ORIGINAL

IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC00-1649

LILIANA CAHUASQUI

Petitioner, Plaintiff

-vs-

U.S.SECURITY INSURANCE COMPANY,

Respondent, Defendant.

_____/

PETITIONER'S BRIEF ON JURISDICTION

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This brief was prepared using Times New Roman 14 point font.

STATEMENT OF THE FACTS AND THE CASE

Liliana Cahuasqui was injured in a motor vehicle accident on October 3, 1995, and subsequently made a claim for Personal Injury Protection (PIP) benefits to U.S. Security Insurance Company. U.S. Security denied Cahuasqui's claim because her father, Milton Cahuasqui, did not list her on the application for insurance. Subsequently, Cahuasqui filed suit to recover PIP benefits and U.S. Security raised the defense of material misrepresentation. *Cor. Slip Op. at 2-3.*

On June 16, 1997, U.S. Security served a proposal for settlement/offer of judgment, which stated as follows:

> PURSUANT TO RULE 1.442 [Eff. 1-1-97] and/or Florida Statute § 768.79, the Defendant U.S. Security Insurance Company, hereby serves this offer to the Plaintiff, Liliana Cahuasqui, to allow judgment to be taken against said Defendant in the amount of One Thousand Five Hundred One Dollars ($1,501.00) inclusive of PIP benefits, interest, penalties, costs, and attorney's fees.

Cor. Slip Op. at 3-4.

The trial judge bifurcated the case and tried the liability issue first. The jury entered a verdict for the Defendant, finding that Milton Cahuasqui had made a material misrepresentation on the application.

The trial court entered a judgment in favor of U.S. Security. *Cor. Slip Op. at 5.*

U.S. Security filed a motion for attorney's fees and costs based upon the proposal for settlement/offer of judgment. Cahuasqui filed a motion to strike U.S. Security's offer of judgment on the grounds that section 768.79 conflicts with section 627.428 (the Insurance Code's attorney's fees statute). The trial court ultimately denied U.S. Security's motion for attorney's fees and costs, finding that the offer of judgment statute was inapplicable to PIP actions, and certified the following question as one of great public importance:

> Is the Proposal for Settlement/Offer of Judgment Statute, F.S. 768.79, applicable to PIP actions?

Cor. Slip Op. at 5-6. [APPENDIX EXHIBIT 1].

The Third District Court of Appeals accepted jurisdiction pursuant to Rule 9.030(b)(4)(A), Fla. R. App. P., and answered the question in the affirmative, reversing and remanding the case for a hearing on attorney's fees. *Cor. Slip Op. at 2.* [APPENDIX EXHIBIT 2].

Cahuasqui filed a *Motion for Rehearing, Rehearing En Banc, and Certification* on April 6, 2000 [APPENDIX EXHIBIT 3] which

was denied on July 5, 2000 [APPENDIX EXHIBIT 4], at which time the Third District filed the Corrected Opinion.

SUMMARY OF THE ARGUMENT

The Third District's decision in *Cahuasqui* expressly and directly conflicts with *Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc.*, 752 So.2d 55 (Fla. 2000), which states that the attorney's fee provision of section 627.736(8) (i.e. section 627.428) is a one-way imposition in favor of the insured.

In addition, *Cahuasqui* also conflicts with *Lasky v. State Farm Ins. Co.*, 296 So.2d 9, 17 (Fla. 1974), as it allows concerns resolved by this Court by passing on the constitutionality of the PIP scheme to resurface within the PIP scheme---i.e., the concern of individuals being economically forced to unduly compromise their settlements by the absence of a PIP scheme.

This Court should exercise its discretion to grant review as the issue here is one of great public importance and the application of the *Cahuasqui* decision erodes the constitutional protections of the no-fault law. Moreover, consideration of the opposing opinions of other judges in the state, including the dissent in the *Cahuasqui* opinion and in the order denying Cahuasqui's *Motion for Rehearing En Banc*, makes this issue one which cries for resolution by this Honorable Court.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH *NATIONWIDE MUT. FIRE INS. CO. v. PINNACLE MEDICAL, INC.*, 752 So.2d 55 (Fla. 2000).

The decision of the Third District Court of Appeal in the instant case expressly and directly conflicts with *Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical Inc.*, 752 So.2d 55 (Fla. 2000). In finding §627.736(5), Fla. Stat., unconstitutional, this Court stated in that '[u]nder section 627.736(5), medical provider-assignees are subject to attorney fees, while insureds suing to enforce the exact same contract enjoy the **one-way** imposition of attorney fees against insurers provided in section 627.428(1)." *Id.* at 59 (emphasis added). The decision of the Third District clearly contradicts this proposition.

The Third District's decision renounces the one-way imposition of fees under 627.736(8), which permits fees only to the insured pursuant to 627.428(1). The Court's decision empowers and encourages insurers to seek fees against PIP insureds, by application of section 768.79, despite the more specific language of sections 627.736(8) and 627.428(1), and despite the conflict-resolution provision of section 768.71.

Application in this case of the reasoning in *Pinnacle* would have resulted in the Third District affirming the trial court's order and finding that §768.79, Fla. Stat., is not applicable to actions under §627.736 as it conflicts with both §627.736(8) and §627.428(1).

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT REVIEW BECAUSE:

A. The issue of whether proposals for settlement/offers of judgment, F.S. 768.79, are applicable to PIP is one of great public importance .

This Court should exercise its discretion to grant review because the application of section 768.79, Fla. Stat., to PIP actions under section 627.736 is an issue of great public importance in the State of Florida. Recognizing such, the trial court certified the question to the Third District Court of Appeal which accepted jurisdiction. The decision in this case transcends into every case filed in the state of Florida to recover PIP benefits. Petitioner requests that this Court consider the importance of the issue involved in considering whether or not to exercise its discretion to grant review.

B. The application of F.S. 768.79 to PIP erodes the constitutional protections of the no-fault law .

In addition, this Court should exercise its discretion to grant review to protect the constitutional balance between the tort rights

taken away from insureds by the PIP scheme and the remedies provided in exchange. The Third District's decision substantially erodes the constitutional balance. The no-fault law was enacted to provide an alternative to litigation of the less serious claims resulting from motor vehicle accidents. Prior to the enactment of the no-fault law, claimants were entitled to sue in tort regardless of the amount of the claim. The enactment of the no-fault statute provided for immunity from certain tort claims, and set up a system of insurance coverage regardless of fault for such claims. *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974).

In exchange for the right to sue in tort, the accident victim received the right to "speedy payment by his own insurer of medical costs, lost wages etc . . ." *Lasky* at 14 (emphasis added). "[T]he foundation of the legislative scheme is to provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption . . ." *Government Employees Ins. Co. v Gonzalez,* 512 So.2d 269,270 (Fla. 3d DCA 1987). "Similarly the legislative objective of section 627.428(1), Fla. Stat., which provides for an award of attorney fees against insurers who wrongfully deny benefits, was to discourage insurance companies from contesting

valid claims and to reimburse successful insured for their attorney fees when they are compelled to sue to enforce their insurance contracts." *Pinnacle* at 59 [citing *State Farm Fire & Cas. Co. v. Palma*, 629 So.2d 830, 833 (Fla. 1993)].

The Third District's decision in this case eviscerates the guarantee of "swift and virtually automatic payment" and permits insurers to force insureds to gamble away their rights under the PIP statute. It undermines the historic purpose of the no fault law by providing insurers with a **"cannon"** to hold over insureds' heads in order to force insureds to compromise their PIP claims.[1] Such a result also expressly and directly conflicts with this Court's decision in *Lasky* where this Court was concerned with whether "[p]rivate individuals are more likely to be economically forced to accept an unduly small settlement of their claims. . ." if the PIP scheme was not in place. *Lasky* at 17. The application of section 768.79 by insurers will economically force insureds to accept unduly small settlement of their PIP claims and not receive the full protection of PIP.

[1] If insureds are forced to compromise their PIP claims under threat of an offer of judgment, they would likely owe the medical provider(s) more for than their 20% co-payment under PIP as the insured has no legal authority to compromise a medical provider(s)' bill.

Moreover, it makes the alternative remedy of no-fault benefits an inadequate substitute to justify the denial of access to courts and creates an imbalance of power in favor of the insurer and heavily against the insured. The application of section 768.79 will have a chilling affect on many insureds, who may give up their legal rights rather than take the risk of having to pay an insurance company's fees. Such a result erodes the protections afforded by the PIP scheme. Thus, this Court should exercise its discretion to grant review to restore the constitutional balance.

C. The courts in Florida are divided on this issue

Although absent a conflicting decision by another district court of appeal the *Cahuasqui* decision is law in Florida, this Court should also exercise its discretion to grant review in order to harmonize the decisions of other judges, most which disagree with the Third District. *See Alexandre v. New Hampshire Indemnity Co.*, 6 Fla. L. Wkly Supp. 723 (Fla. Hillsborough Cty. Ct., 1999); *Lockhart v. Pinnacle Insurance Co.*, 6 Fla. L. Wkly Supp (Fla. Polk Cty. Ct., 1999); *Cruz v. Allstate*, 5 Fla. L. Wkly Supp. 230 (Fla. Miami-Dade Cty. Ct., 1997) and

Holcomb v. Fortune Ins. Co., 4 Fla. L. Wkly. Supp. 479 (Fla. Miami-Dade Cty. Ct., 1996).[2] [APPENDIX COMPOSITE EXHIBIT 5].

CONCLUSION

The decision by the Third District expressly and directly conflicts with this Court's decision in *Pinnacle*. Petitioner respectfully requested that this Court exercise its discretion to grant review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was mailed by overnight delivery on this 10th day of August, 2000 to David B. Pakula, Esq., Fazio, Dawson, DiSalvo, Cannon, Abers, Podreca & Fazio, P.O. Box 14518, 633 South Andrews Avenue, Fort Lauderdale, FL 33302 and Michael A. Nuzzo, Esq., 2100 Coral Way, Suite 504, Miami, Florida 33145.

Respectfully submitted.

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[2] There are also numerous unreported orders striking offers of judgment throughout the state, some of which were cited by Cahuasqui in her Answer Brief below.