IN THE FLORIDA SUPREME COURT

SANDRA FROSTI,

Appellant/Petitioner,

v. Case No. SC07-122

LA VERNE CREEL, as personal representative
of the estate of WILLIAM H. HOUK

Appellee/Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION
ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF CASE AND FACTS

The relevant facts in this case are simple and undisputed. Unfortunately, they are not set out in detail in the lower court's opinion, however, they are set forth in the record. Plaintiff *served* a proposal for settlement on the defendant in the amount of $17,999 on March 22, 2001 and a Notice of Filing was filed with the Clerk specifically as required by the rule. Fla. R. Civ. P. 1.442. Long after the first proposal had expired, a second proposal was *served* on June 3, 2004 in the amount of $24,999 with the Notice being *filed* with the Clerk. No agreement was reached and the second proposal also expired. It is important to note that neither proposal had been *filed* with the Clerk although the appropriate Notice had been *filed*. A jury trial was held in which a verdict was returned in favor of the Plaintiff in the amount of $94,470.66 on August 12, 2004. On August 18, 2004 both original proposals were filed with the Clerk, but only for the sole and express purpose of enforcement and sanction. The Notice of Filing contained the following language:

> "COMES NOW Plaintiff, SANDRA FROSTI, by and through her undersigned counsel, and gives this its notice that on this date the Proposals for Settlement previously served upon counsel for Defendant, HOUK as provided in Florida Statutes Section 768.79 and Fla. R. Civ. P. 1.442 are being filed as required by aforesaid Rule and Statute for ***enforcement and sanction.***"

Thereafter, Plaintiff filed a timely Motion for Attorney Fees and Costs pursuant to Florida Statutes Section 768.79 and Fla. R. Civ. P. 1.442 and Florida Statute

Section 57.104. A hearing was held on Plaintiff's Motion for Attorney Fees and Costs and ultimately an Order entered by the court denying Plaintiff's motion related to fees. It is this Order Denying Plaintiff's Motion for Fees from which appeal was taken to the Second DCA. On December 20, 2006 the Second DCA upheld the trial court's ruling based on its prior decision in *Bottcher v Walsh* (A. 1)

The decision before the Court for review was rendered on December 20, 2006. On January 18, 2007 Sandra Frosti, Petitioner filed its notice invoking this Court's discretionary review pursuant to Article V, Section 3 (b) (4) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030 (2) (A) (vi). The Petitioner, Sandra Frosti's brief on jurisdiction follows.

SUMMARY OF ARGUMENT

Florida Rule of Civil Procedure 1.442 (d) provides "A proposal shall be served on the party to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule". Additionally, in section (i), "Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition for sanctions". The rule is silent as to any specific time parameter in which to "*file*" an expired proposal for settlement. In *Bottcher v. Walsh,* 834 So. 2d 183 (2DCA 2002), the Second District Court of Appeal announced a rule of law which provides that a proposal

for settlement that is prematurely filed is void. They did not define the term premature as the parties in that case conceded that they filed the proposals prematurely. Thereafter, the Fifth District Court of Appeal decided a case based upon similar facts and concluded that the failure to comply with the provisions of Florida Rule of Civil Procedure 1.442 (e) was immaterial and would not preclude the award of attorney fees. *Mills v Martinez,* 909 So 2d 340 (5DCA 2005). They certified the conflict with *Bottcher* to this Court, however, it appears that no appeal was taken.

In the case at bar the Second District Court of Appeal was again confronted with the undefined issue of *premature filing.* The facts presented in the *Frosti* appeal are different than the facts presented in *Bottcher* in that the proposals for settlement were filed more than a week after the return of a substantial verdict in a jury trial and for the express purpose of *enforcement and sanction. Bottcher* filed her proposals at the same time that they were served. In *Frosti*, the Second DCA affirmed an Order entered by the trial court which is based on the decision in *Lyn v. Lyn,* 884 So. 2d 181 (2DCA 2004).

In the case at bar, the lower Court expanded the reach of the extreme remedy of rendering void proposals for settlement deemed prematurely filed by including those filed post verdict. No court has defined what is *premature* and both the statute and rule lack any guidance as to the definition (See, Florida Statute 768.79

and Florida Rule of Civil Procedure 1.442). The Fifth DCA has refused to adopt the extreme sanction of rendering void prematurely filed proposals for settlement and has provided some guidance as to when entitlement begins. This piecemeal method of defining what might or might not be premature and the application of what each district court might believe is the appropriate remedy serves to illustrate the uncertainty that practitioners face and highlight the fact that these decisions are irreconcilable.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal certified by it to be in direct conflict with a decision of another district court of appeal on the same point of law. Article V, Section 3 (b) (4) of the Florida Constitution, and on Florida Rule of Appellate Procedure 9.030 (2) (A) (vi)

ARGUMENT

I. THE LOWER COURT'S DECISION ANNOUNCED A RULE OF LAW WHICH HAS BEEN CERTIFIED TO BE IN DIRECT CONFLICT WITH A DECISION BY THE FIFTH DCA.

It is well settled that this Court's jurisdiction to review decisions of district courts of appeal pursuant to Article V, Section 3 (b) (4) of the Florida Constitution, and on Florida Rule of Appellate Procedure 9.030 (2) (A) (vi) because of a

certified conflict with a rule previously announced by another district. The Second DCA announced a rule of law in *Bottcher v. Walsh,* 834 So. 2d 183 (2DCA 2002) which conflicts with a decision by the Fifth DCA in *Mills v. Martinez*, 909 So. 2d 340 (5DCA 2005). The conflict was previously certified to this Court but it appears no appeal was taken. The Second District was again confronted with another opportunity to confront the same issue which served as the basis for the previously certified conflict and again ruled in concert with its prior decision in *Bottcher*. This time in *Frosti v. Creel,* 943 So. 2d 1023 (2DCA 2006) the Second DCA certified the conflict with between *Bottcher* and *Mills* for resolution by this court.

The Second DCA provides little or no guidance as to specific basis for its decision in either *Bottcher* or the case at bar other than the decision is based on the "unforgiving nature" of the ruling announced in *Schussel v. Ladd Hairdressers, Inc.*, 736 So 2d 776 (4th DCA 1999). In that case the Fourth DCA was interpreting a provision of the rule Fla. R. Civ. P. 1.442 (b) that sets forth a precise time deadline as to when a proposal may be served *(No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier)* as opposed to an undefined, vague and indeterminable purpose related guideline presented by Fla. R. Civ. P. 1.442 (d). (*A proposal shall be served on the party to whom it is made but shall not be filed*

unless necessary to enforce the provisions of this rule) Id. It is important to note that the language of the rule provides for neither a specific deadline nor sanction for failing to comply with the undefined directive. *See generally, Fla. R. Civ. P. 1.442, see also, Fla. R. Civ. P. 1.442(1999)* prior to the 2001 amendment.

The Fifth DCA on the other hand has an opposite view and has eloquently and unambiguously interpreted Fla. R. Civ. P. 1.442. Specifically, the Fifth DCA said about rule 1.442:

> While *rule 1.442* is punitive in nature, its purpose is to sanction a party who unreasonably refuses to settle by shifting the payment of attorney's fees. See *Loy v. Leone, 546 So. 2d 1187 (Fla. 5th DCA 1989).* "Procedural rules should be given a construction calculated to further justice, not to frustrate it." *Singletary v. State, 322 So. 2d 551 (Fla. 1975)*; see [*8] also *Eastwood v. Hall, 258 So. 2d 269 (Fla. 2d DCA 1972).* "When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the trial judge should relax them, if it can be done without injustice to any of the parties." *In re Rutherfurd's Estate, 304 So. 2d 517, 520 (Fla. 4th DCA 1974).*
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> "Generally, where the word 'shall' refers to some required action preceding a possible deprivation of a substantive right, the word is given its literal meaning." *Stanford v. State, 706 So. 2d 900, 902 (Fla. 1st DCA 1998)* (relying on *S.R. v. State, 346 So. 2d 1018, 1019 (Fla. 1977),* and *Neal v. Bryant, 149 So. 2d 529, 532 (Fla. 1962))*. In Neal, we explained that in its normal usage, "shall" has a mandatory connotation. Id. Only when a particular provision relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the statute's directions are given merely with a view to the proper, orderly and prompt conduct of business is the provision generally regarded as directory. Id. (quoting *Reid v. Southern Dev. Co., 52 Fla. 595, 42 So. 206 (1906)).* [*9]

DeGregorio v. Balkwill, 853 So. 2d 371, 374 (Fla. 2003) (citations omitted) (emphasis added).

Mills, 909 So 2d at 343,344.

The Fifth DCA went on to hold that *Mill's* error in prematurely filing her proposal to settle to be such an immaterial matter and as a result allowed her to recover attorney's fees based upon her proposal for settlement. The court went on to reason:

> In *United States v. James Daniel Good Real Property, 510 U.S. 43, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993)*, the Supreme Court stated that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Id. at 63* (citations omitted). The Court reasoned that, when Congress had included various "promptness" requirements in certain statutes but included no penalty for failure to meet those requirements, the Court would not impose its own sanction of dismissal. *Id. at 64-65*. n4 We find that analysis to be compelling here, because it furthers, not frustrates, the purpose of the rule and statute. We believe *Mills's* violation of *rule 1.442(d)* was immaterial and certainly not prejudicial. The trial court followed *Bottcher*, as it was required to do. However, we disagree with *Bottcher* because such an interpretation of the rule defeats its very purpose. For these reasons, we reverse the order denying *Mills's* fee request and certify conflict with *Bottcher*.

The Second DCA has expanded the breadth of its holding in *Bottcher* by including the post trial filing of the proposals for settlement in *Frosti.* The Fifth DCA in *Mills* makes it clear that the remedy in *Bottcher* is not appropriate as it serves to defeat the very purpose of the rule.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the petitioner's argument. This Court adopts recommended rules and rule changes, and is and must be the final arbiter of their meaning.

WHEREFORE, Petitioner, Sandra Frosti, respectfully request this Honorable Court to exercise its discretionary jurisdiction over this cause, quash the decision of the Second DCA, and reverse the trial judge's denial of attorney's fees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I certify that this Petitioner's Brief on Jursidiction complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Scott Samis, Esquire and Jeffery M. Adams, Esquire

P.O. Box 1511, St. Petersburg, Florida 33731, this 29th day of January 2007.

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