

IN THE TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR SARASOTA COUNTY, FLORIDA

NAOMI MARIE STIWICH AS THE
PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARY SCHIRO,
Plaintiff,

v.

CASE NO. 2020 CA 005480 SC
DIVISION H CIRCUIT

GARY PARSONS ,
PROGRESSIVE AMERICAN
INSURANCE COMPANY,
Defendant.

**AMENDED ORDER (1) DENYING PLAINTIFF'S MOTION
FOR ENTRY OF CONFESSION OF JUDGMENT; AND
(2) DIRECTING CLERK TO CLOSE CASE
(Amended to correct title of Order)**

BEFORE THE COURT is Plaintiff's Motion for Entry of Confession of Judgment/Final Judgment and Motion for Attorney's Fees and Costs, docketed on December 22, 2021 [DIN 85]. Defendant Progressive American Insurance Company filed a response in opposition, docketed on January 26, 2022 [DIN 89].

Because the term "judgment" in section 768.79, Florida Statutes is an unambiguous, legal term of art with a specific meaning, Plaintiff's efforts to write into the statute a "functional equivalent" of judgment to support an award of attorney fees for an unaccepted offer of judgment must be rejected. Plaintiff's relief lies with the Legislature to alter the language of section 768.79 to address any perceived unfairness.

Procedural History

Plaintiff Naomi Marie Stiwich, as Personal Representative of the Estate of Mary Schiro, sued Gary Parsons and Progressive American Insurance Company relating to an automobile crash. Progressive was Ms. Schiro's uninsured/underinsured automobile carrier. Plaintiff settled with Defendant Parsons, leaving Progressive as the only defendant.

Plaintiff served upon Progressive a \$7,999.99 offer of judgment / proposal for settlement pursuant to section 768.79, Florida Statutes, and rule 1.442, Florida Rules of Civil Procedure. Because the UM policy limits in this case was \$10,000, Plaintiff designed the offer to be triggered if there were a judgment for policy limits. Progressive let that proposal expire without acceptance.

After the unaccepted offer of judgment—and technically unrelated to, and outside of, the existing lawsuit—Plaintiff filed a Civil Remedy Notice with Florida’s Department of Financial Services against Progressive pursuant to section 624.155, Florida Statutes. Plaintiff alleged generally that Progressive failed to adjust the claim honestly and tender policy limits despite the extensive economic damages in this case. Following Progressive’s receipt of the Civil Remedy Notice, but before expiration of the cure period, Progressive tendered policy limits.

At the time Progressive paid policy limits, the lawsuit remained pending with no judgment having been entered.

Analysis


The issue raised by Plaintiff is whether Progressive’s tendering policy limits during the pendency of the lawsuit triggered an entitlement to attorney fees based on the unaccepted offer of judgment where no judgment was entered.

The Court orally denied Plaintiff’s motion in open Court. The Court incorporates its oral ruling (Exhibit 1) into this Order as if fully set forth. Because there was no “judgment” entered against Progressive, section 768.79 does not authorize an entitlement to attorney fees based on the unaccepted offer of judgment.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. Plaintiff’s Motion for Entry of Confession of Judgment/Final Judgment and Motion for Attorney’s Fees and Costs, docketed on December 22, 2021 [DIN 85] is denied.
2. The Court considers this a final order: all judicial labor in this case has been completed.
3. The Clerk directs the Clerk to close this case.

DONE AND ORDERED in Venice, Sarasota County, Florida, on 04/06/2022.


4/6/2022 3:25 PM 2020 CA
005480 SC
e-Signed 4/6/2022 3:25 PM 2020 CA 005480 SC
HUNTER W CARROLL CIRCUIT JUDGE

SERVICE CERTIFICATE

On 04/06/2022, the Court caused the foregoing document to be served via the Clerk of Court's case management system, which served the following individuals via email (where indicated). On the same date, the Court also served a copy of the foregoing document via First Class U.S. Mail on the individuals who do not have an email address on file with the Clerk of Court.

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR SARASOTA COUNTY
CIVIL DIVISION

NAOMI MARIE STIWICH, as the
Personal Representative of the
Estate of MARY SCHIRO,

Plaintiff, Case No.
2020 CA 005480 SC

vs.

GARY PARSONS and PROGRESSIVE
AMERICAN INSURANCE COMPANY, a
Foreign Profit Corporation,

Defendants.

_____ /

VIDEOCONFERENCE HEARING BEFORE
THE HONORABLE HUNTER CARROLL

DATE: March 22, 2022
TIME: 9:15 a.m. to 9:49 a.m.
PLACE: By Zoom Videoconference
PURSUANT TO: Plaintiff's Motion for
Entry of Confession of
Judgment/Final Judgment and
Motion for Attorney's Fees
and Costs
REPORTED BY: Carol M. Thompson, RMR
Notary Public, State of
Florida at Large

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APPEARANCES:

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Progressive American Insurance Company

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EXHIBITS

(None.)

P R O C E E D I N G S

1
2 THE COURT: I'll call up the next case, Case
3 No. 2020 CA 5480, Naomi Marie Stiwich as Personal
4 Representative of the Estate of Mary Schiro vs.
5 Gary Parsons and Progressive American Insurance
6 Company.

7 What's the name of the court reporter, please.

8 THE COURT REPORTER: Carol Thompson with
9 Michael Musetta & Associates.

10 THE COURT: Let's take appearances, please.

11 MR. GRINDER: Austin Grinder for the plaintiff.

12 MR. FREEMAN: And Stuart Freeman and Jessalea
13 Shettle for the defendant, Progressive American
14 Insurance Company.

15 THE COURT: This is the plaintiff's motion at
16 Document Identification No. or DIN, D-I-N, 85.
17 It's on plaintiff's motion for entry of confession
18 of judgment, slash, final judgment and motion for
19 attorney fees and costs.

20 Mr. Grinder.

21 MR. GRINDER: Yes, Your Honor. This stems --
22 this case stems from a motor vehicle accident and
23 I'll just go over the facts briefly. A proposal
24 for settlement was filed in July of 2021. It was
25 rejected by virtue of not being accepted. The case

1 that they were -- the plaintiffs were entitled to
2 attorney's fees; ultimately, on the appellate
3 decision, said no, there never was a dispute
4 whether coverage applied. It was just a dispute as
5 to the extent of damages. So 627.428 did not
6 apply, but, regardless, the court said paying the
7 policy limits during the pendency of a civil remedy
8 notice is a confession of judgment. And like I
9 said, there was --

10 THE COURT: And that's under 627.428. Right,
11 Mr. Grinder?

12 MR. GRINDER: That case dealt with 627.428,
13 yes, Your Honor.

14 THE COURT: Okay. Do you have any other cases
15 that apply the confession of judgment outside of
16 627.428?

17 MR. GRINDER: No, Your Honor. And there's none
18 on the other side. I mean, it's a case of first
19 impression. I mean, all the cases are lower court
20 cases. In all the cases that I know about, judges
21 have ruled that it is a confession of judgment, but
22 I don't know any appellate decisions either side on
23 this issue.

24 THE COURT: The Court has before it the
25 plaintiff's motion for entry of confession of

1 judgment, slash, final judgment and motion for
2 attorney fees and costs which was filed on December
3 22nd, 2021 at DIN 85. There's a response in
4 opposition at DIN 89.

5 The Court notes this is a two-count case
6 involving an auto accident. Count 2 is against the
7 insurance company here as Progressive American
8 Insurance Company. The complaint alleges that the
9 car crash occurred November 19th, 2019, and we're
10 now more than three years post crash. Suit was
11 filed on December 23rd, 2020, so 13 months after
12 the crash.

13 During the pendency of the case, the plaintiff
14 filed a less-than-policy-limit proposal for
15 settlement offer of judgment under 768.79, which
16 was not timely accepted by the insurance carrier.

17 Also during the pendency of the case, the
18 plaintiff filed a civil remedies notice which
19 during the cure period was or did result in a
20 tendering of the policy limits of \$10,000. And
21 from a practical standpoint, that certainly, with
22 potential exception of any collateral matters,
23 resolved the case against Progressive Insurance
24 because if there is no statutory bad faith action
25 possible and the insurance carrier is only liable

1 for the limits of the insurance contract, then the
2 carrier's paying of the limits of the policy
3 effectively ends the case against Progressive
4 Insurance Company.

5 Now, there is authority out there under
6 627.428, an attorney fee statute that talks about a
7 judgment and a judicially created functional
8 equivalency, which is the payment of the policy
9 limits, and from a policy argument, I totally
10 understand that concept. It makes a lot of sense
11 from a policy standpoint because it does discourage
12 an insurance company from lengthy delaying and then
13 requiring use of a lot of judicial resources to pay
14 policy limits, you know, multiple years after the
15 fact when they could have done it in a more timely
16 manner.

17 The legislature, though, has created a remedy
18 for a delay in filing, which is the civil remedy
19 notice, and so that's the remedy that exists out
20 there. Whether it's a good remedy or not, that's a
21 different story. That's not before the Court.

22 So that then takes us to the basis for a
23 question of for attorney fees here, which is
24 768.79. That statute also talks in terms of
25 judgment and, you know, there is a certain amount

1 of appeal to borrow the judicial construction of
2 627.428 of the term judgment and apply it to the
3 proposal for settlement term of judgment.

4 Unfortunately for the plaintiffs, the term
5 judgment itself, at least in this Court's view, is
6 not ambiguous. The word is judgment and it has a
7 very specific legal meaning. That judgment doesn't
8 or that statute does not talk about functional
9 equivalence or payment of policy limits by
10 insurance carriers. It talks about judgment. And
11 so that is the unambiguous term that the Court has
12 to apply. The statute, as we all know, has to be
13 applied based on its plain and ordinary meaning,
14 and the term judgment obtained in this particular
15 case means you have to actually get a judgment.

16 So I believe that the remedy that plaintiff
17 seeks is with the legislature if there is an
18 unfairness to what the insurance company has done.
19 All that being said, the Court will deny the
20 motion.

21 And so what I'm going to ask is, I want the
22 court reporter to type up my oral ruling. I want
23 it sent to me and then I will do a quick order and
24 I'll just staple the oral ruling to my order.

25 MR. FREEMAN: Thank you, Your Honor.

1 MR. GRINDER: Your Honor, I mean, for purposes
2 of appeal, we need a final judgment. I mean, in
3 Your Honor's order, are you going to put it's a
4 final judgment or --

5 THE COURT: Well, you all both are free to
6 draft up a very simple final order disposing of the
7 case and you can submit it along with the written
8 typed-up ruling, but I want my typed-up ruling the
9 way I just said it. So, send up a very short
10 order, final order adopting for the reasons stated
11 in open court, see attached Exhibit 1, and I'll
12 attach it.

13 MR. FREEMAN: Will do, Your Honor. Mr. Grinder
14 and I will get together. We'll come up with
15 something that's acceptable to the parties and to
16 the Court.

17 THE COURT: Right. But, I mean, is the case
18 against Gary Parsons still ongoing?

19 MR. GRINDER: No. That settled, Your Honor.

20 THE COURT: Then just make sure we have
21 language of finality.

22 MR. GRINDER: Will do, Your Honor.

23 MR. FREEMAN: Thank you for your time.

24 MS. SHETTLE: Thank you, Your Honor.

25 (The foregoing court proceedings concluded at 9:49 a.m.)