

No. _____

**In the
Supreme Court of the United States**

ALAN GRAYSON,

Petitioner,

v.

NO LABELS, INC. ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a diversity jurisdiction case, where award of attorney's fees was made under the Florida State "offer of judgment" procedure rule, in derogation of the Federal "offer of judgment" rule (Rule 68).

THE QUESTIONS PRESENTED ARE:

1. In a diversity jurisdiction case, did the lower court err in awarding attorney's fees under a Florida procedural rule regarding an offer of judgment, in contravention of the Federal offer of judgment rule?
2. Did the lower court fail to defer to controlling State Supreme Court precedent and certification (referral) in the construction of Florida's offer of judgment procedural rule?

PARTIES TO THE PROCEEDINGS

Petitioner

- Alan Grayson

Respondents

- No Labels, Inc.
- Progress Tomorrow, Inc.
- United Together, Inc.
- Nancy Jacobson
- Mark Penn
- “John Doe(s)”

CORPORATE DISCLOSURE STATEMENT

The petitioner is a natural person, not a corporate entity, so no corporate disclosure statement is required. Rule 29.6.

There are no other proceedings directly related to this case. Rule 14.1(b)(iii).

LIST OF PROCEEDINGS

Direct Proceedings below

U.S. Court of Appeals for the Eleventh Circuit
No. 24-10777

Alan Grayson, *Plaintiff-Appellant*, v.
No Labels, Inc., Progress Tomorrow, Inc., United
Together, Inc., Nancy Jacobson, Mark Penn, John
Does, *Defendants-Appellees*.

Final Opinion: January 15, 2025

Rehearing Denial: March 18, 2025

U.S. District Court Middle District of Florida
No. 6:20-cv-1824-PGB-LHP

Alan Grayson, *Plaintiff*, v. No Labels, Inc., Progress
Tomorrow, Inc., United Together, Inc., Nancy
Jacobson, Mark Penn, John Does, *Defendants*.

Final Judgment on Fees: March 12, 2024

Other Related Proceedings

The Complaint was filed in the Circuit Court of the Ninth Judicial District, in and for Orange County, Florida, Case No. 2020-CA-008342-O, *Alan Grayson v. No Labels, Inc. et al.* There was no judgment in that case, because it was removed to federal court.

The case was removed to the U.S. District Court, Middle District of Florida, Case No. 6:20-cv-1824-Orl-

40LRH, *Alan Grayson v. No Labels, Inc. et al.* The final opinion in favor of Defendants was entered on May 20, 2022. M.D. Fla. Docket Entry (“D.E.”) 159. The judgment was entered on May 23, 2022. M.D. Fla. D.E. 162.

Appeal from this final judgment was taken by the Plaintiff to the U.S. Court of Appeals for the Eleventh Circuit, Case No. 22-11740, *Alan Grayson v. No Labels, Inc. et al.* An opinion was entered, affirming the District Court’s dismissal, in favor of the Defendants/Appellees on October 21, 2022. 11th Cir. D.E. 28, Plaintiff’s Petition for Rehearing and Reconsideration was denied on December 14, 2022. 11th Cir. D.E. 31. A petition for certiorari to the U.S. Supreme Court, No. 22-906, seeking review of the judgment on the merits was denied on May 22, 2023.

This instant petition is distinct and pertains only to the awarding of attorney’s fees.

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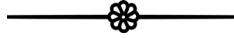
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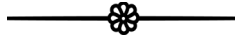
OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated January 15, 2025, is included at App.1a. The final judgment of the U.S. District Court Middle District of Florida, dated March 12, 2024, is included at App.13a. These opinions and orders were not designated for publication.



JURISDICTION

The U.S. Court of Appeals for the Eleventh Circuit Denied Petition for Rehearing on March 18, 2025., is included at App.105a. This Court has jurisdiction under 28 U.S.C. § 1254(1).



STATEMENT OF THE CASE

The Petitioner petitions for certiorari because the lower court decision violates the basic tenets of law applicable to diversity cases, and it transgresses numerous decisions of this Court starting with *Erie v. Tompkins*. The lower court's decision gives rise to a "federal common law" that *Erie* and its progeny have gone to great lengths to preclude.

First, as to whether offers of judgment are "substantive" or "procedural" under *Erie*, the lower court's decision not only violates controlling U.S. Supreme Court precedent (notably the *Shady Grove* case), but it also establishes a clearcut conflict of authority now between the Eleventh Circuit and other Circuits. Fed. R. Civ. P. 68 preempts the State rule of procedure on offers of judgment. Second, if offers of judgment were substantive and not procedural, none of the seven determinations of State Law in the lower court decision comports with the standard of deference to State Law required by *Erie v. Tompkins*, including the duty (under both federal law and Florida Law) to certify (refer) State Law questions to the Florida Supreme Court. This petition is exceptionally important due to the lower court's clash with the core Constitutional value of Federalism.

This is a diversity case centered on the proper application and construction of Florida's "offer of judgment" statute and civil procedure rule, Fla. Stat. 768.69 (the "Florida Statute"), and Fla. R. Civ. P. 1.442 (the "Florida Rule"), as opposed to the Federal Rule on offers of judgment, Fed. R. Civ. P. 68. The lower court wrongly applied the Florida Rule rather than the Fed-

eral Rule, even though the Florida Supreme Court has designated the Florida Rule as procedural rather than substantive, and the Florida Rule expressly does not apply in Federal Court.

Furthermore, if offers of judgment were substantive rather than procedural, then contrary to *Erie*, the lower court decision:

- Disregards indistinguishable controlling legal authority issued by the Florida Supreme Court (and, in two cases, decisions issued by the Florida Supreme Court at the request of the same lower court);
- Impermissibly defers to Florida lower court decisions in lieu of definitive Florida Supreme Court decisions;
- Fails to refer dispositive questions of Florida law to the Florida Supreme Court in the manner mandated by the Florida Constitution; and
- Without such referral guidance from the Florida Supreme Court, ignores the plain meaning of both the Statute and the Rule on dispositive issues.

Therefore, certiorari should be granted, and the decision of the lower court reversed and the attorney's fee award (based solely on the federal court's misconstruction of the state offer of judgment rule) vacated.



REASONS FOR GRANTING THE PETITION

I. The Legal Imperatives Regarding the Construction of Florida Law in a Federal Court Diversity Action.

The central principle at issue in this petition is that “federal courts sitting in diversity cases . . . are to apply state substantive law and federal procedural law.” *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). In this case, federal procedural law on offers of judgment, *i.e.*, Federal Rule of Civil Procedure 68, does not authorize the award of any attorney’s fees. The lower court erroneously applied the state procedural law on offers of judgment, Fla. R. Civ. P. 1.442, to award attorney’s fees.¹ The lower court’s decision therefore dispensed with the indispensable rule set forth by this Court in *Hanna v. Plumer*.

When state substantive law applies, then in *Erie v. Tompkins*, 304 U.S. 64 (1938), the U.S. Supreme Court held:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

¹ In contravention of the “American Rule,” which prohibits such “fee shifting.”

Id. at 78. Note that the proper sources of the “law of the State” are State statutes and the State’s “*highest court*.” *Id.* (emphasis added).² Therefore, *if* the State rule of procedure on offers of judgment, rather than the federal rule of procedure, governed in this case, then the “law to be applied” would be the law as “declared by its Legislature in a statute or by its highest court in a decision.” The lower court decision here violates this rule.

To effectuate this standard, the Florida Constitution mandates certification of “questions” to the Florida Supreme Court that:

are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of [Florida].

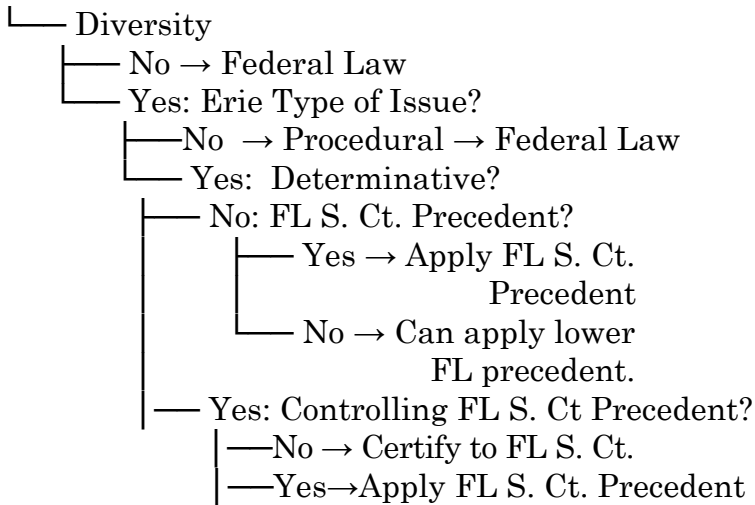
Fla. Stat. 25.031; Fla. Const. art. V, § 3(b)(6); *see also* Fla. R. App. P. 9.150. As the Eleventh Circuit has held, “we leave all aspects of the state law issues in the Florida Supreme Court’s hands.” *Essex Ins. Co. v. Zota*, 466 F.3d 981, 990 (11th Cir. 2006). The Eleventh Circuit itself has held that it certifies questions to the Florida Supreme Court whenever it is “unable to find definitive answers in clearly established Florida law . . . to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law.” *Horowitch v. Diamond Aircraft Industries, Inc.*, 645 F.3d 1254, 1256 (11th Cir. 2011); *accord Southeast Floating Docks v. Auto-Owners*, 82 So.3d 73 (2012) (referring other questions on Fla. Stat. 768.79 to the Florida Supreme Court). “[T]he final

² Note also that in this case, the Florida Supreme Court promulgated the State Rule, Fla. R. Civ. P. 1.442, giving that rule its imprimatur *as a procedural rule*.

arbiter of Florida law [is] the Florida Supreme Court.” *NBIS Construction v. Liebherr-America, Inc.*, No. 22-14104, slip op. (11th Cir. Feb. 29, 2024). Therefore, *if* the State rule of procedure on offers of judgment, rather than the federal rule of procedure, governed in this case, then all “determinative questions” with “no clear controlling precedents” of the Supreme Court of Florida would have to be certified to the Supreme Court of Florida. The lower court decision here violates this rule.

These legal imperatives are illustrated in this chart:

Federal Jurisdiction



II. The Lower Court Erred in Awarding Attorney's Fees Under a Florida Procedural Rule Regarding an Offer of Judgment, in Contravention of the Federal Offer of Judgment Rule.

The core question in this petition is whether an offer of judgment-under Fla. Stat. 768.79 and Florida Rule of Civil Procedure 1.442, as well as offers of judgment under Federal Rule of Civil Procedure 68-are procedural rather than substantive. As long as offers of judgment are *procedural*, then Fla. Stat. 768.79 simply doesn't apply to this case at all, and there is no basis for the award of attorney's fees.

Notably, when the Florida Supreme Court adopted the Florida Rule at issue in this case, *i.e.*, Fla. R. Civ. P. 1.442, it expressly held that offer of judgment rules are procedural, not substantive. *In re Amends to Fla. Rules of Civ. Proc*, 682 So.2d 105, 106 (Fla.1996). This was necessary because the Florida Supreme Court has "rule" authority only to promulgate procedural rules, not substantive law.

Moreover, the U.S. Supreme Court made it clear, specifically, that the Federal Rules of Civil Procedure preempt state statutes on the same subjects. *Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 U.S. 393 (2010). Specifically, in *Shady Grove*, there was a New York state statute prohibiting the recovery of any "penalty" in a class action. The U.S. Supreme Court ruled that Rule 23 occupies this field and negates state statutes on the subject, *Erie* notwithstanding. In fact, "the *Erie* rule has never been invoked to void a Federal Rule [of Civil Procedure]", including Fed. R. Civ. P. 68. *Hanna v. Plumer*, 380 U.S. 460, 470

(1965).³ “It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.” *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996). Therefore, *Shady Grove* is controlling here, and Respondents’ entire premise is untenable.

Other Circuits have held that offers of judgment are procedural, and therefore Rule 68 governs diversity cases, rather than any state procedural rule. *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, 60 F.3d 305 (7th Cir.), *cert. denied*, 516 U.S. 1010 (1995) (per Posner, J.); *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995). What this Court has held in *Hanna v. Plumer* as to Rule 4, and in *Shady Grove* as to Rule 23, applies with equal force to Rule 68 – as the Seventh and Ninth Circuits already have held. The Eleventh Circuit’s decision not only transgresses against *Hanna v. Plumer*, but it also creates a conflict among the Circuits that only the U.S. Supreme Court can resolve. Granting this petition is necessary to bring the Eleventh Circuit into alignment with Justice Scalia’s cogent and compelling opinion in *Shady Grove*, and to resolve the clear conflict that has arisen between the Eleventh Circuit and the other Circuits on this issue.

³ Indeed, *Hanna* itself held that New York State’s law on service of process cannot be invoked to void (or supersede) Fed. R. Civ. P. 4.

III. The Lower Court Failed to Defer to Controlling State Supreme Court Precedent in Construction of the Florida Rule.

If one were to assume, *arguendo*, that the offer of judgment procedural rules were somehow not procedural, but rather substantive, then the lower court's decision would be violently contrary to *Erie v. Tompkins*, as well as basic rules of Federalism. As noted, this is a diversity jurisdiction case removed to federal court under 28 U.S.C. §§ 1332(a)(1)&1441. M.D.Fla.D.E.1. The initial Complaint had five state law claims and no federal law claims, three of which expressly sought injunctive relief. *Id.* After various motions, the final amended Complaint had three state law claims (all tort claims seeking injunctive relief), and no federal law or contract claims. M.D.Fla.D.E.16, 28-30, 34-36.⁴ At that point, the lower court ruled that: "it is difficult to imagine more clear, positive, and specific allegations of civil conspiracy than those set forth in [Petitioner's] Amended Complaint." M.D.Fla.D.E.34 at 14-15.

On May 25, 2021, while holding back all discovery responses, the Respondents issued offers of judgment to the Petitioner, each offering to settle the case for

⁴ The Petitioner's pleading seeking injunctive relief was repeated in the Civil Cover Sheet, pretrial filings, the earlier merits appeal. Petitioner didn't seek a preliminary injunction only because Respondents' counsel conceded that none was needed. The Respondents repeatedly admitted that Petitioner had pled injunctive relief in their Motion to Dismiss, their Answer, and the prior appeal on the merits. M.D.Fla.D.E.16 at 6; M.D.Fla.D.E.36 at 11; Defendants' Opening Brief, No. 22-11740, at 31 (11th Cir. filed Aug. 17, 2022).

\$500. M.D.Fla.D.E.165-1.⁵ Although the matter was in federal court, the offers putatively were made under Fla. Stat. 768.79 (*i.e.*, the Florida Statute), rather than Fed. R. Civ. P. 68 (the “Federal Rule”), where there was no entitlement to fees. Petitioner did not accept these offers.

As discovery concluded, the Respondents filed motions for summary judgment. M.D.Fla.D.E.94&95. Shortly before the trial was to begin, the lower court granted one of these motions. M.D.Fla.D.E.159. The sole ground for summary judgment was that Petitioner had failed to establish that the Respondents *knew* that they were lying about him. *Id.*

The Respondents sought, and failed, to obtain Rule 11 sanctions against the Petitioner. M.D.Fla.D.E.134 at 8-9.

Petitioner appealed from the lower court’s judgment against his claims, and that appeal was unsuccessful.

After that appeal, Respondents renewed their request for attorney’s fees under the State Statute. *See* M.D.Fla.D.E.184&211. The lower court did rule

⁵ These *nominal* offers of judgment of \$500 were made: (i) before any discovery received; (ii) with the Respondents withholding all discovery (for which they later were sanctioned); (iii) after the Respondents’ strenuous efforts to dismiss the case had failed; (iv) with the Respondents facing the prospect of spending millions of dollars in attorney’s fees and costs whether they won or lost. [Subsequent discovery put Petitioner’s damages at more than \$17 million. M.D.Fla.D.E. 89-1,110&111 Ex. A.] One of the Respondents expressly informed the Petitioner that the point of this offer-of-judgment ploy was to try to intimidate the Petitioner into dropping the case through the threat of foisting enormous attorney’s fees on the Petitioner to destroy him, financially. *See* M.D.Fla.D.E.27.

that the Respondents' fee petition was vastly inflated, reducing it from \$1.4 million to \$740,710. *Id.* Nevertheless, the lower court assessed this \$740,710 "penalty" for Petitioner not accepting the Respondents' performative and phony \$500 offers of judgment. The lower court did not, however, properly ascertain or apply Florida law regarding the Florida Statute or the Florida Rule.

Both the Florida Supreme Court and the relevant federal appellate decisions establish unequivocally that *every aspect* of the Florida Statute and the Florida Rule must be strictly construed, and every offer of judgment must strictly comply with them, "because those provisions are in derogation of the common law rule that a party is responsible for its own attorney's fees, and because they are penal in nature." *Diamond Aircraft Industries, Inc. v. Horowitz*, 107 So.3d 362, 372 (Fla.2013) ("*Diamond*"); *accord Kuhajda v. Borden Dairy Co.*, 202 So.3d 391, 394 (Fla.2016); *Audiffred v. Arnold*, 161 So.3d 1274, 1279 (Fla.2015); *Att'ys Title Ins. Fund, Inc., v. Gorka*, 36 So.3d 646 (Fla.2010); *Campbell v. Goldman*, 959 So.2d 223, 227 (Fla.2007); *Lamb v. Matetzschk*, 906 So.2d 1038, 1040 (Fla.2005); *Willis Shaw v. Hilyer Sod Inc.*, 849 So.2d 276 (Fla. 2003); *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606, 615 (Fla.1995). "[B]ecause an award under the offer of judgment statute serves as a penalty, the strict construction rule must be applied in favor of the one against whom the penalty is imposed," and the statute must never be "extended by construction." *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210, 223 (Fla.2003).

Up to this point, the Eleventh Circuit has concurred—as it must, under *Erie. Five For Entertainment SA v. El Cartel Records, Inc.*, No. 17-11491 (11th Cir.

Feb. 14, 2018); *Primo v. State Farm*, slip op. No. 15-14612, slip op. (11th Cir. Sept. 29, 2016); *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1281 (11th Cir.2010).

The proceedings below raised five distinct issues regarding the construction of the Florida Statute and the Florida Rule, and two more issues regarding the strict evidentiary rules that Florida Law applies to every fee petition like this one. These are all *Erie* issues of Florida Law, but the lower court failed to follow the *Erie*/Federalism legal imperatives for *any* of them.

(1) Injunctive Relief Sought. The Florida Statute is specifically limited to civil actions “for damages” exclusively. Fla. Stat. 768.79(1). In a prior diversity case *regarding this same Florida Statute*, the Eleventh Circuit referred *this exact question* to the Florida Supreme Court, for determination of Florida law. The Florida Supreme Court held that any Complaint that “seeks” injunctive relief is not subject to any attorney’s fees under Section 768.79, even if that request is “seriously lacking in merit.” *Diamond, supra, answers implemented, Horowitch v. Diamond Aircraft Industries, Inc.*, No. 10-12931, slip op. (11th Cir. Mar. 8, 2013).⁶

when a plaintiff seeks both monetary and nonmonetary relief, and a party makes a general offer of settlement, section 768.79 is not applicable. . . . [S]ection 768.79 does not apply to an action in which a plaintiff seeks

⁶ In *Diamond*, injunctive relief was not available for the claim that the plaintiff asserted. The Court nevertheless held that attorney’s fees were barred by Section 768.79 itself, simply because injunctive relief had been pled.

both damages and equitable relief . . . [W]e reject a possible exception under section 768.79 for equitable claims that lack serious merit We hold that section 768.79 does not apply to an action for both damages and equitable relief and no exception for a meritless equitable claim exists.

Id. at 373-76. The Florida Supreme Court was as unequivocal and emphatic on this point as anyone possibly could be—and, in fact, the Eleventh Circuit has respected this Florida Supreme Court holding, until now. *B&D Nutritional Ingredients, Inc. v. Unique Bio Ingredients, LLC*, Court of Appeals, No. 19-15081, slip op. (11th Cir. Apr. 6, 2021); *Highland Hlds., Inc. v. Mid-Continent Cas. Co.*, No. 17-14455 (11th Cir. Mar. 12, 2018); *Davenport v. Thor Motor Coach, Inc.*, No. 16-10925, slip op. (11th Cir. Oct. 4, 2016). The about-face by the Eleventh Circuit in this case not only disregards the holding of the Florida Supreme Court in *Diamond*, but also directly contradicts four holdings of the Eleventh Circuit *on the exact same issue*.

Instead of adhering to this *uber*-authority forbidding Florida offers of judgment whenever the Plaintiff pleads injunctive relief, as required by *Erie*, the Eleventh Circuit in this case has attempted to substitute an amorphous different standard, *i.e.*, the “true relief” in the Complaint. Eleventh Circuit Decision at 7. The Eleventh Circuit cites only to a defunct Florida *lower court* decision on this legal issue. *Id.* Under the express terms of *Erie*, however, a lower state court decision cannot be deployed to thwart the holding of the “highest court” in the State.

This Eleventh Circuit violation of the explicit holding of the Florida Supreme Court on a controlling

issue of Florida law is the first example of the lower court's *Erie* violation, if offers of judgment were substantive and not procedural.

(2) Action “In the Courts of This State”. As the first words of the Florida Statute provide, Florida Rule offers of judgment are limited to usage “in the courts of this state,” meaning in state courts, not federal courts. Under the Florida Constitution, the State Legislature and the State Courts steer clear of Federal Court, except to provide an avenue for the Florida Supreme Court to answer questions about Florida law. *See, e.g.,* Fla. Const. art. V, § 2(a).

There is no indication here that the Florida Legislature and the Florida Supreme Court even contemplated that Fla. Stat. 768.79 and Fla. R. Civ. P. 1.442 would substitute for Fed. R. Civ. P. 68 in federal court. Their use of the limiting phrase “in the Courts of this State” strongly indicates to the contrary. In fact, this phrase is a nod to the principle that offers of judgment are procedural, not substantive, and the federal courts have their own rule on them. In fact, there are numerous Florida statutes that limit the term “courts of this state” and the like to State Courts *only*, not Federal Courts. *See, e.g.,* Fla. Stat. 16.01(5), 92.06, 280.02, 768.043, 768.74, 943.0585 & 943.059.

The lower court's disregard of the limiting term “in the courts of this state” in the Florida Statute, and its failure to ascertain the controlling judgment of the Florida Supreme Court on its meaning, is the second example of the lower court's *Erie* violation, if offers of judgment were substantive and not procedural. On its own terms, the statute *cannot* be employed in federal court, but if the question were debatable, then the

question would have to be referred to the Florida Supreme Court to be answered.

(3) Tort Claims. Due to an amendment of the Florida Statute, there is a question of whether the Florida Statute applies to non-contract claims (like the ones here) at all. Since its original enactment, the Florida Statute was amended to add the highlighted limiting language:

the defendant shall be entitled to recover reasonable costs and attorney’s fees **incurred by her or him or on the defendant’s behalf pursuant to a policy of liability insurance or other contract . . .**

Fla. Stat. 768.79(1) (emphasis added). This presently is the only Florida statute providing for attorney fee-shifting under a contract.

There are no attorney’s fees or costs in this case “incurred . . . pursuant to . . . contract.” The Petitioner cited four Florida State Court decisions to the lower court *applying this statute* within this limitation, as well as nearly a dozen statutes from other states with the same limitation on fee-shifting (*i.e.*, the limitation to contract claims). The lower court ignored all this and made an “*Erie* guess,” rather than referring the question to the Florida Supreme Court (as Florida law requires).

The lower court’s judicial deletion of the term “incurred . . . pursuant to . . . contract” from the Florida Statute is the third example of the lower court’s *Erie* violation, if offers of judgment were substantive and not procedural. If this were so, the Florida Statute would be conclusive, and under *Erie*, there would be no “recover[y of] reasonable costs and attorney’s fees”

unless they are “incurred . . . pursuant to a policy of liability insurance or other contract.” If this issue were unclear, however, then the only proper course under *Erie* and Florida law would be to certify the question to the Florida Supreme Court for an answer. The lower court failed to do this.

(4) Offer Form Requirements-Stating Terms with Particularity and That the Proposal “Resolves All Damages That Would Otherwise Be Awarded in a Final Judgment”. The Florida Statute and the Florida Rule both expressly require that: “An offer [of judgment] must: (c) State with particularity the amount offered to settle a claim for punitive damages.” Fla. Stat. 768.79(2); *accord* Fla. R. Civ. P. 1.442(c)(2)(E). The Respondents’ offers of judgment didn’t state this at all, much less with particularity. M.D.Fla.D.E.165-1.

Fla. R. Civ. P. 1.442(c)(2)(B) also requires: “**(c) Form and Content of Proposal for Settlement.** . . . (2) A proposal shall . . . (B) state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action” (Emphasis in original.) Here again, the offers of judgment in this case simply didn’t state this. M.D.Fla.D.E.165-1. What they did state, instead, is a general release— language almost identical to the language that the Florida Supreme Court held void (*i.e.*, voiding the offers of judgment) in *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1079 (Fla.2006). The Eleventh Circuit also expressly has held that this specific error negates the offers of judgment. *Five For Entertainment SA, supra*.

State Farm qualifies as clear, controlling precedent of the Florida Supreme Court, and under *Erie*, it must be obeyed. The lower court did not. This is the fourth

example of the lower court's *Erie* violation, if offers of judgment were substantive and not procedural.

(5) Offers Not Made “In Good Faith”. The Florida Statute and the Florida Rule both establish a special requirement relating to the “good faith” of Florida offers of judgment, and the “reasonableness” of the attorneys’ fees requested. If an offer is not made “in good faith,” then it is disallowed. Fla. Stat. 768.79(7); *Pickett v. R.J. Reynolds Tobacco Co.*, No. 13-13212, 564 F.App’x 981 (11th Cir. 2014) (\$10,000 offer not in good faith).

In judging “good faith,” the Florida Supreme Court has held that the award of attorney’s fees under this Florida statute is “a sanction against a party who *unreasonably* rejects a settlement offer.” *Koppel v. Ochoa*, 243 So.3d 886, 889 (2018); *Att’ys Title Ins. Fund, Inc. v. Gorka*, 36 So.3d 646, 649 (Fla. 2010); *Campbell v. Goldman*, 959 So.2d 223, 227 (Fla. 2007) (emphasis added). There is nothing in the record indicating that the Petitioner’s rejection of the offers here was “unreasonable” (and the lower court’s decision fails to apply this Florida Supreme Court standard.)

Furthermore, both the Florida Statute and the Florida Rule require reduction in the amount of fees awarded in accordance with: (a) the “then” apparent merit of the claim, meaning the apparent merit of the claim when the offer is made; (b) the number and nature of offers made by the parties (*i.e.*, \$500, once); (c) “Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer” (answer: certainly, which is why the Respondents were sanctioned); and (d) “The amount of the additional delay

cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged” (which, according to the Respondents, was more than \$1 million, an amount in no way reflected by their \$500 offers).

Under the Florida Statute and the Florida Rule, these are *mandatory* bases for reduction of the award, and yet there was no reduction by the lower court. The failure to eliminate or reduce the award (as well as the refusal to refer this question to Florida Supreme Court), is the fifth *Erie* violation by the lower court, if offers of judgment were substantive and not procedural.

(6) Adherence to Florida Rules Requiring Substantial Competent Evidence of Reasonableness: No Hearing, No Discovery, No Expert Testimony, No Locality Evidence, No Proof of Retainer, Liability or Actual Payment. Florida law requires that attorney fee petitions be supported by “substantial competent evidence” of fee reasonableness, including all of the items enumerated above. It treats the evidentiary requirements for attorney’s fees as no different from any other contested fact.

For instance, it was already “well-settled” four decades ago that “the testimony of an expert witness concerning a reasonable attorney’s fee is necessary to support the establishment of the fee.” *Crittenden Orange Blossom Fruit v. Stone*, 514 So.2d 351, 352-53 (Fla.1987). A reasonable fee can be established only by an evidentiary hearing. *Florida Patient’s Compensation Fund v. Rowe*, 472 So.2d 1145, 1152 (Fla.1985). Typical is *Arce v. Wackenhut Corp.*, 146 So.3d 1236, 1241 (Fla.3rd DCA 2014), which required “retaining experts, taking depositions, engaging in

other discovery, and preparation for the amount hearing.” *Arce*, 146 So.3d at 1241 n.6.

The Respondents offered no evidence remotely resembling this. *Cf.* M.D.Fla.D.E.200-1 (*Petitioner’s* admissible evidence that Respondents’ attorney’s fees were unreasonable).⁷ The lower court instead relied upon its sense of fee reasonableness, which was never disclosed to the parties, or subject to any briefing.⁸

If an award of attorney’s fees is to be made under State Law, then per *Erie*, that needs to be established under State Law. The absence of any adherence to State Law regarding proof of attorney’s fees is the sixth *Erie* violation here, if offers of judgment were substantive and not procedural.

(7) Adherence to Florida’s “One Attorney Rule” and Pleading Requirement. There are two other respects in which the fee award here does not comport with the *Erie* requirement to apply Florida Law to substantive, not procedural, issues. First, Florida law allows fee-shifting for only one attorney before trial. In other words, “[w]hile the parties have the right to employ as many lawyers as they choose, the Court will not assess lawyer fees for or against any party for more than one lawyer” *Rathmann v. Rathmann*, 721 So.2d 1218, 1220 (Fla.5th DCA 1998). In this case, the Respondents hired ten attorneys, from two different law firms (who claimed hourly rates as high as \$1700).

⁷ The Respondents did not even comply with the applicable federal local rule, Local Rule 7.01(c)(4)(F).

⁸ The lower court did not have oral argument, much less a hearing, on any issue in this case.

The Respondents also breached Florida Law by failing to plead a claim for attorney's fees. Under Florida Law, a request for attorney's fees must be *pled*, or it is barred by lack of notice. *Green v. Sun Harbor Homeowners' Ass'n*, 730 So.2d 1261 (Fla.1998); *Stockman v. Downs*, 573 So.2d 835 (Fla.1991). In this case, there was only a passing reference to attorney's fees, at the end of the Respondents' Answer.

Petitioner sought certification of these questions of law to the Florida Supreme Court, and it was improper for the lower court to deny that request. The breach of the "one-attorney rule" and the pleading requirement, without referral to the Florida Supreme Court, is the lower court's seventh *Erie* violation, if offers of judgment were substantive and not procedural.

By deciding all seven issue of construction of the State Rule and the State Statute without any deference to the decisions of the Florida Supreme Court, *even on the exact same issue*, and making no certification (referral) to the Florida Supreme Court even though this is required by the Florida Constitution and Florida statutes, the Eleventh Circuit has "bollixed up" the fundamental rules of Federalism within its jurisdiction.



CONCLUSION

For the reasons stated above, this petition for certiorari should be granted, and after full briefing, the lower court decision reversed, and the award of attorney's fees vacated.

Respectfully submitted,

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