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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,800

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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 Representataive of the Estate of EULOGIO AVILA, Deceased,

Respondent.

# PETITIONERS' REPLY BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

petitioners, 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 ("Budget"), readopt their statement of the case and facts set forth in their brief on the merits. [1]

1. The parties will be referred to in the position they occupy in this Court and in their **proper** name. Petitioners were the appellees in the Third District and the defendants in the trial court; respondent, Alida Avila, as personal representative of the Estate of Eulogio Avila, Deceased, was the appellant in the Third District and the plaintiff in the trial court. Reference to the record-on-appeal filed in this Court will be by the use of the symbol "R" followed by the appropriate page number. Reference *to* Budget's appendix contained in the initial brief on the merits will be by the use of the symbol "BA" followed by the appropriate **page** number.

## ARGUMENT

### POINT I

WHETHER BUDGET, A SELF-INSURER, IS SUBJECT TO THE UNINSURED MOTORIST STATUTE AND REQUIRED TO OFFER UNINSURED MOTORIST COVERAGE TO ITS RENTERS.

The thrust of Avila's argument under this issue is that Budget, as a self-insurer under Florida law, and based on its "selling" of personal accident insurance in the amount of $150,000, PIP and liability insurance pursuant *to* Budget's rental agreement with the deceased, Avila, was in the business of transacting insurance as defined under 9624.10 and §624.11, Florida Statutes.[2] (Respondent's Brief at 9-10). Accordingly, respondent argues that Budget solicited the decedent to buy insurance, entered into preliminary negotiations, and effectuated a contract of insurance within the rental agreement. Id. Thus, Budget should have offered uninsured motorist coverage to the decedent since Section 627.727(1) mandates that "no motor vehicle liability insurance policy shall be delivered . . . unless uninsured motorist coverage is provided thereon or supplemented thereto." Id at 10.

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2. The applicable statute defines transacting insurance *to* include the following: (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. §624.10, Fla.Stat. (1983).

Section 624.11, Fla.Stat. (1983) requires that no person shall transact insurance in this State without complying with the applicable provisions of the Code.

Many of the contentions raised by Avila as to Budget transacting insurance are resolved by this Court's recent decision in Lipof v. Florida Power & Light Company, 17 FLW S117, ____So. 2d____, Case No. 76,083, Opinion filed 2/7/92, as will be shown, infra.

In Lipoff, Florida Power & Light Co. (Florida Power), entered into a contract with Michael Lipof (Lipof) for Lipof to use his automobile in his work as a meter reader for Florida Power. 17 FLW S117. Lipof first contended that Florida Power acted as an insurer under §624.03, Fla.Stat. (1983), which broadly defines "insurer" as including "every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity." Lipof argued that Florida Power acted as an "insurer" by agreeing to provide through the employer-employee vehicle agreement the following: (1) Compliance with section 324.031; (2) compliance with sections 627.730-.7405; and (3) providing $500,000 indemnification for bodily injury and property damage in addition to the fire and theft insurance. Id.

Based upon the foregoing benefits, Lipof concluded that the agreement is a " 'motor vehicle liability policy,' " and thus, Florida Power had a statutory duty to offer uninsured motorist coverage pursuant to Section 627.727. Id.

Both Florida Power and Budget disputed that its employment contract or rental agreement, respectively, could ever be construed as a "motor vehicle liability insurance policy," and both denied any duty to offer uninsured motorist coverage.

First, §324.021(7), Fla. Stat. (1983), provides that proof of ability *to* respond in damages for liability on account of accidents arising out of the use of motor vehicles must be in the amount of $10,000/$20,000/$5,000.

Section 324.031, Fla. Stat. (1983), sets forth four methods to prove financial responsibility. Budget proved its financial responsibility by furnishing a Certificate of Self-Insurance issued by the Department in accordance with Section 324.171. Section 324.031(4), Fla.Stat. (1983).

Another method of proving financial responsibility under §324.031, supra, is by the owner of the vehicle furnishing satisfactory evidence of holding a motor vehicle liability policy as defined in §324.021(8), and 8324.151. This Court in Lipof, stated the following:

> Section 324.031(1) refers to sections 324.021(8) and 324.151, Florida Statutes (1983), which define the requirements for a "motor vehicle liability policy." Section 324.021(8) defines "motor vehicle liability policy" as "issued by any insurance company authorized to do business in this state." Although section 624.03 defines "insurer" broadly, the language of section 324.021(8) limits motor vehicle liability policies to those policies issued by insurance companies. Florida Power is not an insurance company authorized to do business in the state. Thus, the agreement cannot be characterized as a "motor vehicle liability policy" within the meaning of sections 324.021(8) or 324.031. Therefore, section 627.727, which requires uninsured motorist coverage for motor vehicle liability insurance policies, does not apply to Florida Power.

In similar manner Budget is not an insurance company authorized to do business in the State of Florida. Budget's

agreement cannot be characterized as a motor vehicle policy within the statutes.[3] Therefore §627.727(1), is not applicable since no motor vehicle liability insurance policy was delivered or issued for delivery to the decedent in this State with respect to the Budget vehicle and therefore no uninsured motor vehicle coverage is required.

Section 324.171, Fla.Stat. (1983), provides for a person to qualify as a self-insurer by meeting certain financial requirements, i.e., such person is possessed of a net unencumbered capital of at least $40,000, which requirement Budget satisfied. Accordingly, Budget was issued a certificate of self-insurance making it responsible to respond to the minimum requirements of the Financial Responsibility Law and the minimum requirements of the Florida Motor Vehicle No-Fault Law. (R. 137).

Next, Avila, like Lipof, contended that since Budget provided compliance with the Florida Motor Vehicle No-Fault Law, then Budget should have "all of the obligations and rights of an insurer under Sections 627.730-627.7405." Section 627.733(3)(b), Fla.Stat. (1983). This Court in Lipof stated: "As specified by the legislature, these specific obligations and rights do not include offering uninsured motorist coverage as required by Section 627.727." 17 FLW S118. Further, this Court opined that it is not free *to* expand these rights to encompass uninsured motorist coverage. Id.

Although Avila repeatedly contends that the providing of $150,000 accident insurance plus providing insurance coverage

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3. Further, 5321.151, Fla.Stat. (1983), sets forth the required provisions of a motor vehicle liability policy which provisions are likewise inapplicable to Budget.

for the minimum requirements of the Florida Financial Responsibility Law and the minimum requirements for the Florida Motor Vehicle No-Fault Law constitutes selling insurance, Florida Power's providing of similar coverage in Lipof was not considered by this Court to establish Florida Power as an "insurer." In similar manner, based on the foregoing reasoning, statutes, and case law, Budget was not an "insurer."

Lipof covers a situation where Florida Power offering to provide insurance proved its financial responsibility by posting with the Department a surety bond pursuant *to* §324.031(2), Fla.Stat. (1983). Obviously, this Court found Florida Power's compliance with §324.031(2) through a surety bond is not the same as "issuing" an insurance policy under §324.021(8).

The only difference in the instant case from Lipof is that Budget proved its financial responsibility pursuant to §324.031(4), by furnishing a certificate of self-insurance issued by the Department in accordance with 5324.171.

Finally, this Court in Lipof recognized there may be strong policy reasons for requiring employers who provide employees with bodily injury liability coverage on their personal vehicles also to offer uninsured motorist coverage. However, such a decision must come from the legislature and not from the Court. 17 FLW S118.

Here, we are dealing with a rental agency renting a motor vehicle for a short term, which agency by the terms of its rental agreement expressly excludes any uninsured motorist coverage. Obviously, if there is to be a requirement for rental companies to provide renters with uninsured motorist coverage,

such a decision must come likewise from the legislature and not from this Court.

## POINT II

ASSUMING ARGUENDO THE UNINSURED MOTORIST STATUTE IS APPLICABLE TO BUDGET, WHETHER BUDGET HAS TO OFFER UNINSURED MOTORIST COVERAGE TO A RENTER WHERE BUDGET AS A SELF-INSURER HAD REJECTED UNINSURED MOTORIST COVERAGE WITH THE BUREAU OF FINANCIAL RESPONSIBILITY, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, HAD REJECTED UNINSURED MOTORIST COVERAGE IN ITS EXCESS LIABILITY POLICY, AND HAD EXPRESSLY ADVISED THE RENTER IN THE RENTAL AGREEMENT THAT BUDGET DID NOT PROVIDE UNINSURED MOTORIST COVERAGE.

The thrust of respondent's argument under this Point is simply that the provision on insurance *set* forth under paragraph numbered 7 *to* provide the statutory minimum insurance coverage under the Florida Financial Responsibility Act and the Florida Motor Vehicle No-Fault Law was ambiguous because on the front of the agreement personal accident insurance was provided in the amount of $150,000. (Respondent's brief 17-19).

It must be noted that the same paragraph numbered 7 on the reverse side of the rental agreement stated: "The insurance coverage referred to in this paragrph 7 does not apply: (a) To damages caused to any person, including Renter and driver by an uninsured motorist or an uninsured motor vehicle . . . ." (BA. 6).

Next, respondent argues that paragraph numbered 7 contains language that the paragraph constitutes the entire agreement between Budget and the renter and driver regarding 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. Id.

Then, respondent states that there is a real conflict in the terms of the rental agreement because paragraph numbered 7 limits liability insurance and PIP benefits *to* the minimum required by the State, while, to the contrary, the front of the rental agreement provides personal accident insurance in the amount of $150,000. (Respondent's brief 18).

In this respect, respondent states that where the decedent paid a premium for the $150,000 accident insurance, Budget either defrauded the decedent by limiting liability on paragraph numbered 7 on the back of the agreement *to* much less than the $250,000, or the language in paragraph numbered 7 implies that Budget agreed to an alteration to the terms of the insurance coverage in writing because the decedent paid a premium. Id. [4]

Respondent argues further that the term "personal accident ins." is so ambiguous that it could constitute excess, PIP, liability, or uninsured motorist coverage. (Respondent's brief 18).

No one could argue rationally that a personal accident insurance policy falls within the purview of motor vehicle and casualty insurance in Part XI of the Insurance Code. On the contrary, personal accident insurance comes within the ambit of

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4. Inasmuch as Avila accuses Budget of defrauding the decedent by limiting the accident insurance *to* much less than $150,000, the author of this brief is compelled to state that the respondent was paid $150,000 in accident insurance benefits although such payment has not been made a part of this record.

the Insurance Code dealing with health insurance policies. §§627.601, et seq., Fla.Stat. (1983). For example, under 3627.603, Fla.Stat. (1983), it is provided, inter alia, that benefits for death by accident are not limited to the $1,000 death benefit restriction under a health insurance policy. Furthermore, §627.643(2)(b),(g), Fla.Stat. (1983), in Part VI, Health Insurance Policies, provides minimum standards of coverage in individual forms of accident-only insurance and basic medical expense insurance.

From the foregoing, it is obvious that the insurance coverages provided by Budget under paragraph numbered 7 of the rental agreement consisting of coverages to satisfy the minimum requirements of the Financial Responsibility Law and the Florida Motor Vehicle No-Fault Law, and the exclusion of uninsured motorist coverage in no manner creates any ambiguity with the $150,000 personal accident insurance appearing on the face page of the rental agreement.

Respondent cites American and Foreign Ins. v. Avis Rent-A-Car, 367 So.2d 1060 (Fla. 1st DCA 1979) and McKenzie v. Avis Rent-A-Car Systems, Inc., 369 So.2d 647 (Fla. 3d DCA 1979). In American and Foreign Ins., a provision of the rental agreement provided that the lessor affords coverage for the person using the vehicle in accordance with the standard provisions of an automobile liability insurance policy, a copy of which is available for inspection at the main offices of the lessor on request. The specific liability coverage was $100,000/$300,000 and $25,000 property damage, plus mandatory no-fault benefits.

Avis in American and Foreign Ins. asserted as an affirmative defense that the automobile liability insurance policy provided that no person is insured while engaged in business of his employer with respect to bodily injury to any fellow employee while such employee is in the course of his employment. This exclusion is, of course, known as a "cross-employee" exclusion.

The First District in American and Foreign Ins. held that the agreement failed to identify or sufficiently describe the automobile liability insurance policy or identify the main office where the policy was located and available for inspection. Further, the Court found Avis presented no evidence to establish that a "cross-employee" exclusion is among "the standard provisions of an automobile liability insurance policy."

In American and Foreign Insurance, it should be noted that Avis relied upon an exclusion contained in the automobile liability insurance policy, but not referred to in the rental agreement. Since no reference to the "cross-employee" exclusion was set forth in the rental contract, and it was never proven by Avis that the "cross-employee" exclusion is among the standard provisions of an automobile liability insurance policy, Avis failed to establish that there was no coverage.

On the contrary, a provision expressly excluded uninsured motorist coverage under paragraph numbered 7 of the Budget rental agreement. As to the absence of the personal accident policy, there simply is no merit to the contention that uninsured motorist coverage could be provided in a personal accident policy.

Turning to McKenzie v. Avis Rent-A-Car, supra, the rental agreement provided in pertinent part to furnish coverage in accordance with "the standard provisions of an automobile liability policy.'' Avis did not provide the renter with uninsured motorist coverage. The provision for coverage also provided that a copy of the policy is available for inspection at the main office of the lessor. The policy provided for bodily injury limits of $100,000/$300,000 and property damage limits of $25,000. A summary judgment was granted in favor of Avis because it had qualified as a self-insurer, and had validly rejected uninsured motorist protection for its rental vehicles.

The Third District found in the McKenzie case that the contractual language in the Avis contract was ambiguous as to the key issue of whether uninsured motorist coverage is a standard provision of an automobile policy. No such ambiguity exists under the express language of the Budget contract, wherein uninsured motorist coverage is expressly excluded.

Next, respondent cites the case of Riccio v. Allstate Insurance Company, 357 So.2d 420 (Fla. 3d DCA 1978). In Riccio, the appellant's daughter was involved in an automobile accident in which she received fatal injuries. The third party tortfeasor's insurance company settled for $10,000, the full amount of available coverage. Appellant made a claim against its insurance company for uninsured motorist coverage in an amount equal to its liability limits of $100,000/$300,000. The appellant's insurance company stated that only the minimum amount of uninsured motorist coverage was provided.

In ~~Riccio~~ it appears that the appellant had requested the agent of the insurance company to add his daughter to the policy and to extend coverage to legal limits. Appellant argued that "full coverage," as requested, meant uninsured motorist coverage in an amount equal to liability coverage. The record showed various conversations between the appellant and appellee's agent and that the daughter should be added to the policy and coverage should be increased to the extent that appellant was "fully covered." Further, appellant was given an increased premium billing wherein the employees of the agent for the company stated the increase related to greater coverage. Appellee's agent testified also that full coverage meant that the uninsured motorist limits were the same as the liability limits.

Accordingly, in Riccio a factual question was raised whether "full coverage" i.e. $100,000/300,000 uninsured motorist coverage was afforded to the appellant and his daughter compelling a reversal of the directed verdict in favor of the appellee insurance company. Riccio is simply not applicable to the facts and circumstances of the case, sub judice. Here, the rental agreement expressly excluded uninsured motorist coverage.

Without burdening the Court with a reargument of the reasons and authorities set forth under this Point in the initial brief, petitioner submits respectfully that such reasons and authorities set forth in the initial brief on the merits compel a quashal of the Third District's decision.

## III

THE THIRD DISTRICT COMMITTED REVERSIBLE ERROR BY FINDING THE RENTAL AGREEMENT WAS AMBIGUOUS ON THE ISSUE OF WHETHER OR NOT UNINSURED MOTORIST COVERAGE WAS BEING OFFERED TO THE RENTER.

Respondent attacks Point III by stating that the petitioner did not offer any citation to contradict the Third District's statement that a legal issue exists as to whether a "lessor as a self-insurer up to the first $100,000 is insulated from a duty to provide uninsured motorist coverage to its lessees by virtue of a rejection of such coverage with its excess carrier." (Respondent's brief 22). Respondent then states there is no Florida case on point and that question is squarely in front of the Court. Id.

It is apparent that the Third District has implied that Budget only rejected uninsured motorist coverage in the excess policy, but failed to reject uninsured motorist coverage under its certificate of self-insurance by not notifying the State of a rejection. On the contrary, the record reflects that on September 29, 1983, Budget notified the Chief of the Bureau of Financial Responsibility, Department of Highway Safety and Motor Vehicles, that Budget was formally rejecting uninsured motorist coverage. (R. 138; BA 7). ***See*** Guardado v. Greyhound Rent-A-Car, Inc., 340 So.2d 510 (Fla. 3d DCA 1966); Morpurgo v. Greyhound Rent-A-Car, Inc., 339 So.2d 718 (Fla. 1st DCA 1976).

The Third District's obvious oversight of Budget's rejection of uninsured motorist coverage reflects that the issue

found by the Third District was an inadvertent one.

It should be noted that Avila never responded to the argument of Budget under this Point that the Third District's legal gymnastics to find that the language of the rental agreement as *to* uninsured motorist coverage was qualified and altered in writing, was not supported by a scintilla of evidence, oral or written, of any agreement by Budget to alter the exclusion of uninsured motorist coverage. (Petitioners' brief on merits 17-19).

## CONCLUSION

Based on the foregoing reasons and authorities, the decision of the Third District should be quashed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was mailed to Carlos A. Rodriguez, Esq., Attorney for Respondent, 524 S. Andrews Avenue, Suite 201N, Fort Lauderdale, Florida 33301; Howard K. Cherna, Esq., Preddy, Kutner, Hardy, Rubinoff & Thompson, Attorneys for Defendants, Collier and Childress, 501 N.E. 1st Avenue, Miami, Florida 33132, and to Grant Halliday, Esq., 1906 N. Tampa Street, Tampa, Florida 33602, this ~~19~~ day of March 1992.