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12/10/89

IN THE SUPREME COURT,
OF FLORIDA

CASE NO: 73,836

ROBERT EDWIN SEIBERT, 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, 111, and
HELEN GIBBS, as mother and next
friend of RACHEL LEONA McNAMARA-
GIBBS, a minor child,

Plaintiff/Respondent.

FILED

(SID J. WHITE)

JUN 7 1989

CLERK, SUPREME COURT

By [Signature]
Deputy Clerk

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, 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, shall be referred to as Plaintiffs, Respondents, or by name, McNAMARA. The decedent MATTHEW L. McNAMARA, 111, shall be referred to as decedent or by name. The infant and purported survivor of MATTHEW L. McNAMARA 111, shall be referred to by name, RACHEL LEONA GIBBS, or as the survivor.

SUMMARY OF ARGUMENT

Respondent's claims for coverage simply argue that a survivor is entitled to wrongful death damages and that the uninsured motorist statute requires UM policies to cover these damages notwithstanding the personally injured party nor the accident were covered by the policy. This simplistic approach fails to address the true issue of when an insurance policy comes into play.

The terms of the insurance policy were clear that uninsured motorist insurance was not provided unless an insured person suffered bodily injuries as the result of an automobile accident with an uninsured motorist. This approach is clearly in line with previous Florida case law finding uninsured motorist insurance to be the mutual reciprocal of liability insurance. Since the decedent, if he had survived, would not have a claim for uninsured motorist coverage from this insurance policy, his survivors should not.

Respondent's position is also contrary to the historical basis and approach to uninsured motorist insurance. The Florida Supreme Court has recognized that this statute codified the insurance industry endorsement and the Respondent's claims do not fall within the coverage provided by this endorsement.

The Florida Supreme Court is urged to adopt the approach taken by the better reasoned majority of jurisdictions that have considered this issue. In doing so, it will avoid future conflicts that would otherwise occur in well-established Florida precedents dealing with insurance coverage.

There is a logical and consistent approach to wrongful death claims in the uninsured motorist context. When a wrongful death occurs as the result of an accident with an uninsured motorist, any uninsured motorist policy in which the decedent is an insured applies to the accident and covers both the estate's claims and the derivative claims of the decedent's survivors. This is the approach previously followed by Florida case law and this is the approach that should be reaffirmed by this Court.

ARGUMENT

NEITHER FLORIDA STATUTE S627.727 (1983) NOR PUBLIC POLICY REQUIRES PAYMENT OF UNINSURED MOTORIST BENEFITS TO AN INSURED SURVIVOR WHEN THE DECEDENT WAS NOT AN INSURED UNDER THE TERMS OF THE POLICY.

Respondent gives several arguments why the decision of the Fifth District Court of Appeal should be upheld in the instant case. However, none of these arguments bear up under scrutiny. Respondent indiscriminately strings together two maxims of Florida law: that the purpose of uninsured motorist insurance is to protect persons who are injured by uninsured motorists and that a survivor is entitled to damages in a wrongful death case. However, like the Fifth District Court of Appeal, the Respondent has failed to address the required nexus that an event or accident be covered under the policy before benefits are due. In other words, Respondent does not address how the wording of the uninsured motorist statute requires an uninsured motorist policy to provide coverage where neither an insured party suffers bodily injuries or an insured motor vehicle is involved in the accident.

The issue in this case is not, and has never been, whether a survivor has a cause of action for wrongful death against the tortfeasor who negligently caused the wrongful death. The issue is whether or not language in uninsured motorist insurance policies which limit application of the policy to situations where a named insured suffers bodily injuries (or death) or the insured motor vehicle is involved in the accident are against public policy as set forth in the uninsured motorist

statute. Respondent has clearly failed to show that the terms of the policy violate either the uninsured motorist statute or public policy of Florida.

Respondent contends that all prior Florida case law cited by Liberty Mutual 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. Consequently, general tort law applies with equal force in a wrongful death context. See, e.g., Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Respondent states in his brief "The courts have consistently analyzed the decedent's claim, had he survived, against the tortfeasor in deciding whether or not a claim existed under the [wrongful death act]." (Respondent's brief at p.10-11) However, it is clear that if the decedent had survived he would not have a claim for uninsured motorist coverage from this insurance carrier since he clearly was not an insured party under the policy. The Fifth District's decision in the instant case departed from all prior uninsured motorist case law when it allowed a claim for insurance coverage in a wrongful death context, where there admittedly would not be any coverage in a personal injury context.

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, but fails to grasp the import of the decision. That opinion cites 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 Boynton (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 S627.727 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.

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 of the named insured (class I insureds), See, e.g., Mullis v. State Farm Automobile Insurance Co., 252 So.2d 229 (Fla. 1971); any person 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 personal injury damages of the insured and the derivative damages of those individuals who suffered legally cognizable 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 derivative 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 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, §6.1, p. 174 (2d Ed. 1987) [hereinafter A. Widiss] (emphasis added).

Notwithstanding this acknowledgment by the Supreme Court 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 require coverage to a person who has sustained derivative damages even though it is conceded that

the injured party was neither a class I nor class II insured. This is clearly beyond that coverage contemplated by the codified endorsement.

Petitioner 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. Southern Farm Bureau Cas. Ins. Co., 343 So.2d 467 (Miss. 1977).

Not only do these foreign jurisdictions' opinions carefully set forth the reasoning why Respondent's arguments are specious, these jurisdictions' decisions are in accord with Florida law on collateral issues. For example, Florida has long recognized that there is only one limit of liability on an 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; Vanguard 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 Ca.App.2d 210, 58 Cal.Rptr. 243 (Cal.Ct.App. 1st Dist. 1967); Graham v. American Casualty Co. of Reading, PA, 261 La. 85, 259 So.2d 22 (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 (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' 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 required an insured suffer bodily injuries before insurance coverage applies to a given wrongful death claim has no effect whatsoever on Respondent's claim

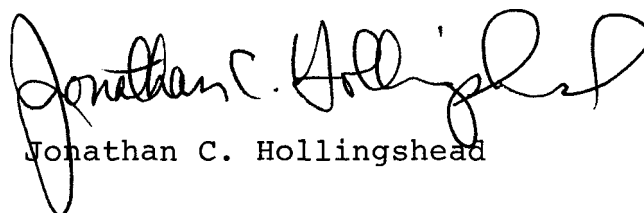
against the third party tortfeasor. The issue in this case is not, and has never been, whether the child of the decedent has a cause of action against a third party for the wrongful death of her father. The issue is whether the grandmother's insurance carrier provides coverage for an accident that did not involve either an insured party or insured vehicle. Neither the Petitioner, the insurance industry, Florida Statutes, nor the grandmother who purchased the insurance ever contemplated that this insurance policy provided coverage for any accident where no person insured under the policy suffered bodily injuries or 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 McNamara v. Liberty Mutual 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.

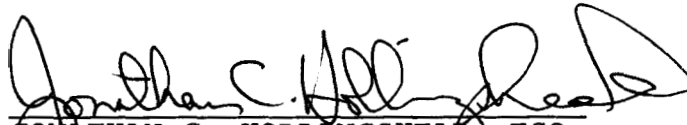
The Fifth District's opinion has created a ratings nightmare for the insurance industry and has seriously jeopardized uninsured motorist coverage for all citizens for the State of Florida. It is urged that the situation be corrected by quashing the opinion of the District Court of Appeal, and that the 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 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 5th day of June, 1989.



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