SUPREME COURT OF FLORIDA

CASE NO: SCC03-1653
Lower Tribunal No: 5D01-3851

SHANNON NICHOLS,

Petitioner,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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PREFACE TO THE REPLY

Petitioner = Appellant = Plaintiff = insured = Shannon Nichols

Respondent = Appellee = Defendant = insurer = State Farm

For brevity, Nichols uses the name of the statute "offer of judgment" in this Reply Brief and in the Nichols Initial Brief for F.S. § 768.79. State Farm has chosen to use the name of the rule "proposal for settlement" in its Answer Brief. Any distinction between them is not significant to this appeal. Both terms are distinct from an "offer to settle" or "offer of settlement," which predates both the statute and the rule, and is sometimes confused with them.

State Farm has added a statement of the case and facts to its Answer Brief which argues disputed facts. No corrections are made here or supplemented as the disputed facts are not about the issue of law that is to be reviewed.

The Initial Brief of Shannon Nichols and the Brief of Amicus Curia of the Academy of Florida Trial Lawyers are collectively referred to as "the Initial Briefs," even though the Amicus Curia does not file a reply brief.

SUMMARY OF THE ARGUMENT

State Farm cites to the instant case as precedent to itself, and has made no attempt to explain the logical problems of the Cahuasqui case that the instant case was decided on. State Farm has not attempted to distinguish the dissents, and has

lumped them into a narrow argument. State Farm ignores the language and case law regarding the conflict of the statutes by just saying since the offer of judgment applies to "any" civil suit for damages, there can be no conflict, without proving that the word "any" in the offer of judgment trumps the same word "any" in the conflicting statutes.

State Farm does not respond to the case law or policy arguments presented.

State Farm's response to the constitutional argument relies on a case decided before the offer of judgment existed to suggest that it was approved by this Court.

State Farm asks this Court to provide it political relief which the Legislature refused to provide.

ARGUMENT

The Answer Brief of State Farm is not responsive to the Briefs of Nichols or the Academy. State Farm cites to the decision below, also to Tran v. State Farm, 860 So. 2d 1000 (Fla. 1st DCA 2003) case, and to the Cahuasqui[1] case in an attempt to provide precedent by pulling itself up by its own bootstraps. No additional reasoning was provided by the Nichols v. State Farm, 851 So.2d 742 (Fla. 5th DCA 2003) majority opinion below or in the Tran opinion. No attempt

[1]U.S. Security Insurance v. Cahuasqui, 760 So. 2d 1101 (Fla. 3d DCA 2000) *review dismissed as improvidently granted*, 796 So. 2d 531 (Fla. 2001).

was made to explain the convoluted rationalization of Cahuasqui, and neither majority opinion attempted to distinguish the dissents. State Farm's Answer simply quotes portions of the majority opinion of Cahuasqui and heaps praise on it without providing substantive support, through logic or caselaw, while heaping derision upon the dissent of Judge Sawaya in Nichols and ignoring the dissent of Judge Fisher in Cahuasqui. The Answer fails to admit that the opinion in Tran v. State Farm certified the same certified question to this court even though it followed the other previous districts.[2]

State Farm only parroted the dicta in the Cahuasqui case, without giving caselaw examples of parallel reasoning and did not attempt to explain the inscrutable statement in that case "[t]his rule that the inclusion of one means the exclusion of another, however, does not mean that the application of one precludes the additional application of another." Cahuasqui 760 So. 2d at 1105. One can not tell if the 3rd District Court majority tried to divine a distinction between "inclusion"

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[2]Separately, another court has felt bound by the precedential holding of Cahuasqui, but has copied the instant certified question to this Court in recognition of the dissents of Cahuasqui and the instant case. "In recognizing that the Nichols and Cahuasqui case were decided in split opinion, this Court follows suit of those two opinions and certifies the following question of great public importance: ...." Lake Worth Physical Therapy Corp., v. Progressive Insurance Corporation, 11 Fla. L. Weekly Supp. 143 (15th Cir., Palm Beach County, 2003).

and "application," or between "exclusion" and "additional application," or if it merely picked the result it wanted and wrote a justification for the novel result. If a major change in the law is going to be made, and there is no clear reasoning that is easy to follow, it should be done by the legislature.

I. STATE FARM FAILS TO SHOW THAT THE OFFER OF JUDGMENT DOES NOT CONFLICT WITH THE PIP STATUTES.

State Farm ignores the other 4 statutes that conflict with the offer of judgment statute for the payment of fees in a PIP suit. The statutes are:

§627.428 - one way street for attorneys fees in a first party action,

§627.736(8) - attorneys fees issues in a PIP suit shall use the one way street

§768.71(1) - the offer of judgment is only available for actions for damages

§768.71(3) - the offer of judgment will lose every conflict with other statutes

The limiting statute, F.S. § 768.71(3) prevents the application of the offer of judgment if it "is in conflict with any other provision of the Florida Statutes, such other provisions shall apply."

The offer of judgment has never won a conflict with any other statute before. State Farm fails to respond to the law, reasoning, and case law of conflict, and has failed to show why PIP law is the one instance where the limiting statute does not prevent application of the offer of judgment. State Farm just challenges

that a conflict even exists. However, as the statutes deal with a litigant's right to a fee award after a PIP trial, conflict exists.

State Farm's argument begins and ends at just quoting that the offer of judgment statute reads that it applies to "any" civil action, but State Farm has provided no other statute, reasoning, or case to prove why the word "any" in the offer of judgment statute is somehow more powerful than the same word in the limiting statute. The word "any" is also used in the one-way street statute, F.S. § 627.428. The word "any" is again used in F.S. § 627.736(8) which applies the one-way street "[w]ith respect to any dispute under" PIP. Also, State Farm does not answer the argument in the Amicus Brief that the language of F.S. § 626.736(8) is the mandatory "shall apply" the one-way street statute, which would exclude a choice of other statutes.

Judge Sawaya's dissent and both of the Initial Briefs gave five cases in which the offer of judgment's limiting statute prevented it from applying to other statutes. State Farm has not distinguished these cases and has not provided harmonizing interpretations.

State Farm attempts to use two cases that referred to the one way street to support its argument, but those were cases about mitigation of fees, not entitlement to fees. Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So.

420 (Fla. 1994) is cited in both Initial Briefs, regarding this Court's recognition that the one way street runs one way. State Farm makes the naked assertion that Danis and the later Scottsdale Ins. Co. v. DeSalvo, 748 So. 2d 941 (Fla. 1999) "destroys" the reasoning of the Initial Briefs, but does not state how it "destroys" it. The offer of judgment is never even mentioned in Danis. In Danis, a subcontractor prevailed on only a portion of its claims against a surety, and even though it lost on the rest of the claims, the subcontractor was still entitled to an award of attorney's fees. Danis, 645 So. 2d at 421. There had been no offer of judgment served on the subcontractor by the surety.

State Farm also seriously misstates DeSalvo. Wholly by advocate's fiat, State Farm, on page 18 of its Answer, tells this Court that, in DeSalvo, "More generally, the issue was how does F.S. § 768.79, which applies to all civil actions for money damages, interact with the one way attorneys' fees provision of F.S. § 627.428 in first party insurance disputes?" This is fantasy, as the opinion does not even mention F.S. § 768.79.

The crux of State Farm's argument is that since an insurer can offer to settle a lawsuit, therefore, the offer of judgment statute must also be applicable. However, insurance companies and sureties were able to settle cases long before the offer of judgment statute existed, and they may still offer to settle cases without

using the offer of judgment statute.

The Cahuasqui majority referred to DeSalvo's use of one sentence from Danis to support its assertion that F.S. § 627.428 interacts with the offer of judgment statute, to wit: "the failure to recover more than an offer of settlement does not mean that an insured that is awarded some recovery is precluded from being awarded any portion of their attorney's fees and costs." Cahuasqui, 760 So. 2d at 1106. Neither the Cahuasqui majority, nor State Farm explain how this sentence supports their position since by its plain language it only refers to insured's receiving attorney's fees, not insurers, and not to the offer of judgment.

State Farm attempts to use Danis to harmonize the offer of judgment statute and the one way street statute. That is not just wrong, but bizarrely wrong. State Farm gives a summary of the Danis opinion, but it only proves the position of Nichols, that the one-way street precludes an insurer or surety from getting fees from the insured. The offer of judgment statute was not involved or even mentioned anywhere in Danis. Cahuasqui erroneously used the Supreme Court case of DeSalvo as showing that the offer of judgment interacted with the one-way street statute. U.S. Sec. Ins. Co. v. Cahuasqui, 760 So. 2d 1101, 1106 (Fla. 3d DCA 2000). But, nowhere in the DeSalvo cite or reasoning is the offer of judgment referred to. It was a question of what is or is not a prevailing party. DeSalvo

straightened out the misinterpretations of Danis, but, now the Cahuasqui court has misinterpreted DeSalvo as well. Cahuasqui has been used by one court to reiterate that the one-way street for fees is inviolate, even counter to the fee statute F.S. §57.105(6), which also applied "to any contract." McCarthy Bros. Co. v. Tilbury Const., Inc., 859 So. 2d 7, 11 (Fla. 1st 2004).

State Farm complains that without the law of Cahuasqui, it can't use the offer of judgment to scare PIP plaintiffs out of the courthouse. But, State Farm can still limit its exposure to fees by using the traditional method for first party suits; by offering to settle without using the offer of judgment. As for State Farm's complaint that it needs the offer of judgment to protect itself from suits without merit, F.S. 57.105(1) exists for that purpose. To protect itself in the future, State Farm can deal fairly with its customers. In the instant case, allowing Shannon Nichols to reschedule the examination with their doctor certainly would have been a better way.

II. THE RULES OF STATUTORY CONSTRUCTION PREVENT THE OFFER OF JUDGMENT FROM APPLYING TO PIP CASES.

State Farm had no answer to the case law examples of statutory construction, In fact, of the more than fifty cases cited in Judge Sawaya's dissent, the Nichols Initial Brief, and the Academy's Amicus Brief, State Farm mentions

about five.

Fee shifting, as it runs counter to the common law and policy of Florida must be narrowly construed. In Sarkis v. Allstate, 863 So. 2d 210 (Fla. 2003),after an exhaustive review of the offer of judgment statute and its corresponding rule, this Court found that since there was no provision for adding a multiplier to the attorneys fees in an Un-Insured Motorist case for a successful plaintiff, none could be added. Likewise, since there is no provision for an insurance company to get attorneys fees from its first party insured in the one-way street statute, none can be added.

III. APPLYING THE OFFER OF JUDGMENT TO PIP SUITS DENIES CONSTITUTIONAL ACCESS TO THE COURTS.

The No-Fault law, standing alone, is unconstitutional because of the elimination of the traditional right to sue for injury in tort. It is only the exchange of this right for the benefit for the almost automatic payment of PIP benefits that allows No-Fault to survive constitutional muster.

State Farm's constitutional argument is out of time sequence. The Answer argues that since Lasky v. State Farm, 296 So. 2d 9 (Fla. 1974), which held the PIP statute to be constitutional, is absent "any reference to the attorney's fee provisions of § 627.428 or 627.736(8) or their (alleged) importance to the Act's

constitutionality" it must be okay. But the Lasky opinion was rendered in 1974. F.S. § 768.79 was not made a law until 1986, twelve years later, with § 58, General Laws Ch. 86-160. (Florida Statutes Annotated §768.79, Derivation).

State Farm argues: "Indeed, an insured can always avoid liability for the insurer's attorneys' fees by accepting the insurer's proposal for settlement." (Answer of Respondent, State Farm, pg 38, topic V). State Farm reasons that since the insured can get into the courthouse, that it has not closed the courthouse doors to the insured, even though the insured has to run back out after the offer of judgment to safeguard his property.

State Farm's Answer on page 43 calls the Initial Brief of Nichols "extremely misleading" for referring to the Senate Staff Analysis that questioned the constitutional viability of altering the one way street in PIP. Nichols quoted the Staff Analysis, gave the cite, and included the internet location for rapid review. It is now attached as an appendix in its entirety.

State Farm's unsupported testimony of how it "usually" settles PIP cases is just vouching for itself. State Farm makes the unsupported statement that the offer of judgment has absolutely no impact on the insurance companies decision to pay suits. This is as unsupported as the Cahuasqui majority's novel finding that the offer of judgment has no impact on the filing of a suit. The remainder of this part

of the Answer is non-legal characterizations as to the motivations of other persons, and self serving statements unsupported by fact, case or testimony.[3]

IV. STATE FARM DOES NOT SHOW HOW A PIP SUIT IS A SUIT FOR UNDETERMINED DAMAGES AND NOT A SUIT FOR BENEFITS.

State Farm's Answer shows that it does not understand the difference between a suit for undetermined damages and a suit to determine rights. In the instant case, the rights are the benefits of the personal injury protection policy.

The instant suit could have been brought as a declaratory action to determine the right to statutory benefits. The sole question for the jury was whether Shannon Nichols unreasonably refused to attend State Farm's examination.

State Farm's reliance on Moore v. Allstate Insurance Co., 570 S0.2d (Fla 1990) is misplaced because Moore was a UM suit. To compare a UM action with a PIP suit is like comparing apples to oranges.[4] Although the insured in a UM

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[3]As to the statements of Nichols's attorney's fee expert, his statements were related to the fact that State Farm was asking for fees he considered "hugely puffed" or "churned" on a case that would have been easy to take to trial early, and that State Farm refused to provide any requested production as to actual payment received, as opposed to that just billed to State Farm. (R. 385 - 387).

[4] This is another flaw in majority opinion of Cahuasqui. The Third District assumes that since Fla. Stat. 768.79 is applicable to a first party UM action, is it equally applicable to first party PIP action. The flaw of this analysis assumes that both actions seek damages and thus they are subject to Section 768.79. Cahuasqui,760 So.2d at 1106.

action must prove coverage, Adelman v. St. Paul Guardian Ins. Co., 805 So.2d 106, 110 (Fla. 4th DCA 2002), once this burden is met, the action becomes a tort action where the insured must prove *liability and damages*. See State Farm Mut. Auto. Ins, Co. v. Fass, 243 So.2d 223, 224 (Fla. 2nd DCA 1971): ("The proof of [the] tort claim against uninsured motorist proceeds with the same burdens of proof as if it were filed as an action in tort.")(alteration in original). A PIP suit, however, is an action to enforce the *security* promised to all Floridians by the Legislature under Fla. Stat. 627.736.

V. STATE FARM FAILS TO SHOW POLICY ARGUMENTS IN FAVOR OF APPLYING THE OFFER OF JUDGMENT TO PIP.

State Farm lumps all the policy arguments of the dissents and the Briefs into a simple set of arguments that it assigns to Judge Sawaya. (Answer Brief p. 26). State Farm works hard to mock the opinion of Judge Sawaya but provides no legal response.

State Farm acknowledges the situation where a victorious PIP plaintiff's judgment would not rise to 75% of the offer of judgment, but then states that it would be an extremely rare occurrence. In a footnote, the appellate attorney for State Farm tries to testify that he had never seen such occur in 8 years of PIP suits. This is de hors the record, but it is an admission that State Farm does not make

reasonable offers of judgment in an attempt to settle a PIP lawsuit, but only bad faith, trivial offers for the purpose of getting to use the threat of attorney's fees. In fact, State Farm had a motive to cut off her treatment as soon as possible, because it did not want to pay for treatment to build a case against itself for her Un-Insured Motorist case.

The Cahuasqui majority's statement: "[w]e find that the application of the offer of judgment statute to PIP actions does nothing to alter this "reasonable alternative," because the statue has no deterrent effect on the filing of PIP suits", is a finding of a fact fashioned out of whole cloth, without any supporting testimony or empirical evidence. It was procedurally improper and it has been publicly questioned as bizarre: "However, if the claimant is out of work or makes only minimum wage, the risk of having to potentially pay thousands of dollars in attorneys' fees, however small that risk might be, would be truly terrifying."[5]

Separately, State Farm does not respond to other arguments in the dissents and Briefs regarding the problems with applying the offer of judgment to PIP suits, including that it would provide a windfall to insurance companies that had already

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[5]Robert N. Heath, Jr., submitting on behalf of the Trial Lawyers Section, *Proposals for Settlement in PIP Cases: Should U.S. Security Ins. Co. v. Cahuasqui be Overturned?*, The Florida Bar Journal, April 2001, at 41. Appendix tab 1.

been paid by premiums for their attorney's fees, and that it would unlevel the playing field.

If Cahuasqui is allowed to stand, it will reverberate through other areas, such as workers compensation and sureties for construction subcontractors.

The recommendations of the "Grand Jury," were used as justification for the changes made to the PIP law in 2003. No change was made to the one way street. State Farm now asks this Court to make changes that the Legislature did not make.

The Answer refers to Oruga Corporation, Inc. v. AT&T Wireless, 712 So. 2d 1141 (Fla. 3d DCA 1998) to suggest that courts must follow the letter of the law even though it leads to an obviously unjust result when applied to a new area. Thus, it aligns itself with a case that guarded the special protection that is provided to those who commit mass fraud. The Oruga problem was later corrected.[6] In Oruga, the district court reluctantly applied the offer of judgment to Mr. Ruiz, because it was afraid that protecting the class representative from such threats was beyond its power. Id. at 1143. This Court later altered the Proposal for Settlement Rule in a way which prevents another Oruga injustice, now an offer of judgment

[6] John C. Davis, *Offers of Judgment and Tenders of Relief before Class Certification, When is it Permissible to Pick Off the Class Representative?*, The Florida Bar Journal, November 2002, at 10.

does not run until after the class has been certified. Fla. R. Civ. P. 1.442 (f)(2).

To answer the question certified here in the affirmative is to render the No-Fault plan not only a No-Pay plan, but also, a We-Dare-You- To-Sue-Us plan.

VI. STATE FARM'S POLITICAL ARGUMENT IS MISPLACED.

State Farm makes a political argument of fraud, but there is no question of fraud here. There was no dispute over the fact that Shannon Nichols was getting an ultrasound examination the same morning that she was scheduled for the F.S. § 627.736(4)(b) examination by State Farm's chosen doctor. Regarding its arguments about fraud by a medical provider, State Farm's wants to make innocent insureds suffer for the actions of the sometimes wealthy health care provider, out of sympathy for the much more wealthy insurance company.

State Farm's reference to, and inclusion of, the Grand Jury report is a red herring. Even when the language conflict of the statutes was going to be removed by the bill, the Legislative Summary still warned about the constitutional problem that would still remain based on access to the courts.[7]

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[7]Staff Analysis and Economic Impact Statement, Bill: CS/SB 1202, Sponsor: Florida Banking and Insurance Committee and Senator Alexander, April 7, 2003 Appendix tab 2.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Ken Hazouri, Esq., of deBeubien, Knight, Simmons, Mantazaris & Neal, 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 _____, 2004.

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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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APPENDIX
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