IN THE SUPREME COURT OF FLORIDA

UNIVERSAL PROPERTY &
CASUALTY INSURANCE COMPANY,

Petitioner,

v.

Case SC2024-0025
6th DCA No. 6D23-296

REBECCA HUGHES

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE SIXTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Universal's statement does not convey the efforts Rebecca Hughes made to resolve this insurance dispute before filing suit, or Universal's concession that she would have to be entitled to recover fees even if her first suit were dismissed.

Hughes' Homeowners Policy with Universal.

Petitioner Universal Property & Casualty Company issued a homeowners insurance policy on Rebecca Hughes' property, effective from April 24, 2019, to April 24, 2020 (R 44). During the policy period, on May 29, 2019, Hughes' property was damaged by an insured peril – a water loss that damaged her home and personal property (R 35).

Hughes' Presuit Attempts to Resolve the Dispute against Universal.

After Hughes suffered covered damages, she timely notified Universal of the loss and applied for insurance benefits (R 34-39).

At the end of its adjustment, Universal stated it had "completed our review of your claim" and issued two checks coded "Building Final" and "Contents Final" (R 135-140). When Hughes disagreed with these "final" payments, Universal asked her to provide contractor's bids -- which she did by providing three bids showing substantial additional amounts were owed (R

141-151). Universal rejected these bids and told Hughes to prepare her own "bid," as she would be acting as her own contractor – which she also did (R 154-156).

Universal did not substantively respond to Hughes' November 17, 2020 email providing her "bid," or her contents inventory showing additional damages were owed. Instead, it directed her to submit future emails to an email submission channel even though that channel was being "phased out" (R 34-39, 152-153, 157). After November 17, 2020, Universal simply stopped communicating with Hughes (R 34-39, 152-153, 157).

Hughes' Lawsuit Against Universal.

In August 2021, Hughes filed her Complaint for Breach of Contract and merits discovery (R 34-208, 209-231). The trial court granted Universal's motion for extension of time and gave Universal until October 1, 2021, to respond to Plaintiff's Complaint, and until October 21, 2021, to respond to Plaintiff's merits discovery. (R 234-236).

On September 29, 2021, almost 30 days before it was required to respond to Plaintiff's merits discovery, and 3 days before it was required to respond to the complaint, Universal responded to Hughes' merits discovery requests and propounded its own (R 238-249, 642-643, 673). Universal's Notice of Compliance to Plaintiff's Discovery Requests confirms the

responses were substantive (R 673). For example, Universal admitted a dispute was known to exist before suit was filed, and it admitted the policy that applies to Hughes' claim was issued in 2019 (R 642).

Three days later, on October 1, 2021, Universal moved to dismiss and first raised its argument that Hughes' claim was subject to the pre-suit notice provisions of §627.70152(3) (R 250-252).

Hughes 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 attorney's fees, it cannot be applied retroactively (R 253-268, 640-643). Finally, she argued Universal waived its position because it participated in the litigation and merits discovery (R 474-475, 643).

Two months after it filed its motion to dismiss, but before the motion was heard on January 5, 2022, Universal agreed to grant Hughes an extension of time to file her answers and responses to Universal's merits discovery (R 421). The court granted the extension until January 3, 2022, and Hughes timely responded on December 20, 2021 (R 421, 476-483).

Hughes also filed Amended Interrogatory Answers and Supplemental Responses to Defendant's Request to Produce before the hearing on Universal's motion to dismiss (R 489-493).

Section 627.70152, Effective July 1, 2021

Over two years after Hughes purchased her Universal policy, and 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. The bill adopting §627.70152 contained a July 1, 2021 effective date. *Hughes v. Universal Prop. & Cas. Ins. Co.*, 374 So. 3d 900, 906 (Fla. 6th DCA 2023).

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 limited the circumstances under which a claimant could recover attorneys' fees for other reasons. It created 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 reasonable attorney's fees. §627.428, Florida Statutes (2020). The same bill creating §627.70152 amended §627.428 to provide fees in property insurance disputes will 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.

Hearing on Motion to Dismiss.

The trial court heard Universal's Motion to Dismiss in January 2022 (R 640-644). Universal argued that §627.70152 applies to all suits not brought by an assignee, and it does not say anything about applying to policies issued

after the statute's effective date (R 640). It also argued the legislative history showed the Legislature intended the statute to apply retroactively based on an earlier version of House Bill 305 (the Senate bill became law)(R 641). Universal claimed the notice requirement was purely procedural, rather than substantive (R 641).

Hughes responded that there is no clear statement of legislative intent the statute should be applied retroactively. She also pointed out that the statute attempts to change substantive rights, including the right to attorney's fees, and the right to file suit if there is a denial or underpayment under her 2019 policy. In response to the trial court's comment that the Florida Supreme Court's decision in *Menendez* v. *Progressive Express Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010), was limited to the PIP statute, Hughes pointed out that the supreme court had applied *Menendez* to similar notice provisions, including the medical malpractice statute (R 641-642). The court, however, found *Menendez* does not apply to §627.70152, and that the statute does not affect any substantive right (R 642).

Hughes also argued the Motion to Dismiss should be denied based on waiver because Universal had participated in the litigation and merits discovery before it filed its Motion to Dismiss (R 642-643). Universal's defense counsel responded to Hughes' waiver argument by acknowledging

that Universal had participated in merits discovery, before it filed the Motion to Dismiss on October 1, 2021, and he conceded that should not have occurred:

> "…Your Honor, I entered a Notice of Appearance in this case yesterday. If I had it in the beginning, I would not have served discovery. I don't—I don't think that was intentional on behalf of counsel who started with this case from the beginning…" (R 643).

Order Dismissing Hughes' Complaint Without Prejudice.

The trial court entered an order dismissing Hughes' complaint without prejudice (R 645-646). The court found clear legislative intent that §627.70152 should apply retroactively. It also found that: §627.70152(3) applies to Hughes' policy and claim; the statute and its application are distinguishable from the PIP statute considered in *Menendez*; and the statute does not affect any substantive right. It also agreed Universal participated in merits discovery but found Universal did not waive its arguments for dismissal based on what the court termed as "the limited participation in merits discovery prior to filing its motion to dismiss, based on the facts and circumstances of the case" (R 646). The court granted the motion and dismissed the complaint without prejudice (R 646).

Appeal to the Sixth District and Universal's admission on fees.

Hughes timely appealed, and the Sixth District reversed in *Hughes v. Universal Prop. & Cas. Ins. Co.*, 374 So. 3d 900 (Fla. 6th DCA 2023).

After oral argument in *Hughes*, the Fourth District issued its opinion concluding §627.70152 evinced retroactive intent and affirming a dismissal for failure to give notice. *Cole v. Universal Prop. & Cas. Ins. Co., 363 So. 3d 1089* (Fla. 4th DCA 2023).

Universal filed *Cole* as supplemental authority, along with a "Notice of Filing Regarding Alleged Concession" (R 918-930). Universal sought to retract its admission during the *Hughes* oral argument that attorney's fees are substantive and that if the dismissal were affirmed, Hughes would have the right to seek fees from the first suit in a second suit (something the statute does not provide).

This admission occurred beginning at 1 hour, 3 minutes into the April 6 online video:

> Judge Traver: If the insureds do what you're asking for them to do, which is to basically re-file in a different action, and then they're successful in that action are they entitled to their pre-notice fees?
>
> Ms. Stein: Assuming things have been preserved, and I don't [think] there could be a Rule 1.525 problem like the last case, I think we would be hard pressed to take an issue on fees that's retroactive. Because I mean our cases in the brief essentially concede fees are substantive so I think whatever applied then, might have a very difficult argument to make that somehow fees might be retroactive as well.

(R 931-932).

Universal reiterated: “This is not about attorney’s fees. It’s not about taking away rights under the contract ... They can go back and file this [notice] and end up in the same exact position.”(R 932). That same position is that the insured is entitled to fees on the first, dismissed, suit.

Hughes’ response to Universal’s unusual pleading quoted Universal’s oral argument concessions that fees are substantive and §627.70152 could not eliminate them (R 932). The argument can also be viewed on the Sixth District’s website (Hughes’ response notes the pertinent time markers).

The *Hughes* opinion reversed on the basis that §627.70152 did not contain the required clear retroactive intent:

> Section 627.70152's text contains no clear evidence of legislative intent for retroactive application; there is no statutory language calling for application of the statute to insurance policies issued before the statute's effective date. In fact, section 627.70152 makes no mention at all of insurance policies issued before the statute's enactment. Rather, it contains an effective date of July 1, 2021, indicating legislative intent for the statute to apply beginning on that date.

374 So. 3d at 906, citing *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011).

As discussed below, the Sixth District disagreed with the Fourth District's opinion in *Cole*. The Sixth District did not reach Hughes' alternative argument that Universal had waived any right to insist on notice by its litigating on the merits.

Universal petitioned this Court and Hughes acknowledged that *Hughes* and *Cole* conflicted.

SUMMARY OF THE ARGUMENT

Absent a clear intent, statutes like §627.70152 that affect substantive rights are not applied retroactively. Section 627.70152 evinces no such clear intent. Section 627.70152 affects the parties' substantive rights, including an insured's right to attorney's fees (which existed and vested before §627.70152 took effect) and imposes a penalty (the loss of the filing fee as well as the impact on attorney's fees). Thus, to apply it retroactively would impair contract rights and violate Florida's constitution.

Universal (and its Amici) fail to evaluate whole text of §627.70152, instead focusing on the notice subsection.

Universal's position would impair contract rights. Universal charged Hughes a premium that contemplated her statutory and contractual right to recover fees. Retroactively eliminating or limiting that right would impair Hughes' contract rights and afford Universal a windfall.

The right to seek fees was a substantive right. As Universal recognized at oral argument, §627.70152 could not eliminate the right to attorney's fees for policies issued before its effective date. That would have unconstitutionally impaired those insurance contracts.

Hughes' right to seek fees vested when her cause of action accrued – which was well before July 2021.

Calling the statute remedial would not permit it to be applied retroactively. Applying §627.70152 to dismiss Hughes' suit would impair her right to fees and result in the loss of her filing fee, another penalty.

ARGUMENT

Standard of Review.

Whether a statute applies prospectively is a pure question of law that is reviewed *de novo*. *Bionetics Corp. v. Kenniasty*, 69 So.3d 943, 947 (Fla. 2011).

"We have long recognized that 'statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome.'" *Planned Parenthood v. State*, 384 So. 3d 67, 76 (Fla. 2024).

I. Section 627.70152 does not apply retroactively because the Legislature did not express clear retroactive intent. The statute must be read as a whole and applying §627.70152 retroactively to policies issued before its effective date would unconstitutionally impair those contracts.

A. This Court's retroactivity framework and Universal's failure to read the whole text.

Whether one looks first for clear retroactive intent, or at whether a claimed "remedial" statute seeks to accomplish its purpose by impacting substantive rights (or creating new burdens), the analysis leads to the same result in this case.

The principles in *Menendez* and *Devon* make sense, using either approach. Insurance policies are heavily regulated contracts. The rights

under them to seek recovery are important and are based on future events. This is so whether considering damage to property that may occur after the policy is issued or the recovery of fees if a policyholder must sue and prevails. Thus, a change that would affect the right to sue or the right to a recovery or potential recovery, would be a substantive change. The Florida Constitution prohibits impairing either side's rights under a contract. So, it makes sense to require a clear statement of intent for a statute that would affect substantive rights to apply to an existing contract.

This Court has long followed a 2-pronged analysis for determining when a statute or statutory amendment should be retroactively applied to an insurance policy issued before the enactment's effective date. First, the Court determines if the Legislature expressed a clear intent for the statute to apply retroactively. If the Court finds a retroactive intent is clearly expressed, it must determine if applying the statute retroactively would violate the Florida or United States Constitutions. *See Devon*, *Menendez*.

As discussed below, the concerns over retroactivity applying to impair contract rights in insurance policies are elevated compared to other statutory amendments. Here the parties' expectations were set when they contracted. Just as an insurer cannot be made to provide greater coverage than it

contracted for, neither should an insured be required to give up rights for which she paid.

When the whole text of §627.70152 is read, the retroactive impact on Ms. Hughes is clear, as discussed in the next section. In sum, retroactivity would impose new burdens on her, eliminate a right to seek attorney's fees that existed when her policy was issued (which right "vested" when her claim accrued), and impose a new monetary penalty in the form of the loss of her filing fee.

Universal would prefer to skip the 2-part test and look at whether the statute is procedural or remedial. Correctly analyzed, the result is the same. Universal errs in assuming that if a statute is "remedial," then the inquiry should be over (IB 11-14).

As the *Hughes'* majority and concurring opinions show, the result is the same here because §627.70152 affects substantive rights (see below). Second, Universal's argument relies on reading only the notice provision and not the whole text of the statute – contravening this Court's decisions. The Second District made the same observation in *Buis v. Universal Prop. & Cas. Ins. Co.*, 2024 Fla. App. Lexis 6910 (Fla. 2d DCA September 6, 2024).

Judge White's concurring opinion in *Hughes* cites this Court's opinions (including a 2019 case authored by Justice Canady) that a statute is

substantive if it achieves a remedial purpose by affecting or creating rights, or by imposing new burdens. 374 So. 3d at 911. Section 627.70152 affects existing rights and imposes new burdens.

B. Section 627.70152 imposes new legal burdens on policyholders and impacts substantive rights.

Section 627.70152 is not just a notice statute. This is clear when the whole text is considered, as required by this Court's opinions. *E.g., DeSantis v. Dream Defenders.*, 389 So. 3d 413, n.12 (Fla. 2024); *Conage v. United States*, 346 So. 3d 594 (Fla. 2022).

Consistent with the whole-text doctrine, Florida law has long required construing 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.") (cite omitted). This Court's recent whole-text decisions emphasize that approach.

There will be times when reading the whole text will benefit those seeking a recovery and times when it will benefit those trying to avoid a recovery. *See Ripple v. CBS Corp.*, 385 So. 3d 1021 (Fla. 2024)(wife entitled

to benefits as surviving spouse); *Steele v. Comm'r of Soc. Sec.*, 385 So. 3d 587 (Fla. 2024)(child not entitled to claim against decedent's estate). That is the nature of neutrally examining the whole text. The text is not twisted to meet one side's desire to lessen claims, for example (IB 8-9, 20, 41).

Universal's desire to focus on the notice provision in section 3 and ignore the consequences of not providing notice is exactly what this Court warns against: "'Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.' Scalia & Garner, supra, at 167." *DeSantis v. Dream Defs.,* n.12.

Universal admitted before the Sixth District that if Hughes' case were dismissed and she were forced to file another suit, she would have the right to seek fees from the first suit (R 931-932). This recognized Hughes' substantive right to fees. But this would require rewriting the statute and would conflict with the text of §627.70152.

Hughes conforms to the whole text approach. *Hughes* considered the statute's "eight interrelated subsections." 374 So. 3d at 902. The opinion describes some of what an insured must do to comply with the "notice" requirement, and what insurers must do. 374 So. 3d at 902-905. The statute

"transformed an insured's ability to sue an insurance company under a property insurance policy and an insurer's obligations to respond to and pay insurance claims." 374 So. 3d at 904. It concluded: "In sum, section 627.70152 significantly alters an insurer's obligation to pay and an insured's right to sue under a property insurance policy." 374 So. 3d at 904.

The statute not only imposes new burdens but affects the insured's right to recover attorney's fees if the insured did not comply. It eliminates the right when the case is dismissed. And if the insured did comply but did not recover certain percentages of the presuit offer, then the right to fees is reduced or eliminated. §627.70152(5), (8).

Universal admits that when a statutory amendment affected the amount of benefits due, courts correctly held it could not be applied to policies issued before the amendment took effect (IB 19). It errs in failing to appreciate the right to attorney's fees is substantive and vests when the cause of action accrues (see below), applying §627.70152 would impact the benefits under an existing policy.

Universal's attempted reliance on the neutral evaluation provision in sinkhole litigation proves why its position is wrong here (IB 19). That statute did not result in a dismissal of the action. There was no impact on fees and

no loss of the filing fee. Rather the action was simply stayed during neutral evaluation.

This shows how the Legislature could have made §627.70152 apply to existing policies: (1) a stay rather than dismissal and (2) no impact on attorney's fees or filing fees. The differences reaffirm §627.70152 was not intended to apply retroactively. Universal may wish §627.70152(5) provided for a stay rather than dismissal – but it cannot rewrite the statute.

Further, Universal is wrong in suggesting there is no real penalty for noncompliance because the insured can refile (IB 36). This ignores that, besides the loss of attorney's fees to that point, an insured would have to pay another filing fee. *Hughes*, 374 So. 3d at 913. The case is not stayed or abated – it is dismissed. The new suit would require a new filing fee. This is a monetary penalty that would flow directly from retroactive application.

Universal argues the notice provision in §627.70152(3) is procedural and does not affect substantive rights, citing *Cole* and *Cantens v. Certain Underwriters at Lloyd's London*, 388 So. 3d 242 (Fla. 3d DCA 2024) (IB 14). Contrary to the whole-text requirement, they explicitly considered only the notice provision. They are addressed further below.

Isolating on the notice provision is precisely the type of myopic argument that this Court's mandate to consider the whole text prohibits.

Besides the other new burdens, a failure to give the section 3 notice leads to the section 5 dismissal, as occurred here. Then section 8(b) eliminates fees for the work done in the initial suit, and section 8(a) reduces or eliminates fees in the second suit. And the insured loses the filing fee from the first suit. As discussed below, the statutory right to seek attorney's fees was a part of the insurance contract before the repeal of §627.428.

C. Applying §627.70152 to Hughes' suit would be an impermissible retroactive application.

Hughes noted the parties agreed that the operative date for determining §627.70152's retroactive application is the subject policy's issuance date. 374 So. 3d at 905. Citing opinions from this Court, it said: "This makes sense because to determine whether a statute concerning insurance contracts has retroactive application, '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.'" 374 So. 3d at 905.

The Sixth District then explained why §627.70152 could not be applied retroactively under this Court's decisions in *Devon* and *Menendez*. As described above, the statute imposes new burdens and impacts the substantive right to attorney's fees. 374 So. 3d at 905.

Not applying §627.70152 to policies predating July 1, 2021, meets the parties' expectations when they entered the insurance contract. Universal expected that if it wrongfully denied coverage it would have to pay Hughes' attorney's fees if she successfully sued. Hughes paid a higher premium for that right. To retroactively remove that right would impair her contract and afford Universal a windfall.

D. The Legislature did not manifest a clear intent for §627.70152 to apply retroactively and Universal ignores the statute's whole text.

The Sixth District recognized this Court's holding in *Devon* that the court must first determine if there is "clear evidence of legislative intent to apply the statute retrospectively." *Devon*, 67 So. 3d at 194. Section 627.70152 had an effective date of July 1, 2021. *Hughes*, 374 So. 3d at 906.

Devon said: "the Legislature's inclusion of an effective date for an amendment is considered to be evidence rebutting intent for retroactive application of a law. *See State Dep't of Rev. v. Zuckerman-Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977)." This Court was even more direct in *Zuckerman*: "The 1977 Legislature's inclusion of an effective date of July 1, 1977, in Ch. 77-281 effectively rebuts any argument that retroactive application of the law was intended." 354 So. 2d at 358.

As the Sixth District observed, the language the statute applies to "all suits arising under a residential or commercial property insurance policy" addresses the types of cases and policies to which the statute applies – not when the statute applies. 374 So. 3d at 906. Neither the bill nor the statute says it applies to policies issued before its effective date. The Legislature could have expressed clear intent that the statute applied to all suits filed after July 1, 2021 (regardless of when the policy was issued), as it essentially did in *Menendez*.

The three concurring opinions in *Sulzer v. Am. Integrity Ins. Co. of Fla.*, 49 Fla. L. Weekly D 132 (Fla. 6th DCA January 8, 2024), agreed the statute lacked clear retroactive intent. Judges Smith and Mize elaborated on the statute's substantive impact on policyholders.

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). Again, §627.70152 contains no such language.

Universal's claim that one can divine "clear intent" from one or two words ("all suits") is precisely the failing this Court has rejected. The Second District in *Buis* said: "Read in context, the phrase 'all suits' is modified by a description of the type of plaintiff and lawsuit for which section 627.70152 applies, not the timing of the insurance policies that are governed by the statute."

Buis continued: "In other words, the language 'all suits' informs the reader that the statute only applies to suits involving plaintiffs who are not 'assignee[s]' and that arise under 'residential or commercial property insurance polic[ies]' and that the statute excludes suits involving plaintiffs who are assignees and that arise under other insurance policies such as automobile or personal injury policies."

The error in purporting to divine intent by isolating two words is even more egregious where the Legislature has shown it knows how to express clear retroactive intent -- as is apparent from *Menendez* and the recent insurance statutory amendments discussed below.

Different portions of the statutory amendments in *Menendez* had different effective dates, with the notice portion applying based on date of treatment and when the suit was filed – not when the policy was issued. *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324, 329 (Fla. 3d DCA

2008), *quashed*, *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 875 (Fla. 2010). This language led the Court to find the retroactive intent for the notice provision clear. By contrast, the Legislature did not clearly state §627.70152 would apply based on the date of suit – something *Menendez* (and the statutes discussed below) shows it knows how to do.

Universal tacitly acknowledges so-called legislative history may no longer be relevant (IB 40). Yet it and the Amici still attempt to overcome the lack of clear retroactive intent by referring to language in an unadopted *draft* House bill that said the statute would apply to policies issued or renewed after July 1, 2021 (IB 40-41).

First, it was the Senate bill that became law, not the House bill. Second, language that the statute would apply only to policies dated after July 1, 2021, would have been superfluous. After *Menendez* and *Devon*, the Legislature would know prospective application for such substantive changes to insurance policies is the rule, absent an express statement of retroactive intent.

Universal has not pointed to anything showing the Legislature as a whole intended the statute should apply to pre-July 1, 2021 policies. It is just as likely, or more likely, the Legislature realized the language in the House

draft was unnecessary given existing Florida law. Omitting superfluous language does not express retroactive intent.

This Court has cautioned against relying on legislative inaction. *Tsuji v. Fleet*, 366 So. 3d 1020, 1031 (Fla. 2023). Not adding superfluous language would be legislative inaction.

The case Universal cites about the deletion of language shows what is missing here. In *Don King Prods. v. Chavez*, 717 So. 2d 1094, 1095 (Fla. 4th DCA 1998), the court said: "In the original bills offered in both the House and Senate, the language expressly created a conclusive presumption of irreparable harm. The section was amended in the final versions to delete that provision and substitute the present language."

By contrast, here the adopted Senate bill simply did not contain the language – which the Legislature would know was superfluous given *Devon*. Eliminating unnecessary language is not evidence of a secret retroactive intent, but a recognition that no language is required when the law is to operate prospectively (and constitutionally).

If Universal were correct and the notice requirements applied to "all suits," then that would have required insureds in pending suits to have given notice. And because they had not, those suits would be dismissed. This would have included claims for which the statute of limitations would have run.

E. Statutory changes should not impair contract rights for either party.

The rule against retroactive application also makes sense. If the Legislature is going to change settled expectations under the law – particularly contract rights – those changes must be prospective. And this works for both sides of an insurance contract.

In *Devon*, the statute at issue imposed a new notice requirement on an insurer who demanded appraisal. The policy in that case predated the statute. This Court found there needed to be more than an effective date to establish clear retroactive intent. The statute did not apply retroactively, even though it was "only a notice requirement."

Similarly, *State Farm Mut. Auto. Ins. Co. v. Gant*, 478 So. 2d 25, 26 (Fla. 1985), held an amendment permitting stacking of uninsured motorist coverage could not be applied to a preexisting contract without impairing the obligations of that contract in violation of article I, section 10 of the Florida Constitution.

In sum, the importance of not impairing settled rights applies to both insurance companies and insureds.

As shown next, the Legislature and Florida law recognize the right to recover attorney's fees related to an insurance policy dispute is a substantive

right that cannot be eliminated for an insured or imposed retroactively on an insurer.

F. The §627.428 right to attorney's fees is substantive and part of every policy.

As quoted above, Universal sought to retract its admission that attorney's fees are substantive and that §627.70152 could not eliminate Hughes' right to fees. Its recognition that the new statute could not eliminate Hughes' existing right to fees was correct. Universal seems to have forgotten that admission in now contending the impact on fees is not substantive (IB 23).

Before this Court, Universal asserts fees are not substantive and not at issue (IB 23, 46). This argument continues its myopic refusal to consider the whole text of the statute (and conflicts with its admission in the Sixth District). Next Universal claims that Hughes' right to seek fees had not vested (IB 46-47). This is wrong as shown below.

Insurance coverage is highly regulated by the Florida Legislature. Chapters 624 to 631 occupy over 700 pages in the official 2023 Florida Statutes. Chapter 627 contains sections on insurance contracts and property insurance.

Florida law has long held that insurance policies issued in Florida are governed by these insurance statutes. *E.g., Found. Health v. Westside EKG*

Assocs., 944 So. 2d 188, 195 (Fla. 2006), citing *Citizens' Ins. Co. v. Barnes*, 98 Fla. 933, 124 So. 722, 723 (Fla. 1929) (finding an ordinance is "part of the contract of insurance" because there was no reason not to apply the "general doctrine that, where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract").

This principle includes that the attorney's fee provision in §627.428 was incorporated in every insurance contract. *E.g., State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *Synergy Contr. Grp., Inc. v. Fednat Ins. Co.*, 332 So. 3d 62, 65 (Fla. 2d DCA 2021).

Universal is arguing that §627.70152 applies to policies that do not contain the language of §627.70152. Universal needs this incorporation doctrine for its position (and would need the doctrine for policies issued or renewed after July 1, 2021, for which it had not added the provisions of §627.70152).

To be consistent and intellectually honest, Universal must recognize the 2019 version of §627.428 was incorporated into Hughes' insurance policy. And it did acknowledge Hughes' substantive right to fees in the Sixth District.

The provisions of §627.70152 are not in Hughes' policy, but Universal is really arguing those provisions should be incorporated into policies (R 69-72). And that is fine for policies issued or renewed after July 1, 2021. As discussed below, when the Legislature enacted a fee statute to add recovery of fees on surplus lines policies, it was careful not to have it apply to existing policies.

Section 627.428 was found in Part II of Chapter 627, where §627.401 provides limited exceptions for when a provision in Part II does not apply to an insurance policy (for example, a policy not issued for delivery or delivered in Florida). Section 627.428 applied to this Florida policy covering real property losses.

A "statutory right to attorney's fees constitutes a substantive right." *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011); s*ee also Moser v. Barron Chase Sec., Inc.*, 783 So. 2d 231, 236 (Fla. 2001)("rights to attorney's fees granted by statute are substantive rather than procedural"); *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).

This makes sense because a right to attorney's fees in general is a substantive right which, if eliminated, would impair the parties' contract. *See,*

e.g., Pelican Bay Homeowners Ass'n v. Sedita, 724 So. 2d 684, 685 (Fla. 5th DCA 1999)(eliminating fee right prohibited by Art. I, sec. 10, U.S. Const.; Declaration of Rights, art. I, sec. 10, Fla. Const.). Similarly, this Court in *State Farm v. Gant*, held an amendment permitting stacking of uninsured motorist coverage could not be applied to a preexisting contract without impairing the obligations of that contract, which would have violated article I, section 10 of the Florida Constitution.

The Legislature recognizes the right to fees is a substantive right and obligation and has done so in the context of protecting insurers. When the Legislature passed §626.9373, granting insureds the right to recover fees against surplus lines insurers, it limited the insurer's fee exposure to "a policy or contract executed by the insurer on or after the effective date of this act." This language protected insurers who had issued policies before the right to fees was imposed, so the insurance policies/contracts were not impaired by adding this additional fee obligation.

Universal misread this statute in its opposition to Hughes' fee motion in this case. It asserted the Legislature treated the 2023 repeal of the surplus lines fee statute, §626.9373(1), differently than the repeal of §627.428 (Fee Response filed March 12, 2024, p 11). This is wrong.

Both §626.9373 and §627.428 were amended in SB 2 in December 2022 (Chapter 2022-271) to remove fees for property insurance claims. Both statutes were repealed in HB 837, which stated the repeal applied only to policies issued or renewed after the 2023 effective date.

In opposing Hughes' fee motion, Universal cited the language in §626.9373 that was there ***before*** any of the recent amendments, limiting the insurer's fee exposure to "a policy or contract executed by the insurer on or after the effective date of this act." (March 12, 2024 Response p 11). As noted, this language in the original act was to protect insurers who had issued policies before the right to fees, so the insurance policies/contracts would not be impaired by adding this additional obligation. This was not a "savings" clause for the change in fees that came years later.

In sum, the Legislature has correctly recognized the right to recover fees is a substantive right that cannot be eliminated – or added – retroactively. Universal was correct to recognize before the Sixth District that §627.70152 could not impair Hughes' right to fees.

G. Universal fails to appreciate Hughes' right to fees vested when her cause of action accrued so that applying §627.70152 would impair that right.

Universal again tries to limit the inquiry to just the notice provision, ignoring the whole statute. As shown above, the sections of §627.70152

operate together to eliminate an insured's right to fees when the action is dismissed – along with forfeiting the filing fee.

Universal argues the right to fees can be ignored because it does not vest until there is a final judgment or confession of judgment. (IB 46-47). That is wrong. The statutory right to attorney's fees afforded by §627.428 ***vests when the underlying cause of action accrues***. *See L. Ross, Inc. v. R.W. Roberts Constr. Co.*, 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985), *approved by* 481 So. 2d 484 (Fla. 1986), and *cited with approval in Bitterman v Bitterman,* 714 So. 2d 356, 363 (Fla. 1998)(emphasis added).

In *L. Ross*, the insured had a judgment against an insurer in an action on a payment bond. The issue before the court was whether the attorney's fee provision in §627.756, Florida Statutes (1983), which limited the attorney's fees an insured could recover from his insurer, applied to the case, or whether §627.428, which repealed that fee limitation and came into effect before the judgment was entered, should be given retroactive effect. Not surprisingly, the court found that because §627.428 created a new substantive right to attorney's fees, it could not be applied retroactively. The court applied the statute that existed when the insured's cause of action on the surety bond vested or accrued.

As Judge Cowart writing for the court explained:

> Substantive rights and obligations created by statutes do not vest and accrue as to particular parties until the accrual of a particular cause of action giving rise to the substantive rights and obligations in a particular instance. Substantive rights and obligations as to the receipt and payment of attorney's fees is somewhat particular because, whether those rights and obligations are viewed as a separate cause of action, or as costs taxed in another, underlying, cause of action, they are ordinarily merely incidental to the other, underlying, cause of action and, in a sense, the right to receive, as well as the reciprocal obligation to pay, attorney's fees, is merely ancillary to, and an incident of, the accrual of the underlying cause of action concerning which the right to recover attorney's fees is given. ***Therefore the right to recover attorney's fees ancillary to another particular underlying cause of action always accrues at the time the other, underlying, cause of action accrues. This means substantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues***.

466 So. 2d at 1098 (emphasis added).

This Court approved *L. Ross* on further review and then quoted from it in *Bitterman*: “This means substantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues.” 714 So. 2d at 363.

"[O]nce a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right." *Universal Prop. & Cas. Ins. Co. v. Laguna Riviera Condo. Ass'n*, 386 So. 3d 629 (Fla. 2d DCA 2024); *see also Tison v. Clairmont Condo. F Ass'n*, 288 So. 3d 699, 702 (Fla. 4th DCA 2019)(citing *L. Ross* with approval, holding condominium owner who

prevailed in suit for unpaid assessments still entitled to collect fees, even though he had sold unit before judgment entered, because the right to pursue fees vested when he was sued).

Hughes' cause of action on her 2019 policy accrued and her right to seek attorney's fees vested in 2020, when Universal refused to pay further toward her loss – well before any 2021 statutory changes. As shown above, the right to attorney's fees if the insured prevailed was part of every policy issued while §627.428 applied.

Again, this result makes sense because, as shown above, the right to attorney's fee is an important aspect of any contractual relationship. It cannot be eliminated without impairing the contract. And Hughes paid for that right here.

Universal's argument that Hughes' right to attorney's fees did not vest until she received a judgment or confession of judgment conflicts with this Court's logical holdings in *L. Ross* and *Bitterman* that the right to seek those fees vested when the insured's underlying cause of action accrued. The cases Universal cites to support its argument – none of which addressed §627.428 -- do not hold otherwise (IB 46-47).

For example, *Romine v. Fla. Birth Related Neurological Injury Comp. Ass'n*, 842 So. 2d 148 (Fla. 5th DCA 2003), held a NICA statutory amendment

that enacted an election of remedies bar could not be given retroactive application. The court stated, "The date of the child's birth and the injuries sustained at that birth, if any, establish the right of the infant to receive NICA benefits and the scope of those benefits. Thus, we conclude that the Romines had a 'present, fixed right of future enjoyment' to receive NICA benefits if she was otherwise qualified to receive such benefits. . . . We conclude that the amendment is more than a mere change in procedure; rather, it changes the right itself." *Id.* at 154-155. Here, this Court has held the relevant date is the date when the underlying cause of action accrued – a time when §627.428 was still in effect. *See L. Ross, Bitterman.*

Universal cites *Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983), for the holding that §627.428 authorized an award of attorney's fees to the insured upon a judgment or confession of judgment in the pending suit (IB 46). When a court may award fees does not speak to when the insured's right to seek those fees accrued and vested. And, as this Court holds, that right accrued and vested at the same time as the underlying cause of action. *See L. Ross; Bitterman*.

The right to fees – like other contract rights under the insurance policy – depends on future events. If there is no property loss, then there will not be

a claim. But the insured paid for the right to make a claim for the loss (and fees) should a claim arise.

R.A.M. of S. Florida, Inc. v. WCI Cmtys., Inc., 869 So. 2d 1210 (Fla. 2d DCA 2004), is completely inapposite (IB 47). There, R.A.M., a subcontractor who did not become licensed until after the construction was terminated, sought to enforce an otherwise unenforceable construction contract, based on a statutory provision repealed shortly after the construction work began that would have permitted R.A.M. to cure this deficiency. The court found that the subcontractor's ability to utilize the statutory cure provision disappeared when the provision was repealed because it was "nothing more than a hope that the opportunity to cure its unlicensed status would remain available." *Id.* at 1218. Because the subcontractor had not taken advantage of the cure provision before it was repealed, there was no contract. Here, by contrast, there was undeniably a contract that incorporated §627.428's fee provision, and Hughes had a vested right to pursue attorney's fees under both the contract and the statute.

Universal cites another equally inapposite case, *M.Z. v. State*, 747 So. 2d 978 (Fla. 1st DCA 1999), for the proposition that "a party cannot challenge the constitutionality of a statute unless he has been, or will be, adversely affected by its terms" (IB 47). First, *M.Z.* involves a criminal sentencing

statute, not a bought-and-paid-for contract and a vested right under that contract. Universal's suggestion that Hughes ultimately may not be adversely affected by depriving her of that right is wrong as shown above (and regardless of the attorney's fee issue the filing fee would be lost). Second, Hughes is not challenging the constitutionality of §627.70152, only its retroactive application.

In sum, Universal relies on inapposite cases that did not involve contract rights. And Universal's erroneous vesting position would not cure the retroactivity problem. The insured paid for the right to seek attorney's fees and that right vested when the cause of action accrued. Further, attorney's fees aside, the dismissal would impose a penalty on Hughes by requiring another filing fee, which also is not permitted.

H. The Sixth District correctly found that §627.70152 could not be applied retroactively even if there were clear intent.

Hughes detailed the substantive changes §627.70152 makes to the insurer-insured relationship in property cases, for attorney's fees and more. 374 So. 3d at 907-910. And it explained why applying those changes retroactively would render the statute unconstitutional.

As described in *Hughes*, *Sulzer*, and the Statement of Facts above, §627.70152 creates new burdens for insureds and insurers. It also reduces or eliminates the insured's right to recover attorney's fees and forces the

insured to pay a new filing fee if the case is dismissed (assuming the statute of limitations has not run). These requirements did not exist at the inception of Hughes' policy period. In simplest terms, these are new obligations, which means they cannot be enforced without impairing the parties' contract.

This Court recently reiterated that statutes must be construed whenever possible to affect a constitutional outcome. *Planned Parenthood*. Construing §627.70152 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)).

I. A claimed remedial purpose does not change the requirement to protect contract rights.

Universal contends the statute should be regarded as remedial and this would cure the absence of clear retroactive language. Judge White's concurring opinion addresses the fallacy in this argument.

Universal's focus on a desire to reduce insurance claims adds nothing to the analysis (IB 8-9, 20, 41). One would hope that the Legislature passes statutes to address a perceived issue it thinks needs improving. That says *nothing* about whether the Legislature intended to pass a law it knew would

run afoul of *Devon*, *Menendez*, and the Florida Constitution if applied retroactively. In other words, the issue is not whether the Legislature thought the statute was a good idea. The issue is whether it intended to violate this Court's prohibitions against impairing rights and specifically policyholder rights. Universal's desire to achieve "more" than the Legislature passed is no basis to rewrite the statute.

Further, Universal ignores that Hughes (like insureds in general) was already required to present her claim to her insurer before filing suit, and she did so, as shown above (R 69-70). The statute gives insurers who make inadequate offers after insureds present their claims another opportunity to avoid suit for insureds who do not acquiesce.

Judge White quoted from Justice Canady's opinion recognizing the law that a remedial statute is substantive if it "achieves a remedial purpose by creating substantive new rights or imposing new legal burdens." 374 So. 3d at 911. In that case, the new statute did not affect or create substantive duties, liabilities, obligations, or rights. 374 So. 3d at 911.

By contrast, here §627.70152 creates new duties and burdens, and creates a new penalty: dismissal and the loss of filing fee, in addition to the impact on attorney's fees. 374 So. 3d at 913.

Universal misplaces its reliance on *Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986)(IB 21-22). That case held a statutory change in the "temporary protection from the disclosure of sensitive documents" was remedial and could be applied retroactively. The change did not diminish contract rights or impose a new penalty (forfeiture of filing fee).

In sum, the remedial label is not a talisman that eliminates the prohibition against applying substantive changes retroactively. Nor would it eliminate the unconstitutional impairment of the existing insurance contracts that would occur.

J. The mistakes in *Cole* and *Cantens* and the PIP red herring.

Hughes addresses some areas where the *Cole* panel went astray. It noted *Cole* focused on a single word instead of the whole text. 374 So. 3d at 907.

Cole also said: "if the legislature had intended to limit this presuit notice provision to policies issued after the statute's effective date, the legislature would have included language saying so." 374 So. 3d at 907. As *Hughes* observes, this reliance on silence inverts this Court's precedent requiring clear evidence of intent for a statute to apply retroactively. *Id.*

Then *Cole* sought to distinguish *Menendez* because it addressed personal injury protection coverage, PIP. 374 So. 3d at 910. As *Hughes*

observed, this ignores that *Devon* applied the *Menendez* approach to real property insurance. Indeed, *Cole* does not even cite *Devon*. This Court has also used the *Menendez* two-part retroactivity analysis in analyzing other statutes. *E.g., Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 130 (Fla. 2011).

A subsequent opinion from a different panel of the *Cole* court cited *Devon* and refused to apply an amended paternity statute retroactively where there was simply an effective date. *McClam v. Carrier*, 373 So. 3d 363, n.2 (Fla. 4th DCA 2023).

Cantens followed *Cole* and so made the same mistakes. *Cantens* cited *Devon* only for the standard of review and ignored that *Devon* applied *Menendez* to a real property insurance statute.

Cantens said §627.70152(3) "itself does not implicate an insured's ability to recover attorney's fees, except insofar as it imposes a procedural notice requirement prior to bringing an action." No – not giving the notice eliminates the right to recover fees when the case is dismissed under section 5.

Cantens then said it, like *Cole*, was not addressing the attorney's fee provision: "The application of other possible statutory requirements, including the now-repealed attorney's fees provision formerly contained within

627.70152, are not before us." This was another refusal to consider the whole text.

This myopic insistence on looking only at one section of the statute violates the whole-text canon. The effect of not giving the section 3 notice is the dismissal under section 5. This dismissal then leads to the denial of fees under section 8, and the loss of the filing fee.

The panel in *Sanchez v. Sec. First Ins., Co.*, 49 Fla. L. Weekly D524 (Fla. 3d DCA March 6, 2024) recognized it was required to follow *Cantens*. Judge Scales' concurring opinion expressed his disagreement with *Cole* and *Cantens*. After discussing the notice, he observed: "Ms. Sanchez and Security First did not include in their bargained-for insurance contract the detailed notice now mandated by the statute, nor did they contract for the statute's mandatory dismissal penalty associated with the statute's new requirements."

Judge Scales continued that the new presuit obligation "effectively requires the insured to adjust his own claim." He noted the new penalty of dismissal and *Cantens'* comment the insured could simply refile, "provides little solace to the low-income policyholder forced to again incur filing and service of process fees, or worse, to a policyholder whose lawsuit has

suffered section 627.70152(5)'s mandatory suit dismissal after the expiration of the statute of limitations, and therefore, cannot re-file."

Despite *Devo*n following *Menendez*, and *Hughes* explaining why both apply here, Universal continues to claim *Menendez* should be ignored because it addressed PIP (IB 23-32). Universal overlooks that property owners with damaged homes also have an interest in a prompt resolution of their claims (IB 24-25).

But what Universal ignores most of all is that the general principle requiring a clear intent to retroactively apply substantive changes to insurance contract rights applies whether considering vehicle, real property, or other insurance for the reasons discussed herein. To try to justify impairing contract rights, Universal returns to its "just a notice provision" argument, ignoring the full statute (IB 29).

Finally, Universal argues that if *Menendez* requires considering the statute as a whole, then this Court should recede from that aspect of *Menendez* (IB 32). First, this tacitly admits that if §627.70152 is considered as a whole, *Hughes* is correctly decided.

Second, Universal cites to nowhere in the trial court or Sixth District that it suggested this aspect of *Menendez* be revisited if the case reached this Court. *See Pinellas Cnty. v. Joiner,* 2024 Fla. LEXIS 976, n.3 (Fla. June 27,

2024)(declining to address a question not passed upon by the trial or district court).

Third, receding from considering the whole text of statutes would mean not just receding from *Menendez*, but from *Conage, DeSantis v. Dream Defs.,* and numerous other decisions this Court has authored.

Fourth, this Court holds that before deciding to recede from a precedent there are other considerations. First, the Court looks at whether the decision is “clearly erroneous.” *State v. Penna*, 385 So. 3d 595, 601 (Fla. 2024). Here *Menendez* was followed in the unanimous *Devon* opinion. That is not the sign of clearly erroneous.

Next the Court would evaluate whether there are any valid reasons for retaining the rule. “The critical consideration is reliance.” *State v. Penna*, 385 So. 3d at 601. "In evaluating reliance interests, courts consider 'legitimate expectations of those who have reasonably relied on the precedent.'" *Id. Penna* observed reliance interests are greater in cases "involving property and contract rights." *Id.* Hughes and other insureds relied on *Menendez* and *Devon*. The insurer (guaranty association) relied on *Menendez* in *Devon*.

Unless this Court is ready to abandon the whole-text approach to statutory construction, there is no need to engage in the *Penna* analysis.

K. Universal's erroneous attempt to distinguish *Devon*.

Universal's attempt to avoid *Devon* again hinges on its claims that no contractual right is being impaired, and the insured suffers no penalty because she can refile (IB 35-36). Putting aside all the other considerations (delay, additional burdens regarding the notice, impact on attorney's fees) the insured would be penalized by the loss of the filing fee.

Asserting the dismissal without prejudice is the "sole penalty" for noncompliance is simply wrong (IB 36). The dismissal means the loss of the filing fee. That fact alone means there is a penalty that would result from retroactive application. That penalty renders the remedial question academic and confirms the statute cannot be applied retroactively. And it could also mean that the insured would be time-barred from re-filing if the statute of limitations had run. *Sanchez*, J. Scales concurring.

As Universal recognized at oral argument, the insured's right to seek attorney's fees is a substantive right that could not be diminished for policies predating §627.70152. The case law cited above confirms this, as does common sense.

II. Section 627.70152 is substantive and cannot apply retroactively to policies issued before its effective date.

A. The Legislature did not intend §627.70152 to apply retroactively.

Most of Universal's claims for retroactive intent are refuted above, but Hughes addresses its additional arguments.

Universal cites a supremacy of text case on construing a term, *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942 (Fla. 2020)(IB 37). A single word is not the issue here and, since then, this Court has emphasized looking at all the textual and structural clues and the whole-text canon. *E.g., Conage, DeSantis v. Dream Defs.*

When the whole text of §627.70152 is considered, the wording makes clear that the Legislature did not express a clear intent - or any intent - for it to apply retroactively. As shown above, when the whole text is considered, not providing the notice leads to dismissal. Dismissal would adversely impact attorney's fees that are part of an existing contract, and impose a penalty in the loss of the filing fee. The Legislature knew from experience that it should not have a statute apply retroactively to impair contract rights or impose a penalty. *See Menendez*.

Considering legislative history is another reason Universal eschews reading the whole text of §627.70152 (IB 38). As shown above, the statute contains significant substantive provisions, including impacting attorney's

fees. If one is going to consider legislative history, the Legislature knew the statute in *Menendez* had been found unconstitutional when it impacted fees. So, including the significant limits on fees in §627.70152 confirms the Legislature did not intend for the statute to be retroactive (and unconstitutional).

Ham said: "we thus recognize that the goal of interpretation is to arrive at a 'fair reading' of the text by 'determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.' Scalia & Garner, Reading Law at 33." 308 So. 3d at 947. The Legislature, knowing what happened in *Menendez*, would want to avoid an unconstitutional retroactive impact.

Universal criticizes the Sixth District for not addressing the "condition precedent" to filing suit language in §627.70152(3) (IB 40). That is likely because while Universal's answer brief quoted the statute, it did not argue any significance should be attached to that language (R 795). And none should.

"As a condition precedent to filing suit under a property insurance policy" says nothing temporally about to which policies the condition applies. It does not say as a condition precedent to filing suit *on any policy issued*

before or after July 1, 2021. As noted, to give "all suits" and "condition precedent" the effect Universal urges would mean suits pending as of July 1, 2021, would have been subject to dismissal. No notice would have been given in any of them.

As shown above, looking to an unadopted bill to claim intent by silence is an invitation to the type of arguments this Court has condemned (IB 41). Universal's contention the Legislature "expressly declined" to clarify its intent as to the 2021 statute (§627.70152) when addressing a 2022 statute points to *nothing* to prove retroactivity of the 2021 statute was considered in 2022 (IB 41).

What would be significant, if considering other legislation, is that the Legislature, in clarifying the 2022 statute and then in passing the 2023 statute repealing attorney's fees, showed it appreciated those changes could not apply to policies issued before the effective dates.

2022 Fla. Laws Ch 271 (2022 Fla. SB 2) revised §627.428 to eliminate the right to attorney's fees in a suit arising under a property policy. Section 627.428(4) stated: "In a suit arising under a residential or commercial property insurance policy, there is no right to attorney's fees under this section." It also revised §627.70152 to delete paragraph 8 regarding fees.

Section 26 said the law took effect upon becoming a law. It was approved December 16, 2022. This act did not contain language addressing retroactive application, so as discussed above, the effective date language did not satisfy the requirement for a clear intent to apply retroactively.

Chapter 2023-15, Laws of Florida, commonly known as HB 837, became effective March 24, 2023. Section 11 repealed §627.428. Other parts of the act took effect immediately, but Section 29 provided the act shall not impair any right under an insurance contract in effect on or before the effective date. Namely, the elimination of the right to fees applied only to policies issued or renewed after the effective date. The Legislature providing the repeal would not affect existing policies showed it understood that to do otherwise would have been unconstitutional. And it included this language because other parts of the new statute applied to cases filed after the effective date.

The Legislature then enacted a statute clarifying that the 2022 statute did not eliminate fees under existing contracts. Chapter 2023-172 (Senate Bill 7052) (signed May 31, 2023) provides:

> Section 23. "Chapter 2022-271, Laws of Florida, shall not be construed to impair any right under an insurance contract in effect on or before the effective date of that chapter law. To the extent that chapter 2022-271, Laws of Florida, affects a right under an insurance contract, that chapter law applies to an insurance contract issued or

> renewed after the applicable effective date provided by the chapter law. This section is intended to clarify existing law and is remedial in nature."

This statute reaffirmed these statutory amendments were not intended to apply retroactively and did not eliminate the right to fees under policies issued before the effective dates: December 2022 for property insurance and March 2023 for other policies. If one assumes a bill passed six months later should not be permitted to clarify the earlier statute, the later bill still confirms the Legislature appreciated the danger of retroactively applying insurance legislation.

Universal argued in its fee response before this Court that, despite the absence of any language showing retroactive application in Chapter 2022-271, it repealed the right to fees, and because the right to fees was statutorily created, the 2022 law applies retroactively. It cited *Yaffee v. International Co.*, 80 So. 2d 910 (Fla. 1955) and *Bureau of Crimes Comp. v. Williams*, 405 So. 2d 747 (Fla. 2d DCA 1981).

Yaffee says: "the general rule, to the effect that repealing statutes should be given a retrospective operation, is based upon, and confined to, the situation where a right or remedy has been created wholly by statute; it being held, in such event, that when the statute is repealed the right or remedy created by the statute falls with it." 80 So. 2d at 911-912. But as

shown above, the right to fees was made a part of every policy, and *Yaffee's* holding actually refutes Universal's argument here.

Yaffee addressed a statute that repealed a statutory exception for usuary as to corporations. Corporate loans made before the statute's effective date were not subject to a usury defense. After the statute that repealed the exception, a borrower asserted a usury defense based on the elimination of the statutory exception. Under Universal's retroactive position, the usuary defense would have been available to the corporate borrower on a loan predating the repeal – because the exception would be as if it never existed.

But this Court rejected that position for several reasons, including that retrospective application would violate the constitutional prohibition against impairing contracts. As shown above, the same would occur with the insured's right to recover fees that was part of the insurance contract.

Federal courts have rejected this insurer argument, noting §627.428 is incorporated into every insurance contract and concluding because the insured's "right to attorney's fees is not merely statutory, cases like *Yaffee* do not apply." *Baptist Coll. of Fla. Inc. v. Church Mut. Ins. Co. Si*, 2023 U.S. Dist. LEXIS 117527 (N. D. Fla. June 23, 2023); *see also Evanston Ins. Co. v. Sheet Metal Masters, Inc.*, 2023 U.S. Dist. LEXIS 233219 (N. D. Fla. December 26,

2023)(“the 2022 amendment to §627.428 that eliminated the right to recover attorney's fees in suits involving residential or commercial property insurance policies did not apply to a policy issued in 2017 because retroactive application of the amendment would impair the insured's rights under the policy.”).

Bureau of Crimes addressed a fee claim after the repeal of the Florida Crimes Compensation Act. It cited the general rule in *Yaffee* and noted the plaintiff had not retained his lawyer until after the repeal. The opinion concluded: “We do not pass on whether Mr. Williams could recover any fees if his attorney had performed services prior to July 1, 1980.” 405 So. 2d at 748. And, of course, the case did not involve insurance or contract rights.

In sum, neither of the cases has anything to do with insurance or insurance statutes. Eliminating the statutory fee claim in *Bureau of Crimes* did not impair a contract (and the court expressly did not address the impact on fees before the amendment). *Yaffee* confirms a statutory amendment cannot not be applied retroactively to impair a contract.

B. Applying §627.70152 retroactively to Hughes’ claim would impair her contract rights.

It is telling that Universal’s heading here refers only to section (3) -- §627.70152(3) – the notice provision (IB 43). But again, the section 3 notice

leads to the section 5 dismissal, which leads to the section 8 loss of attorney's fees (and filing fee).

The claim that retroactively applying the statute would not impair vested rights, create new obligations, or impose a penalty is wrong on all three counts (IB 45). The insureds (and insurer) have additional obligations. Retroactive application would destroy the right to seek fees that vested when the action accrued. And it would impose a penalty: loss of the filing fee (as well as attorney's fees).

Universal's misunderstanding of what vesting means in this insurance contract setting is addressed above (IB 47).

III. The amici briefs make the same mistakes and more.

None of the three amici briefs consider Universal's admission that attorney's fees are substantive and §627.70152 would have to be construed to allow a policyholder whose case was dismissed to recover those fees in the second suit – something the statute does not provide. Nor do they deal with attorney's fees being a part of the policy so that eliminating the right to seek fees that vested when the cause of action accrued would impair the contract. Nor do they address that the loss of the filing fee would be a penalty, so even if the statute could be argued to be procedural and remedial, it could not apply retroactively.

The Federal Association brief's claim the statute does not affect policies ignores how the insured's rights under the pre-July 2021 policy would be impacted (impaired) as detailed above (Federal 3). The cases cited for the general principle that courts apply the law at the time of decision were not addressing statutory changes that would affect contracts between private parties (Federal 7).

The Association's argument the PIP insurance cases should be disregarded is again based on the misconception that §627.70152 would not impact contract rights (Federal 8-13). This argument ignores that, under Hughes' policy, she was required to give notice once (R 69-70; she actually did more than the policy required, as discussed above). The statute would import the additional notice and other requirements into her policy (and impair her right to fees and penalize her by the loss of her filing fee).

Contrary to the Association's argument, *Devon* confirms affecting the policy as §627.70152 would here precludes its retroactive application (Federal 13-14).

The remainder of the Association's brief simply fails to appreciate (or admit) that §627.70152 is much more than a simple notice statute. It would alter vested rights if applied to an accrued claim under a pre-July 2021 policy and would impose a penalty by the dismissal of the suit.

The Venetia Condominium Association brief omits the cite for the opinion that dismissed its suit, *Venetia Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co.*, 2023 U.S. Dist. LEXIS 32685 (S. D. Fla. February 28, 2023). The opinion explains Venetia submitted a claim for damage from the September 2017 Hurricane Irma storm, which the carrier denied in October 2018. Venetia then waited until September 2022 to send a notice under §627.70152, letting the statute of limitations run. Venetia could have filed a protective suit along with sending a notice but apparently did not.

As shown above the statute is not purely procedural (Venetia 6). While any "promise" of tolling would be for policies and suits covered by the statute, Hughes has no objection to "preserving" the claims of insureds who made the same mistake Venetia did (Venetia 8, 20).

Venetia's legislative history argument cites this Court's decisions in *Wright v. City of Miami Gardens*, 200 So. 3d 765 (Fla. 2016), and *State ex rel. Finlayson v. Amos*, 76 Fla. 26, 79 So. 433 (Fla.1918) (Venetia 9-11). *Wright* involved comparing a change in the actual statute – not competing different bills. The 106-year-old *Amos* discussed how two legislative committees resolved a substantive license tax for different types of vehicles. Neither case addressed the significance of a superfluous clause in an unadopted bill of one house. Venetia also mistakenly assumes Florida's

legislative bodies today act like they are the same entity (Venetia 10). As anyone paying attention knows, the House and Senate can have different views.

As shown above, no intent can be divined from both houses agreeing on the Senate bill that did not include superfluous language. It is equally -- or more likely -- both houses ultimately agreed no language was needed, given *Menendez* and *Devon*. This is not clear retroactive intent.

Venetia collects state trial court decisions it likes but makes no comparison to how many rejected retroactivity (Venetia 21). It also neglects to mention its own decision, where the court listed federal cases that "overwhelmingly" found §627.70152 could not be applied retroactively because it affects substantive rights.

Venetia offers no comment on Universal's position that the 2022 amendment eliminates Venetia's right to seek attorney's fees if it were to ultimately recover.

The brief filed by the four insurer associations (Insurer brief) addresses their perceived purpose of the statute (Insurer 3-10). Asserting that a retroactive application would further an alleged intent is not a substitute for clear retroactive intent or a basis to impair contract rights.

Hughes agrees that "words matter" (Insurer 10, 12-15). That includes ***all*** the words of §627.70152 – not just the few the Insurers want to focus on. The brief makes the same mistakes about legislative history addressed above (Insurer 11, 17-19). If there is anything significant in the "history" they provide in their appendix it is the report statement: "no constitutional issues identified" (Insurer Appendix 109). Given the history of *Menendez*, if retroactivity were intended that constitutional issue should have been identified.

The Insurers refer to the timing (delay) in fee recovery (Insurer 11). This misses the point that the right to seek fees was a substantive right Hughes paid for in her policy, which vested when her cause of action accrued. And *Hughes* is correct that this involves more than fees (Insurer 18).

The Insurers' attempted reliance on the assignment statute refutes their position (Insurer 15). *Total Care Restoration, LLC v. Citizens Prop. Ins. Corp.*, 337 So. 3d 74 (Fla. 4th DCA 2022), addressed §627.7152. Section 627.7152 applied to assignments of property insurance claims and required notice by the assignee to the insurer before suing. §627.7152(9).

The Legislature specified the statute "applies to an assignment agreement executed on or after July 1, 2019." §627.7152(13). *Total Care* found this permissible because: "This case does not involve the application of a statute to a preexisting insurance policy; it concerns a statute's

application to an assignment created after the effective date of the statute." 337 So. 3d at 77.

By contrast, here the issue in *Hughes* would involve applying §627.70152 to a preexisting insurance policy. Further, the Legislature's wording of the §627.7152(13) effective date shows the Legislature could have made §627.70152 apply to all suits filed on or after July 1, 2021. But it did not.

The suggestion that the deleted House bill language of "issued or renewed" was "replaced by" the "all suits" language is simply wrong (Insurer 18). The "all suits" language was also in the unadopted House bill that contained "issued or renewed" (Insurer Appendix 77).

As shown above, the Legislature provided the tort portions of the 2023 HB 837 became law immediately. The Legislature appreciated it had to add a carve out that provisions affecting insurance would not apply to policies issued before the effective date. The Legislature learned from *Menendez* and *Devon*; the insurers have not.

CONCLUSION

Section 627.70152 produces a substantive impact on insureds and their insurance contracts and contains no clear evidence of retroactive intent.

Rebecca Hughes requests this Court affirm the Sixth District Court of Appeals' opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished on September 11, 2024, by E-Mail from the Florida E-Filing Portal to counsel of record.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Arial 14-point font and that it complies with the word count requirements in Fla. R. App. P. 9.210.

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