

No. 24-1294

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

BRIEF IN OPPOSITION

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September 18, 2025



QUESTIONS PRESENTED

The Petitioner, former Congressman Alan Grayson, sued Respondents, alleging that their political speech opposing his 2018 campaign for Congress was defamatory and injured him by influencing voters in his district to vote against him, costing him the election. The District Court granted summary judgment in favor of Respondents and held “there is not even a scintilla of evidence showing—much less clear and convincing proof of—actual malice.” *Grayson v. No Labels, Inc.*, No. 6:20-cv-1824-PGB-LHP, 2022 WL 1701853, at *8 (M.D. Fla. May 20, 2022). A unanimous panel of the Eleventh Circuit affirmed in an unpublished per curiam opinion, finding “Grayson submitted no evidence from which a jury might plausibly infer that the defendants” knowingly or recklessly made false statements about Grayson. *Grayson v. No Labels, Inc.*, No. 22-11740, 2022 WL 12144181, at *3 (11th Cir. Oct. 21, 2022). This Court denied Grayson’s petition for certiorari. *Grayson v. No Labels, Inc.*, __ U.S. __, 143 S.Ct. 2514 (2023).

During the litigation, each of the Respondents served a Proposal for Settlement / Offer of Judgment upon Grayson pursuant to Section 768.79, Florida Statutes. Grayson did not accept any of them.

The three questions presented are:

1. Did Grayson fail to preserve for review the issue of the applicability of the Federal offer of judgment rule, when that issue was never briefed before the District Court and was only referenced, in passing, in Grayson’s reply brief in the Eleventh Circuit?

2. Did the lower courts err in determining that Respondents are entitled to an award of prevailing party attorneys' fees pursuant to offers of judgment they served pursuant to Section 768.79, Florida Statutes upon Grayson, which Grayson failed to accept, in a case in which Respondents prevailed on their motions for final summary judgment?
3. Did the lower courts abuse their discretion in determining the amount of prevailing party attorneys' fees to be awarded to Respondents based upon the aforementioned grant of entitlement?

RULE 29.6 STATEMENT

Respondents No Labels, Inc., Progress Tomorrow, Inc., and United Together, Inc., are nongovernmental corporations. They do not have parent corporations. No publicly traded corporation owns 10% or more of any of their stock.

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STATEMENT OF THE CASE

This is the second time that Respondent Alan Grayson has asked this Court to relieve him of the consequences of his decision to over-litigate a meritless defamation case. This Court denied Grayson's prior petition for writ of *certiorari* in Case No. 22-906 (*Grayson v. No Labels, Inc.*, __ U.S. __, 143 S.Ct. 2514 (2023)), in which Grayson sought to reverse summary judgment orders against him on his claims, after those orders were affirmed by a unanimous panel of the Eleventh Circuit in *Grayson v. No Labels, Inc.*, No. 22-11740, 2022 WL 12144181, at *3 (11th Cir. Oct. 21, 2022).

Now, Grayson again requests that this Court reverse the well-reasoned orders of the Magistrate Judge and the District Court Judge in the Middle District of Florida and the Eleventh Circuit, all of which determined that Respondents were entitled to an award of prevailing party attorneys' fees pursuant to unaccepted Offers of Judgment / Proposals for Settlement they served upon Grayson, and which determined the amount of fees to be awarded to Respondents pursuant to that determination of entitlement.

This case arises from Grayson's loss during a Democratic Party Primary Election held on August 28, 2018 for a seat in the United States House of Representatives for Florida's 9th Congressional District, in which Darren Soto defeated him for that seat. Rather than accept that defeat graciously, Grayson instead filed suit against Respondents, initially in State Court which was thereafter removed to the United States District Court for the Middle District of Florida on October 2,

2020, and accused Respondents of taking actions that purportedly caused him to lose that election and tarnish his reputation.

Specifically, in his Second Amended Complaint filed on April 21, 2021, Grayson alleged that Respondents published or caused to be published campaign mailers that included: a) information derived from a December 18, 2015 report by the Office of Congressional Ethics regarding Grayson, among other things, improperly allowing his name to be used by four entities connected to a hedge fund, including entities in the Cayman Islands; and b) allegations of abuse against him made by his ex-wife, Lolita Carson-Grayson. Grayson alleged that these statements were defamatory or defamatory by implication causing him damage, and also alleged that the Respondents conspired to publish those allegedly defamatory statements.

Respondents denied Grayson's claims since the beginning of this action. Indeed, Respondents United Together, No Labels, Nancy Jacobson, and Mark Penn denied any involvement in the publication of any statements about Grayson. They also contended, together with Progress Tomorrow, that any statements published were true or substantially true and did not cause Grayson any harm. Importantly, Respondents denied that those purported statements about Grayson, a public figure, were published with the requisite malice to support a defamation claim.

On May 25, 2021, each of the Respondents served an Offer of Judgment / Proposal for Settlement upon

Grayson pursuant to Section 768.79, Florida Statutes, which Grayson did not accept.

After almost two years of litigation, which was extensively and unnecessarily protracted by Grayson, the District Court on May 20, 2022 granted Respondents' motions for summary judgment on all claims against them. *See* Order [District Court D.E. 159]. Contrary to what Grayson alleges on page 10 of his Petition in this proceeding, the District Court did not grant summary judgment because he purportedly "failed to establish that the Respondents *knew* that they were lying about him." (emphasis in original). Rather, after providing a well-reasoned analysis of the issues raised in the summary judgment moving papers, the District Court granted Respondents' motions for summary judgment in their entirety and held that, "even viewing the record in the light most favorable to Grayson, there is not even a scintilla of evidence showing – much less clear and convincing proof of – actual malice." Order at 17 (emphasis added) [District Court D.E. 159]. Judgment was entered in favor of the Respondents and against Grayson on May 23, 2022. *See* Judgment in Civil Case [District Court D.E. 162].

Grayson then took an unmeritorious appeal to the Eleventh Circuit of the summary judgment final order, which was affirmed *per curiam* by a unanimous panel. Grayson thereafter sought review of the Eleventh Circuit's opinion via petition for *certiorari* to this Court, which this Court denied on May 22, 2023. *See Grayson v. No Labels, Inc.*, __ U.S. __, 143 S.Ct. 2514 (2023).

While Grayson's first appeal was pending, Respondents moved for and obtained an order on entitlement to

their prevailing party attorneys' fees pursuant to the unaccepted offers of judgment they had served upon Grayson in the underlying litigation. Respondents also moved for appellate attorneys' fees.

Respondents filed a supplemental motion for attorneys' fees below following the ruling on entitlement and supported their fee petition with bios, billing records, and detailed briefing. Magistrate Judge Leslie Hoffman Price issued a detailed 79 page Report and Recommendation on amount of fees on January 4, 2024 and recommended that Respondents be awarded \$740,710.00 in prevailing party attorneys' fees. *See* Pet. App.30a–104a. District Court Judge Paul G. Byron thereafter issued a 13-page Order adopting the Report and Recommendation on amount. Pet.App.16a–28a. The Eleventh Circuit unanimously affirmed the award of attorneys' fees in favor of Respondents in a *per curiam* opinion dated January 15, 2025. Pet.App.1a–12a.

Grayson now seeks, for a second time in this litigation, a writ of *certiorari* from this Court on the basis of a newly minted argument that was never adequately addressed or briefed by him below – *i.e.*, that the proposals for settlement / offers of judgment served upon him under Florida law were allegedly preempted by Federal Rule of Civil Procedure 68 and therefore such offers of judgment are not substantive but procedural (Pet. 2). This argument was not preserved for review.

Grayson also seeks, assuming offers of judgment are substantive, review of Respondents' entitlement to prevailing party attorneys' fees pursuant to the offers of

judgment that Grayson did not accept, and also challenges the amount of fees that were awarded to Respondents.

With respect to entitlement, neither the District Court nor the Eleventh Circuit erred in finding entitlement to Respondents' motions for attorneys' fees for at least four (4) reasons.

First, simply because Grayson at some point included a throw away allegation of injunctive relief in his pleadings below – relief he never even sought by way of a motion for a preliminary or permanent injunction – does not insulate him from the consequences of an unaccepted offer of judgment under Section 768.79, Florida Statutes. While Grayson argues that this case is determined by *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013), it is not, because that case and its reasoning is distinguishable from the instant case. *Diamond Aircraft* did hold that Section 768.79 is inapplicable to claims for equitable relief, even where those claims lack merit. However, courts applying the statute recognize that there is a fundamental difference between a claim lacking serious merit that seeks cognizable relief, and a claim that seeks relief which is not even cognizable. Simply put, an equitable claim that is not cognizable will not displace Section 768.79, Florida Statutes, and therefore, Grayson's claims for injunctive relief do not render Florida's Offer of Judgment Statute inapplicable in this case.

Second, the offers of judgment served upon Grayson in this case are not procedurally defective, because they do indeed comply with all requirements of Florida Rule of Civil Procedure 1.442. The offers included all terms and were not unenforceable because they were vague.

Third, simply because the offers of judgment in this case were \$500 each for each Respondent does not mean they were not made in good faith. A nominal offer is not necessarily determinative of a lack of good faith. Here, exposure was low because four of the five Respondents did not even publish any purportedly defamatory statements. Further, Grayson's case was meritless – so meritless in fact that the District Court held that Grayson failed to establish even a scintilla of evidence, much less clear and convincing proof, of actual malice.

Fourth, Grayson's miscellaneous other arguments regarding entitlement are similarly flawed or without merit.

Finally, the lower court did not abuse its discretion in determining the amount of prevailing party attorneys' fees to be awarded to Respondents pursuant to their offers of judgment. The Magistrate Judge issued a painstakingly detailed 79-page Report and Recommendation on amount of fees (Pet.App.29a–104a), which was adopted by the District Court Judge in his 13-page Order (Pet. App.16a–28a), and which was affirmed in all respects by the Eleventh Circuit (Pet.App.1a–12a). Respondents did not recover all the fees they sought, but agree with the determinations made by the lower court as to the amount of reasonable fees to be awarded. The District Court's determination of the amount of fees is well reasoned and does not constitute an abuse of discretion.

Grayson's Petition for Writ of *Certiorari* should be denied in all respects.

REASONS TO DENY THE PETITION

I. GRAYSON FAILED TO PRESERVE THE ISSUE OF WHETHER FEDERAL RULE OF CIVIL PROCEDURE 68 PREEMPTS THE FLORIDA OFFER OF JUDGMENT STATUTE BECAUSE THAT ISSUE WAS INADEQUATELY BRIEFED BELOW.

Grayson's leadoff argument appearing on pages 4-8 of his petition should be rejected because it was not properly made or preserved below. Specifically, at no point did Grayson ever argue before the District Court that Respondents' motions for prevailing party attorneys should be denied because Federal Rule of Civil Procedure 68 allegedly preempts the Florida offer of judgment statute (Section 768.79, Florida Statutes) in a diversity action. And the first time that such an issue was suggested below, in cursory fashion no less, was on the 29th page of Grayson's reply brief in his (second) appeal to the Eleventh Circuit and the first time Grayson even cited to Rule 68 was on page 25 of that reply brief. (*see* 11th Circuit D.E. 47).

Raising an issue for the first time in a reply brief is too little too late and "does not preserve the issue for appellate review." *Toth v. Secretary, Fla. Dept. of Corrections*, 778 Fed. Appx. 624, 625 (11th Cir. June 13, 2019) (holding that issue which was plainly and prominently raised for the first time only in a reply brief was not preserved and could not be considered on appeal); *see also Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 895, 108 S.Ct. 2218, 2223 (1988) (holding that argument raised for the first time in a reply brief in the circuit court "will not be considered here."). And passing references to issues are insufficient to

preserve them for review. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (“A party fails to adequately ‘brief’ a claim when he does not ‘plainly and prominently’ raise it ‘for instance by devoting a discrete section of his argument to those claims.’”).

Regardless, even if he had preserved the issue (which he did not), the Florida offer of judgment rule is indeed substantive and not procedural, as even Grayson tacitly admits by devoting the lion’s share of his petition to arguing how the lower courts purportedly did not defer to state supreme court precedent on the substantive issue of the availability of attorneys’ fees in this case awarded under Florida’s offer of judgment statute. Indeed, if any party has ignored Florida supreme court precedent, it is Grayson and not Respondents, because Florida’s highest court has unequivocally held that Fla. Stat. § 768.79 “is substantive for both constitutional and conflict of law purposes” and further held that “the [Florida] Legislature created a substantive right to attorney’s fees in section 768.79.” *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 80 (Fla. 2012); *see also Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1258 (11th Cir. 2011) (“[W]e conclude that the offer of judgment statute is substantive as a matter of this Court’s precedent.”).

This Court should reject Grayson’s invitation to pass upon an issue related to the applicability of whether a rule of federal procedure somehow preempts Florida’s substantive law on the availability of attorneys’ fees pursuant to the Florida offer of judgment statute because Grayson failed to preserve that issue below through inadequate briefing.

II. THE LOWER COURTS DID NOT FAIL TO DEFER TO FLORIDA'S SUPREME COURT PRECEDENT AND CORRECTLY DETERMINED RESPONDENTS' ENTITLEMENT TO PREVAILING PARTY ATTORNEYS' FEES.

None of the issues Grayson argues in the remainder of his petition on pages 9-18 on the issue of entitlement are meritorious and those issues were already addressed and debunked by the lower courts. Those issues are: a) attorneys' fees are purportedly not available pursuant to Florida's offer of judgment statute (Section 768.79, Florida Statutes) where injunctive relief is allegedly sought (Pet.12-14); b) Respondents' offers of judgment allegedly did not comply with the Florida Rule of Civil Procedure 1.442 (Pet.16-17); c) the offers were purportedly not made in "good faith" even though his defamation claims lacked a "scintilla of evidence" to establish actual malice as required by the elements of his defamation claims in this case (Pet.17-18); and d) other miscellaneous reasons (Pet. 14-15). Grayson's arguments are without merit as the lower courts correctly determined entitlement to prevailing party attorneys' fees for the reasons that follow.

A. Grayson's Claims for Injunctive Relief Do Not Render Florida's Offer of Judgment Statute Inapplicable.

Grayson's primary argument as to the purported lack of entitlement to fees is that the offer of judgment statute, Section 768.79, Florida Statutes, does not apply to this case, because Section 768.79 allegedly applies only to actions for damages, which he can circumvent by simply tacking on a throw-away request for "injunctive relief"

after each claim and then not even pursue such relief in litigation.

The lower courts correctly rejected Grayson’s argument on entitlement by holding that the true relief Grayson sought in this case, even if he had prevailed, was monetary damages (Pet.App.3a, 6a-7a). Indeed, adding a claim for equitable relief is “not always dispositive.” *B&D Nut. Ingredients, Inc. v. Unique Bioingredients, LLC*, 855 F. App’x 503, 507 (11th Cir. 2021).

Grayson’s reliance upon *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013) cited on page 11 of his petition, is misplaced as that case and its reasoning is distinguishable from the instant case. *Diamond Aircraft* did hold that Section 768.79 is inapplicable to claims for equitable relief, even where those claims lack merit. But courts applying the statute recognize that “[t]here is a fundamental difference between a claim lacking serious merit that seeks cognizable relief, and a claim that seeks relief which is not even cognizable.” *Berman v. Kafka*, No. 3:13-cv-1109-J-JBT, 2015 WL 12940184, at *3 (M.D. Fla. July 10, 2015). An equitable claim that is not cognizable will not displace Section 768.79. *See, e.g., Acheron Portfolio Trust v. Mukamal*, 2022 WL 5205699, at *5 n.4 (S.D. Fla. July 29, 2022); *Steaminn Hub Inc. v. Gayle*, 2019 WL 8275138, at *2 (S.D. Fla. Apr. 12, 2019); *Berman*, 2015 WL 12940184, at *3.

Grayson’s equitable claims are not cognizable for four reasons.

First, Grayson’s claims for injunctive relief were inadequately pled because he did not allege any imminent

harm. *See, e.g., Wreal LLC v. Amazon.com Inc.*, 840 F.3d 1244, 1248–49 (11th Cir. 2016) (injunctive relief is an “extraordinary and drastic remedy” that requires a showing of imminent harm). To the contrary, Grayson alleged that Respondents’ actions were intended to harm his 2018 campaign and their conduct ended with his electoral defeat years ago. Thus, Grayson rendered his injunctive relief claims non-cognizable by failing to allege any actual or threatened conduct had occurred in years and by failing to allege that Respondents have motive to campaign against him now.

Second, Grayson never filed a motion seeking injunctive relief, focusing instead on his claim for damages. The Eleventh Circuit rejected this sort of “glancing gesture toward injunctive relief” in a complaint as inadequate when it was never pursued by filing a motion for injunctive relief. *Illuminate Media, Inc. v. CAIR Florida, Inc.*, 2022 WL 4589357, at *3 (11th Cir. Sept. 23, 2022) (“[Plaintiff] cannot dodge responsibility for its own choice to continue litigation by pointing to a single throwaway line in its complaint. To hold otherwise would defeat the entire purpose of the Florida statute—any party could upend the law by inserting a single sentence into its pleadings.”).

Third, Grayson sought to enjoin defamation and defamation by implication (and conspiracy to do so), but Florida courts provide a damages remedy for such offenses—not injunctive relief. This prohibition against enjoining defamation has endured for centuries. *See, e.g., Francis v. Flynn*, 118 U.S. 385, 389 (1886); *Respublica v. Oswald*, 1 U.S. 319, 324–25 (Pa. 1788); Erwin Chemerinsky, *Injunctions In Defamation Cases*, 57 Syracuse L. Rev.

157, 167 (2007); *see also eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (injunctive relief generally unavailable if damages remedy exists). This has long been the law in Florida. *See, e.g., Moore v. City Dry Cleaner & Laundry*, 41 So. 2d 865, 873 (Fla. 1949) (“[A] court of equity will not enjoin the commission of a threatened libel or slander; for the imposition of judicial restraints in such a case would clearly amount to prior censorship, a basic evil denounced by both the Federal and State constitutions. An action at law will ordinarily provide a full, adequate and complete remedy in such cases. . . .”); *Reyes v. Middleton*, 17 So. 937, 939 (Fla. 1895) (“It seems to be well settled that a court of equity will never lend its aid, by injunction, to restrain the libeling or slandering . . . , but that in such cases the remedy, if any, is at law”). Not surprisingly, Florida courts have rejected as a “frivolous claim” an action to enjoin defamation because “[i]t is a ‘well established rule that equity will not enjoin either an actual or a threatened defamation.’” *Demby v. English*, 667 So. 2d 350, 355 (Fla. Dist. Ct. App. 1995) (quoting *United Sanitation Servs., Inc. v. City of Tampa*, 302 So. 2d 435, 439 (Fla. Dist. Ct. App. 1974)).

Fourth, enjoining defamation is prohibited by the First Amendment as a prior restraint, especially in this context which seeks to enjoin campaign-related speech concerning a public figure. The leading case on the prohibition against prior restraints remains *Near v. Minnesota*, which explained:

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the

malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional rights. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.

283 U.S. 697, 718–19 (1931). Such “prior restraints are ‘the most serious and the least tolerable infringement on First Amendment rights.’ When a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases.” *Metropolitan Opera Ass’n, Inc. v. Local 100. Hotel Employees and Rest. Employees Int’l Union*, 239 F.3d 172, 176 (2d Cir. 2001) (quoting *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976)). Thus, “never in the 216-year history of the First Amendment has the Supreme Court found it necessary to uphold a prior restraint in a defamation case or any other.” Chemerinsky, *supra*, at 173. Grayson never had a chance of overturning this long line of cases.

B. The Offers of Judgment Are Not Procedurally Defective Because Respondents Complied With Florida Rule of Civil Procedure 1.442.

Grayson’s next challenge is that the offers of judgment were procedurally defective because they did not allegedly comply with the requirements of Florida Rule of Civil Procedure 1.442, but that argument is similarly baseless.

His perceived grievances are that the offers of judgment purportedly: a) do not state whether they resolve all claims for damages that would otherwise be awarded in a final judgment; and b) do not state with particularity the amount proposed to settle punitive damages. (Pet. 16).

Grayson's first argument is baffling because each offer of judgment does indeed contain the language that Grayson alleges is lacking. (Pet.App. 7a).

As for punitive damages, this is a non-issue because Grayson did not actually plead a claim for punitive damages in the second amended complaint, as he only pled the reservation of his right to seek punitive damages. *See Tower Hill Signature Ins. Co. v. Kushch*, 335 So. 3d 743, 751 (Fla. Dist. Ct. App. 2022) (Fla. R. Civ. P. 1.442(c) (2)(E) only "applies to actual pending claims for punitive damages").

Finally, Grayson's argument that the offers of judgment are purportedly void because they contain general release language (Pet. 16) is without merit. Grayson's reliance on *Five for Entertainment SA v. El Cartel Records, Inc.*, 725 Fed. Appx. 793 (11th Cir. Feb. 14, 2018) for this proposition is misplaced as that case does not stand for the proposition for which it is cited. The *Five for Entertainment* case does not hold that broad general release language in an offer of judgment makes the offer unenforceable, but rather, under the circumstances of that case, the offer was ambiguous because of differing language in the offer itself and the general release attached to the offer. "However, a release that contains broad, expansive language, is not per se, invalid." *Ambeca, Inc. v. Marina Cove Village Townhome Ass'n, Inc.*, 880

So. 2d 811, 812 (Fla. Dist. Ct. App. 2004) (holding offer of judgment containing a general release was enforceable); *see also M&M Sisters, LLC v. Scottsdale Ins. Co.*, No. 21-24081-civ-Moreno/Goodman, 2022 WL 18717403, at *16 (S.D. Fla. Dec. 19, 2022), *adopted* 2023 WL 2017104, at *1 (S.D. Fla. Feb. 15, 2023), (“Both federal and state courts in Florida have enforced offers of judgment which are conditioned upon the execution of a general release.”).

The offers of judgment are not procedurally defective and comply with the requirements of Florida Rule of Civil Procedure 1.442.

C. The Offers of Judgment Were Made in Good Faith.

The lower courts correctly held that Grayson failed to carry his burden of establishing that the offers were not made in good faith. If an offer satisfies the requirements of Section 768.79(1)-(6), Florida Statutes, “the sole basis on which a court can disallow an entitlement to an award of fees is if it determines that [the] offer was not made in good faith.” *McMahan v. Toto*, 311 F.3d 1077, 1083 (11th Cir. 2002); *see also Bostick v. State Farm Mut. Auto. Ins.*, No. 8:16-cv-1400-T-33AAS, 2018 WL 1276884, at *1 (M.D. Fla. Jan. 30, 2018), *adopted* 2018 WL 1251259, at *1 (M.D. Fla. Mar. 9, 2018) (same); Fla. Stat. § 768.79(7)(a).

Grayson argues on pages 17 and 18 of his petition that the offers were purportedly not made in good faith because they were only \$500 each. The burden of proof on the issue of good faith is on Grayson, not the Respondents, because “the burden is upon the offeree to prove that the offeror acted without good faith.” *McMahan*, 311 F.3d at 1083.

Given that Grayson was a public figure (indeed, a public official) at the time the alleged defamatory statements were made, and, as the District Court found in its final order that the alleged statements were sourced to reputable prior publications (including a congressional report), the offer of a nominal amount of \$500 per each Respondent was reasonable and not evidence of a lack of good faith. “A nominal offer is not necessarily determinative of lack of good faith.” *Internutritivo v. Black & Decker U.S., Inc.*, No. 01-15180-civ-Martinez-Klein, 2005 WL 8155562, at *3 (S.D. Fla. June 21, 2005) (holding that single offer of judgment in the nominal amount of \$1,000.00 was enough to meet the good faith standard); *see also State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So. 2d 874, 876 (Fla. Dist. Ct. App. 1997) (holding that insurer was entitled to its attorneys’ fees under Section 768.79, Florida Statutes where it made a \$1.00 offer to its insured, believing it had no liability and should not be part of the litigation).

In *McMahan v. Toto*, for example, the Eleventh Circuit held that a \$100.00 nominal offer satisfied Section 768.79(7)(a)’s good faith requirement. Nominal offers “can be valid if the offerors have ‘a reasonable basis at the time of the offer to conclude that their exposure was nominal.’” *McMahan*, 311 F.3d at 1083. Respondents’ respective \$500 offers, each, set forth in the offers of judgment were made in good faith, as potential exposure was indeed nominal.

The proof of such nominal exposure lies in the fact that final summary judgment was granted in Respondents’ favor and that decision was affirmed on appeal. *Grayson v. No Labels, Inc.*, No. 22-11740, 2022 WL 12144181 (11th Cir. Oct. 21, 2022). Four of the five Respondents did not even publish the allegedly defamatory statements

at issue in this case. Further, Grayson knew, or should have known, that as a public figure he would have to prove that the allegedly defamatory statements against him were required to be made with actual malice (a very high standard), and there was simply no evidence on this point to even get his claim to trial. Grayson ignores these facts and does not address them. *See Grayson*, 2022 WL 12144181, at *2 (“Grayson submitted no evidence from which a jury might plausibly infer that the defendants distributed statements ‘with knowledge that [the statements] were false or with reckless disregard of whether [they were] false or not.’”).

D. Grayson’s Miscellaneous “Other” Arguments Are Flawed.

Grayson’s remaining arguments on entitlement are meritless. In his first miscellaneous argument, Grayson challenges whether the offer of judgment statute, Fla. Stat. § 768.79 applies in cases removed to federal court or are only limited to “the courts of this state,” which Grayson assumes to be only state and not federal courts (Pet. 14-15). As demonstrated above, the Florida offer of judgment statute is substantive and not procedural and does indeed apply in diversity cases. *See Southeast Floating Docks*, 82 So. 3d at 80 (holding that offer of judgment statute is substantive and reaffirming that “the Legislature created a substantive right to attorney’s fees in section 768.79.”); *Horowitch*, 645 F.3d at 1258.

In his second miscellaneous argument, Grayson ignores basic grammar and claims that Respondents’ offers are allegedly defective because there is no “policy of liability insurance or other contract.” Pet. 15-16. But

Section 768.79, Florida Statutes allows defendants to seek attorneys' fees they incurred personally "*or*" fees incurred on "defendant's behalf" under such a contract. Respondents sought fees on their own behalf and Grayson's attempt to misread the statute is unavailing.¹

III. THE LOWER COURTS DID NOT ABUSE THEIR DISCRETION IN DETERMINING THE AMOUNT OF PREVAILING PARTY ATTORNEYS' FEES TO BE AWARDED TO RESPONDENTS PURSUANT TO THE OFFERS OF JUDGMENT.

Finally, Grayson's remaining arguments regarding evidentiary support for the attorneys' fees awarded, including the purported requirement that fees may only be awarded for "one attorney," (Pet. 18-19) are baseless.

The Magistrate Judge issued a painstakingly detailed 79-page Report and Recommendation on amount of fees (Pet.App.29a–104a), which was adopted by District Court Judge Byron in his 13-page Order (Pet.App. 16a–28a), which was affirmed by the Eleventh Circuit (Pet.App.1a–

1. Grayson also alleges that Respondents allegedly "breached Florida Law by failing to plead a claim for attorney's fees," but then admits that Respondents included attorneys' fees in their responsive pleading in the District Court. (Pet. 20). Such notice is all that is required to satisfy the requirement under *Stockman v. Downs*, 573 So.2d 835, 837 (Fla. 1991) that claims for attorneys' fees be pled. *See also Medicomp, Inc. v. United Healthcare Ins. Co.*, No. 6:12-cv-100-Orl-22DAB, 2013 WL 541391, at *1 (M.D. Fla. Aug. 23, 2013), *adopted*, 2013 WL 5740097 (M.D. Fla. Oct. 22, 2013) (failure to plead entitlement to fees in answer did not preclude later motion for fees (citing *Capital Asset Research Corp. v. Finnegan*, 216 F.3d 1268, 1270 (11th Cir. 2000))).

12a). These analyses by five judges in two courts are correct and they did not abuse their discretion in determining and reviewing the amount of reasonable attorneys' fees to be awarded to the Respondents following years of scorched earth litigation initiated and perpetuated by Grayson. Grayson's grievances regarding the amount of fees he is now required to pay as a consequence of his stubborn refusal to accept the offers of judgment in this case should be disregarded as they are without merit, for at least three (3) reasons.

First, Grayson's position that the amount of fees awarded is erroneous because Respondents purportedly failed to carry their burden of proof in establishing the amount of attorneys' fees sought is belied by the over 90 pages of supporting documents, including affidavits, attorney bios, and billing entries, attached to the supplemental fee motions.

In cases, such as this one, where a claim for attorneys' fees is based upon state law claims and is raised in a diversity case, federal courts apply the substantive law of the state in making its determination, here the forum State of Florida. *Trans Coastal Roofing Co. v. David Boland, Inc.*, 309 F.3d 758, 760 (11th Cir. 2002). "Florida has adopted the federal lodestar approach to the calculation of a reasonable attorneys' fee. The lodestar is calculated by multiplying the number of hours reasonably expended on the matter by the reasonable hourly rate for the services provided by counsel for the prevailing party." *Signature Pharmacy, Inc. v. Soares*, No. 6:08-cv-1853-Orl-31TBS, 2012 WL 6652828, at *3 (M.D. Fla. Dec. 21, 2012).

Although the Magistrate Judge did not agree that Respondents should be awarded all that they asked for, Respondents agree that the Magistrate judge fairly determined a reasonable number of hours from the evidence presented in support of the fee motions and determined a reasonable hourly rate as well. The District Court also considered the factors enumerated in the offer of judgment statute, Section 768.79(7)(b), Florida Statutes (Pet.App.95a – 102a), which states that “the court shall consider, along with all other relevant criteria, the following additional factors” in determining the reasonable amount of an attorneys’ fee award: (1) the then apparent merit or lack of merit in the claim; (2) the number and nature of offers made by the parties; (3) the closeness of questions of fact and law at issue; (4) whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer; (5) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and (6) 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. (emphasis added).

Grayson overlitigated this case during its pendency and was the cause of much avoidable work in this case. As correctly held, “[Grayson]’s rejection of the offers of judgment (which the Court has determined were made in good faith) resulted in another 18 months of litigation – including appeals – and another several months of litigation on the fees entitlement issue.” (Pet.App.101a). Such scorched earth litigation has consequences, especially when the non-prevailing party’s case was

meritless. Grayson could have stopped the attorneys' fees on both sides if he had simply accepted the Respondents' offers of judgment when they were made on May 25, 2021. He did not. He pressed forward, accepting the risk that by protracting this meritless litigation, he would be driving up Respondents' attorneys' fees and that he may be held financially responsible for those fees.

Second, Grayson's argument that a judge in determining a reasonable hourly rate cannot take judicial notice of reasonable hourly rates from within the Middle District of Florida and cannot consider his or her own knowledge and experience concerning fees (Pet. 18) is meritless and contrary to well established precedent. "The court, either trial or appellate, is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees . . ." *Norman v. Housing Auth. of the City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). "In making this computation, the court is not tethered to the parties' submissions. Instead, because the court is itself an expert on the question of reasonable hourly rates, it may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Vigil v. Primaso, Inc.*, No. 8:18-cv-1710-T-60CPT, 2020 WL 1976979, at *6 (M.D. Fla. March 12, 2020).

The Magistrate Judge devoted 18 pages of the Report and Recommendation on amount (Pet.App.40a–57a) to providing a detailed analysis of reasonable hourly rates, and that analysis is not erroneous.

Third, Grayson’s remaining arguments to the amount of attorneys’ fees determined to be awarded based on such issues as having more than one lawyer defend this action on behalf of 5 defendants and other miscellaneous objections should be rejected. To begin with, “the computation of a fee award is necessarily an exercise of judgment, because ‘[t]here is no precise rule or formula for making these determinations.’” *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1305 (11th Cir. 2001) (quoting *Hensley v Eckerhart*, 461 U.S. 424, 436 (1983)).

The Magistrate Judge devoted over half of the 79 pages of the Report and Recommendation on amount (Pet.App.57a – 102a) to a detailed and careful analysis of Respondents’ billing entries and accounted for the issues Grayson raised below by deducting time from them in determining a final amount of reasonable hours expended in defending a case that Grayson chose to overlitigate. Moreover, many of Grayson’s objections to the amount of the fees sought did not even appear in Grayson’s opposition brief below prior to the issuance of the Report and Recommendation on amount, but were included in an exhibit, which the District Court correctly held Grayson may not use as an attempt to evade page limits (Pet. App.63a).

CONCLUSION

Litigation has consequences. Grayson should not now be heard to complain about having to pay Respondents the attorneys’ fees they incurred in defending against his unmeritorious claims in an action which Grayson should never have filed in the first place. Grayson could have accepted Respondents’ Offers of Judgment (Proposals

for Settlement) and avoided any potential exposure to having to pay prevailing party attorneys' fees (and could have avoided needlessly prolonging this action as well). But he failed to do so. And that failure has consequences.

For the reasons stated above, Grayson's petition for writ of *certiorari* should be denied in all respects.

Respectfully submitted,

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September 18, 2025