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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.

______________________________/

Application For Discretionary Review Of A Decision
Of The District Court Of Appeal, Fourth District,
Certified To Be In Conflict With Another Decision

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

This is a proceeding for discretionary review of a decision of the Fourth District Court of Appeal which the Fourth District Court of Appeal has certified directly and expressly conflicts with a decision of another Florida appellate court on the same question of law.

This was an appeal to the Fourth District Court of Appeal from a post judgment order striking an offer of settlement pursuant to §45.061, Florida Statutes and a demand for judgment pursuant to §768.79, Florida Statues and denying a motion for attorneys fees pursuant to Rule 1.442, Fla.R.Civ.Pro. The appealed order was entered by the Honorable Jack Musselman in the 17th Judicial Circuit, In and For Broward County.

The petitioner, TGI Friday's Inc., a New York corporation, d/b/a TGI Friday's, was a defendant before the trial court and the appellee before the Fourth District Court of Appeal. Marie D. Dvorak was the plaintiff before the trial court and the appellant before the Fourth District Court of Appeal. In this brief the parties will be referred to as plaintiff or Dvorak, and as defendant or TGI Friday's.

The following symbols will be used in this brief:

(R.____) record on appeal

(A.____) appendix.

STATEMENT OF THE CASE AND FACTS

This case concerns an order denying plaintiff's motions for taxation of attorney's fees and costs pursuant to Section 45.061, Florida Statutes (1987), Section 768.79(1), Florida Statutes (1987) and Rule 1.442, Florida Rules of Civil Procedure. This case arises out of a slip and fall accident which occurred at a TGI Friday's restaurant located in Fort Lauderdale. On April 20, 1987 Marie Dvorak went there to dine with her daughter and a friend. A hostess greeted them at the door and showed them to a table on the left side of the restaurant. Mrs. Dvorak's daughter did not want to sit there and informed the hostess that she would prefer to sit on the upper level of the restaurant in the bar area. The hostess accommodated the group. As the group walked back towards the entrance, Mrs. Dvorak's right foot went out from under her and she fell. Mrs. Dvorak, who was 62 at the time of the accident, broke her right hip.

The plaintiff instituted this personal injury action seeking damages from TGI Friday's, Atlantic Maintenance (the company responsible for cleaning the restaurant), Erwin Chemical Laboratories and Robert Erwin, individually, (the parties who tested the floor finish used on the restaurant floor), for the injuries she sustained in this accident. (A.1-11) In her fourth amended complaint, plaintiff alleged that TGI Friday's was negligent in failing to maintain its premises in a reasonably safe condition and in failing to correct the dangerous condition of the floor. Plaintiff alleged that Robert Erwin was negligent in failing to advise TGI Friday's that the floor finish he had tested was not slip resistant and was not satisfactory for use in a restaurant. By stipulation, Erwin Chemical Laboratories, Inc. was dismissed as a defendant.

Robert Erwin filed a motion for summary judgment. The trial court granted Robert Erwin's motion for summary judgment and entered summary

final judgment in his favor. TGI Friday's filed a notice of appeal seeking review of the summary judgment entered in favor of Robert Erwin. The Fourth District Court of Appeal reversed that summary judgment in *TGI Friday's v. Erwin Chemical Laboratories, Inc.*, 610 So.2d 30 (Fla. 4th DCA 1992).

Plaintiff's claims proceeded to trial against TGI Friday's and Atlantic Maintenance. At the conclusion of all the evidence, plaintiff voluntarily dismissed her claims against Atlantic Maintenance. The case was submitted to the jury on plaintiff's claims against TGI Friday's. The jury returned a verdict in favor of plaintiff and against TGI Friday's. (A.17-20) The court entered a judgment in the amount of $248,000 in favor of the plaintiff based on this verdict.

TGI Friday's filed a timely notice of appeal seeking review of the final judgment for damages. The Fourth District Court of Appeal affirmed the final judgment entered in plaintiff's favor. *TGI Friday's v. Dvorak*, 4th DCA Case No. 91-01820.

Post-verdict the plaintiff filed motions for attorney's fees and costs pursuant to Sections 45.061 and 768.79, Florida Statutes, (1987) and pursuant to Rule 1.442. (A.547-552; 576-578; 579-581) TGI Friday's moved to strike the plaintiff's offers of judgment and settlement and filed a motion to determine plaintiff's entitlement to attorney's fees. (A.32-35) The trial court struck the requests for attorney's fees pursuant to Sections 45.061 and 768.79 on the grounds that the statutes were unconstitutional. The trial court held that Rule 1.442 could not be applied retroactively to this case. (A.84-87) In addition, the trial court made a fact finding that the offers of judgment were not unreasonably rejected. The trial judge who heard and determined the attorney's fee claims was the same judge who presided over the trial and much of the pretrial proceedings. He knew what the evidence was and how close the

liability issue was in this case. In rejecting the plaintiff's attorney's fee claim, he stated:

> 4. Even if §45.061 and §768.79, Florida Statues, 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 ot 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 .
> (R.87-88)

The plaintiff filed a notice of appeal seeking review of the court's order. (R.88) The Fourth District Court of Appeal reversed the denial of attorney's fees pursuant to Section 768.79, but affirmed the denial of fees under Section 45.061 and Rule 1.442. (A.41-44) On motion for rehearing, the Fourth District Court of Appeal certified conflict with the decision in *Bridges v. Newton*, 556 So.2d 1170 (Fla. 3rd DCA 1990). (A.61-65)

The defendants filed a timely notice to invoke the discretionary jurisdiction of this court. This court on June 20, 1994 entered its order postponing a decision on jurisdiction and setting a briefing schedule.

QUESTIONS PRESENTED

I.

Whether the decision of the Fourth District Court of Appeal directly and expressly conflicts with a decision of another Florida appellate court on the same question of law.

II.

Whether "reasonableness" of a party's action in rejecting a settlement offer is relevant in determining a party's entitlement to an award of attorney's fees pursuant to Section 768.79, Florida Statutes (1987).

III

Whether the Fourth District Court of Appeal erred in concluding that the 1987 version of section 768.79 is constitutional.

SUMMARY OF ARGUMENT

This court has jurisdiction to hear this cause on the merits. The decision of the Fourth District-Court of Appeal directly and expressly conflicts with decision of the Third District Court of Appeal in *Bridges v. Newton,* 556 So.2d 1170 (Fla. 3rd DCA 1990). That court implicitly held that under Section 768.79, Florida Statutes (1987) a trial court can deny attorneys fees to an offeror where the party acted reasonably in rejecting a settlement offer. The Fourth District Court of Appeal's decision that the trial court has no discretion in awarding attorneys fees under section 768.79, Florida Statutes (1987) is wrong. Under the statute the court may consider whether a party acted reasonably in rejecting a demand under the statute, and if the party acted reasonably, the trial court may decline to award an attorney's fee.

This court should consider the constitutionality of Section 768.79 and strike the statute as unconstitutional.

ARGUMENT

I.

Whether the decision of the Fourth District Court of Appeal directly and expressly conflicts with a decision of another Florida appellate court on the same question of law.

This Court has jurisdiction to hear this case on the merits because there is direct and express conflict with other Florida appellate decisions. The Fourth District Court of Appeal in its opinion on rehearing certified conflict with the decision in *Bridges v. Newton, supra.* In addition, examination of the decision shows there is conflict. "Conflict" exists when two decisions are wholly irreconcilable or when the decisions collide so as to create an inconsistency or conflict among the precedents. *Williams v. Duggan,* 153 So.2d 726 (Fla. 1963); *Kincaid v. World Insurance Co.,* 157 So.2d 517 (Fla. 1963). In *Nielsen v. City of Sarasota, 117 S0.2d 731 (Fla. 1960),* this Court explained that conflict jurisdiction may be invoked where the District Court of Appeal announces a rule of law which conflicts with a rule previously announced or where the District Court of Appeal applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior decision.

In holding that the plaintiff is entitled to an award of attorneys fees without regard to the reasonableness of defendant's conduct in rejecting the settlement offer made under Section 768.79, Florida Statutes (1987) the Fourth District Court of Appeal has applied a rule of law to produce a different result in a case which involves substantially the same controlling facts as the decision of the Third District Court of Appeal in *Bridges v. Newton, supra.*

In this case, on very similar facts, the Fourth District Court of Appeal has held that a party's action in rejecting a settlement offer or demand

for judgment made pursuant to Section 768.79, Florida Statutes (1987) creates an entitlement to fees which may be defeated only upon a showing that the demand for judgment was made in good faith. This holding directly and expressly conflicts with the decision in *Bridges v. Newton.* This conflict ought to be resolved by this court. This court should quash the decision of the Fourth District Court of Appeal in this case and hold that "reasonableness" of a party's action in rejection of a demand for judgment made pursuant to Section 768.79, Florida Statutes (1987) is relevant in determining that party's entitlement to a fee award.

II.
Whether "reasonableness" of a party's action in rejecting a settlement offer is relevant in determining a party's entitlement to an award of attorney's fees pursuant to Section 768.79, Florida Statutes (1987).

In this case, the Fourth District Court of Appeal, relying on its decision in *Schmidt v. Fortner,* 629 So.2d 1036 (Fla. 4th DCA 1993), held that the trial court had no discretion to deny plaintiff's request for attorneys fees as a result of a demand for judgment made by plaintiff pursuant to Section 768.79(1), Florida Statutes (1987). In *Schmidt v. Fortner,* the Fourth District Court of Appeal analyzed the various provisions on Section 768.79, Florida Statutes (1991) and concluded that the statute creates an entitlement to attorneys fees which may be defeated ***only*** upon a showing that the demand for judgment was not made in good faith.

In *Schmidt* the beneficiaries of a testator's estate sued the former personal representative for alleged improprieties in handling the estate. Four months after suit was filed, the plaintiffs served a demand for judgment in the amount of $500,000 under Rule 1.442, and Sections 45.061 and 768.79, Florida Statutes (1991). The jury returned a verdict of $644,000 in favor of plaintiffs. The plaintiffs then moved for an award of attorneys fees. The trial court denied the motion.

On appeal, the Fourth District Court of Appeal construed the trial court's order on attorneys' fees as a finding that defendant's rejection was reasonable under the circumstances. The court held that even if the trial court's denial of fees was correct under Section 45.061, the finding of reasonable rejection was not dispositive of plaintiffs' entitlement to an award of attorneys' fees under Section 768.79.

The Fourth District Court of Appeal held that in enacting Section 768.79 "the legislature has created a mandatory right to attorneys' fees, if the statutory prerequisites have been met." 629 So.2d at 1040 The Fourth District Court of Appeal stated:

> The statute begins by creating an 'entitlement' to fees. That entitlement may then lead to an 'award' of fees. That award may then be lost by a finding that the entitlement was created 'not in good faith,' *or the amount of the award may be adjusted upward or downward by a consideration of statutory factors.* That, in outline form, is how we read this statute. We explain in more detail in the following paragraphs.
>
> To begin, the words *'shall* be entitled' [e.s.] in subsection (1) quoted above cannot possibly have any meaning other than to create a right to attorney's fees when the two preceding prerequisites have been fulfilled: i.e., (1) when a party has served a demand or offer for judgment, and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. These are the only elements of the statutory entitlement. No other factor is relevant in determining the question of entitlement. The court is faced with a simple, arithmetic, calculation. How that entitlement gets translated into tangible attorney's fees is covered by the process of an 'award.'
>
> 629 So.2d at 1040

The court then concluded that the factors enumerated in subsection (7)(b) pertain to the amount to be awarded, rather than entitlement to an award of attorneys' fees. In *Schmidt* the court analyzed the various factors set forth in the 1991 statute. That statute renumbered Section 768.79(2)(b) as Section 768.7(7)(b) and modified the language of that subsection slightly. The 1991 version construed in *Schmidt* specified in pertinent part:

> (1) . . . If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he shall be

entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

* * *

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

* * *

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is a least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated ***in accordance with the guidelines promulgated by the Supreme Court,*** incurred from the date the offer was served. (emphasis supplied)

* * *

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

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

(1) The then apparent merit or lack of merit in the claim.

(2) The number and nature of offers made by the parties.

(3) The closeness of questions of fact and law at issue.

(4) Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

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

(6) The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged. (emphasis supplied)

In *Fortner* the Fourth District Court of Appeal rejected the contention that the word award as used in Section (7)(b) and entitlement "amount to the same thing, and thus the judge could use the enumerated factors of (7)(b) as the basis for denying all fees to an otherwise qualifying offeror." 629 So.2d at 1042 The Court's rationale for rejecting this argument was as follows:

> In the first place, the term 'award' of fees in subsection (7)(b) obviously relates back to subsection (6)(b) where - as we have just seen - that term firs appears. There the legislature established the mechanism by which an *entitlement* is converted to an *award* of attorney's fees. Subjection (7)(b) proceeds on the notion that a party has successfully perfected a right or entitlement to fees and has properly qualified for an award under subsection (6) Moreover, in order to reach subsection (7)(b), the court must have already ruled out a disallowance of an award because of a finding of 'not made in good faith' under subsection (7)(a). The noun 'award' in (7)(b) therefore refers to the process of fixing the amount of the fee to which the qualifying plaintiff is already *entitled.* It has nothing to do with the entirely separate inquiry as to *entitlement* itself, which is an arithmetic calculation.
>
> Secondly, the noun 'reasonableness' in subsection (7)(b) is modified only by the prepositional phrase, 'of an award'. It is thus the *award* of fees that must be reasonable, i.e., the determination of the amount of the fee, and not whether the *entitlement* is reasonable. Under this statute, the legislature did not give judges the discretion to determine whether it is reasonable to entitle qualifying plaintiffs to fees. Rather, it determined for itself that it is reasonable to entitle every offeror who makes a good faith offer (later rejected) 25 percent more or less than the judgment finally entered to an award of fees. Under subsection (7)(b), the court's discretion is directed by the statutory test solely to determining the reasonability of the *amount* of fees awarded; and that discretion is informed, at least partially, by the 6 factors thereafter listed in that subsection.
>
> 629 So.2d at 1042

The defendant respectfully submits that this analysis and conclusion that the "reasonableness" pertains only to the amount to be awarded, rather that the entitlement to an award is flawed and wrong.

The language "reasonableness of an award of attorney's fees" as used in subsection (7)(b) obviously relates to entitlement, and not to amount. The 1991 statute very clearly specifies in subsection 6(b) that the award of attorneys fees is to be "calculated in accordance with the guidelines promulgated by the Supreme Court." This is a reference to the relevant criteria for determining a reasonable fee amount as contained in the ethical guidelines. *See, Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985); *Standard Guaranty Ins. Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990) Rule 4-1.5(6) of the Rules of Professional Conduct promulgated by this court specifies as follows:

> **(b) Facts to be Considered in Determining Reasonable Fee.** Factors to be considered as guides in determining a reasonable fee include:
>
> (1) The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
>
> (4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client.
>
> (6) the nature and length of the professional relationship with the client;

> (7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the services and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
>
> (8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

Comparison of the factors enumerated in subsection 7(b) of the 1991 statute with these factors to be considered in determining "the reasonableness of an award of attorney's fees" shows that the legislature could only have been referring to entitlement to an award of fees, rather than the amount of a reasonable fee. The merit or lack of merit of the claim is completely irrelevant to the amount to be awarded as a fee, as are the other five enumerated factors.

These factors enumerated in the statute are almost identical to the factors which were previously enumerated in Rule 1.442. This rule was repealed in *Timmons v. Combs,* 608 So.2d 1 (Fla. 1992). In that case this court adopted the procedural portion of Section 768.79, Florida Statutes (1991) as a rule of civil procedure, effective January 1, 1993. Rule 1.442, as it existed when plaintiff made her offer of judgment pursuant to the rule, specified that in order to be entitled to an award of fees pursuant to that rule, the court must find that the party against whom sanctions were sought had unreasonably rejected or refused the offer. The rule set forth the following criteria to be considered:

> (2) In determining entitlement to and the amount of a sanction, the court may consider any relevant factor, including:
>
> (A) the merit of the claim that was the subject of the offer;
>
> (B) the number, nature and quality of offers and counteroffers made by the parties;
>
> (C) the closeness of questions of fact and law at issue;

> (D) whether a party unreasonably refused to furnish information necessary to evaluate the reasonableness of an offer;
> (E) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties;
> (F) the fact that, at the time the offer was made and rejected, it was unlikely that the rejection would result in unreasonable cost or delay;
> (G) the fact that at party seeking sanctions has himself unreasonably rejected an offer or counteroffer on the same issues or engaged in other unreasonable conduct;
> (H) the fact that the proceeding in question essentially was equitable in nature;
> (I) the lack of good faith underlying the offer; or
> (J) the fact that the judgment was grossly disproportionate to the offer.

The factors enumerated by the legislature in Section 768.79(7)(b) very closely parallel the factors which this court, in promulgating the prior Rule 1.442, said the court may consider in determining entitlement to and the amount of a sanction. In cases arising under this rule, the appellate courts required a determination by the trial court regarding unreasonable rejection. *State Farm Mutual Automobile Ins., Co. v. Lathrop,* 586 So.2d 1125 (Fla. 2nd DCA 1991); *Curenton v. Chester,* 576 So.2d 969 (Fla. 5th DCA 1991); *Hostetter-Jones v. Morris Newspaper Corp.,* 590 So.2d 533 (Fla. 5th DCA 1991).

In rendering its decision in this case, the Fourth District Court of Appeal relied on its decision in *Schmidt v. Fortner,* as authority for its holding that the trial court had no discretion to deny attorneys fees as a result of the demand for judgment under Section 768.79. The defendant respectfully submits that the *Schmidt* decision is wrong and does not support the Fourth District Court of Appeal's decision. Moreover, even if the *Schmidt* decision is correct, it is not controlling in this case. This case involves a demand for judgment made pursuant to the 1987 version of the statute. In *Metropolitan*

Dade County v. Jones Boatyard, Inc., 611 So.2d 512 (Fla. 1993) this court held that the version of Section 768.79 in effect at time the cause of action accrues is the version that should be applied in determining attorneys fees thereunder. *See, Buchanan v. Allstate Insurance Co.*, 629 So.2d 991 (Fla. 1st DCA 1993)

The 1987 version of the statute which applies to this case specified:

> **768.79 Offer and demand for judgment**
>
> (1)(a) In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorneys fees incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand, if rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.
>
> (b) Any offer or demand for judgment made pursuant to this section shall not be made until 60 days after filing of the suit, and may not be accepted later than 10 days before the date of the trial.
>
> (2)(a) If a party is entitled to costs and fees pursuant to the provisions of subsection (1), the court may, in its discretion, determine that an offer of judgment was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.
>
> (b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

> 1. The then apparent merit or lack of merit in the claim that was subject to the offer.
> 2. The number and nature of offers made by the parties.
> 3. The closeness of questions of fact and law at issue.
> 4. Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.
> 5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
> 6. The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

This statute differs substantially from the 1991 version of the statute analyzed in *Schmidt v. Fortner.* In *Schmidt* the Fourth District Court of Appeal stated that the term "award" as used in subsection 7(b) obviously related to subsection (6)(b) where the term first appears and the legislature established the mechanism by which an entitlement is converted to an award of attorneys' fees. That same rationale does not apply to the 1987 version of the statute which contains no provision comparable to subsection 6 of the 1991 statute. In the 1987 version of the statute there is no similar reference to an "award" of attorneys fees. 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. The word "award" is never used again until subsection (2)(b) where the term "the reasonableness of an award of attorneys' fees pursuant to this section" is used. Thus, the Fourth District Court of Appeal's entire analysis in *Schmidt* does not apply to this case.

In *Bridges v. Newton, supra* the court construed the 1987 version of this statute. In discussing subsection (2)(b) of that statute the court noted that in determining the reasonableness of an award of attorney's fees pursuant to this section, among the factors expressly to be considered is the number and nature

of offers made by the parties. The court then concluded "It would be entirely unreasonable to reward that behavior with an award of post-demand attorney's fees." 556 at 1171-1172. It is thus apparent that the Third District Court of Appeal construes the term "reasonableness of an award of attorney's fees" in the 1987 statute as relating to entitlement to an award of fees, rather than the amount of an award.

This court ought to adopt that construction of the statute, rather than the construction of the statute adopted by the Fourth District Court of Appeal in *Schmidt* and in this case.

III.

Whether the Fourth District Court of Appeal erred in concluding that the 1987 version of section 768.79 is constitutional.

The trial judge ruled that section 768.79 was unconstitutional as infringing on this court's exclusive rule making authority. At the time the trial judge ruled, this court had not yet decided *Leapai v. Milton*, 595 So.2d 12 (Fla. 1992). The Fourth District Court of Appeal reversed the finding that the statute is unconstitutional.

This court has not directly addressed the constitutionality of Section 768.79. In *The Florida Bar re Amendment to Rules,* 550 So.2d 442 (Fla. 1989), this court specifically declined to address the constitutionality of the purely substantive aspects of Section 768.79, noting "we agree with the committee that sections 768.79 and 45.061 impinge upon this court's duties in their *procedural* details." *Id.* at 443 The court specified that to the extent the procedural aspects of Rule 1.442 (Effective January 1, 1990) were inconsistent with Sections 768.79 and 45.061, the rule supersedes the statutes.

Section 768.79 is clearly unconstitutional insofar as it infringes on this court's rule making power. The defendant concedes that if the *Milton v. Leapai* rationale applies to this statute, the procedural aspects of the statute must be stricken as unconstitutional and the procedural provisions of the civil rule must control over the statute. However, the defendant respectively submits that the *Milton v. Leapai* rationale is not applicable. The substantive parts of Section 768.79 are not severable from the procedural parts of the statute. *Leapai* turned on severability of the invalid procedural provisions of Section 45.061 from the substantive provisions. In *Barndollar v. Sunset Realty Corp.,* 379 So.2d 1278 (Fla. 1979), this court observed that a severability clause in legislation is not determinative of severability. The court stated, "In order for

an invalid provision of an act to be severable, we must be able to conclude that the legislature would have been content to enact the law without the invalid provision." *Id.* at 1280.

In this case, the valid and invalid portions of Section 768.79 are mutually connected with and dependent upon each other. For instance, the sanction of a fee award is only appropriate if the offer is not accepted within a certain time frame, and if the failure to accept is not reasonable. Severance of the "good" from the "bad" would effect a result not contemplated by the legislature. The statute simply cannot be severed so as to save parts of it. Thus it is unconstitutional.

CONCLUSION

This Court has jurisdiction to hear this case on the merits. The petitioner requests this Court to accept jurisdiction in this cause and to quash the decision of the District Court of Appeal, Fourth District, in this matter, and to reinstate the order denying attorneys fees entered by the trial judge.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this **22nd** day of **August**, 1994 to **John B. Marion, Esq.**, Sellars, Supran, Cole & Marion, P.A., P. O. Box 3767, West Palm Beach, FL 33402; **Dan Cytryn, Esq.**, 8100 N. University Drive, Suite 202, Tamarac, FL 33321 and to **Jack W. Shaw, Jr.**, Esq., Suite 1400, 225 Water Street, Jacksonville, FL 32202.

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