IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 85,849

RHONDA KNEALING,

Petitioner,

v.

ERNEST PULEO and MARIA J. PULEO,

Respondents.

_____/

REPLY BRIEF OF PETITIONER

LOWER COURT
4DCA CASE NO. 93-2778

MICHAEL S. BENDELL, ESQ.
Florida Bar #374547
MICHAEL BENDELL, P.A.
Attorney for Petitioner
7000 West Palmetto Park Rd.
Suite 300
Boca Raton, Florida 33433
(407) 367-0300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

SUMMARY OF THE ARGUMENT

Because attorney's fees under §768.79 is viewed as a penalty, and because §44.102 fails to purport to adopt the penalty provisions of §768.79, this court should not read such penalties into §44.102. Although Respondent argues (Answer brief p. 5) that §44.102(5)(b), Florida Statutes (Supp. 1990), pre-dates the service of the offer of judgment under §768.79, Florida Statutes (1989), §44.102(5)(b), Florida Statutes (Supp. 1990), was enacted after the cause of action accrued. 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. Metropolitan Dade County v. Jones Boatyard Inc., 611 So.2d 512 (Fla. 1994).

Reversing this case is consistent with this court's stated policy of requiring pleading notice when attorney's fees liability is sought to be invoked. Stockman v. Downs, 573 So.2d 835 (Fla. 1991).

Because the quotes from Respondent's trial counsel preceded, as the movant in the trial court, the text cited by Respondent in its answer brief (Answer brief page 9), fails to create a basis to claim that Respondent's trial counsel did not invite error.

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)?

Because attorney's fees under §768.79 is viewed as a penalty, and because §44.102 fails to purport to adopt the penalty provisions of §768.79, this court should not read such penalties into §44.102, especially with §768.79 appearing under the chapter entitled "Torts" and §44.102 appearing under the chapter entitled "Mediation." Rather, this court can give effect to the words of §44.102 by viewing it simply as allowing an enlargement of time or an additional opportunity to settle the case, but not a vehicle to impose attorney's fees liability, especially when such attorney's fees liability is viewed as a penalty. Indeed, Respondent concedes that §44.102 simply allows an enlargement of time in stating:

> "Thus, the legislature has simply allowed an enlargement of time within which to serve and accept an offer of judgment in those instances where a court-ordered mediation has taken place but did not result in immediate resolution of the dispute."

(Answer brief at p. 4). The answer brief continues, stating:

> "Likewise, section 44.102, Florida Statutes, allows an additional opportunity for either party to attempt resolution of the dispute after impasse has been declared at a court-ordered mediation and before trial commences."

(Answer brief at p. 6). As to imposing attorney's fees liability, however, §44.102 lacks any language which purports to adopt the penalty provisions of §768.79: namely for attorney's fees or costs. By using the words "attorney's fees," "costs," and "except for pursuing the penalties of this section," in §768.79 (1)(a), the legislature viewed attorney's fees and costs liability in §768.79 as a penalty. Statutes awarding attorney fees in the nature of a penalty must be strictly construed. See Wilmington Trust Co. v.

Manufacturers Life Ins. Co., 749 F.2d 694, 700 (11th Cir. 1985). The law on rules of construction of such statutes is long-standing, and was recently stated in the dissent of the Supreme Court's recent decision in TGI Friday's, Inc.v. Dvorak, 20 FLW S436 (Fla. 1995) aff'g 639 So.2d 58 (Fla. 4th DCA 1994):

> "An initial analysis of section 768.79 reveals that the statute should be strictly construed. There is a long-standing adherence in Florida law to the "American Rule" that attorney fees may be awarded by a court only when authorized by statute or agreement of the parties. See P.A.G. v. A.F., 602 So. 2d 1259, 1260 (Fla. 1992); Rowe, 472 So.2d at 1147-48; Main v. Benjamin Foster Co., 141 Fla. 91, 192 So. 602, 604 (1939); Brite v. Orange Belt Securities Co., 133 Fla. 266, 182 So. 892 (1938). Accordingly, statutes such as section 768.79, which authorized an award of attorney fees, must be strictly construed. Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n., 539 So. 2d 1131 (Fla. 1989); DeRosa v. Shands Teaching Hospital & Clinics, Inc., 549 So. 2d 1039 (Fla. 1st DCA 1989). Moreover, this attorney fee provision is a sanction for failing to settle for the amount of a demand or offering. See Leapai v. Milton, 595 So. 2d 12, 15 (Fla. 1992), Florida Bar re Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989). Statutes awarding attorney fees in the nature of a penalty must also be strictly construed. See Wilmington Trust Co. v. Manufacturers Life Ins. Co., 749 F.2d 694, 700 (11th Cir. 1985).
>
> The rules of statutory construction require all parts of a statute to be read together in order to achieve a consistent whole. Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992)."

Although Respondent argues (Answer brief p. 5) that §44.102(5)(b), Florida Statutes (Supp. 1990), pre-dates the service of the offer of judgment under §768.79, Florida Statutes (1989), §44.102(5)(b), Florida Statutes (Supp. 1990), was enacted after the cause of action accrued. 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 attaches to the underlying cause of action. Metropolitan Dade County v. Jones Boatyard Inc., 611 So.2d 512 (Fla. 1994).[1]

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).

Reversing in this case and resolving the 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), is consistent with this court's stated policy of requiring pleading notice when attorney's fees liability is sought to be invoked. In Stockman v. Downs, 573 So.2d 835 (Fla. 1991), the Supreme Court held that a party must[2] provide pleading notice of a claim for attorney's fees, reasoning at page 837:

> "Our review of the case law leads us to the conclusion that the better view is one expressed in our earlier case-a claim for attorney's fees, whether based on statute or contract, must be pled. The fundamental concern is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise."

Because the pleading of 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.

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

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[1] This precedent was ignored by Respondent's answer brief.

[2] Except in §57.105, Fla. Stat. cases. Ganz v. HZJ, Inc., 605 So.2d 871 (Fla. 1992).

v. Fortner[3], 629 So. 2d 1036 (Fla. 4th DCA 1993), THIS COURT SHOULD STILL REVERSE AND VACATE THE LOWER APPELLATE COURT.

Because the quotes from Respondent's trial counsel preceded, as the movant in the trial court, the text cited by Respondent in its answer brief (Answer brief page 9), fails to create a basis to claim that Respondent's trial counsel did not invite error. That is, Petitioner merely responded to the argument advance by Respondent's trial counsel in the trial court.

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 Robert Schwartz, Esq., GUNTHER & WHITAKER, P.A., P.O. Box 14608, Fort Lauderdale, FL 33302-4608, (305) 523-5885, on September 18, 1995 (Monday).

MICHAEL BENDELL, P.A.
Attorney for KNEALING
7000 West Palmetto Park Rd.
Suite #300
Boca Raton, Florida 33433
(407) 367-0300

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[3] Following Petitioner's initial brief this court decided TGI Friday's, Inc. v. Dvorak, (S.Ct. #83,811) 20 FLW S436 (Fla. 1995) aff'g 639 So.2d 58 (Fla. 4th DCA 1994) and approving the standard set forth in Schmidt v. Fortner, 629 So.2d 1036 (Fla. 4th DCA 1993).

BY: _____
MICHAEL S. BENDELL, ESQ.
Fla. Bar No.: 374547

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

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(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.