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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 85,849

FILED

SID J. WHITE

AUG 9 1995

CLERK, SUPREME COURT

By

Chief Deputy Clerk

RHONDA KNEALING,

Petitioner,

v.

ERNEST PULEO and MARIA J.
PULEO,

Respondents.

INITIAL BRIEF OF PETITIONER

LOWER COURT
4DCA CASE NO. 93-2778

Which was an Appeal from the 17th Judicial Circuit
In and For Broward County, Florida
CASE NO. 92-19733 18 (Judge W. Herbert Moriarty)

✓
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STATEMENT OF THE CASE

1. NATURE OF THE CASE

Following a trial by jury from a motor vehicle personal injury action with judgment entered in favor of Plaintiff for \$5,000, defendants moved for attorney's fees and costs under an offer of judgment under 768.79, Florida Statutes (1989). The trial court denied that motion. Defendant appealed. The district court of appeal reversed. Plaintiff petitioned to invoke discretionary jurisdiction.

2. COURSE OF PROCEEDINGS

Plaintiff sued Defendant for personal injury damages arising out of motor vehicle negligence. (R. 259-262). Following a trial by jury from a motor vehicle personal injury action with judgment entered in favor of Plaintiff, defendants moved for attorney's fees and costs under an offer of judgment under 768.79, Florida Statutes (1989). The trial court denied that motion. Defendants served a notice of appeal citing that denial, the final judgment, and the order awarding costs to plaintiff.

3. DISPOSITION BELOW

The lower appellate court declared an express conflict with Nordyne, Inc. v. Florida Mobile Home Supply, Inc. 625 So.2d 1283 (Fla.1st DCA 1993) and Wright v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994).

The lower appellate court certified the following question as one of great public importance:

Do the time requirements in section 44.102, Florida Statutes (1993) represent an unconstitutional intrusion of the legislature on the rule-making authority of the Supreme Court

in light of the Supreme Court's analysis in Timmons v. Combs, 608 So.2d 1 (Fla. 1992)?

In ruling against Petitioner in this case, the lower appellate court expressly relied upon Schmidt v. Fortner, 629 So.2d 1036 (Fla. 4th DCA 1993) which expressly conflicts with Bridges v. Newton, 556 So.2d 1170 (Fla. 3d DCA 1990). The Supreme Court apparently heard oral argument on conflict jurisdiction on the Schmidt v. Fortner offer of judgment issue in Dvorak v. TGI Friday's, Inc., 639 So.2d 58 (Fla. 4th DCA 1994) (S.Ct. #83,811 review granted oral argument was set for 5/3/95).

STATEMENT OF THE FACTS

"Pursuant to Section 768.79," Respondent served an offer of judgment for "\$15,001" "inclusive of attorney's fees." (R.292-293). The offer bears a certificate of service of mailing of July 1, 1993 (which was the Thursday before the Independence Day Holiday). (R.293-293). Mediation (June 16, 1993) took place more than 2 weeks before 7/1/93. (R.119).

No response was served to the offer of judgment.

SUMMARY OF THE ARGUMENT

Yes, should be the answer to the certified question of: Do the time requirements in section 44.102, Florida Statutes (1993) represent an unconstitutional intrusion of the legislature on the rule-making authority of the Supreme Court in light of the Supreme Court's analysis in Timmons v. Combs, 608 So.2d 1 (Fla. 1992)? This court should reverse, and adopt the well reasoned view of the Nordyne Court. Because the supreme court adopted the procedural portions of §768.79 as a court rule, Timmons v. Combs, 608 So.2d

1 (Fla. 1992), the time altering provisions of §44.102, Florida Statutes (1993), should yield to the time standards of §768.79, Florida Statutes (1989). Because the application of §44.102, Florida Statutes (1993), to this case would be retroactive, this court should reverse and vacate the lower appellate court opinion. Because this court has expressly found §768.79 to be prospective, (and different from §45.061), this court should not construe §44.102, Florida Statutes (1993), to take away that prospective determination. Metropolitan Dade County v. Jones Boatyard Inc., 611 So.2d 512 (Fla. 1994). A logical follow up to this ambush tactic will be, given the existence of mediation that results in an impasse, an offer of judgment can be made 1 day, 1 minute or even 1 second before the start of trial. 1 second is "at any time." Because §44.102, Florida Statutes (1993), fails to manifest any intent to impose attorney's fees and costs liability under §768.79. By omitting any words expressly mentioning liability for attorney's fees or costs, this provision merely permits both, within 30 days of trial, an offer to be served and permits an offer to be accepted, but nothing more.

This court should disapprove of the fourth district ruling in this case in resolving the express conflict in favor of: Nordyne, Inc. v. Florida Mobile Home Supply, Inc. 625 So.2d 1283 (Fla. 1st DCA 1993) and Wright v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994). As the Nordyne court stated: "To the extent that 44.102(5)(b) purports to amend both section 45.061 and section 768.79, it may be best described as a trap set by the legislature for those not fortunate enough previously to have stumbled across it."

Even assuming that the offer was made in a timely matter, and even assuming that this court finds that a citation to §44.102 is not a condition to entitlement to fees and cost, the offer of judgment standard for a right to fees and costs should be a discretionary right, not a mandatory right that turns only on the difference between the amount of a rejected offer and the amount of a later judgment. If this court reverses the Dvorak v. TGI Friday's, Inc., 639 So.2d 58 (Fla. 4th DCA 1994)(S.Ct. #83,811 review granted oral argument set for 5/3/95), this case must necessarily be reversed, because the fourth district used the same standard. Petitioner respectfully urges this court to reject the standard set by Schmidt v. Fortner (construing §768.79, Florida Statutes (1991)).

LEGAL ARGUMENT

I. YES, SHOULD BE THE ANSWER TO THE CERTIFIED QUESTION OF: Do the time requirements in section 44.102, Florida Statutes (1993) represent an unconstitutional intrusion of the legislature on the rule-making authority of the Supreme Court in light of the Supreme Court's analysis in Timmons v. Combs, 608 So.2d 1 (Fla. 1992)?

This court should reverse, and adopt the well reasoned view of the Nordyne Court. In Nordyne, Inc. v. Florida Mobile Home Supply, Inc., 625 So.2d 1283 (Fla.1st DCA 1993), the first district court of appeal affirmed the denial of fees and costs to the offeror, who claimed fees and costs under §768.79, following an unsuccessful mediation in which the offer of judgment was served less than 30 days before trial. In its reasoning, the Nordyne court stated:

Moreover, we note that, recognizing that sections 45.061 and section 768.79, contained conflicting terms, and that both statutes included procedural provisions which intruded upon

the powers granted by our constitution to the judicial branch, the supreme court recently adopted the procedural portions of sections 768.79 as a court rule. Timmons v. Combs, 608 So.2d 1 (Fla. 1992). We believe that section 44.102 (5)(b) likewise intrudes upon the rulemaking power of the judicial branch. Accordingly, in our opinion, the provisions of section 44.102(5)(b) must yield to those of section 768.79, which have been adopted as a court rule."

Nordyne at 1290. In this case, like Nordyne, the trial court denied fees and costs to the offeror, who claimed fees and costs under §768.79, following an unsuccessful mediation in which the offer of judgment was served less than 30 days before trial. In reversing the lower appellate court, this court should adopt the Nordyne reasoning and result, and vacate the opinion of the lower appellate court.

Because the supreme court adopted the procedural portions of §768.79 as a court rule, Timmons v. Combs, 608 So.2d 1 (Fla. 1992), the time altering provisions of §44.102, Florida Statutes (1993), should yield to the time standards of §768.79, Florida Statutes (1989). Section 44.102, Florida Statutes (1993), as construed by the fourth district court of appeal, alters the 30 day time standard for imposing liability for attorney's fees and costs based on the start time of the offer being "at any time" after a mediation impasse and the rejection time set based on the start of trial. It is clear that this is procedural in nature. Thus, it is an intrusion upon the rulemaking power of the judicial branch. In affirming the denial of fees sought by the offeror and reversing the denial of costs of offeree under §768.79, arising from a claim for fees and costs following an unsuccessful mediation in which the offer of judgment was served less than 30 days before trial, Wright

v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994), the third district court of appeal stated that: "This [§768.79] statutory language plainly contemplates that an offeree have a full 30 days within which to accept an offer of judgment."

Because the application of §44.102, Florida Statutes (1993), to this case would be retroactive, this court should reverse and vacate the lower appellate court opinion. A statutory amendment does not apply retroactively absent clear and unequivocal desire for it to be applied retroactively, particularly where to do so would create new liability based upon past transaction. Wilson Ins. Ser. v. West American Ins., 608 So.2d 857 (Fla. 4th DCA 1992) (En banc) (Denying attorney's fees under §768.79); See Larson v. Independent Life & Accident Ins. Co., 29 So.2d 448 (1947). Section 44.102(6)(b), Florida Statutes (1993), does not apply to a cause of action accruing 5/14/90 or to an offer made under § 768.79, Florida Statutes (1989). Section 44.102 manifest no intent to be applied retroactively¹. Thus, the lower appellate court should be reversed, the opinion vacated, and the trial court rulings reinstated.

Because this court has expressly found §768.79 to be prospective, (and different from §45.061), this court should not construe §44.102, Florida Statutes (1993), to take away that prospective determination. In Leapai v. Milton, 595 So.2d 12 (Fla. 1993) that the offer of judgment statute of §45.061 does apply

¹ On the other hand, were it procedural, it could be applied retroactively, but then it would be an unconstitutional intrusion on this court's rule-making authority. Either view should result in reversal.

retroactively to impose attorney's fees liability when the underlying cause of action accrued before the effective date of §45.061. On the other hand, in Metropolitan Dade County v. Jones Boatyard Inc., 611 So.2d 512 (Fla. 1994), this court found that the offer of judgment statute of §768.79 does not apply retroactively to impose attorney's fees liability when the underlying cause of action accrued before the effective date of §768.79, reasoning that the attorney's fees liability of §768.79 (under the torts chapter) attaches to the underlying cause of action, unlike §45.061 which exists as a distinct independent statute under the civil procedure chapter of the Florida Statutes. Were this court to construe §44.102, Florida Statutes (1993), as extending the time period of attorney's fees liability, it would impose attorney's fees liability during a time frame when no such liability existed: namely, within 45 days of trial. In effect, that would be retroactive in effect, because it would impose liability to a cause of action that had already accrued when the auto accident (d/a: 5/14/90) occurred some time before the enactment of §44.102, Florida Statutes (1993).

Refusing to reverse will result in trial ambush tactics. In this case, the offeror's tactic included waiting for more than 2 weeks after the unsuccessful mediation (June 16, 1993), then mailing the offer of judgment apparently on 7/1/93 (which was the Thursday before the Independence Day Holiday). The offer of judgment was mailed only 11 days before the start of trial (trial started Monday, 7/12/93), and §768.79, Florida Statutes (1989),

only empowers² the offeree with a right to accept not later than 10 days before trial. Even assuming offeree's counsel receipt³ of the offer on Friday, 7/2/93, and even assuming offeree's counsel could have contacted his client, the plaintiff, to obtain consent to accept the offer and an acceptance could be prepared, an acceptance on 7/2/93 would be only 10 calendar days until trial started. Section 768.79, Florida Statutes (1989), divests the offeree of any power to accept later than 10 days before the date of trial. Given the timing of the offer, the 15 day delay between mediation and the mailing of the offer, the mailing 11 days before the commencement of trial, the offeror-defendant manifested no intent to allow offeree-plaintiff any reasonable opportunity to accept the offer⁴. No legislature purpose of §768.79 is served by allowing a party to

² Section 768.79, Florida Statutes (1989), provides in part that:

(1)(a) In any action to which this part applies, if a defendant files an offer of judgement which is not accepted by the plaintiff within in 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgement obtained by the plaintiff is at least 25 percent less than such offer,

(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.

§768.79, Fla. Stat. (1989) (emphasis added).

³ Respondents apparently decided not to make any court record of the date of actual receipt. It was neither hand delivered nor sent by certified mail.

⁴ These factors coupled with the failure to cite section 44.102 manifest an intent to attempt to create some technical right to attorney's fees and costs. This court should reject such tactics.

serve a demand or offer of judgment, where even if the mail arrives on the very next day, the offer must be accepted that very day or that power of acceptance expires by statute.

This court should not adopt §44.102 (6)(b) as a court rule or adopt the lower appellate court view. A logical follow up to this ambush tactic will be, given the existence of mediation that results in an impasse, an offer of judgment can be made 1 day, 1 minute or even 1 second before the start of trial⁵. 1 second is "at any time." Before the offeree attorney even explains the offer of judgment to his or her client⁶, the offer of judgment will be deemed rejected because trial has started. Any standard adopted by this court must impose some standard where the offeree has some fair opportunity to consider and accept or reject the offer, before imposing liability for attorney's fees and costs. That fair opportunity is a full 30 days under §768.79. The 30 days is independent of the start of trial. Accordingly, this court should reverse, and vacate the opinion of the lower appellate court.

Section 44.102(6)(b), Florida Statutes (1993), does not apply to offers of judgment under §768.79, Florida Statutes (1989), or to cause of action accruing 5/14/90. In Leapai v. Milton, 595

⁵ In effect, with the Petitioner's power to accept lapsing 10 days before the start of trial under §768.79, Florida Statutes (1989), the mailing of the offer 11 days before trial gave Petitioner, if it arrived in the next day's mail which arrives about noon in Boca Raton, less than 1/2 day to accept it, not 11 days to accept it.

⁶ Given the language of the offer of judgment statute, considering the calculations of "25% less than the offer," and considering the different scenarios, this explanation can be a lengthy undertaking in itself, especially from a personal injury perspective.

So.2d 12 (Fla. 1993) that the offer of judgment statute of §45.061 does apply retroactively to impose attorney's fees liability when underlying cause of action accrued before the effective date of §45.061. On the other hand, in Metropolitan Dade County v. Jones Boatyard Inc., 611 So.2d 512 (Fla. 1994), this court found that the offer of judgment statute of §768.79 does not apply retroactively to impose attorney's fees liability when underlying cause of action accrued before the effective date of §768.79, reasoning that the attorney's fees liability of §768.79 attaches to the underlying cause of action, unlike §45.061 which exists as a distinct independent statute under the civil procedure chapter of the Florida Statutes.

Because §44.102, Florida Statutes (1993), fails to manifest any intent to impose attorney's fees and costs liability under §768.79, or manifest any intent to impose attorney's fees and costs liability following an offer mailed 11 days before trial, the trial court was correct. Section 768.79, Florida Statutes (1989), provides in part:

(1)(a) In any action to which this part applies, if a defendant files an offer of judgement which is not accepted by the plaintiff within in 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgement obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorneys's fees against the award.....

(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 was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(Emphasis added). By using the words "which is not accepted by the

plaintiff within in 30 days", and "[i]f a party is entitled to costs and fees pursuant to the provisions of subsection (1)," Section 768.79 establishes statutory prerequisites to entitlement to fees and cost. Section 44.102(6)(b), Florida Statutes (1993), provides:

Sections 45.061 and 768.79 notwithstanding, an offer of settlement or demand for judgment may be made at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.

By omitting any words expressly mentioning liability for attorney's fees or costs, this provision merely permits both, within 30 days of trial, an offer to be served and permits an offer to be accepted, but nothing more. This statute is silent on imposing liability (or even on mentioning) the attorney's fees and costs liability provisions of §768.79, Florida Statutes (1989). Had the legislature intended to impose attorney's fees and cost liability, §44.102(6)(b) should have included an express reference to such fees and costs liability. An award of attorney's fees is in derogation of common law, and is only allowed when expressly provided by statute or contract.

By using the words "which is not accepted by the plaintiff within in 30 days" and "may not be accept later than 10 days before

In Wright v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994), the third district court of appeal, in discussing an offer of judgment served after a mediation, but sooner than 30 days before trial, stated that: "This rule does not prevent an offeree from actually accepting an untimely offer and avoiding trial; it merely prevents the offer from late serving as the basis for an award of costs and attorney's fees under the statute." That is, "may make an offer at any time after mediation" does not necessarily impose attorney's fees and cost liability.

the date of trial", §768.79, Florida Statutes (1989), manifests an intent to require offers of judgments to be served by mail at least 45 days (30 + 5^{*} + 10) before trial. Otherwise, fees and costs liability do not exist for the offeree. Because the offer in this case was mailed 11 days before trial, it should not shift fees and costs liability onto the offeree, and the trial court was correct in refusing to impose such liability on the offeree.

II. THIS COURT SHOULD DISAPPROVE OF THE FOURTH DISTRICT RULING IN THIS CASE IN RESOLVING THE EXPRESS CONFLICT IN FAVOR OF: Nordyne, Inc. v. Florida Mobile Home Supply, Inc. 625 So.2d 1283 (Fla. 1st DCA 1993) and Wright v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994).

Because the offer of judgment failed to refer to or to cite §44.102, Florida Statutes, the trial court was correct in refusing to award fees and costs, even assuming §44.102, Florida Statutes (1993), applies to an offer of judgment under §768.79, Florida Statutes (1989), or to this 5/14/90 cause of action. In this case, the lower appellate court declared an express conflict with 2 different district courts of appeal: Nordyne, Inc. v. Florida Mobile Home Supply, Inc. 625 So.2d 1283 (Fla. 1st DCA 1993) and Wright v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994).

In Nordyne, Inc. v. Florida Mobile Home Supply, Inc., 625 So.2d 1283 (Fla.1st DCA 1993), the first district court of appeal affirmed the denial of fees and costs under §768.79 arising from a claim for fees and costs following an unsuccessful mediation in which the offer of judgment was served less than 30 days before trial. In its reasoning, the Nordyne court stated:

^{*} This 5 days is the enlargement of time for service by mailing.

To the extent that 44.102(5)(b)⁹ purports to amend both section 45.061 and section 768.79, it may be best described as a trap set by the legislature for those not fortunate enough previously to have stumbled across it. In our opinion, because FHMS [offeror] did not inform Nordyne [offeree] at the time it served its demand for judgment that intended to rely upon section 44.102(5)(b), it is precluded from doing so after the fact.

Nordyne at 1290. This court should adopt the Nordyne reasoning.

In Wright v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994), the third district court of appeal, citing the Nordyne case, likewise affirmed the denial of fees sought by the offeror and reversed the denial of costs to offeree under §768.79, arising from a claim for fees and costs following an unsuccessful mediation in which the offer of judgment was served less than 30 days before trial.

This court should adopt the Nordyne and Wright view, vacating the lower appellate opinion in this case. First, in expressly citing §768.79 in the offer of judgment, the offeree necessary concludes that the 30 day standard applies. As the Nordyne court stated: "To the extent that 44.102(5)(b) purports to amend both

⁹ Although Nordyne was based on §44.102(5)(b), Florida Statutes (1991) (effective 10/1/90), and the lower appellate court (and Respondents) relied upon §44.102(6)(b), Florida Statutes (1993), §44.102(6)(b), Florida Statutes (1993), is the amended version of §44.102(5)(b), Florida Statutes (1991). Both §44.102(5)(b), Florida Statutes (1991), and §44.102(6)(b), Florida Statutes (1993), provide:

Sections 45.061 and 768.79 notwithstanding, an offer of settlement or demand for judgment may be made at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.

(emphasis added). Thus, even if §44.102(6)(b), Florida Statutes (1993), applies to an offer made under §768.79, Florida Statutes (1989), or to cause of action accruing 5/14/90, the trial court was correct in denying fees and costs to Respondents.

section 45.061 and section 768.79, it may be best described as a trap set by the legislature for those not fortunate enough previously to have stumbled across it." Why create more litigation traps? Second, if the offeror intends to rely on §44.102, it is no effort to cite such reliance on the face of the offer of judgment. Third, the lack of a citation can create an ambush tactic, especially when litigating against pro se litigants, or others "not fortunate enough previously to have stumbled across it." Fourth, there is no logical order or sequence to stumble across §44.102 (under the mediation chapter) as modifying the time standards for §768.79 (under the chapter for torts, below part II-damages). Fifth, the time pressure created by such an offer of judgment served 1 second, 1 hour or 1 day before trial does not allow time to research all statutes. That is, because §44.102 necessarily becomes relevant only if the offer is made within 30 days of trial, then the lack of time to research the issue to discover §44.102 creates more reason to require an express citation to §44.102 on the face of the offer of judgment. Sixth, affirming the lower court permitting no citation on the face of the offer of judgment to §44.102 leaves an opportunity for an unwilling offeror to escape an offer that is accepted. That is, when an offeree accepts an offer made within 30 days before trial, an offeror who does not cite §44.102 can still argue that the offer is void, because it was made sooner than 30 days before trial. Accordingly, this court should reverse the lower appellate court, vacate its opinion, and reinstate the trial court's rulings.

III. EVEN ASSUMING THE TRIAL COURT DID NOT CONSIDER the Schmidt

v. Fortner, 629 So. 2d 1036 (Fla. 4th DCA 1993), THIS COURT SHOULD STILL REVERSE AND VACATE THE LOWER APPELLATE COURT.

Even assuming that the offer was made in a timely matter, and even assuming that this court finds that a citation to §44.102 is not a condition to entitlement to fees and cost, the offer of judgment standard for a right to fees and costs should be a discretionary right, not a mandatory right that turns only on the difference between the amount of a rejected offer and the amount of a later judgment. Bridges v. Newton, 556 So.2d 1170 (Fla. 3d DCA 1990). But see, Schmidt v. Fortner, 629 So. 2d 1036, (Fla. 4th DCA 1993)(Construing §768.79, Florida Statutes (1991)); Dvorak v. TGI Friday's, Inc., 639 So.2d 58 (Fla. 4th DCA 1994)(S.Ct. #83,811 review granted oral argument set for 5/3/95). First, were the right to attorney's fees and costs under §768.79 not a discretionary right, but a mandatory right, and "the right to an awards turns only on the difference between the amount of a rejected offer and the amount of a later judgment" as articulated by Schmidt v. Fortner, 629 So. 2d 1036, (Fla. 4th DCA 1993), then there is no consistent meaning to the words of §768.79:

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 costs and attorney's fees.

§768.79, Fla. Stat. (1989). At a minimum, were the words "determining the reasonableness of an award of attorney's fees" solely a dollar amount issue, and not an entitlement issue, the "reasonableness" criteria that follows should logically include factors such as "number of hours expended", "usual hourly billing rate," "attorneys experience", and the like.

If this court reverses the Dvorak v. TGI Friday's, Inc., 639 So.2d 58 (Fla. 4th DCA 1994)(S.Ct. #83,811 review granted oral argument set for 5/3/95), this case must necessarily be reversed, because the fourth district used the same standard. Petitioner respectfully urges this court to reject the standard set by Schmidt v. Fortner (construing §768.79, Florida Statutes (1991)).

Even if this court adopts the standard set by Schmidt v. Fortner (construing §768.79, Florida Statutes (1991)), it does not apply to this case. Section 768.79, Florida Statutes (1989), provides in part:

(1)(a) In any action to which this part applies, if a defendant files an offer of judgement which is not accepted by the plaintiff within in 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgement obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorneys's fees against the award.....

(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 was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(Emphasis added). By using the words "which is not accepted by the plaintiff within in 30 days", and "[i]f a party is entitled to costs and fees pursuant to the provisions of subsection (1)," §768.79 establishes statutory prerequisites to entitlement to fees and cost that written in a restrictive form. Section 44.102(6)(b), Florida Statutes (1993), provides:

Sections 45.061 and 768.79 notwithstanding, an offer of

settlement or demand for judgment may be made¹⁰ at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.

"Section 768.79 notwithstanding" does not mean that an offer mailed 11 days before trial imposes cost and attorney's fees liability.

Because Respondents' counsel did not argue or advocate the Schmidt v. Fortner standard at the trial court level, but argued and advocated a discretionary standard with consideration of a "reasonable offer" under §768.79, Respondents should be precluded from prevailing on the stated ground that "there was no finding that the Puleo's offer of judgment was not made in good faith" standard on appeal. In effect, Respondents invited error by arguing the discretionary "reasonable offer" standard in the trial court. In the transcript on Respondents' motion for fees and costs, the transcript states beginning at (T. 14, line 14) in part:

Mr. Juda [Respondents' trial counsel]: Judge, it is my position that anything after my offer was filed he is not entitled to.

Before there was an offer he may be entitled to those reasonable costs because he had nothing to go with, but once a reasonable offer is filed, the whole purpose in filing that offer is to do away with the expense of litigation.

That is why the expenses that he got in litigation was not a reasonable expense to tax against my client.

The Court: Well do you feel that it was a reasonable offer?

Mr. Juda: \$15,000, yes, judge, and I will explain to you why. [Thereafter, the Court hears Respondents' argument on

¹⁰ In Wright v. Caruana, 640 So.2d 197 (Fla. 3d DCA 1994), the third district court of appeal, in discussing an offer of judgment served after a mediation, but sooner than 30 days before trial, stated that: "This rule does not prevent an offeree from actually accepting an untimely offer and avoiding trial; it merely prevents the offer from late serving as the basis for an award of costs and attorney's fees under the statute." That is, "may make an offer at any time after mediation" does not necessarily impose attorney's fees and cost liability.

why his offer was reasonable. Respondents' counsel does not argue "good faith."]

(R. 258-287, emphasis added). Thus, this court should vacate the lower appellate court order, and reinstate the trial court's ruling.

In moving for rehearing, Respondents first argued "good faith," and the Judge exercised his discretion in ruling against Respondents. The transcripts states beginning at (T. 665, line 9) in part:

Mr. Juda: Sure. Judge, I filed a motion to vacate the final judgment or motion for rehearing and basically, judge, respectfully you made a ruling on my offer of judgment which was filed under 768.79 for two reasons; one, that it was not an unreasonable rejection, two, that my offer was not filed more than 30 days from the time of trial.

Respectfully, Judge, I came back because the clear language of the statute doesn't have anything to do with the reasonableness of the offer. The statute simply says --

The Court: Good faith.

Mr. Juda: Well, it does say that you can deny it for good faith if the offer was not made in good faith. I did not understand that to be your Honor's ruling.

The Court: Let me ask you this. Okay, I mean the question it was reasonable or whether you want to use the words good faith. Let me back up. What was the offer again? [Thereafter, the Court hears Respondents' argument and denies the relief requested.]

(T.666-670, emphasis added). The trial court did not abuse his discretion in refusing to grant the rehearing.

Because the offer of judgment was mailed only 11 days before the start of trial, and \$768.79 only empowers Petitioner with a right to accept not later than 10 days before trial, this court should determine that the offer was not served in good faith as a matter of law. Trial started Monday, 7/12/93. The offer of judgment bears a certificate of service of mailing 7/1/93 (which was the Thursday before the Independence Day Holiday). Mediation

(June 16, 1993) took place more than 2 weeks before 7/1/93. Even assuming Plaintiff's counsel receipt of the offer on Friday, 7/2/93, and even assuming Plaintiff's counsel could have contacted plaintiff to obtain consent to accept the offer and an acceptance could be prepared, an acceptance on 7/2/93 would be only 10 calendar days until trial started. Section 768.79, Florida Statutes (1989), divests plaintiff of any power to accept later than 10 days before the date of trial. Given the timing of the offer, the 15 day delay between mediation and the mailing of the offer, the mailing 11 days before the commencement of trial, defense manifested no intent to allow plaintiff any reasonable opportunity to accept the offer". No legislature purpose of §768.79 is served by allowing a party to serve a demand or offer of judgment, where even if the mail arrives on the very next day, the offer must be accepted that very day or that power of acceptance expires by statute.

RELIEF REQUESTED AND CONCLUSION

Petitioner respectfully requests that this court reverse and vacate the opinion of the fourth district court of appeal. The order of the trial court denying entitlement to attorney's fees and costs, the final judgment, and the cost judgment should all be reinstated. Petitioner should be awarded costs.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this was served by hand/mail to

" These factors coupled with the failure to cite §44.102 suggest an attempt to create some technical right to attorney's fees and costs. This court should reject such tactics.

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(Monday).

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ATTACHMENT \$768.79, Fla. Stat. (1989)

(1)(a) In any action to which this part applies, if a defendant files an offer of judgement which is not accepted by the plaintiff within in 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgement obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorneys'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 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 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.

ATTACHMENT § 44.102(6), Fla. Stat.(1993)

Chapter 44, Mediation Alternatives to Judicial Action

(6)(a) When an action is referred to mediation by court order, the time periods for responding to an offer of settlement pursuant to s. 45.061, or to an offer or demand for judgment pursuant to s. 768.79, respectfully, shall be tolled until:

1. An impasse has been declared by the mediator; or

2. The mediator has reported to the court that no agreement was reached.

(b) Sections 45.061 and 768.79 notwithstanding, an offer of settlement or demand for judgment may be made at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.