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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.

REPLY BRIEF OF PETITIONER

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ARGUMENT

The First District below in extending this Court's decision in *Diamond Aircraft Indus., Inc. v. Horowitch,*107 So. 3d 362 (Fla. 2013), has continued the significant divergence within the district courts by discarding the "test of ambiguity" and holding that this Court in *Diamond Aircraft* has declared that the only test to be applied in considering the validity of a proposal for settlement is one of strict compliance. The expressed legislative intent behind section 768.79, Florida Statutes was to encourage settlement. Since the statute is in derogation of common law, it must be strictly construed. Rule 1.442, like all rules of procedure, was established to implement, not expand or contract, the statute. Thus, the ultimate goal when merging the statute and the rule is to strictly construe the statute, follow the legislative intent, and reduce or avoid confusion or ambiguity.

In contrast, Respondent's position here is simply that strict construction has been firmly established in this Court's jurisprudence for thirteen years in six cases.[1] (*See* Answer Brief at 3.) Strikingly missing from the Answer Brief, however, is any substantive analysis of this Court's opinion in *Diamond Aircraft* or of these broader issues regarding the legislative intent of section 768.79 and the import of the principles of strict construction and rule 1.442. Respondent also

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[1] The Court's precedent on this issue in fact spans over two decades beginning with *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992) and *Leapai v. Milton*, 595 So.2d 12 (Fla. 1992) and since that time this Court has considered issues involving the

ignores that *Diamond Aircraft* was the first case to address a provision of only rule 1.442, which is not reflected or mirrored in the section 768.79, Florida Statutes. In addition, the Answer brief, as well as the record, give no indication that Borden Dairy was ever in any way confused by Ms. Kuhajda's proposal for settlement. Instead Respondent made the conscious decision to decline the proposal for settlement, roll the dice at trial, and is now seeking to escape liability for its decision.

As was expressly articulated in the Initial Brief, Petitioner here seeks a harmony of the Court's precedent, which gives full meaning to the principles of strict construction and the absence of ambiguity, while effectuating the purpose and intent of the statute of encouraging settlement rather than the "gotcha" litigation that has evolved over the past decade. The continual confusion within the lower courts, as aptly demonstrated by the diverging opinions coming out the First District on this very issue, calls for this clarification. *See Colvin v. Clements and Ashmore, P.A.*, 182 So. 3d 924, 925 (Fla. 1st DCA 2016); A.1. Thus, the opinion *Diamond Aircraft* needs to be clarified so as to foreclose the extension of *Diamond Aircraft* offered by the First District opinion below. More importantly, this Court should also clarify the holding of *Diamond Aircraft* so as to inform the lower courts of standard that should be applied in evaluating proposals for settlement: balancing strict construction of the statute with the test of ambiguity

while ensuring that the legislative intent of promoting settlement is not eviscerated by a rigid enforcement of an inapplicable provision of the rule.

I. THE FIRST DISTRICT ERRED IN EXTENDING *DIAMOND AIRCRAFT* TO A COMPLAINT WHERE ATTORNEY'S FEES WERE NOT PLED.

This case presents a unique circumstance in that the attorney's fee provision contained in subsection (c)(2)(F) is only within the rule and is not a requirement of section 768.79, Florida Statutes. In the six cases highlighted by Respondent's brief, the only case in which a proposal for settlement was invalidated by a provision of the rule wholly separate from any statutory requirement is *Diamond Aircraft*. *See* 107 So. 3d at 365. Thus, this same unique circumstance is also true in *Diamond Aircraft*. The factual differences in the case, however, change the analysis. In *Diamond Aircraft* the underlying complaint included a claim for attorney's fees, this difference required the party to address attorney's fees in the proposal in order to eliminate the inherent confusion created by the proposal. *See* 107 So. 3d at 378. Also, as a practical matter where a complaint includes attorney's fees and a defendant's proposal is silent on this issue, the fee agreement between the plaintiff and his attorneys may be implicated and there may be taxability issues to consider as well. This in turn becomes a real consideration to the receiver of the proposal in these circumstances. These same concerns and considerations have no application where there is no legal basis or claim for

attorney's fees because as a practical matter if there is no basis to recover attorney's fees from the opposing party, then there is no basis to include fees in any offer of judgment of that claim.[2]

The *Diamond Aircraft* Court expressly recognized this distinction created by the underlying claim for attorney's fees, stating: "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." *Diamond Aircraft*, 107 So. 3d. at 378.

This important distinction as set forth in *Diamond Aircraft* can not be over-looked or tossed aside, as the Fourth District in *Bennett v. American Learning Systems of Boca Delray, Inc*., and now the First District in *Colvin v. Clements and Ashmore, P.A.*, have so astutely recognized this is not a distinction without a difference. *See* 857 So. 2d 986, 988 (Fla. 4th DCA 2003); 182 So. 3d 924, 925 (Fla. 1st DCA 2016).

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[2] The notion that a party could request payment of attorney's fees as a part of an offer of judgment where the party had no legal entitlement to attorney's fees is not supported by Florida law or section 768.79, despite the reasoning of Judge Kelsey's concurring opinion in *Colvin*. *See* 182 So. 3d 924, 926 (Fla. 1st DCA 2016) (J. Kelsey specially concurring). Pursuant to section 768.79(2), Florida Statutes the offer of judgment is to be construed to only include damages that may be awarded in a final judgment. Thus, where attorney's fees could not be awarded in the final judgment, a party could not include those amounts as part of the offer. To hold otherwise would create an inconsistency between the rule and statute.

The Fourth District in *Bennett* demonstrating forethought and wisdom explained how a ruling such as the First District's below extending *Diamond Aircraft*'s holding to the set of facts here creates an absurd result:

> 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. 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.

857 So. 2d at 988. In addition, the trial court in this case, as well as the trial court in *Colvin* and two Judges on the First District have now all agreed that to require a party to state in a proposal that the attorney's fee provision is not applicable where no claim for fees can legally be plead or recovered is absurd. *See Colvin*, 182 So. 3d 924, 925 ("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 the plaintiff had not sought fees or damages in the complaint, nor could she have.")

In other words, the absurdity and confusion is not created in the case of *Diamond Aircraft* because the underlying claim did include a claim for attorney's fees. Therefore, it makes sense that the proposal for settlement specify whether or not it includes those attorney's fees that are part of the underlying legal claim. If

the claim and proposal does **not** contain attorney's fees then a party should need no statement saying the provision is "non-applicable". While the language in the punitive damages provision is slightly different stating "if any", this same reasoning applies, in that a party does not need some statement demonstrating that the punitive damages provision is inapplicable where no punitive damages are pled in the complaint. *See* Fla. R. Civ. P. 1.442(c)(2)(E). Again by ignoring this significant distinction and simply claiming that 13 years of precedent states otherwise, Respondent overlooks these significant and critical differences in the cases. The First District opinion below is an extension of *Diamond Aircraft*'s holding well beyond the four corners of *Diamond Aircraft* and the Florida Supreme Court precedent on this issue.

Turning to Respondent's contention that Petitioner's proposal are invalid because they do not mention attorney's fees at all, Petitioner would first note that this Court has rightly seen this distinction as one without merit by staying *Colvin v. Clements and Ashmore, P.A.* based upon the ruling in this case.[3] Where there is no basis for a claim for attorney's fees, the analysis is the same whether the proposal is silent on attorney's fees or mentions fees in part. The point here is that the rule itself does not require the party to state "inapplicable". Respondent in arguing

[3] The proposal in *Colvin* stated it was "for $20,000 and stated it was 'inclusive of costs and attorney's fees.'" *Colvin v. Clements and Ashmore, P.A.*, 182 So.3d 924, 925 (Fla. 1st DCA 2016).

about what this or that grammatical textbook states the "rule" is on "whether" misses the entire point of Petitioner's argument.

Quite simply, if rule 1.442's language is interpreted to mean that the drafter of a proposal must state the negative or "inapplicable" for each element that is not applicable based upon the law, this does not conform with the actual language of the rule itself. Moreover, this same logic would likewise hold true for provisions (A) through (G). Thus, the argument, according to the holding of the First District opinion below, would make a proposal 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.

Petitioner's proposal is in full compliance with the section 768.79, Florida Statutes 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, nor could it have. *Bennett* early on properly recognized the logic of the factual difference between a case which pleads a claim for attorney's fees and one that does not and that logic still holds in light of this Court's precedent. *Diamond Aircraft* should not be extended to apply to case where attorney's fees are not pled in the complaint and there is no basis for attorney's fees.

II. THIS COURT NEEDS TO ARTICULATE THE TEST FOR SECTION 768.79, FLORIDA STATUTES.

Respondent throughout the Answer Brief completely discards the fact that subsection (c)(2)(F) is only contained within the rule and no attorney's fee requirement is included within section 768.79, Florida Statutes. The question that must be raised and answered if this attorney's fees provision is only a part of the procedural mechanism and not a part of the legislative requirements is: "Has there been an invasion into the province of the legislature, where a court in enforcing this solitary provision overrides the substantive provisions of the statute and defeats the very purpose of the statute?"

As discussed at length in the Initial Brief, 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...."). That being said the derogation canon is not intended to be used to defeat the intended purpose of the statute. Thus, 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. In the case of section 768.79, Florida Statutes and rule 1.442, it has made sense to interpret these together, as in all but a few unique place the rule

follows the statute. The attorney's fee provision happens to be one of those few, unique places.

This is why this case presents a unique point of consideration in the 20 years of precedent – a point untouched and overlooked by Respondent. This is also why the cases such as *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995) and *Southeast Floating Docks, Inc.*, 82 So. 3d at 79-80, are an important part this Court's precedent on proposals for settlement, as these cases address the interplay between the statute and rule 1.442. Applying principles of strict construction, the statute and its provisions should receive paramount consideration. As explained by this Court in *TGI Friday's, Inc*., in considering the constitutionality of section 768.79:

> 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.

663 So. 2d at 611.

As was more fully articulated in the Initial Brief, the rule, standing alone, should not be strictly construed. *Bennett* correctly recognized this distinction as the starting point of the analysis. *See* 857 So. 2d at 988. As fully discussed in the Initial Brief, well established precedent states that the a rule of civil procedure

should not be not so technically or rigidly enforced so as to obscure justice of the cause or defeat the object for which the rule was enacted. *Strax Rejuvenation and Aesthetics Institute, Inc. v. Shield*, 49 So. 3d 741, 743 (Fla. 2010); *Mills v. Martinez*, 909 So. 2d 340, 343 (Fla. 5th DCA 2005); *Frosti v. Creel*, 979 So. 2d 912, 917 (Fla. 2008) (approving *Mills v. Martinez*, 909 So. 2d 340, 343 (Fla. 5th DCA 2005)). Thus, when considering only a provision of the rule, such as here with attorney's fees, a court should ensure that interpretation of the rule is not so rigidly enforced so as to defeat the purpose of section 768.79.

For while strict construction forms the basis of all inquiries of the validity of a proposal for settlement, a court should also consider 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. This is part of the analysis applied by this Court in *Diamond Aircraft* and in *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006).

The First District's articulation of "strict compliance" versus the "absence of ambiguity" is ultimately what lies at the heart of the problem in this case as well as the continually diverging opinions throughout the lower courts on this issue. Affirmance of this holding would itself require reversal of at least this Court's decision in *Nichols*. *See* 932 So. 2d at 1067. Moreover, this holding by the First District will create substantially more litigation and "gotcha" type tactics, as

parties attempt to use the test of strict compliance like a sword and trial courts are unable to take into consideration the questions of whether the offer was ambiguous and understood by the receiving party. This Court has long lamented the failures of section 768.79 to bring about its intended purpose of encouraging settlement.

Respondent's repeated mantra throughout the Answer Brief is that Ms. Kuhajda has only herself to blame, as there has been no "gamesmanship" afoot. Yet Ms. Kuhajda's proposal here is fully compliant with section 768.79, and as found by the trial court, it was understood by the receiving party and was not ambiguous. Importantly, it states every item and term included in it and which under the law could be applicable to it. Nothing in the record or Answer Brief give any indication that Respondent was ever confused in anyway by the proposal. Nevertheless Respondent seeks to invalidate this proposal based solely upon the failure of the proposal to include language on the attorney's fees provision, outlined only in rule 1.442, stating that this provision was inapplicable to her proposal. Respondent fully knew and understood that the proposal did not include attorney's fees and could not include attorney's fees. This is nothing more than gamesmanship.

Instead of continuing on this path that the First District has begun in extending *Diamond Aircraft*, this Court must bring into harmony the full breadth of this Court's precedent on the issue. The wealth of this Court's thinking on this

matter should not be discarded. A foolish consistency is the hobgoblin of little minds. A strict construction analysis must be the starting point for consideration of all proposals for settlement because attorney's fee statutes are in derogation of the common law. More importantly, a clarification of *Diamond Aircraft* can only serve to assist the courts moving forward, as the emerging conflicts demonstrated by this case as to whether or not this Court has abandoned the test of ambiguity remain a real issue.

Following strict construction as starting point, the Florida courts need the further guidance of this Court's wisdom, as stated in *Nichols*: "[t]he **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." *Nichols*, 932 So. 2d at 1079. 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. Next, 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.

CONCLUSION

In the underlying case, Respondent was not confused by the proposal's failure to include "not applicable" regarding the attorney's fees statement in the offer. Nothing in this Court's precedent on strict construction, rule 1.442, or section 768.79, call for such an interpretation. As conceded by Respondent, the law does not hold that it is "strict construction" versus the "absence of ambiguity" and as such the First District's opinion is this respect is in error.

Diamond Aircraft should not be extended to apply to a situation where the complaint does not demand attorney's fees. The case of *Bennett* properly interprets and applies the law to the underlying facts. This Court should reverse and quash the First District's opinion below and clarify 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 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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