A31173-7/SHL/207719:mtt/vsc

IN THE SUPREME COURT OF FLORIDA
CASE NO. 86,598

HARCO NATIONAL INSURANCE COMPANY,

Defendant-Petitioner,

vs.

FRANCISCO ROBLES,

Plaintiff-Respondent.

FILED
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JURISDICTIONAL BRIEF OF PETITIONER, HARCO NATIONAL INSURANCE COMPANY

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STATEMENT OF CASE AND FACTS

This case interprets the appraisal provision in an automobile insurance policy. Interdistrict conflict on this issue has been certified by the Third District in a factually identical case which is currently pending in this Court.

Francisco Robles purchased a 1984 dump truck in May 1989 which was financed by a $28,643.00 loan from Capital Bank. Robles insured this vehicle with Harco National Insurance Company.

On October 22, 1990, Robles filed a Proof of Loss with Harco, claiming that the truck was stolen. Robles sought reimbursement for the loss pursuant to the terms and conditions of the Harco policy. The policy provided that the maximum damages recoverable at the time of loss was the actual cash value or the cost of repairing or replacing the stolen property, whichever was less, minus a $1,000.00 deductible. If the parties disagreed on the amount of loss, the insurance contract established an appraisal provision to determine what sum was due and owing:

> SECTION III - BUSINESS AUTO CONDITIONS
>
> The following conditions apply in addition to the Common Policy Conditions:
>
> A. LOSS CONDITIONS
>
> 1. APPRAISAL
>
> If you and we disagree on the amount of "loss", either may demand an appraisal of the "loss". In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and

amount of "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

* * *

In November 1990, Harco offered $17,303.00 as the actual cash value of the truck, subject to Robles' $1,000.00 deductible. Robles refused the payment. In a letter dated January 21, 1990, Harco requested that Robles submit to an appraisal of the loss pursuant to the contract terms. Robles' appraiser valued the truck at $29,000.00 (subject to the $1,000.00 deductible). Harco's appraiser valued the vehicle at $16,000.00, subject to the deductible. Because of the dispute between the parties' appraisers, the two appraisers then selected a neutral umpire pursuant to the terms and conditions of the policy's appraisal provision. This independent appraiser/umpire valued the truck at $16,000.00. Harco then tendered $15,000.00 (the appraisal minus the deductible). Robles rejected the offer and filed suit seeking sums in excess of the amount due under either the appraisal provision or the limits of insurance coverage provided by the contract.

Harco moved for Summary Judgment on the grounds that Robles' recovery was limited to the amount established pursuant to the policy's appraisal provisions.

The Trial Court granted Summary Judgment in favor of Harco, but the Third District Court of Appeal reversed on the authority of *American Reliance Insurance Co. v. Village Homes at Country Walk*, 632 So.2d 106 (3d DCA), *rev. denied*, 640 So.2d 1106 (Fla. 1994), which said that this type of appraisal clause is void because of a lack of mutuality.

A similar ruling was issued in the factually identical case of *State Farm Fire & Casualty Co. v. Licea*, 649 So.2d 910 (Fla. 3d DCA 1995), *rev. accepted*, Case No. 85,200, which was also decided based upon the *American Reliance* decision. In *Licea*, the court certified express and direct conflict with decisions of the other four District Court's of Appeal, and the case has been accepted for review by this court. Case No. 85,200.

ISSUE

WHETHER THE INSTANT DECISION OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST, SECOND, FOURTH, AND FIFTH DISTRICT COURTS OF APPEAL.

ARGUMENT SUMMARY

This case presents the same factual situation and legal issue that is currently before this court on a certified conflict in the case of *State Farm Fire & Casualty Co. v. Licea*, 649 So.2d 910 (3rd DCA 1995), *rev. accepted*, Case No. 85,200. Both of the Third District's decisions result from a *stare decisis* application of the rule announced in *American Reliance Insurance Co. v. Village Homes at Country Walk*, 632 So.2d 106 (Fla. 3d DCA), *rev. denied*, 640 So.2d

1106 (Fla. 1994) which is certified to be in conflict with decisions from all other District Courts of Appeal.

ARGUMENT

THE INSTANT DECISION OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST, SECOND, FOURTH, AND FIFTH DISTRICT COURTS OF APPEAL.

Both the instant case and the *State Farm v. Licea*, *supra*, decision hold that an appraisal clause in an insurance contract is unenforceable where the policy provides "if we [the insurance carrier] submit to an appraisal, we will still retain our right to deny the claim." The Third District noted in both decisions that *stare decisis* required this district to follow the rule announced in *American Reliance Insurance Co. v. Village Homes at Country Walk* that an appraisal clause which contains this provisions lacks mutuality and is, therefore, void. Decisions from each of the other District Courts of Appeal in this state hold (as well as the dissent in the *American Reliance* case) that this provision does not affect the validity of an appraisal clause. Rather, these decisions set forth the rule of law that an insurer who participates in an arbitration proceeding to determine the amount of loss suffered by an insured is not deprived of the right to later contest the existence of insurance coverage for the loss because questions of liability are for the court to resolve. While conflict between the Third District Court of Appeal and the other districts is apparent in multiple decisions (see *State Farm v. Licea*, *supra*, at 911-912), the *Licea* court certified express and direct conflict with the decisions of

Montalvo v. Travellers, 643 So.2d 648 (Fla. 5th DCA 1994); *J.J.F. of Palm Beach v. State Farm*, 634 So.2d 1089 (Fla. 4th DCA 1994); *U.S.F. & G. v. Woolard*, 523 So.2d 798 (Fla. 1st DCA 1988); and *Kennilworth Insurance v. Drake*, 396 So.2d 836 (Fla. 2d DCA 1981).

Uniformity of law can be accomplished only if this Court accepts the instant case for review so that a decision can be entered which will conform to the opinion which will be issued following a merits review in the *Licea*, *supra* case. *Mystan Marine, Inc. v. Harrington*, 339 So.2d 200 (Fla. 1976) conflict *certiorari* is appropriate because of the express and direct conflict between the Third District's decision and the cited cases from other district courts of appeal. *Ford Motor Co. v. Kikas*, 401 So.2d 1341 (Fla. 1981). Because of the conflict which is presented between and among the decisions cited, this Court has jurisdiction to review the instant case to resolve this conflict.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that this Court exercise its discretionary jurisdiction, accept this case, and consolidate it for decision with the case of *State Farm Fire & Casualty Co. v. Licea*, 649 So.2d 910 (Fla. 3d DCA 1995), *rev. accepted* Case No. 85,200.

Respectfully submitted,

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By: ____________________
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 11th day of October, 1995, to: Carlos Lidsky, Esq., Carlos Lidsky, P.A., 145 E. 49th Street, Hialeah, FL 33013, Attorneys for Appellant; Leo Bueno, Esq., Leo Bueno, Attorney, P.A., Post Office Box 440545, Miami, FL 33144-0545, Attorneys for Appellant.

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A31173-7/SHL/207719:mtt/vsc

IN THE SUPREME COURT OF FLORIDA

CASE NO.

HARCO NATIONAL INSURANCE COMPANY,

Defendant-Petitioner,

vs.

FRANCISCO ROBLES,

Plaintiff-Respondent.

_______________________________________/

APPENDIX TO
JURISDICTIONAL BRIEF OF PETITIONER,
HARCO NATIONAL INSURANCE COMPANY

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1995

FRANCISCO ROBLES, **

Appellant, **

vs. ** CASE NO. 93-861

HARCO NATIONAL INSURANCE COMPANY, **

**

Appellee. **

Opinion filed January 18, 1995.

An appeal from the Circuit Court for Dade County, Norman S. Gerstein, Judge.

Leo Bueno; Carlos Lidsky, for appellant.

Wicker Smith Tutan O'Hara McCoy Graham & Lane and Shelley H. Leinicke, for appellee.

Before HUBBART, BASKIN and GREEN.

PER CURIAM.

Francisco Robles ("Robles") appeals an adverse final summary judgment which limits his recovery on an alleged stolen vehicle to an amount established pursuant to an appraisal provision of his

automobile insurance policy. Based upon our recent pronouncement in American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d DCA), rev. denied, 640 So. 2d 1106 (Fla. 1994), we must reverse.

Robles purchased a 1980 Ford dump truck in May 1989 which was financed with a loan from Capital Bank in the sum of $28,643. Robles insured the truck with Harco National Insurance Company ("Harco"). Capital Bank was shown on the declaration page as a loss payee to recover a portion of the insurance proceeds "as interest may appear at the time of the loss."

On October 22, 1990, Robles filed a proof of loss with Harco claiming that the truck had been stolen. Robles requested Harco to pay for the loss pursuant to the terms and conditions of the policy. According to the policy, the maximum damages recoverable at the time of the loss was the actual cash value or the cost of repairing or replacing the stolen property, whichever is less, minus a $1,000 deductible for each covered automobile.

If the parties disagreed on the amount of the loss, the insurance contract established an appraisal procedure to determine what sum was due and owing:

> Section III - Business Auto Conditions.
>
> The following conditions apply in addition to the common policy conditions:
>
> A. Loss Conditions
>
> 1. Appraisal

> If you and we disagree on the amount of "loss," either may demand an appraisal of that "loss". In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a) Pay its chosen appraiser; and
>
> b) bear the other expenses of the appraisal and umpire equally.
>
> If we submit to an appraisal, we will still retain our right to deny the claim. (emphasis added).

In November 1990, Harco offered $17,313 as the actual cash value of the truck, subject to the $1,000 deductible. Robles rejected this offer. By letter dated January 21, 1990, Harco requested that Robles submit to an appraisal of the loss pursuant to the terms of the contract. Robles' appraiser valued the truck at $27,000 and Harco's appraiser valued it at $16,000, subject to the deductible. A third appraiser, selected by the two appraisers as the umpire, valued the truck at $16,000. Harco tendered $15,000 (the appraisal minus the deductible). Robles rejected this offer and filed suit.

Harco moved for summary judgment and argued that Robles' recovery was limited to the amount established pursuant to the policy's appraisal provision. The trial court granted Harco's

motion for summary judgment and Robles instituted this appeal. On appeal, Robles argues, among other things, that our American Reliance decision dictates a reversal of the summary judgment because the appraisal provision lacks mutuality of obligation and is therefore unenforceable. We agree. In American Reliance, we said:

> Where the insured and the insurer agree to submit the question of the insured's loss for determination by appraisers, but the appraisal would not affect the question of the insurer's liability except to fix the amounts of value and loss of damage, there in no enforceable arbitration agreement. 14 Couch on Insurance 2d § 50:18 (Rev. Ed. 1983). 'In the absence of an agreement to be bound thereby, the parties are not bound by a determination made by a third person.' Id.

632 So. 2d at 107.

Accordingly, since we conclude that this appraisal provision is unenforceable, the summary judgment must be reversed as there is now a genuine issue of material fact as to the amount, if any, that Robles may recover on his claim.

Reversed and remanded for proceedings consistent herewith.

of contempt and other offenses and he appealed. The District Court of Appeal held that court's failure to comply with rule governing direct criminal contempt required reversal of contempt convictions.

Affirmed in part and reversed in part.

Contempt ⟹66(8)

Court's failure to comply with rule governing direct criminal contempt required reversal of contempt convictions. West's F.S.A. RCrP Rule 3.830.

Bennett H. Brummer, Public Defender, and John H. Lipinski, Sp. Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Randall Sutton, Asst. Atty. Gen., for appellee.

Before NESBITT, JORGENSON and LEVY, JJ.

PER CURIAM.

Appellant claims numerous errors relating to both the substantive offenses and numerous contempt citations.

As far as the contempt citations are concerned, the record reflects that the trial court erred in failing to comply with the provisions of Rule 3.830 of the Florida Rules of Criminal Procedure. *See Jackson v. State,* 626 So.2d 1050 (Fla. 3d DCA 1993); *Peters v. State,* 626 So.2d 1048 (Fla. 4th DCA 1993). Accordingly, the adjudications of contempt, and the sentences imposed in connection therewith, are reversed.

As far as the conviction for the substantive criminal offense is concerned, we affirm. The record clearly reflects that all of the situations about which the appellant complains were either invited or created by him or constituted harmless error, if error at all when the trial proceedings are viewed as a whole.

Affirmed in part and reversed in part.

AMERICAN RELIANCE INSURANCE COMPANY, Appellant,

v.

The VILLAGE HOMES AT COUNTRY WALK, et al., Appellees.

No. 93-2140.

District Court of Appeal of Florida, Third District.

Feb. 8, 1994.

Rehearing Denied March 15, 1994.

Suit was brought relating to casualty insurance policy. The Circuit Court, Dade County, Norman Gerstein, J., entered nonfinal order denying insurer's motion to compel arbitration, and insurer appealed. The District Court of Appeal, Jorgenson, J., held that appraisal provision of policy did not create agreement to submit matter to binding arbitration in view of insurer's reservation of right to deny claim even after appraisal was rendered.

Affirmed.

Cope, J., filed dissenting opinion.

1. Insurance ⟹569

Appraisal provision in casualty policy did not amount to binding arbitration agreement in view of insurer's reservation of its right to deny claim even after appraisal, without any mutual right on part of insured.

2. Insurance ⟹569

There is no enforceable arbitration agreement where insured and insurer agree to submit question of insured's loss for determination by appraisers, but appraisal will not affect question of insurer's liability except to fix amounts of value and loss of damage.

3. Insurance ⟹569

Appraisal provisions in insurance policies may be construed as agreements to arbitrate.

David L. Deehl, Miami, and Michele Feinzig, Fort Lauderdale, for appellant.

Wallace Engels Pertnoy Solowsky & Allen and Jay Solowsky, Miami, for appellees.

Before HUBBART, JORGENSON and COPE, JJ.

JORGENSON, Judge.

American Reliance Insurance Company appeals from a nonfinal order denying its motion to compel arbitration. We have jurisdiction pursuant to Fla.R.App.P. 9.130(a)(3)(C)(v), and affirm.[1]

[1] American Reliance issued a policy of casualty insurance to The Village Homes at Country Walk, which was severely damaged by Hurricane Andrew. Country Walk sued to recover benefits under the policy; the insurer moved to dismiss and to compel arbitration, relying on the following policy clause:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> (a) Pay its chosen appraiser; and
>
> (b) Bear the other expenses of the appraiser and umpire equally.
>
> *If there is an appraisal, we will still retain our right to deny the claim.* (emphasis added)

[2] The policy clause on which the insurer relies is not an enforceable arbitration agreement, as it lacks mutuality of obligation. "The very essence of an arbitration is an agreement to be bound by the factual determination of the arbitrator and thus end the factual controversy." *Bankers & Shippers Ins. Co. v. Gonzalez,* 234 So.2d 693 (Fla. 3d DCA 1970). Where the insured and the insurer agree to submit the question of the insured's loss for determination by appraisers, but the appraisal would not affect the question of the insurer's liability except to fix the amounts of value and loss of damage, there is no enforceable arbitration agreement. 14 Couch on Insurance 2d § 50:18 (Rev.Ed.1983). "In the absence of an agreement to be bound thereby, the parties are not bound by a determination made by a *third person.*" *Id.*

The Florida Supreme Court has held that an agreement not to be bound by an arbitrator's award that exceeds a certain amount is not contrary to public policy or the Florida Arbitration Code. *Roe v. Amica Mut. Ins. Co.,* 533 So.2d 279 (Fla.1988). In *Roe,* the court noted that "the parties simply agreed to binding arbitration as to any award up to $10,000, and to nonbinding arbitration as to any award exceeding that limit." *Roe,* 533 So.2d at 281. In *Roe,* either party could reject an award of over $10,000 and proceed to litigate the claim. However, the policy in this case does not even provide for nonbinding arbitration as to the value of loss, as it reserves only the insurer's right to reject the claim.[2]

[3] Appraisal provisions in insurance policies may be construed as agreements to arbitrate. *See, e.g., Intracoastal Ventures Corp. v. Safeco Ins. Co.,* 540 So.2d 162 (Fla. 4th DCA 1989); *State Farm Fire & Cas. Co. v. Feminine Fashions,* 509 So.2d 376 (Fla. 3d DCA 1987). Here, however, the insurer's

1. American Reliance sought review of the order by a Petition for Writ of Common Law Certiorari. Because the order is an appealable nonfinal order, we treat the petition as an appeal.

2. The supreme court decided *Roe* in the context of a dispute over PIP benefits under an automobile insurance policy. This case involves benefits claimed under a casualty policy for losses occasioned by Hurricane Andrew's destruction of people's homes. Although reconstruction is underway, the process of rebuilding cannot continue without payment of sums allegedly still due under the policy. The displaced homeowners are loathe to submit to the appraisal arbitration process in light of the insurer's right nevertheless, at the conclusion of *that process,* to deny their claims.

reservation of its right to deny the claim destroys mutuality of obligation, is incompatible with the goals of arbitration, and renders illusory any purported agreement to submit to binding arbitration.

AFFIRMED.

HUBBART, J., concurs.

COPE, Judge (dissenting).

I respectfully dissent. The appraisal clause in the present case is reasonably susceptible of an interpretation which is neither illusory nor wanting in mutuality. Accordingly, the order under review should be reversed.

The question before us is how to interpret the appraisal clause of a standard form insurance contract. The insured successfully argued below that the appraisal clause is binding only on the insured and not on the insurer. The trial court declined to enforce the appraisal clause, reasoning that the provision was illusory or wanting in mutuality.

The rules of contract construction applicable here are clear. In the interpretation of an "agreement or a term thereof ... (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, *or of no effect*...." *Restatement (Second) of Contracts* § 203 (1981). Similarly, "[a]ll of the provisions of a contract should be given their due meaning, and should be so construed as to render them consistent and harmonious if possible; effect should be given to each provision if that can reasonably be done." 11 Fla.Jur.2d *Contracts* § 121, at 421 (1979) (footnotes omitted).

With those principles in mind, the text of the appraisal clause must be considered. The key provisions are the last, and third from last, sentences. The appraisal clause states:

> 2. Appraisal
>
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. *A decision agreed to by any two will be binding.* Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> *If there is an appraisal, we will still retain our right to deny the claim.*

(Emphasis added).

The insurer correctly argues that this clause cannot be reasonably construed to allow the insurance company an open-ended escape from the results of the appraisal. The appraisal clause sets out the procedure for appraisal. It then expressly provides, "A decision agreed to by any two [appraisers] *will be binding*." (Emphasis added). "Will be binding" means "will be binding." Thus, once the appraisers have reached a decision, both the insured and the insurer are bound thereby, because the contract says so.

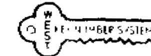
What, then, is the proper interpretation of the final sentence, which states "If there is an appraisal, we still retain our right to deny the claim."? It must be remembered that the appraisal clause in this case allows either the insured or the insurer to make a request for an appraisal. The purpose of the "right to deny" sentence is to state, quite simply, that if the insured requests an appraisal and the insurer proceeds with the appraisal process, the insurer has not thereby abandoned any coverage defenses which may be available to it.

The appraisal clause in the present case is a "plain language" version of a similar appraisal clause interpreted in *Hanover Fire Insurance Co. v. Lewis*, 28 Fla. 209, 10 So. 297 (1891). There, the appraisal clause provided that the award "shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy." *Id.* at 212, 10 So. at 301. The Florida Supreme Court held that the clause was

> *binding* as to the extent of the loss on the assured as well as upon the insurers.... Hence, if, after such ascertainment of the amount of the loss, it should be found that the insurers were legally liable for such loss, they at *once* became bound for the "amount" ascertained and awarded by such *arbitrators*.

Id. at 248, 10 So. at 302–03. *Cf. Roe v. Amica Mut. Ins. Co.*, 533 So.2d 279, 280 (Fla.1988) ("parties may select certain issues and not others to submit to arbitration, and ... an award would be binding only as to those issues submitted.").

The appraisal clause is valid and binding. The order under review should be *reversed*.



1

Eladio Tomas ELIZAGARATE, Appellant,

v.

The STATE of Florida, Appellee.

No. 93–1993.

District Court of Appeal of Florida, Third District.

Feb. 8, 1994.

Rehearing Denied March 8, 1994.

An Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County; Joseph P. Farina, Judge.

Eladio Tomas Elizagarate, pro. per.

Robert A. Butterworth, Atty. Gen., and Charles M. Fahlbusch, Asst. Atty. Gen., for appellee.

Before BARKDULL, BASKIN and GERSTEN, JJ.

PER CURIAM.

This appeal seeks review of an order denying a motion to correct an alleged illegal sentence. Many grounds are urged for reversal, save and except that which relates to the retention of jurisdiction, all are without merit. We do find error in the order as it relates to retaining jurisdiction, and reverse so much of same as it relates to that issue. We return the matter to the trial court for further proceedings in accordance with the reasoning set forth in *Macias v. State*, 614 So.2d 1216 (Fla. 3d DCA 1993).

Affirmed in part, reversed in part, with directions.

2

Forrest Benjamin MOTT, Appellant,

v.

The STATE of Florida, Appellee.

No. 93–696.

District Court of Appeal of Florida, Third District.

Feb. 8, 1994.

Rehearing Denied March 15, 1994.

An Appeal from the Circuit Court for Dade County; Leonard Glick, Judge.

John H. Lipinski, Miami, for appellant.

Robert A. Butterworth, Atty. Gen., and Randall Sutton, Asst. Atty. Gen., for appellee.

Before NESBITT, JORGENSON and LEVY, JJ.

PER CURIAM.

Affirmed. *Fenelon v. State*, 594 So.2d 292 (Fla.1992); *Nixon v. State*, 572 So.2d 1336 (Fla.1990), *cert. denied*, — U.S. —, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991); *Strapp v. State*, 588 So.2d 27 (Fla. 3d DCA 1991);

Judge Boyer entered an order of dependency in April 1992 which continued the children's placement with the Rihas. In the dependency order, he found by clear and convincing evidence that Jeffrey Crouch has a passive/aggressive personality disorder, that he abandoned his daughters after his release from jail in 1988, and that the children would suffer "prospective abuse" which "would produce mental and emotional harm of a lasting nature, as well as possible physical harm[1]" if returned to their father.

The only evidence before the trial court on the matter at hand consists of the findings of the 1992 dependency order, and six independent reports written by five psychologists and one social worker. In their reports, the experts evaluate the girls' mental health as recent as the summer of 1993. The reports overwhelmingly show that the girls are well integrated in the Riha family. All unequivocally recommend that the girls should not be reunited with their father. Some of them indicate that the mere thought of living with their father would cause the girls to suffer both psychological and resulting physical harm.[2]

Jeffrey Crouch did not file or present any evidence, contradictory or otherwise. No evidence regarding the details of the father's arrest or the grounds for the suppression were presented. The 1992 order provided none of the facts or circumstances surrounding the confession. It merely recognized that the evidence presented at the adjudicatory hearing was insufficient to prove the identity of their mother's murderer. The experts do not discuss the confession in their reports but only refer to the fact that the children believe their father murdered their mother.[3]

Although the confession was found inadmissible for purposes of obtaining a conviction in the criminal case against Jeffrey Crouch, the existence of the confession is relevant for purposes of determining whether Jeffrey Crouch's parental rights should be terminated. Its mere existence is relevant in these proceedings as at least some external justification for the girls' belief that their father murdered their mother.

[1-5] A performance agreement must be offered to a parent before terminating parental rights. § 39.451, Fla.Stat. (1993). The goal of any agreement or plan, however, need not be reunification of the parent and child. *See Warren v. Department of Health & Rehabilitative Servs.*, 501 So.2d 706 (Fla. 2d DCA), *review denied*, 508 So.2d 16 (Fla. 1987); *Hornback v. Department of Health & Rehabilitative Servs.*, 576 So.2d 416 (Fla. 3d DCA 1991). Termination of parental rights and subsequent adoption may be the goal of a plan when the return of the child to the parent would be unsafe. *See* § 39.451, Fla. Stat. (1993); *Warren*. Moreover, parental rights have been terminated based on prospective abuse or neglect. *See In re interest of W.D.N.*, 443 So.2d 493 (Fla. 2d DCA 1984); *In the interest of J.J.C.*, 498 So.2d 604 (Fla. 2d DCA 1986).[4] We conclude that the facts of this case establish prospective abuse, making the goal of returning the children to their father untenable.

The plan is quashed and the case remanded for a ruling on the Rihas' petition to terminate parental rights consistent with this opinion.

Petition for certiorari granted; order quashed.

DANAHY, A.C.J., and CAMPBELL and THREADGILL, JJ., concur.

1. The order does not expound on the origin of the physical harm, i.e., whether the father might hurt the children or whether the anticipated severe psychological trauma might result in physical harm.

2. One report describes the source of the physical harm as that which "would arise from the very likely prospect the children will internalize their intensely negative emotions, thus taking its toll on their physical system." Two of the reports, however, divulge that the children fear being physically harmed by their father.

3. The record in a prior-filed certiorari proceeding in this court reveals that Judge Bray heard the motion to suppress the confession. That transcript was not made a part of the record in the trial court, nor has it been made a part of the record in any certiorari proceeding in this court. Nothing in the record before us indicates that either Judge Bray or the parties relied in any way on any facts which may have been divulged at the suppression hearing.

4. The supreme court has not decided the issue of whether "prospective" abuse alone may support a finding of termination of parental rights. *Padgett v. Department of Health & Rehabilitative Servs.*, 577 So.2d 565, 566 n. 1 (Fla.1991).

J.J.F. OF PALM BEACH, INC., d/b/a Sunrise Restaurant, Appellant/Cross-Appellee,

v.

STATE FARM FIRE AND CASUALTY CO., Appellee/Cross-Appellant.

Nos. 91-0505, 91-1082.

District Court of Appeal of Florida, Fourth District.

Feb. 23, 1994.

Motion for Rehearing Stricken as Untimely, Stay Granted April 29, 1994.

On review of arbitrator's decision, determining that period of interruption for purposes of business interruption claim under fire policy was 23.75 months, the Circuit Court, Palm Beach County, Stephen A. Rapp, J., set aside arbitrator's decision. On consolidated appeals and cross appeal, the District Court of Appeal, Farmer, J., held that trial judge was not authorized to disturb arbitrator's decision under rubric of deciding issue of "coverage," even if, as trial judge found, arbitrator had used legally incorrect measure of damage.

Reversed and remanded with directions.

1. Arbitration ⟹63.1, 63.2

Under arbitration law, unless parties so stipulate, it is not given to judges to review arbitrators' decisions for legal and factual accuracy.

2. Insurance ⟹574(6)

Trial judge was not authorized to disturb arbitrator's decision in insurance dispute under rubric of deciding issue of "coverage," even if, as trial judge found, arbitrator had used legally incorrect measure of damage; under policy provision, whether claimant was actually entitled under facts of case to be paid on claim and, if so, precise amount to which claimant was entitled, were questions reserved for arbitrator. West's F.S.A. §§ 682.13, 682.14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Insurance ⟹567.1

Where amount owed on insurance claim, arguably within policy coverage, is dependent on resolution of disputed issues of fact and application of policy language to those facts, extent of claim does not constitute "coverage" question reserved for court, as opposed to arbitrator. West's F.S.A. §§ 682.13, 682.14.

4. Insurance ⟹567.1

Coverage question reserved for court, as opposed to arbitrator, is merely whether claim is arguably within class of claims covered by policy and, thus, arbitration provision. West's F.S.A. §§ 682.13, 682.14.

Theresa A. DiPaola of Roberts & DiPaola, P.A., and Philip M. Burlington of Edna L. Caruso, P.A., West Palm Beach, for appellant.

Brian C. Powers and Robert C. Groelle of Powers & McNalis, Lake Worth, for appellee.

FARMER, Judge.

In this case involving a business interruption claim under a fire insurance policy, the arbitrator (whom the parties call an "umpire") decided that the period of the interruption was 23.75 months. Later the trial judge set aside the arbitrator's decision under the guise of construing "coverage" under the policy. We reverse.

The insuring clause of the policy provides that State Farm is liable for:

"the actual loss sustained by the insured directly from the interruption of business * * * *for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace* such part of the property herein described as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this policy." [e.s.]

After a fire damaged the insured's restaurant, the carrier offered compensation for a two-month period and refused to offer more. The insured, who was evicted from the premises after the fire, claimed substantially more than that. The parties stipulated that the insured's monthly loss was $7,638.

The arbitrator decided that the period of this insured's interruption, as measured by the due diligence clause, was 23.75 months. In making this determination, the arbitrator apparently found that the insured was delayed in diligently making the repairs by the carrier's refusal to resolve this claim. The trial judge concluded, however, that the compensable period of the interruption should be limited to only the actual time physically necessary to effect reconstruction or repair of the edifice destroyed in the fire. In other words, the trial judge employed only an engineering calculus, unaffected by surrounding circumstances, while the arbitrator considered both the physics and the circumstances.

The grounds for vacating or modifying an award are quite limited and specific. A trial judge may vacate an award only for fraud, corruption or partiality by the arbitrators; because the award is in excess of arbitrable jurisdiction; because the arbitrator unreasonably refused to postpone or continue an arbitration hearing; and because of the absence of an agreement to arbitrate.[1] A court may modify an award only for an obvious miscalculation or other self-evident mistake, for ruling on a matter not submitted, and for an imperfection in the form but not the merits of an award.[2] None of these grounds apply here.[3]

[1, 2] Under our arbitration law, unless the parties so stipulate, it is not given to judges to review arbitrators' decisions for legal and factual accuracy. No provision in the arbitration code authorizes judges to act as reviewing courts, in the same way we review trial judges' legal decisions. Here, however, the trial judge did precisely that when he found that the arbitrator used a "legally incorrect measure of damage." Even if that were true, and we do not think it so, that still would not authorize the judge to disturb the arbitrator's decision under the simple rubric of deciding the issue of coverage.

[3] Where the amount owed on a claim, arguably within the policy coverage, is dependent on the resolution of disputed issues of fact and the application of policy language to those facts, as here, the extent of the claim does not constitute a "coverage" question. In *Allstate Ins. Co. v. Candreva*, 497 So.2d 980 (Fla. 4th DCA 1986), where we affirmed an order compelling arbitration in an uninsured motorist case with an arbitration provision, we concluded that the UM carrier's defense of workers compensation immunity was an issue for the arbitrator.

[4] We distinguished the question of coverage, on the one hand, from the question as to the amount the carrier might be liable to pay, on the other, as the issue in that case. As Judge Warner explained:

"The question of 'how much, if any,' the carrier must pay depends on the extent of liability of the [uninsured] tortfeasor as well as the damages to the insured. Thus, it is the court's duty to determine that the tortfeasor was uninsured within the meaning of the policy, and, once that determination is made, it is for the arbitrators to determine the extent of liability of the tortfeasor under the facts presented."

497 So.2d at 982. In other words, the coverage question reserved for the court is merely whether the claim is arguably within the class of claims covered by the policy and, therefore, the arbitration provision. Under the policy provision in this case, whether the claimant is actually entitled under the facts of the case to be paid on a claim and, if so, the precise amount to which the claimant is entitled, is a question reserved for the arbitrator. The *Candreva* rationale fits exactly here.

We remand for the entry of judgment on the arbitrator's decision.

REVERSED AND REMANDED WITH DIRECTIONS.

STONE, J., and JAMES C. DOWNEY, Senior Judge, concur.

1. *See* § 682.13, Fla.Stat. (1993).

2. *See* § 682.14, Fla.Stat. (1993).

3. The only one of these grounds argued below was that the arbitrator was biased in favor of the insured. The issue of bias was tried to a jury, and their verdict was against the carrier. Hence, no statutory ground existed for vacating the award.

ORMOND BEACH ASSOCIATES LIMITED PARTNERSHIP and LPIMC, Inc., Appellants,

v.

CITATION MORTGAGE, LTD., a Nevada Limited Partnership, etc., et al., Appellees.

No. 93–1897.

District Court of Appeal of Florida, Fifth District.

March 4, 1994.

Rehearing Denied April 18, 1994.

Mortgagor appealed decision of the Circuit Court, Volusia County, John V. Doyle, J., permitting sequestration of rents collected by mortgagor prior to enactment of statute on assignment of rents. The District Court of Appeal, Griffin, J., held that statute governing assignment of rents to mortgagee can be applied retroactively to rents collected before enactment of statute, but still held by mortgagor when application for relief is sought.

Affirmed.

Constitutional Law ⟹194

Mortgages ⟹199(2)

Statute governing assignment of rents to mortgagee can be applied retroactively to rents collected before enactment of statute, but still held by mortgagor when application for relief is sought. West's F.S.A. § 697.07.

J. Lester Kaney, of Cobb, Cole & Bell, Daytona Beach, Leighton Aiken and Dana M. Campbell, of Owens, Clary & Aiken, L.L.P., Dallas, TX, J. Thomas Cardwell, of Akerman, Senterfitt & Eidson, Orlando, for appellants.

Terrence Russell and Porcher L. Taylor, III, and Nancy W. Gregorie of Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., Fort Lauderdale, for appellees.

GRIFFIN, Judge.

We affirm the appealed order; however, we do so not on the basis articulated in the lower court's order but on the basis of § 697.07, Florida Statutes (1993). This statute clarifies the legislative intent behind the somewhat murky language of the original 1991 version of the statute and settles differing interpretations of the statute in favor of the view expressed by this court in *Oakbrooke Associates, Ltd. v. Insurance Commissioner of State of California*, 581 So.2d 943, 944 (Fla. 5th DCA 1991) and by other courts.[1] The 1993 statute governing assignment of rents now plainly embraces all rents

1. *See In re Shoppes of Hillsboro, Ltd.*, 131 B.R. 1018 (Bankr.S.D.Fla.1991); *Matter of Growers Properties No. 56, Ltd.*, 117 B.R. 1015 (Bankr.M.D.Fla.1990); *In re Mariner Enterprises of Panama City, Inc.*, 131 B.R. 190 (Bankr.N.D.Fla.1989); *In re One Fourth Street North, Ltd.*, 103 B.R. 320 (Bankr.M.D.Fla.1989); *In re Thymewood Apartments, Ltd.*, 123 B.R. 969 (S.D.Ohio 1991); *Nassau Square Associates, Ltd. v. Insurance Comm'r of the State of California*, 579 So.2d 259 (Fla. 4th DCA 1991); Staff of Fla.S.Comm. on Judiciary, CS for SB 1572 (1993) *Staff Analysis* 2 (Feb. 25, 1993).

Ltd. an opportunity to sell the property and realize $100,000 in equity constitutes an abuse of the trial court's discretion, particularly where the only possible prejudice to Regan is "that the [pending] foreclosure action pertaining to the first mortgage *could* overtake Regan's prior judgment," a prejudice which has not yet occurred, may never occur, and, if imminent, one which could be averted by timely action of the trial court.

KENILWORTH INSURANCE COMPANY, an insurance company authorized to do business in the State of Florida, and Dale A. Miller, Appellants and Cross-Appellees,

v.

Teresa I. DRAKE and State Farm Fire and Casualty Insurance Company, an insurance company authorized to do business in the State of Florida, Appellees, Cross-Appellants and Cross-Appellees.

No. 79–1373.

District Court of Appeal of Florida, Second District.

April 10, 1981.

Insured, who was passenger in vehicle which collided with uninsured motorist's vehicle, brought action against her insurer, driver, and driver's insurer for declaration of her total uninsured-underinsured motorist coverage under policies of both insurers and for a declaration of the insurers' proportionate liability. The Circuit Court, Polk County, Thomas M. Langston, J., entered judgment for insured for the full amount of uninsured-underinsured motorist coverage afforded by both policies, less the amount of personal injury protection paid to her by her insurer, plus costs and attorney fees. All parties appealed from the judgment. The District Court of Appeal, Ott, J., held that: (1) insured could bring action against insurers for declaration of her total uninsured-underinsured motorist coverage and of insurers' proportionate liability, notwithstanding arbitration provisions in both policies of insurance, and (2) uninsured-underinsured motorist coverage provided by both insurers was available to insured.

Affirmed.

1. Insurance ⇐569, 578

Provisions in insurance policy for arbitration are binding insofar as they require referral to arbitration panel of such issues as liability and damages; questions pertaining to coverage provided by policy, however, must be adjudicated by courts, and once proper case for declaratory relief has been instituted, court can and should adjudicate entire controversy so as to avoid multiplicity of suits.

2. Insurance ⇐578

Insured, who was injured while riding as passenger in driver's vehicle when it collided with uninsured motorist's vehicle, could bring action against her insurer and driver's insurer for declaration of her total uninsured-underinsured motorist coverage under both policies and of proportionate liability of insurers, notwithstanding provisions in policies for arbitration.

3. Insurance ⇐531.3(2)

"Stacking" of insurance policies occurs when owner of several vehicles seeks recourse to aggregate coverage afforded by separate policies on each of those vehicles. West's F.S.A. § 627.4132.

See publication Words and Phrases for other judicial constructions and definitions.

4. Insurance ⇐531.3(2)

Rule against stacking of insurance policies did not apply to insured's claim for uninsured-underinsured motorist coverage against her automobile insurer and insurer of driver in whose car she was passenger when injured, where insured's and driver's vehicles were separately owned and covered by separate policies issued to separate insureds. West's F.S.A. §§ 627.727, 627.4132.

5. Insurance ⇐467.51(8)

Purpose of uninsured-underinsured motorist coverage is to provide those so insured with funds from which they can be compensated for injuries sustained in automobile accidents, just as though tort-feasor had carried that much liability insurance; coverage available to insured is not affected by fact that there may be more than one tort-feasor involved. West's F.S.A. § 627.727.

6. Insurance ⇐532.05(2)

Personal injury protection benefits paid to insured by her insurer constituted credit against uninsured-underinsured motorist coverage available to her. West's F.S.A. § 627.727(1).

7. Appeal and Error ⇐1041(2)

Refusal of trial court to permit insured to amend complaint against her insurer, insurer of driver in whose car she was passenger when injured, and driver, to conform to proof that driver and third party were both negligent was not prejudicial to her, where amount of insurance money available to her would not be affected by finding that driver was negligent.

8. Insurance ⇐531.3(2)

Two or more insurers providing uninsured-underinsured motorist coverage should share net uninsured-underinsured motorist liability in proportion to insurance available to claimant under their respective policies, and statutory credits should be applied without regard to source. West's F.S.A. § 627.727(1).

9. Insurance ⇐532.05(2)

Full amount of uninsured-underinsured motorist coverage provided by both insurer of insured, who was passenger in vehicle which collided with uninsured motorist's vehicle, and by her driver's insurer was available to insured where neither insurance policy contained provision reducing amount of uninsured-underinsured motorist coverage by amount of personal injury protection benefits paid.

A. J. Melkus of Boswell, Boswell & Conner, Bartow, for appellants and cross-appellees Kenilworth Insurance/Miller.

Lee S. Damsker of Gordon & Maney, P. A., Tampa, and Clinton A. Curtis of Curtis & Lilly, Lakeland, for appellee and cross-appellant Drake.

Arthur C. Fulmer, of Lane, Massey, Trohn, Clarke, Bertrand & Smith, P. A., Lakeland, for appellee and cross-appellant State Farm.

OTT, Judge.

Teresa I. Drake (hereinafter appellee) was injured in 1977 while riding as a passenger in a vehicle owned and operated by Dale A. Miller (hereinafter appellant) when it collided with a vehicle owned and operated by one Wells, who was uninsured. Appellee's own insurer, State Farm, provided her with $25,000 in uninsured/underinsured motorist coverage (UMC) and $5,000 in personal injury protection (PIP). Appellant carried $15,000 in liability coverage and $15,000 UMC with Kenilworth under a policy that extended protection to passengers in the vehicle, as additional insureds. However, the Kenilworth policy expressly provided that any payments to a claimant under the liability coverage would reduce any UMC that might be available to that claimant as an insured under the policy.

Appellee filed an action in circuit court for a declaration of (1) her total UM coverage under both policies, and (2) the proportionate liability of the two carriers, whom she named as defendants. She also named appellant as a defendant, but alleged that the accident was caused by the negligence of Wells, who was not included as a party to the suit. The complaint alleged a controversy with the two insurance companies as to whether appellee was entitled to recover the combined UMC benefits, as she contended, or only the larger coverage ($25,000) provided under her own policy, as contended by both carriers. Appellee request-

ed the circuit court to take jurisdiction and adjudicate liability, damages and all other matters necessary to do full justice and completely resolve all issues in one proceeding. As to the second issue specified in the complaint, the two insurance companies stipulated that they would pay any judgment in proportion to their respective UM coverages. That is, State Farm agreed to pay 25/40 and Kenilworth agreed to pay 15/40.

The insurance companies objected to the maintenance of the suit, claiming that the policy provisions for arbitration were mandatory and binding. Their motions to dismiss were denied and State Farm cross-claimed against appellant and Kenilworth for a determination of whether appellant's negligence caused or contributed to the accident. A jury was impaneled to decide three questions: (1) the total damages of appellee; (2) the percentage of negligence, if any, attributable to appellant in the accident in question; (3) the percentage of negligence, if any, attributable to Wells (the absent third party tortfeasor). The special advisory verdict returned by the jury assessed appellee's total damages at $45,000 and apportioned negligence at 60% on the part of Wells and 40% on the part of appellant.

Appellee promptly moved the court to amend her pleadings to conform to proof (and the special verdict) by including an allegation of negligence on the part of appellant. The court denied her motion and also denied, without prejudice, State Farm's cross-claim. Judgment was then entered in favor of appellee for the full amount of the UMC afforded by both policies ($40,000), less $5,000 in PIP already paid by State Farm, plus $2,500 attorneys' fees and $2,212 court costs. The insurance companies were ordered to pay the total judgment $39,712, in the proportions specified by their stipulation.

No one appealed from the denial of the cross-claim, but everyone has appealed from the judgment: appellee says that the $5,000 PIP benefits should not have been credited against the UMC and that her motion to amend to conform to proof after the advisory verdict was rendered should have been granted; appellant and Kenilworth claim (and State Farm agrees) that there was no justiciable controversy and therefore the case should have gone to arbitration, and that it was error for the court to "stack" the UMC provided by their two policies; State Farm argues that the $5,000 in PIP benefits it has already paid appellee should be set off against only its share of the liability for UMC. State Farm also claims a $15,000 credit for appellant's liability insurance with Kenilworth.

We affirm the judgment, but due in part to the peculiar facts of this case, and in part to the scarcity of reported precedent, we deem it advisable to explain our reasoning.

I.

[1, 2] *Arbitration.* Policy provisions for arbitration are binding insofar as they require referral to an arbitration panel of such issues as liability and damages. *Sun Insurance Office, Ltd. v. Phillips,* 230 So.2d 17 (Fla. 2d DCA 1970). Questions pertaining to the coverage provided by a policy, however, must be adjudicated by the courts. *Midwest Mutual v. Santiesteban,* 287 So.2d 665, 667[5] (Fla.1974). Further, once a proper case for declaratory relief has been instituted, a court can and should adjudicate the entire controversy, so as to avoid multiplicity of suits. *Travelers Insurance Co. v. Wilson,* 371 So.2d 145, 147[1] (Fla. 3d DCA 1979). The court below did not err in denying the motions to dismiss. The insurance companies not only argued the multiple questions of coverage in that court, they continued to do so here. In doing so, they traversed their assertion that there was no justiciable issue.

II.

[3, 4] *Stacking.* The trial court properly declared that the combined UMC provided by the two insurance policies was available to appellee. "Stacking," now prohibited by section 627.4132, Florida Statutes, occurs when an owner of several vehicles seeks recourse to the aggregate coverage afforded by separate policies on each of those vehicles. Where, as here, vehicles are separately owned and covered by separate policies issued to separate insureds, the reasons for the rule (and thus the rule) against "stacking" vanish. *Cox v. State Farm Mutual,* 378 So.2d 330, 333 (Fla. 2d DCA 1980); *Stephan v. United States Fidelity and Guaranty Co. and State Farm Mutual Automobile Insurance Co.,* 384 So.2d 691 (Fla. 2d DCA 1980).

III.

[5] *Credits Against UMC.* The purpose of UMC is to provide those so insured with a fund from which they can be compensated for injuries sustained in automobile accidents, just as though the tortfeasor had carried that much liability insurance. *Dewberry v. Auto-Owners Insurance Co.,* 363 So.2d 1077, 1081[8] (Fla.1978). The coverage available to the insured is not affected by the fact that there may be more than one tortfeasor involved. *U. S. Fidelity and Guaranty Co. v. Timon,* 379 So.2d 113 (Fla. 1st DCA 1979). Thus, appellee, was covered by UM insurance in the total sum of $40,000.[1] However, the language of the statute (section 627.727, Florida Statutes (1975), as amended by ch. 266, Laws of Fla. (1976))[2] is somewhat ambiguous, which has caused widespread controversy. When this accident occurred on April 28, 1977, subsection (1) of the statute (as amended) read, in pertinent part:

> The coverage provided under this section shall be excess over but shall not duplicate the benefits available to an insured under any workmen's compensation law, personal injury protection benefits, disability benefits law, or any similar law; under any automobile liability or automobile medical expense coverages; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident.[3]

The obvious question is whether the enumerated benefits are a credit against UM insurance, or whether the UM insurance covers those damages which are either over and above or separate and distinct from those damages defrayed by the particular collateral benefits.[4] Our state supreme court chose the first of those alternatives, in a case involving one of the collateral sources enumerated in the statute, i. e., the tortfeasor's liability insurance, and ruled that the language in question provides a credit against UM insurance to the extent that such collateral benefits are available to the insured. *Dewberry, supra,* 363 So.2d at 1081.

[6] Accordingly, we hold that the $5,000 in PIP benefits received by appellee constitutes a credit against the UM insurance available to her. *Carter v. Government Employees Insurance Co.,* 377 So.2d 242 (Fla. 1st DCA 1979); *Fidelity and Casualty Co. of New York v. Moreno,* 350 So.2d 38 (Fla. 3d DCA 1977); *Florida Farm Bureau Casualty Co. v. Andrews,* 369 So.2d 346

1. Kenilworth's reliance upon *Sellers v. United States Fidelity & Guaranty Co.,* 185 So.2d 689 (Fla.1966) as support for the proposition that only the higher limits of UMC, i. e., the $25,000 under the State Farm policy, is available to appellee under the express condition of its policy, is truly baffling. That case explicitly holds that such conditions are contrary to public policy and therefore void.

2. Section 16 of ch. 266, Laws of Fla. (1976), provides:

   This act shall take effect October 1, 1976, and shall apply to all claims arising out of accidents occurring on or after said date.

3. It should be noted that the statute does *not* include other under/uninsured motorist coverage among the specified collateral insurance benefits not to be duplicated. This significant omission has direct impact on the contention made here by both insurers that UM coverage, even by separate insurers in separate policies covering separate vehicles, cannot be combined. The statute, at least, compels no such result.

4. In 1979 the legislature answered that question by again amending the statute, to provide that "Only the underinsured motorist's automobile liability insurance shall be set off against underinsured motorist coverage." UMC evidently will provide excess coverage to benefits from the other enumerated sources. But that does not help the present case.

(Fla. 4th DCA 1978), *cert. denied*, 381 So.2d 764 (Fla.1980). We are aware, of course, that our sister court in the fifth district disagreed with that rule in *State Farm Mutual Automobile Insurance Co. v. Bergman*, 387 So.2d 494 (Fla. 5th DCA 1980), and that the fourth district has receded from *Florida Farm Bureau* in *Lackore v. Hartford Accident and Indemnity Co.*, 390 So.2d 486 (Fla. 4th DCA 1980). It seems to us, however, that *Dewberry, supra*, cannot be construed so narrowly as to be applicable to only such recovery as may be made from the tortfeasor or his liability carrier, and we reject, for the reasons set forth by the first district in *Carter v. Government Employees Insurance Co.*, 377 So.2d 242 (Fla. 1st DCA 1979), *cert. denied*, 389 So.2d 1108 (Fla. 1980), the *Bergman* theory that the 1979 amendment (see n. 4) should be given retroactive effect.

Whatever the effect *Dewberry* may have on PIP benefits, there can be no denial that it firmly established that any liability insurance carried by either or both of the tortfeasors must be credited against UMC. *Jones v. Travelers Indemnity Co. of Rhode Island*, 368 So.2d 1289 (Fla.1979); *Dickey v. Grange Mutual*, 370 So.2d 1234 (Fla. 2d DCA 1979). In the instant case, however, the difficult question lies at the threshold: has there been a binding determination that appellant was at least partially responsible for the accident? Normally, that question is quite critical to an injured claimant because if offsetting credit against UMC is given for the liability insurance of one who may ultimately be found blameless for the accident, the claimant obviously could be deprived of compensation to that extent.

Here, appellee's complaint did not specifically allege the negligence of appellant. However, that is not determinative, because State Farm (appellee's carrier) did raise that issue in its cross-claim and, at the request of both insurers, the jury resolved that question. The problem is that, having obtained that information from the jury, the court failed to use it. Instead the cross-claim was denied without prejudice (presumably to State Farm asserting it in a subsequent action or arbitration proceeding), and that ruling has not been challenged.

We are puzzled by the refusal of the court to include in the declaratory judgment a specific ruling that appellant and Wells were joint tortfeasors. The question of appellant's responsibility could have been adjudicated with finality. There was no necessity, of course, for making a specific allocation of blame between appellant and Wells. Appellee would not be affected because the liability of the tortfeasors would be joint and several, and thus appellant's entire liability coverage would have been made "available" to appellee had the trial court simply determined that appellant was jointly responsible for her damages, inasmuch as they exceeded his liability coverage. Nor, under the particular facts of this case, was the apportionment of negligence important or even meaningful to the insurers. Had *all* the parties been before the court, and had the issue of contribution between joint tortfeasors been properly presented, the apportionment could have been significant in terms of their liability *inter se*, and could have affected the insurers' subrogation rights. Here, however, Wells was not a party to the proceeding and thus the apportionment was meaningless because it was not binding upon him.

[7] Nevertheless, we are unable to hold that the trial court erred in refusing to adjudicate the issue raised by the cross-claim. Our hands are tied by the fact that no one appealed from that order. True, appellee has challenged the refusal of the court to let her amend her complaint to conform to proof that appellant and Wells were both negligent, but that is a different matter and we think that *as to her* such ruling was not prejudicial. The insurance money available to her would not increase if appellant's negligence were established because, as already noted, recovery from his liability insurance would merely decrease the UMC available to her. Conversely, the failure to establish appellant's liability cannot decrease the insurance money appellee will receive. We think the court should have permitted her amendment, since the issue was fully tried and resolved, but the denial of her motion was harmless insofar as she is concerned.[5]

In resolving the final question before us we are forced from the shelter of precedent into uncharted seas. When more than one insurer furnishes UMC, which one gets the credit for any collateral benefits received by or available to the insureds? No appellate court in Florida seems to have considered that problem,[6] and the statute provides no answer. It merely directs that various types of collateral benefits are not to be "duplicated," which *Dewberry* construed as meaning that such benefits were a credit against UMC.

[8] We have concluded that two or more insurers providing UM coverage should share the net UM liability in proportion to the insurance available to the claimant under their respective policies.[7] Statutory credits should be applied without regard to source. Our rationale is this: each insured pays a distinct premium for each coverage afforded by a policy of insurance; theoretically, at least, each coverage could as easily be provided by a separate policy; in fact, each coverage could be provided by a different insurer without affecting the practicalities and realities of the situation. Why, then, should the fact that one carrier provided collateral benefits from one coverage entitle only it to credit against its share of the liability accruing on a separate coverage?

In the case before us, Kenilworth's policy contains a provision which reduces the UM insurance available to a claimant by the amount of any benefits paid to that claimant under the liability coverage provided by the policy, and vice versa. Thus, Kenilworth's liability is limited to $15,000 for the injury of one person, irrespective of which coverage is charged with the payment. Since appellant's negligence has been neither established nor asserted by appellee, his liability insurance is not available to her. Consequently, the UMC afforded appellee under the Kenilworth policy cannot be reduced on that account.

[9] Further, neither insurance policy contains a provision for reduction of the UM coverage if benefits are paid a UM claimant under the PIP coverage of that policy. Accordingly, since the UM coverage provided by the two policies is not subject to reduction pursuant to contractual limitation, the UM insurance available to appellee is the undiminished UM coverage, $40,000. As it works out under the peculiar facts of this case, the stipulation by Kenilworth and State Farm to share liability in proportion to the coverage stated in their respective policies exactly coincides with their legal obligation to share liability in proportion to the UM insurance available under their respective policies. As we have indicated, such coincidence will not occur in every case.

In view of our conclusion that appellant's negligence cannot be considered because (1) appellee did not allege it, (2) it is not determined by the judgment, and (3) no one appealed the denial of the cross-claim, we do not reach State Farm's argument as to the effect of appellant's liability insurance becoming available to appellee.

The judgment is affirmed.

HOBSON, Acting C. J., and GRIMES, J., concur.

5. Kenilworth was the only party injured by the failure to establish appellant's negligence. Had Kenilworth paid appellee $15,000 in liability insurance, it would have had no liability to her for UMC (under the provisions of its policy) and therefore could not have been ordered to pay her attorneys' fees.

6. A similar situation was resolved in *Hunt v. State Farm Mutual Insurance Co.*, 349 So.2d 642, 645 (Fla. 3d DCA 1977) by a terse instruction that the UMI liability "must be prorated." The proper basis of proration, however, was not specified.

7. We have devised a terminology which has been helpful to us in clarifying and resolving the problems we faced in this case. UM "coverage" is the stated limit of protection furnished by the insurance policy or policies. UM insurance "available" is equal to coverage less any reductions specified by the insurance *contract*. UM insurance "liability," where the total claim exceeds total coverage, is the UM insurance available less any *statutory* offsets.

The Legislature enjoys broad discretion in formulating tax statutes. *People Against 561.501 v. Department of Business Regulation*, 587 So.2d 644 (Fla. 1st DCA 1991). However, the State has not cited, nor have we been able to find after extensive research, any authority for the Legislature to single out the produce of one area for taxation, while other like produce in other parts of the state are exempted from tax. To the contrary, in cases in which appellate courts have sustained such taxes, the tax has been imposed state-wide on all like produce. *E.g., State Department of Citrus v. Griffin*, 239 So.2d 577 (Fla.1970); *C.V. Floyd Fruit Co. v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248 (Fla.1937). To do otherwise unfairly burdens those persons who depend for their livelihood on the produce which has been subjected to taxation.

The State relies on subsection (f) of the statute, which provides that the Department of Revenue collect the oyster tax for transfer into the Apalachicola Bay Conservation Trust Fund for the benefit of Apalachicola Bay. The difficulty with this argument, however, is that the two provisions are not interdependent and the validity of the tax must be determined independently of the special purpose stated. This is a tax, not a police power exaction, and whether the funds collected go into the general revenue or into some special fund is not determinative of validity of the tax. There is nothing to prevent the Legislature from amending the statute in question to provide for another use of the funds that do not benefit the Apalachicola Bay.

What is presented here is a revenue-raising measure in the form of a tax on the produce of one area of the State. This tax is distinct from purely regulatory exactions or fees imposed for inspection and licensing that primarily support the regulatory purposes. *See City of Daytona Beach Shores v. State*, 483 So.2d 405 (Fla.1985); and *City of Panama City v. State*, 60 So.2d 658 (Fla.1952). This statute represents a significant departure from previous uses of the tax power which have been held reasonable.

I would affirm the trial court's holding that chapter 90–310, section 9, Laws of Florida, contravenes the article III, section 11(a)(2) prohibition against local laws relating to the assessment of revenues for state purposes.

Nester V. MONTALVO and Carmen Montalvo, Appellants,

v.

The TRAVELERS INDEMNITY COMPANY, Appellee.

No. 93–827.

District Court of Appeal of Florida, Fifth District.

Sept. 30, 1994.

In an arbitration proceeding between insured, who was injured while a passenger in automobile hit by uninsured motorist, and insurer, arbitrators awarded passenger $68,000 plus $5,000 to his wife on derivative loss of consortium claim. Passenger filed motion for confirmation of arbitration award in the circuit court, and after a hearing, the Circuit Court, Brevard County, Tonya Rainwater, J., confirmed only 50% of the award. The passenger appealed. The District Court of Appeal, Thompson, J., held that: (1) it was within discretion of trial judge to change arbitration award and reduce it by 50%; (2) passenger should have been paid the total amount awarded to him by arbitration panel, despite "other insurance" clause; and (3) North Carolina law governed attorneys' fees.

Reversed and remanded.

1. Insurance ⇐574(6)

Insurance company could submit issue of extent of its policy coverage to its insured to trial court, and trial court had discretion to change arbitration award and reduce it by 50% pursuant to "other insurance" clause, since insurance company had not submitted issue of policy limits to arbitration panel.

2. Insurance ⇐574(5.3)

Under North Carolina law, insured, who was injured while a passenger in automobile that was hit by uninsured motorist, should have been paid total amount awarded him in arbitration proceeding between insured and his own insurer rather than be required to collect half the amount from insurer of driver of automobile in which insured was passenger, under his insurer's "other insurance" clause, where passenger's insurer did not join driver's insurer as party to arbitration or confirmation hearing, and thus, could not show that passenger was "insured" entitled to recover under policy of driver's insurer, and where passenger's insurer could have recovered money paid to passenger through other methods such as declaratory judgment against driver's insured or action for contribution from driver's insured.

3. Insurance ⇐531.3(3)

Insurance company could not deny full coverage, consistent with policy limitations, to insured, who was injured while a passenger in automobile that was hit by uninsured motorist, on basis that there was other similar insurance available under driver's policy, within meaning of "other insurance" clause since, under North Carolina law, insurance company was primary insurer of passenger, where passenger's family paid premiums and passenger was named insured under policy.

4. Insurance ⇐125(1)

Trial court was required to use North Carolina law to consider attorney's fees since North Carolina law was used to interpret insurance policy.

Francine D. Holbrook of Merritt Sikes & Ennis, P.A., Miami, for appellants.

Kenneth T. Conner of Frank & Brightman, Orlando, and Herbert M. McMillan, III, of Beers, Tudhope & Wyatt, P.A., Maitland, for appellee.

THOMPSON, Judge.

Nester Montalvo ("Montalvo"), timely appeals the trial court's confirmation of an arbitration award which reduced the arbitration award by 50%. This court has jurisdiction.[1] We reverse with directions. Montalvo was a passenger in an automobile owned and operated by Diago Padilla. This automobile was hit by George Wilder, III. Wilder was an uninsured motorist. Padilla was insured by Integon General Insurance Company ("Integon") a North Carolina company. Montalvo was insured as a family member of the household under his wife's automobile insurance policy with Travelers Indemnity Company ("Travelers"). This policy was issued in North Carolina, on a car which was not involved in the accident. Montalvo suffered serious injuries as a result of the accident which were compensable under the uninsured motorist provisions of the Travelers policy.

Montalvo demanded arbitration with Travelers and filed a "petition to compel arbitration" because the parties could not agree on a neutral third arbitrator.[2] After hearing the presentation of Montalvo and Travelers, the arbitrators unanimously awarded Montalvo $68,500 plus $5,000 to his wife on her derivative loss of consortium claim. Travelers did not file a petition to modify or correct the arbitration award within the 90–day period provided by statute,[3] so Montalvo filed a motion for confirmation of the arbitration award in the circuit court. His petition sought entry of a judgment against Travelers in the amount of the arbitration award, costs and "attorneys' fees incident to bringing this unnecessary petition."

After the petition was filed, Travelers paid Montalvo $36,500, which they alleged represented 50% of the total damages awarded by the arbitrators. Travelers position was that, pursuant to its "other insurance" clause, it was responsible for only 50% of the arbitration award because Montalvo was required to pursue the remaining 50% from Integon, the insurer of Padilla's car. Although Montalvo had filed an uninsured motorist's claim with

1. *See* Fla.R.App.P. 9.030(b)(1)(A) & 9.110(b).

2. *See* § 682.04, Fla.Stat. (1991).

3. *See* §§ 682.12–.15, Fla.Stat. (1991).

Integon, he did not consolidate that claim with the claim against Travelers even though Integon requested that the claims be consolidated. As a result of the failure to consolidate, Integon was not made a party to the arbitration proceedings or the confirmation hearing.

Both Travelers' and Integon's policies contained identically worded "other insurance" clauses in their uninsured motorists benefit provisions:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy. In addition, if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

After a hearing on the motion to confirm the arbitration award, the lower court agreed and confirmed only 50% of the arbitration award. The trial judge relied upon Travelers' assertion that, because both policies provide limits of $100,000 per person and $300,000 per event, each company's proportionate share was one-half of the total damages awarded. Finally, although before the court, the trial court did not address the issue of attorneys' fees. Montalvo appeals.

Montalvo raises three issues on appeal: 1) whether the trial court had the discretion to change the arbitrators' award in the absence of a timely motion to vacate, modify or correct; 2) whether the uninsured policy limits can be reduced by the trial judge pursuant to an "other insurance" clause where there is another insurance policy in effect which covers the same accident; 3) whether the lower court erred by not awarding attorneys' fees to Montalvo. We address these issues seriatim.

Issue I

[1] It was within the trial judge's discretion to change the arbitration award and reduce it by 50%. Under the arbitration code, which governs the procedural aspects of appointing the arbitrators and confirming the award, Travelers may raise the issue of the extent of its policy coverage at the confirmation hearing. As long as the issue was *not* submitted to the arbitration panel, it may be submitted to the trial court. *Meade v. Lumbermens Mut. Casualty Co.*, 423 So.2d 908 (Fla.1982) (policy limits can properly be raised as a defense to paying the arbitration panel's award in the circuit court confirmation hearing). The only issue submitted to the arbitrators was the amount of Montalvo's damages. Travelers did not submit the issue of policy limits to the arbitration panel. The arbitration provision of Travelers' policy provided for arbitration only of the issues of whether Montalvo was legally entitled to damages and, if so, the amount of damages. The question of whether, under the terms of its policy and North Carolina law, Travelers was obligated to pay only one-half of Montalvo's damages was one which only the trial court, not the arbitration panel, could resolve. *Bruno v. Travelers Ins. Co.*, 386 So.2d 251, 252 (Fla. 3rd DCA 1980). The trial court had the discretion to change the arbitration award pursuant to the properly raised defense to the confirmation of the award.

Issue II

[2] Montalvo and Travelers agree that the law of North Carolina controls our interpretation of the two insurance contracts since Travelers' and Integon's policies were issued in North Carolina. *See Lumbermens Mut. Casualty Co. v. August*, 530 So.2d 293 (Fla. 1988) (lex loci contractus rule determines choice of law for interpretation of provisions of uninsured motorist clauses in automobile policies as it determines other issues of automobile insurance coverage). They also agree that under North Carolina insurance law, the "other insurance" clause is permitted. *See* G.S. § 20–279.21 (1985) ("any motor vehicle liability policy may provide for the pro rating of the insurance thereunder with other valid and collectable insurance"). Montalvo argues that since his award does not exceed the policy limit under his Travelers' policy, he should be paid the total amount awarded to him by the arbitration panel. He argues that it should not be his responsibility to seek from every insurance company the correct amount that they may be obligated to pay. Travelers should pay him and then seek to recover its claim against Integon. Based upon our review of North Carolina law, we agree for several reasons.

First, Integon was not properly before the trial court. Travelers argues that Montalvo should have joined Integon and his failure to do so deprived Montalvo of their 50% contribution. As we view the situation, Travelers could have joined Integon as a party to the arbitration as well as to the confirmation hearing. Although Travelers and Montalvo stipulated to the introduction of Integon's policy into evidence and stipulated that each policy was in effect at the time of the accident, there was no stipulation that Montalvo was an "insured" under Integon's policy, that Integon had agreed Montalvo was entitled to payment, or that Integon had paid any amount of damages to Montalvo. In other words, Travelers did not show that Montalvo was an "insured" entitled to recover under Integon's policy. Without there being a proven nexus to show that Integon's policy is the "other applicable insurance," Travelers cannot use Integon as a reason not to compensate Montalvo fully. *See Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967) (terms of another contract between different parties cannot affect the proper construction of an insurance policy unless the second contract constitutes an event which brings a provision of the first contract into effect). Without Integon before the trial court, no determination could be made on the effect of the terms of Integon's policy.

Second, under North Carolina law, Travelers could have sought a declaratory judgment against Integon regarding the companies' obligations under the two insurance contracts. *See North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C.App. 507, 369 S.E.2d 386 (1988) (a declaratory judgment action is appropriate to determine the order of payment between two insurers and the amount of each insurer's share of a settlement figure).

Third, Travelers could have filed an action for contribution from Integon for its pro rata share after paying Montalvo. *See Mid-West Mut. Ins. Co. v. Government Employees Ins. Co.*, 65 N.C.App. 143, 308 S.E.2d 761 (1983) (a contribution claim for personal injuries is appropriate to determine uninsured motorist insurance coverage where injury occurs in a motor vehicle not owned by the covered insured).

[3] In short, there are methods by which Travelers could have recovered the money paid to Montalvo, for example, through a declaratory judgment or contribution. Regardless of who else may be responsible, under North Carolina law, Travelers is the primary insurer since Montalvo's family (Mrs. Montalvo) paid the premiums and he was a named insured under the policy. Therefore, Travelers cannot deny full coverage, consistent with the policy limitations, to Montalvo on the basis that there is other similar insurance available under the "other insurance" clause. *See Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 155 S.E.2d 128 (1967). For these reasons, we reverse and remand to the trial court to affirm the arbitration panel's award for the full amount from Travelers.

Issue III

[4] During the hearing on remand, the trial court shall determine the amount, if any, of attorneys' fees to be awarded, pursuant to North Carolina law only. Montalvo is not entitled to attorneys' fees under section 627.428, Florida Statutes (1991), since Florida law does not apply. *See Andrews v. Continental Ins. Co.*, 444 So.2d 479 (Fla. 5th DCA), *review denied*, 451 So.2d 847 (Fla. 1984) (in a case where the trial court has determined that the law of another state is to be used to interpret an insurance policy, the law of that state shall be used to consider attorneys' fees).

REVERSED and REMANDED for further proceedings consistent with this opinion.

GOSHORN and DIAMANTIS, JJ., concur.

> So what is this evidence about being intoxicated. Well, you know, just being intoxicated isn't enough....

Generally, comments by a prosecutor in closing that the defendant has failed to call a witness are reversible error, as they may lead the jury to believe that the defendant has the burden of proving his innocence. *Crowley v. State*, 558 So.2d 529, 531 (Fla. 4th DCA 1990). The supreme court has carved out a narrow exception within which the state is permitted to draw an adverse inference to a defendant based on the defendant's failure to call a witness. The exception applies when the defendant voluntarily assumes some burden of proof by asserting a defense that requires him to rely on facts that could be elicited only from a witness who is not equally available to the state. *Jackson v. State*, 575 So.2d 181 (Fla.1991). Appellant contends that the special relationship exception does not apply to this case because his defense was voluntary intoxication and not alibi, self-defense, or defense of others, defenses necessarily dependent on the existence of another person to give relevant testimony. *Id.* at 188. While a special relationship existed in that the witness was appellant's mother, appellant's defense did not rely on facts which could be proved only by his mother. The officers at the scene were able to testify regarding their impressions of his intoxication. Therefore, even if the mother had relevant evidence on the issue of the defense, the appellant did not need to rely solely on his mother's testimony to present his defense.

Finding that the comment was harmful error, we reverse and remand for a new trial.

GLICKSTEIN, J., and ALVAREZ, RONALD V., Associate Judge, concur.

WARNER, J., dissents with opinion.

WARNER, Judge, dissenting.

I believe the state's comment was permissible under *Jackson v. State*, 575 So.2d 181 (Fla.1991), as appellant testified that the mother was present during his afternoon drinking bout prior to the arrival of the officers. Therefore, she had relevant evidence unavailable to the state from another source. I would affirm.

STATE FARM FIRE AND CASUALTY COMPANY, Appellant,

v.

Elicer LICEA and Hermida LICEA, Appellees.

No. 94-1261.

District Court of Appeal of Florida, Third District.

Feb. 1, 1995.

Dispute between insurer and insured arose over damages to insured's house from hurricane. Insurer moved for appointment of appraiser pursuant to appraisal clause in policy. The Circuit Court, Dade County, Rosemary Usher Jones, J., denied insurer's motion, and insurer appealed. The District Court of Appeal held that appraisal clause was void for lack of mutuality.

Affirmed.

Green, J., concurred in result.

1. **Courts** ⚷216

Certification had to be made of express and direct conflict between holding that appraisal clause in casualty policy lacked mutuality and was void and other cases holding that policy provisions requiring submission of damages to arbitration were not binding but coverage questions must be adjudicated by courts.

2. **Insurance** ⚷569

Appraisal clause in casualty policy lacked mutuality and was void.

Charlton Lee Hunter and Linwood Anderson, Miami, for appellant.

Hal Vogel, Aventura, Frankel & Finkel and Barry Finkel, Pompano Beach, for appellees.

Before BARKDULL, LEVY and GREEN, JJ.

PER CURIAM.

[1, 2] The Licea's home sustained damage during hurricane Andrew. State Farm was their insurance carrier. A dispute over the amount of damage arose. The Licea's policy contained an appraisal clause. Pursuant to that clause the parties each selected an appraiser but the appraisers could not agree on an umpire. State Farm moved for appointment of an umpire. At hearing on State Farm's motion the Licea's argued that, based on this court's holding in *American Reliance v. Country Walk*, 632 So.2d 106 (Fla.3d DCA); *review denied*, 640 So.2d 1106 (Fla.1994), the appraisal clause lacked mutuality and thus was void. On the authority of this court's decision in *Country Walk* the trial court denied State Farm's motion. This appeal followed.

This panel is of the opinion that Judge Cope's dissent in *Country Walk* sets forth the correct rule of law, to wit: That by participating in an arbitration proceeding to determine the amount of loss suffered by an insured the insurer is in no way deprived of the right to later contest the existence of insurance coverage for that loss. *See and compare Hardware Dealers Mutual v. Glidden Co.*, 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931) (legislation which requires arbitration of single issue of amount of loss is not an unconstitutional denial of due process or equal protection because arbitrator may only decide the amount of loss, all other issues are reserved for the court); *Hamilton v. Home Ins.*, 137 U.S. 370, 11 S.Ct. 133, 34 L.Ed. 708 (1890) (a provision in a contract for the payment of money upon the contingency that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability is undoubtedly valid); *Midwest Mutual v. Santiesteban*, 287 So.2d 665 (Fla.1973) (challenge to coverage under an insurance policy presents a judicial question which may not be decided by arbitration); *Hanover Fire Ins. v. Lewis*, 28 Fla. 209, 10 So. 297 (1891) (whether an insurer is legally liable or obligated to pay a loss is not within the sphere of arbitration, those are questions for the court to decide); *Montalvo v. Travelers*, 643 So.2d 648 (Fla.5th DCA1994) (the question of whether, under the terms of the policy, insurer was obligated to pay only one half of insured's damages was one for the court, not the arbitration panel); *J.J.F. of Palm Beach v. State Farm*, 634 So.2d 1089 (Fla.4th DCA1994) (although coverage issue is a question for the court, the trial court may not disturb an arbitration award under rubric of deciding coverage issue); *State Farm v. Wingate*, 604 So.2d 578 (Fla.4th DCA1992) (where the insurer voids a policy due to the circumstances surrounding the loss the initial issue, to be decided by the court and not the arbitrator, is whether there is coverage for the loss); *Allstate v. Banaszak*, 561 So.2d 465 (Fla.4th DCA1990) (in an declaratory relief action based on an uninsured motorist policy, coverage issues are to be decided by the court not the arbitrator); *U.S.F. & G. v. Woolard*, 523 So.2d 798 (Fla.1st DCA1988) (insurer's declaratory judgment action involved coverage question which is a matter for the court to decide, not the arbitrator); *Allstate v. Candreva*, 497 So.2d 980 (Fla.4th DCA1986) (it is the court's duty to determine whether there is insurance coverage and the arbitrator's duty to determine the extent of the loss); *Criterion Ins. v. Amador*, 479 So.2d 300 (Fla.3d DCA 1985) (question of coverage under an insurance policy is for the court to determine, not the arbitrator); *Nationwide Ins. v. Cooperstock*, 472 So.2d 547 (Fla.4th DCA1985) (coverage issues are for a court of law to decide, liability issues are for arbitrators to decide); *Kenilworth Ins. v. Drake*, 396 So.2d 836 (Fla.2d DCA 1981) (policy provisions that require the submission of damages to arbitration are binding, but questions pertaining to coverage provided by the policy must be adjudicated by the court); *Vigilant Ins. v. Kelps*, 372 So.2d 207 (Fla.3d DCA 1979) (it is well settled that issues concerning the existence of coverage may be determined only by the court, and, conversely may not be a subject of the arbitration process); *Travelers v. Lee*,

358 So.2d 88 (Fla.3d DCA 1978) (notwithstanding any provision for arbitration, the question of coverage is a judicial matter to be determined by the court); *Aetna v. Goldman*, 346 So.2d 111 (Fla.3d DCA 1977) (question of coverage is judicial matter to be determined by court notwithstanding insurance policy provisions pertaining to arbitration); *G.E.I. Co. v. Mirth*, 333 So.2d 545 (Fla.3d DCA 1976) (under liability indemnity policy issues relating to merits of claim are triable at arbitration, but issue bearing on coverage is only triable to the court); *Hayston v. Allstate*, 290 So.2d 67 (Fla.3d DCA 1974) (question of insurance coverage is judicial question which may not be determined by arbitration); *American Fidelity v. Richardson*, 189 So.2d 486 (Fla.3d DCA 1966) *cert. denied* 200 So.2d 814 (1967) (counter claim which disputes coverage must be decided by the court prior to the court proceeding in an action to confirm an arbitration award); *Cruger v. Allstate*, 162 So.2d 690 (Fla.3d DCA 1964) (in declaratory decree action, not withstanding policy provision for arbitration, the coverage question was properly decided by the court).

Accordingly, a request, addressed to the entire court, was made to set this matter for en banc consideration so that *Country Walk* could be revisited and possibly receded from. That request was denied. Under the circumstances this panel is compelled, by the doctrine of stare decisis, to follow this court's earlier decision in *Country Walk*. *See Perez v. State*, 620 So.2d 1256 (Fla.1993); *Holding Electric, Inc. v. Roberts*, 512 So.2d 1112 (Fla.3d DCA 1987), *conflict jurisdiction accepted, reversed on other grounds*, 530 So.2d 301 (Fla.1988). However, we do, pursuant to Article V Section 3(b)(3) & (4) of the Florida Constitution and the Rule 9.030(a)(2)(A)(iv) & (vi) of the Florida Rules of Appellate Procedure, certify an express and direct conflict between our holding today and *Montalvo v. Travelers*, 643 So.2d 648 (Fla.5th DCA 1994); *J.J.F. of Palm Beach v. State Farm*, 634 So.2d 1089 (Fla.4th DCA 1994); *U.S.F. & G. v. Woolard*, 523 So.2d 798 (Fla.1st DCA 1988); and, *Kenilworth Ins. v. Drake*, 396 So.2d 836 (Fla.2d DCA 1981) as cited herein.

The order under review is affirmed, the conflict certified.

Affirmed.

BARKDULL and LEVY, JJ., concur.

GREEN, Judge, specially concurring.

I concur in the result of this opinion based on the settled case of *American Reliance Ins. Co. v. Village Homes at Country Walk*, 632 So.2d 106 (Fla.3d DCA), *rev. denied*, 640 So.2d 1106 (Fla.1994) (en banc consideration denied by this court).

Willie BROWN, Appellant/Cross-Appellee,

v.

The TRAVELERS INSURANCE COMPANY, Appellee/Cross-Appellant.

Nos. 92-3149, 93-0923.

District Court of Appeal of Florida, Fourth District.

Feb. 1, 1995.

Insane insured brought suit against homeowners' insurer seeking declaratory judgment that insurer was liable for loss occurring when insured burned down his home. Insurer counterclaimed for declaratory judgment that intentional acts exclusion precluded coverage. The Circuit Court, Palm Beach County, Richard L. Oftedal, J., entered judgment on posttrial motion for insurer. Insured appealed. The District Court of Appeal, Farmer, J., held that intentional acts exclusion in liability portion of policy did not affect coverage for fire loss under property insurance portion of policy.

Reversed and remanded with directions.

Superseding and withdrawing 641 So.2d 916.

September 17, 1986, the date the claimant reached maximum medical improvement.

AFFIRMED.

WENTWORTH and BARFIELD, JJ., and FRANK, RICHARD H., Associate Judge, concur.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellant,

v.

Brenda Ann WOOLARD, Personal Representative of the Estate of Judson H. Woolard, deceased, and Brenda Ann Woolard, Individually, and South Carolina Insurance Company, a corporation, Appellees.

No. 87-1939.

District Court of Appeal of Florida, First District.

April 26, 1988.

Insurer filed complaint for declaratory relief seeking determination that insureds were not entitled to uninsured motorist benefits and insureds filed countercomplaint seeking to compel arbitration. The Circuit Court, Duval County, Major B. Harding, J., granted application for abitration and appeal was taken. The District Court of Appeal, Wigginton, J., held that: (1) party not injured by uninsured motorist, or one not having claim against uninsured motorist, could not recover under uninsured motorist provision of his own policy, and (2) action for declaratory relief involved insurance coverage questions which were matters to be determined by court, not arbitrators.

Reversed and remanded.

1. **Insurance** ⟹467.51(5)

Under amendment to uninsured motorist coverage statutes, party not injured by uninsured motorist, or one not having claim against uninsured motorist, may not recover under uninsured motorist provision of his own policy. West's F.S.A. §§ 627.727, 627.727(1, 3).

2. **Insurance** ⟹578

Insurer's action for declaratory relief seeking determination that there was no coverage under uninsured motorist provision involved coverage questions which were matters to be determined by court, and not arbitrators, so that granting of arbitration demand required reversal; if alleged tort-feasors in case did not qualify as uninsured motorist or if, for any reason, insureds were not legally entitled to recover damages from them, insurers were not entitled to recover under uninsured motorist portion of policy issued by insurer.

George D. Gabel, Jr. and Robert M. Dees of Wahl and Gabel, Jacksonville, for appellant.

Richard M. Powers, Tallahassee, for appellees.

WIGGINTON, Judge.

Appellant, United States Fidelity and Guaranty Company, appeals, pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), a non-final order granting appellees' application for arbitration of a dispute concerning an insurance contract. We reverse.

Appellee Brenda Ann Woolard, as the widow of Judson Woolard, and as the duly appointed personal representative of his estate, made a claim under the uninsured motorist provisions of an insurance policy issued by appellant to Unit Transportation, the deceased's employer. The claim arose as a result of the deceased's death when the tractor-trailer he was driving struck the rear of a modified school bus on interstate 75 in Georgia. The deceased owned the tractor-trailer but was operating it on behalf of his employer, Unit Transportation. The policy in question was issued by appellant to Unit Transportation and provides coverage to the deceased as an employee of Unit Transportation. It contains uninsured motorist provisions as required by section 627.727, Florida Statutes.

Appellant filed a complaint for declaratory relief in the trial court, seeking a determination that appellees are not entitled to uninsured motorist benefits provided by the policy for the following reasons: (1) Under Florida law, in order to recover uninsured motorist benefits from an insurer, the limits of bodily injury liability protection provided by the policy must be greater than the limits provided by the carrier for the alleged tort-feasor. Section 627.727(3)(b), Florida Statutes. At all material times, the alleged tort-feasors in this case, the owner and the driver of the bus, apparently had liability insurance coverage. Thus, if the limits of bodily injury liability protection contained in the policies issued on behalf of the tort-feasors are in excess of the limits of uninsured motorist coverage under the policy issued by appellant, appellees have no uninsured motorist claim against appellant. (2) Since the deceased had his own insurance coverage with another company, any recovery by appellees from appellant would be prorated between the other insurance company and appellant. (3) Since the accident occurred in Georgia, Georgia law would apply. Under Georgia law, if the deceased was at least 50 percent negligent in causing the accident, his estate would be barred from recovering damages from the alleged tort-feasors, and, therefore, appellees would not be entitled to recover under the uninsured motorist section of the policy issued by appellant.

Appellees answered appellant's complaint and filed a "counter-complaint" seeking to compel arbitration pursuant to section 682.03(1), Florida Statutes, and a provision in the policy providing for arbitration. Appellant moved to dismiss the counter-complaint. After a hearing, the court denied appellant's motion but determined that it would consider appellees' counter-complaint as an application for an order compelling arbitration pursuant to section 682.03, and granted that application.

[1] Appellees assert that pursuant to section 627.727(1), as amended in 1984,[1] all uninsured motorist coverage is excess coverage, with no setoff for the tort-feasor's coverage. We disagree with appellees' application of that amendment to this case. The present wording of subsections 627.727(1) and (3), has not changed the fact that section 627.727 is applicable only to uninsured motorist situations, and the definition of an uninsured motorist did not change with the 1984 amendment. The statute still provides that it applies only for the protection of insureds who are legally entitled to recover damages from owners and operators of uninsured motor vehicles and that an uninsured motor vehicle is one in which the liability limits are less than the limits applicable to the injured person under the injured person's uninsured motorist coverage. A party not injured by an uninsured motorist, or one not having a claim against an uninsured motorist, may not recover under the uninsured motorist provision of his own policy. *See McKinnie v. Progressive American Insurance Co.*, 488 So.2d 825 (Fla.1986) and *Bayles v. State Farm Mutual Automobile Insurance Company*, 483 So.2d 402 (Fla.1985).

[2] Therefore, if the alleged tort-feasors in this case do not qualify as uninsured motorists or if, for any reason, appellees are not legally entitled to recover damages from them, appellees are not entitled to recover under the uninsured motorist portion of the policy issued by appellant. Since appellant's action for declaratory relief clearly involves *coverage* questions which, as appellees admit, are matters to be determined by a court, and not by arbitrators, the granting of an arbitration demand in this instance was error. *See Nationwide Insurance Company v. Cooperstock*, 472 So.2d 547 (Fla. 4th DCA 1985); *Vigilant Insurance Company v. Kelps*, 372 So.2d 207 (Fla. 3d DCA 1979); and

1. As amended, section 627.727(1) now provides, in part:

> The amount of coverage available under this section shall not be reduced by a setoff against any coverage, including liability insurance.

Cruger v. Allstate Insurance Company, 162 So.2d 690 (Fla. 3d DCA 1964). Therefore, we reverse and remand for further proceedings on appellant's declaratory action.

REVERSED AND REMANDED.

ERVIN and THOMPSON, JJ., concur.

Patrick J. CALLIHAN, Ralph N. Lucignano, Edward B. Hall and Elizabeth S. Hall, Appellants,

v.

TURTLE KRAALS, LTD., and J.K. Financial Corp., Appellees.

No. 86–2784.

District Court of Appeal of Florida, Third District.

April 26, 1988.

Condominium unit owners brought action against developer to recover damages allegedly arising from leakage problem in condominium community. The Circuit Court, Monroe County, David P. Kirwan, J., entered judgment in favor of two unit owners. Unit owners appealed. The District Court of Appeal, Hendry, J., held that verdict compensating one unit owner in the amount of $100,000 and second owner in the amount of $25,000 was consistent with evidence.

Affirmed.

1. Evidence ⇐571(10)

Verdict compensating condominium owner in the amount of $100,000 and second condominium owner in the amount of $25,000, for repair costs, diminution in value, and uncompleted amenities due to leakage problem in condominium community caused by developer was consistent with expert testimony that leakage problems could be repaired and that when repaired, value of units would increase.

2. Appeal and Error ⇐205

When trial court sustained condominium developer's objection to hearsay evidence by condominium unit owner regarding potential purchaser's reasons for refusing to place deposit on her unit, which allegedly suffered from leakage problem, unit owner failed proffer evidence at that time, and thus, its exclusion was not reviewable.

Cunningham, Albritton, Lenzi, Warner, Bragg & Miller and Alfred O. Bragg, Marathon, for appellants.

Blackwell, Walker, Fascell & Hoehl and Anthony D. Dwyer and Douglas Stein, Miami, for appellees.

Before HENDRY, BASKIN and FERGUSON, JJ.

HENDRY, Judge.

Condominium unit owners appeal from a final judgment entered on a verdict whereby the developers of "Seawatch" (Turtle Kraals, Ltd. and its general partners) were found jointly and severally liable in an action which claimed deficient construction, violations of rental restrictions and failure to complete the amenities at the condominium community in Marathon. Appellants allege the trial court erred in denying appellant's motion for new trial, claiming the verdict was contrary to uncontroverted evidence, and erred in excluding certain evidence concerning a unit owner's losses.

The sales brochures for Seawatch at Marathon, a condominium community in the Florida Keys, stressed the themes of quality and exclusivity by its portrayal of recreational amenities, and the restriction of rentals to a minimum duration of 30 days. Water leakage into the residential units and common areas was noticed following the first rainfall after occupation of the buildings and persisted with each succeeding shower despite several attempted

roof repairs. The leakage problem eventually became public knowledge and, along with the changing market, caused the number of sales and rentals to drop perceptively.

On August 20, 1985, Turtle Kraals announced that it had deeded all units to Keys Resorts, Ltd., and that there was an assessment deficit of $197,000—the association was insolvent. Unit owners Callihan, Hall and Lucignano filed suit against the developer for damages.

At trial, an objection to hearsay evidence of the financial losses suffered by the Halls on the sale of their unit was sustained. The jury returned a verdict in favor of the developer with respect to the Halls, in favor of Mr. Callihan for $100,000, and in favor of Mr. Lucignano for $25,000. The court entered its judgment on the verdict. The plaintiffs timely motion for a new trial directed at the verdicts was denied. We affirm.

[1] Expert testimony was admitted at trial concerning the condominium design, specifications and construction. Appellant's expert established that the leakage problems in the Callihan and Lucignano units could be repaired for either $7,800 or $2,813 per unit owner, the amount depending upon whether the bearing surfaces or the roof were repaired. A real estate appraiser testified that when repaired, the value of the units would increase. With this evidence before it, the jury's verdict, compensating Mr. Callihan and Mr. Lucignano for repair costs, diminution in value, and uncompleted amenities, was consistent with the evidence. The amount of damages to be awarded rests within the jury's sound discretion, *Richards Co. v. Harrison*, 262 So.2d 258 (Fla. 1st DCA), *cert. denied*, 268 So.2d 165 (Fla.1972), and this discretion is considerable where the damages are unliquidated and are not subject to measurement by a particular standard. *Odoms v. Travelers Ins. Co.*, 339 So.2d 196 (Fla.1976). The evidence here must be viewed in a light most favorable to the jury's verdict. *Conner v. Atlas Aircraft Corp.*, 310 So.2d 352 (Fla. 3d DCA), *cert. denied*, 322 So.2d 913 (1975). The appellants have failed to prove that the amount of the damage award in their favor was unreasonable.

[2] When the trial court sustained appellee's objection to hearsay evidence by appellant Hall regarding a potential buyer's reasons for refusing to place a deposit on her unit, Hall failed to proffer the evidence at that time, and thus its exclusion is not reviewable. *Rezzarday v. West Florida Hosp.*, 462 So.2d 470 (Fla. 1st DCA 1984); *Easton v. Bradford*, 390 So.2d 1202 (Fla. 2d DCA 1980), *review dismissed*, 399 So.2d 1141 (Fla.1981); *Cason v. Smith*, 365 So.2d 1042 (Fla. 3d DCA 1978); *Seaboard Air Line R.R. v. Ellis*, 143 So.2d 550 (Fla. 3d DCA 1962).

Accordingly, for the foregoing reasons and based upon the authorities cited, the final judgment of the trial court is affirmed.

Affirmed.

Edgar W. TELLO, Appellant,

v.

The STATE of Florida, Appellee.

No. 86–500.

District Court of Appeal of Florida, Third District.

April 26, 1988.

An Appeal conducted pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), from the Circuit Court for Dade County; Arthur I. Snyder, Judge.

Edgar W. Tello, in pro. per.

Robert A. Butterworth, Atty. Gen., for appellee.

Before BARKDULL, NESBITT and DANIEL S. PEARSON, JJ.