CASE NO: SC05-214

IN THE SUPREME COURT OF FLORIDA

MARK ANDREW TOBIN, Appellant vs.
MICHIGAN MUTUAL INSURANCE COMPANY, Appellee,

CRAIG MACKAY, individually and as Personal Representative of the ESTATES OF ANA GUTIERREZ MACKAY and JONATHAN PATRICK MACKAY, Appellant, vs. MICHIGAN MUTUAL INSURANCE COMPANY, Appellee,

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HELEN J. HUNTER, Appellant vs. MICHIGAN MUTUAL INSURANCE COMPANY, Appellee

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On Certification from the United States Court of Appeals
for the Eleventh Circuit
Consolidated Case No: 03-12737-JJ

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The law in Florida is clearly established. Individuals, who are not Class I insureds, are entitled to UM/UIM coverage, not otherwise properly rejected, if they receive bodily injury due to the negligence of an uninsured motorist while occupying an insured automobile with the named insured's permission or consent. *See, Government Employees Ins. Co. v. Douglas*, 654 So.2d 118, 119 (Fla. 1995), (citing *Mullis v. State Farm Mutual Automobile Ins. Co.*, 252 So.2d 229 (Fla. 1971) and *Valiant Ins. Co. v. Webster*, 567 So.2d 40 (Fla. 1990); *World Wide Underwriters Ins. Co. v. Welker*, 640 So.2d 46, 49 (Fla. 1994); *See also, Travelers Ins. Co. v. Warren*, 678 So.2d 324 (Fla. 1996) (Class II insureds are essentially third-party beneficiaries of the named insured's policy).

Notwithstanding this well-established principle; the strong public policy in favor of UM/UIM coverage; as well as this Court's repeated admonition that:

> [b]ecause the uninsured motorist statute "was enacted to provide relief to innocent persons who are injured through the negligence of an uninsured motorist; it is not to be 'whittled away' by exclusions and exceptions." For these reasons, provisions in uninsured motorist policies that provide less coverage than required by the statute are void as contrary to public policy. *Young v. Progressive Southeastern Ins. Co.*, 753 So.2d 80, 83 (Fla. 2000) (quoting *Mullis v. State Farm Mutual Auto Ins. Co.*, 253 So.2d at 238);

MICHIGAN MUTUAL argues, in effect, that this Court should rewrite the uninsured motorist statute by holding, for the first time, that UM/UIM coverage, not properly rejected, need not be provided for occupants of an insured vehicle.

In considering MICHIGAN MUTUAL's argument that such a rule should be adopted, we would remind the Court that the evidence in this case indicated that MICHIGAN MUTUAL was well aware that the law in Florida required an offer of UM/UIM coverage equal to the liability limits and that despite this knowledge, MICHIGAN MUTUAL simply failed to satisfy §627.727's requirements. (See Initial Brief, pgs. 16-17).

In other words, this is not a case where a carrier - MICHIGAN MUTUAL – was faced with an ambiguous or questionable statutory provision which the carrier, in good faith, simply misinterpreted. Rather, the law is clear and it should not be changed simply to benefit MICHIGAN MUTUAL.[1]

The narrow issue before this Court is whether the Plaintiffs/Appellants, as Class II insureds or permissive occupants of vehicles insured under MICHIGAN MUTUAL liability policies, are entitled to UM/UIM coverage as a result of the

[1] To the extent that Michigan Mutual implies that a finding of coverage will open the "floodgates" to similar suits against leasing companies, it should be noted that these 3 cases appear to be the only cases filed under the subject policies. Further, because, presumably, any subsequent policies contain proper rejections of UM/UIM coverage, Michigan Mutual's potential liability is extremely limited. Finally, there is no evidence that other leasing companies do not properly reject UM/UIM coverage where it is not otherwise desired.

alleged failure of MICHIGAN MUTUAL to adhere to the requirements of §627.727(1) Fla. Stat., notwithstanding that the liability coverage afforded by the MICHIGAN MUTUAL policies would only cover Ford or Jaguar as the owners of the subject vehicles.

Significantly, MICHIGAN MUTUAL apparently concedes, as we asserted in our Initial Brief, pages 27 through 29, that the district court improperly applied *Diversified Services Inc. v. Avila*, 626 So.2d 364, 365 (Fla. 1992), for the proposition that §627.727 is wholly inapplicable to the MICHIGAN MUTUAL policy. Instead, recognizing that the court improperly applied *Diversified Services Inc.*, MICHIGAN MUTUAL argues that:

> - Because Plaintiffs are not covered under the policy, the Florida Uninsured Motorist Statute has no bearing on this case; and
>
> - Even if Plaintiffs are deemed to be Class II insureds entitled to take advantage of the Florida Uninsured Motorist Statute, Michigan Mutual and Ford fulfilled the statutory requirements for rejecting uninsured motorist coverage for retail leased vehicles.

We will address each of these arguments in the order presented by MICHIGAN MUTUAL and, as indicated below, we submit that MICHIGAN MUTUAL's arguments are contrary to well-established Florida law.

ARGUMENT

IN LIGHT OF MICHIGAN MUTUAL'S UNDISPUTED FAILURE TO OFFER UM/UIM COVERAGE EQUAL TO THE LIABILITY LIMITS OF ITS POLICIES, THE REFORMATION OF THE POLICIES TO EXCLUDE SUCH COVERAGE VIOLATES FLORIDA LAW AND THE JUDGMENTS IN FAVOR OF MICHIGAN MUTUAL SHOULD BE REVERSED

I. THE FLORIDA UNINSURED MOTORIST STATUTE AFFORDS PROTECTION TO PLAINTIFFS/APPELLANTS AS CLASS II INSUREDS

MICHIGAN MUTUAL contends that since no liability coverage was afforded under the MICHIGAN MUTUAL policies to anyone or any entity other than the owners of the vehicles, Jaguar and Ford, the Plaintiffs are not entitled to UM/UIM coverage based on the asserted violation of §627.727. However, conspicuously absent from MICHIGAN MUTUAL's Answer Brief, is any reference to the two Florida cases which are controlling on this issue, and which refute MICHIGAN MUTUAL's claims, *Young v. Progressive S.E. Ins. Co.*, 753 So.2d 80 (Fla. 2000) and *Varro v. Federated Mutual Ins. Co.*, 854 So.2d 726 (Fla. 2nd DCA 2003). Further, while MICHIGAN MUTUAL does refer to *Mullis v. State Farm Mutual Auto Ins. Co.*, MICHIGAN MUTUAL overlooks extensive language in *Mullis* indicating that UM/UIM coverage is mandated for occupants of insured vehicles.

In *Varro v. Federated Mutual Ins. Co.*, the court, citing *Young*, held that a business auto policy, such as the policies in question here, violated the Florida Uninsured Motorist Statute by excluding Class II insureds from the uninsured

motorist coverage afforded by the policy. The court emphasized, in accordance with *Young*, that §627.727(9) lists five limitations that insurance companies may place on UM/UIM coverage and since the five limitations do not include a provision that allows an exclusion of particular individuals from UM/UIM coverage, Class II insureds are statutorily entitled to such coverage.

Simply put, there are no Florida cases in which a court has found that lawful occupants or permissive users of a vehicle otherwise covered by a liability policy can be excluded from the UM/UIM coverage under that policy. The reason is, as this Court has recognized, Class II insureds are third-party beneficiaries of the coverage between the named insured and the carrier. Thus, as stated in *Travelers Ins. Co. v. Warren*, 678 So.2d 324, 326 n.2 (Fla. 1996):

> Thus, Class I insureds are named insureds and resident relatives of a named insured. Conversely, Class II insureds are lawful occupants of the insured vehicle who are not named insureds or resident relatives of named insureds. Class II insureds do not pay for UM coverage under the insured's policy. Rather, Class II insureds are essentially third-party beneficiaries to the named insured's policy. See *Mullis v. State Farm Mut. Auto Ins. Co.*, 252 So.2d 229, 238 (Fla. 1971); *Quirk v. Anthony*, 563 So.2d 710, 713 n.2 (Fla. 2nd DCA 1990), approved 583 So.2d 1026 (Fla. 1991).

See also, *Bulone v. United Services Automobile Association*, 660 So.2d 399, n.1 (Fla. 2nd DCA 1995) approved 679 So.2d 1185 (Fla. 1996) (also recognizing Class II insureds are third-party beneficiaries of named insured's policy); *Auto Owners*

Insurance Company v. Potter, 774 So.2d 859, 861 (Fla. 4th DCA 2000) (Class II insured's claim for uninsured motorist coverage is made only by virtue of the existence of an insurance policy covering the vehicle claimant occupied at the time of the collision).

As such, the test to determine whether or not the UM coverage may be properly excluded with respect to a Class II insured is not, as MICHIGAN MUTUAL argues, whether that individual would be insured for liability coverage if driving the vehicle, but whether coverage is otherwise available for the named insured's use of that vehicle.

In fact, recent Florida decisions have expressly repudiated MICHIGAN MUTUAL's contention. As indicated in *Bulone*, 660 So.2d 399, n.10:

> Because uninsured motorist coverage has been sold with auto liability coverage, there has been a tendency to decide that a person is insured as a claimant for uninsured motorist benefits because the person will be an insured as a defendant under the liability coverage. This analysis has severe limitations, even for class I insureds. See *World Wide Underwriters Ins. v. Welker*, 640 So.2d 46 (Fla. 1994); *Government Employees Ins. Co. v. Douglas*, 654 So.2d 118 (Fla. 1995). For example, from a practical perspective, a 5 – year – old child would never be an insured for liability coverage because the child cannot drive, but the child has need for uninsured motorist coverage both as a passenger in the family car and elsewhere. Whether it is good policy to provide Ms. Bulone with both liability coverage as a *claimant* and underinsured motorist for coverage as a class II claimant is not

> answered by deciding whether she might be insured as a defendant if the Moellers ever let her drive their truck.

Similarly, in *Martin v. St. Paul Fire & Marine Ins. Co.*, 670 So.2d 997, 1000 (Fla. 2nd DCA 1996) rev. den. 670 So.2d 697 (Fla. 1996), the court recognized that the claimant in *Mullis*, was not insured under the family automobile policy for liability coverage when operating the motorcycle involved in that accident but yet this Court held that he was entitled to UM coverage. Thus, the court concluded in *Martin*, that any reading of *Government Employees Ins. Co. v. Douglas*, the primary case relied upon by MICHIGAN MUTUAL, for the proposition that an insurance policy may validly limit uninsured motorist coverage if the liability coverage is inapplicable to a particular individual, would be inconsistent with *Mullis*, the case which has been repeatedly cited by Florida courts, for the principle that Class II insureds are entitled to UM/UIM coverage.

No reasonable interpretation of *Mullis* or its progeny can lead to the conclusion that an occupant of a vehicle otherwise covered for uninsured motorist benefits and liability coverage need also be covered by the policy's liability provisions in order to obtain uninsured motorist coverage. In *Mullis* this Court indicated that §627.0851, the predecessor to §627.727, decrees that :

> [n]o automobile liability policy shall be issued with respect to any motor vehicle registered or garaged in Florida unless coverage is provided therein in not less than the limits described in §324.021(7), F.S.

*** for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease***'

The 'persons insured' thereunder in an automobile liability insurance policy as contemplated by F.S. chapter 324, F.S.A., the Financial Responsibility Law, ordinarily are: the owner or operator of an automobile, his spouse and other members of his family resident in his household and others occupying the insured automobile with the insured owner's permission. These insureds are protected by the policy from liability to others due to injuries they inflict by their negligent operation of the insured owner's automobile. Reciprocally, this same class of insureds is protected by uninsured motorist coverage in the same policy from bodily injury caused by the negligence of uninsured motorists. . . .

Similarly and reciprocally, Section 627.0851, provides for the same limits described in F.S. Section 324.021(7), F.S.A., as uninsured motorist protection coverage. Accordingly, if an uninsured motorist had complied with the financial responsibility law and obtained automobile liability insurance he would have afforded all members of the public, including, of course, the class of insureds described above, the same protection as Section 627.0851 prescribes for those taking advantage of such section. . .

When uninsured motorist coverage was obtained by Shelby Mullis pursuant to §627.0851 for himself as the named insured, for his spouse or for his or his spouse's relatives who are residents of his household, they were given the same protection in case of bodily injury as if the uninsured motorist

> had purchased automobile liability insurance in compliance with the Financial Responsibility Law. This, of course, would not be the case as to other persons potentially covered who are not in class of the named insureds and relatives residents in the Mullis household. These latter are protected only if they receive bodily injury due to the negligence of an uninsured motorist while they occupy the insured automobile of the named insured with his permission or consent.

In sum, and as *Mullis* makes perfectly clear, permissive occupants of insured vehicles are entitled to UM/UIM coverage and that coverage cannot be narrowed by the carrier through exclusions. *Mullis* at 232-233.

As indicated above, *Government Employees Ins. Co. v. Douglas* is the primary case that MICHIGAN MUTUAL relies upon to support the argument that a Class II insured may be excluded from UM coverage, if he or she is not insured under the liability portion of a policy. The *Martin* court, however, clearly recognized that any statements in *Douglas* to that effect, were dicta, since the Court, in *Douglas*, was only addressing whether or not a Class I insured was entitled to UM coverage, for a vehicle not covered under the policy's liability coverage, because the insurer failed to comply with §627.727(9). That, obviously, is not the question before this Court.

It is also interesting to note, however, that in *Martin*, the court emphasized that the determination of who should be covered for uninsured motorist coverage should not be based on the definition of "insured" in the separate section of the

policy providing liability coverage. Rather, the question should be addressed by the policy options offered by the legislature in §627.727(9).

The *Martin* court's conclusion in that respect was, as recognized by the court in *Varro supra*, adopted by this Court in *Young v. Progressive S.E. Ins. Co.*, a case post-dating *Douglas.* As previously emphasized, in *Varro* the court concluded that since §627.727(9) lists five limitations that insurance companies may place on UM coverage, and since the limitations do not include a provision for excluding Class II insureds from UM coverage otherwise available, the Class II insureds were statutorily entitled to such coverage.

In sum, we would submit that Florida law is well-established, that Plaintiffs/Appellants, as permissive occupants of the vehicles covered by MICHIGAN MUTUAL's liability policy, not only have standing to raise challenges to MICHIGAN MUTUAL's failure to comply with §627.727, *see Travelers Ins. Co. v. Quirk*, 583 So.2d 19026, 1028 (1991), but also that because of their status as such Class II insureds, Plaintiffs/Appellants are entitled to the benefit of any uninsured motorist coverage statutorily decreed as a result of noncompliance with §627.727(1). *Mullis v. State Farm Mutual Automobile Ins. Co.*; *Varro v. Federated Mutual Ins. Co.*

II. THE MICHIGAN MUTUAL POLICY IS NOT A TRUE EXCESS OR UMBRELLA POLICY AND THUS, §627.727(1) FLA. STAT., AND NOT §627.727(2) FLA. STAT., CONTROLS

In its fallback argument, MICHIGAN MUTUAL contends that, assuming the Plaintiffs are covered by the MICHIGAN MUTUAL policy, Ford and MICHIGAN MUTUAL satisfied the statutory requirements for rejecting UM coverage, since the policy is governed by the "less stringent" requirements of §627.727(2) Fla. Stat. (Answer Brief, pg. 22). In so contending, MICHIGAN MUTUAL once again either misapprehends or misrepresents Florida law.

At one point, the law in Florida was such that in the absence of an informed rejection by the insured, a carrier issuing an umbrella policy was required to afford UM/UIM coverage equal to the liability limits. *Chicago Insurance Company v. Dominguez*, 420 So.2d 882 (Fla. 2nd DCA 1992); C*ohen v. American Home Assurance Company*, 367 So.2d 677 (Fla. 3rd DCA 1979). In 1984, the Legislature amended the uninsured motorist statute to provide that carriers issuing umbrella policies were not obligated to provide UM coverage under the provisions of §627.727(1). Rather, pursuant to §627.727(2), such a carrier merely needs to make such coverage available as part of the application for the umbrella policy, and at the written request of the insured. *Travelers Ins. Co. v. Quirk*, at 1029; *Ferreiro v. Philadelphia Indemnity* 816 So.2d 140 (Fla. 3rd DCA 2002)*; Tres v. Royal Surplus Line Insurance Company*, 705 So.2d 643 (Fla. 3rd DCA 1998); *Weesner v. United*

Services Automobile Assn., 711 So.2d 1192, 1193 (Fla. 5th DCA 1998); *Continental Ins. Co. v. Howe*, 488 So.2d 917, 920 (Fla. 3rd DCA 1986); see also, *Annotation: "Excess or Umbrella Insurance Policy As Providing Coverage For Accidents With Uninsured or Underinsured Motorist,"* 2 ALR 5th 922 (citing several Florida cases and indicating in footnote 1, that the cases deal with true excess or umbrella policies).

Umbrella policies, or as otherwise known, true excess policies, which are subject to §627.727(2), are designed to provide coverage only when the amount of an insured loss reaches a predetermined level. *Travelers Indemnity Co. v. Overseas Ace Hardware, Inc.*, 550 So.2d 12, 13 (Fla. 3rd DCA 1989); *Chicago Ins. Co. v. Dominguez, supra*. Thus, an umbrella policy, subject to §627.727(2), is to be distinguished from other types of primary coverage, like MICHIGAN MUTUAL's policy, which, under a given set of circumstances, may be excess to other primary coverage, because of the operation of an "other insurance" or "excess" clause. *Allstate Ins. Co. v. Executive Car & Truck Leasing, Inc.*, 494 So.2d 487, 489 (Fla. 1986) citing *Appelman, Insurance Law & Practice Section 4909.85 (1981).*

Simply put, the MICHIGAN MUTUAL Personal Auto Policy provides first dollar coverage to the named insured, Ford, and unlike an umbrella policy, the coverage does not come into effect only when the amount of an insured loss reaches a predetermined level. The applicable provision of the policy indicates:

> This policy, however, shall provide contingent loss and excess auto liability coverage for autos included in the following programs:
>
> Red Carpet Lease, Primus Automotive Financial Services, Inc; and CommerciaLease.
>
> But only as respects the liability of the Named Insured. No coverage is provided to lessees, agents, or permissive users.
>
> As used in this endorsement, contingent loss is defined as liability of the named insured that results in the payment of a claim when,
>
> i. The lessee's underlying primary insurance limits is inadequate, or
>
> ii. The lessees insurer denies coverage.

(See Appendix to Initial Brief, Ex. 1, pg. 4).

Virtually every automobile insurance policy which is written contains "other insurance" or "excess clauses," like the MICHIGAN MUTUAL policy, and which provide that the coverage may be excess to other available coverage. However, as the authorities outlined above indicate, such a provision does not transform such a policy into a true excess or umbrella policy so as to be outside the scope of §627.727(1), because these policies do not expressly state that the coverage is applicable only above a minimum level of loss.

If the opposite were true, and the provision of the uninsured motorist statute which applied - §627.727(1) or (2), depended upon whether other liability

coverage was available for a particular loss, the statute would be rendered impossibly vague since a carrier could never determine whether it had to satisfy the provisions of §627.727(1) until a loss occurred and the carrier was in a position to determine whether there was other valid and collectable insurance available for such a loss.

Accordingly, the cases relied upon by MICHIGAN MUTUAL dealing with umbrella policies are inapplicable to the MICHIGAN MUTUAL policies in question. Thus, MICHIGAN MUTUAL's argument that even if the Florida Uninsured Motorist Statute applies it would be subsection (2) that governs, should therefore be rejected.[2]

[2] Since we believe there is no question that §627.727(1) applies, the Court should reject Michigan Mutual's argument that the evidence would sustain a finding that Ford was aware of the availability of UM/UIM coverage with respect to the contingent policy, and that pursuant to the decision in *Tres v. Royal Surplus Lines Ins. Co.*, 705 So.2d 643 (Fla. 3rd DCA 1998), it should be entitled to judgment in its favor. It should be noted, however, that while this conclusion may be true as to the separate policy sold to Ford for its employees, there is zero evidence in the record, because Michigan Mutual never raised this issue, demonstrating that Michigan Mutual made UM/UIM coverage available for the contingent policy. And the reason of course, is as we emphasized in our Initial Brief, the issue of UM/UIM coverage for the retail lease vehicles was never discussed. As such, *Tres* is not controlling.

CONCLUSION

For the reasons set forth above, the Court should answer the certified question in the affirmative and the Court should further indicate that MICHIGAN MUTUAL is liable for UM/UIM benefits to the extent of the liability limits of the policies insuring the Red Carpet vehicles.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6 day of June, 2005 to: ALL COUNSEL ON ATTACHED MAILING LIST.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief of Appellant was prepared in 14- point Times New Roman font, and was electronically filed on June 6, 2005.

By:_____
CHRISTOPHER J. LYNCH