SUPREME COURT STATE OF FLORIDA

PIRELLI ARMSTRONG TIRE CORPORATION, ETC.

Petitioner,

vs.

META E. JENSON, ETC., ET AL.

Respondent.
_____/

CASE NO.: SC00-833
Lower Tribunal No.: 2D97-04837

BRIEF OF AMICUS CURIAE
FLORIDA DEFENSE LAWYER'S ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CITATIONS . . . . . iii-v

STATEMENT OF CASE AND FACTS vi

SUMMARY OF THE ARGUMENT 1

ARGUMENT

POINT I

THE MAJORITY'S INTERPRETATION OF §768.79, FLORIDA STATUTES (1993) DENIES FLORIDA DEFENDANT'S THE GUARANTEE OF EQUAL PROTECTION AFFORDED UNDER THE UNITED STATES AND/OR FLORIDA CONSTITUTION 2

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

Adler-Built Industries, Inc. v. Metropolitan Dade County,
231 So.2d 197 (Fla. 1970) 12

Burstyn v. City of Miami Beach,
663 F.Supp. 528 (S.D. Fla. 1997) 4

Carnival Leisure Industries Ltd. v. Arviv,
655 So.2d 177 (Fla. 3rd DCA 1995) 11

Cheek v. McGowan Electric Supply Co.,
511 So.2d 977 (Fla. 1987) 12

Collins v. Wilkins,
664 So.2d 14 (Fla. 4th DCA 1995) 13

Demby v. English,
667 So.2d 350 (Fla. 1st DCA 1995) 11

Eagleman v. Eagleman,
673 So.2d 946 (Fla. 1996) 7

Ferre v. State Ex Real Reno,
478 So.2d 1077 (Fla. 3rd DCA 1985) 11

Florida Patient's Compensation Fund v. Rowe,
472 So.2d 1145 (Fla. 1995) 7, 8, 9,

TABLE OF CITATIONS

Garrett v. Mohammed,
686 So.2d 629 (Fla. 5th DCA 1996)
review denied, 697 So.2d 510 (Fla. 1997) 13

Good v. Udhwani,
648 So.2d 247 (Fla. 4th DCA 1994) 7

Jasper v. St. Petersburg Episcopal Community, Inc.,
222 So.2d 479 (Fla. 2nd DCA 1969) 12

Loy v. Leone,
546 So.2d 1187 (Fla. 5th DCA 1989) 12

Richardson v. Merkle,
646 So.2d 289 (Fla. 2nd DCA 1994) 10

Standard Guaranty Insurance Co. v. Quanstrom,
555 So.2d 828 (Fla. 1990) 6, 7, 8, 9, 14

State, Department of Highway Safety & Motor Vehicles v. Salter,
710 So.2d 1039 (Fla. 2nd DCA 1998) 11

Stevenson v. Rutherford,
440 So.2d 28 (Fla. 4th DCA 1993) 11

Suncoast Intern, Inc. v. Department of Business Regulation, Div. of Florida Land Sales, Condominiums and Mobile Homes,
596 So.2d 1118 (Fla. 1st DCA 1992) 11

TABLE OF CITATIONS

Thornber v. City of Ft. Walton Beach,
568 So.2d 914 (Fla. 1990) 11

TransFlorida Bank v. Miller,
576 So.2d 752(Fla. 4th DCA 1991) 9

United States v. Collins
603 F.Supp. 301 (S.D. Fla. 1995) 4

Section57.105
Fla. Stat. 1983 . . . . . 4, 8, 9, 10

Section768.79(1), (6)(a); (6)(b)
Fla. Stat. 1993 . . . . . 1, 2, 4, 6, 7, 10, 11, 12, 13

Section 768.79(7)(b)
Fla. Stat. 1993 . . . . . 1, 5, 7, 10, 11, 12, 13

Fla. Rules of Civil Procedure 1.442(h) 1, 4, 5, 13

Rule 4-1.5 4

STATEMENT OF CASE AND FACTS

We accept the statement of the case and facts as set forth by the petitioners.

SUMMARY OF THE ARGUMENT

The Second District held section 768.79 to require trial courts to consider a contingency risk multiplier in awarding attorney's fees. The court did so by finding that a portion of the statutes, rules promulgated by the supreme court, referred to the rules regulating the Florida Bar. The Florida Defense Lawyers Association, however, submits that the statute should be read to refer to Rule 1.442. This interpretation would make section 768.79 and Rule 1.442 consistent. Rule 1.442 is a rule promulgated by this Honorable Court, is the procedural offer of judgment rule, and does not refer to a contingency risk multiplier. Reading section 768.79 to refer to Rule 1.442 would not result in defendants being denied equal protection under the laws.

ARGUMENT
POINT I

THE MAJORITY'S INTERPRETATION OF §768.79, FLORIDA STATUTES (1993) DENIES FLORIDA DEFENDANT'S THE GUARANTEE OF EQUAL PROTECTION AFFORDED UNDER THE UNITED STATES AND/OR FLORIDA CONSTITUTION

Florida's offer of judgment statute mandates that both defendants and plaintiffs in any civil action for damages filed in the courts of Florida be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served. Section768.79(1), (6)(a); (6)(b), Fla. Stat. (1993). A defendant is entitled to reasonable costs, including investigative expenses, and attorney's fees, if the defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25% less than the amount of the offer. A plaintiff is entitled to reasonable costs, including investigative expenses, and attorney's fees, if the plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25% more than the amount of the offer. Although the sections are identical in terminology and, therefore, should be in results, the Second District's interpretation allows a plaintiff to be awarded up to 2½ times the amount of attorney's fees and reasonable costs that a defendant would be allowed under the same circumstances. Such an interpretation is a classic example of a violation of the guaranties

of equal protection afforded under the United States and/or Florida Constitution. *United States v. Collins*, 603 F.Supp. 301(S.D. Fla. 1995). See also, *Burstyn v. City of Miami Beach*, 663 F.Supp. 528(S.D. Fla. 1997) (equal protection clause is essentially directed to state that persons in a similar situation should be treated alike).

The majority opinion in the instant case held that "the guidelines promulgated by the Supreme Court" include the Rules Regulating the Florida Bar, one of which, Rule 4-1.5, Fees for Legal Services, refers to whether or not the fee is fixed or a contingent. The Second District's interpretation excludes defendants as only one side in a civil action-the Plaintiff- is eligible under a Rule 4-1.5 analysis to receive a contingency risk multiplier because the plaintiff is taking the risk in commencing the action.

The Amicus Curiae respectfully submits that section 768.79(6) does not refer to the Rules Regulating The Florida Bar but, rather, Rule of Civil Procedure 1.442(h).

Rule 1.442 applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supercedes all other provisions of the Rules and Statutes that would be inconsistent with the Rule. Rule 1.442(h)(2) declares that when determining the reasonableness of the amount of the attorney's fees, the Court shall consider, along with all other relevant criteria, the following factors:

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

(B). The number and nature of proposals made by the parties.

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

(D). Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

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

(F). The amount of the additional delay, cost and expense that the party making the proposal reasonably would be expected to incur if a litigation were to be prolonged.

These guidelines could be applied across the board to both plaintiffs and defendants without violating any party's guarantee of equal protection of the laws. This interpretation is certainly more consistent with Section 768.79's reference to guidelines promulgated by the Florida supreme court. Section 768.79(7)(b) it is identical to the wording of Rule 1.442(h)(2). Rule 1.442 has as of today not been interpreted to authorize trial court's to consider and apply a contingency risk multiplier. Because both Section 768.79 and Rule 1.442 are identical in terminology, the Second District's statement that it is clear that the legislature authorized trial courts to consider and apply a contingency risk multiplier under §768.79 is facially incorrect.

The Amicus Curiae's position is supported by this Honorable Court's decision in *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828(Fla. 1990). This court

made it abundantly clear that a contingency fee multiplier is to be considered in contingency fee cases, hence the name. This court specifically found that the multiplier was still a useful tool which could assist trial courts in determining a reasonable fee in tort and contract cases when a risk of non-payment was established. *Id.* at 834.

> If the trial court determines its success is more likely than not at the outset, it may apply a multiplier of 1 to 1.5; if the trial court determines that the likelihood of success was approximately even at the outset, the trial judge may apply a multiplier of 1.5 to 2.0; and if the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5. .... *We emphasize that the criteria and factors utilized in these cases must be consistent with the purpose of the fee-authorizing statute or rule. And that this category, the legislature may be very specific in setting the criteria that can be considered.*

Id. (Emphasis added). The purpose of awarding attorney's fees in contingency fee contract cases and attorneys' fees authorized under Section 768.79 are vitally and significantly different. The purpose of the offer of judgment statute is to serve as a penalty if the parties do not act reasonably and in good faith in settling lawsuits. *Good v. Udhwani*, 648 So.2d 247 (Fla. 4th DCA 1994). Its purpose is to encourage litigants to resolve cases early to avoid substantial amounts of court costs and attorney fees. *Eagleman v. Eagleman*, 673 So.2d 946(Fla. 1996). Because the statute is to serve as a

penalty if parties do not act reasonably and in good faith in settling lawsuits, the risk of non-payment has no application. The risk of non-payment is irrelevant as the relevant factor under §768.79 is whether the parties acted reasonably and in good faith to settle lawsuits in order to avoid substantial amounts of court costs and attorney fees.

Quanstrom reexamined this court's decision in *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145(Fla. 1995). *Rowe* dealt with the constitutional validity of section768.56, Florida Statutes (1981), which directed the trial court to award a "reasonable attorney's fee" to the prevailing party in a medical malpractice action. *Id.* at 1146. The *Rowe* court was specifically and exclusively dealing with an award of reasonable attorney's fees to the prevailing party. The court discussed Florida statutes that authorize courts to award attorney fees to prevailing litigants. (*Id.* at 1148). For instance, this court addressed the legislative authority to award attorney fees to the prevailing party in a civil litigation when the court finds that the losing party raised no "judicable issue of either law or fact." §57.105(Fla. Stat. 1983). Consequently, both in *Quanstrom* and *Rowe*, a multiplier is appropriate in a prevailing litigant's situation.

This court in *Rowe* held that requiring an unsuccessful litigant to pay the prevailing party's attorney fees did not impose a penalty. Rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they were not economically

feasible under the contingent fee system. *Id.* at 1149. Section 769.79 deters litigation.

Section 768.79 is a statute that serves as a penalty to parties who fail to reasonably and in good faith settle lawsuits. To add a contingency risk multiplier to a penalty statute when only one party could be penalized to the extent of 2½ times the other parties' potential penalty does not further the purpose of Section 768.79. The Amicus Curiae respectfully submits that this Honorable Court in *Quanstrom* made it abundantly clear that a contingency risk multiplier is only to be utilized if there is involved the risk of nonpayment. Again, the risk of nonpayment has no application to a penalty statute.

The Fourth District Court of Appeal has held that a contingency risk multiplier is not to be used in computing section 57.105(1), Florida Statutes, attorney's fees. *TransFlorida Bank v. Miller*, 576 So.2d 752(Fla. 4th DCA 1991). In *Miller*, the trial court plaintiff and its counsel instituted and pursued the underlying action, which the trial court deemed frivolous and in bad faith. The court found that the defense of the claim was made necessary by conduct deemed vexatious, oppressive, wanton and designed to abuse the process of the court for the purpose of harassing the defendant. The Fourth District found that there was testimony in the record supporting the trial court's conclusions that the plaintiff's purpose in bringing the action was harassment.

However, the Fourth District held that the trial court erred by applying a contingency risk multiplier in computing the 57.105(1) attorney's fees. *Id.* at 753.

Although the fee agreement between the appellee and his counsel was expressly made contingent upon a successful recovery under section 57.105(1), the appellate court held that the contingency fee provisions of *Florida Patient's Compensation Fund v. Rowe*, *supra,* 474 So.2d 1145 inapplicable to fees recovered under section 57.105(1).

The court reasoned that their view was consistent with the principals expressed in *Standard Guaranty Insurance Co. v. Quanstrom*, *supra*, 555 So.2d 828. The court noted that in that case the supreme court recognized an imposition of a multiplier was not mandated, but that the trial court need only consider whether application was appropriate.

> In *Quanstrom*, the court noted that a significant factor supporting application of a multiplier is whether contingency agreements are customarily used in the type of circumstances involved and whether there is support in the record for a conclusion that the prevailing party would otherwise be unable to afford competent counsel.

Id. at 753. The Second District followed the Fourth District in *Richardson v. Merkle*, 646 So.2d 289 (Fla. 2nd DCA 1994).

In circumstances involving an offer of judgment, whether or not contingency agreements are customarily used or whether there is support in the record for the conclusion that the prevailing party would otherwise be unable to afford competent counsel are simply irrelevant. A party can be a prevailing party and still not be entitled

to an award of costs and attorney's fees under an offer of judgment. Again, attorney's fees are awarded under section 768.79 serve as a penalty to parties who refuse to settle in good faith.

A contingency risk multiplier is utilized in order to reward a plaintiff's counsel who took the case when otherwise the plaintiff would be unable to afford competent counsel.

The purpose of section 57.105 attorney's fees award and attorney's fees awarded pursuant to section 768.79 are similar, however, in purpose. The purpose of section 57.105 attorney's's fees is to discourage baseless claims, stonewall defenses, and sham appeals in civil litigation by placing a price tag through attorney's fee award on losing parties engaged in those activities. *Thornber v. City of Ft. Walton Beach*, 568 So.2d 914 (Fla. 1990); *Stevenson v. Rutherford*, 440 So.2d 28(Fla. 4th DCA 1993); *Demby v. English*, 667 So.2d 350(Fla. 1st DCA 1995); *State, Department of Highway Safety & Motor Vehicles v. Salter*, 710 So.2d 1039 (Fla. 2nd DCA 1998); *Carnival Leisure Industries Ltd. v. Arviv*, 655 So.2d 177 (Fla. 3rd DCA 1995). Both the offer of judgment statute and section 57.105 have as their purposes sanctions. However, under the current judicial decisions interpreting section 57.105 both plaintiffs and defendants are penalized equally. Under the judicial interpretations of section 768.79 a defendant can be penalized to a far greater extent than a plaintiff.

A penalty is generally defined as a sum of money exacted by law as punishment

for doing some prohibited act or for not doing some required act. *Suncoast Intern, Inc. v. Department of Business Regulation, Div. of Florida Land Sales, Condominiums and Mobile Homes,* 596 So.2d 1118(Fla. 1st DCA 1992). The imposition and regulation of a penalty rests within the legislature's discretion, subject to constitutional limits. *Ferre v. State Ex Real Reno*, 478 So.2d 1077 (Fla. 3rd DCA 1985). Statutory penalties are subject to the constitutional limits, including the constitutional provisions that specifically prohibit excessive fines. *Fla. Const. art.* 1, section 17. The law does not favor penalties unless they are specific in the statute and warranted by the facts. *Jasper v. St. Petersburg Episcopal Community, Inc.*, 222 So.2d 479 (Fla. 2nd DCA 1969). Thus, wherever enforcement of a penalty is sought, there must be a strict adherence to every material requirement of the statute; statutes imposing penalties must be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended beyond construction. *Adler-Built Industries, Inc. v. Metropolitan Dade County*, 231 So.2d 197 (Fla. 1970).

The Fifth District Court of Appeal has ruled that the offer of judgment rule is a punitive measure. *Loy v. Leone*, 546 So.2d 1187 (Fla. 5th DCA 1989). The Fifth District reasoned that the thrust of Rule 1.442 was to sanction a party who did not timely accept a settlement offer made prior to trial by shifting payment and recovery of costs incurred after the offer was made. The court cited to *Cheek v. McGowan Electric Supply Co.*,

511 So.2d 977 (Fla. 1987). Consequently, the Rule should be construed in favor of the party to be sanctioned. *Id.* at 1189. Because there is no significant difference between the rule and the current statute, the Amicus Curiae submits that the reasoning and rationale of *Loy*, should apply to the instant case. If it were not for the offer of judgment statute, the defendant would not be liable for any of the plaintiff's costs.

Strictly construing section 768.79 in favor of the defendants, the Florida Defense Lawyers Association respectfully submits that the more reasonable reading of the reference to the guidelines promulgated by the supreme court in section 768.79(6)(a), (b) is to refer to the guidelines promulgated by the supreme court in Rule 1.442. The legislative intent should be reconciled to be consistent with Rule 1.442. The Second District in the instant case, the Fifth District in *Garrett v. Mohammed*, 686 So.2d 629 (Fla. 5th DCA 1996), *review denied*, 697 So.2d 510 (Fla. 1997), and the Fourth District in *Collins v. Wilkins*, 664 So.2d 14 (Fla. 4th DCA 1995), would lead to inconsistent results when construing Rule 1.442 and section 768.79. Reading section 768.79 as the Second District, the Fourth District, and the Fifth District have requires a strained and overly broad reading of section 768.79. When considering that the interpretation given by those courts result in only plaintiffs being allowed a contingency risk multiplier which results in equal protection arguments, those interpretations must fail.

Because section 768.79 is a sanction, only if the statute clearly expresses the intent

to consider a contingency risk multiplier should one be considered. The more reasonable interpretation would be that the statute refers to the factors set forth in Rule 1.442 which do not include a contingency risk multiplier.

This interpretation would also be consistent with the purpose of section 768.79 which is to sanction and the purpose of a contingency risk multiplier which is to provide an incentive for attorneys to take plaintiffs' cases that competent attorneys in the area would ordinarily not take. The contingency risk multiplier as declared by this Honorable Court in *Quanstrom* is to be used when a risk of non-payment is established. This risk would be above and beyond the normal risks incurred in contingency cases. The multiplier would act as an incentive for an attorney to take a case he normally would not. The multiplier is not a penalty or sanction but an incentive. The statute has a totally different purpose. The application of a contingency risk multiplier would not be consistent with that purpose.

CONCLUSION

Based on the forgoing arguments and authorities cited therein, the Amicus Curiae, Florida Defense Lawyers Association, respectfully requests that this Honorable Court answer the certified question in the positive.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by .S. Mail this 12th day of June, 2000 to: Wendy F. Lumish, Attorney at Law, Post Office Box 019101, Miami, FL 33131-9101; Hugh N. Smith, Esquire, Post Office Box 3288, Tampa, FL 33601-3288 and to Joseph H. Lang, Jr., Esquire, 669 1st Avenue North, St. Petersburg, FL 33701.

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