Filing # 165479978 E-Filed 01/25/2023 06:45:32 PM

IN THE SUPREME COURT OF FLORIDA

BRINDA COATES, etc.,

v. Case No.: SC21-175

R.J. REYNOLDS TOBACCO CO.

PETITIONER'S SUPPLEMENTAL RESPONSE REGARDING PETITIONER'S MOTION FOR APPELLATE ATTORNEY'S FEES

Petitioner files this supplemental response pursuant to this Court's January 5, 2023, order requiring the parties to file supplemental responses "addressing whether the moving party must prevail on appeal to be entitled to a provisional award of appellate attorney's fees under section 768.79, Florida Statutes." The Court should answer this question in the negative and provisionally grant Petitioner's Motion for Appellate Attorneys' Fees.

Supplemental Statement of Procedural History

Petitioner seeks an award of appellate attorney's fees under section 768.79 based on a proposal to settle this case for $75,000 served on Respondent in 2001, or alternatively, on a subsequent proposal to settle for $749,000 served in 2017. In its response, Respondent contended, without citation or argument, that

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Petitioner would not be entitled to appellate fees "if the Fifth District's decision in this appeal is affirmed."

As set forth in this Court's merits opinion, the trial court entered judgment for Petitioner for $150,000 in compensatory damages (net of comparative fault) plus $16 million in punitive damages. (Opinion at 4-5.) Respondent appealed and raised three issues, arguing that (1) it was entitled to a directed verdict on liability, (2) it was entitled to a new trial based on alleged juror misconduct, and (3) the punitive damage award was excessive. (DCA 29-89.)

The Fifth District ruled against Respondent on the first two issues, but reversed on the third, remanding for remittitur or a new trial on the amount of punitive damages. *R.J. Reynolds Tobacco Co. v. Coates*, 308 So. 3d 1068, 1070 (Fla. 5th DCA 2020). The district court concluded that the punitive damages award was otherwise reasonable, but was excessive based solely on "the disparity between the punitive and compensatory damages award." *Id.* at 1073. Although each side had prevailed on different issues, the district court granted Petitioner's motion for appellate attorney's

fees conditioned only on the trial court determining Petitioner is entitled to recover attorney's fees generally. (DCA 291.)

The district court also certified to this Court a question of great public importance on this narrow issue. *Id.* at 1073, 1076. Given a certified question that could result in the restoration of the $16 million punitive damage award (99% of the judgment), Petitioner did the only reasonable thing – invoking this Court's jurisdiction. Finding the certified question sufficiently significant and colorable to warrant further review, this Court accepted jurisdiction and, after extensive briefing and oral argument, issued a written opinion rephrasing the certified question and approving the district court's ruling on grounds not directly addressed by the district court. Specifically, this Court concluded that the decedent's death is not an "injury suffered" for purposes of section 768.74(5)(d), Florida Statutes, in a wrongful death action because compensatory damages may not be awarded directly for the death.

I. Section 768.79 Does Not Require a Party to "Prevail" to Be Entitled to Attorney's Fees, Appellate or Otherwise.

Petitioner is entitled to a provisional award of appellate attorney's fees because she obtained a judgment that meets the

statutory requirements of section 768.79. The plain language of section 768.79 entitles plaintiffs "to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand" if "the plaintiff recovers a judgment in an amount at least 25 percent greater than" an offer of judgment made under the statute. § 768.79(1).

Because this appellate proceeding took place well after service of both proposals, Petitioner is thus statutorily entitled to recover all "reasonable costs and attorney's fees" provided the trial court ultimately finds one or both proposals valid and triggered by the amount of the ultimate judgment.[1] *Id.*; *Crowley's Concrete, Inc. v. Gathercole*, 163 So. 3d 1283, 1283 (Fla. 1st DCA 2015).

Section 768.79 contains no "prevailing party" or "prevailing on appeal" requirement. Under any reasonable reading of the statute, plaintiffs can prevail on all issues and appeals and **not** be entitled to attorney's fees, while defendants can **lose** on all issues and

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[1] Petitioner will at least recover net compensatory damages of $150,000, double the amount of her 2001 proposal, the validity of which Respondent disputes. And depending on the amount of punitive damages awarded on remand, she may recover an ultimate judgment at least twenty-five percent greater than her 2017 proposal, the validity of which Respondent does not dispute.

appeals yet still recover their attorney's fees. § 768.79(1). Section 768.79 is entirely unconcerned with whether a party prevails overall or on a particular motion, count, issue, or appellate proceeding, because its purpose is not remedial. Rather, it acts as "a sanction against a party who unreasonably rejects a settlement offer." *Koppel v. Ochoa*, 243 So. 3d 886, 889 (Fla. 2018) (quotation omitted). Denying reasonable appellate attorney's fees incurred in an unsuccessful appeal to a party that otherwise meets section 768.79's requirements would be contrary to the statute's language and punitive intent. The only way to effectuate the patent purpose of the statute – sanctioning the party that unreasonably refused to settle by making them bear both sides attorney's fees and costs – is to apply the statutory language as written.

This Court should not create a "prevailing" requirement where none exists. As this Court has repeatedly warned, a court interpreting a statute "must give the 'statutory language its plain and ordinary meaning,' and is not 'at liberty to add words . . . that were not placed there by the Legislature.'" *Statler v. State*, 349 So. 3d 873, 879 (Fla. 2022) (quoting *McDade v. State*, 154 So. 3d 292, 297 (Fla. 2014)). The Legislature is fully capable of requiring that a

party "prevails" on appeal or overall before recovering appellate attorney's fees, should it choose to do so.

For example, section 627.428(1), Florida Statutes requires an appellate court to award attorney's fees only "in the event of an appeal in which the insured or beneficiary prevails." This Court held that an insured or beneficiary must prevail in an appeal to be entitled to appellate fees under this statute not because that is a general, unstated requirement for any motion for appellate fees, but because that's what the plain language of this particular statute requires. *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254–55 (Fla. 2006). To read such a requirement into other statutes that do not have similar language, as Respondents appears to argue, would improperly render the language in section 627.428(1) surplusage. In a passage this Court has quoted time and time again, it is an "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Williams v. State*, 232 So. 3d 933, 939 (Fla. 2017).

Moreover, far from requiring a party to prevail in an appeal before being entitled to appellate attorney's fees, section 768.79 provides for "mandatory" attorney's fees "when two conditions are satisfied:" (1) the filing of an offer of judgment that is not accepted by the other party within thirty days, and (2) a final judgment within the applicable statutory damages range. *SE Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 79 (Fla. 2012). Judicially creating a "prevailing" requirement would improperly add a third condition to section 768.79 despite the Legislature's "intentional policy choice to limit judicial discretion in the award of attorney's fees" under this statute. *Id.*

In the only decision Petitioner has found that addresses the issue head on, the Fifth District held that there is no need to determine which party "prevailed" either below or on appeal in order to provisionally grant a motion for appellate fees under section 768.79. *Williams v. Brochu*, 578 So. 2d 491, 495 (Fla. 5th DCA 1991), *disapproved in part on other grounds by White v. Steak & Ale of Fla., Inc.*, 816 So. 2d 546, 551 (Fla. 2002). In *Williams*, the Fifth District awarded appellate fees under section 768.79 to a defendant even though the plaintiff won a judgment on the merits in the trial

court and the defendant lost on one issue on the plaintiff's direct appeal and lost on the only issue raised by the defendant on cross-appeal. The court expressly declined to consider which party was the "prevailing party in this case" because the judgment obtained by the plaintiff was low enough to trigger the defendant's proposal for settlement, reasoning as follows:

> Although we find no case in point, because an appeal is but part of the same action being appealed, we perceive no reason why a defendant's right to recover reasonable costs and attorney's fees under section 768.79(1) does not apply to those incurred on appeal in the same action.

Id.

Consistent with that holding, the Fifth District granted Petitioner's motion for appellate fees even though she did not prevail in upholding 99% of her judgment. Far from an outlier, each of the other district courts (save the Sixth, of course, as it has yet to confront the issue) have expressly aligned themselves with *Williams* in ruling on motions for appellate fees under section 768.79. *Lantigua v. Lopes*, 696 So. 2d 532, 533 (Fla. 3d DCA 1997); *Westfield Ins. Co. v. Mendolera*, 647 So. 2d 223, 224 (Fla. 2d DCA 1994); *Mark C. Arnold Constr. Co. v. Nat'l Lumber Brokers, Inc.*, 642

So. 2d 576, 577 & nn.2–3 (Fla. 1st DCA 1994); *Schmidt v. Fortner*, 629 So. 2d 1036, 1043 n.10 (Fla. 4th DCA 1993).

This Court has also relied on this line of caselaw. In *Frosti v. Creel*, this Court held that "Frosti has satisfied the statutory requirements and is entitled to reasonable attorney fees and costs. The right to attorney fees pursuant to section 768.79 applies to fees incurred on appeal." 979 So. 2d 912, 917 (Fla. 2008). To support this holding, the Court cited *Westfield*, 647 So. 2d at 224, which in turn relied on *Williams*.

Two Second District decisions further support Petitioner's position. In *Shazam Auto Glass, LLC v. State Farm Mut. Auto. Ins. Co.*, the petitioner was an insured company seeking benefits from the respondent, its insurer. 300 So. 3d 302, 303 (Fla. 2d DCA 2020). The court held that both parties were entitled to conditional awards of appellate fees, with the conditions depending on the statutory basis. The successful insured petitioner's motion was granted conditioned on it ultimately prevailing in the litigation and, therefore, being entitled to fees under section 627.428(1). *Id.* The motion by the respondent, the defendant below who did not prevail in the appellate proceedings, was granted pursuant to section

768.79 conditioned on the ultimate judgment being "one of no liability or at least twenty-five percent less than the offer of settlement." *Id.*

Similarly, in *Cassidy v. Reichenbach*, 288 So. 3d 583 (Fla. 2d DCA 2019 (table), neither party prevailed on appeal because the appeal was dismissed as moot. Nonetheless, the court granted both parties' motions for appellate attorney's fees pursuant to section 768.79 conditioned on the trial court determining that the ultimate judgment triggered a right to fees for the proposals each party had served on the other.

A holding that a party must prevail in a particular appellate proceeding to be entitled to section 768.79 attorney's fees incurred in that proceeding would not only read language into that statute, it would also threaten to wreak havoc and further multiply litigation over applying this statute whose very purpose "is to 'reduce litigation costs and conserve judicial resources.' " *Kuhajda v. Borden Dairy Co. of Ala., LLC*, 202 So. 3d 391, 395 (Fla. 2016) (quoting *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010)). If this Court were to hold that a party had to prevail on appeal to get attorney's fees for that appeal, what principled basis

would there be to not require the party prevail on any other part of the litigation to get fees for that part? For example, if a defendant lost, say, a motion for summary judgment but ultimately won a defense judgment at trial, the plaintiff would argue that the defendant should not get fees for litigating that motion. Such arguments would doubtless be made by the party that rejected a reasonable chance to settle the case seeking to minimize its penalty.

But again, section 768.79 is punitive, not remedial. Its purpose is not to compensate the party making the proposal, but to punish the party that rejected the proposal by making it bear the fees of both sides that would have been avoided had it accepted the reasonable settlement demand.

None of this is to say that the party who beats its proposal for settlement but loses an appeal along the way will always get appellate attorney's fees for an unsuccessful appeal. Any attorney fee award under section 768.79 must be "reasonable," and if the appellate court determines that appellate fees were incurred based on an unreasonable determination to take an appeal (or not to confess error), then it is free to determine that no amount of fees should be awarded for that appeal or to direct the trial court to not

award fees incurred in litigating an unreasonable position taken on appeal.

Respondent, however, has never taken the position that Petitioner never should have sought review in this Court. Regardless, the district court in certifying the question and this Court in deciding to use its limited resources in granting review to answer the question have made clear that Petitioner's position (as well as that of the dissenting member of this Court who agreed with Petitioner) was not unreasonable, even if it did not ultimately carry the day.

Alternatively, Prevailing Parties May Recover Appellate Attorney's Fees for Unsuccessful Appeals

While Petitioner has not had the chance to see whatever authority or reasoning Respondent may offer to supports its position, she surmises that it may turn not on the language of section 768.79, but instead on the very different language in section 59.46. That statute provides,

> In the absence of an expressed contrary intent, any provision of a statute or of a contract entered into after October 1, 1977, providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees **to the prevailing party on appeal**.

(emphasis added) Some courts, including the Third District in the *Lantigua* case cited above, 696 So. 2d at 533, have cited this as a statutory basis for awarding appellate fees for a proposal for settlement in addition to section 768.79. And Petitioner preserved the argument that she is entitled to appellate fees under this statute in her motion.

But as the reasoning and opinions of this Court in *Frosti* and the other district court opinions cited above make clear, appellate fees are awarded based on a rejected proposal for settlement under section 768.79 itself. Those opinions all cited section 768.79 as the sole basis for the appellate fee awards with no mention of section 59.46. And with good reason. The latter statute simply does not apply by its plain language because section 768.79 is not a statute "providing for the payment of attorney's fees to the prevailing party." Judge Tanenbaum correctly made this point in his special concurrence in *Seadler v. Marina Bay Resort Condominium Association, Inc.*, 341 So. 3d 354, 355 (Fla. 1st DCA 2021).[2]

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[2] The majority granted appellate fees based solely on section 768.79 and this Court's decision in *Frosti*. *Id.* at 354. He suggested this Court erred in *Frosti* because, in his view, an appeal is not part of a "civil action for damages." *Id.* at 354-55. While the underlying

Accordingly, this Court should reject any argument Respondent makes based on section 59.46.

Alternatively, should this Court decide that section 59.46's "prevailing party" language applies to section 768.79, Petitioner should receive a conditional award for either of two reasons. First, the only way to import section 59.42 to this context is to interpret the phrase "prevailing party" in section 59.42 to include a party that beats its proposal for settlement under section 768.79. To that extent, Petitioner may yet be the prevailing party as nothing in this Court's decision prevents her from beating either or both of her proposals for settlement on remand.

Second, Petitioner is the "prevailing party on appeal" under section 59.42 so long as she ultimately prevails once her lawsuit is finally resolved. While she does not dispute she must beat the proposal for settlement, there should be no dispute that she is going to be the prevailing party in this litigation under the "the significant issues" analysis this Court announced in *Moritz v. Hoyt*

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merits decision in *Seadler* is pending review in this Court, the decision regarding attorney's fees is not. Regardless, Respondent waived any such argument in this case and that issue is beyond the scope of the Court's order for supplemental briefing.

Enters., 604 So. 2d 807, 810 (Fla. 1992). Regardless of the amount of punitive damages awarded on remand, she has already finally prevailed on her claims for liability for and amount of compensatory as well as entitlement to punitive damages.

Parties are entitled to recover reasonable attorney's fees for pursuing unsuccessful discovery, motions, or even claims in the trial court under section 768.79, "and there is no logical reason to have a different rule applicable to appeals." *Aksomitas v. Maharaj*, 771 So. 2d 541, 544 (Fla. 4th DCA 2000) (en banc). The en banc Fourth District held in *Aksomitas* that a party may recover appellate attorney's fees under a contractual fee-shifting provision for an unsuccessful appeal so long as he ultimately prevails. *Id.*

Other district courts, on the other hand, hold that parties may not recover appellate attorney's fees under prevailing party statute or contractual provisions unless they win the appeal for which fees are sought. *Brevard Orthopaedic, Spine & Pain Clinics, Inc. v. Health First Med. Mgmt., Inc.*, 130 So. 3d 274, 275 (Fla. 5th DCA 2014); *E. Coast Metal Decks, Inc. v. Boran Craig Barber Engel Constr. Co.*, 114 So. 3d 311, 314 (Fla. 2d DCA 2013); *Bridgestone/Firestone, Inc. v.*

Herron, 828 So. 2d 414, 418 (Fla. 1st DCA 2002); *Allstar Builders Corp. v. Zimmerman*, 706 So. 2d 92, 92 (Fla. 3d DCA 1998).

Should it reach this issue, this Court should adopt the en banc Fourth District's position in *Aksomitas* even though it is in the minority because the majority position "offers no analysis or rationale, nor does it identify any flaw in the Fourth District Court of Appeal's reasoning in *Aksomitas*." *Brevard*, 130 So. 3d at 275 (Griffin, J., dissenting).

The relevant line of caselaw began with two pre-*Moritz* Fourth District cases, *Gen. Accident Ins. Co. v. Packal*, 512 So. 2d 344, 346 (Fla. 4th DCA 1987) and *Cline v. Gouge*, 537 So. 2d 625, 626 (Fla. 4th DCA 1988). In *Packal* and *Cline*, the Fourth District assumed without analysis that "existing law" provided for appellate attorney's fees for an appeal under a fee-shifting contract provision only when a party both ultimately prevails and prevails in that appeal. *See Packal*, 512 So. 2d at 346 (citing three cases addressing attorney's fees under section 713.29, Florida Statutes, for lawsuits involving mechanic's liens, and a fourth case, *Steinhardt v. E. Shores White House Ass'n, Inc.*, 413 So. 2d 785, 785 (Fla. 3d DCA 1982), dealing

with attorney's fees under section 57.105, Florida Statutes, for unsupported lawsuits); *Cline*, 537 So. 2d at 626 (relying on *Packal*).

Despite the paucity of their reasoning, *Packal* and *Cline*'s holdings were adopted without analysis by the Second District, which dubbed it "the general rule." *Sabina v. Dahlia Corp.*, 678 So. 2d 822, 822–23 (Fla. 2d DCA 1996). The Third District then relied without analysis on *Sabina* in *Allstar*, 706 So. 2d at 92.

The Fourth District re-examined *Packal* and *Cline* en banc in *Aksomitas*, another contractual fee-shifting case. *Aksomitas*, 771 So. 2d at 543–44. The *Aksomitas* court explained that "[i]n *Packal* we did not give any reasons why we were establishing the rule, but we may have been influenced because of the manner in which appellate costs are assessed." *Id.* at 543 (citing Fla. R. App. P. 9.400(a)). The court also acknowledged that the four cases cited in *Packal* "did not involve the same issue as *Packal*." *Id.* at 543 n.1.

The en banc court then reasoned that *Packal* was "inconsistent with the intent of the parties in the present case, who agreed that the parties in litigation should be reimbursed for fees." *Id.* at 544. The court observed that

> *Packal,* which singles out appeals, is also arguably inconsistent with *Moritz,* which holds that prevailing party attorney's fees should be awarded to the party prevailing on the "significant issues." *Moritz* does not authorize the denial of prevailing party attorney's fees for an appeal which the ultimate prevailing party lost somewhere along the line. We don't deny prevailing party attorney's fees to a litigant for services rendered in a trial, where the litigant loses that trial, but ultimately prevails, and there is no logical reason to have a different rule applicable to appeals.

Id. (citation removed). Accordingly, the court "recede[d] from *Packal* and *Cline* to the extent that they hold that a party who ultimately prevails in the litigation cannot be awarded attorney's fees for services rendered on an appeal unless that party also prevailed on the appeal." *Id.*[3] Nonetheless, other districts continued to rely on *Cline*, *Sabina*, and *Allstar*. *See*, *e.g.*, *Bridgestone*, 828 So. 2d at 418 (relying on all three without mentioning *Aksomitas*).

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[3] The *Aksomitas* court also relied in part on "the public policy behind statutes which provide for prevailing party attorney's fees" for its holding. *Aksomitas*, 771 So. 2d at 544. While *Aksomitas* dealt with a fee-shifting contractual provision, the court cited to section 627.428 as an example of a statute whose purpose "is to make the insured whole." *Id.* This Court later disagreed with *Aksomitas*'s analysis of section 627.428 as the statute plainly provides for appellate attorney's fees only when an insured "prevails" on appeal, but notably did not disagree with or disapprove of *Aksomitas*'s primary holding. *Brass*, 944 So. 2d at 253 & n.3; *E. Coast*, 114 So. 3d at 314.

The Second District discussed *Sabina* and *Aksomitas* in 2013. *E. Coast*, 114 So. 3d at 313–14.While acknowledging that *Aksomitas* continued to be good law in the Fourth District, the Second District followed the majority approach solely because it had done so, without analysis or reference to *Aksomitas*, in published orders issued after *Aksomitas*. *Id.* at 314.

Judge Altenbernd, who sat on both the *Sabina* and *East Coast* panels, attempted to defend the majority rule in a separate concurrence. *Id.* at 314–15 (Altenbernd, J., concurring). He acknowledged "that a party who prevails in the trial court can often receive an award of fees for time spent unsuccessfully litigating various pretrial motions so long as the motions were filed and argued in good faith," so "[l]ogically, it may be reasonable to extend that rule to allow a party to receive fees for an unsuccessful prosecution of an appeal from a nonfinal order so long as the party prevails." *Id.* at 315 (Altenbernd, J., concurring). Nonetheless, he adhered to the majority rule because "there are reasons of judicial process that may explain our decisions to place an economic risk upon the party who chooses to commence an unsuccessful appeal from a nonfinal order. Our experience convinces us to continue to

adhere to the traditional approach *even if logic might suggest otherwise*." *Id.* (Altenbernd, J., concurring) (emphasis added).

Judge Altenbernd was right on the first point, but wrong on the second. Neither policy concerns about "judicial process" nor balancing "economic risk" (i.e., picking winners and losers) are to be found among the canons of statutory instruction. Instead, a logical reading of the plain text of the statue in its proper context (here, a clear matter of substance, not process) must guide the analysis. *See also Brevard*, 130 So. 3d at 275 (Griffin, J., dissenting) (making the same point and noting that the only explanation for the Legislature specifying in statutes like section 627.428 that a party must "prevail on appeal" to recover appellate attorney's fees is because the general rule is that prevailing parties are entitled to appellate attorney's fees for unsuccessful appeals because otherwise, "the statutory distinction would have been irrelevant." *Id.* (Griffin, J., dissenting).

For the foregoing reasons, whether pursuant to section 768.79 alone or, alternatively, section 768.79 and section 59.42 together, this Court should provisionally grant Petitioners' motion for appellate attorneys' fees.

Respectfully submitted,

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