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 REPLY 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 "(R__)". 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. The decedent CHRISTOPHER MANNIEL shall be referred to as decedent or by name. CHRISTOPHER's father CLYDE MANNIEL shall be referred to by name or as the survivor.

SUMMARY OF ARGUMENT

Florida law has long recognized that uninsured motorist coverage in a given policy is the mutual equivalent of the liability insurance in that policy. Mullis v. State Farm Mut. Automobile Ins. Co., 252 So.2d 229 (Fla. 1971). In other words, if a given policy's liability insurance would apply to a particular accident, then the uninsured motorist provisions of that policy would likewise apply to the accident. Florida has also recognized that the uninsured motorist statute was not intended to expand uninsured motorist coverage beyond that contemplated by the insurance-industry-developed endorsement. See, e.g., Allstate Ins. Co. v. Boynton, 486 So.2d 552 (Fla. 1986). Consequently, the endorsements in the given case and Florida Statutes contemplate that uninsured motorist coverage can apply in a wrongful death claim context. However, it is the insurance coverage of the person who suffers bodily injuries (the decedent) that applies to the claim of the estate and of the survivors. If the person who suffers bodily injuries or death is not an insured under the insurance policy, the insurance policy does not apply to the accident.

The opinion of the Fifth District Court of Appeal is in conflict with all of the above principles and deviates from the entire prior decisional law concerning the uninsured motorist statute. As such, the decision should be quashed and the opinion of the trial court reinstated.

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 SEVERAL PRINCIPLES OF LAW BY APPLYING UNINSURED MOTORIST COVERAGE TO AN ACCIDENT WHICH DID NOT INVOLVE EITHER A PERSON OR VEHICLE INSURED UNDER THE POLICY.

Respondent gives several arguments why the decision of the Fifth District Court of Appeal should be upheld in the instant case. First, Respondent contends that all prior Florida case law should be distinguished based on the fact that various decisions deal with personal injury claims instead of claims under the wrongful death statute.

The wrongful death statute does create separate elements of damages for survivors. However, Respondent's position fails to acknowledge the derivative nature of a survivor's claim in a wrongful death action. Neither the law of tort, the law of contract, insurance policies, or the uninsured motorist statute itself distinguishes between a personal injury cause of action and a wrongful death cause of action. As previously noted, general tort law applies with equal force in the wrongful death context. See, e.g., Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The Fifth District's decision in Valiant departed from all prior uninsured motorist case law when it failed to acknowledge the mutual equivalent concept of Mullis and applied a policy's UM coverage where that same policy's liability coverage would never come into play.

Respondent goes on to contend that the clause in the insurance policy requiring that the injury be "sustained by the insured" was held void as against public policy in Davis v. United States Fidelity & Guaranty Co., 172 So.2d 485 (Fla. 1st DCA 1965). However, a careful reading of Davis establishes that the discussion was unnecessary to the holding of the opinion and therefore obiter dictum. In Davis, the injured party (the decedent) was an insured under the insurance contract. Therefore, the insurance policy did provide coverage for that injury, both for the estate's damages and the survivor's. As argued in the main brief, when an insured dies at the hands of an uninsured motorist, both the uninsured motorist statute and the insurance policy itself consider the wrongful death cause of action to be covered by insurance: the decedent as a class I or class II insured and the survivors as insureds under the third definition in the policy (see argument in Petitioner's Initial Brief pp. 25-26). Therefore, in Davis, the uninsured motorist policy of the insured decedent covered the claims of the estate and the widow survivor. Davis relied in part on the prior opinion of Zeagler v. Commercial Union Insurance Co. of New York, 166 So.2d 616 (Fla. 3d DCA 1964), cert. denied, 172 So.2d 450 (Fla. 1965). In Zeagler, the named insured himself died as a result of injuries he received in an automobile accident with an uninsured motorist. The Third District Court of Appeal again construed the insurance policy of the decedent as providing insurance coverage to the decedent's estate and survivors.

Petitioner in the instant case does not quarrel with these rulings under the facts of those cases. However, neither the Davis nor Zeagler opinion are applicable to the instant facts. In this case it is conceded that the decedent, the person who suffered the bodily injuries (i.e., CHRISTOPHER MANNIEL), was not an insured under the insurance policy of the named insured (i.e., CLYDE MANNIEL). Instead, coverage is sought from a policy that does not cover either an insured or a car that was involved in this accident. This is in complete derogation of all prior uninsured motorist decisions of this state.

Respondent cites the case of Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986) as instructive on the historical basis for uninsured motorist coverage. That opinion sites A. Widiss, A Guide to Uninsured Motorist (1969) as noting that uninsured motorist legislation was an attempt to forestall enactment of compulsory liability insurance requirements. However, this historical note was made by the Court in Bovnton (and by the author Mr. Widiss in his book) to emphasize the fact that uninsured motorist coverage was not originally a legislative enactment but was instead a creation of the insurance industry and basically is a contract provision that legislatures have since generally adopted by reference. Boynton noted that the uninsured motorist statute does not specifically define all provisions of uninsured motorist coverage. The Court noted:

> While Florida's section 627.727 does go into some detail regarding UM coverage, the first sentence of the statute, containing the language at issue here, merely

> defines UM coverage in terms sufficient to identify it as such. This does not suggest any legislative intent to expand UM coverage beyond that contemplated by the insurance-industry-developed endorsement. 486 So.2d at 557.

Notwithstanding this acknowledgment that UM coverage mandated by the statute does not go beyond that contemplated by the insurance-industry-developed endorsements, the Fifth District Court of Appeal in the instant case construed the statute to do exactly that. Specifically, the insurance industry uninsured motorist endorsement contemplates claims being brought for bodily injury or death suffered by: the named insured or a resident relative (class I insureds), See, e.g., Mullis v. State Farm Automobile Ins. Co., 252 So.2d 229 (Fla. 1971); any insured who is injured while riding in an insured vehicle (class II insureds); and a third group of claimants, who are those persons who sustain damages because of injuries to class I or class II insureds. In other words, if the person who suffers bodily injury or death is insured under the policy, the uninsured motorist insurance covers the specific insured's damages and the people who have consequential damage claims because of the bodily injury to the insured. Conversely, if the person who sustained bodily injuries or death is not an insured, coverage does not apply to the injured party or to the people with consequential damage claims. In this latter situation, Alan Widiss, in his second edition of A Guide to Uninsured Motorist Coverage (1969), newly titled Uninsured and Underinsured Motorist Insurance (2d Ed. 1987) has noted that "If an injured person is not covered as

either a clause (a) [Mullis class I] or clause (b) [Mullis class II] insured, persons who sustain consequential damages are not entitled to indemnification under the provisions used in most uninsured motorist insurance policies." A. Widiss, Uninsured and Underinsured Motorist Insurance, 86.1, p. 174 (2d Ed. 1987) [hereinafter A. Widiss] (emphasis added). However, the Fifth District in the instant case erroneously construed the statute to require coverage to a person who has sustained consequential damages even though it is conceded that the injured party was neither a class I nor class II insured.

Respondent next contends that uninsured motorist coverage is offered in Florida instead of compulsory liability insurance and that consequently this forecloses the Petitioner in this case from denying coverage. However, this conclusion cannot logically be drawn from its premise and the premise itself incorrectly states the history of uninsured motorist insurance. The commentator cited in the Boynton opinion noted that one probable reason uninsured motorist coverage was initially offered by carriers was to forestall legislative enactments creating compulsory liability coverage. However, assuming for purposes of argument that this was one reason for originally offering uninsured motorist coverage, the commentator went on to note that the endorsement was unsuccessful in this attempt. A. Widiss 81.10. In 1956, New York became the second state in the union to enact laws requiring compulsory liability insurance for automobile drivers. Id.

But neither New York nor other jurisdictions view compulsory liability insurance as a replacement for uninsured motorist coverage. This is because compulsory liability insurance has not been the answer to uninsured motorists. Even in states with compulsory liability insurance laws, some drivers still drive without insurance. Additionally, a great number of drivers drive with compulsory liability insurance which proves to be insufficient coverage for a given accident and underinsured motorist claims are then pursued. A. Widiss, Chapter 1. Consequently uninsured motorist coverage and compulsory liability insurance are not mutually exclusive and indeed co-exist in many states of the union.

Historically, uninsured motorist coverage has not been the mutually exclusive alternative to compulsory liability insurance as the Respondent claims. Consequently, the fact that Florida does not have compulsory liability insurance has no bearing on this case. In point of fact, the tortfeasor in the instant case was alleged to be underinsured, not uninsured. (R2) Presumably the tortfeasor's insurance would have complied with any hypothetical compulsory liability insurance law, yet Respondent would still be pursuing this underinsured motorist claim.

VALIANT urges this Court to adopt the reasoning of the opinions in other jurisdictions which construe similar uninsured motorist statutes and hold those statutes only require coverage for accidents where the insured suffers bodily injuries or death. See, e.g., Bakken v. State Farm Mut. Ins. Co., 139 Ariz. 196, 678

P.2d 481 (Ariz. Ct. App. 1983); Smith v. Royal Insurance Company of America, 186 Cal.App.3d 239, 230 Cal.Rptr. 495 (Calif. Ct. App. 5th Dist. 1986); LaFleur v. Fidelity & Casualty Co. of New York, 385 So.2d 1241 (La. Ct. App. 3d Cir. 1980); Spurlock v. Prudential Ins. Co., 448 So.2d 218 (La. Ct. App. 1st Cir. 1984); Gillespie v. So. Farm Bureau Cas. Ins. Co., 343 So.2d 467 (Miss. 1977).

Certainly no out of state opinion is binding in this jurisdiction. However, these foreign jurisdictions' opinions carefully set forth the reasoning why the Respondent's argument is specious. Additionally, these jurisdictions are in accord with Florida law on collateral issues. For example, Florida has long recognized that there is only one limit of liability on a insurance policy notwithstanding the number of survivors in a given wrongful death claim or the number of derivative claims in a given bodily injury claim. See, e.g., Florida Insurance Guaranty Assn. v. Cope, 405 So.2d 292 (Fla. 2d DCA 1981); Mackoul v. Fidelity & Casualty Co. of New York, 402 So.2d 1259 (Fla. 1st DCA 1981); Biondino v. Southern Farm Bureau Cas. Ins. Co., 319 So.2d 152 (Fla. 2d DCA 1975); Skroh v. Travelers Ins. Co., 227 So.2d 328 (Fla. 1st DCA 1969). Each of the above cited foreign jurisdictions similarly hold one limit of liability applies in a wrongful death situation notwithstanding the number of survivors of a given insured decedent. See, e.g., Bakken; Vansuard Ins. Co. v. Schabatka, 46 Cal.App.3d 887, 120 Cal. Rptr. 614 (Cal.Ct.App. 4th Dist. 1975); Lopez v. State Farm Fire & Cas.

Co., 250 Cal.App.2d 210, 58 Cal.Rptr. 243 (Cal.Ct.App. 1st Dist. 1967); Graham v. American Cas. Co. of Reading, PA, 261 La. 85, 259 So.2d 22 (La. 1972); U. S. F. & G. Co. v. Pearthree, 389 So.2d 109 (Miss. 1980). Conversely, one of the only two jurisdictions that have allowed a claim similar to the respondent's has now been logically forced to hold that separate limits of liability of uninsured motorist insurance apply to a survivor and an estate in a wrongful death context. See, e.g., Auto-Owners Mut. Ins. Co. v. Lewis, 10 Ohio St. 3d 156, 461 N.E.2d 396 (Ohio 1984). Certainly Arizona, California, Louisiana and Mississippi appear more in line with Florida's approach to uninsured motorist law and the reasoning of those jurisdictions's opinions are persuasive in clarifying the law of this jurisdiction.

Finally, the Respondent contends that a reversal of the Fifth District Court of Appeal decision will deny the Respondent *any* cause of action for wrongful death. This is simply not the case. Reversing the Fifth District Court of Appeal and clarifying that Florida law requires an insured suffer bodily injuries before insurance coverage applies to a given wrongful death claim has no effect whatsoever on Respondent's claim against the third party tortfeasor. The issue in this case is not, and has never been, whether the father of the decedent has a cause of action against a third party for the wrongful death of his son. The issue is whether the father's insurance carrier provides coverage for an accident that did not involve either an

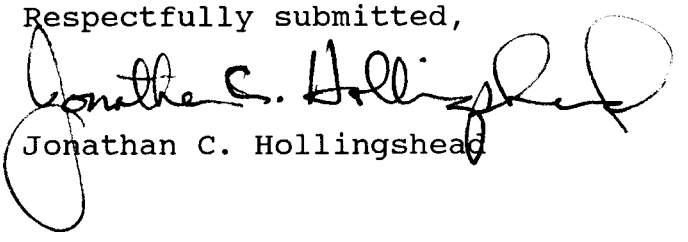
insured party or insured vehicle. Neither the Petitioner, the insurance industry, Florida Statutes, nor the father himself, ever contemplated that this insurance policy provided coverage for any accident where no person insured under the policy suffered bodily injuries and no car insured under the policy was involved in the accident. This is simply an attempt to expand uninsured motorist coverage beyond the scope of mutual reciprocal liability insurance and beyond the scope of the industry contemplated coverage. As such it is an impermissible extension of uninsured motorist coverage beyond the dictates of Mullis v. State Farm. Consequently, the Fifth District Court of Appeal's decision should be quashed and the trial court's order denying coverage reinstated.

CONCLUSION

The Fifth District Court of Appeal's decision in WEBSTER V. VALIANT INSURANCE CO. has eroded Florida's long-standing approach to uninsured motorist claims espoused in Mullis v. State Farm Automobile Ins. Co.: that being, that uninsured motorist insurance is the mutual reciprocal of liability insurance of a given policy. In doing so, the District Court of Appeal has departed from established construction of uninsured motorist policies in general, departed from prior precedent of this Court and other District Courts of Appeal and followed the ill-conceived approach of a minority of other jurisdictions.

The Fifth District's opinion has created a ratings nightmare for the insurance industry and has seriously jeopardized uninsured motorist insurance coverage for all citizens for the State of Florida. It is urged that the situation be corrected by quashing the opinion of the District Court of Appeal and that the appropriate and logical construction of the statute be clarified so that stability and uniformity are reinstated in Florida's uninsured motorist decisions.

Respectfully submitted,



Jonathan C. Hollingshead

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U. S. Mail this 12th day of April, 1988, to: Paul Bernardini, Esq., Larue, Bernardini, Seitz & Berg, Post Office Drawer 2200, Daytona Beach, FL 32015-2200; Cynthia S. Tunnicliff, Esq., Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, Post Office Drawer 190, Tallahassee, FL 32302; and Betsy E. Gallagher, Esq., Kubicki, Bradley, Draper, Gallagher & McGrane, 25 West Flagler Street, Penthouse, Miami, FL 33130.

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