. In *Oldcastle Southern Group, Inc. v. Railworks Track Systems, Inc.*, - So. 3d -- , 2017 WL 6521324, at *1 (Fla. Dec. 21, 2017), the plaintiff sent the proposal for settlement by e-mail. Just like *Wheaton*, *Boatright*, and *McCoy*, it was undisputed that the intended party received the proposal and chose not to accept it. *Id.* at n.2. When, after prevailing on the merits, the plaintiff in *Oldcastle* moved for fees, the defense attempted to avoid the statutory consequence for rejecting the

proposal by invoking the argument that failure to comply with all nine of rule 2.516's formatting requirements rendered the proposal unenforceable. *Id.*

In rejecting that argument, the First District wrote, “[w]e adopt the view of *McCoy* and *Boatright* and hold that compliance with rule 2.516 is not required when serving a proposal for settlement.” *Id.* at *1. Thus, the court said, “[w]e hold that the proposal did not have to be served in accordance with rule 2.516.” *Id.* The First District not only certified conflict with *Wheaton*, *id.* at *1, but it also expressly noted that “*Wheaton* misconstrued our earlier opinion in *Floyd v. Smith*.” *Id.* at *2, n.3.

The proceedings before this Court.

The losing parties in the original conflict cases, Sandra Wheaton in the Third District and Philip Morris in the Second District, sought review of the certified conflict. R.5; *Philip Morris USA Inc. v. Boatright*, SC17-897. This Court accepted review and stayed *Boatright* pending the outcome here. *Boatright*, SC17-897 (Fla. Sup. Ct. order dated Oct. 24, 2017). The losing party in *McCoy* also sought this Court's review and that case has been stayed pending the outcome here. *R.J. Reynolds Tobacco Co. v. McCoy*, SC17-2051 (Fla. Sup. Ct. order dated Dec. 28, 2017). We are uncertain whether the losing party in the *Oldcastle* case will seek review of the conflict the First District certified (the notice of intent to seek review in *Oldcastle* is due the same day as this brief).

SUMMARY OF THE ARGUMENT

The issue presented by the certified conflict is whether the e-mail service provisions of Florida Rule of Judicial Administration 2.516 apply to proposals for settlement. This Court should determine, consistent with the First, Second, and Fourth District Courts of Appeal, that those provisions do not apply to proposals for settlement. There are three independent reasons to reach that conclusion.

First, nothing in section 768.79 or rule 1.442 requires a proposal for settlement to be served by e-mail. If there is no requirement to serve by e-mail, then the e-mail service provisions of rule 2.516 are cannot affect the enforceability of a proposal for settlement.

Second, proposals for settlement are not subject to the e-mail service provisions in rule 2.516 because that rule applies only to documents that are “filed” in the court file – and proposals for settlement are forbidden to be filed in the court file.

Finally, even if rule 2.516 applied to proposals for settlement (which it does not), as a procedural rule, strict compliance with rule 2.516 is not something this Court requires. Which is all to say that failure to comply with rule 2.516 when initially serving a proposal for settlement – either by failing to satisfy all nine of the formatting requirements (the situations in *Wheaton*, *McCoy*, and *Oldcastle*), or

by serving through U.S. mail instead of e-mail (the situations in *Boatright* and *McCoy*) – does not render a proposal for settlement unenforceable.

Thus, as explained below, this Court should quash *Wheaton*; approve the analysis in *Boatright*, *McCoy*, and *Oldcastle*; and hold that the e-mail service provisions of Florida Rule of Judicial Administration 2.516 do not apply to proposals for settlement.

ARGUMENT

Standard of Review. “The certified conflict issue involves the interpretation of the Court’s rules and is a question of law subject to de novo review.” *Kuhajda*, 202 So. 3d at 393 (quoting *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla.2006)). “The eligibility to receive attorney’s fees and costs pursuant to section 768.79 and rule 1.442 is reviewed de novo.” *Kuhajda*, 202 So. 3d at 393-94 (quoting *Pratt v. Weiss*, 161 So.3d 1268, 1271 (Fla.2015)).

I. Nothing in section 768.79 or rule 1.442 requires proposals for settlement to be served by e-mail, so the e-mail service provisions are irrelevant to the enforceability of a proposal for settlement.

To reach the conclusion that proposals for settlement must comply with the e-mail service provisions of rule 2.516, the Third District had to skip over a fundamental, threshold step in the analysis. Specifically, the *Wheaton* court jumped to interpreting (incorrectly) the Rule of Judicial Administration governing e-mail service without first considering the indisputable fact that nothing in the

proposal for settlement statute, section 768.79, or the Rule of Civil Procedure that implements the statute, rule 1.442, imposes the requirement that a proposal for settlement be served by e-mail. *Wheaton*, 217 So. 3d at 127.

In other words, if a court is going to “strictly construe” both the proposal for settlement statute and rule, it should only construe what the statute and rule require. *See* R.39 (quoting *Campbell v. Goldman*, 959 So. 2d 223, 227 (Fla. 2007) (“strict construction is applicable to both the substantive and procedural portions of the rule and statute.”)). Here, there was no need for the Third District to even descend into an interpretation of the e-mail service provisions in rule 2.516 because there is no requirement, in either the proposal for settlement statute or the proposal for settlement rule, mandating the application of rule 2.516. If neither the statute nor the rule require e-mail service, then the e-mail service rule need not be construed, much less strictly construed, when deciding whether a proposal for settlement is enforceable.

Section 768.79 does not require service by e-mail.

An examination of section 768.79 and rule 1.442 make clear that there is no requirement for e-mail service. The procedure for communicating an offer of settlement is set out in section 768.79(3), Florida Statutes, which states:

The offer *shall be served upon the party to whom it is made*, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(Emphasis added.) As the Second District recognized in *Boatright*, by its terms, this statute requires only that the offer be served on the party to whom it is directed. *Boatright*, 218 So. 3d at 964. It does not state, or even imply, that service must be made by a particular method. *Id.*

Rule 1.442(b) does not require service by e-mail.

The same is true of the rule intended to implement the proposal for settlement statute, rule 1.442. *See Kuhajda*, 202 So. 3d at 395 (noting that rule 1.442 is a “procedural rule” that was “designed to implement” section 768.79). Although rule 1.442 contains several provisions that pertain to service of a proposal for settlement, none of these provisions establishes a requirement that a proposal be served by e-mail or, for that matter, by any particular method of service. For example, subdivision (b) sets the beginning and end of the time period in which a proposal may be served. This subdivision states:

(b) 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.

Fla. R. Civ. P. 1.442(b). This subdivision does not require service by e-mail. Nor does it prohibit service by U.S. mail. So long as the proposal was served within the prescribed time periods, either type of service would meet the requirements of this section.

Rule 1.442(d) does not require service by e-mail.

Subdivision (d) of rule 1.442 is similar to section 768.79 in that it outlines the procedure for communicating a proposal for settlement to the opposing party.

This subdivision states:

(d) Service and Filing. A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

Fla. R. Civ. P. 1.442(d). Again, there is nothing in subdivision (d) to suggest that a proposal for settlement must be served by e-mail. And if ever there was a place to indicate that a certain type of service is required, it would be in the subsection called “service and filing.” However, this subdivision, like the counterpart provision in section 768.79(3), refers to “service” only to make the point that the proposal must be served on the party to whom it is directed, and that it must not be filed in the court file. *See Boatright*, 218 So. 3d at 965 (noting that rule 1.442(d) does “not set any specific method for service”). As the Fourth District noted in *McCoy*, the point of the requirement is simply to ensure that the intended recipient has “actual notice” of the offer. *McCoy*, 229 So. 3d at 828. Service by either U.S. mail or by e-mail accomplishes that purpose.

Rule 1.442(c)(2)(G) does not require service by e-mail.

The only remaining part of rule 1.442 that deals with service of a proposal for settlement is subdivision (c)(2)(G), which provides that a proposal for

settlement must “include a certificate of service *in the form required by rule 1.080.*” Fla. R. Civ. P. 1.442(c)(2)(G) (emphasis added). Although not raised by the appellee in *Wheaton*, the appellee in the conflict case, *Boatright*, argued that this provision creates an e-mail service requirement because rule 1.080 requires that every pleading subsequent to the complaint and “every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516.” *Boatright*, 218 So. 3d at 965 (emphasis omitted). Essentially, what the appellee in *Boatright* argued for was an e-mail service requirement by cross-reference to a cross-reference. The Second District rejected that argument and this Court should too.

As the Second District noted, it is definitely a “conundrum” that “rule 1.442(c)(2)(G) refers to rule 1.080, which does not specify ‘the form’ of the certificate [of service].” *Boatright*, 218 So. 3d at 965. “In fact, rule 1.080 states nothing about a certificate of service.” *Id.* The Rules Committee clearly could have suggested to impose service requirements in rule 1.442’s subsection called “service and filing.” The fact that the amendments the committee did suggest reflect the committee’s clear awareness of the e-mail service requirements in rule 2.516, yet the committee chose not to reference or incorporate those requirements into rule 1.442, is further evidence that the e-mail service provisions of rule 2.516 do not apply to proposals for settlement. *See* p.5, note 2, above.

The same goes for the committee note to the 2013 amendment. The committee said “[s]ubdivision (f)(1) was amended to reflect the relocation of the rule regarding additional time *after service by mail or e-mail* from rule 1.090(e) to Fla. R. Jud. Admin. 2.514(b).” Fla. R. Civ. P. 1.442, Committee Notes, 2013 Amendment (emphasis added). Clearly, then, the committee contemplated that service could be accomplished by mail or by e-mail. It is safe to say that the committee is aware of the problems posed by the current version of rule 1.442 and is working hard to create solutions. In the meantime, the language of the rules this Court must interpret in order to resolve the certified conflict are clear.

And the plain language of rule 1.080, as that rule currently exists, reflects that the e-mail service provisions of rule 2.516 do not apply to proposals for settlement. That is because the only reference to service is in rule 1.080(a), which says nothing that applies to proposals for settlement. As the Second District recognized, on its face, the rule applies only to documents that are filed: the rule says “[e]very pleading subsequent to the initial pleading, all orders, *and every other document filed in the action* must be served in conformity with the requirements of Florida rule of Judicial Administration 2.516.” *Boatright*, 218 So. 3d at 965 (emphasis in original) (quoting Fla. R. Civ. P. 1.080(a)). Thus, as the Second District concluded, “[t]he plain language of rule 1.080(a) yields the conclusion that, unless a document is filed in the action, its service need not be in

conformity with rule 2.516's requirements." *Boatright*, 218 So. 3d at 965. And both the proposal for settlement rule and the proposal for settlement statute are unequivocal that proposals "shall not" be filed in any action unless filed as part of a motion to enforce the proposal. *Id.*, citing § 768.79(3); Fla. R. Civ. P. 1.442(d). "Simply stated, proposals for settlement are not subject to the service requirements of rule 2.516 because the proposals do not meet rule 1.080's threshold requirement that they be 'filed in the action.'" *Boatright*, 218 So. 3d at 965.

In any event, even if rule 2.516 were to somehow apply to proposals for settlement (which it does not), e-mail service is not the provision of rule 2.516 to which rule 1.442 refers. The Second District addressed this point in *Boatright*. Even though rule 1.442(c)(2)(G) only mentions a certificate of service, the appellees in *Boatright* argued that the rule nevertheless incorporated the e-mail service requirements of rule 2.516 via cross reference to rule 1.080, which then cross references rule 2.516. *Boatright*, 218 So. 3d at 965-66. As the Second District recognized, that argument is misplaced. *Id.*

Rule 1.442(c)(2)(G) says only that a proposal must have a "certificate of service" that complies with rule 1.080. Rule 1.080(a), in turn, says documents that are filed must be served in conformity with rule 2.516; and rule 2.516(f) does, in fact, contain a form for a certificate of service. That provision says:

(f) Certificate of Service. When any attorney certifies in substance:

“I certify that a copy of the foregoing document has been furnished to (here insert name or names, addresses used for service, and mailing addresses) by (e-mail) (delivery) (mail) (fax) on.....(date).....

Attorney

the certificate is taken as prima facie proof of such service in compliance with this rule.

Fla. R. Jud. Admin. 2.516(f). The certificate of service provision in rule 2.516(f) offers no less than four equally acceptable alternatives, with e-mail and U.S. mail being two available options. *Boatright*, 218 So. 3d at 965-66. Which means, “to the extent that rule 1.442(c)(2)(G) incorporates the certificate of service form in rule 2.516(f),” serving by U.S. mail alone – without serving by e-mail – is sufficient for a party to have “strictly complied with the applicable statute and rules.” *Boatright*, 218 So. 3d at 966. Stated differently, the only thing rule 1.442(c)(2)(G) requires is a certificate of service in conformity with rule 2.516. It says nothing about service, let alone service in compliance with rule 2.516.

In sum, even by cross-reference to other rules, there is no requirement either in rule 1.442 or in section 768.79 that a proposal for settlement be served by e-mail. So the Third District should have stopped there. No doubt, this Court has said that section 768.79 and rule 1.442 must be strictly construed. *See Campbell*, 959 So. 2d at 227. But the duty to strictly construe the statute and the rule works both ways: a court should demand compliance with all of the requirements of the statute and rule, but it should limit the duty of compliance to the requirements that

are actually stated in the text of the statute and the rule. Since there is no requirement that a proposal for service be served by e-mail, e-mail service provisions cannot be construed to render a proposal unenforceable. To uphold the Third District’s ruling would require this Court to effectively rewrite section 768.79 and rule 1.442 by adding text to them, which is neither a form of construction (strict or otherwise) nor the proper function of the courts. *See State v. Globe Comms. Corp.*, 622 So. 2d 1066, 1080 (Fla. 4th DCA 1993) (“[I]t is a time-honored principle of Florida law that it is not the role of a court to rewrite a statute.”), *affirmed*, 648 So. 2d 110 (Fla. 1994).

II. Nothing in the language of rule 2.516 makes the rule applicable to proposals for settlement.

Hoping to distract from the bigger-picture problem that nothing in the proposal for settlement statute or implementing rule requires e-mail service, or perhaps trying to will that requirement into existence, the appellees in both *Wheaton* and *Boatright* (and apparently *McCoy*) primarily focused their energy on the language of rule 2.516 itself. *See, e.g., Boatright*, 218 So. 3d at 295 (noting that “the tobacco companies insist the heart of their argument is found within the language of rule 2.516”). As explained below, those arguments failed in three out of four courts (four out of five if you count a federal opinion³) for good reason: the

³ *Douglas v. Zachry Industrial, Inc.*, No. 6:13-cv-1943-Orl-40GJK, 2015 WL 6750803 at *2-3 (M.D. Fla. Nov. 5, 2015).

email service provisions of rule 2.516 apply only to documents filed in the court file – and proposals for settlement are forbidden by section 768.79 and rule 1.442 from being filed.

The argument made by Mardella in *Wheaton* and the tobacco companies in *Boatright* and *McCoy* goes like this: rule 1.442(d) says a proposal “shall be served on a party or parties to whom it is made,” and rule 2.516(b)(1) says that “[a]ll documents required or permitted to be served on another party must be served by e-mail, unless the parties otherwise stipulate or this rule otherwise provides.” Since rule 1.442(d) “requires” service, and rule 2.516(b)(1) says its requirements apply to all documents “permitted to be served,” the argument is that proposals for settlement must be served in compliance with rule 2.516. R.38-39; *Boatright*, 218 So. 3d at 967. To drive the point home, Mardella Wheaton pointed to a line of cases where this Court has said that “strict construction is applicable to both the substantive and procedural portions of the rule and statute.” R.39 (quoting *Campbell*, 959 So. 2d at 227).

The Third District agreed with that argument. It reasoned that, even though a proposal for settlement cannot be “filed,” it is nevertheless required to be “served.” *Wheaton*, 217 So. 3d at 127. And rule 2.516(b)(1) says that any time a document is “permitted to be served,” it “must be served by e-mail.” *Id.* The Third District found the language of subsection (b)(1) “plain and unambiguous” and

concluded that proposals for settlement fell “clearly within the scope of rule 2.516(b)” and were, therefore, “subject to that rule’s requirements.” *Id.* at 127-28.

The fundamental problem with this reasoning, as recognized in *Boatright*, *McCoy* and *Oldcastle*, is that it focuses on subsection (b)(1) while rendering subsection (a)(1) meaningless. In particular, subsection (a)(1), which is titled “Service; When Required,” (as opposed to subsection (b)(1)’s title, “Service; How Made”) says that “every pleading subsequent to the initial pleading and every other document *filed in any court proceeding*...must be served in accordance with this rule on each party.” Fla. R. Jud. Admin. 2.516(a) (emphasis added).

As the *Boatright* court explained, the argument that rule 2.516 applies because subsection (b)(1) says the rule applies to any document that is *served* ignores that subsection (a)(1) of the same rule specifically says rule 2.516 only applies where the document in question (the one that must be served) is also required to be *filed*. *Boatright*, 218 So. 3d at 967. In other words, the *Wheaton* court’s conclusion only makes sense by ignoring the limitation subsection (a) places on subsection (b). That, of course, is improper under well-settled rules of interpretation. *See, e.g., State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002) (“[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.”).

The *Boatright* court went to pains to methodically explain this most basic flaw in the *Wheaton*'s court analysis. The Second District noted in *Boatright* that this Court has made clear that statutes "should be interpreted to give effect to every clause...and to accord meaning and harmony to all of its parts." *Boatright*, 218 So. 3d at 967 (quoting *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001)). Additionally, when evaluating statutes, courts must avoid construing text as "mere surplusage." *Boatright*, 218 So. 3d at 967 (quoting *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003)). So, "if a statutory provision appears to have a clear meaning in isolation," but giving it that meaning makes the section "inconsistent with other parts of the same statute or other parts in pari materia, the [c]ourt will examine the entire act and those in pari materia in order to ascertain the overall legislative intent." *Boatright*, 218 So. 3d at 967 (quoting *Fla. State Racing Comm'n v. McLaughlin*, 102 So. 2d 574, 575-76 (Fla. 1958)).

Applying that tried-and-true framework of analysis, the Second District concluded that subsection (b) cannot be read to require proposals for settlement to comply with the e-mail service provisions. The *Boatright* court noted that, "by its title, rule 2.516(a) sets forth when the service requirements of rule 2.516 apply" and the text of subsection (a) "confines the scope of rule 2.516 to... '**every other document filed in any court proceeding.**'" *Boatright*, 218 So. 3d at 967 (emphasis in original). Subsection (b)(1) "then sets forth the method by which those

documents must be served....” *Id.* Thus, reading the provisions together, the subsection (b)(1) “documents” that must be served by e-mail are only the “document[s] filed in any court action,” per subsection (a). *Id.*

So, since section 768.79 and rule 1.442 prohibit the filing of a proposal for settlement when it is initially served, rule 2.516 does *not* apply to proposals for settlement. *Id.*; *see also Oldcastle*, 2017 WL 6521324, at *2 (“We agree with *McCoy* and *Boatright* that since the proposal for settlement is not to be filed when it is served, the proposal is not included in the clause ‘every other document filed in any court proceeding.’”); *McCoy*, 229 So. 3d at 829 (“Under the plain language of Rule 2.516(a), then, the initial offer of judgment is outside of the e-mail requirements of that rule.”); *Douglas*, 2015 WL 6750803, at *2 (“[T]he words ‘[a]ll documents required or permitted to be served on another party must be served by email,’ contained in Rule 2.516(b)(1), must be read to incorporate the limiting language ‘filed in any court proceeding,’ found in Rule 2.516(a).”). Indeed, as the Second District cogently concluded, “[i]t makes no sense for rule 2.516(b)(1)’s e-mail service requirements to apply to a *broader* scope of documents than specified by [rule] 2.516(a), which is the portion of rule 2.516 defining its scope.” *Boatright*, 218 So. 3d at 967 (emphasis in original).

Although it could have, the Second District did not stop there. Instead, the court identified two additional reasons why rule 2.516 does not apply to proposals

for settlement. First, the *Boatright* opinion correctly noted that, since subsection (a) “expressly confines its scope to the service of documents ‘filed in any court proceeding,’ we are compelled to read the rule as excluding documents which are *not* ‘filed in any court proceeding.’” *Id.* (emphasis in original), citing *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) (“Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of the other.”).

Second, the court explained that the text of subsection (b)(1) itself supports the conclusion that the rule does not apply to every document served in a case. The *Boatright* opinion pointed out that subsection (b)(1) requires e-mail service “unless the parties otherwise stipulate *or this rule otherwise provides.*” *Boatright*, 218 So. 3d at 967 (emphasis in original) (quoting Fla. R. Jud. Admin. 2.516(b)(1)). The emphasized language “encompasses the language in subsection (a), which confines the word ‘documents’ to only those documents *filed* in the action.” *Boatright*, 218 So. 3d at 967 (emphasis added). Stated differently, subsection (a) “otherwise provides” that the documents that must be served by e-mail are only those documents that also are filed in the court file. Since proposals for settlement are forbidden to be filed in the court file when they are initially served, proposals for settlement do not fall within the class of documents encompassed by rule 2.516.

Finally, the Second District addressed why subsection (d) of rule 2.516 does not support application of the entire rule to proposals for settlement. In a footnote in the *Wheaton* opinion, the Third District said that subsection (d) of rule 2.516 supports the conclusion that the rule applies to proposals for settlement. That subsection, titled “Filing,” says, “[a]ll documents must be filed with the court either before service or immediately thereafter, ***unless otherwise provided by general law or other rules.***” Fla. R. Jud. Admin. 2.516(d) (emphasis in original). In *Wheaton*, the Third District theorized that the emphasized language “implicitly acknowledges that even if a document (such as a proposal for settlement) is not to be filed contemporaneously, it nevertheless falls within the purview of this rule.” *Wheaton*, 217 So. 3d at 128 n.3. Almost daring this Court to say otherwise, the Third District wrote, “[h]ad the Florida Supreme Court intended to exempt such served-but-not-contemporaneously-filed documents from the requirements of rule 2.516, it surely would have said so in subdivision (d).” *Id.* Straining the bounds of logic, the Third District concluded that subsection (d), which relates only to “filing” of documents, could create, by implication no less, service requirements that are expressly negated in subsection (a).

As the *Boatright* court explained, that is not a plausible interpretation. To the contrary, the Second District correctly reasoned that, since section 768.79 and rule 1.442 both expressly provide that a proposal for settlement “***shall not***” be

filed, those are the “general law or other rules” of which subsection (d) speaks when it says documents must be filed “unless otherwise provided for by general law or other rules.” *Boatright*, 218 So. 3d at 968. Summing up the point nicely, the Second District recognized that “[i]f proposals for settlement are excluded from the mandatory filing requirement in rule 2.516(d), they are also excluded from the e-mail service requirement [in subdivision (a),] which is mandatory only if the documents were required to be filed in the first instance.” *Id.*

In short, multiple sections of rule 2.516, read harmoniously instead of in isolation, support the conclusion that the rule does not apply to proposals for settlement. (There is one obvious exception: rule 2.516 would apply when a proposal is attached as an exhibit to a motion seeking to enforce the right to collect attorneys’ fees. At that point, the motion to enforce the proposal is filed in the court and, as an exhibit attached to that motion, the proposal would be filed too. *Id.* But that scenario is not the scenario contemplated by the certified conflict. The conflict contemplates only whether e-mail service is necessary when the proposal is initially served.)

In summary of these points:

Rule 2.516 has no impact on the enforceability of a proposal because nothing in section 768.79 or rule 1.442 requires e-mail service:

- Section 768.79 requires that an offer of settlement must be served on the party to whom it is directed, but it does not specify that service must be made by any particular method.

- Rule 1.442(b) requires that a proposal for settlement be served within a specified timeframe, but it does not require that the proposal be served by any particular method.
- Rule 1.442(d) provides that a proposal for settlement shall be served, but not filed in the court file. It also does not specify that service must be made by any particular method.
- Rule 1.442(c)(2)(G) provides that a proposal for settlement must have a *certificate of service* in the form required by rule 1.080, but rule 1.080 no longer requires a certificate of service in a particular form. Rule 1.080 simply refers the reader to rule 2.516.
- Rule 2.516(f) sets forth a form for a certificate of service a lawyer may use to establish a presumption of service, but even that form does not require service to be made by any particular method. Instead, it allows a person to elect amongst multiple forms of service, with U.S. mail or e-mail being two of them.

The email service provisions of rule 2.516 do not apply to proposals for settlement because proposals are not filed when they are served:

- Rule 2.516(a) says that compliance with the e-mail service components of rule 2.516 is required for “every pleading subsequent to the initial pleading and every other document *filed in any court* proceeding....”
- Section 768.79(3) says that a proposal for settlement “*shall not be filed* unless it is accepted or unless filing is necessary to enforce the provisions of this section.”
- Rule 1.442(d) says that “[a] proposal...*shall not be filed* unless necessary to enforce the provisions of this rule.”

III. The cases cited in *Wheaton* do not support the Third District’s decision.

The *Wheaton* court pointed to only two cases in support of its incorrect conclusion that the e-mail service provisions of rule 2.516 apply to proposals for settlement: the First District’s decision in *Floyd v. Smith* and the Fourth District’s decision in *Matte v. Caplan*. *Wheaton*, 217 So. 3d at 128. It should not be lost on

this Court that both the First District and the Fourth District have expressly disagreed with the *Wheaton* court's analysis. *Oldcastle*, 2017 WL 6521324 at *2; *McCoy*, 229 So. 3d at 829.

The First District point-blank said that the *Wheaton* court "misconstrued" its *Floyd* opinion. *Oldcastle*, 2017 WL 6521324, at *2 n.3. The *Oldcastle* opinion pointed out that the issue in *Floyd* was whether a proposal for settlement had to contain "a certificate of service in the form required by rule 1.080." *Id.* (quoting *Floyd*, 160 So. 3d at 569). As noted by both the Second District and the First District, *Floyd* is inapplicable because it "did not consider the issue of whether rule 2.516 applied to service of a proposal for settlement." *Oldcastle*, 2017 WL 6521324, at *2 n.3; *Boatright*, 218 So. 3d at 968.

The Third District's reliance on *Matte v. Kaplan* fares no better. For starters, as the Second District recognized, *Matte*, like *Floyd*, did not address a proposal for settlement. *Boatright*, 218 So. 3d at 969. Instead, *Matte* addressed a motion for sanctions sought pursuant to section 57.105, Florida Statutes. 140 So. 3d at 687-88. Moreover, even if a section 57.105 motion could be analogized to a proposal for settlement, the Second District pulled no punches explaining why the *Matte* court's reasoning is not legally sound. The *Matte* opinion breezed past the limitation contained in rule 2.516(a) (saying that only documents filed in the court file must be served by e-mail) and skipped to analyzing subsection (b) instead.

Without providing any analysis, the *Matte* decision “simply presumes that preliminary service of a motion for sanctions under section 57.105(4) must be accomplished by e-mail.” *Boatright*, 218 So. 3d at 969. But, similar to proposals for settlement, motions for sanctions under section 57.105 are forbidden to be initially filed. *Id.* The Second District properly noted that the *Matte* court’s failure to take into account rule 2.516(a)’s limitation on e-mail service requirements “constitutes a fatal flaw in that court’s reasoning.” *Id.*; *see also Douglas*, 2015 WL 6750803, at *3 (“It is this Court’s view that the *Matte* decision overlooked the limiting language – ‘filed in any court proceeding’ – and reached an incorrect conclusion as a result.”).

Thus, the Second District declined to extend that flawed reasoning. *Boatright*, 218 So. 3d at 969; *see also Douglas*, 2015 WL 6750803, at *3 (declining to follow the flawed reasoning of *Matte* and noting that it believed “the Florida Supreme Court would also decline to follow *Matte* and instead apply the plain and unambiguous language of the rules [rule 1.442 and rule 2.516].”). This Court should do the same.

IV. Even if the e-mail service provisions in rule 2.516 apply to proposals for settlement, which they do not, strict compliance with that rule is not mandatory.

Even if this Court were to assume, contrary to the plain language of the governing statute and rules, that the e-mail service provisions in rule 2.516

somehow apply to a proposal for settlement, there is yet a final reason to quash the Third District's decision. To wit, a failure to strictly adhere to the e-mail service provisions in rule 2.516 – either by failing to serve a proposal for settlement by e-mail or by failing to comply with all of the formatting requirements in subsection (b)(1)(E) – would not render a proposal unenforceable because this Rule of Judicial Administration is not the rule that must be strictly construed.

Indeed, the rule of strict construction announced in *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007), applies only to the interpretation of section 768.79 and arguably rule 1.442. That is so because the statute and the rule are the authorities that define the necessary elements of a proposal for settlement. This Court in *Campbell* did not demand strict compliance with rules of procedure that apply generally to all civil cases, merely because they happen to apply in the context of a proposal for settlement. It would make little sense for this Court to extend *Campbell* to apply the strict construction principles to general rules that are unrelated to the necessary elements of a proposal for settlement.

This Court's recent ruling in *Kuhajda v. Borden Dairy*, which issued after briefing was complete in *Wheaton* and *Boatright*, firmly supports this point. There, the party seeking to escape the consequences of rejecting a proposal for settlement argued that the proposal was unenforceable because it failed to state the

amount proposed to settle attorneys' fees, per the requirement in rule 1.442(c)(2)(F). *Kuhajda*, 202 So. 3d at 395.

In rejecting that argument, this Court considered two important facts: (1) the requirement to state the amount allocated to pay for attorneys' fees is present in rule 1.442 but not in section 768.79; and (2) there was no basis or claim for attorneys' fees pleaded in the *Kuhajda* complaint. *Id.* Since there was no claim for fees, failure to allocate an amount to fees was irrelevant to evaluating the offer. *Id.* at 396. And it was "undisputable that *Kuhajda* fully complied with the relevant requirements of [rule 1.442] that implement the substantive requirements of section 768.79." *Id.* Thus, this Court said, "[w]e decline to invalidate *Kuhajda's* offer of judgment solely for violating a requirement in rule 1.442 that section 768.79 does not require." *Id.* at 395. This Court reasoned that "[t]he procedural rule should no more be allowed to trump the statute here than the tail should be allowed to wag the dog." *Id.* at 395-96. Put simply, "[a] procedural rule should not be strictly construed to defeat a statute it is designed to implement." *Id.* at 396.

That logic applies with equal force to the conflict issue before the Court now. Rule 2.516, even if it applied to proposals for settlement (which it does not), cannot render a proposal for settlement unenforceable because rule 2.516 is merely a procedural rule. As such, it should not "be strictly construed to defeat" a proposal for settlement. *Id.* That conclusion is all the more compelling given that,

like *Kuhajda*, compliance with the procedural rule is irrelevant to the ability to evaluate the settlement offer. Whether served by U.S. mail or by e-mail, and whether it satisfies all nine of the formatting requirements or complies with only one, the proposal itself says the same thing.

Indeed, even before *Kuhajda*, this Court had held that a proposal for settlement can be enforceable, even if it contains some errors or omissions, so long as it clearly conveys the terms of the offer. This Court explained why it would not condone the recipient of a proposal abandoning common sense as follows:

We recognize that, given the nature of language, it may be impossible to eliminate all ambiguity. The rule does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement.

State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1079 (Fla. 2006).

Thus, when talking about the substantive content of a proposal, strict compliance is necessary to ensure that the terms of a proposal for settlement are clearly understood and can be fairly evaluated by the recipient. If a party cannot understand what it is being offered, it would be unfair to impose the sanction of attorneys' fees for refusing to accept an unclear settlement offer. *See, e.g., Carey-All Transport, Inc., v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008) (“[P]arties should not nit-pick the validity of a proposal for settlement based on

allegation of ambiguity unless the asserted ambiguity could reasonably affect the offeree's decision on whether to accept the proposal for settlement.”); *see also Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 853 (Fla. 2016) (citing favorably to *Carey-All Transport*); *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 649 (Fla. 2010) (stating that the imposition of fees under 768.79 is “a sanction against a party who unreasonably rejects a settlement offer.”). Conversely, it would be just as unfair to rescue a party, who knowingly refused an offer that complied with the statutes and rules related to its substantive contents, simply because the clear proposal was served by U.S. mail or in an e-mail that did not say a specific phrase in all caps.

In other words, strict compliance for the sake of blind adherence to procedural requirements that make no difference in the settlement decision is not what this Court, or the Florida Legislature, intended. Instead, rule 2.516 should be applied in a flexible manner that promotes justice and the speedy resolution of cases and excuses technical deviations from the rule that result in no prejudice. These principles have long been enshrined in Florida jurisprudence. *See Tucker v. State*, 559 So. 2d 218, 220 (Fla. 1990) (“Technical noncompliance with a rule of procedure is permissible if there is no harm to the defendant.”); *State v. Anderson*, 537 So. 2d 1373, 1375 (Fla. 1989) (“The modern trend in both criminal and civil proceedings is to excuse technical defects which have no bearing upon the

substantial rights of the parties. When procedural irregularities occur, the emphasis is on determining whether anyone was prejudiced by the departure.”) (citation omitted); *Singletary v. State*, 322 So. 2d 551, 555 (Fla. 1975) (“Procedural rules should be given a construction calculated to further justice, not to frustrate it.”); *Cannella v. Bryant*, 235 So. 2d 328, 332 (Fla. 4th DCA 1970) (“When a strict enforcement of the letter of practice rules tends to prevent or jeopardize administration of justice, the rules should yield to a higher purpose.”).

Essentially, this case presents the same call to common sense that *Kuhajda* advances. In every one of the cases to address the conflict issue, one party served a proposal for settlement and there is no question that the opposing party received it and the terms of the offer were clear. If proposals for settlement are ever to achieve their intended purpose of incentivizing parties to settle, it must be clear that a party who elects to reject an unambiguous proposal based on a procedural requirement not present in section 768.79 does so at his or her own peril. *See Aspen v. Bayless*, 564 So. 2d 1081, 1083 (Fla. 1990) (noting that the purpose of proposals for settlement is to settle cases without going to trial).

Indeed, the ripple effect of approving the Third District’s decision has the potential to create a tsunami. If this Court were to hold that a proposal for settlement could come undone for a technical violation of a general rule like rule 2.516, it would not be long before proposals would be attacked for all kinds of

reasons that are unrelated to requirements in section 768.79. Would the Court invalidate a proposal for settlement because the caption omits some of the information required by rule 1.100(c)(1)? What if it was not submitted in a form capable of being printed on 8 1/2 by 11 inch paper as required by rule 2.520(h)? What if the lawyer filing the proposal inadvertently failed to put his or her Florida Bar number in the signature block as required by rule 2.515? These are extreme examples, of course, but they help to illustrate that the strict construction rule applies to the requirements of section 768.79, not the procedural elements of a Rule of Judicial Administration that is neither mentioned nor contemplated by that statute.⁴

⁴ We also observe that strictly construing rule 2.516 to apply to proposals for settlement could turn a primary purpose of the proposal for settlement statute on its head. First and foremost, the proposal for settlement rule is meant to encourage settlement without going to trial. *See Aspen*, 564 So. 2d at 1083. If rule 2.516 applies to proposals for settlements and it is to be strictly construed, then rule 2.516(b)(1)(E) poses an obstacle to that goal – because it says documents must be sent by e-mail “to all addresses designated by the attorney or party.” So if, for example, there are three defendants and the plaintiff wants to settle with only one, the rule is plain that the plaintiff has to serve his offer on all three defendants. There are a myriad of reasons a party would not want to share an offer with everyone on the other side. What if the defendant wants the terms of the offer to be confidential? What if a plaintiff does not want co-defendants to know how the plaintiff is valuing each of their cases? In other words, cases that might easily settle could potentially never see a proposal because of this provision. This is but one example of why section 768.79 says proposals shall be served only upon the party to whom the offer is directed and “shall not be filed.” Construing a procedural rule to create a requirement excluded by the statute is not only legally wrong, but also foolhardy and contrary to the purpose of the statute.

The danger of condoning a party's decision to reject an unambiguous proposal for settlement on a hyper-technical ground is that courts might actually subvert the goal of section 768.79. As stated in *Jacksonville Golfair, Inc. v. Grover*, 988 So. 2d 1225, 1227 (Fla. 1st DCA 2008):

The legislature created a property right to an award of attorney's fees where a party complies with section 768.79, Florida Statutes. Although it is true that the statute is in derogation of common law and must be strictly construed, *Willis Shaw Express Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003), ***this rule of construction should not eviscerate the legislature's policy choice.*** When reviewing offers of judgment, courts should use reason and common sense and interpret the offer as a whole to avoid unreasonable results.

(Emphasis added.)

Requiring strict compliance with Florida Rule of Judicial Administration 2.516 would result in this very evisceration. In all of the cases that have examined the issue (*Wheaton, Boatright, McCoy, and Oldcastle*), it was undisputed that the proposals were unambiguous, that they were served by the maker, and that they were received by the intended party. The recipients rejected the proposals and, once the trier-of-fact ruled against them, they wanted to nit-pick the proposals to avoid paying the fees the parties serving the proposals are rightfully entitled to recover. *See Anderson*, 202 So. 3d at 856 (“[A]n offer that complies with section 768.79 and rule 1.442 creates a ‘mandatory right’ to collect attorneys’ fees.”) (citation omitted). To hold that these proposals are unenforceable, and to therefore deny fees, for the failure to comply with a procedural rule that is not only absent

from section 768.79 but also irrelevant to the ability to evaluate the settlement offer, would be a pointless triumph of form over substance.

CONCLUSION

For the reasons stated above, this Court should quash *Wheaton*; approve *Boatright*, *McCoy*, and *Oldcastle*; and remand for proceedings consistent with that holding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to Scott C. Black (sblack@florida-law.com), Dale R. Coburn, III (dcoburn@florida-law.com, oulloa@florida-law.com) and Gaelen P. Jones (gjones@florida-law.com, msoto@florida-law.com, keysfiling@florida-law.com), Vernis & Bowling of the Florida Keys, P.A., 81990 Overseas Highway, Third Floor, Islamorada, Florida 33036 this 22nd day of January 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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