

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' BRIEF ON JURISDICTION

Robert C. Tilghman, PA
One Biscayne Tower
2 South Biscayne Blvd.
Suite 2410
Miami, Florida 33131
Telephone: 305-381-8806
Facsimile: 305-381-8813

Co-Counsel for Petitioners

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STATEMENT OF THE CASE AND FACTS

The Facts

Cathy Menendez was injured in a motor vehicle accident on June 14, 2001 while working for her employer, Monroe County School Board. At the time of the accident, Mrs. Menendez was insured by a motor vehicle policy issued on April 1, 2001 by Progressive Express Insurance Company (hereinafter "Progressive"). Progressive paid several of Mrs. Menendez' medical bills under the personal injury protection coverage ("PIP") before her employer began paying her medical bills and lost income as workers' compensation benefits.

On October 17, 2001, Plaintiffs settled a third-party personal injury claim arising out of the same accident. The School Board asserted a lien against the settlement proceeds and Plaintiffs settled the lien for \$2,000. A claim for PIP benefits was made by Plaintiffs in December of 2001 wherein they sought the reimbursement of the \$2,000 paid to settle the worker's compensation lien and to recover supplemental income Mrs. Menendez would have earned during the summer of 2001. After numerous written demands for the payment of overdue PIP benefits, including a certified letter threatening legal action, suit was filed on November 26, 2002.

When Progressive issued its policy, neither the policy nor section 627.736, Florida Statutes (2001) required a written notice of intent to initiate litigation as a

condition precedent to an action seeking to recover overdue PIP benefits. Thereafter, on June 19, 2001, Chapter 2001-271, Laws of Florida was signed into law, adding subsection 627.736(11). Subsection (11) required an insured claiming overdue PIP benefits to send a written notice of intent to initiate litigation to the insurer as a condition precedent to an action to recover those benefits. Believing subsection (11) did not apply to their claim, Plaintiffs did not send a written notice of intent before filing suit beyond the numerous letters previously sent.

The Case

In response to Plaintiffs' complaint, Progressive filed an answer but did not raise as a defense the failure to provide written notice of intent to initiate litigation as required by section 627.736(11). Progressive ultimately raised that issue when it filed a motion for summary judgment on June 30, 2003. Although Plaintiffs still did not believe section 627.736(11) applied to their claim, out of an abundance of caution, they sent a written notice of intent to initiate litigation to Progressive on November 3, 2003, while this action was pending. Progressive made no payment after receiving the written notice.

The trial court denied Progressive's motion for summary judgment and granted Plaintiffs' motion for partial summary judgment, finding that the amendment adding presuit notice requirements in section 627.736(11) did not apply to Plaintiffs' claim and that, even if it would have applied, Progressive had

denied the claim thus relieving the Plaintiffs of the presuit notice requirement. Thereafter, the parties agreed to the entry of a stipulated final judgment awarding Plaintiffs the compensatory damages they sought, plus prejudgment interest, and Progressive then appealed.

On appeal, the Third District reversed, finding that the presuit notice requirements of section 627.736(11) did apply to Plaintiffs' claim for overdue PIP benefits and, because the amendments were merely procedural and did not alter contractual or vested rights, the retrospective application section 627.736 (11) did not unconstitutionally impair Plaintiffs' existing contract rights. The Third District also found that, although Plaintiffs 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 refiled and thus Plaintiffs were barred from recovering benefits under the policy unless the jury finds that Progressive had denied the claim, a specific exemption from the presuit notice requirement. The court did not address the sufficiency of the notice provided by the letters sent before suit was filed.

SUMMARY OF ARGUMENT

Plaintiffs submit the decision of the Third District directly and expressly conflicts with decisions of this Court and of other district courts on two important issues of law. First, this Court and at least on district court have held that statutory amendments that constitute substantive changes, including changes imposing

conditions precedent, tolling of the statute of limitations, and imposing fees and penalties, cannot be applied to existing insurance policies without impairing contract rights and violating Article I, Section 10 of the Florida Constitution. In conflict with these decisions, the Third District applied section 627.736(11) retroactively, finding that although the amendment required presuit notice as a condition precedent, tolled the statute of limitations, altered the right to recover attorney's fees and imposed a penalty, the amendment was procedural in nature and did not alter any contractual or vested rights of the parties.

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 Third District 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 refiled, and thus recovery is barred.

ARGUMENT ON JURISDICTION

- I. THE THIRD DISTRICT'S OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH OPINIONS OF THIS COURT AND ANOTHER DISTRICT COURT AS IT HOLDS A STATUTORY AMENDMENT THAT IMPOSES CONDITIONS PRECEDENT, TOLLS THE STATUTE OF LIMITATIONS, ALTERS THE RIGHT TO RECOVER ATTORNEY'S FEES AND IMPOSES A PENALTY CAN BE**

APPLIED TO EXISTING INSURANCE POLICIES AS SUCH CHANGES ARE PROCEDURAL AND DO NOT IMPAIR SUBSTANTIVE OR CONTRACTUAL RIGHTS.

Progressive issued an insurance policy to Plaintiffs on April 1, 2001, six weeks before the June 14, 2001 accident. Section 627.736(11) became effective June 19, 2001. 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). Further, this Court has refused to retroactively 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). The application of such substantive changes to existing contracts results in an unconstitutional impairment of contract rights in violation of Article I, Section 10 of the Florida Constitution. *State Farm Mutual Auto. Ins. Co. v. Gant*, 478 So. 2d 25, 26-7 (Fla. 1985). The Third District sought to avoid the application of these principles by finding that the amendment to section 627.736 was procedural only and had no effect on the parties' contractual rights. Such findings are in conflict with opinions of this Court and of at least one district court.

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 found the right to attorneys' fees and the burden to pay attorney's fees to be substantive rights, such that statutory amendments altering the amount of fees recoverable could not be applied retroactively. *Id.* at 484-5. And in *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985), this Court found the obligation of a non-prevailing party to pay attorney's fees constituted a "new obligation or duty," a substantive change which could not be applied retroactively. *Id.* at 1154. In the instant case, section 627.736(11)(d) imposed what the legislature called an interest "penalty" for overdue benefits the insurer wrongfully failed to pay while at the same time eliminated the insured's right to recover attorney's fees if the overdue benefits were finally paid after notice, the same type of changes the cases cited above considered to be substantive and refused to apply retroactively. In conflict with the cases cited above, the Third District found these statutory changes to be "procedural" and applied them retroactively.

The opinion of the Third District also conflicts with decisions of this Court and another district court that have addressed whether statutorily imposed conditions precedent are substantive or procedural. 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. *Id.* at

883. In *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991), this Court recognized that the presuit notice requirements of section 768.57, Florida Statutes (1985), a major factor of which is the tolling of the statute of limitations, are primarily substantive. *Id.* at 983. At least one district court has reached the same conclusion. *See, Walker v. Cash Register Auto Ins. of Leon County, Inc.*, 946 So. 2d 66, 71-2 (Fla.1st DCA 2006)(statutory amendment requiring a twenty-one day notice before being entitled to fees was a substantive change and could not apply retroactively).

The Plaintiffs respectfully submit the opinion of the Third District directly and expressly conflicts with the decisions cited above. Those decisions hold that statutory changes imposing conditions precedent to filing suit, tolling the statute of limitations, altering the right to recover attorney's fees, and imposing a penalty create new obligations and duties and are thus substantive changes that cannot be applied retrospectively. Under virtually the same controlling facts, and despite the fact that they may result in denying a litigant access to courts, the Third District found such statutory changes were procedural and could be applied retrospectively.

II. THE THIRD DISTRICT'S OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH OPINIONS OF THIS COURT AND DISTRICT COURTS IN HOLDING THAT COMPLIANCE WITH CONDITIONS PRECEDENT AFTER SUIT IS FILED BUT BEFORE THE STATUTE OF LIMITATIONS HAS EXPIRED, IN THE ABSENCE OF DISMISSAL AND REFILING, IS OF NO LEGAL EFFECT AND BARS RECOVERY.

In the instant case, Plaintiffs served a written notice of intent to initiate litigation on November 3, 2003, after this action was filed but before the statute of limitations expired and before the trial court ruled on the motions for summary judgment. The Third District reversed the final judgment, finding that Plaintiffs' written notice of intent was of no legal effect and that, were it not for the material issue of fact on the issue of whether Progressive denied the PIP claim, a specific exception to the presuit notice required by section 627.736(11), Plaintiffs would be forever barred from recovery under the policy.

Plaintiffs' argued below that the final judgment should be affirmed because they had complied with the presuit requirements before the statute of limitations expired and Progressive still refused to pay. The Third District held that the written notice of intent sent while this action was pending did not satisfy the condition precedent and, in the "absence of a dismissal and subsequent refile of the complaint," the written notice of intent had "no legal effect." The Third District further held that, on remand, if the jury finds Progressive did not deny the claim, Plaintiffs "are barred from recovery under the insurance contract."¹ Plaintiffs respectfully submit this decision directly and expressly conflicts with decisions of this Court and other district courts.

¹ Although it did not specifically say why, Plaintiffs' assume the Third District has so held as the statute of limitations expired while the appeal below was pending.

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 *Holdings 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. Since the plaintiff had delivered the required affidavit after the suit was filed but before the limitations period expired, this Court held that dismissal was error and the plaintiff should have been allowed to continue the action. *Id.* at 303.

Several district courts have reached the same conclusion regarding premature actions. For example, in *Thomas v. Suwannee County*, 734 So. 2d 492 (Fla. 1st DCA 1999), although the plaintiffs failed to comply with the statutory condition precedent of waiting thirty days before filing suit, 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. In *Askew v. County of Volusia*, 450 So. 2d 233 (Fla. 5th DCA 1984), the district court found that presuit notice, 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.

And in *Williams v. Henderson*, 687 So. 2d 838 (Fla. 2d DCA 1996), although suit was filed prematurely, the appellate court reversed the summary judgment in favor of the defendant, finding that by the time the trial court ruled on the motion more than six months had elapsed after the proper notice was given, so the purpose of the notice was adequately served. *Id.* at 839-40.

Plaintiffs respectfully submit that in finding Plaintiffs' written demand letter was of no legal effect and should bar recovery, the Third District's opinion is in direct and express conflict with the decisions cited above. Such a result would constitute an unconstitutional denial of the Plaintiffs' right to access to court.

CONCLUSION

Plaintiffs 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. Plaintiffs respectfully request this Court to exercise its discretionary jurisdiction to review this matter as these conflicts have far reaching implications not only to litigants seeking overdue PIP benefits mandated by section 627.736 but for all litigants in actions involving statutory conditions precedent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct hereof has been furnished by U.S. Mail this ____ day of April, 2008 to: **DOUG STEIN, ESQ.**, Anania & Bandklayer, Co-Counsel for Progressive Express Insurance Company, Bank of America Tower, 100 SE 2nd Street, Suite 4300, Miami, Florida 33131, **SCOTT C. BLACK, ESQ.**, Co-Counsel for 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 & Nevius, P.L., 302 Southard Street, Suite 205, Key West, Florida 33040.

ROBERT C. TILGHMAN, P.A.
Co-Counsel for Plaintiffs/Petitioners
One Biscayne Tower
2 South Biscayne Blvd.,
Suite 2410
Miami, Florida 33131
Tel: (305) 381-8806

By: _____
ROBERT C. TILGHMAN,
FBN: 437050

CERTIFICATE OF COMPLIANCE

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

ROBERT C. TILGHMAN, P.A.
Co-Counsel for Plaintiffs/Petitioners
One Biscayne Tower
2 South Biscayne Blvd.,
Suite 2410
Miami, Florida 33131
Tel: (305) 381-8806
Fax: (305) 381-8813

By: _____
ROBERT C. TILGHMAN
FBN: 437050