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 INS. CO., and AUTO-OWNERS INS.CO./SOUTHERN-OWNERS INS. CO.,

Respondents.

CASE NO.: SC06-1910

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

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

AMENDED BRIEF ON THE MERITS OF 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

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Dated: April 16, 2007

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STATEMENT OF THE CASE AND FACTS

This case is neither factually nor procedurally complicated. On or about December 14, 2002, James D. Sterling, Jr.,[1] a minor, was seriously injured when, as a pedestrian, he was struck by a car driven by Crystal Freitas, an underinsured motorist.[2] (R.4) At the time of the accident, the Sterlings were insured under an automobile liability insurance policy issued by Ohio Casualty. (R.5-6, 11-77)

The policy issued by Ohio Casualty is a "business" automobile policy issued to James D. Sterling, d/b/a J. D.'s Backhoe Service. (R.13) The policy insured a 1990 trailer and a 2000 Ford F450 flatbed truck. (R.13) It provided $300,000 in uninsured motorist (UM) coverage. (R.13-14, 16) The Florida UM coverage, non-stacked endorsement, provided, in pertinent part:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle." (R.57)

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[1] Appellants, 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 collectively as the "Sterlings" or as the Plaintiffs. The Defendant, OHIO CASUALTY INSURANCE COMPANY will be referred to as "Ohio Casualty" or as the Insurer. AUTO OWNERS INSURANCE COMPANY was dismissed.

[2] All references to the Record on Appeal will be referred to as (R.) followed by citation to the page number of the Record on Appeal.

The endorsement defined 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.
>
> 2. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured." (R.57)

The endorsement also addressed limits of insurance. It provided:

> D. Limit On Insurance:
>
> 1. Regardless of the number of "covered autos," "insureds," premiums paid, claims made or vehicles involved in the "accident," the most we will pay for all damages resulting from any one "accident" is the limit of uninsured motorist coverage shown in the declarations. However, any recovery for damages sustained by the Named Insured, if shown in the Declarations as an Individual or any "family member" of that individual:
>
> (c) While not "occupying" any vehicle may equal, but not exceed, the highest limit of insurance for uninsured motorist coverage applicable to any one vehicle under any one policy affording coverage to you or any "family member." (R.58)

The endorsement also contains additional definitions. It provides:

> F. ADDITIONAL DEFINITIONS
>
> As used in this endorsement:

1. "Family member" means a person related to you by blood, marriage, or adoption, who is a resident of your household, including a ward or foster child. (R.61)

The policy's liability coverage defines the term "insured" as follows:

1. 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:

(1) The owner or anyone else from whom you hire or borrow a covered "auto." This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

(2) Your "employee" if the covered "auto" is owed by that "employee" or member of his or her household.

(3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.

(4) Anyone other than your "employees," partners (if you are a partnership), members (if you are a limited liability company), or a lessee or borrower or any of their "employees" while moving property to or from a covered "auto."

(5) A partner (if you are a partnership), or a member (if you are a limited

> liability company), for a covered "auto" owned by him or her or a member of his or her household.
>
> c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability. (R.17-18)

The policy was also delivered with "An Important Notice To Our Commercial Automobile Policyholders Regarding Changes To Your Uninsured Motorist Coverage." (R.77) This notice advised the insured that the intent of UM coverage on a commercial policy was to cover the insured and the insured's employees while operating or occupying the insured vehicles described in the policy. The notice explained that court decisions in other jurisdictions had expanded the scope of such coverage beyond this stated intent and had ruled that employees were entitled to such coverage even when they were operating a non-business owned vehicle for non-business purposes. The notice further stated that the broadening of coverage, unless corrected, would result in higher premiums and legal fees for the insured and the insured's business. The notice advised the insured of the insurance carrier's desire to help the insured protect what was theirs and to only provide UM coverage for he insured or insured employees while operating or occupying an owned auto described in the policy. (R.77)

The Sterlings timely made a claim for UM benefits and the claim was denied. (R.8-9) They then brought suit against Ohio Casualty both for the benefits and for declaratory judgment under the policy seeking a determination from the

trial court that they were entitled to the benefits. (R.3-6, 8-10) Ohio Casualty answered the Complaint, admitting the Court's jurisdiction and that it had issued a policy of insurance to James D. Sterling, d/b/a J. D.'s Backhoe Service. It denied all further allegations. (R.141-142) Ohio Casualty asserted that there was no UM coverage under the policy for the incident alleged in the Complaint. (R.142)

Both parties then filed cross-motions for summary judgment. (R.157-161, 166-170) The Sterlings stated the policy was issued to James D. Sterling, d/b/a J. D.'s Backhoe Service and that the use of the phrase "d/b/a" was employed to comply with Florida's Fictitious Name Statute. The policy, however, was issued to James D. Sterling. Carolyn Sterling, his wife, and James Jr. were family members as defined in the policy. (R.157-158) Since Ohio Casualty had issued a non-stackable policy on two vehicles, the Sterlings stated that they were entitled, pursuant to Florida Statute §627.727(9)(e), to select any one limit of UM coverage for any vehicle insured under the policy. (R.158-160)

Ohio Casualty, on the other hand, asserted that James D. Sterling, Jr., the minor, was injured as a pedestrian on December 14, 2002, but under the definition of "insured" contained in the liability coverage, he did not qualify as an insured person under that coverage and, reciprocally, no UM coverage was provided. (R.166-170) Ohio Casualty claimed that, as part of the policy, there was a notice, "Notice NP71130501" which explained that it was the intent of the UM coverage

on the commercial auto policy to cover the named insured or the named insured's employees while occupying and operating owned automobiles described in the policy. The notice further claimed that it was correcting confusing language and returned the scope of uninsured motorist coverage to its original intent. (R.168-169) As such, Ohio Casualty claimed that, since James D. Sterling, Jr., did not qualify as an insured, notwithstanding his status as a resident family member of James D. Sterling, there was no UM coverage afforded by the policy. (R.169)

Following a hearing, the trial court granted Ohio Casualty's Motion for Summary Judgment, concluding that the coverage did not extend to James D. Sterling, Jr., a minor, because he did not qualify as an insured under the language of the liability coverage or the Florida UM coverage non-stack form. The court stated that the unambiguous language of the policy did not extend coverage to a family member who was not an occupant of an insured vehicle. (R.183-184)

The trial court entered a final declaratory judgment in accordance with its ruling on the cross-motions for summary judgment. (R.426-428) The Second District Court of Appeal affirmed that decision. Sterling v. Ohio Casualty Ins. Co., 936 So.2d 43 (Fla. 2d DCA 2006). In affirming the trial court, the Second District determined that a business auto policy insuring business or commercial autos was not required to utilize a definition of insured that would provide UM coverage to resident family members of the named insured, even if the named insured as an

individual and not a corporation. That Court concluded that Florida law does not compel auto insures to provide UM coverage to resident family members of individual named insureds who purchase liability insurance to cover a "business" vehicle because UM coverage on a business vehicle does not have to provide the same UM coverage as if it were a family vehicle. Id. at 47. By Order of March 12, 2007, this Court accepted jurisdiction over this case.

ISSUE ON APPEAL

WHETHER OHIO CASUALTY IS REQUIRED TO PROVIDE UNINSURED MOTORIST BENEFITS TO THE RESIDENT MINOR SON OF THE NAMED INSURED?

STANDARD OF REVIEW

This case involves interpretation of a statute and an insurance policy. Questions of statutory interpretation are a matter of law subject to de novo review. B.Y. v. Dept. of Children & Families, 887 So.2d 1253, 1255 (Fla. 2004) Questions of insurance coverage are also subject to de novo review. See, e.g. Auto Owners Ins. Co. v. Above All Roofing, LLC, 924 So.2d 842 (Fla. 2nd DCA 2006).

SUMMARY OF THE ARGUMENT

The issue in this case is straight-forward. Stated simply, the question is whether an uninsured motorist carrier who has issued a policy to an individual may limit uninsured motorist benefits to the occupancy of an insured vehicle on a claim made by a resident relative of the named insured. Florida courts have addressed this issue literally dozens of times. In almost every instance, the courts have relied on the polestar decision, Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971), and have concluded that the insurance carrier may not restrict the provision of uninsured motorist benefits to a Class I insured. Rather, the named insured and resident family members are entitled to uninsured motorist coverage whether they are pedestrians, riding in motor vehicles owned by others, or occupying vehicles owed by them and not insured under the policy.

In the more than 45 years since Mullis was issued, insurers, like Ohio Casualty, have attempted to reduce the benefits they are required to pay by inserting restrictions in the policies. Such restrictions are only permissible when they are unambiguous and consistent with the purpose of the UM statute. Flores v. Allstate Ins. Co., 819 So.2d 740, 745 (Fla. 2000) Ohio Casualty's restrictions do not and cannot meet this test.

First, the provisions in the UM endorsement are hopelessly ambiguous. The limits of liability provision expressly provides that if a resident family member is struck when not occupying an insured vehicle, he or she may elect the highest limits of UM protection provided on any one vehicle insured under the policy. That provision conflicts with and is repugnant to the definition of insured which requires occupancy of the insured vehicle as a condition to obtain coverage. Fundamental principles of insurance contract interpretation which require the broadest coverage in conformity with the state's public policy, should have been adopted below, to recognize this coverage.

Second, Ohio Casualty has not and cannot show its restrictions are consistent with the purpose of the UM statute. Florida courts have repeatedly stated that the purpose of the uninsured motorist statute is for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others. See, Young v. Progressive Southeastern Insurance Company, 753 So.2d 80, 83 (Fla. 2000). As a creature of statute, rather than as a matter of contract, UM protection is not susceptible to attempts by insurance companies to limit or negate that protection. Generally, provisions in such policies that provide less coverage than required by the statute are void as contrary to public policy. Salas v. Liberty Mutual Insurance Company, 272 So.2d 1, 5 (Fla. 1972). Likewise, insurance companies, like Ohio Casualty, may not avoid the rule of Mullis by the expedient

measure of moving exclusionary language into a definition of who may constitute an insured under the policy. See, Devine v. Prudential Property and Casualty Insurance Company, 614 So.2d 683 (Fla. 5th DCA 1993).

In the present case, it is undisputed that James Sterling did not reject UM coverage as authorized by §627.727(1), Florida Statutes. Therefore, the only other restrictions which are authorized by statute are those recognized in §627.727(9), Florida Statutes. Ohio Casualty's restriction is not one that is authorized by that statutory section and, as such, it is simply unenforceable. Ohio Casualty, by restricting the definition of insured, has taken the position that James D. Sterling, Jr., is not an insured because he was not occupying an insured vehicle. That restriction is permissible as to a Class II insured. It is not permissible, and has been recognized as violative of public policy for more than 40 years, as to a Class I insured. As such, Ohio Casualty cannot satisfy either prong of the Flores test.

This Court should reverse the judgment entered below with directions on remand to enter a declaratory judgment finding uninsured motorist benefits available to the Sterlings and for the court to conduct a jury trial to determine the amount of his damages.

ARGUMENT

OHIO CASUALTY IS REQUIRED TO PROVIDE UNINSURED MOTORIST BENEFITS TO THE RESIDENT MINOR SON OF THE NAMED INSURED.

The issue in this case is straight-forward. Simply stated, the question is whether an insurer who issues a motor vehicle liability insurance policy which provides bodily injury liability coverage, must provide UM coverage to a resident relative of the named insured who was injured while not occupying an insured vehicle. Since 1961, when the UM statute was originally passed, Florida courts have repeatedly been asked to address this same issue or issues substantially similar to it. With few exceptions, those courts have uniformly held that when UM coverage has been purchased by the named insured, resident relatives are likewise entitled to UM coverage no matter where they may be at the time of the accident. Such a conclusion is mandated, notwithstanding language in the policy to the contrary, by the public policy of the State. With all due respect to the Second District and the trial court, they erred when they concluded that Ohio Casualty could avoid the provision of UM benefits to James Sterling, Jr., simply by removing him from the definition of an insured person. That conclusion was erroneous. The decision of the Second District should be quashed by this Court.

Any analysis of an UM issue must first start with the applicable statute. Florida Statutes, §627.727(1) (2002), provides, in pertinent part:

> 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 for the protection of persons insured hereunder 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.

The only exception to that mandatory requirement is likewise contained within subsection (1). It provides that UM coverage need not be provided if the named insured rejects such coverage. See, Flores v. Allstate Insurance Company, 819 So.2d 740, 744 (Fla. 2002) (insurers issuing such policies are mandated by statute to offer UM coverage unless it is expressly rejected); Varro v. Federated Mutual Ins. Co., 845 So.2d 726, 728 (Fla. 2d DCA 2003) (expressing same principle of law). In this case, there is no dispute. James Sterling did not reject that coverage.

Policies issued pursuant to Florida Statutes, §627.727(9), are authorized to contain certain limitations provided, however, that the insurance company has strictly adhered to the statutory prerequisites of issuance of such a policy. See, Government Employees Insurance Company v. Douglas, 654 So.2d 118 (Fla. 1995). None of the five enumerated limitations authorize an insurer to include a provision that excludes resident family members of the named insured from such

benefits if they are injured when they are a pedestrian.[3] As such, the limitation is not authorized by either aspect of the statute. Of course, the analysis does not end here because an insurance policy may contain other general conditions affecting coverage or exclusions of coverage as long as such limitations are unambiguous and consistent with the purposes of the UM statute. Flores v. Allstate Ins. Co., 819 So.2d 740, 745 (Fla. 2002).

Applying Flores, the first issue is whether the limitation is unambiguous. The Second District stated that the Sterlings did not raise an issue about ambiguity. That simply was not the case. At the trial court level, and at the Second District, the Sterlings argued that the policy contained conflicting definitions of who was an insured and that the UM limit of insurance provision created an ambiguity because it limited the amount of UM benefits to named insureds or any "family member" to the highest limit of insurance for UM coverage available to any one vehicle under the policy. (R.58, 159-60, 433-34) The limit applies only where the named insured or resident family member is injured while "not" occupying any vehicle. That limitation blatantly contradicts the assertion that one must be occupying the vehicle in the first instance, to qualify for such benefits.

[3] Florida Statutes, §627.727(9) (e) provides that if, at the time of the accident, the injured person is not occupying a motor vehicle (like James Sterling, Jr.) she or he is entitled to select any one limit of uninsured motorist coverage for any one vehicle afforded by a policy under which she or he is insured as a named insured or as an insured resident of the named insured's household. It is this type of benefit the Plaintiffs sought on behalf of James Sterling, Jr.

The UM statute has consistently been interpreted to provide the broadest possible protection to the injured party from the negligence of uninsured motorists and the statute requires a liberal construction to accomplish that purpose. Schutt v. Atlantic Casualty Co., 682 So.2d 684 (Fla. 5th DCA 1996) A contract of insurance must also be interpreted broadly, in favor of the insured, where a policy is uncertain or its terms ambiguous. See, e.g. Young v. Progressive Southeastern Ins. Co., 753 So.2d 80 (Fla. 2000). When interpreting such a policy, a single provision should not be considered in isolation, but should be construed with all other policy provisions against the background of the case. Matthews v. Ranger Ins. Co., 281 So.2d 345, 348 9Fla. 1973). We respectfully submit that application of these principles leads to the conclusion that the policy is ambiguous and that the Flores, test cannot be satisfied by Ohio Casualty.

Even if the provisions of the policy were unambiguous, the limitations sought to be enforced by Ohio Casualty do not satisfy the second prong of the Flores test because the limitations are not consistent with the purpose of the UM statute. Ever since UM coverage has been required in Florida, insurance companies, like Ohio Casualty here, have attempted to limit and avoid that coverage. In the face of such organized efforts to reduce the statutorily mandated coverage, this Court issued its landmark decision in Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971). This Court's decision in

Mullis, has been recognized as having clearly articulated Florida's public policy for Class I insureds. Alamo Rent-A-Car Inc. v. Hayward, 858 So.2d 1238, 1240 (Fla. 5th DCA 2003). In Mullis, this Court stated:

> When uninsured motorist coverage was obtained by Shelby Mullis pursuant to §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 had purchased automobile liability insurance in compliance with the financial responsibility law. This, of course, would not be the case as to other persons potentially covered who are not in the class of the named insured and relatives resident in the Mullis household. These latter are protected only if they receive bodily injury due to the negligence of an uninsured motorist while they occupy the insured automobile of the named insured with his permission or consent. This latter group is necessarily restricted to occupants of the insured automobile for the purpose of coverage identification and to show their insurable relationship to the named insured paralleling coverage for others than named insured in automobile liability policies. However, this is not true as to the named insured and the protected relatives resident in his household.
>
> * * *
>
> Whenever bodily injury is inflicted upon 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 §627.0851. They may be pedestrians at the time of such injury, they may be riding in motor vehicles of others or in public conveyances and they may occupy motor vehicles (including Honda motorcycles) owed by but which are

> not "insured automobiles" of the named insured. 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 insured thereunder as "if the uninsured motorist had carried the minimum limits" of an automobile liability policy. (Citations omitted)

Subsequent to Mullis, in Allstate Insurance Company v. Boyton, 486 So.2d 552, 557 (Fla. 1986), this Court stated that the legislature had "wisely enacted a scheme whereby a motorist may obtain a limited form of insurance coverage for the uninsured motorist, by requiring that every insurer doing business in this State offer and make available to its automobile liability policyholders, uninsured motorist coverage in an amount equal to the policyholder's automobile liability insurance. The policyholder pays an additional premium for such coverage." This Court has also explained that the UM statute is designed for the protection of

injured persons, not for the benefit of insurance companies or motorists who cause damage to others. See, Young v. Progressive Southeastern Insurance Company, 753 So.2d 80, 83 (Fla. 2000), 249 So.2d 429, 430 (Fla. 1971).

Since UM coverage is a creature of statute rather than a matter of contract, which reflects the contemplation of the parties in creating insurance policies, UM protection is not susceptible to attempts by the insurer to limit or negate that protection. Provisions in UM policies that provide less coverage than required by the statute are void as contrary to public policy. Young v. Progressive Southeastern Insurance Company, 753 So.2d 80, 83, citing, Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1, 5 (Fla. 1972); Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229, 233-234.. In short, this Court has repeatedly stated that UM protection is not to be whittled away by exclusions or exceptions. Young, at 83.

Applying those fundamental principles to this case, it is clear that Ohio Casualty should have been required to provide UM benefits for the injuries sustained by James Sterling, Jr. The policy was issued to James D. Sterling, d/b/a J.D.'s Backhoe Service. J.D.'s Backhoe Service is not listed as a corporation or other separate legal entity. The term "d/b/a" is simply employed to comply with Florida's Fictitious Name Statute, §865.09, Florida Statute. The purpose of that statute is to provide notice to one dealing with the business of the real party in

interest. James D. Sterling is J.D.'s Backhoe Service and the real party in interest. He is the named insured under the policy. James Sterling, Jr., was a relative who resided in his household and qualified as a "family member" as defined in the policy. As a resident family member, he is considered a Class I insured for purposes of UM coverage. As a matter of Florida's expressed public policy, Class I insureds enjoy special protection under the UM statute and are entitled to benefits no matter where their location at the time of the accident.

Florida courts have also recognized that insurers, like Ohio Casualty, cannot avoid the rule of Mullis "by the simple expedient of moving exclusionary language into the definition of 'who' is an 'insured' under the policy," as Ohio Casualty has done in this case. See, Devine v. Prudential Property and Casualty Insurance Company, 614 So.2d 683 (Fla. 5th DCA 1993). Mullis requires that UM coverage provide a Class I insured such benefits whenever and wherever bodily injury is inflicted upon them. That decision does not permit coverage to be confined to injury while operating only the owed vehicle, no matter whether such limitations are to be found in an exclusion or in the definition of who is insured. Devine v. Prudential Property and Casualty Insurance Company, 614 so.2d 683 (Fla. 5th DCA 1993). As such, as a Class I insured, James Sterling, Jr., was entitled to UM benefits provided under the policy.

To avoid this obvious conclusion, Ohio Casualty argued that it was only required to provide UM coverage to those persons defined as an insured for the liability coverage and, since James Sterling, Jr., would not qualify as an insured for purposes of liability coverage, it was not required to provide UM coverage to him. That line of analysis, that is, where UM coverage must only be provided to a person who qualifies as an insured for purposes of the liability coverage was expressly rejected by this Court in Government Employees Insurance Company v. Douglas, 654 So.2d 118 (Fla. 1995). In Douglas, this Court recognized that it had previously approved that line of analysis in Nationwide Mutual Fire Insurance Company v. Phillips, 640 So.2d 53 (Fla. 1994) and Worldwide Underwriters Insurance Company v. Welker, 640 So.2d 46 (Fla. 1994). The Douglas Court receded from those decisions because they failed to properly give effect to Florida Statutes, §627.727(9) (1987). That argument simply cannot provide an appropriate legal basis for denial of UM benefits in this case.

Ohio Casualty also argued, and both the trial court and Second District accepted, that the present policy was a "business" auto policy and, as such, the language in its policy which would otherwise offend the requirements of the UM statute should be enforced. With all due respect to the Second District and the trial judge, we believe this argument is without merit. Florida's UM statute has never differentiated between personal automobiles and business automobiles. The statute

has been uniformly applied to any policy providing automobile liability insurance. This uniform application has presumably arisen because the statute addresses itself to all "motor vehicle liability insurance" policies. See, Fla. Stat. §627.727(1). In the few cases in which Florida courts have addressed UM coverage in the context of a policy being issued to a corporation, they have concluded that Class II insureds cannot stack the coverage on multiple vehicles insured under a single policy. The basis of that conclusion is that a corporation cannot have a resident family member. See, e.g., Florida Farm Bureau Casualty Company v. Hurtado, 587 So.2d 13, 14 (Fla. 1991); Travelers Insurance Company v. PAC, 337 So.2d 397 (Fla. 2nd DCA 1976), cert. den., 351 So.2d 407 (Fla. 1977); Liberty Mutual Insurance Company v. Weiss, 797 So.2d 475 (Fla. 3d DCA 2001). The analysis in all of these cases relies upon the distinction of a Class I and a Class II insured first recognized in Mullis. When a corporation is the sole named insured, the only way that any human being could ever be entitled to UM benefits pursuant to a policy issued to the corporation is when they are a lawful occupant of a vehicle owned by the corporation. That is not the case where the named insured is an individual, as is the case here.

If the decision of the Second District is allowed to stand, it will also significantly impact stacking rights of insureds which have been recognized by this Court for more than 40 years. In Sellers v. United States Fidelity & Guarantee Co.,

185 So.2d 689 (Fla. 1966), this Court answered the following certified question from the First District Court of Appeal:

> May an automobile liability insurance carrier providing coverage against injury by an uninsured motorist in accord with the requirements of §627.0851, Florida Statutes, 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 the condition in the USF&G policy which limited recovery to only one policy. The Sellers' Court explained that the statute had delineated its requirements concerning the coverage to be provided by an insurer. Likewise, that statute had stated its requirements concerning sources of recovery of insurance protection if paid from other persons, including other insurance protection, if paid from other persons, including other insurers legally responsible for the bodily injury to the insured. The statute did not provide any latitude for an insurer to limit its liability to "other insurance" clauses or similar clauses as USF&G attempted to do in its policy.

That stacking concept was expanded in Travelers Indemnity Co. v. Powell, 206 So.2d 244 (Fla. 1st DCA 1968). In Powell, Mrs. Powell owned an automobile which was insured by Travelers. Her husband owned an automobile which was separately insured by State Farm. Each of the policies provided UM coverage in the minimum statutory amounts. The Powells, residents of the same household,

were injured in an accident with an uninsured motorist while riding in Mr. Powell's State Farm insured vehicle. State Farm paid both Mr. and Mrs. Powell the limits of its UM coverage. The Powells then made claim against the Travelers' policy for the amount of their damages which exceeded State Farm's coverage. Travelers denied coverage on the basis of the following exclusion:

> This policy does not apply under Part IV:
>
> > (a) To bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile.

The First District noted that the UM statute had been the subject of a great deal of litigation which typically involved the construction of various exclusions or provisions in policies measured against the public policy of the state expressed in the then existing UM statute. The court accepted the argument that the exclusion was invalid because it was not the intent of the statute to limit coverage to an insured by specifying his location or the particular vehicle he was occupying at the time of the injury. The court further explained that the coupling of UM coverage with family protection coverage in an automobile liability policy had rendered each member of the family an insured under such policy purchased by any family member. Complications arose when there were multiple family members, each of whom owned an automobile which had been insured under a separate policy. In such a situation, each family member became an insured under all policies.

Several months after this Court's landmark decision in Mullis, it essentially adopted the pre-existing case law concerning "stacking" when it decided Tucker v. Government Employees Insurance Co., 288 So.2d 238 (Fla. 1973). In Tucker, this Court reviewed a decision of the Third District Court of Appeal which had declared that an insured could not aggregate or stack the amount of coverage provided for each vehicle in a policy that covered multiple vehicles where the policy included per person and accident limitations. In Tucker, this Court explained that its Mullis holding had reverted to the better reasoning of the First District's Sellers' decision. Relying upon Mullis, this Court stated that the total UM coverage an insured had purchased for himself and his family, regardless of the number of vehicles included in the policy, inured to his and his family's benefit when injured by an uninsured motorist. Id.. at 242.

In the years since Mullis and Tucker, the Legislature had amended the uninsured motorist statute and the anti-stacking statute, §627.4132, Florida Statutes, on numerous occasions. It has done so with the legal presumption that it understood the then existing state of the law on each occasion an amendment was passed. Not once since those decisions has the Florida Legislature ever elected to alter the classification of insureds recognized in Mullis, nor has it ever stated that a motor vehicle policy issued for business purposes can legally provide less benefits than a policy issued on a private passenger family vehicle. What the Legislature

did do, with the passage of §627.727(9), Florida Statutes, was to authorize insurers to include any of the enumerated limitations within their policy in exchange for a reduced premium and strict compliance with the other terms of that statute.

In this case, it is clear, Mr. Sterling did not reject UM coverage. It is likewise clear, that the provision relied upon by Ohio Casualty is not authorized by §627.727(9), Florida Statutes. In fact, the provision it attempts to rely upon is contrary not only to its own limits of liability provision, but to §627.727(9)(e), Florida Statutes, which entitles an insured to select any one limit of UM coverage for any vehicle afforded by a policy under which he or she is an insured or insured resident of his household. The statute assumes, in conformity with Mullis and other long-standing precedent, that the named insured and resident family members are all entitled to heightened protection under the statute and certain minimum benefits. In this case, James Sterling, Jr., was entitled to UM benefits. There are no legislative exceptions which allow insurers like Ohio Casualty to offer lesser UM benefits on a "business" auto policy than it is required to provide under any other motor vehicle policy. This Court should quash the decision of the Second District with direction on remand to enter summary judgment in favor of the Sterlings under the declaratory judgment count and to order the trial court to conduct a trial concerning the amount of the damages the Sterlings are entitled to recover.

CONCLUSION

Based upon the above and foregoing authorities, this Court should quash the decision of the Second District with directions on remand to enter judgment in favor of the Sterlings, determining that they are entitled to UM benefits under the policy issued by Ohio Casualty, and to order that a trial be held to determine the amount of the damages sustained by the Sterlings.

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 **Wayne Tosko, Esquire,** Landmark Center One, 315 E. Robinson Street, Suite 275, Orlando, Florida, 32801-4328**,** on April 16, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief on the Merits of 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 Fla. R. App. P. 9.100(1) and 9.210(a)(2).

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