

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: SC00-1649
Lower Tribunal No.: 3d98-3337

LILIANA CAHUASQUI,

Petitioner, Plaintiff

-vs-

U.S.SECURITY INSURANCE
COMPANY,

Respondent, Defendant.

PETITIONER'S REPLY BRIEF

LIDSKY, VACCARO & MONTES
ATTORNEYS AT LAW, P.A.
145 East 49th Street
Hialeah, Florida 33013
(305) 822-2100
(305) 821-5535 [fax]

JUAN C. MONTES, ESQ.
FLORIDA BAR NO. 031313

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT:	
I. §768.71(3) MAKES §768.79 SUBORDINATE TO CONFLICTING STATUTES	1
II. §768.79 DESTROYS THE LEVEL PLAYING FIELD CREATED BY THE LEGISLATURE AND HISTORICALLY PROTECTED BY THE COURTS	4
III. §768.79 CREATES A GREATER CONFLICT IF APPLIED TO THE NO-FAULT ACT THAN A RECIPROCAL FEE PROVISION	6
IV. §768.79 ERODES THE CONSTITUTIONAL PROTECTIONS OF PIP	7
V. APPLICATION OF §57.105 DOES NOT OPEN DOOR TO §768.79	8
CONCLUSION	11
CERTIFICATE OF SERVICE	12
CERTIFICATE OF COMPLIANCE	13

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Allstate Ins. Co. v. Ivey</u> 774 So.2d 679 (Fla. 2000)	4
<u>Carnival Leisure Industries, Ltd. v. Arviv</u> 650 So.2d 177 (Fla. 3 rd DCA 1995)	9
<u>Carnival Leisure Industries, Ltd. v. Holzman</u> 660 So.2d 410 (Fla. 4 th DCA 1995)	9
<u>Clayton v. Bryan</u> 753 So.2d 632 (Fla. 5 th DCA 2000)	10
<u>Danis Industries Corp. v. Ground Improvement Techniques, Inc.</u> 645 So. 2d 420 (Fla. 1994)	4, 5
<u>Gary v. Singletary</u> 700 So.2d 1220 (Fla. 1977)	2
<u>Lasky v. State Farm Ins. Co.</u> 296 So.2d 9 (Fla. 1974)	8
<u>Moran v. City of Lakeland</u> 694 So.2d 885 (Fla. 2 nd DCA 886)	10
<u>Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.</u> 752 So.2d 55 (Fla. 2000)	8
<u>Sachs v. Hoglun</u> 397 So.2d 447 (Fla. 3 rd DCA 1981)	9
<u>Scottsdale Ins. Co. v. De Salvo</u> 748 So.2d 941 (Fla 1999)	3, 4, 5

State Farm Casualty Co. v. Palma
555 So.2d 836 (Fla. 1990) 7

Statutes

57.105 8, 9, 10
627.428 1, 2, 3, 4, 6, 7, 8, 11
627.736 1, 2, 3, 6, 7, 8, 11
768.71(3) 1, 2, 9, 11
768.79 1, 2, 3, 4, 5, 7, 8, 9, 10
768.79(1) 2

Rules

Federal Rule of Civil Procedure 11 10

ARGUMENT

I. §768.71(3) MAKES §768.79 SUBORDINATE TO CONFLICTING STATUTES

The offer of judgment statute does not apply to actions under PIP. Respondent’s statement that “[t]he only exceptions to the statute’s applicability are for non-civil cases and civil cases which are not actions for damages,” (Page 6 of Respondent’s Brief) clearly ignores the plain meaning of §768.71(3), which provides that “[i]f any provision of this part [which includes 768.79] is in conflict with any other provision of the Florida Statutes, such other provision shall apply.” Cahuasqui submits that §768.79 conflicts with §627.736(8) in its application of §627.428, with the legislative and public policy behind the no-fault law, and with prior application of sections 627.736(8) and 627.428 by this Court.

Respondent suggests that this Court assume the legislature deliberately omitted the word “only,” or word to that effect, in section 627.736(8), therefore permitting the application of other fee provisions. However, considering the fact that §627.428 would already apply to any action between the insured and his insurer, and said provision has been in effect for decades, the addition of §627.736(8) serves to further support the contention that attorney’s fees for any dispute under the no-fault act are governed exclusively under §627.428. Respondent’s argument that courts should attempt to give

meaning to all parts of a statute would be better served in observing the application of §768.71(3) in the instant matter. Clearly the defendant insists that such provision be forgotten.¹

The conflict in the application of §768.79 is further illustrated by pointing out the glaring understatement in Example 2 on page 16 of Respondent's Brief. The Respondent attempts to point out various examples of how sections 627.428 and 768.79 operate in different spheres and do not intersect.² The Respondent states:

Example 1: If an insured recovers 75 percent or less than the insurer's offer of judgment, he or she will still recover fees incurred through the date of the offer. The insurer recovers its fees incurred after the date of the offer and those fees are set off against the insured's judgment. § 768.79(1). The statutes are harmonized and the policy objectives of both statutes are achieved.

What Respondent omits however, is that §768.79(1)'s set-off applies to the entire judgment which includes the attorney's fees. Hence, a prevailing plaintiff could likely not recover any attorney's fees and costs, even those incurred prior to the date of the

¹ The analogy by the Respondent involving *Gary v. Singletary*, 700 So.2d 1220 (Fla. 1997) is wholly flawed. *Singletary* involved two provisions within the same chapter which related specifically to the powers delegated to the Parole Commission. Section 768.79 is a general provision in a different chapter applicable to all civil actions for damages. It does not specifically or even broadly refer to the no-fault statute.

² Cahuasqui also maintains that Example 1 illustrates a conflict as it essentially provides fees to the insurer as the prevailing party despite the "one-way" limitation in §627.736(8) permitting fees pursuant to §627.428. Examples 3 & 4 are irrelevant because they do not invoke the application of the offer of judgment statute.

offer. This result eviscerates the policy objectives of §§627.736(8) & 627.428, and illuminates the lack of harmony between the statutes. In footnote three (3) of this Honorable Court's opinion in *Scottsdale Insurance Company v. De Salvo*, 748 So.2d 941, 944 (Fla. 1999), this Court illustrated its holding with a hypothetical example. Using the same hypothetical example, lets assume that the trial court calculated the attorney's fees, costs, and prejudgment interest which accrued prior to the offer at \$4500. Because the \$10,000 determination plus \$4500 (i.e., \$14,500) is less than the \$20,000 offer, \$14,500 becomes the insured's judgment. However, the insured does receive its full attorney's fees up to date of the offer and the insured has no further obligation to the insurer.

Consequently, if the \$20,000 offer was made under §768.79, the insured would see a totally different result. Because the total amount did not exceed 75% of the offer (i.e. \$15,000), the insured is now liable for the insurer's attorney's fees and costs from the date of the offer. Moreover, under provisions of §768.79, said fees/costs are set-off against the total award, including the attorney's fees. If the insurer's fees are \$15,000, not only would the insured receive no attorney's fees, in derogation of both §§627.736(8) & 627.428, but would actually have a judgment entered against it by the insurer. This would conflict with the express language and purpose of sections 627.736(8), 627.428 and this Court's interpretation of §627.428 in *Scottsdale*, supra

and *Danis Industries Corp. v. Ground Improvement Techniques, Inc.*, 645 So.2d 420 (Fla. 1994).³

II.
§768.79 DESTROYS THE LEVEL PLAYING FIELD
CREATED BY THE LEGISLATURE AND HISTORICALLY
PROTECTED BY THE COURTS

Respondent argues that §768.79 encourages settlement of disputed PIP claims and that early resolution is consistent with the intent of the no-fault legislation. Petitioner agrees that early resolution of PIP claims is consistent with the no-fault legislation, but not if those resolutions are unfair settlements forced upon insureds by the threat of being bankrupt by offers of judgment. The enactment of the “one-way” attorney’s fee provision for the insured was a conscious attempt by the legislature to level the playing field so that the economic power of the insurance companies is not so overwhelming that injustice may be encouraged. See *Allstate Ins. Co. v. Ivey*, 774 So.2d 679 (Fla. 2000). The ability for insurers to use offers of judgment in action for

³The Respondent’s argument that under §627.428 an insured who receives one dollar of insurance benefits will be awarded attorney’s fees through the date of the first settlement offer which exceed said recovery shows the fallacy in their contention that no conflict exists. Although under §627.428, *Scottsdale*, and *Danis*, this should be the result if the insured does not recover more than the offer made, when the offer of judgment statute is employed and the insured recovers 75% or less of the offer, the application of the set-off, under §768.79, will diminish or likely eliminate any attorney’s fees to the insured.

PIP benefits redistributes the economic power back the insurer who can hold this loaded gun over the heads of the insureds.

An insurer can always offer to settle a case at any time without resorting to an offer of judgment under §768.79. In fact, under this court's holdings in *Scottsdale, supra* and *Danis, supra*, an insurance company can make a fair and legitimate offer which, if not accepted by an insured who ultimately fails to recover more than the offer, would result in his attorney's fees and costs being cut-off at the time the offer was made. There is no evidence to suggests that offers of judgment generally, encourage legitimate offers from the PIP insurers, but rather nominal offers under threat of reciprocal fees.⁴ Cahuasqui submits that maintaining a level playing field between the economic power of the insurer and insured would actually encourage more legitimate and realistic settlement offers. Indeed, this Honorable Court's opinions in *De Salvo* and *Danis* eliminate the problems of recalcitrant plaintiff lawyers who unnecessarily prolong the litigation solely to increase their attorney's fees, without the need for offers of judgment.

Furthermore, the Petitioner has never argued that because PIP is supposed to streamline the insured's receipt of benefits, that the insurer is deprived of any valid

⁴Respondent makes other factual statement unsupported by the record or any other source, i.e., that most valid PIP claims settle within 90 days (page 4) and that there has been no corresponding increase in suits filed by medical providers against insureds. (page 22, footnote 4).

legal defenses or that PIP litigation is one-sided. Clearly it is not. Nonetheless, the right to attorney's fees is a one-sided means of leveling the economic power.

III.
**§768.79 CREATES A GREATER CONFLICT IF APPLIED TO THE NO-
FAULT ACT THAN A RECIPROCAL FEE PROVISION**

The Respondent concedes that “[a] prevailing party fee statute allowing either side to recover fees would arguably conflict with section §627.428.” (Respondent’s Brief at page 14). However, the Respondent overlooks that the application of §768.79, in effect, does provides for a prevailing fee standard – and worse. Under an offer of judgment, if the judgment “is one of no liability” for the insurer, hence prevailing, it is entitled to its attorney’s fees from the date the offer is made. Said eliminates the “one-way street” of §627.428, creating conflict. What’s even worse is that, even if liability is found and a judgment is entered for the plaintiff, if it is at least 25% less than the offer, the insurer is still entitled to attorney’s fees. This presents an even greater conflict with §627.428 which permits only the insured to receive fees if he prevails. Hence, the insurer get attorney’s fees if it prevails, and sometimes even if it loses. What greater conflict could there be between §§627.736(8), 627.428 & 768.79?

IV.
§768.79 ERODE THE CONSTITUTIONAL PROTECTIONS OF PIP

When the no-fault act was enacted, Floridians lost the right to sue in tort for various damages for which they could previously recover under Florida common-law. In exchange, and to sustain constitutional attack, the legislature gave certain rights to insureds, including the right to speedy payment of medical bills and lost wages from the injured party's own insurer, irrespective of fault. The legislature also provided a right of action against the insurance companies by any aggrieved insured and specifically provided for attorney's fees under §627.428. See §627.736(8). The application of this "one-way" fee provision was and is essential to the constitutionality of the statute because, absent §627.736(8) & §627.428, the right to sue would be more of an illusory right than anything else. Few insureds would be able to afford to hire an attorney to sue to recover PIP benefits, particularly if the benefits recoverable are relatively small.

For the same reason, lawyers would be reluctant to take these cases on a percentage contingency, as some may involve protracted litigation to prevail.⁵ Hence,

⁵ A perfect example is *State Farm & Casualty Co. v. Palma*, 555 So.2d 836 (Fla. 1990), where State Farm decided to "go to the mat" on a \$600 thermographic examination, which resulted in attorney's fees to the insured of \$253,500. The court agreed with Palma's physicians that the examinations were medically reasonable and necessary. If an offer of judgment existed, Mr. Palma would have probably been reluctant to pursue his valid claim, merely because the prospects of losing would undoubtedly force him into bankruptcy. It would encourage insurers

but for the “one way” fee provision, it would be economically unfeasible for most lawyers to represent PIP claimants and for insureds to afford to litigate valid PIP claims. This would place the insured at the mercy of the insurance company which can arbitrarily deny or reduce valid claims, knowing that injured insureds will likely not sue to recover their benefits. This would potentially make PIP a “no pay plan.” Moreover, if the insured has to pay his/her attorney from the benefits received, then the statute would fail to fully compensate them. This is hardly a reasonable alternative to the traditional tort remedy. Although this Court found the No-Fault law constitutional in *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974), the carving away at the protections provided by the PIP statute may erode it to the point of unconstitutionality. The erosion that is caused by the application of section §768.79, Petitioner submits, would make the no-fault act unconstitutional.

V.
APPLICATION OF §57.105 DOES NOT OPEN DOOR TO §768.79

Petitioner contends that §627.428 is a “one-way street” for imposition of attorney’s fees in favor of insured. *Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc.*, 752 So.2d 55, 59 (Fla. 2000). Respondent asserts however, that since sanctions

to fight claims when they are legally wrong, but is economically advantageous to do so.

under §57.105 would be applicable to all actions, including those under §627.736, the “one way street” can be repaved with other fee provisions such as §768.79. Respondent’s contention is wrong for two reasons.

First, unlike §57.105, the applicability of §768.79 is limited by §768.71—the conflict provision. Section 57.105 has no similar restrictions. In fact, §57.105(4) provides just the opposite. It states that “[t]he provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.”

Secondly, §57.105, unlike §768.79, is not outcome determinative. It is a neutral provisions that applies to all cases irrespective of the existence or non-existence of a fee provision and its serves to regulate against frivolous claims and defenses and conduct of the parties and the attorneys. The courts have determined the purpose behind §57.105 to be a deterrent for the pursuance of baseless and frivolous claims. *Sachs v. Hoglun*, 397 So.2d 447 (Fla. 3rd D.C.A. 1981). In *Carnival Leisure Industries, Ltd. v. Arviv*, 650 So.2d 177 (Fla. 3rd D.C.A. 1995), the court stated that the principal issue behind 57.105 was to discourage unfounded claims. See also *Carnival Leisure Industries, Ltd. v. Holzman*, 660 So.2d 410 (Fla. 4th D.C.A. 1995)(the intent behind the statute is to dissuade unfounded claims). Hence, there is no conflict between a statute punishing litigants and their counsel for bringing unfounded claims or defenses and a statute that permits insureds only to recover attorney’s fees if they prevail. Section

57.105 does not punish an insured simply because they lost a case or do not win a high enough judgment.

By the same token it would be illogical for the Respondent to assert that in *Clayton v. Bryan*, 753 So.2d 632 (Fla. 5th DCA 2000) and *Moran v. City of Lakeland*, 694 So.2d 885 (Fla. 2nd DCA 886) (both cases where offers under §768.79 were preempted by their specific and conflictive fee provisions) were wrongly decided and should be subject to §768.79 because they also may be subject to §57.105 or Rule 11 in federal court. The Respondent does not suggest the same illogical argument there.

The Respondent does assert however, that because the statutes in *Clayton* and *Moran* provide some measure of attorney's fees to the defendant, that such denotes more exclusivity and hence, an opportunity for greater conflict than a statute that clearly offers no such prospects for the defendant. In other words, if the legislature gives the defendant some limited rights to attorney's fees, it conflicts with §768.79. However, if the legislature wants to further restrict the defendant and provide it with no rights to attorney's fees whatsoever, then §768.79 is applicable. Said rationale defies logic.⁶ When the intent of a specific outcome-oriented attorney's fee provision is to grant one party fees while denying the other the same prospects, any other general provision that circumvents the original intent of the first provision would be in conflict

⁶ The Holding of the Third District in *Cahuasqui*, would also appear to be in direct conflict with the holdings in *Clayton* and *Moran*, supra.

with same. Hence, the application of an offer of judgment under §768.79 would conflict with the application of attorney's fees under §627.736 & §627.428.

CONCLUSION

The decision of the Third District in *Cahuasqui* should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was mailed this 29th day of June, 2001, to David B. Pakula, Esq., Fazio, Dawson, DiSalvo, Cannon, Abers, Podreca & Fazio, appellate counsel for Respondent, P.O. Box 14519, 633 South Andrews Avenue, Fort Lauderdale, FL 33302, Michael A. Nuzzo, Esq., 2100 Coral Way, Suite 504, Miami, Florida 33145, Barbara Green Esquire, Barbara Green, P.A., Amicus Curie, 1320 S. Dixie Hwy., Gables One Tower, Suite 450, Coral Gables, FL 33146, and Tracy Raffles Gunn, Esq., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Amicus Curie, P.O. Box 1438, Tampa, FL 33601, Hinda Clein, Esq., Conroy, Simberg, et al. 3440 Hollywood Blvd, 2nd Floor, Hollywood, Florida 33021.

LIDSKY, VACCARO & MONTES
ATTORNEYS AT LAW, P.A.
Counsel for Cahuasqui
145 East 49th Street
Hialeah, Florida 33013
(305) 822-2100
(305) 818-9101 [fax]

By: _____
JUAN C. MONTES, ESQUIRE

CERTIFICATE OF COMPLIANCE

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

JUAN C. MONTES, ESQUIRE
Fla. Bar #: 031313