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IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
LAKELAND, FLORIDA

SECURITY FIRST INSURANCE COMPANY,

Petitioner,

v.

EDWINA PEYTON,

Respondent.
_________________________________/

Case No. 2D21-3607, 2D21-3609
TRAVELING TOGETHER
L.T. Case No.: 2021-CA-005661, 2021-CA-005705

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INTRODUCTION AND NOTE REGARDING RELATED CASES

Security First Ins. Co. v. Peyton (Case 2D21-3607) and *Security First Ins. Co. v. Stokely* (2D21-3609) present the same legal issues on whether §627.70152, Florida Statutes (2021), applies to claims under property insurance policies issued before the statute's July 1, 2021 effective date. The underlying facts differ, but the legal argument Respondents present in both responses is the same. A third case with related issues is *Security First Ins. Co. v. Fields* (Case 2D21-3645).

BASIS FOR INVOKING JURISDICTION

Peyton agrees certiorari is available to review the ruling that this case is not subject to the presuit notice requirement in §627.70152, Florida Statutes (2021) (Security First petition page 3, "SF 3"). Because the trial court correctly ruled the statute does not apply, the petition should be denied. It is academic whether review could also be sought by mandamus – because certiorari review is available. But the decision on whether to dismiss is distinct from the mandatory stay in *Citizens Prop. Ins. Corp. v. Trapeo*, 136 So. 3d 670 (Fla. 2d DCA 2014) (SF 8-9).

STATEMENT OF THE CASE AND FACTS

Peyton's Presuit Attempts to Resolve the Dispute and Her Complaint against Security First.

Defendant/Petitioner Security First Insurance Company issued a homeowners insurance policy on Plaintiff/Respondent Edwina Peyton's property, effective from April 25, 2020, to April 25, 2021 (A 6, 90). Peyton suffered damages to her home, on April 26, 2020, that were caused by a covered peril, and she applied for insurance benefits (A 6, 90).

In May 2021, Peyton sent Security First her demand (A 353). On June 3, 2020, Security First admitted coverage for the damage and eventually issued a reservation of rights (A 337). On July 8, 2021, Peyton sued Security First for breach of contract arising from the insurer's failure to pay proceeds due and owing on her property loss (A 5). Peyton alleged all conditions precedent to obtaining payment under the insurance policy had been complied with, met, or waived by Security First (A 6).

Section 627.70152

After Peyton purchased her Security First policy, and after her home suffered a covered loss, §627.70152 went into effect July 1, 2021. This

statute creates new obligations on insureds, imposes new restrictions on the circumstances under which insureds can recover attorney's fees, and gives insurers additional time to investigate claims – even after a denial.

Section 627.70152(3)(a), Florida Statutes (2021), requires insureds provide 10 days' notice of intent to initiate litigation on a form provided by the Department of Financial Services before filing suit. It also specifies the loss information the presuit notice must contain. §627.70152(3)(a)(1)-(5), Florida Statutes (2021). If the claimant insured fails to provide the required notice before filing suit, the court must dismiss the suit without prejudice and may not award the claimant attorney's fees for services rendered before the suit's dismissal. §627.70152(5), (8)(b), Florida Statutes (2021).

Section 627.70152(8), Florida Statutes (2021), also limits the circumstances under which a claimant can recover attorneys' fees for other reasons. It creates a mathematical "formula" dependent on the specific results obtained in relation to the pre-suit settlement demand from the insured or offer from the insurance company when compared to the result at trial.

Before this statutory change, a first party property claimant who prevailed against the claimant's insurance company was entitled to recover

his reasonable attorneys' fees. §627.428, Florida Statutes (2020). The same bill creating §627.70152 amended §627.428 to provide fees in property insurance disputes shall be awarded only as provided in §627.70152 or §57.105. §627.428(1), Florida Statutes (2021).

Section 627.70152(4), Florida Statutes (2021), requires insurers to create a procedure to investigate, review, and evaluate the dispute stated in the notice and respond in writing within 10 business days after receiving the notice. This gives the insurer additional time to investigate the claim, even if it has already denied the claim.

Security First's Motion to Dismiss

Security First moved to dismiss Peyton's complaint for failure to provide the Department of Financial Services with the presuit notice required by §627.70152(3)(a) (A 9-21).

Noticeably absent from Security First's listing of its principal arguments supporting this motion is the first argument in its certiorari petition – that Peyton failed to serve notice of constitutional question on the attorney general or state attorney of the judicial circuit in which the action is pending, as required by Fla. R. Civ. P. 1.071 (SF 10-11, 13-15). In fact,

Security First never argued to the trial court, either in writing or at a hearing, that Peyton had improperly raised or failed to preserve a constitutional challenge to the §627.70152 notice requirement (A 9-21, 324-329, 332-359). Thus, Security First's argument that constitutional notice was required is unpreserved. As discussed below, notice was not required because Peyton argued the statute was not retroactive.

Peyton opposed the motion to dismiss by arguing the statute in effect when an insurance contract is executed governs substantive issues arising with that contract, and there is no evidence in the statute's plain language that the legislature intended to apply §627.70152 retroactively. She also argued that because this statute creates new obligations for both claimants and insurers and impairs a claimant's rights to attorneys' fees, it cannot be applied retroactively (A 89-104).

After a hearing on October 7, 2021, the trial court issued its order dated October 25, 2021, denying Security First's motion to dismiss (A 322-323). The court did not find the statute unconstitutional. Rather, the court construed the statute and found it did not apply. Specifically, the court stated:

> F.S. §627.70152 creates pre-suit notice requirements similar to the medical malpractice pre-

> suit statute and personal injury protection pre-suit notice. Defendant argues that F.S. §627.70152 should be retroactively applied. However, this Court disagrees. The statute is substantive and cannot be applied retroactively to a policy which pre-dates the effective date of July 1, 2021. *See Menendez v. Progressive*, 35 So. 3d 873 (Fla. 2010) (A 322).

Security First has petitioned for review of this order.

NATURE OF THE RELIEF SOUGHT

Security First seeks a writ quashing the denial of its motion to dismiss but is not entitled to one for the reasons discussed here.

ARGUMENT

A. Standard of Review.

Peyton agrees questions of law are reviewed de novo (SF 13). Security First overlooks that there must be a clearly expressed intent by the legislature for a statute to apply retroactively, as discussed below.

Courts have "an obligation to give a statute a constitutional construction where such a construction is possible." *Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1079 (Fla. 2011).

B. The Reordering of Argument Headings.

Security First presents its petition as a single issue with several subparts. It begins by asserting a nonissue – that the insured did not notify the attorney general of a constitutional challenge (SF 13). This ignores that the insured did not need to challenge the statute as unconstitutional based on retroactive application because the threshold inquiry is whether the legislature expressed clear retroactive intent. As discussed below, the legislature did not express such an intent.

Security First relegates this threshold retroactivity issue to its subpart F (SF 30). Because retroactive intent is the ***first*** inquiry, as the Florida Supreme Court has stated multiple times, this Response addresses it first.

The Response then continues with why it would have been unconstitutional to construe §627.70152 to apply to a policy issued before its effective date. Only in Security First's world of wishful thinking could denying insureds attorney's fees to which they had a right when the policy was issued be viewed as procedural change that could apply retroactively.

Finally, the Response debunks Security First's myopic contention that one should look at the notice provision in isolation as a purely procedural device and ignore the statute's substantive changes in established rights.

I. STANDARD FOR RETROACTIVE APPLICATION OF A STATUTE

The Supreme Court of Florida has adopted a 2-pronged analysis for determining when a statute or statutory amendment should be retroactively applied to an insurance policy issued before the effective date of enactment. *Menendez* v. *Progressive Express Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010) explains:

> Because in this case the statute was enacted after the issuance of the insurance policy, the operative

> inquiry is whether the statute should apply retroactively. In this regard, the Court applies a two-pronged test. First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles.

See also, e.g., Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478, 487 (Fla. 2008).

II. THE STATUTE AND THE SENATE BILL EVIDENCE NO RETROACTIVE INTENT, WHICH WOULD BE REQUIRED TO APPLY § 627.70152 RETROACTIVELY (SF issues E & F)

Security First's attempt to apply the 2021 Statute to a policy issued in 2020 is inconsistent with the general rule that "the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Hassen v. State Farm Mut. Auto Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996).

When a statute is enacted after a policy is executed, the first inquiry is whether the statute applies retroactively. *Menendez*, 35 So. 3d at 877. "Substantive statutes are presumed to apply prospectively absent clear legislative intent to the contrary." *Bionetics Corp. v. Kenniasty*, 69 So.

3d 943, 948 (Fla. 2011) ("The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively.").

As discussed more below, “a statutory right to attorney's fees constitutes a substantive right.” *Bionetics*, 69 So 3d at 948, citing *Menendez* (and continuing: “statutory provisions which impose limitations on the right to recover attorney's fees are substantive in nature.).

The bill enacting §627.70152 states only that it is effective July 1, 2021. The “Legislature’s inclusion of an effective date of July 1 … effectively rebuts any argument that retroactive application of the law was intended.” S*tate Dep’t of Revenue v. Zuckerman-Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977).

To vary from the general rule, there must be “clearly expressed legislative intent for retroactive application.” *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 196 (Fla. 2011)

To determine legislative intent, the Court must first look to the actual language used in the statute. *Coastal Creek Condo. Ass’n, Inc. v. Fla. Tr. Servs. LLC*, 275 So. 3d 836, 838 (Fla. 1st DCA 2019). “[I]f the meaning of the statute is clear then this Court's task goes no further than applying the

plain language of the statute." *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007).

There is no evidence the legislature intended §627.70152 to apply retroactively. The statute is clear. The substantive nature of §627.70152, is readily evidenced by Security First's own position in this litigation. Because Security First raised no other ground for dismissal, it implicitly recognizes that, absent application of §627.70152, Peyton's lawsuit should not be dismissed (and the insureds can seek attorneys' fees to which they had a right when the policy was issued).

In *Menendez*, the supreme court addressed a statute in which the legislature expressly provided "the presuit demand requirements shall apply to actions filed on or after the general effective date of the act." *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324, 330 (Fla. 3d DCA 2008), *quashed*, *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 875 (Fla. 2010). Thus, the legislature knows how to express retroactive intent.

By contrast, here the act said only that it takes effect on July 1, 2021. 2021 Fla. SB 76, section 15. Nothing in the plain language of §627.70152

or the bill says it applies to claims arising under policies issued before its effective date.

Security First attempts to overcome this fatal lack of clear retroactive intent by referring to deleted language in a house bill that said the statute would apply to policies issued or renewed after July 1, 2021 (SF 27). Putting aside it was the senate bill that led to the statute, language that the statute would only apply to policies dated after July 1 would have been superfluous. Prospective application is the rule, absent an express statement of retroactive intent – and there is no such statement here. Deleting superfluous language would not express retroactive intent.

Security First's attempted reliance on the statute's language that it "applies exclusively to all suits … arising under a residential or commercial property policy …" adds nothing (SF 14-15). This does not say it applies to suits that arose under policies issued before the statute's effective date.

Case law confirms the absence of language that the amendment is inapplicable to existing contracts is not evidence of retroactive intent. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, at 197 ("the absence of a statement in the act that the amendments are inapplicable to existing contracts does not constitute clear evidence of retroactive intent").

It is well settled that the general rule against retroactive application of statutes applies unless there is a clear statement of intent that the statute applies retroactively. *See, e.g., Meir v. Kirk, Pinkerton, McClelland, Savary & Carr, P.A.*, 561 So. 2d 399 (Fla. 2d DCA 1990).

There are other ways the legislature can express retroactive intent. For example, when the legislature enacted revisions to the Unclaimed Property Statutes, amending §717.107, Florida Statutes, it made clear the amendment would have retroactive applicability: "[t]he amendments made by this act are remedial in nature and apply retroactively." (Note 1 in Florida Statutes, citing section 2, ch. 2016-219).

By contrast, no such language is contained in §627.70152 or Senate Bill 76, which creates §627.70152. Neither the statute nor the enacting legislation mention applying the statute retroactively.

The legislature also knows how to express its intent to have different effective dates for different parts of the same statute. The statutory amendments construed in *Menendez,* for example, had a general effective date, but selected portions expressly indicated a later effective date. *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324, 329-330 (Fla. 3d DCA 2008), *quashed*, *Menendez v. Progressive Express Ins. Co.*, 35

So. 3d 875 (Fla. 2010). By contrast, the legislature did not assign different effective dates to different provisions in §627.70152.

Security First's "policy" argument the new statute is intended to address abuses adds nothing to the legal issues here. (SF 26-29). Security First offered no evidence it did not have a full opportunity to respond to its insured's claim – much less that the insured committed any sort of abuse. At the argument, Security First acknowledged it received notice of the loss in April 2020 and, on July 3, 2020, partially accepted coverage, and then issued a reservation of rights (A 337). Security First also acknowledged receiving a presuit demand from Peyton (A 339). Peyton filed suit in July 2021 (A 5).

III. SECTION 627.70152 COULD NOT BE APPLIED RETROACTIVELY

When possible, courts have "an obligation to give a statute a constitutional construction where such a construction is possible." *Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1079 (Fla. 2011). Construing §627.70152 (and its section (3) notice provision) to apply retroactively would not be constitutionally permissible. "[E]ven where the Legislature has expressly stated that a statute will have

retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Menendez*, 35 So. 3d at 877 (*citing State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla.1995)).

For policies issued after July 1, 2021**,** §627.70152 fundamentally changes the framework for litigating first-party homeowner insurance disputes. The statute creates new obligations for insurers and insureds and, therefore, should not be applied retroactively. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994).

The statute indisputably creates new obligations. It mandates insureds file a notice of intent to initiate litigation before filing a lawsuit against their property insurer. §627.70152(3). This notice must be given 10 business days before filing suit but may not be given before the insurer has made a coverage determination. The notice must specify, among other things, the insurer's alleged acts or omissions giving rise to the suit,

that a copy of the notice was provided to the claimant (if notice is provided by a lawyer or other representative), an estimate of damages (if known and if notice is being provided after a coverage denial), or, if the insurer has not denied coverage, the presuit settlement demand that itemizes damages, attorney fees and costs, and the disputed amount. §627.70152(3)(a).

In addition to creating new obligations for insureds before filing suit, the statute also creates new obligations for insurers. For example, the insurer must have a procedure for the prompt review and evaluation of the dispute stated in the notice, and it must respond in writing within 10 business after receiving the notice. §627.70152(4). If the insurer is responding to a notice following a coverage denial, the statute gives the insurer an additional 14 business days, after providing its response, to reinspect the property and either accept or deny coverage. §627.70152(4)(a). If the insurer has not denied coverage, the insurer must respond by making a settlement offer or requiring the claimant to participate in appraisal or other alternative dispute resolution method. §627.70152(4)(b).

These requirements did not exist at the inception of Peyton's policy period. In simplest terms, these are "new obligations" and unenforceable in this case as a matter of law.

Section 627.70152 also substantively alters an insured's ability to recover attorney's fees (including changing §627.428). As the Supreme Court of Florida holds, "statutes with provisions that impose additional penalties for noncompliance or limitations on the right to recover attorneys' fees do not apply retroactively." *Menendez*, 35 So. 3d at 878.

The supreme court has repeatedly held that "rights to attorney's fees granted by statute are substantive rather than procedural." *Moser v. Barron Chase Sec., Inc.*, 783 So. 2d 231, 236 (Fla. 2001); *see also Timmons v. Combs*, 608 So. 2d 1, 2–3 (Fla. 1992) ("it is clear that the circumstances under which a party is entitled to costs and attorney's fees is substantive"); *Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992).

Section 627.70152(8) limits the circumstances under which an insured can recover attorneys' fees. Dependent on the specific results obtained, the insured's presuit settlement demand, and the insurer's offer when compared to the result at trial, insureds face the prospect of recovering only a percentage of their fees. §627.70152(8).

Previously under §627.428, if the claimant obtained any amount more than the insurance company paid in its claim determination, claimants were entitled to reasonable attorneys' fees and costs as the prevailing party. §627.428(1), Florida Statutes (2020). The same bill that adopted §627.70152 modified §627.428, Florida Statutes (2021), to limit fees in property cases to the formula in §627.70152.

In other words, the legislature altered substantive rights (*i.e.*, the right to collect attorneys' fees) by enacting §627.70152. This substantive change can only apply to policies issued or renewed after its effective date.

Section 627.70152 changes the substantive Florida law on attorney's fees in another manner as well – one that is directly related to the presuit notice requirement in subsection (5). Under section 627.70152(8)(b) on "attorney fees," subpart (b) provides:

> In a suit arising under a residential or commercial property policy not brought by an assignee, if a court dismisses a claimant's suit pursuant to subsection (5), the ***court may not award to the claimant any incurred attorney fees for services rendered before the dismissal of the suit***.

§627.70152(8)(b) (emphasis added).

As §627.70152(8)(b) recognizes, Florida law permits recovery of presuit fees under §627.428. *See, e.g., Magnetic Imaging Systems I, Ltd. v. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987 (Fla. 3d DCA 2003); *Travelers Indem. Ins. Co v. Meadows MRI, LLP*, 900 So. 2d 676, 679 (Fla. 4th DCA 2005). The new statute, however, changes the ability to recover presuit fees for property claims.

To apply (8)(b) to claims under pre-July 1 policies would be another substantive change in policyholder rights. As shown above, Florida law prohibits that. Again, that issue need not be reached because the plain wording of the new statute does not show a clear intent to apply it retroactively.

These issues were addressed by the Florida Supreme Court in *Menendez*. As discussed above, the statute in *Menendez* contains language in the enacting legislation that the statute ***should*** apply retrospectively – unlike §627.70152. Accordingly, the supreme court in *Menendez* was required to determine whether retroactive application was constitutionally permissible. *See Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3d DCA 2008), *quashed*.

Menendez was injured in an automobile accident. 35 So. 3d at 875. Her insurance policy provided personal injury protection ("PIP"). *Id*. The defendant-insurer denied payment of PIP benefits based on a recent change in the law creating certain presuit requirements. *Id*. The new law, which was not in effect at the inception of the policy period, created a "requirement of filing a *notice of intent to litigate*." 35 So. 3d at 876 (emphasis added).

Menendez sued for payment of PIP benefits. 35 So. 3d at 875. She argued the change in the law constituted a "substantive change" to the statute and, as such, could not be applied retroactively. *Id*. Progressive argued, on the other hand, that the "statutory presuit notice provision could be applied retroactively to the insured's claim because it was 'merely procedural' and did not unconstitutionally alter any existing rights." *Id*. at 874. As such, the litigation in the trial court "focused not on whether Progressive owed the benefits, but on whether the statutory presuit notice was required." *Id*. at 875.

The trial court agreed with Menendez and concluded that the statute was not applicable to the claim. *Id*. Progressive appealed to the Third District Court of Appeals. *Id*. The Third District reversed. *Id*. Appeal to

the Florida Supreme Court ensued. *Id*. The "dispositive issue" before the supreme court was whether the PIP statute could "be applied retroactively to an insurance policy issued prior to the enactment of the statute." *Id*. at 876.

The supreme court instructed: "In our analysis, we look at the date the insurance policy was issued and not the date that the suit was filed or the accident occurred, because 'the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Id.* The "central focus" of the court's inquiry was "whether retroactive application of the statute 'attaches new legal consequences to events completed before its enactment.''" 35 So. 3d at 877 (*citing Metro. Dade County v. Chase Fed. Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999), *quoting Landgraf*, 511 U.S. at 270). The court did not dispute the legislature's right to impose these additional statutory conditions to recover PIP benefits. However, the court recognized "***changes imposed by the statutory presuit notice provision create various obligations and burdens that are substantive*** and therefore can only be applied prospectively." *Id*. at 878 (emphasis added).

The court concluded the new statute presented a "substantive change" to the law because it "substantively alters an insurer's obligation to pay and an insured's right to sue under the contract." *Id*. at 879. Consequently, the court did not give the statutory presuit notice provision retroactive application because it violated the general rule against retroactive operation. *Id*.

Menendez is dispositive on the issue presently before this Court. Like *Menendez*, the new statute "alters an insurer's obligation to pay and an insured's right to sue under the contract." *Id*. Indeed, the presuit notice requirement in both cases is substantively indistinguishable. The supreme court in *Menendez* noted:

> Before the addition of the statutory presuit notice provision, section 627.736 did not require an insured to provide notice to an insurer before filing an action for overdue benefits. PIP benefits became overdue if the insurer failed to pay within thirty days after receiving notice from the insured of the fact of a covered loss and the amount of such loss. § 627.736(4)(b), Fla. Stat. (2000). Any overdue payment was subject to a ten percent simple interest rate per year. § 627.736(4)(c), Fla. Stat. (2000). However, if the insurer had reasonable proof to establish that it was not responsible for the payment, the payment was not overdue. § 627.736(4)(b), Fla. Stat. (2000).

> In contrast, the statute as amended in 2001 requires an insured to provide a presuit notice of intent to initiate litigation and provides an insurer additional time to pay an overdue claim. § 627.736(11)(a), (d), Fla. Stat. (2001). Second, the amendment mandates that the payment from the insurer must include interest and penalties not exceeding $250. § 627.736(11)(d), Fla. Stat. (2001). Third, if the insurer pays within the additional time provided by the statute, the payment precludes the insured from bringing suit for late payment or nonpayment and shields the insurer from a claim for attorneys' fees. Id. Finally, the amendment tolls the statute of limitations. § 627.736(11)(e), Fla. Stat. (2001).

Id. at 878. These "problematic provisions" (1) impose a penalty, (2) implicate attorney's fees, (3) grant an insurer additional time to pay benefits, and (4) delay the insured's right to institute a cause of action. *Id*.

The suggestion that the *Menendez* holding should be limited to issues related only to PIP coverage is wrong (SF 31-32). The holding is much broader. The supreme court has concluded on several occasions that presuit notice requirements are substantive in nature. For example, in *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla.1991), the supreme court rejected an argument that the presuit notice requirement in a previous version of the medical malpractice statute was procedural and that it, therefore, violated the court's rulemaking authority. The court stated that

"[t]he statute was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding.... We find that the statute is primarily substantive." *Id*.

Accordingly, several district courts of appeals have reached the same conclusion in dealing with other statutes. For example, in *Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, 88 So. 3d 269 (Fla. 1st DCA 2012), the First District held a statutory amendment adding blood banks to the class of potential defendants entitled to the procedural safeguard afforded by a statute that requires presuit notice of intent to initiate litigation cannot be applied retroactively.

Security First ignores the actual holding of *Fitchner,* and quotes from a page from the dissent (SF 23). Security First and the dissent ignore that the impact of not complying with the notice provision is a dismissal in both situations. As shown herein, the dismissal here would impact the insured's substantive rights.

As the foregoing suggests, there would be another constitutional infirmity with an effort to change the insured's right to fees. "[T]he terms of

section 627.428 are an implicit part of every insurance policy issued in Florida.” *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993). Thus, the 2020 version of §627.428 was part of the policy Security First issued to the insured. To change those contract rights would unconstitutionally impair the contract. Art. I, §10, Fla. Const.

The spirit of *Menendez* and the cases cited herein is clear: There can be no retroactive application of a law that changes the rights and obligations under an insurance contract. In this case, it is undeniable that the new law fundamentally, substantively, and directly alters the rights and obligations of the parties under the subject policy.

IV. SECURITY FIRST'S ARGUMENT TO LOOK ONLY AT 1 "PROCEDURAL" PROVISION DOES NOT SANCTION RETROACTIVE APPLICATION (SF issues C & D)

Security First implores this Court to ignore the major substantive changes the statute wreaks and look only at what it characterizes as the procedural notice provision. This would be an erroneous statutory construction for multiple reasons.

Florida courts construe a statute by looking at the whole statute – not just a selected sentence or provision. *See, e.g.*, *Menendez*, 35 So. 3d at

879 ("In our view, the statute, when viewed as a whole, is a substantive statute."); *Borden v. East-European Ins. Co.*, 921 So. 2d 587 (Fla. 2006) ("It is a well-settled principle of statutory construction that all parts of a statute must be read together to achieve a consistent whole.") (citation omitted).

Section 627.70152's obvious purpose is to give insurance companies that have (wrongfully) denied a claim another chance to avoid fees – to which the policyholder's entitlement would have attached before the statute's application. As shown above, the right to fees is a long-standing substantive right under Florida law. This also shows the error in Security First's attempted reliance on *Trapeo*. (SF 18)

Trapeo held the procedural stay provision was ancillary to the substantive right to neutral evaluation that statute created. Because the procedural stay provision was intertwined with the substantive law, including it in the statute did not violate the rule against separation of powers. Similarly, for the notice provision in §627.70152 to be permissible, it must be ancillary to the *substantive* changes this statute brings.

This does not mean one then ignores all the substantive provisions – which cannot be applied retroactively – and pretends the ancillary notice

provision applies in a vacuum, retroactively. Again, the statute must be construed as a whole.

When Security First's "authorities" are read in context or completely, they do not support its position that a notice provision that alters an insured's right to fees is procedural and can be applied retroactively. For example, Security First quotes: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment …." citing *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999). (SF 19)

Security First omits the next words in the opinion: "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." 737 So. 2d at 499. Section 627.70152 would indeed attach new legal consequences – for example, altering an insured's right to fees under a contract issued before its enactment.

Security First's construction would also violate the clear authority cited above that notice provisions are substantive. The reason they are substantive is obvious: these statutory notice provisions have substantive consequences that flow if they are not followed. Here, that would include

the elimination of a right to attorney's fees that would have attached – if the statute were not applied retroactively.

In sum, while understandable Security First would like to don blinders to try to apply a portion of the statute retroactively, this would violate the rules of statutory construction. It would also be contrary to the legislature's providing an effective date and failing to specify that any portion of the statute should be applied retroactively. And a retroactive application would violate Florida's Constitution (and so should be rejected in favor of a constitutional construction).

V. SECURITY FIRST'S ARGUMENT CONSTITUTIONAL NOTICE WAS REQUIRED IS UNPRESERVED, AND NOTICE WAS NOT REQUIRED BECAUSE PEYTON ARGUED THE STATUTE WAS NOT RETROACTIVE. (SF issue B)

Security First contends, for the first time on appeal, that Peyton failed to serve notice of constitutional question on the attorney general or state attorney of the judicial circuit in which the action is pending, as required by Fla. R. Civ. P. 1.071 (SF 10-11, 13-15). As noted above, Security First did not argue to the trial court that Peyton had improperly raised or failed to preserve a constitutional challenge to the §627.70152 notice requirement

(A 9-21, 324-329, 332-359). Thus, Security First's argument that constitutional notice was required is itself unpreserved.

But even if this argument were preserved (which it was not), notice was not required because Peyton argued the statute was not retroactive. This substantive statute simply does not apply to this case.

CONCLUSION

Plaintiff/Respondent Edwina Peyton requests the Court deny Security First's Petition for Writ of Common Law Certiorari and Petition for Writ of Mandamus on the merits and remand the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished on January 3, 2022, by E-Mail to the Honorable Rex M. Barbas, Circuit Judge, gencivdivj@fljud13.org, and E-Mail from the Florida E-Filing Portal to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation set forth in Fla. R. App. P. 9.045. This response contains 5,407 words in Arial 14-point type font.

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