Case No. SC15-1682

SUPREME COURT OF FLORIDA

SUSANNE L. KUHAJDA,

Petitioner,

v.

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

Respondents.

On Discretionary Review From a Decision
Of the First District Court of Appeal

ANSWER BRIEF OF RESPONDENTS

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SUMMARY OF THE ARGUMENT

Ms. Kuhajda asks this Court to reverse course and to eviscerate the strict construction test for evaluating proposals for settlement that the Court has followed consistently in six different opinions issued over the past 13 years. The Court should decline that invitation and approve the First District's decision.

This Court previously answered the precise question addressed by the First District below: whether a valid proposal for settlement must "state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim." *See* Fla. R. Civ. P. 1.442(c)(2)(F). In *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013)—one of the unbroken line of cases from this Court adhering to the strict construction test—the Court held unequivocally that this requirement was mandatory. While the claim in *Diamond Aircraft* included attorney's fees, the First District below held that "we can see no reason why this holding would not apply equally to a case where attorneys' fees were not sought in the complaint" in light of the mandatory language used in rule 1.442. *Borden Dairy Co. of Ala. v. Kuhajda*, 171 So. 3d 242, 243 (Fla. 1st DCA 2015). The First District's conclusion was not only correct, but unavoidable given the settled law on this issue announced by this Court since 2003.

Mr. Kuhajda's efforts to salvage her proposals are unavailing. She concedes that her proposals did not contain the language required by rule 1.442(c)(2)(F)—

indeed, her proposals never mention "attorney's fees" at all. And her suggestion that this language is optional when fees are not requested in the pleadings because the rule does not provide that a proposal shall "state whether *or not* the proposal includes attorneys' fees and whether *or not* attorneys' fees are part of the legal claim" is contrary to binding precedent and violates long-standing rules of grammar and English usage.

Finally, the Court should reject Ms. Kuhajda's suggestion that it revisit the strict construction test. This Court has now spent more than a decade repeatedly educating judges and attorneys that the requirements in rule 1.442 are mandatory. Retreating from this bright-line test now would sow uncertainty into long-settled law on this subject and create chaos in trial and appellate courts. The solution to the problems with proposals for settlement is not causing more uncertainty, but instead is re-enforcing, yet again, that "shall means shall." By failing to follow this Court's repeated warnings when drafting her proposals, Ms. Kuhajda has only herself to blame for her inability to recover attorney's fees.

ARGUMENT

For 13 years, and in no fewer than six cases, this Court has held that the requirements of Florida Rule of Civil Procedure 1.442 must be "strictly construed." *See, e.g., Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003). As a result, for at least a decade, parties have been "on notice that all 't's' must be crossed and 'i's' dotted" for a proposal to be valid and enforceable. *Campbell v. Goldman*, 959 So. 2d 223, 227 (Fla. 2007) (Pariente, J, specially concurring); *see also Paduru v. Klinkenberg*, 157 So. 3d 314, 318 (Fla. 1st DCA 2014) ("[i]t is now a well settled principle, espoused in our previous decisions as well as those from sister districts, that offers of judgment must strictly comply with section 768.79 and rule 1.442, with any drafting deficiencies being construed against the drafter"). Indeed, just last year, this Court "reiterate[d] that parties must strictly adhere to the requirements of section 768.79 and rule 1.442 to be eligible for an award of attorney's fees and costs." *Pratt v. Weiss*, 161 So. 3d 1268, 1273 (Fla. 2015).

Ms. Kuhajda asks this Court to change all of that. Undeterred by the chorus of cases against her, she asks the Court to eliminate or dramatically weaken the strict construction requirement—presumably by overruling, at least in part, all six of this Court's decisions applying that test. Alternatively, she asks the Court to find that her proposals for settlement strictly complied with the rule's requirements

even though she concedes that her proposals omitted altogether the mandatory language in one entire subsection of rule 1.442. The Court should decline Ms. Kuhajda's invitation to retreat from long-settled law and should approve the First District's decision.

I. The First District's decision correctly held that Ms. Kuhajda's proposals did not comply with the plain requirements of rule 1.442

A. This Court has consistently held that a proposal for settlement must strictly comply with the requirements of rule 1.442

Ms. Kuhajda begins by urging the Court to limit its decision in *Diamond Aircraft*—which held that a proposal must "state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim," as required by rule 1.442(c)(2)(F)—only to cases in which attorney's fees are asserted in the pleadings. To understand why the First District's reading of *Diamond Aircraft* was the only possible one under existing law, it is helpful to examine this Court's rulings before and after that decision.

This Court first announced the strict construction test 13 years ago in *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003). In *Willis Shaw*, the Court held that a joint proposal for settlement served by two plaintiffs was invalid because it did not "state the amount and terms attributable to each party," even though accepting the proposal would have resolved both claims. *Id.* at 278-79. The Court held that, "under the plain language of rule 1.442(c)(3), an offer

from multiple plaintiffs must apportion the offer among the plaintiffs." *Id*. at 279. Significantly, the Court noted that "[t]he language [in rule 1.442] must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees." *Id*. at 278.

The Court reaffirmed the strict construction rule two years later in *Lamb v. Matetzschk*, 906 So. 2d 1037 (Fla. 2005), which held that a joint proposal for settlement must differentiate between the parties, even when one party's alleged liability is solely vicarious.[1] There, the Court concluded that, "[s]trictly construing rule 1.442(c)(3) in accordance with the dictate of *Willis Shaw* and applying it to the facts at hand, it is clear that Lamb's first two proposals for settlement were invalid for they failed to state the amount and terms attributable to the Matetzschks individually." *Id*. at 1040. While noting that this strict interpretation of the rule might complicate drafting valid proposals, the Court noted that "we are confident that the lawyers of this State can and will draft an offer that will satisfy the requirements of the rule." *Id*. at 1041.

The Court next applied the strict construction rule in *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007), in which the Court held that a proposal was invalid because it did not expressly state that it was being served pursuant to section 768.79. The Court reiterated the strict construction test and held that the test

[1] The Court's holding in *Lamb* is no longer good law because of a subsequent amendment to rule 1.442, but the reasoning remains equally valid today.

applies "to both the substantive and procedural portions of the rule and statute." *Id.* at 227. The Court expressly rejected the district court's reasoning that the failure to mention section 768.79 was "a mere technical violation" of the rule. *Id*. at 226. Instead, the Court held that "[t]he plain language of the statute provides that an offer *must* state it is being made pursuant to this section. This is a mandatory requirement for this penal, fee-shifting provision." *Id*. at 227 (emphasis in original).

Most recently, the Court issued opinions just last year in two companion cases that, yet again, reaffirmed the strict construction rule. In both cases, the Court held that the proposals for settlement at issue were invalid because they were joint proposals that did not differentiate between the parties. *See Pratt*, 161 So. 3d 1268, 1272 (Fla. 2015); *Audiffred v. Arnold*, 161 So. 3d 1274, 1279-80 (Fla. 2015). And in both, the Court expressly noted that it was applying the strict construction test to the proposals. *See Pratt*, 161 So. 3d at 1273 ("we conclude that the strict construction utilized in *Easters* is equally applicable here"); *Audiffred*, 161 So. 3d at 1279 ("[u]nder the required strict construction of the rule and the statute, this ultimate effect of the offer requires that it be treated as a joint proposal").

B. In *Diamond Aircraft*, the Court reiterated that a proposal must include the mandatory information regarding attorney's fees

In the midst of this parade of cases, this Court decided *Diamond Aircraft*, which addressed the precise issue presented here: whether a proposal was invalid

for failing to "state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim." *Diamond Aircraft*, 107 So. 3d at 376; *see also* Fla. R. Civ. P. 1.442(c)(2)(F). The party seeking fees argued that its offer was valid because the proposal stated that it was "intended to resolve all claims that were or could have been asserted by Plaintiff," but this Court disagreed. *Id*. at 365, 377-78. In doing so, the Court noted that "[s]trict construction of rule 1.442 required that Diamond Aircraft's offer of settlement include a provision with regard to attorney's fees, and whether such fees were a part of Horowitch's legal claim. The offer of settlement here failed to include such a statement, and the offer would be invalid and unenforceable even if section 768.79 applied." *Id*. at 377-78. The Court specifically rejected the argument that a proposal "that stipulates settlement of all claims" is broad enough to satisfy the rule. *Id*. at 377.

Ms. Kuhajda argues that the First District below erred in applying the holding in *Diamond Aircraft* to this case because *Diamond Aircraft* arose under different facts. Not so.

Borden agrees that the underlying claim in *Diamond Aircraft*, unlike the claim here, included a demand for attorney's fees, but this Court's decision in *Diamond Aircraft* did not rest on that narrow, fact-specific basis. Instead, the Court followed the same bright-line rule of strict construction it had previously established in *Willis Shaw*, *Lamb*, and *Campbell*. In fact, in *Diamond Aircraft* this

Court reiterated once again that *all* of the requirements in rule 1.442 and section 768.79 were "mandatory," not optional. *See Diamond Aircraft*, 107 So. 3d at 377 ("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"). There is nothing equivocal about the language used by the Court in announcing—or, more accurately, re-enforcing—this now-established rule.

Ms. Kuhajda urges the Court to cast aside the bright line test it followed in *Diamond Aircraft* and to follow the Fourth District's decision in *Bennett v. Am. Learning Sys. of Boca Delray, Inc.*, 857 So. 2d 986 (Fla. 4th DCA 2003), which formed the basis of the certified conflict. But this Court expressly questioned the viability of *Bennett* in its *Diamond Aircraft* opinion by noting that the Fourth District issued *Bennett* in 2003, some four years before *Campbell*. As the Court explained, "[i]n *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." *Diamond Aircraft*, 107 So. 3d at 377 (emphasis in original). Though the Court stopped short of overruling *Bennett*—because it had no need to do so to reach its result—the Court made clear that *Campbell*, not *Bennett*, accurately stated Florida law on the proper construction of rule 1.442.

Certainly there is nothing in the *Diamond Aircraft* opinion remotely suggesting that this Court agreed with the rationale of *Bennett*.

Thus, it is no surprise that, in the 13 years since the Fourth District issued *Bennett*, it has *never* been followed by any Florida court for that proposition. The First District below expressly declined to follow *Bennett*, and at least one federal court also concluded that it no longer provided an accurate statement of Florida law. *See Evanston Ins. Co. v. Premium Assignment Corp.*, No. 8:11-cv-2630-T-33TGW, 2013 WL 3285274, * at 2-3 (M.D. Fla. June 26, 2013). In short, *Bennett* remains an outlier—not officially overruled but never followed—and it is universally acknowledged as having dubious precedential value at best.

The Fourth District's decision in *Liggett Grp., Inc. v. Davis*, 975 So. 2d 1281 (Fla. 4th DCA 2008), which Kuhajda also cites as conflicting authority, has fared no better. There, the court concluded that a proposal that did not state "whether attorneys' fees are part of the legal claim" was nonetheless valid because the proposal stated that it "was inclusive of all claims for attorney's fees and costs." *Id*. at 1284. The Fourth District reached this conclusion without citing any authority for support—not even its prior decision in *Bennett*—and without any meaningful analysis. And, like *Bennett*, the decision in *Davis* has never been cited by any court for this proposition since it was issued more than eight years ago. Even the Fourth District itself appears to have abandoned the reasoning in *Bennett*

and *Davis* by adhering to the strict construction test ever since *Campbell*. *See Cano v. Hyundai Motor Am., Inc.*, 8 So. 3d 408, 410 (Fla. 4th DCA 2009) ("[i]f a proposed settlement does not comport with the strict requirements of rule 1.442, an award of attorney's fees and costs pursuant to 768.79 is improper").

Notwithstanding this, Ms. Kuhajda advocates for the approach taken by *Bennett* by arguing that it is "absurd" to require a proposal to include attorney's fees language when attorney's fees are not claimed in the pleadings. *Petitioner's brief at 13-15*. But that contention is both incorrect and irrelevant.

It is incorrect because, as the concurring opinion in the First District's recent decision in *Colvin v. Clements and Ashmore, P.A.* recognized, a proposal under rule 1.442 "is a settlement process" so that "it is imperative that a proposal for settlement very clearly set forth all of its terms so that the receiving party can evaluate the proposal with confidence of having a full and complete understanding of its terms and scope." *Colvin*, 182 So. 3d 924, 926 (Fla 1st DCA 2015) (Kelsey, J., concurring). As Judge Kelsey noted:

> Even if the pleadings do not seek fees, a party might want to make fees a condition of settlement or judgment. To pay fees when fees were not part of the claim is significant, and must be communicated very clearly. Thus it makes sense and comports with the rationale behind cases such as *Diamond Aircraft* to require a proposal for settlement to state whether fees were claimed and whether they are a condition of settlement even if fees were not requested in the pleadings—indeed, *especially if* fees were not requested in the

> pleadings, so that the receiving party clearly understands the legal effect of the settlement terms being offered.

Id.[2]

Regardless, the "absurdity" argument is irrelevant because this Court's precedent makes it abundantly clear that the requirements in the rule are mandatory no matter what. The holding in *Campbell* provides a textbook example. There, this Court held that a proposal was invalid for not citing section 768.79, even though it was the only possible statute that the proposal could have cited at the time. *See Campbell*, 959 So. 2d at 227 (Pariente, J., specially concurring) (agreeing that the proposal was invalid for not citing section 768.79 even though "the requirement that the offer reference the statute on which it is based no longer has any true meaning" and "there was no lack of clarity, uncertainty, or confusion in this offer").

In short, the First District's decision to apply *Diamond Aircraft* to the facts of this case was not only correct, but inevitable in light of this Court's repeated pronouncements. Any other interpretation would render the mandatory language

[2] Ms. Kuhajda's suggestion that the opinion in *Colvin* somehow indicates that the First District no longer agrees with the rationale of *Diamond Aircraft* merits little response. The First District followed *Diamond Aircraft* in *Colvin*, just as it did in *Borden Dairy* and in *R.J. Reynolds Tobacco Co. v. Ward*, 141 So. 3d 236, 238 (Fla. 1st DCA 2014), in which the Court invalidated a proposal that failed to "state with particularity the amount proposed to settle a claim for punitive damages, if any" as required by rule 1.442(c)(2)(E). In light of this clear line of authority from the First District, Ms. Kuhajda's effort to read reluctance into the *Colvin* opinion is both strained and meaningless.

of Rule 1.442(c)(2)(F) optional in cases where attorney's fees were not claimed in the pleadings.

C. The First District correctly held that Ms. Kuhajda's proposals were invalid because they did not mention attorney's fees at all

Applying the strict construction test as required, it is readily apparent that Ms. Kuhajda's proposals are not valid.

The proposals for settlement Ms. Kuhajda served were identical, except for the amount. The initial proposal stated, in its entirety, 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. GREENROCK, 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. GREENROCK, for the total lump sum of $110,000.00 to be paid by said Defendants 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.

Petitioner's Appendix at Exhibit 4.

Notably missing from the proposals is any mention of the words "fees" or "attorney's fees." Thus, the proposals did not "state whether the proposal includes attorneys' fees" nor did they state "whether attorneys' fees are part of the legal claim," as required by Rule 1.442(c)(2)(F). Ms. Kuhajda does not argue otherwise. Even applying a lower standard than strict construction, Ms. Kuhajda's proposals—by ignoring attorney's fees altogether—do not pass muster.

Ms. Kuhajda's only response is to argue that her proposals' silence regarding attorney's rule is excusable because 1.442 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." *Petitioner's brief at 15-16* (emphasis in original). Thus, under Ms. Kuhajda's reading of the rule—which she concedes is "a bit hyper-technical"—the absence of the words "or not" renders this provision optional in many (perhaps most) cases. This novel and tortured reading of the rule is contrary to binding precedent and violates long-standing rules of grammar and English usage.

First, Kuhajda's grammatical take on rule 1.442 finds no support from authorities on modern English usage. As one leading treatise states, "[d]espite the SUPERSTITION to the contrary, the words *or not* are usually superfluous, since *whether* implies *or not*." Bryan A. Garner, *Garner's Modern American Usage* 857 (3d ed. 2009) (emphasis in original). Another popular treatise concurs:

> **Whether**. Generally, use *whether* alone—not with the words *or not* tacked on {they didn't know whether to go}. The *or not* is necessary only when you mean to convey the idea of "regardless of whether" {we'll finish on time whether or not it rains}.

The Chicago Manual of Style 299 (16th ed. 2010) (emphasis in original). *See also* Alan L. Dworsky, *The Little Book on Legal Writing* 41 (1992) ("*Whether* seems to attract needless words. In the phrase *whether or not* you can usually omit the *or not*") (emphasis in original). In short, the phrase "or not" after "whether" is, at best, unnecessary; at worst, it is grammatically improper. That the legislature has tacked on the words "or not" after "whether" on occasions in statutes does not make it any more grammatically correct, much less render the words essential.

Second, Ms. Kuhajda's argument is contrary to the plain language of the rule. The common meaning of the word "whether" denotes "alternative possibilities." *The American Heritage College Dictionary* 1536 (3d ed. 1997). When a rule requires a party to state "whether" something has occurred, common sense dictates that the rule requires the party to state—one way or the other—which of the two "alternative possibilities" has come to pass.

Finally, had this Court intended for the statements regarding attorneys' fees to be optional if fees were not pled in the complaint, it undoubtedly would have used clearer language to accomplish this goal. Indeed, the Court accomplished that precise result in subsection (E) dealing with punitive damages. There, the rule

states that a proposal shall "state with particularity the amount proposed to settle a claim for punitive damages, *if any*." Fla. R. Civ. P. 1.442(c)(2)(E) (emphasis added). By using the phrase "if any," the rule limits that provision's application to cases where a claim for attorney's fees has been asserted. *See Lucas v. Calhoun*, 813 So.2d 971, 973 (Fla 2d DCA 2002) (finding the "if any" language of subsection (E) requires a proposal to include the terms of a punitive damage claim only when the pleadings contain a claim for punitive damages). Yet, the rule uses different language in subsection (F), implying that a different meaning was intended. *See State v. Bradford*, 787 So. 2d 811, 819 (Fla. 2001) (noting that, under "well-settled principles of statutory construction, this Court has held that '[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended'") (quoting *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997)).

II. The Court should not deviate from its consistent line of cases stating that proposals for settlement must strictly comply with rule 1.442

Ms. Kuhajda ends her brief with a lengthy discussion asking the Court "to re-articulate the test of strict construction as applied solely to Florida Rule of Civil Procedure 1.442." *Petitioner's brief at 34*. She decries the use of strict construction "like a sword" to defeat claims for attorney's fees, and suggests that the "absence of ambiguity" should be the focus of any inquiry.

Id. The Court should decline her invitation to re-open settled law on this issue for a number of reasons.

First, contrary to Ms. Kuhajda's suggestion, "strict construction" and the "absence of ambiguity" are not competing, mutually exclusive tests. Instead, this Court's prior decisions make it clear that the two tests work in harmony. To be valid, a proposal must strictly comply with the requirements in the rule and the statute by, for example, stating "with particularity the amount proposed to settle a claim for punitive damages, if any." But a proposal that purports to include all of the information required by the rule or statute can still be invalid if there is "ambiguity within the proposal [that] could reasonably affect the offeree's decision." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006). Thus, in *Nichols*, this Court found a proposal invalid—even though it apparently contained all of the information required by the rule—because it was "too ambiguous to satisfy rule 1.442" since it was unclear whether the plaintiff would be required to release both her PIP and UM claims if she accepted the offer. *Id*. at 1079-80.

Viewed correctly, the "absence of ambiguity" test is really nothing more than a subset of the "strict construction" test. A proposal that is ambiguous, by definition, does not comply with the rule because it does not "state *with particularity* any relevant conditions" or "state *with particularity* all

nonmonetary terms." Fla. R. Civ. P. 1.442(c)(2)(C) (emphasis added); *see Nichols*, 932 So. 2d at 1078-80 (agreeing that a release is a "condition" or nonmonetary term of a proposal, so that any ambiguity in describing the claims to be released fails to satisfy the rule). Thus, this Court's precedent requires that a proposal strictly comply with rule 1.442, which necessarily means that it is free from meaningful ambiguity.

Second, Ms. Kuhajda's request that the Court abandon or emasculate the strict construction test at this point would result in chaos. For more than a decade, this Court has articulated a bright-line test that placed Florida's judges and attorneys on notice that a proposal *must* comply with *all* portions of the statute and rule to be valid. Backing away from that now would serve only to open the floodgates to ad hoc determinations. Borden agrees with Ms. Kuhajda—and with this Court—that seemingly endless litigation over proposals for settlement has frustrated the goal of section 768.79 and rule 1.442. But the solution is not to sow confusion into an otherwise settled area of law; instead, the solution is to enforce the same strict construction that the Court has advanced consistently for the past 13 years.

The result reached by the First District here is not only entirely consistent with precedent, but is also eminently fair. For nearly a decade prior to the service of her proposals in 2012, this Court warned parties and attorneys

that a valid proposal must strictly comply with the rule. Similarly, parties receiving proposals for settlement could evaluate them knowing that, if a proposal did not strictly comply with the rule, rejecting it carried little risk. Though she accuses Borden of "gamesmanship," in the end, Ms. Kuhajda has only herself to blame for failing to follow this Court's directions.

CONCLUSION

For the foregoing reasons, the Court should approve the decision of the First District below and disapprove the decisions in *Bennett* and *Davis*.

Respectfully submitted,

/s/ Charles F. Beall, Jr.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Respondents hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: March 11, 2016

/s/ Charles F. Beall, Jr.