STATE OF FLORIDA

CASE NO.: SC06-1910

L. T. 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, and AUTO-OWNERS INSURANCE COMPANY/SOUTHERN-OWNERS INSURANCE COMPANY,

Respondents.

____/

ANSWER BRIEF ON THE MERITS OF RESPONDENT, THE OHIO CASUALTY INSURANCE COMPANY

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

WHETHER THE SECOND DISTRICT COURT OF APPEALS ERRED IN FINDING THAT THE OHIO CASUALTY POLICY DOES NOT PROVIDE UNINSURED MOTORIST COVERAGE FOR THE ACCIDENT INVOLVING JAMES D. STERLING, JR.

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 and, as such, the policy does not provide coverage for the accident in question.

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

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 otherwise qualified as an insured. The present case is clearly distinguishable from those Florida cases since James D. Sterling, Jr. was not an insured under the Ohio Casualty policy.

THE SECOND DISTRICT COURT OF APPEALS RULED CORRECTLY WHEN IT DETERMINED THERE WAS NO UNINSURED MOTORIST COVERAGE FOR JAMES D. STERLING, JR.

Whether uninsured motorist coverage is available to James D. Sterling, Jr. essentially entails a three pronged analysis. First, whether James D. Sterling, Jr. qualifies as an insured under The Ohio Casualty policy. Second, whether Florida's Uninsured Motorist Statute mandates coverage under the facts of this case. Third, whether Florida case law imposes coverage.

The Ohio Casualty Policy

The preliminary question concerns whether James D. Sterling, Jr. is an insured under The Ohio Casualty business owner's policy. That 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

borrow a covered "auto".

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 unless that business is yours.

4. Anyone other than your "employees", partners, members (if you are a limited liability company) . . . 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 or a member of his or her household.

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". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.

"bodily injury" sustained by another "insured".

At the time of this accident James D. Sterling, Jr. was a pedestrian. He was not in any way involved with the named insured's business nor was he occupying or otherwise involved in any way with a covered "auto." James D. Sterling, Jr. simply does not meet the definition of an insured under the plain language of either the liability or uninsured motorist provisions and, therefore, does not qualify as an insured under the policy.

Sterling references the "Limit of Insurance" provisions of the uninsured motorist coverage in an effort to create some ambiguity in the policy because that provision refers to the term "family members." The Petitioners' reliance on this language to create a so-called ambiguity is misplaced. The limit of insurance provision is just that, a provision that limits the available coverage and defines the most that the company will pay for all damages resulting from one accident. That provision has absolutely nothing to do with who is an insured under either the liability or uninsured motorist provisions and, therefore, cannot be construed to expand the definition of an insured as provided for under the provisions of the policy that specifically and clearly define who qualifies as an insured. In fact, the definition of an insured under both the liability

"**WHO IS AN INSURED**."   That language could not be more straightforward or clear.

In addition to the clear and unambiguous language of the policy itself as to the definition of an insured, the uninsured motorist provisions of The Ohio Casualty policy contains an endorsement which states in part:

AN IMPORTANT NOTICE TO OUR COMMERCIAL AUTOMOBILE POLICYHOLDERS REGARDING CHANGES TO YOUR UNINSURED MOTORIST COVERAGE

> The intent of uninsured and/or underinsured motorist coverage on a commercial automobile policy is to cover you or your employees while operating or occupying an owned automobile described in the policy . . .
>
> The uninsured/underinsured motorist endorsement attached will only provide uninsured/underinsured motorist coverage to you or your employees while operating or occupying an owned auto described in the policy. . .

makes perfectly clear that James D. Sterling, Jr. would not be covered for the accident at issue in this case.

Statutory Analysis

Having demonstrated that James D. Sterling, Jr. did not qualify as an insured under the plain terms of the Ohio Casualty policy, the next issue concerns whether the policy violates *Florida's Uninsured Motorist Statute*. *Florida Statute 627.727* governs uninsured motorist coverage. That Statute provides in part as follows:

(1) No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this State with respect to any specifically insured or identified motor vehicle registered or principally garaged in this State unless uninsured motor vehicle coverage is provided therein or supplemental thereto <u>for the protection of persons insured thereunder</u> who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. (Emphasis added.)

motorist coverage for " . . . persons insured thereunder. . . ." The Statute, on its face, does not mandate uninsured motorist coverage for a person who is not even an insured under a policy. In other words, the Statute does not require that an insurer provide coverage for a person who does not qualify as an insured. The Uninsured Motorist Statute has never mandated that motor vehicle policies must include resident family members within the definition of an insured. As such, the Statute does not mandate uninsured motorist coverage for James D. Sterling, Jr. simply because he is a family member of James D. Sterling, Sr.

As the Second District Court of Appeals in Sterling v. Ohio Casualty Insurance Company, 936 So.2d 42 (Fla. 2d DCA 2006) noted:

> "This Statute has never mandated that specific persons be included in the policy's definition of persons insured thereunder. No other Statute requires a special definition of insured either for liability or uninsured motorist coverage. We note that the Florida Motor Vehicle No-Fault Law expressly requires PIP coverage on a motor vehicle policy

> the same household, persons operating the insured
> motor vehicle, passengers in such motor vehicles,
> and other person struck by such motor vehicle.
> Thus, in at least once circumstance in which the
> Legislature intended to mandate the definition of
> "insured" it has done so expressly." (at 45).

It is also important to note that *Chapter 324 of Florida Statutes - Financial Responsibility - Section 324.151 (1) (a)* mandates that a motor vehicle liability policy

to be proof of financial responsibility must be issued to owners or operators under the following provisions:

> "An owners liability insurance policy shall
> designate by explicit description . . . all motor
> vehicles with respect to which coverage is hereby
> granted and shall insure the owner named therein
> and any other person as operator using such motor
> vehicle or motor vehicles with the expressed or
> implied permission of such owner. . . "

definition of an insured that would include a family member but only requires that the policy insure the owner and operator.

The Case Law

Petitioners cites a line of cases that he argues stand for the proposition that James D. Sterling, Jr. is entitled to uninsured motorist coverage under The Ohio Casualty policy. Each of the cases cited by the Petitioners involve situations in which the insurer was attempting to exclude or otherwise except from coverage persons who otherwise qualified as insureds under the policy. This is a critical distinction.

Mullis v. State Farm, 252 So.2d 229 (Fla. 1971) is often cited as a landmark case in the field of Florida Uninsured Motorist Law. Therefore, that opinion demands careful analysis as to its relevance to the present case.

State Farm issued a policy to Shelby Mullis. Mr. Mullis' son, Richard Mullis, was a minor and lived in the household. Richard was injured while operating a motorcycle owned by his mother and 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 the household if that

defined an insured under the uninsured motorist provisions as meaning the first person named in the declarations and while resident of that person's household, the spouse and relatives. Richard Mullis clearly met the definition of an insured under the policy. Therefore, State Farm was attempting to exclude uninsured motorist coverage for a person who otherwise 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 . . . ". (at 234). The Mullis Court held that this type of an exclusion from uninsured motorist coverage for someone who is otherwise an insured under the policy is not permissible. The Court clearly found it significant that the named insured's son was also an insured under the policy. It was only 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 Court's conclusion in Mullis was perfectly consistent with the language of the *Uninsured Motorist Statute* that requires UM coverage " . . . for the protection of persons insured thereunder." (*F. S. 627.727(1).*

policy to Ramon Salas. Mr. Salas' daughter, Sylvia Salas, was a resident of her father's household and was involved in an accident while riding as a passenger in an uninsured motorist vehicle owned and operated by her brother who was also a resident of the father's household. The Liberty Mutual policy contained a family household exclusion under the uninsured motorist provisions of the policy. Liberty Mutual attempted to rely on that provision/exclusion to preclude coverage. The Court found this provision invalid. Significantly, the Court stated:

> "*Florida Statute 627.0851* establishes the public policy of Florida to be that every insured as defined in the policy, is entitled to recover under the policy for damages he would have been able to recover against the negligent motorist if that motorist had maintained a policy of liability insurance." (at 3). (Emphasis added).

Because Sylvia Salas qualified as an insured under the policy, Liberty Mutual could not exclude coverage based on the vehicle she was occupying at the time of the accident.

In Young v. Progressive Southeastern Insurance Company, 753 So.2d 80 (Fla. 2000), Progressive insured Wang Young. Mr. Young was struck from behind by a

Sheriff's Department was self insured to $100,000. Mr. Young attempted to recover uninsured motorist benefits under the Progressive policy for his damages beyond $100,000. Progressive denied coverage relying on a provisions in their policy that a self-insured vehicle/motorist does not qualify as an uninsured or underinsured motorist and that the language of their policy specifically excludes coverage for a vehicle owned or operated by a self-insurer. The Court found that this exclusion was invalid. The Court noted that uninsured motorist coverage cannot be " . . . whittled away by exclusions and exceptions." (at 83). The carrier was attempting to exclude coverage for a person who met the definition of an insured under the policy based on the nature of the tortfeasors' vehicle, i.e., a self-insured vehicle.

The Petitioners cite the case styled Government Employees Insurance Company v. Douglas, 654 So.2d 118 (Fla. 1995) in support of their position of coverage. The Florida Supreme Court's decision in Douglas does not change the result in the present case. The Supreme Court was addressing a line of cases which held that uninsured motorist coverage is not available if no liability coverage is purchased on the particular vehicle involved in the accident. The Douglas case receded from prior Court's

liability coverage for a particular accident. The Court adopted Justice Shaw's reasoning as follows:

"The majority claims that Mullis v. State Farm, and subsequent cases follow the principal that uninsured motorist coverage is unavailable if the corresponding liability coverage is inapplicable to a particular accident. This principal, however, is wholly unmentioned in Mullis and each of the cases cited by the majority for support. Quite the contrary, all of these cases apply an analysis that focuses exclusively on the injured individual rather than the accident. They rule simply and clearly that uninsured motorist coverage is unavailable if liability coverage is inapplicable to a particular individual . . . ". (at 119). (Emphasis added).

The Douglas Court simply held that an insurer cannot exclude uninsured motorist coverage essentially based on the mode of transportation (i.e., pedestrian, motorcycle or a particular motor vehicle) or the vehicle that the insured was occupying in a particular accident. In fact, the decision in Douglas, supports Ohio Casualty's position that there is no coverage in the present case. As cited above, the Court stated that the rule is " . . . simply and clearly that uninsured motorist coverage is unavailable

case, Ohio Casualty is not attempting to exclude coverage based on a particular accident or vehicle but rather is contending that there is no uninsured motorist coverage because the "particular individual", James D. Sterling, Jr., is not an insured under either the liability or uninsured motorist provisions of the policy. Ohio Casualty's position is perfectly consistent with the Court's ruling in Douglas. In fact, Ohio Casualty's position is not inconsistent with any of the Court's rulings in uninsured motorist coverage cases that have addressed insurance company's efforts to limit the extent of uninsured motorist coverage.

The Petitioners cite the case of Devine v. Prudential Property and Casualty Insurance Company, 614 So.2d 683 (Fla. 4th DCA 1993) for the proposition that limitations or exclusions of coverage even if found in the definition section of the policy are not valid. Although the opinion in the Devine case does not cite the policy language, the opinion notes that Prudential was attempting to move their exclusionary language into the definition of who was an insured under the uninsured motorist provisions of the policy. They stated that this was still a "coverage limitation." Appellants' reliance on Devine is misplaced. In the present case, Ohio Casualty has

the policy. James D. Sterling, Jr. does not qualify as an insured in the first place.

Sterling argues that if the Second District's opinion is affirmed this will have a significant impact on the stacking rights of insureds. This argument is misplaced for at least two fundamental reasons. First, the present case does not involve a stacking
issue. This is a not a case in which Ohio Casualty is asserting that a person who is otherwise an insured under the policy and entitled to uninsured motorist coverage is not entitled to that coverage because that person has uninsured motorist coverage under some other policy or some other vehicle. Ohio Casualty has consistently taken the position that there is no uninsured motorist coverage to start with. Stacking of coverages is simply not at issue. Second, in the Tucker v. Geico, 288 So.2d 238 (Fla. 1973) and Travelers v. Powell, 206 So.2d 244 (Fla. 1st DCA 1968), cases cited by Sterling in reference to their stacking argument, the Definitions Section of those policy included family members as insureds. In fact, the language in the Powell decision supports Ohio Casualty's position in the present case. The Court framed the issue as follows:

> "Is an exclusion in an uninsured motorist policy
> denying

> coverage to a person otherwise insured while occupying an automobile owned by the named insured but not insured under the policy void under Florida law?" (at 245).

In answering that question in the affirmative, the Court noted:

> "The cited Statute . . . establish the public policy of this State to be that every insured, within the definition of that term as defined in the policy, is entitled to recover under the policy for the damages he or she would have been able to recover against the offending motorist . . ." (at 245).

This language is perfectly consistent with Ohio Casualty's position, that is, the person making the uninsured motorist claim must first fall within the definition of an insured under the policy.

As outlined above, the cases cited by the Appellants are distinguishable from the present case in that James D. Sterling, Jr. was not an insured under The Ohio Casualty policy. This distinction is important. For example, in France v. Liberty Mutual, 380 So.2d 1155 (Fla. 3rd DCA 1980), Denise France was injured while a passenger in a friend's car. Denise was residing with her parents who owned two

underinsured motorist benefits under her parents' insurance policy with Liberty Mutual.

The definition section of the Liberty Mutual policy provided coverage for a relative and a relative was defined to mean a person related to the named insured by blood, marriage or adoption who was a resident of the household " . . . provided neither such relative nor his spouse owns a private, passenger automobile." Denise France did in fact own a private automobile. The Court in France distinguished that case from Mullis on the basis that France was not an insured within the definition of the Liberty Mutual policy. As such, the Court found that Denise France was not entitled to uninsured motorist benefits. Significantly, the Court noted that the public policy of Florida as to uninsured motorist coverage provides only that every insured within the definition of that term is entitled to recover uninsured motorist benefits. The Court in France specifically refused to extend that coverage to persons who do not fall within the definition of an insured in the policy.

Similarly, in Progressive American v. Hunter, 603 So.2d 1301 (Fla. 4th DCA 1992), Kathy Hunter lived with her parents. She was injured in an accident involving an automobile operated by an uninsured driver. Kathy Hunter sought uninsured motorist benefits under a policy issued to her parents by Progressive. The Court

was not included within the definition of an insured under the basic liability coverage.

The Second District Court of Appeals finding in the present case that James Sterling, Jr. was not entitled to uninsured motorist coverage under the Ohio Casualty policy is consistent with the rulings of the Court in France and Hunter.

Based on the reasoning as set forth above, this Court should affirm the decision of the Second District Court of Appeals.

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 **25th day of April, 2007**.

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I HEREBY CERTIFY that the Reply Brief of Respondent, THE OHIO CASUALTY INSURANCE COMPANY, complies with the font requirements of *Fla. R. App. P 9.210(a)(2)*.

/s/

WAYNE TOSKO, ESQ.