

**IN THE SUPREME COURT OF FLORIDA  
CASE NO. - SC02-428  
DCA CASE NO. - 5D00-2217**

**SALLY SARKIS,**

**Petitioner,**

**vs.**

**ALLSTATE INSURANCE COMPANY,**

**Respondent.**

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**ANSWER BRIEF**

**OF**

**RESPONDENT, ALLSTATE INSURANCE COMPANY**

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**FOWLER WHITE BOGGS BANKER**

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**CHARLES W. HALL, ESQUIRE**

**Fla. Bar No. 326410**

**501 First Avenue North, Suite 900(33701)**

**Post Office Box 210**

**St. Petersburg, FL 33731**

**and**

**RICHARD A. SHERMAN, ESQUIRE**

**Fla. Bar No. 184170**

**1777 So. Andrews Avenue, Ste. 302**

**Ft. Lauderdale, FL 33316**

**Attorneys for Respondent, ALLSTATE**



## **CERTIFICATE OF INTERESTED PERSONS**

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

1. Allstate Insurance Company  
(Defendant/Respondent)
2. Philip M. Burlington, Esquire of  
CARUSO, BURLINGTON, BOHN & COMPIANI, P.A.  
(Amicus Curiae for Academy of Florida Trial Lawyers)
3. CARUSO, BURLINGTON, BOHN & COMPIANI, P.A.  
(Counsel for Amicus Curiae for Academy of Florida Trial Lawyers)
4. Theresa K. Clark, Esquire of  
Law Offices of Patricia E. Garagozlo  
(Trial Counsel for Defendant/Respondent)
5. Fowler White Boggs Banker P.A.  
(Appellate Counsel for Defendant/Respondent)
6. Charles W. Hall, Esquire of  
FOWLER WHITE BOGGS BANKER P.A.  
(Appellate Counsel for Defendant/Respondent)
7. Graham, Moletteire & Torpy, P.A.  
(f/k/a Graham, Moletteire, Tuttle & Torphy, P.A.)  
(Trial Counsel for Plaintiff/Petitioner)
8. Law offices of Patricia E. Garagozlo  
(Trial Counsel for Defendant/Respondent)
9. Law Offices of Richard A. Sherman, P.A.  
(Appellate Counsel for Defendant/Respondent)

10. Julie H. Littky-Rubin, Esquire of  
LYTAL, REITER, CLARK, FOUNTAIN & WILLIAMS, LLP  
(Appellate Counsel for Plaintiff/Petitioner)
11. Lytal, Reiter, Clark, Fountain & Williams, LLP  
(Appellate Counsel for Plaintiff/Petitioner)
12. Robert M. Moletteire, Esquire of  
GRAHAM, MOLETTEIRE & TORPHY, P.A.  
(Trial Counsel for Plaintiff/Petitioner)
13. Sally Sarkis  
Plaintiff/Petitioner)
14. Richard A. Sherman, Esquire of  
Law Offices of Richard A. Sherman, P.A.  
(Appellate Counsel for Defendant/Respondent)
15. Young Van Assenderp, Varnadoe & Anderson, P.A.  
(Counsel for Amicus Curiae The Florida Chamber of Commerce)
16. Roy C. Young, Esquire  
(Counsel for Amicus Curiae The Florida Chamber of Commerce)
17. Carlton Fields, P.A.  
(Counsel for Amicus Curiae The Florida Defense Lawyers Association)
18. Wendy F. Lumish, Esquire  
(Counsel for Amicus Curiae The Florida Defense Lawyers Association)

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## **PRELIMINARY STATEMENT**

This appeal addresses whether a contingency risk multiplier may be used in awarding attorney fees pursuant to Florida Statute Section 768.79. The Petitioner, SALLY SARKIS, was the plaintiff in the trial court. She will be referred to as “SARKIS” in this brief. The Respondent, ALLSTATE INSURANCE COMPANY, was the defendant in the trial court, and it will be identified as “ALLSTATE.”

References to the transcript of the fee hearing will be identified by the symbol “T” followed by the reporter’s page number. Legal citations contained in this brief are intended to conform to Florida Rule of Appellate Procedure 9.800 and THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, (Columbia Law Rev., et. al., 17th Ed. 2000). All emphasis has been supplied by counsel unless otherwise noted.

## **STATEMENT OF THE CASE AND FACTS**

While the statement provided by SARKIS accurately describes the procedural posture of this case, it omits facts which the District Court considered.

SARKIS' expert also testified that an attorney has no way of knowing, when a client walks in the door, whether or not a proposal for settlement would be made nor whether one would be accepted. (T. 39-41). He admitted that when counsel first meets with a client he or she cannot know whether a proposal for settlement is going to be filed. Further, there is no way to know if a proposal, if filed, will be accepted. (T. 41). The expert admitted that he has settled cases with Allstate on terms that benefited his clients. (T.39). SARKIS' trial counsel did not testify, but he provided the trial judge with an explanation of his role in the case and his thoughts when he undertook it. (T. 5-23). While counsel recognized that this was a difficult case, he offered no evidence that he considered an offer of judgment or whether a reasonable one would be accepted. (T. 5-23).

## SUMMARY OF ARGUMENT

### **A CONTINGENCY RISK MULTIPLIER MAY NOT BE USED TO ENHANCE ATTORNEY FEES AWARDED PURSUANT TO FLORIDA STATUTE SECTION 768.79.**

Unanimously, the judges of the Fifth District concluded that Section 768.79 does not authorize use of contingency risk multipliers to enhance fees awarded following a demand for judgment. Allstate Ins. Co. v. Sarkis, 809 So. 2d 6, 8 (Fla. 5th DCA 2002). Their decision is supported by traditional rules of statutory construction, advances the purpose of the statute, and avoids imposition of an unconstitutional penalty upon defendants reasonably exercising their right to judicial resolution of disputes. The position taken by SARKIS and her amicus would frustrate the purpose of Section 768.79 and unequally penalize defendants in precisely those cases in which they reasonably exercise their right to trial. Those arguments do not warrant reversal of the District Court.

The plain meaning of the statute, as expressed in its actual terms, does not authorize the use of a contingency risk multiplier to enhance fees. Section 768.79 is a penal statute which must be strictly construed in favor of the party to be sanctioned. The courts cannot impose a penalty not provided by the legislature. The history of the statute does not indicate that the legislature intended that multipliers increase the

penalty imposed following a demand for judgment. Further, where a statute specifies factors to be considered in determining fees, other factors may not be used to increase the fee. The legislature specified the factors to be used under Section 768.79 and did not include a multiplier. Therefore, it should be clear that the legislature did not sanction application of a multiplier to enhance fees awarded under this statute.

But, even if one were to conclude that the statute's language does not preclude use of a multiplier, its use would not be appropriate because the purpose of fee-enhancement is at odds with the legislative purpose advanced by the demand for judgment statute. Illogically, an award would be enhanced based upon the very factors which the legislature determined should result in a reduced penalty.

Additionally, contingency risk multipliers are not appropriate absent a showing that they were necessary to obtain competent counsel. That showing cannot be made under this statute because counsel cannot know whether an offer of judgment will be made nor whether it will be unreasonably rejected.

Finally, permitting use of contingency risk multipliers under Section 768.79 would discriminate between plaintiffs and defendants without any rational relationship to a legitimate legislative objective and would impermissibly burden the defendants' rights of free access to the courts.

## ARGUMENT

### **I. A CONTINGENCY RISK MULTIPLIER MAY NOT BE USED TO ENHANCE ATTORNEY FEES AWARDED PURSUANT TO FLORIDA STATUTE SECTION 768.79.**

Unanimously, the judges of the Fifth District concluded that Section 768.79 does not authorize use of contingency risk multipliers to enhance fees awarded following a demand for judgment. Allstate Ins. Co. v. Sarkis, 809 So. 2d 6, 8 (Fla. 5th DCA 2002). Their decision is supported by traditional rules of statutory construction, advances the purpose of the statute, and avoids imposition of an unconstitutional penalty upon defendants reasonably exercising their right to judicial resolution of disputes. The position taken by SARKIS and her amicus would frustrate the purpose of Section 768.79 and unequally penalize defendants in precisely those cases in which they reasonably exercise their right to trial. Those arguments do not warrant reversal of the District Court.

The plain meaning of Section 768.79, as expressed in its actual terms, does not authorize the use of a contingency risk multiplier to enhance fees. The history of the statute does not indicate that the legislature intended its use to increase the penalty imposed following a demand for judgment. Therefore, it should be clear that the legislature did not sanction application of a multiplier to enhance fees awarded under this statute. But, even if one were to conclude that the statute's language does not

preclude use of a multiplier, its use would not be appropriate because the purpose of fee-enhancement is at odds with the legislative purpose advanced by the demand for judgment statute. Illogically, an award would be enhanced based upon the very factors which the legislature determined should result in a reduced penalty.

**A. THE STATUTE.**

Section 768.79 creates a statutory penalty imposed upon litigants who fail to accept certain settlement proposals. The statute's penalty, or sanction, is the obligation to pay the "reasonable costs and attorney's fees" of one's opponent incurred between the date of the offer and the conclusion of the litigation. Fla. Stat. § 768.79(1) and (6). The statute sets forth the criteria to be used in determining this penalty stating:

(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.
  6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.
- (8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

**B. SECTION 768.79 IS A PENAL STATUTE AND ONE IN DEROGATION OF THE COMMON LAW, SO IT MUST BE CONSTRUED STRICTLY.**

In Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828, 834-35 (Fla. 1990), this Court revisited use of contingency risk multipliers which it had adopted five years before, in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). While the Court did not entirely preclude their use in tort and contract cases, it recognized that contingency risk multipliers had limited application and did not apply to all fee-authorizing statutes. The Court wrote:

We emphasize that the criteria and factors utilized in these

cases must be consistent with the purpose of the fee-authorizing statute or rule. In this category, the legislature may be very specific in settling the criteria that can be considered. For example, deputy commissioners must apply specific criteria to determine attorney's fees in workers' compensation cases. In this regard, the lodestar method is consequently unnecessary. It is not our intent to change the law in these instances.

555 So. 2d 834-35 (citations and footnote omitted).

Application of traditional rules of statutory construction demonstrates that contingency risk multipliers may not be used to enhance attorney fees awarded pursuant to the demand for judgment statute. Section 768.79 is a penal statute which imposes a penalty upon parties refusing to accept reasonable settlement proposals. Hilyer Sod, Inc. v. Willis Shaw Express, Inc., 817 So. 2d 1050, 1054 (Fla. 1st DCA 2002); Grip Development, Inc. v. Coldwell Banker Residential Real Estate, Inc., 788 So. 2d 262, 265 (Fla. 4th DCA 2000); RLS Business Ventures, Inc. v. Second Chance Wholesale, Inc., 784 So. 2d 1194, 1197 (Fla. 2d DCA 2001); Schussel v. Ladd, 736 So. 2d 776, 778 (Fla. 4th DCA 1999). See also, TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 615 (Fla. 1995) (Wells, J., concurring in part and dissenting in part); Loy v. Leone, 546 So. 2d 1187, 1189 (Fla. 5th DCA 1989). Subsection one of the statute expressly describes the awards it authorizes as "penalties." Fla. Stat. §768.79(1). Subsection eight refers to them as "sanctions." Fla. Stat. §768.79(8).

As a penal statute in derogation of the common-law, Section 768.79 must be strictly construed in favor of the party to be sanctioned. Hilyer, 817 So. 2d at 1054; Loy, 546 So. 2d at 1189. The courts cannot extend a penal statute to impose a penalty not specifically provided by the legislature. Adler-Built Industries, Inc. v. Metropolitan Dade County, 231 So. 2d 197, 200 (Fla. 1970); Jasper v. St. Petersburg Episcopal Community, Inc., 222 So. 2d 479, 480 (Fla. 2d DCA 1969).

A strict construction of the penalty provision of Section 768.79 does not permit the courts to imply that a contingency risk multiplier should be imposed in addition to the statutory factors expressly listed in the statute. Nowhere does the statute expressly mention addition of a multiplier. Without such an express directive the courts lack the authority to add a multiplier. Under the common law ALLSTATE would have owed no fee whatsoever to SARKIS. See, Dade County v. Pena, 664 So. 2d 959, 960 (Fla. 1995). By enacting Section 768.79, the Legislature created a statutory penalty in the form of a cost and fee award. Had the Legislature intended that the statute's penalty include a contingency risk enhancement, it could have expressly authorized fee enhancement. But, it did not do so and this Court should not, under the guise of construction, expand the penalty to be imposed upon litigants who miscalculate the outcome of litigation.

There is nothing in the legislative history of Section 768.79 to establish that the

legislature intended that a contingency risk multiplier be used to increase the statute's penalty. There is no mention of a contingency risk multiplier in the history of this statute. See Staff Analysis Ch. 86-160; Committee Rept., S.B. 465; Staff Analysis SB 465; CS/SB 465. This omission is particularly significant given that this Court first utilized contingency risk multipliers in Rowe the year before the legislature passed Section 768.79 as part of its effort to enact tort reform and reduce the costs of litigation in Florida. To assume that the legislature intended imposition of a 250% increase in the fees awardable against a defendant as part of its efforts to reduce parties' litigation costs - without ever mentioning that process - defies logic.

Further, the district courts have concluded that a contingency risk multiplier may not be used to increase the penalty imposed by Florida Statute Section 57.105. See Richardson v. Merkle, 646 So. 2d 289, 290 (Fla. 2d DCA 1994); Transflorida Bank v. Miller, 576 So. 2d 752, 753 (Fla. 4th DCA 1991). Thus, even though a litigant presents a patently frivolous defense to a meritorious claim, the penalty imposed is his opponent's costs and fees calculated based upon reasonable hours at a reasonable rate. It is absolutely illogical to conclude that the Legislature intended that a more severe penalty be imposed upon a defendant who merely miscalculates a jury's verdict than is imposed upon one who presents a frivolous defense.

SARKIS argues that the phrase "along with all other relevant criteria" constitutes

legislative authorization to enhance the penalty imposed by the statute. See INITIAL BRIEF pp. 8-13. SARKIS' amicus asserts that the phrase "in accordance with the guidelines promulgated by the Supreme Court" provides the same authority. BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS pp. 5-8. However, this reasoning is flawed when one considers the penal nature of Section 768.79 and the requirement of strict construction.

The fact that a court can consider "guidelines promulgated by the Supreme Court" and "other relevant criteria" to determine a reasonable fee to be awarded for the period following rejection of a demand for judgment does not mean that the court can impose an addition penalty upon a party. Section 768.79(6)(b) simply states that the plaintiff shall be awarded reasonable costs and attorney fees calculated in accordance with the guidelines promulgated by the Supreme Court. To date, this Court has promulgated only one item it designated as a guideline. In 1983, it adopted the Statewide Uniform Guidelines For Taxation of Costs in Civil Actions. Reeser v. Boats Unlimited, Inc., 432 So. 2d 1346, 1349 (Fla. 4th DCA 1983). These guidelines were amended in 2001. Amendments To Uniform Guidelines For Taxation of Costs, 794 So. 2d 1247 (Fla. 2001). Neither version of the guidelines authorizes use of a contingency risk multiplier. Neither addresses attorney fees. A strict construction of the statutory phrase would require that the courts apply only those guidelines in

awarding the costs authorized by the statute. Certainly, the existence of the Court's formal guidelines does not authorize an additional penalty in the form of an enhanced attorney fee.

The Court has also published Florida Rule of Civil Procedure 1.442 which might be considered a guideline. But again, this rule does not expressly provide for use of a contingency risk multiplier. Interestingly, the rule's provision for determining reasonable fees sets forth the same criteria contained in Section 768.79(7)(b) and nothing more. Those factors do not include consideration of whether the fee is contingent.

The Court has also adopted rules regulating the Florida Bar. Rule 4-1.5 regulates fees for legal services and subsection (b) sets forth the factors to be considered as guides in determining a reasonable fee. As explained in Rowe and Quanstrom, the rule addresses the calculation of rates and hours which are the lodestar amount. Rowe, 472 So. 2d at 1150-51; Quanstrom, 555 So. 2d at 830-31. Thus, these limitations are implicit in any calculation of a lawful fee.

The fact that the rule's limitation includes consideration of whether a fee is fixed or contingent does not itself authorize the courts to impose an additional penalty in the form of a contingency risk multiplier. In Florida Birth-Related Neurological Injury Compensation Ass'n. v. Carreras, 633 So. 2d 1103, 1106-07 (Fla. 3d DCA 1994), the

fee-authorizing statute itself expressly required consideration of whether the fee was contingent. The District Court concluded that, despite the legislature's recognition of contingent fees, given the nature of the fee-authorizing statute, a contingency risk multiplier had not been authorized.

The same conclusion has been reached where fees are awarded in workers compensation cases. There the fee-authorizing statute, Section 440.34, expressly requires that the judge consider "the contingency or certainty of a fee." Despite the fact that the statute itself includes consideration of the contingency of the fee, the courts are not permitted to impose a contingency risk multiplier. See Mirlisena v. Chemlawn Corp. 567 So. 2d 986, 988 (Fla. 1st DCA 1990); What An Idea, Inc. v. Sitko, 505 So. 2d 497 (Fla. 1st DCA 1987). See also, Quanstrom, 555 So. 2d at 834-35. Because Section 768.79 is a penal statute which must be strictly construed in favor of the party to be sanctioned, this Court should not expand the penalty provided by the legislature by imposing contingency risk multipliers.

**C. CONTINGENCY RISK MULTIPLIERS ARE PERMISSIBLE ONLY WHERE CONSISTENT WITH THE TERMS AND PURPOSES OF A FEE-AUTHORIZING STATUTE AND THEY ARE NOT CONSISTENT WITH THE PURPOSES OF SECTION 768.79.**

Even if one were to conclude that the statute's language does not prohibit

imposition of a multiplier, use of a multiplier would be inappropriate because the purpose of fee-enhancement is at odds with the legislative purpose advanced by the demand for judgment statute. Where the factors used in a contingency risk multiplier are not consistent with the purpose of the fee-authorizing statute, a multiplier is unnecessary. Quanstrom, 555 So. 2d at 834-35.

The requirement that contingency risk multipliers be used only where their purpose is consistent with the purpose of the fee-authorizing statute is in accord with traditional rules of statutory construction. Courts must give full effect to the legislative purpose behind a statute and must avoid constructions which lead to absurd or unreasonable results. Foley v. State, 50 So. 2d 179, 184 (Fla. 1951); Yeste v. Miami Herald Publishing Co., 451 So. 2d 491, 493 (Fla. 3d DCA 1984).

Both the legislative history and judicial interpretation of Section 768.79 indicate that its purpose is to encourage early resolution of litigation. National Healthcorp Ltd. v. Close, 787 So. 2d 22, 26 (Fla. 2d DCA 2001); Eagleman v. Eagleman, 673 So. 2d 946, 947 (Fla. 4th DCA 1996). See also, Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989) (the purpose of the offer of judgment rule is to encourage settlements and obviate the need for further judicial intervention). It does this by imposing a penalty upon litigants who fail to accept reasonable and good faith settlement offers. Eagleman, 673 So. 2d at 947.

As Judge Casanueva correctly noted in his dissent in Pirelli Armstrong Tire

Corp. v. Jensen, 752 So. 2d 1275, 1277-78 (Fla. 2d DCA 2000):

The legislative history for chapter law 86-160 supports the Fourth District's conclusions. The staff analysis prepared by the Florida House of Representative's Committee on Judiciary for House Bill 321 stated that the proposed "legislation would provide sanctions for the unreasonable rejection of an offer of settlement given by either a defendant or plaintiff." Sanctions were to include attorney's fees. The sanctions provided for by HB 321 would encourage settlement of civil cases which could, in turn, "result in lower litigation costs." Similarly, the Senate Staff Analysis and Economic Impact Statement prepared for Senate Bill 866 indicates the bills purpose was to expand the offer of judgment concept "to encourage settlements between parties."

An unreasonable rejection of an offer of settlement made by either party pursuant to the proposed legislation would result in sanctions. The same purpose and intent identified in the staff analyses for SB 866 and HB 321 were included CS/SB 866. The latter bill pointed out an additional benefit: increased out-of-court settlements should "reduce the fiscal impact of litigation on the court system."

The legislative commentary, albeit meager, powerfully manifests the purposed of section 768.79—to reduce both litigation costs and demand on the state's judicial system by imposing sanctions, including attorneys' fees, on those parties who unreasonably reject an offer of settlement.

However, the legislature carefully balanced the desire to end litigation with

protection of a party's ability to reasonably exercise the right to trial. Section 768.79(7)(b) allows the court to adjust the penalty imposed where there was an apparent lack of merit in the claim when the offer was made and when issues of fact and law were close. In other words, the statute was designed to serve as incentive for reasonable consideration of settlement proposals, not to compel a party to waive the right to trial. This is explained in TGI Friday's Inc. v. Dvorak, 663 So. 2d 606, 613 (Fla. 1995) where this Court stated:

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 twenty-five percent. (emphasis added).

Thus, under the legislature's scheme, a litigant who is likely to prevail may insist upon his right to trial and be subjected to only a small penalty for miscalculating the trial's outcome.

But, the operation of a contingency risk multiplier is at odds with and frustrates the statute's purpose. A multiplier is designed to reward a party's counsel for being successful in difficult cases – those in which the apparent merit and therefore likelihood of success is questionable. Rowe, 472 So. 2d at 1151; Quanstrom, 555 So. 2d at 834. Therefore, in cases of little or questionable merit the court would be

required to impose a high multiplier. Yet, in those same circumstances it is clearly more reasonable for the defendant to have rejected a high settlement offer and to have exercised his right to trial. Because his decision to reject was reasonable, under the statute a reduced penalty would be appropriate. Dvorak, 663 So. 2d at 613. Similarly, in cases with close questions of law or fact, the statute requires that the court consider a reduced penalty. But, the same factors would justify an increase in the multiplier. Thus, irrationally, the same factors which justify a reduced penalty under Section 768.79 also justify an enhanced reward under Rowe or Quanstrom. In short, imposition of a contingency risk multiplier negates the obvious purpose of subsection 7(b). The legislature could not have intended such a result. Because the criteria and factors utilized by a multiplier are not consistent with the purpose of Section 768.79, the use of a contingency risk multiplier in demand for judgment cases is not appropriate.

**D. WHERE A STATUTE SPECIFIES FACTORS TO BE CONSIDERED IN DETERMINING FEES, OTHER FACTORS MAY NOT BE USED TO INCREASE THE FEE.**

This Court has also recognized that, in tort and contract cases, where the legislature has provided specific criteria for consideration in determining a fee, the courts are not free to add contingency risk multipliers. Quanstrom, 555 So. 2d at 834-

35.

The significance of this point was reiterated in Schick v. Department of Agriculture and Consumer Services, 599 So. 2d 641 (Fla. 1992), where the Court held that a contingency risk multiplier could not be used to calculate attorney fee awards made pursuant to Florida Statute Section 73.092. There, as in this case, the fee-authorizing statute provided the criteria which the legislature deemed would result in a reasonable award. The statute stated in pertinent part:

In assessing attorney's fees in eminent domain proceedings, the court shall consider:

- (1) Benefits resulting to the client from the services rendered.
- (2) The novelty, difficulty, and importance of the questions involved.
- (3) The skill employed by the attorney in conducting the cause.
- (4) The amount of money involved.
- (5) The responsibility incurred and fulfilled by the attorney.
- (6) The attorney's time and labor reasonably required adequately to represent the client.
  - (a) The condemnee's attorney shall submit to the condemning authority and to the court complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred at least 30 days prior to a hearing to assess attorney's fees under this section.
  - (b) This subsection shall apply to all proceedings filed after July 1, 1985.

However, under no circumstances shall the attorney's fees be based solely on a percentage of the award.

Fla. Stat. §73.092

After discussing Quanstrom, this Court wrote:

We agree that where the legislature has set forth **specific criteria** for determining reasonable attorney's fees to be awarded pursuant to a fee-authorizing statute, the trial judge is **bound to use only the enumerated criteria**.

599 So. 2d at 643 (emphasis added).

The Schick court held that by expressly listing the factors to be considered in making a Section 73.092 award, the legislature precluded use of a contingency risk multiplier. The Court wrote:

However, where, as here, the legislature specifically sets forth the criteria it deems will result in a reasonable award and will further the purpose of the fee-authorizing statute, only the enumerated factors may be considered.

Id. at 643-44.

The courts have concluded that other legislative expressions were sufficiently specific to make multipliers unnecessary. For example, Section 440.34(1) authorizes fee awards in workers compensation cases. It states, in part:

...However, the judge of compensation claims shall consider the following factors in each case and may increase or decrease the attorney's fee if, in her or his judgment, the circumstances of the particular case warrant such action:

- (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (b) The fee customarily charged in the locality for similar legal services.
- (c) The amount involved in the controversy and the benefits resulting to the claimant.
- (d) The time limitation imposed by the claimant or the circumstances.
- (e) The experience, reputation, and ability of the lawyer performing services.
- (f) The contingency or certainty of a fee.

In Mirlisena v. Chemlawn Corp., 567 So. 2d 986, 987 (Fla. 1st DCA 1990), the First District rejected use of a contingency risk multiplier finding that the workers compensation fee statute, “is sufficiently explicit” and does not warrant further expansion.

Section 766.31(2) governing fee awards in birth-related neurological injury claims states, in part:

...In determining an award of attorney’s fees, the administrative law judge shall considered the following factors:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the

legal services properly.

2. The fee customarily charged in the locality for similar legal services.
3. The time limitations imposed by the claimant or the circumstances.
4. The nature and length of the professional relationship with the claimant.
5. The experience, reputation, and ability of the lawyer performing services.
6. The contingency or certainty of a fee.

In Florida Birth-Related Neurological Injury Compensation Ass'n. v. Carreras, 633 So. 2d 1103 (Fla. 3d DCA 1994), the Third District found that sufficient legislative guidance had been provided to preclude use of a contingency risk multiplier.

In each of these statutes, the legislature included the factors which it deemed would result in an appropriate fee. By expressly setting the criteria, the legislature precluded use of a multiplier. The same should be true here.

Section 768.79(7)(b) sets forth the criteria which the legislature intended be considered in determining a fee following a demand for judgment. The court is required to consider:

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 important affecting nonparties.
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.

By expressing these criteria the legislature selected the factors which would produce the penalty which it deemed appropriate. It is obvious that the factors selected attempt to strike a balance between fairly compensating one party and penalizing the other. Because the legislature expressed the factors to be considered the contingency risk multiplier cannot be applied.

**E. CONTINGENCY RISK MULTIPLIERS ARE NOT APPROPRIATE UNLESS NECESSARY TO PERMIT PARTIES TO OBTAIN COMPETENT COUNSEL, AND THE NECESSARY SHOWING CANNOT BE MADE WITH RESPECT TO SECTION 768.79.**

In addition, application of a contingency risk multiplier in demand for judgment cases is simply illogical. In Quanstrom, this Court noted that for a multiplier to apply,

the market must require it to obtain competent counsel. 555 So. 2d at 834. Therefore, to apply a multiplier under Section 768.79 a court must conclude that at the outset of the representation, a lawyer committed himself to the client based upon the belief that his opponent would incorrectly reject a reasonable settlement offer at some point during the course of the litigation. As the Fifth District concluded below, in Florida that conclusion is not sustainable.

Before Rowe, lawyers willingly represented personal injury claimants and uninsured motorist claimants. A multiplier was not necessary to obtain a competent attorney because multipliers were not available in state court actions, Judge Harris questioned what would happen if a contingency risk multiplier were not available in demand for judgment cases. Would lawyers suddenly stop taking cases such as this? Tetrault v. Fairchild, 799 So. 2d 226, 234 (Fla. 5th DCA 2001) (Harris concurring). The answer is patently obvious. In an environment where television, radio, phone books and billboards are choked with lawyer ads, competent personal injury lawyers are and will be available. In fact, uninsured motorist insurance claimants continue to obtain competent legal representation within the Fifth District even though, since Sarkis, no contingency risk multiplier has been available to them. See e.g. Liberty Mut. Fire Ins. Co. v. Hanson, 824 So. 2d 1013 (Fla. 5th DCA 2002) (insured represented by counsel in certiorari review of uninsured motorist insurance discovery dispute);

Lumbermens Mut. Cas. Co. v. Poling, 823 So. 2d 805 (Fla. 5th DCA 2002) (insured represented by counsel in appeal following judgment awarding uninsured motorist benefits). This Court should recognize that this element can never exist in this context and should preclude use of contingency risk multipliers under Section 768.79.

The primary rationale for allowing contingency risk multipliers is to provide access to competent counsel for persons otherwise unable to afford representation. The availability of a multiplier is thought to level the playing field between the parties with unequal ability to secure counsel. See Bell v. U.S.B. Acquisition Co., Inc., 734 So. 2d 403 (Fla. 1999); Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). One necessary element would be a showing that the attorney representing the party who made the offer of judgment would not have taken the case – nor would any other competent attorney in the legal community – without the availability of a multiplier.

As Chief Judge Schwartz said in Gonzalez v. Veloso, 731 So. 2d 63, 64 (Fla. 3d DCA 1999), such a showing is problematic:

Quaere: Whether any such showing can ever be made, and thus whether a multiplier is ever appropriate, where fees are awardable only when a reasonable offer is not accepted under section 768.79, an eventuality which obviously cannot be anticipated when counsel is obtained.

The Fifth District concluded that in Florida today, the showing could not be

made. Sarkis, 807 So. 2d at 7-8. That conclusion is sound. While SARKIS' evidence suggested that this was a difficult case, that same evidence showed that SARKIS, like any other litigant, could obtain competent counsel to present her personal injury claims without even considering the offer of judgment statute or multipliers.

The Fifth District described SARKIS' expert-evidence stating:

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

Sarkis' attorney testified:

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

Id. at 7-8.

But, SARKIS' expert also testified that an attorney has no way of knowing when a client walks in the door, whether or not a proposal for settlement would be made nor whether one would be accepted. (T. 39-41). He admitted that when counsel first meets with a client you cannot know whether a proposal for settlement is going to be filed. Further, there is no way to know if a proposal, if filed, will be accepted. (T. 41). The expert admitted that he has settled cases with Allstate on terms that benefited his clients. (T.39). SARKIS' trial counsel did not testify, but he provided the trial judge with an explanation of his role in the case and his thoughts when he undertook it. (T. 5-23). While counsel recognized that this was a difficult case, he offered no evidence that he considered an offer of judgment or whether a reasonable one would be accepted. (T. 5-23).

As counsel and the expert demonstrated, a party cannot anticipate whether a Section 768.79 proposal will be made nor whether it will be accepted. But, despite that inability, SARKIS , like other personal injury claimants, was able to retain very competent counsel.

**F. PERMITTING CONTINGENCY RISK MULTIPLIERS WOULD DISCRIMINATE BETWEEN PLAINTIFFS AND DEFENDANTS WITHOUT ANY RATIONAL RELATIONSHIP TO A LEGITIMATE LEGISLATIVE OBJECTIVE AND WOULD IMPERMISSIBLY BURDEN THE RIGHT OF FREE ACCESS TO THE COURTS.**

An additional consideration supports the Fifth District's decision. When construing statutes, the courts should endeavor to implement the legislative intent while avoiding constitutional issues. See State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995); State v. Mager, 356 So. 2d 267, 269 (Fla. 1978). Were the Court to view Section 768.79 as permitting use of a contingency risk multiplier, it would not only encounter a constitutional issue, it would be forced to conclude that the statute and multiplier violate the equal protection of laws guaranteed by the United States and Florida Constitutions, and impermissibly interfere with a defendant's access to the courts.

The Florida Constitution expressly guarantees litigants the right to free access to the courts. Fla. Const. art. 1 § 21. The right to free access to the courts includes the right to pursue one's defenses vigorously. See G.B.B. Investments Inc. v. Hinterkopf, 343 So. 2d 899, 901 (Fla. 3d DCA 1977) (imposing a financial precondition to presentations of a counterclaim violated right to free access). This right cannot be impaired unless the legislature provides a reasonable alternative remedy or identifies an overpowering necessity for the impairment and has no alternative method of meeting the necessity. Kluger v. White, 281 So. 2d 1 (Fla. 1973. Imposing a contingency risk multiplier would severely chill a defendant's willingness to obtain judicial resolution of disputes in precisely those cases in which his case is the

strongest.

As it is written, Section 768.79 strikes a balance between its intended benefit of encouraging settlement of litigation and its penalty for pursuing potentially valid defenses. Where liability and damages are reasonably clear, rejecting an appropriate settlement offer results in payment of those fees which were unnecessarily incurred. Where a claim appears to lack merit or presents close issues of fact or law, the statute imposes a reduced penalty. Fla. Stat. § 768.79(7)(b).

Application of a contingency risk multiplier would destroy this balance. In those cases in which the litigant holds the most meritorious defenses - cases where the claim seems unlikely to succeed - the risk of a large multiplier is the greatest. Thus, litigants would be pressured into foregoing their right to judicial resolution of the matter. The chilling effect created by a contingency risk multiplier unconstitutionally burdens a defendant's right to free access to the courts.

Both the Florida and United States Constitutions guarantee litigants equal protection of the laws. See Fla. Const. Art. 1 § 2; U.S. Const. Amend. 14. A legislative classification is valid unless it is not rationally related to achievement of a legitimate legislative objective. See Heller v. Doe, 509 U.S. 312; 319-20 (1993); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); City of New Orleans v. Dukes, 427 U.S. 297 (1976). The use of a contingency risk multiplier in the

context of Section 768.79 violates the guarantee of equal protection because it subjects defendants to a far more severe penalty than is recoverable from claimants.

Even though, on its face, Section 768.79 applies to both parties, only one side in a civil action - the plaintiff - can actually benefit from a contingency risk multiplier. It is plaintiffs whom seek to create a litigation fund from which to pay their attorneys. Thus, contingency fee contracts are logical and allow plaintiffs to defer the obligation to pay their counsel until they have succeeded in recovering from the defendant. On the other hand, defendants do not seek to create a litigation fund - they merely seek to retain the status quo. And, while in theory it might be possible to craft a contingency fee contract applicable to the defendant, it would be essentially worthless. If the defendant was successful in defeating the plaintiff's claim there would be no litigation fund created. There would be no source of funds from which the defendant's counsel could receive his contingent payment. This is especially true given that plaintiffs do not have insurance which protects them from unsuccessful claims.

Thus, by its very nature, a multiplier rewards only plaintiffs. Sanctioning a defendant who rejects a settlement demand by applying a contingency risk multiplier while not sanctioning a plaintiff with the same multiplier presents a blatantly discriminatory classification between plaintiffs and defendants which is irrational by any standard. This unequal treatment does not further any legislative purpose

embodied in Section 768.79. Instead, it is arbitrary and unreasonable - it is unconstitutional.

These Constitutional issues can and should be avoided by holding that contingency risk multipliers are not applicable to fees awarded pursuant to Section 768.79.

**CONCLUSION**

This Court should affirm the District Court's decision and hold that a contingency risk multiplier may not be used to enhance attorney fees awarded pursuant to Florida Statute Section 768.79.

Respectfully submitted,

FOWLER WHITE BOGGS BANKER

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CHARLES W. HALL, ESQUIRE  
Fla. Bar No. 326410  
501 First Avenue North, Suite 900(33701)  
Post Office Box 210  
St. Petersburg, FL 33731

and

RICHARD A. SHERMAN, ESQUIRE  
Fla. Bar No. 184170  
1777 So. Andrews Avenue, Ste. 302  
Ft. Lauderdale, FL 33316  
Attorneys for Respondent, ALLSTATE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of the foregoing has been furnished by U.S. Mail on January 30, 2003, to **THOMAS D. HALL, CLERK, The Supreme Court of Florida**, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; and a copy each to **JULIE H. LITTKY-RUBIN, ESQUIRE**, Attorney for Petitioner, Post Office Box 4056, West Palm Beach, FL 33402-4056; **ROBERT M. MOLETTEIRE, ESQUIRE**, Attorney for Petitioner, 10 Suntree Plaza, Melbourne, FL 32940; **PHILIP M. BURLINGTON, ESQUIRE**, Attorneys for Amicus Curiae The Academy of Florida Trial Attorneys, Suite 3A/Barristers Bldg., 1615 Forum Place, West Palm Beach, FL 33401; **WENDY F. LUMISH, ESQUIRE**, Attorneys for Amicus Curiae The Florida Defense Lawyers Association, 4000 Bank of America Tower, 100 SE Second Street, Miami, FL 33131; **THERESA K. CLARK, ESQUIRE**, Trial Counsel for Defendant/Respondent, 158 N. Harbor City Boulevard, Suite 200, Melbourne, FL 32935; **RICHARD A. SHERMAN, ESQUIRE**, Attorney for Respondent, 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, FL 33316; and **ROY C. YOUNG, ESQUIRE**, Attorneys for Amicus Curiae The Florida Chamber of Commerce, Post Office Box 1833, Tallahassee, FL 32302-1833.

FOWLER WHITE BOGGS BANKER

---

CHARLES W. HALL, ESQUIRE  
Fla. Bar No. 326410  
501 First Avenue North, Suite 900(33701)  
Post Office Box 210  
St. Petersburg, FL 33731

and

RICHARD A. SHERMAN, ESQUIRE  
Fla. Bar No. 184170  
1777 So. Andrews Avenue, Ste. 302  
Ft. Lauderdale, FL 33316  
Attorneys for Respondent, ALLSTATE

**CERTIFICATE OF TYPEFACE COMPLIANCE**

Pursuant to Florida Rule of Appellate Procedure 9.210, the undersigned counsel certifies that this brief is printed in Times New Roman 14-point font.

FOWLER WHITE BOGGS BANKER

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CHARLES W. HALL, ESQUIRE  
Fla. Bar No. 326410  
501 First Avenue North, Suite 900(33701)  
Post Office Box 210  
St. Petersburg, FL 33731

and

RICHARD A. SHERMAN, ESQUIRE  
Fla. Bar No. 184170  
1777 So. Andrews Avenue, Ste. 302  
Ft. Lauderdale, FL 33316  
Attorneys for Respondent, ALLSTATE