IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC08-789
3DCA No.:3D06-2570

LOUIS R. MENENDEZ, JR. and CATHY MENENDEZ,

Petitioners,

v.

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL, STATE OF FLORIDA

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Facts

Petitioner, Cathy Menendez[1], was injured in a motor vehicle accident on June 14, 2001. When the accident occurred, Cathy Menendez was on the job as an employee of the Monroe County School Board.

At the time of the accident Petitioners were both named insureds on a motor vehicle policy issued to them by Progressive with effective dates of April 1, 2001 to October 1, 2001. (R.3, 5)[2]. When Progressive issued its policy to Plaintiffs, neither the policy nor §627.736, Florida Statutes (2001) required a demand letter[3] as a condition precedent to an action seeking to recover overdue PIP benefits.

Cathy Menendez' medical bills were paid in part by Progressive[4] and, because she was on the job at the time of the accident, other medical bills were

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[1] References to the Petitioners will either be to the "Petitioners" collectively or to Cathy Menendez as "Cathy Menendez" individually. References to Respondent will be to "Progressive."

[2]References to the Record on Appeal will be designated by the letter "R" , followed by the page number(s) and paragraph numbers where appropriate.

[3]Subsection (11) is entitled Demand Letter and the body of the legislation refers to the demand letter as a "written notice of an intent to initiate litigation." Petitioners will refer throughout this brief to such a letter as a demand letter.

[4]In July and August of 2001 Progressive paid $2,131.22 to four different medical providers for services rendered on June 14, 2001, leaving $7,868.78 in available PIP benefits. (R.49).

paid by Monroe County School Board pursuant to Florida's Workers' Compensation Law. (R.48-49; R.99). Cathy Menendez was also paid $5,139.00 for nine weeks of income she lost between June 15, 2001 and August 16, 2001. (R.104). On October 17, 2001, Petitioners settled a third-party personal injury claim arising out of the same motor vehicle accident for the tortfeasor's liability policy limits of $10,000. (R.106-107). Monroe County School Board asserted a workers' compensation lien against the proceeds of the third-party settlement which Petitioners settled on or about March 4, 2002 for the total sum of $2,000. (R.82; R.109-110).

A claim for additional PIP benefits from Progressive was made by Cathy Menendez in December of 2001 through Petitioners' counsel. (R.87). On February 4, 2002, Petitioners' counsel wrote to Progressive's claims manager advising that recent correspondence from Progressive failed to provide Cathy Menendez with the requested application for No-Fault Benefits. (R.86). On March 29, 2002, Petitioners' counsel again wrote to Progressive's claims manager to advise that Progressive had not responded to Cathy Menendez' claim for PIP benefits. (R.88). On April 9, 2002, Petitioners sent a certified letter to Progressive's claims manager again advising that Progressive had completely ignored Cathy Menendez' PIP claim and threatened suit if Progressive did not respond within five days. (R.88).

On April 15, 2002, a Progressive claims representative, Sandra Jones, wrote to Petitioners' counsel for the first time since the claim was made some six months earlier. That correspondence, instead of forwarding the PIP claim forms as requested by Petitioners' counsel or otherwise offering to facilitate Cathy Menendez' PIP claim, suggested only that Progressive was willing to reimburse Monroe County School Board for payments it had made to or on behalf of Cathy Menendez. (R.90). On April 20, 2002, Petitioners' counsel wrote to Progressive's claims representative advising that the worker's compensation lien had been satisfied by the Petitioners and that Cathy Menendez had incurred additional lost wages. (R.92). The April 20, 2002 letter further requested that Progressive immediately send a check in the amount of $2,000 for the amount paid to satisfy the workers' compensation lien and make arrangements to pay PIP benefits for lost income. (R.92).

Having received no response to the April 20, 2002 letter, Petitioners' counsel sent another certified letter to Progressive on May 13, 2002 advising for the second time that, due to the lack of response, suit would be filed. (R.94). On June 4, 2002, Progressive's claim representative again wrote to Petitioners' counsel stating she had not yet determined the amount of workers' compensation benefits paid and thus could not determine how much Monroe County School

Board was entitled to be reimbursed. (R.95). Progressive's letter of June 4, 2002 did not provide PIP application forms or in any way acknowledge Cathy Menendez' right to recover PIP benefits. (R.95).

In addition to the written correspondence with Progressive, Petitioners' counsel had several telephone conversations with Progressive's claims representatives. (R.83, ¶¶4-5). During those conversations Petitioners' counsel advised the adjuster of the prevailing law that established Cathy Menendez' right to recover the $2,000 paid to satisfy the workers' compensation lien under her PIP coverage. (R.83, ¶¶4-5). Throughout these conversations, Progressive's claims representatives consistently took the position that Cathy Menendez was not entitled to PIP benefits because she had received workers' compensation benefits. (R.83-84, ¶¶5, 10). With no further response from Progressive, suit was filed by Petitioners on November 26, 2002, nearly one year after Petitioners first presented their PIP claim to Progressive and six months after Progressive was provided evidence substantiating the satisfaction of the workers' compensation lien. (R.1-8; R. 92).

On June 19, 2001, Chapter 2001-271, Laws of Florida was signed into law, adding a new subsection (11) to §627.736. Subsection (11) required an insured claiming overdue PIP benefits to send a demand letter to the insurer as a condition

precedent to an action to recover those benefits[5]. Having already communicated with Progressive on several occasions, including several demand letters, and believing subsection (11) did not apply to their PIP claim, Petitioners did not send a formal demand letter before filing suit.

The Case

In response to Petitioners' complaint, Progressive filed an answer asserting affirmative defenses, two of which are pertinent to the issues raised in this appeal:

> 4. In the alternative, the Plaintiff has failed to provide this Defendant with adequate notice of the alleged losses.
>
> 7. That Plaintiff has not provided reasonable proof of his/her losses as required by the Florida Statute 627.736.

(R.12). These defenses did not allege that Petitioners failed to send a demand letter or otherwise fail to comply with the requirements found in §627.736(11), Fla. Stat. (2001). Progressive filed a motion on June 30, 2003, seeking leave to amend its answer to add the affirmative defense that §627.736(11), Fla. Stat. (2001) governed this accident, and renewed that motion on March 8, 2004, but never had those motions heard by the trial court. (R.26-30; R. 63-7). Thus, Progressive never

[5]Although §627.736 has been amended several times since 2001, the demand letter remains as a condition precedent to filing suit. See, §627.736(10), Fla. Stat. (2008).

formally asserted the Petitioners' failure to comply with §627.736(11), Fla. Stat. (2001) as a defense.

Although Petitioners still did not believe §627.736(11) applied to their claim, out of an abundance of caution, they sent a demand letter to Progressive on November 3, 2003, while this action was pending. (R.112). Progressive has made no payment since receiving the demand letter.

Progressive filed a Motion for Final Summary Judgment and Motion for Attorney Fees on June 30, 2003 (R.31) and filed a Renewed Motion for Summary Judgment and Motion for Attorney's Fees on March 30, 2004. (R.68). Both motions made the argument that Progressive was entitled to summary judgment because Cathy Menendez failed to provide reasonable proof of her loss and failed to provide Progressive with a demand letter as required by §627.736(11), Fla. Stat. (2001). (R.31-32; R.68-69).

Petitioners filed a Motion for Partial Summary Judgment and Attorneys' Fees on October 22, 2004. (R.73). Petitioners argued, *inter alia*, that Progressive had waived its right to a reasonable proof of loss when it denied coverage and that §627.736(11) did not apply to Cathy Menendez' PIP claim. (R.76-9). In support of their motion, Petitioners filed the affidavit of their counsel which outlined his direct communications with Progressive's claims representatives. (R.83, ¶¶4, 5).

Counsel's affidavit established that, prior to filing suit, Progressive's adjuster had repeatedly and consistently advised that Progressive was not obligated to pay PIP benefits to Cathy Menendez as she had received workers' compensation benefits. (R.82-84, ¶¶5,10). These same sworn facts had been presented to the trial court in Petitioners' verified Motion to Strike as Sham filed in July of 2003 after Progressive filed its first motion for final summary judgment. (R.40, ¶¶5, 10). Despite knowing of this sworn testimony at least two years before the hearing on the summary judgment motions, and despite having been represented by three separate law firms[6], Progressive conducted no discovery to address the issue and filed no affidavit or other evidence to refute the Petitioners' evidence that Progressive had denied all responsibility for the payment of PIP benefits to Cathy Menendez.

The motions for summary judgment were argued before the trial court on July 20, 2005. (R.237). On September 27, 2005, the trial court entered an order denying Progressive's renewed motion for summary judgment and granting Petitioners' motion for partial summary judgment. (R.237-242). The trial court found that §627.736(11), Fla. Stat. (2001) did not apply to any part of Cathy

[6]During this period Progressive was represented by James T. Sparkman & Associates, Adams Blackwell & Diaco, P.A. and Vernis & Bowling of the Florida Keys, P.A. (R.33; R.122; R.143).

Menendez' PIP claim but, even if it did, Cathy Menendez was not required to deliver a presuit demand letter to Progressive because the unrefuted evidence established that Progressive had denied her claim. (R.239, 241). Progressive filed a motion for rehearing on January 12, 2006, which was denied by the trial court on January 24, 2006. (R. 243; R.247).

The case was subsequently set for jury trial on the issue of damages in August 2006. (R.263). Prior to the trial, the parties stipulated to the entry of a judgment in favor of Petitioners. (R.274). On September 18, 2006, the trial court entered the Stipulated Final Judgment wherein Petitioners were awarded damages in the amount of $7,080.00, plus prejudgment interest in the amount of $ 2,818.80. (R.276). Progressive filed its notice of appeal on October 12, 2006. (R.278).

On appeal, the district court reversed, finding that the presuit notice requirements of §627.736(11) did apply to Petitioners' claim for overdue PIP benefits and, because the amendments were merely procedural and did not alter contractual or vested rights, the retrospective application of §627.736 (11) did not unconstitutionally impair Petitioners' existing contract rights. The district court also found that, although Petitioners sent a written notice of intent after the suit was filed, such notice could have no legal effect unless the action was first dismissed and the complaint re-filed. The district court further found that a

question of fact remained as to whether Progressive denied the PIP claim thereby relieving the Petitioners of the requirement of sending a demand letter as a condition precedent to filing suit. Finally, the district court held that, on remand, Petitioners were barred from recovering benefits under the policy unless the jury were to find that Progressive had denied the claim.

SUMMARY OF ARGUMENTS

In their first two arguments on the merits Petitioners contend the decision of the district court is erroneous and in direct and express conflict with decisions of this court and of other district courts on two important issues of law. First, the district court held the presuit requirements of §627.736(11) were merely procedural and can be applied to existing policies of insurance without violating the constitutional prohibition against the impairment of contract rights. This court and other district courts have held that statutory amendments adding substantive changes, including changes imposing conditions precedent, tolling of the statute of limitations, and imposing fees and penalties, the same type of changes found in §627.736(11), cannot be applied retroactively without impairing contract rights and violating Article I, Section 10 of the Florida Constitution. For that reason, the opinion of the district court should be quashed and the Stipulated Final Judgment in favor of Petitioners reinstated.

Second, this court and several district courts have held where an action is prematurely filed due to a failure to comply with conditions precedent, the failure to comply is not fatal to the claim so long as compliance occurs before the statute of limitations expires, even if compliance occurs during the pendency of the action. In conflict with these decisions the district court held compliance with conditions

precedent while an action is pending, even if the limitations period has not expired, is of no legal effect unless the action is first dismissed and the complaint re-filed, and thus recovery is barred. Petitioners contend this holding is erroneous and the opinion of the district court should be quashed and the Stipulated Final Judgment in favor of Petitioners reinstated.

The following two arguments were argued before the district court but not addressed in Petitioner's jurisdictional brief. These arguments are thus presented for the court's discretionary consideration.

In their third argument on the merits, Petitioners argue that, even assuming the 2001 amendments to §627.736, Fla. Stat. should generally be applied retroactively to existing policies, the Legislature did not intend the presuit requirements imposed by the amendments to apply to the benefits sought by Petitioners and thus a written demand was not required. Petitioners submit they were entitled to partial summary judgment and final judgment, and the reversal of said final judgment was erroneous.

And finally, in their fourth argument on the merits, Petitioners contend the district court erred in finding that a question of fact existed as to the denial of Petitioners' PIP claim. In support of their motion for partial summary judgment, Petitioners filed the affidavit of their counsel establishing that Progressive

unequivocally denied the PIP claim. Progressive filed no evidence to counter the affidavit. Thus, under the terms of §627.736(11)(a), Petitioners were relieved of the obligation to comply with statutory conditions precedent before filing suit. Petitioners submit the district court erred in concluding a question of fact existed and thus its opinion should be quashed and the Stipulated Final Judgment in favor of Petitioners reinstated.

ARGUMENTS ON THE MERITS

I. APPLICATION OF AMENDMENTS TO SECTION 627.736, FLA. STAT. (2001) TO INSURANCE POLICY ISSUED PRIOR TO EFFECTIVE DATE OF THE AMENDMENTS IMPAIRED OBLIGATIONS AND RIGHTS UNDER PETITIONERS' EXISTING CONTRACT IN VIOLATION OF FLORIDA CONSTITUTIONAL AND DECISIONAL LAW

The motor vehicle insurance policy issued by Progressive was a six month policy covering the period from April 1, 2001 to October 1, 2001. The addition of §627.736(11) to Florida's No-Fault Act became effective on June 19, 2001, when the governor signed Chapter 2001-271, Laws of Florida into law. In support of the trial court's conclusion that the amendments did not apply to the subject policy, Petitioners argued before the district court that §627.736(11), Fla. Stat. (2001) could not be applied to Petitioners' existing policy without impairing their existing contract rights in violation of Article I, Section 10 of the Florida Constitution[7]. The district court disagreed, finding the application of §627.736(11) to the PIP claim made under Petitioners' existing insurance policy was procedural in nature and did not alter any contractual or vested rights of the Petitioners. Petitioners respectfully

[7]While the issue of impairment of contract rights was not raised before the trial court, a judgment should be affirmed if, upon the pleadings and evidence before the trial court, there is any theory or principle of law that will support the judgment, even if the issued was not argued before the trial court. *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999). The record below fully supports the application of this principle.

submit the amendments to Florida's No-Fault statutory scheme found in §627.736(11) are of the same nature as amendments this and other Florida courts have found to be substantive changes and refused to apply to existing contracts.

Florida has long recognized that the statute in effect at the time an insurance policy is issued governs the parties' substantive rights. *Hassen v. State Farm Mutual Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996). As this court has recognized, "where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become a part of the contract." *Grant v. State Farm Fire and Cas. Co.*, 638 So 2d 936, 938 (Fla. 1994)(citations omitted). Similarly, substantive statutory changes that occur between policy renewals cannot be incorporated into existing policies. *Hassen, supra*; *see also, Esancy v. Hodges*, 727 So. 2d 308, 309-10 (Fla. 2d DCA 1999)(changes in statutes that occur between policy renewals cannot be incorporated into an insurance policy without unconstitutionally impairing the parties' obligations); *Allstate Ins. Co. v. Garrett*, 550 So. 2d 22 (Fla. 2d DCA 1989), *rev. den.*, 563 So. 2d 631 (1990)(amendment to §627.736(7)(a) allowing insurer to terminate payments to medical providers did not apply to policy issued before effective date of amendment).

In determining whether statutory changes can be applied retroactively, this court has held that statutory changes that create new obligations, burdens or duties, or impose new penalties cannot be applied to existing insurance policies. *State Farm Mutual Auto. Ins. Co. v. LaForet*, 658 So. 2d 55, 61 (Fla. 1995)(citations omitted). The application of such substantive changes to existing contracts results in an unconstitutional impairment of contract rights in violation of Article I, Section10 of the Florida Constitution. *State Farm Mutual Auto. Ins. Co. v. Gant*, 478 So. 2d 25, 26-7 (Fla. 1985).

Subsection (11) of §627.736 added several new obligations, burdens and penalties that are of the same type that have been found to be substantive. First, subsections (11)(a) and (d) require the claimant, as a condition precedent, to provide a written notice of an intent to initiate litigation to the insurer before filing an action for overdue benefits[8], and provide the insurer an additional seven business days within which to pay the overdue claim. Second, if payment is made within the seven business days, it shall include applicable interest[9] and a penalty of ten percent of the overdue amount paid, but not more than $250.00. Third, subsection (11)(d) further provides that, if the insurer pays the overdue amount

[8]Benefits are overdue if they have not been paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. §627.736(4)(b), Fla. Stat. (2001).

within the seven business days, it cannot be sued for nonpayment or late payment and will no longer be exposed to attorney's fees for such overdue payments. Fourth, subsection (11)(e) provides that the statute of limitations is tolled for 15 business days following the mailing of the demand letter.

Several decisions have concluded that notice requirements, including presuit notice requirements, are substantive in nature. In *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991), this court rejected the contention that the presuit notice requirement found in §768.57, Fla. Stat. (1985), a condition precedent to filing suit, was procedural. *Id.* at 983. In finding the statute primarily substantive, this court recognized that a major factor in the presuit process was the tolling of the statute of limitations. *Id*. In *VanBibber v. Hartford Accident & Indemnity Ins. Co.*, 439 So. 2d 880 (Fla. 1983), this court held that the condition precedent to filing an action against a liability carrier imposed by the non-joinder statute could not be applied retroactively as it was substantive in nature. *Id*. at 883. And in *Yamaha Parts Distributors Inc. v. Ehrman*, 316 So. 2d 557 (Fla. 1975), the parties' existing franchise agreement provided for the termination of the agreement upon thirty days written notice. *Id.* at 558. Section 320.641, Fla. Stat. (1971), enacted after the franchise agreement was entered into, required ninety days written notice prior to

[9]The payment of interest was previously required under §627.736(4)(b).

cancellation. *Id.* This court found the right to terminate the agreement within thirty days a valuable right such that the ninety day notice requirement could not be retroactively applied without constitutionally impairing contract rights. *Id.* at 558-9.

Several district courts have also found notice requirements to be substantive in nature. In *Walker v. Cash Register Auto Ins. of Leon County, Inc.*, 946 So. 2d 66 (Fla.1st DCA 2006) the district court addressed whether the safe-harbor amendment to §57.105, Fla. Stat. (2002) could be applied retroactively to a pending action. *Id*. at 71. While §57.105 previously provided for the sanction of attorney's fees, the amendment required a twenty-one day notice to the non-moving party before a motion for sanctions could be filed. *Id.* at 70. The district court found such notice requirements were a substantive addition to the statute and could not be applied retroactively. *Id*. at 71. The same result was reached in *Hampton v. Cale of Fort Myers, Inc.*, 964 So. 2d 822 (Fla. 4th DCA 2007). And in *Lumbermens Mutual Cas. Co. v. Ceballos*, 440 So. 2d 612 (Fla. 3d DCA 1983), the district court found the amendment to §627.739, Fla. Stat. (1975) requiring an insurer to provide notice to an insured of the need for collateral insurance to cover PIP deductibles could not be applied to existing policies. *Id.* at 613.

Florida courts have also found that statutory changes granting the right to attorneys fees or penalties to be substantive in nature. For example, in *LaForet* this court refused to retroactively apply a new statute that increased damages in bad faith actions because it was, in substance, "a penalty for the wrongful failure to pay a claim." 658 So. 2d at 61. In *L. Ross, Inc. v. . R.W. Roberts Construction Co., Inc.*, 481 So. 2d 484 (Fla. 1986), this court addressed the retroactive application of §627.756, Fla. Stat. (1983) which was amended to remove the limitation of attorneys fees in actions against sureties on payment bonds that had been capped at twelve and one-half percent. *Id.* at 484. In refusing to apply this change to existing cause of action, this court held "the right to attorney fees is a substantive one, as is the burden on the party responsible for paying the fee. A statutory amendment affecting the substantive right and concomitant burden is likewise substantive." *Id.* at 485. In *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985), this court refused to retroactively apply §768.56, Fla. Stat. (1981) to an existing action as the attorney fee provision constituted a "new obligation or duty" and was thus "substantive in nature." *Id*. at 1154. Similarly, the court in *Cooper v. Aetna Casualty & Surety Co.*, 485 So. 2d 1367 (Fla. 2d DCA 1986), held that an amendment to §627.727, Fla. Stat. (1983) limiting an award of attorneys fees to disputes over coverage issues was substantive and could not be applied to an existing cause of action. *Id*. at 1368.

The limitations imposed by §627.736(11) on the right to file an action to recover overdue benefits and the elimination of attorneys fees as a sanction for the delayed payment of PIP benefits, clearly alter an insured's right to a swift recovery. Likewise, the imposition of a ten percent penalty affects both the insurer who must pay the penalty[10] and the insured to whom the penalty will be paid. Here, when the policy was issued by Progressive, Petitioners had the right to file an action immediately upon the PIP claim being overdue. *See*, *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 891-2 (Fla. 2003)(once insurer has reasonable proof of PIP claim, payment is overdue if not paid within thirty days and insurer does not have reasonable proof it is not responsible for the payment, triggering cause of action); *Amador v. United Auto. Ins. Co.*, 748 So. 2d 307, 308 (Fla. 3d DCA 1999), *rev. den.*, 767 So. 2d 464 (2000)(if the insurer does not pay by the statutory 30-day period, on the 31st day the insured is free to initiate a lawsuit). The right to immediately file suit was considered necessary in light of the recognized purpose of PIP coverage, i.e., to "provide swift and virtually automatic payment so that the

[10]While it would be reasonable to expect Progressive to agree that an imposition of a penalty is a substantive statutory change that cannot be applied retroactively, the limited amount of the penalty, capped at $250.00 is no doubt of no moment to Progressive. Nonetheless, the magnitude of the penalty does not change its substantive nature.

injured insured may get on with his life without undue financial interruption." *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683-4 (Fla. 2000).

Section 627.736(11) likewise affects the insured's ability to enlist assistance of counsel. Prior to the amendment, an insured could retain counsel and recover the full amount of the PIP benefits as counsel would likely be fully compensated by an award of fees to be paid by the carrier. Under §627.736 (11), an insured seeking to recover an overdue payment is likely to be limited to a ten percent recovery, hardly enough to retain counsel. For example, an insured trying to get a $500.00 medical bill paid will be entitled to recover a ten percent penalty of $50.00 if the insurer pays within the seven business day afforded. The expectation of a $50.00 payment cannot be considered an amount sufficient to retain competent counsel. The net effect[11] will be the inability to retain counsel or a reduced recovery of PIP benefits. The purpose of the provision providing for attorneys fees is to "level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to redress in the courts." *Ivey v. Allstate Ins. Co.*, *supra* at 684. By providing an

[11]While Petitioners appreciate the legislature's goal in reducing the abuses in the existing statutory no-fault scheme, there can be no question that the substantive rights of insureds are diminished by the enactment of §627.736(11).

insurer with another chance to pay overdue PIP benefits without being exposed to attorneys fees clearly alters this important and significant right.

Petitioners submit the foregoing analysis makes it clear the changes imposed by §627.736(11) are substantive and thus cannot be applied to the policy issued to Petitioners without violating their constitutional rights. The decision of the district court should thus be quashed and this case remanded for the reinstatement of the Stipulated Final Judgment.

II. COMPLIANCE WITH STATUTORY PRESUIT NOTICE REQUIREMENT AFTER SUIT WAS FILED BUT BEFORE STATUTE OF LIMITATIONS HAD EXPIRED SATISFIED STATUTORY REQUIREMENT AND ENTITLED PETITIONERS TO PARTIAL SUMMARY JUDGMENT

Petitioners argued to both courts below that, because the requirements of §627.736(11) had been complied with before the statute of limitations expired, Petitioners were entitled to a partial summary judgment in their favor even though the suit was filed before the demand letter was sent in November 2003. (R. 79; Appellees' Answer Brief at pp. 32-9). As the trial court found §627.736(11) did not apply to the PIP claim, its order granting Petitioners' motion for partial summary judgment and denying Progressive's motion for summary judgment was silent as to the effect of the demand letter sent after suit was filed.

The district court, on the other hand, finding that §627.736(11) did apply to Petitioners' PIP claim, held that the demand letter sent while this action was pending did not satisfy the condition precedent and, in the "absence of a dismissal and subsequent refiling of the complaint," the demand letter had "no legal effect." *Progressive Express Insurance Co. v. Menendez*, 979 So. 2d 324, 334 (Fla. 3d DCA 2008). The district court further held that, on remand, if the jury finds Progressive did not deny the claim, Petitioners "are barred from recovery under the insurance contract", presumably because the five year statute of limitations had by then expired. *Id*. at 335. Petitioners respectfully submit the district court's opinion is contrary to prevailing law and directly and expressly conflicts with decisions of this court, other district courts of this state and its own prior decisions on the issue of whether a party may effectively comply with conditions precedent even after suit has been filed.

Petitioners have found no case that has addressed this issue in the context of the presuit requirements set forth in §627.736(11). Numerous cases have addressed compliance with conditions precedent in similar circumstances, however, and those cases are controlling. For example, in *Kukral v. Mekras,* 679 So. 2d 278 (Fla. 1996), this court recognized "the failure to comply with the presuit requirements of the [medical malpractice] statute is not necessarily fatal to a plaintiff's claim so

long as compliance is accomplished within the . . . limitations period for filing suit," citing several of its prior decisions and decisions of district courts that have applied that rule to other presuit requirements. *Id.* at 283 (citations omitted). In *Kukral*, the plaintiffs initially served a notice of intent to initiate litigation but did not include a verified medical expert opinion with the notice as required by §766.203(2), Fla. Stat. (1991). *Id*. at 279. The verified medical opinion was provided after the defendant denied the claim and less than ninety days before suit was filed. *Id.* The district court affirmed the dismissal, holding that the "initial failure to strictly comply with the presuit requirements of the statute . . . was fatal to their claim, regardless of any subsequent compliance with the statute's requirements prior to the expiration of the limitations period. *Id*. at 282. This court quashed the district court's opinion, holding that, while carrying out the legislative policy of requiring the parties to engage in meaningful presuit investigation, discovery and negotiations, such presuit statutory schemes must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts. *Id*. at 284. *See also, Florida Hospital Waterman v. Stoll*, 855 So. 2d 271, 276 (Fla. 5th DCA 2003)(the failure to comply with medical malpractice presuit requirements is not fatal to a plaintiff's claims so long as compliance is accomplished within the statute of limitations); *Popps v. Foltz*, 806

So. 2d 583 (Fla. 4th DCA 2002)(dismissal of action for failure to comply with medical malpractice presuit discovery after first presuit notice of intent was not warranted where discovery was subsequently fully complied with).

This liberal interpretation favoring access to the courts has been applied to other statutory schemes that provide for conditions precedent to filing suit. For instance, in *Holding Electric, Inc. v. Roberts,* 530 So. 2d 301 (Fla. 1988), a mechanics' lien foreclosure action was dismissed for the failure to deliver a statutorily mandated affidavit before filing suit. *Id.* at 302. Section 713.06(3)(d)(1), Fla. Stat. (1985) required a contractor to deliver an affidavit to the owner at least five days prior to filing suit. *Id.* Although the plaintiff filed suit before delivering the affidavit, this court reversed the dismissal finding that the plaintiff should have been allowed to continue the action. *Id.* at 303.

Florida courts have also applied this liberal standard to ensure access to courts in the context of conditions precedent found in Florida's waiver of sovereign immunity statute, §768.28(6), Fla. Stat. In *Askew v. County of Volusia*, 450 So. 2d 233 (Fla. 5th DCA 1984), the district court found that presuit notice required by §768.28(6), Fla. Stat. (1981), although given after suit was filed, was properly given within the statute of limitations and thus dismissal of the complaint was error. *Id.* at 235. In *Williams v. Henderson,* 687 So. 2d 838 (Fla. 2d DCA

1996), although the plaintiff did not wait six months before filing suit as required in §768.28(6), Fla. Stat. (1989), the appellate court reversed the summary judgment in favor of the defendant, finding that the failure to comply with the condition precedent was not fatal to the claim. *Id.* at 839-40. And in *Lee v. South Broward Hospital District*, 473 So. 2d 1322 (Fla. 4th DCA 1985), the appellate court reversed the dismissal with prejudice where the notice required by §768.28(6) had been given after suit was filed. *Id*. at 1324.

The Third District and other district courts have followed this rule in the context of the written demand requirements of Florida's civil theft statute. In *Christopher Advertising Group, Inc. v. R & B Holding Company, Inc.*, 883 So. 2d 867 (Fla. 3d DCA 2004), the court addressed the failure of the plaintiff to wait thirty days after sending the written demand required by §772.11, Fla. Stat. (1995). *Id*. at 875. The trial court dismissed the action as having been prematurely filed. *Id*. In reversing, the district court held that, because the thirty day period had expired at the time the motion was heard, the case should not have been dismissed. *Id*. at 876. *See also*, *Seymour v. Adams*, 638 So. 2d 1044, 1049 (Fla. 5th DCA 1994)(unless it appears that plaintiff would be unable to comply with the presuit written demand requirements of §772.11, Fla. Stat. (1989) within statute of limitations, summary judgment is inappropriate).

And finally, in *Thomas v. Suwannee County*, 734 So. 2d 492 (Fla. 1st DCA 1999), this same rule providing for the liberal access to the courts was applied in the context of conditions precedent found in §163.3215(3)(b), Fla. Stat. (1993). *Id*. at 495. In that case, the trial court dismissed the action based upon the plaintiffs' failure to comply with the statutory condition precedent of waiting thirty days before filing suit. *Id*. The district court held that, since the passage of time had cured the problem before the trial court acted on the motion to dismiss, the motion should have been denied. *Id*. at 497.

Petitioners submit the foregoing cases all involve statutory schemes that are intended to encourage the settlement of claims without the cost and burden of hiring counsel and pursuing litigation. The written demand requirement found in §627.736, Fla. Stat. (2001) is no different. Nonetheless, Florida courts have consistently favored access to the courts while still carrying out the legislative policy of requiring parties to engage in presuit negotiations. *Kukral, supra* at 284. In this case, once Progressive filed its motion for leave to amend to assert the defense, a motion that was never heard, Petitioners sent a written demand in

compliance with §627.736(11), trying to bring a resolution to the claim. Had Progressive intended to ever pay this claim it could have done so at that time[12].

In considering the effect to be given to the written demand letter, the district court focused on the procedural question of whether it was the Petitioners' duty to dismiss this action and re-file it, or to move the court for abatement, in order to preserve their right to continue this action. The district court ruled that, in failing to dismiss their action or move to abate the action[13], Petitioners waived their rights. Petitioners submit that, since Progressive had not been given leave to amend its answer to assert noncompliance as an affirmative defense when Petitioners served their written demand letter, it was not Petitioners' burden to bring the issue before the court. Petitioners further submit that any action on their part once they mailed the written demand would have served no purpose other than to increase costs,

[12]Progressive argued below there was no way to pay the claim without confessing judgment or to avoid the prejudice of having to defend the action for one year. Its excuses for non-payment are disingenuous. Progressive could have avoided its own attorneys fees by promptly resolving the case without a formal written demand. Further, Progressive could have argued the Petitioners were not entitled to attorneys fees for the period of time prior to the written demand and avoided paying fees to Petitioners by appropriate motion and order by the trial court.

[13]The district court characterizes Petitioners' argument as suggesting the case should have been abated. Actually, Petitioners argued that abatement would have been the proper course had the issue been brought before the trial court but that, with the passage of time, the need to abate the action had been rendered moot. (Appellees' Answer Brief at pp. 35-6)

attorneys fees and labor for the Clerk of Court. Under these circumstances the district court's ruling is a harsh and unnecessary sanction.

The futility of seeking a stay or abatement was apparent under the circumstances that existed at the time. The purpose serving a written demand letter is to provide the insurer seven business days to pay the overdue claim. Had Petitioners filed a motion to abate or the stay the action once they served the written demand letter, they would not have been able to schedule a hearing and have the matter heard by the trial court before the expiration of the seven business days. Had Petitioners chosen to dismiss their action, they would have had to pay an additional filing fee, forced Progressive to pay its attorneys additional fees and burdened the Clerk with an additional court file.

To require a dismissal or abatement under these circumstances would be, as the Third District once described it, senseless "wheel spinning." *Christopher Advertising Group, Inc. v. R & B Holding Company, Inc.*, 883 So. 2d 867, 876 (Fla. 3d DCA 2004); *see also*, *Angrand v. Fox*, 552 So. 2d 1113 (Fla. 3d DCA 1989)(because the ninety day presuit period had run when the motion was heard, dismissal would serve no purpose other than to require the payment of additional fees). In the instant case, the district court has ruled the Petitioners are barred from recovery, despite having provided written notice, for failing to do what it has

historically considered to be senseless acts. Such a harsh result is not warranted and is contrary to the very basic tenets of Florida law, depriving Petitioners of their day in court for no substantial reason. *See, e.g., Kinney v. R.H. Halt Associates, Inc.*, 927 So. 2d 920, 921 (Fla. 2d DCA 2006)(dismissal in all but most extreme and egregious circumstances is an infringement upon the basic right to have courts open to every person for redress of any injury).

Petitioners respectfully submit that, even if the statutory amendments found in §627.736, Fla. Stat. (2001) did apply to the policy issued on April 1, 2001, all conditions precedent were complied with by the written demand sent in November 2003 and Progressive's failure to timely pay the overdue PIP claim within seven business days after receipt of that written demand entitled Petitioners to proceed with this action. Petitioners further submit that, as there is no dispute that Petitioners were entitled at that time to recover PIP benefits, they were entitled to the partial summary judgment entered by the trial court. Accordingly, the decision of the district court should be quashed and this action remanded for the reinstatement of the Stipulated Final Judgment in favor of Petitioners.

The following arguments address issues that were addressed below but were not the subject of Petitioners' Jurisdictional Brief. Petitioners respectfully request that the court exercise it discretion and consider these issues. *Boca Burger, Inc. v. Forum*, 912 So. 2d 561 (Fla. 2005).

III. OVERDUE PIP BENEFITS SOUGHT BY PETITIONERS WERE NOT BENEFITS FOR WHICH PRESUIT NOTICE WAS REQUIRED

Petitioners argued below that, even assuming the 2001 amendments adding subsection (11) to §627.736 applied to the policy issued by Progressive on April 1, 2001, the Legislature did not intend the required demand letter to apply to claims for benefits sought by Petitioners in their PIP claim and thus no demand letter was required as a condition precedent to this action. The district court disagreed and found that the language of the statute and enacting legislation required application to Petitioners' claims.

Petitioners' argument below was based, in part, upon the recognized abuses in medical claims under PIP coverage and the reason the Legislature felt corrective measures were needed. The title to Ch. 2001-271, Laws of Fla., indicates the act was intended to address insurance fraud and abuses by amending and creating statutory provisions dealing with criminal penalties, the provision of medical

services and personal injury protection benefits. In Section 1 of the act, the Legislature presented its findings that the medical care mandated by the Florida Motor Vehicle No-Fault Law was subject to numerous abuses due to fraud, medically inappropriate over-utilization of treatment and diagnostic services, inflated charges, and other practices on the part of a small number of health care providers and unregulated health care clinics, entrepreneurs and attorneys. The Legislature adopted and incorporated into the act the second interim report of the Fifteenth Statewide Grand Jury entitled "Report on Insurance Fraud Related to Personal Injury Protection."

A review of the entire act and the report of the Fifteenth Statewide Grand Jury make it clear the act was intended to address only abuses related to the medical benefits required under PIP coverage. Nowhere in the legislative findings or Grand Jury report was there a suggestion that claims for disability (lost wages) or death benefits were being abused by insureds, employers or attorneys. Neither the Grand Jury's recommendations nor the language of the act itself addressed claims for lost wages or death benefits or imposed restrictions or obligations on employers.

That the act focused exclusively upon correcting abuses involving medical treatment and services helps explain why the Legislature failed to provide for

specific effective date for lost wage and death claims. It is clear, however, that the Legislature considered the abuses relating to medical treatment and services to be of great public importance and that corrective measures needed to be implemented. In implementing the corrective measures, the Legislature enacted presuit notice requirements for medical claims to become effective on October 1, 2001.

Despite the Legislature's clear intent to remedy abuses relating to medical treatment, the district court construed the act to require a presuit notice of intent in lost wage and death claims almost four months before such presuit notice would apply to medical claims. As this court has held, when a statute is susceptible of and in need of interpretation or construction, it is axiomatic that the courts should endeavor to avoid giving it an interpretation that will lead to an absurd result. *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Service*, 444 So. 2d 926, 929 (Fla. 2006). Since it is clear that the purpose of Ch. 2001-271, Laws of Fla. was to correct abuses in claims seeking to recover medical benefits, and not claims seeking lost wages or death benefits, it is inconceivable the Legislature would have intended the effective date of corrective measures to apply first to claims that were not perceived to be subject to abuses and then, almost four months later, to the types of claims that were subject to abuses. Petitioners

respectfully submit the interpretation given to the act by the district court leads to an absurd result.

The significance of the district court's construction is apparent when the nature of Petitioners' PIP claim is considered. That PIP claim sought to recover two elements, the $2,000.00 she paid to settle the workers' compensation lien[14] and $7,080.00 in supplemental income she lost during the summer of 2001[15]. At the time the workers' compensation lien was settled, Cathy Menendez' employer had paid both medical expenses and indemnity benefits, i.e., loss of income. The lien was satisfied with a single payment that did not allocate specific amounts as being paid for medical benefits and lost income. Thus, it is reasonable to conclude that the $2,000 lien satisfaction included payment for both medical expenses and lost income.

[14]Section 440.39(3)(a), Fla. Stat. (2001) created a lien against the proceeds of any settlement against a third-party tortfeasor.

[15]Other benefits such as rehabilitative services and nursing services, etc., rendered before October 1, 2001, although within the scope of damages sought by the complaint (R.2) and elements of damages that would have been sought by Petitioners had this case gone to trial, are not reflected in the record.

When the Petitioners settled the third-party claim against the tortfeasor on October 17, 2001[16], Cathy Menendez' employer had made thirteen payments to various medical providers for a total of $8,185.58. (R.101-103). All thirteen payments were for medical treatment that occurred between the dates of June 14, 2001 and August 31, 2001. (R.101-103). Further, all of the disability payments made to Cathy Menendez, a total of $5,139.00, was for income she lost in June, July and August of 2001. (R. 104). Thus, both the benefits to which the lien attached and Petitioners' lost supplemental income claim, were for losses that occurred before October 1, 2001[17].

There is no dispute in this action that the amendment adding §627.736 (11), Fla. Sat. (2001) to Florida's No-Fault statutory scheme was intended to apply to medical treatment and services that occurred after October 1, 2001. Chapter 2001-271, §11(3), Laws of Florida clearly provided:

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

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[16]*See, Commercial Union Insurance Co. v Fallen*, 603 So. 2d 610, 613 (Fla. 5th DCA 1992)(workers' compensation lien "attaches when the amount is liquidated through judgment or settlement").

[17]Even if the lien were to have attached at the time of the lien settlement, March 4, 2002, only one payment for $63.00 had been made for treatment that occurred after October 1, 2001. (R.100). That one payment represented less than one percent of the workers' compensation benefits paid as of the March 4, 2001 lien settlement.

Since all of the medical bills that the lien attached to were incurred and paid prior to October 1, 2001, the presuit requirements of §627.736 (11) clearly do not apply to that portion of Petitioners' claims. It is the lost income portion of Petitioners' PIP claim that raises the issue of the applicability of the presuit notice requirements found in §627.736 (11), Fla. Stat. (2001). Again, lost income claims were not the subject of the Grand Jury report nor were they perceived by the Legislature to be subject to abuse. Nonetheless, Progressive argued, and the district court agreed, that, irrespective of Legislature's intent to correct abuses relating to medical claims, the presuit requirements must apply to lost income claims months before they are applied to medical claims. This conclusion was based upon the following section of the act:

> . . . subsection (11) of section 627.736, Florida Statutes, shall apply to treatment and services occurring on or after October 1, 2001, except that subsection (11) of 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(3), Laws of Fla.(Emphasis added). Petitioners argued below that this language made it clear the Legislature intended subsection (11) to apply on the effective date of the act to claims for "interest only", whether such interest claims were pursued as original claims, amended claims, or in the way of a

judgment. Thus, by providing a specific effective date for claims and judgments for "interest only", where it was unnecessary to do so, the Legislature must have intended all other types of claims to have a different effective date. Petitioners urged the application of the rule of statutory construction, *expressio unius est exlusio alterius,* to conclude that, by specifically identifying claims and judgments for "interest only" as having an effective date upon the act becoming law on June 19, 2001, particularly where nothing needed to be stated, the Legislature intended a different effective date for other types of claims. *See, Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80 (Fla. 2000) (mention of one thing by the Legislature implies the exclusion of another).

The district court disagreed and concluded the Legislature intended subsection (11) to apply to all claims, not just for claims for interest only. Petitioners submit that, if the Legislature intended subsection (11) to apply to all claims, it would not have provided a specific effective date for claims for medical treatment and services, nor would it have included the phrase "for interest only." The courts in Florida are not to presume that the Legislature employed useless language in enacting statutory amendments or give meaning to a statute that renders language superfluous. *Johnson v. Feder*, 485 So. 2d 409, 411 (Fla. 1986).

Petitioners thus submit the failure of the Legislature to include a specific effective date for PIP claims seeking lost wages and death benefits creates an ambiguity in the act. In addressing this ambiguity, this Court should apply rules of statutory construction and explore legislative history to determine the Legislature's intent in amending §627.736. *Freeman v. First Union Nat. Bank*, 865 So. 2d 1272, 1276 (Fla. 2004)(citations omitted). To discern legislative intent, courts must consider the act as a whole, the evil to be corrected, and the language of the act, including language contained in the title. *State v. Webb*, 398 So. 2d 820, 824-5 (Fla. 1981)(citation omitted). The act and the Grand Jury report make it clear the Legislature's priority was to correct abuses relating to medical claims and, if it intended claims relating to medical bills to have a different effective date than claims for other types of PIP claims, it would have made the effective date for claims for medical treatment and services earlier than those other claims, not later. It simply makes no sense that the urgency with which corrective measures were to be implemented for claims that were not the subject of abuse was greater than for those claims that were being abused.

That the Legislature did not make this intent clearer is understandable in light of the focus of the act and investigation on medical treatment and services. Nonetheless, the ambiguity created is apparent and the only reasonable

interpretation to be given to the act is to apply the effective date of October 1, 2001 to all types of PIP claims except those claims for interest only. For these reasons, Petitioners submit the decision of the district court should be quashed and the Stipulated Final Judgment reinstated.

IV. CONDITIONS PRECEDENT REQUIRED BY SECTION 627.736(11), FLA. STAT. (2001) DID NOT APPLY TO PLAINTIFF'S PIP CLAIM BECAUSE PROGRESSIVE DENIED CLAIM AS A MATTER OF LAW

Section 627.736(11)(a) specifically provides that a demand letter is not required where the insurer has denied the claim. In support of their motion for partial summary judgment, Petitioners filed the affidavit of their counsel who had several direct communications with Progressive's representatives. (R.82). Counsel's sworn testimony established that he had several conversations with Progressive's claims representative, Sandra Jones, and that Sandra Jones had unequivocally represented that Progressive would not pay PIP benefits to Cathy Menendez because she had received workers' compensation benefits. (R.83-84; R.41-42). This same testimony had been filed with the trial court in Petitioners' Verified Motion to Strike as Sham in July 2003. (R.40-53). In opposing Petitioners' motion for partial summary judgment, Progressive could have had its claims representatives execute affidavits to refute counsel's testimony or it could

have deposed Petitioners' counsel to challenge his testimony. Progressive chose instead to file nothing to refute or challenge counsel's testimony.

Once Petitioners presented evidence establishing that Progressive had denied Petitioners' PIP claim by declaring it would not pay Cathy Menendez any PIP benefits, it was Progressive's burden to come forward with evidence to counter that sworn testimony. Florida law provides that once a movant tenders competent evidence to support a summary judgment motion, the opposing party must come forward with counter evidence sufficient to reveal a genuine issue. *Harvey Building, Inc. v. Haley*, 175 So.2d 780, 782 (Fla. 1965). Progressive did file two affidavits by Robert Grant (R.71, 114), a claims adjuster with no firsthand knowledge of the conversations between Petitioners' counsel and Progressive's adjusters. (R.41, ¶8, R.83, ¶8). Neither affidavit challenged counsel's testimony or otherwise attempted to raise a question of fact on the issue of the denial of the PIP claim. Thus, despite having two years within which to secure some proof that it did not deny the claim, Progressive failed to meet its burden and Petitioners' counsels' testimony remained the only evidence presented to the trial court on the denial of coverage, testimony that was entirely uncontested.

Nonetheless, the district court concluded two letters sent by Progressive's claims representatives raised questions of fact regarding whether Progressive had

denied the claim thus precluding the partial summary judgment. Petitioners submit the district court erred in its conclusion as the letters are consistent with the affidavit filed by Petitioners' counsel and, in fact prove, that Progressive had no intention to pay Petitioners' PIP claim. The two letters sent by Progressive clearly indicate Progressive intended to reimburse Cathy Menendez' employer, and not Cathy Menendez. The first letter states Progressive was inquiring into what "they [workers' compensation] have paid . . . so they [workers' compensation] can be reimbursed." (R.90). The second letter likewise indicates Progressive "need[s] to see what they [workers' compensation] have paid out before we can determine any reimbursement." (R.95).

When these two letters were written, Progressive knew Cathy Menendez' employer had paid workers' compensation benefits to or on behalf of Cathy Menendez and that the workers compensation lien had been satisfied out of the third-party settlement. As a matter of law, Progressive was obligated to pay Petitioners the amount paid to satisfy the lien and owed nothing in the way of reimbursement to the employer or its workers' compensation carrier. *See, Delehanty v. Coronet Insurance Company*, 619 So.2d 990 (Fla. 2d DCA 1993)(insured entitled to recover from PIP carrier amount paid in satisfaction of workers' compensation lien, plus attorney's fees and costs)*; Atlanta Casualty*

Company v. Yadevia, 579 So.2d 213 (Fla. 2d DCA 1991), *rev. den.*, 591 So. 2d 185 (1991)(same). Its stated intent to reimburse Cathy Menendez' employer is necessarily a denial of Cathy Menendez' right to recover and raises no issue of Progressive's intent to pay her claim.

Further, the letters sent by Progressive were sent well beyond the thirty days it had to pay the PIP claim. Florida law provides that the burden is upon the insurer to verify the insured's claim within thirty days. *See, Palmer v. Fortune Ins. Co.*, 776 So.2d 1019 (Fla. 5th DCA 2001), *rev. den.*, 791 So. 2d 1096 (2001)(burden is upon the insurer to authenticate claim within thirty days and insurer cannot shift burden to insured or her attorney); *Crooks v. State Farm Mutual Auto. Ins. Co.*, 659 So.2d 1266 (Fla. 3d DCA 1995), *rev. dism.*, 662 So. 2d 933 (1995)(the burden is clearly upon the insurer to authenticate the claim within the statutory time frame. To rule otherwise would render the . . . 'no-fault' insurance statute a 'no pay' plan-a result we are sure was not intended by the legislature); and *Amador v. United Auto. Ins. Co.*, 748 So. 2d 307 (Fla. 3d DCA 1999), *rev. den.*, 767 So. 2d 464 (2000)(insurer may not use investigation as an excuse to extend the time within which to pay PIP benefits). The letters sent by Progressive were an admission that in June of 2002, six months after Petitioners first advised Progressive of their PIP claim and well over thirty days after it was aware of the

lien satisfaction paid by Petitioners, it had not taken steps to authenticate the claim or verify the amounts paid by Cathy Menendez' employer and had no intention of paying the claim. As a matter of law, once Progressive failed to pay the claim within thirty days, Petitioners were free to file suit. *See, Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 891-2 (Fla. 2003)(once insurer has reasonable proof of PIP claim, payment is overdue if not paid within thirty days and insurer does not have reasonable proof it is not responsible for the payment, triggering cause of action).

While Petitioners submit that no reasonable men could differ in the interpretation of the two letters, even if letters from Progressive could somehow be construed as suggesting Progressive might someday pay benefits, or for that matter, even if the letters had specifically acknowledged coverage and entitlement to payment, once Progressive's adjuster told Petitioners' counsel it would not pay the claim, any prior inconsistent statements would have been irrelevant. Again, the two letters simply cannot refute or raise questions of fact as to what was told to Petitioners' counsel. *See, Peachtree Casualty Ins. Co. v. Walden,* 759 So. 2d 7, 8 (Fla. 5th DCA 2000)(even though insurer had paid some PIP benefits, once it told insured it would no longer would pay PIP benefits, insured did not need to wait to see if insurer was only kidding and could file suit immediately); *Donovan v. State*

Farm Fire & Cas. Co., 574 So. 2d 285, 286 (Fla. 2d DCA 1991)(cause of action accrued when insurer declined to make further payments after having paid benefits for three years). Thus, Progressive could not rely upon the letters it sent to create an issue of fact as they cannot refute the undisputed evidence of its denial of Petitioners' PIP claim.

The undisputed evidence before the trial court conclusively established that Progressive denied Cathy Menendez' claim for PIP benefits. If §627.736(11) applied, Progressive's denial, pursuant to subsection (11)(a), relieved Cathy Menendez of any obligation to comply with actual or perceived conditions precedent and gave the Petitioners the right to immediately file suit. The trial court properly found there were no genuine issues of material fact as to Progressive's denial of Petitioners' claim and that Petitioners were not obligated to provide written notice to Progressive as a condition precedent to this action. Petitioners respectfully submit the district court erred in finding the existence of a disputed issue of fact and in reversing the trial court's final judgment. Accordingly, the decision of the district court should be quashed and this action remanded for the reinstatement of the Stipulated Final Judgment.

CONCLUSION

Petitioners respectfully submit that the opinion of the Third District expressly and directly conflicts with opinions of this Court and other district courts on both the retrospective application of amendments to section 627.736, Florida Statutes (2001) to existing policies and the legal effect of compliance with conditions precedent after suit is filed. For the reasons set forth above, the decision of the district court should be quashed and this case remanded for the reinstatement of the Stipulated Final Judgment.

Petitioners further submit that the issues raised in Arguments III and IV, while not demonstrating direct or express conflict with other decisions, demonstrate the entry of the final judgment in favor of Petitioners by the trial court was proper and should be reinstated.

Finally, Petitioners submit the district court's order granting attorneys' fees to Progressive should also be quashed and an order granting fees to Petitioners, consistent with their Motion for Attorneys Fees, be entered by this court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct hereof has been furnished by U.S. Mail this ____ day of November, 2008 to: **DOUGLAS H. STEIN, ESQ.,** Co-Counsel for Respondent, Progressive Express Insurance Company, Anania & Bandklayer, Bank of America Tower, 100 SE 2nd Street, Suite 4300, Miami, Florida 33131**, SCOTT C. BLACK, ESQ.**, Co-Counsel for Respondent, Progressive Express Insurance Company, Vernis & Bowling of the Florida Keys, PA, Islamorada Professional Center, 81990 Overseas Highway, 3rd Floor, Islamorada, Florida 33036, and **NATHAN E. EDEN, ESQ.,** Co-Counsel for Plaintiffs/Petitioners, Eden & Cates, P.L.**,** 302 Southard Street, Suite 205, Key West, Florida 33040.

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By: _____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief on the Merits complies with the font requirements of Rule 9.210(a)(2).

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