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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1257

TRAVELERS COMMERCIAL INSURANCE COMPANY,

Petitioner,

vs.

CRYSTAL MARIE HARRINGTON,

Respondent.
_____/

L.T. Case No.: 1D11-0015

ON DISCRETIONARY REVIEW OF A DECISION OF
THE FIRST DISTRICT COURT OF APPEAL
CERTIFYING QUESTIONS OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF OF PETITIONER TRAVELERS COMMERCIAL INSURANCE COMPANY

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STATEMENT OF THE CASE AND FACTS

This case is here on discretionary review of a decision of the First District Court of Appeal that certifies two questions and conflicts with other decisions. The First DCA affirmed summary judgment for Respondent Crystal Marie Harrington on two insurance coverage questions involving Florida's uninsured-motorist (UM) statute. Harrington was injured in a single-car accident while riding in a family car that Petitioner Travelers Commercial Insurance Company insured. The driver, a non-family member, had permission to drive the car. His insurer tendered its liability policy limits. So did Travelers. Claiming that her damages exceeded both policies, Harrington sought UM coverage from Travelers. Travelers denied coverage, citing a policy provision that forbids treating an insured vehicle as uninsured for purposes of UM benefits. Harrington sued. The trial court concluded that Travelers could not invoke the exclusion. The First DCA agreed but certified two questions.

The first question involves the interplay between the policy's "your-auto" exclusion—or the "family vehicle exclusion," as the First DCA referred to it—and section 627.727(3), Florida Statutes. The lower courts declined to enforce the exclusion because of perceived conflict with section 627.727(3). But Florida courts, including this one, have enforced "your-auto" exclusions for decades.

The second question, which will be rendered moot if the Court answers the first one "no," involves a waiver of stacked UM coverage. The circuit court held that the named insured's waiver of that coverage did not extend to other insureds such as Harrington. The First DCA affirmed. *Travelers Commercial Ins. Co. v. Harrington*, 86 So. 3d 1274, 1277-78 (Fla. 1st DCA 2012). Its decision created conflict with *Mercury Insurance Co. of Florida v. Sherwin*, 982 So. 2d 1266 (Fla. 4th DCA 2008), and results in other insureds here, including unforeseen ones, being entitled to three times more UM coverage than the policy's named insured.

A. Facts Relevant to the Appeal

The relevant facts are undisputed, and most are recited in the First DCA's opinion. Travelers issued an auto insurance policy to Rhonda Harrington, Harrington's mother and the policy's named insured (R1. 71; A. 15).[1] The policy provides bodily-injury liability coverage of $100,000 per person and $300,000 per accident (A1. 15). It also provides "Uninsured Motorists Non-Stacked" coverage of $100,000 per person and $300,000 per accident (A1. 15). The policy's UM section cross-references an endorsement titled "Uninsured Motorists Coverage – Florida (Non-Stacked)" (A1. 15, 18). Harrington, who is named as a driver of the three vehicles listed on the policy's declarations page (A1. 15, 17), is a Class I

[1] "R#." refers to the volume number of the record. "A. #" refers to the page number of the appendix. Record cites to documents in the appendix can be found in the appendix's table of contents.

insured.[2] The policy defines "[y]our covered auto" as any of the three vehicles listed in the declarations page (A1. 15, 25).

The policy identifies "Coverage A" as liability coverage for bodily injury (A1. 26) and defines an "insured" under Coverage A as including "[a]ny person using 'your covered auto'" (A1. 26). Coverage A lists several exclusions, but none excludes non-family members driving an insured vehicle with permission—such as the driver in this case (R1. 72; A1. 26-27).

The "Uninsured Motorists Coverage – Florida (Non-Stacked)" section of the policy, Coverage D, provides coverage when "an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury'" (A1. 51). The policy defines "uninsured motor vehicle" as, among others, a vehicle "[t]o which a bodily injury liability bond or policy applies at the time of the accident but the amount paid for 'bodily injury' under that bond or policy to an 'insured' is not enough to pay the full amount the 'insured' is legally entitled to recover as damages" (A1. 51). In other words, an "uninsured motor vehicle" includes an underinsured one. It does not, however, include a vehicle owned by or furnished or available for the regular use of the named insured, the named insured's spouse or a family member "unless it is a 'your covered auto' to

[2] "[C]lass I insureds are named insureds and resident relatives of named insureds." *Travelers Ins. Co. v. Warren*, 678 So. 2d 324, 326 n.2 (Fla. 1996). Class II insureds are lawful occupants of an insured vehicle who are not named insureds or resident relatives of the named insureds. *Id.*

which Coverage A of the policy applies *and* bodily injury liability coverage is excluded for any person other than you or any 'family member' for damages sustained in the accident by you or any 'family member'" (A1. 51) (emphasis added). This is the policy's "your-auto" exclusion.

While riding in a family vehicle that Joey W. Williams was driving with permission, Harrington was injured in a single-car accident (R1. 72). Harrington suffered a neck fracture and blindness in her right eye (R1. 72-73). Williams's insurer, Nationwide, tendered its policy limits (R1. 72). Because Harrington claimed that her damages exceeded those limits, Travelers tendered its own limits (R1. 72). But Harrington claimed that her damages exceeded *both* limits and demanded UM coverage from Travelers (R1. 72-73). Travelers declined it (R1. 73).

When she applied for insurance, Harrington's mother opted for "non-stacked (limited)" UM coverage and therefore paid a reduced rate (R1. 70). As proof of that election, Mrs. Harrington signed a "Florida Uninsured Motorists Coverage – Election of Coverage Form" (R1. 70). The form reads:

> I hereby elect the non-stacked form of Uninsured Motorist coverage[.] I, *on behalf of all insureds* under the policy, understand and agree that selection of any of the above options applies to my liability insurance policy and future renewals or replacements of such policy which are issued at the same Bodily Injury Liability limits.

(R1. 70) (emphasis added). Harrington did not sign the form (R1. 70, 73).

B. Proceedings in the Circuit Court

Harrington sued Travelers for UM benefits, alleging that, as a Class I insured, she was entitled to underinsured-motorist coverage as well as stacked underinsured-motorist benefits (R1. 1-6). Among other defenses, Travelers asserted that the vehicle involved was not an "uninsured motor vehicle" as defined in the policy and that Harrington was not entitled to UM or underinsured-motorist coverage (R1. 12). As to stacked UM coverage, Travelers asserted that the policy provided non-stacked coverage (R1. 13).

Harrington moved for summary judgment on the two coverage issues (R1. 61-73). On the question of underinsured-motorist coverage, Harrington described this Court's decision in *Travelers Insurance Co. v. Warren*, 678 So. 2d 324 (Fla. 1996), as controlling, arguing it rendered the vehicle here uninsured for coverage purposes (R1. 62-63). She also argued coverage under section 627.727(3)(b), which renders an insured vehicle uninsured when the policy limits are less than the damages sustained (R1. 66-67). On the question of stacking, Harrington argued that her mother's execution of a non-stacking form was not made "on behalf of all insureds," *see* § 627.727(9), Fla. Stat., and that, absent her own waiver, stacking applied (R1. 67-68, 70).

Travelers cross-moved for summary judgment (R1. 74-134), arguing that the policy excludes UM coverage for insured vehicles owned by or furnished or

available for the Harringtons' regular use, such as the one involved in the accident (R1. 79). Travelers added that Harrington misinterpreted *Warren*, in which this Court held that the subsection of the UM statute at issue here does *not* stack liability and UM coverage (R1. 81). And Travelers explained that, because its policy does not exclude liability coverage for a non-family member driving the insured vehicle and injuring a family member, subsection 627.727(3)(c)—one of the statutory subsections rendering an insured vehicle uninsured for UM purposes—does not apply (R1. 82-84). On the issue of stacked UM coverage, Travelers argued that Harrington's mother's waiver of stacking extended to all insureds, including Harrington (R1. 85-90). Harrington responded that her mother could not be her agent because, when her mother signed the waiver form, Harrington was an adult (R2. 232).

After a hearing (R5. 1-47), the trial court announced that it would grant Harrington's motion and asked her attorney to submit a proposed final judgment (R1. 182). Travelers objected to entry of a judgment awarding damages because no evidence showed that Harrington's damages exceeded the policy's liability coverage and because Travelers' affirmative defenses had not been adjudicated (R1. 180-81; R2. 213). The circuit court nevertheless entered the "Order and Summary Final Judgment" Harrington's attorney submitted, which included a $300,000 judgment (R2. 215-24; R4. 510-20).

Travelers moved for reconsideration, noting that no evidence of damages substantiated the judgment and that affirmative defenses remained at issue (R3. 410-14). After a hearing (R6. 35-45), the trial court denied the motion, finding that Travelers did not dispute Harrington's claims about her injuries and damages and that the parties conceded there were no genuine issues of fact (R3. 477-78). Travelers timely appealed (R4. 481-501).

C. Disposition in the First DCA

The First DCA affirmed in part and reversed in part. *Travelers Commercial Ins. Co. v. Harrington*, 86 So. 3d 1274 (Fla. 1st DCA 2012). On the availability of UM coverage, the First DCA summarily concluded that the trial court's interpretation of the UM statute accords with *Warren* and affirmed. *Id.* at 1276-77. But it certified a question on the UM coverage issue:

> Whether the family vehicle exclusion for uninsured motorist benefits conflicts with section 627.727(3), Florida Statutes, when the exclusion is applied to a Class I insured who seeks such benefits in connection with a single-vehicle accident where the vehicle was being driven by a Class II permissive user, and where the driver is underinsured and liability payments from the driver's insurer, when combined with liability payments under the Class I insured's policy, do not fully cover the Class I insured's medical costs.

Id. at 1278-79.

On the stacking issue, the First DCA affirmed the trial court's conclusion that Harrington's mother's election of non-stacked UM coverage did not extend to

Harrington. *Id.* at 1277-78. The court noted the difference between subsections 627.727(1) and (9), Florida Statutes. *Id.* The former, which addresses total rejection of UM coverage, states that a waiver will be made "on behalf of all insureds." *Id.* The latter, which addresses waiver of stacked coverage, does not contain the words "on behalf of all insureds." *Id.* The court recognized conflict with *Mercury Insurance Co. of Florida v. Sherwin*, 982 So. 2d 1266 (Fla. 4th DCA 2008), and certified a second question:

> Whether uninsured motorist benefits are stackable under section 627.727(9), Florida Statutes, where such benefits are claimed by an insured policyholder, and where a non-stacking election was made by the purchaser of the policy, but where the insured claimant did not elect non-stacking benefits.

Id. at 1279 & n.2.

The First DCA nevertheless reversed the judgment awarding damages. *Id*. The court noted that Travelers had asserted defenses that might affect the benefits due. *Id.* at 1278. Therefore, a final judgment was inappropriate. *Id.*

Travelers invoked this Court's discretionary jurisdiction. This Court has accepted jurisdiction and has stayed further proceedings in the lower courts.

D. Standard of Review

The certified questions present pure questions of law, which are reviewed *de novo*. *Rando v. Government Emps. Ins. Co.,* 39 So. 3d 244, 247 (Fla. 2010). Both

questions involve interpretation of Florida's UM statute. The Court reviews the interpretation of a statute *de novo*. *Id.*

SUMMARY OF THE ARGUMENT

The Court should answer the first certified question "no" and find no conflict between the "your-auto" provision and section 627.727(3), Florida Statutes. First, one of the two subsections the lower courts cited as the basis for UM coverage does not even apply here. Subsection 627.727(3)(c) requires UM coverage only if the policy excludes liability coverage when permissive drivers using the insured vehicle injure a Class I insured. This policy does not exclude such coverage. In fact, it affirmatively provides coverage in such situations and did so here. Second, Florida courts, including this one, have enforced "your-auto" exclusions in a variety of contexts and have held that a vehicle cannot be insured for one purpose under a policy and *un*insured for another. Third, this Court's decision in *Travelers Insurance Co. v. Warren*, 678 So. 2d 324 (Fla. 1996), compels enforcing the "your-auto" provision and answering the first certified question "no."

If the Court reaches the second certified question, it should answer it "no." Harrington seeks to nullify her mother's valid waiver of stacked UM coverage, arguing that her mother, as the named insured, could not bind her daughter or any other insured. This Court should approve *Mercury Insurance Co. of Florida v.*

Sherwin, 982 So. 2d 1266 (Fla. 4th DCA 2008), and find that Harrington's mother, as the named insured and agent of all other insureds here, could elect non-stacked UM coverage on behalf of all insureds. Otherwise, all insureds here, other than Harrington's mother, would be entitled to three times more UM coverage than the policy's named insured without paying a corresponding premium.

ARGUMENT

I. THE "YOUR-AUTO" EXCLUSION IN HARRINGTON'S POLICY DOES NOT CONFLICT WITH SECTION 627.727(3), FLORIDA STATUTES

Florida law requires that policies insuring vehicles for bodily injury also provide "uninsured motor vehicle coverage." § 627.727(1), Fla. Stat. Florida law also requires that, in limited situations, an insured vehicle be treated as *un*insured:

> [T]he term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency;
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the personal legally entitled to recover damages; or
>
> (c) Excludes liability coverage to a nonfamily member whose operation of an insured vehicle results in injuries to the named insured or to a relative of the named insured who is a member of the named insured's household.

§ 627.727(3), Fla. Stat. The insolvency provision in subsection (a) is not at issue. As we explain below, subsection (3)(c) does not apply, and the policy's "your-auto" exclusion precludes recovery under (3)(b).

A. Subsection (3)(c) Does Not Apply Here Because the Policy Covers Non-Family Members Driving the Insured Vehicle and Injuring a Family Member

Section 627.727(3)(c), Florida Statutes, renders certain insured vehicles *un*insured for UM purposes. Because the circuit court relied on this subsection as a basis for coverage (R2. 220) and because the first certified question cites section 627.727(3) generally, *see Harrington*, 86 So. 3d at 1278, we first explain why that subsection does not apply and is irrelevant to the first certified question.

Subsection (3)(c) applies when an insurer excludes liability coverage for a non-family member driving an insured vehicle that injures the named insured or a relative living in the same household. § 627.727(3)(c), Fla. Stat. This policy does not exclude such coverage. The policy provides bodily-injury liability coverage under Coverage A (A1. 26). While that section lists several exclusions, a non-family member driving an insured vehicle with permission and injuring a family member is not among them (A1. 26-27). Thus, subsection (3)(c) cannot apply because the only exclusion it addresses—and its sole basis for converting an insured vehicle into an *un*insured one for UM purposes—is not one of the policy exclusions.

Not only does no such exclusion exist; this policy affirmatively covers a non-family driver causing injury. Coverage A provides bodily-injury coverage when "any 'insured' becomes legally responsible because of an auto accident" (A1. 26). And the policy defines "insured" to include "[a]ny person using 'your covered auto'" (A1. 26). This plainly includes Williams, the driver who caused Harrington's injury. Travelers conceded such coverage by tendering its $100,000 liability limit to Harrington (R1. 72).

Subsection (3)(c) is not relevant for another reason, which this Court explained in *Travelers Insurance Co. v. Warren*, 678 So. 2d 324 (Fla. 1996). *Warren* described subsection (3)(c) as the legislature's response to *Brixius v. Allstate Insurance Co.*, 589 So. 2d 236 (Fla. 1991), which, due to the combination of family and "your-auto" exclusions, resulted in denial of liability coverage *and* UM benefits to a Class I insured. *Id.* at 327-28. "[T]he legislature amended the UM statute in 1992 to add section 627.727(3)(c) so as to avoid the inequity of denying benefits to a class I insured who had paid for the liability coverage to protect permissive users and had also paid for UM coverage." *Id.* at 328. "Significantly," this Court added, "section 627.727(3)(c) did not stack UM coverage on top of liability coverage under a single policy." *Id.*

By providing liability coverage, this policy protected Harrington with the coverage subsection (3)(c) seeks to ensure. Therefore, that subsection does not

apply. In fact, *Warren* suggests that the Court need not evaluate subsection (3)(c) to answer the first certified question. *See Warren*, 678 So. 2d at 326 (limiting the conflict analysis between a "your-auto" exclusion and section 627.727 to subsection (3)(b)). The first certified question should be restated to address only section 627.727(3)(b).

B. Subsection (3)(b) Does Not Apply Because of the Policy's Limited "Your-Auto" Exclusion, Which Does Not Conflict with Section 627.727(3)

The "Uninsured Motorists Coverage – Florida (Non-Stacked)" section of the policy, Coverage D, provides coverage when "an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury'" (A1. 51). The definition of an "uninsured motor vehicle," however, does not include a vehicle owned by or furnished or available for the regular use of the named insured, the named insured's spouse or a family member "unless it is a 'your covered auto' to which Coverage A of the policy applies *and* bodily injury liability coverage is excluded for any person other than you or any 'family member' for damages sustained in the accident by you or any 'family member'" (A1. 51) (emphasis added). Stated differently, covered vehicles do not become *un*insured if the liability policy covers non-family drivers who injure family members (as was the case here). This is the limited "your-auto" exclusion at issue.

Courts, including this Court, have upheld "your-auto" exclusions even broader than the one here. *See Warren*, 678 So. 2d at 326 ("[T]he policy also provided that '*your* car' – the car insured under the policy – was not an uninsured motor vehicle within the meaning of the policy.") (emphasis in original); *Smith v. Valley Forge Ins. Co.*, 591 So. 2d 926, 927 (Fla. 1992) ("[T]he definition of an uninsured motor vehicle excludes any vehicle that is 'owned by or furnished or available for the regular use of you or any family member.'"); *Brixius v. Allstate Ins. Co.*, 589 So. 2d 236, 237 (Fla. 1991) ("[A]n uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy."), *superseded by statute*, § 627.727(3)(c), Fla. Stat. (1992); *Reid v. State Farm Fire & Cas. Co.*, 352 So. 2d 1172, 1173 (Fla. 1977) ("[A]n 'uninsured motor vehicle' may not be the vehicle defined in the policy as the insured motor vehicle."); *National Mut. Fire Ins. Co. v. Olah*, 662 So. 2d 980, 982 (Fla. 2d DCA 1995) ("[U]ninsured does not include 'any motor vehicle insured under the liability coverage of this policy.'"); *Curtin v. State Farm Mut. Auto. Ins. Co.*, 449 So. 2d 293, 294 (Fla. 5th DCA 1984) ("Under the uninsured motor vehicle coverage, he is also clearly barred by the language of the policy which provides that the vehicle insured under that policy cannot be considered to be an uninsured motor vehicle.").

Courts, including this Court, also have concluded that a vehicle cannot be both insured and *un*insured under the same policy. In *Reid*, 352 So. 2d 1172, this

Court enforced a "your-auto" exclusion providing that "an 'uninsured motor vehicle' may not," without limitation, "be the vehicle defined in the policy as the insured motor vehicle." *Id.*, 352 So. 2d at 1173-74. The Court concluded that the family car in *Reid* was not an "uninsured motor vehicle": "It is insured and it does not become uninsured because liability coverage may not be available to a particular individual." *Id.* The Court concluded that the "your-auto" exclusion was an exception to the general rule that an insurer may not limit UM protection and, thus, did not conflict with section 627.727, Florida Statutes (1975). *Id.* at 1173-74. It added that "the particular restriction on uninsured motorist coverage in the present case is not against public policy and is not void." *Id.* at 1174.

Decades of jurisprudence have only strengthened the principle that a vehicle cannot be insured for one purpose and uninsured for another in the same policy. *See Gares v. Allstate Ins. Co.*, 365 F.3d 990, 995 (11th Cir. 2004) ("Florida's intermediate appellate courts have generally concluded that *Reid* controls where there is one policy providing that an automobile insured under the liability portion of the policy cannot also be an uninsured vehicle."); *Olah*, 662 So. 2d at 982 ("[U]ninsured does not include 'any motor vehicle insured under the liability coverage of this policy.'"); *Allstate Ins. Co. v. Baker*, 543 So. 2d 847, 850 (Fla. 4th DCA 1989) ("[A] vehicle cannot be transformed from an insured vehicle into an

uninsured vehicle simply because liability coverage was barred due to a valid enforceable household exclusion in the same policy.").

The Second DCA's decision in *Olah* is particularly relevant. That case addressed, in a multi-policy context, whether the estate of a passenger killed in a car accident could recover UM benefits in light of a "your-auto" provision. 662 So. 2d at 981-82. The estate had recovered under the car owner's liability policy but was denied liability coverage under the decedent's husband's (the driver's) policies because of family exclusions. *Id.* at 981. The husband's insurer also denied UM coverage because of "your-auto" exclusions. *Id.* The estate sued the husband's insurer, and the circuit court awarded UM damages. *Id.*

Finding the "your-auto" exclusion "clear and unambiguous," the Second DCA reversed. *Id.* at 982-83. The opinion, authored by then-Judge Quince, held that "the vehicle was an insured vehicle under the liability portion of the policy and cannot be uninsured under the same policy." *Id.* at 981. Addressing the argument that the vehicle was uninsured because the first policy did not cover all the damages, the court focused on the policy under which UM benefits were sought and distinguished cases allowing UM benefits because "the vehicles which were declared uninsured were not also insured under the same policies." *Id.* at 982.

In *Olah*, as here, the claimant sought recovery under the liability and UM portions of a policy even though another insurer provided liability coverage and

tendered limits. *See id.* at 981. The Second DCA enforced the "your-auto" provision in that multi-policy context by looking only to the policy under which UM benefits were sought. *Id.* at 982-83. The result should be the same here because, as in *Olah*, payment of UM benefits would require treating a vehicle as insured and uninsured under the same policy.

As it has done before, this Court should enforce the "your-auto" exclusion, conclude that a vehicle cannot be insured for one purpose and uninsured for another under the same policy, and find that the "your-auto" provision does not conflict with section 627.727(3), Florida Statutes. And as in *Olah*, the existence of more than one liability policy should not affect the outcome.

C. This Court's Decision in *Warren* Compels the Conclusion that the "Your-Auto" Exclusion Does Not Conflict with Section 627.727(3)

In *Warren*, this Court answered a variant of the first certified question:

> May an injured person who is entitled to recover bodily injury liability benefits, but whose damages exceed the policy limit for liability coverage, also recover under the same policy for uninsured motorist benefits, where the policy excludes the insured vehicle from its definition of "uninsured vehicle"?

678 So. 2d at 325.[3] Although the case involved a Class II insured instead of a Class I insured, the answer did not depend on the difference between the two

[3] *Warren* was a plurality opinion, but, combined with the concurring opinion, a majority of this Court answered the certified question "no," finding that liability and UM coverage could not be stacked under the same policy.

classes. *See id.* Indeed, the insured suffered the same predicament as Harrington: both claimed damages exceeding liability coverage and both sought UM benefits under the same policy that provided liability coverage.

The policy in *Warren* defined an "uninsured motor vehicle" as including "an insured vehicle 'to which a bodily injury liability insurance policy or bond applies at the time of the accident, but the limits are less than the total damages for bodily injury or death resulting from the accident.'" 678 So. 2d at 326. And the policy, like the one here, contained a "your-auto" exclusion: "[T]he policy also provided that '*your* car' – the car insured under the policy – was not an uninsured motor vehicle within the meaning of the policy." *Id.* (emphasis in original).

In *Warren*, Travelers tendered the liability limit but denied a claim for UM benefits under the same policy. *Id.* Noting that the "'your car' exception would clearly prevent the estate from collecting under both the liability and the UM provisions of the policy," the plurality focused on whether section 627.727(3)(b) "negates the effect of the policy's 'your car' exception." *Id.* The plurality tracked the subsection's legislative history and concluded that the current version ensures that UM coverage "would be excess over liability coverage even in instances where the tortfeasor's liability coverage was greater than the claimant's UM coverage." *Id.* at 327.

As the plurality noted, nowhere does the legislative history suggest that subsection (3)(b) was intended to allow Class II insureds injured in a single-car accident to recover *both* liability and UM benefits under the same policy. *Id.* at 327. Thus, it concluded that subsection (3)(b) "does not stack UM coverage on top of liability coverage under one policy for the benefit of class II insureds." *Id.* More broadly, the plurality concluded: "Having determined that section 627.727(3)(b) does not require a stacking of both liability and UM benefits under the same policy, we therefore conclude that the 'liability insurer' referred to in section 627.727(3)(b) means an insurer other than the insurer providing UM coverage to the claimant." *Id.*

Warren compels answering the first certified question "no." Florida courts have enforced "your-auto" exclusions against Class I and Class II insureds. *See* Section I.B. above. Not only is *Warren* another example of that trend, but it concluded that the broad "your-auto" exclusion in that case—broader than the one here—does not conflict with subsection 627.727(3)(b). *See id.* at 327-29.

Warren also applies because it addressed the issue of Class I insureds. The plurality noted that, if it accepted the lower court's interpretation of subsection (3)(b), "class II insureds [would] be in a better position than class I insureds even though the premiums are paid by class I insureds." *Id.* at 328. This statement suggests that, absent reversal, Class II insureds would be able to stack liability and

UM benefits even though Class I insureds could not. *See id.* In fact, *Warren* goes even further, stating that "a class I insured can never make a claim against the liability provisions of the policy." *Id.* In this case, Travelers provided Harrington, a Class I insured, with liability coverage (R1. 72, 77). Yet the First DCA—contrary to *Warren*—required that Travelers *also* pay UM coverage.

Here, Harrington seeks UM benefits from the same liability insurer (Travelers) from which she obtained the second—allegedly insufficient—liability payment, which *Warren* forbids. *See id.* at 327. The undisputed facts show that Harrington initially sought liability coverage from Nationwide, Williams's insurer (R1. 72). When the $50,000 policy limit did not cover her damages, she turned to Travelers (R1. 72). Travelers then tendered its $100,000 liability limit (R1. 72). Claiming that the additional $100,000 still did not suffice, Harrington again turned to Travelers, this time for UM benefits (R1. 73). Under *Warren*, an insured cannot recover UM benefits from the same insurer whose liability payment did not cover the claimant's damages. *See id*.

D. Public Policy Dictates that a Vehicle Cannot Be Both Insured and Uninsured Under the Same Policy Because an Insurer Has No Subrogation Rights Against Its Own Insured

In *Warren*, a majority of the Court—including both the plurality and the concurring justices—concluded that public-policy concerns dictate that a vehicle cannot be both insured and uninsured under the same policy. As this Court said,

"[w]ithout a subrogation right, there is nothing to distinguish this theory of underinsured motorist coverage from liability coverage." *See id.* at 328 (quoting *Bulone v. United Servs. Auto. Ass'n*, 660 So. 2d 399, 404-05 (Fla. 2d DCA 1995)); *see also id.* at 330 (noting the "fundamental principle of insurance law that an insurer cannot subrogate against its own insured" and that "[t]he right to subrogation against the tortfeasor distinguishes UM coverage from liability coverage") (Wells, J., concurring).

Those public policy considerations still apply. Because Travelers does not have a subrogation right against its own insured, the coverage position Harrington urges would require it to pay the disclosed liability limit *plus* the UM coverage, but without subrogation rights. But if the legislature desires dual coverage without subrogation rights, it "should give the insurance companies notice of the change so that they can increase their premiums to cover the risk." *Warren*, 678 So. 2d at 328 (quoting *Bulone*, 660 So. 2d at 404-05); *see also Fidelity & Cas. Co. of NY v. Streicher*, 506 So. 2d 92, 93 (Fla. 2d DCA 1987) (commenting, in the context of the 1984 UM statute, that "we do not feel it was the intent of the legislature to require that an automobile insurance policy provide both liability and [UM] coverage to the same injured party.").

Decisions from other states, which this Court summarized in *Warren*, apply equally here. 678 So. 2d at 328-29. Without distinguishing between Class I and

Class II insureds, this Court quoted from the treatise, *Uninsured and Underinsured Motorist Insurance*:

> One persuasive reason for sustaining this limitation on the coverage is to preclude transforming uninsured motorist insurance into liability insurance for the operators of a vehicle covered by the applicable motor vehicle policy which includes both coverages. . . . A transformation of underinsured motorist insurance into liability insurance is neither intended by insurers nor contemplated in setting the premiums for the coverage.
>
> …
>
> Where there is a single vehicle accident involving an insured vehicle, sometimes a claimant – usually a passenger in the vehicle – attempts to recover under both the vehicle's liability insurance providing coverage for the driver and the underinsured motorist insurance in the same insurance policy. In these cases, courts have almost uniformly rejected such claims. The result in these cases has sometimes been predicated on the provision in the coverage terms which explicitly precludes treating the "insured vehicle" as an "uninsured vehicle."

Id. at 328-29 (quoting 3 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance*, § 35.7, at 178-82 (2d ed. 1995)). The same concerns apply here.

For all these reasons, the Court should apply *Warren*, answer the first certified question "no" and quash the First DCA's decision. Doing so would render the second certified question moot.

II. MRS. HARRINGTON'S WAIVER OF STACKED UM COVERAGE EXTENDS TO HER DAUGHTER

The second certified question is whether UM benefits are stackable when the named insured waived stacking but another insured, who did not sign the waiver form, claims stackable UM benefits. If the Court reaches the question, the answer should be "no." Answering "no" honors long-recognized principles of agency. It also avoids the windfall that would result here if other insureds, including unforeseen ones, collect three times more UM coverage than the policy's named insured without paying a corresponding premium.

Florida law permits the stacking of UM benefits. *See Rando*, 39 So. 3d at 247-48. Therefore, when an uninsured motorist causes a loss, an insured who pays separate premiums for UM coverage may obtain benefits for each premium paid. *Id.* at 247. But insurers may offer, and insureds may accept, less coverage, including unstacked benefits:

> (9) Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the office, establishing that if the insured accepts this offer:
>
> (a) The coverage provided as to two or more motor vehicles shall not be added together to determine the limit of insurance coverage available to an injured person for any one accident . . .

§ 627.727(9)(a), Fla. Stat.

The statute also establishes the procedure for electing reduced UM benefits, including non-stacked coverage:

> In connection with the offer authorized by this subsection, insurers shall inform the named insured, applicant, or lessee, on a form approved by the office, of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations. If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations.

§ 627.727(9), Fla. Stat.

Harrington's mother—the policy's named insured—elected non-stacked UM benefits by executing a form that complies with section 627.727(9) (R1. 70). The form stated that the rejection was made "on behalf of all insureds under the policy" (R1. 70). Yet Harrington, who did not sign the form (R1. 70, 73), claims that she is entitled to stacked coverage because her mother lacked the power to bind her to the non-stacked option.

According to Harrington, her mother's election of non-stacked coverage cannot bind any other insured because, unlike subsection 677.727(1), it does not state that a waiver will be made "on behalf of all insureds." The First DCA agreed. *Harrington*, 86 So. 3d at 1277-78. Under such a reading, *any* insured under the UM portion of the policy, other than Harrington's mother, may collect stacked UM benefits, even though she, the named insured, elected non-stacked UM coverage

and paid a reduced premium based on that waiver. Such a result would be absurd, and the Court should not interpret a statute in a way that would lead to an absurd result. *See Woodall v. Travelers Indem. Co.*, 699 So. 2d 1361, 1363 (Fla. 1997) (interpreting the UM statute). *See also Maddox v. State*, 923 So. 2d 442, 448 (Fla. 2006) ("although the strict meaning of the words in the abstract employed by the Legislature when it drafted section 316.650(9) may admittedly support the outcome of the First District's opinion . . . , such a sterile literal interpretation should not be adhered to when it would lead to absurd results"); *Continental Ins. Co. v. Roth*, 388 So. 2d 617, 618 (Fla. 3d DCA 1980) ("We envision no rational apportionment of the U/M premium among named insureds, should some want the coverage, and others not[.]").

Instead, the Court should approve the Fourth DCA's reasoning in *Mercury Insurance Co. of Florida v. Sherwin*, 982 So. 2d 1266 (Fla. 4th DCA 2008). *Sherwin*, like this case, involved an attempt to invalidate a waiver of stacked UM benefits despite payment of the lower premium. *See id*. at 1267-68. The named insured, the wife, did not sign the waiver; her husband did. *Id.* When the husband was injured in an accident, he demanded stacked UM benefits. *Id.* The insurer declined stacked benefits, citing the waiver form the husband signed. *Id.* The circuit court declared the waiver form invalid because the named insured did not sign it. *Id.* at 1268.

The Fourth DCA reversed. *Id.* Based on agency principles, it concluded that the husband, "as the applicant and authorized agent, bound himself and his wife, as the named insured, to the coverage he elected." *Id.* (citation omitted). As support, it looked to *Acquesta v. Industrial Fire & Casualty Co.*, 467 So. 2d 284, 285 (Fla. 1985), which it deemed controlling. *Sherwin*, 982 So. 2d at 1268-69. In *Acquesta,* this Court, applying agency principles, agreed that a wife vested with apparent authority to secure insurance validly rejected UM coverage. 467 So. 2d at 285. It also adopted the Fourth DCA's reasoning in that case:

> [The insured] correctly expects the insurance company to be bound by the contract in all respects which are of benefit to him and the law will enforce those expectations. The insurer correctly expects [the insured] to be bound in all respects which are of benefit to it. More precisely, both are entitled to all they bargained and paid for. [The insured], by his agent . . . , chose not to have uninsured motorist coverage and did not pay for it.

Id. (approving *Industrial Fire & Cas. Co. v. Acquesta*, 448 So. 2d 1122, 1123 (Fla. 4th DCA 1984)).

Sherwin and *Acquesta* apply here. In *Sherwin*, as in this case, the claimant did not challenge the family member's authority to secure insurance for the family and its vehicles. *See id.* at 1269. Therefore, the Fourth DCA concluded that the husband acted as his wife's agent when securing insurance and rejecting stacked UM coverage. *Id.* at 1270. Here, Harrington never claimed that her mother lacked authority to secure insurance for her family and its vehicles. Harrington's mother

therefore acted as her agent not only for the purpose of obtaining insurance but also for determining its parameters. After all, "[a] principal may not accept the benefits of a transaction negotiated by the agent and disavow the obligations of that same transaction." *Id.* (citing *C.Q. Farms, Inc. v. Cargill, Inc.*, 363 So. 2d 379 (Fla. 1st DCA 1978)).

The Court should answer "no" to the second question for another reason. The subsection outlining the waiver procedure does not envision execution of waiver forms by anyone other than "a named insured" (here, Harrington's mother), an applicant (again, Harrington's mother), or a lessee. *See* § 627.727(9), Fla. Stat. Accepting Harrington's reading would mean that only waivers by persons falling within the named categories are valid, entitling any other insured to the windfall Harrington seeks here. That, too, would be an absurd result.

CONCLUSION

For the reasons stated, this Court should answer the first question "no," which would render the second question moot. If the Court answers the first question "yes," it should answer the second question "no."

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I certify that, this brief is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.100(l).

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