IN THE SUPREME COURT OF FLORIDA

EDMUND MADY	**Fla. S. Ct. No.**	**SC08-808**
	DCA No.	07-842

Petitioner,

v.

DAIMLERCHRYSLER CORPORATION,

Respondent.

PETITIONER'S AMENDED BRIEF ON THE MERITS

On Review From The

Fourth District Court Of Appeal

State Of Florida

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PRELIMINARY STATEMENT

The Petitioner in this case, Edmund Mady, is referred to herein as "Plaintiff." The Respondent in this case, DaimlerChrysler Corporation, is referred to herein as "Defendant." Citations to the Appellate Record are indicated as "(Vol.__, pp.__)." Citations to Plaintiff's appendix are indicated as "(App.__)."

STATEMENT OF THE CASE AND FACTS

On or about May 25, 2003 Plaintiff leased a 2003 Dodge Viper ("Viper") from Fairbanks Dodge ("Lessor"). (Vol. 1, pp. 1-67). Prior, or contemporaneous to Plaintiff's lease of the Viper, Lessor purchased the Viper to lease to Plaintiff. (Vol. 1, pp. 1-67). In consideration for the purchase of the Viper, Defendant issued and supplied to Lessor a written warranty, which included three (3) year or thirty-six thousand (36,000) mile bumper to bumper coverage, as well as other warranties fully outlined in the Manufacturer's New Vehicle Limited Warranty Booklet. (Vol. 1, pp. 1-67). On or about May 25, 2003, with approximately one hundred ninety-five (195) miles on the Viper, Lessor assigned its rights in Defendant's written warranty to Plaintiff. (Vol. 1, pp. 1-67).

Shortly after Plaintiff took possession of the Viper Plaintiff experienced various defects with the Viper that substantially impaired the use, value, and safety of the Viper. (Vol. 1, pp. 1-67). Plaintiff tendered the Viper to Defendant's authorized dealerships on numerous occasions in effort to provide Defendant a

reasonable opportunity to cure the problems associated with the Viper. (Vol. 1, pp. 1-67). Defendant failed to repair the Viper and conform it to the condition called for by the three (3) year or thirty-six thousand (36,000) mile warranty outlined in the Manufacturer New Car Warranty Booklet. (Vol. 1, pp. 1-67).

Frustrated with Defendant's inability or unwillingness to repair the Viper, Plaintiff revoked acceptance of the Viper. (Vol. 1, pp. 1-67). Defendant refused to repurchase the Viper and provide Plaintiff with remedies to which Plaintiff was entitled upon revocation. (Vol. 1, pp. 1-67). Plaintiff, left with no other recourse, brought suit pursuant to provisions of the Magnuson-Moss Warranty Act. (Vol. 1, pp. 1-67). Plaintiff prayed for a return of all monies paid, satisfaction of all liens, diminution in value of the vehicle, all incidental and consequential damages incurred, and all reasonable attorney's fees and costs incurred. (Vol. 1, pp.1-67).

On or about December 16, 2005, Defendant served Plaintiff with a proposal for settlement, pursuant to Section 768.79 of the Florida Statues, and Florida Rule of Civil Procedure 1.442, in the amount of $8,500.00, *exclusive* of all interest, costs, and attorney's fees. (Vol. 1, pp. 150). Defendant previously served Plaintiff with a proposal for settlement in the amount of $6,500.00, exclusive of all interest, costs, and attorney's fees. (Vol. 1, pp. 140). Defendant's December 16, 2005 "Proposal of Settlement Exclusive of Attorneys Fees" reads in part:

> Defendant, DaimlerChrysler Corporation ("DaimlerChrysler"), by and through its undersigned counsel and pursuant to Fla. R.

Civ. P. 1.442 and §768.79, Fla. Stat. hereby proposes settlement ("proposal") to Plaintiff Edmund Mady, under which Defendant DaimlerChrysler shall pay to Plaintiff the total sum of **EIGHT THOUSAND FIVE HUNDRED DOLLARS AND xx/100 ($8,500.00), exclusive of all interest, costs, and attorney's fees** and in support thereof would state as follows:

* * *

Plaintiff's acceptance would settle all causes of action and/or counts against DaimlerChrysler, including Plaintiff's claims for damages. **This proposal is made exclusive of attorney's fees, interest and costs allegedly incurred as a result of this action**.

Edmund Mady will receive **EIGHT THOUSAND FIVE HUNDRED DOLLARS AND xx/100 ($8,500.00) exclusive of attorney's fees**.

DaimlerChrysler does not admit liability for any of the causes of action asserted in Plaintiff's Complaint by extending this proposal for settlement. Moreover, Defendant DaimlerChrysler does not concede that Plaintiff or his attorney's are entitled to any award of attorney's fees as a result of this proposal for settlement or Plaintiff filing of his Complaint in this action. However, **DaimlerChrysler concedes that Plaintiff may seek to prove entitlement to attorney's fees through a hearing before this Court**.

(Vol. 1, pp. 194-200) (emphasis added).

Defendant's Release and Confidentiality Agreement, presented in connection with Defendant's Proposal for Settlement, states:

B. The parties desire to enter into this Release in order to provide certain consideration in full settlement and discharge of all Plaintiff's claims, Chrysler and any other dealership, which are, or might have been, the subject of the alleged defects upon the terms and conditions set forth below **other than what is outlined in section 3.0 infra**.

> 1.1 In consideration as set forth in section 2.0 of this Release, Plaintiff hereby completely releases and forever discharges Chrysler and any Chrysler dealership from any and all past, present and future claims, demands, obligations, actions, services, expenses, and compensation of any nature whatsoever, whether based on a tort, contract, or other theory of recovery, which Plaintiff now has, or may hereafter accrue or otherwise be acquired, on account of, or may, in any way, grow out of, or which is the subject of the vehicle, or any other cause of action of any type, nature or style from the vehicle **other than what is outlined in section 3.0 infra**. Plaintiff agrees to file a Notice of Voluntary Dismissal with Prejudice as to Chrysler in this case of *Edmund Mady v. DaimlerChrysler Corporation and Provident Automotive Leasing Company*, Case No. 50 2005CA007920XXXXMBAO, in the Circuit Court in and for Palm Beach County, Florida, **once the issues outlined in section 3.0, infra, have been resolved**.
>
> * * *
>
> 3.0 **Plaintiff's attorney reserves the right to motion the court for attorney's fees that he contends he is entitled to as a result of his representation of Plaintiff in this case.**

(See App. A-1) (emphasis in original).

On or about January 6, 2006 Plaintiff filed his "Notice of Acceptance of Proposal of Settlement." (Vol. 1, pp. 155-157). Plaintiff's "Notice of Acceptance of Proposal of Settlement" detailed:

> NOW COMES Plaintiff, Edmund Mady, by and through his attorneys, KROHN & MOSS, LTD., and hereby accepts Defendant's Proposal of Settlement in the amount of EIGHT THOUSAND FIVE HUNDRED DOLLARS AND 00/100 ($8,500.00), exclusive of all interest, costs, and attorney's fees.

> Plaintiff reserves the right to move for attorneys' fees and costs pursuant to acceptance of this Proposal of Settlement.

(Vol. 1, pp. 169-200).

On June 30, 2006 Plaintiff filed his Motion for Entitlement to Attorneys' Fees and Costs. (Vol. 1, pp. 169-200). On February 7, 2007 the trial court entered an order denying Plaintiff entitlement to attorney's fees, noting: "Plaintiff has not established that he is a consumer who 'finally prevails' as that term has been defined by the Courts under the fee shifting provisions of the Federal Statutes which form a basis for the suit." (Vol. 2, pp. 213). Plaintiff subsequently appealed the trial court's order. (Vol. 2, pp. 228-230). The Fourth District Court of Appeal affirmed the ruling of the trial court, certifying conflict with the decision of the Second District Court of Appeal opinion in *Dufresne v. DaimlerChrysler Corp.*, 975 So. 2d 555 (Fla. 2d DCA 2008).[1] This appeal follows.

SUMMARY OF THE ARGUMENT

When contemplating the fee shifting provision of the Magnuson-Moss Warranty Act ("Warranty Act") Congress expressly deemed successful litigation to include settlement. Congress intended that a plaintiff who succeeds in litigation, absent formal legal action or court intervention, is entitled to an award of

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[1] The Third District Court of Appeal "reasoned to the same result" as the Second District in *Dufresne v. DaimlerChrysler Corp.*, following the decision of the Fourth District in the instant matter. *San Martin and Nelson v. DaimlerChrysler Corporation*, 983 So. 2d 620 (Fla. 3d DCA 2008).

attorney's fees as a prevailing party. Congress, through explicit direction, made clear that an award of attorney's fees to a plaintiff who "finally prevails" through settlement is proper where litigation is resolved prior commencing formal legal action.

The Warranty Act, as a result of Congress' explicit statutory authorization for an award of attorney's fees to a plaintiff who "finally prevails" through settlement, is removed from the reach of the holding in *Buckhannon Bd. & Care Home, Inc., V. W. Va. Dep't Of Health And Human Res*. The United States Supreme Court provided a constricted, but important window of escape with regard to the extension of *Buckhannon* to "prevailing party" language utilized in statutes other than the Fair Housing Amendments Act ("FHAA"), or the Americans with Disabilities Act ("ADA"): If Congress offers explicit statutory authority, lower courts may award attorney's fees based upon a lesser "strength of victory" than articulated by the Court in *Buckhannon*. Contrary to the legislative language found in the FHAA, the ADA, § 1988, and the FOIA, "explicit statutory language" exists within the Warranty Act to warrant departure from the analysis employed in *Buckhannon* specific to construction of the term "prevailing party" as a "legal term of art."

Notwithstanding, judicial imprimatur is a consequence of a proposal for settlement accepted pursuant to section 768.79 of the Florida Statutes, giving rise

to a material alteration of the legal relationship of the parties involved. Judgments on the merits and consent decrees are non-exclusive examples of judicially sanctioned changes creating the necessary judicial imprimatur as required by *Buckhannon*. The necessary judicial approval and oversight emphasized in *Buckhannon*, derived from the court's jurisdiction to control and enforce private contractual settlement, is present in the instant matter. Section 768.79 of the Florida Statutes affords the trial court "full jurisdiction to enforce the settlement and agreement." The resultant judicially enforceable settlement agreement creates a material alteration of the legal relationship between Plaintiff and Defendant, thus, categorically entitling Plaintiff to an award of attorney's fees

Denying a plaintiff prevailing party status, thereby relieving a defendant of its statutorily authorized obligation to remunerate plaintiff's attorney's fees, leads to an absurd result that cannot survive as proper construction where it would render section 768.79 of the Florida Statutes purposeless. Should a plaintiff not be considered a prevailing party, as defined by the Warranty Act, in an action where that plaintiff accepted a proposal for settlement, the unmistakable result of such construction is to discourage settlement and place an increasing burden on the judicial system. Requiring a plaintiff to continue litigation despite an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system.

Moreover, denying plaintiff prevailing party status effectively distorts defendant's proposal of settlement with respect to the exclusivity of attorney's fees, thereby causing it to fail as an effective conveyance mechanism free from ambiguities. Should a plaintiff be precluded from seeking an award of attorney's fees from the trial court, as outlined and contracted for by way of Defendant's proposal for settlement, Defendant's proposal, presented pursuant to section 768.79 of the Florida Statutes, would fail for reason of ambiguity. Specifically, precluding Plaintiff the right to seek an award of attorney's fees transforms Defendant's proposal for settlement exclusive of attorney's fees into an offer inclusive of attorney's fees, making it fundamentally impossible for a plaintiff to evaluate the true terms and conditions of a defendant's offer.

Accounting for such precedent and policy, the Second and Third District Courts of Appeal found that a settlement agreement entered into pursuant to a proposal for settlement is judicially enforceable and that a plaintiff who accepts a proposal for settlement exclusive of attorney's fees is not precluded from claiming entitlement to attorney's fees under the Warranty Act. Contrary to the Second and Third District, the Fourth District, in finding that a plaintiff is precluded from seeking an award of attorney's fees under the warranty act subsequent to accepting a proposal for settlement pursuant to section 768.79 of the Florida Statutes, ignored the clear direction of the court in *Buckhannon* that a final judgment on the merits is

not a prerequisite to an award of attorney's fees pursuant to a federal fee-shifting provision.

STANDARD OF REVIEW

The issue on appeal is whether a plaintiff who accepts a defendant's proposal for settlement pursuant section 768.79 of the Florida Statutes is precluded from seeking attorney's fees under the Magnuson-Moss Warranty Act. There is no factual dispute. The issue is one of statutory construction. Construction of a statute is purely a legal question, appropriately subject to de novo review. *Maggio v. Fla. Dep't of Labor & Employment Sec.,* 899 So. 2d 1074 (Fla. 2005); *Aramark Unif. & Career Apparel, Inc. v. Easton,* 894 So. 2d 20 (Fla. 2004).

ARGUMENT

I. A PLAINTIFF "FINALLY PREVAILS" UNDER THE FEE SHIFTING PROVISION INCLUDED IN THE MAGNUSON-MOSS WARRANTY ACT WHERE THAT PLAINTIFF IS "SUCCESSFUL IN LITIGATION" THROUGH SETTLEMENT.

Upon enactment in 1975 Congress included a one-way fee-shifting provision in the Magnuson-Moss Warranty Act ("Warranty Act"). Section 2310(d)(2) of the Warranty Act provides:

> If a consumer finally prevails in any action brought [pursuant to this Act], he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost[s] and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the

> commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorney fees would be inappropriate.

15 U.S.C. §2310(d)(2).

When contemplating the fee shifting provision of the Warranty Act Congress expressly deemed successful litigation to include settlement. S. Rep. No. 93-151 (1973). Specifically, the Report of the Senate Committee on Commerce on S. 356, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, reads in pertinent part:

> Section 110 spells out the remedies available to the purchaser of consumer products. A purchaser can utilize informal dispute settlement procedures established by suppliers or, having afforded a supplier a reasonable opportunity to cure, may resort to formal adversary proceedings **with reasonable attorney's fees available if successful in litigation (including settlement)**.

S.Rep. 93-151 at 22-23 (emphasis added); (App. A-2).

A. Congress Intended That A Plaintiff Who Succeeds In Litigation, Absent Formal Legal Action Or Court Intervention, Is Entitled To An Award Of Attorney's Fees As A Prevailing Party.

The Warranty Act is a federal remedial statute aimed at protecting consumers from unscrupulous warrantors. It was enacted to provide consumers with a remedy against warrantors who failed to live up to obligations set forth in their respective warranties. The legislative history of the Warranty Act shows that Congress deliberately set out to create a federal cause of action containing all the

necessary legal tools to enable an injured consumer to enforce the warranties he or she received on consumer goods.

Included as part of the Warranty Act is a congressional policy declaration to promote the use of informal dispute settlement mechanisms. H.R. Rep. No. 93-1107 (1974). Section 2310 of the Warranty Act provides for informal dispute settlement procedures to be utilized prior to commencement of a civil action. 15 U.S.C 2310(a)(3). The legislative history of the Warranty Act explains that "it is the policy of Congress to encourage the development of informal dispute settlement mechanisms." S. Rep. No. 93-151 (1973). The FTC is not required to review individual disputes or settlements. *Id*. at 23. Absent review of individual settlements by the FTC, and without resort to formal legal action or court supervision, a plaintiff who "finally prevails" through informal settlement is deemed "successful in litigation" and is entitled to an award of attorney's fees based upon actual time expended. 15 U.S.C. §2310(d)(2); S. Rep. No. 93-151 (1973).

Senate and House Committee conference reports on the proposed Warranty Act indicate that the informal dispute settlement procedures referenced did not preclude access to the courts. "[A]n adverse decision in any informal dispute settlement procedure would not be a bar to a civil action on the warranty involved in the proceeding." H.R. Rep. No. 93-1107 (1974). A prohibition on a complete

roadblock to the legal system is well-defined: "[I]f a consumer chooses to seek redress…the provisions of [the Warranty Act] preserves all alternative avenues of redress, and utilization of any informal dispute settlement mechanism would then not be required by any provision of this Act." S. Rep. No. 93-1408 (1974). Outside of the informal dispute settlement mechanism, the courts are an "alternative avenue[] of redress." *Id.*

Congress, through explicit direction, made clear that an award of attorney's fees to a plaintiff who "finally prevails" through settlement is proper where litigation is resolved prior commencing formal legal action. Indeed, in certain instances a plaintiff may be precluded from seeking relief in a state or federal court prior to initially resorting to an informal dispute resolution procedure. 15 U.S.C. 2310(a)(4). Congress did not treat resort to an informal dispute settlement procedure as a substitute for a plaintiff's private right of action created by the Warranty Act. *Id.* Congress did, however, make clear that an award of attorney's fees is properly awarded where a plaintiff resolves a dispute prior to bringing an action in an appropriate court of law. S. Rep. No. 93-151 (1973). Congress intended that a plaintiff is entitled to attorney's fees as a prevailing party absent formal court intervention, and solely as a direct result of private settlement.

In the instant matter, Plaintiff filed his Complaint against Defendant alleging breach of warranty under the Warranty Act. (Vol. 1, pp. 1-67). Defendant served

Plaintiff with a proposal for settlement pursuant to Section 768.79 of the Florida Statues, and Florida Rule of Civil Procedure 1.442, in the amount of $8,500.00, exclusive of all interest, costs, and attorney's fees. (Vol. 1, pp. 150). On or about January 6, 2006 Plaintiff filed his "Notice of Acceptance of Proposal of Settlement." (Vol. 1, pp. 155-157). Having afforded Defendant a reasonable a reasonable opportunity to cure the Viper, and in fact subsequent to resort to formal adversary proceedings, Plaintiff succeeded in litigation, as defined by the Warranty Act, through settlement; thus, entitling Plaintiff to an award of attorney's fees.

B. The Florida Supreme Court Has Repeatedly Held That Statutes Should Be Construed So As To Give Effect To Evident Legislative Intent.

"Legislative intent controls statutory construction." *McGhee v. State*, 847 So. 2d 498 (Fla. 4th DCA 2003). "It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1 (Fla. 2004). Courts endeavor to construe statutes to effectuate the intent of the legislature. *Borden v. East-European Ins*. Co., 921 So. 2d 587 (Fla. 2006). Principles for the construction of statutes are designed to ascertain the legislative will and to carry that intent into effect. *Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist*., 274 So. 2d 522 (Fla. 1973). Rules of statutory construction are subordinate to the principle that

legislative intent controls. *American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524 (1938).

C. Congress Provided Explicit Statutory Authorization In The Warranty Act For An Award Of Attorney's Fees To A Plaintiff Who "Finally Prevails" Through Settlement, Therefore, Removing The Warranty Act From The Reach Of The Holding In *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't Of Health And Human Res*.

In *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health and Human Res*., Chief Justice Rehnquist, opining on behalf of the majority of the United States Supreme Court, wrote: "[W]e hold that the 'catalyst theory' is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205." *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health and Human Res*., 532 U.S. 598 (2001). Underlying its rationale, the Court deemed "prevailing party" a "legal term of art." *Id*. Significant, and in accord with the 1952 decision in *Morisstte v. United States*, the Court noted: "Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which its was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 615, *citing Morisstte v. United States*, 342 U.S. 246 (1952).

For reason that the Court in *Buckhannon* interpreted "prevailing party" as a "legal term of art," the logical question presented is whether all statutes utilizing the term "prevailing party," or a similarly constructed term, fall within the wake of the narrow holding of the *Buckhannon* decision. The Court, by way of its analysis, provided litigants a constricted, but important window of escape with regard to the extension of *Buckhannon* to "prevailing party" language utilized in statutes other than the Fair Housing Amendments Act ("FHAA"), or the Americans with Disabilities Act ("ADA"): If Congress offers explicit statutory authority, lower courts may award attorney's fees based upon a lesser "strength of victory" than articulated by the Court in *Buckhannon*, and should congressional language so allow, based even upon the catalyst theory. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 602; *see also Union of Needlestrades, Indus. And Textile Employees, AFL-CIO; CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265 (S.D.N.Y. 2002).

The Court in *Buckhannon* explicitly noted that its holding rests upon review of legislative history "clearly insufficient to alter the accepted meaning of the statutory term." *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 608, *citing Key Tronic Corp. v. Unites States*, 511 U.S. 809 (1994). Specific to the FHAA and ADA, the majority in *Buckhannon* referenced statutory language reading: "The court, in its discretion, may allow the prevailing party…a reasonable attorney's fee

and costs," and "the court…, in its discretion , may allow the prevailing party…a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 3613; 42 U.S.C. § 12205. The Court consequently opined: "We doubt that the legislative history could overcome what we think is the rather clear meaning of 'prevailing party' – the term actually used in the statute." *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 607. Significant, the Court announced that resort to legislative history in determining the meaning of "prevailing party" particular to a specific statute is proper. *Id*.

1. Explicit Statutory Authorization For An Award Of Attorney's Fees Must Be Analyzed On A Case By Case Basis.

In deciding whether the term "prevailing party", as utilized in the FHAA and ADA, allows an award of attorney's fees under the catalyst theory, the Court reviewed the legislative history of the FHAA, the ADA, and certain other federal statutes employing similar language. The Court first analyzed the legislative history of § 1988, as noted in *Hanrahan v. Hampton*, finding that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." *Id*. at 603, *citing Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam). Justifying such finding, the Court explained: "Our '[r]espect for ordinary language requires that a plaintiff receive at least some of the relief on the merits of his claim before he can be said to prevail.'"

Id. "It seems clearly to have been the intent of Congress to permit…an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims either in the *trial court* or on *appeal*." *Id*. (emphasis in original).

The Court noted that the legislative history to § 1988 is "at best ambiguous as to the availability of the 'catalyst theory' for awarding attorney's fees." *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 608. The Court quoted from respective House and Senate Reports: "The phrase 'prevailing party' is not intended to be limited to the victor only after entry of final judgment following a full trial on the merits;" and "[P]arties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." H.R. Rep. No. 94-1558, p.7 (1976); S. Rep. No. 94-1011, p.5 (1976). Against the backdrop of the "American Rule" the Court stated that "explicit statutory authority" does not exist within the legislative history of § 1988 to award attorney's fees under the catalyst theory in light of the connotation associated with "prevailing party" language construed as a "legal term of art."

Subsequent to *Buckhannon*, the D.C. Circuit analyzed the "substantially prevailing" language in the Freedom of Information Act ("FOIA"). In particular, the D.C. Circuit addressed the argument that Congress intended the FOIA's attorney's fee provision to be understood differently from comparable provisions

in other statutes such as the ADA. *Oil, Chem. & Atomic Workers Union v. DOE*, 351 U.S. App. D.C. 199 (D.C. Cir. 2002). The D.C. Circuit looked to the House bill, the Senate bill, and accompanying Committee comments in documenting that "[n]one of the Committee reports mentions awarding fees in the absence of a judgment. *Id*. Accordingly, the D.C. Circuit found that in the context of the FOIA no "explicit statutory authority" can be found to dispute *Buckhannon's* applicability. *Id*.

In *Ruckelhaus v. Sierra Club,* the Court detailed Congressional intent, through enactment of the Clean Air Act ("CAA"), to eliminate traditional restrictive readings of "prevailing party" as utilized by the CAA. The Court found "explicit statutory authority" in the legislative history of the CAA to expand the class of parties eligible for fee awards as a "prevailing party" beyond that discussed by the majority in *Buckhannon*. *Ruckelhaus v. Sierra Club*, 463 U.S. 680 (1983). The Court specifically noted Congress' explicit intention to use the catalyst theory as a legitimate method for obtaining attorney's fees under the CAA. *Id*. at 688.

In *Loggerhead Turtle v. County Council of Volusia County, Fla.*, the Eleventh Circuit Court of Appeals held *Buckhannon* inapplicable to fee the shifting provision included in the Endangered Species Act ("ESA"). *Loggerhead Turtle v. County Council of Volusia County, Fla.*,307 F. 3d 1318 (11th Cir. 2002). Detailing

the holding of *Buckhannon*, the Eleventh Circuit opined that that *Buckhannon* does not invalidate use of the catalyst test as a basis for awarding attorney's fees under the ESA. *Id*. at 1324. In particular, the Eleventh Circuit explained: "First, and most important, there is clear evidence that Congress intended that a plaintiff whose suit furthers the goals of a 'whenever ... appropriate' statute be entitled to recover attorney's fees." *Id*. at 1325. The Eleventh Circuit emphasized that clear evidence of Congressional intent regarding the standard for awarding attorney's fees controls. *Id*. at 1326; *see also Iraola & CIA, S.A. v. Kimberly-Clark Corp.,* 232 F. 3d 854 (11th Cir. 2000).

2. Explicit Statutory Authorization For An Award Of Attorney's Is Found In The Legislative History Of The Warranty Act.

Contrary to the legislative language found in the FHAA, the ADA, § 1988, and the FOIA, "explicit statutory language" exists within the legislative history of the Warranty Act to warrant departure from the analysis employed in *Buckhannon* specific to construction of the term "prevailing party" as a "legal term of art." Congress included a one-way fee-shifting provision when it enacted the Warranty Act into law in 1975. In contemplating the fee shifting provision included in the Warranty Act Congress expressly deemed successful litigation to include settlement. Specifically, the Report of the Senate Committee on Commerce on S.

356, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, provides in pertinent part:

> Section 110 spells out the remedies available to the purchaser of consumer products. A purchaser can utilize informal dispute settlement procedures established by suppliers or, having afforded a supplier a reasonable opportunity to cure, may resort to formal adversary proceedings **with reasonable attorney's fees available if successful in litigation (including settlement)** (emphasis added).

S. Rep. No. 93-151 (1973).

Justice Scalia, concurring with the majority opinion in *Buckhannon*, detailed that when interpreting a "legal term of art," such as "prevailing party," the "absence of contrary direction may be taken as a satisfaction with widely accepted definitions, not as a departure from them." *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 608, *citing Morissette*, 342 U.S. at 263. The Senate Report to the Warranty Act provides not only "contrary direction," but "explicit statutory authority," sufficient to alter the meaning of the term "prevailing party" as interpreted by the Court in *Buckhannon*, accounting for any specialized legal meaning. Congress, utilizing "prevailing party" as a "legal term of art" in drafting the Warranty Act, presumably aware of accumulated legal tradition and meaning of centuries of practice, explicitly instructed against the adoption of the cluster of ideas that were attached to the term "prevailing party," as recognized by the Court in *Buckhannon*. Indeed, Congress intended that a consumer, following resort to

adversarial proceedings, is deemed "successful in litigation," by way of reaching a settlement, and therefore deserving of attorney's fees as a party who "finally prevails" under the Warranty Act. *See* S. Rep. No. 93-151 (1973).

II. JUDICIAL IMPRIMATUR IS A CONSEQUENCE OF DEFENDANT'S PROPOSAL FOR SETTLEMENT PURSUANT TO SECTION 768.79 OF THE FLORIDA STATUTES, GIVING RISE TO A MATERIAL ALTERATION OF THE LEGAL RELATIONSHIP OF THE PARTIES INVOLVED.

Historically, plaintiffs have been awarded attorney's fees as a "prevailing party" where a plaintiff: (1) obtained a favorable judicial order on the merits; (2) obtained a consent decree; (3) contracted for a private settlement; or (4) caused the defendant's voluntary cessation of a legal action without legal obligation to do so. The Court in *Buckhannon* drew the line for fee entitlement somewhere between a consent decree and private settlement. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603. The majority in *Buckhannon* rejected the catalyst theory, noting that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. *Id*.

The Court continued in *Buckhannon*: "In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees." *Id*. at 604, *citing Maher v. Gagne,* 448 U.S. 122 (1980). "Although a consent decree does not always include

an admission of liability by the defendant…it nonetheless is a court-ordered 'chang[e][in] the legal relationship between [the plaintiff] and the defendant.'" *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 604, *citing Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782 (1989). The Court accordingly explained: "[E]nforceable 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 attorney's fees." *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 604.

Important to the Court's analysis, the majority included a footnote underscoring the significance of a consent decree: "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, *citing Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994). The holding in *Buckhannon*, as noted by the United States District Court for the Northern District of Florida, "fell short of a holding that fees may be recovered only if there is a consent decree, not a mere private settlement." *National Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272 (N.D. Fla. 2001). The issue in *Buckhannon* was whether fees could be recovered under the catalyst theory. *Id*. at 1278. Any suggestion that fees may not be recovered for a

mere private settlement was dictum. *Id.* Moreover, the Court did not explicitly state, even in dictum, that fees may not be recovered when there is only a private settlement. *Id.* Notwithstanding, the Court's discussion suggests that that such is the current law. *Id.*

A. Judgments On The Merits And Consent Decrees Are Non-Exclusive Examples Of Judicially Sanctioned Changes Creating The Necessary Judicial Imprimatur As Required By *Buckhannon*.

The touchstone of judicial imprimatur on the change in the legal relationship of parties to litigation is found in the judicial alteration of actual circumstances. Under *Buckhannon* "a plaintiff 'prevails,' and thus is entitled to attorney's fees and costs, when he or she enters into a legally enforceable settlement agreement with the defendant." *Richard S. v. Department of Developmental Services of the State of California,* 317 F. 3d 1080 (9th Cir.2003). Judgments on the merits and consent decrees are non-exclusive examples of judicially sanctioned changes creating the necessary judicial imprimatur as required by *Buckhannon*.[2] *Melton v. Frigidaire*, 346 Ill. App. 3d 331 (1st Dist. 2004); *see also Johnny's IceHouse, Inc. v. Amateur Hockey Ass'n of Illinois,* No. 00 C 7363, 2001 WL 893840 (N.D. Ill. 2001) ("*Buckhannon* pointed to enforceable judgments on the merits and court-ordered

[2] The Court in *Buckhannon* characterizes enforceable judgments and consent decrees as examples on the other side of the line from which the "catalyst theory" falls. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 605 ("We think, however, the 'catalyst theory' falls on the other side of the line from these examples.").

consent decrees as examples of material alterations of parties' legal relationships, but the Court did not hold that those are the only instances in which a party may be deemed to have prevailed."); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago,* 326 F.3d 924, 932 (7th Cir.2003) (noting that judgments on the merits and court ordered consent decrees are examples of "judicially sanctioned changes" in the legal relation of parties); *John T. v. Delaware County Intermediate Unit,* 318 F. 3d 545 (3rd Cir.2003) (finding a stipulated settlement "judicially sanctioned" under *Buckhannon*); *Smyth v. Rivero,* 282 F. 3d 268 (4th Cir. 2002) ("We doubt the Supreme Court's guidance in *Buckhannon* was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly…We will assume, then, that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us, even if not entitled as such.").

B. Section 768.79 Of The Florida Statutes Bestows Upon A Court The Authority To Sanction, Approve, Oversee, And Enforce Settlement, Absent In Connection With Mere Private Agreement.

"A consent decree is an order of the court compelling the defendant to comply with specified terms, not because the court has independently concluded that the plaintiff is entitled to that relief, but because the defendant has voluntarily agreed to those terms." *National Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d at 1278. An order and judgment need not set forth the terms to

which the parties have agreed to constitute a consent decree for reason that an order and judgment in effect incorporate the terms of settlement. *Id*. "The appropriateness of an award of fees surely ought not turn on whether the court does or does not retype the provisions of a settlement agreement as part of an order compelling compliance." *Id*. at 1279.

A consent decree is essentially a settlement agreement subject to continued judicial policing. *U.S. v. City of Miami, Fla.,* 664 F. 2d 435 (5th Cir. 1981). The terms of a consent decree have attributes of both a contract and a judicial act. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). On the one hand, "a consent decree is a voluntary settlement agreement which could be fully effective without judicial intervention. *See City of Miami*, 664 F.2d at 439-40. The consent decree memorializes the bargained for positions of the parties. *United States v. Armour & Co.*, 402 U.S. 673 (1971). The defendant has given up the possibility of prevailing on the merits in exchange for granting certain limited affirmative relief to the plaintiff. On the other hand, a consent decree manifests judicial approval of a settlement and places the authority of the court behind the compromise of the parties. *City of Miami,* 664 F. 2d at 441.

Contrary, private settlement, as the term is used in *Buckhannon*, does "not entail...judicial approval and oversight" as involved in a consent decree. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 604. A private settlement, as

defined by the majority in *Buckhannon*, cannot be enforced by the court. *Id*. Justice Scalia, through his concurring opinion, expounds upon the majority reasoning in drawing the line between court-approved settlements and consent decrees, and private settlements not having the same status: "[I]n the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action in the lawsuit. There is at least some basis for saying that the party favored by the settlement or decree prevailed in the suit." *Id*. at 618.

C. Section 768.79 Of The Florida Statutes Imparts Upon The Trial Court Full Jurisdiction To Enforce Settlement And Agreement.

Section 768.79 of the Florida Statutes reads in pertinent part:

> An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, **the court has full jurisdiction to enforce the settlement and agreement.**

Fla. Stat. §768.79(4).

Defendant filed its "Proposal of Settlement Exclusive of Attorney's Fees" pursuant to section 768.79 of the Florida Statutes, and Florida Rule of Civil Procedure 1.442, on December 16, 2005. (Vol. 1, pp. 194-197). Plaintiff subsequently filed his Notice of Acceptance of Defendant's proposal for settlement with the trial court on December 21, 2005. (Vol. 1, pp. 155-157). Pursuant to

section 768.79(4) of the Florida Statutes the trial court in this matter retained full jurisdiction to enforce the settlement agreement. Fla. Stat. 768.79.

The necessary judicial approval and oversight emphasized in *Buckhannon*, derived from the court's jurisdiction to control and enforce private contractual settlement, is present in the instant matter. Defendant served Plaintiff with a proposal for settlement pursuant to section 768.79 of the Florida Statutes, and Plaintiff subsequently filed his written acceptance of the same with the trial court. (Vol. 1, pp. 155-157). Section 768.79 of the Florida Statutes affords the trial court "full jurisdiction to enforce the settlement and agreement." Fla. Stat. 768.79. The resultant judicially enforceable settlement agreement creates a material alteration of the legal relationship between Plaintiff and Defendant, thus, categorically entitling Plaintiff to an award of attorney's fees. *See Buckhannon Board and Care Home,* 532 U.S. at 604.

Indeed, the judicially enforceable settlement agreement reached by Plaintiff and Defendant, filed with the court pursuant to section 768.79 of the Florida Statutes, falls within the category delineated by Justice Scalia as "court-approved settlements and consent decrees."[3] *Buckhannon Board and Care Home,* 532 U.S.

[3] Important, the Court has noted that consent decrees are not identical in effect to the conclusion reached by a judge after trial; thus, an appeal on the merits usually does not lie from it. *Kaspar Wire Works, Inc. v. Leco Engineering & Mach.*, Inc. 575 F. 2d 530 (5th Cir. 1978). "The parties' proposal does not reflect the considered judgment of a judicial officer: it has been forged by them alone as an

at 618. Stated otherwise, the judicial approval and oversight arising from the trial court's jurisdiction to control and enforce private contractual settlement pursuant to section 768.79 of the Florida Statutes places the settlement agreement in question, as Justice Rehnquist notes, "on the other side of the line" of those examples so characterized by the "catalyst theory." *Buckhannon Board and Care Home,* 532 U.S. at 605.

"If the parties agree to compose their differences by a settlement agreement alone, the only penalty for failure to abide by the agreement is another suit." *City of Miami,* 664 F. 2d at 439. Contrary to such a situation, and like consent decrees, litigants presenting offers made pursuant to Section 768.79 of the Florida Statutes are able to reinforce their compromise and obtain enforceability. *See Id*; Fla. Stat. 768.79(4). Offers made pursuant to Section 768.79 of the Florida Statutes have greater finality than a mere compact between parties. Where a court's implicit authority to enforce terms of an agreement incorporated into an order of dismissal brings a plaintiff across the "prevailing party" threshold, so too must the express statutorily mandated authority afforded to the trial court by way of an offer

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adjustment of conflicting claims and is not a tempered determination of fact and law after the annealment of an adversary trial." *Id*. at 538; *see also Ad-Ex, Inc. v. City of Chicago,* 207 Ill. App. 3d 163 (1st Dist. 1991) (A consent decree is not a judicial determination of the rights of the parties, nor is it a representation of the judgment of the court. It is "merely the court's recordation of the private agreement of the parties").

presented and accepted pursuant to section 768.79 of the Florida Statutes. *See Buckhannon Board and Care Home,* 532 U.S. at 604, *citing Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

Should Defendant have limited the trial court's role to merely dismissing the lawsuit, it cannot be said that the trial court would have played a role in settlement. However, as is the case in the instant matter, where a trial court has full jurisdiction to enforce the settlement that has been presented to it, the trial court is empowered to ensure the terms of the settlement will be carried out. The trial court therefore maintains an active role in settlement. Such is nothing less than "judicial imprimatur."

D. Defendant's Proposal For Settlement, And Accompanying Release And Confidentiality Agreement, Call Upon The Trial Court To Affirmatively Decide Issues Not Yet Resolved, Including Entitlement To, And Amount Of, Attorney's Fees To Be Awarded To Plaintiff.

In *Barrios v. California Interscholastic Federation*, the Ninth Circuit Court of Appeals held that a plaintiff "prevails" under *Buckhannon* when he or she enters into a legally enforceable settlement agreement against the defendant:

> [A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. The Court explained that "a material alteration of the legal relationship occurs [when] the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." In these situations, the legal

> relationship is altered because the plaintiff can force the defendant to do something he otherwise would not have to do.

Barrios v. California Interscholastic Federation, 277 F.3d 1128 (9th Cir.2002), *cert. denied,* 537 U.S. 820 (2002).

The Ninth Circuit, in *Barrios v. California Interscholastic Federation*, explicitly stated: "Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys' fees and costs." In *Richard S. v. Department of Developmental Services of State of California*, the Ninth Circuit similarly noted that in stipulating that the trial court retain jurisdiction to address any issue of attorney's fees and costs that may be unresolved by the parties that "[t]he district court's retention of jurisdiction over the attorney's fees issue, 'thus provid[ed] sufficient judicial oversight to justify an award of attorney's fees and costs.'" *Richard S. v. Department of Developmental Services of State of California*, 317 F. 3d 1080 (9th Cir. 2003); *see also Melton v. Frigidaire*, 346 Ill. App. 3d 331 (1st Dist. 2004) (affirming award of attorney's fees after the plaintiff accepted the defendant's settlement offer exclusive of attorney's fees leaving issue of attorney's fees to be decided by the court).

Complete accord on all issues is not indispensable with regard to a consent decree. *City of Miami,* 664 F.2d at 440. Parties may agree on as much as they can, and call upon the court to decide the issues they cannot resolve. *See Pettway v.*

American Cast Iron Pipe Co., 576 F. 2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). A consent decree may be "partially consensual and partially litigated." *High v. Braniff Airways, Inc.*, 592 F.2d 1330 (5th Cir. 1979).

Defendant acknowledged through its December 16, 2005 proposal for settlement: "DaimlerChrysler concedes that Plaintiff may seek to prove entitlement to attorney's fees through a hearing before this Court." (Vol. 1, pp. 194-197). Defendant's accompanying Release and Confidentiality Agreement details that pursuant to Defendant's proposal for settlement the trial retains jurisdiction to determine entitlement to, and amount of, attorney's fees that Plaintiff's attorney "contends he is entitled to as a result of his representation of Plaintiff in this case." (App. A-1). In fact, Defendant's Release and Confidentiality Agreement exempts from its reach altogether that which is "outlined in section 3.0 infra." (App. A-1). Simply, Defendant explicitly chooses not to require a release of any "right to motion the court for attorney's fees that he contends he is entitled to as a result of his representation of Plaintiff in this case." (App. A-1).

More importantly, Defendant included in its Release and Confidentially Agreement a provision mandating that Plaintiff agrees to file a notice of dismissal with prejudice only "once the issues outlined in section 3.0 infra, have been resolved." (App. A-1). In other words, Defendant not only recognizes the trial

court's jurisdiction to sanction and approve the settlement outlined in Defendant's proposal for settlement, but explicitly directs that Plaintiff file a notice of dismissal only upon conclusion of the trial court's determination regarding entitlement to, and amount of, attorney's fees to be awarded as a result of Plaintiff's uninhibited right to motion to court for the same. (App. A-1).

Defendant's Release and Confidentially Agreement emphasizes the trial court's contractual obligation to retain jurisdiction over settlement, and responsibility to affirmatively rule on Plaintiff's motion for entitlement to attorney's fees. Plaintiff's claim for attorney's fees survives Defendant's proposal for settlement exclusive of attorney's fees. Plaintiff's claim for attorney's fees does not stand alone. The consequence of Defendant's proposal for settlement exclusive of attorney's fees, in connection with Plaintiff's subsequent acceptance, is the incorporation of the trial court in deciding an award of attorney's fees pursuant to section 2310(d)(2) of the Warranty Act. Thus, providing sufficient judicial oversight to justify an award of attorney's fees and costs. *See Barrios v. California Interscholastic Federation,* 277 F.3d 1128 (9th Cir.2002), *cert. denied,* 537 U.S. 820 (2002); *Richard S. v. Department of Developmental Services of State of California*, 317 F. 3d 1080 (9th Cir. 2003).

III. DENYING PLAINTIFF PREVAILING PARTY STATUS DOES VIOLENCE TO THE PURPOSE OF SECTION 768.79 OF THE FLORIDA STATUTES AND IS A DETRIMENT TO PUBLIC POLICY AS WELL AS AN IMPEDIMENT UPON JUDICIAL ECONOMY.

It is neither reasonable nor just that a party may avoid liability for statutory attorney's fees merely by filing a proposal for settlement at some point after a suit is filed but before final judgment is entered, thereby making unnecessary the entry of final judgment. A statute that authorizes an award of attorney's fees to a party bringing suit pursuant to a loss must be construed so that statutory attorney's fees are payable where no technical judgment for the loss is entered due to the voluntary payment of such loss before a judgment can be rendered. Should this Court construe section 768.79 of the Florida Statutes, in connection with the Warranty Act, to allow Defendant to avoid the payment of statutorily authorized attorney's fees simply by presenting to Plaintiff a proposal for settlement exclusive of attorney's fees, such construction would do violence to the purpose of the section 768.79 of the Florida Statutes, which is to "encourage [parties] to acquiesce in claims discovered during litigation to be meritorious and to shift to the claimant the financial burden of carrying on litigation beyond the point where an appropriate offer of judgment on the merits is made." *See Wisconsin Life Insurance Company v. Sills*, 368 So. 2d 290 (Fla. 1st DCA 1979). As well, such

interpretation would cause Defendant's proposal for settlement exclusive of attorney's fees to fail for reason of ambiguity.

A. Denying Plaintiff Prevailing Party Status, Thereby Relieving Defendant Of A Statutorily Authorized Obligation To Remunerate Plaintiff's Attorney's Fees, Leads To An Absurd Result That Cannot Survive As Proper Construction Where It Would Render Section 768.79 Of The Florida Statutes Purposeless.

While the Florida Constitution gives the legislature the exclusive right to enact laws, including those establishing a substantive right to attorney's fees, the Florida Supreme Court has the exclusive rule-making authority under the Constitution to determine what procedures must be followed in order to invoke such rights. *Lepai v. Milton*, 595 So. 2d 12 (Fla. 1992); Florida Constitution, Article V, Section 2. Drafting a valid and enforceable proposal for settlement in pursuant to section 768.79 of the Florida Statutes, therefore, requires strict adherence to Florida Rule of Civil Procedure 1.442. *Lamb v. Matetzschk*, 906 So. 2d 1037 (Fla. 2005); Fla. R. Civ. P. 1.442. Florida Rule of Civil Procedure 1.442 was designed to induce or influence a party to settle litigation. *Hernandez v. Travelers Ins. Co.,* 331 So. 2d 329 (Fla. 3d DCA 1976). The purpose of Florida Rule of Civil Procedure 1.442 is to obviate litigation. *Tucker. v. Shelby Mut. Ins. Co. of Shelby, Ohio,* 343 So. 2d. 1357 (Fla. 1977). A proposal for settlement is intended to end judicial labor. *Lucas v. Calhoun*, 813 So. 2d 971 (Fla. 2nd DCA 2002).

Should this court accept the position that a plaintiff shall not be considered a prevailing party, as defined by the Warranty Act, in an action where that plaintiff accepted a proposal for settlement, the unmistakable result of such a decision would be to discourage settlement and place an increasing burden on the judicial system. In particular, a plaintiff would be forced to deny reasonable offers of settlement and continue litigation solely to maintain a statutorily authorized rights to attorney's fees. Requiring a plaintiff to continue litigation despite an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system.

"It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result." *Dorsey v. State,* 402 So. 2d 1178 (Fla. 1981). *See also State v. Webb*, 398 So. 2d 820 (Fla. 1981) (holding that construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided); *Austin v. State ex rel. Christian*, 310 So. 2d 289 (Fla. 1975) (declaring that statutes should not be construed in a way so as to lead to untenable conclusions). Disallowing an award of attorney's fees, by way of denying prevailing party status to a plaintiff that accepts a proposal for settlement, inhibits any purpose fostered by section 768.79 of the Florida Statutes. Stripped of any impetus to accept a settlement offer presented pursuant to section 768.79 of the Florida Statutes, a plaintiff bringing

suit under the Warranty Act would have no reason to obviate litigation, but rather proceed beyond the point where an appropriate proposal for settlement on the merits is made in attempt to seek a judgment upon which a fee award surely arises. Such an absurd result cannot survive as proper construction where it would render section 768.79 of the Florida Statutes purposeless.

B. Denying Plaintiff Prevailing Party Status Effectively Distorts Defendant's Proposal Of Settlement With Respect To The Exclusivity Of Attorney's Fees, Thereby Causing It To Fail As An Effective Conveyance Mechanism Free From Ambiguities.

"The [offer of judgment] rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions." *Lucas v. Calhoun,* 813 So.2d 971 (Fla. 2d DCA 2002). "Because the offer of judgment statute and related rule must be strictly construed, virtually *any* proposal that is ambiguous is not enforceable." *Stasio v. McManaway,* 936 So. 2d 676 (Fla. 5th DCA 2006) (emphasis in original). The terms and conditions of a proposal should be devoid of ambiguity, patent or latent, and it should be capable of execution without the need for further explanation or judicial interpretation. *Nichols v. State Farm Ins. Co.,* 851 So. 2d 742 (Fla. 5th DCA 2003), *decision approved,* 932 So. 2d 1067 (Fla. 2006); *see also United Serv. Auto Ass'n v. Behar*, 752 So. 2d 663 (Fla. 2d DCA 2000) (holding that applicable rules intend for a proposal for judgment to be as specific as possible, leaving no

ambiguities so that the recipient can fully evaluate its terms and conditions). This requirement of particularity is “fundamental to the purpose underlying the [offer of judgment] statute and rule.” *Id*.

Defendant’s proposal for settlement reads in part: “Defendant DaimlerChrysler shall pay to Plaintiff the total sum of EIGHT THOUSAND FIVE HUNDRED DOLLARS AND xx/100 ($8,500.00), exclusive of all interest, costs, and attorney’s fees.” (Vol. 1. pp. 194-200). Defendant’s proposal further details that Defendant’s offer “is made exclusive of attorney’s fees, interest and costs allegedly incurred as a result of this action,” and that “Edmund Mady will receive EIGHT THOUSAND FIVE HUNDRED DOLLARS AND xx/100 ($8,500.00) exclusive of attorney’s fees.” (Vol. 1. pp. 194-200).

Accordingly, Defendant’s proposal for settlement outlines: “Plaintiff may seek to prove entitlement to attorney’s fees through a hearing before this Court.” (Vol. 1. pp. 194-200). Defendant’s accompanying Release and Confidentiality Agreement provides: “Plaintiff’s attorney reserves the right to motion the court for attorney’s fees that he contends he is entitled to as a result of his representation of Plaintiff in this case.” (App. A-1). Indeed, Defendant’s Release and Confidentiality Agreement calls for dismissal with prejudice only after the issue of entitlement to, and amount of, an award of attorney’s fees to Plaintiff has been determined by the trial court. (App. A-1).

Should this Court determine that Plaintiff is precluded from seeking an award of attorney's fees from the trial court, as outlined and contracted for by way of Defendant's proposal for settlement, Defendant's proposal, presented pursuant to section 768.79 of the Florida Statutes, would fail for reason of ambiguity. Specifically, precluding Plaintiff the right to seek an award of attorney's fees transforms Defendant's proposal for settlement exclusive of attorney's fees into an offer inclusive of attorney's fees.[4] The proposal, construed as such, is therefore ambiguous with respect to a fundamental provision of the agreement. Stated otherwise, should this Court mutate Defendant's proposal for settlement exclusive of attorney's fees into an offer inclusive of attorney's fees, the proposal would fail as efficient mechanism to convey an offer of settlement to the opposing party free from ambiguities so that the recipient could fully evaluate its terms and

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[4] The Fourth District, in *Stephenson v. Holiday Rambler*, 709 So. 2d 139 (Fla. 4th DCA 1998), notes an important distinction between an inclusive and exclusive proposal for settlement made in connection with an action in which the plaintiff utilizes a fee shifting provision: In calculating the requisite 25% disparity needed to obtain an award of fees in an *inclusive proposal*, the court should calculate a plaintiff's reasonable attorney's fees up to the time of the offer, and then add that amount to the final judgment or award. If such an amount is more that 25% less than the offer, then the defendant should be awarded attorney's fees under section 768.79 of the Florida Statutes. In calculating the requisite 25% disparity specific to a proposal for settlement *exclusive of fees*, the plaintiff's costs and fees are not accounted for. The importance of this distinction is exemplified by the rulings of the Second and Fifth District Courts of Appeal in *Talbott v. American Isuzu Motors, Inc.*, 934 So. 2d 643 (Fla. 2nd DCA 2006) and *Marcy v. DaimlerChrysler*, 921 So. 2d 781 (Fla. 5th DCA 2006), finding that the one way fee shifting provision included the Warranty Act inuring benefit solely to a prevailing consumer-plaintiff did not preempt section 768.79 of the Florida Statutes.

conditions.[5] The inherent contradiction included in Defendant's proposal for settlement, should Plaintiff be precluded from seeking an award of attorney's fees, would not only lack consideration,[6] but would make it fundamentally impossible for Plaintiff to evaluate the true terms and conditions of Defendant's offer.

IV. CONTRARY TO THE FINDING OF THE FOURTH DISTRICT COURT OF APPEAL, THE SECOND AND THIRD DISTRICT COURTS OF APPEAL HAVE EXPLICITLY HELD THAT A PLAINTIFF WHO ACCEPTS A PROPOSAL FOR SETTLEMENT EXCLUSIVE OF ATTORNEY'S FEES IS NOT PRECLUDED FROM CLAIMING ENTITLEMENT TO ATTORNEY'S FEES UNDER THE WARRANTY ACT.

A. The Second District Court Of Appeal Found That An Agreement Entered Into Pursuant To A Proposal For Settlement Is Judicially Enforceable And That A Plaintiff Who Accepts A Proposal For Settlement Exclusive Of Attorney's Fees Is Not Precluded From Claiming Entitlement To Attorney's Fees Under The Warranty Act.

In *Dufresne v. DaimlerChrysler Corporation*, Dufresne filed suit against DaimlerChrysler alleging breach of warranty pursuant to the Warranty Act. *Dufresne v. DaimlerChrysler Corp.*, 975 So. 2d 555 (Fla. 2d DCA 2008).

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[5] The Florida Circuit Court for the Ninth Judicial Circuit, acting in appellate capacity, found that a defendant's proposal for settlement exclusive of attorney's fees was not sufficiently particular to be enforced where the defendant contended that the plaintiff was not entitled to an award of attorney's fees as a result of the defendant's offer. *American Honda Motor Co., Inc. v. Fontana*, 2007 WL 1427554 (Fla. Cir. Ct. 2007).

[6] Despite Defendant's proposal for settlement *exclusive* of attorney's fees and Plaintiff's acceptance of the same, under no circumstances could Plaintiff ever had recovered attorney's fees under Defendant's proposal and position taken below. As there does not exist a scenario in which a plaintiff would be able to obtain attorney's fees under such a proposal, the offer fails for lack of consideration.

DaimlerChrysler served Dufresne with a proposal for settlement pursuant to section 768.79 of the Florida Statutes, and Florida Rule of Civil Procedure 1.442. *Id*. at 556. The offer was exclusive of all interest, costs, and attorney's fees. *Id*. Dufresne accepted the proposal for settlement, filed his notice of acceptance with the trial court, and subsequently sought attorney's fees and costs under the Warranty Act. *Id*.

Citing *Buckhannon*, DaimlerChrysler opposed the motion for attorney's fees and costs arguing that Dufresne did not "finally prevail" because he accepted the settlement offer. *Dufresne v. DaimlerChrysler Corp*., 975 So. 2d at 556. DaimlerChrysler contended that to be considered a prevailing party under a federal fee-shifting statute, such as the one contained in the Warranty Act, a party must either obtain a judgment on the merits or a court-ordered consent decree. *Id*. DaimlerChrysler contended that because Dufresne obtained neither judgment on the merits nor a court-ordered consent decree, he could not claim entitlement to fees. *Id*. The trial court agreed and denied Dufresne's request for fees. *Id*.

On appeal, the Second District Court of Appeal explained that while either a judgment on the merits or a consent decree is sufficient to make a plaintiff a prevailing party, they are not, as DaimlerChrysler contended, the only bases upon which a plaintiff can be considered a prevailing party. *Id*. citing *Am. Disability Ass'n v. Chmielarz,* 289 F. 3d 1315 (11th Cir.2002). The Second District noted:

"Where the parties have entered into a settlement and the court has explicitly retained jurisdiction to enforce the terms of the settlement, the explicit retention of jurisdiction over the terms of the settlement [is] the 'functional equivalent of an entry of a consent decree.'" *Id*. citing *Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach,* 353 F. 3d 901 (11th Cir. 2003).

The Second District further concluded:

> Although the trial court here did not enter an order explicitly retaining jurisdiction, a settlement agreement entered into pursuant to an offer of judgment is nevertheless judicially enforceable because the offer of judgment statute states that "[u]pon filing of both the offer and acceptance, the court shall retain full jurisdiction to enforce the settlement agreement." See §768.79(4). We therefore conclude that settlement here is the functional equivalent of a consent decree and that Dufresne is not precluded from claiming entitlement to attorneys' fees under the MMWA simply because he accepted a proposal for settlement.

Dufresne v. DaimlerChrysler Corp., 975 So. 2d at 557-558.

B. The Third District Court Of Appeal Found That A Party Who Accepts An Proposal For Settlement Pursuant To Section 768.79 Of The Florida Statutes, Which Expressly Reserves The Right To Seek An Award Of Attorney's Fees, Is Not Precluded From Seeking Entitlement To Attorney's Fees Under The Warranty Act.

In *San Martin and Nelson v. DaimlerChrysler Corporation*, both San Martin and Nelson filed suit against DaimlerChrysler alleging breach of warranty pursuant to the Warranty Act. *San Martin and Nelson v. DaimlerChrysler Corporation*, 983 So. 2d 620 (Fla. 3d DCA 2008). DaimlerChrysler served both San Martin and

Nelson with proposals for settlement pursuant to section 768.79 of the Florida Statutes, and Florida Rule of Civil Procedure 1.442. *Id*. at 621. DaimlerChrysler's proposal to Nelson stated in relevant part: "Defendant DaimlerChrysler shall pay to Plaintiff the total sum of FOUR THOUSAND DOLLARS AND 00/100 ($4,000.00), exclusive of all interest, costs, and attorney's fees...." *Id*. The proposal further stated that, "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 Amended Complaint in this action." *Id*. Additionally, the "Release and Confidentiality Agreement," Section 3.0, attached to DaimlerChrysler's proposal to Nelson, contained a separate express reservation for the "Plaintiff's attorney…to motion the court for attorneys' fees he contends that he is entitled to as a result of his representation in this case." *Id*. DaimlerChrysler's proposal to San Martin was the same as its proposal to Nelson in all material respects. *Id*. San Martin and Nelson accepted the respective proposals for settlement, filed their notices of acceptance with the trial courts, and subsequently sought attorney's fees and costs under the Warranty Act. *Id*.

Reversing the decisions of the both trial courts, and against the backdrop of *Buckhannon*, the Third District Court of Appeal opined:

> Although an attorney fee recovery under the "catalyst theory" falls on the "other side of the line [of cases]," *id.* at 605, 121 S.Ct. 1835, examined by the Supreme Court where "prevailing party" status was found to attach, **we believe that a party who**

> **accepts an offer of judgment made pursuant to Florida Rule of Civil Procedure 1.442 and section 768.79 of the Florida Statutes (2004), which expressly reserves the right to seek an attorney fee award, satisfies the threshold level of success required to proceed.**

San Martin and Nelson v. DaimlerChrysler Corporation, 983 So.2d at 625.

C. The Fourth District Court Of Appeal, In Finding That A Plaintiff Is Precluded From Seeking An Award Of Attorney's Fees Under The Warranty Act Subsequent To Accepting A Proposal For Settlement Pursuant To Section 768.79 Of The Florida Statutes, Ignores The Clear Direction Of The Court In *Buckhannon* That A Final Judgment On The Merits Is Not A Prerequisite To An Award Of Attorney's Fees Pursuant To A Federal Fee-Shifting Provision.

In the instant matter, the Fourth District Court of Appeal held that Plaintiff's acceptance of Defendant's proposal for settlement pursuant to section 768.79 of the Florida Statutes precluded the trial court from finding that Plaintiff was a prevailing party for purposes of an award of attorney's fees. *Mady v. DaimlerChrysler Corp.*, 976 So. 2d 1212 (Fla. 4th DCA 2008). Underlying its opinion, the Fourth District held that "[o]rdinarily, a private settlement does not satisfy [the requirement of a court-ordered change in the legal relationship of the parties]." *Mady*, 976 So. 2d at 1214, *citing Buckhannon Board and Care Home,* 532 U.S. at 604, *quoting Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375 (1994). "However, when the terms of a private settlement are incorporated into a court order or the court retains jurisdiction to enforce its terms, the agreement can

be construed as the equivalent of a consent decree." *Mady*, 976 So. 2d at 1214, *citing Buckhannon Board and Care Home,* 532 U.S. at 604. The Fourth District continued: There simply was no court-ordered change in the relationship of the parties in this case by the plaintiff's acceptance of DaimlerChrysler's proposal for settlement. *Mady,* 976 So. 2d 1214.

The Fourth District specifically noted that its finding was contrary to that of the Second District:

> We are aware that the Second District Court of Appeal has recently reached a contrary conclusion. *Dufresne v. DaimlerChrysler Corp.,* No. 2D05-5118, 975 So.2d 555 (Fla. 2d DCA 2008). There, the Second District held, under circumstances identical to those in this case, that the settlement of a Magnuson-Moss Act claim, pursuant to section 768.79, "is the functional equivalent of a consent decree," thereby rendering the plaintiff a prevailing party. *Id.* at 557. The court based its holding on subsection (4) of section 768.79, which provides the trial court with "full jurisdiction to enforce the settlement agreement." *Id.* (citing § 768.79(4), Fla. Stat. (2004)). We respectfully disagree.

Mady, 976 So. 2d 1214.

Citing *Buckhannon*, the Fourth District stated: "We find that section 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. *Mady,* 976 So. 2d 1214. "We have previously held that section 768.79, Florida Statutes (1998), and Florida Rule of Civil Procedure 1.442 do NOT require entry of a final judgment unless the judgment is a

term of the proposal for settlement. *Abbott & Purdy Group, Inc. v. Bell,* 738 So.2d 1024 (Fla. 4th DCA 1999). *Mady,* 976 So. 2d 1215. The Fourth District, however, omits from the entirety of its opinion discussion regarding distinguishing characteristics of court-approved settlements and consent decrees, and private settlements not having the same status.

Justice Scalia, concurring in *Buckhannon*, aptly noted: "[I]n the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action in the lawsuit. There is at least some basis for saying that the party favored by the settlement or decree prevailed in the suit." *Id*. at 618. Justice Scalia's comments, in accord with those of the majority in *Buckhannon*, underlie the reasoning which precludes an award of attorney's fees based merely upon the "catalyst theory," but affords such a right to those who prevail by way of consent decree. Of the utmost significance, and directly contrary to the reasoning employed by the Fourth District, consent decrees and court-approved settlements are not identical in effect to the conclusion reached by a judge after trial; thus, an appeal on the merits usually does not lie from it. *Kaspar Wire Works, Inc. v. Leco Engineering & Mach*., Inc. 575 F. 2d 530 (5th Cir. 1978). "The parties' proposal does not reflect the considered judgment of a judicial officer: it has been forged by them alone as an adjustment of conflicting claims and is not a tempered

determination of fact and law after the annealment of an adversary trial." *Id*. at 538; *see also Ad-Ex, Inc. v. City of Chicago,* 207 Ill. App. 3d 163 (1st Dist. 1991) (A consent decree is not a judicial determination of the rights of the parties, nor is it a representation of the judgment of the court. It is "merely the court's recordation of the private agreement of the parties").

The Fourth District additionally points to *Abbot & Purdy Group, Inc. v. Bell*, in apparent support of its statement: "To use the legal fiction of an equivalent consent decree to qualify the plaintiff for prevailing party attorney's fees runs afoul of the very terms of the accepted proposal for settlement." *Mady,* 976 So. 2d 1215, *citing Abbot & Purdy Group, Inc. v. Bell*, 738 So. 2d 1024 (Fla. 4th DCA 1024). However, as correctly explained in *San Martin and Nelson v. DaimlerChrysler Corporation*, the Fourth District in *Abbot & Purdy Group, Inc. v. Bell* indeed found that an accepted proposal for settlement pursuant to section 768.79 of the Florida Statutes could serve as "the near functional equivalent of consent decrees in which neither party admits liability." *San Martin and Nelson v. DaimlerChrysler Corporation*, 983 So.2d at 626. The Fourth District, in *Abbot & Purdy Group, Inc. v. Bell*, not only limited its holding to the finding that acceptance of a proposal for settlement pursuant to section 768.79 of the Florida Statutes does not necessarily equate to "judgment" on the merits, but affirmatively detailed that "so long as the offer satisfies the statutory requirements as to form

and content, the offer must be read as encompassing all damages which may *ultimately* be awarded in the final judgment for purposes of later determining entitlement to attorneys fees under section 768.79." *Abbot & Purdy Group, Inc.*, 738 So. 2d at 1026 (emphasis in original).

Neither *Buckhannon,* nor any subsequent federal opinion, requires the entry of final "judgment" as a prerequisite to seeking an award of statutorily authorized attorney's fees. *Buckhannon*, in accord with the appellate courts of Florida, requires only that a plaintiff seeking an award of attorney's fees pursuant to a federal fee-shifting provision achieve an enforceable alteration of the legal relationship of the parties to litigation. Plaintiff, upon acceptance of a judicially enforceable settlement agreement, obtained the requisite judicial oversight required by the Court, serving as the necessary material alteration of the legal relation of the parties to the instant litigation.

V. AN AWARD OF ATTORNEY'S FEES TO A PREVAILING PARTY UNDER THE WARRANTY ACT IS THE RULE RATHER THAN THE EXCEPTION, AND SHOULD BE CONFERRED ROUTINELY UNLESS THE COURT IN ITS DISCRETION DETERMINES THAT SUCH AN AWARD WOULD BE INAPPROPRIATE.

A typical fee-shifting provision includes two elements: (1) the type of success a petitioning litigant must achieve, and (2) the level of discretion given to the court to award such fees. *See Union of Needlestrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F.

Supp. 2d 265 (S.D.N.Y. 2002). These two elements operate independently of each other. *See Brickwood Contractors, Inc. v. United States*, 288 F. 3d 1371 (Fed. Cir. 2002). A trial court's analysis must first center on the petitioner's level of success. After the issue regarding success of a party is concluded, the court must weigh certain variables to appropriately exercise its congressional grant of discretion. *See Id*.[7]

The issue before this Court is whether a plaintiff who accepts a proposal for settlement pursuant to section 768.79 of the Florida Statutes is precluded from seeking an award of attorney's fees based solely upon level of success.[8] Whether the "court in its discretion shall determine that such an award if attorneys' fees would be inappropriate," is not ripe for adjudication. *See* 15 U.S.C. §2310(d)(2).

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[7] The Court has noted that a plaintiff is considered a "prevailing party" for purposes of attorneys' fees "if [the plaintiff] succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Where sought, monetary relief constitutes at least "some of the benefit the parties sought in bringing the suit." *Id*. at 432, citing *Nadeau v. Helgemoe,* 581 F. 2d 275 (1st Cir. 1978); *see also Farrar v. Hobby*, 506 U.S. 103 (1992) (holding that even nominal damages suffice under the test that a party prevail on the merits of at least some of its claims).

[8] Through its brief before the Fourth District, Defendant contended that the settlement in the instant matter constitutes a *de minimus* recovery for Plaintiff. The trial court, however, found neither that Plaintiff's recovery was *de minimus*, nor that Plaintiff's action was improper, frivolous, or warranted a finding that an award of fees would not be appropriate. The trial court simply held that Plaintiff was precluded from seeking an award of fees from the trial court as a result of Plaintiff's acceptance of Defendant's proposal for settlement.

Notwithstanding, "unless the court in its discretion shall determine that such an award of attorney fees would be inappropriate," attorney's fees are favored as a means of promoting resort to the Warranty Act.[9] *See Skelton v. General Motors Corporation*, 860 F.2d 250 (7th Cir. 1988) ("[S]tatutory fee-shifting provisions reflect the intent of Congress to encourage private enforcement of the statutory substantive rights, be they economic or non-economic, through the judicial process."); *see also Seybold v. Francis P. Dean, Inc.*, 628 F.Supp 912 (W.D. Pa. 1986) ("Where a statutory provision authorizes a fee award, such an award becomes the rule rather than the exception and should be awarded routinely.").

Congress made clear that an award of attorney's fees under the Warranty Act is to be based upon "actual time expended." See 15 U.S.C. § 2310(d)(2). Nowhere in the Warranty Act or its legislative history is there any indication that attorney's fees should be apportioned depending on the result obtained or the value of the underlying claim. Rather, the legislative history of the Warranty Act, as recognized by the United States Seventh Circuit Court of Appeals, makes apparent that attorney's fees are to be based only on the actual time incurred by the attorneys. *See Skelton v. General Motors Corp.*, 860 F. 2d 250 (7th Cir.1988),

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[9] The Third District in *San Martin and Nelson v. DaimlerChrysler Corp.*, explicitly noted that a court's discretion is to be utilized where "the Act has been misused." *San Martin and Nelson v. DaimlerChrysler Corporation*, 983 So. 2d at 624, citing *Gallo v. Am. Izuzu Motors, Inc.*, 85552, 2005 WL 2241010 (Ohio Ct. App. Sept. 15, 2005).

cert. denied, 493 U.S. 810 (1989), quoting S. Rep. No. 986, 1st Sess. 21, 117 Cong. Rec. 39614 (1971).

CONCLUSION

Plaintiff-Appellant-Petitioner, EDMUND MADY, prays that this Honorable Court reverse the judgment of the trial court, and remand this cause for proceedings consistent with such an order.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was furnished via the U.S. mail to: Mr. John Glenn, AndersonGlenn, LLC, 2201 NW Corporate Blvd., Ste 100, Boca Raton FL 33431, and Theodore F. Greene, Law Offices of Theodore F. Greene, LC, PO Box 720157, Orlando FL 32872, on October 21, 2008.

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