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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

REPLY BRIEF OF PETITIONER TRAVELERS COMMERCIAL INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES AND OTHER AUTHORITY

ARGUMENT

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

In its initial brief, Travelers explained that section 627.727(3)(c), Florida Statutes, does not apply here and cannot be the basis for a conflict between Travelers' "your-auto" exclusion and section 627.727(3) (br. at 11-13). It also explained why subsection (3)(b) does not apply and why the policy's "your-auto" exclusion does not conflict with that subsection (br. at 13-17). Travelers then demonstrated that *Travelers Insurance Company v. Warren*, 678 So. 2d 324 (Fla. 1996), compels this Court to answer the first certified question "no" (br. at 17-20) and that public-policy concerns raised in *Warren* also compel that answer (br. at 20-22). Harrington's answer brief does not refute these points.

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

Harrington offers three responses to Travelers' argument that section 627.727(3)(c), Florida Statutes, does not apply. She first argues that the Florida Legislature added subsection (3)(c) to provide liability and UM coverage when a non-family permissive driver drives an insured vehicle and injures a Class I passenger (ans. br. at 17, 26, 28). Harrington ignores the subsection's plain text:

> [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:
>
> (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)(c), Fla. Stat. (2009). Thus, subsection (3)(c) applies—and an insured vehicle is treated as uninsured—only when the policy *excludes* liability coverage for a non-family member whose operation of a covered vehicle injures a Class I insured. *See id.* Travelers' policy does not exclude those drivers (A1. 26-27). To the contrary, it specifically covers them and did here (A1. 26 (providing bodily-injury coverage when "any 'insured' becomes legally responsible because of an auto accident" and defining "insured" to include "[a]ny person using 'your covered auto'")). Indeed, Travelers tendered its $100,000 liability limit to Harrington (R1. 72).

To support her interpretation of subsection (3)(c), Harrington selectively quotes from *Bulone v. United Services Automobile Association*, 660 So. 2d 399 (Fla. 2d DCA 1995) (ans. br. at 27-28). But *Bulone* confirms that the legislature passed subsection (3)(c) to remedy the situation where a Class I insured was denied *both* liability and UM coverage because of a "your-auto" exclusion. It also confirms that subsection (3)(c) does not stack liability and UM coverage:

> As a postscript, it is interesting to view the legislative response to *Brixius v. Allstate Insurance Co.*, 589 So. 2d 236 (Fla. 1991). In *Brixius*, the supreme court ruled that a class I insured, injured as a passenger in his or her own car, was not entitled to receive uninsured motorist coverage on the family auto policy when liability coverage was unavailable for the driver, who was a permissive user. Thus, the named insured who had paid for liability coverage to protect permissive users and had also paid for uninsured motorist coverage *received no benefits*. The legislature quickly rectified this situation in chapter 92-318, Laws of Florida, by adding section 627.727(3)(c). The solution does not stack underinsured motorist coverage on top of liability coverage for the class I insured, but simply provides uninsured motorist coverage when a non-family permissive user is not a covered driver for liability insurance purposes.

Id. at 404 n.7 (emphasis added). Citing this language from *Bulone*, in *Warren*, this Court similarly explained the amendment: "Responding to our decision in *Brixius*, the 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." 678 So. 2d at 328 (citing *Bulone*, 660 So. 2d at 404 n.7). The Court added: "Significantly, section 627.727(3)(c) did not stack UM coverage on top of liability coverage under a single policy." *Id.*

Thus, even the cases Harrington cites (ans. br. at 25-28) confirm that subsection (3)(c) provides UM coverage only when the liability policy does not cover a non-family permissive user. *Warren*, 678 So. 2d at 328; *Bulone*, 660 So. 2d at 404 n.7. More importantly, the cases hold that subsection (3)(c) does not

stack liability and UM coverage. *Warren*, 678 So. 2d at 328; *Bulone*, 660 So. 2d at 404 n.7. For both reasons, subsection (3)(c) does not apply here.

Harrington then seems to argue that she is entitled to UM coverage because her liability claim was against the non-family permissive driver and both liability policies were insufficient (ans. br. at 26-27). Harrington cites no authority for this argument. But she does ignore the plain language of subsection (3)(c), which limits that subsection to situations where *no* liability coverage exists for the non-family driver who injures the Class I insured. *See* § 627.727(3)(c), Fla. Stat. Again, the Travelers policy covered the non-family driver (R1. 72; A1. 26-27), rendering subsection (3)(c) inapplicable.

Harrington also argues that subsection (3)(c) applies because the policy covers non-family members driving insured vehicles who injure family members (ans. br. at 29-31). But that is exactly why subsection (3)(c) does *not* apply. Again, under subsection (3)(c), an insured vehicle is treated as uninsured only when the policy *excludes* liability coverage for a non-family member whose operation of a covered vehicle covers a Class I insured. *See* §627.727(3)(c), Fla. Stat. Because here the non-family driver *was* covered (R1. 72; A1. 26-27), subsection (3)(c) does not apply.

To support this last subsection (3)(c) argument, Harrington suggests a novel way of interpreting a policy, "[t]he antithesis of the [p]olicy language" (ans. br. at

30). Harrington provides no authority for interpreting a policy using its purported antithesis (ans. br. at 30-31). Even if courts permitted policy interpretation through antithesis (they do not), Harrington's "antithesis" is incomprehensible, inconsistent, and skewed in her favor (ans. br. at 31).[1]

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)

Harrington wholly fails to acknowledge five of the cases Travelers cites to demonstrate that courts, including this one, have upheld "your-auto" exclusions even broader than the one here (br. at 14). Nor does she address the line of cases holding that a vehicle cannot, in the same policy, be insured for one purpose and uninsured for another (br. at 15-16). Most tellingly, she ignores Travelers' analysis of *National Mutual Fire Insurance Co. v. Olah*, 662 So. 2d 980, 981-83 (Fla. 2d DCA 1995), which, in a similar multi-policy context, enforced a "your-auto" provision by considering only the policy under which UM benefits were sought. *Olah* distinguished cases allowing UM benefits because "the vehicles which were declared uninsured were not also insured under the same policies" (br. at 16-17). Thus, Harrington essentially concedes that (1) this Court and others have upheld

[1] Harrington accompanies this argument with a 14-case string cite composed of cases (with one exception) from 1964 to 1970, none of which address subsection (3)(c), a 1992 amendment (ans. br. at 30). The sole case from the past 40 years addresses whether a motorcycle is a covered vehicle for UM purposes. *See Sommerville v. Allstate Ins. Co.*, 65 So. 3d 558, 562-63 (Fla. 2d DCA 2011).

"your-auto" exclusions; (2) a vehicle cannot be insured for one purpose and uninsured for another under the same policy; and (3) the existence of more than one liability policy does not alter that result.

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

Harrington's subsection (3)(b) argument hinges on one case, *Warren*, 678 So. 2d 324. Harrington argues that the "your-auto" exclusion here conflicts with subsection (3)(b) because, under *Warren*, the term "liability insurer" in subsection (3)(b) refers to "an insured other than the insured providing U/M coverage" (ans. br. at 32-33). While Harrington accurately summarizes this portion of *Warren*, in applying the case here, she ignores relevant facts.

Subsection (3)(b) provides:

> [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:
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages[.]

§ 627.727(3)(b). In other words, an insured vehicle is treated as uninsured if a liability insurer's limits for bodily injury are less than the claimant's damages.

In considering whether a "your-auto" exclusion conflicted with subsection (3)(b), *Warren* focused on the term "liability insurer." 678 So. 2d at 327. A

plurality of this Court concluded that "liability insurer" means an insurer *other than* the insurer providing UM coverage to the claimant. *Id.* 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, the non-family-member driver's insurer (R1. 72). When that $50,000 policy limit did not cover her damages, she turned to Travelers (R1. 72). Travelers then tendered its own $100,000 liability limit (R1. 72). Claiming that those limits still did not suffice, Harrington again turned to Travelers, this time for UM benefits (R1. 73). But under *Warren*, an insured, like Harrington, cannot recover UM benefits from the same insurer whose liability payment did not cover the claimant's damages. *See id*.

Harrington's argument ignores the second liability payment from Travelers, mentioning only the Nationwide payment (ans. br. at 32-33). But Harrington did not request liability coverage only from Nationwide (R1. 72). She requested coverage from Travelers, which tendered its limits (R1. 72). Under *Warren*, that second liability payment from Travelers—the same liability insurer from which Harrington later sought UM benefits (R1. 73)—removes this case from subsection (3)(b) and prohibits treating the vehicle here as uninsured. *See id.*

Harrington also generally claims that the lower courts' decisions comport with *Warren* (ans. br. at 33). But contrary to her assertion (ans. br. at 33), *Warren* did not construe subsection (3)(c) as applying when a Class II permissive user operates the insured's family vehicle and causes injury to the Class I passenger. In fact, *Warren* limited its conflict analysis to subsection (3)(b). *Id.* at 326. And 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.* at 327. Addressing Class I insureds like Harrington, the plurality noted that, if it let the DCA decision in that case stand, "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, without this Court's decision in *Warren*, Class II insureds would have been able to stack liability and UM benefits even though Class I insureds could not. *See id.* In other words, Harrington could not stack both types of coverage. *See id.* For this reason and all others in Section I.C. of Travelers' initial brief, *Warren* compels answering the first question "no."

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 response to Travelers' public-policy argument (br. at 20-22), Harrington argues that Travelers waived its subrogation rights "when it consented to tender of

the liability coverage from Nationwide" (ans. br. at 34). Once again, Harrington cites no authority.

Speaking generally on the issue of subrogation, Travelers noted that, 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 (br. at 20-21). Among those concerns was the fact that, "[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*, 660 So. 2d at 404-05); *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).

Travelers' consent to Nationwide's tender of its liability coverage does not alter these public-policy considerations, which address Travelers' inability to subrogate against *its* insured. As *Warren* noted, 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." *Id*, 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."). Travelers' treatment of liability limits another insurer tenders does not negate this public-policy concern.

E. The Court Should Reject the Florida Justice Association's Suggestion That It Recede From *Reid*

Recognizing, unlike Harrington, that courts have long held that a vehicle cannot be both insured and uninsured under the same policy (br. at 14-17), Amicus Curiae Florida Justice Association suggests that the Court recede from *Reid v. State Farm Fire and Casualty Company*, 352 So. 2d 1172 (Fla. 1977) (FJA br. at 3, 5-10). In *Reid*, this Court first held that "[A]n 'uninsured motor vehicle' may not be the vehicle defined in the policy as the insured motor vehicle." *Id.* at 1173. As FJA concedes (FJA br. at 3, 5-6), for decades state and federal appellate courts have applied *Reid* in a variety of contexts. In other words, FJA asks the Court to overturn an entire line of cases addressing different policy exclusions and types of claims simply to achieve the result it desires here. Implicitly, FJA also asks the Court to nullify by judicial ruling any legislation, including subsection (3)(c), passed to create an exception to this line of cases. The Court should decline the invitation.[2]

[2] FJA also asks the Court to reinstate *Mullis v. State Farm Mutual Automobile Insurance Co.*, 252 So. 2d 229, 238 (Fla. 1971) (br. at 4-5), *superseded by statute*, § 627.727(9)(d), Fla. Stat. (1987). Over four decades ago, *Mullis* held that "[t]he only exception permitted by the [UM] statute is 'where any insured named in the

FJA's primary support for receding from *Reid* is *Allstate Insurance Co. v. Boynton*, 486 So. 2d 552 (Fla. 1986), which distinguished *Reid* in a footnote because it did not address separate policies. *Id.* at 555 n.5. FJA ignores that this case also does not involve separate policies for purposes of this analysis. As explained above, Harrington's claim for UM coverage is against the *same* Travelers policy from which she already recovered liability limits. Moreover, as the Eleventh Circuit noted in *Gares v. Allstate Insurance Co.*, 365 F.3d 990, 994 (11th Cir. 2004), "the Florida Supreme Court's opinion in *Boynton* does not say whether the automobile at issue in *Boynton* was also, somehow, an insured automobile under the liability portion of the injured mechanic's policy. The opinion also does not state whether the policy contained a clause, similar to the one in *Reid*, providing that an uninsured automobile could not be an automobile covered under the liability portion of the policy." In other words, the *Boynton* footnote does not distinguish *Reid,* as FJA claims, because it did not address the policy at issue in *Reid*.

FJA then asks the Court to decide the first issue based on section 627.727(9), Florida Statutes, which is outside the scope of the certified question. But even the FJA must acknowledge that subsection (9) has not been addressed and is not at play (FJA br. at 10). As a result, this Court should not address that argument. *See*

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policy shall reject the coverage.'" That, too, would require overturning decades of case law and nullifying decades of legislative labor.

Chames v. DeMayo, 972 So. 2d 850, 853 n.2 (Fla. 2007) (declining to address issues outside the scope of the certified question).

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

Travelers' initial brief noted the absurdity of the First DCA's reading of section 627.727(9), Fla. Stat. (br. at 24-25). Affirming the First DCA's view would result in *any* insured under the UM portion of the policy, other than Harrington's mother, collecting stacked UM benefits even though Harrington's mother, the named insured, elected non-stacked UM coverage and paid a correspondingly reduced premium. Harrington does not address this issue or the windfall that would result to even unforeseen insureds (*see* br. at 23-25).

Instead, Harrington claims that the First DCA's decision cannot conflict with *Mercury Insurance Co. of Florida v. Sherwin*, 982 So. 2d 1266 (Fla. 4th DCA 2008), because a "case can only be reviewable on discretionary review before this Court if the conflict can be demonstrated from the district court of appeal's opinion" (ans. br. at 39). But footnote 2 of the First DCA's opinion expressly disagrees with *Sherwin*. *See Travelers Commercial Ins. Co. v. Harrington*, 86 So. 3d 1274, 1279 n.2 (Fla. 1st DCA 2012). Travelers argued conflict with *Sherwin* in its jurisdictional brief (at 9-10), and this Court accepted jurisdiction.

Harrington also attempts to avoid analyzing *Sherwin* by arguing that the case was decided on agency principles (ans. br. at 39-40). But agency principles apply

here, too. Travelers argued that agency principles governed and compelled a finding that Harrington's mother could bind all insureds (R1. 89). And, like the claimant in *Sherwin*, Harrington never argued that her family member lacked authority to secure insurance for the family and its vehicles. *See Sherwin*, 982 So. 2d at 1269. Harrington's mother therefore acted as her agent not only for the purpose of obtaining insurance but also for determining its parameters. Because "[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)), agency issues must be addressed to resolve the second certified question. Based on *Sherwin* and *Acquesta v. Industrial Fire & Casualty Co.*, 467 So. 2d 284 (Fla. 1985), which Harrington does not address, the Court should resolve those issues in Travelers' favor.

CONCLUSION

For the reasons stated here and in the initial brief, 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."

Respectfully submitted,

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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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