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SUPREME COURT OF FLORIDA

RAYMOND COLEMAN, et al.,

Petitioners,

vs.

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

REPLY BRIEF OF PETITIONERS

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TABLE OF CITATIONS

Because there was a lack of an informed rejection of UM coverage on 15 motor vehicles for which liability coverage was purchased in the amount of $25,000 each, Plaintiffs argue that there was not less than $375,000 in aggregate UM coverage.

The premium for the UM coverage can be said to be a part of the premium for the liability coverage since the insured is purchasing statutory UM coverage when he buys liability coverage. Since the insured pays a premium for the liability coverage and, in addition, the implied UM coverage. In essence there exists two types of UM coverage. One coverage is provided as part of any liability policy where there is no informed rejection of it. The other form of UM coverage is that which is contractually purchased. Ordinarily a premium is charged for the latter and not the former primarily because in the former there is a lack of attention by the insurer to live up to its statutory responsibilities.

Plaintiffs, of course, prefer the compelling logic of the Trial Judge rather than, as counsel for FIGA puts it, the compelling logic of the Second District Court of Appeal in finding that the aggregate coverage before setoff was $375,000. The Second District Court of Appeal did not struggle with the demeanor of witnesses or the conflicting expert testimony. Further, the Trial Judge made his decision after a day of testimony giving due regard for the totallity of the evidence and not isolated excerpts of transcripts.

It is clear that a coverage error was made by the insurer in this case that could not be rectified by the abortive attempt of FIGA to reform the policy. Instead, FIGA has chosen to seek refuge in the premium basis for the coverage rather than the coverage language in the policy which is intended to cover all the motor vehicles. Professor Dale Johnson very clearly stated contrary to the implications of counsel for Defendant, that the policy intended to insure all the motor vehicles in inventory when he stated that "[u]nder 21, you're insuring all of them . . . ." (R 952, Emphasis supplied). What clearer statement of coverage can one make? He also said that your not paying a premium for all of them. However, Professor Johnson goes on to state that the premium basis was invalid because of the nature of the UM coverage which is mandated by the UM statute. He states that the "exposure unit" is invalid because of how the policy was drawn to cover a Class I insured. FIGA none-the-less wants this Court to base its decision on this invalidly and erroneously applied "exposure unit" concept in a case where FIGA did not have a justifiable basis for reformation of the policy, where the insurer did not properly inform the insured as to the nature of coverage and where the insurer knowingly included invalid limiting exclusions in the policy to defeat the rather clear statement of public policy of this State allowing the stacking of UM coverage.

Further, Plaintiffs contend that whatever premium was paid it provided for more than two UM coverages, i.e. ITEM "21"

insured all of them. Defendant's contention that Plaintiffs undisputedly paid premiums for two coverages is inaccurate and at odds with Paragraph E - OUR LIMIT OF LIABILITY. The concept of what a "premium" is and how it is calculated can be the subject of gross manipulation by the insurance company. By focusing on the premium paid rather than the coverage purchased, the Defendant is attempting to carve out a premium exception to the UM Statute. This exception will represent a retreat from the public policy of this State favoring the stacking of UM coverage.

The endorsement used in the instant policy is a common Insurance Services Office form providing family UM coverage. This form is used in thousands of policies. At stake is the UM coverage provided under it. Professor Johnson has testified that any limitation of coverage related to any premium charge should have been contained in Paragraph E - OUR LIMIT OF LIABILITY. This policy was purchased in 1982. Yet the policy contains an endorsement CA 2X 17 (Ed. 01 78) prepared in either 1977 or 1978. Paragraph E - OUR LIMIT OF LIABILITY STATES:

> **E. OUR LIMIT OF LIABILITY**
>
> 1. *Regardless of the number of covered autos,* **insureds,** claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the limit of UNINSURED MOTORISTS INSURANCE shown in the declarations.
> 2. Any amount payable under the insurance shall be reduced by:
>
> a. All sums paid or payable under any workers' compensation, disability benefits or similar law, and
>
> b. All sums paid by or for anyone who is legally responsible, including all sums paid under the policy's LIABILITY INSURANCE.
>
> 3. Any amount paid under this insurance will reduce any amount an insured may be paid under the policy's LIABILITY INSURANCE.

(App. 1)

In the supplementary Appendix attached hereto is a sample Insurance Services Office form PP 04 66 (Ed 10-82) prepared sometime in 1982. The LIMIT OF LIABILITY provisions are as follows:

LIMIT OF LIABILITY

The limit of liability shown in the Schedule or in the Declarations for Uninsured Motorists Coverage is our maximum limit of liability for all damages resulting from any one accident with an uninsured motor vehicle. The limit of liability shown in the Schedule or Declarations for Excess Underinsured Motorists Coverage is our maximum limit of liability for all damages resulting from any one accident with an underinsured motor vehicle. This is the most we will pay whether Uninsured Motorists Coverage or Excess Underinsured Motorists Coverage applies, regardless of the number of:

1. Covered persons;
2. Claims made;
3. Vehicles or premiums shown in the Schedule or in the Declarations; or
4. Vehicles involved in the accident.

Any coverage afforded under this endorsement shall apply over and above all sums paid or payable because of the bodily injury under any of the following:

1. Workers' compensation law; or
2. Disability benefits law or similar law; or
3. No-fault coverage; or
4. Automobile medical payments coverage.

Except with respect to coverage under paragraph 2. of the definition of uninsured motor vehicle, any coverage afforded under this endorsement shall also apply over and above all sums paid or payable because of the bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A.

With respect to coverage under paragraph 2. of the definition of uninsured motor vehicle, the limit of liability for Uninsured Motorists Coverage shall be reduced by all sums paid or payable because of the bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A.

In no event will a covered person be entitled to receive duplicate payment for the same elements of loss.

(Supp. App.)

Under the 1982 ISO form, a limitation of liability is placed on the premiums shown in the declarations.

Defendant asserts that the coverages should be limited to two. Nothing in Paragraph E, endorsement CA 2X 17 (Ed. 01 78), limits Plaintiffs coverages to two. The UM coverage provided under the declarations was to all 15 motor vehicles as Professor Johnson stated "[u]nder 21, you're insuring all of them." (R 952, Emphasis added). He also stated that any limitation would be placed under Paragraph E - OUR LIMIT OF LIABILITY. (R 975-976). As the 1982 ISO form demonstrates, Professor Johnson is correct. The insurer had the opportunity to limit coverage by the number of dealer plates had the insurer chosen to do so. The reality is that the insurer chose to use a 1978 form rather than one similar to the 1982 form, although it would have been necessary for the insurer to modify such a form further to deal with dealer plates.

It is immaterial whether UM coverage is purchased covering more than one motor vehicle in a single policy or multiple policies. Likewise it is immaterial whether multiple coverage is purchased by paying a single premium or multiple premiums or obtained by implication as a matter of law for failure to abide by the UM Statute's obligation to obtain a knowing rejection of coverage -- the coverage is still multiple coverage unless properly and legally limited by Paragraph E - OUR LIMIT OF LIABILITY.

Plaintiffs have not only purchased multiple coverage by paying a specific premium but have also purchased the coverage

implied by law as to each vehicle in the inventory when they paid a premium for liability coverage since there was no valid rejection of the coverage.

Plaintiffs submit that "stacking" of coverage should be mandated in this case for nine reasons. First, the policy provided expressly that that UM coverage was being applied to all vehicles identified under ITEM TWO, i.e. "any auto" - whether owned or non-owned. Second, because of the invalid Paragraph E - OUR LIMIT OF LIABILITY provision, an ambiguity exists within the policy requiring that the policy be read in favor of the insured to provide indemnity. Third, because Paragraph E - OUR LIMIT OF LIABILITY provision did not expressly limit multiple coverage or stacking based upon dealer plates or exposure units and the insurer clearly had the opportunity to do so, under principles relating to contracts of adhesion, the policy should be read to not limit stacking on this basis. Fourth, the public policy of Florida as announced in the UM Statute and the Anti-Stacking Statute expressly authorizing stacking of UM coverage is remedial and should be construed to maximize indemnity. Fifth, the Plaintiffs have paid a premium for multiple coverage whether or not that premium was a single or multiple premium. Sixth, because the public policy of the state was not followed by the insurer in that a valid rejection of coverage was not obtained so that it is clear that the insured was either not informed or misinformed by the insurer.

Seventh, Plaintiffs purchased liability insurance on all the motor vehicles and, accordingly, UM coverage was extended as a matter of law on each of the vehicles in Plaintiffs inventory because the insurer failed to obtain the knowing rejection - so there was a purchase of UM coverage by implication of law. Eighth, stacking should be especially dictated where insurers continue to insert knowingly invalid provisions intentionally seeking to avoid liability created by Statute where the policy clearly covers multiple vehicles. Lastly, the Courts should not come to the aid of insurers who have negligently used outdated endorsements or who have negligently used the wrong "exposure unit" as to a particular insured.

Defendant cites a string of cases purportedly to suggest that Tucker v. Government Employees Ins. Co., 288 So. 2d 238 (Fla. 1973) stands for the proposition that only where a premium is paid for additional coverage is stacking of that additional coverage is mandated. (Dfts Br 19, 20). Further, the Defendant contends that cases cited also support "stacking" on the basis of dealer plates. (Dfts Br 21). Plaintiffs submit that while the authorities cited "stack" coverage where an additional premium is paid, the type of policy and manner of premium payment is materially different in the instant case. In addition, none of the policies cited authorize UM coverage to an insured occupied non-owned motor vehicle. Simply put, Defendant's cases do not provide an appropriate answer to the

issues presented. Plaintiffs submit that it is proper to "stack" UM coverage when an additional premium is paid, but this is not the sole basis or justification for "stacking". Stacking is also justified when there exists an ambiguity in the policy and when the public policy has been violated. Taft v. Cerwonka, 433 A. 2d 215 (R.I. 1981)(citing Tucker).

The cases cited by Defendant wherein coverage was "not stacked" or "stacked" on the basis of dealer plates dealt with situations where the claimant was a permissive user, i.e. a Class II insured, and/or a hybrid situation, a contemplated user. Defendant has not cited a single case where multiple coverage as to a Class I insured was denied "stacking" on the basis of the number of covered motor vehicles or where coverage was limited to only the dealer plates rather than the number of insured motor vehicles. All Florida decisions denying "stacking" in commercial situations have been as to Class II insured's, i.e permissive users. See analysis 25 A.L.R. 4th 896, "Combining or 'Stacking' uninsured motorist coverages provided in fleet policy." All Florida decisions that have approved "stacking" have stacked on the basis of the motor vehicles involved. Certainly, if dealer plates are to be allowed as a basis for limiting "stacking," that limitation should be clearly expressed in the LIMITATION OF LIABILITY provisions of the policy as suggested by Professor Johnson. Certainly, as the ISO forms indicate, that option was available to the insurer. The insurer chose not to use this option.

The only instructive commercial case is the case previously cited by Plaintiffs, Posey v. Commercial Union Insurance Company, 332 So. 2d 909 (La. App. 1976). Defendant attempts to discredit the case because of a trivial difference in the wording of the UM Statute. Defendant attempts to suggest further that the result would be contrary in Florida and that the case is not supportive of Florida's public policy. Plaintiffs submit that Defendant's contentions are not correct. When a motor vehicle moves out of inventory, the insured no longer has an insurable interest. Accordingly, the Posey Court appropriately limited the UM coverage to vehicles in inventory where the coverage language of the policy provided coverage for unidentified motor vehicles. The Posey decision demonstrates the role of the public policy surrounding the UM statute and that it is not destroyed by failing to extend coverage although a "premium" has been paid. The case demonstrates the irrationality of basing a "stacking" policy solely on the payment of a premium.

The Trial Judge found that there was a lack of an informed rejection, i.e that the insured had not been properly informed or had been misinformed. Passing references are made in Defendant's brief as to what knowledge the insured had at the time of contracting and at other times as to how the premium was calculated. In all fairness to the Plaintiffs, the issue of the insured's knowledge was not fully tried at the final hearing as

the prior Partial Summary Judgment resulted in a finding that there had not been an informed rejection. The Plaintiff, Sandra Coleman, testified that there was no mention of UM coverage at the time of contracting. Plaintiff later became aware of the UM coverage and how that premium was calculated. The after-acquired knowledge of the Plaintiff as to how the premium was calculated is not relevant or material to the coverage provided under the policy.

Plaintiffs argument is two pronged. First, that the coverage should be stacked because of the lack of an informed rejection. This is purely a decision as a matter of law. Plaintiffs asserted this purely legal position during the trial and the Trial Judge's Final Judgment reflects his ruling. The second prong is based on the payment for coverage on multiple vehicles. Factual issues existed which were resolved by expert testimony. The primary thrust is that "stacking" exists as a matter of law on multiple vehicle policies where liability insurance has been purchased on multiple vehicles and where there is a lack of an informed rejection. However, Plaintiffs feel that it is inappropriate to ignore the expert testimony on factual issues presented as to their alternative basis for recovery. The expert testimony was appropriate because a complex insurance contract was involved and the expert testimony assisted the trier of fact as is evident from the Letter of Judge Gallagher announcing his decision. (App. - 6). The

expert testimony pertaining to the "exposure unit" involved and the relationship of premium and coverage are indispensable when the policy is to be interpreted in light of the standards of the industry. How else is the testimony of the standards in the industry going to be considered by the Court except by expert testimony. The Second District Court of Appeal decision ignored the expert testimony and the standards of the industry and principles of underwriting which the Trial Judge had to resolve based on conflicting expert testimony. Defendant's reference to Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984) is inapposite in that standards of the insurance industry and applicable underwriting principles of insurance relating to garage policies was not in issue in the case.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 7th day of May, 1987, to RAYMOND T. ELLIGETT, JR., Esquire and CHARLES P. SCHROPP, Esquire, SHACKLEFORD, FARRIOR, STALLINGS & EVANS, Professional Association, Post Office Box 3324, Tampa, Florida 33601.

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