SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

JUAN YOUNG and ALINA YOUNG,
his wife,

Petitioners,

v.

PROGRESSIVE SOUTHEASTERN
INSURANCE COMPANY, a Florida
Corporation,

Respondent.

CASE NO. 93,544

RESPONDENT, PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY'S, ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent, Progressive Southeastern Insurance Company,[2/] for the most part, accepts the Statement of the Case and Facts contained in the Youngs' Initial Brief. Progressive would supplement the Statement of the Case and Facts as follows:

In its answers and defenses, particularly the Eighth Affirmative Defense, Progressive maintained that the Plaintiffs' uninsured motorist (UM) claim was limited by any terms, conditions, exclusions and limitations set forth in the policy.[3/] (R. 55) Progressive also raised the definition of UM vehicle contained in its policy and the fact that the Plaintiffs were not entitled to uninsured/underinsured motorist coverage as the Sheriff's vehicle was self-insured and, therefore, could not be considered underinsured or uninsured with respect to Fla. Stat. § 627.727. (R. 55-56) Plaintiffs filed no reply to Progressive's affirmative defenses and filed no pleading seeking to avoid any provision of the contract, nor did they assert that any provision violated Florida law.

In response to Progressive's motion for summary judgment, the Plaintiffs maintained that the provisions relied upon by Progressive were unenforceable as against public policy, and the defense of sovereign immunity could not be raised to the deny the Plaintiffs' UM benefits. (R. 115-118, T. 1-25) They admitted at the

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[2/] For ease of reference herein, the Respondent, Progressive Southeastern Insurance Company, will be referred to as Progressive. The Plaintiffs/Petitioners, Juan Young and Alina Young, will be referred to by name or as the Plaintiffs.

[3/] All references to the Record on Appeal will be referred to as (R) followed by citation to the page of the record. All references to the transcript will be referred to as (T) followed by citation to the appropriate page of the transcript.

hearing that the Sheriff was self-insured. (T. 8) At no time did the Plaintiffs argue that under the language of the policy, coverage was afforded because the policy was ambiguous and the exclusion was more narrow than those previously interpreted by Florida courts.

ISSUES

I.

IS A POLICY PROVISION WHICH EXCLUDES A VEHICLE OWNED OR OPERATED BY A SELF-INSURER FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" FOR PURPOSES OF UNINSURED/UNDERINSURED MOTORIST COVERAGE PERMISSIBLE UNDER FLORIDA LAW AND PUBLIC POLICY?

II.

IF SUCH PROVISIONS ARE PERMISSIBLE, DOES THE PROGRESSIVE EXCLUSION APPLY TO THE YOUNGS' CLAIM?

SUMMARY OF THE ARGUMENT

This Court should answer the certified question from the Second District Court of Appeal in the affirmative and approve the decision of the Second District. The Hillsborough County Sheriff's Office was self-insured for its automobile liability as authorized by Fla. Stat. § 768.28(15)(a) and was a qualified self-insurer as that term is defined in Fla. Stat. § 324.171. Florida Statutes § 627.727(1) requires motor vehicle liability policies to provide UM coverage for persons insured under those policies who are injured as a result of the negligence of an uninsured motorist. Florida Statutes § 627.727(3)(b) expands the definition of uninsured motorist as follows:

> (3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (b) has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages; . . .

[emphasis supplied]

In Florida, a self-insurer is not, for most purposes, considered to be an "insurer" under the Florida Insurance Code. Government Employees Ins. Co. v. Wilder, 546 So.2d 12 (Fla. 3d DCA), rev. den., 554 So.2d 1168 (Fla. 1989). On two occasions, this Court has determined that self-insurers are not liability insurers for purposes of Fla. Stat. § 627.727. In Lipof v. Florida Power & Light Co., 596 So.2d 1005 (Fla. 1992), this Court determined that a self-insurer, Florida Power, had not issued a motor vehicle liability policy when it issued an agreement with an employee

to provide compliance with Fla. Stat. § 324.031, compliance with the Florida Motor Vehicle No-Fault Law and excess indemnity protection in the amount of $500,000.00. Florida Power was found not to be subject to the requirements of Fla. Stat. § 627.727. Likewise, in Diversified Services, Inc. v. Avila, 606 So.2d 364 (Fla. 1992), this Court held that a motor vehicle rental agency who provided compliance with Fla. Stat. § 324.031 through its status as a self-insurer was not an insurer for purposes of Fla. Stat. § 627.727 and its associated requirements for the offering of UM coverage.

The holdings in Lipof and Diversified Services are instructive here as well. A self-insurer is not a liability insurer, and its documents evidencing compliance with Chap. 324, Fla. Stat. do not constitute a liability insurance policy. Florida Statutes § 627.727(3)(b) broadens the definition of uninsured motorist to include those situations where a liability insurer's limits are less than the insured's damages. The statute does not apply to self-insurers, nor create "underinsured" motorists claims if one is injured by a vehicle that is owned by one. As such, Progressive's policy provision does not contradict the statute.

Equally as important, the Youngs' claims that the provision in Progressive's policy is illegal and void as against public policy has been waived. The Youngs filed no reply to the affirmative defenses which raised the provision in the policy. If one attempts to avoid a contract on the basis that a provision is illegal, the illegality must be pled or it is waived. See, Miami Electronics Center, Inc. v. Saporta, 597 So.2d 903 (Fla. 3d DCA 1992), rev. den., 613 So.2d 8 (Fla. 1993); Jorge v. Rosen, 208 So.2d 644 (Fla. 3d DCA 1968). If an answer includes an affirmative defense and the opposing party seeks to avoid it, he is required under the rules to file

a reply containing the avoidance. North American Phillips Corp., Inc. v. Boles, 405 So.2d 202, 203 (Fla. 3d DCA 1981). Since the Youngs never filed a reply to the affirmative defenses, the entire issue has been waived.

Finally, to the extent that the Plaintiffs now argue that the court misinterpreted the policy and that the language in Progressive's policy is more narrow than those previously construed by Florida courts, that argument has likewise been waived. It was not raised at the trial court level at all, either in a complaint, plaintiffs' reply to affirmative defenses, response to motion for summary judgment or even at the hearing. Moreover, the Plaintiffs conceded that the Sheriff was a self-insured entity, and it is clear that self-insurers are more than just contemplative under Florida's Financial Responsibility Law. Florida Statutes § 324.171 specifies exactly what one must do to be considered a self-insurer for purposes of that statute. This Court should resort to the ordinary rules of contract construction and approve the decision of the Second District.

ARGUMENT

I.

THE PROGRESSIVE POLICY PROVISION WHICH EXCLUDES A VEHICLE OWNED OR OPERATED BY A SELF-INSURER FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" FOR PURPOSES OF UNINSURED/UNDERINSURED MOTORIST COVERAGE IS PERMISSIBLE AND ENFORCEABLE UNDER FLORIDA LAW AND PUBLIC POLICY.

This case is not complicated. The Plaintiff was allegedly injured when his vehicle was struck by a car owned by the Hillsborough County Sheriff's Office. The record unequivocally disclosed that the Hillsborough County Sheriff's Office was self-insured as authorized by Fla. Stat. § 768.28(15)(a) in the amount of $100,000.00 per person and $200,000.00 per accident for its liability arising from the ownership, maintenance and use of automobiles. (R. 96-97). The Plaintiffs claim that they are entitled to UM benefits under the Progressive policy because their damages exceed the statutory cap of $100,000.00. The Plaintiffs and the Academy of Florida Trial Lawyers (hereinafter the "Academy") then vigorously argue that the definition of an uninsured or underinsured vehicle under Progressive's policy is prohibited under a broad public policy of the state which they interpret to require that UM benefits be provided in every scenario. What the Youngs and the Academy forget, however, is that articulation of any given public policy is contained within the precise words chosen by the legislature to express that public policy. Careful analysis of the words actually chosen by the legislature in the UM statute in this case should lead this Court to the conclusion that the certified question raised by the Second District Court of Appeal should be answered in the affirmative.

Florida Statutes § 627.727(1) provides in pertinent part:

> No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically-insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Florida Statutes § 627.727(3) then further defines the term "uninsured motor vehicle." Florida Statutes § 627.727(3)(b) is the subsection under which the Youngs claim that they are entitled to benefits under the statute. That statutory subsection provides:

> (3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (b) has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages; . . .

[emphasis supplied]

As this Court has previously stated on several occasions, the plain meaning of statutory language is the first consideration of statutory construction. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). In Shelby Mut. Ins. Co. of Shelby, Ohio v. Smith, 556 So.2d 393, 395 (Fla. 1990), this Court stated:

> As we said in Heredia v. Allstate Ins. Co., 358 So.2d 1353, 1354-55 (Fla. 1978):

> In matters requiring statutory construction, courts always seek to effectuate legislative intent. Where the words selected by the legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent. Foley v. State ex rel Gordon, 50 So.2d 179, 184 (Fla. 1951); Platt v. Lanier, 127 So.2d 912, 913 (Fla. 2d DCA 1961). It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocable meaning.

With those basic guidelines, this Court may analyze the statute to see if under the circumstances, the Youngs are entitled to uninsured/underinsured motorist benefits.

To be entitled to benefits under the statute, it is imperative that the Youngs demonstrate that the Sheriff's vehicle was an "uninsured motor vehicle" as defined in the statute. To qualify as an "uninsured motor vehicle" for purposes of Fla. Stat. § 627.727(3)(b), they need to demonstrate that the "liability insurer" of the motor vehicle which struck them provided limits of bodily injury liability for its insured which were less than the total damages sustained by Mr. Young. The issue which must then be addressed is whether the Hillsborough County Sheriff's Office is an insurer under Florida law. If the Sheriff's Office is not a liability insurer, then under the clear and unambiguous terms chosen by the legislature, no UM benefits are required because the Sheriff's vehicle was not "uninsured."

It is undisputed that the Hillsborough County Sheriff's Office, as authorized by Fla. Stat. § 768.28(15)(a) (1995), self-insured its liability for the $100,000.00 per-person and $200,000.00 per-person limited waiver of sovereign immunity provided in Fla. Stat. § 768.28(5) (1995). (Petitioner's brief, p. 1, 12, T. 8) Florida Statutes § 324.171 also specifically outlines the minimum financial obligation

under which a person or entity may qualify as a self-insurer under the state's Financial Responsibility Law. In this case, the Hillsborough County Sheriff's Office exceeded those minimum guidelines. Likewise, Fla. Stat. § 324.021(8) defines a "motor vehicle liability policy" in part as one ". . . issued by any insurance company authorized to do business in this state." [emphasis supplied]

In Florida, a self-insurer is not, for most purposes, considered to be an "insurer" under the Florida Insurance Code. Government Employees Ins. Co. v. Wilder, 546 So.2d 12 (Fla. 3d DCA), rev. den., 554 So.2d 1168 (Fla. 1989). In fact, this Court has on at least two occasions determined that a self-insurer as contemplated by the Financial Responsibility Statute, is not an insurer for purposes of the obligations and responsibilities imposed by virtue of Fla. Stat. § 627.727. In Lipof v. Florida Power & Light Co., 596 So.2d 1005 (Fla. 1992), Florida Power had hired Michael Lipof as a meter reader and bill deliverer. As part of his employment agreement, Florida Power arranged for insurance coverage on his personal vehicle while he was an employee with Florida Power. Florida Power agreed to provide compliance with Fla. Stat. § 324.031, compliance with the Florida Motor Vehicle No-Fault Law, excess indemnity protection for the benefit of Florida Power and Lipof with combined bodily injury and property damage limits of $500,000.00 and fire, theft, comprehensive protection and full collision or upset protection. Lipof and Florida Power shared the cost of the excess indemnity protection equally. The agreement further stated that Lipof rejected UM coverage and authorized Florida Power to convey that rejection.

Lipof was seriously injured in an automobile accident with an underinsured vehicle. After exhausting his personal injury protection coverage, he sued Florida Power seeking declaratory relief regarding insurance coverage provided by the agreement. Florida Power moved for and was granted summary judgment on the basis that it owed Lipof no duty of offering UM coverage because it was not an insurer or insurance company as recognized by Fla. Stat. §§ 627.733 and 324.031 and because of its status as a self-insurer. The Fourth District affirmed the trial court's summary judgment on the basis that self-insurance is not considered a policy of insurance, and, therefore, the requirements of Fla. Stat. § 627.727 were inapplicable to self-insurers. Accepting the case on the basis of a certified question, this Court stated that the issue was whether Florida Power became Lipof's "insurer" through the employee vehicle agreement thereby creating a duty to offer UM coverage as required by Fla. Stat. § 627.727.

Lipof maintained that Florida Power had acted as an "insurer" under Fla. Stat. § 624.03 because it acted as an indemnitor through the employee vehicle agreement in several ways. First, by compliance with the Financial Responsibility Statute, second by its compliance with the No-Fault Act and third, by providing $500,000.00 indemnification for bodily injury and property damage in addition to the fire and theft insurance. Lipof maintained that based upon those benefits, the agreement was a motor vehicle liability policy, and as such, Florida Power had a statutory obligation to offer UM coverage. Florida Power denied that the agreement was a motor vehicle liability policy and concluded that it owed no duty to offer UM coverage to Lipof.

This Court first addressed Lipof's contention that the agreement became a motor vehicle liability policy because Florida Power provided compliance with Fla. Stat. § 324.031. This Court noted that this statutory section provided four methods of proving financial responsibility. Lipof argued that as owner or operator of the vehicle, he chose to use the agreement as motor vehicle liability insurance pursuant to Fla. Stat. § 324.031(1).

Addressing the argument, this Court stated that Fla. Stat. § 324.031(1) referred to §§ 324.021(8) and 324.151 which defined the requirements for a "motor vehicle liability policy." Writing for a unanimous court, Justice Harding explained that Fla. Stat. § 324.021(8) defined "motor vehicle liability policy" as "issued by any insurance company authorized to do business in this state." Justice Harding further wrote that while Fla. Stat. § 624.03 defined "insurer" broadly, the language of Fla. Stat. § 324.021(8) limited motor vehicle liability policies to those policies issued by insurance companies. Florida Power was not an insurance company authorized to do business in this state, and as such, the agreement could not be characterized as a motor vehicle liability policy within the meaning of the referenced statutory sections. Moreover, Fla. Stat. § 627.727 which required UM coverage for motor vehicle liability insurance policies did not apply to Florida Power.

The Court further explained that Florida Power's having agreed to post a surety bond to provide Lipof's compliance with Fla. Stat. § 324.031 was not the same as "issuing" an insurance policy under § 324.021(8). As such, Florida Power was not an "insurer" and was under no statutory obligation to offer UM coverage to Lipof.

This Court also rejected Lipof's second argument that the agreement became a "motor vehicle liability policy" because Florida Power provided compliance with the Florida Motor Vehicle No-Fault Law. Lipof maintained that Fla. Stat. § 627.733(3)(b) stated that a person providing security authorized by § 324.031(2), (3) or (4) for compliance with the Florida No-Fault Law had all "the obligations and rights of an insurer under ss. 627.730 - 627.7405." This Court rejected that argument and stated that as specified by the legislature, those specific obligations and rights did not include offering UM coverage as required by Fla. Stat. § 627.727. In fact, the Court concluded that it was not free to expand those rights to encompass UM coverage. Moreover, while there may be strong public policy reasons for requiring employers like Florida Power to provide employees with liability coverage on their personal vehicles and to also offer UM coverage, that such a decision must come from the legislature and not from the court.

Less than a year later, this Court issued its decision in Diversified Services, Inc. v. Avila, 606 So.2d 364 (Fla. 1992). In Avila, the issues presented to the Court were whether Fla. Sta.t § 627.727(1) required a self-insured automobile leasing company that provided its lessee's compliance with the Financial Responsibility Law to offer UM coverage and whether the rental agreement drafted by the company for rental and insurance coverage was ambiguous on the coverage issue, thereby precluding summary judgment. This Court concluded that Fla. Stat. § 627.727(1) did not require self-insured automobile leasing companies to offer UM coverage to its lessees for leases that were less than one year in duration.

In Diversified Services, Avila entered into a rental agreement with Diversified, d/b/a Budget Rent-A-Car of Miami, Inc., in May, 1984. He was killed when his rented vehicle collided with an uninsured vehicle. His widow and the personal representative of his estate brought an action against Budget alleging entitlement to UM benefits, or alternatively, that Budget had sold liability insurance to the decedent without offering UM coverage in violation of Fla. Stat. § 627.727(1). Budget denied all allegations regarding the injury and damages and further maintained that it had fulfilled its obligations by providing Avila with compliance under Fla. Stat. §§ 324.071 and 324.171. Budget maintained that it was the named insured in an excess comprehensive general liability insurance policy and it had rejected UM coverage because of its status as a self-insurer. As such, Budget concluded it owed Avila no duty to offer UM coverage.

The trial court granted summary judgment to Budget. The Third District Court of Appeal reversed the summary judgment finding that there was a material issue of fact whether the lessee had purchased or had reason to believe he had purchased a policy which would provide benefits in the event of a collision with an uninsured vehicle. The Third District also noted a second issue not specifically addressed by the trial court which was whether the lessor, as a self-insurer up to the first $100,000.00, was insulated from a duty to provide UM coverage to its lessee by virtue of a rejection of such coverage with its excess carrier.

This Court stated that the first issue for resolution was whether Fla. Stat. § 627.727(1) required a self-insured automobile leasing company that provided its lessee's compliance with Fla. Stat. § 324.031 to offer UM coverage. Citing to its

decision in Lipof, this Court explained that the legislature had defined the term "motor vehicle liability policy" as "issued by any insurance company authorized to do business in the state." Because the employer in Lipof was not an insurance company, this Court concluded that the employment agreement did not fit within the definition of a motor vehicle liability policy, and as such, Fla. Stat. § 627.727 did not impose a duty on the employer to offer UM coverage. This Court noted that while the manner of compliance in Lipof was distinguishable from that in Avila, the reasoning in Lipof was instructive. The Court explained that Budget had provided Avila's compliance with Fla. Stat. § 324.031 through its status as a self-insurer. As in Lipof, merely providing compliance through self-insurance was not the same as issuing a "motor vehicle liability policy," and as such, Fla. Stat. § 627.727 was not applicable. Moreover, Budget's status as a self-insurer did not make it an "insurer" under the Florida Insurance Code. As such, this Court concluded that Fla. Stat. § 627.727 did not impose a duty upon self-insured automobile leasing companies to offer UM coverage on leases that lasted less than a year. See also, Budget Rent-A-Car Systems, Inc. v. Taylor, 626 So.2d 976 (Fla. 4th DCA 1993) (as a self-insurer, Budget's liability to its renter under a contract is not that of an insurance company under the Florida Insurance Code, nor is the contract an insurance policy under the code).

In the present case, the Hillsborough County Sheriff's Office is a qualified self-insurer pursuant to Fla. Stat. § 768.28(15)(a) and Fla. Stat. § 324.171. As a self-insurer, it is, by definition, not an "insurer" within the context of the Florida Insurance Code, and in particular, Fla. Stat. § 624.03. Moreover, under the principles

recognized by this Court in Lipof and Diversified Services, Inc., the fact that the Sheriff's Office has documents which demonstrate it is a self-insurer does not render those documents an insurance policy for purposes of Fla. Stat. § 324.021(8) because the Sheriff's Office is not "an insurance company" authorized to do business in this state. Since the Sheriff's Office, as a qualified self-insurer, is not, by definition, a liability insurer, Fla. Stat. § 627.727(3)(b) is simply inapplicable to this case. As such, the Youngs have not and cannot demonstrate that they are statutorily entitled to UM benefits under the circumstances presented in this case.

The legislature used a specifically-defined term in the insurance code, "insurer," in describing those situations which, under the statute, would create a right to underinsured motorist coverage. As noted by this Court in Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984), when a court construes a statutory scheme, it may not question the substantial legislative policy reasons underlying the statute, nor exercise any prerogative to modify or shade the clearly-expressed legislative intent of the statutory enactment in order to uphold the policy that may be favored by the court. Instead, courts were without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications. To do so would be abrogation of legislative power. Id. at 219 (quoting American Bankers Life Assurance Co. of Fla. v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968)). See also, McDonald v. Roland, 65 So.2d 12, 14 (Fla. 1953) (where legislature's intent is clearly discernible, court's duty is declared as it finds it, a court may not modify or shade it out of considerations of policy).

Given the clear language of the statute, the criticism of the Fourth District's decision in Amica Mut. Ins. Co. v. Amato, 667 So.2d 802 (Fla. 4th DCA 1995), rev. den., 676 So.2d 1368 (Fla. 1996) by the Youngs and the Academy are inappropriate and without legal foundation. In Amato, Amica provided $500,000.00 in UM coverage to Edward Amato who was involved in an automobile accident with a truck owned by the City of Ft. Lauderdale. With Amica's consent, Amato entered into a settlement agreement with the City for an amount less than the statutory cap. He then asserted a UM claim against Amica. Amica denied the claim on the ground that the City's vehicle was not an "uninsured motor vehicle" and sought a declaratory judgment to that effect in the lower court. Amica asserted that the City of Ft. Lauderdale was a self-insurer pursuant to Fla. Stat. § 768.28(15)(a), and as such, any vehicle owned or operated by the City was not an uninsured motor vehicle under the policy. Its policy, similar to Progressive's here, provided that an uninsured motor vehicle did not include any vehicle or equipment owned or operated by a self-insurer.

The trial court rendered judgment in favor of Amato ruling that he was entitled to UM benefits. The Fourth District reversed that judgment. As the Youngs argue here, Amato maintained that the language in the policy was impermissible and void under Florida law because it reduced the statutorily-prescribed UM coverage and violated the principles espoused in Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971). Although the Fourth District agreed that Mullis stood for the principles for which it was cited, it disagreed that the policy provision did anything more than correctly state the law and inform the insured of its limitations. The Fourth

District correctly stated that the City was entitled to be self-insured and that "self-insured" was something that was different than "uninsured." The Fourth District correctly explained that "uninsured" was when the tort-feasor's liability insurer had provided limits of bodily injury liability coverage for its insured which were less than the total damages sustained. What the Amato court omitted was an explanation of the next step in the analysis. Since the City of Ft. Lauderdale was a "self-insurer," it was not a liability insurer, and as such, Fla. Stat. § 627.727(3)(b) was simply inapplicable to Amato's claim. The court did, however, correctly state that a self-insured entity was statutorily permitted to retain the risk of liability, a risk which was theoretically infinite. Citing to the Third District's decision in Gabriel v. Travelers Indemnity Co., 515 So.2d 1322 (Fla. 3d DCA 1987), rev. den., 525 So.2d 878 (Fla. 1988), the court correctly concluded that self-insured vehicles are not "uninsured." Id. at 803. The court also rejected the argument that the sovereign immunity of the tort-feasor created an "uninsured status." As such, the court concluded that since Ft. Lauderdale was not uninsured, the judgment rendered in favor of Amato was reversed with directions to enter judgment in favor of Amica. See also, Comesanas v. Auto-Owners Ins. Co., 700 So.2d 118 (Fla. 2d DCA 1997) (adopting rationale of Amato and finding similar policy provision to be valid under Florida law.

The decision of the Fourth District in Amato can equally be understood if viewed from a historical perspective from which it was derived. In Johns v. Liberty Mut. Fire Ins. Co., 337 So.2d 830 (Fla. 2d DCA 1976), the plaintiff was injured in a collision with a vehicle owned by the City of St. Petersburg and operated by an uninsured City employee. At the time of the accident, the plaintiff had a policy with

Liberty which provided UM coverage which included a provision stating that an uninsured highway vehicle shall not include a highway vehicle owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or similar law. Likewise, the policy did not include within the definition of uninsured highway vehicle a vehicle that was owned by the government, a political subdivision or a department or agency. The trial court entered a final judgment in favor of Liberty finding that the City of St. Petersburg was not an uninsured motorist.

The Second District stated that the first issue for its determination was whether the government-owned, highway vehicle exclusion was valid. It held that it was invalid. The court next addressed the issue of whether the City of St. Petersburg was a self-insurer up to $25,000.00 so as to bring into application the definition which excluded the self-insurer from the meaning of uninsured motor vehicle. The Second District stated that the exemption from the Financial Responsibility Law did not make a municipality a self-insurer. The court further held that the City of St. Petersburg did not hold a certificate of self-insurance in accordance with the Financial Responsibility Statute, and as such, was not a self-insurer within the meaning of the act. Id. at 832. The court then stated that it was unnecessary to determine the validity of the provision in the policy given its determination that the City was not a self-insurer.

Subsequent to Johns, the Florida legislature amended Fla. Stat. § 768.28 to specifically authorize municipalities to become self-insured. Thereafter, in Gabriel v. Travelers Indemnity Co., 515 So.2d 1322 (Fla. 3d DCA 1987), rev. den., 525 So.2d

878 (Fla. 1988), the Third District was faced with the question of whether a vehicle owned by the City of Miami, which was not protected by a liability insurance policy, was "uninsured" so as to entitle Gabriel to receive UM benefits. The trial court concluded that since the City of Miami had maintained a self-insurance program, the vehicle was not uninsured, and Gabriel was not entitled to receive benefits.

The Third District affirmed that judgment. The court distinguished the Second District's decision in Johns on the basis that the legislature had specifically authorized municipalities to become self-insured. Gabriel had maintained that the City's failure to obtain a certificate described in the Financial Responsibility Statute left it at uninsured and entitled him to recover UM benefits. The Third District rejected that argument stating that the primary reason for recognizing the City's status as self-insured is the public purpose behind the UM statute. The court stated that the test for determining an injured party's entitlement to UM benefits was whether the offending motorist had insurance available for the protection of the injured party. The court concluded that the City of Miami had such insurance through its trust fund. Moreover, the court found that the City's failure to obtain a certificate of insurance was relevant only to a matter of proof of financial responsibility. The certificate was not the sole means of demonstrating self-insurance.

It is from that historical perspective that the Amato court analyzed the provision in the Amica policy and concluded that the insurer was authorized to rely upon the language because "self-insured" is not "uninsured." That conclusion is consistent with both the analysis and ultimate determinations reached by this Court in Lipof and Diversified Services, Inc.

The Youngs and the Academy both assert that Amato and the Second District's decision here conflicts with this Court's decision in Michigan Millers Mut. Ins. Co. v. Bourke, 607 So.2d 418 (Fla. 1992). Those assertions are simply wrong. In Bourke, there was no issue presented to this Court regarding the school board's status as a self-insurer. In fact, quite the opposite was true. There, the school board had in effect a liability insurance policy, and its policy limits of $325,000.00 were exhausted. Indeed, it was the availability of such coverage that was critical to this Court's conclusion to allow recovery beyond the sovereign immunity limits when the insurance coverage was available. More importantly, the availability of that liability insurance triggered the UM carrier's obligations under Fla. Stat. § 627.727(3)(b). That situation is wholly different than the present one where no liability insurer and no liability policies are present.

Likewise, this Court should reject the assertion by the Youngs that the Amato decision is repugnant to this Court's holding in Allstate Ins. Co. v. Boynton, 486 So.2d 552 (Fla. 1986). First, the Boynton court never addressed sovereign immunity nor the concept of self-insurance. Neither concept was an issue in the case. The issue was whether the UM carrier was entitled to the absolute defense of worker's compensation immunity. The only thing that Boynton and Bourke have in common is that they address the language contained in Fla. Stat. § 627.727(1) regarding an insured who is legally entitled to recover damages from owners or operators of uninsured motor vehicles. That issue is simply not present in this case, nor has it ever been.

Even if the Youngs had demonstrated that the UM statute had been triggered, the decision of the Second District should nevertheless be approved because the Youngs waived any right to challenge the legality of the provision at issue. As noted in the Statement of the Case and Facts, Progressive raised the policy provision concerning self-insurers in its answers and defenses. The Youngs filed no reply to the affirmative defenses. Florida Rules of Civil Procedure 1.100(a) provides in pertinent part:

> If an answer or third party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance.

Where a plaintiff does not seek to avoid the substantive allegation of an affirmative defense, a reply need not be filed. Kitchen v. Kitchen, 404 So.2d 203 (Fla. 2d DCA 1981). An avoidance is an allegation of additional facts intended to overcome the affirmative defense. Buss Aluminum Products, Inc. v. Crown Window Co., 651 So.2d 694 (Fla. 2d DCA 1995). If an answer includes an affirmative defense and the opposing party seeks to avoid it, he is required under the rules to file a reply containing the avoidance. North American Phillips Corp., Inc. v. Boles, 405 So.2d 202, 203 (Fla. 3d DCA 1981). See also, City of Brooksville v. Hernando County, 424 So.2d 846, 848 (Fla. 5th DCA 1982). When one seeks to avoid a contract, the avoidance must be specifically pled. See, Centrust Savings Bank v. Barnett Banks Trust Co., N.A., 483 So.2d 867 (Fla. 5th DCA 1986) (one who attempts to avoid contract must plead avoidance as an affirmative defense). Moreover, if one attempts to avoid a contract on the basis that the provision is illegal, the illegality must

likewise be specifically pled or it is waived. See, Miami Electronics Center, Inc. v. Saporta, 597 So.2d 903 (Fla. 3d DCA 1992), rev. den., 613 So.2d 8 (Fla. 1993); Jorge v. Rosen, 208 So.2d 644 (Fla. 3d DCA 1968). Since the Youngs never filed any reply containing any avoidances to the contract, even if the provision was impermissible under Florida law, that position has been waived by their failure to plead the avoidance.

This Court should answer the certified question in the affirmative and approve the decision below.

II.

THE EXCLUSION IN THE POLICY PRECLUDES COVERAGE FOR THE YOUNGS' CLAIM.

This Court can easily dispose of the second argument raised by the Plaintiffs in this appeal simply by resorting to well-established principles of contract interpretation. The Progressive policy provides in pertintent part:

> We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle up to the limit of liability as defined in this part. The bodily injury must be caused by accident arising out of the ownership, maintenance or operation of the uninsured motor vehicle.

(R. 15)

The policy then states that the term "uninsured motor vehicle" does not include any vehicle "owned by or operated by a self-insurer as contemplated by any financial responsibility law, motor carrier law or similar law. (R. 16)

The crux of the Plaintiffs' argument is that the Hillsborough County Sheriff's Office was not a self-insurer as contemplated by the Florida Financial Responsibility Law because it did not obtain a self-insurance certificate from the Department of Insurance. The Plaintiffs omit, however, that this precise argument was rejected by the Gabriel court. Second, the Youngs' attorney conceded that the Sheriff's Office was self-insured at the hearing on the motion for summary judgment. (T. 8) Indeed, rather than at least acknowledge the facts of record or the fact that the argument they are making was specifically rejected by the Third District in Gabriel, the Youngs instead create an analytical strawman and then proceed to knock it down, while at the same time, announcing their inevitable conclusion that the policy is ambiguous. There is nothing at all ambiguous about the policy when interpreted by utilizing the well-established principles of contract interpretation.

Generally, insurance contracts are to receive a receive a reasonable, practical and sensible interpretation which is consistent with the intent of the parties and not a strained, forced or unrealistic interpretation. See, Weldon v. All American Life Ins. Co., 605 So.2d 911, 915 (Fla. 2d DCA 1992); American Manufacturers Mut. Ins. Co. v. Horn, 353 So.2d 565, 568 (Fla. 3d DCA 1977), cert. den., 366 So.2d 885 (Fla. 1978). Generally, where the terms of a policy are irreconcilable or ambiguous, the courts have adopted a construction which provides the most coverage. See, e.g., Coleman v. Valley Forge Ins. Co., 432 So.2d 1368, 1370 (Fla. 2d DCA 1983). However, when exclusions are clearly stated in an insurance policy, they are to be upheld. Id. at 1370-1371. The rule that ambiguities must be construed against an insurer so as to define coverage applies only when there exists genuine

inconsistencies, uncertainty or ambiguity in the meaning after the court resorts to the ordinary rules of construction. See, St. Paul Guardian Ins. Co. v. Canterbury School of Fla., Inc., 548 So.2d 1159 (Fla. 2d DCA 1989). That rule of construction does not authorize courts to place strained or unnatural constructions on terms of a policy in order to create uncertainty or ambiguity. See, Jefferson Ins. Co. of New York v. Sea World of Florida, Inc., 586 So.2d 95, 97 (Fla. 5th DCA 1991). Resort to those principles in this case leads to but one conclusion which is that the vehicle which struck Mr. Young was not an uninsured motor vehicle under the policy issued by Progressive.

Here, Fla. Stat. § 324.171 identifies who may qualify as a self-insurer. Florida Statutes § 768.28(15)(a) authorizes the state or its sub-divisions or municipalities to be self-insured pertaining to any liability that may arise as a result of tort claims. The record as provided by the Sheriff's Office demonstrates that the Hillsborough County Sheriff's Office elected to exercise the option provided to it by the legislature and self-insured its motor vehicle liability as authorized by Fla. Stat. § 324.171. The limits provided exceed the minimum requirements of that statute.

Even if this policy was not clear and unambiguous, like their argument addressed to the legality of the provision, the Youngs have likewise waived this issue as well. Nowhere at the trial court level did the Youngs ever argue that the policy exclusion was ambiguous, or if enforced, would not deprive the Youngs of UM coverage that they sought. Since an issue may not be raised for the first time on appeal, this Court should not even consider the argument. See, e.g., McGurn v. Scott, 596 So.2d 1042 (Fla. 1992).

CONCLUSION

This Court should answer the certified question received from the Second District in the affirmative and approve the decision of the Second District. The Hillsborough County Sheriff's Office, as a self-insurer, is not an insurance company, and its self-insurance documents do not qualify as a liability insurance policy. Florida Statutes § 627.727(3)(b) creates a statutory underinsured motorist claim only when a liability insurer has issued a policy whose limits are less than the damages of the claimant. Here, since there is no liability insurer, and no liability insurance policy, Fla. Stat. § 627.727(3)(b) simply has no application to this case. Simply stated, there is no underinsured motorist claim which may be raised by the Youngs pursuant to the statute.

Likewise, the policy is clear and unambiguous as the Hillsborough County Sheriff's Office is a self-insurer as contemplated by Fla. Stat. § 324.171. This Court should approve the decision entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. MAIL to **Anthony T. Martino, Esquire,** Post Office Box 24268, Tampa, Florida 33623; **Charles P. Schropp, Esquire,** SunTrust Financial Centre, Suite 2600, 401 E. Jackson Street, Tampa, Florida 33602-5226; and **Louis K. Rosenbloum, Esquire,** Post Office Box 12443, Pensacola, Florida 32582-2443, on February 11, 2000.

_____
George A. Vaka, Esquire

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