IN THE SUPREME COURT OF FLORIDA

CASE NO.: 85,396

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

RJT ENTERPRISES, INC., d/b/a DISCOUNT RENT-A-CAR,

Respondent.

Discretionary Proceedings to Review a Decision of the District Court of Appeal, Fourth District, State of Florida. Case No.: 93-2135

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CITATIONS

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TABLE OF CITATIONS (Continued)

Other

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QUESTION PRESENTED

WHERE A RENTER'S INSURER OWES A DUTY OF DEFENSE AND INDEMNIFICATION TO THE RENTER, DOES IT ALSO OWE THE RENTAL AGENCY A DUTY OF DEFENSE AND INDEMNIFICATION WHERE THE REQUIREMENTS OF SECTION 627.7263 HAVE BEEN MET.

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PREFACE

This brief is submitted on behalf of Respondent, RJT ENTERPRISES, INC., d/b/a DISCOUNT RENT-A-CAR, in response to the brief of Petitioner, ALLSTATE INSURANCE COMPANY. In this brief, the parties will be referred to by name. Reference to the documents contained in the record before the Fourth District Court of Appeal will be by the abbreviation "R." followed by a page number. The transcript of proceedings will be referred to by the initial "T." followed by a page number. Reference to the appendix to this brief will be by the abbreviation "A." followed by a page number. Any emphasis appearing in quoted material is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

RJT acknowledges that the statement of the case and facts presented by Allstate is correct.

SUMMARY OF ARGUMENT

The question certified by the Fourth District Court of Appeal should be answered in the affirmative. In enacting section 627.7263, the legislature intended to relieve automobile rental companies from the burden created by application of the dangerous instrumentality doctrine, by permitting these companies to shift that burden to the renter's insurer where the renter carried such insurance. Where, as here, the renter's policy provides that the insurer will defend persons insured under the policy, that duty to defend extends to the rental company as well as to the named insured. The policy may not be

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construed so as to eliminate that duty and require the rental company to pay for its own defense, without substantially negating the result intended by the legislature.

In the present case, Allstate agreed that the rental contract complied with section 627.7263, that the vehicle involved in the accident was an "insured auto" under its policy, and that the statute shifted the primary coverage for that vehicle to Allstate. Since that primary coverage is required by the financial responsibility law to cover the vehicle's owner as well as its operator, RJT as the owner of that vehicle was also covered under the Allstate policy. Although Allstate attempted to circumvent that statutory requirement by ostensibly excluding rental agencies from its definition of "persons insured," that attempt must fail because the policy cannot limit coverage required by statute.

As an insured under the policy, then, RJT was entitled to a defense under the policy's own terms. Since Allstate wrongfully refused to provide that defense, however, RJT was required to pay roughly $30,000 even though a jury ultimately found no liability. Surely that was not the result intended by the legislature when it enacted section 627.7263, and it should not be approved by this Court.

By answering the certified question in the affirmative and approving the opinion of the Fourth District Court of Appeal, this Court will permit rental agencies to receive the relief intended by the legislature. As applied here, it will allow RJT to be indemnified by Allstate for the substantial costs it incurred as a result of Allstate's wrongful refusal to provide RJT a defense, as well as for its fees and costs in prosecuting this action for declaratory relief .

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ARGUMENT

WHERE A RENTER'S INSURER OWES A DUTY OF DEFENSE AND INDEMNIFICATION TO THE RENTER, IT ALSO OWES THE RENTAL AGENCY A DUTY OF DEFENSE AND INDEMNIFICATION WHERE THE REQUIREMENTS OF SECTION 627.7263 HAVE BEEN MET.

Where a car rental agreement complies with the provisions of section 627.7263, Florida Statutes, signifying that both the rental agency and the renter have agreed to shift primary responsibility for the leased vehicle to the renter's insurer, the coverage thus provided for the vehicle inures to the benefit of both the renter and the owner of the vehicle. The question certified by the Fourth District Court of Appeal, as paraphrased above, should thus be answered in the affirmative.

On at least three separate occasions, RJT's counsel advised Allstate's counsel in writing (R.5-7) that RJT was covered under the Allstate policy and was entitled to a defense by Allstate in the Isaiah Young litigation. In his January 8, 1990 letter, RJT's trial counsel pointed out that although the trial date was fast approaching, Allstate had done nothing to defend either liability or damages and had totally abrogated its responsibilities toward RJT, further noting that RJT was expending considerable time and money in trying to prepare the case for trial with no help whatever from Allstate, the primary carrier (R.5). Nonetheless, Allstate refused to undertake RJT's defense, and on the day of trial, its counsel announced that Allstate had reached a settlement with Mr. Young (T.35). RJT continued to defend the lawsuit, through its own counsel, and obtained a defense verdict.

Since no judgment was entered, Allstate was never called upon to indemnify RJT for any such judgment. RJT's action against Allstate below was thus solely an action to

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recover the attorney's fees and costs which it was required to expend as a result of Allstate's wrongful refusal to defend it. Before discussing that duty to defend, however, logic dictates that we first address the question of whether RJT was in fact covered under Allstate's policy by operation of section 627.7263, since Allstate's duty to defend flows from that relationship.

RJT Covered Under Allstate Policy

Every owner of a Florida registered vehicle must establish financial responsibility for that vehicle. This may be accomplished by obtaining a policy of insurance covering the vehicle and insuring the owner and operator for liability arising from its use, in the amount of at least $10,000.00 per person. Sections 324.021(7), 324.022 and 324.151(1)(a), Fla. Stat. Under the common law, where the vehicle was offered for rent or lease, its owner's insurance would be primary up to the $10,000.00 financial responsibility limit. Allstate Insurance Company v. Fowler, 480 So. 2d 1287 (Fla. 1985).

Note: this statute was in effect not 1985.

In 1976, the Legislature adopted section 627.7263, Florida Statutes, which allowed the owner to shift that responsibility to the renter, provided the rental contract contained the appropriate statutory language.[1] The purpose of that statute was

> ...to permit the lessor of an automobile to shift primary liability for the leased vehicle to the lessee's insurance carrier, thus rendering its own insurance secondary.

McCue v. Diversified Services, Inc., 622 So. 2d 1372, 1374 (Fla. 4th DCA 1993). Compliance with the statute makes the lessee's insurer the primary insurer of the leased

[1] It was stipulated that the agreement in the present case properly complied with the statute.

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automobile. InterAmerican Car Rental, Inc. v. Safeway Insurance Company, 615 So. 2d 244, 245 (Fla. 3rd DCA 1993).

As the Fourth District explained in its opinion in the present case, the primary insurance for the rental vehicle, which is the subject of section 627.7263, is required by the financial responsibility law to cover both the owner and the operator, i.e., the rental agency and the renter in this context. The court further observed that nothing in the statute suggests a legislative intent to only partially shift that primary coverage (A.4). RJT Enterprises, Inc. v. Allstate Insurance Company, 650 So. 2d 56, 59 (Fla. 4th DCA 1994). On the contrary, the very purpose of the statute is to allow the rental agency to reduce its own insurance to a secondary status, placing the primary burden on the renter. McCue at 1374.

Given the fact that the rental agreement in the present case fully complied with the statute, RJT and its renter effectively agreed that primary coverage for the vehicle involved in the accident would be shifted to Allstate. As a result, RJT became an omnibus insured under the Allstate policy up to the limits required by the financial responsibility law, since section 627.7263 has the effect of altering any provision of the insurance contract between the renter and his insurer which conflicts with the provisions of that statute. Commerce Insurance Company v. Atlas Rent-A-Car, Inc., 585 So. 2d 1084 (Fla. 3rd DCA 1991), rev. denied 598 So. 2d 75 (Fla. 1992).

Allstate, no doubt recognizing the efficacy of the statute to accomplish such a result, attempted to exclude such coverage in its policy. Although the vehicle itself was an "insured auto" under the policy (subparagraph 4, page 4, Plaintiff's Exhibit 3), as

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Allstate conceded (T.27), Allstate tailored its definition of "persons insured" so as to ostensibly exclude coverage for rental agencies.[2] Subsection (3) of that definition, quoted in full at page eight of Allstate's brief, includes as a person insured "any other person or organization liable for the use of an insured auto," a definition which would encompass a rental agency such as RJT. However, the policy then qualifies that definition by stating "...if the auto is not owned or hired by this person or organization." Thus, the policy itself provided coverage for the vehicle in question and provided that any organization liable for use of that vehicle was a "person insured," but only if the vehicle were not owned by that organization.

We submit that this attempt by Allstate to so limit its coverage cannot be given effect in light of section 627.7263. Indeed, Allstate concedes, citing Commerce Insurance Company v. Atlas-Rent-A-Car, Inc., that if its policy is in conflict with the statute in that regard, the statute will control (Allstate brief, p.13-14). Accordingly, as the Fourth District concluded, RJT's compliance with section 627.7263 shifted to Allstate the responsibility for primary coverage of all claims arising from the accident, including a responsibility to provide primary coverage to RJT (A.5). RJT, 650 So. 2d at 60.

The result reached by the Fourth District is further supported by that line of cases, including this Court's recent decision in Grant v. State Farm Fire & Casualty Company, 638 So. 2d 936 (Fla. 1994), holding that insurance policies incorporate statutes in effect

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[2] Even Judge Stevenson, who dissented to the opinion under review, characterized this provision as "a slick attempt to avoid any possibility that section 627.7263(1) would require the provision of a defense to a rental agency,..." The dissent also recognized, however, that this language would be a nullity if the statute required a contrary result (A.5). RJT, 650 So. 2d at 60.

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at the time of their issuance. In Grant, this Court quoted the following from Standard Accident Insurance Company v. Gavin, 184 So. 2d 229, 232 (Fla. 1st DCA 1966), cert. dismissed 196 So. 2d 440 (Fla. 1967):

> ...[W]here a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become a part of the contract.

Id. at 232. In Gavin, the court refused to give effect to a policy provision which purported to reduce uninsured motorist benefits by the amount of worker's compensation benefits paid by the insurer, so as to reduce the coverage below the minimum amount required by law.

Where a policy is issued that does not conform to a particular statute, the court will write into the policy a provision to comply with the law. United States Fire Insurance Company v. Van Iderstyne, 347 So. 2d 672, 673 (Fla. 4th DCA 1977) [requiring increased uninsured motorist limits]. Quoting Gavin with approval, this Court in Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229, 234 (Fla. 1971) struck down a policy provision excluding uninsured motorist coverage for injury while occupying an owned but non-covered vehicle, holding that statutorily required insurance protection cannot be narrowed by the insurer through exclusions contrary to the law. Id. at 232-233. Since an insurer is without the power in its policy to limit coverage required by statute, Gavin, 184 So. 2d at 232, Allstate could not validly exclude coverage to RJT where RJT had complied with section 627.7263.

Allstate Had a Duty to Defend RJT

If Allstate cannot so limit its coverage contrary to the statute, then RJT becomes

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an omnibus insured under the policy up to the limits of the financial responsibility law. It then follows from the terms of the policy itself that Allstate was required to defend RJT in the action by Isaiah Young, since the policy states that Allstate "will defend a person insured if sued as the result of a covered auto accident (Plaintiff's Exhibit 3, page 3)."

The major theme of Allstate's brief is that the duty to defend is purely contractual. We agree with Allstate that the duty to defend is a contractual one, and that in the absence of statutory regulation the duty should be established by a fair reading of the contractual language. Aetna Insurance Company v. Borrell-Bigby Electric Company, Inc., 541 So. 2d 139, 142 (Fla. 2nd DCA 1989) (special concurring opinion of Judge Altenbernd). Under the facts of the present case, section 627.7263 had the effect of bringing RJT within the scope of Allstate's coverage, thus triggering Allstate's duty to defend under the language of its own policy and the numerous cases which Allstate has cited in its brief. Accordingly, the Fourth District correctly concluded that section 627.7263 shifted to Allstate the responsibility for primary coverage for all claims arising from the vehicle up to the basic minimum limit, including a responsibility to provide primary coverage to RJT, and that such coverage encompassed the duty to defend.

Allstate seems to suggest at page eight of its brief that it had no duty to defend because RJT did not have a contract with Allstate and never paid premiums to Allstate. However, a direct contractual relationship is not necessary in order to create a duty to defend; as the policy itself provides, Allstate has undertaken to defend any "person insured," which, under the definitions section of the policy, would include any person using the insured vehicle, a person who clearly would not have paid a premium or be

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in a direct contractual relationship with Allstate. Allstate thus cannot validly argue that the lack of a contractual relationship has any effect on its duty to defend RJT.

Although Allstate claims that section 627.7263 does not impose a duty to defend, it apparently recognizes that the statute does shift the primary responsibility for coverage to the renter's insurer. Indeed, it has conceded as much in its brief (Allstate brief, pp.13-14). We submit that this statutory shifting of coverage had the effect of making RJT an insured, and that the limiting provision on Allstate's definition of "persons insured" in subsection (3) ["...if the auto is not owned or hired by this person or organization"] is in conflict with section 627.7263 and is nullified thereby. Gavin; Mullis. Accordingly, RJT, as an "organization liable for the use of an insured auto" is a "person insured" to whom Allstate owed a duty to defend in the Isaiah Young litigation.

Allstate further relies on the fact that section 627.7263 does not expressly state that the renter's insurer has a duty to defend the rental agency (Allstate brief, pp. 14, 16). However, since (as Allstate repeatedly asserts) the duty to defend is a contractual one, it is unnecessary that the statute even mention such a duty. If, as we contend, the statute had the effect of making RJT a "person insured" under the Allstate policy up to the primary limits of coverage, then Allstate had a duty to defend both the driver and RJT. As Allstate conceded below, if such a duty arose, it would have the duty to defend the case to its conclusion (T.28-30). See also Aetna Insurance Company v. Borrell-Bigby Electric Company, Inc., 541 So. 2d 139 (Fla. 2nd DCA 1989).

In its motion for rehearing to the Fourth District and in its brief before this Court, Allstate argues that Budget Rent-A-Car Systems v. Taylor, 626 So. 2d 976 (Fla. 4th DCA

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1993) stands for the proposition that "the party having the primary responsibility for payment of the limits required by the financial responsibility law does not *ipso facto* have a duty to defend (Allstate brief, p.18)." In that case, however, the lease agreement did not comply with section 627.7263, and thus Budget, which was self-insured, was obligated to pay the first $10,000.00 in the action against it and its renter. Budget assumed the defense of the renter as well as itself until it settled with the injured party and obtained a partial release of its renter in the amount of $10,000.00. In holding that Budget had no duty to defend the renter, the Fourth District noted that in the ordinary insurance contract, the duty to defend is found in the provisions of the policy. In the Budget case, however, it was not dealing with an insurer or an insurance policy, but rather a self-insurer with a rental contract. There was no provision in the rental contract requiring Budget to defend the renter at all.

In the present case, of course, Allstate has such a policy, which does contain a promise to defend. Moreover, as the Fourth District noted in its opinion on rehearing, Budget dealt with the second layer of coverage, which is not controlled by section 627.7263 at all (A.5-6). RJT, 650 So. 2d at 60-61. The Budget decision is thus wholly inapposite here.

Legislative History Supports RJT's Position

The legislative history supplied by Allstate in the appendix to its brief makes it clear that one of the purposes of the proposed bill was to lower the insurance premiums paid by automobile leasing companies. See Senate Staff Analysis, HB3686 (July 12, 1976). That legislative intent would be frustrated under Allstate's interpretation of the

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statute, which the Fourth District properly rejected. Assume, for example, that the total judgments against the renter and the rental agency arising from an automobile accident were less than $10,000.00. For the reasons discussed earlier in this brief, the renter's insurer would be required to pay both judgments pursuant to section 627.7263, regardless of whether its policy explicitly provided coverage for the rental agency. If, however, the rental agency had to conduct its own defense, it would receive no real benefit from the statute. This is so because the cost of defending itself through trial (which was nearly $30,000 in the present case, Plaintiff's Exhibits 6 and 7) would be far more significant in many instances than the amount of damages recoverable by the injured party.

The Fourth District correctly concluded that section 627.7263 shifted the responsibility for primary coverage to Allstate, and that this coverage encompassed the duty to defend all parties insured thereunder, including RJT. Accordingly, RJT is entitled to recover its attorney's fees and costs for defending the action by Isaiah Young as well as for prosecuting the action for declaratory relief. Aetna Insurance Company v. Borrell-Bigby, 541 So. 2d at 141. This Court should answer the certified question in the affirmative and approve the decision of the Fourth District Court of Appeal.

CONCLUSION

It is evident that the legislature intended to benefit the rental car companies in the state of Florida by lowering the cost of their insurance. As is well illustrated by the facts of this case, those subjects of the legislature's concern would gain no such benefit if Allstate's arguments were accepted. For the reasons set forth above, the legislature's

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intent will be given effect only by an affirmative answer to the certified question, and we respectfully urge this Court to so rule.

Respectfully submitted,

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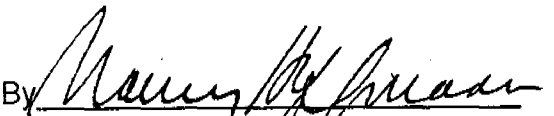
By 
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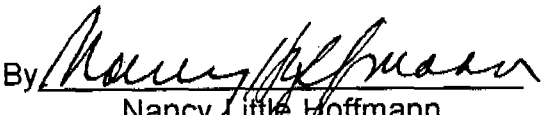
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and attached has been served by mail this 30th day of May, 1995, to: Samuel Tyler Hill, Esquire, 800 Southeast Third Avenue, Suite 200, Fort Lauderdale, Florida 33316, Co-Counsel for Petitioner; Lori J. Caldwell, Esquire and Darryl L. Gavin, Esquire, Rumberger, Kirk & Caldwell, Post Office Box 1873, Orlando, Florida 32802-1873, Co-Counsel for Petitioner; and Mark A. Morrow, Esquire, Law Offices of Ronald E. Solomon, P.A., Post Office Box 14156, Fort Lauderdale, Florida 33302, Co-Counsel for Respondent.

By 
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