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Manuel Farach

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KIS Group, LLC v. Moquin, Case No. 4D18-1435 (Fla. 4th DCA 2018).
A trial court's denial of defendant's motion for summary judgment on a fraud claim is not the functional equivalent of a determination that a sufficient factual basis exists under Florida Statute section 768.72 for plaintiff to claim punitive damages.

Supreme Court of Florida

No. SC17-1387

MARIE ANN GLASS,
Petitioner,

vs.

NATIONSTAR MORTGAGE, LLC, etc., et al.,
Respondents.

January 4, 2019

QUINCE, J.

Marie Ann Glass seeks review of the decision of the Fourth District Court of Appeal in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017), on the ground that it expressly and directly conflicts with *Bank of New York v. Williams*, 979 So. 2d 347 (Fla 1st DCA 2008), on the question of whether a voluntary dismissal provides a basis for being considered the prevailing party for the purpose of appellate attorney fees. We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const. For the reasons that follow, we quash the decision of the Fourth District.

BACKGROUND

On December 17, 2013, Nationstar Mortgage filed a verified complaint against Marie Ann Glass, pursuing an *in rem* action to foreclose a mortgage on real property in Broward County, Florida. The mortgage, a Home Equity Conversion Loan Agreement (commonly called a reverse mortgage), was prepared on November 16, 2007, and properly recorded. The complaint alleged that on March 18, 2013, the loan went into default due to non-payment of taxes and/or insurance on the property. Nationstar requested the full balance of the loan: $205,397.93, plus interest, escrow, title search expenses, and attorney's fees as defined in the loan agreement.

On May 22, 2014, Glass filed a motion to dismiss the verified complaint, arguing that it "fails to allege necessary 'approval by an authorized representative of the Secretary [of Housing and Urban Development],' " to declare a default of the loan. Glass then provided four reasons that the complaint should be dismissed. Last, Glass alleged that Nationstar attached the incorrect document to its pleading.

On June 26, 2014, the parties agreed to an order permitting Nationstar to amend its complaint by providing additional filings. Nationstar submitted the correct loan agreement on June 30, 2014. On July 16, 2014, Glass filed a motion to dismiss the amended complaint, making the same arguments as before and adding that Nationstar's amendment appended as an exhibit loan documents that

named Countrywide Bank as the lender and failed to allege or demonstrate that Nationstar was the proper holder of the note. On October 20, 2014, Nationstar responded to the motion to dismiss, arguing that it had met its legal duty in the complaint and requested attorney's fees pursuant to the terms of the note and mortgage.

On October 23, 2014, the trial court granted Glass's motion to dismiss without prejudice for Nationstar to file an amended pleading within 30 days. Nationstar filed its amended complaint on November 24, 2014. On December 4, 2014, Glass filed a motion to dismiss asserting that the amended complaint failed to correct any of its previous defects. On April 15, 2015, the trial court granted Glass's motion to dismiss with prejudice.[1] Glass sought attorney's fees pursuant to Florida Rule of Civil Procedure 1.525, the mortgage, and section 57.105(7), Florida Statutes (2014).

Nationstar filed a notice of appeal with the Fourth District Court of Appeal on November 30, 2015. Nationstar filed its initial brief on September 26, 2016, arguing, in part, that none of the arguments offered by Glass in her motions to dismiss had merit and "all of the possible grounds for the circuit court's order are

1. The trial court granted rehearing and struck the language, "having been afforded an opportunity to amend its pleading, Plaintiff has failed to do so" from the order and issued a revised order on November 5, 2015.

incorrect as a matter of law." After briefing, Nationstar filed a notice of voluntary dismissal on March 13, 2017. Glass filed a renewed motion for appellate attorney's fees based on section 57.105(7) and Nationstar's voluntary dismissal. The Fourth District issued an opinion denying Glass's motion, granted rehearing en banc, and issued a nearly identical opinion on rehearing en banc.

Glass sought the discretionary review of this Court.

ANALYSIS

The issue presented in this case is a homeowner's entitlement to appellate attorney's fees pursuant to section 57.105(7), Florida Statutes, after a bank files a notice of voluntary dismissal in the district court of appeal. Below, the Fourth District found that Glass was not entitled to appellate attorney's fees because she prevailed on her standing argument presented in the trial court. Because our caselaw is clear that a voluntary dismissal of an appeal renders the opposing party the prevailing party for the purpose of appellate attorney fees and because Nationstar maintained its right to enforce the reverse mortgage contract in its appeal until the dismissal, we quash the decision below. Additionally, we write to address the mischaracterization of the procedural history of this case by the district court.

In relevant part, the Fourth District's opinion in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017), held:

> The Borrower prevailed in the circuit court based on her argument that the Lender lacked standing under the contract. On appeal, she argued that the court correctly dismissed the Lender's complaint for lack of standing. In a situation such as this, where a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in that same contract.

Id. at 898. Further, the Fourth District explained:

> Simply put, to be entitled to fees pursuant to the reciprocity provision of section 57.105(7), the movant must establish that the parties to the suit are also entitled to enforce the contract containing the fee provision. A party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract.

Id. at 899. The Fourth District therefore denied Glass's motion for appellate attorney's fees. *Id.*

Nationstar did not seek review of the attorney's fees order in the district court. Instead, Nationstar appealed the dismissal order, stating in its Notice of Appeal, "[Nationstar] appeals to the Fourth District Court of Appeal the Order of this Court dated November 5, 2015 . . . . The nature of the order is a final order dismissing Plaintiff's case against Defendant with prejudice." Nationstar then voluntarily dismissed the appeal. The Fourth District denied Glass's motion for appellate attorney's fees based not on the voluntary dismissal on appeal but instead on the ancillary issue of her successful dismissal of the complaint at trial. *Nationstar Mortgage LLC v. Glass*, No. 4D15-4561 (Fla. 4th DCA Apr. 12, 2017).

On motion for rehearing en banc, the district court reiterated its prior opinion, stating, "We grant the Borrower's motion for rehearing en banc and, after en banc consideration, adopt the panel opinion as revised below." *Glass*, 219 So. 3d at 897.

In *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990), we held, "In general, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party." *Id.* at 919 (citing *Stuart Plaza, Ltd. v. Atl. Coast Dev. Corp.*, 493 So. 2d 1136 (Fla. 4th DCA 1986)). Accordingly, notwithstanding the issues with the lower court's dismissal, the Fourth District improperly denied Glass appellate attorney's fees based on Nationstar's voluntary dismissal of the appeal.

In its decision, instead of addressing the entitlement to appellate attorney's fees based on the voluntary dismissal, the Fourth District opined that section 57.105(7) precluded an award of attorney's fees because Glass prevailed in having Nationstar's complaint dismissed. The Fourth District's conclusion that Glass was not entitled to appellate attorney's fees after Nationstar voluntarily dismissed its appeal was predicated on Glass's argument in the trial court that Nationstar failed to adequately allege that it had standing to foreclose her mortgage. This reasoning both misstates the basis of the trial court's ruling on Glass's motion for dismissal and fails to address Glass's motion for appellate attorney's fees based on the voluntary dismissal.

In the trial court, Glass moved to dismiss the foreclosure action against her, arguing four bases for her motion. First, Glass alleged that Nationstar's complaint failed to allege any assignment from Countrywide and that Nationstar's status as holder of the note was insufficient. Second, Glass alleged that Nationstar failed to allege a breach of the contract because the contract provided that the lender would pay such property charges as loan advances. Third, Glass alleged that Nationstar failed to demonstrate that it had received approval from HUD to accelerate the loan, as required by the terms of the loan. Fourth, Glass alleged that the exhibits to the complaint contravened the finding that nonpayment of taxes is a default because there was sufficient equity remaining on the line of credit to fund taxes and insurance. The trial court granted the dismissal but did not provide any reasoning for its decision. It is, therefore, inaccurate to state that Glass was successful only for demonstrating that Nationstar lacked standing.

Further, the Fourth District stated, "On appeal, [Glass] argued that the court correctly dismissed the Lender's complaint for lack of standing." *Nationstar Mortgage*, 219 So. 3d at 898. This is not an accurate statement of Glass's argument. In her answer brief to the Fourth District, Glass asserted that the trial court properly dismissed the complaint based on defects in the amended complaint and re-asserted three of the four reasons she raised in her motion to dismiss: (1) failure to allege standing, (2) inappropriate remedy, and (3) failure to allege HUD

Secretary approval. Additionally, Glass argued that the trial court properly dismissed the complaint with prejudice after Nationstar failed to amend the defects in the complaint after the first dismissal.

The Fourth District's decision partly relies on the decision of the Third District Court of Appeal in *Bank of New York Mellon Trust Co. v. Fitzgerald*, 215 So. 3d 116 (Fla. 3d DCA 2017), wherein the district court held that because no contract existed between the bank and Fitzgerald, she could not invoke the reciprocity provisions of section 57.105(7). There are factual distinctions between *Fitzgerald* and *Glass*. Fitzgerald entered into a mortgage with Northstar and concurrently signed a promissory note made payable to Northstar that bore a special indorsement stating, "PAY TO THE ORDER OF JPMORGAN CHASE BANK, N.A., ITS SUCCESSORS AND/OR ASSIGNS WITHOUT RECOURSE." *Id.* at 117-18. The Bank of New York Mellon Trust Company filed an action against Fitzgerald seeking to foreclose the mortgage and attached a copy of the note and mortgage. Fitzgerald filed her answer and affirmative defenses, asserting that the bank lacked standing because the note was specially indorsed to an entity other than the bank and the bank was not the lawful assignee. The case proceeded to non-jury trial and the trial court entered a final judgment in favor of Fitzgerald after finding that Bank of New York Mellon Trust failed to establish assignment of the mortgage or transfer or any actual delivery of the note on the part of J.P.

Morgan Chase Bank. *Id.* at 118. This is unlike the present case where the trial court made no specific findings and Glass alleged that Nationstar failed to demonstrate a step in the transfer or assignment of the mortgage and note as one of four reasons the trial court should dismiss the complaint.

Below, Glass alleged, "The Complaint has an assignment from Bank of America to Plaintiff appended; however, the Complaint fails to allege the assignment of transfer from Countywide [sic] Bank, FSB to Bank of America." Additionally, she alleged, "The exhibits show Plaintiff lacks standing to assert the claims alleged as it is not the 'lender' under the reserve mortgage, the Amended Complaint (like the previous iteration) still fails to allege any assignment from the Lender and Plaintiff's status as 'holder' of the Note does not give Plaintiff standing as the Note is not a negotiable instrument." Even if the trial court's dismissal was based on lack of standing, it was not based on a finding that Nationstar did not hold the note but on a finding that Nationstar's complaint was legally insufficient for failure to properly demonstrate the chain of title.

In *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), we explained:

> At the outset, we note that some of the decisions of this Court contain the historically incorrect statement that attorney fee statutes are "in derogation of the common law." At the time of the American Revolution, the English court generally awarded attorney fees to the prevailing party in all civil litigation. By its decisions, however, this Court, along with the majority of other jurisdiction in this country,

> refused to accept the "English Rule" that attorney fees are part of the costs to be charged by a taxing master, adopting instead the "American Rule" that attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties. . . . This state has recognized a limited exception to this general American Rule in situations involving inequitable conduct.

Id. at 1147-48 (footnote and citations omitted). Further, we have stated, "It is well-settled that attorneys' fees can derive only from either a statutory basis or an agreement between the parties." *Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194, 1198 (Fla. 2009) (citing *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993)). And finally, "where a motion for attorney's fees is based on a prevailing-party provision of a document, the fact that a contract never existed precludes an award of attorney's fees." *David v. Richman*, 568 So. 2d 922, 924 (Fla. 1990).

Our caselaw is clear that a party is precluded from claiming attorney's fees under a contract that has been found to have never existed. *See id.* However, we have also held "that when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable." *Katz v. Van Der Noord*, 546 So. 2d 1047, 1049 (Fla. 1989). We explained:

> The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist. It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract. This analysis does no violence to

> our recent opinion in *Gibson v. Courtois* [539 So. 2d 459 (Fla. 1989)] in which we held that the prevailing party is not entitled to collect attorney's fees under a provision in the document which would have formed the contract where the court finds that the contract *never* existed.

Katz, 546 So. 2d at 1049.

In the instant case, a reverse mortgage contract clearly existed between Glass and Countrywide Mortgage Company, which was assigned from its successor in interest, Bank of America, to Nationstar Mortgage.[2] Even if we assume that Glass prevailed on her standing argument, the contract was merely unenforceable by Nationstar because it failed to demonstrate that it was the rightful successor in interest. We therefore conclude that, had the issue been presented as an issue on appeal to the Fourth District, Glass would be entitled to attorney's fees at the trial level.

CONCLUSION

For the foregoing reasons, we quash the decision of the Fourth District in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017), and approve the decision in *Bank of New York v. Williams*, 979 So. 2d 347 (Fla 1st

2. Bank of America purchased Countrywide Financial Corporation on July 1, 2008. *See* Press Release, Bank of America Completes Countrywide Financial Purchase (July 1, 2008), *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle&ID=1171009#fbid=eZ2TlYp6FgM.

DCA 2008), on the question of whether a voluntary dismissal provides a basis for being considered the prevailing party for the purpose of appellate attorney fees.

It is so ordered.

PARIENTE, LEWIS, and LABARGA, JJ., concur.
POLSTON, J., dissents with an opinion, in which CANADY, C.J., and LAWSON, J., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

POLSTON, J., dissenting.

This Court does not have the constitutional authority to review this case because the Fourth District Court of Appeal's decision in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017), does not expressly and directly conflict with the First District Court of Appeal's decision in *Bank of New York v. Williams*, 979 So. 2d 347 (Fla. 1st DCA 2008), on the same question of law. Therefore, I respectfully dissent.

In *Glass*, 219 So. 3d at 898, the Fourth District explained that, to be entitled to attorney's fees under section 57.105(7), Florida Statutes, two requirements must be met: "First, the party must have prevailed. Second, the party had to be a party to the contract containing the fee provision." Then, the Fourth District proceeded to discuss the legal issue at hand, which involved the second requirement of whether the party was a party to the contract. *Id.* at 898-99. The Fourth District explained that, "[s]imply put, to be entitled to fees pursuant to the reciprocity

provision of section 57.105(7), the movant must establish that the parties to the suit are also entitled to enforce the contract containing the fee provision." *Id.* at 899. Thus, the Fourth District held that, "[i]n a situation such as this, where a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in that same contract." *Id.* at 898.

In contrast, in granting a motion for attorney's fees, the First District in *Williams* only addressed the first requirement of section 57.105(7). Specifically, the First District addressed the Bank of New York's argument "that Williams was not entitled to an award of attorney's fees because she was not a prevailing party under section 57.105(7)." *Williams*, 979 So. 2d at 347. The Bank of New York contended "that because the same factual and legal issues raised in the dismissed action are also the subject of the new litigation, Williams cannot be the prevailing party under section 57.105(7)." *Id.* at 347-48. The First District disagreed, holding that "[t]he refiling of the same suit after the voluntary dismissal does not alter the appellees' right to recover prevailing party attorney's fees incurred in defense of the first suit." *Id.* at 348 (quoting *State ex rel. Marsh v. Doran*, 958 So. 2d 1082, 1082 (Fla. 1st DCA 2007)). The First District stated that, "since the complaint was dismissed with prejudice, it is clear that Williams was the prevailing party." *Id.*

Accordingly, because *Glass* involved the second requirement of section 57.105(7) while *Williams* involved the first, the two cases do not expressly and directly conflict on the same question of law. Therefore, I respectfully dissent.

CANADY, C.J., and LAWSON, J., concur.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Fourth District - Case No. 4D15-4561

(Broward County)

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Supreme Court of Florida

No. SC17-716

SANDRA KENT WHEATON,
Petitioner,

vs.

MARDELLA WHEATON,
Respondent.

January 4, 2019

QUINCE, J.

Petitioner Sandra Wheaton seeks review of the decision of the Third District Court of Appeal in *Wheaton v. Wheaton*, 217 So. 3d 125 (Fla. 3d DCA 2017), on the ground that it expressly and directly conflicts with *Boatright v. Phillip Morris USA, Inc.*, 218 So. 3d 962 (Fla. 2d DCA 2017), *McCoy v. R.J. Reynolds Tobacco Co.*, 229 So. 3d 827 (Fla. 4th DCA 2017), and *Oldcastle Southern Group, Inc., v. Railworks Track Systems, Inc.*, 235 So. 3d 993 (Fla. 1st DCA 2017), regarding whether proposals for settlement made pursuant to section 768.79, Florida Statutes (2018), and Florida Rule of Civil Procedure 1.442 must comply with the email service provisions of Florida Rule of Judicial Administration 2.516. We have

jurisdiction. *See* art. V, § 3(b)(3), Fla. Const. For the reasons that follow, we quash the decision of the Third District.

FACTS AND PROCEDURAL HISTORY

Respondent, Mardella Wheaton, sued her ex-daughter-in-law, Petitioner, Sandra Wheaton, for unlawful detainer. Petitioner served a proposal for settlement on Respondent via email. Respondent received the proposal but did not accept it.

The trial court granted Petitioner's motion for summary judgment.[1] Petitioner then moved to enforce her proposal for settlement and to collect attorney's fees. Respondent opposed the motion on three grounds: (1) the proposal was vague; (2) the proposal was not made in good faith; and (3) the proposal failed to strictly comply with the e-mail service requirements of rule 2.516. The trial court rejected the vagueness argument but agreed that the proposal failed to strictly comply with the requirements of rule 2.516.[2] The basis for the trial court's ruling was that Petitioner's email "did not include a certificate of service, a subject line containing the words 'SERVICE OF COURT DOCUMENTS,' and [failed to

1. Respondent appealed the summary judgment loss to the Third District, which affirmed the trial court per curiam. *Wheaton v. Wheaton*, 194 So. 3d 1036 (Fla. 3d DCA 2016).

2. Because the trial court found that the proposal was unenforceable, it did not reach the issue of whether the offer was made in good faith.

comply with] other requirements of rules 1.442, 1.080 and 2.516 of the Florida Rules of [Civil Procedure and Judicial Administration.]" In support of its conclusion, the trial court relied on the Fourth District Court of Appeal's decision in *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014), and precedent from this Court stating that section 768.79 and rule 1.442 must be strictly construed. Therefore, according to the trial court, Petitioner's failure to comply with all of the formatting requirements set forth in rule 2.516(b)(1)(E) rendered the proposal unenforceable.

Petitioner appealed the trial court's decision to the Third District Court of Appeal, arguing that "because the proposal for settlement is neither a pleading nor a 'document filed in any court proceeding,' it is not subject to the requirements of rule 2.516." *Wheaton*, 217 So. 3d at 127. The Third District acknowledged that subdivision (a) of rule 2.516 applies only to documents that are filed in court proceedings, and that section 768.79 and rule 1.442 expressly forbid a party from filing a proposal when it is initially served. *Id.* However, the court disagreed with Petitioner's reliance on the language in subdivision (a) of rule 2.516. *Id.* Instead, the court found that "[t]he relevant language is contained in subdivision (b) of rule 2.516, which provides in pertinent part: 'All documents required *or permitted to be served* on another party *must be served by e-mail*, unless the parties otherwise

stipulate or this rule otherwise provides.'" *Id.* The district court went on to hold that

> the document in question (the proposal for settlement) is "permitted to be served on another party." And because the parties did not "otherwise stipulate," and because the rule does not "otherwise provide," this proposal for settlement "*must* be served by e-mail" and therefore must be served in compliance with the e-mail requirements of rule 2.516, regardless of whether the document is contemporaneously filed with the court. We find this language plain and unambiguous, and hold that a proposal for settlement falls clearly within the scope of { "pageset": "S7f rule 2.516(b) and is subject to that rule's requirements.

Id. at 127-28 (footnote omitted). In so holding, the district court noted that it "agree[d] with the decision and analysis" set forth in the First District Court of Appeal's decision in *Floyd v. Smith*, 160 So. 3d 567 (Fla. 1st DCA 2015), and the Fourth District's decision in *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014). *Wheaton*, 217 So. 3d at 128.

Petitioner filed a motion for rehearing, arguing that the district court's decision was inconsistent with this Court's decision in *Kuhajda v. Borden Dairy Co. of Alabama, LLC*, 202 So. 3d 391 (Fla. 2016), which was published after briefing was completed in *Wheaton*. The district court summarily denied Petitioner's motion. Now before this Court, Petitioner contends that the Third District's decision expressly and directly conflicts with *Boatright v. Phillip Morris USA, Inc.*, 218 So. 3d 962 (Fla. 2d DCA 2017), *McCoy v. R.J. Reynolds Tobacco*

Co., 229 So. 3d 827 (Fla. 4th DCA 2017), and *Oldcastle Southern Group, Inc. v. Railworks Track Systems, Inc.*, 235 So. 3d 993 (Fla. 1st DCA 2017).

ANALYSIS

The conflict issue presented is whether proposals for settlement made pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 must comply with the email service provisions of Florida Rule of Judicial Administration 2.516. The standard of review in determining whether an offer of settlement comports with section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 and is de novo. *Pratt v. Weiss*, 161 So. 3d 1268, 1271 (Fla. 2015). Because the conflict issue involves the interpretation of the Court's rules, in this case Florida Rule of Judicial Administration 2.516, the standard of review is also de novo. *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006).

Relevant Provisions

Section 768.79, Florida Statutes ("Offer of judgment and demand for judgment"), "provides a sanction against a party who unreasonably rejects a settlement offer." *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003). Section 768.79 provides in relevant part:

> In any civil action for damages filed in the courts of this state, if 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 on the

> defendant's behalf . . . if . . . the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

The statute further provides that an offer shall:

> (a) Be in writing and state that it is being made pursuant to this section.
>
> (b) Name the party making it and the party to whom it is being made.
>
> (c) State with particularity the amount offered to settle a claim for punitive damages, if any.
>
> (d) State the total amount.

§ 768.79(2), Fla. Stat. (2018). The section also states that a proposal "shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section." § 768.79(3), Fla. Stat. (2018).

Section 768.79 is implemented by Florida Rule of Civil Procedure 1.442 ("Proposals for Settlement"). The rule provides that a proposal shall:

> (A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;
>
> (B) state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F);
>
> (C) state with particularity any relevant provisions;
>
> (D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;
>
> (E) state with particularity the amount proposed to settle a claim for punitive damages, if any;
>
> (F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

> (G) include a certificate of service in the form required by rule 1.080.

Fla. R. App. P. 1.442(c)(2). The rule also states that a proposal "shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule." Fla. R. App. P. 1.442(d).

While rule 1.442 requires proposals for settlement to include a certificate of service, rule 1.080 no longer contains a certificate of service provision. Instead, the rule states that "[e]very pleading subsequent to the initial pleading, all orders, and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516." Fla. R. Civ P. 1.080(a).[3]

The relevant portions of rule 2.516 provide:

> (a) **Service; When Required.** Unless the court otherwise orders, or a statute or supreme court administrative order specifies a different means of service, *every pleading subsequent to the initial pleading and every other document filed in any court proceeding*, except applications for witness subpoenas and documents served by formal notice or required to be served in the manner provided for service of formal notice, *must be served in accordance with this rule on each party*. No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons.

3. Rule 1.080(f) used to contain a certificate of service provision, but it was deleted in 2012 when rule 2.516 was adopted. *See In re Amend. to Fla. Rules of Jud. Admin.*, 102 So. 3d 505, 510 (Fla. 2012).

(b) **Service; How Made.** When service is required or permitted to be made upon a party represented by an attorney, service must be made upon the attorney unless service upon the party is ordered by the court.

(1) **Service by Electronic Mail ("e-mail").** *All documents required or permitted to be served on another party must be served by e-mail, unless the parties otherwise stipulate or this rule otherwise provides.* A filer of an electronic document has complied with this subdivision if the Florida Courts e-filing Portal ("Portal") or other authorized electronic filing system with a supreme court approved electronic service system ("e-Service system") served the document by e-mail or provided a link by e-mail to the document on a website maintained by a clerk ("e-Service"). The filer of an electronic document must verify that the Portal or other e-Service system uses the names and e-mail addresses provided by the parties pursuant to subdivision (b)(1)(A).

(Emphasis added.) The rule goes on to provide the following formatting requirements:

(i) All documents served by e-mail must be sent by an e-mail message containing a subject line beginning with the words "SERVICE OF COURT DOCUMENT" in all capital letters, followed by the case number and case style of the proceeding in which the documents are being served.

(ii) The body of the e-mail must identify the court in which the proceeding is pending, the case number, the name of the initial party on each side, the title of each document served with that e-mail, and the name and telephone number of the person required to serve the document.

(iii) Any document served by e-mail may be signed by any of the "/s/," "/s," or "s/" formats.

(iv) Any e-mail which, together with its attached documents, exceeds the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court, must be divided and sent as separate e-mails, no one of which may exceed the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court and each of which must be sequentially numbered in the subject line.

Fla. R. Jud. Admin. 2.516(b)(1)(E)(i)-(iv).

Conflict Cases

In *Boatright*, the plaintiffs served four proposals for settlement on the defendants—one from each plaintiff to each defendant. *Boatright*, 218 So. 3d at 964. The proposals were sent to the defendants via U.S. certified mail. *Id.* Following a jury verdict in their favor, the plaintiffs filed a motion for attorney's fees and costs based in part on the defendants' failure to accept the proposals for settlement. *Id.* The trial court denied the motion, finding that the plaintiffs were not entitled to attorney's fees and costs because they did not serve their proposals for settlement on the defendants by email, and therefore failed to strictly comply with section 768.79 and rule 1.442. *Id.*

In reversing the trial court, the Second District held that "proposals for settlement are not subject to the service requirements of rule 2.516 because the proposals do not meet rule 1.080(a)'s threshold requirement that they be 'filed in the action.' " *Id.* at 965. Additionally, the district court rejected the *Wheaton* court's reliance on subdivision (b) of rule 2.516, reasoning that "rule 2.516(b)(1)'s mandatory service requirement is confined to every pleading subsequent to the initial pleading and documents that are filed in court—it does not extend to literally every document which is due to be served." *Id.* at 970. In doing so, the district court certified conflict with the Third District's decision. *Id.* at 971.

In *McCoy*, the plaintiff served a proposal for settlement on each of three defendants by U.S. certified mail. *McCoy*, 229 So. 3d at 828. The defendants received the proposals for settlement but did not accept them. *Id.* After trial, the plaintiff obtained a verdict that entitled him to attorney's fees under section 768.79 and moved for attorney's fees. *Id.* The defendants opposed the motion, arguing that the plaintiff failed to email the proposals pursuant to rule 2.516. *Id.* The trial court denied the motion. *Id.*

The Fourth District reversed the trial court, finding that "[w]here a party has actual notice of an offer of settlement, and the offering party has satisfied the requirements of section 768.79 on entitlement, to deny recovery because the initial offer was not emailed is to allow the procedural tail of the law to wag the substantive dog." *Id.* (citing *Kuhajda*, 202 So. 3d 391). The court noted that both section 768.79 and rule 1.442 require service of proposals for settlement but prohibit filing, and found that as applied to rule 2.561(a), a proposal for settlement is neither a pleading nor a document "filed in any court proceeding." *McCoy*, 229 So. 3d at 829 (quoting Fla. R. Jud. Admin. 2.516(a)). Thus, "under the plain language of Rule 2.516(a), then, the initial offer of judgment is outside of the email requirements of that rule." *Id.* at 829.

The district court also disagreed with *Wheaton*, stating that in reaching its conclusion, the Third District

> imports language from rule 2.516(b) to add words to the plain language of 2.516(a). Instead of focusing on subsection 2.516(a), which specifies when email service is "required," the *Wheaton* court looked to subsection 2.516(b) to hold that email service was required for the initial delivery of an offer of judgment.
>
> We disagree with *Wheaton*; subsection (a) is not ambiguous, so a court should not add words to manipulate its meaning.

Id. (citation omitted).

In *Oldcastle*, the plaintiff sent a proposal for settlement by email to the defendant. *Oldcastle*, 235 So. 3d at 993-94. The defendant received the proposal—but did not accept it—and then the plaintiff received a judgment more than 25 percent greater than the amount demanded in the proposal. *Id.* at 994 (citing § 768.79(1), Fla. Stat. (2014)). The defendant argued that the proposal had to be served in accordance with rule 2.516, which the First District rejected. *Id.* at 995.

The district court acknowledged that the plaintiff's proposal did not comply with the formatting requirements set forth by rule 2.516(b)(1)(E). However, the court found that these requirements did not apply because "compliance with rule 2.516 is not required when serving a proposal for settlement." *Id.* at 994. To reach its conclusion, the court examined rule 2.516(a) and found that "since the proposal for settlement is not to be filed when it is served, the proposal is not included in the clause 'every other document filed in any court proceeding.' " *Id.* at 994-95. In

doing so, the court adopted the view of *Boatright* and *McCoy* and certified conflict with *Wheaton*. *Oldcastle*, 235 So. 3d at 994.

Interpretation

We have previously stated that both rule 1.442 and section 768.79 should be strictly construed. *See Campbell v. Goldman*, 959 So. 2d 223, 226 (Fla. 2007) (citing *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003)). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931)); *accord Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992). If, however, the language of the rule is ambiguous and capable of different meanings, this Court will apply established principles of statutory construction to resolve the ambiguity. *See, e.g., Gulfstream Park Racing Ass'n, Inc., v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006).

From the plain language of section 768.79 and rule 1.442, neither require service by email. The procedure for communicating an offer of settlement is set out in section 768.79(3), Florida Statutes (2018), which states:

> The offer *shall be served upon the party to whom it is made, but it shall not be filed* unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(Emphasis added.) The statute only requires that the offer be served on the party to whom it is directed and not be filed with the court but does not require service by email.

Similarly, subdivision (d) of rule 1.442 outlines the procedure for communicating a proposal for settlement to the opposing party. The subdivision states:

> **(d) Service and Filing.** A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

Fla. R. Civ. P. 1.442(d). Again, the rule provides that the offer must be served on the party to whom it is directed and not filed with the court but does not require service by email. However, unlike section 768.79, rule 1.442 provides that a proposal for settlement must "include a certificate of service in the form required by rule 1.080." Fla. R. Civ. P. 1.442(c)(2)(G).

As previously mentioned, rule 1.080 does not specify the form of the certificate of service. Instead, the rule provides:

> *Every pleading subsequent to the initial pleading, all orders, and every other document filed* in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516.

Fla. R. Civ. P. 1.080(a) (emphasis added). This does not apply to proposals for settlement because a settlement offer is neither a pleading subsequent to the initial pleading, an order, or a document filed with the court. Accordingly, based on rule

1.080's plain language, rule 2.516 would not apply to proposals for settlement made pursuant to section 768.79 and rule 1.442.

It appears that in reaching its conclusion to the contrary, the Third District focused on construing rule 2.516 more than section 768.79 and rule 1.442. However, even the plain language of rule 2.516 does not support the Third District's conclusion. The provisions of rule 2.516 that are at issue in this case are subdivision (a), "Service; When Required," and subdivision (b), "Service; How Made." According to the first subdivision, "every pleading subsequent to the initial pleading and every other document filed in any court proceeding . . . must be served in accordance with this rule." Fla. R. Jud. Admin. 2.516(a). The rule goes on to state in the second subdivision that "[a]ll documents required or permitted to be served on another party must be served by e-mail, unless the parties otherwise stipulate or this rule provides otherwise." Fla. R. Jud. Admin. 2.516(b)(1). Therefore, the plain language of the rule provides that if a document is (1) a pleading subsequent to the initial pleading, or (2) a document filed in any court proceeding, it must be served according to the rule. Then, the rule goes on to provide that service must be made by email if the document (1) requires service or (2) permits service.

The Third District appeared to agree that the rule only requires service if the document is a pleading subsequent to the initial pleading or a document filed in

any court proceeding because it determined that a proposal for settlement is a document that is "permitted to be served on another party." *Wheaton*, 217 So. 3d at 127 (quoting Fla. R. Jud. Admin. 2.516(b)). However, if rule 2.516 creates two groups of documents that must be filed—documents that are required to be served and documents that are permitted to be served—proposals for settlement would not fall in the latter group. The proposal for settlement statute provides that a proposal "shall be served" on the party to whom it is made, but "shall not be filed" unless it is accepted or filing is necessary to enforce the provisions of the statute. § 768.79(3), Fla. Stat. (2018). Similarly, the rule that implements section 768.79 states "[a] proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule." Fla. R. Civ. P. 1.442(d). We have previously held that "[t]he word 'shall' is mandatory in nature." *Sanders v. City of Orlando*, 997 So. 2d 1089, 1095 (Fla. 2008); *see also Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.' "). Therefore, a proposal for settlement is a document that must be served on the party to whom it is made but must not be filed with the court. By its plain language, a proposal for settlement is not a required document as contemplated by rule 2.516. Accordingly, the Third District erred in finding that a proposal for settlement is subject to the requirements of rule 2.516.

In support of its conclusion, the Third District relied on two cases: the First District's decision in *Floyd*, 160 So. 3d 567, and the Fourth District's decision in *Matte*, 140 So. 3d 686. However, neither case addresses the issue of rule 2.516 as it relates to proposals for settlement. In *Floyd*, the First District considered whether a proposal for settlement had to contain "a certificate of service in the form required by rule 1.080." *Floyd*, 160 So. 3d at 569 (quoting Fla. R. Civ. P. 1.442(c)(2)(G)). Having addressed that specific issue, *Floyd* is inapplicable to the instant case because it did not consider the issue of whether rule 2.516 applied to service of a proposal for settlement. Likewise, in *Matte*, the court addressed a motion for sanctions sought pursuant to section 57.105, Florida Statutes (2013). *Matte*, 140 So. 3d at 687-88. In that case, the court overlooked the limitation contained in rule 2.516(a) and began its analysis by construing subdivision (b). In doing so, the court found that preliminary service of a motion for sanctions under section 57.105 must be accomplished by email. However, motions for sanctions are similar to proposals for settlement in that they are forbidden from being initially filed. *See* § 57.105(4), Fla. Stat. (2018). This, as noted by the Second District Court of Appeal, "constitutes a fatal flaw in that court's reasoning." *Boatright*, 218 So. 3d at 969; *see also Douglas v. Zachry Indus., Inc.*, No. 6:13cv1943Or140GJK, 2015 WL 6750803, at *3 (M.D. Fla. Nov. 5, 2015) ("It is

this Court's view that the *Matte* decision overlooked the limiting language—'filed in any court proceeding'—and reached an incorrect conclusion as a result.").

Moreover, even if this Court were to accept the Third District's interpretation, Petitioner's failure to comply with the email formatting requirements set forth in rule 2.516 would not render the proposal unenforceable. Respondent contends that when parties seek to obtain attorney's fees, "all t's must be crossed and i's dotted." *Campbell*, 959 So. 2d at 227 (Pariente, J., specially concurring). However, we recently held that a proposal for settlement that did not strictly comply with rule 1.442(c)(2)(F) was not invalid where the proposal "complied with the relevant requirements of the rule that implemented the substantive requirements of section 768.79." *Kuhajda*, 202 So. 3d at 396. In that case, we recognized that section 768.79 and rule 1.442 must be strictly construed but found that strict construction was required "in contexts in which the provisions of the rule implemented the substantive requirements of section 768.79." *Id.* at 395. Because we found that "the offers of judgment at issue in this case are not ambiguous," we "decline[d] to invalidate Kuhajda's offers of judgment solely for violating a requirement in rule 1.442 that section 768.79 does not require." *Id.* In doing so, we reasoned that "[t]he procedural rule should no more be allowed to trump the statute here than the tail should be allowed to wag the dog." *Id.* at 395-

96. Ultimately, we held "a procedural rule should not be strictly construed to defeat a statute it is designed to implement." *Id.* at 396

As applied to the instant case, even if we were to find that rule 2.516 applied to proposals for settlement, Petitioner's failure to comply with the rule would not render the proposal unenforceable because the proposal complied with the substantive requirements set forth by section 768.79. Petitioner's proposal was in writing, stated that it was made pursuant to the section, named the party making the offer and the party to whom it was made, stated the amount offered to settle, and the total amount as required by the statute. *See* § 768.79(2)(a)-(d). Moreover, the proposal stated that it would resolve all damages that would otherwise be awarded in a final judgment, stated the relevant conditions, and whether the proposal included attorney's fees as required by the additional provisions found in the rule implementing the section. Fla. R. Civ. P. 1.442(c)(2). The only deficiencies the trial court found in the proposal were related to requirements set forth by rule 2.516. However, pursuant to *Kuhajda*, that should not be enough to find that the proposal is unenforceable. Because the proposal complied with the substantive requirements set forth by the statute, the proposal is valid.

CONCLUSION

The plain language of section 768.79 and rule 1.442 do not require service by email. Moreover, because a proposal for settlement is a document that is

required to be served on the party to whom it is made, rule 2.516 does not apply. Accordingly, the Third District erred in affirming the trial court. Accordingly, we quash *Wheaton*, approve *Boatright*, *McCoy*, and *Oldcastle*, and remand for proceedings consistent with this decision.

It is so ordered.

PARIENTE, LEWIS, POLSTON, and LABARGA, JJ., concur.
CANADY, C.J., concurs in result with an opinion, in which LAWSON, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

CANADY, C.J., concurring in result.

I agree with the majority's conclusion that the "Petitioner's failure to comply with the email formatting requirements" of Florida Rule of Judicial Administration 2.516 is not a basis for determining the settlement proposal to be invalid. Majority op. at 17. But I disagree with the majority's holding that proposals for settlement are not subject to the email service requirement of rule 2.516. Majority op. at 15. So I would adopt the Third District's view of the interpretation of rule 2.516 but reject its conclusion that the settlement offer was invalid.

The adoption of rule 2.516 was the culmination of an effort to develop "a *comprehensive* proposal to implement e-mail service in Florida." *In re Amendments to Fla. Rules of Judicial Admin., Fla. Rules of Civil Procedure, Fla. Rules of Criminal Procedure, Fla. Prob. Rules, Fla. Rules of Traffic Court, Fla.*

Small Claims Rules, Fla. Rules of Juvenile Procedure, Fla. Rules of Appellate Procedure, Fla. Family Law Rules of Procedure—E-Mail Serv. Rule, 102 So. 3d 505, 506 (Fla. 2012) (emphasis added). In adopting rule 2.516, we acknowledged that it "was modeled after" the then-existing Florida Rule of Civil Procedure 1.080. *Id.* at 507. And we stated unequivocally that "new rule 2.516 provides that *all documents required or permitted to be served* on another party must be served by e-mail." *Id.* (emphasis added). Nothing in the history, context, or structure of the rule suggests that the unqualified reference in the text of subdivision (b) to "[*a*]*ll documents* required or permitted to be served" is intended to include only documents that are filed. Fla. R. Jud. Admin. 2.516(b)(1) (emphasis added).

Subdivision (a) of rule 2.516 contains general provisions concerning the requirements for service of pleadings and other documents that are "filed in any court proceeding." Fla. R. Jud. Admin. 2.516(a). The scope of subdivision (a) is thus limited to court filings. But that does not mean that the scope of subdivision (b) is similarly limited. Subdivision (a) simply does not address documents that are not filed. Subdivision (b), by its express terms, specifies how service must be made whenever "service is required or permitted to be made." Fla. R. Jud. Admin. 2.516(b). By its plain language, the scope of subdivision (b) necessarily extends beyond documents that are filed in court proceedings to include documents that are served but not filed.

The majority errs in relying on the reference in Florida Rule of Civil Procedure 1.442(c)(2)(G) to "a certificate of service in the form required by rule 1.080." Majority op. at 13. Since the adoption of rule 2.516 in 2012, rule 1.080 has not contained a form certificate of service. With the adoption of rule 2.516 the form certificate of service was moved to the new rule, where it is set forth in subdivision (f). So the reference on which the majority relies is an obsolete, erroneous reference to a superseded version of rule 1.080—a nonsensical reference that can only be treated as meaningless. It can certainly provide no guidance for interpreting the scope of rule 2.516(b), much less a basis for disregarding the plain language of that rule.

LAWSON, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Third District - Case No. 3D16-490

(Monroe County)

Maegan P. Luka, Philip J. Padovano, and Joseph T. Eagleton of Brannock & Humphries, Tampa, Florida; and Robert Stober of Hersoff, Lupino & Yagel, LLP, Tavernier, Florida,

for Petitioner

Dale R. Coburn, Gaelan P. Jones, and Matthew S. Francis of Vernis & Bowling of the Florida Keys, P.A., Islamorada, Florida,

for Respondent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

VIRGINIA CRARY,

Appellant,

v.

TRI-PAR ESTATES PARK AND RECREATION DISTRICT, an independent special taxing district,

Appellee.

Case No. 2D17-3540

Opinion filed January 4, 2019.

Appeal from the Circuit Court for Sarasota County; Frederick P. Mercurio, Judge.

Craig C. Crary of the Law Office of Craig C. Crary, P.A., Sarasota, for Appellant.

David L. Boyette and Jason T. Gaskill of Adams and Reese LLP, Sarasota, for Appellee.

SILBERMAN, Judge.

This appeal presents the legal question of whether Tri-Par Estates Park and Recreation District, an independent special taxing district, has the authority to enforce rules and regulations promulgated by its Board of Trustees governing the use of its facilities. We answer this question in the negative because Tri-Par's charter does not

provide for the enforcement of its rules and regulations and the Board lacked the authority to confer such power on itself. We therefore reverse the final summary judgment entered in Tri-Par's favor.

Tri-Par is an age fifty-five and older deed-restricted community of mobile homes with facilities or common areas including a pool, spa, clubhouse, recreation hall, exercise room, laundry room, and shuffleboard courts. Tri-Par is also an independent special taxing district that was incorporated into a park and recreation district in 1978 by special act. See Ch. 78-618, § 1, at 366, Laws of Fla. Tri-Par's charter was amended by the legislature in 2001 and is now codified in chapter 2001-343, Laws of Florida ("the Enabling Act").

Tri-Par conducts its business through its Board of Trustees, and the Enabling Act provides the Board powers that include the following:

> Section 15. The trustees shall supervise all real and personal property owned by the district, and shall have the following powers in addition to those already herein enumerated:
>
> . . . .
>
> (g) To promulgate reasonable rules and regulations governing the use of the facilities of the district.
> (h) To use district funds in the administration and enforcement of the deed restrictions as filed in the Sarasota County public records for properties within the district.

Ch. 2001-34, at 3533-34. The Enabling Act also contains the following provision regarding the Board's authority to adopt rules and regulations:

> Section 17. A record shall be kept of all meetings of the board of trustees and in such meetings a concurrence of a majority of said trustees shall be necessary to any affirmative action taken by the board. Said trustees may adopt such rules and regulations, not inconsistent with any

> portion of this act, as it may deem necessary or convenient in and about the transaction of its business and in carrying out the provisions of this act.

Id. at 3535 (emphasis added).

In 1999, Tri-Par recorded a Declaration of Covenants, Conditions and Restrictions ("Deed Restrictions") in Sarasota County. In 2006, Tri-Par recorded an amendment to the Deed Restrictions which conferred on the Board the following additional authority:

> 22. In addition to other powers and duties of the Board of Trustees in the administration and enforcement of the deed restrictions and the Rules and Regulations, the Board of Trustees or a committee designated by the Board of Trustees shall have all the powers and duties necessary and/or convenient for levying reasonable fines against property owners and their licensees, invitees or other occupant(s) of the mobile homes who fail to comply with any provision of the deed restrictions or properly promulgated rules of the community. . . .

(Emphasis added.) In 2015, the Board promulgated Rules and Regulations that, in Item 5.08, specifically provide the Board authority to revoke lot owners' access to the facilities or common areas for rules violations. Item 5.08 also provides those accused of rules violations the right to a hearing before a quorum of the Board or its Executive Committee.

In September 2016, Tri-Par filed a declaratory judgment action against lot owner Virginia Crary in which it asserted that Crary had repeatedly violated its Rules and Regulations and refused to recognize Tri-Par's enforcement authority. Tri-Par eventually obtained a final summary judgment providing, in pertinent part, that

> (iii) Tri-Par is entitled to enforce the provisions in the Deed Restrictions, the Enabling Act and the rules and regulations promulgated by the Board of Trustees;

> (iv) the enforcing authority of Tri-Par includes the right to suspend common area use rights; and
> (v) the enforcement authority of Tri-Par includes the authority to levy fines against lot owners and their licensees, invitees or other occupants of the mobile homes. . . .
> (vi) the rules promulgated by Tri-Par establish a due process procedure by which anyone subject to enforcement can have a hearing before representatives of the trustees.

Crary recognizes the Board's authority to promulgate its Rules and Regulations. However, Crary argues that the Board does not have the authority to enforce its Rules and Regulations because that power was not conferred by the legislature in the Enabling Act. Tri-Par argues the Enabling Act implicitly provides enforcement authority. Tri-Par alternatively argues that both the Rules and Regulations and the Deed Restrictions explicitly provide the Board enforcement authority. We conclude that the Enabling Act does not provide for the enforcement of Tri-Par's Rules and Regulations. We also conclude that the Board lacked the authority to confer such power on itself by enacting Rules and Regulations or amending its Deed Restrictions.

Because Tri-Par is a special taxing district created by the legislature, its powers are limited to those granted by the legislature. See Bd. of Comm'rs of Jupiter Inlet Dist. v. Thibadeau, 956 So. 2d 529, 532 (Fla. 4th DCA 2007). Moreover, article I, section 18, of the Florida Constitution precludes such an administrative agency from imposing a prison sentence or "any other penalty except as provided by law." See Op. Att'y Gen. Fla. 83-92 (1983) (quoting art. I, § 18, Fla. Const.). And the term "by law" means a legislative enactment and not an act by the district's governing authority. Art. I, § 18, Fla. Const.; see also Broward County v. La Rosa, 484 So. 2d 1374, 1376 n.3 (Fla. 4th DCA 1986), approved, 505 So. 2d 422 (Fla. 1987); Op. Att'y Gen. Fla. 83-92. The legislative enactment does not have to expressly confer authority on the administrative

agency; instead, "an agency has the power to take actions that are 'necessarily or reasonably incident to the powers expressly granted' in a statute." Robinson v. Dep't of Health, 89 So. 3d 1079, 1082 (Fla. 1st DCA 2012) (quoting Hall v. Career Serv. Comm'n, 478 So. 2d 1111, 1112 (Fla. 1st DCA 1985)).

The legislative enactment that grants Tri-Par's authority as a taxing district is the Enabling Act. And while the Enabling Act grants Tri-Par the power to promulgate rules and regulations, it does not provide Tri-Par the power to enforce the rules and regulations. Cf. § 418.22(8), Fla. Stat. (2016) (providing a recreation district created under section 418.20 the power "[t]o adopt and enforce rules for the use of the recreational facilities owned or operated by the district"). Since the Enabling Act has not made any provision for the enforcement of the Rules or Regulations, the Board does not have enforcement authority. See Op. Att'y Gen. Fla. 83-92.

The Enabling Act is analogous to the charter in opinion 83-92 which the Attorney General ("AG") construed as not providing a Park and Recreation District the authority to enforce its own rules and regulations. See id. In opinion 83-92, the district's board of trustees sought to use the city's police department and the county court to enforce the district's rules and regulations governing the use of its facilities. Id. In order to determine the extent of the board's authority to delegate enforcement of its rules and regulations, the AG looked to the board's charter.

The AG noted that the charter authorizes the board to promulgate rules and regulations regarding the use of its facilities but that it "makes no provision for enforcement, does not expressly authorize the district's governing board to enforce such rules, and does not prescribe any penalties for the violation of such rules and

regulations." Id. In the absence of any such provisions, the AG opined that article I, section 18, of the Florida Constitution, prohibits the board or any other governmental unit from imposing penalties for violations of its rules and regulations. Id.

Like the charter in opinion 83-92, the Enabling Act provides for the promulgation of Rules and Regulations but makes no provision for enforcement, does not expressly authorize the Board to enforce its Rules and Regulations, and does not prescribe any penalties for the violation of those Rules and Regulations. Thus Tri-Par is prohibited by article I, section 18 from imposing penalties for the violation of its Rules and Regulations.

Tri-Par argues that section 15(h) of the Enabling Act implicitly provides enforcement authority because it authorizes Tri-Par "[t]o use district funds in the administration and enforcement of the deed restrictions." However, section 15(h) provides for enforcement of Tri-Par's Deed Restrictions; it does not mention enforcement of Tri-Par's Rules and Regulations.

Tri-Par alternatively argues that the Rules and Regulations and Deed Restrictions explicitly provide the Board enforcement authority. However, the Rules and Regulations and Deed Restrictions were not promulgated by the legislature; they were promulgated by Tri-Par's Board. And Tri-Par, as an administrative agency whose powers are limited to that conferred by the legislature, does not have the authority to adopt Rules and Regulations or Deed Restrictions providing for the assessment of penalties. See Dep't of Envtl. Regulation v. Puckett Oil Co., Inc., 577 So. 2d 988, 991-92 (Fla. 1st DCA 1991) (holding that DOAH did not have the authority to adopt a rule setting a jurisdictional time limitation on the right of any agency to respond to a petition

for fees or costs); La Rosa, 484 So. 2d at 1377 (holding that Broward County lacked the authority to adopt an ordinance authorizing an administrative agency to issue cease and desist orders and assess penalties for illegal discrimination).

In conclusion, the Enabling Act does not provide for the enforcement of Tri-Par's Rules and Regulations, either explicitly or implicitly. Instead, the enforcement power provided by the Act is limited to the enforcement of Tri-Par's Deed Restrictions. While Tri-Par promulgated Rules and Regulations and amended its Deed Restrictions to provide it enforcement power, it did not have the authority to confer such power on itself. Accordingly, the trial court erred in determining that Tri-Par has the authority to enforce its Rules and Regulations and in setting forth the scope of that authority by looking outside of the Enabling Act. The final summary judgment is therefore reversed and remanded.

Reversed and remanded.

CASANUEVA and MORRIS, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed January 2, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-1859
Lower Tribunal No. 07-99-M

Rodney E. Shands, et al.,
Appellants,

vs.

City of Marathon, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Andrew M. Tobin, P.A., and Andrew M. Tobin (Tavernier), for appellants.

Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., and Michael T. Burke and Hudson C. Gill (Fort Lauderdale), for appellees.

Before LAGOA, C.J., and LOGUE, and SCALES, JJ.

LOGUE, J.

In this inverse condemnation case, Appellants, Rodney Shands, Robert Shands, Kathryn Edwards, and Thomas Shands (collectively "the Shands"), appeal a summary judgment entered in favor of the City of Marathon. We reverse.

FACTS

The Shands sued the City of Marathon for inverse condemnation alleging that zoning and environmental regulations deprived them of all or substantially all economic use of an island they owned within the boundaries of the City. This is the second time this case has come before us. We had previously reversed an order dismissing this case as barred by the statute of limitations. Shands v. City of Marathon, 999 So. 2d 718 (Fla. 3d DCA 2008). In that prior case, we described the facts as follows:

> Dr. R.E. Shands purchased the 7.9–acre Little Fat Deer Key in 1956, and seven acres of adjacent bay bottom in 1959, before any state land use policies existed. He died in 1963, and his wife inherited the property, now known as Shands Key. She conveyed title to their children, the appellants, in 1985. From the time it was purchased until 1986, Shands Key was within Monroe County jurisdiction and was zoned General Use.
>
> In 1986, Monroe County adopted the State Comprehensive Plan and development regulations that altered Shands Key's zoning status to Conservation Offshore Island (OS), and placed it in the Future Land Use category. When the City of Marathon incorporated in 1999, it adopted the 1986 Monroe County comprehensive land use plan, and Shands Key was within the City bounds. In 2005, the City adopted the City of Marathon

> Comprehensive Plan; the land use and zoning designations of Shands Key remained unchanged.
>
> In 2004, the Shands filed an application for a dock permit. The application was denied, referring to the City's prohibition on development in areas classified as high quality hammocks, or areas with known threatened or endangered species. The Shands then filed a Beneficial Use Determination (BUD) application as required by the City of Marathon Code of Ordinances, Article 18. The Special Master at the conclusion of the BUD hearing found that the Shands had reasonable economic investment-backed expectations that they could build a family residence on the Key, as planned in the late 1950s. The Special Master recommended that the City grant a building permit for a single family home exempt from the Rate Of Growth Ordinance (ROGO) requirements of 0.1 units per acre, or purchase the property for a mutually agreeable sum. After a public hearing, the Marathon City Council rejected the Special Master's recommendations and denied the Shands' BUD application.
>
> The Shands then brought suit against the City, claiming that the City's acts resulted in an as-applied regulatory taking of their property without just compensation, in violation of state and federal law.

Id. at 720–22 (footnotes omitted).

Based upon the agreement of the parties, the trial court stayed this case until a decision was reached in the Beyer v. City of Marathon, case no. 3D12-277, which was then pending before this court. Once this Court upheld a summary judgment for the City in Beyer v. City of Marathon, 197 So. 3d 563 (Fla. 3d DCA 2013), the City moved for summary judgment in this case. Finding the facts of Beyer "indistinguishable from the instant case," the trial court entered summary judgment for the City. The Shands timely appealed.

ANALYSIS

This Court reviews a trial court's ruling on a motion for summary judgment de novo. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Id.

Summary judgment "is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings." Florida Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006). Because summary judgment tests the sufficiency of the evidence to justify a trial, it "is proper only if, taking the evidence and inferences in the light most favorable to the non-moving party, and assuming the jury would resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law." Moradiellos v. Gerelco Traffic Controls, Inc., 176 So. 3d 329, 334–35 (Fla. 3d DCA 2015).

A court considering summary judgment must avoid two extremes. On one hand, a "party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict." Perez-Rios v. Graham Companies, 183 So. 3d 478, 479 (Fla. 3d DCA 2016) (quoting Martin Petroleum Corp. v. Amerada Hess Corp., 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000)). On the other hand, "a motion for summary judgment is not a trial by affidavit or deposition.

Summary judgment is not intended to weigh and resolve genuine issues of material fact, but only identify whether such issues exist. If there is disputed evidence on a material issue of fact, summary judgment must be denied and the issue submitted to the trier of fact." Perez–Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017).

The Shands argue the trial court improperly granted summary judgment for the City because the regulations at issue constituted a facial, categorical taking of their property. In the prior appeal of this matter, an earlier dismissal of this case based on the statute of limitations was reversed precisely because we characterized the Shands' claim as being "as applied" and not "facial." Shands, 999 So. 2d at 726 ("As this is not a claim for a facial taking, but an as applied taking, it follows that the statute of limitations did not begin to run until February 27, 2007, when the City of Marathon rejected with finality the Special Master's BUD recommendation and denied the Shands' BUD application."). The trial court therefore properly treated this case as an "as applied" challenge.

The Shands' main argument is that the summary judgment for the City is improper because the trial court erred by determining Beyer was factually on all fours with the instant case. We affirmed summary judgment in Beyer, because "under an 'as applied' takings analysis, the Beyers were not deprived of all economically beneficial use of the property." Beyer, 197 So. 3d at 566–67. This

was so because the "City assigned the Beyers sixteen points under its Residential Rate of Growth Ordinance, having a value of $150,000," and therefore "[t]he award of ROGO points, coupled with the current recreational uses allowed on the property, reasonably meets the Beyers' economic expectations under [the facts of that case]." Id.

While Beyer involved the same regulations in the same municipality, it did not involve the same property. "In an as-applied taking claim, the landowner challenges the specific impact of the regulation on a particular property." Shands, 999 So. 2d at 723. Unlike the record in Beyer, the record here, for example, contains no valuation of the ROGO points. Without a valuation of the ROGO points, it cannot be said, as the trial court did here, that the facts of Beyer are "indistinguishable from the instant case," and therefore it cannot be said that the City is entitled to a judgment as a matter of law. The valuation of the ROGO points and other facts of Beyer cannot mechanically be imported into this case both because a motion for summary judgment can only be granted based on the record in a particular case and, as mentioned above, an "as applied" takings challenge can only be resolved based upon the impact of the regulation on a particular parcel of property.

Reversed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

KIS GROUP, LLC, ALERION MANAGEMENT GROUP, LLC and,
RICARDO DEAVILA,
Petitioners,

v.

YVES MOQUIN,
Respondent.

No. 4D18-1435

[January 2, 2019]

Petition for writ of certiorari to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Donald W. Hafele, Judge; L.T. Case No. 502016CA011722XXXXMB.

Mary F. April, Peter M. Bernhardt and Courtney G. Tito of McDonald Hopkins LLC, West Palm Beach, for petitioners.

Daniel M. Samson of Samson Appellate Law, Miami, and Matthew S. Sarelson of Kaplan, Young & Moll-Parrón, Miami, for respondent.

DAMOORGIAN, J.

Petitioners KIS Group, LLC, Alerion Management Group, LLC and Ricardo DeAvila seek certiorari review of the trial court's order granting Respondent Yves Moquin's motion to amend his complaint to assert a claim for punitive damages. Because the court failed to follow the procedural requirements of section 768.72, Florida Statutes, we grant the petition.

Petitioner KIS is a company that was formed for the sole purpose of investing in KIOSK Information Systems, Inc., a company that designs and manufactures kiosk systems. Petitioner Alerion manages KIS and Petitioner DeAvila serves as a manager for Alerion. In 2010, Respondent purchased two membership units in KIS for $353,333.33. Five years later, Respondent contacted DeAvila and requested to redeem his investment in KIOSK. Before granting the request, DeAvila advised Respondent that KIOSK might be sold within the year. Respondent acknowledged the possibility of a sale but decided to nonetheless redeem his investment.

Several months after Respondent redeemed his investment, KIOSK sold for a substantial profit. Respondent thereafter sued Petitioners for, amongst other things, fraud in the inducement. The fraud claims were predicated on Respondent's belief that at the time he requested to redeem his investment, Petitioners knew that the sale of KIOSK was imminent and not merely a remote future possibility as represented by DeAvila. Respondent maintained that Petitioners intentionally withheld this information in order to fraudulently induce him to sell his units early. Petitioners moved for summary judgment and, following a hearing, the court granted partial summary judgment. The three separate fraud claims against Petitioners, however, survived.

Shortly thereafter, Respondent moved to amend his complaint to add a claim for punitive damages. At the ensuing hearing, Respondent argued that the court's previous denial of Petitioners' motion for summary judgment on the fraud claims was the functional equivalent of a determination by the court that there was a reasonable evidentiary basis for punitive damages. In support thereof, Respondent cited *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987) for the proposition that "proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages." Petitioners countered that regardless of the previous ruling on the motion for summary judgment, the court was required to conduct a section 768.72 evidentiary inquiry to determine whether there was evidence in the record which would provide a reasonable basis for recovery of punitive damages.

After hearing argument from both parties, the trial court made it abundantly clear that it did not believe Respondent established a reasonable evidentiary basis for punitive damages:

> [T]he ipso facto argument that you used, while it may or may not be viable under Florida law, despite the statutory requirement of proffer of evidence, under these particular facts, I'm hard-pressed to watch a jury or allow a jury to consider [punitive damages] at the same time they're considering the underlying claim.
>
> Because again, these facts are not the type of egregious facts, at least not from my perspective, that we usually see to justify a claim for punitive damages. . . . These facts are just not that compelling . . . .

Nonetheless, believing that it was constrained by the holding in *Ablanedo*, the court granted Respondent's motion to amend. The court also abated all financial discovery so that Petitioners could either seek review of the order or file a motion for summary judgment in order to test the adequacy of the punitive damages claim. This petition follows.

"Certiorari review is available to determine whether a trial court has complied with the procedural requirements of section 768.72, but not to review the sufficiency of the evidence." *Tilton v. Wrobel*, 198 So. 3d 909, 910 (Fla. 4th DCA 2016).

Section 768.72, Florida Statutes, provides in relevant part that: "In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." § 768.72(1), Fla. Stat. (2018). In other words, "[t]he statute requires the trial court to act as a gatekeeper and precludes a claim for punitive damages where there is no reasonable evidentiary basis for recovery." *Bistline v. Rogers*, 215 So. 3d 607, 611 (Fla. 4th DCA 2017). This is because punitive damages are reserved for truly culpable behavior and are intended to "express society's collective outrage." *Imperial Majesty Cruise Line, LLC v. Weitnauer Duty Free, Inc.*, 987 So. 2d 706, 708 (Fla. 4th DCA 2008) (quoting *Hosp. Corp. of Lake Worth v. Romaguera*, 511 So. 2d 559, 565 (Fla. 4th DCA 1986)).

In the present case, it is clear that the trial court did not follow the procedural requirements of section 768.72 in ruling on Respondent's motion to amend. Nonetheless, Respondent maintains that the court did not depart from the essential requirements of the law because it applied the correct law, namely *Ablanedo*. We disagree.

A careful reading of *Ablanedo* demonstrates that the case does not stand for the proposition that a trial court's denial of a motion for *summary judgment* on a fraud claim is the functional equivalent of a determination by the court that there is a reasonable evidentiary basis for punitive damages. *Ablanedo* involved a situation where the trial court allowed the jury to consider the issue of compensatory damages on a fraud claim at the close of evidence, but at the same time entered a *directed verdict* on the punitive damages claim. 511 So. 2d at 538. Accordingly, the court's holding that "proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages" was made in the specific context of the sufficiency of the evidence on a motion for directed verdict. *Id.* at 539; *see also Rappaport v. Jimmy Bryan Toyota of Fort Lauderdale, Inc.*, 522 So. 2d 1005, 1006

(Fla. 4th DCA 1988). That case did not involve, as here, the issue of whether a ruling by the trial court on a motion for summary judgment that a defendant has failed to establish that there are no material issues of fact regarding a fraud claim is the functional equivalent of a plaintiff establishing, for pleading purposes, a reasonable evidentiary basis for punitive damages. *See Ameriseal of N. E. Fla., Inc. v. Leiffer*, 738 So. 2d 993, 995 (Fla. 5th DCA 1999) (recognizing that "[a]lthough similar, summary judgments and directed verdicts are *not* identical").

Moreover, even if *Ablanedo* does stand for the proposition that a trial court's denial of a motion for summary judgment on a fraud claim is the functional equivalent of a determination by the court that there is a reasonable evidentiary basis for punitive damages, the enactment of section 768.72 undercuts the scope of that ruling. Unlike consideration of a motion for summary judgment which precludes the court from weighing the evidence or reaching conclusions therefrom, section 768.72 necessarily requires the court to weigh the evidence and act as a factfinder. It is axiomatic, then, that the analysis required for a motion for summary judgment cannot be substituted for the analysis required under the statute.

The First District's holding in *Noack v. Blue Cross & Blue Shield of Florida, Inc.*, 872 So. 2d 370 (Fla. 1st DCA 2004) is instructive. In that case, the petitioners sought mandamus relief to compel the trial court to grant their motion seeking leave to amend the complaint to assert a claim for punitive damages. *Id.* at 371. The petitioners maintained that the trial court's ruling was contrary to the law of the case as established in an earlier appeal wherein the appellate court reversed an order granting the respondents' motion for summary judgment on the petitioners' fraud claim. *Id.* In rejecting the petitioners' argument, the court held that:

> The conventional analysis utilized in resolving a summary judgment motion has no application in the context of a punitive damages determination under section 768.72. Whether the entitlement to plead a claim for punitive damages has been established must be determined under the procedure and standards set forth in the statute, and our finding in the earlier appeal that respondents failed to establish that there is no material issue of disputed fact concerning the fraud claim is not the equivalent of petitioners establishing a reasonable evidentiary basis for punitive damages.

Id. at 371–72 (internal citation omitted).

In support of its holding, the *Noack* court relied on the Fifth District's decision in *Potter v. S.A.K. Development Corp.*, 678 So. 2d 472 (Fla. 5th DCA 1996). In *Potter*, the court considered, and ultimately rejected, the argument that if a trial court has determined that there is a material issue of fact on a claim for fraud, then, *ipso facto*, the procedural requirements of section 768.72 have been satisfied:

> We cannot agree that a finding by the trial court that a defendant has failed to establish that there is no material issue of fact concerning whether he perpetrated a fraud is the equivalent of the plaintiff establishing a reasonable evidentiary basis for punitive damages.
>
> This case illustrates the sort of confusion that can result when the statutory procedure is not complied with. Before a defendant may be subjected to financial worth discovery and required to defend a punitive damage claim, the statute requires that the plaintiff provide the court with a reasonable evidentiary basis for punitive damages. This procedure needs to be followed exactly as required by statute, *using the standards set forth in the statute*.

Id. at 473 (emphasis added); *see also Hudson Hotels Corp. v. Seagate Beach Quarters, Inc.*, 696 So. 2d 867, 868 (Fla. 4th DCA 1997) (Gross, J., dissenting) (favorably citing *Potter* for the proposition that "[a] holding that a defendant has failed to establish the absence of any material fact on a plaintiff's tortious interference claim is not the equivalent of the plaintiff establishing a reasonable evidentiary basis for punitive damages").[1]

Accordingly, we grant the petition and quash the trial court's order granting the motion to amend to assert a claim for punitive damages.

Petition granted.

TAYLOR and LEVINE, JJ., concur.

* * *

[1] As the majority in *Hudson Hotels* denied the petition without explanation, that case is tantamount to a per curiam affirmance without written opinion and has no precedential value. *St. Fort v. Post, Buckley, Schuh & Jernigan*, 902 So. 2d 244, 248 (Fla. 4th DCA 2005) ("We reiterate that a per curiam affirmance without written opinion, even one with a written dissent, has no precedential value and should not be relied on for anything other than res judicata.").

Not final until disposition of timely filed motion for rehearing.