

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: SC00-1649
Lower Tribunal No.: 3D98-3337

LILIANA CAHUASQUI

Petitioner, Plaintiff

-vs-

U.S.SECURITY INSURANCE
COMPANY,

Respondent, Defendant.

PETITIONER'S INITIAL BRIEF

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STANDARD OF REVIEW

The issue of whether offers of judgment are applicable in P.I.P. actions is a question of law. As such, the proper standard of review is de novo. See. Armstrong v. Harris, 773 So.2d 7 (Fla. 2000); Invo Florida, Inc. v. Somerset Venturer, Inc., 751 So.2d 1263 (Fla. 3d DCA 2000).

STATEMENT OF THE FACTS AND THE CASE

Liliana Cahuasqui was injured in a motor vehicle accident on October 3, 1995, and subsequently made a claim for Personal Injury Protection (PIP) benefits to U.S. Security Insurance Company. U.S. Security denied Cahuasqui's claim because her father, Milton Cahuasqui, did not list her on the application for insurance. Subsequently, Cahuasqui filed suit to recover PIP benefits and U.S. Security raised the defense of material misrepresentation. U.S. Security Insurance Co. v. Cahausqui, 760 So.2d 1101, 1102 (Fla. 3rd D.C.A. 2000). Milton Cahuasqui was not a party to this case. Petitioner relied upon Milton Cahuasqui's testimony that the U.S. Security's agent was aware that Liliana lived with him and was expressly told that she did not have to be listed on the application. (R. 91-95).

On June 16, 1997, U.S. Security served a proposal for settlement/offer of judgment, which stated as follows:

PURSUANT TO RULE 1.442 [Eff. 1-1-97] and/or Florida Statute § 768.79, the Defendant U.S. Security Insurance Company, hereby serves this offer to the Plaintiff, Liliana Cahuasqui, to allow judgment to be taken against said Defendant in the amount of One Thousand Five Hundred One Dollars (\$1,501.00) inclusive of PIP benefits, interest, penalties, costs, and attorney's fees.

Id. at 1103.

Cahasqui could not accept the offer of judgment as medical bills incurred totaled \$11,967.50, plus lost wages of \$2,028.00. (R. 249-251).

The trial judge bifurcated the case and tried the liability issue first. The jury entered a verdict for the Defendant, finding that Milton Cahuasqui had made a material misrepresentation on the application. The trial court entered a judgment in favor of U.S. Security. *Id.* at 1103-1104.

U.S. Security filed a motion for attorney's fees and costs based upon the proposal for settlement/offer of judgment. Cahuasqui filed a motion to strike U.S. Security's offer of judgment on the grounds that §768.79 conflicts with §627.428 (the Insurance Code's attorney's fees statute). The trial court ultimately denied U.S. Security's motion for attorney's fees and costs, finding that the offer of judgment statute was inapplicable to PIP actions, and certified the following question as one of great public importance:

Is the Proposal for Settlement/Offer of Judgment Statute,
F.S. §768.79, applicable to PIP actions?

Id. at 1102.

The Third District Court of Appeals accepted jurisdiction pursuant to Rule 9.030(b)(4)(A), Fla. R. App. P., and answered the question in the affirmative, reversing and remanding the case for a hearing on attorney's fees. *Id.*

Cahuasqui filed a *Motion for Rehearing, Rehearing En Banc, and Certification* on April 6, 2000 (R. 254-265) which was denied on July 5, 2000 (R. 266-283), at which time the Third District filed the Corrected Opinion. *See U.S. Security*

Insurance Co. v. Cahausqui, 760 So.2d 1101, 1102 (Fla. 3rd D.C.A. 2000).

Cahuasqui filed a Petition for Writ of Certiorari with this Court on August 10th, 2000. On February 7, 2001, this Court accepted Jurisdiction of this matter.

SUMMARY OF THE ARGUMENT

The application of §768.79 to P.I.P. would impair insureds' rights pursuant to both 627.736(8) and 627.428 as it would allow insurers to circumvent payment of insureds' attorney's fees by permitting the insurers to include fees as part of the benefits or ignore it altogether. Hence, insureds would be forced to pay attorneys fees from the recovery for P.I.P. benefits, instead of the insurer paying for such separately.

Furthermore, the application of §768.79 to P.I.P. impairs insureds' rights to recover full benefits under the threat to having to pay the insurer for its fees, thereby eroding the constitutional protections afforded to insureds by P.I.P.-- insureds having already lost certain rights in tort. Therefore, the application of §768.79 to P.I.P. unconstitutionally erodes the "reasonable alternatives" provided by the P.I.P. statute.

The application of F.S. §768.79 to an action to recover P.I.P. benefits under F.S. §627.736 conflicts with the attorney's fee provisions of §§627.736(8) and 627.428. F.S. §627.736(8) provides solely for the application of §627.428 as a fee provision under the statute. F.S. §768.71 maintains that if F.S. §768.79 (offer of judgment) conflicts with any other provision, the other provision shall govern. Hence, §768.79 is not applicable in a P.I.P. action.

ARGUMENT

THE OFFER OF JUDGMENT STATUTE CANNOT BE CONSTITUTIONALLY APPLIED TO P.I.P.

A.

Application Of F.S. §768.79 Impairs Insureds' Rights Under F.S. 627.736 And Nullifies F.S. §§ 627.736(8) & 627.428

In Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 752 So.2d 55, 59 (Fla. 2000), this Court confirmed that the attorney's fee provision of §627.736(8), i.e. §627.428, is a "one-way" imposition in favor of the insured. Subsequently in Allstate Ins. Co. v. Ivey, 774 So.2d 679 (Fla. 2000), this Court reiterated the purpose of this one-way fee provision under §§ 627.736(8) & 627.428 by stating:

It is clear to us that the purpose of this provision is to level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts.

The Third District Court of Appeal redistributed the economic power back to the insurer in U.S. Security Insurance Co. v. Cahausqui, 760 So.2d 1101, 1102 (Fla. 3rd D.C.A. 2000), by allowing insurers to use the offer of judgment statute as an economic sword to discourage the pursuit of legitimate P.I.P. claims to the detriment of the insured.

The legislative purpose of PIP insurance 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, 271 (Fla. 3rd DCA 1987). In order to ensure compliance by insurers, the legislature included subsection (8) as part of §627.736. Section 627.736(8) states:

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 s. 627.428 shall apply.

Hence, an insured who prevails over his or her insurer is entitled to attorney’s fees; the statute offers no similar prospect for the insurer. Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420 (Fla. 1994). 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). “The...public policy underlying this aspect of the statute is to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies.” Danis Industries, 645 So. 2d at 421. Insureds rarely have the same resources to litigate as the insurers do. By providing attorney’s fees to a prevailing insured, but not to an insurer, the statute encourages insureds to pursue claims that are being contested by their insurers, without fear of reprisal.

The application of §§627.736(8) and 627.428 operate to allow an insured to recover his P.I.P. benefits in full, without having to pay his attorney out of his own pocket or from a percentage of his benefits. Hence, the insured can recover 100% of the benefits due, with no reduction in his recovery attributable to attorney's fees.

The offer of judgment to Cahuasqui, however, would have produced a different and damaging result.

The offer of judgment made to Cahuasqui the instant case was for \$1501.00 "inclusive of PIP benefits, interest, penalties, costs and attorney's fees." The medical bills totaled \$11,967.50, and the lost wages \$2,028.00. Hence, the insured offered less than 19% of what would have been an \$8,000 obligation under the P.I.P. statute.¹ To allow an insurers to offer less than the 80% of reasonable and necessary medical bills and less than 60% for lost wages under the threat of attorney's fees to the claimant, would allow insurers to divest themselves of their obligations under the P.I.P. statute, would encourage insurers not to pay the full benefits due, and would discourage insureds from pursuing their rights under the P.I.P. statute.

Another glaring problem with the application of offers of judgment to P.I.P. is that insured has no means of forcing a medical provider to accept the offer made by his/her insurer. How can Cahuasqui, or any insured, accept a \$1501.00 offer of judgment when almost \$12,000.00 is outstanding to her physicians. Hence, the insured

¹ \$10,000 minus a \$2000 deductible.

is faced with an extremely harsh financial dilemma--accept the offer of judgment and face a huge obligation to her medical providers for the difference or reject the offer of judgment and risk a huge obligation to the insurer if unsuccessful. Placing the insured in such a dilemma does not foster the no-fault statutory scheme. Why should insureds, who have lost their rights under tort and are forced to pay premiums by law for P.I.P., have to gamble their lives' savings to receive full benefits under the insurance contract? They should not have to.

Moreover, in offers of judgment such as in Cahuasqui, where the offer is inclusive of attorney's fees and costs, the insured is forced to compensate his/her attorneys from the underlying amount. Hence, the insured must pay his own attorney's fees and costs out of the benefits received, contrary to the express purpose of both §§627.736(8) and 627.428.

In the instant action, U.S. Security offered the \$1501.00 offer of judgment on June 16, 1997, after substantial litigation had taken place. Cahuasqui would have to accept less than 19% of the benefits due and use that amount to cover costs and attorney's fees which, by June 16, 1999, would have accounted for more than the offer itself.² Hence, by allowing insurers to make offers of judgment under 768.79, they

² A review of the record on appeal prior to June 16, 1997 supports this contention.

can nullify both §§627.736(8) and 627.428 by including the attorneys fees as part of the benefits offered, and not in addition to the benefits due.

B.
THE APPLICATION OF F.S. §768.79 TO
P.I.P. IS UNCONSTITUTIONAL AND DENIES
ACCESS TO COURTS

Article §21 of the Florida Constitution guarantees:

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

The right to sue in tort for damages suffered in an automobile accident was long established under the Florida common law. Were it not for the requirement of “swift and virtually automatic payment”, the no fault scheme, by taking the right to sue in tort, would violate the right of access to courts under Article I, §21, Florida Constitution. Compare Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974) with Kluger vs. White, 281 So.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.)

Where a 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 for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger, 281 So.2d at 4. The PIP statute takes away the right to sue for personal injuries and medical expenses sustained in motor vehicles accidents, but gives certain rights in exchange. In Lasky, the Supreme Court held the PIP statute constitutional because,

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

296 So.2d at 15.

U.S. Security contends that “[w]hen an offer of judgment is applied in a P.I.P. case, the insured is treated the same as any other plaintiff bringing a civil action for damages.” *Appellants Initial Brief at p. 10*. U.S. Security however, fails to realize that P.I.P. insureds are afforded greater protection than other litigants because the legislature has limited their rights for redress for medical expenses and lost wages within the personal injury protection scheme. The application of the offer of judgment statute to PIP cases would subtract from protections created by the legislature to ensure that the citizens have a reasonable alternative to the traditional tort

action and would render that assurance of speedy payment hollow. Insurance companies can, and do, use the offer of judgment as a tool to discourage insureds to forego or compromise valid claims due to the threat of possibly having to pay the insurer's fees. If the insured is threatened into accepting less than the full amount of P.I.P. benefits due, he will be responsible to his medical providers for more than his 20% responsibility and the insurer will escape by paying less than his 80% obligation. Certainly, the insured will not get the benefit of the policy he/she is forced by law to pay for. Moreover, since the right to sue in tort for medical expenses and lost wages was eliminated by the enactment of the P.I.P. statute, the insured is left without adequate protection. Therefore, the application of §768.79 is unconstitutional as it erodes the protection offered insureds by the legislature in exchange for the loss of their rights in tort.

The fact that an offer of judgment may frighten an insurer to compromise a P.I.P. claim, operates to impair the P.I.P. statute from operating as a "reasonable alternative to the traditional tort action" because if the insured is forced to accept less than the 80% due, the insured will owe his medical providers more than the 20% contemplated by the P.I.P. statute and is left with no legal recourse against tort-feasors for the difference, obviating any guarantee of a "swift and virtually automatic payment," and making P.I.P. unconstitutional.

C.
F.S. § 768.79 CONFLICTS WITH THE
PROVISIONS OF §§ 627.736 & 627.428.

An offer of judgment pursuant to Florida Statute §768.79³ cannot be employed by an insurer in a first-party action for P.I.P. benefits since its application would conflict with the express provisions of both F.S. §§627.736 and 627.428.

Florida Statute §627.736 provides that:

Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle... [covering]...[e]ighty percent of all reasonable expenses for necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services...[and]...[s]ixty percent of any loss of gross income and loss of earning capacity per individual from inability to work proximately caused by the injury sustained...

F.S. §627.736(1)(a)&(b).

To enforce the above provisions the P.I.P. Statute authorizes attorneys fees for successful actions brought by insureds. Section 627.736(8) states:

³ Cahuasqui maintains that F.S. 768.79 is inapplicable irrespective of which version applied. However, according to established authority, the version applicable in a particular case is that which was in effect when the cause of action “accrued.” *See City of Punta Gordon v. Burnt Store Hotel, Inc.*, 650 So.2d 142 (Fla. 2d DCA 1995) and *Brodose v. School Bd. of Pinellas County*, 622 So.2d 513 (Fla. 2d DCA 1993). In the instant action, the cause of action accrued in 1996, hence the 1995 version applies.

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 s. 627.428 shall apply.

F.S. §627.428(1) provides:

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.

Undoubtedly 627.428, alone, permits an insured who brings a claim against his insurer for P.I.P benefits under §627.736 to recover attorney's fees for the successful prosecution of said action, without the necessity of §627.736(8). Nonetheless, the legislature decided to specifically include subsection (8) as part of F.S. §627.736 and permit attorneys fees only pursuant to §627.428 and not through the application of any other fee statute. Hence, the Appellant cannot be permitted to circumvent the expressed language of 627.736(8) by attempting to recover fees under another statute. Had the legislature intended to allow the use of any other fee provision in an action for P.I.P. benefits, it could have stated otherwise in subsection (8), or, perhaps, eliminated the provision altogether.

It is an axiomatic rule of statutory construction that where a statute mentions one thing it necessarily implies the exclusion of another. Under the ancient principle of *expressio unius est exclusion alterius* the enumeration of conditions or things in the statute is to be construed as excluding from its operation all those not expressly mentioned. 49 Fl Jur. 2d §126 (1984). This well entrenched rule of statutory construction has been held applicable to Florida's Insurance Code and more specifically, in the personal injury protection section of the Florida Statutes. See Industrial Fire & Casualty Insurance Co. v. Kwechin, 442 So. 2d 1337 (Fla. 1984). Hence, F.S. §627.736(8)'s reference to only one fee statute, necessarily implies the exclusion of others.

Furthermore, §768.71(3) states that “[i]f a provision of this part is in conflict with any other provision of the Florida Statutes, such **other** provision shall apply.” Thus, even the provision which regulates the offer of judgment statute gives preference to the more specific provision in §627.736(8). (Emphasis added).⁴

Moreover, Cahuasqui's position is further supported by well-established precedent regarding conflicts between general and specific statutory provisions. When a general statute conflicts with a specific statute, the specific statute covering a particular area controls in matters within that specific statute's scope over a

⁴ Cahuasqui agrees with the analysis of The Academy of Florida Trial Lawyers' Amicus Brief at page 20, where they cite to three circumstances where the offer of judgment and §§627.726(8) and 627.428 cannot be harmonized.

statute covering the same and other subjects in more general terms. McKendy v. State, 641 So. 2d 45 (Fla. 1994); See Adams v. Culver, 111 So. 2d 665 (Fla. 1959); State v. Billie, 497 So. 2d 889 (Fla. 2d DCA 1986). F.S. §627.736(8) addresses the issue of attorney's fees to the prevailing party in a dispute between an insured and an insurer over P.I.P. benefits, and defers solely to F.S. §627.428, which only permits the insured to recover fees. F.S. §768.79 addresses the issue of the entitlement to attorney's fees in "all civil cases", and therefore, is a statute which covers cases in more general terms. Therefore, the more specific provisions of §§627.736(8) and 627.428 should apply over that of §768.79.

In Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997), the Second District disallowed attorneys fees under an offer of judgment to a prevailing defendant in a civil rights case, under 42 U.S.C. §1988, finding that, "because section 1988 allows the award of attorney's fees to prevailing defendants in a much more limited context than does §769.79(1), §1988 preempts section 768.79(1)." 694 So.2d at 887. Similarly, in Clayton v. Bryan, 753 So.2d 632 (Fla. 5th DCA 2000), the Court held that the offer of judgment statute was inapplicable to award fees to a defendant in an action under the Federal Fair Debt Collections Practices Act, 15. U.S.C. §1692, since that statute only provided fees to the defendant if the suit is brought in bad faith to harass the defendant.

Similarly, application of the offer of judgment statute in P.I.P. cases, would undermine the basic purpose of the P.I.P. statute and cannot be reconciled. The P.I.P. statute is not silent as to fees. Section 627.736(8) specifically addresses attorneys fees - and provides them only to a prevailing insured; not an insurer. Hence, §768.79 is in an action for P.I.P. benefits.

CONCLUSION

The Third District erred in permitting the application of the offer of judgment statute to the no-fault statutory scheme. The application of §768.79 conflicts with the plain language of §§627.736(8) & 627.428 and further erodes the protections which otherwise make P.I.P. constitutional. Hence, the decision of the Third District in Cahuasqui should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was mailed this 27th day of March, 2001, to David B. Pakula, Esq., Fazio, Dawson, DiSalvo, Cannon, Abers, Podreca & Fazio, appellate counsel for Respondent, P.O. Box 14518, 633 trial counsel for Respondent, South Andrews Avenue, Fort Lauderdale, FL 33302, Michael A. Nuzzo, Esq., 2100 Coral Way, Suite 504, Miami, Florida 33145, Barbara Green Esquire, Barbara Green, P.A., Amicus Curie, 1320 S. Dixie Hwy., Gables One Tower, Suite 450, Coral Gables, FL 33146, and Tracy Raffles Gunn, Esq., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Amicus Curie, P.O. Box 1438, Tampa, FL 33601.

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