ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-492

Florida Bar No. 184170

RANDY LAMZ and DEBORAH LAMZ, his wife,

Petitioners,

v.

GEICO GENERAL INSURANCE COMPANY, a foreign corporation, MORRIS LEISNER and MARNEE HEATHER NICHOLS,

Respondents.

ON PETITION FOR DISCRETIONARY **REVIEW**
FROM THE FOURTH DISTRICT **COURT OF APPEAL**

BRIEF OF RESPONDENTS ON JURISDICTION

MORRIS LEISNER and MARNEE HEATHER NICHOLS

(With Appendix)

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POINT ON APPEAL

THERE IS NO DIRECT AND EXPRESS CONFLICT BETWEEN LAMZ AND KRAWZAK AND MEDINA, AS THERE WERE THE TWO CASE UPON WHICH THE FOURTH DISTRICT BASED ITS OPINION; THE PRINCIPLES OF LAW ANNOUNCED IN THOSE TWO CASES WERE APPLIED IN LAMZ; THIS COURT HAS NO JURISDICTION TO REVIEW THE LAMZ DECISION; AND THE PETITION MUST BE DISMISSED.

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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STATEMENT OF THE FACTS AND CASE

There is no express and direct conflict as the Fourth District properly appled the legal principles in Krawzak and Medina, infra, to the facts of this case; where GEICO was a named Defendant, was properly identified at trial, and it appeared in the verdict form as a party/Defendant. There is nothing for this Court to resolve and the Petition must be dismissed.

The Plaintiff wanted to let the jury know that there was ample insurance coverage for all the Defendants, to pay for a large verdict for the Plaintiff. The Plaintiff wanted to tell the jury that GEICO was an "underinsured" motorist carrier, thus, letting the jury know that the other two Defendants had insurance coverage or were collectible:

> The reason why the plaintiff would be prejudiced if the jury is told that Geico is the UM carrier as distinguished from the underinsured motorist carrier, is that a jury will believe if they're the uninsured motorist carrier, that Mr. Nichols and Ms. Lesiner - I exchanged the names - are uncollectible defendants. That's misleading the jury.
>
> (R 252-253).

GEICO was a named party Defendant in this litigation and its attorney was identified at trial as representing the insurance carrier. GEICO appeared on the verdict form; and the jury was instructed that GEICO was liable for the negligence of the Defendants. The jury returned a Verdict awarding the Plaintiffs close to $37,000 (R 523). The Plaintiffs appealed; but failed to put the entire trial transcript in the Record, so they were

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limited to arguing that not identifying GEICO as the "underinsured" motorist carrier was per se, prejudicial, reversible error.

The Fourth District applied this Court's decisions in Government Employees Insurance Company v. Krawzak, 675 So. 2d 115 (Fla. 1996) and Medina v. Peralta, 724 So. 2d 1188 (Fla. 1999):

> [K]rawzak was a case where Geico was joined as a defendant in a personal injury lawsuit against the driver of an automobile which rear-ended the plaintiff Krawzak's car. Geico was Krawzak's underinsured motorist carrier. The trial court granted Geico's motion in limine and prevented any reference before the jury about an insurance company being involved in the case. The jury had no idea that Geico **was** a party in the trial; Geico's lawyers were identified as co-counsel for the defendant tortfeasor. See 675 So.2d at 116-17.
>
> This court reversed for a new trial in Krawzak v. Government Employees Insurance co., 660 So.2d 306 (Fla. 4th DCA 1995), aff'd, 675 So.2d 115 (Fla.1996). We held that "[a]n uninsured or underinsured motorist carrier should not be able to hid its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor." 660 So.2d at 310. We reasoned that [i]n this case, GEICO is the real party in interest.... If there had been a settlement with the tortfeasor, there would be no question that GEICO would have been the only party before the jury. GEICO could not have been made invisible or disguised in the courtroom in the fashion which occurred here, where the jury was told that GEICO's counsel was the tortfeasor's co-counsel but was unaware that it was otherwise a party.
>
> Id. at 309.
>
> The supreme court affirmed and approved our decision in Krawzak. See Krawzak, 675 So.2d at 117. The court wrote that "it is appropriate for a jury to be aware of the

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presence of a UM insurer which has been properly joined in the action against the tortfeasor." Id. The supreme court emphasized that to allow a UM insurer, "which by statute is a necessary party, not [to] be so named to the jury is a pure fiction in violation" of the policy against charades in trials. Id. at 118. The court observed that the "unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance." Id.

Cases since Krawzak have reversed where the UM carrier was not identified at all as a party in a trial. For example, in Medina, the supreme court held that it was per se reversible error for a trial court to entirely "exclude from a jury the identity of an uninsured or under insured motorist (UM/UIM) insurance carrier that has been joined as a necessary party to an action." 724 So.2d at 1189; see also State Farm Mut. Auto. Ins. Co. v. Miller, 668 So.2d 935 (Fla. 4th DCA 1996); Brush v. Palm Beach County, 679 So.2d 814 (Fla. 4th DCA 1996); Smith v. Baker, 704 So.2d 567, 568 (Fla. 2d DCA 1997).

We read Krawzak as requiring identification of a UM or UIM carrier as a party defendant and designation of the attorneys representing the carrier at trial. We do not read the case as mandating the revelation of the precise nature of the insurance coverage implicated in the case. The major policy reason behind the Krawzak rule-the avoidance of charades at trial-is satisfied by the disclosure of the insurer as a party and the identification of the lawyers at trial acting on its behalf. With such disclosure, a jury observing and listening to the carrier's lawyers will understand the carrier's position at trial.

Revealins in this case that Geico **was** the underinsured motorist carrier would have been suggested to the jurors that the other defendants had insurance coverage. This runs counter to the policy of "excludinq improper references of a defendant's insurance coverage in civil proceedings... to preclude jurors from affixinq liabilitv where none

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> otherwise exists or to arrive at excessive amounts through sympathy for the injured party with the thought that the burden would not have to be borne by the defendant." Melara v. Geico, 712 So.2d 429, 431 (Fla. 3d DCA 1998) (citing Carls Mkts, Inc. v. Meyer, 69 So.2d 789, 793 (Fla.1953)); see Brush, 679 So.2d at 815; Nicaise v. Gagnon, 597 So.2d 305, 306 (Fla. 4th DCA 1992); cf. Dosdourian v. Carsten, 624 So.2d 241, 248 n. 5 (Fla.1993) (noting that the trial judge has discretion not to advise the jury of a settlement amount if doing so would unfairly prejudice a party).
>
> Lamz v. Geico, 748 So. 2d 319, 320-321 (Fla. 4th DCA 1999) (emphasis added) (A 1-3).

There is no direct and express conflict between Lamz and any other case. This Court has no jurisdiction nor any reason to review Lamz and the Petition must be dismissed.

S-Y OF ARGUMENT

There is no direct and express conflict between the holding in Lamz and the holdings in Krawzak and Medina; as Lamz properly applied this Court's disclosure rule to find total compliance. GEICO and its attorney was properly identified as a party-Defendant, being sued by the Plaintiff. There is no different holding, nor disclosure principle, announced in Dosdourian, or Boecher, infra, that could, in any way, conflict with Lamz. The only claim of conflict in the Plaintiffs' Brief is that the "intent" of these cases has been violated by Lamz, because the jury is entitled to know which Defendants are collectible and which are not. There is no such rule of law; and the Plaintiff has failed to show any real direct and express

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conflict. This Court has no jurisdiction to review the Opinion below and the Petition must be dismissed.

ARGUMENT

THERE IS NO DIRECT AND EXPRESS CONFLICT BETWEEN LAMZ AND KRAWZAK AND MEDINA, AS THERE WERE THE TWO CASE UPON WHICH THE FOURTH DISTRICT BASED ITS OPINION; THE PRINCIPLES OF LAW ANNOUNCED IN THOSE TWO CASES WERE APPLIED IN LAMZ; THIS COURT HAS NO JURISDICTION TO REVIEW THE LAMZ DECISION; AND THE PETITION MUST BE DISMISSED.

The trial below was in full compliance with the disclosure dictates of this Court and there is no direct and express conflict between Lamz and any Supreme Court case. Below, the Plaintiffs' Brief tried to mislead the court into believing that GEICO was not identified at all, even though it was (see, Initial Brief of Appellant, pages 1-6). Now, the Plaintiffs try to mislead this Court, by arguing that they told the judge they wanted the jury to know why GEICO was sitting on the opposite side from them, to dispel any inference that the Plaintiffs had done something wrong. This latest, erroneous version of the facts, must be disregarded; and any alleged conflict arising from this new argument is completely waived, since it was never raised at trial, or on appeal.

Furthermore, all the information required by this Court was given at trial. GEICO's position, as a parrty-Defendant being sued by the Plaintiffs' and any possible bias connected to that; was thoroughly covered in the lengthy voir dire. The Plaintiffs just wanted the jury to know that all three Defendants were

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collectible, to enhance their financial recovery. That is exactly why the trial judge and the Fourth District properly refused to identify GEICO as the "underinsured" motorist carrier. Lamz, 311. The Petition must be summarily dismissed, as no conflict could, nor does exists.

Every single case addressing this issue, including Krawzak and Medina, have found reversible error only when the UM carrier was not identified at trial at all. That is not the situation in the present case, where not only was GEICO identified at trial, but GEICO's counsel, also identified as such, participated from being to end of trial; and throughout the Plaintiffs could refer to GEICO as the Plaintiffs' insurance company in complete and total compliance with Krawzak, supra. The holding in Krawzak is as follows:

> We approve the decision below and resolve the conflict by finding that in actions to which section 627.727(6), Florida Statutes (1991), is applicable, it is appropriate for a jury to be aware of the presence of a UM insurer which has been properly joined in the action against the tortfeasor. We agree with the well-reasoned opinion of the district court in this case and disapprove Colford to the extent it is in conflict with the district court's decision on this issue.
>
> Krawzak, 117.

The conflict resolved in Krawzak was between the lower court decision in that case and the Fifth District's decision in Colford v. Braun Cadillac, Inc., 620 So. 2d 780 (Fla. 5th DCA 1993). Colford held that a UM carrier should not be identified at all at trial, because of the potential problem of informing

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the jury that their was insurance coverage available to pay the plaintiff's damages. Therefore, the only issue was whether the carrier should be identified at all at trial. It was not an issue of whether the carrier must be referred to as the "uninsured" motorist carrier, the plaintiff's insurance carrier, or the "underinsured" motorist carrier. That was never an issue in any of the cases up to Krawzak and following Krawzak.

In Krawzak, this Court affirmed the Fourth District's own decision in Krawzak v. Government Employees Insurance Company, 660 so. 2d 306 (Fla. 4th DCA 1995), which had held that where the plaintiff had a direct cause of action against GEICO, as the UM insurer under § 627.736(6), the presence of the UM carrier, which is lawfully sued and properly joined in the suit, should be disclosed to the jury, in its actual status as a party defendant. GEICO was identified as a party Defendant and Lamz's insurance carrier at trial, so no direct and express conflict could possibly exist.

The issue in Krawzak was simply whether the UM carrier needed to be identified at all as a party to the lawsuit -- not how much insurance coverage it, or anyone else, provided and not whether it was the uninsured motorist carrier, or the underinsured motorist carrier. This conclusion is substantiated by the cases which have actually looked at this issue, both before and after Krawzak; Medina, supra (it is per se reversible error for a trial court to exclude from jury the identity of an UM/UIM insurance carrier that has been joined as a party to the action; reversing trial court ruling that Allstate would not

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participate at trial, except for the final judgment); State Farm Mutual Automobile Insurance Company v. Miller, 688 So. 2d 935 (Fla. 1996) (where judge had ruled that the jury would not be told UM carrier was a party; following the Fourth District's decision in Krawzak, held that juries "should be made aware that the insurer is a party in UM cases"); Smith v. Baker, 704 So. 2d 567 (Fla. 2d DCA 1997) (jury should be aware that UM insurer is a party, when properly sued and joined in action; trial court erred in ruling sua sponte that UM carrier would be excluded from trial; no references could be made and no mention be made of State Farm during trial; counsel for State Farm had to act as the attorney for individual defendant; and State Farm's name could not be used on verdict form); Brush v. Palm Beach County, 679 so. 2d 814 (Fla. 4th DCA 1996) (identifying the attorneys for the UM carrier as co-counsel for the tortfeasor and severing the UM carrier **was** a deception on the jury, where UM carrier was a party defendant and should have been identified as such, along with the uninsured's tortfeasor); Furtado v. Walmer, 673 So. 2d 568 (Fla. 4th DCA 1996) ("it appears that in a suit for uninsured/underinsured motorist benefits the insurance carrier may now be identified to the jury as a party in the lawsuit").

The Record in this case totally established that GEICO's position was never that the jury should be misled, nor that its identity should be hidden from the jury. In fact GEICO was properly identified as the insurance carrier for the Plaintiffs; GEICO was identified as a named party in the suit; GEICO was represented by independent counsel; it participated in the trial;

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the jury was instructed that GEICO was liable for the co-Defendants negligence; and GEICO was listed on the Verdict form.

The complete lack of merit in the Petitioner's Brief is shown by their claim that there could be, or possibly is, direct and express conflict between Lamz and Allstate Insurance Company v. Boecher, 733 So. 2d 993 (Fla. 1999) and Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993). As this Court is well aware, Boecher, a case handled by undersigned counsel, announced no different rule of law, nor has a holding that could possibly be in direct and express conflict with Lamz. Lamz dealt with the proper identification of parties to the suit; while Boecher simply had to with whether or not a party, was bound by the same limitations on discovery, as experts at trial.

Dosdourian, supra, is the landmark case that held Mary Carter Agreements in invalid. What the Court was referring to in Dosdourian, regarding the truth being told to the jury, was that a Mary Carter Agreement allowed a defendant to appear as if they were a real defendant when, in fact, the strategy was for the defendant to be testifying in favor of the plaintiff. Because of this charade between the plaintiff and defendant, this Court invalidated Mary Carter Agreements. Again, there is nothing in Dosdourian that has any application to the Lamz decision. The Plaintiffs cite a Dosdourian footnote, regarding the "alignment of interest;" which was never an issue raised below and the Lamz jury was clearly aware of how the parties were aligned. The parties were told th-at GEICO was a Defendant, being sued by the

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Plaintiffs and any bias or prejudice regarding this alignment of interest was completely covered in voir dire.

The parties were properly identified at the Lamz trial; there was no charade or undisclosed arrangement between one side and the other, nor between the co-Defendants and the jury was not mislead in any way whatsoever. There is no direct and express conflict; nor any inference of any direct and express conflict; nor any "intent" leading to direct and express conflict in this case. The Petition must be summarily dismissed, as there is nothing for this Court to resolve.

CONCLUSION

This Court does not have jurisdiction to review the Fourth District's decision in Lamz, as there is no direct and express conflict between the holding and the principals of law used in Lamz and any other decision, including those of the Florida Supreme Court and the Petition must be denied.

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CERTIFICATE OF SERVICE

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