

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA
RULE OF CIVIL PROCEDURE 1.442.

Case No.: SC21-277

COMMENT OF THE FLORIDA JUSTICE ASSOCIATION

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INTRODUCTION AND STATEMENT OF INTEREST

The Florida Justice Association (the “FJA”) is dedicated to strengthening and upholding Florida’s civil justice system and protecting the rights of Florida’s citizens and consumers. The FJA was founded in 1961 and has more than 3,500 members, including trial lawyers, consumer advocates, and litigants. The FJA believes all Floridians benefit when they have a fair chance to seek justice in our State’s courts and that Florida’s consumers are safer when wrongdoers are held accountable.

This matter interests the FJA because the proposal for settlement (“PFS”) has become a critical part of the civil justice system. In furtherance of its mission, the FJA regularly works with the Florida Legislature to ensure the PFS mechanism serves the objectives of encouraging reasonable settlements and reducing the volume of litigation in the courts. The FJA’s activities include lobbying for or against bills that would amend section 768.79, Florida Statutes, and filing amicus briefs and comments in proceedings having the potential to affect those interests. The substance of Florida’s PFS mechanism is a matter of profound importance for the FJA and its members.

The FJA has a particular interest in respectfully opposing proposals to make substantive changes to Florida's PFS mechanism by way of judicial rulemaking rather than legislative lawmaking. The Legislature periodically considers amending the PFS statutes, especially section 768.79, Florida Statute, the statute that applies in most civil cases. For example, the Legislature recently declined to adopt amendments to that statute regarding the inclusion of attorney's fees in a PFS and a joint PFS served on more than one recipient, subjects also addressed by the proposed rule amendments. *See Fla. SB 686 (2021); see also Fla. S. Comm. on Banking & Ins., CS for CS for SB 686 (Mar. 11, 2021),* <https://www.flsenate.gov/Session/Bill/2021/686/Analyses/2021s00686.bi.PDF>.

The FJA understands these to be matters of substantive law that belong to the Legislature and outside this Court's constitutional rulemaking authority. This is especially so where, as here, the Legislature has long established a straightforward statutory framework governing the substance of PFSs.

Notwithstanding recent efforts to revise the PFS statutes, section 768.79, Florida Statutes has remained virtually unchanged since

1990, when its language was significantly rewritten to adopt the same statutory scheme that governs today. *See* Ch. 90-119, § 48, Laws of Fla.¹

Part I of this Comment suggests three important criteria that the FJA submits this Court should consider with regard to each of the proposed amendments: (1) Does the amendment intrude into substantive matters that belong to the Legislature? (2) Is the amendment consistent with the substantive requirements of all the various PFS statutes (not just section 768.79)? (3) Will the amendment reduce or increase collateral litigation? The rest of this Comment applies these criteria to three proposed changes to Rule 1.442, largely supporting one and respectfully opposing two others.

In Part II, the FJA supports the proposed amendments to subdivisions (c)(2)(B) and (D) to prohibit nonmonetary terms other than dismissal, but it submits that the exception should be expanded to allow non-monetary conditions authorized by statute because statutes other than section 768.79 authorize non-monetary

¹ The 1997 amendments removed gender-specific references, but did not make any substantive changes in legal effect. *See* Ch. 97-102, § 1175, Laws of Fla.

terms. As modified, these amendments would eliminate intrusions of the rule into substantive matters, avoid conflict with the relevant statutes, and greatly reduce litigation.

In Part III, the FJA opposes the proposed amendments to subdivisions (c)(2)(B) and (F) to codify this Court's interpretation of the substantive requirements of section 768.79 and to require a PFS to include attorneys' fees and costs and limit the amount of damages, attorneys' fees, costs, and prejudgment interest. These are issues of substantive law, the amendments directly conflict with several substantive statutory provisions, and they will result in substantial litigation.

Finally, in Part IV, the FJA also opposes the proposed new subdivision (c)(5), which seeks to establish substantive rules for the use of joint proposals for settlement. Whether and under what circumstances multiple parties can make or receive a PFS – the rejection of which creates a right to recover attorneys' fees – are substantive issues that belong to the Legislature, which has not authorized joint proposals and would be the body to provide the rules for when a PFS to two or more recipients would trigger a right to attorney's fees. Moreover, the proposed amendment would create

opportunities for gamesmanship and result in substantial additional litigation.

I. The Court should evaluate each proposal based on three discrete criteria.

Rule 1.442 regulates the procedures by which Florida's PFS statutes are given effect. Logically, this Court should evaluate proposed amendments to Rule 1.442 in light of how well they serve that function. This analysis can be crystallized into three discrete criteria: (1) that the proposed amendment confine itself to procedural matters and not intrude upon the legislative power; (2) that the proposed amendment be consistent with the text of the relevant statutes; and (3) that the proposed amendment serve the PFS mechanism's goal of reducing unnecessary litigation.

A. Would the amendment go beyond this Court's constitutional authority to make procedural rules, intruding into matters of substantive law entrusted to the Legislature?

The first criterion by which this Court should judge a proposed amendment to Rule 1.442 is whether it intrudes into the political branches exclusive authority to make substantive law. The Florida Constitution vests the legislative power in the Legislature and the judicial power – including rule-making authority – in this

Court. Art. II, § 3; Art. III, §§ 1, 6, 7; & Art. V, §§ 1, 2(a), Fla. Const. “Generally, the Legislature is empowered to enact substantive law while this Court has the authority to enact procedural law.” *Massey v. David*, 979 So. 2d 931, 936 (Fla. 2008).

The history of Rule 1.442 is in many ways defined by the distinction between procedure and substance. Shortly after the Legislature enacted sections 45.061 and 768.79, Florida Statutes, this Court concluded the procedural elements of those statutes intruded upon its constitutional rulemaking authority, and adopted a new version of Rule 1.442 to provide a uniform procedure for implementing the substantive, statutory component of the PFS mechanism. *The Fla. Bar re Amend. to Rules of Civil Proc., Rule 1.442 (Offer of Judgment)*, 550 So. 2d 442 (Fla. 1989). This Court then held the provisions of those statutes creating a substantive right to fees were, unsurprisingly, substantive rather than procedural, and therefore within the scope of the legislative power. *TGI Fridays, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995); *Timmons v. Combs*, 608 So. 2d 1, 2–3 (Fla. 1992); *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992).

This Court recognized the importance of the constitutional boundary between substantive and procedural regulation again when it adopted most of the current version of the rule in 1996. Following the rationale of *TGI Friday's*, *Timmons*, and *Leapai*, this Court rejected a recommendation of the Civil Procedure Rules Committee of The Florida Bar that included a provision that was “at variance with section 768.79” because it was a trespass upon “the legislative prerogative to enact substantive law.” *In re Amends. to Fla. Rules of Civil Proc.*, 682 So. 2d 105, 105–06 (Fla. 1996).

The only purpose of rule 1.442 is to provide a procedural framework to implement the substantive requirements of section 768.79 regarding settlement proposals.

We decline to invalidate Kuhajda’s offers of judgment solely for violating a requirement in rule 1.442 that section 768.79 does not require. The procedural rule should no more be allowed to trump the statute here than the tail should be allowed to wag the dog.

Kuhajda v. Borden Dairy Company of Alabama, LLC, 202 So. 3d 391 (Fla. 2016).

The distinction between the legislative-substantive and judicial-procedural permeates the above-referenced decisions. See *Timmons*, 608 So. 2d at 2–3 (“In ... light of our ruling in *Leapai v.*

Milton 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.”). The proposed amendment to subdivision (a)² – which this Comment will not otherwise address – appears to spring at least in part from this distinction, as do the proposed amendments to subdivisions (c)(2)(C) and (D), which this Comment discusses in detail in Part II.

The Court ought to consider even close questions to be a red flag warranting extreme caution before implementing as it can result in tremendous uncertainty and a proliferation of collateral litigation. A PFS that complies with a rule requirement that is arguably substantive and/or in conflict with the statute is subject to challenge, but not until the case has been fully litigated.

In examining a close question, the Court might even ask itself whether a proposed change is based on public policy concerns that go beyond the beyond how a case is processed by the courts and

² The proposed amendment would add to Rule 1.442(a): “The procedural requirements of this rule shall be applied according to their plain meaning; but if the procedural requirements of this rule are ambiguous, they shall be construed pursuant to the standard set forth in Florida Rule of Civil Procedure 1.010, not strictly.”

whether it would truly be appropriate for that change to be beyond the power of the Legislature to undo by amending section 768.79 or another applicable statute. If the matter is truly procedural, then the Legislature would have no authority. And if it is substantive, then it should not be included in a rule of procedure.

In short, this Court should regard the absence of substantive provisions as the *sine qua non* by which it judges the propriety of any proposed amendment to Rule 1.442.

B. Is the amendment consistent with the substantive provisions of not just section 768.79, but also the other statutes to which it applies?

Because the Legislature has the exclusive constitutional power to define the substantive, statutory elements of the PFS mechanism, its procedural elements as defined and enacted by this Court must be consistent with the relevant statutes. Any procedural element inconsistent with the substance of the law would be a nullity. *See Kuhajda*, 202 So. 3d at 396 (“A procedural rule should not be strictly construed to defeat a statute it is designed to implement.”); *In re Amends. to Fla. Rules of Civil Proc.*, 682 So. 2d at 105 (rejecting a proposed amendment because it was “at variance with section 768.79”).

This does not, however, mean a proposed amendment must be consistent only with section 768.79. Rule 1.442 applies to “all proposals for settlement authorized by Florida law,” not just to those authorized by section 768.79. Fla. R. Civ. P. 1.442(a). Although section 768.79 is the most frequent authority under which a PFS is served, it is not the only one. In fact, the Committee Note to the 1996 version of the rule explains the rule was “amended to reconcile, where possible” the text of the rule with sections 44.102, 45.061,³ 73.032, and 768.79. 1996 Comm. Note to Fla. R. Civ. P. 1.442. And sections 70.001, 627.70152, and 627.7152, Florida Statutes, also authorize PFSs in varying forms.

This Court held section 44.102(5) (which at the time was denominated section 44.102(6)) was unconstitutional because it was purely procedural and had no substantive aspect. *Knealing v. Puleo*, 675 So. 2d 593, 596 (Fla. 1996). But the remaining statutes listed above remain in force, and this Court should analyze whether

³ Section 45.061—which applies only to causes of action accruing on or before June 21, 1990—is unlikely to affect any future cases, but it nevertheless remains on the books. § 45.061(6), Fla. Stat.

to adopt a given proposed amendment to Rule 1.442 in terms of whether it is consistent with those statutes.

C. Would the amendment reduce or increase litigation?

The third criterion is the degree to which a proposed change tends to serve, rather than frustrate, the purpose of Florida's PFS mechanism. The purpose of the PFS mechanism "is to reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions." *Kuhajda*, 202 So. 3d at 395 (citation and internal marks omitted); see also *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989) (explaining Rule 1.442 "was implemented solely to encourage settlements in order to eliminate trials if possible" and that "the clear intent of the underlying policy of the rule was to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process"). This is also the goal of the Florida Rules of Civil Procedure as a whole. Fla. R. Civ. P. 1.010 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."). Common sense dictates that rule changes that reduce risks of increased litigation, delay, and cost should be embraced, while proposed amendments that increase those risks should be disfavored.

II. The proposed changes to subdivisions (c)(2)(C) and (D) prohibiting nonmonetary terms except for dismissals with prejudice should be made, with minor modifications, because they will eliminate current intrusions of the rule into the legislative domain, avoid conflict with the relevant statutes, and reduce litigation.

Applying the criteria identified in section I of this Comment, the FJA supports the proposed amendments to subdivisions (c)(2)(C)⁴ and (D)⁵ with minor modifications. These proposed amendments would confine Rule 1.442 to procedural implementation of the substantive elements of the PFS mechanism, would be consistent with the plain language of those statutes, and would reduce unnecessary litigation both by allowing litigation to be brought to a speedy, mutually acceptable conclusion and by reducing the scope for potential ambiguity.

The proposed amendments to subdivisions (c)(2)(C) and (D) satisfy the first two criteria on the same basis; that is, these revisions would excise substantive elements that should not have

⁴ The proposed amendment would revise subdivision (c)(2)(C) as follows: “state with particularity any relevant conditions exclude nonmonetary terms, with the exception of a voluntary dismissal of all claims with prejudice.”

⁵ The proposed amendment would revise subdivision (c)(2)(D) thus: “state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal.”

been in Rule 1.442 in the first place, and which are at variance with the statutory arm of the PFS mechanism.

Indeed, by purporting to authorize non-monetary conditions, the current version of the rule is itself at variance with section 768.79(2), which does not contemplate the use of **any** nonmonetary conditions such as releases, indemnification agreements, or confidentiality provisions in proposals for settlement. *See Diecidue v. Lewis*, 223 So. 3d 1015, 1022 (Fla. 2d DCA 2017) (Casanueva, J., concurring) (“Where the legislature sought a straightforward proposal based upon the acceptance or rejection of a monetary amount, the allowance of nonmonetary conditions ... alters the dynamics envisioned by the legislature.”).

Especially with regard to section 768.79, the most commonly used PFS statute, non-monetary conditions can also prevent the contemplated comparison between the PFS and the judgment obtained. Non-monetary conditions may impose substantive obligations or benefits that are neither available in a judgment nor measurable by dollars even though they may have great value to one side or impose great burdens to the other. This prevents that kind of apples-to-apples comparison required by the clearly

substantive provisions of section 768.79. Judge Griffin has explained the problem in questioning why a non-monetary condition would be in a proposal at all:

If it is a term beyond what the settling litigant would be entitled to, it ought to invalidate the offer.

Section 768.79, Florida Statutes, appears to contemplate a straightforward and exclusively mathematical test: compare the amount of the rejected offer to the amount of the plaintiff's verdict, and apply the twenty-five percent differential. Under section 768.79, you offer an "amount," not a deal. You can't apply mathematics to "non-monetary offers."

Dryden v. Pedemonti, 910 So. 2d 854, 857 (Fla. 5th DCA 2005)

(Griffin, J., concurring).

Indeed, at least one district court has emphasized that a PFS cannot be used to force a litigant to accept – on pain of being on the hook for the other side's attorneys' fees – a term that could not be imposed on them in litigation.

A proposal for settlement should not include conditions that, if accepted, would cause an offeree to give up a claim or right that it could not have otherwise lost in the litigation. Otherwise, an offeror might seek to use the coercive aspects of the offer of judgment statute to exact concessions not legally available. When an offer contains as a condition a "general release," care should be taken to insure that the proposed release does not seek to extinguish claims that are extrinsic to the litigation.

Nichols v. State Farm Mut., 851 So. 2d 742, 746 n.3 (Fla. 5th DCA 2003) (citation omitted), *approved* 932 So. 3d 1067 (Fla. 2006).

One might logically posit, in fact, that “the only enforceable ‘nonmonetary condition’ allowable under the rule is one that does not go beyond what the offeror would be entitled to by operation of law, upon settlement.”

Sparklin v. Southern Indus. Assocs., Inc., 960 So. 2d 895, n.1 (Fla. 5th DCA 2007) (quoting *Dryden*, 910 So. 2d at 858 (Griffin, J., concurring)).

Moreover, the reason a PFS under section 768.79 cannot be used in an action that in which relief beyond money damages is because it is simply not possible to compare non-monetary terms in the same way the statute requires comparing the amount of the PFS with the judgment obtained:

The statute does not have a similar provision as to claims for non-monetary relief. Specifically, the statute does not have any provision that would authorize a court to compare an offer (or demand) regarding non-monetary relief against the judgment obtained for the purpose of determining entitlement to a fee award.

Winter Park Imports, Inc. v. JM Family Enterprises, 66 So. 3d 336, 340 (Fla. 5th DCA 2011).

Similarly, section 627.70152 does not contemplate that either the insured's "presuit settlement demand" or the insurer's "presuit settlement offer" may include any nonmonetary conditions. That statute focuses on payment of an amount of money.

There are at least four non-monetary terms that one party or another may particularly want as part of any settlement that would nonetheless be properly prohibited by the proposed amendments.

First, parties often haggle over the terms of a release. To the extent it is a standard release limited to the parties and claims in the lawsuit, such a requirement may not be problematic, though it is also unnecessary as the judgment or dismissal with prejudice entered pursuant to accepting the PFS will have *re judicata* effect. *See Dryden*, 910 So. 3d at 857 (Griffin, J., concurring) ("If the nonmonetary condition is something to which the settling litigant is already entitled by operation of law, the condition is superfluous.") But if the release goes further to require a release of non-parties or of unrelated claims that would not be extinguished by a judgment or dismissal with prejudice, then there is no basis for comparing the terms of the PFS with the judgment obtained.

Second, parties often want indemnification agreement or lien resolution provisions before paying money to settle a case. Such provisions impose new substantive obligation on the party accepting them that would not be imposed by any judgment in the case. Moreover, it is impossible to determine the ultimate cost of agreeing to an indemnification provision in a PFS. Say a plaintiff is faced with a PFS for \$10,000 that includes an indemnification requirement. The plaintiff may be perfectly willing to end the litigation by accepting that amount, but practically prevented from doing so because that might require the plaintiff to incur ten times that amount to indemnify the defendant if some third party asserts even a frivolous claim against the defendant. How can a PFS like that be compared to the judgment obtained? It cannot.

Third, confidentiality agreements are also problematic. In some instances, they are outright prohibited by statute. §§ 69.801(3), (4), & (8), Fla. Stat. (2021) (voiding contract terms that conceal matters of public interest such as public hazards and settlements of claims against the State or its subdivisions). They are also contrary to the principles of openness and public access that govern the day-to-day operation of Florida's judicial branch. See

Fla. R. Gen. Prac. & Jud. Admin. 2.420 (requiring public access to judicial branch records subject only to narrow exceptions that serve specific, important privacy or safety interests).

Finally, many plaintiffs are less concerned with the money at stake and more concerned about vindicating themselves. Thus, they often seek to include a term in a settlement agreement that requires the defendant to admit fault or even publicly apologize. Such a term may have real world implications against the defendant and their reputation, which might lead them to reject such a PFS even if the amount would otherwise be acceptable. While this non-monetary term may drive the decision to accept the PFS, it cannot be accounted for in the ultimate comparison to the judgment obtained.

In short, the non-monetary nature of terms like this warrant the general prohibition in the proposed amendment. The limited exception in the proposal allowing a PFS to state that the case will be resolved by a voluntary dismissal with prejudice rather than the entry of a judgment, on the other hand, does not implicate these concerns and is consistent with both the separation of powers and the terms of the relevant statutes. It simply provides an alternative mechanism for bringing the case to a conclusion without actual

entry of a formal judgment. The ending of the case after a PFS has been accepted is a procedural matter arising from an administrative necessity for the courts – a settled case does not vanish into the ether of its own accord, and a court must do something to remove the matter from its docket and close the file. The voluntary-dismissal exception is not substantive so long as the terms for the dismissal are exclusively monetary, and it is not at variance with any statutory provision. This exception will also reduce litigation and promote settlement by allowing parties to settle cases immediately for actual payment rather than requiring a defendant bear the stigma of having a formal judgment being entered against it and becoming a judgment debtor. Thus, a PFS providing that the defendant will pay the plaintiff an amount of money within a number of days and the plaintiff will then file a notice of dismissal with prejudice would be authorized.

While no other non-monetary conditions should be allowed in a PFS under section 768.79, one additional exception is warranted. Just as this Court cannot trump the Legislature's substantive authority by permitting nonmonetary conditions in PFSs where statutes do not allow them, neither can it prohibit nonmonetary

conditions in PFSs where statutes explicitly permit them. Section 70.001(4)(c), Florida Statutes, contains a list of nonmonetary terms that government entities are allowed to offer in PFSs issued in cases subject to that statute.

To be fully consistent with the substantive element of the PFS statutes, the proposed amendment to subdivision (c)(2)(C) should be modified to read “exclude all monetary terms, with the exception of a voluntary dismissal of all claims with prejudice **and any other nonmonetary terms specifically permitted by statute.**”

(Emphasis added to show suggested addition.)

The forbidding of nonmonetary conditions where not expressly permitted by statute will also tend to reduce litigation and encourage reasonable settlement on simple, comprehensible, and mutually agreeable terms because it is conditions like this that often spawn litigation over whether the PFS was ambiguous.

Diecidue, 223 So. 3d at 1022 (Casanueva, J., concurring)

(explaining “nonmonetary conditions are more likely to be subjected to an ambiguity analysis or an assertion of ‘nitpicking’ ”); *see also*, *e.g.*, *Zalis v. M.E.J. Rich Corp.*, 797 So. 2d 1289, 1290–91 (Fla. 4th DCA 2001) (considering whether a condition requiring waiver of the

right to bring any future action against the defendant satisfied Rule 1.442(c)'s particularity requirement, and holding it did not because it "is intrinsically a condition incapable of being stated with the particularity required"); *Mix v. Adventist Health Sys./Sunbelt, Inc.*, 67 So. 3d 289, 292 (Fla. 5th DCA 2011) (holding a proposal for settlement was ambiguous where it required the plaintiffs to sign a release if they accepted, but did not specify the terms of that release, meaning the reader could "only speculate about what the ... release would contain and what it would have achieved that dismissed Florida Hospital with prejudice would not have accomplished"). Forbidding nonmonetary conditions where not expressly permitted by statute will reduce ambiguity and, therefore, the volume of litigation.

One final point is worth making. Just because a PFS cannot include non-monetary terms to be enforceable does not prevent the parties from agreeing to a settlement that contains whatever non-monetary terms the parties negotiate.

Certainly, should the parties desire a more expansive and extensive settlement, the option of private settlement negotiation remains. Therein the parties' settlement considerations may resolve disposition issues by measuring present financial considerations against

the potential of future financial exposure. There is no question that the exercise of private settlement negotiations offers more flexibility regarding settlement terms than does the existing statute-rule combination. There, the consideration of the benefits offered by the economic terms of the settlement are more likely to result in a settlement than would the sanction operation of the existing statute-rule combination.

And it should be recognized that difficulties are created when the judiciary looks to import the norms of settlement discussion into a jurisprudence flowing from the operation of a sanction-driven statute-rule combination.

Diecidue, 223 So. 3d at 1022 (Casanueva, J., concurring).

Parties do not need a statute or rule to provide the framework for reaching a settlement. The purpose of section 768.79 is not to provide such a mechanism, but rather to encourage settlements by rewarding reasonable, early-stage offers and punishing failures to accept them when it was reasonable to do so. *See Sarkis v. Allstate Ins. Co.*, 863 So. 210, 222 (Fla. 2003) (explaining a section 768.79 fee award “is a sanction against the rejecting party for the refusal to accept what is presumed to be a reasonable offer” to settle).

Adopting these proposed amendments removes an obstacle to the smooth functioning of the PFS mechanism and reduces the possibility for gamesmanship and manipulation, such as

manufactured latent ambiguities or insertion of nonmonetary “poison pill” conditions to forestall otherwise-reasonable settlements.

III. The proposed changes to subdivisions (c)(2)(B), (E), and (F) addressing fees and costs and the definition of “judgment obtained” in section 768.79 should not be made because they address issues of substance, conflict with substantive provisions of the relevant statutes, and threaten to increase litigation.

The proposed amendments to subdivisions (c)(2)(B)⁶, (E)⁷, and (F) do not satisfy the three criteria this Court should use to analyze the propriety of proposed amendments to Rule 1.442. These proposed amendments are not limited to procedural matters, they are inconsistent with the relevant statutes, and they would not tend to reduce litigation and encourage settlements.

This Court indicated the proposed amendments were intended to codify the formula set forth in *White v. Steak & Ale of Florida*,

⁶ The proposed amendment would revise subdivision (c)(2)(B) thus: “state that the proposal resolves all damages, attorney’s fees, taxable costs, and prejudgment interest that would otherwise be awarded in a final judgments in the action in which the proposal is served, subject to subdivision (F) if the final judgments were entered on the date of the proposal.”

⁷ The proposed amendment adds the word “and” at the end of the present subdivision (c)(2)(E) to accommodate the deletion of subdivision (F).

Inc., 816 So. 2d 546 (Fla. 2002). But that formula is substantive, not procedural, as is evident from this Court’s recent decision in *CCM Condominium Association, Inc. v. Petri Positive Pest Control, Inc.*, No. SC19-861, 2021 WL 4096926, at *1, *4 (Fla. Sept. 9, 2021). There, this Court considered the phrase “judgment obtained” in section 768.79 and concluded *White* was not a clearly erroneous interpretation of that provision.⁸ This Court acknowledged that

section 768.79(2) provides that “[t]he offer shall be construed as including all damages which may be awarded in a final judgment.” **Attorney’s fees and costs are not damages.** It was only by interpreting the phrase “net judgment entered,” **which is not defined in the statute**, that this Court determined that pre-offer attorneys’ fees, pre-offer costs, and pre-offer prejudgment interest should be included in the “judgment obtained.”

Id. at *4 (alteration in original) (emphasis added, citations omitted).

⁸ Although respectfully disagreeing that the holding in *CCM* is consistent with the plain language of section 768.79—and agreeing with the reasoning expressed in Chief Justice Canady’s dissent—the FJA recognizes that this Court’s decision in *CCM* is the law. If the Legislature disagrees with that decision, the Legislature is well-situated to amend section 768.79 to reflect its view of the correct interpretation. This latter fact lends further weight to *CCM*’s treatment of the issue as substantive rather than procedural. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 255 (2012) (explaining *stare decisis* “has special force in statutory cases” because the legislature “can change the law whose meaning the prior judicial interpretation established”).

By defining in rule 1.442 a term not defined in section 768.79, the proposed amendment would be making substantive law. This Court is empowered to give substantive meaning to ambiguous statutory terms when deciding a case, but not to craft its own independent substantive definitions of legislative terms in the course of exercising its procedural rulemaking power. Not only would adding such a substantive rule provision be at variance with its purely procedural character, *Kuhajda*, 202 So. 3d at 395, the proposed amendments would exceed this Court’s constitutional mandate to regulate **only** the procedural aspects of Florida’s PFS mechanism.⁹ These amendments fail to satisfy the first criterion.

The proposed amendments also fail to satisfy the second criterion: they are inconsistent with the statutory element of the PFS mechanism. Section 768.79(2) provides that a PFS “shall be construed as including all damages which may be awarded in a final judgment.” This presupposes that the amount of the PFS

⁹ It is worth nothing that, if the language proposed in rule 1.442(c)(2)(B) is purely procedural, because it “definitional” language that is not present in section 768.79, under this Court’s precedent in *Kuhajda* and its lineage, a party would not have to comply with the requirements of amended section (c)(2)(B) in order to serve an enforceable proposal.

might otherwise include something else—namely, attorney’s fees and costs. As this Court noted in *CCM*, attorney’s fees and costs are not damages.¹⁰ 2021 WL 4096926, at *4; *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) (characterizing attorney’s fees as “collateral to and separate from ... the merits”). Stating that a PFS resolves all damages, attorney’s fees, and taxable costs as the proposed amendment suggests would therefore not only be inconsistent with the nature of attorney’s fees and costs as distinct from damages, but it would also be “at variance with section 768.79” and therefore an intrusion upon “the legislative prerogative to enact substantive law.” *In re Amends. to Fla. Rules of Civil Proc.*, 682 So. 2d 105, 105–06 (Fla. 1996). These proposed amendments transgress the second criterion with regard to section 768.79.

These proposed amendments also conflict with other PFS statutes. For example, section 73.032(4)(a)(2) expressly **forbids**

¹⁰ That is, they are not damages outside of certain limited contexts, such as indemnification claims, where attorney’s fees and costs may be recovered as damages. *E.g.*, *Rayburn v. Bright*, 163 So. 3d 735, 736–37 (Fla. 5th DCA 2015). Prejudgment interest is a form of damages. *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214 (Fla. 1985).

PFSs in eminent domain actions from including attorney’s fees and costs.

Section 627.70152(3)(a)5 requires a plaintiff whose action arises under a residential or commercial property insurance policy to “itemize the damages, attorney fees, and costs,” but that statute also excludes the attorney’s fees and costs from the “disputed amount” that must also be included in the demand, § 627.70152(2)(c), Fla. Stat. (2021). The statute further indicates that the insurer’s presuit settlement offer need **not** include attorney’s fees and costs. *See id.* (providing that the “[d]isputed amount” does not include “attorney’s fees and costs, **if** part of the offer” (emphasis added)).

Much like section 768.79, section 70.001 does not require a PFS to mention attorney’s fees, taxable costs, or prejudgment interest at all.

Section 627.7152 defines “Judgment obtained” to exclude **all** interest of any kind, § 627.7152(1)(e), Fla. Stat. (2021), and does not require either the insured or the insurer to include in their respective PFSs the amounts the proposed amendments to Rule 1.442 would require them to include, *id.* §§ 627.7152(9)(a) & (b).

In short, the proposed amendments to subdivisions (c)(2)(B), (E), and (F) cannot be squared with the statutory element of Florida's PFS mechanism.

As to the third criterion, these proposed amendments would spawn a bevy of trials within trials as the parties litigate what the amount of damages, attorney's fees, taxable costs, and prejudgment interest would have been on the date the PFS was served. This is fertile ground for creative attorneys to exercise their ingenuity and create protracted disputes about collateral issues, tying up attorney and judicial resources in ways Florida's PFS mechanism was designed to avoid.

For example, the focus on the measure of damages at the time of the date of the PFS is especially problematic. Even putting aside the addition of new claims seeking different kinds of damages, consider the many forms of damages that have a past and future component. At the time the PFS is served, many of those damages – whether they be medical expenses or pain and suffering in a personal injury case or lost profits in a commercial case – will yet to have materialized. But later, as contemplated surgeries take place or potential business opportunities are realized or lost, the amounts

of past and future damages necessarily change. Surely the Court does not intend a mini-trial about what an injured person's pain and suffering damages were or how much lost profits a wronged corporate suffered on the date of the PFS. But that argument would ostensibly be authorized by the proposed language.

IV. The proposed addition of subdivision (c)(5) should not be made because it addresses issues of substance, conflicts with substantive provisions of the relevant statutes, and threatens to increase litigation.

Rule 1.442(c) presently states, in pertinent part, as follows:

(3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

(4) Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

The proposed amendment would add subdivision (c)(5):

(5) A party may make to two or more other parties a joint proposal that requires acceptance by all the parties to whom the proposal is made. Each party to whom such a joint proposal is made may accept the proposal. If any party rejects such a joint proposal, the action must proceed as to all parties to whom such a joint proposal was made, whether or not the other parties accepted or

rejected it; and the sanctions pursuant to applicable Florida law, based on the failure to accept a proposal, apply to each party who rejected such a joint proposal but do not apply to any party who accepted it.

This Court should not adopt this proposal because (1) it is purely substantive rather than procedural, infringing upon the Legislature’s exclusive authority; (2) it would permit gamesmanship that undermines the purpose of section 768.79, Florida Statutes; and (3) it would create extensive litigation regarding constitutionality and the effect of the new provision.

Section 768.79 “create[s] a mandatory right to attorney's fees, if the statutory prerequisites have been met.” *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th DCA 1993). As such, “the circumstances under which a party is entitled to costs and attorney's fees is substantive,” outside this Court’s authority to regulate in the exercise of its procedural-rulemaking power. *Timmons*, 608 So. 2d at 2–3; *see also TGI Friday's*, 663 So. 2d at 611 (explaining “[t]he Legislature has created a substantive right to attorney's fees in section 768.79 on the occurrence of certain specified conditions”).

Notwithstanding those interpretations of the substance of

section 768.79, the proposed subdivision (c)(5) eliminates that “mandatory” right to fees where the offeror meets the prerequisites of section 768.79 but a joint offeree “accepts” the PFS only to have it rejected by another offeree. For example, assume a defendant serves a joint PFS on husband-and-wife plaintiffs, allocating the offer as required by subsection (c)(3). The husband “accepts” the proposal but the wife rejects it, and the case continues against both plaintiffs as a result. Thereafter, the jury returns a defense verdict, triggering a “mandatory” right to collect fees against both the husband and wife under section 768.79. *See* § 768.79(1), Fla. Stat. (“[I]f a defendant files an offer of judgment which is not accepted by **the plaintiff** within 30 days, the defendant **shall** be entitled to recover reasonable costs and attorney's fees incurred by her or him ... from the date of filing of the offer if the judgment is one of no liability” (emphasis added)).

Under the proposed subdivision (c)(5), however, even though the PFS was not accepted by “the plaintiff,” the husband plaintiff is immune from fee liability. Because the proposed rule changes the circumstances under which an offeror is entitled to attorney’s fees, the provision is substantive and, therefore, a matter that lies

outside this Court's power and within the exclusive competence of the Legislature.

In fact, all provisions of Rule 1.442 purporting to authorize joint offers, including subsections (c)(3) and (4), are substantive in nature. Whether and under what circumstances multiple parties can make or receive a PFS the rejection of which creates a right to recover attorney's fees are substantive issues. Otherwise, the Legislature would be powerless to expressly prohibit joint proposals.

Especially with regard to by section 768.79, which consistently refers to "a plaintiff," "the plaintiff," "a defendant," "the defendant," and "the party" in the singular, there is no indication that joint proposals are authorized as a matter of substantive law in the first place. While courts should generally construe statutory language so that "[t]he singular includes the plural," that is only "where the context will permit." § 1.01, Fla. Stat. (2021). As evidenced by the need for provisions like these and the litigation spawned over joint PFSs, joint proposals create substantive complications that require significant workarounds that are found nowhere in the statute. The context of section 768.79 does not permit a reasonable reader to assume the Legislature intended to open such a Pandora's Box *sub*

silentio..

In other words, if the Legislature intended that “[a] proposal may be made by or to any ... any combination of parties,” as subdivision (3) provides, it would have said so and provided the necessary substantive rules for determining when such a PFS is triggered. *See, e.g., Adv. Op. to Gov. re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (“We therefore adhere to the ‘supremacy-of-text principle’: ‘The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.’”) (quoting Scalia & Garner, *Reading Law* 56); *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 375 (Fla. 2013) (“If the Legislature intended to authorize the recovery of attorney's fees under those circumstances, it could have and would have explicitly provided for them in section 768.79.”).

Even if procedural, proposed subdivision (c)(5) is bad policy because it would permit gamesmanship that subverts the very purpose of the PFS mechanism, giving litigants license to prolong the litigation without facing the threat of fees taxed against them pursuant to an unaccepted proposal.

The proposed subdivision (c)(5) poses a special danger in this regard where there is a great wealth disparity between two offerees. For instance, assume a plaintiff serves a “joint offer” on a judgment-proof driver and their wealthy employer. The employer would be incentivized to “accept” the proposal, thereby insulating itself from fee liability, while requiring or incentivizing its impecunious employee to reject it (perhaps against the employee’s own interest). If a single lawyer represents both the employee driver and the vicariously liable employer (as is most often the case), that lawyer may now have a conflict of interest and would be exposed to a professional malpractice claim, should the lawyer fail to perceive and avoid the conflict. And if the employee rejects the proposal at the employer’s behest, the employer now has license to prolong the litigation without any concern regarding fee exposure.

Conversely, assume a husband and wife are involved in a wreck, the husband dies, and the wife is appointed personal representative of his estate, which is without any collectible assets. The wife files suit in her individual capacity and as personal representative. If served with a “joint offer” to settle for an amount lower than she was hoping to recover, the wife would be

incentivized to accept it in her individual capacity but then reject it as the personal representative, effectively shielding herself from any fee liability.

Or perhaps a defendant serves a joint proposal on husband-and-wife plaintiffs. If all their collectible assets are marital assets (as is often the case), the threat of attorneys' fees being taxed against the rejecting spouse is negligible, discouraging settlement.

There would also likely be considerable litigation concerning the scope, meaning, and validity of the proposed subdivision (c)(5) itself, should it be adopted. It is reasonable to expect parties would energetically dispute whether Rule 1.442(c)(5) is substantive or procedural and, by extension, whether this Court overstepped its constitutional authority by adopting the subdivision. Parties would likely also litigate the latent ambiguities in the proposed subdivision (c)(5). To illustrate, assume a single offeror serves a "joint offer" on two or more offerees, which is then "accepted" by one but rejected by others. As a result, the case does not settle and proceeds to trial against all the offerees. In that situation, to be entitled to fees, would the offeror have to "beat" the proposal for settlement as to all offerees (including any amount allocated to an offeree who

“accepted” the joint proposal) or only those who rejected it?

To further illustrate the ambiguity, assume a plaintiff serves a “joint offer” to two defendants who are both alleged to be directly negligent (joint tortfeasors) for \$200,000 total (allocated \$100,000 to each). Defendant A “accepts” the proposal but defendant B rejects it. Defendant A is now immune from fee liability under that proposal but remains a defendant in the litigation. Defendant A wins a defense verdict, but plaintiff obtains a judgment against defendant B for \$126,000 (which is at least 25 percent greater than the amount of the offer allocated to defendant B but less than the total amount of the offer). Is the plaintiff entitled to recover fees under the proposal for settlement against defendant B? The proposed rule is silent on that issue.

Another open question is whether the proposed revision still runs afoul of this Court’s holding in *Attorneys’ Title Insurance Fund, Inc. v. Gorka*, 36 So. 3d 646 (Fla. 2010). In *Gorka*, this Court held a joint PFS was invalid and unenforceable because

it is conditioned such that neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal. The conditional nature of the offer divests each party of independent control of the decision to settle, thereby rendering the offer of

judgment invalid and unenforceable.

Id. at 649. This Court further explained that the language of Rule 1.442

inherently requires that an offer of judgment must be structured such that either offeree can independently evaluate and settle his or her respective claim by accepting the proposal irrespective of the other parties' decisions. Otherwise, a party's exposure to potential consequences from the litigation would be dependently interlocked with the decision of the other offerees.

Id. at 650.

The stated justification for proposed subdivision (c)(5) suggests it aims to avoid the above-quoted rulings from *Gorka* and instead codify the dissent, which interpreted section 768.79 to provide that

[i]n the event a plaintiff accepts by filing the requisite notice of acceptance with the court, then there could be no recovery under the statute from that plaintiff. On the other hand, if a plaintiff does not file the requisite notice of acceptance, then the plaintiff who has not accepted is subject to the terms of the costs recovery statute.

Id. at 653–54 (Polston, J., dissenting). That further emphasizes the substantive nature of the proposed rule. If this Court wishes to re-address or recede from *Gorka*, then it should wait until it is presented with a case or controversy to do so. *See, e.g., Younkin v. Blackwelder*, Case No. SC19-385, 2021 WL 4782799, at *3 (Fla.

Oct. 14, 2021) (“[Z]eal to correct an error in the law should not be allowed to precipitate the abrogation of fundamental restraints on the exercise of judicial power.”).

In any event, the proposed rule still runs afoul of *Gorka*. Although an offeree who “accepts” a joint offer is no longer exposed to fees under the proposal for settlement, that offeree still cannot settle the case without the other offerees’ approval. As such, a joint offer served under Rule 1.442(c)(5) is still “conditional” in nature, divesting each offeree of the “independent control to settle” and still exposing the “accepting” offeree to “potential consequences from the litigation [that] would be dependently interlocked with the decision of the other offerees.” 36 So. 3d at 649–50. Thus, as drafted, proposed Rule 1.442(c)(5) does not “fix” the perceived problems with *Gorka*.

CONCLUSION

For the foregoing reasons, this Court should make the proposed changes to subdivisions (c)(2)(C), (D), and (G), but not the proposed changes to subdivision(c)(2)(B), (E), and (F) or subdivision 1.442(c)(5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on November 1, 2021, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record.

/s/ John S. Mills
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limit requirements of Rule 9.210(a)(2).

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