SUPREME COURT
STATE OF FLORIDA

SC06-1910

L. C. CASE NO.: 2 D05-1875

JAMES D. STERLING and CAROLYN STERLING, as Parents and Natural Guardians of JAMES D. STERLING, JR., a minor, and JAMES D. STERLING and CAROLYN STERLING, Individually,

Petitioners,

vs.

THE OHIO CASUALTY INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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Dated: November 1, 2006.

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STATEMENT OF THE CASE AND FACTS

Respondent adopts the Petitioners' Statement of The Case and Facts.

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT OR OTHER DISTRICT COURTS OF APPEAL?

SUMMARY OF THE ARGUMENT

On the face of the OHIO CASUALTY business auto policy and based on the clear and unambiguous language of that policy, JAMES D. STERLING, JR. is not an insured under either the liability provisions of the policy or the uninsured motorist provisions of the policy. That is, JAMES D. STERLING, JR. does not qualify as an insured or meet the definition of an insured under either of those provisions.

Florida Statute 627,727, which governs uninsured motorists coverage, provides that a motor vehicle liability insurance policy must provide uninsured motorist coverage " . . . for the protection of persons insured thereunder . . . ". Therefore, under the statutory language uninsured motorist coverage is only required to be provided if the person is insured under the policy. Since JAMES D. STERLING, JR. is not insured under the OHIO CASUALTY business policy, the Statute does not mandate coverage.

There are numerous Florida cases that have addressed language in motor vehicle policies wherein the insurer has attempted to exclude or limit uninsured motorist coverage. An overview of the Florida cases that have addressed these issues reveals that the Courts have essentially said that an insurer cannot exclude uninsured motorist

coverage based on the mode of transportation or the vehicle that the insured was occupying. However, in each of the cases that have addressed this issue the person seeking uninsured motorist coverage qualified as an insured under the policy and the insurer was attempting to exclude uninsured motorist coverage or limit that coverage to someone who was otherwise qualified as an insured. The present case is clearly distinguishable from the Florida case law in this area in that this was a business auto policy and JAMES D. STERLING, JR. was not an insured under the OHIO CASUALTY policy. Therefore, the Second District Court of Appeals' decision is not in conflict with the decisions of either this Court or the other District Courts of Appeal.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS FROM EITHER THIS COURT OR OTHER DISTRICT COURTS OF APPEAL

The OHIO CASUALTY Business Automobile policy defines an insured under the liability coverage as follows:

WHO IS AN INSURED

The following are "insureds":

A. You for any covered "auto";

B. Anyone else while using with your permission a covered "auto" you own, hire or borrow except . . .

2. Your "employee" if the covered "auto" is owned by that employee. . .

3. Someone using a covered "auto" while she or he is working in a business of selling, servicing, repairing autos . . .

4. Anyone other than your "employees", partners, members . . . or any of their employees while moving property to or from a covered "auto".

5. A partner (if you are a partnership) . . . for a covered "auto" owned by him or her . . .

The Florida Uninsured Motorist Coverage Non-Stacked Form defines an insured as follows:

WHO IS INSURED

1. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto."
2. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

As outlined below, the type of policy at issue and the policy language are easily distinguishable from the cases cited by the Petitioners.

The Petitioners cite at length the Supreme Court's decision in Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971). State Farm issued a policy to Shelby Mullis. Shelby Mullis' son, Richard Mullis, who was a minor and lived in the household, was injured while operating a motorcycle which was not a covered vehicle under the State Farm policy. The State Farm policy excluded uninsured motorist coverage to an insured while occupying a motor vehicle owned by a resident of household if vehicle was not an "insured

automobile." The State Farm policy further defined an insured under the uninsured motorist provision as meaning the first person named in the declarations and while resident of that person's household, the spouse and relatives. Therefore, in Mullis, Richard Mullis was clearly an insured under the policy. State Farm then attempted to exclude uninsured motorist coverage for a person who qualified as an insured. Significantly, the Court stated that: "Robert Lamar Mullis is not excluded from the definition of insured. In fact, the exclusionary clause specifically refers to bodily injury to an insured . . ." . It was because Richard Mullis qualified as an insured under the policy that he was then classified as a Class I insured, that is a family member as defined under the policy. The Mullis case simply stated that insurance carriers cannot insert provisions in policies that reduce coverage for " . . . the class of persons insured thereunder . . . ". In other words, the Court in Mullis was addressing a personal auto policy which defined an insured to include a family member and then State Farm attempted to exclude coverage for an insured while occupying a vehicle owned by a resident of the household if the vehicle was an "insured automobile." That is not the issue in the present case.

The Divine v. Prudential Property and Casualty Insurance Company, 614 So.2d 683 (Fla 5th DCA 1993) case is a one paragraph opinion. In that case the

Court stated that an insurance company cannot move exclusionary language into the definition of who is an insured under the policy so as to avoid the holding in Mullis. The Devine Court does not cite the language contained in the Prudential policy. In any event, Ohio Casualty was not moving "exclusionary language" into the definition section of the policy. Rather, JAMES D. STERLING, JR. simply was not an insured under the policy to start with.

In Travelers Insurance Company v. Spencer, 397 So.2d 358 (Fla. 1st DCA 1981), Holly Spencer was injured while driving her son's vehicle. That vehicle was not listed on a policy issued by Travelers. Travelers contended that Spencer was not entitled to uninsured motorist coverage because such coverage extended only to vehicles listed on the policy. However, the policy did list Holly Spencer as a named insured. The Court found that an insurer cannot limit a named insured's right to uninsured motorist benefits only as to a vehicle listed under the policy. That was not the issue in the present case. JAMES D. STERLING, JR. was not an insured under the policy and, furthermore, this was not a case in which OHIO CASUALTY was attempting to limit uninsured motorist coverage to a particular vehicle.

The Sellers v. United States Fidelity and Guaranty Company, 185 So.2d 689 (Fla. 1966) case addressed whether uninsured motorist coverage could be denied

based on the fact that the insured had other similar insurance available. The Sellers case has nothing to do with the facts of the present case. The OHIO CASUALTY policy does not attempt to exclude or preclude coverage based on the availability of some other coverage.

In Automobile Insurance Company of Hartford, Connecticut v. Beem, 460 So.2d 138 (Fla. 3rd DCA 1985), Hartford attempted to exclude coverage based on policy language that stated that the policy did not provide uninsured motorist coverage for bodily injury sustained by a person while occupying a motor vehicle owned by that person or a family member which was not insured for coverage under the policy. In Beem, the person seeking coverage was an insured as defined by the policy. The Court simply held that Hartford could not exclude an insured under the policy from recovering uninsured motorist benefits based on the vehicle that person was driving.

Each of the cases cited by the Petitioners in an effort create a conflict have a common thread. In each of those cases the person seeking uninsured motorist coverage was an insured under the policy. That is, that person met the definition of an insured under the liability and/or uninsured motorist provisions. The insurer then attempted to exclude or otherwise except from coverage persons who qualified as insureds under the policy. In the present case, the OHIO CASUALTY

business auto policy is not attempting to exclude coverage based on a particular accident or vehicle but rather JAMES D. STERLING, JR. was not entitled to uninsured motorist coverage because he simply was not an insured under either the liability or uninsured motorist provisions of the policy to begin with. Secondly, none of those cases dealt with business auto policies. That fact alone distinguishes this case from the cases cited by Petitioners. The findings of the District Court of Appeals in this case is perfectly consistent with the case law of other District Courts of Appeals and the Florida Supreme Court's prior ruling in the area of uninsured motorist law. In fact, none of the cases cited by the Petitioners involved business owners automobile policies containing language similar to that contained in the OHIO CASUALTY policy. As such, there is no conflict.

At Page 9 of the Petitioners' Brief they contend that this Court should exercise its discretion to review this case on the merits because of an alleged broad application to insurance consumers. First, the District Court of Appeals did not ask this Court to rule upon a question certified to be of great public importance. The Petitioners cite no authority that would confer jurisdiction on this Court based on some alleged and undefined " . . . broad application to insurance consumers." The Travelers v. Powell, 206 So.2d 244(Fla.1st DCA 1968)case cited by the Petitioners

was a stacking case which is not the issue in the present case. In Powell the insurer was attempting to limit coverage to a person who qualified as an insured. Finally, the Powell case did not create a new basis to confer jurisdiction on the Florida Supreme Court.

CONCLUSION

The decision of the Second District Court of Appeal does not expressly and directly conflict with either the decisions of the District Courts of Appeal or decisions of the Florida Supreme Court. Therefore, Respondent respectfully submits that this Court should decline to exercise it discretionary jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery to GEORGE A. VAKA, ESQUIRE, VAKA, LARSON & JOHNSON, P. L., 777 South Harbour Island Boulevard, Suite 300, Tampa, FL 33602 and to JAMES W. CLARK, ESQUIRE, 3407 W. Kennedy Boulevard, Tampa, FL 33609 this **24th day of October, 2006**.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Respondent's Brief on Jurisdiction complies with the font requirements of *Fla. R. App. P. 9.100(1)* and *9.210(a)(2)*.

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WAYNE TOSKO, ESQ.