IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC02-428

SALLY SARKIS,

Petitioner,

-vs-

A L L S T A T E I N S U R A N C E COMPANY,

Respondent.
_____/

BRIEF OF AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL LAWYERS
ON BEHALF OF THE PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Academy of Florida Trial Lawyers ("Academy") is a large, voluntary state-wide association of more than 4,000 trial lawyers, concentrating on litigation in all areas of the law. Members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

The issue in this case is of importance to the Academy because the application of the contingency risk multiplier is intended to facilitate a party's ability to obtain counsel for litigation. Thus, any unreasonable restriction on its use would necessarily inhibit a party's right to access to the courts. For that reason, the Academy has sought leave to appear as Amicus Curiae in this case.

SUMMARY OF ARGUMENT

Trial courts should not be prohibited from considering the use of contingency risk multipliers to determine a reasonable attorney's fee awarded pursuant to §768.79, Fla. Stat. In the 1990 amendments to that statute, the legislature specifically provided that the calculation of attorney's fees should be done "in accordance with the guidelines promulgated by the Supreme Court," §768.79(6)(a) and (b), Fla. Stat. At the time of that amendment, the contingency risk multiplier was a well-established consideration for determining a reasonable attorney's fee, pursuant to this Court's decisions. Additionally, this Court adopted the Rules Regulating the Florida Bar, which contain a provision specifically identifying as a relevant factor in determining a reasonable fee "whether the fee is fixed or contingent," R. Regulating Fla. Bar 4-1.5(b)(8). Therefore, since the legislature is presumed to know the law in the area in which it enacts legislation, it is obvious that the legislature intended to incorporate this Court's guidelines, which included the contingency risk multiplier, for purposes of determining a reasonable fee award under §768.79, Fla. Stat.

The use of a contingency risk multiplier in this context does not constitute an equal protection violation. Under this Court's decisions, the use of such a multiplier is not limited solely to the determination of fees for plaintiffs. Additionally, the legislature has not created any distinction in the language of the statute which would

justify an equal protection analysis, since it simply identified factors that could be considered by the trial court in determining a reasonable attorney's fee. Even if the use of a multiplier is deemed to justify equal protection analysis, it is clear that there is a rational basis for the legislature's action. While the statute is intended to encourage parties to conclude litigation amicably, the legislature could reasonably have decided to permit the use of a multiplier in order to protect a party's right to access to the courts. Therefore, the statute does not violate the equal protection provision of the Florida Constitution.

QUESTION PRESENTED

THE DECISION OF THE FIFTH DISTRICT SHOULD BE QUASHED, BECAUSE CONTINGENCY RISK MULTIPLIERS SHOULD BE A VALID CONSIDERATION IN DETERMINING A REASONABLE ATTORNEY'S FEE UNDER §768.79 FLA. STAT.

ARGUMENT

The trial court in this case conducted a lengthy evidentiary hearing to determine an appropriate award of attorney's fees to Plaintiff's counsel pursuant to §768.79, Fla. Stat. The defendant did not challenge Plaintiff's entitlement to an award of attorney's fees, but challenged the trial court's utilization of a contingency risk multiplier to calculate those fees. The Fifth District concluded that the factual predicate for the utilization of a multiplier could never be demonstrated in the context of an offer of judgment, a conclusion that relies on an overly strict interpretation of this Court's decisions in FLORIDA PATIENTS COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985), and STANDARD GUARANTY INS. CO. v. QUANSTROM, 555 So.2d 828 (Fla. 1990). The Defendant also argued that the legislature never intended the multiplier to be used in calculating a fee award pursuant to §768.79, Fla. Stat., which is erroneous, as a matter of law. For these reasons, this Court should quash the

Fifth District's decision and rule that contingency risk multipliers are an appropriate consideration in determining a reasonable fee pursuant to §768.79, Fla. Stat.

Legislative Intent

A proper analysis of the language of §768.79, Fla. Stat., and its development over the years compels the conclusion that the legislature intended that the contingency risk multiplier would be a valid consideration in determining a reasonable attorney's fee under that statute.

Section 768.79, Fla. Stat., was originally enacted in 1986, Ch. 86-160 §58, Laws of Fla. That version of the statute did not specifically address the calculation of attorney's fees, other than to list certain factors in determining the reasonableness of an award §768.79(2)(b), Fla. Stat., including, inter alia, "the then apparent merit or lack of merit in the claim that was subject to the offer" (1986).

In 1990, §768.79, Fla. Stat., was substantially rewritten, and one of the amendments included the statement that a party entitled to an award under the statute, "shall 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,..." [Emphasis supplied], §768.79(6)(a) and (b), Fla. Stat. The addition of that language clearly demonstrated the legislature's

intent to incorporate this Court's guidelines for determining attorney's fees into the statute. The legislature is presumed to know the existing law when it enacts a statute, including judicial construction of statutes on the subject, WILLIAMS v. JONES, 326 So.2d 425, 434 (Fla. 1975); SEAGRAVE v. STATE, 802 So.2d 281 (Fla. 2001); STATE DEPT. OF INSURANCE v. FIRST FLORIDIAN AUTO AND HOME INS. CO., 803 So.2d 771 (Fla. 1st DCA 2001).

At the time the legislature specifically incorporated the Supreme Court guidelines into the calculation of attorney's fees under §768.79, Fla. Sta., it was well-established that a contingency risk multiplier was an appropriate consideration in determining a reasonable fee. At the time of the 1990 amendments to §768.79, Fla. Stat., FLORIDA PATIENTS COMPENSATION FUND v. ROWE, supra, in which this Court first promulgated the guidelines governing use of the contingency risk multiplier, had long been the law in Florida. Additionally, that decision had been clarified in STANDARD GUARANTY INS. CO. v. QUANSTROM, supra, prior to the adoption of the statutory amendments. Thus, in addition to the contingency risk multiplier being a well-established factor in determining reasonable attorney's fees, it had also recently been reevaluated and approved by this Court at the time the legislation was enacted.

Additionally, at the time §768.79, Fla. Stat., was amended in 1990, the Rules Regulating the Florida Bar were in effect, having been adopted by this Court effective January 1, 1987, THE FLORIDA BAR RE RULES REGULATING THE FLORIDA BAR, 494 So.2d 977 (Fla. 1986). Rule Regulating Florida Bar 4-1.5(b) specifically delineates "factors to be considered in determining reasonable [attorney] fee." Subsection (b)(8) of that rule specifically identifies one of those factors as "whether the fee is fixed or contingent...." By virtue of the legislature's adoption of the Supreme Court guidelines relating to the calculation of attorney's fees in §768.79(6)(a), Fla. Stat. (1990), obviously the legislature approved of the use of that factor in the context of the statute. The manner in which that consideration has been factored into the attorney's fee calculation has been through the use of contingency risk multiplier, ROWE, supra, QUANSTROM, supra.

There is no basis to construe the statutory language of §768.79, Fla. Stat. to exclude consideration of a contingency risk multiplier pursuant to ROWE and QUANSTROM. If the legislature had intended to eliminate the multiplier from the calculation of attorney's fees pursuant to §768.79, Fla. Sta., the legislature could easily have said so. However, it did not, and based on well-established principles of statutory construction, the legislature must be deemed to have intended that the contingency risk multiplier be considered in the context of §768.79, Fla. Stat. This

was the conclusion of the Fourth District in COLLINS v. WILKENS, 664 So.2d 14 (Fla. 4th DCA 1995), see also, ISLAND HOPPERS, LTD. v. KEITH, 27 Fla.L.Weekly D1257 (Fla. 4th DCA May 29, 2002).

Even Judge Casanueva, in his concurring dissenting opinion in ARMSTRONG TIRE CORP. v. JENSEN, 752 So.2d 1275, 1277 (Fla. 2d DCA 2000), acknowledges that the incorporation of the Supreme Court guidelines into the statute could support the holding that the legislature intended the multiplier to be utilized. Respectfully, the only reasonable conclusion is that the legislature was well aware that the Supreme Court had adopted the contingency risk factor as a relevant consideration in determining a reasonable fee award, and that the language of §768.79, Fla. Stat., demonstrates the legislature's intent for it to be considered when awarding fees under that statute.

Use of a Multiplier in Awarding Fees under §768.79, Fla. Stat., Is Not Unconstitutional

The concurring/dissenting opinion of Judge Casanueva in PIRELLI ARMSTRONG TIRE CORP. v. JENSEN, 752 So.2d 1275 (Fla. 2d DCA 2000), erroneously contends that the use of a contingency risk multiplier in determining fees under §768.79, Fla. Stat., violates the constitutional principle of equal protection.

Respectfully, Judge Casanueva's analysis is flawed in numerous respects, and should be rejected.

First, the argument should be rejected because it is based on a fundamentally flawed factual predicate. Judge Casanueva contends that (752 So.2d at 1277), "only one side in a civil action - the plaintiff - is eligible under Rule 4-1.5 analysis to receive a contingency risk multiplier because the plaintiff is taking the risk in commencing the action," citing FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, supra; BELL v. USB ACQUISITION CO., 734 So.2d 403 (Fla. 1999). However, neither of those cases holds that only a plaintiff is entitled to an enhancement of fees based on the contingent nature of the fee agreement.

In fact, Rule 4-1.5(b)(8) specifically provides that a factor to be considered in determining a reasonable fee in any context is whether the fee is fixed or contingent. This Court noted in BELL v. USB ACQUISITION CO., supra, 734 So.2d at 411, that based on that provision:

> Even without a multiplier the court would be authorized to award a greater fee based on the contingent nature of the fee agreement, or reduce the fee award where there was no risk of nonpayment.

Thus, clearly the fundamental premise of Judge Casanueva's argument is flawed. This is further demonstrated by the fact that this Supreme Court has specifically authorized

the use of a multiplier in situations where the fee agreement provides for a partial contingency, see LANE v. HEAD, 566 So.2d 508 (Fla. 1990). As noted in Justice Overton's concurrence in LANE, that decision necessarily holds that contingency risk multipliers can be used not only where the attorney faces a risk of recovering no fees, but also in those situations where there is a risk of not being paid in full, 566 So.2d at 513 (Overton, J. concurring). Thus, there is no prohibition against a defense attorney being entitled to a multiplier, if an appropriate fee agreement exists with the client.

Even assuming arguendo Judge Casanueva's fundamental premise that only plaintiffs are entitled to a multiplier, that still would not justify the conclusion that the statute is unconstitutional. While it has been held that the legislature authorized the application of a contingency risk multiplier in §768.79(7)(b), Fla. Stat. (1993), see COLLINS v. WILKENS, supra; GARRETT v. MOHAMMED, 686 So.2d 629 (Fla. 5th DCA 1996), the statute itself does not create any distinction between plaintiffs or defendants. Thus, the legislature has not made a classification that can be challenged as arbitrary, but has simply provided that the standard criteria relevant to the determination of a reasonable attorney fee should be considered.

The legislature has also authorized other considerations in determining a reasonable fee such as, inter alia, the "then apparent merit or lack of merit in the claim," "the number and nature of offers made by the parties," and "the closeness of

questions of fact and law at issue," see §768.79(7)(b), Fla. Stat. Even assuming arguendo that one relevant factor would apply only to plaintiffs, that does not constitute an unreasonable classification for purposes of the equal protection analysis. This is clear because the statutory directive is for the trial court in all cases to determine a reasonable award, no matter what criteria are considered. As noted by this Court in TGI FRIDAYS, INC. v. DVORAK, 663 So.2d 606, 613 (Fla. 1995), this necessarily means that the trial court has discretion with respect to the amount of fees, depending upon many considerations:

> Thus, in a given case, the court could justifiably reduce the amount of the attorney's fee to be assessed against a severely injured plaintiff who suffered an adverse verdict after rejecting a small settlement offer. By the same token, 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.

Since the statute directs only that a reasonable fee be awarded, there is no unreasonable classification made by the legislature.

Even assuming arguendo that the legislature has created some specific classification involving the use of multipliers in §768.79, Fla. Stat., that would not constitute an equal protection violation. As noted by Judge Casanueva, a statute such as §768.79 is only entitled to the lowest level of scrutiny under the equal protection

analysis, which is the rational basis standard, 752 So.2d at 1277. As explained by the United States Supreme Court in DANDRIDGE v. WILLIAMS, 397 U.S. 471, 485 (1970), under that standard, if there is any reasonable basis for the classification in the statute, it should be upheld, even if it results in some inequality. The Court in DANDRIDGE also stated that it would not invalidate a legislative provision if any state of facts reasonably may be conceived to justify it, 397 U.S. at 485, quoting McGOWAN v. MARYLAND, 366 U.S. 420, 426 (1961). The Court emphasized that the judiciary has not been granted power under the equal protection provision to impose what it views to be wise economic or social policy, because the creation of such policy distinctions is peculiarly a legislative task, see MASSACHUSETTS BOARD OF RETIREMENT v. MURGIA, 427 U.S. 307 (1976); see also, CITY OF NEW ORLEANS v. DUKES, 427 U.S. 297 (1976).

As noted in ROWE and QUANSTROM, the purpose of a multiplier is to encourage attorneys to take meritorious, but difficult, cases that would not be taken if there was not the possibility of an enhancement of the fee. Clearly, the legislature could reasonably conclude that it did not wish to eliminate that incentive by enacting §768.79, Fla. Stat., even though that statute is intended to encourage the resolution of cases. Put another way, while the statute is intended to encourage parties to conclude litigation amicably, the legislature may not have intended to chill a party's right to bring

the litigation initially. Thus, even though the use of the multiplier might result in some defendants being treated differently than plaintiffs, that would not offend equal protection because there is a rational basis for the classification. Moreover, the statute specifically limits the award of fees to that which is reasonable and, thus, in no event, would a defendant be forced to pay an unreasonable fee.[1]

In summary, Judge Casanueva's opinion is fundamentally flawed, since the enhancement of a fee award based on the contingent nature of the fee agreement is not applied solely to the benefit of plaintiffs. Moreover, the legislature has not created any distinction between plaintiffs and defendants in §768.79, Fla. Stat., which would justify an equal protection analysis. Even if this Court does accept Judge Casanueva's flawed premise and engages in the equal protection analysis, there clearly is a rational basis for the legislature's adoption of the criteria for determining reasonable attorney's fees and, therefore, the statute is constitutional.

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[1]/An alternative rational basis for permitting the use of multipliers in this context is that the amount of the multiplier is determined by the likelihood of success at the outset, see ROWE, supra. Thus, while a defendant might feel secure enough to reject an offer of judgment based on its analysis of the likelihood of success at the outset of the suit, if it is aware that a multiplier might be applied, it would have more motivation to reevaluate the case at the time the demand for judgment pursuant to §768.79, Fla. Stat., is made, rather than relying solely on its initial evaluation of the likelihood of success.

CONCLUSION

For the reasons stated above, the decision of the Fifth District should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to RICHARD A. SHERMAN, ESQ., 1777 S. Andrews Ave., Ste. 302, Ft. Lauderdale, FL 33316; THERESA K. CLARK, ESQ., 158 N. Harbor City Blvd., Ste. 200, Melbourne, FL 32935; ROBERT M. MOLETTEIRE, ESQ., 10 Suntree Plaza, Melbourne, FL 32940; CHARLES W. HALL, ESQ., P.O. Box 210, St. Petersburg, FL 33731; JULIE H. LITTKY-RUBIN, ESQ., P.O. Box 4056, West Palm Beach, FL 33402, by mail, on November 19, 2002.

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CERTIFICATE OF TYPE SIZE & STYLE

The Academy of Florida Trial Lawyers hereby certifies that the type size and style of the Brief of Amicus Curiae is Times New Roman 14pt.

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