

NOT FINAL UNTIL TIME  
EXPIRES TO FILE RE-HEARING  
MOTION, AND IF FILED, DISPOSED OF

IN THE CIRCUIT COURT OF  
THE ELEVENTH JUDICIAL  
CIRCUIT, IN AND FOR MIAMI-  
DADE COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO. 07-475 AP  
& 08-037 AP

LC CASE NO: 06-23427 SP 25

UNITED AUTOMOBILE  
INSURANCE COMPANY,

Appellant,

vs.

DORA MAURICIA UBEDA,

Appellee.

THE ORIGINAL FILED  
ON JUN 15 2009  
IN THE OFFICE OF  
CLERK COURT DADE CO. FL

Opinion filed this 15th day of June, 2009.

An appeal from the County Court in and for Miami-Dade County, Florida, Judge  
Lawrence D. King.

Ivy R. Ginsberg, Esq., for Appellant, United Automobile Insurance Company.

Virginia M. Best, Esq., for Appellee, Dora Mauricia Ubeda.

Before SILVERMAN, EMAS and FERNANDEZ, JJ.

EMAS, J.

The issue presented in this case is whether an insured's premature demand letter, required by statute as a condition precedent to filing suit, is a deficiency which can be cured by the sending of a second demand letter while the lawsuit is pending, or is a deficiency which necessitates abatement, or a voluntary dismissal and refiling, of the lawsuit.

We hold that abatement or dismissal is required, and therefore reverse the trial court's entry of summary judgment in favor of the insured.

Appellee Dora Ubada ("Ubada" or "the Insured"), was injured in an automobile accident on August 13, 2006. Ubada received medical treatment between August 15, 2006, and September 13, 2006. On September 14, 2006 (before the bills for the medical treatment were overdue), Ubada sent a demand letter to her personal injury protection ("PIP") carrier, United Automobile Insurance Company ("United Auto" or "the Insurer"), notifying United Auto of her intent to initiate litigation. The letter was sent pursuant to Florida Statutes, section 627.736(11).

United Auto did not respond to the demand letter. Three months later, Ubada filed a complaint against United Auto for its failure to pay benefits. Thereafter, Ubada amended her complaint twice, adding subsequent medical treatment provided from September 14, 2006, to October 24, 2006. United Auto filed an amended answer and affirmative defenses, raising the premature nature of the demand letter by asserting that Ubada had failed to meet all conditions precedent before filing suit.

Ubada did not seek abatement, or voluntarily dismiss and refile the lawsuit. Instead, on May 10, 2007, Ubada sent United Auto a second demand letter, this time demanding payment for all medical treatment provided from August 15 to October 24, 2006.

The trial court entered summary judgment in favor of Ubada on the issue of reasonable, related and necessary, and later entered a judgment awarding attorney's fees to Ubada pursuant to Florida Statutes, section 627.736(8). United Auto appeals both judgments, contending that the premature demand letter could not be cured absent an abatement or a dismissal (and refiling) of the action.

The controlling statute in this case is section 627.736(11), Florida Statutes. (2005)<sup>1</sup>, which provides, in pertinent part:

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<sup>1</sup> The 2005 version of the statute governs because it was the statute in effect at the time the parties entered into the insurance contract. See *Hassen v. State Farm Mut. Ins. Co.*, 674 So.2d 106 (Fla. 1996).

(a) *As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).*

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(d) If, within 15 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of \$250, no action may be brought against the insurer.... *The insurer is not obligated to pay any attorney's fees if the insurer pays the claim or mails its agreement to pay for future treatment within the time prescribed by this subsection.*

(Emphasis added.)

The language of this subsection is plain and unambiguous: the demand letter must be sent before litigation can be commenced, and must not be sent until the claim is overdue. In the case at bar, the letter sent by Ubeda to United Auto was premature, having been sent before the claims were overdue.<sup>2</sup> We find that this case is controlled by the recent decision in *Progressive Express Ins. Co. v. Menendez*, 979 So.2d 324 (Fla. 3d DCA 2008), *cert. granted*, 994 So.2d 1105 (Fla. 2008).

*Menendez*, like the instant case, involved a claim for benefits under a PIP policy. In *Menendez*, the insured failed to send any demand letter before filing suit. The insurer, in answering the complaint, raised the affirmative defense of failure to comply with the presuit demand letter, a condition precedent under section 627.736(11). The insured did not move to abate the action or voluntarily dismiss and refile the complaint; instead, eleven months into the litigation, the insured sent a demand letter to the insurer.

In reversing the trial court's entry of summary judgment in favor of the insured, the Third District held that the failure to comply with the statutory condition precedent under section 627.736(11) could not be cured by sending a demand letter during the pendency of the lawsuit:

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<sup>2</sup> Fla. Stat. §627.736(4)(a) provides: "Personal injury protection insurance benefits... shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same."

In Florida, when a lawsuit is prematurely filed, the proper remedy at the trial level is an abatement or stay of the action. By definition, mere prematurity is curable "simply by the passage of time." Litigation is also premature (and curable by abatement) where the plaintiff's complaint is dismissed for failing to fulfill statutory administrative prerequisites prior to filing a legal action. Contrarily, the material breach of an insured's contractual duty to perform a condition precedent renders the insurance contract ineffective and relieves the insurer of its contract obligations.

*Similarly, where a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, not abatement, is the proper remedy. The presuit demand letter requirement of subsection 627.736(11) was an unambiguous condition precedent to the filing of the plaintiffs' lawsuit, and as described above, the statute applied to the plaintiffs' claim unless [the insurer] denied or reduced the claim. [The insurer's] answer, proposed amended answer, and motion for summary judgment all put the plaintiffs on notice of their failure to comply with that statutory requirement. At those points in the proceedings, the plaintiffs could have asked the trial court to abate the premature action until they complied with the statute, or could have voluntarily dismissed and refiled their action after complying with the presuit demand requirements.*

*Menendez*, 979 So.2d at 333-34 (citations omitted)(emphasis added).

We recognize that there is a significant factual difference between *Menendez* and the instant case: In the instant case, the demand letter was deficient because it was sent too early. By contrast, the plaintiffs in *Menendez* failed to send *any* demand letter before filing suit. It was the complaint, not the demand letter, which was premature in *Menendez*. Ubeda argues that this distinction renders *Menendez* inapplicable, because the demand letter in the instant case, though premature, did in fact provide United Auto with actual notice of her intent to initiate litigation.<sup>3</sup>

The intent of the presuit notice provision is a legislative effort to prevent unnecessary litigation and promote quick and efficient payment of overdue personal injury protection benefits. By requiring a demand letter before suit is

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<sup>3</sup> In fact, United Auto was arguably given even "more" notice than required, since the demand letter was sent earlier than permitted by law.

filed, the insurer is placed on notice that the insured believes the claim is overdue and intends to pursue this position by filing suit, giving the insurer an opportunity to pay the claim and thus avoid unnecessary litigation and the assessment of attorney's fees which would be imposed should the insured later prevail in court.

The insured's failure in *Menendez* to send any presuit demand letter prior to filing suit certainly presents a more compelling circumstance requiring abatement or voluntary dismissal. The instant case, by contrast, presents a more difficult situation, since the Insured did send a demand letter, but did so before the claim was overdue.<sup>4</sup> Here, United Auto was in fact placed on notice of Ubeda's intent to file suit, which is a primary purpose underlying the provision. However, we cannot ignore the fact that the statute also plainly prohibited Ubeda from sending the presuit demand letter before the claim was "overdue." The creation of this time limitation was intended to provide an insurer with a reasonable time frame within which to investigate the underlying claim and determine whether benefits should be paid, reduced or denied.

By disregarding this time limitation and sending a defective (i.e., premature) presuit demand letter, Ubeda placed United Auto on the horns of a dilemma: Respond to a demand letter regarding a claim that is not yet overdue; ignore the demand letter knowing that it is premature and therefore fails to comply with the mandatory language of the statute; or advise the Insured of the defective nature of the demand letter. Ubeda's failure to comply with the statutory presuit requirements should not place her in an advantageous position of being able to file suit earlier than permitted by law, thereby denying her insurer the time that is statutorily mandated to investigate and (if appropriate) pay the claim.

Moreover, the sending of a second demand letter (during the pendency of the lawsuit) is insufficient to cure the defect of the original premature demand letter, absent an abatement or voluntary dismissal. If United Auto paid the claim

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<sup>4</sup> The distinction between the two circumstances was aptly described in *Grip Dev., Inc. v. Coldwell Banker Residential Real Estate, Inc.*, 788 So.2d 262, 270-71 n.8 (Fla. 4<sup>th</sup> DCA 2000)(Farmer, J., dissenting): "Just as one recognizes a difference in consequences from being in line beforehand and getting there after the train has already left the station, so the law applies different consequences to filing or doing an act prematurely and filing or doing an act too late."

upon receipt of the second demand letter, this might arguably have served as a confession of judgment, subjecting United Auto to certain statutory penalties for failing to pay an "overdue" claim: attorney's fees (sections 627.736(8) and 627.428), together with interest and a ten percent penalty up to a maximum of \$250 (sections 627.736(4)(c) and (10)(d)). See *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So.2d 217 (Fla. 1983); *First Floridian Auto & Home Ins. Co. v. Myrick*, 969 So.2d 1121 (Fla. 2d DCA 2007).<sup>5</sup>

Were we writing on a clean slate, the facts of this particular case might warrant affirmance.<sup>6</sup> However, given the broad and unconditional language of *Menendez*, Ubeda's failure to seek abatement or a voluntary dismissal is fatal to her claim. As the Third District concluded in *Menendez*:

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<sup>5</sup> While an abatement might not have proven useful to "cure" the prematurity of the first demand letter, it could have provided the trial court an opportunity to determine 1) whether either the first or second demand letter was sufficient to comply with the statutory condition precedent and 2) whether United Auto's payment of the claim under that second demand letter would amount to a confession of judgment and subject United Auto to the statutory penalties provided under Chapter 627.

<sup>6</sup> See *Kukral v. Mekras*, 679 So.2d 278 (Fla. 1996)(construing the medical malpractice statutory presuit and notice requirements and recognizing that, when possible, such statutes should be construed in a manner that favors access to the courts, especially when the defendant has not been prejudiced by plaintiff's actions); *Robinson v. Scott*, 974 So.2d 1090 (Fla. 3d DCA 2007). *Kukral* held that courts should not mechanically apply presuit requirements and that the medical malpractice statutory scheme should be read liberally to fulfill its remedial purpose while not unduly restricting a litigant's right of access to the courts as guaranteed under Art. I, §21, Fla. Const. The Court also observed: "Under the trial court's strict application of the statute here, a claimant who prematurely filed a notice of intent and later secured a corroborating medical affidavit would be forever barred from court no matter how much time remained for filing suit, or how soon after serving notice the expert corroboration was secured. Such a claimant would be in an even worse position than a claimant who filed no notice at all but is allowed to correct this deficiency within the limitations period. This result is at odds with our interpretation of the statute's requirements as well as the need to balance those requirements with a party's right to go to court." *Kukral*, 679 So.2d at 282-83.

In *Menendez*, the Third District strictly applied the presuit requirements of §627.736(11)(a), relying upon *Levine v. Dade County Sch. Bd.*, 442 So.2d 210 (Fla. 1983) and *City of Coconut Creek v. City of Deerfield Beach*, 840 So.2d 389 (Fla. 4<sup>th</sup> DCA 2003) for the proposition that only abatement or dismissal is the proper remedy. *Menendez*, 979 So.2d at 333. Those cases, however, expressly recognized that the nature of the statute in question required strict construction of the presuit notice provision ("Because this subsection [§768.28(6)] is part of the statutory waiver of sovereign immunity, it must be strictly construed." *Levine*, 442 So.2d at 212)(statute at issue broadened common law standing to challenge municipal land use decisions and "[a]s such, the statute must be strictly construed." *City of Coconut Creek*, 840 So.2d at 392. The statute at issue in this case is more closely analogous to the medical malpractice provision construed in *Kukral* than the statutory provisions construed in *Levine* and *Coconut Creek*.

We are also not persuaded by the plaintiffs' argument that the demand letter sent approximately eleven months after the initiation of the instant litigation cured the potential deficiencies in the conditions precedent to the filing of their lawsuit. In the absence of a dismissal and subsequent refiling of the complaint, the demand letter sent nearly one year after the initiation of the lawsuit has no legal effect. To rule otherwise would effectively nullify the words of the legislature, and we decline the invitation to do so. *See Ingersoll v. Hoffman*, 589 So.2d 223, 224 (Fla. 1991) ("To suggest that the requirements of the statute may be easily circumvented would be to thwart the legislative will.")

979 So.2d at 334.

The trial court erred in granting summary judgment<sup>7</sup> and we therefore reverse and remand for proceedings consistent with this opinion. Because we reverse the entry of summary judgment in favor of Ubeda, we likewise reverse the trial court's judgment awarding attorney's fees to Ubeda.

(SILVERMAN & FERNANDEZ, JJ., CONCUR)

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<sup>7</sup> It should be noted that the trial court entered final judgment in September 2007, and therefore did not have the benefit of the Third District's opinion in *Menendez*, which was issued in March 2008.