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.

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

This proceeding arises from the trial court's Order Granting Plaintiff's Entitlement to Attorney's Fees and Costs pursuant to Plaintiff's proposals for settlement served under section 768.79, Florida Statutes and Florida Rule of Civil Procedure 1.442. (A.1.) 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 directly on point with the instant case, reversed the trial court's Order below. (A.1.)

The Complaint filed by Plaintiff in the underlying lawsuit brings a single claim for the negligent operation and maintenance of an automobile by Defendants and for the resulting bodily injury and pain and suffering. (A.2.) The Complaint further makes a demand against Defendants for damages, plus costs, interest and trial by jury and does **not** plead any claim for attorney's fees nor would the negligence claim have supported a claim under Florida law for attorney's fees. (A.2.) Plaintiff served two separate proposals for settlement on Defendants during the course of the litigation. (A.3.) The first proposal for settlement proposed to settle all claims against Defendants for the total lump sum of $110,000.00. (A.4) The second proposal for settlement proposed to settle all claims against Defendants for the total lump sum of $120,000.00. (A.4) The text of both proposals is the same except for the amount and state as follows:

> COMES NOW the Plaintiff, SUSANNE L. KUHAJDA, by and through the undersigned attorney, pursuant to Fla. R. Civ. P., 1.442 and Florida Statute §768.79, and hereby offers to settle all claims asserted and demands made against BORDEN DAIRY COMPANY OF ALABAMA, LLC and MAJOR O. GREEN ROCK, in the above-styled cause, in exchange for the following amount:
>
> Plaintiff proposes to settle all claims against BORDEN DAIRY COMPANY OF ALABAMA, LLC and MAJOR O. GREEN ROCK, for the total lump sum of $110,000.00 to be paid by said Defendant to Plaintiff, SUSANNE L. KUHAJDA, to settle all of her claims.
>
> Since any damages awarded would be jointly and severally owed by each Defendant, satisfaction of the aforementioned proposal by either Defendant will satisfy the proposal to the remaining Defendant. The aforementioned proposal includes costs, interest and all damages or monies recoverable under the Complaint and by law.

(A.4.) Defendants did not respond to either proposal.

The jury returned a verdict in favor of Ms. Kuhajda in the amount of $440,177.00 and Final Judgment was entered in the amount of $430,177.00. (A.5 & 6.) Following entry of the Final Judgment, the trial court entered an order awarding the Plaintiff's attorney's fees pursuant to the rejected proposals for settlement. The trial court found that section 768.79 and rule 1.442 "must be strictly construed because both are in derogation of the common law" and that "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." (A.7.)

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), as the

offers did not contain an express statement on attorney's fees. (A.1.) The opinion below notes that 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 subsection (c)(2)(F), where the complaint does **not** include a claim for attorney's fees. Nevertheless, the First District, relying on *Diamond Aircraft*, held that the test to be applied to proposals for settlement under rule 1.442 is now strict compliance and no longer a test of ambiguity: "the supreme court has made the test strict compliance, not the absence of ambiguity." (A.1.) In so holding, 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.1.) The First District, however, found the decision of *Bennett* expressly conflicted with this holding and certified conflict. (A.1.)

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

The announcement by the First District that the test to be applied in considering the validity of a proposal for settlement made pursuant to rule 1.442 is now one of strict compliance and is no longer a test of ambiguity presents this

Court with the opportunity to begin to strike some balance amid what has evolved into a game of "gotcha" in the constant litigation over the enforceability of proposals for settlement that are not perfectly drafted and to place back into the approach the clear legislative intent behind section 768.79 to reduce litigation by encouraging settlement. This opportunity presents itself by way of the need to clarify this Court's decision in *Diamond Aircraft* in order to not only to rectify the conflict within the district courts with regard to whether or not parties must now include statements in proposals for settlement on the inapplicability of attorney fees where none were pled in the complaint but also with regard to the proper test to be applied by the lower courts for evaluating proposals for settlement.

First, *Diamond Aircraft* should not be extended beyond its facts and the cases of *Bennett v. American Learning Systems of Boca Delray, Inc*., 857 So. 2d 986, 988 (Fla. 4th DCA 2003) and *Liggett Group, Inc v. Davis*, 975 So. 2d 1281 (Fla. 4th DCA 2008), should not be abrogated and overruled. The Fourth District in *Bennett* properly interpreted section (c)(2)(F) to the set of facts, in which the complaint does not plead a claim for attorney's fees. Even if this Court applies the test of strict construction adopted by the First District, rule 1.442 does not require a party to state the negative or include inapplicable terms in the offer. The Fourth District in *Bennett* properly recognized that such language would be surplusage and is not required under the rule. The First District recently noted that logic in

Bennett's decision when it again certified conflict to this Court with the *Bennett* decision. *See Colvin v. Clements and Ashmore, P.A.*, 2016 WL 167010, Case No. 1D15-1966 (Fla. 1st DCA January 15, 2016). In addition, the plain language of (c)(2)(F) does not require information to be included where it is not applicable or not included in the offer. Finally, strict construction of section 768.79, Florida Statutes requires this Court only to ensure that entitlement to attorney's fees is not broadly construed beyond what the Legislature intended (i.e., that a party has served a demand or offer for judgment, and a party has recovered a judgment at least 25 percent more or less than the demand or offer). Where the proposal for settlement fails to state that an item, like attorney's fees, is not applicable to the proposal and that item is only required under the procedure implementing the statute, strict construction of the statute is maintained. Thus, *Diamond Aircraft* should not be extended to apply to a set of facts in which the complaint does not include a claim for attorney's fees

Second, the First District erred in declaring that the rule is now only one of strict compliance. In *Diamond Aircraft,* this Court utilized both principles of strict construction and the absence of ambiguity in considering the offer of judgment before it. *See* 107 So. 3d 377. Looking at this Court's holding in *Diamond Aircraft*, both tests are still part of the analysis. The issue is not strict construction versus ambiguity, as the First District has framed it, but rather how these two

principles interact with one another with strict construction forming a foundation for considerations of ambiguity based upon the surrounding facts of the offer.

In addition, this Court should clarify its position on how strict construction is considered with regards to interpreting the procedural components of rule 1.442, separate from section 768.79. A rule of civil procedure, adopted by the courts, is a very different animal than a statute. In fact, the Florida Supreme Court recognized this distinction between the statute and the rule in *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992) (adopting section 768.79 as a rule, to the extent that it governed procedural matters, and repealing the then existing version of rule 1.442 in its entirety). Thus, while a statute that creates an entitlement to attorney's fees is in derogation of the common law and as such must be strictly construed, *Dade County v. Pena*, 664 So. 2d 959, 960 (Fla.1995), rule 1.442 is merely the mechanism for the procedure under the statute and should not be given the same strength of force as the legislative enactment. *See Bennett*, 857 So. 2d at 988 (citing to *In re Amendments to Fla. Rules of Civil Procedure*, 682 So. 2d 105, 105-06 (Fla. 1996)). In the instant case, the court is presented with a unique circumstance where the validity of the proposal turns on a provision of the rule alone that is not included in the statute. Thus, the interpretation of the rule's provision, standing outside of the statute, should be interpreted such as to further the intent of the statute not frustrate it.

Finally, the First District erred in articulating the test as strict construction alone. Strict construction should not be used as a sword to eviscerate the intent of the statute of encouraging settlement. With *Diamond Aircraft* as the starting point, this Court must quash the First District's decision below and clarify that both tests of strict construction and ambiguity remain significant inquires when considering the validity of an offer of judgment. This Court should further articulate that where there is an issue of procedure under the rule alone, as in the instant case of the attorney's fees in the offer under (c)(2)(F), the intent of the statute is to encourage settlement and the rule of procedure should not be technically or rigidly enforced as to obscure justice of the cause or defeat the object for which the rule was enacted.

ARGUMENT

Proposals for settlement under section 768.79, Florida Statute and Florida Rule of Civil Procedure 1.442 have been a prominent subject in this Court's jurisprudence for the past two decades, since this Court first upheld the constitutionality of the statute. *See TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995). Throughout this time this Court has noted, as well as lamented, that much of this litigation has served to undermine rather than serve the legislative intent of encouraging settlements.[1] Despite this Court's continued guidance in this

[1] *See, e.g., Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010)

area of law, the district courts remain in conflict with diverging opinions continually emerging as to the proper test to be applied by the trial court when considering whether or not to invalidate a proposal for settlement in a cases where an offer was timely made and rejected and the final judgment was either 25% less than or greater than the offer.

For example, cases out of the Second and Fifth Districts have emphasized that courts should not nit-pick the proposal for settlement.[2] On the other end of the spectrum, are those cases, like the one before this Court, applying a test of strict compliance. *See Borden Dairy Co.v. Kuhajda*, 171 So. 3d 242, 243 (Fla. 1st DCA 2015); *R.J. Reynolds Tobacco Co. v. Ward*, 141 So. 3d 236 (Fla. 1st DCA 2014). While this Court's opinions have sometimes emphasized principles of strict

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("The expected result of the attorneys' fee sanction was to reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions. The effect, however, has been in sharp contrast to the intended outcome because the statute and rule have seemingly increased litigation as parties dispute the respective validity and enforceability of these offers.") (citing to *Sarkis v. Allstate Ins. Co*., 863 So. 2d 210, 218 (Fla. 2003)); *MGR Equipment Corp., Inc. v. Wilson Ice Enterprises, Inc*., 731 So. 2d 1262, 1264 (Fla. 1999) ("The purpose of [section 768.79] is to "terminate all claims, end disputes, and obviate the need for further intervention of the judicial process" by encouraging parties to exercise their "organic right ... to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise.") (quoting *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989)).

[2] *See Miley v. Nash*, 171 So. 3d 145, 149 (Fla. 2d DCA 2015) (citing to *Carey–All Transp., Inc.*); *Mathis v. Cook*, 140 So. 3d 654, 657 (Fla. 5th DCA 2014); *Carey–All Transp., Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008) ("[P]arties should not 'nit-pick' the validity of a proposal for settlement based on allegations of ambiguity unless the asserted ambiguity could 'reasonably affect the offeree's decision' on whether to accept the proposal for settlement.")

compliance, this Court has continued to emphasize, as well, the underlying facts of the case and whether or not those facts render a proposal clear or ambiguous.[3] This case offers the court a significant opportunity to harmonize this precedent in order to give meaningful guidance to both the district and trial courts of this State and to advance the goal of achieving a test that can ultimately serve the legislative intent of encouraging settlements and reducing litigation costs arising from the "gotcha tactics" that have arisen from these types of disputes. As well put by this Court in *Nichols* the ultimate question is whether the party receiving the offer understands what the offer is proposing such that it is "sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification". *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006). Even the First District has now back-tracked from its hard-line position articulated in the opinion below of strict compliance only, demonstrating even more the need for this Court to give balance and clarity to this issue. *See Colvin*, 2016 WL 167010.

This first issue before the Court presents the occasion to properly frame its

[3] *See, e.g., Audiffred v. Arnold*, 161 So. 3d 1274, 1280 (Fla. 2015) (holding that the proposal was invalid for failing to apportion between two plaintiffs even though offer stated it was made by only one plaintiff because both plaintiffs were to dismiss the complaint and "the statute and the rule mandate apportionment under such circumstances to *eliminate any ambiguity* with regard to the resolution of claims") (emphasis added); *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006) (holding State Farm's proposal invalid because after considering the condition of the proposed release the Court found the proposal for settlement ambiguous based upon the underlying facts that there was a pending PIP and UM claim).

opinion in *Diamond Aircraft* and to foreclose the extension of *Diamond Aircraft* that was offered by the First District opinion below. The second issued raised by this case allows this Court to clarify the holding of *Diamond Aircraft* by specifying the standard the courts should apply in evaluating proposals for settlement: balancing strict construction of the statute with the rule of procedure to ensure that the legislative intent of promoting settlement is not eviscerated by immaterial or inapplicable provisions that result in gotcha litigation.

I. *DIAMOND AIRCRAFT* SHOULD NOT BE EXTENDED TO APPLY WHERE THE PLAINTIFF'S OFFER OF JUDGMENT DOES NOT INCLUDE A STATEMENT REGARDING ATTORNEY'S FEES AND NO CLAIM FOR ATTORNEY'S FEES WAS PLED.

Standard of Review. Appellate courts apply a *de novo* standard of review when the construction of a procedural rule is at issue. *See Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006). In addition, the eligibility to receive attorney's fees and costs pursuant to section 768.79 and rule 1.442 is reviewed *de novo*. *See Audiffred*, 161 So. 3d at 1278.

A. The Offer Of Judgment Strictly Complied With The Provisions Of Rule 1.442 And *Bennett* Sets Forth The Proper Analysis For A Case In Which Attorney's Fees Were Not Pled In The Complaint.

The subsection of rule 1.442 -(c)(2)(F) - upon which this case rests, states: "a proposal *shall* . . . state *whether* the proposal includes attorneys' fees and *whether* attorneys' fees are part of the legal claim." Fla. R. Civ. P. 1.442(c)(2)(F)

(2010). In *Bennett*, a case on point with the instant case, the proposal for settlement failed to comply with 1.442(c)(2)(F) and did not state whether the offer included attorney's fees and whether the legal claim included attorney's fees. 857 So.2d at 987. Like the instant case, the plaintiff therein had not claimed attorney's fees in the complaint and there was no contractual or statutory provision providing for an award of attorney's fees. *See id*. at 988. In holding that the proposal was valid the Fourth District explained: "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." *Id*. at 988. The *Bennett* Court further explained this holding, as follows:

> 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. 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. . . . 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. This reasoning of the Fourth District is in fact in line with the language of rule 1.442(c)(2)(F), which does not say that a party must state that a provision is not applicable.

In fact, when this Court had the opportunity to overrule *Bennett* in *Diamond Aircraft*, it did not do so and instead limited the opinion to the certified question and facts before it. 107 So. 3d at 377. Moreover, the only portion of *Bennett* with which this Court took issue was *Bennett*'s secondary or more generalized holding that a general offer to settle all claims is broad enough to *include* any claim for attorney's fees.[4] Since *Bennett* more recent decisions have followed course finding that where a claim for attorney's fee is not pled or viable, the offer does not need to include any statement in the negative or stating it is inapplicable. *See generally Liggett Group, Inc*, 975 So. 2d at 1281; *Mortgage Now, Inc. v. Stone*, 2014 WL 3533199 (N.D. Fla. 2014).

Regardless of this precedent, the First District's decision below held that it could find "no reason" why the holding of *Diamond Aircraft* - "that an offer of judgment failed to strictly comply with rule 1.442(c)(2)(F) because it did not state that it included attorney's fees and whether attorney's fee were part of the legal claim" where there was a demand for attorney's fees in the underlying complaint - would not equally apply to a case where no claim for attorney's fees were pled.

[4] In *Diamond Aircraft*, the court stated: "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." 107 So. 3d at 377.

(A.1.) On January 15, 2016, however, the First District released its opinion in *Colvin v. Clements and Ashmore, P.A.*, 2016 WL 167010, Case No. 1D15-1966 (Fla. 1st DCA January 15, 2016), in which the First District is already back-pedaling from its decision below in *Borden Dairy Co. v. Kuhajda*. *See* 171 So. 3d at 243. The *Colvin* case involves the identical issue as the instant case. 2016 WL 167010 at *1. While the First District again certified conflict with *Bennett*, the majority opinion in *Colvin* does not reaffirm the holding that strict compliance is now the test and that rule 1.442(c)(2)(F) must be strictly enforced in a case where attorney's fees were not pled in the complaint. *See id*. Instead the opinion quotes the language of *Bennett* which states that it makes no sense to require a party to state in its offer that it does not include attorney's fee where no claim for attorney's fee was pled or recoverable. *See id*. Then, after citing to *Bennett*, the *Colvin* opinion states:

> While *Bennett* seems like a very logical approach, we are mindful of this Court's recent decision in *Borden Dairy Co. v. Kuhajda*, 171 So. 3d 2424 (Fla. 1st DCA 2015), which reaffirmed that rule 1.442 and section 768.79 must be strictly construed. In light of *Borden*, we affirm. We continue to recognize a conflict with *Bennett v. American Learning Systems of Boca Delray, Inc*., 857 So. 2d 986 (Fla. 4th DCA 2003); thus, we certify conflict with that decision.

Id. (emphasis added). The First District in *Colvin* further notes that the "trial court recognized the absurdity of requiring the proposal to state whether attorney's fees and punitive damages were part of the legal claim where

plaintiff had not sought fees or damages in the complaint, nor could she have." *Id*. This recent opinion in *Colvin* draws into significant question whether or not the First District remains in agreement as to *Diamond Aircraft*'s application to a case in which attorney's fees have not been pled.

Similar to *Colvin*, the trial court in the instant case also recognized the absurdity of requiring the offer to include a statement on attorney's fees where no attorney's fees were pled in the complaint.

> Mr. Syfrett: . . . had I said this offer does not include attorney's fees or punitive damages, because it did not, because I was not claiming it, that would create a huge ambiguity.
> The Court: Yeah. Well, it's a good argument, because then you're thinking, well, if I accept the offer as stated, then I – I haven't resolved what they think is an issue of attorney's fees and punitive damages, wherein the real sense –
> Mr. Syfrett: Yeah, I mean, it's just –
> The Court: There is no lawful right to claim any of that.

(A.8.) Thus, two trial courts and now a different panel of judges at the First District have noted that the inclusion of the inapplicable attorney's fees statement create an absurdity and confusion in the offer based upon the underlying fact that attorney's fees are not part of the complaint and could not be pled in the case.

The recognition of this absurdity, which is created by requiring a party to state that attorney's fees are not part of a proposal for settlement where both parties have full knowledge that attorney's fees are not and could not be part of any proposal, was fully recognized by the *Bennett* court when it held that it made no

sense to require a party to state that the offer or claim does not include attorney's fees where attorney's fees have not been pled and there is no basis for attorney's fees at law.

This logical approach, as noted by the *Colvin* opinion, is founded upon both the underlying facts of the case and language of the rule itself. Such an analysis is consistent with this Court's precedent, as the Court requires an analysis of both the actual legal issues before the court and the underlying facts when considering the validity of an offer of judgment. *See, e.g., Nichols*, 932 So. 2d at 1079 (holding State Farm's proposal invalid because after considering the condition of the proposed release the Court found the proposal for settlement ambiguous based upon the underlying facts that there was a pending PIP and UM claim).

Turning to the language of rule 1.442(c)(2), the emphasis has most often be placed upon the word "shall" at the beginning of the clause. In fact, in *Diamond Aircraft*, the court explained its use of "shall" as follows:

> Furthermore, if the elements of rule 1.442(c)(2) were not mandatory, we would have stated at the beginning of rule 1.442(c)(2) that the proposal "may" contain the requirements listed in that subsection. That subdivision of rule 1.442 explicitly states that a proposal "shall" contain the following requirements, which includes the requirement of a statement directed to the attorney's fees at issue.

107 So. 3d at 377. Turning, however, to the language used in the clause at issue, subsection (f) states that the proposal shall state *whether* it includes attorney's fees and *whether* those claims are part of the claim. The subsection, however, does not

state that the proposal shall include whether ***or not*** it includes attorney's fees and whether ***or not*** those claims are part of the claim. Although this point may appear a bit hyper-technical, Plaintiff would suggest that unfortunately the entire premise of these cases rests upon such hyper-technical arguments and construction of the rule. Moreover, looking at more than just the plain language of the rule, this point really flows from common sense and an understanding of the English language. If the underlying claim does include attorney's fees, i.e. the affirmative –the proposal then would need to state if it includes those attorney's fees and if the inclusion of those attorney's fees in the proposal are part of the underlying legal claim. If the claim and proposal does **not** contain attorney's fees then a party would need no statement saying the provision is "non-applicable", as noted by the *Bennett* court, or that the offer does not include attorney's fees.

If pursuant to a "strict construction" interpretation the language "shall" at the beginning is interpreted to mean state the negative or state "inapplicable", then this same logic holds true for provisions (A) through (G). In other words, the same type argument would be logically consistent as to subsection (C), which says: "state with particularity any relevant conditions". Thus, the argument, according to the logic of the First District opinion below, would make a proposal is invalid because it does not include a statement: "the Offer does not contain any relevant conditions" or "n/a as to (c)(2)(C)". Again, Petitioner suggests that as stated in

Bennett such a statement is surplusage – unnecessary to the proposal and to any party considering the proposal. *See* 857 So. 2d at 988. Where an offer of judgment does affirmatively include attorney's fees or conditions those shall be expressly stated based upon the facts and conditions of the case and that offer.

This point was argued before the trial court and the trial court immediately grasped the import of it. As well put by the trial court, should the proposal have expressly stated the negative then the offeree is placed in the position of wondering if the offeror by express inclusion of the negative statement, i.e. not including a claim for attorney's fees where none was pled, if a remaining claim for fees not covered by the proposal or lawsuit exists and remains outside of the proposal. (A.8.) In practice this creates a distinct confusion in the proposal itself.

Applying statutory interpretation principles, both the Legislature and Court know how to use and frequently do use the terminology "whether or not" in both statutes and rules. A Westlaw search of Florida Statutes and rules turns up approximately 1,286 hits for the phrase "whether or not". While it would not be productive to go through all of those examples for this Court, it might prove useful to point to a couple for illustrative purposes. Section 631.923, Florida Statutes states: "Any release of the corporation and its insured must clearly state ***whether or not*** any claim filed with the receiver in excess of the liability of the corporation under s. 631.57 is waived." Likewise, section 107.04, Florida Statutes

states: "The applicant may also state ***whether or not*** he or she favors the ratification of the proposed amendment or opposes it and ***whether or not*** he or she desires his or her name to appear upon the ballot as favoring or opposing such amendment or as unpledged." On the other hand, there are other examples where "whether" is used without the "or not". These instances typically occur in circumstances where there remains an alternative choice. *See, e.g.*, Fla. R. Juv. P. 8.257 ("The order of referral shall also state whether electronic recording or a court reporter is provided by the court.") These few examples within the Florida Statutes and rules of the use of the term "whether," aptly demonstrate the use of "or not" when calling for both the affirmative and the negative, as well as a choice between two alternatives.

Additionally, the old principle of *expressio unius est exlusio alterius* is applicable herein. This canon applies where "items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003). If the Court in drafting the rule had intended for the negative to be stated, the Court would have chosen to instruct the offeror to state whether "or not" the proposal includes attorney's fees.

The *Bennett* Court's analysis for considering a proposal for settlement that does not include a statement on attorney's fees where there is no claim for attorney's fees made in the complaint is correct – to include a provision stating that subsection (c)(2)(F) is not applicable is surplusage and is not required by the rule. The First District panel in *Colvin* has now recognized the logic of *Bennett*. *Diamond Aircraft*'s holding should not be extended to apply to a case in which attorney's fees were not pled in the underlying complaint.

B. The Offer of Judgment Strictly Complies With The Requirement of Section 768.79, Florida Statutes.

Moving from a consideration of the requirements of rule 1.442 to the requirements of the statute, where the complaint does not plead a claim for attorney's fees and the offer of judgment accordingly does not include a statement regarding attorney's fees the offer is in full compliance with the requirements of section 768.79, Florida Statutes. Moreover, if the offer did include the "not applicable" language or "*This Proposal Does Not Include Attorney's Fees and Attorney's Fees Are Not Part Of The Claim*", it would have no bearing on a strict construction analysis under the statute or rule. Strict construction principles arise out of the fact that a statute is in derogation of the common law. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077-78 (Fla. 2001) ("[A] statute enacted in derogation of the common law must be strictly construed...."). Because at common law attorney's fees are not and never have been recoverable under the

common law, Florida cases applied the derogation canon to attorney's fees statutes. *See, e.g., Jackson v. Hatch*, 288 So. 2d 564, 566 (Fla. 2d DCA 1974) ("Statutes authorizing the award of attorneys' fees are considered in derogation of common law so as to require strict construction.) (citing *Kittel v. Kittel*, 210 So. 2d 1 (Fla. 1967). Attorney's fees are only recoverable by enabling statutes which create the rights to attorney's fees or by contract. However, the derogation canon is not intended to be used to defeat the intended purpose of the statute: "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 72 S. Ct. 1011, 1015 (U.S. 1952).

The Florida courts have narrowly interpreted attorney's fees statutes to limit the breadth of entitlement to fees to only those claims which the Legislature expressly intended to give entitlement to under the substantive statute.[5] Florida courts have consistently found in applying the derogation canon to attorney's fees

[5] *See, e.g., Kittel*, 210 So . 2d at 4 ("It may well be that, under the circumstances, the Legislature should provide some means for requiring the husband to pay for the services of his wife's attorney. This is, however, a legislative, not a judicial, prerogative."); *Jackson*, 288 So. 2d at 566 ("The Legislature has seen fit for the prevailing party in a mechanic's lien foreclosure action to be awarded his attorney's fees. It would constitute an undue extension of legislative intent to hold that simply because one portion of a lawsuit involved the foreclosure of a mechanic's lien, the prevailing party should be entitled to collect his attorney's fees for all aspects of the case.").

statutes that the statutes should be strictly construed, meaning that they should not be interpreted broadly so as to give parties rights to attorney's fees beyond that which the Legislature accorded that right.

In specifically considering the constitutionality and breadth of section 768.79, this Court stated: "The Legislature has modified the American rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79 on the occurrence of certain specified conditions. To the extent section 768.79 creates substantive rights, we find the statute constitutional." *TGI Friday's, Inc.*, 663 So. 2d at 611. The court then went on to explain the breadth of entitlement under section 768.79:

> To begin, the words "shall be entitled" [e.s.] in subsection (1) quoted above cannot possibly have any meaning other than to create a right to attorney's fees when the two preceding prerequisites have been fulfilled: i.e., (1) when a party has served a demand or offer for judgment, and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. <u>These are the only elements of the statutory entitlement.</u>

Id. (emphasis added). While the statute has been amended several times since the decision in *TGI Friday's, Inc.*, the entitlement provisions have not changed in substance.

Thus, in strictly construing the statute this legislative intent should receive paramount consideration. To suggest that the failure of the offer of judgment to meet a piece of the procedural mechanism, i.e. stating that (c)(2)(F) is inapplicable,

where there is no basis for (c)(2)(F) applicability, does not infringe upon strict construction principles. In fact, Petitioner here would assert that a judicial ruling extending the holding of *Diamond Aircraft* to this set of facts would be an invasion into the province of the Legislature.

> Article V, section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts of this State. The Legislature, on the other hand, is entrusted with the task of enacting substantive law. In *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla.1992), we noted that the judiciary and legislature must work together to give effect to laws that combine substantive and procedural provisions in such a manner that neither branch encroaches on the other's constitutional powers.

TGI Friday's, Inc., 663 So. 2d at 611.

While the rule, standing alone, should not be strictly construed, even if one applies the principles of strict construction to the rule, the logic of *Bennett* holds. To create a rule that informs parties that an offer of judgment must now spell out everything that is <u>not</u> included in the offer of judgment and identify every item that is not applicable takes the idea of strict construction to an absurd extreme. Strict construction with the two (2) elements required by the statute, 768.79, does not require this superfluous language. Any perceived necessity to include what is <u>not applicable</u> to the offer flows only from the procedure involved in making the proposal, and does not broaden a party's right to attorney's fees in a given case beyond what the statute has authorized. Thus, a strict construction interpretation has been maintained.

Turning to the proposal in the instant case, Plaintiff expressly made a demand or offer and stated what was included in the offer: (1) costs, (2) interest and (3) damages recoverable under the Complaint or by law, giving the recipient exact knowledge of the terms and conditions covered by the proposal. By the very canon of *expressio unius est exlusio alterius*, noted above, the exclusion of attorney's fees was deliberate. There is nothing in this list or the proposal that would indicate that attorney's fees might be included and, in fact, the reference to damages recoverable under the Complaint, which does not and cannot include a claim for attorney's fees, makes the offer plain on its face.[6] The proposal is in full compliance with the statute and rule 1.442(c)(2)(F), strictly construed, as the legal claim does not include attorney's fees and the offer does not include attorney's fees and as such there is no requirement to state the negative or "not applicable".

II. THIS COURT SHOULD REVERSE THE FIRST DISTRICT'S DECISION BELOW STATING THAT STRICT COMPLIANCE IS NOW THE EXCLUSIVE TEST AND CLARIFY ITS OPINION IN *DIAMOND AIRCRAFT*.

Standard of Review. Appellate courts apply a *de novo* standard of review when the construction of a procedural rule is at issue. *See Saia Motor Freight Line, Inc.*, 930 So.2d at 599. In addition, the eligibility to receive attorney's fees and costs pursuant to section 768.79 and rule 1.442 is reviewed *de novo*. *See Audiffred*, 161

[6] Attorney's fees are not considered part of a Plaintiff's damages. *See Bidon v. Dep't of Prof'l Regulation*, 596 So. 2d 450, 452 (Fla.1992) ("In general, actual or compensatory damages are not defined as including attorney's fees.").

So. 3d at 1278.

A. The First District Erred In Holding That Strict Compliance Is Now The Test.

The First District initially in *R.J. Reynolds Tobacco Co. v. Ward*, 141 So. 3d 236 (Fla. 1st DCA 2014)[7] and now in the opinion below held that when considering the entitlement to attorney's fees pursuant to section 768.79 and rule 1.442, this Court has discarded the old test of the absence of ambiguity and declared a new test of strict compliance: "the supreme court has made the test strict compliance, not the absence of ambiguity." (A.1.) Moreover, the First District has utilized this holding to extend *Diamond Aircraft* to a set of facts, which implicates a procedural requirement of only the rule which is not mirrored in the statute,

[7] While *Ward* was the initial case out of the First District to announce the strict construction test following *Diamond Aircraft*, *Ward* concerns an offer of judgment which failed to include a statement regarding punitive damages under the requirements of both section 768.79 and rule 1.442(c)(2)(E). *See* 141 So. 3d at 238. The holding in *Ward* was again factually specific and is inapplicable to the instant case. In *Ward*, the plaintiffs' amended complaint included a claim for punitive damages. 141 So. 3d at 237. Unlike subsection (c)(2)(F) regarding attorney's fees, both section 768.79, Florida Statutes and rule 1.442 (c)(2)(E) require a proposal for settlement to state with particularity the amount proposed to settle any claim for punitive damages, where such a claim exists. As the plaintiffs' proposal failed to specify an amount for settling the punitive damages claim or indicate in any way what portion of the total sum offered should be allocated to punitive damages, the *Ward* case found the proposal to be invalid. *See id*. at 238. However, where there is no claim for punitive damages, there is no requirement to provide a provision regarding punitive damages in the proposal. Similarly where there is no claim for attorney's fees in the complaint, there should be no necessity to include a provision regarding attorney's fees in the proposal. Thus, these two provisions should be read harmoniously to reach a consistent approach.

subsection (c)(2)(F). This pronouncement by the First District reveals a larger emerging conflict within the Florida District Courts of Appeal. Not only is this conflict creating confusion but the opinion of the First District is not an accurate reflection of this Court's precedent.

This history of the strict construction/compliance test began with *Hilyer Sod*, in 2003 and was then followed by *Campbell* in 2007. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278–79 (Fla.2003); *Campbell v. Goldman*, 959 So. 2d 223, 227 (Fla. 2007). *Hilyer Sod* concerned an issue regarding whether an offer from multiple plaintiffs must apportion the offer among the plaintiffs. *See Hilyer Sod*, 849 So. 2d at 278. *Campbell*, on the other hand, concerned an offer that failed to include any reference to section 768.79, and the *Campbell* court under a strict construction analysis held that the proposal must state that it is being made pursuant to the statute. *Campbell*, 959 So. 2d at 227. In between *Hilyer Sod* and *Campbell*, this Court decided *Nichols*, which relied primarily upon ambiguity principles in considering the facts of a release as a condition of an offer of judgment under the provisions of rule 1.442(c)(2)(C) & (D). *See* 932 So. 2d at 1079. Petitioner would note that in order to follow the First District holding below, that ambiguity principles no longer apply, at a minimum requires clarification of this Court's holding in *Nichols*.

Diamond Aircraft Industries, Inc. v. Horowich

In *Diamond Aircraft* the Court took up a certified question from the Eleventh Circuit based upon section (c)(2)(F), which stated:

> 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 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).[8] In answering this question in the negative, this Court fully explored the *Bennett* decision, the case certified at conflict, but did not to overrule it. The *Diamond Aircraft* court, instead, drew attention to the underlying factual distinction that in *Bennett* the complaint 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**.

[8] 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.

Id. at 378 (emphasis added). Thus, the court relied upon strict construction but then specifically found that based upon the facts of the claim for attorney's fees in the underlying complaint an ambiguity was created in the offer by the failure to include the statements on attorney's fees in the offer. In fact, the court said that it was the *ambiguity* in the offer that "necessitated" the presence of a statement on attorney's fees.[9]

Contrary to the holding of *Ward* and the First District decision below, *Diamond Aircraft* does not hold that strict compliance, as opposed to the absence of ambiguity, is now the test. Additionally, *Nichols* is still strong precedent that a court should look to the underlying facts to determine if ambiguities are present in the offer.[10] *See* 932 So. 2d at 1079. Thus, while strict construction principles form

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[9] The court then calls into question the continuing validity of *Bennett*'s 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.

[10] Additionally, following the court's opinion in *Diamond Aircraft* the court again relied upon ambiguity principles to invalidate a proposal for settlement where the

the foundation for ensuring that a party does not receive attorney's fees on a claim to which they are not entitled based upon the legislative mandates, principles of whether or not a party receiving the offer understands the offer and whether or not it is ambiguous under the facts of a given case is an important consideration under both *Diamond Aircraft* and *Nichols,* in assessing the components of the procedure for conveying the offer pursuant to the rule.

B. This Court Should Re-articulate The Test Of Strict Construction As Applied To Rule 1.442.

The certified conflict before this Court arises from the case of *Bennett v. American Learning Systems of Boca Delray, Inc*., which was a breach of contract and slander case. *See* 857 So. 2d at 987. Like the instant case, the *Bennett* complaint contained no allegations requesting attorney's fees nor suggesting an entitlement thereto, and the offer of judgment failed to include any statements in compliance with subsection 1.442(c)(2)(F). *See id*. at 987. Before reaching the merits of the issue, the *Bennett* court first 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

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proposal failed to properly comply with the apportionment requirement under the statute and rule. *See Audiffred*, 161 So. 3d at 1280 (" We conclude that the statute and the rule mandate apportionment under such circumstances to eliminate any ambiguity with regard to the resolution of claims by nonofferor/nonofferee parties").

> 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. As it was for the *Bennett* court, this should be the starting point of the inquiry before this Court.

The crux of this inquiry is whether Florida Rule of Civil Procedure 1.442, standing alone, should be subject to the same "strict construction" principle that is applied to section 768.79, Florida Statutes. While Petitioner proposes that this Court should re-evaluate the test of strict construction as applied solely to rule 1.442, Petitioner does not intend by making this argument to suggest to this Court that it should simply throw the baby out with the bathwater. Rather, Petitioner asserts that this case presents a unique circumstance in that subsection (c)(2)(F) is only contained within the rule, not within section 768.79, and as such the principles of strict construction concerning attorney's fee statutes are not implicated on the same level under the specific facts of this case. Additionally, the historical underpinnings of the Court's precedent on section 768.79 and rule 1.442 support the conclusion that the rule itself is the procedural mechanism for that statute, not the substantive law embodied by the statute. Petitioner, however, would note that this Court's long-standing jurisprudence concerning the entitlement to attorney's fees under section 768.79 and rule 1.442 still offers the foundation for the analysis of the case.

As previously discussed, the law is well established that a statute creating an entitlement to attorney fees must be strictly construed. *Dade County*, 664 So. 2d at 960 ("[I]t is also a well-established rule in Florida that 'statutes awarding attorney's fees must be strictly construed.' *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n*, 539 So. 2d 1131, 1132 (Fla. 1989)."). Thus, in *Hilyer Sod*, the Florida Supreme Court first announced the test of strict construction of section 768.79, Florida Statutes and rule 1.442 relying upon the derogation canon. *See* 849 So. 2d at 278.

This Court and other district court opinions, like the *Bennett* opinion above, have noted that rule 1.442 is the procedural mechanism for section 768.79. *See, e.g., Pratt v. Weiss*, 161 So. 3d 1268, 1269 (Fla. 2015) ("Florida Rule of Civil Procedure 1.442 articulates the procedures that implement section 768.79"); *Hilton Hotels Corp. v. Anderson*, 153 So. 3d 412, 415 n.1 (Fla. 5th DCA 2014) ("Section 768.79 provides the substantive law concerning offers and demands of judgment, while rule 1.442 provides for its procedural mechanism"). Thus, the rule does not create an entitlement to attorney's fees; the rule merely outlines the procedure for pursuing a claim for fees under section 768.79. *See, e.g., Timmons*, 608 So. 2d at 3 ("it is clear that the circumstances under which a party is entitled to costs and attorney's fees is substantive and that our rule can only control procedural matters.") In 2012, this Court considered once again the constitutionality and scope

of section 768.79. In so doing, the Court examined the statute's interplay with rule 1.442, stating:

> The current version of the offer of judgment statute is procedurally buttressed by Florida Rule of Civil Procedure 1.442, which details the requirements to properly file a proposal of settlement.
> . . . .
> Section 768.79 is unlike procedural rules that provide courts significant discretion to facilitate the administration of justice.

Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co., 82 So. 3d 73, 79-80 (Fla. 2012).

Despite this precedent, in *Hilyer Sod* the court made no distinction between the principles of construction applicable to section 768.79, Florida Statutes and rule 1.442, treating both as essentially the substantive law regarding attorney's fees. *See* 849 So. 2d at 278. Then again four years later, in *Campbell*, the court reaffirmed this holding finding that both the statute and rule must be strictly construed pursuant to the derogation cannon. *See* 959 So. 2d at 223. Neither case considers in any part the nature of rule 1.442, as a rule of civil procedure or the application of the derogation canon.

With regards to construction of the rules of civil procedure, ample authority exists on this issue. The general construction principle applied to the Court's procedural rules is explained in Rule 1.010: "[t]he general guide to construction of the procedural rules is set forth in Florida Rule of Civil Procedure 1.010, which states that the rules 'shall be construed to secure the just, speedy, and inexpensive

determination of every action.'" *Barco v. School Bd. of Pinellas County*, 975 So. 2d 1116, 1123 (Fla. 2008) (quoting Fla. R. Civ. P. 1.010). The court has held that in interpreting the rules of procedure, "[p]rocedural rules should be given a construction calculated to further justice, not to frustrate it." *Singletary v. State*, 322 So. 2d 551, 555 (Fla. 1975). In *Lackos v. State*, 339 So. 2d 217, 219 (Fla. 1976), for example, the court held that the test of strict enforcement of a rule should be whether the alleged violation was prejudicial. Quoting from the district court opinion by then Judge Grimes, the court noted that "[t]he modern trend in both criminal and civil proceedings is to excuse technical defects which have no bearing upon the substantial rights of the parties." *Id*. at 219. These principles have been consistently followed by the lower courts to ensure that construction of the rules of procedure is not so technically or rigidly enforced as to obscure justice of the cause or defeat the object for which they were enacted. *Mills v. Martinez*, 909 So. 2d 340, 343 (Fla. 5th DCA 2005); *Pruitt v. Brock*, 437 So. 2d 768, 774-75 (Fla. 1st DCA 1983). As recently as 2010, this Court again held: "We reiterate that the rules [of civil procedure] should be interpreted to further justice and not frustrate it." *Strax Rejuvenation and Aesthetics Institute, Inc. v. Shield*, 49 So. 3d 741, 743 (Fla. 2010).

Strict construction should not be discarded but likewise it should not be used as a sword to defeat the purpose and intent of the statute, especially where the

factual issue involved in the case concerns only the procedure under the rule and not the substantive law of the statute. This issue was highlighted in the case of *Mills v. Martinez*. 909 So. 2d at 343. In *Mills*, the Fifth District considered the issue of the plaintiff's failure to comply with a provision of rule 1.442, which states that the proposal shall not be filed unless necessary to enforce provisions of the rule. *See id*. The proposals in *Mills* were prematurely filed two years prior to trial. *See id*. In considering the issue, the court explained:

> While rule 1.442 is punitive in nature, its purpose is to sanction a party who unreasonably refuses to settle by shifting the payment of attorney's fees. "Procedural rules should be given a construction calculated to further justice, not to frustrate it." "When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the trial judge should relax them, if it can be done without injustice to any of the parties."

Id. (citations omitted). This Court in *Frosti v. Creel*, 979 So. 2d 912, 917 (Fla. 2008), approved of the Fifth District's decision in *Mills* overturning the conflicting decision of the Second District.

While statutes enacted by the legislature establish the substantive law of the state, the rules of procedure serve only to implement the rights created by law. Article V, Section 2(a) of the Florida Constitution provides in material part that the Supreme Court "shall adopt rules *for the practice and procedure* in all courts." (emphasis added). Rules of procedure do not create substantive rights. The rule has been transformed from its original role as procedural mechanism to enforce a right

to what is now a substantive requirement which stands in the way of the right and the intent behind this statute, "which is to 'encourage settlements in order to eliminate trials if possible.'" *Campbell*, 959 So. 2d at 227 (Pariente concurring) (quoting *Unicare Health Facilities, Inc.*, 553 So. 2d at 161). Thus, the unintended consequence of applying strict construction to the rule alone has resulted in outcomes that violate the principle that Rules of Civil Procedure are interpreted to further justice and not frustrate it.

This case gives the Court the opportunity to re-articulate the test of strict construction as applied solely to Florida Rule of Civil Procedure 1.442. As noted above by the *Bennett* court, the attorney's fee component of 1.442(c)(2)(F) to state whether the proposal includes attorney's fees and whether the claim includes attorney's fee is not mirrored in the statute. Thus, the need to wield the doctrine of strict construction like a sword in order to cut-off the right to attorney's fees in this case is unwarranted. Instead as recognized by the court in *Mills* strict construction can provide the backdrop against which the court can harmonize the tests of both strict construction with the statute and the absence of ambiguity pursuant to the procedural requirement of the rule. This approach will comply with the legislative intent of the statute and will not frustrate or defeat the purpose for which the rule was established.

C. The Proper Test Is An Application of Strict Construction Of The Statute And Rule Followed By Considerations of The Absence of Ambiguity And Furthering The Purpose Of The Rule To Encourage Settlement.

This Court has repeatedly recognized that the intent behind section 768.79 and rule 1.442 was to promote settlement. *See Southeast Floating Docks*, 82 So. 3d at 79 (Section 768.79 was enacted to deter parties from rejecting presumably reasonable settlement offers by imposing sanctions through costs and attorney's fees.); *See Gorka*, 36 So. 3d at 649 (per curiam). The Court, however, has also lamented the failure of the statute to produce its desired result. *See Gorka*, 36 So. 3d at 650 ("The effect, however, has been in sharp contrast to the intended outcome because the statute and rule have seemingly increased litigation as parties dispute the respective validity and enforceability of these offers.") Justice Pariente, in concurrence, aptly made this same observation in *Campbell*, stating:

> Over the years I have expressed concern about whether either the rule or the statute is fulfilling its intended purpose of encouraging settlement or at times is having the opposite effect of increasing litigation.

Campbell, 959 So. 2d at 227 (J. Pariente concurring).

Under the First District decision below, not only is the intent of the statute likely to be further frustrated, but litigation will only increase, as parties struggle to know how to clarify all the items, terms or conditions that now should be listed as inapplicable or expressly stated as not included in the offer. *See* Fla. R. Civ. P. 1.442(c)(2)(A)-(G). In actual practice, the composing and acceptance/rejection of

an offer of judgment is no longer about the communication of an understandable and reasonable offer to the opposing party but a game of "gotcha". This was never the intent of the statute and certainly is not the intent behind the procedural implementation given in the rule.

This Court in *Nichols* sets forth guidance for the interplay between all these varying tests and principles. *See* 932 So. 2d at 1079. Significantly *Nichols* was decided in between *Hilyer Sod* and *Campbell* and considers an issue involving a release as a condition of settlement under rule 1.442's requirement that the settlement proposals "state with particularity any relevant conditions" and also "state with particularity all nonmonetary terms." Fla. R. Civ. P. 1.442(c)(2)(C)-(D); *See id.* at 1078. In giving guidance under rule 1.442 the Court explained:

> 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.

Id. at 1079 (emphasis added). The court further quoted *Lucas v. Calhoun*, 813 So.2d 971, 973 (Fla. 2d DCA 2002), stating:

> The 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. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.

Id.

While *Nichols* is based upon a considerations of subsections (c)(2)(C) and (D), these guiding principles regarding the rule have significant applicability in the context of interpreting rule 1.442 in its entirety. In fact, Petitioner contends that *Nichols* sets forth a framework consistent with this Court's entire body of precedent that can merge these principles into a consistent whole.

Additionally, the Petitioner would note that outside of the First District, the other districts still follow the ambiguity approach to considering the validity of offers of judgment. *See, e.g., Miley*, 171 So.3d at 145 (holding that while the proposal could have been more specific in identifying the claims, the language used did not contain a level of ambiguity rendering it invalid); *Mathis*, 140 So. 3d at 657 (noting that "it may be impossible to eliminate all ambiguity from proposals for settlement"); *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So.3d 348, 353 (Fla. 4th DCA 2011) (holding that the proposals of settlement under the offer of judgment statute and rule were not ambiguous for failing explicitly to identify which party would make settlement payment); *Carey–All Transp., Inc.*, 989 So. 2d at 1206 ("Therefore, parties should not 'nit-pick' the validity of a proposal for settlement based on allegations of ambiguity unless the asserted ambiguity could 'reasonably affect the offeree's decision' on whether to accept the proposal for settlement."). These cases following the ambiguity test cite predominantly to *Nichols*.

However, if *Nichols'* guidance is to serve as the benchmark test, it need not do so with the failed purpose of leaving this Court's significant strict construction precedent in the dust. Instead, as recognized by *Hilyer Sod*, *Campbell* and *Diamond Aircraft*, the legal prerequisites of ensuring that that a party has served a demand and a party has recovered a judgment at least 25 percent more or less than the demand pursuant to section 768.79 and mirrored in rule 1.442, which entitles a party to attorney's fees must be strictly construed under the derogation canon. Second, once strict construction has been considered, a court must ensure there is no ambiguity within the proposal created by the facts of the case, as this Court did in both *Diamond Aircraft* and in *Nichols*, such that the offer is sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. Finally, where there is an issue of only the procedure used under the rule alone (whether this is an issue of timeliness or an item is inapplicable under the facts), it is the court's job to ensure that the rule is not technically or rigidly enforced as to obscure justice of the cause or defeat the object for which the rule was enacted. This harmony of the Court's precedent gives full meaning to the principles of strict construction and the absence of ambiguity, while effectuating the purpose and intent of the statute. Thus, the First District opinion below should be quashed.

CONCLUSION

In the underlying case, the Defendant was not confused by the proposal's failure to include "not applicable" regarding the attorney's fees statement in the offer and/or some type of statement stating that attorney's fees were not pled and thus not included in the offer. The Defendant knew the claim was a negligence complaint and, as such, that the legal claim did not (and could not) include attorney's fees and, as such, the proposal did not (and could not) include attorney's fees. The issue before the Court is nothing more than gamesmanship and legal maneuvering, the effect of which is that common sense and a practical application of the laws of this State are being turned into a "gotcha" situation through the use of the legal term "strict construction".

This Court's precedent on strict construction, rule 1.442, section 768.79, as well as the language of rule 1.442(c)(2)(F), itself, do not call for such an interpretation. *Diamond Aircraft* does not hold that strict construction is now the test and the absence of ambiguity is no longer a consideration under section 768.79, Florida Statutes and rule 1.442. Thus, *Diamond Aircraft* should not be extended to apply to a situation where the complaint does not demand attorney's fees and the case of *Bennett* properly interprets and applies the law to the underlying facts. Moreover, this Court should reverse and quash the First District's opinion below and plainly state that both tests of strict construction and the

absence of ambiguity remain significant inquires when considering the validity of a proposal for settlement. Additionally, *Diamond Aircraft* should be clarified to the extent that it can be read harmoniously with this Court's precedent that where there is an issue of procedure under the rule alone, the court's job is to ensure that rule 1.442 is not technically or rigidly enforced as to obscure justice of the cause or defeat the object for which the rule was enacted, which is encouraging settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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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