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

REPLY BRIEF 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: May 21, 2007

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

As we stated in our initial brief, the question in this case is straight-forward. It is simply whether an insurer who issues a motor vehicle liability insurance policy which provides bodily injury liability, must also provide UM coverage to a resident relative of the named insured who was injured while not occupying an insured vehicle. To assist the Court in its analysis of this issue, we outlined the history of UM coverage in this State and the long line of decisional authority that expressly states the public policy that underlies the UM statute. We also identified for the Court the special protection that Class I insureds (named insured and resident family members) enjoy when issues of the UM coverage are involved. We also outlined for the Court the long-standing decisional authority which holds that restrictive provisions in UM policies, which have not been expressly authorized by the Legislature, have been determined to be void as contrary to the public policy of this State. We will not burden the Court and repeat that analysis here.

The insurance company's response to our analysis is, likewise, straight-forward. It maintains that there is a three-pronged analysis that must be applied to resolve the issues involved in this matter. According to Ohio Casualty, first, it must be determined whether James D. Sterling, Jr., is an insured under the Ohio Casualty policy. Second, it must be determined whether Florida's UM statute mandates coverage under the facts of this case and, lastly, whether Florida decisional law imposes coverage in this instance. At the outset, and, most respectfully, we believe that Ohio Casualty's assertion regarding the proper analysis is flawed. The analysis to be applied was expressly stated by this Court in Flores v. Allstate Insurance Company, 819 So. 2d 740 (Fla. 2002). Under Flores, the first issue is whether the limitation in the policy is ambiguous. If the court concludes that the limitation is unambiguous, the next question is whether the limitation is consistent with the purposes of the UM statute. Only if the limitation can meet both prongs of the test can the insurance company rely upon the limitation.

Even under Ohio Casualty's three-pronged analysis, it contends that the insured's minor resident son did not qualify as an insured for purposes of liability coverage and, as such, the insurer was not required to provide him UM coverage. This explanation is nothing more than a repackaged version of the argument that

UM coverage must only provide the reciprocal coverage required by the Financial Responsibility Statute, an analysis which was expressly rejected by this Court in Government Employees Insurance Company v. Douglas, 654 So. 2d 1118 (Fla. 1995). In doing so, this Court receded from a previous line of cases which had accepted the "reciprocal" analysis, as expressed in Worldwide Underwriters Insurance Company v. Welker, 640 So. 2d 46 (Fla. 1994) and Nationwide Mutual Fire Insurance Company v. Phillips, 640 So. 2d 53 (Fla. 1994).

Ohio Casualty tries to limit the effect of this Court's holding in Douglas by asserting that Douglas and the numerous other decisions from Florida courts subsequent to Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229 (Fla. 1971), which have voided insurer's illegal attempts to restrict UM coverage, apply solely to limitations regarding occupancy of a certain vehicle by a named insured or a resident family member. According to Ohio Casualty, the definition in this case, which excludes coverage to all resident relatives, is not one that restricts coverage to occupancy of a certain vehicle and, as such, its policy should be enforced as written. Even if Ohio Casualty's interpretation of the Douglas and Mullis line of authority were correct, its position in this case is still wrong. The very evil that Ohio Casualty concedes those cases prohibit, that is, limiting coverage to occupancy of certain vehicle, is precisely the situation

presented by Ohio Casualty's policy here. According to Ohio Casualty, no one, a resident relative of the named insured, or otherwise, could ever obtain UM benefits under its policy unless they were occupying the insured motor vehicle. It is, however, that restriction which, even under Ohio Casualty's analysis, renders the provision void and unenforceable as a matter of Florida's public policy.

In support of its position, Ohio Casualty cites to the Third District's decision in France v. Liberty Mutual, 387 So. 2d 1155 (Fla. 3d DCA 1980) and Progressive American Insurance Company v. Hunter, 603 So. 2d 1301 (Fla. 4th DCA 1992). Admittedly, those cases stand for the proposition that if there is no liability coverage, there is no corresponding obligation to provide UM coverage. The analysis does not, however, end there. In fact, in light of Douglas, one has to question the on-going validity of these decisions.

For instance, Progressive American Insurance Company v. Hunter, 603 So. 2d 1301 (Fla. 4th DCA 1992), was specifically referenced in the Fifth District's opinion in Nationwide Mutual Fire Insurance Company v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992). There, the Fifth District determined that Nationwide's attempt to do the very same thing that Ohio Casualty has done here, that is, limit UM coverage to a Class I insured based upon the purported absence of liability coverage, was violative of Florida's long-standing public policy pertaining to UM

protection. The Fifth District's decision in Phillips was quashed by this Court in Nationwide Mutual Fire Insurance Company v. Phillips, 640 So. 2d 53 (Fla. 1994) which, itself, was later receded from in Douglas. As such, the continued validity of this line of analysis is seriously in question. Indeed, the Second District recognized that the continued validity of this line of analysis was questionable. See, Martin v. St. Paul Fire & Marine Insurance Company, 677 So. 2d 987 (Fla. 2nd DCA 1996). That court noted that making availability of UM coverage dependent upon liability coverage seemed somewhat arbitrary and unrelated to the public policies promoted by UM coverage. Recognizing that a family may have a greater need for UM coverage for family members who have no need to be included within the definition of an insured for purposes of liability coverage, the Martin court stated that such situations are better remedied by the various policy options offered by the Legislature in Florida Statute Section 627.727(9), rather than by judicial approval of broader exclusions based upon the definition of insured in a separate section of a policy providing liability coverage. Id. at 1000.

Once again, even if the "reciprocal" liability analysis did survive Douglas, Ohio Casualty has done specifically what it concedes it is prohibited from doing under Florida law. Through its definition of insured, it has attempted to restrict UM coverage to the occupancy of the insured vehicle. The only time that James D.

Sterling, Jr., could qualify as an insured under this policy is if he is occupying an insured vehicle. Of course, under Mullis and Douglas, those very types of restrictions are unenforceable unless they are articulated in Florida Statutes Section 627.727(9). The only limitation contained within that statute when such a person is a pedestrian, is contained within subsection (e). Those are the very benefits that were sought by James D. Sterling, Jr., here. As such, even if the reciprocal analysis has continued viability, Ohio Casualty has done precisely what it has acknowledged it is prohibited from doing by restricting coverage to James D. Sterling Jr.'s occupancy of an insured vehicle.

In its answer brief, Ohio Casualty has, for the most part, simply dismissed the notion that there is any ambiguity in its policy by virtue of the "limits of liability" provision in UM endorsement. Once again, we believe that the only reason why Ohio Casualty has dismissed the claim is because it simply cannot defend its position. The Florida uninsured motorist endorsement specifically states:

> With respect to the coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement. (R.57)

Unlike the Coverage Form, the UM endorsement specifically encompasses the concept of family member and provides a definition which includes James D. Sterling, Jr. (R.61). The limits of insurance coverage provision also conflicts with the definition of an insured because it specifically recognizes the right of a resident family member to choose the highest limits of insurance for UM coverage applicable to any one vehicle under any one policy affording coverage to the family member when injured while not occupying a vehicle. (R.58) This provision is hopelessly in conflict with any definition contained within the "Coverage Form" which attempts to restrict coverage solely to those persons who are actually occupying an insured vehicle. Ohio Casualty has not and cannot offer any plausible explanation why it would include a specific provision in its UM endorsement restricting the rights of resident family members to make claims pertaining to all available UM benefits issued under the policy if, as it asserts, they have no right to assert such a UM daim in the first instance. Ohio Casualty's policy satisfies neither of the factors identified in Flores and the restrictions it relies upon should not be enforced.

Perhaps most telling about Ohio Casualty's answer brief is the argument that it has omitted. That is, it has omitted any argument whatsoever to support the Second District's conclusion that insurers are authorized to create different UM

coverages and policies based upon the characterization of use of the vehicle. That is, that business auto policies and personal auto policies can, in some fashion, be treated differently under the UM statute. As we argued in our initial brief, the statute has never raised such a distinction. Apparently, by its silence on the issue, Ohio Casualty concedes that the scope of benefits to be provided under an UM policy issued pursuant to Florida Statute Section 627.727 may not be defined based upon the classification or characterization of use of the vehicle. This factor, which appears to be part of the bedrock of the Second District's decision, is simply not a legitimate factor to include in the analysis.

Finally, Ohio Casualty, without explanation, simply denies that stacking rights that have been recognized in this State for decades are affected whatsoever by the Second District's decision. We again must take exception. The analytical foundation for the stacking concept is that one who purchases more than one UM policy does so to avail himself and family members of all policies purchased. See, e.g., Travelers Indemnity Co. v. Powell, 206 So. 2d 244 (Fla. 1st DCA, 1968). Under Ohio Casualty's theory, the number of policies purchased and premiums paid are irrelevant. All that matters, according to the insurance company, is occupancy of a certain vehicle. Numerous insurers have been told by the court on countless occasions that such a position is contrary to Florida law and the public

policy expressed therein. This Court should tell Ohio Casualty the same thing yet one more time. This Court should quash the decision of the Second District with directions on remand to enter summary judgment in favor of the Sterlings on 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 May 21, 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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