IN THE SUPREME COURT OF FLORIDA

CASE NO.:SC06-611

Lower T.C. No. 4D04-4920

Florida Bar No. 137172

ROSE G. CAMPBELL,

Petitioner,

vs.

CLIVENS GOLDMAN,

Respondent,
_____/

BRIEF AND APPENDIX OF RESPONDENT ON THE MERITS (CONFLICT CERTIORARI)

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I.

INTRODUCTION

The Respondent, Clivens Goldman, was the Plaintiff in the trial court and was the Appellant in the District Court of Appeal, Fourth District. The Petitioner, Rose G. Campbell, was the Defendant/Appellee. In this Merits Brief of Respondent, the parties will be referred to as the Plaintiff and the Defendant and, if necessary for clarification or emphasis, by name. The symbols "R," "T," and "A" will refer to the record on appeal, the transcript of the hearing held on Plaintiff's Motion for Entitlement to Attorney's Fees, and the Appendix accompanying this Brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

A.

The pertinent portion of the Plaintiff's "Proposal for Settlement," served August 16, 1999 provided as follows:

* * *

"PROPOSAL FOR SETTLEMENT

> COMES NOW the Plaintiff, CLIVENS GOLDMAN by and through the undersigned attorneys and files this

> Proposal for Settlement to Defendant, ROSE G. CAMPBELL, in accordance with Florida Rule of Civil Procedure 1.442 and would state as follows:"
>
> * * * (R.1)

When the Plaintiff recovered a net verdict/judgment in an amount of money twenty-five percent (25%) greater than his Proposal for Settlement, he filed his Motion for Attorney's Fees (R. 4-8). The Defendant objected to Plaintiff's entitlement to attorney's fees on the ground that the proposal was "defective" because:

> * * *
>
> "MR. HILL: Your Honor, it is our position that their proposal for settlement is defective.
>
> If you look at the proposal for settlement, which is attached to their motion, the proposal for settlement does not make reference to any Florida law or Florida statute which would enable them to collect fees.
>
> Under the statute itself that they're traveling under, it says that when you make the proposal, it has to be - the statute has to be cited in the proposal.
>
> There is case law, *McMullen Oil versus ISS International* out of the Second District at 698 So.2d 372, *Murphy versus Tucker* out of the Second District, 689 So.2d 1, 164, *Pippin versus Latosynski*, 622 So.2d 566.
>
> And there are numerous Supreme Court cases which have told the District Courts and told the courts that this statute is in derogation of common law and must be strictly construed.

* * *

> MR. HILL: I think you've caught the nutshell argument here between the case law that exists as we have it today, and that is that the Fourth DCA has not ruled on this specific issue that we're in front of you on.
>
> The cases I have cited to you, the *Pippin*, the *Murphy* and the *McMullen* case all out of the Second District basically have said that if you don't specifically comply with this statute, then your proposal for settlement is defective.
>
> Her proposal for settlement does not comply with the statute because it does not cite the statutory authority, and based upon the decisions that are right on this point out of the Second DCA, then her proposal should not be deemed to be a sanction against my client.
>
> * * * (T. 8, 9, 24)

The trial court entered a written order and denied Plaintiff's motion for fees (R. 10, 11) stating:

* * *

"ORDER ON MOTION FOR ENTITLEMENT TO FEES AND COSTS

> THIS MATTER is before this Court on the Plaintiff's Motion for Entitlement to Fees and Costs Pursuant to section 768.79, Fla. Stat. (1995). The motion is denied for the reasons hereinafter set forth.
>
> Rule 1.442(c)(1), F.R. Civ., P., requires that '[a] proposal shall be in writing and shall identify the applicable Florida law under which it is being made.' It is undisputed that the Plaintiff's 'Proposal for Settlement' referred to the applicable rule but not the statutory provision upon which the proposal was being made.

> In support of his motion, Plaintiff argues that this court should be guided by the Fifth District Court's opinion in *Spruce Creek Development Co. of Ocala, Inc. v. Drew*, 746 So.2d 1109 (Fla. 5th DCA 1999). In *Spruce Creek*, the court reasoned that since there was only one statute that applies to Rule 1.446(c)(1), citing the rule or the statute satisfies the purpose of the rule. *Id. at 1116.* Plaintiff also relies upon *Grip Development v. Coldwell Banker Residential Real Estate, Inc.*, 788 So.2d 262 (Fla. 4th DCA 2000). The court in *Grip* made references to *Spruce Creek* for the limited purpose of responding to the dissenting opinion. In fact, the majority in *Grip* reaffirmed rule that section 768.79 and Rule 1.442 are in derogation of the common law and, therefore, must be strictly construed. *Id. at 265*. It is inappropriate for this court to venture into the realm of judicial dicta that is in response to a dissenting opinion in order to extract a rule contrary to the rule of the majority opinion. *See Murphy v. Tucker,* 689 So.2d 1164, 1165 (Fla. 2d DCA 1997); ('[s]tatutes authorizing attorney's fees must be strictly construed, and this court has no basis to conclude another construction is warranted here.')."
>
> * * * (R.10, 11)

Upon entry of a final order (R.9) appeal was taken to the Fourth District which court, in an opinion now reported, *See,* GOLDMAN v. CAMPBELL, 920 So.2d 1264 (Fla. App. 4th 2006) (A.1 - 11) reversed the order denying the Plaintiff's Motion for Attorney's Fees, adopting the position of the Fifth District in SPRUCE CREEK DEVELOPMENT CO. OF OCALA, INC. v. DREW, 746 So.2d 1109 (Fla. App. 5th 1999):

> "In *Spruce Creek*, the Court noted that the issue of attorney's fees was moot, but, for guidance on remand, stated that the Plaintiff's settlement proposal was not void for failure to expressly reference Section 768.79. The Court deemed the omission 'an insignificant technical violation of the rule.'... It reasoned that '[n]ow that there is only one statute governing offers of judgment, implemented by Rule of Civil Procedure 1.442, the purpose of Rule 1.442(c)(1) is met where either the Rule or the statute is referenced.'... We adopt the Fifth District's position in *Spruce Creek* on this issue and certify conflict with the First and Second District's decisions in *Pippin* [*Pippin v. Latosynski*, 622 So.2d 566 (Fla. App. 1st 1993)] and *McMullen Oil Co.[McMullen Oil Company, Inc. v. ISS International Service System, Inc.*, 698 So.2d 372 (Fla. App. 2d 1997)] *Goldman v. Campbell, supra,* 920 So.2d at page 1266.

In a specially concurring opinion, Judge Farmer joined in the certification of conflict but expressed his own "take" on the issue, *See:* FARMER, J., concurring specially, 920 So.2d at page 1267. Having expressed his opinion concerning the apparent turn in the law regarding "strict construction of procedural rules, like Rule 1.442," Judge Farmer voiced his desire that if this Court exercised jurisdiction over this case:

> "...I hope it will reconsider its policy of strict construction of procedural rules like Rule 1.442 and make clear that strict construction of attorney's fees' statutes means only that judges have no power of interpretation to extend such statutes beyond their stated terms and nothing else..." 920 So.2d at page 1274.

This proceeding followed.

B.

At pages 1-6 of her brief, the Defendant presents to this Court the history of this case and does so in an overall objective manner. However, at page 3 of her brief, the Defendant, after setting out with specificity both the applicable Florida statute and the implementing Rule of Civil Procedure states:

> "In other words, both the statute passed by the Legislature and the rule crafted by this Court specifically require that the proposal specify the statute under which the proposal is being made, and since the proposal did not comply with the rule and the statute, the proposal was invalid." *See:* Brief of Defendant, at page 3.

To the extent that the Legislative enactment (the statute) intrudes upon this Court's rule making authority (for the form, content and service of the offer of judgment) Plaintiff will challenge, on constitutional grounds, Defendant's assertions. Same will be presented in the argument portion of this Brief.

III.

ISSUE PRESENTED

WHERE A STATUTE CHANGES THE COMMON LAW SUCH THAT CONSTRUCTION OF SAID STATUTE IS REQUIRED TO BE "STRICT" IS THE SAME "STRICT" CONSTRUCTION REQUIRED OF THE FLORIDA RULE OF CIVIL PROCEDURE WHICH IMPLEMENTS THE STATUTE [AND IF SO, WHY SO].

IV.

SUMMARY OF THE ARGUMENT

The "original" purpose and policy as pertains to the Florida Rules of Civil Procedure included (and includes) an intent to excuse technical defects which have no bearing upon the substantial rights of the parties. When procedural irregularities occur, the courts focus on determining whether anyone was prejudiced by the departure. No injustice to the rules of statutory construction occur when the Rules of Procedure are applied as they were intended to be, when enacted.

Whatever may have been protocol before adoption of the Florida Rules of Civil Procedure, with the adoption of same, the 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 violation.

While a trial court is generally obligated to apply a strict interpretation to substantive legislative enactments, such rigid construction is not required in judicial interpretation of rules of procedure.

It makes perfect legal, logical, factual and practical sense that where a litigant has multiple (substantive) choices from which to prepare and serve an offer of judgment, a procedural rule which requires that the source of the offer be identified,

[else the offer is "deficient"] is appropriate. However, it is appropriate because, absent the source, prejudice to the offeree is apparent! The offeree does not know, and could not know, the authority for the offer. Given "choices" the prejudice is obvious - - one has to guess under which [substantive] statute the offer is based. However, where, as here, there (now) exists only one source, there can be no prejudice! A "violation" in that sense is truly "technical" and insignificant!

Where, how, and for what reason it became necessary to "strictly construe" a Florida Rule of Civil Procedure can now only be explained by this Court. The instant cause presents a technical, harmless and insignificant violation of a Rule of Procedure. The opinion rendered by the Fourth District in the instant cause should be approved as the law in the State of Florida. Decisions to the contrary should be disapproved. The order denying the Plaintiff's Motion for Attorney's Fees should be reversed.

V.

ARGUMENT, INCLUDING STANDARD OF REVIEW

WHERE A STATUTE CHANGES THE COMMON LAW SUCH THAT CONSTRUCTION OF SAID STATUTE IS REQUIRED TO BE "STRICT," "STRICT" CONSTRUCTION OF THE FLORIDA RULE OF CIVIL PROCEDURE WHICH IMPLEMENTS IT SHOULD NOT BE REQUIRED.

In COMMON LAW 37 (1881) OLIVER WENDELL HOLMES wrote:

> "The history of what the law has been is necessary to the knowledge of what the law is."

For the reasons which follow, the opinion herein being reviewed should be approved as the law in Florida.

A.

OFFERS OF JUDGMENT: A WELL TRAVELED PATH

The Fourth District, in the subject opinion, has joined with the Fifth District, in its opinion in SPRUCE CREEK, supra, in holding:

> "... now that there is only one statute governing offers of judgment, implemented by Rule of Civil Procedure 1.442, the purpose of Rule 1.442(c)(1) is met where either the Rule or the statute is referenced..." 920 So.2d at page 1266.

One statute, implemented by a single rule of procedure. We have reached this point by traveling the following path:

1. Prior to 1990, offer of judgment attorney fees were awardable under §45.061, Fla. Stat. (1987), as well as under §768.79, Fla. Stat. (1990). The Legislature repealed §45.061 for causes of action accruing after October 1, 1990. See: Ch 90-119, §22, Laws of Florida.

2. Prior to June 20, 1996 offer of judgment attorney's fees were awardable under Section 44.102, Fla. Stat. (1992), as well as under §768.79, Fla.

Stat. (1990). In KNEALING v. PULEO, 675 So.2d 593 (Fla. 1996) this Court declared §44.102, unconstitutional.

3. From 1996 to the present there exists only one statute under which offers of judgment/proposal for settlement attorney fees are authorized, to wit:§768.79.

All of the above devolved through a series of statutory enactments, rule changes and court opinions, *See:* LEAPAI v. MILTON, 595 So.2d 12 (Fla. 1992); TIMMONS v. COMBS, 608 So.2d 1 (Fla. 1992); and KNEALING v. PULEO, supra, all uniform in their recognition that:

> "... the circumstances under which a party is entitled to costs and attorney's fees is substantive and that our Rule [of Civil Procedure] can only control procedural matters..." *See:* TIMMONS, 608 So.2d at pages 2 and 3. *See, also:* SARKIS v. ALLSTATE INSURANCE COMPANY, 863 So.2d 210 (Fla. 2003), at Footnote 6.

B.

CLEARING THE PATH

Having adopted (as its own) the Fifth District's position in SPRUCE CREEK, the Fourth District certified conflict with the opinions of the First and Second Districts in PIPPIN, supra, and MCMULLEN, supra, cases which invalidated offers of judgment for failure to identify the Florida law under which the

offer of judgment was made. The Defendant, at pages 17-22 of her brief, notes the existence of PIPPIN and MCMULLEN as well as several other cases decided in the same general time frame as PIPPIN and MCMULLEN. The Plaintiff would suggest to this Court PIPPIN, MCMULLEN, and the cases specifically cited by the Defendant (at pages 17-22 of her brief) may be distinguished from the instant cause because all implicated a time frame wherein multiple authorities authorizing offers of judgment, [*See:* Section 45.061, Section 44.102, and Section 768.79, Fla. Stat.,] co-existed. Given their co-existence, the need for certainty was mandated:

1. MCMULLEN OIL CO., INC., 698 So.2d 372, supra, decided August 22, 1997, implicated an offer which had been served no later than 1992 and sought fees under "all applicable Florida statutes and the rule."

2. MURPHY v. TUCKER, 689 So.2d 1164, supra, was decided on March 5, 1997 and implicated an offer made in 1995. On its face, at least two statutes were then extant.

3. PIPPIN v. LATOSYNSKI, 622 So.2d 566, supra, was decided on August 4, 1993 and implicated both §45.061 and §768.79.

4. WRIGHT v. CARUANA, 640 So.2d 197 (Fla. App. 3rd 1994) was decided on August 2, 1994 and it involved an offer made on December 10, 1992.

The case attempted to reconcile Rule 1.442, Florida Rules of Civil Procedure with Florida Statutes, §45.061 and §768.79. From the face of the opinion itself, it is clear more than one "statute" was involved.

To those remaining cases cited by the Defendant which do invalidate offers of judgment [made during a period of time outside of the "PIPPIN/MCMULLEN era"] Plaintiff will simply note most, if not all, apply the rule of strict construction [whether it be under the statute, or the rule,] to matters of substance, not procedure! *See, for example:* CONNELL v. FLOYD, 866 So.2d 90 (Fla. App. 1st 2004) - - non-monetary condition was not stated; HALES v. ADVANCED SYSTEMS DESIGN, INC., 855 So.2d 1232 (Fla. App. 1st 2003) conditions of the offer vague and ambiguous.

It seems clear that "strict construction" has been applied whenever substantive, not procedural, matters are implicated!

C.

THE FLORIDA RULES OF CIVIL PROCEDURE

1.

DE NOVO REVIEW

Plaintiff will continue his argument by noting the following at page 7 of the Defendant's brief wherein it is written:

* * *

> "There is probably no rule of law more firmly established in Florida, and repeatedly stated by this Court, than the rule that attorney's fee statutes, and specifically the proposal for settlement statute, are in derogation of common law and must be strictly complied with; and if there is not strict compliance, attorney's fees cannot be recovered. The Court has restated this rule of law four times in the last five years... (citations omitted)... It is surprising that this Court is having to address the issue again, only one year later. No rule of law has been made more clear by the Court than this rule, and therefore the opinion of the Fourth District must be reversed."

In stating the obvious, the Defendant is arguing with herself. The dispute in the instant cause comes not from a contention that the attorney's fee statute is not to be "strictly construed" but that the Rule of Procedure implementing it should not be. If the issue was as clear as the Defendant asserts; if the holdings of this Court uniformly supported the assertions made by the Defendants; if conflicting signals were not sent by this Court as relates to the dispositive issue; and if there were not (at least) two opinions questioning why the procedural aspects of a procedural rule which implements a substantive statute must itself be "strictly construed" then

(perhaps) Defendant's assertions would be more palatable.

In presenting her argument, the Defendant identifies the (perceived) dispositive issue as implicating this Court's:

> "... long standing precedent of strictly construing provisions that alter the common law rule that parties must bear their own attorney's fees...." *See:* Brief of Defendant, at page 13.

To the extent that this Court has a "long standing precedent" of strictly construing provisions that alter the common law rule [that parties must bear their attorney's fees,] such "provisions" cannot be found in the Rules of Procedure! It is the Legislature which is solely authorized to enact substantive law. *See:* IN RE AMENDMENTS TO FLORIDA RULES OF CIVIL PROCEDURE, 682 So.2d 105 (Fla. 1996). *See, also:* LEAPAI v. MILTON, supra, and TIMMONS v. COMBS, supra.

Likewise, the Defendant cannot find support for her argument in the history of the Florida Rules of Civil Procedure. The reason is clear. The Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure and, as such, federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules. *See:* WILSON v. CLARK, 414 So.2d 526 (Fla. App. 1st 1982) and authorities cited therein. Florida Rule of Civil Procedure

1.010 was derived from several of this Court's predecessor rules as well as Federal Rule 1. *See:* Historical Notes to Florida Rule of Civil Procedure 1.010.

In their treatise, Federal Practice and Procedure, *See:* WRIGHT AND MILLER, 4 Fed. Prac. and Proc., Civ. 3rd (2006) Section 1029, Professors Wright and Miller, speaking to Federal Rule of Civil Procedure 1 write:

> "It is not an exaggeration to say that the keystone to the effective functioning of the Federal Rules is the discretion given to the trial court... The Rules grant considerable power to the judge and in many context only provide general guidelines as to the manner in which it should be exercised. In using this discretion, judges must view the rules with a friendly and sympathetic understanding and, in many situations, must exercise a wise and sound discretion to effectuate the objectives of the simplified procedure. This discretion often must be used to relieve counsel or parties from the consequences of excusable error or neglect. The rules will remain a workable system only as long as trial court judges exercise their discretion intelligently on a case by case basis; the application of arbitrary rules of law to particular situations only will have a debilitating effect on the overall system."

Inherent in the underpinnings to both the Federal and Florida Rules of Civil Procedure is the expectation that there will be no rigid construction of any Rule of Procedure and that trial judges must exercise "wise and sound discretion to effectuate the objectives of the simplified procedure." In speaking to the dispositive issue permeating this proceeding, it was written:

* * *

> "There is no place in the federal civil procedural system for the common law rule that statutes, and rules having the force of statutes, that are in derogation of the common law are to be strictly construed. Rule 1 requires the judge to construe the rules liberally to further the cause of justice. However, the judge must exercise this discretion soundly and with restraint because a construction that ignores the plain wording of a rule or fails to view it as part of the total procedural system ultimately may prove to be as detrimental to the system as an arbitrary or rigid construction and, in the end, not further the goal of the 'just, speedy and inexpensive determination of every action.'..."

It is clear that there exists no "long standing precedent" supporting any conclusion that the Rules of Procedure must be "strictly construed." In point of fact, the opposite appears. Given the above, and dovetailing with what Plaintiff argues herein, Judge Farmer observed, in his specially concurring opinion:

> "In this case, the offer did not identify in plain text the statute on which it was based. Sure, that is a technical violation of Rule 1.442(c)(1). But so what? This statute is now so pervasively used that such offers are routinely expected. Could anyone reading the offer imagine that it was made under anything but the offer of judgment statute! No one in this case could have been under any mis-impression as to the basis for the offer and that the fees would be sought if the result warranted it. Inferring the statute from the context and circumstances does not extend Section 768.79 beyond the circumstances specified by its drafters. As the statute requires, the award of fees still turns on a qualifying offer, a rejection and a triggering outcome..." 920 So.2d at page 1274.

The Plaintiff would suggest to this Court that it makes perfect legal, logical, factual and practical sense that where a litigant has multiple (substantive) choices from which to prepare and serve an offer of judgment [or to settle, etc.] a procedural rule which requires that the source of the offer be identified, [else the offer is "deficient"] is appropriate. However, it is appropriate because, absent the source, prejudice to the offeree is apparent! The offeree does not know, and could not know, the authority for the offer. Given "choices" the prejudice is obvious - - one has to guess under which [substantive] statute the offer is based. However, where, as here, there (now) exists only one source, there can be no prejudice! A "violation" in that sense is truly "technical" and insignificant!

The Plaintiff agrees with the Defendant that review herein is de novo. Consistent therewith, this Court should examine the subject rule in the context of the single statute now extant, and approve as the law in the State of Florida the opinion rendered in this case:

> "... now that there is only one statute governing offers of judgment, implemented by Rule of Civil Procedure 1.442, the purpose of Rule 1.442(c)(1) is met where either the Rule or the statute is referenced..."

2.

STATUTE VERSUS RULE

If, as it is, *See:* LEAPAI v. MILTON, supra, and TIMMONS v. COMBS, supra, within the legislative authority to change the common law and allow for an award of statutory attorney's fees when certain (specified) conditions are met; and, if, as it is, *See:* THE FLORIDA BAR RE AMENDMENT TO RULES, 550 So.2d 442 (Fla. 1989) and LEAPAI v. MILTON, supra, outside legislative authority to prescribe the procedures under which statutorily authorized attorney's fees are obtained; and, if, as it is, *See:* LEAPAI v. MILTON, supra, and TIMMONS v. COMBS, supra, outside this Court's authority to change the common law as to substantive matters (i.e., attorney's fees) yet within this Court's authority to control procedures governing such awards, why must it be required that Rule 1.442 (or any Rule of Civil Procedure for that matter) be "strictly construed?" This Court recognized the lines of demarcation in TGI FRIDAY'S, INC. v. DVORAK, 663 So.2d 606 (Fla. 1995) and stated:

> "Article V, Section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts of this state. The Legislature, on the other hand, is entrusted with the task of enacting substantive law... The Legislature has modified the American Rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in Section 768.79 on the occurrence of certain specified conditions..." 663 So.2d at page 611.

There can be no doubt that in this case there exists no prejudice to anyone as a consequence of the Plaintiff's failure to include in his offer specific reference to Section 768.79. As heretofore noted, there is now only one basis for the making of such offer. Likewise, it is no answer to the legal question before this Court to suggest, as the Defendant does, that the "statute" requires the authority to be listed. *See:* Brief of Defendant at pages 3, 7, 9, 13, 29-35. Such a statutory "requirement"

is itself constitutionally infirm as intruding upon this Court's rule making authority. *See:* TIMMONS v. COMBS, supra, and TGI FRIDAY'S, supra.

Plaintiff will not travel down the entire historical trail set out by Judge Farmer. To do so, and to fully address the question why attorney's fees are (or are not) "penal," is enough to take this Brief well past its page restrictions. Further, assuming attorney's fees are not "penal" legislative enactments authorizing fees would, in any event, constitute a change to the common law rule which would take us back to the threshold question here: Why must the subject procedural rule be "strictly" construed? Plaintiff will, nevertheless, borrow from said concurring opinion, and note the following as it relates to the foundation issue:

* * *

"The purpose of walking through these Supreme Court

> decisions on the construction of statutes providing for attorney's fees is to make clear that all of them involve statutory construction and applied the derogation canon calling for strict construction when a statute changes the common law. None of them turns on a rule of penal lenity in the construction of attorney's fee statutes. That distinction is central in considering the Court's most recent decisions requiring strict construction of a rule of procedure.
>
> *Willis Shaw* was its first case to hold that a procedural rule must be strictly construed. Without any explanation, the Supreme Court simply asserted that 'because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees.' [e.s.] 849 So.2d at 278. The Supreme Court apparently borrowed the notion of penal strictness about the rule from the First District's opinion in the same case without elaboration or explanation. Thus the use of penal to justify strict construction of rules of procedure was dropped into Florida jurisprudence like a deus ex machina. The Court's application of a statutory canons strict construction to a rule of procedure is unprecedented." 920 So.2d at page 1268.

See, for example: GREAT AMERICAN INDEMNITY CO. v. WILLIAMS, 85 So.2d 619 (Fla. 1956) and WEATHERS EX REL. OCEAN ACCIDENT AND GUARANTEE CORPORATION v. CAUTHEN, 12 So.2d 294 (Fla. 1943).

The Defendant, at pages 24 and 25 of her brief comes to this Court's defense and asserts that Judge Farmer's research into the issue "was not accurate." To the Defendant's assertions Plaintiff would simply note that whatever may have

been protocol before adoption of the Florida Rules of Civil Procedure, with the adoption of same:

> "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..." *See:* LACKOS v. STATE, 339 So.2d 217 (Fla. 1976).

See, also: HANZELIK v. GROTTOLI AND HUDON INVESTMENTS, 687 So.2d 1363 (Fla. App. 4th 1997):

> "A trial court is generally obligated to apply a strict interpretation to substantive legislative enactments...
>
> * * *
>
> However, such rigid construction is not required in judicial interpretation of rules of procedure. *See:* Fla. R. Civ. P. 1.010(1996). ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."). As discussed infra, we conclude that those portions of Section 768.79 relating to the timing of an acceptance of an offer of judgment are procedural in nature and therefore, have force of law only because these portions have been adopted by the Florida Supreme Court as Florida Rule of Civil Procedure 1.442..." 687 So.2d at page 1365.

In accord: 12A Fla.Jur. 2d Courts and Judges, Section 206: While Court rules are construed in much the same way as statutes, rigid construction, used in interpreting

statutes, is not required in the judicial interpretation of procedural rules, and WRIGHT AND MILLER, 4 Fed. Prac. and Proc. Civ 3rd (2006) Section 1029.

3.

THE UNANSWERED QUESTION

There exist authorities to which both this Plaintiff and the Defendant turn for support. The holdings are found in cases from the District Courts and from this Court. Yet, although such cases exist, Judge Farmer noted:

> "... the Court has not explained how a procedural deficiency in a litigant's offer could have any effect on the underlying substantive entitlement to such fees. Awarding fees in this case in spite of a failure of the offer to identify the statute creating the entitlement to fees does not extend the statute's substantive reach to circumstances beyond the statute's stated basis for awarding fees. Whether or not the statute is mentioned in the offer, the party will still have to show a qualifying offer and a precipitating result. To the contrary, overlooking such harmless procedural defects would simply vindicate both Section 768.79's policy of imposing fees when litigation continues after an otherwise qualifying offer, as well as Rule 1.010's interpretive command to apply the rules justly and equitably, not strictly. Discretion to forgive harmless rule violations is therefore clearly not inconsistent with the strict construction of attorney's fee statutes. So the truth is that there is no justification for strict construction of Rule 1.442..." 920 So.2d at page 1271.

To the above, the Plaintiff would add that justification for a "strict

construction" of the procedural rule cannot be found in the arguments presented by the Defendant at pages 14-23, 26-28 or 29-35 of her brief.

First, and foremost, the cases cited by the Defendant only provide the basis for why the issue before this Court exists - - the cases do not explain, or attempt to harmonize, why a procedural rule implementing a statutory enactment is required to be strictly construed! The Defendant relies on the cases but provides no independent justification for their results.

Second, the arguments advanced at pages 26-28 of her brief are plainly without merit. The Defendant states:

> "The underlying opinion also attempts to justify a relaxed requirement regarding the identification of the statutory basis for attorney's fees by noting that there exists only one such statute. That simply is not true. In addition to Section 768.79, Florida Statute Section 45.061 authorizes trial judges to award sanctions - - including attorney's fees - - based upon rejected offers of settlement..." *See:* Brief of Defendant at page 26.

But Section 45.061, Fla. Stat., was long ago repealed. *See:* SARKIS v. ALLSTATE INSURANCE COMPANY, 863 So.2d 210 (Fla. 2003), Footnote 6:

> "Section 45.061 was a similar offer of judgment statute, which was repealed with respect to actions accruing after October 1, 1990. Ch.90-119, Section 22, Laws of Fla. Section 768.79 was therefore left as the only statute applicable to actions accruing after that date."

Likewise, the Defendant is off track in suggesting there is significance to the fact (that):

> "... there are numerous Florida statutes which authorize attorney's fees as well as dozens of federal statutes which frequently can form the basis for a fee award in state court. Therefore, there is an absolute necessity for a lack of 'guess work' when a party moves for attorney's fees, and that is why both the legislature and the court have expressly stated that the statute relied upon must be identified."

But that argument does not apply here, as the issue is the legal sufficiency of an offer of judgment and not the legal sufficiency of a motion for attorney's fees subsequently filed!

Third, the arguments advanced by the Defendant at pages 29-35 of her brief merely repeat what was presented at pages 14-23 of her brief, to wit: that there exist cases which hold that the statute and rule are to be "strictly construed." However, that only (again) identifies the fact that there exists an issue which needs resolution! At this juncture, Plaintiff's response, without becoming repetitive, can be limited to merely noting that rigid construction is not required in judicial interpretation of rules of procedure. *See:* HANZELIK, supra, and cases cited thereat.

4.

UNIFORMITY IN THE RULES

In LACKOS v. STATE, supra, this Court stated:

> "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..." 339 So.2d at page 219.

Save for the language in the implicated opinions, wherein it has been stated that Rule 1.442 must be "strictly construed" [because it implements a statutory enactment which changes the common law, to wit: attorney's fees,] most of the decisions under the Florida Rules of Civil Procedure dealing with procedural

irregularities mandate a showing of prejudice to the affected party before a "sanction" or forfeiture will be allowed.

In SARKIS v. ALLSTATE INSURANCE COMPANY, supra, this Court held that the use of a multiplier in awarding attorney's fees authorized by Section 768.79 was error. This Court stated:

> "This conclusion follows this Court's precedent in which we have construed the offer of judgment statutes since their adoption in 1986, ruled upon their constitutionality, and adopted Rules of Civil Procedure implementing them." 863 So.2d at page 218.

In SARKIS, supra, this Court further stated:

> "We have recognized that attorney fees awarded pursuant to the offer of judgment statutes are sanctions. These fees are awarded as sanctions for unreasonable rejections of offers of judgment. We have set forth in Rule 1.442 the factors to be considered in determining a reasonable amount of attorney fees awarded as sanctions. We have not included the use of a multiplier in the rule as a factor to be considered in the award of attorney fees. Because attorney fees awarded under the offer of judgment statute are sanctions against the party against whom the sanction is levied, we have held that the statute and rule must be strictly construed..." 863 So.2d at page 218.

This Court's holding was in the context of deciding a substantive, not procedural, matter! Yet, the form and content of the offer remain as matters of procedure! In point of fact, this is precisely why the rules of procedure should not be "rigidly construed." While any portion of a promulgated rule may, on occasion, implicate a substantive matter (assuming it does not violate separation of powers) that portion of the rule should be "strictly construed." However, matters of procedure should not be strictly construed!

Judge Farmer noted that while it might be argued that the majority opinion in the instant cause is in conflict with WILLIS SHAW and LAMB v. MATETZSCHK, 906 So.2d 1037 (Fla. 2005) it can, and should, more accurately be said that the subject opinion is in accord with LACKOS, supra, and STATE v.

CLEMENTS, 903 So.2d 919 (Fla. 2005). The Plaintiff would agree and urge that LACKOS, supra, be re-affirmed. The Plaintiff would respectfully suggest to this Court that procedural rules should not be rigidly construed. To do so goes directly against the expressed purposes for why they were enacted in the first place! *See:* WILSON v. SALAMON, 923 So.2d 363 (Fla. 2005):

> "... continuing to abide by the principles of stare decisis where there has been a clear showing, as we believe there has been here, that our original purpose and policy have been undermined, only serves to undermine the integrity and credibility of our court system..." 923 So.2d at page 367.

The "original" purpose and policy as pertains to The Florida Rules of Civil Procedure included an intent to excuse technical defects which have no bearing upon the substantial rights of the parties. When procedural irregularities occurred,

the courts focused on determining whether anyone was prejudiced by the departure. No injustice to the rules of statutory construction occur when the Rules of Procedure are applied as they were intended to be, when enacted!

The opinion rendered by the Fourth District in the instant cause should be approved as the law in the State of Florida. Decisions to the contrary should be disapproved. The order denying the Plaintiff's motion for attorney's fees should

be reversed.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Plaintiff respectfully urges this Honorable Court to approve, in all respects, the opinion of the Fourth District and to remand this cause to the trial court with directions to grant the Plaintiff's motion for attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to the following counsel of record this 6th day of September, 2006.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief was prepared in accordance with the rule requiring 14 point Times New or 12 point Courier New.

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APPENDIX

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