IN THE SUPREME COURT
OF FLORIDA

SALLY SARKIS,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.
_____/

CASE NO. SC02-428
5th DCA CASE NO. 5D00-2217

PETITIONER'S BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner certifies that the following persons and/or entities have or may have an interest in the outcome of this case:

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   (Defendant/Respondent)

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PREFACE

A Brevard County jury awarded petitioner/plaintiff, Sally Sarkis, damages far in excess of the offer of judgment made to her by defendant/respondent, Allstate Insurance Company. The trial court then awarded Mrs. Sarkis a reasonable attorney's fee, which included a multiplier for the contingency fee risk assumed by her attorney. The Fifth District below reversed the attorney's fee award, finding the offer of judgment statute, §768.79, does not authorize the award of a multiplier. In this Court, petitioner, Sally Sarkis, will be referred to as plaintiff or by her proper name. Respondent, Allstate Insurance Company, will be referred to as defendant or Allstate. All emphasis is that of the writer unless otherwise stated.

The following abbreviations will be used:

OR - Original Record on Appeal

T - Transcript of the hearing held before the trial court on May 23, 2000

JURISDICTIONAL STATEMENT

After submission of jurisdictional briefs, this Court accepted discretionary jurisdiction to review this case by order dated September 11, 2002.

POINTS ON APPEAL

I. **§768.79 AUTHORIZES TRIAL COURTS TO AWARD CONTINGENCY FEE RISK MULTIPLIERS IN CALCULATING ATTORNEY'S FEE AWARDS.**

II. **THE APPLICATION OF A CONTINGENCY RISK MULTIPLIER TO AN AWARD OF ATTORNEY'S FEES UNDER §768.79 DOES NOT VIOLATE THE GUARANTEE OF EQUAL PROTECTION AFFORDED UNDER THE CONSTITUTIONS OF EITHER THE UNITED STATES OR FLORIDA.**

STATEMENT OF THE CASE AND FACTS

Two months after Sally Sarkis was injured in an automobile accident while riding as a passenger, she hired attorney Robert Moletteire of Graham, Moletteire & Torpy, P.A. (f/k/a Graham, Moletteire, Tuttle & Torpy, P.A.), to represent her in a bodily injury claim (OR 1026-1027; T 10). Ms. Sarkis settled her case against the tortfeasor/driver for his $20,000 policy limits, and then sued Allstate for underinsured motorist benefits owed pursuant to her own policy (T 11). She served a proposal for settlement on July 15, 1998 in the amount of $10,000 (OR 996-999). Allstate, true to form, did not settle the case, and it went to trial before a Brevard County jury resulting in a $122,700 verdict (OR 943-944; 1000-1001). After adjustments for the prior settlement and the PIP payments, the trial court entered a net final judgment in the

amount of $87,700 (OR 1000-1001). Having exceeded the statutory threshold amount, Ms. Sarkis was therefore entitled to an award of reasonable attorney's fees and costs (OR 943-944; 1000-1001).

Ms. Sarkis timely moved for attorneys' fees and costs under the offer of judgment statute (OR 996-999; 1002-1008). Her motion sought compensation for her attorney for 176 hours of work at $350 per hour (OR 996-999; 1002-1008). She further sought a contingency fee risk multiplier (OR 996-999; 1002-1008).

The Fifth District fully recognized that the case possessed all the right ingredients which would normally entitle her attorney to a multiplier. As Judge Sharp wrote:

> In this case, Sarkis **made a strong showing to support the award of a multiplier**. One of her attorney expert witnesses testified that the possibility of obtaining a multiplier fee award in this case was 'absolutely something that any competent attorney would be taking into consideration and expect.' In accepting this case, he said, an attorney would have to consider the need to recover more than $35,000 because of the PIP, medical payments and tortfeasor setoffs, and the attorney would have to prove permanent injury for a plaintiff with a history of prior accidents and pre-existing conditions--**not a promising case from the outset**. Further, because **the case involved Allstate as the insurer/defendant and it has a firm policy not to settle cases, this case would likely go to trial, with the attorney having to finance costs. There was no way to mitigate the risk of non-payment in any way.**

Allstate Insurance Co. v. Sarkis, 809 So. 2d 6, 7 (Fla. 5th DCA 2001). Id. The court further found her attorney's testimony persuasive, quoting Mr. Moletteire as stating:

> [I]t is very tough to find competent counsel unless that counsel has an understanding that if we succeed at tilting the windmill [Allstate] and doing that successfully that there will be a reward at taking the risk on a contingency fee.

Id. at 8.

Every judge in this en banc opinion of the Fifth District agreed with Judge Sharp's recitation of the facts. Id. Every judge agreed that Ms. Sarkis' case was not promising at the outset. Id. The opinion nakedly reveals the court's belief that Ms. Sarkis' case presented the textbook example of a case crying out for an award of a contingency fee risk multiplier. Id.

Notwithstanding the overwhelming factual endorsement of the plaintiff's right to a multiplier, the Fifth District refused to allow the award in the offer of judgment context, and instead chose to retract from its own prior precedent on that point. Id. at 8. The District Court then adopted half of the two-pronged view of Judge Casanueva dissenting in Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275 (Fla. 2nd DCA 2000)(Casanueva, J., concurring in part and dissenting in part), rev. dismissed, 777 So. 2d 973 (Fla. 2001), that neither Standard Guar. Ins. Co. v. Quanstrom, nor §768.79 authorizes the use of contingency risk multipliers in

calculating attorney's fees awarded under the offer of judgment statute. Sarkis, 809 So. 2d at 8. Importantly, the Fifth District **did not** find §768.79 violated equal protection. Id. Compare, Sarkis, 809 So. 2d at 8. (Harris, J., specially concurring)(acknowledging the majority's singular holding that §768.79 does not authorize multipliers, but additionally questioning whether the statute would also violate equal protection).

SUMMARY OF ARGUMENT

The Fifth District erred in concluding that §768.79 does not provide for an award of a contingency fee risk multiplier as part of the computation of a "reasonable attorney's fee," simply because the Legislature did not explicitly employ the term "multiplier" in drafting the legislation. The District Court overlooked that the statute does expressly direct trial courts to compute reasonable attorney's fees according to the guidelines promulgated by this Court, which require a consideration of whether the fee is fixed or contingent. Until Sarkis, four out of the five appellate districts in this State, including the Fifth District, unequivocally found legislative authority for contingency fee risk multipliers in the offer of judgment setting. In light of the plain language of the statute, as well as the reasoning of our State's intermediate appellate courts, this Court should reverse the Fifth District's opinion below, and rule that §768.79 authorizes a multiplier.

While the Fifth District did not find §768.79 to violate the equal protection guarantees afforded by either our State or Federal Constitutions, this Court should address that issue to avoid future challenges. The statute plainly treats all similarly situated litigants--whether plaintiffs or defendants--similarly. When the statutory threshold is met, the Legislature has empowered trial courts to award a reasonable attorney's fee. The Legislature requires lower courts to compute such a fee on a case-by-case basis, guided by the factors articulated in the statute. There is nothing to prohibit a defendant willing to forego periodic attorney's fees payments for the promise of a fee paid contingent upon a specified result, from seeking a risk multiplier under this statute. Ironically, under any level of scrutiny this Court were to view this statute, it easily passes constitutional muster, as it affords equal protection to all litigants who successfully prevail on offers of judgment.

ARGUMENT

I. §768.79 AUTHORIZES TRIAL COURTS TO AWARD CONTINGENCY FEE RISK MULTIPLIERS IN CALCULATING ATTORNEYS' FEE AWARDS.

§768.79, Florida Statutes (1995), provides in pertinent part as follows:

> (6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) **If a defendant serves an offer which is not accepted by the plaintiff** and the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorneys' fees, **calculated in accordance with the guidelines promulgated by the Supreme Court**, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) **If a plaintiff serves an offer which is not accepted by the defendant**, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff 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.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

> (b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, **along with all relevant criteria**, the following additional factors:

The Fourth District recently addressed the issue of legislative authority for multipliers in this statutory context, engaging in a meticulous analysis which specifically disagreed with the Sarkis court's "cursorily adopt[ed] view of Judge Casanueva's dissent in Pirelli." See, Island Hoppers, Ltd. v. Keith, 820 So. 2d 967, 974 (Fla. 4th DCA 2002). Expounding upon its prior analysis in Collins v. Wilkins, 664 So. 2d 14 (Fla. 4th DCA 1995), rev. denied, 670 So. 2d 937 (Fla. 1996), which explicitly found that the Legislature authorized trial courts to consider the application of a contingency risk factor as a criterion for determining a reasonable fee under the offer of judgment statute, the court reiterated its reasoning, which for many years has served as the seminal authority in Florida for allowing a multiplier in the offer of judgment context. See, Island Hoppers, Ltd., supra. at 974[1].

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[1]Before the Fifth District's reversal of its prior precedent in the Sarkis opinion below, every district in this state addressing the issue (all but the Third which failed to reach the legal issue itself, opining that the requirements for a multiplier were not factually met in that particular case), relied upon the Fourth District's decision in Collins to support the conclusion that the legislature authorized trial courts to consider application of a contingency risk multiplier in offer of judgment cases. See, Garrett v. Mohammed, 686 So. 2d 629, 631 (Fla. 5th DCA 1996), rev. denied, 697 So. 2d 510 (Fla. 1997); Lewis v. Bondy, 752 So. 2d 1225, 1225 (Fla. 1st DCA 2000); Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275, 1275 (Fla. 2nd DCA 2000), rev. dismissed, 777 So. 2d 973 (Fla. 2001). But see, e.g., Amisub (American

The Fourth District's analysis centered upon the plain language of the statute finding that §768.79(7)(b) carefully guides trial courts on how to determine the reasonableness of an attorney's fee. See, Island Hoppers, supra. at 973-974. To arrive at a reasonable fee, the statute requires trial courts to consider certain factors "along with all other relevant criteria." Id. at 973. Those "relevant criteria" refer back to §768.79(6)(a) and (b), where the Legislature ordered trial courts to calculate a reasonable fee in accordance with the guidelines promulgated by this Court. Id.; see also, §768.79(6)(a) and (b), Fla. Stat. (1995). Those guidelines, as the Fourth District noted, consider "whether or not the fee was fixed or contingent" as a factor for considering reasonableness. Id. at 974, (citing, Florida Rules of Professional Conduct, Rule 4-1.5(b)(8), Fees for Legal Services).

Furthermore, the Fourth District explained that Rule 4-1.5(b)(8) specifies that *all* factors should be considered in setting a reasonable fee, "and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors." Id. at 974 (citing Rule 4-1.5(c)). As noted by the Island Hoppers court, the controlling version of the statute in that case contained the

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Hosp.), Inc. v. Hernandez, 817 So. 2d 870, 873 (Fla. 3d DCA 2002)(Acknowledging the conflict among the districts concerning the use of a multiplier under §768.79, but holding that no multiplier was appropriate factually because the plaintiff's counsel renegotiated the fee agreement when the litigation became burdensome, thereby obtaining competent counsel and mitigating the risk of non-payment thereby negating the application of a multiplier).

exact same language as the statute previously examined in Collins (decided in 1995), because the offer of judgment statute was not amended between 1990 and 1997. Id. at 974, n. 3. Because Ms. Sarkis' accident occurred in 1996, the statutory language and reasoning from both Collins and Island Hoppers, also apply here.

Importantly, the Pirelli dissent upon which the Fifth District's decision below is based, candidly acknowledges that subsection (6) of §768.79 does indeed "direct a trial court to calculate an award of attorneys' fees in accordance with the factors promulgated by [this Court]." Pirelli, 752 So. 2d at 1278 (Casanueva, J., dissenting). Judge Casanueva even conceded that a reading of the "fee factors promulgated by [this] court could support" a multiplier on a fee awarded under the offer of judgment statute. Id. at 1277. However, because neither subsection of the statute expressly mentions a multiplier, Judge Casanueva opined that "without this express directive, the court lacks the authority to use a multiplier." Id. at 1278 (Casanueva, J. dissenting).

Judge Casanueva and the Sarkis court both determined that the Legislature's decision not to use the **express** words "risk multiplier" prohibits a consideration of a multiplier, despite the remaining statutory language which strongly indicates to the contrary. Using that reasoning, a party could argue that the Legislature's decision not to use the actual terms "hourly rate" or "time spent" would also prohibit those factors as considerations in computing a "reasonable fee." The support for those particular

fee factors also comes from this Court's guidelines expressed in Rule 4-1.5 which uses the language "time and labor required," and "fee customarily charged," but does not employ the actual terms of "hours spent" or "hourly rate." Because Allstate does not challenge the Legislature's authorization for those factors, it seems disingenuous to suggest that "whether the fee is fixed or contingent," also enumerated by this Court in Rule 4-1.5, somehow does not apply in the computation.

It is a well established norm of statutory construction to choose an interpretation of a statute which renders its provisions meaningful. Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999). Statutory interpretations that render statutory provisions superfluous are, and should be, disfavored. Id. (Citations omitted). Additionally, where words used in grammatical construction employed in a stature are clear and convey a definite meaning, the legislature is presumed to have meant what is said and it is unnecessary to resort to rules of statutory construction. See, Kokay v. South Carolina Ins. Co., 380 So. 2d 489, 491 (Fla. 3rd DCA 1980), aff'd., 398 So. 2d 1355 (Fla. 1981).

While this statute does not explicitly employ the words "risk multiplier," the language of the statute does explicitly reference the "guidelines promulgated by the Supreme Court," as well as a reference to "all other relevant criteria" needed to

determine the reasonableness of the fee. The express directive of the Legislature in stating that,

> [t]he plaintiff shall be awarded reasonable costs, including investigative expenses, and attorneys' fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served...

requires trial courts to refer to Rule 4-1.5 in determining the reasonable fee. Justice Wells confirmed that conclusion in TGI Fridays, Inc. v. Dvorak, 663 So. 2d 606, 616 (Fla. 1995)(Wells, J., concurring in part and dissenting in part) when he wrote, "I conclude that the guidelines to which the statute refers are those set forth in Rule 4-1.5 of the Rules Regulating the Florida Bar." To disregard the Legislature's explicit reference to this Court's guidelines found in Rule 4-1.5 would render the provision superfluous and meaningless. Compare, Hawkins, supra, at 1000. It simply makes no sense to allow consideration of some of the factors generally--though not explicitly--addressed, but to disregard others.

For over six years, four of the five appellate districts (including the Fifth before its turnabout in Sarkis) found legislative authority authorizing an award of a multiplier under §768.79. The Pirelli majority went so far as to write:

> Thus, it is clear that the legislature authorized trial courts to consider and apply a contingency risk multiplier when awarding an attorney's fee under section 768.79. Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d at 1276.

Support for these holdings is ironically found in this Court's original opinion adopting the use of the contingency risk multiplier in the first place. In Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), this Court adopted the federal lodestar approach for computing reasonable attorneys' fees awardable under §768.56, Florida Statutes (1981), which granted attorneys' fees to prevailing parties in medical malpractice cases. The text of that statute provided:

> (1) Except as otherwise provided by law, the court shall award a **reasonable attorneys' fee** to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization; however, attorneys' fees shall not be awarded against a party who is insolvent or poverty stricken. Before initiating such a civil action on behalf of a client, it shall be the duty of the attorney to inform his client, in writing, of the provisions of this section. When there is more than one party on one or both sides of an action, the court shall allocate its award of attorneys' fees among prevailing parties and tax such fees against non-prevailing parties in accordance with the principles of equity. In no event shall a non-prevailing party be required to pay to any or all prevailing parties any amount in attorneys' fees in excess of that which is taxed against such non-prevailing party. **A party who makes an offer to allow judgment to be taken against him shall not be taxed for the prevailing party's attorneys' fees which accrue subsequent to such offer of judgment if the final judgment is not more**

> **favorable to the prevailing party than the offer.** The court shall reduce the amount of attorneys' fees awarded to a prevailing party in proportion to the degree to which such party is determined by the trier of fact to have contributed to his own loss or injury.
>
> (2) This section shall not apply to any action filed before July 1, 1980.

As is the case with §768.79, nowhere within the text of that statute did the Legislature explicitly provide that a risk multiplier could be awarded.[2] However, this Court not only found that statute constitutional, but also went on to conclude that the computation of a "reasonable attorneys' fee" under that statute should occur against the prescriptions of the Florida Bar's Code of Professional Responsibility, which was at the time under consideration by this Court. Rowe, at 1146; 1147-1148; 1150, n. 6. Those factors contained within the Rowe opinion, are the same exact eight factors explicitly included in Rule 4-1.5 today (save some minor textual changes).

Thus, this Court has long recognized the reference to the factors in the Rules of Professional Conduct as a basis for awarding a risk multiplier as part of the computation of a "reasonable fee," when a contingent fee is involved. It has done so without the Legislature's explicit use of the word "multiplier." For this Court to now

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[2]Ironically, that statute from which the multiplier concept arose also addressed attorneys' fees awarded after service of an offer of judgment, providing further support that the two concepts are legislatively compatible.

rule otherwise would effectively undo prior precedent, thereby requiring this Court to overrule its long established and well-considered decisions in Rowe and Quanstrom.

Even when this Court later modified its decision in Rowe with its opinion in Quanstrom to comply with decisions rendered by the United States Supreme Court, it still concluded that a trial court may consider a contingency fee risk factor when awarding a statutorily-directed reasonable attorney's fees to a lawyer employed on a contingent basis. Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 831 (Fla. 1990). It reiterated that in determining the fee, courts should apply the factors enunciated in the Florida Bar Code of Professional Responsibility. Id. at 830.

Independent of the clear legislative authority allowing for a multiplier in this case, there is no logical inconsistency in applying the Quanstrom factual requirements in the offer of judgment context as the Fourth District explicitly found in Island Hoppers, supra., at 975. According to that court:

> We recognize whenever a potential client walks through an attorney's door for the first time, a wide array of factors enter the calculus as to whether or not counsel will in fact decide to undertake that representation. *Rowe* and *Quanstrom* recognized potential clients whose cases seem to have a relatively low likelihood of success at the outset, may face considerable difficulties in securing counsel, and may often be unable to afford to competent counsel. As such, the multiplier was established, to serve as an incentive of sorts, for attorneys to undertake representation where a risk of non-payment was established. Although an attorney

> contemplating representation of a particular client can never 'know' for certain whether or not entitlement to a fee award under 768.79 will ultimately be established, surely skilled counsel can, contrary to the words of Chief Judge Schwartz in *Gonzalez*, 'anticipate' such. Offers of judgment, as well as requests to apply multipliers, have clearly become part and parcel of litigation in the State of Florida; this court need only look at any monthly docket to recognize such. We find no inconsistency in holding competent counsel can 'anticipate' the eventual filing of a 768.79 offer of judgment, 'anticipate' the possible entitlement to fees if the statutory prerequisites are met, and 'anticipate' the possibility said fee award will be multiplied. Id. at 975.

The Fourth District's reasoning directly comports with the opinion in Bell v. U.S.B. Acquisition Co., Inc., 734 So. 2d 403 (Fla. 1999), where this Court engaged in an extensive analysis of the precedent concerning the guidelines for calculating court-awarded attorneys' fees. Bell made it clear that the factors underlying the computation of reasonable attorneys' fees apply whether the fees are awarded pursuant to a statute or contract, or as a sanction for "inequitable conduct." It then reiterated that Rowe articulated an objective structure to help calculate a "reasonable fee." See, Id. at 406.

Once a party successfully overcomes the statutory threshold entitling him or her to an award of attorneys' fees under §768.79, the Legislature has vested the trial judge with the authority to determine a "reasonable" fee. Simply because §768.79 serves as a sanction against a litigant who unreasonably rejects an offer to settle the case, and

is not a "fee shifting" statute per se, is of no consequence to that task. The Legislature has armed the trial court with an entire arsenal of factors and considerations which the trial court may employ to customize a reasonable fee award in each individual case. Attorneys who represent clients in difficult but meritorious cases, facing the very real possibility that they will not be paid, should certainly have the trial court consider the potential non-payment in any context which triggers the application of this Court's guidelines set forth in Rule 4-1.5(b)(8). As §768.79 is clearly one of those contexts, a plaintiff and her attorney who prevail may legally seek an attorney's fee award that contains a multiplier.

The Fifth District's en banc opinion in Sarkis essentially ignored all applicable precedent of this Court, as well as the underlying rationale of Rowe, Quanstrom and Bell. The sole basis for its refusal to award the plaintiff's counsel a contingency fee risk multiplier--in a case where it explicitly found a "strong showing to support the award of a multiplier"--existed was its determination that neither Quanstrom, nor §768.79 authorized the use of contingency risk multipliers in calculating attorney's fees awarded under the offer of judgment statute.[3] The Fifth District's conclusion simply runs afoul with this Court's numerous decisions finding multipliers appropriate and

[3]It is clear from the court's language and the corresponding concurrence that the majority did not adopt Judge Casanueva's first and primary basis for rejecting a multiplier under §768.79, which was based upon the equal protection problem he perceived.

necessary, because the word "multiplier" never appears in any of the statutes addressed. This Court should quash the decision below.

II. THE APPLICATION OF A CONTINGENCY RISK MULTIPLIER TO AN AWARD OF ATTORNEYS' FEES UNDER §768.79 DOES NOT VIOLATE THE GUARANTEE OF EQUAL PROTECTION AFFORDED UNDER THE CONSTITUTIONS OF EITHER THE UNITED STATES OR FLORIDA.

According to this Court in Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000):

> Equal protection is not violated merely because some persons are treated differently than other persons. It only requires that persons similarly situated be treated similarly. In the absence of a fundamental right or a protected class, equal protection demands only that a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose.

Judge Casanueva himself conceded that the lowest level of scrutiny, i.e., the rational relationship test--applies to this statute. See, Pirelli, 752 So. 2d at 1277 (Casanueva, J. dissenting). The language of §768.79 clearly reveals that persons similarly situated are treated similarly; namely, the statute plainly requires an award of attorneys' fees both to defendants and to plaintiffs in all applicable litigation situations when the statutory threshold is met, and the motion is timely filed. As the statute states:

> (6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or

> involuntary dismissal, the court shall determine the following:
>
> (a) **If a defendant serves an offer which is not accepted by the plaintiff**, and if the judgment obtained by the plaintiff is at least 25% less the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorneys' fees, calculated in accordance with the guidelines promulgated by the Supreme Court....
>
> (b) **If a 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, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorneys' fees, calculated in accordance with the guidelines promulgated by the Supreme Court.... (Emphasis added).

Obviously, the statute itself unequivocally treats both plaintiffs and defendants similarly, in that both parties are entitled to a reasonable fee if the judgment obtained fits within the proper parameters.

Contrary to §768.79, where all litigants are by the very language of the statute treated similarly, Florida courts have long refused to find equal protection violations even with statutes containing far more suspect classifications than the one purportedly existing here. For example, in Jory v. Department of Professional Regulation, 583 So. 2d 1075 (Fla. 1st DCA 1991), rev. denied, 591 So. 2d 182 (Fla. 1991), the court upheld an order refusing to award a non-resident prevailing party who filed a petition for

attorneys' fees pursuant to §57.111, Florida Statutes (1989)(the Florida Equal Access to Justice Act), when the party was not a resident of Florida. The party contended that the classification scheme between licensed residents and licensed non-residents in the statute violated equal protection under both the state and federal constitutions. Id. at 1078. The court engaged in a determination of whether the classifications were reasonable in light of the purpose of the statute, and whether the statute presented arbitrary or invidious discrimination between the classes. Id. Because, like here, there was no impingement upon any fundamental interests of a certain group, the state's only burden was to determine that the statute's classifications were rational and reasonably related to the state's interests, without having to precisely articulate the legitimate underlying purposes of the classification. Id. The court held that the statutory distinction between resident and non-resident licensees was rationally and reasonably related to the state's economic interest in limiting the financial impact of an award of attorneys' fees, and upheld the statute as constitutional.

Similarly, in J. R. Furlong, Inc. v. Chrysler Corp., 419 So. 2d 385 (Fla. 3rd DCA 1982), the Third District determined that §320.641(5), Florida Statutes (1981), did not violate equal protection even though the statute failed to allow reasonable attorneys' fees for a prevailing motor vehicle manufacturers (or similarly situated entity) but did allow fees for prevailing dealers, holding that there was a public interest at stake to

equalize the difference in bargaining power between motor vehicle dealers and motor vehicle manufacturers. Likewise, in Florida Medical Center, Inc. v. Von Stetina, 436 So. 2d 1022, 1030 (Fla. 4th DCA 1983), rev'd. on other grounds, 474 So. 2d 783 (Fla. 1985), the Fourth District held that §768.56 which only allowed attorneys' fees to prevailing parties in medical malpractice cases, created a reasonable classification bearing a reasonable relationship to a permissible legislative objective.

Section 768.79 comports with equal protection. The statute provides for an award of attorneys' fees to plaintiffs and defendants. It requires the calculation of a "reasonable fee" on a case-by-case basis, vis-à-vis application of the many statutory factors embodied in this Court's guidelines set forth in 4-1.5, Rules of Professional Conduct, as well as the six others contained in §768.79(7)(b):

> (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 non-parties.

> (6) The amount of the additional delayed cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

It is disingenuous to suggest that the "reasonableness" of any two attorneys' fees will ever be the same. Every case is different. Every attorney is different. Recognizing the uniqueness of cases, attorneys and various approaches to litigation, the Legislature compiled fourteen total factors, allowing a customized "reasonable fee" analysis to occur in each individual case. Nothing about Rule 4-1.5 or §768.79(7)(b) limits the consideration of these factors either to plaintiffs or defendants. Rather, whether the fee itself is contingent is simply one of the many individual factors for the court to consider in making its fee award.

Certainly, if an attorney wishes to represent a defendant on a fee which is contingent upon the results obtained, thereby foregoing regular periodic payments of fees and expenses, there is nothing in the offer of judgment statute prohibiting that defendant from being awarded a multiplier. Under any view of this statute, either as enacted or applied, there is no way for a defendant to demonstrate unequal treatment. Importantly, even the Fifth District, which could not find legislative authority for an award of a contingency fee risk multiplier, rejected that portion of Judge Casanueva's Pirelli dissent which found the statute violative of equal protection.

CONCLUSION

This Court should quash the en banc opinion of the Fifth District in Allstate Insurance Co. v. Sarkis, 809 So. 2d 6 (Fla. 2001). In reversing, this Court should find both that the plain language of §768.79 authorizes the use of a contingency fee risk multiplier in computing a reasonable attorneys' fee, and that it does not violate equal protection afforded by either our State or Federal Constitutions.

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