SUPREME COURT OF FLORIDA

CASE NO. SC00-833

PIRELLI ARMSTRONG TIRE
CORPORATION, etc.,

Petitioner,

v.

META E. JENSEN, etc., et al.,

Respondent.

______________________________ /

PETITIONER'S
REPLY BRIEF ON THE MERITS

On Certified Question from the
District Court of Appeal,
Second District

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), undersigned counsel certifies that this Brief of Petitioner, Pirelli Armstrong Tire Corporation, is printed in 12-point Courier type.

ARGUMENT

I. THE COURT ERRED BY CONSIDERING A CONTINGENT RISK MULTIPLIER IN THE CONTEXT OF A FEE AWARD UNDER THE OFFER OF JUDGMENT STATUTE.[1]

A. The Applicable Fee-Authorizing Statute Does not Include the Contingent Risk Multiplier as Criteria to be Considered.

A threshold issue in this case is whether the Legislature authorized consideration of a multiplier when setting a fee pursuant to the offer of judgment statute. Based on an analysis of the language of the statute and abundant law defining the circumstances under which a multiplier can be considered, it is clear that the court erred in expanding the language of section 768.79(7)(b) to include consideration of a multiplier.

Plaintiff responds that there is no requirement that the statute expressly reference a multiplier in order for a multiplier to be applied. Plaintiff's argument ignores and, in fact, fails to even acknowledge this Court's pronouncement in Schick v. Department of Agric. and Consumer Servs., 599 So. 2d 641, 644 (Fla. 1992) to the effect that:

> Where, as here, the legislature specifically sets forth the criteria it deems will result in a reasonable award and will further the purpose of the fee-authorizing statute, only the enumerated factors will be considered.

Id. at 643.

Applying Schick, courts in Florida have uniformly held that a multiplier was improper if not provided for in the fee-authorizing

[1] **Although Plaintiff rearranged the order of arguments in its Answer Brief, we will present our arguments here in the same order as our Initial Brief.**

statute. See Birth-Related Neurological Injury Compensation Ass'n v. Carreras, 633 So. 2d 1103 (Fla. 3d DCA 1994); Richardson v. Merkle, 646 So. 2d 289 (Fla. 2d DCA 1994); Stewart Select Cars, Inc. v. Moore, 619 So. 2d 1037 (Fla. 4th DCA 1993); TransFlorida Bank v. Miller, 576 So. 2d 752 (Fla. 4th DCA 1991); What An Idea, Inc. v. Sitko, 505 So. 2d 497 (Fla. 1st DCA 1987); Mirlisena v. Chemlawn Corp., 567 So. 2d 986 (Fla. 1st DCA 1990).

Instead of acknowledging Schick and agreeing that an express reference is required, Plaintiff argues that a literal reading of the factors to be considered would mean that a lodestar could not be considered because it was not specifically referenced in the statute either. (Answer Br. at 23) Thus, the argument goes, Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) and Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990) would have to be overruled because the underlying statutes interpreted in those cases did not reference the lodestar calculation. (Answer Br. at 24)[2]

Plaintiff's argument is totally without merit because it fails to recognize, as it must, that the determination of a reasonable hourly rate and the reasonable number of hours expended (i.e., the

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[2] **Trying to prove too much, Plaintiff also contends that the reasonableness of Defendant's failure to settle could not be considered either because it was not referenced in the statute. (Answer Br. at 23-24 n.13) But, this argument fails to recognize that the statutorily defined factors like "then apparent merit or lack of merit," "closeness of questions of law and fact," and "whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer" all bear directly** on the issue of the party's reasonableness in rejecting the offer.

lodestar) is at the core of the determination of most "reasonable fees." See In re Estate of Platt, 586 So. 2d 328, 335 (Fla. 1991) ("Determining a reasonable hourly rate . . . and the number of hours . . . is an appropriate starting point for the computation of a reasonable fee in estate proceedings, eminent domain proceedings and **most other proceedings**"). See also Birth-Related (even though use of multiplier was not part of the fee-setting criteria, the lodestar method was appropriate under statute which tracks Rule 4-1.5). Thus, there is no basis to conclude that Rowe and Quanstrom must be overruled if Pirelli's argument is to succeed.[3]

In light of the foregoing, the real question here is **not** whether a fee-authorizing statute must identify the multiplier as a factor in order to be considered -- that was resolved by Schick -- but rather the question is whether reference to "the guidelines promulgated by the Supreme Court" constitute approval of the use of a multiplier.[4] As Pirelli pointed out in its Initial Brief, "the guidelines promulgated by the Supreme Court" include the factors used to determine the lodestar. While those guidelines also reference the contingency of the risk, it does not follow that this reference should trigger consideration of a multiplier. For

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[3] There also appears to be the suggestion in Plaintiff's argument that the lodestar and multiplier were part of one formulation and thus the lodestar cannot be evaluated without the multiplier. (Answer Br. at 23) But, as the cases cited supra reflect, courts have routinely utilized the lodestar, but not the multiplier.

[4] The reference in section 768.79 to "other relevant criteria" does not aid Plaintiff's argument because, as discussed in Pirelli's Initial Brief and infra, the consideration of a multiplier would be inconsistent with the fee-authorizing statute and thus, it cannot be relevant.

example, in Birth-Related, involving a statute which virtually tracks the guidelines promulgated by the Supreme Court, the Third District specifically rejected the notion that "whenever the fee setting statute contains a 'contingency or certainty of a fee' factor, the Quanstrom contingency multiplier should simply be plugged in." Id. at 632. Instead, the court looked to the fee-authorizing statute and its purpose to conclude that no multiplier could be applied.

Just as the court in the cases cited above confronted the award of a statutorily-authorized reasonable attorney's fee (i) without allowing the use of a contingent risk multiplier; and (ii) without running afoul of Rowe and Quanstrom, the same approach is appropriate here. This Court does not have to overrule Rowe and Quanstrom to reach the right result. To the contrary, the Court would have to disapprove Birth-Related, Richardson, Moore, TransFlorida Bank, Mirlisena, and Sitko, in order to hold that all statutorily-authorized reasonable fee awards must consider a contingent risk multiplier.

In sum, the plain meaning of the offer of judgment statute does not allow for the use of a contingent risk multiplier in determining a proper fee award. As such, it is clear that the Legislature did not sanction the use of a multiplier in awarding attorney's fees to a plaintiff pursuant to an offer of judgment.

B. Consideration of a Multiplier is Inherently Inconsistent With the Purpose Behind Section 768.79.

Pirelli's second argument as to why a multiplier may not be considered under section 768.79 is that the use of a multiplier is

inconsistent with the purpose behind the fee-authorizing statute. In response, Plaintiff does not cite a single case in which a fee-authorizing statute was interpreted to permit a contingent risk multiplier when consideration of the multiplier ran counter to the purpose of the statute itself.

And, of course, there is no such case because this Court in Quanstrom "emphasize[d] that the **criteria and factors** utilized in [tort] cases must be consistent with the purpose of the fee-authorizing statute or rule." 555 So. 2d at 834. Thus, Plaintiff's statement that "the use of a multiplier in calculating a reasonable attorney's fee need not be related to the public policy supporting the award of such fees as a sanction," (Answer Br. at 26-27 n.17) flies in the face of this Court's decision in Quanstrom.[5]

Importantly, Plaintiff does not take issue with the purpose of section 768.79 as succinctly summarized by Judge Casanueva in his dissenting opinion below, "[b]oth the legislative history and the judicial interpretation of section 768.79 suggest that its purpose is to encourage the resolution of litigation." Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275, 1277-78 (Fla. 2d DCA 2000)(Casanueva, J., concurring in part, dissenting in part). There is simply no way to reconcile the goal of encouraging settlement

[5] **Similarly, while Plaintiff argues that it is enough that "the award of a sanction in the form of reasonable fees furthers the public policy underlying the enactment of the statute which imposes a sanction of that type," (Answer Br. at 27 n.17) Quanstrom makes it crystal clear that "the criteria and factors** utilized in [tort] cases must be consistent with the purpose of the fee-authorizing statute or rule."

with the use of factors that reward counsel for being successful in representing a plaintiff in a difficult case. Simply stated, contingent risk multipliers are intended to encourage litigation, rather than encourage settlement.

Although Plaintiff contends that the risk of nonpayment used to multiply an award and the lack of merit used to lower the sanction do not measure the same thing, the facts of this case demonstrate the invalidity of Plaintiff's assertion. The parties agreed that at the outset of the case and at the time the offer of judgment was made, Plaintiff was unlikely to succeed. (S.T. 120) Plaintiff's expert used this fact to enhance the award. Yet, at the same time, it is that very same fact that supports the reduction of the fee under section 768.79 and TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995).

As such, Plaintiff totally misses this point when he argues: "the fact that consideration of one factor may require upward adjustment of the lodestar, while consideration of another requires reduction, does not preclude consideration of both factors to further the separate policy reasons for considering both in the first place." (Answer Br. at 32). The flaw in this argument is that the **factors** supporting a contingent risk multiplier do not "further the separate policy reasons . . . in the first place." Indeed, the consideration of factors supporting the application of a contingent risk multiplier runs counter to the purpose of the statute by encouraging risky, low-merit litigation.

Thus, the only reasonable interpretation of the statute is that set forth in Dvorak. Therein, the court made clear that "the

court could reasonably conclude that a defendant with a small liability potential who rejected a large settlement offer should pay only a **reduced fee** even though the verdict ultimately exceeded the offer by more than twenty-five percent." Id. at 613. Plaintiff's contrary reading which would allow the very same facts to increase the award through a multiplier turns the purpose of the offer of judgment statute on its head.

Moreover, it is important to recognize that, in his decision to accept this case, Plaintiff's counsel could not have calculated the possibility of receiving attorney's fees by way of a statutory sanction imposed on Defendant. Unlike a prevailing-party statute that allows an attorney to calculate the risk at the outset, in this case there was no reason to expect fee shifting when the decision was made to take on the representation. In this way, this sanction statute is different from prevailing-party statutes and, instead, more closely resembles a statute like section 57.105, under which courts have found a contingent risk multiplier to be inapplicable. See Richardson; TransFlorida Bank.

It remains only to note that Plaintiff's argument really does prove too much. If the "social policy" of the contingent fee arrangement applies to every award of a reasonable fee, then the series of cases cited in the previous section must be disapproved. Surely this Court never meant for a contingent risk multiplier to have such universal application.

C. Use of a Multiplier in the Context of the Offer of Judgment Statute Constitutes a Denial of Equal Protection.

In his dissenting opinion, Judge Casaneuva noted that "there is no underpinning in the legislative policy for the unequal application of section 768.79 nor is there a rational basis to sanction only party defendants with a multiplier." Pirelli, 752 So. 2d at 1278. Indeed, as Plaintiff acknowledges "[i]t is clear from the face of the statute that the legislature expressly provided for an equal and identical 'sanction' against all plaintiffs and all defendants to whom its provisions are applicable." (Answer Br. at 7) That is all Defendant seeks.[6]

Plaintiff makes several arguments in response, none of which are persuasive. Primarily, Plaintiff argues that courts have routinely found a rational basis supporting the use of contingent fee enhancement. (Answer Br. at 9-10, 12-13) Admittedly, many

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[6] **Plaintiff suggests that either party may be subject to a contingent fee arrangement and thus, there is no disparate treatment between plaintiffs and defendants. (Answer Br. at 5-6 n.1) In truth, defendants do not** hire counsel on a contingency basis. And, they certainly do not do so if the hope for a fee recovery is premised on a sanction statute, like section 768.79, that promises no fee shifting, even to the prevailing party, at the time the case is accepted. Indeed, it is only **after** a qualifying offer is made and rejected, **and** a qualifying judgment is thereafter obtained, that the sanction of reasonable attorney's fees even arises. At bottom, unless there is a prevailing party statute that promises fees from the plaintiff upon success in the case (which section 768.79 does not, as merely a sanction statute), a defendant does not obtain counsel on a contingency fee basis with **only** the promise of a sanction statute shifting fees. It is nothing more than sophistry to equate plaintiffs and defendants in their access to, and usage of, contingency fee representation in the context of section 768.79.

Thus, there is a clear classification between plaintiffs and defendants if section 768.79 is read (on its face, no such reading is mandated) to permit plaintiffs to utilize contingency risk multipliers upon sanctioning of defendants, but yet denying the reciprocal for typical defendants upon the sanctioning of plaintiffs.

prevailing party fee-shifting statutes have been interpreted to allow for contingent fee awards to plaintiffs. But in those instances, there is a rational relationship between the purpose of the fee-authorizing statute and the **criteria and factors** that lead to the award of an enhanced, or multiplied, fee to a prevailing party. Here, to the contrary, the **criteria and factors** that support the application of a contingent risk multiplier are inconsistent with the purpose of the fee-authorizing statute. In other words, section 768.79 gives no factual predicate to indicate a rational relationship between its purpose and the use of a contingent fee multiplier.

In particular, the purpose of section 768.79 is to encourage the termination of litigation. Plaintiff does not dispute this. Instead, Plaintiff argues that the award of a contingent risk multiplier is consistent with this purpose. As the United States Supreme Court has cautioned in City of Burlington v. Dague, 505 U.S. 557, 563 (1992), the use of contingent risk multipliers can encourage claimants to proceed with nonmeritorious claims. As such, there is no relationship -- much less a rational relationship -- between an offer of judgment statute aimed at discouraging further litigation, and the availability, to **only** plaintiffs, of a contingency risk multiplier, which can encourage further nonmeritorious litigation. There is no consistency between the purpose of the statute and the utilization of factors supporting a contingent-risk multiplier.

Moreover, Plaintiff tries to confuse the equal protection analysis by referencing a rational basis for enhancing a fee with

a contingent risk multiplier. Plaintiff blurs the true test. The legal standard is clear: the statute must be rationally related to the achievement of a legitimate legislative objective. See Heller v. Doe, 509 U.S. 312, 319-20 (1993). In this case, there is no factual context from which this Court could ascertain a relation between the irrational classification (plaintiffs and defendants) and the purpose of the fee-authorizing statute. There can be no dispute that the statute was meant to encourage the termination of litigation. That legislative intent just cannot be reconciled with the use of factors supporting a contingent risk multiplier, such multipliers serving the purpose to encourage litigation. **In other words, the Legislature created no factual predicate indicating that the award of attorney's fees under its statute aimed at terminating litigation, should actually rely upon factors that actually encourage (sometimes nonmeritorious) litigation. This fact sets sanction statutes apart from prevailing party statutes.** Plaintiff's reliance on a misplaced rational basis analysis must fail.

Citing the historical development of contingent fees, Plaintiff further claims that a plaintiff's "reasonable fee" must account for the risk of nonpayment through the use of a multiplier. (Answer Br. at 11-12) But, in making this assertion, Plaintiff fails to account for the numerous cases Pirelli has cited in which courts have specifically rejected a multiplier even when plaintiff was subject to a contingent fee arrangement. And the reason is generally the same -- the use of a multiplier is not supported by the fee-authorizing statute.

In sum, we agree that the statute, by its very terms, should apply equally to plaintiffs and defendants. The construction urged by Plaintiff here, though, results in an arbitrary inequality. Thus, having two possible constructions of the statute, we again revert to Justice Adkins's cautionary note: "[i]f a statute may reasonably be construed in more than one manner, this Court is obligated to adopt the construction that comports with the dictates of the Constitution." Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986).

II. CONSIDERATION OF A MULTIPLIER WAS ERROR UNDER THE FACTS OF THIS CASE.

Even if this Court were to conclude that a multiplier was not precluded by the language of the statute itself, once the factors set forth in Rowe are evaluated, it is clear that the criteria set forth therein have not been met.

A. Plaintiff Failed to Establish that a Multiplier was Necessary to Obtain Counsel.

The "very first factor listed in Quanstrom for courts to consider in determining if a multiplier should be utilized . . is whether the relevant market requires a contingent fee multiplier to obtain competent counsel." Bell v. U.S.B. Acquisition, 734 So. 2d 403, 409 (Fla. 1999) Analyzing this factor in the context of section 768.79, the Third District recently noted:

> Quaere: Whether any such showing can ever be made, and thus whether a multiplier is ever appropriate, when fees are awardable only when a reasonable offer is not accepted under § 768.79, an eventuality which obviously cannot be anticipated when counsel is obtained.

Gonzalez v. Veloso, 731 So. 2d 63, 64 n.2 (Fla. 3d DCA 1999). See also Strahan v. Gauldin, 756 So. 2d 158 (Fla. 5th DCA 2000). Plaintiff fails to even acknowledge these decisions even though these courts have it exactly right.

When Plaintiff's attorney agreed to take this case, there was **no** reasonable expectation that a court-awarded reasonable attorney's fee would **ever** be available. There was no applicable prevailing party fee-authorizing statute, and any court-awarded reasonable attorney's fee under a sanctions statute would only arise later in the case after the occurrence of numerous unpredictable turns-of-events. Thus, Plaintiff has not shown that a contingent risk multiplier was necessary to obtain counsel.

III. THE COURT ERRED AND/OR ABUSED ITS DISCRETION IN THE MANNER IN WHICH THE FEE AWARD WAS DETERMINED.

Pirelli's final point is that any award greater than the lodestar was improper under the facts of this case because: (1) the court improperly utilized the "results obtained" as an enhancing factor when, as a matter of law, it can only be a decreasing factor,[7] see Alvarado v. Cassarino, 706 So. 2d 380 (Fla. 2d DCA 1998), (2) the multiplier was given improper weight, and (3) the court abused its discretion in awarding an enhanced fee under the facts of this case.

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[7] **Plaintiff chastises Pirelli for arguing that there was no evidence as to "results obtained" and then arguing that the court improperly used this "missing evidence." (Plf's Br. at 37) A review of Section II of Pirelli's Initial Brief reveals that Pirelli never argued the lack of evidence as to this particular factor.**

As to the first point, Plaintiff actually quotes the language from Rowe indicating that "the results obtained" is a basis for **reducing** the fee. (Answer Br. at 37-38) Plaintiff then denies that the court used this as a increasing factor. The record reveals otherwise. Plaintiff's expert specifically cited the "results obtained" as a factor in increasing the award. (S.T. 118) The trial court adopted this view and cited the fact that the results obtained was excellent as support for an increased award. (R. 3842-43)

As to the last two points, Plaintiff's argument in essence is that the court reached a "fair" result in that it reduced the reasonable fee (which included the multiplier) by 25%. (Plf's Br. at 39) Of course, the fallacy of that argument is its starting point -- that an enhanced fee was reasonable. Indeed, just the opposite is true. Given this Court's ruling in Dvorak, it is hard to imagine how any award greater than the lodestar can be tolerated. Pirelli acted reasonably in rejecting a high settlement demand at a time when the case had little or no merit. Pirelli should not be penalized when it did not act improperly.

CONCLUSION

Based on the foregoing, Pirelli requests that the final judgment be reversed with directions to limit fees in accordance with the statutory factors set forth in section 768.79.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on July ___, 2000, to **HUGH N. SMITH, ESQUIRE,** Attorney for Plaintiff, Smith & Fuller, P.A., Barnett Plaza, 101 East Kennedy Boulevard, Suite 1800, PO Box 3288, Tampa, Florida 33061.

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