IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

RJT ENTERPRISES, INC., etc.,

Respondent.

SUPREME COURT NO. 85,396

District Court of Appeal,
4th District - No. 93-2135

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This action originated from the lawsuit captioned *Isaiah Young v. John Weinerth and RJT Enterprises, Inc.*, filed in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The *Isaiah Young* matter arose out of a motor vehicle accident between Mr. Young's vehicle and a vehicle owned by Respondent, RJT Enterprises, Inc. (hereinafter "RJT") (T 4), and driven by John Weinerth, who had leased the vehicle from RJT. (R 1-3) (R 43-46).

At the time of the accident, Mr. Weinerth was insured by Petitioner, Allstate Insurance Company (hereinafter "Allstate"), under an Allstate automobile policy, policy number 041582979. (R 2; 44) (R 18-19) (R 24-25) (R 83). Upon his lease of the vehicle from RJT, Mr. Weinerth signed a rental agreement which provided that his own insurance would be primary for the limits of liability and personal injury protection required by Florida Statutes § 324.021(7) and 627.736. (R 4) (R 19) (R 25).

During the course of the *Isaiah Young* litigation, RJT requested that Allstate provide it separate counsel and a defense as to the litigation brought by Isaiah Young. (R 5-7) (R 20) (R 26). Because RJT was not defined as an insured under the Allstate policy, and due to the fact that the duty to defend is solely a contractual matter between an insurer and its insured, Allstate

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The symbol "R" refers to the index to record on appeal. The symbol "T" refers to the transcript of proceedings taken March 3, 1993 and filed August 17, 1993 (noted on page 2 of the Index to Record).

declined to defend RJT. (R 18-20) (R 24-26). At all times, Allstate provided a defense for its insured, John Weinerth.

Allstate eventually reached a settlement with Isaiah Young on behalf of Mr. Weinerth, paying the $10,000 limits under the policy. (T 27-28). The trial between Isaiah Young and RJT proceeded forward, resulting in a defense verdict for RJT. Thereafter, RJT filed an action against Allstate, claiming that by operation of Florida Statute § 627.7263, Allstate had a duty to defend it in the *Isaiah Young* case. RJT sought to recover its attorney's fees and costs incurred in the suit brought by Mr. Young. (R 1-3) (R 43-46).

The trial court entered judgment in favor of Allstate, holding that RJT "was not an insured for which a duty of defense was owed under the insurance policy issued by Defendant, ALLSTATE INSURANCE COMPANY, to John Weinerth". (R 76-77). RJT appealed to the Fourth District Court of Appeal (R 80), which reversed the trial court's judgment pursuant to its November 16, 1994 opinion. The court, however, certified the following question as being one of great public importance:

> "ASSUMING THAT THE RENTER'S INSURER OWES A DUTY OF DEFENSE AND INDEMNIFICATION TO ITS INSURED, THE RENTER, DOES THE RENTER'S INSURER OWE THE RENTAL AGENCY, A NON-INSURED UNDER THE POLICY, ANY DUTY OF DEFENSE AND/OR INDEMNIFICATION?"

RJT Enterprises, Inc. v. Allstate Insurance Company, 19 F.L.W. 2394 (Fla. 4th DCA Nov. 16, 1994). Allstate filed a motion for rehearing and rehearing en banc, which was denied pursuant to the court's February 15, 1995 opinion. Allstate thereafter filed the

Notice of Intent to Invoke Discretionary Jurisdiction which is presently before this Court.

SUMMARY OF ARGUMENT

The trial court was correct in ruling that RJT was not owed a duty of defense under the insurance policy issued by Allstate to its insured, John Weinerth.

An insurance company's duty to defend is strictly a contractual matter between the company and the party with whom it has contracted. In consideration for premiums paid, the insurance company contractually obligates itself to defend its insured. In the instant case, John Weinerth is Allstate's insured, and Allstate defended Mr. Weinerth in the action underlying this case. It is undisputed that RJT is not defined as an insured under the Allstate insurance policy. In the absence of a contract between Allstate and RJT, there is no basis upon which to impose upon Allstate a duty to defend RJT.

RJT contends Florida Statute § 627.7263 has changed the established law and imposes upon Allstate a duty to defend. However, Section 627.7263 does not by its terms or intent require a lessee's insurer to provide a defense to a rental company. The statute merely permits a rental company to shift to a lessee's insurer the primary obligation to pay on behalf of the lessee the limits required by Florida Statute § 324.021(7) and 627.736. Florida Statute § 627.7263 does not in any way, shape or form require a lessee's insurer to provide a defense to a lessor rental company. This Court should not add words to the statute or legislative history in order to find a duty to defend. Had the legislature intended to impose upon a lessee's insurer the separate

and additional duty to defend, it could have set forth such a requirement in the statute. It did not.

Allstate respectfully requests that this Court answer the certified question in the negative and reverse the decision of the District Court of Appeal.

ARGUMENT

I. ALLSTATE DOES NOT OWE THE RESPONDENT RENTAL AGENCY, A NON-INSURED UNDER ITS POLICY, ANY DUTY OF DEFENSE.

In its opinion filed November 16, 1994 in the underlying case of *RJT Enterprises, Inc., d/b/a Discount Rent-A-Car v. Allstate Insurance Company*, the Fourth District Court of Appeal certified to this Court the following question as being one of great public importance:

> "ASSUMING THAT THE RENTER'S INSURER OWES A DUTY OF DEFENSE AND INDEMNIFICATION TO ITS INSURED, THE RENTER, DOES THE RENTER'S INSURER OWE THE RENTAL AGENCY, A NON-INSURED UNDER THE POLICY, ANY DUTY OF DEFENSE AND/OR INDEMNIFICATION?"

RJT Enterprises, Inc. v. Allstate Insurance Company, 19 F.L.W. 2394, 2395 (Fla. 4th DCA Nov. 16, 1994). For the reasons set forth below, Allstate submits this Court should answer the question in the negative.

A. The Duty To Defend Is Purely a Contractual Obligation

It is well established in Florida that an insurer's duty to defend arises solely from the insurance contract entered into between the insurance company and its insured. *Carrousel Concessions v. Florida Insurance Guaranty*, 483 So. 2d 513, 516 (Fla. 3d DCA 1986); *Budget Rent A Car Sys. v. Taylor*, 626 So. 2d 976, 978 (Fla. 4th DCA 1993). It is strictly a contractual undertaking and does not arise by operation of statute or common law. *Argonaut Insurance Company v. Maryland Casualty Company*, 372 So. 2d 960, 963-64 (Fla. 3d DCA 1979); *RJT Enterprises, Inc. v. Allstate Insurance Company*, 19 F.L.W. 2394, 2395 (Fla. 4th DCA

Nov. 16, 1994) (Stevenson, J., dissenting); *Brown v. Lumbermens Mutual Casualty Company*, 390 S.E.2d 150, 152 (N.C. 1990); 7c Appleman, *Insurance Law and Practice* (Berdal ed.), § 4682, p. 27 (1979); 14 *Couch on Insurance* 2d (Rev. ed.) § 51.35, p. 444 (1982); 46 C.J.S. *Insurance* § 1146 (1993). In consideration for premiums paid, the insurance company contractually obligates itself to defend its insured. 46 C.J.S. *Insurance* § 1145, subpart c (1993). An insurer's duty to defend is personal between itself and its insured. There is no duty on the part of the insurance company to defend anyone who is not an insured under the terms of the policy, *Auto-Owners Insurance Company v. Jones*, 397 So. 2d 317, 319 (Fla. 4th DCA 1981), and the duty cannot inure to the benefit of another insurer. *Argonaut Insurance Company v. Maryland Casualty Company*, 372 So. 2d 960, 963 (Fla. 3d DCA 1979). Moreover, an insurer's duty to defend is separate and distinct from the duty to indemnify. *Klaesen Bros., Inc. v. Harbor Ins. Co.*, 410 So. 2d 611, 612 (Fla. 4th DCA 1982); *Baron Oil Company v. Nationwide Mutual Fire Insurance Company*, 470 So. 2d 810 (Fla. 1st DCA 1985). Accordingly, under Florida law, an insurance company's duty to defend extends only to persons or entities with whom it has contracted. It is legally separate from any duty to indemnify. If there is no contract to defend, no such duty exists. *Budget Rent A Car Sys. v. Taylor*, 626 So. 2d 976, 978 (Fla. 4th DCA 1993).

In this case, Allstate issued an automobile insurance policy to John Weinerth. Part I of the policy, entitled Automobile Liability Insurance, provides:

> **We** will defend a person insured if sued as the result of a covered **auto** accident. This defense will be supplied even if the suit is groundless, false or fraudulent. **We** will defend that person at **our** own expense, with counsel of **our** choice and, may settle any claim or suit if **we** feel this is appropriate.

Allstate Automobile Policy, page 3. (contained in R 83). "Persons insured" is defined as follows:

> **Persons Insured**
> (1) while using **your** insured **auto**
> a) **you**,
> b) any **resident**, and
> c) any other person using it with **your** permission.
>
> (2) while using a non-owned **auto**
> a) **you**,
> b) any **resident** relative of **your** household using a four wheel private passenger, station wagon or **utility auto**.
>
> (3) any other person or organization liable for the use of an insured **auto** <u>if the **auto** is not owned or hired by this person or organization</u>.

Allstate Automobile Policy, page 4. (contained in R 83) (underscore added). Because RJT owned the automobile Mr. Weinerth was operating at the time of the accident (T 4), RJT does not fall within the policy definition of "persons insured". RJT does not dispute this point. RJT never paid premiums to Allstate and never had a contract with Allstate. Allstate therefore had no contractual obligation to provide a defense to RJT.[1] As held by

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[1] The Allstate policy further provides the following: **"We** can't be obligated by a person insured voluntarily making any payments or taking other actions except as specified in this policy." Allstate Automobile Policy, page 5. (R 83). Pursuant to this clause, the insured's execution of a lease agreement with RJT cannot obligate Allstate to any duties not called for in the policy. *See Grant v. New Hampshire Insurance Co.*, 613 So.2d 466, 471 (Fla. 1993) (insured may not unilaterally vary terms of a contract of insurance); *Southeastern Fidelity Insurance Company v. Cole*, 493 So.2d 445, 447 (Fla. 1986) (provision in rental agreement

the authorities cited above, in the absence of a contractual duty to defend, no such duty exists.[2]

The majority of the Fourth District Court of Appeal's November 16, 1994 opinion in this case concerns the issue of whether Florida Statute § 627.7263 shifts to the lessee's insurer the primary responsibility of indemnification on behalf of both the lessee and the lessor (as opposed to shifting the responsibility only as far as it affects the lessee). Once the court decided that issue, it addressed the duty to defend issue in one sentence in the paragraph immediately preceding the certified question. *Marr Investments, Inc. v. Greco*, 621 So. 2d 447 (Fla. 4th DCA 1993) is the only authority the court cited in support of its decision that Allstate had a duty to defend RJT. The court cited this case for the proposition that the "duty to defend is broader than the duty of coverage/indemnification". *See RJT Enterprises, Inc.* at p. 2395. Although the above principle was properly applied in the *Marr Investments* case, it has no application in this case.

In *Marr Investments*, a suit was filed against Marr for purported negligence. The issue before the court was whether the allegations of the complaint fell within coverage afforded by a liability policy issued to Marr by Alliance General Insurance

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cannot be relied upon to alter provisions of an insurance policy). In any event, the terms of the lease agreement do not in any way require Allstate or its insured to provide a defense for RJT. (See R 4).

[2] A concise analysis of the bounds of an insurer's duty to defend is set forth in Judge Stevenson's dissent in *RJT Enterprises, Inc. v. Allstate Ins. Co.*, 19 F.L.W. 2394 (Fla. 4th DCA, Nov. 16, 1994).

Company. Alliance claimed the action against Marr was actually for assault and battery, and therefore coverage was specifically excluded by the assault and battery exclusion contained in the policy. With respect to issues of that type, Florida courts have held that the allegations of the complaint should be examined together with the terms of the insurance policy, and if there is any doubt concerning the duty to defend, the matter is to be resolved in favor of the insured. In that context, courts have indeed held that the duty to defend is broader than the duty to indemnify.

Application of the principles set forth in *Marr Investments*, however, presupposes the party seeking a defense is defined as an insured under the policy in the first place and that the insurance company has contracted with that party to provide a defense. A court does not reach the principles espoused in *Marr Investments* where, as in this case, the party seeking the defense is not defined as an insured under the insurance policy or where the insurance company has never contracted with the party to provide a defense. As indicated above, in the absence of a contractual duty to defend, no duty exists. Moreover, the instant case is not one in which the trial court was asked to determine whether the tort allegations asserted in the complaint filed by Isaiah Young fell within policy coverage. For the above reasons, *Marr Investments* is inapposite.

It is undisputed that Allstate never contracted to provide a defense to RJT. Without a contractual undertaking, there can be no duty to defend.

B. Florida Statute § 627.7263 Does Not Impose a Duty to Defend

The established law set forth above makes it clear that in the absence of a contractual undertaking, an insurance company has no duty to defend a non-insured under its policy. RJT however contends that Florida Statute § 627.7263 has changed the established law and imposes upon Allstate a duty to defend. To the contrary, Allstate submits that Florida Statute § 627.7263 (often referred to as the "shifting statute") by its clear and unequivocal terms merely allows a rental agency to shift to a lessee's insurance carrier the primary responsibility for payment of the limits required by Florida Statute § 324.021(7) and 627.736.[3] *See Grant v. New Hampshire Insurance Co.*, 613 So. 2d 466, 470 (Fla. 1993) (§ 627.7263 merely allows lessor to shift primary limits of liability to lessee) ; *RJT Enterprises, Inc. v. Allstate Insurance Company*, 19 F.L.W. 2394, 2395 (Fla. 4th DCA Nov. 16, 1994) (Stevenson, J., dissenting) (§ 627.7263 shifted responsibility for

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[3] Florida Statute § 324.021(7) (1985) refers to the ability to respond in the amount of $10,000 for bodily injury or death of one person in any one accident; in the amount of $20,000 for bodily injury or death of two or more persons in any one accident; and in the amount of $5,000 because of injury to or destruction of property of others. Florida Statute § 627.736 (1985) refers to the ability to respond in the amount of $10,000 in personal injury protection. No subsequent modifications material to this action have been made to these statutes.

primary layer of indemnification; statute does not require that lessee's insurer provide a defense).

1. Florida Statute § 627.7263 Is Limited In Scope and Courts Have Interpreted it Accordingly

Florida Statute § 627.7263 provides the following:

> **627.7263 Rental and Leasing Driver's Insurance to be Primary; Exception. -**
>
> (1) The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.
>
> (2) Each rental or lease agreement between the lessee and the lessor shall contain a provision on the face of the agreement, stated in bold type, informing the lessee of the provisions of subsection (1) and shall provide a space for the name of the lessee's insurance company if the lessor's insurance is not to be primary.

§ 627.7263, Florida Statutes (1985) (the language of the current statute is identical).

By way of background, Florida Statute § 627.7263 was enacted in response to the dangerous instrumentality doctrine and the financial responsibility law as they apply to the unique situation of a rental car. Pursuant to the dangerous instrumentality doctrine, a rental car company, as owner of the rental vehicle, is vicariously liable for the negligent operation of its vehicle. The financial responsibility law requires the owner of a motor vehicle to provide proof of financial responsibility for himself and any other person operating his motor vehicle or motor vehicles. See Florida Statute § 324.151(1)(a). Therefore, in the rental car

context, a situation is created where a lessee is covered under two separate insurance policies for the limits of the financial responsibility law -- his own policy and the rental company's policy.

Because of this dual coverage, the issue of primacy was presented. Which policy would be primary in the event of an accident? The courts resolved the issue by holding that the first layer of coverage must come from the owner (rental company) and the second layer from the lessee. *See Allstate Insurance Company v. Fowler*, 480 So. 2d 1287 (Fla. 1985) (espousing general rule that first layer of coverage must come from insurer of owner). Thus, before passage of § 627.7263, the owner's policy was primary for payment of the limits required by the financial responsibility law.

In response to this unique situation, the Florida legislature enacted § 627.7263. The effect of the statute in its current form is to allow rental companies to alter the common law rule which required their own insurance coverage to be primary on behalf of the lessee. Assuming the technical requirements of the statute are satisfied, the lessee's policy becomes primary for payment of the limits required by Florida Statutes § 324.021(7) and 627.736.

Allstate does not deny that if the technical requirements of the statute are met, the lessee's insurance carrier will be primarily responsible for payment of the limits required by § 324.021(7) and 627.736 on behalf of the lessee. If the carrier's policy is in conflict with the statute in that regard, the statute will control. *See* e.g. *Commerce Ins. Co. v. Atlas Rent-A-Car,*

Inc., 585 So. 2d 1084 (Fla. 3d DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992) (with regard to payment of limits under financial responsibility law, statute controlled over conflicting provision in lessee's policy which purported to make rental company's coverage primary). However, the statute is no broader than that. The statute does not mention, let alone require, that an insurance company's separate and contractual obligation to defend its premium-paying insured must also be extended to a rental car company which is a non-insured under the policy. No court has ever before reached that conclusion.

In *Mondello v. Liberty Mutual Insurance Company*, 507 So. 2d 1178 (Fla. 2d DCA 1987), the limited scope of Florida Statute § 627.7263 was recognized. In that case, Mondello leased an automobile from Liberty Mutual's insured, a car dealership, and was involved in an accident with an uninsured motorist. Mondello contended that because the dealership's lease agreement failed to comply with the technical requirements of Florida Statute § 627.7263, Liberty Mutual was responsible on a primary basis for not only the limits required by the statute, but also uninsured motorist benefits since Florida Statute § 627.727(1) requires each liability policy issued in the State of Florida to contain uninsured motorist coverage. The trial court rejected this argument and entered summary judgment in favor of Liberty Mutual. Mondello appealed.

The Second District Court of Appeal affirmed the trial court, emphasizing the fact that Florida Statute § 627.7263 "makes no

reference to uninsured motorist insurance". *Id.* at 1180. The court went on to state:

> "Rather, 'once the requirements of the statute are satisfied by requiring the lessor to be responsible up to the limits of the financial responsibility law, or to properly shift the burden, the parties are free to contract between themselves as to any additional responsibility.' *Patton v. Lindo's Rent-A-Car*, 415 So. 2d 43, 45 (Fla. 2d DCA 1982), *see also Maryland Casualty Company v. Reliance Insurance Company*, 478 So. 2d 1068 (Fla. 1985) (citing *Patton*). Thus, the parties to a rental or lease agreement must contract between themselves regarding uninsured motorist coverage."

Id. Accordingly, the court held that the party responsible for payment of the limits required by Florida Statutes § 324.021(7) and § 627.736 was not obligated as to matters not referenced by § 627.7263. Instead, any additional responsibilities must be specifically contracted for between the parties.[4]

In *Maryland Casualty Company v. Reliance Insurance Company*, 478 So. 2d 1068 (Fla. 1985), the limited scope of § 627.7263 was also recognized by this Court. In that case, Bob Salmon, Inc. leased an automobile to B.A.T. Pipeline, Inc. Salmon was covered by an auto policy issued by Reliance, and B.A.T. was insured by Maryland. An employee of B.A.T., while using the leased auto, caused injuries to a third party. The third party sued Reliance and Maryland, which cross-claimed against each other, both claiming that the other's policy provided the primary insurance coverage.

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[4] See Footnote 1, *supra*. The terms of the lease agreement do not in any way require Allstate or its insured to provide a defense for RJT. As indicated previously, RJT is not defined as in insured in the Allstate policy.

The issue before the court was the proper interpretation of Florida Statute § 627.7263. Reliance conceded that it would be responsible on a primary basis for the limits required by § 324.021(7) and § 627.736 ($10,000), but maintained that § 627.7263 does not create any further obligations. Maryland claimed that Reliance's coverage extended to the full limits of its policy. The trial court entered judgment in favor of Maryland and Reliance appealed.

The Fourth District Court of Appeal reversed the trial court, stating that "the plain language of the statute simply does not support Maryland's contention that Reliance's coverage is primary to the full extent of its policy limits." *See Reliance Ins. Co. v. Maryland Cas. Co.*, 453 So. 2d 854, 856 (Fla. 4th DCA 1984). On appeal to The Supreme Court of Florida, the Fourth District's decision was affirmed. This Court stated that "words in a statute should be given their plain and ordinary meaning" and noted that the legislature could have omitted the last sentence of subsection (1) of § 627.7263 had it intended for the lessor to automatically provide coverage up to the full extent of its policy. 478 So. 2d at 1070.

Although the *Mondello* and *Maryland Casualty Company* cases do not address the duty to defend issue, they nevertheless demonstrate the narrow scope of § 627.7263. Just as the terms of the statute do not reference or require uninsured motorist coverage or payment of full policy limits, the statute also does not reference or require provision of a defense. As in *Maryland Casualty Company*,

had the legislature intended to impose an obligation to defend, it certainly could have said so.

One Florida court has previously addressed the duty to defend in the rental car context. Ironically, it was the Fourth District Court of Appeal in *Budget Rent A Car Sys. v. Taylor*, 626 So. 2d 976 (Fla. 4th DCA 1993). In that case, Taylor leased an automobile from Budget pursuant to a written lease agreement. While using the automobile, Taylor was involved in an accident with Murphy. As a result of the accident, Murphy sued Taylor and Budget. Budget defended itself and also assumed the defense of Taylor. Before trial, Budget settled Murphy's claim on its own behalf and obtained a partial release of Taylor to the extent of the amount Budget paid to Murphy.[5] At that point, Taylor's personal insurer, Valley Forge Insurance Company, assumed the defense of Taylor. The case ultimately resulted in a jury verdict in favor of Murphy for $23,000.

Subsequently, Taylor and Valley Forge filed a declaratory judgment action against Budget, claiming that Budget breached its duty to defend Taylor. The trial court found that Budget had a duty to defend Taylor through the conclusion of the action brought by Murphy. Budget appealed.

On appeal, the Fourth District Court of Appeal recognized the duty to defend is purely contractual:

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[5] Budget settled for $10,000, the amount required under the financial responsibility law. Although not discussed in the case, it is apparent that Budget's lease agreement did not comply with Florida Statute § 627.7263. As a result, Budget had to pay the $10,000 on a primary basis.

> "All the authorities we have found subscribe to the proposition that a duty to defend is purely contractual and if there is no contract to defend, no such duty exists."

Id. at 978. The court went on to recognize that Budget had no duty to defend in the first place:

> "It seems to us that if there is no contractual duty to defend in the parties' contract then there is no duty defend....In fact, [Taylor] received more than he was entitled to, i.e., a free defense of his liability to the extent of the coverage he purchased."

Id. at 979. Reversing the trial court, the Fourth District Court of Appeal found that Budget had performed all of its contractual responsibilities "and then some". *Id.* The court found that Taylor and Valley Forge were attempting to establish a duty to defend by "*ipse dixit*".[6]

According to the *Budget* decision, 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. Rather, the duty to defend is purely contractual and, if there is no contract to defend, no such duty exists. *Id.* at 978. The court in *Budget* found that Budget had no duty to defend in the first place, despite the fact that it was primary for payment of the limits required by the financial responsibility law. A like result should follow in the instant case.

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[6] Defined by Black's Law Dictionary, Fifth Ed. (1979), as "a bare assertion resting on the authority of an individual".

2. Florida Statute § 627.7263 Should Be Applied In Accordance With Its Clear and Unequivocal Terms

As demonstrated below, the basic rules of statutory construction require that Florida Statute § 627.7263 be applied in accordance with its clear and unequivocal terms. Because the statute does not provide for a duty to defend, no such duty should be found.

It is a basic principle of statutory construction that when a court interprets the meaning of a statute, it must look first to the plain language of the statute itself. *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1559 (11th Cir. 1989). If the language is unambiguous, the plain meaning of the statute must control. *City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993); *U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991); *Steinbrecher v. Better Const. Co.*, 587 So. 2d 492, 493 (Fla. 1st DCA 1991). Unambiguous language of a statute is not subject to judicial construction. *State v. Jett*, 626 So. 2d 691, 693 (Fla. 1993); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992); *Lipof v. Florida Power and Light Co.*, 596 So. 2d 1005 (Fla. 1992) (court is not free to expand rights and obligations under Florida Statutes § 627.730 - 627.7405 to encompass uninsured motorist coverage -- such a decision must come from legislature).

The language of Florida Statute § 627.7263 is clear and unambiguous. Where the technical requirements of the statute are met, the primary responsibility for payment of the limits required

by Florida Statute § 324.021(7) and 627.736 is shifted to the lessee's insurance carrier. The statute provides for nothing else, and Florida courts have rejected attempts to broaden the scope of the statute. *See Mondello, Maryland, supra.* Significantly, an obligation to defend is not mentioned in § 627.7263, § 324.021(7) or § 627.736. In such a case, a court should not go beyond the clear wording of the statute to give it a different meaning. *Forsythe, Lipof, supra.* As this Court declared in *Maryland Casualty Company, supra* (regarding whether § 627.7263 imposes a duty to pay full policy limits), had the legislature intended to impose a duty to defend, it certainly could have said so.

3. The Legislative History Behind Florida Statute § 627.7263 Does Not Reveal An Intent to Impose a Duty to Defend

Because the language of Florida Statute § 627.7263 is clear and unambiguous, it is unnecessary for this Court to go beyond the statute and look at the legislative history. However, if the legislative history is examined, the same conclusion is reached: § 627.7263 does not impose a duty to defend.

The applicable legislative history has been filed as an Appendix to Allstate's Brief on the Merits. Significantly, there is no reference whatsoever concerning the defense of a rental company. The history reflects only an intent to allow shifting of the primary responsibility for payment of the limits required by the financial responsibility law. There is simply nothing in the

legislative history on which to base a ruling that the legislature intended to impose a duty to defend.

Unless the legislative history clearly contradicts the statutory language, the statutory language must control. *In re Braniff, Inc.*, 110 B.R. 980 (Bankr. M.D. Fla. 1990). A court can not attribute to the legislature an intent beyond that expressed by the legislature. *Board of Monroe County v. Department of Community Affairs*, 560 So. 2d 240, 242 (Fla. 3d DCA 1990). Any doubt as to legislative intent should be resolved in favor of not adding words to the statute. *Special Disability Trust v. Motor and Compressor Company*, 446 So. 2d 224, 226 (Fla. 1st DCA 1984).

In this case, there is not a single word in either the language of § 627.7263 or the legislative history concerning a duty to defend. Under these facts, words should not be added to the statute to find such a duty.

4. Florida Statute § 627.7263 Must Be Strictly Construed

It is presumed that a statute is not intended to change a common law rule unless the statute is explicit and clear in that regard. *City of Hialeah v. State ex rel. Morris*, 183 So. 745, 747 (Fla. 1938); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) (statute did not supersede common law where neither express language of statute nor legislative history clearly reveal that intent). Courts are constrained to interpret statutory enactments so as not to alter common law unless the statutory language is clear in its intent to do so. *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372, 1377, *reh'g. denied*, 626 So. 2d 207

(Fla. 2d DCA 1993). Unless a statute clearly and explicitly states that it changes the common law, it will not be held to change common law by implication. *Peninsular Supply Company v. C.B. Day Realty of Florida, Inc.*, 423 So. 2d 500, 502 (Fla. 3d DCA 1982). A statute intending to alter the established law must show that intention in unequivocal terms. *Holler v. International Bankers Insurance Company*, 572 So. 2d 937, 939 (Fla. 3d DCA 1990).

In this case, the established common law holds that the duty to defend is strictly a contractual obligation owed only to the person with whom the insurance company has contracted. *See* Section A of Allstate's Brief. Florida Statute § 627.7263 can not change this common law rule unless the statutory language is clear and explicit in that regard. In this case, it is not. Indeed, neither the statute nor the legislative history mention a duty to defend. Therefore, according to the rules of statutory construction followed by the courts of this state, § 627.7263 can not be interpreted so as to impose upon Allstate a duty to defend.

C. Florida Statutes § 324.021(7) and 627.736 Do Not Impose a Duty to Defend

Previous sections of this Brief have covered the fact that the neither the language nor legislative history of Florida Statute § 627.7263 mention a duty to defend. Likewise, Florida Statute § 324.021(7) and 627.736, the two statutes referenced in § 627.7263, also do not impose a duty to defend.

Florida Statute § 324.021(7) provides:

> (7) PROOF OF FINANCIAL RESPONSIBILITY. - That proof of ability to respond in damages for

> liability on accounts of accidents arising out of the use of a motor vehicle:
>
> (a) In the amount of $10,000 because of bodily injury to, or death of, one person in any one accident;
>
> (b) Subject to such limits for one person, in the amount of $20,000 because of bodily injury to, or death of, two or more persons in any one accident; and
>
> (c) In the amount of $5,000 because of injury to, or destruction of, property of others in any one accident.

Florida Statute § 627.736 provides:

> **627.736 Required personal injury protection benefits; exclusions; priority. -**
>
> (1) REQUIRED BENEFITS. - Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to the provisions of subsection (2) and paragraph (4)(d), to a limit of $10,000...

Section 324.021(7), Florida Statutes (1985) and § 627.736, Florida Statute (1985) (no subsequent modifications material to this lawsuit have been made to these statutes). The purpose of these statutes is to protect the public by ensuring that at least a minimum amount of benefits will be available to compensate injured motorists. The statutes do not in any way impose a duty to defend. The statutes refer only to the ability to respond 1) in the amount of $10,000 for bodily injury or death of one person in any one accident; 2) in the amount of $20,000 for bodily injury or death of two or more persons in any one accident; 3) in the amount of $5,000

because of injury to or destruction of property of others; and 4) in the amount of $10,000 in personal injury protection.

As mentioned above, § 627.7263 is often referred to as the "shifting statute". This is because it allows for a shift of the primary responsibility for payment of the limits required by Florida Statute § 324.021(7) and 627.736. Responsibility for payment of the limits required by the two statutes is the only thing shifted by § 627.7263. Since § 324.021(7) and 627.736 do not make reference to or require a defense, there is no duty to defend to shift over to the lessee's insurance carrier. A statute can not shift something that was never there in the first place.

D. Florida Statute § 627.7263 Was Enacted to Establish Priority Between Insurance Policies Covering the Lessee, Not to Confer Coverage Upon Rental Car Companies

As further support for its position that Florida Statute § 627.7263 does not impose a duty to defend, Allstate would again refer to the history behind the statute.[7] To summarize, in a rental car situation, the lessee is covered under two separate policies up to the limits required by the financial responsibility law. This presented a primacy issue which was resolved by the courts holding that the owner's (rental company's) policy must pay first on behalf of the lessee, and the lessee's policy second. *See Fowler, supra*. Upon enactment of § 627.7263, however, the lessee's policy becomes primary for payment up to the limits required by

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[7] The history behind Florida Statute § 627.7263 is outlined in Section B 1 of this Brief, pp. 10-12.

Florida Statutes § 324.021(7) and 627.736, provided the technical requirements of the statute are satisfied.

Considering the history behind the statute, Allstate submits that § 627.7263 was enacted to provide a mechanism for determining which of the two policies will be primary *for the lessee* -- the rental company's policy or the lessee's policy. It in no way confers coverage upon the rental company, much less an obligation on the part of the lessee's carrier to defend the rental company.

Allstate's position that § 627.7263 simply addresses which policy will be primary *for the lessee* is supported not only by the history behind the statute, but also by the language used in the statute. Significantly, the statute refers to the insurance that will be "primary". The issue of primary versus secondary coverage would make no sense outside the context of a mutual insured. As explained above, only the lessee is a mutual insured in a rental car situation. The rental car company is not defined as an insured under the lessee's policy. (See for example the Allstate policy involved herein). Accordingly, Allstate submits the statute simply provides a mechanism for determining which of the policies covering the *lessee* will be primary for payment on behalf of the *lessee*. The statute does not confer any coverage whatsoever upon the rental company. If the statute does not confer coverage upon the rental company, it certainly cannot confer a duty to defend.

CONCLUSION

Pursuant to established law, an insurance company's duty to defend is separate and distinct from its duty to indemnify. The duty to defend is strictly a contractual matter between the insurer and its insured. Because RJT has no contract with Allstate, there can be no duty to defend.

In addition, Florida Statute § 627.7263 does not by its terms or intent require a lessee's insurer to provide a defense for a rental company, much less a rental company which is not defined as an insured under the insurer's policy. The statute merely permits a rental company to shift to a lessee's carrier the primary obligation to pay on behalf of the lessee the limits required by Florida Statute § 324.021(7) and 627.736. Florida Statute § 627.7263 does not in any way, shape or form require a lessee's insurer to provide a defense to the lessor. Had the legislature intended to impose upon insurers the separate and additional duty to defend, it could have set forth such a requirement in the statute. It did not.

Allstate respectfully requests that this Court answer the certified question in the negative and reverse the decision of the District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Samuel Tyler Hill, 800 S.E. Third Ave., Suite 200, Ft. Lauderdale, FL 33316 and Ronald E. Solomon, P. O. Box 14156, Ft. Lauderdale, FL 33302 this 14th day of April, 1995.

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0058823

IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

RJT ENTERPRISES, INC., etc.,

Respondent.

SUPREME COURT NO. 85,396

District Court of Appeal,
4th District - No. 93-2135

APPENDEX OF PETITIONER, ALLSTATE INSURANCE COMPANY

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INDEX

COMM. _____

DATE: May 19, 1976 ACTION: FINAL _____

SENATE STANDING COMMITTEE ON COMMERCE

Staff Evaluator (Livingston)

1976 Bill No. & Introducer	Relating to:
HB 3687 Rep. Steinberg	Insurance

I. SUMMARY:

Makes coverage primary for liability or personal injury protection insurance for the rental or leasing driver or his authorized driver of a rental or leased motor vehicle. Requires each rental or lease agreement to contain an appropriate provision.

II. ANALYSIS:

A. Current Situation:

Currently representatives of the rental car industry have expressed concern over the effects on insurance premiums as a result of several recent court cases wherein questions had arisen as to the primary or secondary nature of the liability of the driver and/or rental company in an automobile accident case.

B. Bill Analysis:

This bill attempts to clarify, in the event a motor vehicle is rented or leased, whose coverage, the lessor (owner) or lessee, is primary.

The bill would make the driver's insurance primary for the first $15,000/$30,000 of coverage and also for the primary PIP benefits.

III. TECHNICAL ERRORS:

None noted.

IV. STAFF COMMENTS:

None

V. REFERENCES:

Commerce

COMM. _____

ACTION:

DATE: July 8, 1976

FINAL _____

SENATE STANDING COMMITTEE ON COMMERCE

Staff Evaluator (Green)

1976 Bill No. & Introducer		Relating to:
HB 3687	Rep. Steinberg	Insurance

I. SUMMARY:

Provides that the liability insurance coverage and basic personal injury protection benefits covering a lease car driver shall be primary up to the basic minimum limits required by law. Requires that lease car rental agreements provide notice of the requirement to the parties in bold face type and that the agreement provide a space for the name of the leasing driver's insurance company.

II. ANALYSIS:

Current Situation:

Florida courts have consistently held that automobiles are "dangerous intrumentalities" and, as such, subject the owner to liability for the negligence of those driving them with his permission. In the area of lease cars, the Florida Supreme Court has held that when a person leases an automobile and pays part of the lease charge for insurance coverage by the lessor (the owner), even another person driving the lease car, contrary to the express terms of the lease agreement, will be covered by the lessor's insurance. Susco Rental System of Florida v. Leonard, 112 So 2d 832 (Fla. 1959). In 1972 the court went further to hold that in an identical situation in which the driver's insurance carrier had paid a claim, that company was entitled to indemnification by the lease car owner's insurance company because the owner's insurance was primary. Roth v. Old Republic Insurance Company, 269 So. 2d 3 (Fla. 1972).

The law in Florida has been well settled that the owner of an automobile (including a lease car owner) is primarily responsible for the negligence of drivers of that automobile, and certainly in the case of a lessee who pays for insurance coverage by the owner's insurance carrier, the owners insurance will be primary.

Analysis:

This bill substantially changes the current law regarding primacy of insurance coverages in rental car agreements. The bill provides that the lease car driver's insurance shall provide primary coverage for the financial responsibility limits required by law (currently $15,000 bodily injury for one person, $30,000 per occurrence, and $5,000 property damage, but which will decrease to 10/20/5 on October 1, 1976, by operation of chapter 76-266) and the basic required personal injury protection benefits ($5,000 per person.)

The bill provides that the lease agreement shall include a provision in bold face type informing the lessor

of the above provisions, and it must include a space for the name of the leasing driver's insurance company.

Presumably, the lease car company's insurance will provide basic limits of coverage, as required by the financial responsibility law, if the driver does not have his own insurance.

If the lease car company's insurance coverage is for more than the basic limits required by law, then any amount up to those limits would provide excess coverage over the driver's minimum limits even though the driver's own insurance coverage has greater than the required minimum limits. The driver's insurance would only be primary for the minimum limits and would be secondary thereafter.

III. TECHNICAL ERRORS:

The word "lessor" on page 1, line 29, should be "lessee". The person who leases the car should be the one put on notice of the insurance provisions of the contract.

IV. COMMENTS:

This bill may cause significant reductions in the insurance premiums paid by lease car companies because most of the leasing drivers will have their own insurance which will provide minimum required coverage. However, there is no mandate that lease car rental rates be adjusted downward in the case of a rental to an insured driver. The bill mandates no different rental rate for insured or uninsured drivers.

The bill also raises questions about who must provide the minimum insurance for persons renting cars on business. For instance, if a state employee rents an automobile on official business and the rental charge is paid by the state, does this bill mandate that the driver's personal insurance cover him, or does the state have an obligation to insure its employees for minimum coverage? There is certainly a question about how this bill will affect existing contracts for rental car services. The state has just entered a contract with Hertz Corporation for the period July 1, 1976, through June 30, 1977. According to a memorandum to all state agencies, subject: Rental Car Contract from Jack Kane, Executive Director of the Department of General Services, dated June 25, 1976, Hertz will provide primary liability coverage in the amount of 100/300/25. There is no mention of this bill or its effects, if any, on this contract.

There also may be problems with this bill as it applies to rentals which involve travel in states other than Florida. Will these provisions apply if a car is leased in Florida, driven out of state, and an accident occurs elsewhere? Similarly, how will the law affect a person driving a rental car in Florida when he leased it in some other state? These may be complex confliot of laws questions, and court interpretation may be required to answer them.

V. REFERENCES: Commerce

COMM. _____

ACTION:

DATE: July 12, 1976 FINAL _____

SENATE STANDING COMMITTEE ON COMMERCE

Staff Evaluator (Green)

1976 Bill No. & Introducer	Relating to:
HB 3686 Rep. Steinberg	Insurance

I. SUMMARY:

Provides that the liability insurance coverage and basic personal injury protection benefits covering a lease car driver shall be primary up to the basic minimum limits required by law. Requires that lease car rental agreements provide notice of the requirement to the parties in bold face type and that the agreement provide a space for the name of the leasing driver's insurance company.

II. PURPOSE:

The purpose of this bill appears to be threefold: 1) to lower the insurance premiums paid by automobile leasing companies; 2) to clarify the statutory law on primacy of coverages in lease car situations; and 3) to extend the privilege of renting automobiles to certain drivers who have their own insurance but who may be precluded from leasing an automobile because of age, an adverse driving record, etc.

The present law on primacy of insurance coverages when an insured driver leases an automobile was made clear by a 1959 decision of the Supreme Court. In Susco Car Rental System of Florida v. Leonard, 112 So. 2d 832 (Fla. 1959), the Court held that in accordance with Florida's long-standing "dangerous instrumentality" doctrine, the owner (in this case, the rental car company) is primarily liable for the negligence of those who drive his automobile with his permission. That case held that the rental car company's insurance coverage was primary even in the case of the leasing driver's loaning the leased car to another person without the company's permission and contrary to an express agreement not to allow any other person to drive the leased car. Susco was strengthened by the Court's subsequent decision in a case with similar facts, Roth v. Old Republic Insurance Company, 269 So. 2d 3 (Fla. 1972).

This bill substantially changes the current law regarding primacy of insurance coverages in rental car agreements. The bill provides that the lease car driver's insurance shall provide primary coverage for the financial responsibility limits required by law (currently $15,000 bodily injury for one person, $30,000 per occurrence, and $5,000 property damage, but which will decrease to 10/20/5 on October 1, 1976, by operation of chapter 76-266) and the basic required personal injury protection benefits ($5,000 per person.)

The bill provides that the lease agreement shall include a provision in bold face type informing the lessor

of the above provisions, and it must include a space for the name of the leasing driver's insurance company.

Presumably, the lease car company's insurance will provide basic limits of coverage, as required by the financial responsibility law, if the driver does not have his own insurance.

If the lease car company's insurance coverage is for more than the basic limits required by law, then any amount up to those limits would provide excess coverage over the driver's minimum limits even though the driver's own insurance coverage was greater than the required minimum limits. The driver's insurance would only be primary for the minimum limits and would be secondary thereafter.

III. ECONOMIC CONSIDERATIONS:

This bill has significant/~~xxxxxxxxxxxx~~ economic impact.

This bill may have a significant economic impact on insurance premium costs of motor vehicle rental businesses.

A. Persons or entities economically affected including agencies of government:

The bill should mean lower insurance premiums for lease car companies. If the driver who leases the car has insurance, then the lease car company will only be responsible for coverage in excess of the minimum limits required by law. Providing excess coverage only should certainly mean a savings in cost. The rates should have some relationship to the percentage of drivers who are currently personally insured compared to the number of lease car drivers who do not have their own insurance. Specific dollar figures have not been obtained.

The driving public may be adversely affected because now the driver's insurance will provide primary minimum coverage for any accident occurring in a rental vehicle. This will mean that for rating purposes, any accidents in which the driver is involved while driving a rental car will be considered in arriving at his premiums and whether or not he will be insured by a given insurer. Some drivers may be forced into buying their insurance from the assigned risk Joint Underwriting Association because of their accident experience while driving leased automobiles.

The bill will have an immediate impact on lease car businesses and the insurance industry. The amount of insurance dollars actually paid in claims and collected in premiums should not be materially affected, but the responsibility will shift somewhat from the lease car business to the motoring public. All lease car contracts will have to be rewritten, and the administrative expense of claims handling and allocation between insurance companies may prove an additional expense to the insurance industry.

The Department of Insurance has no regulatory authority over lease car companies or their rates. Therefore, the economic impact of implementing this bill by the state should be minimal, but at the same time, there is no guarantee that any cost savings to the lease car companies will be passed on to the public.

Presently, it is not clear what economic impact this bill will have on the state's contract for leased vehicles. The contract includes insurance provisions which, presumably, will not be affected because the insurance purchased is through the lease car company involved in the contract.

B. Source of funds:

If lease car companies transfer part of the burden of insuring accidents that occur in leased cars to the leasing drivers, then it becomes obvious that the burden of insuring these accidents will be passed on to the state's insured drivers.

C. Impact if the bill does not pass:

The current situation is that insurance rates for lease car compnaies are quickly rising as they are for all drivers. Insurance premiums for the businesses involved will remain high under the current situation. Also, certain drivers who presently may have difficulaty renting automobiles because of their driving records may not obtain any relief even though they have their own insurance.

IV. COMMENTS:

The word "lessor" on page 1, line 29, should be "lessee". The person who leases the car should be the one put on notice of the insurance provisions of the contract.

There may be some complex conflict of laws questions about the operation of this bill when applied to operation of leased cars in other states if they were rented in Florida under the provisions of this bill. Court interpretation may be required to answer these questions.

V. REFERENCES: Commerce