IN THE SUPREME COURT
STATE OF FLORIDA

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, an insurance corporation licensed to do business in the state of Florida,

Petitioner,

v.

KEVIN PHILLIPS and KIMBERLY PHILLIPS (formerly known as Kimberly Scanato),

Respondents.

S.C. CASE NO. 80, 986

DCA CASE NO. 92-00270

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Respondents would adopt by reference the decision of the Fifth District Court of Appeal. (A. 1-11). Furthermore, the Respondents would agree with the brief summary of the facts provided by Nationwide. However, the Respondents would also add that Nationwide admitted it did not follow the statutory requirements for limiting uninsured motorist coverage as outlined in Florida Statute §627.727(9). This would include not only obtaining a signed acceptance of this limited coverage by the named insured, but also charging a lesser premium for this more restricted coverage.

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER REPORTED APPELLATE DECISIONS FROM THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL?

SUMMARY OF THE ARGUMENT

The decision of the Fifth District does not expressly and directly conflict with the decision of this court in Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990). There, this court held that there would be no uninsured motorist coverage for a wrongful death claim where the decedent, as opposed to the survivor, was not an insured under the policy. In this case, Mr. Phillips was clearly an insured under Nationwide's policy. The Fifth District's decision in this case merely restates the holding of Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971), which has also been recently reaffirmed by this court. This case is factually indistinguishable from Mullis. Therefore, there is no reason why the Fifth District's opinion arriving at the same conclusion as Mullis should create conflict jurisdiction in this court. It is conflict of decisions and not conflicts in opinions or reasons that supplies jurisdiction for a review by certiorari. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970).

Furthermore, the decision in this case does not conflict with the other District Court opinions cited by Nationwide in its brief, since those decisions involve the construction of different insurance policies. In each of those cases, it was decided that the injured party was not an "insured" under the definitions contained within the insurance policy itself. As previously noted, there is no question in this case but that Mr. Phillips was

an insured. In fact, under the definitions contained in the policy, as the spouse of the named insured, he had the same status as the named insured.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH NUMEROUS OTHER REPORTED APPELLATE DECISIONS FROM THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

It has long been recognized that "it is conflict of **decisions**, not conflict of **opinions** or **reasons** that supplies jurisdiction for review by certiorari." Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1990) (emphasis in original). This rule was quoted with approval by the majority in Jenkins v. State, 385 So.2d 1356 (Fla. 1980). It is clear that there is absolutely no conflict between this decision and this court's holding (or decision) in Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990). The holding of the Valiant decision was that a wrongful death claim could not be made under an uninsured motorist policy where the decedent (as opposed to survivor) was not an insured under that policy. In this case, Mr. Phillips was clearly an insured under Nationwide's policy since he was the spouse of the named insured and they lived together in the same household. In fact, under the definitions contained in Nationwide's policy, he was included within the term "you" and therefor had the same status as the named insured under this policy. There is absolutely no Appellate Court decision in the state of Florida which has upheld an exclusion to uninsured motorist coverage to a named insured.

There can be no conflict with any other Appellate Court

decision where the facts of this case are totally indistinguishable from the facts in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971). Of course, in Mullis, the resident relative was riding a motorcycle which was not insured for liability purposes under State Farm's policy. State Farm's policy had virtually the same exclusion that Nationwide is attempting to use against Mr. Phillips in this case. However, the Supreme Court held that such an exclusion was against public policy and contrary to the Uninsured Motorist Statute. The ongoing validity of the Mullis decision cannot be questioned since the Valiant opinion recognized that it remains the "polestar" in determining the extent to which the state requires uninsured motorist coverage to be provided. Valiant at 411. Furthermore, the Mullis holding was recently reaffirmed by this court in its decision in Florida Farm Bureau Cas. Co. v. Hurtado, 587 So.2d 1314 (Fla. 1991).

This case, likewise, does not conflict with any of the decisions of the District Courts of Appeal cited in the Petitioner's brief. Each of those decisions involved insurance policies that are materially different from the Phillips' policy with Nationwide. In particular, each of those cases decided that, under the wording of those particular insurance policies, the injured resident relative/claimant was simply not an insured as that term was defined in those policies. There is no such restrictive definition of an "insured" under Nationwide's policy.

The Fourth District's opinion in Welker v. Worldwide Underwriters Ins. Co., 601 So.2d 572 (Fla. 4DCA 1992), adequately discusses the distinctions between the cases relied upon by the Petitioner and those which have applied the Mullis analysis to find that the claimant is entitled to uninsured motorist coverage. See also, Auto-Owners Ins. Co. v. Bennett, 466 So.2d 242 (Fla. 2DCA 1984). Auto-Owners Ins. Co. v. Queen, 468 So.2d 499 (Fla. 5DCA 1985) and Lewis v. Cincinnati Insurance Co., 503 So.2d 908 (Fla. 5DCA), rev. denied, 511 So.2d 297 (Fla. 1987). These decisions are all in accord with the Fifth District's opinion in this case.

Of course, conflict with a trial court opinion cannot supply jurisdiction to this court and therefore the decision in Deluna v. Valiant Insurance Co., ____F.Supp. _____ 6 Fla. Law Weekly. 209 (M.D. Fla. June 8, 1992), is totally irrelevant to this Court's determination of jurisdiction.

CONCLUSION

The decision of the Fifth District does not provide this Court with the basis to exercise its discretion to hear this case on the merits since there is no express and direct conflict with any other Florida Appellate Court decision. In fact, the Fifth District opinion merely applies the holding of Mullis to a case which is "on all fours" with that "polestar" decision. It is clear that there would only have been conflict jurisdiction if the Fifth District had ruled with Nationwide. The **decision** in this case simply does not conflict with any **decision** of this court or any District Court of Appeal. Therefore, under the rule in Gibson and Jenkins, this Court should not accept jurisdiction to review this case on the merits.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to GEORGE A. VAKA, ESQ., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601, this 11th day of January, 1993.

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