

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 BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS^{1/}

Introduction. When Liberty Mutual Insurance Co. [“Liberty”] solicited the insurance business of Continental Properties, Inc., a family business owned by Jack and Caroline Weiss, Caroline, who handled the company’s insurance affairs, insisted that she and Jack be individually named in the company’s auto policies and that they be provided with full uninsured motorist [“UM”] coverage. The proposal submitted by Liberty’s agent indicated that UM coverage would be provided, without limitation. The proposals sent in the following years did the same. The confusing, 81-page policy Liberty issued appeared to provide UM coverage on its face, and named Jack and Caroline as insureds in an endorsement. Nevertheless, when Jack was killed by an uninsured motorist, Liberty denied coverage.

A non-jury trial was held on coverage. During that trial, Liberty’s own witnesses testified that the key provisions of Liberty’s policy were ambiguous. In light of those admissions, and the policy language on which they were based, the trial court determined that Jack was an insured under Liberty’s auto policy and umbrella

^{1/} “R” refers to the record on appeal. “T1” refers to the trial transcript from the coverage trial, which appears in the record at R. 1067-2023. “T2” refers to the separately numbered trial transcript of the stacking and damages trial. For the Court’s convenience, Liberty’s auto policy is included in an appendix attached to this brief, together with the Third District’s opinion. “A” refers to that appendix.

policy with respect to UM coverage.^{2/}

Liberty appealed. Plaintiff cross-appealed. The Third District reversed. *Liberty Mutual Ins. Co. v. Weiss*, 790 So.2d 475 (Fla. 3d DCA 2001). It ignored the fact that because Jack was named in the policy, he was a Class One insured under *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So.2d 229 (Fla. 1971), entitled to UM coverage as a matter of law. It ignored the testimony of Liberty's own witnesses as to the policy's ambiguities, and strictly construed the policy to preclude UM coverage. Because it determined that Liberty provided no UM coverage to Jack, it did not reach the stacking or other issues involved in the appeal and cross-appeal.

This Court accepted jurisdiction to review conflict between the Third District's decision, *Mullis* and *St. Paul Fire & Marine Ins. Co. v. McDonald*, 525 So.2d 455 (Fla. 4th DCA 1988), which applied *Mullis* to a policy like the one here.

The accident. Jack Weiss was a prominent workers' compensation attorney. On February 21, 1995, Jack, his wife Caroline, their daughter Adeena, and a Spanish lawyer and business associate, Mr. Mena, left Jack's office and drove to a restaurant

^{2/} In a later jury trial, the jury determined that the uninsured motorist was negligent, that Jack was 30% comparatively negligent and substantial damages were awarded. The jury also determined that Plaintiff had rejected stacking under Liberty's auto policy and had rejected all UM coverage under Liberty's umbrella policy. (T2. 1500-01). The trial court subsequently granted a directed verdict in favor of Weiss on the stacking issue, finding that Liberty did not prove that it had met the statutory requirements for offering non-stacked coverage. (R. 1060-61).

for dinner. (T2. 203, 827-28). Jack and Mr. Mena had been discussing both the sale of Royal Trust Towers, an office building indirectly owned by Jack and Caroline, to a client of Mr. Mena and also a business association between Jack's and Mr. Mena's law offices. (T1. 373-375, 418). The discussions were to be continued over dinner. (T1. 376). Jack was struck and killed by a speeding uninsured motorist while crossing the street to go to the restaurant. (T2. 834). As detailed below, the fact that this accident occurred while Jack was engaged in the business of Royal Trust Towers has an important bearing on the issue of insurance coverage.

Uninsured Motorist Coverage - the first trial. Jack and Caroline were the owners of Royal Trust Towers Ltd., which owned the office building where Jack's law office was located. They were also owners, officers and directors of Intercontinental Properties, Inc., which managed the building. Caroline ran Intercontinental Properties. (T1. 342-43, 356).

In 1992, a Liberty agent/employee, Alex Perez, solicited Intercontinental's insurance business. (T1. 120-21). Perez eventually spoke to Caroline about property and auto coverage. (T1. 350-51). Caroline told Perez that she wanted \$1 million in coverage on each car, including UM coverage. She also wanted an umbrella policy with a minimum of \$2 million coverage. (T1. 351). Caroline specifically requested that Liberty name her and Jack in the policy. (T1. 352).

Q: So the record is clear, did you specifically instruct Mr.

Perez that both you and your husband were to be individually insured in these policies?

A: I wanted to make sure that we are insured into it [sic], and that we would have either our name on the policy or we would have endorsements.

(T1. 353). She also requested UM coverage for herself and Jack:

Q: Did you give Mr. Perez any instructions as to whether you and Mr. Weiss would be or should be individually insured for uninsured, underinsured motorist coverage?

A: Yes, of course. That was a big criteria with Jack, since his practice was personal injury practice. And he says these catastrophes happen all the time and he wanted to make sure we had uninsured, underinsured, we had the proper coverage and umbrella, the stacking of all of the cars. And all of that instructions was given to Alex Perez.

Q: And based on your discussions with Mr. Perez, was it your understanding that you and your husband had uninsured/underinsured motorist coverage pursuant to the business auto policy?

A: Yes.

(T1. 354-55). Perez admitted that he had conversations with Caroline but had no recollection as to the substance of those conversations. (T1. 173).

Perez sent a proposal to Intercontinental detailing the coverages provided and the premiums charged. The proposal had to be revised because it did not include the cars driven by Jack, Caroline or their daughters. Another Liberty agent, James Fiet, prepared and sent a revised proposal. (T1. 178-79; T1.Pl.Ex. 8). The proposal

listed “automobile liability” and “uninsured motorist” coverage with limits of \$1,000,000. It listed “Drive Other Car Coverage” (“DOC”). None of these provisions had any limitation. None indicated that Liberty was not providing Jack or Caroline the requested UM coverage. Significantly, Fiet admitted that if he intended a limitation on full coverage, he would have listed that limitation in the proposal. (T1. 518). Both he and Perez acknowledged that the proposal listed no limitations on the UM or DOC coverage. (T1. 231, 237-38, 241-42, 518).

Liberty issued the policy in 1992 and renewed it in 1993 and 1994. The 1993 and 1994 proposals were identical to the 1992 proposal; they did not indicate any limitation on UM coverage or that the DOC coverage did not include UM. (T1. Pl.Ex. 7-10). In 1993, Caroline wrote Perez and requested that the endorsements in favor of Jack and Caroline remain in full force and effect. (T1. 325-26, 369; T1. Pl.Ex. 12). Perez assured Caroline the policy covered her and Jack. (T1. 366-70).

The policy issued pursuant to the 1994 proposal was in effect on February 21, 1995, when Jack was killed. (T1. Pl.Ex. 1). Liberty charged over \$13,000 for auto coverage, including UM coverage, on seven vehicles, for that policy. (T1. 130, T1. Pl.Ex. 1). The seven vehicles included all the personal vehicles owned by Jack, Caroline and their daughters. (T1. 130, 196, 201, 351, 366; T2. 787). No other insurance policy covered those personal vehicles. (T2. 782).

The Liberty policy, including the DOC endorsement, make Jack a Class

One Insured. As detailed in the argument below, Class One insureds are entitled to UM coverage as a matter of law. Class One insureds are those who are named in the policy and are insured for liability whether or not they are occupying a vehicle covered under the policy. Under the Liberty policy, Jack was a Class One insured – he was insured for liability whether or not occupying a covered vehicle. He was therefore entitled to UM coverage as a matter of law.

The general provisions of the Liberty policy, found in the Business Auto Coverage Form, provide liability coverage to all permissive users of the vehicles covered by the policy. (A. 76). Thus, these provisions provide liability coverage to Jack while operating one of the covered vehicles.

The DOC endorsement to the Liberty policy expands on this coverage. The endorsement lists “Jack J. & Caroline Weiss” as named insureds. The endorsement provided liability coverage to Jack while operating vehicles not insured under the policy. Thus, the DOC endorsement provided:

B. CHANGES IN LIABILITY COVERAGE

1. Any auto you don't own, hire or borrow is a covered auto for LIABILITY COVERAGE while being used by any individual named in the Schedule or by his or her spouse while a resident of the same household
2. The following is added to WHO IS AN INSURED:
Any individual named in the Schedule and his or her spouse, while a resident of the same household, are insureds while using any covered auto described in

paragraph B.1 of this endorsement.

Thus, the Liberty policy insured Jack whether or not he was occupying a covered vehicle. He was a Class One insured under that policy.^{3/}

Ambiguity in the DOC endorsement. Even if Jack was not a Class One insured entitled to UM coverage as a matter of law, he was nevertheless entitled to UM coverage because the DOC endorsement provided UM coverage. Alternatively, the DOC endorsement was ambiguous as to whether the it provided UM coverage.

The DOC form was a standard preprinted ISO form consisting of two pages to which Liberty attached a nonstandard third page. (A. 47-49). On the first page, underneath the heading “Schedule,” is a table consisting of two rows. In the first row, there are three headings: “Name of Individual,” “Liability,” and “Auto Medical Payments.” Under “Name of Individual,” there is a box to enter the names of the people being insured. Under “Liability” and “Auto Medical Payments” there are boxes to enter the limits and the premiums for those coverages.

In the second row, there are four headings: “Name of Individual,” “Uninsured Motorists,” “Underinsured Motorists,” and “Physical Damage.” Again, under

^{3/} Liberty did not dispute that the DOC endorsement provided coverage to Jack. As Liberty stated in its brief to the Third District: “While JACK WEISS was a named insured on the Drive Other Car Endorsement, that endorsement only provided coverage for bodily injury and property damage, and did not modify the definition of who is an insured for uninsured motorist coverage.” Initial Brief of Appellant, Liberty Mutual Insurance Company at 7.

“Name of Individual” there is a box to enter the names of the people being insured. Under “Uninsured Motorists” and “Underinsured Motorists” there are boxes to enter the limits and premiums for those coverages, and under “Physical Damage” there is a box to enter its relevant coverage information.

Under “Name of Individual” in both the first row (which includes liability coverage) and the second row (which includes UM coverage) are the words “SEE ATTACHED SCHEDULE.” The attached third page, which is not part of the pre-printed form, lists “Jack J. and Caroline Weiss” under the heading “Name of Individual.” (A. 49).

All of the other boxes on the first page, including the boxes for “Uninsured Motorists” and “Underinsured Motorists,” are blank. The DOC form specifically states what to do when the boxes are blank. The bottom of the form states: **“If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.”** The “Declarations” are found in the appendix at (A. 5-11). The first page of the Declarations shows that UM coverage is being provided and that a premium is charged for that coverage. (A. 5). Other pages of the Declarations state that \$1,000,000 in UM coverage is provided. (A. 10-11).

Liberty could not explain why, if liability coverage was the only coverage

offered, it failed to list it in the box on Page 1 of the DOC form. Or, if UM coverage was not part of the DOC endorsement, why the insured was told to see the “Attached Schedule” for the names of the individuals covered for UM. Indeed, Liberty’s own underwriting manager, with 20 years experience at Liberty, admitted the form was both confusing and ambiguous:

Q. Do you know why it says, “See attached schedule” on the first page under the block next to uninsured motorist if liability is all that is being provided?

A. No, I cannot answer that.

Q. Do you find that to be confusing?

A. It is just not evident here what the intent was.

* * *

Q. So if you look at it you cannot tell what the intent was?

A. That is correct.

Q. Does that make it ambiguous to you?

A. If I cannot discern the intent it would be construed as ambiguous.

(T1. 318-19).

The second page of the DOC form states in Paragraph A: “This endorsement changes only those coverages where a premium is shown in the Schedule.” (A. 48).

As previously noted, only the first page of the DOC form is labeled “Schedule”;

Liberty left all the coverage and premium boxes on that schedule blank; page one of the DOC form tells the insured to look to the Declarations Page if there is a blank; and the Declarations Page shows that a premium was paid for UM coverage. (A. 5).

The third page of the DOC endorsement, on which Liberty's argument relies, does not contain the word "schedule." Nothing on the first two pages of the endorsement tells the insured to look to this third page to determine whether the endorsement provides UM coverage. This third page has a table listing coverages horizontally. The coverages are "BI/PD," "Auto Med. Pay," "Uninsured/Underinsured Motorists," "Physical Damage." (A. 49). The number "52" appears under "BI/PD." Liberty equates the BI/PD coverage with the "Liability" coverage mentioned on the first page of the endorsement; it therefore concludes that the endorsement only provides liability coverage. Nothing in the policy, however, explains to the insured what "BI/PD" means. And, as previously noted, nothing tells the insured to look at this page, rather than the "Schedule of Coverage" in the Declarations, to determine whether the policy provides coverage.

UM coverage for Jack as "agent for Royal Trust Towers." Even if Jack was not entitled to UM coverage under the DOC endorsement, Jack was still entitled to UM coverage under Liberty's policy. Liberty's policy had a specific endorsement providing UM coverage to various categories of persons, including those named as insureds in the policy. (A. 66). The policy listed the named insureds the following:

Intercontinental Properties, Inc.,
Agent for Royal Trust Towers, Ltd.

Although there was room for “Agent for Royal Trust Towers, Ltd.” to appear on the same line as “Intercontinental Properties, Inc.,” it was placed on a separate line.

At trial Liberty claimed that there was only one named insured, Intercontinental Properties. It claimed the second line was descriptive of the first, i.e., that the word “as” should be inserted in the second line so it read “as Agent for Royal Trust Towers, Ltd.” Liberty could not explain what was added to or subtracted from Intercontinental’s coverage if “Agent for Royal Trust Towers” was merely descriptive. Plaintiff argued that Jack was a named insured because he was an “Agent for Royal Trust Towers, Ltd.” and was acting as such at the time of his death. At the very least, the clause was ambiguous. It did not clearly show whether “Agent for Royal Trust Towers” was descriptive of “Intercontinental Properties, Inc.,” or whether it identified a second group of named insureds. (T1. 582-84).^{2/}

Significantly, Liberty’s own employees testified that by using the term “Agent for” there were two insureds, not one. Intercontinental Properties was one; the second was “Agent for Royal Trust Towers.” William Stoddard, Liberty’s senior

^{2/} The Liberty umbrella policy had a semi-colon instead of a comma between “Intercontinental Properties, Inc.” and “Agent for Royal Trust Towers, Ltd.” Liberty could not explain why a semi-colon was used if the two names were really one. (T1. 98, 321-22, 324).

manager assigned to Plaintiff's claim, testified:

Q: My first question is Intercontinental Properties, Inc. is one named insured. Is that correct?

A: Yes.

Q: And then there is a second named insured, Agent for Royal Trust Towers, Ltd. Is that correct?

A: Yes.

(T1. 99). See also (T1. 100-01)(same). In addition, Alex Perez, the Liberty agent who sold the policy, repeatedly testified in his deposition, read during trial, that there were two named insureds:

Q. Who made that decision that you were writing the insurance for the agent rather than the principal?

A. I'm sorry, I'm writing the insurance for both Intercontinental Properties, Agent for Royal Trust Towers.

Q. Both are named insureds?

A. Both are named insureds on the policy.

(T1. 141-42). See (T1. 139-40, 227-28). Robert Sprague, Liberty's Florida underwriting manager with 25 years experience, testified that he had never seen "agent for" used in a policy. (T1. 311, 314). He admitted that the use of "agent for" made the policy ambiguous. (T1. 316, 324-25).

Liberty nonetheless claimed that it provided no UM coverage for Jack. It argued that despite its use of the term "Agent for Royal Trust Towers" and its

specific listing of Jack as a named insured in the DOC endorsement, its policy was a standard commercial policy which did not afford Jack UM coverage while a pedestrian. The trial court ruled to the contrary (R. 2040):

Jack J. Weiss was a named insured under the Drive Other Car Coverage Endorsement, and as a general partner of Royal Trust Towers, Ltd. was a named insured as an Agent for Royal Trust Towers, Ltd.

The Third District reversed. With respect to the DOC endorsement, the Third District stated: “a ‘Drive Other Car’ endorsement, providing coverage for bodily injury and property damage, did not modify the definition of who was an insured for UM coverage.” 790 So.2d at 477. The Third District failed to recognize, however, that by modifying the definition of who was insured for liability, the DOC endorsement modified, as a matter of law, who was insured for UM coverage. With respect to the language of the policy itself, the Third District stated: “[T]he plain language of the insurance policy requires reversal of the lower court’s determination that decedent was a named insured on the business auto policy to ‘Intercontinental Properties, Inc., Agent for Royal Trust Towers, Ltd.’” 790 So.2d at 477.

In light of its determination of no UM coverage, the Third District did not reach issues raised on appeal and cross-appeal relating to stacking of UM coverage. 790 So.2d at 477. The facts relevant to those issues are presented here in the event this Court exercises its discretion to decide all issues relating to UM coverage.

The second trial – stacking of UM coverage. The trial court conducted a second trial before a jury on the issues of negligence of the uninsured motorist, comparative negligence, damages, and on whether the insured rejected stacked UM coverage under the auto policy and all UM coverage under the umbrella policy.

The parties disputed whether there was a signed form in which Plaintiff rejected stacked UM coverage. Liberty relied on a copy which had a check in the box electing non-stacked coverage. But another copy had no such check. Plaintiff argued that none of the copies should be admitted; all were untrustworthy. (T2. 77-79). Liberty argued that all should be admitted; the jury should decide which was authentic. (T2. 81). The trial court refused to exclude any of the copies. (T2. 83).

Plaintiff first asked Liberty to produce the original rejection form in 1995. Plaintiff filed five motions for production and obtained a court order compelling production. (T2. 425; R. 2041-42). Liberty did not comply; it claimed it did not have the original. (R. 2041-42). Nonetheless, in the midst of trial, Liberty suddenly claimed that it found the original. (R. 2041-42; T2. 446). This new-found document had a check mark electing non-stacked coverage.

As detailed below, the trial court should not have admitted the forms on which Liberty relied to support its claim that the insured waived stacked UM coverage under the auto policy and all UM coverage under the umbrella policy. Various parts of the forms on which Liberty relied were highly suspicious. No one had first-hand

knowledge as to execution of all parts of those documents. There was unrebutted testimony from both Caroline and Plaintiff's handwriting expert that Caroline's purported signature on the 1992-93 auto policy form was a forgery. (T2. 817, 919, 942). An indentation analysis showed that someone had purposely tried to duplicate Caroline's signature. (T2. 938-39, 944, 956, 963). Of course, this analysis was not possible until Liberty produced the purported original forms in the middle of trial. Although the 1992-93 rejection forms for the auto policy and umbrella policies would have been signed the same day, they bore dates one day apart. (T2. 613-14). The same is true of the 1993-94 forms; they also bore dates one day apart. (T2. 624-25). Liberty could not explain why the forms had different dates. (T2. 614-15). Moreover, the indentation analysis showed the forgery of Caroline's signature occurred while one form was on top of the other, even though the forms had different dates. (T2. 938-39). Ms. Hernandez, the Liberty employee who prepared the 1993-94 auto form, admitted the dates should have been the same. (T2. 624-25). The 1993-94 umbrella form was typed; she acknowledged that she never types. (T2. 617, 622). She had no idea who prepared the 1993-94 umbrella form or when it was prepared. (T2. 618, 620-22).

Equally important, the forms found by Liberty during trial were not maintained in the normal course of business. The documents which Liberty claimed were "originals" were purportedly lost and were not found until the middle of trial. (T2.

432, 446; R. 2041-42). There was no testimony why or how they were lost or how they were found. The only explanation was by Liberty's counsel—the forms were found in a place where they were not supposed to be. (T2. 446). The documents had three sets of staple holes, indicating they had been attached to other documents. Yet when Liberty eventually produced them they had no attachments. (T2. 504-08, 1151, 1155-56). Liberty admitted that rejection forms would have been prepared for every policy year, but Liberty never found any forms for the 1994-95 policy, the policy which was in effect when Jack was killed. (T2. 592-94).

Under these circumstances, Liberty should have been required to authenticate the forms on which it relied with appropriate testimony. When Liberty sought to introduce these forms into evidence without any authentication, Plaintiff objected. (T2. 1116, 1119-24). See also (T2. 41-87). That objection was overruled. (T2. 1123). Liberty was allowed to introduce the forms without the authenticating testimony of a records custodian or knowledgeable witness. (T2. 1123-24).

Significantly, Liberty's employee, Ms. Hernandez, testified that it was Liberty's practice to select non-stacked coverage for its insureds. (T2. 596, 600-01, 604, 619). "We basically always chose the non-stacked coverage for the customer, because the stacking coverage would basically double the premium." (T2. 601).

Q: So every time you sent one of these forms out on a business auto policy in your 10 years you checked non-stacked?

A: Non-stacked.

(T2. 601). Ms. Hernandez herself checked off “non-stacked” on the selection form for the 1993-94 policy. (T2. 618-19).

Liberty’s witnesses also acknowledged that Liberty did not offer UM coverage under its umbrella policy. Liberty’s underwriting manager testified:

Q: . . . Do they [Liberty] discourage the sale of UM coverage in umbrella policies?

A: Yes.

Q: They do discourage that?

A: Yes.

Q: How do they discourage that?

A: We choose not to offer that exposure on the umbrella coverage We do not offer it up on what is excess, which is a voluntary coverage under our standard, we don’t put it there.

(T2. 326). Ms. Hernandez testified that she always checked off the box rejecting UM coverage for umbrella policies because Liberty told her that it was against the law to have UM coverage on an umbrella policy in Florida. (T2. 597)(“They told us that in the state of Florida you could not have -- you could not elect the uninsured motorist for your umbrella policy”).

Further facts will be ~~SUMMARY OF ARGUMENT~~ of the brief as necessary.

The trial court’s determination that Liberty’s policy provides UM coverage for

Jack's death while a pedestrian was correct for three independent reasons: (1) Jack is a Class One insured under Liberty's policy and therefore entitled to UM coverage as a matter of law; (2) the DOC endorsement expressly provides UM coverage or, at a minimum, is ambiguous as to whether it provides UM coverage and thus is construed against Liberty; and (3) Jack was insured under the Liberty policy as "agent for Royal Trust Towers."

The "Drive Other Car" endorsement of the Liberty Mutual policy provided Jack with liability coverage whether or not he was occupying a motor vehicle insured under the policy; his liability coverage was not limited to when he was occupying an insured motor vehicle. As a result, Jack was a Class One insured under that policy. Pursuant to *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So.2d 229 (Fla. 1971), Class One insureds are entitled to UM coverage as a matter of law. Any attempt by an insurer to exclude UM coverage for a Class One insured is invalid. This is precisely the conclusion reached by the Fourth District in *St. Paul Fire & Marine Ins. Co. v McDonald*, 525 So.2d 455 (Fla. 4th DCA 1988), when it applied *Mullis* to a DOC endorsement like the one involved in this case.

Moreover, the DOC endorsement, by its terms, provides UM coverage. The endorsement states that it provides "those coverages where a premium is shown in the Schedule." The first page of the endorsement is the only page labeled "Schedule." On that schedule, all the boxes for coverages and premiums are blank.

The “Schedule” refers the insured to the policy’s Declarations to complete those blanks: “If no entry appears above, information required to complete this endorsement will be shown in the Declarations.” The Declarations show a premium for UM coverage. As a result, there is UM coverage under the DOC endorsement.

In the least, the DOC endorsement is ambiguous. Indeed, Liberty’s own underwriter admitted the DOC endorsement was ambiguous because its intent was not obvious. The trial court properly construed that ambiguity against Liberty.

The trial court also properly determined that Jack was provided UM coverage as an agent for Royal Trust Towers, Ltd. At a minimum, the policy is ambiguous as to whether “Agent for Royal Trust Towers, Ltd.” described a category of insureds, or merely described “Intercontinental Properties, Inc.” Significantly, Liberty’s own witnesses, including its employee who sold the policy and the senior manager handling the claim, testified that Intercontinental Properties, Inc. was not the only insured. They testified that “Agent for Royal Trust Towers, Ltd.” was a separate insured. Under these circumstances, the trial court’s determination is fully supported by the record.

The trial court also properly found that Plaintiff was entitled to stacked UM coverage. The right to sell unstacked UM coverage is governed by statute. Liberty failed to prove at trial that it complied with the statutory prerequisites necessary to sell unstacked UM coverage. Its attempt to prove post-trial that it complied with the

statutory prerequisites was properly rejected by the trial court, not only because Liberty was required to present that evidence at trial, but also because the post-trial material submitted by Liberty was flawed, inconclusive and disputed.

There is stacked UM coverage for another reason as well. The trial court should have excluded the unauthenticated rejection forms on which Liberty relied to establish non-stacked coverage. Despite numerous demands for production, the purported original form was not produced until the middle of trial. Moreover, the forms on which Liberty relied were fraught with problems of trustworthiness. Under these circumstances, Liberty was required to authenticate the forms as a predicate to their admissibility. Yet, it produced no authentication testimony. As a result the forms should have been excluded and Plaintiff should have been entitled to a directed verdict on the issue of whether there was a rejection of stacked UM coverage under the auto policy and whether there was a rejection of all UM coverage under the umbrella policy. In the least, Plaintiff is entitled to a new trial on these issues because of the improperly admitted forms.

The trial court also erred in failing to direct a verdict on the rejection issue with respect to the umbrella policy because Liberty did not give Plaintiff an appropriate opportunity to choose UM coverage under that policy. Liberty's own witnesses testified that they did not offer UM coverage under the umbrella policy because, contrary to Florida law, Liberty does not offer UM coverage for such policies.

Under these circumstances, Liberty failed to make the required statutory offer of UM coverage under the umbrella policy.

ARGUMENT

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

No one ever waived UM coverage under Liberty's auto policy. Nevertheless, Liberty argues that Jack was not entitled to UM coverage when killed as a pedestrian because its auto policy was a commercial policy and, as a result, only provided UM coverage to persons while occupying vehicles covered under the policy. Liberty's argument is without merit. There is UM coverage under Liberty's policy for three separate reasons: (1) Jack is a Class One insured under Liberty's policy and therefore entitled to UM coverage as a matter of law; (2) the DOC endorsement either expressly provides UM coverage or, at a minimum, is ambiguous and thus construed against Liberty; and (3) Jack was insured under the Liberty policy as "agent for Royal Trust Towers."^{3/}

UM Coverage As a Class One Insured. Liberty agrees its policy provides UM coverage to Jack while occupying a vehicle covered by the policy. It argues, however, that Jack has no UM coverage while a pedestrian because the DOC endorsement does not provide UM coverage. Liberty is wrong. The DOC

^{3/} Whether an insurance policy provides coverage presents an issue of law which is reviewed de novo by this Court. *Allstate Ins. Co. v. Rush*, 777 So.2d 1027 (Fla. 4th DCA 2001).

endorsement, together with the other portions of Liberty's policy, makes Jack a Class One insured, entitled to UM coverage as a matter of law.

Florida law recognizes two classes of insureds in auto liability policies. Class One insureds are those who are named in the policy and are insured whether or not they are occupying a vehicle covered under the policy. Class Two insureds are those who are not named in the policy and are insured only because they are occupying a vehicle covered under the policy. This classification of insureds was first recognized by this Court in *Mullis v. State Farm Mut. Auto Ins. Co.*, 252 So.2d 229 (Fla. 1971), which held that those insureds in the first class were entitled to UM coverage as a matter of law and that any attempt by an insurer to limit or exclude that UM coverage was invalid. As stated in *Mullis*, 252 So.2d at 238:

Pursuant to the requirements of the [uninsured motorist] statute [then numbered as Section 627.0851], they cover two classes of insureds. The first includes Shelby Mullis and his wife and members of their family as long as they are residents of his household. In a second class are other persons not members of the Mullis family who are covered only while they are lawful occupants of one of the insured automobiles. Richard Lamar Mullis is a member of the first class; as such he is covered by uninsured motorist liability protection issued pursuant to Section 627.0851 whenever or wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist. He would be covered thereby whenever he is injured while walking, or while riding in motor vehicles Any other conclusion would be inconsistent with the intention of Section 627.0851. It 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.

In *Florida Farm Bureau v. Hurtado*, 587 So.2d 1314 (Fla. 1991), this Court again recognized these two classes of insureds. “Class-one insureds are covered regardless of their location On the other hand, coverage for class-two insureds is limited to occupancy in the insured vehicle.” 587 So.2d at 1318-19. Significantly, the *Hurtado* Court recognized: “The distinction between class-one and class-two insureds has been firmly entrenched in Florida law for more than twenty-five years.” *Id.* at 1319. *See also Young v. Progressive Southeastern Ins. Co.*, 753 So.2d 80 (Fla. 2000)(reaffirming *Mullis*).

Here, Jack was a Class One insured. First, he was specifically named in the policy as part of the DOC endorsement. Moreover, the DOC endorsement afforded him liability coverage regardless of the vehicle he was occupying. Under *Mullis*, as a Class One insured, Jack was entitled to UM coverage while a pedestrian as a matter of law. Indeed, as stated by this Court in *Hurtado*, 587 So.2d at 1316:

. . . . *Mullis v. State Farm Mutual Automobile Insurance Co.*, 252 So.2d 229 (Fla. 1971) . . . did determine that under Florida law, an insurance company could not exclude a [Class One] named insured from uninsured motorist coverage even though the named insured was not operating a vehicle insured under the policy.

See also Government Employees Ins. Co. v. Douglas, 654 So.2d 118 (Fla. 1995).

Mullis was applied to a DOC endorsement in *St. Paul Fire & Marine Ins.*

Co. v. McDonald, 525 So.2d 455 (Fla. 4th DCA 1988).^{4/} The issue was whether two employees of the corporate insured were entitled to UM coverage. The Fourth District's decision was clear:

Taylor and Jones cite to numerous cases following the leading case of *Mullis v. State Farm Mutual Automobile Insurance Company*, 252 So.2d 229 (Fla. 1971), which set forth the purpose and intention of the uninsured motorist statute to require insurers to offer uninsured motorist coverage coextensive with liability coverage provided in a policy. *Mullis* announced the prohibition against insurers inserting exceptions to defeat the statutory scheme. Furthermore, Taylor and Jones contend that, when St. Paul issued the policy in question furnishing liability insurance to the insured occupants of non-owned autos as described therein, it was required by statute to furnish uninsured motorist coverage for said occupants. Any effort to expressly exclude them by negative provisions restricting the uninsured motorist coverage were invalid.

We agree with the position of the trial court and appellees that the policy in question does afford uninsured motorist coverage to Taylor and Jones under the provisions of the policy and circumstances of this case.

525 So.2d at 455. Thus, the Fourth District held that *Mullis* required an insurer to offer UM coverage under a DOC endorsement when it issued liability coverage under that endorsement.

^{4/} In *McDonald*, the endorsement was called "Liability Protection For Autos You Don't Own." It was, however, almost word-for-word the same as the DOC provision in this case. 525 So.2d at 456.

Liberty will undoubtedly argue that this rule does not apply because the policy which it issued was “commercial,” not personal. However, the application of *Mullis* is determined, not by whether the policy is labeled “commercial” or “personal,” but by whether the injured person is a Class One or Class Two insured. *American Fire & Cas. Co. v. Sinz*, 487 So.2d 340 (Fla. 4th DCA 1986)(corporate policy provided UM coverage for relative of officer listed as additional insured; court noted “substantial and important difference” between policy before it and policy which did not name individuals as additional insureds); *Lumbermens Mutual Cas. Co. v. Martin*, 399 So.2d 536 (Fla. 3d DCA 1981). Here, Jack is a Class One insured because the Liberty policy provides him with liability insurance regardless of the automobile he is occupying and even though that automobile is not insured under the Liberty policy. He is entitled to UM coverage as a matter of law. Any inconsistent provision in Liberty’s policy is invalid. *See also American Fire & Cas. Co. v. Sinz*, 487 So.2d 340 (Fla. 4th DCA 1986).

The conflict between the Third District’s decision, this Court’s decision in *Mullis*, and the Fourth District’s decision in *McDonald* is an important one. Small family businesses, like the Weisses’, often insure family vehicles under the business’ insurance policy. Employees are often provided with employer-owned vehicles for their personal use. The purpose of the DOC endorsement is to provide such persons with the equivalent liability coverage they would have if the vehicles were

owned by them personally.^{5/} The very purpose of *Mullis* is to make sure policies providing such liability coverage also provide UM coverage as a matter of law. In the words of *Mullis*, “no policy exclusions contrary to the statute of any of the class of family insureds are permissible since UM coverage is intended by the statute to be uniform and standard motor vehicle accident liability insurance for the protection of such insureds” 252 So.2d at 238. As a result, as a Class One insured, Jack is entitled to UM coverage as a matter of law.

UM coverage under the DOC endorsement. Moreover, the DOC endorsement, by its terms, provides UM coverage or, at a minimum, is ambiguous. As a result, the trial court properly construed the endorsement against Liberty and determined that it provides UM coverage.

Language in an insurance policy must be construed in favor of the insured and against the insurer. *See Mactown, Inc. v. Continental Ins. Co.*, 716 So.2d 289, 291 (Fla. 3d DCA 1998); *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176,

^{5/} As stated by Liberty Mutual on its own web site: “The basic structure of the business automobile policy is to provide coverage for anyone operating a covered automobile with the permission of the named insured, subject to a few exceptions found in the policy. One not so obvious but very important point is that this policy does not provide employees with the broad coverage they might expect from their personal automobile insurance. . . . DOC coverage is needed when individuals who are furnished company cars for their personal use do not purchase their own personal automobile policy.” *See* www.libertymutual.com/business/drive.html.

179 (Fla. 4th DCA 1997). Coverage provisions are construed broadly in favor of coverage while exclusions and limitations are construed strictly. *See Westmoreland*, 704 So.2d at 179, and cases cited therein. “[W]here two interpretations of policy language can fairly be made, the one allowing the greatest coverage to the insured will prevail.” *Secured Realty Inv. Fund III v. Highlands Ins. Co.*, 678 So.2d 852, 854 n.3 (Fla. 3d DCA 1996). Application of these rules compels the conclusion that the DOC endorsement provides UM coverage or, at a minimum, is ambiguous and therefore was properly construed to provide coverage.

According to Liberty, the second page of the DOC form tells the insured to look to the third page to determine what coverage the DOC endorsement provides. Liberty then argues that the third page makes plain that the DOC endorsement does not provide UM coverage. Both of Liberty’s arguments are without merit.

The provision of the second page on which Liberty relies says that the DOC endorsement provides “only those coverages where a premium is shown in the Schedule.” Liberty contends this pre-printed language refers to page 3 of the DOC endorsement, which is nowhere labeled “Schedule,” and not to page 1, which is labeled “Schedule.” This is impossible. The word “Schedule” on the second page must mean the “Schedule” on the first page, not the third page. The first two pages of the DOC endorsement are a preprinted ISO form, labeled “Page 1 of 2” and “Page 2 of 2.” Page 3 is not part of the preprinted form; it is a typed add-on. Thus,

“Schedule” on page 2 of the preprinted form must mean the “Schedule” on page 1 of the preprinted form, not an added-on third page which was not contemplated as being part of the form.

Moreover, the third page of the DOC endorsement, on which Liberty’s entire argument depends, is not labeled “Schedule.” The word “Schedule” appears nowhere on that page. Only the first page of the DOC endorsement is labeled “Schedule.” That first page tells the insured to look to the third page only for “Name of Individual.”^{6/} It does not tell the insured to look to the third page for the premiums charged. Instead, all the premium boxes on the “Schedule” on the first page are blank. The “Schedule” on the first page tells the insured to look to the “Declarations,” not the third page, if an entry on that “Schedule” is blank: **“If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.”** The “Schedule of Coverages” on the Declarations page shows a premium charge for UM coverage.

In short, the DOC endorsement says it provides UM coverage if a premium is

^{6/} In obvious recognition of the difference between the first page, labeled “Schedule,” and the third page, Liberty typed in the words “See Attached Schedule” on the first page when it intended to refer to the third page for the “Name of Individual” and not the word “Schedule.” The word “Schedule” only appears on the first page.

shown for UM coverage “in the Schedule.” The “Schedule” on page one of the DOC endorsement tells the insured to look to the Declarations page. The “Schedule” on the Declarations shows a premium for UM coverage. By its terms, the DOC endorsement provides UM coverage.

In the least, the DOC endorsement is ambiguous as to whether the insured should look to the “Schedule” on the first page (which in turn tells the insured to look to the “Declarations”) or instead look to the third page, as Liberty argues, to determine whether there is UM coverage. An ambiguity arises where more than one interpretation may be given to the policy. *Ellsworth v. Ins. Co. of N. America*, 508 So.2d 395, 400 (Fla. 1st DCA 1987). Because that is true here, the construction affording coverage must be chosen.

The second prong of Liberty’s argument—that the third page attached to the DOC form unambiguously tells the insured that it only provides “Liability” coverage—is also without merit. That page has no reference whatsoever to “Liability” coverage. It only refers to “BI/PD” coverage. According to Liberty, “BI” means “bodily injury” which necessarily means “Liability” insurance, the coverage referred to on the first page of the DOC form, but not UM. But the policy nowhere defines “BI/PD.” Moreover, even if the insured properly guesses that “BI” means “bodily injury,” this does not mean that “BI” is limited to liability coverage. As this Court stated in *Tucker v. Gov’t Employees Ins. Co.*, 288 So.2d 238, 241 (Fla. 1969): “An

insured under uninsured motorist coverage is entitled by the statute to the bodily injury protection that he purchases . . .” In other words, UM includes “bodily injury,” i.e., “BI” coverage. “BI” does not unambiguously mean “Liability” coverage to the exclusion of UM coverage. This is especially true, where, as here, the DOC form tells the insured to look to the “Declarations” to fill in the blanks, and the Declarations show UM coverage and a premium charged for that coverage.

Liberty simply ignores the first and second pages of the endorsement. It ignores the instruction on the first page for the reader to refer to the Declarations Page of the policy if there are no entries under the coverages listed on the first page of the endorsement. It ignores the fact that the reader is directed to the “Attached Schedule” only for identifying the named individuals, not for determining what coverage is provided. It ignores the fact that the second page informs the insured that if he has UM coverage, as the Declarations Page in this policy shows was included, then the named individual is covered if struck by an uninsured vehicle while a pedestrian. It ignores the fact that the policy nowhere defines “BI/PD.”

The testimony at trial supports the conclusion that the policy was, at best, ambiguous. When Liberty’s underwriter, Mr. Sprague was asked to explain the DOC endorsement, he was unable to do so. Instead, he acknowledged the references on page one to the “attached schedule” for the named insured created an ambiguity. According to Mr. Sprague: “It is just not evident here what the intent

was.” (T1. 318). And, as Mr. Sprague also acknowledged: “If I cannot discern the intent it would be construed as ambiguous.” (T1. 318-19). In light of Liberty’s own acknowledgment that the DOC provision is ambiguous, it cannot be said that the trial court erred in construing that ambiguity in favor of coverage.

Named Insured Clause. There is also a third basis for UM coverage. The Liberty policy includes an endorsement which provides UM coverage to those named as insured. (A. 66). The Declarations page of the policy lists as named insureds:

Intercontinental Properties, Inc.,
Agent for Royal Trust Towers, Ltd.

Here, the trial court determined Jack was an insured because he was acting as “agent for Royal Trust Towers” at the time of his death.

Liberty did not dispute in the Third District that Jack was an agent for Royal Trust Towers, Ltd. and was acting as such at the time of his death.^{7/} Instead, it claimed the second line above – “Agent for Royal Trust Towers, Ltd.” – is not a second category of named insured, but is merely descriptive of the first line. In other words, there is only one insured, Intercontinental Properties, Inc.

Liberty’s argument is contradicted by the testimony of its own witnesses.

^{7/} Jack and Caroline were the general partners of Royal Trust Towers, Ltd. General partners are agents of a partnership. *Kelly v. State*, 597 So.2d 900 (Fla. 3d DCA 1992).

Alex Perez, the Liberty agent who sold the policy, admitted that there were two insureds, not one. “I’m writing the insurance for both Intercontinental Properties, Agent for Royal Trust Towers.

Q. Both are named insureds?

A. Both are named insureds on the policy.

(T1. 141-42). See also (T1. 139-40, 227-28). William Stoddard, Liberty’s senior manager assigned to Plaintiff’s claim, also admitted that there were two insureds:

Q: My first question is Intercontinental Properties, Inc. is one named insured. Is that correct?

A: Yes.

Q: And then there is a second named insured, Agent for Royal Trust Towers, Ltd. Is that correct?

A: Yes.

(T1. 99). See also (T1. 100-01)(same).^{8/} In light of these admissions, it cannot be said that the trial court erred in determining that there were two insureds, not one.

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 has no need for a descriptive phrase to clarify who is

^{8/} The only other Liberty employee to testify on this issue was Robert Sprague, Liberty’s Florida underwriting manager. He admitted that the use of “agent for” made the policy ambiguous. (T1. 316, 324-25).

meant. Nor can Liberty explain what is added to or subtracted from Intercontinental Properties' coverage if "Agent for Royal Trust Towers" is in fact merely descriptive. Thus, "Agent for Royal Trust Towers" is surplusage under Liberty's construction. It is axiomatic that 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). Moreover, if "Agent for Royal Trust Towers" was simply descriptive of "Intercontinental Properties," it should appear on the same line as "Intercontinental Properties" because it is part of that name. But it does not. This cannot be explained away as the result of inadequate space. There is ample room for "Agent for Royal Trust Towers" to appear on the same line. Finally, Liberty cannot explain why the umbrella policy separates "Intercontinental Properties" from "Agent for Royal Trust Towers" with a semi-colon, not just a comma. The semi-colon indicates that the two are separate, not one.

There is no reason why an insurance policy cannot list those insured by description instead of by name, as was done here.

Obviously there is no requirement that a person must be described by name in order to be an insured under the policy. It is sufficient if his identity as an insured can be ascertained by applying the description contained in the policy.

Providence Washington Ins. Co. v. Stanley, 403 F.2d 844, 849 (5th Cir.

1968)(quoting 4 J. Appleman, Insurance § 2341 (1968 Supp.)). Or, as another authority states:

The insured may be identified in the policy either by name or by description. For example, the insured may be referred to as “employee,” or “dependent,” or “eligible debtor.”

As the purpose of a name is to designate the person intended to be insured, any designation which fulfills that purpose is sufficient.

3 Couch on Insurance 3d § 40.3 (1997)(footnotes omitted).

In the least, the policy is ambiguous as to whether “Agent for Royal Trust Towers, Ltd.” describes a separate group of insureds or merely describes “Intercontinental Properties.” As detailed above, ambiguities in insurance policies must be construed in favor of the insured and against the insurer. This universal proposition is as applicable to named insured clauses as to any other ambiguous provision. *See, e.g., Ellsworth*, 508 So.2d 395 (Fla. 1st DCA 1987)(ambiguity in defining “named insured” had to be construed against insurance company); *Mutual Fire, Marine & Inland Ins. Co. v. Florida Testing & Engineering Co.*, 511 So.2d 360 (Fla. 5th DCA 1987). The ambiguity here must be construed against Liberty.

Liberty argued, and the Third District concluded, that a business policy provides only limited UM benefits to officers, employees or owners or a business. However, in none of the cases cited by the Third District were the officers,

employees or owners a named insured. As *Lumbermens Mut. Cas. Co. v. Martin*, 399 So.2d 536 (Fla. 3d DCA 1981), makes plain, an individual has UM coverage under a business auto policy when that individual is a named insured. The issue is determined, not by the label placed on the policy, but on whether the individual is named in the policy. See also *American Fire & Cas. Co. v. Sinz*, 487 So.2d 340 (Fla. 4th DCA 1986)(corporate policy provided UM coverage for relative of officer designated in policy as additional insured; court noted “substantial and important difference” between policy which did not name individuals as additional insureds, and the policy before it which designated individuals as additional insureds); *Cox v. State Farm Mut. Auto. Ins. Co.*, 378 So.2d 330 (Fla. 2d DCA 1980); *Florida Farm Bureau Cas. Co. v. Andrews*, 369 So.2d 346 (Fla. 4th DCA 1978).

In sum, Liberty’s argument that the only named insured is Intercontinental Properties must fail. At best, Liberty’s policy was ambiguous. That ambiguity was supported by the testimony of Liberty’s own witnesses. The trial court properly resolved that ambiguity against Liberty and in favor of coverage.

Finally, this Court cannot ignore the fact that Caroline specifically asked Liberty to provide UM coverage for her and Jack; that Liberty’s agent, Perez, assured her that Liberty was providing that coverage; and that the proposals sent by Liberty to Plaintiff year after year stated that Liberty was providing UM coverage and DOC coverage, without any limitation whatsoever. When an insurance application

grants greater protection than the policy, the application controls. *See Mathews v. Ranger Ins. Co.*, 281 So.2d 345 (Fla. 1973); *State Farm Mut. Auto. Ins. Co. v. Mallard*, 548 So.2d 733 (Fla. 3d DCA 1989); *Liberty Mut. Fire Ins. Co. v. Sanderman*, 286 So.2d 254 (Fla. 3d DCA 1973); *Joseph Uram Jewelers, Inc. v. Liberty Mut. Fire Ins. Co.*, 273 So.2d 111 (Fla. 3d DCA 1972). The insured is not required to review the policy to see if it provides the requested coverage. *Id.* Here, Liberty never advised Plaintiff or anyone else that it was not providing the requested coverage. Plaintiff was entitled to assume and rely on the fact that the requested coverage was provided. The trial court properly reached that same conclusion.

II. THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFF WAS ENTITLED TO STACK UM COVERAGES.^{9/}

The second trial involved the issue of UM stacking. The trial court granted Plaintiff's motion for directed verdict on the grounds that Liberty had not shown that it was legally entitled to sell non-stacked policies. The order should be affirmed. Liberty failed to produce any evidence at trial that it had complied with the statutory

^{9/} Because it found no UM coverage, the Third District did not reach this issue and the other coverage issues which follow in this brief. Petitioner suggests that this Court should address these issues so that all issues relating to coverage are resolved. *See Savoie v. State*, 422 So.2d 308, 310 (Fla. 1982)(once this Court accepts jurisdiction, it has discretion to reach all issues in the case, including issues not reached by the district court); *Hurt v. Naples*, 299 So.2d 17 (Fla. 1974)(same); *Marley v. Saunders*, 249 So.2d 30 (Fla. 1971)(same).

prerequisites for non-stacked coverage.^{10/}

Under Florida common law, a named insured who pays for UM insurance on multiple vehicles is entitled to stacked coverage as a matter of law. The insurer is not entitled to limit the insured's coverage through anti-stacking provisions in the insurance policy; such provisions are invalid. *Coleman v. Florida Ins. Guar. Ass'n, Inc.*, 517 So.2d 686, 688 n.1 (Fla. 1988); *Tucker v. Gov't Employees Ins. Co.*, 288 So.2d 238, 241-42 (Fla. 1973).

The Florida legislature has created a limited exception to the rule of stacking if the insurance company meets certain prerequisites. Fla.Stat. § 627.727(9) provides that an insurer may offer an insured a choice between stacked and non-stacked UM coverage if:

In connection with the offer authorized by this subsection, insurers shall inform the named insured, applicant, or lessee, on a form approved by the department, of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations. 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. . . . 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

^{10/} Appellate review of a directed verdict requires a determination of whether there is any reasonable evidence to support the verdict. *Scott v. TPI Restaurants, Inc.*, 798 So.2d 907 (Fla. 5th DCA 2001).

providing such coverage. The revised rates shall reflect the anticipated reduction in loss costs attributable to such limitations but shall in any event reflect a reduction in the uninsured motorist coverage premium of at least 20 percent for policies with such limitations.

This provision imposes three requirements which the insurer must meet before it can issue a valid non-stacked policy. First, the insurer must offer stacked coverage to the insured in a proper notice. Second, the insurer must obtain an informed, knowing acceptance of non-stacked coverage. Third, the insurer must file revised, decreased premium rates of at least 20 percent for non-stacked policies with the Department of Insurance. The insurance company must satisfy all three requirements before it can issue a valid non-stacked policy. If these statutory requirements are not met, the UM coverage stacks as a matter of law. As this Court explained in *Government Employees Ins. Co. v. Douglas*, 654 So.2d 118, 120-21 (Fla. 1995):

As recognized by the Fourth District Court of Appeal, to limit coverage validly, the insurer must satisfy the statutorily-mandated requirement of notice to the insured and obtain a knowing acceptance of the limited coverage. An insurer who provides coverage with the section 627.727(9)(d) limitation is also statutorily required to file revised, decreased premium rates for such parties.

It is our opinion that these requirements were the quid pro quo given by the legislature to insurers for the right to limit uninsured motorist coverage by this exclusion. As further recognized by the Fourth District in its opinion in its case, if the policy exclusion is valid despite noncompliance with the statute, the provision of section 627.727(9)(d) is rendered meaningless.

Here, Liberty introduced no evidence at trial that it satisfied the third requirement, i.e., that it filed revised, decreased premium rates with the Department of Insurance. See (T2. 1233-39). In the absence of such evidence, there was no showing that the quid pro quo for non-stacked policies had been satisfied. As a result, this was a stacked policy as a matter of law.

Liberty claimed the trial court should have denied the motion for directed verdict because it produced an “affidavit,” after trial, which it claims shows that the required decreased premium rates had been filed.^{11/} Liberty relied on Fla.R.Civ.P. 1.530(c) and *State Farm Mut. Auto Ins. Co. v. Carr*, 700 So.2d 156 (Fla. 4th DCA 1997), for the proposition that the trial court was required to consider this document submitted after the jury trial was concluded. Neither support Liberty’s position.

Rule 1.530(c) is limited to motions for new trial. Liberty’s affidavit was not filed in support of or in opposition to any new trial motion. Instead, it was filed in opposition to a post-trial motion for directed verdict. Fla.R.Civ.P. 1.480, not 1.530(c), controls such motions. It states:

When a motion for a directed verdict made at the close of all of the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action

^{11/} Although the document filed by Liberty was styled an “affidavit,” it was not. The notary merely attested that the declarant signed the document; there is no statement that it was under oath. Moreover, the document does not detail how the declarant has personal knowledge of the stated facts. (R. 1027-28; 1051-54).

to the jury subject to a later determination of the legal questions raised by the motion.

Submitting new affidavits post-trial for the court to consider in ruling on a directed verdict motion is a perversion of this rule. *See Houghton v. Bond*, 680 So.2d 514 (Fla. 1st DCA 1996). The legal issue addressed by a motion for directed verdict is whether sufficient evidence was introduced at trial to allow the jury to find in favor of the non-moving party. *See Cooper Hotel Serv., Inc. v. MacFarland*, 662 So.2d 710, 712 (Fla. 2d DCA 1995); *Singer v. Borbua*, 497 So.2d 279, 280 (Fla. 3d DCA 1986). Obviously, evidence submitted after trial is not part of that equation.^{12/}

Moreover, Liberty's post-trial document was contested with a contrary affidavit. (R. 1058-59). In fact, application of the rate schedules attached to Liberty's post-trial affidavit result in rates for UM coverage different from those actually charged for the policy at issue. The trial court was not required to decide an issue post-trial by competing affidavits when Liberty never introduced its evidence at trial before the jury.

Nor does *Carr*, 700 So.2d 156, hold differently. In *Carr*, the trial court

^{12/} A motion for new trial may be based on matters outside the record of the trial, i.e, juror misconduct. It therefore makes perfect sense that Rule 1.530(c) provides that a court may consider affidavits in determining such a motion. But that is a far cry from saying that a court may consider post-trial affidavits in ruling on a directed verdict. Entitlement to a directed verdict is determined by evidence before the court and the jury, not by "evidence" filed post-trial.

entered a final judgment for the insured because the insurance company did not prove that it had filed the premium rate information necessary to comply with § 627.727(9). On appeal, the trial court was reversed. The appellate court held that the trial court should have granted the insurance company the short continuance it had requested in order to obtain and introduce that evidence. Here, when Plaintiff moved for a directed verdict at trial on this ground, Liberty did not ask for a continuance to procure the information. See (T2. 1233-39, 1330-37). The trial court nevertheless gave Liberty an extra day to respond to this issue. Liberty did not ask for more time. The trial court cannot be faulted for not granting an additional continuance which was never requested.

Liberty claimed Plaintiff bore the burden of proof on this issue. It is well-settled, however, that the burden of proof is on the insurer to prove it complied with the requirements of § 627.727(9). See *Omar v. Allstate Ins. Co.*, 632 So.2d 214 (Fla. 5th DCA 1994); *Adams v. Aetna Cas. & Sur. Co.*, 574 So.2d 1142 (Fla. 1st DCA 1991); *Riggsby v. West American Ins. Co.*, 505 So.2d 1364 (Fla. 1st DCA 1987); *Hartford Ins. Co. v. Pearson*, 495 So.2d 1190 (Fla. 4th DCA 1986); *Gen. Acc. Fire & Life Assur. Corp., Ltd. v. MacKenzie*, 410 So.2d 558 (Fla. 4th DCA 1982). Although these cases deal with the statute's first two requirements, notice and an informed rejection, there is no reason why the burden of proof on the third requirement should fall differently. Indeed in *Douglas*, 654 So.2d at 121, this Court

approved the Fourth District's decision in *Government Employees Ins. Co. v. Douglas*, 627 So.2d 102, 103 (Fla. 4th DCA 1993), which upheld stacking because, inter alia, "[t]here is also no evidence concerning insurer's compliance with the requirements of filing revised premiums." Here too, there is no evidence of Liberty's compliance with that requirement. The result should be the same.

In *Auger v. State Farm Mut. Auto. Ins. Co.*, 516 So.2d 1024 (Fla. 2d DCA 1987), the court explained that the burden of proof on whether an offer of UM coverage has been made is on the party required to make the offer—the insurance company. The same principle applies to the third prong of § 627.727(9)'s quid pro quo. The burden of showing Liberty complied with the reduced rate filing requirement was on the party required to make that filing—Liberty. *See A-One Coin Laundry Equip. Co. v. Waterside Towers Condo. Ass'n, Inc.*, 561 So.2d 590, 593 n.2 (Fla. 3d DCA 1990)(burden on party asserting statutory exception to general rule).

Liberty argued it had no further burden of proof because § 627.727(9) provides a conclusive presumption of non-stacked coverage when the insurer obtains a signed rejection of stacked coverage. But that presumption pertains only to the second requirement for issuing a valid non-stacked policy, i.e., whether there was a knowing and informed rejection. The insurance company can meet its burden on that issue by showing a signed rejection on an approved form. But that evidence does

not provide a presumption that the insurer was legally entitled to issue a non-stacked policy. The presumption arising from a signed rejection of stacking is irrelevant to whether there are other statutory requirements the insurer must meet. And, as *Douglas*, 654 So.2d at 120-21, instructs, there is another requirement—filing rate reductions with the Department of Insurance.

Finally, Liberty claimed that Plaintiff's motion for directed verdict based on the rate filing element of § 627.727(9) injected a new theory into the case. It did not. Plaintiff pled that she had purchased UM coverage on multiple vehicles and that she had not rejected stacked coverage and was therefore entitled to stack the coverages under her business auto policy. (R. 69-84). As explained above, the burden of pleading and proving that Liberty fell within an exception to the stacking rule was on Liberty. Indeed, Liberty's claim of surprise ignores the fact that Plaintiff directed discovery to Liberty on this very issue. (R. 985-86, 989, 991). *See generally Mitchell v. Bonnell*, 770 So.2d 1292 (Fla. 3d DCA 2000)(rejecting defendant's claim of surprise where complaint broad enough to encompass theory and facts supporting it were elicited in discovery). In any event, Liberty's remedy for an alleged departure from the pleadings was to ask for a continuance—such as that made by the insurer in *Carr*. *See Seaboard Air Line R.R. Co. v. Cain*, 175 So.2d 561 (Fla. 3d DCA 1965). A defendant who does not move for a continuance cannot claim it was prejudiced by the new theory. *Batista v. Walter & Bernstein, P.A.*, 378 So.2d 1321 (Fla. 3d DCA

1980). The issue is waived. *See Nichols v. Paulucci*, 652 So.2d 389 (Fla. 5th DCA 1995); *Strange v. School Bd. of Citrus County*, 471 So.2d 90 (Fla. 5th DCA 1985); *Gulfstar, Inc. v. Borg-Warner Acceptance Corp.*, 360 So.2d 454 (Fla. 3d DCA 1978); *Strickland v. St. Petersburg Auto Auction, Inc.*, 243 So.2d 603 (Fla. 4th DCA 1971).

In sum, the trial court properly granted a directed verdict on the issue of stacking because Liberty failed to show it had met the statutory requirements for issuing a non-stacked policy.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING LIBERTY'S UNAUTHENTICATED REJECTION FORMS. ABSENT THOSE FORMS, WEISS WAS ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF A KNOWING WAIVER OF STACKED COVERAGE UNDER THE AUTO POLICY AND UM COVERAGE UNDER THE UMBRELLA POLICY. IN THE LEAST, WEISS IS ENTITLED TO A NEW TRIAL ON THESE ISSUES BECAUSE OF THE IMPROPERLY ADMITTED FORMS.

The trial court abused its discretion in admitting the rejection forms Liberty relied on without any authenticating testimony. Absent those forms, Plaintiff was entitled to stacked UM coverage as a matter of law because Liberty failed to prove, by other evidence, that Weiss made a knowing and intelligent waiver of stacked coverage. Plaintiff was also entitled to UM coverage under the umbrella policy for the same reason. In the least, Plaintiff is entitled to a new trial on these issues

because of the improperly admitted forms.^{13/}

Liberty was required to prove Weiss made a knowing and intelligent rejection of stacked coverage. In the absence of such a rejection, Plaintiff is entitled to stacked coverage as a matter of law. *See Douglas*, 654 So.2d 118 (Fla. 1995). Similarly, Liberty was required to prove that it offered UM coverage to Weiss under the umbrella policy. *Strochak v. Federal Ins. Co.*, 717 So.2d 453 (Fla. 1998). But here, the only evidence that Liberty introduced to support its contentions were the rejection forms.^{14/} And those forms were improperly admitted.

The forms had to be properly authenticated before they could be admitted as business records. Fla.Stat. § 90.803(6)(business record admissible when criteria for admission is “shown by the testimony of the custodian or other qualified witness”). Liberty was required to produce the records custodian or other qualified witness to establish that each element of the statutory predicate had been met before the forms could be admitted into evidence. Absent such testimony, the evidence was inadmissible hearsay. *See Saul v. John D. & Catherine T. MacArthur Foundation*, 499 So.2d 917 (Fla. 4th DCA 1986)(business records inadmissible unless statutory

^{13/} The trial court’s admission of evidence is reviewed by this Court for an abuse of discretion. *Stewart & Stevenson Services, Inc. v. Westchester Fire Ins. Co.*, 804 So.2d 584 (5th DCA 2002).

^{14/} When the trial court indicated that it might exclude all of the forms, Liberty’s counsel conceded: “You can then just direct a verdict on that issue.” (T2. 75).

predicate established by records custodian). *See also Forester v. Norman Roger Jewell & Brooks Int'l, Inc.*, 610 So.2d 1369 (Fla. 1st DCA 1992)(admission of EMT reports error where foundation not laid); *Fletcher v. McEwen*, 561 So.2d 616 (Fla. 4th DCA 1990)(documents inadmissible where records custodian did not testify); *Doran v. Department of Health & Rehab. Serv.*, 558 So.2d 87 (Fla. 1st DCA 1990)(same). *Medlock v. State*, 537 So.2d 1030 (Fla. 2d DCA 1988)(same).

That requirement was especially important here because the rejection forms relied on by Liberty were fraught with problems of trustworthiness. No one at Liberty had first-hand knowledge as to their execution. Caroline's signature on at least one of the forms was a purposeful forgery. The supposedly "original" 1993-94 auto form discovered during trial had staple holes, indicating it had been attached to other documents, but no documents were attached when Liberty eventually produced it. The forms for the auto policy and the umbrella policy should have been dated the same but were not. Although Liberty admitted that rejection forms would have been prepared for every policy year, Liberty never found any forms for the 1994-95 policy, the policy which was in effect when Jack was killed. In addition, the "original" 1993-94 forms, produced at trial, were purportedly lost and not found until the middle of trial. There was no testimony why or how they were lost; there was no testimony how they were found. The only explanation was by Liberty's counsel—the forms were found in a place where they were not supposed to be. Under these

circumstances, the statutory requirement that Liberty authenticate the forms as a predicate to their admission was more important, not less. Yet, Liberty offered no proof of authenticity at all. Under these circumstances, the forms should not have been admitted.

Moreover, it was an abuse of discretion to admit the purported “original” forms because, despite numerous pretrial discovery requests and an order compelling production, they were not produced until the middle of trial. *Borcheck v. State Farm Mut. Auto. Ins. Co.*, 766 So.2d 482 (Fla. 5th DCA 2000)(court properly excluded photo not produced pretrial in response to request to produce). *Cf. Southern Bell Tel. & Tel. Co. v. Kaminester*, 400 So.2d 804 (Fla. 3d DCA 1981)(trial court abused discretion in admitting patient interview sheet not produced in pretrial discovery on ground of privilege); *Rommell v. Firestone Tire & Rubber Co.*, 394 So.2d 572 (Fla. 5th DCA 1981)(error to allow expert to testify about matters which were precluded in discovery).

Without these forms, Plaintiff was entitled to a directed verdict on the rejection issues. The only other “evidence” on these issues was the insured’s receipt of the policy. However, an insured’s receipt of a policy without the statutorily-required UM coverage does not meet the insurer’s burden of proof on the rejection issues. *See Carbonell v. Automobile Ins. Co.*, 562 So.2d 437 (Fla. 3d DCA 1990); *Northern Ins. Co. v. Hiers*, 504 So.2d 1382 (Fla. 5th DCA 1987); *Zisook v. State Farm Mut.*

Auto. Ins. Co., 440 So.2d 452 (Fla. 3d DCA 1983); *Nationwide Mut. Ins. Co. v. Jones*, 414 So.2d 1169 (Fla. 5th DCA 1982). Thus, the Weisses were entitled to a directed verdict on these issues.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT ON THE ISSUE OF UM COVERAGE UNDER THE UMBRELLA POLICY BECAUSE LIBERTY’S EMPLOYEES ADMITTED THAT THEY NEVER OFFERED UM COVERAGE UNDER THE UMBRELLA POLICY.

In the non-jury trial, the trial court correctly held that Jack Weiss was an insured under the umbrella policy.^{15/} Liberty has not challenged this finding. The trial court erred, however, by not also ruling that the umbrella policy provided UM coverage to Jack Weiss as a matter of law because Liberty, by its own admission, never offered UM coverage with the umbrella policy.^{16/}

Fla.Stat. § 627.727(2) requires an insurer issuing an umbrella policy to offer UM coverage. UM coverage is mandated here because Liberty, by its own admission, failed to offer UM coverage with its umbrella policy. Liberty’s employees all testified that Liberty never offered UM coverage with an umbrella policy. According to those employees, they checked “no UM coverage” for the Weisses under the umbrella policy because, contrary to Florida law, Liberty does not

^{15/} The “umbrella” policy specifically provides automobile liability coverage to the “officers and directors” of Intercontinental Properties, Inc. It is undisputed that Jack Weiss was both an officer and director of Intercontinental Properties, Inc. Thus, as an “officer or director,” Jack Weiss was entitled to full UM coverage.

^{16/} The trial court’s denial of a directed verdict is reviewed to determine whether there is reasonable evidence to support the verdict. *Scott v. TPI Restaurants, Inc.*, 798 So.2d 907 (Fla. 5th DCA 2001).

provide UM coverage with such policies. (T. 326-27, 598, 626). Indeed, Ms. Hernandez testified she always checked the box rejecting UM coverage because Liberty told her that it was against the law to have UM coverage on an umbrella policy in Florida. (T2. 597) (“They told us that in the state of Florida you could not have – you could not elect the uninsured motorist for your umbrella policy”). But Fla.Stat. § 627.727(2) requires insurers to offer at least \$1 million in UM coverage under umbrella policies. *Strochak v. Federal Ins. Co.*, 717 So.2d 453 (Fla. 1998). Thus, Liberty, by its own admission, did not make the offer required by the statute.

Liberty’s failure or refusal to offer UM coverage under the “umbrella” policy mandates such coverage as a matter of law. *Strochak v. Federal Ins. Co.*, 717 So. 2d 453, 455 (Fla. 1998); *Sirantoine v. Illinois Employers Ins. Of Waussau*, 438 So. 2d 985, 985 (Fla. 3d DCA 1983); *First State Ins. Co. v. Stubbs*, 418 So. 2d 1114 (Fla. 4th DCA 1982). Accordingly, by operation of law, Liberty provided \$1 million in UM coverage under the umbrella policy, the amount it was required to offer pursuant to Fla.Stat. § 627.727(2).

Liberty may attempt to argue that Intercontinental waived its right to UM coverage. This argument must fail, however, because one cannot waive that which was never offered. It is undisputed that, despite the clear mandate of Florida law, Liberty did not offer UM coverage with respect to umbrella policies. As such, there can be no waiver of coverage that Liberty readily admits it never offered. *Realin v.*

State Farm & Fire Cas. Co., 418 So. 2d 431 (Fla. 3d DCA 1982) (there can be no informed rejection in the absence of informing offer; duty to inform insured of the availability of higher limits and to offer those limits to insured.)

For the foregoing reasons, because Liberty did not offer UM coverage under its umbrella policy in violation of Fla.Stat. § 627.727(2), the umbrella policy provided UM coverage as a matter of law. And, because there is no rejection of stacked coverage under that policy or evidence that Liberty complied with the rate filing requirements for its umbrella policies, that coverage must be stacked as well.

CONCLUSION

For the foregoing reasons, Caroline Weiss, as Personal Representative of the Estate of Jack J. Weiss, deceased, 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 UM coverages, or at a minimum is entitled to a new trial on those stacking issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 19th day of July, 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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