S130717

IN THE SUPREME COURT OF CALIFORNIA

PHILADELPHIA INDEMNITY INSURANCE COMPANY, Appellee and Respondent,

v.

BLANCA MONTES-HARRIS, et al., Appellants and Petitioners; and Companion case.

On Request of the United States Court of Appeals
for the Ninth Circuit, Case Nos. 03-56651/03-56652
United States District Court, Central District Case No. 02-3616 RSWL (RCx)
The Honorable Judge Ronald W. Lew

ANSWER BRIEF OF RESPONDENT PHILADELPHIA INDEMNITY INSURANCE COMPANY

David M. Glasser, SB #82156
GREENSPAN, GLASSER & ROSSON
300 Corporate Pointe, Suite 375
Culver City, California 90230

James E. Green, Jr.
Julia Forrester-Sellers
CONNER & WINTERS, LLP
15 East Fifth Street, Suite 3700
Tulsa, Oklahoma 74103-4344

Attorneys for Respondent, PHILADELPHIA INDEMNITY INSURANCE COMPANY

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Julia Forrester-Sellers
CONNER & WINTERS, LLP
15 East Fifth Street, Suite 3700
Tulsa, Oklahoma 74103-4344

Attorneys for Respondent, PHILADELPHIA INDEMNITY INSURANCE COMPANY

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I. CERTIFIED QUESTION OF LAW

The Ninth Circuit Court of Appeals has requested this Court to answer the following question: "Does the duty of an insurer to investigate the insurability of an insured, as recognized by the California Supreme Court in *Barrera v. State Farm Mut. Auto Ins. Co.*, 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674 (1969) apply to an automobile liability insurer that issues an excess liability insurance policy in the context of a rental car transaction?"

II. ANSWER TO THE CERTIFIED QUESTION OF LAW

The answer to the certified question is no. In the thirty-six years since the Supreme Court of California published the *Barrera* opinion, no California court has ever applied its public policy principles to an *excess* insurer. As a matter of principle, *Barrera's* heightened duty to investigate the insurability of an insured should not be extended to this dissimilar context. *Barrera* involved statutorily mandated, minimum Financial Responsibility insurance and the unique public policies which underlie Financial Responsibility insurance, while this case involves optional excess insurance over and above Financial Responsibility limits. *Barrera* involved a consumer purchase of primary, long-term insurance for an owned automobile,

while this case involves supplemental insurance purchased during a brief, commercial car rental transaction. *Barrera* involved a written insurance application, while this case involves none. *Barrera* involved an insurer seeking to ***rescind*** an owner policy, while this case involves an insurer seeking to ***enforce*** the exclusionary terms of the written Rental Agreement and Policy. *Barrera* involved an accident that occurred some twenty months after the application was accepted and after a prior claim was paid, while this case involves an accident occurring only four days after the rental. Finally, *Barrera* involved an insurer failing to even visually inspect a driver's license that had "PROBATION" stamped across its face, while this case involves the affirmative, statutorily compliant, visual verification of an Arizona driver's license that plainly appeared valid on its face. The facts and rationale of *Barrera*, as well as statutes applicable to rental car transactions, demonstrate that the *Barrera* holding should *not* be expanded to cover this incongruent circumstance.

This is not a case where a driver was left without automobile insurance coverage required by law. The Financial Responsibility limits of $15,000 per person and $30,000 per accident required by § 16056 of the California Vehicle Code *were provided* by Budget

Rent-A-Car. Rather, this is a case where Alric Burke, who rented a vehicle from Budget and purchased *excess* liability insurance, presented his Arizona driver's license to the Budget rental counter clerk as his qualification to rent the vehicle, and, although his license appeared valid on its face, he knew or should have known that it had actually been suspended. This is a case of misrepresentation.

Petitioners misstate no less than **17 times** in their Opening Brief that Respondent, Philadelphia, sought rescission of the subject Supplemental Liability Insurance ("SLI") Excess Policy. In fact, Philadelphia never sought rescission of its coverage, nor did it receive that remedy at the trial court. To the contrary, Philadelphia filed a declaratory judgment action to *enforce* the Policy and the clearly stated exclusions of the Rental Agreement and Policy. Philadelphia showed that the terms and conditions of its SLI Excess Policy were violated and express exclusions applied to the accident. Therefore, rescission is not an issue. Coverage under the SLI Excess Policy is precluded by the terms of the Policy.

Petitioners have vainly attempted to contort the facts of this case to fit the *Barrera* decision. There is no correlation. The *Barrera* decision is limited to automobile insurance policies issued to meet

California's minimum Financial Responsibility limits (set forth in § 16056 of the California Vehicle Code). The remedy in *Barrera* was that the insurer was estopped to rescind coverage up to *Financial Responsibility limits* only. California's public policies underlying its Financial Responsibility requirements are not applicable to excess insurance. This is evident through the language of Cal. Ins. Code § 11580.1(a), which allows insurance policies that *exceed* the minimum financial requirements to contain additional exclusions not allowed in primary, mandatory limits policies. Under California law, excess policies may properly contain exclusions which, if contained in underlying financial responsibility policies, would be void as against public policy. This shows the legislature's considered intent to distinguish between primary Financial Responsibility insurance and excess insurance as to issues of public policy. *Barrera* applies only to the former.

III. STATEMENT OF THE CASE

A. Background Facts

At the time of the subject car rental, Burke, the renter, presented to the Budget rental clerk what appeared to be a valid Arizona driver's license. The clerk visually inspected the license and compared the

signature on the license to the signature on the Rental Agreement. In fact, however, Burke's license had been suspended by the State of Arizona. This suspension was only the latest in a number of prior suspensions. Desirie Brewer was a co-renter and authorized driver of the vehicle along with Burke.

Concurrently with the misrepresentation in renting the vehicle, Burke and Brewer purchased optional coverage under a Rental SLI Excess Policy. The SLI Excess Policy, underwritten by Philadelphia, provides for *excess* liability coverage for the difference between the primary Financial Responsibility liability limits provided to the renter by Budget under the Rental Agreement, and a $1,000,000 combined single limit, all subject to the terms, conditions, and exclusions of the SLI Excess Policy. In this unique relationship, Budget, as the named policyholder, enrolls a rental customer who purchases the optional SLI excess coverage at the time of the rental as an additional insured under the existing master policy of excess insurance.

Four days after the rental, Petitioners Blanca Montes-Harris and her minor children, Monica Arredondo and Camilla Toni Harris ("Montes-Harris"), were allegedly injured while Burke was driving

the rental vehicle. Petitioner Javier Cortez was also allegedly injured in the accident.[1]

B. Procedural History

On May 3, 2002, Philadelphia filed a Complaint for Declaratory Relief against Burke, Petitioners, and other parties. The relevant allegations of the Complaint are that Brewer and her children were excluded from coverage for their alleged injuries because the SLI Excess Policy provided no coverage for injuries to any renter, authorized driver, or resident blood relatives of the renter or authorized driver, and that Burke was not entitled to coverage because Burke rented the vehicle and purchased SLI coverage by presenting what purported to be a valid Arizona driver's license, but failed to disclose that his license had been suspended by the State of Arizona.

The trial court granted a portion of Philadelphia's summary judgment motion, ruling that Brewer and her children were excluded from coverage under the named insured and family member exclusion. Brewer did not appeal this decision. Subsequently, Judge

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[1] In addressing the certified question to this Court, Petitioner Cortez has filed the identical brief that he filed in the Ninth Circuit Court of Appeals. That brief and Philadelphia's response are already of record in this matter. Therefore, this Answering Brief is primarily focused upon responding to Petitioner Montes-Harris's Opening Brief.

Lew, as the trier of fact following a bench trial, found that Burke knew his driver's license was suspended or that he had no reasonable basis to believe it was valid when he presented it to Budget; that he therefore misrepresented his driver's license status to Budget; and that coverage under the Philadelphia SLI Excess Policy was thus precluded by the express terms of the Rental Agreement and SLI Excess Policy.

Petitioners Montes-Harris and Cortez have both admitted that Burke misrepresented his driver's license status at the Budget rental counter, thereby violating the terms and conditions of the rental agreement and the terms and conditions of the SLI Excess Policy. *See* Principal Brief of Petitioner Montes-Harris filed in the Ninth Circuit, pages 19 and 20; *see also* Principal Brief of Petitioner Cortez filed in the Ninth Circuit, page 18.

C. Appeal and Certification of Question of Law by the Ninth Circuit

After hearing oral argument from the Petitioners and Respondent on December 10, 2004, the Ninth Circuit panel certified a question to this Court. In so doing, the Ninth Circuit observed that there is no California case law to support the extension of *Barrera* to excess insurers in the rental context. To be sure, Petitioners seek an

extension, not an *interpretation*, of *Barrera*. Petitioners admit that, under existing law, *Barrera* does not apply to this case. Petitioner Montes-Harris admits in her Opening Brief that the *Barrera* decision does not address excess liability insurers. She also concedes that the Ninth Circuit did not find a single case applying the *Barrera* decision to excess insurers. In fact, in numerous subsequent decisions since its publication in 1969, the *Barrera* decision has consistently been limited to automobile liability policies issued to meet California's Financial Responsibility limits.

IV. LEGAL ISSUES PRESENTED BY THE NINTH CIRCUIT'S CERTIFIED QUESTION

The Ninth Circuit's certified question contains at least two distinct implied questions. First, should the *Barrera* decision be extended to apply to optional, excess insurance coverage? The answer is no. Second, is there a material difference between the sale of private, primary automobile insurance coverage in the ordinary consumer setting and the sale of optional, excess coverage under an existing policy of insurance as part of a commercial, automobile rental transaction? The answer is yes.

A. The *Barrera* Decision Should not be Expanded to Include Excess Insurers.

The facts and the public policy driving the *Barrera* decision are entirely distinguishable and inapplicable to the instant situation, and therefore the principles espoused in the *Barrera* decision should not be applied in this case.

1. The Facts of *Barrera* and this Case are Distinguishable.

In *Barrera v. State Farm Mut. Ins. Co.*, 456 P.2d 674, 71 Cal. 2d 659, 79 Cal. Rptr. 106 (1969), the Supreme Court of California evaluated whether a primary insurer could **rescind** a private party, compulsory, liability policy after it discovered -- almost two years after the policy was issued and twenty months after paying one claim on the policy -- that an applicant made material misrepresentations during the application process. The *Barrera* decision is completely distinguishable on at least six material grounds. First, *Barrera* involves mandatory Financial Responsibility insurance, while this case involves only optional excess insurance. Additionally, *Barrera* addressed a consumer purchase of an owner's policy, while the base transaction here is a commercial car rental. *Barrera* involved a

written application and formal underwriting process, while the present case involves enrolling additional insureds as a part of the rental transaction. Further, the insurer in *Barrera* sought rescission; Philadelphia seeks to enforce the terms of the policy. *Barrera* involved a lengthy time period, two years after the policy was issued, as opposed to four days in this case. Finally, the uninspected driver's license in *Barrera* was invalid on its face, while the ostensibly valid Arizona license here was admittedly visually inspected.

2. *Barrera* is Grounded in and Limited to the Financial Responsibility Laws.

Probably the most important distinction between this case and *Barrera* is that *Barrera* is limited to insurance mandated under the California Financial Responsibility statutes. Petitioners' attempt to impose a duty on Budget to obtain a Department of Motor Vehicle report or to perform some other unspecified "investigation" based on the language of the *Barrera* decision is misguided. First, even the *Barrera* Court did not impose a Department of Motor Vehicles' request as a matter of law. Second, and more importantly, the *Barrera* reasoning is firmly founded solely on the public policy underlying the Financial Responsibility Laws. The *Barrera* decision is replete with references to the Financial Responsibility Law:

> After the injured person has obtained a judgment against the insured, therefore, he may compel the insurer to pay the judgment *to the extent of the monetary limits set forth in the Financial Responsibility law* . . . . 456 P.2d at 689, 71 Cal. 2d at 681, 79 Cal. Rptr. at 121. (Emphasis added).

See also, inter alia, 456 P.2d at 677, 71 Cal. 2d at 662, 79 Cal. Rptr. at 109 ("Plaintiff moved for a new trial, urging that the public policy expressed in *California's Financial Responsibility Law* impelled a finding of laches by State Farm. . . ."); 456 P.2d at 680, 71 Cal. 2d at 667, 79 Cal. Rptr. at 112 ("State Farm's investigative practices . . . may violate the public policy underlying *California's Financial Responsibility Law.*"); 456 P.2d at 682, 71 Cal. 2d at 670, 79 Cal. Rptr. at 114 (such a rule would defeat "the basic policy of the *Financial Responsibility Law*"); 456 P.2d at 683, 71 Cal. 2d at 672, 79 Cal. Rptr. at 115 ("The public policy expressed in the *Financial Responsibility* and related laws requires that we construe statutes" in light of its purpose.) (Emphasis added.) California cases citing *Barrera* have repeatedly recognized that the *Barrera* decision is based upon the public policy expressed in the Financial Responsibility law. *See, e.g., United Servs. Auto. Ass'n v. Pegos*, 107 Cal. App. 4th 392, 397, 131 Cal. Rptr. 868 (2003) ("The *Barrera* court concluded this obligation . . . [was] derived from the public policy underlying

California's Financial Responsibility law and the quasi-public nature of the insurance business"); *American Cont'l Ins. Co. v. C & Z Timber Co.*, 195 Cal. App. 3d 1271, 1278, 241 Cal. Rptr. 466 (1987) ("The duty imposed on the automobile insurer in *Barrera* was compelled by statutory public policy considerations emanating from the automobile Financial Responsibility law"); *Fireman's Fund Ins. Co. v. Superior Ct.*, 75 Cal. App. 3d 627, 632, 142 Cal. Rptr. 249 (1977) (the court noted the "lengthy discussion . . . [in which] the [*Barrera*] court concerns itself with the public policy expressed in the Financial Responsibility law"); *Fireman's Fund Am. Ins. Co. v. Escobedo*, 80 Cal. App. 3d 610, 620, 145 Cal. Rptr. 785 (1978) (the court observed that the Barrera ruling was based on the public policy of the Financial Responsibility law). No California case has ever applied the public policy principles in *Barrera* to an excess insurer.

Further, Petitioner Cortez mistakenly cites the *United Servs. Auto. Ass'n v. Pegos*, 107 Cal. App. 4th 392, 131 Cal. Rptr. 2d 866 (2003) decision as a basis for applying the public policy arguments espoused in *Barrera* to this action. The *Pegos* decision, as recognized by the Ninth Circuit in its certified question, simply held that the California Court of Appeal recognized that *Barrera* applies when an

insured adds a new car to an existing policy of insurance. Still, the *Pegos* decision is completely distinguishable from this instant situation because (1) it is a rescission case and (2) it interprets the public policy requirements placed on coverage issued to meet the minimum Financial Responsibility Laws of California.

The Financial Responsibility Laws are supported by the public policy of seeking to make owners of motor vehicles financially responsible to those they injure in the operation of such vehicles. However, the Legislature has determined that such public policy is *fully served* by requiring insurance coverage of $15,000 per person and $30,000 per accident, the mandatory automobile liability limits. Any insurance over those minimum limits is not subject to the same policy arguments, but is instead governed by the policy of endorsing freedom of contract. This is evident through the language of Cal. Ins. Code § 11580.1(a) that provides in part:

> However, none of the requirements of subdivision (b) shall apply to the insurance afforded under any such policy (1) to the extent that the insurance *exceeds* the limits specified in subdivision (a) of Section 16056 of the Vehicle Code, or (2) if the policy contains an underlying insurance requirement, or provides for a retained limit of self-insurance, equal or greater than the limits specified in subdivision (a) of Section 16056 of the Vehicle Code. (Emphasis supplied.)

This language of § 11580.1(a) allows insurance policies that *exceed* the minimum financial requirements to contain additional exclusions not allowed in primary, mandatory Financial Responsibility limits policies. Excess policies may properly contain exclusions which, if contained in underlying Financial Responsibility policies, would be void as against public policy. Excess policies are therefore, by statute, not subject to the same public policy restrictions as primary financial responsibility policies. *Hertz Corp. v. Home Ins. Co.*, 14 Cal. App. 4th 1071, 18 Cal. Rptr. 267 (1993).

Furthermore, contrary to the argument in Petitioners' Opening Brief, while the Petitioners might have a reasonable expectation that insurers will provide certain coverage, the Petitioners could have *no reasonable* expectation of excess coverage. The law and the underlying public policy require only primary Financial Responsibility Coverage of $15,000 per person and $30,000 per accident. The Petitioners remaining in this litigation were occupants in other vehicles, not the rental vehicle. Their only *reasonable* expectation as members of the public would be that the rental vehicle was insured in compliance with California's compulsory Financial Responsibility Laws. The public policy emanating from California's

Financial Responsibility law, which benefits the general public as well as the insured, requires nothing further. It is undisputed that Budget provided the Financial Responsibility compulsory primary coverage for this accident. Therefore, the Petitioners' only reasonable expectation has been met, and they could have no *reasonable* expectation that the rental vehicle or driver would carry additional, excess insurance not required by California law. Petitioners' "reasonable expectations" argument is unfounded.

Petitioners' public policy arguments are entirely misdirected. The public policy arguments of *Barrera* are aimed at compulsory liability insurance policies, *not* voluntary excess insurance policies. The California Legislature has balanced the competing interests, and has determined that California's public policy to protect the public from automobile accidents by mandatory insurance extends only to the statutory Financial Responsibility limits. Any extension of those public policy principles to include insurance *above* the Financial Responsibility limits must be reserved to the Legislature.

B. There is a Distinction between the Sale of Automobile Insurance in the Ordinary Commercial Setting and as Part of an Automobile Rental Transaction.

In the ordinary consumer setting, a written insurance application is prepared and submitted to an insurance carrier. Thereafter, the carrier has the luxury of a reasonable amount of time to investigate a potential insured and determine whether or not coverage should be issued and on what terms. By contrast, because of the commercial context of a rental car transaction, the purchase of excess insurance will take place in a matter of minutes at the time of rental. The SLI Excess Policy is a master policy of insurance that, in this case, identified Budget as the policyholder. Subject to the terms, conditions, and exclusions identified in the excess coverage, Budget has the limited authority to enroll *qualified* renters under the existing master SLI Excess Policy as additional insureds, if the renters so opt, without submitting a written application to Philadelphia. Indeed, in the commercial context of a car rental, the taking of a written application would not be commercially practicable. However, *qualified* renters are limited specifically to those with valid driver's licenses who are authorized by Budget to drive the rental vehicle. *See* Affidavit of Mark Plousis, attached hereto (exhibits to the Affidavit

can be found in the record at Tab No. 32 pages 219 through 232 of the Supplemental Excerpts of Record).

In contrast to an ordinary consumer insurance purchase, here, the gravamen of the transaction is *rental of a vehicle.* There is no separate transaction in which the renter qualifies for and purchases insurance. There is only *one* transaction. Budget, as the rental company, but also as the SLI policyholder, has the primary duty to qualify individuals to rent vehicles, but additionally has the right to allow a qualified renter to elect to be added to the optional SLI Excess Policy. Budget's actions in qualifying a customer to rent a vehicle are the focus of the transaction, but *they are the same actions* which qualify the renter to purchase SLI excess insurance.

In *Barrera,* the Court required a carrier to conduct a "reasonable" investigation of the insurability of the insured within a "reasonable time" after issuance of the owner's Financial Responsibility policy. 456 P.2d at 689, 71 Cal. 2d at 681, 79 Cal. Rptr. at 121. In that context, the court suggested that a DMV check sometime within the two years the policy was in effect might be (but was not necessarily) reasonable. A "reasonable" investigation will obviously vary depending on the case specific circumstances. Here,

contrary to their allegations, Petitioners never even attempted to introduce evidence to the trial court of the viability, let alone the reasonableness, of an insurance carrier *in a car rental setting* in California conducting an instantaneous investigation into a renter's driving record *in Arizona.*[2] Petitioners make a baseless assertion that, due to the availability of the internet, a "reasonable" (though undefined) investigation of a renter can be made "almost instantaneously." To the contrary, there is no evidence that Philadelphia or Budget could have obtained information on Burke's driving record from the State of Arizona in a matter of minutes, if at all. There are not only administrative hurtles, but privacy issues as well. The fact that, after the accident, a police officer was able to obtain information on Burke's driving record is irrelevant, in that Arizona law specifically provides that "appropriate authorities," i.e., police departments, may obtain such information. *See* A.R.S. § 28-1853. Petitioners' claim that some further investigation would have been practically or commercially reasonable is completely groundless.

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[2] In fact, of course, thousands of people rent cars in California daily from all over the United States and the world. The burden Petitioners seek to place on rental car companies and rental insurers to verify licenses from other states and even other countries in mere minutes is unreasonable. It is one that would be impossible to comply with and one that the California Legislature has not seen fit to impose.

Moreover, the sole evidence regarding the rental transaction is that the Budget rental clerk *fully complied* with Cal. Veh. Code §§ 14604 and 14608 in qualifying Burke to rent the vehicle. Section 14604(a) states that "[a]n owner is not required to inquire of the department [of motor vehicles] whether the prospective driver possesses a valid driver's license." Section 14604(b) states further that "[a] rental company is deemed to be in compliance with subdivision (a) if the company rents the vehicle in accordance with Sections 14608 and 14609." The only investigation requirement in Section 14608 is for the rental clerk to inspect the prospective renter's driver's license and compare the signature on the license with the signature on the rental agreement. Since qualification to rent the vehicle is what is required to qualify one to purchase SLI excess coverage, the same investigation by the rental counter clerk qualifies both.[3]

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[3] Petitioners question why Philadelphia should also be protected by these statutes applicable to rental companies. The simple answer is that there is only *one transaction*, and the rental company is the entity that qualifies the renter to purchase the insurance. Moveover, the California Legislature is aware that rental companies like Budget, as owners of the vehicles, often supply the mandatory Financial Responsibility insurance for renters as part of the rental transaction. Armed with that knowledge, the legislature has nevertheless clarified that a rental company need not ask the DMV about a renter, but must

The differing commercial circumstances between the issuance of a typical owner's primary automobile liability policy and the enrollment of a car renter as an additional insured on an existing excess SLI Policy dictate that the same investigative processes cannot and should not apply. California statutes support the point by expressly and reasonably limiting a rental company's duty to investigate a driver.

C. Other Significant Distinctions Make Barrera Inapplicable.

1. California Statutes Provide a Safe Harbor to a Rental Car Company that Visually Inspects a Driver's License.

Barrera focused on what investigation of the applicant is commercially reasonable when an insurer issues a private, primary policy to cover the mandatory Financial Responsibility limits. It specifically addressed Department of Motor Vehicle reports. Here, however, there is no question about commercial reasonableness, because the legislature has conclusively established what investigation is commercially reasonable in the rental car context. A car rental

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only visually inspect the renter's license and verify his signature. Since the Legislature has seen fit to require no further investigation by the offeror of *mandatory Financial Responsibility* insurance, there can be no principled reason to require any further investigation by the offeror of *optional*, *excess* insurance.

company must visually inspect the license and the signature of the renter. The California Legislature mandates that it is commercially ***un***reasonable to require the rental car industry (which also often supplies Financial Responsibility insurance to its renters) to do more than visually inspect the license and signature of a renter. Cal. Veh. Code § 14608 states:

> No person shall rent a motor vehicle to another unless:
>
> (a) The person to whom the vehicle is rented is licensed under this code or is a non-resident who is licensed under the laws of the state or country of his or her residence.
> (b) The person renting to another person has inspected the driver's license of the person to whom the vehicle is to be rented and compared the signature thereon with the signature of that person written in his or her presence.

The requirements of Ca. Veh. Code § 14608 have, as recently as 2000, in *Lindstrom v. Hertz Corp.*, 81 Cal. App. 4th 644, 96 Cal. Rptr. 2d 874 (2000), been interpreted by a California appellate court only to require the rental counter clerk to examine the driver's license of its renters, just as Budget did in the current case. Further, in *Osborn v. Hertz Corp.*, 205 Cal. App. 3d 703, 252 Cal. Rptr. 613 (1988), another case involving the interpretation of Cal. Veh. Code §

14608, the court held that Hertz had *no duty* to do anything beyond its examination of the driver's license of the renter.[4]

Budget complied with the safe-harbor requirements specifically set out by the California Legislature when it inspected Burke's license and signature before allowing him to rent the vehicle and purchase SLI Excess insurance. Petitioners do not dispute this, but instead illogically ask this Court to extend the public policy arguments of *Barrera* to the car rental context and to the context of *excess* liability insurance. However, the Supreme Court of California decided *Barrera* in 1969. If the California Legislature intended the investigation standard of *Barrera* to be extended into other areas beyond insurance policies issued to meet the minimum Financial Responsibility Law of California, it could have passed statutes to that effect. Instead, however, as recently as 1993, the California

[4] *See also, e.g., Nunez v. A&M Rentals, Inc.*, 63 Mass. App. Ct. 20, 822 N.E. 2d 743 (2005) (Under Massachusetts General Laws c. 90 § 32C, "No lessor shall lease any motor vehicle or trailer until the lessee shows that he or his authorized operator is the holder of a duly issued license to operate the type of motor vehicle or trailer which is being leased." 63 Mass. App. Ct. at 24, 822 N.E. 2d at 747. The *Nunez* court held that the rental car company fulfilled its duty when the renter showed it a valid license, and the rental car company owed no further duty under Massachusetts law. Further, the *Nunez* court cited to the *Lindstrom* decision and observed that it is within the province of the Legislature to make the law regarding the extension of duties beyond the requirements contained in the state statutes.)

Legislature amended Cal. Veh. Code § 14608 and did *not* extend the investigation duty of *Barrera* to commercial rental car transactions, thereby reaffirming the safe harbor of a visual license check. There is no hint in the *Barrera* case or in the case law interpreting Cal. Veh. Code § 14608 that anything more is required of the rental car industry. *See Lindstrom v. Hertz Corp.*, 81 Cal. App. 4th 644, 96 Cal. Rptr. 2d 874 (2000); *see also*, *Osborn v. Hertz Corp.*, 205 Cal. App. 3d 703, 252 Cal. Rptr. 613 (1988).

In *Osborn,* the plaintiff proposed that a higher standard should be placed on individuals who rent vehicles than on other drivers. However, the *Osborn* Court responded to that assertion by stating that "whether drivers of rental cars should be treated differently from other drivers, are matters properly resolved on the other side of Tenth Street, in the halls of the Legislature . . . ." Further, under the current law of California, the "defendant [Hertz] was entitled to rely upon [the renter's] driver's license as sufficient evidence of his ability to drive. (*See* § 14608)." *Osborn*, 205 Cal. App. 3d at 711, 252 Cal. Rptr. 613. Petitioners' argument to extend *Barrera* to the rental car excess insurance context must be reserved to the Legislature.

2. Rescission is not at Issue Here.

Unlike *Barrera*, Philadelphia has never sought rescission of the SLI Excess Policy. Rescission has never been requested or pled by Philadelphia in this action. In fact, the Petitioners' assertion that Philadelphia has sought "rescission" of the SLI Excess Policy makes no sense in light of the trial court's finding that Brewer (as an additional authorized driver of the rental vehicle) and her children were excluded from coverage under the SLI Excess Policy under the "named insured and family member" exclusion. Brewer did not appeal the trial court's decision that tacitly affirmed the validity of the Policy and its terms and conditions. Respondent Philadelphia now merely seeks to enforce another term.

Petitioners' profuse but erroneous references to rescission in this case are transparent attempts to align this case with *Barrera*. This Court should not be misled by such a self-serving misrepresentation of the record.

3. Delay is not in Question.

The *Barrera* court also focused upon the timeliness of State Farm's investigation into the insurability of an individual applying for personal insurance on his own vehicle to meet the minimum Financial

Responsibility limits under the California Vehicle Code. State Farm had already paid one claim on the policy. Then, almost two years later, after a more significant wreck, State Farm finally completed its underwriting process and discovered that its insured had misrepresented his driving record on his initial application. The court in *Barrera* specifically called into question State Farm's motivations and underwriting processes when it made the decision to rescind an *almost two-year-old insurance* policy, *on which State Farm had already paid a previous accident claim.* The *Barrera* court criticized State Farm for its "practice of postponing its investigation of insurability until after the assertion of a 'significant' claim." 456 P.2d at 684, 71 Cal. 2d at 672, 79 Cal. Rptr. at 116. There are simply no comparable facts here. The accident here occurred within four days of the rental, and there was no "postponement" of any investigation. The Budget rental counter clerk qualified Burke to rent the car pursuant to California statutes and, concurrently, by that same act, qualified Burke to purchase SLI Excess Coverage. The statutorily-required "investigation" was performed at the rental counter.

4. Carriers are Entitled to Rely upon Policy Exclusions.

Furthermore, public policy supports denial of insurance coverage on these facts. Burke's actions fall within a clear and express dishonesty and misrepresentation exclusion in the SLI Excess Policy. If Petitioners were to prevail, insurance carriers would be obligated to pay, notwithstanding their insureds' violations of exclusionary clauses and/or material breaches of the contract. Insurers would become strictly liable guarantors and would lose their ability to enter into enforceable contracts. This would not only make the purchase of insurance policies prohibitively expensive (innocent insureds would have to pay for malfeasant insureds), but this theory is contrary to California statutes and case law. *See Brown v. The Travelers Ins. Co.,* 87 P.2d 377, 31 Cal. App. 2d 122, 123-124 (1939) (the carrier has a good defense against the injured party whenever the insured has been guilty of a violation of the conditions of the policy); *see also*, Cal. Ins. Code § 11580.1.

In our society, people rely everyday on the persons they conduct business with to be honest in their dealings. Moreover, in one of the most critical security situations facing our nation today, the visual inspection of a driver's license is the basic requirement to allow

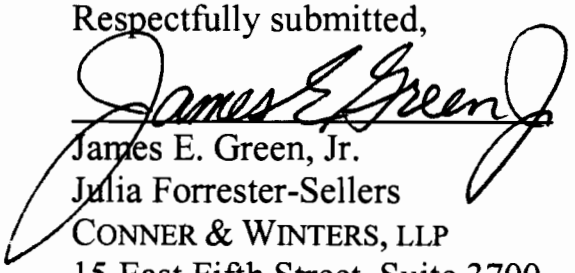
a passenger on an airplane. The California Legislature has seen fit to impose no higher duty upon rental companies. Excess carriers, too, should be entitled to rely on their customers' honesty, on the visual inspection of licenses, and their contractual provisions.

V. CONCLUSION

Barrera does not apply in this context. The California Legislature has clearly delineated between Financial Responsibility and excess insurance. It has also provided an investigative safe harbor for rental companies. It was Burke, not Philadelphia that violated a duty. Philadelphia had an expectation that the information provided by Burke was accurate. Because of Burke's misrepresentation of his driver's license at the Budget rental counter, it was fully within Philadelphia's rights under the law to deny coverage based upon a valid exclusion.

Dated: April 28, 2005

Respectfully submitted,



James E. Green, Jr.
Julia Forrester-Sellers
CONNER & WINTERS, LLP
15 East Fifth Street, Suite 3700
Tulsa, Oklahoma 74103-4344
Telephone: (918) 586-5711
Facsimile: (918) 586-8992

and

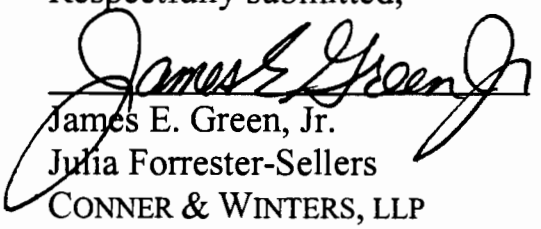
David M. Glasser, SB #82156
GREENSPAN, GLASSER & ROSSON
300 Corporate Pointe, Suite 375
Culver City, California 90230
Telephone: (310) 649-1991

CERTIFICATION OF WORD COUNT

I certify that, pursuant to California Rules of Court, Rule 29.1(c)(1), that the attached ANSWER BRIEF OF APPELLEES AND RESPONDENTS PHILADELPHIA INDEMNITY INSURANCE COMPANY, excluding the cover and components of the brief excluded from the word count computation under Rule 29.1(c)(3), contains 5135 words.

Dated: April 28, 2005

Respectfully submitted,



James E. Green, Jr.
Julia Forrester-Sellers
CONNER & WINTERS, LLP
15 East Fifth Street, Suite 3700
Tulsa, Oklahoma 74103-4344
Telephone: (918) 586-5711
Facsimile: (918) 586-8624

and

David M. Glasser, SB #82156
GREENSPAN, GLASSER & ROSSON
300 Corporate Pointe, Suite 375
Culver City, California 90230
Telephone: (310) 649-1991

PROOF OF SERVICE

STATE OF OKLAHOMA) PHILADELPHIA INDEMNITY VS. MONTES-HARRIS
COUNTY OF TULSA) Supreme Court Case No.: S130717

I am employed in the County of Tulsa, State of Oklahoma. I am over the age of 18 and not a party to the within action. My business address is 15 East Fifth Street, Suite 3700, Tulsa, Oklahoma 74103-4344.

On **April 28, 2005**, I served the foregoing document described as:

ANSWER BRIEF OF APPELLEE PHILADELPHIA INDEMNITY INSURANCE COMPANY

on interested parties in this action, by placing a true copy thereof addressed as follows:

PLEASE SEE ATTACHED MAIING LIST

[X] **BY MAIL**: I caused such envelope to be deposited in the mail at Tulsa, Oklahoma. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Tulsa, Oklahoma, in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

[ ] **VIA FACSIMILE**: I caused such document to be transmitted from facsimile number (918) 586-8624 to the facsimile machine(s) (310) 478-2270 and (626) 396-3333 of interested parties on the date specified above. The facsimile machine I used was in compliance with Rule 2003(e) and the transmission was reported as complete and without error. Pursuant to Rule

2008(e), I caused a copy of the transmission report to be properly issued by the transmitting facsimile machine.

[ ] **BY OVERNIGHT COURIER**: I deposited such envelope in a regularly maintained overnight courier parcel receptacle prior to the time listed thereon for pick-up. Hand delivery was guaranteed by the next business day.

I declare under penalty of perjury under the laws of the State of Oklahoma that the foregoing is true and correct.

Linda S. Clark

Linda S. Clark

MAILING LIST

PHILADELPHIA INDEMNITY INS. CO.
vs. MONTES-HARRIS, ET AL.

Supreme Court Case No.: S130717

David M. Glasser, Esq.
GREENSPAN, GLASSER & ROSSON
300 Corporate Pointe, Suite 375
Culver City, CA 90230
Attorneys for Appellee/Respondent,
Philadelphia Indemnity Insurance Company

David R. Denis, Esq.
LAW OFFICES OF DAVID R. DENIS
350 South Figueroa Street, Suite 250
Los Angeles, CA 90071
Attorney for Appellant/Petitioner, Javier Cortez

Robert M. Hindin, Esq.
Bruce D. Abel, Esq.
Snow T. Vuong, Esq.
Douglas W. Davis, Esq.
HINDIN & ABEL, LLP
11601 Wilshire Boulevard, Suite 2490
Los Angeles, CA 90095
Attorneys for Appellants/Petitioners, Blanca Montes-Harris,
Monica Arredondo, and Camilla Toni Harris

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILADELPHIA INDEMNITY INSURANCE COMPANY, a Pennsylvania Insurance company, Plaintiff, v. ALRIC BURKE, XAVIER MORI, RICHARD FINDLEY, DENIKAN BREWER, DESIRIE BREWER, DANE FLORES, DELESA FLORES, TAY O'NEIL, LEVAR DOMINIQUE, JAVIER CORTEZ, BLANCA ARREDONDO, CAMILLA TONI HARRIS, NATALIE BURKE, AND KRISTINA ANNE RACEK Defendants.	CASE NO.: 02-3616 RSWL

DECLARATION

State of Pennsylvania)
) ss.
County of Montgomery)

I, Mark Plousis, declare as follows:

I am of legal age and capacity, and depose and state as follows:

1. I am Assistant Vice President of Underwriting for Philadelphia Indemnity Insurance Company ("Philadelphia") and prior to this position, I was Assistant Vice President of Claims.

2. I am familiar with the matters set forth in this Declaration based upon personal knowledge and business records of Philadelphia.

3. Attached as Exhibit A hereto is a true and correct copy of a Rental Supplemental Liability Insurance Excess Policy, Policy No. PHSL100102, issued to Budget Rent A Car Corporation ("Budget"), as policyholder, with a policy period from 01-01-2000, to be continuous until cancelled ("SLI Excess Policy"). The SLI Excess Policy provides third-party liability insurance only and contains a limit of liability of the difference between $1,000,000.00, combined single limit for each accident, bodily injury and property damage, and the underlying primary coverage in an amount equal to the state minimum financial responsibility liability limits of the applicable jurisdiction provided under the terms of the rental agreement entered into between Budget and its customer. These underlying primary limits are provided by Budget either by insurance or self-insurance.

4. Budget, as policyholder, has the right to allow a customer renting a car from it to, at the customer's option, be added as an insured under the SLI Excess Policy at the time of the rental, assuming the customer qualifies with Budget as an authorized renter under its company policies and practices.

5. Only those rental customers who qualify as renters and authorized drivers of the rental vehicle under the terms and conditions of the applicable Budget rental agreement are qualified to become insureds under the SLI Excess Policy.

6. Philadelphia does not give instructions, verbally, written, electronically, or otherwise to Budget as to the method and manner Budget carries out its rental car transactions and qualifies persons to rent vehicles under its rental agreements.

7. Philadelphia does require that any rental customers of Budget who are enrolled by Budget as insureds under the SLI Excess Policy, must be so enrolled only at

the time of the execution of the rental agreement and not added later, for example after a loss may occur.

8. Philadelphia has been provided by Budget with a copy of a rental agreement between Alric A. Burke and Budget dated June 6, 2001 in which it appears that Alric A. Burke accepted supplemental liability insurance as a part of the rental. Desirie Brewer is listed as an additional driver on this rental agreement. A true and correct copy of the rental agreement that was provided to Philadelphia by Budget is attached hereto as Exhibit B.

9. It is my understanding that, while operating the rental vehicle, Alric A. Burke was in an accident on June 10, 2001 in Los Angeles County, California.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 5 day of November, 2002.

MARK PLOUSIS
Assistant Vice President, Underwriting
Philadelphia Indemnity Insurance Company

STATE OF PENNSYLVANIA)
) ss.
COUNTY OF MONTGOMERY)

Signed or attested before me on this 5th day of Nov, 2002 by MARK PLOUSIS.

Notary Public

My Commission, No. _____.
Expires 1-3-06.