SUPREME COURT
STATE OF FLORIDA

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,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Respondent.

SC_____

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

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL CASE NO. 2D05-1875

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioners, 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,[1] adopt the decision of the Second District Court of Appeal as their Statement of the Case and Facts.[2] Petitioners would provide a summary as follows:

On December 14, 2002, the Sterlings' minor son was injured when, as a pedestrian, he was struck by a vehicle driven by Crystal Fereitas (A.I, 2). Fereitas' liability insurance was insufficient to cover the damages sustained by the Sterlings' son.

At the time of the accident, the Sterlings had two insurance policies. The first was issued by Southern Owners Insurance Company and insured two family vehicles with James D. and Carolyn Sterling as the named insureds (A.I, 2). OHIO CASUALTY issued a policy to the named insured, James D. Sterling, d/b/a J. D.'s

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[1] The Petitioners, 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, will be referred to as Plaintiffs or by name. The Respondent, THE OHIO CASUALTY INSURANCE COMPANY, will be referred to as OHIO CASUALTY or the insurance company.

[2] In conformity with Florida Rule of Appellate Procedure 9.120(d), the decision of the Second District Court of Appeals is attached hereto as Appendix I. All references to the Appendix will be referred to as (A.___) followed by citations to the appropriate page number of the Appendix. The Order denying certification is attached hereto as Appendix II.

Backhoe Service (A.I, 3), which insured a flatbed truck and trailer. The uninsured motorist (UM) form was entitled "Florida Uninsured Motorist Coverage - Non-Stacked" (A.I, 3). The definition of "insured" for purposes of the UM coverage included anyone occupying a covered auto or occupying a temporary substitute for such auto. It likewise covered anyone entitled to recover damages because of bodily injury sustained by an insured occupying such an auto. The policy definition of an insured did not, however, include resident family members of the named insured (A.I, 4).

After OHIO CASUALTY refused coverage, the Sterlings filed a declaratory judgment action seeking a determination that they were entitled to UM benefits (A.I, 5). The trial court granted summary judgment in favor of OHIO CASUALTY and the Second District affirmed that decision (A.I, 5, 9). The Second District noted that OHIO CASUALTY wrote the policy to exclude coverage for the very claim that was being brought on behalf of the Sterlings' son as a pedestrian. The Court acknowledged that the Sterlings' argument was that Florida law and the public policy surrounding the law prohibited OHIO CASUALTY from issuing such a policy and that the policy must be construed to provide coverage to Sterlings' son as a Class I insured (A.I, 5). The Second District stated: "We disagree." (A.I, 5)

The Court stated that while much of the case law and portions of the Statute are written with the expectation that the law applies to family automobile insurance policies, it was unconvinced that unincorporated businesses were prohibited from purchasing the same business-oriented policies that are purchased by corporations (A.I, 7). Relying again on the "business" nature of the policy, the Court stated that this Court's holdings in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971) and Government Employees Insurance Company v. Douglas, 654 So.2d 118 (Fla. 1995), do not require an insurer to provide UM coverage using a definition of insured in a business automobile policy that was a substantial expansion of the definition normally used in a business policy (A.I, 7). The Court concluded that because the Sterlings had also sued their family automobile insurer, that they had the ability to provide adequate UM coverage for their family without intermingling family and business expenses. As such, the Court concluded that there was nothing in Florida law to compel an insurance company to issue UM coverage on a vehicle owned and insured by an individual but used in a business (A.I, 9).

JURISDICTIONAL ISSUE

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

SUMMARY OF THE ARGUMENT

The decision of the Second District expressly and directly conflicts with this Court's decision in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971). In Mullis, this Court stated that whenever bodily injury is inflicted upon the named insured or insured members of his family by the negligence of an uninsured motorist, they are covered by uninsured motorist liability insurance issued pursuant to the requirement of Florida's UM statute. Indeed, Florida courts have recognized since Mullis that an insurance purchaser's family, so long as they are residents of the household, are Class I insureds and they are covered by UM protection whenever and wherever bodily injury occurs. See, Hunt v. State Farm Mutual Automobile Ins. Co., 349 So.2d 642 (Fla. 1st DCA 1977). The decision of the Second District holds that an insurance company is not required to provide uninsured motorist coverage to the resident son of the named insured simply because the vehicle insured has a commercial use.

The decision also conflicts with Devine v. Prudential Property and Casualty Ins. Co., 614 So.2d 683 (Fla. 5th DCA 1993) where the Fifth District held that an insurer could not permissibly exclude UM coverage to Class I insureds merely by using restrictive definitions as to who qualified as an insured. Once again, the Second District here reached the exact opposite result and found that Ohio Casualty's restriction was not prohibited and, instead, was permitted. Finally, the

Court's decision conflicts with Travelers Insurance Company v. Spencer, 397 So.2d 358 (Fla. 1st DCA 1981). There, the named insured on a business auto policy was a partnership in which each partner was also listed as the named insured. The First District held that any attempt to restrict Mr. Spencer's rights to UM coverage, as a Class I insured, must be condemned as contrary to public policy. Once again, the Second District reached the exact opposite result here. This Court should accept jurisdiction and review the case on the merits.

ARGUMENT

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

Pursuant to Art. V, Sec. 3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with a decision of another District Court of Appeal or this Court on the same question of law. This Court's constitutional authority to review an appellate decision establishing a point of law requires only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. The Florida Star v. B. J. F., 530 So.2d 286, 288 (Fla. 1988); Persaud v. State, 838 So.2d 529, 532-533 (Fla. 2003).

The decision of the Second District in this case conflicts with a variety of cases, both from this Court and the other District Courts of Appeal. In Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971), this Court stated:

> When uninsured motorist coverage was obtained by Shelby Mullis pursuant to Sec. 627.0851 for himself as the named insured, for his spouse and for his or his spouse's relatives who are residents of his household, they were given the same protection in case of bodily injury as if the uninsured motorist has purchased automobile liability insurance in compliance with the financial responsibility law.
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> * * *
>
> Whenever bodily injury is inflicted upon the named insured or insured members of his family by the negligence of an uninsured motorist under whatever conditions, locations, or circumstances, any such insured happens to be in at the time, they are covered by uninsured motorist liability insurance issued pursuant to requirements of Sec. 627.0851. Id. at 233.
>
> Insurers or carriers writing automobile liability insurance and reciprocal uninsured motorist insurance are not permitted by law to insert provisions in the policies they issue that include or reduce the liability coverage prescribed by law for the class of persons insured thereunder who are legally entitled to recover damages from owners or operators of motor vehicles because of bodily injury [emphasis in original]. Id. at 234.

In concluding, the Mullis Court stated:

> . . . To achieve this purpose, no policy exclusions contrary to the statute of any of the class of family

> insureds are permissible since uninsured motorist coverage is intended by the Statute to be uniform in standard motor vehicle accident liability insurance for the protection of such insureds thereunder as "if the uninsured motorist had carried the minimum limits" of an automobile liability policy (citations omitted).

Since Mullis, Florida's courts have repeatedly stated that persons who are a member of the first class of insured, that is, the named insured, his or her spouse and family members residing in the insured's household, are covered by UM coverage whenever and wherever bodily injury was inflicted by the negligence of an uninsured motorist. See, e.g. Automobile Insurance Company of Hartford, Connecticut v. Beem, 469 So.2d 138, 140 (Fla. 3rd DCA 1985); Omar v. Allstate Insurance Company, 632 So.2d 214, 215-216 (Fla. 5th DCA 1994). In Hunt v. State Farm Mutual Automobile Ins. Co., 349 So.2d 642 (Fla. 1st DCA 1977), the Court stated:

> . . . Since Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971), an insurance purchasers' family, so long as they are residents of the household, falls within the first class of insureds. As such, they are covered by uninsured motorist protection whenever and wherever bodily injury occurs. Id. at 644.

The decision of the Second District in the present case clearly conflicts with Mullis and the other decisions from the District Courts of Appeal which have held that UM coverage must be provided to the named insured and resident family members of the named insured as a matter of public policy as expressed by the UM

statute. No decision has recognized some permissible exception if the vehicle insured was used for business.

The decision of the Second District also conflicts with the Devine v. Prudential Property and Casualty Ins. Co., 614 So.2d 683 (Fla. 5th DCA 1993). There, Prudential did precisely what the defendant did here. That is, it managed to exclude a whole class of insureds simply by utilizing the definition of "who is an insured" under the policy to avoid the rule expressed in Mullis. The Fifth District stated that an insurer could not do so merely by using the expediency of a definition to effectuate an exclusion. In this case, the Second District reached the exact opposite result. It allowed the insurer to avoid the Mullis rule by the use of language in its definition which did not include resident relatives as insureds. The Second District's approval of the use of that tactic in this case expressly and directly conflicts with the Fifth District's rejection of that tactic in Devine.

The Second District's decision also conflicts with Travelers Insurance Co. v. Spencer, 397 So.2d 358 (Fla. 1st DCA 1981). There, Mr. Spencer was injured while driving his son's vehicle. The vehicle was not listed on the business policy that insured Mr. Spencer's partnership. Travelers contended that there was no UM coverage because the son's vehicle was not listed on the policy. Noting that the partnership policy listed Mr. Spencer and his other partners as the named insured, the First District stated that he was a Class I insured. The Court held that any

attempt to restrict his right to UM coverage only as to listed autos must be condemned as contrary to public policy. Id. at 360. Once again, the Second District again reached the exact opposite result.

Not only is there sufficient conflict upon which to demonstrate this Court's jurisdiction, this Court should exercise its discretion and review this case on the merits because the issue in this case has broad application to insurance consumers in this State. The decision not only directly influences who might qualify as an insured, but also implicates UM stacking law which has existed for 40 years in this State. In Sellers v. United States Fidelity and Guaranty Co., 185 So.2d 689 (Fla. 1996), this Court answered the following certified questions from the First District Court of Appeal:

> May an automobile liability insurance carrier providing coverage against injury by an insured motorist in accord with the requirements of Sec. 627.0851, Florida Statutes [F.S.A.] after accepting a premium for such coverage, deny coverage on the grounds that the insured has other similar insurance available to him?

This Court answered that question in the negative and concluded that the UM statute invalidated a condition in the U.S.F.&G. policy which limited recovery to only one policy. See, also, Travelers Indemnity Co. v. Powell, 206 So.2d 244 (Fla. 1st DCA 1968) (allowing family members to stack uninsured motorist coverage under separate policies where a premium was charged for uninsured motorist benefits under each policy). The Second District's decision suggests that

insurance companies can avoid these stacking rights not solely through the authorized limitations recognized in Section 627.727(9), Florida Statutes, but, instead, can further limit them simply based upon the classification of the use of the vehicle which is the insured vehicle. Most respectfully, the Statute itself applies to all motor vehicle liability insurance policies. It does not distinguish between commercial or personal auto policies. The Second District has, in effect, added provisions to the Statute that simply do not exist. If insurance companies are to be authorized to provide different levels of UM coverage based upon the classification of the motor vehicle, then such authorization must come from the Legislature.

CONCLUSION

The decision of the Second District Court of Appeal expressly and directly conflicts with other reported decisions from this Court and the other District Courts of Appeal. This Court should exercise its discretion, grant review, and address the case on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to **James W. Clark, Esquire,** 3407 W. Kennedy Blvd., Tampa, Florida 33609, and via U.S. Mail and Facsimile (407-481-9171) to **Wayne Tosko, Esquire,** Landmark Center One, 315 E. Robinson Street, Suite 275, Orlando, Florida, 32801-4328**,** on _____.

_____

George A. Vaka, Esquire
Florida Bar No. 374016
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Brief on Jurisdiction of the Petitioners, 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, complies with the font requirements of Rule 9.100(1) and 9.210(a)(2), Fla. R. App. P.

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