IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-789
L.T. Case No.: 3D06-2570

LOUIS R. MENENDEZ, JR. and CATHY MENENDEZ,

Petitioners,

v.

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Respondent.

On Discretionary Review From The District Court
of Appeal, Third District of Florida

RESPONDENT'S AMENDED ANSWER BRIEF ON JURISDICTION

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INTRODUCTION

Respondent, Progressive Express Insurance Company, responds to the Brief on Jurisdiction filed by Petitioners, Louis R. Menendez, Jr. and Cathy Menendez ("Menendez"). "Op." refers to the Opinion of the Third District Court of Appeal included in the Appendix attached to Petitioners' Brief.

STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Facts and the Case violates a basic principle of law regarding this Court's discretionary review, *i.e.* the **only** facts relevant to a determination of jurisdiction are those found within the four corners of the opinion of the district court of appeal. ("DCA"). *Hardee v. State*, 534 So. 2d 706, 708 (Fla. 1988)("[F]or purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion."). Petitioners' Statement is derived from the record (sans record citations) which includes information far beyond that included in the Third District's Opinion. Respondent requests this Court to ignore Petitioners' Statement and consider the following Statement derived solely from the Third District's Opinion.

On June 14, 2001, Menendez was injured in an automobile accident. (Op. 2). She was covered by Personal Injury Protection ("PIP") insurance issued by Respondent with effective dates of April 1, 2001 to October 1, 2001. (Op. 2). She

was also eligible for workers' compensation, and her employer paid for nine weeks of her lost income. (Op. 2). While most of her medical bills were paid by workers' compensation, Respondent paid a total of $2,131.22 of her medical bills. (Op. 2). Petitioners settled their claims against the insurer of the other motorist, and paid $2,000 from that settlement to satisfy a lien filed by Menendez's employer. (Op. 2).

In December 2001, Petitioners made a claim for PIP benefits. (Op. 2-3). On February 4, 2002, Petitioners' counsel sent the first of a series of letters to Respondent, claiming lost supplemental income and reimbursement of the $2,000 paid to Menendez's employer. (Op. 3). Respondent sent two written requests for additional documents. (Op. 3). On November 26, 2002, Petitioners filed suit, and Progressive answered, asserting that Petitioners had failed to comply with all conditions precedent to filing the lawsuit. (Op. 3).

Both parties filed motions for summary judgment. Respondent argued that Petitioners failed to provide it with a pre-suit demand letter in compliance with Florida Statute §627.736(11). (Op. 3). On November 21, 2003, Petitioners sent a demand letter to Progressive. (Op. 3 n. 1). The trial court denied Respondent's motion and granted Petitioners' motion for partial summary judgment, finding that §627.736(11) did not apply to any part of Menendez's PIP claim. (Op. 3).

Respondent appealed and, on March 19, 2008, the Third District issued its "opinion on motion for rehearing and clarification."(Op. 19). The court reversed, holding that the pre-suit requirements of §627.736(11) apply to Petitioners' claim, and remanded for a trier of fact to determine whether Respondent denied or reduced Petitioners' claim. (Op. 19). The court noted that, "[s]tatutes which do not alter contractual or vested rights but relate only to remedies or procedure are not within the general rule against retrospective operation . . ." (Op. 10).

SUMMARY OF THE ARGUMENT

The Third District's Opinion does not directly and expressly conflict with any other decision regarding the retroactive application of §627.736(11) or the attempted post-suit compliance with §627.736(11). An "express and direct conflict on the same question of law," which affords this Court the discretion to accept a case, is one in which, on virtually identical facts, one DCA reaches a different result than another DCA or this Court. When two cases are **not** founded on facts which are the same, or are decided on different propositions of law, there is no conflict despite that the cases are decided differently. No case cited by Petitioners is founded on similar facts as the instant case, and each was decided on a different proposition of law. Petitioners have failed to demonstrate the required "express and direct conflict on the same question of law" as that at issue in this case.

ARGUMENT

I. THE THIRD DISTRICT'S OPINION DOES NOT EXPRESSLY, DIRECTLY OR OTHERWISE CONFLICT WITH AN OPINION OF THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL.

An "express and direct conflict on the same question of law," which affords this Court the discretion to accept a case, is one in which, on virtually identical facts, one DCA reaches a different result than another DCA or this Court. *Aravena v. Miami-Dade County*, 928 So. 2d 1163 (Fla. 2006). When two cases are not founded on facts which are "analytically" the same, there is no conflict notwithstanding that the two cases are decided differently. *Department of Revenue v. Johnston*, 442 So. 2d 950 (Fla.1983). In addition, when two cases are decided on "different propositions of law," there is no conflict notwithstanding that the two cases are decided differently. *Curry v. State*, 682 So. 2d 1091 (Fla.1996).

Petitioners contend that the Third District's Opinion conflicts with ten decisions of other DCAs or this Court. However, not one of those decisions is founded on similar, let alone "virtually identical," facts as this case, and each was decided on a different proposition of law. In general, §627.736(11) requires that the claimant, prior to filing any lawsuit for benefits, provide the insurer with a demand letter specifying each exact amount, the date of treatment or service, and the type of benefit claimed to be due. None of the cases cited by Petitioners

involves the legislative purpose of §627.736(11) which is to place the insurer on notice of the claimant's intent to initiate litigation so that the insurer may pay the claim and avoid litigation. *Hernandez v. Progressive Express Ins. Co*., 14 Fla. L. Weekly Supp. 232c (Fla. 11th Cir. Ct. Jan. 17, 2007).

Here, Respondent was not provided with a pre-suit demand letter required by §627.736(11) and, therefore, was not given a final opportunity to avoid litigation. As held by the Third District, applying §627.736(11) does not affect any substantive right held by Petitioners who were not deprived of their right to seek full compensation from Respondent. Rather, §627.736(11) imposes a procedure by which Petitioners could seek full compensation without the need to file a lawsuit. Had Petitioners complied with the statute, and Respondent chosen to acquiesce to the demand letter, Petitioners would have been paid the full amount of benefits plus a ten percent penalty and all accrued interest. Applying §627.736(11) to this case raises no issue concerning a substantive right.

A. **The Third District's Opinion Does Not Directly And Expressly Conflict With Any Of The Five Cases Cited By Petitioners Regarding The Retroactive Application Of Florida Statute §627.736(11).**

State Farm Mutual Automobile Insurance Co. v. Gant, 478 So. 2d 25 (Fla. 1985) concerned whether Florida Statute §627.727(10)(1992) applied retroactively. That statute acted to increase the amount of recoverable bad faith damages in an

uninsured motorist case. Upon finding that the statute created a monetary "penalty" which did not previously exist, this Court determined the statute to be substantive and not retroactive. Unlike §627.727(10)(1992), §627.736(11) imposes no penalty.

L. Ross, Inc. v. R. W. Roberts Construction Co., Inc., 481 So. 2d 484 (Fla. 1986) concerned whether an amendment to Florida Statute §627.428(1983) applied retroactively, *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) concerned whether Florida Statute §768.56(1980) applied retroactively, and *Walker v. Cash Register Auto Insurance of Leon County, Inc.*, 946 So. 2d 66 (Fla. 1st DCA 2006) concerned whether Florida Statute §57.105(2001) applied retroactively. All of the statutes affected the entitlement to attorney's fees. Upon finding that the right to fees is substantive, the respective courts held that the statutes did not apply retroactively. Here, §627.736(11), does not affect any claim to attorney's fees.

In *VanBibber v. Hartford Accident & Indemnity Insurance Co.*, 439 So. 2d 880 (Fla. 1983), the issue was whether Florida Statute §627.7262(1982) applied retroactively. That statute precluded non-insureds from joining the insured's insurer in an action to determine the insured's liability. Only upon finding that the new statute conditioned the vesting of the interest of a third party to an insurance policy upon obtaining a judgment against the insured, did this Court find the statute to be substantive, and not retroactive. Here, §627.736(11), does not affect

any rights of non-insureds nor rights under a liability insurance policy.

B. **<u>The Third District's Opinion Does Not Directly And Expressly Conflict With Any Of The Five Cases Cited By Petitioners Regarding Complying With Florida Statute §627.736(11) After Suit Is Filed.</u>**

Kukral v. Mekras, 679 So. 2d 278 (Fla. 1996), was a medical malpractice action wherein the plaintiff did not timely comply with the pre-suit requirements for conducting an investigation as required by Florida Statute §766.202(4)(1991). However, the purpose of the pre-suit investigation imposed by that statute was to screen out frivolous claims, *id*. at 280, *i.e.* a purpose completely different than the purpose of §627.736(11), *i.e.* to provide the insurer with an opportunity to avoid being sued.

Holding Electric, Inc. v. Roberts, 530 So. 2d 301 (Fla. 1988), was an action to foreclose a mechanic's lien where the plaintiff failed to provide the defendant a pre-suit affidavit, as required by Florida Statute §713.06(3)(d)1(1985), listing the name of the unpaid lienors, the amount due, and the services provided. In holding that the suit should be allowed to proceed, this Court noted the dual purpose of the statute. First, the required affidavit protected the owner against the risk of having to pay for the same service twice, *id.* at 304, a purpose not applicable in the instant case. Second, timely compliance with the statute allowed the owner to make proper payment before suit is filed. However, the Court specifically determined that

post-suit compliance alone did not satisfy that purpose, and permitted it only upon the plaintiff being liable for all of the owner's attorney's fees incurred for that portion of the action attributable to the failure to comply with the statute. *Id*. at 303. The Third District did not impose that requirement in this case.

Thomas v. Suwannee County, 734 So. 2d 492 (Fla. 1999), was an action challenging a zoning special exception. The plaintiff did not wait the required thirty days from complying with the pre-suit requirements imposed by Florida Statute §163.3215(4)(1993) to file a complaint with the government agency, and affording the agency thirty days in which to respond, before suing it. In determining that the case should not have been dismissed, this Court held that because the purpose of the statute was merely to allow the agency "a last chance to respond before the case is filed in circuit court," *id.* at 498, the mere passage of time satisfied that purpose. The mere passage of time does not satisfy the function of §627.736(11), *i.e.* providing the insurer the opportunity to avoid being sued.

Askew v. County of Volusia, 450 So. 2d 233 (Fla. 5th DCA 1984) and *Williams v. Henderson*, 687 So. 2d 838 (Fla. 2d DCA 1996), were actions against government actors, implicating the sovereign immunity provisions of Florida Statute §768.28(6), requiring that pre-suit notice of the claim be given to the appropriate government agency, and that in the absence of any final disposition by

the agency, no court action could be filed for six months after that pre-suit notice was given.

In *Williams*, the court held that, although the plaintiff had not waited six months before filing suit, more than six months had elapsed before the trial court finally disposed of the issue, and the defendant had ample time to respond. However, non-compliance with the pre-suit requirements of §627.736(11) does not satisfy the purpose of §627.736(11), *i.e.* providing the insurer with an opportunity to avoid being sued.

In *Askew*, the court held that, because the plaintiff had provided the six months notice prior to the filing of an amended complaint which added the county as a defendant, the notice was timely. *Id.* at 235. Thus, the issue of retroactivity was not even implicated.

CONCLUSION

The decision of the Third District does not conflict with any decision of any other court. This Court should decline to exercise its discretionary jurisdiction to review this matter.

Respectfully submitted,

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