IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioner,

v.

RICHARD D. POUNDERS, as Personal Representative of the Estate of MICHAEL DENNIS POUNDERS, deceased, and on behalf of RICHARD D. POUNDERS, individually, and LINDA POUNDERS, individually,

Respondents.

CASE NO. 82,832

PETITIONER'S INITIAL BRIEF ON MERITS

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MISCELLANEOUS

Fla.R.App.P. 9.130 1

STATEMENT OF THE CASE AND FACTS

The Defendant/Petitioner, Nationwide Mutual Fire Insurance Company,[2] states the Statement of the Case and Facts as follows:

This appeal arose from a summary final judgment on the issue of liability concerning uninsured motorists ("UM") coverage entered against Nationwide in favor of the Plaintiffs on April 12, 1993.[3] (A 1-2) The judgment was entered pursuant to the court's order granting the Plaintiffs' motion for summary judgment and denying Nationwide's motion for summary judgment concerning the existence of UM coverage. (A 3-4) A timely appeal to the Second District followed. (A 5) That court issued a Per Curiam Affirmance of the judgment concerning liability citing Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971) and Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), rev. granted, 620 So.2d 761 (Fla. 1993). (A 177-178)

This case began as a one-count complaint brought against Nationwide and Jose Gomez by Mr. Pounders, as personal

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[2] For ease of reference herein, the Defendant/Petitioner, Nationwide Mutual Fire Insurance Company, will be referred to as Defendant or as Nationwide. The Plaintiffs/Respondents, Richard Pounders, as Personal Representative of the Estate of Michael Dennis Pounders, deceased, and on behalf of Richard D. Pounders and Linda Pounders, individually, will be referred to as the Plaintiffs. All other persons will be referred to by name.

[3] In accordance with Fla.R.App.P. 9.130, an Appendix accompanies this brief. All references to the Appendix will be referred to as (A) followed by citation to the appropriate page number of the Appendix.

representative of the estate of the decedent, Michael Dennis Pounders, and on behalf of himself and his wife, individually. (A 6-10) The complaint stated that it was a claim for wrongful death and other damages. (A 6) It stated that Michael Dennis Pounders, the decedent, died on February 15, 1992, leaving his father as personal representative of the estate and his mother and father as the surviving beneficiaries under the Florida Wrongful Death Act. (A 7) The complaint also stated that on February 15, 1992, Jose Gomez owned and operated a 1988 Toyota in Lakeland, Florida, in a negligent fashion so that it collided with the decedent, resulting in injuries that ultimately caused his death. (A 7) The Plaintiffs sought damages for the wrongful death of their son and reserved the right to seek punitive damages against Gomez for his willful and wanton conduct in operating the vehicle while under the influence of alcohol. (A 8)

Paragraph 13 of the complaint alleged that Michael Pounders was a resident in the home of his mother and father who were insured with Nationwide. (A 8) The complaint further stated that Michael Dennis Pounders was an insured under two policies, each of which provided UM limits in the amount of $50,000 and $100,000 per accident. (A 9) The Plaintiffs alleged that the vehicle operated by Gomez was an uninsured motor vehicle. (A 8) They also stated that Nationwide had denied UM benefits under the terms of its policy and the applicable law. (A 9) The Plaintiffs sought damages against Nationwide and Gomez. (A 9-10)

Nationwide answered the complaint and admitted the court's jurisdiction, that it did business in the State of Florida and that it had been notified of the claim by the Plaintiffs. (A 11-12) Nationwide also admitted that it properly denied UM benefits to the Plaintiffs under the terms of its policies and the applicable law. (A 12) Nationwide generally denied the remainder of the allegations. (A 11-12) Nationwide also raised a variety of affirmative defenses, those which went to the coverage and those which went to defending the tort aspect of the UM claim. (A 12-15) Of significance to this appeal, Nationwide maintained that the claims did not trigger the UM coverage insuring agreements contained in the two policies, and further, that the claims would be excluded by virtue of Exclusion Nos. 4 and 6 contained within the policies. (A. 13-14) Nationwide also stated that damages available to the Plaintiffs were those solely authorized by Fla. Stat. § 768.21 (1991). The Plaintiffs denied all of Nationwide's affirmative defenses. (A 16-17)

In December, 1992, the Plaintiffs amended their complaint striking paragraph 9 and substituting the following paragraph:

> As a result of the death of Michael Dennis Pounders, his estate is entitled to recover for medical and/or funeral expenses and for net accumulations as set forth in Fla. Stat. § 768.21, and all other damages allowed by law including property damage to the 1988 Suzuki motorcycle owned and operated by the decedent, Michael Dennis Pounders, at the time of the accident. (A 18-19)

Nationwide thereafter filed its answers and defenses to the amended complaint. (A 20-24) In addition to the affirmative

defenses it had previously raised, Nationwide argued that property damage was not recoverable under the Florida Wrongful Death Act, that the Plaintiffs had failed to state a cause of action entitling them to recovery of property damage to the decedent's motorcycle, and further, the property damage was not a covered item of damage under the UM coverage provided by Nationwide. (A 23-24)

Thereafter, the parties entered into a stipulation of certain facts. (A 25-28) They agreed that the policies attached to the stipulation were correct copies of the respective policies under which the Plaintiffs were seeking coverage. (A 25-26) They likewise stipulated that the policies had been issued to Mr. or Mrs. Pounders with inception dates of January 12, 1992, and expiration dates of July 12, 1992. (A 26) It was agreed that Michael Pounders was the resident son of Mr. and Mrs. Pounders, Nationwide's insureds. (A 26) The stipulation stated that at the time of the accident, the decedent was occupying a 1988 Suzuki motorcycle which was designed primarily to be driven on public roads. (A 26) It also stated that as a result of the collision between the Gomez automobile and the motorcycle operated by Michael Pounders, he sustained bodily injuries which resulted in his death. (A 26) The parties further agreed that for purposes of these proceedings, Mr. Gomez was operating an uninsured motor vehicle within the meaning of Fla. Stat. § 627.727(3)(b) (1991) at the time of the accident.

The stipulation also stated that the 1988 Suzuki motorcycle was not listed on the declarations pages of either of

the Nationwide policies. Instead, Policy No. 77 N 411-484 insured a 1988 Ford Thunderbird owned by and Mr. and Mrs. Pounders or either individually, and that policy had UM benefits in the amount of $50,000 each person/$100,000 each occurrence. (A 27) The parties agreed that Policy No. 77 N 411-485 insured a 1986 Ford F-150 pickup truck and a 1951 Ford F-1 pickup truck, each of which were listed on the policy declarations. The policy declarations listed UM benefits in the amount of $25,000 each person/$50,000 each occurrence. (A 27) The parties agreed that the 1988 Suzuki motorcycle was not being used as a temporary replacement vehicle for any of the vehicles listed on the policy as a result of any breakdown, repair, servicing or loss. (A 27) The parties also stipulated that to the extent that it was determined that Michael Pounders would be entitled to UM benefits under the two policies, the amount of damages available to Mr. and Mrs. Pounders were the policy limits for the coverage under the two Nationwide policies, the amount of which to be determined in accordance with Florida law. (A 27-28)[4]

THE POLICIES

[4] During the proceedings below, Mr. Pounders maintained that the estate of the decedent had a claim and that additionally, he and his wife had individual claims which were subject to separate insurance limits. The judgment does not differentiate between these claims and in an abundance of caution, Nationwide sought review of them to the extent Plaintiffs argued that anyone other than the personal representative of the estate may assert a wrongful death claim or that the estate and Mr. and Mrs. Pounders are subject to separate claims limits under the policies. The Plaintiffs conceded at the Second District that the judgment did not address this issue and it will, therefore, not be argued before this Court.

The policies issued to Mr. and Mrs. Pounders are identical with the exception of the vehicles they insure. Policy No. 77 N 411 484 lists as the named insured Richard or Linda Pounders. (A 34) It insures a 1988 Ford Thunderbird automobile. (A 34) Policy No. 77 N 411 485 is likewise issued to Richard or Linda Pounders as the named insured. (A 60) It insures a 1986 Ford F-150 pickup truck and a 1951 Ford F-1 pickup truck. (A 60)

The policies contain the relevant exclusions to UM coverage. Exclusion No. 4 and No. 6 state:

> This coverage does not apply to:
>
> 4. **Bodily injury** suffered while **occupying** a **motor vehicle** owned by **you** or a **relative:**
>
> a) which is not insured for Bodily Injury Liability coverage under this policy; or
> b) for which the owner has previously rejected Uninsured Motorists coverage with any insurer as permitted by Florida law.
>
> It also does not apply to **bodily injury** from being hit by any such **motor vehicle.**
>
> 6. Payment for any punitive or exemplary damages. (A 51, 75)

The policies also provide automobile liability coverage. The policies state:

> COVERAGE AGREEMENT
>
> **PROPERTY DAMAGE AND BODILY INJURY LIABILITY COVERAGE**
>
> 1. **We** will pay for damages for which **you** are legally liable as a result of an accident arising out of the:
>
> a) ownership;
>
> b) maintenance or use; or

c) loading or unloading;

of **your auto.** A **relative** also has this protection. So does any person or organization, except a vehicle leasing company, who is liable for the use of **your auto** while used with your permission. (A 41, 65)

The policies also contain certain coverage extensions concerning the use of other motor vehicles. The policies provide:

USE OF OTHER MOTOR VEHICLES

This coverage also applies to certain other **motor vehicles** as follows:

1. A **motor vehicle you** do not own, while it is used temporarily in place of **your auto.** **Your auto** must be out of use because of:

   a) breakdown;
   b) repair;
   c) servicing; or
   d) loss.

2. A four-wheel **motor vehicle** newly acquired by **you.** It applies only:

   a) during the first 30 days **you** own the vehicle unless it replaces **your auto;** and
   b) if **you** do not have other insurance. **You** must pay any premiums resulting from this coverage.

3. A **motor vehicle** owned by a non-member of **your** household and not covered in item 1. of this section.

   a) This applies only to policies issued to persons (not organizations) and while the vehicle is being used by **you** or a **relative.** It protects the user, and any person or organization, except as noted below in b), who does not own the vehicle but is legally responsible for its use.
   b) This does not apply to losses involving a **motor vehicle:**

(1) used in the business or occupation of **you** or a **relative** except a **private passenger auto** used by **you, your** chauffeur, or **your** household employee;
(2) owned, rented or leased by an employer of an **insured;**
(3) rented or leased by anyone for or on behalf of an employer of an **insured;** or
(4) furnished to **you** or a **relative** for regular use. Furnished for regular use does not include a **motor vehicle** rented from a rental company for less than 28 days. (A 42-43, 66-67)

The policies also contain certain relevant definitions. Of significance to this case are definitions number 2, 6, 7 and 10. Specifically, the policies include the following:

DEFINITIONS

This policy uses certain common words for easy reading. They are defined as follows:

2. "YOU" and "YOUR" mean the **policyholder** and spouse if living in the same household.

6. "YOUR AUTO" means the vehicle(s) described in the Declarations.

7. "MOTOR VEHICLE" means a land **motor vehicle** designed primarily to be driven on public roads. This does not include vehicles operated on rails or crawler treads. Other vehicles designed for use mainly off public roads shall be included within the definition of **motor vehicle** when used on public roads.

10. "OCCUPYING" means in, upon, entering, or alighting from. (A 37, 61)

Finally, with respect to the amounts payable for losses, the policies provide:

LIMITS OF PAYMENT

AMOUNTS PAYABLE FOR UNINSURED MOTORISTS LOSSES

We agree to pay losses up to the limits stated in the policy Declarations. The following applies to these limits:

1. Bodily Injury limits shown for any one person are for all legal damages, including all derivative claims, claimed by anyone arising out of and due to **bodily injury** to one person as a result of one occurrence.

   The per-person limit is the total amount available when one person sustains **bodily injury,** including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims, or any other claims made by anyone arising out of bodily injury, including death, to one person as a result of one occurrence.

   Subject to this per-person limit, the total limit of **our** liability shown for each occurrence is the total amount available when two or more persons sustain **bodily injury,** including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims, or any other claims made by anyone arising out of **bodily injury,** including death, to two or more persons as a result of one occurrence.

2. Limits apply as stated in the Declarations, and are payable as follows:

   a) Except with respect to **you** or a **relative,** the insuring of more than one person or vehicle under this policy does not increase **our** payment limits.

   b) In no event will any **insured** other than **you** or a **relative** be entitled to more than the per-person limit which applies to the **motor vehicle** the **insured** was **occupying** when injured.

c) **You** or a **relative** are entitled to up to the sum of the per-person payment limits shown on the Declarations. This does not apply to policies issued to corporations.

3. **We** will pay benefits under this coverage only over and above any that are available:

   a) under any workers' compensation or disability benefits law or similar law.

   b) under any auto Liability or auto Medical Payments coverage.

   c) from any liable party.

   d) from any source under the Florida Motor Vehicle No-Fault Law. Benefits also will be payable only over and above any that would be available under this law except for the application of a **deductible.**

4. We will not pay any uninsured motorists loss until the limits of all bodily injury liability coverage available from any source have been exhausted by payment of settlements or judgments.

DISPOSITION

Nationwide filed a motion for summary judgment based upon the undisputed facts of record in that the decedent was operating his own motorcycle which was not insured under Nationwide's policy at the time of the accident. (A 29-88) As such, under the provisions of both of the Century II Automobile Policies issued by Nationwide, UM benefits were excluded by virtue of Exclusion No. 4 contained in the policies. (A 29-31) Copies of the respective policies were submitted with the motion for summary judgment as

well as the Plaintiffs' response to Nationwide's request for admissions.

The Plaintiffs also filed a cross-motion for summary judgment. (A 89-98) The Plaintiffs maintained that Nationwide's policy exclusions were invalid as a matter of law. (A 90) The Plaintiffs also maintained that the exclusions were invalid in that Nationwide had not procured a signed letter of rejection of UM protection from the insured pursuant to Fla. Stat. § 627.727(9). (A 90) In support of the motion for summary judgment, the affidavits of Mr. and Mrs. Pounders were filed. (A 95-98) In each of the affidavits, Mr. and Mrs. Pounders stated that at no point in time prior to the accident did they reject UM coverage in accordance with Fla. Stat. § 627.727(9).

Nationwide filed the affidavit of Robert Costello, Esquire, in opposition to the Plaintiffs' motion for summary judgment. (A 99-104) The affidavit stated that Mr. Costello was a claims attorney for Nationwide and was its corporate designated representative in this matter. (A. 101) Mr. Costello stated that the policies procured by Mr. and Mrs. Pounders were not policies which contained the alternative form of UM coverage authorized by Fla. Stat. § 627.727(9). (A 102) Instead, these policies were issued in compliance with Fla. Stat. § 627.727(1). (A 102) The affidavit further stated that Nationwide's form had been approved by the Department of Insurance and attached to the affidavit, the Department's approval of Form FA-6169-B which contained Exclusion No. 4. (A 102-104) Finally, the affidavit stated that neither

Nationwide policy was required to be issued in compliance with Florida's Financial Responsibility Law, Chapter 324 Florida Statutes. (A 102) Each of the parties submitted memoranda in support of their motion for summary judgment. (A 105-123, 124-141)

On March 15, 1993, the trial court conducted a hearing concerning the cross-motions for summary judgment. (A 142-176) The trial court concluded that Nationwide could not enforce Exclusion No. 4 contained in its respective policies and was prohibited by the rule of Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971). The Second District affirmed that decision. (A 177-178)

ISSUE ON APPEAL

I.

WHETHER AN AUTOMOBILE INSURANCE POLICY WHICH PROVIDES UNINSURED MOTORISTS COVERAGE PURSUANT TO FLA. STAT. § 627.727(1) MAY PERMISSIBLY EXCLUDE UNINSURED MOTORISTS COVERAGE FOR A PARTICULAR ACCIDENT WHERE THE LIABILITY PROVISIONS OF THAT POLICY DO NOT APPLY TO THE ACCIDENT?

SUMMARY OF THE ARGUMENT

The issue involved in this case is straightforward. It may be resolved by resorting to long-standing precedents and the appropriate rules of statutory interpretation. This Court should quash the decision of the Second District with instructions on remand to enter judgent in favor of Nationwide.

When construing UM policies and the UM statute, this Court has long held that UM coverage is intended to provide the reciprocal or mutual equivalent of automobile liability insurance coverage prescribed by the Financial Responsibility Law. See, Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971). Such coverage must be provided for "persons insured thereunder" in the minimum amounts prescribed by that statute. The term "persons insured thereunder" are those persons who are required to be insured by virtue of Chapter 324 Florida Statutes.

In Valiant Ins. Co. v. Webster, 567 So.2d 408, 410 (Fla. 1990), this Court re-emphasized its previous announcement of this rule in Mullis. The Valiant majority stated:

> Since our decision in Mullis, the courts have consistently filed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorist provisions would likewise be applicable; whereas, if the liability provisions do not apply to a given accident, the uninsured motorist provisions of that policy would also not apply (except with respect to occupants of the insured automobile). [citations omitted]

The Valiant majority also emphasized the words "persons insured" as used in the UM statute were the same persons required

to be insured under a liability policy issued pursuant to the Financial Responsibility Law. Numerous Florida cases have already followed that analysis. See, e.g., Government Employees Ins. Co. v. Wright, 543 So.2d 1320 (Fla. 4th DCA), rev. den., 551 So.2d 464 (Fla. 1989); Crosby v. Nationwide Mut. Fire Ins. Co., 622 So.2d 117 (Fla. 4th DCA 1993). In fact, the Second District has used this analysis on previous occasions. See, Bolin v. Massachusetts Bay Ins. Co., 518 So.2d 393 (Fla. 2d DCA 1987).

In the present case, the Second District cited as controlling authority the Fifth District's decision in Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), rev. granted, 620 So.2d 761 (Fla. 1993). This Court should reject the rule announced by the Fifth District and quash the decision below with directions on remand to enter judgment in favor of Nationwide because the decedent was injured while occupying his motorcycle which was not insured under Nationwide's policy and for which Nationwide was not otherwise statutorily obligated to provide such coverage.

ARGUMENT

I.

AN AUTOMOBILE INSURANCE POLICY WHICH PROVIDES UNINSURED MOTORISTS COVERAGE PURSUANT TO FLA. STAT. § 627.727(1) MAY PERMISSIBLY EXCLUDE UNINSURED MOTORISTS COVERAGE FOR A PARTICULAR ACCIDENT WHERE THE LIABILITY PROVISIONS OF THAT POLICY DO NOT APPLY TO THE ACCIDENT.

This case is not complicated. The material facts were not disputed. This case simply involves the construction of Nationwide's Century II Automobile Policy an whether it was required to provide UM coverage to Michael Dennis Pounders when he was killed while operating his own motorcycle which was not insured under the policies issued by Nationwide. Here, the trial court and the Second District erred when they respectively concluded that Nationwide was required to provide UM coverage to the resident son of Nationwide's named insureds for this accident. This Court should quash the decision of the Second District with instructions on remand to reverse the trial court's order and for entry of a judgment in favor of Nationwide.

Florida courts have often analyzed automobile insurance policies to determine whether an insurer may permissibly exclude UM coverage for any given accident. This Court's decision in Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971) has been recognized as the "polestar" decision concerning UM coverage.[5] As such, it provides the logical starting point for any analysis of Nationwide's policy and whether Exclusion No. 4 if permissible

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[5] See Florida Farm Bureau Cas. Co. v. Hurtado, 587 So.2d 1314 (Fla. 1991).

under existing Florida law. In Mullis, Richard Mullis, the resident son of State Farm's insured, Shelby Mullis, was injured by the negligence of an uninsured motorist, while operating a Honda motorcycle which was owned by his mother, and not insured under State Farm's policy. Mullis demanded arbitration under State Farm's policy. State Farm refused arbitration. State Farm's UM coverage provided that the company would pay all sums which the insured was legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injuries sustained by the insured and caused by an accident with the uninsured automobile. State Farm's policy defined the term "insured" to mean the first person named in the declarations and while residents of his household, his spouse and the relatives of either. Id. at 231. State Farm's policy contained Exclusion (b) which read as follows:

> Insuring Agreement III does not apply:
>
> (b) To bodily injury to an insured while occupying or through being struck by a land motor vehicle owned by the named insured or any resident of the same household, if such vehicle is not an insured automobile;

Id. at 231.

Both the trial court and the First District determined that State Farm's exclusion was enforceable and that Mullis was not entitled to any UM coverage. This Court quashed the decision of the First District and determined that the exclusion was contrary to Fla. Stat. § 627.0851, the then-existing UM statute.

This Court explained that the UM statute provided that no automobile liability policy shall be issued with respect to any motor vehicle registered or garaged in Florida unless coverage was provided therein "in not less than the limits described in § 324.021(7) Fla. Stat. . . . 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 . . ." Id. at 232. The court explained that the term "persons insured" thereunder in an automobile liability insurance policy as contemplated by Chapter 324, Fla. Stat., the Financial Responsibility Law, ordinarily were the owner or operator of the automobile, his spouse and other members of his family resident in the household and others occupying the insured automobile with the owner's permission. As to those persons, they were protected by the policy from liability to others due to injuries they inflicted by their negligent operation of the automobile. Reciprocally, those same persons were protected by the uninsured motorists statute in the same policy from bodily injury caused by the negligence of uninsured motorists.

The Mullis court stated that automobile liability insurance coverage obtained in order to comply with or conform to the Financial Responsibility Statute, after an insured's first accident, could not be narrowed through exclusions which were contrary to law. The same was true as to the Financial Responsibility Law's counterpart, the uninsured motorists statute.

After reviewing the case law from around the state and the country, the Court described its holding as follows:

> . . . Uninsured motorists 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. To achieve this purpose, no policy exclusions contrary to the statute of any class of family insureds are permissible since the uninsured motorists coverage is intended by the statute to be uniform in standard motor vehicle accident liability insurance for the protection of such insureds thereunder as "if the insured motorist had carried the minimum limits" of an automobile liability policy. [citations omitted]

Id. at 237-238.

The Mullis court concluded that as to the first class of insureds, those required to be insured under the Financial Responsibility Statute and reciprocally, under the uninsured motorists statute, they were entitled to protection whenever or wherever bodily injury was inflicted upon them.

Almost 20 years later, in Valiant Insurance Co. v. Webster, 567 So.2d 408, 410 (Fla. 1990), this Court succinctly stated the analytical principle to be applied in such a determination as follows:

> Since our decision in Mullis, the courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorists provisions would likewise be applicable; whereas, if the

> liability provisions did not apply to a given accident, the uninsured motorists provisions of that policy would also not apply (except with respect to occupants of the insured automobile). E.G., Auto-Owners Insurance Co. v. Queen, 468 So.2d 498 (Fla. 5th DCA 1985); Auto-Owners Insurance Co. v. Bennett, 466 So.2d 242 (Fla. 2d DCA 1984); France v. Liberty Mutual Insurance Co., 380 So.2d 1155 (Fla. 3d DCA 1980).

Likewise, the Valiant court once again emphasized the words "persons insured" as used in the UM statute, are the same persons who are insured under the liability policy required by the Financial Responsibility Law. Id. at 410.

Reading Fla. Stat. § 627.727 (UM coverage), in para materia with Chapter 324, Fla. Stat. (liability coverage), is not a new idea. Florida courts have long read the statutes together to determine issues relating to UM coverage. See, Fischer v. State Farm Mutual Automobile Insurance Co., 495 So.2d 909, 911 (Fla. 3d DCA 1986) ("It appears then, that interstices in the uninsured motorists statute are, by legislative design to be filled by the particulars of the more specific Financial Responsibility Law.") In fact, the earliest version of the UM statute makes specific reference to Chapter 324, Fla. Stat. See, Fla. Stat. § 627.0851 (1961).

Florida Statutes § 324.151 identifies those provisions which are required to be included in insurance policies which are issued to satisfy the statute. Florida Statutes § 324.151(1)(a) requires the owner's policy to designate all motor vehicles with respect to which coverage is granted. Further, the statute

requires that the policy insure the owner named therein and any permissive operator of the identified motor vehicles against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of those motor vehicles. Significantly, it does not require the owner's policy to insure all relatives who may happen to reside with the insured. Florida Statutes § 324.151(b) requires such a policy to insure the person named within the policy against loss from the liability imposed upon him by law for damages arising out of the use by the named insured of any motor vehicle which is not owned by him within the territorial limits described within the statute. Florida Statutes § 324.151(2) states that the provisions of this section do not apply to any automobile liability policy unless and until it is furnished as proof of financial responsibility for the future as recognized by Fla. Stat. § 324.031. This Court has recently reaffirmed that the statute mandates liability coverage only after an insured's first accident. See, Grant v. New Hampshire Insurance Co., 613 So.2d 466 (Fla. 1993).[6]

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[6] Florida Statutes § 324.011 identifies the purpose of the Financial Responsibility Law. That section generally states that the operator of a motor vehicle involved in an accident or convicted of certain traffic offenses will be required to respond for such damages and show proof of financial ability to respond for damages in future accidents as a prerequisite to his future exercise of the benefits of operating or owning a motor vehicle on the public streets and highways of this state. Although not addressed in the trial court's order, nor by the Fifth District, it does not appear that the Financial Responsibility Law applies to this policy. In order for the Financial Responsibility Law to apply, the policy must have been certified as proof of financial responsibility for the future in compliance with the act.

As noted by the Valiant majority, Florida's District Courts of Appeal have embraced the liability coverage analysis when determining whether there is reciprocal UM coverage for a particular accident. In this case, it appears that the Second District has overlooked its own precedent which has used the analysis. In Bolin v. Massachusetts Bay Insurance Co., 518 So.2d 393 (Fla. 2d DCA 1987), Mr. Bolin was driving his own separately-insured vehicle when he was involved in an automobile accident with an uninsured motorist. He made a claim under his wife's policy for UM benefits. The lower court granted summary judgment in favor of the insurance company. The trial court concluded that no benefits

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See, Lynch-Davidson Motors v. Griffin, 182 So.2d 7 (Fla. 1966). Where the policy has not been certified to be in compliance with the act, exclusions contained in the policy do not violate the provisions of the Financial Responsibility Law nor of its underlying public policies. See, Yakelwicz v. Barnes, 330 So.2d 810 (Fla. 3d DCA), appeal dis., 341 So.2d 1087 (Fla. 1976). The burden of demonstrating that the insurance company certified the policy as being in compliance with the Financial Responsibility Law and having been issued so that the owner could be in compliance with it, is on the insured and not on the insurer. See, Safeco Insurance Co. of America v. Hawkeye-Security Insurance Co., 218 So.2d 759 (Fla. 1st DCA 1969). Where the policy is issued and is not certified as proof of financial responsibility, exclusions are valid and not in violation of Florida law or public policy. See, Ennis v. Charter, 290 So.2d 96 (Fla. 1st DCA 1974).

Conversely, if the Financial Responsibility Law does not apply, there is no prohibition from including exclusions in uninsured motorists coverage within that policy. See, Safeco Insurance Co. of America v. Hawkeye-Security Insurance Co., 218 So.2d 759 (Fla. 1st DCA 1969). See generally, Carquillo v. State Farm Mutual Automobile Insurance Co., 529 So.2d 276 (Fla. 1988); State Farm Fire & Casualty Co. v. Becraft, 501 So.2d 1360 (Fla. 4th DCA 1986). Even if the statute did apply, however, Nationwide's exclusion does not violate the statute.

were provided by virtue of a provision which excluded UM coverage for bodily injury to an insured while occupying a highway vehicle other than an insured automobile owned by the named insured or by any person residing in the same household who was related to the named insured.

On appeal, the Second District affirmed that decision. The court's analysis centered upon the definition of "persons insured" under the liability section of the policy. That policy provided:

> Persons Insured: Under the Liability and Medical Expense Coverages, the following are insureds:
>
> (a) with respect to an owned automobile,
>
> (1) the named insured and any relative resident of the same household,
>
> (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
>
> (3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a)(1) or (2) above;
>
> (b) with respect to a non-owned automobile,
>
> (1) the named insured,
>
> (2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

> (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above.

The Bolins argued that the exclusion was invalid as a matter of law and cited to the Mullis decision. The insurance company maintained, however, that while it could not exclude UM coverage to persons who were covered under the basic liability coverage of the policy, Mr. Bolin was not insured under either section. The Second District stated that Mr. Bolin was not an insured under (a) "persons insured" of the liability policy, that is, for an owned automobile, as an owned automobile was defined in the policy as one for which premium charges had been made. The automobile Mr. Bolin had been driving did not meet that criteria. Additionally, the Bolin court concluded that Mr. Bolin was not a covered person with respect to (b) "persons insured", concerning non-owned automobiles. Under the policy, a non-owned automobile was defined as one which was not owned by either the named insured or a relative. Since Mr. Bolin was operating his own separately-insured vehicle, he did not fall within the "non-owned" category. Thus, because the policy did not provide basic liability coverage for Mr. Bolin's operation of the vehicle, there was no prohibition from excluding UM coverage to him, and the summary judgment was affirmed.

The Fourth District used the exact same analysis in Government Employees Insurance Co. v. Wright, 543 So.2d 1320 (Fla. 4th DCA), rev. den., 551 So.2d 464 (Fla. 1989). In Wright, Mrs.

Wright owned a 1980 Buick which was covered by another insurance company for PIP benefits, but not for UM coverage. Mrs. Wright married the resident son of GEICO's insureds, Mr. and Mrs. Hull, and then resided with them. Mr. Hull had purchased a GEICO policy which provided both liability and UM coverage on his own family vehicle.

While driving her own Buick, Ms. Wright was injured in an accident with an uninsured motorist. She filed a complaint against GEICO for UM coverage under the father-in-law's policy upon which he was the named insured. The "persons insured" section of the policy provided that the named insured and resident relatives were insured with respect to owned automobiles. With respect to non-owned automobiles, the named insured and relatives, when using a private-passenger auto or trailer, were also insured. The policy defined an "owned automobile" as the vehicle named in the policy. A non-owned automobile was defined as an automobile not owned by Hull or his relatives. The policy also excluded bodily injury to an insured while occupying or through being struck by an underinsured or uninsured automobile owned by an insured or relative.

The trial court granted summary judgment in favor of Ms. Wright and found that as a matter of law, Mr. Hull's UM coverage extended to her for the accident because she was a resident in his household. The Fourth District reversed that decision. That court noted that Wright contended that as a resident relative in the Hull household, she was entitled to basic liability coverage and,

therefore, UM coverage. The Fourth District rejected the premise that she was insured under the liability coverage because the liability provisions of the policy expressly excluded (or did not include) her under the circumstances because she was not injured in an owned or a non-owned insured vehicle as defined in the policy. That court further explained that while Ms. Wright may have been covered if she was injured while riding in Hull's automobile, the policy did not extend to all unknown automobiles which may be owned by all of the Hulls' relatives. Since Ms. Wright was not afforded basic liability coverage under Mr. Hull's policy, the UM exclusion contained in that policy did not violate any of Florida's public policies.

This analysis was likewise used in Progressive American Insurance Co. v. Hunter, 603 So.2d 1301 (Fla. 4th DCA 1992). In Hunter, Eugene and Opienell Hunter owned several automobiles that were insured by Progressive for both liability and UM coverage. Their daughter, Kathy Hunter, jointly with her father, owned a Pontiac which was separately insured by another insurance company for liability and other coverages, but not for UM coverage. While driving the Pontiac, Kathy was injured in an accident with an uninsured driver. She subsequently sought UM benefits under her parents' policy. Like Mr. Phillips here, Kathy was not a named insured under that policy, nor was her Pontiac a listed automobile. The trial court entered summary judgment in Kathy's favor, allowing her to recover under the UM section of Progressive's policy.

Progressive's policy provided:

> We will pay on behalf of the injured persons, damages, other than punitive or exemplary damages, for which an insured person is legally liable because of bodily injury and property damage caused by accident and arising out the ownership, maintenance or use of your insured auto, utility trailer or any non-owned auto. . . .
>
> "Insured Person" means:
>
> 1. You, or a relative, for any liability arising out of the ownership, maintenance, or use of your insured auto,, utility trailer or any non-owned auto.

The policy's UM coverage excluded bodily injury sustained "while occupying or when struck by a motor vehicle owned by you or a relative for which insurance is not afforded under Part I - LIABILITY TO OTHERS or Part III - UNINSURED MOTORISTS."

The Fourth District reversed the trial court's summary judgment, following the reasoning set forth in its previous Wright decision. That is, where a named insured's resident relative is not included under the basic liability coverage, the insurer may permissibly exclude UM coverage to that person. The Fourth District reasoned that Kathy was not provided liability coverage when driving her Pontiac because it was not an "insured auto." Kathy's Pontiac was not listed on the policy, and it was not a "non-owned auto" because it was jointly owned by Kathy and her father, a named insured. Thus, the Fourth District held that Progressive could permissibly exclude UM coverage to Kathy for the accident. See also, Grant v. State Farm Fire & Casualty Co., 620 So.2d 778 (Fla. 4th DCA 1993) (decision affirming summary judgment in favor of insurer that UM coverage was permissibly excluded for

insured's injuries while occupying an owned, but uninsured motorcycle which was not listed in the policy); DeLuna v. Valiant Insurance Co., 792 F.Supp. 790 (M.D.Fla. 1992).

More recently, the Fourth District once again relied upon this analysis when construing a Nationwide policy under circumstances nearly identical to those presented in this case. In Crosby v. Nationwide Mut. Fire Ins. Co., 622 So.2d 117 (Fla. 4th DCA 1993), the issue was whether UM benefits were available to a resident son of the named insured's household who was struck by an uninsured motorist while operating a motorcycle which was owned by him, but not insured under the Nationwide policy. The Fourth District affirmed the summary judgment finding that there was no coverage. The Fourth District noted that Nationwide had relied on its decision in Government Emp. Ins. Co. v. Wright, 543 So.2d 1320 (Fla. 4th DCA 1989) in which the court had explained that where a claimant was not insured under the liability section of the policy, UM coverage was not mandated by Mullis. The Fourth District also recognized that there was language in this Court's opinion in Valiant Ins. Co. v. Webster, 567 So.2d 408 (Fla. 1990) to support the argument that this Court had has already reached the same conclusion.

The Fourth District also relied upon the same analysis, but reached the opposite conclusion in Welker v. Worldwide Underwriters Ins. Co., 601 So.2d 572 (Fla. 4th DCA 1992), rev. granted, 620 So.2d 764 (Fla. 1993).

Of significance to this appeal, however, was that court's discussion of its previous decision in Wright and the Second District's decision in Bolin. In distinguishing the policies present in the case before it and in those cases, the court stated that those policies contained no blanket inclusion extending basic liability insurance coverage to all resident family members. Instead, those policies allocated insured "status" through use of a particular motor vehicle, either owned or non-owned. The Fourth District explained that under those policies, resident family members were not Class I insureds and need not be afforded UM coverage. However, once an insurer provided basic liability coverage to all resident family members, it could not, in a later section, restrict the coverage and thereby deny the insured family members UM coverage while those persons were driving those vehicles or vehicles owned by third parties.

The Fourth District succinctly stated the rule as follows:

> When an insurance company purports to provide basic liability coverage to the named insured and the insured's relatives, it cannot later exclude those relatives from uninsured motorists coverage. When the policy contains no such blanket inclusion, as in Wright and Bolin, resident family members can be excluded from coverage. The burden is squarely on the insurance companies to draft their automobile policies so as not to run afoul of Mullis, which has been the law of this state for over 20 years.[7]

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[7] The Welker decision is consistent with the result reached by other District Courts of Appeal which have utilized the same analysis. See, e.g., Auto-Owners Insurance Co. v. Bennett, 466 So.2d 242 (Fla. 2d DCA 1984); Incardona

In the present case, it is clear that Michael Pounders was not provided basic liability coverage under either of the Nationwide Century II Policies while operating his own motorcycle which was not insured under the policies. Under the insuring agreement of the liability coverage, Nationwide agreed as follows:

> 1. **We** will pay for damages for which **you** are legally liable as a result of an accident arising out of the:
>
> a) ownership;
>
> b) maintenance or use; or
>
> c) loading or unloading;
>
> of **your auto.** A **relative** also has this protection. (A 41, 65)

The term "your auto" is defined to mean the vehicle or vehicles described in the declarations attached to the policy. (A 37, 61) The declarations attached to the policies describe a 1988 Thunderbird and two pickup trucks. (A 34, 60) They do not identify any motorcycles. Therefore, under the basic insuring agreement, Michael Pounders would be insured for basic liability coverage only while operating the 1988 Thunderbird or the two pickup trucks.

The policy also contains certain coverage extensions relative to the use of other motor vehicles. A review of those coverage extensions demonstrates that none of them apply to the decedent's use of his motorcycle. Therefore, the first part of the

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v. Auto-Owners Insurance Co., 494 So.2d 513 (Fla. 2d DCA 1986), rev. den., 503 So.2d 326 (Fla. 1987); Auto-Owners Insurance Co. v. Queen, 468 So.2d 498 (Fla. 5th DCA 1985); Lewis v. Cincinnati Insurance Co., 503 So.2d 908 (Fla. 5th DCA), rev. den., 511 So.2d 297 (Fla. 1987).

analysis has been satisfied, that is, Michael Pounders was not provided basic liability coverage under Nationwide's Century II Policy for the motorcycle accident of February 15, 1992.

Thereafter, the coverage exclusions contained in Nationwide's UM coverage need to be reviewed.[8] Exclusion No. 4 states:

> This coverage does not apply to:
>
> 4. **Bodily injury** suffered while **occupying** a **motor vehicle** owned by **you** or a **relative:**
>
> a) which is not insured for Bodily Injury Liability coverage under this policy; or
> b) for which the owner has previously rejected Uninsured Motorists coverage with any insurer as permitted by Florida law.
>
> It also does not apply to **bodily injury** from being hit by any such **motor vehicle.** (A 51, 75)

The parties stipulated that Michael Pounders owned the motorcycle which he was operating and which was involved in the February 15, 1992, automobile accident. Nationwide's policy

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[8] As noted in the Statement of the Case and Facts, the Department of Insurance approved Nationwide's forms. The Department of Insurance is that entity of state government which was created and empowered by the state to enforce the provisions of the insurance code. Florida Statutes § 624.307(1). Florida Statutes § 627.410 outlines the procedure for the filing and approval of various forms used in insurance policies throughout the state. Florida Statutes § 627.411(1)(a) requires the Department to disapprove any form which is in any respect in violation of the Insurance Code. Presumably, had the Department believed that the exclusion in the uninsured motorists provision of Nationwide's policy in any fashion violated the Insurance Code, it would not have approved this form.

defines the term "motor vehicle" to mean "a land motor vehicle designed primarily to be driven on public roads. This does not include vehicles operated on rails or crawler-treads. Other vehicles designed for use mainly off public roads shall be included within the definition of motor vehicles when used on public roads." The policy further defines the term "occupying" to mean "in, upon, entering or alighting from." The declarations pages of the policies indicate that UM coverage was purchased solely for a 1988 Thunderbird and two pickup trucks. It was not purchased for any other vehicles. Since under the definitions in the policy, Michael Pounders was occupying a motor vehicle which was owned by him, but not insured for UM coverage under the policy while he was living in his parents' household, the exclusion would clearly apply.[9]

During the summary judgment hearing and at the Second District, the Plaintiffs premised their argument upon the Fifth District's decision in Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So.2d 1385, (Fla. 5th DCA 1992), rev. granted, 620 So.2d 761 (Fla. 1993). The Second District here relied upon Phillips to affirm the judgment entered against Nationwide. For a multitude of reasons, the Phillips case was wrongly decided, and this Court should not rely upon it as the basis for its decision in this case.

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[9] It was admitted at the summary judgment hearing by Plaintiff's counsel that the motorcycle was insured by another insurer. (A 170) There is no indication in the record whether UM coverage was rejected for that policy.

Factually, the Phillips case is substantially similar to the present one. There, Nationwide issued its Century II Policy to Kimberly Phillips, f/k/a Kimberly Scanato, as the named insured. The policy insured only one vehicle, a Chevette. On September 28, 1990, Kevin Phillips, Kimberly Phillips' husband, was riding a motorcycle owned by him when he was injured by the negligence of an uninsured motorist. As in the present case, Nationwide denied Kevin Phillips' claim for UM benefits on the basis that he was not provided basic liability coverage under the policy, and, therefore, Nationwide could rely upon its Exclusion No. 4 in its UM coverage. The trial court granted the Phillips' motion for summary judgment and held that Kevin Phillips was entitled to UM coverage for the September 28, 1990 accident. Nationwide appealed that judgment to the Fifth District.

The Fifth District affirmed the summary judgment entered in favor of Mr. and Mrs. Phillips. The court erroneously stated that Nationwide contended that Mullis had been overruled by Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990). The court, however, accurately stated that Nationwide maintained that under the rule announced in Webster, an insured is not entitled to UM coverage if liability coverage under the same policy would not apply to the particular accident in question. The Fifth District did not disagree with Nationwide's position that Kevin Phillips would not have been provided liability coverage for the September 28, 1990 motorcycle accident. Instead, the court rejected the entire analysis and instead relied upon the Valiant dissent as the

basis for its holding. The court noted that Nationwide's argument that UM coverage was not applicable unless liability coverage would have been available was not new, and in fact, acknowledging the conflict, noted that some of its sister courts had interpreted Mullis as requiring the liability coverage analysis. Citing, Progressive American Insurance Co. v. Hunter, 603 So.2d 1301 (Fla. 4th DCA 1992); Government Employees Insurance Co. v. Wright, 543 So.2d 1320 (Fla. 4th DCA 1989), rev. den., 551 So.2d 464 (Fla. 1989); Bolin v. Massachusetts Bay Insurance Co., 518 So.2d 393 (Fla. 2d DCA 1987). In fact, the Fifth District recognized that Valiant Insurance Company had successfully made the same argument outside of the wrongful death context. Citing, DeLuna v. Valiant Insurance Co., 792 F.Supp. 790 (M.D.Fla. 1992).

The Fifth District explained that this Court had repeatedly held that Class I insureds were provided with UM coverage regardless of their location. The court explained that if the "new liability coverage" analysis which focused on coverage for the accident rather than the individual insured were correct, then UM coverage would no longer apply to Class I insureds who happened to be pedestrians or using public conveyances.[10] The court also explained that when the Mullis court equated UM coverage to liability coverage, it simply meant that any Class I insured was entitled to UM benefits equal to the liability insurance that the tort-feasor would have had if he carried liability insurance equal

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[10] This would not be true under Nationwide's policy because it does not attempt to exclude UM coverage that otherwise may exist under that factual scenario.

to the Class I insured's liability insurance. Remarkably, that court never disagreed with the conclusion that Mr. Phillips was not insured at all for liability coverage, and, therefore, its discussion of which class Mr. Phillips was a member seems confused.

Rather than recognizing that the decision in Valiant merely applied the Mullis rule, the Fifth District interpreted Valiant as drastically changing the law in Florida. It stated that if this Court had intended to effect such a drastic change in UM coverage, it would have expressly receded from Mullis in Valiant. That court noted that instead, Valiant probably intended merely to restate the rule of law stated in Mullis concerning limitations of coverage to Class I insureds.

The Fifth District then determined that Nationwide's Exclusion No. 4 would not otherwise be enforceable because Mrs. Phillips had not elected the limited UM coverage provided in Fla. Stat. § 627.727(9)(d). That court noted that the 1987 Legislature created subsection (9) to allow insurers to offer alternative UM coverage. The Fifth District held that if the insurer wished to offer the limited UM coverage, it must first satisfy the statutorily-mandated notice requirement. The court stated that if an insurer failed to satisfy that requirement, the law stated in Mullis governed, and the exclusion was unenforceable. Citing, Carbonell v. Auto Insurance Co. of Hartford, Conn., 562 So.2d 437 (Fla. 3d DCA 1990). The court concluded that since Nationwide had

not secured such an election, it could not restrict the UM coverage to any specific vehicle.[11]

With all due respect to the Fifth District, its analysis and conclusion in Phillips is thoroughly flawed and should not have been accepted by the Second District here. The Fifth District's statements notwithstanding, the Valiant decision never purported to, nor does Nationwide maintain, that it overruled Mullis. It simply re-emphasized that the term "persons insured thereunder" as used in Fla. Stat. § 627.727(1) are the same persons who are required to be insured under a liability policy issued pursuant to Fla. Stat. § 324.151. That statute requires only that the named insured and permissive users be provided liability coverage for a specifically-designated (by explicit description) motor vehicle with respect to which the coverage is granted. It does not require an automobile liability insurance carrier to provide insurance coverage for any and all motor vehicles that the named insured may own or operate. Likewise, that statute does not require a liability carrier to insure all members of the named insured's household for purposes of liability coverage. It merely requires that an insurer provide coverage to the named insured and any permissive user of the specifically-identified and designated automobile. If the automobile liability insurance carrier is not

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[11] Recently, a different panel of the Fourth District approved of this aspect of the Phillips analysis and attempted to distinguish its own decision in Crosby on the basis that the opinion did not address the effect of the 1987 statute. See, Government Emp. Ins. Co. v. Douglas, 627 So.2d 102 (Fla. 4th DCA 1993).

required to provide liability coverage to all of the named insured's resident relatives, for any and all motor vehicles that they may own or operate, a UM carrier is likewise not required to provide UM coverage for any relative who may reside with the named insured for any and all motor vehicles they may be operating at the time they are injured. The Fifth District's decision likewise cited to no provision in the UM statute which required that all resident relatives be insured. Instead, under the banner of "public policy" and its misperception of Fla. Stat. § 627.727, it declared Nationwide's Exclusion No. 4 invalid.

Likewise, it is inconceivable how the Phillips court could conclude that the analysis advocated by Nationwide constituted a "new liability coverage" analysis. The very analysis rejected by the Fifth District is the same analysis utilized by this Court in Mullis.[12] Given the judiciary's historical reliance upon the Financial Responsibility Law as an aid to interpreting the uninsured motorists statute, the only way to conclude that the "liability coverage" analysis is new, is to ignore more than 30 years of UM law in Florida. This Court should not repeat the Fifth District's mistake.

Aside from its rejection of the "new liability coverage" analysis, the Phillips court relied upon an alternative ground to determine that Nationwide's UM Exclusion No. 4 was unenforceable.

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[12] In fact, it is the same analysis the very same court used in Auto-Owners Insurance Co. v. Queen, 468 So.2d 498 (Fla. 5th DCA 1985) and Lewis v. Cincinnati Insurance Co., 503 So.2d 908 (Fla. 5th DCA), rev. den., 511 So.2d 297 (Fla. 1987).

That court ruled that since Nationwide's named insured had not elected the UM coverage outlined in Fla. Stat. § 627.727(9), that Nationwide could not exclude UM coverage to her husband when he was injured while operating a vehicle not insured under the policy. To reach this conclusion, the court must have overlooked or misapprehended not only the explicit language of the UM statute, but well-established precedents concerning statutory construction.

To understand how the Phillips court erred, it is important to recognize that the UM statute has repeatedly been amended. Despite frequent amendments to the statute as a whole, the first sentence to Fla. Stat. § 627.727(1) has remained the same for nearly ten years. Prior to 1984, Florida's UM statute provided in pertinent part:

> 627.727(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 . . . (1982) [emphasis supplied]

In 1984, however, the statute was amended to read as follows:

> 627.727(1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any specifically insured or identified 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 . . . (1984.Supp.) [emphasis supplied]

The change in the language of the statute was created by Chapter 84-41 Laws of Florida. The Legislature appears to have

explained its reasoning in changing the language as the description of the bill provides in pertinent part:

> Limiting applicability to policies insuring specific vehicles;

Essentially, what the 1984 Legislature did was make clear its intention to limit required UM coverage to policies insuring specific vehicles. Rather than require UM coverage for the protection of persons insured under any motor vehicle liability policy, the amended statute had a more circumscribed scope. Under the amended statute, UM coverage is required only for the protection of persons insured under liability policies covering specifically insured or identified motor vehicles. The statute applicable to the present policy likewise does not require UM coverage to be provided to persons insured under any motor vehicle liability policy. Florida Statutes § 627.727(1) (1991) requires only that UM coverage be provided for persons insured under liability policies covering specifically insured or identified motor vehicles. The same version of the statutory language applied to the policy issued to the insured in Phillips. The 1984 amendment is yet another clear expression by the Legislature that UM coverage is to track liability coverage required by the Financial Responsibility Law. Like Fla. Stat § 324.151, the 1984 amendment makes clear not only which liability policies must provide UM coverage (policies insuring specifically insured or identified motor vehicles), but also to whom UM coverage must be afforded ("persons insured thereunder").

In 1987, the Legislature created Fla. Stat. § 627.727(9). Chapter 87-213, Laws of Florida. The 1987 amendment did not alter the first sentence of Fla. Stat. § 627.727(1), which addresses which policies must provide UM coverage and to whom it must be provided. Instead, the Legislature created an alternative limited form of UM coverage which could be elected by the named insured in return for a premium which is reduced by at least 20%. The alternative UM coverage authorized by Fla. Stat. § 627.727(9) appears to give the insured the choice of waiving the rights to "stack" or aggregate all UM coverage that would otherwise be available as recognized shortly after Mullis in Tucker v. Government Employees Insurance Co., 288 So.2d 238 (Fla. 1973). The new statute also appears to address the "stacking" rights of an insured as recognized in South Carolina Insurance Co. v. Kokay, 398 So.2d 1355 (Fla. 1981). See also, Lezcano v. Leatherby Insurance Co., 372 So.2d 214 (Fla. 4th DCA 1979). In short, the 1987 amendment appears to address the breadth of the required coverage, but does not expand the category of policies to which such coverage must be offered nor the persons who are required to be insured under such policies.

In Phillips, the Fifth District determined that since the named insured had not selected the alternative type of UM coverage recognized in Fla. Stat. § 627.727(9), that Nationwide was required to provide UM coverage to Mr. Phillips while operating his uninsured motorcycle. Evidently, under the analysis of subsection (9) used by the Phillips court, an insurer must now provide UM

coverage for all motor vehicles, rather than specific ones, and for all family members, even if they are not otherwise insured under the liability policy. Obviously, such an interpretation of Fla. Stat. § 627.727(9) creates an irreconcilable conflict with the clear language of Fla. Stat. § 627.727(1). The Phillips court was not required to create this needless conflict to reasonably interpret the statute. In fact, had that court resorted to well-established principles of statutory construction, the conflict could have been avoided altogether.

Florida courts have long held that when construing a statute, the court must give meaning to all the words chosen by the Legislature. See, Atlantic Coastline R.R. Co. v. Boyd, 102 So.2d 709 (Fla. 1958). The statute should be construed so that it is meaningful in all of its parts. See, Walinski v. Fields, 267 So.2d 1 (Fla. 1972). Likewise, it should be construed in its entirety and its legislative intent gathered from the entire statute rather than solely from any one part. See, State v. Hayles, 240 So.2d 1 (Fla. 1970).

Likewise, where possible, it is the duty of courts to adopt the construction of statutory provisions which harmonizes and reconciles it with other provisions of the same act. See, Woodgate Development Corp. v. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977). Simply stated, provisions of an act are to be read as consistent with one another rather than in conflict, if there is any reasonable basis for consistency. See, State v. Putnam Co. Development Authority, 249 So.2d 6 (Fla. 1971).

Had the Fifth District applied those long-standing principles to the interpretation of the UM statute, it could have easily concluded that the coverage authorized by Fla. Stat. § 627.727(9) is simply an alternative to coverage which allows the insured to stack limits. Such an interpretation is a reasonable interpretation of that subsection and likewise, does not create irreconcilable conflict with the other sections of the Act.

Likewise, such an interpretation appeals to the common sense. In 1984, the Legislature amended the UM statute and tailored it to fit with the language of the Financial Responsibility Law. The Financial Responsibility Law and its interpretations have been an integral tool for the interpretation of the UM statute since its inception. The relationship between the two statutes has historically been well recognized by the judiciary. It is difficult to understand, given all of this history and the efforts the 1984 Legislature expended, to neatly align the language of the UM statute to that of the Financial Responsibility Law, how it could reasonably be said that Fla. Stat. § 627.727(9) was intended to change all previous UM law and not mention this drastic change even one time. Common sense dictates that the Legislature would not create such a radical departure from pre-existing Florida law under the auspices of an "alternative" form of coverage.

In the present case, it is clear that Michael Pounders was not insured for purposes of liability coverage for the operation of his motorcycle under the Nationwide policies issued to

his parents. Since he was not insured for purposes of liability coverage for the operation of that motorcycle (he was not a person insured thereunder), Nationwide is not prohibited from excluding him from UM coverage under the same policies. Since Michael Pounders did not constitute a "person insured thereunder," Nationwide was not required to provide him with UM coverage and is, therefore, not precluded from relying upon the exclusions to such coverage in this case. This Court should quash the decision of the Second District with instructions on remand to reverse the judgment entered against Nationwide and to enter judgment for Nationwide.

CONCLUSION

This Court has long held that if basic liability coverage is applicable to a particular accident, the UM provisions likewise would be applicable. This Court has also held that if the basic liability coverage does not apply to a given accident, UM coverage likewise does not apply to that accident. This analysis recognizes that the Legislature has not statutorily required UM coverage to be provided for every resident relative of a named insured. Instead, this Court has looked to both the Financial Responsibility Statute and Uninsured Motorist Statute to determine who is a "person insured thereunder" in a liability policy and for whom UM coverage must be provided. In this case, Michael Pounder was not provided basic liability coverage for the February, 1992 motorcycle accident which claimed his life. Therefore, Nationwide was permitted to exclude UM coverage to him. This Court should quash the decision of the Second District Court of Appeal with directions on remand that judgment should be entered for Nationwide.

Respectfully submitted,

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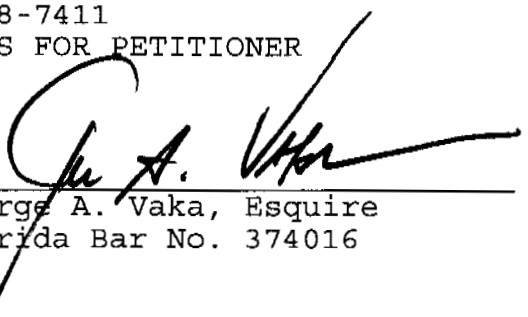
By: 

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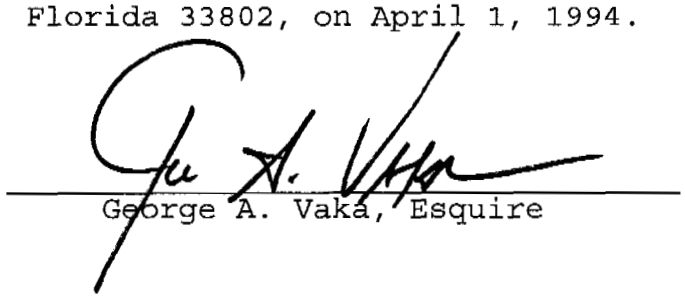
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to **W. Clinton Wallace, Esquire,** Post Office Box 177, Lakeland, Florida 33802, on April 1, 1994.



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