IN THE SUPREME COURT OF FLORIDA

TGI FRIDAY'S INC., a New York corporation, d/b/a TGI FRIDAY'S,

Petitioner,

v.

CASE NO. 83,811

MARIE DVORAK,

Respondent.

BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION, AMICUS CURIAE

OSBORNE, McNATT, SHAW, O'HARA,
BROWN & OBRINGER
Professional Association
Jack W. Shaw, Jr., Esquire
Florida Bar No. 124802
Suite 1400, 225 Water Street
Jacksonville, Florida 32202-5147
(904) 354-0624

Attorneys for Florida Defense Lawyers Association, Amicus Curiae

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae Florida Defense Lawyers Association accepts the Statement of the Case and Facts contained in Petitioner's Initial Brief on the merits.

For purposes of this Amicus Curiae Brief, the relevant facts and proceedings are simple and straightforward. On April 18, 1989, plaintiff served a demand for judgment under Section 768.79(1)(a), Florida Statutes (1987), in the amount of Sixty-Five Thousand ($65,000.00) Dollars. Plaintiff eventually obtained a jury verdict and a resulting judgment in the amount of Two Hundred Forty-Eight Thousand ($248,000.00) Dollars. Thereafter, plaintiff moved for attorneys' fees and costs in connection with the demand for judgment (and corresponding demands under Section 45.061, Florida Statutes (1987), and Rule 1.442, Florida Rules of Civil Procedure). The trial court declined to award attorneys' fees and costs. Among the grounds assigned by the trial court were that the various demands made by plaintiff were not unreasonably rejected by defendant.

On appeal, the District Court reversed the denial of attorneys' fees under Section 768.79, Florida Statutes (1987), holding that the trial court had no authority to deny attorneys' fees on the basis that the demands were not unreasonably rejected by defendant.

SUMMARY OF ARGUMENT

The District Court erred in concluding that an award of attorneys' fees and costs was mandatory so long as a good-faith demand for judgment met the statutory 25% criterion, even though

the defendant had acted reasonably in rejecting the demand. Properly construed, the statute permits the trial court to decline to award fees and costs under Section 768.79, Florida Statutes (1987), if the demand for judgment was reasonably rejected.

The District Court's construction of the statute effectively "writes out" of the statute four of the six factors the legislature specified should be considered by the trial court in determining the reasonableness of an attorneys' fee award. All six of the specified factors are relevant to determining the reasonableness of granting an attorneys' fee award because of the reasonableness or unreasonableness of the rejection of a demand for judgment. Only two of the six listed factors are even arguably relevant to the reasonableness of the amount of such an attorneys' fee award. The District Court's holding thus renders significant portions of Section 768.79(2)(b), Florida Statutes (1987), mere surplusage, in violation of the rule that statutes should be so construed as to give meaning and effect to every portion of the statute.

The District Court's holding also violates the rule that statutes should be so construed as to effectuate the legislative intent. The intent of Section 768.79, Florida Statutes (1987), is to promote reasonable evaluations of a case and its settlement prospects. The District Court's holding penalizes reasonable evaluations simply because the evaluator's crystal ball turned out in retrospect to be wrong by a particular margin of error, no matter how reasonable the evaluation may have been at the time. Properly interpreted, the statute permits a party to avoid these

penalties if it can demonstrate that it did precisely what the legislature wanted to be done -- make a reasonable evaluation.

The District Court also erred in holding that the word "shall" created a mandatory entitlement to fees when, in context, the word was used in a directory sense.

The District Court's construction of Section 768.79, Florida Statutes (1987), leads to absurd results, requiring a court to consider factors that have no relevance whatsoever to the issue under consideration and penalizing a party despite the fact that it has done exactly what the statute is intended to require. That construction should be rejected. This Court should hold that a defendant which reasonably rejected a demand for judgment is not liable under this statute for plaintiff's subsequently-incurred attorneys' fees and costs.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT A TRIAL COURT MAY NOT DENY AN AWARD OF ATTORNEYS' FEES AND COSTS UNDER SECTION 768.79, FLORIDA STATUTES (1987), EVEN THOUGH DEFENDANT ACTED REASONABLY IN REJECTING THE DEMAND FOR JUDGMENT, SO LONG AS THE JUDGMENT RECOVERED IS IN AN AMOUNT AT LEAST 25% GREATER THAN THE OFFER AND THE OFFER WAS MADE IN GOOD FAITH.

The interest of Florida Defense Lawyers Association in this case is limited to a single, straightforward issue: whether a trial court is required to award attorneys' fees and costs under Section 768.79, Florida Statutes (1987), in every instance in which the plaintiff's judgment exceeds by 25% a good-faith demand for judgment made under the statute, even if defendant acted reasonably at the time in rejecting the demand. The Record in the instant

case reveals that the statutory 25% requirement has been met, and the District Court's opinion states that there is no claim that the demand in this case was not made in good faith. The trial court ruled that defendant had not acted unreasonably in rejecting the demand, and District Court did not reach that question. Accordingly, we assume, for purposes of this brief, that plaintiff made a good-faith demand for judgment, that defendant acted reasonably in rejecting that offer, and that the judgment eventually recovered by plaintiff exceeded the amount of the demand by more than 25%. The question we address is simply one of statutory construction.

Section 768.79, Florida Statutes (1987), provides (emphasis supplied):

> (1)(a) In any action to which this part applies, 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 from the date of filing of the offer 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. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. <u>If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.</u> If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.
>
> (b) Any offer or demand for judgment made pursuant to this section shall not be made until 60 days after filing of the suit, and may not be accepted later than 10 days before the date of the trial.

(2)(a) If a party is entitled to costs and fees pursuant to the provisions of subsection (1), the court may, in its discretion, determine that an offer of judgment was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim that was subject to the offer.

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 offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

The District Court focused on the language in Section 768.79(1)(a), Florida Statutes (1987), that if the 25% limitation is met, plaintiff "shall be entitled to recover reasonable costs and attorneys' fees" (emphasis supplied) incurred thereafter. The District Court, relying on its earlier decision in Schmidt v. Fortner, 19 FLW D44 (Fla. 4th DCA 1993), reasoned that the word "shall" made such an entitlement mandatory. The District Court then reasoned that Section 768.79(2)(a), Florida Statutes (1987), provided the only exception to a mandatory award of attorneys' fees, permitting the trial court to determine that a demand for judgment had not been made in good faith. Finally, the District Court reasoned, the language of Section 768.79(2)(b), Florida Statutes (1987), referring to "reasonableness of an award of

attorneys' fees" dealt only with the amount of attorneys' fees to be awarded. In short, the District Court read the statutory phrase in Section 768.79(2)(b), Florida Statutes (1987), as: "When determining the reasonableness of [the amount of] an award of attorney's fees pursuant to this section . . ." and rejected a construction as: "When determining the reasonableness of [granting] an award of attorney's fees pursuant to this section . . ."

The District Court's reasoning was flawed, causing it to reach an erroneous result. Read properly, the statute authorizes an award of attorneys' fees where there was a good-faith demand for judgment and the statutory 25% limitation is met, but further authorizes the trial court to decline to award fees and costs (not just limit the amount awarded) where the defendant did not act unreasonably in rejecting the demand for judgment. Contrary to the District Court's conclusion, the most logical reading of the language of Section 768.79(2)(b), Florida Statutes (1987), is: "When determining the reasonableness of [granting] an award of attorney's fees pursuant to this section, . . ."

The legislative intent in enacting Section 768.79, Florida Statutes (1987), was to promote reasonable evaluations of cases in an effort to settle them where possible. The cardinal rule of statutory construction, of course, is that the legislative intent is the polestar by which the courts must be guided, since it is the essence and vital force behind the law. Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969); Ervin v. Peninsular Telephone Co., 53 So.2d 647 (Fla. 1951); Sunshine State

News Co. v. State, 121 So.2d 705 (Fla. 3d DCA 1960). The primary guide to statutory interpretation is the intent and purpose of the legislature. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). Any construction of a statute which would operate to impair, pervert, nullify or defeat the object of the statute should be avoided. Becker v. Amos, 105 Fla. 231, 141 So. 136 (1932).

Permitting a party who reasonably rejected the opponent's offer of, or demand for, judgment to avoid liability for subsequently-incurred attorneys' fees is fully consistent with the legislative objective, since it provides a sanction in those instances where the demand or offer is unreasonably rejected, but not in those situations in which a reasonable evaluation resulted in a rejection. The "bright line" test imposed by the District Court, however, does not advance the legislative objective, since it imposes sanctions notwithstanding the reasonableness of the evaluation that was conducted.

Assume, for instance, that a personal injury plaintiff has $50,000 in provable damages and claims another $50,000 in damages which may or may not be provable; assume further that the same plaintiff has a 10% chance of prevailing on the issue of liability. In that hypothetical, it would be quite reasonable for a defendant to evaluate the damage aspect of the claim as involving $75,000, then to discount that figure by 90% to recognize the unlikelihood of plaintiff prevailing, thus yielding a "value" of plaintiff's claim at $7,500. Assume this same plaintiff filed a demand for judgment in the amount of $50,000. Defendant would be acting

reasonably in rejecting that demand, since it wholly fails to account for the fact that plaintiff is unlikely to prevail. Yet, if that 10% chance of plaintiff prevailing comes to pass, and the jury awards the same $75,000 which defendant had assessed as the value of the damage claim, the District Court's construction of the statute would require the defendant to pay plaintiff's subsequently-incurred attorneys' fees and costs. That result plainly does not comport with the statutory intent of requiring reasonable evaluation of the value of a claim, and in fact tends to subvert it. Accordingly, such a construction of the statute should be rejected.

The District Court's basic error was in not recognizing that the statutory factors listed in Section 768.79(2)(b), Florida Statutes (1987), are relevant to the issue of the reasonableness of a defendant's rejection of a demand for judgment but, for the most part, are not relevant to evaluating the reasonableness of the amount of an attorneys' fee award. That subsection directs the trial court to consider six listed factors, along with other relevant criteria, "when determining the reasonableness of an award of attorneys' fees." The quoted language was read by the District Court as referring solely to the reasonableness of the amount of such an award. We submit that the quoted language instead sets forth criteria for determining the reasonableness of granting such an award.

The first listed factor is: "The then apparent merit or lack of merit in the claim that was subject to the offer." Patently,

the apparent merit (or lack thereof) of a claim is extremely relevant to whether a defendant acted reasonably in rejecting a demand for judgment. If the claim in the present case appeared at the time to be wholly meritless, the defendant would have been acting quite reasonably in rejecting a $65,000 demand for judgment. If, on the other hand, it appeared at the time that plaintiff's claim was meritorious, this factor would tend to show that defendant had acted unreasonably in rejecting the demand for judgment.[1]

On the other hand, this statutory factor has no bearing on the reasonableness of the amount of an attorneys' fee award for attorney time expended after rejection of a demand. Whether plaintiff's claim appeared meritorious or meritless at the time of the demand for judgment is wholly irrelevant to the amount of attorney time and effort expended subsequent to making a demand for judgment. Significantly, this statutory factor specifically refers to the "then apparent" merit or lack of merit of the claim. The fact that plaintiff's case appeared meritless at the time a demand for judgment was made, although relevant to the reasonableness of defendant's evaluation of the demand, is wholly irrelevant to the reasonableness of attorneys' fees incurred subsequent to the demand.

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[1]An additional relevant criterion (to use the statutory language) in this connection would be an evaluation of the likely range of damage verdicts, should the case result in a verdict for plaintiff.

The second statutory factor is: "The number and nature of offers made by the parties." Again, that factor is relevant to the reasonableness of defendant's evaluation of a particular demand for judgment. Assume, for instance, that the plaintiff serves a series of demands for judgment under this statute, with each successive demand being lower in amount than the one before. That scenario tends to reflect a recognition by plaintiff that his initial demands for judgment were excessive, thus tending to demonstrate the reasonableness of defendant's rejection of them.

Once again, this statutory factor has no significant bearing on the reasonableness of the amount of an attorneys' fee award for time subsequently expended. The only possible bearing this factor could have on that issue is the amount of time necessary to re-evaluate the case and prepare a new offer of judgment or demand for judgment -- a de minimis expenditure of time in the context of the amount of time necessary for discovery and other trial preparation.

The third statutory factor is: "The closeness of questions of fact and law at issue." Arguably, that factor could be relevant to the reasonableness of an attorneys' fee award for subsequent time expenditures, in that close questions of fact might legitimately generate additional discovery efforts and close questions of law might legitimately generate additional legal research, both of which would increase the amount of attorney time subsequently incurred.

At the same time, of course, this statutory factor is plainly relevant to the reasonableness of a defendant's evaluation of a demand for judgment. For instance, if the question of liability was a close question of fact (for instance, a red light-green light intersection collision "swearing match") and the amount of damages was relatively clear, a defendant might be acting quite realistically in evaluating the "value of the case" as approximately one-half the projected damage amount and rejecting a demand for judgment for 75% of the projected damage amount.

Similarly, an evaluation of the case could hinge on a close question of law. For instance, prior to this Court's decision in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), a defendant evaluating a case in which 95% of the causal fault was that of an immune employer, 2% of the causal fault was defendant's and 3% of the causal fault was plaintiff's, would have had vastly different valuations of a case if the District Court decision in Fabre v. Marin, 597 So.2d 883 (Fla. 3d DCA 1992), applied (in which case defendant would be liable for 40% of the damages) or if the Fifth District's decision in Messmer v. Teachers Ins. Co., 588 So.2d 610 (Fla. 5th DCA 1991), rev. den., 598 So.2d 77 (Fla. 1992), applied (in which case defendant would be liable for only 2% of the damages).

The fourth statutory factor is: "Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer." That factor is patently relevant to the reasonableness of a defendant's rejection of a plaintiff's

demand for judgment. Any doubt of this is removed by the fact that Section 45.061(2), Florida Statutes (1987), lists only two factors to be considered in deciding whether a statutory offer of settlement was unreasonably rejected, the first being (Section 45.061(2)(a), Florida Statutes (1987)): "Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer."

Assume, for instance, that plaintiff in a personal injury case made a demand for judgment in the amount of $100,000, but withheld medical records demonstrating a severe permanent injury resulting from defendant's negligence, and also delayed discovery efforts concerning plaintiff's physical condition.[2] Such a withholding of vital information is plainly relevant to whether a defendant acted reasonably in rejecting a demand for judgment, since it demonstrates that defendant was not provided with crucial information necessary to make an informed evaluation of the value of the claim. Indeed, the court in State Farm Mutual Auto. Ins. Co. v. Malmberg, 623 So.2d 755 (Fla. 5th DCA 1993), made precisely that point. Dealing with the corresponding provision of Section

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[2]FDLA does not have access to the apparently-voluminous transcript in this case, and makes no claim that plaintiff in this particular case has done any of the acts mentioned in these hypotheticals. We take no position as to the reasonableness of this particular defendant's rejection of plaintiff's demand for judgment, other than to note that the trial court found that defendant had acted reasonably in rejecting the demand for judgment.

45.061(2)(a), Florida Statutes, with nearly identical language, the court said (623 So.2d at 758, emphasis in original):

> The next crucial determination is whether, at the time the offer was made, the offeree acted unreasonably in not accepting it. Many facts and circumstances might be relevant, depending upon the particular case, and the situation in which the offeree found himself, and what he reasonably knew about the case at the time the offer was made. As the statute suggests, if the offeror withheld information about the case from the offeree so that the offeree was not in a position to analyze the merits of the case and the offer, a rejection would not be unreasonable.

On the other hand, whether a plaintiff unreasonably refused to furnish information necessary to evaluate the reasonableness of a demand for judgment has no conceivable bearing on the amount of attorney time and effort incurred by plaintiff after the date of filing of the demand.

The fifth statutory factor is: "Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties." Once again, Section 45.061(2), Florida Statutes (1987), has a corresponding (identically-worded) provision, demonstrating the relevance of this factor to an evaluation of the reasonableness of a rejection of a demand for judgment.

This statutory factor is applicable both to the reasonableness of the defendant's evaluation of the demand for judgment and to the reasonableness of the attorneys' time and costs incurred subsequent to the demand. For instance, if a plaintiff were attempting to establish a new and broader theory of liability (as in Conley v. Boyle Drug Co. 570 So.2d 275 (Fla. 1990)), or was involved in a

case which an insurer had decided to make a test case of (as in Palma v. State Farm Fire and Casualty Co., 489 So.2d 147 (Fla. 4th DCA 1986), rev. den., 496 So.2d 143 (Fla. 1986), appeal after remand, 524 So.2d 1035 (Fla. 4th DCA 1988), approved, 555 So.2d 836 (Fla. 1990), appeal after remand, 585 So.2d 329 (Fla. 4th DCA 1991)), it is quite likely that a significant number of additional attorney hours and costs would reasonably be incurred, thus being relevant to the amount of the award.[3]

By the same token, however, the fact that a defendant seeks to make a particular case a test case has great significance to whether it acted reasonably in declining to accept a demand for judgment in that case. Plaintiff's counsel and institutional defendants select particular cases as "test cases" regarding legal issues involving nonparties (subsequent plaintiffs, other insureds, etc.) for a variety of reasons. A particular case may involve an especially favorable set of supporting facts, an appealing client, a repugnant opponent, an unusually favorable procedural posture, or be especially attractive as a "test case" for any of a number of other reasons. Whatever factor or factors make a particular case especially appealing as a "test case" may not be present in any other case. In that context, it is far more reasonable for a plaintiff to decline an offer of judgment or for a defendant to decline a demand for judgment, in order to preserve the unique

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[3]In Palma v. State Farm Fire and Casualty Co., supra, for instance, the underlying dispute was over a $600 bill for a thermogram, but plaintiff's counsel was awarded $253,500 in attorneys' fees.

features of the "test case" than would be true if the same case involved an isolated, non-recurring situation.

The final statutory factor is: "The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged." Again, that factor is plainly relevant to the reasonableness of the offeree's action in rejecting an offer of, or demand for, judgment. If, for instance, it could be expected that a plaintiff suing for breach of a commercial construction contract would be delayed for several years, and incur significant costs which would not be reimbursed except through litigation, thus putting economic pressures on plaintiff to accept a more realistic evaluation of a case than was reflected in a particular demand for judgment, it would be reasonable for the defendant to consider that fact in determining whether or not to accept the demand for judgment at the higher amount.

This factor, however, has no relevance whatsoever to the amount of attorneys' fees reasonably incurred subsequent to the offer of, or demand for, judgment. Significantly, this statutory factor speaks in terms of the amount that the offeror "reasonably would be expected to incur," plainly reflecting that the issue is to be evaluated as of the time of the offer of judgment or demand for judgment.

Moreover, it must be noted that these statutory factors are to be used in determining the reasonableness of an award of attorneys' fees, not the reasonableness of a cost award. Delay

costs and expenses might be relevant to the reasonableness of a cost award, but that it not what the statutory factors deal with, and it is plain that the expectable delay costs and expenses have no bearing on the reasonableness of a subsequent expenditure of attorney time.

In short, each of the six listed statutory factors has direct relevance to whether a party acted reasonably in evaluating an offer of judgment or demand for judgment served by the opponent.[4] Only two of those six factors have any conceivable relevance to the reasonableness of the amount of an award of attorneys' fees. The District Court overlooked this point in its decision below and, as a result, has given the statute a construction which is absurd: under the District Court's holding, a trial court must consider four factors which have absolutely no bearing on the reasonableness of the amount of an attorneys' fee award in determining whether that amount is reasonable.

A court should not construe a statute in such a manner as to reach an illogical or ineffective conclusion when another construction is possible. Gracie v. Deming, 213 So.2d 294 (Fla. 2d DCA 1968). A statute will not be so construed as to lead to absurd results. Williams v. State, 492 So.2d 1051 (Fla. 1986); State ex rel. Florida Industrial Commission v. Willis, 124 So.2d

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[4]It is worthy of note that Section 45.061(3), Florida Statutes (1987), which sets forth the factors to be considered in determining the amount of sanctions to be awarded for unreasonable rejection of a statutory offer of settlement, does not mention any of the six statutory factors listed in Section 768.79(2)(b), Florida Statutes (1987).

48 (Fla. 1st DCA 1960), cert. den., 133 So.2d 323 (Fla. 1961). Yet, that is precisely what the District Court has done in this case.

Moreover, by its construction of the statute, the District Court has treated four of the statutory factors listed in Section 768.79(2)(b), Florida Statutes (1987), as superfluous. A statute must be so construed as to give meaning to every word and phrase, giving effect to all provisions of the enactment and not treating any portion as mere surplusage. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977); Stein v. Biscayne Kennel Club, Inc., 145 Fla. 306, 199 So. 364 (1940); State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979). The District Court's holding violates this rule of statutory construction.

In addition to its failure to recognize the significance of the statutory factors of Section 768.79(2)(b), Florida Statutes (1987), on the proper construction of the statute, the District Court erred in construing the word "shall" in Section 768.79(1)(a), Florida Statutes (1987), as being mandatory, and as requiring, in every instance in which a good-faith offer met the statutory 25% limitation, the award of attorneys' fees and costs. Relying on its prior opinion in Schmidt v. Fortner, 19 FLW D44 (Fla. 4th DCA 1993), for the proposition that the word "shall" indicated a mandatory entitlement to fees, the court overlooked a far more logical reading.

It has been held that, where appropriate in the context of a statute, the word "shall" should be construed as being directory

rather than mandatory. State v. Bell, 160 Fla. 874, 37 So.2d 95 (1948); Simmons v. State, 160 Fla. 266, 36 So.2d 207 (1948). As the court phrased it in White v. Means, 280 So.2d 20, 21 (Fla. 1st DCA 1973): ". . . the interpretation of the word 'shall' depends upon the context in which it is found and upon the intention of the legislature as expressed in the statute." Plainly, interpreting the word "shall" in the present statutory context as being directory, rather than mandatory, permits a far more logical construction of the statute which gives effect to all of its provisions and does not lead to absurd results. The District Court erred in holding to the contrary.

The District Court's construction of the provisions of Section 768.79, Florida Statutes (1987), violates several rules of statutory construction. It fails to give any meaning to several significant portions of the statute, in violation of the rule that a statute must be construed so as to give effect to all provisions and not treat any portion as mere surplusage. The District Court's construction leads to absurd results, in violation of the rule that a statute should not be so construed. It fails to recognize that the word "shall," in context, may be directory rather than mandatory. Finally, it fails to give effect to the legislative intent of promoting reasoned evaluations of potential settlement of the case. For all of these reasons, the result reached by the District Court should be rejected. Rather, this Court should hold that, even if a good-faith demand for judgment meets the statutory 25% requirement, a trial court may, in appropriate circumstances,

nonetheless decline to award subsequently incurred attorneys' fees and costs where the defendant's rejection of the demand for judgment was reasonable at the time.

CONCLUSION

For all the reasons set forth above, this Court should reverse that portion of the District Court's decision holding that a trial court has no authority, where a good-faith demand for judgment meets the statutory 25% limitation, to decline to award subsequently-incurred attorneys' fees and costs on the grounds that defendant acted reasonably at the time in rejecting the demand for judgment. This Court should hold that a trial court does have the authority, where the facts warrant, to decline to award subsequently-incurred fees and costs in that situation.

Respectfully submitted,

OSBORNE, McNATT, SHAW, O'HARA,
BROWN & OBRINGER
Professional Association

Jack W. Shaw, Jr., Esquire
Florida Bar No. 124802
Suite 1400, 225 Water Street
Jacksonville, Florida 32202-5147
(904) 354-0624

Attorneys for Florida Defense Lawyers Association, Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Marjorie Gadarian Graham, Esquire, Northbridge Centre, Suite 1704, 515 N. Flagler Drive, West Palm

Beach, FL 33401; John B. Marion, Esquire, Sellers, Supran, Cole & Espy, P.A., P.O. Box 3767, West Palm Beach, FL 33402; and to Dan Cytryn, Esquire, 8100 N. University Drive, Suite 202, Tamarac, FL 33321, by U.S. Mail, this 22nd day of August, 1994.

ATTORNEY