SUPREME COURT OF FLORIDA

CASE NO: SC03-1653
Lower Tribunal No: 5D01-3851

SHANNON NICHOLS,
Petitioner,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Respondent.

APPELLANT'S INITIAL BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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PREFACE

For convenience, Petitioner, the Appellant in the appeal below and the plaintiff in the case below, the insured, will be referred to as Shannon Nichols, and the Respondent, Appellee in the appeal below and the defendant in the case below, the insurer, State Farm Mutual Automobile Ins. Co., will be referred to as State Farm.

Petitioner = Appellant = Plaintiff = insured = Shannon Nichols

Respondent = Appellee = Defendant = insurer = State Farm

The certified question has been passed on to the Supreme Court by the Fifth District Court in its opinion below. State Farm has appealed a different issue of the opinion below on a different ground, without approval of the Fifth District Court. The number of that appeal is SC03-1481.

"Offer of judgment and Demand for Judgment" is the title of F.S. 768.79. "Proposal for Settlement" is the title of the Fla. R. Civ. P. 1.442. Although the rule controls, offer of judgment will be used as it is the older terminology.

Motorists in Florida are required to buy Personal Injury Protection insurance, or PIP, which pays for most of their medical expenses if they are injured by a car, even if it was their own fault. PIP is also known as No-Fault insurance. F.S. Sections 627.730 - 627.7405.

The record of the 5th District Court will be referenced as (5DCA R.).

STATEMENT OF THE CASE AND FACTS

JURISDICTION

Jurisdiction of this case is based on the question certified by the Fifth District Court of Appeal to be of great public importance in its opinion, filed June 13, 2003. (5DCA R. 36 - 59). This court has jurisdiction. Fla. R. App. P. 9.030(a)(2)(A)(v). As this is a question certified by a Court of Appeal, no jurisdictional briefs are permitted. Fla. R. App. P. 9.120(d).

NATURE OF THE CASE

This is a civil case seeking benefits under an insurance policy.

DISPOSITION BELOW

Shannon Nichols lost after a two day trial in January 2000. Based on an offer of judgment filed in 1999, and the new ruling of U.S. Security Ins. Co. v. Cahuasqui, 760 So. 2d 1101 (Fla. 3d DCA 2000), a final judgment for attorney's fees was entered against Shannon Nichols, but the trial court also certified a question as one of great public importance as to whether the offer of judgment applied to personal injury protection contracts. A stay was entered in the case pending the resolution of Cahuasqui before the Supreme Court. (R. 405) The Supreme Court found that review was improvidently granted and declined review in

November of 2001[1], and this appeal went forward. (R. 408 - 10). The Fifth District Court of Appeal found that the proposal for settlement did apply to PIP contracts, but certified the question to this Court with a slight rephrasing.

The Fifth District Court, answering a second point of the appeal which is not before this Court in the instant appeal, found that the particular proposal for settlement served by State Farm in this case was defective on its face and the decision below awarding fees against Shannon Nichols was reversed for that reason. Although the Fifth District's decision did not conflict with any other opinion, State Farm is attempting to have this court review that aspect of the appeal alone. This Court has already received State Farm's initial brief on that separate issue. That appeal was requested earlier in time than the instant appeal, and so it has a lower number.

STANDARD OF REVIEW

The standard of review is de novo for certified questions.

COURSE OF THE PROCEEDINGS

A complaint for breach of contract was filed on November 27, 1997. (R. 1-4). On February 2, 1999, State Farm served a proposal for settlement for $250.

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[1]U.S. Security v. Cahuasqui, 760 So. 2d 1101, 1102 (Fla. 3d DCA 2000) rev. gr. 786 So.2d 1183 (Fla. 2001) rev. dismissed 796 So.2d 532 (Fla. 2001).

(R. 288-89) After a 2 day trial in January 2000, the jury decided Shannon Nichols unreasonably refused to attend State Farm's examination. (R. 263)

CASE BACKGROUND and STATEMENT OF THE FACTS

Shannon Nichols was injured in a vehicle collision in September 1996. (R. 1-4). She was insured for PIP by State Farm. (R. 1 - 4). She received the total value of her car and policy limits of the tortfeasor's bodily injury policy, making her underinsured motorist coverage from State Farm available along with the PIP coverage. (R. 1- 4, 347). Shannon Nichols received chiropractic and orthopaedic treatment. (R. 8 - 12, 478). In December of 1999, State Farm contracted with DRS, Inc. to schedule Shannon Nichols to submit to an examination by Dr. Westergan, M.D.[2] (R. 472 -73). The examination time was rescheduled by agreement. (R. 472 - 73, 478). The final date for the examination was to be January 20, 1997. (R. 474).

Shannon Nichols had been having lower abdominal pain over her right ovary area. (R. 487). Her ob-gyn doctor ordered an ultrasound to diagnose the pain. (R.

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[2]F.S. 627.736(7)(a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon the request of an insurer, submit to mental or physical examination by a physician or physicians.

490 - 95). Shannon Nichols had previously had 3 abnormal pap smears. (R. 175 - 77). The ultrasound was scheduled for January 20, 1997, at 10:30, the same day as State Farm's examination. (R. 178). Shannon Nichols attended the ultrasound instead of her insurer's medical examination. (R. 183).

State Farm paid the ambulance, hospital, and prior medical and chiropractic bills, but due to the missed appointment with their medical examiner, State Farm refused to pay further PIP benefits for any further medical or chiropractic treatment, and Shannon Nichols sued in Orange county court. (R. 8 - 12, 120). State Farm served a Proposal for Settlement of $250 to cover both benefits and attorneys fees in February 1999, about a year after the start of the case. (R. 288 - 89). The existence of a contract and past properly submitted bills were stipulated to, as well as past bills submitted and not paid and interest to a total of about eleven hundred dollars. There was no controversy as to the amount of benefits if Shannon Nichols won her trial. Shannon Nichols lost after a 2 day trial, on the question of whether she unreasonably refused to attend the January 20, 1997 medical examination. (R. 263). State Farm moved for and was denied attorneys fees based on its proposal for settlement (R. 290 - 91). State Farm later moved for reconsideration based on the new Cahuasqui case which was granted. (R. 300 - 330). A hearing was held on the amount of fees. (R. 382 - 404). Judgment was

entered against Shannon Nichols for $23,199.00. (R. 374 -76). Collection proceedings were stayed pending resolution of Cahuasqui before the Supreme Court. (R. 405). When the Supreme Court decided that there was no actual conflict between the offer of judgment in Cahuasqui and the mandatory arbitration for doctor's bills in Nationwide v. Pinnacle, 753 So.2d 55 (Fla. 2000), the appeal on the certified question to the 5th District Court of Appeals went forward. (R. 406 - 07). The Fifth District Court accepted jurisdiction on January 8, 2002. (5DCA R. 7).

The question the county trial court certified was:

> Are proposals for settlement served pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 in actions to recover personal injury protection benefits valid and enforceable or applicable to pip suits?

The Fifth District rephrased the question, removing the word "benefits," as:

> 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 brought by its insured to recover under a personal injury protection policy?

and answered in the affirmative in its opinion, but certified the question to this Court as a question of great public importance. Nichols v. State Farm Mutual Automobile Insurance Company, 851 So. 2d 742 (Fla. 5th DCA 2003). (5DCA R. 36-59). Judge Sawaya, in his 18 page dissent, rephrased the question to restore

the word benefits to accentuate the fact that a PIP suit is not a civil suit for damages at law.

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative because:

The offer of judgment statute does not apply to PIP cases because there are already two specific statutes which control attorney's fees in PIP cases.

The offer of judgment statute does not trump the two specific statutes because it is a conditional statute that is subordinate to a statute above it in its chapter which states that if the offer of judgment statute conflicts with any other statute, that other statute will control.

The offer of judgment does not apply to PIP cases because it only applies to "any civil suit for damages." Although the rem is money, a PIP suit is a suit for benefits, not damages.

The offer of judgment does not apply to PIP because of these doctrines of statutory construction; including one statute specifically excludes all others, the specific statute controls over the general statute, and a statute in derogation of the common law must be strictly construed.

At first look, PIP is unconstitutional because it abolishes the age old

common law cause of action of tort for general damages. PIP was saved from being unconstitutional because the legislature provided a benefit in exchange for the loss of the tort right, the almost automatic payment of some medical bills and lost wages without the perils of a suit at law. Applying the offer of judgment to PIP cases denies the insured the benefit of the exchange of the right. When the uncertainties of a suit at law and the one-sided threat of financial ruin enter into the PIP scheme, the driver has lost the benefit of the exchange, and PIP remains unconstitutional.

The offer of judgment does not apply to PIP because of the public policy of PIP.

The Legislature has recognized that attorney's fees are a one way street and left this aspect of PIP alone, even while creating other new special advantages for PIP insurers over their customers. The legislature, in Senate Staff analysis, has stated that PIP fees are a one way street and that to make the offer of judgment apply to PIP raises the problem of unconstitutionality.

The Cahuasqui decision is incorrect.

ARGUMENT

The certified question should be answered in the negative because the offer of judgment does not apply to PIP cases.

The certified question is

> 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?

The offer of judgment does not apply to PIP suits because it would make PIP unconstitutional. PIP is unconstitutional because it removes the right of tort from motorists. PIP only survives constitutional muster because of the benefits that are provided in the exchange of the right to sue in tort. Lasky v. State Farm.[3] If the offer of judgment was applied to PIP, the motorist would lose the benefit of the exchange, and PIP will remain unconstitutional.

But it is not even necessary to review the constitutionality of PIP, as the offer of judgment does not apply to PIP suits per statute, case law, and the public policy of the PIP statutes.

I. THE OFFER OF JUDGMENT STATUTE DOES NOT APPLY TO PIP CASES BECAUSE IT CONFLICTS WITH THE PIP STATUTES.

The offer of judgment statute, which establishes a two way street for

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[3] 296 So. 2d 9 (Fla. 1974).

attorneys fees, conflicts with the one way street for attorneys fees established in PIP suits. The offer of judgment statute itself says that it will always give precedence to any other statute if there is conflict between them.

The first statute in the damages part of the negligence chapter provides the conditions on the offer of judgment statute:

> Chapter 768 Negligence, Part II, Damages
> §768.71 Applicability; conflicts.-
> (1) Except as otherwise specifically provided, this part applies to any action for damages, whether in tort or in contract.
> (2) This part applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date.
> (3) *If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply.* (italics added)

The attorney's fee provision of the PIP statute, F.S. 627.736(8)[1] instructs that the one way street provided for in first party insurance disputes, F.S.

[1]F.S. 627.736(8) Applicability of provision of regulating attorney's fees. – With respect to any dispute under the provisions of sects. 627.730 - 627.7405 between the insured and the insurer, the provisions of sect. 627.428 shall apply.

627.428[2], will control. The one way street provides that when an insured sues their own insurance company successfully, their attorneys' fees will be paid. There is no provision for an insurance company to be paid its attorney's fees if it is successful.

The offer of judgment Statute, §768.79, provides:

> (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 ... is at least 25 percent less than such offer....

The proposal for settlement statute conflicts with both F.S. 627.736(8) and F.S. 627.428, in the chapter "Insurance Rates and Contracts." The instant case was solely for benefits under the PIP insurance statute. There was no allegation of negligence in the pleadings.

The No-Fault scheme is entirely contained in a package of laws passed in 1971.[3] No-Fault provides for fees for insureds against their own insurance

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[2]627.428. Attorney's fee -
(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate 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 the recovery is had.

[3]F.S. 627.730 - 627.7405.

company in a single statute, F.S. 627.736(8). It refers to F.S. 627.428, which provides that attorney's fees are paid for an insured who successfully gets a judgment against their own insurance company. This is the "one way street" for attorney's fees.[4]

If interpretation of the statute is needed, it is not to be interpreted in a manner that would deem legislative action useless or meaningless.[5] If the offer of judgment statute in the negligence chapter is given the very expansive interpretation needed to trump both attorney's fee provisions in the insurance chapter, the PIP statute F.S. 627.736(8) which directs the reader to the one way street for first party actions of an insured against their own insurer becomes meaningless, the limiting statute F.S.768.71(3) in the Negligence chapter becomes meaningless in this context, the attorney's fees statute F.S. 627.428 becomes meaningless in practice, and the limiting phrase "for damages" in the offer of judgment statute is ignored.

A. Case law shows that the offer of judgment statute does not apply to PIP cases because of conflict between the statutes.

The limiting statute F.S. 768.71(3) prevented the offer of judgment from

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[4]Danis v. Ground Improvement Techniques, 645 So. 2d 420, 421 (Fla 1994).

[5]Oruga Corp., Inc. v. AT&T Wireless of Florida, Inc., 712 So. 2d 1141 (Fla. 3d DCA 1998).

applying to attorney's fees in City of Live Oak v. Harris.[6] Harris beat her offer of judgment against the city, and was awarded $55,000 in attorney's fees, but the offer of judgment did not apply because it conflicted with the sovereign immunity statute that limited attorney's fees to only 25% of the judgment, and her attorney's fees award was reduced to about $8,000. Harris 702 So. 2d at 277. The court recognized that this was not a fair result, because if the city had beaten its offer of judgment against her, there would be no limit to the amount of fees.

The power of the limiting statute to prevent the offer of judgment from winning a conflict was cited in Beauvais v. Edell, 760 So. 2d 262, 265 (Fla. 4th DCA 2000) .n4: "We note that if sections 768.043 and 768.74 were in conflict section 768.043 would control. See § 768.71(3)."

No cases but Cahuasqui and its progeny have found that the limiting statute did not apply to competing fee provision. In Barberena v. Gonzalez, the court decided upon offset statutes that were in conflict due to the different time periods involved, that the specific offset statute (F.S. 627.7372) in the No-Fault law controls the more general offset statute (F.S. 768.76) in the Negligence chapter, and

[6]City of Live Oak v. Harris, 702 So. 2d 276 (Fla. 1st DCA 1997).

that the limiting statute prevented the general offset statute from applying.[7]

B. The offer of judgment does not apply to PIP cases because a PIP case is not a civil suit for damages.

Judge Sawaya pointed out in his well reasoned dissent in the opinion below that inquiry into this case need go no further than the first phrase of the first sentence of the offer of judgment statute. The offer of judgment statute, F.S. 768.79, states as its initial words that it only applies "In any civil action for damages filed in the courts of this state,". A PIP suit is not a "civil action for damages." It seeks enforcement of the right to payment that was exchanged for the loss of the right to sue for damages. The amount of benefits due in a PIP suit is generally predetermined. The questions are generally only whether the medical treatment was "necessary, reasonable and related," or whether the insured unreasonably refused to attend an examination, or whether a bill was properly submitted. Although the rem is ultimately money benefits, the suit is more akin to an action in equity to determine rights only, not an action at law for which money damages must be determined. The sole question before the jury in the instant case was whether Shannon Nichols unreasonably refused to attend the medical

[7]Barberena v. Gonzalez, 706 So. 2d 60, 61 (Fla. 3rd DCA 1998) citing Kirkland v. Allstate Ins. Co., 655 So. 2d 106, 109 (Fla. 1st DCA 1995).

examination. (R. 263). There was no question for the jury to determine money damages.

The statute limits the offer of judgment only to cases for damages:

> 768.71(1) Except as otherwise specifically provided, this part applies to any action for damages, whether in tort or in contract.

The dissent of Judge Sawaya in Nichols highlights the importance of reading the actual language of the offer of judgment statute by distinguishing the rem in his slightly altered version of the certified question, which restores the term "benefits" to accentuate the fact that a PIP suit is not a suit for damages. Nichols v. State Farm Mutual, 851 So. 2d 742, 747 (Fla. 5th DCA 2003). The term "benefits" was in the original questions certified by the trial court.

II. THE OFFER OF JUDGMENT DOES NOT APPLY TO PIP CASES BECAUSE OF THE DOCTRINES OF STATUTORY CONSTRUCTION.

Three doctrines of statutory construction apply here. The importance of the doctrines is explained in Ruth v. Higgins, which struck an offer of judgment out of a PIP case shortly before the Cahuasqui decision.

> The Florida Statues are written by many hands over many sessions with many policies in mind. Inevitably, in spite of the best efforts of the legislature, statutes can be passed that appear to conflict. This is the reason for rules of statutory construction. When confusion arises we are to be guided by such rules. So, even though the

> court does not see these statutes as conflicting, there is a rule of statutory construction, which resolve the matter with the same result. In apparent statutory conflicts, specific statutory provisions with narrow focus control over general statutory provisions with broad focus. *McKendry v. State*, 641 So. 2d 45 (Fla. 1994). Fla. Stat. 768.79 is very broadly written and applies to "all civil actions." Fla Stat. 627.428 is much narrower as it applies on to PIP cases.

Ruth v. Higgins and Allstate Indemnity Co., 7 Fla. Weekly Supp. 270 (12th Cir. Jan 31, 2000).

A. The offer of judgment does not apply to PIP cases because of the doctrine of statutory construction of *inclusio unius est exclusio alterius*.

This doctrine states that the inclusion of one is the exclusion of another.[8] This rule is recognized in Florida generally, and in PIP specifically.[9]

The reference of F.S. 627.736(8) to only one fee statute excludes other fee statutes. The Florida Motor Vehicle No-Fault law was enacted as a complete package of statutes.[10] Because, unlike most laws or statutory schemes, it included one attorney's fee provision, it has excluded all others. If the statutory scheme is

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[8]Black's Law Dictionary 908 (4th ed., revised 1968).

[9]Industrial Fire & Casualty Insurance Co. v. Kwechin, 447 So. 2d 1337 (Fla. 1983).

[10]F.S. 627.730 - 627.7405.

broken by including another fee statute, the entire No-Fault scheme is broken, as the loss of the traditional right of tort was exchanged for the almost automatic payment of 80% of medical bills and 60% of lost wages and a right to sue the insurer in a traditional first party action where attorney's fees are only available to an insured. Removing the traditional protection of the insured in a dispute with their own insurance company will cause the No-Fault system to become unconstitutional.

If F.S. 627.736(8), which specifically refers to the one way street of F.S. 627.428, was not in the PIP statute, F.S. 627.428 would still apply to PIP cases. There had to be a purpose for adding the redundant instruction in F.S. 627.736(8) to guide the inquiry on no-fault attorney's fees to F.S. 627.428. Otherwise, F.S. 627.736(8) is superfluous. The additional language of F.S. 627.736(8) was not necessary to make the one way street apply, because PIP is in the same chapter, but the inclusion of paragraph (8) is a second legislative statement that F.S. 627.428 is the only provision that will apply. It is a road sign that says “Begin one way street.”

B. The offer of judgment does not apply to PIP cases because of the statutory rule that a specific statute takes precedence over a general statute.

When a specific statute addressing a narrow class of cases has any

conflict with a general statute, the more specific statute is considered an exception to the general terms of the more comprehensive statute.[11] F.S. 627.736(8) addresses the specific issue of attorney's fees to the prevailing party in a dispute between insured and insurer over a PIP contract, and directs the reader solely to F.S. 627.428, which only permits the insured to recover fees. Since the offer of judgment statute applies to attorney's fees in "all civil cases," it is a statute which by the term "all" covers cases in more general terms.

The inclusion of subsection (3) of F.S. 768.71, stating that any conflicting provision of Florida Statutes shall apply, is the legislature's recognition that its broad application to "all civil suits" should not sweep before it all special situations which have been specifically codified in other statutes.

An example of the priority of a specific fee statute over the general offer of judgment fee statute is in Moran v. City of Lakeland.[12] The Second District found that the offer of judgment statute did not apply to a civil rights action because of federal preemption of the statute and "because section 1988 allows the award of attorney's fees to prevailing defendants in a much more limited context than does

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[11]McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994), Adams v. Culver, 111 So. 32d 665 (Fla. 1959), State v. Billies, 497 So. 2d 889 (Fla. 2d DCA 1986).

[12]Moran v. City of Lakeland, 694 So. 2d 886, 887 (Fla. 2d DCA 1997).

section 768.79(1), section 1988 preempts section 768.79(1)."

Also, the offer of judgment is in the damages part of the Negligence chapter. It must be general to make it out of that chapter. It is too general to infiltrate the Florida Insurance Code[13], an area traditionally heavy in policy and close legislative control. We must recognize that "all" means "all," and the offer of judgment is therefore a law of general application. Besides using the word "all," and the limiting statute, what more must the legislature do to inform the courts that this is a law of general application?

The specific provisions of F.S. 627.736(8) in the PIP statute and F.S. 627.428 in the insurance code control the issue of attorney's fees instead of the general provision F.S. 768.79.

C. The offer of judgment statute does not apply in PIP cases because of the doctrine of statutory construction that a statute that is in derogation of the common law must be narrowly construed.

A statute enacted by the legislature which changes the common law is in derogation of the common law and must be strictly construed. The common law of attorney's fees in America was that each party was responsible for their own attorney's fee. This is "the American rule" which was a change from "the English

[13]Chapters 624-632, 634, 635, 641, 642, 648, and 651.

rule."[14] In the English rule, the loser paid the attorney's fees of both sides. It was this threat of crushing attorney's fees that kept the lower classes out of the court room and ensured that the civil courts were for the use of the large property owners only. The American rule offered greater justice for all, as a person of modest means was able to negotiate a modest contract with an attorney, and was not responsible for the extravagant attorney's fees of a richer person.

The fragile position of the offer of judgment was reviewed in Shussel v. Ladd Hairdressers, Inc,[15] which stated that since the offer of judgment is punitive in nature and runs contrary to the common law, it must be strictly construed. Here, the offer of judgment must be narrowly construed, and must not be given the extra legs to jump over the provisions of the other statutes.

III. THE OFFER OF JUDGMENT STATUTE DOES NOT APPLY TO PIP CASES BECAUSE IT WOULD UNCONSTITUTIONALLY DENY ACCESS TO THE COURTS.

Floridians are guaranteed access to the courts by our Constitution. "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, sect. 21, Fla. Const. Applying

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[14]Bell v. U.S.B. Acquisitions Co., Inc., 734 So. 2d 403, 406 (Fla. 1999).

[15]736 So. 2d 776 (Fla. 4 DCA 1999), citing TGI Friday's v. Dvorak, 663 So. 2d 606, 614 (Fla. 1999), also, Foreman v. E.F. Hutton & Company, Inc., 568 So. 2d 531 (Fla. 3d DCA 1990).

the offer of judgment to PIP it destroys the constitutionality of the No-Fault scheme and makes a PIP suit too financially dangerous to file.

The No-Fault scheme eliminated Floridians' right to be compensated for injuries caused by other drivers. An injured person must first show a permanent injury within the specific legal definition of the statute to receive full compensation. F.S. 627.737(2). This, on its face, is an unconstitutional denial of access to the courts for redress of any injury as guaranteed by Florida's constitution. But the No-Fault scheme withstood constitutional scrutiny because what the Legislature has taken away with one hand, it has given "equal or better" with the other. Lasky v. State Farm, 296 So. 2d 9 (Fla. 1974). The equal or better was the almost automatic payment of PIP benefits.

Also, the application of the offer of judgment to PIP destroys the percentage given in the statute of paying 80% of medical bills, because if an insured accepts a small offer of judgment, they still remain liable for the entirety of the doctor's bills.

PIP was constitutional only because the loss of rights in tort has been compensated for by the "swift and virtually automatic payment so that the injured

insured may get on with his life without undue financial interruption."[16] Giving the insurers the power to threaten to saddle the insured with the financially devastating attorney's fees of a lost PIP suit takes away the strong likelihood of "swift and virtually automatic payment." An injured person should not have to chose between no treatment and the risk of loss of their savings. The offer of judgment does not apply to PIP cases in that it would make PIP unconstitutional because most injured people would not be able to risk losing and would not be able to pay fees, and therefore would not bring their clams to the courts.

This Court has long recognized No-Fault's tenuous hold on constitutionality. "[T]he provisions of Florida's No-Fault Law that denied a plaintiff the right to sue unless certain threshold damages existed was not a violation of access to courts because the right was replaced with the ability to recover uncontested benefits and an exemption from tort liability." Nationwide Mut. Fire Ins. Co., v. Pinnacle Medical, Inc., (Fla. 2000), citing Smith v. Department of Insurance, 507 So. 2d 1080, 1088 (Fla. 1987) citing Lasky v. State Farm Insurance Co., 296 So. 2d 9 (Fla 1974). No-Fault survives in the shadow of unconstitutionality only because of the

[16]Ivey v. Allstate Ins. Co., 774 So. 2d 679, 683-84 (Fla. 2000) (citing Government Employees Ins. Co. v. Gonzalez, 512 So. 2d 269, 271 (Fla. 3d DCA 1987) (citing Comeau v. Safeco Ins. Co., 356 So. 2d 790 (Fla. 1978)).

benefits it provides. If the umbrella of protection for the motorist is made more narrow, the entire No-Fault structure fails.

The application of the offer of judgment to PIP cases would close the courthouse doors to most injured people. The threat of having to pay tens of thousands of dollars of attorneys fees just to ensure payment of a few hundred dollars for their treatment would prevent most people from filing suit. A driver could no longer risk a law suit for an arbitrary reduction of a treatment bill by the insurance company. If the court refuses summary judgment to the injured person, and a jury finds against the them, the result would be financial catastrophe for most Floridians. It is not the intent of No-Fault, or of the Constitution, that the courts shall only be open to the rich, the lucky, or to those who have nothing left to lose.

Although the language of the statutes and the doctrines of statutory construction prevent the offer of judgment from being construed as interfering with the No-Fault statute, if such a reading is still possible, it must be construed differently. "When two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to avoid any

violation of the constitution."[17]

IV. AN AWARD OF ATTORNEY'S FEES TO A SUCCESSFUL INSURER, RATHER THAN SOLELY TO SUCCESSFUL PLAINTIFFS, VIOLATES THE POLICY OF THE FLORIDA MOTOR VEHICLE NO-FAULT LAW.

A. Recent Senate bills reveal the Legislature's acknowledgment that the offer of judgment does not apply to PIP cases because it is against the public policy of PIP.

The Legislature has, in recent years, made many changes to PIP that make it more difficult for the injured insured to recover and easier for the insurance company to reject claims, but has left alone the one way street of attorney's fees.

Since 1998, if a doctor does not send a bill for treatment rendered within a month, the doctor is forbidden from being paid by the insurance company, the patient, or anyone. F.S. 627.736(5)(c) 1998. This bizarre ban is unknown outside of PIP.

Since August 1, 2001, an injured person must give their insurance company a second chance to correct a refusal of payment before suing by sending it a "demand letter." F.S. 627.736(11) 2001. If the injured person has retained an attorney to investigate the case prior to suit, they are uncompensated for attorney's

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[17] Industrial Fire & Casualty Insurance Co. v. Kwechin, 447 So.2d 1337, 1339 (Fla. 1983) citing State v. Beasley, 317 So. 2d 750 (Fla. 1975), Garcia v. Allstate Ins. Co., 327 So. 2d 784 (Fla. 3d DCA 1976).

time if the insurance company, with suit looming, pays. So an insurance company can get away with not paying properly on claims, and only has to pay, with no penalty, when they have been told they have been caught. This free warning shot over the bow is also unknown outside of the law of PIP. As of August 2003, the "demand letter" applies more broadly. Through these major and novel changes, the one way street for attorney's fees has remained untouched.

The language of Senate Bill sb1464, in 2001, tried to add 11 paragraphs to F.S. 627.736, including the language: "(c) This section or s. 627.428 does not limit in any way a person's ability to employ the provisions of s. 768.79." SB 1464, 2001 Legis., 1st Sess. (2001)

Earlier this year, the Senate, and a joint committee once again acknowledged that 768.79 does not apply to PIP. In the 2003 session, the attempt was made with the Committee Substitute for Senate Bill sb1202c1, this time, attempting to make the offer of judgment statute more specific, by adding:

> Subsection (9) is added to section 768.79, Florida Statutes, to read: " 768.79 offer of judgment and demand for judgment. -- (9) This section is applicable to any civil action filed which applies to s. 627.736, in any court in this state. A filing in compliance with this section does not constitute an admission of coverage, and an insurer may not be estopped from denying coverage, denying liability, or defending against any claim on its merits."

CS/SB 1202, 2003 Fla. Legis., 1st Sess. (2003) page 67[18]

These are both legislative acknowledgment that the offer of judgment does not apply to PIP, and that a PIP suit is not a law claim "for damages," as that phrase was to removed by the proposed change.

The Senate Staff analysis commented on the bill and described what the current state of the law is:

> Under present law, insurers are required to pay attorney's fees under s.627.736,F.S.if they lose in court to insureds or to beneficiaries under an insurance policy contract. However, if insurers prevail in court, their fees are not paid by the losing side. This section is known as the "one-way attorney's fee" provision.

CS/SB 1202, 2003 Legis. Sess. (2003) Senate Staff Analysis and Economic Impact Statement, Bill, Author, Enrich, Staff Director Deffenbaugh, pg. 9, April 7, 2003[19]

Even the staff analysis, which encouraged the bill, acknowledged that the bill may make PIP unconstitutional:

> The Committee Substitute for SB 1202 does not reduce PIP benefits, but puts limitations on receiving PIP benefits, such as medical fees schedules, and limits on recovery of attorney fees. Such limitations may raise the constitutional issue of where the No-Fault Law continues

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[18]website location http://flsenate.gov/cgi-bin/view_page.pl?File=sb1202c1.html&Directory=session/2003/Senate/bills/billtext/html&Tab=session&Submenu=1

[19]website address http://www.flsenate.gov/data/session/2003/Senate/2003/bills/analysis/pdf/2003s1202.bi.pdf

> to provide a reasonable alternative remedy for redress of injury, in exchange for limiting the right to sue in tort for pain and suffering and other non-economic damages, based on the constitutional right of access to courts for redress of injury under s. 21 of Article I of the Florida Constitution. The Legislature can abolish a judicial remedy provided a reasonable alternative remedy, commensurate benefit or overpowering public necessity for the abolishment is shown and there is not alternative method for meeting that public necessity. See *Kluger v. White*, 281 So.2d 1 (Fla. 1973); *Psychiatric Assoc. v. Siegel*, 610 So.2d 419 (1992)

CS/SB 1202, 2003 Legis. Sess. (2003) Senate Staff Aanalysis and Economic Impact Statement, Author, Enrich, Staff Director Deffenbaugh, April 7, 2003, Section IV. Constitutional Issues, D. Other Constitutional Issues:, pg. 21 *(citation format in original)*[19]

B. The offer of judgment does not apply to PIP cases in that it is against public policy because of the economic disparity between insurance companies and the public and the offer of judgment encourages the insurance company to protract litigation.

Forcing the insured to pay the insurance company's attorneys means that insurance companies will determine what is reasonable, not the courts. An insured can even be forced to pay for insurance companies' attorneys if the insured wins the case, but doesn't beat the offer. This is a harsh result, considering that the law requires motorists to enter into business with one of these PIP insurance companies.

Realistically, applying the offer of judgment to PIP cases destroys the ability

of an injured person to go to court to get payment for their bills. It changes PIP to a *caveat emptor*, buyer beware situation, where a motorist must shop for insurance based on the reputation of the company for paying its bills. Only market forces would protect the public from insurance companies.

Applying the offer of judgment to PIP encourages the insurance company to adopt a strategy of litigating many more claims, thereby creating a threat to many more insureds of suffering huge attorney's fees and bankruptcy if they dare to seek their benefits on a refused or reduced medical bill.

In the instant case, State Farm moved for a jury trial a month and a half after the time to do so had run. (R. 16 - 18). The court granted the motion over the objection of Shannon Nichols, and the fees for the case necessarily increased. (R. 41 - 42).

Applying the offer of judgment to PIP cases is a windfall to insurance companies. They are paid premiums for their policy which includes the fees of attorneys. They can save money by refusing to pay benefits, and can pocket large profits on the offer of judgment by being paid more for attorneys fees than they paid out, if any. Economic disparity is an aspect of the need for the continued application of the one way street to PIP suits.

C. Applying the offer of judgment to PIP cases provides lop-sided

advantage to insurance companies.

An insurance contract is a special kind of contract. Unlike a normal business contract, the insurance company has a right to know everything about the customer. Insurance contracts are frequently held invalid, with the insurance company having no obligation because of some lack of frankness, or misrepresentation by the customer, even though the insurance company has taken the premium, and may have been willfully blind to the supposed misrepresentation.

Insurance companies consistently and constantly threaten their insureds with criminal prosecution when a claim is made. Every form which an insurance company sends to every insured and potential claimant includes the threat, "Any person who knowingly and with intent to injure, defraud, or deceive any insurer files a statement of claim or an application containing any false, incomplete, or misleading information is guilty of a felony of the third degree."[20] However, there is no such criminal sanction to be applied against insurance companies.

Applying the offer of judgment to PIP cases is a lopsided advantage to insurance companies, because the insured cannot make a demand for judgment against an insurance company as the suit does not seek money damages, and it

[20]817.234(3)(b).

would be redundant because a winning insured gets her attorney's fees paid anyway. A radical change in the No-Fault scheme should at least apply evenly to all parties.

The No-Fault scheme was implemented in 1972. At that time, in response to the tremendous profits which insurance companies were going to receive, the Legislature ordered a 15% rebate on premiums.[21] Now, again, only the legislature can specifically apply the offer of judgment to PIP cases because it can then apply a compensating benefit to insureds. Otherwise, insurance companies will be unjustly enriched.

State Farm in the instant case, and insurance companies in general, have already been paid for their attorneys from their own customers like Shannon Nichols as part of their policy premiums. Forcing Shannon Nichols to pay State Farm again gives it double recovery.

Insurance companies can profit from litigation if the offer of judgment applies to PIP. In this case, the court awarded State Farm $23,199.00 against

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[21]"Insurers are required to lower their rates for the required coverages by not less than 15% of the combined premiums for the existing financial responsibility coverage. The reduction goes into effect on the effective dated of the coverage sections of the act, January 1, 1972, with a refund or credit given on existing liability policies whose terms extend beyond this date." 1971 Florida Legislative Service Bureau, cited 71998 Fla. Stat. Ann. 627.730 (1996).

Shannon Nichols even though there was no fee contract in evidence and no evidence that State Farm actually paid its attorneys anything specifically for this case. (R. 382 - 99). If State Farm's attorneys were on an annual retainer or if they are in house counsel, the fees awarded under an offer of judgment are pure windfall profit to State Farm. It is against public policy to reward an insurance company for litigating against its customers.

V. CAHUASQUI IS INCORRECT.

With the exception of Cahuasqui and its progeny, Florida courts have held that attorney's fees in a PIP suit are a one way street, with fees being reimbursed to insureds only if they win. The Supreme Court has defined that PIP fees are a "one way street offering the potential for attorney's fees only to the insured...."[22] Only Cahuasqui has found a crosswalk in the one way street of attorney's fees in PIP suits.[23]

There is little to add to the correctly reasoned dissent of Judge Fletcher in Cahuasqui. The majority decision of the court in Cahuasqui is flawed. It ignored statutes, doctrines, cases, and PIP policy. It created its own unsupported and

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[22]Danis Industries Corp v. Ground Improvement Techniques, Inc., 645 So. 2d 420 (Fla. 1994).

[23]U.S. Security v. Cahuasqui, 760 So. 2d 1101, 1102 (Fla. 3d DCA 2000) rev. gr. 786 So.2d 1183 (Fla. 2001) rev. dismissed 796 So.2d 532 (Fla. 2001).

incorrect fact that the offer of judgment would not affect the filing of PIP suits. It incorrectly justified its opinion on cases in unrelated areas of law to argue that since offers of judgment applied in those areas, they must also apply to PIP.

If the offer of judgment applies to PIP cases, it will chill insureds from filing PIP suits, and insurers will have almost total discrection in paying claims or not.

As to the cases the Cahuasqui majority used to justify its decision, those areas of law relied on were not ones that were brought into being by a law that was unconstitutional on its face, like PIP is. Specifically, the Cahuasqui majority referred to medical malpractice cases,[24] a frivolous motorcycle injury case [25], and a laborer's lien case from 1949.[26]

This Court has not reviewed Cahuasqui. Review of Cahuasqui was granted

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[24]Id., at 1107, citing Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) and Pohlman v. Mathews, 440 So. 2d 681 (Fla. 1st DCA 1983).

[25]Id., at 1107, citing Whitten v. Progressive Cas. Ins. Co., 410 So. 2d 501 (Fla. 1982).

[26]Id., at 1107, citing Hunter v. Flower, 43 So. 2d 435, (Fla. 1949). Paradoxically, the Cahuasqui majority neglected that Hunter reasoned that the laborer's lien law granting attorney's fees was constitutional because of the one-way street for fees in insurance cases. "It is of interest to observe that the courts have practically uniformly held constitutional statutes requiring insurance companies to pay attorney's fees to successful plaintiffs in actions to recover claims the insurance companies have refused to pay, although plaintiffs need not pay their fees if unsuccessful, the necessity of bringing the action being vexatious." Hunter at 437.

on apparent conflict with Nationwide Mutual Fire Ins. Co. v. Pinnacle.[27] Pinnacle was similar to Cahuasqui because the madatory arbitration clause for medical providers in the PIP statute was another unconstitutional attempt to make a detour around the one way street for fees. However, since the mandatory arbitration clause was not related to the question of the application of the offer of judgment to PIP claims, review was denied as improvidently granted.[28]

In the Cahuasqui dissent, Judge Fletcher lists the doctrines of statutory construction that are ignored by the majority, and succinctly sums up the flaws of the majority's decision. Just because the PIP insurer can still defend against a claim, then ipso facto, by that fact, in and of itself, the majority amends the PIP statutes by the offer of judgment, sub silencio,[29] contrary to controlling authority.[30]

Cahuasqui is aberrational. It should not destroy PIP.

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[27]753 So.2d 55 (Fla. 2000).

[28]U.S. Security v. Cahuasqui, 760 So. 2d 1101, 1102 (Fla. 3d DCA 2000) rev. gr. 786 So.2d 1183 (Fla. 2001) rev. dismissed 796 So.2d 532 (Fla. 2001).

[29]sub silencio - Lat: under silence; silently. When a later opinion reaches a result contrary to what would appear to be controlling authority, it is said that the later case has overruled sub silencio the prior holding by necessary implication. Barron's Law Dictionary 471 (Third ed. 1991)

[30]Cahuasqui, 760 So. 2d at 1108.

CONCLUSION

The certified question should be answered in the negative. The offer of judgment does not apply to PIP cases.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Ken Hazouri, Esq., of Drage deBeubien, 332 N. Magnolia Ave., Orlando, FL, 32802, tel. 422-2454, fx 849-1845 and Philip D. Parrish, Esq., Two Datran Center, Suite 1705, 9130 South Dadeland Boulevard, Miami, Florida 33156, tel. 305-670-5550, fx 305-670-5552, by_____ this___day of _____, 2003.

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CERTIFICATE OF FONT

I certify that this brief is submitted in Times New Roman 14-point font, which is proportionately spaced, and complies with the font requirements of Fla. R. App. P. Rule 9.210.

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THOMAS P. HOCKMAN, ESQ.