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 ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Respondent, Progressive Express Insurance Company ("Progressive"), responds to the Initial Brief on the Merits ("I.B.") filed by Petitioners, Louis R. Menendez, Jr. and Cathy Menendez (referred to collectively as "Petitioners" and Cathy Menendez individually as "Menendez"). Throughout this Brief, "R." refers to the Record on Appeal, and all emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

It is long-settled that in an appellate brief, the "statement of the facts must not only be objective, but must be cast in a form appropriate to the standard of review applicable to the matters presented." *Thompson v. State*, 588 So. 2d 687, 689 (Fla.1st DCA 1991). The standard of review of a summary judgment such as that at issue in the instant case has been clearly stated by this Court:

> Appellate courts review summary judgment orders de novo **with all facts and inferences to be resolved in favor of the party opposing the summary judgment**.

Florida Bar v. Cosnow, 797 So. 2d 1255, 1258 (Fla. 2001).

Petitioners' Statement of the Facts and Case is anything but "objective," and in no manner is appropriate to the applicable standard of review, *i.e.* that the issue is one of law, and all facts and inferences are to be resolved in favor of Progressive. Rather, Petitioners' Statement of the Facts and Case is a one-sided recitation, designed to

place Progressive in a bad light. The following is an objective presentation of the proceedings before the lower tribunals.

While traveling to work, Menendez was involved in an automobile accident on June 14, 2001, where she was a passenger in a vehicle that was struck by an underinsured driver. (R. 233, 238). On the date of loss she was covered by an insurance policy issued by Progressive affording Personal Injury Protection ("PIP") coverage with effective dates of April 1, 2001 to October 1, 2001. (R. 233). In addition, Menendez was eligible for workers' compensation, and her employer paid for nine (9) weeks of her lost income. (R. 238). While most of her medical bills were paid through workers' compensation, Progressive paid a total of $2,131.22 to four (4) different medical care providers. (R. 49). Petitioners settled their claims against the insurer of the other motorist, and paid $2,000 from that settlement to satisfy a worker's compensation lien filed by Menendez's employer. (R. 238).

Petitioners then sought entitlement to PIP benefits under Menendez's own automobile insurance policy. (R. 238). In December 2001, Petitioners made a claim for PIP benefits, and on February 4, 2002, Petitioners' counsel sent the first of a series of letters to Progressive, asserting a claim for lost supplemental income and reimbursement of the $2,000 paid to Menendez's employer. (R. 73-113). Progressive sent two (2) written responses requesting additional documents. (R. 89-90, 94).

The issues were not resolved, and on November 26, 2002, Petitioners filed a Complaint alleging that Progressive failed to pay any part of Menendez's lost wages as a result of the accident. (R. 1-8). Despite alleging that all conditions precedent to the filing of their lawsuit had been satisfied (R. 2), Petitioners did not provide Progressive with written notice of an intent to initiate litigation prior to filing suit pursuant to Florida Statute §627.736(11) (2001). (R. 36-37, 114-18).

Progressive filed its Second Amended Answer[1] denying all relevant allegations and raising various affirmative defenses including:

> That Plaintiff has not provided reasonable proof of his losses as required by the Florida Statute 627.736.

and

> This accident is governed by the terms and limitations of Fla. Stat. 627.736, including but not limited to section (11). As such, the Plaintiff failed to comply with the pre-suit notice requirements of section (11), by failing to properly file the notice letter.

(R. 66).

Soon thereafter, Progressive filed a "Motion for Summary Judgment and Motion for Attorney's Fees Pursuant to Fla. Stat. 57.105," on the grounds that Petitioners never submitted any documentation of wage loss prior to filing suit, nor

[1]Progressive filed its Answer to Complaint on December 30, 2002, (R. 11-13), and on June 30, 2003, filed a Motion for Leave to Amend Answer. (R. 23-30). On March 8, 2004, Progressive filed a Renewed Motion for Leave to Amend Answer attaching the Second Amended Answer. (R. 63-67).

did they provide Progressive with reasonable proof of such loss. (R. 31-35). Moreover, Progressive argued that summary judgment was proper where it was undisputed that Petitioners did not send Progressive a pre-suit demand letter and, therefore, did not satisfy a condition precedent to filing suit as required by the PIP statute. (R. 31-35). Progressive also attached to its motion the affidavit of Robert Grant, the claims adjustor in charge of Petitioners' file, which attested to the fact that:

> [A]t no time prior to the filing of [this] lawsuit, did Progressive receive any documentation of the plaintiff's [sic] wage loss.

(R. 36).

In response, Petitioners filed a Motion to Strike as Sham both Progressive's Motion for Leave to Amend Complaint, and Progressive's Motion for Summary Judgment. (R. 40-53). Specifically, Petitioners claimed that, prior to the commencement of the litigation, Progressive maintained the position that payment of any PIP benefits was not required because Menendez had been covered under Worker's Compensation and had received payments thereunder. (R. 40-53). In addition, Petitioners argued that the affidavit of Robert Grant should be stricken "as patently not competent and not based on first-hand knowledge." (R. 42). The trial court never entered an order on Petitioners' Motion to Strike.

Progressive filed a "Renewed Motion for Summary Judgment and Motion for Attorney's Fees Pursuant to Fla. Stat. 57.105" on March 30, 2004, which was identical

in all respects to its previously filed motion for summary judgment. (R. 68-72). Progressive also filed and attached another affidavit by Robert Grant to its motion, which attested to the fact that:

> [A]t no time prior to the filing of the above lawsuit, did the plaintiff or her attorney submit an intent to initiate litigation demand letter as required by Fla. Stat. 627.736(11).

(R. 114-18).

Petitioners subsequently filed a "Motion for Partial Summary Judgment and Motion for Attorneys' Fees" on the issue of liability for payment of PIP benefits, claiming that extensive discovery was conducted **after** the action had been filed which provided Progressive with reasonable and adequate proof of loss that Progressive claims it did not have **before** suit. (R. 73-80). Petitioners also argued that a statutory written demand was not a condition precedent to this action because §627.726(11) (2001) pertains only to "claims for payment for treatment and services occurring after October 1, 2001," and that, even if the statute did apply, Petitioners provided Progressive with a written demand on November 21, 2003, *i.e.* one (1) year **after** suit was filed. (R. 73-80). Petitioners also argued that the pre-suit demand requirement did not apply where "the insurer has denied" a claim and that, in this case, Progressive's actions amounted to a "clear denial" of the claim, thus eliminating the need for a written demand. (R. 73-80). In an attempt to support these claims, Petitioners attached

various exhibits to their motion, including an affidavit of Nathan E. Eden, Petitioners' counsel, which also annexed a series of correspondence that took place between Progressive's Claims Representatives and Mr. Eden, between February 4, 2002 and June 4, 2002. (R. 81-113).

Progressive filed a Reply to Petitioners' Motion for Partial Summary Judgment and Motion for Attorneys' Fees. (R. 233-36). Specifically, Progressive responded by stating that Petitioners' Motion for Summary Judgment should be denied where Petitioners failed to file a pre-suit demand letter as required by §627.736(11). (R. 233-36). Moreover, Progressive argued that, not only did Petitioners wait approximately one year (1 year) after filing their Complaint to send Progressive a "pre-suit" demand letter, but also, none of the lost wages that were eventually demanded in Petitioners' "pre-suit" demand letter were previously mentioned by Petitioners prior to the commencement of the lawsuit. (R. 233-36). As a result, all of Petitioners' letters failed to meet the requirements for a pre-suit demand letter as required by §627.736(11). (R. 233-36). In addition, Petitioners' letters were inadequate to show reasonable proof of a loss as they never mentioned any lost wages. (R. 233-36). Progressive also submitted a "Notice of Filing Supplemental Authority in Support of Defendant's Motion for Summary Judgment and Attorney's Fees Pursuant to Fla. Stat. 57.105." (R. 145-231).

The hearing on both parties' motions for summary judgment took place on July 20, 2006. (R. 232). On September 29, 2005, the trial court entered its "Order Denying Defendant's Renewed Motion For Partial Summary Judgment And Motion For Attorney's Fees And Granting Plaintiffs' Motion For Partial Summary Judgment And Motion For Attorneys' Fees." (R. 237-42). In its Order, the trial court found that no pre-suit demand letter was required because: (1) Progressive effectively denied Menendez's claim; and (2) the claim was for damages incurred prior to October 1, 2001. (R. 241). Progressive filed a Motion for Rehearing (R. 243-46), which was ultimately denied. (R. 247-48). The parties entered into a Stipulation for Entry of Final Judgment (R. 274-75), and a Stipulated Final Judgment was entered on September 19, 2006. (R. 276-77).

Progressive appealed and, on March 19, 2008, the Third District issued its "opinion on motion for rehearing and clarification." *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3d DCA 2008).[2] The Third District reversed the trial court, holding that the pre-suit written demand requirements of §627.736(11) do apply to Petitioners' claim, and remanded for a trier of fact to determine whether Progressive denied or reduced Petitioners' claim. *Id*. at 334-35.

In particular, the Third District noted that "[s]tatutes which do not alter

[2] The Third District issued its original opinion on December 5, 2007.

contractual or vested rights but relate only to remedies or procedure are not within the general rule against retrospective operation . . .” (*Id*. at 330 quoting *Tejada v. In re Forfeiture of the Following Described Property: $406,626.11 in U.S. Currency*, 820 So. 2d 385, 390 (Fla. 3d DCA 2002)(quoting *Rothermel v. Florida Parole and Probation Comm’n*, 441 So. 2d 663, 664 (Fla. 1st DCA 1983)). The Third District held that:

> Because we conclude that the application of subsection 627.736(11) to the plaintiffs’ claim for PIP benefits is procedural in nature, and it does not alter any contractual or vested rights of the plaintiffs, we find that to require the plaintiffs to provide presuit notice before filing their lawsuit after the enactment of the statute does not violate the general rule against retrospective application.

Id. at 331.

STANDARD OF REVIEW

The Supreme Court’s review of a district court of appeal’s decision as to the constitutionality of a statute is *de novo*. *Carribean Conservation Corp., Inc. v. Florida Fish & Wildlife Conservation Comm’n*, 838 So. 2d 492, 500 (Fla. 2003).

SUMMARY OF THE ARGUMENT

1. Application of §627.736(11) to this case is in complete accord with the mandates of the Florida constitution. Section §627.736(11) unambiguously requires that the claimant, prior to filing any lawsuit for benefits, must provide the insurer with a demand letter. Absent the demand letter, the lawsuit is premature. The legislative intent in enacting §627.736(11) was 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. Here, Progressive was not provided with a pre-suit demand letter required by §627.736(11). Section 627.736(11) applies to Menendez's claim for wage loss notwithstanding that Petitioners entered into their insurance policy prior to the enactment of §627.736(11). Not only did the legislature expressly state that the statute applies retroactively, retroactive application of §627.736(11) is constitutionally permissible. Application of a statutory amendment only contravenes the constitutional prohibition against impairment of contracts when it changes the substantive rights of the parties to existing contracts. Petitioners did not have a vested contractual right to sue Progressive without first sending a demand letter. Section 627.736(11), as a "remedial" or "procedural" statute, does not alter vested rights, and did not deprive Petitioners of their substantive right to seek compensation from Progressive.

Accordingly, there is no constitutional bar to applying §627.736(11).

The fact that §627.736(11)(d) provides that, if the insurer complies with the demand letter and pays the demanded amounts, the insurer is not obligated to pay attorney's fees, is of no moment. Although, generally, a right possessed by an insured to an entitlement to attorney's fees is a substantive right, in the instant case Petitioners did not possess a right to an entitlement to fees. There are only two (2) grounds upon which a claimant can recover attorney's fees for prevailing against its insurer: (1) pursuant to §627.428(1) after filing suit and obtaining a judgment in its favor; and (2) by way of a confession of judgment when, after suit is initiated but before judgment is entered, the insurer pays the claim. An essential element for a confession of judgment to apply, however, is that litigation against the insurer be initiated and pending at the time that the insurer pays the claim. Thus, even before §627.736(11) was enacted, an insured had no claim to attorney's fees against an insurer absent the pendency of a lawsuit. By reiterating in §627.736(11) that a claimant does not have a claim for fees against an insurer who, prior to the initiation of litigation, complies with a demand letter and pays a claim, the legislature did not deprive or abridge any substantive right which the claimant might have had. One cannot be deprived of a substantive right which one did not possess in the first place.

2. Petitioner's post-suit demand letter, sent one (1) year **after** the commencement of the lawsuit, did not satisfy the requirements of §627.736(11), which requires that the claimant, **prior** to filing any lawsuit for benefits, provide the insurer with a demand letter. A "post-suit demand letter" does not satisfy the plain language or the purpose of §627.736(11), *i.e.* to put the insurance company on notice of an intent to initiate litigation on a PIP claim submitted as overdue so the insurance company can pay and avoid being sued. The purpose of §627.736(11) is simply not served by allowing post-suit "compliance." Petitioners' request of this Court to ignore the plain and unambiguous language of §627.736(11) requiring that the demand letter be sent **prior** to any litigation being initiated, is contrary to the long-settled principle of law that the plain language of a statute cannot be ignored because the primary source for determining legislative intent is the language chosen by the Legislature to express its intent. Pursuant to a plain reading of §627.736(11), Petitioners' post-suit demand letter did not satisfy the requirements of the statute.

3. The PIP benefits sought by Petitioners are benefits to which the requirements of §627.736(11) apply. Petitioners' argument that §627.736(11) does not apply because, it is "reasonable" to conclude that the $2,000 lien satisfaction included payment for both medical expenses and lost income, fails for four (4) separate reasons: (1) for the

reasons set forth above, to the extent that the $2,000 payment did represent bills for medical treatment, those claims were not properly submitted, thereby not triggering Progressive's obligation to pay; (2) not all of Petitioners' medical bills were incurred after October 1, 2001, and therefore those medical bills certainly were subject to §627.736(11); (3) there is no evidence in the Record as to how the $2,000 settlement was allocated, or that any of the settlement was earmarked for payment of medical bills as opposed to lost wages, or other expenses; and (4) the Record belies Petitioners' contention that any of its claim against Progressive consisted of payments for medical treatment. Petitioners argument, *i.e.* that the June 19, 2001 date of the enacting legislation applies only to a claim for interest, is contrary to all rules of statutory construction. When the enacting legislation is properly read in conjunction with §627.736(11), although a demand letter is only required for claims for "treatment and services" occurring after October 1, 2001, a demand letter is required for any other claim, such as one for wage loss, when the lawsuit is filed after June 19, 2001, as Petitioners' was.

4. Contrary to Petitioners argument, Progressive did not deny Petitioners' claim. At the very least, as determined by the Third District, there is an issue of fact as to whether Progressive denied Petitioners' claim.

ARGUMENT

I. APPLICATION OF §627.736(11), FLA. STAT. (2001) TO THIS CASE IS IN COMPLETE ACCORD WITH THE MANDATES OF THE FLORIDA CONSTITUTION.

Florida Statute §627.736(11)(2001), entitled "Demand Letter," was enacted in 2001 and requires that:

> As a condition precedent to filing any action for an overdue claim for benefits under paragraph (4)(b), the insurer must be provided with written notice of an intent to initiate litigation; provided, however, that, except with regard to a claim or amended claim or judgment for interest only which was not paid or was incorrectly calculated, such notice is not required for an overdue claim that the insurer has denied or reduced, nor is such notice required if the insurer has been provided documentation or information at the insurer's request pursuant to subsection (6). Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

§627.736(11)(a), Fla. Stat. (2001).[3]

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[3]Subsection (4)(b) states, in relevant part, as follows:

> Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days **after the insurer is furnished notice of the fact of a covered loss and the amount of same**.... However, notwithstanding the fact that written notice has been furnished to the insurer, **any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for payment**.

§627.736(4)(b), Fla. Stat. (2001).

Section 627.736(11) further mandates that the "Demand Letter" contain very specific information:

> **The notice required shall state that it is a "demand letter under s.627.736(11)" and shall state with specificity:**
>
> 1. **The name of the insured** upon which such benefits are being sought.
>
> 2. **The claim number or policy number** upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and **an itemized statement specifying each exact amount**, the date of treatment, service, or accommodation, **and the type of benefit claimed to be due.** A completed Health Care Finance Administration 1500 form, UB 92, or successor forms approved by the Secretary of the United States Department of Health and Human Services may be used as the itemized statement.

§627.736(11)(b), Fla. Stat. (2001).

If, within seven (7) business days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of ten (10) percent of the overdue amount paid by the insurer, no action may be brought against the insurer, and the insurer is not obligated to pay any attorney's fees. §627.736(11)(d), Fla. Stat. (2001).

Accordingly, "[t]he statute unambiguously requires that the claimant, prior to

filing any lawsuit for benefits, must provide the insurer with a demand letter which must specify each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. Unless such requirements are met, the lawsuit is premature." *Physical Therapy Group, LLC a/a/o Harry Morales v. Mercury Ins. Co. of Fla.*, 13 Fla. L. Weekly Supp. 889c, 890 (Miami-Dade Cty. June 2, 2006).[4]

The legislative intent in enacting §627.736(11), was 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**. *Progressive Express Ins. Co. v. Polynice*, 12 Fla. L. Weekly Supp. 1015b (Fla. 9th Cir. Ct. July 18, 2005); *Hernandez v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 232c (Fla. 11th Cir. Ct. Jan. 17, 2007). *See also, Progressive Express Ins. Co. v. Broussard*, 12 Fla. L. Weekly Supp. 277b (Fla. 6th Cir. Ct. Dec. 6, 2004) (the plaintiff's failure to provide a demand letter deprived insurer of the opportunity to pay the claim and avoid litigation). "[A]dherence to the pre-suit notice requirement promotes the legislative goal of reducing unnecessary litigation, in part, to avoid the overburdening of the courts with actions that could be resolved before suit." *Physical Therapy*, 13 Fla. L. Weekly Supp. at 890.

[4]Because PIP benefits are limited to $10,000, §627.736(1), Fla. Stat. (2001), most PIP cases are filed in the County Court. Accordingly, the law regarding the PIP statute has, almost exclusively, been developed by County Court Judges and Circuit Court appellate panels.

Here, Progressive was not provided with a pre-suit demand letter required by §627.736(11) and, therefore, was not placed on notice of the covered loss, nor given a final opportunity to review the claim and avoid litigation. Nevertheless, Petitioners contend that §627.736(11) does not apply to Menendez's claim for wage loss because they entered into their insurance policy prior to the enactment of §627.736(11). Accordingly, Petitioners argue, any application of §627.736(11) would be a retroactive application impairing their contractual rights protected by Article I, Section 10 of the Florida Constitution. That contention is meritless.

The question of whether a statute applies retroactively is a two-prong inquiry. The first inquiry is whether the legislature intended the statute to apply retroactively, which is best evidenced by any express command from the legislature. *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499-500 (Fla. 1999). In the instant case, that express command is quite evident. The enacting legislation accompanying §627.736(11) provides that:

> [S]ubsection (11) of section 627.736, Florida Statutes, shall apply to **treatment and services** occurring on or after October 1, 2001 . . .

and

> [E]xcept that **subsection (11)** of section 627.736, Florida Statutes, **shall apply to actions filed on or after the effective date of this act with regard to a claim** or amended claim or judgment for interest only **which was not paid** or was incorrectly calculated.

Ch. 2001-271, §11, Laws of Florida.

The effective date of the legislation, as correctly noted by Petitioners, was June 19, 2001. Thus, the legislature intended that §627.736(11) be retroactively applied, *i.e.* applied to various services and claims notwithstanding when the insurance policies from which those claims arise were entered into. Accordingly, the second inquiry becomes relevant, *i.e.* whether retroactive application of §627.736(11) is constitutionally permissible. *Metropolitan Dade*, 737 So. 2d at 499.

Petitioners argue that to apply the legislature's requirement of sending a demand letter in the instant case, when the insurance policy was issued prior to the enactment of §627.736(11), would unconstitutionally impair Petitioners' vested contractual right afforded by Article V, section 3(b)(3), Florida Constitution.[5] Although, as argued by Petitioners, the provisions of the Insurance Code are a part of the insurance contract, that does not necessarily mean that a vested contractual right is impaired by applying a subsequent amendment to the Insurance Code. Rather, application of a statutory amendment contravenes the constitutional prohibition against impairment of contracts **only** when it has the effect of "**changing the substantive rights** of the parties to

[5]Petitioners' concern for Progressive and the affect that the imposition of a 10% penalty has on its constitutional rights, is appreciated but of no moment. (I.B. 19). The constitutional rights of Progressive are not at issue in this case.

existing contracts." *Manning v. Travelers Ins. Co.*, 250 So. 2d 872, 874 (Fla. 1971). As widely held:

> A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment . . . To be vested[,] a right must be more than a mere expectation based on an anticipation of the continuance of an existing law . . .

Clausell v. Hobart Corp., 515 So. 2d 1275, 1276 (Fla. 1987), *cert. denied*, 485 U.S. 1000 (1988).

In the instant case, the imposition of the notice requirement did not affect any vested contractual right. Petitioners cite no authority, and none exists, for their contention that they had a vested contractual right to sue Progressive without first sending a demand letter. At best, they may have had an expectancy, but that expectancy was subject to change. *See Romine v. Florida Birth Related Neurological Injury Compensation Ass'n*, 842 So. 2d 148, 154 (Fla. 5th DCA), *rev. denied*, 857 So. 2d 195 (Fla. 2003)(a mere expectation does not give rise to a vested right).

Section 627.736(11), as are all statutes which merely impose a pre-suit notice requirement, is "remedial" or "procedural" in nature. *See City of Coconut Creek v. City of Deerfield Beach*, 840 So. 2d 389 (Fla. 4th DCA 2003)(pre-suit notice requirement in action to enforce municipal comprehensive plan is "procedural"); *Sanchez v. Degoria*, 733 So. 2d 1103 (Fla. 4th DCA 2003)(pre-suit notice requirement in §1983 action is

"remedial"); *Widmer v. Caldwell*, 714 So. 2d 1128 (Fla. 1st DCA 1998)(pre-suit notice requirement in action against state is "procedural"). "[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 and, absent a savings clause, all pending proceedings are affected." *Tejada*, 820 So. 2d at 390.

This case is very similar to *Campagnulo v. Williams*, 563 So. 2d 733 (Fla. 4th DCA 1990), *quashed on other grounds*, 588 So. 2d 982 (Fla. 1991), where in 1986, the plaintiff commenced a claim for dental malpractice which had accrued in 1984. The trial court entered summary judgment against the plaintiff on the basis that the plaintiff had failed to comply with the pre-suit notice requirements which had been enacted in 1985. The Fourth District affirmed that ruling, holding that:

> the appellant's rights are not affected by the pre-suit requirements of the statute and therefore not subject to retroactive impairment. **The notice requirement did not affect appellant's right to bring a malpractice action or the value of that action if brought.** [The pre-suit notice statute] simply required appellant to file notice ninety days prior to the institution of a malpractice action.

Id. at 734-35 (citation omitted). *See also*, *Paley v. Maraj*, 910 So. 2d 282 (Fla. 4th DCA 2005)(pre-suit requirement in malpractice action is procedural and therefore applies even though action accrued prior to enactment of statute requiring affidavit).

That same principle applies here. Section 627.736(11) did not deprive

Petitioners of their substantive right to seek compensation from Progressive. Rather, it merely provided a different procedure for doing so - - a procedure which could avoid massive amounts of time and expense in accord with the swift payment intent of the PIP statute. Nor did Section §627.736(11) deprive Petitioners of their right to bring an action against Progressive in the event Petitioners' entire claim was not completely satisfied by Progressive. The statute merely required them to first send a demand letter, affording Progressive a last opportunity to completely satisfy that claim. Accordingly, there is no constitutional bar to applying §627.736(11).

Perhaps realizing that the imposition of a notice requirement, itself, does not affect constitutional rights, Petitioners argue that they have been denied a substantive right because §627.736(11)(d) provides that if the insurer complies with the demand letter and pays the demanded amounts, "[t]he insurer shall not be obligated to pay any attorney's fees . . ." This argument is a classic meritless red-herring.

Although, generally, any right possessed by an insured to an entitlement to attorney's fees is a substantive right, *L. Ross, Inc. v. R. W. Roberts Constr. Co., Inc.*, 481 So. 2d 484 (Fla. 1986), in the instant case Petitioners did not possess any right to an entitlement to fees. Section 627.736(11) does not deprive Petitioners of any substantive right to attorney's fees because Petitioners, nor any claimant, never had a claim for attorney's fees absent the filing of a lawsuit.

There are only two (2) grounds upon which a claimant can recover attorney's fees for prevailing against its insurer. First, is pursuant to Florida Statute §627.428, which provides that:

> 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 insured 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.

§627.428(1), Fla. Stat.

Thus, pursuant to §627.428(1), a claimant is entitled to an award of fees only after it files suit and a judgment is entered in its favor. *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993). Obviously, the entry of a judgment requires that litigation first be initiated. Absent litigation, there can be no award of fees under §627.428(1).

The second, and only other, ground upon which a claimant may be entitled to fees against its insurer, is by way a "confession of judgment." Long ago, this Court recognized that, even once litigation was initiated, insurers were able to avoid paying fees under §627.428(1) by paying the disputed amount before a judgment was entered – absent a judgment, there would be no entitlement to a fee. Recognizing the inequity

of this, this Court held that the payment of a claim after suit is initiated, but before judgment is entered, is the equivalent of a confession of judgment which gives rise to the entitlement to fees under §627.428(1):

> The statutory obligation for attorney's fees cannot be avoided simply by paying the policy proceeds **after suit is filed** but before a judgement is actually entered . . .

Wollard v. Lloyd's and Cos. of Lloyd's, 439 So. 2d 217, 218 (Fla. 1983)(quoting *Gibson v. Walker*, 380 So. 2d 531, 533 (Fla. 5th DCA 1980)).

An essential and prominent element for the legal fiction of a confession of judgment to apply, however, is that litigation against the insurer be initiated and pending at the time that the insurer pays the claim:

> The confession of judgment . . . doctrine applies where the insurer has denied benefits the insured was entitled to, **forcing the insured to file suit**, resulting in the insurer's change of heart and payment before judgment. However, **courts generally do not apply the doctrine where the insureds were not forced to sue to receive benefits** . . .

State Farm Fla. Ins. Co. v. Lorenzo, 969 So. 2d 393, 397-98 (Fla. 5th DCA 2007) (citations omitted). *See also, Jerkins v. USF & G Specialty Ins. Co.*, 982 So. 2d 15, 17 (Fla. 5th DCA 2008)("Payment made **after a suit is filed** operates as a confession of judgment."); *First Floridian Auto & Home Ins. Co. v. Myrick*, 969 So. 2d 1121, 1124 (Fla. 5th DCA 2007), *rev. denied*, 980 So. 2d 489 (Fla. 2008)(same); *Basik Exports & Imports, Inc. v. Preferred Nat'l Ins. Co.*, 911 So. 2d 291, 294 (Fla. 4th DCA 2005), *rev.*

denied, 935 So. 2d 1219 (Fla. 2006)(the purpose of an award of attorney's fees pursuant to §627.428(1) is "to reimburse successful policy holders **forced to sue** to enforce their policies.").

Thus, as demonstrated above, even before §627.736(11) was enacted, an insured had no claim to attorney's fees against an insurer absent the pendency of a lawsuit. Accordingly, by reiterating in §627.736(11) that a claimant does not have a claim for fees against an insurer who, prior to the initiation of litigation, complies with a demand letter and pays a claim, the legislature did not deprive or abridge any substantive right which the claimant might have had. **One cannot be deprived of a substantive right which one did not possess in the first place.**

None of the cases relied upon by Petitioners even remotely supports their contentions. In *State Farm Mutual Automobile Insurance Co. v. Gant*, 478 So. 2d 25 (Fla. 1985), this Court considered whether Florida Statute §627.727(10)(1992) applied retroactively. That statute acted to increase the amount of bad faith damages that could be recovered against an insurer in an uninsured motorist case. Only upon finding that the statute created a monetary "penalty" which did not previously exist, did this Court determine the statute to be substantive and not retroactive. Unlike §627.727(10)(1992), §627.736(11) imposes no penalty against Petitioners.

In *L. Ross, Inc. v. R. W. Roberts Construction Co., Inc.*, 481 So. 2d 484 (Fla. 1986), this Court considered whether an amendment to Florida Statute §627.428(1983) applied retroactively. That amendment acted to increase the amount of attorney's fees that could be recovered against an insurer. Only upon finding that the right to attorney's fees is a substantive right, did this Court hold that the amendment could not apply retroactively. Here, §627.736(11) does not affect any existing claim to attorney's fees.

Similarly, in *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985), this Court considered whether the enactment of Florida Statute §768.56(1980) applied retroactively. That statute created an entitlement to attorney's fees in medical malpractice actions. Upon finding that the right to attorney's fees is a substantive right, this Court held that §768.56(1980) could not apply retroactively. Here, again, §627.736(11), does not affect any existing claim to attorney's fees.

Similarly, in *Walker v. Cash Register Auto Insurance of Leon County, Inc.*, 946 So. 2d 66 (Fla. 1st DCA 2006), *rev. denied*, 959 So. 2d 718 (Fla. 2007), the First District considered whether an amendment to Florida Statute §57.105(2001) applied retroactively. That amendment created a safe harbor to a claim for entitlement to attorney's fees as a sanction by allowing the non-movant to withdraw or amend the offending document. Again, upon finding that the right to attorney's fees is a

substantive right, the court held that §57.105(2001) could not apply retroactively.(The court also held that, because the withdrawal of claims, defenses or arguments could substantively affect the outcome of a case, §57.105(2001) could not retroactively apply.) Here, again, §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), this Court considered whether Florida Statute §627.7262(1982), the so-called "non-joinder"statute, 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.

Clearly, even before the enactment of §627.736(11), Petitioners never had an entitlement to fees if Progressive had paid the claim prior to the initiation of any litigation. Thus, the legislature's statement in §627.736(11) that, if the insurer complies with the demand letter and pays the claim pre-suit it is not obligated to pay attorney's fees, did not deprive Petitioners of any right that they possessed.

Indeed, what Petitioners seem to be complaining about is that by enacting §627.736(11), Petitioners' attorney has been deprived of the ability to generate a fee.

Indeed as they state in their Brief, "Here, when the policy was issued by Progressive, Petitioners had the right to file an action immediately upon the PIP claim being overdue." (I.B. 19). Petitioners seem to have overlooked that the PIP statute was not enacted for the benefit of lawyers. Rather, it was enacted to effect payment of claims with the least delay. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683-84 (Fla. 2000). Section 627.736(11) is designed to avoid litigation and have claims paid as swiftly as possible. There is, of course, no entitlement to be paid an attorney's fee in an action filed solely to generate an attorney's fee. *See Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047 (Fla. 5th DCA), *rev. denied*, 791 So. 2d 1094 (Fla. 2001). *See also, State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d at 397 (§627.428(1) should not be construed to encourage a race to the courthouse to initiate needless litigation solely to generate am attorney's fee).

The legislature's enactment of §627.736(11) affected no substantive right possessed by Petitioners. The Third District's application of §627.736(11) was in complete accord with the mandates of the Florida constitution.

II. PETITIONERS' POST-SUIT DEMAND LETTER DID NOT SATISFY THE REQUIREMENTS OF §627.736(11), FLA. STAT. (2001).

Petitioners argue that they satisfied §627.736(11)(a) by sending a demand letter to Progressive on November 21, 2003, almost one (1) year **after** the commencement of the lawsuit, and first including the demand for lost wages that had not been previously requested. Petitioners' argument is entirely without merit and directly contrary to both the language and purpose of §627.736(11)(a).

"The requirements of section 627.736(11), Florida Statutes, are very specific and are designed, in part, to provide the insurer with an opportunity to know from the demand letter the exact amount claimed, the specific service provided, and the specific date that the service and amount claimed as over due." *Polynice*, 12 Fla. L. Weekly Supp. at 1016. As best stated by one court:

> **[T]he demand letter requirements are intended to be, and must be, strictly construed to effectuate their purpose.** The bottom line of the requirement is to enable the person designated by the insurance company to look at, and only at, the four corners of one letter (and its statutorily authorized attachments), in order to fully understand its potential liability.

Chambers Med. Group, Inc. v. Progressive Express Ins. Co., 12 Fla. L. Weekly Supp. 556, 556 (Fla. 13th Cir. Ct. Mar. 18, 2005).

The legislative intent in enacting §627.736(11), was to place the insurer on

notice of the bills which remain unpaid, and of the claimant's intent to initiate litigation so that the insurer may pay the claim and avoid litigation. *Polynice*, 12 Fla. L. Weekly Supp. at 1015; *Hernandez*, 14 Fla. L. Weekly Supp. at 232c.

Here, it is undisputed that Petitioners did not provide the required written notice to Progressive until almost one (1) year into the litigation. However, a "post-suit demand letter" does not satisfy the plain language or the purpose of §627.736(11), *i.e.* to put the insurance company on notice of an intent to initiate litigation on a PIP claim submitted as overdue **so the insurance company can pay and avoid being sued**. Petitioners' "post-suit demand letter," obviously, did not provide Progressive with the opportunity to avoid litigation. Because Petitioners failed to comply with the statute, Progressive had no option but to endure the time, effort and expense of one (1) year of litigation, which could have been avoided had Petitioners provided Progressive with the statutorily mandated option to pay.[6]

The purpose of §627.736(11) is simply not served by allowing post-suit "compliance." As best stated by one court:

[6] Once suit had been initiated, Progressive had no viable way to simply pay Petitioners' claim without that payment being deemed a confession of judgment and potentially subjecting itself to a claim for attorney's fees. *Wollard*, 439 So. 2d at 217. Had Petitioners complied with §627.736(11), Progressive could have assessed the claim, and opted to pay with no liability for attorney's fees. Fla. Stat. §627.736(11)(d)(2001).

> The court finds that the clear, unambiguous language of the statute requires that the Plaintiff send a demand letter to the insurer *prior* to the initiation of the lawsuit. **Therefore, the court does not find that the Plaintiff cured the deficiency by sending a demand letter to the insurer six months after filing his lawsuit.**

Grabowsky v. Allstate Indem. Co., 12 Fla. L. Weekly Supp. 1072, 1073 (Fla. Volusia Cty. Ct. Aug. 25, 2005)(italics in original).

Petitioners cite various cases in which the respective courts held that post-suit compliance with the statutes at issue in those cases precluded dismissal of the case. However, none of those cases concerned §627.736(11). Moreover, the purposes and intents of the different statutes at issue in those cases which precluded dismissal, do not even approximate the purpose and intent of §627.736(11).

For instance, *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996) was a medical malpractice case wherein, although the plaintiff did not timely comply with the pre-suit requirements to conduct an investigation as required by Florida Statute §766.202(4) (1991), the court allowed the suit to proceed. The purpose of the pre-suit investigation imposed by that statute was to screen out frivolous claims. *Id*. at 280. Thus, where allowing untimely compliance with the pre-suit requirements of the medical malpractice statute may satisfy the function of that statute in a medical malpractice case, it does not satisfy the function of the pre-suit requirements of §627.736(11), *i.e.* providing the insurer with an opportunity to avoid being sued.

Petitioners also cite *Holding Electric, Inc. v. Roberts*, 530 So. 2d 301 (Fla. 1988), which was an action to foreclose a mechanic's lien pursuant to Chapter 713 of the Florida Statutes. The defendant moved to dismiss the action on the basis that the plaintiff had not given the defendant a pre-suit affidavit, as required by Florida Statute §713.06(3)(d)1(1985), which listed the name of the unpaid lienors, the amount due, and the services provided. In holding that the suit should be allowed to proceed, the Court noted that the purpose of §713.06(3)(d)1(1985) was two-fold. First, the required affidavit protected the owner against the risk of having to pay for the same service twice. *Id.* at 304. Thus, untimely compliance with the requirement of an affidavit could satisfy that purpose in a mechanic's lien case. That purpose, however, has no application in the instant case.

Second, the Court mentioned that timely compliance with §713.06(3)(d)1(1985) also 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 post-suit compliance only upon the plaintiff becoming 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.

Petitioners also rely on *Thomas v. Suwannee County*, 734 So. 2d 492 (Fla.

1999), which was an action challenging a zoning board's grant of a special exception. The plaintiff did not wait the required thirty (30) days from complying with the pre-suit requirements imposed by Florida Statute §163.3215(4)(1993) to file a "verified complaint" with the local government agency whose actions were complained of, and affording the agency thirty (30) days in which to "respond," before initiating its action against the agency in the circuit court. In determining that the case should not have been dismissed, the 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. Thus, where allowing untimely compliance with the pre-suit requirements may satisfy the function of that notice in a zoning case, it does not satisfy the function of the pre-suit requirements of §627.736(11), *i.e.* providing the insurer with an 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. Those cases implicated the sovereign immunity provisions of Florida Statute §768.28(6), requiring that pre-suit notice of the claim be made to the Department of Insurance and the appropriate government agency, and that in the absence of any final disposition by the agency, no court action could be filed for six (6) months after that pre-suit notice was given.

In *Williams*, the court held that, although the plaintiff had not waited the full six (6) months before filing the lawsuit, he did wait 58 days, and more than six (6) months had elapsed (in fact almost three (3) years had gone by) before the trial court finally disposed of the issue. Accordingly, the defendant had ample time to respond. Thus, the purpose of §768.28(6), which is to provide the state and its agencies with sufficient notice of claims filed against them, *Id.* at 839, was satisfied. Thus, where allowing untimely compliance with the pre-suit requirements of the sovereign immunity statute may satisfy the function of that statute in an action against a government entity, it does not satisfy the function of the pre-suit requirements 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 (6) 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.

Petitioners are asking this Court to ignore the plain and unambiguous language of §627.736(11) requiring that the demand letter be sent **prior** to litigation being initiated. Petitioners' request that this Court apply a "liberal interpretation" to the statute (I.B. 24) is contrary to every principle governing how courts are to read statutes. It is a long-settled that the plain language of a statute cannot be ignored

because "the primary source for determining legislative intent is the language chosen by the Legislature to express its intent." *Donato v. American Tel. and Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000). *See also, DeGregorio v. Balkwill*, 853 So. 2d 371 (Fla. 2003)("Legislative intent is determined primarily from the statute's language."); *Nationwide Mut. Fire Ins. Co. v. Southeast Diagnostics, Inc.*, 766 So. 2d 229 (Fla. 4th DCA 2000)(If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving construction or speculation as to what the legislature intended). As best stated by this Court:

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; **the statute must be given its plain and obvious meaning.**

Donato, 767 So. 2d at 1150 (quoting *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984)).

In other words, courts are precluded from construing "an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Id.* at 1151. *See also, Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000)("An interpretation of a statutory term cannot be based on this Court's own view of the best policy."); *State v. Diguilio*, 491 So. 2d 1129, 1133 (Fla. 1986)("Our responsibility as an appellate court is to apply the law as the Legislature has so clearly announced it."); *Florida*

Dep't of Educ. v. Cooper, 858 So. 2d 394, 397 (Fla. 1st DCA 2003)("Courts are not free to choose an interpretation they conclude is the best public policy, but must defer to the other branches of government to make those choices.").

In short, courts are precluded from engaging in "impermissible judicial legislation." *Martin v. Town of Palm Beach*, 643 So. 2d 112, 115 n.7 (Fla. 4th DCA 1994). "It is fundamental that judges do not have the power to edit statutes so as to add requirements that the legislature did not include." *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999). *See also, Knowles v. Beverly Enterps.-Fla., Inc.* 898 So. 2d 1, 11 (Fla. 2004); *Limbaugh v. State*, 887 So. 2d 387, 395 (Fla. 4th DCA 2004), *rev. denied*, 903 So. 2d 189 (Fla. 2005)("In construing statutes, Judges are not free to add or delete provisions from plain statutory text . . . and have no authority to fill statutory voids or enlarge the domain of statutes already adopted."). As best phrased by one court:

> [T]he procedures and requirements set forth in the PIP statute is a matter of policy exclusively within the province of the Legislature who, as opposed to Courts, are not only equipped to deal with and weigh the relevant policy issues, but also to whom the legislative authority is accorded.

Martin v. Progressive Auto Pro Ins. Co., 14 Fla. L. Weekly Supp. 394a, 395 (Fla. 4th Cir. Ct. Feb. 2, 2007).

Therefore, pursuant to a plain reading of §627.736(11), Petitioners' post-suit demand letter did not satisfy the requirements of the statute.

Lastly, Petitioners' argument that the dismissal or abatement[7] of their action is mere "wheel spinning" (I.B. 28), is disingenuous. At issue here is the denial of Progressive's last opportunity to avoid litigation and the exposure to attorney's fees. Accepting Petitioners' tardy demand letter as properly submitted under §627.736(11) would deprive Progressive of that opportunity and render the statute meaningless.

Petitioners failed to satisfy the statutorily mandated condition precedent of providing Progressive with a **pre-suit** demand letter. Allowing a post-suit demand letter to satisfy the requirements of §627.736(11) would impermissibly ignore the plain language of the statute, and eviscerate the intent of the legislature.

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[7]In its decision, the Third District noted that once Progressive, by its Answer, proposed Amended Answer and motion for summary judgment, put Petitioners on notice of their failure to send a pre-suit demand letter, Petitioners should have moved to abate the action to make an effort to comply with the statute. *Menedez*, 979 So. 2d at 334. Petitioners now argue that because the trial court did not rule on Progressive's motion to amend its Answer to include non-compliance with the statute as an affirmative defense, Petitioners were under no obligation to move to abate. (I.B. 27). Simply stated that argument is disingenuous. In their own Motion for Partial Summary Judgment, Petitioners argued that a statutory written demand pursuant to §627.736(11) was not a condition precedent to this action. (R. 73-80). Thus, for all intents and purposes, Petitioners consented to have this issue determined by the trial court. *See Paul Gottlieb & Co., Inc. v. Alps S. Corp.*, 985 So. 2d 1, 5 (Fla. 2d DCA 2008)("It is well recognized that an affirmative defense can be tried by consent.").

III. THE PIP BENEFITS SOUGHT BY PETITIONERS ARE BENEFITS TO WHICH THE REQUIREMENTS OF §627.736(11), FLA. STAT. (2001) APPLY.

Petitioners argue that §627.736(11) does not apply because, when they paid $2,000 to settle the workers compensation lien, the workers compensation carrier had paid $8,185.58 in Petitioners' medical bills. Thus, Petitioners surmise, "it is reasonable to conclude that the $2,000 lien satisfaction included payment for both medical expenses and lost income." (I.B. 33). This argument fails for four (4) separate reasons.

First, for the reasons set forth in the preceding sections of this Brief, to the extent that the $2,000 payment did represent bills for medical treatment, those claims were not properly submitted pursuant to §627.736(11), thereby not triggering Progressive's obligation to pay pursuant to §627.736(4)(b).

Second, not all of Petitioners' medical bills were incurred after October 1, 2001. In fact, at least $4652.16 of Petitioners' medical bills were incurred for treatment rendered after October 1, 2001. (R. 96). Thus, even Petitioners must concede that those medical bills certainly were subject to §627.736(11).

Third, there is no evidence in the Record whatsoever how the $2,000 settlement was allocated, or that any of the settlement was earmarked for payment of medical bills as opposed to lost wages, or other expenses. Because all reasonable inferences are to be construed in favor of Progressive as the non-moving party, *Clay Elec. Coop.*,

Inc. v. Johnson 873 So. 2d 1182 (Fla. 2003), there is nothing to support Petitioners' bald conclusion, that it is reasonable to conclude that some of that $2000 consisted of medical bills.

Fourth, the Record belies Petitioners' contention that any of their claim against Progressive consisted of payments for medical treatment. In their belated demand letter sent on November 21, 2003, Petitioners specified their claim. In the blank space designated for "Medical Providers" Petitioners state "Not applicable." (R. 112). In the blank space for "Lost Wage Statement" Petitioners state "See attached," and attach a list of lost wages totaling $7,080. (R. 113). No other demand is made of Progressive. Thus, there is no evidence that any portion of Petitioners' claim against Progressive consisted of medical benefits. Progressive did not deny or reduce Petitioners' claim for wage loss benefits nor, despite Progressive's repeated requests pursuant to §627.736(6), did Petitioners provide Progressive with documentation or information regarding the exact amount of the wage loss reimbursement sought.[8]

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[8] Section 627.736(6), as it pertains to wage loss, states in relevant part, as follows:

> Every employer shall, if a request is made by an insurer providing personal injury protection benefits under ss. 627.730-627.7405 against whom a claim has been made, furnish forthwith, in a form approved by the department, a sworn statement of the earnings, since the time of the bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based.

§627.736(6)(a), Fla. Stat. (2001).

Rather than rely on the plain and unambiguous language of §627.736(11) as this Court must, *Donato*, 767 So. 2d at 1150; *DeGregorio*, 853 So. 2d at 371, Petitioners ask this Court to ignore that language, and instead rely on a report from the "Fifteenth Statewide Grand Jury" to interpret that language. (I.B. 31). Not only is Petitioner's request contrary to the long-settled principles of law that the plain language of a statute cannot be ignored, Petitioners argument regarding the construction of §627.736(11) is based on a mis-reading of the enacting legislation. Although the provision does indicate that §627.736(11) applies to **medical treatment and services** rendered after October 1, 2001, Ch. 2001-271, §11, Laws of Florida ("[S]ubsection (11) of section 627.736, Florida Statutes, shall apply to **treatment and services** occurring on or after October 1, 2001. . ."), it further provides that §627.736(11) applies to an action regarding **any other type of claim, such as lost wages**, filed after June 19, 2001, the effective date of §627.736(11):

> [E]xcept that subsection (11) of section 627.736, Florida Statutes, shall apply to actions filed on or after the effective date of this act with regard to a claim or amended claim or judgment for interest only which was not paid or was incorrectly calculated.

Ch. 2001-271, §11, Laws of Florida.

Petitioners misread the enacting legislation claiming that the June 19, 2001 date applies only to a claim for interest, or an amended claim for interest, or a

judgment for interest. (I.B. 35).That reading is contrary to all rules of statutory construction. The word "or" is to be construed as a "disjunctive," *i.e.* those matters modified by the word "or" are mutually exclusive to all other words. *Piper Aircraft Corp. v. Schwendemann,* 564 So. 2d 546 (Fla. 3d DCA 1990), *rev. denied,* 577 So. 2d 1328 (Fla. 1991). Thus, as opposed to Petitioners' misreading of Ch. 2001-271, §11, the enacting legislation should be read as providing that the June 19, 2001 effective date applies only to a claim, or an amended claim, or a judgment for interest.

When the enacting legislation is read in conjunction with §627.736(11), although a demand letter is only required for claims for "treatment and services" occurring after October 1, 2001, a demand letter is required for any other claim, such as one for wage loss, when the lawsuit is filed after June 19, 2001, as Petitioners' was. Section 627.736(11) unquestionably applies to Petitioners' claims.

IV. PROGRESSIVE DID NOT DENY ANY OF PETITIONERS' CLAIM.

Petitioners argue that, even if some part of their claim arose out of events occurring after October 1, 2001, §627.736(11) would still not apply because Progressive effectively denied their claim, and §627.736(11)(a) excepts denied claims from the requirement of a pre-suit demand letter. That argument is meritless because Progressive did not deny Petitioners' claim. At the very least, as determined by the Third District, there is an issue of fact as to whether Progressive denied Petitioners'

claim.

In the Record, attached to the affidavit of Petitioners' counsel, Nathan Eden, is a series of correspondence between Mr. Eden and Progressive's claim representatives from February of 2002 through June of 2002, (R. 85-94), which negates any contention that Progressive denied Petitioners' claim for wage loss benefits. In addition, those letters plainly refute the unfounded assertion made by Mr. Eden that Progressive did not request any documentation concerning wage loss. (R. 82).

On March 29, 2002 and April 9, 2002, Mr. Eden wrote to Progressive regarding Petitioners' claim for PIP benefits. (R. 86-87). Progressive's claims representative, Sandra Jones, responded on April 15, 2002 with a letter stating that:

> I have enclosed a pay out log showing payments we have made to date on your client's PIP claim. We have not received any additional meds on this file. **I was told that workers comp is involved and has made payments. I need a copy of what they have paid and a copy of their lien if they are filing one so they can be reimbursed**.

(R. 89-90).

Mr. Eden responded on April 20, 2002, with a letter which stated that:

> Indeed, Workman's Comp has been paying 100% of my client's medical bills to date. However, we have had to pay them back at this point the sum of $2,000.00. My client also sustained lost wages.

(R. 91-92).

On May 13, 2002, Mr. Eden sent Ms. Jones another letter advising that he would be proceeding to suit. (R. 93). Progressive responded with a final letter on June 4, 2002, again requesting the additional information and documentation regarding Menendez's Worker's Compensation lien:

> Please be advised I am in receipt of your most recent letter dated 5/13/02. **As previously requested I need a copy of the workers Comp lien and a copy of everything they have paid out to date.** We paid some bills as at that time we didn't know Ms. Menendez was filing through workers comp. **Has workers Comp reimbursed her for lost wages as well? We need to see what they have paid out before we can determine any reimbursement.**

(R. 94).

Clearly, neither of Progressive's letters to Petitioners' counsel even infers that payment on their claims would not be forthcoming. On the contrary, Progressive's letters reveal that Progressive was willing to make the appropriate reimbursements upon receiving reasonable proof of the worker's compensation lien, and Menendez's lost wages. Nevertheless, Petitioners filed this action on November 26, 2002 without first providing Progressive with the requested information.

Petitioners' contend that Progressive did not pay their claim within thirty (30) days of having received it. (I.B. 41). However, it is undisputed that Progressive never received documentation of Menendez's claim for wage loss or worker's compensation benefits *prior* to the commencement of the instant action. As the trial court properly

noted in its Order:

> [A]lthough **it was after the fact of filing the action,** Menendez did provide documentation of her claim for wages.

(R. 240).

Even Petitioners conceded in their Motion for Partial Summary Judgment that Progressive did not acquire adequate proof of the loss until *after* suit was filed:

> . . . [P]rogressive certainly has obtained the proof it needed through discovery **after this action was filed**.

(R. 74).

Petitioners' reliance on Mr. Eden's affidavit to somehow establish that Progressive denied their claim, is equally misplaced. Mr. Eden states that it was "Progressive Express Insurance Company's position, via Sandra Jones, adjuster, that Progressive would not pay for any items of damages because Worker's Compensation had paid." (R. 83). Mr. Eden attaches the aforementioned letters to "corroborate" his statement. However, in neither letter did Ms. Jones take the position that Progressive would not pay Petitioners' claim. Rather, she stated that the decision would be made upon receipt of requested information, none of which was forthcoming. Thus, the very letters which Mr. Eden relies on to corroborate his statements, contradict those statements. Conflicts within affidavits, and the exhibits attached thereto, create issues of fact precluding summary judgment. *Morales v. Coca-Cola Co.*, 813 So. 2d 162 (Fla. 4th DCA 2002); *Brewer v. Gulfcoast Transit Co.*, 679 So. 2d 341 (Fla. 2d DCA

1996).

Progressive was not placed on notice of which claims remained unpaid prior to the commencement of this litigation and was, therefore, not given the opportunity to pay the claim and avoid being sued. There is nothing in the Record establishing that Progressive denied Petitioners' claim. At the very least, as determined by the Third District, the issue is one which must be decided by the trier of fact.

CONCLUSION

Based on the foregoing arguments and authorities, the decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via U.S. Mail this 1st day of December, 2008 to: Scott C. Black, Esq., Esq., trial counsel for Respondent, 81990 Overseas Highway, 3rd Floor, Islamorada, FL 33036; Robert C. Tilghman, Esq., counsel for Petitioners, One Biscayne Tower, 2 South Biscayne Blvd., Suite 2670, Miami, FL 33131; and Nathan E. Eden, Esq., co-counsel for Petitioners, 302 Southard Street, Suite 205, Key West, FL 33040.

By: _____
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CERTIFICATE OF TYPE SIZE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Brief has been prepared by using Times New Roman 14 point font.

By: _____
Douglas H. Stein