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State Farm Mutual Automobile Insurance Co. v. Shannon Nichols Docket Number: SC03-1483 | SC03-1653

CHIEF JUSTICE: AND WE WOULD TAKE THE NEXT CASE ON THIS MORNING'S DOCKET, WHICH IS STATE FARM VERSUS NICHOLS. PARTIES ARE READY?

YES, YOUR HONOR. CHIEF YOU MAY PROCEED.

MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS KEN HAZOURI. I AM HERE ON BEHALF OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. THIS IS AN APPEAL INVOLVING CROSS APPEALS RELATING TO BOTH THE PROPOSAL FOR SETTLEMENT PROCEDURE SET FORTH IN 768.79, AND THE NO FAULT ACT, SPECIFICALLY THE PIP STATUTE, 627.736. A BRIEF RECITATION OF WHAT HAPPENED IN THIS CASE, THERE WAS A PIP SUIT FILED BY THE PLAINTIFF, SHANNON NICHOLS. SHE WAS SEEKING TO RECOVER ABOUT \$800-SOMETHING IN PIP BENEFITS. MONEY TO PAY FOR TREATMENT THAT SHE HAD RECEIVED AT A CHIROPRACTOR'S OFFICE. WHAT HAPPENED WAS STATE FARM SCHEDULED HER FOR AN IME, CME. IT WAS RESCHEDULED TWO OR THREE TIMES FOR HER, THEN SHE FAILED TO ATTEND, SO, THEN, UNDER THE PIP STATUTE, STATE FARM WITHDREW HER PIP BENEFITS. SHE KEPT GOING TO THE CHIROPRACTOR AND INCURRED THE ADDITIONAL TREATMENT, AND THEN THE ISSUE BECAME WHETHER SHE UNREASONABLY REFUSED TO ATTEND THE CME. THE JURY IN A TWO-DAY JURY TRIAL FOUND THAT SHE DID REFUSE TO ATTEND AND STATE FARM PROPOSED A SETTLEMENT FOR \$250 AFTER DOING DISCOVERY THAT LENT IT TO THE STRONG SUSPICION THAT THIS CLAIM WAS MERITLESS.

JUSTICE: SO THE ISSUE IN THIS CASE IS WHETHER THERE WAS A CIVIL ACTION FOR DAMAGES?

THAT WAS ONE OF THE ISSUES THAT WAS FIRST RAISED BY JUDGE SOWOYA WHEN IT WAS FIRST RAISED ON APPEAL.

JUSTICE: THE STATUTE TALKS ABOUT ACTION FOR DAMAGES, DOES IT NOT?

YES, YOUR HONOR. IT DOES.

JUSTICE: COULD THE PLAINTIFF HAVE FILED A SUIT, SINCE THE ACTION WAS FOR DAMAGES APPARENTLY WHAT THE PLAINTIFF SAYS, COULD THE PLAINTIFF HAVE FILED IT FOR A DECLARATORY JUDGMENT ACTION?

I BELIEVE THERE DIDN'T USED TO BE WIGGLE ROOM TO DO THAT UNDER THE DECLARATORY ACT CHAPTER 786. I BELIEVE THERE WAS CASE LAW THAT SUGGESTS THAT THE PLAINTIFF COULD HAVE DONE THAT. I AM NOT QUITE SURE AS TO HOW THAT WOULD TURN OUT ON A MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT, BUT THE ONE THING THAT IS CERTAIN IS THAT THIS WAS NOT A DECLARATION. THIS WAS A CLAIM FOR DAMAGES BECAUSE THAT WAS WHAT WAS EXPRESSLY SET FORTH IN THE PLAINTIFF'S COMPLAINT.

JUSTICE: AREN'T THERE A LOT OF CASES WHERE THE PLAINTIFFS FILE LAWSUITS FOR DECLARATORY JUDGMENT, BASED ON COVERAGE ISSUES. THEY WANT A DECLARATION THAT SOMETHING OR IS NOT COVERED OR FALLS WITHIN THE COVERAGE OF THE POLICY?

I THINK THAT MOST DECLARATORY ACTIONS OVER COVERAGE, MOST IF NOT ALL, INVOLVE WHETHER

THERE IS COVERAGE UNDER THE POLICY AS A WHOLE.

JUSTICE: SO ARE THOSE CIVIL ACTIONS FOR DAMAGES UNDER THE STATUTE?

THAT PARTICULAR TYPE OF LAWSUIT IS NOT. IF YOU FILE A DECLARATION, TO DETERMINE WHETHER THERE IS COVERAGE UNDER THE POLICY BECAUSE THE EVENT OR THE CLAIM, IF IT IS A CLAIMS-MADE POLICY, FELL OUTSIDE OF THE POLICY PERIOD, OR THERE WAS MISREPRESENTATION MADE AND YOU ARE JUST TALKING ABOUT COVERAGE OVER THE OVERALL POLICY, WHERE YOU ARE NOT SAYING GIVE ME A JUDGMENT FOR DAMAGES, THAT I DON'T THINK THAT THAT IS AN ACTION FOR DAMAGES. THAT IS NOT WHAT HAPPENED IN THIS CASE, AND THERE IS LAW, BY THE WAY, ON THE ISSUE OF WHETHER DECLARATIONS OR LAWSUITS STYLED AS ACTIONS FOR DECLARATORY RELIEF THAT, REALLY, SEEK MONEY, THE END OF THE DAY THEY ARE SEEKING TO GIVE DECLARATIONS SO THEY CAN RECOVER MONEY, THAT THOSE ARE COVERED BY 768.679, AND THOSE ARE ACTIONS FOR DAMAGES UNDER THE STATUTE, SO EVEN UNDER THE BEST DAY IF YOU WANTED TO STYLE THIS OR ANY PIP SUIT WHERE YOU ARE SEEKING TO RECOVER INSURANCE BENEFITS, IF YOU WANT TO TRY TO STYLE THAT AS A DECLARATION AT THE END OF THE DAY I THINK WHAT YOU ARE SEEKING IS TO RECOVER MONEY AND I THINK THAT IS WHAT YOU ARE ASKING FOR AND IT IS AN ACTION FOR CIVIL DAMAGES, AS CONTEMPLATED BY THE STATUTE.

JUSTICE: I WAS CONCERNED ABOUT WHAT, OF WHAT THE PROPOSAL FOR SETTLEMENT CONSISTED. I NOTICE THAT THE FIFTH DISTRICT HELD THAT IT WAS DEFECTIVE.

CORRECT.

JUSTICE: AS FAR AS IT BEING IN CONFORMITY WITH THE RULE. WHAT DID IT CONSIST OF?

WHAT DID THE PROPOSAL CONSIST OF?

JUSTICE: RIGHT. WHAT WAS IT?

THE SALIENT PORTIONS, REALLY, RELATED TO THE RELEASE THAT WAS SUGGESTED. WE OFFERED TO PAY \$250.

JUSTICE: RIGHT.

AND YOU HAVE TO READ, I BELIEVE THE FIRST AND FOURTH PARAGRAPH YOU HAVE TO READ TOGETHER. THE FIRST PARAGRAPH COMPLIED WITH THE PORTION OF THE RULE 1.442, WHICH IS YOU HAVE TO TELL WHAT CLAIMS YOU ARE SEEKING TO RESOLVE, AND WHAT WE SAID WAS STATE FARM OFFERS 250 TO RESOLVE ALL CLAIMS ARISING IN OR OUT OF THIS LAWSUIT. WE SUBMIT THAT THAT WAS SIGNIFICANT, BECAUSE IT LIMITED THE CLAIMS THAT WERE BEING SETTLED TO WHAT IS GOING ON IN THE LAWSUIT. NOW, THE FOURTH PARAGRAPH DID SAY STATE FARM, UPON ACCEPTANCE, PLAINTIFF WILL EXECUTE A GENERAL RELEASE THAT WILL BE LIMITED TO ALL CLAIMS, CAUSE OF ACTION, ET CETERA. IT DID SAY ETC, THAT HAD ACCRUED THROUGH THE DATE OF THE ACCEPTANCE OF THE PROPOSAL.

JUSTICE: SO ARGUABLY, THAT WOULD HAVE COVERED THE U.M. CLAIM.

ARGUABLY.

JUSTICE: AND SO AT LEAST IT WOULD BE A FAIR STATEMENT THAT COUNSEL WOULD NOT REASONABLY ADVISE THEIR CLIENT JUST TO SIGN IT AND SEND IT BACK.

I THINK THAT IS A FAIR STATEMENT. WHAT WE WOULD SAY IS YOU HAVE TO COMPARE PARAGRAPH ONE OR I AM SORRY, YOU HAVE TO READ PARAGRAPH ONE AND PARAGRAPH FOUR IN

PARI MATERIA , AND IF YOU PUT THOSE TOGETHER, I THINK IT WAS CLEAR THAT WHAT WAS BEING REQUESTED WAS A RELEASE TO SETTLE PIP CLAIMS. NOW, IF COUNSEL --

JUSTICE: WHY WOULD THEY HAVE TO SIGN A GENERAL RELEASE , RELEASING EVERY ACTION THAT YOU HAVE UNTIL TODAY, IF IT IS ONLY A PIP ACTION?

THEY WOULD NOT. IF HE WOULD --

JUSTICE: CLEARLY YOU WERE VERY CANDID, AND WE APPRECIATE THAT , BUT THAT LAST SENTENCE IS THE KIND OF CATCH ALL THAT YOU WANT AS YOU REPRESENT A DEFENDANT. YOU TRY TO GET THEM AS BROAD AS YOU CAN, AND UNFORTUNATELY IN THIS CASE, IT JUST WENT THERE, DIDN'T IT? BECAUSE YOU WOULD PROBABLY HAVE TO HAVE A LAWSUIT TO REFORM AND DO ALL OF THESE OTHER THINGS TO GET OUT OF IT AS A PLAINTIFF .

YOUR HONOR , I HAVE TO BE CANDID. CERTAINLY IT WOULD HAVE BEEN BETTER IF I HAD PUT ALL PIP CLAIMS . NO DOUBT. BUT I THINK WHEN YOU READ THEM IN PARI MATERIA , THAT THAT IS WHAT WAS GOING ON, AND IF COUNSEL HAD ANY CONCERN , I AM NOT SUGGESTING THAT THE RULE REQUIRES HIM TO DO THIS , IF HE HAD ANY CONCERN, IF HE HAD TO PROTECT HIS CLIENT, IT IS A SIMPLE PHONE CALL TO SAY , HAY , I WANT TO ACCEPT THIS IF THAT IS WHAT THE CLIENT WANTED TO DO , BUT YOU HAVE THE U.M. CLAIM AND THEN THE ISSUE IS RESOLVED.

JUSTICE: BUT WE ARE TALKING ABOUT WHETHER AN OFFER OF SETTLEMENT IS GOING TO BIND THE NONOFFERING PARTY TO PAY ATTORNEYS FEES. WE HAVE BEEN PRETTY STRICT IN REQUIRING THAT THE OFFER CONFORM TO CERTAIN STANDARDS , AND THIS OFFER, WHETHER INADVERTENTLY OR NOT, SEEMED TO REQUIRE THAT THE PLAINTIFF RELEASE CLAIMS THAT WEREN'T PART OF THIS PARTICULAR LAWSUIT, AND UNDER THE TERMS OF THE RELEASE AS PROPOSED IN THE OFFER , STATE FARM WOULD HAVE BEEN WITHIN ITS RIGHTS , LATER ON, TO SAY , JUDGE , THEY RELEASED THEIR U.M. CLAIM. THEY SIGNED A RELEASE. THEY AGREED TO SIGN IT. THAT IS WHY WE SETTLED THIS CASE. WE WOULDN'T HAVE SETTLED IT IF THEY HADN'T AGREED TO IT. THEY ARE BOUND BY THAT AGREEMENT AND LEGALLY YOU HAVE YOU WOULD HAVE BEEN -- YOU WOULD HAVE BEEN CORRECT , RIGHT?

I DON'T THINK SO. IN THERE THAT I ARGUMENT MAKES SENSE IN PRACTICE , IF WE ARE TALKING ABOUT HAD THEY ACCEPTED IT , THEN THE RELEASE WOULD HAVE NEVER INCLUDED THE U.M. CLAIM SO THERE WOULD HAVE BEEN NO ARGUMENT FOR THAT. THAT WOULD HAVE BEEN RESOLVED ON SETTLING THE CASE. MR . HOCKMAN WOULD HAVE TOLD ME I HAVE GOT THIS U.M. CLAIM AND I WOULD HAVE SAID IT IS NOT GOING IN THAT RELEASE. THAT WAS NEVER INTENDED. NOW , IF WE ARE TALKING ABOUT HAD THEY ACCEPTED IT AND THEN I GAVE THEM A RELEASE THAT ALSO INCLUDED THE U.M. CLAIM, WOULD THEY BE BOUND TO SIGN THAT RELEASE BECAUSE THEY SEND THE PROPOSAL? I DON'T THINK SO.

JUSTICE: HAD THE U.M. CLAIM ACCRUED , AT THE TIME THAT YOU SENT THIS OFFER OF JUDGMENT?

YES, YOUR HONOR. IT WAS PRE-SUIT. IT HADN'T BEEN FILED BUT THE ACCIDENT HAD HAPPENED. MR. HOCKMAN CAN PROBABLY TELL YOU WHETHER THE PLAINTIFF , MS. NICHOLS, HAD SETTLED WITH THE TORTFEASOR AT THAT POINT BUT CERTAINLY THE ACCIDENT HAD HAPPENED AND IT WAS ACCRUED .

JUSTICE: THIS CANTERO HAD SAID THAT IF THE --

JUSTICE: JUSTICE CANTERO HAD SAID THAT , IF YOU HAD SAID, BASED UPON PART OF THE PIP CLAIM , IF YOU HAD SAID THIS RELEASE IS FOREVERYTHING, THAT IS REALLY WHAT THAT RELEASE SAYS BASICALLY, ISN'T IT?

IT IT WOULD N'T HAVE SAID THAT.

JUSTICE: IF THEY HAD SIGNED WHAT YOU WANTED HIM TO SIGN , THAT IS A RELEASE OF ALL CLAIMS THAT HAD ACCRUED UP TO THAT POINT , THAT WOULD HAVE INCLUDED - -

I AM SOR RY.

JUSTICE: THAT WOULD HAVE INCLUDED THE UNDERINSURED.

IN THE ORY , LOOKING AT THE LANGUAGE OF THE PROPOSAL , YOU CAN MAKE THAT ARGUMENT OR MAKE THAT STATEMENT. IN REALITY , HE WOULD NOT HAVE BEEN REQUIRED TO SIGN A RELEASE THAT INCLUDED THE U.M. CLAIM. IT JUST WOULDN'T HAVE HAPPENED, AND WHAT I WAS GOING TO FINISH THE ANSWER , HAD HE SEND THE PROPOSAL , AND LET'S JUST SAY STATE FARM HAD BAD MOTIVATIONS , WHICH THEY DID NOT, AND I HAD A BAD MOTIVATION , WHICH I DID NOT, AND HAD I GIVEN HIM A RELEASE THAT SAID HERE IS THE RELEASE. YOU AGREED TO SIGN IT THAT INCLUDES YOUR U.M. CLAIM. YOU ARE BOUND. I WOULD THINK HE WOULD HAVE AUTHORITY TO GO TO THE COURT AND FILE A MOTION TO BE RELEASED FROM THIS PROPOSAL AND SAY THIS IS NEVER WHAT I INTEND. I UNDERSTOOD IT TO MEAN THE PIP CLAIMANT COURT WOULD HAVE HAD THAT INHERENT AUTHORITY AS ACCEPTED BY THE ACCEPTANCE OF THE PROPOSAL AND AS GOVERNED BY CONTRACTURAL LIMITATIONS.

JUSTICE: BUT THAT REALLY DEFEATS THE WHOLE IDEA OF THE OFFER OF JUDGMENT RULE AS WE HAVE CONSTRUED IT , AND WE HAVE CONSTRUED IT VERY STRICTLY AND SAID IT IS A BAM-BAM SITUATION. NOW, MY CONCERN HERE IS THAT, IF THIS IS NOT A VALID OFFER OF JUDGMENT , ISN'T THIS WHOLE QUESTION A HYPOTHETICAL ? ANOTHER WHOLE QUESTION OF?

JUSTICE: OF WHETHER YOU CAN HAVE A VALID OFFER OF JUDGMENT, UNDER THE PIP STATUTE. SINCE WE DON'T HAVE ONE HERE. IF YOU ASSUME WE DON'T HAVE ONE HERE.

YOU MEAN , IS THE WHOLE QUESTION OF WHETHER THE PROPOSALS FOR SETTLEMENT APPLY IN PIP CASES NOW HYPOTHETICAL?

JUSTICE: RIGHT.

I DON'T THINK SO , BECAUSE THE FIRST DECISION HAD TO JUMP OVER THAT FIRST HURDLE , WHICH I THINK WOULD BE AN UMBRELLA OVER THE SECOND ARGUMENT AND SAY , BEFORE WE EVEN CONSIDER WHETHER STATE FARM'S PROPOSAL WAS VALID IN THIS CASE , WE HAVE TO DETERMINE WHETHER IN THE FIRST PLACE, A PROPOSAL FOR SETTLEMENT CAN EVEN BE USED IN A PIP CASE , SO I THINK THAT WAS THE THRESHOLD QUESTION, AND THEN THEY MOVED ON TO THE SECOND ONE, WHICH WAS SPECIFIC TO THE STATE FARM'S PROPOSAL IN THIS CASE, SO I DON'T THINK --

CHIEF JUSTICE: THEY FOUND IN YOUR FAVOR ON THAT ISSUE , CORRECT?

YES , THEY DID , YOUR HONOR. YES. CHIEF CHIEF -- CHIEF CHIEF SO YOU HAVE GOT A CASE THAT SAYS THE --

CHIEF JUSTICE: SO YOU HAVE GOT A CASE THAT SAYS THE OFFER OF JUDGMENT DOES APPLY. ARE THERE ANY CONTRARY IN THE PIP CASES?

NO, YOUR HONOR.

CHIEF JUSTICE: AND THEN DRYDEN VERSUS PIEDAMONTE , IS ANOTHER CASE INVOLVING , I GUESS YOU ARE NOT INVOLVED.

THANKFULLY.

CHIEF JUSTICE: BUT ANOTHER RELEASE CASE, AND THEY HAVE , CONSISTENT WITH NICHOLS.

YES.

CHIEF JUSTICE: TALKED ABOUT THE SAME PROBLEM THAT THE OFFER-OF-JUDGMENT STATUTE, REALLY , WASN'T MEANT TO DEAL WITH THESE NONMONETARY CONDITIONS , SO YOU KNOW, AGAIN, I G UESS IF WE AGREE THAT THE , W I T H THE FIFTH DIST RICT ON THE RELEASE ISSUE , AND DISCHARGE JURISDICTION, I MEAN, IT IS STILL ON THE CERTIFIED QUESTION, YOU STILL HAVE THAT CASE IN FAVOR O F FINDING FOUR , THAT THE OFFER-OF-JUDGMENT STATUTE APPLIES, CORREC T?

CERTAINLY AND THAT WAS THE CERTIFIED ISSUE , AS YOUPOINTED OUT . FOR WHAT IT IS WO RTH.

CHIEF JUSTICE: I AM INTERESTED, JUST TO HEAR OVER \$800 THERE WAS A TWO-DAY TRIAL AND \$23,000 IN ATTORNEYS FEES , AND YOU KNOW , IT IS SO MEWHAT DISCONCERTING FROM AN ADMINISTRATION OF JUSTICE POINT OF VIEW . IF THEY HAD SEND THE 25 0.

YES.

CHIEF JUSTICE: AND THERE WAS CONTIN UING ME DICAL EXPENSES , THE FACT THAT THEY DIDN'T COMPLY WITH THE CME , D OES THAT CUT OFF ALL BENEFITS FOR THE FUTURE YOUR OR JUST UP TO THE, UP THROUGH THE TIME THAT, I MEA N IF SHE SAYS, WELL , OKAY NOW I WILL HAVE A MED ICAL EXAMINATION, HOW DOES THAT WORK?

WELL , I THINK THE WA Y IT WOULD WORK IS THIS , THE STATE FARM HAD WITHDRAWN BENEFITS PERMANENTLY , BECAUSE SHE FAILED TO ATTEND THE I ME. OKAY. SO SHE ACCEPTS THE PROPOSAL . WE WOULD HAVE PAID \$2 50. WE WOULD HAVE SETTLE THE -- SETTLED ALL PIP CLAIMS THROUGH THAT DAY.

CHIEF JUSTICE: SO EVEN IF SHE HAD SAID AFTERWARDS ANDSAID I SEE THE JURY SAYS NOW REASONABLY REFU SED , THAT WOULD HAVE ENDED THE ENTIRE PIP CLAIM?

IF SHE ACCEPTED IT , IT WOULD HAVE BEEN BEFORE THE JURY DETERM INATION.

CHIEF JUSTICE: NO AS FAR AS WHAT HAPPENED IN THE JURY TRIAL, IF THE JURY FOUND THAT SHE UNREASONABLY REFUSED.

YES.

CHIEF JUSTICE: DOE S THAT MEAN THAT SHE CAN NOT CLAIM PIP BENEFITS FOR THE FU TURE YOUR?

YES. ONCE THE JURY MADE THAT DETERMINATION , THEN YES, BECAUSE THAT IS A DETERMINATION THAT SHE UNREASONABLY REFUSED T O ATTEND , WHICH ME ANS STATE FARM'S PERM ANENT WITHDRAWAL OF BENEFITS WAS VALID .

CHIEF JUSTICE: SO THEREFORE THE JUDGMENT THAT WAS EN TERED IN YOUR FAVOR IN ITSELF, WOULD WIPE OUT THEABILITY TO CLAIM ANY F U RTHER PIP BENE FITS .

THAT IS CORRECT.

CHIEF JUSTICE: I G UESSTHAT IS WHY, BE CAUSE WHEN WE USED TO, AGAIN IT IS A PROPOSAL OF SETTLEMENT , BUT THE ORIG INAL OFFER OF JUD GMENT WOULD BE IF THEY ACCEPTED IT , THEY WOULD SAY I ACCEPT THE 2 50, THAT WOULD END , THEN WOULD THAT NOT END THE LAWSUIT?

THAT WAS, THAT IS THE INTERESTING QUESTION. I THINK SHE COULD HAVE SEND THE 250 AND ENDED THE LAWSUIT AND SI GNED THE RELEASE , W HICH WOULD HAVE TO BE L IMITED TO ALL BENEFITS PRESENT OR PAST , AND I BELIEVE, I WOULD HAVE TO RESEARCH IT, THAT SHE COULD GO GET MORE CHIROPRACTIC TREATMENT AFTER THAT AND THEN FILE A N OTHER LAWSUIT .

CHIEF JUSTICE: AFTER THE FINDING OF UNREASONABLE RE-- THAT WOULDN'T HAVE BEEN AFTER THE FI NDING OF UNREASONABLE AT THAT POINT.

THERE WOULDN'T HAVE BEEN A FINDING OF DETERMINATION ON MERITS , WHICH IS WHY SHECOULD HAVE BEEN TREATED AND GO BACK AGAIN.

CHIEF JUSTICE: THAT IS WHY YOU NE EDED THE RELEASE IN ALL CANDOR.

NO, BECAUSE YOU CAN'T ASK FOR RELEASE IN PIP BENEFIT S. THE REASON WE ASK FOR PIP IS BECAUSE THERE ARE SO MA NY TYPES O F BENEFITS THAT CAN ACCRUE. IF -- ACCRUE . IF STATE FARM SON DAY LATE , THEY CAN FILE ANOTHER CLAIM FOR 10 CENTS, SO EVEN IF IT WAS PAID LATE , THEY CAN FILE ANOTHER LAWSUIT, SO STATE FARM SAID, THE IDEA WAS WEARE GO ING TO PA Y YOU THIS AND EVERYTHING IN THE PASTIS DONE . THERE IS NO COMING BACK AND SAYING I WANT TO PUT THIS BILL IN MY COMPLAINT AND NOW SUE ON THIS B ILL, AND IT HAPPENS ALL THE TI ME. THAT WAS THE REAS ON FOR P UTTING IT - -

JUSTICE: B EFORE YOU SIT DOWN, CAN YOU EXPLAIN TO ME HOW THIS OFFER OF JUDGMENT , ATT ORNEYS FEES STATUTE PL AYS INTO THE ATTORNEYS FEE PROVISION , UNDER THE PIP STATUTE, IT SELF , WHICH SEEMSTO BE SORT OF A ONE-WAY STREET , ATTO RNEYS FEE WHEREYOU CAN ONLY, ONLY THE SUCCESSFUL PLAINTIFF IS ENTITLED TO ATTORNEY FEES .

HOW DO THEY INTERACT. WHEN I WAS LOOKING OVER THIS, I ACTU ALLY THO UGHT THAT THIS CASE WOULD BE THE NEAT , FINAL EXPLANATION AS TO HOW THESE TWO STATUTES INTERACT, BECAUSE THE FI RST CASE WAS DANAS, WHER E THERE WAS AN OFFER OF SETTLEMENT PROPOSED AND THE INSURED RECO VERED SOME MONEY, AND THE ISSUE I S WHO I S THE PREVAILING PAR TY, WITH A ONE-WAY ATTORNEYS FEE PROVISION UNDER 628. 428 AND A A PROPOSAL O F SETTLEMENT FROM THE OTHER SIDE. THIS COURT SAID THAT THE PLAINTIFF IS THE PREVAILING PARTY, IF THEY ARE ENTITLED --

JUSTICE: I AM MORE INTERESTED IN THE UNDERLYING POLICY OF 627, BECAUSE IN DANAS, IT SEEM S TO SAY THAT WE HAVE THIS POLI CY BECAUSE WE DON'T WANT INS URERS FAILING TO PAY THESE PIP BENEFITS, AND YE T YOU CAN END RUN THAT BY GETTING THE ATTORNEYS FEES UNDER THEOFFER-OF-JUDGMENT STATUTE, THEN IT SEEMS TO SORT OF NEGATE THE 627 ATTORNEYS FEE. LET ME C UT TO THE CHASE A LITTLE QUIC KER THEN. THE OFFER-OF-JUDGMENT STATUTE AS IT RELATES TO A 627.428 FIRST PARTY INSURANCE CLAIM, DO ES NOT C REATE A TWO-WAY S TREET OF EQUAL, IT IS NOT LIKE A PREVAIL ING PARTY ATTORNEYS FEE PROVISION WHERE IT SAYS WHOEVER WINS ON THE SIGNIFICANT ISSUES OF THE CASE WINS. AS I PUT FORTH EXTENSIVELY IN THE BRIEF, IN REALITY , IN FUNCTIONALITY , IN OR DER FOR AN INSURANCE COMPANY TO PREVAIL ON AN OFFER OF JUDGMENT, THEY ARE GOING TO HAVE TO GET A ZERO VERDICT, BECAUSE IF THE PLAINTIFF RECOVERS \$ 1 AND THIS HAPPENSALL THE TIME IN A TRIAL , THEY WILL SAY JUST AWARD THIS ONE DAY. IF THEY RECOVER \$ 1 THAT IMMEDIATELY KI CKS IN DESALVO, WHICH MEANS YOU HAVE T O ADDIN THE ATTORNEYS FEES AND COSTS SI NCE THE FIRST DA TE OF OFFER OF THE PROPOSAL FOR SETTLEMENT, IN ORD ER TO DETERMINE WHETHER UNDER DESALVO , WHETHER THE OFFER PREVAILED , SO IT REQUIRES A ZERO VERDICT. I AM SORRY . MY TIME IS RUNNING OUT. IT IS NOT LIKE YOU CAN HAVE AN OFFER FOR \$2 50 AND THE PLAINTIFF RECOVERS \$50, WHICH IS LESS THAN THE THRESHOLD, AND THEN SAY STATE FARM WINS AND TH EN YOU A DD IN THE COSTS AND ATTORNEYS FEES , BUT IT IT IS STILL ONEROUS AND THE ATTORNEYS FEES IS NOT TO THE EXTENT THAT YOU COULD FIND IT

UNCONSTITUTIONAL UNDER THE NO FAULT ACTOR ANYTHING LIKE THAT.

CHIEF JUSTICE: WE WILL LET YOU SAVE A MINUTE FOR REBUTTAL.

THANK YOU, CHIEF MR. HOCKMAN. >> I AM THOMAS HOCKMAN FOR THE PLAINTIFF IN THIS CASE, SHANNON NICHOLS. THIS IS PRIMARILY A CASE WHERE WE ARE HERE TODAY FOR THE CERTIFIED QUESTION FROM THE CASE BELOW, WHETHER OR NOT THE OFFER OF JUDGMENT APPLIES TO A PIP CASE. IT SHOULD NOT. THIS QUESTION WAS THERE AND WE WERE THERE IN FRONT OF THE FIFTH DISTRICT ON A CERTIFIED QUESTION, DOES THE OFFER OF JUDGMENT APPLY TO PIP SUITS.

CHIEF JUSTICE: YOU CAME UP FROM THE COUNTY COURT?

YES. FROM THE COUNTY COURT DIRECTLY TO THE --

CHIEF JUSTICE: A CERTIFIED QUESTION IN COUNTY COURT.

AND THE OTHER, SO WHEN WE GOT THERE, THOSE, THE COURT FOLLOWED CAHUASQUI, BUT IT DIDN'T FIT BECAUSE THEY HAD OFFERED A SETTLEMENT OF JUDGMENT. AND IN THE PETITIONER'S SUPPLEMENTAL NOTICE OF AUTHORITY, WE HAVE BENNETT VERSUS AMERICAN LEARNING SYSTEMS OF BOCA DELRAY, WHICH CITED NICHOLS.

CHIEF JUSTICE: HAVE YOU CITED THOSE IN YOUR BRIEF?

THE BRIEF WAS IN 2003. THESE CAME OUT CITING NICHOLS.

CHIEF JUSTICE: DID YOU FILE A NOTICE OF SUPPLEMENTAL AUTHORITY?

YES. SEPTEMBER OF 2000.

JUSTICE: THESE ARE CASES THAT FOLLOWED NICHOLS FOR WHICH PROPOSITION?

THE PROPOSITION WAS IN SOME OF THE CASES QUOTED, THE TERMS OF CONDITION FOR PROPOSAL OF SETTLEMENT SHOULD BE FREE OF ANY AMBIGUITIES, PATENT OR LATENT. THREE CASES CITED.

JUSTICE: ARE YOU GOING TO SPEAK ABOUT THE FIRST ISSUE?

YES. I WISH TO SPEAK ABOUT THE ISSUE THAT THE OFFER OF JUDGMENT DOESN'T APPLY.

JUSTICE: THE COURTS HAVE CONSISTENTLY HELD THAT THE OFFER OF JUDGMENT DOES APPLY TO PIP ACTIONS.

ONE COURT HAS HELD THAT, CAHUASQUI, AND THE FLETCHER DECISION, DISSENT IN THAT CASE SAYS THAT THEY HAVE TAKEN OUT OF ONE-WAY STREET STATUTES AND HODGEPODGED TOGETHER SOMETHING THAT SAYS, WELL, BECAUSE ONE-WAY STREETS EXIST, IT SHOULD, THEN, ALLOW AN INSURANCE COMPANY TO GET FEES BACK, AND THAT IS NOT THE CASE AT ALL. FLETCHER MADE A LONG AND GOOD DESCENT ABOUT THAT.

IS YOUR ARGUMENT THAT THE STATUTE, THAT THE OFFER-OF-JUDGMENT STATUTE DOES NOT APPLY, BECAUSE THE ATTORNEYS FEES PROVISION IN THE PIP STATUTE, KIND OF PREHE WANTS THE FIELD FOR ATTORNEYS FEES, AND IF IT SAYS, IF THAT PROVISION SAYS ATTORNEYS FEES, THEN YOU DON'T USE ANY OTHER STATUTORY ATTORNEYS FEES PROVISION?

YES. 1971, THE ACT, THE NO FAULT, THE AUTOMOBILE REPARATIONS ACTOR NO FAULT, WAS MADE AS A SET OF LAWS, AND IN THAT, THAT, BY ITSELF, THE IDEA OF TAKING AWAY A

FLORIDIAN 'SRIGHT TO SUE FOR ANY REDRESS , IS AGAI NST THE ARTICLE I SECTION 21, ACCE SS TO THECOURTS. THEY SAID SOME OF THESE INJURIES, YOU CANNOT SUE FOR REDRESS, SO THAT WOULD BE UNCONSTITUTIONAL, BUT I N THE CAHUASKUI COURT --

UNDER UM MO TORIST BENEFITS, CASES HAVE HELD CONSISTENTLY THAT YOU CAN G ET AN OFFER OF JUDGMENT , STATUTE , ATTORNEYS FEES , E VEN THOUGH THERE IS ANOTHER ATTORNEYS FEES PROVISION IN THE UM STATUTE.

YES. OF COURSE UNINSURED MOTORISTS EXI STED WELL BEFORE NO-FAULT , AND WHEN THERE IS UNINSURED MOTORIST INVOLVED, AS HAS BEEN PROVED IN THE AD LEMAN CASE SAYS IN THE BRIEF, THAT IT I S A DIFFERENT COURT CASE.

JUSTICE: IS IT YOUR POSITION THAT THERE IS A DIFFERENCE BETWEEN 428 AND THE PROVISION OF THE NO-FAULT STATUTE? ANOTHER NO-FAULT STATUTEDIRECTS TO 4 28. 627.736-8.

JUSTICE: BUT IN UM AND ALL SORTS OF INSURANCE CASES, THIS COURT HAS RECOGNI ZED THAT THE OFFER-OF-JUDGMENT STATUTE IS APPLICABLE TO 428 ACTION .

I DON'T FOL LOW THAT SPECIFICALLY I N PIP IT WAS CUT OUT , THESE RIGHTS WERE CUT OUT IN EXCHANGE FOR L OSING THAT RI GHT , YOU GO T A ONE -WAY STREECHLT OTHERCASES , THERE MIGHT NOT HAVE BEEN A LOSS OF A RIGHT -- ONE-WAY STREET. OTHER CASES, THERE MIGHT NOT HAVE BEEN A LOSS O F A RIGHT.

JUSTICE: BUT OTHER CASES , EVERY TIME YOU GET A FEE AGAINST INSURANCE COMPANIES , UNDER 428 , THAT IS A ONE-WAY STREET PROVISION.

CORRECT.

JUSTICE: AND WE HAVE HELD THAT THE OFFER OF JUDGMENT PROVISION , THE STATUTE AND THE RULE PE RTAIN TO FEES UNDER 428.

I DON'T KNOW WHICH CASE THAT WOULD BE SPECIFICALLY TO SHOW THE DISTINGUISHING ASPECT OF THAT , AND I DON'T BELIEVE THAT WAS FOUND IN THE ANSWER BRI EF. WE HAVE LOOKED HERE AT PROBLEM WITH THE LOSS OF THE BENEFIT OF THE BURDEN, OF THE EXC HANGE , THE LOSS OF THE BENEFIT OF THE EXCHANGE, WHEN THAT COMMON LAW RIGHT PROTECTED BY THE CONSTITUTION, WAS ENTIRELY GIVEN YOU UP BY NO FAULT AND WAS REPLACED WITH A ONE-WAY STREET.

JUSTICE: CAN I ASK THIS QUESTION. YOU SEEM TO BE DRAWING ON THE NO-FAULT OR PERSONAL INJ URY PROTECTION STATUTE AS A UNIQUE KIND OF ANIMAL, IF YOU WILL. COULD WE GO, COULD WE EXPLORE JUST GENERAL FLORIDA LAW, FOR EXAMPLE D O W E HAVE FWHI AUTHORITIES IN THEAREAS OF FOR EXAMP-- HAVE ANY AUTHORITIES , FOR EXAMPLE IN THE AR EAS O F CONDEMNATION ONE OTHER KINDS OF CASES, AS TO WH AT, BECAUSE WHAT YOU ARE SAYING ESSENTIALLY IS THAT THIS IS A REMEDIAL KIND OF STATUTE, AND BECAUSE OF THE NATURE OF THE PIP STATUTE , THAT YOU SHOULD NOT BE AB LE TO HAVE ATTORNEYS FEES GO THE OTHER WAY. DO WE HAVE ANY OTHER STATUTORY SCHEME, IS WHAT I AM GETTING TO , O F OTHER TYPES, TWO THAT JUST COME TO MIND, THE CONDEMNATION AND UNFAIR TRADE PRACTICES, BUTWE HAVE A LOT OF ATTORNEYS FEES UNDER FLOR IDA LAW. IS THERE ANY OTHER AREA THAT MATCHES WITH THE ARGUMENT THAT YOU ARE PRESENTING TODAY , IF WE AS SUME THAT THE PIP STATUTE IS CONSUMER-KIND OF ORIE NTED AND THEREFORE THE PROTEC TION OF THE PEOPLE. ARE THERE ANY OTHER EARS WHERE WE DO NOT ALLOW THE -- ARE THERE ANY OTHER AREAS WHERE WE DO NOT ALLOW THE OFFER OF JUDGMENT TO APPLYTO THAT UNDERLYING POLICY TYPE OF REASON?

I DON'T UNDER WHAT YOU MEAN B Y NO FAULT AS A REMEDIAL STATUTE.

JUSTICE: NO FAULT IS DESIGNED AS INTENDED I N I VEY, YOU READ THE OPINION , THAT IT IS THERE TO PAY QUICKLY AND RAPI DLY AND WITHOUT DISPUTE AND WITHOUT FAULT , IT IS L IKE AN ADMINISTRATIVE KIND OF THING , LIKE A REMEDIAL STATUTE TO GET MUST NOT INTI THE HA NDS OF INJURED PEOP LE, SO M Y QUESTION -- MO NEY INTO THE HANDS OF IN JURED PEOPLE , SO MY QUESTION , DO YOU UNDERSTAND HOW I AM COMING TO THAT ? SO WE HAVE PROTECTIVE KIND OF LEGISLATION , THE TWO THAT I JUST MENTIONED , WHER E WE HAVE ATTORNEYS FEES ATTACHED,AND THERE MAY BE MANY OTHERS. CAN YOU YOU GIVE US ANY OTHER AREAS OF THE LAW THAT WE HAVE HELD BECAUSE OF THE N ATURE OF THE UNDERL YING STATUTE , THAT YOU CANNOT APPLY THE OFFER-OF-JUDGMENT STATUTE ? THAT - -

THE CL OSEST THING I CAN THI NK MIGHT B E WORKERS COMP , WHERE YOU GAVE UP YOUR COMMON LAW RIGHT TO SUE YOUR EMPLOYER FOR --

JUSTICE: THAT IS NOT IN CIRCUIT COURT. THAT IS COMP. THAT IS NOT A CIRCUIT COURT ACTION.

THERE IS A ONE-WAYSTREET. EVERYWHERE EL SE THERE WAS N'T AN ACTUAL TAKING AWAY O F ARIGHT. BEFORE , THERE WAS NOT , W ITH THE LANDLORD TENANT ACT , THEY DIDN'T TAKE AWAY THE RIGHTS TO SUE EACH OTHER. THAT HAD EXISTED. THIS IS DI FFERENT BECAUSE IT TAKES AWAY THAT RIGHT, ANDIT TAKE S IT AWAY WITH A VERY GENERAL STATUTE IN THE DAMAGES PART , NEGLIGENCE CHAPTER , WHICH IS SUBINORDINATE TO A CLAUSE THAT SAYS , IF THERE ARE ANY STATUTES IN THIS SECTIONTHAT CONFLICT WITH ANY OTHER PROVISION OF THE FLORIDASTATUTES, S UCH OTHER PROVISION WILL CONTROL, AND THAT HAS CONSISTENTLY WON A CONFLICT WITH OTHER STATUTES. IN THE CASE ALSO BR OUGHT UP IN THE A.M. I CAN YOU GETBRIEF IN P HASE YEAR -- IN THE AM ICUS BRIEF IN P H ASE YEAR , VERSUS THE COUNTY , THERE AGAINST METROPOLITAN DADE COUNTY , THE OFFER OF JUDGMENT THERE FAILED NEXTTO THE WRONGFUL-DEATH STATUTE BECAUSE OF LI MITING C LAUSE , 768.71-3. ALSO IN HA RRISS VERSUS CITY OF LIVE OAK , A WO MAN SUED HER CITY . SHE DID NOT OFFER JUDGMENT. SHE BEAT HER O WN OFFER OF JUDGMENT. SHE WAS AWARD 58,0 00 AND THEN SHE SHOULD HAVE WON ON HER OFFER OF JUDGMENT , HER ACTUAL ATTORNEYS FEES, BUTIT CAME BACK AND SA ID NO , BECAUSE THE OFFER OF JUDGMENT FEES IS A GENERALFEE.IT IS WE AK. IT CAN'T GO IN AND A FFECT THE SOVEREIGN IMMUNITY FEES , WHICH LIMITS NOT ONLY YOU TO \$100,000 AGAINST A STATE ENTITY BUT ALSO , NO MA TTER WHAT YOU GET, YOU CAN ONLY GET 25 PERCENT , SO THERE AGAIN , THIS STATUTE HAS LOST N EXT TO AN Y OTHER , AND THAT IS NOT EVEN GOING TO THE QUESTION OF WHE THER OR NOTIT WAS SPECIFIC . THE SPEC IFIC O VERT GENERAL , BECAUSE THE -- THE SPECIFIC OVER THE GENERAL , BECAUSE THE ATTORNEYS FEES SH IFTING OF THE OFFER OF JUDGMENT IS VERY BRO AD AND GOES AGAINST THE COMMON LAW RULE THAT WE HAVE , THE AMERICAN RULE , THAT YOU COVER YOUR OWN ATTORNEYS FEES , VERY SPECIFIC, BRINGING IN THE OLD ENGLISH RULE. IT CAN'T GO OUT AND GAIN THE EXTRA LEG TO SAY MAKE A TWO-WAY STRE ET IN THE ONE-WAY STREET. I F IT IS NOT ONE-WAY STREET AND STAYS ONE WAY , IT IS NOT REALLY A ONE-WAY STREET. WE COULD JUST ELIMINATE BY THIS , ALL OF THE ATTORNEYS FEES PROVISIONS IN PIP AND HAVE ABOUT THE SAME RESULT, AND THAT WASN'T THE PLAN.

CHIEF JUSTICE: YOU HAVEGOT THE ABILITY TO CONT ROL T I ME AN, HERE WE HAVE ASITUATION WHERE , YES, THIS IS A STREAMLINED SYSTEM. THE JURY, AS THE JURY FO UND YOUR CL IENT UNREASONABLY REFUSED TO SU BMIT TO A MEDICAL EXAMINATION REQUIRED UNDER HER TERMS O F INSURANCE. YOU SUBJECT, THEN , STATE F ARM T O TWO D AYS OF A TRIAL. I DON'T K NOW WHO T O OK LO NGER IN TR YING THIS CASE. I DON'T SEE THAT H OW THAT INTERFERES WITH RIGHT OF ACCESS. I THINK THAT , AS MR . HAZOURI SAID, IT IS A SITUATION THAT , UNLESS YOU TOTALLY LOSE , AS YOU DID IN THIS CASE , THEY ARE GOING TO BE ON THE HOOK FOR ALL YOUR ATTORNEYS FEES AND INTEREST AND EVERYTHING ELSE. SO IT SEEMS THAT THIS IS , FROM A POLICY POINT OF V IEW AND AS SUMING THAT WE ARE INTERPRETING THE LEG ISLATURE 'SINTENT IN THIS REGARD , THAT THIS I S A GOOD APPLICATION OF THE OFFER-OF-JUDGMENT

STATUTE .

IN THE POLI CY APPLICATION , THE LEGISLATURE HAS TIME TO LOOK AT THIS AGAIN ANDAGAIN. A S IT SAYS IN THE BRIEF , THEY ACTUALLY TR IE D TO , COMMITTEES TRIED T O ALTER 768.71, THE OFFER OF JUDGMENT, TO A LLOW IT TO APPLY IT TO THIS. THE CAHUASKQUI CASE DID NOT EXIST WHEN IT WAS FI LED.

JUSTICE: REG ARDING YOUR ONE-WAY STREET , AS JUSTICE WELLS INQUI RED, THEN THATWOULD BE TRUE IN ANY CASE INVOLVING AN INSURED AGAINST THE COMPANY , W OULD IT NOT, IF IT IS ONLY THE ONE-WAY STREET, I THINK YOU MADE THE STATEMENT THAT THIS WOULD T OTALLY ELIMINATE, THEN, ANYTHING, OR YOU CANNOT HAVE THE OFFER-OF-JUDGMENT STATUTE APPL Y IN THE ONE-WAY STREET KIND OF CASES . ALL INSURANCE CASES ARE THAT W AY.

BECAUSE THEY HAVE ELIMINATED, LIKE THE LABORERS LIEN , HUNTERS V ERSUS FLOW ER, WHICH IS A ONE-WAY STREET THAT CAHUASQUI SAID THERE IS A ONE-WAY STREET THAT SOMEHOW IT HAD T O BE T AKEN THE OTHER WAY, THAT CAME FROM THE INSURED'S BRIEF THERE, WHICH SAYS THESE ARE SMALL AMOUNTS. YOU HAVE TO PROVIDE ATTORNEYS FEES. THESE CL AIMS BEING VEXATIOU S TO BRIN G. ALS O IN RESPONSE TO ONE OF THE OTHER QUESTIONS, IF SHE HAD SEND THE \$250 AT ANYTIME, SHE COULD NOT HAVE RECEIVED ANY BENEFIT S F YOU GO TO A -- BENEFIT S F YOU GO TO A DEFENDANT'S M E DICAL EXAMINER WHO SAYS YOU CAN'T HAVE ANY MORE CHIROPRACTIC BENEFITS, THEN YOU CAN GO AND GET NEUROLOGICAL DOCTORS IF YOU HAVE THAT, B UT IF YOU MISS THAT, YOU CAN'T GO TO ANYTHING. THAT IS IT . JUST LET ME ASK YOU THIS . IN YOUR COMP LAINT , DID YOU HAVE A CLAUSE THAT ASKED FOR DAMAGES?

YES. I SAID A CI VIL ACTION FOR DAMAGES IN THE BEGINNING. THE REASON FOR THAT IS --

JUSTICE: SO THIS WAS AN ACTION FOR DA MAGES , AND 768.79 SAYS, IN ALL CIVIL ACTION FOR DAMMINGS. CORRECT?

YES. -- FOR DAMAGES. CORRECT? THAT IS WHAT THE STATUTE SAYS.

YES.

JUSTICE: SO IN ORDER FOR THIS COURT TO RULE IN YOUR FAVOR ON THIS CERTIFIED QUESTION , W E WOULD HAVE TO FIND SOME WAY TO DE FINE THIS STATUTE IN A WAY THAT I T DOESN'T MEAN WHAT IT EXPRESSLY SAYS, WOULD WE NOT?

WELL , THERE IS A RE ASON FOR THAT , BECAUSE IN MY COUNTY AT THE TIME , IF YOU JUST DO A DECLARATORY ACTI ON, THEY MOVE TO DISMISS IMMEDIATELY , BECAUSE THEY SAY YOU CAN'T SUE IN COUNTY COURT OR CIRCUIT COURT, S MALL CLAIMS COURT FOR , THEY SAY YOU CAN'T SUE IN COUNTY COURT , SMALL CLAIMS COURT FOR DECLARATORY ACTION , EVEN THOUGH THE STATUTE D I RECTLY SAYS NOW THAT IT IS C HANGED, YOU CAN. WE WERE DOING THAT SO THAT WE COULD JUST GET PAST THAT FIRST MOTION TO DISMISS AND GET ON TO IT , BUT JUDGE SOWAI'S ARGUMENT SAYS IT IS PRO PER AND JUST A QUESTION OF BENEFITS. IT IS A PROBLEM, ALSO , W ITH THE INSURANCE COMPANY. THEY DON'T WANT TO DO A DECLARATORY ACTION AND DEAL W ITH THAT, BEC AUSE THEY DON'T KN OW HOW MUCH YOU ARE TALKING ABOUT.

JUSTICE: BUT THIS I S BENEFITS VERSUS DAMAGES ACTION IS REALLY JUST -- DAMAGES , REALLY IS JUST SPLITTING HA IRS. WHEN IT COMES DOWN TO IT , WHAT YOU ARE TALKING ABOUT IS A PLAINTIFF THAT WAS SUING FOR THE FACT THAT THEY WERE IN JURED AND THERE WERE DAMAGES AS A RES ULT OF THE INJURY, W HETHER YOU CA LL IT BENEFITS OR DAMAGES.

IF SHE HAD WON EITHER POINT , SHE WOULD HAVE HAD A DECLARATORY ACTION. SHE COULD HAVE CONTINUED ON AND GET MORE TREATMENT IF SHE WA NTED IT , OR IF SHE HAD WON AN AWA RD OF THE \$1100 THAT WAS --

JUSTICE: WHAT WOULD HAVE BEEN THE QUESTION IN A DECLARATORY JUDGMENT ACTION?

DID SHE UNREASONABLY REFUSE TO ATTEND THE CME, THE MEDICAL EXAMINATION, WHICH WAS THE JURY QUESTION.

JUSTICE: IT JUST SEEMS TO ME THAT THE DECLARATORY JUDGMENT STATUTE, I THOUGHT, WAS TO DECLARE THE RIGHTS OF PEOPLE, THE CONTRACTS, AND SO IN THIS CONTRACT, IT SEEMS THAT YOU KNOW, THERE IS A PROVISION FOR SEEING AN INDEPENDENT MEDICAL PERSON OR CME, SO WHY WOULD YOU NEED TO HAVE A DECLARATORY JUDGMENT ACTION FOR THAT KIND OF SITUATION?

WELL, THE JURY QUESTION WAS A YES OR NO. IT WAS A DECLARATORY DETERMINATION, AND THEN EVERYTHING ELSE WOULD HAVE JUST FALLEN -- WE COULD HAVE JUST DONE A DECLARATORY ACTION AND THEN PRESENTED TO THE COURT LATER, IF THEY DIDN'T PAY.

JUSTICE: WOULD YOU HAVE BEEN ENTITLED TO A JURY TRIAL IF IT WAS A DECLARATORY JUDGMENT ACTION?

YES.

CHIEF JUSTICE: JUSTICE BELL.

THE OTHER CASES SHOW THAT, AND SPECIFICALLY THAT THE LIMITING STATUTE HAS PREVENTED OTHER LAWS FROM COMING IN AND AFFECTING, LIKE THE OFFER OF JUDGMENT, AND BARBERENA VERSUS GONZALEZ, THERE WERE TWO OFFSET STATUTES, A SPECIFIC ONE AND A MORE GENERAL ONE SUBSERVIENT TO THE LIMITING CLAUSE 768.71 SUB3. THERE THEY SAID, O KAY, THERE IS A CONFLICT. IN BOVAY VERSUS A DELL, THERE WAS ANOTHER QUESTION INVOLVING ADITOR, THERE ON THE GROUND THEY SAID IN A NOTE THAT THE CONCURRING OPINION SAID IF THERE WAS A CONFLICT, THE LIMITING STATUTE WOULD HAVE --

JUSTICE: IF WE SAY THAT THE OFFER-OF-JUDGMENT STATUTE DOESN'T APPLY IN THIS SITUATION AND THAT THEREFOR THE ATTORNEYS FEE PROVISION UNDER THAT IS NOT APPLICABLE, HOW TO DAY INSURANCE COMPANY, THEN, PROTECT ITSELF, WHEN A -- HOW DOES AN INSURANCE COMPANY, THEN, PROTECT ITSELF, WHEN AN INSURED HAS AN OPPORTUNITY TO BRING A SUIT AS YOU DID IN THIS CASE, YET THE INSURANCE COMPANY HAS NO WAY TO PROTECT ITSELF?

THE INSURANCE COMPANY HAS ALREADY RECEIVED ITS ATTORNEYS FEES. TO ALLOW IT TO GET ITS ATTORNEYS FEES A GAIN, PROVIDES A WINDFALL TO THE INSURANCE COMPANY.

JUSTICE: DID YOU SAY THEY HAVE ALREADY RECEIVED --

THEIR ATTORNEYS FEES FROM SHANNON NICHOLS WHO PAID TO STATE FARM FOR DECADES OR A DECADE, AND THAT IS WHERE THEY GOT THEIR MONEY. TO LET THEM GO AND GET THEIR MONEY AGAIN, GETS THEM PAID TWICE, AND SHE IS REQUIRED TO DO BUSINESS WITH A PIP INSURER.

JUSTICE: YOU MEAN BY PAYING THE PREMIUMS TO THE POLICY.

CORRECT, AND SHE, WHEN NO FAULT CAME IN AND SAYS YOU HAVE TO GET THIS MINIMUM COVERAGE, NO MATTER HOW BAD OR HOW GOOD A DRIVER YOU ARE, SO IT IS A BENEFIT, AND IT IS A BENEFIT ON TOP AFTER BENEFIT THAT THE INSURANCE COMPANIES HAVE.

CHIEF JUSTICE: IT SEEMS TO ME THAT NOW YOU ARE GOING INTO OTHER POLICY CONSIDERATION THAT ARE NOT OF CONSTITUTIONAL MAGNITUDE, AND SO WE GET BACK TO THIS BEING TO ME, A STATUTORY INTERPRETATION CASE, AND IF WE DECIDE IT IS AN ACTION FOR DAMAGES, THEN THE ONLY ISSUE IS, SOMEHOW DID THE LEGISLATURE, IN ENACTING THE PIP STATUTE,

REFERRING TO THE ATTORNEYS FEE STATUTE , INTEND FOR THAT TO TRUMP THE OFFER-OF-JUDGMENT STATUTE , AND WHICH , WAS THAT A LATER ENACTED STATUTE , THE OFFER-OF-JUDGMENT STATUTE?

YES

CHIEF JUSTICE: AND WITHOUT ACCEPTING , THAT IS NOT ACCEPTING BUT EXCEPTING PIP SUITS , THAT IS , THESE OTHER ISSUES THAT YOU ARE BRINGING UP , WHETHER IT IS FAIR OR UNFAIR , SEEMS LIKE IT IS MORE DIRECTED TO THE LEGISLATURE.

THESE ARE ARGUMENTS BY STATE FARM, SAYING, WELL , GEE , WE HAVE HAD PIP FOR 30 YEARS BUT NOW , JUST AS OF 2001 WE HAVE TO BE ABLE TO GET ATTORNEYS FEES BACK FROM OUR OWN INSUREES , SHOULD THEY LOSE A TRIAL .

CHIEF JUSTICE: WHAT HAPPENED IN 2001?

THAT IS WHEN CAHUASQUI WAS DECIDED AND BEFORE THIS CASE , WHEN THE 1997 CASE STARTED.

CHIEF JUSTICE: NOTHING HAPPENED IN THE LEGISLATURE.

RIGHT.

CHIEF JUSTICE: SOMEBODY IN THE INSURANCE INDUSTRY REALIZED WHY NOT TAKE ADVANTAGE OF THE OFFER-OF-JUDGMENT STATUTE?

AND THE OFFER-OF-JUDGMENT STATUTE WAS MADE IN 1987, SO IT HAD SET THERE FOR ABOUT, FOR MORE THAN TEN YEARS , 15 YEARS.

CHIEF JUSTICE: THAT IS DOESN'T HELP US IN INTERPRETING THE LEGISLATIVE INTENT .

THE LEGISLATURE INTENT, IF THEY HAD WANTED TO NOT INCLUDE PIP , WOULD THERE HAVE BEEN SOME MENTIONING IN THE OFFER-OF-JUDGMENT STATUTE , THEY WOULD HAVE SAID THIS APPLIES TO ALL CIVIL ACTIONS FOR DAMAGES. UNLESS THERE IS A CONFLICTING PROVISION, EXCEPT FOR PIP . SO THAT WASN'T THERE.

CHIEF JUSTICE: YOU HAVE USED YOUR TIME UP.

THANK YOU .

THANK YOU. I WILL TALK FAST. JUSTICE LEWIS , I WANTED TO RESPOND TO YOUR QUESTION. THERE IS NO OTHER AREA IN THE LAW WHERE SOMEBODY IS SAYING THAT 768.7 SHOULDN'T APPLY IN A CIVIL ACTION -- 768.79 SHOULDN'T APPLY IN A CIVIL ACTION FOR DAMAGES AND ONE POTENTIAL AREA THAT COMES TO MIND IS THE FRAUDULENT LIEN STATUTE UNDER THE FRAUDULENT LIEN STATUTE , I THINK IT IS 371.1 , IT IS ONLY THE PLAINTIFF THAT CAN RECOVER ATTORNEYS FEES, THE PLAINTIFF IS THE CONTRACTOR AND THE CONSUMER , THERE IS MORE POWER AND ECONOMIC BALANCE AND WHATSOEVER, AND THERE IS NO PROPOSAL FOR SETTLEMENT IN THAT LITIGATION .

JUSTICE: IS THERE ANY LITIGATION IN THAT AREA THAT YOU ARE AWARE OF?

IT HAS PROBABLY BEEN LITIGATED BUT I DON'T KNOW OF ANY DCA CASES. THAT WOULD OPEN A PANDORA'S BOX , IF THIS COURT WERE TO RULE THAT SETTLEMENT DIDN'T APPLY IN PIP CASES. THAT IS THE ONE THAT COMES TO MIND. JUSTICE WELLS , I THINK YOU HIT THE NAIL ON THE HEAD. WHAT THEY ARE REALLY ASKING FOR HERE IS TO CARVE OUT AN EXCEPTION TO 768.79,

WHICH IS NONEXISTENT UNDER THE PLAIN LANGUAGE, WHICH SAYS ANY CIVIL ACTION FOR DAMAGES. YES.

CHIEF JUSTICE: YOU SP OKE VERY FAST AND GOT IN AT LEAST A MINUTE-PLUS. WITH THAT , THE TIME IS EXPIRED.I JUST HAD A QUESTION. I SEE THIS IS A 2 00 3 CASE . WHAT , GOOD THE COURT , IS THERE -- DID THE COURT , IS THERE SOME, WHAT IS THEREASON FOR THE DELAY?

IT DID PENNED, L E T ME SAYTHIS. IT WAS F ULLY BRIEFED AND THEN AN AMICUS CAME IN , A N EW AMICUS CAME IN AND WANTED TO FILE AN AMI CUS BRIEF , AND THEN THERE WAS DISCUSSION ABOUT HOW LONG THE AMICUS BRIE F WOULD BE AND THERE WERE MOTIONS FILED AND THEN IT REALLY PENDED BEFORE THIS COURT FOR AL MOST A YEAR . THE FI RST AMICUS IS WHEN ALL THE MOTIONS WERE FILED ABOUT HOW MANY PAGES.

CHIEF JUSTICE: WE WILL L OOK INTO THAT , BECAUSE NORMALLY WHEN BRIEFS ARE FILED , THERE IS, WE PROMPTLY S ET THE CASE FOR O RAL ARGUMENT, SO I THANK B OTH S IDES FOR INFORMATIVE ORAL ARGUMENT, AND I AM SURE JUDGE ARNO LD, WHEN HE FIRSTRULED IN THIS CASE, DIDN 'T THINK IT WAS GOING TO BE COMING ALL THE WAY UP HERE. THE COURT WILL TAKE ITSMORNING RECESS OF 15 MINUTES.

THANK YOU.

MARSHAL: PLEASE RI SE