ORIGINAL

SUPREME COURT OF FLORIDA

CASE NO. SC00-1649

LILIANA CAHUASQUI,

Petitioner,

vs.

U.S. SECURITY INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

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Certification Regarding Type Size and Style

This brief uses 14 point proportionately spaced Times New Roman type in compliance with this court's administrative order.

I.

STATEMENT OF THE CASE AND FACTS

Petitioner, Liliana Cahuasqui, seeks review of the decision of the Third District Court of Appeal below based on this court's discretionary jurisdiction to review decisions of a district court of appeal which expressly and directly conflict with decisions of the supreme court on the same question of law. See Art. V § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(iv). Cahuasqui contends that the Third DCA's decision conflicts with this court's decisions in Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 5 (Fla. 2000) and Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974).

The facts, set forth in the decision below, reported at 760 So. 2d 1101, are as follows:

> Cahuasqui was allegedly injured in an automobile accident which occurred on October 3, 1995. Cahuasqui made a claim for PIP benefits under a U.S. Security insurance policy that had been issued to her father, Milton Cahuasqui. U.S. Security denied Cahuasqui's claim because Mr. Cahuasqui's application for PIP insurance had not listed his daughter as an additional resident driver.

Subsequently, Cahuasqui filed suit against U.S. Security seeking recovery of PIP benefits. U.S. Security answered and raised material misrepresentation as a defense.

On June 13, 1997, the trial court noticed the case for a jury trial on August 26, 1997. On June 16, 1997, U.S. Security served its proposal for settlement/offer of judgment pursuant to rule 1.442, Florida Rules of Civil Procedure and section 768.79, Florida Statutes (1997) in the amount of $1,501.00....

The trial judge bifurcated the trial on the liability and damage issues. The jury found that Milton Cahuasqui had made a material misrepresentation on his application for insurance with U.S. Security, and therefore Liliana was not entitled to PIP benefits under U.S. Security's policy. Accordingly, the trial court entered final judgment in favor of U.S. Security, reserving jurisdiction over the issue of attorney's fees and costs.

U.S. Security filed a motion for attorney's fees based on its proposal for settlement/offer of judgment. The trial court initially granted U.S. Security's motion for attorney's fees. Cahausqui thereafter filed a motion to strike U.S. Security's offer of judgment on the grounds that section 768.79, Florida Statutes, conflicts with section 627.428, Florida Statutes... and therefore the court's grant of U.S. Security's attorney's fees was unconstitutional.

A hearing regarding U.S. Security's entitlement to attorney's fees and Cahausqui's motion to strike U.S. Security's offer of judgment fees was held June 11, 1998. Ultimately, the trial court reversed itself and denied U.S. Security's motion for attorney's fees, holding that the offer of judgment statute was inapplicable to PIP actions, but certified this question to us of our consideration. We accepted jurisdiction.

760 So. 2d at 1103-04 (footnotes omitted).

The Third DCA reversed the order denying U.S. Security's motion for fees. There are three main components to the Third DCA's holding.

First, the court held that section 768.79 applies in PIP insurance cases, since it applies by its own terms in "all civil actions for damages," and has been held applicable to all types of insurance actions in which monetary relief is sought against an insurance carrier. 760 So. 2d at 1104-06.

Secondly, the Third DCA held that section 768.79 does not conflict with sections 627.428 and 627.736(8). Section 627.736(8) merely states that section 627.428 applies in PIP cases. It does not state, and cannot reasonably be interpreted to mean, that section 627.428 is the only fee statute which applies in PIP cases. For example, section 57.105 applies in PIP cases as well as section 768.79. 760 So. 2d at 1105-06.

Third, the court held that applying section 768.79 in PIP actions does not unconstitutionally deny insureds access to the courts "because the statute has no deterrent effect on the filing of PIP suits," and it may, at worst, "encourage a PIP insured to settle a contested claim after suit is filed." 760 So. 2d at 1107.

Cahuasqui now seeks review, contending that jurisdiction exists due to express and direct conflict with Pinnacle Medical and Lasky.

II.

JURISDICTIONAL ISSUE

Does the Third District Court of Appeal's decision below expressly and directly conflict with Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 5 (Fla. 2000) and Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974)?

III.

SUMMARY OF ARGUMENT

The Third DCA's decision does not expressly and directly conflict with Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 5 (Fla. 2000) or Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974). Cahuasqui addresses entirely different issues that those in Pinnacle Medical and Lasky.

In Pinnacle Medical, this court held, in part, that the PIP arbitration statute, section 627.736(5), violates due process because it arbitrarily distinguishes between medical providers and insureds. The Cahuasqui decision does not address the issue of due process and does not address a statutory provision which treats insureds and medical providers differently. Therefore, there cannot be express and direct conflict.

In Lasky, the court held that the No-Fault Act does not deny access to the courts. Cahuasqui holds that section 768.79, which was not in effect when Lasky was decided, does not deny PIP insureds access to the courts. There is no conflict.

IV.

ARGUMENT

The Third DCA's Decision Does Not Expressly and Directly Conflict With Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., or Lasky v. State Farm Ins. Co.

The Third DCA's decision below does not expressly and directly conflict with this court's decisions in Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 55 (Fla. 2000) or Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974). As the Third DCA observed in its opinion, the issue of whether section 768.79, Fla. Stat. (1997) applies in PIP cases is one of first impression.

In order for express and direct conflict to exist, the allegedly conflicting decisions must address the same issue. See Times Publishing Co. v. Russell, 615 So. 2d 158 (Fla. 1993). Express and direct conflict does not exist when the case is one of first impression. See Cortez v. State, 731 So. 2d 1267 (Fla. 1999) (no express and direct conflict where DCA's decision was "the only case which has addressed the effect of section 856.031 on warrantless arrests for loitering and prowling").

In Pinnacle Medical, this court did not address the applicability of section 768.79 in PIP cases. The issue in Pinnacle Medical concerned a statutory provision, section 627.736(5), Florida Statutes, which mandated arbitration of disputed PIP claims between insurers and medical providers who have accepted an assignment of

benefits. The court held, in relevant part,[1] that section 627.736(5) "arbitrarily distinguishes between medical providers and insureds, violating medical providers' due process rights." The court stated: "Under 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)." 753 So. 2d at 59.

Cahuasqui addresses a different statute and a different constitutionality issue. The issue raised and addressed in Cahuasqui was whether section 768.79 unconstitutionally denies insureds access to courts when applied in PIP cases. The issue of due process was not raised below or discussed in the Third DCA's opinion.

In addition, unlike the PIP arbitration statute at issue in Pinnacle Medical, section 768.79 applies equally to insureds and medical providers. Therefore, it does not "arbitrarily distinguish" between the two classes of litigants.

Express and direct conflict does not exist merely because the court in Pinnacle

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[1] The main holding of Pinnacle Medical is that the mandatory arbitration provision of section 627.736(5) unconstitutionally denies assignee-medical providers access to the courts. The court observed that the legislature denied these litigants of the right to sue in court without providing a meaningful alternative. 753 So. 2d at 57-59. That part of the Pinnacle Medical decision is not at issue and Cahuasqui does not contend that it gives rise to conflict jurisdiction. This case does not present the question of whether an alternative dispute resolution system, such as arbitration, constitutes a denial of access to the courts.

Medical alluded to section 627.428 as a "one-way imposition of attorney fees against insurers." Pinnacle Medical cannot reasonably be interpreted as holding that an insurer cannot recover fees against an insured under another applicable statute, such as sections 768.79 or 57.105. The court's allusion to the "one-way" fee statute was intended only to illustrate how assignee-medical providers are treated differently than insureds when they are compelled to arbitrate rather than sue in court.

Lasky also addressed an entirely different issue than Cahuasqui. Lasky held that the No-Fault Act does not unconstitutionally deny access to the courts. Lasky could not have addressed the constitutionality of section 768.79, which was not even in effect when the case was decided.

Cahuasqui is consistent with Lasky. The Third DCA held that the offer of judgment statute does not deter the filing of PIP suits and therefore does not alter the No-Fault Act's "reasonable alternative" to traditional tort litigation:

> In Lasky, the Supreme Court of Florida held that the PIP statute did not violate the right of access to the courts because it provides "a reasonable alternative to the traditional action in tort." 296 So. 2d at 15. We find that the application of the offer of judgment statute to PIP actions does nothing to alter this "reasonable alternative," because the statute has no deterrent effect on the filing of PIP suits. At worst, we believe that the offer of judgment statute may encourage a PIP insured to settle a contested claim after suit is filed.

760 So. 2d at 1106-07 (footnotes omitted).

In her brief on jurisdiction, Cahuasqui inappropriately argues the merits of the case. U.S. Security disagrees with Cahausqui's position on the merits. However, this brief only addresses the issue of jurisdiction.

V.

CONCLUSION

It is respectfully submitted that the court should decline to exercise discretionary jurisdiction in this case because Cahuasqui does not expressly and directly conflict with Pinnacle Medical or Lasky.

Respectfully submitted,

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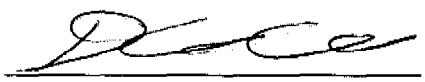
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of September, 2000 to **Michael Nuzzo, Esquire**, 2100 Coral Way, Suite 504, Miami, Florida 33145, Trial Counsel for Defendant/Appellee; **Carlos Lidsky, Esquire**, Lidsky & Vaccaro, 145 East 49th Street, Hialeah, Florida 33013, Counsel for Plaintiff/Appellant.



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