

**THE SUPREME COURT OF THE STATE OF FLORIDA**

**TALLAHASSEE, FLORIDA**

**CASE NO. SC02-428**

**SALLY SARKIS,**

**Petitioner,**

**-vs-**

**ALLSTATE INSURANCE  
COMPANY,**

**Respondent.**

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**BRIEF OF AMICUS CURIAE**  
**FLORIDA CHAMBER OF COMMERCE**  
**ON BEHALF OF RESPONDENT ON THE MERITS**

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## **INTRODUCTION**

The Florida Chamber of Commerce is a corporation organized and existing under the laws of the State of Florida. The Chamber has approximately 6000 members and is part of a Federation of 89 chambers representing approximately 107,500 members. The members include corporations, partnerships, sole proprietorships and other business entities that are subject to the jurisdiction of the courts of this State.

The Chamber's mission is "to be the leader in the formulation and advocacy of sound, public policy for Florida business." Among the Chamber's specific concerns in carrying out its mission is to make sure the courts of this State follow the laws as passed by the Legislature in a fair and just manner. The Chamber wishes to appear as Amicus Curiae because this case will be the first occasion for this Court to apply the standards for fee awards provided in Fla. Stat. Sec. 768.79 (7)(b) with respect to offers of and demands for judgment. The Chamber's members that get involved in litigation have a strong interest in preserving proper incentives to act reasonably in responding to statutory offers of and demands for judgment, which is the purpose of this statute. Allowing use of contingency risk multipliers under this statute would burden the right of access to the courts by deterring those with the strongest cases from insisting on adjudication rather than settlement.

Pursuant to Section 9.370 of the Florida Rules of Appellate Procedure, the Florida Chamber of Commerce has secured the consent of all parties to appear as amicus curiae in this case.

### **STATEMENT OF THE CASE**

The Chamber adopts the statement of respondent, Allstate Insurance Company.

### **STATEMENT OF FACTS**

The Chamber adopts the statement of respondent, Allstate Insurance Company.

## **SUMMARY OF ARGUMENT**

Section 768.79 provides a procedure for parties to offer or demand judgment and encourages reasonable consideration of such offers or demands by allowing an award of fees if the recipient of the offer or demand rejects it and the party making the offer or demand then obtains a judgment 25% better than the offer or demand. In determining entitlement to fee award, no consideration is given to whether the rejection of the offer or demand was reasonable.

But the amount of a fee award must reflect the purpose of the authorizing statute, and the statute here reinforces that requirement by providing specific guidance on what factors should be considered. The purpose of this statute is not to make competent counsel available, but to provide proper incentives to act reasonably in responding to statutory offers of and demands for judgment. A fee award pursuant to this statute is a sanction, and allowing the use of multipliers for the risk of not prevailing would create perverse incentives by imposing the largest sanctions in precisely those cases where the rejection of the offer or demand was most reasonable.

Both the purpose of the statute and the specific guidelines provided by the legislature call for fee awards to be reduced where the rejection of the offer or demand was reasonable. Multiplying such awards when, against the odds, the offer or demand is bettered would be improper. Moreover, such use of multipliers

would improperly burden access to the courts by pressuring defendants with the best cases to settle rather than seeking to have those cases adjudicated.

## QUESTION PRESENTED

Does Section 768.79 authorize enhancement for contingency risk of an attorney fee sanction imposed for rejection of an offer of or demand for judgment, where the very existence of serious contingency risk shows that the rejection of the offer or demand had a reasonable basis?

## ARGUMENT

### **I. STATUTORY FEE AWARDS MUST BE CONSISTENT WITH THE PURPOSE AND TERMS OF THE FEE AUTHORIZING STATUTE.**

Court awarded attorney fees play an important role in the administration of justice.<sup>1</sup> But, if such fees are not determined in a proper manner, such awards “result[] in a species of social malpractice that undermines the public in the bench and bar,” “brings the court into disrepute[,] and destroys its power to perform adequately the function of its creation.”<sup>2</sup> So courts must take great care in determining the proper factors to use in making any fee award.

This Court’s decision in *Standard Guaranty Insurance Co. v. Quanstrom*<sup>3</sup> refined the standards for determination of reasonable attorney fees to be awarded under the usual types of statutes and contract provisions that provide for award of fees to a prevailing party. But *Quanstrom* explicitly recognized that the standards it

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<sup>1</sup> *Florida Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1149 (Fla. 1985).

<sup>2</sup> *Id.* at 1149-50.

<sup>3</sup> *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

prescribed would not apply under every statute. Rather, any statutory fee award must be based on “criteria and factors ... consistent with the purpose of the fee authorizing statute.”<sup>4</sup> Moreover, “the legislature may be very specific in setting the criteria that can be considered.”<sup>5</sup> “Different types of cases require different criteria to achieve the legislative or court objective in authorizing the setting of a reasonable attorney’s fee.”<sup>6</sup> Thus, the *Quanstrom* standards apply only where neither the purpose nor the terms of the authorizing statute indicate otherwise. Here, both the purpose and the terms of Section 768.79 call for a different approach.

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<sup>4</sup> *Id.* at 834.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 833.

**II. UNLIKE THE STATUTES DISCUSSED IN *QUANSTROM*, SECTION 768.79 IS NOT DESIGNED TO ENFORCE PUBLIC POLICY OR TO ASSURE ACCESS TO COMPETENT COUNSEL, BUT RATHER TO PENALIZE PARTIES WHO FAIL TO ACT REASONABLY IN CONSIDERING OFFERS OF OR DEMANDS FOR JUDGMENT.**

*Quanstrom* considered fee awards based on two types of provisions. First, there were public-policy enforcement statutes. The “major purpose” of this type of fee-shifting statute “is to provide an incentive for private enforcement of ... statutory policy” and to supply aggrieved citizens with the financial resources to undertake such enforcement, while vindicating their own rights.<sup>7</sup> In ordinary tort and contract cases, there is no public policy to be enforced, but a fee-shifting provision allows one with a meritorious claim or defense to assert that claim or defense at no ultimate cost. A party who must pay fees out of the recovery or savings from successful litigation is not made whole.<sup>8</sup> The fee award compensates for the cost of enforcing the litigant’s rights. In such cases, a primary objective is “to provide access to competent counsel for those who could not otherwise afford it.”<sup>9</sup> It is this objective which justifies use of contingency risk multipliers.

The purposes of a fee award imposed for rejecting an offer of or demand for judgment are different from those of the types of statutes addressed in *Quanstrom*. Section 768.79 is not concerned with enforcing statutory public policy or with

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<sup>7</sup> *Id.* at 832.

<sup>8</sup> *Id.* at 834.

<sup>9</sup> *Bell v. U.S.B. Acquisition Co.*, 734 So. 2d 403, 411 (Fla. 1999).

providing access to competent counsel. Rather, its purpose is “the early termination of litigation by encouraging realistic assessments of the claims made.”<sup>10</sup> The statute is to “serve as a penalty if the parties did not act reasonably and in good faith in settling lawsuits.”<sup>11</sup> It seeks to “reduce both litigation costs and demands on the state’s judicial system by imposing sanctions, including attorney’s fees, on those parties who unreasonably reject an offer of settlement.”<sup>12</sup>

To be sure, entitlement to some fee award exists whenever a rejected award is bettered by at least 25%.<sup>13</sup> But the legislature has directed that existence or lack of reasonable grounds for rejecting the offer or demand be considered in setting the amount of the penalty. One consideration, as pointed out by Petitioners and the Academy of Florida Trial Lawyers, is “reasonable . . . attorney’s fees, calculated in accordance with the guidelines promulgated by the Supreme Court.”<sup>14</sup> This

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<sup>10</sup> *U.S. Security Ins. Co. v. Cahuasqui*, 760 So. 2d 1101, 1104 (Fla. 3<sup>rd</sup> DCA 2000); *National Healthcorp Ltd. Partnership v. Close*, 787 So. 2d 22,26 (Fla. 2<sup>nd</sup> DCA 2001); see *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989) (“the underlying policy of the rule was to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process”).

<sup>11</sup> *Goode v. Udhwani*, 648 So. 2d 247, 248 (Fla. 4<sup>th</sup> DCA 1994); FLA. STAT. 768.79(1) (referring to “the penalties of this section”).

<sup>12</sup> *Pirelli Armstrong Tire Corp. v. Jensen*, 752 So. 2d 1275, 1278 (Fla. 2<sup>nd</sup> DCA 2000) (concurring and dissenting opinion, analyzing legislative history).

<sup>13</sup> *TGI Friday’s Inc. v. Dvorak*, 663 So. 2d 606, 611-13 (Fla. 1995).

<sup>14</sup> FLA. STAT. 768.79(6)(a) & (b), quoted Petitioner’s Brief on the Merits (“Pet. Br.”), 6-7; Brief of Amicus Curiae the Academy of Florida Trial Lawyers on Behalf of Petitioner on the Merits (“AFTL Br.”), 5.

language does appear to reference Rule 4-1.5 of the Florida Rules of Professional Conduct, which *Quanstrom* interpreted (and, perhaps even *Rowe* and *Quanstrom* themselves<sup>15</sup>). But the statute does not stop there. In critical language, all but ignored by Petitioners and the AFTL, the statute continues by providing that

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

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

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

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<sup>15</sup> The AFTL argues that the legislature effectively adopted the *Quanstrom* standards. (AFTL Br. 6) But it largely ignores the effect of subdivision (7), quoted in text, which clearly calls for departure from the *Quanstrom* standards. The AFTL notes the existence of the subdivision (7) factors (AFTL Br. 10), but does not address their implications for use of contingency multipliers.

6. The amount of additional delay, cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.<sup>16</sup>

Petitioners ignore this part of the statute in addressing the appropriateness of contingency multipliers, discussing it only in arguing that the statute is constitutional.<sup>17</sup> Indeed, they devote almost a page and a half to quoting subdivisions (6) and (7) of the statute, but cut off the quote in the middle of a sentence, to omit the six factors listed in subdivision (7)(b). Only a few of the courts that have approved contingency multipliers under § 768.79 have even noted the existence of the factors listed in subdivision (7)(b).<sup>18</sup> They have ignored the way those factors alter the *Quanstrom* analysis as regards § 768.79.

But this statutory language must be considered and given effect. Legislative intent and policy concerns must control the courts' construction of statutes.<sup>19</sup> Courts determine the Legislative intent by examining the plain and ordinary meaning of the statutory language.<sup>20</sup> Courts do not have the power to construe an

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<sup>16</sup> FLA. STAT. 768.79(7).

<sup>17</sup> (Pet. Br. 21-22).

<sup>18</sup> *Island Hoppers, Ltd. v. Keith*, 820 So. 2d 967, 973 (4<sup>th</sup> DCA 2002); *Collins v. Wilkins*, 664 So. 2d 14, 15 (Fla. 4<sup>th</sup> DCA 1995).

<sup>19</sup> *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)

<sup>20</sup> *Mayo Clinic Jacksonville v. Department of Professional Regulation*, 625 So. 2d 918 (Fla. 1st DCA 1993).

unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.<sup>21</sup>

This Court has already construed the relevant statutory language. In *TGI Friday's Inc. v. Dvorak*,<sup>22</sup> this Court recognized that the statute makes the reasonableness of the parties' conduct in connection with the statutory offer/demand process a key factor in determining the amount of the fee award sanction for rejecting an offer/demand that is bettered at trial:

[T]he wording of the statute as a whole leaves no doubt that the reasonableness of the rejection is irrelevant to the question of entitlement [to a fee award]. However, it is equally clear that these enumerated factors are intended to be considered in the determination of the amount of the fee to be awarded. Thus, in a given case, the court could justifiably reduce the amount of the attorney's fee to be assessed against a severely injured plaintiff who suffered an adverse verdict after rejecting a small settlement offer. By the same token, the court could reasonably conclude that a defendant with a small liability potential who rejected a large settlement offer should pay only a reduced fee even though the verdict ultimately exceeded the offer by more than 25%.<sup>23</sup>

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<sup>21</sup> *American Bankers Life Assurance Company v. Williams*, 212 So.2d 777, 778 (Fla. 1st DCA 1968) (emphasis added).

<sup>22</sup> *TGI Friday's Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995).

<sup>23</sup> *Id.* at 613.

The last sentence of this passage establishes that the trial court here could properly have denied any contingency multiplier and even could have reduced the lodestar fee on the facts presented here. Sally Sarkis had recovered policy limits of \$20,000 from the tortfeasor and demanded another \$10,000 from her own insurer, Allstate Insurance Company. Because she had a history of prior accidents and preexisting conditions and any recovery would be subject to an offset for PIP benefits paid, her own evidence shows that her prospects of bettering her \$10,000 demand at trial were, in the words of the Fifth District, “not a promising case.”<sup>24</sup> So Allstate had good reason to reject this demand. Against what she herself portrays as long odds, she managed to recover a net judgment of \$87,700, \$77,700 more than she had demanded.<sup>25</sup>

Sarkis’s own lawyers argued that, in light of PIP recovery and the tort limits, they would have a tough time bringing a UM claim, because this was the second accident Sarkis was involved with in four years.<sup>26</sup> (They later discovered that Sarkis had been involved in eight additional accidents, though that evidence did not go to the jury.<sup>27</sup>) Sarkis had treated with many doctors since 1992; she had had

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<sup>24</sup> *Allstate Ins. Co. v. Sarkis*, 809 So. 2d 6, (Fla. 5<sup>th</sup> DCA 2001).

<sup>25</sup> The gross verdict was \$122,700, which was reduced by \$20,000 for the recovery against the tortfeasor and \$15,000 for PIP and medical payments benefits previously paid. (R. 943-44; 1000-1001)

<sup>26</sup> (R. 42-43)

<sup>27</sup> (R. 43-44)

low back and leg problems since the birth of her child in 1980 and had headaches due to a craniotomy in 1975.<sup>28</sup> Her doctor could not distinguish between injuries from the 1992 accident and the 1996 accident at issue in this case.<sup>29</sup>

The resulting causation issues meant that Allstate had only “a small liability potential,” so there were excellent grounds for rejecting Sarkis’s demand for settlement. In the words of the statute, the “then apparent merit” of Sarkis’s claim was weak and the “questions of fact” were (at worst) close. Nonetheless, the trial court determined that a reasonable hourly rate for Sarkis’s lawyer was \$350 and that 167 hours had been properly spent on the claim after rejection of Sarkis’s demand for judgment.<sup>30</sup> This produced a lodestar fee of \$58,450. The court also applied a contingency multiplier of 1.5,<sup>31</sup> bringing the award to \$87,675. The Fifth District Court of Appeals held that the statute did not permit use of a contingency risk multiplier, but otherwise affirmed the award.

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<sup>28</sup> (R. 43)

<sup>29</sup> (R. 46-47)

<sup>30</sup> (R 1028-31)

<sup>31</sup> (R 1028-31)

### III. THE PURPOSE AND TERMS OF SECTION 768.79 PRECLUDE USE OF A CONTINGENCY MULTIPLIER TO INCREASE A LODESTAR FEE.

Courts that have approved contingency multipliers under § 768.79 have given no effect to the factors listed in subdivision (7)(b). They have treated the addition of those factors as leaving the *Quanstrom* analysis fully applicable to awards under § 768.79.<sup>32</sup> But that ignores the differences in statutory purpose and this Court's admonition that any statutory fee award must be based on "criteria and factors ... consistent with the purpose of the fee authorizing statute."<sup>33</sup> As this Court recognized in *TGI Friday's*, § 768.79 fees are intended to be a sanction, whose size is to be assessed in light of the reasonableness of the parties' conduct in connection with the statutory offer/demand.

*Quanstrom's* admonition to apply fee award statutes in ways that further the purposes of such statutes accords with more general rules of statutory construction. Courts should construe statutes in light of the purpose to be

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<sup>32</sup> Even if the *Quanstrom* analysis were fully applicable, it would be difficult (if not impossible) to make the evidentiary showing necessary to support such a multiplier. See, e.g., *Strahan v. Gauldin*, 756 So. 2d 158 (Fla. 5<sup>th</sup> DCA 2000), *rev. disp'd*, 800 So.2d 225 (Fla. 2001); *Internal Med. Specialists, P.A. v. Figueroa*, 781 So. 2d 1117 (Fla. 5<sup>th</sup> DCA 2001); *Tetrault v. Fairchild*, 799 So. 2d 226, 234-(Fla. 5<sup>th</sup> DCA 2001) (Harris, J. concurring). Because the District Court concluded in this case that contingency multipliers are never permissible under Section 768.79, it did not reach the question whether the showing that would be necessary under *Quanstrom* had been made.

<sup>33</sup> *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828, 834 (Fla. 1990).

achieved by the legislation.<sup>34</sup> Every Legislative act should have a logical and practical intent.<sup>35</sup> The manifest intent of the legislature will prevail over any literal import of words used by it.<sup>36</sup>

As this Court interpreted the statutory language here in *TGI Friday's*, the fact that a defendant has only “a small liability potential” shows that the rejection of a large demand had a reasonable basis and supports a reduced fee award. That is directly the opposite of the logic behind a contingency multiplier, where the “small liability potential” would indicate a large risk and call for a large multiplier.

Because a fee award is intended to serve as an incentive for reasonable consideration of a statutory offer/demand and a sanction for unreasonable conduct, an analysis centered on encouraging attorneys to pursue claims and compensating them for the risk of doing so produces results contrary to the purposes of the statute. As Professor Leubsdorf has pointed out, use of contingency multipliers “can produce bizarre and unfair results”:

The smaller the plaintiff's prospects of success, the greater the contingency bonus paid to his persevering lawyer. Yet this means that the defendant must pay more

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<sup>34</sup> *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Services, Inc.*, 444 So. 2d 926 (Fla. 1983).

<sup>35</sup> *Silver Sands of Pensacola Beach, Inc. v. Pensacola Loan & Sav. Bank*, 174 So.2d 61 (Fla. 1<sup>st</sup> DCA 1965).

<sup>36</sup> *Worden v. Hunt*, 147 So.2d 548 (Fla. 2<sup>nd</sup> DCA 1962).

when the balance of precedent and evidence was relatively favorable to him. On the other hand, when the plaintiff was certain of success because the defendant's position was hopeless or frivolous, the defendant pays no contingency bonus.<sup>37</sup>

Such consequences arguably can be justified when the purpose of the award is to create incentives for enforcement or to assure access to competent counsel.<sup>38</sup> But they make no sense at all when the purpose is to sanction unreasonable conduct. The largest sanctions would be imposed on the most reasonable conduct, contrary to the clear purpose of the legislature.

Here, the requirement to construe the statute here in accordance with the legislative purpose is reinforced by the rule that "statutes awarding attorney's fees must be strictly construed."<sup>39</sup> Strict construction requires denial of a contingency multiplier that the statute nowhere authorizes and implicitly precludes.

Other rules of statutory construction lead to the same conclusion. Courts will not interpret a statute to produce an unreasonable conclusion or one contrary

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<sup>37</sup> John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 488-89 (1981). This article and its approach to contingency multipliers was relied upon by this Court in *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985) (citing article); *id.* at 1151 (capping multiplier, as suggested 90 YALE L.J. at 505-12).

<sup>38</sup> 90 YALE L.J. at 497-501.

<sup>39</sup> *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n*, 539 So. 2d 1131, 1132 (Fla. 1989); *Wilmington Trust Co. v. Manufacturers Life Ins. Co.*, 749 F.2d 694, 700 (11th Cir. 1985).

to the statutory purpose.<sup>40</sup> Courts will read all parts of a statute together to achieve a consistent whole.<sup>41</sup> Imposing magnified penalties for the most reasonable refusals to settle is an absurd result, contrary to the purpose of the statute, and ignores key statutory language.<sup>42</sup>

Moreover, contingency multipliers are unlikely to benefit defendants very often, because contingency fees for defense are difficult to structure and rarely used.<sup>43</sup>

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<sup>40</sup> *Worden v. Hunt*, 147 So.2d 548 (Fla. 2<sup>nd</sup> DCA 1962).

<sup>41</sup> *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992).

<sup>42</sup> If greater fees are truly necessary to attract competent counsel in demand for judgment situations, there is a better solution than finding the necessary money by mulcting defendants who reasonably reject settlement demands. If the contingent fees now permitted by FLA. R. PROF COND 4-1.5 are inadequate to attract competent counsel, counsel could be permitted to agree with their clients that they would get both the agreed contingency fee and the fee award. Here, counsel would have gotten \$30,080 in extra fees beyond those due under the demand for judgment plus a statutory award up to \$58,450, potentially exceeding the \$87,675 award here. Counsel would thus get the very prospect of an enhanced fee that is said to be necessary here, but at the expense of the client who benefited from the lawyer's skill and risk-taking--not from the opponent who quite reasonably rejected the demand and should be subject to only a modest sanction.

<sup>43</sup> This fact raises equal protection problems with allowance of contingency multipliers, problems that have been found to render any such allowance unconstitutional. *Pirelli Armstrong Tire Corp. v. Jensen*, 752 So.2d 1275, 1277-78 (Fla. 2<sup>nd</sup> DCA 2000) (Casanueva, J., dissenting from allowance of multiplier), *adopted*, *Allstate Ins. Co. v. Sarkis*, 809 So.2d 6, 7 (5<sup>th</sup> Dist. 2001). The Chamber understands that this issue is being addressed in other briefs and does not feel the need to offer further discussion here.

Finally, allowing contingency risk multipliers in § 768.79 cases may well undermine the statutory objective to “to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process”<sup>44</sup> Plaintiffs in cases like this one, with low chances of success but potentially large recoveries may make demands, not with an eye to settling, but just high enough to hope they will be rejected and create the possibility of a fee bonanza if the claim does succeed. Such an approach might risk disallowance of any fee, should the court find the offer to have been in bad faith. But bad faith findings are unlikely for offers near the borderline of reasonableness, so there is significant room for tactics that will either decrease the prospect of settlement or drive settlement values up, through the fear of magnified fee awards, like the one here.

While the statute leaves fee awards largely to the discretion of trial courts, that discretion must be exercised in a way consistent with the purpose of the statute. Because use of contingency multipliers is directly contrary to those purposes, no such multiplier can be permitted on the facts here or on any other set of facts that might justify a multiplier under the *Quanstrom* standards. In the only reported opinion that has truly analyzed the implications of Section 768.79(7)(b) regarding award of contingency multipliers, Judge Harris concluded that “it seems clear that the legislature did not contemplate a contingency fee multiplier. Such a

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<sup>44</sup> *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989).

multiplier is inconsistent with the policy encompassed within section 768.79(b).’<sup>45</sup>

Both the language and purpose of the statute and its construction in *TGI Friday’s* support that conclusion, and this Court should so hold.

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<sup>45</sup> *Tetrault v. Fairchild*, 799 So. 2d 226, 234-(Fla. 5<sup>th</sup> DCA 2001) (Harris, J. concurring).

**IV. SECTION 768.79 SHOULD NOT BE CONSTRUED TO AUTHORIZE CONTINGENCY RISK MULTIPLIERS, BECAUSE DOING SO WOULD IMPROPERLY BURDEN DEFENDANTS' CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS IN PRECISELY THOSE CASES WHERE THEY HAVE THE MOST JUSTIFICATION FOR SEEKING ADJUDICATION RATHER THAN SETTLEMENT.**

Both the U.S. and the Florida Constitutions guarantee litigants the right to free access to the courts.<sup>46</sup> This right to free access to the court is an aspect of a citizen's right to petition the government and is one of the "most precious of the liberties" safeguarded by the U.S. Constitution.<sup>47</sup> The right to free access to the courts includes the right to pursue one's defenses vigorously.<sup>48</sup> The Constitutional right of access to the courts cannot be impaired unless the Legislature can provide a reasonable alternative remedy or an overpowering public necessity for the impairment and no alternative method of meeting such public necessity.<sup>49</sup>

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<sup>46</sup> *G.B.B. Investments, Inc v. Hinterkopf*, 343 So.2d 899, 901 (Fla. 3<sup>rd</sup> Dist. 1977) (holding that the financial precondition imposed by the lower court before a defendant could assert a counterclaim violated the defendant's constitutional right to free access to the courts under Florida constitution).

<sup>47</sup> *BE & K Construction Co. v. National Labor Relations Board*, 122 S. Ct. 2390, 2396 (2002); *United Mine Workers of America v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).

<sup>48</sup> *G.B.B. Investments, Inc.*, 343 So.2d at 901 (requiring payment of a sum of money into the registry of the court unrelated to filing fees as a condition for defending a lawsuit has long been declared constitutionally impermissible), citing *Hovey v. Elliott*, 167 U.S. 409 (1897).

<sup>49</sup> *Kluger v. White*, 281 So.2d 1 (Fla. 1973) (invalidating a statute requiring a minimum of \$550 property damages arising from an automobile accident before bringing an action).

Obviously conscious of the need to avoid improper burdens on the right to defend, the legislature crafted Section 768.79 to strike a delicate balance between encouraging reasonable settlement conduct and avoiding undue burdens on the right to pursue substantial defenses. Allowing the use of the contingency risk multiplier would tip the delicate balance. It would pressure defendants with the most meritorious defenses (hence, the highest contingency risk multiplier), to forgo their right to pursue their defenses vigorously. The application of the contingency risk multiplier would improperly burden a defendant's right to free access to the court.

Whenever possible, statutes are to be construed to preserve their constitutionality and to avoid even substantial questions regarding their validity.<sup>50</sup> This rule, too, requires a holding the Section 768.79 does not authorize contingency multipliers.

## CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed and cases permitting contingency multipliers under § 768.79 disapproved.

YOUNG, VAN ASSENDERP, VARNADOE

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<sup>50</sup> *Carter v. Sparkman*, 335 So.2d 802, 805 (Fla. 1976); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

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**CERTIFICATE OF TYPE SIZE AND STYLE**

The Florida Chamber of Commerce hereby certifies that the type size and style of the Brief of Amicus Curiae is Times New Roman 14pt.

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