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SUPREME COURT OF FLORIDA

RAYMOND COLEMAN, ET AL.,

Petitioners,

v.

FLORIDA INSURANCE GUARANTY ASSOCIATION, INC.,

Respondent.
_____/

CASE NO. 70,075
SECOND DISTRICT COURT
OF APPEAL NO. 86-648

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

INITIAL BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

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 the Appendix are designated by the prefix "App".

Reference to §627.727, Florida Statutes (1981), is referred to as "UM Statute(s)" and the term uninsured/underinsured motorist is referred to as "UM".

STATEMENT OF THE CASE AND FACTS

As a result of an automobile accident which occurred on April 23, 1983, the Appellant, Raymond Coleman, suffered severe disabling injuries. After exhaustion of the tortfeasors' liability policy limits through settlement, Appellants sought the UM coverage under a garage policy carried in the name of Appellant's wife, Sandra Coleman d/b/a Coleman Auto Sales.

The garage policy extended liability and UM coverage to "any auto." (App. 1) 15 motor vehicles were owned by Sandra Coleman, Appellant, on the date of the accident.

The garage policy did not on the face of it disclose that the UM premium was calculated on the basis of dealer plates. (R 9). This inference was drawn from the testimony at trial and not the policy itself, as the term "plates" was not defined in the policy. (R 4-22).

All 15 motor vehicles owned by Appellant were registered and garaged in the State of Florida. (R 889-893, 924-925).

Appellant, the named insured, testified at trial that at the time she purchased the garage policy there was no mention or discussion of UM coverage by the insuror at all. (R 905).

Further, the Appellant testified 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. (R 907-908). She further testified it was her intention to purchase insurance for every vehicle owned by her. (R 920-921).

Evidence at trial established that Appellants had two dealer tags and 50 paper temporary tags issued at material times during the policy period. (R 885, 925, 928). Appellant testified that once a temporary tag had been assigned to a particular vehicle that it was good for 20 days. (R 926) She further testified that she routinely used paper tags in her day to day operations. (R 926-927). She stated that motor vehicles were placed on the roads of this State with these temporary tags in the conduct of her business. (R 927).

Since FIGA disputed at trial the number and nature of vehicles for which coverage was extended under the garage policy, testimony by insurance experts was deemed essential to resolve these factual issues.

Dr. Dale Johnson was called and accepted by the Trial Court as an expert in insurance. (R 930-942), (App. - 4). Dr. Johnson testified that the garage policy was a contract of adhesion. (R 946).

Dr. Johnson testified that tying the premium to dealer tags was not a proper exposure unit (basis for calculating premiums, R 949) in respect to a Class I insured. (R 952) He testified that the premium charged Mrs. Coleman for UM coverage was not appropriately calculated because the policy was written to her personally rather than to a corporation. The distortion was related to the doctrine of stacking, where stacking is not allowed for corporate insureds, (R 948-950), but would exist for Class I insureds, i.e., Mrs. Coleman and her husband (R 957-958). The insurer should have charged a price per vehicle which would have been more appropriate to the type of contract. (R 950-951).) Further, the expert stated that the opportunity was there for the insurer to charge a specific premium for each insured vehicle. (R 951). He stated that under this garage policy the insurer was insuring all the motor vehicles but not charging premiums on a per vehicle basis. (R 952). He further stated that the premium charged was a totally different issue from the coverage granted under the policy. (R 952). Dr. Johnson testified that UM coverage would be stacked on all 15 motor vehicles regardless of the price paid for the premium. (R 957).

On cross examination, Dr. Johnson testified that liability coverage was extended to all 15 vehicles and that the coverage was not affected by the number of exposure units, i.e. two operators, used by the insurance company to calculate premiums. (R 966). He further stated that while the basis for premium

charges on a business automobile "fleet" policy may change, the coverage extended under the policies would not. (R 968). He stated that since the insurance policy is a contract of adhesion it would be appropriate, if you were going to limit stacking to the number of plates, to say so in the policy (R 974-975); and it should also have been contained in Paragraph E, the limitation of liability provisions. (R 975-976).

Eric Tilton, Esquire, was called on behalf of Appellants and qualified as an expert on the Florida Insurance Code, statutory construction and on the Uninsured Motorist Statute. (R 996), (App. - 5). Mr. Tilton testified that he was the primary drafter of the rewrite of the Florida Insurance Code, the overall revision in 1982. (R 990). His official title was Editor in Chief of the Insurance Code Rewrite and he was employed by the Florida House of Representatives. (R 984). He was co-author of the Staff Report. (R 993).

He further testified that the UM limits on the declarations would only exist if there had been a knowing rejection of coverage. (R 1003). He stated that Mr. Coleman, the Co-Appellant, was a Class I insured, (R 1006), and stated that the UM endorsement was clearly a personal UM endorsement, as it talked about family members as opposed to what one might use in

a corporate situation.[1] (R 1003) He further stated that the UM coverage would be stacked irrespective of whether a premium was paid. (R 1007-1008) When asked about the coverage provided under the garage policy and how many times do you have the limits, Mr. Tilton stated:

> . . . [H]ow many times do you have those limits, and the issue, as I understand it in this case, is whether that's times two vehicle tags or is it times fifteen vehicles.
>
> Under the Uninsured Motorist Statute and the case law it would be fifteen vehicles. The Statute says nothing about dealer tags nor nothing about tags period. It speaks to vehicles. (R1001-1002).

Judge Gallagher announced his ruling in a letter to counsel. (App. - 6). Thereafter, the Final Judgment was entered adjudicating UM limits of $25,000 per motor vehicle, aggregating the coverage through "stacking" for total UM coverage of $375,000 and was based in part on its prior Partial Summary Final Judgment which was not appealed. (App. - 3), (App. - 7).

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[1] It should be noted that the trial judge stated on page 3 of his September 3, 1985 letter to counsel announcing his decision that:

> ...I have to accept the dichotomy of the distinction of the various classes and since Mr. Bolves could not get his policy reformed (App. - 2) he is stuck with his Class I "Family" designation which clearly provides for stacking and therefore I must go along with Mr. Grahams' thesis that we stack "all vehicles" which is symbol 21. (Emphasis supplied)

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

FIGA's Motion For Rehearing was denied. FIGA filed its Notice of Appeal and Appellants filed their Notice of Cross-Appeal. The Second District Court of Appeal reversed Judge Gallagher's decision and certified the following question as one of great public importance:

> 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?

The Second District Court of Appeal concluded that the Appellants had only purchased two UM coverages and refused Appellants cross-appeal. (App. - 8).

The Second District Court of Appeal denied rehearing on January 27, 1987. (App. - 9).

Notice To Invoke Discretionary Jurisdiction was served on February 11, 1987.

ARGUMENT

ISSUES PRESENTED

I. DID THE SECOND DISTRICT COURT OF APPEAL ERR WHEN IT CONCLUDED THAT THE COLEMANS' PAID FOR ONLY TWO UM COVERAGES?

II. DID THE SECOND DISTRICT COURT OF APPEAL ERR BY FAILING TO CONSIDER THE EXPERT OPINION EVIDENCE PRESENTED TO THE TRIAL COURT THAT APPELLANTS HAD PAID PREMIUMS ON THE FIFTEEN COVERED AUTOS?

III. 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?

IV. DID THE TRIAL COURT ERR IN OFFSETTING FIGA'S STATUTORY LEGAL LIMIT OF LIABILITY BY THE AMOUNT OF SETTLEMENT PROCEEDS RECEIVED BY INSURED TO PRODUCE UM COVERAGE OF ONLY $225,000?

SUMMARY OF THE ARGUMENT

The Trial Court properly stacked UM coverage on 15 motor vehicles after finding that the named insured, Appellants, had not made a knowing rejection of UM coverage mandated by law. This was justified on the basis that there was ample evidence of a lack of an informed rejection which is undisputed on this record calling for the extension of UM coverage of not less than the liability limits. Further there was evidence that the named insured had paid a premium for UM coverage for "any auto", which by expert testimony would include the 15 motor vehicles owned by Appellant as of the date of the accident. The limitation of liability provisions in the policy were void and against public policy creating an ambiguity in the policy which should be resolved against the insurer. The Court could infer from the testimony that the rating unit used was inappropriate to the coverage written; however, the rating unit used in no way affected the coverage language of the the contract. Finally, because the contract was an adhesion contract, the insurer could have specified that stacking would be limited in some manner to UM coverage determined by dealer plates. The insurer failed to limit their liability in a legal manner in this case.

The Trial Court erred in offsetting FIGA's legal limit of liability by the amount of prior settlements, $75,000, to reduce available coverage to only $225,000. The Trial Court should have declared FIGA's liability to be $300,000 after reducing the insuror's liability by the amount of the prior settlements which were entered into with the consent of FIGA.

The Second District Court of Appeal committed error in reversing the Trial Court by finding that the Coleman's paid for only two UM coverages when they had paid a premium to insure all 15 motor vehicles. The error occurred because the Second District Court of Appeal improperly ignored the expert testimony which adequately supported the judgment of the Trial Court. Assuming, further, arguendo, that the Colemans had only paid for two coverages and the insurer had so limited the UM coverage in a legal manner, which it did not, the stacking of UM coverage is still mandated by law under the UM Statute because the insurer failed to secure an informed rejection of coverage. The public policy of the State therefore extended the UM coverage to the 15 motor vehicles as if the Coleman's had purchased it because they had purchased liability coverage for the 15 motor vehicles.

POINT I

THE SECOND DISTRICT COURT OF APPEAL ERRED WHEN IT CONCLUDED THAT THE COLEMANS' PAID FOR ONLY TWO UM COVERAGES

Whether or not the Colemans paid for two or more UM coverages is a question of fact for which it was necessary for the trial court to receive evidence and was the basis for the one day trial and the subject of testimony of three insurance experts. The Second District Court of Appeal's opinion ignores the evidence received at the trial as to how the coverage was extended under the policy to all 15 motor vehicles owned by Appellants. In effect the Second District Court of Appeal

substituted its judgment on this critical factual issue for that of the trier of fact and decided the issue as a matter-of-law.

The evidence before the trial court was that the Colemans' purchased UM coverage on all fifteen motor vehicles.

The Second District Court of Appeal opinion, at page 3, states that "We conclude that the number of UM coverages available to be stacked should be based upon the number of cars for which UM premiums were paid." Appellants have met this requirement. Professor Dale Johnson stated that the number of cars for which UM premiums were paid was fifteen although the the charge was not on a per vehicle basis. (R 952) He stated that a distinction must be drawn between the premium charged and the coverage extended. (R952) These issues are entirely separate. (R952) In concluding that the issues are one and the same, the Second District Court of Appeal has ignored basic governing principles of insurance and underwriting.

The Second District Court of Appeal's conclusion is based on the provisions of ITEM TEN which attempts to demonstrate how the premium was calculated.

ITEM TEN is not related by any express provisions of the policy to the "COVERAGE" provisions of the policy which are contained in ITEM TWO entitled SCHEDULE OF COVERAGES AND COVERED AUTOS. This construction was supported by the testimony of Professor Dale Johnson at the trial. ITEM TWO, unlike ITEM TEN relied upon by this Appellate Court as the basis for its

Opinion, states unequivocally that "Each of these coverages will apply only to those autos shown as covered autos." The opinion of the Second District Court of Appeal thus wholly ignores express provisions of the policy that clearly state that the UM coverage extended under the policy shall apply to all autos covered under the policy, i.e., in the case at bar, a total of fifteen (15) autos. The same express portion of the policy further states that the policy provides coverage for which a premium charge is shown in ITEM TWO, and not ITEM TEN which was focused on by the Second District Court of Appeal. Unlike ITEM TWO, no limitation or reference is made in ITEM TEN to the extension of UM coverage under the policy. Thus, the UM coverage is extended under ITEM TWO; not ITEM TEN. In effect, the Court's opinion alters this coverage and deprives the Colemans of the UM coverage provided expressly under the contract and which they purchased. The premium paid provided UM coverage on all fifteen autos, regardless of the method of premium calculation. (R 957) Accordingly, the UM coverage on all fifteen autos should be stacked.

It was appropriate for the trial court to stack the coverage on only the fifteen motor vehicles. This holding is consistent with the policy provision which states "Each of these coverages will apply only to those autos shown as covered autos." The policy further underscores the importance of this key contract language under Part II of Page 1 which states:

> A. ITEM TWO of the declarations shows the autos which are covered autos for each of your coverages. The numerical symbols explained in ITEM THREE of the declarations describe which autos are covered autos. The symbols entered next to a coverage designate the only autos that are covered autos.

The Colemans urge the Court not to consider the emotional arguments of the insurer which successfully caused the Second District Court of Appeal to to focus on how cheap the coverage was. The Second District Court of Appeal was impressed by the $14.00 premium. The broad grant of UM coverage was described by the insurer under ITEM TWO, SCHEDULE OF COVERAGES AND COVERED AUTOS. Appellants point out that under the Limitation of Liability Provisions of the UM Endorsement, Paragraph E., the express policy language was to provide only one UM coverage regardless of how much premium was paid or the number of autos covered. (App. -) The insurer counted on the validity of the limitation of liability of insurance provisions of the UM Endorsement to restrict the coverage and not the premium calculation provisions of ITEM TEN.

The price tag approach taken by the Second District Court of Appeal Opinion rewards the insurer for its negligence and intentional failure to abide by the public policy set forth under the UM Statute.

Professor Johnson testified as follows:

> Q. Was there an opportunity in this contract, as you see it, to specifically identify vehicles or to otherwise specifically insure them such that they could insure in that manner? Look under 27, for example.

A. Oh no. There were no specifically described automobiles. That's the purpose of 21, so that you don't have to specifically describe them.

* * * *

A. Yes. The opportunity is there to cover specifically described automobiles if you wish. That allows you if you have you a large number of vehicles to pick and chose those that you do no wish to insure and not insure those that you don't want to.

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

Q. And is there a distinction between a premium charge and the coverage under the policy?

A. Yes.

Q. Are they two entirely separate issues?

A. Totally different issues.

Appellants' construction of the policy was most pointedly underscored at the trial by Professor Dale Johnson when he was asked:

Q. So, in this particular policy if I could direct your attention to the schedule of this policy, which is actually-- it's Item 5, liability insurance premiums. It indicates on there that there are two regular operators and that is used as a rating unit: is that correct?

A. Yes.

Q. So, would you agree with me, then, that the exposure unit with respect to the liability policy is the number of operators?

A. An operator is considered as an exposure unit, but it doesn't effect the coverage. It's still there on fifteen vehicles. (R 966)

While ITEM TEN sets forth the "exposure unit" on the UM coverage like ITEM FIVE sets forth the "exposure" unit on the liability coverage, the coverage is still there on fifteen motor vehicles. (R 952, 966) Just as the UM coverage provisions, the SCHEDULE OF COVERAGES AND COVERED AUTOS under ITEM TWO makes no reference to ITEM FIVE with respect to the extension of liability coverage extended under the policy. The complexity of the policy and the appropriateness of the exposure units utilized is precisely why the trial court deemed it necessary to entertain expert testimony on the issues of fact. Since Mrs. Coleman paid for coverage on the fifteen motor vehicles, regardless of how the insurer calculated the premium she is entitled to stack the coverage. Tucker v. Government Employees Insurance Co., 288 So. 2d 238 (Fla. 1973).

POINT II

THE SECOND DISTRICT COURT OF APPEAL ERRED BY FAILING TO CONSIDER THE EXPERT OPINION EVIDENCE PRESENTED TO THE TRIAL COURT THAT APPELLANTS HAD PAID PREMIUMS ON THE FIFTEEN COVERED AUTOS

On page 6 of the Second District Court of Appeal Opinion, the Court merely recited the provisions of ITEM TEN in rejecting Appellants' argument that the policy does not show that two coverages were being purchased. The correct interpretation to be given to ITEM TEN was the subject of expert testimony. The Second District Court of Appeal ignored this expert testimony

and the basic principles of insurance and underwriting that was properly presented and considered by the Trial Court.

The limitation of liability provisions were contained in the UM Endorsement itself under paragraph E and not ITEM TEN as demonstrated by the testimony of Professor Johnson. Professor Johnson states (R 974-975):

> Q. Wouldn't it be, in your opinion, appropriate to say that if you're going to limit stacking to the number of plates to say so?
>
> A. Yes. I would say it would be appropriate to indicate that you were limiting the stacking to just those vehicles for which you pay the charge for the dealer plates.

Further, he states (R 975-976):

> Q. And further, since you are familiar with Paragraph E, I know it says-- we are talking about the limitations of liability provisions. Wouldn't it mention the number of plates from Paragraph E?
>
> A. It would probably be the appropriate place to put it since it's trying to limit liability.

Paragraph E did not limit coverage in any manner by limiting the UM coverage to the number of plates, but instead attempted to limit the UM coverage to that for one vehicle. The manner it which it was limited was void as against public policy thereby causing an ambiguity to exist within the policy on the subject of limitation of liability for UM coverage. However, ITEM TWO expressly states "Each of these coverages will apply only to those autos shown as covered autos." Hence, the appropriate construction would be to limit stacking to those

identified as "covered autos" and which meet the requirements of §627.727(1), Florida Statutes, i.e. where liability policies are issued for vehicles which are registered and principally garaged in this state. The evidence before the trial court was that the "covered vehicles", the fifteen owned vehicles meeting these requirements, should be stacked regardless of how they were priced for premium, i.e. regardless of how cheap the coverage was. (R 957).

This Second District Court of Appeal's disregard for the expert testimony at trial violates the essential requirements of law and deprives Appellants of due process. §90.703, Florida Statutes; Aetna Insurance Company of Hartford, Connecticut v. Loxahatchee Marina, Inc., 236 So. 2d 12 (Fla. 4th DCA 1970); Red Carpet Corp. of Panama City Beach v. Calvert Fire Ins. Co., 393 So. 2d 1160 (Fla. 1st DCA 1981); Section 9, Article I, Constitution of the State of Florida. In Aetna, supra at 14, the Court stated:

> The purpose of an expert is to aid the trier of fact in the quest for truth in those areas which are not of common knowledge. Obscure connotations of an insurance policy can be greatly illuminated by knowledge of custom and usage in the industry as well as the expert's knowledge of terms which take on a different hue in the specialized field of general knowledge.

Consequently, in the Red Carpet Corporation of Panama City Beach v. Calvert Fire Insurance Co., the First District Court of Appeal reversed a jury verdict where expert testimony of an

insurance expert was excluded. Id. at 1161. The Second District's failure to accept the expert testimony of the factual issue of coverage has erroneously placed it in the position of the de novo trier of fact. It's de facto exclusion of the expert's testimony is error.

Further, in doing so the Second District Court of Appeal has failed to apply the most fundamental basic principle of contract construction that an insurance contract, a contract of adhesion, is to be construed in favor of the insured to provide coverage. 30 Fla. Jur. 2d., §406 et seq.

Appellants would submit that the Second District Court of Appeal misinterpreted the policy and that this misinterpretation was the direct result of its failure to consider the expert opinion testimony presented to the Trial Court. A close reading of the insurance contract and the expert testimony interpreting it adequately supports the judgment of the Trial Court.

POINT III

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 STACK A NUMBER OF UNINSURED MOTORIST COVERAGES EQUAL TO THE NUMBER OF CARS OWNED BY THE INSURED, AND FOR WHICH LIABILITY INSURANCE WAS PURCHASED, REGARDLESS OF HOW MANY PREMIUMS HE HAS PAID FOR UM COVERAGE

The Second District Court of Appeal's rejection of the above Point was in error; however, this issue is a moot point as expert testimony proved the Colemans had purchased the UM coverage described in the contractual language of their policy.

The facts of the contractual purchase of coverage are covered in Point I, a refutation of the Second District Court of Appeal's finding that the Colemans had purchased only two UM coverages, and in Point II, an argument against the Second District Court of Appeal's ignoring of expert testimony as presented at trial and substituting their own judgment de novo.

The Trial Court properly concluded that once the insuror had failed to properly inform the insured of the UM coverage mandated by law the Court was bound to extend the UM coverage mandated by §627.727, Florida Statutes, which provided in pertinent part:

> (2)(a) 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 lower limit complying with the rating plan of the company as may be selected by the named insured; but in any event the insurer shall make available, at the written request of the insured, limits of up to $100,000 each person and $300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the rating plan of the company. (Emphasis supplied)

The UM Statute, as interpreted by the Courts of this State, has made the extension of UM coverage mandatory on all vehicles on which liability coverage is purchased, including the "stacking" of this coverage as to Class I insureds, in the abscence of a knowing rejection of the coverage.

The Final Judgment is merely a reflection of this public policy. (R837-839). This extension of UM coverage where there is a lack of informed rejection is made as a matter of law and

applies regardless of whether UM coverage is purchased or not, whether premiums for UM coverage are paid or not. The operative provision of the Statute is not the purchase of UM coverage, but the bodily injury liability insurance purchased.

The Second District Court of Appeal Opinion incorrectly asserts that the argument of the Colemans' cannot be accepted because it would lead to an irrational result. The Colemans' correctly argue the UM coverage under the policy was limited to the number of covered autos owned by them on the date of the accident. This contention is grounded on express provisions of the insurance policy under ITEM TWO which states in pertinent part: "Each of these coverages will apply only to those autos shown as covered autos."

Unfortunately, this Second District Court of Appeal has focused on the emotional arguments of the FIGA, which were not made on the basis of the scope of coverage expressly limited by the terms of ITEM TWO but intended by FIGA to cause concern over the cheapness of the coverage. Since the policy intended all fifteen autos to be covered, a resolution of the ambiguity should have been to provide UM coverage as to all fifteen vehicles. Such a construction is well grounded in the express provisions of the insurance contract.

The Second District Court of Appeal asserted that the Colemans' argument was inconsistent because the number of cars owned allegedly had no relationship to the extent of liability

coverage under the terms of the policy. However, this conclusion was incorrect. There was a relationship between the UM coverage provided under §627.727(1), Florida Statutes, and the number of cars under the express terms of ITEM TWO which provided:

> This policy provides only the coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those autos shown as covered autos. Emphasis supplied.

Nowhere in ITEM TWO is the amount of the charges related to the specific items covered. The Colemans are entitled to rely on the coverages granted by the wording of ITEM TWO, i.e. 21 = ANY AUTO, given that the exclusions attempted in Paragraph E of the UM Endorsement are invalid.

Appellants would submit that there is nothing irrational about attempting to rely on the express term "only" in limiting the intended coverage. If the motor vehicle was not a "covered auto," no UM coverage would be extended by the contract's express terms. This limiting term was inserted into the insurance contract by the insurer and not the Colemans.

FIGA's arguments based on policy language fail in that the limitations of the extension of UM coverage as matter of law are contained in the UM Statute and not the policy. §627.727(1), Florida Statutes, provides in pertinent part:

> (1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of

> persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy rejects the coverage in writing. (Emphasis supplied)

Accordingly, extension of UM coverage under the statute is not only limited by the term "any auto" since only bodily injury liability insurance is purchased for this class by the named insured, but the named insured's motor vehicles must be registered or principally garaged in this State. It is undisputed that all the motor vehicles for which the Trial Court extended coverage were registered and principally garaged in this State. Further, it was undisputed that the subject policy extended liability coverage to each of the named insured motor vehicles which were registered and garaged in this State. From the foregoing it is obvious that UM coverage would not be extended to any car occupied by the named insured which was not registered or principally garaged in this State.

Accordingly, when the named insured purchases liability coverage the named insured is also purchasing the UM coverage extended automatically under §627.727, Florida Statutes, at the same time unless there has been an informed rejection of the coverage.

The failure of the insuror to abide by the law is the chief reason why coverage is extended. FIGA has agreed that there was a failure to abide by the law and that coverage is extended.

However, FIGA seeks to mitigate the effect of the statute by making arguments with regard to the UM premiums charged which would only apply in those instances where there was an informed rejection. Mrs. Coleman was entitled to rely on the ITEM TWO--SCHEDULE OF COVERAGES AND COVERED AUTOS, which stated that she was obtaining UM coverage for "any auto" for "a charge." Mrs. Coleman, being a sensible and reasonable person, was correct to interpret this to mean the autos she owned, as she rejected nothing. If the named insured had made an informed rejection of coverage, then a meritorious claim could be made that UM coverage should be limited by the premiums paid. However, if the insuror is attempting to ignore or limit the extension of UM coverage as mandated by law it will not charge a premium for the UM coverage it is intentionally trying not to extend. Consequently, in those case where insurors were issuing excess liability policies but not providing corresponding UM limits or UM coverage, the insurors were not charging premiums for the UM coverage. Spira v. Guaranty National Insurance Company, 468 So. 2d 541 (Fla. 4th D.C.A. 1985); Sirantoine v. Illinois Employers Insurance of Wausau, 438 So. 2d 985 (Fla. 3rd D.C.A.); First State Insurance Co. v. Stubbs, 418 So. 2d 1114 (Fla. 4th D.C.A. 1982), review denied, 426 So. 2d 26 (Fla. 1983); Aetna Casualty & Surety Company v. Green, 327 So. 2d 65 (Fla 1st D.C.A. 1976); cert. denied, 336 So. 2d 1179 (Fla.

1976); Chicago Ins. Co. v. Dominguez, 420 So. 2d 882 (Fla. 2nd D.C.A. 1982). In fact the insurors intended only to extend the excess liability limits (sometimes in the millions of dollars). However, those insurors have found UM coverage extended none-the-less in the absence of a knowing rejection of coverage. Judge Grimes opinion in Chicago Ins. Co. is very instructive, as he states:

> It may be that those companies in the business of writing umbrella policies have not fully appreciated the necessity of obtaining a rejection of higher limits. However, these policies do provide coverage which includes liability for motor vehicle accidents, and the statute delineates no exceptions. Supra at p. 883.

The public policy enunciated in the UM Statute required the extension of UM coverage. The Court's, in effect, found that the purchase of liability insurance includes UM coverage unless rejected. The Second District Court of Appeal held that because $1,000,000 of liability insurance was purchased that the insured was entitled to $1,000,000 in UM coverage. All, Appellants would add, without payment of a single dime of premium for UM coverage. The same cavalier attitude that extended to these insurors issuing umbrella policies apparently has set in from time to time in carriers issuing fleet or garage policies. These insurors cannot simply look to the Courts for protection when they intentionally or negligently fail to abide by the requirements of the Florida UM Statute.[2]

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[2] Appellant would note that Chapter 84-41 §1, Laws of Fla. provided that umbrella policies are no longer included in the statute.

FIGA's reliance on language in Tucker v. Government Employees Insurance Co., 288 So. 2d 238 (Fla. 1973), is misplaced since Tucker was not a case involving the extension of UM coverage based on the lack of an informed rejection. Further, FIGA's limiting interpretation of Tucker simply is not correct. Tucker states:

> The determinant of the amount of coverage is the total which the insured purchases pursuant to the authority of the statute and not that which the insuror otherwise attempts to limit by a provision of the policy. (p.242)

Consequently, it is the amount of liability insurance purchased under the UM statute that is critical. If UM is implied for lack of an informed rejection because the named insured has purchased liability coverage, then the named insured has purchased UM coverage pursuant to the authority of the statute. Tucker merely establishes that UM coverage is then aggregated. Tucker further stands for the proposition that the insuror cannot attempt to limit UM coverage by any provision of the policy, be it a scheme based on premiums (in this case dealer plates) or other such limiting provisions. Auto-Owners Insurance Co. v. Prough, 463 So. 2d 1184 (Fla. 2nd D.C.A. 1985). Thus, the insuror cannot limit its liability for extended UM coverage under §627.727, Florida Statutes, and its obligation to secure an informed rejection of coverage, by merely tying the UM coverage to the number of vehicles for which it will insure, the number of premiums it will charge, or the

number of dealer plates being used even if the plates become a basis for charging a premium. Under §627.727, Florida Statutes, it is the extension of liability coverage and requirement to secure a rejection of UM coverage which is critical, not the number of license plates being used in someone's business. The number of license plates being used is not referenced in the statute.

FIGA's reliance on isolated language in Tucker, which was not a case where UM coverage was implied as a matter of law but actually purchased, can only serve to mislead this Court. The Coleman's claim not only that they paid a premium for the coverage but also because there was an absence of an informed rejection of the mandated coverage that payment of a premium was unnecessary to extend the UM coverage.

In Tucker, the Supreme Court stated:

> A reading of Section 627.0851, F.S. as it appears in Florida Statutes 1969 and F.S. Section 627.727, as the latter appears in Florida Statutes 1971, the uninsured motorist statute, does not disclose any statutory basis for a "stacking" exclusion in a policy combining auto liability coverage for two or more automobiles of the named insured with uninsured motorist coverage included. (p.241)

Logic dictates that one cannot purchase what one is not offered. If the law requires that coverage be offered but it is not, can the insuror be secure by stating that the coverage was not purchased. Mullis v. State Farm Mutual Auto Ins. Co., 252 So. 2d 229 (Fla. 1971), and its progeny, i.e. Tucker, stand for the notion that stacking is available in all situations of

multiple UM coverage and cannot be limited by policy provisions or premium schemes of the insuror. Auto-Owners Insurance Co. v. Prough, 463 So. 2d 1184 (Fla. 2nd D.C.A. 1985). The extent of coverage is that purchased pursuant to §627.727, Florida Statutes, whether that coverage be implied where there is no informed rejection of coverage or where it is specifically purchased after an informed rejection. In either instance, the Trial Judge held that the coverage is stacked. In the case at bar, since the Trial Judge implied UM coverage on each of the motor vehicles for which liability coverage had been extended, he simply stacked the coverages as would occur if they had been properly charged for.

Lastly, it must be stated that Paragraph E of the Garage Policy which pertains to OUR LIMIT OF LIABILITY makes an attempt to limit coverage to the limits in the declarations regardless of the number of covered autos, insureds, claims made or vehicles involved. Such provisions have been repeatedly held to be impermissible. Tucker v. Government Employees Insurance Co., 288 So. 2d 238 (Fla. 1973). No attempt is made in section E to limit the liability for UM coverage based on the premium structure set forth in ITEM TEN thereby creating a clear ambiguity. Even the garage policy itself seems to limit its concerns to multiple extensions of UM coverage to matters or events other than premiums charged. Since many of the terms referenced in Paragraph E are emphasized by bold print and have

special meaning, the absence of any specific reference to the word premium appears to give that term no particular significance in terms of the limitation provisions pertaining to UM coverage. Consequently, by the express terms of the policy the premiums paid have no bearing on the limitations of coverage provisions, Paragraph E, or the provisions of ITEM TWO and ITEM THREE.

Testimony at trial demonstrated that because the named insured was not incorporated that the rating unit was inappropriate. The testimony at trial made it clear that the basis for calculation of the premium produced greater coverage to a Class I insured than was justified by the rating unit because the insuror had failed to require the Plaintiffs to incorporate their business. It should be noted, as was the case by Judge Gallagher, that FIGA voluntarily abandoned its attempt to reform the subject policy in a manner that would suggest that the Plaintiff was not entitled to Class I insured status. In the Trial Judge's Order Dismissing Counterclaim, the Trial Court dismissed with prejudice FIGA's attempt at reformation. (R - 259), (App. -). This action is particularly important in that FIGA cannot claim mistake of fact as to the nature or extent of coverage granted under the subject Garage Policy. Further, FIGA became subject to the apparent ambiguities created by the policy and its application to a Class I insured who was a family member of the named insured with the broad interpretation and

extensions of coverage under §627.727, Florida Statutes, which would not have been available had the named insured been a corporation.

FIGA tries to create sympathy for its position by citing certain aberrational results which are not only highly improbable but are directly controllable by the insuror by simply obeying the law, the requirements of §627.727, Florida Statutes, by seeking to obtain from the named insured proper rejections of UM coverage. This advice would be particularly appropriate where the policy covers Class I insured's. Certainly, the seeking of a valid informed rejection of coverage would solve the improbable and extreme aberrational nightmares postulated by FIGA.

The case of Florida Farm Bureau Casualty Co. v. Andrews, 369 So. 2d 346 (Fla. 4th D.C.A. 1978) held that a commercial fleet policy providing for UM coverage of $100,000/$300,000 on each of six trucks would be stacked on a policy written to Pic-Nic Tomato Farms, Inc. which also listed Andrews as a named insured. Along with a $100,000/$300,000 of UM coverage for a vehicle privately owned by Andrews, the total coverage was stacked to produce $700,000 of UM coverage. The Trial Court entered summary judgment in favor of Andrews. It is unclear from the written decision as to how the policy was written and as to whether separate premiums were charged on each of the trucks. The case basically stands for the proposition that

stacking of coverage on commercial vehicles is available to the same extent as in private policies when the commercial policy insures the named individual insured.

In Lumbermans Mut. Cas. Co. v. Martin, 399 So. 2d 536 (Fla. 3rd D.C.A. 1981), the Court stacked UM coverage on four commercial vehicles to produce $60,000 of UM coverage. The Court held that neither the nature and purpose of the insured vehicles is material in deciding the stacking issue. The primary determinant was that the policy was written to cover a "class one" resident relative of the named insured. Supra at p. 538. In the case at bar the injured Appellant is and was determined to be a "class one" resident relative of the named insured. This status has not been attacked on appeal. The Third District Court of Appeal distinguished Travelers Insurance Co. v. Pac, 337 So. 2d 397 (Fla. 2d D.C.A. 1976) which denied stacking to "class two" insureds, omnibus insureds who are not named insured's or relatives of the named insured.

This "class one"/"class two" distinction was again recognized by the Second District Court of Appeal in Cox v. State Farm Mutual Automobile Insurance Company, 378 So. 2d 331 (Fla. 2nd D.C.A. 1980) where the Court limited its holding in Pac to those who achieve their status as an insured only by driving an employer's vehicle. Supra at p. 332. Had premiums been of significance in the Pac decision, coverage should have been extended to Class II insured's, or omnibus insured's.

However, the public policy of this State has flowed from the requirements of the UM Statute and not the insurance policy.

In a case cited by Plaintiffs/Appellants to the Trial Court, the case of Posey v. Commercial Union Insurance Company, 332 So. 2d 909 (La. Ct. App. 2nd Cir. 1976), stacking was permitted on two of three vehicles used for commercial vehicles. The policy did not list any specific automobiles or number of motor vehicles for which liability coverage is afforded. The named insured had originally purchased and paid premiums on three vehicles, but one vehicle had been disposed of prior to the accident. The Court stacked only two of the vehicles, not being persuaded by the insured that three vehicles should be stacked because three premiums had been paid. The Court looked to the vehicles owned at the time of the accident for which liability insurance existed rather than the premiums paid. Like Florida, stacking was mandated by the public policy enunciated by the UM Statute; not premiums paid.

Stacking has been justified on three grounds. See discussion in Taft v. Cerwonka, 433 A. 2d 215, 217 (R.I. 1981) First, the policy is ambiguous causing the ambiguous policy provisions to be construed in favor of the insured. Second, "stacking" is dictated by the statute and is a matter of public policy. Third, the insured has paid premiums for UM coverage on multiple vehicles and thus is entitled to coverage based on his purchase.

In some jurisdictions, distinctions are drawn between the named insured and family members and permissive users. Fuqua v. Travelers Ins. Co., 734 F. 2d 616 (11th Cir. 1984) and Marchese v. Aetna Casualty & Surety Co., 284 Pa. S. 579, 426 A. 2d 646 (1981), are generally cited for the proposition that dealer plates are a valid basis in fleet policies for limiting UM coverage. However, neither of these cases dealt with a Class I insured. In fact, the claimants were Class II, omnibus insured and/or contemplated users. The claimants argued that as contemplated users they occupied the same position as Class I insureds. The argument worked to a limited extent in Marchese and didn't fly in Fugua. Their special status stemmed from the dealer plates.

Judge Gallagher reviewed the authorities and considered the arguments of FIGA and rejected them on the notion that Florida law directs the extension of UM coverage where there exists no rejection of UM coverage mandated by law. Because multiple vehicles were extended liability coverage under the policy, the Trial Court properly aggregated the UM coverage available to a Class I insured. The Trial Court concluded further that the insurance contract was a contract of adhesion and ambiguities should be resolved in favor of the insured.

POINT IV

THE TRIAL COURT ERRED IN OFFSETTING FIGA'S STATUTORY LEGAL LIMIT OF LIABILITY BY THE AMOUNT OF SETTLEMENT PROCEEDS RECEIVED BY INSURED TO PRODUCE UM COVERAGE OF ONLY $225,000

The Trial Court held that the $75,000 of settlement proceeds received by Appellant should offset FIGA's legal liability limit of $300,000 to produce only $225,000 of UM coverage for the accident of April 23, 1983. (R 838). The Trial Court had found UM coverage totalling $375,000 after stacking 15 autos at $25,000 per vehicle. Applying the offset of $75,000 would properly produce a policy liability of $300,000 which was FIGA's legal limit. Accordingly, assuming that only $375,000 of UM coverage existed, the Trial Court should have declared FIGA's liability to be $300,000 rather than the $225,000.

§631.56(1)(b), Florida Statutes, provided in pertinent part:

> (1) The association shall:
>
> (b) Be deemed the insurer to the extent of its obligation on the covered claims. . . .

Construing the limitation provisions of §631.56(1)(a)3, Florida Statutes with the obligation provisions of subsection (1)(b) supports the Colemans' argument. The Trial Court cited no authority for the application of the offset to FIGA's legal limit. The Trial Court should have declared the available UM coverage to be $300,000.

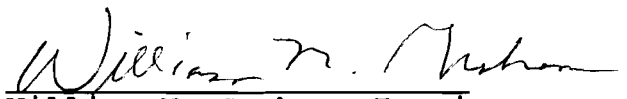
CONCLUSION

The Second District Court of Appeal committed error in reversing the Trial Court by finding that the Coleman's paid for only two UM coverages when they had paid a premium to insure all 15 motor vehicles. The error occurred because the Second District Court of Appeal improperly ignored the expert testimony which adequately supported the judgment of the Trial Court. Assuming, further, arguendo, that the Colemans had only paid for two coverages and the insurer had so limited the UM coverage in a legal manner, which it did not, the stacking of UM coverage is still mandated by law under the UM Statute because the insurer failed to secure an informed rejection of coverage. The public policy of the State therefore extended the UM coverage to the 15 motor vehicles as if the Coleman's had purchased it because they had purchased liability coverage for the 15 motor vehicles.

The Trial Court properly extended UM coverage to each of the 15 autos in Appellants' inventory. The Trial Court properly stacked the UM coverages implied by law because the insuror failed to obtain a valid knowing rejection of UM coverage mandated by law and because the Colemans had paid a premium for the coverage. The Trial Court erred, however, in offsetting FIGA's legal liability limit by the $75,000 received by Appellants in settlement proceeds. The Trial Court should have declared FIGA's UM liability to be $300,000 for the accident of April 23, 1983. Accordingly, the Second District Court of

Appeal should be reversed and this cause should be remanded back to the Trial Court with instructions to enter judgment for Appellants declaring that FIGA's legal liability for UM coverage to be $300,000.

Respectfully submitted,



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