IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Plaintiff/Petitioner,

vs.

LARRY WAYNE MORRISON and KAY MORRISON, his wife,

Defendants/Respondents.

SUPREME COURT CASE NO. 74.317

FIFTH DISTRICT APPEAL NO. 88-1676

CIRCUIT COURT CASE NO. 88-0008-CA

WER BRIEF OF THE DEFENDANT/RESPONDENT ON THE MERITS

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SUMMARY OF ARGUMENT

The issue in this case is whether or not the 1983 Florida Legislature intended to make all uninsured motorists coverage excess to any tortfeasor's liability limits and also whether or not the legislature "forgot" to change §627.727(3)(b) Florida Statutes 1984 which defines an uninsured motor vehicle.

An additional issue in this case is, what were the policy provisions of the Universal Underwriters Insurance Company policy written to Register Chevrolet - Oldsmobile, Inc. as it pertains to uninsured motorist coverage.

The Defendant/Respondents would agree that the issues of uninsured motor vehicle coverage have been discussed in four of the five District Courts of Appeal, cited by the Petitioner in their Summary of Argument, page 3 in the Brief of Petitioner on the Merits. The Defendant/Respondent would take issue that the first and third District's Analysis are the better reasoned opinions and would rely on the decisions of Shelby Mutual v. Smith, 527 So.2d 830 Fla. 4th DCA 1988 and Morrison v. Universal Underwriters, 543 So.2d 425 Fla. 5th DCA 1989.

ARGUMENT

The Petitioner, page 9, in their Brief on the Merits states as follows:

> In effect, the Fourth and Fifth District Courts of Appeal are substituting their own judgement of the wisdom of the statute for that of the legislature which chose not to repeal the statute in the face of other statutory provisions changing certain set off provisions in the law which, in the opinion of some such as the Fourth and Fifth District Courts of Appeal, to result that those courts did not think was 'fair'.

The Fourth District Court of Appeal in Shelby Mutual Insurance Company v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988) which is pending in this Court, and the Fifth District Court of Appeal in Morrison v. Universal Underwriters, 543 So.2d 425 (Fla. 5th DCA 1989), were not substituting their own judgements but were following the intent of the 1983 Florida Legislature.

The Courts in Shelby and Morrison were provided with a summary of the 1983 legislative process in the enactment of House Bill 319, effective October 1, 1984, amending §627.727, Florida Statutes, by eliminating section (2)(b) and substantially changing section (1).

It was clearly stated in the Staff Summary and Analysis that the excess uninsured motorist coverage which was required to be offered by motor vehicle insurers in 1982 would now be considered to be the "new excess uninsured motorist coverage" providing a full limit of uninsured motorist protection which would be in addition to, and not reduced by the other party's liability coverage (R 112 - 115, Exhibit IV).

The Analysis went on to give an example as follows:

> For example, assume a motorist purchases uninsured motorist coverage with limits of $10,000 per person, $20,000 per accident. He is involved in an accident with another motorist who has bodily injury liability insurance of $10,000 per person, $20,000 per accident. Under these facts, no uninsured motorist coverage is available if the motorist has purchased the standard uninsured motorist protection. If the motorist elected to purchase the excess uninsured motorist coverage, assuming the damages are sufficient, the full $10,000 excess UM would be available, in addition to the $10,000 liability insurance available from the other driver.

If as the Petitioner, Universal, would have it, the term, "uninsured motorist motor vehicle" shall be deemed to include an insured vehicle when the liability insurer thereof has provided limits of bodily injury liability for its insured which are less then the limits applicable to the insured person provided under uninsured motorist coverage applicable to the injured person, then the example cited in the Staff Analysis would be meaningless since the definition of "uninsured motor vehicle," §627.727(3), **1984** Supplement to Florida Statute **1983**, only includes a liability insurer that has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under the uninsured motorist coverage applicable to the injured person. Since in the example given, liability limits are the same as UM not less, then the tortfeasor with the 10/20 policy would not, according to the Petitioner's interpretation of the law, be a "uninsured motor vehicle".

The Analysis goes on to state in section B:

> The bill makes excess uninsured coverage the only type of uninsured motorist coverage required to be offered by insurers. As presently required for the standard form of uninsured motorist coverage, excess uninsured motorist coverage would be required to be provided unless rejected in writing by a named insured. As explained above, excess uninsured motorist coverage provides limits of coverage that are in addition to, and not reduced by, the other driver's liability coverage (R 112-115, Exhibit IV).

The two cases that Petitioner, Universal, relies on are USF&G v. Woolard, 523 So.2d 7098, (Fla. 1st DCA 1988), and Marquez v. Prudential Property, 534 So.2d 918 (Fla. 3rd DCA 1988), currently are pending in this Court. Apparently these Courts did not have the benefits of the Staff Analysis as did the Courts in the cases of Shelby and Morrison.

Two recent cases that have have been decided in 1989 which are consistent with Shelby and Morrison, Supra, are Government Employee's Insurance Company v. Bruton, 538 So.2d 1375 (Fla. 4th DCA 3/1/1989) and Park v. Wausau, 14 F.L.W. 1607 (4th DCA 7/7/89).

The Fifth District Court of Appeals in Morrison, Supra stated:

> For some unknown reason, §627.727(3)(b) was never eliminated and as a result, considerable confusion has ensued.

One would also question as to whether or not section (3)(b) should have been eliminated in the 1983 version of §627.727, Florida Statutes, which required the insured to make available at the written request of the insured, "excess underinsurance motor vehicle coverage."

For the first time, S627.727, Florida Statutes 1982 Supplement to Florida Statutes 1981 added the words, "under-

In prior versions of S627.727, Florida Statutes, the only reference to underinsured motorist was found in paragraph (1) where it stated:

> Only the underinsured motorist automobile liability insurance shall be set off against underinsured motorist coverage.

In 1982, the Legislature amended section (2) of S627.727, Florida Statutes, adding subparagraph (b), known as "excess underinsured motor vehicle coverage." Paragraph (b) states as follows:

> In addition, the insurer shall make available, at the written request of the insured, excess underinsured motor vehicle coverage, providing coverage for an insured motor vehicle when the other person's liability insurer has provided limits of bodily injury liability for its insured which are less than the damages of the injured person purchasing such excess underinsured motor vehicle coverage. Such excess coverage shall provide the same coverage as the uninsured motor vehicle coverage provided in subsection (1), except that the excess coverage shall also be over and above, but shall not duplicate, the benefits available under the other person's liability coverage. The amount of such excess coverage shall not be reduced by a setoff against any coverage, including liability insurance (R 112-115, Exhibit II).

This same provision is also found in §627.727(2)(b), Florida Statutes (1983).

Prior to the amendment to S627.727, Florida Statutes (1982), there is only one definition to be concerned with and

that was what was an "uninsured vehicle." An uninsured vehicle

is one in which the tortfeasor had no insurance and is also defined in §627.727(3)(b), Florida Statutes (1981), (1983), (1984):

> Has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person.

This definition of uninsured motor vehicle is found in all versions of §627.727(3)(b), Florida Statutes, and was not changed until 1989. Prior to 1982, in a situation where damages where greater than the limits of both the liability coverage and the uninsured motorist coverage, the carrier could setoff the tortfeasor's automobile liability insurance coverage with the injured parties uninsured motorist coverage. In other words, the two coverages would not be added together in order to compensate the claimant fully for his damages.

The 1982 Legislature for the first time addressed this situation and amended S627.727, Florida Statutes, as previously indicated and added subsection (b) to paragraph (2) giving us therefore the second definition "excess underinsured motor vehicle coverage."

The state of the law therefore, at this time was that there was the standard uninsured motorist coverage and at the election of the insured, excess underinsurance motorist vehicle coverage. For the first time, the amount of the damages incurred by the injured person was addressed by the Legislature.

In the 1984 Supplement to S627.727, Florida Statutes (1983), effective 10/1/84, paragraph (2)(b) was deleted and in its place paragraph (1) was amended as follows:

> ...under any motor vehicle liability insurance coverage; ...and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. The amount of coverage available under this section shall not be reduced by a setoff against any coverage including liability insurance.

The provision:

> Only, the underinsured motorist's automobile liability insurance shall be set off against under-insured motorist coverage.

was deleted by this amendment.

The Insurance carriers authorized to write automobile insurance in the state of Florida were allowed to consider the amendment in their rate structure (R 112-115, Exhibit IV).

To allow the Petitioner, Universal, to prevail in their argument and only to have to provide uninsured motorist coverage when the liability limits of the tortfeasor are less than the uninsured motorist limits of their insured would be a windfall for Universal and other carriers because since 1984 they have been allowed by the State to collect higher premiums.

The Petitioners directed the Court's attention to what they claim to be similar language found in the UUIC policy which defined uninsured motorist vehicle to include:

> ... which at the time of the accident, was insured or bonded with at least the amounts required by the applicable law where covered auto is principally garaged, but their limits are less than the limits of this insurance," (R 9-89).

The provision in the UUIC policy dealing with uninsured motorist and underinsured motorist is found from pages 55 through 60, endorsements #45, 46, 47, and 48. Apparently only endorsement 45 and 46 apply to the UUIC Policy (See the declaration on page 5 at the beginning of the policy).

The Petitioner's quoted definition of uninsured motorist vehicle found on page 5 of their brief is the same as is found on page 57 which added subparagraph (4), endorsement 46 to the three previous definitions of uninsured motorist found in endorsement 45.

I think it is important to note on the bottom of pages 55 and 56 of the policy, the words:

> Copyright 1982 Universal Underwriters Insurance Company. Edition 7-82.

It is therefore quite clear that the Petitioner Universal did not change this policy either in 1982 when the insurance companies were required to offer "excess motorist coverage" nor did they change their policies to reflect the change in the 1984 Supplement to §627.727(1), Florida Statutes, 1983.

The Petitioners failed to indicate in their brief that in 1985, Petitioner, Universal, changed their policy with an endorsement called the Florida State Amendatory Part. Specifically they changed Endorsement No. 045, "Uninsured Motorist - Bodily Injury" as follows:

> The DEFINITION OF "UNINSURED MOTOR VEHICLE" is amended to include:
>
> (4) Which is an underinsured motor vehicle for which the sum of all liability bonds or policies at the time of an ACCIDENT

provides a limit that is less than the amount an INSURED is legally entitled to recover as damages caused by the ACCIDENT.

Exclusion (c) is deleted.

The second paragraph of the MOST WE WILL PAY is replaced by the following:

...Any coverage afforded under this insurance shall apply over and above all sums paid by or for anyone who is legally responsible, including all sums paid or payable for the same elements of loss under any liability Coverage Part of this policy...

This amendatory part is found on pages 2-A and 2-B of the policy and on the bottom of the two pages it states:

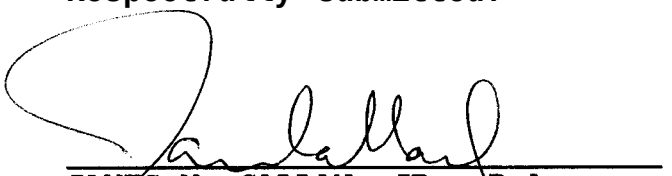
Copyright 1985 Universal Underwriters Insurance Company, Edition 5-85.

Therefore, the definition of uninsured motorist vehicle quoted by the Petitioner on page 2 of their brief and page 57 of the UUIC Policy, does not apply since Universal amended the definition of uninsured motor vehicle in 1985.

CONCLUSION

It is respectfully requested that this Court follow the decision of the Courts in Shelby and Morrison and find in favor of the Defendant/Respondent.

Respectfully submitted.



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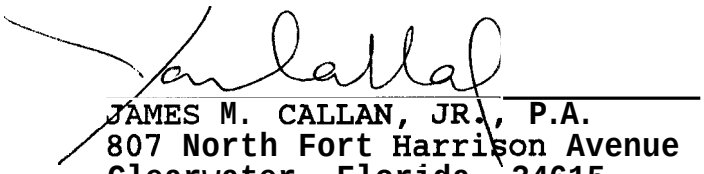
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 2nd day of November, 1989, to: Jeffrey R. Fuller, Esq., P. O. Box 12349, St. Petersburg, FL 33733-2349.



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