IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,811

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

Petitioner,

vs.

MARIE D. DVORAK,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF AND CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER CITATIONS

PREFACE

The following symbols will be used in this brief:

(R.____) will refer to the trial record on appeal.

(A.____) will refer to the appendix.

(T.____) will refer to the trial transcript.

(H.____) will refer to the hearing held on October 3, 1991, on Plaintiff's Motion To Determine Entitlement to Attorney's Fees.

The Appellee, Marie Dvorak, will be referred to either as Plaintiff or Marie Dvorak. The appellant, TGI Friday's, will be referred to as TGI Friday's or the Defendant.

STATEMENT OF FACTS

Plaintiff has no substantial dispute with TGI Friday's statement of the facts, but the statement is incomplete. Appellant, **MARIE DVORAK**, served three offers of judgment or settlement in this case which is the subject of this appeal. They were as follows:

Statute or Rule	Date Served	Amount of Offer
45.061	4/14/89	$55,000.00 (R. 544 - 546)
768.79(1)(a)	4/14/89	$65,000.00 (R. 576 - 578)
Rule 1.442	1/2/90	$69,750.00 (R. 547 - 552)

The lawsuit was filed on October 5, 1987 (R. 31 - 33). Plaintiff obtained a jury verdict of $248,000.00 (R. 518 - 521).

At the hearing on the Motion For Attorney's Fees and Costs, an attorney, Jack Donahoe, testified for Mrs. Dvorak. He testified that he has been an attorney since 1966, practicing law for approximately 27 years, doing primarily defense work for insurance carriers in Fort Lauderdale, and that he had tried over 300 personal injury cases (H. 8 - 10). Mr. Donahoe testified that it was unreasonable for the defense to reject the offer (H. 52), and the refusal to accept the offer "[r]esulted in exactly what the rule was . . . intended to forego, if possible, and that is extensive and costly litigation, which is what happened when it was rejected" (H. 15). Counsel for the Plaintiff also testified to the factors as set forth in Rule 1.442(h)(2)(A)-(J) (H. 63 - 70).

In an order prepared and written by counsel for TGI Friday's (H. 80), the trial court failed to award attorney's fees on three main grounds (Appendix 1- 5). The first was that the trial court held that the two statutes were unconstitutional because they impinged upon the Supreme Court's exclusive authority to adopt rules for practice and procedure. The trial court

further held that if the trial court could hold Rule 1.442 unconstitutional for impinging upon legislative authority to promulgate substantive law, it would have held so.

The trial court further essentially held that Rule 1.442, section 768.79, and section 45.061 could not be applied retroactively. Finally, the trial court held that the various offers made by the Plaintiff to the Defendant were not unreasonably rejected.

The following statement of facts pertains to the cross-petition filed within this brief, and was information that was available to the Defendant at the time the offer was made pursuant to section 45.061, or was information that was reasonably ascertainable by the Defendant at the time that they rejected the offer of judgment.

Mrs. Dvorak had gone through two surgeries (T. 1690), had a herniated disc (T. 1690), and had $23,000.00 in unpaid medical bills (T. 1691). In the first hospitalization, she was hospitalized for ten days, and had surgery and three pins placed in her hip (T. 1690). She used a walker for six weeks, and a cane for another six weeks (T. 1244). After the second surgery, she had the screws taken out, and she had to use a walker for another six weeks (T. 1244). As a result of the fall, she can no longer do gardening or shop (T. 1246), and can no longer do volunteer work at her church (T. 1248).

Marie Dvorak testified that she was in too much pain to look for anything on the floor after she fell (T. 1238), but someone called a manager who came over to her and agreed that the floor was "awfully slippery" (T. 1238). Mrs. Dvorak stated that the floor was extremely slick: "almost like a skating rink" (T. 1236).

Julianne Dvorak, Mrs. Dvorak's daughter, who was walking immediately in front of Mrs. Dvorak (T. 1294), testified that when she walked in "the floor was extremely slick and

slippery", and the floor felt as if she had been cooking in her kitchen and grease had gotten on the floor: "kind of greasy" (T. 1296). The floor felt like she was walking on ice (T. 1297). She stated that the manager admitted to her that "the floor is very slippery" (T. 1297).

Andrew Recupero, a sculptor by profession, was with Mrs. Dvorak and her daughter at TGI Friday's that night (T. 1358). He testified that from the moment he entered the restaurant, he "had to walk very gingerly", and "couldn't take long strides", because he felt like his "traction was not good enough to take a normal walk" (T. 1360). He stated that he was just attempting to offer his arm to Mrs. Dvorak when she fell (T. 1360). Mr. Recupero testified that he had jumped out of an airplane as a skydiver, and considered walking on TGI Friday's floor that night about as safe as skydiving (T. 1361 - 1362).

The manager on duty at the time, Tim Cummings, testified that he knew the area where Mrs. Dvorak fell because he saw two foot long skid marks from her shoes on the floor (T. 1330). The manager testified that Mrs. Dvorak fell about ten feet from the entrance way inside the restaurant (T. 1367).

Michael Leonetti was the head bus boy at the restaurant where Mrs. Dvorak fell (T. 421). Mr. Leonetti had worked for TGI Friday's on and off for about five years beginning in December of 1985 (T. 420). He worked the 5:00 p.m. to 1:00 a.m. shift (T. 460). Mrs. Dvorak fell at approximately 9:00 p.m., on the dinner shift (T. 423, 1365 - 1366). Mr. Leonetti had approximately five employees working under him as busboys (T. 458). Mr. Leonetti stated that customers would complain to him that the wood floor was slippery on the average of six occasions per week (T. 459), and that customers were constantly complaining of the slipperiness of the wood floor (T. 490). When they complained, he would check the area, and sometimes,

something was down there, other times, nothing was down there (T. 459). When he told management about the problem, sometimes they would just shrug it off (T. 460).

Mr. Leonetti testified that one of the reasons that the floors were so slippery is that substances would ooze into crevices between the wood planks (T. 461). He stated:

> The wood floors are wood planks that are shellacked and buffed, and between each wood plank would be a little notch or a groove that would run throughout the whole restaurant planks. There would be about an eighth or quarter of an inch wide and about an eighth of an inch deep, and then substances tend to build inside the cracks throughout the day. I mean, you go ahead and try to wipe it up or sweep or whatever, and still ooze into the crevices itself, and that built up there.

Mr. Leonetti testified that spills of sauces and drinks occurred all of the time (T. 463), and that he sometimes put salt down on the floor, but most of the time he would not, and even when he did, the salt did not always resolve the problem with that particular spill (T. 517). He stated that the dressings that would spill on the floor were oil-based salad dressings (T. 464). He knew that they were oil-based because he had been involved in mixing the dressings (T. 489), and had cleaned up spills of salad dressings: "Many times, many, many times a day, many times" (T. 464).

Mr. Leonetti said that Friday's gave him red towels to clean up the spills, but they didn't do much good, because the towels would simply "smear stuff around" (T. 465). He stated that the waiters and waitresses spilled sauces and drinks while carrying them (T. 463). Mr. Leonetti stated that because the waiters and waitresses were in a hurry and by the way they carried the food, they would spill milk, coffee, and mayonnaise, etc., and drag it on their feet through the

entire restaurant (T. 463). He said that there were usually sixteen employees on the night shift making hundreds of trips back and forth in and out of the kitchen (T. 466). He stated that in the kitchen, the cooking line had a lot of grease involved in the cooking process (T. 466). He said that on Thursdays at 9:00 p.m., which is when Mrs. Dvorak fell, the condition of the floor was that you could see particles of grease on the floor (T. 468), and that waiters and busboys would drag out things from the kitchen floor on the bottom of their shoes, and that their shoes would have grease on the bottom of them (T. 471). He said that the grease itself cannot be visibly seen on the floor (T. 472).

The Plaintiff presented a video tape of TGI Friday's kitchen, which demonstrated the ongoing conditions in the kitchen (T. 476 - 481). The video demonstrated how waiters and busboys would track grease out of the kitchen on their feet onto the restaurant wood floor (T. 472). Mr. Leonetti stated that the beverage area in the kitchen immediately adjacent to the front of the restaurant would have spills on the floor all of the time (T. 480).

In addition to Michael Leonetti, the Plaintiff presented three other ex-employees who testified that the wood floor of TGI Friday's was always slippery.

Joanne Melton worked at TGI Friday's in Plantation as an assistant comptroller, and for two years as a waitress at the TGI Friday's in Coral Springs (T. 1074). She stated that the wood floor at Friday's was slick because of the "highly polished wood" (T. 1074). She slipped on the wood floor on three separate occasions (T. 1075), one time on water, the other two while serving tables (T. 1078). She was wearing shoes with rubber soles at the time (T. 1079). She said that she had seen fifteen to twenty people slip and fall on the wood floors at TGI Friday's (T. 1080). Her husband also slipped on the wood floor, and nobody knew if anything was on

the floor at the time (T. 1081). She discussed her husband's fall with the management of TGI Friday's (T. 1080).

Kim Deater testified that she worked at the same location where Mrs. Dvorak fell for over one year (T. 519). She described the coating on the wood floor as polyurethane (T. 519). She stated that she slipped on the wood floor at TGI Friday's one time while she was working there, and one time while she was off from work (T. 520). She stated that she had to walk very carefully at TGI Friday's, because the floor is slippery even when there is nothing on it (T. 522).

Andrea O'Connell, a thirty-three year old woman and college graduate with a degree in acting from Purdue University (T. 547), testified that she worked at this TGI Friday's for five years on and off, and that she herself had fallen on two to three occasions while working at TGI Friday's (T. 551). She stated that people and employees complained that the wooden floors tended to be slippery (T. 533), and that women with high heels had to be careful of the floor because of its slipperiness and the high gloss finish (T. 536). She stated that when she herself slipped and fell on the floor, sometimes there was something on the floor that she slipped on (T. 537), and other times she couldn't see anything on the floor (T. 546). She was also aware of about four to five occasions when persons slipped and fell when there was nothing visible on the floor (T. 545). She stated that the last time that she slipped, there was definitely nothing on the floor (T. 552).

In addition to the four ex-employees that testified that people were always slipping and falling and the floors were always slippery, Plaintiff presented the testimony of three customers who had slipped and fallen on the same wood floor where Mrs. Dvorak fell.

Elizabeth Preuc testified that her slip and fall happened at TGI Friday's in September of 1985 (T. 773). She was being escorted by the hostess on the first floor when both feet went right out from under her while walking on the wood floor "wearing regular dress shoes" (T. 774, T. 776, T. 777, and T. 783). She states that no restaurant has floors as slippery as TGI Friday's (T. 784).

Mrs. Preuc's daughter, Cindy, is a legal secretary who went out with her mother at the TGI Friday's in Plantation (T. 723). She stated that her mother was wearing one inch heels (T. 763), and that the incident happened near the front door (T. 725). She states that her mother was wearing rubber soled shoes (T. 764), and believes that the manager checked them to see if there was anything underneath her shoes (T. 765). She saw her mother slip and fall on her right side and injure her right elbow, and she looked on the floor, and saw nothing on it (T. 726). She actually got down on the floor and examined the area where her mother fell with her hands and felt the floor was slippery but she couldn't see anything on it (T. 762). A waitress or hostess of TGI Friday's came over to her and her mother after they had sat down and said that many other customers had complained to her about falling in the restaurant (T. 761), and about the floors being slippery (T. 762). Ms. Preuc had been in TGI Friday's before her mother had slipped and fallen, and found the floor slippery (T. 763).

Cindy Quintero was a legal secretary who, on February 25, 1987, less than two months before Mrs. Dvorak fell, was with her husband and two other couples (T. 1026). She was coming back from the ladies room when she slipped and fell on what she describes as a highly shellacked wooden floor while wearing low-heeled shoes (T. 1026, T. 1028). Mrs. Quintero and the waiters and waitresses that came to help her didn't notice anything on the floor (T.

1030). She was not under the influence of drugs or alcohol (T. 1031 - 1032). She stated that whenever she wore any kind of heel on that TGI Friday's floor, her feet felt unsteady (T. 1037).

Denise Ogonowski was a ninth and tenth grade teacher at Chaminade-Madonna High School in Hollywood (T. 1039). In August of 1986, she was at the Plantation location (where Mrs. Dvorak fell) with her husband and some friends (T. 1040). She was wearing topsider boat or dock shoes with a rubber sole on the bottom when her left foot went out from under her, and she slipped and fell on the wood floor (T. 1041, T. 1067). She stated that it felt like she slipped on "grease or some kind of slippery substance like that" (T. 1041). She stated that she had had nothing to drink (T. 1068), and was injured and thought she broke her foot (T. 1072).

Barry Horowitz was the president and owner of the company that cleaned the floors of all of the South Florida TGI Friday's restaurant locations (T. 366 - 367). He testified that his company, Atlantic Maintenance Corporation, derived about twenty percent of its billings from TGI Friday's (T. 378). Mr. Horowitz testified that the floors in all of the South Florida TGI Friday's were the same polyurethane coated wood, and that all the stores were designed the same (T. 371, T. 373, T. 374). He stated that there were three levels in every South Florida TGI Friday's, and each level is the same polyurethane coated wood (T. 373). He stated that he used the same floor finish to clean all of the South Florida TGI Friday location's floors, and that he used the same cleaning procedures in all of the locations (T. 374). Mr. Horowitz admitted that there was grease on the floor of the kitchen when his company's crew came in to clean it at night (T. 377). Mr. Horowitz admitted that grease moves around in a restaurant, and that he had to use a grease cutter in the kitchen to dissolve the grease on the floor (T. 400). He further stated that the wood floors would be spray buffed six out of seven nights, and one of the main

purposes of spray buffing was to remove grease (T. 407). Mr. Horowitz also testified that the floors were stripped one time per week, and one of the reasons the floor was stripped was to remove the grease on the wood floor (T. 370). Mr. Horowitz also admitted that the area of the wood floor of the restaurant coming out of the kitchen looked hazy, and one of the reasons that it was hazy was possibly because of the grease accumulation (T. 399, T. 416).

The regional manager of TGI Friday's, Burt Guiardo, testified that spills are a danger in a restaurant area on a wood floor if somebody walks on them (T. 1504). Carl Hansley, the manager of facilities for TGI Friday's at the time of the incident, admitted that Friday's did not have regular procedures for cleaning the floors during the hours that the restaurant was open, other than if there was a spill (T. 717).

William English testified by video deposition from Oakton, Virginia. Mr. William English is a board certified safety professional who is the author of a book entitled Slips, Trips and Falls, Safety Engineering For The Prevention of Slip, Trip and Fall Accidents (R. 1045). Mr. English was the director of loss control for Marriott Restaurant Operations for ten years and his duties were to resolve the accident problem of the organization and prioritizing the worst problem first, which was falls (R. 1047). He was administrator of safety and worker's compensation for Westinghouse Electric Corporation for six to seven years, a safety engineer for an insurance company for four years, and a safety engineer for several dozen gas manufacturing plants (R. 1075). He was on the American Society For Testing and Materials Subcommittee dealing with the slip resistance of floors, and on the Floor Polish Committee which is also dominated by wax manufacturers and some engineers and professors (R. 1044).

Mr. English published several articles, including one entitled *Slips and Falls in Restaurants - - Causes and Remedies*, July 1988, and another article published in the National Safety Council's monthly magazine, dealing with fall prevention in restaurants called *Don't Fall Down On The Job* (R. 1044).

While with Marriott Restaurant Operations for twelve years, Mr. English developed guidelines for accident investigation, and developed the training materials for Marriott managers and supervisory personnel in investigating an accident (R. 1054). Mr. English reviewed and analyzed approximately one thousand slip and fall accidents, categorized them, and then developed proper safety engineering procedures (R. 1054 - 1055). Mr. English testified that when he worked for Marriott Restaurant Operations, and had carpeting put in on the restaurant floors, the slip and fall problem was virtually eliminated (R. 1030). Mr. English has also received a patent from the U.S. Government for a slip tester that he invented (R. 1066).

TGI Friday's attorney *stipulated* to Mr. English being an expert in the field of slip and falls (R. 1049).

Mr. English stated that "had the dining room been carpeted, not only would this fall not have occurred, but many others would have been prevented" (R. 1053). He stated that TGI Friday's did not follow procedures that are used in the restaurant industry such as carpeting or track-off mats (R. 1053). Mr English had reviewed and analyzed approximately one thousand slip and fall accidents while working for Marriott Restaurant Corporation, categorized them, and then developed proper safety engineering procedures (R. 1054). He states that had Friday's provided a carpeted floor or a floor with track-off mats, the vast majority of falls that occurred at TGI Friday's would not have occurred (R. 1053). He testified that falls are the most common

injury causing problem in the restaurant industry, and that "falls are the leading type of accident in the U.S. excluding automobile accidents" (R. 1054). He testified that placing carpeting on the floor would be less expensive than maintaining the hard wood floor (R. 1038). Mr. English stated that with "grease on the floor, every wax on the market would have been treacherous" (R. 1038).

Mr. English's ultimate opinion was that TGI Friday's provided a floor surface that was hazardous under the environmental conditions that continually prevailed there (R. 1094). He testified that Friday's "had a considerable grease-tracking problem" (R. 1077), and the general problem in restaurants is that grease gets tracked on the floor (R. 1164). Mr. English stated that most of TGI Friday's food items are either submerged in oil or create grease when they are cooked, and the more grease that's involved in the cooking process, the more grease that gets on the floor and is therefore tracked around the facility (R. 1071). He explained that "grease gets on the floor through tracking from the kitchen by service personnel by the spilling of food particles on the floor by service personnel, and the general tracking of everyone throughout the restaurant" (R. 991). As persons walk through the restaurant, the grease "keeps going with them and it's redeposited on the floor wherever they step" (R. 1072). Mr. English opined that the grease on the floor caused Mrs. Dvorak to fall (R. 989, 990, 1063).

Mr. English stated that one of the things that substantiates the grease-tracking theory is that the majority of the fall incidents that he analyzed occurred after 6:00 p.m., even though Friday's has a busy lunch period (R. 1165). He testified that since it's difficult to eliminate grease from a restaurant floor, the most efficient slip-preventor is carpeting, textured flooring, or abrasive tile (R. 1071 - 1072). He further testified that most laypersons not trained in the

evaluation of the influence of grease in producing falls would not be able to tell that there was grease on the floor. Mr. English stated that there were five slip and fall incidents that occurred in the subject TGI Friday's in one year, which was "a higher frequency of falls that any restaurant company I've ever worked for would accept" (R. 1104). Mr. English stated that there was an ongoing pattern of slip and falls in South Florida TGI Friday's restaurants (R. 1097), and had TGI Friday's had carpeting placed on the floor of this restaurant, Mrs. Dvorak's slip and fall accident would not have occurred (R. 1163).

Tom Black, TGI Friday's expert, testified that the coefficient of friction had to be .5 or greater for a floor surface such as TGI Friday's had, to be safe (T. 1399). Carl Hansley, who was the director of facilities for TGI Friday's at the time, testified that the coefficient of friction only had to be .25 (T. 705). When Mr. Black tested the wax on the floor for TGI Friday's, he didn't know whether the floor wax he was testing was the same as the floor wax used on the night of the Plaintiff's fall (T. 1408 - 1409) The court also found that TGI Friday's had lied in their answers to interrogatories in failing to disclose that their expert, Tom Black, had performed slip tests on the floor of TGI Friday's (T. 1495 - 1496).

SUMMARY OF ARGUMENT

Section 768.79, Florida Statutes (1987) creates a mandatory entitlement to attorney's fees and costs when the statutory prerequisites have been met. Once the statutory prerequisites have been met, only the lack of a good faith offer can result in the denial of an award of fees and costs.

Once either a defendant obtains an award of less than 25 percent of its offer, or a plaintiff obtains an award of more than 25 percent of its offer, that party is automatically entitled to attorney's fees and costs unless the offer was made in bad faith.

Defendant's argument ignores the plain wording of the statute and the basic rules of statutory construction. Subsection (2)(b)[(7)(b)][1] contains factors which the court must consider in determining the amount of attorney's fees to be awarded; those factors do not pertain to entitlement. This is obvious since the legislature omitted the word "costs" from subsection (2)(b)[(7)(b)], and all other relevant sections refer to both costs and attorney's fees. Further, subsection (2)(b)[(7)(b)] does not contain the word "entitlement", nor any form thereof, and use of the word "reasonableness", which has uniformly referred to a determination of the amount of a fee, clearly indicates that subsection (2)(b)[(7)(b)] does not pertain in any way to entitlement.

Four District Courts of Appeal agree with Plaintiff's interpretation of the statute, and the only court that disagrees is the Third District Court of Appeal, and it appears that their

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[1] The Fourth District Court of Appeal in their opinion referred to the subsection as (7)(b). For all intents and purposes, subsection (2)(b) and subsection (7)(b) are the same under both the 1987 version and the 1990 amendment, and will be referred to in this brief by indicating both of the sections.

disagreement comes in dicta. Further, the first subsection of the statute makes an award of attorney's fees mandatory "[h]e shall be entitled . . . ."

Section 768.79 was enacted as part of the Tort Reform Act of 1986, which was created to "deter unnecessary litigation." Determining that an attorney's fee is mandatory if a party is wrong by more than 25 percent encourages settlements and "deter[s] unnecessary litigation." Making the award of attorney's fees mandatory will result in tort litigation no longer being viewed as the lottery where a plaintiff has nothing to lose but to "roll the dice" in the hope of "hitting that pot of gold".

SUMMARY OF ARGUMENT OF CROSS-PETITION

The decision of the Fourth District Court of Appeal with regard to section 45.061, Florida Statutes (1987), conflicts with at least four or five decisions of other district courts of appeal. The Fourth District Court of Appeal erred in denying Plaintiff's motion for an attorney's fee under section 45.061, Florida Statutes (1987), because there was no evidence presented by the defendant TGI Friday's at trial that would allow TGI Friday's to overcome the presumption that TGI Friday's unreasonably rejected Plaintiff's offer of $55,000.00, resulting in a jury verdict of $248,000.00.

Further, the Fourth District Court of Appeal stated that the trial court, in deciding whether to award attorney's fees under section 45.061, could rely upon its "observation of the evidence at trial", which statement conflicts with the statutory requirements of subsection 45.061(2), that the court consider "all the relevant circumstances *at the time of the rejection* . . . ." (emphasis added.)

The trial court made no express findings of fact in making its determination that the offer was not unreasonably rejected, making it difficult to facilitate meaningful appellate review. An appellate court is now required to review the entire transcript of 1,700 pages in trying to determine whether the trial court was correct.

Finally, expert or sworn testimony is required under section 45.061 to rebut the presumption of unreasonable rejection, and at the hearing, only the Plaintiff presented expert or sworn testimony, and the defendant presented no testimony.

ARGUMENT

RESPONSE TO POINT I

Plaintiff agrees that this Court has jurisdiction to hear this case on the merits because of direct and express conflict.

RESPONSE TO POINT II

SECTION 768.79, FLORIDA STATUTES (1987) CREATES A MANDATORY ENTITLEMENT TO ATTORNEY'S FEES WHEN THE STATUTORY PREREQUISITES HAVE BEEN MET, AND UNDER THOSE CIRCUMSTANCES, ONLY THE LACK OF A GOOD FAITH OFFER CAN RESULT IN THE DENIAL OF THE AWARD.

Defendant TGI Friday's argues that the word "award" as used in section 768.79(2)(b) means the same thing as the word entitlement used in subsection (6)(b) of the 1991 version of the statute[2]. [The Fourth District Court of Appeal in their opinion referred to the subsection as (7)(b). For all intents and purposes, subsection (2)(b) and subsection (7)(b) are the same under both the 1987 version and the 1990 amendment, and will be referred to in this brief by indicating both of the sections].

"It is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous, there is no occasion for judicial interpretation." *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So.2d 452, 454 (Fla. 1992). Plaintiff is unsure whether this Court will deem this statute to be "plain and unambiguous." Therefore, Plaintiff will address Defendant's and amicus' contentions in this brief and will set forth the relevant law pertaining to statutory construction and interpretation.

Defendant's argument that the word "award" means the same thing as the word

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[2] Plaintiff agrees that the statute at issue here is the 1987 version. In the 1987 version, the word award is in subsection (2)(b) and entitlement (entitle) is in subsection (1)(a). The language in the two versions with regard to "award" and entitlement did not change.

entitlement ignores several basic rules of statutory construction[3]. "The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Department of Professional Regulation, Board of Medical v. Durrani*, 455 So.2d 515, 518 (Fla. 1st DCA 1984). Had the legislature intended subsection (2)(b)[(7)(b)] to refer to an *entitlement* to fees, the legislature would have used the word *entitlement* in subsection (2)(b)[(7)(b)], and would not have chosen a word that is universally associated with determining the *amount* of a fee, i.e., "reasonableness".

The word "reasonableness" in subsection (2)(b)[(7)(b)] relates back to section (1)(a) [section 1 of the 1990 version][4] which states "[h]e shall be entitled to recover *reasonable* costs and attorney's fees . . . ." (emphasis added.) Following the word "reasonableness", the legislature sets forth the criteria for the court to use in awarding a reasonable attorney's fee.

That brings the second rule of statutory construction into play:

> [W]hen statutes employ exactly the same words or phrases, the legislature is assumed to intend the same meaning. *Goldstein v. Acme Concrete Corp.*, 103 So.2d 202 (Fla. 1958). See also *Medical Center Hosp. v. Bowen*, 811 F.2d 1448 (11th Cir. 1987): [There is a presumption that the same words used in different parts of an act have the same meaning].

Schorb v. Schorb, 547 So.2d 985, 987 (Fla. 2d DCA 1989). Use of the word reasonable, or any form thereof ("reasonableness") in subsection (2)(b)[(7)(b)], taken in light of the use of that word reasonable in subsection (1) in the context of reasonable attorney's fees, delineates that

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[3] Incredulously, despite this entire case riding on the statutory construction of this statute, Defendant does not cite one rule of statutory construction.

[4] Subsection (1)(a) of the 1986 version and subsection (1) of the 1990 version are for all intents and purposes the same, and will be referred to interchangeably throughout this brief.

subsection (2)(b)[(7)(b)] refers to a determination as to the amount of a fee, and not a determination as to entitlement. Subsection (1) states that a party is entitled to recover "reasonable costs and attorney's fees", and subsection (2)(b)[(7)(b)] tells the court how to determine the "reasonableness" of the attorney's fee.

Further, subsection (1)(a) is the section dealing with entitlement, and subsection (2)(a)[(7)(a)] is the section dealing with good faith. Subsection (2)(a)[(7)(a)] uses the word "entitled", as does subsection (1)(a). Subsection (2)(a)[(7)(a)] therefore creates an exception to entitlement, i.e., if "an offer of judgment was not made in good faith." However, both the words "good faith" and "entitle" are glaringly missing from subsection (2)(b)[(7)(b)]. "When the legislature has carefully employed a term in one section of a statute and has excluded it in another, it should not be implied where excluded." *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 233 (5th Cir. 1972). The fact that the legislature excluded the words "good faith" and "entitled" from subsection (2)(b)[(7)(b)] substantiates that subsection (2)(b)[(7)(b)] does not pertain to entitlement. The legislature very simply would have said "when considering entitlement" or "in determining whether a party acted in good faith", and not "when determining the reasonableness of an award of attorney's fees . . . . " As was said in *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972):

> Where Congress includes particular language in one section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.

Defendant next argues that the factors in subsection (2)(b)[(7)(b)] "obviously relates to entitlement, and not to amount." (Petitioner's brief, page 12). Those factors do not relate to entitlement, but are items which the court must consider "[a]long with all other relevant criteria

. . . " [subsection (2)(b)[(7)(b)] in determining a reasonable attorney's fee [See, e.g., *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), and Rule 4-1.5(6) of the Florida Rules of Professional Conduct]. What happened is that the legislature wanted to be certain that the determination of a reasonable attorney's fee took into consideration the six factors set forth in subsection (2)(b)[(7)(b)].

The legislature is presumed to know the law as it exists when it passes a new law on the subject. See, *Adler-Built Industries, Inc. v. Metropolitan Dade County*, 231 So.2d 197 (Fla. 1970) (citing *Collins Investment Co. v. Metropolitan Dade County*, 164 So.2d 806 (Fla. 1964)). It is very likely that these factors set forth in subsection (2)(b)[(7)(b)] were intended by the legislature to modify and clarify the law with regard to the "multiplier" as set forth in *Rowe* with regard to the determination of a reasonable fee under this statute. In other words, for example, a plaintiff might otherwise be entitled to a multiplier calculated pursuant to the rationale of *Rowe*, and *Standard Guaranty Insurance Company v. Quanstrom*, 555 So.2d 828 (Fla. 1990). The legislature wanted to make certain that certain additional factors over and above those factors set forth in *Rowe* were taken into consideration in awarding a reasonable fee, and if, for example, the case was a "test-case", the fee would be increased or decreased accordingly. See, e.g., *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).

For example, contrary to Defendant's contention, factor number 1: the "[m]erit or lack of merit in the claim", is very relevant to the amount to be awarded as a fee. If the merit of the case should have been readily apparent to a defendant who refused plaintiff's offer of

judgment, then the attorney's fee award should be enhanced. Conversely, if the merit of the claim was not readily apparent to the party at the time the offer was rejected, that would be a factor weighing against enhancement of the fee.

Another key point of statutory construction mitigating against Defendant's argument is that if subsection (2)(b)[(7)(b)] did refer to entitlement, that subsection would have referred to "costs", in addition to attorney's fees. Subsection 1(a) refers to *costs* and fees, section (2)(a)[(7)(a)] states that if a party's offer is not in good faith, the party may not get "*costs* and fees", but section (2)(b)[(7)(b)] makes *no reference* to the word costs. If subsection (2)(b)[(7)(b)] was intended to refer to entitlement, and not just to the determination of the amount of attorney's fees, why was the word "costs" missing from that section speaking about reasonableness? The answer is that reasonableness has always referred to the *amount* of an attorney's fee, and since the subsection doesn't deal with entitlement, there is no need to mention costs because items one through six are criteria for the court to consider in determining the amount of fees. Further, the word "reasonable" has always been used by the legislature and the Florida courts to refer to the determination of the amount of attorney's fees, and not as to entitlement.

Under Defendant's interpretation, a defendant who gets a verdict against them, which verdict is twenty-five percent less than the offer made by that defendant, may not necessarily be entitled to fees, but will be automatically entitled to costs, even if the plaintiff obtains a verdict against the defendant, because the word "costs" is not in subsection (2)(b)[(7)(b)]. "It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole." *Forsythe*, at 455. Further, the 1990 amendment requires the award of "investigative

expenses" if the party rejecting the offer is off by more than 25 percent [section 768.79(6)]. Under Defendant's interpretation, investigative expenses will also automatically be awarded against a party who wrongly rejected the offer, but attorney's fees will not. As was stated in *Wakulla County v. Davis*, 395 So.2d 540, 543 (Fla. 1981):

> "[T]he law favors a rationale, sensible construction. *Realty Bond & Share Co. v. Englar*, 104 Fla. 329, 143 So.152 (1932). Courts are to avoid an interpretation of a statute which would produce unreasonable consequences."

Determining that it is unreasonable to award fees to an offeror who did 25 percent better than the offer, but then mandating an award of investigative expenses and otherwise untaxable investigative expenses to the offeror leads to an absurd result which could not have reasonably been intended by the legislature.

Defendant argues that the language in subsection (6)(a) of the 1990 version of the statute that states that the award of "reasonable costs, including investigative expenses and attorney's fees, [shall be] calculated in accordance with the guidelines promulgated by the Supreme Court . . ." reflects that subsection [(7)(b)](2)(b) relates to entitlement. First, this 1990 amendment is not the version that is at issue in this case. Second, subsection (2)(b)[(7)(b)] specifically states that the court, when determining an award of fees, shall consider the six "additional factors". The "additional factors" are criteria which the legislature felt were essential in the determination of the amount of a reasonable attorney's fee. Further, the words in subsection (2)(b)[(7)(b)] "[t]he court shall consider, along with all other relevant criteria, the following additional factors . . ." reflects that the legislature was aware that there was "other criteria" that a court had to consider in determining the amount of a reasonable attorney's fee, over and above "[t]he guidelines promulgated by the Supreme Court . . . ."

Further, the words "calculated in accordance with the guidelines promulgated by the Supreme Court . . ." modify the words "[s]hall be awarded reasonable costs, including investigative expenses, and attorney's fees, ..." Under this punctuation, "costs" also must be "[c]alculated in accordance with the guidelines promulgated by the Supreme Court . . . ." The comma after the words "attorney's fees" indicates that intention[5,6].

The "additional factors" would also have been relevant regarding whether to award costs, however, the legislature's omission of any reference to costs in subsection (7)(b) clearly indicates that that subsection is not an entitlement section, but are "additional factors" for the court to consider in determining the amount of a reasonable attorney's fee. If the legislature had intended that subsection (2)(b)[(7)(b)] deal with entitlement, they would logically have added the word "costs" to that subsection.

Defendant then embarks on a discussion of Rule 1.442 of the Florida Rules of Civil Procedure that is irrelevant to section 768.79 and to the issues in this case. That Rule was adopted on January 1, 1990 [*The Florida Bar re Amendment to Rules*, 550 So.2d 442 (Fla. 1989)], and it survived only two and a half years [repealed in *Timmons v. Combs*, 608 So.2d 1 (Fla. 1992)]. The rule was an attempt to reconcile conflicts between section 768.79, which

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[5] "[T]he Legislatures of our country have consistently attempted to follow the rules dictated by the grammar books with the result that statutes now are punctuated prior to enactment." *Wagner v. Botts*, 88 So.2d 611, 613 (Fla. 1956).

[6] "The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act but to the manner in which it is punctuated." *Florida State Racing Commission et al. v. Bourquardez*, 42 So.2d 87, 88 (Fla. 1949).

is a mandatory fee statute, and section 45.061, which is not a mandatory statute, but which applies a statutory presumption. The adoption and interpretation of Rule 1.442 has nothing to do with the intent of the legislature when they adopted section 768.79 as part of the 1986 Tort Reform Act. Defendant argues that the Fourth District Court of Appeal was wrong in its interpretation of section 768.79 in *Schmidt v. Fortner*, 629 So.2d 1036 (Fla. 4th DCA 1993). At the time of the writing of this brief, seven members of the Fourth DCA agreed with the interpretation of *Schmidt* without dissent (including the Honorable Harry Anstead, now a member of this Court). See *Schmidt, Dvorak v. TGI Friday's*, 639 So.2d 58 (Fla. 4th DCA 1994), and *Aitken v. Gajadha*, 636 So.2d 766 (Fla. 4th DCA 1994), and the rationale of *Schmidt* was recently adopted by the Second DCA in *Government Employees Insurance Company v. Thompson*, 641 So.2d 189 (Fla. 2d DCA 1994), and the First District Court of Appeal in *Mark C. Arnold Construction Co. v. National Lumber, Inc.*, 19 Fla. L. Weekly, D1714 (Fla. 1st DCA August 12, 1994). The Fifth DCA also seems to have adopted the same interpretation as the Fourth in *Williams v. Brochu*, 578 So.2d 491, 494 (Fla. 5th DCA 1991):

> Because the plaintiff's judgment obtained for damages was $1,200, which was at least 25% less than the amount of the first Offer of Judgment (i.e., $1,200 is less than $1,500 which is 25% less than $2,000), the defendant was entitled to recover attorney's fees under that statute based on the plaintiff's failure to accept the first Offer of Judgment.

The only contrary interpretation and the only district holding otherwise is found in *Bridges v. Newton*, 556 So.2d 1170 (Fla. 3d DCA 1990), which holding is distinguished for two reasons:

1. The court held that the offer was not made in good faith because the plaintiff herself felt that the offer was inadequate and in fact tried to extricate herself from it; whereas in our case there was no contention that the offer was not made in good faith, and;

2. Because *Bridges* was decided upon an interpretation that the lack of good faith exception applies to both offers of judgment and demands for judgment, it was unnecessary for that court to reach the interpretation of section 768.79(2)(b), and therefore what was said there is dicta. See, *Schmidt*.

Further, Defendant argues that *Schmidt* is irrelevant because our case involves the 1987 version of the statute, and *Schmidt* involves the 1990 version. However, that argument lacks merit because the relevant portions of the statutes at issue are the same for all intents and purposes. The major purpose of the 1990 redaction was to add more definitive procedural aspects.

Defendant next argues that the *Schmidt* rationale does not apply because "the only reference to an award of fees in the 1987 statute is made in subsection (1)(a) and refers to an award of damages to the plaintiff." (Petitioner's brief, page 16). Wrong. The word "award" is also found in subsection (2)(a) of the 1987 version [and also in the 1990 amendment in subsection (7)(a)]. Further, the Fourth District Court of Appeal has also applied the *Schmidt* rationale to the 1987 version of the statute. *Aitken*, supra.

Amicus argues that the use of the word "shall" in the statute connotes a "directory, rather than mandatory . . ." context. This issue was not raised by TGI Friday's in either the trial court or in the Fourth District Court of Appeal. It has been held by this Court that an

appellate court will not consider issues not presented to the trial judge. *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981)[7]. As was stated in *Keating v. State*, 157 So.2d 567 (Fla. 1st DCA 1963) an "[a]micus is not at liberty to inject new issues into a proceeding . . . ." Defendant, having failed to raise this issue below that the word "shall" is directory and not mandatory, amicus should be precluded from arguing this issue for the first time before this Court.

In any event, the cases cited by amicus do not support its argument. "The word 'shall' is normally used in a statute to connote a mandatory requirement rather than a future tense." *Drury v. Harding*, 461 So.2d 104 (Fla. 1984); *S.R. v. State*, 346 So.2d 1018 (Fla. 1977); *Neal v. Bryant*, 149 So.2d 529 (Fla. 1963); *Holloway v. State*, 342 So.2d 966 (Fla. 1977); *City of Orlando v. County of Orange*, 276 So.2d 41 (Fla. 1973); *Thompson v. State*, 246 So.2d 760 (Fla. 1971). In ignoring this long line of Florida cases, amicus also ignores the fact that the only time the word "shall" has been construed as directory and permissive and not mandatory is:

1. When necessary to conform to constitutional requirements. *Belcher Oil Company v. Dade County*, 271 So.2d 118 (Fla. 1972);

2. Where a statute sets the time when something is to be performed, "where no provision restraining the doing of it after that time is included and the act in question is not one upon which court jurisdiction depends." (footnote omitted). *Schneider v. Gustafson Industries, Inc.*, 139 So.2d 423, 425 (Fla. 1962), and;

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[7] *Dober*, coincidentally, was a case in which counsel for TGI Friday's participated in. No wonder why counsel for petitioner TGI Friday's decided to steer clear of this issue and allow amicus to argue the issue for it.

3. In the case cited by amicus: "[i]t becomes an unreasonable infringement of the inherent power of the court to perform the judicial function because it burdens the court with doing an empty and meaningless act." *Simmons v. State*, 36 So.2d 207, 208 (Fla. 1948), or;

4. If the legislature encroaches upon a judicial power upon which the legislature does not have the authority. *State v. Genung*, 300 So.2d 271 (Fla. 2d DCA 1974).

The first three are inapplicable and require no explanation. With regard to number 4, this Court has already held that the legislature had the authority to adopt section 45.061, a statute awarding attorney's fees against a non-prevailing party under certain circumstances. *Leapai v. Milton*, 595 So.2d 12 (Fla. 1992). The authority of the legislature to authorize courts to award attorney's fees is without question. "Statutes authorizing courts to award attorney's fees to prevailing litigants have long withstood constitutional attack." *Rowe*, at 1148. This Court further stated: "We find that an award of attorney's fees to the prevailing party is 'a matter of substantive law properly under the aegis of the legislature', in accordance with the long-standing American Rule adopted by this Court". *Rowe*, at 1149. Therefore, none of the exceptions to the general rule that the word "shall" is mandatory apply here. Id. Further, it has been held that:

> [w]here "shall" refers to some required action preceding a possible deprivation of a substantive right, *S.R. v. State,* supra; *Neal v. Bryant*, supra; *Gilliam v. Saunders*, 200 So.2d 588 (Fla. 1st DCA 1967), or the imposition of a legislatively-intended penalty, *White v. Means,* 280 So.2d 20 (Fla. 1st DCA 1973), or action to be taken for the public benefit, *Gillespie v. County of Bay,* 112 Fla. 687, 151 So. 10 (1993), it is held to be mandatory...

Allied Fidelity Insurance Co. v. State, 415 So.2d 109, 111 (Fla. 3d DCA 1982). This act most certainly constitutes "the imposition of a legislatively intended penalty" *Allied,* at 111. This was

confirmed in *Goode v. Udhwani*, 19 Fla. L. Weekly D2172 (Fla. 4th DCA October 12, 1994), wherein it is stated:

> The purpose of § 768.79 was to serve as a penalty if the parties did not act reasonably and in good faith in settling lawsuits. The statutory language even refers to "the penalties of this section." § 768.79 (1).

Therefore, the word "shall" must be construed as mandatory.

Even the case of *White v. Means*, 280 So.2d 20 (Fla. 1st DCA 1973) cited by amicus supports plaintiff's position. The issue there was whether the word "shall" in an attorney's fee statute should be construed as mandatory or permissive. The statute provided in relevant part:

> "The court shall determine the issues of paternity of the child, . . . and if the court shall find the defendant to be the father of the child *he shall so order and shall further order the defendant to pay the complainant* . . . , such sum or sums as shall be sufficient *to pay reasonable attorney's fee*, hospital or medical expenses, cost of confinement and any other expenses incident to the birth of such child. (Emphasis supplied.)"

White v. Means, at 20, 21. *White* arrives at the exact opposite result that amicus is seeking this Court to find. The court in *White* held that the word "shall" in an attorney's fee provision mandates an award of fees. Such is the case in every attorney's fee statute containing similar language. See, e.g., section 627.428, Florida Statutes, and other attorney's fee statutes referred to in *Rowe*.

Finally, it has been held that "ordinarily, the use of 'shall' in a statute carries with it the presumption that it is used in the imperative rather than the directory sense." *In re One (1) 1984 Ford Van* 150, 521 So.2d 244 (Fla. 1st DCA 1988). Amicus argues that 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 or error, no matter how reasonable the

evaluation may have been at the time." (Amicus brief, page 2). What's being forgotten is that an analogous situation has existed for years in all litigation cases. The taxation of costs has always gone against the losing party, no matter how reasonable the losing party's evaluation of the case was.

Section 768.79 isn't the first time in Florida legal history that a party in a losing offer of judgment situation had to pay regardless of whether the losing party made a correct judgment regarding the value of a claim. Prior to the advent of the first offer of judgment *attorney's fee* statute in this state in 1986 (section 768.79), the Florida Supreme Court adopted Rule 1.442 effective January 1, 1973, which stated in relevant part "if the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer . . . ." The party who lost tried to argue that the rule was discretionary, and the court disagreed:

> [w]e hold that the express language of the rule leaves no doubt that reasonable costs must be awarded to the defendant where, a proper offer of judgment is made thereunder, the plaintiff does not accept the offer, and the judgment finally obtained by the plaintiff is not more favorable than the offer. *The rule itself is couched in mandatory terms and is designed to induce or influence a party to settle litigation and obviate the necessity of a trial.* (emphasis added.)

Santiesteban v. McGrath, 320 So.2d 476, 478 (Fla. 3d DCA 1975). Whether the party opposing the offer made a correct judgment or not, if that party lost under the old offer of judgment rule, that party had to pay the costs, which is no different than this statute, except that attorney's fees are added.

As stated, attorney's fee statutes allowing the prevailing party an attorney's fee in certain cases have been the law of the land for many years. See, *Rowe*, at 1148. Section 768.79 is the

same in the sense that it automatically gives the prevailing party who meets the statutory prerequisites an attorney's fee, but allows a 25 percent leeway for error. Section 768.79 further has a separate section which allows enhancement or reduction of the amount of fees according to certain criteria. (Subsection (2)(b)[(7)(b)]).

Courts have upheld arbitration provisions because they decrease litigation. *Midwest Mutual Insurance Company v. Santiesteban*, 287 So.2d 665 (Fla. 1974). Mediation rules have been enacted to encourage settlements. This Court has always acted in a way to promote settlements and decrease the necessity for litigation[8]. The Fourth District's interpretation of *Schmidt* will go far to encourage settlements and decrease the amount of litigation, especially frivolous litigation.

Amicus talks about a statutory intent of requiring reasonable evaluation of the value of a claim. The statutory intent of the 1986 Tort Reform Act (when this particular statute was initially adopted) had to do with decreasing the costs of litigation and increasing the availability of liability insurance coverage. *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987). In encouraging plaintiffs and defendants to seriously evaluate all offers of judgment made, that legislative intent is achieved. Interpreting the statute to allow a discretionary entitlement to fees will result in fees almost never being granted (just like sanctions under Rule 1.380 of the Florida Rules of Civil Procedure, which almost never happen, because they are discretionary with the trial judge . . . and they in no way deter frivolous discovery and responses that occur), and the intent of the legislature to promote settlements and discourage litigation will be thwarted.

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[8] "The law favors settlement of disputes and the avoidance of litigation." *Imhof v. Nationwide Mutual Insurance Co.*, 19 Fla. L. Weekly S441, 442 (Fla. September 8, 1994); *DeWitt v. Miami Transit Company*, 95 So.2d 898 (Fla. 1957).

The legislature finally has enacted a 'get-tough' law with 'teeth' in a 'send the message' statute that says that litigation is a serious thing, and if you're wrong, and if you refuse an offer, you're paying more than just taxable costs; and the legislative intent should prevail.

Amicus argues that this Court should read into this statute a requirement that on every occasion that this statute is at issue (which will be the majority of civil cases), a trial court should make a subjective determination regarding whether a party acted unreasonably in rejecting an offer of judgment. Reading such a requirement into the statute will create a logjam of evidentiary hearings to determine whether a party acted unreasonably in rejecting an offer, creating a floodgate of appeals with the appellate courts required to examine the entire record of every appeal to determine whether there is substantial competent evidence to support a trial court's decision. The legislature, in enacting the Tort Reform Act of 1986, sought to "deter unnecessary litigation" (*Dvorak*, at 58), not increase it. Amicus' position would have the opposite effect of the intent of the statute and the entire Act. The legislative history was cited in this court's opinion in *Smith v. Department of Insurance*, 507 So.2d 1080, 1084 (Fla. 1987), in relevant part:

> WHEREAS, the people of Florida are concerned with the increased cost of litigation . . . and
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> . . .
>
> WHEREAS, the Legislature finds that the current tort system has significantly contributed to the insurance availability and affordability crisis, and
>
> . . .
>
> WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action.

Giving the trial courts discretion to determine whether to award attorney's fees will result in the antithesis of "dramatic legislative action" which is set forth in the preamble to the 1986 Tort Reform Act. A mandatory award of fees, if one party is wrong by more than twenty-five

percent, is dramatic legislative action designed to encourage settlement and decrease the cost of litigation. Further, this Court has stated that it is this Court's "obligation . . . to honor the obvious legislative intent and policy behind an enactment . . ." *Byrd v. Richardson-Greenshields Securities*, 552 So.2d 1099, 1102 (Fla. 1989).

On page 7 of its brief, Amicus gives a perfect example of how convoluted their interpretation that they are espousing will make proceedings under this statute if their position is adopted. Every trial and appellate judge will be engaging in mental gymnastics to try to second-guess a jury verdict and evaluate what a case is worth. To affirm a jury verdict that awards twenty-five percent more or less than an offer, but then to refuse to award attorney's fees because a party's refusal to accept was reasonable, makes a mockery of our jury system. We would then have courts affirming jury awards, but denying fees by essentially stating that the jury award was unreasonable because one party's conduct in not accepting an offer was reasonable. In a case such as this case, where the offer of judgment was $65,000, and the jury award was $248,000, for the court to affirm the judgment, but to then say that the failure to accept the offer was reasonable, is inconsistent and puts the jury system into further disrepute. A finding that the Defendant's failure to accept the offer of judgment was reasonable carries with it the corollary that the jury's award was unreasonable.

In amicus' hypothetical, amicus will have the defendant bring in an expert who says that the defendant only had a 10 percent chance of losing, but the plaintiff will have an expert stating that the defendant had a 90 percent chance of losing, and the decision is then left to the trial judge's *whim* on whether to award fees or not. Political cronyism and other favoritisms will win out over a structured, calculated, and definitive standard set forth by the legislature. Discretion

will be the rule, setting itself up for an abuse of discretion. If the act has no 'teeth', it will not perform as intended. As was stated by Justice Overton in *Rowe*, at 1149:

> The assessment of attorney fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed. In certain causes of action, attorney fees historically have been considered part of litigation costs and the award of these costs is intended not only to discourage meritless claims, but also to make the prevailing plaintiff or defendant whole. It can be argued that, rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they are not economically feasible under the contingent fee system.

This Court further quotes Justice Cardozo, who wrote in *Life and Casualty Insurance Co. v. McCrary*, 54 S.Ct. 482 (U.S. 1934):

> We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so, the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmakers may include the fees of an attorney. *There are systems of procedure neither arbitrary nor unenlightened, and of a stock akin to ours, in which submission to such a burden is the normal lot of the defeated litigant, whether plaintiff or defendant.*

Rowe, at 1148.

The probable reason why section 45.061 was abolished by the legislature is because it was less workable and less manageable, leading to discretionary and inconsistent results, whereby section 768.79 keeps it simple. Subsection (2)(b)[(7)(b)] should be interpreted as: "when determining the reasonableness of [the amount of] an award of attorney's fees pursuant to this section . . . ." That is because the wording that follows "[t]he court shall consider *along with all other relevant criteria*, the following additional factors . . . . " (emphasis added) most likely refers to Rule 4-1.5 of the Rules of Professional Conduct, *Rowe*, *Standard Guaranty*

Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990), and case law in determining the amount of fees.

The Florida Defense Lawyers Association has taken the position that they have because the statute, as construed by the Fourth District Court of Appeal, decreases their business. Now insurance carriers have a reason to settle cases early, and not stretch them out while the carrier earns interest on the money at the claimant's expense. Amicus is upset because defense lawyers now have pressure from their insurance carriers to settle cases that they never had before. Likewise, plaintiff's lawyers and their clients will have a greater incentive to settle cases because the pressure is on them to properly evaluate a claim. No longer will tort litigation be viewed as the lottery where a plaintiff has nothing to lose but to "roll the dice" in the hope of "hitting that pot of gold." As was stated by Justice Overton in construing section 768.56, a statute awarding attorney's fees to the prevailing party in malpractice cases, and from where section 768.79 was fashioned:

> The statute may encourage an initiating party to consider carefully the likelihood of success before bringing an action, and similarly encourage a defendant to evaluate the same factor in determining how to proceed once an action is filed.

Rowe, at 1149.

The factors set forth in subsection (2)(b)[(7)(b)] are items whereby "the amount of the award may be adjusted upward or downward . . . " *Schmidt*, at 1040. Amicus argues that several of the factors "are not relevant to evaluating the reasonableness of the *amount* of an attorney's fee award" (Amicus brief, page 8). Amicus is incorrect for the reasons that follow.

For example, factor number 1, "the then apparent merit or lack of merit in the claim . . . " is no less related to the calculation of attorney's fees than is the contingency risk multiplier

set forth in *Quanstrom,* or the "results obtained" as set forth in 4-1.5 of the Rules Regulating the Florida Bar. In *Rowe*, this Court stated that when determining the *amount* of an attorney's fee to be awarded:

> When the trial court determines that success was more likely than not at the outset, the multiplier should be 1.5; when the likelihood of success was approximately even at the outset, the multiplier should be 2; and, when success was unlikely at the time the case was initiated, the multiplier should be in the range of 2.5 and 3.

Rowe, at 1151. When the trial court determines the chance of success at the outset under *Rowe*, that is very similar to determining "the then apparent merit or lack of merit . . . " set forth in factor number 1 of subsection (2)(b)[(7)(b)].

The second statutory factor: "the number and nature of offers made by the parties", can also enhance or decrease an attorney's fee depending upon the circumstances.

Amicus concedes that the third statutory factor: the "closeness of questions of fact and law at issue . . . " "could be relevant to the reasonableness of an attorney's fee award . . . " (amicus brief, at 10), but then argues that that factor has nothing to do with the amount of an attorney's fee. Again, amicus misses the point. This is also a factor to consider in determining whether to adjust an attorney's fee upward or downward.

Subsection (2)(a)[(7)(a)] gives the trial court discretion to award attorney's fees even if the offer was not made in good faith: "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." (emphasis added.) Subsection (2)(a)[(7)(a)] demonstrates how strong the legislative intent is to award fees. Even if the offer was *not* made in good faith, the trial court technically can award attorney's fees. However, if the court decides to award fees despite the

lack of good faith, for example: unreasonably failing to furnish information [Section (2)(b)4 [(7)(b)4], the trial court can then reduce the attorney's fee award substantially because of the unreasonable refusal "to furnish information necessary to evaluate" the claim.[9]

Amicus also acknowledges that the fifth statutory factor has relevancy to the calculation of the amount of an attorney's fee.

Item number 6 goes directly to determining the amount of the fee to be awarded. Number 6 requires a determination of what one would reasonably expect a party to spend defending or prosecuting a case, and if the defendant spends substantially more than it should, the court can reduce the amount of the fee awarded because, for example, the defendant expended an unreasonable amount of time and money in defending the case. Amicus' contention that items 1 through 6 do not relate to determining the amount of a reasonable attorney's fee is without merit.

Subsection (2)(b)[(7)(b)], as clarified by the 1990 amendment to section 768.79, reflects the intent that first the court shall determine a reasonable attorney's fee (the lodestar). Once the lodestar is determined, items 1 - 6 of subsection (2)(b)[(7)(b)], and the factors in *Rowe* and in *Quanstrom*, should be examined in determining whether a multiplier or divider should be applied. In the alternative, an equally reasonable interpretation is that the six factors set forth

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[9] It should be noted that subsection (2)(a)[(7)(a)] asks the court to determine whether, at the time the offer was made, was it made in good faith. Subsection (2)(b)(4)[(7)(b)(4)] does not go to whether the person was in good faith *at the time that they made the offer*, but goes to whether at other times during the course of the litigation (other than at the time the offer was made) there was an unreasonable refusal to furnish information. Therefore, good faith as set forth in subsection (2)(a)[(7)(a)] is a determination made at the time the offer is made, and not at some other time other than when the offer is "made", as is subsection (2)(b)4[(7)(b)4].

in that subsection, along with the factors set forth in Rule 4-1.5 of the Rules Regulating the Florida Bar, should be taken into consideration in determining the lodestar, and then the court can subsequently apply a multiplier or a divider, if appropriate.

Section 768.79, as construed by the Fourth District Court of Appeal, will discourage plaintiffs from filing and proceeding with frivolous lawsuits and will encourage settlements. It will deter defense attorneys and insurance carriers from stretching out cases, and will instead encourage them to settle cases so that they can avoid incurring attorney's fees. The statute works both ways, and it says to the public and attorneys: "If you think you have nothing to lose by thinking that litigation is a lottery that you can't lose, think again."

In sum:

1. Subsection (1)(a)[(1)] creates the entitlement,

2. Subsection (2)(a)[(7)(a)] says that it can be taken away, and

3. Subsection (2)(b)[(7)(b)] sets forth additional factors to consider in determining a reasonable attorney's fee.

RESPONSE TO POINT III

SECTION 768.79 IS CONSTITUTIONAL.

The Defendant TGI Friday's raises the issue of the constitutionality of section 768.79 after having basically conceded the issue at the oral argument before the Fourth District Court of Appeal:

Marjorie Gadarian Graham (appellate attorney for defendant TGI Friday's):

> I want to talk about *Schmidt*. Let me just briefly expose the first two issues that they raised on appeal which happens to be the constitutionality of 45, the statute and chapter 45 and 768.79. *Milton v. Leapai* clearly disposes of that. The constitutionality of 768.79 has not been directly addressed, although I will tell you, I think probably implicit in the *Timmons* decision where the Supreme Court adopted 768.79 as a rule of procedure that they're implicitly severing out the procedural and saying we're adopting it, (and the posture right now is there is, can be, and I'm on the rules committee and Mr. Cytryn has just come one, there's a whole new rule pending that is going to revise the offer-judgment rule into a rule). Let's talk about *Schmidt* . . .
>
> (Oral Argument Tape attached).

When counsel for plaintiff attempted to argue the constitutionality, Judge Larry Klein, the judge in the Fourth District Court of Appeals, stated as follows: "Well, she's pretty much conceded that issue."

Irrespective of the concession by counsel, section 768.79 is constitutional. First, there is "a presumption that the acts of the Legislature are constitutional and that all reasonable doubts are to be resolved in favor of their validity . . . " (footnote omitted). *Belk-James v. Nuzum*, 358 So.2d 174 (Fla. 1978). Second, section 768.79 is very similar to section 45.061, which has been held constitutional by this Court. This Court, in an opinion written by Justice Overton with regard to section 45.061, stated that there are just some instances when new laws have to contain

both procedural and substantive aspects, and they are not necessarily unconstitutional because they contain both:

> We reject the applicability of this principle under the circumstances of this case. We have consistently held that statues should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality. *McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974). (footnote omitted) This is particularly so in areas of the judicial process that necessarily involve both procedural and substantive provisions to accomplish a proposal's objective. To strictly apply the nonseverance principle, as done by the district court, would make it increasingly difficult to adopt new judicial process proposals that have both substantive and procedural aspects (footnote omitted)

Milton v. Leapai, 595 So.2d 12, 14 (Fla. 1992). In *Timmons v. Combs*, 608 So.2d 1 (Fla. 1992), this Court stated with regard to section 45.061:

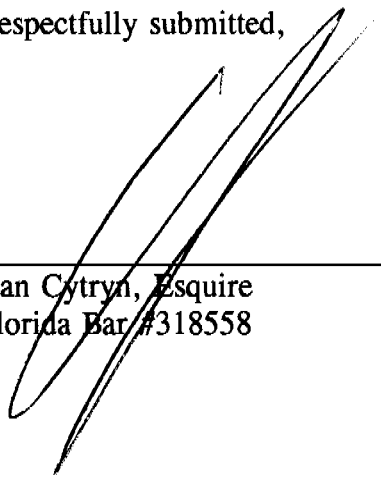
> We held that the statute was constitutional in that it created the substantive right to attorney's fees and costs. We rejected the lower court's conclusion that the statute must be declared unconstitutional because it also contained procedural aspects.

Section 768.79, being markedly similar to section 45.061, is constitutional for the same reasons set forth in *Leapai*.

CONCLUSION

Plaintiff requests that this Court approve the opinion of the Fourth District Court of Appeal as concerns section 768.79. In the alternative, even if this Court decides that an award of fees is discretionary as contended by Defendant and amicus, Plaintiff requests that the opinion be affirmed, because the Defendant did not raise the issue in either the trial court or the appellate court that the Plaintiff did not make the offer in good faith. In the alternative, if this Court determines that the determination of the factors in subsection (2)(b)1-6 [(7)(b)1-6] are criteria that the Court must take into consideration in determining *entitlement*, then this Court should still affirm this case for the failure of the Defendant to present any evidence in the trial court below with regard to those factors set forth in (2)(b)1-6 [(7)(b)1-6].

Respectfully submitted,



Dan Cytryn, Esquire
Florida Bar #318558

CROSS-PETITION ARGUMENT

POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH SEVERAL DECISIONS OF THE OTHER APPELLATE COURTS.

This Court has jurisdiction to hear this case on the merits because there is direct and express conflict with several district court decisions.

The Fourth District Court of Appeal's statement that the trial court, in deciding whether to award attorney's fees under section 45.061, Florida Statutes (1987), may rely upon its own "observation of the evidence at trial" conflicts with the Fifth District Court of Appeals decision in *O'Neil v. Wal-Mart Stores, Inc.*, 602 So.2d 1342 (Fla. 5th DCA 1992), which requires the trial court to "consider all the relevant circumstances *at the time of the rejection . . .*", at 1343.

In holding that the trial court may consider the evidence at trial in deciding to whether to award attorney's fees, the Fourth District Court of Appeal has announced a rule of law which conflicts with a rule previously announced by the Fifth District Court of Appeal in a case which involves substantially the same controlling facts. This court should quash the decision of the Fourth District Court of Appeal in that regard and apply the plain wording of the statute that the court should "consider all the relevant circumstances *at the time of the rejection.*" The time of the rejection of the offer was not at the time of trial, but was two years earlier when the offer was not accepted within the time set forth by section 45.061(1): "an offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected."

Further, the Fourth District Court of Appeal's statement: '"Section 45.061(2) provided that a court "may" award attorney's fees if the court determines that an offer of judgment was "rejected unreasonably"', conflicts with the First District Court of Appeal's opinion in *Sears Commercial Sales v. Davis,* 559 So.2d 237 (Fla. 1st DCA 1990), which states that the award is mandatory, and uses the word "is entitled", not "may":

> Section 45.061 provides, in pertinent part, that if a judgment obtained by a plaintiff is at least twenty-five percent greater than the offer made by the plaintiff and rejected by the defendant, the rejection of the offer is presumed to be unreasonable, § 45.061(2), and the plaintiff *is entitled* to an award of costs and expenses, including attorney's fees, plus interest, incurred in preparing for trial, § 45.061(3). [Emphasis added].

The Fourth District Court of Appeal's decision on this issue also conflicts with *Memorial Sales, Inc. v. Pike*, 579 So.2d 778, 780 (Fla. 3d DCA 1991), which appears to mandate attorney's fees once the plaintiffs received at least 25 percent less than the offer rejected:

> In the instant case, the plaintiffs rejected an offer of $2,501.00 and were awarded nothing. Pursuant to section 45.061, this creates the presumption that the plaintiffs unreasonably rejected the defendants' offer of settlement. Consequently, the defendants are entitled to recover the costs and attorney's fees which the parties have already stipulated to as reasonable.

The Fourth District Court of Appeal's decision in *Dvorak* also conflicts with the Third District Court of Appeals decision in *Lennar Corporation v. Muskat*, 595 So.2d 968 (Fla. 3d DCA 1992). In *Lennar*, the Third District Court of Appeal reversed the trial court's denial of an attorney's fee because the party opposing the assessment of the attorney's fee "made no evidentiary showing to rebut the presumption of unreasonable rejection created by section

45.061(2)(b) . . . . That holding expressly conflicts with the decision of the Fourth District Court of Appeal which allowed the trial court to deny plaintiff's motion for attorney's fees with no evidentiary showing.

The decision of the Fourth District Court of Appeal also conflicts with *Carlough v. Nationwide Mutual Fire Insurance Co.*, 609 So.2d 770 (Fla. 2d DCA 1992), which requires the presentation of evidence supporting a party's position at a hearing on a motion to determine entitlement to attorney's fees, something the Fourth District Court of Appeal stated that the defendant TGI Friday's did not have to present.

POINT II

THE TRIAL COURT AND THE APPELLATE COURT ERRED IN NOT AWARDING ATTORNEY'S FEES TO THE PLAINTIFF.

A. The Fourth District Court of Appeal erred in determining that the trial court has complete discretion in deciding whether to award fees in case of an unreasonable rejection; an award of sanctions to a party obtaining a judgment twenty-five percent better than its offer is mandatory unless the offeree overcomes the burden of the presumption of unreasonable rejection.

The Fourth District Court of Appeal stated in *Dvorak v. TGI Friday's*, 639 So.2d 58, 60 (Fla. 4th DCA 1994): "Section 45.061(2) provides that a court 'may' award attorney's fees if the court determines that an offer of judgment was rejected unreasonably." The Fourth District Court of Appeal overlooked the fact that once the offeror/plaintiff gets more than 25 percent of the offer at trial (or once the offeree/plaintiff gets 25 percent less than the offer), sanctions become mandatory unless the presumption of unreasonable rejection is rebutted by the offeree. Section 45.061(2) provides in relevant part:

> 2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:
>
> (a) 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.

> (b) Whether the suit was in the nature of a "test-case," presenting questions of far-reaching importance affecting nonparties.
>
> *An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected*, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law. (emphasis added.)

The Fourth District Court of Appeal erroneously interpreted the word "may" as giving the trial court complete discretion, no matter what the result. The only time that the word "may" operates to give the trial court complete discretion in whether to award sanctions is if the result obtained by the plaintiff/offeror is not 25 percent greater than the offer rejected by the defendant, or if the result obtained by the defendant/offeror is not 25 percent less than the offer rejected by the plaintiff-offeree. Under such circumstances, even if, for example, the plaintiff does not obtain a judgment for at least 25 percent greater than the offer rejected, the court still "may" make a determination that the offer was "rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation." Section 45.061(2).

For example, if a plaintiff makes an offer for $10,000, and the judgment is for $11,000, the trial court has discretion under this section to award fees, even though the judgment is only 10 percent more than the offer, if the required finding of unreasonable rejection resulting in

needless increase in the cost of litigation is found by the trial court. Once the plaintiff obtains a judgment in an amount at least 25 percent greater than the offer made by the plaintiff, the standard changes from discretion on the part of the trial court, to an award being mandatory, unless the defendant rebuts the presumption of unreasonable rejection. Since plaintiff's judgment was more than 25 percent more than the amount of the plaintiff's offer, the *burden* then shifted to TGI Friday's to overcome the statutory presumption. *Gross v. Albertsons, Inc.*, 591 So.2d 311 (Fla. 4th DCA 1991).

B. The Fourth District Court of Appeal erred in holding that the time for determination of whether the offer was unreasonably rejected is at trial, and not at the time that the offer was rejected.

The Fourth District Court of Appeal held that "it was perfectly proper for the defendant to have relied on what occurred at trial . . . in determining whether the defendant TGI Friday's had unreasonably rejected the offer". This flies in the face of the statutory language which requires that "the court shall consider all the relevant circumstances *at the time of the rejection* . . . " See, *O'Neil v. Wal-Mart Stores, Inc.*, 602 So.2d 1342 (Fla. 5th DCA 1992).

The offer was made on April 4, 1989, and the case was tried in April of 1991, two years later. The operative date to determine whether the offer was unreasonably rejected was 45 days from April 4, 1989, the date that the offer was made, not what happened two years later at trial. See, *United Liquors v. Jaquin-Florida Distilling Company*, 584 So.2d 571 (Fla. 2d DCA 1992): [offer is deemed rejected when not accepted within forty-five days]. The trial court made no

findings concerning the relevant circumstances at the time the offer was rejected, and the Fourth District Court of Appeal misconstrued the law on this issue.

C. In denying sanctions pursuant to section 45.061, a trial court must make express findings of fact to facilitate meaningful appellate review.

In *O'Neil v. Wal-Mart Stores, Inc.*, 602 So.2d 1342 (Fla. 5th DCA 1992), the court held that "express findings supporting the 'unreasonable rejection' conclusion are needed in order to permit meaningful appellate review of appellate review of such the awards," at 1343. Likewise, if a trial court is going to find against the statutory presumption of unreasonable rejection, it must make express findings of fact to support the trial court's finding that the presumption has been adequately rebutted. When no such express findings are made, the appellate court is then forced to review the entire record to try to find support for a trial court's conclusion that the presumption of unreasonable rejection was rebutted. The lack of express findings of fact does nothing to facilitate appellate review, and only creates more work for the appellate courts.

Simply stating that an offer was not unreasonably rejected without factual findings is a legal conclusion. Legal conclusions do not facilitate appellate review, because the court is then required to review the entire record, which in this case consisted of over 1,700 pages. The Fourth District Court of Appeal erred in not requiring express finding of fact when arriving at its conclusion that the presumption of unreasonable rejection was rebutted by the defendant TGI Friday's.

D. Expert or sworn testimony is required under section 45.061 to rebut the presumption of unreasonable rejection.

The Fourth District held in *Dvorak* "that it was not necessary for the defendant to put on an expert witness to testify about whether there was an unreasonable rejection." *Dvorak*, at 60. The Third District has held that a party seeking "to rebut the presumption of unreasonable rejection created by section 45.061(2)(b) . . . " must make an "evidentiary showing to rebut the presumption of unreasonable rejection . . . " *Lennar Corporation v. Muskat*, 595 So.2d 968 (Fla. 3d DCA 1992). TGI Friday's made no evidentiary showing to rebut the presumption of reasonable rejection.

There are two types of presumptions set forth in the Florida Evidence Code. They are set forth in section 90.302, which provides in relevant part:

Every rebuttable presumption is either:

> (1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or
>
> (2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

Under either subsection (1) and (2), TGI Friday's fails to rebut the presumption. Assuming that the presumption falls under (1), TGI Friday's was required to introduce "credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact . . . ." TGI Friday's failed to produce any evidence, and the only evidence introduced was introduced by the Plaintiff. Therefore, TGI Friday's has failed to rebut the presumption under section 90.302(1).

If this is a presumption affecting the burden of proof, then TGI Friday's also loses, since TGI Friday's failed to introduce any evidence to rebut Plaintiff's expert who testified that TGI Friday's reasonably rejected the offer, resulting in extensive and costly litigation.

Further, whether an offer "was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation . . . ", is not something that should be decided by a judge without expert testimony. What makes the judge an expert on the value of a personal injury case? What if the judge had only been on the bench one week, and had been a corporate lawyer? Why is he an expert? Just as expert testimony is required for an award of attorney's fees (see, *Lamar v. Lamar*, 323 So.2d 43 (Fla. 4th DCA 1975), it should also be required in making a determination whether an offer has been unreasonably rejected. What makes a trial judge an automatic expert on the value of a personal injury case and the intricacies involved in whether the offer was reasonable or unreasonable?

It is said in the sponsors' note to section 90.304:

> The presumptions affecting the burden of proof, which are defined in section 90.304, place a greater burden on the one asserting the non-existence of the presumed fact because of the greater harm to the individual or to societal stability that would ensue should the presumed fact be disproved.

Certainly, in failing to produce any evidence to rebut the presumption, TGI Friday's loses.

Section 45.061(2) creates a rebuttable presumption that if the plaintiff gets a judgment in the amount of 25 percent more than the offer that was made by the plaintiff, then the offer "shall be presumed to have been unreasonably rejected by a defendant." TGI Friday's presented no evidence, testimony or facts to rebut this presumption. Therefore, it is clear that the trial court committed reversible error in not awarding attorney's fees under this statute. Finally,

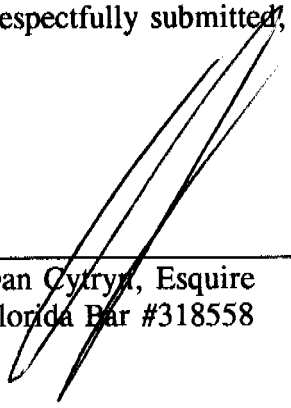
because only plaintiff presented evidence supporting its position, plaintiff must prevail. As was stated in *Carlough v. Nationwide Mutual Fire Insurance Company*, 609 So.2d 770, 771 (Fla. 2d DCA 1992):

> Because only Carlough provided evidence supporting his position at the hearing, he should prevail upon his motion for attorney's fees. Under the circumstances, upon remand, Nationwide should not be given a second bite at the ample (sic) to present evidence which it failed to produce at the scheduled evidentiary hearing. *See In re Forfeiture of 1987 Chev. Corvette,* So.2d 594 (Fla. 2d DCA 1990). "Somewhere the curtain must ring down on litigation." *Broward County v. Coe,* 376 So.2d 1222, 1223 (Fla. 4th DCA 1979).

CONCLUSION OF CROSS APPEAL

The decision of the Fourth District Court of Appeal on this issue should be quashed and the case should be remanded to the trial court for a determination of the amount of sanctions, including interest, costs, and attorney's fees, to be assessed under this section.

Respectfully submitted,



Dan Cytryn, Esquire
Florida Bar #318558

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to: John B. Marion, IV, Esquire, Sellars, Supran, Cole & Marion, P.A., P.O. Box 3767 West Palm Beach, Florida 33402, Marjorie Gadarian Graham, Esquire, Marjorie Gadarian Graham, P.A., Northbridge Centre, Suite 1704, 515 North Flagler Drive, West Palm Beach, Florida 33401, and to Jack W. Shaw, Jr., Suite 1400, 225 Water Street, Jacksonville, FL 32202 this 31ST day of October, 1994.

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8100 North University Drive
Suite 202
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Tel. No.: (305) 724-2000
Fax No.: (305) 721-7793

Dan Cytryn, Esquire

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,811

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

Petitioner,

vs.

MARIE DVORAK,

Respondent.
_____/

RESPONDENT'S APPENDIX

DAN CYTRYN, ESQUIRE
Law Offices of Dan Cytryn, P.A.
8100 North University Dr.
Suite 202
Tamarac, FL 33321

Attorney for Respondent

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 87 27137 01

MARIE D. DVORAK, an individual,

Plaintiff,

vs.

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

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S OFFERS OF JUDGMENT AND SETTLEMENT AND MOTION TO DETERMINE PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES

THIS CAUSE came on to be heard upon Defendant's June 11, 1991 Motion to Strike Plaintiff's Offers of Judgment and Settlement, and Motion to Determine Plaintiff's Entitlement to Attorney's Fees, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby considered,

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Offer of Settlement pursuant to §45.061 and Offer of Judgment and Demand for Judgment pursuant to §768.79, Florida Statutes, are hereby stricken. The Florida Supreme Court has held that §45.061 and §768.79, Florida Statutes, infringe upon that Court's procedural rule making authority as set forth in Article V, Section 2(a) of the Florida Constitution. The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment) 550 So.2d 442, 443 (Fla. 1989) (stating that "§768.79 and §45.061 impinge upon this Court's duties in their procedural

details."); Hughes v. Goolsby, 578 So.2d 348 (Fla. 1st DCA 1991); Curenton v. Chester, 576 So.2d 969 (Fla. 5th DCA 1991); Milton v. Leapai, 562 So.2d 804 (Fla. 5th DCA 1990). This Court has reviewed the case of A.G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2nd DCA 1990), submitted by the Plaintiff on this issue. However, that case completely ignores and is contrary to the Florida Supreme Court's determination that §45.061 and §768.79, Florida Statutes, infringe upon the Court's exclusive authority to adopt rules for practice and procedure in Courts pursuant to Article V, Section 2(a) of the Florida Constitution.

2. The Defendant maintains that current Florida Rule of Civil Procedure 1.442, effective July 1, 1990, is unconstitutional. The Defendant asserts that the Rule violates Article II, Section 3 (Separation of Powers) in that the sanction of attorney's fees imposed by the Rule is substantive in nature and, therefore, impinges upon the legislative authority of promulgating substantive law pursuant to Article III, Section 1 of the Florida Constitution. It appears well settled by the Florida Supreme Court that the award of attorney's fees can only be based upon statute or agreement between the parties, and the award of attorney's fees is substantive in nature. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985). This Court has compared current Rule 1.442 to §45.061 and §768.79, Florida Statutes, and the Rule virtually mirrors those Statutes in procedure and sanction. Therefore, since current Rule 1.442 is virtually identical to §45.061 and §768.79 regarding

matters of procedural and substantive law, it logically follows that the Rule is also unconstitutional. However, notwithstanding the above, this Court cannot hold current Rule 1.442 unconstitutional due to what appears to be established principle that neither the Trial nor Appellate Courts have authority or jurisdiction to invalidate a Rule promulgated by the Florida Supreme Court pursuant to its procedure and practice rule-making authority as provided by Article V, Section 2(a) of the Florida Constitution. Reinhardt v. Bono, 564 So.2d 1233 (Fla. 5th DCA 1990).

3. Notwithstanding the fact that this Court cannot hold current Rule 1.442 unconstitutional, it is the opinion of this Court that the Rule cannot be retroactively applied and, therefore, Plaintiff's Offer of Judgment pursuant to the Rule is hereby stricken. Current Florida Rule of Civil Procedure came into effect on January 1, 1990. The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So.2d 442, 443 (Fla. 1989). In Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), the Florida Supreme Court held that the award of attorney's fees pursuant to §768.56, Florida Statutes, was substantive law in that it created new obligations and duties and, therefore, could not be retroactively applied in cases where the effective date of the statute occurred after the cause of action accrued. Since the award of attorney's fees is substantive in nature, and current Rule 1.442 came into effect after the cause of action in this case

accrued, Plaintiff's Offer of Judgment made pursuant to current Rule 1.442 cannot be retroactively applied. Moreover, §45.061 came into effect in July, 1987, after the subject cause of action accrued. Therefore, that statute could not be retroactively applied even if it were constitutional.

4. Even if §45.061 and §768.79, Florida Statutes, were constitutional, and current Rule 1.442 could be retroactively applied in this matter, this Court is of the opinion that the Offers of Judgment made pursuant to the above-referenced Statutes and Rule of Civil Procedure were not unreasonably rejected by the Defendant and, therefore, Plaintiff is not entitled to an award of attorney's fees pursuant to the guidelines set forth in current Rule 1.442 and the above-referenced Statutes. Throughout this arduous, hotly contested nine day trial, this Court struggled with various rulings, now on appeal, involving the predicate for and admissibility of evidence; work product; hearsay; and other matters of law. In this Court's opinion, a decision by the Appellate Court on the issues raised during the trial of this cause will have far reaching importance beyond the scope of this cause. Moreover, several times throughout the trial of this cause this Court acknowledged that more guidance from the Appellate Courts on the issues raised was needed. The Court further notes that the Plaintiff failed to adduce any evidence at trial that the subject floor, by itself, failed to meet slip resistance or building code standards of the community. As such, and based upon the foregoing,

this Court does not find that the Offers and Demands for Judgment were unreasonably rejected or resulted in an unreasonable delay and needless increase in the cost of litigation.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 15th day of November, 1991.

JACK MUSSELMAN
A TRUE COPY

CIRCUIT COURT JUDGE MUSSELMAN

Copies Furnished to:

LAWRENCE E. BROWNSTEIN, ESQUIRE, Post Office Box 3767, West Palm Beach, FL 33402-3767.

DAN CYTRYN, ESQUIRE, 5950 W. Oakland Park Blvd., Lauderhill, Florida 33313.

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