36-5310
DRC/tcl

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2000
DCA No. 3D00-420

CAROLINE WEISS, as Personal Representative of the Estate of JACK J. WEISS, deceased,

Appellant/Petitioner

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a foreign corporation,

Appellee/Respondent

RESPONDENT'S BRIEF ON THE MERITS

DAVID R. CASSETTY, ESQ.
FBN 991023
O'CONNOR, CHIMPOULIS, RESTANI, MARRERO & McALLISTER, P.A.
Attorneys for LIBERTY MUTUAL
2801 Ponce De Leon Boulevard, 9th Floor
Coral Gables, Florida 33134
(305) 445-4090 Phone
(305) 445-7728 Fax

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

CASES

RULES

STATUTES

STATEMENT OF THE CASE AND FACTS

Petitioner, CAROLINE WEISS ("WEISS") accurately states that she brought an uninsured motorist claim under a LIBERTY MUTUAL INSURANCE COMPANY ("LIBERTY") policy, for an accident in which her husband, while a pedestrian, was struck by an uninsured motorist, William Perez. The remainder of her Statement of the Case and Facts contains argument, inaccuracies, and representations as "fact" of issues which are disputed.[1] Accordingly, LIBERTY submits its own statement.

Notwithstanding WEISS' characterizations of the "family business," it is undisputed that WEISS sued under a policy issued to "Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd." R.I-74-76. The suit alleged that the policy "ostensibly" named Intercontinental Properties, Inc., as agent for Royal Trust Towers, Ltd. as the insured, and that Jack Weiss was or should be deemed an additional named insured. R.I-74-75.

[1]For instance, WEISS asserts as that Jack Weiss was a class one insured under the business auto policy (Brief at pp. 5-6), when that issue was contested; WEISS can hardly claim the issue to have been decided in her favor, given the fact that the Third District determined that he was not covered for this accident.

WEISS moved for partial summary judgment, claiming entitlement to coverage under the "Drive Other Car" endorsement. R.I-105-108. LIBERTY moved for summary judgment, on the basis that Plaintiff's claim for coverage as an officer, director and principal of the named insured does not entitle Plaintiff to coverage, as a matter of law. R.I-119-135. Both motions were denied.

The trial court bifurcated the issues of liability and damages. R.IV-668. The lower court also granted partial summary judgment, finding William Perez negligent for the accident, although reserving the issue of comparative negligence for a jury determination. R.III-516-517. At the start of the liability trial, the parties stipulated that William Perez never produced evidence of insurance, and meets the statutory definition of uninsured motorist.

The parties agreed to conduct a bench trial on Counts II and III, the claims for breach of contract and declaratory judgment against LIBERTY, as liability on these counts is based on a legal question, with the claim for negligence to be submitted to a jury in the event that LIBERTY prevailed on the contract claims.[2]

---

[2]Notwithstanding the fact that the claim that LIBERTY negligently failed to procure the requested insurance was never tried, WEISS spices her Statement with "facts" relating only to that claim. *See, e.g.*, Brief at pp. 3-5. Of course, if this claim

At the bench trial, WEISS argued that, as general partner of the limited partnership, Jack Weiss was "Agent for Royal Trust Tower, Ltd." and thereby a named insured, contrary to the allegations of the Amended Complaint that there was one named insured, "Intercontinental Properties, Inc., Agent for Royal Trust Towers (sic), Ltd." R.I-74-75.

The evidence established that Intercontinental Properties, Inc. was appointed the agent of Royal Trust Tower, Ltd. by the limited partnership, and that Intercontinental Properties conducted business and held itself out to the public as the agent for Royal Trust Tower, Ltd. R.VIII-1384, 1423. Intercontinental Properties, Inc. entered leases with the building's tenants as agent for Royal Trust Tower, Ltd. (signed by WEISS), paid insurance premiums, and even brought suit as the agent for Royal Trust Tower, Ltd. R.VIII-1474, 1451-1452, and 1435-1436, respectively.

In fact, WEISS testified in her deposition in January, 1997 that it was her understanding that "the named insured would be Intercontinental Properties, Inc., as

---

ever is tried, LIBERTY will contest these allegations, in part with WEISS' own admission that she understood that the named insured would be Intercontinental Properties, Inc., as agent for Royal Trust Towers, Ltd. R.VIII-1450-1451. For now, however, the negligence issues are irrelevant.

agent for Royal Trust Towers, Ltd." which is consistent with the allegations of the Amended Complaint. R.VIII-1450-1451; R.IX-1753-1754. At trial, WEISS modified this testimony, asserting that her understanding was that the named insured would be Intercontinental Properties, Inc., "as one of the agents" for Royal Trust Tower, Ltd. R.VIII-1451; R.IX-1754. Nevertheless, she admitted that Intercontinental Properties obtained the insurance for Royal Trust Tower, Ltd. R.IX-1747.

At the conclusion of the bench trial, the trial court found that Jack Weiss was covered under the business auto policy issued to "Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd.," because he was a general partner of Royal Trust Tower, Ltd. and accordingly was liable for the obligations of the limited partnership. R.XXIII-2040. The court also noted that he was named in the "Drive Other Car" endorsement, although the court fell short of stating that the "Drive Other Car" endorsement provided uninsured motorist coverage. *Id.*

After the bench trial, the court entered judgment on Counts II and III in favor of WEISS against LIBERTY, thereby mooting the alternative claim for negligence. R.XXIII-2040. Thereafter, the parties tried the damages to a jury. The court limited the evidence upon which the jury could consider the value of the decedent's estate, by

granting WEISS' motion in limine to exclude reference to any of the decedent's businesses except for his law practice. R.V-799; R.XII-107. This eliminated evidence of the enormous debt Jack Weiss was accumulating.

In addition to determining the amount of damages due to the estate, the jury had to determine whether the named insured elected nonstacked UM coverage in the (primary) business auto policy, and whether the named insured rejected UM coverage in the umbrella policy.

Pursuant to Fla. Stat. § 627.727(1), LIBERTY introduced photocopies of the selection/rejection forms for UM coverage under the two policies, which forms were signed by WEISS (in 1992) and Jack Weiss (in 1993). The forms demonstrate that Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd., elected non-stacked UM coverage equal to the bodily injury limits of $1,000,000 on the business auto policy, and rejected UM coverage on the umbrella policy, in each year.[3]

[3]There were no forms for 1994, in which policy year Jack Weiss was killed. However, §627.727(1) provides that once the insured has rejected coverage, UM need not be provided in superceding policies unless the insured requests the coverage in writing. WEISS did not plead or introduce evidence that the insured requested coverage in writing, for which reason the 1993 forms signed by Jack Weiss are controlling.

Unfortunately, the original forms were not where they were supposed to be, in the underwriting file, and the trial proceeded with the photocopies.

WEISS introduced photocopies of the same forms, only without the check mark electing the non-stacked coverage for the business auto policy, and without any check mark on the umbrella policy. WEISS argued that the forms proved that there was stacked coverage under each policy. WEISS' photocopies were different than those contained in the LIBERTY files only in the absent check marks, and first surfaced at the deposition of the business sales representative, Alex Perez, in an early stage of the litigation. The forms were produced by WEISS' then counsel, and were attached to the deposition of Alex Perez, who was unable to authenticate the documents. R.V-819-826. Both sides moved to exclude the other party's copies, under the best evidence rule. R.IV-731; R.V-819. The court denied both motions. R.XII-83.

After four days of trial, the original documents were located in a warehouse in Massachusetts used by the production department located in Maine. The originals immediately were shipped to Florida, and upon receipt defense counsel contacted WEISS' counsel for inspection and testing. R.XV-415. The trial court declared a

one-week hiatus, during which time the originals were subjected to ink testing, as well as impression testing by WEISS' expert. R.XV-460; R.XX-1124-1179; R.XVIII-911-945. Color copies of the originals and WEISS' altered photocopies are appended hereto as Appendix "A."

LIBERTY moved to dismiss WEISS' claim for committing a fraud upon the court, based in part upon WEISS' submission of the altered selection/rejection forms,[4] which the court denied. R.V-827-839. After the originals were found, LIBERTY renewed the motion, which the trial court again denied. R.XV-413.

---

[4]LIBERTY also raised several clear instances of perjury by WEISS, all designed to maximize her damages award. *See*, LIBERTY's Initial Brief to the appellate court at pp. 10-15. For instance, WEISS attempted to controvert the testimony of William Perez' passenger, Elsa Carrasquilla, who stated that Jack Weiss was talking on his cellular telephone when he stepped from between the two parked vehicles in front of Perez' vehicle, by testifying that the telephone was in Jack's inside coat pocket; to support this, WEISS testified that the telephone rang while Jack was strapped to the stretcher, but that they could not answer it because of the straps, only to later learn that her daughter was the one trying to call him. R.XVIII-832-833. In fact, this could not have happened, because the jacket had only one inside pocket, on the left side over the heart, and the paramedics placed a mechanical CPR device called a "thumper" over his heart to provide chest compression the entire ride to the hospital. R.XX-1095. Additionally, the telephone records show that JACK WEISS received a call five minutes before the accident, which call was not disconnected until five minutes after the accident. R.XX-1100-1102.

The jury accepted the original documents, rejected the photocopies WEISS offered which lacked the check marks on the originals, and expressly found that LIBERTY obtained an "informed, knowing and intelligent rejection" of stacked coverage on the business auto policy and UM coverage on the umbrella policy. R.XVII-1500-1501; R.XXIII-2037-2039.

After denying WEISS' motions for directed verdict, upon which the court had reserved until after the verdict, the court then granted WEISS' motion for judgment in accordance with the motion for directed verdict on the issue of stacking on the business auto policy. R.XVII-1503-1504; R.VI-1060-1061. The trial court accepted the argument that LIBERTY had the burden of proving that the named insured had paid a reduced rate for the non-stacked coverage, and had not paid for stacked coverage, notwithstanding the fact that WEISS introduced no evidence of having paid for stacked coverage. R.VI-1061. The court then entered a verdict for the total amount of damages, having determined that Jack Weiss was a named insured and that the primary policy stacked UM coverage. R.XI-2031-2032.

The appeal followed, in which the Third District reached only one issue, determining that the trial court erred in denying LIBERTY's motion for summary

judgment, because Jack Weiss was not a named insured under the Intercontinental properties, Inc., Agent for Royal Trust Tower, Ltd. policy. *Weiss*, 790 So.2d at 477.

SUMMARY OF ARGUMENT

The decision of the Third District does not conflict with this Court's opinion in *Mullis*, or the Fourth District's opinion in *McDonald*, because the Third District's opinion neither addresses class one coverage nor the finding from *McDonald* that UM coverage must be offered in a "Drive Other Car" endorsement. Instead, the Third District's opinion is consistent with this Court's ruling in *Bartoszewicz*, because the LIBERTY policy was issued to a corporation, and did not specifically name Jack Weiss as a named insured.

Even were there a conflict, Jack Weiss would not be entitled to coverage under the policy, because he was not an additional named insured, and he was not covered regardless of what vehicle in which he may be riding; instead, Jack Weiss was covered only when using a vehicle he did not own, hire or borrow, or while within one of the specifically insured vehicles (as were any other passengers in the specifically insured vehicles). Thus, Jack Weiss was a class two insured not entitled to coverage as a pedestrian.

Because Jack Weiss did not purchase UM coverage under the "Drive Other Car" endorsement, he is not entitled to UM coverage as a pedestrian. Moreover,

LIBERTY was not required to obtain a rejection of UM coverage on the endorsement, because it does not insure specifically identified vehicles registered or principally garaged in Florida, and does not provide insurance for family transportation vehicles.

Were the Court to consider the additional issues raised by WEISS, the Court should reverse the trial court's direction of a verdict on stacking based upon LIBERTY's failure to prove at trial that the named insured paid a reduced rate for non-stacked coverage. WEISS never pled nor proved that she paid for stacked coverage, and the evidence submitted post-trial demonstrates that the named insured actually paid substantially less than the 80% normal premium required for non-stacked coverage. Conversely, the Court should affirm the trial court's admission of the uninsured motorist selection/rejection forms, attached hereto in the Appendix, because the documents were authenticated properly and demonstrate that WEISS attempted to perpetrate a fraud on the court by submitting altered photocopies in order to obtain millions of dollars of insurance coverage which the policy did not provide, and for which the named insured had not paid. Finally, the Court should affirm the trial court's denial of the motion for directed verdict on the issue of UM coverage under the umbrella policy, because there is competent, substantial evidence that the named

insured was aware of the availability of UM coverage, including the admissions of WEISS herself.

Should this Court retain jurisdiction, the opinion of the Third District should be affirmed.

PROLOGUE: Jurisdiction was Granted Improvidently

WEISS argues that conflict jurisdiction exists when a decision of a district court applies a rule of law to produce a different result than that in a case which involves substantially the same facts. Petitioner's Brief at 5.[5] However, the Third District's statement that the endorsement did not modify the definition of who was a named insured for UM coverage does not apply a rule of law to produce a different result than that from this Court in *Mullis v. State Farm Mut. Auto Ins. Co.*, 252 So.2d 229 (Fla. 1971) or the Fourth District in *St. Paul Fire & Marine Ins. Co. v. McDonald*, 525 So.2d 455 (Fla. 4th DCA 1988), because the Third District did not address the argument on class one insureds which was involved in those two cases.

---

[5]WEISS relies on *Neilsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960), a case decided under the Court's former certiorari jurisdiction. As of the 1980 amendment eliminating this Court's certiorari jurisdiction, conflict jurisdiction must be apparent within the four corners of the opinion, and cannot be established by "implied" or "inherent" conflict. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

As previously stated, the conflict must be contained within the text of the opinions. *Reaves*, 485 So. 2d at 830. Accordingly, this Court lacks jurisdiction where the cases alleged to conflict are distinguishable on their facts. *See, e.g., Curry v. State*, 682 So.2d 1091, 1092 (Fla. 1996) (dismissing review as improvidently granted where cases purportedly in conflict addressed different propositions of law). The present case involves two critically distinct facts from *Mullis*: first, *Mullis* involved a resident family member of the named insured, the son of the named insured, whereas the present case involves a corporate named insured for which there can be no class one insureds; secondly, the policy in *Mullis* provided liability insurance with respect to a motor vehicle registered or garaged in Florida, thereby triggering the protections of Fla. Stat. § 627.0851, whereas the present case involves an attempt to impose UM coverage on an endorsement which provides liability coverage for unidentified vehicles, thereby falling outside the parameters of Fla. Stat. § 627.727(1). Rather than conflicting with *Mullis*, the Third District follows this Court's opinion in *Travelers Ins. Co. v. Bartoszewicz*, 404 So.2d 1053, 1055 (Fla. 1981). *Weiss*, 790 So.2d at 476-77.

Like the former statute, § 627.727(1) provides that UM coverage must be offered on policies which provide liability coverage for specifically identified

automobiles registered or garaged in Florida. The "Drive Other Car" endorsement on which WEISS relied in the District Court does not provide liability coverage for any specifically identified automobile, but rather only for unidentified automobiles which are not owned, hired or borrowed. WEISS' statements (in the Petitioner's Jurisdictional Brief at 5, 7 and 9) that the endorsement provides liability coverage "regardless of the vehicle [Jack Weiss] was occupying" are inaccurate, as the endorsement provides coverage only where Jack Weiss was in a vehicle that the insured did not own, hire or borrow. Thus, there is no conflict with *Mullis*.

Neither does this case conflict with *McDonald*. In *McDonald*, the named insured purchased UM coverage under a comprehensive insurance package policy, which policy included liability coverage for non-owned autos. *McDonald*, 525 So. 2d at 456. The Fourth District construed § 627.727(1) to apply to this coverage, and found that the named insured did not reject the coverage. *Id*. at 456. In contrast, the Third District found only that the endorsement "did not modify the definition of who was an insured for UM coverage[,]" and does not address the Fourth District's finding that § 627.727(1) applies to an endorsement providing additional coverage to the named insured. Thus, the "decision" by the Third District, that the endorsement does

not modify the definition of who was an insured for purposes of UM coverage, is not in express and direct conflict with the "decision" in *McDonald* that the named insured did not reject UM coverage under its endorsement, precluding conflict jurisdiction. *See, Kennedy v. Kennedy,* 641 So. 2d 408, 409 (Fla. 1994) (limiting conflict jurisdiction to the actual basis for each decision rendered).

Accordingly, this Court should find that jurisdiction was granted improvidently because the sole issue for jurisdiction was not preserved for review.

ARGUMENT

I. The District Court Properly Reversed the Denial of Summary Judgment

A. The Court Correctly Determined that the Business Auto Policy Did Not Provide UM Coverage for this Accident

LIBERTY prevailed on appeal, because the business auto policy did not provide uninsured motorist coverage for Jack Weiss except while within a covered auto. *Weiss,* 790 So.2d at 477. WEISS plead that Jack Weiss was covered under the business auto policy as an officer, director or employee of Intercontinental Properties, Inc., agent for Royal Trust Towers, Ltd. R.I-75. The law is well settled that business automobile policies do not cover officers, directors or employees, except when in a covered vehicle. *See, e.g., Travelers Ins. Co. v. Bartoszewicz,* 404 So. 2d 1053, 1054

(Fla. 1981); *Lampkin v. National Union Fire Ins. Co.*, 581 So. 2d 175 (Fla. 3d DCA 1990). *Pearcy v. Travelers Indemnity Co.*, 429 So. 2d 1298 (Fla. 3d DCA 1983), rev. den. 438 So. 2d 833 (Fla. 1983); *Auto-Owners Ins. Co. v. Brockman*, 524 So. 2d 490, 492-3 (Fla. 5th DCA 1988). In *Lampkin*, the court held that an uninsured motorist policy which listed the corporation as a named insured did not extend coverage to an employee, even though the employee was listed as an operator of the vehicle. *Id.* 581 So. 2d at 175. *Pearcy* held that the listing of an employee as operator of a corporation's vehicles on an uninsured motorist policy issued to the corporation does not convert the employee into a named insured. *Id*., 429 So. 2d at 1298-99. Furthermore, *Brockman* provided that the sole stockholder and president of a corporation was not a named insured merely because of his office and stock ownership interest. *Id.*, 524 So. 2d at 493.

In the opinion under review, the court explained the economic rationale for such corporate policies, citing *Willingham v. Travelers Ins. Co.,* 483 So. 2d 778 (Fla. 3d DCA 1986). *See Liberty Mutual Ins. Co. v. Weiss*, 790 So. 2d 475 (Fla. 3d DCA 2001). In *Willingham*, the court found that it is not unreasonable that parties would declare a corporation the named insured without necessarily meaning to include

employees. Benefits are conferred by naming the corporation alone, because anyone who is injured while occupying a corporation car or who is struck by a corporation car, and who is not required to have their own coverage, will be insured. *See*, *Id.* at 779. Here, however, the decedent was a pedestrian who was struck by an automobile while jaywalking.

WEISS plead coverage under a legally untenable theory. Accordingly, the lower court properly found that there was an erroneous denial of LIBERTY's motion for summary judgment. *See, generally, Fisher v. Keyes Co.*, 271 So. 2d 787, 788 (Fla. 3d DCA 1973). The judgment entered by the lower court must be affirmed.

B. The Lower Court Properly Determined that Jack Weiss is not a Named Insured

WEISS asserts there is UM coverage under LIBERTY's policy for three reasons: (1) Jack Weiss was a Class One insured, (2) he was a named insured under the "Drive Other Car" ("DOC") endorsement, and (3) he was an "agent for Royal Trust Towers" and thereby a named insured.

(1) Jack Weiss was Class Two

WEISS correctly argues that Florida law recognizes a distinction between two classes of insureds: those who are named insureds and are covered regardless of whether they are in a covered vehicle, called class one; and those who are not named insureds and who are covered only when they are in a covered vehicle, called class two. WEISS' brief at pp. 22, 23 quoting *Florida Farm Bureau v. Hurtado*, 587 So.2d 1314, 1318-19 (Fla. 1991). WEISS misapprehends the policy language, with regard to both points.

First, Jack Weiss was not a named insured. Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd. is the named insured. Unlike the commercial policy in *American Fire and Cas. Co. v. Sinz*, 487 So.2d 340 (Fla. 4th DCA 1986), upon which WEISS relies at p. 25, LIBERTY's policy does **not** include corporate officers as named insureds. *Contrast, id.* at 340 *with* WEISS' Appendix at 59, 64, 66, 76. Instead, LIBERTY's policy is like that in *Bartoszewicz*, where the named insured was defined as the person or organization named in the declarations of the policy. *Id.*, 404 So.2d at 1054. Therefore, Jack Weiss could not be a class one insured. *Accord*, *Pearcy v. Travelers Indemnity Co.*, 429 So.2d 1298, 1298-99 (Fla.

3d DCA), *rev. den.*, 438 So.2d 833 (Fla. 1983)(listing employee as an operator of insured vehicles does not make employee a named insured).

Similarly, WEISS misconstrues the policy as to the second prong, contending that the DOC endorsement "afforded him liability coverage regardless of the vehicle he was occupying." WEISS' Brief at p. 23. In fact, the endorsement only provided him liability coverage in "[a]ny **auto** you don't own, hire or borrow" while being used by a listed individual or their resident spouse. WEISS' Appendix at 48 (emphasis in original). Thus, there are many autos in which the DOC endorsement would not have provided Jack Weiss coverage, including the seven listed vehicles under the policy.[6] Ironically, WEISS seeks to stack the UM limits by seven vehicles insured under the policy, in which vehicles the DOC endorsement would not cover him, while simultaneously arguing that the DOC endorsement made Jack Weiss a class one insured because it covered him regardless of vehicle. Rather than providing coverage

[6]Jack Weiss was covered while in the seven listed vehicles, but not by the DOC endorsement. The UM endorsement provides coverage for anyone occupying a covered auto; thus, Jack Weiss would have been covered if he had been in one of the listed cars when William Perez struck him, but he was not covered as a pedestrian, since he was not a named insured. *See*, WEISS' Appendix at 66.

unlimited as to vehicle, as required for class one status, the endorsement provided limited coverage to Jack Weiss, qualifying him as a class two insured.

Additionally, Fla. Stat. § 627.727(1), on which the Fourth District relied in *McDonald*, does not apply to the DOC endorsement, since the statute addresses only policies issued "with respect to any specifically insured or identified motor vehicle." Fla. Stat. § 627.727(1). The endorsement applies only to specifically **un**identified motor vehicles, thereby falling outside of the statute's purview, under its plain language. *Cf.*, *Martin v. St. Paul Fire and Marine Ins. Co.*, 670 So.2d 997, (Fla. 2d DCA), *rev. den.*, 682 So.2d 1100 (Fla. 1996). In *Martin*, the court first notes that the policy insuring the antique car undisputedly qualifies as a policy of motor vehicle liability insurance delivered in Florida on a specifically described Florida automobile, thereby meeting the plain language of §627.727(1). *Id.* at 1000. That description undisputedly does not apply to Intercontinental Properties' DOC endorsement.

Martin continues to find §627.727(1) inapplicable to the antique auto policy, notwithstanding the foregoing, because the policy does not insure a family vehicle. *Id.* at 1001. After analyzing the rationale in *Mullis*, which predated no-fault policies, the court found that tying uninsured motorist coverage to financial responsibility coverage

"is no longer a compelling analysis[,]" and found only the concept of class one insurance as "family coverage" to be viable. *Id.* Because the antique car insured by the policy was not for family transportation, the class one concept was inapplicable. *Id.* The same is true with Intercontinental Properties' DOC endorsement, which provided no coverage for family transportation.[7]

Thus, to the extent this Court cares to review the purported conflict between *Weiss* and *McDonald*, the plain language of the statute contradicts the Fourth District's holding in *McDonald*, and cannot provide coverage for Jack Weiss under the endorsement. Moreover, the concept of class one coverage is inapplicable to the endorsement, which only provides coverage in vehicles not owned, hired or borrowed by the insured.

(2) <u>Insured Did Not Purchase UM under DOC</u>

The appellate court correctly determined that the DOC endorsement, providing coverage for bodily injury and property damage, did not modify the definition of who was an insured for uninsured motorist coverage. *Weiss,* 790 So. 2d at 477. WEISS'

[7]WEISS argues that Intercontinental Properties was a family business, and the business auto policy covered their family cars; however, this argument was rejected by this Court in *Bartoszewicz*. *See*, p. 27, *infra*.

argument depends upon a strained, unreasonable reading of the plain language of the contract, which cannot be used to create ambiguity. *See, e.g., United States Fidelity & Guaranty Co. v. Romay,* 744 So. 2d 467, 471 (Fla. 3d DCA 1999) (*en banc*).

The endorsement clearly states, in its initial paragraph: "This endorsement changes only those coverages where a premium is shown in the Schedule." R.II-222; WEISS' Appendix at 48. WEISS argues that the attached schedule marked as page 3 of the endorsement is not a schedule, despite the fact that this third page is the only place where Jack Weiss' name appears, because it was not preprinted by the Insurance Services Office, Inc. WEISS Brief at pp. 27-28. No rule of construction supports this interpretation.

The plain meaning of the word "schedule" includes any supplemental statements appended to the insurance contract which would provide the described information. *Government Employees Ins. Co. v. Rebel*, 434 So. 2d 29, 30 (Fla. 3d DCA 1983). WEISS ignores the holding in *Rebel*, arguing that page 3 of the DOC endorsement cannot be the referenced "schedule" because it does not have the word "schedule"on the page. *See,* WEISS' Brief at p. 28. This Court has rejected this same argument, that all terms must be defined to avoid ambiguity, in *Deni Associates of Fla., Inc. v.*

State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1139 (Fla. 1998). The Court further held that policies will not be construed to reach an absurd result. *Id.* at 1140. WEISS' argument, that the policy must be construed to ignore the schedule on page 3 of the endorsement, seeks an absurd result, and must be rejected.

The schedule appended as page 3 of the DOC endorsement clearly names Jack Weiss and clearly shows a premium only under the bodily injury and property damage (i.e., liability) coverage. R.II-223; WEISS' Appendix at 49. No premium is shown underneath the uninsured motorist coverage. *Id.* Thus, under the clear language of the endorsement, only the liability coverage is changed by the endorsement.[8]

Therefore, under paragraph B.2 of the DOC endorsement, Jack Weiss is a named insured while using any covered auto described in paragraph B.1 of the endorsement. R.II-222; WEISS' Appendix at 48. However, Jack Weiss was not using a covered auto at the time of his death, but rather was a pedestrian, and therefore not entitled to coverage under the DOC endorsement.

---

[8]The Rating Summary, which directly follows the Declarations page, confirms this, showing coverage for "DOC LIAB," i.e., Drive Other Car liability coverage, and does not indicate UM or any other coverage under this endorsement. *See,* WEISS' Appendix at 6.

Intercontinental Properties could have obtained coverage for the accident between William Perez and Jack Weiss, had it paid a premium for uninsured motorist coverage under the DOC endorsement. If a premium were shown in the attached schedule under the UM coverage, which it is not, then the changes set forth in paragraph C of the endorsement would apply, providing uninsured motorist coverage for the WEISSES. WEISS' Appendix at 48. WEISS would have the Court look to the attached schedule to identify Jack Weiss as a named insured, but ignore the remainder of the attached schedule, including the absence of any premium paid for UM coverage. "As we previously stated, it is not within the purview of the courts to create insurance coverage where none exists on the face of the insurance contract." *Liberty Mut. Ins. Co. v. Capelletti Bros., Inc.*, 699 So. 2d 736, 738 (Fla. 3d DCA 1997); *Deni*, 711 So.2d at 1139 ("As a court, we cannot place limitations on the plain language of a policy exclusion simply because we may think it should have been written that way.")

Accordingly, the appellate court correctly noted that the endorsement did not modify the definition of who was an insured for uninsured motorist coverage. *Weiss*, 790 So.2d at 477.

(3) There is but One Named Insured

Next, WEISS claims that her husband, "as a general partner of Royal Trust Tower, Ltd. was a named insured as an Agent for Royal Trust Tower, Ltd." WEISS' Brief at pp.31-36. This argument was not addressed by the court below, was never pled, and was controverted by WEISS' own deposition testimony. In addition, it contravenes established law.

The business auto policy identifies the named insured as "Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd." R.I-75; Appendix "B"at p.1. The name Jack Weiss does not appear anywhere in the named insured provision. This Court has recognized that "the term 'named insured' has a restricted meaning and does not apply to persons not **specifically** named in the policy." *Travelers Ins. Co. v. Bartoszewicz*, 404 So. 2d 1053, 1054 (Fla. 1981) (emphasis supplied), citing *Kohly v. Royal Indemnity Co.*, 190 So. 2d 819, 821 (Fla. 3d DCA 1966), *cert. den*., 200 So. 2d 813 (Fla. 1967). *Accord*, *Southeastern Fidelity Ins. Co. v. Suwanee Lumber Mfg. Co.*, 411 So. 2d 950, 951 (Fla. 1st DCA 1982). Jack Weiss is not specifically named in the policy as a named insured. Moreover, the Petitioner's rationale for construing

Jack Weiss to be a named insured is the same rationale rejected by this Court in *Bartoszewicz*.

The trial court erroneously reasoned that Royal Trust Tower, Ltd. had no liability on its own, but rather Jack Weiss bore the exposure for the limited partnership, as a general partner. R.XI-2016-2017. Similarly, the Fifth District had found coverage for Mr. Bartoszewicz as a named insured in a policy issued to Vaughn Printers, Inc., on the basis that only persons within the corporation can sustain personal injury and therefore the corporation's employees must be the named insureds for PIP coverage. *Bartoszewicz*, 404 So. 2d at 1054. This Court reversed, finding the policy to be unequivocal. *Id*. at 1055, citing *Rosen v. National Union Fire Ins. Co.*, 249 So. 2d 701 (Fla. 3d DCA 1971). In *Rosen*, the Third District determined that an automobile owned by Steve Tokarski, individually, was not owned by the named insured under a policy issued to "Frank Martin and Steve Tokarski d/b/a Market Truck Stop." *Id.* at 702. The *Rosen* opinion does not engage in construction of the policy based upon liability under partnership law, but rather looks to the plain language of the listed named insured.

In the present case, the policy unambiguously identifies the named insured as Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd. WEISS argues that "Agent for Royal Trust Tower, Ltd." was a second named insured, in addition to Intercontinental Properties, Inc., and that Jack Weiss was an agent as the general partner. This construction is erroneous, and contrary to WEISS' own testimony.[9]

First, the policy does not have a conjunction before the word "agent." The first rule of construction[10] requires the courts to enforce the clear, unambiguous terms of the contract. *Liberty Mut. Ins. Co. v. Capeletti Bros., Inc.*, 699 So. 2d 736, 638 (Fla. 3d DCA 1997). The contract must be given a practical, sensible interpretation. *Saks v. National Casualty Co.*, 623 So. 2d 853, 854 (Fla. 3d DCA 1993). The clear, unambiguous wording of the policy specifically names only one insured, "Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd." The practical,

---

[9] In her first deposition, WEISS testified consistently with the Amended Complaint, that she understood the named insured would be "Intercontinental Properties, Inc., as agent for Royal Trust Towers, Ltd." R.VIII-1450-1451. WEISS thus admitted that her husband was not a named insured, although she later changed this testimony.

[10]WEISS argues that the named insured clause is ambiguous, and therefore to be construed against the insurer. WEISS' Brief at p. 34. However, this rule of construction is applicable only after resort to the ordinary rules of construction. *Deni*, 711 So. 2d at 1138.

sensible interpretation of the phrase "Agent for Royal Trust Tower, Ltd." is as a description of the preceding noun, "Intercontinental Properties, Inc." In order to reach its finding, the trial court had to insert the term "and" between the phrases. The addition of the term "and" by the trial court is reversible error, as the court cannot rewrite or add to the terms of the contract. *See, e.g., Pol v. Pol*, 705 So. 2d 51, 53 (Fla. 3d DCA 1997), *rev. den.*, 717 So. 2d 536 (Fla. 1998); *International Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29 (Fla. 3d DCA 1973).

Second, the addition of the conjunction is unnecessary, as WEISS admits that "Agent for Royal Trust Tower, Ltd." is an accurate description of Intercontinental Properties, Inc. *See, e.g.*, R.VIII-1384, 1385, 1423, 1430. In fact, the named insured maintained bank accounts, signed leases, and otherwise conducted business as "Intercontinental Properties, Inc., Agent for Royal Trust Tower, Ltd." *See, e.g.*, R.VIII-1429, 1474. In deciding who is an insured, "the facts as they actually exist must be determinative." *Nateman v. Hartford Cas. Ins. Co.*, 544 So. 2d 1026, 1027 (Fla. 3d DCA 1989).

Indeed, given the fact that Intercontinental Properties, Inc. is an agent of Royal Trust Tower, Ltd., the mere insertion of the term "and" would be insufficient to create

coverage. The named insured would have to be identified as "Intercontinental Properties, Inc. and any other agent of Royal Trust Tower, Ltd." or "Intercontinental Properties, Inc. and all agents of Royal Trust Tower, Ltd." in order to bring Jack Weiss within the named insured provision. Such revision is forbidden, particularly where the unambiguous language can be given effect as written. *Pol*, 705 So. 2d at 53.

Furthermore, the trial court's erroneous factual determination that Jack Weiss, as a general partner, was an agent of Royal Trust Tower, Ltd. is not supported by competent, substantial evidence.[11] A partner is an agent of the partnership only for the purposes of the partnership's business. Sections 620.60(1), 620.8301(1), Fla. Stat. WEISS submitted a petition for workers compensation benefits to the insurance carrier for Jack J. Weiss, P.A., asserting that Jack Weiss was on his way to meet an attorney regarding "legal matters dealing with the Law Office of Jack J. Weiss," and thus, was conducting the business of his law practice at the time of his death. R.VIII-1460-1461.

---

[11]WEISS asserts that LIBERTY did not dispute the “fact” that Jack Weiss was acting as an agent of Royal Trust Tower. Ltd. at the time of his death. WEISS’ Brief at p. 31. Actually, LIBERTY established that Jack Weiss was not acting as an agent for the partnership, based on WEISS’ sworn testimony in her claim against the worker’s compensation carrier for Jack J. Weiss, P.A., in which she testified that he was acting as agent for his law practice at his death, and collected benefits thereby. R.VIII-1461-1467.

WEISS confirmed this in her sworn deposition taken in the workers compensation proceeding, and ultimately received workers compensation benefits from the carrier for the law practice. R.VIII-1461-1467. Thus, Jack Weiss was not an agent for Royal Trust Tower, Ltd. at the time of his death.[12]

Finally, Counts II and III of the Amended Complaint, on which the trial court entered judgment, assert coverage for Jack Weiss as a principal, owner and officer of Intercontinental Properties, Inc. and the general partner of Royal Trust Tower, Ltd. R.I-75. It is well settled that a business auto policy listing a corporation as the named insured does not cover the corporation's officers or owners, except when in a covered vehicle. *Bartoszewicz*, 404 So. 2d at 1054. WEISS did not amend these claims to assert coverage as the named insured, or move to conform the pleadings to this argument. In fact, Petitioner's own testimony was to the contrary: in deposition, she

[12]The prior, inconsistent testimony in the workers compensation proceeding, in which WEISS successfully recovered benefits, precludes WEISS from claiming that Jack Weiss was working for the partnership at the time of the accident, under the doctrine of judicial estoppel. *Smith v. Avatar Properties, Inc.*, 714 So.2d 1103, 1107 (Fla. 5th DCA 1998). Additionally, the allegation that Jack Weiss was on his way to a meeting would be insufficient to establish agency at the time of the accident, under the coming and going rule. *See, Sussman v. Florida East Coast Properties, Inc.*, 557 So. 2d 74, 75 (Fla. 3d DCA 1990).

testified that her understanding was that the named insured would be Intercontinental Properties, Inc., as agent for Royal Trust Tower, Ltd.; at trial, she amended this to be an understanding that the named insured would be Intercontinental Properties, Inc., "as one of the agents" for Royal Trust Tower, Ltd. R.VIII-1450-1451. Under either of WEISS' versions, the named insured would be Intercontinental Properties, Inc., in its representative capacity of the partnership. Hence, Jack Weiss was not a named insured, by WEISS' own admission, but rather the corporation was the named insured.

II. The Trial Court Erred in Directing a Verdict on Stacking

While the Court has discretion to rule on issues other than that for which jurisdiction was granted, such discretion should not be exercised in this case. The parties briefed eight issues in the appeal and cross-appeal, of which the appellate court addressed only one. Were this Court to reverse the appellate court on that issue, the Court should remand the remaining issues for consideration. *See, e.g., Lexington Ins. Co. v. Simkin Indus., Inc.*, 704 So.2d 1384, 1386 (Fla. 1998) ("On remand, any issues previously raised but left unresolved can be addressed.")

The trial court entered a judgment that the business auto policy provides stacked UM coverage, notwithstanding the facts that the jury expressly found Intercontinental Properties to have knowingly rejected stacked coverage and that Intercontinental Properties did not pay for stacked coverage. The trial court accepted WEISS' argument that LIBERTY had the burden of proving that the insured paid a reduced rate for the non-stacked coverage, even though this issue was never raised until the evidence was closed. R.VI-1061. LIBERTY appealed the trial court's countermand of the jury's finding, which the appellate court did not reach. *Weiss*, 790 So.2d at 476.

WEISS claims that a directed verdict is appropriate where the insurer fails to show compliance with § 627.727(9), citing several cases which WEISS admits deal only with the requirements of notice and an informed rejection. *See* WEISS' Brief at p. 41. In the appeal, the parties found only two cases, *State Farm Mut. Auto. Ins. Co. v. Carr*, 700 So.2d 156 (Fla. 4th DCA 1997), and *Bifulco v. State Farm Mut. Auto. Inc. Co.*, 693 So.2d 707 (Fla. 4th DCA 1997), which address the evidentiary requirement at issue here. However, *Carr* involved the **reversal** of a directed verdict, where the issue of compliance with the reduced rate requirement had not been at issue in the case prior to directed verdict. *Id*., 700 So.2d at 156. The court stated: "As

State Farm had no notice that this was an issue in the case, it is not surprising that it was unprepared to introduce proof that it had complied with the statute by making the required filings." *Id.* at 157. The same is true in the present case. WEISS did not plead, or introduce evidence, that the insured paid the premium for stacked coverage.[13]

Similarly, *Bifulco* reversed a summary judgment. *Id.*, 693 So.2d at 708. The trial court had granted summary judgment for the insurer, who had not met its burden of proving the non-existence of any disputed issues of fact, under the stringent standard imposed by Rule 1.510. *Id.* Because summary judgment requires the movant to establish the non-existence of facts which otherwise would be the non-

[13]WEISS argues that LIBERTY was not surprised by this unplead theory, because she sent LIBERTY discovery on this issue. WEISS' Brief at p. 43. While WEISS requested the rate filings in their Fourth Request for Production, she did not seek these documents after LIBERTY objected on relevance, or seek to amend the pleadings to include this issue. R.VI-986. Indeed, Petitioner's insurance expert, William Hartnett, revealed at his deposition that he requested various LIBERTY filings from the Department of Insurance, most of which related to a potential claim for bad faith, but he did not claim to have requested the rate filing information. The deposition was provided to the court during the bench trial. R.IX-1515. Thus, LIBERTY was surprised, given the fact that WEISS accepted LIBERTY's objection to the rate filings as irrelevant, and made no further attempt to obtain the information, much less inject the issue into her pleadings.

movant's burden, *see*, *Holl v. Talcott*, 191 So.2d 40, 43-44 (Fla. 1966), *Bifulco* does not establish that the insurer has the burden of proving reduced rates at trial.

Section 627.727(9) does not state that the burden of proving nonpayment for UM coverage is shifted to the insurer. When the legislature does shift the burden of proof in a statute, it does so expressly. *Contrast*, § 627.727(9) *with* § 56.29(6)(a). In fact, the very statute on which WEISS relies does contain an evidentiary component, but not for the proposition for which WEISS relies on it. In § 627.727(1), the legislature explicitly provides: "If this form is signed by a named insured, it will be conclusively presumed that there was an informed, knowing rejection of coverage or election of lower limits on behalf of all insureds." Again, in subsection (9) the legislature reiterates: "If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations."

In contrast, the language regarding the rate filings is not set forth in terms of evidentiary presumptions or burdens: "Any insurer who provides coverage which includes the limitations provided in this subsection shall file revised premium rates with the Department for such uninsured motorist coverage to take effect prior to initially

providing such coverage." Section 627.727(9). This language is not phrased in terms of an evidentiary burden, but rather is an administrative requirement. Thus, if LIBERTY did not comply with the reduced rate filings, the Department of Insurance could not approve the issuance of unstacked policies. However, nothing in the statute states that an insurer must affirmatively establish at trial that the insured did not pay full rates for unstacked coverage, in addition to proving the knowing, informed rejection of the coverage; in fact, such a construction is contrary to the plain language contained in two places in the statute, creating the conclusive presumption of a knowing, informed rejection solely upon proof of a signed form.[14]

Accordingly, the courts have enforced policy provisions consistent with § 627.727(9) without reference to the rates charged. *See, e.g., Nationwide Ins. Co. v. United Services Automobile Ass'n*, 715 So.2d 1119 (Fla. 1st DCA 1998); *Auto-Owners Ins. Co. v. Christopher*, 749 So.2d 581 (Fla. 5th DCA 2000); *Mangual v. State Farm*

---

[14]The conclusive presumption can only be challenged by proof of fraud, forgery or trickery. *Johnson v. Stanley White Ins.*, 684 So. 2d 248, 250 (Fla. 2d DCA 1996). Although WEISS argued below that these occurred, the jury specifically found that LIBERTY obtained an informed, knowing and intelligent rejection of stacked uninsured motorist coverage for the business automobile policy and an informed, knowing and intelligent rejection of uninsured motorist coverage for the umbrella policy. R.XVII-1500-1501; R.XXIII-2037-2039.

Mut. Auto. Ins. Co., 719 So.2d 981 (Fla. 5th DCA 1998). *Contrast*, *Omar v. Allstate Ins. Co.*, 632 So.2d 214, 216 (Fla. 5th DCA 1994)("the burden is on the insurer to show an informed, knowing rejection of uninsured motorist coverage.") LIBERTY met its acknowledged burden of proving an informed, knowing rejection of stacked coverage on the primary policy and UM coverage on the umbrella policy, and does not have a further burden of proving that the insured did not pay for stacked coverage (unless, of course, the insured pleads and proves the contrary; WEISS did neither).

Moreover, the trial court's grant of the motion in accordance with the motion for directed verdict on this issue disserves the interests of justice. As in *Carr*, the insurer was not placed on notice that the rate filings were at issue. The trial court erred in refusing to permit LIBERTY to present evidence of the reduced rate filings, as required by the Fourth District in *Carr*. The trial court struck, as untimely, evidence establishing that Petitioner in fact paid approximately 40% of the premium for stacked coverage, as set forth in the rates filed with the Department of Insurance, attached to a timely motion for rehearing.[15] R.VI-1027-1033, 1061. Thus, because the insured did

[15] This ruling ignores the plain language of Rule 1.530(c), which permits a party moving for rehearing to rely on attached affidavits. Thus, the affidavit was not untimely, as the motion for rehearing and attached affidavit were filed within 10 days

not pay for stacked coverage, the interests of justice are disserved by the trial court's contravention of the verdict, where the insurer had filed such reduced rates with the Department, but the issue was never raised in the pleadings. *Carr*, 700 So. 2d at 156.

LIBERTY should not have had to present the rate information because the trial court should not have directed a verdict on this unplead issue. *Bleasdell v. Underwriters Guarantee Ins. Co.*, 707 So.2d 411, 412 (Fla. 1st DCA 1998). In *Bleasdell*, the insured moved for a directed verdict on the grounds that the insurer had not proved that the form on which it relied complied with § 627.410. The District Court rejected the argument without reaching its merits, because the insured had not plead nor offered proof of noncompliance, just as in the present case. *Id.* at 412. *Accord, Kimbro v. Metropolitan Life Ins. Co.*, 112 So.2d 274, 277 (Fla. 3d DCA 1959) (burden on insured to produce evidence bringing himself within the terms of the contract). The trial court erred in directing a verdict in contravention of the jury's

---

of the order directing the verdict on stacking. WEISS complains that Rule 1.530 cannot be used to circumvent a directed verdict (WEISS' Brief at pp. 39-40), but does not support this contention with any authority. In fact, this Court has stated that ruling on a new trial based on new evidence cannot be done inflexibly, and that the rules "must sometimes bend in order to meet the ends of justice[.]" *Ogburn v. Murray*, 86 So.2d 796, 798 (Fla. 1956), quoting *Gaither v. Anderson*, 139 So. 587, 588 (Fla. 1932).

finding that the named insured knowingly, voluntarily and intelligently rejected stacked coverage.

WEISS further contends that LIBERTY's remedy for her departure from the pleadings is a continuance. WEISS' Brief at p. 43. While a continuance is one remedy, this Court has found that the proper remedy for a judgment entered on an unpled theory is reversal. *Arky, Freed, Sterns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988). WEISS did not plead that Intercontinental Properties paid for stacked coverage, presented no evidence that it paid for stacked coverage, and the rate filing information submitted post-verdict showed that LIBERTY filed rates reduced by a greater percentage than that required by the statute and that Intercontinental Properties actually paid a lower rate than that permitted by the rate filings.[16] R.VI-1027-1029.

---

[16]The only trial testimony on the issue came from Jim Fiet, who testified that the charge for stacked coverage was approximately $250 per vehicle. R.XIV-379. As the rate-filing affidavit shows, the charge for stacked coverage for 2-4 vehicles is $284, and for 5-9 vehicles is $412 per vehicle. R.VI-1029. Intercontinental Properties paid $815 for UM coverage on 6 vehicles, or approximately $135 per vehicle, well below the 80% of normal premium required by statute; and $35 below the 41.5% rate filed with the state. *Id*.

Essentially, WEISS convinced the trial court to stack coverage because LIBERTY did not present the evidence that Intercontinental Properties actually paid far less than required, when the issue was never raised. The trial court erred by disturbing the jury's verdict, which held that Intercontinental Properties knowingly rejected stacked coverage, and by rewarding this "gotcha" tactic. *See, generally*, *Green v. Ed Ricke & Sons*, 584 So.2d 1101, 1103 (Fla. 3d DCA 1991).

III. The Trial Court Was Within Its Discretion in Admitting Intercontinental Properties' UM Rejection Forms

Initially, the only objection WEISS raised to the UM rejection forms on which LIBERTY relied, was the best evidence rule. R.IV-731; R.XII-29-30. Only after multiple witnesses testified regarding the documents, and LIBERTY moved the documents into evidence, did this objection arise. R.XVII-1300 (objecting to the entire 1992-93 policy, to which rejection form is attached).

Moreover, the documents were sufficiently authenticated by WEISS' expert's testimony that WEISS signed one of the documents. R.XVIII-919. While the expert opined that her signature on the other document was forged,[17] this does not constitute

[17]WEISS' expert also was unable to authenticate of the exemplar signatures given to him as an example of WEISS' genuine signature. R.XVIII-928-929.

an objection to authentication. More importantly, no challenge was raised as to the authenticity of Jack Weiss' signatures on the forms for the second policy year (1993-94), which forms are controlling under §627.727(1). Additionally, the documents sufficiently were authenticated by the testimony of Lourdes Hernandez and Jim Fiet, who identified their handwriting on the forms. R.XVI-607-608; R.XIV-366, 368, 370, 380-382. Additionally, the rejection forms matched the coverage provided in the policies, including the policies admitted into evidence by WEISS, creating circumstantial evidence sufficient to establish a prima facie showing of genuineness. *See, i.e., ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc.*, 617 So. 2d 750, 751 (Fla. 4th DCA 1993); *State v. Love*, 691 So. 2d 620 (Fla. 5th DCA 1997). Finally, Alex Perez sufficiently authenticated the entire 1992 policy, by testifying that the renewal policies which WEISS introduced into evidence provided the same coverage as the initial policies. R.XX-1058.

Moreover, WEISS eventually testified that she did sign one of the forms, but that the form was blank when she signed it, as were the forms that Jack Weiss signed. R.XVIII-813-815. Again, while the jury rejected this testimony, the admissions themselves provide sufficient authentication.

The photocopies introduced into evidence by LIBERTY, to which WEISS objected on the best evidence rule, exactly match the original documents, and differ only from the versions introduced into evidence by WEISS which lack check marks. The original documents, which by their form, contents and acknowledged handwriting were identified, and which exactly duplicated the copies introduced into evidence by LIBERTY, properly were admitted into evidence. Moreover, the jury rejected WEISS' explanations and found that LIBERTY obtained an "informed, knowing and intelligent rejection of stacked Uninsured Motorist coverage for the Business Automobile Policy" and "informed, knowing and intelligent rejection of uninsured motorist coverage for the umbrella policy." R.XXII-1500-1501. Thus, the jury determined the documents submitted by WEISS were not altered after she and Jack Weiss signed them, leaving the inescapable conclusion that WEISS' photocopies were altered.

WEISS requests that this Court provide her with millions of dollars of coverage for which Intercontinental Properties did not pay, which she and Jack Weiss rejected, based on photocopies she altered and presented into evidence, because the original documents were not sufficiently authenticated to her liking. Were the Court to address

this issue, the only appropriate determination is to affirm the trial court's admission of the documents, and reverse the trial court's denial of LIBERTY's motion to dismiss based upon the fraud perpetrated by WEISS in the litigation.

IV. The Trial Court Properly Denied the Motion for Directed Verdict on the Issue of UM Coverage under the Umbrella Policy Because There Is Competent Substantial Evidence That Intercontinental Properties was Aware of the Availability of UM Coverage

WEISS, in her case in chief, adduced evidence that UM coverage is available for umbrella policies, although underwriting discouraged the sales force from selling it. R.XIV-391-394. Thus, WEISS' contention that the court erred because the evidence established that LIBERTY never offered UM coverage on umbrella policies fails to acknowledge the evidence that the coverage was available. The court properly left the dispute to the jury, which found that Intercontinental Properties knowingly rejected UM coverage on the umbrella. *See, e.g.*, *Hendricks v. Dailey*, 281 So.2d 101, 103 (Fla. 1968)(directed verdict proper only in the complete absence of evidence or inferences).

Moreover, the standard for umbrella policies is different than that for primary policies; for umbrellas, the insurer need only make the insured aware that UM coverage is available, but need not obtain an informed rejection of the coverage, since only §

627.727(2) applies to umbrellas, and not subsection (1). *Strochak v. Federal Ins. Co.*, 717 So.2d 453, 457 (Fla. 1998) (Wells, Justice, concurring); *Tres v. Royal Surplus Lines Ins. Co.*, 705 So.2d 643, 645 (Fla. 3d DCA 1998); *Weesner v. United Services Auto. Ass'n*, 711 So.2d 1192, 1194 (Fla. 4th DCA 1998).

Clearly, there was evidence from which the jury could determine that Intercontinental Properties was aware of the availability of UM coverage. In fact, WEISS admitted that Intercontinental Properties was aware, when she repeatedly testified that she requested and received that coverage in the umbrella policy. R.XVIII-786-787, 792, 794, 812, 815, 825. Indeed, the form signed by Jack Weiss in 1993 rejecting UM coverage for the umbrella policy is sufficient itself to establish that Intercontinental Properties was aware of the availability of UM coverage under the umbrella policy, as is the 1992 form which WEISS admitted to signing (and which states in large, bold type that by signing the insured is waiving valuable coverage). R.XVIII-813; *see, also,* Appendix hereto.

While the jury did not believe her testimony that Intercontinental Properties did not reject the coverage, there is ample evidence from which the jury could conclude that she was aware of the coverage. WEISS did not testify that no one offered her

UM for the umbrella, as she now argues as the basis for reversing the denial of her motion for directed verdict, but rather testified that she demanded such coverage. The court properly denied the motion for directed verdict.

CONCLUSION

For the foregoing reasons, the judgment in favor of LIBERTY MUTUAL INSURANCE COMPANY must be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the forgoing was served by U.S. Mail this ____ day of August, 2002, to: **Marc Cooper, Esq.,** Colson Hicks Eidson, 255 Aragon Avenue, 2d Floor, Coral Gables, Florida 33134; and **William Perez**, 2152 S.W. 14th Terrace, #2, Miami, FL 33145.

O'CONNOR, CHIMPOULIS, RESTANI,
MARRERO & McALLISTER, P.A.
Attorneys for Liberty Mutual
2801 Ponce de Leon Boulevard, Ninth Floor
Coral Gables, Florida 33134
Tel: (305) 445-4090
Fax: (305) 445-7728

By:_____
DAVID R. CASSETTY
FBN 991023

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitations and the font is in Times New Roman 14-point typeface, in compliance with Rule 9.210(a)(2).

O'CONNOR, CHIMPOULIS, RESTANI,
MARRERO & McALLISTER, P.A.
Attorneys for Liberty Mutual
2801 Ponce de Leon Boulevard, Ninth Floor
Coral Gables, Florida 33134
Tel: (305) 445-4090
Fax: (305) 445-7728

By:_____
DAVID R. CASSETTY
FBN 991023

T:\BRIEFS\Briefs - pdf'd\01-2000_ans.wpd