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 REPLY BRIEF ON THE MERITS

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

A. The statute plainly demonstrates the Legislature's authorization for multipliers in offer of judgment cases.

Allstate and its amici try to convince this Court that the offer of judgment statute does not specifically authorize the use of a multiplier in computing a "reasonable fee." Even the most cursory review of the statute reveals their assertion is plainly erroneous.

In 1986, the originally enacted section 768.79 advised trial courts to calculate a reasonable fee based on the same six factors which are still listed in section 768.79(7)(b). However, the Legislature's overhaul of the statute four years later in 1990, explicitly stated that attorneys' fees were to be "calculated in accordance with the guidelines promulgated by the supreme court." Section 768.79(6)(a) and (b), Fla. Stat. (1990). As noted by the Academy of Florida Trial Lawyers in its Initial Brief, because the Legislature is presumed to know the existing law when it enacts a statute, and because Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) had long been the law at that time, the Legislature's inclusion of this Court's guidelines was purposeful, and obviously meant to embrace the use of the contingency

fee risk multiplier in the computation of an attorney's reasonable fee. See e.g., Seagrove v. State, 802 So. 2d 281 (Fla. 2001).

Respondents'[1] attempts to suggest that the enumerated factors in section 768.79(7)(b) is the complete list of relevant criteria explicitly enumerated by the Legislature is disingenuous at best. Respondents ignore sections 768.79(6)(a) and (b), which explicitly provide that a party shall be awarded reasonable costs and attorneys' fees, calculated in accordance with the **(guidelines promulgated by the supreme court)**. Section 768.79(7) simply provides the trial court with other elements for consideration, listing six "additional factors," and stating that the trial court shall consider these "along with **all other** relevant criteria." Additionally, Allstate's assertion that the only guideline this Court has ever promulgated is the Uniform Taxation of Costs is simply untenable in the face of the concurring opinion in TGI Fridays, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995), where Justice Wells explicitly concluded that the guidelines to which the statute referred were those set forth in Rule 4-1.5 of the rules regulating the Florida Bar. Id. at 616 (Wells, J., concurring in part and dissenting in part).

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[1]Unless otherwise specified, "Respondents" collectively refers to Respondent, Allstate Insurance Company, as well as amici, the Florida Defense Lawyers Association and the Florida Chamber of Commerce. Also, all emphasis is added unless otherwise so indicated.

Respondents then cite factually inapposite cases which actually undermine their argument that a risk multiplier does not apply in offer of judgment cases. Preliminarily, this Court should note that none of the statutes involved in those cases reference this Court's "guidelines." Nor do any of them allow consideration of the fluid "all other relevant criteria" standard listed in this statute. Compare, Schick v. Department of Agriculture and Consumer Services, 599 So. 2d 641 (Fla. 1992)(When statute enumerates a finite group of factors for determining an attorney's fee, only those specific factors are applicable). Additionally, in each of those cases, there is some factually distinguishable reason for why the courts in those cases prohibited multipliers.

In TransFlorida Bank v. Miller, 576 So. 2d 752, 753 (Fla. 4th DCA 1991), for example, the Fourth District refused to award a multiplier for fees awarded under section 57.105 for the very logical reason, that:

> A case that is so patently frivolous as to cause counsel to undertake litigation for a fee that is solely contingent on a section 57.105 recovery cannot reasonably be treated as involving a risk that would support a multiplier.

See also, Richardson v. Merkle, 646 So. 2d 289 (Fla. 2nd DCA 1994). In Florida Birth-Related Neurological Injury Compensation Ass'n v. Carreras, 633 So. 2d 1103 (Fla. 1994), the Third District refused to award a multiplier in a NICA case, despite the

fee provision allowing for consideration of a contingent fee. Respondents overlook, however, that the court's decision there turned on the "no-fault" nature of NICA:

> [T]he *Quanstrom* and *Rowe* multipliers **were adopted in the context of fault-based litigation**. In that context, the *Quanstrom* multiplier allows multiplication of the attorneys' fee by a factor of up to 2.5. 555 So. 2d at 834. **The NICA program by contrast is a no-fault system.** It contemplates routine claim processing where eligibility determination should ordinarily be straightforward. The major hurdle in a NICA petition is the determination of eligibility, and litigation over eligibility should be the exception rather than the rule. **Accordingly**, it is our conclusion that a *Quanstrom* contingency multiplier is not to be considered in NICA cases. Instead, the 'contingency or certainty of a fee' element is one factor to be weighed against the other statutory factors.

Stewart Select Cars, Inc. v. Moore, 619 So. 2d 1037 (Fla. 4th DCA 1993), rev. denied, 632 So. 2d 1027 (Fla. 1994) is also inapplicable because the court found that the statute at issue there specifically limited a "reasonable attorney's fee" as one awarded only "for the hours actually spent on the case." In drafting the explicit attorney fee scheme embodied in section 440.34 in workers' compensation cases, the Legislature determined a multiplier was not necessary in light of the rest of the scheme. See e.g., What An Idea, Inc. v. Sitko, 505 So. 2d 497, 503 (Fla. 1st DCA), rev. denied, 513 So. 2d 1064 (Fla. 1987).

Section 768.79 explicitly refers to this Court's guidelines. It requires consideration of "other relevant criteria." It then provides additional enumerated factors. It is clear, therefore, as the Fourth District found in Island Hoppers, Ltd. v. Keith, 820 So. 2d 967 (Fla. 4th DCA 2002), that the Legislature provided for a multiplier in the computation of a reasonable fee under the offer of judgment statute. Even Judge Casanueva, perhaps the most vocal critic of offer of judgment "multipliers," agreed that a reading of the fee factors promulgated by this Court could indeed support a multiplier. See, Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275, 1277 (Fla. 2nd DCA 2000)(Casanueva, J., concurring in part and dissenting in part), rev. dismissed, 777 So. 2d 973 (Fla. 2001). This Court should find that the Legislature provided for consideration of a multiplier when parties beat their offers of judgment.

B. Offers of judgment have become so commonplace in litigation, that counsel considers them in the calculus of whether or not to accept a case at the outset.

In Gonzalez v. Veloso, 731 So. 2d 63, 64 (Fla. 3rd DCA 1999), Chief Judge Schwartz rejected an attorney's ability to meet the requisite factual burden to obtain a multiplier in the offer of judgment setting, questioning:

> 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 section 768.79, an eventuality which obviously cannot be anticipated when counsel is obtained.

According to the Fifth District, "[i]t is not fair to the parties or the Bar to continue to hold out the hope of obtaining a contingency risk multiplier in offer of judgment cases and then overturn the awards because of the inability to prove the impossible." Allstate Ins. Co. v. Sarkis, 809 So. 2d 6, 8 (Fla. 5th DCA 2001).

Recognizing how commonplace offers of judgment have become in the litigation of personal injury cases, however, the Fourth District astutely noted:

> 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. Island Hoppers, Ltd. v. Keith, 820 So. 2d 967, 975 (Fla. 4th DCA 2002).

Just as lawyers can be sure that a case will involve taking depositions, propounding interrogatories, and serving requests for production, they can be sure that either they or their opponent will serve a proposal for settlement. When plaintiffs serve such proposals, they are fully aware that if a defendant accepts the offer, the attorney's fee will be a simple contractual percentage of the settlement offer.

Here, for example, Ms. Sarkis's attorney knew if Allstate accepted the offer to settle, he would have received only a $4,000 fee (40% of $10,000), an amount far less than the time it took to go through discovery and get the case into settlement posture. Had he not known at the outset of Allstate's reputation for refusing reasonable settlement offers and the very real possibility that it would indeed reject Ms. Sarkis's offer, thereby entitling him to a fee possibly including a multiplier, he very well may have refused to represent Ms. Sarkis at the outset, determining the case was not economically feasible. Compare, Rowe, 472 So. 2d at 1149 ("It can be argued that, rather than deterring plaintiffs from litigating, the statute [at issue in that case] could actually encourage plaintiffs to proceed with well-founded malpractice claims that would have otherwise been ignored because they are not economically feasible under the contingent fee system.") The chance known at the outset, that Allstate would ultimately unreasonably reject an offer of judgment and the possibility that the fee would include a multiplier enabled Ms. Sarkis to secure representation.

C. *The purpose of a contingency fee risk multiplier is entirely consistent with the purpose of the offer of judgment statute which punishes parties who unreasonably reject settlement offers with an award of attorney fees.*

Respondents have gone to great lengths to demonstrate how the "multiplier" and the offer of judgment statute are somehow at odds. This Court explained the purpose of the contingency fee risk multiplier in Rowe:

> The contingency risk factor is significant in personal injury cases. Plaintiffs benefit from the contingent fee system because it provides them with increased access to the court system and the services of attorneys. **Because the attorney working under a contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guarantied remuneration for his services.** When the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorney fee. Id. at 1151.

In Rowe, this Court recognized that the availability of attorneys' fees would have the effect of encouraging plaintiffs to bring meritorious claims that would not otherwise be economically feasible to bring on a non-contingent basis. See, Bell v. U. S. B. Acquisition Co., Inc., 734 So. 2d 403, 411 (Fla. 1999)(citing, Rowe, 472 So. 2d at 1149). It is notable, contrary to Respondents' argument, that this Court made a point of reiterating in Bell, that Quanstrom did not restrict a contingency fee award to "rare" tort and contract cases only, but instead concluded that the multiplier is "a useful tool which can assist trial courts in determining a reasonable fee in this category of cases when a risk of non-payment is established." Bell, 734 So. 2d at 408. This Court has

even allowed multipliers in cases where the fee arrangement was only partially contingent. See, Lane v. Head, 566 So. 2d 508, 511 (Fla. 1990).

The harmonious purpose of the offer of judgment statute is simply to create a substantive right to collect reasonable costs and attorneys' fees as "penalties" for the declining party's failure to accept the offer and terminate the litigation. See e.g., Abbott & Purdy Group Inc. v. Bell, 738 So. 2d 1024 (Fla. 1999). It is untenable for Respondents to argue that a reasonable attorneys' fee for an attorney who risks never being paid is not more than for an attorney who is paid, win, lose, or draw. The thrust of Respondents' argument about the incompatibility of the multiplier and the offer of judgment is not about the multiplier as a concept, but rather as to the method of computation. They complain that the multiplier amount increases as the legitimacy of the claim decreases. This assertion is erroneous for two reasons.

First, Respondents completely ignore that the entitlement to attorneys' fees is only triggered when the final judgment is compared to the offer made. In other words, courts do not simply award attorneys' fees based on winning or losing. Instead, after a period of investigation and litigation, where the party has often developed its case through discovery, the party serves a reasonable settlement offer, which could very well be accepted in thirty days, thereby ending the case. The Legislature has deemed the rejection of an offer to settle unreasonable, when the final judgment after the jury's

verdict is 25% more than the offer to settle. Thus, a plaintiff has to do far more than merely "tip the scales" to receive an award of attorneys' fees under the statute. Unlike other statutory fee awarded contexts like section 627.428, for example, where the plaintiff must merely prevail, here, the Legislature requires a process of assessing the evidence and considering the intangibles to arrive at a reasonable settlement amount. The jury ultimately confirms whether that amount was reasonable or not. Therefore, by the time the plaintiff makes an offer of judgment, he or she has figured the weaknesses and problems with the claim in developing a reasonable settlement offer. If the plaintiff beats the offer, the trial court may award a multiplier reflecting a mitigation of the attorneys' non-payment factor, in an amount the trial court deems appropriate.

The second reason why the statute and the multiplier concept are completely accordant is found within the statute itself. Multipliers are computed by first establishing a lodestar, and then adding or subtracting from the fee, based upon a "contingency risk" factor and the "results obtained." See, Rowe, 472 So. 2d at 1151. Thus, while a lodestar may be multiplied, the trial court may very well adjust the fee **downward** based upon the results obtained. Id.

Similarly, the offer of judgment statute provides for the exact same type of computation. Section 768.79(6)(b) mandates the initial computation: i.e., the plaintiff

is awarded a reasonable attorneys' fee, "calculated in accordance with the guidelines promulgated by the supreme court," which as we know, includes the use of a lodestar as well as possibility of a multiplier. Importantly, the next paragraph of the statute then allows the trial court to make a downward adjustment, analogous to the downward adjustment provided for in Rowe. Section 768.79(7)(b) says that when determining the reasonableness of the attorneys' fee award, the court shall consider (along with all other relevant criteria) "the apparent merit or lack of merit of the claim and the closeness of questions of fact and law." The Legislature, therefore, has obviously reconciled any purported cross purposes between the statute and the multiplier.[2]

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[2]Respondents suggest that a lodestar plus a multiplier creates some type of "lottery-esque" windfall for victims' attorneys. The use of the term "multiplier" for some reason, seems to evoke unfair images of fat-cat contingency fee lawyers frolicking in big piles of cash while hourly rate lawyers get proverbial lumps of coal. However, if we were to strip away the semantics, and replace the word "multiplier" with a phrase like "non-payment factor," it would be obvious that the determination of what constitutes a reasonable fee under the offer of judgment statute must account for the risk of non-payment. Certainly, that risk may very well be worth a couple of hundred dollars more per hour to the contingency fee attorney than to the hourly attorney paid the same rate, win, lose or draw.

While the Respondents in this case seem offended by Plaintiff's counsel's attorney fee award in the amount of $87,675, they fail to acknowledge that the lodestar alone was $58,450, representing 167 hours at an hourly rate of $350. Thus, had Allstate prevailed on an offer of judgment served at the same point in time in this case, its counsel with commensurate experience and time in the file, would too have been entitled to the same fee of $58,450. The additional $30,000 the trial court awarded Ms. Sarkis' lawyer simply represented the amount of money which constituted a "reasonable fee" for an attorney who agreed to represent her with no guarantee that he would ever be paid (The trial court added a 1.5 multiplier to Mr. Moletteire's lodestar which increased the fee from $58,450 to $87,675.) It is interesting to note that if the word "multiplier" were never used to compute Mr. Moletteire's reasonable fee under the offer of judgment statute, the trial court easily could have figured in an additional $150 per hour to his usual $350 hourly rate to account for the risk of non-payment, and for the fact that he advanced all the costs of litigation as

D. *Simply because a multiplier may not be appropriate in some offer of judgment cases is no reason for this Court to throw out the proverbial baby with the bath water and foreclose anyone from ever seeking a multiplier after prevailing on an offer of judgment.*

It is crucial for this Court to stay focused on the law that the Sarkis opinion has created. That court has ruled as a matter of law, under any and all circumstances, there is never a situation where a multiplier is appropriate, even though the statute allows for consideration of it.

This case, as the Fifth District candidly recognized, happens to be one begging for a multiplier. See, Allstate v. Sarkis, 809 So. 2d at 7. Plaintiff's counsel was well aware of his client's prior accident history and her pre-existing conditions. However, he possessed competent medical testimony that she had sustained additional injury in this accident. With the promise of a potential multiplier, he took the meritorious, yet difficult case.

In the face of these issues, Ms. Sarkis was willing to conclude her lawsuit against Allstate for a mere $10,000. Allstate, however, believed the case was worth

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compared to his counterpart who was paid regularly both for his time and costs. Had the trial court then figured Mr. Moletteire's reasonable hourly rate at $500 per hour and arrived at the lodestar fee by multiplying the number of hours he had expended in the case, the trial court's fee award would have amounted to $88,000; 375 dollars more than he was awarded with the multiplier. The irony of this semantical twist should not be lost on this Court.

less than $8,250. It rejected the Plaintiff's offer to settle. By awarding Ms. Sarkis $122,700 in damages for her injuries, the jury boldly told Allstate that its valuation was entirely incorrect. Simply because a multiplier may not be appropriate in one case is no reason to hold uniformly that no multiplier would ever be appropriate.

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.

Respondents ignore that section 768.79 by its **plain language** applies equally to plaintiffs and defendants. They refuse to discuss the standard for reviewing the statute's classifications, which is merely that they are rational and reasonably related to the state's interests. Jory v. Department of Professional Regulation, 583 So. 2d 1075, 1078 (Fla. 1st DCA), rev. denied, 591 So. 2d 182 (Fla. 1991). Any defendants who would choose to accept payment on a contingent basis rather than a periodic basis would too be entitled to consideration of an enhancement of their attorneys' fee in the event they were successful on an offer of judgment. It is simply disingenuous to suggest that because plaintiffs' attorneys generally work on a contingent fee and defense attorneys do not that the statute somehow fails to pass constitutional muster.

None of the Respondents cite one case in support of their argument that their access to courts is impaired by the application of a risk multiplier in an offer of judgment setting. As noted above, the multiplier is just another fancy way of leveling the playing field in the process of assessing a reasonable attorney fee under the offer of judgment statute. Certainly, no one can legitimately argue that a reasonable attorneys' fees assessed under the offer of judgment statute for an attorney risking non-payment should not be higher than a reasonable attorneys' fee for an attorney who does not accept such a risk. The offer of judgment statute has already been found to be constitutional. There is nothing about enhancing a contingent fee, be it a plaintiff or a defendant's lawyer, which undermines that determination.

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 or access to courts afforded by either our State or Federal Constitutions.

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