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 REPLY BRIEF/ ANSWER BRIEF ON CROSS-PETITION

JOHN B. MARION, IV, ESQ.
Sellars, Supran, Cole & Marion, P.A.
P.O. Box 3767
West Palm Beach, FL 33402-3467
(407) 471-3300

and

MARJORIE GADARIAN GRAHAM
Marjorie Gadarian Graham, P.A.
Northbridge Centre, Suite 1704
515 N. Flagler Drive
West Palm Beach, FL 33401
(407) ~~655-9146~~ 775-1204
Attorneys for Petitioner

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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

TGI Friday's relies on the statement of the case and facts set forth in its initial brief.

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.

(on cross-petition)

IV.

Whether the Fourth District Court of Appeal conflicts with the decisions in *O'Neil v. Walmart Stores, Inc.*, 602 So.2d 1342, (Fla. 5th DCA 1992), *Sears Commercial Sales v. Davis,* 559 So.2d 237 (Fla. 1st DCA 1990), *Memorial Sales v. Davis,* 559 So.2d 237 (Fla. 1st DCA 1990) *Lennar v. Muskat,* 595 So.2d 968 (Fla. 3rd DCA 1992)

V.

Whether the trial court erred in denying an award of fees pursuant to Section 45.061, Florida Statutes.

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. The denial of attorneys fees under Section 45.061 should be affirmed because the record supports the trial judge's finding that the defendant did not act unreasonably in rejecting the plaintiff's offer.

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 plaintiff has conceded that there is a conflict and that this court has jurisdiction to review this case on the merits.

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).

The plaintiffs' argument on this point, especially as set forth at page 34 of her brief, could best be characterized as naive. The interpretation of Section 768.79 by the Fourth District Court of Appeal will have far greater ramification on plaintiffs (and their lawyers) that it will have on defendants (and their lawyers). If there is an automatic entitlement to attorneys' fees in any case where plaintiff does not recover a judgment which is at least 25 per cent greater than the offer, plaintiffs will in close liability cases be forced to accept what might otherwise be a ridiculously low offer because of the potential threat of an automatic award of attorneys' fees. Moreover, plaintiffs' lawyers will repeatedly find themselves in legal malpractice situations if they don't urge their clients to accept such offers. Finally, plaintiffs who do not obtain a judgment exceeding the offer may be coerced into abandoning meritorious appeals because of this "club". This surely cannot be the result which the legislature intended - - for either plaintiffs or defendants.

The plaintiff very conveniently ignores the distinctions between the 1987 Statute and the 1991 Statute. The simple fact is that the analysis of *Schmidt v. Fortner,* 629 So.2d 1036 (Fla. 4th DCA 1993) is not applicable to the 1987 version of the Statute.

III.

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

TGI Fridays relies on its argument set forth in the initial brief.

(on cross-petition)

IV.

Whether the Fourth District Court of Appeal conflicts with the decisions in *O'Neil v. Walmart Stores, Inc.*, 602 So.2d 1342, (Fla. 5th DCA 1992), *Sears Commercial Sales v. Davis*, 559 So.2d 237 (Fla. 1st DCA 1990), *Memorial Sales v. Davis*, 559 So.2d 237 (Fla. 1st DCA 1990) *Lennar v. Muskat*, 595 So.2d 968 (Fla. 3rd DCA 1992)

Examination of the decision of the Fourth District in this case shows that there is no conflict with any of the above cited cases. "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 this case the Fourth District Court of Appeal has not applied a rule of law to produce a different result in a case which involves substantially the same controlling facts as the cited decisions. Moreover, the Fourth District

Court of Appeal has not announced a rule of law which conflicts with a rule of law involved in the cited cases. The plaintiff relies on dicta in the cited cases. Dicta does not create a conflict.

Since there is no conflict this court should deny the cross-petition for reivew.

(on cross-petition)

V.
Whether the trial court erred in denying an award of fees pursuant to Section 45.061, Florida Statutes.

The trial court did not err in denying plaintiff's request for an award of attorneys fees pursuant to Section 45.061. The trial court found that the defendant did not unreasonably reject the plaintiff's' offer of settlement. The court concluded that because the rejection was not unreasonable, the plaintiff was not entitled to an award of attorneys' fees under Section 45.061. The Fourth District Court of Appeal affirmed that finding.

Section 45.061 specifies that the Court must determine that an "offer was rejected unreasonably" in order to impose a sanction of fees and cots. The cases which construe and discuss this statute all specify that in ruling on a motion for sanctions, the trial court must make a determination regarding whether the offer was unreasonably rejected. The Fifth District Court of Appeal has stated that a written finding of unreasonable rejection is a predicate to an award of fees under Section 45.061. *O'Neil v. Wal-Mart Stores, Inc.*, 602 So.2d 1342 (Fla. 5th DCA 1992); *Curenton v. Chester,* 576 So.2d 969 (Fla. 5th DCA 1991). The Fourth District Court of Appeal requires a finding of unreasonable rejection. *Johnston v. Kloster Cruise Ltd.*, 604 So.2d 572 (Fla. 4th DCA 1992); *Gross v. Albertson's, Inc.*, 591 So.2d 311 (Fla. 4th DCA 1991). Moreover, the Fourth District Court of Appeal has held that while Section 45.061 creates a presumption of unreasonable rejection, the presumption is not conclusive.

Winn Dixie Stores, Inc. v. Elbert, 590 So.2d 15 (Fla. 4th DCA 1991). Similarly, in cases arising under the civil rule, the appellate courts have 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, supra; Hostetter-Jones v. Morris Newspaper Corp.,* 590 So.2d 53 (Fla. 5th DCA 1991).

The plaintiff incorrectly states that the only evidence before the trial court regarding the reasonableness of the rejection was that of Jack Donahoe. That is wrong. Donahoe admitted on cross-examination and in response to certain hypothetical questions that the rejection would not be unreasonable. (R.26; 41; 48-49) The trial judge admitted Donahoe's entire opinion, over objection, strictly on the basis that it was the witness' "opinion". (RR.12) The trial judge was free to reject this expert's "opinion" and to rely on his own observations both prior to and throughout the course of the trial.

The trial judge who heard the motions for sanctions was the same judge who presided over the entire trial and much of the pretrial proceedings. He knew first-hand what transpired during the pre-trial and trial proceedings. He knew first-hand how close the liability and evidentiary issues were in this case. It was he who almost directed a verdict for the defendants, who came very close to granting a mistrial and who initially ruled that the incident reports on which plaintiff premised her case were inadmissible. The trial judge was imminently correct in relying on his first-hand observations of this case and in ruling that defendant's rejection of the offers was not "unreasonable." In *Gross v. Albertson's Inc., supra,* the Fourth District Court of Appeal affirmed a finding regarding unreasonableness of a rejection, even though there was no "expert" testimony that the offer was unreasonably rejected. This court affirmed the

trial court's determination, noting, "The trial court had the benefit of presiding over the trial." *Id.* at 314.

The trial court's order specifies this was a hotly contested suit and that the court "struggled with various rulings . . . involving . . . admissibility of evidence; work product; hearsay and other matters of law." The court noted "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. " (R.86-87)

Before trial began the defendant made a motion in limine regarding plaintiff's alleged fall on grease. (T.22 *et. seq.*) Pretrial, the defendant had moved for a summary judgment on plaintiff's allegations that she had slipped on a foreign substance on the floor. (R.1-30) At the hearing on the defendant's motion for summary judgment, the court expressed concern that there was no evidence regarding a foreign substance on the floor. (R.27) The court, prior to trial, cautioned plaintiff's counsel, "you have to go beyond speculation, that's for sure." (R.27) The court told plaintiff's counsel, "you got a close question, Dan, you know that." (R.28) At trial, the court reiterated that this was a close case. The court stated, "Fellows, it looks to me like we - this, this is going to be a fairly close question, obviously. You both have more or less agreed on it." (T.58) The court observed, "it's a real tough question here." (T.59) The court told the lawyers:

> I, I don't like to direct verdict, I really don't like to direct verdicts; I've done it, but I don't like to do it when it's a jury trial and this lady has obviously been hurt.
>
> But I'm going to allow you to show the dangerous condition, I think you're entitled to do that. But I'm going to require you to show that that dangerous condition was indeed the cause of this lady's fall. And if that inference cannot be properly drawn at that

> point in time, I'm going to have to take it away from the jury, because I don't think it should go to the jury under those circumstances. So I'm announcing that in advance.
>
> (T.60)

Halfway through the trial the court again commented on the closeness of the liability issue and the weakness of plaintiff's case. The court stated as follows:

> THE COURT: Well, Dan, let me say this. I've really been quite lenient about the situation, but I know and you know that we've had a difficult time with this case trying to establish what caused this fall. I understand that.
>
> And I don't want to talk in front of the witness necessarily here, either. But I've given wide latitude, because I realize what, you know, the difficulty you're encountering here and I suppose somehow or other you plan later down the line to tie in to the evidence somewhere, somehow, that there was grease in the path that this lady walked. And I'm very interested in how you ever possibly can do that, except through like, counsel is saying, through speculation that some came out of the kitchen, maybe. And that is not burden of proof. That's the problem I'm having.
>
> But I've given you great latitude in the hope somehow or other I don't rule in your case and not let you present your case, that's what I'm doing. But, you know, you've talked about grease, grease, grease, grease. It feels like we're on Broadway here, after a while, when you talk about grease, that's going on in every witness and everything you say, and that's what the jury is going to be thinking, grease, grease, grease. (T. 404-405)

The trial judge later commented that he had never been involved in a slip and fall case where it was not known what caused the fall, "but that he was trying one." (R.438) Although the trial court reserved ruling on defendant's motions for directed verdict (T.1355; 1596), it is quite clear from these comments that

the court thought liability was a very close question in this case and that plaintiff's case was very tenuous.

There were also a number of very close evidentialy and legal issues in this case. Admissibility of the incident reports was a hotly disputed question. Initially the court ruled the reports were not admissible. The court later reversed this ruling and admitted the reports. These reports were critical to plaintiff's case. If they had not been admitted, the plaintiff most likely would have not been prevailed. At one juncture when the court ruled that testimony about another incident would be admitted, the trial judge commented, "You know this case is going up any way I go now. I don't know what in the world to do. I ought to go up, too." (T.751) The court stated that it had concerns about admitting the evidence. (T.751)

These comments by the trial court throughout the course of the trial and review of the trial transcript and record as a whole, shows this was a close case insofar as plaintiff's claims were concerned. It is quite obvious that the trial court was very close to directing a verdict against the plaintiff. The key evidentiary ruling on admissibility of the incident reports was initially decided in defendant's favor. Under all the circumstances of this case, the trial court properly found that defendant did not act unreasonably in rejecting the plaintiff's offers and demands.

Even the plaintiff's "expert" admitted on cross-examination that there is a much higher percentage of defense verdicts in slip and fall accidents. (RR.24) He conceded that this case was defendable if there was no evidence of a foreign substance on the floor and the floor finish met slip resistance standards. (RR.26) The expert testimony shows that the finish met the applicable standards. Donahoe said that if there were no evidence of grease on the floor or that the finish was slippery, "I should tell my client we would get a directed

verdict and to try the case." (RR.41) Donahoe admitted that if there was no evidence to get the case to a jury, a defendant would not be "unreasonable" to reject a plaintiff's settlement offer or demand. (RR.48-49)

The evidence and record amply support the trial judge's fact finding that it was not unreasonable for defendant to reject plaintiff's demand when it did nothing in this record shows that the liability evidence at trial was any different than the liability picture at the time the offer was rejected by the defendant. In determining whether the rejection was reasonable or unreasonable at the time of rejection the trial judge ought to be able to evaluate the defendant's conduct at that time in view of the record as a whole. The order and decision of the Fourth District Court of Appeal should be approved because the evidence shows defendant did not act "unreasonably." Thus, plaintiff was not entitled to attorney's fees pursuant to Section 45.061.

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 in full the order denying attorneys fees entered by the trial judge.

Respectfully Submitted,

JOHN B. MARION, IV, ESQ.
Sellars, Supran, Cole & Marion, P.A.
P.O. Box 3767
West Palm Beach, FL 33402-3467
(407) 471-3300

MARJORIE GADARIAN GRAHAM
Marjorie Gadarian Graham, P.A.
Northbridge Centre, Suite 1704
515 N. Flagler Drive
West Palm Beach, Florida 33401

By: Marjorie Gadarian Graham
Marjorie Gadarian Graham
Florida Bar #1420532

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this **17th** day of **January**, 1995 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.

By: Marjorie Gadarian Graham
Marjorie Gadarian Graham
Florida Bar #1420532