IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,800

DIVERSIFIED SERVICES, INC., a foreign corporation, d/b/a/, BUDGET RENT-A-CAR OF MIAMI, INC., a Florida Corporation, and PALM BEACH DODGE, INC. a Florida corporation,

Petitioners,

vs.

ALIDA AVILA, as personal Representative of the Estate of EULOGIO AVILA, Deceased,

Respondent.

RESPONDENTS' BRIEF ON THE MERITS

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RESPONDENTS' BRIEF ON THE MERITS

INTRODUCTION

The Parties will be refered to in the position they occupy in this Court with their proper name or relationship to Eulogio Avila, who will be refered to as the deceased or Lessee/ Deceased. There are two Petitioners, Diversified Services, Inc. d/b/a/ Budget and Palm Beach Dodge, Inc., who were the Appellees in the Third District and Defendants in the trial Court. Budget shall be identified as Lessor/Petitioner. The Appendix will be referred to as "A.", the Record on Appeal as "R/A." and the transcript of the hearing on the Motion for Summary Judgment, which is located in the Record on Appeal at 154-171, will be referred to as "R.", with the corresponding page number from the transcript as a reference.

STATEMENT OF THE CASE AND FACTS

EULOGIO AVILA (hereinafter referred to as Lessee/Decedent) entered into an Automobile Rental Agreement with DIVERSIFIED SERVICES, INC. d/b/a BUDGET RENT A CAR OF MIAMI, INC. (hereinafter referred to as Lessor/Petitioner) on May 25, 1984 [A.5] [R. at 3-16], Lessee/Decedent was involved in an automobile collision with Defendant, EDWARD EARL CHILDRESS an May 26, 1984. Defendant, LILLIE M. COLLIER, owned the vehicle Mr. Childress was driving at the time of the collision. Lessee/Decedent died as a result of the May 26, 1984, collision. Defendant's Childress and Collier's vehicle was an uninsured motor vehicle under the definition in Florida Statute 627.727(3)(a) [R. at 12]. 1/

ALIDA AVILA (hereinafter referred to as the Respondent) is the wife of the Lessee/Decedent and is the Personal Representative of his Estate. Respondent filed suit against Lessor/Petitioner, and PALM BEACH DODGE, INC.(hereinafter known as Petitioner), UNIVERSAL CASUALTY INSURANCE COMPANY, FLORIDA INSURANCE GUARANTY ASSOCIATION, LILLIE M. COLLIER, EDWARD EARL CHILDRESS and ST. PAUL FIRE AND MARINE INSURANCE COMPANY (hereinafter referred to as St. Paul) under the Florida Wrongful Death Act. St. Paul was previously dismissed from the case [R. at 3]. After St. Paul was dismissed from the case, Respondent filed an Amended Complaint on June 7, 1988, which was dismissed without prejudice upon motion by Defendant's Childsess and Collier, and then a Second Amended Complaint on January 10, 1989

[R/A.106-111]. The **Second** Amended Complaint is the Complaint at issue. Lessor/Petitioner and Petitioner filed an Amended Answer to Amended Complaint on June 16, 1988, upon which they moved for the Summary Judgement which is the subject of this appeal. Count 2 of the Second Amended Complaint[R/A.106-111] makes the uninsured motorist claim against Lessor/Petitioner and Petitioner in paragraphs **11** through 16. Paragraph 13 states that Lessor/Petitioner had sold Lessee/Deceased liability insurance without offering uninsured motorist coverage contrary to Florida Statutes 627.727(1). Paragraph 16 makes a claim for Uninsured Motorist coverage under all existing policies covering the automobile rented to Lessee/Deceased.

On April 21, 1989, Lessor/Petitioner filed the Motion for Summary Final Judgement [R/A.127-147]. A hearing was held on this motion on July 11, 1989, and the Honorable Maria Goderich reserved ruling [R at 1 through 18]. On July 17, 1989, the Judge entered an Order Granting Defendant's Motion for Summary Final Judgment [R/A.172]. On August 8, 1989, Respondent timely filed the Notice of Appeal [R/A.148].

Petitioner 's Motion for Summary Judgement was heard in the chambers of Dade Circuit Judge Mario Goderich on July 11, 1989. Judge Goderich granted Petitioner's Motion for Summary Judgement over Respondent's objections and specifically found that the rental agreement between Lessor/Petitioner and Lessee/Deceased was not required to provide uninsured motorist coverage under Florida law nor did it provide uninsured motorist coverage by its

terms. The Appeal to the Third District Court of Appeal followed.

In the opinion filed July 17, 1990, the Third District reversed the summary judgment entered by the trial court for Defendant/Petitioner. The Third District in their opinion adopted the argument made by Appellant/Respondent to the extent that numerous references are made to the Rental Agreement as a "policy" which provided benefits: a factual issue existed as to whether Lessee/Deceased "purchased, or had good reason to believe that he was purchasing a policy that would provide benefits in the event of a collision with an uninsured vehicle." (A 3) The factual issue precluded summary judgment. The Third District in their opinion further adopted the argument made by Appellant/ Respondent that there was a legal issue which precluded summary judgment: whether "lessor as a self-insurer up to the first $100,000, is insulated from a duty to provide uninsured motorist coverage to its lessee by virtue of a rejection of such coverage with its excess carrier," (A 4) In interpreting their own opinion in Guardado v. Greyhound Rent-A-Car, Tnc., 340 So. 2d 510 (Fla 3d DCA 1976), the Third District Court determined that Guardado "does not answer the question" (A 4) about the duty of the lessor who sold some insurance coverages to lessee to provide Uninsured Motorist coverage for the gap below the excess carrier.

Following the Third District's reversal, a notice to invoke the discretionary jurisdiction of this Court was filed by petitioner and the Court accepted Jurisdiction.

POINTS ON APPEAL

I. WHETHER THE LESSOR/PETITIONER, A SELF-INSURER WHO SOLD INSURANCE COVERAGE TO THE LESSEE/DECEASED, WAS REQUIRED TO OFFER THE LESSOR/DECEASED UNINSURED MOTORIST COVERAGE UP TO THE LIMITS OF LIABILITY COVERAGE PURSUANT TO FLORIDA *STATUTE* 627.727(1).

II. WHETHER THE CONTRACT DRAFTED BY LESSOR/PETITIONER FOR THE RENTAL AND THE INSURANCE COVERAGE WAS AMBIGUOUS AS TO THE UNINSURED MOTORIST COVERAGE FOR LESSEE/DECEASED, CREATING A JURY QUESTION AND FACTUAL ISSUE AND DEFEATING SUMMARY JUDGMENT.

SUMMARY OF THE ARGUMENT

This case is one where the Lessor/Petitioner's rental agreement sold insurance coverage to Lessee/Deceased, not only through an independent insurance company, but through the self insurer, Lessor/Petitioner. The face of the Rental Agreement reflects that Lessee/Deceased paid a premium for a "Damage Waiver" insurance and for "Personal Accident Insurance" "as described in the certificate of insurance (available on request)...". Paragraph 7 on the reverse side of the agreement says that the insurance described in paragraph 7 does not include uninsured motorist coverage. Paragraph 7 also states that it is the entire agreement between Lessor/Petitioner and Lessee/Deceased "regarding the terms and conditions of insurance provided by Budget," unless an alteration is agreed to by Budget in writing or the paragraph or portions of the paragraph are unlawful or conflict with "public policy" they "shall be modified to provide the minimum amount of insurance coverage necessary to comply with the law or public policy".

The rental agreement is ambiguous because "Personal Accident Insurance" of "$150,000.00 with medical" is provided on the front of the agreement as described in a "certificate of Insurance" at some undisclosed location, and could include uninsured motorist coverage. Since the front of the Rental Agreement refers to a Certificate of Insurance which "describes" the accident insurance, obviously, paragraph 7 on the reverse side of the

agreement is in conflict when it states that it is the entire agreement regarding the terms and conditions of the insurance provided. Further, paragraph 7 refers to the minimum insurance required by state law for liability and PIP: $10,000 bodily injury, $5,000 property liability and $10,000 PIP. The Personal Accident Insurance purchased by Lessee/Deceased is shawn as $150,000.00. This is either a conflict with paragraph 7 or a written modification changing the terms, coverage and amount of insurance. This language creates a factual ambiguity which defeats Lessor/Petitioner's Motion for Summary Judgement. Further, this language and the existence af the "Certificate of Insurance" raises the issue as to whether the Rental Agreement provides uninsured motorist coverage or by its terms led Lessee/Deceased to reasonably believe that he was purchasing uninsured motorist coverage. Again raising dispositive factual issues that defeat the Lessor/Petitioner's Motion for Summary Judgement. In our case, the Third District concurred with this conclusion and further stated that since there was reference to "another policy providing coverage without a sufficient identity of the policy," (A 4) there was to be no summary judgment, citing MacKenzie. In our case, the Third District went on to say that a fact question for the jury can be raised when a "plaintiff sought to be 'fully covered"' implying that Lessee/ Deceased did so by purchasing all the coverages offered to him by Lessor/ Petitioner. (A 4).

The Lessor/Petitioner, as an admitted self-insurer, is subject to all the rights and obligations of an insurer. One of the obligations placed on an insurer is to offer uninsured motorist coverage as part of the sale of liability insurance. Lessor/Petitioner claims to be selling liability and PIP insurance to Lessee/Deceased in paragraph 7 on the reverse side of the rental agreement. Further, Lessor/Petitioner offered and Lessee/Deceased purchased "Personal Accident Ins." or "accident insurance" described elsewhere offered on the front of the contract. Lessor/Petitioner claims they do not and did not offer uninsured motorist coverage to Lessee/Deceased. If the Lessor/Petitioner did not offer uninsured motorist coverage, then the portion of paragraph 7 which disclaims uninsured motorist coverage is in conflict with Florida Statute 627.727(1), as are the actions of Lessor/Petitioner in not offering uninsured motorist coverage while selling liability coverage to Lessee/Deceased. By the terms of the rental agreement and under Florida law, the portion of paragraph 7 disclaiming uninsured motorist coverage which conflicts with the statute and public policy should be stricken. Therefore, there is uninsured motorist coverage up to the limits of liability coverage to be determined by a jury as a factual issue and Petitioners' Motion for Summary Judgement should be denied and the Third District Court affirmed.

ARGUMENT

POINT I

I. WHETHER THE LESSOR/PETITIONER, A SELF-INSURER WHO SOLD INSURANCE COVERAGE TO THE LESSEE/DECEASED, WAS REQUIRED TO OFFER THE LESSEE/DECEASED UNINSURED MOTORIST COVERAGE UP TO THE LIMITS OF LIABILITY COVERAGE PURSUANT TO FLORIDA STATUTE 627.727(1).

The Lessor/Petitioner filed their Self-Insurer Certificate, number 304, as Exhibit A attached to their Motion for Summary Final Judgement and they admit to being a self-insurer [R/A.127-147][R.3]. Further, Lessor/Petitioner admits that they are responsible per Florida Statute 324.021(7) Proof of Financial Responsibility, to provide liability insurance and PIP insurance [R. 11-12]. Petitioners' counsel [R. 12], the Judge [R.13] and Respondent's counsel concur that the Financial Responsibility statute in effect at the time of this accident required a minimum 10/20 liability policy. Florida Statute 324.021 (1973). In fact, the rental agreement [A.5] on its face reflects the purchase of insurance by the Lessee/Deceased by the payment of a premium and paragraph 7 on the reverse side describes the insurance as only the minimum PIP and liability. On its face, the rental agreement reflects that Lessee/Deceased paid a premium for "$150,000.00 with medical" of "Personal Accident Ins." The fact that Lessor/Petitioner sold PIP and liability insurance to the Lessee/Deceased is absolutely clear and has not been contested by Petitioners [R. 11-12]. Therefore, the Lessor/Petitioner has transacted insurance as defined in

Florida Statute 624.10 which states:

> 624.10 Transacting insurance
>
> "Transact" with respect to insurance includes any of the following, in **addition** to other applicable provisions of this code:
> (1) Solicitation or inducement.
> (2) Preliminary negotiations.
> (3) Effectuation of a contract of insurance.
> (4) Transaction of matters subsequent to effectuation of a contract of insurance and arising out of it.

Once Lessor/Petitioner has transacted insurance, Lessor/ Petitioner is subject to the provisions **of** the insurance **code.** Florida Statute **624.11 (1982).** The Lessor/Petitioner solicited the Lessee/Deceased to buy insurance, entered **into** preliminary negotiations, and effectuated a contract of insurance within the rental agreement and hand delivered **same** to the Lessee/Deceased. Therefore, having transacted insurance, Lessor/Petitioner must comply with the Insurance Code or law, specifically Florida Statute 627.727(1), which mandates that " No motor vehicle liability insurance policy shall be delivered..... unless uninsured motor vehicle coverage is provided therein or supplemental thereto...".

Historically, Florida Statute 324.021(7) Proof of Financial Responsibility (hereinafter referred to as the PFR statute), has been directly quoted in the text of the Uninsured Motorist Statute (hereinafter referred to as the UM statute), formerly Florida Statute 627.0851 **(1961).** Until **1973 the** above UM statute said that Uninsured Motorist coverage had to be provided in every

automobile liability policy "in not less than the limits described in section 324.021(7)." In 1971 the legislature amended section 627.0851 to add "in not less than the limits described in section 324.021(7), and in an amount up to 100 percent of the liability insurance purchased by the named insured for bodily injury'' (emphasis added). The case of Lumbermen's Mutual Casualty Company,v. Beaver, 355 So.2d 441 (FLA 4DCA 1978), explains the link between the PFR and UM statute and stands for the proposition that UM coverage must be offered up to the limits of liability coverage in the applicable policy. In 1973 when the legislature passed Florida Statute 627,727, the reference to the PFR statute was deleted and the tougher language was inserted, "in an amount not less than the limits of liability insurance purchased by the insured." Subsequently, the reference to the PFR statute has disappeared and a higher standard of at least the liability limits has to be offered and rejected in writing. Florida Statute 627.727(1) and 627.727(2)(a). The historical reading of this statute is significant because it shows the legislative intent that links the Proof of Financial Responsibility and uninsured motorist statutes and indicates that the legislative intent has been to increase this mandatory UM requirement which is placed on all persons transacting liability insurance policies in the state.

Petitioners raise the PFR statute as a defense stating that there is no requirement to offer insurance **beyond** the PIP

and liability stated in the PFR statute. Yet the Uninsured Motorist statute specifically cited the PFR statute as the standard for the amount of UM coverage that was mandated. The reference was only dropped to impose a higher standard as specified in the Uninsured Motorist Statute, F.S. 627.727. The legislative intent is clear: to mandate UM coverage by linking it to the PFR statute and then by specifying an allowable greater amount in the UM statute. This court must look to the UM **and** PFR statutes, the legislative intent and public policy, all of which suggest Uninsured Motorist coverage in the present case.

Petitioners' Motion for Summary Judgement stands or falls on the premise that they assert that a self-insurer is "a very special animal".[R.13]. Petitioners' counsel does not cite any law in the Motion for Summary Judgement to define the nature of the beast under the present facts. Based on the preceding argument the Lessor/Petitioner is transacting insurance and sold Lessee/Deceased liability insurance. The case cited by Petitioners, Guardado v. Greyhound Rent-A-Car, Inc., 340 So.2d 510 (Fla 3DCA 1976), (hereinafter referred to as Guardado) only finds that a self insurer has the right as the named insured in an excess policy to waive uninsured motorist coverage for a lessee. Petitioners seek to extend that case to also say that after they have waived the excess UM with an insurance company, they can sell liability insurance within their self-insurer limits and for some unknown reason bypass the UM statute or be found exempt from

it. The case of Dixie Farms Inc. v. The Hertz Corporation, 343 So.2d 633, 635-6, (Fla. 3rd DCA 1977),(hereinafter referred to as Hertz) holds otherwise when it states "a self-insurer ..... is subject to all rights and obligations of an insurer under the Florida Automobile Reparations Reform Act, Sections 627.730-627.741 Florida Statutes (1975)." In the Hertz case, the self-insurer, Hertz, was defending a Declaratory Action in the Circuit Court against a lessee. A Hertz motion to dismiss based on estoppel had been granted by the Circuit Court and lessee appealed to the Third District Court of Appeal and prevailed. Lessee sought an award of attorney's fees on appeal based on Florida Statute section 627.428 which states that an omnibus or named insured can recover attorney's fee from the "insurer" (emphasis added) after the insured obtains a judgement and prevails. The Court held that a self-insurer is not a very special animal at all because if the Hertz lessee abtained such a final judgement, the self-insurer was going to have the insurer's obligation of paying attorney's fees to lessee, and the self insurer would be subject to " all the rights and obligations of an insurer". Hertz at 635,636. The legislature has stated that a self-insurer "shall have all of the obligations and rights of an insurer under ss. 627.730-627.7405." Florida Statute section 627.733 (3)(b) (1982). The interesting thing about the Hertz case is that it awards attorney's fees under Florida Statute section 627.428, which is not part of the text of the

cited sections of Florida Statutes, 627.730-627.7405. Therefore, Hertz can be cited for the self-insurer literally having all the rights and obligations of an insurer, outside of sections 627.730-627.7405, including the obligation to pay attorney's fees and the obligation to provide UM coverage under the terms of Florida Statute 627.727.

The Guardado case merely recognizes that a self-insurer stands in the shoes of a named insured when dealing with an excess carrier for coverage above and beyond the self insurer limits. As such, the self insurer receives the recognized right of a named insured to reject UM coverage in writing. See, Mattingly v. Liberty Mutual Insurance Company, 363 So.2d 147 (Fla.4DCA 1978); Morpurgo v. Greyhound Rent-A-Car, Inc., 339 So.2d 718 (Fla.1DCA 1976); Kohly v. Royal Indemnity Co., 190 So.2d 819 (Fla.3DCA 1966), cert. den. 200 So.2d 813 (Fla. 1967). The Guardado case and the cases cited do not say that a self insurer is therefore excused of all the rights and obligations of an insurer contrary to the Hertz case. The issue of whether a self insurer transacting insurance with a lessee, apart from a separate insurance company, is subject to the obligation of the UM statute has not been addressed by any Florida Court. In the opinion below, The Third District Court rejected Petitioners' argument that a self-insurer does not have the obligations of an insurer and refused to expand Guardado.

The public policy considerations favor Respondent's position and favor this Court adhering to the Hertz decisian and limiting

the Guardado decision. Referring to the denial of UM coverage in a rental situation, the Guardado case itself at page 512 states:

> Appellant's attempt to distinguish Kohly, supra, fram the instant case, on the sole ground of appellee's status as a self-insured is a good effort to circumvent what is admittedly a sore spot in the law.

The Hertz approach solves this "sore spot" of no UM coverage as far as self-insurers. Interestingly, the Hertz decision came after the Guardado case and its holding of self-insurer rights and obligations was therefore not considered in Guardada but should be considered now. The public policy explained by the Florida Supreme Court in Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971) and explained further in Auto-Owners Insurance Company v. Bennet, 466 So.2d 242 (Fla.2DCA 1984), further support the Hertz approach. In Mullis, at pages 232-233, the Court stated:

> Uninsured motorist coverage ... is intended ... to protect the described insureds... who are legally entitled to recover damages... from owners or operators of uninsured motor vehicles because of bodily injury and is not to be "whittled away" by exclusion or exceptions.

The Court took the approach that since UM coverage was required for all persons insured under policies providing basic liability coverage, once these conditions were met, then exclusions were not legally permissible. Auto-Owners at 243. In Auto-Owners, the named insured's son was excluded from UM coverage by **the policy** language in the UM portion of the policy because he owned his own automobile. The Court held that the UM coverage exclusion was invalid because the insurance policy extended basic liability

coverage to the son under the liability portion of the policy and per the Mullis case the insurance policy had to provide UM coverage to the son. Auto-Owners at 244. If we accept the holding in Hertz that a self-insurer has all the obligations of an insurer and include the obligation of providing UM coverage, and we accept that the rental agreement transacts insurance because included in its terms is a policy of liability insurance, then the Petitioners' attempt to exclude UM coverage must fail.

A similar case to ours pending before this Court, Lipof v. Florida Power & Light Co., 558 So.2d 1067 (Fla.4th DCA 1990), addresses the issue of whether an employer self-insured who offers liability coverage as part of an employee benefits package to his employee must also offer Uninsured Motorist coverage: the Fourth District said no. Lipof dealt with insurance and a self-insured but is somewhat different due to the employee-employer on going contractual relationship, the employer's desire to have employee use his personal vehicle for work and the fact that in our case there was an insurance transaction where Deceased/Lessee paid money to Lessor/Petitioner for insurance coverage, including liability coverage, in an arms length transaction. Also, the terms of the agreement in Lipof were not ambiguous. Our case and Lipof, allow this Court to deal with all aspects of the self-insurer rights and obligations for UM coverage and this Court should adhere to the Hertz decision and the Third District's decision in our case in treating the Petitioner as an Insurer.

ARGUMENT

POINT II

II. WHETHER THE CONTRACT DRAFTED BY LESSOR/PETITIONER FOR THE RENTAL AND THE INSURANCE COVERAGE WAS AMBIGUOUS AS TO THE UNINSURED MOTORIST COVERAGE FOR LESSEE/DECEASED, CREATING A JURY QUESTION AND FACTUAL ISSUE AND DEFEATING SUMMARY JUDGMENT.

A careful reading of the rental agreement[A.5] indicates that the insurance provisions on the front and on the back of the agreement are in conflict. The entire paragraph 7 on the back of the rental agreement seems to describe the minimum benefits that Lessor/Petitioner is required to provide under the applicable law. For example, Budget agrees to provide " personal injury protection benefits with the maximum deductible allowed by law" and "liability insurance coverage with limits of liability equal to the minimum limits required by the financial responsibility law of the state." It is this same paragraph which states that "The insurance coverage referred to in this paragraph 7 (emphasis added) does not apply: a) To damages caused to any person, including Renter and driver by an uninsured motorist or uninsured motor vehicle" (emphasis added). After restricting its obligation to the bare minimum, the paragraph ends by stating that " This paragraph 7 constitutes the entire agreement between Budget and the Renter and driver regarding the terms and conditions of the insurance provided by Budget to the Renter and driver and no alteration thereof shall be valid unless agreed to by Budget, in writing (emphasis added). So, reading paragraph 7,

Budget at the time of this accident would have agreed to provide $10,000.00 PIP benefits with an $8,000.00 deductible and liability insurance of $10,000.00/$20,000.00 with no UM coverage: the bare minimum per their definition in paragraph 7.[R.12]. The conflict in the terms of the rental agreement is real because the front of this agreement states "Personal Accident Ins. $150,000.00 with Medical By this acceptance renter purchases accident insurance as described in the certificate of insurance (available on request) and agrees to pay therefore a premium as shown in the adjoining column." Lessee/Deceased paid this premium, *so* either Budget defrauded him by inserting paragraph 7 in the small print on the back of this agreement, limiting the insurance to much less than $150,000, or as paragraph 7 says, Budget agreed to an alteration of the terms of insurance coverage in writing because Lessee/Deceased paid a premium! The written agreement altering the terms is the short statement about "Personal Accident Ins." which is *so* ambiguous that it could be excess PIP, liability, or uninsured motorist coverage: "the policy itself is ambiguous"[R. 8] and "has there been any uninsured motorist coverage offered?"[R. 15] It is clear that the "Personal Accident Ins." increases the limits described in paragraph 7 and adds medical coverage. Personal accident insurance by its definition implies insurance for the person not the car which reasonably includes UM coverage.

The ambiguity as to whether Personal Accident Ins includes uninsured motorist coverage must be interpreted in favor of Lessee/Deceased and against Petitioners because they drafted the contract, the rental agreement. See, American Agronomics Corporation v. Ross, 309 So.2d 582 (Fla.3DCA 1975), cert. denied 321 So.2d 558 (Fla.1975). In MacKenzie v. Avis Rent-A-Car Systems, Inc., **369** So.2d 647 (Fla.3DCA 1979), the Court interpreted an ambiguity in a rental agreement in favor of the lessee and ruled that Lessor's Motion for Summary Judgement should have been denied because there was a factual issue **as** to whether the rental agreement provided for UM coverage, Avis had agreed to provide coverage for the lessee in accordance with "the standard provisions of an automobile policy" and the issue was whether the standard provisions included UM. MacKenzie at 648. The Court stressed that there was a specific provision (emphasis added) in the rental agreement that created the factual ambiguity Id. at 649. Our case is identical because there is a specific provision which expands the limited coverage afforded on the back of the agreement in paragraph 7. In support, the Court cites the case of Riccio v. Allstate Ins. Co. **357** So. 2d 420 **(Fla.3d** DCA **1978),** wherein the insurance company's phrase of providing "full coverage" created an ambiguity as to whether there was UM coverage and precluded summary judgement. Id. Like in our case, in MacKenzie the lessor did not submit affidavits in the Circuit Court that explain the factual issue by providing a

definition, in MacKenzie, of what were the standard provisions of an automobile policy and in our case, of what was Personal Accident Insurance. Like in our case, the MacKenzie rental agreement made reference to the policy "copy which is available for inspection at the main office of Lessor on request". Id. at 648. In our case, Lessor/Petitioner's rental agreement in the Personal Accident Ins. section refers to the "accident insurance as described in the certificate of insurance (available on request)", language similar to MacKenzie and to the language in American and Foreign Insurance Company v Avis Rent-A-Car System, Inc., 367 So.2d 1060 (Fla.1DCA 1979). In American Insurance, the same language from the MacKenzie rental agreement was interpreted as being ambiguous because the agreement failed to identify or sufficiently describe the insurance policy or identify the location of the main office where the policy was located. MacKenzie at 650. In our case, the Third District concurred and further stated that since there was reference to "another policy providing coverage without a sufficient identity of the policy," (BA 4) there was to be no summary judgment, citing MacKenzie. In our case citing Riccio , the Third District went on to say that a fact question for the jury can be raised when a "plaintiff sought to be 'fully covered'" implying that Lessee/ Deceased did so by purchasing all the coverages offered to him by Lessor/Petitioner. Similar factual issues from the rental agreement language exist in our case, requiring this Court to affirm the Third District.

Even if this Court were not willing to interpret F.S. 627.727 as requiring a lessor who sells or provides liability insurance to a lessee up to his self-insured limits, to offer the same limits in Uninsured Motorist coverage, this Court should conclude that this Lessor was still free to contract for a broader coverage for Lessee than what was required. In Universal Underwriters Insurance Company v. Morrison, 574 So.2d 1063 (Fla. 1990), this Court held that the insurance policy definition of underinsured motorist coverage was broader than the statutory definition and that a greater coverage was offered to Plaintiff. The terms of the rental agreement/policy themselves as stated, defeat the Motion for Summary Judgment because they provide a broader coverage than just the minimum liability and PIP. The factual issue remains for the jury to interpret the terms of the agreement and determine whether Petitioner offered deceased Uninsured Motorist coverage. Affirming the Third District opinion in our case on this basis would not require rental car companies to offer uninsured motorist coverage by interpretation of Florida Statute, but would require clear terms in the rental agreement/policy as to what insurance coverage is being offered and sold to Lessees.

ARGUMENT

POINT III

III. THE THIRD DISTRICT CORRECTLY FOUND THAT THE RENTAL AGREEMENT WAS AMBIGUOUS AS TO WHETHER IT PROVIDED UNINSURED MOTORIST COVERAGE TO RESPONDENT UNDER BOTH ITS TERMS AND OPERATION OF FLORIDA STATUTE 627.727.

The Third District Court of Appeal was absolutely correct in its analysis of the record, the rental agreement and policy-law considerations in rendering its opinion in this case, and this Court should Affirm their decision.

Petitioner affers no citations to contradict the Third District's statement that a legal issue exists as to whether "the lessor, *as* a self-insurer up to the first $100,000, is insulated from a duty to provide uninsured motorist coverage to its lessee by virtue of a rejection of such coverage with its excess carrier....Guardado.... relied on by the Lessor, does not answer the question." (A. 4). There is no case on point in Florida and that question is squarely before this Court. Florida Statute 627.727 mandates uninsured motorist coverage for every liability policy with no exceptions that apply to our case. The clear language of this statute, legislative intent and policy considerations favor Respondent. See, Mullis; Travelers Insurance Companies v. Chandler, 569 So.2d 1337(Fla.1stDCA 1990).

Budget seeks to put lessee in the driver's seat in a dangerous instrumentality, offer and sell insurance to lessee, provide liability, PIP, damage collision waiver and "accident insurance" coverage while claiming to be exempt from 627.727

uninsured motorist coverage. The Third District was exactly right when it described this contract as a "policy" refering to the insurance coverages paid for by decedent, some described in a seperate document. When Budget elected to sell insurance to decedent, they transacted insurance for profit, just like an insurance company writing a liability policy. There is no legal authority or public policy for them to circumvent the clear meaning of F.S. 627.727 requiring uninsured motorist coverage.

Because Budget drafted the Rental Agreement, they inserted the minimum coverage they would provide in paragraph 7 and allowed the modification of that coverage by written agreement or by operation of law.(A.5). When Decedent paid for accident insurance and selected the full insurance coverage, paragraph 7 was modified. By operation of law, specifically F.S. 627.727, paragraph 7 must be modified to comply with the minimum insurance required for uninsured motorist coverage. The Third District had the factual and legal basis to conclude that the issue of the coverage provided was for jury determination. Budget's attempted uninsured motorist coverage rejection was sucessful in the excess liability policy but unsucessful here due to the language of the agreement and the Uninsured Motorist statute, not due to judicial fiat as Petitioner argues.

Accordingly, the decision of the Third District should be Affirmed.

CONCLUSION

On the first point, Guardado deals with a waiver by the lessor/self-insurer of UM coverage, provided by a separate insurance company, for a lessee. The broader interpretation of Guardado advanced by Petitioners is that the lessor/self-insurer is excused from the insurer obligation(F.S. 627.727) of providing uninsured motorist coverage. The broader interpretation of Guardado directly conflicts with the Hertz case and Florida Statute section 627.733(3)(b) which impose all the rights and obligations of an insurer on a self-insurer. Under Hertz and as a matter of policy, this Court should adopt the narrow interpretation of Guardado espoused by the Third District in our case.

On the second point, if you accept Petitioners' argument based on paragraph 7, stating the upper limit of coverage and "all" the terms, then there is an ambiguity, a factual conflict, between paragraph 7 and the terms as stated in the "Personal Accident Ins." clause. The conflict can be resolved by reading paragraph 7 as referring to the minimum Petitioners, as owners, were required to provide under state law, whether Lessee/Deceased paid anything or not. When Lessee/Deceased paid the premium for personal accident insurance, Budget agreed to the written modification of the terms stated in paragraph 7 and increased the type of coverage and the limits. Either way, there is a factual issue and Petitioners' Motion for Summary Judgment should have been denied and the decision of the Third District Affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing Initial Brief of Respondent upon RICHARD GALE, ESQUIRE, New World Tower, 100 N. Biscayne Boulevard, Suite 2608, Miami, Florida 33132, Howard K. Cherna, Esq.,Attorney for Collier/Childress, 501 N.E. 1st Avenue, Miami, Fl. 33132, and to Grant Halliday, Esq. 1906 N. Tampa Street, Tampa, Fl.33602, by placing a copy of same in the United States Mail to the above, properly addressed and postage prepaid on this 18th day of February, 1992.

CARLOS A. RODRIGUEZ

A P P E N D I X

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1990

ALIDA AVILA, as personal representative of the Estate of EUGLOGIO AVILA, deceased,

Appellant,

vs.

DIVERSIFIED SERVICES, INC., a foreign corporation d/b/a BUDGET RENT-A-CAR OF MIAMI, INC., a Florida corporation; PALM BEACH DODGE, INC., a Florida corporation; UNIVERSAL CASUALTY INSURANCE COMPANY, a foreign corporation, FLORIDA INSURANCE GUARANTY ASSOCIATION; LILLIE M. COLLIER; EDWARD EARL CHILDRESS; and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a foreign corporation,

Appellants.

CASE NO. 89-1971

Opinion filed July 17, 1990.

An Appeal from the Circuit Court for Dade County, Mario P. Goderich, Judge.

Wilson & Rodriguez and Carlos A. Rodriguez (Fort Lauderdale), for Appellant.

Dube and Wright and Richard M. Gale, for Appellants.

Before HUBBART, FERGUSON and LEVY, JJ.

PER CURIAM.

Eulogio Avila entered into an Automobile Rental Agreement with Budget Rent-A-Car of Miami, Inc. He was fatally

injured when his rented vehicle collided with an uninsured automobile. Alida Avila, wife of the deceased and personal representative of his estate, brought this action against the lessor alleging entitlement to uninsured motorist benefits or, alternatively, that the lessor sold liability insurance to the deceased without offering uninsured motorist coverage in violation of section 627.727(1), Florida Statutes (1989). Construing the policy, in the absence of supporting affidavits or other evidence, the trial court entered a summary judgment for the defendants. We reverse.

Two issues are raised by the appellant: (1) Whether the lessor, a self-insurer who sold insurance coverage to the deceased, was required to offer uninsured motorist coverage up to the limits of liability coverage pursuant to section 627.727(1), Florida Statutes and (2) whether the contract drafted by the lessor for the rental and insurance coverage was ambiguous on the coverage issue, thus precluding a summary judgment without a consideration of parol evidence.

The face of the Rental Agreement reflects that the deceased paid a premium for "Damage Waiver" insurance and for "Personal Accident Insurance" as described in a separate certificate of insurance which is "available on request." Although a provision on the reverse side of the agreement declares that the insurance described on the front does not include uninsured motorist coverage, and that it is the entire agreement between the parties, that language is qualified by another provision which nullifies its conclusive effect where an alteration is agreed to

by Budget in writing, or the paragraph or portions of the paragraph are unlawful or in conflict with public policy.

Avila contends first that the Rental Agreement is ambiguous because Fersonal Accident Insurance in the amount of $150,000--for which a premium is charged--is provided on the front of the agreement, and the coverage could include uninsured motorist coverage. The certificate of insurance was not produced by the lessor in support of its summary judgment motion. A second contention is that the lessor, as an admitted self-insurer, is held to all the obligations of an insurer including a statutory duty to offer uninsured motor vehicle coverage as part of the sale of liability insurance.

The lessor responds that (1) paragraph seven of the agreement expresses in clear terms that there is no coverage for damages caused by an uninsured motorist or an uninsured motor vehicle, (2) it *did* not sell liability coverage, (3) the lessor's rejection of uninsured motorist coverage in its excess policy with St. Paul Fire and Marine Insurance Company was effective to deny any uninsured motorist coverage *to* the deceased-lessee, and (4) the $150,000 Personal Accident Insurance purchased by the deceased was a health insurance policy.

As already noted, the first response relies on qualified language in the policy. There is a material issue of fact whether the lessee purchased, or had good reason to believe that he was purchasing, a policy that would provide benefits in the event of a collision with an uninsured vehicle. There is also a legal issue, not specifically addressed by the trial court,

whether the lessor, as a self-insurer up to the first $100,000, is insulated from a duty to provide uninsured motorist coverage to its lessee by virtue of a rejection of such coverage with its excess carrier. This court's opinion in Guardado v. Greyhound Rent-A-Car, Inc., 340 So.2d 510 (Fla. 3d DCA 1976), relied on by the lessor, does not answer the question.

In MacKenzie v. Avis Rent-A-Car Sys., Inc., 369 So.2d 647 (Fla. 3d DCA 1979), we held that where there is a reference in the rental agreement *to* another policy providing coverage without a sufficient identity of the policy, a defendant is not entitled to a summary judgment on the basis of what may or may not be a covered loss by the terms of the referenced policy. See also Riccio v. Allstate Ins. Co., 357 So.2d 420 (Fla. 3d DCA 1978)(in light of evidence that the plaintiff sought to be "fully covered" in purchase of insurance, a fact question remained for the jury on whether the defendant had complied with statute requiring that uninsured motorist coverage be provided).

Reversed and remanded for further consistent proceedings.

RENTER'S SIGNATURE ON THIS RENTAL AGREEMENT WILL BE CONSIDERED AS AUTHORIZATION FOR ANY AND ALL RENTAL CHARGES TO BE SUBMITTED TO THE APPLICABLE CREDIT CARD IMPT

75 97007 55202 7
EULOGIO AVILA 8655

EDP MAY 25 2004

Budget
rent a car

Sears
* SEARS, ROEBUCK AND C

Budget Rent A Car System Licensee
RENTAL AGREEMENT
DIVERSIFIED SERVICES, INC. d/b/a
BUDGET RENT A CAR OF MIAMI
☐ 2601 NW Lejeune Rd P.O. Box 592263
Miami, Florida 33159 305 871 1013
☐ 9151 NE 2nd Avenue Miami Shores, Florida 33138
Phone 305 756 1800
☐ MIAMI INTERNATIONAL AIRPORT
RENTAL AGREEMENT

DE RA 0014790

AMOUNT 125.00 APPROVAL CODE CC SIX

DATE 05/25/04 RENTING LOCATION MIAMI AIRPORT

REPLACEMENT CAR ORIGINAL CAR

CLOTH - 46

	Car No./Type		M412493
	License No.		9927AV
	Make		APTES 4DR
	Time In		
	Time Out		11:34
	Mileage In		
	Mileage Out		7442
	Miles Driven		

Arrival Date | Method | Time | MP

Renter
AVILA EULOGIO
Phone No. (813) | D.O.B. 05/04/43 | Super Rez. No.
Home Address
MEYER ST
City | State FL | Zip 33614
License No. | Exp. Date 05/04/87 | State FL
Firm Name
ODERN FURNITURE CO
Firm Phone (813) 875-7442 | Corp. Rate No.
Charge Card No. | Res. No.
Remarks/Agency

Local Address 171 SW 3 RD ST | Local Phone No. (305) 241-7435
Additional Driver
ONE
License No. | Exp. DT | State
Signature

Car Condition
0 DAMAGE

I agree to return this vehicle on or before the date indicated due back. I will return to same location where rented unless otherwise indicated on line below. Rental subject to additional fee if not returned to renting location.

I WILL RETURN VEHICLE TO: MIAMI
2601 NW LEJEUNE ROAD
MIAMI
FL
DT BY
05/26/04

AUTH BY | DATE

MINIMUM ONE DAY RENTAL

DAILY RATE IS BASED ON 24 HOUR DAY

RENTER FURNISHES ALL GASOLINE INCLUDING TANK REFILL UPON RETURN. TANK FULL AT TIME OF RENTAL

CAR MAY NOT BE DRIVEN OUTSIDE OF THE STATE OF FLORIDA

081872

ALL CHARGES ARE SUBJECT TO FINAL AUDIT

PARTS AND REPAIR CHARGES WILL NOT BE REFUNDED WITHOUT RECEIPT AND PROPER AUTHORIZATION.

ALL PARKING AND TRAFFIC VIOLATIONS ARE RESPONSIBILITY OF RENTER

I agree to be bound by the terms and conditions on both sides of this rental agreement.

x Renter(s) Signature

x Rosa DUB NO. 9171
Authorized BUDGET Representative Signature 84171

ORIGINAL COPY

TOTAL LIABILITY

I reject the Damage Waiver coverage and agree to pay BUDGET for loss or damage to vehicle (regardless of negligence) provided vehicle is operated or used in conformity with the terms and conditions of the rental agreement

Corp. Rate $

Declines Renter Init. | Accepts XXXXXXXXX

DAMAGE WAIVER

By initialing renter agrees to pay the sum indicated per day for each day or fraction thereof that this rental agreement is in effect and BUDGET agrees to waive all claims against renter for collision damage to vehicle provided it is operated or used in conformity with rental agreement

Accepts Renter Init. | Declines XXXXXXXXX Renter Init.

Personal Accident Ins.

$150,000.00 With Medical
By this acceptance renter purchases accident insurance as described in the certificate of insurance (available on request) and agrees to pay therefore a premium as shown in the adjoining column

DECLINES Renter Init. XXXXXXXXXXX

ACCEPTS Renter Init.

FUEL GAUGE POSITION
OUT F 7/8 6/8 5/8 4/8 3/8 2/8 1/8 E
IN F 7/8 6/8 5/8 4/8 3/8 2/8 1/8 E

DATE	DEPOSIT
	$
	$
	$
TOTAL	$

TYPE OF PAYMENT

CUSTOMER'S INITIALS

CORP. RATE

XXX White XXX Yellow Canary Gold
XXX XXX XXX XXX

9		MLS @	c
10		HRS @	$
11	12.00	DYS @	$
12	30.00	WKS @	$
13	95.00	Rate Code	
		3CAD	
14		Total Time & Mileage Charges	
15			
16			
17		Net Time & Mileage Charges	
18		Intercity Fee	
19		Total Taxable Charges	
20		Sales Tax 6%	
21			
22		Personal Accident Ins. Per Day	
23	2.50	Personal Effects Protection	
24		Damage Waiver Per Day	
25	6.95	Total Gross Charge	
26		Less	
27		Less	
28		Less Deposits	
29		AMT. DUE BUDGET	
30		CASH REFUND	
31		AMT. DUE CUSTOMER OR TRAVEL AGENT	
32		MAIL REFUND	

RETURNED AT | R/A CLOSED BY | EMP NO

BUDGET RENT A CAR RENTAL AGREEMENT

BUDGET rents to Renter signing the face of this Agreement the vehicle described subject to all the terms and conditions set forth on both sides of this Rental Agreement and Renter agrees.

1. Vehicle is the property of BUDGET and is in good condition. Renter will return vehicle, together with all tires and equipment, in the same condition as when received, ordinary wear and tear accepted, to the PLACE and on the DUE BACK DATE specified or sooner upon demand by BUDGET. BUDGET may peacefully repossess the vehicle without demand at any time if it is illegally parked or used in violation of law or of the Agreement or is apparently abandoned.

2. The following restrictions are cumulative and each shall apply to every use, operation or driving of vehicle. Under no circumstances shall vehicle be used, operated or driven by any person:
(a) For the transportation of persons or property for hire; or
(b) Who has given BUDGET a false name, age or address; or
(c) In any race, speed test or contest or for any illegal purpose; or
(d) To propel, push or tow any vehicle or trailer; or
(e) While under the influence of intoxicants or narcotics; or
(f) Where the odometer of vehicle has been tampered with or disconnected; or
(g) By any person other than (1) the Renter who signed this agreement, or (2) any additional Renter who signed this agreement.

3. Renter will pay BUDGET on demand all charges including, but not limited to, for time, mileage (as determined by factory installed odometer) minimums, service, Damage Waiver, applicable taxes, or other charges entered on the reverse side hereof. Renter is responsible, and will reimburse BUDGET upon demand, for all loss or damage whatsoever (and regardless of negligence) to vehicle, its equipment and tools. If Renter has directed the billing for charges to another person or company, and upon being billed they shall fail to make payment, Renter will upon demand by BUDGET, promptly pay said charges.

4. Renter or the driver of vehicle shall in no event be deemed the agent or employee of BUDGET in any manner or for any purpose whatsoever.

5. BUDGET shall not be liable for loss of, or damage to, any property left, stored or transported by Renter or any other person in or upon any premises of BUDGET, any service vehicle, or any rental vehicle, either before or after the return thereof to BUDGET, whether or not said loss or damage was caused by, or related to, negligence of BUDGET, its agents or employees. Renter assumes all risk of such loss or damage and waives all claims against BUDGET by reason thereof, and Renter agrees to hold BUDGET harmless from, and to defend and indemnify BUDGET against, all claims based upon or arising out of such loss or damage.

6. Renter agrees to lock the ignition and doors to said vehicle, secure all windows, and remove the keys from the vehicle when it is unattended.

7. BUDGET will provide personal injury protection benefits with the maximum deductible allowed by law (should personal injury protection benefits be required under the laws of the state wherein the vehicle was rented), and Renter does hereby agree to accept said coverage. BUDGET also agrees to provide, to Renter and driver, liability insurance coverage with limits of liability equal to the minimum limits required by the financial responsibility law of the State in which the vehicle is rented. As a condition for this coverage, Renter and driver agree to comply with, and be bound by, all terms, conditions, limitations, and restrictions related to said coverage, and deliver to BUDGET every process, pleading or paper of any kind relating to any claim, suit or proceeding received by Renter or driver in connection with any accident or occurrence. Said coverage further requires that Renter and driver shall not aid or abet the assertion of any claim, and shall cooperate with BUDGET and insurer in the investigation and defense of any claim or suit.

In states where permitted by law or regulation (and to the extent so permitted) the liability coverage described above may be afforded, subject to the same terms, conditions, restrictions and limitations herein described, under a bond or self-insurance arrangement in lieu of, or in combination with, an automobile liability insurance policy.

The insurance coverage referred to in this paragraph 7 does not apply:
(a) To damages caused to any person, including Renter and driver, by an uninsured motorist or uninsured motor vehicle, or for medical expenses incurred by persons sustaining injuries while riding in or on, entering or leaving, the rented vehicle; or
(b) To any obligation for which Renter or the driver of vehicle, or any insurance carrier as his insurer, may be held liable under any worker's compensation, unemployment compensation, or disability benefits law, or any similar law; or
(c) To any liability assumed by Renter or by any driver of vehicle under any contract of whatsoever nature; or
(d) To damage or destruction of property owned by, rented to, in charge of, or transported by, Renter or the driver; or
(e) While said vehicle is used, driven or operated in violation of the provisions of paragraph 2 (a), (b), (c), (d), (e), (f), or (g), hereof.

This paragraph 7 constitutes the entire agreement between BUDGET and the Renter and driver regarding the terms and conditions of the insurance provided by BUDGET to the Renter and driver and no alteration thereof shall be valid unless agreed to by BUDGET, in writing. If any provisions of this paragraph shall be found to be unlawful, unenforceable, or contrary to public policy, then that portion of this paragraph which is unlawful, unenforceable, or contrary to public policy shall be modified to provide the minimum amount of insurance coverage necessary to comply with the law or public policy, and the remainder of this paragraph shall remain in full force and effect.

8. Renter agrees to pay all costs, expenses and attorney's fees incurred by BUDGET in collecting sums due or in regaining possession of vehicle or in enforcing or recovering any damages, losses or claims, against Renter.

9. If vehicle has been rented by any person who has given to BUDGET a false or a fictitious name, address, or business affiliation, or if renter fails or refuses to return vehicle to BUDGET within 48 hours following demand upon Renter by BUDGET (which demand shall be deemed delivered to Renter by the deposit of a registered or certified letter in any U.S. mail box addressed to either residence or business address of Renter, as shown on the reverse side hereof), Renter shall be conclusively presumed to be in unlawful possession of said vehicle and under such circumstances, Renter hereby releases and discharges BUDGET from any and all claims, suits or demands of every kind or nature whatsoever arising out of, or relating to, any alleged false arrest, false imprisonment, false detention, defamation of character, assault, malicious prosecution, trespass or invasion of civil rights arising out of, or relating to, the issuance of a warrant for the arrest of Renter, or any person operating vehicle, or arising out of, or relating, to any other action by BUDGET, including, but not limited to, self-help, which BUDGET deems necessary in order to effect the return of vehicle, or the collection of any monies due BUDGET pursuant to the terms of this Rental Agreement.

10. Renter shall be responsible for, and shall pay all fines, penalties and forfeitures imposed for parking or traffic violations, including reasonable attorney's fees, which are incurred while the vehicle is rented to the Renter.

11. No rights of BUDGET under this Rental Agreement may be waived unless in writing and signed or initialed by BUDGET.

12. VEHICLE SHALL NOT BE DRIVEN OUTSIDE THE STATE OF FLORIDA, OR OTHERWISE REMOVED.
(a) If vehicle is driven out of the State of Florida, a charge of $ 50 fifty cents per mile for all miles driven during the entire rental period will be due BUDGET. This charge shall be in addition to the rates agreed upon by Renter at time of rental.

13. This Agreement shall be construed in accordance with, and shall be governed by, the laws of the State wherein the vehicle was rented. Any provision hereof found to be invalid, unenforceable or illegal shall be severable, and shall not affect the validity of the remaining portions hereof.

FOR SERVICE OR IN CASE OF ACCIDENT CALL 305-871-3053.
AUTHORIZATION MUST BE OBTAINED PRIOR TO REPAIRS
IT IS IMPORTANT FOR YOUR PROTECTION THAT YOU DO NOT SURRENDER THIS COPY.
This is your only record of this transaction. If payment is made in cash, this is your receipt.
This copy serves as vehicle registration while you are in possession of the vehicle.
YOU MUST PRESENT THIS COPY OF *RENTAL AGREEMENT* AT TIME OF CHECK-IN