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,

Petitioner,

vs.

LIBERTY MUTUAL INSURANCE CO.,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. THE TRIAL COURT PROPERLY DETERMINED THAT THE AUTO POLICY PROVIDED UM COVERAGE.

Jack was entitled to UM coverage as a Class One Insured. It is common for family businesses to use the family's vehicles for work and to insure them on the business' auto policy. However, a typical business auto policy does not provide the broad coverage afforded by a personal auto policy. As recognized in Liberty's web site, the DOC endorsement is designed to rectify this and provide the missing coverage. Although a family policy would provide UM coverage for Jack's death as a pedestrian, Liberty asserts that its policy, which includes a DOC endorsement and insures the Weiss family vehicles, provides no such coverage.

Liberty concedes a Class One Insured is entitled to UM coverage when killed as a pedestrian. Liberty also concedes the distinction between Class One and Two Insureds: Class Two Insureds are only insured when occupying insured vehicles; Class One Insureds are named in the policy and covered regardless of location. *Florida Farm Bureau v. Hurtado*, 587 So.2d 1314 (Fla. 1991); *U.S. Fid. & Guar. Co. v. Curry*, 395 So.2d 530, 532 (Fla. 1981).[1/]

To avoid the conclusion that Jack is a Class One Insured because he is named

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[1/]In *Curry*, this Court recognized that then-Judge Grimes "correctly drew the line between classes of insureds" in *Cox v. State Farm Mut. Auto. Ins. Co.*, 378 So.2d 330 (Fla. 2d DCA 1980) as "those who are named in the policy," on the one hand, and "those who are lawful occupants of the insured vehicle," on the other.

in the policy and provided liability coverage even when not occupying the insured vehicles, Liberty dissects its policy into two separate policies. It treats the business auto policy (without the DOC endorsement) as one policy and the DOC endorsement as another. It then argues that Jack is not a Class One Insured under the separate business auto policy because he is not specifically named in it and is not a Class One Insured under the DOC endorsement because it "provided limited coverage." Liberty's Brief at 19. However, Liberty did not issue two policies; it issued only one policy of which the DOC endorsement is an integral part. Indeed, Liberty's policy specifically lists the DOC Endorsement as an integral part. (A. 7).

The single insurance policy issued by Liberty must be "read as a whole." *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). When Liberty's policy is so read, and not parsed into two policies, the only conclusion is that Jack is a Class One Insured. First, Jack is named in the policy–in the DOC endorsement. Indeed, the purpose of naming him is to extend him coverage beyond his occupancy of the insured motor vehicles, i.e., beyond that afforded a Class Two Insured.

Second, Jack has liability coverage whether or not he is in the insured motor vehicles. Liberty's Business Auto Coverage Form covers anyone using "a covered auto you own, hire or borrow . . . ." (A. 76). "You" is defined as the Named Insured. (A. 75). Thus, anyone using vehicles owned, hired or borrowed by the Named Insured is covered. The DOC Endorsement provides the liability coverage missing in

the Business Auto Form. It provides liability coverage to Jack and Caroline when they are using "[a]ny auto you **don't** own, hire or borrow," (A. 48), i.e., any auto not owned, hired or borrowed by the Named Insured. These two provisions are mirror images; each provides the coverage missing in the other. The Business Auto Form insures Jack when operating vehicles owned, hired or borrowed by the Named Insured. The DOC Endorsement insures Jack when operating vehicles not owned, hired or borrowed by the Named Insured. Together they insure Jack regardless of the vehicle he is operating. As already noted, this is the hallmark of a Class One Insured.

Liberty looks at the DOC Endorsement in isolation. It argues "there are many autos in which the DOC endorsement would not have provided Jack Weiss coverage, including the seven listed vehicles under the policy." Liberty's Brief at 18. But the issue is not whether the DOC Endorsement covers Jack regardless of the vehicle he is occupying. Instead, the issue is whether **Liberty's policy** provides that coverage. As detailed above, it does. The coverage under the Business Auto Form, combined with the coverage under the DOC endorsement, both of which are part of the single Liberty policy, cover Jack regardless of the vehicle he is in and whether or not he is occupying a vehicle listed under the policy. As a result, Jack is a Class One insured.[2/]

[2/]The fallacy of Liberty's argument is further illustrated by its argument at 19 concerning Fla.Stat. § 627.727(1), which refers to a "motor vehicle liability insurance policy" issued with respect to specifically identified motor vehicles. According to Liberty, this part of the UM statute, relied on by the Fourth District in *St. Paul Fire*

Liberty's cases do not support it. In *Travelers Ins. Co. v. Bartoszewicz*, 404 So.2d 1053 (Fla. 1981), the insurance policy insured "Vaughn Printers, Inc." It did not name the company's employees. In concluding that an employee was not a named insured, this Court applied the rule that "the term 'named insured' has a restricted meaning and does not apply to persons not specifically named in the policy." 404 So.2d at 1054. Here, Jack **was** "specifically named in the policy," i.e., in the DOC endorsement. *Bartoszewicz* supports Petitioners, not Liberty.

Travelers also relies on *Martin v. St. Paul Fire and Marine Ins. Co.*, 670 So.2d 997 (Fla. 2d DCA 1996). There, the policy provided limited coverage to an antique auto. In view of the limited coverage, the court concluded the insurer was not required to offer UM and stated: "Unlike a typical family auto policy, this specialty policy provides no coverage if the named insured or a family member is driving another automobile." *Id*. at 999. Here, Liberty's policy **does** provide liability coverage to Jack when he is driving autos other than those insured under the policy, the indicia of a Class One Insured. Indeed, *Martin* recognized: "The broad coverage

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& Marine Ins. Co. v. McDonald, 525 So.2d 455 (Fla. 4th DCA 1988), does not apply to the DOC endorsement because it only applies to policies issued "with respect to any specifically insured or identified motor vehicle" and "[the DOC] endorsement applies only to specifically unidentified motor vehicles." But the DOC endorsement is not a separate policy. It is **part** of Liberty's policy. And Liberty's policy was issued for "specifically insured or identified motor vehicles," i.e., the seven vehicles owned by the Weiss family. Fla.Stat. § 627.727(1) applies here.

mandated for class I insureds in *Mullis* is still mandated in all policies insuring motor vehicles that are family automobiles." 670 So.2d at 1001. Here, Liberty's policy insures all the Weiss family autos and provides broad coverage to Jack and Caroline even when they are not operating them. *Martin* supports Petitioners, not Liberty.

Significantly, Liberty makes no attempt to justify the Third District's superficial analysis. The Third District stated: "The law is well settled that a business auto policy such as the one at issue here does not provide coverage for officers, unless the person is within a covered vehicle." (A. 3). There is no such sweeping rule. In each instance the result depends on the policy's terms.[3/] Here, Jack was named in Liberty's policy. That policy covered him whether or not he was in one of the insured motor vehicles. He was a Class One insured entitled to UM coverage. The Third District's sweeping generalization was wrongly applied here.

Finally, Liberty suggests this Court should revisit jurisdiction and conclude there is no conflict with *McDonald*. As detailed in Petitioner's jurisdictional brief and main brief at 23-26, the conflict between the decision below, *McDonald* and *Mullis* is clear, express and important. *McDonald* held that a DOC endorsement which extended liability coverage to non-owned vehicles, so that coverage was not limited

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[3/]As Liberty acknowledges at 17, there is such coverage in cases like *American Fire and Cas. Co. v. Sinz*, 487 So.2d 340 (Fla. 4th DCA 1986), where the officer is named in the policy. Indeed, Liberty's umbrella policy provides coverage to "officers and directors" of Intercontinental Properties and therefore insures Jack.

to occupancy of the insured motor vehicles, mandated UM coverage under *Mullis.* The Third District, faced with a similar DOC endorsement, refused to so conclude. Instead, it held that because the policy was "commercial," there was no UM coverage. The Third District and *McDonald* reached different conclusions on substantially similar facts so as to create conflict.[4/] Moreover, because the conflict affects every small business owner who, like Jack and Caroline, were persuaded to drop their family auto policies and insure their family vehicles through their business, it is an important one which should be resolved by this Court.

The DOC endorsement provides UM coverage for Jack's death even if Jack is not a Class One Insured. Liberty concedes Jack is a named insured under the DOC endorsement and, if the endorsement provides UM coverage, it covers his death. Liberty's Brief at 22-23. Liberty argues, however, that UM coverage is not provided because the "attached schedule" to the endorsement does not show a premium for it. The "attached schedule" is irrelevant. UM coverage exists because a premium for UM coverage is shown in the Declarations.

The DOC endorsement is a standard pre-printed two page ISO form. The first

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[4/]Liberty suggests that this principle of conflict jurisdiction, which has its genesis in *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960), did not survive the 1980 constitutional amendments. However, this Court has applied it after 1980. *Crossly v. State*, 596 So.2d 447 (Fla. 1992). Simply put, when two decisions on their face reach different conclusions on substantially similar facts, the conflict is express.

page consists of a schedule with twelve blank sections. Liberty filled in the two sections where the names of the individuals covered by the endorsement are to be listed by typing "SEE ATTACHED SCHEDULE." Liberty left the other ten sections for the coverages limits and premiums blank. Significantly, Liberty did not direct the policyholder to an "Attached Schedule" to ascertain the missing information. Page one of the endorsement provides that if any of the sections of the schedule are left blank, "**information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement."** (A. 47). Here, it is undisputed that a premium for UM coverage is shown in the Declarations.(A. 5). The endorsement's plain language establishes that it provides UM coverage.

Liberty ignores the plain language and argues this Court should look to the third page to ascertain whether there is a UM premium. Liberty argues that when page two of the endorsement states a premium must be shown in the "Schedule," that the "schedule" referenced is the third page and not the Schedule at page one. Liberty is unable to explain, however, how a pre-printed two page endorsement could refer to a typed third page that should not even exist.[5/] Liberty glosses over this point by arguing "schedule" can be broadly defined to include the third page. Page one of the endorsement, however, instructs this Court to refer to the Declarations if "no entry

[5/]When Liberty assembled the endorsement it clearly thought there was a difference between the third page and the endorsement's "Schedule" because both times it referred to the third page it typed "See Attached Schedule," not "See Schedule."

appears above . . . ." Thus, even if "schedule" is broadly defined to include the third page, the UM premium still does not appear "above," and the endorsement still instructs this Court to the Declarations, where a premium for UM coverage is shown.

Moreover, Liberty wrongly argues that the third page shows only a premium for liability coverage. That page does not refer to "liability" coverage. It refers to "BI/PD" coverage but does not define the term. As this Court stated in *Tucker v. Gov't Employees Ins. Co.*, 288 So.2d 238, 241 (Fla. 1973): "An insured **under uninsured motorist coverage** is entitled by the statute to the **bodily injury** protection that he purchases . . . ." Thus, UM **includes** BI coverage, and therefore BI cannot unambiguously mean liability coverage to the exclusion of UM coverage.

At a minimum, Liberty's policy is ambiguous. Mr. Sprague, Liberty's designated representative on underwriting, acknowledged the references on page one to the "attached schedule" created an ambiguity. According to Mr. Sprague: "It is just not evident here what the intent was." (T1. 318). And, as he also acknowledged: "If I cannot discern the intent it would be construed as ambiguous." (T1. 318-19).

Coverage provisions are construed broadly in favor of coverage while exclusions and limitations are construed strictly. *See Westmorland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 179 (Fla. 4th DCA 1997), and cases cited therein. Accordingly, the trial court properly construed that ambiguity in favor of coverage.

The Second Named Insured includes Jack. Liberty's entire argument is based on the flawed premise that "Intercontinental Properties, Inc., Agent for Royal Trust Towers, Ltd." is a standard named insured provision that unambiguously names a corporation as the only named insured. The trial court disagreed and, after a bench trial, concluded there were two named insureds. The first is listed by name: "Intercontinental Properties, Inc." The second is listed by description: "Agent for Royal Trust Towers, Ltd." Thus, the second is not an entity, but a category which includes Jack Weiss who was the general partner for Royal Trust Towers, Ltd.[6/]

Liberty quotes *Travelers Ins. Co. v. Bartoszewicz*, 404 So.2d 1053, 1054 (Fla. 1981) where the court said "the term 'named insured' has a restricted meaning and does not apply to persons not specifically identified in the policy." This does not mean that a named insured cannot be listed by description instead of by name.[7/] Here, the second named insured, Agent for Royal Trust Towers, encompasses a group

[6/]Liberty wrongly claims Petitioner never pled this theory. Counts II and III of the Amended Complaint both assert that Jack had UM coverage as a named insured. Petitioner also argued this position in opposition to Liberty's motion for summary judgment and filed a motion for summary judgment on it. (R. 266-90; 581-615).

[7/]*See Transamerica Premier Ins. Co. v. Miller*, 41 F.3d 438, 442 (9th Cir. 1994); *Industrial Chem. & Fiberglass Corp. v. North River Ins. Co.*, 908 F.2d 825, 830 (11th Cir. 1990); *Providence Washington Ins. Co. v. Stanley*, 403 F.2d 844, 849 (5th Cir. 1968)(quoting 4 J. Appleman, Insurance § 2341 (1968 Supp.)(holding no requirement named insured be described by name)); *Fireman's Fund Ins. Co. v. Vordermeier*, 415 So.2d 1347 (Fla. 4th DCA 1982)(enforcing named insured provision that named "any person . . . or organization acting as a real estate manager"); 3 Couch on Insurance 3d § 40.3 (1997)(named insured may be identified by "name or description").

described by description and Jack, as general partner of Royal Trust Towers, is within that description and therefore a named insured.

Liberty argues this construction is unreasonable, even though based on the policy's plain language and the testimony of its own employees. Significantly Alex Perez, the employee that sold the policies, and William Stoddard, the employee that handled the claim, both testified there were **two named insureds**, not one, and that the second named insured was "Agent for Royal Trust Towers." And Mr. Sprague, Liberty's head of Florida underwriting, testified that in over 25 years at Liberty he had never seen the term "agent for" used and that by using it, Liberty had drafted an ambiguous named insured provision. Petitioner's Main Brief at 11-12.

Liberty's argument ignores not only the testimony of its own employees, but also reads "Agent for Royal Trust Towers" out of the policy. "Intercontinental Properties, Inc." is clear. It does not need a descriptive phrase to clarify who is meant and Liberty has failed to show what is added or subtracted from Intercontinental's coverage by including the phrase.[8/]

Liberty also contends the word "and" must appear after "Intercontinental Properties" for there to be two named insureds. But "and" is unnecessary because Liberty separated the two named insureds by a **comma** in the business auto policy and

[8/] An insurance contract should not be construed to render some part of it meaningless; it should be construed so as to give meaning to each provision. *See, e.g., Premier Ins. Co. v. Adams,* 632 So. 2d 1054 (Fla. 5th DCA 1994).

a **semicolon** in the umbrella policy. If Liberty Mutual wanted "Agent for Royal Trust Tower" to be a restrictive clause modifying Intercontinental Properties, it could have written the policies to reflect this intent.[9/] Further, Liberty's construction requires this Court to ignore the comma and semicolon and add "as" after "Intercontinental Properties." In short, the essence of Liberty's argument is that it drafted an ambiguous named insured clause. That ambiguity must be construed against it.[10/11/]

II. THE TRIAL COURT PROPERLY FOUND PLAINTIFF WAS ENTITLED TO STACK UM COVERAGES.

Liberty does not dispute that it was required to comply with Fla.Stat. § 627.727(9) in order to sell non-stacked coverage. Liberty does not dispute that it

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[9/] *See Harvard Farms, Inc. v. National Cas. Co.*, 555 So. 2d 1278, 1279 (Fla. 3d DCA 1990)(comma used to separate series of words and not to set off a restrictive clause).

[10/] *Ellsworth v. Insurance Co. of N. America*, 508 So.2d 395 (Fla. 1st DCA 1987) (ambiguity in defining "named insured" construed against insurer).

[11/] Despite Liberty's contrary claim, evidence established that Jack was acting as agent for Royal Trust Towers at the time of his death. Jack was meeting with a lawyer and business associate from Spain, Mr. Mena, to discuss **both** the sale of Royal Trust Towers, an office building indirectly owned by Jack and Caroline through Royal Trust Towers, Ltd., to a client of Mr. Mena and also a business association between Jack's and Mr. Mena's law offices. The meeting was ongoing and continuing over dinner, thus Liberty's citation to *Sussman v. Florida East Coast Properties, Inc.*, 557 So. 2d 74, 75 (Fla. 3d DCA 1990) is inapposite. *See Schoenfedler v. Winn & Jorgensen, P.A.*, 704 So.2d 136 (Fla. 1st DCA 1997). Liberty argues without support that the business meeting could not have had a dual purpose (sale of the building and association of law offices) and accuses Caroline of giving inconsistent testimony. Not only was Caroline's trial testimony consistent with her earlier testimony in the workers compensation proceeding, it was supported by the testimony of Mr. Mena.

offered no evidence of such compliance at trial. Liberty nevertheless claims that the trial court should not have granted a directed verdict on this issue.

Liberty claims the trial court abused its discretion in failing to consider a filing it made after trial. However, the court was not required to consider such post-trial "evidence," especially where it was contested by other evidence. Petitioner's Main Brief at 39-40. Moreover, the "interests of justice" do not entitle Liberty to a second opportunity to put on evidence that was always in its possession. *See Dalton v. Dalton*, 412 So.2d 928 (Fla. 1st DCA 1982); *Butler v. Pettigrew*, 409 F.2d 1205 (7th Cir. 1969); *Corky Foods Corp.*, 91 B.R. 998 (S.D. Fla. 1988). Liberty's failure to understand the importance of that information does not change this conclusion. *See United States v. Bransen*, 142 F.2d 232 (9th Cir. 1944).

Liberty claims Petitioner bore the burden of proof on this issue. Yet it fails to distinguish the cases which hold the burden is on the insurer with respect to the statute's first two requirements, notice and informed rejection, and it fails to explain why the burden should not be the same with respect to the statute's third requirement. Petitioner's Main Brief at 41-42. Liberty claims that this injected a new issue into the case. It did not. Petitioner's Main Brief at 42-43. Finally, the trial court continued the trial for a day so Liberty could address the issue; Liberty asked for no additional continuance. It cannot complain now. Petitioner's Main Brief at 43.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING LIBERTY'S UNAUTHENTICATED REJECTION FORMS.

Petitioner's main brief set forth a litany of suspicious unexplained circumstances surrounding the unauthenticated forms which Liberty first produced in the middle of trial. Liberty does not contest that these suspicious discrepancies existed. Instead, it cursorily claims that there was adequate authentication because the allegedly "original" form had a check mark like the photocopies it produced during discovery. This simplistic response does not explain away the multiple, significant authentication concerns raised by these documents.

Fla.Stat. § 90.803(6) provides that even a records custodian's testimony does not make records admissible if "the sources of information or other circumstances show a lack of trustworthiness." Here, there was no records custodian testimony and the circumstances definitely show "a lack of trustworthiness."

Liberty suggests waiver. It argues Weiss did not object to these forms until Liberty moved them into evidence. But that is the appropriate time for objecting to the introduction of documentary evidence – when it is sought to be introduced. Liberty cites no contrary precedent. Liberty's claim that the forms were admissible because they matched the policy's coverage similarly misses the point. The issue was what coverage was requested, not the coverage Liberty actually issued. Finally, the cases

on which Liberty relies to support introduction of the forms as business records without a records custodian do not support its position.[12/]

Very simply, without a record custodian's testimony, introduction of the forms purporting to reject stacked coverage was error. The serious discrepancies in the forms made authentication more important, not less. Moreover, Liberty does not contest that this evidence was anything but prejudicial and that a directed verdict would have been required if this evidence had not been admitted.

IV. THE TRIAL COURT SHOULD HAVE GRANTED A DIRECTED VERDICT ON UM COVERAGE UNDER THE UMBRELLA POLICY BECAUSE LIBERTY'S EMPLOYEE ADMITTED LIBERTY NEVER OFFERED UM COVERAGE UNDER THE UMBRELLA POLICY.

Petitioner's main brief details the testimony of Liberty's employees that Liberty does not offer UM coverage under umbrella policies, contrary to the requirements of Fla.Stat. § 627.727(2). Liberty does not challenge this testimony.[13/] To avoid the

[12/]*ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc.*, 617 So.2d 750 (Fla. 4th DCA 1993) held a manager's testimony regarding original documents over which he had control was sufficient authentication. There was no such predicate here. *State v. Love*, 691 So.2d 620 (Fla. 5th DCA 1997) held a letter was sufficiently authenticated as written by the defendant or someone on his behalf because it contained information only the defendant would know. That is not the issue here.

[13/]Liberty states at 41 that Weiss "adduced evidence that UM coverage is available for umbrella policies." It cites to testimony by McKnight that he once sold such a policy. (T2. 391-94). That is not the issue; the issue is whether Liberty offered the Weisses UM coverage under the umbrella policy as required by Florida law. McKnight's testimony does not address this. In addition, McKnight "deferred" to Fiet and Sprague on this issue. Sprague, Liberty's underwriter, testified: "We choose not to

conclusion that Petitioner is entitled to a directed verdict on this issue, Liberty claims that Caroline was "aware" of the availability of UM coverage under the umbrella policy because she asked for it and thought she had received it. At best, this shows that Liberty allowed Caroline to believe she had the coverage which Liberty's employees testified that Liberty did not and would not provide. This hardly meets the statute's requirements that the insurer offer UM coverage under the umbrella policy. Because Liberty's employees admitted Liberty did not comply with Fla.Stat. § 627.727(2), Petitioners are entitled to UM coverage under the umbrella policy.

CONCLUSION

Petitioner respectfully requests this Court to conclude that Petitioner is entitled to UM coverage under Liberty's primary and umbrella policies and is entitled to stack those coverages or, at a minimum, is entitled to a new trial on those stacking issues.

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offer that exposure on the umbrella coverage." (T2. 326). Similarly, Fiet, Liberty's agent, testified: "It's my understanding from underwriting we don't want uninsured motorists protected under the umbrella." (T2. 376).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 9th day of September, 2002, to: David R. Cassetty, Esq., O'CONNOR & MEYERS, P.A., Counsel for Liberty, 2801 Ponce de Leon Boulevard, 9th Floor, Coral Gables, FL 33134; and William Perez, 2152 S.W. 14th Terrace, #2, Miami, FL 33145.

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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).

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