App 107

047

IN THE SUPREME COURT,
OF FLORIDA

CASE NO: **73,836**

ROBERT EDWIN EIBERT, and
LIBERTY MUTUAL INSURANCE COMPANY,

Defendant/Petitioner,

vs.

MATTHEW L. McNAMARA, JR., and
SHARON McNAMARA, as Co-Personal
Representative of the Estate
of MATTHEW L. McNAMARA, III, and
HELEN GIBBS, as mother and next
friend of RACHEL LEONA McNAMARA-
GIBBS, a minor child,

Plaintiff/Respondent.

PETITIONER'S INITIAL BRIEF

JONATHAN C. HOLLINGSHEAD, ESQ.
Fisher, Rushmer, Werrenrath,
Keiner, Wack & Dickson, P.A.
Post Office Box **712**
Orlando, FL **32802**
Fla. Bar #307726
407/843-2111

Attorneys for LIBERTY MUTUAL
INSURANCE COMPANY

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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, LIBERTY MUTUAL INSURANCE COMPANY, shall be referred to as Defendant, Petitioner, or shall be referred to by name, LIBERTY MUTUAL. Appellees, MATTHEW L. McNAMARA, JR., and SHARON McNAMARA, as Co-Personal Representative of the Estate of MATTHEW L. McNAMARA, III, and HELEN GIBBS, as mother and next friend of RACHEL LEONA McNAMARA-GIBBS, a minor child, shall be referred to as Plaintiffs, Respondents, or by name.

STATEMENT OF THE CASE AND FACTS

MATTHEW L. MCNAMARA III was the son of MATTHEW L. McNAMARA, JR. and SHARON McNAMARA. (R1-2) On or about March 21, 1984, MATTHEW McNAMARA III was involved in an automobile accident with an underinsured motorist and subsequently died from the injuries he received. (R1-2) At the time of his death, Mr. McNAMARA was a single person who resided with his parents.

At the time of the accident, HELEN GIBBS resided with her mother, MARY GIBBS. (R25) Although HELEN GIBBS and MATTHEW McNAMARA III were never married, HELEN contends she was pregnant with his child at the time of his death. (R2) HELEN GIBBS subsequently gave birth to her daughter RACHEL LEONA McNAMARA GIBBS. (R25) Although paternity is contested by the Petitioner in this lawsuit, for purposes of the summary judgment below and this appeal, this allegation is assumed to be true. (R30)

At the time of the accident, MARY GIBBS, mother of HELEN and grandmother of RACHEL, maintained an automobile liability insurance policy with LIBERTY MUTUAL INSURANCE COMPANY (hereinafter LIBERTY MUTUAL). Said policy provided uninsured motorist coverage. The uninsured motorist provisions of the insurance policy provided:

> We will pay damages for bodily injury sustained by a **covered person** and caused by an accident, which that **covered person** is legally entitled to recover from the owner or operator of an:
>
> 1. **Uninsured motor vehicle,** if the Schedule or Declarations indicates that Uninsured Motorists Coverage applies: or

> **2. Underinsured motor vehicle,** if the Schedule or Declarations indicates that Excess Underinsured Motorists Coverage applies. (R45)

The term "covered person" was defined as:

> **"Covered Person"** as used in this endorsement means:
>
> 1. You or any **family member.**
> 2. Any other person occupying your covered auto.
> 3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above. (R45)

The term **"you"** and "family member" were defined as:

> Throughout this policy, **"you"** and **"your"** refer to:
>
> 1. The "named insured" shown in the Declarations; and
>
> 2. The spouse if a resident of the same household.
>
> . . .
>
> **"Family member"** means a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child. (R37)

Under these definitions and provisions MARY GIBBS was the named insured and RACHEL GIBBS (the newborn child), came within the definition of a family member. Consequently, RACHEL GIBBS was a covered person under LIBERTY MUTUAL's policy. Conversely, the decedent father, MATTHEW McNAMARA 111, was not a resident of MARY GIBBS home or a relative of MARY GIBBS and therefore was not a "family member" or "covered person" or insured under LIBERTY MUTUAL's policy.

As the result of MATTHEW McNAMARA III's death, his parents, as Co-personal Representatives of the Estate of MATTHEW McNAMARA III brought a cause of action against LIBERTY MUTUAL

to recover uninsured motorist benefits for RACHEL GIBBS' damages as a survivor of her purported father's estate. (R1-3) The trial court ultimately ruled that MATTHEW McNAMARA III was not an insured under the underinsured motorist provisions of MARY GIBBS' insurance policy with LIBERTY MUTUAL and granted summary judgment to the insurance carrier. (R63-64)

The Personal Representatives appealed to the Fifth District Court of Appeal. (R65-66) In an opinion reversing the trial court, the Fifth District acknowledged that the decedent was not an insured under the insurance policy of the survivor and that the policy only covered damages for bodily injuries sustained by an insured. (A2) However, the Fifth District Court of Appeal followed its previous decision of Webster v. Valiant Ins. Co., 512 So.2d 971 (Fla. 5th DCA 1987) and held that the insurance provision which required bodily injury be sustained by an insured was an attempt to restrict uninsured motorist coverage provided by Florida Statute, §627.727 (1983). (A1-2) Consequently, the court held the provision void as against public policy and construed the insurance policy to provide uninsured motorist coverage to a survivor for the survivor's damages as a result of the accident.

Subsequently, the court granted the carrier's motion for certification and certified to the Florida Supreme Court the following question of great public importance:

MAY A SURVIVOR, AS THAT TERM IS DEFINED IN THE FLORIDA WRONGFUL DEATH ACT, RECOVER FROM HIS OWN UNINSURED MOTORIST INSURANCE POLICY HIS DAMAGES WHERE THE DECEDENT IS NOT A COVERED PERSON UNDER THE POLICY? (A4)

Review of this decision by the Florida Supreme Court is now sought by Petitioner, LIBERTY MUTUAL.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal holds that a survivor's insurance policy is applicable to a particular accident notwithstanding the fact that the decedent is not an insured under the policy. The Court's decision abolished the previous requirement that an insurance policy apply to a given accident before coverage arises for particular damages. The decision directly and expressly deviates from established principles of law regarding uninsured motorist coverage: that is, uninsured motorist coverage under a given policy is the mutual equivalent of the liability coverage of that policy. It applies in a given situation to the same extent that a liability coverage of that policy would apply to the same situation. Mullis v. State Farm Automobile Insurance Co., 252 So.2d 229 (Fla. 1971).

The decision of the Fifth District Court of Appeal holds that the policy provision requiring bodily injuries be sustained by an insured is contrary to the statute. However, a careful review of the wording of the §627.727(1) case law construing that provision, and §§627.727(3) and (7) all establish that the uninsured motorist statute only requires coverage be provided for bodily injury to the person insured under the policy. Consequently, the definitions and provisions within the uninsured motorist policy are not contrary to the statute and should be given their intended effect limiting coverage to bodily injuries sustained by an insured person.

The decision of the Fifth District Court of Appeal fails to acknowledge the interrelated nature of a survivor's claim to the death of the decedent. In doing so, it departs from the established principle of law regarding wrongful death that a survivor's claim is derived from the decedent. Hoffman v. Jones, 280 So.2d **431** (Fla. **1973**); Variety Children's Hospital v. Perkins, **445** So.2d 1010 (Fla. **1984**).

The decision also departs from established Florida law regarding policy provisions limiting the extent of liability for a given claim and a given accident. Florida law construes limits of liability provisions as only allowing one limit of liability where only one person suffers bodily injuries, i.e., the claims of an estate and those of survivors of the estate are considered one claim for purposes of limits of liability. However, the Fifth District's opinion acknowledges a separate claim of a survivor and places the prior precedent in doubt.

Finally, the Fifth District's opinion conflicts with the better reasoned view of the majority of jurisdictions who have addressed the issue. A review of foreign jurisdictions that have departed from the majority, one is distinguishable on the facts and the other has been logically forced into legal holdings acknowledged as contrary to every other state in the union.

The decision of the Fifth District Court of Appeal has called into question many established principles of Florida uninsured motorist law, has effectively rewritten uninsured motorist coverage within this state and has seriously jeopard-

ized the uninsured motorist industry of this state. In light of these serious conflicts and ramifications, this Court should quash the decision of the Fifth District Court of Appeal and clarify that in a wrongful death context, Florida law anticipates the uninsured motorist carrier of the decedent as the coverage which applies.

LIBERTY MUTUAL'S INSURANCE POLICY

The insurance policy in the instant case was an automobile insurance policy issued to MARY GIBBS. (R5-31) For purposes of the entire policy, the word "you" was defined as the "named insured" and the separate term "family member" was defined as "a person related to you by blood, marriage or adoption, who is a resident of your household." (Emphasis added) (R37) Endorsement PP04-66 Uninsured/Underinsured Motorist Coverage-Florida was the Florida Uninsured Motorist Coverage Endorsement part of the policy. (R45-46) This policy provided as follows:

> INSURING AGREEMENT
>
> We will pay damages for bodily injury sustained by a covered person and caused by an accident, which that person is legally entitled to recover from the owner or operator of an:
>
> 1. Uninsured motor vehicle . . . (Emphasis added) (R45)

The Florida endorsement provided the additional definition for the term "covered person" as follows:

> "Covered person" as used in this endorsement means:
>
> 1. You or any family member.
> 2. Any other person occupying your covered auto.
> 3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above (R45)

As set forth and shown in Request for Admissions and attached insurance policy, RACHEL GIBBS was a family member of the named insured. (R25) Consequently, RACHEL GIBBS was a "covered person" under the uninsured motorist provisions of the policy. However, RACHEL GIBBS was not involved in the auto

accident and did not suffer any bodily injuries, sickness, disease or death as the result of the auto accident.

Conversely, applying the same definitions, the decedent, MATTHEW McNAMARA III was not a "covered person" for purposes of the uninsured motorist provisions of MARY GIBBS' policy. MATTHEW McNAMARA III was not a named insured in the policy. (R36) Nor was MATTHEW McNAMARA III occupying a covered auto of the policy at the time of his accident. (R1) Finally, MATTHEW McNAMARA III admittedly was not a relative of MARY GIBBS or a resident of MARY GIBBS' household at the time of his death: thus he was not a "family member" as that term is defined in the policy. (R25, 37) Consequently, the decedent, MATTHEW McNAMARA III was not a "covered person" for the purposes of uninsured motorist coverage.

Clearly, under the definitions of the policy, the uninsured motorist policy only paid for damages for bodily injury "sustained" by a "covered person". While MATTHEW McNAMARA III sustained bodily injuries, he was not a covered person under the policy. Inversely, although RACHEL GIBBS was a covered person under the policy, she suffered no bodily injuries and, again the uninsured motorist provisions did not apply.

Notwithstanding the fact that the decedent was concededly not an insured under LIBERTY MUTUAL's policy of insurance, the Fifth District Court of Appeal ruled that LIBERTY MUTUAL's insurance policy still applied to the accident and covered the daughter's survivor damages recoverable pursuant to the Wrongful Death Act. (A2-3) The Court construed §627.727(1),

Florida Statutes (1983) as requiring an uninsured motorist insurance policy to provide coverage for survivor damages of an insured even though neither a covered person or a covered auto was involved in the accident. The Court abolished 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. This required nexus is evident in basic tenets of uninsured motorist law and from a careful analysis of the statute itself.

SCOPE OF UNINSURED MOTORIST COVERAGE

One fundamental tenet of uninsured motorist coverage has always been: if the liability provisions of an insurance policy would be applicable to a particular accident, the uninsured motorist provisions of that policy 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 by the Florida Supreme Court in Mullis v. State Farm Automobile Insurance Co., 252 So.2d 229 (Fla. 1971) in determining the scope of coverage provided by Florida's Uninsured Motorist Statute. There, the Florida Supreme Court construed $627.0851, Florida Statutes (the predecessor to $627.727) as providing the reciprocal or mutual equivalent of automobile liability coverage prescribed by the Financial Responsibility Law.

The Court acknowledged uninsured motorist coverage provided insurance "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease." 252 So.2d at 232. The Court then noted the normal persons insured under a policy complying with the Financial Responsibility Law included the owner, his spouse and other members of his family resident in his household. The Court noted:

> These insureds are protected by the policy from liability to others due to injuries they inflict by their negligent operation of the insured owner's automobile. Reciprocally, this same class of insureds is protected by uninsured motorist coverage in the same policy from bodily injury caused by the negligence of uninsured motorists. 252 So.2d at 232.

In addressing the conditions under which uninsured motorist coverage applied, the Court drew a distinction between the group of insured persons constituted as the named insured, his spouse and his or his spouse's relatives who are residents of his household (Class I insureds) and the other group of insured persons occupying the insured's automobile when they are injured (Class II insureds). These two classes of people were considered covered due to their insurable relationship to a known risk. The Court stated:

> When uninsured motorist coverage was obtained by Shelby Mullis pursuant to Section 627.0851 for himself as the named insured, for his spouse and for his or his spouse's relatives who are residents of his household, they were given the same protection in case of bodily injury as if the uninsured motorist had purchased automobile liability insurance in compliance with the Financial Responsibility Law. This, of course, would not be the case as to other persons potentially covered who are not in the class

> of the named insured and relatives resident in the Mullis household. These latter are protected only if they receive bodily injury due to the negligence of an uninsured motorist while they occupy the insured automobile of the named insured with his permission or consent. This latter group is necessarily restricted to occupants of the insured automobile for the purpose of coverage identification and to show their insurable relationship to the named insured paralleling coverage for others than named insured in automobile liability policies. (Emphasis added) 252 So.2d at 233.

The Court reaffirmed that uninsured motorist coverage was prescribed by statute and could not be contractually lessened. But the extent of uninsured motorist coverage was not infinite, and only accidents to which the liability insurance coverage would apply were likewise covered by uninsured motorist insurance. The Court concluded:

> In sum, our holding is that uninsured motorist coverage prescribed by Section 627.0851 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 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), the policy defined an "insured" for purposes of both liability coverage and uninsured motorist coverage as any person related by blood or marriage who is a resident of the same household provided that the person did not own a private passenger automobile. Although the Plaintiff

resided with her parents, she insured her own car and was therefore excluded from the definitions of an "insured". The Third District Court of Appeal 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. Thus, where the Plaintiff was not an insured under the policy for purposes of liability coverage or uninsured motorist coverage, the uninsured motorist provisions of the policy did not apply to the accident.

The tracking principle of Mullis has also been applied in the converse situation. In Auto-Owners Insurance 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 son was a resident relative and was defined as an insured for purposes of liability coverage of the policy. However, the definition of persons insured for purposes of uninsured motorist coverage was worded differently and the son was excluded coverage under these definitions. Unlike the instant case, the Second District correctly focused on the insured status of the decedent, not the survivor. Notwithstanding the purported exclusion, the Second District Court of Appeal noted that uninsured motorist coverage was meant to track the liability portion of the policy. Since the decedent was insured for purposes of the liability coverage, the exclusion in the uninsured motorist provisions was void. Consequently, the Court held uninsured motorist coverage was available since the

liability coverage of the policy would have applied to the accident.

Finally, the Fifth District Court of Appeal has itself recognized this tracking principle in Auto-Owners Insurance Co. v. Queen, 468 SO.2d 498 (Fla. 5th DCA 1985). The underlying facts and policies in Queen were identical to Bennett and the Fifth District Court of Appeal correctly focused on the insured status of the decedent and followed the dictates of Mullis and the legal reasoning of Bennett and France.

The mutual equivalent 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 potentially apply. However, the decision of the Fifth District Court of Appeal in the instant case vitiates this principle by determining the uninsured motorist coverage of the policy applies to the accident even though it is clear the liability coverage of the policy would not apply to the accident.

The decedent, MATTHEW McNAMARA 111, was admittedly not a resident relative of MARY GIBBS at the time of the accident. Additionally, at the time of the accident MATTHEW McNAMARA III was a passenger in an underinsured vehicle of a friend and was not utilizing an auto covered by MARY GIBBS' insurance policy. (R2) Clearly, MATTHEW McNAMARA III was a stranger to the GIBBS policy and the liability coverage would clearly not apply to the accident.

Notwithstanding this fact, the Fifth District Court of Appeal held the uninsured motorist provisions of the policy did apply to the automobile accident and covered the daughter's survivor damages. In so ruling, the Fifth District Court of Appeal broadened the scope of uninsured motorist coverage in a given policy way beyond the bounds of liability coverage in the same policy, all in direct conflict with the holdings and dictates of Mullis, Queen, Bennett, and France.

The above conflicting result arises from the Fifth District erroneously focusing solely on the fact that the Plaintiff is an insured under the uninsured motorist policy. Instead, the correct focus should be did the person insured in the uninsured motorist policy suffer bodily injuries or, stated conversely, did the person who suffered bodily injuries have uninsured motorist insurance. If the answer to this question is yes, the uninsured motorist policy of the injured party pays uninsured motorist benefits to that injured party. Likewise, when the injured party dies, the uninsured motorist policy of the decedent pays uninsured motorist benefits to the estate and the statutory survivors who are entitled to recover.

A careful examination of the uninsured motorist statute and the policy provisions of uninsured motorist policies, makes it clear that, in a wrongful death context, it is the decedent's uninsured motorist coverage which is answerable for the damages of the estate and survivors and not the uninsured motorist coverage of a survivor's separate automobile policy.

THE UNINSURED MOTORIST STATUTE

The statute applicable to the cause of action in the instant case is **S627.727,** Florida Statutes **(1983).** Section **627.727(1)** provides, in pertinent part:

> Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.
>
> (1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. . . . (Emphasis added)

As previously discussed, this is the same provision of the statute that was analyzed in Mullis v. State Farm Mutual Automobile Insurance Co., **252 So.2d 229** (Fla. **1971).** There, it was consistently noted throughout the opinion that the coverage provided by uninsured motorist insurance was for bodily injuries suffered by the person insured. For example, the Court stated:

> These insureds are protected by the policy from liability to others due to injuries they inflict by their negligent operation of the insured owner's automobile. Reciprocally, this same class of insureds is protected by uninsured motorist coverage in the same policy from bodily injury caused by the negligence of uninsured motorists. (Emphasis added) **252** So.2d at **232.**

Further in the opinion the Court stated:

> When uninsured motorist coverage was obtained by Shelby Mullis pursuant to Section **627.0851** for himself as the named insured, for his spouse and for his or his spouse's relatives who are residents of his household, they were given the same protection in case of bodily injury as if the uninsured motorist

had purchased automobile liability insurance in compliance with the Financial Responsibility Law. This, of course, would not be the case as to other persons potentially covered who are not in the class of the named insured and relatives resident in the Mullis household. These latter are protected only if the receive bodily injury due to the negligence of an uninsured motorist while they occupy the insured automobile of the named insured with her permission or consent. This latter group is necessarily restricted to occupants of the insured automobile for the purpose of coverage identification and to show their insurable relationship to the named insured paralleling coverage for others than named insured in automobile liability policies. However, this is not true as to the named insured and the protected relatives resident in his household.

Whenever bodily injury is inflicted upon named insured or insured members of his family by the negligence of an uninsured motorist, under whatever conditions, locations, or circumstances, any of such insureds happen to be in at the time, they are covered by uninsured motorist liability insurance issued pursuant to requirements of Section 627.0851. (Emphasis added) 252 So.2d at 233.

Finally, in its holding the Court specified:

In sum, our holding is that uninsured motorist coverage prescribed by Section 627.0851 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 occupants of the insured automobile covered in his automobile liability policy.

Therefore, throughout the opinion the Court noted the coverage was for bodily injuries sustained by an insured.

It is significant that the statute and Mullis both stress the term "bodily injuries". "Bodily injury" is a more limited term than "personal injuries." In Malone v. Costa, 151 Fla. 144, 9 So.2d 275 (1942), the Florida Supreme Court, construing a statute requiring certain insurance before operating vehicles

for hire, compared the term "bodily injuries" with the term "personal injuries", and held that the phrases were not synonymous. The Court noted that the term bodily injuries was more limited and referred to injuries involving the element of physical contact. However, "personal injuries" was broader and included non-physical injuries and derivative damages such as consortium. The Court stated:

> The term "personal injuries" is broader, more comprehensive and significant than the term "bodily injuries" . . . Personal injuries do not necessarily mean or involve the element of personal contact. Personal injuries may occur to the father by the seduction of his daughter, or to the husband by the alienation of the affections of his wife. The consequential damages sustained by the husband because of the injuries to the wife in the case at bar are personal injuries. 9 So.2d at 277.

Under these definitions, a survivor's claim under the wrongful death statute would clearly not constitute a "bodily injury". The First District has similarly held that the insurance phrase "bodily injury, sickness, or disease including death . . ." did not encompass survivor damages separate and apart from the decedent's injuries. See, e.g., Skroh v. Travelers Insurance Co., 227 So.2d 328 (Fla. 1st DCA 1969).

The legislature is presumed to know prior Court rulings when it drafts new legislation and the choice of the terms "bodily injury, sickness, or disease, including death", were used in 5627.727 with the bodily contact or physical ramifications of injuries in mind. Therefore, the statute only requires coverage if an insured suffers bodily injuries. The statute does not require coverage where an insured has not suffered bodily injuries but instead simply has a claim for

intangible damages because of bodily injuries suffered by some third person who is not insured under the policy.

Other provisions of S627.727 make it clear that in enacting the Uninsured Motorist Statute the legislature intended the insurance policy of the decedent to apply and did not intend an insurance policy of some third party such as a survivor to apply to a given accident. Both §627.727(7) adopting threshold criteria and §627.727(3) defining uninsured motorists indicate the legislative intent to focus on a decedent's policy and not that of a survivor.

Florida is a "No Fault" state and the No Fault Law is codified in the Florida Motor Vehicle No-Fault Law. §§627.730-627.7405, Fla. Stat. (1983). This statute requires mandatory personal injury protection benefits and in turn provides certain limitations on the recovery of damages. Specifically, damages for pain, suffering, mental anguish, and inconvenience are not recoverable unless the physical injury received consists of a certain significant nature as set forth in the statute. S627.737, Fla. Stat. (1983). This limitation on recovery is recognized and adopted in the Florida Uninsured Motorist Statute. Specifically, §627.727(7) provides:

> The legal liability of an uninsured motorist coverage insurer shall not include damages in tort for pain, suffering, mental anguish, and inconvenience unless the injury or disease is described in one or more of the paragraphs (a) through (d) of §627.737(2).

In a wrongful death context, it is the decedent's injury, and not the intangible damages of a survivor, which pass the threshold requirements of S627.737.

The provision is logically sound when the decedent is the insured under the policy. Obviously the bodily injury of the decedent (death) passes the threshold requirement of 5627.737 (2)(d), Florida Statutes (1983). Consequently, the legal liability of the uninsured motorist insurer of the decedent includes the above stated intangible damage claims.

In contrast, attempting to apply §627.727(7) to a survivor's claim alone is impossible by definition. With the exception of lost support and services, the major claim of a survivor is for mental pain and suffering. See, e.g., §768.21(2)-(4), Florida Statutes (1983). Yet a survivor's damages are not described in the no-fault threshold sections 627.737(2)(a)-(d). Consequently, §627.727(7) states the legal liability of the uninsured motorist insurer (of the survivor) shall not include damages in tort for pain, suffering, mental anguish, etc.: the main claim of most survivors. Such an absurd result was clearly not intended by the Legislature. A logical, obvious construction is preferred; §627.727(7) clearly contemplates the insurance carrier of the decedent (and not the insurance carrier of a survivor) as the company which supplies coverage in a wrongful death suit.

Finally, the statute's intent that the decedent's uninsured motorist coverage is the applicable coverage in a wrongful death suit is shown in the statutory definition of an "uninsured motor vehicle". Section 627.727(3) states, in pertinent part:

> For the purpose of this coverage, the 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 limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person. (Emphasis added).

As previously established, the injured person in a wrongful death action is the decedent. Consequently, pursuant to the statute, in order to determine whether an uninsured (underinsured) motorist situation even exists, the coverage limits of the tortfeasor's liability policy must be compared to the coverage limits of the decedent's uninsured motorist policy. It is thus evident the statute contemplates the uninsured motorist policy of the decedent supplies coverage to wrongful death claims and not the policy of a survivor.

By erroneously focusing on the uninsured motorist policy of the survivor instead of the decedent, anomalous results can occur when applying §627.727(3)'s definition of uninsured motorist vehicles. For example, assume a tortfeasor has an insurance policy providing liability insurance in the amount of $20,000, the decedent has uninsured motorist coverage in the amount of only $10,000, but a non-resident relative has uninsured motorist coverage in the amount of $50,000. Under this scenario, pursuant to §627.727(3) the tortfeasor's vehicle would not constitute an "uninsured motor vehicle'' since the liability insurer of the tortfeasor has provided limits of liability greater than the uninsured motorist limits applicable to the injured person. However, the survivor would still be

entitled to recover under the reasoning of Webster v. Valiant, notwithstanding this is not an uninsured or underinsured motorist situation.

In summary, the wording of the statute and case law construing the statute has consistently shown the coverage provided is for bodily injuries sustained by an insured. In the case of a wrongful death claim, the decedent is the only person who has suffered bodily injuries and the uninsured motorist policy of the decedent is applicable. This construction is carried through the whole statute including the definition of an uninsured motor vehicle of subsection (3) and the threshold damage provisions of subsection (7).

UNINSURED MOTORIST POLICIES

In accordance with the above construction of the statute, provisions of uninsured motorist insurance policies indicate that it is the insurance policy of the decedent, and not that of a survivor, which is applicable in an uninsured motorist/wrongful death scenario. Under the insurance policy in the instant case (and numerous other policies providing coverage in the State of Florida) there are three distinct groups who are defined as "covered persons". (R45) Group one is the named insured and any related person residing in the household. Group two is any person occupying a covered automobile. These two definitions encompass and cover both Class I and Class II insureds as defined in Mullis v. State Farm Automobile Insurance Co., 252 So.2d 229 (Fla. 1978). However, there is a third group defined as "any person for damages that person is

entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1 or 2 above." (R45) This definition includes as "covered person" all persons who are entitled to damages because of bodily injuries sustained by a Class I or Class II insured. Consequently, people who are entitled to consortium damages because of their relationship to an insured are considered "covered persons" under definition 3 of the policy. Likewise, under definition 3 of the policy, people who are entitled to survivor damages because of their relationship to an insured decedent are considered "covered persons" under the decedent's policy.

However, consistent with the uninsured motorist statute, the uninsured motorist provisions only cover accidents where the liability insurance provisions of the policy would apply. This statutory scheme is accomplished by the insuring provisions only applying to damages for bodily injury sustained by a covered person. Thus the uninsured motorist provisions are exactly coexistent with the liability provisions of the policy; no more and no less. Although the Fifth District in Webster construed such provisions as restricting the uninsured motorist coverage provided by the statute, the true effect of the holding was to increase the scope of uninsured motorist coverage beyond the scope of liability coverage.

DERIVATIVE NATURE OF SURVIVOR'S CLAIM

The above anomalous result arises from the Fifth District's failure 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, 508 So.2d 713 (Fla. 1987), all prior decisions of the Florida Supreme Court have recognized the derivative nature of the 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, per the theory that a cause of action merges into a judgment, an injured party's prior judgment for personal injuries will bar a subsequent cause of action for wrongful death brought by the survivor when the injured party dies. Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1984).

The Webster and McNamara opinions directly conflict with this established principle by allowing a survivor to recover uninsured motorist benefits where it is conceded the decedent could not recover such benefits. 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.

Finally, if it were assumed the survivor's claim was not derivative, the Webster and McNamara opinions conflict 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 for and against the 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 daughter's claim for survivor 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 daughter suffered any demonstrable physical injury and is claiming any emotional damages for such injury. Indeed, the child was not even born at the time of the accident. Notwithstanding, the daughter seeks to recover the pain and suffering allowed under the Wrongful Death Statute for a survivor. By ignoring the nexus between the daughter's emotional claims and the impact visited on the decedent, the Fifth District's opinion conflicts with the Impact Rule.

The Fifth District's failure to recognize the derivative nature of the survivor's claim has dire effects when viewed in the context of determining a particular policy's limits of liability. Florida Courts have always noted an insurer's right

to limit its liability for a given claim and a given accident. When this is done, the limit of the policy for a given claim applies to the injured party and all those who have derivative claims because of the injured party.

For example, in New Amsterdam Casualty Co. v. Hart, 153 Fla. 840, 16 So.2d 118 (1943), a woman injured in an auto accident and her husband brought a claim for her physical injuries and his consequential damages. The liability policy of the tortfeasor provided insurance in the amount of "Five Thousand each person, Ten Thousand each accident". A jury ultimately awarded the wife $8,000.00 in damages and the husband $2,500.00 in damages. The insurance company tendered its $5,000.00 limits which was accepted in satisfaction of the judgment of the wife. The husband then sued for satisfaction of his own judgment and the Supreme Court ultimately held that his judgment was for consequential damages only and consequently the one limit of liability applied to both "claims".

Although New Amsterdam Casualty Co. v. Hart involved claims against a liability policy, the same result has been reached where the claim was made against an uninsured motorist carrier. In Biondino v. Southern Farm Bureau Casualty Insurance Co., 319 So.2d 152 (Fla. 2d DCA 1975), a husband was injured as the result of an automobile accident with an uninsured motorist. After obtaining the uninsured motorist protection in the limits "for each person", suit was instituted by the husband's wife seeking additional coverage for her consortium claim. In ruling that the "each person" limits applied to

all damages whether direct or consequential, the Second District Court of Appeal noted the only material difference between the New Amsterdam case and the one before them was the fact that the claim was against an uninsured motorist carrier. Finding this a distinction without a difference, the Second District followed the dictates of New Amsterdam.

The dictates of New Amsterdam and Biondino have also been applied in the context of a wrongful death claim. In Skroh v. Travelers Ins. Co., 227 So.2d 328 (Fla. 1st DCA 1969), a father, whose son was killed in an automobile accident, brought suit against the tortfeasor as the administrator of the estate of his son and individually as a survivor (father) of his deceased son. After jury verdicts, the father attempted to recover separate limits of liability for the estate's claim and his claim as a survivor under the estate. The First District Court of Appeal held that only one limit of liability applied for bodily injuries and the father's survivor claims were derivative. The Appellate Court noted:

> The appellant contends that under the language of the policy the words 'bodily injury' means bodily injury, 'sickness or disease', including death therefrom; and that the father's pain and suffering resulted from the son's injury and therefrom constituted a sickness or disease, within the purview of the wording of the policy.
>
> We cannot agree with this contention. The bodily injury referred to in the policy, we think, clearly indicates only such injury to the body of the injured, or a sickness or disease contracted by the injured as a result of the injury, the same as the death resulting therefrom, and cannot be properly construed to include the pain and suffering of a survivor as falling within the terms 'sickness or disease' resulting to the injured. . . . (Emphasis in the original) 227 So.2d at 330.

Consequently, the Court held only one limit of liability applied in the wrongful death context.

Like New Amsterdam, Skroh involved a liability insurance policy. However, this same logic has been applied to a wrongful death claim against an uninsured motorist carrier. In Mackoul v. Fidelity & Casualty Co. of New York, 402 So.2d 1259 (Fla. 1st DCA 1981), the father of a child killed in an automobile accident involving an uninsured motorist, attempted to recover separate limits of liability for the estate and each of the survivors. Following New Amsterdam and Biondino, the First District ruled only 1 per person limits in a decedent's policy applied in a wrongful death case notwithstanding there was more than one survivor. Likewise, the Second District Court of Appeal in Florida Insurance Guaranty Assn. v. Cope, 405 So.2d 292 (Fla. 2d DCA 1981) also ruled that the per person limits of liability of the decedent's uninsured motorist policy applied in a claim brought by the personal representative of the decedent's estate, even though the decedent had left a surviving husband and two minor children, all of whom each had a separate statutory survivor's claim.

Notwithstanding the dictates of New Amsterdam and its progeny, the Fifth District in Webster and McNamara held the survivor of a decedent who died in an accident involving an uninsured motorist has a separate claim for his survivor damages against his own uninsured motorist carrier. As such,

the holding directly conflicts with Mackoul and Cope and again results from the failure of the Fifth District case to acknowledge the derivative nature of a survivor's claim.

Finally, the Webster and McNamara opinions make coverage in a given case depend solely on the seriousness of the injury incurred by the injured party. In doing so, the Fifth District conflicts with established precedent and makes a distinction between claims for personal injury and claims for wrongful death. Where the claim involved is one for personal injuries, if the injured party is not a "covered person", the injured party is not entitled to any benefits under the uninsured motorist insurance policy. See, e.g., Harrell v. Sellars, 424 So.2d 881 (Fla. 1st DCA 1983) (where stepdaughter was clearly a resident of her mother's separate household, her accidents were not covered under her stepfather's insurance policy); American Security Insurance Co. v. VanHoose, 416 So.2d 1273 (Fla. 5th DCA 1982) (where daughter and granddaughters did not live with their father/grandfather in same household, they were not insureds under his policy and were not entitled to uninsured motorist benefits); Cavalier Insurance Co. v. Bailey, 292 So.2d 67 (Fla. 3d DCA 1974) (where daughter resided in a separate household with her mother, she was not entitled to uninsured motorist benefits on a policy of her father's).

Although these cases set forth established Florida law, the Fifth District's decision has the net effect of determining coverage based solely on the seriousness of the injured party's injuries. If the injured party does not die, presumably the

uninsured motorist policy does not apply pursuant to VanHoose. However, if the injured party does die from his or her injuries, the policy suddenly applies for the survivor's damages. Again, this inconsistent result occurs from erroneously focusing on the survivor's status as an insured instead of focusing on the insured status of the injured party.

FOREIGN JURISDICTIONS

The issue whether a survivor can recover his own survivor damages from his own insurance carrier even though the decedent is not an insured under the policy has been considered by other jurisdictions. Although the authorities are split, the majority follow the better reasoned view holding that the insured must suffer the bodily injuries in order for the coverage to apply and in the context of a wrongful death case, the insured must be the decedent. The majority of jurisdictions have ruled that a survivor in a wrongful death claim does not have a claim against the survivor's own uninsured motorist carrier where the person who suffered the bodily injury (the decedent) is not an insured under the policy.

For example, the Appellate Courts of Louisiana addressed the issue in LaFleur v. Fidelity & Casualty Co. of New York, 385 So.2d 1241 (La. Ct. App. 3d Cir. 1980) and Spurlock v. Prudential Insurance Co., 448 So.2d 218 (La. Ct. App. 1st Cir. 1984). In LaFleur, 3 children sought uninsured motorist claims against their respective individual uninsured motorist policies for their individual damages as survivors of their mother who died through the negligence of an uninsured motor-

ist. It was conceded that the mother was not a resident relative of any of the three children nor was she occupying a car insured by any of the three policies. Consequently, it was agreed that the mother was not an insured under any child's policy. The children brought the uninsured motorist claims asserting they were "insureds" under their policies and that any requirement that an insured suffer bodily injuries was in derogation to the uninsured motorist statute and void as against public policy.

In affirming the denial of coverage, the Court determined that Louisiana's uninsured motorist provisions did not intend such broad coverage be required.

> We are likewise of the belief that the Louisiana legislature did not intend for the statutory language contained in LSA-R.S. 22:1406(d)(1)(a) to afford coverage for what an insured may be legally entitled to recover as his "wrongful death" damages, sustained because of the death of some third person. . . . 385 So.2d at 1245.

Similarly, in Spurlock v. Prudential Insurance Co., 448 So.2d 218 (La. Ct. App. 1st Cir. 1984), the First Circuit Court of Appeal of Louisiana followed LaFleur in denying children's claims against their own respective uninsured motorist policies for "injuries sustained" (i.e., survivor claims for the wrongful death of their father) where it was stipulated that the father was not a resident of any of the plaintiffs' households and was not an insured under any of the policies.

California has denied similar claims. In Smith v. Royal Insurance Co. of America, 186 Cal. App. 3d 239, 230 Cal. Rptr. 495 (Cal. Ct. App. 5th Dist. 1986), appellant sought to recover

her damages as a survivor of her father's wrongful death from injuries sustained in an automobile collision with an uninsured motorist. Again, it was stipulated that the father was not a resident of his daughter's household, nor was he occupying a car covered by the daughter's insurance policy. Consequently, the decedent was not an insured under the survivor's policy. Identical to the instant case, the policy did not provide insurance for the survivor's separate claim because the policy only provided for "recovery for bodily injury[s] sustained by a covered person". 186 Cal. App. 3d at 241, 230 Cal. Rptr. at 496. Although the policy did not provide coverage, the survivor argued the limitation was in derogation to the uninsured motorist statute of California and was consequently void as against public policy. The Court noted:

> The thrust of appellant's argument is that the statutory language permits recovery even where the insured is not the injured party. So long as the insured (in this case appellant under her husband's policy) has a cause of action for wrongful death against an uninsured motorist the insurer is liable, according to appellant. . . . 186 Cal. App. 3d 242, 230 Cal. Rptr. at 496.

However, the Court disagree with this interpretation finding that the California uninsured motorist statute only required coverage when an insured suffered bodily injury or wrongful death. The Court went on to hold:

> Clearly, the appellant is not an insured who suffered bodily injury or wrongful death. Thus, under the statute and pursuant to legislative intent, she is not entitled to recover under her policy. 186 Cal. App. 3d at 243, 230 Cal. Rptr. at 497.

The same approach was taken by the Supreme Court of Mississippi in Gillespie v. Southern Farm Bureau Casualty

Insurance Co., 343 So.2d 467 (Miss. 1977). Under facts similar to Smith and LaFleur, an adult daughter attempted to recover from her own uninsured motorist carrier her damages as the survivor of her mother who was killed by an uninsured motorist. The facts were again clear that the mother was not a resident relative of the daughter's household. Nor was the mother occupying a car insured by the daughter's policy at the time of the accident. Although the uninsured motorist policy provisions would only pay damages for "bodily injury" sustained by the insured, the survivor argued the language of the uninsured motorist statute did not require bodily injury to the insured and the requirement should therefore be read out of the insurance policy.

Again, the Supreme Court of Mississippi construed the uninsured motorist statute and the uninsured motorist policy to be consistent and requiring "the injuries or death, because of an uninsured motorist, must be to the named policyholder, his or her spouse or a relative of either, while a member of the household of the named policyholder". 343 So.2d at 470. Consequently, the Court found the decedent was not an insured either under the statute or under the policy and no uninsured motorist coverage was provided.

Finally, Arizona has joined the states which construe the uninsured motorist statute as only requiring coverage for bodily injuries sustained by an insured. In Bakken v. State Farm Mutual Insurance Co., 139 Ariz. 196, 678 P.2d 481 (Ariz. Ct. App. 1983) the Arizona Court addressed the issue under a

slightly different factual context. There, the decedent died as a result of bodily injuries she received as a pedestrian when she was struck by an uninsured motorist. The decedent's husband and a son who lived with his parents sought to recover uninsured motorist coverage from each of their own policies. Under the terms of both policies, the decedent was an "insured" since she was a spouse or relative living in the same household as both named insureds. Although each policy provided uninsured motorist coverage in the amount of $15,000.00 for bodily injury to one person and $30,000.00 for bodily injury to two or more persons in the same accident, anti-stacking clauses in the policies limited the total amount of coverage for one person under both policies to $15,000.00. The Court specifically noted that the "other insurance" clauses or "anti-stacking" clauses had been repeatedly upheld by the Courts of Arizona. However, these decisions were attempted to be circumvented by the plaintiff survivors who argued that they each, as insureds under their own policies, had separately incurred damages as a result of the wrongful death of the decedent. The Court stated:

> The essence of this argument is that the focus must be upon the plaintiffs themselves as the insureds, that their status as insureds in and of itself is sufficient to justify recovery, and that the insured status of the person receiving bodily injuries with resulting death is immaterial. From this premise they then urge that the 'other insurance' clauses of the policies are simply inapplicable because no plaintiff insured was 'injured as a pedestrian,' but rather, each plaintiff insured was injured because of the wrongful death of another person. 678 P.2d at 484.

However, the Arizona Court held this approach was fallacious and went on to hold:

> . . . that Arizona's statutory provisions (and the provisions of the policies involved in this case) require coverage only for damages resulting from bodily injury, including death, of an insured and that in interpreting both the statutory and policy provisions relating to the amount of damages recoverable, the focus must be upon the bodily injury (including death) to that insured. **678** P.2d at **484.**

The Arizona Court analyzed the Arizona uninsured motorist statute and construed these provisions as requiring an insured to suffer bodily injuries. Consequently, there was no coverage provided to a survivor in their capacity as insureds because of some injury which they themselves might have received resulting from the decedent's death. The Court noted whatever these injuries might be "they were not bodily injuries". **678** P.2d at **485.** In denying the Plaintiff's claims, the Court gave an example of a factual scenario which pointed up the fallacy of the survivor's position. The Court stated:

> A simple illustration demonstrates the invalidity of plaintiff's contentions that it is their status as insureds that provides their entitlement to damages, rather than the status of the decedent as an insured. At the time of her death, Mrs. Bakken was survived by seven children and her spouse. Assume, for purposes of illustration, that each of these children and her husband owned automobiles covered by separate State Farm policies with uninsured motorist coverage and, further, that at the time of her accident, she was not living in the same household with her spouse or any of her children. Under such circumstances she would not have any connection with any of the policies and clearly would not have been an insured under them. Consequently, there would not have been any uninsured motorist coverage available for the damages resulting from her devastating bodily injuries. However, under plaintiff's interpretation, if she were to then die as a result of her bodily injuries, suddenly there would spring into existence uninsured motorist coverage under each of the eight

> policies. This coverage would exist under each policy (since each insured under the separate policies would have suffered wrongful death damages) with a possible total coverage of $105,000. Under plaintiffs' theory, the 'other insurance' clauses in the policies would not be applicable because none of the insureds were 'injured as a pedestrian', only Mrs. Bakken, a non-insured, receive such injuries. Such a result would be patently absurd in the context of statutorily mandated uninsured motorist coverage. 678 P.2d at 484-85.

Consequently, Arizona sided with LaFleur and other jurisdictions in determining that a survivor does not have a separate claim against his own uninsured motorist carrier where the decedent is not an insured under the policy.

While the majority of jurisdictions follow the LaFleur and Bakken approach, two states have allowed a survivor to recover from his own uninsured motorist carrier notwithstanding the fact that the decedent was not an insured under the policy. In State Farm Mutual Automobile Insurance Co. v. Selders, 187 Neb. 342, 190 N.W.2d 789, (1971), the Nebraska Supreme Court held a father could recover from his own uninsured motorist carrier his damages as a survivor of three minor children who were killed by an uninsured motorist even though the father lived separate and apart from his divorced wife and three children and the children were not insureds under the father's uninsured motorist policy.

However, a careful reading of the opinion indicates the Court misconstrued a provision of the insurance policy. In Selders, the father's insurance policy provided uninsured

motorist coverage for persons insured thereunder and defined persons as:

> **(1)** the first person named in the declarations and while residents of his household, his spouse and the relatives of either;
>
> (2) any other person while occupying an insured automobile; and
>
> **(3)** any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this coverage applies. **190** N.W. Rptr.2d 790.

The Court noted that because of the divorce and separate residences, neither the ex-wife nor the three minor children who lived with her were residents of the father's household and were not insureds under the definitions of the policy. The Court stated:

> . . . We have found that the children were not members of their father's household and therefore not listed as 'insured' under provision **(1)**. Provision (2) is not applicable. Provision **(3)** would appear to be meaningless if limited to injuries sustained by the insureds mentioned in provisions **(1)** and (2). It apparently was intended to comply with the statutory requirement found in section **60-509.01**, R.R.S. **1943**, which requires uninsured motorist insurance 'for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. . . . (Emphasis supplied) As pointed out, Earl B. Selders, as the father, is legally entitled to recover damages for the death of his children and he is an insured. Provision **(3)** adds an additional category of 'insured'. It provides not only for recovery for injuries sustained by an insured but also for the recovery of other consequential damages which an insured is legally entitled to recover from an uninsured motorist. **190** N.W. Rptr.2d at 792.

However, the Nebraska Supreme Court misconstrued the third definition of insureds. This definition is included to provide insurance to those persons entitled to consequential damages

when an insured suffers bodily injuries. The intent of this provision is more clearly seen in the wording set forth in Florida policies which provide:

> "Covered Person" as used in this endorsement means:
>
> 1. You or any family member.
> 2. Any other person occupying your covered auto.
> 3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above. (R29)

Consequently, the Selders opinion can easily be distinguished from the insurance policy and statutory provisions that apply to the instant case.

Finally, the Ohio Supreme Court has sided with Nebraska and allowed a survivor to seek uninsured motorist benefits from his own insurance carrier notwithstanding the decedent is not an insured under the policy. In Sexton v. State Farm Mutual Automobile Insurance Co., 69 Ohio St.2d 431, 433 N.E.2d 555 (Ohio 1982), the plaintiff's father was the survivor of his decedent daughter who died as the result of an automobile accident with an uninsured motorist. It was conceded that at the time of the accident, the daughter did not live with her father and was not a resident relative nor an insured under her father's uninsured motorist policy. The court noted that the father was an insured under his policy and that the father would legally be entitled to recover his damages as a survivor that were caused by an uninsured motorist. Concluding its simplistic analysis, the Ohio Court noted this was enough to

provide a cause of action against the uninsured motorist carrier of the survivor.

Although Ohio takes the approach sought by the survivor in the instant case, the Sexton opinion has caused Ohio to depart from other jurisdictions on other established uninsured motorist principles. As previously noted, Florida adheres to the view that the insurer of a decedent in an uninsured motorist situation owes one limit of liability to the decedent's estate and all the survivor's. 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). However, the Ohio Supreme Court has now held that separate limits of liability of uninsured motorist insurance apply to a survivor and an estate in a wrongful death context. In Auto-Owners Mutual Insurance Co. v. Lewis, 10 Ohio St. 3d 156, 461 N.E.2d 396 (Ohio 1984) a son was left permanently physically disabled and mentally incompetent as the result of injuries he received in an automobile accident involving an uninsured motorist. There the father brought a cause of action as the guardian of his son and a separate claim individually for the loss of his son's services. The Court ultimately ruled that the father was entitled to recover the limits of liability first in his representative capacity as the guardian of his son and again individually as the father of his son. The Court noted this result was a logical extension of Sexton v. State Farm Mutual Automobile Insurance Co. In a two judge dissent, it was noted that the majority opinion placed Ohio virtually

alone among the states by allowing multiple single limits for each person having a claim as the result of the bodily injury to only one person. 462 N.E.2d at 403.

PUBLIC POLICY

As shown above, the uninsured motorist statute and public policy anticipates causes of action for wrongful death that would involve uninsured motorist coverage. However, in such an instance, it is only the uninsured motorist policy of the decedent that covers the loss. Whenever an insured person died from "bodily injury" as a result of an accident with an uninsured motorist, the uninsured motorist policy provisions of the insured decedent would not only provide coverage to the decedent's estate, but would additionally provide coverage to survivors. Since the decedent is an insured, the insurance company has rated the insurable risks and charged an appropriate premium. That the insured could die is part of the insurable risk and the insurer still covers the risk up to the limits of the policy. It is simply paid to the estate and survivors.

However, in the instant case the Plaintiff attempts to broaden the scope of coverage to allow a survivor to seek recovery, not only under the uninsured motorist policy of a decedent, but under the uninsured motorist policy of the survivor. Such a construction is not only contrary to the statute and the insurance policy in the instant case, but adopting this construction would have dire results in the

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industry when an insurance carrier attempted to accurately rate the risk.

For example, a 24 year old individual who lives alone in Tallahassee could purchase one million dollars worth of uninsured motorist coverage on his one automobile. An insurer notes one named insured, no resident relatives, only one car others may potentially occupy, and the insurer can determine a reasonable premium for the coverage. Now assume this individual has an estranged spouse, two parents and four children all of whom live separately from the insured. Since none of them reside with the insured nor would be drivers of the insured's vehicle, the insurer has no reason to be aware of the number of relatives and no "insurable relationship" to the insured's liability policy as noted in Mullis v. State Farm Mutual Automobile Insurance Co.. Consequently, there is no rational way the carrier can "rate the risk" or limit its liability.

Under Florida's Wrongful Death Act the insured individual is a potential "survivor" of each of these relatives and has a legal right to make a separate, unrelated claim (pain and suffering, mental anguish, net accumulations) for policy limits. Under the Fifth District's approach, the UM insurer would be exposed to a potential claim as each of the above relatives died from an accident involving an uninsured motorist. Presumably the potential liability of the insurer could be seven million dollars instead of the purchased one million dollars. This certainly should not be considered in contemplation of the parties to the insurance contract which on its

face covered only bodily injuries sustained by a "covered person".

To adequately assess such a risk would greatly complicate the insurance rating process. In addition to the normal inquiry as to type of car, who might drive the car, residents in a household; an insurer would need to inquire into whether the applicant had a spouse living separately, whether the applicant was above or below 25 years of age, and which of the statutorily requisite relatives were living or dead, etc. Since no Florida Courts have ever permitted such a claim, none of these matters have played a part in rating the premiums of uninsured motorist coverage in the past, which is indicative that this coverage has not previously been contemplated. The Fifth District's construing the policy and statutes as providing coverage in this instance has indeed been a windfall to the survivor. It is also a decision with broad ramifications to the insurance industry and the citizens of this state as a whole, especially when considering the potential impact on premium rates, and the ability to provide coverage.

CONCLUSION

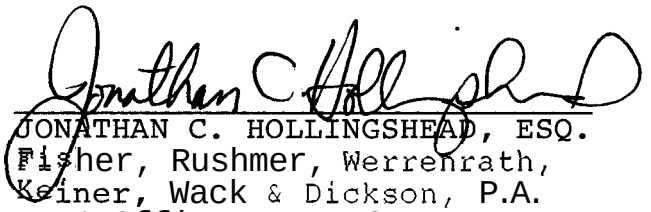
The Fifth District Court of Appeal's decision in McNamara v. Liberty Mutual Ins. Co. has followed its previous decision in Webster, and in so doing has conflicted with numerous well-established principles of uninsured motorist law set forth by this Court and followed by other District Courts of Appeal. Allowing the decisions of the Fifth District Court of Appeal to stand calls into question the continued validity of the tracking principle set forth in Mullis and the derivative nature of a survivor's claim set forth in Hoffman and Perkins. The opinion also ignores the wording of the statute itself and erodes Florida's approach to uninsured motorist claims in numerous areas including: (a) application of the statutory definition of an uninsured motorist, (b) the statutory requirement that a claimant pass the no-fault thresholds, and (c) policy construction in determining limits of liability in an uninsured motorist situation.

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.

For the foregoing reasons, this Court is urged to quash the decision of the Fifth District and affirm the trial court's summary judgment.

Respectfully submitted,



JONATHAN C. HOLLINGSHEAD, ESQ.
Fisher, Rushmer, Werrenrath,
Keiner, Wack & Dickson, P.A.
Post Office Box 712
Orlando, FL 32802
Fla. Bar #307726
407/843-2111

Attorneys for LIBERTY MUTUAL
INSURANCE COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U. S. Mail to: W. M. Chanfrau, Esq., Post Office Box 3156, Daytona Beach, FL 32018; and J. Hood Roberts, Esq., 11 E. Pine Street, Orlando, FL 32801, this 19th day of April, 1989.

JONATHAN C. HOLLINGSHEAD, ESQ.
Fisher, Rushmer, Werrenrath,
Keiner, Wack & Dickson, P.A.
Post Office Box 712
Orlando, FL 32802
Fla. Bar #307726
407/843-2111

Attorneys for LIBERTY MUTUAL
INSURANCE COMPANY