IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
APPELLATE DIVISION (CIVIL): AY
CASE NOs.: 502016AP900225CAXXMB; 502016AP900251CAXXMB
L.T. No.: 502015SC009382XXXXSB

CENTRAL PALM BEACH
PHYSICIANS & URGENT
CARE, INC. d/b/a TOTAL MD
(a/a/o ALLAN OCAMPO),
Appellant/Cross-Appellee,

v.

PROGRESSIVE SELECT
INSURANCE COMPANY,
Appellee/Cross-Appellant.
_____/

Opinion filed: FEB 20 2020

Appeal from the County Court in and for Palm Beach County,
Judge Paul A. Damico

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PER CURIAM.

Central Palm Beach Physicians & Urgent Care, Inc. ("Central") appeals a final judgment of no liability entered in favor of Progressive Select Insurance Company ("Progressive") in Central's Personal Injury Protection ("PIP") benefits lawsuit against Progressive. Progressive cross-appeals the court's denial of its motion for attorney's fees based on a rejected proposal for settlement. We **AFFIRM** the lower court's final judgment without further comment, but, for the

reasons set forth below, **REVERSE** the lower court's denial of Progressive's motion for attorney's fees and **REMAND** for the trial court to award Progressive attorney's fees.

This case began when Central sued Progressive for its alleged failure to pay the full amount of benefits under a PIP insurance claim. In its complaint, Central also pleaded entitlement to attorney's fees and costs. Progressive, in turn, served Central with a Proposal for Settlement ("PFS") pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. In its PFS, Progressive offered Central $100 for PIP benefits and $150 for attorney's fees and costs to resolve: "[a]ny and all causes of action and claims whatsoever that [Central] has asserted or could have asserted in the present action, and any and all claims arising from the loss that is alleged to have occurred on 12/28/2014." Central did not accept the PFS.

Thereafter, Progressive moved for final summary judgment. Progressive prevailed on its motion and the court entered a final judgment of no liability in its favor. Progressive then moved for attorney's fees and costs based on its rejected PFS. However, the court denied Progressive's motion, ruling that the PFS was unenforceable because it did not strictly comply with the provision of Rule 1.442 requiring a PFS to state "whether attorney's fees are part of the legal claim." Fla. R. Civ. P. 1.442(c)(2)(F). We review the court's ruling as to Progressive's eligibility to receive attorney's fees and costs pursuant to its PFS *de novo*. *See Pratt v. Weiss*, 161 So. 3d 1268, 1271 (Fla. 2015).

The court below relied on *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013), to invalidate Progressive's PFS. In *Diamond Aircraft*, the Florida Supreme Court held that a PFS was unenforceable because it did not comply with the form and content requirements of Rule 1.442; specifically, it omitted whether the PFS included attorney's fees and whether attorney's fees were part of the legal claim. *Id.* at 377. While holding that strict construction with

Rule 1.442 is required, the court distinguished its holding from a prior decision of the Fourth District Court of Appeal, *Bennett v. American Learning Systems of Boca Delray, Inc.*, 857 So. 2d 986, 988 (Fla. 4th DCA 2003). In *Bennett*, the Fourth District Court of Appeal upheld a PFS, which failed to state whether it included attorney's fees and whether the legal claim included attorney's fees, because the complaint did not include a claim for attorney's fees. 857 So. 2d at 988. Because a plaintiff who fails to plead for attorney's fees cannot recover them, the *Bennett* court explained that it would be "needless surplusage" to require inapplicable language about attorney's fees in the PFS. *Id.* The complaint in *Diamond Aircraft*, however, contained a claim for attorney's fees. 107 So. 3d at 377. The Florida Supreme Court held that this created an ambiguity in the PFS not present in *Bennett*, thus necessitating a specific statement regarding attorney's fees. *Id.*

After the lower court's ruling in the instant case, the Florida Supreme Court decided *Kuhajda v. Borden Diary Co. of Alabama, LLC*, 202 So. 3d 391 (Fla. 2016), which represents a shift from a 'strict compliance' to an 'absence of ambiguity' test, for analysis as to the validity of a PFS. Although the Florida Supreme Court reiterated the distinction between cases where attorney's fees are pleaded in the complaint and those in which they are not, the Court also declined to invalidate a PFS solely for violating a requirement in Rule 1.442 that section 768.79 does not require. *Id.* at 395. In doing so, the Court reasoned that section 768.79 is intended to "reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions." *Id.* By contrast, "[t]he only purpose of Rule 1.442 is to provide a procedural framework to implement the substantive requirements of section 768.79." *Id.* Based on these principles, the court emphasized that the "procedural rule should no more be allowed to trump the statute here than the

tail should be allowed to wag the dog," and that a "procedural rule should not be strictly construed to defeat a statute it is designed to implement." *Id.* at 395-96.

Here, we consider a question not yet addressed by an appellate court—whether a PFS must use the exact language outlined in Rule 1.442(c)(2)(F) when attorney's fees are pled in the complaint or, conversely, whether different language indicating that attorney's fees are part of the legal claim contemplated by the PFS may be sufficient. Guided by the purpose of section 768.79, the holding in *Kuhajda*, and the Fourth District Court of Appeal's general rejection of attempts to inject ambiguity into otherwise sufficient PFSs, we hold that different language is sufficient so long as it is unambiguous. *See e.g.*, *Golisting.com, Inc. v. Papera*, 229 So. 3d 862, 865 (Fla. 4th DCA 2017) ("[rule 1.442] does not demand the impossible," it "merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification.") (citation omitted); *Kiefer v. Sunset Beach Investments, LLC*, 207 So. 3d 1008, 1011 (Fla. 4th DCA 2017) ("we look to the entirety of a proposal . . . without 'nitpicking' in search for ambiguity."); *Costco Wholesale Corp. v. Llanio-Gonzalez*, 213 So. 3d 944 (Fla. 4th DCA 2017) ("courts are discouraged from 'nitpicking' . . . unless the asserted ambiguity could 'reasonably affect the offeree's decision' on whether to accept."). What matters is not the exact verbiage used, but whether the PFS is clear enough to allow the offeree to know what it is settling for if it accepts the PFS. *See also Progressive Select Ins. Co. v. Multicare Rehabilitation, LLC*, 27 Fla. L. Weekly Supp. 232b (Fla. 17th Cir. Ct. Apr. 25, 2019) (finding error to deny attorney's fees motion on ground that PFS did not strictly comply with Rule 1.442).

In this case, although Progressive did not use the exact words "attorney's fees are part of the legal claim," Progressive specifically mentioned attorney's fees in its PFS and offered to resolve Central's attorney's fee claim for $150. This language was sufficiently clear to inform

Central that Progressive's PFS included attorney's fees and allowed Central to make an informed decision regarding whether to accept the PFS. Thus, this Court holds that Progressive's PFS was unambiguous with respect to whether it included attorney's fees and was, therefore, enforceable. Accordingly,

We **REVERSE** the lower court's denial of Progressive's motion for attorney's fees and **REMAND** for the trial court to award Progressive a reasonable amount of attorney's fees. Further,

We also **GRANT** Progressive's Motion for Appellate Attorney's Fees based on our affirmance of the lower court's final judgment in favor of Progressive and our reversal of its order denying Progressive's motion for attorney's fees. *See Frosti v. Creel*, 979 So. 2d 912, 916 (Fla. 2008) ("The right to attorney fees pursuant to section 768.79 applies to fees incurred on appeal."). KASTRENAKES, COATES, and ROWE JJ., concur.

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Opinion/Decision filed: FEB 20 2020

Appeal from Palm Beach County Court
Judge Paul A. Damico

Date of Appeal: August 31, 2016

DATE OF PANEL: JULY 23, 2019

PANEL JUDGES: KASTRENAKES, COATES, ROWE

AFFIRMED/REVERSED/OTHER: AFFIRM in Part; REVERSE in Part

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	DISSENTING:	CONCURRING SPECIALLY:
	With/Without Opinion	With/Without Opinion
2/3/20		
DATE: J.	J.	J.
2/18/20		
DATE: J.	J.	J.
2/19/2020		
DATE: J.	J.	J.