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IN THE SUPREME COURT,
STATE OF FLORIDA

CASE NO: **71,222**

VALIANT INSURANCE COMPANY,

Defendant, Petitioner,

vs.

JANET WEBSTER, as Personal Representative of the Estate of CHRISTOPHER BAINE MANNIEL, Deceased,

Plaintiff, Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

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PREFACE

For purposes of this petition, the following references shall be used. All citations to the record shall be indicated as "(A__)". Appellant, VALIANT INSURANCE COMPANY, shall be referred to as Defendant, Petitioner, or shall be referred to by name, VALIANT. Appellee, JANET WEBSTER, shall be referred to as Plaintiff, Respondent, or by name, WEBSTER.

STATEMENT OF THE CASE AND FACTS

This is a petition to invoke the discretionary jurisdiction of the Supreme Court pursuant to 9.030(a)(2)(A)(iv). The underlying opinion of the Fifth District Court of Appeal expressly and directly conflicts with prior decisions of the Supreme Court and other District Courts of Appeal on the same questions of law. The case arises from the denial of a claim for uninsured motorist coverage in the context of a wrongful death claim. Specifically, the decedent, CHRISTOPHER MANNIEL, was killed by an uninsured motorist. CHRISTOPHER was survived by his divorced parents, JANET WEBSTER and Clyde Manniel. Prior to his death, CHRISTOPHER resided with his mother separate and apart from his father. Consequently, all parties agree CHRISTOPHER was not an insured under his father's policy.

JANET WEBSTER as Personal Representative of the Estate of CHRISTOPHER MANNIEL, brought a claim against VALIANT INSURANCE COMPANY, the insurance carrier of the father, Clyde Manniel, for uninsured motorist benefits to cover Clyde Manniel's survivor damages. The trial court ruled VALIANT's insurance coverage did not apply. The Fifth District Court of Appeal reversed and this petition for discretionary review follows.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal holds that a survivor's insurance policy is applicable to a particular accident notwithstanding the decedent is not an insured under the policy. The decision directly and expressly deviates from the established principle of law regarding uninsured motorists that uninsured motorist coverage under a given policy is the mutual equivalent of the liability coverage of that policy. Mullis v. State Farm Automobile Ins. Co., 252 So.2d 229 (Fla. 1971). The decision also ignores the established principle of law regarding wrongful death that a survivor's claim is derivative of the decedent. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1984). Finally, the decision departs from established Florida law regarding the Impact Rule. Champion v. Gray, 478 So.2d 17 (Fla. 1985).

In light of the above serious conflicts, this Court should accept jurisdiction of this case. This is especially true since the decision has effectively rewritten uninsured motorist coverage and seriously jeopardized the uninsured motorist industry of this state.

ARGUMENT

THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL ON THREE SEPARATE PRINCIPLES OF LAW: (1) LIABILITY OF AN INSURER PURSUANT TO UNINSURED MOTORIST PROVISIONS IS ONLY AS BROAD AS LIABILITY OF AN INSURER PURSUANT TO LIABILITY COVERAGE PROVISIONS; (2) A SURVIVOR'S CLAIM PURSUANT TO THE WRONGFUL DEATH ACT IS DERIVATIVE THROUGH THE DECEDENT; AND (3) THE IMPACT RULE PRECLUDES AWARDING DAMAGES FOR PAIN AND SUFFERING WHERE NO PHYSICAL IMPACT HAS OCCURRED.

The opinion of the Fifth District Court of Appeal in the instant case is deceptively simple in its logic and must be carefully analyzed to realize that it is directly contrary to certain established principles of Florida law. The opinion has broadened the entire scope of uninsured motorist coverage by effectively rewriting the basic provisions of uninsured motorist insurance policies and misconstruing the uninsured motorist statute. As a direct consequence of this opinion, the entire rating approach for uninsured motorist coverage is jeopardized and established precedents of Florida law are called into question.

The cause of action arose out of an automobile accident where the decedent, Christopher Manniel, was killed as the result of a collision with a car driven by an uninsured motorist. (Al) The decedent was survived by his divorced parents. At the time of the accident, the decedent resided with his mother and was not a resident of his father's household. (Al) Consequently he was not an insured under his father's automobile insurance policy

provided by VALIANT. (A2) Notwithstanding the fact that the decedent was concededly not an insured under Valiant's policy of insurance, the Fifth District Court of Appeal ruled that Valiant's insurance policy still applied to the accident and covered the father's survivor damages recoverable pursuant to the Wrongful Death Act. (A4)

The court focused on the fact that the claim was for the surviving father, that the father was an insured under the policy and that the accident involved an uninsured motorist. This syllogistic reasoning ignores the required nexus that an insurance policy apply to a given accident before coverage arises for particular damages, a nexus Florida courts have consistently required. In so holding, the appellate court broadened the scope of application for uninsured motorist coverage beyond the scope of liability coverage, ignored the derivative nature of a survivor's claim under the Wrongful Death Act, and departed from the Impact rule, all in direct contravention of established Florida law.

SCOPE OF UNINSURED MOTORIST COVERAGE:

The fundamental tenet of uninsured motorist coverage has always been: If the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorist provisions would likewise be applicable. Conversely, if the liability provisions of an insurance policy would not apply to a given accident the uninsured motorist provisions of that policy would not apply either.

This tenet was recognized and applied in Mullis v. State Farm Automobile Ins. Co., 252 So.2d 229 (Fla. 1971) by the Florida Supreme Court in analyzing the scope of coverage provided by Florida's Uninsured Motorist Statute. There the Supreme Court held:

> In sum, our holding is that uninsured motorist coverage prescribed by 8627.0851 is statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage prescribed by the Financial Responsibility Law, i.e., to say coverage where an uninsured motorist negligently inflicts bodily injury or death upon a named insured, or any of his family relatives resident in his household, or any lawful resident in his household, or any lawful occupants of the insured automobile covered in his automobile liability policy. 252 So.2d at 237-38.

The above principle that the scope of a policy's uninsured motorist coverage tracks the scope of its liability coverage has been consistently applied by the District Courts of Appeal of this state. In France v. Liberty Mutual Ins. Co., 380 So.2d 1155 (Fla. 3d DCA 1980) Liberty Mutual defined an "insured" for both purposes of liability coverage and uninsured motorist coverage as any person related by blood or marriage who was a resident of the same household provided that the person did not own a private passenger automobile. The court upheld the definition even in the face of public policy challenges since the uninsured motorist section of the policy provided coverage coextensive with the liability section.

The tracking principle of Mullis has also been applied in a converse situation. In Auto-Owners Ins. Co. v. Bennett, 466 So.2d 242 (Fla. 2d DCA 1984) a plaintiff brought a claim for

uninsured motorist benefits against his insurance carrier when his son died in an automobile accident. The court held uninsured motorist coverage was available since the liability coverage of the policy would have applied to the accident. In fact, the Fifth District Court of Appeal recognized this tracking principle in Auto-Owners Ins. Co. v. Queen, 468 So.2d 498 (5th DCA 1985) and followed the dictates of Mullis and the legal reasoning of Bennett and France.

The principle espoused in Mullis and followed in France, Bennett and Queen requires the scope of coverage under uninsured motorist provisions to be equivalent to and apply to situations where the liability coverage of the policy would apply. However, the decision of the Fifth District Court of Appeal in Webster v. Valiant Ins. Co. vitiates this principle by determining uninsured motorist coverage applies to the accident even though all parties agree the liability coverage of the policy would not apply to the accident. Specifically, the court acknowledges that the decedent was **not** a covered person under either the liability or uninsured motorist provisions of the policy. (A2) Consequently, the named insured's liability coverage would not apply to this accident. Notwithstanding, the Fifth District Court of Appeal's decision provides the uninsured motorist provisions of the insurance policy did apply to the automobile accident and covered the father's survivor damages.

DERIVATIVE NATURE OF SURVIVOR'S CLAIM:

The above conflicting result arises from the Fifth District's refusal to recognize the derivative nature of a survivor's claim under the Wrongful Death Act. Although this Court has consistently noted the independent right of a survivor to sue under the Wrongful Death Act, **See**, e.g. Nissan Motor Co. v. Phlieger, **12** F.L.W. 256 (Fla. **1987),** all prior decisions of the Florida Supreme Court have recognized the derivative nature of a survivor's claim. No prior Florida decision has allowed a survivor to recover where the decedent could not have recovered. For example, the Supreme Court has held that a survivor's claim is reduced due to the comparative negligence of a decedent Hoffman v. Jones, **280** So.2d **431** (Fla. **1973).** Similarly, a prior judgment for personal injuries will bar a cause of action for wrongful death brought when the injured party subsequently dies. Variety Children's Hospital v. Perkins, **445** So.2d **1010** (Fla. **1984).**

The Webster opinion directly conflicts with this established principle by allowing a survivor to recover where it is conceded the decedent could not recover. This amounts to nothing less than the substitution of a survivors uninsured motorist insurance policy for the missing uninsured motorist insurance policy of a decedent.

ABROGATION OF THE IMPACT RULE:

Finally, if it were assumed the survivor's claim was not derivative, the Webster opinion conflicts with established

Florida law regarding the Impact Rule. In Champion v. Gray, 478 So.2d 17 (Fla. 1985), and Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985) the Florida Supreme Court revisited Florida's "Impact Rule" which bars a plaintiff recovery for emotional distress caused by the negligence of another absent some form of physical impact. In those cases the Court reviewed the policy arguments that supported application of the Impact Rule and determined the Rule would be modified to allow a cause of action for emotional distress where these damages were accompanied by discernible physical injuries. However, the court reaffirmed the Impact Rule to the extent it denied recovery for emotional damages where no demonstrable physical injury existed.

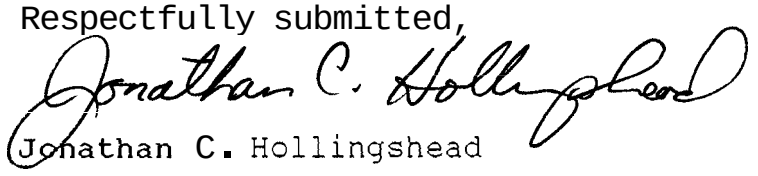
The Fifth District's opinion, by ignoring the derivative nature of a survivor's claim and allowing the father's claim for emotional damages absent physical impact disregards the Impact rule and directly conflicts with Champion and Brown. There was no allegation either raised at the trial level or on appeal to indicate that the father has suffered any demonstrable physical injury and is claiming any emotional damages for such injury. Instead the father seeks to recover the pain and suffering allowed under the Wrongful Death Statute for a survivor. By ignoring the nexus between the father's emotional claims from any impact visited on the decedent, the Fifth District's opinion conflicts with the Impact Rule.

CONCLUSION

The Fifth District Court of Appeal has utilized a very simplistic approach to a convoluted claim and in so doing has conflicted with at least three distinct and well-established principles of law set forth by this court and followed by other district courts of appeal. Allowing the decision of the Fifth District Court of Appeal to stand calls into question the continued validity of the tracking principle set forth in Mullis; the derivative nature of a survivor's claim set forth in Hoffman and Perkins and the Impact Rule set forth in Champion and Brown.

Additionally, the opinion has dire ramifications for the insurance industry. Established Florida law has created a framework by which insurance underwriters may accurately rate risks. In deviating from these established principles, the Webster Court has substantially broadened uninsured motorist coverage beyond the scope of liability coverage. This deviation not only broadens previously established risks but also destroys the underlying rating premises, leaving underwriters incapable of accurately assessing the newly broadened risks. Consequently this decision has served to exacerbate an already critical situation in the insurance industry.

Respectfully submitted,



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