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' REPLY BRIEF ON THE MERITS

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ARGUMENTS ON THE MERITS

I. APPLICATION OF AMENDMENTS TO SECTION 627.736, FLA. STAT. (2001) UNCONSTITIONALLY IMPAIR OBLIGATIONS AND RIGHTS UNDER PETITIONERS' EXISTING POLICY

Progressive argues the application of the statutory changes to the existing contractual relationship between it and Petitioners is permissible because 1) the Legislature intended the statutory changes to apply to existing policies and, 2) those changes do not affect any substantive, contract or vested rights. Petitioners submit Progressive is wrong on both issues.

Progressive's first argument finds no support in Chapter 2001-271, Laws of Florida. The act specifically provides that presuit notice requirements found in §627.736(11) shall apply to claims for "treatment and services occurring on or after October 1, 2001." The act is silent as to lost income, death benefits, or the type of hybrid claim asserted by Petitioners, the amount paid to satisfy a worker's compensation lien. Progressive relies upon the exception to the October 1, 2001 effective date[1] for "a claim or amended claim or judgment for interest only" to conclude that the effective date for all claims is June 19, 2001. Progressive's

[1] Progressive's conclusion is erroneous. A provision that merely states a statute will take effect on a certain date expresses no intent other than the statute should have prospective application. *See, Melendez v. Dreis And Krump Manufacturing Co.*, 515 So. 2d 735, 736 (Fla. 1987).

interpretation creates an effective date for claims for medical treatment and services, the type of claims the Legislature felt were being abused, nearly four months later than the effective date for claims for the type of PIP claims that were not being abused. This Court should avoid giving legislation an interpretation that will lead to such an absurd result. *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Service*, 444 So. 2d 926, 929 (Fla. 2006).

Even assuming, *arguendo*, the Legislature intended the presuit requirements to apply to claims made under existing policies, its intent does not resolve the issue as Florida law provides, "[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mutual Auto. Ins. Co. v. LaForet*, 658 So. 2d 55, 61(Fla. 1995)(citations omitted); *see also, Metropolitan Property and Liability Ins. Co. v. Gray*, 446 So. 2d 216, 219 (Fla. 5th DCA 1984)(regardless of the intent, a statute may not, constitutionally, alter, amend or impair the rights of the parties to an existing contract). Thus, the application of the amendments to §627.736, Fla. Stat. (2001) to existing insurance policies turns on whether the amendments impair existing or vested rights, or create new obligations, burdens or duties, or impose new penalties. *LaForet*, *supra*, at 61. (Emphasis added).

Progressive argues that Petitioners had no vested or substantive contract rights, only an expenctancy, as of the effective date of the statute, June 19, 2001. Petitioners disagree. When Mrs. Menendez was injured in the accident of June 14, 2001, she was immediately entitled to PIP benefits (Progressive paid $2,131.22 for medical services rendered on June 14, 2001), workers compensation benefits (Monroe County paid $2,831.25 for medical services rendered on June 14, 2001), and she had a cause of action against the tortfeasor that caused the accident. Under Florida, law Petitioners had a vested right in the cause of action against the tortfeasor. *Romine v. Florida Birth Related Neurological Injury Compensation Ass'n*, 842 So. 2d 148, 154 (Fla. 5th DCA 2003), *rev. den.,* 857 So. 2d 195, (Fla. 2003)(minor plaintiff had a substantive, vested right to recover NICA benefits the day she was born). Similarly, Mrs. Menendez' right to worker's compensation benefits, and her employer's corresponding right to a lien against the proceeds of her third party claim, were substantive contractual rights, fixed as of the date of the injury, and could not be altered by subsequent legislation. *Sullivan v. Mayo,* 121 So. 2d 424 (Fla. 1960). Finally, Petitioner's contractual rights to PIP benefits were fixed as of the date the policy was issued. *Lumbermens Mutual Cas. Co. v. Ceballos*, 440 So. 2d 612 (Fla. 3d DCA 1983). Clearly, Petitioners had a present, fixed right of future enjoyment to those PIP benefits as of June 14, 2001.

Progressive's reliance on *Romine, supra,* is misplaced. In *Romine*, the court found the plaintiff had a substantive, vested right on the day she was born, because she had a "present, fixed right of future enjoyment." *Id.* at 154. Progressive's reliance on *Clausell v. Hobart Corp.,* 515 So. 2d 1275 (Fla. 1987), is likewise misplaced. In *Clausell*, this Court specifically recognized that the issue was not whether a statute may apply retroactively, rather the effect to be given to a decision of a court of last resort. *Id.* at 1276; *see, Melendez v. Dreis And Krump Manufacturing Co.*, 515 So. 2d 735, 736 (Fla. 1987).

Progressive erroneously cites to several cases to support its argument that the PIP presuit notice requirements are merely procedural changes. Progressive first cites to *City of Coconut Creek v. City of Deerfield Beach*, 840 So. 2d 389 (Fla. 4th DCA 2003), yet nowhere in that opinion does the court state presuit requirements are procedural. In fact, another district court has concluded the same statutory notice was substantive. *See, Emerald Acres Investments, Inc. v. Bd. of Cty Commissioners of Leon County*, 601 So. 2d 577, 580 (Fla. 1st DCA 1992). Progressive also cites to *Widmer v. Caldwell*, 714 So. 2d 1128 (Fla. 1st DCA 1998). In that case, however, the issue was not whether the presuit notice requirement was substantive or procedural. The court merely referred to the failure to provide notice as a "temporary procedural bar" to the lawsuit. *Id.* at 1129. And

Progressive's cite to *Campagnulo v. Williams*, 563 So. 2d 982 (Fla. 4th DCA 1990) is misleading, as this Court's subsequent opinion in *Williams v. Campagnulo*, 588 So.2d 982 (Fla. 1991) specifically found that the presuit notice was not procedural, and that the entire statute was "primarily substantive." *Id*. at 983.

At least one Florida insurer has successfully argued that the PIP presuit notice is substantive. In *Shenandoah Chiropractic, PA v. National Specialty Ins. Co.*, 526 F. Supp. 2d 1283 (S.D. Fla. 2007), the court was faced with the question whether §627.736(11), Fla. Stat. was procedural or substantive in order to determine if the notice requirement applied to that federal action. *Id.* at 1286. The district court recognized the required presuit notice was not merely a simple notice but one that required the insured to provide very specific information and that the failure to comply with the condition precedent would eliminate an insured's remedy, concluding that the presuit notice was substantive and must be applied in that federal action. *Id*. at 1288.

While no Florida appellate court has addressed this particular PIP amendment, at least two trial courts have found the presuit notice requirements of §627.736(11) were substantive changes and could not be applied retroactively. *See, Millennium Diagnostic Imaging Center, Inc. v. Progressive Express Ins. Co.*, 12 Fla. L. Weekly Supp. 80b (Fla. Miami-Dade Cty. Ct. October 5, 2004)(PIP presuit

requirement prescribe a new duty and created substantive rights, including carrier's substantive right to avoid being sued and paying fees and costs); *West Gables Open MRI, Inc. v. Peak Property and Casualty Ins. Co.,* 13 Fla. L. Weekly Supp. 495a (Fla. Miami-Dade Cty. Co. February 22, 2006)(presuit amendment prescribes duties and rights that are substantive in nature and impede access to court). The opposite interpretation sought by Progressive here should not be permitted[2].

Progressive tries to minimize the significance of the pre-suit requirements, arguing subsection (11) "merely required them to first send a demand letter" as if a simple, informal letter would suffice[3]. Petitioners submit the burden and obligations imposed by subsection (11) are both significant and substantive. Prior to the amendment, the burden to substantiate a PIP claim was upon the insurer. *See, Palmer v. Fortune Ins. Co.*, 776 So.2d 1019 (Fla. 5th DCA 2001), *rev. den.*, 791 So. 2d 1096 (2001)(burden on the insurer to authenticate claim within thirty

[2] The same type of inconsistency sought by Progressive here lead at least one jurist to lament that, if the law were to provide inconsistent protection to large insurers, "Mr. Bumble is correct: '[T]he law is a ass, a idiot.' " *Patry v. Capps*, 618 So. 2d 261, 263 (Fla. 2d DCA 1993) (Judge Altenbernd dissenting).

[3] Had an informal written notice of intent been all that was required, Progressive received notice of that intent on several occasions. Over the eleven months Petitioner's counsel sent at least five letters to Progressive urging the payment of PIP benefits, two of which were certified letters advising that suit would be filed if there was no response. (R. 86-94).

days and cannot be shifted to insured or her attorney). Healthcare providers and employers were required by §§627.736(5)(d) and (6)(a) to provide the PIP carrier with detailed information and documentation. The practical effect was that this information was not routinely provided to the insured.

With the amendment, an insured is required to contact the carrier or the Department of Financial Services to determine the person designated by the carrier to receive the presuit notice, determine what PIP benefits are overdue, prepare an itemized statement with detailed information about the medical services provided including the date of each treatment, the exact amount charged for the service, the outstanding amount, the nature of the benefit is sought, and then incur the cost of sending the notice by certified mail to the carrier. According to Progressive, an insured must also determine the precise amount of a lien satisfaction attributable to specific medical bills and lost income, even though benefits were long ago paid and not overdue. In effect, the insured must conduct a presuit investigation into what previously had been the carrier's obligation. At the same time the insurer is no longer immediately exposed to attorneys' fees for overdue benefits, once considered to be necessary to level the playing field and encourage timely payment of benefits. These are the type of obligations, burdens and duties this Court no doubt referred to when it refused to apply "statutory changes that create new

obligations, burdens or duties, or impose new penalties . . . ." *State Farm Mutual Auto. Ins. Co. v. LaForet*, 658 So. 2d 55, 61 (Fla. 1995).

Petitioners respectfully submit the presuit notice requirements found in §627.736(11) not only impair Petitioners' existing substantive and vested contract rights, but impose new duties, obligations and penalties and are thus substantive changes that cannot be retroactively applied to existing policies.

II. COMPLIANCE WITH PRESUIT NOTICE AFTER SUIT WAS FILED SATISFIED STATUTORY REQUIREMENT

Progressive does not, nor can it, point to any rational basis for distinguishing the PIP presuit requirements from other presuit schemes. They all have as a goal early settlement and avoidance of litigation. In medical malpractice cases, as with the PIP presuit requirements, another goal is to eliminate non-meritorious claims. Appellate courts in Florida have recognized the harsh results from the type of strict application urged by Progressive and found that presuit statutory schemes must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts.

Progressive cites to several trial court decisions that support its position. It ignores, however, several trial court decisions, some of which it was involved in, that have held abatement while the plaintiff complies with presuit notice is the proper course. *See, Ponte Vedra Chiropractic Medicine & P.T., Inc. v. Progressive*

Express Ins. Co., 12 Fla. L. Weekly Supp. 770b (Fla. St. Johns Cty. Ct. April 25, 2005)(where pre-litigation notice required by §627.736(11) is insufficient, the better practice is to abate the action to allow the plaintiff to cure the insufficiencies)*; Ponte Vedra Chiropractic Medicine & P.T., Inc. v. Progressive Auto Pro Ins. Co.*, 12 Fla. L. Weekly Supp. 152b (St. Johns Cty. Ct. November 8, 2004)(case abated to give plaintiff opportunity to submit a demand letter in compliance with §627.736(11))*; Miller Chiropractic Center v. Ocean Harbor Casualty Ins. Co.*, 11 Fla. L. Weekly Supp. 1027a (Fla. Broward Cty. Ct. August 23, 2004)(appropriate disposition where plaintiff did not comply with statutory presuit requirements was to abate the action to allow plaintiff to comply).

Progressive argues that it had to "endure the time, effort and expense of one (1) year of litigation" because Petitioners did not send a demand letter until after suit was filed. Progressive ignores the fact that Petitioners waited eleven months before filing suit, during which time counsel for Petitioners sent at least five letters to Progressive urging the payment of PIP benefits, two or which were certified letters advising that suit would be filed if there was no response. (R. 86-94). Instead, Progressive did nothing and, after suit was filed, did not raise the issue of compliance with presuit notice requirements for seven months, all the while denying Petitioners had any covered losses. (R. 20-1; R. 23). Yet Progressive

wants this Court to believe if it had only received the written demand required in §627.736(11), it would have paid the claims within seven days. Neither the record nor logic support such a conclusion.

Progressive also complains that once suit had been filed, it had no "viable way" to pay the PIP claim without confessing judgment and exposing itself to attorneys' fees. Progressive ignores the statutory language which specifically provides that the insurer will "not be obligated to pay any attorney's fees if the insurer pays the claim . . ." within seven days. §627.736(11)(d), Fla. Stat. (2001). Progressive and other insurers have successfully avoided paying attorney's fees in these same circumstances. *See, Ponte Vedra Chiropractic Medicine & P.T., Inc. v. Progressive Auto Pro Ins. Co.*, 12 Fla. L. Weekly 152b (St. Johns Cty. Ct. November 8, 2004)(while action is stayed, if insurer pays the claim within the deadline, it will not be subject to attorney's fees); *Miller Chiropractic Center v. Ocean Harbor Casualty Ins. Co.*, 11 Fla. L. Weekly 1027a (Fla. Broward Cty. Ct. August 23, 2004)(during abatement, if insurer pays the claim within the deadline, it will not be subject to an award of attorney's fees). Thus, had Progressive timely paid Mrs. Menendez' PIP claim after receiving the written demand in November 2003, it could have successfully argued that it should not pay attorneys' fees.

As this Court has recognized, *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996), the policy behind presuit notice statutes "must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy . . . ." *Id.* at 284 (emphasis added). To permit compliance with the written demand letter after an action was filed does not diminish the goal of the PIP presuit notice requirements any more than in any other statutory scheme. To rule otherwise is to unreasonably deny Petitioners access to court.

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

In responding to this issue on appeal, Progressive provides no explanation why the Legislature would have intended the presuit notice requirements to apply to claims for lost wage benefits, a type of claim that was not perceived to be subject to abuse, months before the same presuit notice requirements were to apply to claims for medical treatment and services. Petitioners thus rely upon the argument in their initial brief and above as to the interpretation to be given to the enacting legislation found in Chapter 2001-271, Laws of Florida.

In its first and third arguments, Progressive claims it did not have to pay Petitioners the $2,000 they paid to satisfy the worker's compensation lien as they

did not provide an itemized list of the overdue benefits as required by subsection (11). Of course, when the lien was satisfied, none of the medical bills or the lost income benefits were overdue. Not only would an itemization of overdue benefits be an impossible task, since subsection (11) requires a presuit notice only for overdue PIP benefits under subsection (4)(b), no presuit notice was required for the reimbursement of the $2,000.

Progressive also agues that it is unreasonable to conclude any of the $2,000 paid to satisfy the worker's compensation lien included medical expenses incurred prior to October 1, 2001. It is undisputed that, as of the attachment of the lien on October 17, 2001, Monroe County had paid $8,185.58 (61% of the total) to medical providers and $5,139.00(39% of the total) to Mrs. Menendez for her lost income. Although it was not an issue when Progressive denied coverage for that claim in 2002, Progressive now finds it unreasonable to conclude that at least a portion of the lien satisfaction included medical expenses. Petitioners submit that the only logical conclusion is that the lien satisfaction represented a pro rata payment of medical bills and lost income. Thus, at least 61%, or $1,220, of the $2,000 was for medical bills incurred prior to October 1, 2001 and Progressive had no excuse for not paying at least that amount within thirty days. Having failed to do so, nothing precluded this action from being filed against Progressive.

Progressive also points out that "at least $4,652.16 of Petitioners' medical bills were incurred for treatment rendered after October 1, 2001." Since the lien attached to the third party settlement of October 17, 2001, how much was paid by the employer after that date is irrelevant.

Petitioners submit the Legislature did not intend for presuit requirements to apply to any of the benefits sought by Petitioners and thus, even if the statutory amendments apply, no presuit notice was required as a condition precedent.

IV. CONDITION PRECEDENT DID NOT APPLY TO PETITIONERS' PIP CLAIM BECAUSE PROGRESSIVE DENIED CLAIM AS A MATTER OF LAW

Progressive erroneously argues that Petitioners were obligated to provide Progressive with documentation or information regarding the exact amount of the wage loss reimbursement sought. Florida law is well settled that it is the insurer's burden to substantiate a PIP claim. *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). There is nothing in the record to even raise an inference that Progressive met its burden by contacting Monroe County to obtain income information. Further, the two letters sent by Progressive's adjuster did not seek

documentation or information in order to reimburse the Petitioners the $2,000, rather the adjuster was inquiring about a reimbursement to Monroe County.

The only record evidence conclusively established that Progressive consistently and unequivocally denied Petitioners' PIP claim. The sworn testimony of Petitioners' counsel, never refuted by Progressive, conclusively established that Progressive's adjuster "never asked for any documentation of the items of damage Plaintiffs were seeking" and through their verbal and written correspondence, Progressive specifically announced that it was not required to make "payment of any PIP benefits to their insured" and steadfastly maintained that Progressive "owed Plaintiffs nothing", even after being advised that Florida law required a PIP carrier to reimburse its insured for the amount paid to satisfy a worker's compensation lien. (R. 40-1, ¶¶ 6, 9 and 10; R. 83-4, ¶¶ 5, 6 and 10). Progressive's position that the $2,000 paid to satisfy the lien was not a covered loss was confirmed when Progressive filed the affidavit of Robert Grant in this action clearly stating that the $2,000 claim submitted to Progressive before suit was filed was not a covered loss. (R. 121). Even after this litigation began, Progressive refused to acknowledge Mrs. Menendez' suffered wage losses claim by denying the Request for Admissions. (R. 20-3).

Progressive argues that the two letters authored by its adjuster were filed to corroborate the testimony of Petitioners' counsel. In truth, they were filed because they were the only correspondence sent by Progressive over the eleven month period Petitioners sought their PIP benefits. That the adjusters were ignoring their legal obligations only substantiates that Progressive had no intention of paying the claim and in fact denied the claim. Again, the unrefuted sworn testimony conclusively established that Progressive denied this PIP claim.

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. 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 December, 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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CERTIFICATE OF COMPLIANCE

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

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