IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC15-1682
First DCA Case No.: 1D14-4706

SUSANNE L. KUHAJDA,

Petitioner,

v.

BORDEN DAIRY COMPANY OF ALABAMA, LLC and MAJOR O. GREENROCK,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

This proceeding arises from the trial court's Order Granting Plaintiff's Entitlement to Attorney's Fees and Costs pursuant to Plaintiff's offers of judgment served under section 768.79, Florida Statutes and Fla. R. Civ. P. 1.442. (A.1.) That order was reversed by the First District Court of Appeal, in a decision expressly certified to be in conflict with the decision in *Bennett v. American Learning Systems of Boca Delray, Inc*., 857 So. 2d 986 (Fla. 4th DCA 2003), a case on all fours with the instant case. (A.4.)

The underlying lawsuit brought a single claim for negligence against Defendants. (A.1.) The Complaint makes a demand against Defendants for damages, plus costs, interest and trial by jury. The Complaint does **not** plead any claim for attorney's fees nor would the negligence claim have supported any claim under Florida law for attorney's fees. (A.2.) During the course of litigation, Plaintiff served two offers of judgment on Defendants (A.2.) The offers proposed to "settle all claims asserted and demands made" and specifically "include[d] costs, interest and all damages or monies recoverable under the Complaint and by law." (A.2.) The jury returned a verdict in Plaintiff's favor and the final judgment was in excess of twenty-five percent of the amount proposed for settlement. The trial court found that although section 768.79 and rule 1.442 should be strictly construed, "Plaintiff's offer of settlement comported with the statute and rule

requirements and was sufficiently clear and unambiguous to have allowed Defendants to make an informed decision without needing any clarification."

On appeal, the First District reversed the trial court's order finding that the offers failed to strictly comply with the requirements of rule 1.442(c)(2)(F). (A.3.) The opinion below notes this Court in the case of *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013), did not reach the issue of the applicability of section (c)(2)(F), where the complaint does **not** include a claim for attorney's fees. In so noting, the First District stated that "we can see no reason why this holding [*Diamond Aircraft*] would not apply equally to a case where attorneys' fees were not sought in the complaint." (A.3.) The First District, however, found the decision of *Bennett* expressly conflicted with this holding and thus "we certify conflict with that decision." (A.4.)

The district court's order was rendered on August 14, 2015 and the Petitioner's notice of invoking this Court's discretionary jurisdiction was timely filed on September 11, 2015. This case is properly before this Court. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(vi).

SUMMARY OF ARGUMENT

In the case of *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013), this Court took up the certified question on whether an offer of judgment was valid where a claim for attorney's fees was demanded in the

complaint but the offer of judgment failed to specify whether attorney's were included in the offer or whether attorney's fees were part of the legal claim. This court answered that question in the negative finding the offer in *Diamond Aircraft* invalid. As recognized by the First District below, the decision in *Diamond Aircraft* was limited by this Court to the certified question and the facts before it, which had included a demand for attorney's fees as part of the underling claim.

The First District relying upon its decision in *R.J. Reynolds Tobacco Co. v. Ward*, 141 So. 3d 236 (Fla. 1st DCA 2014), held that the test of strict compliance of rule 1.442 invalidates the offer in the instant case, even though the negligence complaint did not and could not have included a claim for attorney's fees.

In both *Bennett v. American Learning Systems of Boca Delray, Inc*., 857 So. 2d 986 (Fla. 4th DCA 2003) and *Liggett Group, Inc v. Davis*, 975 So. 2d 1281 (Fla. 4th DCA 2008), the underlying complaints did not and could not have included a claim for attorney's fees and the offers of judgment did not include statements concerning whether attorney's fees were part of the legal claim. Unlike this case, the Fourth District in both *Bennett* and *Liggett* held that the offers of judgment were valid. As correctly recognized by the First District in its opinion, the decision below expressly and directly conflicts with the Fourth District's decision in *Bennett*. Additionally, the decision conflicts with *Liggett*. Moreover, following this Court's decision in *Diamond Aircraft* there has been growing

conflict among Florida's courts regarding the application of *Bennett*. In fact, the First District has another case with the identical issue before it at this time. *See Colvin v. Clements and Asmore, P.A.*, No. 1D15-1966 (Fla. 1st DCA 2015).

This Court should exercise its jurisdiction to correct the conflict between the decision below and the decisions of the Fourth District, as well as to resolve any conflict and confusion within the courts concerning the applicability of *Diamond Aircraft*'s holding to cases which do not include legal claims for attorney's fees.

ARGUMENT

I. THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF *BENNETT* AND THE FIRST DISTRICT CERTIFIED CONFLICT.

The case of *Bennett v. American Learning Systems of Boca Delray, Inc*., 857 So. 2d 986, 987 (Fla. 4th DCA 2003), involved a claim for breach of contract, fraudulent inducement, and slander based upon the termination of plaintiff's teaching position with the appellee. Like in the instant case, the complaint contained no allegations requesting attorney's fees nor suggesting an entitlement thereto. In *Bennett*, the offer of judgment failed to state whether the offer included attorney's fees and whether the legal claim included attorney's fees. *See id*. at 987. In considering the issue, the *Bennett* court noted:

> What is immediately apparent is that the statute does not require the offer to include whether it contains attorney's fees, while the rule does. . . . When the supreme court adopted the amended rule requiring an offer to

> state whether it included attorney's fees, it explained that these provisions were procedural in nature and thus within the province of the court to adopt. *In re Amendments to Fla. Rules of Civil Procedure*, 682 So. 2d 105, 105-06 (Fla. 1996).

Id. at 988.

After noting this difference between the requirements of the rule and statute, the Fourth District went on to hold that the offer of judgment before it complied with the rule, stating "While the provision with respect to attorney's fees does not use the "if any" language, we conclude that it is also a needless surplusage to include 'not applicable' as to attorney's fees in the offer of judgment where no claim for attorney's fees has been pled." *See id*. In so holding, the court explained:

> The Supreme Court held in *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991), that a claim for attorney's fees under either statute or contract must be pled. No recovery of attorney's fees may occur absent a pleading requesting them. *See id*. at 837-38. It would make no sense to require a defendant to state in its offer of judgment that the offer does not include attorney's fees, when plaintiff did not claim an entitlement to them and could not recover them because of failure to plead. Moreover, in this case not only did appellant fail to plead attorney's fees, no contractual provision granted her attorney's fees, nor were statutory attorney's fees authorized pursuant to any of her causes of action.

Id. at 988. The First District's opinion in this case squarely conflicts with this holding. In fact, under the First District's opinion here a party is now required to include in an offer of judgment the surplusage "not applicable" or some other type of statement in the negative, where the complaint does not include a claim for

attorney's fees or any legal basis for attorney's fees. Conflicting with *Bennett* the First District found: "the supreme court has made the test strict compliance, not the absence of ambiguity, we can see no reason why this holding would not apply equally to a case where attorney's fees were not sought." (A.3.) [1]

This pronouncement in the opinion reveals a larger emerging conflict within Florida's District Courts of Appeal. This conflict is most plainly demarcated by cases like *Borden Dairy Co. v. Kuhajda*, 152 So.3d 763 (Fla. 1st DCA 2015) and *R.J. Reynolds Tobacco Co. v. Ward*, 141 So. 3d 236 (Fla. 1st DCA 2014) on the one hand and the cases of *Miley v. Nash*, 2015 WL 4931416, at *3 (Fla. 2d DCA 2015); *Mathis v. Cook*, 140 So. 3d 654, 657 (Fla. 5th DCA 2014) and *Carey–All Transp., Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008) on the other hand. In *Borden Dairy* and *Ward* the courts are focusing on the test of strict compliance with rule 1.442. In *Miley*, *Mathis* and *Newby* the courts are focusing

[1] The Fourth District, in the case of *Liggett Group, Inc v. Davis*, 975 So. 2d 1281 (Fla. 4th DCA 2008), ruled in accordance with *Bennett*. The proposal in *Liggett* was based upon a complaint that did not include a demand for attorney's fees. In *Liggett*, the defendant argued to Fourth District "that the proposal failed to strictly comply with the requirements of the statute and rule" specifically claiming the proposal "was unclear how and when the lawsuit would actually be dismissed, and failed to state 'whether attorneys' fees are part of the legal claim' as required by the rule." *Id*. at 1284. In affirming the trial court's decision that the proposal was valid, the court stated: "the proposal for settlement stated that it would 'settle and completely resolve all claims' being made by the plaintiffs against the defendant. It also provided that the proposal was inclusive of all claims for attorney's fees and costs. In short, it was sufficient to comply with the rule." *Id*.

on the test of ambiguity. Those cases following the ambiguity test cite predominantly to *State Farm Mut. Auto. Ins. Co. v. Nichols* for the following principle:

> The **rule** does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement.

932 So. 2d 1067, 1079 (Fla. 2006) (emphasis added). On the other end of the spectrum, those cases following the test of strict compliance cite predominantly to *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278–79 (Fla. 2003) (requiring strict compliance with rule 1.442(c)(3) which dictates that a "joint proposal shall state the amount and terms attributable to each party"). This general conflict has never been more apparent than in the opinion of the First District below, which affirmatively holds that the test is no longer the absence of ambiguity but strict compliance. (A.3.)[2]

This larger conflict has been exacerbated by this Court's decision in *Diamond Aircraft*. In *Diamond Aircraft* the certified question was as follows:

> UNDER FLA STAT. § 768.79 AND RULE 1.442, IS A DEFENDANT'S OFFER OF JUDGMENT VALID IN A **CASE IN WHICH THE PLAINTIFF DEMANDS ATTORNEY'S FEES**. THE OFFER PURPORTS TO SATISFY ALL CLAIMS BUT FAILS TO

[2] Contradicting this statement, the Second District in *Miley v. Nash*, on July 10, 2015, held the test was whether the offer was ambiguous and noted that parties should not "nit-pick" a proposal for settlement. 2015 WL 4931416, at *3

> SPECIFY WHETHER ATTORNEY'S FEES ARE INCLUDED AND FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE PART OF THE LEGAL CLAIM?

107 So. 3d at 365 (emphasis added).[3] In answering this question in the negative, this Court fully explored the *Bennett* decision but did not to overrule it, instead drawing attention to the underlying factual distinction that in *Bennett* the underlying claim did not include a demand for attorney's fees. Specifically, this court held:

> We conclude that, even if section 768.79 applied in this case, Diamond Aircraft would not be entitled to attorney's fees under that section because Diamond Aircraft's offer of settlement did not strictly comply with rule 1.442, as it did not state that the proposal included attorney's fees and attorney's fees are part of the legal claim. Unlike the complaint in *Bennett*, the complaint here contained a legal claim for attorney's fees, **which created an ambiguity in Diamond Aircraft's offer of settlement that was not present in *Bennett*, thereby necessitating the presence in the offer of settlement of a specific statement regarding attorney's fees**.

Id. at 378 (emphasis added). While the Court found that Diamond Aircraft's offer did not "strictly comply" with rule 1.442, the Court held that because the complaint contained a demand for fees the absence of any statement on attorney's fees in the offer created an *ambiguity* in the offer, which "necessitated" the presence of a statement on attorney's fees. Breaking this down, the Court relied on both "strict compliance" **and** "ambiguity" principles. More telling, however, is the conclusion

[3] Of note, the Court in *Diamond Aircraft* did not expand or reword the certified question before it, which was limited to "a case where the plaintiff demands attorney's fees". 107 So. 3d at 365.

reached by the Court that it was the absence of the language regarding attorney's fees in the offer (in light of the demand in the complaint) that created the ambiguity which necessitated the attorney's fee language in the offer.

Diamond Aircraft also discussed *Bennett*'s secondary and more generalized holding than the one discussed above, stating: "The appellate court [in *Bennett*] further held that because the offer proposed settlement of all counts of the complaint, including costs and interest, that language was sufficient to include a claim for attorney's fees, had the plaintiff included such a claim in the pleadings." *Id*. at 377. This Court then called into question the continuing validity of this broader holding:

> The court in *Bennett* did state that a general offer of settlement like the offer here (i.e., one that stipulates settlement of all claims) is broad enough to include any claim for attorney's fees. *See Bennett*, 857 So.2d at 988. However, the Fourth District decided *Bennett* in 2003, which was approximately four years before this Court's 2007 decision in *Campbell*. In *Campbell*, this Court stated that "all portions" of both section 768.79 and rule 1.442 must be strictly construed, which draws the continuing validity of *Bennett* into question.

Id. While a general offer of settlement may no longer be specific enough to include a claim for attorney's fees, this pronouncement does not change *Bennett*'s primary holding that where there is **no** claim for attorney's fees the offer judgment need not contain a statement indicating the provision is **not** applicable. Nothing in the *Diamond Aircraft* opinion contradicts this specific holding in *Bennett*. Moreover, this Court in *Diamond Aircraft* expressly finds that the presence of the

demand for attorney's fee in Diamond Aircraft's complaint created an ambiguity in the offer of judgment that necessitated inclusion of a statement regarding attorney's fees. *See id*. at 378. As such, *Diamond Aircraft* does not hold that strict compliance, as opposed to the absence of ambiguity, is now the test. Thus, at a minimum, the First District's decision below could create further confusion with this Court's ruling in *Diamond Aircraft*.

By holding that Plaintiff's offer of judgment was invalid because it did not include a statement saying that the offer did **not** include attorney's fees and that attorney's fees were **not** part of the legal claim, the decision expressly and directly conflicts with decisions of *Bennett* and *Liggett* by announcing a contrary rule of law. In addition, by declaring that the offer is invalid based solely on rule 1.442 and that the test under the rule is strict compliance rather than ambiguity, the decision below conflicts with *Miley*, *Mathis* and *Newby* and at a minimum creates confusion with *Diamond Aircraft*. The First District certified the conflict with *Bennett*. Accordingly, Petitioner respectfully submits that this Court should exercise jurisdiction.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court has and should exercise jurisdiction to review the decision below under Article V, section 3(b)(3) of the Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following has been furnished this 21st day of September, 2015 via electronic mail delivery only to:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the herein Petitioners' Brief on Jurisdiction was printed in 14-point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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