SUPREME COURT OF FLORIDA

CASE NO. 02-428

SALLY SARKIS,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

_____ /

BRIEF OF AMICUS CURIAE,
FLORIDA DEFENSE LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENT

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SUMMARY OF THE ARGUMENT

This case presents an issue of first impression in this Court concerning the propriety of applying a contingent risk multiplier to enhance a fee award made pursuant to section 768.79, Florida Statutes. The Fifth District, adopting a portion of the dissent in Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275 (Fla. 2d DCA 2000), correctly concluded that the offer of judgment statute does not allow for the use of a contingent risk multiplier in determining a proper fee award. Allstate Insurance Co. v. Sarkis, 809 So. 2d 6 (Fla. 5th DCA 2001). That decision should be approved.

The fee-authorizing statute, 768.79, identifies the specific criteria to be considered. Because the terms of the authorizing statute do not provide for the use of a contingent risk multiplier, the Court's analysis is limited to those factors. See Schick v. Department of Agric. & Consumer Servs., 599 So. 2d 641 (Fla. 1992).

Importantly, Petitioner's reading of 768.79 is at odds with the purpose behind the statute. The statute was designed to "encourage the terminating of litigation". It thus strains credibility to read the statute so as to "encourage[] the bringing of a civil action" by "enhanc[ing] the [attorney's fee] award in such a generous manner." Pirelli, 752 So. 2d at 1276-77 (quoting from both the dissenting and majority opinions).

The use of a contingent risk multiplier is also inconsistent with the purpose behind section 768.79 because the factors that

would increase an award pursuant to an analysis of a contingent risk multiplier, would result in a decreased award pursuant to the offer of judgment statute. Accordingly, based on the language of section 768.79, as well as its purpose, it was error to consider a contingent risk multiplier.

Indeed, this disconnect between the statute's purpose and the application of a contingent risk multiplier gives rise to an equal protection violation. While under some statutes there might be a rational basis to allow a multiplier, there is no rational relationship between that arbitrary classification and the purpose of section 768.79. In this circumstance, Defendant is denied equal protection of the law.

For all these reasons, Amicus Curiae, the Florida Defense Lawyers Association, urges this Court to approve the decision of the Fifth District.

ARGUMENT

XXI. THE APPLICABLE FEE-AUTHORIZING STATUTE DOES NOT INCLUDE THE CONTINGENT RISK MULTIPLIER AS CRITERIA TO BE CONSIDERED.

In Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990), this Court explained the manner in which a contingent risk multiplier may be considered and applied. After identifying the relevant factors to be considered, the Court noted as follows:

> In [tort and contract cases], the legislature may be very specific in setting the criteria that can be considered. For example, deputy commissioners must apply specific criteria to determine attorney's fees in workers' compensation cases. In this regard, the lodestar method is consequently unnecessary. It is not our intent to change the law in those instances.

555 So. 2d at 835 (citations omitted).

This Court further explained in Schick v. Department of Agric. & Consumer Servs., 599 So. 2d 641 (Fla. 1992):

> Where . . . 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 644. Applying that test in the context of the fee-authorizing statute for inverse condemnation proceedings, the Court held:

> [t]he legislature has specifically included in section 73.092 the criteria to be considered in awarding attorney's fees pursuant to section 73.091 and neither the contingent nature of the fee arrangement nor the risk of nonpayment of fees is an authorized consideration. We therefore . . . hold that in determining the

> reasonableness of an attorney's fee award, made pursuant to section 73.091 . . . a Rowe contingency risk multiplier should not be utilized.

Id. at 643.

As such, it is clear that the Court must look at the particular fee-authorizing statute to determine the appropriate factors to be considered. Numerous courts have carefully done such an analysis in the context of a wide array of statutes to conclude that a multiplier is inappropriate.

For example, the Third District reached the same result in the context of section 766.31 in Florida Birth-Related Neurological Injury Compensation Ass'n v. Carreras, 633 So. 2d 1103 (Fla. 3d DCA 1994). The statute at issue in Carreras listed a number of factors including "the contingency or certainty of a fee." § 766.31(1)(c)(6). Citing Schick, the court noted that the trial court correctly limited itself to the statutory factors. The fact that the statute included "the contingency or certainty of a fee" did not mean that the case was "eligible for a Quanstrom contingency multiplier." 633 So. 2d at 1106.

In Richardson v. Merkle, 646 So. 2d 289 (Fla. 2d DCA 1994), the Second District held that a contingency risk multiplier should not be applied to an award of fees based on section 57.105, Florida Statutes. See also Transflorida Bank v. Miller, 576 So. 2d 752 (Fla. 4th DCA 1991). Similarly, in Stewart Select Cars, Inc. v. Moore, 619 So. 2d 1037 (Fla. 4th DCA 1993), the Fourth District held that because the fee-authorizing statute, section 501.215, provided for reasonable fees "for the hours

actually spent on the case," the use of a contingent risk multiplier was inappropriate. Id. at 1038.

Finally, the use of a multiplier was rejected in the context of the workers' compensation attorneys' fee statute, section 440.34, Florida Statutes. See Mirlisena v. Chemlawn Corp., 567 So. 2d 986 (Fla. 1st DCA 1990); What an Idea, Inc. v. Sitko, 505 So. 2d 497 (Fla. 1st DCA 1987). Cf. Cheung v. Executive China Doral, Inc., 638 So. 2d 82 (Fla. 3d DCA 1994), disagreed with on other grounds by Berry v. Scotty's, Inc., 789 So. 2d 1008 (Fla. 2d DCA 1998) (because section 443.041(2)(b) does not include criteria by which to determine the amount of fees, resort to Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) and Quanstrom is proper).

Like the statutes described in the foregoing cases, the offer of judgment statute enumerates specific criteria to be considered. Specifically, section 768.79(7)(b) provides:

> 7(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:
>
> 1. The then apparent merit or lack of merit in the claim.
>
> 2. The number and nature of offers made by the parties.
>
> 3. The closeness of questions of fact and law at issue.
>
> 4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

> 5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
>
> 6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

Given the Legislature's enumeration of these specific criteria, the district court below, following the dissent in Pirelli, correctly concluded that the statute did not permit the use of a multiplier.

Petitioners challenge this conclusion because section 768.79(6)(b) refers to the guidelines promulgated by the Supreme Court and one of those guidelines is "whether or not the fee was fixed or contingent." Petitioner's analysis is wrong.

As explained in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) and Quanstrom, the guidelines set forth in Florida Rule of Professional Conduct 4-1.5 and Florida Bar Code of Professional Responsibility DR 2-106(B), address the calculation of reasonable rates and numbers of hours; i.e., the lodestar. Quanstrom, 555 So. 2d at 830. Thus, the Supreme Court's guidelines are implicit in **any** calculation of a reasonable fee.[1]

On the other hand, the fact that those guidelines include consideration as to whether there is a contingency arrangement does not authorize the court to apply a contingent risk multiplier. Indeed, in Carreras, the Third District concluded

[1] Because the guidelines are necessary to provide a basis upon which to determine hours and rates, this gives meaning to 768.79's reference to guidelines. As such, this reading of the statute does not make a portion of the statute superfluous and meaningless as Petitioner suggests. (See Petitioner's Br. at 12.)

that even though the fee-authorizing statute identified contingency of the risk as a factor, this did not mean that the fee was eligible for a multiplier. Similarly, the attorneys' fee statute for workers' compensation claims, section 440.34, Florida Statutes, included the same criteria, yet a multiplier was not permitted. See Mirlisena, 567 So. 2d at 986; Sitko, 505 So. 2d at 497. Thus, a reference to the guidelines is not the predicate for authorizing the use of a multiplier.

Likewise, while section 768.79(7)(b) provides that the court may consider "other relevant criteria", as discussed below, the contingent risk multiplier is not a "relevant criteria" nor would its use be consistent with the purpose behind the fee-authorizing statute. Thus, the language of section 768.79(7)(b) does not expand the statutory criteria to include a multiplier.[2]

XXII. CONSIDERATION OF A MULTIPLIER IS BOTH IRRELEVANT AND INHERENTLY INCONSISTENT WITH THE PURPOSE BEHIND SECTION 768.79.

Even assuming arguendo that the words of the statute allowed for the use of a multiplier, such an interpretation of the statute is plainly at odds with the legislative purpose behind the statute and as such, cannot stand.

It is well established that "laws should be enforced with common sense and applied without losing sight of the legislative purpose behind their enactment." Mackey v. Household Bank, F.S.B., 677 So. 2d 1295, 1298 (Fla. 4th DCA 1996); Amente v.

[2] Indeed, it is noteworthy that in TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995), this Court looked at the statutory factors only and never suggested the use of a multiplier.

Newman, 653 So. 2d 1030, 1032 (Fla. 1995)("If possible, the courts should avoid a statutory interpretation which leads to an absurd result."). Thus, where a statute can be given more than one interpretation, "the one that will sustain its validity should be given and not the one that will destroy the purpose of the statute." City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950). "To do otherwise is to generate disrespect for the law by creating a morass of technical regulations with no connection to human experience." Mackey, 677 So. 2d at 1298.

Consistent with the foregoing, the 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. Indeed, the principle guiding force must be the fee-authorizing statute; otherwise, the purpose behind the fee-authorizing statute will have been wholly eviscerated. Id. at 834. See also American Reliance Ins. Co. v. Nuell, Baron & Polsky, 654 So. 2d 289 (Fla. 3d DCA 1995) (court refused to allow multiplier to be applied to attorney who represents himself given that such a rule would promote attorney self-representation which is not favored). As such, any analysis of the fee award must begin with the fee-authorizing statute.

In his dissenting opinion in Pirelli, Judge Casanueva accurately described the purpose behind the offer of judgment statute:

> Both the legislative history and the judicial interpretation of section 768.79 suggest that its purpose is to encourage the resolution of litigation. In Eagleman v. Eagleman, 673 So. 2d 946, 947 (Fla. 4th DCA 1996)

(citations omitted), the Fourth District noted:

> The spirit of the offer of judgment statute is to encourage litigants to resolve cases early to avoid incurring substantial amounts of court costs and attorney's fees. It serves as a penalty for parties who fail to act reasonably and in good faith in settling lawsuits.
>
> The legislative history for chapter law 86-160 supports the Fourth District's conclusion. The staff analysis prepared by the Florida House of Representative's Committee on Judiciary for House Bill 321 stated that the proposed "legislation would provide sanctions for the unreasonable rejection of an offer of settlement given by either a defendant or plaintiff." Sanctions were to include attorneys' fees. The sanctions provided for by HB 321 would encourage settlement of civil cases which could, in turn, "result in lower litigation costs." Similarly, the Senate Staff Analysis and Economic Impact Statement prepared for Senate Bill 866 indicates the bill's purpose was to expand the offer of judgment concept "to encourage settlements between parties."

Pirelli, 752 So. 2d at 1277-78 (Casanueva, J., concurring in part, dissenting in part). Thus, 768.79 serves as a penalty for parties who fail to act reasonably and in good faith in settling lawsuits.

In contrast, the purpose of a contingent risk multiplier is to encourage and reward counsel for taking particular cases and to fairly compensate him for doing so. Thus, in adopting the use of a multiplier in the context of section 768.56, Florida Statutes, the Court in Rowe noted that the fee award was intended to “encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they are not economically feasible under the contingent fee system.” Id. at

1149. See also Discovery Experimental and Dev. v. Department of Health, 824 So. 2d 195 (Fla. 2d DCA 2002). It thus serves as a protection against the risk of nonpayment. Thus, the use of a contingent risk multiplier provides for access to courts by rewarding a plaintiff for taking a case.

easuring the purpose and intent of the fee-authorizing statute against the purpose of a multiplier, it is clear that the use of a multiplier is both irrelevant and inconsistent with 768.79.

A. The Considerations Supporting the Use of a Multiplier are Irrelevant in the Context of the Offer of Judgment Statute.

The discussion of the purpose behind section 768.79 and the use of a multiplier makes clear that the use of a multiplier is irrelevant in the context of evaluating a fee award under the offer of judgment statute. Simply stated, a fee award under the offer of judgment statute is intended to sanction a party who fails to settle. What that penalty should be, depends on the conduct being punished and not on the reward to a plaintiff for taking the case in the first instance. Since the purpose to be served by enhancing the award under Rowe has nothing to do with the purpose of sanctioning a party who does not settle, the multiplier is irrelevant.

Moreover, while counsel is encouraged to take certain types of cases because of the potential for fee enhancement under a fee-shifting statute, the offer of judgment statute's purpose is

to settle claims, not to encourage lawsuits.[3] And, it is not the purpose of the offer of judgment statute to encourage lawyers to take cases in order to obtain a fee award. As such, the statute should not be interpreted to encourage lawyers to take cases for the purpose of getting a fee award because it would also encourage lawyers to make offers without a good faith basis. Further, it would encourage meritless litigation for the purpose of trying to win fees in situations where there is no fee-shifting statute.

B. The Use of a Multiplier is Also Inherently Inconsistent With the Offer of Judgment Statute.

As discussed above, the purpose of the offer of judgment statute is to penalize parties who unreasonably fail to settle a claim. Given this purpose, if a party has been unreasonable in rejecting a settlement, as where the chances of a liability finding are high (a situation where a multiplier would never be appropriate) and the demand is reasonable, a court may find that an award would be higher pursuant to the criteria set forth in section 768.79. On the other hand, where defendant's liability is remote, it becomes more reasonable for that defendant to reject a high offer. In that circumstance, this Court in TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995), noted that the award is justifiably reduced:

> Thus, in a given case, the court could justifiably reduce the amount of the attorney's fee to be assessed against a

[3] Indeed, were the case one for which the legislature was concerned about access to courts, they would have enacted a fee-shifting statute.

> 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.

Id. at 613.

In contrast, because the contingent risk multiplier rewards counsel for being successful in representing a plaintiff in a difficult case, a case which has little "merit" thereby justifying the rejection of a high demand for judgment, would result in a high multiplier because of the risk involved. Similarly, the closeness of questions of law and fact would decrease the award under section 768.79, but increase the multiplier. In short, the same factors that would lower an award pursuant to section 768.79, will enhance the award under Rowe) and Quanstrom.[4]

Legislative purpose (and in this case, the related legislative intent) cannot be thwarted by an interpretation that serves to defeat the statute. See Vildibill v. Johnson, 492 So. 2d 1047, 1049 (Fla. 1986)("Legislative intent must be given effect even though it may contradict the strict letter of the statute."). Accordingly, this Court is compelled by the language

[4] The decisions contrary to Sarkis, including the majority opinion in Pirelli and Collins v. Wilkins, 664 So. 2d 14 (Fla. 4th DCA 1995), failed to consider the purpose behind section 768.79 and the inherent inconsistency between the two approaches to calculating an attorneys' fee award. When these overriding policy considerations are taken into account, it is clear that Collins and Pirelli were incorrectly decided.

of section 768.79, as well as by its purpose, to reject the use of a contingent risk multiplier.

XXIII. USE OF A MULTIPLIER IN THE CONTEXT OF THE OFFER OF JUDGMENT STATUTE CONSTITUTES A DENIAL OF EQUAL PROTECTION.

By its very nature, a multiplier is only available to the plaintiff because, effectively, only plaintiffs utilize contingent fee arrangements. See Pirelli Armstrong Tire v. Jensen, 752 So. 2d 1275 (Fla. 2d DCA 2000) (Casanueva, J., dissenting). While there may be circumstances where the use of a multiplier bears a rationale relationship to some legislative purpose, here, the use of a multiplier results in grossly disparate treatment depending upon who makes the proposal for settlement and does so without any relationship to the purpose of the statute. Id. at 1277-78. Accordingly, use of a multiplier denies defendants equal protection of the law pursuant to the Fourteenth Amendment of the United States Constitution. Id.

The Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[5] At the very least, this guaranty must mean that government cannot draw arbitrary classifications among persons that promote no related government purpose. See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L.

[5] Both the Florida and the United States Constitutions guaranty the equal protection of the laws. See Fla. Const. art. I, § 2; U.S. Const. Amend. 14. The Florida Constitution, however, uses the terminology: "All natural persons, female and male alike, are equal before the law . . . ." Thus, while the federal and state legal standards are quite similar, amicus curaie will focus on federal law. See Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886) (Equal Protection Clause applies to corporations).

Rev. 341 (1949) (the Equal Protection Clause limits the legislature's freedom of classification).

The legal standard is clear: a statute must be rationally related to the achievement of a legitimate legislative objective. See Heller v. Doe, 509 U.S. 312, 319-20 (1993); Dandridge v. Williams, 397 U.S. 471 (1970); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (different classifications of persons "must be reasonable, and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

Under this standard, the United States Supreme Court has held that irrational favoritism of one group (here, plaintiffs) over another group (here, defendants) will not withstand constitutional scrutiny, as "[e]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." Romer v. Evans, 517 U.S. 620, 632 (1996). Equal protection of the laws "is not achieved through indiscriminate imposition of inequalities." Id. (citations omitted). A "classification of persons undertaken for its own sake" is not permitted under the Equal Protection Clause. Id. at 636.

Consistent with the federal courts, this Court has also interpreted statutes by reference to equal protection principles. Indeed, in prohibiting an offered construction of Florida's Wrongful Death Act, Justice Adkins emphasized that while such "a

statutory classification" "must only be rationally related to a legitimate state interest," "it cannot be wholly arbitrary." Vildibill, 492 So. 2d at 1050. See also In re Platt, 586 So. 2d 328 (Fla. 1991) (there is no equal protection for the public or the lawyer if we allow a method of assessing attorneys' fees that produces different results for the same type of case, depending on the preference of the trial judge).

There is no narrow scope or 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. Eagleman v. Eagleman, 673 So. 2d 946, 947 (Fla. 4th DCA 1996). As noted above, that legislative intent cannot be reconciled with the use of a contingent risk multiplier. Instead, the construction urged arbitrarily discriminates between plaintiffs and defendants without any factual predicate from the Legislature for doing so. Pirelli, 752 So. 2d at 1277-78 (Casanueva, J., dissenting).[6] As such, there is no relationship -- much less a rational relationship -- between an offer of judgment statute and the availability, to only plaintiffs, of a contingency multiplier.

Thus, under Petitioner's interpretation of 768.79, if a case has low merit, but a high damage potential and a demand is made

[6] See also Sawyer v. Sigler, 320 F. Supp. 690, 698 (D. Neb. 1970), aff'd, 445 F.2d 818 (8th Cir. 1971) ("When a state affords one person a right by statute, it must afford all persons the same right, ... at least in the absence of some exceptional circumstance based upon an interest by the state in the class of persons constituting the exception").

by a plaintiff, the fee allowed would be enhanced. However, if the offer is made by defendant who is not entitled to a multiplier, it would result in a reduced fee. Such a result is illogical given that the purpose of the statute -- resolution of litigation -- is the same regardless of who made the proposal. As a result, the blatantly discriminatory classification between plaintiffs and defendants is an unconstitutional denial of equal protection in this circumstance.

In sum, a ruling allowing a multiplier under the offer of judgment statute sanctions in a different manner depending on whether the movant for attorney's fees was a plaintiff or a defendant. This is the exact type of unfair treatment that the equal protection clause prohibits.

CONCLUSION

Based on the foregoing, the Florida Defense Lawyers Association respectfully requests this Court approve the decision of the Fifth District.

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The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Courier New 12-point font.

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