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IN THE SUPREME COURT OF FLORIDA

RAYMOND COLEMAN, et al.,

Petitioners,

vs. CASE NO. 70,075

FLORIDA INSURANCE GUARANTY ASSOCIATION, INC.,

Respondent.

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ON CERTIFICATION FROM THE SECOND DISTRICT COURT OF APPEAL

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# ANSWER BRIEF OF RESPONDENT

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## PRELIMINARY STATEMENT

Sandra Coleman (the named insured) and Raymond Coleman, her husband (the injured party) are referred to collectively as "Plaintiffs", the capacity they occupied in the trial court.

Florida Insurance Guaranty Association, the Defendant below is referred to as "FIGA".

References to the Record on Appeal are designated by the prefix "R". References to Plaintiffs' initial brief are designated by the prefix "Pl Br.".

References to the Second District's opinion, Florida Insurance Guaranty Association, Inc. v. Coleman, 501 So.2d 32 (Fla. 2d DCA 1986), are designated by the prefix "Coleman."

## STATEMENT OF THE CASE AND FACTS

Although the facts in this case were undisputed, FIGA cannot accept Plaintiffs' statement of the facts, since it omits significant facts relevant to the legal question presented, as well as inaccurately portraying some of the testimony of their own expert.

Plaintiffs commenced this case against FIGA in April, 1984, for alleged injuries sustained by Mr. Coleman in an automobile accident a year earlier. (R 1-3) FIGA was named as Defendant by reason of the insolvency of Gulf American Insurance Company, formerly known as Voyager Casualty Insurance Company, which had issued a "garage policy" to Mrs. Coleman for the operation of her used car business. (R 1,4)

Ultimately, Plaintiffs amended their complaint to reflect that the two other automobiles involved in Mr. Coleman's accident had paid him their liability policy limits, a combined total of $75,000.00. (R 76)

The Voyager garage policy stated that it would provide liability insurance in the amount of $25,000.00, and uninsured motorist insurance in the amount of $20,000.00 for covered autos. (R 7). The trial court entered a partial summary judgment finding that Mrs. Coleman, as the named insured, had not made an informed rejection of UM coverage in an amount less than the liability coverage ($25,000.00), so that she was entitled to UM limits of $25,000.00. (R 809-811). FIGA did not appeal this aspect of the case.

The particular category selected for covered autos in the liability and UM sections of the policy used the symbol "21", which was thereafter defined as "any auto", and not as "owned autos only", or other more restrictive categories. (R 7) The garage policy included specific schedules itemizing the basis for the premiums paid for the different coverages. Hence, under liability insurance, since it provided coverage for two persons, the total rating units were 2.0, which was used to calculate a liability premium. (R 8) Similarly, under Item 10 in the policy, the uninsured motorist insurance premium was specifically shown to be calculated based on the number of

plates and the rate per plate. In this instance, two dealer plates at $7.00 per plate for a premium of $14.00:

ITEM TEN – UNINSURED MOTORISTS INSURANCE – PREMIUMS – REFER TO ITEM ELEVEN FOR SEPARATELY REGISTERED COVERED AUTOS.

| Number of Plates | Rate Per Plate | Premium |
|---|---|---|
| 2 | 7.00 | 14.00 |

(R 9). This premium was also reflected on the schedule. (R 7).

While Mrs. Coleman's auto business had varying numbers of automobiles on the lot at any given time which could be operated by using up to fifty temporary paper tags, her business had two permanent dealer plates. (R 838) Plaintiffs' characterization of Mrs. Coleman's testimony is incomplete and inaccurate in stating that she "had no understanding at the time she purchased insurance that the amount of money she was going to pay for UM coverage was directly related to the number of dealer tags that she had in use at her dealership" (Pl Br 2). Mrs. Coleman had already testified that at the time she purchased the policy "there was no mention at all of uninsured motorist. That was not discussed at all." (R 905). Consequently, it is obvious that there was no specific discussion as to UM premiums being based on dealer plates. However, Mrs. Coleman clearly testified in her deposition testimony read at trial that she

knew her insurance premiums depended on the number of "hard" dealer plates, and not the number of temporary paper tags:

> "Question: Let me ask this, then. Maybe this will clear up the problem. Have your premiums ever been affected by the number of paper tags that you have at your dealership?"
>
> "Answer: No."
>
> "Question: So, it's only the hard tags that they have taken into account?"
>
> MR. GRAHAM: Your Honor--
>
> "Answer: Right."

(R 910-911). Mrs. Coleman's subsequent testimony at trial further established that she understood the difference between the two hard dealer plates and the 50 temporary paper tags (R 926-927; see also Pl Br 2) 1/

Several expert witnesses testified on behalf of the Plaintiffs and FIGA as to their interpretations of UM insurance under the Voyager policy. Predictably, Plaintiffs' experts testified that although the premiums paid for UM may have been based on the two dealer plates, that the Plaintiffs should still be able to stack beyond those two coverages, to 15 (the number of vehicles that happened to be on the lot at the time of Mr. Coleman's accident. (R 957, 1001) FIGA's witnesses testified to the contrary, that stacking should only be allowed to the extent of the two dealer plates.

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1/ See also, the different purposes described in §320.13, Florida Statutes (1985) ("dealer license plates") and §320.131, Florida Statutes (1985) ("temporary tags").

(R 1062, 1066, 1107). All of the experts at trial agreed that the calculation of UM premiums under the Voyager policy was on the basis of the two dealer tags - namely that they were the "exposure units". (R 969, 1013, 1049, 1095).

As demonstrated above, the Second District was clearly correct in this case in observing that the undisputed fact was that the Plaintiffs paid only two UM premiums based on the number of hard dealer tags. Coleman at 33. Obviously, an expert's testimony does not change the facts. Rather, it was the opinion of Plaintiffs' expert, Dale Johnson, that regardless of the number of premiums paid, the UM coverage should have been stacked for all vehicles on Mrs. Coleman's lot (R 952, 957).

At Pl Br 3, Plaintiffs state that Mr. Johnson's testimony was that "the insurer was insuring all motor vehicles, but not charging premiums on a per vehicle basis." (Citing R 952). However, shortly thereafter in their argument, Plaintiffs re-phrase Johnson's testimony to be "that the number of cars for which UM premiums were paid was 15, although the charge was not on a per vehicle basis." (Pl Br 10, again citing R 952, emphasis by Plaintiffs). To the contrary, Johnson specifically observed that here a UM premium was not being paid for all vehicles. In referring to

the insurance policy symbol "21" which was defined as "any auto" in the Voyager policy, Dr. Johnson stated:

> Under 21, you're insuring all of them, and in some cases, you are paying a premium for all of them. This one you're not."

(R 952, emphasis added). Johnson subsequently confirmed that his testimony was "that those dealer plates are the exposure unit in calculating the premiums in this case." (R 969). As noted above, there were two dealer plates.

Thus, while there may have been a difference in the opinion of the experts as to whether the hard dealer tags were proper "exposure units" for insurance rating purposes, there was no dispute over the fact that the UM premium was based on the two hard dealer tags, as specifically set forth in the policy, as discussed above, and as noted by the Second District.

Judge Gallagher announced his ruling in a letter to counsel, requesting Plaintiffs' counsel to draw the final judgment reflecting that he was permitting stacking on the basis of every vehicle for which Mrs. Coleman had title (including one that had no engine 2/), and offsetting the $75,000.00 settlement proceeds from FIGA's $300,000.00 statutory limit. (R 577-580)

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2/ Among the cars owned by Mrs. Coleman at the time of the accident as to which the trial judge stacked UM coverage was a Volkswagen that had previously been stolen and stripped of even its engine so that it could not be driven at the time of Mr. Coleman's accident, and was ultimately sold for junk, for $25.00. (R 923-924)

The final judgment prepared by Plaintiffs' counsel held that UM coverage would be stacked for all vehicles titled in Mrs. Coleman's name, stating: "the subject policy very clearly covered 'any auto' titled in the named insured." (R 838, ¶6). This was clearly an incorrect statement since, as noted above, UM was provided for "any auto", not just those titled in Mrs. Coleman's name.

The judgment reduced the UM coverage to FIGA's $300,000 statutory limit, and then offset the $75,000 liability settlement proceeds for a UM limit of $225,000.

The Second District reversed on appeal, holding that to stack UM coverage for every auto Plaintiffs might occupy would produce an absurd result, and holding that stacking should be based on the number of UM premiums paid. The court certified this case to this Court based on the question set forth hereafter as point I.

## ISSUES ON APPEAL

Since Plaintiffs' first two "issues" are simply subpoints in its argument against the Second District's resolution of the certified question, FIGA deals with them within its discussion of the certified question. Therefore, FIGA restates the issues as follows, to comport with the question as certified by the Second District:

I. WHEN AN INSURED HAS PURCHASED UNINSURED MOTORIST COVERAGE, BUT HAS NOT MADE AN INFORMED REJECTION OF UNINSURED MOTORIST COVERAGE LIMITS HIGHER THAN THOSE PURCHASED, MAY THE INSURED STACK A NUMBER OF UNINSURED MOTORIST COVERAGES EQUAL TO THE NUMBER OF CARS OWNED BY THE INSURED OR MAY HE ONLY STACK THE NUMBER OF UNINSURED MOTORIST COVERAGES FOR WHICH HE PAID A PREMIUM?

II. WHETHER THE TRIAL COURT ERRED IN OFFSETTING FIGA'S STATUTORY LEGAL LIMIT OF LIABILITY BY THE AMOUNT OF SETTLEMENT PROCEEDS RECEIVED BY THE INSURED?

## SUMMARY OF THE ARGUMENT

FIGA begins its analysis of the certified question by reviewing the purpose of uninsured motorists coverage and the established rationale behind the concept of stacking that coverage. Namely, UM coverage is stacked to the extent that an insured has paid premiums for more than one UM coverage. Plaintiffs' argument confuses the concept of stacking with the separate issue of the limits of UM coverage in the absence of an informed rejection.

FIGA next demonstrates that stacking based on premiums paid is consistent with numerous out-of-state cases. FIGA then addresses Plaintiffs' first two "points" and shows that the evidence was clear that Plaintiffs paid premiums for only two UM coverages. Plaintiffs' expert's testimony could not change this fact, and in fact, he did not testify contrary to the clear policy provisions.

Finally, Plaintiffs' argument regarding offsetting the settlement proceeds received is moot if this Court affirms the Second District's decision, and in any event, the offset clearly follows from the plain language of the guaranty statute.

## ARGUMENT

I. WHEN AN INSURED HAS PURCHASED UNINSURED MOTORIST COVERAGE, BUT HAS NOT MADE AN INFORMED REJECTION OF UNINSURED MOTORIST COVERAGE LIMITS HIGHER THAN THOSE PURCHASED, THE INSURED MAY NOT STACK A NUMBER OF UNINSURED MOTORIST COVERAGES EQUAL TO THE NUMBER OF CARS OWNED BY THE INSURED, BUT MAY ONLY STACK THE NUMBER OF UNINSURED MOTORIST COVERAGES FOR WHICH HE PAID A PREMIUM.

A. Introduction.

Plaintiffs begin the argument portion of their brief by attempting to fabricate a factual issue where none exists - a fiction which relies on ignoring the testimony of their own expert as well as the clear import of the insurance policy at issue. This is perhaps explained by Plaintiffs' inability to deal with the compelling logic of the Second District that UM coverages are stacked on the basis of the number of coverages an insured has paid for, and not by the fortuity of the number of cars an insured may have titled in his name at any particular time. The Second District's decision on this point follows directly from this Court's decision mandating stacking for UM coverages where multiple premiums were paid for those coverages. FIGA will address Plaintiffs' first and second "issues" below after considering the actual question certified to this Court.

B. Stacking UM coverage is based on the number of UM premiums paid.

Before addressing the question of stacking, it is necessary to appreciate what it means for a class one insured to have UM coverage. The insurance policy in this case

provided for liability insurance and UM insurance for "any auto" (R 7; symbol "21" used in item two is defined in item three as "any auto"). This is consistent with this Court's landmark decision in Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971).

Mullis held that uninsured motorist coverage was designed to cover a class one insured "whenever or wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist," so that purported UM exclusions for class one insureds riding in owned but unlisted vehicles on a particular policy would not be enforced. Id. at 238. Thus, Mullis clearly holds that UM will travel with an insured in any vehicle he occupies regardless of what the policy says (i.e., "any auto", owned auto", etc.).

Mullis noted specifically that it was not necessary in that case to decide any question considering multiple uninsured motorist coverage. Id. at 232, n.1. However, the Supreme Court specifically addressed the question of "stacking" of multiple UM coverage in Tucker v. Government Employees Ins. Co., 288 So.2d 238 (Fla. 1973). Tucker held that "an insured under uninsured motorist coverage is entitled by the statute to the full bodily injury protection that he purchases and for which he pays premiums." Id. at 242 (emphasis added). Consequently, the Court held that policy provisions purporting to limit the amount of UM coverage to a single coverage would not do so where the

insured had purchased multiple UM coverage. The Court reiterated the sentiments in Mullis that uninsured motorist protection does not inure to a particular motor vehicle, but protects the individual against injury by an uninsured motorist. Id.

Tucker repeatedly emphasized that "the determinant of the amount of coverage is the total which the insured purchases," and that the insured who was paying multiple premiums for UM coverage was entitled to multiple coverage. In addition to the quote above, the Court noted that "the premiums rates are standard and uniform on a per-car basis." Perhaps most significantly, the Court observed that "the total uninsured motorist coverage which the insured has purchased for himself and his family, regardless of the number of vehicles covered by his auto liability policy, inures to him or any member of his family when injured by an uninsured motorist." Id. at 242 (emphasis added).

Thus, it is clear from Tucker that the concept behind UM coverage is that class one insureds should be entitled to the amount of UM coverage for which they pay premiums - regardless of the number of vehicles covered - and that UM coverage is purchased based on a premium paid per coverage. Thus, where the insurance policy in the instant case insures class one insureds for UM when they are in "any auto," that does not mean that the policy calls for stacking the UM coverage for every conceivable auto an insured could occupy. Rather, in the words of the Supreme Court, "regardless of the number

of vehicles covered" one looks to the amount of uninsured motorist protection that the class one insured "purchases and for which he pays premiums." In the instant case, the insured Plaintiffs undisputedly paid premiums for two UM coverages, as is clearly set forth in their policy.

The importance of the concept of UM coverage being tied to the amount of coverage for which the class one insured has paid a premium is evidenced in Fireman's Fund Ins. Co. v. Pohlman, 485 So.2d 418 (Fla. 1986). The Court previously held that the amendment excepting UM from the anti-stacking statute could not apply retroactively to a policy issued before its effective date. State Farm Mutual Automobile Ins. Co. v. Gant, 478 So.2d 25 (Fla. 1985). Pohlman held that although the policy had been issued prior to the date stacking was again allowed, that where an endorsement adding an additional vehicle to the policy could constitute the issuance of a new policy to which stacking would be permitted. In doing so, the Court emphasized the importance of the payment of a premium for the risk:

> It is possible that an endorsement which either adds a premium or adds a premium and a vehicle, constitutes the issuance of a new policy incorporating the statutory amendment into its terms. A court must examine the risk covered by the additional premium. In this instance, the fact that the increased premium is covering a risk involved with insuring an additional vehicle, leads to the conclusion that a separate and severable contract was entered into on the date of the endorsement.

478 So.2d at 420-421. Thus, the Court concluded that where the insured had paid an additional premium after the effective date of the statute allowing stacking, that he would be permitted to stack the UM coverage available by virtue of that additional premium. 3/

C. Plaintiffs have confused UM stacking with the separate concept of the effect of a lack of informed UM rejection.

Plaintiffs engage in a major fallacy in their argument that UM coverage is "implied" to every vehicle they may happen to have on the lot at any given time. (Pl Br 26) Plaintiffs have confused the lack of informed rejection--which goes only to the amount of UM coverage per vehicle--with the separate issue of when UM coverages are stacked. As the Second District observed, "In the absence of an informed rejection, the statutes and case law merely tie the limits of UM coverage to the limits of liability insurance." Coleman at 34 (emphasis by court).

The fallacy of Plaintiffs' position is obvious when one considers the cases on which it rests - cases holding there is UM coverage for excess liability policies absent a rejection. (Pl Br 22-23) Plaintiffs fail to appreciate that

3/ See also, Auto-Owners Insurance Co. v. Prough, 463 So.2d 1184 (Fla. 2d DCA 1985), holding that stacking was permissible after the 1980 amendment excluding UM coverage from the anti-stacking statute, and emphasizing the portion of Tucker providing for stacking of a policy covering multiple vehicles where multiple premiums have been charged.

those cases simply did not depend on stacking. Those excess cases relied on the concept (subsequently changed by statute) that excess insurers which failed to obtain a rejection of UM coverage had to provide UM coverage up to the amount of policy limits. In the instant case, this means that where Plaintiffs purchased $25,000 in liability coverage they are entitled to UM coverage in that amount, rather than the $20,000 specified in the policy. The UM statute confirms this analysis.

Section 627.727(1) Florida Statutes (1981) requires that auto insurers provide UM if it is not rejected. Section 627.727(2) specifically addresses the amount of such UM, stating "the limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured . . . " (or such different amount as selected). Thus, Plaintiffs here have $25,000 in UM coverage, the limits of their bodily injury coverage. They clearly did not have bodily injury liability coverage of $375,000, as their position must assume. Ending the inquiry at this point (which Plaintiffs' argument logically does) means that Plaintiffs would have only $25,000 in UM coverage available.

The only reason that Plaintiffs are entitled to multiple UM coverages is because, under the rationale of Tucker, they paid for multiple coverages (in this case two coverages). Thus, to use Plaintiffs' language, the only issue as to

"implied" UM coverage in this case is that which raises the UM coverage from the $20,000 that was specified in the policy to the $25,000 liability limits. The real issue in the case is the extent of multiple UM coverage which Tucker has clearly established is based on the UM purchased, regardless of the number of vehicles covered.

The Second District noted that Plaintiffs' argument that UM should be stacked on the basis of the number of cars to which liability or UM insurance applied would lead to absurd results. Even Plaintiffs recognize the absurdity of this and have attempted to temper it by misreading their own policy and in the preparation of the trial court judgment below. Namely, Plaintiffs prepared the judgment so that it incorrectly stated that "the subject policy very clearly covered 'any auto' titled in the named insured." (R 838, ¶6). As noted above, there was no limitation to autos titled in the named insured, and both liability and UM coverage were provided for "any auto". Thus, if Plaintiffs' argument were accepted, there would be no limitation of the amount of UM stacking to the autos owned, but it would be stacked for any auto Plaintiffs could occupy. Coleman, at 34.

Even Plaintiffs attempt to temper this absurd result by limiting stacking to owned autos produces ridiculous results. In the instant case, Plaintiffs had up to fifty temporary tags, so that, depending on the number of cars on their lot, their UM coverage would range from stacking 50

cars ($1.25 million) to 15 cars to 2 cars (or possibly none under Plaintiff's theory, if there were no owned autos at a particular time). Such a multiplication of UM coverage beyond the premiums Plaintiffs paid for two UM coverages flies in the face of the underlying rationale of stacking UM coverage as discussed in Tucker and Coleman. Plaintiffs' scheme would make it to the benefit of every class one insured to make sure that in addition to owning the one or two vehicles on which he was actually paying a premium and intending to purchase UM coverage which could be stacked, that he also own as many "junk" cars as he wished to increase his UM limits without paying a premium. In fact, Plaintiffs achieved this very result in the trial court by persuading it to multiply UM coverage by all owned vehicles, which included at least one vehicle that was not in operating condition at the time of the accident, since it did not even have an engine, and was ultimately sold for scrap. (R 923-924).

If Plaintiffs' view were to prevail, not only would it make it advantageous for insureds to hold title to numerous uninsured vehicles, but it would produce unlimited stacking where the insured bought only one UM coverage while rejecting it on all other cars. Since Mullis correctly prohibits limiting UM to a particular car, every class one insured's UM coverage applies to any auto he might occupy. Thus, if he owns six cars and purchases one UM coverage while rejecting five other available coverages, he is entitled to that one

coverage regardless of which owned (or non-owned) vehicle he occupies. Under Plaintiffs' theory, he would be entitled to stack his UM coverage six times (if injured in an owned car, or seven times if injured in a non-owned car). Once again, Plaintiffs' theory produces an absurd result.

Plaintiffs also attempt to temper these irrational results by misreading their policy (Br 19). Plaintiffs again assert that the UM coverage is limited to the number of owned autos and argue that Item 2 in the policy expressly limits coverage to "covered autos." (R 7). Plaintiffs ignore the fact that covered autos are then described in the schedule under Item 2 for UM insurance by symbol "21" which is then defined in Item 3 as "any auto." (R 7). Thus, it is absolutely clear that the Plaintiffs' insurance policy provided UM coverage for any auto that Plaintiffs might be occupying, as is mandated by this Court's decision in Mullis. There is simply no escape from Plaintiffs' irrational argument that if one is to stack the UM insurance from every car for which UM insurance could be available, that the stacking would be virtually unlimited.

The fallacy of Plaintiffs' position is evident by considering a simple example, where an individual is injured in someone else's vehicle, while being a class one insured under his own policy, for which he paid premiums for two UM coverages. Such an individual has any UM coverage available to a class two insured while in the non-owned vehicle that he

is occupying. Furthermore, consistent with Tucker, he would be permitted to stack his two UM coverages for which he has paid premiums with regard to this injury suffered in the non-owned vehicle. However, according to Plaintiffs' theory, since the injured individual is covered with respect to three vehicles (the one in which he is riding and the two named in his own policy) he should be able to stack three UM coverages under his own policy. Again, this flies in the face of Tucker and produces an absurd result.

D. Out-of-state and garage policy cases confirm the Second District's conclusion.

Numerous out-of-state cases have adopted the concept of Tucker that the number of UM coverages a class one insured is entitled to stack is equal to the number of UM coverages for which he has paid premiums under his policy. In situations as described in the example above, UM has been stacked on the basis of UM coverage purchased, and not for additional cars the insured might have been occupying. E.g. Sturdy v. Allied Mutual Ins. Co., 203 Kan.783, 457 P.2d 34 (1969) (class one insured riding non-described motorcycle entitled to stack two UM coverages in his policy covering two automobiles); followed in Davis v. Hughes, 229 Kan. 91, 622 P.2d 641 (1981) (reiterating insured can stack two UM coverages for which he paid separate premiums); Taft v. Cerwonka, 433 A.2d 215 (R.I. 1981); (plaintiff can stack two UM coverages under policy where two separate premiums paid; UM not stacked three times even though Plaintiff in third undescribed car at time of

accident); American States Insurance Co. v. Milton, 89 Wash. 2d 501, 573 P.2d 367 (1978) (plaintiff can stack nine UM coverages for which he paid separate premiums; UM not stacked ten times even though in tenth car at time of accident). Chaffee v. United States Fidelity and Guaranty Company, 181 Mont. 1, 591 P.2d 1102 (1979) (plaintiff can stack three UM coverages for which he paid separate premiums; UM not stacked four times even though in fourth undescribed car at time of accident). Cameron Mutual Ins. Co. v. Madden, 533 S.W.2d 538 (Mo. 1976)(citing Tucker); Maid v. Illinois Farmers Ins. Co., 101 Ill.App.3d 1065, 428 N.E.2d 1139 (1981)(stacking where separate premiums paid); Nationwide Insurance Co. v. Gode, 187 Conn. 386, 446 A.2d 1059 (1982) (plaintiff can stack two UM coverages under policy where two separate premiums paid; UM not stacked three times even though in third undescribed car at time of accident); Cunningham v. Insurance Company of North America, 213 Va. 72, 189 S.E.2d 832 (1972)(allowing injured to stack the three UM coverages he paid separate premiums for (p. 833, 837) on top of one UM coverage available as class two insured for vehicle he was occupying; did not stack his UM coverage four times). 4/

4/ Cunningham was cited with approval by the court in Travelers Insurance Co. v. Pac, 337 So.2d 397 (Fla. 2d DCA 1976), cert. denied, 351 So.2d 407 (Fla. 1977), for not stacking class two insured coverage.

Out-of-state cases considering garage policies have indicated that stacking should be based on the number of dealer plates, and not cars on the lot. In Fuqua v. Travelers Ins. Co., 734 F.2d 616 (11th Cir. 1984)(Ala. law) the court held that an employee of a car dealership was a class two insured and so could not stack coverages under the policy. However, the case is instructive since it notes that there were 27 "dealer plate" automobiles owned and insured by Travelers, and that the owner had paid a premium for each vehicle for uninsured motorist coverage. Thus, the clear implication of the case is that a class one insured (such as an individual owner) would have been entitled to stack the 27 "dealer plate" coverages, but not to stack UM for every car on his car lot that would also have been covered under the insurance policy.

Marchese v. Aetna Casualty & Surety Co., 284 Pa.S. 579, 426 A.2d 646 (1981) also addressed a "garage" policy of insurance covering 20 "dealer plates". In this case, the individual driving one of the cars was specifically designated in the policy, so that the court treated him as a class one insured and held he was entitled to stack the 20 plates. Again, there was no suggestion that he was entitled to stack all vehicles on the lot of the Pontiac-Cadillac dealership. Plaintiffs attempted to argue below that the principles of this case were somehow not applicable because the insured there was a class two insured. While the

individual plaintiff in Marchese may not have been the named insured in the sense that he paid the premiums on the policy, he was specifically named in the policy and, as the opinion clearly indicates, given the rights of a named or class one insured to stack. However, that stacking was as to dealer plates, not all cars on the lot covered by the policy. 5/

Plaintiffs' attempt to analogize the fleet policy cases can be of no avail (Pl Br 28-29). In such fleet policy cases coverage is based on the number of vehicles on the policy, as indicated in Maxwell v. U.S. Fidelity & Guaranty Company, 399 So.2d 1051 (Fla. 1st DCA 1981) ("vehicles would from time to time be added or deleted by endorsement"), and Florida Farm Bureau Casualty Company v. Andrews, 369 So.2d 346 (Fla. 4th DCA 1978)(the fleet policy "provided coverage for six

5/ In the trial court Plaintiffs cited Utica Mutual Ins. Co. v. Contrisciane, 504 Pa. 328, 473 A.2d 1005 (1984) (R 549). In this case, the insured (decedent) was operating a car insured under his employer's fleet policy when killed in an accident with an uninsured motorist. The court held, consistent with the holding in Pac, supra, that the decedent, as a class two insured, was not entitled to stack all cars under his employer's policy, but was entitled to the UM coverage on the particular vehicle he was occupying. 437 A.2d at 1010. However, the court went on to hold that since the decedent was a class one insured under his father's policy, which covered three vehicles with UM limits, that the decedent's estate was also entitled to stack those three UM coverages. Id. at 1012. Once again, the decedent was not entitled to stack a fourth level of UM under his class one insured policy, even though the policy unquestionably provided UM for him while he was in the fourth vehicle. Consequently, the Utica case is entirely consistent with the prior rulings of the Florida courts and the principles behind the stacking of UM coverage based on the number of UM premiums.

pick-up trucks" and "the fleet policy provided for uninsured motorist coverage on each of the trucks in the amount of $100,000/$300,000.") This is clearly distinguishable from the garage policy at issue for which UM was based on the number of "hard" dealer plates.

Plaintiffs' citation of Posey v. Commercial Union Insurance Company, 332 So.2d 909 (La. App. 1976) is inapposite for two reasons. First, at the time of the decision, the applicable Louisiana statute provided that each insurance policy had to have a specific amount of UM ($5,000) for each vehicle for which there was liability coverage. Id. at 914. By contrast, the Florida Statute (and the subsequently amended Louisiana statute) speak in terms of UM being provided in the amount of bodily injury limits. Second, the result reached in Posey under that different statute is clearly contrary to the result that would be compelled under Florida law in Tucker, where if the insureds had paid premiums for three UM coverages they would be entitled to stack three such coverages.

E. Plaintiffs paid premiums for only two UM coverages.

Plaintiffs' first "point" on appeal relies entirely on a misreading of the undisputed evidence and a misunderstanding of the purpose of an expert. As indicated in the Statement of Facts, Plaintiffs' insurance policy unquestionably showed in Item 2 that they had paid a $14 premium for UM coverage and in Item 10, that the UM coverage was calculated at the

rate of $7 per plate times two plates (R 7, 9). Additionally, Mrs. Coleman knew that she had two plates and knew that her premiums in general in her insurance policy depended on the number of plates, as contrasted with temporary tags (R 926-927).

Plaintiffs next assert incorrectly that their expert, Dale Johnson, "stated that the number of cars for which UM premiums were paid was fifteen although the charge was not on a per vehicle basis." (Pl Br 10). As indicated in the Statement of Facts, he did not say this, but specifically noted that under some insurance policies, one pays a premium for all vehicles insured, but that "this one you're not." (R 952).

Plaintiffs conclude their argument here by stating that Mrs. Coleman paid for coverage on the vehicles, regardless of how the premium is calculated, and thus should be able to stack fifteen coverages. (Pl Br 14) Plaintiffs again confuse the concept that UM coverage applies to any car they might occupy (not just the fifteen they own), and is a separate issue from how many coverages are stacked - which depends on how many UM premiums are paid. See Part B above and Coleman at 34.

Beyond contradicting the undisputed facts, including that of their own expert, Plaintiffs' argument assumes that their expert would be permitted to testify in contravention of the plain language of the policy and have that considered as

factual evidence. That simply ignores the role of the expert, a problem manifested in Plaintiffs' second "point" on appeal.

F. The Second District did not err in reviewing the trial court's opinion in light of the "expert" opinion evidence.

As noted above, Plaintiffs' second "point" begins with the erroneous assumption that their expert testified that Plaintiffs were paying 15 UM premiums (Pl Br 14, Point II heading). Incredibly, Plaintiffs then go on to cite to the testimony regarding paragraph E of the policy's UM endorsement, which seeks to limit total UM coverage to the amount of one UM coverage regardless of the number of covered autos. (R 15)

Tucker provided that such a clause did not limit UM to one coverage when a class one insured had paid separate premiums for more than one UM coverage. In the instant case, Plaintiffs paid for two UM coverages and thus Tucker must modify this contractual provision to that extent. However, there is nothing that mandates providing insureds with multiple UM insurance beyond the number of coverages for which they have paid premiums. Namely, the purpose of the UM statute is not to give insureds UM coverage bonanzas which they have not paid for. Coleman, supra at 34.

As discussed above, Plaintiffs' expert did not (and indeed, could not) testify as to the "facts" Plaintiffs assert, so that the remainder of their argument is somewhat

confusing. However, Plaintiffs' discussion of the expert cases cited at Pl Br 16 overlooks an important principle of expert testimony (Pl Br 16). "Regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court." Palm Beach County v. Town of Palm Beach, 426 So.2d 1063, 1070 (Fla. 4th DCA 1983), remanded, 460 So.2d 879 (Fla. 1984). In its opinion remanding, the Supreme Court specifically approved the district court's holding that such expert testimony amounting to legal conclusions should have been excluded. 460 So.2d at 882.

Finally, Plaintiffs' argument overlooks the fact that the Second District was reviewing a pure question of law here. Even Plaintiffs' counsel observed as much when he stated at the outset of the trial:

> Your Honor, it's irrelevant, I think, as to what the intentions are. It's the question of coverage and I think it's up to the Court as a matter of law, and after the Court hears the insurance experts it may help to decide this issue, but if you look at the policy it very clearly deals with the situation of involving non-owned and owned automobiles and under UM and liability coverage.

(R 890 emphasis added; see also R 882). As the Eleventh Circuit recently noted, "Under Florida law, the interpretation of an insurance contract is also a matter of law to be decided by the court, which is subject plenary

review." Gulf Tampa Drydock Company v. Great Atlantic Insurance Company, 757 F.2d 1172, 1174 (11th Cir. 1985). In sum, there was no dispute in the facts of this case and it is clear that Plaintiffs paid only two UM premiums under their policy. The question of the extent to which Plaintiffs can stack UM coverage is purely a question of law, as Plaintiffs' attorney recognized himself. Since a question of law was involved, the Second District was entitled to a plenary or de novo review of the issue. 6/

Since Plaintiffs recovered $75,000 from the liability insurers of the other vehicles, there can be no recovery of the $50,000 UM coverage (2 x $25,000) available from FIGA. See Bayles v. State Farm Mutual Automobile Insurance Co., 483 So.2d 402 (Fla. 1986) (the instant case, like Bayles, arose from an accident predating the amendment in Chapter 84-41, Laws of Fla.).

II. THE TRIAL COURT DID NOT ERR IN OFFSETTING FIGA'S STATUTORY LEGAL LIMIT OF LIABILITY BY THE AMOUNT OF SETTLEMENT PROCEEDS RECEIVED BY THE INSURED.

Plaintiffs' offset argument is reached only if this Court reverses the Second District and permits stacking based on

6/ See also, Lumber & Wood Products, Inc. v. New Hampshire Insurance Company, 807 F.2d 916, 918 (11th Cir. 1987) in which the court again observed that the construction of an insurance policy was subject to a de novo review, rather than under the "clearly erroneous standard," and that this applied even if the construction involved mixed questions of law and fact, so that the reviewing court is free to substitute its judgment for that of the trial court.

every auto which Plaintiff's might own or occupy. Plaintiffs then complain that the trial court subtracted the $75,000 Plaintiffs received from the tortfeasors' insurance from FIGA's $300,000 limit, rather than the $375,000 potential UM coverage urged under Plaintiffs' stacking theory.

Plaintiffs quote Section 631.57(1)(b), Florida Statutes (1985) stating that FIGA is the insurer to the extent of its obligations on covered claims (miscited in their brief as § 631.56(1)(b)). Section 631.57(1)(a)3 states that "such obligations shall include only that amount of each covered claim which is in excess of $100 and is less than $300,000..."

Plaintiffs fail to discuss Section 631.61, Florida Statutes (1985) entitled "Non-duplication of Recovery", which provides:

> (1) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall not be required to exhaust first his rights under such a policy. Any amount payable on a covered claim under this part shall be reduced by the amount of any recovery under such insurance policy.

This section makes it clear that although an insured does not have to seek recovery from other insurance sources before coming after FIGA 7/, that in the event the party seeking recovery from FIGA has previously recovered funds from an

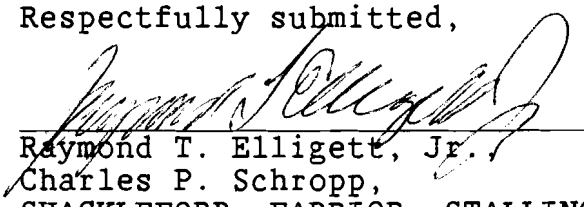
7/ This coincides with Section 631.60, Florida Statutes (1985) which provides that a claimant recovering from FIGA is deemed to have assigned his rights under the policy to FIGA.

insurer, that the amount "payable on a covered claim" is reduced by that recovery. Since Section 631.57 provides that the maximum amount payable on a covered claim by FIGA is $300,000, the non-duplication of recovery section makes it clear that the $75,000 already recovered by the Plaintiffs from other insurance companies would have to be offset against FIGA's $300,000 limit.

## CONCLUSION

Based on the foregoing arguments, it is apparent that Plaintiffs were only entitled to stack the two $25,000.00 UM coverages for which they paid premiums. Since Plaintiffs have already received settlements in excess of this amount from the liability insurers of the other drivers (namely $75,000.00), they are not entitled to any further recovery under their own UM policy. Therefore, the opinion of the Second District should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail, postage prepaid, to: WILLIAM N. GRAHAM, ESQ., 800 W. DeLeon Street, Tampa, FL 33606 this 2nd day of April, 1987.

Raymond T. Elligett, Jr.

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