Filing # 105155735 E-Filed 03/19/2020 01:27:08 PM

IN THE SUPREME COURT OF FLORIDA

CCM CONDOMINIUM ASSOCIATION, INC., d/b/a COUNTRY CLUB MANOR CONDOMINIUM ASSOC.,

Petitioner,

vs.

PETRI POSITIVE PEST CONTROL, INC.,

Respondent.

Case No.: SC19-861

L.T. Case Nos.: 4D18-1290
CACE13-027168

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Authorities iii

Argument in Reply 1

I. The PFS statute's language is plain: courts must compare the judgment actually obtained (not some lesser amount) against the PFS that was rejected. 1

A. *White* cannot override the plain meaning of the PFS statute. 1

B. Petri's attempt to construe the plain meaning of the statute fails 6

C. Petri's other statutory construction arguments are invalid and contrary to the plain meaning of the statute 9

II-IV. CCM stands on its previous arguments as to Points II through IV 15

Conclusion 15

Certificate of Service 16

Certificate of Compliance 16

TABLE OF AUTHORITIES

Cases

Amador v. Walker,
862 So. 2d 729 (Fla. 5th DCA 2003)..... 2, 10

Antunez v. Whitfield,
980 So. 2d 1175 (Fla. 4th DCA 2008).....10

Argonaut Ins. Co. v. May Plumbing Co.,
474 So. 2d 212 (Fla. 1985) 8

Brannon v. Tampa Tribune,
711 So. 2d 97 (Fla. 1st DCA 1998) 5

Brown v. Nagelhout,
84 So. 3d 304 (Fla. 2012) 5

City of Hollywood v. Lombardi,
770 So. 2d 1196 (Fla. 2000) 5

DeSalvo v. Scottsdale Insurance Co.,
705 So. 2d 694 (Fla. 1st DCA 1998) 12

DeSalvo v. Scottsdale Insurance Co.,
748 So. 2d 941 (Fla. 1999) 12

Garner v. Wood,
251 So. 2d 252 (Fla. 1971) 4

Holly v. Auld,
450 So. 2d 217 (Fla. 1984) ..... passim

In re Amendments to Unif. Guidelines for Taxation of Costs,
915 So. 2d 612 (Fla. 2005) 10

Johnson v. State,
91 So. 2d 185 (Fla. 1956) 4

Lieupo v. Simon's Trucking, Inc.,
286 So. 3d 143 (Fla. 2019) 4

N. Fla. Women's Health & Counseling Servs. v. State,
866 So. 2d 612 (Fla. 2003) 3

Palmentere Brothers Cartage Service, Inc. v. Copeland,
277 So. 3d 729 (Fla. 1st DCA 2019) 13

Perez v. Circuit City Stores, Inc.,
721 So. 2d 409 (Fla. 3d DCA 1998)..... 11, 12

Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n,
271 So. 3d 1001 (Fla. 4th DCA 2019)..... 2, 6, 8

Primo v. State Farm Mut. Auto. Ins. Co.,
2015 WL 5474481 (M.D. Fla. Aug. 10, 2015).....14

Primo v. State Farm Mut. Auto. Ins. Co.,
661 Fed. App'x 661 (11th Cir. 2016) 15

Puryear v. State,
810 So. 2d 901 (Fla. 2002) 2

Segundo v. Reid,
20 So. 3d 933 (Fla. 3d DCA 2009).....13

Shands Teaching Hospital & Clinics v. Mercury Insurance Co.,
97 So. 3d 204 (Fla. 2012) 1, 2, 8

Shepard v. State,
259 So. 3d 701 (Fla. 2018) 4, 5

State Farm Mutual Automobile Insurance Co. v. Nichols,
932 So. 2d 1067 (Fla. 2006) 1

State v. Gaulden,
134 So. 3d 981 (Fla. 1st DCA 2012) 14

State v. Poole,
No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020).....2, 3

State v. Sturdivant,
94 So. 3d 434 (Fla. 2012) 4

White v. Steak & Ale of Florida,
816 So. 2d 546 (Fla. 2002) ..... passim

Statutes

§ 45.061, Fla. Stat. (1997).....12

§ 57.041, Fla. Stat 7

§ 627.428, Fla. Stat. 12

§ 768.79, Fla. Stat. 5, 8, 14

History, § 768.79, Fla. Stat. (2019) 5

ARGUMENT IN REPLY

I. The PFS statute's language is plain: courts must compare the judgment actually obtained (not some lesser amount) against the PFS that was rejected.

A. *White* cannot override the plain meaning of the PFS statute.

In its answer brief, Petri goes to great lengths to avoid addressing the main issue before the Court: whether the plain language of section 768.79(6), Florida Statutes, requires a trial court to deduct post-offer prejudgment interest and post-offer costs from the "net judgment entered" to calculate the amount of the "judgment obtained" that determines whether the offeror is entitled to fees. Instead, Petri spends most of its brief arguing that this issue was decided by *White v. Steak & Ale of Florida*, 816 So. 2d 546 (Fla. 2002), and its progeny such as *Shands Teaching Hospital & Clinics v. Mercury Insurance Co.*, 97 So. 3d 204 (Fla. 2012), and *State Farm Mutual Automobile Insurance Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006).

We have already explained why any language in those cases implying that post-offer costs or post-offer prejudgment interest should be excluded from the "judgment obtained" is nonbinding *obiter dicta*. *See* IB at 33-41. But even if the Court disagrees, and concludes that *White* or *Shands* made a precedential holding that post-offer costs and post-offer prejudgment interest must be excluded from the "judgment obtained," the Court should recede from that holding as contrary to the PFS statute. As we explained in our initial brief, nothing in the language of section

768.79(6) provides any basis for excluding those amounts; rather, its plain meaning requires the inclusion of *all* costs and *all* prejudgment interest. *See* IB at 14-23.

Thus, the Fourth District correctly recognized that, to the extent *White* and *Shands* may require post-offer amounts to be excluded from the calculation, those decisions "appear to have gone beyond the statutory language to create a different threshold for attorney's fees awards under the statute." *Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n*, 271 So. 3d 1001, 1004 (Fla. 4th DCA 2019). One of the cases that Petri relies upon said the same thing: *White*'s supposed exclusion of post-offer costs from the calculation "modifies the literal language of the statute." *Amador v. Walker*, 862 So. 2d 729, 732 (Fla. 5th DCA 2003).

And this Court can—and must—recede from precedent that misinterprets or conflicts with the clear language of a statute. *See State v. Poole*, No. SC18-245, 2020 WL 370302, at *15 (Fla. Jan. 23, 2020) ("When we are convinced that precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield."); *see also Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("The doctrine of stare decisis bends . . . where there has been an error in legal analysis.").

Petri, however, argues that *stare decisis* requires the Court to adhere to the "*White* formula" (which purportedly excludes post-offer costs and interest) because there has been no significant change in circumstances and the "*White* formula" has not proven to be "unworkable in practice." AB at 33. But as this Court recently made

clear in *Poole*, those are insufficient reasons to adhere to precedent that violates the clear meaning of a statute.

In *Poole*, the defendant had argued—just as Petri does here—that before the Court may overrule a prior decision, it must consider factors such as "whether the decision has proved unworkable" and "whether there have been drastic changes in the factual premises underlying the decision." *Poole*, 2020 WL 370302, at *14 (quoting *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 637 (Fla. 2003)). The Court disagreed, explaining,

> we are wary of any invocation of multi-factor *stare decisis* tests or frameworks like the one set out in *North Florida Women's Health*. They . . . often serve as little more than a toolbox of excuses to justify a court's unwillingness to examine a precedent's correctness on the merits.
>
> We believe that the proper approach to *stare decisis* is much more straightforward. **In a case where we are bound by a higher legal authority**—whether it be a constitutional provision, **a statute**, or a decision of the Supreme Court—**our job is to apply that law correctly to the case before us**. When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield.

Poole, 2020 WL 370302, at *15 (emphasis added).

Thus, *Poole* makes clear that the Court will not bind itself to an earlier misinterpretation of a statute just because it is "workable," but will instead apply the statute correctly—even when that requires the overruling of a prior decision. This Court has previously receded from decisions that conflicted with a statute's plain

meaning, without any intervening change in circumstances or evidence that the prior decision was "unworkable." *See*, *e.g.*, *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 144-47 (Fla. 2019) (receding from precedent that incorrectly applied one statute's definition of "damage" to actions brought under a different statute); *Shepard v. State*, 259 So. 3d 701, 705-07 (Fla. 2018) (receding from precedent that conflicted with the plain meaning of the statutory term "weapon"); *State v. Sturdivant*, 94 So. 3d 434, 440-42 (Fla. 2012) (receding from a prior decision that conflicted with the plain language of the felony murder statute).[1]

Petri makes another attempt to shield the "*White* formula" from scrutiny by invoking the canon that "when a statute has been construed by the courts, and subsequently re-enacted, the legislature is presumed to be familiar with the judicial construction and to adopt it as part of the law." AB at 34 (*quoting Garner v. Wood*, 251 So. 2d 252, 256 (Fla. 1971)); *see also* AB at 3, 14, 34-35, 41.

That maxim, however, is not an iron-clad rule, but only a canon of statutory construction. *See Garner*, 251 So. 2d at 256; *Johnson v. State*, 91 So. 2d 185, 187 (Fla. 1956). And Florida courts do not resort to rules of statutory construction when the language of a statute is clear and unambiguous. *See Lieupo*, 286 So. 3d at 145; *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). That includes the legislative inaction

[1] Regardless, CCM submits that any rule that requires a trial court to determine separate amounts for pre-offer and post-offer costs is unworkable in practice, for the reasons discussed at pages 41-44 of CCM's initial brief.

canon; otherwise, every court decision that misinterprets a clearly-worded statute would become increasingly immune from attack as the statute is reenacted year after year. Instead, this Court has overturned such decisions after several years or even decades of legislative inaction. *See*, *e.g.*, *Brown v. Nagelhout*, 84 So. 3d 304, 310-11 (Fla. 2012) (receding from a 55-year-old decision that was contrary to the plain language of the venue statutes); *Shepard*, 259 So. 3d at 706-07 (receding from a 23-year-old decision that misinterpreted the word "weapon" in Florida's felony reclassification statute); *Leiupo*, 286 So. 3d at 144-47 (receding from a nine-year-old decision that applied the wrong statutory definition of "damage").

Here, the language of section 768.79(6) clearly and unambiguously does not allow post-offer costs or pre-judgment interest to be deducted from the "judgment obtained," so the legislative inaction canon is inapplicable. *See Holly*, 450 So. 2d at 219. Also, that canon has far more probative value when the Legislature has actively revised the statute without changing the specific language construed by the earlier decision. *See City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1202 (Fla. 2000) ("[T]he legislature is presumed to know the judicial constructions of a law when enacting **a new version** of that law.") (emphasis added) (quoting *Brannon v. Tampa Tribune*, 711 So. 2d 97, 100 (Fla. 1st DCA 1998)). That is not true here because section 768.79 has not been amended since 1997, five years before *White* was decided. *See* History, § 768.79, Fla. Stat. (2019).

For these reasons, the Court should reject Petri's attempt to hide behind the *White* decision and instead focus on the central issue presented by this case: whether the plain language of section 768.79(6) requires (or even allows) the deduction of post-offer costs and post-offer prejudgment interest from the "judgment obtained." As the Fourth District's opinion points out, "the proper interpretation of the offer of judgment statute is a question of great public importance, as it is so widely used and is an important tool for settlement of litigation." *Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n, Inc.*, 271 So. 3d 1001, 1007 (Fla. 4th DCA 2019).

And, as we explained previously, the question of great public importance that the Fourth District certified for review should be broadened to include post-offer costs—not only to completely dispose of this case, but also to fully correct the confusion that *White* has generated about the proper interpretation of the PFS statute. *See* IB at 2, 9, 19-20. Petri has not offered any substantive argument against CCM's request to reframe the question; in fact, Petri's own arguments lump together prejudgment interest and costs, confirming that the two issues are inseparable. (Relatedly, Petri also does not dispute that CCM will be entitled to attorneys' fees if CCM prevails on either the prejudgment interest issue *or* the cost issue.)

B. Petri's attempt to construe the plain meaning of the statute fails.

It is not until pages 39-40 of its answer brief that Petri attempts to construe the relevant language of the PFS statute. But Petri does not find any support in the

statutory language for deducting post-offer costs and interest from the "judgment obtained." Instead, Petri resurrects an invalid argument that was rejected by *White*.

Petri's argument is that section 768.79(6)'s definition of "judgment obtained," read literally, consists only of damages and does not include any costs or interest.[2] Petri notes that subsection (6) of the PFS statute does not mention costs as part of the "judgment obtained." But because subsection (2) of the statute states that "the offer shall be construed as including all damages that may be awarded in a final judgment," Petri infers that the "net judgment entered" referenced in subsection (6) must be limited to damages. AB at 39-40. There are three flaws with this argument.

First, as *White* explains, Petri's argument confuses the *judgment* with the *verdict*. *White* held that the "judgment obtained" is not limited to the judgment for damages, because "the amount of the judgment for damages awarded by the jury is the 'verdict,' not the judgment," and section 768.79(6) "does not limit this net judgment entered to the verdict." 816 So. 2d at 550. *White* further held that the "judgment obtained" includes costs "because a prevailing party is entitled to a judgment for taxable costs." *Id*.; *see also* § 57.041(1), Fla. Stat. (providing that an award of taxable costs "shall be included in the judgment"). (To be clear, that much of *White* is precedential and correctly applies the plain meaning of the PFS statute.)

[2] Petri's argument also posits that the "judgment obtained" does not include any attorneys' fees. But that issue is not before the Court, because CCM had no basis for recovering attorneys' fees apart from the PFS statute.

Second, Petri incorrectly relies on subsection (2) of the PFS statute as a basis for limiting the "judgment obtained." Subsection (2) only sets forth requirements for the *settlement offer*. Accordingly, it states that "the **offer** shall be construed as including all damages that may be awarded in a final judgment." § 768.79(2), Fla. Stat. (emphasis added). But that has no bearing on what is included in the "judgment obtained," which is determined by subsection (6). And even if it did, subsection (2)'s inclusion of "all damages" in "the offer" is a *minimum* requirement; it does not prevent costs from also being included in the offer or the "judgment obtained."

Third, even if Petri's argument were correct, the "judgment obtained" would still include prejudgment interest—both pre-offer and post-offer amounts. As Petri acknowledges, "prejudgment interest is merely another element of pecuniary damages." *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214 (Fla. 1985). Therefore, if the "judgment obtained" consisted only of damages, it still would include prejudgment interest—*all* of it. *See* IB at 18-19. That is why the Fourth District concluded that all prejudgment interest should be included in the "judgment entered," and therefore, CCM would be entitled to an award of attorneys' fees under "the plain meaning of the statute" (had the court not felt constrained by *Shands* to hold otherwise). *Petri Positive Pest Control, Inc.*, 271 So. 3d at 1004.

Thus, Petri is incorrect that "a rigid construction of section 768.79 would exclude **all** . . . costs and interest from the calculation . . . ." AB at 40 (emphasis in

original). Rather, the plain meaning of section 768.79(6) *includes* all costs and prejudgment interest in the "judgment obtained."

C. Petri's other statutory construction arguments are invalid and contrary to the plain meaning of the statute.

None of the other arguments that Petri offers for construing the PFS statute in its favor have any basis in the statutory text. Most of them are policy arguments, but the Court may not override the clear language of the statute based on appeals to policy. *See Holly*, 450 So. 2d at 219 ("[I]t is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court."). Plus, each of Petri's arguments is based on faulty reasoning.

Petri's first policy-based argument is that including post-offer costs in the "judgment obtained" would encourage plaintiffs to delay the litigation and wait to incur costs until after the offer was served, to increase their chances of beating the PFS. (AB at 38, 39). That might make sense if the "judgment obtained" included *only* post-offer costs, but that is not CCM's position. Instead, CCM maintains that both pre-offer *and* post-offer costs are included in the "judgment obtained," so it makes no difference whether they are incurred before or after the offer.

Plus, under either party's interpretation of the statute, there is already an incentive for the offeror to serve its PFS before the bulk of its attorneys' work has been done—and, therefore, before most of the costs have been incurred—in order to maximize the amount of fees that will be recoverable under the PFS. *See*

§ 768.79(6)(a), (b) (providing for the recovery of attorneys' fees "from the date the offer was served"). Petri's claim that this thwarts the legislative goals of reducing expenses and promoting early settlements is illogical, because a party that serves a PFS before it has incurred most of its litigation costs is attempting to do those very things—i.e., to minimize costs by achieving an early settlement of the case.

Petri's argument is a variant of one set forth in *Amador v. Walker*, 862 So. 2d 729, 732 (Fla. 5th DCA 2003), which posited that including post-offer costs in the "judgment obtained" would give plaintiffs an incentive to deliberately incur increased post-offer costs solely for the purpose of beating the PFS. *Id.* at 732. But that is not true, because only *reasonably necessary* costs are taxable. *See In re Amendments to Unif. Guidelines for Taxation of Costs*, 915 So. 2d 612, 615 (Fla. 2005). That is why the Fourth District rejected the same argument in the context of a different fee-shifting statute. *See Antunez v. Whitfield*, 980 So. 2d 1175, 1179 (Fla. 4th DCA 2008). And considering that only prevailing parties may recover their costs, it is extremely unlikely that any plaintiff would gamble on spending unnecessary or excessive costs just to improve its chance of recovering fees.

Petri's second policy-based argument starts with the assumption that the offer "includes only prejudgment interest and costs accrued up to the date of the offer" (AB at 36), and concludes that an "apples-to-apples" comparison requires that the "judgment obtained" must also include only prejudgment interest and costs accrued

up to the date of the offer. AB at 37; *see also* AB at 31. The flaw in this argument is there is no reason to assume that the amount of a PFS includes some specific component allocated to pre-offer costs and pre-offer prejudgment interest.

Rather, the offeror's decision regarding the amount of the PFS will be based on a mix of considerations such as how much or how little the plaintiff might accept to settle, how much the defendant is willing to pay, and the likely outcome (or range of plausible outcomes) at trial if the PFS is rejected. These are necessarily round figures that are based on rough estimates, especially when there are multiple areas of uncertainty such as the jury's determination of liability, comparative fault (when applicable), and noneconomic or unliquidated damages (when applicable).

Thus, the notion that a PFS is necessarily based on the precise amounts of costs and prejudgment interest that the offeror thinks the plaintiff is entitled to recover on the very day the PFS is served, and not one day later, is entirely unrealistic. It is also contrary to the plain language of section 768.79(6), which bases the amount of the "judgment obtained" on the "net judgment **entered**"—meaning, the judgment that is actually entered at the conclusion of the case, not some imaginary judgment that could have been entered on the date of the offer.

Petri's assumption that a PFS includes only pre-offer costs and interest is derived from the Third District's opinion in *Perez v. Circuit City Stores, Inc.*, 721 So. 2d 409, 411-12 (Fla. 3d DCA 1998), which inappropriately relied on section

45.061(2), Florida Statutes (1997), to conclude that only pre-offer costs are included in an offer. But section 45.061(2), unlike section 768.79(6), explicitly defines the amount of the judgment to be compared against the offer as "the total amount of money damages awarded plus the amount of the costs and expenses reasonably incurred by the plaintiff . . . prior to the making of the offer." Section 768.79(6)'s definition of "judgment obtained," on the other hand, is *not* limited to damages and pre-offer costs, as we have explained previously. *Perez* also relied on *DeSalvo v. Scottsdale Insurance Co.*, 705 So. 2d 694 (Fla. 1st DCA 1998), *approved sub nom. Scottsdale Insurance Co. v. DeSalvo*, 748 So. 2d 941 (Fla. 1999), but that case concerned a court-made doctrine used to determine whether an insured is entitled to fees under yet another dissimilar statute, section 627.428, Florida Statutes.

And despite its erroneous reliance on those authorities as to costs, *Perez* correctly held that all prejudgment interest is included in the "judgment obtained." 721 So. 2d at 410, n.2. Thus, *Perez* provides no support for Petri's attempt to exclude post-offer prejudgment interest from the fee entitlement calculation.

A third policy-based argument advanced by Petri is that it is too difficult for an offeree to predict the amount of interest, costs, damages, and attorneys' fees that the plaintiff would be entitled to recover at the end of the case. AB at 16, 42-43. But an offeree *always* has to predict the amount of damages that the plaintiff will recover at the end of the case. Although a couple of decisions have disallowed fees when the

judgment included damages that the plaintiff had not pled or sought at the time of the offer, *see Palmentere Brothers Cartage Service, Inc. v. Copeland*, 277 So. 3d 729, 732-34 (Fla. 1st DCA 2019), *Segundo v. Reid*, 20 So. 3d 933, 938-39 (Fla. 3d DCA 2009), that is a rare exception that does not apply here. Normally, it is beyond dispute that the amount of damages to be compared against the PFS is the amount awarded at the end of the litigation.

And it is no more difficult for an offeree to estimate the amount of costs that a plaintiff will incur by the end of the case than it is to predict a jury's award of damages. The same goes for attorneys' fees (although post-offer fees are not at issue here). Plus, Petri's assumption that a party will know the exact amount of costs and fees that its opponent will have incurred at the time a PFS is served is highly unrealistic. It would have to make an educated guess at those amounts, just as it would concerning damages and post-offer costs and fees. As for post-offer interest, the offeree need only estimate the expected length of the litigation and make a mathematical calculation. None of this is any more difficult or impractical than predicting a jury's award of damages, which offerees do in every PFS case.

But the biggest flaw with all of Petri's policy-based arguments is that policy choices are the exclusive province of the Legislature. *Holly*, 450 So. 2d at 220. The Legislature could have reasonably decided to make an offeree's liability for fees dependent on the actual "net judgment entered," rather than an imaginary judgment

that could have been entered on the date of the offer, because it concluded that an offeree should have to consider and be held accountable for the additional length and expense of the litigation that would result from rejecting the offer. The Legislature also could have decided that determining a party's entitlement to fees should be as simple as possible, requiring only a comparison between the actual judgment and the offer without any need to reconstruct a hypothetical judgment that could have been entered on the date of the offer. Whatever the Legislature's reasoning was, the language of section 768.79(6) is clear, so the Court may not modify that language to uphold a different policy preference. *Holly*, 450 So. 2d at 220.

Petri also makes two statutory construction arguments that are *not* policy based. One relies on the legislative inaction doctrine, which does not apply for the reasons discussed above. The other is based on the principle that section 768.79 should be construed in favor of the offeree because it is in derogation of the common law and imposes a penalty. *See* AB at 42. But that is yet another canon of statutory construction that cannot be applied here, because section 768.79(6) is unambiguous. *See State v. Gaulden*, 134 So. 3d 981, 983 (Fla. 1st DCA 2012). Regardless, Petri's interpretation of the statute (or rewording of it) does not favor offerees as a class—in fact, it has been applied *against* offerees. *See Primo v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 5474481, at **4, 10 (M.D. Fla. Aug. 10, 2015) (awarding attorneys'

fees against plaintiff whose pre-offer costs plus damages were insufficient to beat defendant's PFS); *aff'd*, 661 Fed. App'x 661 (11th Cir. 2016).

II-IV. CCM stands on its previous arguments as to Points II through IV.

Petri has not responded to the arguments in Points II through IV of CCM's initial brief, so CCM stands on its initial brief as to those points.

CONCLUSION

As CCM requested in its initial brief, the Court should either clarify that *White* is limited to its facts and has been unintentionally overextended or recede from *White* as contrary to the plain meaning of the PFS statute. The Court should also revise the certified question so that it addresses both costs and prejudgment interest and answer the question in the negative. Finally, the Court should quash the Fourth District's decision and remand with directions to reinstate the judgments awarding attorneys' fees to CCM.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on **Thomas Hunker** (thomas.hunker@csklegal.com; tamara.mihajlovic@csklegal.com) and **Sanaz Alempour** (sanaz.alempour@csklegal.com; toni.ortiz@csklegal.com), Cole, Scott and Kissane, 600 N. Pine Island Road, Suite 500, Plantation, Florida 33324, this on this 19th day of March 2020.

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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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