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

REPLY BRIEF OF PETITIONER ON THE MERITS
ROSE G. CAMPBELL

(With Appendix)

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

REFERENCES

13,
14

TABLE OF CITATIONS (Continued)

POINTS ON APPEAL

I. GOLDMAN's position would not only undo the current measure of certainty in the law, but would encourage non-merit-based litigation regarding the validity of proposals for settlement.

II. Rules of Procedure are not inherently liberal in nature.

III. GOLDMAN's argument that references to Section 768.79 are now superfluous is misguided.

IV. GOLDMAN's proposed solution is inappropriate for his perceived problem.

V. GOLDMAN's Brief ignores the effect of Florida Statute Section 768.79.

REPLY ARGUMENT

GOLDMAN's Brief provides a history of Florida offer-of-judgment law, and then urges this Court to now adopt a liberal interpretation of Florida Rule of Civil Procedure 1.442 by opining that the reasons for prior pronouncements of strict construction no longer exist. That position is elementally flawed in several respects.

I. GOLDMAN's position would not only undo the current measure of certainty in the law, but would encourage non-merit-based litigation regarding the validity of proposals for settlement.

GOLDMAN's argument begins by imaginatively describing the particularly-active history of Florida offer-of-judgment law as a "well traveled path." Respondent's Brief at 9. His suggestion for the future of that path, however, is for it to completely reverse course and travel down a slippery slope.

Specifically, if there is one thing that may be said about the history of offer of judgment law, it is that this Court has repeatedly reminded the bench and bar that valid offers must strictly comply with the terms of both the statute and rule.

For example, in Willis Shaw Exp., Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278–79 (Fla. 2003), the Court held that "[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."

Then, when the district courts began to opine that the Willis Shaw apportionment rule did not apply to cases of pure vicarious liability, this Court instructed the bench and bar that a strict construction of Rule 1.442's language requires apportionment in every case. Lamb v. Matetzschk, 906 So. 2d 1037, 1041 (Fla. 2005).[1]

That repeated emphasis on strict compliance and certainty is in accordance with the purpose behind offer of judgment law – to promote settlements and avoid litigation. E.g. MGR Equipment Corp. v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262, 1263-64 n. 2 (Fla. 1999)(noting that rule 1.442 "mandates greater detail in settlement proposals, which will hopefully enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation"). See also, State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1078 (Fla. 2006)("A proposal for settlement is intended to end

[1] The Court has reaffirmed the strict construction principle in other contexts, as well. For example, in Sarkis v. Allstate Ins. Co., 863 So. 2d 210, 223 (Fla. 2003), the Court held that attorney's fee multipliers could not be used in offer of judgment cases, stating: "Neither section 768.79 nor rule 1.442 authorizes the use of a multiplier in determining the amount of attorney fees as a sanction for the rejection of an offer. Applying a strict construction of the statute and rule, a

judicial labor, not create more.").

Perhaps more importantly, that repeated emphasis on strict compliance and certainty is beginning to have the desired effect. Recently, in Graham v. Peter K. Yeskel 1996 Irrevocable Trust, 928 So. 2d 371, 374 (Fla. 4th DCA 2006), the Fourth District noted: "Before Lamb, some district courts of appeal loosely applied the form and content requirements of rule 1.442(c), asking whether it was fair or logical to apply the requirements of the subsection in a given case." Heeding this Court's decisions, however, the court then noted: "In Lamb and rule 1.442(a), we believe that the supreme court, like Dr. Seuss's Horton the elephant, meant what it said and said what it meant . . . ." Id. at 373(citing Dr. Seuss, Horton Hatches the Egg (Random House, Inc., 1982)).

GOLDMAN's position in this appeal is the effective undoing of all of that precedent. Like the former "loose application" of the Rule noted by the Graham court, GOLDMAN would have trial and intermediate appellate judges return to the practice of speculating as to whether a given deficiency is really a material or prejudicial one under the facts of the case at hand.

That practice would have the very immediate effect of

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multiplier therefore cannot be applied under section 768.79 or

undermining the entire purpose behind offers of judgment. Civil litigants would again find themselves embroiled in rounds of non-merit-based litigation, as they disputed the validity of borderline or arguable offers.

For example, Rule 1.442(c)(2)(A) states that every proposal "shall name the party or parties making the proposal and the party or parties to whom the proposal is being made." In a case where there is only one plaintiff and one defendant, is that really a material term? Could either party really claim prejudice if the proposal does not name the individuals involved? It seems to be such a fundamental requirement, yet under GOLDMAN's loose analysis of the Rule it is an issue which would have to be litigated.

Perhaps more importantly, would apportionment requirements still apply in cases where a single plaintiff makes an offer to two defendants, one of which is solely vicariously liable for the other? This Court answered that question only one year ago in Lamb, but its decision was expressly based upon a strict construction of Rule 1.442's requirements. Lamb, 906 So. 2d at 1041. If that strict construction no longer applies – as GOLDMAN suggests – does the Lamb decision no longer apply,

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rule 1.442 . . . ."

either?

Furthermore, since the outcome of many of those disputes under GOLDMAN's analysis would hinge on the facts of the particular case, it would be difficult – if not impossible – for any one decision to create precedent that could avoid litigation in other subsequent cases. Accordingly, GOLDMAN's position is simply contrary to the purpose and intent of offer-of-judgment law.

II. Rules of Procedure are not inherently liberal in nature.

Aside from the detrimental effect which GOLDMAN's position would have on the law, her statement of the vehicle for the Court to achieve that effect is unsound. As noted above, GOLDMAN has apparently adopted Judge Farmer's position, from his concurrence below, that there is no reason or precedent for the strict construction of a Rule of Procedure. See Goldman v. Campbell, 920 So. 2d 1264, 1268 (Fla. 4th DCA 2006). In the Initial Brief, CAMPBELL described that – contrary to Judge Farmer's statement – the precedent for strict construction has existed just as long as the Rules themselves. See Merchants' Nat Bank of Jacksonville v. Grunthal, 22 So. 685, 687 (Fla. 1897); Florida Land Rock Phosphate Co. v. Anderson, 39 So. 392, 397 (Fla. 1905); Hoodless v. Jernigan, 41 So. 194, 196 (Fla. 1906);

Syndicate Properties v. Hotel Floridian, Co., 114 So. 441, 442 (Fla. 1927); Bryan v. State, 114 So. 773, 775 (Fla. 1927).

That precedent, as most recently reiterated by this Court May 11, 2006, is "that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction." Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 599 (Fla. 2006). More importantly, that precedent is logical and well reasoned.

Each Rule of Procedure has a purpose, and each uses carefully-drafted language to fulfill that purpose. In some instances, a rule may describe an act that is intended to be optional or discretionary, and it will thus use language consistent with that intent. For example, Rule 1.270 states that trial judges "may" consolidate or bifurcate actions for trial. Given that language, the district courts have consistently interpreted the decision to be a purely discretionary one. Most recently, in Commercial Carriers Corp. v. Kelley, 920 So. 2d 739, 740 (Fla. 5th DCA 2006), the court noted the effect of the Rule's use of the word "may," stating:

> While an order denying a motion to consolidate is reviewable by certiorari, the ruling rests within the sound discretion of the trial court. Indeed, rule 1.270(a), Florida Rules of Civil Procedure, the rule governing consolidation, notes specifically

> that when actions involve common questions of law or fact, the court "may" order a joint trial, or "may" order consolidation, or "may" make such other orders as "may" tend to avoid unnecessary costs or delay.

On the other hand, Rule 1.420(e) states that, when an action has not been actively prosecuted within the Rule's terms, the court "shall" dismiss the case. Given that language, Florida courts have consistently concluded that the Rule's requirements are mandatory. For example, in Classical Financial Servs., L.L.C. v. G2 Resources, Inc., 898 So. 2d 251, 252 (Fla. 4th DCA 2005), the court noted that Rule 1.420(e) "specifically states 'shall dismiss,' and there is no discretion on the trial court's part."

Accordingly, the rules should be applied just as any logical person would interpret them when reading their language. Words like "shall" denote a mandatory requirement, while words like "may" denote a permissive one.

Relative to this case, Rule 1.442 states: "A proposal shall be in writing and **shall** identify the applicable Florida law under which it is being made." Fla. R. Civ. P. 1.442(c)(1)(emphasis added). The requirement that the proposal identify the applicable law is preceded by its own, dedicated modifier "shall." That is a clear directive that it is a

mandatory requirement, just as the related requirement that the proposal "shall be in writing" is mandatory.

GOLDMAN suggests that all language in all Rules should be given liberal construction, reasoning that there exists "the expectation that there will be no rigid construction of any Rule of Procedure and that trial judges must exercise wise and sound discretion to effectuate the objectives of the simplified procedure." Respondent's Brief at 15(emphasis and quotation omitted). That reasoning is unsound. The construction a rule receives does not depend simply upon its status as a rule – it depends on the language used within that rule. It would be nonsensical to use the word "shall" in a rule, and then construe it to denote only an optional provision.

Therefore, the Court should reject GOLDMAN's position that all Rules of Procedure, by their very nature, must be liberally construed. Rules, just like statutes, should be applied in accordance with their plain language. E.g. Saia, 930 So. 2d at 599("the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction").

Furthermore, in the preceding section, CAMPBELL described the detrimental effect that a relaxed interpretation of Rule 1.442 would have on offer-of-judgment law. The issue discussed

in this section adds a new dimension to that impact. If this Court were to decide that the word "shall" in Rule 1.442 does not connote mandatory conduct, where does that leave all other rules that use similar language? This Court used the word "shall" in Rule 1.525, and then in Saia explained that its intent was "to establish a bright-line rule to resolve the uncertainty surrounding the timing of these posttrial motions [for attorney's fees]." Saia, 930 So. 2d at 600(internal quotation omitted). If the word "shall" means one thing in Rule 1.525, and another thing in Rule 1.442, does that not send conflicting messages to the bench and bar? GOLDMAN's position should be rejected for that reason, as well.

III. GOLDMAN's argument that references to Section 768.79 are now superfluous is misguided.

In addition to the foregoing problems with GOLDMAN's argument, his Brief uses as its cornerstone the contention that references to Section 768.79 are no longer necessary in proposals for settlement because it is now the only statute of its kind. The implication there, apparently, is that all litigants will inherently know the nature and source of all proposals for settlement served upon them. That implication presumes much.

Specifically, attorney's fees awarded pursuant to a

proposal for settlement are sanctions intended to punish the unreasonable rejection of that settlement opportunity. E.g. Sarkis v. Allstate Ins. Co., 863 So. 2d 210, 218 (Fla. 2003)("attorney fees awarded pursuant to the offer of judgment statutes are sanctions. These fees are awarded as sanctions for unreasonable rejections of offers of judgment."). Given that fact, the law should ensure that litigants will always know and understand the effect of that document. For example, if a *pro se* litigant receives a proposal in the mail, he may not know — as GOLDMAN presumes — that he should look at Florida Statute Section 768.79 to see what should be done. If the statute is listed in the proposal, however, everyone who receives one will know where to look regardless of their legal sophistication.

The requirement thus serves an important function, in that it reinforces the entire purpose of proposal for settlement law. As noted above, proposals are intended to "enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation." MGR, 731 So. 2d at 1263-64 n. 2. If the law ensures that every party knows the source of the proposal — through a specific reference to the operative statute — even unsophisticated litigants will be able to understand the meaning of the document, know the potential

sanctions that could result, and thus concentrate more on a genuine effort to reach a reasonable settlement.

When the Legislature enacted Section 768.79, it included as one of the very first requirements of a valid proposal that it "must . . . state that it is being made pursuant to this section." §768.79(2)(a), Fla. Stat. Likewise, when this Court adopted Rule 1.442, it included the requirement that every proposal "shall identify the applicable Florida law under which it is being made." Fla. R. Civ. P. 1.442(c)(2)(A). Those related requirements retain their importance today even if Section 768.79 is, as GOLDMAN suggests, the only surviving basis for proposals for settlement under Florida law.

In short, the issue is not whether appellate judges or attorneys who have researched the issue for brief-writing purposes know the "well travelled path" of proposal-for-settlement law. The issue is whether the Rule and Statute are designed to ensure that every litigant knows what is expected to achieve a settlement, and what is expected before sanctions will be imposed. The Rule and Statute currently fulfill that purpose, and GOLDMAN's position should be rejected for that reason as well.

IV. GOLDMAN's proposed solution is inappropriate for his perceived problem.

GOLDMAN asks this Court to approve a relaxed interpretation of only 1 of the 13 uses of the word "shall" in Rule 1.442, based upon his contention that the particular one at issue describes a requirement that is no longer necessary under Florida law. As explained in the foregoing sections, his logic as to the means to accomplish that goal is unsound, and the result if he were to prevail is harrowing.

Simply stated, GOLDMAN's proposed solution is inappropriate for his perceived problem. Even if the Court were to agree with GOLDMAN that the requirement at issue has become superfluous, however, the answer is not to render an opinion which ignores the plain language of the Rule and alters the longstanding precedent of strict construction. The solution, if needed, would be to amend the Rule and statute as appropriate. Accordingly, the Court should reject GOLDMAN's position for that reason, as well.

V. GOLDMAN's Brief ignores the effect of Florida Statute Section 768.79.

Following the argument presented in GOLDMAN's Brief, all of the above discussion has related to Rule 1.442 and the effect of it's mandatory language. What GOLDMAN has completely overlooked, however, is that this issue does not concern Rule 1.442 in isolation. Proposals for Settlement have their genesis

in Florida Statute Section 768.79, as only the Legislature has the authority to enact such a penal, fee-shifting provision. E.g. State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1077 (Fla. 2006)(stating the fee-shifting provisions are "a matter of substantive law properly within the aegis of the legislature")(internal quotation omitted).

That statute specifies that, in order for a civil litigant to claim entitlement to attorney's fees, his offer "must: (a) Be in writing and state that it is being made pursuant to this section." §768.79(2)(a), Fla. Stat. Again, the word "must" indicates a mandatory requirement, and it is a requirement that is a substantive part of the fee-shifting provision.

Accordingly, contrary to GOLDMAN's contention, this case does not concern solely a "procedural rule which implements a substantive statute." Respondent's Brief at 13. The above-quoted portion of Section 768.79 does not describe the procedure for enforcing the proposal, it describes the mandatory substance of the proposal itself. If a civil litigant wishes to impose the fee-shifting sanction on his opponent, he "must" comply with those substantive requirements.

GOLDMAN does not dispute the longstanding rule that fee-shifting statutes must be strictly construed as they are in

derogation of the common law. Indeed, it would be virtually impossible for him to do so. E.g. State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1077 (Fla. 2006); Lamb v. Matetzschk, 906 So. 2d 1037, 1040-41 (Fla. 2005); Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003); Sarkis v. Allstate Ins. Co., 863 So. 2d 210, 218 (Fla. 2003).

In this case, GOLDMAN's Proposal not only failed to comply with a mandatory term of Florida Rule of Civil Procedure 1.442, but it also failed to strictly comply with a compulsory requirement of Florida Statute Section 768.79. It thus should have been declared unenforceable pursuant to the often-stated principle of strict construction, and the Court should quash the Fourth District's decision.

CONCLUSION

This Court should adhere to the principles of strict construction for fee-shifting statutes and rules, as outlined above, in the Initial Brief, and in the Court's own prior decisions, and accordingly quash the decision of the Fourth District in Goldman v. Campbell, 920 So. 2d 1264 (Fla. 4th DCA 2006).

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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