SUPREME COURT OF FLORIDA

CASE NO: SC03-1653
L.T. No.: 5D01-3851

SHANNON NICHOLS

Petitioner,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

Respondent.

BRIEF OF *AMICUS CURIAE* THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS

The Academy of Florida Trial Lawyers is a voluntary statewide association of trial lawyers specializing in litigation in all areas of the law. Many Academy members represent claimants in PIP cases. For many of these clients, PIP is an important resource, or the only resource available to obtain medical treatment for their injuries.

The Academy believes its input may assist the Court in resolving the issues raised in this case, and that this Court's decision will have a tremendous impact on its members and their clients. See, Rathkamp v. Dept. of Community Affairs, 730 So.2d 866 (Fla. 3d DCA 1999).

THE CERTIFIED QUESTION

The district court opinion, Nichols v. State Farm Mutual, 851 So.2d 742 (Fla. 5th DCA 2003 is before this Court on the following question which is certified by the district court to be of great public importance:

> May an insurer recover attorney's fees under rule 1.442, Florida Rules of Civil Procedure, and section 768.79, Florida Statutes, in an action by its insured to recover under a personal injury protection policy?

Id. at 747.

For the foregoing reasons, the Amicus Academy of Florida Trial Lawyers, respectfully suggests that this Court answer the question in the negative.

SUMMARY OF THE ARGUMENT

The Offer of Judgment / Proposal for Settlement statute, §768.79, should not apply in PIP cases. The PIP No-Fault system was carefully designed to provide prompt payment of medical expenses to accident victims. While taking away their right to sue the tortfeasor the legislature gave the victims the right to prompt payment from their own insurer. It armed the insured with the right to court-awarded attorneys fees to ensure enforcement of that right.

The PIP statute, §627.736(8), specifically provides that fees in PIP cases ***shall be awarded in accordance with §627.428***. Those specific statutes should control over the general provisions of §768.79, which apply in civil actions generally. Indeed, Chapter 768 acknowledges this fact by providing, in §768.71(3), that when a provision of that part of Chapter 768 conflicts with another statute, the other statute controls.

For example, in Frazier v. Metropolitan Dade Cty, 701 So.2d 418 (Fla. 3d DCA 1997), the court applied §768.71 (3), to a conflict between the wrongful death statute (the more specific statute) under which a non-negligent survivor's recovery cannot be reduced due to another survivor's negligence, and the comparative negligence statute (the more general statute), which dictates that each party's liability is limited to that party's percentage of fault, the comparative fault statute must yield to the wrongful death statute.

The offer of judgment statute cannot constitutionally apply in PIP cases. The Legislature cannot take away a common law right without providing a reasonable alternative. When it enacted the PIP system, the Legislature took away the injured insured's right to sue the tortfeasor in exchange for the insured's right to prompt and virtually certain recovery of expenses from the PIP insurer. Application of the offer of judgment statute eliminates both the certainty and promptness of that "*quid pro quo*." It renders the legislative alternative to a tort suit inadequate and unreasonable by giving the insured ***less than the coverage she paid for***, in exchange for her right to sue in tort.

An insured who has paid premiums to obtain prompt payment of benefits without litigation, who has been injured and has incurred medical bills and lost wages, should not be compelled either to accept less than she paid for or to risk becoming obligated to pay the insurance company's attorneys' fees. To rule as the Fifth District has ruled is, literally, to "add insult to (personal) injury."

ARGUMENT

THE OFFER OF JUDGMENT STATUTE SHOULD NOT, AND CONSTITUTIONALLY, CANNOT APPLY IN PIP CASES

The application of the offer of judgment statute to PIP cases is contrary to the express language of the PIP statute, and violates the right of access to courts provision of Article I, section 21 of the Florida Constitution.

The PIP statute, §627.736(8) provides:

> **Applicability of provision regulating attorney's fees**.--With respect to any dispute under the provisions of ss. 627.730-627.7405 between the insured and the insurer, the provisions of §627.428 shall apply.

Section 627.428(1), provides:

> Upon the rendition of a judgment or decree in any of the courts of this state against an insurer and in favor of any named or omnibus insured ... the trial court... shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had.

The Offer of judgment statute, §768.79, provides, in part:

> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days,

> the defendant shall be entitled to recover reasonable costs and attorney's fees . . .if the judgment is one of ***no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer . . .***

(Emphasis added.)

Article I, §21 of the Florida Constitution guarantees:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

A. THE OFFER OF JUDGMENT STATUTE DOES NOT APPLY IN PIP CASES

The arguments which the Academy will present to this Court are largely those that were presented to the district court below. In an effort to secure the high ground of statutory construction, the majority opinion mis-classified these as "policy" arguments. 831 So.2d at 745. Contrary to the majority opinion, Judge Sawaya's dissent forcefully and effectively explains why, in considering both what the Legislature said and what it meant, the Offer of judgment statute does not apply to suits for PIP benefits.

Basic rules of statutory construction and interpretation confirm that the offer of settlement statute does not apply in PIP suits. Florida's Motor Vehicle No-Fault Law is contained in sections §627.730 through §627.7405 of the Florida Statutes. The no

fault law has its own provision on attorney's fees, §627.736(8), which specifically provides that, in disputes between the insured and insurer in PIP cases, "the provisions of §627.428 ***shall*** apply." (Emphasis added.)

The language of the statute is plain, clear and unambiguous - the statute expressly refers to only §627.428 as applicable "with respect to any dispute under the provisions of §627.730 - §627.7405 between the insured and the insurer." The PIP statute does not include the general offer of settlement statute as applicable in PIP benefits disputes between insured and insurer.

Under the doctrine of *inclusio unius est exclusio alterius*, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. Industrial Fire & Casualty Insurance Co. v. Kwechin, 447 So.2d 1337, 1339 (Fla. 1983).

A second principle of statutory construction also applies here: a specific statute addressing a narrow class of cases governs over a general statute. The more specific statute is considered an exception to the general terms of the more comprehensive statute. McKendry v. State, 641 So.2d 45, 46 (Fla. 1994). The Legislature specifically recognized this principle when it enacted §768.71(3).

For example, in Rollins v. Pizzarelli, 761 So.2d 294 (Fla. 1999), this Court held that the PIP statute's more specific no-fault collateral source provision should apply in favor of the general collateral source statute on the question of PIP set-offs. Similarly, in Foreman v. E.F. Hutton & Company, Inc., 568 So.2d 531 (Fla. 3d DCA 1990), the Court held that a specific statute governing fee awards in RICO cases controlled over the general statute applicable to fee awards in "any civil action" found to have been brought frivolously or in bad faith, i.e., §57.105.

Here, a specific statute covering a particular subject area, i.e., PIP suits, provides that another specific one-way statute concerning attorneys fees in insurance claims, should control over a general statute covering the same and other subjects in more general terms, i.e., the award of attorneys fees triggered by offers of judgment in all civil actions.

By its plain terms, §627.428 ***already applied*** in PIP cases, as it does in any other dispute between an insured and an insurer. It was not necessary to enact §627.736(8) to make it apply. Therefore, the Legislature must have intended something more: it must have intended that §627.428 be the ***only*** attorneys fees statute to apply in PIP cases. Otherwise, §627.736(8) is superfluous.

Moreover, in §768.71(3), the Legislature has expressly acknowledged that the offer of settlement statute shall not prevail over more specific attorneys' fees statutes.

Thus, while the majority opinion places great emphasis on the generally inclusive language of the offer of settlement statute, i.e., "In any civil action for damages filed in the courts of this state," it simultaneously ignores the strictures of §768.71(3).

The Legislature has had years to amend §627.736(8), the PIP fee provision, to include a reference to the offer of settlement statute if the offer of settlement statute were in fact intended to apply to PIP suits. The Legislature has not taken this step, and for good reason. As we discuss below, to do so would be a denial of the constitutional right of access to courts.

When the Legislature added the"any civil action for damages" language to §768.79 in 1990, it did not repeal §768.71(3). Contrary to the majority opinion below and the majority opinion in U.S. Security Ins. Co. v. Cahuasqui, 760 So.2d 1101 (Fla. 3d DCA 2000), rev. dismd., as Improvidently Granted, 796 So.2d 552 (Fla. 2001) it makes sense to construe the language as pertaining only to "any civil action for damages" so long as another statute does not conflict.

Read together, the two statutes (§768.71(3) and §768.79) mean that §768.79 applies to all civil actions for damages filed in the courts of this state, ***unless, in a particular case, it conflicts with another statute***.

Some Thoughtful Policy Arguments

Application of §768.79 to PIP cases would defeat the purpose of the attorneys fees provision of the PIP statute -- to give the insured, already economically weakened by medical bills and lost wages, the financial power to contest the denial of a valid claim. The majority opinion ignores the vast disparity in power and resources between an insured and an insurer, which so obviously influenced the Legislature when it passed §627.736(8) and §627.428, allowing fee awards to a prevailing insured, but not to a prevailing insurer.

These statutes create a "one-way street offering the potential for attorneys' fees only to the insured or beneficiary." Danis Industries v. Ground Improvement Techniques, Inc., 645 So.2d 420 (Fla. 1994); Cahuasqui, supra, 760 So.2d at 1108 (Fletcher, J., dissenting).

The purpose of §627.428 is to "discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts." Ins. Co. of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992); Danis Industries, 645 So.2d at 421.

The disparity in power and resources of insureds and insurers means that the offer of judgment statute would have a much greater impact on a PIP insured than it

does on an insurer. PIP suits typically involve a relatively nominal amount of money (though not nominal to many insureds). **Any** risk of having to pay the insurance company's attorney's fees would be terrifying to an insured. The insured may not be willing — or able — to take that risk. So the insured may be forced by circumstances beyond her control to settle for less than the amount she is owed. At the same time, the insured cannot effectively use §768.79 against the insurer. The insurer's posture is the same whether it accepts or rejects an offer of judgment. The insurer is already liable to the insured for attorneys fees if the insured prevails. If the insured does not prevail, the insurer will not have to pay fees under either statute. No insurance company is ever going to be impressed or threatened by any offer a PIP claimant may make under the offer of judgment statute.

Applying the Offer of judgment statute to PIP claims will not reduce litigation. There will still be plenty of litigation. The only difference will be that the insureds will be sued by their health care providers for unpaid bills. ***Litigation by health care providers for unpaid bills is precisely what PIP is supposed to prevent***. People like Ms. Nichols would be subjected to such litigation, even though she paid for PIP coverage to protect her from exactly that problem. That is not how PIP is supposed to work.

In Cahuasqui, the Third District held that public policy justifies the application of the offer of settlement statute to PIP suits 760 So.2d at 1105. ("We see no reason why this policy should not apply to a PIP case just as it applies in any other civil action for damages.") The majority opinion below followed this reasoning. 851 So.2d at 745.

But that battle can and is being fought within the context of the PIP statute. For instance, Scottsdale Insurance Company v. DeSalvo, 748 So.2d 941 (Fla. 1999) eliminates any concern that PIP suits are strictly fee-driven. Under DeSalvo, the PIP carrier's exposure to attorney fees to its insured stops from the point in the litigation when the carrier makes "the first offer of settlement which exceeds the recovery amount, including the damage award and attorney fees, costs, and interest the insured would have received if the insured had accepted that offer of settlement on the date it was made." Id.

Unlike the result reached by this Court in DeSalvo, application of the offer of judgment statute in the context of a PIP claim, as dissenting Judges Fletcher and Sawaya note, ***creates a one-way street going the wrong way***. An insurer may create pressure on an insured to settle by making an offer of judgment and imposing on the insured the risk of attorneys fees. But the insured does not enjoy the same benefit from the offer of judgment statute, because the insured already has a fee-triggering

mechanism which was the recognized *quid pro quo* for the relinquishment of the insured's ability to sue the tortfeasor. In our opinion, the majority below and in Cahuasqui missed an exit sign on the highway of statutory construction and ended up at the wrong destination.

B. APPLYING §768.79 IN PIP CASES RESULTS IN AN UNCONSTITUTIONAL DENIAL OF ACCESS TO COURTS BY ELIMINATING THE "QUID PRO QUO" OF PROMPT AND VIRTUALLY AUTOMATIC PAYMENT OF MEDICAL BILLS AND EXPENSES, PROMISED IN EXCHANGE FOR RELINQUISHING THE RIGHT TO SUE THE TORTFEASOR

Applying the offer of settlement statute to PIP suits will have a unconstitutional chilling effect on an already limited access to courts.

Article I, §21 of the Florida Constitution guarantees:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Where the right of access to courts for redress of a particular injury is a part of the common law of the state, the Legislature:

> is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative

> method of meeting such public necessity can be shown.

The right to sue in tort for damages suffered in an automobile accident was long ago established under the Florida common law.

In Lasky v. State Farm Ins. Co., 296 So.2d 9, 15 (Fla. 1974), the Supreme Court held the PIP statute constitutional because:

> In exchange for the loss of a former right to recover — upon proving the other party to be at fault — for pain and suffering, etc., in cases where the thresholds of the statute are not met, the injured party is assured a speedy payment of his medical bills and compensation for lost income from his own insurer, even where the injured party was himself clearly at fault.

Were it not for the requirement of "swift and virtually automatic payment", obtained in exchange for the right to sue in tort, the PIP statute would violate the right of access to courts under Article I, §21, Florida Constitution. Compare Lasky, supra. with Kluger v. White, 281 So. 2d 1 (Fla. 1973) (property damage provision of no fault statute unconstitutional denial of access to courts where no provision for prompt recovery from own insurer).

The recognized intent of the no-fault statute is "to guarantee swift payment of PIP benefits." Crooks v. State Farm Mutual Auto. Ins. Co., 659 So. 2d 1266, 1268 (Fla. 3d DCA 1995). 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 or the insurance coverage of either party. 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).

The law requires the owner of a motor vehicle to maintain security, by insurance or otherwise, for the payment of no-fault benefits. 296 So. 2d at 13. If the owner does not maintain the required security, he is not entitled to immunity. 296 So. 2d at 14.

In exchange for the loss of the right to sue in tort, the accident victim received the right to "the ***speedy*** payment by his own insurer of medical costs, lost wages, etc. ..." 296 So. 2d at 14. (emphasis added). While there were also other benefits conferred by the statute, it was this "prompt recovery of his major, salient out-of-pocket losses" that was the heart of the benefits conferred on the claimant. Id.

> "[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)(emphasis added). As the

> Supreme Court recognized in Industrial Fire & Casualty Insurance Co. v. Kwechin, 447 So.2d 1337, 1339 (Fla. 1983), central to its earlier decision in Lasky to uphold the no-fault law was the assurance that persons would in fact receive the "some economic aid in meeting their medical expenses and the like, in order not to drive them into dire financial circumstances . . ."

Application of the offer of judgment statute to PIP claims vitiates the requirement that payment be "swift" and "virtually automatic." It places a daunting obstacle in the way of an insured seeking payment of a PIP claim. Indeed, many insureds will likely give up their valid PIP claims rather than face the risk of having to pay the insurance company's attorneys fees should they be unsuccessful.

As Judge Sawaya put it:

> Because of the imposition of fees pursuant to §768.79, instead of traveling down an unobstructed one-way street to recovery as intended by the Legislature, many injured insureds may find themselves stuck in front of a toll booth erected and maintained by their insurance companies without sufficient funds for passage through. This certainly is not the intention of the Legislature.

851 So.2d at 751.

No matter how meritorious the insured's claim against her PIP insurer may be, there is a substantial risk inherent in our jury system. No realistic attorney, claimant,

or judge can predict the outcome with any true probability. The result is that reasonable-minded PIP claimants will be forced to accept offers of settlement that do not cover their out-of-pocket medical or other expenses that PIP was designed to cover - not because they think that is all they deserve- but because they do not want to run the risk of attorney fee exposure.

A PIP claimant should not have to compromise PIP benefits simply because of the risk that if he does not prevail on a meritorious claim he will have to pay attorney fees to his PIP carrier - a financial exposure which could far exceed the amount of benefits in dispute. Few reasonable persons would take that financial risk. The law should not place PIP claimants in that dilemma when the law has already restricted the claimant's right of access to courts to seek redress against the tortfeasor. PIP claimants should not be intimidated from pursuing the alternative remedy the Legislature gave them.

When swift economic aid from the PIP carrier - - the *quid pro quo* for taking away access to courts - - is not forthcoming, the insured has no choice but to sue his PIP carrier for it. He cannot sue the tortfeasor. The no fault law has denied that access to court. Applying the offer of settlement statute to PIP cases has a chilling effect on the PIP insured's already limited access to court to recover his economic losses from an automobile accident.

The Legislature can only take away a right to sue if the alternative it provides is "reasonable." Kluger, 281 So.2d at 5. Taking away the right to sue in exchange for a right to recover only part of the benefits for which one has paid premiums is not "reasonable." Allowing the use of the offer of judgment statute in a PIP case would thus violate the right of access to courts.

C. A SUIT FOR PIP BENEFITS IS NOT AN ACTION FOR DAMAGES

As the dissent points out, the majority's view that the two statutes can be harmonized ignores the fundamental difference between actions for PIP benefits and actions for damages. Any discussion of whether the PIP statute conflicts with any other statute must begin with this basic premise: ***In PIP cases, the legislature has taken away the insured's right to sue the tortfeasor.*** The only reason that this is allowable under the constitution is that the insured is guaranteed prompt and almost certain (though only partial) payment of her medical bills by her own insurer. Any statute which interferes with that guarantee conflicts with the fundamental bargain of the PIP statute.

In Cahuasqui, the Third District held that "the mere fact that the legislature provided that §627.428 applied in PIP cases does not, by itself, mean that it conflicts with the offer of judgment statute." 760 So.2d at 1006

That analysis is superficial. A more reasoned analysis of §627.428 compels the conclusion that it creates a one-way street for attorney's fees to insureds when they are forced to litigate with their insurance carrier. By contrast, §768.79, the offer of judgment statute, is a two-way street. The majority opinion ignores not only the rules of statutory construction, but also the rules of the road when it holds that there is no conflict between a one-way street and a two-way street.

A plaintiff with a meritorious claim, PIP or otherwise, may lose his or her suit for any number of reasons: ineffective lawyer; a bad jury panel; or the luck of the draw in terms of trial court judges. Any one of those difficult-to-predict factors could result in a lost claim, or a successful claim which is not successful enough to avoid the imposition of attorney's fees under the offer of judgment statute. However, with respect to §57.105, that same insured is not subject to imposition of attorney's fees. Accordingly, the conflict between the PIP statute and the offer of judgment statute is significantly and palpably greater than any potential conflict between the PIP statute and §57.105.

The Fifth District's opinion in Weesner v. United Services Auto. Ass'n, 711 So.2d 1192 (Fla. 5th DCA 1998) upon which the Cahuasqui majority relied, is also inapposite. Weesner involved uninsured motorist coverage, not PIP coverage.

Far more analogous is Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997). In Moran, the plaintiff brought an action under 42 U.S.C. §1983, a part of the Civil Rights Act. The defendant filed an offer of judgment, which the plaintiff declined. The court then granted summary judgment in favor of the defendant. The defendant moved for attorneys' fees and costs pursuant to Fla. R. Civ. P. 1.442 and §768.79, which the trial court granted. The Second District reversed. The court held that the statute conflicted with the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988. Section 1988 is construed to provide that "a prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." 694 So.2d at 886. The court in Moran, held that, "because section 1988 allows the award of attorney's fees to prevailing defendants in a much more limited context than does §768.79(1), section 1988 preempts section 768.79(1)." Id.

In so ruling, the Second District must have realized that Congress was cognizant of the very real imbalance of power between plaintiffs and defendants in civil rights cases when it enacted §1988. The Civil Rights Attorneys Fees Awards Act was intended to correct that imbalance of power and encourage plaintiffs to pursue their civil rights. See, In re: Estate of Smith, 644 So. 2d 158, 159 (Fla. 4th DCA 1994).

To allow application of the offer of judgment statute in that situation would have undermined the basic purpose of the attorneys fees statute.

Similarly, in the present case, application of the offer of judgment statute in a PIP case would undermine the basic purpose of the PIP statute. The insured could not proceed without facing the threat of having to pay the insurer's attorneys fees.

This is a far greater threat than the possibility of not recovering all of her own attorneys fees, as in Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So.2d 420 (Fla. 1994) or Scottsdale Ins. Co. v. DeSalvo, 748 So.2d 941 (Fla. 1999). A PIP insured whose attorney takes the case on a contingency fee basis — almost always for a court awarded fee — usually will not be obligated to pay the attorney if the recovery of fees from the insurance company is limited under Danis or Scottsdale. That is far less of a risk to the insured than application of the offer of judgment statute. Under the offer of judgment statute, the insured will have to pay the insurer's attorney, as well as the health care provider.

The Court should not allow the application of the offer of judgment statute to upset the very delicate balance of power the Legislature has created in the PIP statute.

CONCLUSION

The offer of judgment statute does not apply in PIP cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished via U.S. mail to: Ken Hazouri, Esq., Drage deBeubien, 332 North Magnolia Avenue, Orlando, FL 32802 on December 11, 2003.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel certifies that the size and font style used in this brief is 14 pt, New Times Roman, in compliance with Fla.R.App.P. 9.210.

Respectfully submitted,

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