IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-611 Florida Bar No. 184170

ROSE G. CAMPBELL,

Petitioner,

v.

CLIVENS GOLDMAN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

ROSE G. CAMPBELL

(With Appendix)

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POINT ON APPEAL

THE FOURTH DISTRICT'S OPINION IS IN EXPRESS AND DIRECT CONFLICT WITH SEVERAL APPELLATE CASES WHICH HOLD THAT WHEN A PROPOSAL FOR SETTLEMENT DOES NOT REFERENCE THE RELEVANT STATUTE, § 768.79, IT IS INVALID. IT IS ALSO IN EXPRESS AND DIRECT CONFLICT WITH SEVERAL SUPREME COURT CASES WHICH HOLD THAT PROPOSALS FOR SETTLEMENT, AND OTHER ATTORNEY FEE STATUTES ARE IN DEROGATION OF COMMON LAW AND MUST BE STRICTLY CONSTRUED, AND ANY FAILURE TO DO SO WILL INVALIDATE THE PROPOSAL. ACCORDINGLY, THIS HONORABLE COURT SHOULD ACCEPT JURISDICTION AND OVERTURN THE DECISION OF THE FOURTH DISTRICT.

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INTRODUCTION

The Respondent/Appellant, CLIVENS GOLDMAN, will be referred to as Goldman and/or Plaintiff.

The Petitioner/Appellee, ROSE G. CAMPBELL, will be referred to as Campbell and/or Defendant.

The Record on Appeal will be designated by the letter "R."

The Hearing Transcript appearing in the Record will be designated by the letter "T."

All emphasis in the Brief is that of the writer, unless otherwise indicated.

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STATEMENT OF THE FACTS AND CASE

The plaintiff filed a Proposal for Settlement which failed to state that it was being made pursuant to the applicable statute, Section 768.79. The trial judge applied the existing law and held that the Proposal was invalid.

On review, the Fourth District concluded that the omission was an "insignificant technical violation" of the fee-shifting provisions and reversed. In doing so, the lower court certified conflict with Pippin v. Latosvnski. 622 So. 2d 566 (Fla. 1st DCA 1993) and McMullen Oil Company. Inc. v. ISS International Service System. Inc.. 698 So. 2d 372 (Fla. 2d DCA 1997). Applying the rule of strict construction with regard to statutes in derogation of the common law, both of those decisions specifically stated that a Proposal for Settlement which fails to cite the statute under which it is being made — as is required by both the statute and rule — is invalid.

The Fourth District's decision also contained an 11-page specially concurring Opinion by Judge Farmer, in which he opined that the Court should change its well-settled rule that attorney's fees statutes are in derogation of common law and must be strictly construed. The specially concurring Opinion also certified conflict. Accordingly, this case is before this Honorable Court on certified conflict.

The Proposal for Settlement reads 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:
>
> 1. That this proposal for settlement is being made by

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Plaintiff, CLIVENS GOLDMAN to Defendant, ROSE G. CAMPBELL.

2. This proposal is being made to induce full and final settlement of the herein case, with each party to bear their own costs and attorney's fees.

3. Plaintiff, CLIVENS GOLDMAN offers to fully release Defendant, ROSE G. CAMPBELL, for all matters at controversy in the above-referenced lawsuit, in exchange for payment to the Plaintiff, CLIVENS GOLDMAN by Defendant, ROSE G. CAMPBELL, of the total amount of Ten Thousand Dollars and 00/100 ($10,000.00).

4. This proposal shall remain open for a period of thirty days from the date of service of this proposal.

(Rl-3).

The proposal only references Florida Rule of Civil Procedure 1.442, and not the relevant statute, Section 768.79. Rule 1.442(c), concerns form and content of proposals for settlement, and reads as follows:

(c) Form and Content of Proposal for Settlement.

(1) **A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.**

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a

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claim for punitive damages, if any;

(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

(G) include a certificate of service in the form required by rulel.080(f). (Emphasis added.)

No statute was mentioned in the Proposal for Settlement. The settlement proposal for $10,000 was rejected by the defendant, and subsequently, a Judgment was entered against the plaintiff for the amount of $18,900, an amount which exceeded the Proposal for Settlement by more than 25%. Consequently, the plaintiff filed a Motion for Entitlement to Attorney's Fees, in accord with Florida Statute Section 768.79, which reads as follows:

(2) the making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) **Be in writing and state that it is being made pursuant to this section.**

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment. (Emphasis added.)

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.

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The transcript of the hearing on attorney's fees is in the record at (R22), and will be referred to by "TH," followed by the page number in the top right-hand corner. At the hearing on the Motion for Entitlement to Attorney's Fees, the plaintiff contended that his failure to cite Section 768.79 in the Proposal for Settlement, which is required by both Rule 1.442 and Section 768.79 itself, was not fatal. In arguing that it was a valid proposal for settlement, the plaintiff cited Grip Development. Inc. v. Coldwell Banker Residential Real Estate. Inc.. 788 So. 2d 262 (Fla. 4th DCA 2000) and Spruce Creek Development Co. of Ocala. Inc. v. Drew. 746 So. 2d 1109 (Fla. 5th DCA 1999). The plaintiff cited to *dicta* in Spruce Creek, that said that failure to expressly reference Section 768.79 was a mere technicality and did not render a proposal for settlement invalid (TH 4).

She also maintained that in Grip, supra, the Fourth District Court of Appeal adopted the aforementioned Spruce Creek, *dicta*. However, the trial court judge pointed out that in Grip, the majority was merely responding to dissenting Judge Farmer in that case, not creating a holding (TH 20).

The plaintiff also contended that because two of the other statutes governing entitlement to attorney's fees had been eliminated, it was no longer necessary to cite the statute under which the Proposal for Settlement was traveling. The trial judge noted: "Why would the rule - why do you think that the Supreme Court specifically said:

> "an Offer of Judgment must or shall (they used the word "shall") identify the applicable Florida law under which it is being made? If the Supreme Court put that in there, don't you think that they did it for a reason, which is to let the other side know the basis, the statutory basis for attorney's fees?"
>
> (TH 27).

The defendant argued that the Supreme Court and also Second District has made it very

clear that if you do not specifically comply with the statute, the proposal for settlement is defective. The defendant also pointed out that the portion of Spruce Creek which is the basis for the Appellant's argument was mere *dicta*. In his final remarks, counsel for the plaintiff said:

> "There is a current conflict in the districts that has not been determined by the Supreme Court.
>
> He has given you a First and Second District court opinions, which I believe are distinguishable based on what I have already told the court.
>
> The Fifth District says that a technicality in the Fourth District Court of Appeal cites that in a collateral issue, but aligns itself with its decision in its majority opinion."
>
> (TH 28).

On November 17,2004, the trial judge entered his Order denying the plaintiffs Motion for Entitlement to Attorney's Fees and Costs, which reads as follows:

> **Order on Motion for Entitlement to**
> Fees **and** Costs
>
> THIS MATTER is before this Court on the Plaintiffs 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)(l), 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 Plaintiffs "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 shall be guided by the Fifth District Court's opinion in *Spruce Creek Development Co. ofOcala, 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)(l), 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 reference 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.")

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida this 17th day of November, 2004.

_____

DORIAN DAMOORGIAN
CIRCUIT COURT JUDGE

(R10-11).

Thereafter, the plaintiff appealed, raising as error the entry of the court's Order denying the Motion for Entitlement to Attorney's Fees and Costs. As indicated, the Fourth District reversed, and certified conflict.

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SUMMARY OF ARGUMENT

The Fourth District held in this case that even though the Proposal for Settlement did not reference the statute moved under, namely Section 768.79, that the proposal nonetheless was valid.

The Fourth District certified that this Opinion was in express and direct conflict with two cases; and the specially concurring Opinion stated there additionally was conflict with three Fourth District cases. Therefore, the Opinion is replete that there is express and direct conflict. The Opinion of the Fourth District was error and must be reversed for several reasons.

DEROGATION OF COMMON LAW

There is probably no rule of law more firmly established in Florida, and repeatedly stated by this Court, than the rule that attorneys' 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 can not be recovered. The Court has restated this rule of law four times in the last five years. Lamb: Willis Shaw Express: Sarkis: Morsani: infra. Lamb, Willis Shaw Express, and Morsani were unanimous opinions, and Sarkis had one dissent on a different issue. 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.

One reason for this rule of law, is that there must be certainty as to whether a Proposal for Settlement is valid, so that a party can know whether it is necessary to respond to the Proposal. If a Proposal for Settlement is in strict compliance with the rule and statute, a party can know it is valid, and make a decision whether to respond.

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On the other hand, there are many reasons why a Proposal for Settlement may not be in compliance with the statute or rule. There has been **extensive** litigation as to whether various types of non-compliance with the Proposal for Settlement Statute and Rule, are **substantial** enough to invalidate a Proposal for Settlement.

In order to establish certainty, the Court has established a "bright line test," such that if a proposal complies with the statute and rule, it is valid; and if not, it is not valid. The Proposal for Settlement statute and rule are not complicated, and there is no reason a party can not comply with them. This simple common sense rule, requiring strict compliance, assures that a party is able to know whether or not a proposal is valid.

If the Opinion of the Fourth District in this case were adopted as the law of Florida, there would be uncertainty in the law, in that a party could never know whether or not a proposal was valid, and whether or not the party needed to respond, because the litigant could always litigate whether the deviation from the statute or rule is **substantial.** There simply would be no certainty in the law if the Fourth District's Opinion were upheld, and this is one reason for the Court's "bright line test" of strict compliance.

Just in the last ten years, a Westlaw search indicates there have been at least 134 recorded appellate decisions seeking to interpret this rule. This underscores that the only way there can be certainty in the law, as to whether **a** Proposal for Settlement is valid, is by the wisdom of this Court's holding, that there must be strict compliance with the Proposal for Settlement statute and rule.

This Court adopted Rule 1.442, and if the Court thought that it was not necessary for litigants to reference the statute, it certainly has the power to amend the rule, to delete the language requiring this. Since Rule 1.442 was adopted in 1989, the Court has amended it five

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times, and has never deleted this provision requiring that the statute should be referenced. Therefore, it appears clear that the Court's intention is that the statute must be referenced.

Moreover, if the Court wanted to delete this requirement of referencing the statute, the consistent way to do this would be to change the rule, and then in **future** Proposals for Settlement, parties will know for certain whether it is valid or not. The requirement of strict compliance and certainty will be upheld for both past and future Proposals for Settlement. On the other hand, under the Opinion of the Fourth District, which holds that courts can determine if a deviation from the strict requirements of the statute is **substantial** or not, there can never be any certainty as to whether a proposal is valid, because parties can always litigate as to whether the deviation is **substantial.**

Therefore, if the Court does wish to eliminate the requirement of referencing the statute in future cases, it could amend Rule 1.442(c) to eliminate this requirement from future Proposals for Settlement, such that there will be certainty in the law up until it is amended, and there will be certainty in the law afterward. However, the "worst of all worlds" is to follow the Opinion of the Fourth District, where courts can determine that strict compliance is not necessary, and can litigate whether a deviation from strict compliance is substantial or not, and there will never be any certainty as to whether or not a Proposal for Settlement is valid.

Florida law in regard to construction of statutes and rule is clear, that when a statute or rule is clear and unambiguous, it must be given its clear meaning. Rule 1.442(c) which was written by this Court, and Section 768.79 are totally clear and unambiguous, so they must be given their clear meaning.

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ARGUMENT

THE FOURTH DISTRICT'S OPINION IS IN EXPRESS AND DIRECT CONFLICT WITH SEVERAL APPELLATE CASES WHICH HOLD THAT WHEN A PROPOSAL FOR SETTLEMENT DOES NOT REFERENCE THE RELEVANT STATUTE, § 768.79, IT IS INVALID. IT IS ALSO IN EXPRESS AND DIRECT CONFLICT WITH SEVERAL SUPREME COURT CASES WHICH HOLD THAT PROPOSALS FOR SETTLEMENT, AND OTHER ATTORNEY FEE STATUTES ARE IN DEROGATION OF COMMON LAW AND MUST BE STRICTLY CONSTRUED, AND ANY FAILURE TO DO SO WILL INVALIDATE THE PROPOSAL. ACCORDINGLY, THIS HONORABLE COURT SHOULD ACCEPT JURISDICTION AND OVERTURN THE DECISION OF THE FOURTH DISTRICT.

Standard of Review

Since this appellate proceeding concerns the interpretation of a statute and rule of civil procedure, the Standard of Review is *de novo.* State of Florida. Department of Transportation v. Southtrust Bank. 886 So. 2d 393 (Fla. 1st DCA 2004); Smith v. Smith. 902 So. 2d 859 (Fla. 1st DCA 2005).

ARGUMENT

This Court has **a** longstanding — and recently reaffirmed — precedent of strictly construing statutes and rules which award attorney's fees. In the Opinion rendered below, the Fourth District departed from that precedent and held that substantial compliance with the fee-shifting provisions was acceptable. This Court should overturn that decision because it is contrary to the mandate of the Legislature, is contrary to the spirit and intent of the Rules of

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Procedure, and would serve only to foster extensive non-merit based litigation in the future.

In that regard, this Brief will examine the nature of the certified conflict currently before the Court, outline the history of this Court's precedent of strict construction, and explain why the Court should adhere to that precedent in this case.

CERTIFIED CONFLICT

In the proceedings below, the Fourth District examined a case where a plaintiff attempted to recover attorney's fees under a proposal for settlement which, contrary to Florida Rule of Civil Procedure 1.442 and Florida Statute Section 768.79, did not identify the statute under which it had been made. Goldman v. Campbell. 920 So. 2d 1264, 1265 (Fla. 4th DC A 2006). The lower court recognized the judiciary's long history of strictly construing such fee-shifting provisions, but deemed the omission "an insignificant technical violation of the rule." Id. at 1266. In that regard, it certified conflict with the First District's Opinion in Pippin v. Latosvnski. 622 So. 2d 566 (Fla. 1st DCA 1993) and the Second District's Opinion in McMullen Oil Company. Inc. v. ISS International Service System. Inc.. 698 So. 2d 372 (Fla. 2d DCA 1997), both of which adhered to strict-construction principles and invalidated proposals under the same facts. Id

In a specially concurring Opinion, Judge Farmer agreed that there was already a conflict among those cases, but stated that he would also certify conflict with the Fourth District's Opinions in Grip Development. Inc. v. Coldwell Banker Residential Real Estate. Inc.. 788 So. 2d 262 (Fla. 4th DCA 2000), Jaffrev v. Baggy Bunnv. Inc.. 733 So. 2d 1140 (Fla. 4th DCA 1999), and Cohen v. Arvin. 878 So. 2d 403 (Fla. 4th DCA 2004).

The conflicting opinions are thus as follows: In McMullen. the Notice of Filing referenced Section 768.79, but the offer of judgment did not. McMullen. 698 So. 2d at 372. The Second District thus found the proposal invalid, stating: "McMullen's offer of judgment lacked

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the specificity required by the statute." Id

Similarly, in Pippin v. Latosvnski. 622 So. 2d 566, 569 (Fla. 1st DCA 1993), the plaintiff submitted a proposal for settlement which stated that it was being made:

> ..."pursuant to Rule 1.441, Florida Rules of Civil Procedure, 'Offer of Judgment,' or such other pre-existing statute or rule of procedure as is deemed applicable by a court of competent jurisdiction."

The First District found that proposal invalid based upon the fact that it did not specifically identify the statute upon which it was based - Section 768.79. Id

As indicated, the specially concurring Opinion stated that conflict should also be certified with Grip Development. Inc. v. Coldwell Banker Residential Real Estate. Inc.. 788 So. 2d 262 (Fla. 4th DCA 2000); Jaffrev v. Baggy Bunny. Inc.. 733 So. 2d 1140 (Fla. 4th DCA 1999); Cohen v. Arvin. 878 So. 2d 403 (Fla. 4th DCA 2004).

In Grip, the Fourth District held that a Proposal for Settlement was invalid since it was filed three days prior to the 90-day period following service of the Complaint. Grip. 788 So. 2d at 262. The court noted that prejudice or lack thereof is not relevant, but only whether there is strict compliance with the statute. Id

In Jaffrev. the Fourth District invalidated a Proposal for Settlement because the Motion to Tax Fees and Costs was not filed within 30 days of the Verdict, while in Cohen, the Fourth District invalidated a Proposal for Settlement because it did not apportion amounts attributable to each offeror. Jaffrev. 733 So. 2d at 1140; Cohen. 878 So. 2d at 403. Again, both of those holdings were based upon a strict construction of Section 768.79 and Rule 1.442. Jaffrev. 733 So. 2d at 1140; Cohen. 878 So. 2d at 403.

A. **STRICT CONSTRUCTION**

In this case, the Court should adhere to its longstanding precedent of strictly construing provisions that alter the common law rule that parties must bear their own attorney's fees. Under such a strict construction, the proposal for settlement filed in this case must be declared invalid.

Specifically, Respondent's Proposal for Settlement failed to comply with the express terms of both Florida Statute Section 768.79 and Florida Rule of Civil Procedure 1.442. In pertinent part, Rule 1.442 states:

> "A proposal shall be in writing and **shall identify the applicable Florida law under which it is being made."** (Emphasis added.)
>
> Fla.R. Civ. P. 1.442(1997).

Florida Statute Section 768.79(2)(a) mirrors the rule and also requires reference to the statute:

> "An offer must be in writing **and state that it is being made pursuant to this section."** (Emphasis Added.)
>
> § 768.79, FlaJStat (1997).

Accordingly, both the statute and the rule clearly and unambiguously require that the party proposing settlement cite the statutory authority under which the settlement is being proposed. The plaintiff's Proposal for Settlement failed to cite any statute; thus, under the plain language of both the rule and statute, it is invalid.

Florida law is clear that statutes involving attorney's fees are in derogation of common law and must be strictly construed. The common law rule was that each party would pay his own attorney's fees. It has repeatedly been held that the Florida Proposal for Settlement Statute, namely Section 768.79, and the corresponding Proposal for Settlement Rule, namely Rule 1.442,

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are in derogation of common law and must be strictly construed. **i.**

FOUR TIMES IN FIVE YEARS

This Court has published four opinions in the last five years stating that attorney's fees statutes are in derogation of common law and must be strictly construed, and it would seem that the rule is so firmly established that it does not need debate. E.g. Lamb v. Matetzschk. 906 So. 2d 1037,1040-41 (Fla. 2005); Willis Shaw Express. Inc. v. Hilver Sod. Inc.. 849 So. 2d 276,278 (Fla. 2003); Sarkis v. Allstate Ins. Co.. 863 So. 2d 210,218 (Fla. 2003); Major League Baseball v. Morsani. 790 So. 2d 1071,1078-79 (Fla. 2001). Lamb. Willis Shaw Express, and Morsani were unanimous decisions, and Sarkis had one dissent on a different issue. It is surprising that it is necessary for the Court to address this rule of law yet again only one year later. Allowing the Opinion of the Fourth District to stand, would call into doubt dozens of other cases which have disallowed attorney's fees in various factual situations because there was not strict compliance with the applicable statute.

The rule of strict construction was most recently reaffirmed by this Court in the case of Lamb v. Matetzschk. supra. A Proposal for Settlement did not differentiate between the parties, and the Court held that it was invalid because both Section 768.79 and Rule 1.442 are in derogation of the common law principle that each party bears its own attorney's fees. Accordingly, there must be strict compliance.

The Lamb case was decided in 2005, and in 2003, the Court decided two other cases, and specifically held that attorney's fees statutes are in derogation of common law and must be strictly construed, Willis Shaw Express. Inc. v. Hilyer Sod. Inc.. supra, and Sarkis v. Allstate Insurance Company. 863 So. 2d 210 (Fla. 2003).

In Willis Shaw, the Court again enunciated this long-standing rule of law:

> ...This language must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees. *See Major League Baseball* v. *Morsani,* 790 So.2d 1071,1077-78 (Fla.*2001)("[A] statute enacted in derogation of the common law must be strictly construed...."); *Dade County v. Pena,* 664 So.2d 959, 960 (Fla. 1995)("[I]t is also a well-established rule in Florida that 'statutes awarding attorney's fees must be strictly construed.' *Gershuny* v. *Martin McFall Messenger Anesthesia Professional Ass 'n,* 539 So.2d 1131,1132 (Fla. 1989)."). A strict construction of the plain language of rule 1.442(c)(3) requires that offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror.
>
> Willis Shaw. 278-279.

In Sarkis. the Court also addressed whether there must be strict construction of Section 768.79 and Rule 1.442, and stated:

> The reason that the statute and rule are to be strictly construed is not because either is ambiguous but because the statute authorizes and the rule implements an award of attorney fees and because the assessment of attorney fees pursuant to the statute and rule is a sanction. It is the long-standing precedent of this Court that statutes and rules authorizing attorney fees or imposing penalties are to be strictly construed as written and not extended by implication. Since neither the statute nor the rule authorizes a fee multiplier, an authorization for the use of a multiplier would have to be by implication in violation of both long-standing and very recent precedent of this Court. *See,* majority op. At 223.
>
> Sarkis. 224.

A landmark case in which the Court applied the "deeply rooted, centuries old tenet of the common law" and held it applied in Florida, that statutes which are in derogation of common law must be strictly construed, is Major League Baseball v. Morsani. supra.

The Court held:

> Second, as noted above, equitable estoppel is a deeply rooted, centuries old tenet of the common law. On the other hand, fixed time limitations for filing suit, i.e., statutes of limitations, were unknown at common law and are a creature of modern statute. This Court has held that a statute enacted in derogation of the common law must be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise:
>
> > The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.
>
> Major League Baseball. 1077-1078.

An important reason for this rule of law is that a litigant should know if he will be liable for, or entitled to, attorney's fees at the conclusion of the litigation. If strict compliance is not the rule of law, a party can never know whether a proposal would be valid or not, and this would require endless litigation as to how far a party can deviate from the requirements of a statute and still be entitled to, or liable for fees.

Therefore, the public policy clearly dictates that there must be strict compliance with attorney's fee statutes, so that there can be certainty in the law as to whether attorney's fees will be owed at the conclusion of the litigation.

Due to the express and direct conflict with Pippin and McMullen Oil Company, as well as the conflict with this Court's firmly established rule of law that attorney's fees statutes are in derogation of common law and must be strictly complied with, this Honorable Court should reconcile the conflict, reaffirm that, because attorney's fees statutes are in derogation of common

law there must be strict compliance, and reverse the decision rendered below.

ii. OTHER CASES HOLDING ATTORNEY'S FEES STATUTES ARE IN DEROGATION OF COMMON LAW

In addition to this Court's recent precedent regarding strict construction, numerous District Court decisions, when construing the proposal for settlement statute, have applied that rule. The Third District adhered to strict construction in Oruga Corporation. Inc. v. AT&T Wireless of Florida. Inc.. 712 So. 2d 1141,1145 (Fla. 3d DCA 1998), where the court said:

> We begin our analysis of the attorney's fees issue ever cognizant of the well established rule that: M[S]tatutes authorizing an award of attorney's fees are in derogation of the common law[;] [tjherefore, such statutes must be strictly construed." *Whitten* v. *Progressive Cas. Ins. Co.,* 410 So.2d 501, 505 (Fla. 1982)(citation omitted); *see also Ciaramello* v. *D'Ambra,* 613 So.2d 1324, 1325 (Fla. 2d DCA 1991)(citation omitted)....

In accord is Nichols v. State Farm Mutual. 851 So. 2d 742, 746 (Fla. 5th DCA 2003), where the Fifth District held that, in order for a proposal for settlement to comply with the requirement of strict construction, it must not require judicial interpretation:

> Rules 1.442(c)(2)(C) and (D), Florida Rules of Civil Procedure, provide that the relevant conditions and all nonmonetary terms of the offer be stated with *particularity.* The terms of any proffered release are subject to this rule. *Zalis* v. *M.E.J. Rich Corp.,* 797 So.2d 1289 (Fla. 4th DCA 2001); *Gulf Coast Transp., Inc.* v. *Padron,* 782 So.2d 464 (Fla. 2d DCA 2001). This requirement of particularity is fundamental to the purpose underlying the statute and rule. A proposal for settlement is intended to end judicial labor, not create more. *Lucas* v. *Calhoun,* 813 So.2d 971 (Fla. 2d DCA 2002); *Jamieson* v. *Kurland,* 819 So.2d 267 (Fla. 2d DCA 2002). For this reason, a proposal for settlement should be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. *Id.* at 973 (citing *UnitedServs. Auto Ass'n* v. *Behar,* 752 So.2d 663, 665 (Fla. 2d DCA 2000). Moreover, the proposal should be capable of execution without the need for further explanation or judicial interpretation. *Id.* The rule and statute must be strictly

> construed because they are in derogation of the common law. *Willis Shaw Express, Inc.* v. *Hilyer Sod Inc.,* 849 So.2d 276,2003 WL 1089304 (Fla. March 13,2003).

The rule that a proposal for settlement which is at all ambiguous, is unenforceable, was discussed in Barnes v. The Kellogg Company. 846 So. 2d 568 (Fla. 2d DCA 2003), where the Second District said:

> It is well established that the offer of judgment statute and the related rule must be strictly construed because they are in derogation of common law. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.,* 28 Fla. L. Weekly S225, S225 2003 WL 1089304, _ So.2d __ ,__ (Fla. Mar. 13, 2003). As a result, virtually any proposal that is ambiguous is not enforceable. *See, e.g., Twiddy* v. *Guttenplan,* 678 So.2d 488 (Fla. 2d DCA 1996). A proposal to two or more plaintiffs who each have a claim for their own separate damages is normally unenforceable because it requires them to aggregate their damages or settle their separate claims in some collective fashion. *See Allstate Indent. Co. v. Hingson,* 808 So.2d 197 (Fla. 2002); *Allstate Ins. Co.* v. *Materiale,* 787 So.2d 173 (Fla. 2d DCA 2001). Likewise, a proposal from two or more plaintiffs who each have a claim for their own separate damages is normally unenforceable. *See Hilyer Sod,* 28 Fla. L. Weekly at S225, _ So.2d at _. A plaintiffs collective proposal to two or more defendants who have varying degrees of liability and may have rights to contribution between or among one another is also unenforceable. *See C & S Chems., Inc.* v. *McDougald,* 754 So.2d 795 (Fla. 2d DCA 2000).
>
> Id, at 571.

In Wright v. Caruana. 640 So. 2d 197 (Fla. 3d DCA 1994), a proposal for settlement was declared invalid by the Third District. Contrary to the requirements of Section 768.79, the proposal was only made 27 days prior to trial. Noting that the statute required a 30-day window, the court held that attorney's fees could not be awarded under that provision.

In Murphv v. Tucker. 689 So. 2d 1164 (Fla. 2d DCA 1997), the proposal referenced Rule

44.102, but not Section 768.79, so it was invalid. The appellant was appealing a final judgment entered against him, and the award of attorney's fees to the appellee. The Second District Court of Appeal noted that the appellee's offer of judgment was made pursuant to Section 44.102, and that "[t]he offer did not reference § 768.79, Fla. Stat. (1995)." Id at 1164. The court explained that, because Section 768.79 requires offers to specifically state they are being made under that section, the proposal at issue must be declared invalid. In doing so, the court observed "statutes authorizing attorney's fees must be strictly construed." Id. at 1165.

In Hibbard v. McGraw. 862 So. 2d 816 (Fla. 5th DC A 2003), a 16-year old was injured in a car accident, while riding as a passenger. The girl eventually filed a suit against the other driver, through her mother, though by that time she was 18. Prior to trial, the defendants offered a proposal for settlement, which stated:

> "Defendants, MICHAEL McGRAW and DUAL INCORPORATED, by and through their undersigned counsel, hereby submit their proposal for settlement in favor of Plaintiff, AMANDA KAY CARR, in the total sum of THIRTY FIVE THOUSAND AND ONE DOLLARS ($35,001), exclusive of attorneys' fees and costs, in exchange for an executed full release and voluntary dismissal with prejudice as to all claims against the Defendants, MICHAEL McGRAW and DUAL INCORPORATED.

Two weeks later, the defendants moved to amend the pleadings to show as the sole plaintiff, the girl who had been injured, since she was more than 18 years old. Later, in ruling on this motion, the court told Carr to appear on her own behalf for her individual claim, but also ordered that her mother, Faith Carr Hibbard, who had originally brought suit on behalf of Carr, would remain as a party plaintiff for her parental claims pertaining to general damages and claims for medical bills while Carr was a minor. The jury found the defendant only 5% negligent, and the defendant moved for an award of attorney's fees pursuant to Section 768.79

and Rule 1.442. The lower court awarded attorney's fees and the plaintiff appealed.

On appeal, the court stated that the defendants served their proposal to "Plaintiff Amanda K. Carr, *before* moving to amend the pleadings to show Carr as the "sole" plaintiff; and that at the time the proposal was served, Amanda K. Carr was the named plaintiff." Also, the court pointed out that because the defendants' position was that Carr was the sole plaintiff, it was unclear whether they were proposing to settle all the claims inclusive of Carr and her mother, or only Carr's claims. Due to rule of strict construction regarding proposals for settlement, and the unclear and ambiguous nature of the proposal for settlement, the appellate court found that the defendants were not entitled to an award of attorney's fees under § 768.79.

In Connell Floyd. 866 So. 2d 90 (Fla. 1st DCA 2004), the First District applied the rule of strict, and held that a proposal for settlement was legally insufficient and therefore invalid because it contained a non-monetary condition that was not stated, namely the particularity required by Florida Rule Civil Procedure 1.442(c)(2)(c), and (d).

The appellee in Connell had named the appellants as joint defendants in the lawsuit. They in turn filed multiple compulsory counter-claims against the appellee, arising from the same set of facts and circumstances. The appellants then proposed a settlement for $1.00 to the appellee for his claims on the condition that the appellees stipulate to a final judgment that would have made a specific finding, that the appellants prevailed in the defense of the appellee's claims against them. The appellants won at trial, and then sought fees pursuant to § 768.79 and Rule 1.442, which the trial court rejected.

On review, the appellate court held:

> "Applying strict construction, we conclude that the non-monetary condition proffered by the appellants was not stated with sufficient particularity to have allowed the appellee to fully evaluate his

terms on impact."

Id at 92.

The court noted that the broad language in the proposal for settlement rendered the appellee unable to evaluate what its choices were because had he submitted to the settlement, he would have surrendered all his defenses against the appellants' counter-claim. Thus, applying the rule requiring strict construction of proposal for settlement, the court found the proposal for settlement was invalid.

Again, in Hales v. Advanced Systems Design. Inc.. 855 So. 2d 1232 (Fla. 1st DC A 2003), the First District applied the rule of strict construction of proposals for settlement, and denied the motion for attorney's fees, when the original proposal for settlement was not strictly in compliance with Section 768.79, or Rule 1.442. There, the defendant delivered to the plaintiff an offer of judgment for $14,169.46, on condition that the plaintiff release the defendant and all its officers, president and former, etc.:

> "all claims at law or in equity, that plaintiff may have against any of those parties, whether known or unknown, liquidated or not liquidated, accrued or not accrued, including without limitation all claims that plaintiff asserted or could have asserted...."
>
> Ii at 1233.

In reversing the trial court's granting of the motion for attorney's fees, the appellate court indicated that the proposal for settlement, which required the plaintiff to release the defendant of any claim that might arise in the future, against any remotely related entity, lacked particularity required by Section 768.79 and Rule 1.442 regarding conditions and non-monetary terms in proposals for settlement, and due to the rule requiring strict construction, was invalid.

Yet another case in which the court applied the rule requiring strict construction of

proposal for settlement, and found a proposal for settlement to be invalid for failure to comply with Section 768.79 and Rule 1.442, was Lucas v. Calhoun. 813 So. 2d 971 (Fla. 2d DCA 2002). There, the lawsuit had resulted from a vehicular accident. The plaintiff sued for his bodily injuries, pain and suffering, mental anguish, etc., as well as property damage to his motorcycle, and loss of use of it. During the litigation, the plaintiff served an offer of judgment to the defendants for $7,999, with each party to bear its respective costs and attorney's fees; and also stated that the plaintiff intended to release and discharge the defendants from liability for the bodily injury claimed.

The trial court later denied the plaintiffs motion for attorney's fees made pursuant to Rule 1.442, and the appellate court affirmed based on the rule requiring strict construction in a proposal for settlement case. The appellate court held that subsection (c) and (d) of Rule 1.442 required particularity in conditions in non-monetary terms of proposals, and because of the plaintiff's failure to indicate whether the proposal would release the defendants from his property damage and any tangible damages claimed, it was not sufficiently particular and therefore invalid. As a result, for failure to strictly comply with the rule and statute, the plaintiff was unable to recover attorney's fees.

Many other cases have also applied to this rule of law:

> ...Since section 768.79 and Florida Rule of Civil Procedure 1.442 are punitive in nature in that they impose sanctions upon the losing party and are in derogation of the common law, they must be strictly construed.
>
> Schussel v. Ladd Hairdressers. Inc.. 736 So. 2d 776 (Fla. 4th DCA 1999).

* * *

Offers of judgment are punitive in nature and are in

> derogation of the common law, and for those reasons they must be strictly construed. *Schussel v. LaddHairdressers, Inc.,* 736 So.2d 776, 778 (Fla. 4th DC A 1999). The circuit court erred in awarding fees based on a defective offer, and we reverse that award.
>
> RLS Business Ventures. Inc. v. Second Chance Wholesale. Inc.. 784 So. 2d 1194 (Fla. 2d DCA 2001).

In this regard, see also Twiddv v. Guttenplan. 678 So. 2d 488 (Fla. 2d DCA 1996), which held that a joint offer of judgment was not specific enough to comply with the strict construction of the statute, and was invalid; Pepper's Steel & Alloys. Inc. v. United States. 850 So. 2d 462 (Fla. 2003)(which applied this rule of strict construction to Florida Statute Section 627.728, which awards attorney's fees upon the rendition of a judgment against an insurer); Encompass Incorporated v. Alford. 444 So. 2d 1085 (Fla. 1st DCA 1984)(which applied the requirement of strict construction to attorney's fees being sought under the mechanics' lien statute); Ahmed v. Lane Pontiac-Buick. Inc.. 527 So. 2d 930 (Fla. 5th DCA 1988)(which applied the rule of strict construction to an offer of judgment under an earlier statute, which did not specifically provide for attorney's fees).

In summary, it is well-established that proposals for settlement must state the applicable rule and law under which they are traveling, and numerous cases hold this. It is definitively and unambiguously clear on the face of Rule 1.442, and Section 768.79(2)(a), that both require specific mention of the statute in all proposals for settlement. There is a uniformity of law holding that statutes in derogation of common law must be strictly construed. If this Court permits the decision rendered below to stand, it would implicitly call into doubt all of the aforementioned decisions. Accordingly, it should adhere to the principle of strict construction for that reason, as well.

iii. JUDGE FARMER'S CONCURRING OPINION

In the underlying case, Judge Farmer wrote a lengthy concurring opinion in which he expressed his justification for a relaxed interpretation of the rules. Goldman. 920 So. 2d at 1267-74. He noted that, in Willis Shaw, this Court stated that rule 1.442 "'must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees.[1]" Id at 1267. However, Judge Farmer opined: "To my mind, the court's rationale for strict construction of the rule for settlement offers is incoherent with its own prior decisions." Id. He based that opinion upon a claim that "Willis Shaw was its first case to hold that a procedural rule must be strictly construed." Id at 1268. Judge Farmer further stated that this Court's "application of a statutory canon's strict construction to a rule of procedure is unprecedented," and mused that it was simply "dropped into Florida jurisprudence like a *deus ex machina."* Id

With all due respect to Judge Farmer, his research into that issue was not accurate. This Court first adopted rules of practice on October 15,1895. See, Poyntz v. Reynolds. 19 So. 649, 650 (Fla. 1896). A mere 16 months later, in Merchants' Nat Bank of Jacksonville v. Grunthal. 22 So. 685,687 (Fla. 1897), the Court declared: "The court, equally with suitors, is bound by its rules, and **they must be construed as statutes would be construed**."(emphasis added). Far from being a recent *deus ex machina,* this Court often reiterated that principle of construction during the rules' infancy. E.g. Florida Land Rock Phosphate Co. v. Anderson. 39 So. 392, 397 (Fla. 1905)("To our rules, then, and the construction put upon them by this court, we must go for guidance, remembering that the appellate court, equally with suitors, is bound by its rules, and they must be construed as statutes would be construed."); Hoodless v. Jernigan. 41 So. 194,196 (Fla. 1906)("as we have several times enunciated, the appellate court, equally with suitors, is

bound by its rules, and they must be construed as statutes would be construed"); Syndicate Properties v. Hotel Floridian. Co.. 114 So. 441,442 (Fla. 1927)("This court is bound by the rules prescribed by it as much so as attorneys, and it must construe them as statutes are constructed."); Bryan v. State. 114 So. 773, 775 (Fla. 1927)("The court is bound by the rules which must be construed as statutes are construed.").

Perhaps more importantly, the principle of strict construction is not an antiquated theory, but has, of late, been reiterated by this Court as recently as May 11,2006. Saia Motor Freight Line. Inc. v. Reid. ___ So. 2d ___ , 31 Fla. L. Weekly S281 (Fla. May 11,2006)("It is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction."). See also. Mitchell v. State. 911 So. 2d 1211,1214 (Fla. 2005)("The same principles of construction apply to court rules as apply to statutes."): Brown v. State. 715 So. 2d 241,243 (Fla. 1998)("Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules.").

Accordingly, the premise for Judge Farmer's concurrence is not accurate. This Court has, from the beginning, maintained that the rules are to be construed as statutes are construed. Thus, a strict construction of Rule 1.442 is required.

Moreover, Judge Farmer's analysis focused on a belief that the liberal or strict construction of the rule was determinative. That opinion, however, glosses over the fact that the statute also requires that an offer "state that it is being made pursuant to this section." There can be no dispute that, as a statute in derogation of the common law, that provision must be strictly construed. Accordingly, Judge Farmer's analysis may ultimately be moot - offers are invalid if they do not strictly comply with the statute's requirements.

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iv. NUMEROUS STATUTES AUTHORIZE ATTORNEY'S FEES

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. However, that statute contains different requirements for litigants to observe, most notably a 45-day response time as opposed to the 30-day period described by section 768.79. Accordingly, it is essential that the "guess work" be eliminated when a party moves for fees, and thus parties must state the statutory basis for their offer.

In addition to section 45.061, 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 on must be identified.

Some of the Florida statutes which award attorney's fees are the following:

1. § 57.105, Fla. Stat. - allows attorney's fees for frivolous litigation;

2. § 44.103, Fla. Stat. - authorizes attorney's fees for court-ordered nonbinding arbitration;

3. § 713.29, Fla. Stat. - allows attorney's fees for the prevailing party when any action is brought to enforce a lien or to enforce a claim against a bond;

4. § 627.756, Fla. Stat. - governs attorney's fees in suits brought by owner or subcontractor, laborers, and materialmen against surety insurers under payment or performance bonds written by the

insurer;

5. § 44.102, Fla. Stat. - allows costs and fees in court-ordered mediation;

6. § 627.428, Fla. Stat. - awards attorney's fees when an insured prevails against an insurer in state court;

7. § 440.34, Fla. Stat. - governs attorney's fees in workers' compensation suits;

8. § 77.28, Fla. Stat. - allows attorney's fees brought for garnishment actions;

9. § 60.05, Fla. Stat. - allows an attorney's fees when an abatement of nuisance action has been brought by a state agency without reasonable ground for the action;

10. § 61.16, Fla. Stat. - governs the rules for awarding attorney's fees in marriage dissolution actions;

11. § 173.10, Fla. Stat. - allows legal fees where a property owner fails to pay a special assessment or interest;

12. § 173.08, Fla. Stat. - governs attorney's fees for suits regarding tax certificates, special assessments, and delinquent taxes, as related to a landowner;

13. § 559.77, Fla. Stat. - awards attorney's fees in situations where a debtor has to bring a civil action against a person violating § 559.72;

14. § 733.106, Fla. Stat. - governs the rules for attorney fees in probate proceedings;

15. § 768.79, Fla. Stat. - governs attorney's fees in regard to offers of judgment and demands for judgment;

16. § 57.111, Fla. Stat. - seeks to diminish deterrence from obtaining review of or defending against a governmental action by awarding attorney's fees and costs against a state in certain situations;

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17. § 57.115, Fla. Stat. - awards attorney's fees and costs against a judgment debtor in connection with an execution judgment;

18. § 68.086, Fla. Stat. - provides attorney's fees in miscellaneous proceedings;

19. § 73.092, Fla. Stat. - governs attorney's fees in eminent domain situations;

20. § 111,065, Fla. Stat. - requires that employers of any officers working for the law enforcement, correctional, or probation facilities, reimburse their employees for attorney's fees in any civil or criminal action arising out of the performance of the officer's official duties;

21. § 440.34, Fla. Stat. - governs workers' compensation proceedings;

22. § 448.104, Fla. Stat. - concerns attorney's fees in labor disputes;

23. § 501.2105, Fla. Stat. - allows a court to award attorney's fees in deceptive and unfair trade practice suits;

24. § 627.6698, Fla. Stat. - allows an insured person to seek attorney's fees from a health insurance group when they prevail;

25. § 718.125, Fla. Stat. - gives judges the power to grant attorney's fees when suits are brought to enforce contracts or leases in a condominium or association situation;

26. § 772.185, Fla. Stat. - allows for attorney's fees in civil remedies for criminal practices.

Accordingly, the Fourth District's conclusion that there currently exists only one basis for an award of attorney's fees is not accurate, and the Court should reject its reasoning in that regard, as well.

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B. RULES OF CONSTRUCTION: WHEN A RULE OR STATUTE IS CLEAR AND UNAMBIGUOUS. IT MUST BE GIVEN ITS CLEAR MEANING

In addition to the precedent of strict construction, the Fourth District's decision is also contrary to longstanding rules of statutory construction. In particular, Florida law is clear that, when a statute or rule is clear and unambiguous, it must be given its clear meaning.

In the present case, Section 768.79 expressly states that a proposal must identify that it is being made pursuant to that statute, and similarly Rule 1.442, which was established by this Court, requires a proposal to identify the statute being moved under. Both of those provisions have been amended several times, but the language has remained in both the statute and the rule.

It can hardly be argued that it was a pure accident that the Legislature put this language in the statute, and that this Court also put the exact same language in the rule; and that the Court has never taken this language from the rule which requires the statute to be cited. Therefore, the rule of statutory construction must be applied - since the statute is absolutely clear and unambiguous, and the rule passed by the Court is also clear and unambiguous, they must be given their clear meaning.

The rule of statutory construction should be borne in mind, namely if a statute or rule is clear and unambiguous it must be given its clear meaning. Statutes and rules should be interpreted to give effect to the intent of the Legislature. This rule of law was restated by this Court in City of Tampa v. Thatcher Glass Corporation. 445 So. 2d 578, 579 (Fla. 1984):

> The cardinal rule of statutory construction is "that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute."

Similarly, in Department of Legal Affairs v. Sanford-Orlando Kennel Club. Inc.. 434 So. 2d 879, 882 (Fla. 1983), the Court stated:

> ...'It is a well established rule of construction that the intent of the Legislature as gleaned from the statute is the law."

This rule of law has been stated countless times. In Deltona Corporation v. Florida Public Service Commission. 220 So. 2d 905 (Fla. 1969), the court said:

> It is a cardinal rule that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute....

In State v. Gale Distributors. Inc.. 349 So. 2d 150,153 (Fla. 1977), the Court said:

> ...Furthermore, it is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the section and every part of the statute as a whole. From a view of the whole law in *pari materia,* the Court will determine legislative intent....

In accord, see, Beebe v. Richardson. 23 So. 2d 718 (Fla. 1945); Maryland Casualty Company v.Marshall. 106 So. 2d 212 (Fla. 1st DCA 1958).

While legislative intent controls construction of statutes in Florida, that intent is determined primarily from the language of the statute. St. Petersburg Bank & Trust Co. v. Hamm. 414 So. 2d 1071 (Fla. 1982); Opperman v. Nationwide Mutual Fire Insurance Company. 515 So. 2d 263 (Fla. 5th DCA 1987). The plain meaning of the statutory language is the first consideration. St. Petersburg. 414 So. 2d at 1071; Opperman. 515 So. 2d at 266.

Moreover, this established law is also applied to the interpretation of court rules. When, as here, the language of the statute and rule is not only clear and unambiguous, but also uniform, and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; just like a statute, the rule must be given its plain and obvious meaning. Opperman. 515 So. 2d at 266; Holly v. Auld. 450 So. 2d 217 (Fla. 1984). As noted in both St Petersburg and Opperman. the plain language here is obvious. Where both the statute and rule of

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civil procedure are clear, and both contain the exact same requirement, there is no basis for an argument that the language should not be applied.

Again, the legislative intent is determined primarily from the statute's language, or the rule's language. St. Petersburg. 414 So. 2d at 1073; State v. Perez. 531 So. 2d 961 (Fla. 1988). The only reason this Court would not follow the literary and plain meaning of the language of the statute, is when such an interpretation would lead to an absurd or illogical result. St. Petersburg. 414 So. 2d at 1073; Perez. 531 So. 2d at 962. The only illogical result, that could possibly occur, when deviating from the plain and obvious language of the Ordinance, would be to circumvent the clear wording and meaning of both the legislature and the Court. Therefore, the Court should apply the plain language as it is written.

Florida courts are bound by the definite phraseology in statutes and are to be give effect to every clause of a statute. Perez. 531 So. 2d at 963; Florida State Racing Commission v. Bourquardez. 42 So. 2d 87, 88 (Fla. 1949); State ex rel. City of Casselberrv v. Maeer. 356 So. 2d 267,269 (Fla. 1978). Nor can the court add words, which are not intended to be in a statute or rule, which is exactly what the Respondent in this case is requesting this Court do. Chaffee v. Miami Transfer Company. Inc.. 288 So. 2d 209 (Fla. 1974)(court in construing statute cannot invoke a limitation or add words to the statute not placed there by the legislature); Armstrong v. City of Edgewater. 157 So. 2d 422 (Fla. 1963)(courts should be extremely cautious in adding words to a statute enacted by the legislature); Atlantic Coast Line Railroad Company v. Bovd. 102 So. 2d 709 (Fla. 1958)(in construing a statute the court cannot take the liberty of supplying a word); Rebich v. Burdine's and Liberty Mutual Insurance Company. 417 So. 2d 284 (Fla. 1st DCA 1982)(courts in construing a statute may not insert words or phrases in that statute where to all appearances were not in the mind of the legislature when the law was enacted; when there is

doubt as to legislature intent, doubt should be resolved against the power of the court to supply missing words).

In the present case, both the statute and rule clearly and unambiguously require that the statute moved under be cited. Therefore, the proposal is clearly invalid, and in violation of both the statute and the rule, and the trial court correctly held that it was invalid.

C. MULTIPLE LITIGATION OF RULE 1.442(c)

The Court should also reject the Fourth District's rationale of substantial compliance because it is contrary to the spirit and purpose of the rules. Specifically, the rules are intended to simplify and streamline litigation, not create new internal controversies for parties to litigate. For example, in Wilson v. Salamon. 923 So. 2d 363, 368 (Fla. 2005), the Court succinctly stated with respect to Rule 1.420(e)'s failure to prosecute requirements: "The analysis has simply become too subjective." Realizing that subjectivity served only to "spur[] an increase in non-merit-based litigation," the Court thus, reverted to a strict construction of the Rule as a "bright-line test" that is predictable and easy to apply. More recently, in Saia Motor Freight Line. Inc. v. Reid. ___ So. 2d __ , 31 Fla. L. Weekly S281 (Fla. May 11,2006), the Court adopted a similar "bright-line time requirement" for motions for costs and attorney fees under Rule 1.525.

At issue in this case is Rule 1.442 — a provision that has already been the subject of extensive non-merit-based litigation. In the last ten years, a Westlaw search reveals there have been at least 134 recorded appellate decisions seeking to engraft exception upon this clear language. See generally. Security Professionals. Inc. v. Segall. 685 So. 2d 1381 (Fla. 4th DCA 1997); Bodek v. Gulliver Academy. Inc.. 702 So. 2d 1331 (Fla. 3d DCA 1997); McFarland & Son. Inc. v. Basel. 727 So. 2d 226 (Fla. 5th DCA 1999); Flight Express. Inc. v. Robinson. 736

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So. 2d 796 (Fla. 3d DCA 1999); Spruce Creek Development Co. of Ocala. Inc. v. Drew, supra: United Services Automobile Association v. Behar. 752 So. 2d 663 (Fla. 2d DCA 2000); C&S Chemicals. Inc. v. McDoueald. 754 So. 2d 795 (Fla. 2d DCA 2000); Sparks v. Barnes. 755 So. 2d 718 (Fla. 2d DCA 1999); Strahan v. Gauldin. 786 So. 2d 1189 (Fla. 2001); Danner Construction Company. Inc. v. Reynolds Metals Company. 760 So. 2d 199 (Fla. 2d DCA 2000); Goldstein v. Harris. 768 So. 2d 1146 (Fla. 4th DCA 2000); Safelite Glass Corporation v. Samuel. 771 So. 2d 44 (Fla. 4th DCA 2000); Ford Motor Company v. Meyers. 771 So. 2d 1202 (Fla. 4th DCA 2000); Allstate Indemnity Company v. Hingson. 808 So. 2d 197 (Fla. 2002); Stern v. Zamudio. 780 So. 2d 155 (Fla. 2001); Allstate Insurance Company v. Materiale. 787 So. 2d 173 (Fla. 2001); Alanwood Holding Co. v. Thompson. 789 So. 2d 485 (Fla. 2d DCA 2001); Dudley v. McCormick. 799 So. 2d 436 (Fla. 1st DCA 2001); Clipper v. Bay Oaks Condominium Association. Inc.. 810 So. 2d 541 (Fla. 2d DCA 2002); Lucas: Florida Gas Transmission Company v. Lauderdale Sand & Fill. Inc.. 813 So. 2d 1013 (Fla. 4th DCA 2002); Basel v. McFarland & Sons. Inc.. 815 So. 2d 687 (Fla. 5th DCA 2002); Hilver Sod. Inc. v. Willis Shaw Express. Inc.. 817 So. 2d 1050 (Fla. 1st DCA 2002); Thompson v. Hodson. 825 So. 2d 941 (Fla. 1st DCA 2002); Pearson v. Gabrelcik. 838 So. 2d 664 (Fla. 1st DCA 2003); Crespo v. Woodland Lakes Creative Retirement Concepts. Inc.. 845 So. 2d 342 (Fla. 2d DCA 2003); Barnes v. The Kellogg Company, supra: Willis Shaw Express. Inc. v. Hilyer Sod Inc.. supra; and Matetszchk v. Lamb. 849 So. 2d 1141 (Fla. 5th DCA 2003).

If the Court were to abandon a strict construction standard with respect to Rule 1.442, and require only reasonable compliance, it would simply set the stage for a new round of non-merit based litigation over what constitutes reasonable compliance. Worse yet, when applying such a subjective standard, reasonable people could reach difference results under the same set of facts.

In short, the test would be unworkable and contrary to the spirit of the rules. The Court should thus follow both its longstanding precedent and recently-reaffirmed practice of strictly construing the Rules. Litigants will know what is required of them, and judiciary's interpretations of their actions will be consistent. Therefore, the public policy of the law is best served by upholding the "bright line" test, as announced by this Court in Willis Shaw.

D. PUBLIC POLICY

After considering the public policy ramifications, it is clear that a joint proposal for settlement, which fails to itemize the terms and conditions as to each party, should not be valid. This Court in Willis Shaw and Lamb reaffirmed a "bright line" rule as to whether proposals for settlement are valid. After the decisions in Willis Shaw and Lamb, all attorneys in the State know what is required in order to file a valid proposal for settlement, namely that it be itemized as to every plaintiff and every defendant. Since Rule 1.442(c) was effective in 1997, there have been at least 31 appellate cases construing various scenarios. Now, as a result of Willis Shaw and Lamb, there is no uncertainty in the law, and when a party prepares a proposal for settlement, it knows what is necessary in order for it to be valid, and similarly, when a party is served with a proposal for settlement, it can look at this "bright line" rule of Willis Shaw and Lamb, and easily see if it is valid.

However, if this Honorable Court should follow the plaintiffs position, it would bring uncertainty back into the law. Trial courts would be allowed to engraft judicial exceptions to Rule 1.442, and a body of appellate caselaw would need to be handed down in the future, as to which Proposals for Settlement **will** or **will not** be valid. Therefore, a party being served with some Proposals for Settlement will not know whether they are valid, until the caselaw develops

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years in the future.

To recede from Willis Shaw and Lamb and allow trial judges to engraft exceptions on the clear wording of the Rule would create uncertainty of the law for years in the future, and require appellate caselaw to interpret a myriad of exceptions for years in the future. The ingenuity of attorneys in urging exceptions to rules is boundless. Therefore, the public policy would clearly be best served by the Supreme Court, by upholding the "bright line" test of Willis Shaw, such that in the future every plaintiff and every defendant can instantly tell whether a proposal for settlement is valid, by whether it is itemized.

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CONCLUSION

There is express and direct conflict between the decision in the present case and Pippin and McMullen Oil, supra, as well as being in express and direct conflict with Lamb; Willis Shaw: Sarkis: and Morsani. supra. Accordingly, the decision of the Fourth District must be reversed.

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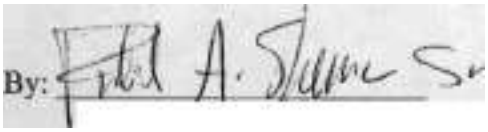

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CERTIFICATE OF SERVICE

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CERTIFICATION OF TYPE

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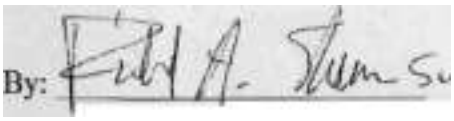
By: 

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INDEX TO PETITIONER'S APPENDIX

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of medical care to die in an Intentionally concealed environment. The latter theory Included evidence that Oder (1) cut the telephone lines both Insldeand outside the house, (2) covered the window to prevent outsiders from viewing the carnage within, and (3) locked the front and side doors. Qrier testified thai lie did these tilings duo to fear of going to jail rather than imminent harm to his person. The State, however, did not argue the second theory ns grounds for conviction below. Had the Slate argued this evidence as an independent basis to convict, I believe the guilty verdict would have been Bustainable. *See Rayl* v. *State,* 765 So. 2d 917 (Pla. 2000); *see also State* v. *Delva,* 575 . So. 2d 643,645 (Fla. 1991) ("Falling to instruct on an element of the crime over which die record reflects there was no dispute is not fundamental error and there must bean objection to preserve the issue for appeal.").

The State presented this second theory for (he first time on nppenl. Because the State presented this theory for the first time on appeal, we must reverse. *Suite v. Faxworth,* 757 So. 2d 1270 (Fla. 4lh DCA 2000). For this additional reason, 1 join the opinion of the majority.

Attorney's Ices—Proposal tor settlement—-Validity—Where plaintiff recovered net verdlddjudgment In amount twenty-five percent greater than proposnl for settlement, trial court erred In denying motion for altorney's fees on ground that proposal did not cite statutory provision upon which proposal was made—Conflict certified

CLIVENS GOLDMAN, Appellant, v. ROSBCI. CAMPBELL, Appellee. <lltiDlslrtct C>«e No. 4D04-4920. Maidi t, 2006. Appeal Irani the Circuit Court for (lie Seventeenth Judicial Circuit, Btuwtml County; Dot Inn K. Dumoorgum, Judge; LT. Ciue No. 98-6194 25. Counsel; Arnold U. Ginsberg oraiusberg & Schwnite, Mlmnl, ami Nicole S. Freedlnndor of Nelson *Si* Freedlamler, Miami, for nppal lout. Rldum) A. Rlieimun of ilieLawOIHcesofnichHiTl A. Sliefiiwn,FoitLaml«xtale,Bii(ISRiimel Tyler Hill of Hill & Leniongello, P.A., PortLauderdale, for appellee.

CrAY1x>n,J.)ClivensOoldinan, the plaintiff below, timely appeals the denial of tils motion for attorney's fees and costs. His motion fur fees . and coats was filed pursuant to section 768.79, Florida Statutes, niter he recovered a net verdict/judgment in an amount twenty-five percent greater than his Proposal for Settlement. The trial court denied the plaintiff's motion because the proposal did not cite the statutory provision upon which the proposal was made. We reverse with directions to grant the plaintiff's motion for attorney's fees."

On August 13,1999 and again on November 17,2003, plaintiff served the defendant, Rose G. Campbell, with a notice of "filing of plaintiff's proposal for settlement for $10,000. The proposal was never accepted, nor was it filed with the court. Although the proposal referenced Florida Rule of Civil Procedure 1.442, it did not cite the applicable statute, section 768.79, Florida Statutes. Subsequently, on May 27,2004, the plaintiff was awarded a jury verdict In the amount of $18,900, which was twenty-five percent more than was offered in the settlement proposal, A final judgment for the same tunounl wus rendered.

An offer of settlement must comply with both rule 1.442 and section 768.79. Rule 1.442(c)(l) (1999) stales: "A proposnl [for settlement] shall be in writing and shall identify tire *applicable Florida law* under which it is being made." (Emphasis added). Section 768.79(6)(b) (1999) reads: "If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at leaNt 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculate d in accordance wllh the guidelines promulgated by the Supreme Court, Incurred from the date Ihc offer was served." Subsection (2) lists therequlremenU of a valid settlement offer:

(a) Be in writing and *stale that it is being made pursuant to this section.*

(b) Name the party making h and the party to whom It Is being made.

(c) State with particularity the amount offered to settlea claim for punitive damages, If any.

(d) State its total amount.

(Emphasis added).

The Florida Supreme Court has recognized that both nite 1.442 and section 768.79 are in derogation of the common law rule that parties are responsiblefortheirownattorney's fees. *See Willis Shaw Express, Inc. v. llllyer Sod, Inc.,* 849 So. 2d 276,278 (Fla. 2003). It has thus held that the statute and rule must be strictly construed. *See Major League Baseball v. Morsani,* 790 So. 2d 1071, 1078-79 (Fla. 2001) (" [A] statute enacted in derogation of the common law must be strictly construed.... The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard."); *TGI Friday % Inc.* v. *Dvorak,* 663 So. 2d 606,615 (Fla. 1995) (Wells, J., concurring in part and dissenting in part) (stating that statutes that award attorney's fees, such as 768.79, must be strictly construed). Strict construction is required of both the statute and the rule "[because attorney fees awarded under the offer of judgment statute nre sanctions against the party whom the sanction is levied." Sarfajv. *Attstate Ins. Co.,* 863 So. 2d 210,218 (Fla. 2003).

Following tills principle of strict construction, we have found settlement proposals invalid when they did not comply with the slatutory and rule requirements. *See Grip Dev., Inc. v. Coldwell Banker Residential Real Estate, Inc.,* 788 So. 2r| 262,265 (Fla. 4th DCA 2000) (holding settlement proposal served prematurely under Florida Rule of Civil Procedure 1.442 to be Invalid and finding the premature service to not be an " insigni ficant technical violation" as In *Spruce Creek Development Co. v. Drew,* 746 So. 2d 1109 (Fla. 5th DCA 1999)); *Scliwrsel v. Ladd Hairdressers, Inc.,* 736 So. 2d 776,778 (Fla. 4th DCA 1999) (affirming order denying offer of judgment because it was untimely); *see also Halt v. Lexington Ins, Co.,* 895 So, 2d 1161,1166 (Fla. 4th DCA 2005) (pursuant to Florida Rule of Civil Procedure 1.442(c)(3), "a proposal to two or more plaintiffs who each Iwve a claim for their own separate damages is normally unenforceable because it requires them to aggregate their damages or settle their separ ate claims in some collective fashion").

Several oilier district courts of appeal, have similarly struck proposals. *See Cornell v. Floyd,* 866 So. 2d 90,92 (Fla. 1st DCA 2004) (holding defendants not entitled to attorney's fees because settlement offer did not state non-monetary terms with particularity as required by Florida Rules of Civil Procedure 1,442(c)(2) (Q and (D)); *McMullen Oil Co., Inc. v. ISSInt 'IServ. Sys.,Inc,* 698 So. 2d 372,373 (Fla. 2d DCA 1997) (holding that the offer of judgment was insuffi cient to satisfy statutory requirement!) where it failed to expressly state that it was made pursuant to Ihe statute and merely referred to "all appllcableFlorida statutes and the Florida Rules of Civil Procedure); *Miuphy v. Tucker,* 689 So. 2d 1164, 1165 (Fla. 2d DCA 1997) (holding that section 768.79 must be strictly construed); *Pippin* v. *iMtasynski,* 622 So. 2d 566,569 (Fla. 1st DCA 1993) (holding offer invalid because it failed to reference section 768.79; omitting reference "failed to adequately place defendants on notice that Latosynskl was traveling under section 768.79 in addition to the *m\t")\ see also Hessv.* Wa/ton,89SSo.2d 1046,1049 (Fla. 2d DCA 2005) (staling, "even a cl ear and unambiguous statute which imposes attorneys' fees or another penalty must be 'construed' In favor of the common law").

Despite this authority, the plaintiff argues that failure to cite the statute in the settlement proposal is not fatal. He relies on language in 111©fifth district's opinion hi *Spruce CreekDevelopmentCo. ofOcala, Inc. v. Drew,* 746 So. 2d 1109 (Fla. 5th DCA 1999). In *Spruce Creek,* (lie court noted thiit the issue of attorney's fees waa moot, but, for guidance on remand, stated that the plaintiffs' settlement proposal was not void for failureto expreasly reference section 768.79. The court deemed the omission "an Insignificant technical violation of the rule." *Id.* at 1116. It reasoned that "[nlow that there is onlv one

governing offers of judgment, implemented by Rule of Civil Procedure 1.442, the purpose of Rule 1.442(c)(l) is met where either the rule or the statute is referenced." *Id.* We adopt the fifth district's position in *Spruce Creek* on this issue and certify conflict with the first and second district courts' decisions in *Pippin* and *McMullen Oil* ***Company.***

In this case, the plaintiff submitted bis proposal for settlement on August 13,1999, at a time when only one statute, section 768.79, existed under which offer of judgment/proposal fur settlement attorney's fees were awardable. Hence, the concern for clarity and certainty we expressed in *Grip Development* and other cases scrutinize Ing settlement proposals is not a factor here.

Accordingly, we reverse the order denying the plaintiff's motion for attorney's fees.

Reversed. (POLBN, J., concurs. FARMBR, J., concurs specially with opinion.)

(FARMER, J,, concurring specially.) I reach the same outcome, and 1 **join in certifying conflict. But (here are more apposite supreme court** decisions, and I havca different take. Because of thepervaslveness of the issue involved, I think I should set down once again—this lima more thoroughly—my own analysis of the problems with thecourt's policy **ofstrict** construction when attorneys fees are at issue.[1]

'Hie supreme court has long had a policy *of strict construction* in connection with attorneys fees. Recently In *Willis Shaw Express Inc. v.HilyerSodlnc,* 849 So.2d 276 (Fla. 2003), the court approved a decision-denying fees because of what may be a harmless defect in the offer. The district court had invalidated Ihe offer, saying:

> " [T]heoffer of judgment statuteomi *rule* should be Btrlctly construed because the procedure is In derogation of the common law and *1$ penal in nature.* Florida follows the common law approach to attorney's fees under which each party pays Its own fees, absent a statutory or contractual provision to the contrary....
>
> **"In addition,** ***section 768.79 Imposes a penally*** **for unreasonably** rejecting a settlement offer. 'Statutes imposing a penalty muatal ways be construed strictly in favor of the one against whom the penalty Is imposed and are never to be extended by construction.' *Holmberg v. Dep 't of Nat. Resources,* 503 So.2d 944,947 (Pla. 1 st D6A1987); *see also mi Friday's, Inc.* v. *Dvorak,* 663 So.2d 606, 615 (Pla.1995) ('Statutes awarding attorney fees in the nature of a penalty must also be strictly construed.') (Wells, J., concurring in part nnd dissenting in port), *Tfils nde* Is so well-cemented in Florida law that the Florida Supreme Court has applied the rule without a great deal of explanation. ... The abundance of case law cited by both parties in this case demonstrates that courts have generally applied a strict construction to section 768.79 *and Rule 1,442* by the frequency with which they invalidate unspecified offers." [e.s.]

HttyerSodlnc. **v.** ***Willis Shaw Express Inc.*****, 817 So.2d 1050, .1054** (Fla. 1st DCA2002). In approving the decision of the First District, the supreme court said that the language of rule 1.442 "must be strictly construed because the offer of judgment statute *and nde* are in derogation of the common law rule that each party pay Its own fees." **[e.s.J** ***Willis ShawExpress, Inc.*** **v.** ***HilyerSod, Inc.*****, 849 So.2d at 278.** In *Lamb v. Matetzschk,* 906 So.2d 1037,1040-41 (Fla. 2005), the court simply cited and followed *Willis Shaw* without elaboration.[2] From these decisions it is apparent **that** the court has now justified strict construction *of rule 1.442* (as opposed to the statute) because it believes attorneys fees arepenal. To my mind, the court[1] s rationale for strict construction of the *nde* for settlement offers is incoherent with its own prior decisions.

The origin of the court's policy of strictly construing *statutes* creating an entitlement to attorneys fees stretches back decades—and in one sense even centuries. Nearly fifty years ago, in *Great American Indemnity Co.* v. *Williams,* 85 So.2d 619,623 (Pla. 1956), the court said: "theaward of attorneys fees *is In derogationofcommonlawmul* that *acts* for that purpose should be construed strictly."[3] [e.s.] *Great* ***American*** **relied on** ***Weathers ex rel. Ocean Accident & Guarantee Corporation*** **v.** ***Cauthen,*** **12 So.2d294 (Fla. 1943), and** ***WeathenhaA*** also held that statutes in derogation of the common law must be strictly construed. 12 So.2d. at 295. My poiirt here is that the court's ori ginal basis for strict construction o f attorneys fees statutes was the ancient canon of statutory construction involving legislative changes in the common law, not (but statutes for attorneys' fees are penal in nature.

Two decades later, ihe court repeated this holding in *Sunbeam* ***Enteiprlses.Inc. v. Upthegrove,3\6So.2d3A,'il*****(Fla. 1975),relying on both** ***Great American*** **and** ***Weathers.*** **Only two years after** ***Sunbeam,*** the court relied on it in *Roberts* v. *Carter,* 350 So.2d 78,78-79 (Fla. 1977) ("The fundamental rule In Florida has been thatan 'award o ^attorneys' fees is in derogation of the common law and that statutes allowing for the award of such fees should bts strictly construed.' "). Nearly a decade later, *Roberts* was the basis for *Finkelsleih* v. *North Broward Hospital District,* 484 So.2d 1241, 1243 (Fla. 1986). ***Finkelstein*** **led to** ***Gershuny \>. Martin McFall Messenger Anesthesia*** *Professional Ass'n,* 539 So.2d 1131, 1132 (Fla. 1989) ("Florida requires that statutes awarding attorney's fees must be strictly construed"). *Gershuny* was then the basis *far Dade County* v. *PeM,* 664 So.2d 959,960 (Fla. 1995), repeating the sameprinclple and Ihe derogation canon.[4] We are still talking about *statutes,* not rules, being read under (he derogation canon.

The purpose of walking through these supreme court decisions on Ihe construction of *statutes* providing for attorneys fees is (o make clear that all of them Involved *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 attorneys fee statutes. That distinction is central in consideringthecourt'smost recent decisions requiring strict construc tion **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 **thai** "because ihe offer of judgment statute *and rule* are in derogation of the common law rule that each party pay its own fees." fe.s.] 049 Sd.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.[5] Thus Ihe use *of penal* to justify strict construction of *rules of procedure* was dropped Into Florida jurisprudence like a *dens ex machina.* The court's implication *ad statutory* canon's strict construction to a rule of procedure is unprecedented.

1 repeat, it Is also incoherent. Unmentioned in these opinions but lying elsewhere in the legal corpus is the court's earlier exercise of its formal rule-making power in which it adopted for the rules of civil procedure their own universal interpretive principle. This rule says: "These rules shall be construed to secure *ihe Just,* speedy, and inexpensive determination of every action." [e.s.] Fla. R. Civ. P. 1.010. The commentary to rule 1.010 explains;

> "The direction that the rules 'shall be construed to Becure the Just, Bpeedy, and inexpensive determination of every action' has two courses. It is, first, a direction that if a rule needs interpretation, *the* ***stated objective is the guide.*** **Ihe direction recognizes that** ***procedural law is not an end In ilse(f; it h only th e means to an end.*** **And that end** is Ihe proper administration of the substantive law. Procedural law fulfills Us purpose if the substantive law in thereby administered In H 'just, speedy, and inexpensive' manner.... It is, next, a direction that each rule shall be applied witli that objective in mind, especially where . the court may exercise a Judicial discretion." [e.s. j

30 FLA. STAT. ANN. 11 (1985). In short, the supreme court's formally Bellied principle for Interpreting therules is not one of strict construction at all—mechanically striking down every failure to follow procedural rules—but is instead an equitable guideofjustapplicatinn for all the rules ("lhese,rules").

Not long after the ndopllonof the niles, the court explained why the principle of a "just" conslructlon was applicable even in *criminal* cases:

> " "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 proceduml irregul arities occur, the eiophasis is on determining whether anyone was prejudiced by the departure. A defendant Is entitled to a fair trial, not a perfect trial.'" [CO.]

Lackos v. State, 339 So.2d 217,219 (P)a. 1976). *Lackos* formulated the following standard for violations of the requirements of procedural niles: "|wje agree that a showing of prejudice should be a condition precedent to undertaking the kind of procedural niceties envisioned by [prior decisions *strictly enforcing apivcedural rule]"* [e.s.] The court has since repeated the same principle *mState* v. *Anderson,* 537 So.2d 1373,1375 (Fla. 1989). Even more recently—in *HpoU-Willis Shaw* holding—the court reaffirmed the *Lackos* principle iu *State v. Clements,* 903 So,2d 919,921 (Fid. 2005). TWs interpretive principle of excusing technical defects that do not affect tiie substantive rights of the parties contrasts starkly with the use of both the derogation and penal canons, which the court has used in interpreting attorneys fees statutes to require strict application to "technical defects" nml "procedural irregularities".

The supreme court's abrupt change in *Willis Shaw, mu\dy contrary* ' to its own prior precedent settling the same issue differently, was not justified by the court. It is slated in a single sentence without further comment. Hence *Willis Shaw* has all the earmarks of a stealth obliteration of settled precedent. On the other hand, we were recently taught that the supreme court does riot overrule itself without expressly saying so. *Putyear v. State,* 810 So.2d 901,905 (Fla. 2002). We were Instructed that:

> "Where n court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement, on the same specific issue, the court Is to apply our express holding in the former decision until such time as tin's Court recedes from the express holding. Where this Court's decisions create this type of disharmony within the case law, the district courts may utilize their authority to certify a question of great public importance to grant this Court jurisdiction to settle the law.".

810 So.2d at 905-06. It bears remembering that *Lackos* actually directly considered and fully explained which interpretive principle should be applied to procedural niles, while *Willis Shaw* simply introduces strict construction of a rule without ever mentioning *Lackos.*

If one stops with *Willis Shaw,* it might seem that *Lackos* has been cast aside. If one continues on to *Clements* it would seem that/.«dx Is still controlling. Has the court retreated from the policy employed *"mLackosmd Clements!* If the retreat is only forniles about idtornoys fees, is there a coherent justification for different treatment of procedural rules for determining attorneys fees?" If rules about fees are to be strictly construed because they are thought penal, why not also rules involving other sanctions in the civil rules? Indeed, why not rules providing for dismissal of claims or defenses?

Eveumoretelllng,however,J8tliecentralquestioiii'alsedbylVir7//,y *Sltaw:* if the *Lackas-Clemtnts* interpretive principle about just application could be properly applied in criminal caBcs—where punishment is the very purpose—what is the Justification for carving out a contrary principle in civil cases just because attorneys fees are helnft imposed'/ One struggles to grasp the thought that the court thinks attorneys fees are more pennl than Incarceration mid criminal finesi I reiterate, *Wills Shaw* and *Lamb* are not coherent with the surrounding body of law.

The derogation canon is ill-suited to rules of procedure. The supreme court's power to adopt niles is limited to "practice and procedure in all courts...." Art... V., § 2(a), Fla. Const. The court hns itself made clear that court rules can control only procedural matters and cannot niter substantive law. *flmmons v. Combs,* 608 So.2d 1,3 (Fla. 1992).Therefore, if a particularapplicationofarule would effect a change in Bubslanli velaw, themle is invalid to that extent and cannot be so applied. If the rule has no effect on substantive law no matter how it is applied, there is no reason to insist on a strict interpretation or application. Consequently Hie derogation canon—created for *statutory* changes in substantive common law—lias no logical purpose or use In the interpretation of mere rules of procedure. *See also Blankfeld* v. *Richmond Health Care Inc.,* 902 So.2d 296,305 (Fla. 4th DCA2005) (Farmer, J., concurring) (re historical origins of substantive canons).

On the other hand, when statutes must be strictly construed, it really means that the statute may not be extended or enlarged by judicial cons tmction or interpretation. *See, e.g., Lee v. Walgreen Drug Stores,* 10So.2d314,316(Fla. 1942) ("Such statutes mustalwaysbe construed strictly and are never to be extended by implication."). Omissions or gaps in the statutes should not be filled by judicial construction. In other words, section 768.79 should be read to allow fees only in the circumstances stated clearly in the statute. Judges should not broaden the statute's realm by construction or interpretation. In the end, strict construction should have no greater application than that.

A litigant cannot seek attorneys fees from an adverse party without n statutory or contractual entitlement. See/'.A.G. v. *A.F.,* 602 So.2d 1259, 1260 (Fla. 1992); *Florida Ratients Compensation Fund* v. *Rowe,* 472 So,2d 1145,1147-48 (Fla. 1985); Mrf« v. *Benjamin Foster Co,,* 192 So. 602,604 (1939); B/<« v. *Orange Belt Securities Co.,* 182 So. 892 (193 8). Hence a party planning to seek such fees wil I, at some point, have to identify the substantive bas is for fees. Under mle 1.442, an offering party is to "identify theappllcableFloridalaw under which ' [the proposal] is being made." Fla. R. Civ.P. 1.442(c)(l). Identification of the applicable law at that point helps give the offeree a signal—if one is truly needed—that the offeror may use the offer later as a basis for an award of fees under section 768.79?

But the court lias not explained how a procedural deficiency in a UtlgantVo/fer could have any effect on the underlying substantive entitlement to such fees. Awarding fees in this vase in spite of a failure of theoffer to identify the statute creating the entitlement to fees does not extend the statute's substantive readi 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 npply theniles justly and equitably, not strictly. Discretion to forgive harmless *mle* violations Is therefore clearly *not inconsistent* with the strict conslniclion of attorneys fee statutes. vSo the truth is that there Is no justification for strict construction of rule 1.442.

Actually, the real problem with this rigid interpretation in regard to issues of attorneys fees has nothing to do with hermeneutlcs anyway. The substantive provisions of section 768.79 as to the entitlement to fees are clear and unambiguous, requiring no mterpretalion.J think the essential difficulty arises from something unspoken in these opinions, nnd it is this: the offer of judgment statute is functionally and unfairly one-sided.

The statute Is biased in favor of (hose who are being sued for money damages—who alone can make nominal offers merely to set \ up a claim for attorneys fees when the litigation is over. There is no comparable offering stratagem whereby claimants can make nominal offers without risk, merely to set up an entitlement under section 768.79 to attorneys fees. Inn personal injury case involving disputed liability and significant damages, a lawyer'a advice to relect a nomin&V

offer served at the beginning of the lawsuit is not unreasonable.' Claimants' lawyers have understandably been arguing for a legal rationale to escape the application of section 768.79's bias nnd unfairness. I think many judges are discomfited by this unspoken truth.

Yes, section 76B.79 is clear but unavoidable when the qualifying facts appear. Unhappily, theplain text of the offer of |u dgment statute betrays a legislative purpose to have it mechanically and routinely applied whenever there is an offer followed by a qualifying outcome. *See WFriday's Inc. v. Dvorak,* 663 So.2d 606, 614 (Fla. 1995) (Wells, J., dissenting) (section 768.79 eliminated any discretion in entitlement to attorneys fees). And yes, this one-sided disadvantage of the statute is something only the Legislature can correct.

But instead of illuminating the statute's invidious effects by open discussion to urge a legislative correction, the court' 8 reliance on t he ¦ derogation and penal canons obscures this bias in a fog of pointless talk about Btrict construction. Strictly construing the stnlule^-beyond refusing to extend its reach—does absolutely nothing to correct ilo intrinsic unfairness. Ironically, the kind of strict construction usually applied in the cases actually ends up visiting even moreunfaimess on some claimant* who are deprived of fees because of a "technical defect" or "procedural irregularity" in an offer that had no effect on the offeree.' *See Hauss v. Waxmcm,* 914 So.2d 474,475-79 (Pla. 4th DCA 2005) (Farmer, J., concurring) (failure to identify sectiori768.79 in otherwise qualifying offer had no effect on offeree who had preceded such offer with its own offer obviously intended merely to setup right to attorneys fees if outcome favorable to defendant).

Tlift decisional incoherence traces directly from conceiving awards of attorney fees under section 768.79 as *penal.* The truth is that the offer of judgment attorney fees just another litigation cost *Cf. Argonaut Ins. Co. v. May Plumbing Co.,* 474 So.2d 212, 214 (Fla. 1985) ("prejudgment interest is merely another element of pecuniary damages"); *sea also* David L. Man, *Ihe 1996Amendments to Florida Rule ofCivil Procedure 1,442; Recon-a Decade of Collusion,* 71 FLA. BAR J, 32, 33 (Aug. 1997) ("when entitlement to fees is a remedy provided by substantive law, the legislature has implemented its sovereign discretion to create a right to fees under the occurrence of certain circumstances. The .interest vindicated by the assessment of such fees is not the proper administration of Judicial procedures) but rather the public policy goals that motivated the legislature's creation of the entitlement." [if.o.]). The offeree is paying the cost of exercising the privilege of continuing to litigate after a qualifying offer has been made.[10]

Although the attorneys fees canbe onerously high, the imposition of fees under section 768.79 operates no more punilively (except for its inequality) than other consequences experienced routinely and frequently in ordinary litigation." There are any number of statutes for prevailing party attorneys fees. CostB are awarded against the loser, but they are not penal in their application in civil litigation. Interest itself is a consequence borne by every losing parly, but as *Argona\tt* ¦ shows it is not imposed as punishment, only a consequence of being liable.

This characterization of attorneys fees as penal Is truly mystifying. The ıposition of fees under section 768.79 is not based on misconduct by yone. Fees ore not imposed because theparly or lawyer has engaged In isbehavior or improper or prohibited conduct. Parties have a right to igate claims or defenses in these cases. *See* Art. 1,6 21, Fla. Const, ɔurts shall always be open to redress injury). Guessing wrong in a hard se on liability or how much the jury will Ik award is not misconduct. ıe conduct leading to an award of fees H under this statute is not even *ılumprohibinim,* let alone *malum in xe.* it is not something for which the *w* is designed In punish a party or lawyer. The imposition of fees under ction 768.79 really functions no differently than prevailing party torneys fees provisions, except that it does nolapply to all prevailing ırlies—only the party making a qualifying offer.

In the sense it is used by me court in characterizing (he statute, there 1B a penal nature inherent in all law. Indeed the central feature of the entire American legal system is Us coercive effect. The system functions on legal coercion. The President may say "the Supreme Court has made its decision; now let them enforce it" in a dispute over the Indian tribes, but for all other litigants there is final process, a Sheri f f or a Marshal, and a method for carrying out a final judgment or a decree. Every time the court enters a money judgment, an injunction or n decree, every time it imposes costs, feeB and interest, it vindicates the judgment with the coercive force of final process.

As a matter of routine coercion of law's decisions, individuals can have their property taken in a levy of execution, they can be held in contempt, they can be made to pay a fine, and they can even be incarcerated. All of this could surely be described *a&penalin* the sense that *Willis Shawmes* the term. Properly understood, the imposition of fees under section 768.79 is just one more legal coercion to vindicate ' a specified outcome fixed by the Legislature's choice of substantive policy In civil litigation. If judges are now to justify limiting or nvoiciing soni eoulconies by labeling *[\vzmpenal,* then therationaliza-tion is sayingbolh far too much and yet nothing at all. All law *iapenal* in the seas"'- *Willis Shaw* uses the

As for strict or liberal construction, I think it is well ««« time to lay aside this odd relic from centuries past when thecommonlaw was the source of lnw and social policy. *See Blankfeld,* 902 So.2d at 303-06 (Farmer, J,, concurring) (discussing origins of substantive canons). There is no longer much reason to be suspicious of any legislative change in the common law because there is not much of it left unaffected by Btrttules. The strict/liberal interpretive canons have become illusory tests in the interpretation of legal writings—whether statutes, rules or contracts. The goal in all such instances should be to interpret these writings correctly, to construe them as they were meant by their source, author or assenting parties. These strict and liberal canons may seem on the surface to point in one direction or another, but they almost never lend any real insight into how a set of words should be applied in a specific circumstance. *Blatikfeld,* 902 So.2d at 303-06. More frequently, the elastic notions of strict and liberal construction become tendentious, usually ending up as a post-hoc justification for a particular application by judicial fiat rather than a true illumination of how tin interpretation was reached.

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)(l). 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 \inder anything but the offer of judgment statute? No one in this case could have been under any misimpression as to the basis for the offer and that 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, To paraphrase the cniirt'sLflcfaw justification, litigants In dvil cases are entitled to a fair application of the rules, not a perfectly strict one.

In this case, one might nrgue that the majority opinion Is in conflict with *Willis Shaw* and *Ijtmb.* But It should more accurately be said that it is in accord with *Lackos* and *Clements.* Based on *Puryear,!* think we should follow the latter path.

There is no denying, however, that the majority opinion is in express conflict with cases in other districts holding that the mere failure to stale the statute Is fatal to an award of fees otherwise created by a qualifying offer and rejection. *See e.g. McMullen Oil Co., Inc. v. 1SS International Service tystem,* Inc., 698 So.2d 372,373 (Fla. 2d DCA 1997); *Murphy v. Tucker,* 689 So.2d 1164,1165 (Fla. 2d DCA 1997); and *Pippin* v. *Latosyndd,* 622 So.2d 566,569 (Fla. 1st DCA 1993). To those I woul d add our own decisions in *Grip Development', Ji\ff\ey v. Baggy bunny ;Inc,* 733 So.2d 1140,1141-42 (Fla. 4th DCA

1999); and *Cohen* v. *Arvin,* 078 So.2d 403,405-06 (Fla. 4lh DCA 2004), which involved some kindred variation to n failure lo identify the statute in the offer.

If the supreme court exercises jurisdiction over this case, 1 hope it will reconsider its policy of strict construction of procedural rules like rule 1.442 and make clear that strict.construction of attorneys fees . statutes means only that judges buve no power of Interpretation to extend tuch statutes beyond their stated terms and nothing else. I urge the court to exchange the strict and liberal canons for the time-honored tests of text and the standard meanings of language in general use, as well as purpose and context. If these fall, then there are the linguistic canons, the rule of lenity, and other traditional guides to meaning.

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v. *Waxman,*914 *8oM* 474 (Fl«. 4lli DCA2005) (Farmer. I., concurring).

MiiecmiltlieldlhaUti-ictcoiistmctioiideirandsHdlffeiBnliBledjulntpioposal.evoii .when one defendant's alleged liability li purely vicarious, [3]tn Ibis Instance, the term *acts* refers lo statutes.

'There wa> no need lo interpret the iiittiite because ill plnla meaning authorizedfees only In actions for wages and Pen's had sund for reinstatement

'See aho Bonus v. Kellogg Co., 846 So.2d 568,571 (Fla. 2d DCA 2003) ("His well established lliat the offer of Judgment itntute nnd (lie related rule must be sti Icily coiiittued because Uiey ore In derogation of common law,").

'See aho Fla. R. Civ. P. 1.525 (setting dine limit for filing motions for attorneys feel).

ilia not uncommon for attorneys fee statutes to contain procedural provisions. *See* 1968.79(2)(a), Fla. Slat. (7.005) (offer niusl be in writing and state that It Is being made under this statute). These procedural aspects ore beyond the Legislature's authority, however, nnd should be considered as surplusage; nnd die controlling procedures are - those established by the supreme comt under Its ivile-makiug power in rules 1.442 or ,1.525. *S»e* Ail. V, 12(a), Pla. Const.; *see aho Gulliver Academy Inc. v. Bottek,* 694 So.2d 675 {Fla. 1997) (In spite of 30-day time limit for Tiling motion for fees established in section 768,79(6), trial court could grant open-ended extemlonofilme for filing such motion undenule 1.090).

*'BiaseetilfyerSodlnc. v. WllltsSlm\vExprmI>ia,W*So.2d 1050,1054 (Fk 1st DGA 2002) ("section 768.79 Imposes a penalty for unreitsoiiiibly rejecting a settlement offer."). It Is obvious, however, Unit under this statute a rejection does not have to be unreasonable, 'lite statute merely requires that It be undone by die finnl outcome.

'As applied in some fee decisions, it seems that Ihe le/in *stria* Is really being confused will) *severe* and *stern. See e.g. McMullen Oil Co. v. ISSInl* 7 *Sen; System,* /HC.,698 So.2d 372,373 (Fla.2d DCA 1997); *Muipliy v.* 7)ic*«r,689So.2d 1164,1165 (Fla. 2d DCA 1997); and *Pippin v. Latosynskl,* 622 So.2d 566,5C9 (Fla. 1st nCA 1993), as well as our own decisions In *Giip DeveU>i>mem;Jaffiiiv* v, *Baggy Bunny, Inc.,* 733 So.2d 1140,114142 (Ha. 4th DCA 1999); and *Cohen* v. *Anin,* 078 So.2d 403, 405-06 (Fla. 4lh DCA 2004), all of which Involved failures to stale the statute ur some near vnriant, rather Uian-a fiiilure to show entitlement under a stnlute or contract,

"Nonetheless, it is Important to perceive that this coat can be a significant detriment, one that Is capable of chilling nccoss to justice.

»qC *TOf Friday* Inc. v. Dvorak,* 663 *So2A* 006,613 (Fla. 1995) fin a given case, the court could Justifiably reduce the amount of Ihe attorney's fee In be assessed ugAlnst ' a severely injured plnlnliff who suffered nil adverse verdict after lejBctlng a small settlement offer. By die same token, the ootnt could reasonably conclude that a defendant with a small liability potential who rejected A large settlement offer should pay only a reduced fee even though the verdict ultimately exceeded the offer by more than twenty-five percent."). Unfortunately, It is not clear to me Ihat trial judges are using their control over die amnuntof such fees to reduce the bias and unfairness I u the statute.

Garnishment—Exemptions—Creditor complied with statutory requirements when, upon service of debtor's clnims of exempt l»u, creditor timely served sworn documents denying entitlement to exemptions—Creditor's replies were sufficient to "contest" claims of exemption, mid trial court erred when It dissolved write of gnrnbiunent on ground thnt creditor's responses merely dented tininis of exemption Instead of "contesting" them

nreCADlBCOMPANY.asABslgneaofFimUiiloiiNallonalHnnkofPIorlila.flom the FIJ1C, as receiver for Southeast Bank, N.A., A])pellant, v. PEOASUS RANCH, INC., WILLIAM R. PONSOLDT and MAIUANR L. PONSOLDT. Appellees. 4th District Case No. 4DO5-1636. March 1,2006. Appeal ftom the Circuit Com t for the Nineteenth Judicial Circuit, Okeechobee County; Robert R. Makeumon, Judge; L.T, Case No. 9.1-705 CA. Counsel: Keith A. Graham of Marchenii & Grahnm, P.A,, Orfondo, for appellant. Louli E. Lazem, Jr., of Wright, Ponsoldt & Loze&u, L.L.P., Sluait, for appellees.

(MAY, J.) A creditor appeals an order dissolving seven writs of garnishment. It argues the court erred in finding its replies were insufficient to comply with the requirements o f section 77.041(3), Florida Statutes (2004). We agree and reverse.

In an attempt to execute on *a* judgment against Ponsoldt and his i wife, the creditor Cadle obtained post-judgment writs of garnishment * and served ihenron seven garnishees. Ponsoldt timely answered the writs using **the** form slatutorily authorized in section 77.041(1), (2), Florida Statutes (2004). He claimed the assets in the possession of the garnlshees were exempt, pursuant to chapter 222, Florida Statutes (2004). Specifically, as to assets possessed by four of the garnishees, Ponsoldt claimed an exemption for wages owed to him as "head of family," pursuant to section 222.11, Florida Statutes (2004). As to assets possessed by three other garnlshees, Ponsoldt claimed the exemption for life insurance or annuities, pursuant to sections 222.13 and 222.14, Florida Statutes (2004).

Cadle timely replied to Ponsoldt's claims of exemption by filing 8worn, notarized documents, pursuant to sections 77.041(3) and 222.12, Florida Statutes (2004). The first reply denied the facts allegedhi the claims of exemptions for the first four garnishees. Cadle's reply to Ponsoldt's claim of exemption as to the writs against the remaining three garnishees consisted of a separate document for each garnishee, - denying the claim of exemption,

Ponsoldt moved to strike Cadle' 8 replies, At the hearing, Ponsoldt argued that Cndle'g replies were defective on their face because they failed to comply with section 77.041(3) because he had relied on section 77,041(1) to make his claims of exemption. Specifically, Ponsoldt maintained Cadle's responses merely denied his claims itistead of "contesting" 1hein and therefore did not technically comply with seclion77.041(3), The trial court granted Ponsoldt's motion and dissolved the writs of garnishment against the seven garnishees.

We review orders construing statutes, such as those controlling garnishment and claims of exemption, *de* HOW). *See Slate* v. *Bunts,* . 875 So. 2d408,410 (Fla.2004) (citing*Stalev,* Gfagmary«r,789 So. \ 2d 297,301-02 n.7 (Fla. 2001)).

Cndle argues the trial court erred when it found Cadle's sworn documents facially deficient, thereby denying Cadleof en evidentiary hearing where Ponsoldl would have had the burden of proving his entitlement to the exemptions. Cadle maintains that its replies satisfied the plain meaning of "contest" and "denial of facts" under both chapters 77 and 222, Florida Statutes (2004). Ponsoldt continues to' maintain that Cadle's replies were Insufficient.

A simple reading of the two statutes reveals how chapters 77 and 222 Interrelate. We read them *in pan materia,* relying on the more specific statute to control the more general one. *Ortiz v. Dep't of Health,* B82 So. 2d 402,405 (Pla. 4th DCA 2004) (citations omitted). Chapter77 sela forth general procedures for garnishment. Chapter 222, on the other hand, exempts certain assets and sourcesof income from garnishment. *See Miami Herald Publ 'g Co. v. Payne,* 358 So.2d 541,542 (Fla. 1978). Section 222.11 establishes the "head of family" exemplion. § 222.1 l(l)(c), (2)(a) & (b), (3), Fla. Stat. (2004). Exemptions for lire insurance proceeds and annuity contracts are provided by sections 222.13 and 222.14.

In addition to authorizing the exemptions, chapter 222provides a process for claiming the "bead of family" wage exemption without reference to chapter 77. *See* § 222.12. But, chapter 222 does not provide n similar process for insurance and annuity exemptions.[1]

In formulating its exemption laws the State lias an interest In preventing "owners of exempt property and then- families" from being "reduced to absolute destitution, thus becoming a charge upon the public." *Slatcoffv. Dezen,* 76 So. 2d 792,794 (Fla. 1954) (en bane), To protect that Interest, the legislature enacted section 77.041, streamlining procedures for garnishment proceedings. 13 Fla. Jur.2d, Creditors' Rights & Remedies § 4 (Supp. 2003).

Section 77.041[1] provides lhat wheua writ of garnishment is issued, the clerk shall attach antJtice, and a "Claim of Exemption and Request for Heating" form. B 77.041(1). The form consists of a tick **Ust** of