IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

MYRDA MANASSE,

Respondent.

Appeal Case No: **89,366**
4th District Case No: 94-23 18

RESPONDENT'S REPLY BRIEF

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Statement of the Facts and Case

The statement of the facts and case relevant to the issues before this court are concisely set forth by the Fourth District in it's opinion. Accordingly, the Respondent would adopt that statement of the facts and case. However, the Respondent would add the following supplement to that statement:

At the time of trial, plaintiff was working at two jobs in the food service industry, K. F. C. and McDonald's (Tr.2 16-17; Tr2 47-48). However, she was in training to become a certified nurse assistant. Unlike her duties at K. F. C. and McDonald's, her duties as a nurse assistant would require lifting and turning people (Tr.2 28-30). Her chiropratic physician testified that if plaintiff wished to avoid aggravating her condition, she would have to avoid excessive lifting or bending as well as repeated light bending or lifting (Tr.2 148). The doctor also opined that the lifting and turning of patients required by the duties of a certified nurse assistant or a nurse could be expected to aggravate plaintiffs conditions (Tr.2 149).

All of the experts who testified as to the permanency of plaintiffs lower back injury at L 5/S 1 offered their reasoned medical opinions as to plaintiffs future as regards that injury and agreed that plaintiffs disk injury will require her to permanently modify her lifestyle in order to avoid the risk of worsening her condition and increasing her pain (Tr.2 99-100; 148,149). The jury was presented with absolutely no testimony that plaintiff would have been free of pain and able to resume all of her prior activities, All testimony related to plaintiffs future treatment involved

procedures designed to mitigate and/or to slow the expected degeneration of plaintiffs injured disc, which degeneration would result in increased pain . That is to say, the only testimony presented at trial regarding future treatments related to relief from pain (Tr.2 145-147; 212-213).

Allstate has never challenged the fact that the record reflects competent substantial evidence to support the jury finding that plaintiff received a permanent injury as a result of the automobile accident caused by the underinsured tortfeasor, that the plaintiff endured pain and suffering as a result of that accident or that the claim for future medical expenses was for anything other than treatment for injuries received in that accident,

SUMMARY OF ARGUMENTS

The Fourth District was eminently correct in reversing the instant action for a new trial. The jury found that the Plaintiff suffered a permanent injury and required past and future medical treatment. Well established case law supports that such a verdict is inadequate as a matter of law, in that a jury could not logically award damages for treatment and at the same time not have awarded damages for pain requiring the treatment,

The Fourth District has never required a contemporaneous objection to an inadequate verdict. The proper method to address an inadequate verdict is by post trial motion. Even if the Court were inclined to believe that the procedure should be changed, it would be inappropriate in this case to have required the Plaintiff to object to the verdict prior to the discharge of the jury.

The Petitioner has not met its burden of proof of showing an abuse of discretion by the trial court's denial of Allstate's request for attorney fees pursuant to an offer ofjudgment. The court fully considered the positions of both parties and made its determination based upon the relevant factors at the time the offer was made. Absent an abuse of discretion, the decision of the trial court should be affirmed.

ARGUMENT I

WHERE A JURY FINDS THAT A PLAINTIFF HAS SUSTAINED A PERMANENT INJURY AND AWARDS FUTURE MEDICAL EXPENSES, BUT AWARDS NO FUTURE INTANGIBLE DAMAGES, THE VERDICT IS INADEQUATE AS A MATTER OF LAW.

That the jury verdict awarding zero damages for plaintiffs future pain and suffering was properly reversed by the District Court is supported by the well established rule that where a jury awards damages for reasonable and necessary medical treatment, it's failure to award damages for the pain and suffering requiring such treatment renders the verdict inadequate as a matter of law.

In *Mason v. District Board of Broward College*, 644 So.2d 160 (Fla. 4th DCA 1994), the Fourth District held that an award of medical expenses for treatment provided to relieve pain without a commensurate award for the related pain and suffering is inadequate as a matter of law. In *Mason*, the jury awarded the plaintiff damages for all of his past medical expenses, but awarded nothing for his past pain and suffering. In reversing the trial court's denial of the plaintiffs motion for additur or a new trial, the District Court stated:

> "The jury in the instant case found the negligence of appellee caused damages to appellant. It also found each party fifty percent negligent. The jury went on to award appellant all of his medical expenses, but awarded appellant zero damages for past pain and suffering. In a similar situation, this court held that such an award by a jury was inadequate as a matter of law. *See Daigneault v. Gache*, 624 So.2d 818 (Fla. 4th DCA 1993), rev. denied, 634 So.2d 623 (Fla. 1994). In *Daigneault*, this court reasoned that since the jury found all of the injured party's medical expenses were necessary or reasonably obtained by appellant as a result of her injuries, it "logically follows that the jury had to believe that appellant suffered some degree of pain and discomfort as a result of her injuries." *Id* at 820.

In both *Daigneault* and the instant case, the injured party sought treatment because of pain. The juries in both cases awarded all of the medical expenses as a result of treatment for that pain. Yet, the juries did not award any damages for the pain itself Although the jury in the instant case was fiee to disbelieve appellant's claim of pain and suffering and the testimony of his treating physician and chiropractor, it could not have done so and at the same time found all of appellant's medical bills were reasonable and necessary for the treatment of such pain:

> ". . . if all of appellant's treatments were reasonably necessary to alleviate his pain, then appellant suffered pain for which he should have been compensated. Hence, the jury could not have logically awarded damages for treatment and at the same time not have awarded damages for the pain requiring the treatments." 644 So.2d at 16 1 (footnotes omitted).

The *Daigneault* decision cited in *Mason* involved a plaintiff who suffered a back injury in a motor vehicle accident for which she received treatment for a period of three years to alleviate pain. The jury awarded the plaintiff the exact amout of her total medical expenses less the amout she had received under PIP coverage, but awarded zero for future medical expenses, lost earning ability, and past bodily injury, pain and suffering. In reversing the trial court's denial of the plaintiffs motion for a new trial, the court stated:

> "Appellant testified that she experienced pain and suffering as a result of the accident and Dr. Soroka testified that his treatments rendered over a three year period were in response to her complaints of pain. While the jury was free to disbelieve appellant's claim of pain and suffering, and was also at liberty to reject the testimony of her treating physician, Dr. Soroka, the jury could not reasonably disbelieve appellant's claim of pain and still find that all of the medical

> treatment rendered by Dr. Soroka to alleviate these complaints of pain was reasonable and necessary . . . it was thus unreasonable for the jury not to have awarded the appellant some amount for her past physical pain and suffering. The verdict, which awarded zero for that element of damages, was therefore inadequate as a matter of law.

In ***Butte v.Hughes***, 521 So.2d 280 (Fla. 2nd DCA 1988), the Second District reviewed the trial court's denial of the plaintiffs' motion for a new trial and for additur. The jury had found that the plaintiff sustained a permanent injury as a result of the accident, awarded $9, 000 for future medical expenses, but returned a zero verdict on the plaintiffs claims of pain and suffering and loss of consortium. In reversing the denial of the plaintiffs motion for a trial, the court stated:

> "In the instant case, the jury found that Mr. Butte suffered a permanent injury as a result of the accident. The jury compensated him for future medical expenses associated with that injury. The jury, however, returned a zero verdict for appellant's general damages. The jury's zero verdict for general damages was grossly inadequate and totally inconsistent with its finding of permanent injury and with its award of future medical expenses." **521** So.2d at 28 1.

In ***Harrison v. Housing Resources Management, Inc., 588*** So.2d **64** (Fla. 1st DCA 199 1), the First District reversed a trial court's denial of the plaintiffs motion for a new trial based upon the inadequacy of the jury verdict. In ***Harrison,*** tenants of an apartment complex sued the company which managed the complex following an assault on the plaintiff in her apartment. The jury awarded the assaulted plaintiff past medical expenses of $720 and future medical expenses of $6, 900 for a two year period. The daughter of the assaulted tenant, who discovered her mother in hysterics immediately following the assault, was awarded past medical expenses of $640 and future medical expenses of $5, 200 for a two year period. The mother received no

award of damages for her lost earning capacity and neither of the plaintiffs received any damages for past or future pain and suffering. In reverse the trial court's denial of the plaintiffs motion for a new trial, the court stated:

> "In light of the substantial and unrebutted testimony of the counselors who treated L. Harrison and her daughter after the attack, we conclude that the jury could not reasonably have returned a verdict which included no compensation for the appellant pain and suffering the jury's award of damages for appellant's medical expenses demonstrates its acceptance of the appellants' psychological injuries, for their past medical expenses were incurred for psychological services and their claim for future care was based upon their anticipated need for more of those services, In our view, the jury's acceptance of the appellant psychological injuries is wholly inconsistent with its finding that they endured no compensable all pain and suffering." 588 So.2d at 66-67.

See also, *Een* v. ***Rice, 637*** So.2d ***331*** (Fla. 2nd DCA 1994) (reversing denial of a new trial where jury awarded plaintiffs $20,609.02 for medical expenses but zero dollar verdict for past and future non-economic damages, finding jury's award of damages for medical expenses demonstrated acceptance of plaintiffs' physical injuries which, therefore, mandated an award for pain and suffering); *Thornburg v. Pursell*, 446 So.2d 713 (Fla. 2nd DCA 1984) (Remanding case for new trial on damages where jury awarded plaintiff amount of his past medical expenses, but failed to award damages for pain and suffering and future medical expenses, stating, " where, as here, a jury finds liability and awards only the amount of the medical expenses incurred, despite evidence of pain and suffering and uncontradicted testimony as to the need for future medical expenses, the award is considered to be inadequate").

In this case, as pointed out by the District Court, the $10,000 present value

of future medical expenses over a 40 year period was the precise amount requested in closing arguments for "palliative care". In view of the well accepted definition of the word "palliative" as serving or tending to palliate (defined as "to lessen the pain or severity of without actually curing; alleviate; ease"), **WEBSTER'S NEW WORLD DICTIONARY** (2nd College Ed. 1984), and the fact that the only testimony presented at trial regarding future treatments related to relief from pain, it is difficult to argue that the trial court intended its statement "palliative care " to mean anything other than care intended, designed, or required to lessen, alleviate or ease plaintiffs' pain, Consequently, the trial court could not have logically concluded that the jury was reasonable in awarding damages to plaintiff for future treatments for pain yet still find that the pain for which the treatments are to be provided was not proven by the greater weight of the evidence or, alternatively, not compensable,

The District majority herein also correctly placed significance on the jury's affirmative finding that the plaintiffs' injury was permanent:

> " In this case, the jury could have disbelieved that plaintiff sustained a permanent injury or disbelieved that she required future treatment of her medical condition. But having found that plaintiff suffered past pain and suffering, and having further found that plaintiff sustained a permanent injury from the accident requiring $10,000 in future medical expenses over a forty year time span, it is not logical or reasonable for the jury to have concluded that there would be zero future intangible damages associated with the permanent injury and future medical care."

The appellant is not unmindful that the District Court has suggested a need for a more specific jury instruction in order to obviate the problems that arise when a jury awards zero damages for non-economic damages. However, the Respondent will address that need in the next argument.

ARGUMENT II

IF SUCH A VERDICT REQUIRES A NEW TRIAL, THE PLAINTIFF DID NOT HAVE TO OBJECT BEFORE THE DISCHARGE OF THE JURY.

It has long been the rule that whereas a party is obligated to object to an inconsistent verdict prior to discharge of the jury, an inadequate verdict may be challenged by post trial motions. As the Fourth District noted in its opinion herein:

> "Our court has not previously required a plaintiff to object prior to the discharge of the jury. We have routinely reviewed cases without the requirement of a contemporaneous objection where a finding of inadequacy was based on answers to special interrogatories. *See, e. g; Daigneault; Mason.* We implicitly rejected any requirements in *Berez* v. *Treadway*, 599 So.2d 1028 (Fla. 4th DCA 1992). Yet we struggled with this issue in *Hendelman vs. Lion Country Safari, 609* So.2d 766 (Fla. 3rd DCA 1992) (Dell, J., concurring andAnstead, J., dissenting), review dismissed, 618 So.2d 209 (Fla. 1993).
>
> * * *
>
> Because the jury's finding of zero future non-economic damages in this case was unreasonable in light of its other findings of a permanent injury and substantial future medical expenses, we find the jury verdict was inadequate as a matter of law. *See Aymes v. Automobile Insurance Co., 658* So.2d 1246 (Fla. 4th DCA 1995); *Mason; Daigneault.*

The Second and Fifth Districts have also addressed whether a contemporaneous objection should be required. In *Cowen* v. *Thornton,* 621 So.2d 688 (Fla. 2nd DCA 1993), review denied, 634 So.2d 629 (Fla. 1994), a case where a jury found a defendant was partly responsible for the plaintiffs' damages but nevertheless rendered a zero verdict, Judge Altenbernd wrote:

> "I am inclined to believe that any party who wishes to appeal such an erroneous verdict should be required to preserve the error by

> an objection prior to discharge of the jury.
>
> In light of the existing case law, however, plaintiffs trial council had no reason to believe a timely objection was necessary to challenge the inadequate verdict posttrial. Especially when neither the trial judge nor defense counsel raised this problem before the jury was discharged, I do not believe it would be appropriate in this case to require the plaintiff to have objected to the verdict prior to discharge of the jury."621 So.2d at 688.

Similarly, in *Simpson* vs. *Stone,* 662 So.2d 959 (Fla. 5th DCA 1995), the Fifth District held that the lack of clarity in the existing case law on this point made it inappropriate to find that plaintiff waived her right to challenge the verdict posttrial on the basis of inadequacy

Thus, plaintiffs council had no reason to believe a timely objection was necessary to challenge the inadequate verdict post trial herein. Since the Fourth District has not previously required a plaintiff to object prior to discharge and the Second and Fifth Districts concede the lack of clarity in the existing law, it follows that a requirement for a contemporaneous objection could only be prospective and inappropriate in this case in order to require the plaintiff to have objected prior to discharge of the jury. However, since the District Court has certified the question in an obvious attempt to have the Supreme Court clarify the requirement, the Respondent will hereafter address the issue.

It is most respectfully submitted that to properly recognize the nature of the problems arising from contemporaneous objections prior to discharge, this Honorable Court needs to view the situation from the trial environment. That is to say, stand in the shoes of the trial judge and trial attorneys that hear a verdict being read that finds permanent injury, awards medical expenses and lost wages, but inexplicitly awards zero for "pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, loss of

capacity for the enjoyment of life."

First, consider the options available to the trial judge. This situation was presented in *Sears, Roebuck and Co. v. Genovese,* 568 So.2d 466 (Fla. 4th DCA 1990). Therein, the trial judge apparently recognized the inadequacy in the verdict as he read it and before it had been announced to counsel. He directed the jury to revisit its verdict informing it that any aspect of the verdict could be modified if it so chose. At a bench conference, he advised counsel that the jury had awarded zero non-economic damages. The second verdict awarded $46, 903.80 for past medical expenses and $75,000 for future medical expenses, but adhered to a zero award for non-economic damages. A new trial was required.

Next, consider the options available to the defense attorney. He/she could remain silent and expect the burden of any objections to fall on the plaintiff or risk an argument on appeal that the verdict was inconsistent, not inadequate. But assume for a moment that defense counsel does raise the objection. What instruction should he/she request? Herein, Allstate suggests:

> "In the present case, assuming there was any inconsistency in the verdict, (which Allstate does not concede), it could have been corrected very simply by sending the jury back for further deliberations with an instruction that if they awarded future medical expenses they were also required to award and amount for future pain and suffering." (main brief page 29).

But the aforementioned instructions cannot be harmonized with the "properly balanced instruction" test set forth in *City of Tampa v. Long, 638* So.2d 35 (Fla. 1994). Since the jury has already answered the question of medical expenses for the plaintiff, the only fair instruction would be **"since** you have awarded future medical expenses **you** are also **required** to award an amount for future pain and suffering." It seems fair to suggest not many defense attorneys are going to request

that instruction.

Finally, consider the options for the plaintiffs attorney. The undersigned confidently believes he can speak for the majority of the plaintiffs' bar by stating that when you hear a zero verdict for intangibles in the 90's, you become seized with fear that the verdict is a product of considerations beyond the evidence and testimony at trial. Inundated by a proliferation of tort reform rhetoric, juries are all too frequently applying personal beliefs that injured parties are only entitled to out of pocket expenses--a notion that totally disregards the Florida Standard Jury Instructions. A jury that is predisposed with these concepts will obviously not give a plaintiff fair compensation even if they are directed to revisit the verdict.

Least it be suggested that the last observations represents no more than "personal injury attorney paranoia", the court would be invited to reflect on some further considerations. Since the Tort Reform Act, soft tissue trial defense tactics have developed a plethora of" explanations" that pander to the juror who may be pre-disposed to escape an award of intangibles. To begin an analysis, one has to recognize the "givens" of soft tissue injury, to wit: 1) soft tissue injuries typically do not fully manifest until hours or even days after a problem, so victims typically do not get admitted to a hospital, 2) soft tissue injuries do not show up on X rays, and the doctors' fmdings are in large part based upon a history given by the patient, 3) soft tissue injuries rarely incapacitate the injured party; victims can work and engage in normal activities, they just do it in pain and when aggravated sufficiently they seek palliative treatment, 4) medical science has found bizarre cases of even serious soft tissue injuries that have been caused by events other than physical trauma (the most extreme being disc herniation caused by sneezing). In the event one or more jurors have a bias about personal injury lawsuits, these factors can actually play unfairly to the defense advantage. In this regard, this

Honorable Court's attention would be respectfully directed to the case of *Fazzolari v. City of West Palm Beach,* 608 So.2d 927 (Fla. 4th DCA 1992).

In *Fazzolari*, during jury selection, appellant's counsel asked if any of the jurors had negative feelings about personal injury lawsuits. Over half of the jury panel raised their hands in response to this question. Upon further questioning by appellant counsel, all of those jurors indicated in one fashion or another that their feelings would continue to exist during the trial and that there was a chance that those feelings could affect their ability to be fair. The trial court denied all of appellant's challenges for cause; appellant exhausted his peremptory challenges and requested additional challenges. When that request was denied, some of the challenged jurors apparently set on the jury.

The jury failed to award future damages although they did make an award for past damages. But the jury did not find a permanent injury. The District Court felt the verdict did not require a new trial. Specifically, the District Court found:

> "Here, the jury was clearly concerned about the question of whether there was a need for future medical expenses; they asked a question during their deliberations about whether future medical cost could be managed by an insurance carrier, thereby implying that there was some question about awarding money directly to the plaintiff for this purpose. They were clearly concerned with the credibility or necessity of those expenses to the point that they wondered whether, if awarded, the expenses could be monitored. It cannot be said that there was no justification in the record for their apparent concerns. After the accident, the plaintiff was not admitted to the hospital, and only sought additional medical attention tier seeing a lawyer. X rays showed that he had a pre-existing injury. At the time of trial, the plaintiff was working full time at a wage 40% higher than he was making before the accident, and he testified that he had not received any medical treatment for this injury during the past year. The defense experts testified that the plaintiffmight need future treatment if he was having a flare up, but with adequate treatment that he could do almost anything that a normal individual could do, including picking up as much as seventy-five pounds. Other experts testified that the plaintiff

> had a bulging, but not herniated, disc. They said that the bulging could have been caused by sneezing, and there was conflicting neurological evidence of nerve irritation. Finally, the experts findings were, in large part, based upon a history given to them by the plaintiff. Given the facts of this case, it was not error for the trial court to refuse to overturn the jury's verdict." At pages 929-930.

The point of exploring *Fazzolari* is not to criticize the trial judge or the Fourth District's assessment of the jurors method of arriving at a verdict. Both the trial judge and the DCA felt the jury verdict could be explained if given every benefit of the doubt that would exclude considering matters outside the evidence and testimony, But an alternative explanation that may fairly be drawn from the conduct of the jury deliberations is that six citizens took it upon themselves to attempt creative tort reform. Under the standard jury instructions in effect when *Fazzolari* was tried, the jury would not have been considering future medical expenses unless they had first answered the threshold question in favor of the Plaintiff, Because the court was unwilling to let them break new ground for "monitoring" future medical payments, the jury must have changed the answer on the permanency issue. If a jury is simply told to revisit the verdict in light of a zero award for intangibles after permanent injury, it is predictable that some jurors will simply change the answer on permanency in order to avoid violating a personal belief about damage awards (as seems to be the case in *Fazzolari*). Florida has never had an instruction that authorizes a jury to make a tiding "no permanency" in order to satisfy a personal belief that a plaintiff should only recover out of pocket expenses.

But now the Fourth District has suggested that the Supreme Court should give guidance by way of an improved jury instruction that would stem the flood of zero verdicts for non-economic losses when out of pocket losses have been awarded. But, respectfully, perhaps it's not a jury instruction that is needed, but a verdict form. Simply stated, the verdict form needs to be turned

around. The jury should determine a fair amount of compensation for all elements of damage, and then address the threshold questions of permanency, comparative negligence and affirmative defenses. That way the trial judge can quickly identify inconsistent/inadequate verdicts by a cursory review and direct the jury accordingly. It may seem to require unnecessary work when a jury, for example, finds no permanency. But it saves enormous judicial labor if the inconsistent/inadequate verdict requires a new trial.

ARGUMENT III

THE TRIAL JUDGE DID NOT ERR IN DETERMINING THAT ALLSTATE'S OFFER OF JUDGMENT WAS NOT MADE IN GOOD FAITH

Allstate's argument to this Court is that the trial judge abused it discretion in denying Allstate's motion for attorney's fees under Section 768.79(7)(a) of the Florida Statutes. In support of its argument, Allstate asserts that the trial judge's determination that Allstate's offer was not made in good faith was grounded on an "insufficient basis."

It is well established in this district that a trial court's findings of fact with regard to an award of attorney's fees are presumed to be correct, *Alternative Development, Inc. v. St. Lucie Club & Apartment Homes Condominium Ass'n, Inc.*, 608 So.2d 822 (Fla. 4th DCA 1992); *Maass v. Christensen,* 447 So.2d 1044 (Fla. 4th DCA 1984). The standard of review of an order denying attorney's fees is whether the trial court abused its discretion. *Hoover v. Sprecher,* 610 So.2d 99 (Fla. 1st DCA 1990); *Deakyne v. Deakyne,* 460 So.2d 582 (Fla. 2nd DCA 1984). Thus, in seeking a reversal of the trial court's denial of an award of attorney's fees, Allstate bears the burden of "presenting a record that would justify a conclusion that the judgment was arbitrary or unreasonable." *Hamlet v. Hamlet,* 583 So.2d 654 (Fla. 1991).

The standard to be applied in this district in determining whether a party is entitled to an award of attorney's fees and costs under Section 768.79 of the Florida Statutes is set forth in the Fourth District's decision in *Schmidt* v. *Fortner*, 629 So.2d 1036 (Fla. 4th DCA 1993). According to *Schmidt,* once the elements of statutory entitlement are satisfied, i.e., a defendant has timely served an offer of judgment which has been rejected by the plaintiff who subsequently obtains a judgment which is at least 25 percent less than the amount of the offer, the trial court is permitted to exercise

its discretion to disallow an award of attorney's fees to the defendant if it determines that the offer "was not made in good faith." 629 So.2d at 1041. Where attorney's fees are denied without a finding that an offer ofjudgment was not made in good faith, such denial is reversible error. See, e.g., *Dvorak* v. *TGI Friday's Inc.*, 639 So.2d 58 (Fla. 4th DCA 1994); *Good v. Udhwani, 648* So.2d 247 (Fla. 4th DCA *1994); Puleo v.* DS *Knealing, 654* So.2d 148, (Fla. 4th DCA 1995).

Plaintiff is aware of no reversals by this Court of a trial court's denial of attorney's fees under Section 768.79 where, as in the case at bar, a trial court has exercised its discretion in explicitly determining that an offer ofjudgment was not made in good faith. Admittedly, this Fourth District's decision in *Schmidt* was based upon the trial court's erroneous determination that the demand for judgment in that case was made in the absence of any reasonably reliable way to measure the loss at the time the offer was made and that the demand was, therefore, reasonably rejected, which the DCA found was not a proper basis to determine the existence of a lack of good faith under Section 768.79(7)(a). See also, *Puleo v. Knealing, supra,* (holding that offer not made in good faith is not the same as an offer reasonably rejected). Nevertheless, the *Schmidt* decision does provide some guidance as to other factors which would permit the granting or the denial of fees under that provision.

For example, the *Schmidt* court noted that one factor which we could constitute "both the absence of good faith and the presence of bad faith" is an intent of an offering party not to settle the case at the figure offered or demanded. *629* So.2d at 1040 n. 5. The *Schmidt* court did not state, however, that a determination of the absence of good faith or the presence of bad faith could only be established on this basis. Indeed, the *Schmidt* court also recognized that relevant to a determination of the absence of good faith is the reasonableness of the offer as determined by the relationship

between the amount of the offer is made. Finding that a reasonable basis existed in *Schmidt* for the demand ofjudgment made in that case, the court stated:

> "A reasonable basis here existed in the general range of assets that the probate judge said were missing from the estate. To require the exacting proof that a prima facie case entails would be both contrary to the text and quite antithetical to the purpose and intent of the statute. It would clearly discourage making good faith offers of settlement early in a case, i.e. before the parties have expended substantial sums in attorney's fees and costs for discovery and preparation for trial." 629 So.2d at 1039 (emphasis supplied).

In contrast, the *Schmidt* court implicitly acknowledged that where discovery has proceeded in a case to the extent that facts reveal that a particular offer has no reasonable basis, a trial court may properly determine that an offer was not made in good faith. In this regard, the court noted:

> "A mere belief that the figure offered or demanded will not be accepted, on the other hand, does not necessarily suggest to us either the absence of good faith or the presence of bad faith-at least where the offeror fully intends to conclude a settlement if the offer or demand is accepted as made, and the amount of the offer or demand is not so widely inconsistent with the known facts of the case as to suggest on its face the sole purpose of creating a right to fees if it is not accepted." 629 So.2d at 1040 n.5 (emphasis supplied).

Allstate contends that at the time the offer was made, Allstate's offer of $4,000.00 has a "reasonable foundation" and that "[n]othing in the amount of the offer suggests that it was made for the sole purpose of setting up a later entitlement to fees." In support of this argument, Allstate points to its statement at the hearing that notwithstanding the completion of discovery, its offer was based solely on the testimony of the IME, Dr. Melvin Young, of no permanency of injury, and its belief that in determining damages for Plaintiffs injuries, a jury would consider that Plaintiffs injuries were actually caused by an accident which occurred subsequent to the accident for which the Plaintiff was seeking damages. Selectively excluded from Allstate's consideration in making its offer were the

facts then known that prior to the second accident, Plaintiff had been discharged by her treating physician with an impairment rating and that an MRI had been completed which demonstrated a clear disc herniation. That these facts were known by Allstate at the time of the offer was pointed out to the trial court by Plaintiffs counsel at the hearing, and was not disputed by Allstate. (Tr. 1 9-10).

To argue that an offer has a "reasonable foundation" where it is based on a selective disregard for those facts revealed by discovery which are unfavorable to a defendant's position and an assumption that a jury would improperly consider that the damages claimed by a plaintiff were caused by a subsequent accident despite evidence to the contrary is to totally ignore the meaning of the word "reasonable." Indeed, an offer based on such a blatantly unreasonable foundation is undoubtedly among those offers the *Schmidt* court envisioned as being "so widely inconsistent with the known facts of the case as to suggest on its face the sole purpose of creating a right to fees if it is not accepted." 629 So.2d at 1040 n.5. Furthermore, Allstate's contention that "there is nothing in the record to suggest that ALLSTATE was unwilling to conclude a settlement if the offer was accepted', is not an exception to the requirement that an offer have a reasonable basis,

Allstate also argues that despite the trial court's clear statement that ". .based on the state of the case on March 11, 1994 when the offer was made I find that this was not a good faith offer within the meaning of section 768.79 7(a)," (Tr. 1 1 1), the court really meant to say that Allstate's offer was not unreasonably rejected. There is nothing in the record to support Allstate's view of the court's reasoning. During the hearing, Judge Gross made no statement suggesting in any way that he considered or applied a "reasonable rejection" standard in determining whether Allstate was entitled to fees and costs under Section 768.79(7)(a). Instead, the trial judge specifically directed both parties' counsel to argue whether or not the offer, at the time is was made, was made in good faith.

(Tr. 1 8) In response to this request, both parties' counsel presented the facts known at the time of the offer, which, as pointed out by Allstate's counsel, was after "all discovery had been completed." The information presented to the court permitted the court to rule on the narrow issue it had articulated, and the court proceeded to so rule.

Finally, Allstate argues that the trial judge improperly placed the burden of establishing the "good faith' requirement of the offer on Defendant. The record clearly reflects, however, that Judge Gross neither intended to place nor did he place such a burden on Allstate when he stated that "I'm not saying who is required to show this or that, I'm saying the issue really before I can rule is whether or not under 768.79 7(a) is the good faith of the offer. I'm asking you to tell me why that was a good faith offer at the time it was made on March 1 lth, 1994." (Tr.l 8-9). As Allstate has pointed out in its brief, after Allstate's counsel stated his reasons why he believed the $4,000.00 offer of judgment was a good-faith offer (Tr. 1 9), Plaintiffs counsel presented his statement of why he believed the offer was not made in good faith. (Tr.l 9-10). Allstate has cited no authority to support its contention that when a trial court inquires of each party's counsel as to whether an offer of judgment was made in good faith and also specifically states that in making this inquiry it is not stating which of the two parties carries the burden of proof on this point, its discretion in finding that such an offer is not made in good faith has been abused.

For the foregoing reasons, it is clear that Allstate has not carried its burden of showing, on the record, that the trial court's order denying Allstate's request for attorney's fees was arbitrary or unreasonable. Consequently, Allstate's failure to establish that the trial court abused its discretion, mandated the trial court's judgment on this issue be affirmed by this Court.

CONCLUSION

For the reasons aforementioned, the Respondent would respectfully request this Honorable Court to affirm the Fourth District opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Henry L. Kaye, Esq., 230 Royal Palm Way, Suite 205, Palm Beach, Florida 33480, Joe Hankin, Esq., 5 15 N. Flagler Drive, Suite 203, West Palm Beach, Florida 33401, James P. Cooksey, Esq., 2601 Broadway, Suite 3, West Palm Beach, Florida 33402, Michele I. Nelson, Esq., Paxton, Crow, Bragg, Smith & Keyser, P.A., Barristers Building, Suite 500, 1615 Forum Place, West Palm Beach, Florida 33401, and to: Barbara Green, 1320 South Dixie Highway, Suite 450, Gable One Tower, Coral Gables, Florida 33146 by U.S. Mail this 13th day of March, 1997.

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