IN THE THIRD DISTRICT COURT OF APPEAL
MIAMI, FLORIDA

Case No. 3D19-2196

SAFEPOINT INSURANCE COMPANY,

Appellant,

vs.

JANNIE WILLIAMS,

Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

SafePoint Insurance Company ("SafePoint") appeals from a final judgment entered in favor of its insured, Jannie Williams, and from the trial court's denial of two post-judgment fee motions. The Court should reverse the final judgment because SafePoint was entitled to a directed verdict or new trial. All admissible evidence established that Ms. Williams's losses were caused by an air conditioning leak that occurred over a period of time. These facts fall squarely within the policy exclusion for losses caused by the constant or repeated seepage or leakage of water, which the Court recently enforced in SafePoint's favor. *See Deshazior v. SafePoint Ins. Co*., 3D18-2414, 2020 WL 2549546 (Fla. 3d DCA May 20, 2020). The trial court compounded its error by summarily denying SafePoint's two post-judgment motions for an award of fees and costs, both of which arise from SafePoint's repeated good faith efforts to resolve a case that should never have gone to trial.

Ms. Williams sued SafePoint after discovering water damage in her home caused by an air conditioning leak. Ms. Williams claimed to have noticed the leak when she found wet clothing in her bedroom closet. That closet shares a wall with an air conditioning closet, which Ms. Williams only entered about once a month to change the filter. Her policy excludes losses caused by the "constant or repeated seepage or leakage of water or steam, or the presence of condensation of humidity, moisture or vapor, which occurs over a period of time . . . ." (R. 252, 302, 305).

SafePoint's expert determined that this leak occurred over a period of months. The Court recently affirmed summary judgment in SafePoint's favor where a leak occurred over a similar period of weeks or months. *See Deshazior*, 2020 WL 2549546, at *2. In contrast to SafePoint's expert, Ms. Williams's expert testified repeatedly that he had no opinion on the duration of the leak. Although he attempted to contradict his deposition testimony at trial, SafePoint objected and established that he had no opinion on duration. The Court is familiar with this expert's tactics, as it rejected a similar attempt by the same witness in *Deshazior*, at *3.

In light of the uniform testimony on duration, SafePoint moved for a directed verdict or a new trial after the jury returned a verdict in Ms. Williams's favor. Ms. Williams responded that the verdict could be upheld based upon either her expert's testimony, her own testimony, or the premise that the jury could simply reject SafePoint's expert's testimony. None of these grounds are legally sufficient. First, her expert had no opinion on duration. He conceded this point at trial and during his deposition. Ms. Williams testified only to entering her air conditioning closet once a month. This testimony is insufficient to establish a period of time outside of the exclusion given the month-long gap between filter changes. Finally, the jury could not reject the testimony of SafePoint's expert without a rational basis in the evidence to do so. Because no such basis exists, the trial court should have entered a directed verdict or granted a new trial based upon the manifest weight of the evidence.

The trial court separately erred in denying both of SafePoint's post-judgment fee motions. Although Ms. Williams's claim was subject to an obvious policy exclusion, SafePoint continuously attempted to settle this case and avoid a needless trial. Ms. Williams's expert provided an initial damages estimate of $12,937.74, which inaccurately included losses from another lawsuit Ms. Williams filed against SafePoint. Shortly afterward, SafePoint served an offer of judgment under section 768.79, Florida Statutes, in the amount of $25,000.00 plus a stipulation that Ms. Williams could recover her reasonable attorneys' fees and costs under section 627.428, Florida Statutes. Despite SafePoint's offer to pay double her own damages estimate, Ms. Williams rejected the offer by failing to respond.[1]

On the first day of trial, Ms. Williams's counsel recognized that her estimate was overstated and stipulated to a maximum indemnity award of $2,834.92 if the jury found coverage ($5,234.92 in damages minus her deductible). As a result, Ms.

[1] Ms. Williams was represented in the trial court by the Strems Law Firm, P.A. ("SLF"). On June 5, 2020, The Florida Bar filed a petition for the emergency suspension of Scot Strems, SLF's owner and sole named partner, on grounds that he "sits at the head of a vast campaign of unprofessional, unethical, and fraudulent conduct that now infects courts and communities across the state." *See* Petition for Emergency Suspension, The Florida Bar v. Scot Strems (June 5, 2020) (accessible at https://efactssc-public.flcourts.org/CaseDocuments/2020/806/2020-806_Petition_75827_petition2Dsuspension2028emergency29.pdf). The Bar alleged misconduct including a failure to communicate with clients, such as one instance of a client being unaware a lawsuit was filed on her behalf. (*See id*., ¶ 7, pp. 22–24). On June 9, 2020, the Florida Supreme Court suspended Mr. Strems from practice. *See* June 9, 2020 Order, Case No. SC20-806 (accessible at https://efactssc-public.flcourts.org/casedocuments/2020/806/2020-806_disposition_149781_d31i.pdf).

Williams agreed before trial even began that her maximum recover would be less than one eighth of what SafePoint had offered to settle months earlier.

After the jury returned a verdict in Ms. Williams's favor, SafePoint filed two motions for an award of fees. First, SafePoint sought fees as a sanction under the inequitable conduct doctrine because Ms. Williams's counsel needlessly perpetuated this litigation for no apparent reason other than to accrue additional attorneys' fees. Second, SafePoint sought to enforce its offer of judgment under section 768.79.

The trial court held a non-evidentiary hearing, during which both of SafePoint's fee motions were initially noticed. The parties stated, however, that SafePoint's inequitable conduct motion would be rescheduled for an evidentiary hearing. The trial court acknowledged that the hearing would be reset. Nonetheless, the trial court summarily denied the inequitable conduct motion without the matter being argued or evidence being taken. The Court should reverse this denial of due process, particularly given the egregious facts described in the motion.

The trial court erred just as obviously in denying SafePoint's motion for an award of fees based upon its offer of judgment, albeit for two alternative reasons. As explained below, section 768.79 involves a comparison between the amount offered and the "judgment obtained" at trial. If Ms. Williams's "judgment obtained" was at least 25% less than SafePoint's offer, SafePoint is entitled to recover its fees. A patchwork of decisional authority has interpreted and modified the term

"judgment obtained," beginning with *White v. Steak & Ale of Florida, Inc*., 816 So. 2d 546 (Fla. 2002). These judicial modifications frequently produce unforeseen results that necessitate further judicial clarification. To a greater degree than many if not all of its predecessors, this case calls for such action.

Ms. Williams argued (and the trial court apparently agreed) that *White v. Steak & Ale* requires the trial court to quantify her fees and costs as of the date of the offer and add those amounts to SafePoint's offer and the final judgment before performing section 768.79's comparison. Nothing in the statutes, rule, or case law requires a court to quantify and include these amounts in cases where an offeror, like SafePoint here, stipulates to their recovery. In fact, such a requirement renders section 768.79 a nullity in any case where fees are sufficiently larger than damages. Surely the Legislature did not intend such an absurd result or disparate impact on insurers.

Because SafePoint stipulated to payment of Ms. Williams's fees and costs in addition to its offer to settle her damages claim, the trial court should have compared the offer to the judgment without adding the fees and costs to those amounts. Had the court done so, SafePoint is entitled to recover under its offer of judgment. This result comports with the law and basic sense. From any rational perspective, this case should never have reached trial. SafePoint's offer of judgment was the safeguard to prevent this waste of party and judicial resources. Further, Ms. Williams was deprived of an offer eight times greater than her counsel stipulated she

would recover at trial. The only beneficiary of these choices was her counsel, whose primary pursuit since this lawsuit's inception was the recovery of attorneys' fees.

Even if the Court were to accept Ms. William's methodology, the Court must nonetheless reverse the denial of fees and remand for the alternative reason that neither the parties nor the trial court have actually quantified the amount of Ms. Williams's fees and costs. The trial court could not possibly have applied Ms. Williams's methodology correctly because the trial court lacked sufficient data. At a minimum, remand is necessary to quantify these amounts.

SafePoint respectfully requests that the Court reverse the final judgment and direct entry of a verdict in SafePoint's favor. Alternatively, SafePoint requests that the Court remand for a new trial because the evidence on duration was not conflicting. In addition, SafePoint requests that the Court reverse the trial court's denial of its inequitable conduct motion because the matter has not been properly heard and warrants a complete record. Finally, SafePoint requests the Court reverse the denial of its offer of judgment motion and remand with instructions to grant the motion or, in the alternative, for further proceedings on the amount of fees and costs.

STATEMENT OF THE CASE AND FACTS

SafePoint's Expert Determines that the Air Conditioning Leak Occurred over a Period of Time, While Ms. Williams's Expert Disclaims Any Opinion on Duration

On September 22, 2015, Ms. Williams filed a one-count complaint for breach of her insurance policy seeking damages of $20,449.55 in connection with an air

conditioning leak. (R. 25–26). Ms. Williams claimed to have discovered the leak after noticing wet clothing in her bedroom closet, which shares a wall with her hallway air conditioning closet. (R. 4239:2–6, 4318:9–14, 4336).

Throughout this case, SafePoint's primary defense has centered on the policy's exclusion of coverage for loss caused by the "constant or repeated seepage or leakage of water or steam, or the presence of condensation of humidity, moisture or vapor, which occurs over a period of time . . . ." (R. 252, 302, 305). Coverage is excluded "regardless of any other cause or event contributing concurrently or in any sequence to the loss." (R. 303).

To support her claims, Ms. Williams hired an expert, Mr. Rafael Leyva, whose company provided a repair estimate on July 5, 2018, in the amount of $12,937.74. (R. 252, 629:3–4, 1571, 3267). Mr. Leyva confirmed during his deposition that this was his full estimate. (R. 628:15–29:4). According to Mr. Leyva, this amount would restore Ms. Williams's home to its pre-loss condition. (R. 635:21–23).

More significant than the opinion Mr. Leyva disclosed is that which he disclaimed. Mr. Leyva testified during his deposition that he had no opinion about the duration of the air conditioning leak. (R. 257). This is consistent with the Court's recent observation about Mr. Leyva in *Deshazior*, where he "agreed in his deposition that he was not an expert in evaluating duration." 2020 WL 2549546, at *2. The trial court in this case later acknowledged that Mr. Leyva's opinion did not "narrow

down the duration" during a summary judgment hearing. (R. 1980:14–15).

SafePoint, in contrast, hired Mr. David Ross, P.E., who opined that the damage at Ms. Williams's home "was not consistent with a short term fortuitous leak." (R. 156, 249). Instead, the leak was consistent with long-term moisture exposure over a period of more than nine months. (*Id.*).

Because Mr. Leyva conceded he had no opinion about the duration of the leak, SafePoint moved in limine to preclude his testimony on that subject. (R. 2514, 2519–21). During the hearing on SafePoint's motion, the trial court acknowledged that Mr. Leyva had no opinion on duration and therefore testifying on the subject at trial would be "adding information not previously disclosed." (R. 3450 at 78:8–10). The trial court cautioned plaintiff's counsel not to present opinions beyond those about which Mr. Leyva testified during his deposition. (R. 3451 at 82:11–18).

Before Trial, SafePoint Repeatedly Offers to Settle in an Amount Greater than Ms. Williams's Damages Claim and Estimate

Throughout the litigation, Ms. Williams ignored SafePoint's repeated good faith settlement offers. Months before trial began, on September 14, 2018, SafePoint served an offer of judgment in the amount of $25,000.00 in damages for her indemnity claim.[2] (R. 3214–17). In addition, SafePoint agreed to stipulate to Ms.

[2] Although denominated a "Proposal for Settlement," the term "offer of judgment" is used in this brief for purposes of consistency. *See Starboard Cruise Services, Inc. v. DePrince*, 259 So. 3d 295, 299–302 n.1 (Fla. 3d DCA 2018) ("The terms 'proposal for settlement' and 'offers of judgment' are used interchangeably, however section

Williams's entitlement to an award of attorneys' fees in the event the offer were accepted. (R. 3216). SafePoint later made a second global offer to Ms. Williams to settle in this case and a separate lawsuit she filed for $50,000.00. (R. 3283–85). Ms. Williams rejected both offers by failing to respond, and the parties proceeded to trial.

The Parties Proceed to Trial Primarily on Duration After Ms. Williams Stipulates to a Maximum Damages Recovery Far Less than SafePoint's Settlement Offers

On the day trial began, the parties stipulated on the record that Ms. Williams would recover an indemnity award of $2,834.92 in the event the jury were to find that coverage applied. (R. 4120:9–18). This amount represents a total judgment of $5,234.92 minus a $2,500.00 deductible. (*Id.*). Both sides acknowledged that the case turned primarily on the leak's duration, as Ms. Williams's counsel stated during her opening statement that "the real issue in this case, the only thing that's really for you guys to decide, is the duration of the damages at the house . . . ." (R. 4243:6–9). Similarly, counsel characterized the question for the jury: "How long has the damage at the property been occurring?" (R. 4243:20–21).

On direct examination, Ms. Williams testified that she entered her air conditioning closet after noticing wet clothing in her bedroom closet. (R. 4318:9–14, 4336). She testified that she was unaware of any prior leaks, and that she changed the air conditioning filter on a "regular basis":

A. No, I never had a problem. I changed the A/C filter on a regular

768.79 uses the term 'offers of judgment.'").

> basis, once a month. And sometimes, you know, maybe I may have not changed it, like, the same date of each month, you know, maybe, you know, two, three days later I did, you know, change the A/C filter.

(R. 4319:22–4320:1). Ms. Williams continued that she changed the filter once a month, and she had "never seen water down on the floor." (R. 4320:21–22). She stated that had there been water on the floor, she would have seen it. (R. 4320:23–24). Unlike the air conditioning closet, she entered her clothing closet "[j]ust about every day." (R. 4321:12–13). Water was not visible from the hallway before the door to the air conditioning room was opened. (R. 4341:7–13).

On cross examination, Ms. Williams testified that she did not know the duration of the air conditioning leak:

> Q. Now, I know you testified that you first noticed the water on January 3rd, 2015, but you don't know how long the air conditioning unit had been leaking, correct?
>
> A. Correct. I don't know.
>
> Q. Okay. And you don't know if it had been leaking for a period of time, correct?
>
> A. No, because I didn't -- well, I had never seen a leak before.

(R. 4354:3–11).

On redirect, counsel attempted to create an inference that Ms. Williams would have known of a leak in the air conditioning room because she entered the adjoining storage closet on a daily basis:

> Q. When was the last time you checked the air conditioning unit before this leak occurred?

> A. Okay. Again, it's been a long time since it happened, and I check it -- on a monthly basis, I change the filter. And I don't know whether the leak came right after I checked it and didn't go back in there.
>
> But it couldn't have because the leak was inside the closet, and I go in that closet practically every day since that's where my clothes is kept. Because my closet in my bedroom is so small, I go -- all my clothes and stuff is kept in that closet. And if anything would leak or anything, you know, I would have saw it, but I didn't see anything until then.

(R. 4363:7–19).

Ms. Williams called Mr. Leyva, who testified that the cause of Ms. Williams's loss was the air conditioning leak. (R. 4408:16–17). Notwithstanding SafePoint's efforts to prevent Mr. Leyva from exceeding the scope of his disclosed opinion, he testified improperly that he found nothing "that would be considered long-term damage." (R. 4408:6–8). The trial court sustained SafePoint's contemporaneous objection. (*See* R. 4408). Mr. Leyva later stated that a "one-time air conditioning leak" occurred, to which SafePoint objected. (R. 4410:6–9). The trial court overruled the objection. (R. 4410:10). Shortly afterward, SafePoint's counsel reiterated to the trial judge her pretrial concern that Mr. Leyva would attempt to inject duration testimony and exceed his permitted testimony. (R. 4417:9–21).

Under cross examination, Mr. Leyva clarified that his opinion did not address the duration of the leak:

> Q. You do not know how long the air conditioning unit at Jannie Williams' property was leaking; is that correct?
>
> A. No.

Q. You do know how long it was?

A. No, I don't know.

Q. Okay. So, is it correct, you, Mr. Leyva, do not know how long the air conditioning unit was leaking at Mrs. Williams' property?

A. Not definitely. I can make a guess based on previous experience.

Q. But you do not know, Mr. Leyva?

A. No.

(R. 4425:24–4426:11).

SafePoint called Mr. Ross, who testified that the air conditioning leak "occurred for a duration of more than nine months." (R. 4436:5–7). Mr. Ross based his conclusion on the level of deterioration to the wood and corrosion in the area. (R. 4438:9–4441:5). He explained that the saturation point necessary to create the observed level of deterioration could not result from a single exposure to moisture. (R. 4441:20–24). Instead, the exposure would have to be repeated. (R. 4441:20–4442:2, 4445:25–4446:4).

On cross examination, Ms. Williams's counsel pointed out that some areas of the photographs were black and some areas were brown, with the latter reflecting a lack of moisture exposure. (R. 4442:24–4443:23). In this regard, Mr. Ross relied upon his experience and training to determine the areas of the wood that were subject to long-term moisture exposure. (R. 4467:20–4468:12). Although Ms. Williams's counsel questioned whether certain areas of the wood were brown or black, at least part of the wood was "absolutely black." (*See* R. 4442:15–4445:24, 3090–92).

After resting, SafePoint moved for judgment in its favor based on the policy's exclusion of losses caused by the constant or repeated seepage or leakage of water. (R. 4471:12–14). Ms. Williams's counsel responded that Ms. Williams testified the event occurred only on January 3, 2015, that Mr. Leyva testified (over objection and in limine ruling) to a "one-time event," and that Mr. Ross's testimony was "subjective." (R. 4471:23–4472:4, 4473:1–6). The trial court denied the motion, finding that sufficient testimony was elicited from "Williams, Leyva and even Mr. Ross . . . ." (R. 4476:8–13).

On February 21, 2019, the jury entered a verdict in Ms. Williams's favor. (R. 2951, 4561). The jury found that Ms. Williams's damages were not caused by the contrast or repeated seepage or leakage of water. (R. 2951, 4561).

SafePoint Moves for Directed Verdict or New Trial
Because the Only Evidence on Duration Proved SafePoint's Defense

On March 7, 2019, SafePoint renewed its motion for directed verdict and moved alternatively for a new trial. (R. 3096). SafePoint argued that a directed verdict was appropriate because Ms. Williams offered no evidence as to the duration of the leak, and the only admissible evidence on the subject was that of Mr. Ross. (R. 3098–3101). SafePoint sought a new trial because the manifest weight of the evidence established a long-term leak.[3] (R. 3102–03).

[3] SafePoint subsequently filed an amended motion advancing the same substantive arguments with corrected attachments. (*See* R. 3105).

On August 16, 2019, the trial court heard SafePoint's renewed motion for directed verdict and for new trial. (R. 4588). SafePoint again pointed out that Mr. Ross was the only witness to testify on duration. (R. 4589:15–23). Ms. Williams did not file a response. Instead, Ms. Williams's counsel argued during the hearing the jury may have simply elected not to believe Mr. Ross. (R. 4600:9–13). Ms. Williams's counsel cited *Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013), for the proposition that a case may be submitted to a jury with unrebutted expert testimony if lay testimony exists to rebut it. (R. 4621:20–4622:19). The lay testimony counsel identified was Ms. Williams's statement that she entered the air conditioning room monthly. (R. 4598:22–4599:3, 4623:2–5).

SafePoint Moves for an Award of Fees Based on Ms. Williams's Rejection of SafePoint's Substantially Greater Settlement Offer Before Trial

On the same day the jury entered its verdict, Ms. Williams moved for an award of her attorneys' fees pursuant to section 627.428, Florida Statutes. (R. 3094). SafePoint immediately requested Ms. Williams's fees and costs records. (R. 3318). Receiving no response, SafePoint repeated its request the next day. (R. 3318). On April 10, 2019, SafePoint sent a third request, to which Ms. Williams responded that SafePoint should serve formal discovery. (R. 3318). SafePoint obliged, and Ms. Williams moved for an extension of time to respond. (R. 3318–19). An agreed order provided the extension, but Ms. Williams again moved for an extension. (R. 3319). On its merits, SafePoint opposed Ms. Williams's fee motion because Ms. Williams

stipulated before trial to a recovery vastly less than what SafePoint offered to settle months earlier. (*See* R. 3229).

On March 8, 2019, SafePoint filed its own motion for an award of fees and costs based on Ms. Williams's inequitable conduct (the "Inequitable Conduct Motion"). (R. 3205). SafePoint sought an award of fees because Ms. Williams indefensibly rejected numerous offers to settle the case and avoid a needless waste of resources at trial, most notably the offer of $25,000.00 in damages plus reasonable attorneys' fees. (R. 3205–06). By this offer, SafePoint offered double the amount of Ms. Williams's initial adjusted damages estimate, which was inflated because it encompassed damages at issue in Ms. Williams's separate lawsuit.[4] (R. 3209–10).

SafePoint explained that instead of accepting this offer, Ms. Williams proceeded to trial and stipulated on the record to a maximum indemnity recovery of $2,834.92 – a fraction of the $25,000.00 that SafePoint offered months earlier. (R. 3206; 3267). These facts reveal that the only motivation to proceed to trial was to compound attorneys' fees to the obvious detriment of their client. (R. 3210).

On March 19, 2019, SafePoint filed a second motion for an award of its fees and costs pursuant to its rejected offer of judgment (the "Offer of Judgment Motion"). (R. 3262). SafePoint pointed out that the $2,834.92 maximum indemnity

[4] This explains Ms. Williams's decision on the morning of trial to stipulate to a reduced maximum damages recovery of $5,334.92. (*See* R. 3267).

recovery to which Ms. Williams's counsel stipulated at trial was significantly less than the rejected $25,000.00 indemnity offer. (R. 3264). In fact, the offer was double the amount of the damages estimate that Ms. Williams's counsel substantially reduced on the morning of trial because of overlapping claims in a separate lawsuit against SafePoint. (R. 3267).

In response, Ms. Williams moved for sanctions under section 57.105, Florida Statutes. (R. 3296). Ms. Williams contended that under the Florida Supreme Court's interpretation of section 768.79, Florida Statutes, in *White v. Steak & Ale*, any analysis of the "judgment obtained" had to include the amount of her reasonable fees and costs accrued as of the date of the offer. (R. 3297–98). Notwithstanding that Ms. Williams refused to produce her fee or cost data, Ms. Williams claimed that the Offer of Judgment Motion was frivolous because SafePoint could not perform the calculation under *White v. Steak & Ale*. (R. 3298).

Ms. Williams filed another motion for sanctions under section 57.105, Florida Statutes, directed toward both SafePoint's response to her fee motion and SafePoint's Inequitable Conduct Motion. (R. 3305). Ms. Williams contended that the $25,000.00 pre-suit offer by SafePoint was not in good faith because it so vastly exceeded Ms. Williams's claimed damages. (R. 3306, 3310). SafePoint responded that Ms. Williams continually withheld the fee and cost data that she claimed was necessary to establish fee entitlement. (R. 3318–19). SafePoint also demonstrated

that it could estimate costs as of the offer date, and that the Inequitable Conduct Motion was based on Ms. Williams's counsel's decision to reject a better recovery for the client in favor of inflating a fee claim. (R. 3324).

The Inequitable Conduct Motion and the Offer of Judgment Motion were both scheduled for a non-evidentiary hearing on August 19, 2019. During the hearing on SafePoint's motions for directed verdict and new trial on August 16, 2020, the parties previewed their arguments on the Offer of Judgment Motion. (*See* R. 4638:24–4639:18). For purposes of conducting section 768.79's comparison, the trial court indicated that the "number affects the argument about the [offer of judgment]," and the parties "need those numbers." (R. 4641:17–19, 4640:15–18). The trial court concluded that during the hearing on August 19, the court would determine whether section 768.79's comparison would consider "attorneys' fees and costs or just taxable costs." (R. 4645:20–23). Once the formula was set, the "math problem" could be solved. (R. 4646:24–4647:4). The trial court directed Ms. Williams to be prepared to disclose fee and cost information. (R. 4647:24–4648:3).

The parties returned for the August 19 hearing, and SafePoint's counsel first noted that the Inequitable Conduct Motion would require a subsequent evidentiary hearing to be scheduled. (R. 4684:6–13). Ms. Williams's counsel agreed with that procedure. (*Id.*). Accordingly, the hearing proceeded on SafePoint's Offer of Judgment Motion only. (*See* R. 4684–85).

SafePoint explained its multiple attempts to settle the case by offering amounts that exceeded Ms. Williams's damages estimate. (R. 4685:24–4686:10). Before trial, Ms. Williams's counsel stipulated to a maximum recovery that was a fraction of what SafePoint offered to settle. (R. 4686:12–16). SafePoint's counsel argued that the offer of judgment was enforceable, including its stipulation to pay fees and costs. (*See* R. 4697–99). SafePoint again noted that a subsequent evidentiary hearing would be necessary on the Inequitable Conduct Motion. (R. 4699:6–11). Ms. Williams's counsel also acknowledged "that sounds like we're going to come back for an evidentiary hearing on the inequitable conduct" and "[w]e're coming back for an evidentiary hearing . . . ." (R. 4701:8–11, 19).

Ms. Williams's counsel then conceded that the offer was not ambiguous or unenforceable because it stipulated to Ms. Williams's entitlement to fees and costs. (R. 4704:22–4705:9) ("I'm not arguing that it's ambiguous or unenforceable."). Counsel argued only that the measure of "judgment obtained" under section 768.79 included the amount of Ms. Williams's attorneys' fees. (R. 4705).

SafePoint's counsel responded that a reasonable interpretation of *White v. Steak & Ale* would be to omit the amount of fees from the "judgment obtained" when comparing it to an offer of judgment that stipulated to the recovery of such fees. (R. 4713, 4715–16). The trial court expressed concern that this may permit a defendant to recover fees even where a plaintiff prevails (R. 4717:15–20). SafePoint's counsel

pointed out that such a result fully comports with the Legislature's intent to encourage the realistic assessment and settlement of claims:

> That's exactly what [an offer of judgment] is meant to do. We said you're not going to beat $25,000 at trial as it relates to indemnity, interest and costs. We can't possibly guess your attorneys' fees, so we're just agreeing to it. And had they accepted this, a notice of acceptance, we would have been before Your Honor arguing entitlement. And in addition to the $25,000 check, we would have written a check for whatever their attorneys' fees were.

(R. 4718:8–15).

The trial court noted that the purpose of the hearing was to "make a determination" on whether to include attorneys' fees in the comparison of the offer of judgment to the "judgment obtained." (R. 4723:4–6). The trial court inquired whether there would be a discussion about the Inequitable Conduct Motion. (R. 4725:17–19). SafePoint's counsel stated that the parties should "postpone the inequitable conduct doctrine until we have the fees and costs data to deal with whatever we need to deal . . . ." (R. 4726:1–4). Ms. Williams's counsel did not object, responding only that the purpose of the August 19 hearing was to agree on the offer of judgment formula and produce relevant materials. (R. 4726:6–9). The trial court invited the parties to reset the Inequitable Conduct Motion with his judicial assistant on the fourth floor of the courthouse. (R. 4726:20–25).

The Trial Court Summarily Denies SafePoint's Motion for Directed Verdict or New Trial and Both of SafePoint's Fee Motions

Following the August 19 hearing, the trial court contacted the parties and

announced his ruling telephonically: the trial court would deny both SafePoint's Inequitable Conduct Motion and Offer of Judgment Motion. (*See* R. 3329). SafePoint immediately requested that the trial court hold a status conference to explain its decision to deny the motions given that the amount of Ms. Williams's fees and costs had yet to be determined. (R. 3327). SafePoint also noted that the parties had agreed to postpone hearing the Inequitable Conduct Motion, which the parties had not scheduled or argued. (R. 3329).

On October 14, 2019, the trial court denied SafePoint's motion for directed verdict and new trial. (R. 3334). The trial court entered final judgment in the amount of $3,566.10 (the verdict of $2,843.92 plus pre-judgment interest of $722.18). (R. 3421). The trial court also entered written orders denying SafePoint's Inequitable Conduct Motion and Offer of Judgment Motion. (R. 3417–3420). The trial court entered a written order granting Ms. Williams's motion for an award of fee entitlement and ordering her to produce fee and cost data.[5] (R. 3331–33).

SafePoint appealed the final judgment and the denial of its two fee motions.[6] (R. 3406). On December 6, 2019, SafePoint asked this Court either to advise the

[5] The trial court erred to the extent it concluded Ms. Williams is entitled to recover any fees from the date of SafePoint's offer. (R. 3232–33); *see Scottsdale Ins. Co. v. DeSalvo*, 748 So. 2d 941, 944 (Fla. 1999); *Danis Indus. Corp. v. Ground Improvement Techniques, Inc*., 645 So. 2d 420 (Fla. 1994). This will be raised, if necessary, on review from that ruling.

[6] *See Yampnl v. Turnbeny Isle S. Condo. Ass'n. Inc*., 250 So. 3d 835, 837 (Fla. 3d DCA 2018) (holding that the denial of a motion for an award of fees is a final order).

trial court that it could hear and resolve SafePoint's motion for clarification or, in the alternative, relinquish jurisdiction for that purpose. By Order dated January 7, 2020, the Court denied SafePoint's motion, and the appeal proceeded.

SUMMARY OF THE ARGUMENT

The Court should reverse the trial court's denial of SafePoint's motion for directed verdict or new trial because all admissible testimony on duration establishes a leak occurring over a "period of time." Mr. Ross's testimony was unrebutted by Mr. Leyva, who affirmatively disclaimed any opinion on the subject. Ms. Williams testified only that she frequented her air conditioning closet once a month, which fails to establish a duration outside the scope of the exclusion. The jury was not free to reject Mr. Ross's testimony because there was no conflict in the evidence. The Court should reverse the trial court and enforce the exclusion consistently with the Court's opinion in *Deshazior*, 2020 WL 2549546.

The Court should also reverse the trial court's denial of the Inequitable Conduct Motion. The parties and the trial court all understood this matter was to be heard during a subsequent evidentiary hearing, as required under applicable law. By denying the motion without an adequate hearing, the trial court violated SafePoint's due process rights. The issue must be remanded for a hearing to elicit testimony and evidence about the decision to continue litigating this case to the detriment of all parties, including Ms. Williams.

Finally, the Court should reverse the trial court's denial of SafePoint's Offer of Judgment Motion. Although cases interpreting section 768.79, Florida Statutes, are notoriously difficult to navigate, the solution here is simple. Because SafePoint stipulated to pay Ms. Williams's statutory fees and costs, those amounts should be excluded from section 768.79's comparison. The only fair and logical application of section 768.79 is to compare SafePoint's $25,000.00 offer to the judgment that Ms. Williams obtained. A contrary interpretation would render section 768.79 a nullity whenever fees sufficiently exceed the amount of damages at issue.

This approach would reconcile a significant conflict between section 768.79, Rule 1.442, and a disarray of interpreting case law. The Court would also reconcile the obvious inequity in Ms. Williams's rejection of a $25,000.00 settlement offer only to stipulate to a fraction of that amount as her maximum recovery on the first day of a needless trial. The Court should reverse the order denying SafePoint's Offer of Judgment Motion and remand for entry of an order granting that motion.

Even if the Court does not approve SafePoint's approach, remand remains necessary because the trial court failed to quantify the amount of Ms. Williams's pre-offer fees and costs. Without quantifying that amount, the trial court could not have performed the comparison that Ms. Williams proposed under section 768.79.

ARGUMENT

The Trial Court Erred in Denying SafePoint's Motion for Directed Verdict or New Trial Because All Testimony on Duration Established a Policy Exclusion

The Court reviews the denial of SafePoint's motion for directed verdict *de novo*. *See Kopel v. Kopel*, 229 So. 3d 812, 819 (Fla. 2017). The denial will be affirmed if any reasonable view of the evidence sustains the verdict. *Id.* The mere existence of an issue of material fact, however, is insufficient to withstand a motion for directed verdict. *See Transcapital Bank v. Shadowbrook at Vero, LLC*, 226 So. 3d 856, 863 (Fla. 4th DCA 2017).

The Court reviews the denial of SafePoint's motion for new trial for abuse of discretion. *See Graham Companies v. Amado*, 45 Fla. L. Weekly D877 (Fla. 3d DCA Apr. 15, 2020). A trial court abuses its discretion if the evidence is not conflicting. *See id.*; *Lawrence v. Beaulieu Group*, 123 So. 3d 695, 696 (Fla. 3d DCA 2013). Despite this deference, the Court should reverse the verdict if no rational evidentiary basis supports it. *See Campbell v. Griffith*, 971 So. 2d 232, 235–36 (Fla. 2d DCA 2008); *Pack v. Geico Gen. Ins. Co*., 119 So. 3d 1284, 1287 (Fla. 4th DCA 2013). "A trial judge who properly denies a motion for directed verdict may still grant a new trial because the verdict is against the manifest weight of the evidence." *Mini-Hosp., Inc. v. J.P. Realty, Inc*., 431 So. 2d 323, 323 n.1 (Fla. 3d DCA 1983).

As both parties acknowledged in their opening statements, the trial turned primarily on whether Ms. Williams's claimed loss was excluded because her air

conditioning leak occurred over a "period of time." (R. 3597–3602). The Court recently enforced the same policy exclusion and affirmed summary judgment in SafePoint's favor. In *Deshazior*, which also featured Mr. Leyva's incapacity to testify on duration, the Court affirmed summary judgment for SafePoint because the evidence established that the loss "likely occurred by slow leakage or seepage of water over a period of weeks or months." 2020 WL 2549546, at *2.

This Court's interpretation that a leak lasting for weeks or months occurs over a "period of time" is consistent with other courts to address the subject. *See Hoey v. State Farm Florida Insurance Co*., 988 So. 2d 99, 100–01 (Fla. 4th DCA 2008) (affirming judgment in favor of insurer based upon "continuous or repeated leakage of seepage of water" exclusion where insured testified that leak occurred "for a course of three weeks or so" and evidence indicated leak may have been longer); *accord Brodzinski v. State Farm Fire & Cas. Co*., CV 16-6125, 2017 WL 3675399, at *5 (E.D. Pa. Aug. 25, 2017) ("There is nothing that is ambiguous about the phrase 'over a period of time' when read in the context of the entire exclusion."); *Power v. State Farm Fire & Cas. Co*., 193 So. 3d 471, 475 (La. 5th Ct. App. 2016); *Fifth v. State Farm Ins. Co*., No. 11-7440, 2014 WL 1253542, at *5 (D.N.J. Mar. 25, 2014) (finding "over a period of time" unambiguous and concluding that leakage over the course of one month fell within the exclusion).

The only direct testimony on the issue of duration came from SafePoint's

expert, Mr. Ross. He testified that the air conditioning leak "occurred for a duration of more than nine months." (R. 4436:6–7). He based that conclusion on the level of deterioration to the wood and corrosion. (R. 4438:3–4442:2). He explained that the saturation point necessary to create the level of deterioration he observed in photographs could not result from a single exposure to moisture. (R. 4441:18–4442:2, 4445:14–4446:4). Although Ms. Williams's counsel questioned whether certain areas of the wood in the photographs were brown or black, he testified that part of the wood was "absolutely black." (*See* R. 4442:15–4445:24; R. 3090–92). Mr. Ross's testimony was the only testimony stating the duration of the leak.

In response to SafePoint's motions for directed verdict, Ms. Williams identified three potential grounds upon which the jury could have based its verdict: (1) Mr. Leyva's testimony (over objection and in limine ruling) that the leak was a "one-time event"; (2) Ms. Williams's testimony that she entered the air conditioning closet once a month to change the filter; and (3) even in the absence of contrary testimony, the jury could entirely disregard Mr. Ross's testimony under *Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013). (R. 4472:19–4474:7; 4598:19–4560:13; 4621:18–4622:19). Even a cursory review of these grounds confirms that Mr. Ross's testimony was the *only* admissible testimony on duration, meaning there was no rational basis for the jury to reject it under *Van v. Schmidt*.

Beginning with Mr. Leyva, he stated categorically during his deposition that

he had no opinion about duration. (R. 257, 1980:2–15). SafePoint, concerned that he would attempt to change course at trial, moved in limine to restrict his testimony to his disclosed opinions. (R. 3449 at 75:8–77:4; 3450 at 78:8–10; 3450 at 81:21–24). The trial court was reluctant to believe that Mr. Leyva would engage in such misconduct, but cautioned Ms. Williams's counsel not to elicit any undisclosed opinions. (R. 3451 at 82:11–18).

Unfortunately, SafePoint's concerns proved prescient. Notwithstanding SafePoint's efforts in limine, Mr. Leyva interjected that he found nothing "that would be considered long-term damage." (R. 4408:6–8). The trial court sustained SafePoint's contemporaneous objection. (*See* R. 4408:9–11). Mr. Leyva later stated that a "one-time air conditioning leak" occurred, to which SafePoint immediately objected. (R. 4410:6–7). The trial court overruled the objection. (R. 4410:8–10). For the avoidance of doubt, however, Mr. Leyva stated unequivocally under cross-examination that his opinion did not address duration:

> Q. You do not know how long the air conditioning unit at Jannie Williams' property was leaking; is that correct?
>
> A. No.
>
> Q. You do know how long it was?
>
> A. No, I don't know.
>
> Q. Okay. So, is it correct, you, Mr. Leyva, do not know how long the air conditioning unit was leaking at Mrs. Williams' property?
>
> A. Not definitely. I can make a guess based on previous experience.

Q. But you do not know, Mr. Leyva?

A. No.

(R. 4425:24–4426:11).

It should be noted that Mr. Leyva's failed attempt to reverse his testimony was not an isolated occurrence. The Court rejected a nearly identical attempt by Mr. Leyva in *Deshazior*, where Leyva likewise testified in his deposition that he had no opinion about duration. 2020 WL 2549546, at *2 ("He also agreed in his deposition that he was not an expert in evaluating duration."). At summary judgment, the trial court rejected Mr. Leyva's contradictory affidavit in which he claimed that damages were the result "of a one-time sudden and accidental event . . . ." *Id.*, at *2 n.5. This Court affirmed summary judgment in SafePoint's favor because Mr. Leyva's shifting testimony was legally insufficient to rebut SafePoint's evidence on duration.

Turning to Ms. Williams, her counsel focused on her statement that she changed her air conditioning filter once a month. (R. 4598:22–4599:3, 4623:2–5). Specifically, Ms. Williams testified that she entered the air conditioning closet approximately once a month for this purpose:

> A. . . . I changed the A/C filter on a regular basis, once a month. And sometimes, you know, maybe I may have not changed it, like, the same date of each month, you know, maybe, you know, two, three days later I did, you know, change the A/C filter.

(R. 4319:22–4320:1).[7] She assumed that the leak had not been occurring over time because she claimed not to have seen water on the floor while changing the filter. (R. 4320:21–23).

On cross examination, however, Ms. Williams acknowledged that she did not know the actual duration of the leak:

> Q. Now, I know you testified that you first noticed the water on January 3rd, 2015, but you don't know how long the air conditioning unit had been leaking, correct?
>
> A. Correct. I don't know.
>
> Q. Okay. And you don't know if it had been leaking for a period of time, correct?
>
> A. No, because I didn't -- well, I had never seen a leak before.

(R. 4354:3–11).

Taken as true and construed in her favor, Ms. Williams's testimony states that the leak could have occurred continuously for any period of time between filter changes. In other words, the leak could have started at any point after Ms. Williams's monthly visit (plus or minus "two, three days later") to the air conditioning closet. Her testimony does not narrow this period or provide any estimate as to the leaks' true duration. Because such a period of weeks would trigger the exclusion, Ms. Williams's testimony does not establish that the leak did not occur

[7] In her deposition, Ms. Williams testified that she changes the filters "every month and a half, two months . . ." (R. 1654:9–11).

"over a period of time." *See Deshazior*, 2020 WL 2549546, at *2 (period of weeks or months); *Hoey*, 988 So. 2d 99 (insured testifies to leak occurring over approximately three weeks). In fact, Ms. Williams recognized as much on redirect when she testified, "I don't know whether the leak came right after I checked it and didn't go back in there." (R. 4363:11–12).

Finally, Ms. Williams's counsel argued that the jury was free simply to reject Mr. Ross's testimony if they desired. Ms. Williams's cited *Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013), for the appropriate legal standard. (R. 4621:20–4622:19). In that case, the Florida Supreme Court described a jury's ability to reject uncontroverted expert testimony: "the jury could properly reject the experts' uncontroverted testimony, *provided that the jury's rejection of the uncontroverted expert testimony was premised on some reasonable basis in the evidence.*" *Van v. Schmidt*, 122 So. 3d at 246–47 (emphasis added); *see Boyles v. A & G Concrete Pools, Inc*., 149 So. 3d 39, 48 (Fla. 4th DCA 2014) ("The jury's ability to reject expert testimony must be founded on some reasonable basis in the evidence."); *Beach Cmty. Bank v. First Brownsville Co*., 85 So. 3d 1119, 1121 (Fla. 1st DCA 2012) ("However, the court's discretion in rejecting expert testimony cannot be exercised arbitrarily and requires some reasonable basis in the evidence."). As noted above, there was no other competent testimony or evidence on duration. The jury could not reject Mr. Ross's testimony absent such a conflict.

Because no reasonable view of the testimony could sustain a verdict against SafePoint, the trial court erred in denying SafePoint's motion for directed verdict. Similarly, the trial court abused its discretion in denying SafePoint's motion for new trial because no rational evidentiary basis exists to support the verdict.

The Trial Court Erred in Perfunctorily Denying the Inequitable Conduct Motion Without a Hearing and After the Parties Agreed to Its Postponement

The trial court erred in summarily denying both of SafePoint's post-trial fee motions. First, the trial court erred in denying SafePoint's Inequitable Conduct Motion when all parties agreed during the August 19, 2019, hearing that the motion would be re-set for a subsequent evidentiary hearing. This deprivation of due process is particularly striking given the underlying facts, which involve blatantly disregarding the client's best interests. The Court reviews this issue *de novo*. *See Thomas v. Cromer*, 276 So. 3d 69, 72 (Fla. 3d DCA 2019) ("We review a claim of deprivation of due process de novo.").

Where a trial court resolves a motion without an adequate hearing, the court deprives the movant of due process. *See Miami-Dade County Bd. of County Com'rs v. An Accountable Miami-Dade,* 208 So. 3d 724, 734 (Fla. 3d DCA 2016) ("It is well established that 'the granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process.'") (quoting *Celebrity Cruises, Inc. v. Fernandes*, 149 So. 3d 744, 750 (Fla. 3d DCA 2014)).

This follows from the premise that the movant's due process rights include "the right to 'a full hearing before a court having jurisdiction of the matter, the right to introduce evidence at a meaningful time and in a meaningful manner, and judicial findings based upon that evidence.'" *State, Dept. of Fin. Services v. Branch Banking & Tr. Co*., 40 So. 3d 829, 833 (Fla. 1st DCA 2010) (quoting *Brinkley v. County of Flagler*, 769 So. 2d 468, 472 (Fla. 5th DCA 2000)). "General principles of due process prohibit entry of an order affecting the parties' legal rights before the parties have been given a full opportunity to litigate all factual and legal issues pertaining to those rights." *Id.*

SafePoint's Inequitable Conduct Motion was based on bad faith litigation misconduct, which requires detailed fact-finding by the trial court. *See Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002) (motions for sanctions based on bad faith conduct, like the Inequitable Conduct Motion, require "an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees."); *see, e.g.*, *Santini v. Cleveland Clinic Florida*, 65 So. 3d 22, 39 (Fla. 4th DCA 2011) (". . . [T]he trial court abused its discretion in that it was required to permit Dr. Santini and McCoy an evidentiary hearing with respect to a finding of bad faith—whether the sanctions were issued under the trial court's inherent authority or on its own initiative under section 57.105.").

In light of this evidentiary requirement, on August 19, 2019, both parties acknowledged at the outset of the hearing that the Inequitable Conduct Motion would be re-noticed for a subsequent evidentiary hearing. (R. 4683:25–4684:18). The parties again noted during each of their substantive arguments that the Inequitable Conduct Motion would be re-set for a later date. (R. 4699:7–11, 4701:8–11) (including Ms. Williams's counsel stating that it "sounds like we're going to come back for an evidentiary hearing on the inequitable conduct" and "[w]e're coming back for an evidentiary hearing . . . ."). This is consistent with the trial court's observation that the intended purpose of the August 19 hearing was to "make a determination" about the proper formula to apply to SafePoint's Offer of Judgment Motion. (R. 4723:4–6).

At the conclusion of the hearing, the trial court inquired whether there would be any argument on the Inequitable Conduct Motion. (R. 4725:17–19). The parties once more confirmed that a subsequent hearing would be scheduled after discovery progressed on the issue of Ms. Williams's fees and costs. (R. 4725:20–4726:9). The trial court invited the parties to schedule that hearing with the court's judicial assistant after leaving the hearing. (R. 4726:20–25).

Inexplicably, the trial court denied the Inequitable Conduct Motion without an opportunity to present evidence or argument at the agreed-upon subsequent hearing. Because this denial deprived SafePoint of due process, the Court should

reverse the denial of the Inequitable Conduct Motion and remand for a sufficient evidentiary hearing. Such a hearing is essential to the trial court's full consideration of SafePoint's motion and SafePoint's preservation of its rights.

Although the trial court did not hold a hearing, take evidence, or state any basis for its ruling, SafePoint notes that the facts amply support the relief it seeks. Since 1920, the Florida Supreme Court has recognized that sanctions are appropriate against an attorney who pursues unnecessary litigation in order to increase his or her fees. *Moakley*, 826 So. 2d at 223–24 (discussing *U.S. Sav. Bank v. Pittman*, 86 So. 567, 571–72 (Fla. 1920)). An award of fees in SafePoint's favor would be appropriate because Ms. Williams's counsel rejected a settlement offer nearly eight times the amount that counsel stipulated to recover before trial began. (R. 3214–17, 4120:9–18). SafePoint's settlement offer would have provided Ms. Williams with eight times what her counsel agreed to recover for her, and would have done so nearly two years ago. (*See* R. 628–29, 635:21–23, 1571, 3267).

These facts warrant a full and fair opportunity for all parties to present evidence because the only beneficiary of this decision was Ms. Williams's counsel. *See Pittman*, 86 So. at 571–72 ("The action of attorney Bull in bringing up the demurrer for settlement was not done in the interests of the complainant, but done by him solely for his interest, and for no benefit of his client."). The Florida Supreme Court has suspended the owner and sole named partner of that law from practice for

alleged misconduct that includes a dereliction of the duty to keep clients informed. *See* Petition for Emergency Suspension ¶ 5, pp. 22–24; June 9, 2020 Order, Case No. SC20-806. The only explanation offered for Ms. Williams's rejection was that she was "skeptical" about SafePoint's "exaggerated" offer. (R. 3306). It strains all credulity to argue that Ms. Williams was concerned about receiving too large of a settlement payment. *See The Florida Bar v. Patrick*, 67 So. 3d 1009, 1013 (Fla. 2011) (observing that when an attorney counseled his client to reject a settlement offer because the offer would not cover the entirety of the attorney's fees, "the referee found that [the attorney's] explanations of the rejection of the offer 'defy reason, logic, and an attorney's duty to zealously represent a client.'"). SafePoint is justifiably concerned that Ms. Williams may have never seen the offer at all.

The Court should reverse the denial of the Inequitable Conduct Motion and direct the trial court to hear the matter at an evidentiary hearing, as the parties agreed.

The Trial Court Erred in Denying SafePoint's Offer of Judgment Motion

The Court should reverse the trial court's denial of the Offer of Judgment Motion, or, alternatively, remand for further proceedings. The trial court should have granted the Offer of Judgment Motion because SafePoint offered eight times the amount Ms. Williams stipulated was her maximum recovery at trial. Ms. Williams argued that the amount of her fees and costs should be quantified and included within section 768.79's mathematical comparison in order to skew the

result in her favor. To the contrary, no such requirement exists in the statute, implementing rule, or case law. In fact, including fees and costs disparately impacts parties and renders the statute a nullity in cases where attorneys' fees are comparatively larger than damages. To avoid this disparate impact and ensure the statute serves its intended purpose, SafePoint stipulated in its offer that it would pay Ms. Williams's fees and costs, separate and apart from her damages. By doing so, SafePoint removed the amount of fees and costs from the statutory comparison. Under this approach, SafePoint is clearly entitled to recover its fees under the offer of judgment statute and the Court should reverse the trial court's denial of the Offer of Judgment Motion.

Even if the trial court accepted Ms. Williams's argument and included her fees and costs in the comparison under section 768.79, the trial court lacked sufficient information to complete the analysis. Because the amount of Ms. Williams's fees and costs as of the date of the offer has not been determined, the trial court incorrectly denied SafePoint's motion. The Court should remand for a determination of those amounts and a proper comparison under the statute.

The Trial Court Should Have Granted SafePoint's Offer of Judgment Motion

Where an offer of judgment stipulates to the offeree's entitlement to statutory or contractual fees and costs, a court should not include those amounts when performing section 768.79's mathematical comparison. Because the comparison

under the statute examines the difference between the offer and the recovery as a percentage rather than an absolute number, inclusion of fees and costs in any case where attorneys' fees are comparatively larger than a party's damages skews the result and renders the statute a nullity. Such a result completely undercuts the Legislature's intent to encourage the settlement of lawsuits and disparately impact parties like SafePoint. *See White v. Steak & Ale*, 816 So. 2d at 550. Indeed, including fees and costs in a case like this enables an offeror to evade the consequences of refusing a reasonable offer by unilaterally escalating its own fees and thereby manipulating the statutory comparison.

Section 768.79's disparate impact in cases like this originates not from any language in the statute or implementing rule, but from the case law. Section 768.79 defines the term "judgment obtained," underlined in the following excerpt, and describes the process for comparing it to a party's offer of judgment:

> (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 percent less than the amount of the offer, the defendant 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, 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.
>
> For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.[8]

Rule 1.442, Florida Rules of Civil Procedure, delineates certain procedural requirements for a valid offer or proposal:

> (2) A proposal shall:
>
> (A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;
>
> (B) state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F);
>
> (C) state with particularity any relevant conditions;
>
> (D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;
>
> (E) state with particularity the amount proposed to settle a claim for

[8] Notably, the Legislature directs that the Florida Supreme Court's guidelines will apply in section 768.79(6)(a)-(b). The Legislature did not invite the Florida Supreme Court to define or expand upon the term "judgment obtained."

> punitive damages, if any;
>
> (F) state whether the proposal includes attorneys' fees and whether attorneys' fee are part of the legal claim; and
>
> (G) include a certificate of service in the form required by Florida Rule of Judicial Administration 2.516.

Neither section 768.79 nor Rule 1.442 address the impact of a party's statutory or contractual fee entitlement on the comparison between an offer of judgment and the "judgment obtained" under section 768.79. That is, neither instruct a court to include those amounts within the "judgment obtained," and, if so, at what point in time to fix those amounts. The Florida Supreme Court took up this issue in *White v. Steak & Ale*, which modified the statutory definition of "judgment obtained" to add fees and costs that had accrued as of the date of an offer:

> In summary, we conclude that the "judgment obtained" pursuant to section 768.79 includes the net judgment for damages and any attorneys' fees and taxable costs that could have been included in a final judgment if such final judgment was entered on the date of the offer. Thus, in calculating the "judgment obtained" for purposes of determining whether the party who made the offer is entitled to attorneys' fees, the court must determine the total net judgment, which includes the plaintiff's taxable costs up to the date of the offer and, where applicable, the plaintiff's attorneys' fees up to the date of the offer.

816 So. 2d at 551 (emphasis added). Note, the underlined language does not appear within the statutory definition underlined above. *See* Fla. Stat. § 768.79(6).

In the years following *White v. Steak & Ale*, courts have struggled greatly to reconcile this judicial modification with section 768.79's language and legislative

intent. *See Pacheco v. Gonzalez*, 254 So. 3d 527, 535 (Fla. 3d DCA 2018), *review denied*, SC18-1940, 2019 WL 4165124 (Fla. Sept. 3, 2019) ("While [p]roposals for settlement are intended to end judicial labor, not create more, . . . the opposite has occurred, and proposals for settlement . . . have instead generated significant ancillary litigation and case law.") (citations and quotations omitted); *Paduru v. Klinkenberg*, 157 So. 3d 314, 318 (Fla. 1st DCA 2014) (". . . [M]any jurists have lamented that the offer of judgment statute has had the unfortunate and unintended consequence of spawning additional litigation, even though the statute was enacted to have exactly the opposite effect."); *Embroidme.com, Inc. v. Travelers Prop. Cas. Co. of Am*., 12-81250-CIV, 2015 WL 419879, at *2 n.3 (S.D. Fla. Jan. 22, 2015) ("Florida case law regarding proposals for settlement has seemingly veered away from the actual wording of the rule and statute, however."); Trawick, Fla. Prac. & Proc. § 25:17 (2019-2020 ed.) ("The ramifications of this rather complex rule and the court decisions construing it have made proposals for settlement so technical that the rule has lost a great deal of its utility and has increased judicial labor with additional litigation. It should be simplified or repealed.").

This case demonstrates perhaps the most illogical and inequitable result of *White v. Steak & Ale*'s expansion to date: in any situation where attorneys' fees are comparatively larger than a party's damages at the time of an offer, section 768.79 provides no remedy if fees are quantified and included in the comparative figures.

This anomaly results from *White v. Steak & Ale* grafting pre-offer fees and costs onto the "judgment obtained" under section 768.79.

Part of the basis for the Florida Supreme Court's ruling was to reconcile section 768.79 with the court's earlier holdings in *Danis Industries Corp. v. Ground Improvement Techniques, Inc*., 645 So. 2d 420 (Fla. 1994) and *Scottsdale Insurance Co. v. DeSalvo*, 748 So. 2d 941, 943 (Fla. 1999). Both of those case discuss an insurer's ability to limit an insured's recovery of fees under section 627.428 by making a settlement offer that exceeds the insured's recovery at trial. *See DeSalvo*, 748 So. 2d at 944. Both hold that to determine whether an insurer has limited its exposure under section 627.428, a trial court must add to the final judgment the amount of an insured's fees and costs as of the date of the offer. *Id.* The court decided to apply the same analysis in *White v. Steak & Ale,* but foresaw no problem with that expansion:

> Although *Danis* and [*DeSalvo*] involved an award of attorneys' fees under section 627.428, we see no reason why this rationale should not apply equally to offers or demands made under section 768.79(6).

White v. Steak & Ale, 816 So. 2d at 551 n.5.

The court did not look carefully enough at the mathematical differences inherent in that expansion. The unforeseen problem results from the mathematical difference between comparisons under section 627.428 and section 768.79. Section 627.428, *Danis*, and *DeSalvo* all involve a straight-line numerical comparison of the

insured's recovery to the insurer's settlement offer. It matters only which number is greater. Section 768.79, in contrast, involves comparing amounts against each other to arrive at a percentage difference. Instead of merely deciding which number is greater, a plaintiff's "judgment obtained" must be at least 25% less than a defendant's offer to trigger the defendant's entitlement under section 768.79. In performing this calculus, it becomes mathematically certain that a defendant will be unable to make a viable offer of judgment if fees and costs are quantified, included in the comparison, and substantially larger than a plaintiff's damages. This anomaly occurs whenever fees and costs greatly exceed the amount of damages at issue. In such circumstances, even dramatic differences between a defendant's offer to settle damages and a plaintiff's ultimate recovery at trial have no impact because fees and costs dominate the statutory comparison.

The following table illustrates this alarming result. The first two rows approximate the facts in this case. The first row omits the amount of fees from the analysis. A comparison of SafePoint's offer to Ms. Williams's recovery reveals that the judgment obtained is 80% less than the offer. Using this methodology, SafePoint is entitled to recover under section 768.79. If the $200,000 in fees Ms. Williams's counsel seeks are included with the offer and the recovery, those fees dwarf the amount of damages and skew the corresponding percentage difference. Once fees are included, the percentage difference drops to less than 9%. Subsequent rows

reflect the outcome where fees are quantified, included, and the amount of damages recovered at trial becomes increasingly less than the offer.[9]

Offer	**Fees at Time of Offer**	**Damages Judgment at Trial**	**Comparison if Fees Are Quantified and Included**	**Outcome**
$25,000 in damages, "plus fees"	Entitlement stipulated, therefore not quantified and included in comparison	$5,000 (1/5th of pre-trial offer)	Offer: $25,000 vs. "Judgment Obtained": $5,000	"Judgment obtained" is 80% less than the offer, offeror is entitled to recover under section 768.79
$25,000 in damages, "plus fees"	$200,000	$5,000 (1/5th of pre-trial offer)	Offer: $225,000 vs. "Judgment Obtained": $205,000	"Judgment Obtained" only 9% less than offer, no entitlement
$25,000 in damages, "plus fees"	$200,000	$1,000 (1/25th of pre-trial offer)	Offer: $225,000 vs. "Judgment Obtained": $201,000	"Judgment Obtained" only 11% less than offer, no entitlement

[9] Costs are omitted for simplicity and because of the inter-district conflict discussed below in *Petri Positive Pest Control, Inc. v. CCM Condominium Association, Inc*., 271 So. 3d 1001 (Fla. 4th DCA 2019), *review granted*, SC19-861, 2019 WL 5704171 (Fla. Nov. 5, 2019).

$25,000 in damages, "plus fees"	$200,000	$1 (1/25,000th of pre-trial offer)	Offer: $225,000 vs. "Judgment Obtained": $200,001	"Judgment Obtained" only 11% less than offer, no entitlement

If fees and costs are quantified and included in the statutory comparison, section 768.79's viability depends entirely on the proportional relationship between the plaintiff's fees and damages.[10] In the final example of a *de minimus* damages judgment accompanied by substantial pre-offer fees, an offer 25,000 times greater than the ultimate judgment is insufficient to trigger the offeror's entitlement under section 768.79. The offeror in each of these examples extends a settlement offer multiple times greater than the offeree's damages, which should end the litigation.

[10] The dominating effect of fees, if quantified and included in the statutory comparison, can be seen mathematically by assuming F = fees at the date of the offer, O = damages offered in an offer of judgment, and J = the damages judgment. If fees are quantified and included under *White v. Steak & Ale*, excluding costs and interest, the "judgment obtained" is F + J. A defendant is entitled to recover where:

$$\frac{F+J}{F+O} \leq .75$$

When F becomes significantly larger than O and J, those terms become increasingly insignificant—regardless of O's magnitude in comparison to J. This can be seen from calculating the limit as F increases. Because 1 > .75, :

$$\lim_{F\to\infty}\left(\frac{F+J}{F+O}\right) = \lim_{F\to\infty}\left(\frac{1+\left(\frac{J}{F}\right)}{1+\left(\frac{O}{F}\right)}\right) = 1$$

Because 1 > .75, a defendant cannot recover when fees dominate the comparison.

In each example, however, the offeror is denied the benefit of section 768.79 merely because the offeree has accumulated a proportionally larger amount of attorneys' fees. The offeree, in turn, insulates itself from exposure under section 768.79 simply by increasing its fee claim.[11] In each of these examples, all parties except the offeree's counsel would fare better had the offer been accepted. When attorneys' fees single-handedly drive the course of litigation, the tail wags the dog.

As SafePoint argued in the trial court, however, there exists a remarkably simple solution to this complex problem. If an offeror stipulates to the offeree's fee and cost entitlement, those amounts should be excluded from the comparison under section 768.79. (*See* R. 4713:6–17, 4715–16). Neither section 768.79, Rule 1.442, nor *White v. Steak & Ale* necessarily require that the amount of fees and costs be quantified and included within an enforceable offer. *See Coconut Key Homeowners Ass'n, Inc. v. Lexington Ins. Co*., 649 F. Supp. 2d 1363, 1371–72 (S.D. Fla. 2009) ("Plaintiff now argues that this Offer should be stricken because it 'fails to offer any specific amount of attorney fees.' However, Florida Statute § 768.79 does not require that each independent element of an Offer of Judgment be specifically

[11] In first-party insurance litigation, a plaintiff's attorney typically recovers at the conclusion of the litigation under section 627.428, Florida Statutes, or by contingency. These attorney-client relationships rarely require the client to pay monthly invoiced amounts. As a result, fees accrued at the date of the offer are unlikely to reflect amounts actually paid by the client. This arrangement incentivizes elevated fee claims without the backstop of meaningful client review.

quantified."). Nor is a party restricted from simply stipulating to the other party's statutory entitlement to fees and costs as of the date of the offer, as SafePoint did here. *See Wisconsin Life Ins. Co. v. Sills*, 368 So. 2d 920, 922 (Fla. 1st DCA 1979), *dismissed*, 373 So. 2d 461 (Fla. 1979) ("A defendant would require prophetic powers to estimate the amount of fees to be awarded for his adversary's services.").

In fact, only Rule 1.442 proscribes the technical form of an offer, which must state only whether the offer includes attorneys' fees and whether fees are part of the legal claim. The same rule requires only that the total amount of the offer be stated, and that any amount of punitive damages be stated with particularity. *See* Rule 1.442(2), Florida Rules of Civil Procedure; *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc*., 849 So. 2d 276, 278–79 (Fla. 2003) ("This rule was amended in 1996 to require greater detail in settlement proposals."); *R.J. Reynolds Tobacco v. Ward*, 141 So. 3d 236, 238 (Fla. 1st DCA 2014) (reversing entitlement under offer that stated it included punitive damages but failed to quantify them). By requiring that amounts other than attorneys' fees be quantified, the Rule indicates that fees need *not* be stated with particularity. *See Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) ("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another."); *Sills*, 368 So. 2d at 921–22 ("The terms of Rule 1.442 do not require that the defendant concede liability for attorneys' fees, either in fact or in amount.").

If an offeror stipulates to the offeree's entitlement to fees and costs, removing those items from the mathematical comparison under section 768.79 avoids the disparate impact in cases like this. Requiring their inclusion in section 768.79's mathematical comparison serves no purpose under that statute when an offeror stipulates to their recovery. An offeree is assured of its reasonable fee recovery and need not evaluate fees as a component of the proposed settlement amount.

SafePoint is not alone in struggling with the Florida Supreme Court's ad hoc formulation. Perhaps recognizing some of the difficulties it has created, the Florida Supreme Court recently accepted review of *Petri Positive Pest Control, Inc. v. CCM Condominium Association, Inc*., 271 So. 3d 1001 (Fla. 4th DCA 2019), *review granted*, SC19-861, 2019 WL 5704171 (Fla. Nov. 5, 2019). There, the Fourth District addressed whether *White v. Steak & Ale*'s "judgment obtained" included post-offer prejudgment interest. In that case, the plaintiff's entitlement turns on whether the relatively small amount of post-offer interest is included within the "judgment obtained." *Id.* at 1002.

The Fourth District and SafePoint agree on the source of their respective problems: "A review of the supreme court case law shows that the court does appear to have gone beyond the statutory language to create a different threshold for attorney's fee awards under the statute." *Id.* at 1004. The Fourth District also agrees that the Florida Supreme Court's attempt to reconcile section 768.79 with *Danis* and

DeSalvo was inapposite because "section 627.428 is not the same as section 768.79."[12] *Id.* at 1006. Although the Fourth District grappled with a conceptually distinct problem, that problem shares its origin with SafePoint's.

Finally, the public policy underlying section 768.79 militates in favor of only one outcome. Merely by accruing enough attorneys' fees, a party should not be insulated from the consequence of rejecting an offer of judgment that should end the litigation. The Legislature provided a remedy to deter this result. SafePoint invoked that remedy by offering double Ms. Williams's initial damages estimate and eight times what she later stipulated to recover at trial. Ms. Williams's decision to reject SafePoint's settlement offers, presumably at counsel's direction, is precisely what the Legislature intended to prevent. Allowing a sufficiently inflated fee claim to nullify section 768.79 contorts the Legislature's intent, burdens the courts with unnecessary litigation, and promotes nothing but abject gamesmanship by incentivizing the accrual of attorneys' fees. As noted above, these concerns are deepened in the context of first party insurance litigation because a plaintiff's counsel is unlikely to have expected payment from the plaintiff for pre-offer fees.

[12] The Fourth District certified conflict and a question of great public importance. *See id.* at 1002 ("Were we writing on a clean slate, we would interpret the statute as written and include post-offer prejudgment interest. But as the supreme court opinions appear to exclude post-offer prejudgment interest in the judgment obtained, we are bound to follow the supreme court."). The Florida Supreme Court accepted jurisdiction, the case is fully briefed, and argument is set on October 7, 2020.

These pre-offer amounts are likely only ever submitted for payment to a defendant if the plaintiff prevails under section 627.428.

Considering the insurance carrier's perspective, section 768.79 serves as an indispensable safeguard against ever-rising attorneys' fee claims. In many first party coverage disputes, damages are relatively small in comparison to fee claims. Fees frequently become both the focus of the litigation and, in many cases, the primary deterrent to settlement. "The underlying purpose of the offer of judgment statute includes the early termination of litigation by encouraging realistic assessments of the claims made." *U.S. Sec. Ins. Co. v. Cahuasqui*, 760 So. 2d 1101, 1104 (Fla. 3d DCA 2000). The *claim* should be the focus where the carrier stipulates to an insured's fee and cost entitlement.

Here, SafePoint encouraged a realistic assessment of the claim by offering Ms. Williams double her damages estimate and eight times more than she stipulated to recover as trial began. (*See* R. 628–29 (Mr. Leyva discussing his estimate); 1571 (estimate), 3214–17 (offer of judgment); 4120:9–18 (pretrial stipulation)). Ms. Williams would have received that payment years before she will recover a fraction of it, if at all. This result is manifestly unfair to SafePoint, the trial judge, the jurors, and the administrative personnel whose time and resources were consumed with a trial that should have never occurred. In equal measure, the result is unfair to Ms. Williams. The only beneficiary here is her counsel. SafePoint employed the

Legislature's remedy to avoid this unjust result. The Court should hold that SafePoint is entitled to recover its reasonable fees and costs. *See Jacksonville Golfair, Inc. v. Grover*, 988 So. 2d 1225, 1227 (Fla. 1st DCA 2008) ("The legislature created a property right to an award of attorneys' fees where a party complies with section 768.79, Florida Statutes.").

At a Minimum, The Trial Court's Denial of the Offer of Judgment Motion Was Premature Because Ms. Williams's Fees and Costs Have Not Been Determined

If the Court disagrees with SafePoint and requires that fees and costs be quantified under section 768.79 and *White v. Steak & Ale*, the Court must nonetheless remand for the trial court to determine those amounts. In the trial court, Ms. Williams argued that it was necessary to quantify fees and costs under section 627.428, and then add those amounts to the judgment under *White v. Steak & Ale*. (*See* R. 4702:18–4705:13, 4716:16–19) ("So, I'm adding -- to determine whether or not I beat your proposal for settlement, I'm going to add my costs, and I'm going to add my attorneys' fees as of [the date of the offer], and it's going to be more than $25,000."). Indeed, Ms. Williams sought sanctions on the grounds that SafePoint could not calculate the "judgment obtained" without quantifying her reasonable attorneys' fees and costs as of the date of the offer. (*See* R. 3296–97).

The parties have yet to litigate (and the trial court has yet to determine) the amount of Ms. Williams's reasonable fees and costs under section 627.428. (*See* R. 3331 (ordering the parties to conduct discovery and schedule an evidentiary hearing

on the issue)). Until these amounts are determined, the trial court could not have applied Ms. Williams's formulation and compared the "judgment obtained" to SafePoint's offer. Accordingly, under Ms. Williams's formulation, the trial court's denial was premature and remand is necessary to compute these amounts.

Because the trial court did not determine the amount of Ms. Williams's fees and costs at the time of the offer, it was mathematically impossible to solve 768.79's "math problem" using the calculus she proposed. (*See* R. 4646:24–4647:4, 3327). If the Court rejects SafePoint's argument above and considers the numerical amount of Ms. Williams's fees and costs, the Court must remand for a determination of that amount before determining SafePoint entitlement *vel non* under section 768.79.

CONCLUSION

SafePoint requests that the Court reverse the final judgment and direct entry of a directed verdict or new trial in SafePoint's favor because the evidence on duration was not conflicting. SafePoint also requests that the Court reverse the denial of its Inequitable Conduct Motion because an evidentiary hearing is necessary under these facts. Finally, SafePoint requests the Court reverse the denial of its Offer of Judgment Motion and remand with instructions to grant the motion or, alternatively, to determine the amount of Ms. Williams's recoverable fees and costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2020, I electronically filed the foregoing by using the Florida E-Portal system, which will transmit it by e-mail to all counsel of record.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Initial Brief is Times New Roman in 14 Point Type.

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