IN THE SUPREME COURT OF FLORIDA

FLORIDA FARM BUREAU CASUALTY COMPANY,

Petitioner,

v. CASE NO. 75,624

RIGOBERTO HURTADO and SUSANA HURTADO, his wife,

Respondents.

_____/

RESPONDENTS' BRIEF ON THE MERITS

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PREFACE

This proceeding seeks to review a decision by the Third District Court of Appeal in Hurtado v. Florida Farm Bureau Casualty Company, 557 So.2d 612 (Fla. 3d DCA 1990). The record before the District Court of Appeal is designated as [R.___] and the Appendix as filed by the Petitioner is designated as [A.___]. All emphasis in this brief is supplied by the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The decision of the Third District Court of Appeal under review found that the 1988 amendments to the Florida anti-stacking statute, Section 627.4132, Florida Statutes (1980), allowed the stacking of the 11 different coverages provided in the single policy issued by Florida Farm Bureau.

The case is an appeal from a summary judgment in favor of the insurance company. The Third District reversed that summary judgment. Before this Court, there is no assertion by the insurance company that issues of fact existed.

Mr. Hurtado was seriously injured in a collision with an uninsured motorist. At that time, he was driving a motor vehicle owned by his employer, Miranda Groves and Nurseries, Inc. Mr. Hurtado was driving the vehicle with his employer's consent. Indeed, the vehicle was furnished to Mr. Hurtado as his personal vehicle under his employment arrangement with Miranda Groves.

It is undisputed that Hurtado was an insured person under the Florida Farm Bureau policy. Miranda Groves also owned 10 other vehicles and each vehicle was insured by Florida Farm Bureau. [R.8]. Each vehicle was listed on the same policy and each vehicle had $300,000 in uninsured motorist coverage. [R.8]. A separate premium was paid for each of these different UM coverages. [R.8]. The policy listed the particular vehicle that Hurtado was driving and the individual premium paid upon it. All of the other vehicles and their separate premiums were also listed. [R.8]. This was a policy designated as a "Business Auto Policy." The named insured was the corporation, Miranda

Groves and Nurseries, Inc. The policy stated that Miranda Groves had 35 employees.

The Plaintiff, Mr. Hurtado, occupied a special relationship with his employer which was much different than that enjoyed by most employees. The District Court noted the importance of this relationship and held that Miranda Groves purchased uninsured motorist insurance with the full knowledge that Hurtado would use the vehicle full-time. The Court further specifically held that "just as a named insured purchases coverage to benefit family members, Miranda purchased insurance to benefit Hurtado."

The Plaintiff worked as a mechanic for Miranda Groves which was an agricultural corporation and the named insured under the policy. [R.8]. The Plaintiff did not speak English. As a part of his employment arrangement, he was furnished with a home for his wife and family on property owned by the employer. The employer provided this housing as a further incident of the employment arrangement. [A.54]. The entire family resided in the home and the employer paid all of the utilities and other expenses concerning the home. [A.54,55]. As a further part of the Plaintiff's employment arrangement, Miranda Groves provided him with the personal use of the vehicle involved in the accident. [A.54,55]. The Plaintiff and his family used this vehicle for personal matters, including grocery shopping and took the vehicle to their home at night on the corporate property. Miranda Groves paid all the expenses concerning the vehicle, including license plates, repairs, gasoline and all expenses concerning the insurance coverage which included uninsured motorist protection. In addition, the Plaintiff was allowed to

and did in fact use the employer's 10 other vehicles. These are, of course, the 10 vehicles upon which stacked coverage is now sought. [A.54,55]. Plaintiff Hurtado thus had a relationship with all 11 of the insured vehicles and, as the court found, the corporate insured intended to provide coverage on all 11 vehicles for Mr. Hurtado's benefit.

The insurance policy in question begins with Part I entitled, "Words and Phrases with Special Meaning." Included within this portion of the policy is subsection (F) which contains the definition of the word "insured." Part III, subsection (D), is entitled "who is insured" and in its entirety states as follows:

> D. WHO IS INSURED.
>
> 1. You are an insured for any covered auto.
>
> 2. Anyone else is an insured while using with your permission a covered auto you own, ...

The UM portions of the policy provide even broader coverage and state as follows:

> D. WHO IS INSURED.
>
> 1. You or any family member.
>
> 2. Anyone else occupying a covered auto . . .

There is no question but that Mr. Hurtado was "an insured" under this policy. Florida Farm Bureau conceded UM coverage and paid $300,000 but refused to stack the coverages for the 11 vehicles listed in the policy.

The Third District analyzed the legislative history behind the 1980 amendments to Section 627.4132 and concluded that

stacking should be allowed under those amendments. Prior to this decision, no court had ever analyzed this particular aspect of the legislative history behind this statute. It is apparent that no litigant had ever brought this legislative history to a court's attention.

The Court concluded that Mr. Hurtado did not occupy the position of either a Class I or a Class II insured under the older case authorities on the subject. The Court concluded that Mr. Hurtado occupied the position of an insured person who was specifically the beneficiary of stacked UM coverage which was intended by the Florida Legislature. The court was convinced by the legislative history which stated that UM coverage on "commercial vehicle fleets" would be stacked and that "UM insurance rates would increase by an average of 15% as a result of this bill."

ISSUES ON REVIEW

POINT I

WHETHER THE 1980 AMENDMENT TO §627.4132 (FLORIDA'S ANTI-STACKING STATUTE) MODIFIED THE CLASSIFICATION OF CLASS I AND CLASS II INSUREDS AS ESTABLISHED IN MULLIS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 252 So.2d 229 (FLA. 1971).

POINT II

WHETHER ISSUES OF FACT BARRED A SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT INSURANCE COMPANY ON THE STACKING ISSUE.

SUMMARY OF ARGUMENT

The District Court correctly interpreted the 1980 amendment to the anti-stacking statute to allow stacking of the separate UM coverages. The legislative history shows this was exactly the intent of the amendment. In 1980, the Florida Legislature chose to allow stacking of UM coverages and further intended that UM rates would be raised accordingly.

ARGUMENT

POINT I

WHETHER THE 1980 AMENDMENT TO §627.4132 (FLORIDA'S ANTI-STACKING STATUTE) MODIFIED THE CLASSIFICATION OF CLASS I AND CLASS II INSUREDS AS ESTABLISHED IN MULLIS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 252 So.2d 229 (FLA. 1971).

The Third District Court of Appeal held that stacking was appropriate under this policy pursuant to the 1980 amendments to the anti-stacking statute. The Court specifically found that Hurtado was within the class of individuals which the Legislature intended to benefit in the 1980 amendment to Section 627.4132. Prior to this decision, no other court had considered and addressed the applicable legislative history of the 1980 amendment. Apparently, no lawyer had brought this history to a court's attention.

In 1976 in Chapter 76-266, §10, the Legislature enacted Section 627.4132. This became known as the anti-stacking statute and expressly prohibited stacking of all coverages provided in a single policy including uninsured motorist coverage. The statute is as follows:

(As enacted in 1976)

627.4132 Stacking of coverage prohibited.--If an insured or named insured is protected by any type of motor vehicle insurance policy for liability, uninsured motorist, personal injury protection, or any other coverage, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. However, if none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage. Coverage on any other vehicles shall not be added to or

> stacked upon that coverage. This section shall not apply to reduce the coverage available by reason of insurance policies insuring different named insureds. (emphasis added)

The statute was amended in 1980. The words "uninsured motorist" were deleted from the first sentence and a new sentence was added stating that the anti-stacking section did not apply to UM coverage. The revised statute (80-364) showing the changes stated:

> (As enacted in 1980)
>
> 627.4132 Stacking of coverage prohibited.--If an insured or named insured is protected by any type of motor vehicle insurance policy for liability, ~~uninsured motorist,~~ personal injury protection, or other coverage, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. However, if none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage. Coverage on any other vehicles shall not be added to or stacked upon that coverage. This section ~~shall~~ does not apply:
>
> (1) To uninsured motorist coverage.
> (2) To reduce the coverage available by reason of insurance policies insuring different named insureds.

Florida Farm Bureau's brief before this Court incorrectly represents the 1980 version of the statute. At page 15 of the brief, the statute is quoted without the underlining showing the additions to the statute. At page 16, the insurance company also incorrectly argues that, if the Legislature had really intended to change anything, it would have done more than simply deleting the term "uninsured motorist" from the anti-stacking statute. In fact, the Legislature did considerably more than

that and the Legislature's intent to totally remove uninsured motorist coverage from any stacking restrictions is obvious from the changes in the wording of the statute. In addition, the legislative history of the statute is specifically on point and indicates that the Legislature intended to allow stacking for commercial fleets of vehicles and that UM rates would go up by 15% as a result.

Strangely, the insurance company's brief before this Court never suggests what it is that the Legislature might have intended by the 1980 amendment to the anti-stacking statute. The insurance company simply argues that the Third District was wrong in its interpretation of the amendment but steadfastly refuses to even suggest what intention the Legislature had. The insurance company further argues that the Senate Economic Impact Analysis should not have been considered because the intent of the Legislature was so clear and obvious.

This Court has already specifically answered the question of whether a court may look to the legislative history of Section 627.4132. In New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983), this Court resorted to the legislative history of Chapter 80-364. This Court also stated its recognition that there was a "basis for disagreement on how Section 627.4132 was intended to operate." Resort to legislative history also occurred regarding this same statute in Auto-Owners Insurance Company v. Prough, 463 So.2d 1184 (Fla. 2d DCA 1985).

In Ivey v. Chicago Insurance Co., 410 So.2d 494 (Fla. 1982), this Court considered other amendments to the uninsured motorist statute and specifically relied upon the Senate's Staff

Analysis and Economic Impact Statement pertaining to the legislation. The Court stated:

> An act's legislative history is an invaluable tool in construing the provisions thereof. We believe that the 1977 amendment to section 627.727(2)(b) was intended to clarify the legislature's intention, and that the amendment should be considered in construing said law. As Justice Roberts noted:
>
> > The rule seems to be well established the interpretation of a statute by the legislative department goes far to remove doubt as to the meaning of the law. The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.

In passing, we also note Justice McDonald's special concurring opinion in Ivey where he states that the plaintiff, a mere passenger of an insured vehicle, had the same rights and same coverage that the named insured had. This statement was in regard to the stacking of UM coverage.

Certainly, the Third District cannot be held in error for having considered the legislative history of this statute since this Court and the other district courts have considered precisely the same history in interpreting the statute.

In support of its Motion for Summary Judgment, the plaintiff filed a certified copy of the Senate Staff Analysis and Economic Impact Statement. [A.34,36-8]. This staff analysis indicates beyond question that an insured in a corporate vehicle such as the plaintiff herein, is to be permitted to stack UM coverage. Specifically, Part II of the Senate Staff Analysis and Economic Impact Statement states as follows:

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

> Under this bill, individuals would have, in most situations, more than 1 policy that would provide UM coverage for any one accident. For example, if a family owned 2 cars with equal UM coverage, twice as much coverage would be available under this bill for any one accident than under present law. More significantly, commercial vehicle fleets would have UM coverage multiplied by as many vehicles covered by the policy.
>
> A spokesman for the insurance industry estimates that UM rates would increase by an average of 15% as a result of this bill. [A.38]. (emphasis added)

The District Court also found from the history, an intent to revive prior case law as to the "extent of uninsured motorist insurance coverage." The Court also stated that the Senate Statement was more informative than the House Analysis because it provided a more complete analysis of the effect of the amendment.

It is also compelling that the economic analysis of the bill indicated that rates for UM coverage would go up 15 percent as a result of this statutory amendment. At no point has the insurance company involved in this case ever addressed this issue. This is a perfect example of why economic impact statements are required for legislation. If the amendment was not intended to produce more coverage, the history would not have noted that UM rates would increase by 15 percent. We assume the company has raised its UM rates. It now simply does not want to provie the additional coverage.

The policy in question listed 11 vehicles and a separate premium was charged for UM coverage on each vehicle. Thus, the

insured corporation paid a premium for 11 different coverages. It is firmly established that UM coverage is not dependent upon a particular vehicle. Here, 11 different coverages were paid for and Mr. Hurtado is entitled to the benefits of this coverage. See Coleman v. Florida Insurance Guaranty Association, Inc., 517 So.2d 686 (Fla. 1988).

The stacking controversy really begins with a non-stacking case, Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971). Although not really involving stacking, it created the classes of insureds designated as Class I and Class II. These classes were created based upon the particular policy provisions which were in the policy in question in Mullis and commonly used in most insurance policies at the time. The policy defined "insured" as the named insured and all relatives of the named insured while residents of the household. This became Class I. Class II was "any other person while occupying an insured automobile."

Stacking of uninsured motorist coverage actually began with Tucker v. Government Employees Insurance Co., 288 So.2d 238 (Fla. 1973). Tucker cites Mullis and allowed for stacking of UM coverage. In interpreting both Tucker and Mullis, the Second District Court of Appeal issued Travelers Insurance Co. v. Pac, 337 So.2d 397 (Fla. 2d DCA 1976). The Pac decision concludes that the "net effect" of both Tucker and Mullis is that stacking of UM coverage is allowed for Class I insureds but not allowed for Class II insureds. All of these cases, Mullis, Tucker, Pac, and numerous other similar decisions, occurred before the Florida

Legislature stepped in and initially tried to restrict stacking in 1976.

The 1976 anti-stacking statute has been held to be less than a "model of clarity" in this Court's opinion in South Carolina Insurance Co. v. Kokay, 398 So.2d 1355 (Fla. 1981). The only reason to change the statute must have been to benefit the Class II insured. The issue thus becomes whether stacking of UM coverage should be allowed for what were previously Class II insureds or indeed, whether such a class should continue to exist at all under the 1980 amendment. The Kokay case concerned the existing 1976 anti-stacking statute and the concurring opinion notes the importance of the 1980 amendment pointing out that the opinion would be of "limited application" in view of the 1980 change in the statute.

The insurance company relies upon two cases from the Fourth District Court of Appeal. In 1983, the Fourth District decided State Farm Mutual Automobile Insurance Co. v. Lewis, 425 So.2d 603 (Fla. 4th DCA 1982) and in 1984, the same court decided American States Insurance Co. v. Kelley, 446 So.2d 1085 (Fla. 4th DCA 1984), rev. denied, 456 So.2d 1181 (Fla. 1984). Lewis expressly dealt with the 1976 version of §627.4132. Kelley expressly dealt with the 1980 version of §627.4132. Despite the fact that there were two markedly different statutes involved, the later Kelley decision specifically relies upon the earlier Lewis interpretation of the 1976 statute.

Lewis held the 1976 statute did not intend to overrule the Class I/Class II doctrine stated in the 1971 Mullis decision. Without recognizing that the Legislature had

drastically changed the statute in 1980, the Fourth District applied the same Class I/Class II rationale in Kelley and held that the Legislature once again did not intend to change the statute at all in regard to uninsured motorist coverage.

If the two decisions are placed side by side, it is obvious that Lewis expressly deals with the 1976 statute and Kelley expressly deals with the 1980 version of the statute but that the distinction between the statutes as to the new wording "this section does not apply . . . to uninsured motorist coverage" is never noted. Despite this fact, Kelley has been cited (without analysis) on numerous occasions. See Coleman v. Florida Insurance Guaranty Association, Inc., 517 So.2d 686 (Fla. 1988); Woodard v. Pennsylvania National Mutual Insurance Co., 534 So.2d 716 (Fla. 1st DCA 1988); Auto-Owners Insurance Co. v. Brockman, 524 So.2d 490 (Fla. 5th DCA 1988); Durden v. Compass Points, Inc., 521 So.2d 363 (Fla. 5th DCA 1988) and Fundament v. May, 445 So.2d 710 (Fla. 4th DCA 1984). We respectfully suggest that Kelley was wrongly decided and that none of the subsequent cases have recognized or addressed this issue.

There are specific rules governing statutory construction. Resort to legislative history is required when the statute is not absolutely clear on its face. However, courts deal only with that legislative history which is brought to its attention. This is particularly true of an economic impact analysis statement which is not available in the average lawyer's library. We suggest that Kelley and numerous other cases would have been decided differently had the courts been provided with the correct information.

The insurance company also relies extensively on the 1971 Mullis decision. Certainly, Mullis is a polestar as to the basic outlines of UM coverage but it has been retreated from insofar as the 1980 amendment to Section 627.4132. In New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983), this Court held that Mullis was not controlling because it was based on the earlier version of the uninsured motorist statute rather than the amended version. Mullis obviously never contemplated the statutory changes since it was decided in 1971.

Thus, the question presented to the Third District was simply the correct meaning of Section 627.4132 as it now exists. In short, the issue was whether the anti-stacking statute applies at all to uninsured motorist coverage.

Times and Insurance Policies Change

The entire Class I/Class II rationale was based upon the standard automobile insurance policy in effect when the Mullis case was decided in 1971. The Mullis policy defined "insured" by including the named insured and his household relatives in paragraph one and any other person in paragraph two. This Court, and numerous district courts thereafter, have steadfastly stuck by the two-class theory. The supposed theory of the class structure was stated in both Mullis and Pac and numerous other opinions. The theory is that the named insured intends to buy extra protection for himself and his family but that he does not intend to buy that protection for mere guests or employees.

The basis for this theory is the Mullis policy language:

> (1) the first person named in the declarations and while residents of his

household, his spouse and the relatives of either;

(2) any other person while occupying an insured automobile; and . . .

This language is historically the most common definition of an "insured" contained in older automobile insurance policies.

Insurance policies have changed. The present "Business Auto Policy" issued by Florida Farm Bureau Casualty Insurance Company has a new definition of the insured. The policy was issued to a corporation as the named insured. The most logical construction is that any corporate employee who is furnished with a full-time personal vehicle and is authorized to drive all insured vehicles and who is residing on the corporate property should have full rights to stack the coverages. Mr. Hurtado is "an insured" under the policy, a corporate employee, a driver of all 11 vehicles and a resident on the corporate premises. [A.54-5]. Class I and Class II based solely on family status simply makes no sense against the background of today's modern policies and the facts of this case. The Third District recognized this change in the policy, the special relationship between the named insured and Mr. Hurtado and the change in the law by virtue of the 1980 amendment.

Mr. Hurtado was not merely a guest in an insured vehicle nor was he merely an employee driving an insured vehicle. Instead, Mr. Hurtado was a person whose employer fully intended to benefit by purchasing UM coverage and by providing him with a home, a vehicle and numerous other benefits. The Legislature intended to benefit Mr. Hurtado and stacking was appropriately allowed.

Close to the end of the insurance company's brief, an argument is asserted by a "parade of imaginary horribles." The carrier asserts that the wife and some unknown number of children might be insured. Such a result is not required. The carrier has every opportunity to limit UM coverage in accordance with the applicable statutes and requirements of this State. However, when the carrier receives premiums for the coverage which the insured intended to provide, then the carrier should be required to respond. This is not a situation where the injured insured claims benefits in excess of the coverage provided. Mr. Hurtado will receive only the amounts to which he is entitled less appropriate setoffs.

POINT II

WHETHER ISSUES OF FACT BARRED A SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT INSURANCE COMPANY ON THE STACKING ISSUE.

Even if the classic definitions of Class I and Class II are to be maintained, Mr. Hurtado should still be given the right to stack UM coverage and issues of fact would bar a summary judgment in favor of the insurance carrier. The rationale of Mullis was that the insured would want to protect his family but not protect anyone else. This was a court-created presumption and we respectfully suggest that there is at least an issue of fact about whether this named insured wanted to protect Mr. Hurtado and his family. This family are not residents of a named insured's house but they are residents of the dwelling unit on the insured's property furnished and paid for by the insured.

It is axiomatic that a summary judgment cannot be granted in the face of factual issues. Thus, even if the concepts of the two classes are maintained, there is still an issue of fact in this case preventing summary judgment in favor of the insurance company. The policy must be construed to provide expansive coverage and the fact issues concerning the relationship between the named corporate insured and the insured resident/employee were sufficient to bar summary judgment in favor of the carrier.

There is a judicially created "presumption" that a named insured would want to buy additional coverage for his family. See Mullis and Pac. Certainly this presumption is not exclusive. Under the circumstances of this case, there is at least a factual issue as to whether stacked coverage was intended for Mr. Hurtado.

CONCLUSION

The opinion of the Third District should be affirmed or in the alternative, the matter should be remanded for determination of the fact issues upon which coverage would exist.

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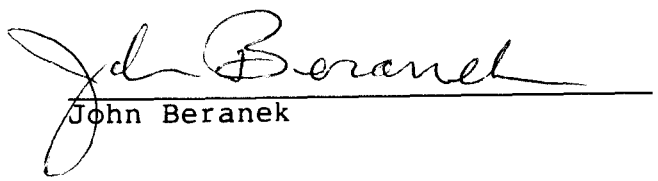
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U. S. Mail to GEORGE A. VAKA, ESQUIRE, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, FL 33601 and MARK J. FELDMAN, ESQUIRE, 2350 Coral Way, Suite 302, Miami, FL 33145, this 14th day of September, 1990.



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