IN THE SUPREME COURT OF FLORIDA

JUAN YOUNG and ALINA YOUNG, his wife, Petitioners, v. PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY, Respondent.	:	CASE NUMBER: 93,544

ON CERTIFIED QUESTION
FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONERS' REPLY BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 12-point Courier non-proportionally spaced type font which does not exceed ten characters per inch.

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SUMMARY OF ARGUMENT

Progressive[1] argues for the first time in this Court that its self-insurer exclusion is valid because of what amounts to a "glitch" in the Florida underinsured motorist coverage statute. According to Progressive, this statute limits underinsured motorist coverage to vehicles insured by a policy issued by an insurance company. Progressive is wrong. The cases on which Progressive purports to rely did not interpret the term "insurer," which is broadly defined in the Florida insurance code and easily encompasses the self-insurance activities of the Hillsborough County Sheriffs Office ("HCSO").

Moreover, even if Progressive were correct, its self-insurer exclusion would still be invalid. If a self-insurer is not a "insurer" for uninsured motorist ("UM") purposes, and the protection provided is not "insurance" as defined in the Florida insurance code, a vehicle covered only by self-insurance is necessarily "uninsured" for UM purposes and the underinsured motorist provisions of the UM statute are irrelevant.

Progressive also argues for the first time in this Court that the Youngs waived their right to contest the self-insurer exclusion by failing to file a reply to Progressive's affirmative defenses.

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[1] **The Youngs use the same designations of the parties and the record as in their initial brief. References to Progressive's answer brief are designated by the prefix "AB."**

However, it is Progressive which has waived the point because it failed to raise this argument in its motion for summary judgment or at the summary judgment hearing before the trial court. Florida law and procedure do not countenance such attempts to "sandbag" one's opponent on summary judgment.

Alternatively, even if self-insurer exclusions were to be found generally valid, the Progressive exclusion does not apply to the Youngs' claim. Progressive erroneously contends that this argument was rejected by a case which actually directly supports the Youngs' position. Similarly, Progressive's attempt to claim that the Youngs have waived this contention is factually inaccurate and also refuted by pertinent case law.

ARGUMENT

I. THE PROGRESSIVE POLICY PROVISION WHICH EXCLUDES A VEHICLE OWNED OR OPERATED BY A SELF-INSURER FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" IS INVALID AND UNENFORCEABLE AS CONTRARY TO FLORIDA LAW AND PUBLIC POLICY.

In their initial brief, the Youngs demonstrated that *Amica Mutual Insurance Company v. Amato*, 667 So. 2d 802 (Fla. 4th DCA 1995), *rev. denied*, 676 So. 2d 1368 (1996) ("*Amato*"), which approved a "self-insurer exclusion" as a permissible exception to UM coverage, was incorrectly decided. Specifically, the Youngs showed that the *Amato* decision was based on the incorrect premise that only self-insurers assumed a "theoretically infinite" risk of liability; overlooked decisions either from or expressly approved by this Court which dictated a different result; and created incongruous and legally inappropriate results, including preventing Florida motorists from protecting themselves through the purchase of UM insurance from damages caused by "self-insured" drivers with limited assets.

In its answer brief, Progressive essentially abandons its prior arguments in favor of a position asserted for the first time in this Court. Progressive's newly-advanced position is that "self-insurer exclusions" are permissible under Florida law because of what would amount to a "glitch" in §627.727(3)(b), Fla. Stat., the underinsured motorist provision of the UM statute. According

to Progressive, the wording used in this subsection of the statute limits underinsured motorist coverage to cases in which the tortfeasor is insured by a policy issued by an insurance company. Based on its contention there is no legal requirement to provide underinsured motorist coverage when a self-insurer is involved, Progressive argues that "self-insurer exclusions" from UM coverage, such as Progressive's, are therefore permissible.

Progressive purports to rely on the language of §627.727(3)(b), Fla. Stat., which provides in pertinent part that an "uninsured motor vehicle" is also deemed to include:

> an insured motor vehicle when the liability insurer thereof. . . has provided limits of bodily injury liability which is less than the total damages sustained by the person legally entitled to recover damages.

Focusing on the term "liability insurer," Progressive argues that the HCSO is not a "liability insurer" as that term is used in the statute. Progressive bases its claim that the HCSO is not a liability insurer on *Lipof v. Florida Power & Light Co.*, 596 So. 2d 1005 (Fla. 1992) ("*Lipof*"), and *Diversified Services, Inc. v. Avila*, 606 So. 2d 364 (Fla. 1992) ("*Avila*"), two decisions holding that companies which had satisfied their financial responsibility requirements under Florida law through bonding or self-insurance were not obligated also to offer UM coverage.

Significantly, Progressive offers no reason or rationale why the Legislature would have distinguished between tortfeasors covered by insurance policies and tortfeasors covered by surety

bonds or self-insurance for purposes of permitting underinsured motorist coverage. Under Progressive's interpretation of the statute, a motorist injured by a tortfeasor carrying minimum liability insurance could assure payment of his or her damages by purchasing UM insurance; however, an identically situated motorist who had the misfortune to be injured by a self-insured motorist would be powerless to protect himself from the tortfeasor's inability to pay the full amount of his or her damages. In lieu of a rationale for its position, Progressive cites *Heredia v. Allstate Ins. Co.*, 358 So. 2d 1353 (Fla. 1978) ("*Heredia*"), for the proposition that a court is not free to interpret a statute where the words used by the legislature are clear and unambiguous. In short, Progressive acknowledges its position does not make sense, but claims that the Youngs, and this Court, are stuck with it.

Fortunately, the Youngs' claim cannot be dismissed so arbitrarily. Initially, Progressive's argument is fallacious in that it is based on attempting to stretch the *Lipof* and *Avila* decisions far beyond their actual holdings. Progressive claims these decisions establish the general proposition that a person or organization which has satisfied its financial responsibility requirement by any means other than purchasing an insurance policy is not an "insurer" under Florida law. However, both *Lipof* and *Avila* actually construed the term "motor vehicle liability policy," language expressly defined and limited by statute to a policy

"issued by any insurance company authorized to do business in this state." *See* §324.021(8), Fla. Stat.[2] Indeed, the *Lipof* decision went on out of its way to point out that, unlike the language which it was construing, the term "insurer" was defined broadly by the Florida insurance code. *Lipof*, 596 So. 2d at 1007.

Lipof and *Avila* thus have no bearing on the construction of the term "liability insurer" in §627.727(3)(b), Fla. Stat. The relevant statutory definition is that of "insurer" which, as the *Lipof* court expressly observed, is defined comprehensively rather than restrictively in the Florida insurance code.

Specifically, §624.03, Fla. Stat., defines an "insurer" as follows:

> "Insurer" includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity.

Similarly, §624.02, Fla. Stat., defines "insurance" as follows:

> "Insurance" is a contract whereby one undertakes to indemnify another or to pay or allow a specified amount or a determinable benefit upon determinable contingencies.

These definitions easily encompass the self-insurance activities of the HCSO. As a self-insurer under §768.28(15), Fla.

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[2] **While** *Lipof* also stated that Florida Power was not its employee's "insurer," and not under a statutory obligation to offer him UM coverage, the decision carefully pointed out that this statement was based upon the fact that providing financial responsibility compliance through the purchasing of a surety bond was not the same as issuing an insurance policy under §324.021(8) since this statute expressly limited the term "motor vehicle liability policy" to policies issued by insurance companies.

Stat., the HCSO undertook the obligation to pay claimants up to $100,000.00 per person and $200,000.00 per accident upon the occurrence of the determinable contingency that it or its employees became liable for motor vehicle negligence. Under these circumstances, the HCSO plainly is an "insurer" as defined in §624.03, Fla. Stat., and as used in §627.727(3)(b), Fla. Stat.[3]

Equally significantly, Progressive's newly-discovered position does not carry the day even if Progressive were correct in its contention that a self-insurer is not a "liability insurer" under §627.727(3)(b), Fla. Stat. Progressive's entire argument is predicated on the assumption that the Youngs' sole access to UM coverage is through the underinsured motorist provisions of the UM statutes, §627.727(3), Fla. Stat. *See* AB, p. 19. However, this assumption necessarily depends on a second assumption, namely that the HCSO patrol car is an "insured motor vehicle" for UM purposes, since the underinsured motorist provisions of the UM statute by definition apply only to insured vehicles.

Progressive's assumption that the HCSO patrol car is an insured motor vehicle for the purposes of the UM statutes is a classic example of impermissibly attempting to have one's cake and

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[3] **At an absolute minimum, the term does not so unambiguously exclude self-insurers that this Court is bound under *Heredia*** to accept the conclusion that the legislature irrationally distinguished between citizens injured by vehicles insured by insurance companies and those injured by self-insured vehicles for no discernable reason.

eat it too. Progressive cannot have it both ways. If, as Progressive asserts, the HCSO is not an "insurer," then the liability protection provided by the HCSO to its employees under §768.28(15), Fla. Stat., cannot be "insurance." As previously noted, under the Florida insurance code, every person engaged as an indemnitor, surety or contractor in the business of entering into contracts for "insurance" is considered an "insurer." It therefore necessarily follows that a vehicle protected only by "non-insurance" provided by a "non-insurer" must be "uninsured."

Thus, if Progressive's narrow interpretation of the term "liability insurer" is correct, a self-insured vehicle is "uninsured" for purposes of the UM statutes. Accordingly, §627.727(3)(b), Fla. Stat., which applies solely to insured vehicles, has no application, and the Youngs would be entitled to claim UM coverage from Progressive under §627.727(1), Fla. Stat., because of the HCSO patrol car's "uninsured" status.

In sum, whether or not a self-insurer is considered a "liability insurer" under §627.727(3)(b), self-insurer exclusions such as Progressive's violate Florida law and public policy. If the term includes self-insurers, as contemplated by the broad definition of "insurer" under the Florida insurance code, then the Progressive exclusion impermissibly limits coverage specifically required under §627.727(3)(b), Fla. Stat. If the term does not include self-insurers, as argued by Progressive, then self-insured

vehicles are "uninsured" for UM purposes and the Progressive exclusion impermissibly eliminates coverage mandated by §627.727(1), Fla. Stat.

Perhaps in further recognition of the fact that it cannot prevail on the merits of its contention that "self-insurer exclusions" are valid, Progressive also raises for the first time in this Court the argument that the Youngs have waived their objection to Progressive's exclusion. According to Progressive, this waiver arises from the Youngs' having failed to file a reply asserting the invalidity of the self-insurer exclusion in response to Progressive's affirmative defenses.

Progressive's second new position is equally meritless. It is Progressive, not the Youngs, which has waived this argument. This appeal is from a summary judgment and, under Rule 1.510(c), Fla.R.Civ.P., a motion for summary judgment must state with particularity the grounds upon which it is based and the substantial matters of law to be argued in support of the motion. Progressive's motion for summary judgment nowhere stated that Progressive sought entitlement to summary judgment because the Youngs had failed to file a reply to its affirmative defenses, nor was any such argument made to the trial court during the summary judgment hearing.

Progressive's attempt to "sandbag" the Youngs on this issue is particularly unfair because the asserted pleading "defect" was

easily correctable. Had Progressive raised the lack of a reply in its motion for summary judgment, the Youngs would simply have obtained leave from the trial court to file a reply.

Instructive on this point is *Lee v. Treasure Island Marina, Inc.*, 620 So. 2d 1295 (Fla. 1st DCA 1993) ("*Lee*"). In *Lee*, after having obtained a summary judgment in a personal injury action on the ground that the plaintiff's negligence was the sole proximate cause of his injuries, the defendant sought to bolster the summary judgment on appeal by also arguing that the allegations of the plaintiff's complaint were not sufficient to support a cause of action for negligence. In reversing, the First District noted that, in light of this additional argument, the defendant's motion for summary judgment did not comply with Rule 1.510(c), Fla.R.Civ.P. It then observed that "the obvious purpose of this rule is to eliminate surprise and to provide the parties a full and fair opportunity to argue the issues." 620 So. 2d at 1297.

The First District concluded by stating that "had this issue been properly raised below, the matter could have been resolved by simple amendment of the complaint." *Id.* These observations apply with equal force to the present case. Other authorities to the same effect include *Finn v. Lee County*, 479 So. 2d 246 (Fla. 2d DCA 1985) (summary judgment reversed when theory on which movant proceeded not stated in summary judgment motion), and *City of Cooper City v. Sunshine Wireless Co. Inc.*, 654 So. 2d 283 (Fla. 4th

DCA 1995) (summary judgment reversed where appellant did not receive notice of certain issues addressed at the summary judgment hearing.) In short, Florida law and procedure do not tolerate Progressive's attempt to "sandbag" the Youngs on the waiver issue.

II. EVEN IF "SELF-INSURER EXCLUSIONS" ARE PERMISSIBLE, THE PROGRESSIVE POLICY PROVISION DOES NOT APPLY TO THE YOUNGS' CLAIM.

In its initial brief, the Youngs also demonstrated that, even if "self-insurer exclusions" were permissible restrictions on UM coverage under Florida law, the Progressive exclusion, which excludes only the limited class of motor vehicles "owned by or operated by a self-insurer **as contemplated by any financial responsibility law, motor carrier law, or similar law** (emphasis added)," did not apply to the Young's claim. Specifically, the Youngs demonstrated that the HCSO had not obtained the certificate of self-insurance required to qualify as a self-insurer under the financial responsibility law,[4] was not a motor carrier, and that the term "similar law" could not apply to the sovereign immunity waiver statute under which the HCSO was self-insured.

Progressive's first response is to erroneously assert that the Youngs' "precise argument" was rejected by the Third District in *Gabriel v. Travelers Indemnity Co.*, 515 So. 2d 1322 (Fla. 3d DCA

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[4] **Section 324.171(1), Fla. Stat., provides in pertinent part: "Any person may qualify as a self-insurer by obtaining a certificate of self-insurance from the department. . . ."**

1987), *rev. den.*, 525 So. 2d 878 (Fla. 1988) ("*Gabriel*"). *See* AB, p. 28. In *Gabriel*, an individual who had sustained injuries in an automobile accident with a City of Miami vehicle contended that the City was uninsured because it did not obtain a certificate of self-insurance from the Department of Insurance as required by the financial responsibility law. The Third District rejected that argument stating:

> The City chose to be self-insured and maintains coverage through its Risk Management Department. Thus, under section 768.28(13), [now §768.28(15)] the City qualifies as a self-insurer against tort liabilities.

515 So. 2d at 1323.

Contrary to Progressive's contention, *Gabriel* directly supports the Youngs' position. It establishes that §768.28, Fla.Stat., provides independent authority for a governmental entity to be self-insured, and also that a governmental entity does not have to comply with the requirements of the financial responsibility law in order to obtain that self-insured status.

Progressive next argues that its insurance contract must be given a reasonable, practical and sensible interpretation rather than a strained or unnatural construction. The Youngs agree but fail to see how these concepts aid Progressive. The strained and unnatural construction being advanced in this case is by Progressive, which argues that all self-insurer exclusions should be interpreted alike regardless of the language they use, and which ignores the language in the Progressive policy which expressly

limits this exclusion to particular classes of self-insured vehicles.

Progressive's final contention is that the Youngs' argument has been waived by the Youngs' failure to assert these differences in policy language in the trial court. This argument is also misplaced. First, it is factually incorrect. The record shows that the limitating language of the Progressive self-insurer exclusion was raised at the summary judgment hearing (T. 7-8). Second, even if Progressive's argument were correct, it fails to distinguish between "issues" and the "arguments" or "theories" which support an issue. While new issues generally may not be raised for the first time on appeal, new arguments or theories to support those issues may be advanced. This distinction was discussed in the context of *amicus curiae* briefing in *Keating v. State*, 157 So. 2d 567, 569 (Fla. 1st DCA 1963), as follows:

> A significant distinction is apparent as between "issues" and "theories" in support of a particular issue. We agree with relator's position that amicus is not at liberty to inject new issues in a proceeding; however, amicus is not confined solely to arguing the parties' theories in support of a particular issue.

Other cases recognizing that additional arguments in support of an issue may be advanced on appeal include this Court's decision *Marchesano v. Nationwide Property and Cas. Ins. Co.*, 506 So. 2d 410 (Fla. 1987), and *Eastern Cement v. Halliburton Co.*, 600 So. 2d 469 (Fla. 4th DCA 1992).

The "issue" of *Amato's* applicability to the facts of this case was squarely raised in the trial court by Progressive itself. For example, Progressive's motion for summary judgment stated: "[t]he 4th District Court of Appeal addressed this exact issue in Amica Mutual Insurance Company v. Amato, 667 So. 2d 802 (Fla. 4th DCA 1995)" (R. 93-94), and that: "[t]here is no distinction between the facts in Amica and those in the present case" (R. 94). By pointing out the significant differences in language between Progressive's policy and that in *Amato*, the Youngs are simply advancing an additional argument or theory demonstrating that Progressive's position on this issue was in error.

Finally, Progressive's waiver argument is misplaced because it fails to take into account that this appeal is from a summary judgment, a procedure under which the moving party has the burden of establishing the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. Since the burden is exclusively on the movant, a party against whom summary judgment has been entered may direct the appellate court's attention to matters of record which demonstrate that the moving party failed to meet its burden, even if that portion of the record was not argued to the trial court at the summary judgment hearing.

For example, in *Holland v. CSX Transp., Inc.*, 583 So. 2d 777 (Fla. 2d DCA 1991) ("*Holland*"), the trial court had entered summary judgment on a record containing a response to a request for

admissions which rendered the summary judgment inappropriate but had not been brought to the trial court's attention. In reversing, the court observed:

> Although we understand from counsel at oral argument that the trial judge was not reminded of the existence of the admission at the hearing on the appellees' motion for summary judgment, the omission remained a part of the record, and disregard of it was error.

583 So. 2d at 779.

Here, the substantial difference in the wording of the self-insurer exclusions in the Progressive policy and in the policy language construed by *Amato* appears on the face of the record. It was Progressive's burden to demonstrate that this difference in policy language had no significance. Progressive failed to meet its burden and, as in *Holland*, the Youngs are simply pointing out that Progressive should never have been awarded a summary judgment. For all of these reasons, the Youngs' arguments concerning the limiting language of the Progressive exclusion are not barred by waiver.

CONCLUSION

For the reasons stated, the Youngs respectfully request that the certified question be answered in the negative, and that self-insurer exclusions be held to violate Florida law and public policy. Alternatively, the Youngs request a ruling that the narrow version of this exclusion contained in the Progressive policy does not apply to the Youngs' claim.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 13th day of November, 1998, a true and correct copy of the foregoing PETITIONERS' REPLY BRIEF ON THE MERITS, was sent via U.S. Mail to:

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