IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-808
Lower Tribunal No(s).: 4D07-842

EDMUND MADY	vs.	DAIMLERCHRYSLER CORPORATION
Petitioner		Respondent

RESPONDENT DAIMLERCHRYSLER CORPORATION'S ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE FOURTH DISTRICT COURT OF

APPEAL STATE OF FLORIDA

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PRELIMINARY STATEMENT

The Petitioner, Edmond Mady, shall be referred to herein as "Mady" or Plaintiff. The Respondent, DaimlerChrysler Corporation, shall be referred to herein as "Chrysler" or Defendant. Florida's Proposal for Settlement Rule, Rule 1.442, Fla. R. Civ. P., and Offer of Judgment Statute, section 768.79, Fla. Stat., shall be referred to as "Proposal for Settlement." The Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., shall be referred to as the MMWA, the Magnuson-Moss Warranty Act, or the Act. Citations to the Appellate Record are indicated as "AR" followed by the page number(s). Citations to Mady's Appendix are indicated as "Mady App." followed by the index number(s).

STATEMENT OF FACTS AND CASE

Mady's Complaint in the trial court alleged defects involving a 2003 Dodge Viper ("Vehicle") that he leased from a dealership on May 25, 2003 AR 1-67. The gross capitalized costs of the Vehicle totaled at least $91,589.50. *Id*. Specifically, Mady alleged problems with the vehicle's steering and suspension system, the electrical system, the exterior trim, and the transmission. *Id*, ¶ 19. At no point in time did Mady ever submit any evidence to support any of these allegations. Notwithstanding, in his Complaint, Mady sought a return of all monies paid for the Vehicle, satisfaction of all liens, diminution in value of the Vehicle, incidental and

consequential damages, cost of repair damages, plus attorneys' fees and costs, inter alia. *Id*.

During the course of the litigation and early in the litigation, Chrysler made two Proposals for Settlement exclusive of attorneys' fees and costs to Mady, each accompanied by a release: November 7, 2005 in the amount of $6,500.00 and December 19, 2005 in the amount of $8,500.00. Mady App. A-2; AR, 140, 150. In each Proposal for Settlement, Chrysler denied that Mady was entitled to attorneys' fees and costs and specifically stated that no judgment was to be entered by the court upon acceptance of the Proposals for Settlement. *Id*.

Mady accepted the December 19, 2005 Proposal for Settlement. AR 155-157. Thereafter, Mady's attorney motioned the trial court for an award of attorneys' fees pursuant to the MMWA contending that Mady was the prevailing party as a result of his acceptance of the Proposal for Settlement. AR 169-200. On February 7, 2007, the trial court denied the Motion. AR 213; Mady App. A-1. The Fourth District Court of Appeal ("4th DCA") affirmed the ruling of the trial court and certified a conflict with the decision of the Second District Court of Appeal's ("2nd DCA") opinion in *Dufresne v. DaimlerChrysler Corp.*, 975 So. 2d 555 (Fla. 2d DCA 2008). This Court accepted jurisdiction of this matter based upon the conflict on August 21, 2008.

SUMMARY OF ARGUMENT

An award of attorneys' fees pursuant to the Magnuson-Moss Warranty Act lies in the *sole discretion* of the trial court, and may only be made if a plaintiff "finally prevails" in the litigation. Mady did not finally prevail in the litigation. Mady merely accepted a Proposal for Settlement in a nominal amount as compared to his original demand for damages. There was no trial and no judicial ruling on the validity of his claims. Nor was there any involvement by the trial court in disposition of the settlement offer made by Chrysler. Moreover, no evidence was ever introduced in the Record to support Mady's claims. As a result, Mady is not entitled to an award of prevailing party attorneys' fees pursuant to the federal one sided fee-shifting provision contained in the Magnuson-Moss Warranty Act.

The one sided fee-shifting provision of the MMWA provides for an award of attorneys' fees to a plaintiff who "finally prevails." The United States Supreme Court and its progeny have held that an award of attorneys' fees pursuant to a federal "finally prevails" fee-shifting statute requires a plaintiff to either obtain a judgment on the merits or obtain a court ordered consent decree. Mady obtained neither. The acceptance of a Proposal for Settlement does not confer prevailing party status upon a plaintiff sufficient for an award of attorneys' fees pursuant to the MMWA. In Florida, unless a Proposal for Settlement provides for the entry of judgment (consent decree), the trial court lacks the authority to enter a final judgment where the offeror was willing to proceed with payment and conclusion of

settlement. Without a court order that judicially alters the relationship of the parties, the court does not have authorization to make an award of attorneys' fees to a Plaintiff.

The legislative history cited by Mady does not alter the applicability of *Buckhannon* to the case at bar. Legislative intent is better derived from the statute itself. The Senate Report analysis cited by Mady references an award of attorneys' fees to someone "successful in litigation". The provision ultimately enacted in the MMWA that provides for attorneys fees requires the plaintiff to "finally prevail" in his action under the MMWA. Because no statutory reference point for the provision cited in the Senate Report exists, the holding in *Buckhannon* remains the binding precedent in this case.

Other courts including the United States District Court for the Western District of Virginia have followed the Buckhannon precedent and found that settlement agreements do not meet the prevailing party status established by Buckhannon. Furthermore, various federal courts continue to hold that where there is no final judgment entered on the merits and no consent decree, a settlement agreement is insufficient to confer prevailing party status pursuant to the MMWA. Case law in the State of Florida also supports the fact that a settlement is not sufficient to confer prevailing party status under its various prevailing party statutes.

The various cases cited by Mady do not apply to this case, do not support their theory or otherwise involve attorney fees provisions that are materially different than the attorney fees provisions at issue in *Buckhannon* and the case at bar. The United States Court of Appeals authority from the Ninth Circuit relied upon by Mady to support his position is the minority view and as such, should be disregarded since *Buckhannon* does not allow prevailing party status without judicial imprimatur.

The Proposal for Settlement at issue is not unambiguous. Florida's Proposal for Settlement Rule and Statute allow a Proposal to be made exclusive of attorneys' fees. Mady had the choice of rejecting the Proposal and pursuing the damages alleged in his Complaint. Instead, he elected to accept a nominal amount to resolve this matter in comparison to his original demand. His election to do so was a test to his resolve regarding the merits of his claim. He cannot now be heard to cry foul regarding something he knew Chrysler did not agree to concede.

Four of the five district courts of appeal in Florida have ruled upon the issue in this case. Chrysler submits that the 2nd and 3rd DCA decisions were wrongly decided. This Court should follow the reasoning in *Mady* since there must be a court ordered change in the relationship of the parties in order to be the prevailing party under the MMWA.

ARGUMENT

I. INTRODUCTION

This matter is before the Court to resolve the conflict between *Mady v. DaimlerChrysler Corp.*, 976 So. 2d 1212 (Fla. 4th DCA 2008) and *Dufresne v. DaimlerChrysler Corp.*, 975 So. 2d 555 (Fla 2d DCA 2008). [1] Specifically, the issue to be resolved is whether a Plaintiff is the "prevailing party" pursuant to the MMWA when he/she accepts a Proposal for Settlement that is made specifically exclusive of attorneys' fees, without conceding entitlement to same under the MMWA.

Chrysler submits that the *Dufresne* decision was wrongly decided and contrary to the United States Supreme Court precedent of *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598 (2001) and its progeny. The *Dufresne* decision inappropriately expands the *Buckhannon* holding by finding that Dufresne was a prevailing party for the purposes of the MMWA as a result of accepting a settlement offer on the terms proposed in Chrysler's Proposal for Settlement. A Plaintiff that accepts a Proposal for Settlement like that at issue in this case is not a prevailing party for the purposes of an award of attorneys' fees pursuant to the MMWA since there was no court ordered change in the relationship of the parties. *Mady* and *Buckhannon*.

[1] The 3rd DCA also came down with a decision on this same issue prior to the 4th DCA ruling in *Mady*. *San Martin and Nelson v. DaimlerChrysler Corp.*, 983 So. 2d 620 (Fla. 3d DCA 2008). The 3rd DCA's decision followed the reasoning of the 2nd DCA in *Dufresne*. Another case with this exact issue was also heard in the First District Court of Appeal ("1st DCA") *Ballato v. DaimlerChrysler Corp.*, 968 So. 2d 559 (Fla 1st DCA 2007). There, the Court issued a per curiam affirmed decision without opinion affirming the trial court's denial of an award of fees in that case on the same basis sought by Mady here.

II. MADY IS NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES UNDER THE MAGNUSON-MOSS WARRANTY ACT.

Chrysler submits that the acceptance of a Proposal for Settlement does not confer prevailing party status upon a plaintiff sufficient for an award of attorneys' fees pursuant to the Magnuson-Moss Warranty Act. Federal prevailing party fee-shifting statutes require either the entry of judgment against a defendant or a court ordered consent decree before a court may make an award of prevailing party attorneys' fees to a plaintiff. *Buckhannon* at 600. Mady obtained neither of these results. Mady accepted a settlement offer in an amount which was nominal in comparison to his original demand. There was no trial and no judicial ruling on the validity of his claims. Nor, was there any involvement by the trial court in the disposition of the settlement offer made by Chrysler. Moreover, no evidence was ever introduced in the Record to support Mady's claims.

A. THE MAGNUSON-MOSS WARRANTY ACT CONTAINS A FEE SHIFTING PROVISION WHICH IS ONLY APPLICABLE TO CONSUMERS WHO "FINALLY PREVAIL" AND IS SUBJECT TO THE DISCRETION OF THE TRIAL COURT.

The Magnuson-Moss Warranty Act is a one-way federal fee-shifting statute that prescribes content and minimum standards for written warranties. 15 U.S.C. § 2301 et seq.; *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1325 (11th Cir. 2001). Under the MMWA, if a consumer "finally prevails" in a breach of

warranty action, the court *may* award to the prevailing consumer "a sum equal to the aggregate amount of costs and expenses … determined by the court to have been reasonably incurred by the Plaintiff" *unless the court determines that an award of attorneys' fees is inappropriate.* 15 U.S.C. § 2310(d)(2) (emphasis added). An award of attorneys' fees is discretionary even if the plaintiff finally prevails. *Shaver v. Kawasaki Motors Corp., U.S.A.*, 614 S.E.2d 240, 243 (Ga. App. 2005) (award of MMWA attorneys' fees is discretionary); *Coey v. Dave Gill Pontiac-GMC, Inc.***,** 2005 WL 289457 at *5 (Ohio App. 10 Dist. 2005) (echoing the opinion set forth in *Coey* which emphasizes the discretionary nature of an award of attorneys' fees); *Virchow v. University Homes, Inc.*, 699 N.W.2d 499, 506-07 (S.D. 2005) (holding that a MMWA attorneys' fee award is discretionary even if consumer prevails); *Hines v. Chrysler Corp.*, 971 F. Supp. 212 (E.D. Pa. 1997) (finding that an award of attorneys' fees to consumer who prevails in action under federal MMWA is not automatic); *Hatfield v. Oak Hill Banks*, 222 F. Supp.2d 988, 990 (S.D. Ohio 2002) (stating that the court has the discretion to award reasonable attorneys' fees to prevailing parties in cases brought under the MMWA).

The MMWA addresses and encourages settlement and authorizes the creation of an informal dispute resolution mechanism. 15 U.S.C. § 2310(a). The MMWA does not, however, contain any provision holding that acceptance of a

settlement entitles a consumer to an award of prevailing party attorneys' fees, and the filing of a lawsuit pursuant to the MMWA does not automatically entitle a plaintiff to an award of attorneys' fees. *See generally* 15 U.S.C. § 2301 et seq. The MMWA only provides for the discretionary award of attorneys' fees if a consumer "finally prevails."

B. IN ORDER TO BE DEEMED A "PREVAILING PARTY" UNDER A FEDERAL FEE-SHIFTING STATUTE ONE MUST OBTAIN A JUDGMENT ON THE MERITS OR A COURT ORDERED CONSENT DECREE.

A party who "finally prevails" in an action filed pursuant to a federal fee-shifting statute is one who obtains a judgment on the merits or a court ordered consent decree. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598, 600 (2001). This standard was set by the United States Supreme Court, and is the binding precedent here. In *Buckhannon*, the Supreme Court was faced with the broad issue of whether federal fee-shifting prevailing-party statutes allow a trial court to make an award of attorneys' fees to a plaintiff who has not secured a judgment on the merits or a court ordered consent decree. *Id.* The Supreme Court held that without one of these results, a trial court may not make such an award. *Id.*

The *Buckhannon* petitioners sought an award of prevailing party attorneys' fees pursuant to 42 U.S.C. § 3613(c)(2). *Id.* at 601. The claim for attorneys' fees

was based on the "catalyst theory", which holds that a "plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* The *Buckhannon* petitioners claimed that they were the prevailing party because their conduct in filing suit had forced the State of West Virginia to materially alter its legislative position. *Id.* Additionally, the *Buckhannon* lawsuit claimed that West Virginia "self-preservation" statutes violated the Fair Housing Amendments Act of 1988 ("FHAA") and the American Disabilities Act ("ADA"). *Id.* After suit had been filed, the Virginia legislature enacted legislation eliminating the "self-preservation" statutes that conflicted with the FHAA and ADA. *Id.* Subsequently, the district court dismissed the plaintiffs' suit as moot. *Id.*

The *Buckhannon* plaintiffs moved for an award of prevailing party attorneys' fees pursuant to 42 U.S.C. § 3613(c)(2) subsequent to the dismissal of the lawsuit. The district court denied the *Buckhannon* petitioner's motion for attorneys' fees adhering to the Fourth Circuit Court of Appeals' en banc decision in *S-1 and S-2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (C.A. 4 1994). *Id* at 602. On appeal, the Fourth Circuit Court of Appeals *per curiam* affirmed the district court's ruling. *Id.* The Supreme Court affirmed the Fourth Circuit's decision and stated, "*[w]e cannot agree that the term 'prevailing party' authorizes federal courts to award attorneys' fees to a plaintiff who, by simply filing a nonfrivolous*

but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." *Id.* at 606. (emphasis added). Accordingly, without a *court order* that judicially alters the relationship of the parties, the court does not have the authorization to make an award of prevailing party attorneys' fees to a plaintiff. *Id.* at 604. (emphasis added)

Mere settlement between the parties is not enough for an award of prevailing party attorneys' fees. *Id.* Specifically, the terms of any settlement agreement must provide that the defendant agrees to be bound by a judicially ordered consent decree. *Id.* The *Buckhannon* Court further opined:

> Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking *unless the terms of the agreement* are incorporated into the order of dismissal. *Id.* at 604, n.7 *citing Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (emphasis added).

Buckhannon was applied to ***all*** federal "prevailing party" fee-shifting statutes. *Buckhannon*, 532 U.S. at 603.[2] Thus, pursuant to *Buckhannon*, the decision

[2] *See also New England Reg'l Council v. Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (holding that the plaintiff was not a prevailing party because the district court did not enter an order compelling the defendant to adopt the regulations sought by plaintiff); *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 336 F.3d 200, 206 (2d Cir. 2003) (holding that plaintiff was not a prevailing party where the parties reached a settlement and the case was conditionally discontinued subject to the resolution of the issue of attorneys' fees); *J.C. v. Regional Sch. Dist. 10, Bd. Of Educ.*, 278 F.3d 119 (2d Cir. 2002) (establishing that *Buckhannon* "held that, to be a prevailing party, one must either secure a judgment on the merits or be a party to a settlement agreement that is expressly enforced by the court through a consent decree"); *N.Y. State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 158-59 (2d Cir. 2001) (reversing grant of fees where the parties entered a private settlement and the district court dismissed the case as moot); *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 560 (3d Cir. 2003) (refusing to follow

reached by the Fourth DCA in *Mady* is correct since the trial court had no involvement whatsoever in the settlement of this matter.

1. Settlement of an alleged breach of warranty suit brought pursuant to the Magnuson-Moss Warranty Act does not confer "prevailing party" status to Mady and the Legislative History cited by Mady does not alter this conclusion.

As noted, prevailing party status may only be attained where either a judgment is entered on the merits or a consent decree is ordered. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 606. Another federal district court has found that mere settlement of a claim is insufficient to confer prevailing party status pursuant to the MMWA. *Pitchford v. Oakwood Mobile Homes, Inc.*, 212 F. Supp.2d 613, 617 (W.D. Va. 2002) *citing Buckhannon Bd. and Care Home, Inc.*, 532 U.S. at

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Barrios's narrow reading of *Buckhannon); Smyth v. Rivero*, 282 F.3d 268, 279-81 (4th Cir. 2002), *cert. denied*, 537 U.S. 825 (2002) (holding that the district court's order of dismissal was insufficient to confer prevailing party status where the terms of the settlement had not been made part of the court's order and settlement did not require judicial oversight); *Toms v. Taft*, 338 F.3d 519, 529 (6th Cir. 2003) (holding that private settlement agreements do not confer prevailing party status where there is no judicial oversight in enforcing the settlement and the district court did not issue any order altering the defendant's conduct); *Chambers v. Ohio Dep't of Human Servs.*, 273 F.3d 690, 692 (6th Cir. 2001) (recognizing that *Buckhannon* overruled case law that adopted the catalyst theory and imposed a requirement of a judicially-sanctioned change for parties to prevail); *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 667 (7th Cir. 2001) (recognizing that "[t]he significance of the *Buckhannon* decision ... [is] its insistence that a plaintiff must obtain formal judicial relief, and not merely 'success,' in order to be deemed a prevailing or successful party under any attorneys' fee provision...."); *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (finding that plaintiffs were not prevailing parties even though the settlement agreement entered into between the parties was approved by the Court pursuant to Fed. R. Civ. P. 23(a)); *Thomas v. National Science Found.*, 330 F.3d 486 (D.C. Cir. 2003) (asserting that *Buckhannon makes* it clear that a party prevails only if there has been a court-ordered change in the legal relationships between the parties); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002) (holding that a court-endorsed settlement did not meaningfully alter the legal relationship of the parties under *Buckhannon* because the only effect was to dismiss the union's lawsuit with a court order and because there was nothing left for the district court to oversee); *Doe v. Boston Public Sch.*, 264 F.Supp.2d 65, 72 (D. Mass. 2003); (declining to adopt narrow view of *Buckhannon* and holding that only parties securing a judicially sanctioned change, *i.e.*, a judgment on the merits or court-ordered consent decree qualify as prevailing parties); *J.S. & M.S. v. Ramapo Cent. Sch. Dist.*, 165 F.Supp.2d 570, 576 (S.D.N.Y. 2001) (holding that private settlement agreement that was never read into the record did not render plaintiff a prevailing party).

604. Mady's attempt to circumvent binding precedent through piecemeal legislative statements and reference to case law that is not at all applicable to this case does nothing to undermine the *Buckhannon* holding or the clear language of the MMWA itself. *I.N.S. v. Cardoza-Fonseca***,** 480 U.S. 421, 433 n.12 (1987).

Congressional intent is better derived from the words of the statute itself than from a patchwork record of statements inserted by individual legislators and proposals that may never have been adopted by a committee, much less an entire legislative body. *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291 (4th Cir. 2000), *aff'd*, 534 U.S. 438 (2002); *see also Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784-85 (6th Cir. 2003) (holding that Congressional intent is best derived from the unambiguous text of the statute itself). A single passage in legislative history cited to promote the position of a party is not entitled to authoritative weight if that same passage is not anchored within the text of the statute itself. *Shannon v. U.S.***,** 512 U.S. 573, 583 (1994). Courts have no authority to enforce snippets gleaned from legislative history that have no statutory reference point. *Id* at 584. Nowhere in the statute does the MMWA allow for an award of attorneys fees to someone "successful in litigation".

Furthermore, the Senate Report cited by Mady in support of his Petition is littered with unenacted statements and recommendations. A deeper reading of the Report reveals that the description of the different sections of the MMWA in the

Report does not comport with the actual enacted language of the MMWA. *See* S.Rep. 93-151 at 22-24. The Senate Report contains whole sections that were not included within the final enacted MMWA. *Id.* In fact, the Senate Report cites to the definition of an express warranty in Section 110 as set forth in the Uniform Commercial Code, yet there is no such section in the MMWA. *Id.* at 24. The Senate Report also refers to sections 113 and 114 of the MMWA, but neither of these sections is codified in the MMWA. While the Senate Report addresses settlement and attorneys' fees in one parenthetical reference, the applicability of the Report to the MMWA is limited solely to those passages actually contained within the MMWA itself. *Shannon v. United States,* 512 U.S. 573, 583 (1994).

While the *Buckhannon* decision does look to legislative history in its analysis of the term "prevailing party", it is clear that the Court was doubtful the legislative history would overcome what they think is the clear meaning of "prevailing party", the phrase actually used in the Acts at issue there (and in the MMWA). *Id* at 607. Thus, despite recognizing that some of the House and Senate Reports analyzed, referenced the possibility of "prevailing" in *Buckhannon* without a final judgment on the merits or "without formally obtaining relief" (as does the Senate Report at issue for the MMWA), the Court rejected the use of the catalyst theory absent "explicit statutory authority" as espoused by the "American Rule" regarding attorneys fees. *Id* at 607-608. In fact, upon closer analysis of some of

the legislative history at issue in *Buckhannon*, it is obvious the House and Senate Reports actually considered what it meant to "prevail" for the purposes of the federal statutes at issue there. *Id*. Whereas the Senate Committee analysis at issue here merely addressed the availability of attorneys fees under the MMWA if "successful in the litigation". Mady's App. 3 at pp. 22-23. Importantly, the attorney fee provision ultimately enacted in the MMWA allows for fees only if the consumer "finally prevails" not if he is "successful in litigation". Thus, Chrysler submits that this legislative history is in fact more ambiguous then that analyzed by the Court in *Buckhannon*. Accordingly, the history should be disregarded since it is readily apparent that the United States Supreme Court would preclude an award of fees for a settlement under the MMWA absent explicit statutory authority for same. Thus, Mady's argument in this regard should be rejected

Rather than rely on piecemeal legislative history, the court in *Pitchford v. Oakwood Mobile Homes, Inc.*, 212 F.Supp.2d 613 (W.D. Va. 2002) applied the Supreme Court precedent of *Buckhannon* to the "prevailing party" issue raised when settlement is reached in a MMWA case. The *Pitchford* Court held that settlement does not confer "prevailing party" status sufficient for an award of attorneys' fees pursuant to the MMWA. *Id.* The *Pitchford* case is directly on point to the issue raised in this matter.

In *Pitchford*, the parties settled a case filed by the plaintiff pursuant to the MWWA. *Id.* at 615. After settling the case, the plaintiff's attorneys notified the court that the parties had reached a settlement and compromise on plaintiff's substantive claims and were attempting to settle all issues of costs, expenses and attorneys' fees. Thereafter, the plaintiff submitted a status report to the court in which she represented that the parties had failed to resolve informally the issue of costs, expenses, and legal fees. The parties agreed to have the issue of attorneys' fees decided by the court and also agreed to a settlement conference before the magistrate judge. During the conference, the magistrate judge entertained argument and issued a report and recommendation. *Id.* In his report and recommendation to the district court judge, the magistrate judge hearing the fee issue ruled in favor of the plaintiff and awarded fees in excess of $50,000.00. *Id.* The defendant objected to the attorneys' fee award recommended by the magistrate judge on the basis that the plaintiff was not the "prevailing party" because the plaintiff did not receive an award of damages. *Id.*

In its review of the magistrate's recommendation, the district court analyzed *Buckhannon's* "prevailing party" standard against the MMWA and the MMWA's "finally prevails" standard. *Id.* at 617-19. After this review, the *Pitchford* Court held that the plaintiff did not "finally prevail" as required under the MMWA because the plaintiff settled the case. *Id.* The court held that the settlement

agreement entered into between the parties was not sufficient to create the "finally prevails" status necessary for an award of attorneys' fees under the MMWA. *Id.* The court also examined the terms of the settlement agreement and recognized that the settlement agreement contained no stipulation to entitlement to attorneys' fees, and instead, as was the case in *Mady*, merely allowed the plaintiff to seek entitlement to attorneys' fees. *Id.* at 620. The *Pitchford* court held that pursuant to the Supreme Court's decision in *Buckhannon*, the MMWA and its "finally prevails" standard requires a plaintiff to either obtain a judgment on the merits or have a consent decree entered in his favor before attorneys' fees may be awarded. *Id.* Settlement does not meet this standard. *Id.*; *see also Coey***,** 2005 WL 289457 at *5 (citing *Buckhannon* and awarding no attorneys' fees in MMWA case to plaintiff who won jury verdict but was awarded no damages); *Stenger v. LLC Corp***.,** 819 N.E.2d 480, 482 (Ind. App. 2004) (rejecting, pursuant to *Buckhannon*, claim for attorneys' fees after settlement that did not provide for attorneys' fees was reached in MMWA case); *Nat'l Coalition for Students with Disabilities v. Bush*, 173 F.Supp.2d 1272, 1278-79 (N.D. Fla. 2001) (citing *Buckhannon* as disallowing fees for "private settlements"). Where there is no final judgment entered on the merits and no order of a consent decree, a settlement agreement is insufficient to confer prevailing party status pursuant to the MMWA.

A recent case out of the United States Circuit Court of Appeals for the Eleventh Circuit also followed the holding in *Buckhannon.* The case of *Morillo-Cedron v. District Director for the U.S. Citizenship and Immigration Services,* 452 F3d 1254, 1258 (11th Cir. 2006) addresses the proposition that a plaintiff cannot be considered a "prevailing party" under a federal fee shifting statute unless the plaintiff litigates the case to a final judgment or obtains a court-ordered change in the legal relationship between the plaintiff and the defendant.

In *Morillo-Cedron,* the plaintiffs filed suit in federal district court for mandamus relief when the District Director for the United States Citizenship and Immigration Services failed to act in accordance with the direction of the Administrative Appeals Office ("AAO") which ordered the Director to follow AAO rulings in relation to the plaintiffs who were applicants for lawful permanent residency. *Id.* at 1255. The plaintiffs sought attorneys' fees pursuant to 28 U.S.C. § 2412(d), the Equal Access to Justice Act ("EAJA"). *Id.* The district court issued an order to show cause as to why mandamus relief should not be granted. *Id.* In response, the defendant government voluntarily granted lawful permanent resident status to the plaintiffs. *Id.* The district court then issued an interim order requiring the defendant to proceed on the plaintiffs' residency status. *Id.*

The district court issued an order denying the request for mandamus relief since same was moot as a result of defendant's voluntary action. *Id.* However, the

district court found that plaintiffs' lawsuit was the "catalyst which caused the government to process [plaintiffs'] applications" and concluded that on that basis, plaintiffs were prevailing parties entitled to an award of attorneys' fees. *Id.* Defendant filed a motion for reconsideration citing to *Buckhannon*, but the district court denied the motion and concluded that *Buckhannon* did not apply to EAJA cases. *Id.* at 1255-56.

The Eleventh Circuit Court of Appeals considered whether *Buckhannon* applied to the EAJA and whether the district court erred in finding that the plaintiffs were entitled to an award of attorneys' fees and costs under the "catalyst theory." *Id.* at 1256. The court stated that the Supreme Court's decision in *Buckhannon* "sweeps more broadly" to awards of attorneys' fees in various Federal fee-shifting statutes, and that the Supreme Court "has consistently interpreted nearly identical fee-shifting provisions of other statutes." *Id.* at 1257, *citing Marek v. Chesny,* 473 U.S. 1, 49 (1985) (listing over 100 federal fee-shifting statutes, one of which includes the Magnuson-Moss Warranty Act).

The court held the term "prevailing party" was intended to have the same meaning and interpretation in the EAJA as in other prevailing party fee-shifting statutes. *Id.* at 1258, *citing Ratzlaf v. U.S.*, 510 U.S. 135 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). In line with *Buckhannon*, the court held that because plaintiffs

did not litigate to judgment, "plaintiffs did not obtain a court-ordered change in the legal relationship between them and the defendant.…They did not obtain relief on the merits of their claim" in that the defendant "voluntarily processed their applications and conducted interviews before the district court entered any final judgment." *Id.*

Likewise, as noted, Mady cannot be deemed "prevailing party" for the purposes of an award of attorneys' fees under the MMWA pursuant to the acceptance of the Proposal for Settlement. Chrysler offered settlement through a Proposal for Settlement. Within the Proposal for Settlement, the parties explicitly agreed that no judgment would be entered against Chrysler upon acceptance of the Proposal. Mady's App. A-2, ¶ 5. As in *Pitchford*, within the Proposal for Settlement, Chrysler specifically denied Mady was entitled to attorneys' fees, but stipulated that Mady could argue entitlement to attorneys' fees to the trial court.

The trial court did not approve, ratify or acknowledge the settlement agreement between Chrysler and Mady nor did the court enter any type of final order, decree or judgment after Mady accepted the Proposal for Settlement. AR 213. Furthermore, there was no evidence whatsoever in the Record to support any of Mady's claims. Thus, Mady did not obtain a "court-ordered change in the legal relationship" with Chrysler and did not obtain relief on the merits in that Chrysler voluntarily agreed to settlement of the claim (at a nominal amount) in accordance

with *Buckhannon, Pitchford* and *Morillo-Cedron supra*. Accordingly, this Court should follow *Buckhannon, Pitchford* and the 4th DCA's decision in *Mady* on the basis that the settlement agreement entered into between the parties was not sufficient to create the "finally prevails" status necessary for an award of attorneys' fees under the MMWA.

2. Acceptance of a proposal for settlement pursuant to § 768.79, Fla. Stat. and Rule 1.442, Fla. R. Civ. P., does not provide an alteration of the legal relationship necessary for an award of prevailing party attorneys' fees pursuant to the MMWA since there was no judicial imprimatur and the Proposal for Settlement was not ambiguous.

Mady's claim that he is entitled to receive attorneys' fees under the MMWA is erroneous as a Proposal for Settlement does not alter the legal relationship between the parties so as to justify an award of prevailing party attorneys' fees. According to the decision in *Buckhannon,* the underlying *principal* necessary for an award of prevailing party attorneys' fees in a federal fee-shifting statute is judicial action that materially alters the legal relationship of the parties, which may be achieved through either a judgment entered on the merits or through a court ordered consent decree. *Buckhannon,* 532 U.S. at 604. Acceptance of a Proposal for Settlement *does not* meet this standard. *Abbott & Purdy Group, Inc. v. Bell*, 738 So. 2d 1024, 1026-27 (Fla. 4th DCA 1999)(emphasis added). In Florida, unless a proposal for settlement provides for the entry of judgment (consent decree), the trial court lacks the authority to enter a final judgment in the case

where the offeror was willing to proceed with payment and conclusion of settlement. *Id.*

The courts in *Dufresne* and *San Martin* and *Nelson* cite to section 768.79(4), Fla. Stat., for the proposition that the Proposal for Settlement in those cases are the functional equivalent of a consent decree since the statute gives the court jurisdiction to enforce the settlement upon filing of both the offer and acceptance. Indeed, courts are entitled to enforce all settlement agreements to at least some minimal extent because settlement agreements are interpreted according to contract law. *Spiegel v. H. Allen Holmes, Inc.***,** 834 So.2d 295 (Fla. 4th DCA 2002). However, the entry of judgment or consent decree upon acceptance of the settlement offer is not warranted unless agreed to as a term of the offer as the contractual language controls the interpretation and application of the settlement agreement. *Abbot & Purdy Group, Inc. v. Bell*, 738 So. 2d at 1027. This basic contractual principle was recognized by the Supreme Court in *Buckhannon* as *Buckhannon* applies to settlement agreements enforced through a consent decree, but was taken no further by the Court. *Buckhannon*, 532 U.S. at 604. Therefore, unless specified in the settlement agreement or agreed to by the parties, a court may not enter a consent decree pursuant to a Proposal of Settlement. *Id.* As noted by the 4th DCA in the *Mady* decision, "[t]he key is a court ordered change [in] the relationship between [the] Plaintiff and the Defendant" (citation omitted). 976 So.

2d 1212, 1215. Here, there simply was no such change in the relationship of the parties and no court involvement with the settlement whatsoever. Florida case law involving similar issues as the case at bar lends support to Chrysler's position.

In *Pines v. Growers Service Co., Inc.*, 787 So. 2d 85 (Fla. 2d DCA 2001), the court was faced with an issue very similar to the issue before this Court. The issue was whether the terms of a settlement agreement were controlling as to a reservation of rights, which allowed the plaintiff's attorneys to seek statutorily authorized attorneys' fees pursuant to the settlement agreement. *Id.* at 87-88. In *Pines*, the 2nd DCA held that the trial court's "conclusion that the joint stipulation and settlement agreement constituted the functional equivalent of a confession of judgment was legally erroneous." *Id.* The court carefully scrutinized the terms of the settlement agreement and recognized that although the parties had reserved the right to seek statutorily authorized attorneys' fees, they had not stipulated to a confession of judgment. *Id.* at 89.

In both *Mady* and *Dufresne*, the facts are similar to those set forth in *Pines*. Like *Pines*, there was no stipulation to the entry of a consent decree or entry of judgment upon acceptance of the Proposals for Settlement. Additionally, within both the Proposals, Mady and Dufresne had the ability to motion the court for an award of attorneys' fees while stipulating that Chrysler did not concede to their

claim of entitlement to any award of attorneys' fees as a result of acceptance of the Proposals. The Proposals as accepted specifically state:

> Chrysler does not admit liability for any of the causes of action asserted in Plaintiff's Complaint by extending this proposal for settlement. This is strictly a proposal for settlement. Moreover, Defendant Chrysler does not concede that Plaintiff or his attorneys are entitled to any award of attorneys' fees as a result of this proposal for settlement or Plaintiff's filing of his Complaint in this action.

Id. This reservation of rights to seek entitlement did not bestow the prevailing party status necessary for an award of attorneys' fees upon Mady.

In *Boxer Max Corporation v. Cane A. Sucre, Inc.*, 905 So. 2d 916 (Fla. 3d DCA 2005), the court considered whether the Plaintiff was entitled to attorneys' fees and costs as the prevailing party pursuant to a lease agreement that contained a mandatory "prevailing party" attorney fee provision. The 3rd DCA reasoned that a "prevailing party for the purposes of attorneys fees, is a party which the trial court determined prevailed on significant issues in litigation…. Just because a party receives a monetary award does not necessarily mean the party is a prevailing party in the litigation….[t]here is no prevailing party when a settlement occurs." *Id.* at 918. The court held that the Plaintiff was not entitled to attorneys' fees (even in the face of a mandatory attorneys' fees provision that was at issue in the lease that was the subject of the litigation) even though it received some relief on the merits from the trial court. *Id.*; *see also Zhang v. D.B.R. Asset Management, Inc*, 878 So.

2d 386, 387 (Fla. 3d DCA 2004) (holding "[t]he 'prevailing party' for purposes of awarding attorneys fees is the party determined by the trial court to have prevailed on significant issues in the litigation…. Simply because a party obtained some economic benefit as a result of litigation, does not necessarily mean that party has succeeded on the major issue in the case"). The 3rd DCA set forth this finding even though the record revealed that the parties actually entered into a settlement agreement at trial with the help of the trial judge. *Id.* at 918.

Here, Mady accepted a Proposal for Settlement that was nominal as compared to his original demand. There was no trial or otherwise any adjudication on the merits. Furthermore, there was no record evidence to establish that Mady prevailed on any issues in the litigation by accepting the Proposal for Settlement. The trial court had no role whatsoever in deciding the merits of this case, in helping the parties with the terms of the settlement, or in ordering anything relating to the settlement. Mady and Chrysler simply stipulated that liability for attorneys' fees was in dispute at the time of settlement.

Moreover, the Proposal for Settlement was not silent on the issue of attorneys' fees; it stated that the offer was made ***exclusive*** of attorneys' fees. The Proposal for Settlement was not ambiguous either. Florida's Proposal for Settlement Rule allows for a Proposal for Settlement to be made exclusive of attorneys fees. Fla. R. Civ. P., 1.442(c)(2)(F). There was clearly no concession of

entitlement to attorneys' fees. *Id*. Mady knew, by the terms of the Proposal for Settlement, that Chrysler would contest his request for fees and that Chrysler would not stipulate to entitlement. *Id*. Instead of rejecting the Proposal and moving forward with his claim, Mady made a conscious choice to accept a settlement in an amount significantly less than his original demand knowing that Chrysler did not agree to any fee claim he believed he was entitled to under the MMWA. Any interpretation, implication, or argument to the contrary is an attempt to avoid the effect of the unambiguous terms of the Proposal for Settlement and should be disregarded as lacking credit.

Contrary to Mady's blanket assertions, a defendant in a MMWA case has no obligation to pay attorneys' fees unless a plaintiff "finally prevails" and a court makes an award of fees. Mady failed to achieve either of these necessary results, and Chrysler should not be obligated to pay his attorneys' fees for a case he conceded was not worth anywhere near his original demand of return of all monies paid on the subject vehicle, a payoff of all liens on the subject vehicle, incidental and consequential damages, cost of repair damages, plus attorneys' fees and costs. *Buckhannon*, 532 U.S. at 604; *Pitchford*, 212 F. Supp.2d at 617.

3. Distinction of cases analyzing *Buckhannon*, inter alia, as cited by Mady

Mady cites several cases analyzing *Buckhannon* to support his premise that *Buckhannon* provides two non-exclusive examples of situations in which fees may

be awarded. These cases are factually and legally inapposite to the present case and are cited in an attempt to confuse and distract the Court from the issues at hand.

In the section of his Initial Brief dealing with Congressional intent, as noted, Mady makes much to do over the Report of the Senate Committee on Commerce to support his position that a settlement is enough in an MMWA case to bestow prevailing party status on a consumer. In support of his position, he cites to *Ruckelhaus v. Sierra Club*, 463 U.S. 680 (1983) and *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 307 F. 3d 1318 (11th Cir. 2002). Neither of these cases is applicable to the case at bar since the attorney fee statutes involved in those cases contain language quite different from that contained in the MMWA and the provisions of the statutes analyzed by the *Buckhannon* Court. In those cases, the courts extended the catalyst theory to attorneys fee shifting statutes that specifically allow courts to "award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate." *Loggerhead* at pp. 1322-1323. In the statute involved in this case, as in the statutes at issue in *Buckhannon*, the courts are not given the leeway afforded by the "whenever…appropriate" provisions at issue in *Ruckelshaus* and *Loggerhead*. Specifically, for cases that involve true "prevailing party" statutes, *Buckhannon* categorically abolishes the use of the catalyst theory in

determining an award of attorneys fees. Thus, neither *Loggerhead* nor *Ruckelshaus* can be considered as support in this case since the attorney fee statutes at issue in those cases are clearly different than those at issue in *Buckhannon* and the case at bar.

Mady also cites *National Coalition for Students with Disabilities v. Jeb Bush*, 173 F.Supp.2d 1272, 1274 (ND Fla. 2001), and contends that that the *Buckhannon* Court left open the issue of whether fees may be recovered pursuant to a private settlement. However, a review of that case reveals that the court in the *Jeb Bush* case concedes that the current state of the law is that no fees will be awarded for a mere private settlement. *Id* at 1278. There, the court ultimately held that a "settlement agreement, *coupled with a judgment* requiring parties to abide by the agreement" rendered the plaintiffs prevailing parties in the lawsuit entitling plaintiffs to attorneys' fees. *Id.* at 1274 (emphasis added). The court pointed out that while *Buckhannon* did not explicitly state that fees were not recoverable when parties enter into a private settlement agreement, the Supreme Court's discussion of the dichotomy between a private settlement agreement and consent decree "suggests that this is not the law" (meaning attorney fees are not recoverable as a result of a private settlement agreement). *Id.* at 1278; *but see Melton v. Frigidaire*, 805 N.E.2d 322 (Ill. App. 2004) (an Illinois court erroneously interpreted erroneously Buckhannon's rationale to be nonexclusive and held that a plaintiff

was entitled to attorneys' fees as a prevailing party after the defendant agreed to repurchase the plaintiff's product for the full purchase price). The court in *Jeb Bush* concluded that the case fell under the category of a consent decree since the order and judgment entered incorporated the terms of the settlement agreement requiring compliance with these specific terms as opposed to a private settlement agreement which does not require judicial approval. *Id.* at 1278-79.

Mady also relies upon *American Disability Assoc., Inc. v. Chmielarz,* 289 F.3d 1315, 1317 (11th Cir. 2002) to support his appeal. In *American Disability Assoc., Inc.,* the Eleventh Circuit held that as a result of the parties entering into a settlement which was "approved, adopted and ratified by the district court in a final order of dismissal … the settlement constitutes a 'judicially sanctioned change in the legal relationship of the parties'" and therefore qualified as a consent decree. *Id* at 1317. The court noted that the parties agreed that the Plaintiff was entitled to attorneys' fees in the settlement agreement, unlike the case at bar where Chrysler specifically denied Mady's entitlement to fees. *Id.* at 1317-18. The court ultimately declined to analyze whether a private settlement agreement constitutes a judicially sanctioned change in the legal relationship of the parties since the district court entered an order of dismissal, approving, adopting and ratifying the settlement agreement effectuating the same result as would have been achieved

pursuant to a consent decree. *Id.* at 1320. No such order was entered by the trial court in the case at bar.

Mady also cites to *Barrios v. California Interscholastic Federation*, 277 F.3d 1128 (9th Cir. 2002) and *Richard S. v. Dept. of Developmental Services*, 317 F. 3d 1080 (9th Cir. 2003) to support his contention that a private settlement agreement which can be enforced by a party renders the party as prevailing regardless of the lack of a consent decree or specific/express retention of jurisdiction. The Tenth Circuit recently criticized the Ninth Circuit's opinion in *Barrios*:

> The Ninth Circuit diverges from its sister circuits on this issue by conflating the mere contractual enforcement of a settlement agreement and the judicial enforcement of a court order incorporating the terms of a settlement agreement…. The *Barrios* court held that the plaintiff was entitled to fees because "his settlement agreement affords him a legally enforceable instrument" sufficient for prevailing party status under pre-*Buckhannon* precedent…. This position can be maintained only by denying the difference between an "instrument" enforceable as a matter of contract law and a court order enforceable as a matter of judicial oversight--a distinction that is self-evident and widely acknowledged [internal cites omitted]. More to the point, denying this distinction would render the prevailing approach to settlement agreements (and the *Buckhannon* passages from which it derives) meaningless, because any such agreement, however private, is a legally enforceable contract.

Bell v. Board of County Com'rs of Jefferson County, 451 F.3d 1097, 1103 (10th Cir. 2006) (holding "if a court does not incorporate a private settlement into an order, does not sign or otherwise provide written approval of the settlement's

terms, and does not retain jurisdiction to enforce performance of the obligations assumed by the settling parties, the settlement 'does not bear any of the marks of a consent decree' and does not confer prevailing party status on the party whose claims have been compromised"); *see also Toms v. Taft*, 338 F.3d 519, 528-29 (6th Cir. 2003) ("Only enforceable judgments on the merits and court ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorneys fees…. Private settlements do not confer prevailing party status."). *Barrios* is recognized as the minority view and should be disregarded. Likewise, the *Richard S.* case is distinguishable due to the significant court oversight involved in that case, inter alia, and should otherwise be disregarded since it is another 9th Circuit case following the minority view espoused in *Barrios*.

Here, there exist no judicially sanctioned change in the legal relationship between Mady and Chrysler. The court did not enter a judgment, a final order dismissing the case, a consent decree nor any order acknowledging, ratifying or adopting the settlement between Mady and Chrysler that would render Mady a prevailing party in the lawsuit. Chrysler specifically denied that Mady was entitled to fees in the Proposal for Settlement and the parties stipulated that judgment would not be entered upon acceptance of the Proposal for Settlement. The only order entered by the trial court was the order denying Mady's Motion for

attorneys' fees. AR 213. Accordingly, Mady cannot be considered the prevailing party in this case in accordance with federal and state law.

III. MADY'S INTERPRETATION AND APPLICATION OF THE MAGNUSON-MOSS WARRANTY ACT IN RELATION TO FLORIDA'S PROPOSAL FOR SETTLEMENT RULE AND STATUTE IS ERRONEOUS

Mady postulates that absurd and inequitable results will occur should this Court uphold the trial court's denial of his Motion for Fees. Mady also claims he should automatically be entitled to attorneys' fees because he filed suit pursuant to a federal one way fee-shifting statute and he settled the case. This is not true.

Notwithstanding the clear and binding precedence of *Buckhannon*, Mady's position in this case fits directly into the category of cases (as do all other cases handled by Krohn & Moss) recognized in *Assoc. of Disabled Americans, Inc. v. Integra Resort Mgmt., Inc*, 385 F.Supp.2d 1272, 1281 (M.D. Fla. 2005), wherein the court noted that a MMWA cottage industry lawsuit binge has developed "essentially driven by economics, -- that is, the economics of attorneys' fees." *Id.*

Krohn & Moss, the law firm retained by Mady, bases its practice on a business model designed to minimize work and maximize profits by litigating in volume, using cut-and-paste pleadings, relying on the low evidentiary thresholds required in warranty cases and using paralegals extensively.[3] According to an

[3] DaimlerChrysler has been served with more than 200 cases filed by Mady's counsel in the last 4 to 5 years. Each of these cases involve breach of warranty pursuant to the Magnuson-Moss Warranty Act; every one of the pleadings,

article about Krohn & Moss, the firm has a "booming business" that employs 40 lawyers in nine states and "processes complaints with the efficiency of a well-oiled machine, bringing in anywhere from a few thousand dollars to more than $100,000 in damages and legal fees in each case." *See* Kevin Davis, *Lemon aid; A local law firm has made a big business out of five-figure claims against car dealers,* Crain's Chicago Business (November 17, 2003). According to the article, it is estimated that Krohn & Moss files about 1,000 consumer fraud and warranty claims in Illinois each year and another 3,000 in other states on behalf of unhappy car buyers. *Id.* According to one estimate, Krohn & Moss filed over 4,300 automotive suits in Cook County, Illinois alone between 1999 and 2002. *Id.* Since its founding, the firm has gone to trial in only about 1% of its cases. "We're able to settle most cases," according to Krohn. *Id.* Krohn & Moss' single-minded goal is to generate fees regardless of the amount they are able to recover for their clients. They sue under the federal Magnuson-Moss Warranty Act and presume that they are automatically entitled to all of their fees based on the inflated hours spent prosecuting them. They are wrong. Attorneys' fees and costs are only available when there is a judgment on the merits or consent decree as mandated by *Buckhannon*.

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motions, and discovery demands filed by his counsel's firm is so substantially similar that more often than not the only distinguishable feature between the case is the names of the parties and the year, make, and model of the particular vehicle at issue.

Notwithstanding, even if private settlements could allow for an award of attorneys' fees under the MMWA fee shifting provision, the settlement in this case does not render Mady, who demanded a full refund of all monies paid, lien payoff, incidental and consequential damages, cost of repair damages, plus attorneys' fees, inter alia, a prevailing party. AR 1-67. In fact, it is far more accurate to find that Chrysler prevailed, because if any "success" was achieved here by Mady, it was *de minimus*.

In *Farrar v. Hobby*, 506 U.S. 103, 114-15 (1992), after considering the issues on which the plaintiff prevailed and "the amount of damages awarded as compared to the amount sought," it was held that a court "may lawfully award low fees or no fees" in a case of *de minimus* success. There is no novelty in distinguishing between a party in whose favor judgment is rendered and a party who obtains meaningful relief. *Poteete v. Capital Engineering, Inc.*, 185 F.3d 804, 807 (7th Cir. 1999). Even a plaintiff who receives a *de minimus* judgment, as opposed to settling as is the case here, will be awarded zero attorneys' fees under a statute that makes the award of fees to a prevailing party a matter of course. *Id*. *See e.g. Farrar*, 506 U.S. at 114-15, *see also Cole v. Wodziak*, 169 F.3d 486 (7th Cir. 1999); *Coey.*,2005 WL 289457 at *5.

Moreover, if a suit is frivolous, and settled merely for its nuisance value, the plaintiff is not even a prevailing party in a technical sense. *See Poteete*, 185 F.3d

at 807; *Fisher v. Kelly*, 105 F.3d 350, 353-54 (7th Cir. 1997); *see also Ernest v. Deere & Co.*, 2004 WL 1462507 (Conn. Super. 2004) (although there is a public policy favoring attorneys' fees in order to enforce warranties on relatively small purchases, there also is a policy against pursuing actions only for the attorneys' fees). The MMWA only allows for an award of attorneys' fees to a plaintiff who finally prevails. *Pitchford*, 212 F. Supp.2d at 617. Mady did not prevail in this case. He accepted a nominal or de minimus settlement compared to his original demand. As such, the trial court did not abuse its discretion when it denied Mady's Motion.

IV. MADY'S DENOUNCEMENT OF FLORIDA'S PROPOSAL FOR SETTLEMENT RULE AND STATUTE IN THE MMWA CONTEXT FAILS TO RECOGNIZE AND APPLY THE ESSENTIAL PURPOSE OF THE RULE AND STATUTE

The purpose behind the Proposal for Settlement rule and statute is to encourage early settlement and end protracted litigation. *Fox* v. *McCaw Cellular Commc'n Fla., Inc.*, 745 So. 2d 330, 337 (Fla. 4th DCA 1998). This purpose is not antithetical to the Magnuson-Moss Warranty Act's goal of leveling the playing field between consumers and manufacturers. The case law on this issue is clear that the purpose of § 768.79, Fla. Stat., and Rule 1.442, Fla. R. Civ. P. is to promote early and efficient resolution of litigation. *See, Nat'l Healthcorp Ltd. P'ship v. Close*, 787 So. 2d 22, 26 (Fla. 2d DCA 2001) (stating that the legislative purpose of section § 768.79, Fla. Stat., is to encourage the early settlement and

termination of litigation in civil cases generally); *Glanzberg v. Kaufman*, 771 So. 2d 60, 61 (Fla. 4th DCA 2000); *U.S. Sec. Ins. Co. v. Cahuasqui*, 760 So. 2d 1101, 1104-05 (Fla. 3d DCA 2000). Attempting to end the litigation underlying this appeal was exactly Chrysler's purpose in making the proposal. Chrysler merely wished to settle Mady's *de minimus*, or otherwise frivolous claim for a nominal amount, so as to forego the unnecessary task of spending thousands or perhaps tens of thousands of dollars to prove its defense. Mady's counsel, however, wishes to impose a duty upon all warrantors that does not exist in law by forcing warrantor's to pay plaintiff attorneys' fees as part of a settlement regardless of the merit of their client's case and certainly without any showing of proof that their client's case had any merit in the first place.

In *Marek v. Chesny*, 473 U.S. 1 (1985) when addressing whether the federal Offer of Judgment Rule, Fed. R. Civ. P. 68, would produce a chilling effect on consumer protection statutes, the Supreme Court stated:

> [m]erely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer.

Marek, 473 U.S. at 5. The Supreme Court further opined:

> [T]o be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68, however, is in no sense inconsistent with the

> congressional policies underlying § 1983 and § 1988. Section 1988 authorizes courts to award only "reasonable" attorneys' fees to prevailing parties.

Id. This particular stance has been echoed in Florida law as well. *See Fox,* 745 So. 2d at 337 (Farmer, J. concurring specially)*; Clayton v. Bryan*, 753 So. 2d at 632, 635-36 (Fla. 5th DCA 2000) (Harris, J. dissenting).

In the case at bar, Chrysler offered to pay to Mady an amount certain. Mady's App. A-2. Chrysler, however, contested an award of any fees under the circumstances and Mady knew that. *Id*. Mady was certainly free to attempt to negotiate for a settlement which provided for the entry of judgment or for attorneys' fees. However, he did not do this. Mady accepted the Proposal for Settlement and now seeks an award of attorneys' fees which is not authorized because he neither secured a judgment nor obtained a court ordered consent decree. When Mady decided to accept the Proposal for Settlement, it is presumed he did so based upon how he felt about the merits of his case. As such, his claims should be ignored as Mady voluntarily settled his case and has failed to articulate any error made by the 4th DCA in *Mady*.

V. THE FOURTH DISTRICT COURT OF APPEAL'S DECISION CORRECTLY DECIDED THAT MADY WAS NOT THE PREVAILING PARTY FOR AN AWARD OF ATTORNEYS' FEES PURSUANT TO THE MMWA BY ACCEPTING CHRYSLER'S PROPOSAL FOR SETTLEMENT MADE EXCLUSIVE OF ATTORNEYS' FEES.

As this Court is aware, the exact issue before here has arisen and been decided in four of the five district courts of appeal for the State of Florida. The first decision was rendered by the 1st DCA in the case of *Ballato v. DaimlerChrysler Corp.*, 968 So. 2d 559 (Fla. 1st DCA 2007). In that case, the 1st DCA issued a per curiam affirmed decision without opinion affirming the trial court's denial of Ballato's Motion for Attorneys' Fees pursuant to a Proposal for Settlement made exclusive of attorneys' fees. Thereafter, the 2nd and 3rd DCA's issued the *Dufresne* and *San Martin* and *Nelson* opinions reversing the trial court's rulings denying an award of attorneys' fees based on the same kind of Proposal for Settlement at issue in *Ballato*. Finally, the 4th DCA issued its opinion affirming the trial court's denial of an award of attorneys' fees pursuant to Mady's acceptance again based on the same kind of Proposal for Settlement.

Chrysler submits that the *Mady* decision is the correctly decided case and that the Court should resolve the conflict with the *Dufresne* and *San Martin* and *Nelson* decisions by disapproving those decisions and following the holding made in *Mady*. The 2nd and 3rd DCA's decisions have inappropriately eroded the holding of the United States Supreme Court in *Buckhannon* by finding that the private settlements consummated by Chrysler between Dufresne, San Martin and Nelson were the functional equivalent of a consent decree where none of the trial

courts in those cases had anything whatsoever to do with the settlements between the parties.

Each of the courts in *Dufresne*, and *San Martin*, and *Nelson* erroneously relied upon §768.79(4), Fla. Stat. to conclude that the settlement agreements at issue in those cases were the functional equivalent of a consent decree since that provision provides court's jurisdiction to enforce the settlement agreement if necessary. While it is true that §768.79(4) does allow the courts jurisdiction to enforce settlements under that statute in certain circumstances, it is clear that none of the trial courts in the cases at issue had anything whatsoever to do with the settlement of those matters. There were no hearings on the settlements, there were no court ordered discussions regarding the settlements, and there was nothing incorporated whatsoever in any decree or order that was ultimately adopted, ratified or ordered by any of these courts. These cases were simply settled privately between the parties on the terms noted in the Proposals for Settlement.

The *Mady* decision correctly recognized that §768.79(4)'s provision for enforcement is not the same as the required affirmative court action that either approves of the terms of a settlement or affirmatively retains jurisdiction for enforcement. *Id* at 1215. To rule otherwise, goes against the binding precedent of the United States Supreme Court in *Buckhannon* and its progeny. Accordingly, Chrysler submits that this Court should align itself with the decisions in *Mady*, and

the other federal courts that have consistently refused to expand the language of section 2310(d)(2) to cases in which the trial court has not become actively involved in the settlement either by entering a judgment, approving a settlement, or expressly reserving jurisdiction to enforce the settlement. *Id*.

CONCLUSION

Thus for the foregoing reasons, Respondent Chrysler respectfully requests this Honorable Court to align itself with the decision in the 4th DCA case of *Mady* and disapprove of the decisions from the 2nd and 3rd DCA's in *Dufresne* and *San Martin* and *Nelson.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Ted Green, P.O. Box 720157, Orlando, Florida 32872-0157 and Aaron Radbil, Krohn & Moss, Ltd., 120 W. Madison Street, 10th Floor, Chicago, Illinois 60602 via U.S. Mail this ____ day of December, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this computer generated brief was prepared using Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Fla. R. App. P.

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